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### **Foreword**

In September 2018, the Queensland Government directed the Queensland Productivity Commission to undertake an inquiry into imprisonment and recidivism. This report presents our findings and recommendations.

Despite declining crime rates, imprisonment rates in Queensland are increasing. Imprisonment rates for Aboriginal and Torres Strait Islander peoples are high and growing, and the rate of imprisonment of women is also growing. These matters are not unique to Queensland and reflect wider Australian trends.

Imprisonment is an expensive response to crime and directly costs the Queensland community almost one billion dollars annually. Incarceration has profound impacts on prisoners, their families and the community. Our findings challenge the notion that community safety is best served by continuing the current approach. We propose a comprehensive suite of recommendations which we believe will improve outcomes, reduce costs and keep communities safer.

Our report makes the case for a narrowing of the scope of criminal offences. We argue for some crimes to be punished with non-custodial options. We propose a greater role for restitution and restorative justice. We recommend widening the sentencing options available to the courts. We conclude that better rehabilitation and reintegration would reduce recidivism. We recommend an expansion of diversionary options. We consider the overrepresentation of Indigenous people and provide recommendations.

We understand that some of the recommendations in this report may not be implemented without wide community agreement and political will. Further consideration will be necessary for some reforms. This will take time and should not be rushed. Nevertheless, we believe it is important to present our analysis and recommendations and hope that this is a catalyst for further debate leading to improved outcomes.

This report would not have been possible without the contributions of some 600 stakeholders, representing ordinary Queenslanders, government agencies and statutory bodies, victim peak bodies, prisoner advocates, unions, the judiciary, corrections officers, prisoners, Indigenous peak bodies, advocacy organisations and academics. We applaud the willingness of stakeholders to seek better outcomes for victims, offenders, and the community and thank all individuals and organisations who participated in the inquiry.

Finally, we thank the staff of the Commission for their commitment and professionalism in the preparation of this material. The Commissioners wish to thank inquiry leader Matthew Clark and executive director Kristy Bogaards, without whose contribution this report would not have been delivered to the level of quality achieved. A full list of the Queensland Productivity Commission staff who contributed to this inquiry is listed inside the back cover.

Kim Wood

Principal Commissioner (Presiding Commissioner) 1 August 2019 Commissioner

PA Fredericks.

**Bronwyn Fredericks** 



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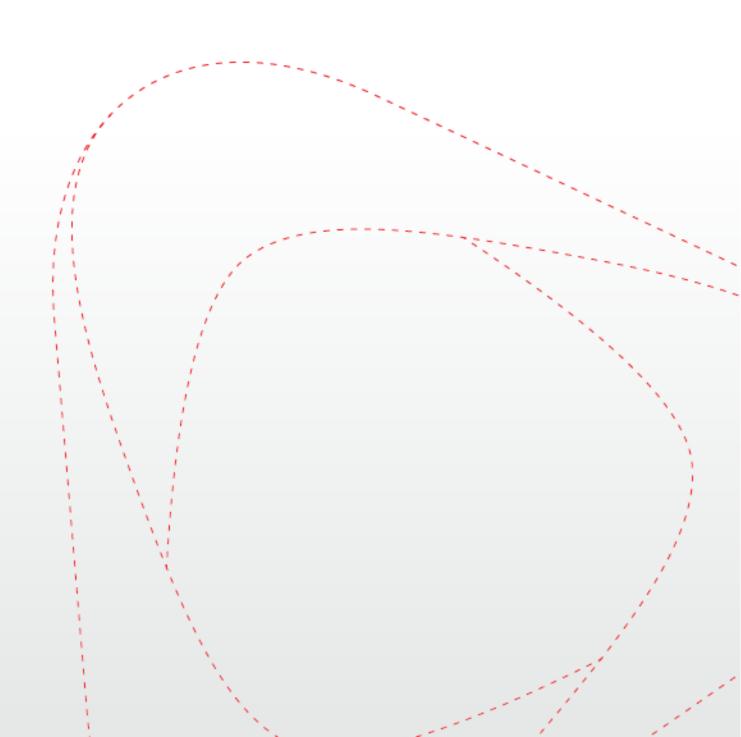


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#### Key points

- The rate of imprisonment—the number of prisoners per head of population—has increased by more than 160 per cent since 1992.
  - This increase has primarily been driven by policy and system changes and a focus on short-term risk, not crime rates.
  - The median prison term is short (3.9 months) and most sentences (62 per cent) are for non-violent offences—30 per cent of prisoners are chronic but relatively low harm offenders.
  - Each month, over 1,000 prisoners are released back into the community. Over 50 per cent will reoffend and return to prison or to a community correction order within two years.
  - Social and economic disadvantage is strongly associated with imprisonment. Around 50 per cent of
    prisoners had a prior hospitalisation for a mental health issue and/or were subject to a child
    protection order—for female Indigenous prisoners, this figure climbs to 75 per cent.
- At the margin, the costs of imprisonment are likely to outweigh the benefits, with increasing imprisonment working to reduce community safety over time:
  - It costs around \$111,000 per year to accommodate a prisoner, with indirect costs in the order of \$48,000 per person, per year.
  - Prisons are not effective at rehabilitation, and can increase the likelihood of reoffending.
  - Without action to reduce growth, the government will need to build up to 4,200 additional cells by 2025. This will require investments of around \$3.6 billion.
- Given the scale of policy reforms required, an essential first step will be to overhaul the decision-making architecture of the criminal justice system, including establishing an independent Justice Reform Office to provide a focus on longer-term outcomes and drive evidence-based policy-making.
- Many offending behaviours can be addressed outside of the criminal justice system through a victim restitution and restoration system, targeted community-level interventions and greater use of diversionary approaches.
- A lack of sentencing options constrains the ability to effectively deal with offending behaviours and makes the system costlier than it needs to be. More sentencing options are required including:
  - more flexible community corrections orders supported by effective supervision and treatment
  - supervised residential options that allow treatment to address offending behaviours.
- After many decades of operation, illicit drugs policy has failed to curb supply or use. The policy costs around \$500 million per year to administer and is a key contributor to rising imprisonment rates (32 per cent since 2012). It also results in significant unintended harms, by incentivising the introduction of more harmful drugs and supporting a large criminal market. Evidence suggests moving away from a criminal approach will reduce harm and is unlikely to increase drug use.
- High Indigenous incarceration rates undermine efforts to solve disadvantage—currently an Indigenous male in Queensland has an almost 30 per cent chance of being imprisoned by the age of 25. Longterm structural and economic reforms that devolve responsibility and accountability to Indigenous communities are required. Independent oversight of reforms is essential.
- These reforms, if adopted, could reduce the prison population by up to 30 per cent and save around \$300 million per year in prison costs, without compromising community safety.



## 1 What is the inquiry about?

Across Australia and other developed countries, governments are contending with rising imprisonment and high levels of recidivism. In Queensland, the rate of imprisonment has risen by more than 160 per cent since 1992 and by around 61 per cent between June 2012 and March 2019.

Infrastructure has not kept up with this growth, with prisons currently holding around 37 per cent more prisoners than they are designed to hold.

More than half of prisoners reoffend and are given a new sentence of imprisonment or community supervision within two years of their release. The rate of imprisonment for Aboriginal and Torres Strait Islander people continues to outstrip the rate for the rest of the population, and imprisonment rates for women have been increasing faster than for men.

The growth in prisoner numbers has significant social and economic implications for the Queensland community, affected individuals and their families, and the Queensland Government.

In September 2018, the Queensland Government asked the Commission to undertake an inquiry into imprisonment and recidivism in Queensland. The terms of reference for this inquiry ask us to examine how government resources and policies can be best used to reduce imprisonment and recidivism and improve outcomes for the community over the medium to longer term. The terms of reference ask us to consider:

- trends in imprisonment and recidivism and the causal factors underlying these trends
- factors affecting imprisonment for Aboriginal and Torres Strait Islander people, women and young people
- the benefits and costs of imprisonment, including its social effects, financial costs and effectiveness in reducing/preventing crime
- the effectiveness of programs and services to reduce the number of people in prison, including

- prevention and early intervention approaches, non-imprisonment sentencing options, and the rehabilitation and reintegration of prisoners
- the efficacy of adopting an investment approach, whereby investments in prevention, early intervention and rehabilitation deliver benefits and savings over the longer term.

The terms of reference require that our recommendations are consistent with the Queensland Government Policy on the Contractingout of Services.

### Our approach

There are many factors that influence imprisonment and recidivism. The scope of this inquiry therefore encompasses a broad set of issues and areas—from early intervention to post-prison support (Figure 1).

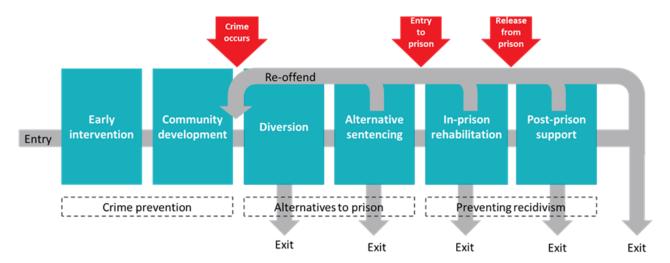
Given the broad scope of this inquiry, it was not possible for the Commission to conduct a detailed operational review of the Queensland criminal justice system (Box 1) or every program, policy or action that affects imprisonment.

Our approach to this inquiry reflects that at least 10 major reviews have looked at aspects of the criminal justice system in Queensland over the last decade. Many of their recommendations are still being implemented. This inquiry has built on, rather than revisited, the issues covered by these reviews.

The Commission has concentrated on the key policy and institutional changes that are likely to provide the greatest net benefit to the community. The Commission has taken a community-wide approach to assessing options—where possible, assessing the costs and benefits of reform options and examining whether there were more effective and efficient ways of doing things.



Figure 1 The scope of this inquiry



The terms of reference for this inquiry asked us to consider ways to reduce the number of people flowing through the prison system, including for women, youth and Aboriginal and Torres Strait Islander people. We have examined and reported on trends in offending and imprisonment data for each of these groups wherever this was possible.

In most cases, the reforms proposed in this report will help reduce offending and imprisonment for all demographic groups. This is reflected in our recommendations, which are generally not targeted to specific demographic groups.

The Commission has, however, developed specific recommendations to address the overrepresentation of Aboriginal and Torres Strait Islander people in Queensland prisons. This approach reflects the intractability of the underlying causes of Indigenous imprisonment.

Finally, it was not possible for the Commission to develop conclusive findings and recommendations across all issues that affect imprisonment and recidivism. For those issues, we have identified areas for further review. These should form a body of priority work for the Queensland Government.

#### Box 1 The Queensland system

Several institutions make up the Queensland criminal justice system, including law enforcement agencies; courts; agencies responsible for detaining, supervising and rehabilitating offenders (including prisons); a range of advocacy and oversight bodies; and agencies involved in prevention and intervention.

There are over 11,000 sworn police officers, 200,000 criminal lodgements dealt with by the courts each year and 9,000 prisoners managed in custody (11 high security prisons, 6 low security prisons, and 13 work camps). In 2017–18, the budgetary cost of the criminal justice system in Queensland (police, the courts and corrections) was around \$3.5 billion.

Many other stakeholders play a role in the system—from oversight or advisory bodies like the Crime and Corruption Commission and the Queensland Sentencing Advisory Council, to legal services, service providers, representative groups and the media.



### Consultation

The Commission operates on a public inquiry model, underpinned by open and transparent consultation.

This final report presents the Commission's findings and recommendations based on its analysis of the evidence provided by a broad range of stakeholders from across the judiciary, unions, legal advocates, peak bodies, Indigenous and non-Indigenous

advocacy groups, service providers, prisoners, academics, government and members of the public.

To prepare the final report, we consulted on our issues paper (released September 2018) and draft report (released February 2019).

### The Commission met with over 600 stakeholders

#### **PUBLIC HEARINGS AND FORUMS**

The Commission received 25 PRESENTATIONS through public hearings in Cairns, Townsville and Brisbane. Public forums were held in Cairns, Brisbane, Townsville, Rockhampton & Mount Isa.



#### SUBMISSIONS



The Commission received

### 89 written SUBMISSIONS

(46 on the draft report + 43 on the issues paper)



The Commission held over

## 150 MEETINGS

**± stakeholders including** ₹ two expert workshops



#### **SITE VISITS**

The Commission undertook site visits to:

**EIGHT correctional facilities**—Lotus Glen. Helena Jones. Borallon. Aurthur Gorrie. Townsville, Capricornia, Brisbane and Brisbane Women's

the Drug and Alcohol, Magistrate and Murri courts

service providers—seven crisis accommodation centres

**DIRECT CONSULTATION** with Aboriginal and Torres Strait **Islander communities** 



The Commission held public forums and additional one on one meetings in Hope Vale. Aurukun and Napranum.

Further meetings were also held in Yarrabah.

Copies of all submissions and the transcripts and recordings of the public hearings can be accessed through the Commission's website, www.qpc.qld.gov.au



### What stakeholders told us

# The system is not achieving desired outcomes

Prison/detention does not prevent offending. Research consistently shows that prisons are ineffective in rehabilitating offenders and preventing re-offending. Imprisonment is therefore a poor use of public money. (Balanced Justice sub. 1, p. 33)

[W]hen governments talk about community protection as a reason, they only focus on the short term when offenders are actually in prison, and very little focus on community protection in the long term, e.g. post release. (Erikson, Monash University sub. 5, p. 5)

We learn nothing of use in prison and spend our lives in a place that reinforces how worthless we are. (Anonymous prisoner sub. DR40, p. 2)

Despite falling crime rates, record numbers of our most marginalised Queenslanders have been imprisoned. (Sisters Inside sub. 39, p. 3)

Recidivism rates ... for First Nation people and ... for non-First Nation people point to a system failure in the important area of rehabilitation. This failure, as evidenced by the recidivism rates, is catastrophic and is a signficant driver of crime. (Hamburger sub. 14, p. 13)

# Prisons are overcrowded, and this is impacting rehabilitation

Double ups are occurring in every state-run centre (other than the low security centres), in some there are insufficient facilities for all prisoners to sit down to eat at the one time and access to scarce industry programs designed to assist in rehabilitation is further reduced. (Together Queensland sub. 29, p. 1)

## Issues are broader than the prison system

Rehabilitation is of little assistance when gaol offers a more inviting environment than the communities to which they must return. (Families Responsibilities Commission sub. 23, p. 1)

Addressing Indigenous incarceration requires a long term, community-led focus

[A]ny real improvements in the headline imprisonment rates will forever be elusive unless there is a clear focus on empowerment and developing 'human capital' so that Indigenous people, over generations, have the means to lift themselves out of poverty. (Cape York Partnerships sub. 6, p. 2)

# Offending behaviours are often the result of many complex factors

There is a significant body of evidence documenting the links between mental health issues and incarceration, as well as between childhood trauma and future psychosocial problems. (The Royal Australian & New Zealand College of Psychiatrists, sub. 31, p. 5)

#### There are no quick fixes

Investing in programs addressing offending behaviour is not an easy sell, however, if we are serious about preventing crime and increasing the safety of our children, young people and communities, we must look into investing in long term solutions, not short term perceived 'fixes'. (Bravehearts sub. 40, p. 1)

Queensland, like the rest of Australia, relies heavily on the criminal justice system to respond to alcohol and other drug use despite recognition that alcohol and other drug use is better framed as a health issue. (Queensland Network of Alcohol and Other Drug Agencies sub. 30, p. 3)

## Solutions require bipartisan support

This cannot be a political issue. (Queensland Victim's Homicide Support Group sub. 18, p. 3)

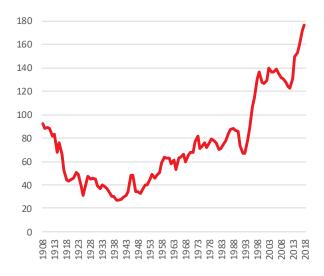


## 2 Imprisonment is a growing problem

# Imprisonment rates are increasing, despite falling crime rates

Imprisonment is growing much faster than the population—the rate of imprisonment in Queensland is currently higher than at any time since 1900. The prison population grew rapidly during two periods. From 1992 to 1999, the rate of imprisonment roughly doubled. It increased rapidly again from 2012 to 2018—growing by 44 per cent.

Figure 2 Adult imprisonment per 100,000 population, Queensland



Source: ABS 2018k, 2019a; OESR 2009.

Similar trends are occurring in the rest of Australia.

Measuring changes in underlying crime rates is challenging, because the rate at which crimes are reported change over time. This may reflect changing community attitudes—for example, in relation to domestic and sexual violence—but can also reflect changes in policing effort or focus.

Over the longer term, the most reliable indicator of crime levels are homicide rates (since most cases are reported). While homicide rates increased slightly during the 1970s, they have declined approximately two-thirds from their peak in the 1980s.

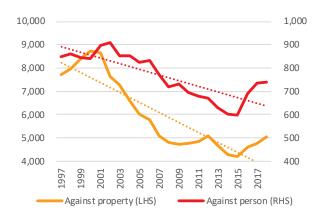
Figure 3 Homicide rate per 100,000 population, Australia



Source: ABS 2018l; Bricknell 2008; Neill & Leigh 2008.

Queensland data suggest a similar trend. Reported crime rates—those offences which are reported, or policed—have trended downward for the past two decades.

Figure 4 Reported offence rate per 100,000 population, Queensland



Note: The increase in reported offences against the person from 2015 appears to be largely due to additional reporting of offences rather than an increase in the underlying crime rates. Source: QPS 2019c.



The *reported* offence rate can be a misleading indicator of the underlying rate of crime, since it can be affected by changes in reporting and policing effort—both of which seem to have increased significantly. Adjusting for these factors suggests that actual offending rates may have declined by as much as 20 per cent over the last decade (Figure 5).<sup>11</sup>

Despite the decline in underlying crime rates, surveys show that most Australians believe that crime is increasing (Box 2).

Figure 5 Reported and proxy actual offending rates.



Rates are presented as indexes to allow comparisons of change over time. Index: 2009=100.

Source: QPC calculations; ABS 2019d, 2019g.

### Box 2 Do public perceptions match the reality?

Crime is a key concern for Australians. This is for a good reason. Victims of serious offences can suffer trauma that severely reduces their quality of life. For others, fear of crime can limit their participation in the community.

While Australians' perception of safety has improved on some measures<sup>a</sup>, most Australians believe that crime rates have increased over the last few years, and about a third believe that crime has increased a lot.<sup>b</sup> This is similar in other countries, where people commonly believe crime rates are rising, when in fact the opposite is occurring.<sup>c</sup>

Similarly, the community often feel the judiciary is 'out of touch' or that sentences are too lenient and inconsistent. However, research shows that when given the full facts about a case, members of the public typically choose sentences that are on par with, or more lenient than, the imposed sentenced.

Public anxiety about crime is what drives state government investment in law enforcement. It is this investment, not underlying trends in crime, which has played the dominant role in shaping demand for criminal justice resources over the last ten years. (Weatherburn 1993)

c Davis, B & Dossetor, K 2010, (Mis)perceptions of Crime in Australia, Trends & Issues in Crime and Criminal Justice, no. 396, Australian Institute of Criminology.

. .

a For example, in 1996, females were almost twice as likely to avoid public transport and one and half times less likely to walk home alone after dark than they are today. ABS 2017, Personal Safety, Australia, cat. no. 4906.0.

b Essential Research 2018, The Essential Report, January.

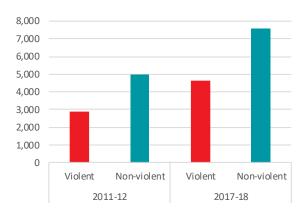
<sup>&</sup>lt;sup>11</sup> Note: Underlying offending rates are a weighted bundle of four offences: physical assault, theft, property damage and unlawful entry. Reported offending rates include property and personal offences.



## Prison terms tend to be short, and used for non-violent offending

Most prison sentences are short. **The median prison sentence is only 3.9 months.** Often the whole sentence, or most of it, is served on remand—where opportunities for rehabilitation are limited. Non-violent offenders accounted for over 60 per cent of all prisoners in 2017-18.

Figure 6 Prison sentences, Queensland

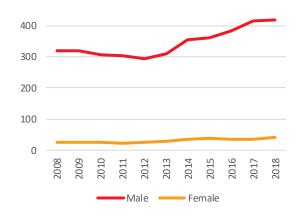


Source: ABS 2019e.

## Women are imprisoned at much lower rates than men, but rates are growing

The rate of imprisonment for women is around ten times lower than it is for men. However, it has increased by more than 60 per cent over the last decade.

Figure 7 Imprisonment rates, Queensland

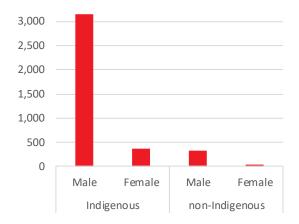


Source: ABS 2018k.

## Aboriginal and Torres Strait Islander people are overrepresented...

Indigenous imprisonment rates are around ten times the non-Indigenous rate. For Indigenous men, the rate of imprisonment is over 3,000 persons per 100,000 population.

Figure 8 Age-standardised imprisonment rates, levels, per 100,000 population

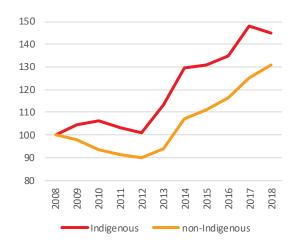


Source: ABS 2018k.

### ...and rates are growing over time

Indigenous imprisonment rates increased by 45 per cent between 2008 and 2018. This growth was around 50 per cent faster than for non-Indigenous people.

Figure 9 Age-standardised imprisonment rates, indexed growth



Source: ABS 2018k.



## Risk factors are associated with imprisonment

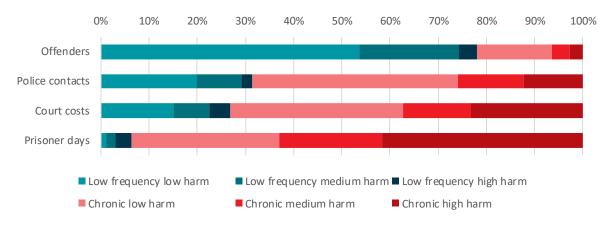
### Chronic offending

Although prison is supposed to be an option of last resort (*Penalties and Sentencing Act 1992*), many individuals are imprisoned for non-violent or less serious offences. This is usually because the

individual has committed several other offences prior to imprisonment.

The Commission estimates that around 30 per cent of the burden of imprisonment is borne by chronic, but low harm offenders (Figure 10).

Figure 10 Police contacts, court costs and prisoner days attributable to offender groups, Queensland



Source: QPC analysis of a cohort of offenders born in 1990. Chronic offenders are those who have been found guilty of at least five offences.

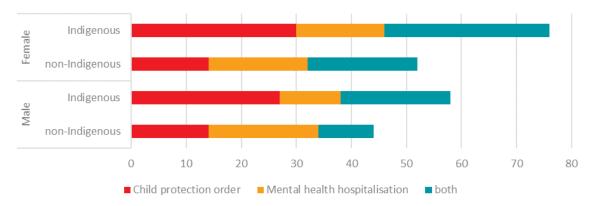
### Exposure to risk factors

Many risk factors interact with one another and become compounded over time—for example, a cognitive disability may increase the risk of substance abuse, which in turn further inhibits

executive function. These risk factors are exacerbated by socio-economic disadvantage.

Research shows that almost half of all Queensland prisoners are likely to have been previously hospitalised for mental health issues and/or have a history of child neglect (Figure 11).

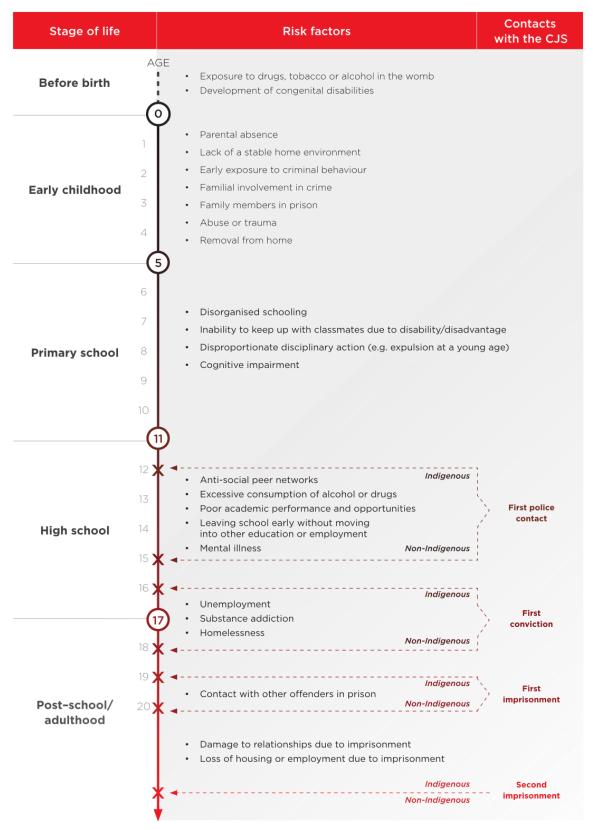
Figure 11 Child protection orders and mental health hospitalisations for Queensland prisoners



Source: Unpublished research by Griffith University's Criminology Institute.



Figure 12 Risk factors and contact with the criminal justice system - Queensland



Source: QPC analysis.



# Rising imprisonment rates are driven by system changes, not crime rates

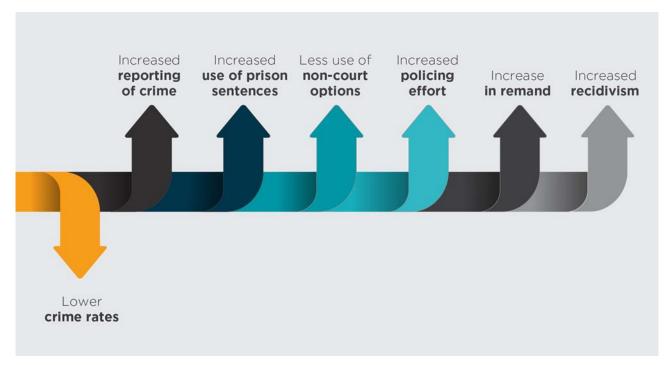
It is difficult to precisely break down the changes in imprisonment rates over the last few decades into its key components. Nevertheless, the evidence suggests that the key factors driving the change in imprisonment are:

- increased reporting of crime—the reporting rate for physical assault increased 45 per cent between 2008–09 and 2017–18
- an increase in the use of prison sentences over other options—the proportion of sentences involving prison has risen for both violent and non-violent offences
- an increase in recidivism rates—the proportion of prisoners returning to prison with a new sentence within two years increased from 29 per cent in 2006–07 to 43 per cent in 2017–18

- an increase in policing effort—clearance rates for reported offences against the person and offences against property have increased since 2008–09
- an increased propensity for police to use court action—the proportion of offences (other than public order) dealt with through court action increased from 83.7 per cent to 87.5 per cent between 2008–09 and 2016–17, with police less likely to use non-court options such as cautions, conferencing and penalty notices
- a significant increase in the proportion of unsentenced (remanded) prisoners in the last five years—while difficult to measure, this appears to have resulted in a sizeable number of prisoners serving a longer time in prison than they otherwise would have.

Changes in sentence lengths have had little impact on imprisonment rates.

Figure 13 Key drivers of the increase in the imprisonment rate





## The costs of imprisonment are high

### Imprisonment is costly, and this cost is borne by the community

On average, it costs \$111,000 to keep an adult in prison for a year. In 2017–18, the total cost of running Queensland's prisons was \$960 million. These costs are increasing. From 2011–12 to 2017–18, real net operating expenditures on prisons increased by around 29 per cent, significantly more

than the increase in general government expenditures.

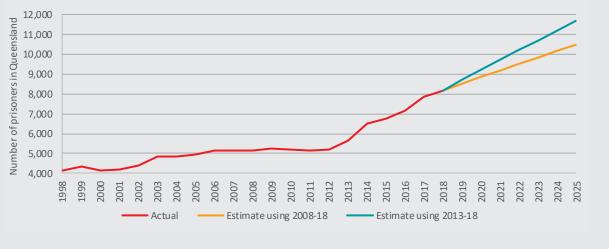
Queensland prisons are overcrowded—across all prisons, capacity is currently at 130 per cent. Without efforts to reduce demand, a significant expansion of capacity will be required (Box 3).

### Box 3 The cost of housing Queensland's growing prison population

In September 2018, the high security prisoner population exceeded the original design capacity<sup>a</sup> of prisons by 30 per cent, or nearly 2,000 prisoners.

The Queensland Government has announced new cell capacity of nearly 1,400 prison cells by 2023, at a total cost of \$861 million. Despite this, without further investments or changes to policy, prisons are likely to remain significantly overcrowded based on their original design capacity.

In the absence of any investments or policy change, the Commission projects the high security prison population will exceed design capacity by between 3,000 and 4,200 prisoners by 2025. To keep prisons within their original design capacity will require investments of between \$1.9 billion and \$2.7 billion beyond the \$861 million already announced.



a To allow for prisoner movement, 'total design capacity' refers to 95 per cent cell occupancy. Sources: ABS 2018k; Queensland Government sub. 43, p. 72; Ryan 2019c.

### Prison imposes additional costs on offenders and their families

Although prison is intended to punish offenders, costs extend beyond the direct effect on the prisoner during the term they serve. These indirect costs can include forgone employment, as well as higher rates of unemployment, social exclusion, homelessness and poor mental health following release.

Prison disrupts parent—child relationships, alters the networks of familial support and places new burdens on government services such as schools and family support services. Studies suggest that the indirect costs of imprisonment may be in the order of \$48,000 per year for each prisoner.



## There is little evidence that more imprisonment is beneficial for the community

### How prison affects offending

At a general level, prisons do reduce crime. While an offender is in prison, they are unable to commit further offences. The prospect of prison can also deter others from offending and can deter prisoners from reoffending.

There is no research for Queensland that quantifies how prison deters individuals from committing crime or prevents offending through incapacitation. The limited Australian evidence suggests that:

 There are diminishing returns from the use of imprisonment—that is, the additional benefit (through a reduction in crime) declines significantly as more people are imprisoned.

- Increasing policing effort has a much greater impact on crime than increasing the severity of punishment—Increases in sentence length do little to prevent crime.
- Well-designed community corrections can reduce recidivism without compromising community safety.

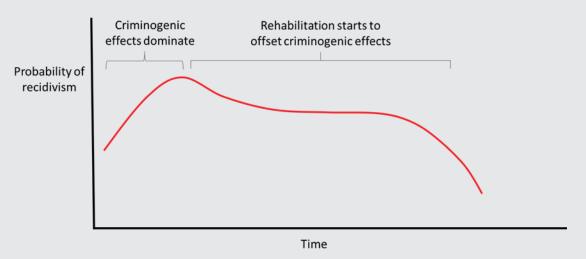
Research suggests that factors such as rising income has a much greater impact on reducing crime than the increase in imprisonment.

Beyond those findings, it is also important to consider what happens after prisoners exit from prison, and the extent to which prison rehabilitates or criminalises prisoners. If prisons simply turn prisoners into more effective criminals, they are likely to make the community less safe over time (Box 4).

### Box 4 Does imprisonment make reoffending more likely?

The relationship between imprisonment, rehabilitation and the criminogenic effects of prison is poorly understood and likely to vary considerably depending on the prison environment, including the level of overcrowding. Nevertheless, research suggests that during the first year of a prison term the criminogenic effects of prison override any benefits arising from rehabilitation or from deterring the prisoner from offending again.

Figure 14 Possible effects of prison on recidivism



Source: Adapted from Mears et al. 2016.



### Increasing imprisonment may impose net costs on the community

The Commission has undertaken a preliminary, illustrative analysis of the costs and benefits of imprisonment for a range of offences. We estimate that, at the current rate of imprisonment, incarcerating an additional prisoner is likely to prevent (through deterrence and incapacitation) around 14.3 crimes for property offences, and around 1.4 crimes for violent offences.

These benefits can be compared against the direct costs of imprisonment, by assessing the harms that would be avoided by preventing property and violent crimes.

Table 1 provides sample results from the Commission's analysis. It shows that incarcerating an additional person for a homicide would provide a large net benefit to the community (since the harm of offending is high); however, the costs from incarcerating an additional burglar (where harm is much lower) would outweigh the benefits.

This result does not suggest that we should never imprison anyone for burglary, but rather that increasing the use of prison, particularly for less serious offences, is likely to impose a net cost on the community.

Even where there is a net benefit from imprisonment, it may not be the best option—evidence suggests that alternatives to prison, for at least some offences, can provide greater net benefits to the community.

While this analysis is subject to a number of important limitations, it suggests that, while it is beneficial to imprison offenders who impose high harms on the community, in the case of many other offences, imprisonment is likely to impose net costs on the community. Furthermore, it is likely that lower cost options, such as community corrections orders, would provide greater benefits to the community. These conclusions are consistent with emerging research in other jurisdictions.

Table 1 Illustrative net benefits of imprisonment

Offence	Offences avoided	Harm avoided	Prison cost	Net benefit
Homicide	1.4	\$4,142,168	\$800,978	\$3,341,190
Burglary	14.3	\$35,396	\$111,247	-\$75,851

Harm avoided is the average harm associated with the offence (from 2014 Australian Institute of Criminology harm estimates) multiplied by the offences avoided.

Prison costs are the average sentence length multiplied by \$111,200. Sentence length is the average sentence length sourced from ABS, Prisoners in Australia, cat. no. 4517.0.

The net benefit is the harm avoided less the prison cost. Note: Estimates exclude costs on offenders or their families.

## A plan to reduce imprisonment

### Where are we now?

Imprisonment rates are the highest they have been since Federation and have been growing at an increasing rate. Today, there are 80 per cent more Aboriginal and Torres Strait Islander people in prison than there were 10 years ago. Prisons are more than 30 per cent above their original design capacity, and the judiciary and probation and parole workers have the highest caseloads in Australia.

### What is the aim?

A system that has the support of the community, uses resources efficiently and effectively, and works to reduce the harms from crime over time by:

- addressing the causal factors behind offending behaviours
- deterring and preventing criminal activity
- imprisoning only those who present an unacceptable risk to the community
- reducing the risks of future harm by effectively rehabilitating and reintegrating offenders.

### How to get there?

Achieving a meaningful reduction in imprisonment will require reforms across the criminal justice system. This will require:

- More diversionary and prevention activities that address offending behaviours and avoid unnecessary and expensive interactions with the criminal justice system.
- Reductions in the scope of crime, including through reforms to illicit drug policy that move away from a reliance on criminal law to reduce harms.
- More flexible sentencing options that allow offending behaviours to be addressed and provide opportunities for victim restitution and restoration.
- More effective rehabilitation and reintegration by increasing accountability for outcomes, building the right infrastructure, and better equipping prisoners to reintegrate back into the community.
- Addressing entrenched social and economic disadvantage in Indigenous communities by investing in community-led interventions, including the transfer of decision-making and accountability to discrete Indigenous communities.

These reforms will need to be underpinned by a better decision-making architecture that provides clear guidance to agencies on managing risk and enables evidence-based policy-making.

### What are the benefits?

If implemented, the reforms are likely to result in significant reductions in future prison populations. If reforms were implemented today, the Commission estimates the prison population would be between 20 to 30 per cent lower in 2025 than it otherwise would be. This would save between \$165 and \$270 million in annual prison costs and avoid up to \$2.1 billion in prison investments.

The reforms are also likely to make the community safer, shift resources away from organised criminal networks and deliver economic benefits (such as increased employment). These broader benefits are difficult to estimate, however, proposed drug reforms alone are likely to deliver more than \$2 billion in net benefits to the community.



## 3 Reform options

## Build a better decision-making architecture

This inquiry has identified ways to improve the management of offending behaviour, which would both increase community safety and reduce the burden that crime imposes on the community, including the cost of imprisonment.

However, without change to the underlying decision-making architecture that drives the operation of the criminal justice system, the benefits of reforms are less likely to be realised, and problems are likely to re-emerge over time.

The decision-making architecture can be improved in three key ways:

- Establishing objectives, guidance and accountabilities to drive how agencies operate, including how they should balance immediate risks against activities that would be expected to improve community safety over time.
- Building the evidence base and mechanisms to support evidence-based decision-making.
- Embedding a whole-of-system approach, both in terms of funding and decision-making, and from the perspective of individuals moving through the various stages of the criminal system.

### Setting the objectives

The overarching objectives of the criminal justice system help to guide decision-making across the system—from the way that police officers exercise discretion on the street, to how corrective services manage prisoners back into the community after their sentence has been served.

The Queensland Government has established that a key objective for the criminal justice system is to 'keep communities safe'. This objective is established as one of six priorities under the 'Our Future State' plan.

However, this objective can be interpreted in a variety of ways. For instance, that the community safety objective implies that agencies should prioritise activities that incapacitate or otherwise prevent those who may present a risk from interacting with the community.

Over the longer term, however, community safety may be best achieved by addressing the factors that lead to offending behaviours. For example, while prison can be used to mitigate short-term risk (by incapacitating an offender), it can risk long-term safety outcomes if it exposes individuals to criminogenic effects and/or fails to tackle the root causes of offending.

Individuals on the front-line of service delivery confront the management of these risks on a day-to-day basis. For example:

- Police must choose whether to arrest, caution or divert offenders.
- Judges must decide what sentence to give.
- The Parole Board must decide whether to grant parole.
- Corrections must choose how to reintegrate offenders.

Without clear guidance, there will always be a tendency to shift offenders into the criminal justice system, give harsher sentences or use imprisonment, since it is natural for individual agents in the system to use available options to avoid short-term risks or to shift risks to others in the system.

Similarly, when viewed through the prism of an individual agency, the 'keep communities safe' objective is likely to result in the prioritisation of effort to deliver immediate requirements without consideration for effectiveness or impacts on the rest of the system.



This implies that the overarching objectives for the criminal justice system need to provide greater guidance on long-term outcomes.

To this end, the Commission recommends that the government establish an explicit, overarching objective for the criminal justice system:

Improve community well-being over time by reducing the harms from crime.

To provide more specific guidance to those developing and implementing criminal justice policy, this overarching objective should be supported by five operational objectives.

The criminal justice system should efficiently and effectively aim to:

- address the causal factors behind offending
- deter criminal activity
- incapacitate individuals who present an unacceptable risk to the community
- reduce the risk of future offending through rehabilitation and reintegration
- maintain the legitimacy of the system.

While it is important that the broad ideas behind these objectives are embedded in legislation, the government will need to provide more specific guidance to agencies on how they expect agencies to manage these objectives.

This guidance should be provided to agencies in the form of public statements of intent to each of the core agencies in the criminal justice system. These statements of intent should set out the performance expectation of each agency and how this performance will be assessed against the government's objectives.

## Designing a new approach to decision-making

Policy decisions for the criminal justice system cover some of the most complex and challenging issues facing government. Over many decades, however, the decision-making architecture has been based on a 'siloed', or by function, decision-making process. The result is that:

- The costs, benefits and potential unintended impacts of policies are rarely considered fully.
- Decisions made for one part of the system do not consider impacts on other areas.
- There are few mechanisms or incentives for reinvesting funds across agencies in ways that might improve outcomes for the community.
- Evidence and data reside in individual agencies, making it difficult to assess the impacts of policy change.

Decision-making could be improved by taking a system-wide approach and introducing a greater level of independence and transparency.

This can be achieved by establishing a statutorily independent body—the Justice Reform Office—with four key functions:

- Endorsing and approving agency policy and budget submissions for cabinet and cabinet committee review.
- Providing independent expert advice on system-wide issues.
- Overseeing justice system reforms and reporting on those reforms.
- Leading and supporting evidence-based policy making.



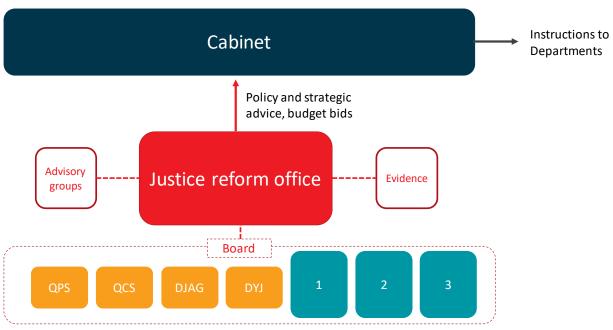
To be effective, the Office will need to work with agencies but remain at arms-length from their day to day operations. It should have some level of accountability to agencies but should also be able to exert influence over them.

To this end, the Commission recommends that the Justice Reform Office should be responsible to a board that includes senior executives from the core criminal justice agencies.<sup>2</sup> To ensure independence, the board should also have independent members with a majority voting right (Figure 15). The board should receive advice from advisory groups of experts on specialist issues.

The Justice Reform Office should largely be funded by reallocating existing resources to support its key functions.

To make more informed policy, the Commission also recommends that the government establish a formal process for assessing the costs and benefits—including any unintended consequences—of policy or legislative changes that would have sizable impacts on the community. This process—a justice impact test—should be undertaken by the Justice Reform Office and require formal public consultation and reporting.

**Figure 15 The proposed Justice Reform Office** 



Board is comprised of department representatives and selected independent members with a majority voting right

<sup>&</sup>lt;sup>22</sup> The proposed structure and operating model would be similar to Building Queensland.



## Reduce the scope of criminal offences

## Reduce the scope of criminal offences

Criminal sanctions are only one option for dealing with harmful behaviours. Many activities that are known to be harmful, such as smoking, are dealt with in other ways including through measures such as public health campaigns and regulation without criminal sanctions.

It is difficult to assess the extent to which the scope of criminal law has expanded, since this is determined by both the number of offences, which has increased by almost 70 per cent since 1970, and how they are enforced.

The criteria for determining whether an activity should be a criminal offence, or whether an existing offence should be removed from the reach of the criminal law, include:

- the extent to which the activity causes harm to others
- the extent to which criminal sanctions deter harmful offending or prevent harmful offending through incapacitation
- the costs that criminal sanctions impose on offenders, those close to them, and the community more broadly
- whether these costs are a proportional response to the harm caused by the offender
- whether criminalisation has unintended consequences that create harm
- whether criminalisation undermines public perception of the legitimacy of the law
- whether there are alternative regulatory or other measures that can address the behaviour (including a criminal law of lesser scope), and that provide greater net benefits than criminalisation.

Offences with the strongest rationale for criminalisation tend to be the traditional common law crimes of murder, rape, assault and theft. These offences involve direct harm to another person in a way that violates that person's rights. They also tend to be relatively high-harm offences as ranked by

both public opinion and judicial sentencing decisions.

However, many behaviours that are criminalised do not have such a strong rationale, particularly those that do not involve a victim, result in indirect or unintended harm, or are simply seen as offensive.

These include illicit drugs possession offences, motor vehicle and some driving offences, regulatory offences and public nuisance offences. In total, these offences contribute around 30 per cent of the prison population.

Illicit drug offences have the most scope for reform and are discussed in the next section. For other offences the reform options are not so clear.

Imprisonment for these offences is less likely to provide net benefits (although this will not be true in all cases). Further, removing these offences from criminal law may reduce pathways to prison.

However, it is possible that removing some offences would remove an important discretionary tool for police that allows them to avoid charging individuals with more serious offences (including those that might result in imprisonment).

The Commission has insufficient information to assess whether there are offences, other than drug-related offences, that should be removed from criminal law. Nevertheless, there is enough evidence to suggest that further action is warranted.

For this reason, the Commission recommends that a suitable body, such as the Queensland Law Reform Commission, be tasked with assessing whether there are opportunities to reduce the scope of criminal offences.

This assessment should focus on reviewing the benefits and costs of removing regulatory and public nuisance offences from legislation that defines these acts as criminal. In reviewing these offences, consideration should be given to alternative approaches for minimising the social harms caused by these offences.



### Illicit drug reform

Drug use, both illicit and legal, is associated with significant harm, such as:

- impacts on users and their families
- drug-related property theft and violence.

Currently, the main approach to minimising harms from illicit drugs is through a policy of criminalisation.

All available evidence suggests that the policy has not been effective in restricting use and supply. Despite this, the Queensland Government spends around \$500 million enforcing drug laws and imprisons around 1,840 people per year.

Today, drugs are prevalent and easy to source. As noted by Mick Palmer, former AFP Commissioner:

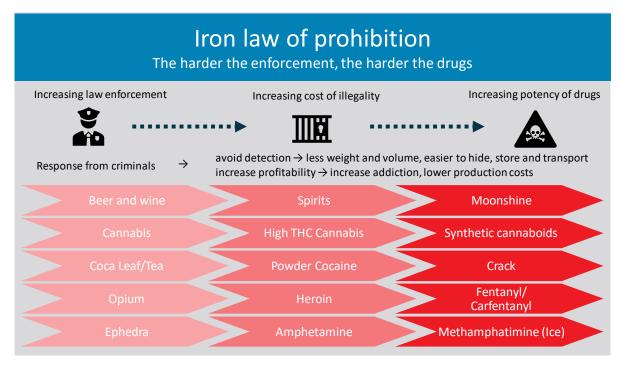
'Despite our best endeavours over many years, drugs are as readily available now as they have ever been. [There is] an ever-widening array of, increasingly dangerous, drugs available for use.' (sub. DR023, p. 3)

In Queensland, around 1 in every 6 people have recently used an illicit drug—and usage has increased over the last decade. The price of illicit drugs has fallen relative to income, and obtaining drugs is easier than ever.<sup>3</sup>

Where other jurisdictions have relaxed the criminalisation of drug usage, there has been little effect on usage rates.<sup>4</sup> Even in those jurisdictions where supply has been legalised, most evidence suggests there has been no long-term increase in usage or drug-related harms.

The criminalisation of drug use has also resulted in unintentional harms. These harms arise largely because criminalisation encourages the creation of more harmful and dangerous drugs (Figure 16).

Figure 16 Prohibition encourages supply of more harmful and addictive substances



Source: Modified from the Global Commission on Drug Policy, 2018.

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<sup>&</sup>lt;sup>3</sup> A recent global drug survey found that home delivery of illicit drugs sourced online was growing, with users citing they could 'get cocaine delivered faster than pizza'. A 2018 survey by the Australian Institute of Health and Welfare reported that 94 per cent of users said methamphetamine was 'very easy' or 'easy' to obtain.

<sup>&</sup>lt;sup>4</sup> The best evidence comes from Portugal, which decriminalised all drug use. There is no evidence that the reforms led to increased drug use, while drug-related harms and criminal justice system costs seem to have declined.



Harms arise because the profitability of illicit drugs<sup>5</sup> creates enormous incentives for organised crime to enter into illegal markets.

In an illegal market, unregulated criminal operations are unlikely to be concerned with the harms they cause to users or the broader community and are most likely to focus on distribution methods that will generate the most profits—that is, drugs which cost little to manufacture and for which a market can be created (by encouraging addiction if necessary).

Currently, the most profitable and growing market appears to be methamphetamine (commonly known as ice), a drug associated with very high levels of community harm.

The criminalisation of drug usage also appears to inhibit health-based responses. This is evident in the statistics, which show that the rate of drug-related accidental deaths has increased (by 144 per cent since 1997), with illicit drugs now responsible for more deaths than road accidents in Queensland.

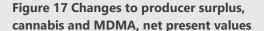
Drug reform options need to be assessed by considering the potential costs and benefits to the Queensland community. To this end, the Commission has conducted a cost–benefit analysis of a range of reform options, which found:

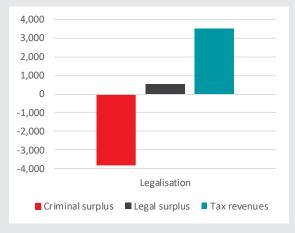
- There are large net benefits (around \$850 million) from decriminalising the use and possession of cannabis.
- These benefits would be higher (around \$1.2 billion) if the government chose to fully legalise and regulate the supply of lower harm drugs such as cannabis and MDMA.
- Legalisation of lower harm drugs would also move around \$4.0 billion out of illegal markets, significantly curtailing criminal activity (Box 5).
- Decriminalising other illicit drugs, while more uncertain<sup>6</sup>, is also likely to generate net benefits (around \$700 million).

### Box 5 Benefits from legalisation of cannabis and MDMA

One of the key benefits from legalisation of illicit drugs is that it moves production from illegal markets to legal ones. Rather than money being channelled into profits from criminal activity, surpluses from production (profits) can be taxed and used for public good.

Under a legalisation scenario for cannabis and MDMA, the Commission estimates that around \$4.3 billion of funds currently being channelled through criminal markets could be made available to fund legitimate activities.





Source: QPC estimates.

Queensland Productivity Commission

<sup>&</sup>lt;sup>5</sup> Research from the Australian Bureau of Statistics suggests that wholesale and retail margins to operators in the drug market range from 46 per cent for cocaine to 91 per cent for amphetamines—direct wholesale and retail margins are less than 2 per cent for beer, wine and spirits.

<sup>&</sup>lt;sup>6</sup> Mainly because there is less of evidence on how consumption of higher harm drugs such as heroin and methamphetamine would be affected as fewer jurisdictions have embarked on reforms to decriminalise or legalise higher harm drugs.



The Queensland Government should adopt a more effective approach for managing the supply and use of illicit drugs. This approach should aim to:

- reduce harms from drug use
- substantially reduce organised crime in Queensland
- establish strong regulatory approaches to manage drug use and supply
- reduce costs that drug use places on the criminal justice system, including through imprisonment

While the ultimate destination for reform is clear, the design, implementation and sequencing of changes will be critical. Based on the available evidence, the Commission has developed a staged process for reform.

The first stage should be to decriminalise the use and possession of lower harm illicit drugs, such as cannabis and MDMA. Consideration will need to be given to the regulatory framework around use, including, for example, the regulation of use in public places.

At the same time, the government should expand the provision of health support and drug treatment services to reduce drug harms.

The next stage should establish a regulatory framework for the supply of low harm drugs.

As for other potentially harmful activities (such as liquor and gaming), the framework should establish the arrangements for supply, including licensing for production and retail, and regulation of licenced premises, with a regulator to oversee this framework.

The final stage of the reforms should be to legalise the use and regulated supply of cannabis and MDMA.

The government should also move to adopt a regulatory approach to other illicit drugs. However, given the complexities in approaches to managing higher harm drug use, a reform pathway will need to be developed. This should consider:

- removing imprisonment as an option for use and possession
- implementing health-based approaches to minimise harmful drug use
- reducing supply from illicit markets
- developing options for regulating use and supply.

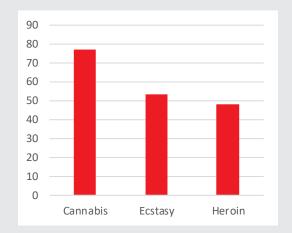
The government should establish a taskforce to oversee the implementation of reforms. This taskforce should monitor and assess the impacts at each stage of reform and report to parliament on their effects.

### Box 6 Growing support for drug reform

There is a growing international trend towards drug liberalisation. Canada and Uruguay have recently legalised cannabis, and in the United States half of states have legalised or decriminalised cannabis. Cocaine has been decriminalised in several countries and prescription opiate treatments adopted in others. Many jurisdictions are reconsidering prohibition—Luxembourg announced legalising cannabis and New Zealand will hold a referendum on the issue in the 2020 general election.

Data from the National Drug Strategy Household Survey 2016 show that over 50 per cent of the population of each state, including Queensland, supports the decriminalisation of cannabis and ecstasy.

Figure 18 Support for drug decriminalisation



Source: AIHW 2017c.



## Deal with offending in better ways

### Focus more on victims

The criminal justice system mainly focuses on criminals, not on the victims of crime.

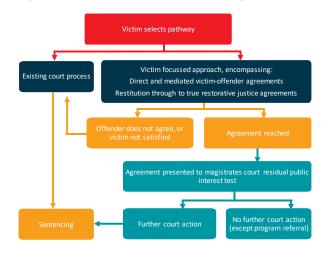
In criminal matters, the state is currently the litigant and victims largely play a passive role in the process. The offender's 'debt' is paid to the state, often in the form of a prison sentence. The victim plays no role in the setting of the sentence and typically receives no compensation from the offender for the harm done and there is little opportunity for restoration.

Beyond the direct impact on victims, the indirect impact has been to entrench a high-cost approach to community safety, with ongoing pressure for further legislative and other interventions in an attempt to address community concerns. The result, at least anecdotally, is that such interventions have not always met the needs of victims and more offenders are in prison than is necessary.

Under a victim-focused system, victims can be provided with an option to choose a sentencing pathway that focuses on victim restitution and restorative justice, rather than the standard sentencing process. Where the victim chooses direct involvement in the process, the offender's debt is in effect paid to the victim prior to any state consideration. This could involve both financial and non-financial assistance to victims.

These approaches are typically associated with a reduction in the use of imprisonment because they provide acceptable alternatives to prison (through compensation, rehabilitation requirements and victim—offender restoration). For low harm offences, restorative justice can substitute for court sanctions, including imprisonment. For more serious offences, the court may need to consider any residual state interest. That is, final sentencing should consider genuine attempts toward victim restoration, as well as any residual need to protect the community, including by deterring others. In other words, the offender's 'punishment' is the sum of her or his efforts towards victim restoration plus the residual sanction imposed by the courts.

Figure 19 A victim-focused sentencing process



Where victims and offenders are suited to restorative justice practices, there is solid evidence that these practices can reduce recidivism. Evidence also indicates that victims are more satisfied with outcomes under restorative justice practices compared to normal court sentencing.

The victim-focused approach to sentencing is perhaps most advanced in New Zealand, where the requirement to provide for the interest of victims is enshrined in legislation—for example, sentencing purposes include both restoration and reparation to victims.

The Commission recommends that a victim restitution and restoration system be adopted in Queensland, including that a victim-focused approach be included in the *Penalties and Sentencing Act 1992*.

The Commission estimates that this reform, if implemented fully, could reduce the prison population by around 450 persons by 2030–31, with net savings of around \$40 million annually with further benefits to victims.



# Use more cost-effective sentencing options

The judiciary has a range of restrictions on the types of sentences they can give to offenders. These restrictions include limitations on the types of penalties available (such as limitations on home detention), the length of probation and the flexibility with which penalties can be combined.

These restrictions mean that a prison sentence is often the only satisfactory option available to the judiciary, even though it may not be the best option for protecting the community or rehabilitating the offender. As a result, sentencing outcomes can make the system more expensive than it needs to be and makes the community less safe over time.

For the judiciary to apply sentences that are the most effective and efficient, they must have access to:

- options that allow sentencing to be matched to actions that will remedy an individual's offending behaviour
- information on the availability and suitability of these options.

This will require a wider set of sentencing options than currently available.

To provide a greater range of sentencing options, a new community corrections order should be introduced. This order should allow for a combination of community-based options including:

- home detention and other community-based supervision
- monetary fines, community service, and options for victim restoration and restitution
- referral to treatment or other options to address offending behaviours.

To make these community-based sentences a viable alternative to imprisonment, restrictions on their duration and combination with other penalties should be removed.

The new community corrections orders should also be supplemented by greater supervision, including through technological measures, such as electronic monitoring.

Community corrections orders like this have been implemented in other jurisdictions. The emerging evidence shows they can often substitute for prison terms without compromising community safety, and when complemented with rehabilitation programs, are associated with significant reductions in recidivism.<sup>7</sup>

For many offenders requiring greater supervision—such as those with mental health issues, cognitive impairments or drug dependence, or where remoteness makes it difficult to restrict offender movements—in the absence of other alternatives, prison will remain the go-to option even if even it is not suitable for addressing the causal factors driving offending.<sup>8</sup>

To address this gap, the Commission recommends that a residential supervision order be introduced into the sentencing mix. A residential supervision order should only be used for those offenders who would otherwise have received a short prison term and are likely to benefit from residential supervision.

Under this option, offenders would be accommodated in small, low security facilities that provide treatment or other services to address offending behaviours. Although offender supervision may need to be undertaken by QCS, the operations of residential facilities should be managed outside of the corrections system.

Although these facilities should form part of the 'correction's estate', there should be opportunities for these facilities to be initiated from outside of the corrections system, including by community and non-government entities.

Queensland Productivity Commission

<sup>&</sup>lt;sup>7</sup> While prison is effective in preventing crime in the community by physically incapacitating offenders, there is little evidence that community corrections, used appropriately, are less effective at deterring offending behaviour (Sydes et al. 2018; Trevena & Poynton 2016; Trevena & Weatherburn 2015). There is also emerging evidence that they are more effective than prison terms at breaking the cycle of reoffending.

<sup>&</sup>lt;sup>8</sup> Under current sentencing arrangements, the only way an offender with a mental health issue or a cognitive impairment can avoid prison is to receive a forensic health order. This is generally only used in exceptional circumstances and is rarely lifted.



Currently, limited resourcing is provided to support the supervision of offenders in the community—although 70 per cent of individuals being supervised by QCS are under a form of community-based order, this cohort attracts only 10 per cent of the corrections budget (the remainder is spent on prisons).<sup>9</sup>

Redirecting funding to community-based supervision options is likely to result in lower overall spending, since it would encourage substitution of expensive prison sentences for less costly community-based orders.

It is difficult to assess the extent to which community-based sentencing could substitute for imprisonment, since every prisoner has a unique set of circumstances, which would make them more or less suitable for a community corrections order.

Nevertheless, the Commission estimates that in the order of 20–30 per cent of the current prison population may be suitable for a community corrections order.

The benefits of these reforms (Figure 20) include:

- making available a wider array of sentencing options that will allow courts to better fit sentences to the offence and the circumstances, to better meet the sentencing purposes
- delivering better rehabilitation and reintegration outcomes and helping offenders to avoid the criminogenic effects associated with prison, such as the loss of housing and employment. This will assist in reducing the current high rates of reoffending
- lowering the current costs of the criminal justice system by facilitating the greater substitution of lower cost non-custodial options for imprisonment
- reducing the future costs of the criminal justice system by stopping offenders from cycling in and out of the system.

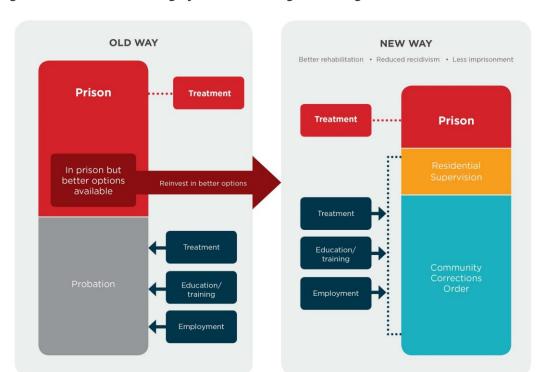


Figure 20 Reduce reoffending by better matching sentencing outcomes to offenders

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<sup>&</sup>lt;sup>9</sup> Queensland has the lowest expenditures on community supervision in Australia, and the highest ratio of offenders to community corrections staff.



To maintain community confidence in these changes, the community needs to be assured that sentencing is being used in the most appropriate way. The Queensland Sentencing Advisory Council (QSAC) should continue to strengthen the community's confidence in sentencing outcomes, by producing and communicating evidence on sentencing and assessing this against community expectations.

# Improve monetary fines

In theory, monetary fines are the most efficient sentencing option<sup>10</sup> and are widely used. In practice, however, the effectiveness of monetary fines is constrained by their design and the ability of an individual to pay.

This limitation could be addressed in two ways:

- Backing fines with non-monetary options (such as community service).
- Setting fines to an effective level (for example, as a proportion of income).

The State Penalties and Enforcement Register (SPER) has introduced a system of work and development orders<sup>11</sup> to provide non-monetary options for fines—it should continue to develop cost-effective options to allow offenders to repay debts to society.

Income-based monetary fines have been introduced in several countries, including Germany, which successfully used income-based fines to reduce their reliance on imprisonment.<sup>12</sup> Similar proposals have been examined in New South Wales but have been rejected because of concerns about the complexity and potential administrative costs.

Given the complexity of the issues, the Commission has not been able to arrive at a firm conclusion on income-based fines. Nevertheless, this is an issue worthy of further investigation, as are other options to make monetary fines more effective. To this end, the Sentencing Advisory Council or another suitable body should be appointed to investigate further, and report back to the government.

## Reduce remand

Remanded prisoners are those who have been refused bail but are yet to be convicted of a crime.

The number of remanded prisoners held in custody has more than doubled since 2012. Currently, around 30 per cent of all prisoners are on remand.

There is no single factor behind the growth in remand. Rather, there appears to be a combination of legislative changes, policy and practices which, together, reduce the chance of bail being granted, or if it is granted, increases the chance of it being breached.

Remand in custody has negative impacts on the defendant—such as loss of accommodation and employment and exposure to hardened criminals—that can increase the probability of reoffending.

Typically, remanded prisoners do not have access to rehabilitation programs, further exacerbating the criminogenic effects of imprisonment.

There are opportunities to reduce the use of remand in custody by:

- making bail decision-making more robust, through the use of a more evidence-based and transparent risk management framework
- facilitating the defendant staying in the community through the greater use of noncustodial options, addressing accommodation needs and providing rehabilitation opportunities
- reducing court delays—implementing other recommendations in this report, such as decriminalising certain offences, and supporting restitution, restorative justice and diversion options, would assist in reducing court workloads.

The negative, often criminogenic, effects of remand in custody should also be mitigated by giving defendants greater access to rehabilitation opportunities.

<sup>&</sup>lt;sup>10</sup> In theory, a system of deterrence based on monetary fines will be more efficient than imprisonment, since imprisonment is a costly form of punishment and consumes resources, while monetary fines transfers resources between the offender and the victim or the state. In practice, fines only act as a deterrent when set at a level that has a meaningful impact on the offender. For instance, if individuals do not have the ability to pay, it is unlikely to work as a deterrent to offending.

<sup>11</sup> Under a work and development order, an offender can perform community service or undertake treatment to pay their SPER debt.

<sup>12</sup> Restricting short sentences and introducing day fines reduced the number of short prison terms in Germany by 80 per cent.



# Improve rehabilitation and reintegration

Over 1,000 prisoners are released back into the community every month—over half of these will return to prison or corrective services within two years.

Although the Queensland system provides for a rehabilitation and reintegration throughcare approach 'on paper', evidence presented to this and previous inquiries suggests many prisoners receive limited rehabilitation, and many are released back into the community with minimal support. This makes the community less safe than it otherwise could be.

There are many different options for improving rehabilitation and reintegration, including increasing resources for programs, or reforming the way services are delivered. However, these options are unlikely to be effective without first reforming the foundational governance arrangements that incentivise performance and provide accountabilities for outcomes.

# Improve accountability arrangements for QCS

Under the current arrangements, Queensland Corrective Services (QCS) has few incentives for providing effective throughcare to prisoners. QCS does not suffer consequences if an offender is not rehabilitated and has few responsibilities beyond the prison gate. They do, however, pay a high price if prisoners escape.

These incentives tend to focus correctional activities on containment, with the result that there is an undersupply of effective rehabilitation and reintegration.

To overcome these problems, new governance arrangements need to be introduced to give QCS clearer guidance for prioritising rehabilitation and reintegration (relative to its containment and supervision objectives) and to provide the right incentives to achieve those outcomes.

To this end, the government should improve performance indicators on rehabilitation and reintegration. It should publicly report against these indicators, which should also be introduced into performance frameworks for individual prisons and contracts for senior executive employment.

An Office of the Chief Inspector was established to monitor prison conditions and respond to complaints. This inspectorate sits in QCS and has not publicly reported since 2012.

Greater transparency and accountability would be achieved through the establishment of a properly resourced independent Inspectorate of Prisons. It should have information-gathering powers and be required to publish its reports.

#### Better rehabilitation

Prisons are currently more than 30 per cent over their original design capacity. This impedes the effectiveness of prisons in achieving rehabilitation outcomes.

While overcrowding is largely outside QCS's control, work practices could be improved to better utilise existing infrastructure in providing prisoners with greater access to work and educational opportunities that prepare them for release.

There are also opportunities to improve case management, widen eligibility for in-prison programs, ensure prisoners are assessed for NDIS eligibility and better tailor rehabilitation programs and services to address the needs of prisoners.

QCS is reviewing its approach to these issues following previous reviews. This review process needs to be more transparent, with public reporting on progress and outcomes.



## Better reintegration services

The period immediately following release from prison is a difficult and challenging period for many prisoners.

Many prisoners (including those paroled) are released with little notice, and without the basic tools for release into the community. Further, a large proportion of prisoners appear unprepared for release, even when release dates are known.

To lower offending immediately after release, QCS should be assigned responsibility for the provision of a minimum standard of post-release support. This standard should include:

- short-term housing for prisoners who do not have accommodation on release
- adequate documentation for proof of identity to open bank accounts and apply for other services, and a Medicare card to access health services
- assistance to establish an email account and procure a mobile phone
- information on support services available to assist with their reintegration
- financial supports for the first week of release
- appropriate transport to their accommodation.

The Queensland Government should require QCS to regularly report against this standard.

QCS also provides reintegration services through contracted arrangements with NGO providers. These services provide access to case managed support to prisoners assessed to have a high risk of reoffending.

To ensure value for money, and to assess whether reintegration support is adequate, QCS should commission an independent public evaluation of its contracted reintegration services.

# Increase support for parole

Most prisoners are released on parole so that their reintegration into the community can be supervised. This is an important component of a prisoner's sentence, since it provides the community with a small window in which an ex-prisoner is still under some form of coercive power. It is likely that the outcomes during this window can be significantly improved.

The expenditures on supervising prisoners in the community are small. Queensland probation and parole workers have the highest caseloads of any state. This means the focus of these workers must be on basic compliance, including technical breaches. To improve matters, the Queensland Government should:

- reassign expenditures to community supervision
- ensure directions on technical breaches of parole are consistent with objectives in relation to reintegration and rehabilitation.

# Introduce work release options

Improvements can be made to allow QCS to provide opportunities for prisoners to engage in real-world activities that would assist their reintegration.

Work, education and other release arrangements have been used successfully in the past in Queensland and are used in many jurisdictions around the world. These arrangements should be reintroduced in Queensland. To support their use, the relevant Minister should provide direction to QCS on how, and under what circumstances, these arrangements should be used.



# Improve the capital portfolio

Correctional infrastructure is Queensland is predominantly designed for incapacitation.

Queensland has the lowest proportion of prisoners held in low security settings than any other jurisdiction (Figure 21).

Figure 21 Prisoners held in open custody



Source: SCRGSP 2019d.

The capacity, composition and design of correctional facilities shape the outcomes of the prison system. Given their long lives, the composition of prison assets changes slowly, and needs to be formed and evolved through a long-term strategy.

A different infrastructure strategy is necessary if the government wants to focus on constraining the growth in the number of prisoners and pay more attention to rehabilitation and reintegration.

This strategy would require less capacity expansion, more investment in prison design and a change to the composition of infrastructure, to manage all the factors that drive offending behaviour.

The recommendations in this report provide ways for reducing future prisoner numbers and should allow government to consider more innovative options for future investments (such as facilities for residential supervision by non-government entities).

Regardless of whether the government accepts the recommendations in this report, or stays with the status quo, it needs to set out a long-term infrastructure strategy that supports its overall approach to the corrections system.

This strategy needs to:

- align infrastructure objectives with the objectives of the broader criminal justice system
- ensure infrastructure keeps up with demand
- consider a broad range of options and be open to innovation
- provide opportunities for the community sector to be involved in managing low security correctional assets, particularly those with a rehabilitation focus.



# Target prevention and early intervention

As noted by many stakeholders, getting the right social and economic conditions in place in the longer term (many of which are broader than this inquiry) are likely to provide the most long-lasting and effective outcomes.

Within this, however, is a more direct consideration of whether and how prevention and early intervention can be used to address the causal factors that may lead to imprisonment.

The causal factors behind offending are complicated and include a range of factors, such as cognitive impairments, mental health issues, exposure to trauma and childhood maltreatment—all of which are more prevalent in the prison population than in the general population.

There is strong evidence that addressing these risk factors can reduce crime and deliver future savings through avoided prison expenditure and justice system costs. However, it does not follow that early intervention and prevention *programs* will necessarily deliver these results. They can be risky investments, because they can involve large costs with uncertain outcomes.

For this reason, evidence-based programs targeting high-risk individuals and communities are likely to be the most cost-effective.

Although interventions can occur at any time, the evidence suggests that earlier interventions (whether early in life or early in pathways to adult offending) can provide high returns when they are effective.

The Commission notes there have been several recent inquiries and recommendations that focused efforts on prevention and early intervention in a range of various areas, including youth justice and child safety.<sup>13</sup>

The Commission has not revisited areas covered by these inquiries and has instead focused its analysis on a small number of areas identified by stakeholders.

# Target community level interventions

Queensland data show that a small number of chronic offenders who begin offending early in life account for a large proportion of all offending and imprisonment. Identifying these individuals prospectively, however, has proven challenging.

Data show that chronic offenders tend to be concentrated in a small number of geographic areas. These tend to be communities where there are high levels of entrenched social and economic disadvantage. In Queensland, this includes Indigenous communities predominantly located in regional, remote and very remote locations.

Effective interventions in these locations are likely to generate large benefits.

Interest in early intervention investment strategies, such as justice reinvestment that empowers community development, is growing and early results are promising. Evaluations of the Maranguka Justice Reinvestment Project in Bourke suggest crime reductions can be achieved through evidence-based, community-led approaches.

However, the government must ensure frameworks are in place to drive evidence-based policy-making and program selection, improve coordination across government and non-government agencies, and deliver robust program evaluations.

The government should prioritise investments in community-led prevention and early intervention in communities with high levels of entrenched disadvantage.

Given the levels of offending in many Indigenous communities, the initial focus should be to establish projects that aim to reduce Indigenous offending.

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<sup>&</sup>lt;sup>13</sup> Several recent inquiries that have recommended reforms to youth justice and child protection, and many of their recommendations are still being implemented or evaluated. These include the Queensland Child Protection Commission of Inquiry, the Atkinson Report on Youth Justice, and the Independent Review of Youth Detention.

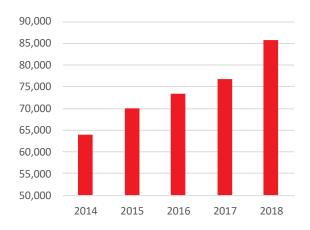


# Improve incentives for educational engagement

Stakeholders raised concerns that disconnection from the school system is a key risk factor for offending behaviours. This is evident in data that show that educational attainment for prisoners is far below the population average.<sup>14</sup>

While the government is focusing efforts to address student engagement, the rising incidence of school disciplinary absences (Figure 22) suggests a significant number of students are at risk of disengagement from the school system.<sup>15</sup>

Figure 22 Student disciplinary absences in Queensland state schools, 2014–2018



Source: Department of Education 2019.

It is important that perverse incentives, such as might arise from school performance reporting, do not encourage excessive use of student disciplinary absences. To this end, the Commission recommends improving transparency around school-level efforts to promote student engagement and re-engagement.

Schools should also receive more tools to help manage problem behaviours. As a first step, the

Department of Education should work with universities to improve behavioural management training for pre-service teachers, focusing on the identification and management of students at risk of disengaging from education. Other opportunities to improve the identification and support of at-risk children through the school system should also be explored, including opportunities for improving referrals to the National Disability Insurance Scheme.

### Address barriers to access

Stakeholders raised concerns about barriers that prevent some individuals from accessing services to help prevent offending behaviours. These focus around the absence of support for services that aim to prevent child sex offences. Given the high costs these offences impose on the community, and the high level of stigma around them, the government should consider supporting services that prove to be effective at preventing child sexual offending. This should be a priority of the government's Sexual Violence Prevention Framework.

# Improve support for children of prisoners

Children and young people with incarcerated family members are known to be at greater risk of engaging in antisocial behaviour; effective intervention may prevent intergenerational transmission of criminal behaviour. To improve matters, the government should amend prisoner admission processes to better identify these children and ensure that supports are available for them.

Further, the government should explore ways in which the operation of correctional facilities can better help maintain family relationships.

Queensland Productivity Commission

<sup>&</sup>lt;sup>14</sup> Only 17 per cent of Queensland prisoners completed Year 12, compared to 62 per cent for the general population.

<sup>&</sup>lt;sup>15</sup> In 2018, more than 3,700 student disciplinary absences were issued to children in the first two years of primary school, and more than 27,000 were issued to students in the first two years of high school.



# Expand diversionary options

## Diversion is underutilised

For many low harm or minor offences, police enforcement and court proceedings impose costs on offenders that exceed the harm of their offending. Further, this initial interaction can result in an escalation of interactions with the criminal justice system.

De-escalating these interactions or diverting these offenders can avoid unnecessary impacts for the individual and save costs across the criminal justice system—each diversion is likely to save around \$9,200 in criminal justice costs.

Options for police to divert adult offenders away from the criminal justice system are limited and, aside from a caution/diversion for minor cannabis possession, there is limited scope for adult cautioning in Queensland.

This is reflected in proceedings. Queensland makes the least use of non-court proceedings (17 per cent), compared to New South Wales, Victoria and South Australia (59, 29, and 55 per cent respectively), particularly for illicit drugs and public order offences (Table 2).

Table 2 Non-court proceedings, 2016-17

Offence	Qld	NSW	Victoria	SA
Illicit drugs	20%	28%	34%	80%
Public order offences	42%	84%	90%	78%

Source: ABS 2019g.

Queensland's low use of diversion reflects limited legal and police flexibility, diversion options (for treatments), and police expertise and incentives in the use of diversion and de-escalation. Underlying this 'aversion to diversion' is a perceived high risk from adverse publicity for errors in the use of police discretion.

# Expand cautioning options

Existing police cautions are used infrequently because they can only be applied in limited circumstances and there are administrative hurdles that limit their use.

To improve matters, two new cautioning approaches should be adopted.

The first is a more usable adult caution, with fewer administrative hurdles.

The second is an expansion of cautioning for drug offences. Subject to the illicit drug reforms discussed earlier, a three-stage caution should be introduced for all illicit drugs.

This new drug caution should include:

- a simple caution
- a caution with educational material provided
- a caution with mandatory referral to face-to-face counselling.

# Introduce an option for deferred prosecution

Under a deferred prosecution agreement, the police or prosecutor consents not to prosecute an offender for an agreed period, providing they do not reoffend and adhere to any other terms (such as receiving treatment). If the offender completes their agreement, the prosecution is cancelled, avoiding court and any penalties. If the offender reoffends, proceedings are commenced for both the deferred and new offence.

Deferred prosecution provides benefits over simple cautions because it provides an offender with an incentive not to reoffend (or to seek treatment). It has advantages over court-based diversions because it avoids complex court processes and provides more certainty to the offender. <sup>16</sup>

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<sup>&</sup>lt;sup>16</sup> Under court-based diversions, the judge retains discretion to take into account any actions an offender has taken.



Deferred prosecution has been used successfully in the United States, where it has been shown to substantially reduce adverse reoffending and employment outcomes.<sup>17</sup>

The Commission proposes that three forms of deferred prosecution be adopted:

- a simple deferred prosecution agreement that is conditional on no repeat offence within a specified period—which could be offered on the spot by police
- a deferred prosecution agreement with additional conditions/actions that relate to assessment/treatment/restoration—which would usually be negotiated by the prosecutor
- a community-deferred prosecution agreement with additional conditions/actions that relate to assessment/treatment/restoration—where the conditions are developed and agreed with a community group, such as a community justice group, who would also monitor those requirements.

# Encourage the use of diversion

Effective use of diversion can be encouraged by:

- clear direction from the Minister through a statement of intent
- an expression of support for the appropriate use of diversion, through the Queensland Police Service's operational plan and performance indicators
- training and practice manuals that support the use of diversion and de-escalation, including a simplified public interest test.

To maintain community confidence in diversion, a monitoring and evaluation framework should be established to ensure that the use of these diversion options contributes to community well-being.

# Evaluate the approach to family and domestic violence

Several stakeholders raised concerns about the policing and prosecution of domestic and family violence issues.

The current approach to domestic and family violence is enacted through the government's *Not Now, Not Ever* strategy, and assumes there is a perpetrator and a victim. This is very often the case, but stakeholders have raised concerns that situations are not always so clear-cut.<sup>18</sup>

In these cases, the approach may force individuals into contact with the criminal justice system where there are few benefits or where better approaches exist.

Given the potential for unintended consequences, and the number of domestic and family violence offences (and breaches) that result in imprisonment, the Commission recommends that the government's *Not Now, Not Ever* evaluation strategy include an assessment of:

- whether current policing and enforcement strategies, including the use of imprisonment, are working to reduce the incidence of domestic and family violence
- the extent to which the strategy has resulted in unintended consequences
- whether there are opportunities for greater use of diversion to treatment, restoration or other approaches that would reduce harms.

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<sup>&</sup>lt;sup>17</sup> A natural experiment in Harris County in the United States showed a 56–76 per cent reduction in reoffending over ten years and a 16–20 percentage point increase in employment.

<sup>&</sup>lt;sup>18</sup> For example, where both parties to a dispute had been prosecuted under domestic violence laws.



# Address Indigenous overrepresentation

Indigenous incarceration is one the most pressing problems that Queensland faces:

- Indigenous incarceration rates are more than 10 times the non-Indigenous rate<sup>19</sup> and are amongst the highest rates of any group in the world.
- Indigenous prisoners make up around 31 per cent of the total number of people incarcerated in Queensland, despite making up only 4.6 per cent of the population.
- An Indigenous male has almost a 30 per cent chance of being imprisoned by the age of 25.
- 80 per cent of Indigenous prisoners have been to prison before.

During consultation, several stakeholders indicated that in some communities, imprisonment is no longer a deterrent—detention has simply become a rite of passage for some young people. For some, life is so difficult that time in prison may seem an attractive alternative, and an experience that they can share with already imprisoned friends and relatives.

Essentially, the rate of imprisonment has risen so high in some communities that it has become a risk factor in itself. When prison is normalised to this extent, it acts to reinforce dysfunction and disempowerment, continuing the cycle of offending and imprisonment.

Making life in the community more desirable than life in prison must be a basic objective of reform if imprisonment is to act as a real deterrent.

# Address entrenched social and economic disadvantage

The main reason Indigenous people experience higher levels of incarceration than non-Indigenous people is that they are, on average, significantly more exposed to the risk factors that lead to elevated rates of offending. These factors include

high rates of unemployment, exposure to alcohol abuse and family dysfunction.

The risk factors reflect entrenched social and economic disadvantage that has its roots in historical policies.

The statistical evidence is stark. For example, research by Griffith University's Criminology Institute found that around 60 per cent of all Indigenous prisoners had previously been subject to a child protection order, hospitalised for a mental health episode or both—for female Indigenous prisoners this number rises to 76 per cent.<sup>20</sup>

Although there is a general recognition that solutions need to be developed with and by Indigenous communities, governments have not found mechanisms to put this into practice.

The Commission's previous inquiry Service delivery in Queensland's remote and discrete Indigenous communities provides these mechanisms. It proposed three key reforms:

- structural reforms that transfer accountability and decision-making to regions and communities
- service delivery reforms that focus more on the needs of individuals and communities, such as user-driven services and place-based models
- economic reforms that support community development, enable economic activity and make communities more sustainable.

These reforms require significant changes to the way things are done, but the principles behind these reform elements could be applied more broadly than to just the remote and discrete Indigenous communities and should underpin any plan to address Indigenous incarceration.

Stakeholders reiterated support for these reforms, and the Queensland Government provided inprinciple support in 2018. However, there are emerging concerns that the reforms are not being implemented.

<sup>&</sup>lt;sup>19</sup> Age-adjusted rates of imprisonment.

<sup>&</sup>lt;sup>20</sup> Based on an analysis of a cohort of the population born in 1990. Rates of prior hospitalisations were more than five times higher for Indigenous prisoners than for the general population, and child protection orders were more than eight times higher.



As a priority, the Queensland Government should implement the recommendations of the Service delivery to Queensland's remote and discrete Indigenous communities report. A suitable independent body should be authorised to report on progress against each of these recommendations. A report on progress should be made public within twelve months

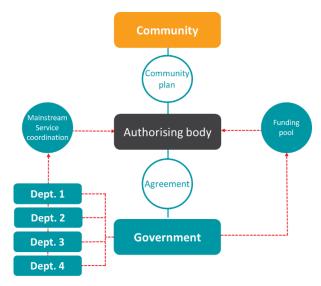
# Support changes to accountability and decision-making

Rather than directing service delivery, the government should seek to set outcomes and accountabilities through formal arrangements with communities. To put the reforms into practice, the government should negotiate local Indigenous justice agreements with those remote and discrete Indigenous communities that indicate they are ready to do so.

These agreements should include:

- the outcomes to be achieved
- the resourcing that will be transferred to communities for the commissioning of services to reduce offending and imprisonment
- the nature and delivery of government-provided services that contribute to reducing offending and imprisonment, such as policing actions and prisoner reintegration services
- opportunities for a local authority to be established, for example through the operation of community-based residential supervision facilities
- incentives for the achievement of milestones or outcomes
- rigorous monitoring and evaluation, including agreed reporting arrangements.

Figure 23 Funding and resourcing arrangements to support the devolution of decision-making and accountability



The lessons from this inquiry are relevant for other Indigenous communities. For Indigenous communities outside of remote and discrete areas, the Queensland Government should seek to support similar arrangements that would encourage and foster the establishment of local Indigenous capability.

# Support service delivery reforms that create opportunities for community control

Many of the reforms proposed in this report will also help to reduce the levels of Indigenous incarceration.

These reforms should be supported through justice agreements. Where possible, the reforms should form the basis for transferring responsibility and accountability to Aboriginal and Torres Strait Islander communities.

Proposed reforms that would facilitate opportunities for greater community control over service delivery include:

 deferred prosecution agreements to allow communities greater opportunity to be directly involved in the rehabilitation of offenders



- a greater focus on community-orientated policing, which allows communities to be involved in the way their communities are policed
- restitution and restoration processes that allow communities to hold offenders to account for their actions
- residential supervision facilities that can be operated by Indigenous-controlled entities.

#### Introduce economic reforms

Priority should be given to reforms that seek to address the entrenched social disadvantage that is a causal factor behind offending in many Indigenous communities. Priority actions should include:

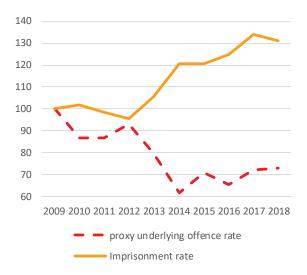
- removing barriers to local economic activity, including ensuring that procurement and job requirements do not exclude Indigenous participation
- developing a land tenure reform plan that better supports economic development in remote communities
- reforming policies that facilitate the growth of the Indigenous private sector
- investigating ways to develop community and market initiatives in Indigenous communities, including through the use of arms-length funding arrangements that devolve authority to communities.

# Reduce interactions with the criminal justice system

Indigenous communities have made significant efforts to reduce offending. This is evident in the statistics, which suggests that Indigenous offending rates may have fallen by as much as 25 per cent over the last decade.

Despite this, the level of Indigenous incarceration continues to rise (Figure 24).

Figure 24 Indices of Indigenous imprisonment, and estimated offending rates



Source: ABS 2018k, Commission estimates.

While the factors behind this rise are similar to those affecting the broader community, Indigenous communities are most likely to be affected by a 'one-size-fits-all' approach to policy making. Further, an increasing tendency to use imprisonment is likely to compound existing problems in Indigenous communities and undermine efforts to reduce offending rates.

For this reason, it is vital that decision-makers understand the implications for Indigenous incarceration of changes to the law, policy and practice.

To help inform decision-makers, justice impact tests should include an explicit requirement to assess the impact of any proposal on Indigenous people and communities.

To improve accountability, justice targets should be included in the *Closing the Gap* framework. These should be supported by regular public reporting on criminal justice outcomes (such as offending rates, breaches of orders and imprisonment rates) at a suitable level of regional disaggregation.



# Improve the decision-making architecture

#### Recommendation 1

The Queensland Government should adopt a common overarching objective for the criminal justice system. This objective should be to 'improve community well-being over time by reducing harms from crime'.

To provide guidance to those developing and implementing criminal justice policy, this overarching objective should be supported by five operational objectives.

The criminal justice system should aim to efficiently and effectively:

- Address the factors behind offending.
- Deter criminal activity.
- Incapacitate individuals who present an unacceptable risk to the community.
- Reduce the risk of future offending through effective rehabilitation and reintegration.
- Maintain the legitimacy of the system.

The government should provide specific guidance to each agency through public statements of intent, setting out the performance expectations and how this performance will be assessed against the objective. The government should also develop and release a strategy document that outlines how the criminal justice system will achieve its objectives. This strategy should be consistent with any guidance to agencies.

#### Recommendation 2

The Queensland Government should establish an independent statutory body (the Justice Reform Office) to improve the efficiency and effectiveness of the criminal justice system. Its key responsibilities should be to:

- approve policy and budget submissions from the core criminal justice sector agencies prior to submission to Cabinet and Cabinet committees
- oversee justice system reforms
- provide advice to government on priority criminal justice policy issues
- · lead and support evidence-based policy-making.

The office should be responsible to a board that includes representation from each of the core criminal justice agencies and independent members. The independent members on the board should have a voting majority.



The Queensland Government should require the Justice Reform Office to undertake the following specific tasks within 24 months of its establishment:

- develop common performance objectives and indicators across the core criminal justice agencies, including targets for
  - reducing offending and reoffending rates
  - reducing Indigenous incarceration
- develop mechanisms for allocating resources to support system objectives
- develop systems to provide accurate and timely data to support decision-making, and improve transparency and accountability
- develop modelling that promotes understanding of how policy and other proposals are likely to impact across the system
- develop a framework to ensure criminal justice related programs and activities are adequately and consistently evaluated.

#### Recommendation 4

The Queensland Government should introduce a justice impact test to ensure that decision-makers are informed of the full impacts of policy proposals. This test should assess:

- all costs and benefits of the proposal
- impacts on key stakeholders, including community members, government and community agencies
- alternative options.

The justice impact test should be undertaken by the Justice Reform Office and should involve public consultation and reporting.

# Reduce the scope of criminal offences

#### Recommendation 5

The Queensland Government should seek to remove those activities from the *Criminal Code Act 1889* and other relevant legislation for which the benefits of being included do not outweigh the costs.

When assessing whether an activity should be redefined, consideration should be given to:

- the extent to which the activity causes harm to others and the nature and level of that harm
- whether the use of criminal sanctions imposes costs on offenders that are proportionate to the harm caused to others
- whether the act of criminalisation creates more positive effects for society than negative ones—this should include an assessment of deterrence and any unintended consequences that might cause harm
- whether there are other, non-criminal options that might better prevent harm
- whether criminalisation undermines public perception of the legitimacy of the law.

The government should assign a suitable body, such as the Queensland Law Reform Commission, the task of reviewing the stock of criminal offences. The review should also recommend removing those offences where an alternative approach to the criminal law is likely to provide better outcomes.



# Reform drug laws

#### Recommendation 6

The Queensland Government should adopt a more effective approach for managing the supply and use of illicit drugs. This approach should aim to:

- reduce harms from drug use
- substantially reduce organised crime in Queensland
- establish effective regulatory approaches to manage drug use and supply
- reduce costs that drug use places on the criminal justice system, including through imprisonment.

The government should establish a reform taskforce as soon as practical to progress reforms. This taskforce should monitor and assess the impacts at each stage of reform and report to parliament on their effects.

#### Recommendation 7

Under an overarching policy of legalised and regulated supply and possession, the Queensland Government should:

- For lower harm drugs, introduce a staged approach to reform:
  - Stage 1: Decriminalise the use and possession of lower harm drugs
  - Stage 2: Expand health support and drug treatment services to reduce drug harm
  - Stage 3: Design a regulatory framework for the supply of cannabis and MDMA
  - Stage 4: Legalise use and regulated supply of cannabis and MDMA
  - Stage 5: Subject to evaluation of evidence, extend reform to other lower harm drugs.
- For higher harm drugs, investigate and develop the optimal sequencing of further reforms to move from a criminal approach to a health-based and regulatory approach. As an initial step, imprisonment should be removed as a sentencing option for the use or possession of higher harm drugs.



# Expand the use of restitution and restorative justice

#### Recommendation 8

The Queensland Government should introduce victim-focused restitution and restoration into the sentencing process. This system should:

- give victims the option of engaging in a process of restitution and restoration with the offender prior to sentencing
- provide victims and offenders with sufficient options for achieving restoration for harms inflicted, including financial and non-financial compensation
- take into account, through charging and/or the sentencing process, agreements that are reached between the victim and offender
- provide mechanisms to ensure that courts consider any residual public interest in final sentencing
- allow normal court processes to proceed where victims choose not to pursue restitution or restoration, or where victims and offenders cannot reach agreement
- include appropriate protections for victims and offenders
- be supported by inclusion of restorative justice principles in the *Penalties and Sentences Act 1992*.

Victim-focused restitution and restoration should be made available for any offence where a victim is identifiable.

## Increase sentencing options

#### Recommendation 9

The Queensland Government should establish a community corrections order that:

- provides options for home detention
- removes restrictions on the use of community-based orders, or on the combination of these orders with other sentences, including monetary fines, community service, and options for victim restoration and restitution
- is supported by appropriate services to address the causes of offending behaviours and to minimise breaches of these orders.

To encourage the appropriate use of non-custodial sentencing, the government should:

- establish mechanisms to ensure that resources are reallocated to community corrections to support changing court sentencing practices
- amend section 9(2) of the Penalties and Sentences Act 1992 to include a consideration of the costs of sentencing options, including the financial costs imposed on the community.

To ensure sentencing options support community safety and rehabilitation, the government should create a presumption in favour of courts seeking pre-sentence assessment, including psychological assessment, where there is reason to believe the offender is suffering from a mental illness or intellectual disability and the court is considering imposing a prison sentence.



To provide better rehabilitation options for offenders with cognitive impairment, mental illness, drug problems or other relevant circumstances, the Queensland Government should introduce a community corrections order with a residential supervision option. This option should be enabled by facilities that:

- have an emphasis on therapeutic treatment of offenders who would otherwise be given a term of imprisonment
- allow for the supervision of offenders by non-government providers.

Queensland Corrective Services should seek business cases from interested parties to support this proposal. These business cases should be assessed in the context of a broader infrastructure strategy (Recommendation 28).

#### Recommendation 11

The Queensland Government should make monetary penalties more effective by:

- removing restrictions on the use of monetary penalties by courts
- creating more opportunities for offenders to pay down fines through community service or other work and development orders.

The Queensland Sentencing Advisory Council or another suitable body should investigate options for the introduction of income-based fines, and report back to the government.

#### Recommendation 12

The Queensland Government should review legislated restrictions on judicial discretion, to ensure they are serving their intended purpose. The review should be undertaken by an independent body, such as the Queensland Sentencing Advisory Council, and be completed within 24 months.

#### Recommendation 13

To strengthen community confidence in sentencing, the Queensland Government should:

- expand the role of the Queensland Sentencing Advisory Council in producing and communicating an evidence base for sentencing and assessing sentencing in Queensland against this evidence
- introduce judicial self-monitoring, independent external review or other appropriate mechanisms to improve the consistency of sentencing outcomes for lower-level offences, for which appeal mechanisms are infrequently used.

# Improve the use of remand

#### Recommendation 14

To encourage confidence in bail, and its efficient use, the Queensland Government should:

- develop evidence-based risk assessment tools to assist police and courts when considering bail applications
- make available, through legislative amendment, a greater range of non-custodial options to courts, including electronic monitoring and home detention
- establish a mechanism to allocate resources to support any changes in the use of community-based supervision
- trial remand accommodation options for homeless offenders, including bail hostels and low security custodial facilities
- consider extending the operations of Court Link to more locations.



To provide greater guidance to courts, the Queensland Government should insert guiding principles into the *Bail Act 1980*, based on the following principles:

- Preserving the integrity of the court process.
- Preserving the safety of the community and persons affected by crime.
- Taking account of the presumption of innocence and the right to liberty.
- Taking account of the cost of imprisonment to the community, including the defendant.
- Promoting transparency and consistency in bail decision-making.

Further, the government should amend section 16 of the *Bail Act 1980* to ensure that this section is consistent with these guiding principles.

#### Recommendation 16

To reduce remand levels, the Queensland Government should investigate opportunities for reducing delays between bail hearings and sentencing.

#### Recommendation 17

To assist the rehabilitation of prisoners, the Queensland Government should ensure that prisoners on remand are able to access suitable programs and other activities likely to aid their rehabilitation.

# Improve rehabilitation and reintegration

#### Recommendation 18

Queensland Corrective Services should publish a statement of intent, certified by the Minister for Corrective Services as a report to Parliament, which sets out ways in which it will contribute to, and be accountable for, government objectives, including ways to reduce imprisonment by improving rehabilitation and reintegration.

#### Recommendation 19

Queensland Corrective Services should, within 12 months:

- establish and report against performance indicators in the statement of intent to increase accountability and report on performance
- · extend its performance framework to individual prisons and negotiate service agreements with them
- include performance indicators for reducing recidivism in senior executives' performance agreements
- assist the government to establish its priorities for throughcare by ensuring that policy options are assessed within an effective risk management framework
- align its strategic and operational priorities more closely to actions that would make throughcare more effective
- publish information on its strategies for achieving its objectives including the progress and results of any reviews it is undertaking.



Queensland Corrective Services should develop policies and procedures to minimise the impacts of overcrowding on rehabilitation outcomes. These should include changes to work practices that:

- allow prisoners greater access to work and educational opportunities
- improve infrastructure utilisation.

#### **Recommendation 21**

To improve rehabilitation outcomes, Queensland Corrective Services should:

- · ensure that prisoners have incentives to participate successfully in rehabilitation activities
- improve the measurement and reporting of in-prison rehabilitation, including performance indicators for individual prisons. It should review the impact of these indicators on incentives within two years of implementation
- work with the State Penalties Enforcement Registry, to determine within six months, whether there is a costeffective option to make work and development orders available in prisons
- publish its implementation plan for moving individuals under its care onto the National Insurance Disability Scheme, and report regularly on its progress in implementing it
- undertake public reviews of its assessment, case management and mental health programs and publish review reports and outcomes
- develop initiatives for reducing recidivism among remand and short-sentence prisoners, by commissioning research, drawing on expert advice and developing an implementation plan
- consider a process that will help prisoners to deal with the barriers they face in addressing financial matters, particularly debt, due to their imprisonment, where that would help to reduce reoffending.

#### Recommendation 22

The Queensland Government should establish a properly resourced, independent Inspectorate of Prisons. It should have information-gathering powers and be required to publish its reports.

#### Recommendation 23

To improve reintegration of prisoners, Queensland Corrective Services should:

- remove regulatory impediments to reintegration, including those that impede the use of work release and day release options
- introduce measures to ensure that parole worker caseloads support effective community supervision
- investigate options for a prisoner housing program similar to the Corrections Victoria Housing Program, and report on housing outcomes for released prisoners
- establish a panel of providers who can deliver reintegration services.

To support these changes the Queensland Government should amend the *Corrective Services Act 2006* to include work release as a reason for granting a prisoner leave from prison.



To ensure prisoners have access to mental health and substance addiction treatment services after their release, Queensland Corrective Services should be assigned the responsibility for arranging and funding treatment to ensure continuity of in-prison and post-prison treatment. The responsibility should exist until a prisoner's sentence is completed.

#### Recommendation 25

To lower the risk of an offender reoffending immediately following release, Queensland Corrective Services should be assigned the responsibility for the provision of a minimum standard of post-release support. This should include:

- short-term housing for prisoners who do not have accommodation on release
- adequate documentation for proof of identity to open bank accounts and apply for other services and a Medicare card to access health services
- assistance to establish an email account and to procure a mobile phone
- copies of educational qualifications attained in prison (or obtained before prison)
- information on support services available to assist with reintegration including employment agencies and social welfare support
- financial supports for the first week of release
- appropriate transport to accommodation.

The government should require Queensland Corrective Services to regularly report against this standard.

#### Recommendation 26

To ensure value for money, Queensland Corrective Services should commission an independent evaluation of its contracted reintegration services. This evaluation should assess:

- the outcomes of the services in terms of recidivism
- the value of the services from the prisoners' perspective
- benchmarking the services against similar programs interstate
- the reporting framework
- the appropriate length of time to provide reintegration services.

Queensland Corrective Services should complete this evaluation and make it publicly available by June 2021.

#### Recommendation 27

The Queensland Government should provide clearer direction to Queensland Corrective Services on how it expects the service to manage technical breaches of parole. This guidance should be provided through the statement of intent.



# Develop an infrastructure plan

#### Recommendation 28

Queensland Corrective Services should develop and implement a long-term correctional infrastructure strategy in partnership with the Justice Reform Office that:

- describes how the correctional infrastructure portfolio will evolve to meet the objectives of the criminal justice system
- is based on robust forecasts of the future numbers and composition of both offenders and prisoners
- uses the best available evidence on the effect of infrastructure on rehabilitation
- considers all feasible infrastructure options
- allows for the involvement of non-government entities in developing innovative solutions to supervise and rehabilitate offenders
- sets out deliverables, timetables and accountabilities.

The Queensland Government should review and revise the correctional infrastructure strategy periodically to ensure it remains consistent with the objectives of the criminal justice system.

#### Recommendation 29

Queensland Corrective Services should:

- ensure that its planning for infrastructure is closely integrated with planning across the department, which in turn needs be integrated with planning for the criminal justice system as a whole
- develop and publish guiding principles for infrastructure decisions, with reference to principles developed by Infrastructure Australia
- publish its forecasting model and commission regular independent reviews of it.

# Target prevention and early intervention

#### Recommendation 30

The Queensland Government should prioritise investments in community-led prevention and early intervention in communities with high levels of offending. To this end, the government should:

- identify projects that would be suitable for a justice reinvestment approach
- establish funding arrangements to support justice reinvestment projects
- facilitate access to data and establish monitoring and evaluation frameworks
- facilitate coordination and collaboration between government and non-government service providers (including police, courts and corrections) and communities
- prioritise projects aimed at reducing Indigenous offending. As a first step, the government should outline its plan for justice reinvestment in Cherbourg.



To prevent disengagement from the education system, the Queensland Government should:

- commission an independent assessment of student disciplinary absences (SDAs) in Queensland state schools to determine:
  - the underlying reasons for the increased incidence of SDAs, and whether SDAs are applied consistently within and between schools
  - the impacts of SDAs on student outcomes, including their impact on future criminal justice system involvement
  - whether there are opportunities to improve transparency, accountability and outcomes through governance, reporting and support arrangements.
- identify schools and regions with concentrations of at-risk and disengaged children and develop multi-agency approaches for assessing and responding to these children's needs
- prioritise the assessment of at-risk children for cognitive impairments and other disabilities and ensure there are sufficient resources in the school system to support referrals to the National Disability Insurance Scheme where appropriate
- work with universities to improve the behavioural management training for pre-service teachers with a focus on identifying and managing students at risk of disengaging from education.

#### Recommendation 32

To prioritise the prevention of child sexual abuse, the Queensland Government should assess the availability and effectiveness of preventative services for individuals who are at risk of committing child sexual abuse as it develops its Sexual Violence Prevention Framework.

#### Recommendation 33

To reduce the intergenerational impacts of imprisonment, the Queensland Government should:

- ensure prisoner admission processes identify children of prisoners and other high-risk family members
- provide information to prisoners' families and carers of their children about available support services and facilitate referrals to service providers
- assess the availability and effectiveness of existing support services that target children of prisoners and their parents/carers and address service gaps
- facilitate prisoner access to parenting support programs where appropriate
- examine options for maintaining parent–child relationships while a parent is imprisoned.



# Expand diversionary options

#### Recommendation 34

To reduce interaction with the criminal justice system, the Queensland Government should expand diversionary options by establishing:

- an adult caution for use in situations where it is a first or infrequent offence and the police are satisfied that such a caution provides sufficient action
- a multi-stage caution and diversion scheme for all drug possession that allows for a staged response and supports further reform to the legal framework for drugs
- a three-tier deferred prosecution arrangement that provides:
  - a simple agreement conditional on the offender desisting from further offending for a specified period
  - an agreement for additional conditions relating to assessment, referral and treatment to address offending behaviours
  - an agreement where additional conditions are developed and monitored by approved community groups,
     such as community justice groups
- local policing plans based on problem- and community-oriented policing practices, developed in partnership with community groups such as the community justice groups, for communities with high levels of offending and imprisonment.

In implementing these diversionary responses, the government should consider administrative savings for the police and courts, protections for persons from unfair agreements and net-widening.

#### Recommendation 35

To incentivise the effective use of these diversion responses, the government should:

- provide clear direction to the Queensland Police Service, though a ministerial statement of intent, to encourage the effective use of diversionary options and de-escalation consistent with high-performance policing practices
- establish high-level goals and key performance measures that encourage the Queensland Police Service to
  implement local policing plans, diversion and de-escalation, and ensure the Queensland Police Service develop
  police training and practices in the use of de-escalation, discretion and diversion—including a simplified public
  interest test/assessment tool
- implement a monitoring and evaluation framework to ensure that the use and development of these diversion responses contribute to community safety and maintains the confidence of the community
- build and support local community capacity to engage in local policing plans and administer deferred prosecution agreements
- give police and local justice groups access to the assessment and referral network being developed for work and development orders and Court Link.



The Queensland Government should ensure that its evaluation of the *Domestic and Family Violence Prevention Strategy* includes an assessment of:

- whether current policing and enforcement strategies are working to reduce the incidence of family and domestic violence in communities with high levels of economic and social disadvantage
- the extent to which the strategy has had unintended consequences
- whether there are opportunities for greater use of diversion to treatment, restoration or other approaches that would reduce harms.

# Address Indigenous overrepresentation

#### Recommendation 37

As a priority, the Queensland Government should implement the recommendations of the Commission's *Service delivery in Queensland's remote and discrete Indigenous communities* report.

Implementation should prioritise:

- structural reform to transfer decision-making and accountability for service delivery to remote and discrete communities
- economic and land tenure reform to address economic and social disadvantage that contributes to offending in these communities.

A suitable independent body should be authorised to report on progress against each of these recommendations. A report on progress should be made public within twelve months.

Where appropriate, the government should extend the reforms to other Indigenous communities, with a priority focus on those communities with high levels of offending or imprisonment.

#### Recommendation 38

To progress the transfer of decision-making and accountability to communities, the Queensland Government should negotiate local Indigenous justice agreements with those Indigenous communities that are ready to do so.

These agreements should include:

- the outcomes to be achieved
- the resourcing that will be transferred to communities to commission services to reduce offending and imprisonment
- the nature and delivery of government-provided services, such as policing actions and prisoner reintegration services
- opportunities for local authority to be established, for example through the operation of residential supervision facilities
- incentives for the achievement of milestones or outcomes
- rigorous monitoring and evaluation, including agreed reporting arrangements.

The Justice Reform Office should be given responsibility for negotiating agreements with local Indigenous communities. The independent body should oversee implementation of agreements and report on progress and achievement of outcomes.

The government should progressively foster decision-making capacity and negotiate local justice agreements with other Indigenous communities with high offending and imprisonment rates.



To ensure that policy-makers are fully informed of all potential policy impacts, the Queensland Government should require that all legislative and policy changes are assessed against their impacts on Indigenous communities in remote and regional areas. This should form part of the justice impact test in Recommendation 4.

#### Recommendation 40

To improve accountability and inform policy development, the Queensland Government should provide:

- justice-related statistics at a suitable level of regional disaggregation, to monitor local progress and support local Indigenous justice agreements (reported at least biannually)
- an annual report on progress in meeting state Indigenous justice targets, including *Closing the Gap* justice targets
- regular independent assessment of progress in implementing Indigenous justice reforms
- results of evaluations, where available, of the impact of state and local reforms on Indigenous offending and imprisonment.

#### Recommendation 41

In implementing the recommendations of the Commission's *Service delivery to Queensland's remote and discrete Indigenous communities report*, the Queensland Government should prioritise those recommendations that seek to address the entrenched economic disadvantage that is a causal factor behind offending, including:

- removing barriers to local economic activity, including ensuring that procurement and job requirements do not exclude local participation
- developing a land tenure reform plan that better supports economic development in remote communities
- reforming policies that facilitate the growth of the Indigenous private sector
- investigating ways to develop community and market initiatives in Indigenous communities, including through the use of arm's length funding arrangements that devolve authority to communities.

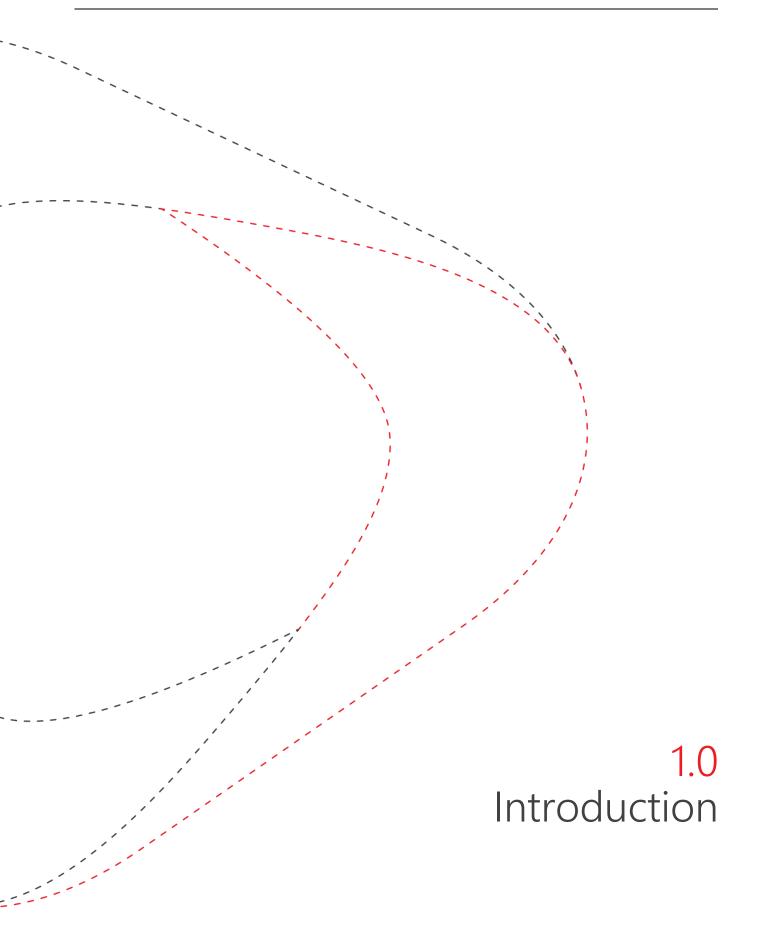
#### Recommendation 42

The Queensland Government should implement a new approach to alcohol management that includes a focus on:

- effective and efficient ways to manage the consumption of alcohol in discrete Indigenous communities
- devolving control of alcohol management to communities
- supporting community decision-making with timely information through which communities can measure the effectiveness of their strategies
- alternative strategies, such as the use of community-controlled alcohol permits.

To ensure that communities and other stakeholders are well informed, the government should publicly release the independent review of the overall effectiveness of alcohol management plans.







#### 1.1 What have we been asked to do?

Across Australia and other developed countries, governments are contending with rising imprisonment and high levels of recidivism. In Queensland, imprisonment has been rising significantly faster than population growth—over the period 2012 to 2018 the number of people in prisons rose by around 58 per cent, while population only grew by 9.7 per cent (ABS 2019a). This recent growth continues a long-term trend that has seen the State's imprisonment rate increase by more than 160 per cent since 1992.

This growth in imprisonment has occurred against a backdrop of steadily declining crime rates and has resulted in significant overcrowding of prison facilities.

The use of prisons is expensive—it costs around \$111,000 to keep every prisoner for a year. Despite this expense, prisons do not rehabilitate a large proportion of the people who enter them. More than half of prisoners reoffend and are given a new sentence within two years of their release.

In this context, the Commission has been asked to investigate how government resources and policies could be best used to reduce imprisonment and recidivism to improve outcomes for the community over the medium to longer term. The terms of reference for the inquiry ask the Commission to report on:

- trends in imprisonment and recidivism and the causal factors underlying these trends
- factors affecting imprisonment for Aboriginal and Torres Strait Islander people, women and young people
- the benefits and costs of imprisonment, including its social effects, financial costs and effectiveness in reducing/preventing crime
- the effectiveness of programs and services in Australia and overseas to reduce the number of people in prison and returning to prison, including prevention and early intervention approaches, non-imprisonment sentencing options, and the rehabilitation and reintegration of prisoners
- the efficacy of adopting an investment approach, whereby investments in prevention, early intervention and rehabilitation deliver benefits and savings over the longer term.

The terms of reference require that our recommendations are consistent with the Queensland Government Policy on the Contracting-out of Services, which states that there will be no contracting-out of services currently provided by the Queensland Government unless it can be clearly demonstrated to be in the public interest.

The full terms of reference for the inquiry are provided in Appendix A, along with a table outlining how this report addresses those terms of reference.

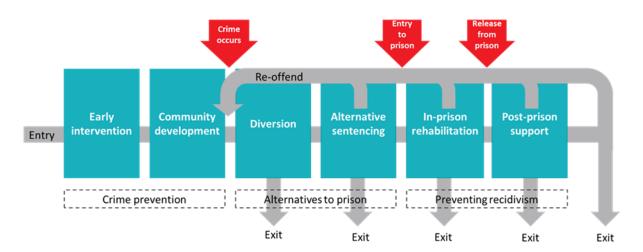
# 1.2 Our approach

This inquiry is about imprisonment and recidivism relating to the adult corrections system. However, as imprisonment and recidivism are impacted by a broad set of factors, the scope of this inquiry encompasses a wider set of issues and areas than just an examination of prisons—it encompasses areas ranging from early intervention through to post-prison support (Figure 1.1).

Given the broad scope of this inquiry, it was not possible for the Commission to conduct a detailed operational review of the Queensland criminal justice system or every program, policy or action that affects imprisonment.



Figure 1.1 Inquiry scope—the system



Our approach reflects that there have been at least 10 major reviews looking at various aspects of the criminal justice system over the last decade. Many of the recommendations from these reviews are still being implemented. The Commission has not attempted to revisit the findings of these reviews—rather we have tried to build on them.

The Commission has concentrated on the key policy and institutional changes that are likely to provide the greatest net benefit to the community. The Commission has taken a community-wide approach to assessing options—where possible, assessing the costs and benefits of reform options and examining whether there were more effective and efficient ways of doing things.

The terms of reference for this inquiry ask us to consider ways to reduce the number of people flowing through the prison system, including women, youth and Aboriginal and Torres Strait Islander people. Where possible we have examined and reported on trends in offending and imprisonment for each of these demographic groups.

In most cases the reforms proposed in this report will address imprisonment and recidivism for all demographic groups. For this reason, the recommendations are, in general, not specific to any demographic groups.

While the Commission recognises that the youth justice system is an important conduit into the adult corrections system, we have not conducted a review of the youth justice system. Partly this decision was made to keep the scope of work manageable, but also because the Report on Youth Justice (Atkinson 2018), which examines these issues, was only released in 2018.

Similarly, the Commission has not conducted a review of the Child Protection system, despite its links with later offending. This system was reviewed extensively in 2013 by the Queensland Child Protection Commission of Inquiry (Carmody 2013), and the government is still implementing and reviewing many of its recommendations.

Given the scale of Indigenous overrepresentation in the prison system, and its intractability, the Commission has included a separate section on Indigenous imprisonment in this final report. This section highlights the underlying factors driving Indigenous incarceration rates and the solutions required to tackle them. The section draws on other parts of the report but also discusses the unique actions that will be required.

The terms of reference for this inquiry also ask the Commission to consider incarceration rates for women. Although it is a growing concern, the evidence suggests that female imprisonment is not a significant driver of the overall growth in imprisonment. Further, the evidence suggests that the drivers of female incarceration are not significantly different than for the general population. For this reason, the Commission has included its assessment of gender-specific issues throughout the report, rather than in a separate section.



Finally, it was not possible for the Commission to develop conclusive findings and recommendations across all issues that affect imprisonment and recidivism. For those issues, we have identified areas for further review. These should form a body of priority work for the Queensland Government.

#### 1.3 Consultation

The Commission operates on a public inquiry model, which is underpinned by open and transparent consultation. In preparing this report, the Commission held over 150 meetings with over 600 stakeholders, including academics, community leaders, service providers, courts, police, corrections and other government agencies. To prepare this final report, we released an issues paper (September 2018), a draft report (February 2019) and:

- · conducted public forums in Brisbane, Townsville, Cairns, Mount Isa and Rockhampton
- held public hearings in Brisbane, Townsville and Cairns
- visited a number of Indigenous communities
- held direct meetings with stakeholders, including Indigenous and non-Indigenous advocacy groups, service providers, the judiciary, unions, legal advocates, peak bodies, academics and government
- visited drug and Murri courts
- conducted site visits to eight correctional centres.

We also received 89 written submissions, which we have incorporated into our analysis.

Further details on consultation, including submissions, are available in Appendices B and C. The Commission would like to thank all individuals, organisations and agencies that took the time to participate in consultation during the development of this report.

## 1.4 Report structure

The first part of this report (Chapters 2–7) provides context for the remainder of the report. It includes a description of the conceptual framework used by the Commission (Chapter 2), provides an overview of the criminal justice system (Chapter 3), and examines data on crime and imprisonment in Queensland (Chapter 4), trends in recidivism (Chapter 5), the pathways that lead people to prison (Chapter 6), and the benefits and costs of imprisonment (Chapter 7).

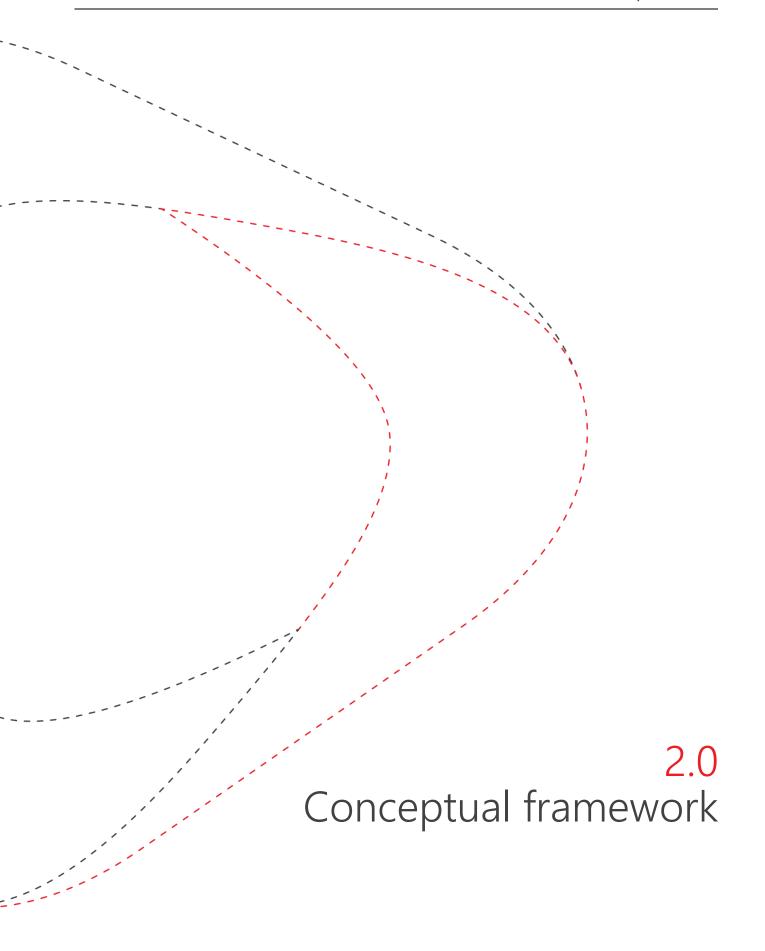
Chapters 8 and 9 examine the decision-making architecture that underpins the criminal justice system in Queensland, and how this architecture can be improved.

Chapters 10–16 assesses options for addressing rising imprisonment. They examine prevention and early intervention (Chapter 10), diversion (Chapter 11), reforms to reduce the scope of crime (Chapter 12), drug policy reform (Chapter 13), a victim focused system (Chapter 14), sentencing options (Chapter 15) and ways to reduce the use of remand (Chapter 16).

Chapters 17–20 examine policies directly related to prisons, including improving throughcare (Chapter 17), in-prison rehabilitation (Chapter 18), prisoner reintegration (Chapter 19) and custodial infrastructure (Chapter 20).

Chapters 21–23 look at the overrepresentation of Aboriginal and Torres Strait islander people in the criminal justice system, including the underlying causes (Chapter 21) and possible solutions (Chapters 22 and 23).







This chapter sets out the conceptual framework that the Commission used to analyse the issues relating to imprisonment and recidivism.

#### Key points

- Many options exist for reducing imprisonment and recidivism from early intervention through to postprison support. These options cut across the criminal justice system and the 'ecosystem' that surrounds it.
- Options must be assessed against the overarching objective of the criminal justice system, which, in simple terms, is community safety. However, viewed through the broader role of government to maintain and enhance well-being, this suggests a more complex set of considerations:
  - how actions impact community safety over time—there may be little purpose in measures taken to keep the public safe today if they jeopardise public safety in the future
  - whether the system of law and its enforcement is seen as fair and just—the community (including offenders and victims) must have confidence in the system and believe it can support community safety over time
  - the extent to which options provide benefits that outweigh the costs to the community
  - how resources allocated to community safety compete against other policy priorities—scarce resources should flow to areas where they generate the best outcome for the community.
- Attempts to achieve 'zero tolerance' or 'no harm' are likely to impose costs much greater than the benefits they provide and may introduce large unintended consequences. Beyond some point there are diminishing returns from an increased effort to improve safety. Eliminating all crime or operating a system with no risk are not feasible options.
- Within this context, the relevant issues are the level of resources that should be allocated to achieving community safety and how they can best be used. The approach in this inquiry revolves around four questions:
  - What are the right roles for government? While the Queensland Government has a clear part to play in achieving community safety, it can do so in many ways.
  - Are current policies and programs working to improve community safety over time? Policies and actions should be effectively achieving their intended objective over time.
  - Are there better ways of doing things? The most effective and efficient policy options should be used.
  - Are there ways to improve decision-making across and within government and encourage innovations to improve efficiency? Decisions should be informed by robust evidence, provide the right incentives and encourage continuous improvement.



## 2.1 Introduction

This chapter outlines the framework underpinning the Commission's approach to this inquiry. This framework provides a structure for considering options to reduce imprisonment and recidivism and improve outcomes for the community over the medium to longer term.

There are many options that could be considered for reducing imprisonment and recidivism, ranging from early intervention to post-prison support. It is necessary to have a framework to assess which options are likely to provide the best outcomes. The framework must consider what is best not just for individuals within the system, but also for the broader community.

Before applying the framework, however, options need to be considered against the overarching objectives of the criminal justice system. After identifying the objectives, it is then a question of how government can best achieve its objectives while minimising the cost to the community. Essentially, at issue is what level of resources should be allocated to achieving community safety and how those resources can be best used.

There are four key questions:

- What are the right roles for government?
- Are current policies and programs working to keep the community safe over time?
- Are there better ways of doing things?
- Are there ways to improve decision-making across and within government, and encourage innovations to improve efficiency?

# 2.2 Objectives

The starting point for determining the best role for government is to understand the objectives government is aiming to achieve through the criminal justice system.

Various legislation and policy settings suggest that the primary objective is to keep communities safe. This is one of government's main responsibilities and is established in one of the Queensland Government's six priorities:

The government is absolutely committed to ensuring Queenslanders are safe. The evidence clearly demonstrates the need to focus on the causes of crime and violence, and on prevention strategies such as education, employment and other social services. (Queensland Government 2018c)

Safety is an objective of the criminal justice system, because crime not only harms victims, but also threatens the peace and security of society at large and erodes social and economic capital (Cooter & Ulen 2016, p. 457). Crime can also make the community feel less safe. In unsafe communities, people are exposed to trauma, which can profoundly affect their quality of life and expose them to financial costs; people need to change their behaviour or spend money to avoid becoming victims of crime; property rights are not respected, and saving and investment are discouraged (Organisation for Economic Co-operation and Development 2013).

At a high level, the community safety objective appears unambiguous. However, there are some important and interlinked conditions for this objective to be met.

First, community safety must prevail over the longer term. In practice, this means that actions taken today must keep the community safe both in the short term and over time. For example, if imprisoning low-level offenders has a significant criminogenic effect, they can become more serious offenders, making the community less safe over time.

Second, the community (including offenders and victims) must have confidence in the system's justness and fairness to support community safety over time. Legitimacy of the system is crucial, because crime and the criminal justice system both involve infringements on personal liberty. Crimes are involuntary transactions between



offenders and victims, and in the criminal justice system the state uses coercive powers to infringe on the rights of offenders (including to imprison them). The system needs to satisfy community expectations about justness and fairness, including the community's tolerance for loss of liberty, desire for retribution and denunciation of acts considered unacceptable.

Finally, the objective of keeping the community safe needs to be considered in the context of government's broader role in maintaining and enhancing well-being (Queensland Treasury 2018). This means that the community safety objective must be achieved in a way such that the benefits outweigh the costs to the community. Securing the benefits of safety involves costs—for example, to run the police force, courts and prisons. Trade-offs must be made against other uses of resources, and tough questions must be confronted, including the level of safety the community is willing to pay for.

Ultimately, options to improve community safety are also limited by the resources that are available. Given the many competing public policy objectives, it is not possible to devote unlimited resources to provide community safety, particularly since beyond some point there are diminishing returns from increased effort to improve safety. An extra dollar spent on the criminal justice system means that less is available for other government priorities, such as health, education and protecting the Great Barrier Reef (Queensland Government 2018c). The net benefits of spending on the criminal justice system need to exceed what could have been achieved elsewhere:

The community, which funds the criminal justice system, has every right to expect these funds to be used effectively. (Moynihan 2008, p. 20)

Different approaches are used to achieve the community safety objective in various parts of the criminal justice system. The main approaches to improve community safety are captured in legislation (such as the *Penalties and Sentencing Act 1992* (Qld)) and can be categorised as:

- · deterring potential offenders
- incapacitating people who have offended so that they cannot commit more crime
- rehabilitating and reintegrating offenders so they are able to pursue more productive lives.

Underpinning the legitimacy of the system, the *Penalties and Sentencing Act 1992* (Qld) provides an allowance for retribution in proportion to the magnitude of the wrongdoing.

Ideally, all four approaches should support each other, but this is not always the case. For example, imposing longer jail sentences to increase deterrence may undermine efforts to rehabilitate offenders who might have been rehabilitated if they had spent less time in jail. The challenge is to find optimal combinations of retribution, deterrence, incapacitation, and rehabilitation that contribute most to community well-being.

# 2.3 What are the right roles for government?

The power to restrict people's rights through imprisonment and other penalties rests with government. The government, therefore, has the pre-eminent role to play in the criminal justice system.

From an economic perspective, the government's role is conditioned by the presence of market failures, which exist throughout the criminal justice system. For example:

- Community safety has the characteristics of a public good, for which private provision is typically inadequate.
- Externalities are common—the actions of offenders impose costs on victims, their families and the broader community, which would be inappropriate to prevent in advance through commercial negotiation, and for which it is difficult to seek compensation after the event.
- Information asymmetries are frequent—for example, most people rarely need legal advice and may not be equipped to assess the quality of lawyers. This makes a case for government regulation of legal services.

Government is heavily involved in the criminal justice system through six broad roles (Box 2.1).



With appropriate regulation, many of the roles—and activities—can be delivered efficiently in markets. For example, legal advice and some security services are provided commercially, and non-government organisations are involved in rehabilitation and reintegration. However, across the criminal justice system, markets are largely absent or incomplete, which suggests a significant role for government.

The questions for this inquiry then are about *which* roles government should undertake in the criminal justice system and *how* it should undertake them.

#### Box 2.1 Government roles in the criminal justice system

First, governments **administer the legal and regulatory framework**, which sets out acts currently defined as crimes and gives the state the capacity to impose sentences that punish offenders. Legislation influences sentencing policy, although the law also develops through judicial interpretation.

Second, governments **commission services**. This includes:

- choosing between different service provision models, such as in-house or contracting out
- designing the governance framework within which the chosen model operates
- implementation, which could include administering regulation
- service stewardship, including performance monitoring, evaluating outcomes, spreading good practice, and managing boundaries with other services (New Zealand Productivity Commission 2015, p. 131).

Third, governments **establish and fund agencies and other institutions**, including police, courts, tribunals, ombudsmen, corrections facilities, schools and other institutions with a role in early intervention.

Fourth, governments **provide services**; for example, the Queensland Government manages prisons in Queensland.

Fifth, governments **become contract managers** when they hire private firms to provide services. For example, private firms and non-government organisations provide some services in prisons.

Sixth, governments **regulate activities** provided by the private sector, such as legal services.

# 2.4 Are current policies and programs working to improve community safety over time?

Criminal justice policies are effective if they help achieve the government's objective of keeping the community safe and maintaining safety over time.

While governments are unlikely to knowingly implement policies that are ineffective, they often experience pressure to respond quickly to problems. As such, they must make judgments about how much evidence to collect before acting.

Where there are complex social problems or policy interactions (such as those relating to this inquiry), it can lead to policies being developed that have unintended consequences, even where those policies seem inherently logical. For example, several stakeholders raised concerns that mandatory sentencing policies designed to address organised crime on the Gold Coast were resulting in individuals in remote communities facing harsh penalties for relatively minor traffic offences.



This inquiry, therefore, attempts to make an assessment of whether current policies improve community safety over time, by looking at the empirical evidence available; examines whether the system produces unintended consequences; and assesses the extent to which decision-making is supported by evidence.

The effectiveness of any policy depends on how well it is implemented. Typically, the effectiveness of policy depends on the actions of many agencies. Developing performance targets, measuring performance, evaluating policies, and considering how to improve them, all become critical tasks. Further, if the approaches that agencies use conflict, resources could be wasted when different areas do not support each other, or work against each other. The complexity of the criminal justice system, which involves many agencies with decision-making discretion, can lead to such problems. As noted by Daly (2012, pp. 2–4):

Although [agencies] are connected to each other and share certain objectives, they also have their own agendas. A more accurate term for system would be a 'collection of interdependent agencies', each having its own function ... Conflicts over aims stem from the functions of each agency. For example, the police are to investigate crime and arrest and detain suspects, while the courts are to protect the rights of the defendant. Conflict may also emerge from the bureaucratic interests of each agency.

For this reason, the inquiry attempts to examine how the criminal justice system works as a whole, rather than examining each component of the system in isolation.

# 2.5 Are there more effective and efficient policies that would improve outcomes?

To find policy improvements, this inquiry sought to identify effective and efficient options for achieving the government's objectives.

### Identify the problem and develop policy options

Problem identification involves identifying and describing the difficulties and challenges that prevent a certain outcome from being achieved. A primary challenge is to identify the underlying causes rather than the symptoms of policy problems. This usually requires a careful examination of the evidence, including any data, as well as understanding the incentives of the various agents that operate in the system being assessed.

Problem identification, when done properly, should define the underlying problem, as well as its source and scale. Diagnosing the problem usually suggests options for addressing it. For example, there are many reasons why released prisoners would find it difficult to re-enter the labour market. If, after investigation, it is found that the primary reason is that employers are using prison records as a screening tool to assess work-readiness, then policy solutions would need to consider ways of reducing this barrier.

In its assessment, the Commission has considered:

- whether current policies have a program logic that includes a clear articulation of the problem
- policies or actions that contribute to increasing rates of imprisonment without providing an obvious social benefit.



#### Assess the policy options

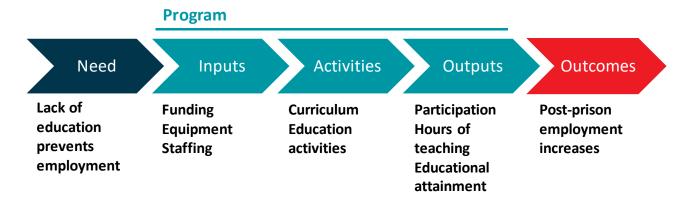
There are usually several policy options for addressing any social problem (including the status quo). To choose between them requires an assessment of whether they will work (effectiveness) and the size of net benefits (efficiency).

#### Effectiveness—will/does the policy work?

It is often not possible to predict how effectively any single intervention or policy might contribute to a broad outcome—such as community safety—because other factors are involved that affect the outcome that the intervention or policy was intended to achieve.

Where this is the case, proxy measures can be used to assess effectiveness. This is usually done by examining the program logic (Figure 2.1) and assessing outputs—such as the number of prisoners participating in an accredited program—that are likely to lead to the achievement of an outcome (SCRGSP 2018).

Figure 2.1 Clear program logic can help assessment, even where outcomes are difficult to assess



The Commission's approach to examining effectiveness has been to assess outcomes where this is possible. However, where this has not been possible, we have attempted to examine relevant outputs, or look for evidence of good design of a policy, such as:

- it targets a well-specified problem, and establishes clear outputs and targets
- it has already been implemented effectively elsewhere
- it is based on a strong evidence base of what works
- it shows an understanding of the incentives facing those affected by or involved in implementing the policy.



#### Efficiency—Is the policy the best way to address the problem?

There are typically several policy choices that can achieve community safety—from early intervention to post-prison support. Allocating more resources to any of these options will have some impact on crime, imprisonment and recidivism. The key question for government relates to which policies will deliver the greatest net benefit to the Queensland community.

A policy option is efficient if its benefits exceed its costs (including all social costs and benefits) and no other use of resources would yield higher value for the community. The inclusion of social costs and benefits is important, as costs and benefits must be considered from the perspective of overall community well-being.

Efficiency requires minimising the costs of producing specified outputs (productive efficiency), producing the most valued outputs (allocative efficiency) and ensuring there is improvement over time (dynamic efficiency) (Box 2.2).

#### Box 2.2 Concepts of efficiency

#### **Productive efficiency**

The inquiry looked for options that improve productive efficiency, and therefore reduce production costs. For example, maintaining quality while reducing the cost of supplies used in prisons improves productive efficiency.

#### **Allocative efficiency**

Even after productive efficiency is achieved, it is still possible that resources could create bigger social benefits elsewhere. For example, rather than spending money on prisons—even after improving their productive efficiency—a higher return might be achieved by spending more money on crime prevention.

Adopting an allocative efficiency framework can help governments to consider how much to spend on community safety and where to spend it. It implies that there is an efficient level of spending on safety—given that community welfare would be reduced if the benefit from increasing expenditure beyond this point is less than its cost—and that the budget should be spent where it yields the highest net benefits.

#### **Dynamic efficiency**

Whereas productive and allocative efficiency are about how resources are used at a given time, dynamic efficiency is about how resource use improves over time, often through innovation.

Dynamic efficiency in the criminal justice system is affected by the strength of incentives to innovate. This may depend on whether, for example, funding is supportive; whether risk-taking is penalised or rewarded; the degree of decision-making flexibility and autonomy of managers of facilities; and workplace relations arrangements. The strength and impact of these incentives depend on governance arrangements.

Measuring efficiency can be challenging, particularly where intangible benefits (such as community perceptions about safety) are important. Cost–benefit analysis is typically used to measure efficiency and assess options against each other. Where possible, the Commission has attempted to use a cost–benefit framework for assessing the efficiency of public policies that affect imprisonment and recidivism.



# 2.6 Does the decision-making architecture support the best outcomes?

The agencies that comprise the criminal justice system are highly interdependent—a policy change or action in one part of the system can affect the operations of other parts of the system. Interdependency requires system governance, in the form of a mechanism for allocating resources and making decisions. Such a mechanism should incentivise collaboration, effectiveness and efficiency:

Good governance should establish processes that lead to optimal decisions and outcomes for the wider community, including efficient and responsible use of Government resources ... Good governance arrangements increase the likelihood and degree to which an agency will deliver on its objectives, and meet its intended purpose ... [and] allow an agency to promptly identify any issues or risks that arise. (ERA 2015, p. 87)

Governance arrangements should encourage decision-makers to focus on their objectives and to seek to improve their performance. The arrangements need to be designed on a system-wide basis so that, for example, the roles and responsibilities of agencies are consistent with each other, rather than being in conflict or leaving gaps. This will help them to manage their interdependencies, without undermining the appropriate discretion of individual agencies.

Various sources (ERA 2015; UK House of Commons Justice Committee 2017; UK Ministry of Justice 2016) suggest that effective governance arrangements include:

- a clear and well-understood purpose—which influences whether institutions and individuals are focused on achieving that purpose
- clearly and consistently defined roles and responsibilities—the way in which decisions are made about whether and how to expand, maintain or close programs and infrastructure
- appropriate devolution of decision-making authority to managers, backed up by adequate resources and
  performance frameworks—the extent to which decision-making is devolved to managers influences the scope
  for innovation, their capacity to attract high-quality staff, and the scope and flexibility to provide services in an
  integrated way, which affects effectiveness and cost of services
- measures (such as reporting requirements and performance agreements) to ensure accountability follows responsibility—the performance management framework influences incentives, behaviour and outcomes
- independent and public assessment to determine whether purposes have been achieved—independent scrutiny influences performance and the scope for improving poor performers
- a robust evidence base for decision-making and sharing information about successful approaches
- a framework within which decisive action is taken if performance is deficient.

The way these features combine determines the shape and strength of incentives. Different combinations are possible. Using these criteria to identify gaps in governance—such as incomplete objectives, performance indicators or evaluation frameworks—can identify options for improving them.



# 2.7 A framework for considering policy options

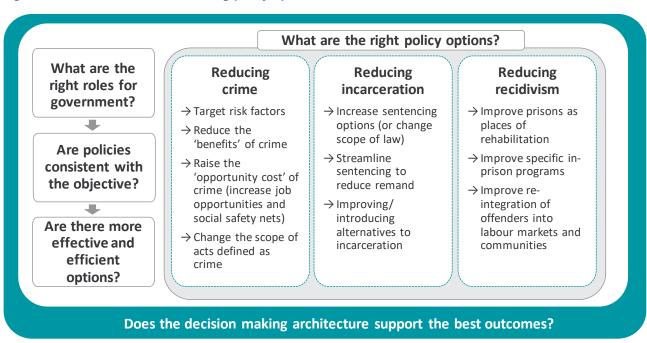
This chapter has set out a framework for considering policy options to reduce imprisonment and recidivism while improving outcomes for the community. The Commission's approach concentrates on whether government is in the right roles; whether current policies and programs are consistent with the objective; whether there are policy options likely to provide greater benefits to the community than current practice; and whether governance arrangements allow effective decision-making and encourage innovation.

Under this framework, a broad range of policies should be considered. In general terms, policies fall into three categories—that is, policies to:

- reduce crime—options may include targeting risk factors, deterring criminal activity or changing the scope of acts defined as crime
- reduce incarceration—such as by increasing the use of alternative sentencing options or reducing the scope of acts that are eligible for prison sentences
- reduce recidivism—this may include improving rehabilitation and reintegration through more funding, improved program design or changing incentives.

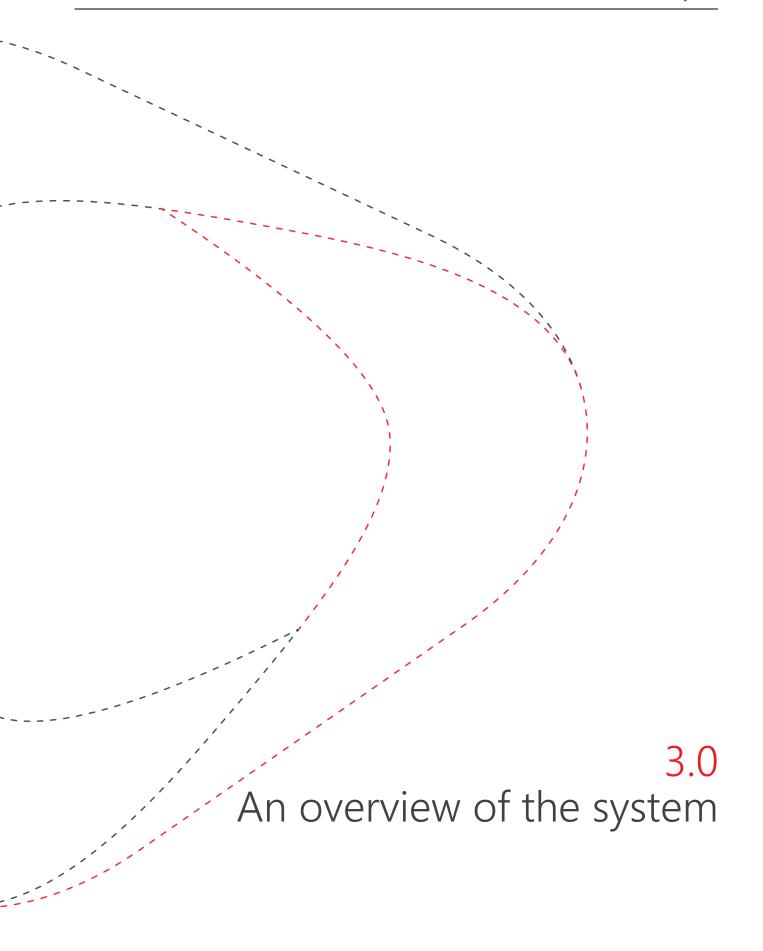
A stylised illustration of the framework is presented in Figure 2.2.

Figure 2.2 Framework for considering policy options



The remainder of this report applies this framework to assess current arrangements and proposes options for reform.







This chapter describes the key features of the Queensland criminal justice system that influence imprisonment and recidivism and examines how offenders move through the criminal justice system.

### Key points

- The criminal justice system in Queensland is made up of various institutions including law enforcement agencies, courts, corrections (including prisons), a range of advocacy and oversight bodies, and organisations involved in rehabilitation, reintegration, prevention and intervention.
- In 2017–18, the cost of the core criminal justice system in Queensland (police, the courts and corrections) was \$3.5 billion, or \$712 per capita. Of this amount, expenditure on corrections was just over \$1 billion, most of which was spent on the prison system.
- In 2017–18, around 11,800 sworn officers responded to more than 500,000 reported offences, clearing just under 320,000 of these offences (63 per cent)—making 115,000 arrests and issuing over 140,000 notices to appear in court.
- In the same year around 120 judicial offices (full time equivalent) dealt with over 155,000 appearances, involving 420,000 charges. Just over 90 per cent of defendants were found guilty.
- Most offenders were dealt with outside of the prison system—only 13,300 people were sentenced or remanded to prison in 2017–18.
- On any given day in 2017–18, around 9,000 prisoners were detained in one of Queensland's 11 high security prisons, 6 low security prisons and 13 work camps. A further 21,000 offenders were managed in the community by Queensland Corrective Services.
- The criminal justice system is one of three legal systems that mediate harmful behaviours. The other systems are the regulatory and civil justice systems, which can provide alternative ways to keep the community safe.
- A decision to imprison an offender is the culmination of decisions throughout the criminal justice system. Given the large number of offences and offenders moving through the system, small changes at any decision point can have large impacts on the size of the prison population.
- There are two sets of processes that determine the number of offenders flowing through the system and into prison—the making of criminal law and the enforcement of that law.
- The making of criminal law involves legislation made by parliament, and common law, which is based on historical court decisions. The independence of courts to interpret and apply the law, and their separation from the government and parliament, is a key element in Queensland's democracy. Over the past twenty years, key changes to legislation have tended to increase the penalties, including the use of prison, that apply to offences.
- Criminal law is enforced through a criminal justice process undertaken by police, courts and corrections. Decisions made at each stage of this process influence imprisonment and recidivism:
  - policing activity, including to target offending behaviours
  - police decisions to prosecute
  - prosecution decisions to pursue a higher or lower charge and to oppose or support bail
  - court decisions to grant or reject bail while a defendant awaits trial
  - sentencing decisions once a defendant is found guilty.



# 3.1 The criminal justice system in Queensland

The criminal justice system comprises a broad and complex system. The boundaries around the roles performed by this system often overlap with the civil justice and regulatory systems. The entire criminal justice system, the way its components work together and the areas of law it covers all affect the flow of individuals into and out of prison.

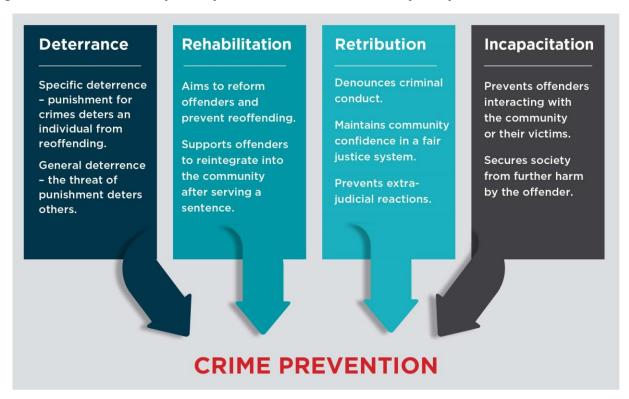
#### The institutions

The criminal justice system comprises a diverse range of institutions, including law enforcement, courts, agencies responsible for detaining and rehabilitating offenders, a range of advocacy and oversight bodies, and agencies involved in prevention and intervention. Of these, police, courts and corrections represent the core institutions.

In 2017–18, government funding of the core criminal justice system in Queensland (police, courts and corrections) was just over \$3.5 billion, or \$712 per capita. Police received 65 per cent of funding (\$2,306 million), corrections received 30 per cent (\$1,064 million) and courts received 5 per cent (\$174 million).<sup>21</sup>

The purposes of the criminal justice system are generally set out in legislation, such as the *Penalties and Sentencing Act 1992 (Qld)*, which provides for sentencing based on the concepts of deterrence, rehabilitation, retribution and incapacitation (Figure 3.1).

Figure 3.1 How the criminal justice system aims to achieve community safety



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<sup>&</sup>lt;sup>21</sup> The Commission estimates includes net recurrent costs (including transport and health for prisons) and capital costs. Court costs were not available on a net basis. Per capita rates are based on the most recent demographic data (ABS 2019a; SCRGSP 2019b, 2019c, 2019d).



#### **Police**

The service objectives of the Queensland Police Service (QPS) are to:

- uphold the law by working with the community to stop crime and make Queensland safer
- contribute to stopping crime and making the community safer through road safety relationships, reducing road trauma and evidence-based enforcement anywhere, anytime (Queensland Government 2019d).

QPS employs close to 15,500 people, with over 11,800 sworn officers directly involved in maintaining public order, investigating and preventing crime, and arresting and bringing alleged offenders before the courts (QPS 2017). Most police investigations are initiated following a report made by the public, and in 2017–18, QPS responded to just over half a million offences. Of those, QPS cleared close to 320,000 offences, taking action against just over 306,000 offenders—these actions included making nearly 115,000 arrests and issuing over 140,000 notices to appear at court (QGSO 2019a). The police also provide prosecution services to the Magistrates Court.

#### Courts

The courts decide on bail and remand, preside over the trial and plea processes, decide on guilt (which may be made by jury), sentence offenders and hear appeals against convictions and sentences. The prosecution and defence counsel (including Legal Aid Queensland) play important roles in the court process.

The three levels of court in Queensland are the Magistrates Court, which deals with summary offences and less serious indictable offences, the District Court, which deals with offences with up to a 20-year maximum imprisonment, and the Supreme Court, which hears all other offences. Additional specialist courts include the Children's, Coroners, Mental Health, Murri, Drug and Alcohol, and Domestic and Family Violence courts.

In 2017–18, the Supreme Court employed 11.7 full time equivalent (FTE) judicial officers, with 27.9 FTEs in the District Court, 79.7 FTEs in the Magistrates and 6.7 FTEs in the Children's Court (SCRGSP 2019c). Those courts dealt with over 155,000 appearances involving more than 420,000 charges. Most appearances are before a Magistrates Court (over 148,000) with the remainder (just under 7,400) dealt with in the higher courts. Just over 90 per cent of defendants were found guilty (QGSO 2019b).

The Department of Justice and Attorney-General (DJAG) is responsible for administering justice in Queensland and supports the court system by delivering prosecution and court services. The service objectives of DJAG are to:

- enable fair resolutions of disputes, increase community safety, and uphold legal and social rights for both adults and children
- enable resolution of serious criminal cases that bring the guilty to justice and safeguard the innocent; ensure the state is legally protected; build safe communities; and provide oversight of child protection (Queensland Government 2019b).

In late 2017, the responsibility for youth justice (including detention) was transferred from DJAG to the Department of Child Safety, Youth and Women (DCSYW) and corrective services were separated into a stand-alone agency, Queensland Corrective Services (DJAG 2018a). In May 2019, the government announced the transfer of youth justice to a newly created Department of Youth Justice (Farmer 2019c; Palaszczuk & Farmer 2019).



#### Corrections

Queensland Corrective Services (QCS) is responsible for the administration of prisons and community corrections. It holds people on remand, supervises prison sentences, provides rehabilitation, prepares inmates for release and supervises probation, parole and community service orders. As established in the *Corrective Services Act 2006* (Qld), the purpose of QCS is to prevent crime through the humane containment, supervision and rehabilitation of offenders.

The service delivery objective of QCS is to provide safe, modern and responsive correctional services to rehabilitate prisoners and offenders, and prevent crime, making Queensland safer (Queensland Government 2019b).

QCS provides two core services—the prison system and community corrections:

- Around 9,000 prisoners are currently managed on any given day in facilities across Queensland, including 11 high security prisons, 6 low security facilities, the Princess Alexandra Hospital secure unit and 13 work camps (ABS 2019c; QCS 2018c). Two high security facilities are privately managed (Arthur Gorrie and Southern Queensland), but will transfer to public control following a government decision announced in March 2019 (Ryan 2019a).
- Around 21,000 offenders are currently managed in the community under community corrections by the
  probation and parole service within QCS. The service is divided into seven regions, with 34 district offices
  servicing major areas of Queensland (QCS 2018c).

Supervisory and rehabilitation services are provided within both systems. QCS provides these services or contracts out the delivery of these services to private or non-government organisations. In 2017–18, QCS employed just under 4,900 FTE staff (QCS 2018c).

### Other participants in the criminal justice system

While police, courts and corrections represent the core institutions of the criminal justice system, many other public sector and non-government organisations have roles within the criminal justice system or participate in criminal justice processes. Some have regulatory roles, some provide services, and others are advocates. The community itself is central to the process, while the media can be highly influential in how the system operates.

This diverse range of participants include:

- Monitoring and oversight bodies
  —Several bodies in Queensland perform monitoring and oversight functions including the Crime and Corruption Commission (investigates major crime and corruption), the Public Interest Monitor (monitors applications for and the use of surveillance and covert search warrants), the Legal Services Commission (receives and deals with complaints about lawyers, law practice employees and unlawful operators) and the Office of the Chief Inspector (monitors standards and operational practices relating to the Queensland corrective services system).
- Institutions involved in policy and legislation development—Government and non-government bodies provide input into the development of policy and legislation, including the parliament, government departments, the Queensland Sentencing Advisory Council, the Queensland Law Reform Commission, the Queensland Law Society, the Queensland Bar Association, the Crime and Corruption Commission, the Crime Statistics and Research Unit and university research centres.
- **Legal services**—Legal assistance to financially disadvantaged people is provided by Legal Aid Queensland and the Aboriginal and Torres Strait Islander Legal Service.
- **Service providers**—Many organisations and individuals provide services to the system—such as solicitors, barristers, other government departments (such as Queensland Health, the Department of Education and Department of Housing and Public Works) and non-government organisations (such as victim support counsellors and rehabilitation service providers).



- **Representative groups**—Organisations who represent particular interests—such as victim representation groups, the law society, trade unions and prisoner groups—monitor, participate in and express views on the criminal justice system.
- **The community**—The community itself also plays an important role in the operation of the criminal justice process. Community reporting of crime is the primary means for initiating police action. Members of the public act as witnesses, fulfil jury duty and facilitate the reintegration of prisoners. The community sets the environment in which crime is committed and victims are supported, and to which offenders return.
- The media—The media has an important role in informing the public about the level of crime and the operation of the criminal justice system. For example, the media has highlighted many of the issues relating to domestic and family violence. Also, the Fitzgerald inquiry into police corruption in Queensland was initiated in response to investigative journalism.

# 3.2 Some important features affecting imprisonment

# The criminal justice system—one of three systems for mediating harm

The criminal justice system is one of three legal systems that mediate harmful behaviours. The other systems are the regulatory and civil justice systems. Together these systems influence behaviours and interactions where harm can arise—whether the harm involves physical violence, negligence, reduces the level of trade and exchange in an economy, or imposes externalities. Criminal law is the only legal system that uses imprisonment as a penalty.

Key parameters that influence the choice of legal system are whether a behaviour, interaction or transaction:

- deals with unforeseen/uncontracted harm that is specific to an interaction (and requires a specific solution), or involves repeated identifiable harms (that constitute market failures)
- involves harm arising from negligence, or intent
- involves an unwilling victim, or willing participants (Figure 3.2).



Incomplete contracts Market failure/Social costs Regulated Complete transactions transactions Mediation Civil justice Ombudsman Regulatory Willing Negligence participants system system **Civil Courts** Licensing Restorative Decriminalisation justice **Criminal** justice system Intent Victims

Figure 3.2 The criminal, civil and regulatory legal systems

There can be significant overlap in the ability to use these systems—thereby providing alternative ways to mediate or control harm. The best system is the one that generates the greatest overall benefit for society or reduces harm in the least cost way. It is also possible to manage harm using a combined approach. For example, potential harms from car usage are mediated by an ability to sue for damages in the civil courts, through regulated safety standards for car manufacture and by criminal sanctions for intentional harm, such as reckless driving.

'Criminal' transactions

Stakeholders raised questions about where human services fit within this framework (for example, Hamburger sub. DR017, p 19). Although not explicitly identified in the diagram above, human services are largely incorporated into the regulatory system. While some services, such as police and corrections clearly sit within the criminal justice system, most do not sit within this system. For example, health services are (in the main) delivered to willing participants and are funded by government to minimise social costs or where there is a market failure.



# Making and enforcing criminal law

Criminal justice comprises two separate processes—the making of law and the enforcement of that law.

The government is involved in both processes, having the majority control or confidence of the elected parliament that makes laws, and the responsibility to administer the criminal justice process.

Queensland adheres to the Westminster system, which provides for a separation of powers between the parliament, the executive and the judiciary. Under this system, parliament makes laws and the executive administers policy. Both the interpretation of the law and the authority to exercise that law rest with judicial officers (judges and magistrates) presiding over courts.

### Making criminal law

Prior to 1899, criminal conduct in Queensland was defined through common law. Common law is the body of historical court decisions that arose from victims, and then governments, bringing perpetrators before court for judgment. Queensland codified common law into legislation with the *Criminal Code Act 1899* (Qld). Queensland's criminal code is an extensive law, but common law is still relied upon if there is ambiguity. New South Wales and Victoria have less defined criminal legislation and consequently rely more heavily on common law.

The Queensland Parliament has virtually sole responsibility for making criminal law in Queensland. While much smaller in scope, Commonwealth law still creates offences, most notably in respect of border or international issues (such as drug importation and human trafficking) and tax fraud.

Usually, executive government proposes a law, and parliament considers, sometimes amends, and passes the necessary legislation.

Over the past twenty years, key changes to criminal justice legislation have tended to increase the penalties applying to criminal offences by:

- separately identifying specified offences and aggravating factors, usually to apply greater penalties—the serious violent offences regime, organised crime, child pornography, child sex offending and exploitation, one punch, strangulation and domestic violence as an aggravating factor
- increasing maximum penalties—for breaches of domestic violence orders, graffiti and drug trafficking
- restricting the use of bail—presumption of no bail in specified domestic violence offences
- limiting the availability of parole—non-parole periods for serious violent offences, multiple murders, child sexual offences, and 'no body, no parole'
- introducing, and subsequently reversing, a harsher youth justice regime (boot camps), *Vicious Lawless Association Disestablishment Act 2013* (Qld) and the removal of prison as a sentence of last resort.

A list of major legislation that defines Queensland criminal law is provided in Table 3.1.



Table 3.1 Key legislation determining criminal acts in Queensland

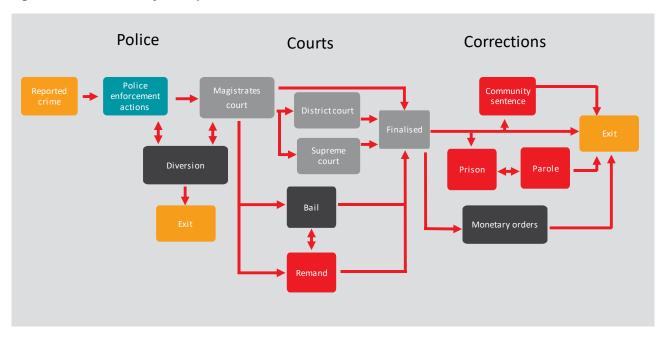
Act	Purpose		
Criminal Code Act 1899	The primary instrument for the source of criminal law in Queensland. Specifies offences and maximum terms of imprisonment.		
Drugs Misuse Act 1986	Specifies drug related offences, and in conjunction with the <i>Drugs Misuse Regulation 1987</i> , defines drugs and quantities for different levels of offence.		
Police Powers and Responsibilities Act 2000	Provides for the powers and responsibilities of police officers.		
Justices Act 1886	Sets out the powers and jurisdiction of justices and magistrates and provides for proceedings and appeals.		
Bail Act 1980	Sets out requirements around the release of defendants charged with offences.		
Evidence Act 1977	Sets out the requirements for the admissible use of evidence and witnesses in trial.		
Penalties and Sentencing Act 1992	Establishes the powers of courts to sentence offenders and provides sentencing guidelines.		
Corrective Services Act 2006	Specifies the objectives for corrective services, the operation of imprisonment according to court sentences, requirements to manage prisoners in a safe and secure environment, and requirements regarding parole.		
Dangerous Prisoners (Sexual Offenders) Act 2003	Defines dangerous prisoners and provides for their continued detention, care and treatment, or supervised release.		
Youth Justice Act 1992	Establishes the basis for administration of juvenile justice, including requirements for police, diversion, courts and detention.		
Victims of Crime Assistance Act 2009	Provides for the financial assistance of victims in cases of serious harm.		
Regulatory Offences Act 1985	Defines offences for minor theft and damage to property.		
Summary Offences Act 2005	Defines public nuisance and minor offences (for example, graffiti).		



### Enforcing criminal law—the criminal justice process

The enforcement of criminal law occurs across police, courts and corrections. The typical process or flow through the adult criminal justice system starts when a crime is reported and may flow through to a range of outcomes including imprisonment of an offender (Figure 3.3).

Figure 3.3 The criminal justice process



The police determine the number of offenders flowing through the system by making decisions to:

- police certain activities and enforce the law
- divert offenders away from the criminal justice system or to undertake criminal proceedings
- support bail or seek the remand in custody of the accused
- prosecute defendants (in the Magistrates court).

The courts directly or indirectly impact imprisonment and recidivism, including through:

- bail—courts consider applications for bail if police have previously rejected bail
- · conviction—courts (juries, judges or magistrates) determine the guilt or otherwise of an accused
- sentencing—judges and magistrates impose a sentence if the accused is found guilty. Sentences can include penalties involving fines, community service, community-based corrections and imprisonment
- parole—if a prison sentence of less than three years is imposed for offences other than sexual or serious violent offences, courts set a parole release date (parole is the conditional release of a prisoner into the community under supervision). If a prison term of more than three years (or for sexual or serious violent offences) is imposed, courts can set a parole eligibility date when an application for parole can be made to the Parole Board.



Corrections is often the final stage in the process. Important decisions affecting offenders in the corrections system include:

- assessment of prisoners—QCS assesses prisoners to determine the rehabilitation needs of prisoners, and the support that is required for prisoners returning to the community
- parole—QCS monitors and enforces parole conditions (through suspending parole and issuing a warrant for police arrest and direct return to prison); the independent Parole Board considers parole applications and whether parole should be further suspended or cancelled for breaches of parole conditions.

Imprisonment is the culmination of various stages of the criminal justice process. In 2017–18, over a half million offences were reported to QPS. The vast majority of those offences were dealt with through means other than imprisonment—only 13,330 people were sentenced or remanded to prison in that year (Figure 3.4; see Appendix E for further information).

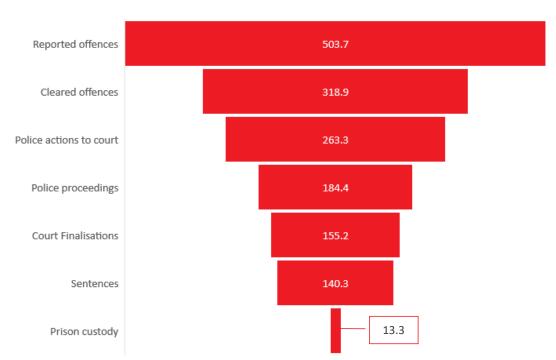


Figure 3.4 From offence to prison, 2017–18 ('000s)

Note: An alleged offender may have several offences and be involved in several proceedings and court finalisations. For example, QPS proceeded against 112,768 unique offenders in the year, through 306,200 actions.

Source: QPC estimates; ABS 2018d, 2019c, 2019q; QGSO 2019a.



# A system of interdependence and independence

The criminal justice system involves a sequence of decisions, so changes made at one stage affect later stages. Imprisonment is the result of prior decisions regarding enforcement activities, arrest, remand, adjudication, sentencing and custodial supervision (probation, community service and parole). Those latter stages can then have future impacts after release from prison, through their influence on recidivism.

Both resourcing and decision-making can have flow-on effects. For example:

- Increased resourcing of police can result in increased police activity and a subsequent increase in the number of arrests. If the resourcing of courts is not similarly increased, delays in court proceedings can result in an increase in the numbers of people remanded in custody. The increased number of people on remand and sentenced to prison can then result in larger prison populations, possibly beyond the design capacity of the prisons and the operational capability of the prison system if additional resourcing is not provided. In an overcrowded prison environment, rehabilitative treatments could be less effective, thus increasing recidivism, with resulting impacts on the community and police.
- A legislative amendment that requires the judiciary to impose prison sentences for certain offences, may not
  only increase the prison population (with the possible consequences discussed in the previous example), but
  also impact disproportionately on the offenders' families and communities. This may result in greater personal
  and social disadvantage and increased intergenerational criminality, leading to higher criminal activity and flowon impacts for policing.

Despite this interdependence, independence of components of the system is also a feature of the system. The separation of the powers of the executive, parliament and the judiciary is an important principle of government in Queensland, designed to prevent the abuse of coercive power. The degree of independence required to deliver the effective protection of liberty is subject to debate, but the independence of the judiciary and sovereignty of parliament are considered essential features of successful democracies (Vasquez & Porčnik 2018; Wells 2006). The practical impact on the relationship between the government and the courts is illustrated in the annual report of the Magistrates Court:

The working relationship between judicial officers and court staff is highly nuanced. Magistrates and MCS [Magistrates Court Services] staff have different reporting structures – there is no single authority that oversees both cohorts as a whole. Judicial independence provides magistrates with the authority to manage the operations of their court without interference from the executive and its employees. However magistrates and MCS staff must still rely on each other to ensure that the work of the court is delivered to the best possible standard. (Queensland Courts 2018c, p. 5)

Some degree of independence of police operations, and, to a lesser extent, the operations of corrective services, is also considered desirable, even though they are both arms of the executive government (Bronitt & Stenning 2011; Stenning 2011).<sup>22</sup>

These elements of independence can lead to institutions in the criminal justice system functioning separately and without coordinating their activities. Given that policy issues within the criminal justice system are often complex and contentious, the decision-making architecture will be a significant determinant of the outcomes for the criminal justice system.

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<sup>&</sup>lt;sup>22</sup> Accordingly, their functions are given to the Police Commissioner and the Corrective Services Commissioner, rather than to directorsgeneral, and the extra arm's length can help prevent their discretion being used to the executive's advantage (such as police harassment or harsh prison treatment).

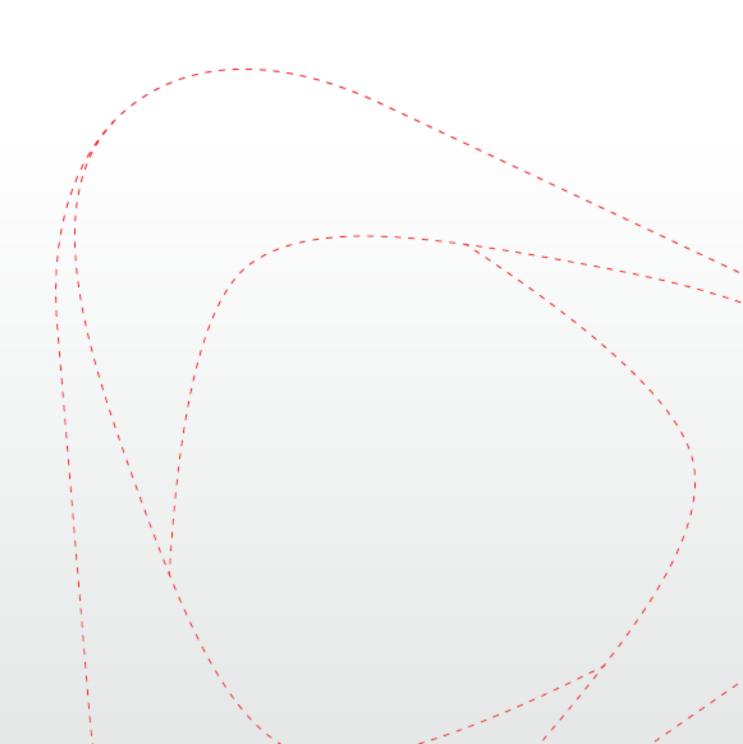


# 3.3 Conclusion

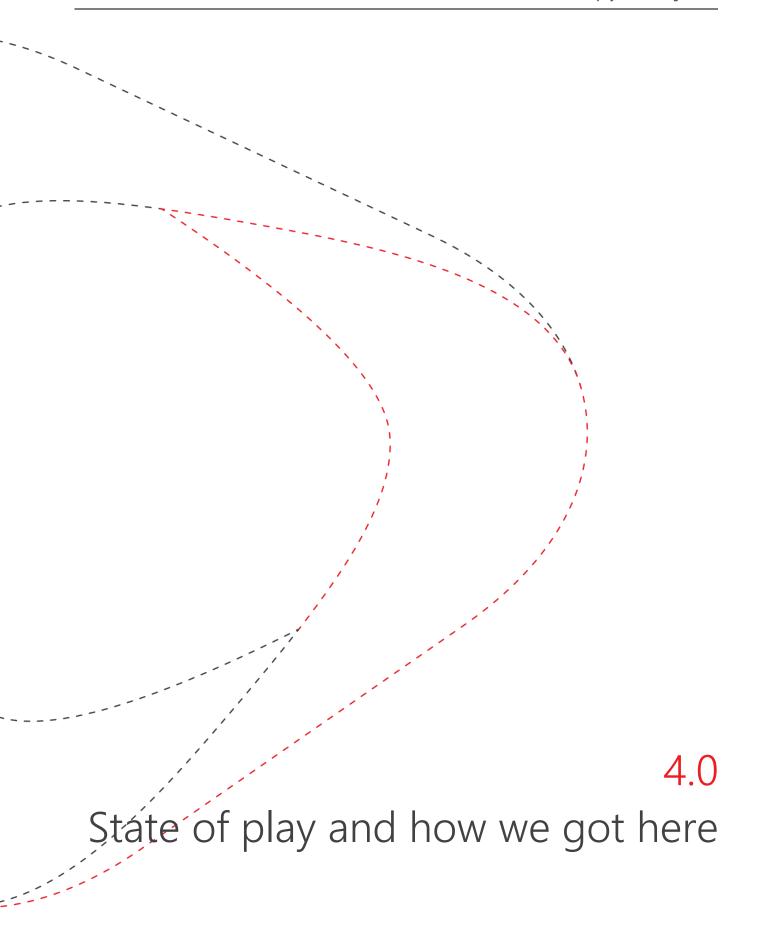
Considerable resources are devoted to the operation of the criminal justice system. As the only mechanism by which society exercises the legitimate use of coercive power and imprisonment, it has significant checks and balances built into its operation—with multiple agencies in various roles. Those checks and balances apply to both the making and enforcement of the criminal law. The overall impact of the system is the result of many decisions along the enforcement process, creating functional interdependence between agencies that have varying degrees of independent governance. This creates challenges for government management of the system and its effective application to achieve community safety.

There are other legal and social systems available to keep the community safe and reduce harm, such as the civil and regulatory systems. The best system for dealing with any harmful behaviour is that which best reduces harm, or promotes community safety, at least cost.











This chapter discusses aggregate crime trends and key drivers of the increase in imprisonment.

### Key points

- The rate of imprisonment in Queensland has increased steadily since the 1930s. However, in recent decades the rate of increase has been accelerating. From 1992 to 1999, the rate of imprisonment doubled. Between 2012 and 2018, the rate of imprisonment increased by 44 per cent (or 6.3 per cent per annum, compared with 2.2 per cent since the 1930s).
- Imprisonment rates for:
  - Indigenous Queenslanders are 10 times the rate for non-Indigenous Queenslanders
  - women are lower than for men, but the female imprisonment rate is increasing faster—growing by
     62 per cent in the last decade.
- Most prison sentences are short—the median duration of stay is 3.9 months.
- From 2012 to 2018, the offences that contributed most to the growth in sentenced prisoners were illicit drug offences, which added around one third of the growth in prisoner numbers.
- There is no evidence that the increase in the rate of imprisonment has been caused by increasing crime rates. Although it is difficult to estimate the underlying rate of crime, the data suggests:
  - The rate of offences that people report to police (or that police detect) are falling over time—the rate of reported offences fell by 8.4 per cent from 1997 to 2018.
  - Reporting rates are rising—the reporting rate for physical assault rose 45 per cent between 2008-09 and 2017-18—suggesting underlying crime rates are falling faster than reported rates.
  - Underlying rates of offences against property and persons are estimated to have fallen 18 per cent between 2008–09 and 2017–18, while the proportion of individuals committing these types of offences may have fallen by as much as 40 per cent.
  - The evidence suggests rising imprisonment has not been a key driver of declining crime rates.
- Although crime rates are generally falling, surveys show that most Australians believe crime rates have increased in the last few years, and around a third believe crime has increased a lot.
- The increase in imprisonment has mainly been driven by:
  - the increase in the proportion of crime reported to police, and an increase policing effort—clearance rates have risen substantially since 2008–09
  - the use of prison sentences rather than other sentencing options—from 2011–12 to 2017–18, the proportion of sentences involving prison increased for both violent offences (from 16.8 to 29.4 per cent) and non-violent offences (from 4.1 to 7.0 per cent)
  - higher recidivism rates—the proportion of prisoners returning to prison within two years increased from a low of 27.6 per cent in 2005–06 to 42.7 per cent in 2017–18
  - the propensity for police to use court—the proportion of offences (other than public order offences) dealt with through non-court action fell by 23 per cent between 2008–09 and 2017–18, with police less likely to use cautions, conferencing, drug diversionary schemes or penalty notices
  - the rising proportion of prisoners on remand—unsentenced prisoners increased 103 per cent between 2012 and 2018, from 1,250 prisoners to 2,652 prisoners. Breach of bail offences almost doubled, from 259 offences per 100,000 people in 2010–11 to 502 offences in 2015–16.



## 4.1 Introduction

Identifying the drivers of rising imprisonment is not a simple task, as the factors that influence imprisonment are complex and reflect not only changes in criminal behaviour but also broader community and societal changes. The lack of available consistent or granular data imposes limitations on this analysis and has driven variations in the use of dates and jurisdictions throughout this chapter.

This chapter provides an analysis of Queensland data explaining changes to imprisonment, including disaggregated data for Indigenous and female prisoners where possible.

# 4.2 A long-term decline in crime rates

One of the key factors that affects imprisonment is offending. This means it is important to understand the underlying level of criminal activity that exists in the community. There is, however, no single indicator that measures criminal activity. All existing measures are a proxy for criminal activity.

The most common measure is *reported* crime, which measures offending that is either reported to or detected by police. It can be a misleading measure of actual crime, because the rate at which crimes are reported change over time. This can reflect changing community attitudes—for example, in relation to domestic and sexual violence—but can also reflect changes in policing effort, focus or efficiency.

Over the longer term, the most consistent indicator of crime is the homicide rate (since most homicides are reported).<sup>23</sup> Homicide rates in Australia have declined by about two-thirds since the 1980s and are now at their lowest in a century (Figure 4.1).

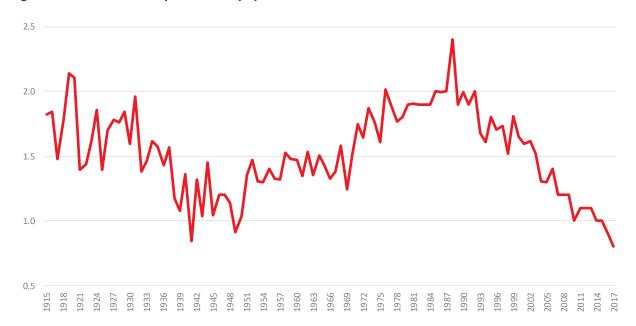


Figure 4.1 Homicide rate per 100,000 population, Australia

Source: ABS 2018l; Bricknell 2008; Neill & Leigh 2008.

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<sup>&</sup>lt;sup>23</sup> An Australian Institute of Criminology paper (Indermaur 1996) suggests that homicide rates are a good indicator of trends in violence more generally.



### Reported crime

Queensland data from the Queensland Police Service (QPS) suggests other offences have followed a similar trend. Between 1997 and 2018, the total rate of reported offences fell by 8.4 per cent, with rates related to the most serious crimes falling by significantly more (Figure 4.2). The rate of reported offences against the person, which include assaults, declined by 12.8 per cent over the period. The murder and other homicide rates decreased 62 and 79 per cent respectively. The exceptions to this trend were the offence rates for rape and attempted rape, which increased by 93 per cent—although sexual offences and assaults fell by 25 per cent.

The general decline in serious crimes observed in Queensland is consistent with national trends:

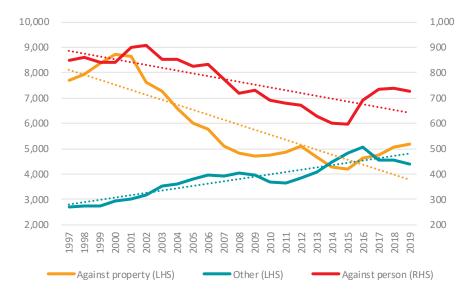
Between 2002 and 2016 Australia experienced an unprecedented fall in crime. The recorded murder rate in Australia fell by 33%, the recorded rate of kidnapping/abduction fell by 29%, the recorded robbery rate fell by 58%, the recorded rate of burglary/break and enter fell by 55%, the recorded rate of motor vehicle theft fell by 54% and the recorded rate of other theft fell by 26%. (Weatherburn 2018)

Reported offence rates against property also trended downward, declining 35 per cent. This included unlawful entry (64 per cent lower), arson (48 per cent lower), fraud (17 per cent lower) and theft (7.2 per cent lower).

For other crimes—which include violations for drugs, prostitution, weapons, gaming, liquor, traffic and breaches of domestic violence orders—the reported offence rate increased 68 per cent. The main contributors to the increase are:

- drug offences (31.0 per cent contribution)—mostly possession of drugs (12.1 per cent) and other drug offences (16.9 per cent)
- good order offences (31.5 per cent contribution)— mostly resist, incite, hinder and obstruct police offences (17.1 per cent) and public nuisance (9.5 per cent)
- breach of domestic violence protection order (22.3 per cent contribution).

Figure 4.2 Reported offence rates per 100,000 population, Queensland



Source: QPS 2019c.



Since 2015, reported offences against property and reported offences against persons increased. Two-thirds of the reversal in reported personal crime was due to assaults. This appears to be at least partly due to increased reporting and policing of domestic and family violence in Australia (for example, Voce & Boxall 2018, p. 2).<sup>24</sup>

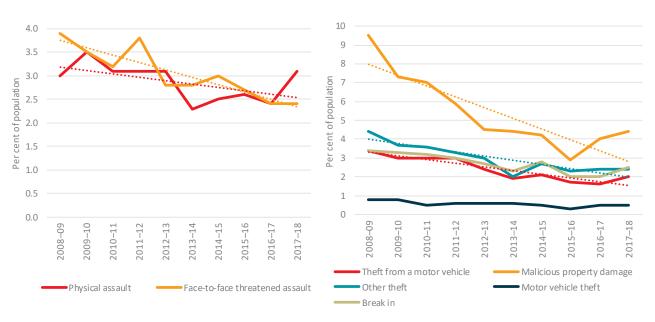
For property crime, most of the increase is due to other theft, where the reporting rate increased by a similar proportion. Fraud—driven by identity and credit card types—was the next greatest contributor.

### Victimisation rates

Victimisation statistics, which include both reported and unreported crimes, can provide a more accurate measure of the underlying incidence of crime, compared to reported offences only. That said, as victimisation statistics are survey—based, they are prone to large sampling errors and, by design, do not provide information on victimless crimes (such as traffic offences or possession of illicit drugs).

Victimisation data suggests the rate at which people in Queensland experienced crime between 2008–09 and 2017–18 fell for most types of crime (Figure 4.3). The victimisation rates fell for malicious property damage (54 per cent), motor vehicle theft (38 per cent), other theft (45 per cent) and break-in (26 per cent). The proportion of the state's population aged 15 and over who experienced a physical assault fell over most of the period but is estimated to have returned to previous rates in 2017–18—face-to-face threatened assault remains down 38 per cent.

Figure 4.3 Victimisation rates for people aged 15 and over who experienced a crime in the last 12 months, Queensland



Source: ABS 2019d.

The only crime type that does not appear to have declined is sexual assault. The ABS data shows that the victimisation rate for sexual assault in Australia has remained at a similar rate over the last decade.

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<sup>&</sup>lt;sup>24</sup> Domestic violence data is not comprehensively or reliably reported and this makes it difficult to determine the extent to which it has contributed to changes in offending in Queensland (AIHW 2019b, p. 103). There is also a lack of research on domestic violence reporting in Australia (Voce & Boxall 2018, p. 5).



### The propensity to report crime

Changes in people's propensity to report crime affects official crime rates. People may not report crimes for a variety of reasons, including that they thought it was too trivial, thought nothing could be done, did not want to incur additional costs, considered the matter was personal, were too upset or injured, did not want the perpetrator punished, or for some other reason. Also, changes in society's awareness of and tolerance for crime can affect people's inclination to report crime.

Between 2008–09 and 2017–18, victimisation rates appear to have fallen more than reported offence rates, suggesting an increase in the propensity to report crime. An increase in the propensity to report crime means that the *underlying* crime rate is likely to have fallen faster than the *reported* rate. That is, if the propensity to report crime had remained constant, then the decline in recorded offence rates would have been even larger.

Victims of personal crimes, including physical and sexual assault, appear to be more frequently reporting crime to police (ABS 2019d). The reporting rate of physical assault increased 45 per cent between 2008–09 and 2017–18. Victims of property crimes are also becoming more likely to report incidents to police, apart from break-ins.

# Underlying crime rates

As discussed earlier, there are no official statistics that report the underlying crime rates. However, it is possible to adjust the reported offence rates with respect to the rate at which crime is underreported, to estimate a proxy for the underlying rate of crime.

Estimates of underlying crime rates (Figure 4.4) show that between 2008–09 and 2017–18, underlying rates of crime in Queensland are likely to have fallen. Physical assault is likely to have fallen by around 30 per cent (compared to an increase in the reported rate over the same period).

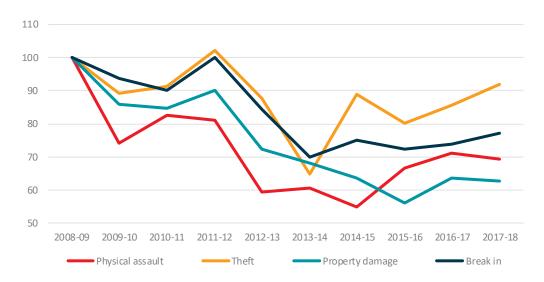


Figure 4.4 Estimated underlying offending rates, Queensland, indexed to 2008–09

Note: Underlying offending are calculated by adjusting reported offending rates to account for unreported crime. Source: QPC calculations; ABS 2019d; QPS 2019c.

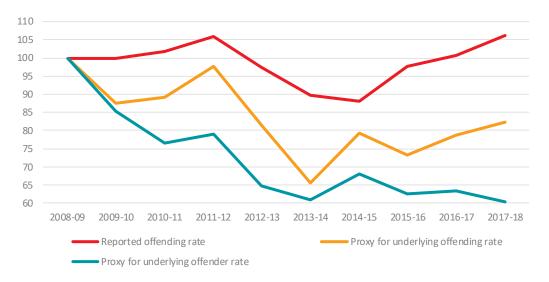
When these estimates of underlying offender rates are combined into a single proxy measure, the underlying rate of offences against persons and property decreased by 17.6 per cent over the period 2008–09 to 2017–18 (Figure 4.5). This compares to an increase of 6.3 per cent for reported offences.

Using the same methodology, it is also possible to estimate a proxy for the number of individuals committing offences (Figure 4.5). While this methodology does not capture changes in the offending rates it can show changes



in the number of individuals committing offences in the population. The Commission's estimates suggest that the number of individuals committing offences against property or person, per head of population, may have fallen by as much as 40 per cent between 2008–09 and 2017–18.

Figure 4.5 Estimated underlying aggregate offending and offender rates, Queensland, indexed to 2008–09



Note: Underlying offending are calculated by adjusting reported offending and offender rates to account for unreported crime. Reported offending rate refer to combined offences against the person and offences against property. 'Other' offences are excluded from the estimates.

Source: QPC calculations; ABS 2019g, 2019d; QPS 2019c.

### Do perceptions of crime match reality?

Crime is one of the most important concerns of the Queensland community (Committee for Economic Development of Australia 2018, p. 9). The effects of crime can significantly reduce quality of life, and many people live in fear of crime, which can constrain people's involvement in the community.

The public's perception of crime plays an important role in shaping policy through its influence in the political process, and indirectly through the evolution of social norms (for example, concerning what is just punishment):

Public anxiety about crime is what drives state government investment in law enforcement. It is this investment, not underlying trends in crime, which has played the dominant role in shaping demand for criminal justice resources over the last ten years ... Whenever unwarranted public anxiety about crime trends is the trigger for all this, public money is being wasted on a grand scale. It is no use consoling oneself with the thought that, if the investment was driven by a mistaken view of crime trends, it will nonetheless have the effect of reducing crime. The available evidence gives little reason to believe that increased investment in law enforcement automatically brings with it a decrease in crime rates. (Weatherburn 1993, p. 37)

Australians' perceptions of safety on some measures have improved over the last two decades, particularly for females (ABS 2017b). In 2016, females were almost half as likely as in 1996 to avoid public transport and two-thirds as likely to avoid walking alone because they felt unsafe. The proportion of females who felt unsafe at home alone after dark fell from 21.4 per cent to 9.9 per cent.



Nonetheless, a majority of Australians believe that crime rates have increased over the last few years (Essential Research 2018). About a third believe crime has increased a lot. Research into crime perceptions in Australia suggests perceptions are often inaccurate:

In Australia, studies have shown a substantial proportion of the population incorrectly believe crime rates are increasing when, in fact, they are stable or declining (Davis & Dossetor 2010, p. 1).

Regular time series data on Australian perceptions of crime is not available. However, evidence from other countries suggests there is a lack of a relationship between changes in crime rates and people's perceptions of changes in crime rates. In the United States, despite violent victimisation rates falling by three-quarters since 1994, the majority of people in almost every year believed that crime was increasing (McCarthy 2014). Similarly, in the United Kingdom, most respondents thought that crime was increasing in each year surveyed, despite crime rates falling since 1995 (UK Office for National Statistics 2017). While people are likely to perceive crime as increasing in general, they are much less likely to perceive crime as increasing in their local neighbourhood (Davis & Dossetor 2010; Weatherburn et al. 1996).

# 4.3 Rising rates of imprisonment

The rate of imprisonment in Queensland is currently higher than at any other time since 1900 (Figure 4.6). Following a period of steady decline between 1900 and 1938, the trend reversed and imprisonment rates began to steadily increase. Since 1992, there have been two periods of rapid increases in the imprisonment rate. Between 1992 and 1999 the imprisonment rate doubled. Then, from 2012 to 2018, the imprisonment rate increased by 44 per cent.

180
160
140
120
100
80
60
40

Figure 4.6 Imprisonment rate per 100,000 population, Queensland

Note: To show continuous historical data of imprisonment rates, the number of adult prisoners is divided by the entire population. The ABS present imprisonment rates as the number of prisoners divided by the adult population.

Source: QPC calculations; ; ABS 2018k, 2019a; OESR 2009.

As at March 2019, Queensland's prison population was 9,033 (up from 5,594 in June 2012). Around 13,000 people flow through Queensland's prisons each year (ABS 2019c).



Box 4.1 compares Queensland imprisonment rates to other jurisdictions.

## Box 4.1 Are Queensland imprisonment rates higher than they should be?

The Australian imprisonment rate (227.2 per 100,000 adults) is approximately the same as Queensland's (221.4) (ABS 2018k). All Australian states and territories have experienced a growth in imprisonment rates. The Australian imprisonment rate also grew by 32 per cent since 2012—slightly slower than Queensland's.

According to statistics from the OECD, adult incarceration rates vary considerably across countries. Amongst OECD countries, the United States' incarceration rate is the highest, at 698 incarcerated people per 100,000 population, while Iceland's rate is low, at 45 (2016 rates) (OECD 2016). Australia's incarceration rate is listed as 152, slightly higher than the OECD and world averages 147 and 144 respectively (OECD 2016; World Prison Brief 2016).

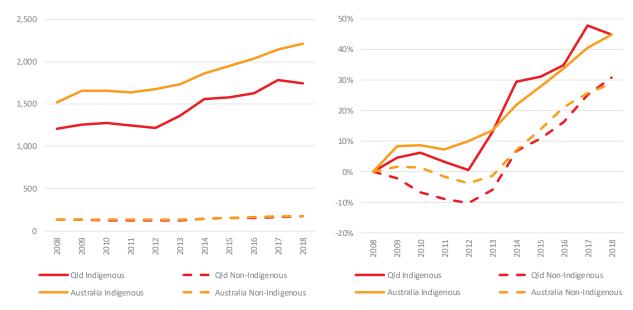
Queensland is not the only jurisdiction that has experienced increasing incarceration rates. On average the OECD rate increased from 117 to 156 between 1992 to 2010 and then fell to 2016. Incarceration rates in most developed countries fell between 2010 and 2016 (OECD 2016).

## Indigenous imprisonment rates are high and rising faster than general rates

Aboriginal and Torres Strait Islander people are overrepresented in Queensland prisons. They comprise 4.6 per cent of the state population, but 31.1 per cent of the prison population. The age standardised rate of imprisonment for Indigenous Queenslanders is 10 times higher than for non-Indigenous people (Figure 4.7).

Between 2008 and 2018, the age standardised imprisonment rate for Indigenous people increased by around 45 per cent, significantly faster than for the non-Indigenous rate (around 31 per cent). For the whole of Australia, the increase in imprisonment rates was similar (45 per cent versus 29 per cent, respectively).

Figure 4.7 Rate and growth of age standardised adult imprisonment per 100,000 adults, by Indigenous status



Note: Age standardised rates are adjusted for differences in the age distribution of the Indigenous and non-Indigenous populations. Source: ABS 2018k.



# Female imprisonment rates are low but growing faster than for men

Female prisoners in Queensland accounted for 8.5 per cent of the prison population in 2012, but this share increased to 9.5 per cent by 2018. The proportion of females in prison per 100,000 persons has grown 61.7 per cent from 26 persons in 2008 to 42 persons in 2018—while that of males has grown by 30.8 per cent (Figure 4.8). The Queensland female imprisonment rate grew faster than the national rate (up 45.6 per cent).

Figure 4.8 Rate and growth of adult imprisonment per 100,000 adults, by gender, Queensland

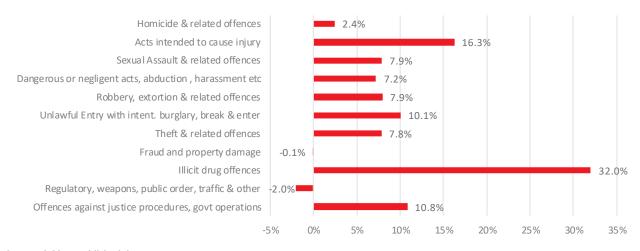


Source: ABS 2018k.

# Increase in prisoners by type of offence

From 2012 to 2018, the number of sentenced prisoners rose by 1,729 persons, or 40.2 per cent (QCS unpublished data). The largest driver was increased illicit drug offences, contributing 32 per cent of the growth (Figure 4.9). Offences against justice procedures, theft and unlawful entry offences—all of which tend to be non-violent, lower harm or, in some cases, victimless—contributed a further 29 per cent of growth. Acts intended to cause injury contributed 16.3 per cent.

Figure 4.9 Contributions to the growth in sentenced prison population from 2012 to 2018, Queensland



Source: QCS unpublished data.



The change in contributions has changed the overall composition of the prison population. The share of prisoners convicted of homicide (and related offences) fell by 2.4 percentage points, while the share of illicit drug offenders rose by 6.2 percentage points over the period 2012 to 2018 (Table 4.1).

Table 4.1 Share of sentenced prison population by type of offence, Queensland, 2012 and 2018

	Share (per cent)		Change
Offence type	2012	2018	Percentage points
Homicide and related offences	10.9	8.5	-2.4
Acts intended to cause injury	18.7	18.0	-0.7
Sexual assault and related offences	15.0	13.0	-2.0
Dangerous or negligent acts, abduction, harassment etc.	3.3	4.4	1.1
Robbery, extortion and related offences	10.3	9.6	-0.7
Unlawful entry with intent. burglary, break and enter	14.9	13.5	-1.4
Theft and related offences	2.8	4.2	1.4
Fraud and property damage	6.1	4.3	-1.9
Illicit drug offences	10.3	16.5	6.2
Regulatory, weapons, public order, traffic and other	3.6	2.0	-1.6
Offences against justice procedures, government operations	4.2	6.1	1.9

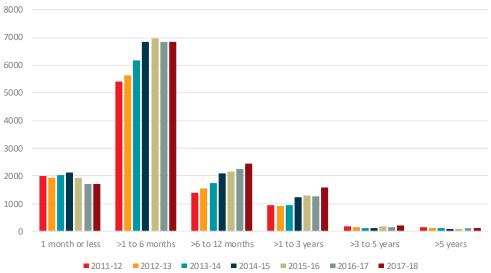
Source: QCS unpublished data.



### Most prisoners receive relatively short sentences

The prison population is characterised by a high degree of 'churn'—that is, prisoners discharged a short time after arrival. More than half (52.9 per cent) of prisoners discharged in 2017–18 were in prison for between one and six months (Figure 4.10). The median sentence length for all prisoners is 3.9 months.

Figure 4.10 Duration of stay in custody for prisoners discharged during the year, Queensland

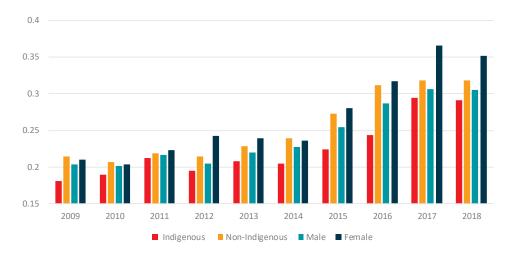


Source: QCS unpublished data.

#### Rising numbers of prisoners on remand

The number of unsentenced prisoners (on remand) increased from 20 per cent of the total prison population in 2009 to 31 per cent in 2018 (Figure 4.11). Between 2009 and 2018, there was a 14 percentage point rise in the remand rate for female prisoners, compared to a 11 percentage point increase for male prisoners (QCS unpublished data). Remand rates for Indigenous and non-Indigenous prisoners both increased by 11 percentage points.

Figure 4.11 Proportion of unsentenced prisoners by gender and Indigenous status, Queensland



Source: QCS unpublished data.



# 4.4 Drivers of increasing adult imprisonment

This section focuses on the factors that contributed to the growth in imprisonment over the last decade.

Higher imprisonment rates have primarily been driven by the functioning of the criminal justice system and society's attitudes towards crime, rather than an increase in the incidence of crime.

For many of the crimes typically associated with imprisonment, the rate of recorded offences has declined. Further, as discussed in previous sections, the underlying rate of offences against property and persons appears to have fallen significantly (by around 18 per cent) over the last decade.

Conversely, the evidence suggests that rising imprisonment cannot explain the decline in crime. A 2011 study by the Victorian Sentencing Advisory Council found that imprisonment has a negative but generally insignificant effect upon the crime rate (Ritchie & Ritchie 2011). A 2012 study by the Bureau of Crime Statistics and Research using Australian data supported this view, finding that factors such as the probability or length of imprisonment have much less an effect on crime rates than improvements in average weekly earnings (Wan et al. 2012).

Throughout the developed world crime rates have been declining for decades, this is consistent across countries despite substantial differences in imprisonment levels and trends (Tonry 2014). Globally, imprisonment explains little of the drop in crime rates or differences between countries (Farrell 2013; Lappi-Seppala 2011; Roeder et al. 2015; Tonry 2014).

This suggests that the increasing rate of imprisonment in Queensland cannot be explained simply as being a consequence of a general increase in offences against the person or against property. Compositional shifts in crime also cannot be a significant contributor to the increase in the rate of imprisonment, because crimes that have decreased the most are those that are more likely to result in imprisonment and/or a lengthier sentence.

Overall, most of the factors that are driving increases in the rate of imprisonment appear to be factors primarily involving the criminal justice system—that is, interactions with the system and decisions taken within the system.

## Significant contributors to the increase in imprisonment

Imprisonment has been rising mainly because of an increase in:

- the reporting of crime (see section 4.2)
- the remand population
- police effort
- police propensity for court action
- custodial sentencing versus alternatives
- · recidivism.

The reduction in the incidence of crime is likely to have offset at least some of the increase in imprisonment.

#### Remand and bail

Growth in remand (unsentenced prisoners) appears to have made a significant contribution to increasing imprisonment. Between 2012 and 2018, the unsentenced prisoner population (prisoners on remand) increased 112 per cent, from 1,250 prisoners to 2,652 prisoners (Figure 4.12). This increase was faster than for the sentenced prison population, which increased 43 per cent over the same period.



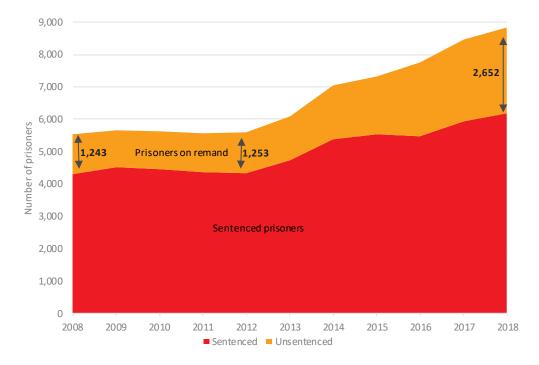


Figure 4.12 Sentenced and unsentenced prisoners, Queensland

Note: Data is from the National Prisoner Census on prisoners held in custody in Australian adult prisons in all states and territories on 30 June of each year. 'Total prisoners' includes sentenced prisoners, unsentenced prisoners (prisoners on remand), and post-sentenced prisoners. For this chart, 'sentenced prisoners' includes post-sentenced prisoners (0.4 per cent of the prisoner population in 2017). Source: ABS 2018k.

If a prisoner does not spend any additional time in prison due to remand<sup>25</sup>, then an increase in the use of remand will not increase the overall prison population. However, in some cases, an increase in remand contributes to increasing imprisonment—for example, not all people on remand will be found guilty; some will be found guilty but not sentenced to prison; and others may be in remand longer than the prison sentence they eventually receive.

Although the Commission does not have Queensland data to sufficiently disentangle these issues, the Bureau of Crime Statistics and Research, analysing bail decisions in New South Wales (which exhibits similar trends), found that remanding ten additional defendants would increase imprisonment by one person (Rahman 2019). If the same analysis holds for Queensland, this implies that the increase in the use of remand would have increased the prisoner population by around 140 people between 2008 and 2018.

Several factors appear to be contributing to the increase in the remand population:

- A backlog of cases in the Magistrates' Courts has grown amid slow growth in the number of judicial officials—the pending case load of Queensland adult criminal courts (49 per cent) has risen faster than the number of judicial officials (9 per cent) to hear those cases. Between 2010–11 and 2017–18, the backlog of criminal court cases increased 80 per cent (though there are fewer than in 2016–17) (SCRGSP 2019a).
- Recent changes in the treatment of domestic violence arising from *Not Now, Not Ever* strategy has resulted in an
  increase in the reporting of domestic violence, increased domestic violence protection orders and associated
  breaches—changes removing the presumption of bail in 2017 for those charged with a domestic violence
  offence are likely to impact on the number of remand prisoners.

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<sup>&</sup>lt;sup>25</sup> For example, a prisoner who spends a year on remand and is then sentenced to three years imprisonment will only spend a further two years in prison. This means that there is no net change in their time in prison. However, if a prisoner spends a year on remand, and is sentenced to 8 months, then their time in remand would have increased their total time in prison by 4 months.



- Breach of bail offences have increased—the rate has approximately doubled from 259 per 100,000 people in 2010–11 to 502 in 2015–16 (QSAC 2017). The rate of offences for breach of bail where it was the main offence rose 54 per cent.
- The proportion of people given custodial sentences for bail breaches increased from 13.5 per cent in 2012–13 to 18.7 per cent in 2015–16 (QSAC 2017, p. 12).

### Police productivity and practices

From the data, police appear to have become more effective at solving crimes and bringing proceedings. The proportion of reported offences against the person that were cleared by the QPS rose from 84.8 per cent in 2008–09 to 94.1 per cent in 2013–14 (although the proportion of cleared offences has since fallen back to 86.6 per cent in 2016–17) (QPC calculations). The proportion of offences against property cleared by police rose from 35.7 per cent in 2008–09 to 45.8 per cent in 2016–17.

During the same period, the ratio of all police personnel to the population fell slightly. This suggests police are solving more crimes and maintaining offence rates with relatively fewer personnel.

It is also possible that as personal and property crime becomes less prevalent, more police resources are devoted to tackling other offences that do not necessarily have an identified victim.

The police are more likely to use court action for most offences. The proportion of all offences (except for public order offences) that are dealt with through non-court action has decreased—from 16.3 per cent in 2008–09 to 12.5 per cent in 2017–18 (QPC calculations; ABS 2019g). It appears that police have become less likely to use non-court actions such as cautions/warnings, conferencing, counselling, drug diversionary schemes or penalty notices for most crimes other than public order offences.

#### Court decisions

Between 2005–06 and 2012–13, the use of custodial orders increased more than twice as fast as non-custodial orders (13.8 and 5.8 per cent respectively) (ABS 2019e). QSAC found that the use of imprisonment in the higher courts increased 1.5 times from 2005–06 to 2007–08, while the share of other orders halved (QSAC 2018b, p. 16).

From 2011–12 to 2017–18, the proportion of sentences involving custody in a correctional institution increased for both violent offences—from 16.8 to 29.4 per cent—and non-violent offences—from 4.1 to 7.0 per cent (Figure 4.13). Courts are becoming less likely to sentence offenders to monetary orders, with the proportions of violent and non-violent offenders sentenced to monetary orders falling from 58.3 to 39.9 per cent and 79.6 to 71.4 per cent respectively. The proportional use of fully suspended sentences, community supervision orders and other non-custodial orders all increased.





Figure 4.13 Share of types of sentences for higher and magistrates courts, Queensland

Note: By selected principal sentence, because data is not available for all offence types. Violent crimes include homicide, acts intended to cause injury, sexual assault, robbery and related offences. Nonviolent crimes include unlawful entry, fraud, illicit drugs and related offences. Source: ABS 2019e.

### Court-ordered parole

Since 2000, the most significant legislated change to impact on prison numbers was the move to court-ordered parole in 2006. This changed the sentencing options available to courts, and at the same time reduced the ability of QCS to release prisoners to the community. The result was that the courts switched from using partially suspended prison sentences to court-ordered parole. The impact of this shift was to reduce time in prison and increase the remaining parole period (the length of headline sentences did not change much over this period). Many offenders were ordered immediate release to parole at sentencing (close to 50 per cent) and the number of prisoners on short sentences decreased significantly (QCS 2018h).

The longer parole periods increased the parole population—who are susceptible to parole breaches and suspensions—and return to prison. Much of the flattening in the prison population from 2006–07 to 2012–13 arose from a shift of those who would otherwise have been sentenced to prison being released into the community on parole (which rose by 30 per cent over that same period).

By 2010–11, parole suspensions began to increase. The reasons for this are unclear, but the reversal in this trend in 2014 suggests that this may be the result of changes in QCS risk assessment procedures (QCS 2013; QSAC 2018b). Without court-ordered parole it is likely that a more gradual increase in the prison population would have occurred from 2006. Overall, the changes altered the pattern of growth in prisoner numbers, first flattening then contributing to the increase in imprisonment from 2011–12.

#### Recidivism

When ex-prisoners reoffend, their offence contributes to the incidence of underlying crime. If the offence is reported or detected by police, it is captured in reported crime statistics. An increase in the rate of recidivism can increase the aggregate likelihood that a punishment of imprisonment will be chosen by the judiciary (for example, the offender has already traversed through the sentencing hierarchy, or the severity of offences is more likely to merit imprisonment). The increase in recidivism is likely one factor contributing to the proportional increase in custodial sentencing options noted above.

The common indicators for recidivism suggest that recidivism rates are increasing in Queensland (Chapter 5). For example, the proportion of offenders proceeded against more than once increased 6.4 percentage points between



2010–11 and 2017–18 (ABS 2019g; SCRGSP 2019a). The proportion of released prisoners in Queensland receiving new sentences increased 4.4 percentage points between 2012–13 and 2017–18. The proportion of prisoners who have known prior imprisonment increased from 58.3 per cent in 2008 to 63.6 per cent in 2018.

Chapter 5 discusses recidivism in greater detail.

### Factors that had no or only a minor effect

The factors below do not appear to have significantly contributed to the rise in imprisonment.

### Sentence lengths

Several legislative changes since 2000 have increased sentence lengths for specified offence types, such as by setting non-parole periods and maximum sentence amounts. These have been limited to more serious and less frequent offending (for example, the one-punch, 'no-body, no-parole' and child exploitation laws).

Overall, aggregate sentence length data and expected time to serve data indicate that the time spent in prison has not been an important driver of increasing imprisonment. The average expected time to serve for all offences declined 3 per cent from 29.7 months in 2012 to 28.8 months in 2018 (ABS 2018k).

The average duration of stay in custody for all prisoners discharged during the year was 7.4 months in 2011–12. It declined to 6.4 months in 2014–15, before returning to 7.4 months in 2017–18 (QCS unpublished data). The median duration rose from 2.9 to 3.9 months.

### Prosecution success rates

The probability of a defendant being found guilty has been relatively stable between 2010–11 and 2016–17, at around 90 per cent. In 2017–18 there was a slight decrease—about 86 per cent of defendants in Queensland's magistrates and higher courts were found guilty (ABS 2019e).

### Proportion of probation and parole orders successfully completed

Between 2012–13 and 2017–18, the proportion of probation and parole orders that were successfully completed was relatively stable at 76 to 78 per cent (DJAG 2017, p. 120; QCS 2018c). However, an increasing rate of parole combined with a constant rate of parole failure would contribute to an increase in the imprisonment rate.

# 4.5 A comparison with the 1990s increase in imprisonment

From the early to late 1990s, the rate of imprisonment increased rapidly—doubling over a relatively short period. The largest impact on prison numbers was caused by corrective services practices and the courts, with a moderate impact from police practices, and low impacts from changes in the legislative framework and demographic trends (Criminal Justice Commission 2000).

The recent increase in the rate of imprisonment in Queensland has both similarities with and differences to the increases in the 1990s.

In both periods:

- Imprisonment increased because of a wide range of influences operating across the criminal justice system.
- The volume of offences entering the criminal justice system was not an important driver of increasing imprisonment rates. The volume of reported offences in the 1990s made a small positive contribution, while more recently it has made a negative contribution.
- Aggregate sentence lengths did not contribute to changes in imprisonment.



- A shift occurred in court sentencing, with a sentence of imprisonment becoming more likely than other sentencing options.
- Recidivism increased, which would be one of the factors influencing court sentencing.

However, in the 1990s:

- The proportion of unsentenced (held on remand) to sentenced prisoners remained stable. More recently, the ratio has increased—increases in remand appears to play a larger role than in the 1990s.
- Changes in parole practices contributed to a rise in imprisonment, through lengthening the duration of stay.
- Fine-related offences formed a large share of new prison arrivals. That factor has not contributed significantly to the recent increase in imprisonment.

# 4.6 Summary

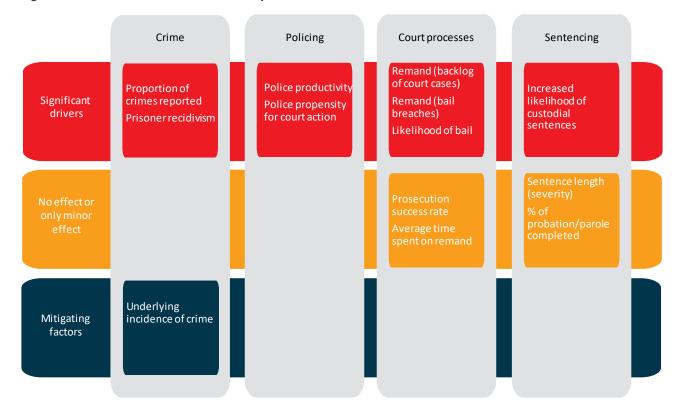
Queensland's current rate of imprisonment is the highest it has been since 1900. Since 2012 the rate of imprisonment has increased by 61 per cent, and the prison population increased from 5,594 to 9,033 prisoners.

The types of offences that made the largest contributions to this growth were illicit drug offences (32 per cent), robbery, unlawful entry, burglary and theft (26 per cent), acts intended to cause injury (16 per cent) and offences against justice procedures (11 per cent).

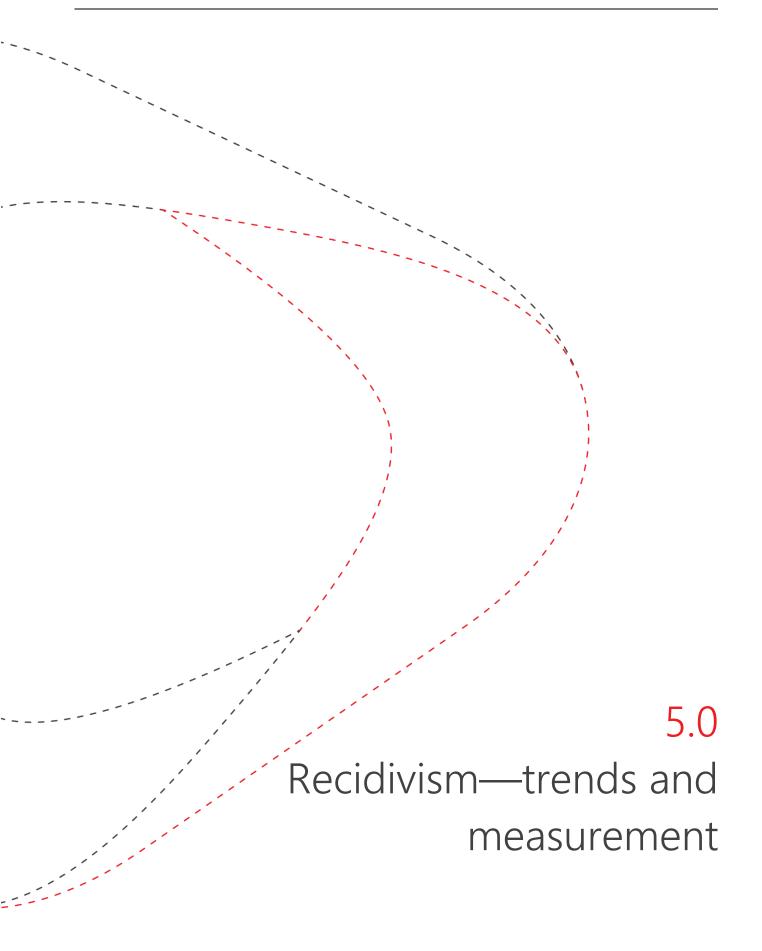
Imprisonment rates have increased despite falling crime rates. The largest reductions in crime were generally for the most serious offences.

The rise in imprisonment rates has been driven by a number of 'system' changes. Figure 4.14 summarises these drivers.

Figure 4.14 Drivers of the increase in imprisonment in Queensland









This chapter examines trends in recidivism. It also looks at currently available measures and their shortcomings, and how these may be overcome.

### Key points

- Recidivism occurs when an individual who has previously offended commits a new offence. Measuring recidivism is important, because it:
  - helps identify disproportionate harm to some families and communities caused by cycles of crime, and creates incentives for the criminal justice system to address this harm
  - shows whether the criminal justice system is effective in rehabilitating offenders
  - shows whether specific policies or programs are effective, which creates incentives for program operators and enhances the efficient allocation of resources.
- It is not always possible to know when someone reoffends. Therefore, proxy indicators such as reimprisonment or reconviction are required to measure recidivism. Measures currently available are:
  - the number and proportion of offenders who are proceeded against by police multiple times in a year—for example, in 2016–17, one in three Queensland offenders were proceeded against more than once
  - the proportion of adults released from prison who return to corrections—of the most recent cohort of released prisoners, 42.7 per cent returned to prison and 11 per cent returned to community corrections (but not prison) within two years
  - the proportion of adults released from community orders who return to corrections within two years—of the most recent cohort, 22 per cent returned to prison or community corrections
  - the number and proportion of prisoners who were previously imprisoned—for example, in 2018, 63.6 per cent of Queensland prisoners had been in prison before.
- Such measures are crude indicators of recidivism. They do not track the relative severity of reoffending, the number of reoffending episodes or the time between such episodes. They provide <u>limited information on</u> prisoner characteristics, making valid comparison difficult.
- Nevertheless, currently available measures indicate that:
  - recidivism rates in Queensland are increasing
  - Aboriginal and Torres strait islander people reoffend more than their non-Indigenous counterparts,
     and men reoffend more than women
  - prisoner recidivism rates in Queensland are at or above the national average
  - since 2012, both the proportion of offenders with a high risk of reoffending and the average reoffending risk of offenders have increased.



# 5.1 Introduction

Recidivism is the return to criminal behaviour by an individual after they have been arrested, convicted, sentenced and discharged in respect of a prior offence (Maltz 1984a, p. 1). Measuring recidivism is important for three reasons

First, it measures the degree to which offenders are rehabilitated. Reducing the rate and severity of reoffending is an important purpose of the criminal justice system, and accurate measurement is important to provide incentives and feedback. Reductions in recidivism help reduce the burden on the criminal justice system. For example, a NSW study found that reducing the percentage of recidivists re-entering prison had a greater impact on the cost of corrective services than the same percentage reduction in new offenders (Weatherburn et al. 2009, p. 6).

Second, for many treatment programs, it is important to know how many participants reoffend. High levels of recidivism may indicate prison rehabilitation or re-entry programs are failing to turn offenders away from crime. As an indicator of program effectiveness, measured recidivism creates incentives for program operators. It allows programs to be compared and resources to be allocated cost-effectively.

Third, measuring recidivism identifies harm and provides incentives for the criminal justice system to address this harm. For families and communities, recidivism can lead to repeat victimisation, normalise crime, damage local economies and weaken community networks. The normalisation of crime and weakening of community networks can also lead to more crime generally (Morenoff & Harding 2014, p. 215).

A major difficulty with measuring recidivism is that crime, and its timing, is difficult to observe. Measures of recidivism must use a proxy for reoffending based on available data, such as:

- the number or proportion of prisoners who return to prison in a given timeframe
- the length of time before reoffending
- the number or proportion of offenders who are reconvicted in a given timeframe
- the number or proportion of offenders proceeded against multiple times in a given timeframe.

## 5.2 Available measures

Recidivism can be measured on a systemwide (macro) scale or an individual or program (micro) scale. Macro measurement—which uses aggregate data—is important for assessing overall trends in recidivism, determining the effect of systemwide policy and promoting public confidence in the criminal justice system. Micro measurement—which uses individual data—is important for assessing the outcomes of different programs and treatments, including their interactions with differing offender backgrounds. While useful for evaluating the criminal justice system, publicly available measures are only provided at an aggregate level and cannot be used to assess the impacts of specific policies or programs.

Currently, the main publicly available recidivism measures are data provided by the Australian Bureau of Statistics and the Productivity Commission. The most commonly reported measures are:

- the proportion of offenders aged 10 or older who are proceeded against multiple times within a year
- the proportion of adults released from prison in a given year who return to corrective services (either prison or community corrections) within two years
- the proportion of adults discharged from community corrections orders who return to corrective services (either prison or community corrections) with a new correctional sanction within two years
- the proportion of current prisoners who were previously imprisoned.



## Proportion and number of offenders proceeded against in a given year

This measure reports the number of offenders proceeded against by the number of proceedings brought against them in a given year. It shows that one in three Queensland offenders was proceeded against more than once in 2017–18. That proportion was greater than for any Australian state for which the ABS reports this metric (ABS 2019g).

Three inferences can be drawn from this measure. First, the rate of reoffending leading to prosecution within a given year is increasing among the offender population. Second, both Indigenous offenders and Indigenous Queenslanders are more likely to face multiple prosecutions than their non-Indigenous counterparts. Third, male and female offenders reoffend at similar rates.

Between 2010–11 and 2017–18, the number of offenders proceeded against more than once increased by 27.5 per cent, and the proportion of offenders proceeded against more than once increased by 6.5 percentage points. The largest growth occurred in those proceeded against five or more times, the number of which grew by 72.6 per cent (Figure 5.1).

Growth in the proportion of offenders proceeded against more than once does not necessarily indicate a greater amount of recidivism or recidivists. If there are fewer offenders proceeded against once, the *proportion* of repeat offenders will increase even if their numbers are static (or falling at a slower rate). This occurred between 2015–16 and 2016–17, when the proportion of offenders facing multiple prosecutions grew, but the number of such offenders declined.

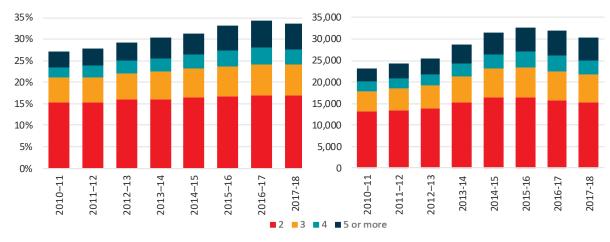


Figure 5.1 Proportion and number of offenders by number of proceedings, Queensland

Sources: ABS 2019q; SCRGSP 2019a.

Indigenous offenders were much more likely to be proceeded against multiple times during 2017–18 than non-Indigenous offenders (Figure 5.2). This understates the extent of the disparity between Indigenous and non-Indigenous recidivism, because Indigenous people are already overrepresented among offenders generally. When adjusting for statewide population, 1 in 29 Indigenous Queenslanders faced at least two police proceedings in the 2012–13 financial year, compared to just 1 in 267 non-Indigenous Queenslanders. By 2017–18, those rates had increased to 1 in 26 and 1 in 240, respectively.<sup>26</sup>

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<sup>&</sup>lt;sup>26</sup> In this chapter, estimates of the Indigenous population are drawn from ABS 2018f, series B. Total populations are drawn from ABS 2019a, and non-Indigenous populations are calculated as the differences between the two. This is to maintain consistency with the approach in ABS 2018k (see explanatory notes 63–64) and ABS 2019g (explanatory notes 16–22), from which data in the chapter is drawn.



Indigenous Non-Indigenous 60% 16,000 60% 16,000 14,000 14,000 50% 50% 12,000 12,000 40% 40% 10.000 10 000 30% 8,000 30% 8,000 6.000 6.000 20% 20% 4,000 4,000 10% 10% 2,000 2,000 0% 0 2008-09 2010-11 2011-12 2012-13 2013-14 2014-15 2015-16 2016-17 2017-18 2010-11 2011-12 2012-13 2013-14 2014-15 2015-16 2016-17 2017-18 2009-10 2010-11 2011-12 2012-13 2013-14 2014-15 2016-17 2009-10 2010-11 2011-12 2012-13 2013-14 2014-15 2015-16

Figure 5.2 Proportion and number of offenders by Indigenous status and number of proceedings, Queensland

Source: ABS 2019g.

Male and female offenders are proceeded against multiple times at similar rates, though women are less likely to be offenders overall (Figure 5.3). Trends in both the number and proportion of offenders are similar across genders.

25.000 35% 25,000 30% 20.000 20,000 25% 25% 15,000 15,000 20% 20% 15% 15% 10,000 10,000 10% 10% 5,000 5,000 5% 5% 0% 2012–13 2013-14 2014-15 2015-16 2016-17 2016-17 2011-12 2009-10 2011-12 2012-13 2013-14 20 14-15 20 15-16 20 16-17 20 14-15 009-10 60-800 2008-09 2009-10 2013-14 2015-16 2017-18 2013-14 2014-15 60-800 010-11 2010-11 2011-12 2012-13 2016-17 0009-10 2010-11 2015-16 .18 2011-12 012-13 Male Female

Figure 5.3 Proportion and number of offenders by gender and number of proceedings, Queensland

Source: ABS 2019g.

#### Returns to corrective services

The Productivity Commission provides two indicators of recidivism relating to the proportion of offenders who return to corrective services within two years:

- the proportion of individuals released from prison, including those subject to correctional supervision following release (such as parole), who return to either prison or corrective services generally
- the proportion discharged from community corrections who return to community corrections or corrective services generally.

Only individuals who return under a new sentence are counted.



Discharged from community corrections Released from prison 60% 60% 50% 50% 40% 40% 30% 30% 20% 20% 10% 10% 2010-11 2011-12 2012-13 2014-15 2015-16 2012-13 2015-16 2012-13 2013-14 2016-17 2017-18 2013-14 2014-15 2016-17 Aust Old Old ■ To prison only or to prison and community corrections ■ To community corrections only or to prison and community corrections ■ To prison only ■ To community corrections only

Figure 5.4 Proportion of individuals released from prison and community corrections returning to corrective services within two years, Queensland and Australia

Of Queensland offenders released from prison in 2015–16, over half returned to corrective services with a new correctional sanction in 2017–18—that is, 42.7 per cent returned to prison and 11 per cent returned to community corrections (but not prison). These two-year return rates have increased substantially over time, rising from 38.3 per cent who returned to prison and 8.7 per cent who returned to community corrections, of those released in 2010–11 (Figure 5.4).

The proportion of Queensland prisoners released in 2015–16 who returned to corrective services was slightly below the national average, but 8.5 percentage points higher than the figure for Western Australia and 8 higher than for South Australia.

Rates of return were much lower for offenders released from community corrections. Of Queensland offenders discharged from community corrections in 2015–16, only 22.3 per cent returned to either community corrections or prison by 2017–18.

A significant problem with this measure is that it is not disaggregated by gender or indigeneity, which makes comparisons between demographics impossible. This can significantly affect how the measure is interpreted.

# Proportion of prisoners previously imprisoned

Of Queensland prisoners incarcerated in 2018, 63.6 per cent had known prior imprisonment. That proportion was higher than any other state's proportion and the national average of 56.7 per cent (Figure 5.5).

Trends for this indicator suggest that recidivism is increasing. The proportion of prisoners who were previously imprisoned in Queensland in 2018 was 5.4 percentage points higher than in 2008. However, this sudden increase may have been driven partially by legislative changes rather than changes in underlying rates of reoffending. For example, in 2013 the punishment for failing to pull over under instruction from police was increased from a \$300 fine to a minimum penalty of either 50 penalty units (\$6527.50 today) or 50 days of incarceration.<sup>27</sup> This meant that offenders were now more likely to go to prison for the same offence and more likely to be reimprisoned.

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<sup>\*</sup> In 2011–12 only the total number of community corrections discharges returning to community corrections was available, not the total number returning to corrective services for Queensland.

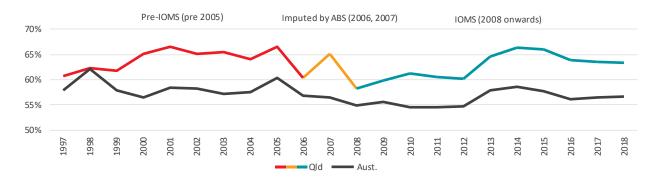
Source: SCRGSP 2019a.

<sup>&</sup>lt;sup>27</sup> Criminal Law Amendment Act 2012 (Qld) s. 21; also see the explanatory notes to that Act.



As of 2008, Queensland data is derived from the Integrated Offender Management System (IOMS) of Queensland Corrective Services (QCS). Comparisons should not be made with pre-2008 data (ABS 2018k Explanatory Note 97).

Figure 5.5 Proportion of prisoners who have been previously incarcerated, Queensland and Australia

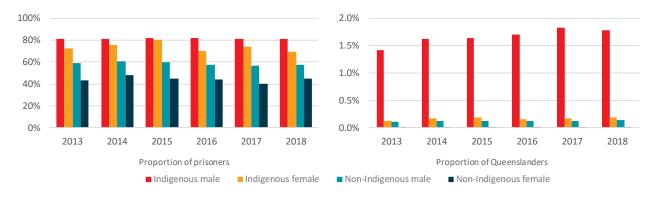


Source: ABS 2018k.

Indigenous prisoners are more likely than their non-Indigenous counterparts to have been incarcerated previously. Of male prisoners in 2018, 81.2 per cent of Indigenous prisoners were previously imprisoned, compared to 57.2 per cent of non-Indigenous prisoners.

As Indigenous people are more likely to be imprisoned, this measure also understates the difference in recidivism between Indigenous and non-Indigenous Queenslanders. When comparing the number of individuals imprisoned for at least a second time as a proportion of the total population, rather than as a proportion of prisoners, a much greater disparity is evident. In 2018, 1.77 per cent of all Indigenous males in Queensland were in prison for at least the second time, compared to 0.18 per cent of Indigenous females, 0.13 per cent of non-Indigenous males and 0.01 per cent of non-Indigenous females (Figure 5.6).

Figure 5.6 Prisoners serving at least a second term, as a proportion of prisoners and population, Queensland



Source: ABS 2018f, 2018k.

A problem with this measure is that it suffers from an unspecified timeframe. If a second imprisonment term is lengthy, that prisoner will continue to impact this indicator long after the reoffending occurred. This means that this indicator may not provide a useful indicator of the current health of the criminal justice system or cost of recidivism to communities.



## Risk of reoffending scores

An individualised measure developed by Queensland Corrective Services (QCS) is the 'risk of reoffending' (RoR) score. RoR scores are determined by QCS on prison entry to assess an offender's general risk of reoffending. A higher score indicates a greater risk. RoR scores are calculated based on risk factors, including age, education, employment level, number of current offences and number of previous convictions (Queensland Government sub. 43, p. 74). As these scores are based on individual offender characteristics, they are the only micro measure of recidivism currently available to the Commission.

Although RoR scores do not measure actual reoffending, their strong predictive validity was confirmed in 2015 by the Griffith Criminology Institute, which compared predicted levels of recidivism with actual levels of recidivism (Queensland Government sub. 43, pp. 74–75). As such, RoR scores of prisoners today serve as a proxy for future recidivism levels. Less than 10 per cent of prisoners with RoR scores of 1 reoffend, compared to approximately 70 per cent of prisoners with a score of 15 and 90 per cent of prisoners with the maximum score of 22.

Of prisoners with an RoR score, the proportion with a score of at least 16 has increased by 5.0 percentage points between July 2012 and August 2018 (Figure 5.7). Over the same period, the proportion with an RoR score of no more than 10 fell by 6.8 percentage points and the average RoR score grew from 11 to 11.7. This indicates that the current prison population is increasingly recidivistic.

12.00 50% 45% 11.75 40% 11.50 35% 11.25 30% 25% 11.00 20% 10.75 Jul-12 Jul-13 Jul-14 Jul-15 Jul-16 Jul-17 Jul-18 Jul-13 Jul-15 Jul-18 Jul-12 Jul-16 Jul-17 Average RoR score RoR 1-10 RoR 11-15 RoR 16+

Figure 5.7 Average RoR score of prisoners, and proportion of prisoners by RoR score ranges, 2012–2018

Source: QCS, unpublished data.

RoR scores have an advantage over other currently available measures, in that they incorporate relevant prisoner characteristics. A key disadvantage is that a considerable proportion (around 20 per cent) of the prison population are not assessed—these appear to be some (but not all) prisoners on remand. Any systematic difference between remanded and sentenced prisoners would weaken inferences made from this measure.

### Deficiencies with available measures

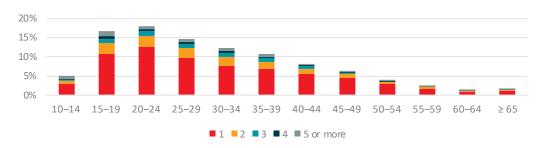
The measures above share some problems, in addition to having their specific problems. They do not track lifetime reoffending or the relative severity of crimes; neither do they capture the time between offences or are standardised by or constructed with reference to offender characteristics. They may also be sensitive to changes in policy or legislation that do not affect the underlying rates of crime. For example, if a legislative change increases the likelihood of an offender going to prison, measures of returns to prison will show an increase in recidivism even if there is no change in reoffending rates.

Standardisation for age is particularly important, as younger people tend to commit more crime (see Figure 5.8). To allow for comparisons between groups with different age profiles, or the same group over time, imprisonment and offence rates are standardised by age. Currently available recidivism rates are not. Consequently, age-related decline in offending and reoffending may distort comparisons in ways that are not obvious. For example, longer prison terms may reduce measured recidivism simply because offenders are older when they are released. This also means that comparisons between populations with different age profiles, such as Indigenous and non-Indigenous



Queenslanders, may be misleading. Finally, trends in measured recidivism will be influenced by changes in demography, which makes comparisons over time challenging.

Figure 5.8 Proportion of offenders by age and number of proceedings, Queensland, 2017-18



Source: ABS 2019g.

Proportional and absolute measures of recidivism can serve different purposes; it is important to consider both. The proportion of offenders who reoffend is an indicator of the justice system's ability to rehabilitate offenders. For example, if two groups of offenders with different characteristics receive different treatments, different rates of reoffending may indicate different program benefits.

In contrast, the number of reoffenders (or reoffences) is more useful for measuring total social costs. Where possible, the number of reoffenders should be adjusted for population when comparing different groups (for example, Indigenous and non-Indigenous) or changes over time.

Whatever measure of recidivism is used, it is important to consider both rates and absolute numbers. Viewing them in isolation may present a misleading or incomplete picture, as demonstrated above by changes in the numbers of offenders proceeded against more than once.

While comparisons can be made between Australian states based on nationally reported metrics, many measures of recidivism internationally and in policy research cannot be usefully compared. International comparisons of recidivism are largely invalid due to inconsistent measures, opaque methodology and, in some cases, outdated data (Fazel & Wolf 2015, p. 6).

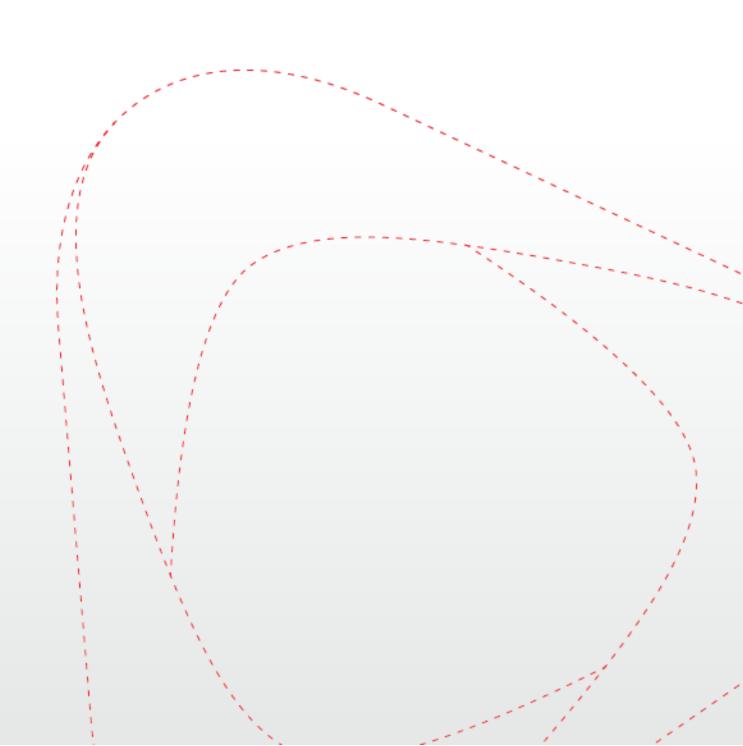
## 5.3 Conclusion

Currently available measures indicate that recidivism in Queensland is higher than the national average and is increasing. Those measures indicate that Indigenous individuals and males reoffend at higher rates. However, available measures have significant shortcomings—they do not account for lifetime reoffending per offender, nor measure the time delay between offences, control for the influence of age, reflect the relative severity of crimes or identify which types of offenders reoffend at greater rates.

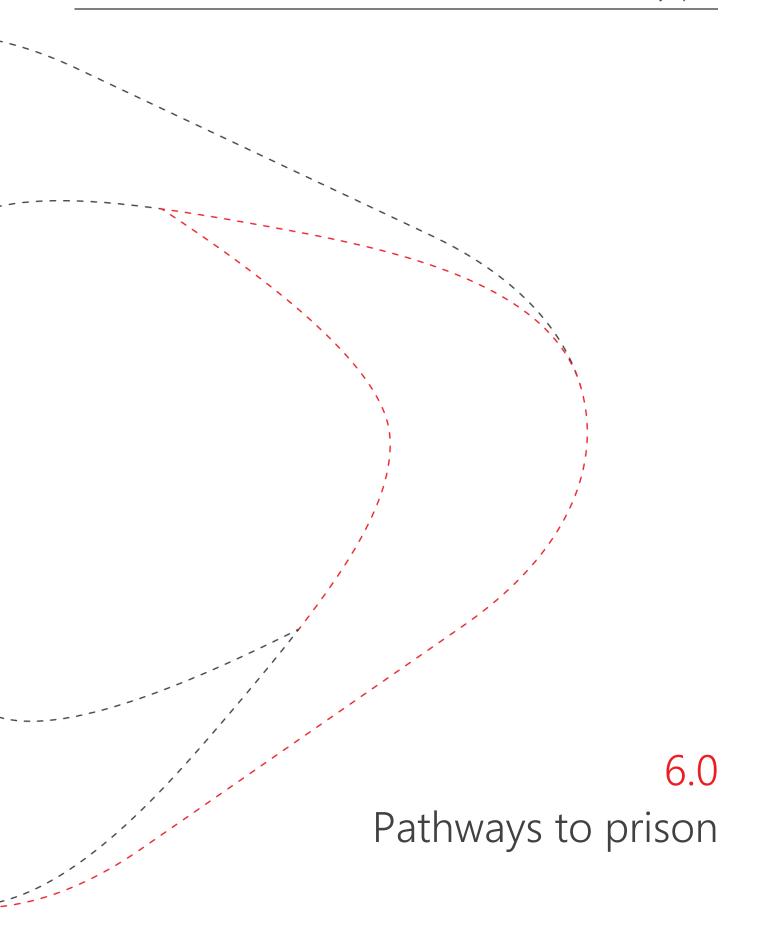
These shortcomings have three important implications. First, no single measure can be reliably used as a metric of recidivism. Second, even taken together, available measures may paint an incomplete or misleading picture of the current efficacy of the criminal justice system. Third, no available measure exists which can be used to assess the specific impact of a specific policy or program.

A new metric to measure recidivism that overcomes those inadequacies is desirable. Though such a metric would require careful consideration and a potential restructuring of reporting arrangements, the metric is necessary to fully evaluate the health of the justice system, the effectiveness of specific programs or policies and the cost of recidivism to the community, and to provide relevant incentives to service providers. A measure is most likely to be an accurate representation if developed for a specific purpose (for example, to evaluate specific programs). Measures should be developed in consultation with experts, statisticians and stakeholders in the criminal justice field.











This chapter seeks to outline the different offending pathways that led people to prison.

### Key points

- There is significant variation among both people who go to prison and people who commit crime.

  There are also large differences in the impact these individuals have on police resources, courts and corrections
- Exposure to risk factors increases chances of offending and imprisonment. Risk factors arise from
  many sources, including birth related events, mental health, personal relationships and substance use.
  Queensland research shows that both offenders and prisoners are likely to have had mental health
  issues and/or a history of child neglect. For male Indigenous prisoners, over 50 per cent had been
  subject to a child protection order and/or had been hospitalised for a mental health disorder. For
  female Indigenous prisoners this number is over 75 per cent.
- The Commission has undertaken an analysis of a cohort of people born in 1990 to understand their offending and imprisonment histories. This analysis suggests offenders fall into two broad groups—those who offend infrequently, and those who have chronic offending patterns.
- Consistent with other Queensland research, the Commission's analysis suggests that a small number of chronic offenders impose large costs on the criminal justice system:
  - Chronic offenders made up 22 per cent of offenders, but 88.3 per cent of all people who had been to prison and 93.5 per cent of prison costs (as measured by prisoner-days).
  - Chronic offenders begin interacting with police at a much younger age and have a persistently higher rate of contact.
  - Of chronic offenders, 70.5 per cent committed only low or medium harm offences. That group made up 41.4 per cent of all offenders who had been to prison and accounted for 30.2 per cent of all prisoner-days.
  - Chronic offenders who commit the most serious crimes represent only 2.7 per cent of all offenders but contributed 41.8 per cent of all prisoner-days.
- Indigenous offenders were much more likely to be chronic offenders. Indigenous men make up just 2.4 per cent of the cohort, but 7.6 per cent of all offenders, and 26.4 per cent of chronic high harm offenders. Indigenous overrepresentation is greatest in respect of time spent in prison.
- Indigenous people from remote and regional areas have higher levels of convictions for 'more serious' offending (such as serious assault) and spend more time in prison.
- Women have fewer police contacts than men, offend less frequently, tend to commit lower harm offences and go to prison less often.



# 6.1 Introduction

Every prisoner in Queensland has a unique personal history and set of circumstances that led them to be incarcerated. Between any two individuals there is significant variation in the nature and frequency of their offending and the events and risk factors that have influenced them.

This chapter aims to understand how individuals end up offending and in prison. It examines research and presents data on the offending pathways for Queensland prisoners and offenders, and the risk factors that may start them on these pathways.

The chapter presents data and analysis from a range of academic sources to:

- assess the risk factors that increase the probability that individuals will engage in offending behaviour
- examine the costs that offenders impose on the criminal justice system.

The chapter also presents research conducted by the Commission. This research examines a cohort of offenders born in 1990, using data<sup>28</sup> from youth justice, police, courts and corrections. This data has allowed the Commission to analyse the offending histories of individuals to determine whether there are patterns in their pathways to prison. This pathway approach is consistent with a growing body of research which examines criminal offending in a life-course context.

# 6.2 Risk factors along the pathway to prison

Life-course criminology is not a settled field of study—some researchers focus on the influence of environmental and external factors in shaping lifetime criminal behaviour (Moffitt 1993) while others contend that observed offending behaviours are due to an underlying propensity to offend established very early in life (Gottfredson & Hirschi 1990).

This section presents a non-exhaustive summary of empirical studies establishing links between a risk factor and subsequent offending behaviour. Figure 6.1 provides an illustration of the timing of some risk factors, alongside significant milestones in early life and the average ages of criminal justice contacts for individuals born in 1990 who eventually went to prison.

### Pre-birth and birth related factors

- Fetal Alcohol Spectrum Disorders ('FASD'), caused by prenatal exposure to alcohol, can involve lifelong physical and neurodevelopmental impairments (Bonello et al. 2014) and has been connected with offending and imprisonment outcomes. A more detailed discussion of FASD is found in Chapter 10.
- A review in Rain (2013) found overwhelming evidence that prenatal exposure to alcohol, illicit drugs or nicotine can impair cognitive development, which heightens the risk of offending in later life (Streissguth et al. 2004; Tibbetts & Rivera 2015).
- *In utero* nutrient deprivation can have a similar impact malnutrition in pregnant mothers was identified as a risk factor in the development of future criminality (Liu & Rain 2006; Rain 2013).
- Birth complications including the displacement of the placenta away from uterus (*abruptio placentae*), oxygen deprivation of fetus (*anoxia*), fetal distress, low birth weight, and poor general infant health<sup>29</sup> have been linked to later offending (Tibbetts & Rivera 2015). These complications can interact with social and developmental factors in the first years of life and can affect future offending (Beaver 2009; Piquero & Tibbetts 1999; Rain 2013; Tibbetts 2014).

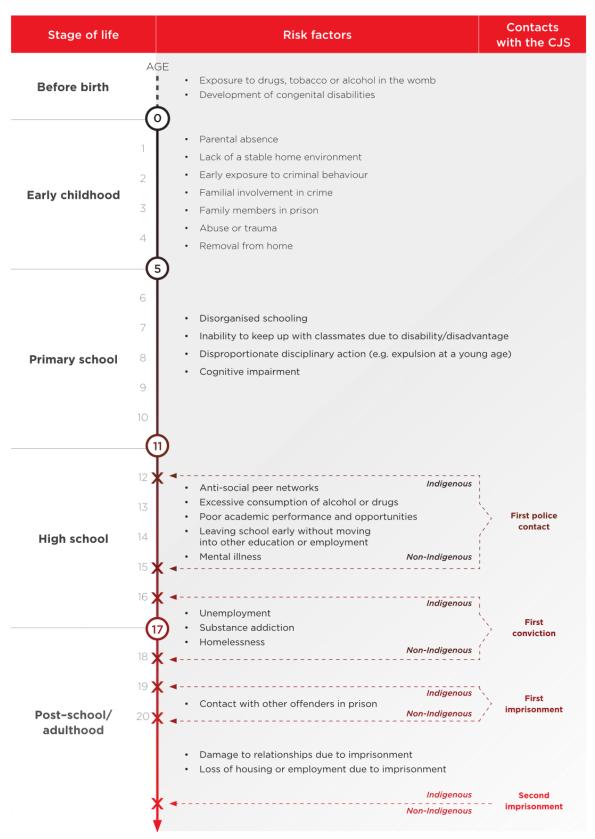
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<sup>&</sup>lt;sup>28</sup> Data was provided by the Queensland Police Service, the Department of Justice and Attorney-General, Queensland Corrective Services and the Queensland Government Statisticians Office.

<sup>&</sup>lt;sup>29</sup> As indicated by APGAR scores, a scoring system widely used for assessing health of newborns.



Figure 6.1 Occurrence of risk factors, stages of life and criminal justice system (CJS) contacts for prisoners born in 1990





#### Child maltreatment and involvement with child protection

- Victims of childhood maltreatment are at increased risk of subsequent youth justice involvement (Baskin & Sommers 2010; Bright & Johnson-Reid 2008; Widom, et al. 2006). Studies in Queensland (Stewart et al. 2015, see below) and South Australia (Malvaso et al. 2017) found that the strongest predictors of a criminal conviction in adolescence or young adulthood are recurrent, prolonged and sustained abuse, and placement in out-of-home care.
- According to research by the Australian Institute of Health and Welfare (AIHW), 47.7 per cent of those under youth justice supervision also received child protection services (AIHW 2018e, p. 6). Those under youth justice supervision were 9 times as likely to have received child protection services than those without youth justice involvement. A quarter of those in out-of-home care had been subject to youth justice supervision, 16 times the rate of the general population (AIHW 2018f, p. 16).

#### Mental health

Mental health is also a strong risk factor for future offending in adults. There is emerging evidence that adult-onset offending may be directly associated with adult-onset mental health problems, particularly schizophrenia and bipolar disorders (Elander et al. 2000; Zara & Farrington 2010, 2013).

#### **Substance abuse**

- Early consumption of alcohol or drugs can impair brain development in teenage years and lead to both higher immediate and lifelong risks of crime. Thornberry (2005) showed that young people with drug and alcohol problems are the most likely to be unsuccessful at transitioning to stable adult roles.
- While smoking and illicit drug use is in decline among young Australians, risky alcohol consumption remains high (AIHW 2018b). One study found 'young people under youth justice supervision were 30 times as likely as the young Australian population to receive an alcohol and other drug treatment service', and '50 times as likely to be treated for amphetamines' (AIHW 2018e, p. vii). Similarly, young people receiving these treatments were 30 times as likely to be under youth justice supervision as the general population (AIHW 2018e, p. iiv).
- Alcohol-fuelled and drug-induced crimes are often committed by young people (Miller et al. 2012) but studies
  on adult offending have identified the connection between late-onset crime and substance dependence
  (Elander et al. 2000; Pulkkinen et al. 2009; Zara & Farrington 2010).

#### Relationships with parents, partners and peers

- Children of parents who engage in criminal activity are at increased risk of offending themselves (Beaver 2013; Connolly et al. 2018; Farrington et al. 2009; Nijhof et al. 2009). This effect is stronger when both parents offend, stronger for the mother than the father, and stronger for violent offending than non-violent offending (Laurens et al. 2017).
- For adolescents who are already delinquent, research suggests that joining with delinquent peers further exacerbates criminal behaviour (Thornberry 2005). It may also increase the likelihood of serious group offending and risk of apprehension and conviction (Tillyer & Tillyer 2014).
- Weak adult intimate-partner bonds have been shown to increase people's risks of committing crime (Kivivuori & Linderborg 2010; Mata & van Dulmen 2011). These studies provide support to the view that family ties and strong social connections serve as protective factors that steer people away from criminal offending and reoffending (Laub & Sampson 2003).

It is important to note that factors identified above do not occur in isolation, and often lead to or reinforce one another. For example, substance abuse is connected with attachment to delinquent peers, which in turn is known to increase the individual risk of delinquency (Kirk & Laub 2010; Watts & McNulty 2015). Many of these risk factors are also intergenerational—for example, a person with parents engaged in criminal behaviour is more likely to engage in crime themselves, increasing the risk of their children offending.



# 6.3 Offending, child protection and mental health

There is a strong link between traumatic childhood events, mental health problems and offending. Using linked administrative data on Queenslanders born in 1990, the Griffith University Criminology Institute was able to determine whether an offender had previously been in the custody of child protection or had been admitted to hospital for a mental health episode. The Institute found a large proportion of prisoners and offenders also had a mental health hospitalisation, child protection system contact, or both (Figure 6.2).

non-Indigenous Mal Offenders Indigenous Female non-Indigenous Indigenous non-Indigenous Male risoners Indigenous non-Indigenous Indigenous 30% 80% 10% 20% 40% 50% 60% 70% ■ Child protection Child protection and mental health ■ Mental health

Figure 6.2 Overlap between courts, child protection and mental health for offenders and prisoners

Source: Stewart 2019.

The overlap between offending, child protection and prisoners is larger for prisoners than for offenders generally, larger for Aboriginal and Torres strait islander people than non-Indigenous people and larger for women than men. It is most severe for Indigenous women—three-quarters of Indigenous female prisoners have had a mental health episode, been in child protection, or both.

Offenders are more likely to have contact with child protection or mental health services, and people with a child protection history or mental health hospitalisation are more likely to offend.

While only 23 per cent of people without a mental illness hospitalisation offended, 52 per cent of people with a mental illness hospitalisation had. Offenders with a hospitalisation offended more frequently than those without and 16 per cent had been sentenced to imprisonment, compared to 5 per cent of those without. For offenders who had been hospitalised, 70 per cent were hospitalised before their first court appearance, and 80 per cent were hospitalised before their first prison sentence (Stewart 2019).

Similarly, 52 per cent of people who had a recorded history of childhood maltreatment had offended, compared to 23 per cent of people without. On average, offenders with prior child protection contact committed 52 per cent more offences than those without and were 6.6 times more likely to be sentenced to prison.

This research emphasises that offending is strongly connected to a history of child maltreatment and mental health admissions. This connection is even stronger for prisoners, who on average exhibit more harmful or more frequent offending than offenders generally (Stewart 2019).



# 6.4 Characteristics of Queensland prisoners

Queensland prisoners are predominantly male and non-Indigenous.<sup>30</sup> However, Aboriginal and Torres Strait Islander people comprise a much greater proportion of Queensland prisoners than Queenslanders generally (Table 6.1).

The median age of all prisoners was 33.4, younger than the state-wide median of 36.4. On average, male prisoners were 1.9 years older than female prisoners, and Indigenous prisoners were 3.7 years younger than their non-Indigenous counterparts.

Current prisoners began interacting with police at a young age and continued to do so frequently. A quarter of all prisoners had formal contact with police by age 14, half by 16, and three quarters by 22. While male and female prisoners have their first police contact at similar ages, Indigenous people begin interacting with police at 15.7 years old, 5.5 years younger (on average) than their non-Indigenous counterparts and 4 in 5 Indigenous prisoners had their first police contact before turning 20. Prisoners formally interacted with Queensland Police (QPS) 3.8 times (on average) every year after their first contact, 31 with female prisoners interacting more frequently on average than men, and Indigenous prisoners more frequently than non-Indigenous prisoners.

A quarter of current prisoners had their first conviction by age 18, and half had their first conviction by 22. As with ages of police contacts, females were first convicted slightly younger (1.1 years on average) than males, and Indigenous prisoners were first convicted 4.5 years younger (on average) than non-Indigenous prisoners.

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<sup>&</sup>lt;sup>30</sup> Supplementary tables can be found in Appendix D.

<sup>&</sup>lt;sup>31</sup> This average includes only those for whom it had been at least one year since their first police contact.



Compared to the general population, prisoners are less likely to have finished school, less likely to have been employed and more likely to have been homeless before entering prison. They are more likely to have high or very high psychological distress, and more likely to be taking mental health medication. They consume tobacco and illicit drugs, particularly methamphetamines, at higher rates (Table 6.1).

Table 6.1 Characteristics of Queensland prisoners compared to the general population

Characteristic	Prisoners (%)	Population (%)
Male	90.5	49.4
Aboriginal or Torres Strait Islander	31.1	4.6
Median age (years)	33.4	36.4
Foreign born	12.4	28.9
Completed Year 12	18.8	61.7
Not completed Year 10	32.5	19.0
Employed	25.8ª	61.6
Unemployment rate	51.9ª	6.2
Sleeping rough or in temporary housing	33.3ª	0.5
High or very high psychological distress	32.1ª	11.9 <sup>b</sup>
Taking mental health related medication	26.3 <sup>b</sup>	18.2
Very good/excellent self-reported health	20.8ª	55.0
Disability limiting activity, employment or education	35.0	18.3
Daily smokers	62.1ª	12.2
Taken any illicit drug in the past year	61.7	16.8
Used methamphetamines in the past year	38.3ª	1.5
Used marijuana in the past year	36.3ª	10.3

a Prior to entry to prison.

Sources: ABS 2008, 2016b, 2016a, 2018k, 2018m, 2018g, 2018h, 2018e; AIHW 2018d, 2018c, 2018b, 2019c.

It is important to distinguish between *prisoners* and *people who have been to prison*. The average prisoner (based on the prison 'stock' at a point in time) will have a more serious and lengthy criminal history than the average person who has ever been to prison. This is because more serious or frequent offenders will receive more or longer imprisonment terms. To obtain a complete picture of the histories of people that end up in prison it is better to study a group of offenders over time than to retrospectively examine the histories of those that end up in prison.

b Based on national data.



# 6.5 Cohort analysis

In addition to the above research, the Commission has conducted its own analysis based on data provided by the Queensland Police Service, the Department of Justice and Attorney-General, Queensland Corrective Services and the Queensland Government Statisticians Office. This data contains all relevant records for individuals born in the year 1990. Using the single person identifier ('SPI') associated with each entry, records for each individual were linked across their interactions with those criminal justice agencies. The following analysis is based on that linked birth cohort data.

A natural limitation of this approach is that it only describes offending up to an age of 27–28. However, available data for older cohorts is more limited.<sup>32</sup> Analysis of similarly aged cohorts is common in academic criminology (see for example, Allard et al. 2014).

There are two further limitations associated with the use of SPIs. First is that not all offenders are assigned SPIs and, sometimes offenders can be assigned more than one – the exact effect of this on the analysis is unknown. Second, this analysis cannot account for migration in and out of Queensland or other sources of sample attrition (such as death).

To understand the different types of offenders, individuals were grouped based on their number of convictions, and the 'harmfulness' of their offending. The harm associated with an offence was categorised as high, medium or low (Table 6.2). This categorisation was based on offence rankings in the ABS National Offence Index ('NOI'), which orders offences based on their 'perceived seriousness' (ABS 2018j).

Table 6.2 Disaggregation of low, medium and high harm offences

Level of harm	NOI range	Examples
High	≤ 29	All homicide and related offences, all sexual assault and related offences, dealing or trafficking illicit drugs, robbery (aggravated), serious assault (either resulting in injury or not), abduction or kidnapping.
Medium	30 – 88	Common assault, robbery (non-aggravated), all theft and related offences, all fraud and deception related offences
Low	≥ 89	All public order offences, all traffic and vehicle regulatory offences, cruelty to animals, possess or use illicit drugs, riot and affray, trespass

Source: ABS 2018j.

Using this approach, six types of offenders were defined based on whether their offending is:

- low frequency (L) or chronic (C), and
- low harm (L), medium harm (M) or high harm (H).

More detail on each category of offender type is provided in (Table 6.3).

<sup>&</sup>lt;sup>32</sup> Court records available to the Commission do not reliably extend to before 2002. Of the birth cohort data available to us, the 1990 cohort was the oldest that was able to capture juvenile offending from ages 14 onwards.



Table 6.3 Definitions of offender types, offenders and proportions of prisoners

Туре	Offences by age 28	Offenders (%)	Offenders who have been to prison (%)	Prisoner-days (%)
LL	Fewer than 5 low level offences. No medium or high level offences.	53.6	3.1	1.2
LM	Fewer than 5 low or medium level offences. No high level offences.	20.7	3.5	1.8
LH	Fewer than 5 total offences, with at least one high level offence.	3.8	5.1	3.4
CL	5 or more low or medium level offences. No high level offences.	15.5	41.4	30.2
СМ	5 or more total offences, with 1 high level offence.	3.7	22.3	21.5
СН	5 or more total offences, with more than 1 high level offence.	2.7	24.6	41.8

Note: Prisoner-days are the total number of days a person has spent in prison across their life. It includes all days in an adult correctional institution, including both as a sentenced prisoner and on remand.

Totals may not add to 100 due to rounding.

Source: QPC analysis of DJAG, QGSO and QCS unpublished data.

## Gender and indigeneity across offender types

Men were more likely to be convicted of an offence than women, and Aboriginal and Torres Strait Islander people were more likely to be convicted of an offence than non-Indigenous people.<sup>33</sup> These trends are more prominent as offending becomes more harmful or more chronic. This is clearest with Indigenous men, who make up 2.4 per cent of the Queensland population (of that age), but 26.4 per cent of chronic, high harm offenders (Figure 6.3).

There is a stronger relationship between indigeneity and offending than there is between gender and offending. While women tend to be less represented among higher harm and chronic offender types, for Indigenous women the opposite is true. <sup>34</sup>

<sup>&</sup>lt;sup>33</sup> Except where statistics are drawn from external sources, in this chapter individuals whose indigeneity cannot be ascertained are classed as 'non-Indigenous.' This is to maintain consistency with QCS's recording of Indigenous status. The method for classifying indigeneity (and other demographic factors) is outlined in Appendix D.

<sup>&</sup>lt;sup>34</sup> A small proportion could not be reliably assigned a gender and have been excluded from these comparisons.



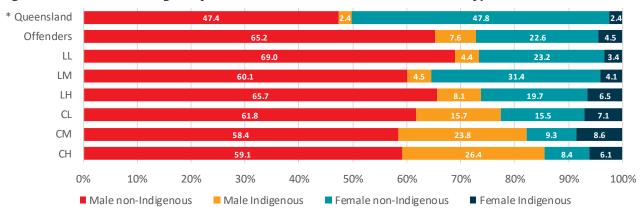


Figure 6.3 Gender and indigeneity for Queenslanders, offenders and offender types

Note: Queensland population proportion are based on 25-29 year-olds. Source: DJAG, unpublished data; \*ABS 2018q.

## Low frequency offenders

In total, 17,680 individuals in the 1990 birth cohort were classified as low frequency offenders. They collectively comprise 78 per cent of all offenders, but only 11.7 per cent of individuals who have been to prison, and 6.5 per cent of prisoners-days.

Table 6.4 states key outcomes for individuals who committed offences at a low frequency. It shows that:

- Most offenders are low frequency, low harm.
- Low frequency offenders had similar ages of first police contact and first conviction.
- Few low frequency offenders went to prison. Of those that did, they did so for the first time at similar ages.
- Low frequency offenders typically went to prison only once.
- More serious offenders were more likely to go to prison and spent a greater length of time in prison if they did.

There are large differences in the types of offending between each group of offenders.

Low frequency low harm offenders mostly committed traffic, public order, illicit drug and justice procedure offences. Few offences resulted in imprisonment; of those that did, more than half were breaches of orders or drug possession.

Almost all offences committed by these offenders were traffic and vehicle regulatory offences (57.9 per cent), public order offences (21.1 per cent), illicit drug offences (9.2 per cent) and offences against justice (8.7 per cent). A large portion of all traffic offences were 'driver licence offences' (24.7 per cent of all offences) and a further third were drink or drug driving offences (17.7 per cent of all offences). Of the offences that resulted in a prison sentence, 38.5 per cent were for drug possession, 23.1 per cent related to a breach of a violence order, 15.4 per cent related to breach of bail, and 7.7 per cent were driver license offences.

Low frequency medium harm offenders typically committed theft, negligent acts, and traffic and vehicle regulatory offences. Most offences leading to prison concerned theft, common assault, burglary or negligent driving.

Theft and related offences comprised 26.9 per cent of all offences committed by this group (with an additional 5.2 per cent being fraud related offences), dangerous and negligent acts comprised 23.0 per cent and traffic and vehicle regulatory offences comprised 17.6 per cent. Of negligent acts, almost all relate to either driving under the influence or dangerous driving. Though they only comprise 3.2 per cent of this group's total offences, common assault is the cause of 16.2 per cent of prison sentences in this group. Almost half of their prison sentences result from property crimes—theft, fraud and burglary related offences comprise 21.6, 16.2 and 6.1 per cent of all convictions leading to prison, respectively.



Low frequency, high harm offenders were characterised by single instances of assault, high level drug offences and robbery.

For low frequency, high harm offenders, assaults form 31.6 per cent of all offending and 43.3 per cent of all prison sentences. This is likely driven by the harmfulness of these offences—serious assaults causing injury making up 25.3 per cent of all offences and 33.3 per cent of offending leading to prison, alone. Illicit drug offences made up 17.9 per cent of all offences and 26.7 per cent of all offences leading to prison. Of drug crime resulting in incarceration, all of it relates to dealing or trafficking in drugs. Robbery also drives imprisonment for this group, comprising 1.6 per cent of all offending, but 10 per cent of prison sentences.

Table 6.4 Outcomes for low frequency offenders born in 1990, Queensland

	Low harm		Medium harm		High harm	
	average	median	average	median	average	median
Number of individuals	12,146		4,681		853	
Age of first police contact	20.1	20	19.2	19	18.9	19
Age of first conviction	21.6	21	20.5	20	21.0	20
Number of police contacts	2.6	2	3.2	2	3.8	3
Number of low harm convictions	1.6	1	0.7	0	0.9	1
Number of mid harm convictions	0.0 <sup>a</sup>	O <sup>a</sup>	1.2	1	0.2	0
Number of high harm convictions	0.0ª	0 <sup>a</sup>	0.0 <sup>a</sup>	O <sup>a</sup>	1.2ª	1 <sup>a</sup>
Percentage ever imprisoned	0.33		0.96		7.79	
Of those who went to prison:						
age of first imprisonment	23.5	24	22.9	23	22.5	22
number of imprisonment terms	1.2	1	1.2	1	1.1	1
prison term length (days)	139.8	78	196.0	75	224.3	164

a By definition.

Source: QPC analysis of DJAG, unpublished data; QGSO, unpublished data; QCS, unpublished data.

### Chronic offenders

Collectively, chronic offenders made up 22.0 per cent of all offenders, but 88.3 per cent of all people who have ever been to prison and 93.5 per cent of all prisoner-days.

Table 6.5 shows that chronic offenders:

- began interacting with police and committing offences at a young age
- had high numbers of police contacts and convictions generally
- committed many low level offences, regardless of their overall harm level
- who went to prison, typically went more than once and spent several months in prison at a time.



Table 6.5 Outcomes for chronic offenders born in 1990. Queensland

	Low harm		Medium harm		High harm	
	average	median	average	median	average	median
Number of individuals	3,513		845		622	
Age of first police contact	16.5	17	15.4	15	15.2	15
Age of first conviction	18.8	18	17.9	18	17.9	18
Number of police contacts	17.8	12	23.2	16	27.5	19
Number of low harm convictions	7.6	6	9.3	7	9.6	8
Number of mid harm convictions	3.1	1	3.2	1	4.0	2
Number of high harm convictions	0.0a	O <sup>a</sup>	1.0ª	1 <sup>a</sup>	3.7	3
Percentage ever imprisoned	15.3		34.2		51.1	
Of those who went to prison:						
age of first imprisonment	23.2	23	22.6	23	21.4	21
number of imprisonment terms	2.4	2	2.4	2	3.4	2
prison term length (days)	110.7	74	152.7	114	211.7	124

a By definition.

Source: QPC analysis of DJAG, unpublished data; QGSO, unpublished data; QCS, unpublished data.

Figure 6.4 shows the distribution of certain offence types for the three kinds of chronic offenders.

Traffic and vehicle regulatory offences make up a large number of convictions for chronic offenders, but a relatively small proportion of prison offences.

These offences made up 27.7, 20.7 and 14.6 per cent of the convictions accrued by low, medium and high harm chronic offenders, respectively. However, of offences that led to prison, the equivalent rates were only 3.3, 3.4 and 2.3 per cent. Driver's licence offences constituted approximately 54 per cent of traffic offences, and 86 per cent of traffic offences leading to prison for the three chronic offender types.

Offences against justice made up a large proportion of offences committed by chronic offenders and a larger proportion of those that led to prison. Most offences against justice are breaches of violence orders or breaches of bail.

Offences against justice procedures make up 17.9 per cent of the offending of all chronic offending groups. For low, medium and high harm types, these offences comprise 22.6, 28.9, and 19.3 per cent of offences leading to prison, respectively. However, in absolute terms, the average high harm offender committed more offences against justice procedures leading to prison than the average medium harm offender, and the average medium harm offender more than the average low harm offender. Of offences against justice leading to prison 36 per cent relate to breaches of violence orders, and a further 45–52 per cent relate to breaches of bail.

Burglary, theft and fraud related offences made up around 22 per cent of all chronic offending. However, these translated to a larger proportion of prison offences for low harm offenders.

Twenty per cent of all chronic low harm offending were burglary, theft or fraud related, however, this led to 53.1 per cent of prison sentences. These offences comprise a similar proportion of medium and high harm groups and resulted in 31 and 19.8 per cent of their prison sentences, respectively. As such, these property crimes comprised a substantial cause of imprisonment for chronic offender groups.



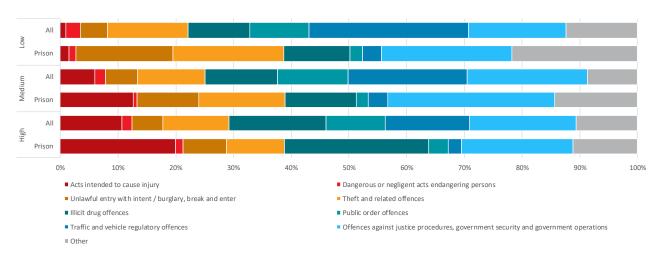


Figure 6.4 Offences and offences leading to prison for chronic offender groups

Source: QPC analysis of DJAG, unpublished data; QGSO, unpublished data; QCS, unpublished data.

Higher harm chronic offenders were more likely to commit illicit drug offences and more likely to go to prison for them. This is driven by an increased likelihood of being involved in dealing or trafficking.

For low harm offenders, illicit drug offences made up 10.7 per cent of all offences and 11.4 per cent of all offences leading to prison. The majority of these relate to drug possession. These rates are slightly higher for medium harm offenders. For high harm chronic offenders, however, 16.7 per cent of all their offences, and 25 per cent of the offences that led to prison, are illicit drug related. Unlike low and medium harm offenders, for whom dealing and trafficking made up less than a quarter of drug offences, around half the drug offending of high harm offenders was supply oriented—47.5 per cent of drug offences, and 75.2 per cent of all drug offences leading to prison, are for dealing or trafficking illicit drugs.

Acts intended to cause injury made up a large portion of offences committed by chronic offenders, and strongly correlated with an offender's overall harm categorisation.

For low harm offenders, acts intended to cause injury constituted just 0.9 per cent of all offences, and 1.5 per cent of all offences leading to prison. For this group, all fell within the relatively less serious category of 'common assault.' For medium harm offenders, these rates rise to 6 per cent and 12.6 per cent respectively. Serious assault causing injury (the highest level of this category) alone constituted 4 per cent of all medium harm offender convictions, and 9.4 per cent of all offences resulting in imprisonment. For the highest harm category of chronic offenders, assaults comprised 10.7 per cent of all convictions and 19.9 per cent of all imprisonment sentences. Serious assault causing injury made up 15.1 per cent of all imprisonment offences alone for this group.



# 6.6 Burdens on the criminal justice system

Based on the offender types identified above, this section examines how different offender types imposed different burdens on police, courts and corrections. An accurate assessment of costs to CJS agencies is extremely complex, and this analysis should only be interpreted as a *relative* comparison between offender types, not as an assessment of the *absolute* burdens on the CJS.

### Police contacts

It is difficult to attribute the costs of police contacts with offenders, given the widely variant costs associated with any event. For example, there would be large differences in police resources spent arresting a murderer compared to arresting a thief. For this reason, it is not possible for the Commission to accurately assess police costs associated with different offenders. Instead, this section assesses the relative burden of offender groups by comparing the numbers of police contacts of each offender profile as offenders age. Given that high harm offences are likely to have larger average costs associated with each event, this is likely to underestimate the burden arising from the higher harm offending groups.

As shown in Figure 6.5, low frequency offenders had relatively few contacts over time, and those contacts were uniformly distributed across their adult lives. In contrast, chronic offenders had a much higher frequency of police contacts with contacts escalating from a young age. Chronic high harm offenders have the highest police contacts and contacts with police start much earlier than other groups, peaking at age 18.

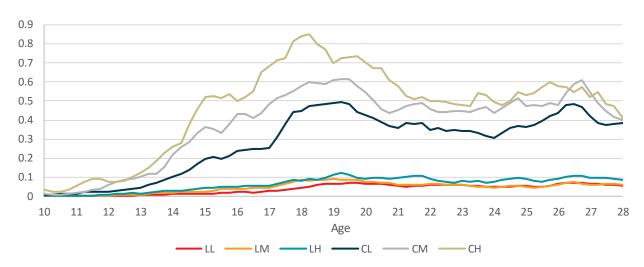


Figure 6.5 Average police contacts per offender per quarter, by offender type

Source: QPC analysis of DJAG, unpublished data; QGSO, unpublished data; QPS, unpublished data.

In absolute terms, low harm chronic offenders generated the largest proportion of police contacts over the offenders' observable lives (Figure 6.6), as they have a relatively high number of lifetime contacts and constitute the largest chronic group. From age 10 to age 28–29, chronic offenders generate a combined 68.6 per cent of police contacts, despite comprising just 22 per cent of all offenders.

Even with significant caveats associated with this simple measure, the conclusion is clear—chronic offenders, imposed the largest burden on police resources both on average and as a proportion of the total.



50% 40% 30% 20% 10% 0% 10 12 13 15 19 20 11 14 16 17 18 21 22 23 25 26 27 28 Age LM CL CM

Figure 6.6 Proportion of all police contacts per quarter, by offender type

Source: QPC analysis of DJAG, unpublished data; QGSO, unpublished data.

## Burden on the court systems

As with police costs, court and justice costs vary significantly for different offences and offending events. This section seeks to simply compare relative burdens of different offender profiles. For each offender type, the number of court finalisations in each court type (Supreme, District, Magistrates or Children's Magistrate) are multiplied by the costs per finalisation derived from Report on Government Services (SCRGSP 2019a). Because of simplifying assumptions in the derivation of these costs, they should be considered relative costs.

As with police costs, chronic high harm offenders imposed by far the greatest per offender costs on the court system (Figure 6.7). They committed high level, high frequency offending and are consequently most likely to repeatedly appear in the more expensive higher courts. However, even low harm, chronic offenders imposed a greater average cost to courts than all low frequency types. All chronic groups imposed consistently higher average costs than their non-chronic equivalents.

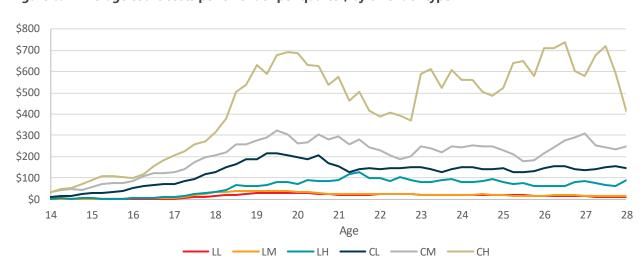


Figure 6.7 Average court costs per offender per quarter, by offender type

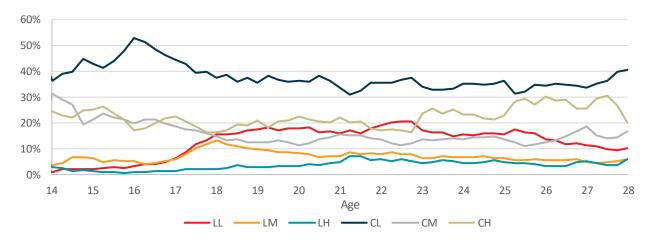
Source: QPC analysis of DJAG, unpublished data; SCRGSP 2019a.

In terms of a proportion of total court costs, low harm chronic offenders imposed the most burden on the system at any given point in time (Figure 6.8). As with police, this resulted from them being the largest of the chronic



offender groups. In aggregate, chronic offenders accounted for 73.2 per cent of total estimated court costs, despite accounting for only 22 per cent of all offenders.

Figure 6.8 Proportion of total court costs per quarter, by offender type



Source: QPC analysis of DJAG, unpublished data; QGSO, unpublished data.

#### Prison costs

As with police and court costs, chronic offenders impose a disproportionate burden on the prison system (as measured in prisoner-days). Note that while prisoner-days are used to represent the proportional burden on the prison system, they do not capture the whole burden on corrective services as they do not include community corrections.

Chronic high harm offenders impose by far the largest per person prison costs. In contrast, low frequency low and medium harm offenders impose very low costs per offender over their lives (Figure 6.9).

Figure 6.9 Prisoner days per quarter, by offender type



Source: QPC analysis of DJAG, unpublished data; QGSO, unpublished data.

In terms of total burdens on the system, chronic offenders impose a disproportionate share of all prison costs — chronic offenders collectively comprise just over 22 per cent of all offenders, but 88.3 per cent of individuals who have been to prison, and 93.5 per cent of all prisoner-days (Figure 6.10). As offenders age, the proportion of the total burden each chronic type bear converge to around 30 per cent each.



100% 80% 60% 40% 20% 0% 17 18 19 20 21 22 23 24 25 26 27 28 Age -LM LH - CL -- CM

Figure 6.10 Proportion of the prisoner-days per quarter, by offender type

Source: QPC analysis of DJAG, unpublished data; QGSO, unpublished data; QCS, unpublished data.

## Overall impacts

Chronic offenders impose a disproportionate burden on the three major components of the CJS (Figure 6.11). This disparity grows as offenders progress through the system, likely because chronic offenders are more likely to have police contacts escalate to court appearances, and are more likely to go to prison following a court appearance. These findings are comparable to the results of research conducted by Griffith Criminology Institute (Box 6.1).

Offenders Police contacts Court costs Prisoner days 0% 10% 20% 30% 40% 50% 60% 70% 80% 90% 100% ■ Low frequency low harm ■ Low frequency medium harm ■ Low frequency high harm ■ Chronic high harm Chronic low harm ■ Chronic medium harm

Figure 6.11 Proportions of police contacts, court costs and prisoner-days attributable to offender types

Source: QPC analysis of DJAG, unpublished data; QGSO, unpublished data; QCS, unpublished data.



## Box 6.1 Griffith Criminology Institute trajectory costing

Griffith Criminology Institute has undertaken several analyses of similar administrative data (for example, Allard et al. 2014) that examine different lifetime offender profiles and attribute lifetime costs to the CJS. There are three major differences between the approaches in those studies and this chapter.

- In this chapter offender 'types' are explicitly defined (for example, fewer than five low harm offences, with no others). In the Griffith studies 'trajectory' membership is determined endogenously.
- The offender types defined in this chapter are defined independently of indigeneity. The analysis performed by Griffith University was applied to Indigenous and non-Indigenous offenders separately.
- The Griffith studies do not use a 'harmfulness' distinction between offences. They do not include traffic and vehicle regulatory offences in offence counts, but do include formal cautions, youth justice conferences, youth court appearances and adult court appearances.

Using a life-course approach, researchers examined the offending records of a 1983–84 Queensland birth cohort between the ages 10 and 31. They found that those individuals typically fall into one of three categories:

- non-offenders and low rate offenders, who have either no offences or a low number of offences
- adolescent onset moderate offenders, who begin offending at around 15, have an average of 25 offences by age 31, and whose offending peaks from ages 20 to 25
- early onset chronic offenders, who begin offending at age 13, have an average of 108 offences by age 31 and have a peak offending period between the age of 20 and 21.

As with the Commission's analysis, the vast majority of individuals were categorised as low rate or non-offenders (82.8 per cent). In contrast, a small group of chronic offenders (2.9 per cent) are responsible for a disproportionate amount of all crime.

Conclusions of those studies in respect of indigeneity also align with the results in this chapter— Aboriginal and Torres Strait Islander people are more likely to fall within moderate and chronic offender groups than non-Indigenous people. Further, the average moderate or chronic Indigenous offender committed more offences than their non-Indigenous counterparts.

Griffith researches (Allard et al, unpublished) then estimated lifetime costs to the CJS of each offender type. As opposed to the relatively simplistic approach of this chapter, Allard et al used detailed unit costs per offence based on usage of police resources (including full-time equivalent staff costs), the proportion going to trial, average trial lengths, characteristics of the trials, costs associated with community orders, costs of conferencing and costs of youth detention.

Allard et al found that chronic offender trajectory groups account for a disproportionate amount of direct criminal justice system expenditure. These groups comprised only 2.9 per cent of the cohort but accounted for 57.12 per cent of total expenditure. By age 31, the average Indigenous chronic offender cost \$381,547 while the average non-Indigenous chronic offender cost \$75,244. Just over 10 per cent of the cohort were in the adolescent onset groups, but they accounted for one-third of expenditure. On average, each Indigenous adolescent onset offender cost \$58,113 while each non-Indigenous adolescent onset offender cost \$9,227 by the time they turned 31. Over 80 per cent of the cohort were in the low rate and non-offending groups, and they accounted for 5.1 per cent of total costs.

These results generally accord with the Commission's own conclusion that chronic offenders impose a disproportionate burden on the criminal justice system. The differences in scale are likely due to differences in offender definitions, and increased specificity associated with the Griffith studies.



# 6.7 Offender characteristics by demographic

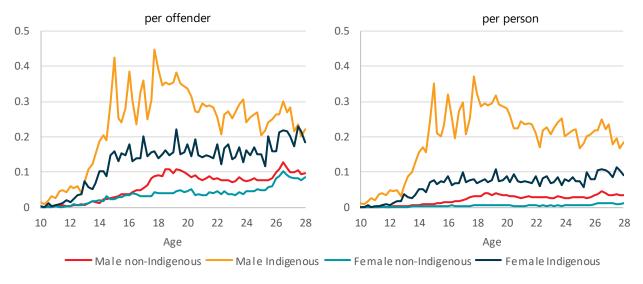
As discussed in section 6.5 above, Aboriginal and Torres Strait Islander people, particularly males, were overrepresented in more chronic and more serious offending groups. A limitation of the offender typology used above is that some groups are too small to be reasonably broken down across gender and indigeneity simultaneously. This section instead applies a similar approach to that performed on offender types but across gender, indigeneity and remoteness.

#### Police contacts

Male offenders had higher rates of contact with police than women, and Aboriginal and Torres Strait Islander offenders had higher rates of police contact than non-Indigenous offenders. The average Indigenous offender also experienced a much higher rate of contact while under the age of 18.

This disparity between these groups is larger still when considered on a per person (rather than a per offender) basis (Figure 6.12). The average rate of police contact with Indigenous men between the ages of 10 and 28 was 8.9 times higher than for non-Indigenous men. Though women have lower rates of police contact in general, the Indigenous disparity is even wider—Aboriginal and Torres Strait Islander women had 14 times more frequent contact with police than non-Indigenous women.

Figure 6.12 Average police contacts per quarter, by gender and indigeneity for individuals born in 1990



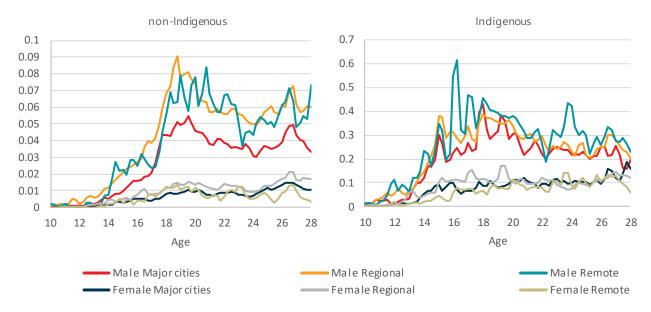
Note: 'per person' refers to the relevant Queensland population.

Source: ABS 2018g; QPC analysis of DJAG, unpublished data; QGSO, unpublished data; QPS, unpublished data.

For both Indigenous and non-Indigenous males, remote and regional offenders interacted with police more frequently, on average, than offenders in major cities (Figure 6.13). Non-Indigenous women in regional areas appear to have higher rates of police contact than those in major cities or remote area, while Indigenous women have similar levels of contact independent of remoteness.



Figure 6.13 Average police contacts per quarter, by gender, indigeneity and remoteness for individuals born in 1990

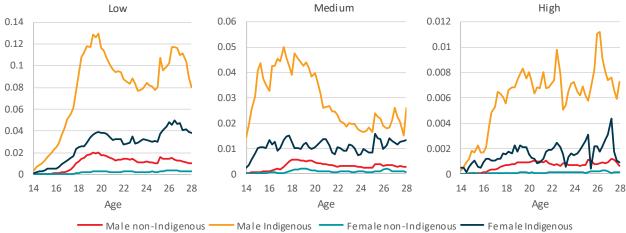


Source: ABS 2018q; QPC analysis of DJAG, unpublished data; QGSO, unpublished data; QPS, unpublished data.

# Offending profiles

As with police contacts, Indigenous offenders were convicted of offences more frequently than their non-Indigenous counterparts. This disparity is true for low, medium and high level offending (Figure 6.14).

Figure 6.14 Average convictions over time for persons born in 1990, by gender and indigeneity



Source: ABS 2018g; DJAG, unpublished data; QPS, unpublished data.



Figure 6.15 outlines the differences in the kinds of offences committed by different demographic groups.

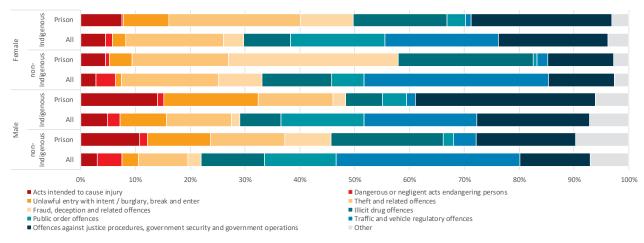
#### Differences in male and female offending

The main differences between male and female offending were that:

- Assaults made up a slightly greater proportion of male offending (and offences leading to prison) than female
  offending. However, they made up a much larger proportion of the offences leading to prison for males than
  females. Male assaults more often fell within the category of serious assault.
- Theft and related offences made up a much larger proportion of all offending and offending leading to prison for females compared to males. Similarly, a larger share of female offending was comprised of fraud and related offences.
- A much greater proportion of imprisonments for women were related to drug crime.
- A greater proportion of male offending related to public order offences than female offending.

Note that for all offences, the rate of crime is lower for women than men. For example, while a greater proportion of female imprisonments relate to drug crime, males still go to prison more frequently for drug crimes.

Figure 6.15 Proportions of offences, and offences leading to prison, by gender and indigeneity, for persons born in 1990



Source: QPC analysis of DJAG, unpublished data; QGSO, unpublished data; QPS, unpublished data.

### Differences between Indigenous and non-Indigenous offending

The principle differences between Indigenous and non-Indigenous offending are:

- Assaults comprised a larger proportion of all offending, and a much larger proportion of offending leading to
  prison for Aboriginal and Torres Strait Islander people. While common assaults made up a similar proportion of
  total offending for both groups, the disparity is driven by serious assaults these made up about 1.5 times the
  proportion of Indigenous offending as they did non-Indigenous offending.
- Public order offences made up a much larger proportion of Indigenous offending than non-Indigenous offending. This disparity persisted for offences leading to prison, but to a lesser degree.
- Non-Indigenous offending was more likely to be traffic and vehicle regulatory offending. For both groups, these offences translated to a small portion of offences leading to prison.
- A larger proportion of non-Indigenous offending was fraud related.



- Illicit drug offences were a much larger proportion of the offending of non-Indigenous people.
- Offences against justice procedures made up 1.6 times the proportion of convictions leading to imprisonment for Indigenous people. Most of these offences are either breaches of bail (1.9 times the proportion for Indigenous people) and breaches of violence orders (around 2 times the proportion for Indigenous people).

As with the comparison between males and females for every category of offence, the rates of convictions are much higher on a population basis for Indigenous people than non-Indigenous people.

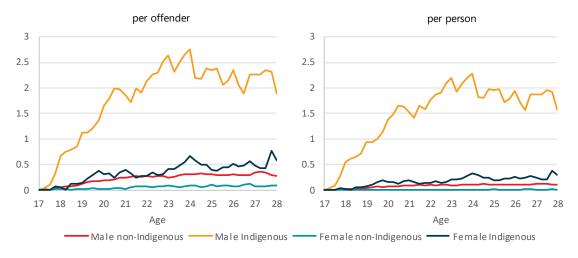
#### The effect of remoteness

Remote and regional Indigenous people were convicted of more offences on average. The disparity is greatest for high harm crime—remote Indigenous people were convicted of approximately 1.4 times as many low level offences as their metropolitan counterparts, but 2.2 times as many high harm crimes.<sup>35</sup>

## Time in prison

The average Indigenous man spent a much greater proportion of their life between 18 and 28 years in prison than any other group. While men spend more time in prison than women, time in prison correlates more strongly with indigeneity than gender—Indigenous women spend a greater proportion of time in prison than non-Indigenous men over the entire observed age range (Figure 6.16).

Figure 6.16 Prisoner-days per quarter, by gender and indigeneity, for persons born in 1990



Source: ABS 2018g; QPC analysis of DJAG, unpublished data; QGSO, unpublished data; QPS, unpublished data.

Consistent with the fact that regional and remote Indigenous people tend to commit more high-harm crime than their metropolitan counterparts, the lifetime imprisonment rates for the former groups are higher. While the same is true for non-Indigenous persons, the number of non-Indigenous remote prisoners is too small to make any meaningful inferences.<sup>36</sup>

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<sup>&</sup>lt;sup>35</sup> Offence type profiles are not further disaggregated by remoteness due to the small sample sizes of some groups.

<sup>&</sup>lt;sup>36</sup> These are not disaggregated based on gender as the number of prisoners would be too small.



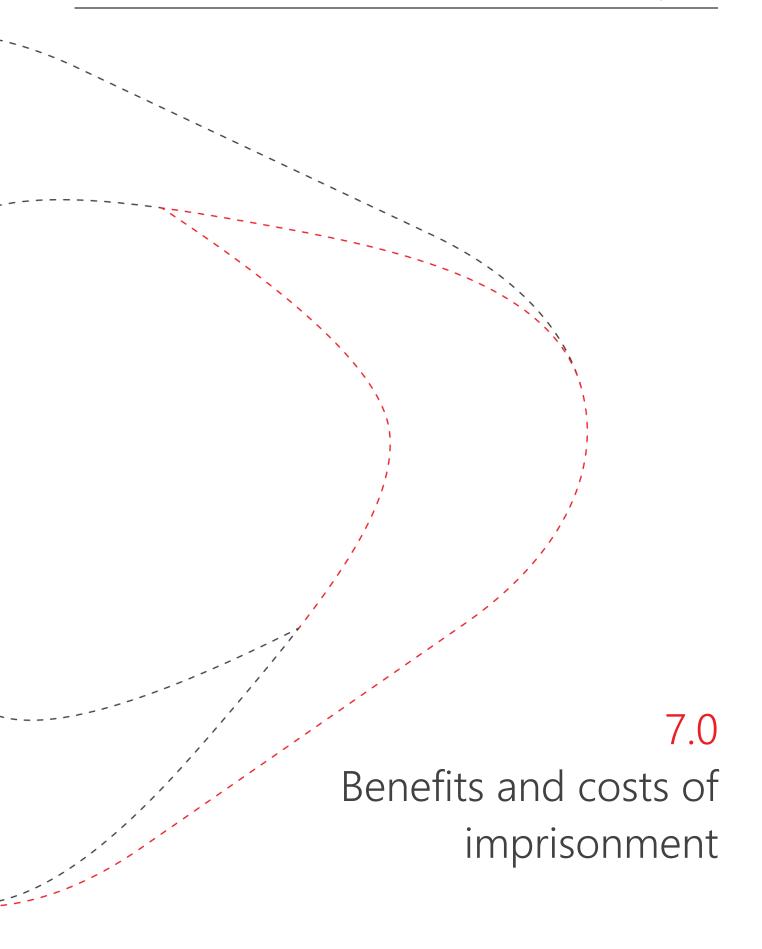
# 6.8 Conclusion

There are many risk factors with a documented effect on offending. These risk factors can occur throughout a person's life, even before birth. These risk factors are complex and often feed into one another, which can compound an individual's risk of offending.

While most offenders commit few offences, chronic offenders impose the majority of the burden of criminal justice agencies. The disparity between the relative burdens imposed become more acute the further into the system an offender progresses. As a consequence, just 2.7 per cent of all offenders contribute 41.8 per cent of all prisoner-days.

Aboriginal and Torres Strait Islander people are much more likely to offend, and much more likely to fall into more chronic and harmful offender groups. Similarly, men are more likely to offend, and more likely to exhibit chronic and harmful offending than women. The former effect tends to dominate the latter, and Indigenous women tend to exhibit behaviour which is much more similar to Indigenous men than to non-Indigenous women. Lastly, offending is more chronic and harmful among remote and regional populations of Aboriginal and Torres strait islander people than for their metropolitan equivalents.







The terms of reference ask us to examine the costs and benefits of imprisonment. This chapter sets out a high-level framework for considering these costs and benefits, and provides a preliminary, illustrative analysis of its application.

#### Key points

- Despite the large financial and social costs that increasing rates of imprisonment impose on the community, the benefits are poorly understood. There is little or no research to quantify the impact of imprisonment on crime, and how that impact translates into harms avoided for the community.
- Cost–benefit analysis (CBA) provides an objective and systematic framework for comparing the total benefits and costs of a policy against other options. It can be used to answer a range of questions, including:
  - Do the benefits of imprisonment outweigh the costs?
  - Do the net benefits differ for the various categories of offenders?
  - What alternative policies can deliver the same or better outcomes at lower cost?
- The Commission has taken initial steps to set out a framework to illustrate the potential costs and benefits of imprisonment.
- The costs of imprisonment are considerable:
  - The Queensland Government spends a substantial amount to support its 14 prison centres—\$960 million in 2017–18 or around \$111,247 per prisoner per year.
  - The costs of imprisonment go beyond operating prison facilities. Imprisonment also affects families and wider communities; it can also negatively affect post-release outcomes for those released back to the community. These indirect costs may be in the order of \$48,000 per year per prisoner.
- Society benefits from imprisonment of serious offenders:
  - Imprisonment primarily delivers benefits through incapacitation and deterrence—initial estimates suggest that, on average, between 14.3 property crimes are avoided for every additional person imprisoned for property offences, while 1.4 violent crimes are avoided for each additional person imprisoned for violent crimes.
  - The average harm avoided varies considerably across offence types—from around \$3 million for homicide to around \$2,500 for residential burglary.
- The Commission's high-level assessment suggests:
  - There are large net benefits—in terms of harm avoided—from keeping some offenders in prison (either due to the harms associated with the offence, or the frequency of offending).
  - The increasing use of prison is unlikely to provide net benefits to the community for many offences.
  - For many offences, there appear to be lower cost options that would provide greater benefits to the community.
- More investigation is needed into the effect of rising imprisonment rates on crime, the harm that different offences impose on the community (and how these should be valued) and the differential impacts of crime and imprisonment on different cohorts or population groups.



## 7.1 Introduction

Imprisonment is increasingly used as a policy instrument for controlling crime (as shown in Chapter 4). This is evident in the statistics, which show that imprisonment rates have increased steadily since the 1930s, with the rate of growth accelerating in recent decades—the imprisonment rate increased by 164 per cent from 1992 to 2018.

While the use of imprisonment provides benefits to the community by preventing and deterring crime, it also comes with a range of incumbent costs. These costs include both the direct costs of jailing offenders—approaching \$1 billion a year in Queensland—and a range of indirect costs, including impacts on families of offenders and lost economic activity.

Policy options that increase the use of imprisonment should be assessed through this lens. That is, the question should be asked whether the benefits of increasing the use of imprisonment are worth the costs they entail. Further, these policy options should be assessed against alternative options that might deliver similar benefits but at lower cost.

Currently, there is little or no assessment of the costs or benefits of imprisoning an offender in Queensland. Stakeholders the Commission spoke with were unable to provide any examples of where the costs and benefits of policies that would increase the use of imprisonment had been assessed. The Commission was also unable to find studies that have assessed how the increasing use of imprisonment affects crime in Queensland. Across Australia, this line of inquiry is relatively unexplored—the Commission could find only two studies that have attempted to assess this relationship using Australian data.

This chapter takes some first steps in improving the understanding of the costs and benefits of imprisonment. It attempts to quantify the costs and benefits of imprisonment, using available information from several agencies. However, given the paucity of evidence available, it can only be considered a preliminary, illustrative assessment.

# 7.2 The CBA approach

Cost—benefit analysis (CBA) is a method of evaluation that uses economic concepts to estimate and compare the total benefits and costs of a policy against other options. It calculates the dollar value of the benefits and costs incurred by a community affected by the policy problem. CBA takes a broad perspective, typically considering financial, social and environmental costs and benefits. If the sum of all benefits less costs (net benefit) is positive, then the community is said to be better off from the policy.

The goal is to identify the policy option that provides the largest net benefit to the community. By monetising impacts, CBA provides an objective framework for comparing different impacts, including those that occur in different time periods. Best practice in CBA requires all assumptions used in the analysis to be made explicit. Box 7.1 lists the key steps in conducting a CBA.

Applying CBA to complex social issues is challenging, because social policies often provide intangible benefits and costs—such as an increase in safety—which have no explicit monetary value and can be difficult to quantify. Given this, a CBA will in practice:

- identify all direct and indirect costs and benefits
- quantify and monetise each cost and benefit, if possible
- describe unquantifiable costs and benefits, including an assessment of likely magnitude, if possible
- assess the timing and distribution of costs and benefits.



## Box 7.1 Steps in cost–benefit analysis

- Step 1: Specify the set of options.
- Step 2: Decide which costs and benefits 'count' (e.g. state, national or international impacts).
- Step 3: Identify the impacts.
- Step 4: Predict the impacts over the life of the proposed policy.
- Step 5: Monetise (place dollar values on) the impacts.
- Step 6: Discount future costs and benefits to obtain present values.
- Step 7: Compute the net present value of each option.
- Step 8: Perform sensitivity and distributional analysis.
- Step 9: Formulate a conclusion.

Within the criminal justice system, CBA has been used in the past to assess individual programs. For example:

- Deloitte Access Economics (2013) compared the costs and benefits of investment in residential drug and alcohol treatment for Indigenous offenders with the costs and benefits of incarceration. The study found significant financial savings in favour of residential treatment.
- Morgan (2018) used a statistical matching method to compare the costs of keeping low level offenders in prisons with the costs of allowing the same offenders to serve their sentences in the community, holding benefits constant. The study found that the average cost of imprisonment for each prisoner is nine times more than the average cost of a community order.

This chapter provides a framework for implementing CBA on imprisonment and uses this framework to make an exploratory assessment of the costs and benefits of imprisonment. The analysis focuses on the marginal costs and benefits. That is, it attempts to examine whether the increasing use of imprisonment is likely to provide net benefits. This is an important distinction and captures the idea that there may be diminishing returns from the use of imprisonment.

Assessing the costs and benefits of imprisonment presents many challenges. A key challenge is that there are many intangibles, such as the value of human life, the harm caused to the victim and the value of public safety, which make any quantification exercise challenging. Other challenges include the choice of discount rates for valuing costs and benefits accrued at given time periods, as well as how to account for the distribution of these impacts across individual circumstances or profiles of offenders. Finally, there is only limited data available to inform the analysis.

Given these difficulties, the Commission's analysis takes a conservative approach, focusing on the direct harms to victims and the direct financial costs to the community from the use of imprisonment. Further, assessments were only possible for a small number of offence types. Given these limitations, the Commission's analysis should be considered as an indicative assessment.



# 7.3 The benefits of imprisonment

The community benefits from imprisonment in that it reduces crime mainly through two effects—incapacitation and deterrence:

- The *incapacitation effect*—while in prison, an offender cannot cause harm to the public. Accordingly, imprisonment results in less crime because offenders are physically prevented from breaking the law while they are incarcerated.
- The deterrence effect—the threat or experience of imprisonment can prevent crime. This effect presumes that individuals are aware of the consequences of breaking the law, and that this knowledge is accounted for in all decisions to commit a crime. Deterrence occurs when the cost of punishment (accounting for the probability of being caught) is perceived to be greater than the benefits of offending, such that the individual chooses to not offend.

Studies confirm that imprisonment leads to statistically significant reductions in crime through both the incapacitation and deterrence effects.

For incapacitation, the evidence suggests that crime rate reductions are significant, but this effect diminishes as the rate of imprisonment increases (Barbarino & Mastrobuoni 2014; Buonanno & Raphael 2013; Owen 2009). This occurs because an increase in imprisonment rates without a corresponding increase in crime rates implies less serious offenders are being incarcerated. This equates to a weaker incapacitation effect for each additional prisoner. This diminishing effect is explained by studies that suggest that offending outcomes are highly skewed by a small number of chronic offenders who commit a large proportion of offences. This implies that as the most serious offenders are imprisoned, the benefits of incapacitation fall rapidly.

For deterrence, the literature suggests that, while crime is responsive to policing effort (the probability of being caught), it is not particularly responsive to the severity of criminal sanctions (Chalfin & McCrary 2017). These findings are explained by the general tendency of offenders to 'discount' the cost of future penalties heavily. This temporal discounting implies that potential criminals are more strongly influenced by the immediate threat of arrest than the threat of a future punishment. Studies also show that for any given probability of arrest once an individual receives a penalty, further or harsher penalties do not cause further deterrence (Drago et al. 2011; Mastrobuoni & Rivers 2016).

The use of prisons may also deliver other benefits. The most significant of these pertain to the benefits that victims and the community receive from retribution, and any rehabilitation that occurs as a result of imprisonment. Estimating the value of these benefits is possible but challenging—for example, there is no market price on the benefits an individual might receive from perceptions of 'just' outcomes. Further, it is not clear from the literature that victims receive a clear benefit from the retributive elements of imprisonment (Funk et al. 2014) or that prison provides a significant contribution to rehabilitation.

# Measuring benefits

One way of estimating the benefits of imprisonment is to observe how changes in imprisonment have affected crime rates over time. This type of analysis uses the economic concept of elasticity which, in general, is a measure of the change that results in one variable in response to a change in another. In the case of crime, an elasticity value of -1.0 indicates that a 1 per cent increase in the imprisonment rate will decrease the crime rate by 1 per cent. This elasticity approach to measuring benefits captures both the incapacitation and deterrence effects of imprisonment.

Several studies have estimated elasticities for broad categories of crimes—for example, for all crimes, or for violent versus non-violent crimes. A recent survey of international studies by Chalfin & McCrary (2017) showed that the elasticity of general crime with respect to imprisonment ranges from -0.1 to -0.7. The authors themselves place the true value at 'approximately -0.2', which indicates that the crime rate falls by less than the change in the imprisonment rate.



There are few studies that have estimated elasticities using Australian data. Kelaher & Sarafidis (2011) used NSW crime data on violent and property crime rates to estimate relationships between arrest, imprisonment and imprisonment duration (Box 7.2). Using the same crime data, Wan et al. (2012) used improved crime estimates and arrest rates, as well as controlling for the heroin 'drought' that occurred over the period of analysis.

The Commission's assessment is that, although both use NSW data, the Wan et al. (2012) study provides the most robust estimates of the relationship between crime and imprisonment that are available. They found that:

- property crime rates decline by 0.115 per cent for each 1 per cent increase in the imprisonment rate
- violent crime rates decline by 0.170 per cent for each 1 per cent increase in the imprisonment rate.

## Box 7.2 Estimating elasticities

Estimating elasticities is a succinct and concise way to capture the impact of imprisonment on crime rates. The empirical measurement of these values is complex. First, elasticities would ideally be calculated for specific crimes—for example, for serious assault, car theft, burglary or drug trafficking—given that offenders of these crimes are most likely to respond to imprisonment differently. For an overall indication of impact, general elasticities can also be calculated for broader classes of crime, such as violent versus non-violent crimes, or personal versus property crimes, while controlling for age, gender, ethnicity and similar background variables.

In estimating crime elasticities, causation may flow in both directions. That is, a change in imprisonment rates directly affects crime rates, but any change in crime rates can also affect incarceration rates. Given this simultaneous relationship, the resulting values from ordinary least squares estimation will be biased and can lead to misleading conclusions. Researchers can control for observed determinants of the rising crime rates and try to account for the reverse causality by looking at the timing of changes but concerns about the correlation between unobserved determinants of incarceration and crime rates are difficult to alleviate without a causal identification strategy. One popular strategy is the use of instrumental variables (Johnson & Raphael 2012; Levitt 1996; Owen 2009). Another is the use of natural experiments such as the Italian pardon, which saw one-third of the nation's prisoners released in August 2006 (Barbarino & Mastrobuoni 2014; Buonanno & Raphael 2013; Drago et al. 2011).

In making use of elasticity values, the Commission employed the following formula to estimate the impact that changing the use of imprisonment would have on crime<sup>37</sup> for the specified year t:

$$C_a = |\xi| \times \frac{\Delta P}{P_t} \times C_t$$

where  $C_a$  is the number of crimes avoided,  $\xi$  is the elasticity of the crime rate due to imprisonment,  $\Delta P/P_t$  is the fractional change in the prison population due to an additional prisoner, and  $C_t$  is the number of crimes committed during the year t.

<sup>&</sup>lt;sup>37</sup> The formula is the simplest and most convenient one to use, although it assumes elasticities are constant, even though they may vary with imprisonment rates.



Using the elasticity estimates from Wan et al. (2012) and Queensland data on prison numbers and offences for 2018, the number of avoided violent and property crime can be estimated (Table 7.1). The results suggest that:

- imprisoning an additional property offender would avoid around 14.3 property crimes per year.
- imprisoning an additional violent offender would avoid around 1.4 violent crimes per year.

Table 7.1 Number of crimes avoided by imprisoning the marginal prisoner

Input values used for the crime-	No. of property crimes avoided		No. of violent crimes avoided	
prevention formula	Short run	Long run	Short run	Long run
ξ  from Wan et al. (2012)	0.087	0.115	0.107	0.170
Prisoner population $(P_t)$	1,972	1,972	4,607	4,607
Number of offences ( $C_t$ )	245,202	245,202	36,691	36,691
Number of crimes avoided $(C_a)$	10.8	14.3	0.9	1.4

Sources: Prisoner population data from ABS 2018k, and Number of offences data from QPS 2019d.

# Estimating avoided harm

The monetary benefits of avoided crimes can be obtained by associating crimes with the dollar value of the harm associated with each crime type. The resulting monetary value should be interpreted as the marginal benefit from imprisonment—that is, the savings incurred from avoided crime by incarcerating an additional prisoner.

Estimates of the monetary value of harms from crime are sourced from a research report prepared for the Australian Institute of Criminology (AIC) titled *Counting the costs of crime in Australia: A 2011 estimate* (Smith et al. 2014). The AIC estimates include medical costs, lost output and intangibles. While the AIC makes an effort to quantify intangibles such as fear of crime, emotional damage and resulting depression, the methodology used would appear to underestimate emotional harms.<sup>38</sup> This means that the study was likely to underestimate the costs of crime, particularly for those offences for which there are large indirect personal costs (such as those associated with sexual assault).<sup>39</sup> For this reason, the Commission has limited its analysis to a narrow range of offences where the AIC estimates provide reasonable coverage of the actual harms from crime, and where there is a victim. These offences include homicide, assault (non-sexual), residential burglary and vehicle theft.

<sup>&</sup>lt;sup>38</sup>The AIC methodology is derived from one that is used to estimate harms from vehicle accidents (Smith et al. 2014).

<sup>&</sup>lt;sup>39</sup>Johnston et al. (2018) provides alternative estimates of violent crime (sexual assault, physical assault and violent robbery), which include an estimate of the monetary compensation required by victims to offset their loss of well-being. Using longitudinal data collected by the University of Melbourne (HILDA survey and the Australian Journeys Home Survey), the authors estimated the costs of violent crime (for compensation purposes) were \$87,900 per incident, on average. The AIC estimates were used in this study because they provide costs for a more disaggregated set of offences.



Estimates of avoided harms are provided in Table 7.2. The average value of harms from all assault offences is \$2,969 although it is clear that the cost of harm for assaults requiring hospitalisation is significantly higher than if the assault victim was physically uninjured—\$64,611 versus \$499. The low average value implies that the majority of assault cases cause no injuries. The cost results are presented this way, since there is some uncertainty regarding the harms avoided through imprisonment.<sup>40</sup> The true value may lie somewhere between the average and more serious harms.

Table 7.2 Estimates of avoided harm, 2018

Offence	Average harm per offence (\$)	Crimes avoided (number)	Avoided harm (\$)
Homicide	3,059,409	1.4	4,142,168
All assault	2,969	1.4	4,019
– Hospitalised	64,611	1.4	87,478
– Uninjured	499	1.4	675
Burglary	2,475	14.3	35,396
Theft of vehicles	7,269	14.3	103,947

Note: Compiled from 'Counting the costs of crime in Australia: A 2011 estimate' (Smith et al. 2014), adjusted using the consumer price index (CPI) (ABS 2019b). Crimes avoided are from Table 7.1—1.4 crimes for violent crimes and 14.3 crimes for property crimes.

# 7.4 The costs of imprisonment

The costs of imprisonment can be broken down into the direct costs and the indirect costs. The direct costs relate to the direct financial costs of imprisonment. These include the costs of running prisons and the other criminal justice system costs, including policing, court costs and prisoner reintegration costs.

The indirect costs of imprisonment are wider in scope and can include impacts on prisoners, their families and the broader community. They may also include loss of social capital, lost productive capacity and increased risks to health and mental well-being (Besemer & Dennison 2017; Enggist et al. 2014; McCausland et al. 2013). These costs are less tangible than the direct costs and are more difficult to estimate, since many have no obvious market price.

One controversial aspect in obtaining indirect costs of imprisonment is the inclusion of the costs to the prisoner—after all, prison is intended to impose significant costs on people who commit offences. However, the costs that prisons impose on prisoners often continue to be incurred after release. Excluding prisoner costs can bias decision-making, and lead to incorrect conclusions about alternative policies.

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<sup>&</sup>lt;sup>40</sup> The estimates of avoided harms need to match the factors underlying the estimates of avoided crime (the elasticity estimates). The elasticity estimates sourced from Wan et al. (2012) relate to all reported violent crime, including serious and less serious offences. This implies that harm estimates should include all reported assaults, not just those that involved a prison sentence. However, as only 60 per cent of assaults are reported, it is not clear that the average AIC harm estimates provide an accurate estimate of the harms avoided through the use of imprisonment.



#### Direct costs: prisons

The financial cost of prison should include both the operating costs and an allowance for the capital costs of running Queensland's prisons.

The Productivity Commission's *Report on Government Services* shows that the Queensland Government spent \$960 million in 2017–18 across its 14 prison facilities. This average per prisoner expenditure is \$111,247 per annum, or \$305 per day (SCRGSP 2019a).

For the purposes of a CBA, costs should be estimated at the margin. That is, costs should be equivalent to the cost of incarcerating an additional prisoner, which may differ significantly from the average cost of imprisonment. For example, when a prison is operating below capacity, the cost of incarcerating an additional prisoner is likely to be much lower than the average cost because there may be no need to increase staff or the number of prison beds. However, when prisons are at, or above capacity (as is the case today), the marginal cost of imprisonment can be higher than the average cost.

For this exercise, the Commission has assumed that average costs are a reasonable indicator of the marginal costs of imprisonment.

The state's prison system is part of the wider criminal justice system, which includes the courts and the police. These other parts of the criminal justice system have large costs (total expenditures across the criminal justice system in 2017–18 were around \$3.5 billion). However, when examining the costs of imprisonment, only the cost of actual imprisonment has been included. That is, court and policing costs have been excluded, since these may be incurred regardless of whether or not prison was chosen as the form of punishment.

# Indirect cost: lost production

For the duration of the jail term, a prisoner is unable to be employed in the community. This cost includes lost wages or business income that the prisoner would otherwise have earned; it also includes the loss of the prisoner's productive capacity due to any depreciation of work skills or employability because of imprisonment. Offsetting these losses are any productive work the prisoner engages in while in prison.

Approximately 26 per cent of Queensland prisoners were employed in the 30 days prior to entering prison in 2018 (AIHW 2019c). As far as the Commission is aware, the aggregate value of such productivity loss for the economy has not been estimated for Queensland. However, Morgan (2018) estimated that the cost of lost productivity averaged \$16,543 per prisoner in Victoria.

Many prisoners engage in some form of work while in prison, and this should be netted out from any estimate of lost production. The value of prison work is accounted for in the direct financial costs discussed in the previous section, and so should not be double counted.

#### Other indirect costs

Imprisonment imposes many other indirect costs on prisoners, their families and the broader community. Imprisonment has been shown to worsen prisoners' physical health (Enggist et al. 2014), exacerbate mental illness (White & Whiteford 2006) and cause inmates' human capital to decline, with costs increasing with the length of imprisonment. Post-release data also show that imprisonment adversely affects future outcomes including higher unemployment (Holzer 2009; Mueller-Smith 2014; Travis et al. 2014), social exclusion and homelessness (Payne et al. 2015).



For the families of prisoners, imprisonment can lead to a loss of income and reduce total resources available for meeting household expenses. Besemer & Dennison (2017), for example, show an increased dependence on welfare benefits among families with experience of imprisonment. For prisoners who are parents to young children, imprisonment 'disrupts parent-child relationships, alters the networks of familial support, and places new burdens on governmental services such as schools, foster care, adoption agencies, and youth-serving organizations' (Beil et al. 2018). In Australia, the increase in women's imprisonment has been shown to impact on children's welfare in both the short and long term (Goulding 2007).

There are also some savings from avoided provision of government services to individuals while they are in prison that would offset some of these costs—for example, welfare, public health and housing.

Measuring the total value of indirect costs due to imprisonment is difficult, given the wide range of individual backgrounds across the prison population. A survey by Donohue (2009) suggests that all indirect or 'collateral' costs could add up to around US\$25,000 per year per prisoner in 2005. Others have suggested that the total 'social' costs of imprisonment (including lost productivity) are about twice the magnitude of direct prison costs (Spelman 2000). A reasonable estimate of the total indirect costs incurred per prisoner per year in Australia is likely to be in the order of \$48,000 (June 2018 prices); however, these costs have not been included in the Commission's analysis.

# Criminogenic effects

Imprisonment has been shown to worsen prisoner outcomes through its criminogenic effect. This effect is premised on the view that prisons are a social learning environment in which criminal orientations are potentially reinforced. Accordingly, instead of being reformed, the experience of imprisonment can intensify one's commitment to a life of crime and increase criminal offending through the transfer of pro-criminal attitudes, values, skills, and roles.

Australian policy papers often identify the criminogenic effect of prison as a major contributor to higher rates of recidivism, even though results in the international academic literature are mixed and not definitive (see, for example, Bayer et. al (2009) and Nagin et. al (2009)). Weatherburn (2014) demonstrates some criminogenic effect from prison in Australia. In this study of New South Wales inmates, it was found that offenders who received a prison sentence were slightly more likely to reoffend than those who received a non-custodial penalty.

While criminogenic effects may be significant, they are not quantified in the Commission's analysis because they are difficult to assess.



# 7.5 Illustrative net impacts

The net impact of the estimated costs and benefits of imprisonment (at the margin) are provided in Table 7.3. It shows that:

- there are net benefits equivalent to \$3.34 million from imprisoning an additional person convicted of a homicide offence
- increasing the use of imprisonment for assaults, particularly those at the lower end of the harm scale, is unlikely to provide net benefits to the community can could impose net costs of between \$34,894 and \$121,696
- there do not appear to be benefits from increasing imprisonment for residential burglary, but there may be benefits relating to car theft.

The results imply that, for a range of offences, the use of imprisonment, at the margin, is likely to result in the costs exceeding the benefits. This does not mean there are not benefits from imprisonment. Rather, the results show that increasing the use of prison, particularly for lower harm offences, is likely to impose greater costs on the community than the benefit it receives from imprisoning an offender.

Table 7.3 Illustrative net benefits from imprisonment

Offence	Cost of harm per incident (\$) <sup>a</sup>	Expected time to serve (yrs) <sup>b</sup>	Total costs of imprisonment (\$)°	Total benefits (avoided harm) (\$) <sup>d</sup>	Net gain or loss (total benefits- total costs) (\$)
Violent offences					
Homicide	3,059,409	7.2	800,978	4,142,168	3,341,190
Assault	2,969	1.1	122,372	4,019	-118,352
– Hospitalised	64,611	1.1	122,372	87,478	-34,894
– Uninjured	499	1.1	122,372	675	-121,696
<b>Property offences</b>					
Residential burglary	2,475	1	111,247	35,396	-75,851
Thefts of vehicle	7,269	0.6	66,748	103,947	37,199

a. Cost of harms per offence are derived from Smith et.al. (2014). Harms per offence were converted into June 2018 prices. Those dollar values were then converted to March 2019 prices using national CPI numbers from the ABS 2019b.

b. Expected time to serve are from ABS 2018k and matched with the Australian Institute of Criminology offence types. Expected time to serve is not available for prisoners sentenced to an indefinite term or to life where no minimum term has been fixed. For homicide, 62.9 per cent of Queensland offenders are currently serving indeterminate sentences. The 'true' average sentence served for this crime type is therefore most likely to be higher than the figure in the table.

c. The cost of imprisonment is calculated as the expected time to serve multiplied by \$111,247 (annual cost of per prison in jail).

d. Benefits are calculated as the harm per offence multiplied by the number of offences avoided through imprisonment. These are 1.4 for violent crimes and 14.3 for property crimes.



#### Limitations

It is important to note that the Commission's analysis is illustrative and there are some important caveats on how the results should be interpreted.

First, the dollar estimates of net impact are highly dependent on the cost of harm estimates per incident used in the calculation (Table 7.3, column 2). Given the wide availability of data, the AIC estimates for medical costs of harm per incident and the estimates for cost of lost output during the victim's period of recovery appear robust (Smith et al. 2014). However, the intangible cost component of their published estimates—for example, those associated with pain, elevated fear and anxiety levels, psychological distress and depression of victims, and the indirect tolls these victim costs exert on other family members—are subject to great uncertainty.<sup>41</sup>

There is also some uncertainty about how avoided harm should be estimated. The elasticity estimates used in this chapter, infer that the avoided harms that should be included in the estimates are the average of *all* reported offences, rather than just those that would attract a prison term. However, even with this caveat, it is difficult to directly match harm estimates with offending types.

Second, many indirect costs and benefits associated with imprisonment are not accounted for. Available costings do not include any retributive or rehabilitative benefits. Where benefits are included, the benefits have been estimated using aggregate indicators that may not apply to specific cases—for example, the harms per offence are the average harm associated with an offence and may not represent the harms avoided through imprisonment. Harms to prisoners (post-sentence) and their families have also not been included in our estimates.

Third, the Commission's analysis uses broad estimates of harm. It is possible that the harms from specific offending that results in imprisonment are significantly different from the harms discussed in this chapter. The Commission's estimates of harm also do not account for risk—for example, the risk that an assault may escalate to homicide.

Fourth, the Commission has used research from New South Wales to inform its estimates of the elasticity of crime with respect to imprisonment. It is possible that estimates using Queensland data would produce different results.

Finally, because the Commission's analysis only covers a narrow range of offences, it is difficult to make general conclusions about the use of imprisonment. This is particularly problematic for drug-related offending, which has contributed significantly to the increase in imprisonment rates. This is the subject of reforms discussed in Chapter 13.

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<sup>&</sup>lt;sup>41</sup> Estimates for the intangible cost component in Smith et. al 2014 were taken from the costs of intangibles associated with road accidents used by the Bureau of Transport Economics, where these were based on jury awards that are funded by compulsory third-party insurance for motorists.



# Comparisons with other studies

As discussed earlier in this chapter, very few studies have attempted to assess the costs and benefits of imprisonment. Nevertheless, broad conclusions from the few studies the Commission could find generally concur with its findings. For example:

- Chan (1995) concludes that even a modest reduction in crime would involve a heavy price in terms of increases in imprisonment, stating that a 10 per cent decline in crime in New South Wales would require a doubling of the prison population. Given that imprisonment rates have increased substantially since this conclusion was made (in 1995), it is likely that the same study conducted today would conclude that a larger increase in imprisonment would be required to achieve the same percentage reduction in crime.
- Abrams (2012) in a cost–benefit study in the United States concludes that the net benefits from imprisonment increase when the lowest level offending does not lead to imprisonment.
- The Council of Economic Advisers (2016) found that in most robust cost–benefit calculations in the United States, the costs of incarceration outweigh the benefits.

# 7.6 Alternatives to imprisonment

The CBA framework can also be used to compare alternative policy options. It was not possible for the Commission to conduct explicit cost–benefit analyses of alternative sentencing options, but there are a range of studies that suggest non-custodial options would provide more cost-effective options to deal with some offending behaviours.

When considering the use of non-custodial options as a replacement for current or future imprisonment, the primary question is whether they are as effective at keeping the community safe. The evidence to answer this question is still emerging. However, the literature suggests that, for at least some offences, the use of community-based corrections orders can be as effective as custodial sentences.

While community corrections cannot be as effective as prison for preventing crime by incapacitating offenders, there is little evidence that, used appropriately, they are any less effective at deterring offending behaviour (Sydes et al. 2018; Trevena & Poynton 2016; Trevena & Weatherburn 2015). There is, however, emerging evidence that community-based sentences are more effective than prison terms at breaking the cycle of reoffending.

Wang and Poynton (2017) find an 11–31 per cent reduction in the odds of reoffending for offenders who receive an Intensive Corrections Order (ICO), compared with those who receive a prison sentence of up to 24 months. This result is consistent with earlier studies by Ringland and Weatherburn (2013), which showed lower rates of reoffending for recipients of ICOs, compared to those who served their sentences in prison.

This result is qualified by Drake (2011) who found that intensive supervision focused on surveillance achieves no reduction in recidivism, while intensive supervision coupled with treatment achieves about a 10 per cent reduction in recidivism. Wan et. al. (2014) examined the relationship between parolee supervision and reoffending and found that more active supervision can reduce parolee recidivism, but only if it is rehabilitation-focused.

Morgan (2018) made an attempt at considering a broader range of costs. The study used propensity scoring to match a small cohort of 804 Victorian prisoners and community corrections offenders who were then tracked over a five-year period. The approach considered a broad range of indirect costs including lost productivity, lost earnings, supported accommodation costs, medical costs, government payments, value of community work and changes in the use of drugs and alcohol. The study found:

- The total costs of the original sentence were \$61,179 for those who served a prison term and \$6,516 for those who served a community sentence.
- Over a five-year period, the net present value of costs associated with the prison cohort were \$144,480, compared to \$49,633 for the cohort who was originally sentenced to a community corrections sentence.



Despite the study's limitations, its results highlight the important point that there may be significant cost advantages in moving some offenders from prison to community corrections.

# 7.7 Conclusion

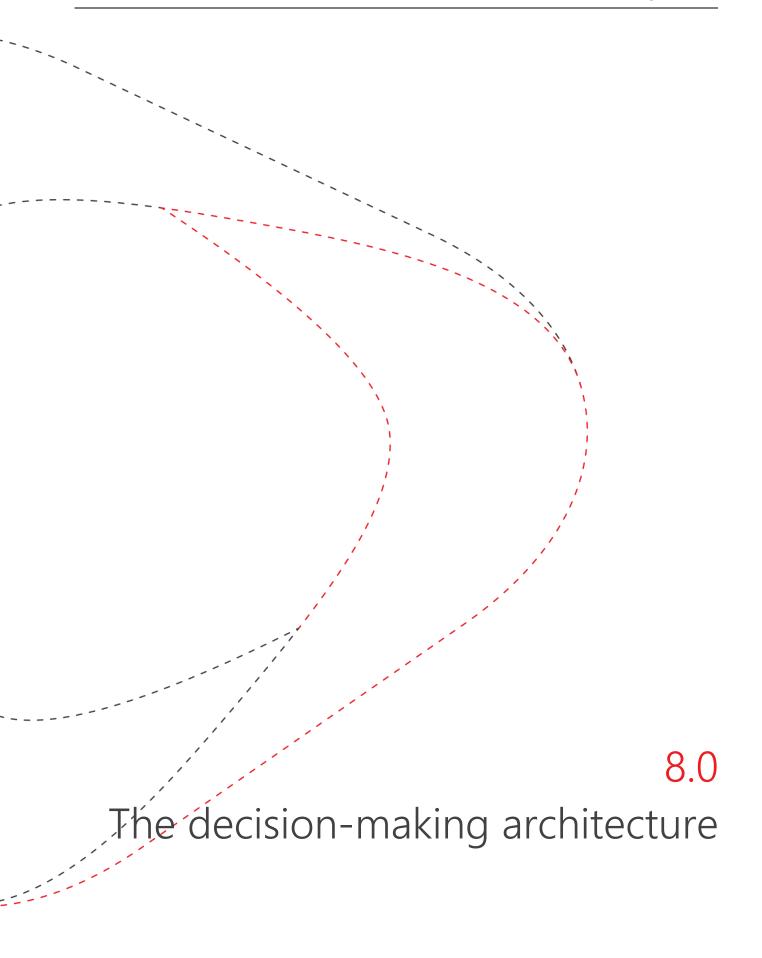
While this analysis suffers from a number of important limitations, it suggests that, while there are likely to be benefits from imprisoning offenders who impose high harms on the community, there are a range of offences for which the use of imprisonment is likely to impose net costs on the community. Furthermore, it is likely that lower costs options, such as community corrections orders, would provide greater benefits to the community. These conclusions are consistent with emerging research in other jurisdictions.

What is evident, is that policies that have led to the increase in imprisonment have not been underpinned by robust evidence. Despite the large financial and social costs that increasing rates of imprisonment impose on the community, the benefits are poorly understood. There is little or no research to quantify how imprisonment impacts on crime, and there is no program of works in place to improve this situation. Despite this, imprisonment policies remain the centrepiece for governments to address crime across Australia.

To inform future policy, greater investment in research is required. More investigation is needed into the effect of rising imprisonment rates on crime, the harm that different offences impose on the community (and how these should be valued) and the differential impacts of crime and imprisonment on different cohorts or population groups.

This investment needs to shift beyond the production of statistics to research and the communication of findings that will lead to better informed policies on the use of imprisonment.







This chapter assesses the existing decision-making architecture that governs the criminal justice system in Oueensland.

## Key points

- Decision-making in the criminal justice system is challenging because of the complex problems being tackled and the contentious policy environment in which the system operates. The various components of the criminal justice system are also highly interdependent. Changes in one part of the system can affect other parts.
- These challenges require a high-quality decision-making architecture that results in:
  - the functions of government agencies being delivered in the most effective and efficient (technical efficiency)
  - resources being allocated to the most effective and efficient activities (allocative efficiency)
  - new and innovative solutions occurring over time (dynamic efficiency).
- The Queensland Government and its agencies have several coordination mechanisms and have made some progress in developing a better evidence base to inform criminal justice policy. Although it is difficult to discern how well the existing decision-making architecture is performing overall, the available evidence suggests that there is room for further improvement:
  - Policy-making needs to adopt a whole-of-system perspective.
  - Policy-making processes need to follow best practice in order to avoid unintended consequences.
  - Information and evidence systems need to better support and inform decision-making.
  - Funding arrangements need to better allocate resources across the sector.
  - Decision-making needs to avoid being reactive in order to allow consideration of options that are likely to provide the greatest benefits to the community.
- Without changes to the underlying decision-making architecture, there will be a continued high risk that policy and resource allocation decisions are made that do not deliver the best outcomes for the community. This means the system will be less successful in achieving its objective of community safety and will be costlier than necessary. Moreover, any reforms that are introduced are less likely to be successful, resulting in problems persisting and worsening or re-emerging over time.



# 8.1 Complex problems in a contentious environment

The criminal justice system operates in a complex policy environment. Offending behaviours are driven by a wide range of factors, and there is often significant debate about what works to alleviate them. Further, crime and imprisonment are an emotive issue, which often drives volatile and divergent perspectives. Government and its agencies that operate within the criminal justice system face significant challenges in addressing the complex problems associated with crime and imprisonment (Table 8.1).

As discussed in Chapter 3, a decision to imprison an offender is the culmination of decisions throughout the criminal justice system. These decisions reflect both the making of criminal law and its enforcement.

The criminal justice system is a system of independence and interdependence. While the institutions need to operate independently (for example, through judicial independence), actions in one part of the criminal justice system impact on other parts (for example, increases in policing effort impact both activity in the criminal courts and the flow of offenders into correctional facilities).

This interdependence suggests that the criminal justice system should be assessed as a system, not merely as individual and discrete agencies.

Making the wrong decisions is likely to impose significant costs on the community.

Imprisoning too many people can be costly—it costs around \$111,000 to house a prisoner for one year, involves the loss of individual liberty, and can impose long-term costs on offenders and their families. Imprisonment can also make the community less safe if imprisonment has criminogenic effects.

At the same time, too little punishment or too little enforcement can encourage crime and diminish community safety. Crime can impose significant costs on the community, either directly through harms to victims, or indirectly by eroding social cohesion and economic activity (such as might occur through the loss of property rights).

Given the complexity of the issues in the criminal justice system, the contentious and volatile environment in which policy-making occurs and the central role of government, the quality of the decision-making architecture will be a significant determinant of overall outcomes from the criminal justice system.

In this report, the Commission is recommending a wide range of policy reforms to reduce imprisonment and recidivism and improve outcomes. However, in the longer term, it is the quality of decision-making that will determine the success of any reform agenda. Without an effective decision-making architecture to support the criminal justice system, reform may not be achieved and problems will re-emerge.

Within the highly complex policy environment in which it operates, the decision-making architecture of the criminal justice system must be capable of:

- ensuring agencies' functions are delivered in the most effective and efficient way (technical efficiency)
- diverting resources from less effective and efficient activities to more effective and efficient ones (allocative efficiency)
- encouraging new and innovative solutions (dynamic efficiency).

This chapter provides a brief assessment of the decision-making architecture in Queensland and shows that there are areas where things could be improved. The following chapter (Chapter 9) provides suggestions for reforms that would improve matters.



Table 8.1 Crime and imprisonment as 'wicked problems'

Characteristics of wicked problems	Crime and imprisonment context
Wicked problems are difficult to clearly define	There are different views regarding the extent to which crime is a problem and whether increasing imprisonment is itself a problem or is part of the response to concerns about crime.
Wicked problems have many interdependencies and are often multi-causal	Crime has many personal and social causes that are interdependent. Tensions exist between different responses to crime. These include imprisonment, which emphasises deterrence based on punishment, and therapeutic approaches, which address offenders' personal issues and build protective factors such as good health, education and employment.
Attempts to address wicked problems often lead to unforeseen consequences	Actions taken in one part of the criminal justice system can lead to impacts elsewhere. For example, higher arrest rates to reduce crime may lead to intergenerational disadvantage that results in higher crime and imprisonment rates in the long term.
Wicked problems are often not stable	Factors such as new technology affecting policing or criminal activity, or market developments (such as new supplies of illegal drugs) can quickly change the policy environment.
Wicked problems usually have no clear solution	No single set of solutions is likely to provide a complete answer. Responses such as more aggressive policing or increased therapeutic treatment of offenders are likely to provide only a partial solution, and their success may only be observable in the longer term.
Wicked problems are socially complex	Issues of social disadvantage, indigeneity, gender and age interact with broader social and economic factors, as well as concepts of justice and fairness, in highly complex ways, making clear solutions difficult to find.
Wicked problems hardly ever sit conveniently within the responsibility of any one organisation	Agencies in the justice, health, education and housing sectors; the judiciary, and legal profession; non-government organisations; and private businesses have roles in reducing crime and imprisonment through their participation in the criminal justice system or in delivering the services or creating the conditions that make criminal activity more or less likely.
Wicked problems require changing behaviour	Changing the behaviour of not only offenders but also other participants in the criminal justice system sector is important in solving problems.
Some wicked problems are characterised by chronic policy failure	Despite some examples of good practice and successful reform in the criminal justice system, imprisonment rates have been rising for a long time. This trend is observable across many other jurisdictions.

Source: Adapted from APSC 2007.



# The contentious policy environment

The activities of police, courts and corrective services take place in a contentious and volatile environment. Crime is an emotive topic, which is reflected in news coverage and in television programs, movies and books. 'Law and order' is a significant issue in almost every state election.

This environment is characterised by:

- **inaccurate perceptions about crime trends**—studies suggest that the public's perceptions of trends in crime, the percentage of crimes that involve violence, and the imprisonment rates of convicted offenders are often highly inaccurate (Davis & Dossetor 2010; Essential Research 2018; Roberts & Indermaur 2009)
- **inaccurate perceptions about sentencing**—research in other jurisdictions suggests that while respondents tend to be generally dissatisfied with sentencing outcomes, when they are confronted with relevant information about sentencing, they tend to propose sentences that are on par with or more lenient than the sentences imposed by the judge (Bartels et al. 2018)
- an influential media—the main sources of news for a majority of the public are traditional news outlets (News and Media Research Centre 2019). The media's presentation of crime has the potential to affect not only the public's understanding of crime and criminal justice, but also their perceptions of safety and, in turn, criminal justice policy-making (Waters et al. 2017)
- high-profile events that generate intense public interest—public concerns can be heightened by individual high-profile cases. Two examples are the alleged murder of Elizabeth Kippin in 2016 by a man on parole, and the motor vehicle attack on pedestrians in Bourke Street, Melbourne, in 2017. These events prompted calls for tighter controls on parole and bail conditions.

This environment can create the conditions where criminal issues become polarising, so that policy responds to intense political pressures that may not generate policy outcomes in the public's best interest.

During periods of increased crime rates, or in the aftermath of crimes that draw particular attention, governments can often face pressure from the public and the media to implement or extend 'tough on crime' responses such as increased arrests, tougher sentencing laws and practices, mandatory sentencing, and tougher bail eligibility and conditions. While these may be politically expedient, there is no evidence to suggest that these policy responses have any beneficial impact on reducing the rates of offending. (PWC sub. 13 p. 69)

Several stakeholders expressed these concerns during consultations and in submissions (Box 8.1).



#### Box 8.1 Stakeholder views on the roles of politics and media

'Given that the increased use of imprisonment has continued whilst crime rates have been falling, it has been suggested that it is politics, rather than crime, which is increasing these imprisonment rates.' (Balanced Justice sub. 1, p. 28)

'Politics is clearly the main barrier [to reform]. Any government running on a law and order platform tend to see more prisons and longer sentences as a sure way to more votes. And when governments talk about community protection as a reason, they only focus on the short term when offenders are actually in prison, and very little focus on community protection in the long term, e.g. post-release.' (Eriksson sub. 5, p. 5)

'The Australian public and the media are able to influence decision makers, which is why during periods of increased crime rates, or in the aftermath of crimes that draw particular attention, governments often face pressure to get 'tough on crime'. However, there is a discrepancy between the public's perception of crime and what the statistics reveal.' (PWC sub. 13, p. 40)

'[S]tudies have shown that confidence in the courts is affected by access to information. This means that cases that attract media attention are likely to shape how the public perceives the courts. For obvious commercial reasons, the media reports on interesting, unusual cases rather than on every case or the overall pattern of cases.' (IPA sub. 11, attachment 3.3, p. 34)

'Responding objectively to the evidence is made difficult, however, by a hostile media and others who demonise young people and take a 'lock them up' approach. The lack of empathy for young people in some parts of our community is highly concerning.' (YAC sub. 34, p. 4)

'[P]oliticians and the media must end the counter-productive 'tough on crime' rhetoric and respond to the (actual, not perceived) risk to individuals and community.' (QCOSS sub. 20, p. 4)

'[T]he generation of better quality and more readily digestible data would be of benefit to dispelling popular misconceptions, as would the promotion of greater political bi-partisanship.' (Carrington & Hogg sub. 3, p. 6)

'This cannot be a political issue ... For long term change to occur we need long term planning. Both major parties and independent MP's need to consider the value of developing support to address the issue of early intervention.' (QHVSQ sub. 18, p. 3)



# 8.2 Policy development requires a whole-of-system perspective

Many of the issues facing the criminal justice system do not fit neatly into traditional government structures built on discrete functions and siloed agency service delivery. Four core agencies are active in the criminal justice system—Queensland Police Service (QPS), the Department of Justice and Attorney-General (DJAG), Queensland Corrective Services (QCS) and the Department of Youth Justice. These agencies are separate bodies, although QPS and QCS report to the same minister.<sup>42</sup>

The four agencies and the broader criminal justice system are highly interdependent—a policy change or action in one part of the system can affect the operations of other parts of the system. This implies that policy development should adopt a whole-of-system perspective in order to:

- avoid unintended consequences arising from actions in one part of the system impacting on other parts
- exploit opportunities to address problems in one part of the system more effectively and efficiently through action taken in other parts.

While there are some elements of policy coordination and cooperation across the criminal justice system, there appear to be few mechanisms that encourage a whole-of-system approach to decision-making.

# Objectives and goals

Effective governance arrangements should encourage decision-makers to focus on their objectives. These objectives should be designed on a systems basis so that there are no conflicts, and roles and responsibilities are clear (Chapter 2).

The current objective for the criminal justice system is to 'keep communities safe' (Chapter 2). This is set out in various legislation and policy settings and is established in the Queensland Government's six priorities under 'Our Future State'. Beyond the two goals established in 'Our Future State'<sup>43</sup>, there does not appear to be a set of common goals or performance frameworks to support the achievement of targets or to establish accountabilities across the individual agencies:

In an environment in which there is no common goal it is inevitable that participants will pursue their own goals. The credibility of the system is seriously undermined by the absence of both an agreed understanding of its purpose and an effective coordination of all its participants towards that purpose. If there is no consensus on the purpose of the system, then it is hard to imagine how there can be a strategic direction. (Glanfield 1993)

While some guidance is provided to agencies through ministerial charter letters, these tend to provide only very broad guidance and they do not set out detailed performance expectations. Further, there is little evidence of a coordinated, systems approach in the guidance to agencies within the criminal justice system.

# Policy coordination

Ideally, agencies would ensure that policies are coordinated to encourage a whole-of-system perspective to address overarching system objectives. This would mean tackling problems across different parts of the criminal justice system in a systemic way, with resources flowing between agencies to support initiatives that would drive the best outcomes.

<sup>&</sup>lt;sup>42</sup> Until 2017, QCS was located in DJAG, although QCS and DJAG reported to different ministers. Until 2017, youth justice was also located in DJAG, before being merged into the Department of Child Safety, Youth and Women. In 2019, it formed its own department.

<sup>43</sup> The two goals are: by 2028, a 10 per cent reduction in the rate of Queenslanders who were victims of personal and property crime; and by 2020–21, a 5 per cent reduction (from 2015–16) of young offenders who have another charged offence within 12 months of an initial finalisation for a proven offence (Queensland Government 2018c).



There are several coordination mechanisms in place across the criminal justice system (Box 8.2), as well as commitments to cooperation and coordination across agencies.

#### Box 8.2 Main coordination mechanisms

Several mechanisms within the Queensland Government facilitate whole-of-government coordination in the criminal justice system.

- **Cabinet**—Cabinet considers issues, mainly through ministerial submissions and, during the budget process, through budget submissions. The Cabinet Secretariat, the Department of Premier and Cabinet, and Queensland Treasury manage these processes. The Queensland Cabinet Handbook lists a number of requirements for whole-of-government coordination.
- **Ministerial Charter Letters**—The Premier issues Ministerial Charter Letters, which detail the government commitments and priorities that ministers are responsible for delivering through the portfolio agencies. There are several references in the Ministerial Charter Letters to justice sector ministers and agencies about working with other agencies. These include:
  - Police (11 priorities overall)—'Work with other Ministers to increase the proportion of offenders, particularly young people, diverted from the criminal justice system'.
  - Corrections (3 priorities overall)—'Work with relevant Ministers and government departments to reduce demand across the criminal justice system, including through interventions to help break the cycle of reoffending'.
  - Justice (18 priorities overall)—'Deliver an effective, responsive and efficient justice system that underpins a just and safe Queensland. A justice system informed by ... consideration of any strategies and practices that continue to address demand management across the system' (Queensland Government 2018b).
- Cluster Group—The Queensland Government has established a Deputy Director-General Cluster Group for the 'Keep Communities Safe' priority of 'Our Future State: Advancing Queensland's Priorities'. The Cluster Group is required to progress actions to achieve targets under the priority 'Keep Communities Safe'. The two priority targets are to:
  - reduce the rate of Queenslanders who are victims of personal and property crime by 10 per cent over 10 years
  - reduce the rate of youth reoffending by 5 per cent over five years by 2020–21 (starting from 2015–16) (Queensland Government, sub. 43, p. 6).
- Program Management Office—The Queensland Budget announced funding in 2019–20 for a
  Program Management Office to support a whole-of-government program focused on developing and
  implementing reform across the criminal justice system and informing an integrated and coordinated
  approach to policy, legislation and budgetary decision-making. The work program involves
  embedding a system-level approach to policy, service delivery, and investment across all related
  criminal justice and human service agencies.



Notwithstanding these coordinating mechanisms, there is limited evidence that coordinated action in pursuit of common objectives is prevalent in the sector. As noted by the Youth Advocacy Centre Inc. (sub. 34, p. 12):

There are two challenges to improved cooperation: The inability of government to date to 'desilo' and work effectively across agencies.

The service delivery statements of each agency do not convey a strong sense of interconnectedness and collaborative action. There is some evidence in the 2019–20 Queensland Budget of better coordination of measures to address certain justice issues (such as youth offending), but it is not clear how sustained this will be.

## Funding allocations

The current funding model provides resources for individual agencies' activities (such as services, schemes and programs). Each agency makes separate submissions to the annual budget process. Although central agencies play a monitoring and coordinating role, the complexity of causal impacts in the criminal justice system makes it difficult to assess cross-agency operational and financial impacts:

- Because agencies make budget submissions separately, the likelihood is reduced that the impact of proposals
  on other agencies is considered. This means that the flow-through impacts of decisions made by any single
  agency are not internalised by that agency, giving it few incentives to consider how purchasing and delivery
  affects the broader criminal justice system.
- Funding is top-down and distributed centrally, with few mechanisms for those who use and supply services to affect decision-making. Those who know what is required often do not have the capability or incentives to make a change. For example, caseworkers have little opportunity to influence rehabilitation and reintegration decisions, which may reduce incentives for prisoners to engage in rehabilitation.
- Although the problems being addressed are complex and dynamic, current funding arrangements do not
  appear to promote a wide range of services and procurement processes and may not be sufficiently dynamic to
  deliver service solutions for the difficult and complex problems evident in the criminal justice system.

Fiscal reprioritisation—whereby resources are reallocated from less to more effective and efficient uses—should be a basic instrument of improving allocative efficiency across the criminal justice system. However, there is no straightforward mechanism to allow this to happen quickly. While the budget process is intended to affect these types of transfers, cabinet budget committees and central agencies often do not have the detailed knowledge of the operation of agencies to do so effectively. At best, growth in funding to agencies is only marginally reduced or increased, meaning significant reallocations of funding will only occur over time.



# 8.3 Policy-making processes and capabilities

Criminal justice policy development and service delivery take place in a complex and volatile environment. In addition to agency interconnections, the clients of the system and the situations they face are complicated, and there is always potential for social, economic and technological change.

To make optimal decisions in such an environment, agencies need:

- best practice policy-making
- a strong information and evidence base when developing policy and making service delivery decisions.

## Policy development processes

The complexity of issues, and large financial and social costs involved heightens the need for policy-making based on best practice principles (Box 8.3).

## Box 8.3 Regulatory impact assessment—best practice principles

Recognising the importance of good policy-making practice, regulation-making throughout Australia is subject to regulatory impact assessment. This is a systematic approach to regulation-making that employs a cost-benefit framework and stakeholder consultation to inform the decision-maker of the best response to a regulatory issue. The Council of Australian Governments established best practice principles for regulation making:

- Establish a case for action before developing solutions.
- Consider a range of feasible policy options, and an assessment of their benefits and costs.
- Adopt the option that generates the greatest net benefit for the community.
- Ensure legislation does not restrict competition unless the benefits exceed the costs.
- Provide effective guidance to relevant regulators and regulated parties.
- Ensure that regulation remains relevant and effective over time.
- Consult effectively with affected stakeholders at all stages of the regulatory cycle.
- Ensure that government action is effective and proportional to the issue being addressed.

The Queensland Government established the independent Office of Best Practice Regulation to assist agencies in applying effective and rigorous regulatory impact assessment as part of their standard policy development process.

Source: Queensland Treasury 2016.

It is difficult to determine whether policy development in the criminal justice sector consistently follows best practice principles.

In Queensland (as in most other states), there is an exclusion from the regulatory impact assessment process for 'regulatory proposals relating to police powers and administration, general criminal laws, the administration of courts and tribunals and corrective services' (Queensland Treasury 2016). It excludes, for example, proposals to lengthen mandatory sentences, introduce new criminal offences and make changes to prison practices. This means that one of the 'safeguards' to ensure that policy-making and legislative change in the criminal justice sector follow best practice principles is not available.



Evidence from stakeholders suggests that criminal justice system policies sometimes have adverse unforeseen consequences. For example, legislative changes such as mandatory sentencing were raised as often having unintended consequences, particularly for Aboriginal and Torres Strait Islander people (PWC sub. 13, p. 39; ATSILS sub. 35, p. 6; the Chief Magistrate, pers. comm. 15 October 2018). Similar concerns were raised regarding policies regarding the policing and enforcement of family and domestic violence (see Chapter 11).

While program evaluation is sometimes undertaken, including in the core criminal justice agencies, it is not comprehensive, systematic or undertaken consistently. Further, evaluation reports are not always made public, making it difficult for stakeholders to assess the success or otherwise of policy. For example, a lack of program evaluation information has made it difficult for the Commission to form views with respect to the government's rehabilitation and reintegration activities.

## Information and modelling to support decision-making

Access to high-quality information supports good decision-making at both a policy level and a service delivery level. Robust and timely data, modelling and program evaluation, combined with best practice policy processes, allow the government to improve performance.

High-quality information systems support a better understanding of the experience of offenders inside and outside of the criminal justice system. Further, data systems that straddle the criminal justice agencies can enable system-wide analysis.

Two key system deficiencies were identified during consultations with stakeholders:

- Connectivity of databases—databases across the three core agencies fail to connect directly, with data unable to be easily matched from one database to the next. This partly arises from the different bases on which each of the systems is structured—'offence', 'case' or 'offender'. Moreover, the use of the 'single person identifier', intended to be a common field used on all databases to allow tracking of individuals as they pass through the criminal justice system, is not rigorously applied. A tendency to concentrate on the quality of data that is immediately useful to the individual agency leads to a degradation of data that would otherwise be useful for the analysis of the whole criminal justice system.
- **Modelling capability**—there is insufficient modelling capacity across the agencies in the criminal justice system, and the capacity that does exist tends to focus on single-agency requirements. Hence, primary questions such as how much additional prison capacity is required if police numbers are increased, a new criminal offence is introduced or bail eligibility is tightened, are not informed by robust information.

To address these concerns the Queensland Government announced the establishment of the Crime Statistics and Research Unit (CSRU) in July 2017. The unit was established in Queensland Treasury to provide an independent, transparent and authoritative information service, which could undertake criminal justice research and data analysis, and report findings in a meaningful way. Its functions include:

- providing a central repository of crime data and enable data linkages between criminal justice agencies
- strengthening the integrity and quality of recorded crime data and instil public confidence in crime statistics
- building an evidence base to support decision-making and policy development for government
- undertaking detailed data analysis and reporting the information in a meaningful way
- undertaking dedicated criminal justice research and evaluation
- improving access to crime data for all Queenslanders (Queensland Government sub. 43, pp. 4–5).

The CSRU has already had some success and has been instrumental in providing third party access to agency data to Griffith University's Criminology Institute. To date, however, this work has not translated into policy advice that influences outcomes across the criminal justice system. In the two years since its establishment, the CSRU has



produced two statistical publications, but is yet to produce any criminal justice research (although a high-level research agenda has been produced).

The Commission understands that the Program Management Office is also undertaking work to consolidate data from across the criminal justice agencies, in order to better inform budget bids from the core agencies. This is a positive initiative, which will help central agencies to take a more informed 'systems' view when assessing policy proposals. As discussed earlier, the Program Management Office lacks formal mechanisms for coordinating policy, lacks permanence and may not have sufficient buy-in from agencies. These features mean the office is unlikely to be as successful as it could be, particularly over the longer term.

# 8.4 Outcomes suggest there is room for improving the decisionmaking architecture

While it is difficult for the Commission to assess day to day decision-making across the criminal justice system, outcomes suggest that there is room for improvement.

Queensland's prison population is growing rapidly, having increased by around 60 per cent since 2012. Despite the financial, economic and social costs that this increase imposes on the community, there is little evidence that it will provide net benefits to the community.

It is evident that policies that have led to the increase in imprisonment have not been underpinned by robust evidence (see Chapter 7). There is little research that quantifies how imprisonment impacts on crime, or how imprisonment affects difference cohorts of people. Further, there is no obvious program of works in place to address this shortcoming or to assess individual policies, to ensure they provide net benefits to the broader community (or to identify whether there are better or cheaper ways of achieving such net benefits).

While the Commission has observed data sharing between researchers and criminal justice system agencies, a significant gap remains in how this translates into policy. As noted by Professor P. Mazarolle:

Where we probably come unstuck is the translation from research then to policy and practice on the ground ... maybe it's happening behind the scenes but in terms of that upfront evaluations of what works and police and domestic violence, responding to a serious and organised crime. What are the innovative models[?]. [T]here are still great opportunities and gaps. (Brisbane Public Hearing, p. 39)

The current high levels of prison overcrowding also suggest that the current decision-making architecture has not been able to sufficiently consider or foresee the consequences of policy actions.

In September 2018, the high security prisoner population exceeded the design capacity of prisons by 30 per cent, or nearly 2,000 prisoners. There have been recent announcements to increase prison capacity, but the prison population will remain beyond the prisons' design capacity for the foreseeable future (Box 8.4).

Overcrowding of prison facilities increases the costs of the system and undermines the ability of the corrections system to rehabilitate offenders, making the community less safe over the longer term (further discussed in Chapter 18).

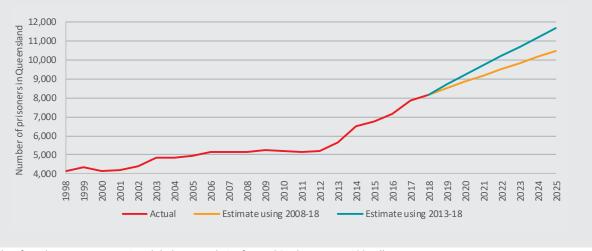


### Box 8.4 The cost of housing Queensland's growing prison population

In September 2018, the high security prisoner population exceeded the original design capacity<sup>a</sup> of prisons by 30 per cent, or nearly 2,000 prisoners.

The Queensland Government has announced new cell capacity of nearly 1,400 prison cells by 2023, at a total cost of \$861 million. Despite this, without further investments or changes to policy, prisons are likely to remain significantly overcrowded based on their original design capacity.

In the absence of any investments or policy change, the Commission projects the high security prison population will exceed design capacity by between 3,000 and 4,200 prisoners by 2025. To keep prisons within their original design capacity will require investments of between \$1.9 billion and \$2.7 billion beyond the \$861 million already announced.



a To allow for prisoner movement, 'total design capacity' refers to 95 prisoners per 100 cells. Sources: ABS 2018k; ABS 2017a; Queensland Government sub. 43, pp 72; Ryan 2019c.

Current levels of overcrowding suggest decision-making processes have become reactive, with action being delayed until the situation (in this case, overcrowding) becomes critical. This can narrow the range of options being available because they need to be rolled out quickly. In the case of infrastructure, reactive decision-making is likely to lead to the construction of high-security facilities since this is the infrastructure decision-makers are most familiar with.

Several stakeholders noted that past investment decisions have favoured high-security correctional facilities over other facilities that might better rehabilitate prisoners and provide better outcomes for the community over the long term. For example:

Our current prison system largely adopts a 'one size fits all' approach with far too many short-term prisoners being churned through high security facilities at great financial cost with little or no rehabilitation outcomes. That is, the 'one size fits all' is tailored to the highest common denominator of high security prisoners, which is essential for their incapacitation but counterproductive to outcomes of deterrence, retribution, rehabilitation for less serious offenders. (Hamburger, sub. 14, p. 16)



There is also evidence of resourcing imbalances in the system. For example, data show that community corrections receive only 10 per cent of total corrections expenditures, despite managing 70 per cent of offenders. This was a concern noted by Carrington and Hogg:

[I]n 2014–2015 the average daily population of offenders under supervision whether in prison or in the community numbered 23,500. Of these, approximately 30% only were in prison. When we look at total recurrent expenditures, we find that this 30% of offenders consumed 90% of the correctional budget, leaving a paltry 10% of the budget to support the supervision of 70% of offenders in the community. (sub. 3, p. 12)

Increased investment in the corrections system, including the prison system, may not be the best solution to addressing overcrowding in state prisons. It is possible that measures in other parts of the criminal justice system, or even outside the criminal justice system, would constitute more effective and efficient responses to prison overcrowding. However, current decision-making processes, operating in the context of a criminal justice system populated with distinct and siloed agencies, make it difficult to effectively explore these options.

### 8.5 Conclusion

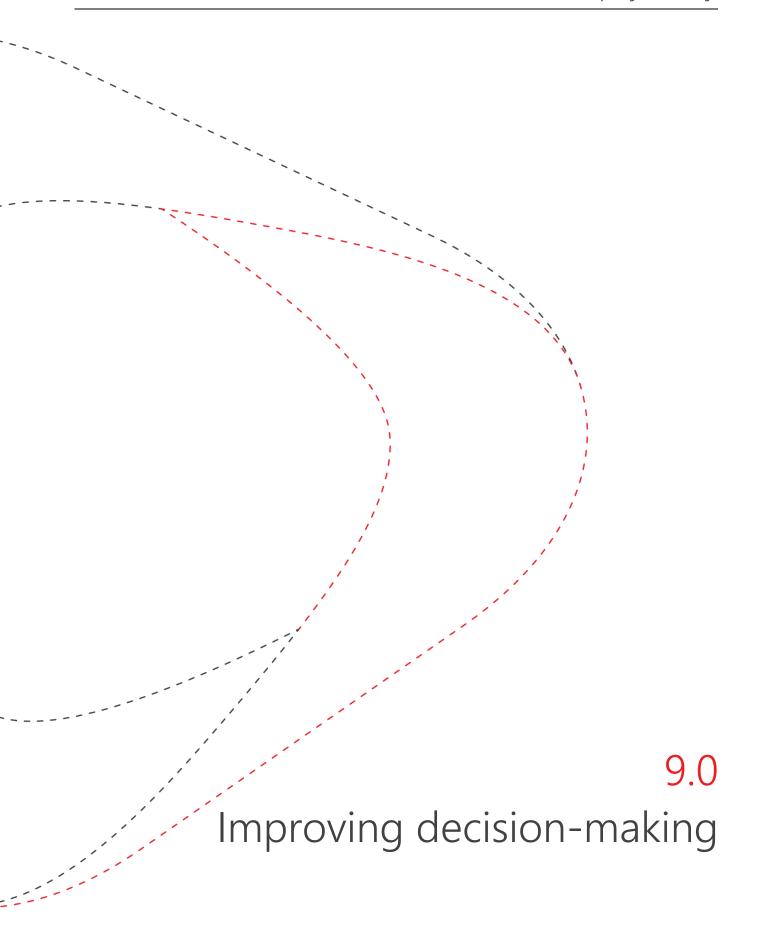
While there is some evidence of good practice, the current decision-making framework in the Queensland criminal justice sector has a range of areas that could be improved:

- Policies need to adopt a whole-of-system perspective, to improve coordination of policies and actions in pursuit of overarching system objectives.
- Policy-making processes need to follow established best practice in order to avoid unforeseen consequences.
- Information and evidence systems need to be improved to ensure that decisions are made with the best information.
- Funding arrangements need to support the optimal allocation of resources across the sector.
- Decision-making needs to be less reactive, so that more considered options can be made available.

Given that the criminal justice system operates in a difficult policy environment, without these improvements, there are significant risks that the system will make policy and resource allocation decisions that are not in the best interests of the community. This means the system will be less successful in achieving its objective of community safety and will be costlier than it needs to be. Moreover, ongoing effective reform of the system may not be achievable, resulting in problems growing or re-emerging over time.

Chapter 9 discusses solutions to address these concerns.







This chapter examines options and makes recommendations for improving governance and funding arrangements in the Queensland criminal justice sector.

#### Key points

- Without change to the underlying decision-making architecture that supports the criminal justice system, the benefits of the reforms recommended in this report may not be realised, and problems will re-emerge over time.
- There are opportunities to improve policy development and service delivery in the criminal justice system by:
  - setting objectives for the criminal justice system, to drive policy and decision-making across the sector
  - increasing transparency in decision-making and improving accountability for achieving criminal justice objectives
  - making better use of evidence to support funding and policy-making decisions.
- Beyond these changes, a more fundamental institutional change is required to address the underlying problems inherent in the existing agency-level decision-making architecture.
- Establishing an independent statutory body, with a mandate to develop, assess, and advise on policy and funding from a community- and system-wide perspective, is likely to improve decision-making and accountability.
- An independent 'Justice Reform Office' should be established with responsibilities to:
  - endorse and approve policy and budget submissions from the core criminal justice sector agencies to Cabinet and Cabinet committees
  - provide independent expert advice on system-wide issues
  - oversee justice system reforms and report on those reforms
  - lead and support evidence-based policy-making.
- The key governance features of the Justice Reform Office should include:
  - legislative backing for its independence, key functions and responsibilities
  - a board that includes representation by independent members and senior officers from the core criminal justice agencies
  - a requirement for public consultation including the use of advisory groups, with representation from the community, the judiciary, academia, service delivery organisations and other individuals, groups and institutions.



## 9.1 Introduction

After assessing the governance and decision-making architecture in the Queensland criminal justice system (Chapter 8), the finding is that the existing system is deficient in a number of important respects:

- Policy development and service delivery occur through separate agencies, which is not well-suited to delivering coordinated services to address complex social problems.
- Policy-making processes are not always best practice.
- There is limited Information and data systems to inform decision-making.
- Funding arrangements do not support the effective and efficient allocation of resources across the sector.

There is little evidence to support the view that increases in imprisonment deliver net benefits to the community (Chapter 7). Despite this lack of evidence, policies to increase the use of imprisonment have been introduced consistently over several decades. While these policies may have provided some benefits to the community, it is likely that many have come at a net cost. Further, it is evident that options that would impose fewer social and economic costs on the community have not been pursued.

As discussed throughout this report, carefully implemented reductions in imprisonment can deliver net benefits to the community. However, it is apparent these reforms will be difficult to sustain under the decision-making architecture that is in place today.

The deficiencies in the existing decision-making architecture can be addressed by:

- setting clear objectives for the criminal justice system
- designing institutional arrangements that support system-wide decision-making
- improving the policy development process
- increasing access to information and evidence
- establishing mechanisms for efficiently allocating resources across the criminal justice system.



# 9.2 Setting the objectives of the criminal justice system

Effective government arrangements require a clear and specific purpose to help guide policy-makers, agencies and individuals in choosing from the range of policy tools and processes to address a problem. Clear objectives also establish a basis on which the performance of the system, and its policies, can be assessed against (see Chapter 2).

The Queensland Government has established the priority of 'Keeping communities safe' as one of Queensland's six 'Our Future State' priorities. To meet that priority, key performance objectives are to reduce the rate of crime victims, and to reduce rates of youth offending.

However, without greater guidance, this objective could be interpreted in many ways, particularly when viewed through the individual functions that exist in the criminal justice system. For instance, the community safety objective implies agencies should prioritise activities that incapacitate individuals who present any potential risk to the community.

Over the longer term, however, community safety may be best achieved by addressing the factors that lead to offending behaviours. For example, while prison can be used to mitigate short-term risk (by incapacitating an offender), it can risk long-term safety outcomes if it exposes individuals to criminogenic effects and/or fails to tackle the root causes of offending.

Accepting the community needs to be kept safe *over time* is to acknowledge that there are trade-offs between immediate and longer-term outcomes that any risk management strategy needs to acknowledge. It recognises the possibility that a course of action may increase the risk of harm to the community in the short term but reduce it more significantly in the longer term. This means, for example, that any community safety objectives achieved by increasing the use of imprisonment needs to be considered against the harms it may cause by exposing lower-level offenders to criminogenic effects, and whether other options would provide a better balance between short-term and long-term risks.

Decision-makers in the criminal justice system are confronted daily with the task of how to manage these risks:

- Police officers must decide whether to caution, arrest or divert a suspected offender.
- Judges must decide which sentence to give—that is, whether to fine, give a community-based order to, or imprison a convicted offender.
- Corrections agencies must decide how to balance the degree of supervision of a prisoner (that is, high security or low security) and the prisoner's rehabilitation and reintegration.
- Parole boards must decide between continued incarceration and a period of supervision in the community, for each prisoner seeking parole.

While the immediate implications for community safety of a decision are often readily apparent (for example, it is safer in the short term to imprison than to divert a suspected offender), the nature of the longer-term trade-offs and risks over time can often only be understood by reference to the evidence of evaluations and statistical studies.

Without clear guidance on objectives and ways to manage risks, there will always be a tendency to shift offenders into the criminal justice system, give harsher sentences, or use imprisonment, since it is natural for individual agents in the system to avoid short-term risks.



To this end, the Commission recommends that the Queensland Government establish a new common overarching objective for the criminal justice system:

Improve community well-being over time by reducing harms from crime.

To provide more specific guidance to those who develop and implement criminal justice policy, this overarching objective should be supported by five operational objectives.

The criminal justice system should aim to efficiently and effectively:

- address the casual factors behind offending
- deter criminal activity
- incapacitate individuals who present an unacceptable risk to the community
- reduce the risk of future offending through effective rehabilitation and reintegration
- maintain the legitimacy of the system.<sup>44</sup>

While it is important for the broad ideas behind these objectives to be embedded in legislation, the government will need to provide more specific guidance to agencies on how they expect agencies to manage these objectives.

These objectives should be provided, in the form of public statements of intent, to each of the core agencies in the criminal justice system. The statements of intent should set out the expected performance of each agency and how this performance will be assessed against the Queensland Government's objectives. The government should also develop and release a strategy document that outlines how the criminal justice system will achieve its objectives. This strategy should be consistent with any guidance to agencies.

To embed the objectives, the Queensland Government should also introduce more comprehensive and detailed common performance objectives and indicators across the core criminal justice agencies. These could include general justice performance objectives, such as reducing offending and reoffending rates, and specific performance objectives, such as for Aboriginal and Torres Strait Islanders, youth and women. It is important that performance objectives and indicators across the sector both agree with and align with the overarching criminal justice system objective.

# 9.3 Institutional arrangements that will support system-wide decision making

Chapter 8 found a number of deficiencies in the decision-making architecture that supports the Queensland criminal justice system. Key amongst these are that the decision-making architecture is not well-suited to addressing complex social problems requiring system perspectives and coordination. Further, funding arrangements do not support the effective and efficient allocation of resources across the sector.

Currently, policy development and service delivery occur through four separate agencies—the Queensland Police Service (QPS), the Department of Justice and Attorney-General (DJAG), Queensland Corrective Services (QCS) and Department of Youth Justice (DYJ).

Improving the decision-making architecture and processes that underpin the criminal justice system will require new institutional arrangements to be established to support system-wide decision-making. These arrangements need to address the underlying incentives that influence decision-making. They should also address responsibilities and accountabilities.

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<sup>&</sup>lt;sup>44</sup> Maintaining the legitimacy of the system requires demonstrating respect for victims and the rights of defendants and offenders. It also requires being transparent in justice policy and processes, recognising and understanding community expectations for the criminal justice system, and engaging with the community on changes to the system.



Jurisdictions have implemented various options for coordinating activities across their criminal justice systems (see Appendix M). These range from various forms of departmental structures (including single mega-departments and departments reporting to several ministers), justice sector committees (similar to the current model in Queensland) and formal justice sector leadership boards (in New Zealand). While jurisdictions have been grappling with how to best manage their criminal justice systems, there is no consensus on a single model of best practice.

Given this lack of consensus, options need to be assessed against a set of criteria. To this end, the decision-making architecture should meet at least three criteria:

- Internalise the full set of costs and benefits across the criminal justice sector in policy and funding advice and decision-making, whilst ensuring effective delivery of each of the criminal justice functions.
- Establish accountability for outcomes across the criminal justice sector to ensure that policy and funding reforms are delivered.
- Provide authority to allow policy and funding reforms to be achieved.

The Commission has considered a wide range of options against these criteria. The two options that best meet these criteria are:

- a Justice Reform Office (JRO)—an independent statutory body that establishes cross-agency decision-making mechanisms and formulates a reform policy agenda in cooperation with the agencies. It would oversee strategic policy and reform efforts, and support resource reallocation across the sector. The office would be governed by a board with independent and criminal justice agency representation
- a mega-department (Department of Justice (DOJ))—a single department encompassing the four existing criminal justice agencies, answerable to one or, more likely, several ministers. The operational arms of police and corrections could be separated into distinct agencies.

This assessment is summarised in Table 9.1.



Table 9.1 Decision-making architecture options—a coordinating body and mega-department

Reform criteria	Justice Reform Office (JRO)	Department of Justice (DOJ) mega- department
Internalisation of costs and benefits in advice and decision-making	Having an independent body responsible for achieving the system reform agenda would allow the adoption of a 'system-wide' approach that accounts for all costs and benefits of policy options.	A mega-department would allow internalisation of costs and benefits across its functional areas since they would be answerable to a single executive. However, this may be compromised if the department is answerable to several ministers, each with different functional responsibilities.
	Being more at arm's length from each of the agencies, the JRO would be more objective in providing advice on funding priorities and reallocation across the sector, including transfers external to the core agencies (for example, justice reinvestment).	A large department structure can make it challenging to allocate resources because the four functional areas could still operate as discrete areas with different interests, with some areas more influential than others.
Sufficient accountability	The JRO would be ultimately accountable to its responsible minister for fulfilling its defined coordination and reform function. Its board structure would also make it accountable to the core justice agencies (through agency representatives) and the community (through its independent community-based board members) for addressing reform issues.	DOJ would be accountable for multiple operational, policy and longer-term reform objectives. It would probably be accountable to several ministers. This would dilute its accountability for achieving longer-term system reform objectives.
Sufficient authority	While the JRO would not have direct operational authority over other agencies, it would have statutory backing to undertake its functions, including to review and endorse policy and budget proposals for Cabinet and Cabinet committee approval.	DOJ would be given a mandate from the government to achieve a reform agenda. Having all the core justice functions in the one organisation would give it authority that would reduce resistance to change.



## An independent Justice Reform Office

Having a Justice Reform Office or a mega-department would have benefits over the current structure. Both would improve the governance structures to enable better coordination of functions and activities. Further, both would be able to achieve reform by internalising the full costs and benefits of change across the sector, being accountable for reform and having the authority to drive reform across the sector.

A mega-department would have the benefits of a single organisational structure answerable to a single executive. This would give it the authority to deliver reform and reallocate resources across functions. However, its size and the multiplicity of operational, policy and reform objectives across policing, courts, corrections and youth justice would make it difficult to manage. The operational and political need to address short-term priorities would likely lead to the subordination of longer-term reform priorities. Further, a large organisation, especially if it is answerable to multiple ministers, would be prone to the development of internal politics that drive reform and funding priorities rather than the evidence of what is in the longer-term interests of the community. That is, the size and complexity of the organisation would lead to its incentives to achieve productive reform being subsidiary to other considerations.

On balance, a statutorily independent Justice Reform Office is likely to be the better mechanism for achieving optimal system-wide policy formulation and reform over the long term. The key features of the proposed office (provided below) will give it a broad system-wide perspective and allow it to be sufficiently separate from day to day operational issues (so it can focus on longer-term reform), while maintaining sufficient accountability back to justice system agencies (via its board).

Its statutory independence from government will give it greater freedom to explore options while using its relationships with the justice agencies and the community to facilitate the delivery of reform. As it will work with and across the sector, it is less likely than an oversight body that is more distant from the sector to suffer a lack of information and understanding.

A risk is that it would have insufficient authority to drive reform in the other criminal justice agencies. However, this risk can be managed by establishing the office's functions (including to review and endorse policy and budget proposals) in legislation. The Justice Reform Office's authority can also be strengthened through:

- a strong mandate from government to pursue a reform agenda
- an independent governance structure, with representation from senior executives from the key criminal justice agencies and the community
- the responsible minister being the Premier or other senior minister.

The Commission received broad endorsement for the Justice Reform Office (proposed in the draft report) from academics, policy makers in the core justice and central agencies, as well as community stakeholders. A former Commissioner of Queensland Corrective Services viewed the Justice Reform Office model as an improvement over the status quo:

I can see no reason why a Justice Reform Office, as described in the draft report, would not be able to achieve those objectives. That model is certainly preferable to the status quo. The formation of a super Justice Department would require significant machinery-of-government structural changes, risking disruption to business-as-usual activities of the core agencies for some time. Consideration should be given to an independent board of the Office or at least an independent chair. (Rallings, sub. DR1, p. 6)



## Governance structure of the Justice Reform Office

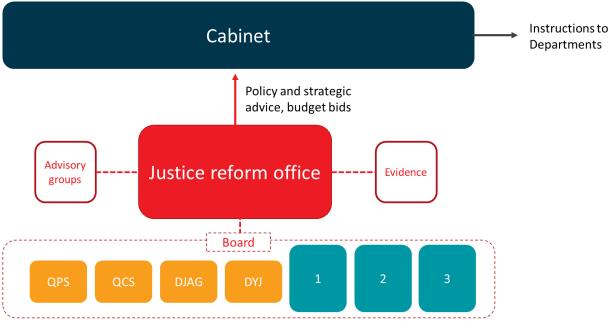
To provide it with sufficient longevity and independence to reform decision-making, the Justice Reform Office should be established as a statutory body with a mandate to provide independent expert advice to government on matters relating to the criminal justice system.

The governance structure of the Justice Reform Office must enable it to consider the perspectives of each of the core agencies responsible for delivering the services of the criminal justice system, as well as those services that surround the system. The office will also need sufficient expertise, resources and authority to implement the reform agenda.

To this end, the Justice Reform Office should be arm's length from, but accountable to, the government, the community and the criminal justice system (Figure 9.1):

- The office should be responsible to a suitably constituted board that includes representation from the community and each of the core criminal justice agencies (QPS, DJAG, QCS and DYJ).
- The office should be responsible to the Premier or other senior minister, who should appoint the chair of the board and the independent members of the board. To help preserve its independence of action, the voting rights of the independent members should exceed those of the government members on issues related to the strategies, policies and performance of the criminal justice system.
- The office should be an outward-facing organisation with strong linkages to the judiciary, community groups, academia, service delivery organisations, business, trade unions and the broader community. It should establish advisory groups as required.

Figure 9.1 Governance structure of the Justice Reform Office



Board is comprised of department representatives and selected independent members with a majority voting right



# Key functions

The key functions of the Justice Reform Office should be established in legislation. These functions should be to:

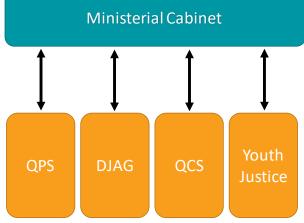
- endorse and approve policy and budget submissions from the core criminal justice sector agencies for Cabinet and Cabinet committee review
- provide independent expert advice on system-wide issues
- oversee justice system reforms and reporting on those reforms
- lead and support evidence-based policy-making.

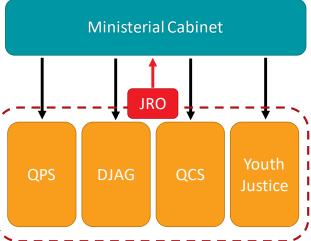
Day to day operations

The Justice Reform Office would have no role in day to day operations of the sector but would work with the core justice agencies to advise the government on policy, planning and strategic issues (Figure 9.2).

Figure 9.2 Functions of the Justice Reform Office and core criminal justice agencies

# Ministerial Cabinet Ministerial





Policy, strategy and planning

The Justice Reform Office would be responsible for endorsing policy and budget submissions to the government on justice system reform issues. Policy, strategy and planning submissions, including relevant budget submissions, initiated by justice agencies would be required to be reviewed and endorsed by the Justice Reform Office for consistency with system objectives and assessment of system impacts. Protocols would need to be established with the justice agencies to determine the process for Justice Reform Office review and endorsement.

The Justice Reform Office will be similar to Building Queensland in its governance structure and in at least some of its functions (Box 9.1).



## Box 9.1 Building Queensland

Building Queensland performs a key role in developing business cases for major infrastructure projects, and helping government determine infrastructure priorities. It develops the Infrastructure Pipeline Report to assist the Queensland Government in determining the projects that will best address the state's infrastructure priorities

Building Queensland works with agencies to develop detailed business cases for projects with an estimated capital cost of delivery of over \$50 million. For projects of \$100 million or more it leads the development of the business case.

Building Queensland has a board of management. It consists of eight members including the chairperson, four part-time members (all non-government) and the chief executives of the Department of Premier and Cabinet, Queensland Treasury and the Department of State Development, Manufacturing, Infrastructure and Planning.

The Minister for State Development, Manufacturing, Infrastructure and Planning is the minister responsible for Building Queensland. This Minister appoints the chairperson and part-time members of the board and can give a written direction to Building Queensland about the performance of its functions.

Sources: Building Queensland n.d.; Queensland Parliament n.d.

The Justice Reform Office will perform functions currently performed by the Program Management Office (PMO)—developing and implementing reform across the Queensland criminal justice system, and informing an integrated and coordinated approach to policy, legislation and budget decision-making (Queensland Government 2019a).

It is proposed that the Justice Reform Office will also perform a range of other functions. These include:

- undertaking assessments of policy proposals
- establishing common performance frameworks across the criminal justice system and working with government to develop ministerial statements of intent for criminal justice agencies (Chapter 17)
- establishing funding arrangements to support justice reinvestments (Chapter 10)
- working with corrections to establish a plan for the development of future correctional infrastructure (Chapter 20)
- negotiating justice agreements with Indigenous communities (Chapter 22).

The functions of the Justice Reform Office should be largely funded by reallocating existing resources to support its key functions. For example, if the recommendation of such an office is adopted, resources currently provided to the PMO should be reallocated to the Justice Reform Office.



# 9.4 Improving the policy development process—a justice impact test

As discussed in Chapter 8, most jurisdictions in Australia (including Queensland) have an established regulatory impact assessment process for assessing changes to regulation outside of criminal law.

At least in principle, there is no reason why criminal justice policy proposals should not be subject to a similar level of public scrutiny as other regulation. Criminal justice proposals would benefit as much as other regulatory proposals from proper problem definition, canvassing of a wide range of options, consideration of all the costs and benefits, and comprehensive consultation. Given the potential for unintended consequences arising from policy changes involving criminal justice issues, a thorough process of policy development along the lines of regulatory impact assessment should be used.

In the United Kingdom, departments are required to complete a justice impact test for all new policy proposals that could potentially impact on any operational aspect of the justice system, particularly on the volume of cases going through courts or tribunals, or the way that cases are dealt with by the justice system. The justice impact test is then circulated to the relevant business groups across the Ministry of Justice to quantify the impacts on their areas. The department making the proposal generally funds any additional costs imposed by the proposal (UK Ministry of Justice 2018).

To improve the policy development process and to ensure that risks of unintended consequences are minimised, the Commission recommends that a formal justice impact test be introduced in Queensland. This test should:

- establish the case for action
- consider a range of feasible options, and assess the costs and benefits of each approach
- assess the impacts on each of the justice agencies, including the fiscal impacts
- consider impacts on all affected community stakeholders.

Public consultation should be a key requirement of the justice impact test. Justice impact tests of major policy proposals should also be publicly released in the same way that major regulatory impact statements are made public.

The Justice Reform Office should coordinate and undertake the justice impact tests for any significant proposals affecting the criminal justice system.



# 9.5 Better information and modelling

## Improving information, evaluation and evidence

Program evaluation is undertaken by the Queensland Government, including the core criminal justice agencies. However, evaluation of programs would be more beneficial if it were systematically employed, integrated into service design and undertaken within a framework that allowed programs across the criminal justice system to be directly compared. This approach would allow resources to be reallocated from less successful to more successful services.

The work of the Washington State Institute for Public Policy (WSIPP) is an example of how evidence-based program evaluation based on cost–benefit analysis can be used to improve public policy (Box 9.2). The New South Wales Government has sought to emulate the approach of WSIPP (NSW Treasury 2016). Other examples of evidence based policy and program evaluation in the criminal justice area includes the evidence briefs of the New Zealand Ministry of Justice (NZ Ministry of Justice 2018) and the reports of the United Kingdom's What Works Network (UK Government 2018). Sentencing advisory councils in Queensland and other jurisdictions also support evidence-based policy.

The development of a strong evidence base, such as a database of performance evaluations that allows comparison of programs operating within the criminal justice system, would also encourage more effective service delivery and resource allocation. It would do this by:

- providing guidance to the government and justice agencies as to which programs work and which do not
- improving accountability—the public, parliament, the media and other organisations can see the success or otherwise of individual programs. This will both place pressure on the government and support its decisions to reallocate its resources in favour of the successful programs
- providing a resource for universities and other research organisations to support their studies of the criminal justice system, which can further develop the overall evidence base that the criminal justice system can use
- systematically developing a base of evaluation and evidence.

In July 2017, the Queensland Government announced the establishment of the Crime Statistics and Research Unit (CSRU) in Queensland Treasury to undertake criminal justice research and data analysis, and report findings in a meaningful way. To date, the CSRU has produced two statistical reports, and works behind the scenes to clean and provide agency data to approved clients, including Queensland academics and the PMO. The CSRU has not published policy analysis or research.

The Queensland criminal justice system needs a robust base of evidence if it is to set a course of reform and continual improvement. This evidence base should include reliable crime, court and corrections statistics, research that reveals system linkages, and information on the performance of the operation of the various elements of the system. Moreover, the development of this evidence base needs to be closely linked to the development of a criminal justice reform agenda, if the reform agenda is to be evidence based.

To this end, the CSRU will need to work closely with the Justice Reform Office to ensure that research supports justice system requirements and is sufficiently robust. Consideration should be given to whether there is merit in structurally separating the statistical and research functions of the CSRU, as this may allow more independent policy advice.



## Box 9.2 Washington State Institute for Public Policy

The Washington State Institute for Public Policy (WSIPP) is a nonpartisan public research group which works with legislators, legislative and state agency staff, and experts in the field to carry out research in the areas of education, criminal justice, children and adult services, health and general government.

Cost-benefit analyses are conducted on a large number of programs to allow comparison of performance. WSIPP's goal is to provide 'policymakers and budget writers with a list of well-researched public policies that can, with a high degree of certainty, lead to better statewide outcomes coupled with a more efficient use of taxpayer dollars'.

For example, in 2006, WSIPP produced a paper titled *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rate* in which it considered the performance of a wide range of programs. It found that:

there are economically attractive evidence—based options in three areas: adult corrections programs, juvenile corrections programs, and prevention... if Washington can successfully implement a moderate—to—aggressive portfolio of evidence-based options, then a significant level of future prison construction can be avoided, state and local taxpayers can save about two billion dollars, and net crime rates can be lowered slightly. (Aos et al. 2006b, p. 16)

WSIPP's work is considered to have contributed to Washington's better performance on reducing crime. By 2011, impacts on several crime indicators had been achieved—for example, Washington's juvenile arrest rates had declined by 67 per cent since 1990, compared to 49 per cent nationally; crime rates had declined; and its incarceration rate is 56 per cent of the national rate (NSW Treasury 2016).

WSIPP continues its program evaluation and evidence-based research work for Washington State.

Source: WSIPP 2018.

The South Australian Government's Criminal Justice Information Management project provides an example of an initiative to improve the quality of data management to better understand and measure the operation and performance of the criminal justice system (Box 9.3). The aims of the South Australian information system seem broader than is currently envisaged in Queensland and would provide strong support to efforts to improve system and program evaluation. It would also complement the improvements in modelling discussed below.

## Box 9.3 South Australian Criminal Justice Information Management

In 2016, the South Australian Government initiated its Criminal Justice Information Management (CJIM) project in recognition that, historically, criminal justice system information had existed in silos, with only basic levels of interaction between organisations. Through the CJIM project, business processes are to be improved to avoid rework, overlap, duplication and unnecessary effort through better sharing of information. The CJIM project aims to:

- develop a deeper understanding of the interconnected criminal justice system
- establish mechanisms to measure the performance of the criminal justice system
- identify ways that the criminal justice system might be improved, both in terms of delivering better services to citizens and by finding ways to be more effective from an organisational perspective.

Source: SA Attorney-General's Department 2016.



# Developing better modelling of the criminal justice system

As discussed earlier, modelling capacity within and across the agencies of the Queensland criminal justice system is limited. Other jurisdictions have a greater modelling capability. For example, in New South Wales, the Bureau of Crime Statistics and Research (BOCSAR) has developed a significant modelling capacity. For example, BOCSAR was able to successfully predict how changes to bail processes would impact on the remand population (Halloran et al. 2017). Other jurisdictions are also developing their modelling capacity. In 2017, the Western Australian Government announced the development of new modelling capacity to assist it in directing reform of the criminal justice system (Box 9.4).

An improved modelling capacity within the core criminal justice agencies would provide valuable support to policy development within the sector, particularly when investigating the impact of policy proposals. However, such modelling needs to balance being useful to government and its agencies, being understandable in its mechanics and being easy to maintain.

To ensure continuity, there is a need to establish who is accountable for its ongoing development and maintenance, and how it can be used to support decision-making across the criminal justice system. There seems to be a prima facie case for establishing this capacity and accountability in the Justice Reform Office.

#### Box 9.4 Western Australian Justice Pipeline Model

In 2017, the Western Australian Government announced a budget allocation of \$850,000 towards the development of a Justice Pipeline Model to assist with policy development of justice-related issues.

The model is intended to capture the flow of activities and costs throughout the justice sector, from police dealing with crime, through to the courts and to the management of prisons and community sentences. It identifies how changes in one part of the system can have a significant impact on the other parts of the system, for example the effect on the court and prison system of a sudden increase in the number of police prosecutions, or the effect of an increase in the number of judges on time to trial in a particular court.

The Western Australian Treasurer indicated it would be able to project the potential success or failure of initiatives and direct money where it would do the most good.

Source: Government of Western Australia 2017.



# 9.6 Options for resource reallocation

An important feature of a well-functioning service delivery system is fiscal reprioritisation, whereby resources are reallocated from less to more effective uses and from inefficient to efficient uses.

As discussed in Chapter 8, under the normal government budgetary process it is difficult to reallocate funding from one use to another because of the information asymmetry that exists between central and service delivery agencies. Common methods to reallocate resources, such as efficiency dividends and agency budget bids, tend to be blunt, marginal and/or prone to error. To address this, different approaches can be employed.

The most obvious one is for an external organisation to undertake periodic reviews of the funding of criminal justice agencies. Such reviews would investigate the appropriateness, effectiveness and efficiency of the agencies' use of funding. The review could recommend the cessation of some programs, the expansion of others and the reallocation of funding across agencies. To some degree, the reviews would address the information imbalance currently inherent in the system. However, while periodic reviews can produce beneficial outcomes, their cost can prevent them being a permanent or frequently used mechanism.

Another approach would be to impose a strategy of justice reinvestment. Justice reinvestment is a funding strategy which originated in the United States as a response to rising and unsustainable numbers of people in prison. The central principle of justice reinvestment is that better social outcomes can be achieved by reallocating some of the expenditure on prisons to other programs which directly target the underlying causes of crime.

The ongoing application of the principle of justice reinvestment could improve the flexibility of funding within the criminal justice system. There are several options for the practical application of justice reinvestment. The simplest application is to require all criminal justice agencies to apply the principle to its service delivery framework and demonstrate the application of the principle in its annual budget submission.

The benefit of such an approach is that each agency must demonstrate how funding has been released from less to more effective options for achieving the government's objectives and therefore the approach becomes ingrained in the agency's service delivery approach. However, a key weakness of the approach is that information on the potential for reallocation is only known by each agency; therefore, it will require additional accountabilities between government and agencies.

A third approach is a cross-agency funding model that assists with transfers across the criminal justice system.

As the name implies, a cross-agency funding model resources several agencies to pursue outcomes sought by government. The funding can be a supplementation for several agencies that are jointly contributing to an outcome for the government or an ongoing arrangement for pooling resources. There are many examples of the supplementation model having been applied in Queensland, often in response to recommendations from inquiries or whole-of-government strategies.

An example of a pooling model is the Justice Sector Fund (JSF) used in New Zealand. The JSF uses money saved by an agency to fund another agency's initiatives to reduce crime and reoffending. The JSF commenced in April 2012. By 2017, it had funded 66 projects from savings by justice sector agencies. Over the five-year period, the total savings across the justice sector agencies were NZ\$273 million, an average of NZ\$55 million per annum (annual justice agencies total funding exceeds NZ\$2 billion) (NZ Ministry of Justice n.d.).

The pooling model also can be used to directly apply the principle of justice reinvestment across the criminal justice system. The incentives for criminal justice system agencies to make and release savings into the pool are stronger compared to a single agency justice reinvestment funding model, because each agency has an opportunity to bid for funds in the pool. A further benefit is that it encourages innovation in service delivery, as new ideas can be funded from the funding pool.

It is likely that no single approach would be sufficient, and a combination of approaches would be required over time.



#### Recommendation 1

The Queensland Government should adopt a common overarching objective for the criminal justice system. This objective should be to 'improve community well-being over time by reducing harms from crime'.

To provide guidance to those developing and implementing criminal justice policy, this overarching objective should be supported by five operational objectives.

The criminal justice system should aim to efficiently and effectively:

- · Address the factors behind offending.
- Deter criminal activity.
- Incapacitate individuals who present an unacceptable risk to the community.
- Reduce the risk of future offending through effective rehabilitation and reintegration.
- Maintain the legitimacy of the system.

The government should provide specific guidance to each agency through public statements of intent, setting out the performance expectations and how this performance will be assessed against the objective. The government should also develop and release a strategy document that outlines how the criminal justice system will achieve its objectives. This strategy should be consistent with any guidance to agencies.

#### Recommendation 2

The Queensland Government should establish an independent statutory body (the Justice Reform Office) to improve the efficiency and effectiveness of the criminal justice system. Its key responsibilities should be to:

- approve policy and budget submissions from the core criminal justice sector agencies prior to submission to Cabinet and Cabinet committees
- oversee justice system reforms
- provide advice to government on priority criminal justice policy issues
- lead and support evidence-based policy-making.

The office should be responsible to a board that includes representation from each of the core criminal justice agencies and independent members. The independent members on the board should have a voting majority.



#### Recommendation 3

The Queensland Government should require the Justice Reform Office to undertake the following specific tasks within 24 months of its establishment:

- develop common performance objectives and indicators across the core criminal justice agencies, including targets for
  - reducing offending and reoffending rates
  - reducing Indigenous incarceration
- develop mechanisms for allocating resources to support system objectives
- develop systems to provide accurate and timely data to support decision-making, and improve transparency and accountability
- develop modelling that promotes understanding of how policy and other proposals are likely to impact across the system
- develop a framework to ensure criminal justice related programs and activities are adequately and consistently evaluated.

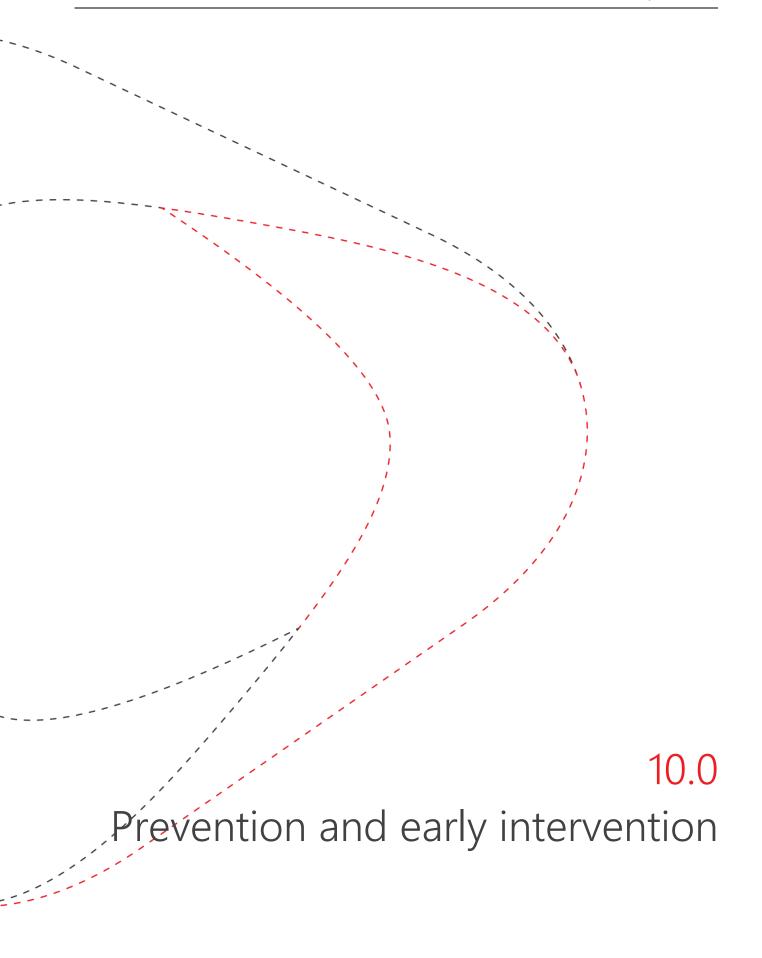
#### Recommendation 4

The Queensland Government should introduce a justice impact test to ensure that decision-makers are informed of the full impacts of policy proposals. This test should assess:

- all costs and benefits of the proposal
- impacts on key stakeholders, including community members, government and community agencies
- alternative options.

The justice impact test should be undertaken by the Justice Reform Office and should involve public consultation and reporting.







This chapter considers the effectiveness of prevention and early intervention approaches in reducing the number of people in adult prisons. It highlights the challenges and barriers to effective implementation, provides examples of programs in Queensland and identifies opportunities for targeting prevention and early intervention efforts.

## **Key Points**

- Prevention and early intervention measures can reduce crime and deliver future savings through
  avoided prison expenditure and justice system costs. The economic and social benefits of measures
  may extend beyond their impact on the criminal justice system.
- Investments in prevention and early intervention involve risk. Initiatives can be expensive to implement and have uncertain outcomes. The benefits of programs often accrue over long time frames and outcomes can be difficult to attribute to a single program.
- There is opportunity to improve decision-making around prevention and early intervention across government. Frameworks should be established to drive evidence-based policy making, improve coordination across government and non-government agencies, and deliver robust program evaluations.
- Evidence-based programs targeting high-risk individuals and communities are likely to provide the highest net benefits to the community. Significant benefit may be achieved by targeting:
  - chronic and costly offenders who are estimated to impose an average cost of \$75,000 (non-Indigenous) and \$381,000 (Indigenous) in criminal justice system costs by the age of 31 years.
  - communities characterised by extreme social and economic disadvantage, including Indigenous communities in regional and remote areas of Queensland—10 per cent of Queensland postal areas are estimated to account for around half of the criminal justice system costs of chronic offending.
- Government should establish frameworks to support community-level approaches, particularly in Indigenous communities where there are high levels of social and economic disadvantage. Justice reinvestment is a community-led, place-based approach to prevention and early intervention that has shown promising early results in Australia.
- Existing government systems and services provide opportunity to target preventative programs and interventions to individuals at-risk of future criminal behaviour. In this regard, government should:
  - commission an independent evaluation of student disciplinary absences (SDAs) in Queensland state schools
  - prioritise the assessment of at-risk children for cognitive impairments and other disabilities and ensure there are enough resources in the school system to support referrals to the National Disability Insurance Scheme where appropriate
  - ensure teachers and schools are equipped to identify and manage difficult behaviours and recognise when referrals to additional services may be required
  - prioritise the prevention of child sexual abuse by assessing the availability and effectiveness of preventative services for individuals who are at-risk of committing child sexual abuse as it develops its Sexual Violence Prevention Framework
  - improve existing processes within the prison system to better identify and support the children of prisoners and strengthen family relationships.



# 10.1 Introduction

Crime prevention includes strategies and measures that seek to reduce the risk of crimes occurring, and their potential harmful effects on individuals and society (AIC 2012). Early intervention attempts to prevent crime by identifying individuals and communities who are most at risk of participating in crime, to reduce the likelihood of people entering the adult criminal justice system and ultimately prison.

Because prevention and early intervention programs address the root contributors of crime, they have enormous potential to reduce criminal offending and adult imprisonment. There is empirical evidence both internationally and in Australia that early intervention approaches can work (Allard et al. 2014):

Overall, the research shows that early prevention programmes are effective in substantially reducing long-term criminal justice costs: Investing in early prevention is more cost–effective than imprisonment ... (Gluckman 2018, p. 13)

Crime prevention can reduce the long-term costs associated with the criminal justice system and the costs of crime, both economic and social, and can achieve a significant return on investment in terms of savings in justice, welfare, health care, and the protection of social and human capital. (AIC 2012, p. 2)

There are however, significant risks associated with early interventions to prevent offending. Interventions can be difficult to target, expensive and there may be limited evidence about their effectiveness.

Many stakeholders suggested that greater investment in prevention and early intervention initiatives is needed, particularly for Indigenous Australians.<sup>45</sup> Stakeholders also suggested that leaving intervention until a person was in the correctional system was leaving it to late:

Like health, it is best to prevent rather than have to cure. (Queensland Homicide and Victims Support Group sub. 18, p. 1)

While this inquiry's focus is on the adult prison system, the youth justice system can be an important pathway to the adult system. Early intervention in the youth justice system can prevent people progressing to adult imprisonment. The Commission notes that the Queensland Government has recently responded to the *Report on Youth Justice* (Atkinson 2018) and, for this reason, has not revisited youth justice in detail.

The Commission also notes there are many policy levers available to governments that have the potential to impact social and economic factors and address disadvantage, but that these are beyond the scope of this inquiry. Many of these policies do not have a crime reduction focus but may be very effective in reducing crime and imprisonment by addressing causal factors.

This chapter discusses different types of prevention and early intervention measures and some of the challenges associated with their implementation. It considers evidence about the effectiveness of measures as well as opportunities to improve decision making and policy frameworks that support prevention and early intervention initiatives. Finally, the chapter examines options for targeting measures to high risk communities and individuals.

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<sup>&</sup>lt;sup>45</sup>For example, see Balanced Justice sub. 1, p. 1; Eriksson sub. 5, p. 3; Ellem et al. sub. 7, pp. 6–7; PWC sub. 13, p. 11; yourtown sub. 15, pp. 6–7; QHVSQ sub. 18, p. 1; QCOSS sub. 20, pp. 4,12; RANZCP QLD sub. 31, pp. 3–5,13; YAC sub. 34, p. 6; Amnesty International sub. 37, p. 16; QMHC sub. 38, pp. 8–11; Sisters Inside sub. 39, pp. 22–24; Change the Record sub. 41 pp. 3,6–7,20.



# 10.2 Types of prevention and early intervention

Prevention and early intervention programs can be classified into three categories—situational, developmental and community prevention.

**Situational prevention** focuses on changing the opportunities for crime by increasing its costs or reducing its benefits. Common approaches include increasing surveillance, setting rules and norms, concealing or removing targets of crime, and technologies that increase security (Welsh et al. 2015, p. 477).

**Developmental prevention** programs focus on addressing risk factors. The theory behind these programs postulates that criminal behaviour is influenced by behavioural and attitudinal patterns that were learned during an individual's development (Welsh et al. 2015, p. 468). Interventions often focus on elements such as education, health, behaviour management and parenting (Welsh et al. 2015, pp. 470–471).

**Community prevention** promotes social cohesion and guardianship and seeks to address social disorder and deterioration. Common approaches include programs to address employment, education and intergenerational disadvantage (Welsh et al. 2015, p. 484).

The three types of prevention and early intervention programs are not always clearly delineated, and borders become blurred when programs have multiple approaches and objectives.

# Most interventions target risk factors

While the decision to commit an offence ultimately rests with the individual, there is a large body of evidence to suggest that contextual factors increase or decrease the risk that an individual will make decisions leading to crime.

The factors that criminologists regard as causing criminal behaviour do not invariably result in criminal behaviour, which makes targeting individuals for intervention difficult. Risk factors for crime are, however, cumulative in their effect (Weatherburn 2001). Similarly, there are protective factors that reduce the likelihood that an individual will commit an offence. Risk and protective factors (some of which are listed in Figure 10.1) can apply to both individuals and communities.

As discussed in Chapter 6, risk factors may be present from before birth and can accumulate in the early years. This suggests that there may be opportunity to target interventions for at-risk children early in life and prevent the onset or severity of offending.

Figure 10.1 Risk factors and protective factors

#### Risk factors **Protective factors** Poverty and unemployment Strong community Experience of trauma • Employment, and hope for the future Drug and alcohol abuse Education • Poor school performance (attendance and academic achievement) Resilience • Mental health issues Health Cognitive disability • A place to call home • Family problems (discord; domestic violence; poor parenting) • Positive influences (e.g. family, friends, and work) • History of abuse/victimisation Effective parenting • Family members with criminal justice involvement • Delinquent, antisocial, or poor peer relations • Early age of delinquency onset Anti-establishment attitudes • Public tolerance of crime • Key life transitions Homelessness

Source: Heerde et al. 2018; Loeber & Farrington 1999; Victorian Auditor General's Office 2011; Weatherburn 2001.



# 10.3 Challenges with prevention and early intervention

Prevention and early intervention can be seen as a three-stage process. Each stage presents its own challenges (Figure 10.2).

Figure 10.2 Stages of prevention and early intervention



# Identification and targeting are crucial

Identifying those individuals and communities who are most at risk of criminal behaviour and would benefit most from remedial intervention is central to the success of a prevention or early intervention program.

Targeting the wrong individuals/communities unnecessarily wastes resources on those who do not need the program, those who it is unlikely to positively affect, or may miss those who need it most. For example, Loeber & Farrington observed:

School problems, especially when combined with other problems, characterize 80% or more of serious delinquent youth. It should be carefully observed, however, that the converse is not true. The largest proportion of youth having school problems are not serious delinquents. (1999, p. 409)

Targeting individuals but not their community (and vice versa) may also result in the intervention being ineffective in achieving sustained improvements, as it may fail to comprehensively and concurrently address risk factors (Loeber & Farrington 1999, p. 423).

During consultations, stakeholders suggested that those most at risk of offending behaviour are often already in contact with the justice system, or are known to authorities; or they can be readily identified through other channels such as schools and child safety.

Government services, such as child safety services, can therefore play a critical role in identifying at-risk children:

Two in every five (40.8%) children in detention had also been involved in the child protection system ... In Queensland, Department of Justice and Attorney-General (DJAG) data from February 2014 shows that 76% of children known to the Queensland youth justice system were also known to Child Safety Services. Similarly, in 2015–16, 32% of children in youth detention in Queensland had a child protection order history. (QFCC sub. 36, p. 82)

Interventions tend to use socioeconomic and crime-related data to determine at-risk communities. If such data is available, this may be a cost-effective approach to identifying these communities.

# Assessment is required to determine the right approach

Interventions are most effective when the needs of an individual and their community have been properly assessed. Failure to appropriately address all or at least most of these needs (and their root causes) may diminish the effectiveness of the intervention.

The presence of risk factors alone does not determine either the probability that an individual will offend or the interventions which may reduce this likelihood. Different individuals (or communities) experiencing similar risk factors may have very different probabilities of offending and needs. The presence of protective factors at an



individual and community level are an important consideration for assessing risks and needs (Rennie & Dolan 2010; Smart 2019).

Individuals and groups may have multiple and complex needs, and these may need to be prioritised, particularly in a resource constrained environment. Individual and community needs can change over time, so they should also be reassessed at appropriate intervals.

Needs assessments can be highly subjective and are shaped by the parties involved and the evidence considered.

It is important to consider who is involved in a needs assessment and how they are involved, as the inclusion or exclusion of different voices may result in the identification and prioritisation of different needs. (Smart 2019, p. 5)

The views of the identified individuals and communities are an important consideration in assessing needs. However, the Commission has heard from stakeholders that this often does not occur.<sup>46</sup>

# Designing effective interventions is also challenging

Interventions that addresses multiple risk factors (such as health, education and behaviour) are likely to involve coordination between different government organisations, not for profits and private sector specialists, and may need to involve family members. Such interventions cross multiple 'system' boundaries, posing significant coordination challenges.

Prevention and early intervention strategies should be responsive to the needs of individuals and communities and their design should be tailored to the environment in which they will be delivered (AIC 2012, p. 9). However, understanding needs in complex environments can take time and require the involvement of skilled individuals.

The goal of promoting both human and community development is fundamental yet calls for an extraordinary range of skills and a level of community engagement and trust that can take years to develop. (Batchelor et al. 2006, p. 3)

A program that has been effective in its pilot study is not guaranteed to be successful when scaled. Pilot interventions are often implemented by experts in the field with strong networks, high motivation, a strong desire and incentives to see a program succeed. 'Hidden' parameters, such as cultural or environmental factors, may also affect the outcomes of pilot studies. These elements can be difficult to identify and replicate on a large scale and in different contexts.

The optimal timing of interventions can be difficult to determine. Some studies advocate intervening at critical transition points, for example, points related to family, school, peers, life events and community and cultural factors (AIC 2003, 2012, pp. 5–6). However, it is not possible to say conclusively that intervening at any one age, transition point (for example, entering high school), or event (for example, receiving a police caution) is best. Comprehensive data on all variables in a variety of contexts is not available and different individuals have different needs at different times.

Conceptually, successful and effective interventions prior to an offence are likely to yield far greater net benefits than successful diversionary or post-incarceration interventions, as the costs of crime may be delayed or avoided altogether. However, the cost of the intervention itself is also brought forward and may capture people who were never going to enter prison in the first place.

A final consideration is that the benefits of these programs often extend beyond reductions in crime to other social and economic benefits. This does not diminish their overall social and economic benefit, but these broader benefits may not reflect government priorities and may distort incentives for individual government agencies to implement particular programs.

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<sup>&</sup>lt;sup>46</sup> For example, the Commission was told in Indigenous communities that community engagement was often inadequate.



# 10.4 Evidence on effectiveness

The availability of widespread evaluation data on prevention programs and interventions in Queensland is lacking. However, there is sufficient international evidence to suggest that prevention and early interventions can deliver significant returns to society (Welsh & Farrington 2011, p. 125S). However, programs can be difficult and costly to implement and there can be a high a risk of failure.

A study by Welsh et al (2015) reviewed high quality benefit-cost analyses of crime prevention programs and found wide differences between different programs and approaches. Although costs and benefits are estimated differently between programs, the study found that most programs delivered benefits that exceeded costs. Some however had costs which outweighed benefits.

Importantly, the analysis found that programs that were able to be targeted towards the highest risk locations or people had the highest benefit-cost ratios. The authors also noted that developmental preventions and interventions were more likely to deliver longer term benefits and benefits beyond reduced crime.

An earlier study by Welsh and Farrington (2011) reviewed comprehensive research on the costs of early prevention compared to prison. It found a strong case for early crime prevention as an economically viable alternative to prison and noted that benefits from prevention begin to accrue at an early age.

The Washington State Institute for Public Policy (2019) is tasked with identifying evidence-based policy and programs in Washington State. It too has identified that some prevention and intervention programs have benefits which substantially outweigh costs (although many others did not). Their work assesses impacts beyond the criminal justice system, but it demonstrates that effective programs can offer favourable returns on investment.

The New Zealand Ministry of Justice (2019) produces Evidence Briefs to inform policy development and decision making. The briefs provide systematic reviews of justice related interventions and summarise New Zealand and international research. The assessments do not include a cost–benefit analysis. However, interventions shown to reduce offending (albeit to different extents) include:

- early interventions for children under 13 (these may include intensive home visits for parents with babies and toddlers, parenting programs, and behavioural management training for teachers)
- family-based interventions for teenagers
- youth mentoring, particularly when professionally delivered
- behavioural interventions in schools
- high-quality early childhood education (prior to school) for socioeconomically disadvantaged children
- situational crime prevention for property and public order offences.

The effectiveness of programs appears heavily influenced by program design, delivery and targeting. Some interventions were shown to cause harm and make offending more likely (such as programs that take young people to visit prisons to deter them from offending).

Overall, the findings from international research suggest:

- Prevention and early intervention programs have the potential to reduce the number of people entering the
  criminal justice system and deliver benefits that exceed their costs. Benefits can accrue from a young age. They
  may be broad in nature and extend beyond reductions in crime. However, sometimes the costs of interventions
  exceed the benefits.
- Prevention and early intervention must be implemented carefully, with due consideration given to identification
  and assessment of at-risk individuals and communities. If at-risk individuals cannot be tightly identified or their
  problems properly assessed, costs will be higher, or benefits will be reduced, diminishing the effectiveness of the
  intervention.



# 10.5 Prevention and early intervention in Queensland

The Queensland Government has implemented prevention and early intervention initiatives that aim to prevent offending either directly or indirectly. In some cases, these have been implemented in response to major reviews, such as:

- Report on Youth Justice (Atkinson 2018)
- Queensland Child Protection Commission of Inquiry (Carmody 2013)
- Townsville's voice: local solutions to address youth crime (Smith 2018)
- Independent Review of Youth Detention in Queensland (McMillan & Davis 2016).

Given the scale of recent reviews and that recommendations are still being implemented, the Commission has not investigated operational issues regarding youth justice or child protection. The Commission notes major youth justice reforms have recently been announced and the government released its Youth Justice Strategy Action Plan 2019–2021 (Department of Youth Justice 2019) in late July 2019. The Commission recognises the importance of early intervention in these environments which are known pathways to adult offending and imprisonment.

A sample of public and private programs is provided in Box 10.1. Some have been evaluated; others have not.

# Box 10.1 Queensland prevention and early intervention programs

- **Transition2Success (T2S)** A program assisting at-risk youth with job-related training, social skills and behaviour management. A Deloitte Access Economics (2018, p. 8) evaluation found every \$1 spent on the program delivered benefit of \$2.57.
- Logan Together—commenced in 2015. Aims to reduce developmental vulnerability of children through maternity and child health, 'first three years' development initiatives, neighbourhood networks, community mobilisation, jobs and investment in service integration. The 2018 Progress Report shows early instances of positive impacts (Clear Horizon 2018).
- **Project Booyah**—A police-led initiative incorporating adventure-based learning principles, social and skills development, community and familial interventions, mentoring, youth support and educational and vocational scholarships. Evaluations have shown positive results (Department of Child Safety, Youth and Women 2019, p. 6).
- Clontarf Academies—behavioural, educational, and mentoring program for Indigenous youth linking
  participation in sporting academies with school engagement. Evaluation results indicate the Clontarf
  academies have improved school engagement, re-engagement, attendance, behaviour and academic
  outcomes (Synergistiq 2017).
- **First 1000 Days**—a Queensland Health place-based (Caboolture and Townsville) program with a focus on health and well-being from conception to two years. It deals with family violence, unemployment, mental illness, substance abuse and disability (Fentiman 2016).
- **Griffith Neighbourhoods**—seeks to prevent youth sexual violence and abuse through a range of measures tailored to the local community context. Early evaluations show promising outcomes (Griffith University 2018).
- **YouthChoices**—a multi-systemic therapy-based program to reduce youth reoffending rates for young people who are at risk of detention or on remand. The Program is one of three Social Benefit Bond pilot programs (Queensland Treasury 2019c).



# Better program evaluations are needed

It was not possible to review all prevention and early intervention programs in Queensland as part of this inquiry. Despite some reported program evaluations (such as those discussed in Box 10.1), the Commission notes that many interventions are yet to be formally evaluated or evaluated with significant rigour.

Criminal justice systems commonly suffer from the absence or poor quality of data and the failure to evaluate programs and practices. (Cunneen et al. 2017, p. 8)

Robust program evaluations are essential for determining whether programs are achieving their objectives and whether they are cost effective. They should identify and measure outcomes and guide decisions about whether a program is working as intended, whether improvements should be made, or whether a program should cease. Critically, program evaluations help build an evidence base to support future decision making.

Program evaluations are complicated by a range of factors, including:

- multidimensional and cumulative program impacts, which extend beyond the criminal justice system
- long-term program effects, which may take years or decades to realise
- participant commitment and follow-up
- difficulties in attributing benefits to a single program
- the limited capacity of service providers, including not-for-profit organisations, to undertake evaluations, including over long timeframes.

Some of these challenges were highlighted in a 2018 study of programs in Aurukun (Staines & Moran 2019). Aurukun is a remote and discrete Indigenous community in Cape York that experiences extreme disadvantage and relatively high crime rates. The study looked at 39 youth programs being delivered in Aurukun during a six-month period and found that robust program evaluations were "near impossible" owing to programmatic crowding and the hybrid effects of multiple programs. It highlighted that planning needs to be based on an understanding of the local environment and how proposed programs may interact:

Although their combined effects may be net positive, it is equally plausible that they are net negative. This has also created a situation where it is extremely difficult to isolate effects of individual programmes, and thus, the efficacy of different approaches remains unclear.

Despite this, each of the programmes identified in this paper collect data and build individual narratives of success to secure political and funding support ... Although programmes might meet public accountability benchmarks that are set in capital cities, these do not necessarily translate into tangible outcomes on the ground. (Staines & Moran 2019, p. 18)

The short-term nature of funding and pilot programs often makes evaluations of long term impacts difficult. This was evidenced in a recent evaluation of a crime-prevention grants program in Victoria (Urbis 2018) and reflected in stakeholder feedback during community visits. Stakeholders indicated that programs were not given enough time to become established and to demonstrate effectiveness.

Evaluation frameworks should therefore be sufficiently flexible to accommodate the circumstances of each program and the broader environment in which it is operating. In its previous report on service delivery in remote and discrete Aboriginal and Torres Strait Islander communities, the Commission noted that evaluation frameworks should facilitate adaptive learning and recognise that the solutions for complex problems may not be developed in a perfectly linear process (2017, pp. 236–237). Evaluations in these circumstances must be ongoing.

In Queensland, evaluation methods vary across programs, government departments and non-government agencies. Evaluation results are not always readily accessible and comparisons between programs are challenging. Transparency around decision making and evaluations is often lacking.



Some stakeholders suggested that when working with service providers, government departments tend to focus on outputs (for example, the number of participants in a program) rather than outcomes, which demonstrate the real value of a service or program.

The work of the Washington State Institute for Public Policy provides a good example of how programs can be evaluated, and information made available to guide evidence-based decision making.

Systematic program evaluations across government and non-government sectors would contribute to improved transparency, accountability, efficiency and effectiveness. Direct comparisons between programs would enable resources to be directed where they add most value.

#### There is room for better coordination and collaboration

As previously noted, prevention and early intervention programs may address a broad range of risk and protective factors and generally cut across multiple government and non-government agencies. Effective coordination of effort is likely to reduce duplication and improve efficiencies and effectiveness. It can also help prevent inconsistencies or gaps between separate programs.

Stakeholders noted the siloed nature of government agencies and suggested that departmental funding arrangements prevented the development of joint initiatives and cooperative problem solving. Effective coordination requires that the right people are involved at the right time in the prevention and early intervention process:

[T]he criminal justice system is represented by a number of silos that do not function as a holistic system and these silos are not part of a holistic whole of government and community response to family and community breakdown and crime. Consequently, the criminal justice system is isolated from influencing the drivers of the circumstances causing people to offend. (Hamburger sub 14, p.4)

Many stakeholders highlighted the benefits of approaches which emphasise collaboration and coordination.<sup>47</sup> Examples include collective impact (Box 10.2) and place-based justice reinvestment initiatives.

However, coordination and cooperation between agencies is challenging with competing interests and priorities at play. Youth Advocacy Centre (YAC) noted two challenges in this regard:

The inability of government to date to "de-silo" and work effectively across agencies. This is sometimes driven by the political imperative that particular ministers want to be able to show what they and their department have achieved, as well as the jealous guarding of departmental budgets. Staff also may not see the value of having to spend time liaising and meeting with others when they have particular tasks to do for their own department.

The tender processes which make community agencies competitors while requiring them to work collaboratively and in partnership. The latter needs trust between the agencies but if divulging certain information may give another agency a competitive advantage, then an ongoing level of self-interest will prevail. (sub. 34, p.11)

Staines and Moran's (2019) study of Aurukun demonstrates the unintended consequences that may arise when programs are implemented without adequate coordination or consideration of the environment in which they are operating. They noted significant program saturation and overlap, which could potentially place heavy demands on participants and may have adverse cumulative effects. A place-based approach which emphasises the needs of the community and brings all parties together to develop cohesive solutions may help address this.

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<sup>&</sup>lt;sup>47</sup> For example, see Amnesty International sub. 37, pp18-19; Carrington and Hogg sub. 3, p. 14; Hamburger sub. DR17, p. 13; Civil Liberties Australia sub. DR13, p .15; Peak care sub. DR29, p .4.



## Box 10.2 Collective impact approaches

Collective Impact is a framework to tackle deeply entrenched and complex social problems. The approach is based on a belief that no single policy, government department, organisation or program can tackle or solve increasingly complex social problems. It calls for stakeholders to abandon their own agenda for a common agreed agenda, sharing measurement and aligning effort.

Collective Impact initiatives have a centralised infrastructure or backbone organisation to help focus stakeholder efforts behind the agenda.

The five key elements are:

- a common agenda, which involves a shared understanding of the problem and a joint approach to solving it through agreed actions
- collecting data and measuring results consistently across all the participants for alignment and accountability
- a plan of action that outlines and coordinates mutually reinforcing activities for each participant
- open and continuous communication to build trust, assure mutual objectives, and create common motivation
- a backbone organisation to serve the entire initiative and coordinate participating organisations and agencies.

The Logan Together program (Box 10.1) was developed using a collective impact approach.

Source: Smart 2017.

# 10.6 Targeting high-risk communities

Given the high cost of prevention and early intervention strategies, effective targeting of communities or groups at greatest risk of criminal behaviour and imprisonment is likely to provide for more efficient and effective resource allocation.

Place-based approaches that target specific geographical locations and population groups were supported by many stakeholders:

The drivers or causal factors of crime, imprisonment and recidivism largely exist in certain locations, that is they are 'place-based', they are multi-faceted, and we can clearly identify the reasons for their existence. This indicates that responses to be effective need to be place-based and holistic. (Hamburger sub DR17, p. 5)

A place-based, developmental approach to crime prevention seeks to address future potential criminal behaviour by addressing risk factors and strengthening the protective factors known to be associated with criminal behaviour. (QCOSS sub DR24, p. 12)

Amnesty International recommends that the Queensland Government increases the allocation of funding to Indigenous community-led and controlled organisations, within existing budgets, to support culturally appropriate, place-based Indigenous designed and led preventative programs. (Amnesty International sub. 37, p. 17)

Research has shown that crime is not randomly distributed, and is instead concentrated in geographic locations, particularly those characterised by high levels of social and economic disadvantage (Allard et al. 2013, p. 6; Cunneen et al. 2017, p. 3). Queensland research shows that 10 per cent of postcode locations accounted for



50.5 per cent of the criminal justice system costs of chronic offending in Queensland (Allard et al. 2013, p. 29). Indigenous communities in regional, remote and very remote areas are among these locations.

Given the high level of offending in some Indigenous communities and the overrepresentation of Indigenous people in Queensland prisons, targeted interventions in these areas could potentially generate large benefits.

Place-based approaches to crime prevention and early intervention may offer benefits including flexibility, local autonomy, capability building opportunities, greater collaboration and coordination at the local level, and opportunity for "bottom-up" approaches.

At the same time, they present challenges, particularly in regional and remote settings. These include difficulties in attracting and retaining appropriately skilled personnel, building local capability and overcoming coordination issues (particularly under centralised decision-making models). Further, place based approaches aimed at addressing underlying causes of offending and incarceration may require sustained effort over a long-term horizon.

The Queensland Government has supported initiatives to reduce crime and improve community outcomes in specific communities including Logan (Department of Communities, Disability Services and Seniors 2019), Townsville (Queensland Government 2018f), Cairns (Ryan 2018), Aurukun (Queensland Government sub. 43, p.18) and Cherbourg (Furner 2017).

## Hot spot policing

Hot spot policing focusses policing effort on areas that have high-crime densities. Hot spot policing has typically referred to policing of concentrated crime locations within urban areas (for example, specific streets or precincts). Research has shown that this type of policing can be effective at preventing crime (Mazerolle 2001; Ratcliffe 2003). However, hot spot policing of this sort is unlikely to address the underlying causes of offending behaviour.

The government has also focussed policing effort at a community level to address high crime rates and improve community safety. For example, in response to crime and community safety concerns in Aurukun in 2016–17, the government directed resources to support increased policing effort in the community through additional police officers and 24-hour policing. Concerted policing effort such as this may help stabilise crime levels (at least temporarily) and allow the community to focus on other underlying problems.

## Justice reinvestment

There is growing interest in justice reinvestment in Australia as a mechanism for investing in prevention and early intervention initiatives.

Justice reinvestment is a strategy which originated in the United States (US) as a response to rising and unsustainable rates of imprisonment. The central principle of justice reinvestment is that better economic and social outcomes can be achieved by redirecting future criminal justice system expenditure to programs which target the underlying causes of crime and imprisonment. The intention is that these programs ultimately deliver savings by reducing future crime and imprisonment. Such programs typically include prevention and early intervention initiatives but may also include diversionary programs and other reforms within the criminal justice system. The benefits of justice reinvestment initiatives may extend beyond the criminal justice system.

Justice reinvestment was originally intended to be a place-based strategy to address community-level problems (Cunneen et al. 2017). It adopts a data-driven approach to identify communities with high rates of imprisonment and work with them to develop and implement evidence based-solutions.

Justice reinvestment typically involves four key stages (Figure 10.3).



Figure 10.3 Stages of justice reinvestment

Justice mapping **Implementation** Evaluation Analysis of criminal justice data and Development of options including Monitoring and evaluation of Roll out of specific reforms. indicators of disadvantage to reform outcomes including initiatives to reduce offending and Savings generated are reinvested identify drivers of offending, generate savings savings generated. back into the community. incarceration and associated Outcomes may extend beyond the criminal justice system costs. criminal justice system. Includes identification of existing community assets and services.

Key challenges associated with justice reinvestment approaches include:

- difficulties with coordination and collaboration within and between governments, non-government agencies and the community
- the limited availability of reliable data and evidence about what works to address imprisonment
- the long-term nature of investments and uncertainty about potential future savings from re-directing resources
- the need to garner community support for prevention strategies
- the absence of robust program evaluations.

Program uncertainty, long-term outlooks and difficulties attributing outcomes to program expenditure complicate investment decisions around justice reinvestment initiatives. If private or philanthropic funding for initiatives is lacking, there may be a role for government to fund initial upfront investments and establish frameworks for reinvestment. There may also be opportunities for pooled funding arrangements (private and public funding). Funding arrangements should have a long-term focus as investments may only be returned over the long term.

Justice reinvestment approaches have varied between and within countries. In the US, justice reinvestment has moved away from place-based approaches (Cunneen et al. 2017, p. 4; Willis & Kapira 2018, p. 3) towards criminal justice responses to rising incarceration. Results in the US are mixed, where more than 27 states have participated in the Justice Reinvestment Initiative. In Texas, justice reinvestment policies reportedly delivered savings of \$443 million over a two year period (2008–2009), and substantially reduced parole revocations and prison populations to such an extent that Texas closed a prison in 2012 (The Council of State Governments Justice Centre (CSG) 2019). However, independent analysis suggests justice reinvestments in the US have not delivered substantial reductions in prison populations to date (Willis & Kapira 2018, p. 19).

In the United Kingdom, justice reinvestment describes policies framed around payment for outcomes and social impact investment. Implementation has not been as widespread as in the US. Conclusive results are still limited (Shwartz et al. 2017; Willis & Kapira 2018, p. 25). The evaluation of one pilot was unable to identify the reasons for reported outcomes and whether these were external to the piloted initiatives (Wong et al. 2015).

#### Justice reinvestment as a means of addressing Indigenous overrepresentation

Justice reinvestment is at an early stage of development in Australia but has largely retained a strong place-based focus, with emphasis on community-driven long-term solutions and capacity building. For these reasons, it is often raised as a suitable approach for addressing Indigenous imprisonment.<sup>48</sup>

One of the most developed justice reinvestment programs in Australia is the Maranguka Justice Reinvestment Project, which commenced in 2013 following years of effort by the Bourke community to identify crime prevention

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<sup>&</sup>lt;sup>48</sup> For example see ALRC 2018; Cunneen et al. 2017; Willis & Kapira 2018; Balanced Justice sub.1; Carrington and Hogg sub.3; PwC sub.13; Hamburger sub.14; QCOSS sub. 20; RANZCP QLD Branch sub. 31; YAC sub. 34; Amnesty International sub. 37; Queensland Mental Health Commission sub. 38; Sisters Inside sub. 39; Change the Record sub. 41.



opportunities (Box 10.3). Initial results from the Maranguka Project are promising, with reports of positive economic and social returns, and reduced offending rates.

In response to the 2016 independent review of youth detention (McMillan & Davis 2016), the Queensland Government initiated a pilot program to assess Cherbourg's suitability and readiness for justice reinvestment. The government's Youth Justice Strategy Action Plan 2019–20 (Department of Youth Justice 2019, p. 9) includes a commitment to implement justice reinvestment in Cherbourg 'to provide opportunities for young people to be positively involved in the community, instead of turning to crime'. However, further detail is unavailable. The government should detail the outcomes of the Cherbourg trial program and clarify how justice reinvestment will be progressed in Cherbourg going forward.

## Box 10.3 Maranguka Justice Reinvestment Project, Bourke

Bourke is one of the most disadvantaged communities in Australia, with high long-term unemployment and family violence, and the highest rate of juvenile convictions in New South Wales.

The community of Bourke was concerned about the number of Aboriginal families experiencing high levels of social disadvantage and rising crime. In response to these concerns, the local community identified initiatives to reduce offending and make the community safer.

The Maranguka Justice Reinvestment project was initiated in 2013 by a coalition of local Aboriginal leaders and state-wide organisations. Justice mapping and planning took place from 2013 and program implementation commenced in 2015. Initiatives include learner driving programs, school holiday activity programs, three-year-old health and development checks, and men's groups. The Maranguka Justice Reinvestment project was designed and delivered using a collective impact approach and supported by a single 'backbone' organisation. It has diverse funding from a range of sources including the Vincent Fairfax Family Foundation, Dusseldorf Forum, Cages Foundation, JUST Reinvest NSW, St Vincent de Paul Society, the NSW Government and Lend Lease

A limited KPMG impact assessment (KPMG 2018, p. 6) estimated the gross economic impact of the project in 2017 was \$3.1million, or five times the 2017 operational costs of \$600,000. Of this, approximately two thirds related to the justice system. The impact assessment was based on a single year and was limited in its analysis. However, KPMG noted that if the project sustained just half the results achieved in 2017, an additional gross impact of \$7 million over the next five years could be delivered.

KPMG also reported the following improvements in 2017 compared to 2016:

- 23 per cent reduction in police recorded incidence of domestic violence
- 38 per cent reduction in charges across the top five juvenile offence categories
- 14 per cent reduction in bail breaches
- 42 per cent reduction in days spent in custody
- 31 per cent increase in year 12 student retention rates.



Justice reinvestment as a reform strategy has the potential to deliver significant benefits if implemented effectively. As a place-based and community-led approach, it may be particularly well suited to addressing chronic and costly offending in Aboriginal and Torres Strait Islander communities. Outcomes from the Maranguka Project are encouraging; however, further evidence is needed to demonstrate the effectiveness of justice reinvestment approaches.

The Australian Productivity Commission has suggested that in relation to Indigenous imprisonment, the main benefits of a justice reinvestment approach are likely to be social benefits which accrue to the individuals, families and communities involved (McDonald 2013, p. 8). However, as noted in Chapter 21, some Indigenous communities account for a large proportion of chronic and costly offending, and overall, Aboriginal and Torres Strait Islander people are estimated to account for a disproportionately large amount (40 per cent) of criminal justice system expenditure (Griffith Criminology Institute sub. DR32, p. 2.). This suggests there is scope for reduced expenditure in the criminal justice system if interventions reduce Indigenous people's involvement in it. The Griffith Criminology Institute (sub. DR32, p. 2) estimates that on average, Indigenous chronic offenders will cost \$381,000 in justice system costs by age 31. Investments that prevent an Indigenous person from commencing a pathway to chronic and costly offending would therefore deliver significant returns.

Government should consider options for supporting justice reinvestment projects and helping build the evidence base of what works. To this end, the government should:

- identify projects that would be suitable for a justice reinvestment approach
- · establish funding arrangements to support justice reinvestment projects
- facilitate access to data and establish monitoring and evaluation frameworks
- facilitate coordination and collaboration between government and non-government service providers (including police, courts and corrections) and communities
- prioritise projects aimed at reducing Indigenous offending—as a first step, the government should outline its plan for justice reinvestment in Cherbourg.

# 10.7 Recognising red flags and pathways to imprisonment

This section considers gaps in prevention and early intervention in Queensland. As the Commission has not assessed the full suite of programs across the state, additional gaps may exist. The issues discussed in this chapter include those raised by stakeholders as requiring priority attention based on known risk factors and pathways to imprisonment.

# Identifying at risk individuals in the school system

While schools are primarily responsible for providing education to children, they play two key roles in prevention and early intervention. Firstly, schools enable young people to acquire a quality education and enhanced employment opportunities that constitute important protective factors against criminalisation (Homel et al. 2015, p. 2). Secondly, they can help identify young people exhibiting behaviours that may lead to subsequent criminality, and target supports to shift them from a criminal pathway.



A range of stakeholders<sup>49</sup> raised concerns that schools are increasingly using student disciplinary absences<sup>50</sup> (SDAs) rather than supporting at-risk children. As the *Report on Youth Justice* found:

As early as age five, children manifest behavioural signs indicative of a need for targeted support with increasing numbers of children of a very young age being excluded from primary school in several Australian jurisdictions, including Queensland, where in 2017, 1,027 children at prep level were subject to suspensions or exclusions. (Atkinson 2018, p. 34)

The use of SDAs in Queensland state schools has risen over the last five years both in absolute terms and as a proportion of total state school enrolments (Figure 10.4). The number of SDAs rose by 34 per cent between 2014 and 2018. Indigenous students accounted for 25 per cent of all SDAs in 2018, compared to 22 per cent in 2014, despite Indigenous students making up only 10 per cent of total enrolments (Department of Education 2018c, 2018b, 2019).

Suspensions make up the clear majority of SDAs (97 per cent in 2018). The number of suspensions rose by 37 per cent between 2014 and 2018, while the number of exclusions and cancellations fell by nearly 17 per cent. Although suspensions may be less severe than exclusions or enrolment cancellations, stakeholders indicated that suspensions can have adverse impacts—labelling and stigma may reinforce negative attitudes and promote further disengagement, while time away from school may be spent engaging in anti-social behaviour.

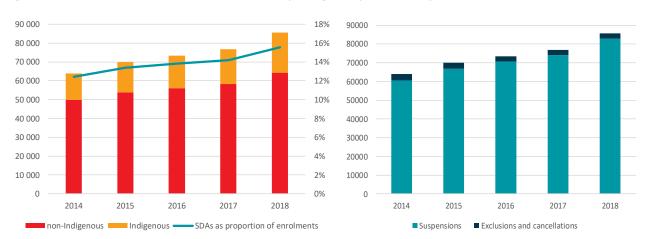


Figure 10.4 SDAs in Queensland state schools by indigeneity and SDA type, 2014–2018

Note: Enrolment figures are based on August enrolments Source: Department of Education 2018b, 2019

In 2018, 3,766 SDAs were applied for children in the first two years of schooling (prep and year one) (Figure 10.5). SDAs in years seven to nine accounted for nearly half (47 per cent) of all SDAs in 2018. The transition to high school sees a large increase in the number of SDAs issued. The number of SDAs for year seven students more than doubled when year seven was moved from primary to high school in 2015. There were 3,818 SDAs for year seven students in 2014, rising to 9,537 in 2015 (Department of Education 2019).

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<sup>&</sup>lt;sup>49</sup> yourtown sub. 15, pp. 7–9; QHVSQ sub. 18, p. 2; QNADA sub. DR 20, p. 6; YAC sub. 34, p. 20.

<sup>&</sup>lt;sup>50</sup> SDAs include suspensions (short and long), exclusions and cancellations of enrolment. The number of SDAs does not reflect the total number of students subject to an SDA as individual students may receive multiple SDAs.



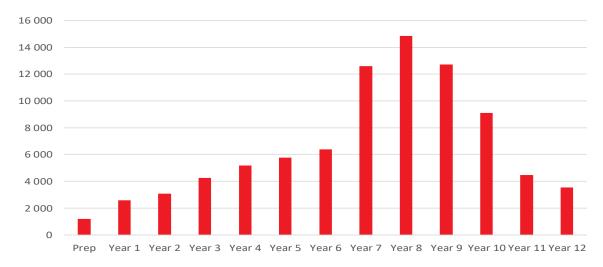


Figure 10.5 SDAs in Queensland State schools by year level, 2018

Source: Department of Education 2019.

Keeping children connected to school has been shown to improve social participation, skills and educational achievement levels, which, in turn, have been demonstrated to reduce offending (Heerde et al. 2018; Homel et al. 2015, p. 2; Loeber & Farrington 1999; Victorian Auditor General's Office 2011; Weatherburn 2001).

The Report on Youth Justice made recommendations aimed at keeping children connected, including:

- · targeting schools for early intervention programs
- providing alternative school options to high-risk students
- providing greater coordination and involvement between government agencies in transitioning children back into school following detention (Atkinson 2018, p. 8).

The Queensland Government has programs focussed on keeping children in education such as T2S, Regional Youth Engagement Hubs, pop-up class rooms and positive learning centres (Department of Education 2017a, 2018a; Queensland Government 2018g). It also recently announced funding for 50 new FlexiSpaces to support schools to provide innovative learning spaces to retain students at risk of disengagement. Despite these initiatives, the incidence of SDAs has risen annually between 2014 and 2018 (Department of Education 2019).

Significant processes are involved in considering the suspension or exclusion of a child from school, including assessments of the child's behaviour and individual circumstances. The school must also consider its duty of care to the child; yet, beyond altruism there appears to be little incentive to keep 'problem' children in school (Department of Education 2017b). The grounds for suspension under s. 282 of the *Education (General Provisions) Act 2006* (Qld) (EGPA) are broad and include being charged with an offence.

Principals may exclude a child if suspension is inadequate to deal with the student's disobedience, misbehaviour, conduct or risk. The threshold requirements for exclusion are outlined in s. 292 of the EGPA. Exclusion decisions may be reviewed by the Director-General, and a regional manager is also allocated to the student. Students and parents/carers have a right of reply to any suspension or exclusion notice (Department of Education 2017b).

There are competing considerations. Schools are primarily responsible for providing education—the impact that at-risk children might have on other students should not be underestimated or left unconsidered when developing alternative solutions to suspension and exclusions.



Schools and the Department of Education publish SDA data. However, this does not demonstrate whether the level of SDA use is appropriate or the number of students subject to an SDA. Some stakeholders suggested that the rise in SDA use may be partially due to "zero-tolerance" policies while others suggested that standardised testing and reporting may also play a part as schools may be under increasing pressure to demonstrate high levels of achievement. Others suggested that schools may be increasingly using SDAs because of the availability (or perceived availability) of alternative learning environments such as Positive Learning Centres and "flexischools".

Greater transparency and accountability around the increasing incidence of SDAs is necessary to determine the underlying drivers of SDAs, whether the level of SDA usage is appropriate and whether increasing use of SDAs deliver net benefits. Improved analysis of SDA data may identify schools or regions requiring more targeted supports and could provide for a better understanding of the impacts of SDAs, including on future criminal behaviour. Longitudinal studies that track students through the school system and beyond would be useful in this regard.

It is recommended that the Queensland Government commission an independent evaluation of SDAs in Queensland state schools to determine:

- the underlying reasons for the increased incidence of SDAs, and whether SDAs are applied consistently within and between schools
- the adequacy of supports provided to students while absent from school and on their return to school from an SDA
- the impacts of SDAs on student outcomes, including their impact on future criminal justice system involvement
- whether there are opportunities to improve transparency and accountability through school reporting arrangements, including reporting of efforts to identify the underlying causes of problem behaviour and support students that are subject to an SDA.

#### Supporting teachers to identify and manage difficult behaviours

Stakeholders working within the education system suggested that teachers should be better supported to identify and respond to challenging behaviours among students. This includes ensuring pre-practice training equips teachers to identify and manage challenging behaviours and recognise behaviours that warrant referral for further assessment and/or support.

In this regard, stakeholders raised concerns about the prevalence of undiagnosed health issues and disabilities among school students and the impact these may have on student behaviour, learning and engagement. Amnesty International (sub. 37, p. 14) identified hearing disorders, such as otitis media, which are more prevalent among Aboriginal and Torres Strait Islander children and noted they can lead to disengagement from school.

As discussed further in this chapter, better assessment of cognitive impairments is needed, particularly among school children in Indigenous communities. A University of New South Wales project examining Indigenous Australians with cognitive disability in the criminal justice system, recommended that education and information is required to enable school personnel to better recognise and respond to children with a cognitive impairment and complex support needs (Baldry et al. 2015). Greater awareness in schools of symptomatic behaviours could facilitate the referral of individuals for assessment, diagnosis and early interventions.

To address these concerns, the Commission recommends that the Department of Education work with universities to improve the behavioural management training for pre-service teachers with a focus on the identification and management of students at risk of disengaging from education.



#### Directing effort to high-risk schools and regions

To promote efficient resource allocation, interventions should be targeted to schools and regions with concentrations of at-risk and disengaged children. Identification of these schools and regions should be evidenced based, using indicators drawn from a range of sources (for example, school and departmental data, health data and the Australian Early Development Census).

# Better assessment of cognitive impairment is needed

Stakeholders raised concerns about the prevalence, underdiagnosis and inadequate consideration of cognitive impairment (or disability) within prisons and the criminal justice system more broadly. Of particular note were concerns raised about fetal alcohol spectrum disorder (FASD)<sup>51</sup> (Box 10.4).

Cognitive impairment describes ongoing deficits in mental processing which may affect communication, comprehension, reasoning, judgement and learning. Cognitive impairment is a risk factor for criminal behaviour, but it also impacts an individual's ability to navigate the criminal justice system.

Individuals with cognitive impairment are more likely to be involved in the criminal justice system and are overrepresented in the prison population (Queensland Government sub. 43, p. 24; Mental Health Commission of NSW 2017, p. 4; Synapse n.d.; Victorian Institute of Forensic Mental Health 2019). Evidence suggests the prevalence of cognitive impairment is higher among Indigenous prisoners than non-Indigenous prisoners (Baldry et al. 2015; Shepherd et al. 2017, p. 2).

A 2018 study of Western Australia's only youth detention centre (Banksia Hill Detention Centre) found 89 per cent of the 99 participants had at least one domain of severe neurodevelopmental impairment (Bower et al. 2018).

Timely diagnosis of individuals with cognitive impairment facilitates early interventions:

There is evidence that providing support and services for infants and young children with early developmental impairments and their families can alter the child's longer term developmental trajectory, and reduce the risk of secondary health and psychosocial complications. (The Royal Australasian College of Physicians 2013, p. 2)

There are concerns that cognitive disability remains undiagnosed, particularly in remote locations and among Indigenous communities. An assessment program undertaken in schools in selected Cape York communities found that in some locations, around one quarter of students met the criteria for diagnosis of intellectual impairment (Nelson et al. 2016, p. 20). More recently, the Queensland Government Specialist Disability Services Assessment and Outreach Team reportedly identified up to 50 students in Doomadgee with intellectual impairment (O'Rourke 2019).

The Queensland Branch of the Royal Australian and New Zealand College of Psychiatrists (sub. 31, p. 7) called for routine screening for cognitive impairments, learning disabilities and mental health issues in schools, as well as adequate funding to provide supports where necessary. However, even where a diagnosis is made, access to coordinated support services may be limited. This was highlighted in a 2015 report concerning Indigenous Australians with Mental Health Disorders and Cognitive Disabilities in the Criminal Justice System:

Children and young people from already racialised and criminalised communities and families who struggle with cognitive or mental impairment are not supported in the community, in school or in the child and family support systems in the way middle class young people are; instead they are increasingly dealt with by systems of control rather than systems of care and support (Baldry 2010; Baldry, Dowse, McCausland and Clarence 2012). (Baldry et al. 2015, p. 19)

<sup>&</sup>lt;sup>51</sup> For example, see CYI sub. DR39, p. 9; Catalano sub. 25, p. 2; Anne Russell, Cairns public hearing; Amnesty International, Brisbane public hearing, p. 67; Jan Hammill, Brisbane public hearing; Mount Isa Family Support Service and Neighbourhood Centre Inc sub. DR9, p. 2.



During consultations in remote communities, stakeholders expressed concern that the National Disability Insurance Scheme (NDIS) was of little assistance if services were not available on the ground to meet individuals' needs. Multi-agency approaches may help bridge this gap. In this regard, the Commission notes that the Queensland Government has committed funding in the 2019-20 State Budget for the Specialist Disability Services Assessment and Outreach Team to deliver specialist clinical services and assist Aboriginal and Torres Strait Islander people with a disability to support them to access the NDIS.

The government should continue to prioritise the assessment of at-risk children for cognitive impairments and other disabilities and ensure there are enough resources in the school system to support referrals to the National Disability Insurance Scheme where appropriate.

#### Box 10.4 Fetal alcohol spectrum disorder

Fetal Alcohol Spectrum Disorder (FASD) is an umbrella term used to describe a range of impacts caused by exposure to alcohol in the womb. The consequences vary along a spectrum of disabilities including physical, cognitive, intellectual, learning, behavioural, social and executive functioning disabilities, and problems with communication, motor skills, attention and memory.

The prevention of FASD can improve mental health of children including intellectual, cognitive and learning abilities, speech and language, and behaviour and emotional well-being.

FASD is not routinely assessed in Australia and there is general agreement that it is underdiagnosed.

Despite limited data on the prevalence of FASD, studies suggest individuals with FASD are overrepresented in the criminal justice system:

- Of the 99 participants assessed in the 2018 study of the Banksia Hill Detention Centre, 36 per cent had FASD (Bower et al. 2018). The prevalence of FASD was even higher among Indigenous detainees (47 per cent).
- A University of Washington study of 415 individuals with FASD in the United States found 60 per cent had criminal justice involvement and 35 per cent had been incarcerated. Individuals also had high rates of school disengagement (Streissguth et al. 2004, pp. 233–234).
- Stakeholders were also of the view that FASD is prevalent among prisoners and a risk factor for criminal behaviour:

As a result of cognitive and intellectual impairments, people with FASD are at high risk of criminal behaviour, coming into contact with the criminal justice system, failing to comply with court ordered sentences and re-offending. (Queensland Mental Health Commission sub. 38, p.5).

I'm not sure how much I can stress the likelihood that huge numbers of people in our prisons in Australia, and even more who are there more than once, have FASD. ... The reason that juveniles and adults with FASD are incarcerated to such a high degree is because of the known and studied symptoms of this disability. I'm wondering how fair our justice system is when people are incarcerated for behaving in exactly the way that 40 or 50 years of research has found are related to this disability. (Ann Russell, Cairns public hearing, p. 4).



# Programs to prevent child sexual abuse may not be accessible to those who need them

Stakeholders raised concerns about barriers preventing some individuals from accessing services to prevent offending behaviours. These include a lack of support for services that aim to prevent highly stigmatised offences such as child sexual offending:

Identifying and providing prevention and early intervention programs with sex offenders is critical in any holistic approach to protecting communities and addressing sexual offending. Prevention programs targeting potential abusers, who have not actually committed an offence but may be at risk of doing so, are not as developed as other types of programs but clearly demonstrate an opportunity for prevention. (Bravehearts sub. 40, p. 7)

Individuals at risk of committing sexual offending may be hesitant to seek assistance or disclose their concerns for fear of being reported and the associated stigma.

In its submission, Bravehearts (sub. 40, pp. 8–9) highlighted international programs aimed at preventing child sexual assault by targeting individuals at-risk of offending. These programs help people in two ways: firstly, they raise awareness that assistance is available, and secondly, they provide reassurance to those seeking help that it is a safe place to seek it. For example, *Stop It Now!* is a self-prescribing program available in the UK. It provides a confidential helpline for abusers and those at risk of abusing as well as from people who are concerned about a child or the behaviour of another adult. Callers are not required to disclose personal details, but when information is provided that identifies a child who has been, or is at risk of being abused, or where a criminal offence has been committed, these details will be passed on to relevant agencies (Stop it now! UK & Ireland 2019).

Between 2002 and 2012, the helpline took over 30,000 calls from 14,500 people. More than 5,500 callers (or 38 per cent) were people concerned about their own behaviour and around 375 of these were adults who had not previously abused a child but were troubled by their thoughts and wanted assistance (Denis & Whitehead n.d., pp. 11–12). Qualitative evaluations suggest the helpline directly helps prevent re-offending and has the potential to stop people from committing their first sexual offence against a child (Brown et al. 2014). An economic evaluation of the program highlighted difficulties in quantifying benefits but suggested benefits from significantly reducing the extent of child sexual abuse via helpline provision may be substantial (Bowles 2014, p. 8).

In her submission, Dr Kelly Richards (sub. DR7, p. 1) noted the lack of similar programs available in Australia and suggested that international programs demonstrate that individuals will seek support if it is available.

Given the high costs these offences impose on the community, and the stigma associated with them, there is a prima facie case for increasing support for services that prevent child sexual offending where they are found to be effective. To this end, the Government should consider the availability and effectiveness of preventative programs for potential child sex offenders as it develops its Sexual Violence Prevention Framework.



# Children of incarcerated parents may require additional support

Stakeholders raised concerns about the impact of incarceration on the children of prisoners.<sup>52</sup>

As discussed in Chapter 6, intergenerational transmission of anti-social behaviour and criminality between parents and children is well established. Both Australian and international studies have shown that parental incarceration increases the risk of future conduct problems (Murray et al. 2012; Tzoumakis et al. 2019a). Reported risks of parental incarceration include stigmatisation, removal from home and family, financial stress and disengagement from school (Perry et al. 2011, p. 459; Social Policy Evaluation and Research Unit 2015; Shine for Kids sub. DR26, p. 3). Children of incarcerated parents may be exposed to multiple risk factors, some of which may have contributed to the offending behaviour of their parents.

Dr Kath McFarlane raised the intergenerational implications of imprisonment and out-of-home-care:

Research indicates that many children of prisoners become enmeshed in the justice system once they enter care, with devastating long-term consequences including imprisonment, homelessness, disrupted education etc. This is a transgenerational cycle: many of the parents in prison were themselves looked after, so too were their grandparents. Many of the children taken into care following parental imprisonment will follow this same path, with young women in care likely to become pregnant and then have their child removed while they themselves are still in the care system. (McFarlane sub. 10, p. 8)

It should be noted that for some children, parental incarceration may be associated with positive impacts, for example, where this limits the child's exposure to family violence and abuse.

Based on national prisoner survey results, nearly one in five (18 per cent) prison entrants had at least one parent or carer in prison when they were a child. This was more likely among Indigenous entrants (31 per cent) and younger prison entrants aged 18–24 years (27 per cent) (AIHW 2019c).

Prisoner surveys also reveal that many prisoners are parents. Nationally, more than half (54 per cent) of female prison entrants and over a third (37 per cent) of male prison entrants reported having at least one dependent child (AIHW 2019c). These rates are higher among Indigenous prison entrants, with some reported estimates for Indigenous females as high as 80 per cent (Human Rights Law Centre & Change the Record 2017, p. 13).

Rising imprisonment rates are likely to increase the number of children at risk of intergenerational transmission of offending behaviours. However, there is no official data on the number of children with an imprisoned parent (or parents) across Australia (ADCQ 2019, p. 95; Dennison et al. 2013).

A 2013 study (Dennison et al. 2013) estimated that approximately four per cent of all Queensland children were likely to experience paternal imprisonment in their lifetime, but that the rate for Aboriginal and Torres Strait Islander children was between 12.5 per cent and 16.3 per cent. A New South Wales study considering both maternal and paternal imprisonment estimated that four per cent of all children and 20 per cent of Indigenous children would experience imprisonment of either parent over their lifetime (Quilty et al. 2004).

International research suggests children of incarcerated parents are nearly 10 times more likely to be imprisoned than children of non-prisoners (Gluckman 2018, p. 16).

Literature often refers to children of incarcerated parents as 'hidden' (see for example Trotter et al. 2015, p. 4; Weaver & Nolan 2015, p. 4; Shine for Kids sub. DR26, p. 13). However, their parent's interaction with the criminal justice system provides opportunity for identification at multiple points, from time of arrest through to admission to prison.

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<sup>&</sup>lt;sup>52</sup> For example, see Shine for Kids sub. DR26; Institute of Public Affairs sub. 11, Attachment 5.1, p. 9; Peak Care sub. DR29, p. 3; QCOSS sub. DR24, pp. 5 and 9; Sisters Inside sub. 39, p. 10.



The support needs of children of incarcerated parents will depend on a range of factors including the child's age, care arrangements, relationship with the imprisoned parent, support networks, and length of imprisonment. However, to assess the needs of these children, they must first be identified.

#### Identifying and supporting children of prisoners

Queensland Corrective Services (QCS) advises that prisoner admission processes are intended to identify whether a prisoner has children in their care and whether they will be unsupervised as a result of the parent's incarceration. There is no formal process for identifying the broader support needs of children beyond child safety matters. There is also no process for collating information about the total number of children affected by parental imprisonment. This information could be used to better understand the needs of this high-risk group, provide information to families about support services that may be available to them, and to make referrals to service providers where appropriate. QCS should establish a process for identifying children affected by a parent's imprisonment as part of the prisoner admission process.

The Commission was advised that some correctional facilities may have local processes for providing information about support services for children of prisoners, but there is no standard process in this regard. Beyond visitor information, the Queensland Government and QCS websites provide little information about support services for families of prisoners.

Stakeholders in Indigenous communities noted the lack of support offered to the families of prisoners, including on their return from prison. The Anti-Discrimination Commission Queensland also provided confronting stories of the experiences of two incarcerated women and their children. The mothers in these circumstances were both concerned about the lack of support for their children:

A said there was a lack of support for helping her daughters. She would like a network to try and help them. In her view, there was a huge need for more assistance for prisoner's children 'on the outside'. (Anti-Discrimination Commission Queensland, sub DR13, p. 10)

The Commission has not been able to assess the full range of support services available to prisoners' families and their children. Even where services exist (whether government or non-government), children and their carers may not be aware of them or understand how to access them. The Queensland Government should review the availability and effectiveness of existing support services to:

- 1. identify available support services and ensure prisoners' families and carers are informed about them
- 2. identify gaps in support services and consider trialling evidence-based programs to address these.

#### Maintaining parent-child contact while a parent is incarcerated

The maintenance of family connections has been associated with reduced recidivism (Farmer 2017; Weaver & Nolan 2015) and investments to aid these connections may therefore deliver future returns. This position was supported by several stakeholders (Shine for Kids sub. DR26, p10; Hamburger sub. DR17, p. 20).

The maintenance of parent-child relationships while a parent is incarcerated may not always be in the child's best interest, but where it is, the following obstacles may make interactions particularly challenging:

- large distances between a child's residence and the prison
- rigid processes around prison visits, including frequency and length of visits
- the environment for prison visits not being suited to children and families
- denial of access by caregivers
- phone call costs
- limited availability for video calling.



Women's correctional facilities in Queensland provide some accommodation where babies and young children (aged zero to five) can reside with their incarcerated mothers. Playgroup activities operated by a non-government organisation are also offered for these children. Parenting programs may also be available to build parenting skills and to support positive engagements between mothers and their children.

For male prisoners and female prisoners whose children do not reside with them, the *Corrective Services Act 2006* (Qld) provides for a child to visit if the chief executive considers it is in the best interests of the child. When considering the best interests of a child, a range of factors are considered, including the nature of the child-parent relationship, relevant court orders and the child's wishes among other things. Where a visit is not authorised, alternative forms of contact may be available if approved (for example, video conferencing).

Shine for Kids (sub. DR26) made several recommendations for improving parent-child contact in the prison environment. These include supporting transport services for children to attend prison, ensuring security checks for prison visits are conducted with a customer service approach, providing family and child visitor centres to provide information and support as well as child friendly visitor areas with age appropriate furniture and activities, and facilitating greater use of video calling technology.

QCS should examine options for improving parent-child contact while a parent is incarcerated, including expanding existing programs or undertaking trial programs.

#### Strengthening child and family relationships in prison and beyond

The Queensland Government funds several parenting programs in women's prisons as well as programs to support child and family connections during imprisonment and following release. In their submission, Shine for Kids (sub. DR26, p. 11) recommended that parenting and family connection programs should be extended to male prisons also.

In the United Kingdom, the Farmer review of the importance of strengthening prisoners' family ties considered intergenerational offending and observed the following:

Access to organisations and services that have proven expertise in helping families with members inside prison is vital for guarding children's future life chances, but so too is ensuring men inside are supported to be engaged fathers so they can be part of the protective web around their children. (Farmer 2017, p. 18)

Similarly, Keith Hamburger noted:

Throughcare's effectiveness will be compromised unless it is part of a holistic response including family and community strengthening. (Hamburger sub. DR17, p. 21)

The government should ensure correctional rehabilitation and reintegration considers the family situation of prisoners and facilitates access to parenting support programs where appropriate.



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#### Recommendation 30

The Queensland Government should prioritise investments in community-led prevention and early intervention in communities with high levels of offending. To this end, the government should:

- identify projects that would be suitable for a justice reinvestment approach
- establish funding arrangements to support justice reinvestment projects
- facilitate access to data and establish monitoring and evaluation frameworks
- facilitate coordination and collaboration between government and non-government service providers (including police, courts and corrections) and communities
- prioritise projects aimed at reducing Indigenous offending. As a first step, the government should outline its plan for justice reinvestment in Cherbourg.

#### Recommendation 31

To prevent disengagement from the education system, the Queensland Government should:

- commission an independent assessment of student disciplinary absences (SDAs) in Queensland state schools to determine:
  - the underlying reasons for the increased incidence of SDAs, and whether SDAs are applied consistently within and between schools
  - the impacts of SDAs on student outcomes, including their impact on future criminal justice system involvement
  - whether there are opportunities to improve transparency, accountability and outcomes through governance, reporting and support arrangements.
- identify schools and regions with concentrations of at-risk and disengaged children and develop multi-agency approaches for assessing and responding to these children's needs
- prioritise the assessment of at-risk children for cognitive impairments and other disabilities and ensure there are sufficient resources in the school system to support referrals to the National Disability Insurance Scheme where appropriate
- work with universities to improve the behavioural management training for pre-service teachers with a focus on identifying and managing students at risk of disengaging from education.

#### Recommendation 32

To prioritise the prevention of child sexual abuse, the Queensland Government should assess the availability and effectiveness of preventative services for individuals who are at risk of committing child sexual abuse as it develops its Sexual Violence Prevention Framework.

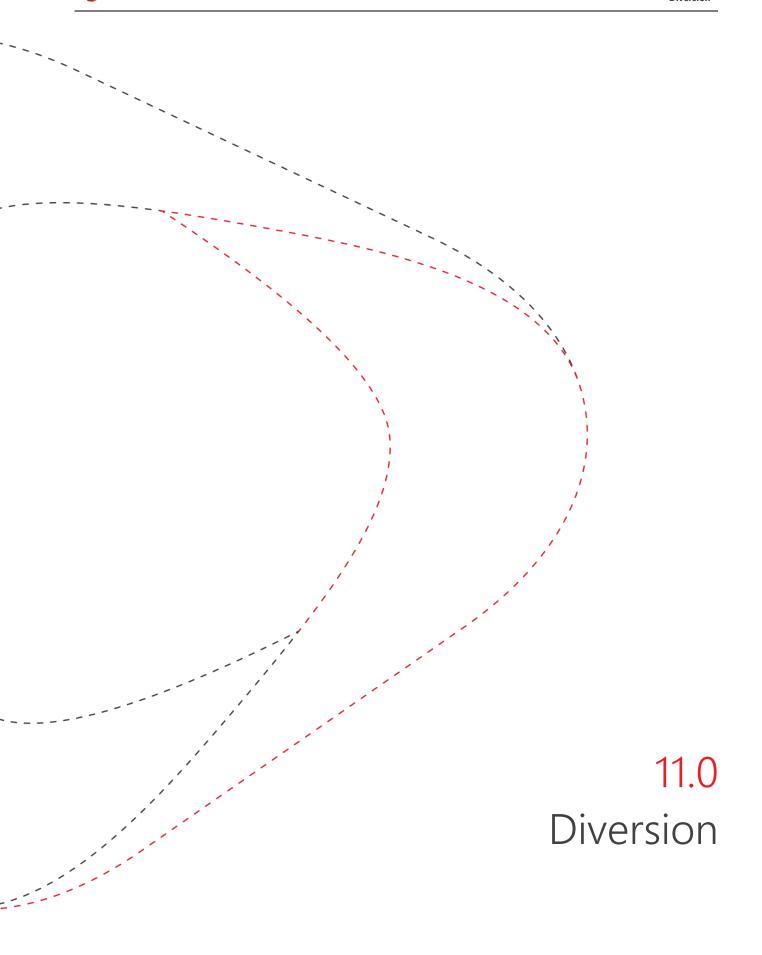


# Recommendation 33

To reduce the intergenerational impacts of imprisonment, the Queensland Government should:

- ensure prisoner admission processes identify children of prisoners and other high-risk family members
- provide information to prisoners' families and carers of their children about available support services and facilitate referrals to service providers
- assess the availability and effectiveness of existing support services that target children of prisoners and their parents/carers and address service gaps
- facilitate prisoner access to parenting support programs where appropriate
- examine options for maintaining parent–child relationships while a parent is imprisoned.







This chapter outlines the role of diversion within the criminal justice system, its use in Queensland, and identifies opportunities for more effective use of diversionary options.

#### Key points

- Contact with the criminal justice system can have persistent (and criminogenic) adverse impacts.
- Diversion can reduce adverse impacts by:
  - providing a more proportionate response to low harm offending—nearly 30 per cent of adult offenders do not go on to offend again or offend infrequently—with potential savings of \$2,105 per diversion from avoided court costs
  - diverting offenders to treatment that addresses factors driving their offending—recidivist offenders
    have an elevated incidence of drug abuse, mental health issues, homelessness and cognitive
    impairment—with potential savings of \$9,200 per diversion from reduced reoffending.
- When properly designed and implemented, de-escalation and diversion reduce offending and criminal justice costs—thereby improving community safety.
- Compared to other states, Queensland makes little use of non-court proceedings (17 per cent of all proceedings compared to 29–59 per cent in other states).
- Queensland's low use of diversion reflects limited legal and police flexibility, limited diversion options, and limited incentives to promote their use.
- The following diversion responses should be introduced:
  - an adult caution with fewer administrative hurdles
  - drug cautions—subject to other reforms to the legal framework—that extend beyond cannabis use and provide a tiered response of information, fine and referral
  - deferred prosecution agreements—with an ability to require conditions, such as referral to assessment, no repeat offending, obtaining assessment or treatment, restorative mediation or other agreed action (such as an apology or other restitution).
- For these responses to be effective, the government should:
  - establish and report against key performance measures for local policing plans, diversion and deescalation
  - ensure QPS develop police training and practices in the use of de-escalation, discretion and diversion—including a simplified public interest test/assessment tool
  - support local communities to engage in local policing plans and administer deferred prosecution agreements
  - allow QPS and local justice groups to access the network of responses and treatment that is being developed for work and development orders and Court Link, for use in local policing plans and deferred prosecution agreements
  - strengthen the evaluation framework for the government's domestic and family violence prevention strategy to include an assessment of diversionary options.



## 11.1 Introduction

Diversion provides alternatives to formal police and court processes for dealing with offending behaviours. There are three broad types of diversion:

- warnings—such as formal cautions issued by police
- referral to treatment—usually to address the underlying risk factors for offending, such as drug treatment
- diversion to alternative justice processes that better suit the victim or defendant—such as Murri Court or restorative justice processes.

While this chapter provides some discussion of court-initiated diversion, it is not its primary focus. Initiatives such as Court Link, Murri Court and the Drug Court all use diversionary approaches, but many of them have only been established or reintroduced in recent years and are awaiting formal evaluation.

Rather, the chapter focuses on diversionary options for the police, particularly establishing the tools and incentives that would be required to facilitate more effective use of diversionary options.

# 11.2 The benefits of diversion

Diversion can have the following benefits:

- It reduces unproductive contact with the criminal justice system that can lead to further offending—which arises from stigma (personal, social and formal) and labelling (forming criminal self-identity).
- It treats underlying factors that contribute to offending, such as drug use, anger management, homelessness, and mental illness—thereby reducing reoffending.
- It saves criminal justice resources.

# Reducing unproductive contact with the criminal justice system

Interactions with the criminal justice system can affect offenders over and above any penalties they receive—by affecting future employment, social status, self-esteem, self-identity and personal relationships (Moore et al. 2016). These stigmas can add to deterrence, but can also encourage self-identification as an offender, leading to further offending. The latter effect is considered strongest when defendants are younger and more impressionable (Wiley & Esbensen 2013).

Police detection of an offence can deter individuals from further offending—reducing the need for further proceedings. In their survey of the research literature on criminal deterrence, Chalfin and McCrary (2017, p. 12) conclude that:

The best available evidence suggests that the experience of arrest does lead to an increase in the perceived likelihood of being apprehended for a future crime.

#### De-escalation

Unproductive contact can also occur when police interaction with an alleged offender leads to resisting arrest, assault of a police officer, or failure to comply with police requirements (such as move-on orders). The use of deescalation practices by police can avoid additional harms and offending. Further benefits can arise from reduced complaints of police use of excessive force and enhanced respect for the law (Tyler 2003).



# Treating factors that contribute to offending

Diversion to appropriate treatments can help offenders address factors that contribute to their offending. Common factors are drug and alcohol use, mental illness, homelessness and cognitive impairment. Table 11.1 identifies the types of problems addressed by the Victorian Court Integrated Services Program (CISP), a program that helps offenders on bail access treatment.

The evaluation of the CISP program indicates a 10-percentage point reduction in recidivism, with a minimum benefit to cost ratio of 1.7 (PricewaterhouseCoopers 2009, p. 10).

Table 11.1 Top six problems and treatment and support services under the Victoria CISP

Top six referrals by reason	Number of referrals	Top six treatment and support services	Number of referrals
Problems with illicit drugs	1,824	Alcohol and other drugs: including pharmacology	1,721
Mental illness/other mental disorder	1,289	Material aid: including travel cards, food vouchers, crisis packs and backpack swags	1,128
Accommodation—long term	535	Mental health: including mental health court liaison service and psychological services	973
Accommodation—emergency	480	Housing: including CISP initial assessment and planning service, crisis and transitional housing	714
Problems with alcohol	457	Medical: including assessment of medical needs, medication review and specialist services	523
Acquired brain injury/cognitive impairment	279	Men's behaviour change programs	186

Note: Participants may have more than one reason for referral.

Source: Magistrates' Court of Victoria 2016, p. 55.

While self-motivation is often considered to be essential for achieving outcomes, the evidence suggests that mandated or required treatment is often just as effective as voluntary referrals (Ip 2008). Incentives can also assist with treatment completion—the Queensland Drug and Alcohol Court uses strong incentives to require the offender to adhere to weekly treatments and court attendance, in lieu of a suspended prison sentence of up to four years.

In considering the use of diversion to treatment it is important to note that:

- diversion can be applied in conjunction with victim restoration or other court-determined penalties
- diversion treatments are not an easy option—the behavioural changes they promote require effort from an offender (van Ginneken 2016).<sup>53</sup>

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<sup>&</sup>lt;sup>53</sup> During the Commission's site visit to the Drug and Alcohol Court, a participant voluntarily exited the program and was taken into custody to complete their suspended prison sentence.



#### Rehabilitation outside prison is more effective

Community-based rehabilitation is likely to be more effective than prison-based rehabilitation. While like-for-like comparisons are difficult, the key factors in favour of community-based rehabilitation are that:

- prison environments create behavioural changes that reduce inmates' ability to integrate back into the community and increase their likelihood of reoffending
- behavioural improvements achieved through programs provided in prisons often do not carry through after release, particularly if there is no community-based follow-up support (Howells 2000).

Given the high costs of prisons and enduring impacts on prisoners (and the community), it can be cost-effective to take advantage of opportunities to help offenders to modify their behaviour and avoid incarceration. These issues are also discussed in Chapter 15, which examines options for increasing the use of community corrections orders in place of imprisonment.

#### Reducing criminal justice system costs

Simple cautions that divert first-time or infrequent low harm offenders generate savings in police and court-processing costs. The magnitude of savings depends on how frequently they are used, and the savings in each case (see Box 11.1). Thompson et al (2014) estimate that an adult caution for Queensland would save 4.3 per cent of criminal justice system costs (\$32.5 million per year). As the target for a caution (first minor offence) is unlikely to progress directly to prison, it is unlikely that there will be immediate savings from prevented incarceration.

Early diversion to treatment, however, has the potential to reduce imprisonment and introduce large savings if it can divert an individual away from a criminal career. Estimates by Griffith Criminology Institute (sub. DR32, p. 3) show that chronic offenders can impose costs on the criminal justice system in the order of \$381,000 by the time they are 31 years old. Societal costs are likely to be higher.

#### Box 11.1 Estimates of savings from diversion

Adult cautioning can provide savings to the criminal justice system where it avoids court costs and any other costs that result if an individual escalates through the criminal justice system. While the latter is difficult to estimate, simple estimates show that each caution that prevents court proceeding would save \$2,105 per diversion.<sup>54</sup>

In the case of diversions that refer offenders for treatment, the key source of savings is from reduced recidivism. An example of possible savings is provided by the evaluation of the CISP, which showed both a reduction in recidivism (down 10 percentage points) and in the severity of future offending. Based on an analysis of two cohorts, the evaluation showed that the average days of imprisonment for those who received treatment through CISP was 8 days, compared to 40.6 days for a control group who did not receive treatment.

If similar outcomes could be achieved in Queensland, this would generate prison cost savings of around \$9,943 per participant. Assuming the same cost ratios as the CISP evaluation, net benefits (after accounting for avoided court and other criminal justice costs, as well as CISP costs) are likely to be around \$9,200 per participant.

Source: PricewaterhouseCoopers 2009; QPC estimates.

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 $<sup>^{54}</sup>$  Savings are estimated using a methodology outlined in Thompson et al. (2014), inflated to today's prices.



# 11.3 Key risks for diversion

While diversionary approaches can provide many benefits, they can also create risks if they are poorly designed or implemented. Key risks include:

- A lack of, or ineffective, targeting—used badly, diversion could reduce community safety.
- Unintended effects from net-widening where minor offending is captured.
- Limiting access to procedural justice by encouraging self-incrimination and denying access to independent courts, needs to be balanced against administrative savings and other benefits to the offender from diversion.

#### The importance of targeting

The general challenge for diversion to treatment/assistance is to match an offender with cost-effective treatments. The key issues are:

- Targeting is difficult and requires a level of expertise and an appropriate risk assessment framework. At the early stages of offending it is hard to identify future risk without significant background information—this is often not available to decision-makers (such as police) or is costly to obtain (requiring assessment).
- Timing can be critical for the success of some treatments, such as drug rehabilitation (providing treatment when the motivation to change is high).
- High-risk individuals tend to have multiple needs and obtaining holistic treatment can be difficult.
- The level of need may not be directly correlated with the level of offending—a criminal justice perspective may not value the treatment of low risk offenders—even if those treatments are socially valuable.

Diversions also need to be carefully targeted so that they do not result in an increase in offending. This might occur where cautions are seen as a 'soft' outcome, reducing the deterrence of future offending. To maximise benefits, cautioning options typically target offenders who are more likely to be deterred from further offending—for example, those who admit guilt, or whose offence is minor or is without intent (Amodio et al. 2007; Cooter & Ulen 2016, pp. 462–484).

#### Net-widening

Net-widening is a common concern for diversion programs. It occurs when the lower-level sanctions of a diversion scheme are applied to individuals who would otherwise have escaped any sanction, pulling them into contact with the criminal justice system and creating associated 'contact harms' (the stigma effects identified earlier). Formal diversionary approaches can lower the thresholds for contact with the criminal justice system by encouraging police to place offenders into the system.

Diversion can also have a 'resourcing' effect if it has a lower 'cost' of enforcement (such as a shorter police processing time) that allows the police to increase their enforcement actions. This occurred in the trial of ticketing for public nuisance offences, where on the spot fines (tickets) allowed police to spend more time on the beat and enforce more offences (Mazerolle et al. 2010).

Net-widening is not always bad. For example, net-widening might be beneficial where it results in additional policing of undesirable behaviour.

One way to prevent unintentional net-widening is to apply a threshold or restriction that recognises the harms from contact—and only allows diversion to apply above that threshold. Such thresholds may be based on age, type of offence, offending circumstances or the use of a public interest test—net-widening can be reduced by targeting.



#### Due process

A further concern with diversion is that it substitutes administrative savings for due process. The key issue is the requirement, and consequent incentive, for alleged offenders to admit quilt and self-incriminate—cutting off the opportunity to seek counsel, test evidence and be adjudicated/sentenced by an impartial judge—but also cutting off the harm from contact with courts.

Diversion from court processes can also be achieved by simplifying law and enforcement processes, thereby creating a form of strict liability. Strict liability reduces the burden of proof and associated enforcement costs—it is not necessary to prove carelessness or fault. An example is the enforcement of traffic speed limits, where police are given the power to directly punish offending by issuing tickets—individuals who wish to dispute the offence must appear in court.

In making laws to simplify the imposition of penalties, society trades off the gains from administrative efficiency, against losses from possible injustice. For this reason, ticketing<sup>55</sup> is traditionally used where guilt can be easily proven or where there is low probability of error. For example, ticketing of public nuisance was introduced because, under former court proceedings, there were high rates of quilty pleas or quilty ex parte (from not attending court) indicating low risks of injustice (as most offenders chose to bypass the court process).

#### 114 Diversion in Queensland

#### Diversion is used less than in other jurisdictions

Compared to other jurisdictions, Queensland makes limited use of diversion. Options for police to divert offenders away from the criminal justice system are limited. Apart from a caution/diversion for minor drug possession, there is limited scope for adult cautioning in Queensland. This is reflected in proceedings.

In 2016–17, the police made just under 170,000 proceedings against offenders aged 10 years and older. Most of these matters were sent to court—only 17 per cent of all proceedings were made using non-court action. The use of non-court proceedings is low compared to New South Wales, Victoria and South Australia (59, 29, and 55 per cent respectively). As shown in Table 11.2, the use of non-court proceedings for illicit drug and public order offences in Queensland are low relative to other jurisdictions.

With few non-court options, the risk of mismatching the response to the crime increases.

Table 11.2 Non-court proceedings, 2016–17

Offence	Qld	NSW	Victoria	SA
Illicit drugs	20%	28%	34%	80%
Public order offences	42%	84%	90%	78%

Source: ABS 2019g.

<sup>55</sup> Ticketing refers to police infringement notices where, for selected offences, a 'ticket' for a fine is made on the spot—if a person wishes to dispute the penalty in court, they can elect to do so within a specified period. There is a presumption of guilt rather than innocence.



There are many reasons why diversion is used less in Queensland than in other jurisdictions. Key factors, as highlighted by stakeholders, include:

- operational policies that limit the use of pre-court adult diversions—formal options for police are largely limited to a restricted adult caution, and a restricted drug caution (for cannabis only)
- limited supply of diversion programs (such as drug and alcohol programs, alternative dispute resolution, homelessness responses, domestic violence programs)
- limited expertise amongst police and courts about when and how to limit unproductive contact with the criminal justice system, triage and connect offenders to treatment
- limited incentives to encourage the use of diversion—police KPIs can promote proceedings rather than deescalation and encourage a focus on outputs rather than underlying harm.

These factors are interrelated. For example, it is difficult to develop expertise for diversion schemes that do not exist.

In relation to court-based diversion, there has been significant policy change over the last ten years, with several diversion programs, such as Drug, Murri and specialist courts disbanded or defunded, and then reintroduced.

Queensland recently began increasing the level of court-based diversion, with the re-establishment of the Drug and Alcohol Court, the introduction of Court Link (based on the Victorian CISP program) and work and development orders (WDOs). Given that the government is still evaluating the outcomes of these initiatives, this chapter does not consider court-based diversion any further.

It is difficult to assess whether the lower use of diversion has had an impact on the flows of people through the criminal justice system. For example, while Queensland has the youngest adult prison population among Australian states, Queensland also has younger adult offenders compared to other states—so it cannot simply be attributed to a lack of diversion (ABS 2019g). However, Queensland imprisons the greatest number of offenders for drug possession, with 295 of the total of 395 sentenced prisoners in Australia (ABS 2018k).

It is challenging to compare outcomes across jurisdictions because of the number of confounding factors that are likely to affect these outcomes.

The best evidence for change comes from initiatives in New Zealand. The New Zealand Police undertook a five-year program, 'Policing Excellence' (2009–2014) as part of a transformation to move from:

being predominantly reactive and offender focused, to being proactive, prevention and victim focused, resulting in a modern, mobile and accessible police service. (New Zealand Police 2014, p. 7)

Policing Excellence set the following targets:

- a 4 per cent shift in police resources to crime prevention activities (a 5.8 per cent shift was achieved)
- a 13 per cent decrease in recorded crime (a 20.1 per cent reduction was achieved)
- a 19 per cent decrease in non-traffic prosecutions (a 41.3 per cent drop was achieved) (New Zealand Police 2014).

<sup>&</sup>lt;sup>56</sup> Work and development orders allow SPER debtors meeting hardship criteria to 'pay' off their debt with work or attending programs that can reduce future offending.



## Incentives could to be improved to support diversion

It is important that police have the right incentives to undertake diversion, de-escalation and best practice policing practices.

The use of diversionary options by police requires the exercise of discretion. The environment in which this discretion is exercised is often characterised by uncertainty. For example, the likelihood of success of a diversionary option in these circumstances may be far from clear. A diversionary option may require a genuine commitment from the offender to be successful, but the character and intentions of the offender may be hard to discern.

In the presence of uncertainty, the options that frontline personnel choose will reflect the incentives they face. Faced with an offender, officers can choose to implement a diversionary option or proceed with a prosecution. In making their decision, they will weigh up any penalties they face for making a 'wrong choice' against the rewards for when they 'get it right'.

In the absence of direct instructions or other incentives, there are few rewards for making a successful diversion, since success is difficult to measure and may take some time to become apparent. In this environment, proceeding with a prosecution provides an opportunity to pass the risks to other parties (prosecutors and the courts).

In many cases, proceeding with a prosecution will be the right choice, since it can provide an opportunity to gather more information or reduce the degree of uncertainty. In this regard, the court trial process itself may be viewed as a good mechanism for generating and testing the veracity of information. However, it is also expensive and does not suit every circumstance.

Incentives should encourage police and police prosecutors to use diversionary options if doing so carries little risk or would lead to high payoffs in terms of avoided future harms.

Currently, existing incentive arrangements appear to act as an impediment to the expansion of diversionary options.

The QPS's operational procedures manual, for example, appears to instruct officers to err on the side of proceeding to prosecution:

[T]he proper decision in most cases will be to proceed with the prosecution if there is sufficient evidence. Mitigating factors can be put to the court at sentence. (QPS 2019b, p. 8)

Best practice police practices, such as problem- and evidence-based policing (Hoffman et al. 2005), and community-oriented policing (Crime and Misconduct Commission 2009; Criminal Justice Commission 1998) have featured in QPS documents over time, but there is little reporting (or evidence) of their uptake by QPS.

There are no reported performance indicators relating to diversion, outside of a performance measure relating to youth cautioning (see section 11.9). Police policy and procedures may also limit the use of diversion and encourage prosecution.

An absence of diversion-orientated performance indicators is likely to increase officer aversion to risk-taking, with a focus on other measured activities.<sup>57</sup>

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<sup>&</sup>lt;sup>57</sup> Significant review resources and due process are devoted to police promotions—the independent Police Service Reviews by the CCC deal with officer grievances regarding promotion, transfers and disciplinary action (other than misconduct), with application to the Supreme Court for a judicial review as a final remedy. The significant uptake of body-worn cameras by officers through private purchase can be interpreted as an aversion to risk (Doorley 2015).



#### Gaps in the diversionary toolkit

Existing diversion options in Queensland are shown in Table 11.3.

Early in the criminal justice process, diversionary options focus on helping offenders avoid formal criminal justice proceedings mainly through formal or informal cautioning and referrals. The benefits of these options arise through reduced labelling effects, which lower recidivism, and savings in administration costs. However, as discussed earlier, cautioning is used relatively infrequently, and, as shown in Table 11.3, there are few cautioning options available for police.

When formal contact is unavoidable, such as when offending is more serious or persistent, existing court-based diversionary options seek to treat underlying conditions that contribute to offending (for example, the Drug and Alcohol Court). These court-based options are likely to offer benefits from reduced recidivism (if treatment is successful) but are expensive to administer (Queensland Courts 2016, pp. 67, 116). The treatment of underlying conditions also relies on providing incentives for offenders to participate, however, the threat of sanctions as will be discussed in later sections, may be uncertain in some court settings.

The Commission compared Queensland's diversion programs against best practice in other jurisdictions and from prior reviews, and identified the following gaps in diversion:

- unnecessary restrictions, which limit police use of adult cautions
- limited availability of diversion options for the offence of drug possession
- no scope for deferred prosecution.

These are discussed in the next sections.



**Table 11.3 Queensland diversion options** 

Program (provider)	Eligibility/Target	Description
Police referrals (QPS)	Victims, witnesses and offenders	There are 85,000 annual referrals to a network of 490 providers—primarily phone-based interventions (73 per cent) providing information and advice (79 per cent). Domestic and family violence is the largest source of referral.
Non-statutory caution (QPS)	Aged, impaired or minor offending	Targeted to those over 65 years of age or mentally impaired, but also available for minor offending. Requires admission of guilt, approval of sergeant and any victim. Only 560 cautions from over 250,000 police actions for 2017–18 (0.2 per cent).
Police Mental Health Referral (QPS, QH)	Persons suffering episode of mental illness	Triage service to assist police responses to persons with mental illness or episode of mental illness.
Police drug diversion (QPS)	First offence for possession of 50 grams of cannabis or paraphernalia	Requires admission of guilt, and no prior convictions or previous diversion. Involves attendance at a 90-minute information/education intervention. Currently trialling a phone-based intervention.
Drug and Alcohol Assessment Referral (DAAR)/Illicit Drug Court Diversion program (IDCD) (DJAG–Courts)	Defendants in the Magistrates Court	DAAR applies where substance use is a contributing factor to offending. IDCDP applies to defendants who plead guilty to drug possession. Limits on prior diversion. Attendance is a condition of a good behaviour bond. The program is similar to police drug diversion but applies to a wider set of drug types.
Court Link (DJAG–Courts)	Defendants in the Magistrates Court	A bail–based program that does not require admission of guilt. Case management (usually 12 weeks) connecting participants to services to address housing, employment, drug and alcohol, health and social needs that are related to offending—becomes a bail condition with monitoring by a dedicated Magistrate. Only available in Brisbane, Cairns, lpswich and Southport.
Murri Court (DJAG–Courts)	Indigenous defendants	Supports Indigenous defendants through the court process.  May refer to/arrange treatment and support services.  Provides sentencing report to the Magistrate.
Drug and Alcohol Court (DJAG–Courts)	Drug/alcohol related offending with prison sentence	Prison sentence is suspended, during which the Magistrate/multi-disciplinary team provides intensive treatment/monitoring and support (usually 2–3 years). Current capacity of 125 participants.
Work Development Orders (State Penalties Enforcement Registry, SPER)	SPER debtors in economic hardship	Allows debtors to undertake work, counselling or treatment with sponsor organisations to pay off outstanding SPER debt (excludes compensation and restitution). Commenced in 2017.

Note: Mediation and restorative justice processes are excluded from the table (discussed in Chapter 14). Sources: Queensland Courts 2018b; QPS 2018c.



# 11.5 Improve the adult caution

The authority for police to make adult cautions is provided through police procedures rather than legislation. The aim is to:

- · prevent adult onset offending
- · divert first time offenders from the criminal justice system
- save prosecution resources
- provide for efficient and effective finalisation (Queensland Police Service 2019, p. 34).

Historically, this caution has been targeted at persons who are over the age of 65 years and have an intellectual or other disability, but it can also be used more generally where the offence is minor<sup>58</sup> (Criminal Justice Commission 1999; Queensland Police Service 2019). The use of a caution requires sufficient evidence, admission of guilt by the alleged offender, prior approval by a sergeant (not involved in the investigation) and the agreement of any victims.

#### The caution is used infrequently

This caution is little used (see Table 11.3). The limited use of cautions reflects the availability of alternative actions (such as a verbal warning or ticketing), and the 'usability' of each option. A caution has two disadvantages—compared to alternative options or to further police proceedings—that are likely to provide disincentives for use:

- the requirement to obtain agreement of victims—other forms of proceeding do not require their agreement; decisions on the consequences for the offender are made by police/prosecution/courts (but in consultation with victims). Practically, police may find it difficult to obtain a victim's agreement to a caution immediately following an offence
- the requirement to seek approval by a sergeant—this is likely to provide a disincentive compared to actions that officers can take independently (but which have a larger impact on the alleged offender, such as arrest). While sergeant oversight can reduce the risk of inappropriate cautions, it contributes to the restricted use of cautions.

# There is potential to improve the use of adult cautioning

The need for direct oversight of cautions seems unnecessary. Given the information systems available to police on the street—which can provide information on prior offending and any previous cautions—it should be possible to develop guidelines for use (such as giving cautions only for first and minor offences). Officer use of cautions can also be monitored, which is best practice for the use of simple cautions in the United Kingdom (UK Ministry of Justice 2015). Evaluation of and public reporting on the expanded use of cautions is required to ensure it contributes to community safety and community confidence.

Expanding officer use of cautions should not require extensive training. The police have experience in the use of cautions for youth offenders, and the principles are similar. An adult caution should be less complex to administer than that for young people where additional procedures are required to protect children (from stigma) and to ensure they are adequately supported/represented.

If police are to increase their use of a caution it may be important that the government and parliament (in representing the community) signal to police their approval for using cautions through legislation. The current drug diversion is provided by legislation. A legislative basis is also required if police are asked to make decisions where victim and public interests conflict. For example, youth cautions established in legislation reflect a

<sup>&</sup>lt;sup>58</sup> Currently, the caution cannot be used for offences relating to domestic violence, drink driving, offences against the person, or where there are multiple offenders.



community decision that the public interest in diversion (in favour of the child) outweighs the retribution that a victim might desire.<sup>59</sup>

# 11.6 Expand diversionary options for drug possession

Queensland police are currently able to offer diversion for minor possession (50 grams) of cannabis (or possession of cannabis paraphernalia). Eligibility requires an admission of guilt and no associated indictable offence or prior convictions/cautions. The diversion requires the offender to complete an intervention providing information, education and/or assessment (lasting 90 minutes), with further referral to support/treatment services. Failure to attend the intervention can result in a penalty. Under the intervention, no conviction is recorded (but it is entered into police administrative records). The diversion is available for first offences.

#### Further levels of diversion would increase its effectiveness

A survey of Australian states' drug diversion schemes concluded that there are consistent reductions in reoffending for those who complete diversion interventions. The primary benefits arise from reduced contact with the criminal justice system and harm reduction through reduced consumption and referral to treatment (Payne et al. 2008).

A review of drug courts (Queensland Courts 2016, p. 36) recommended expanding the pre-arrest and post-arrest options for minor drug offences. The recommendation was to provide three levels of caution: a simple caution, a caution with educational material that may be delivered online, and a caution with a requirement to attend or participate in a face-to-face or online education program. It also recommended applying penalty infringement notices (ticketing) to a broader range of minor illicit drug offences than currently applies.

Adding further steps to the existing drug caution will expand the benefits of diversion as this would allow for incremental responses to repeated possession offences. The use of additional tiers recognises that for many people the recovery from drug dependency is cyclic, with repeated stages of relapse and progress (Lubman et al. 2014).

In addition, there are likely to be benefits from expanding the use of diversion to all illicit drugs (not just cannabis) since the same underlying principles are present—harm reduction through education, treatment and reduced contact with the criminal justice system.

Chapter 13 sets out in greater detail the current framework for illicit drugs in Queensland and proposes reforms to the treatment of drug possession and supply. Within the context of these reforms, the Commission recommends that the government provide for further levels of diversion in responding to the offence of drug possession that should be available for all drug types.

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<sup>&</sup>lt;sup>59</sup> Conditional on the seriousness of the offence. The (legislated) United Kingdom simple caution allows officers to make such a judgment (UK Ministry of Justice 2015).



# 11.7 Introduce deferred prosecution for offenders

Under a deferred prosecution agreement (DPA), the police or prosecutor consents not to prosecute an offender for an agreed period, providing they do not reoffend, and they adhere to any other terms (such as receiving treatment). If the offender completes their agreement, the prosecution is cancelled, avoiding court and any penalties. If the offender reoffends, proceedings are started for both the deferred and new offence. It is similar to a suspended sentence but operates earlier in the criminal justice process.

Deferred prosecution is used for criminal offending in the United States but is currently limited to use for corporate offending in Australia (Bronitt 2018). Mueller-Smith and Schnepel (2018) provide evidence of the effectiveness of deferred prosecution from two natural experiments (from Harris County in the US in 1994 and 2007) arising from an unexpected decrease and increase in the use of deferred prosecution. They found that those who received deferred prosecution had:

- fewer subsequent convictions—by 56–76 per cent (over the following ten years)
- increased employment—by 16–20 percentage points (on average over ten years).<sup>60</sup>

DPAs have been trialled in the United Kingdom, where prosecution was deferred if conditions are met. Box 11.2 outlines some of the recent evidence from these trials.

#### Box 11.2 Operation Turning Point—a UK trial of deferred prosecutions

Operation Turning Point was an English trial of a deferred prosecution (2011–13). The trial randomly selected offenders from a pool of offenders who:

- had passed a public interest test to prosecute
- had a relatively low number of convictions
- had a relatively low likelihood of prison and had committed a relatively less serious offence.

Individuals who were selected were given a Turning Point 'contract' and were warned that non-compliance would result in certain prosecution. The contents of the contracts varied, but features included compensation, letters of apology, anger management and non-contact provisions. The study then compared key metrics between those diverted to Turning Point contracts, and those who proceeded to court.

Though there was no statistically significant difference in prevalence of re-arrests for all offender types, there was a statistically significant difference for violent offenders—Turning Point participants had a 34 per cent lower rearrest rate than the control group. There have been 68 per cent fewer court cases in the Turning Point group than the control group, and researchers estimated Turning Point interventions cost around a third of a court proceeding. Further, initial evidence indicated that victims were more satisfied with Turning Point than court proceedings.

Source: Neyroud et al. 2016

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<sup>60</sup> Positive employment effects arise from avoided convictions and their negative effects on job applications.



## Deferred prosecution can target diversion to the offender

A DPA can be used to specify other conditions that address offending behaviours (seeking treatment or assistance) or restorative justice (with the victim or community).

Deferred prosecution fills the gap between a simple caution and court-based bail programs such as Court Link (see Table 11.3). The conditions of a DPA can vary from a simple undertaking to not reoffend, through to treatment, victim restoration, or other actions that address offending behaviours. In this way, a DPA can be tailored to the needs of offenders.

An example of the type of benefits a deferred prosecution can generate is provided by the (court-based) Criminal Justice Diversion Program in Victoria. This program is targeted at low harm first offenders. The required actions can include a victim apology, counselling, voluntary work, defensive driving course or victim compensation. In 2015–16, 6,872 referrals were made, with 5,154 offenders placed on diversion (by a Magistrate); 5,030 plans were completed. An evaluation shows reduced recidivism for program participants—13 per cent compared to 33 per cent for the control group (Rutter & Hardy 2019).

DPAs are likely to provide greater incentives for offenders to comply with conditions than under court-based diversions. Compared to court-based diversions, DPAs can provide more immediate certainty to the offender of the outcome from a completed agreement—no prosecution to penalty. With court-based bail programs (such as Court Link), the effect upon any sentence from successfully completing a program remains at the discretion of the magistrate.<sup>61</sup>

The Commission envisages that, in cases where an offender does not complete their agreement, those details would be provided to a magistrate as part of the prosecution submission on sentencing, which 'credits' an offender with any actions they did complete. The information provided by a failed agreement and any repeat offending can provide a Magistrate with useful information for court sentencing.

A DPA, with appropriate safeguards, could also be used with youth offenders.

# Three types of deferred prosecution agreement

The Commission proposes that three forms of deferred prosecution be adopted:

- a simple DPA conditional on no repeat offence within a specified period—which could be offered on the spot by police
- a DPA with additional conditions/actions that relate to assessment/treatment/restoration—which would usually be negotiated by the prosecutor
- a community DPA with additional conditions/actions that relate to assessment/treatment/restoration—where the conditions are developed and agreed with a community group, such as a community justice group (CJG), who would also monitor those requirements.

A simple DPA provides a step above a caution but retains the element of deterrence and the threat of punishment for offending. As a result, DPAs should more easily gain the confidence of police, victims and the wider community.

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<sup>&</sup>lt;sup>61</sup> Offender participation without a certain payoff is reliant on self-motivation, which can enhance the success of rehabilitation. Under Court Link, a dedicated magistrate is involved in regular monitoring of the participant's progress, which enhances the recognition of their effort/success in sentencing.



The use of additional conditions would be applied where offending is more serious, where a pattern of offending is apparent—which increases the risk of a (first) prison sentence occurring—and where the conditions (such as treatment) will contribute to reduced reoffending. To prevent net-widening, the government will need to develop guidelines to ensure that the progression between simple and action-based DPAs is proportional to the harm of the underlying behaviour.

Any agreed course of action should include conditions that are fair, reasonable and proportional to the offence. It could include:<sup>62</sup>

- obtaining assistance to address/treat underlying risk factors for offending—for example, treatment for managing/treating mental illness, mentoring by a community group
- undertaking actions to address risks to offending (attending school/alternative activities/curfew)
- a satisfactory restorative justice mediation (see Chapter 14 on victim restitution)
- victim restoration (apology, repair/recompense of damages, voluntary work).

There may be merit in allowing an offender to seek and propose a DPA—with the final agreement approved by a prosecutor, victim or community group.<sup>63</sup>

#### Community involvement in the administration of DPAs

DPAs provide a means to engage the local community in working with an offender to address factors that contribute to their offending. Box 11.3 indicates a possible process for a community DPA.

#### Box 11.3 Developing a deferred prosecution agreement together with the community

A process for a community DPA could involve:

- Police or prosecution draft a DPA, which includes a reoffending condition, and provide it to the community group.
- The community group develop a course of actions with the offender (who may be advised by counsel).
- The final agreement is provided to police/prosecutor.
- The community group supports/monitors the completion of agreed actions.
- Police monitor any reoffending that might arise in the normal course of their duties.
- An agreement is fulfilled when the agreed actions/no reoffending is completed.

<sup>&</sup>lt;sup>62</sup> Guiding principles are outlined in recommendation 2: 'Guiding principles for interventions in a criminal justice context', from the Queensland Drug and Specialist Courts Review (Queensland Courts 2016, p. 71).

<sup>&</sup>lt;sup>63</sup> An offender will have some understanding of the causes of their offending, and their contributions can help reduce the costs of forming an agreement.



A community justice group<sup>64</sup> (CJG) is one community body that could fulfil the role, but the opportunity should be available to other organisations with sufficient capability to manage any agreed actions and referrals. Submissions supported such place-based approaches to facilitate diversion:

The place-based approach via our proposed local community Special Purpose Vehicles ... will facilitate "police discretion, diversion and cautions" in the knowledge that offenders will be subject to supervision by trained Community Mentors and that there will be credible local programs in place to assist people at risk of offending. (Hamburger, sub. DR17, p. 18)

#### Community DPAs have several advantages:

- They can utilise existing experience from the operation of the Murri Court, local mediation and from other organisations, such as the Family Responsibility Commission.
- They can allow diversions to tap into local expertise and resources.
- They can operate where court-based programs are not available.
- They allow police to focus on offending rather than treatment.
- Joint police–community group involvement provides a check on disproportionate agreements.
- In Indigenous communities, they allow for local and culturally appropriate agreements.
- They give additional leverage to the community over local offenders to deal with their behaviours.
- They are amenable to evaluation and provide a way to measure the effectiveness of agreed actions and the contribution of community groups.

Community involvement in DPAs is consistent with the recommendations for local Indigenous justice agreements outlined in Chapter 22 and should help inform community applications for reinvestment funding recommended in Chapter 10.

Community based diversion was also recommended in the Royal Commission into Aboriginal Deaths in Custody, the Fitzgerald report (promoting community-based policing), the Cape York Justice Study and Restoring Order.<sup>65</sup>

## Guilt and proportionality in deferred prosecution agreements

One view is that for DPAs to be effective, they require an admission of guilt that is sufficient for court finalisation.

A key benefit of the requirement for an admission of guilt is that it allows the case to proceed directly to court in the event that the offender defaults on the agreement. This can result in significant savings to police administration budgets and court budgets. It can also reduce emotional and time costs for victims.

Offsetting these benefits is the risk that the law applies inappropriate or disproportionate sanctions. Early plea bargaining, restorative justice processes, strict liability offences and DPAs all face this risk to some degree.

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<sup>&</sup>lt;sup>64</sup> CJGs comprise Indigenous Elders who help Indigenous defendants/offenders navigate the police and court systems. The government funds CJG coordinators, operating expenses and pays fees for cultural submissions to Magistrates. CJGs may also assist offenders with treatment of offending behaviour.

<sup>&</sup>lt;sup>65</sup> See Appendix 2 in *Restoring Order* (Crime and Misconduct Commission 2009) for a summary of prior reports views on community based policing and diversion.



An alternative to requiring an admission of guilt was proposed by ATSILS:

Further, one of the challenges for a diversionary option to apply, is the condition precedent that there be an 'admission of guilt'. Consideration should be given to a system, such as that which applies in relation to a Domestic Violence Application—where a respondent can consent to an order (in this case, a diversion), without an actual admission. Admissions are more problematical in the youth sector, given the need (at least for indictable offences) for an independent support person to be present. (sub. DR016, p. 8)

On balance, the Commission considers an admission of guilt should be required to:

- maintain incentives for an offender to complete the conditions/actions under a DPA
- reduce incentives for an offender to use a DPA to delay their day in court (reducing the celerity of punishment)
- retain incentives to complete the conditions/actions of a negotiated DPA, which may include treatment and rehabilitation programs.

The key risk with DPAs is to protect against self-incrimination or uninformed admission of guilt. While maintaining an admission of guilt, this risk can be reduced by:

- providing a time period in which an offender can reconsider their guilty plea. The time period provides the
  offender with an opportunity to seek legal and other advice, or to change their own views after a 'cooling-off'
  period
- providing opportunities for the provision of advice and a time period for the offender to more fully consider what is in their best interests.

The risks associated with reducing procedural protections are greatest for the proposed simple DPA, though those risks can be reduced by providing a time period to alter the plea (see Table 11.4). For the other two proposed types of DPAs, the negotiation process with a prosecutor or community group results in a lower level of risk.

Table 11.4 Proposed DPAs and reducing the risks associated with guilty pleas

Type of DPA	Party responsible for execution	Timeframe	Risk of overly coercive criminal law	Proposed additional protection/s
Simple DPA	Officer at scene	On-the-spot	Medium to high risk in those situations where offender is uninformed.	Yes, 10 days to reconsider admission of guilt
DPA with conditions, actions	Prosecutor	Prior to first court appearance*	Low risk due to considered negotiation process with prosecutor, and offender having time and opportunity to obtain advice	Not required
Community DPA with conditions, actions	Community group following referral from prosecution or police	Prior to first court appearance*	Low risk due to considered agreement making with the community group, and offender having time and opportunity to obtain advice	Not required

<sup>\*</sup> The date of first court appearance can vary significantly, but it will normally be at least two weeks.



#### Access to services

It is clear from the experience of mature referral programs, such as in Victoria (CISP) and NSW (work development orders), that demand for treatments will grow. There is little information to assess the extent of unmet demand for services, and consequent priorities.

It is beyond the scope of this inquiry to assess the likely demand for these services, but there is merit in developing a means to identify demand and creating a market or matching mechanism through which providers can observe demand and develop responses.

There is also likely to be merit in creating economies of scope and scale by enabling DPAs to access the same type of treatment services provided to Court Link. Expanding DPA services for use as work development orders may also help increase the reach of community groups, allowing them to develop a scale that will improve the services they can offer.

# 11.8 Local policing plans

Local policing plans are a means to enable local community members to partner with police in reducing offending. The underlying premise is that local concerns, knowledge, capability and resources can be applied in partnership with police to improve community safety. Such plans are often considered in the context of Indigenous communities, where cultural differences between the community and police make plans a useful means to build trust and to tailor responses.

Community DPAs provide a formal mechanism for communities to help address offending behaviours. They would become a key mechanism for community involvement in diversion (along with the Murri Court). Plans could address when and how community DPAs will be applied.

The Commission also envisages plans providing other pathways that lead away from the criminal justice system.

QPS has an Indigenous Community/Police Consultative Groups (ICPCGs) initiative that aims to build community-police relations and address local policing issues—using a problem oriented policing framework (QPS 2019a). The QPS (2007) submission to the Crime and Misconduct Commission's inquiry into policing in Indigenous communities indicated that 18 ICPCGs had been established—but their effectiveness and sustainability had been variable—and more consistent community involvement was needed as well as increased capacity of community members. That submission identified examples of diversion and related issues:

[T]he diversion of drunken people or children from family violence situations to a place of safety such as a care centre or the home of a relative or friend requires the presence of a suitable environment and competent carer. Unfortunately, in the experience of police, this cannot be assured in many Indigenous communities (QPS 2007, p. 12).

Despite ICPCGs, the Crime and Misconduct Commission (2014, p. ix) recommended a stronger form of planning, with greater local control, active police support, and public reporting. In a follow-up report, the Crime and Misconduct Commission (2014) found that little progress had been made on the community policing plans.

The Commission considers that local policing plans can make an important contribution to the availability and use of diversion and de-escalation in a community. They can address:

- community pathways for recurring situations that might precipitate offending—from alcohol use, minor disputes, mental health, cognitive impairment, homelessness, truancy and youth boredom
- recurring victimisation—through harm minimisation and target hardening
- preventative actions—such as driver licencing and navigating bail conditions.



Local plans regarding policing, diversion, de-escalation and DPAs would fit under the local Indigenous justice agreements recommended in Chapter 22.

To be successful, the Commission considers that local policing plans will require:

- capacity building and remuneration for community members—the Family Responsibility Commission provides an example of how training and remuneration can fit with local elders in positions of authority (and is particularly relevant for DPAs (CMC 2009, p. 329))
- commitment by head office and local police to partnering with the community to produce plans that make those communities safer.

# 11.9 Improving incentives for the use of diversion

This section considers how incentives could be developed to encourage more effective use of diversion and deescalation. In providing options for diversion, it is essential that police have the right incentives to use them:

[C]riminalisation and decriminalisation are not simply about what is or is not on the statute books, but how the law is enforced and what sorts of responses are preferred by decision-makers. (Quilter & McNamara sub DR21, p. 4)

Measuring police performance is inherently difficult. The activities that police undertake are diverse and are largely unobserved. Police officers are required to operate independently in circumstances that may range from domestic violence disputes to providing street directions. Much of their work is reactive and determined by offenders and their victims—and constrained by procedural justice. The police have discretion at various levels—organisational discretion on methods and staffing, through to officer discretion on the use of powers authorised by law.

To overcome these difficulties, governments measure police performance on several dimensions, from activities (training, policing methods) to outputs (clearing offences) and outcomes (crime, community satisfaction). The Commission has considered the various levels at which decision-making incentives are applied to QPS to see how diversion and de-escalation can be supported by:

- · delivery priorities
- performance measures
- strategic direction
- operational street-level guidelines.

# Delivery priorities

Formally, government priorities currently flow through to police activities through the Premier's letter to Ministers on their portfolio priorities for the term of government. These priorities focus on discrete activities rather than outcomes. Examples of current priorities for the Minister for Police include supporting the implementation of the Domestic and Family Violence Prevention Strategy 2016–19, the internal QPS strategy, *Our People Matter*, and the Queensland Government's *Action on Ice* plan. These priorities are provided to QPS through the Ministerial charter letter (or letter of intent).

The QPS operational plan reflects those delivery priorities and identifies activities and high-level internal responsibilities. The focus is on discrete programs, such as *Action on Ice*, and their completion dates.



As it stands, the QPS operational plan gives insufficient weight to diversion and de-escalation.

To this end, the government should provide QPS with clearer direction on how it wishes the police to use diversionary options. This direction should be provided though a ministerial statement of intent that requests the QPS to promote the use of diversion and de-escalation. These practices should form part of a wider delivery priority around 'high-performance policing practices' that includes community-oriented, problem-oriented and evidence-based policing. Local policing plans would fall within this delivery priority. It should also include existing police initiatives relating to high performance policing practices.

In response, the QPS should modify its operational plan to reflect this direction.

#### Performance measures

The Commission has considered current performance indicators and how diversionary options might be supported by the performance management framework for QPS.

QPS currently reports its targets and previous year performance in service delivery statements, which form part of the government Budget, and in its annual report. These measures are divided into 'crime and public order' and 'road safety', with only one that explicitly refers to diversion (Box 11.4).

#### Box 11.4 QPS performance measures

- Crime and public order:
  - percentage of personal safety, property, and good order offences cleared within 30 days
  - rate of complaints against police
  - perceptions of police integrity
  - satisfaction of those having contact with police
  - public satisfaction in dealing with public order problems
  - public satisfaction in dealing with emergencies and disasters
  - percentage of code 1 and 2 incidents attended within 12 minutes
  - percentage of juveniles diverted as a ratio of police proceedings
  - cost of crime and public order per person
  - percentage of prosecutions where costs were awarded against the police (in annual report only).
- Road safety:
  - road crash fatalities per 100,000 population
  - road crash hospitalisations per 100,000 population
  - cost of road safety per person.

Source: QPS 2018a, Queensland Government 2019d.

The use of diversion can be added into the existing set of indicators, like the recent addition of youth diversion.

The key issue regarding performance management is that police activities which are preventative, such as deescalation, are hard to measure. Consequently, police may focus on activities that are measured and neglect unmeasured activities that contribute to community safety.



An example of this problem was raised in the Task Force Bletchley report:

[T]he perception that performance was measured through 'statistics' was strongly evidenced in the Constable/Senior Constable focus groups. Statistics such as the number of arrests made, infringement notices issued, street checks and Supportlink referrals were cited as examples of the 'statistics' which were used in performance measurement. While not all the cited measurements were enforcement related, it was commented that "there are no stats for giving someone advice...". ... Based on the comments from the focus groups it appears that the focus of performance targets is not solely enforcement based, however there may be insufficient recognition of de-escalation or 'giving advice.' (2015, p. 111)

Several possible indicators that measure de-escalation are suggested by the Policing with Empathy initiative (Allen 2016):

- ratio of arrests for disobeying a move on order to total move on orders
- ratio of resisting arrest charges to total arrests
- ratio of police assaults to enforcement actions.

The data for these measures is already available within QPS systems, and so would not require significant administrative effort to compile and report. While these measures are unlikely to be sufficient as standalone measures they provide some indication of the quality of police interactions with alleged offenders. It is important that they are reported across different QPS regions and divisions, since average measures can hide important variations across regions.

#### Strategic plan

The QPS strategic plan (2019–2023) sets four-year priorities under four strategic objectives, each with performance indicators:

- strengthen relationships—maintain public confidence, increased perceptions of police honesty and fairness, decreased police complaints and increased user satisfaction
- make the community safer—police dealing with public order problems, decreased road crashes, emergency responses, reduced youth offending and increased offender diversions
- equip our workforce for the future—increased staff engagement and increased workforce diversity
- stop crime—response timeliness, crime clearance rates, public safety perceptions, reduced crime victims (QPS 2019e).

Stretch targets should be set to match the strategic plan. Rather than maintain imprecise 'soft' targets (such as 'reducing' the rate of complaints against police), more precise 'hard' targets should be adopted (for example, a reduction of a certain percent over four years). The only QPS performance targets that consistently adjust each year are those that flow from the ten-year targets agreed as part of the National Road Safety Strategy (to reduce road deaths by 30 per cent).

The New Zealand Policing Excellence initiative demonstrates that significant change is possible in a short period of time (New Zealand Police 2014). Under the program, five-year targets were set for prevention activities—increase their share of resources by 4 per cent, decrease recorded crime by 13 per cent and decrease prosecutions by 19 per cent—all were exceeded. This demonstrates the importance of performance measures in achieving strategic goals.



## Decision rules to support diversion

It is important that a well-designed decision rule exists for police in choosing whether to exercise a diversionary option. In terms of what rules might be based on, one stakeholder suggested:

In order for the test to achieve the objective of reducing criminalisation, it will need to be framed in such a way as to exclude from the reach of public order and other minor offences behaviours that are currently falling within it. A harm/proportionality/cost analysis ... could be a useful touchstone for this exercise. For example, it is well known that offensive language/public nuisance on-the-spot fines and charges often arise when an individual swears at a police officer. A simple public interest test might provide that, by definition, such behaviour is insufficiently harmful to warrant an on-the-spot fine, arrest or charge, and that other options should be employed by police officers. (Quilter & McNamara sub. DR21, p. 7)

As it stands, the police operational procedures manual sets out a decision process to be used by officers in relation to a statutory caution (Box 11.5). This test is broad and straightforward and incorporates most (if not all) factors relevant for deciding whether to issue simple diversion, such as a simple caution. However, for more involved diversion or de-escalation techniques (for example, a DPA with conditions), a more sophisticated test is likely to be required.



#### Box 11.5 Eligibility rules for the non-statutory caution

To be eligible for a caution, the following criteria must be met:

- The offender must be of or over the age of sixty-five, or
- The offender has an intellectual disability or infirm to the extent there is no real risk of repetition of the offence, or
- The offence is minor in nature taking into account:
  - the extent of culpability and/or harm caused
  - the degree of intention or the expectation of any resultant harm
  - any significant aggravating factors
  - any significant mitigating factors
  - any other factors relating to the offence or offender where it would be more appropriate to have the matter dealt with in a court.
- The offender must:
  - admit to the offence
  - have no existing criminal history or a significant lapse of time (at least two years) has occurred following a previous caution for a similar offence
  - consent to being cautioned for the offence. Such consent is to be, where available, electronically recorded or alternatively documented in an official police notebook.
- There must be sufficient admissible evidence available to prove a prima facie case.
- A caution is likely to be the best outcome for the victim and the offender.

An adult caution is not to be administered for an offence involving domestic violence, drink driving, an offence against the person, for example assault, or for an offence involving multiple offenders.

Source: QPS 2019b, pp. 34–35



As with the police decision to charge, diversion and de-escalation decision rules may be informed by the *Director's Guidelines* from the Office of the Director of Public Prosecution (ODPP). Those guidelines were developed to assist police officers and staff of the ODPP in their exercise of discretion and contain a two-tiered test in deciding whether a case should proceed to court:

- whether there is sufficient evidence
- whether the public interest requires a prosecution (Office of the Director of Public Prosecutions 2016, p. 2).

The guidelines list relevant factors in determining if the public interest requires a prosecution. Many of these factors will be relevant for both police and prosecutors in the exercise of discretion, such as the seriousness of the offence, the existence of mitigating or aggravating circumstances, or the attitudes of the victim (Office of the Director of Public Prosecutions 2016). However, many of these factors are not necessarily pertinent to a police decision or easily assessed by police, such as the costs of prosecution, the necessity to maintain public confidence in Parliament and the courts, or the existence of an overlapping civil matter.

A complex decision framework may impede the use of diversion options by introducing uncertainty into the decision-making process. In the presence of uncertainty, current procedure is to err in favour of proceeding to prosecution and not using diversion.

While there may be good reasons to err on the side of prosecution, this tendency may impede use of effective diversionary options.

Simple decision-making processes for employing diversionary options would help promote certainty in their use. This in turn makes it less likely for the officer to revert to the 'default rule' of proceeding with prosecution. Similarly, any decision must rely on information that an officer would possess.

This inquiry's draft report raised the possibility of implementing a simplified public interest test to help with officer decision making. The motivation was to help QPS officers to choose diversionary options more frequently, particularly once a broader suite of options is available. Inquiry consultations indicated that the QPS has been considering how it could improve support to officers by providing simplified decision rules. Ultimately, QPS is best placed to develop policing guidelines and this work should be progressed to support the introduction of new diversionary options consistent with its ministerial statement of intent.

#### Monitoring and evaluation

Continual monitoring, reporting and evaluation is important for good governance and necessary to ensure police and the community maintain confidence in the use of diversion, de-escalation and community engagement.

Officer and public confidence in any additional priorities will require QPS to monitor progress, outputs and outcomes, and evaluate and publish results. Monitoring should relate to established performance indicators, which should be evaluated and refined over time.



# 11.10 Diversions for domestic and family violence

Several stakeholders raised concerns about the policing and prosecution of domestic and family violence. These concerns primarily relate to unintended consequences of the current strategy, which assumes there is a perpetrator and a victim of violence. However, in situations that are not always so clearly delineated <sup>66</sup>, this approach may force individuals into contact with the criminal justice system where there are few benefits or where better approaches exist. It has also increased domestic violence (DV) related imprisonment, particularly for Indigenous females.

Concerns appeared strongest for the unintended impacts domestic violence orders were having in Indigenous communities.

With the recent changes to legislation governing domestic and family violence, Magistrates now frequently issue 5 year DV Orders in cases where a respondent has not attended the hearing. The situation is further complicated by the fact that in most Indigenous communities, there is minimal opportunity for an application to be made to the Court to discharge a DV order.

Of particular concern to the Commissioner are cases involving siblings and family members where such Orders are made by Courts, particularly in Indigenous communities where mediation services are available, and these mediation services have not been canvassed by the Applicant Police Officer ...

(M)any adults within each community often have multiple DV orders against them which were the result of one serious historical incident – which has never been repeated. The existence of such an Order or Orders precludes many community members from employment in the child care area and in the education of children, and can be particularly harsh on women who have limited employment opportunities. (Family Responsibilities Commission, sub. 23, p. 2).

However, concerns were also raised that a one-size fits all approach may not be effective:

Right now we tend to take a one size fits all with respect to domestic violence perpetration and there is good evidence that they don't work ... we know with domestic violence there are at least three different typologies so people might address some of the domestic violence risks but they don't address the other risks which leaves them to recidivate.

[T]here is really good evidence they [diversions to treatment] don't work but we are throwing millions of dollars at a program which is only going to work for maybe 20 percent of the people that are engaged in a partner with violence. (Mazerolle, Brisbane public hearing, 3 May 3, pp. 35, 38)

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<sup>&</sup>lt;sup>66</sup> For example, the Commission was provided with examples where both parties to a dispute had been prosecuted under domestic violence laws.



# It is not clear what diversionary responses are available under the strategy

On 28 February 2015, the Premier received the report of the Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an end to domestic and family violence in Queensland.*<sup>67</sup>

The Queensland Government's response is contained in *The Domestic and Family Violence Prevention Strategy 2016–2026* (the DFV strategy). The DFV strategy sets out a ten-year plan comprising a sequence of four action plans. The first action plan for 2015–16, released with the strategy, focused on the priority actions to be implemented by the government in response to the report, and set the foundation for change going forward (Box 11.6).

Since its implementation, the domestic violence offences and breaches of DV orders appear to have made a strong contribution to the increase in imprisonment in Queensland (Chapter 4).<sup>68</sup>

While the DFV strategy includes court-based diversion, there does not appear to be options for pre-court diversions. Further, it is not clear if the court-based diversions are effective or are used effectively.

#### Box 11.6 Not Now Not Ever initiative—outcomes of the first action plan

The Queensland Government reports that some outcomes from the first action plan include:

- fast tracking legislative reforms to better protect victims and improve perpetrator accountability, in part, through:
  - increased penalties for breaches of domestic violence protection orders
  - allowing a specific notation to be made on a person's criminal history for domestic violence-related offences
  - creation of a stand-alone offence for non-fatal strangulation.
- establishing a trial of a domestic and family violence specialist court at Southport
- improving the way QPS handles complaints about domestic and family violence to ensure the most appropriate response to those affected.

Source: Queensland Government 2017c.

# The evaluation strategy needs to be strengthened

The strategy includes an evaluation framework that is intended to inform progression of the action plans. The evaluation framework is based around four areas:

- impact on domestic violence
- effectiveness and relevance
- · efficiency of the strategy
- equity (impacts for vulnerable groups).

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<sup>&</sup>lt;sup>67</sup> The report can be accessed at https://www.csyw.qld.gov.au/campaign/end-domestic-family-violence/about/not-now-not-ever-report. The Queensland Government's response and action plans can be accessed at https://www.csyw.qld.gov.au/campaign/end-domestic-family-violence/dfvp-strategy.

<sup>&</sup>lt;sup>68</sup> Domestic violence data is not comprehensively or reliably reported, and this makes it difficult to determine the extent to which it has contributed to changes in offending in Queensland (AIHW 2019b, p. 103). There is also a lack of research on domestic violence reporting in Australia (Voce & Boxall 2018, p. 5).



The current evaluation framework identifies efficiency as an evaluation item but does not explicitly include the costs and impacts arising from criminal justice system responses—such as the reversal of bail onus, police practices, DV orders, intervention orders, the nature of sentencing—as part of the data collection process or framework. These impacts should be included, including their contribution to perpetrator attitudes and wider DFV strategy outcomes.

Given the potential for unintended consequences, and the number of domestic and family violence offences (and breaches) that result in imprisonment, the evaluation strategy should include an assessment of:

- whether current policing and enforcement strategies, including the use of imprisonment, are working to reduce the incidence of domestic and family violence
- the extent to which the strategy has resulted in unintended consequences
- whether there are opportunities for greater use of diversion to treatment, restoration or other approaches that would reduce harm.

#### Recommendation 34

To reduce interaction with the criminal justice system, the Queensland Government should expand diversionary options by establishing:

- an adult caution for use in situations where it is a first or infrequent offence and the police are satisfied that such a caution provides sufficient action
- a multi-stage caution and diversion scheme for all drug possession that allows for a staged response and supports further reform to the legal framework for drugs
- a three-tier deferred prosecution arrangement that provides:
  - a simple agreement conditional on the offender desisting from further offending for a specified period
  - an agreement for additional conditions relating to assessment, referral and treatment to address offending behaviours
  - an agreement where additional conditions are developed and monitored by approved community groups,
     such as community justice groups
- local policing plans based on problem- and community-oriented policing practices, developed in partnership with community groups such as the community justice groups, for communities with high levels of offending and imprisonment.

In implementing these diversionary responses, the government should consider administrative savings for the police and courts, protections for persons from unfair agreements and net-widening.



#### Recommendation 35

To incentivise the effective use of these diversion responses, the government should:

- provide clear direction to the Queensland Police Service, though a ministerial statement of intent, to encourage the effective use of diversionary options and de-escalation consistent with high-performance policing practices
- establish high-level goals and key performance measures that encourage the Queensland Police Service to
  implement local policing plans, diversion and de-escalation, and ensure the Queensland Police Service develop
  police training and practices in the use of de-escalation, discretion and diversion—including a simplified public
  interest test/assessment tool
- implement a monitoring and evaluation framework to ensure that the use and development of these diversion responses contribute to community safety and maintains the confidence of the community
- build and support local community capacity to engage in local policing plans and administer deferred prosecution agreements
- give police and local justice groups access to the assessment and referral network being developed for work and development orders and Court Link.

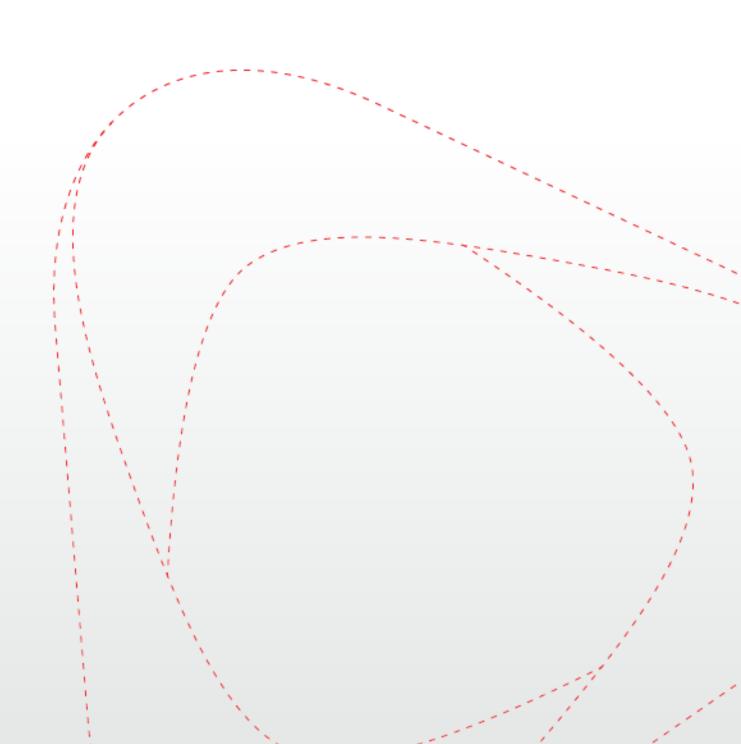
#### Recommendation 36

The Queensland Government should ensure that its evaluation of the *Domestic and Family Violence Prevention Strategy* includes an assessment of:

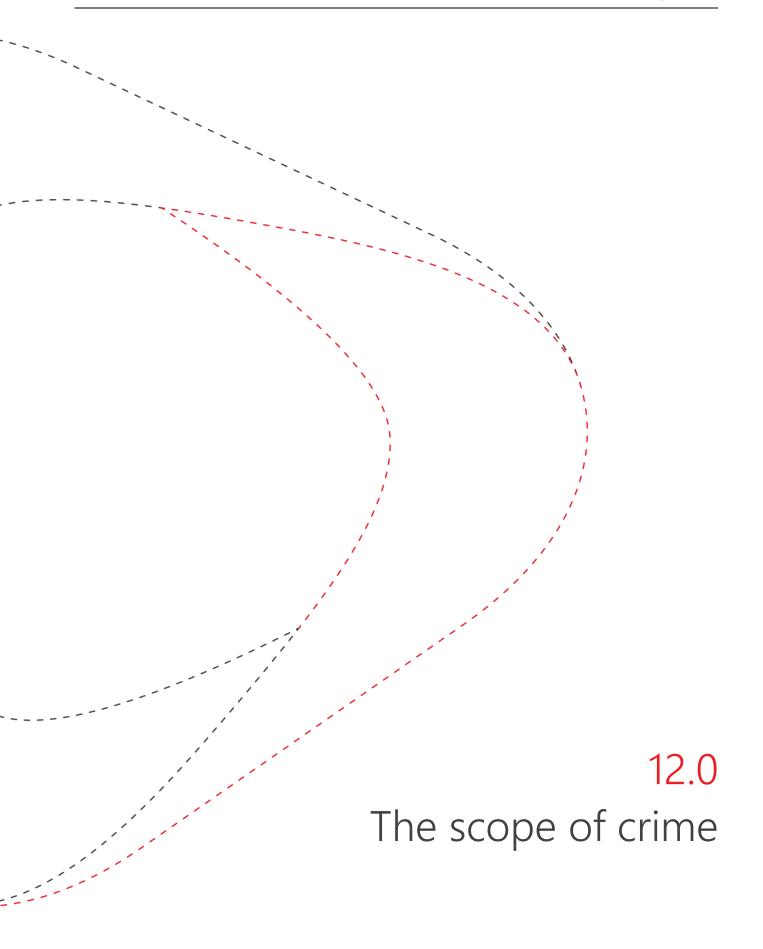
- whether current policing and enforcement strategies are working to reduce the incidence of family and domestic violence in communities with high levels of economic and social disadvantage
- the extent to which the strategy has had unintended consequences
- whether there are opportunities for greater use of diversion to treatment, restoration or other approaches that would reduce harms.

Queensland Productivity Commission











This chapter discusses the rationales for criminalising an activity and considers the broad spectrum of criminal offences against these rationales. The intention is to highlight types of offences with relatively weaker rationales which, subject to further detailed analysis, might be candidates for reform.

#### Key points

- The criminal offences that apply in Queensland are defined in legislation passed by either the Queensland or Commonwealth Parliament. For some offences, there does not appear to be a strong rationale for criminalisation.
- A significant proportion of the prison population is imprisoned for activities that were not illegal less than 50 years or so ago, or the acts themselves are relatively new (for example, due to technological changes), and are non-violent offences.
- There is evidence of problems associated with excessive criminalisation in Queensland. Three key problems are reduced liberty and excessive imprisonment; reduced legitimacy of the law; and enforcement resources being diverted to lower harm offences.
- Criminal sanctions are only one option for dealing with behaviours currently defined as a criminal offence. Many activities that are known to be harmful are dealt with by other means.
- Offences that involve harm to self, indirect harm, or risk of harm, or that involve someone giving offense, generally result in lower to medium harm and account for roughly 32 per cent of the prison population. The rationale for criminalising these offences is relatively weak (compared to the offences of murder, manslaughter, rape, assault and theft, which directly harm someone else), although criminalisation may still provide net benefits, depending on the offence.
- The Commission recommends that the Queensland Government seek to remove activities from the criminal code and other legislation that define criminal offences where the benefits of including the activities do not outweigh the costs. This may be progressed through a root and branch review of the stock of criminal offences.
- In analysing whether an activity should be criminalised, the following criteria should be considered:
  - the extent to which the activity causes harm to others and the nature and level of that harm
  - whether the use of criminal sanctions imposes costs on offenders that are proportionate to the harm caused to others
  - whether the act of criminalisation creates more positive effects for society than negative ones—this should include an assessment of deterrence and any unintended consequences that might cause harm
  - whether there are other, non-criminal options that might better prevent harm and provide greater net benefits for society.
- A fundamental re-think on the principles underpinning criminalisation and the current reach of the criminal law would potentially reduce the resources required by the criminal justice system and reduce Queensland's prison population.



#### 12.1 Introduction

Every person in a Queensland prison has been found guilty of a criminal offence defined under a law passed by either the Queensland Parliament or the Commonwealth Parliament (or they are on remand).

For many offences, the choice to use the criminal law to address an activity provides clear benefits over alternative policies or approaches that would also regulate, reduce or prohibit the act. However, there are instances where the case for the criminal law appears weak. Alternative approaches to the criminal law may be preferable and result in a reduced demand for prisons.

To investigate criminalisation in Queensland, it is necessary to consider:

- the problems associated with excessive use of the criminal law (overcriminalisation)
- whether overcriminalisation is a problem in Queensland
- the various rationales that might be used to justify defining a behaviour as a crime.

# 12.2 The meaning of the term 'criminalisation'

Formal criminalisation refers to the making of an activity illegal under the criminal law (or increasing the size of the 'statute book'). Substantive criminalisation refers to non-formal changes that change the application of the criminal law through the exercise of discretion, for example, by the judiciary, the police, prosecutors and parole boards (McGorrery 2018a, p. 189). The term is also sometimes used to describe the process of criminalising actors or offenders rather than the acts (or behaviours).

The reach of the criminal law can be expanded through:

- offence creation and expansion—bringing new behaviours within the scope of the criminal law, re-criminalising behaviours already proscribed by the criminal law, and expanding the definitional scope of offences
- penal intensification—for example, increasing penalties, mandatory penalties, sentencing aggravating factors and other related procedural changes
- restricting defences—for example, reverse onus provisions within a statute that shifts the burden of proof onto the individual specified to disprove an element of the information. Typically, this provision concerns a shift in burden onto a defendant
- expanding enforcement powers—for example, police powers, as well as the powers of other state agencies including prosecution and corrections
- expanding pre- or post-correctional powers—pre-conviction remand and bail conditions, post-sentence detention and post-release conditions
- reducing procedural safeguards—the protections afforded to a defendant in the course of criminal proceedings. Procedural changes that alter, for example, the right to legal representation and legal aid, the right to interpretation and translation, notification of rights, and assistance for vulnerable defendants
- civil-criminal hybridity—this refers to 'two-step' criminalisation, where conditions are imposed under a civil order and breach is a criminal offence
- compliance regimes—where criminal sanctions form part of a regulatory compliance regime (McNamara et al. 2018, p. 95).

This chapter focuses primarily on formal criminalisation (offence creation). However, other areas of the report address some of the ways in which the reach of the criminal law can expand as outlined above (for example, the exercise of discretion by enforcement agencies is discussed in Chapter 11).



# 12.3 Costs of criminalisation

The purpose of criminalisation is to protect society from activities considered harmful. However, excessive criminalisation can impose a range of costs on the community, including unwarranted reductions in liberty, too many people imprisoned, reductions in the legitimacy of the law in the eyes of the public, diversion of enforcement resources away from higher harm crimes towards lower harm crimes, and dilution of the stigma meant to be associated with the criminal law.<sup>69</sup>

The use of criminal law is likely to be excessive if the laws and regulations that make certain behaviours criminal have a detrimental effect on society, or where there are less harmful or more effective ways to deal with the behaviour.

#### Reductions in liberty, including excessive imprisonment

The criminal law plays an important role in underpinning individual liberty by protecting the rights of individuals to go about their business without being harmed or coerced by others. It also works to protect individual property rights and helps to underpin the conditions required to foster economic growth.<sup>70</sup>

However, excessive criminalisation can undermine liberty in unnecessary ways. When there are too many rules, or there are rules that a large proportion of the population choose to ignore, there is a risk that criminalisation will punish or restrict the liberty of too many people. A system which overcriminalises is bound to overpunish by both punishing those who deserve no punishment and by inflicting too harsh a punishment on those that do. By leading to overpunishment, the excessive use of the criminal law violates the generally accepted notion that criminal sanctions should be proportional to the seriousness of the offence (Husak 2010, p. 623).

Excessive criminalisation can result in increasingly lower harm activities being made criminal, potentially punishable with imprisonment. One of the ways this contributes to rising imprisonment is due to 'net-widening'—expansion in low harm acts increases contacts with the criminal justice system and can act as a pathway to prison. The risk of imprisonment is increased, while the censured behaviour may be neither harmful or wrongful:

[T]he third common case of prosecution against the public interest relates to young people whose only crime is developmentally-appropriate exploration of their sexuality. In Queensland, if two children – even if both fifteen years old – are involved in [consensual] sexual activity, they can both be charged with indecent dealing of a child under 16 ... As a result, the future of some Queensland children will be significantly affected due to having sexual offence records which will unfairly label them. Whilst education is important to discourage behaviours which put children and young people at risk, criminalisation is not. (YAC sub. 34, p. 10)

# Reductions in the legitimacy of the law

The excessive use of criminal law to address some acts or behaviours risks undermining the public's respect for the law. This means that overcriminalisation can erode the principle of legality itself:

• Where there are large volumes of criminal law, it becomes difficult for ordinary citizens to know what is proscribed. Since ignorance of the law is rarely an excuse, the criminal law can ambush persons, punishing them

<sup>&</sup>lt;sup>69</sup> Additional risks of excessive criminalisation include reduced judicial flexibility resulting from an increasing stock of legislation imposing more restrictions on the judiciary; reductions in private behaviours that are welfare-enhancing overall, but sometimes also produce impacts that are undesirable; and reductions in deterrence through criminalising acts that are less deserving of the stigma associated with committing crimes (stigma dilution) (Ashworth 2008; Mungan 2012, 2015).

<sup>&</sup>lt;sup>70</sup> On the other hand, the criminal law can also impose significant risks to liberty because, in part, enforcement of the law involves the powers of the state over the individual.



for behaviour they did not know to be prohibited (there is no fair warning). This muddles and narrows the distinction between criminals and ordinary citizens (Mungan 2012).

• If citizens encounter inessential and obscure criminal laws, or laws that they do not respect, their respect for the wider legal system can also decline, threatening the maintenance of social order (Husak 2010).

Overcriminalisation can mean that ordinary citizens who might otherwise regard themselves as law-abiding are committing crimes, and only official discretion (in arrest or prosecution) protects them from prosecution and punishments. When the criminal justice system overcriminalises, no discernible principle distinguishes those persons who are punished from those who are not.

McGorrery notes that the criminal law may not be the best response to undesirable behaviour and urges considerable caution in expanding the use of the criminal law for offences:

The criminal law is a necessary part of a fully functioning liberal democracy, but it should be used with extreme caution ... Research has repeatedly proven the effectiveness of a criminal justice system is inextricably linked to whether it is perceived as legitimate, fair and coherent. When the criminal law is too broad, too narrow, or inconsistent, it loses legitimacy. It also loses legitimacy when new laws are introduced that are purely symbolic and add no real substance to existing laws. (McGorrery 2018b)

Significant care needs to be exercised in defining an activity as a criminal offence. Offences with a weak rationale can lead to under-enforcement of the law:

When criminal law is used to prohibit actions that are: (a) widespread and ubiquitous; (b) strongly motivated so that such actions will continue to be done even if prohibited; (c) unclear in a populace's mind as to their moral status; (d) clear but divided in the populace's mind about their moral status; or (e) clearly wrong in a populace's mind but not popularly thought properly punishable by the criminal law (so that criminal prohibition is just 'for show')—when criminal law prohibits these kinds of actions, it invites under-enforcement. (Moore 2014, p. 203)

Criminal laws that are rarely or never enforced impose costs on a legal system, including a lessened respect for law; the potential for selective, arbitrary, and unequal enforcement; and the potential for extortion from officials with discretion whether to enforce such laws.

#### Diversion of enforcement resources to lower harm offences

Overcriminalisation can also mean that low harm offences are drawn into the scope of the criminal justice system. This can lead to the government's scarce resources being devoted to dealing with low harm offences rather than being applied to more important priorities:

- Overcriminalisation can result in the diversion of enforcement and other resources away from higher harm offences towards lower harm offences (Kim & Kim 2015, p. 1652).
- The enforcement of laws can direct money and time away from more important issues, such as tackling the social problems that create the incentives and occasions for offending in the first place (Husak 2010).

# Stigma dilution

An important feature of the criminal law is the stigma that the criminal law creates, compared to alternatives such as the civil law. 'Stigma' is the cost to the offender of other people's knowledge of the offender's crime.



The criminalisation of minor offences can reduce the stigma attached to being convicted of a serious crime, such as murder, rape or theft (referred to as stigma dilution).<sup>71</sup> A consequence is that the deterrence of serious offences is reduced in the absence of offsetting policy changes, such as longer sentence lengths. As stigma is an efficient form of punishment (Friedman 2000), stigma dilution increases the total social costs of crime, because it increases enforcement costs for a given level of crime and/or it increases crime through reducing deterrence.

If there are offences which should be addressed in a way other than through the criminal law, then a benefit of decriminalisation is that it will increase the deterrence value of sanctions applied to serious crimes when the label 'criminal' more closely aligns with truly wrongful acts (Mungan 2015, p. 3).

# 12.4 Does Queensland make excessive use of the criminal law?

It is difficult to establish whether the criminal law is used only in those situations where it provides the best possible response to a problem. International evidence suggests that the reach of the criminal law has expanded too far in many developed countries (Box 12.1).

There are, however, no comprehensive stocktakes or measures of criminalisation in Queensland or Australia. Further, there have been few studies that have examined whether the acts currently defined as offences in Queensland should be addressed by the criminal law.

#### Contributions to convictions and imprisonment

The DJAG Queensland Wide Integrated Court (QWIC) database contains over 8,700 offence codes that are active (are on the statute books). Each offence code maps to a specific section of a legislative Act.

There are a great many Acts that define offences that result in criminal convictions and a smaller but still significant numbers of Acts that define offences that result in a conviction with a sentence of imprisonment.

#### All convictions resulting in imprisonment or another sentence

Queensland courts, in 2017–18, convicted offenders of offences defined in roughly 200 separate pieces of legislation. Offences defined in the *Criminal Code Act 1899* (Qld) comprised 26.6 per cent of all charges resulting in convictions. The next most active legislative instrument was the *Transport Operations (Road Use Management Act 1995* (Qld) (22.1 per cent) followed by the *Drugs Misuse Act 1986* (Qld) (16.0 per cent).

There were 2,170 distinct offences (or offence codes) that offenders were convicted under in 2017–18. The largest legislative contributions came from the *Criminal Code Act 1899* (Qld) (convictions under 772 different offence codes accounting for 26.6 per cent of all convictions); *Drugs Misuse Act 1986* (Qld) (95 offence codes); *Customs Act 1901* (Cwlth) (8 offences); and *Domestic and Family Violence Protection Act 1989* (Qld) (98 offence codes).

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<sup>&</sup>lt;sup>71</sup> 'Stigma dilution takes place when the signal provided by a serious conviction becomes noisier, and therefore less informative, due to some legal change that pools in relatively highly productive individuals with people who have high criminal tendencies. Increasing the scope of the criminal law, in particular, can cause stigma dilution by broadening the pool of criminals, and therefore reducing their average deviation from the average citizen' (Mungan 2015, p. 2).



#### Box 12.1 Significant overseas concerns about trends in criminalisation

While there are differences in the criminal law systems of Australia, the United States and Great Britain, the countries have a common legal heritage under the common law.

In the United States and Great Britain, there are significant concerns that the reach of the criminal law has expanded too far. The number of acts or behaviours defined as criminal offences and regulated through the criminal law has expanded rapidly in the United Kingdom and the United States:

In 2000, it was estimated that there were more than 4000 punishable crimes at the federal level alone in the United States. There wouldn't be a criminal lawyer in the country, let alone a lay person, familiar with each of those offences ... conducted a similar review of new crimes in the UK over two separate years, finding that thousands of offences were created, an alarming number of them outside the legislature through subordinate legislation ... The offences were most commonly in the areas of agriculture, terrorism, health and safety at work, and elections, and more than half of them were punishable by a term of imprisonment. (McGorrery 2018a, p. 191)

More than 8,000 criminal offenses now exist in England and Wales. Many of these offenses criminalize activities that do not involve moral turpitude. In the United States there are 4,000 Federal offenses, and a comparable number of criminal offenses in the individual states. Likewise, in the U.S.A. there is also a third stratum of criminalization at the local level. (Baker 2011, p. 6)

Chalmers & Leverick (2014, p. 65) found that 1,395 criminal offences were created in 1997–98 alone, and a further 1,760 offences in 2010–11.

Case studies, observation and anecdotal evidence support some degree of overcriminalisation:

In many countries, including Australia, the number of criminal offences has grown exponentially over the last three decades, and the list of activities brought within the category of 'crime' has correspondingly widened. The word 'over-criminalisation' has been coined to capture the phenomenon of the deployment of criminal law as a policy response or regulatory mechanism beyond its legitimate limits. (McNamara 2015, p. 33)

#### Convictions resulting in imprisonment

Offences defined under the *Criminal Code Act 1899* (Qld) were responsible for 48.4 per cent of all convictions resulting in adult imprisonment in 2017–18. The next largest contributors were the *Drugs Misuse Act 1986* (Qld) (19.1 per cent), the *Bail Act 1990* (Qld) (8.2 per cent), and the *Domestic and Family Violence Protection Act 1989* (Qld) (7.8 per cent). There were 994 distinct offences (offence codes) under which prisoners were convicted to prison in 2017–18.<sup>72</sup>

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<sup>&</sup>lt;sup>72</sup> The 994 offence codes relate to the following Acts: *Criminal Code Act 1899* (Qld) (631 offence types (codes) accounting for 48.4 per cent of convictions to prison); *Drugs Misuse Act 1986* (Qld) (78 codes); *Transport Operations (Road Use Management) Act 1995* (69 codes); *Criminal Code Act 1995* (Qld) (Cth) (48 codes); *Weapons Act 1990* (Qld) (45 codes); *Summary Offences Act 2005* (Qld) (26 codes); *Police Powers and Responsibilities Act 2000* (15 codes); *Corrective Services Act 2006* (Qld) (13 codes); *Invasion Of Privacy Act 1971* (Qld) (9 codes); *Health (Drugs And Poisons) Regulation 1996* (Qld) (8 codes); and *Domestic And Family Violence Protection Act 1989* (Qld) (5 codes).



#### Stock of prisoners at 30 June 2018

The prison population at 30 June 2018 comprised prisoners convicted under 23 separate legislative acts. The *Criminal Code Act 1899* (Qld) accounted for a much higher share of offences leading to imprisonment (at 72.7 per cent) than it did for all convictions. *The Drugs Misuse Act 1986* (Qld) (10.9 per cent), *Customs Act 1901* (Cth) (4.5 per cent and *Domestic And Family Violence Protection Act 2012* (Qld) (3.8 per cent) were the next largest contributors.

#### Long-run expansion in the stock of offences

DJAG's QWIC database contains information on the start date for each offence code as well as information on the end date of codes that have expired. This information can be tabulated to provide a partial picture of how active legislators have been in creating new offences going back over 100 years.

From the late 1980s to 2018, offence code creation dwarfed the entire prior period with the exception of 1899 (the year the *Criminal Code Act 1899* (Qld) was introduced) and 1962 (Figure 12.1). However, the expiration of codes was also much higher during the same period (not shown). This suggests high levels of legislative activity, but not necessarily code expansion in itself.

Changes in the net stock of offence codes can provide a measure of the expanding reach of the criminal law. However, the net stock of codes can change when a more general offence is redefined into multiple more narrowly defined offences. This reduces the quality of the net stock of codes as an indicator of changes in the proportion of undesirable activities in society brought within the reach of the criminal law.

Legislative activity increasing the net stock of offence codes (new codes created minus codes ended) began to rise in the early 1960s, then rose sharply from the mid-1980s to 1998. It then fell sharply in 1999 (but re-tracing only part of the prior increase), maintaining a flat to downward trend since. It is not clear to what extent changes result from changes in the reach of the criminal law versus the process of more narrowly defining offences.

Figure 12.1 Offence code creation and net increase in stock of codes

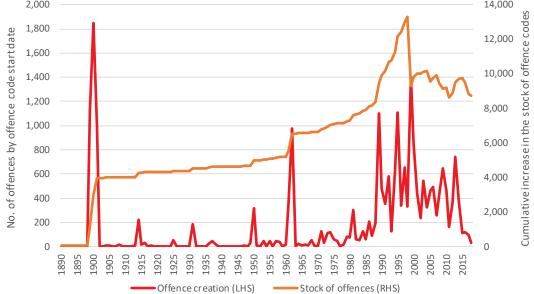
2,000

14,000

12,000

12,000

12,000



Note: Based on just over 8,700 active codes contained in QWIC (codes that are still on the statute books). New offence codes can be created when parliament passes new legislation and when existing legislation is amended to create new offences.

Source: Unpublished DJAG data.



## Expansion of the criminal law, 2012 to 2016

A recent study measured expansions and contractions in criminalisation in Queensland, New South Wales and Victoria for the period 2012 to 2016. It reviewed more than 100 criminal law statutes enacted across the three jurisdictions. The study found that a large majority (85 per cent) of the criminal law statutes passed in NSW, Victoria and Queensland between 2012 and 2016 effected an expansion of criminalisation. Only 14 per cent of the statutes passed in the review period narrowed the parameters of criminalisation in any respect (McNamara et al. 2018, pp. 102–103).

Expansion in Queensland occurred primarily through offence creation, offence expansion, expanding enforcement powers, expanding pre- or post-correctional powers, and reducing procedural safeguards (Table 12.1).

Table 12.1 Expanding criminalisation in Queensland, 2012 to 2016

	2012	2013	2014	2015	2016	Total
Offence creation	1	3	3	0	2	9
Offence expansion	2	2	2	0	1	7
Penal intensification	3	4	3	1	2	13
Restricting defences	0	0	1	0	0	1
Expanding enforcement powers	1	4	2	1	2	10
Pre/post correctional powers	1	7	0	0	1	9
Reducing procedural safeguards	2	4	2	0	0	8
Civil-criminal hybridity	1	1	1	0	2	5
Compliance regimes	0	1	0	0	1	2

Note: Contractions included instances of enhancing procedural safeguards (3 instances), depenalisation (1 instance), diversionary programs (2 instances) and narrowing an offence (1 instance).

Source: McNamara et al. 2018.

#### Stakeholder views

Consultations and submissions to the inquiry raised concerns about the criminalisation of a range of offences:

[It is] essential to consider and implement systemic alternatives to criminalisation, for example: decriminalisation of minor offences (e.g. public nuisance, evade fare, begging, possession of drugs under a certain quantity); introduction of adult cautioning, and/or greater use of justice mediation or referral to restorative justice conferencing, even for violent offences. (Sisters Inside sub. 39, p. 27)



The impacts of the criminalisation of illicit drugs were highlighted most. Stakeholders favoured addressing the problems of illicit drugs through health strategies rather than criminalisation:

Decriminalisation of personal use and possession of illicit drugs provides the opportunity for a health—rather than criminal justice—response and facilitates greater treatment seeking and opportunities for recovery. This in turn could contribute to reducing recidivism rates. (QMHC sub. 38, p. 8)

The decriminalisation of drugs will lead to reduced prisoner numbers ... and refocus substance use as a health issue that requires a health intervention. (APS College of Forensic Psychologists sub. 27, p. 5)

Decriminalisation of personal use and possession of illicit drugs provides the opportunity for a health response rather than a criminal justice response and facilitates greater treatment seeking and opportunities for recovery. Learnings from efforts to improve criminal justice policy responses to drug use and distribution, such as have occurred in Portugal, conclude that decriminalisation does not lead to increases in drug use and in fact, evidence indicates reductions in problematic drug use, drug related harms and criminal justice overcrowding. Decriminalisation in Portugal has enabled police to focus their attention on more serious drug trafficking offences. (QNADA sub. 30, p. 8)

Submissions also raised significant concerns about public nuisance offences:

Our observation is that the charging and sentencing of persons with public nuisance offences lead to the overuse of short sentences of imprisonment with respect to repeat offenders who inevitably have a mental illness or addiction issues that lead them into unwanted attention. The other group that is frequently charged with repeat public nuisance offences are the homeless. (ATSILS sub. 35, p. 3)

Many of the concerns expressed in consultations and submissions can find support in the criminology, legal, health, economic and other literatures, although arguments in favour of current approaches to criminalisation can also be found.

# Significant and growing number of non-violent offenders in prison suggests a problem

While there is uncertainty about the scale of the problem in Queensland, a significant proportion of the prison population is imprisoned for offences that were not illegal less than 50 years or so ago, or the acts themselves are relatively new (for example, due to technological changes), and are non-violent offences (Figure 12.2). From 2011–12 to 2017–18, the number of persons imprisoned for violent and non-violent offences increased by 60 per cent and 54 per cent respectively. In 2017–18, 62 per cent of people sentenced to custody in a correctional institution were sentenced for an offence that can be classified as non-violent.

As the decision-making processes by which an activity is made criminal are sometimes less than ideal, it is possible that the justification for some acts to be made criminal has neither a strong moral, nor economic or other justification.



8,000
7,000
6,000
5,000
4,000
3,000
2,000
1,000

Violent Non-violent Violent Non-violent
2011-12
2017-18

Figure 12.2 People sentenced to custody in a correctional institution for violent and non-violent offences, Queensland, 2011–12 and 2017–18

Note: Adult finalised defendants sentenced to a correctional institution. Excludes fully suspended sentences or custody in the community. 'Violence' includes ANZSOC divisions 01 (Homicide & related offences) through to 06 (robbery/extortion).

Source: ABS 2018c.

## 12.5 How should we decide which acts should be criminalised?

A rationale or principle is required to assess whether an activity should be added or removed from the legislation that makes a behaviour criminal. A strong rationale can avoid a risk of either excessive criminalisation or under-criminalisation and the unintended consequences that might arise.

Without a clear test and decision-making procedure, the creation of a new criminal offence may be a politically convenient response to public concern responding to the pressures placed on politicians to be seen to be taking immediate action. The need for 'action' discourages consultation and research. Growth in the criminal law may significantly reflect this pressure (Ashworth 1995, p. 23).

At this time, there is no commonly agreed test to determine whether an act, or an omission, should be made criminal. However, there is a growing body of theoretical literature which attempts to define the legitimate parameters of the criminal law.

There are several commonly accepted rationales that can be considered in assessing whether an activity or offence should be criminal or not, and a number of decision-making procedures have been proposed.



# Harm principle—harm to others

There is agreement that harm is always a relevant consideration when deciding to criminalise an act. That is, the extent to which an activity harms others should be a primary consideration for criminalisation.<sup>73</sup>

This concept is based on John Stuart Mill's 'harm principle', first discussed in *On Liberty* (Mill 1869). This principle is based on the idea that individuals should be free from coercion by others, including the state (the concept of negative liberty). Liberty is important because:

We support or value liberty because we see—looking empirically at places that protect it to a high extent and those that do not—that human beings have much greater welfare and happiness in the former, in places where there is plenty of individual freedom and liberty. That is why liberty is so important—because it so obviously delivers good consequences, on average, over time...We value it and cherish it precisely because the evidence is clear. (Allan 2011, p. 333)

In the case of crime, the liberty of both victims and offenders are relevant and should be considered in the design of policies/laws and in their application. Where a person is the direct victim of a crime, the offender has often violated the person's right to be free from coercion. This can involve both rights related to their person (body) and their property.

For an offender, criminal sanctions, particularly imprisonment, involves a choice by the state to restrict the offender's liberty. When considering whether the use of state power to limit the liberty of a citizen can be justified, the restriction of the liberty of one citizen can be justified only to prevent harm to others.

If this principle was the sole test of whether an activity should be criminalised, then undesirable acts that do not involve direct harm by violating the rights of others would not be made offences. Given the value placed on the liberty of all citizens, the state could not justifiably imprison or otherwise punish offenders who have committed acts that do not involve significant and direct harm to others.

The principle of harm to others underlies the rationale for many acts being defined as criminal offences, and why many offenders are in prison.

### Harm principle—extensions to the principle

'Harm' that justifies criminalisation can be difficult to define clearly and can be the subject of much argument. Some writers hold that a wider variety of acts are justifiably criminalised than allowed for under Mill's harm principle. Criminalisation of these acts are justified, rightly or wrongly, based on the principles of risk of harm; harm to self; indirect harm; and the offence principle. Examples of offences, for each of the principles, are provided in Box 12.2.

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<sup>&</sup>lt;sup>73</sup> A number of alternatives to the harm principle have been proposed. The principle of individual sovereignty holds that, 'it is violations of freedom, not harm, that constitute the legitimate basis for sanctions '(Feinberg & Coleman 2008, p. 243). 'The only legitimate restrictions on conduct are those that secure the mutual independence of free persons from each other' (Ripstein, p. 271 in Feinberg & Coleman 2008). Baker (2011) proposed that to criminalise an act requires that: the agent's actions result in or aim for objectively bad consequences of a kind that are sufficiently serious to make her deserving of criminal condemnation; and the agent knowingly (culpably) chose to bring about (aimed or attempted) those bad consequences even though she knew her actions would adversely affect the interests of others Baker (2011, p. 26). In most cases, harm will be the 'objective bad consequence', but the author allows for other bad acts/consequences, such as privacy losses, to be in scope.



### Box 12.2 Examples of offences, by harm principle

#### **Harm principle (direct harm to others)**

- murder and manslaughter
- common assault; sexual assault
- robbery; and theft

#### Risk of harm

- dangerous or negligent acts endangering persons
- supply-side illicit drugs offences
- prohibited weapons/explosives offences
- betting, gambling and liquor offences
- traffic and vehicle offences
- offences involving breaches of orders (custodial orders, parole, bail, violence)
- various regulatory offences seeking to alter behaviours (public health and safety, disease prevention offences, import/export regulations)

#### Harm to self (paternalism principle)

- illicit drug use and possession offences
- prostitution offences
- some public order and disorderly conduct offences

#### Indirect harm

- environmental pollution
- · forgery and counterfeiting
- fraudulent trade practices
- resist or hinder police officer or justice official
- offences against justice procedures

#### Offence principle

- offences against privacy
- censorship offences
- offences against public order sexual standards
- offensive language
- offensive behaviour
- vilification or incitement of hatred on racial, cultural or ethnic grounds

As at 30 June 2018, there were 6,152 sentenced prisoners in Queensland prisons. Offences with the underlying principle of harm to others accounted for 68.3 per cent of the prison population; 50.3 per cent ranked as high harm and 18.0 per cent as medium harm (Table 12.2).

The extensions to the concept of harm have the effect of significantly increasing Queensland's prison population. Offences involving risk of harm account for 23.3 per cent of the prison population; harm to self for 4.5 per cent, indirect harm for 3.7 per cent; and the offence principle for 0.1 per cent.

#### Debates on extensions to the harm principle

There are strongly opposing views on the merits of the extensions to the harm principle. Whether these extensions can be justified as a rationale for criminalising a behaviour or act requires a moral, ethical, or philosophical discussion as well as a more practical look at the impacts of the decision to use the criminal law (the costs and benefits of regulating the behaviour).

The extensions to the harm principle have the consequence of weakening the concept of negative liberty as a constraint on state action, resulting in a more permissive approach to extending the reach of the criminal law (eds Ratnapala & Moens 2011, p. 3). A practical consequence is that many more behaviours are criminalised—more offenders are sentenced and prison populations increase.



Table 12.2 Harm principle and extensions, prison shares by level of harm

Principle	Description	Prison share by level of harm, 2018 (%)			
	Description	High harm	Medium harm	Low harm	
Harm to others	Behaviours resulting in direct harm to other persons or their property	50.3	18.0	0.0	
Risk of harm	Risk of harm refers to actions that have not caused harm, but create a risk of harm. Exposing a person to a risk of harm can be viewed as wronging them. A person's interests may be set back whether or not the person is actually harmed	16.4	0.1	6.8	
Harm to self	Harm to self refers to actions that hurt or endanger the actor. Criminalising an offence where the actor primarily hurts themselves relies on the principle of legal paternalism	0.0	0.0	4.5	
Indirect harm	Indirect harm refers to actions that do not directly harm anyone, but may indirectly cause harm, or only harms the public interest	0.0	3.4	0.3	
Offence principle	The offense principle maintains that preventing shock, disgust, or revulsion is a morally relevant reason justifying criminalisation of a behaviour or act	0.0	0.0	0.1	

Note: Prison shares based on 2018 national prisoner census. Low/Medium/High refers to whether an offence is ranked in the lowest third of National Offence Index (NOI) rankings (relatively less harmful offences), the middle third, or the highest third (the most harmful offences). The NOI is described in Appendix F.

Source: QPC.

Some authors reject the extensions of the harm principle and the expanded criminalisation that results:

Only specific, direct violations of an individual's self-ownership and property rights may justify the use of non-consensual force against an aggressor. (Barnett & Hagel 1977)

The concept of negative liberty (focusing narrowly on significant and direct harm to others) can provide a stronger bulwark against criminalisation:

The stipulation we need is 'liberty' in the sense of negative liberty; for it is liberty of this kind that is opposed to the kind of restraints constituting the criminal law. (Moore 2014, p. 185)

Under the harm principle, it is never a relevant reason to restrict conduct merely because the conduct is offensive (as opposed to harmful) or intrinsically immoral, or because it is necessary to prevent a person from harming himself or herself:

[P]eople have a general right not to have their choices restricted by criminalization. The right is not only about having the freedom [to] do as one chooses so long as it does not wrong others, but also about not being subjected to the harmful consequences that flow from unfair criminalization (detention, penal fines, conviction, stigmatization, etc.). Criminalization has harmful consequences for those who are labelled criminals and therefore people have a right not to be criminalized unless it is fair to override their right. (Baker 2011, p. 2)



Husak (2014) makes an important distinction between 'bad consequences' or 'dis-utility' and a proper understanding of 'harm'. The bad consequence that a person suffers through the action of another person should not be properly regarded as a harm unless his rights are violated. Offences based on paternalism would not meet this test of harm:

In fact, the justifiability of all criminal paternalism is called into question by a requirement that conduct must implicate a right before it may be criminalized. Paternalism is almost certainly a legitimate justification for law outside the criminal domain, but usually provides a poor rationale for punishment. (Husak 2014, p. 221)

Many writings on criminalisation hold that John Stuart Mill's concept of liberty—based on harm to others—should be the litmus test on whether an activity is criminalised:

[T]he prevention of harm to others is the sole justification for state interference with personal liberty. (Luna 2005, cited in Herring 2015, p. 10)

However, these views are far from unanimous. For example, Feinberg & Coleman (2008) suggest that when considering whether a state action that restricts a person's liberty is justified, there may be circumstances where the harm (to others) principle may need to be supplemented with the offence principle, moralism or paternalism principles.

#### The criminal law as moral condemnation

The moral arguments around whether extending the harm principle is right or wrong are largely outside the scope of this inquiry. However, the debate has consequences for the inquiry. Extending the harm principle contributes to an extension of the reach of the criminal law, resulting in a broadening of the range of enforcement activities and expansion in the demand for prison services.

Consistent with the declaratory function of the criminal law, some authors argue that for an activity to be criminalised, it must be worthy of moral condemnation. If not, criminal law ceases to relate to genuine wrongdoing and loses legitimacy (McGorrery 2018a, p. 190). Others argue that the moral argument for criminalisation is only justified where there is significant harm to others:

Harm to others is not the only justification for overriding a person's right not to be criminalized, but it is the only moral justification of sufficient weight to outweigh a person's right not to be jailed. (Baker 2011, p. 8)

Some acts, such as those involving harmless wrongdoing (for example, exhibitionism) might warrant being defined as a crime only if the maximum sentence does not involve potential imprisonment (that is, the restriction on the offender's liberty or autonomy is only justified to the extent that the maximum penalty is a fine) (Baker 2011, pp. 8–9).

# The economic approach

The economic approach is to:

- establish a rationale for government intervention by clearly identifying a problem and understanding why, in the absence of intervention, the problem will persist
- consider the merits of alternative policy options for addressing the problem, including doing nothing, and determine which option provides the greatest expected net benefit
- consider whether the intervention is likely to improve outcomes taking account of, for example, potential implementation problems and unintended consequences, such as, those that result from difficult-to-predict changes in behaviour. When considering whether to impose a criminal sanction, the risk of the sanction itself imposing harm needs to be considered.



Economic analysis also provides a number of criteria for considering whether a behaviour is likely to be best addressed by the criminal law or an alternative approach, for example:

- Judgment-proof offenders—these are offenders who do not have the capacity to pay compensation under the civil law. Offenders who intend to commit an offence have an incentive to avoid detection resulting in relatively low reporting and conviction rates, compared to undesirable behaviours where intent is absent. To hold a given level of deterrence, a lower certainty of punishment requires a higher severity of punishment. Monetary fines are a more efficient form of punishment than imprisonment, but the more that the level of the fine is raised the more capacity to pay becomes a problem for many offenders.
- Positive value offences—if the court sets a sanction above the level of harm (for example, for the purpose of increasing deterrence outlined above), then the value to the 'victim' of a guilty finding may be greater than the actual harm done. This provides an incentive for entrapment and/or framing offenders, favouring the use of the criminal law (given its higher level of procedural protections for offenders) over the civil law (economic criteria are discussed further in Appendix J).

# Criminalisation decision-making procedures

Husak (2008, 2014) recommends a test comprising seven principles of criminalisation, while McGorrery (2018b) suggests a five-step decision-making procedure (Table 12.3).<sup>74</sup> Each principle must be passed to justify criminalisation.

If the Queensland Government was to implement a formal regulatory test for the creation of new criminal offences (see discussion of the justice impact test in Chapter 9), then these tests, along with others in the literature, could inform design of such a test. The tests could also be used in a review of the stock of existing offences (as recommended later in this chapter). In the case of the Husak test, Husak views the test as supporting a minimalist criminalisation approach.<sup>75</sup>

<sup>&</sup>lt;sup>74</sup> Other authors have proposed variants of these sorts of tests. An application of the Husak test can be seen where it is applied to the U.S. criminal offence of polygamy (Husak 2014).

<sup>&</sup>lt;sup>75</sup> The problems in constraining harm to closely align with the concept of negative liberty have led some writers to propose alternative principles to constrain the reach of the criminal law (more in line with what is intended under Mill's harm principle). An example is the principle of individual autonomy, which supports a minimalist approach to what should be criminalised (see Ashworth 1995, p. 64). Minimalist criminalisation approaches are more likely to be adopted the stronger is one's view that criminalisation can cause significant harms of its own. A criminal law that is only as wide as necessary also maintains the censure attached to criminal convictions (Herring 2012, p. 20).



**Table 12.3 Criminalisation decision-making procedures** 

Husak 7-step criminalisation test	McGorrery 5-step criminalisation test
1. It must be wrongful	1. Identify the <i>interest</i> at stake
2. It must be <i>harmful</i>	2. Identify the <i>harm</i> to that interest
3. It must <i>deserve</i> punishment	3. Identify the <i>wrongfulness</i> of the harm being done to that interest
4. The burden of establishing legitimacy should rest with the state	4. Establish that there are no alternative regulatory or other measures more suitable (including a criminal law of lesser scope)
5. There should be a substantial state interest in achieving the law's objective	5. Establish that the criminal law would have a more positive than negative effect on society
6. The law must <i>actually</i> advance that objective	
7. The law should be no more extensive than necessary to achieve the objective	

Sources: Husak 2008, 2014; McGorrery 2018b.

# 12.6 Applying the principles and economic criteria

The normative principles and economic criteria outlined earlier are applied below as a high-level filter over the stock of existing criminal offences. The most likely alternative approach to the criminal law and the strength of the rationale for using the criminal law are noted. Specific recommendations are not made, as this requires a great deal more work; see, for example, the illicit drug recommendations in Chapter 13 (supported by Appendixes G, H, and I).

# Principles filter

Offences with a relatively weak rationale for criminalisation tend to be concentrated in ANZSOC divisions 09 to 16 (see the notes to Table 12.4).

Many criminal offences in Queensland are unlikely to pass the criminalisation decision-making frameworks being developed in the literature, such as the Husak and McGorrery tests.

#### Economic criteria

Based on economic criteria, the rationale for criminalisation is strongest for the traditional common law offences (such as murder, assault and rape) concentrated in ANZSOC divisions 01 to 08, particularly high harm offences. Appendix J discusses these assessments further.

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Table 12.4 Assessment of offences against principles and economic criteria

Categories of offences	ANZSOC^	Type of harm	Level of harm (NOI)	Husak, violation of right	Violation of individual autonomy	Risk of judgment- proof offenders	Risk of positive value offences	Next best alternative	Strength of rationale for criminal law
Intent and high harm	01, 02, 03, 04, 06	Harm to others (01-03, 06), risk of harm (04)	M/H	Yes	Yes	Н	Н	Civil law, or civil law with punitive damages perhaps paid to a third party to address positive value offence problem	Strong
Intent and low harm	05, 07, 08	Harm to others	L/M	Yes	Yes	М	М	Maintain within criminal law, QPS enforcement with restorative justice. Non-financial compensation options	Strong
Fraud, deception, related offences	09	Indirect harm	М	Mixed	Mixed	М	М	Civil law alternatives	Medium
Illicit drugs	10	Use: harm to self. Supply: risk of harm	Use (L); Supply (H)	No	No	L	L	Decriminalise/legalise with combination of health-based approach and regulatory/tax framework (Chapter 13)	Weak
Regulatory offences (property and environmental tamage)	12	Mostly indirect harm; some harm to others	М	Mostly no	Mostly no	L	L	Clear property rights. Civil/administrative remedies	Weak
Public order offences	13	Harm to self, indirect harm, offense principle	L	No	No	L/M	L	Civil law (but two-step criminalisation risk), health-based approach, restorative justice. Deferred prosecution agreements (Chapter 11)	Weak, but need viable alternatives
Regulatory offences, anticipatory	11, 14, 16	Risk of harm	11 (H); 14 (L); 16 (L/M)	11 possibly, others no	11 possibly, others no	Mixed	L	Civil law, administrative fines	11 Medium; others weak
Breaches of orders	15*	Risk of harm	L	No	No		L	Civil and administrative remedies	Weak

Note: Based on the average tendency of the offences in each ANZSOC division. In the case of division 03: Sexual assault and related offences, each 4-digit offence is ranked as harm to others and high harm under the NOI. However, for some divisions the characteristics of 4-digit codes within the division may differ, for example, some based on harm to others and some based on risk of harm. Harm based on rankings in NOI. \* Codes 1500–1532. ^ ANZSOC divisions are: 01 Homicide and related offences; 02 Acts intended to cause injury; 03 Sexual assault and related offences; 04 Dangerous or negligent acts endangering persons; 05 Abduction, harassment and other offences against the person; 06 Robbery, extortion and related offences; 07 Unlawful entry with intent; 08 Theft and related offences; 09 Fraud, deception and related offences; 10 Illicit drug offences; 11 Prohibited and regulated weapons and explosives offences; 12 Property damage and environmental pollution; 13 Public order offences; 14 Traffic and vehicle regulatory offences; 15 Offences against justice procedures, government security and operations; and 16 Miscellaneous offences.

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The economic criteria tend to be more permissive of an expansive criminal law when they are applied as a high-level filter. This is partly because the criminal law can be a cost effective regulatory mechanism even if, based on other considerations, alternative regulatory mechanisms are preferred. However, in a detailed analysis of each individual offence, or set of related offences, the net benefit test provides a more stringent test. It requires that a broad conceptualisation of the costs and benefits of criminalising a behaviour be adopted, and that benefits must outweigh costs. This requires taking account of matters such as the actual observed impacts of criminalisation; and the observation that a significant proportion of the offender population responds reasonably poorly to the incentives provided by criminal punishment.<sup>76</sup>

# 12.7 Implications for a reduction in the prison population

## How the principles compare in terms of prisoner numbers

Offences based on Mill's harm principle comprise a majority of the prison population and these offences are predominantly ranked as high harm, although medium harm offences also account for a significant share of the prison population (Table 12.2). These types of offences have the strongest rationale for criminalisation, although there is the potential to make greater use of restitution and restorative justice processes, while maintaining the offences in the criminal law with continuing police enforcement of the law.

A policy decision to remove offences justified on the basis of the various extensions to the harm principle would have major implications for the prison population. In aggregate, these offences accounted for almost 32 per cent of the prison population in 2018 (see Table 12.2).

# Female and Indigenous imprisonment

With a few exceptions, offences based on harm to others are classified in ANZSOC divisions 01–08, while offences based on extensions of the harm principle are in divisions 09–16. If reforms were to focus on divisions 09–16, given their weaker underlying rationale for criminalisation, then reforms are likely to have a larger relative benefit for females than for males.

At 30 June 2018, the share of females in Queensland prisons for a major serious offence classified in ANZSOC 01–08 was 57 per cent, while for males it was 73 per cent (Figure 12.3). For divisions 09–16, the female prison share was 43 per cent, while only 27 per cent for males.

In contrast, reforms may provide a smaller relative benefit for Indigenous offending and imprisonment compared to the case for non-Indigenous persons. The share of prisoners with a major serious offence classified in divisions 09–16 was 34 per cent for non-Indigenous persons versus only 17 per cent for Indigenous persons.

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<sup>&</sup>lt;sup>76</sup> What matters for deterrence policy is that a reasonable proportion of offenders respond to the incentives provided by punishment. For those that do not (the people repeatedly observed in the criminal justice system) other or additional policies may be needed (Appendix J).



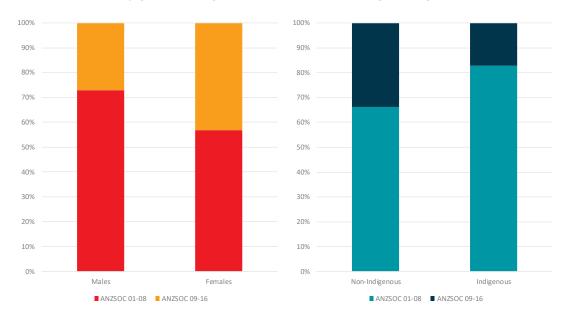


Figure 12.3 Prison shares by gender, Indigenous status and ANZSOC grouping

Source: QCS unpublished data.

# 12.8 The opportunity for a stocktake and review of criminal offences

# A large and complex task

The analysis and discussion above suggest that there is a reasonable basis to be concerned about the scope of the criminal law in Queensland. It has expanded over a long period of time and many offences appear to have a relatively weak underlying rationale.

The analysis of specific sets of offences or issues also raises concerns about the impacts of the criminal law (for example, the analysis of illicit drugs in Chapter 13).

Husak's test of criminalisation requires that the burden of proof for criminalising an act rests with the state. A law must be shown to be justified; it is not presumed to be justified simply because it is in the statute books. In Husak's view, this requires a high burden of proof. For many criminal offences in Queensland, this burden of proof has likely never been established.

There have been few studies of the expansion (or contractions where they occur) of the criminal law in Queensland. This suggests that there would be value in a formal root and branch review of the criminal law, focusing on whether the criminal law is the best policy option available.

An appropriate body to undertake the review may be the Queensland Law Reform Commission. The proposed Justice Reform Office is also an option to coordinate and drive the review process.

### Principles to guide the stocktake

The Commission suggests that the proposed review, when considering whether a behaviour should be criminalised, could be guided by the principle expressed by Ashworth (1995)—that is, that conduct should only be criminalised to the extent necessary to 'protect individual autonomy, or to protect those social arrangements necessary to ensure that individuals have the capacity and facilities to exercise their autonomy'. The decision should be taken with an assessment of the 'probable impact of criminalization, its efficacy, its side-effects, and the possibility of tackling the problem by other forms of regulation and control' (Ashworth 1995, p. 64).



In analysing whether an activity should be criminalised, the Commission is of the view that the following criteria should be considered:

- the extent to which the activity causes harm to others and the nature and level of that harm
- whether the use of criminal sanctions imposes costs on offenders that are proportionate to the harm caused to others
- whether the act of criminalisation creates more positive effects for society than negative ones—this should include an assessment of deterrence and any unintended consequences that might cause harm
- whether there are other, non-criminal options that might better prevent harm.

One of the costs of overcriminalisation is reduced legitimacy of the criminal law. Information on the public's views about whether a behaviour should be criminalised should also be taken into account, subject to appropriate protections of individual rights (that is, having regard to the risks of majority rule).

### 12.9 Conclusion

There is a relatively strong justification for the criminal law in relation to traditional common law offences, which typically involve high levels of harm to others. The justification for criminalising offences based on extensions of the harm principle are usually weaker.

The stock of criminal law offences should be reviewed. Various alternative approaches are often available that may produce better outcomes, including reducing undesirable behaviours over the long term.



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#### Recommendation 5

The Queensland Government should seek to remove those activities from the *Criminal Code Act 1889* and other relevant legislation for which the benefits of being included do not outweigh the costs.

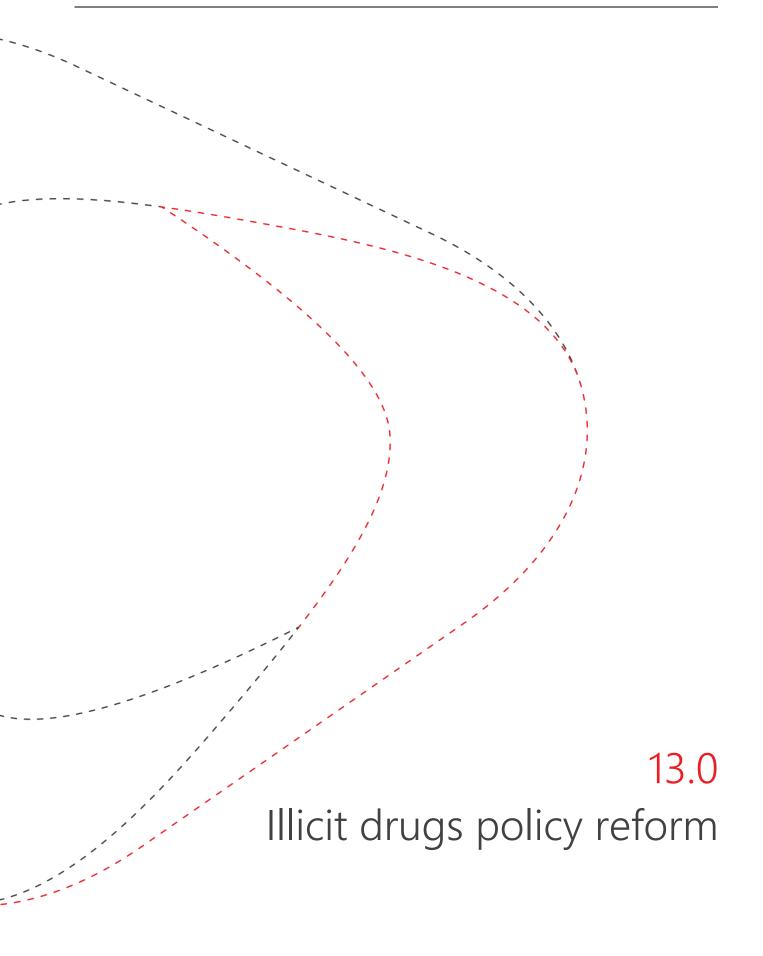
When assessing whether an activity should be redefined, consideration should be given to:

- the extent to which the activity causes harm to others and the nature and level of that harm
- whether the use of criminal sanctions imposes costs on offenders that are proportionate to the harm caused to others
- whether the act of criminalisation creates more positive effects for society than negative ones—this should include an assessment of deterrence and any unintended consequences that might cause harm
- whether there are other, non-criminal options that might better prevent harm
- whether criminalisation undermines public perception of the legitimacy of the law.

The government should assign a suitable body, such as the Queensland Law Reform Commission, the task of reviewing the stock of criminal offences. The review should also recommend removing those offences where an alternative approach to the criminal law is likely to provide better outcomes.

Queensland Productivity Commission







This chapter highlights the problems that arise from criminalising the use and supply of illicit drugs and recommends significant reforms that would reduce the harms caused by problematic drug usage, interactions with the criminal justice system, and would reduce imprisonment rates.

## Key points

- The topic of illicit drugs features prominently throughout this inquiry—including in discussions about the contribution of illicit drugs to rising imprisonment rates, the relationship between drugs and crime, in-prison use of drugs, links with mental health issues, and the provision of alcohol and other drug support services.
- In line with the National Drug Strategy 2017–2026, Queensland pursues a strategy of demand reduction, supply reduction and harm reduction. The dominant strategy is based on a policy of criminalising (prohibiting) the use and supply of illicit drugs.
- Criminalisation has been in place for many decades, but it has proven ineffective at significantly reducing the consumption of illicit drugs and has not achieved sustained reductions in supply.
- Criminalisation has created significant costs and unintended harms. It helped to create an illegal market worth at least \$1.6 billion (with high levels of violence), made the quality of supply uncertain (resulting in increased morbidity and mortality), and impeded treatment of harmful use. Expenditure on the enforcement of drug laws is around \$500 million annually.
- Drug offences have contributed notably to the growth in imprisonment. Between 2012 and 2018, drug offences contributed 32 per cent of the increase in Queensland's sentenced prison population. Drug offenders make up 22 per cent of Queensland's female prison population (15 per cent for males).
- Reform that legalises lower harm drugs (cannabis and MDMA) and decriminalises other drugs is likely to provide net benefits to the Queensland community of at least \$2.8 billion and reduce the prison population by around 1,050 people by 2025.
- Legalisation, in conjunction with supporting regulatory frameworks and improved health responses, would provide more benefits than decriminalisation, because it would reduce the many unintended harms that arise from criminalising the supply of drugs.
- While many of the benefits of legalisation are difficult to quantify, the Commission estimates that the legalisation of cannabis, alone, would shift \$3.7 billion in profits from criminal activity to more productive use (such as harm minimisation strategies).
- The objectives of reform should be to:
  - move to a model of legal and regulated supply for all drugs. This would require a staged approach, with the use/possession of drugs being decriminalised first
  - rebalance policy towards a much stronger health-based approach to the harms of drug usage.
- The design, implementation and sequencing of reforms will be critical. To this end, a drug reform taskforce should be established to design and progress reform for government. It should operate transparently and undertake significant public engagement. Its key task would be to design the regulatory framework needed to support reforms and coordinate the policy transition towards a stronger health-based approach.



# 13.1 Introduction

Issues related to illicit drugs have featured prominently in consultations and submissions to this inquiry. They have arisen in various contexts, including in discussions of the contribution of illicit drug offences to:

- the increase in Queensland's prison population
- crime
- in-prison use of drugs
- linkages with mental health issues
- provision of alcohol and other drug services.

There is a long-standing debate about whether drug-related offences, particularly use and possession offences, should be criminalised. Reform proposals raise concerns for many people and, like any other significant reform, entail risks.

# 13.2 The existing policy framework

## Australia's National Drug Strategy 2017–2026

Since its first iteration in 1985, Australia's National Drug Strategy has been underpinned by an objective of minimising the harms associated with alcohol, tobacco, and illicit and pharmaceutical drug use (Department of Health 2017).

Illicit drug use is often referred to as a 'victimless' crime. In most cases, taking drugs provides benefits to the consumer in the same way that the consumption of alcohol or gambling does. Like alcohol consumption and gambling, it can result in significant costs for some consumers, including costs to their family, friends and the wider community (PC 1999, 2010). However, unlike for alcohol and gambling, the dominant approach to the problems of illicit drugs is a policy of criminalisation.

The use of drugs is associated with health, social and economic burdens, including accidental drug-related deaths (\$1.3 billion in 2017–18), loss of quality of life (\$1.3 billion), hospitalisations (\$107 million), property crime (\$1.5 billion), violent crime (\$637 million) and drunk and drug driving costs (\$1.1 billion). Considerable resources are invested in enforcing laws against illicit drugs—around \$500 million in Queensland (see Appendix G).

Drug-related policies can be beneficial if they reduce these cost burdens. The National Drug Strategy 2017–2026 seeks to achieve these reductions through a combination of policies addressing demand reduction, supply reduction and harm reduction:

- Demand reduction: Preventing the uptake and/or delaying the onset of use of alcohol, tobacco and other drugs; reducing the misuse of alcohol, tobacco and other drugs in the community; and supporting people to recover from dependence through evidence informed treatment.
- Supply reduction: Preventing, stopping, disrupting or otherwise reducing the production and supply of illegal drugs; and controlling, managing and/or regulating the availability of legal drugs.
- Harm reduction: Reducing the adverse health, social and economic consequences of the use of drugs, for the
  user, their families and the wider community. Harm reduction strategies encourage safer behaviours, reduce
  preventable risk factors and can contribute to a reduction in health and social inequalities among specific
  population groups.



# The policy of prohibition

The two main Queensland legislative instruments defining and regulating illicit drugs are:

- the Drugs Misuse Act 1986 (Qld)
- the Drugs Misuse Regulation 1987 (Qld).

The intention of these instruments is to reduce both the supply of and demand for illicit drugs, primarily by defining offences to which criminal penalties apply. They prohibit the production, supply, trafficking in, and possession of scheduled drugs, and define a range of related criminal offences. Maximum penalties vary both by the type of substance involved and the type of offence.

In Queensland, narcotic drugs and psychotropic substances are listed in different schedules of the *Drugs Misuse Regulation 1987* (Qld), where they are differentiated by their natural or chemical ingredients and structure:

- Schedule 1 substances are treated more punitively. They include amphetamine, cocaine, heroin, lysergide, phencyclidine, MDMA ('ecstasy'), PNA ('death') and methamphetamine.
- Schedule 2 substances are treated less punitively. They include cannabis, methadone, morphine, opium, anabolic steroids, and other image-enhancing drugs (Schloenhardt 2015, p. 399).

Categorising substances as schedule 1 and 2 does not appear to align well with recent evidence on the relative harms of different drugs (see the section on 'Drug Harms' in Appendix G).<sup>77</sup> As an example, carfentenil is a schedule 2 listed drug, but has about 500 times the potency of heroin.

For both schedules, maximum penalties are high (Table 13.1).

The Australian Government has also enacted laws defining criminal offences for illicit drugs. These laws are mainly concerned with conduct relating to the import and export of drugs. The most common instance of federal criminal law in state courts involve Commonwealth drug offences, which overlap with equivalent state offences. A 'significant proportion' of offences are prosecuted under both regimes (Schloenhardt 2015, p. 38).

#### International agreements

Australia is a signatory to three United Nations drug control conventions:

- the 1961 Single Convention on Narcotic Drugs—which created a universal zero tolerance control system for the production, distribution, possession and use (arguably) of opium, coca and cannabis drugs and their derivates or analogues, other than for medical and scientific purposes
- the 1971 Convention on Psychotropic Substances—which focuses on psychotropic drugs and medications such as amphetamines, other stimulants, benzodiazepines, barbiturates and psychedelics, such as lysergic acid diethylamide (LSD) (the 1961 Convention is concerned strictly with plant-based drugs and their derivatives)
- the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances—with the central
  purpose to harmonise criminal legislation and law enforcement efforts worldwide to curb production,
  possession and trafficking of illicit drugs. This convention is largely concerned with fighting organised crime by
  mandating cooperation in international drug law enforcement, as well as with the International Narcotics
  Control Board (INCB) (Parliament of Victoria 2018).

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<sup>&</sup>lt;sup>77</sup> UN conventions classify controlled substances according to their therapeutic value and potential for risk or misuse. Most national laws include analogous schemes pertaining to drug scheduling, which detail procedures for adding, removing and transferring drugs between the schedules subject to international directives under the conventions. Currently 124 narcotic drugs and 130 psychotropic substances are controlled under the UN conventions (Parliament of Victoria 2018, p. 46). In Australia, drug scheduling is the responsibility of the Commonwealth Department of Health and the Therapeutic Goods Administration.



Table 13.1 Penalties for drug offences, Drugs Misuse Act 1986 (Qld)

Criminal conduct	Person/action it applies to	Schedule 1 substances	Schedule 2 substances
Producing (s. 8)	A person who unlawfully produces a dangerous drug. The growing, preparing, manufacturing, packaging and production of drugs.	20–25 years	15–20 years
Trafficking (s. 5)	A person who carries on the business of unlawfully trafficking in a dangerous drug. Trafficking is the supply of drugs as part of an illegal commercial operation. This usually involves larger amounts of drugs, several acts of supply, or evidence of an organised business supplying drugs.	25 years (s. 5(1))	20 years (s. 5(b))
Supplying (s. 6)	A person who unlawfully supplies a dangerous drug to another person. Supply can involve giving, distributing, selling, administering or transporting drugs; offering to give, distribute, sell, administer, transport or supply drugs; and preparing to give, distribute, sell, administer, transport or supply drugs.	Unaggravated: 20 years Aggravated: 25 years to life	Unaggravated: 15 years Aggravated: 20– 25 years
Possession (s. 9)	A person who unlawfully has possession of a dangerous drug. Possession is not the same as owning the drug. You can be in possession of a drug even if you did not buy it or have not used it.	20–25 years	15–20 years

Source: Updated from Schloenhardt (2015); Queensland Government n.d.

The three conventions, along with operations of the INCB, govern international, national and sub-national drug policy and laws for countries who are signatories. The INCB is the body responsible for reporting on member states' observation of the requirements contained in the three conventions.

Article 36 of the 1961 Convention requires member states to adopt measures against:

cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention...

The conventions restrict the range of drug reform options available to jurisdictions if the jurisdiction intends to remain fully compliant with the conventions. The conventions list the substances for international control, which then become reflected in domestic policies, and prohibit the establishment of a legal regulated market for non-medical use of cannabis or any other scheduled drug (Bewley-Taylor & Jelsma 2012, pp. 1, 16).

The conventions do not clearly require the criminalisation of use/possession for listed substances (Bewley-Taylor & Jelsma 2012, p. 5). That may be one reason why an increasing number of countries have proceeded as if criminalisation of possession is not required, while the reforms in relatively few countries have addressed the supply side of the illicit drug market. However, jurisdictions are increasingly adopting drug reforms that push the boundaries of the conventions or constitute out-right breaches (see Appendix I on the recent legalisation of cannabis in Canada).

The UN conventions have played an important role in the proliferation of prohibition policies across countries, although domestic influences have also been strong (Box 13.1).



# Box 13.1 History of the expansion of the criminal law to drugs

In the 19<sup>th</sup> century, Australia had a laissez faire attitude with respect to drugs. Most drugs were legally available, and regulation was minimal. Cannabis, opium, heroin and MDMA were all legal products in Australia in the first half of the 20<sup>th</sup> century (McDonald 2011, p. 2). The boundary between what is legal and illegal has evolved over time:

For instance, heroin was available on prescription until 1953 and was used so widely as a painkiller and in cough mixtures that Australians were amongst the world's largest consumers of opium. (Gotsis et al. 2016)

Drug Free Australia (n.d.) argues that drug prohibitions:

were first initiated as a result of strong societal support for unified political measures against the recreational use of certain drugs which were deemed to either present unacceptable harm to the individual user, to present unacceptable harm to the users' surrounding community or to transfer too great a burden to the community.

Early moves to prohibition begun with smokable opium in Queensland in 1891:

The development of Aboriginal opium laws was a reflection of White Australian paternalism that view Aboriginal people as a 'special case'. But even here, the powerful role of anti-Chinese mythology cannot be ignored. (Manderson 1993, p. 34)

Maintenance of opiate users under medical supervision continued in Queensland until the 1960s (Manderson 1993, p. 136). Prohibition was steadily extended, with international pressure and conformity key in establishing the current approach to drugs. According to Shephard and Blackley (2010, p. 250):

Despite the failed experiment of alcohol prohibition, the USA and the United Nations played important roles in the spread of drug prohibition to other nations during the twentieth century. By 1961, virtually every country in the world had some form of drug prohibition. These laws were required for signers of international agreements in order to maintain membership in the international community.

The first penal controls on unauthorised cannabis use were introduced in Queensland in 1937 (Norberry 1997). Attempts to prohibit alcohol were less successful, being rejected in two Queensland referendums in 1920 and 1923 (Queensland Parliament 2018) and in other states.

The usage of (now illicit) drugs remained low until the 1960s but increased over the period coinciding with the countercultural revolution and Vietnam War. The rate of reported drug offences was relatively low—11 per 100,000 people in 1969–70. This has since grown 4,818 per cent to 533 per 100,000 in 2017–18 (Fitzgerald 1989, pp. 150–151; ABS 2019g).

The efficacy of drug prohibition has long been questioned—inquiries in the 1970s questioned the new norm of prohibition and supported decriminalising cannabis possession, including the Senate Select Committee on Drug Trafficking and Drug Abuse, the Senate Standing Committee on Social Welfare, the New South Wales Joint Parliamentary Committee upon Drugs and the South Australian Royal Commission into the Non-Medical Use of Drugs (Norberry 1997).

More recently, alternative approaches to regulating drugs were implemented in many jurisdictions—the possession and cultivation of small quantities of cannabis were decriminalised in South Australia in 1986 and in the ACT in 1992 (Manderson 1993, p. 204). Queensland has made tentative steps to reform, including de facto decriminalisation of a first cannabis possession offence.



# 13.3 The terminology of drug reform

The terms used to describe the reform of illicit drugs policies can be confusing, as they may be used to mean different things in different studies. In particular, it is important to clarify the meanings of prohibition, depending of decriminalisation and legalisation:

- *Full prohibition*: defining drug use, possession and supply as criminal offences, which result in a criminal record, and sometimes a prison sentence.
- Depenalisation: the maintenance but relaxation of the penal sanction provided for by the criminal law.
   Depenalisation can refer to consumption-related offences—which may be dealt with through referral schemes or alternative sanctions for offenders who are found to be drug dependent—but also to small-scale trading. The approach involves the reduction or elimination of custodial penalties, but crucially, the specific conduct or activity remains a criminal offence.
- Decriminalisation: the elimination of a conduct or activity from the sphere of criminal law. As such, the term, which is most commonly used in reference to consumption-related offences, refers to legal contexts where the sanctions associated with certain acts are of an administrative character or have been abolished altogether. In this situation, other (non-criminal or civil) laws can regulate the conduct or activity that has been decriminalised. Decriminalisation can apply to the use/possession of drugs and/or the supply of drugs (in which case it is usually referred to as legalisation).
- Legalisation: the amendment of law to eliminate any sanction, criminal or administrative, associated with the activity. Use of a drug is legal, as is drug supply (Bewley-Taylor & Jelsma 2012, p. 4; Hughes et al. 2016).

Decriminalisation reforms can take the form of either de jure or de facto reform (Box 13.2).

# Box 13.2 De jure and de facto decriminalisation

Decriminalisation can occur through *de jure* reforms (formal changes to the criminal law) or *de facto* reforms (implemented more through changes in practice).

*De jure* reform removes criminal penalties for the use/possession of illicit drugs from the criminal law (with the optional use of non-criminal sanctions). *De jure* decriminalisation can occur through:

- removing criminal penalties
- removing criminal penalties for use/possession below threshold levels
- removing/reducing criminal penalties based on eligibility criteria in addition to threshold levels (for example, prior offending record, concurrent offences, requirements to admit the offence)
- replacing criminal penalties with civil penalties (such as a fine) (criminal penalties may apply for people who fail to comply with the civil penalty)
- replacing criminal penalties with administrative penalties (such as a ban on attending a designated site)
- referral to drug information, counselling or treatment.

For de facto reform, criminal penalties remain in the law, but can be lessened in practice, through:

- non-enforcement of the law (through police discretion or police or prosecutorial guidelines)
- referral of offenders to education/treatment instead of court.

Source: Hughes et al. 2016; Ritter et al. 2018.



# 13.4 Assessment of the current approach

The main arguments in support of the status quo (the policy of prohibition) are:

- Reduced consumption: in the absence of the policy of criminalisation, harm to self and harm to others would be higher. Prohibition reduces consumption compared to a more permissive policy framework.
- Reduced supply: enforcement efforts do not eliminate supply, but they help reduce it.
- Helping problematic drug users: criminalisation allows actors within the criminal justice system (such as the police and the judiciary) to identify problematic drug users and direct them towards services that can provide them with assistance.

### The impact on consumption

There are two mechanisms through which prohibition might reduce drug use—through a deterrent effect and/or by increasing prices. Research suggests these mechanisms have not been effective, as the overall effect on drug consumption is small or insignificant.

#### The consumption of illicit drugs has not declined in Queensland

Illicit drug usage in Queensland is common. Almost half of Queenslanders (44.3 per cent) over the age of 18 have used illicit drugs in their lifetime (AIHW 2017c). The AIHW data implies that as of 2018, about 1.7 million Queensland adults (aged 18 and older) have used illicit drugs, with 15.9 per cent or 611,000 having used them in the last 12 months.

The most commonly recently used illicit drugs in Queensland are cannabis, ecstasy, cocaine, methamphetamines, inhalants, and hallucinogens. Additionally, pharmaceuticals are misused—4.1 per cent of Queenslanders have misused prescription pain-killers, analgesics and opioids and 1.3 per cent misused tranquillisers and sleeping pills (AIHW 2017c).

Daily usage of legal drugs, alcohol and tobacco, fell in Queensland between 2001 and 2016 (Table 13.2). Recent usage of any illicit drugs increased over the same period, but cannabis usage fell.

Table 13.2 People aged 14 years and older using drugs, Queensland

	2001	2004	2007	2010	2013	2016
Daily tobacco smoking (%)	21.0	19.8	17.2	16.7	15.0	14.5
Daily alcohol drinking (%)	8.4	9.6	8.3	8.3	7.4	6.4
Recent cannabis use (%)	12.7	12.1	9.5	11.0	11.1	11.9
Recent illicit drug use (any) (%)	16.3	15.9	13.7	15.1	15.5	16.8

Note: 'Recent' refers to the last 12 months. 'Any' refers to any one of the drugs classified as an illicit drug. Source: AIHW 2017c.

The majority of Australians aged 30 to 39 (55.1 per cent) and 40 to 49 (54.9 per cent) having consumed illicit drugs during their lifetime (AIHW 2017c). Almost half of these age groups (49.9 and 48.1 per cent) have consumed cannabis during their lifetime.

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<sup>&</sup>lt;sup>78</sup> The per cent of people 14 year or over in Queensland who have recently used these drugs (defined as use in the last year) are cannabis (11.9 per cent), ecstasy (2.1 per cent), cocaine (2.1 per cent), methamphetamines (1.5 per cent), inhalants (1.0 per cent) and hallucinogens (0.9 per cent).

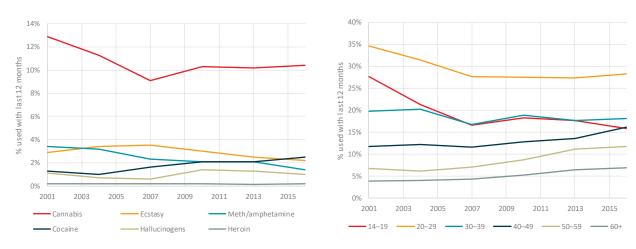


Recent illicit drug usage is highest amongst those aged 20 to 29 and 30 to 39, followed by those aged 40 to 49.

Recent illicit drug use appears to have decreased between 2001 and 2007 in Australia (Figure 13.1). However, usage has since risen and was 1.8 percentage points higher in 2016 than 2007. Usage increased in all age groups, except for people aged 14 to 19<sup>79</sup>. The increase in usage was greatest for people aged 40 to 59.

In contrast, the proportion of the population not drinking or smoking has stabilised or decreased in all age groups in Australia between 2007 and 2016 (AIHW 2017c).

Figure 13.1 Proportion of population using illicit drugs in the last twelve months by age cohort, Australia



Source: AIHW 2017c.

#### International consumption and severity of sanctions—no clear relationship

One might expect that countries that have the toughest penalties for drug use would have the lowest levels of drug use. However, there is no obvious relationship between how prevalent drug use is and how aggressively the criminal law and other regulatory policies towards reducing prevalence are applied. A study of the global prevalence of the most commonly used recreational drugs concluded:

Globally, drug use is not distributed evenly and is not simply related to drug policy, since countries with stringent user-level illegal drug policies did not have lower levels of use than countries with liberal ones. (Degehardt et al. 2008)

In Australia, ecstasy, cocaine, methamphetamines and opioids are significantly more expensive than in other western countries (Martin et al. 2018, p. 102).<sup>80</sup> This does not appear to have strongly deterred Australian users—illicit drug use in Australia is relatively high. UNODC data suggest Australia has the second-highest prevalence of ecstasy use, the equal highest of cocaine, the fourth-highest of amphetamines and the fourth-highest of prescription opioids.

The United States imprisons about five times more people per capita than Queensland. The proportion of the population the United States imprisons for drugs (0.18 per cent) is similar to the proportion Queensland imprisons for all offences (Appendix G). However, this does not appear to have deterred drug consumption—the United States consumes more illicit drugs per capita than Australia (Degehardt et al. 2008; UNODC n.d.).

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<sup>&</sup>lt;sup>79</sup> Data suggests that over the longer term, youths are reducing illicit drugs use significantly—lifetime use amongst persons aged 12 to 17 fell between 2001 and 2016 from 31 to 12.9 per cent.

<sup>&</sup>lt;sup>80</sup> Ecstasy, cocaine, methamphetamines and opioids were 425, 242, 328 and 197 per cent higher than the baseline price. These differences were statistically significant at the 99.9 per cent level.



#### Consumption has been largely unresponsive to illicit drug reforms

#### More countries are undertaking reforms

All states and territories have undertaken some form of reform related to cannabis (either de jure or de facto reforms), and some jurisdictions have undertaken de facto reforms for illicit substances other than cannabis. Reforms include various forms of diversionary approaches, such as cautions, provision of information, referral to treatment, compulsory treatment and compulsory education.

Many other countries have implemented decriminalisation reforms, while some countries have created legal markets for the supply of formerly illicit drugs (see Appendix I for a list of Australian and overseas reforms). Within some countries, reform has varied at the state or provincial level of government (for example, the United States).

#### No impact or only a small impact on consumption after reforms

The consumption of illicit drugs does not appear to have increased significantly following criminal law reforms that reduce the sanctions applying to consumption.

The literature on depenalisation of cannabis possession in various states of the United States, the Netherlands, Portugal and Australian states finds that reducing penalties has either no or only small effects on prevalence of use (Home Office 2014; Hughes et al. 2016; MacCoun 2010).

There is no evidence that decriminalisation of limited cultivation in South Australia and Alaska substantially changed consumption (Bryan et al. 2013b, p. 60).

Reviews of the Portuguese experience of decriminalising all drugs have not found evidence of an increase in drug usage (Greenwald 2009; Hughes & Stevens 2010) (see Box 13.3).

In Australia, a recent review of studies concluded that law reforms had little impact on the prevalence of cannabis use:

In our review of the analytical literature about the impact of decriminalisation on cannabis use in Australia, we found one study reporting a significant increase in cannabis use in states where it has been decriminalised, one study demonstrating a decrease in cannabis use after decriminalisation, and five studies showing that decriminalisation had no significant impact on the prevalence of cannabis use. Collectively, this would suggest that at the very least reform of the law and the ending of criminal sanctions for cannabis use has no or little impact on prevalence. (Eastwood et al. 2016)

Some users, particularly the young, may not be responsive to the legal status of consumption if they do not respect the law and question why consumption is illegal. Social norms and the internalisation of those norms into a person's values are an important determinant of a person's voluntary compliance with the law. When such norms are not internalised, compliance with the law relies solely on the threat of punishment (Gabbay 2005).



## Box 13.3 Demand responses to decriminalisation in Portugal

In 2001, Portugal decriminalised the purchase, possession and use of all illicit drugs. The change went beyond depenalisation, which removes custodial sentencing as an option for low-level drug offenders, but did not amount to legalisation, as the production, manufacture and large-scale distribution of illicit drugs remain a criminal offence.

Low-level offenders are now dealt with administratively by an informal 'Dissuasion Commission', which determines an appropriate non-custodial sanction. The purpose of the commission is not to punish the offender but to encourage treatment and rehabilitation. The commission is not able to mandate treatment but can suspend a penalty on the condition that an offender agrees to be treated. Investments in drug treatment, harm reduction and social reintegration were expanded.

Depending on the study examined, there was either no increase or only a very small increase in adult drug usage. The reforms did lead to a reduction in drug-related harms (both problematic drug use and youth drug use declined), and criminal justice system costs (Greenwald 2009; Hughes & Stevens 2010):

While small increases in drug use were reported by Portuguese adults, the regional context of this trend suggests that they were not produced solely by the 2001 decriminalization. We would argue that they are less important than the major reductions seen in opiate-related deaths and infections, as well as reductions in young people's drug use. The Portuguese evidence suggests that combining the removal of criminal penalties with the use of alternative therapeutic responses to dependent drug users offers several advantages. It can reduce the burden of drug law enforcement on the criminal justice system, while also reducing problematic drug use. (Hughes & Stevens 2010, p. 1018)

Decriminalisation did not result in drug prices falling:

We find that (retail) prices of cocaine and opiates did not decrease following the drug decriminalization. Therefore, drug decriminalization seems to have caused no harm through lower illicit drugs prices, which would lead to higher drug usage and dependence. This evidence contrasts with the commonly held belief that drug decriminalization would necessarily lead to a dramatic increase in usage rates. (Felix & Portugal 2017, p. 127)

#### Why does prohibition not suppress consumption?

#### The certainty of punishment is weak

One explanation of why prohibition policies do not have a strong effect on consumption is that, while the severity of penalties can be high (Table 13.1), the certainty of being apprehended and convicted is very low:

[I]n regard to virtually any crime, it is the fear of getting caught rather than the level of punishment which is the key to successful law enforcement. If people think they are likely to get away with a crime or the chances of getting caught are low, the deterrence effect is weak and many will take the risk. The effectiveness of a law depends more on the perception that swift detection and apprehension of people who offend is likely, rather than on the severity of the punishment. (Palmer et al. 2015, p. 13)



About 90,000 drug offences are prosecuted each year in Australia while an estimated 2680 million drug offences are committed each year (2400 million cones, 40 million pills, 40 million hits, etc.) or about 1 prosecution per 30,000 offences; the cocaine rate is about one prosecution for every 110,000 lines of coke. (Jiggens 2013)

Existing policy settings provide at most a very weak deterrent to consumption. Therefore, it would be expected that the removal of sanctions would not lead to a significant increase in consumption.

Increasing the certainty of punishment may be an option, but this would entail a large increase in resourcing of enforcement and would be expected to criminalise and imprison more people and increase the unintended harms caused by prohibition.

#### Responsiveness to changes in price is inelastic

Drug consumption appears to respond to changes in the price of drugs, although the degree of responsiveness varies between studies. A number of Australian studies have estimated the responsiveness of cannabis consumption to changes in its price. There is some variance in the estimates, but a 10 per cent decrease in price is likely to lead to an increase in cannabis use in the area of 4 per cent (an elasticity of -0.4). This level of response is fairly low (or inelastic).

In a meta-analysis of international studies (including Australia) of the responsiveness of drug consumption to changes in its price, Gallet (2014) found a somewhat lower elasticity for cannabis at -0.2 compared to cocaine and heroin, which had elasticities of -0.55 and -0.50 respectively. The study also found that prices have a relatively larger impact on an individual's choice of whether or not to consume drugs, as opposed to how much to consume (Gallet 2014, p. 65).

There are a number of reasons to expect that consumers would be relatively unresponsive to changes in drug prices:

- For problem drug users, addictions reduce responsiveness. Users who consume drugs daily or weekly account for a high proportion of total drug consumption in Queensland.
- For other drug users, the availability of substitutes will influence price responsiveness. Studies find that alcohol and drugs are generally substitutes, although estimates of the degree of substitutability vary by study (Appendix G). Australians have relatively high disposable incomes which may also reduce responsiveness to price changes.
- For low income drug consumers, increases in price can partly be offset by increased offending, such as, property crime (the theft and sale of goods to earn income).

Estimates of price responsiveness vary by drug with some studies finding that heroin users have relatively elastic responses, although, estimates vary widely (Chalmers et al. 2009).

Prohibition is intended to raise the costs of supplying drugs, resulting in higher prices to consumers and lower drug consumption. Whether prohibition has actually achieved this, is questionable. Also, higher prices could be achieved in other ways—reforms can be accompanied by supporting changes to regulations and tax policies which can be used to purposefully alter the price of illicit drugs (see section 13.5).

Whether prices would be lower or higher under an alternative approach compared to the existing prohibition policy will depend largely on the objectives and details of any reform proposals.



## The impact on supply

Prohibition has not resulted in a sustained reduction in supply (Box 13.4).

A would-be supplier of illicit drugs looks at whether the potential benefits of the crime (the money earned) outweigh the likely costs (the costs of supplying the drugs and the risks of being convicted). If so, there is an incentive to enter the market for the supply of illicit drugs.

The illicit drug market, which is controlled by organised crime, is extremely lucrative. Australia has amongst the highest prices in the developed world and the Queensland market has a retail value of over \$1.6 billion (Appendix G). Research from the ABS suggests that wholesale and retail margins to operators in the drug market range from 46 per cent for cocaine to 91 per cent for amphetamines (ABS 2013). In comparison, direct wholesale and retail margins<sup>81</sup> are less than 2 per cent for beer and wine, spirits and tobacco (ABS 2018a).

## Box 13.4 Enforcement and the control of supply

Research funded by the National Drug Law Enforcement Research Fund found that supply reduction activities do not appear to affect drug supply:

Direct evidence of the effect of seizures and supplier arrests is fairly sparse. In their review, Mazerolle, Soule and Rombouts (2007) identified four studies which examined the specific impact of supply control initiatives on drug use and drug related harm (Rumbold & Fry 1999; Weatherburn & Lind 1997; Wood et al. 2003; Smithson, McFadden, Mwesigye & Casey 2004). Three of these studies (Rumbold & Fry 1999; Weatherburn & Lind 1997; Wood et al. 2003) found no effect of drug seizures on drug use patterns, drug-related deaths or overdoses, treatment enrolment or rates of crime and arrest. McFadden, Mwesigye and Casey (2004) are alone in finding substantial effects from seizures. (Wan, W et al. 2014, p. 4)

Wan, W et al. (2014) studied the impact of seizures and supplier arrests in NSW on the use of and harms associated with three drugs—heroin, cocaine and amphetamine-type substances (ATS). They studied whether seizures of heroin, cocaine and ATS, and/or supplier arrests have any effect on emergency department admissions and use/possess arrests over the period July 2001 to June 2011. If supply policies reduce use and harm, the study should find a negative relationship. However, the study found:

No consistent effects were found between any of the supply reduction measures and police reports of theft, robbery and assault.

The associations between supply reduction variables and use and harm measures for cocaine and ATS were all either non-significant or positive... These findings suggest that increases in cocaine or ATS seizures or ATS supplier arrests are signals of increased (rather than reduced) supply. (Wan, W et al. 2014, p. 17)

There was some evidence that 'very large-scale supply control operations do sometimes reduce the availability of illicit drugs' for a period (Wan, W et al. 2014, p. 1).

Incapacitating a drug supplier provides additional opportunities for existing drug suppliers to expand supply or for new suppliers to enter the market. Without changes to the underlying profitability of illicit drug supply, it is not surprising that supply reduction efforts appear to have only temporary impacts on the illicit drugs market:

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<sup>&</sup>lt;sup>81</sup> If product taxes and food and beverage services are included, the margin on beer is 8.5 per cent and on wine 4 per cent.



Attempts to stamp out the illegal drug trade have failed all over the world, and have consumed more and more resources. Wider powers have been granted to police, customs officers and other law enforcers. More jails have been built and more people jailed ...

There is no benefit in blinkered thinking. The starting point must be an acceptance that illegal drugs are established in the community and that prohibition has not worked. Orthodox policing is quite unable to enforce the law. (Fitzgerald 1989, p. 196)

A former Australian Police Commissioner submitted that, from his years of police experience:

The reality is that, contrary to frequent assertions, drug law enforcement has had little impact on the Australian drug market or for that matter, on the drug markets of most, if not all, countries in the world.

... Indeed, during a period of, arguably, the most stringent prohibitionist enforcement in history, worldwide drug production has increased, drug consumption has increased, the number of new kinds of drugs has increased, drugs remain readily available to the consumer market, drug prices have decreased and the purity of street drugs has increased. If this is a recipe for success it is difficult to envisage a recipe for failure. (Palmer 2018)

Without a major suppression of consumer demand, incentives to supply will continue to be strong. Enforcement simply causes the substitution of one source of supply for another.

### Health impacts

To the extent that prohibition reduces drug usage, it may act to reduce harms from use. However, prohibition may also work to increase the harms to drug users by:

- reducing the quality of drugs, or making the quality much more uncertain
- impeding health care providers from providing and improving treatments to drug users
- potentially increasing, through imprisonment, the mortality of drug users as tolerance to use and support networks are reduced
- impeding the use of clean needles in injecting drugs, contributing to the spread of infectious diseases.

#### Drug quality and overdoses

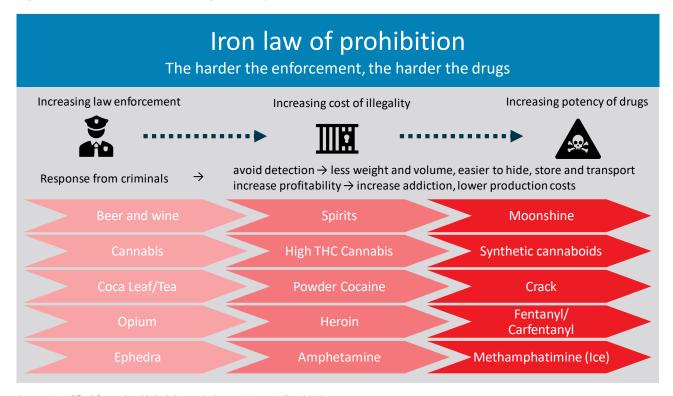
Prohibition makes the consumption of drugs more dangerous than it otherwise would be, because it maintains an illegal and unregulated market for the supply of drugs. There are no mechanisms for monitoring production, labelling products, or standardising and testing products for health effects. This results in:

- production practices that introduce impurities into drugs. Drugs can be contaminated by mould, fungi, bacteria, heavy metals, pesticides and other substances. Often, manufacturing takes place in clandestine laboratories by unqualified chemists
- incentives to make drugs as small and compact as possible (and more potent) to minimise the risk of detection
- transactions with significant uncertainty as to the quality of the drug being purchased and consumed. Users cannot be sure of the chemical composition of what they are buying, or how potent the drugs are.

International research suggests that efforts to increase enforcement only work to encourage the supply of more potent and addictive substances by criminal networks (Figure 13.2).



Figure 13.2 Prohibition encourages supply of more harmful and addictive substances



Source: Modified from the Global Commission on Drug Policy 2018.

These factors increase the risks of taking drugs, including overdose and death. Drug overdoses are one of the leading causes of accidental deaths in Australia—in 2016, drugs were determined to have been the underlying cause for 23 per cent of accidental deaths (Penington Institute 2018, p. 12).<sup>82</sup>

The rate of drug-induced accidental deaths in Queensland increased 144 per cent, from 1.7 per 100,000 people in 1997 to 4.14 in 2017.<sup>83</sup> The peak for the rate of accidental drug induced deaths was 5.18 in 2015 (Chrzanowska et al. 2019).

Multiple drugs were recorded in most (59 per cent) accidental drug-related deaths in Australia (Penington Institute 2018, p. 7).

In recent years, accidental drug-related deaths have exceeded road accident deaths in Queensland (Figure 13.3). In 2016, 300 people died accidentally due to drug use.

<sup>&</sup>lt;sup>82</sup> 'Accidental drug-related deaths' refers to both illicit and licit drugs. It includes alcohol and prescription drug-related deaths but does not include tobacco.

 $<sup>^{83}</sup>$  Data for 2017 is not finalised and is subject to revision by the ABS.



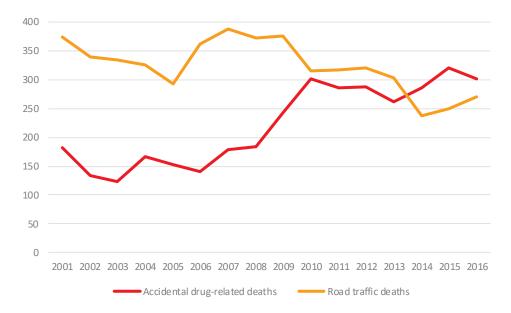


Figure 13.3 Accidental drug-related and road traffic deaths, Queensland

Source: Penington Institute 2018.

#### Prohibition may impede harm reduction strategies

Harm reduction strategies are not dependent on criminalising illicit drugs use and supply. Drug reforms involving new regulatory frameworks and health-oriented expenditure policies may be more effective in an environment that removes some of the problems that prohibition creates.

Benfer et al. (2018) argue that prohibition stigmatises drug users, which can impede harmful drug users from seeking treatment. The authors conclude that less prohibitive policies would encourage more drug users to engage with health services.

Willingness to seek help for problem drug use and the propensity to utilise health services may be increased by shifting away from the dominant criminalisation approach. A survey of drug users found that users from countries with a strong prohibition-based drug policy reported a far greater propensity to seek help following the introduction of more permissive policies (Benfer et al. 2018, p. 165). The main reason for the change in help-seeking behaviour cited was the reduced fear of criminal sanctions.

The criminalisation of drug users can even impede close family members from identifying problematic drug use and offering support:

Drug dependent users are treated as criminals and as a consequence are frequently reluctant to confide in family or friends as to the cause of any medical problems when they occur—or to seek medical help—or if they do, to tell the truth about the likely cause of their sickness. (Palmer sub. DR23, p. 4)

Treating drug use as a criminal offence also has been shown to contribute to the prevalence of HIV amongst drug users and their partners (Box 13.5).



## Box 13.5 Contributing to HIV prevalence

The policy of prohibition contributes to the prevalence of HIV/AIDS among people who use drugs and their sexual partners.

- Fear of arrest drives persons who use drugs underground, away from HIV testing and HIV prevention services and into high-risk environments.
- Restrictions on provision of sterile syringes to drug users result in increased syringe sharing.
- Prohibitions or restrictions on opioid substitution therapy and other evidence-based treatment result in untreated addiction and avoidable HIV risk behaviour.
- Conditions in prison and the lack of HIV prevention measures in prison lead to HIV outbreaks among incarcerated drug users.
- Disruptions of HIV antiretroviral therapy result in elevated HIV viral load and subsequent HIV transmission and increased antiretroviral resistance.
- Limited public funds are wasted on harmful and ineffective drug law enforcement efforts instead of being invested in proven HIV prevention strategies.

Source: Global Commission on Drug Policy 2012.

The use of imprisonment as an enforcement option may also exacerbate the harms from drug use. This can occur where the users' underlying reasons for drug use are not addressed, increasing risks post-release. One study found that after imprisonment, drug users were at a three to eightfold increased risk of drug-related death in the first two weeks after release (Merrall et al. 2010).<sup>84</sup> The risk remained elevated for the next two weeks.

Where prohibition policies redirect expenditures away from harm-minimisation strategies to enforcement they are likely to impose significant social costs. As discussed previously, it is unclear whether enforcement provides benefits to the community (if it does not reduce use or supply). Harm reduction programs on the other hand, have been shown to provide benefits that exceed costs.

A study of California treatment outcomes found a benefit to cost ratio of 7 to 1, largely attributable to reductions in subsequent criminal activity (Ettnar et al. 2006). A literature review of 18 benefit-cost studies found that benefits exceeded costs, with benefit-cost ratios of 1.6 to 26 (Cartwright 2000). A Minnesota study found benefit-cost ratios for treatment and recovery services of between 2.4 and 16.1. For prevention and early intervention services, the study found benefit-cost ratios of 0.2 to 20.4 (Merrick et al. 2017).

# Other impacts of prohibition

## Criminalising drugs contributes strongly to the growth in imprisonment and reported offending

There were 1,423 prisoners in Queensland prisons in 2018 for a drug offence as their most serious offence—most (66 per cent) were imprisoned for trafficking or dealing offences. Possession or use offences were the most common drug offences and contributed 22 per cent of the people imprisoned for drug offences in 2018 (ABS 2018k).

Since 2012, drug offences have made the largest contribution (32 per cent) to the increase in Queensland's sentenced prison population. Over that period, the number of people imprisoned primarily for drug offences grew

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<sup>&</sup>lt;sup>84</sup> This occurred because user tolerance fell during their enforced abstinence, and support networks were lost.



125 per cent (QCS unpublished data). The number of reported possession offences has quadrupled since 2012. Prisoners whose most serious offence is a drug offence now comprise 16.2 per cent of the total prison population.

Drug offences have played a significantly larger role in increases in female offending rates and imprisonment for females than for males (Box 13.6).

### Box 13.6 Drug offences are a key factor in female recidivism and rising imprisonment

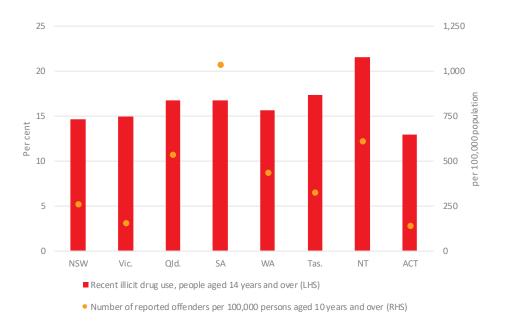
The terms of reference ask the Commission to look at the factors driving imprisonment and recidivism of women. The contribution of drugs offences to figures for female offending is significant. Between 2012 and 2018, reported drug offences contributed 89 per cent of the increase in reported female offenders.

Drug offenders make up 22.4 and 15.4 per cent of Queensland's female and male prison populations. The number of women imprisoned primarily for drug offences increased 219 per cent between 2012 and 2018. Drug offences are the largest contributor to the increasing rate of female imprisonment, contributing 35.5 per cent of the increase between 2012 and 2018.

Queensland makes use of imprisonment for drug users more than other jurisdictions—Queensland imprisons more than twice as many people for drug possession/use (316 people) as the rest of Australia combined (132 people) (ABS 2018k).

The high use of imprisonment appears to be a policy choice, rather than due to differences in drug usage (Figure 13.4). While the per cent of Queensland's population that has recently used drugs does not differ significantly from other states, reported offender rates are significantly higher (at 533 persons per 100,000 population), with the exception of South Australia (at 1,038 persons). Policy differences between jurisdictions may relate to differences in police priorities, enforcement strategies and the use of diversionary strategies including cautions.

Figure 13.4 Recent illicit drug use (2016) and reported drug offender\* rates (2017-18), by state



<sup>\*</sup> Reported offenders includes persons reported for a use/possession offence and/or a supply offence. Source: ABS 2019q; AIHW 2017c.



## The illegality of drugs contributes to other crimes

#### A complex drug-crime relationship

While the proportion of prisoners who have recently used an illicit drug is high, this does not mean that drug use causes other forms of crime, as the relationships between drugs and crime are complex (Box 13.7).

#### Box 13.7 The relationships between drug use and crime

There are many potential links between drugs, and drug enforcement and crime. Some individuals may be predisposed to commit crimes and take illegal drugs. Individual characteristics associated with increased drug use and increased propensities to commit crimes include low self-esteem, risk-taking behaviour, high discount rates, aggressive tendencies, general disrespect for authority, and unstable or impoverished households.

An explanation for the relationship between drug use and crime is that drug use acts as the catalyst for criminal offending or the development of an individual's criminal career through one of the following effects:

- the psycho-pharmacological effect—crimes committed under the influence or whilst intoxicated
- the economic-compulsive effect—crimes committed for financial gain and where the proceeds are typically used to fund drug purchases
- the systemic effect—crimes that occur as a consequence of participation in the illegal and unregulated market for drugs (Goldstein 1985).

The initiation of drug use typically occurs subsequent to the onset of offending (Menard et al. 2001). Once both crime and drug use have commenced, each appears to increase the probability that the other will continue. Crime and drug use appear related to one another in different ways across the life-course—that is, while some crime is caused by drug use and some drug use is caused by crime, both are also heavily influenced by a similar set of underlying factors.

Drug use is also often associated with crime because:

- the aspects of the lifestyle associated with being an offender may encourage heavy alcohol and other drug use (e.g. being single, being geographically mobile, partying/using drugs when between jobs and only working occasionally)
- the extra income derived from crime may allow the offender to more easily purchase drugs
- offenders may use drugs as a source of self-medication, 'Dutch courage', or as a justification to continue committing crime (White & Gorman 2000).

Problematic drug use and crime may be the result of low self-control (Gottfredson & Hirschi 1990) and impaired functioning. The latter explanation suggests that altered physical, psychological and emotional functioning may result from drug use and can lead to involvement in crime. Factors associated with involvement in crime (such as poverty, personality disorders, associations with antisocial peers and lack of prosocial support) may also associated with problematic drug use.

More than 40 years of detailed drug-crime research has not yet answered the question of causation.

Sources: Freiberg et al. 2016, pp. 88–89; Shepard & Blackley 2010, pp. 252–3.

There are at least four competing explanations of the drug-crime relationship:

- Drug use leads to crime.
- Crime leads to drug use—the inverse causality model (Brochu 1995).



- Drug use and crime influence each other in a pattern of mutual causation.
- The relationship between drug use and crime is either coincidental or spurious and both result from common underlying influences (Menard et al. 2001; White & Gorman 2000).

Support for the hypothesis that drug use causes crime is not strong. Researchers frequently find a weak link or no effect for the impact of drug use on crime.<sup>85</sup> Drawing a firm conclusion from the literature is difficult. Each of the explanations of the relationship between drugs and crime can provide insights depending on the characteristics of offenders and types of offences being examined.

#### Violence for the control of supply

While the relationships between use (the demand side of the market) and crime are complex, the impact of prohibition on crime on the supply side of the market is much clearer.

Prohibition drives the supply side of the drug market underground, where it is unregulated and driven by high profit levels. The high rewards to increasing market share, the lack of legal mechanisms to resolve disputes and the type of people involved contribute to high levels of violence:

[T]he 'drug problem' is in fact not about the drug per se but the attendant problems associated with illicit drug markets and drug distribution systems, something not applicable to the regulated markets for alcohol and tobacco. (Parliament of Victoria 2018, p. 61)

There are concerns about the ability of the criminal justice system to exert any real control over the drug market. A lack of such ability can undermine respect for and compliance with the law. Many individuals who sell, purchase and consume illicit drugs pay little penalty for their law-breaking. This may weaken their fear of apprehension, encouraging them to break other laws. A similar effect may be felt by people who are law-abiding but observe those who are not. In this way prohibition can 'foster a social norm in which voluntary compliance with all laws is diminished' (Miron 2004, p. 26).

#### Corruption

The corrupting influence of black markets on the justice system has long been identified. The Fitzgerald inquiry concluded that 'enforcing laws which prohibit conduct on which the community is divided, and which does not threaten the community, is questionable' (Fitzgerald 1989, p. 361). The criminalising of drugs, prostitution and gambling and the strong demand for these products were identified as a factor in police corruption. At least ten commissions and inquiries have been held in Australia into police corruption, with illicit drugs being a common element (Merrington 2017, pp. 92–93).

The Royal Commission into the New South Wales Police Service identified that there was an overwhelming body of evidence of close relationships between police and those involved in drug supply:

The corrupting influence of the trade in narcotics has been emphasised at almost every stage of the Royal Commission inquiries ... (Wood 1997, p. 13)

Even in environments where the need and capacity to restrict drug use are much stronger, black-market demand can have a corrupting influence. Taskforce Flaxton identified that the high demand for illicit drug, prescription drugs, drug equipment and other contraband poses a risk of corruption in prisons (Crime and Corruption Commission 2018, p. 15).

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<sup>&</sup>lt;sup>85</sup> From their survey of the literature, (Shepard & Blackley 2010, p. 252) concluded that "[r]esearchers who have reviewed the evidence find uncertainty, a weak link or no effect for the impact of drug use on crime'. Miron (2004, pp. 14–15) argued that 'the evidence for the causal effect for drug use on crime does not stand up to careful scrutiny' and that 'reviews of the literature on drug use and crime have consistently concluded there is little evidence that drug use causes crime'. Mast et al. (2000, p. 292) also found that 'substantial research literature suggests that there is no reliable association between drug use and major non-drug crimes'. MacCoun & Reuter (2003, p. 65) concluded that '[m]ost drug users are not otherwise criminally active, and the vast majority of drug-using incidents neither cause nor accompany other forms of criminality.'" Except for a small subset of drug users, drug use and crime appear to be largely unrelated (Rasmussen & Benson 1994). There is evidence to suggest a causal relation to property crime, but not to violent crime.



#### Costs of enforcement and criminalisation

Prohibition is an expensive policy. Criminalising drug users and suppliers involves large expenditures on police, courts, community corrections and prisons that are borne by the society, generally through higher taxes or lower government expenditure on more useful activities. The Commission estimates that the criminal justice system spends around \$500 million annually on enforcing drug laws (see Appendix G).

The personal impacts of drug-related imprisonment include time costs, loss of social capital, lost productive capacity and increased risks to health and mental well-being, disqualification from some types of employment and limitations on travel. In addition, there may be secondary costs to family, friends and the broader community.

Drug convictions can also indirectly lead to imprisonment, since convictions contribute to a person's criminal history, and so, while the drug offence may not be the direct cause of imprisonment, it may add to a person's cumulative offence history or result in court orders that are later breached.

For drug users that are caught but do not experience imprisonment, there are other non-trivial costs, including legal fees, fines, community service, the stigmatisation of a criminal record and time costs.

# 13.5 Options for reform

Reform can involve depenalisation within the criminal law, and various forms of decriminalisation and legalisation. However, reform can also be much broader than just changes to the criminal law and how the law is enforced. Reforms may involve the development of supporting regulatory frameworks, changes to health services, and preventative and education initiatives that assist in reducing harm.

When designing reform options, some of the key factors that need to be considered are:

- the substances that should be included in the scope of reforms
- the degree of reform of the criminal law for use/possession offences (the demand side of the market)
- the degree of reform of the criminal law for supply-related offences
- the types of supporting regulatory frameworks that are needed and their design, including whether reforms are needed regarding taxes and enforcement mechanisms, such as administrative fines
- the need for prevention, education, and health and treatment reforms, and opportunities for supporting these reforms.

#### Substances to be included in reforms

The two main criteria for deciding which illicit drugs should be included in reforms are the level of harm and the prevalence of use.

The current scheduling of drugs under the *Drugs Misuse Act 1986* (Qld) is not a good indicator of relative harms, since the schedules do not align with evidence on their relative harms (Box 13.8). Some drugs, which evidence suggests are lower harm, are listed in schedule 1 (such as ecstasy), and some relatively higher harm drugs are listed in schedule 2 (such as fentanyls). Therefore, an option of reforming all drugs based on schedule 2 listed drugs would not be consistent with a reform strategy that targets the lowest harm drugs first.

In Queensland, prevalence of use is highest for cannabis and MDMA (ecstasy):

- Cannabis is the most commonly used drug in Queensland; risks of addiction are lower; and estimates of harm per user are relatively low.
- MDMA, similar to cannabis, has a relatively low addictiveness and harm per user; and the prevalence of using it is high.



If a strategy is adopted to reform laws for some drugs before others, then the Commission considers that these two drugs are the best candidates.

#### Box 13.8 The relative harms of drugs

Collins and Lapsley (2008, p. 3) estimated that of the total costs of drug abuse in Australia in 2004–05, the greatest cost was from tobacco (56.2 per cent), followed by alcohol (27.3 per cent) and illicit drugs (14.6 per cent).

A drug harm index developed for the New Zealand Ministry of Health estimated that the harms per drug user between casual and dependent users, and between substances, differ significantly. Harms for MDMA and ecstasy were estimated, in NZ dollars, at between \$400 and \$2,200 for casual users, rising to \$4,700 for dependent users. Cannabis was the next lowest harm drug with costs of \$2,100 for casual users and \$22,100 for dependent users. At the higher harm end, the costs for dependent users of heroin and methamphetamines were estimated at \$98,600 and \$111,300 (McFadden Consultancy 2016).

The proportion of drug users that sought emergency medical treatment was highest for heroin, with a higher proportion seeking treatment for alcohol than for MDMDA or cannabis, according to the global drug survey (Winstock et al. 2019).

Studies consistently rank the relative harms of ecstasy and cannabis as lower than that of legal drugs (alcohol and tobacco) and other illicit drugs (such as heroin and cocaine) (Bonomo et al. 2019; Nutt et al. 2007, 2010; Van Amsterdam et al. 2015) (see Figure 13.5).

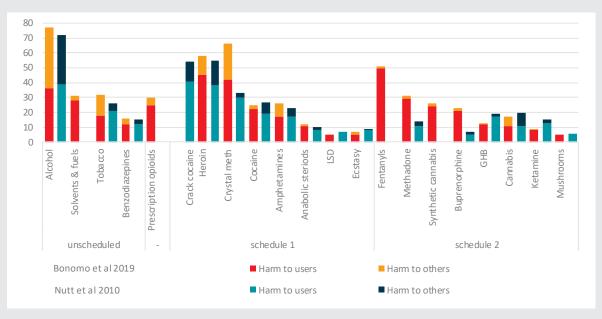


Figure 13.5 Drug harm ranking, by schedule

Notes: Rankings are out of 100. Scheduling based on Queensland regulation. Harm rankings were estimated per user and prevalence is not considered. The studies use multi-criteria analysis to collate the knowledge of subject experts. Source: Adapted from Bonomo et al. 2019; Nutt et al. 2010.

An initial focus on the lowest harm drugs is consistent with reform approaches adopted overseas. Every overseas jurisdiction that has reformed drug laws has included cannabis in the reforms. Some countries have decriminalised all drugs. Where countries have legalised the market, these reforms have focused on cannabis in most cases, although some countries have legalised a broader range of substances. Uruguay, for example, legalised heroin.



# Decriminalisation reform options

The University of New South Wales Drug Policy Modelling Program (Ritter et al. 2018) outlined four broad decriminalisation models:

- Removal of use/possession from criminal law irrespective of the amount possessed. This model may be with a civil sanction or no action at all (a civil sanction might apply, for example, where use violates a place of use restriction, such as, use in a public park).
- Removal of use/possession from criminal law up to a certain threshold amount.
- Removal of criminal penalties for eligible people or offences up to a certain threshold amount (for example, a maximum number of cautions).
- Change in practice but not removal from the criminal law (de facto decriminalisation).

Each of these models involves changes to use and possession offences (or how these offences are policed) without changing supply offences (i.e. reforms operate on the demand side of the 'market' only).

Though decriminalisation was recommended by many stakeholders, and there is a substantial literature on alternative approaches, there is no clear agreement on which model is preferable. Different jurisdictions have adopted different models.

South Australia, the Australian Capital Territory and the Northern Territory have undertaken de jure reforms for the use and possession of cannabis involving the substitution of a system of civil fines for criminal offence sanctions (Table 13.3). No state or territory has undertaken de jure reforms for illicit substances other than cannabis.

All jurisdictions have undertaken some form of de facto reform for cannabis, including Queensland. Two exceptions are South Australia and the Northern Territory (however, both have undertaken de jure reform). These reforms involve various forms of diversionary approaches, such as cautions, provision of information, referral to treatment, compulsory treatment and compulsory education. Other than in New South Wales and Queensland, these types of reforms have also been extended to certain illicit drugs other than cannabis.

No state or territory has implemented criminal law reforms legalising supply-side-related offences.

Some of the issues that arise in selecting between different models include:

- De facto versus de jure reform: de facto reform involving the exercise of discretion can be selectively applied to favour or disfavour particular groups. De facto changes are also susceptible to reversal, while de jure reform is formally protected by the law rather than convention (Munro 2017). De facto schemes typically have strict eligibility criteria only applying under restricted circumstances (such as for first time offenders). De facto schemes can also exclude those most marginalised and/or those most in need of diversion into treatment and rehabilitation. De jure schemes have fewer restrictions, which can increase program access and equity (Hughes et al. 2016, pp. 5–6).
- Fines and other civil penalties: shifting penalties from the criminal to the civil sphere does not remove all of the costs associated with criminalisation. The administrative imposition of fines, even if characterised as civil penalties or noncriminal sanctions, can have significant punitive effects, which may be indistinguishable from the effects of court-imposed fines for criminal offences (McNamara & Quilter sub. DR21, p. 3). Problematic drug users are among the most financially disadvantaged members of the community and may lack the capacity to pay fines (QNADA sub. DR20, p. 5).
- Referrals to assistance: referrals of dependent users to drug treatment may assist them to manage or solve their addictions and underlying problems. Any decriminalisation model would need to consider how referrals are facilitated, and the role of the criminal justice system in the process.
- The risk of net-widening: reducing penalties for illicit drugs may result in net-widening if police resources are redirected to more low-level offenders. In South Australia, penalisation resulted in net-widening (see Chapter 11), but it does not appear to have been the case in Portugal. In the United Kingdom, cannabis was



reclassified as a lower-class drug and guidance issues were given to police to warn and confiscate rather than arrest users. Following this change, the number of convictions fell initially, but eventually returned to previous levels and the overall number of drug possession offences increased sharply with more formal warnings (Bryan et al. 2013b, pp. 20–22).

Overall, the evidence suggests that any decriminalisation reform should:

- decriminalise the use/possession of smaller quantities of drugs, which is the type of quantities that are consistent with the personal use of illicit drugs
- retain cautioning, referrals to drug information and treatment as options and/or as ways to deal with problematic drug use
- improve the treatment of drug-related harms by removing prison as a sentencing option for drug possession and use
- ideally be implemented via legislation, rather than administratively.

# Legalisation reform options

#### Additional benefits of legalisation

Legalisation has the potential to provide benefits in addition to those that can be obtained through decriminalisation. This is because it can address the harms associated with black market supply where decriminalisation cannot. Legalisation, accompanied by the types of supporting regulatory and health reforms outlined above can reduce:

- overdoses and other health harms by improving the quality of drugs through standardisation of dosages and removal of adulterants, contaminants and other drugs
- violence and corruption associated with organised crime
- the profits going to organised crime
- law enforcement expenditure on drug supply and allowing redirection of resources to dealing with crime and/or providing drug treatment services
- the social costs of criminalisation and imprisonment
- unsafe injecting practices and discarding of equipment in public.

Legalisation can also provide benefits in shifting employment from the illegal market and normalising it within a legal and regulated market. It can also make consumption more transparent, allowing harmful consumption patterns to be better identified and addressed (for example, as criminal stigma and the threat of sanctions no longer applies, there are fewer incentives to hide consumption from family and medical professionals).

Some stakeholders supported legalisation as a way of significantly curtailing or displacing the existing illegal market for manufacture and supply:

The aim should be to try to undermine the market for currently illicit drugs by economic means rather than through criminal sanctions. Consequently, few if any prison inmates should be serving sentences for drug related offences. (Palmer sub. DR23, p. 15)



Table 13.3 Decriminalisation options provided in Australia by police, and key requirements

Reform type and jurisdiction	Drugs	Scheme	Response	Allowable no. of referrals	Response to non- compliance	
De jure reforms						
ACT	Cannabis	Simple cannabis offence notice (SCON)	Fine	No limits	May result in criminal penalty	
NT	Cannabis	Cannabis expiation scheme	Fine	No limits	Debt to state; may result in criminal prosecution	
SA	Cannabis	Cannabis expiaton notice (CEN)	Fine (option to pay via community service)	No limits	Reminder notice, additional fee; automatic criminal conviction	
De facto reforms						
ACT	All illicit drugs (incl. cannabis)	Police Early Diversion (PED) Program	Caution plus brief intervention	2 previous	May result in criminal penalty	
NSW	Cannabis	Cannabis cautioning scheme	Caution plus information	1 previous	Recorded and court advised if subsequently re- offends	
NT	Other illicits	NT Illicit Drug Pre-Court Diversion Program	Assessment + compulsory treatment	No limits	May result in criminal penalty	
QLD	Cannabis	Police diversion program for minor offences	Assessment	1 previous	May result in criminal penalty	
SA	Other illicits	SA Police Drug Diversion Initiative (PDDI)	Assessment + referral	No limits	May result in criminal penalty	
TAS	All illicit drugs (incl. cannabis)	Police diversion	Caution + brief intervention (for 3 <sup>rd</sup> assessment +	3 previous (in last 10 years)	May result in criminal penalty	
VIC	Cannabis	Cannabis cautioning program	compulsory treatment) Caution plus education and optional referral	1 previous	Nil	
VIC	Other illicits	Drug diversion program	Assessment + referral	1 previous	May result in criminal penalty	
WA	Cannabis	Cannabis intervention requirement	Assessment + compulsory education	1 previous	May result in criminal penalty	
WA	Other illicits	All drug diversion	Assessment + compulsory treatment	1 only	May result in criminal penalty	

Notes: Reform status as at 2016.

Source: Reproduced from Hughes et al. 2016.



#### Timing of reform

Some level of decriminalisation often precedes legalisation reforms. As an example, Australian states and territories have all undertaken some form of decriminalisation without reforming the supply side of the market. However, if the end goal is a legal and regulated market, then there may be benefits of reforming supply before fully decriminalising use if there are concerns that consumption may increase after reforms (Box 13.9).

Legalisation entails a more extensive set of reforms than decriminalisation. This is, in part, because of the additional changes needed to the criminal law, but mainly because of the supporting regulatory and health-based approaches which should accompany reform (although many health reforms could also be undertaken if reforms were restricted to decriminalisation). Given the need for careful design of these supporting reforms, legalisation requires more time to implement than decriminalisation reforms.

# Box 13.9 An alternative option for a transitionary approach for higher harm substances

If the longer-term goal of reform was to create legal, regulated markets, then an option is to address the supply side of the market first for higher harm substances, such as, heroin. Under this approach, each step in the supply chain would be legalised and regulated prior to demand-side reforms.

The rationale for this approach is:

- The policy of prohibition is relatively ineffective in suppressing supply; therefore, it may also be ineffective in suppressing any shifts in demand.
- There is uncertainty about the size of the consumption response to reforms (although evidence indicates a nil to small response, and for higher harm drugs there is evidence of reduced demand).
- Many of the harms of consumption originate from supply-side prohibition policies, and there are concerns these would increase (particularly problematic use).
- These harms would ideally be addressed prior to undertaking demand-side reforms. To the extent that
  consumption does increase, the increased consumption involves the drugs that have already been
  made safer through regulation. In the case of heroin, for example, a pharmacy sales model might be
  adopted. Purchasing through a pharmacy would not be an offence, while purchasing through other
  means would be treated as it is now.
- Delaying demand-side reforms for higher harm drugs would allow for the proposed transition to a health-based approach to be more fully implemented. This would further reduce the risks of any consumption increase.

In practice, the difference between what occurs now and what would occur is:

- Case 1 (existing arrangements): a police officer observes a drug transaction. The buyer (user) is ignored (a form of de facto decriminalisation), a caution is given, or a more significant penalty is given depending on the circumstances. The seller faces a lengthy prison sentence.
- Case 2 (a transitionary authorised seller model): a police officer observes a drug transaction. The buyer is given a caution or more significant penalty. The seller is treated as in case 1, because the seller is not an authorised seller. It is pointed out to the buyer that if they had purchased from an authorised seller (for example, a pharmacy) then no penalties would have applied.

The effect would be to strengthen incentives to source higher harm drugs from authorised sellers. Authorised sellers would in turn source their supplies from a legal regulated supply chain where, for example, product standards and product labelling requirements apply.



# 13.6 Supporting policies to reduce risk and harm

# Risk and risk mitigation

Any significant reform process entails risk. The key risks of drug reform proposals in part depends on the specifics of the proposal. However, there are a number of risks (real or perceived) which are common across most options. These include:

- an increase in drug usage, particularly in problematic drug usage
- easier/earlier access to drugs for youth
- an increase in crimes committed jointly with drug offences
- an increase in overdoses
- an increase in drug driving
- loss of amenity in public spaces for non-drug users.

As discussed earlier, evidence suggests that these risks are fairly low: the reform experience of other jurisdictions suggests that a large rise in consumption is unlikely; and, for some risks, the most likely outcome is a reduction in the underlying problem (for example, problematic drug use). While regulation can be imperfect in achieving its objectives, the government has at its disposal a wide range of policy options which can be used to help mitigate risks, including:

- regulatory instruments applied at different stages of the supply chain and to the demand side of the market, including alternative retail models and product safety regulations
- taxes to influence prices
- an ongoing role for the criminal law
- · prevention and informed drug education programs
- supporting health and treatment provision and access.

Any drug reform proposals would need to consider in detail what supporting regulatory and tax policies are needed, their objectives, the scope to apply existing regulatory mechanisms and institutions, and where new mechanisms or institutions may be needed.

Some of the options are outlined below in order to show that there are many policy tools available to address drug risks. The detailed design of the supporting regulatory framework would occur as part of the reform process after the government has set the broad directions for reform.

# Supporting demand- and supply-side controls

A large range of policy instruments are available to support drug reform and help reduce harms.

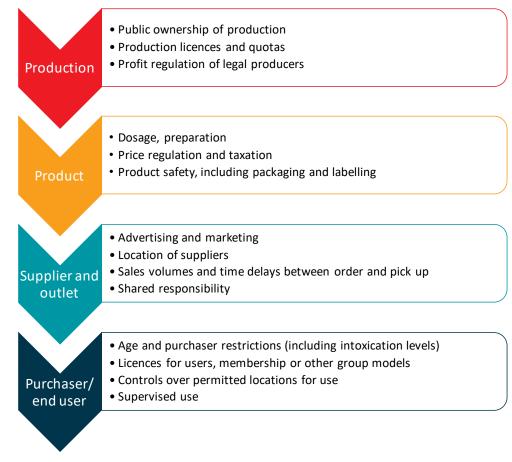
If legalisation reforms are adopted, some of the regulatory options include regulations (and other forms of policy interventions) targeting the legal production of drugs, similar to the regulatory frameworks that are already in place for the existing licit production of drugs in Australia (see Appendix H for some examples); supplier and outlet (distribution) regulations; and product regulations (Figure 13.6).

Under legalisation and decriminalisation reforms (depending on the particular decriminalisation model chosen), there are a suite of purchaser/end-user regulatory options including, for example, age and place of use restrictions like those that currently apply for alcohol.

Many of these policy instruments have been implemented in Canada following the legalisation of cannabis (see Appendix I).



Figure 13.6 Policy instruments to support drug reform



Source: Transform Drug Policy Foundation 2009; QPC.

# A variety of retail models

There are a number of different models for the regulation of the supply (retailing) of drugs. Different models may be more suited to the retailing of certain drugs depending on the level of drug risk (Box 13.10). For those drugs where risks of harm are greatest (such as heroin), the prescription model or medically supervised use may be the most appropriate. For those drugs that pose lower risks (such as cannabis), the licensed sales model may be the best option.



# Box 13.10 Regulated supply (retail) models

#### Prescription model

The prescription model is the most tightly controlled and enforced drug supply model. Under this model, drugs are prescribed to a user by a qualified and licensed medical practitioner. They are dispensed by a licensed practitioner/pharmacist from a licensed pharmacy or other designated outlet.

The process is controlled by a range of legislation, regulatory structures and enforcement bodies, which guide, oversee and police the prescribing doctors and dispensing pharmacists. They also help determine which drugs are available, in what form, where, and under what criteria.

#### Pharmacy sales model

The pharmacy model, while still within a clearly defined medical framework, is less restrictive and controlling than the prescription model. Pharmacists are trained and licensed to dispense prescriptions, although they cannot write them. They can also sell certain generally lower risk medical drugs from behind the counter. Such dispensing generally takes place from licensed pharmacy venues.

Pharmacists are overseen by regulatory legislation, managed by various agencies and are subject to a clearly defined enforcement infrastructure. They either fulfil prescriptions or sell over-the-counter products with conditions, such as, buyer age, level of intoxication, quantity requested, or case-specific concerns relating to potential misuse. In addition, pharmacists are trained to offer basic medical advice, support and information.

#### Licensed sales model

A licensed sales system for drugs may put various combinations of regulatory controls in place to manage the vendor, the supply outlet, the product and the purchaser. These controls may be supported by changes to police, customs, trading standards, and health and safety policies and practices. The Queensland commercial hotel licence, subsidiary off-premises licence, and producer/wholesaler licence are examples of the licensed sales model applying to the off-premises sale of alcohol.<sup>86</sup>

#### Licensed premises model

The licensee is responsible for restricting sales on the basis of age, intoxication and hours of opening. Licence infringements are sanctioned by a sliding scale of fines, loss of licence, and even criminal penalties. Licensees can be held partially or wholly liable for how their customers behave. The Queensland commercial hotel licence, subsidiary on-premises licence, bar licence and community club licence are examples of the licensed premises model applying to the on-premises sale of alcohol. Various controls exist over the venue and (in particular) the licensee.

#### Unlicensed sales model

Under the unlicensed sales model, regulation focuses on standard product descriptions and labelling. Where appropriate, food and beverage legislation (dealing with packaging, sell by dates, ingredients etc.) can be adopted.

Source: Transform Drug Policy Foundation 2009; Queensland Government n.d.

<sup>&</sup>lt;sup>86</sup> A description of the Queensland commercial licensing framework for alcohol can be accessed at https://www.business.qld.gov.au/industries/hospitality-tourism-sport/liquor-gaming/liquor/licensing/applications/types.



# **Product safety**

The supply of drugs is currently regulated by a specialist regulatory framework covering both licit and illicit drugs regulation (see Appendix H). It includes, for example, Queensland Health and the Australian Government's Therapeutic Goods Administration and the Office of Drug Control. The regulation of the supply of medicinal cannabis provides an example.

A post-reform regulatory framework might utilise the existing and more general product safety framework applying in Queensland and Australia. Product safety regulation in Australia for general consumer products is a shared responsibility between the Australian Competition and Consumer Commission (ACCC) and the states and territories (Box 13.11). Under the *Australian Consumer Law and Fair Trading Act 1989*, Queensland's Office of Fair Trading promotes the safe use of consumer products and ensures certain goods and services supplied in Queensland meet mandatory safety standards.<sup>87</sup>

# Box 13.11 Product safety

Some of the product safety regulatory tools currently used include:

- Product safety standards: The purpose of a mandatory standard is to make particular safety or
  information features on products compulsory for legal supply of the product into the Australian
  market. It is an offence to supply goods that do not comply with mandatory standards. If a product is
  subject to a mandatory standard, it must meet specific safety criteria before it can be sold in Australia.
  These can relate to performance; composition; contents; methods of manufacture or processing;
  design; construction; finish; packaging or labelling.
- Mandatory information standards: Mandatory information standards ensure that consumers are provided with important information about a product to assist them in making a purchasing decision. Information standards do not necessarily relate to the safety aspects of a product. For example, information standards may cover ingredient labelling for cosmetics, labelling for tobacco products, or care labelling for clothing and textiles.
- Product liability: The liability provisions of the Australian Consumer Law generally apply to a manufacturer that supplies consumer goods in trade or commerce. A product has a safety defect if it does not meet the level of safety the public is generally entitled to expect. While the expected level of safety will vary from case to case, it is ultimately for a court to determine whether a product has a safety defect. The court will take various factors into account when determining whether a product has a safety defect. A consumer can seek compensation from a manufacturer who has supplied a product with safety defects if that product has caused loss or damage. Loss and damage can include injuries to the person making the claim, or injuries or death to another individual; and economic loss caused by damage to, or destruction of another good, land, a building or a fixture.

Suppliers who fail to comply may face enforcement action that attracts fines (under the criminal law) and pecuniary penalties (under the civil law).

Source: Australian Competition & Consumer Commission n.d.

<sup>&</sup>lt;sup>87</sup> See the Queensland Government website, Our role in product safety, https://www.qld.gov.au/law/your-rights/consumer-rights-complaints-and-scams/product-safety-for-consumers/our-role-in-product-safety.



#### **Taxes**

If legalisation reforms were undertaken, then as part of designing a supporting regulatory framework, consideration would need to be given to the role of taxes in affecting the price of drugs—and consumption levels—in a legally traded market.

The consumption of alcoholic beverages in Australia is currently taxed under two systems: excise duty (and excise-equivalent customs duty); and the wine equalisation tax (WET). Excise duty is levied on the domestic production of alcohol (beer, spirits and other excisable beverages). Excise rates are expressed per litre of alcohol and vary from \$0 to \$84.51 per litre of alcohol. Imported alcohol products are subject to customs duty at a rate equivalent to the excise rate that would apply, had the products been produced domestically. The WET is applied to the making, importing and wholesale selling of wine. The tax is applied at a rate of 29 per cent of the wholesale value of wine.

While it may be desirable for the state to apply a tax on drugs after reform, this is not currently possible.

The application of a separate state excise or sales tax on drug transactions would not withstand challenge under section 90 of the Constitution. Section 90 vests the Commonwealth with the exclusive power to impose duties of customs and excise (excise taxes are taxes on goods not services, which is why states can apply gambling taxes). A series of High Court decisions have defined excise duties to be any levy imposed upon goods at any point in the production and distribution chain. The option of using high business fees in place of a tax has also been challenged in court and is no longer a viable option (fees can be applied to cover the costs of providing a service, for example, administrative costs).

If the sale and purchase of a drug is legal, then it would become subject to the goods and services tax (GST) collected by the Commonwealth Government on behalf of the states and territories. It is permissible to charge differential rates under the GST (currently the two rates are 0 per cent and 10 per cent), such as 30 per cent. However, any changes to the legislation underpinning the GST requires the unanimous agreement of all states and territories as parties to the Intergovernmental Agreement on Federal Financial Relations (IGAFFR), as well as endorsement by the Commonwealth Government, and passage of the legislation by both Houses of the Commonwealth Parliament.

Revenues collected under the GST are distributed to states and territories using Commonwealth Grants Commission formulas (relativities). Application of a differential rate under the GST could result in leakage of Queensland tax revenue to other jurisdictions, if those jurisdictions did not also legalise.

A possible option is for the state government to own one of the steps in the supply chain, say, a facility that undertook drug testing, or an element of the distribution chain that would provide it with a monopoly position in the legal market. As a monopoly provider, the business would charge high prices, generating significant revenue that would be returned to government through dividend payments. However, this raises significant governance issues.

Other options may be available through negotiations with the Commonwealth and through COAG, such as having the Commonwealth impose an excise tax on legal drug transactions, like the excise it imposes on alcohol. The tax would need to be applied uniformly across states (not discriminate between states), but if legalisation was not undertaken in other states, then the tax would in effect only apply to transactions occurring in Queensland. An agreement could be made with the Commonwealth for a return of the revenues. This assumes the Commonwealth would be willing to cooperate, which may not be the case, given obligations under the UN conventions.



# An ongoing role for the criminal law

Following drug reforms, the criminal law will still have a role in regulating drug supply and use, in more than one way:

- If reforms involve a small number of substances (for example, cannabis and MDMA), or a subset of all substances, then laws and policies applying to other illicit drugs will continue.
- Reforms may apply to use/possession offences, but not supply offences.
- Reforms related to use/possession are likely to include regulations specifying the conditions under which use/possession is legal (such as place of use conditions). Where the conditions are breached, administrative/civil or criminal sanctions are likely to apply.
- If reform includes supply offences, a supporting regulatory framework will need to be put in place, defining legal supply. Supply that does not meet the conditions established for legal supply, such as breaches of licensing conditions, will be subject to some form of sanctions, which may include the criminal law.

To the extent that illicit drug use is associated with, or increases the likelihood of, other offences—such as assault or theft—these offences will continue to be criminal offences. Decriminalisation/legalisation reforms do not alter the fact that assault of a person, and other offences causing harm to person or property, or the risk of harm, will continue to be criminal offences and will be policed and punished according to the severity of the act.

### Health-based approaches

Reforms that enhance the provision of health and treatment services can assist in mitigating any reform risks and provide benefits to existing problem users. Shepard & Blackley (2010, p. 265) concluded that '[b]ased on the preponderance of the empirical evidence, there is considerable support for the reallocation of resources away from law enforcement and towards education, treatment and rehabilitation'.

Given the harms of drug use for problem users, and the harms created or exacerbated by the policy of prohibition, stakeholders expressed a strong interest in pursuing a shift in policy towards a health-based approach.

The Commission has heard from subject experts that there is insufficient funding of drug treatment. Reforms can provide savings and revenues that could be redirected to better support drug-related health services. Provision of prevention, education<sup>88</sup>, harm reduction and drug treatment services would help to ameliorate harms associated with any changes to drug use following the relaxation of criminal sanctions.<sup>89</sup>

In conjunction with reforms to the criminal law, submissions to this inquiry supported a significant rebalancing of policy effort and resources towards a health-based approach:

Queensland, like the rest of Australia, relies heavily on the criminal justice system to respond to alcohol and other drug use despite recognition that alcohol and other drug use is better framed as a health issue. (QNADA sub. 30, p. 3)

<sup>&</sup>lt;sup>88</sup> Community-based and education programs may help reduce or dissuade youth drug consumption. Iceland's Planet Youth program was associated with larger reductions in alcohol, tobacco and cannabis use in communities with the intervention than in communities without (Kristjansson et al. 2010). Factually based mass media campaigns have shown effectiveness in reducing tobacco smoking prevalence (Das et al. 2016).

A global study found 43 per cent of school and other drug prevention programs were effective (Agabio et al. 2015). An Australian study of school-based prevention programs founds five of seven achieved reductions in alcohol, tobacco and cannabis (Teesson et al. 2012). Another review found four programs had enough evidence to support use, three showed some evidence, one showed no evidence of effectiveness and two showed negative effects (Lee et al. 2014). This suggests that evidence-based education and other programs can provide benefits, but program design and evaluation matter.

<sup>&</sup>lt;sup>89</sup> As discussed earlier, reforms that include health-based responses typically see a decrease in problematic drug usage/harms from drug use.



... health-based responses to illicit drug use and possession reduce the adverse social consequences of contact with the justice system and provide a more efficient and cost effective opportunity to identify people most in need of treatment. (QNADA sub. DR20, p. 3)

The approach to illicit drug reform taken in Portugal was given broad support:

The Commission is of the view that the approach taken in several countries including Portugal, to move towards a health-based approach to address the underlying biopsycho-social issues leading to problematic drug use through evidence-informed treatment, is consistent with the Australian National Drug Strategy 2017-2026 commitment to harm minimisation through three pillars [harm reduction, demand reduction and supply reduction]. (QMHC sub. 38, pp. 9–10)

The Committee recommended exploring alternative models of treatment for these offences, such as the Portuguese model of reform, which decriminalised the personal use and possession of all illicit drugs in 2001. Rather than being arrested, people caught with a personal supply are given an appropriate ruling or penalty by a Commission for the Dissuasion of Drug Addicts such as, they may be given a warning or be required to attend treatment services. The Commissions come under the Ministry of Health rather than Ministry of Justice and comprise a treatment professional, social worker and lawyer and are supported by a range of agencies such as treatment, health, employment, child protection, social services and schools. (RANZCP sub. 31, p. 5)

The Alcohol and Drug Foundation (sub. DR28, p. 11) supported the Portuguese approach and recommended that prevention and education play a part in reducing drug harms:

All Queensland school systems invest in the training of teachers to ensure delivery of evidence—informed drug education and to ensure schools are resourced to provide special needs education and pastoral care to assist all students to complete secondary schooling.

A stronger health-based approach will involve significant policy design efforts and has significant resource implications. Given the interrelationships between drug use (particularly problematic use) and the services which address harms, there may be benefits in having the design of criminal law reforms tightly coordinated with the design of a stronger health-based approach to harms.

# 13.7 Cost-benefit analysis of illustrative reform options

The Victorian Law Reform, Road and Community Safety Committee (Parliament of Victoria 2018) found that there were very few Australian studies of the costs and benefits of alternative drug reform options. It recommended that the Victorian Government commission such a study (Parliament of Victoria 2018, p. 83).

The Commission aims to help fill this gap by quantifying the costs and benefits of several illustrative drug reform options in Queensland.

# Description of the quantified models

There are many permutations of potential drug reforms. Given the complexity of the task, it was only possible to quantify costs and benefits for a few options. These options were selected on the basis that they illustrate plausible reform approaches and would demonstrate how the costs and benefits of reforms might vary depending on their design.

To this end, four options were selected:

- Option 1: Decriminalise cannabis
- Option 2: Legalise cannabis



- Option 3: Legalise MDMA
- Option 4: Decriminalise other drugs (due to data limitations, only MDMA, methamphetamines, heroin and cocaine were quantified).

For each option, it is assumed that drug treatment services would be provided to reduce harms from use.

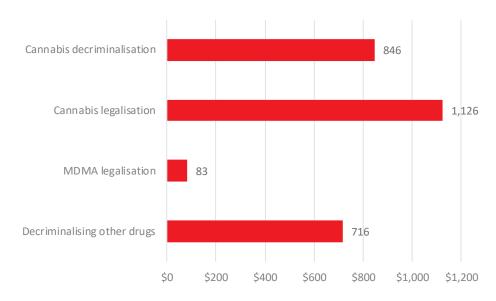
The Commission has undertaken a cost–benefit analysis (CBA) to quantify the net benefits for each of the drug reform options. A CBA analysis attempts to quantify all impacts arising from policy changes in monetary terms in order to derive an estimate of net benefits (or costs).

There are limitations of the CBA approach, including that it can be difficult (or controversial) to monetise many impacts, particularly for social impacts where there are no markets to derive price estimates. These methodological issues are discussed in more detail in Appendix G, along with detailed assumptions and results.

# Summary of the CBA results

The results from each of the scenarios (Figure 13.7) show that the net benefits of reforms are substantial. Combined cannabis and MDMA legalisation, and decriminalisation of other drugs, is likely to generate more than \$2.8 billion in net benefits for the Queensland community.

Figure 13.7 Net benefits from reforms, \$ million



Notes: All results are net present values. Results do not include any changes to consumer or producer surpluses. Cannabis legalisation benefits are additional to cannabis decriminalisation benefits. See Appendix G. Source: QPC estimates.

The net benefits from cannabis decriminalisation arise mainly from reductions in policing and enforcements costs and improved health responses for users.

The magnitude of these benefits increases when reforms are extended to include cannabis legalisation. Additional benefits accrue mainly from further reductions in policing and enforcement of drug supply, but also from a reduction in harm imposed from criminalisation (mainly reduced imprisonment).

The estimated net benefits do not depend on providing drug treatment for cannabis and MDMA—there would be net benefits with or without treatment (although treatment increases benefits).

Decriminalisation of all drugs is estimated to provide net benefits, as long there is no large increase in the usage of high harm drugs such as methamphetamines and heroin.



The results presented in Figure 13.7 are likely to be an underestimation of the net benefits from reform, because many significant benefits were not quantified.

The CBA has not estimated benefits that might occur from users switching from higher harm drugs to lower harm drugs that are legalised or decriminalised. It has also not quantified many of the harms that would be avoided by removing drugs from the control of organised crime networks.

The results exclude any changes to consumer surpluses. Any changes are likely to generate substantial benefits for the consumers of drugs, particularly where reforms increase drug safety—however, these are excluded from the results presented in Figure 13.8.

There are also likely to be large benefits from reforms that shift revenue from illegal markets to legal, controlled markets, since this would generate large revenues that can be shifted to more productive use.

The Commission estimates that the legalisation of cannabis could transfer around \$3.7 billion from criminal profits to legal revenues (Figure 13.8). Where these revenues can put to more productive use, they are likely to generate significant benefits to the community, which are not captured in the estimates.

\$4,000 \$3,000 \$1,000 \$1,000 -\$1,000 -\$2,000 -\$3,000 -\$4,000 -\$4,000 -3788 Criminal surplus Legal surplus Tax revenues

Figure 13.8 Transfer of surpluses, cannabis legalisation, \$million

Source: QPC estimates.

Assuming constant imprisonment rates, it is estimated that 1,621 drug offenders will be in prison in Queensland by 2025. Based on the results of the CBA, it is possible to estimate the effects on imprisonment of implementing the legalisation of cannabis and MDMA and decriminalising other drugs. If these reforms were implemented, there would be an estimated 1,051 fewer prisoners by 2025. This would include around 139 fewer female prisoners.

# Sensitivity analysis

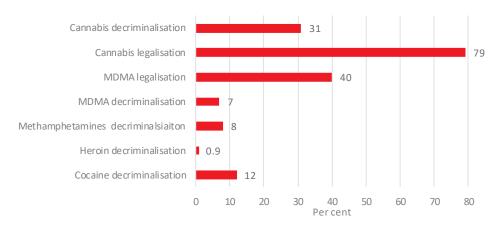
The CBA is most sensitive to consumption responsiveness. That is, if drug usage is more likely to increase following reforms, then results are more likely to be negative. To illustrate this, the Commission has estimated 'break-even' points—the point at which a rise in consumption would negate any benefits—for a range of drugs. These are presented in Figure 13.9.

For cannabis legalisation, consumption could increase up to 64 per cent before the benefits of reform no longer outweigh the costs of reform.



These results suggest that the net benefits of reform are certain for cannabis and MDMA and are more certain if reforms are extended to include legalisation. The benefits of reform are less certain for methamphetamines, heroin and cocaine, suggesting other harm reduction strategies should be implemented alongside any changes to criminalisation.

Figure 13.9 Break-even point-increase in consumption required to provide no net benefits



Note: Price elasticity is based on the medium scenario. Source: QPC calculations.

# 13.8 Support for reform

#### Stakeholder views

Many individuals and organisations who participated in the inquiry—through submissions; at consultation meetings; and at public hearings—are either directly engaged in the criminal justice system or active in public policy processes affecting the system. Illicit drug problems and reforms were discussed with:

- the Queensland Police Service
- some government departments
- entities providing legal assistance to offenders
- entities providing health services to offenders, such as alcohol and drug treatment programs
- health advisory bodies
- academics whose specialties include mental health treatment, legal theory and criminalisation, criminology, criminal policy design and evaluation, and health economics
- organisations representing victim and offender interests
- organisations representing Indigenous persons, such as local councils, service delivery organisations and advocacy bodies.

Stakeholders to this inquiry were virtually unanimous that criminalising drug use does not achieve its objectives and can create significant problems. There was also some support for the view that, at least for some drugs, criminalising supply creates far more harm than it helps avoid.

While there was a recognition of current problems and support for reform (Box 13.12), there were differences of view on what reform should look like, for example:

• which illicit drugs should be included in reforms



- how far to take use/possession reforms
- whether reforms to supply offences should also be progressed
- what the ongoing role of police officers post-reform should be, particularly with respect to being able to signpost problematic users towards assistance. 90

# Box 13.12 Stakeholder support for reform

Civil Liberties Australia (CLA) supports the removal of criminal offences from legislation where the benefits of being included do not outweigh the costs, including in relation to illicit drugs offences (CLA, sub. DR5, p. 2).

QNADA supports decriminalisation reforms as a means of reducing imprisonment, recidivism and as part of a health-based approach:

We believe that decriminalisation of personal possession and use of illicit drugs offers significant net benefits to the community. (QNADA, sub. DR20, p. 5)

We strongly support recalibrating the Queensland system towards health-based responses for people who use illicit drugs, and moderating the law enforcement approach for drug trafficking and supply, which we believe will improve health and wellbeing of Queensland communities. (QNADA sub. DR20, p. 3)

QCOSS also supported the decriminalisation drugs and replacement with a health response (QCOSS, sub. DR24, p. 11).

The ADF notes that a major benefit of decriminalisation would be a reduction in the harms to the user that result from being 'criminalised':

The major harm that decriminalisation prevents is the criminal convictions acquired by people who are found guilty of personal possession and use of drugs. Conviction disrupts lives seriously, including closing off career, employment and travel options and causing problems with personal relationships. Drug decriminalisation prevents those harms and collateral benefits include putting people who use drugs in touch with health and welfare services and lessening the stigma on illicit drug use that can prevent people from seeking help. (Alcohol and Drug Foundation (ADF) sub. DR28, p. 7)

In the case of remote Indigenous communities, concerns were expressed about drug reform. In particular, there was uncertainty around the implication of reforms for those communities with alcohol management plans (AMPs).

This suggests that, apart from the selection of alternative reform options, any reform processes will need to engage stakeholders and the broader public to ensure that key concerns are addressed.

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<sup>&</sup>lt;sup>90</sup> To test and discuss the key methods, assumptions and preliminary results of the CBA, the Commission held a panel discussion on 14 May 2019 with researchers Dr Caroline Salom (University of Queensland (UoQ)), Dr Marian Shanahan (University of New South Wales), Dr Andrew Smirnov (UoQ), and Associate Professor Melissa Bull (Queensland University of Technology). The panel participants were chosen for and provided advice based on their respective subject areas of expertise. However, the findings of the CBA are solely the responsibility of the Commission. As with stakeholder opinions, participants may hold differing opinions about the best option for reform. As an example, one participant had previously published research finding that legalisation of cannabis was unlikely to provide net benefits—in contrast to the findings of the Commission's CBA (Shanahan & Ritter 2014). The same participant had undertaken program evaluations of drug diversion programs finding net benefits from diversion (Shanahan et al. 2016).



# Community views

Data from the National Drug Strategy Household Survey 2016 show that over 50 per cent of the population of each state, including Queensland, supports the decriminalisation of cannabis and ecstasy (support for heroin decriminalisation is slightly less than 50 per cent in Queensland, Western Australia and the Northern Territory) (Figure 13.10).

In the survey, decriminalisation is defined based on responses to a list of preferred actions to be taken when a person is found in possession of an illicit drug. Decriminalisation responses include no action; caution; civil penalty; and/or referral to drug education/treatment.

The survey also found that '[c]ommunity tolerance has increased for cannabis use, with higher proportions of people supporting legalisation and a lower proportion supporting penalties for sale and supply' (AIHW 2017c, p. 9). Support for legalisation of cannabis increased from 26 per cent in 2013 to 35 per cent in 2016 (AIHW 2017c, p. 128).

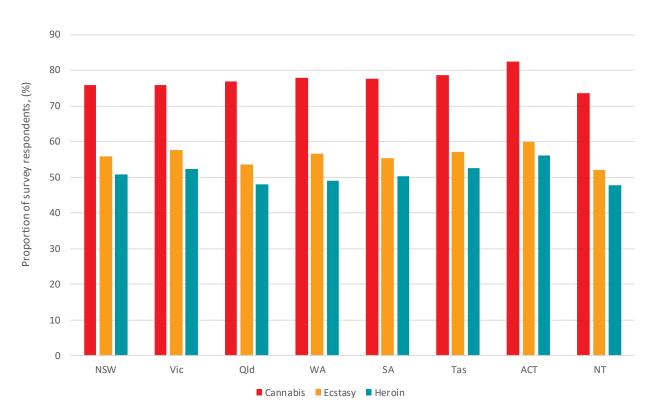


Figure 13.10 Support for decriminalisation in Australia by state and territory, 2016

Notes: Data is from the Australian Institute of Health and Welfare's National Drug Strategy Household Survey 2016. For the 2016 survey, the total sample size was 23,772 persons 14 years of age or older.

Source: Ritter et al. 2018.

Public support for a 'regulate and tax' approach rather than a criminalisation approach is also strong. A 2016 Essential Media poll found that 55 per cent of Australians supported regulating and taxing cannabis (Wodak 2018). At least 50 per cent of the following groups supported these types of reforms—men, women, Australian Labor Party voters, and Greens party voters. Liberal National Party voters also favoured a regulate and tax approach compared to the existing criminal law approach (47 per cent).



Support for reforms can be compatible with a position against personal consumption. A person may be against personal consumption of illicit drugs, but hold the view that it is not the role of the state to punish a behaviour that other citizens voluntarily choose to engage in.

# 13.9 Progressing a reform agenda

The Commission recommends that:

- reforms be progressed through a transparent and staged reform process
- an independent body be assigned to lead reform.

Some recommendations are dependent on the type of reform chosen by the Queensland Government. For example, if legalisation is supported, then the design of a supporting regulatory framework will need to include an appropriate regulatory agency.

# A transparent and staged reform process

To achieve reform and manage the risks of reform, the public will need to be brought along. Drug policy is a topic that often evokes emotions and fears. Gathering evidence, assessing it and transparently communicating it to the public can help this process.

A staged approach to the reform is necessary. Then the assessment of outcomes of earlier stages can inform the implementation of later stages. Reform of lower harm drugs—beginning with cannabis and MDMA—should precede higher harm drugs.

While legalisation is estimated to offer greater benefits than decriminalisation for lower harm drugs, it is a complex reform requiring a detailed and fundamental redesign of drug frameworks. For this reason, decriminalisation generally occurs before legalisation.

Assessment of the evidence gathered from legalising cannabis and MDMA drugs will be instrumental to considering whether the supply of other (particularly lower harm) drugs should be provided by organised crime or through a regulated market designed to reduce harm.

# An independent body to lead reform

A taskforce with relevant expertise (including in public policy, drugs, health, law enforcement, law, economics and commerce), should be established to oversee and design the new legal, regulatory and administrative frameworks. The taskforce would comprise individuals both from within and outside the public sector.

The taskforce would make recommendations to the Queensland Government that have enough detail so that agencies can easily adopt them.

# Design the initial decriminalisation reforms

As discussed earlier, there are a number of decriminalisation models that could be adopted. The taskforce should analyse and make recommendations on the decriminalisation models it considers should be used for different drug types.

# Design a supporting regulatory framework

Principles that the taskforce should apply in designing a regulated legal drug market include:

- Regulation should not be so prohibitive that it is less expensive and easier to access black markets.
- Incentives should push potential consumers away from the highest harm substances.



- Information on product quality, dosage and potential harms should be readily available.
- Taxes, where applied, should not be so high that they sustain black markets, or so low that they encourage large uptake of drugs.

Regulatory design should build on those elements of existing regulatory frameworks considered to be working well. This is particularly the case for any legalisation reforms. Australia and Queensland already have an extensive regulatory framework for the growing, manufacturing, transport and supply of licit drugs. Queensland has a regulatory framework for industrial cannabis and medicinal cannabis. Other states (particularly Tasmania) have experience in the regulation of a legal poppy growing industry (Appendix H).

The taskforce will need to consider potential conflicts between medicinal and recreational regulation—for example, to ensure medicinal users are not incentivised to shift to recreational providers.

The design of the regulatory framework will need to also consider the institutional environment. For example, it should identify the institutions that should have an ongoing role in administering and enforcing the regime recommended by the taskforce. The uncertainties of a new market and the regulatory effects will necessitate ongoing policy development and a dynamic regulator.

The design of any regulatory framework also needs to consider proper governance arrangements, as poor incentives could arise from the government wearing 'many hats', such as being:

- regulator of a legal market
- beneficiary of revenues from drug sales
- possibly an owner of a business or other entity (such as, a drug testing body) operating within the legal market
- funder and/or provider of health and treatment services.

The taskforce will also need to address many aspects of the regulation of supply and consumption, such as public use restrictions, and will need to consider integration with existing policies, for example, policies on drug driving.

# Design the transition to a health-based approach

The taskforce should coordinate the design of the transition to a stronger emphasis on the health care of drug users. The process will need to include both public sector and non-public sector entities (for example, NGOs active in health service provision), and a combination of bodies that are active in the provision of policy advice and bodies that bring strong service delivery expertise.

# International and Commonwealth laws and policies

One of the issues that the taskforce will be confronted with is the extent to which international obligations and Commonwealth law and policy provide impediments to reform in Queensland.

Legalisation from Queensland in isolation from the Commonwealth and other states and territories would give rise to cross-border regulatory differences. It would be preferable for the Commonwealth and other states to take a unified approach to drug reform, likely through COAG. However, there are benefits to Queensland reforming, regardless of whether the rest of Australia adopts a similar approach.

Some of the issues the taskforce will need to consider are:

- overlapping Commonwealth–Queensland policies and laws that affect supply-side reforms, such as integration
  of reform proposals with the existing regulatory framework for the cultivation, manufacture, transport and
  supply of licit drugs
- the restriction on applying a state tax on legal drug transactions imposed by *section 90* of the Constitution, and the options that this leaves the state to influence prices in a legal market



- any potential outright conflict between Commonwealth law and Queensland reform, particularly in relation to obligations under the UN conventions (Box 13.13)
- the implications of Commonwealth laws concerning the import and export of illicit drugs, as these laws will likely remain in place for the foreseeable future
- overlapping areas of responsibility between the Commonwealth and Queensland governments in many areas of service delivery that will be impacted by the transition to a health-based approach.

### Box 13.13 Obligations under UN conventions

The UN conventions do not oblige states to criminalise drug use and possession—a clear distinction is made with trafficking (Bewley-Taylor & Jelsma 2012, p. 6; INCB 2019). Latitude also exists where implementing the conventions conflicts with constitutional and other legal principles of a country, as the Netherlands, Alaska and Germany have put forward, and as courts in South Africa, Argentina and Mexico have found in regard to cannabis.

Australian states have already implemented decriminalisation measures without obstruction from the Commonwealth.

On the other hand, extending reforms to the creation of legal markets of supply would appear to be a violation of the conventions:

[A] legal regulated market for non-medical use of cannabis or any other scheduled drug is not permissible within the treaty framework. (Bewley-Taylor & Jelsma 2012, p. 1)

Nonetheless, legalisation has been achieved in a number of jurisdictions. States have addressed the obligations in various ways:

- Uruguay argued that its policy is in line with the original objectives of the treaties and when there is conflict, the more foundational human right obligations prevail over drug treaty obligations (Jelsma et al. 2018, p. 10).
- Bolivia withdrew from the treaties in 2009, changed its constitution to allow the legal consumption of coca and then re-acceded with reservations (Room & MacKay 2012).
- Canada acknowledged its legalisation of cannabis puts it in violation of drug conventions and cited
  that prohibition simply did not work and the change would better protect the safety and health of its
  people (Hulan 2018).
- The Netherlands has addressed its obligations since the 1970s by maintaining prohibitive legislation but not prosecuting aspects of the law, including for low-level offences and coffee-shop supply (Bewley-Taylor et al. 2014, pp. 33–34).
- Twelve American jurisdictions have moved to legalise the recreational use of cannabis, which conflicts with federal laws. United State officials have argued that since cannabis cultivation, trade and possession remain offences under federal law, the United States remains in compliance and there is sufficient flexibility in the framework allowing for regulated cannabis drug markets (Jelsma et al. 2018, p. 8).

The INCB has publicly admonished states it considers to be in violation of the treaties (INCB 2013, 2018a, p. 36). However, the INCB does not have the authority to enforce its directives.



### An indicative timeline for reform

Key uncertainties that will affect the extent and timing of reforms include the preferred approaches adopted by government, the time it takes to establish supporting regulatory reforms, and discussions with the Australian Government concerning obligations under the UN conventions and options for tax arrangements.

With these uncertainties in mind, an indicative timeline for reform is provided in Figure 13.11.

Figure 13.11 An indicative timeline for reform

Within first year	Establish a Taskforce on Drug Reform  Design decriminalisation reform options  Design and assign a monitoring and reporting function
Within 2 years	Review alcohol and drug treatment services  Design the transition to a health-based approach  Adopt preferred decriminalisation model  Design supporting regulatory frameworks for legalisation of cannabis/MDMA  Coordination with the Australian Government
Within 3 years	Create a legal, regulated market for cannabis and MDMA Establish regulatory agency
After 5 years	Ongoing implementation of evaluation plan Subject to evidence from evaluations, extend legalisation reforms to other drugs starting with those that are least harm Ongoing monitoring and public reporting

# 13.10 Summary

All available evidence suggests drug prohibition is not an effective or efficient policy.

The results of the CBA undertaken for this inquiry suggest that there are significant net benefits from moving away from a policy of criminalising drug users.

While there are uncertainties on the impacts of reform, these risks can be reduced by careful reform design and the development of a supporting regulatory framework.

Four main policy changes are needed:

- to significantly scale back the use of the criminal law as an instrument to deal with drug consumption
- to develop a supporting regulatory framework that will better manage problematic consumption
- to rebalance policies and resources towards a health-based approach
- to move, in the longer term, towards a legal, regulated market for the supply of drugs, although this will need careful design and planning.



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#### Recommendation 6

The Queensland Government should adopt a more effective approach for managing the supply and use of illicit drugs. This approach should aim to:

- reduce harms from drug use
- substantially reduce organised crime in Queensland
- establish effective regulatory approaches to manage drug use and supply
- reduce costs that drug use places on the criminal justice system, including through imprisonment.

The government should establish a reform taskforce as soon as practical to progress reforms. This taskforce should monitor and assess the impacts at each stage of reform and report to parliament on their effects.

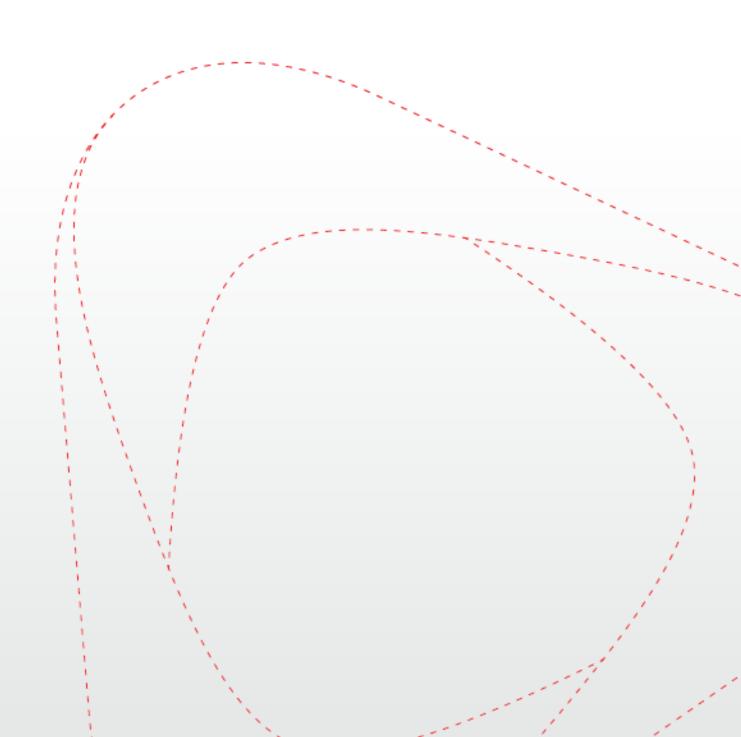
#### Recommendation 7

Under an overarching policy of legalised and regulated supply and possession, the Queensland Government should:

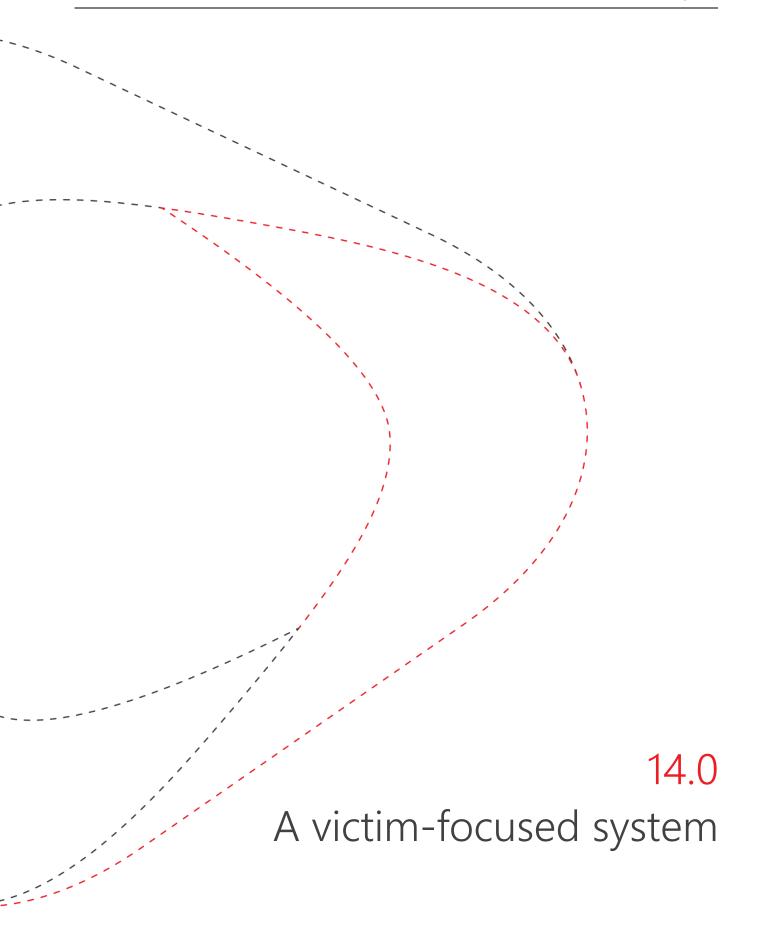
- For lower harm drugs, introduce a staged approach to reform:
  - Stage 1: Decriminalise the use and possession of lower harm drugs
  - Stage 2: Expand health support and drug treatment services to reduce drug harm
  - Stage 3: Design a regulatory framework for the supply of cannabis and MDMA
  - Stage 4: Legalise use and regulated supply of cannabis and MDMA
  - Stage 5: Subject to evaluation of evidence, extend reform to other lower harm drugs.
- For higher harm drugs, investigate and develop the optimal sequencing of further reforms to move from a criminal approach to a health-based and regulatory approach. As an initial step, imprisonment should be removed as a sentencing option for the use or possession of higher harm drugs.

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This chapter proposes a fundamental change to the role of victims in the sentencing process, with significant implications for the criminal justice system and the use of prisons. Focusing relatively more on victims means focusing relatively less on punishment through imprisonment.

#### Key points

- While improvements have been made to recognise and address the harm resulting from crime, victims
  are still largely peripheral to the criminal justice system. Assistance provided to victims offsets only a
  fraction of the harm done, and victims have no effective role in sentencing. This has consequences for
  the effectiveness of the criminal justice system, including how prisons are used:
  - Incentives to report crime are reduced—this means many crimes go unpunished, while harsher sentencing is encouraged for those that are apprehended.
  - The need for imprisonment is increased—whereas restitution to victims and restorative justice processes can provide effective substitutes to imprisonment (at least for lower harm crimes) and can reduce the severity of court sentencing for higher harm crimes.
  - Opportunities are missed to reduce recidivism—as evaluations of restorative justice processes have found that they are a cost-effective way to reduce reoffending.
  - For victims and offenders for whom restorative justice practices are suitable, the processes have been found to increase victim satisfaction with the criminal justice system.
- Consultations and stakeholder submissions provided strong support for an expansion of existing restorative justice processes.
- The purposes of just punishment, deterrence and rehabilitation could be better achieved under a victim-focused sentencing process. The process would introduce an option that would reduce the need for imprisonment and improve the community's confidence in the criminal justice system.
- Key features of the process should be:
  - Prior to a case being brought to court, the victim is given an opportunity to choose between
    whether sentencing should proceed under a mediated restitution and restoration process, or under
    normal court processes.
  - Victims and offenders agree a course of action that satisfies both the victim and the offender.
  - If the victim's demands are unreasonable, the offender will not proceed with the agreement.
  - Where agreement is reached, there are two options: the agreement is taken into account in the
    decision to proceed to court; or the outcomes of the agreement are taken into account in
    sentencing, with sentences modified accordingly.
  - Where a secondary or residual public interest remains (for example, in deterring other offenders), cases proceed to court for further court action in addition to any agreement outcomes.
  - The proposal for a more victim-focussed system should apply for all types of offences involving harm to an identifiable victim.
- Under reasonable assumptions, the proposal may reduce average imprisonment levels by 453 persons by 2030–31, thereby reducing government expenditures by upwards of \$40 million.



# 14.1 Introduction

While improvements have been made over recent decades in recognising and addressing the harm done to victims, victims are still largely peripheral to the criminal justice system, other than as a potential witness. This has consequences for the effectiveness of the system, including how prisons are used.

A system more focused on the restoration of victims may also benefit offenders, and the general public, through lowering reoffending and the prison population. There is an opportunity, at least for lower harm offences, to use restitution and restorative justice processes more and prison less.

The proposal is one of several strategies canvassed in this report to reduce the interactions of relatively low harm offenders with the criminal justice system, thereby reducing the risk of progression towards higher harm crimes and imprisonment.

The terms 'low harm' and 'high harm' refer to the ranking of offences by their relative levels of seriousness or harm (for example, murder versus common assault). A lower harm offence may still involve significant negative impacts on a victim.

The criminalisation discussion in Chapter 12 focused mainly on offences where the justification for criminalisation was one of the extensions of the harm principle where, typically, an offence does not involve direct harm to another person. This chapter focuses on those offences where there is direct harm to an individual identifiable victim (offences are listed in Figure 14.1).

Figure 14.1 The primary focus of criminalisation and victim-focused reform



Note: In terms of the classification of offences, the focus here is on ANZSOC divisions 01 to 08 (Chapter 12 has more significant implications for offences classified in ANZSOC divisions 09 to 16).

Source: QCS unpublished data; QPC estimates.

A system that provides greater focus on victims is not only likely to build greater confidence in the criminal justice system, it will also provide for a greater range of non-prison options for dealing with offending behaviours.



# 14.2 Current assistance for victims

# Restitution and compensation orders

Under the *Penalties and Sentencing Act 1992* (Qld), the court can make restitution and compensation orders to be paid by an offender to a victim. These orders can provide monies to the victim and return of property.

A restitution and compensation order can be applied in addition to any other sentence, such as community service orders. If the offence caused any injury to any person (not just the actual victim of the offence), compensation may also be ordered.<sup>91</sup>

Failure to comply with a restitution or compensation order can result in the offender being arrested and taken into custody. The offender may again be dealt with for the original offence. Alternatively, the court can extend the time period over which the payment is to be made (ss. 38).

An offender convicted in a Magistrates Court of an offence relating to property may be released with no sentence imposed if the offender pays damages (which may include that person's legal costs) to the person who is entitled to the property (Caxton Legal Centre 2019).

In 2016–17, Queensland courts made 14,857 restitution and compensation orders, comprising 3,058 compensation orders and 11,799 orders for restitution of property (unpublished DJAG data). In comparison, there were 266,681 reported offences against person or property in the same year (QPS 2019d).

### Victim assistance programs

Some of the types of assistance provided to victims include:

- the Victim Coordination Program run by Victim Assist Queensland, which helps victims of violent crime through the court process, including referrals to agencies for support and support for attending court
- the Charter of Victims' Rights, which describes the way a victim should be treated, as far as practicable and appropriate, by Queensland Government agencies and non-government organisations
- the victim register, which allows the victim to receive information on the facility to which the sentenced offender has been assigned, the offender's parole application if relevant and the date they are eligible for release.

Under the *Victims of Crime Assistance Act 2008*, the Queensland Government provides a range of financial assistance to victims of crime (Box 14.1).

<sup>&</sup>lt;sup>91</sup> Section 35 states that a court may order an offender to make restitution of property; pay compensation to a person for any loss or destruction of, damaged caused to, or unlawful interference with, property; and/or pay compensation for personal injury suffered by a person because of the commission of an offence. In this chapter, the use of the term 'restitution' has a broader meaning than in s. 35. It covers the restitution of property, financial compensation and other forms of 'compensation' that might be agreed between an offender and a victim.



#### Box 14.1 Financial assistance from the Queensland Government

Victims of acts of violence may be granted financial assistance.

If a victim's application for financial assistance is approved, then monies to cover some or all of the costs associated with the victim's recovery may be provided, including:

- · medical and counselling costs, and other reasonable expenses to help recovery from an injury
- loss of earnings (up to \$20,000—special conditions apply)
- crime scene cleaning costs
- legal costs incurred in applying for assistance (up to \$500—special conditions apply) and funeral costs (up to \$8,000).

The total amount of assistance granted will vary depending on the victim's individual circumstances.

A primary victim may also be eligible to receive a special assistance payment of up to \$10,000. A related victim may be eligible to receive a distress payment of up to \$10,000 as well as a dependency payment.

In total, a primary victim may be granted up to \$75,000. Other victims may be granted up to \$50,000.

Source: Queensland Government 2017a.

From December 2009 to March 2019, the total number of applications for victim financial assistance was 23,070, of which 17,652 have been finalised. Of the 17,652 finalised applications, 1,704 applications did not receive funding, as they were assessed as not eligible. Of eligible applications, 12,556 were for assistance to the primary victim of the crime, with an average grant amount of \$8,275 (DJAG 2019) (Figure 14.2).

Of the applications for assistance to the primary victim, most involved offences that were assault-related, followed by domestic violence and sexual offences. The largest grants (on average) were provided for murder (in relation to domestic violence) and sexual offences.



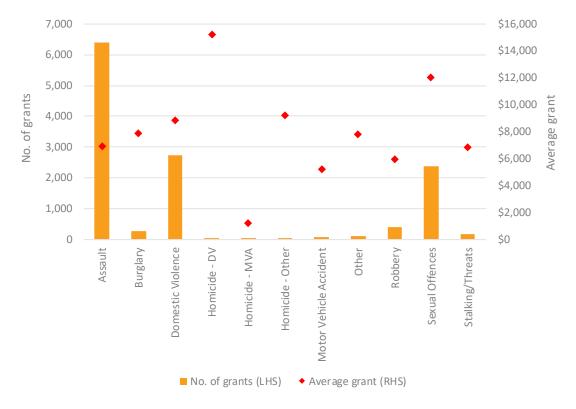


Figure 14.2 Applications for victim financial assistance, primary victims, December 2009 to March 2019

Note: The Victims of Crime Assistance Act 2009 defines a primary victim as a person who dies or is injured as a direct result of the act being committed against the person. Apart from the primary victim, financial assistance may be available for the categories of parent secondary, related, witness secondary and funeral only. A 'parent secondary' victim is the parent or carer of a victim (under 18) injured as result of becoming aware of the act of violence. A 'witness secondary' victim is someone who is injured because they saw or heard the act of violence. A 'related victim' is a close family member and financial dependants of a person who has died as a direct result of the act of violence. A person who, under Aboriginal tradition or Torres Strait Island custom, is regarded as a close family member may also be considered. Source: DJAG 2019.

# Adult restorative justice in Queensland

#### Restorative justice is:

[A] process by whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future. (Marshall 1996, p. 37 cited in Larson 2014, p. vi)

Restorative justice processes differ from the conventional criminal justice system in the following ways:

- The crime is perceived as a conflict between individuals, which has resulted in harm to victims and communities.
- Emphasis is placed on repairing the harm caused by offending and restoring relationships.
- An opportunity is provided for active participation by victims, offenders and communities (Larson 2014, p. 2).

Restorative justice processes can take many forms, including restorative justice conferencing (RJC); offender-victim mediation (direct or indirect), and offender-victim reconciliation meetings; reparative panels; community justice panels and circle sentencing; and restorative reintegration services, such as Circles of Support (New Zealand Government 2016, p. 2).



The most common form of restorative justice service or program in Queensland, Australia and New Zealand is the RJC. Other variations on the restorative justice model are also in operation in Queensland (Box 14.2).

In Queensland, RJCs are provided for crimes committed by youth and adults. Queensland's adult restorative justice conferencing (ARJC) service is available at any stage of the criminal justice process. 92 It involves a voluntary meeting between the offender, the victim and their respective communities of support to discuss the offence, its impacts and the steps the offender can take to redress the harm caused. If there is agreement, the ARJC service can monitor it for compliance.

In 2017–18, there were 2,273 referrals to Queensland youth restorative justice conferencing (45 per cent were police referrals), and 1,412 conferences were held (Department of Child Safety, Youth and Women 2018). 93

Restorative justice is used much less frequently in adult criminal justice processes. Over 2017–18, there were only 358 referrals to the ARJC and 184 conferences held (DJAG unpublished data). Although used less frequently, the ARJC service achieved a 92 per cent satisfaction rate amongst victims and offenders, and a 96 per cent compliance rate with outcomes agreed to in ARJC (DJAG 2018b, p. 4).

### Box 14.2 Mornington Island Restorative Justice Program

The Mornington Island Restorative Justice Program was initially funded by the Australian and Queensland governments in 2008 and managed by the Queensland Department of Justice and Attorney-General. The Junkuri Laka Justice Association has been operating it since 2011.

The model, which was developed in consultation with families and Elders, uses a culturally sensitive approach to resolving and minimising community conflicts to prevent conflicts from escalating. It differs from the Queensland Government ARJC model and New Zealand restorative justice models in that it is mainly a community peacemaking process rather than an element of the traditional court-based criminal justice process, although most referrals are from police and courts. The courts still consider serious crimes.

An evaluation conducted in 2014 found that the program produced positive results. Over 90 per cent of survey participants indicated that 'mediation sorted out trouble better than police or court' at least sometimes, and 89 per cent considered that it stopped adults getting into trouble with police and courts at least sometimes and that mediation made them feel safer.

In 2017–18, the Mornington Island Restorative Justice Program had approximately 104 mediation files with a resolution rate of 86 per cent.

Source: DJAG 2018a, p. 37; Colmar Brunton 2014, pp. 80, 93, 112.

# 14.3 Victims remain peripheral to the system

### Assistance addresses a small fraction of harm

Victim assistance measures address only a small number of the cases involving harm to victims:

• Financial Assistance Grants help address the harm to victims but are only provided in relatively few cases. Of the 297,093 reported offences against the person between December 2009 and March 2019, only 12,556 assistance grants were provided to victims—equivalent to 4 per cent of offences (DJAG 2019; QPS 2019d).

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<sup>&</sup>lt;sup>92</sup> All ARJCs run by the Dispute Resolution Branch of the Department of Justice and Attorney-General are conducted under the *Dispute Resolution Centres Act 1990.* 

<sup>&</sup>lt;sup>93</sup> The Department of Child Safety, Youth and Women (2018b) provides an interim evaluation of the Restorative Justice Project for youths.



- Restitution and compensation orders accompany only a small fraction of crimes involving harm to a victim.
- Adult restorative justice processes are provided for a relatively small number of criminal defendants.
- Victim Impact Statements are the only means by which victims can influence sentencing. The statements describe the effect of a crime on a victim—how the crime has harmed the victim and affected their life—but provide no mechanism for the victim to seek reparation.

### No role in sentencing

Victims have no authority in sentencing for any criminal offence.

For crimes involving harm to individual victims, harm is internalised by the victim of the crime and the victim's close family and friends. For example, physical assault injures the victim, but also those close to the victim through their empathy (care) for the victim. Crime can also impact a victim's behaviour in a way that can damage relationships and even reduce their ability to earn an income and care for their family.

Some harm may be externalised to the community more broadly, such as when crime in one location contributes to a heightened concern for personal safety across many locations. To restore personal safety, individuals may forego activities that they prefer (such as walking through parks alone) and buy things they would have preferred not to (such as bars on windows). However, the fraction of harm that is externalised is rarely sufficient that it can be said that crime is against the community or the state rather than the individual.

Nonetheless, the criminal justice system denies the victim of a crime from playing any significant role in the redress of the criminal act. Instead, a criminal act is treated as an offence against the law, with the state as the main party to the dispute. The punishment of crime then involves 'debts' paid to the state, rather than to the victim.<sup>94</sup>

A survey of NSW residents in 2011 found that almost 87 per cent of respondents agreed that victims of theft, vandalism and assault should have the opportunity to inform offenders of the harm caused, and roughly 74 per cent agreed that victims should have a say in how the offender can make amends (Moore 2012). The study concluded that 'principles underpinning restorative justice initiatives are well supported by the community'.

Similar results were found in the United Kingdom, with 94 per cent of survey respondents agreeing that people who have committed offences, such as theft and vandalism, should be required as part of their sentence to do unpaid work in the community, 88 per cent agreeing that victims should be given an opportunity to inform offenders of the harm caused, and 71 per cent agreeing that victims should have a say in how the offender can make amends for the harm caused (Prison Reform Trust 2011, p. 1).

# 14.4 Consequences of the current system

# Reduced incentives to report crime encourages inefficient sentencing

The lack of restitution and restoration of victims reduces incentives to report crime:

Results indicated that payment of restitution, perception of fair process, and good interpersonal treatment were positively related to victims' willingness to report crimes in the future but that satisfaction with information about the process was not. (Ruback et al. 2008, p. 697)

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<sup>&</sup>lt;sup>94</sup> Chapter 12 discusses acts that are sufficiently harmful to warrant the condemnation of the criminal law, and how these acts, in addition to the harm caused to individuals, can damage social norms or values.



This is because victims tend to report crime with a view to what reporting will accomplish, not because of an obligation to report:

When victims decide whether to report a crime, their decision rests largely on what they think reporting will accomplish. For example, among reporters of property crimes, the most common reasons given for reporting are to recover property or collect insurance (32%), to prevent this crime or to prevent further crimes (15%), or to catch or punish the offender (12%) (Matson & Klaus, 2003, table 101). Only a small percentage (7%) report because they feel a duty to report the victimization. In fact, if victims report only to realize specific goals, they are likely to be disappointed because most reported crimes are not solved, and, even if there is a conviction, victims are unlikely to have their property restored. (Ruback et al. 2008, p. 698)

Reporting rates are 60 per cent or less for all offences other than break-ins and motor vehicle theft. Reporting rates for attempted break-ins, other theft and face-to-face threatened assault are around 40 per cent (meaning that 60 per cent of these offences are not reported to the police) (Table 14.1).

Table 14.1 Reporting rates, selected offences, Queensland 2017–18

Offence	Reporting rate (%)
Physical assault	60
Break-in	74
Malicious property damage	53
Attempted break-in	44
Other theft	39
Face-to-face threatened assault	43

Note: Non-face-to-face threatened assault, robbery and sexual assault rates in most years have higher relative standard errors and should be used with caution. Therefore, they have not been included in the table.

Source: ABS 2019d.

Weak incentives to report crimes mean that crimes can go unpunished. This in turn creates an environment in which the deterrence for committing an offence is lower than would otherwise be the case for any given level of punishment (since an offender knows they are less likely to be punished). Crime, for those would-be offenders who are reasonably responsive to incentives, is typically considered to be deterred by two factors: the probability of being punished and the severity of that punishment. An increase in one can be offset by a decrease in the other to keep the level of deterrence fixed. For example, policies that lead to increases in reporting and conviction rates can provide 'room' for reducing the severity of sentencing (whether the level of a monetary fine or average sentence length) without reducing deterrence.

# A focus on state punishment increases the need for imprisonment

Restoration of the victim is a potential substitute for court-applied sanctions including imprisonment. A significant proportion of prisoners in Queensland prisons are sentenced for low harm offences. Restoration has the potential to stop the flow of offenders of low harm crimes against an identifiable person into prison.

There was support for viewing restitution/restoration as a substitute for imprisonment:



Prison should be an absolute last resort and certain offences should never lead to prison. As the Inquiry Issues Paper highlights there are alternatives available (such as home detention, forfeiture and restitution, and restorative justice). (QCOSS sub. 20, p. 13)

The criminal justice system should have incentives for restitution. Of the alternatives to prison, restitution is the only punishment that explicitly puts the needs of the victim first; before inquiring into any other interests of justice, where possible we ought to incentivise making the victim whole. (IPA sub. 11, p. 62)

[I]ncarceration actually requires the victims of crime to pay to punish the victim as their taxes are spent on incarceration. And given the host of issues prisoners face upon release, such as poor health and employment outcomes, there is likely to be a greater impost on the victim through publicly funded health care and unemployment payments. (IPA sub. 11, p. 62)

For lower harm offences, restoration can fully substitute for court-imposed sanctions even if offenders have little financial capacity for restitution, because restitution can include both financial and non-financial 'payments' (such as the provision of services to the victim or the community requiring only the offender's labour).

For medium and higher harm offences, restoration could provide a partial substitute for court sentencing. However, this can also reduce the prison population if courts take account of the restoration efforts of the offender and reduce the severity of sentences accordingly (for example, where the court reduces sentence lengths).

Even where courts are unlikely to impose a prison sentence, restoration processes can reduce reoffending leading to a reduction in the prison population over time.

# Uniform approaches when circumstances differ

The criminal justice system tends to follow uniform approaches to problems rather than respond to significant differences in victims and offenders and their respective needs. However, there is significant variation in:

- the level of harm caused to victims from similar actions—the same offence can result in widely varying levels of harm depending on the characteristics of victims, any relationships between the victim and offender and the circumstances in which the offence was committed
- offenders' responses to the same set of incentives—policy settings that strongly deter some would-be offenders may be highly ineffective for other would-be offenders
- victims' desired responses to the harm
- remorse expressed by offenders to the harms they have caused.

A system with uniform approaches can cause problems when there is widely differing underlying conditions:

Victims of similar criminal acts oftentimes suffer significantly different harms ... however, the law is unable to impose accurate sanctions based on actual harms because information problems pervade the criminal justice system. Criminals oftentimes do not know who the high harm victims are ex ante. Courts oftentimes cannot confirm certain types of harms ex post... [and] cannot always utilize the information they have in their possession. As a result, the law commonly treats dissimilar cases alike. Within large bounds, law imposes the same expected sanction on crimes inflicting different levels of harm. (Mikos 2012, p. 94)

The result is a certain level of victim and community dissatisfaction with sentencing.<sup>95</sup> This in turn, at least anecdotally, may have driven a rising number of ad hoc legislative and system changes contributing to the increase in imprisonment without necessarily keeping the Queensland community safer.

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<sup>&</sup>lt;sup>95</sup> See Bartels et al. 2018; Gately et al. 2017; Lovegrove 2007; Mackenzie et al. 2012.



# Missed opportunities to reduce recidivism

The very small scale of adult restorative justice processes in Queensland forecloses one avenue for addressing high recidivism rates.

Restorative justice conferencing can reduce reoffending:

The main results ... were that for offenders who participated in a Police or court-referred [Restorative Justice] RJ conference, 34% reoffended over the following 12 months. This is in comparison to 39% of otherwise similar offenders who did not participate in an RJ conference.

This reduction in reoffending is in line with the international evidence. The reduction in reoffending was larger for those offenders who had committed property damage and dishonesty offences. (New Zealand Government 2016, p. 3)

Reviews have found supporting evidence from New Zealand and other countries:

The latest reviews of high quality international evidence have found that restorative justice (RJ) conferencing reduces reoffending.

This conclusion is supported by robust research from New Zealand.

The latest results from New Zealand research show that for every 15-20 low-risk offenders participating in a conference, one fewer will be reconvicted. (New Zealand Government 2016, p. 1)

[T]he international and New Zealand research allow us to safely conclude that RJ conferences for adult offenders reduce reoffending. (New Zealand Government 2016, p. 3)

Further evidence on the impacts of restorative justice, and the theory behind restorative justice are discussed in Box 14.3.

In-prison restorative justice programs can also assist in reducing recidivism. From its experience working with prisoners in Australia since 1979, Prison Fellowship Australia considers that restorative justice practices can reduce recidivism and that, in general, offenders are willing to participate:

- b) Prisoners are largely unaware of the personal impact of their crimes an important component of the rehabilitation process, and restorative justice is the best means of delivering this insight.
- c) Prisoners have been keen to undertake challenging restorative justice encounters in our experience, and have become more empathetic and aware of the effects of crime and experience reduced recidivism.
- d) The current approach does not facilitate crime victims/survivors with opportunities to meet their offender or as in Queensland a 'surrogate offender', and this is a barrier to the healing process for them. (Prison Fellowship sub. 22, p. 15)



# Box 14.3 Impacts of restorative justice

Recent evidence on RJC impacts on reoffending

Four meta-analyses prior to 2008 demonstrated that RJCs lead to lower rates of reoffending than standard processing through the courts system without RJCs. However, three other meta-analyses prior to 2008 came to the opposite conclusion.

Since 2008, several randomised controlled trials of RJCs have been conducted, commissioned by the United Kingdom Home Office. These studies have substantially increased the amount of high-quality research about RJCs, rendering the conclusions of the older meta-analyses out-of-date.

Campbell Collaboration provided the first meta-analysis that took advantage of these new randomised controlled trials. The systematic meta-analysis was based on ten randomised controlled trials, seven of which were from the UK, one from the US, and two from Australia. The programs in all but three had restricted their sample to adults. There was a mixture of violent and property offenders across the studies.

The main finding from this meta-analysis was that in comparison to standard criminal justice processing without RJC, assignment to a restorative conference reduces subsequent offending, with an average effect size of d=0.155. This means that for a typical group of offenders of whom 20 per cent will reoffend, RJCs reduce the proportion who reoffend to 16 per cent.

Why might restorative justice processes perform better at reducing reoffending?

Restorative justice has the potential to reduce recidivism because it engages informal social controls through the inclusion of family, supporters and community representatives (Daly 2001) and the impact of meeting one's victim face to face (Strang 2002). Informal social control is widely believed to influence offending:

Hirschi's (1969) social control theory was grounded in the belief that bonds with prosocial values, people and institutions prevent people from engaging in criminal behaviour. The social bonds required to prevent rule-breaking are achieved through four elements—commitments, attachments, involvements and beliefs. In essence, the poor opinion that friends and families may have of an individual's deviant behaviour has the effect of inhibiting rule-breaking. (Larson 2014, p. 23)

The theory of reintegrative shaming (Braithwaite 1989) posits that restorative justice processes inhibit further offending, as they encourage reconnection with prosocial bonds, which helps reduce reoffending (Larson 2014, p. 23).

Stigma can play an important role in restorative justice compared to normal criminal court processes leading to different outcomes:

Conferencing, one of the more common forms of restorative justice, is thought to be more effective than court processes in reducing reoffending due to the different stigmatising effects of each. That is, stigmatising of offenders in traditional processes serves only to reinforce their deviant behaviour, whereas conferences stigmatise the behaviour and not the individual. (Larson 2014, p. 23)

Sources: New Zealand Government 2016; Strang et al. 2013; Larson 2014.



Prison Fellowship Australia's submission highlighted a number of reasons why restorative justice may help change the behaviours of prisoners and reduce reoffending:

The [Sycamore Tree Project] program and its themes of remorse, forgiveness, responsibility and restitution helps prisoners make a meaningful internal commitment to get off the cycle of offending. Prison officials spoke about prisoners gaining understanding of forgiveness and taking responsibility for their actions. (Prison Fellowship sub. 22, p. 5)

Concerns that restorative justice processes may increase offending because they are 'soft on crime' is not supported by the empirical evidence of impacts on recidivism, the views of some stakeholders who considered that shaming can have strong impacts on an individual, or the experience of those providing restorative justice services in prisons:

A common misconception is that restorative justice is 'soft on crime'. Prison Fellowship's experience is that the most confronting and challenging aspect for prisoners is to have to face crime survivors, albeit not the actual person, but someone who has experienced a similar crime. Prisoners often confide that such a meeting to them is more frightening and harder to deal with than anything else they have had to experience. Apart from the prisoners, crime survivors who participate in the STP corroborate that it is not 'soft on crime': (Prison Fellowship Australia, sub. 22, p. 7)

# 14.5 A victim-focused sentencing reform

#### Prioritise the victim's 'claim'

The purposes of sentencing would be better achieved under a victim-focused sentencing process.

The reform proposal is based on prioritising the victim's claim over the state's claim to pursue any one of the purposes of sentencing as set out in the *Penalties and Sentencing Act*, s. 9. Under this proposal, victims have an opportunity to seek restoration prior to court sentencing.

The victim's claim would be exercised through their choice of sentencing path.

#### Victims choose a sentencing path

Under the proposal, the authority is given to victims to choose whether to have sentencing proceed as per existing court processes, or along a path that encompasses a range of options from restitution through to restorative justice (Figure 14.3).

Some victims and offenders will be amenable to the more restorative aspects of the process, while others will be comfortable with a narrower focus on restitution (or compensation), whether financial or non-financial.

Restitution processes can be about more than financial compensation, and restorative justice can also entail a component of compensation—in practice, there can be significant overlap between the processes. Even where there is a strong focus on restitution to the victim, there can be benefits to the offender—for example, where it substitutes for court-imposed sanctions, such as imprisonment.

The balance between restitution and restoration will vary, given diversity in victims and offenders and evolving perceptions of the successfulness or otherwise of mediated outcomes.



Victim focussed approach, encompassing:
Direct and mediated victim-offender agreements
Restitution through to true restorative justice agreements

Offender does not agree, or victim not satisfied

Agreement presented to magistrates court residual public interest test

No further court action

(except program referral)

Figure 14.3 A victim-focused sentencing process for adult offenders

# A voluntary process

Through a facilitated or mediated process, victims and offenders agree a course of action that satisfies both the victim and the offender.

Evidence has shown that for a restorative justice approach to work, the process needs to be voluntary, and both the victim and the offender need to be committed to the process:

RJCs delivered in the manner tested ... appear likely to reduce future detected crimes among the kinds of offenders who are willing to consent to RJCs, and whose victims are also willing to consent. (Strang et al. 2013, p. 5)



Voluntary consent to participate strengthens compliance with agreed outcomes:

Participation in restorative justice programs is voluntary. As a result, offenders often comply with restitution agreements when they have followed a restorative justice program (Van Hecke & Wemmers, 1992). Offenders who do not accept their responsibility and who are not open to the idea of reparation will not enter a program. Thus, once admitted into a restorative justice program, offenders are prone to accept responsibility for their behaviour and repair the harm caused to the victim and, as a result, the victims of these offenders are likely to receive reparation. In their meta-analysis, Umbreit, Coates and Vos (2001) found that 90% of cases that are addressed through mediation end in an agreement. (Wemmers & Canuto 2002, p. 19)

If either the victim or offender does not agree to proceed along a restorative justice path, then the case proceeds in the usual way. This respects the wishes of victims and provides protection to both victims and offenders.

#### How the process would work

#### Point of referral

The Queensland Police Service (QPS) and/or the Office of the Director of Public Prosecutions (ODPP) communicates with the victim and informs them of their role in choosing how the case proceeds. If the victim chooses to use restorative justice processes, the QPS or ODPP is told of this choice.

To assist victims in their choice, basic information on the process and the options available to the victim are provided to the victim as soon as possible. This can be done in various ways:

- The investigating officer discusses the options with the victim and provides supporting information material (for example, a pamphlet).
- Information is provided through a web portal.
- A help desk can be established to give verbal assistance.

#### Mediation

How the restorative justice process proceeds will depend on the type of the process. A typical process might follow these steps:

- A mediator is appointed.
- The mediator meets with the victim (or their representative).
- Where the victim's focus is exclusively on restitution (financial and/or non-financial), the mediator enters directly into negotiations with the offender, if the offender is willing to participate. This may or may not involve face-to-face meeting/s between the offender and victim.
- Where the victim is willing to proceed along a restorative justice path, the mediator meets with the offender, forms a judgment on the appropriateness of such a path and advises both the victim and the offender. If both wish to proceed, the conference proceeds. The mediator facilitates discussions between the victim and offender, and provides advice on suitability, but does not have the final say on whether the process proceeds.<sup>96</sup>
- The mediator documents the agreement and presents it to the institution that will apply a residual public interest test (discussed below).

The functions of the mediator could vary—for example, the mediator could assist the victim in choosing the best way forward for the victim; mediate restitution; facilitate and arrange the supporting services for restorative justice processes; and provide restorative justice conferencing services.

<sup>&</sup>lt;sup>96</sup> There would need to be some exceptions, such as, where the mediator is of the view that the victim is being coerced by the offender to choose the restitution/restorative justice pathway.



The proposal encompasses the wishes of victims from a focus on restitution through to restorative practices. As the civil law has a long history of dispute resolution through mediation focused on financial compensation, the best design features from Queensland civil law might help in designing streamlined restitution-focused processes.

# Reaching agreement

#### Scope of actions under the agreement

The agreement between victim and offender could include many elements other than financial payments to the victim, particularly where the offender does not have the capacity to pay, or where the victim and offender are focused on restorative practices. For low harm offences, offenders with no financial resources can still pay restitution through their time or labour, for example, by cutting lawns, painting houses or assisting community organisations.

Victims would not have authority to seek some options currently available to the judiciary, such as custodial sentencing options. Historical options no longer acceptable to community standards, such as, corporal punishments, would also not be permitted.

If the victim is unreasonable in their demands, then the offender will not proceed with the agreement. The case returns to court for sentencing in the usual way.

#### Signalling partial victim satisfaction

The victim may acknowledge that the offender has bargained in good faith and has done what the offender is capable of in terms of restitution. However, this may not satisfy or fully restore the victim. The agreement should have a facility to acknowledge the efforts of the offender and the victim's view that the efforts fall short of restoration. The court would take the efforts of the offender into account when deciding whether further sentencing is required.

### Role of the court under the proposal

### Below a threshold, the court would be obligated to accept the conditions of the agreement

The agreement between the victim and the offender is presented to a Magistrates Court, accepted by the Court, and no further action is permitted except for the purposes of rehabilitation. This exception may be necessary in order to provide access to costly treatment or other forms of rehabilitation programs.

The agreement 'clears' the offender's debt. The approach has strong parallels to the operation of the civil law where wrongs are addressed between victims and offenders.

#### Where there is a 'residual' public interest, the court imposes a further sentence

Even where there is an agreement between the victim and offender to the victim's satisfaction, there will be cases where a secondary or 'residual' public interest justifies further court sentencing. Take murder as an extreme example:

- Through a mediator, the victim's family makes an agreement with the murderer. This agreement provides partial but nowhere near full restitution given the value of life, or provides no compensation focusing solely on the psychological and emotional elements of restorative justice.
- The agreement between the victim and offender is presented to the court. If no further action is taken by the court, then the purpose of the restoration of victims is not fulfilled, just punishment is not served, and there is



potentially under-deterrence of a serious violent offence. The agreement between victim and offender has not fully taken into account harms of the crime external to the victim.<sup>97</sup> An additional prison sentence is required.

However, given the prevalence of relatively short sentences in the total number of defendants sent to prison each year, most cases will not involve such a clear gap between what is required to restore a victim and the capacity of the defendant to deliver.

For offences receiving a sentence of imprisonment under current court processes, 100 per cent of the 'debt owed' by an offender is usually paid to the state in the form of time spent in prison—zero per cent is often paid to the victim. Under the proposal, say 50 per cent of the debt might be paid to the victim through some form of restoration and 50 per cent to the state or community through prison time or community supervision (these fractions would vary depending on judicial decisions and the specifics of each case). From an offender's perspective, the severity of sentencing might change little under the proposal, but a portion of the debt paid would be redirected towards the restoration of victims. From a broader community perspective, victim restoration is improved and there is a reduction in the resources consumed in imprisoning offenders.

A set of principles establishing a residual public interest will likely be based on the degree of harm relating to the offence (discussed in Appendix K). A range of other specific sentencing contexts will also need to be addressed, such as the existing role of indefinite sentencing where there is a high risk of further harm upon release from prison.

#### An alternative process

Consultations on the draft report raised a potential constitutional concern with the proposal to submit mediated agreements to the Magistrates Court, have a magistrate apply the residual public interest test, and, where the offence falls below the test threshold, be legislatively required to accept the conditions of the agreement and take no further court action (discussed further in Appendix K).

Assuming the constitution would in fact not permit the proposal as described above, then there are at least two options:

- The residual public interest test could be integrated with existing QPS/ODPP processes that determine whether an offender will be charged and whether the case will proceed to court.
  - Below the test threshold, the case would not proceed to court and no criminal conviction would be recorded.
  - Above the test threshold, the case would proceed as per normal court processes and judges would take into
    account the agreement in determining sentencing. How much of a sentence 'discount' is given would be
    subject to judicial discretion.
- Mediators could be required to include former judicial officers of a federal, state or territory court as part of their mediation (restorative justice) service.

Otherwise, the process would remain as set out in Figure 14.3.

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<sup>&</sup>lt;sup>97</sup> The presence of harms external to the individual victim can provide a rationale for some form of government (or court) intervention. The argument is that victims will make pre-cautionary investments to deter crime (to avoid being a victim of crime), but these investments only take into account the potential harm to the individual, and not the external harms. Therefore, from a social point of view, there may be under-investment in private measures to prevent crime. While the rationale of external harms may justify a significant policy intervention, it is unclear whether it justifies anything like the current state monopolised and almost entirely publicly funded criminal justice system (police services, court services and correctional services).



## Eligibility

#### Applies only to those crimes with an identifiable victim

The proposal would apply to crimes where there is harm to an individual/s identifiable victim. The process would not apply, for example, to offences against public property, victimless crimes, where there has been no harm, or crimes involving the risk of harm, such as certain traffic-related offences.

## Applies to all types of offences

The proposal would apply to all types of offences where harm has been caused to an individual identifiable victim/s (harm to their person or property). This would include offences that rank as high harm as well as low harm (the rationale for including high harm offences is discussed in Appendix K).

Some 'difficult' offences, such as gender-based domestic violence, may need to be transitioned under the proposal gradually, pending the development of appropriate standards, processes and the accumulation of evidence on outcomes.

As an approximation for the potential number of cases involved, Queensland higher courts and Magistrates Court finalised 30,621 defendants in 2017–18 involving offences where there was harm to an individual identifiable victim(s) (Table 14.2). Of these defendants, 6,929 received a sentence involving custody in a correctional institution.

Table 14.2 Queensland courts, number of finalised defendants by offence, 2017–18

ANZSOC offence divisions	Finalised defendants: total proven guilty	Custody in a correctional institution
Homicide and related offences	68	65
Acts intended to cause injury	7,394	2,948
Sexual assault and related offences	912	510
Dangerous or negligent acts endangering persons	6,549	712
Abduction, harassment and other offences against the person	490	66
Robbery, extortion and related offences	396	344
Unlawful entry with intent	2,218	1,018
Theft and related offences	12,594	1,266
Total	30,621	6,929

Notes: ANZSOC divisions 01–08 are used as an approximation of the number of defendants where the case involved harm to an identifiable individual victim. However, there are some offences within these divisions that are based on a principle other than the harm principle. Further, there are some offences classified within other ANZSOC divisions that may be candidates for inclusion under the victim-focused proposal, for example, certain fraud offences. Also, reporting rates are well less than 100 per cent, but there is some evidence of increasing rates. Therefore, the numbers in the table represent a conservative estimate of the maximum potential number of victim-offender mediations that could occur if all victims-offenders agreed to enter a restorative justice process, and the option was available state-wide. Source: ABS 2019e.



## Delivery of restitution/restorative justice processes

Depending on victims' responses to the proposal, a significant scaling-up of the provision of restitution/restorative justice processes in Queensland is likely to be required. This can involve an expansion of the existing model used in providing the ARJC. It can also involve the introduction of a community contracting model similar to that used for restorative justice in New Zealand (see Appendix K).

A community contracting model would support the provision of a wide range of approaches to restorative justice and allow approaches to be tailored to local and cultural conditions. Different types of entities could be contracted to provide services including small community-based organisations and NGOs. Some stakeholders considered that non-government provision assisted with achieving successful restorative justice outcomes:

Both the mediator appointed to mediate an RJSA and any facilitator of RJ conferencing program should ideally be independent of government and not a public servant. ... it is the experience of PFAQ that victims of crime and offenders tend to regard 'non-government employees' as more 'invested' in the RJ process, performing the role by choice, not as a member of a larger bureaucracy. In particular, PFAQ has found that offenders who participate in PFAQ programs, whether chaplaincy, visitation or the [Sycamore Tree Project] are impressed by the fact that PFAQ volunteers are willing to visit with them at largely their own expense or in their own free time, simply because they want to make a difference to their lives. Prisoners and victims are likely to view a referral to an independent mediator or RJ conciliator as a process worth investing in, rather than simply participating in another government process. (Prison Fellowship Australia, sub. DR027, p. 6)

A community contracting model would also align well with proposed Indigenous remote and regional service delivery reforms (QPC 2017).

## Incorporation of restorative justice principles

Consultations indicated some support for incorporating restorative justice principles into the *Penalties and Sentences Act*:

PFAQ is strongly of the view that restoration principles should be included as a sentencing purpose in the Penalties and Sentences Act ('the PS Act') since it considers those principles to be essential to an effective and fair sentencing framework.

If [Restorative Justice Sentencing Agreements] RJSAs are accepted as one form of sentencing (which PFAQ strongly supports), then the PS Act will need to be amended to reflect the purposes of restorative justice not only in the objectives and purposes of the PS Act (s 3) but also in the guidelines for sentencing (s 9). Further, RJSAs would have to be included as one of the forms of sentencing available under the PS Act along with the other options for sentencing presently available. (Prison Fellowship Australia sub. DR027, p. 4)

This could provide support for agreements both where agreements are submitted to magistrates or if agreements are submitted to the ODPP/QPS and influence the decision to proceed to court. The insertion of restorative justice principles would support the ODPP's *Director's Guidelines*, which are designed to assist the exercise of prosecutorial decisions, including when to proceed with a charge in the public interest. For both options, insertion of restorative justice principles may increase the likelihood that magistrates and judges give full consideration to the outcomes agreed by victims and offenders when considering further court sentencing.



## 14.6 Benefits and risks

## Impacts on Queensland's prison population

While significantly improved victim restoration is a worthy objective in its own right, the proposal is intended to provide one means for reducing Queensland's imprisonment rate for those types of offences involving harm to individual victims.

## Risks and benefits of a demand-driven system

Victim-offender demand for restitution/restorative justice is likely to increase if the option is seen as providing better outcomes for both victims and offenders. Demand is determined by the attractiveness of the service and is not rationed based on limited funding and queuing, or constrained by the referral decisions of police, magistrates and judges. In this sense, demand for the path is 'open-ended'.

The proposal provides for a form of a 'market test'. Over time, accumulated experience with the new system will inform participants on whether the system provides better outcomes for victims and offenders. Good performance will lead to an expansion in demand, while poor performance will lead to a contraction. Combined with an evaluation plan, early implementation of the proposal will provide learnings that suggest improvements over time.

Open-ended demand programs can pose risks related to the timing of costs and benefits, with implications for agency budget management. Another risk is that demand drives expanding mediation/conferencing costs, but the expected substitution for imprisonment does not occur. This might be because of judicial decisions that do not fully take into account victim and offender agreements, or because, rather than declining as expected, recidivism increases.

On the other hand, an important advantage of victims being able to drive the level of demand for restitution/restorative justice is that provision is less constrained by political, bureaucratic and judicial inertia and/or opposition to the processes.

#### Mechanisms through which the prison population may be impacted

The proposal would have an impact on the prison population through several mechanisms:

- an increase in crime and, therefore, potentially imprisonment, *if* the proposal leads to a system that delivers an overall reduction in deterrence compared to existing policy settings (this is not expected to be the case)
- offsetting effects on the prison population, which may occur where the proposal contributes to increased crime reporting rates due to the changed incentives for victims:
  - the increased reporting rates may increase the number of people presenting to court (flowing through the system) and the number of people sentenced to prison
  - on the other hand, the increase in reporting rates increases the certainty of punishment and, all else being
    equal, allows for a decrease in the severity of punishment while holding deterrence constant. More crime is
    punished, but there is the potential to punish it less severely. Or, severity can be held constant and the disutility from committing crime increased, at least for those persons who are relatively responsive to incentives
- for offences below the threshold, a reduction in the prison population resulting from an offenders' 'debt' or obligations being directed towards victims rather than paid to the 'community' through, largely, idle time spent in prison—restoration substitutes for prison time
- for offences above the threshold, a reduction in the severity of sentencing (reduced time spent in prison) to the extent that the judiciary takes into account an offender's efforts to restore victims
- a reduction in the prison population through a reduction in recidivism



- a reduction in medium and higher harm offences and imprisonment to the extent that the proposal restricts low harm offenders presenting to prison, and low harm offences are a pathway to higher harm offences and more severe prison sentences
- an increase in deterrence for 'inexperienced' low harm recidivists where restitution/restorative justice provides a
  more 'severe' outcome (or greater disutility from offending) than existing court sentencing. An example is where
  courts are following a sentencing hierarchy for an offender whereby early stage offences are given a severity of
  sentence below the harm done by the offence (the use of warnings are an example). In these cases, there is the
  potential that restitution/restorative justice outcomes result in an outcome more closely aligned to the principle
  of proportionality.

## Uncertainty concerning take-up rates

There is significant uncertainty concerning expected take-up rates of the option to enter into a restitution/restorative justice process, including:

- the percentage of victims who will exercise the option
- for those victims, the percentage of offenders who would voluntarily agree to participate
- whether victim and offender choices will change over time
- the extent to which magistrates and judges will take into account victim and offender agreements for offences above the test threshold, which will have a very large impact on the incentives facing offenders to participate.

Some evidence suggests that a large share of victims would be interested in a restorative meeting with offenders:

It is difficult to estimate the size of unmet demand in the [New Zealand] adult system, because relatively few cases are currently considered for conferencing and eligibility rules can be complex.

It is estimated that only about 6% of cases that are before the courts and that could be referred for RJ actually are referred. International survey evidence suggests that up to half of victims would be interested in a restorative meeting with the offender.

Applied to the annual figure of over 100,000 prosecutions in New Zealand, this suggests that if all victims were offered a restorative conference by default in New Zealand, demand would be much greater than can be met by the current scale of provision, even after the planned expansion. (New Zealand Government 2016, p. 6)

The proposal encompasses a broader range of interactions between victims and offenders than restorative face-to-face meetings; therefore, the potential for take-up by victims may be higher if victims and/or offenders know other alternatives are available, apart from restorative face-to-face meetings, which they may think are the more 'difficult' option.

### Illustration of potential demand

A reasonable base estimate of the potential number of cases where victims would choose restitution/restorative justice is the finalised defendants figures for higher courts and the Magistrates Court (Table 14.2). Based on that data in Table 14.2, we assume that the number of eligible defendants increases in line with population growth to 41,290 cases by 2030–31 (Table 14.3). If the proposed restorative justice processes contribute to a reduction in reoffending, then this would support a long-term decline in the number of eligible cases.

After making assumptions about the gradual increasing availability of the restitution/restorative justice services, and victim and offender choices and how they might change, we estimate 11,561 mediations may occur by 2030–31. We further assume that in 9,249 of these cases the conditions of the agreement are fully honoured.



Of these cases, it is assumed that 20 per cent involve a potential prison sentence under normal court processes. The other 70 per cent involve some other form of sentence not involving prison (for example, monetary fines). It is further assumed that the test threshold is set at a level such that one-third of the offences that would normally lead to prison fall below the threshold (the test threshold is where agreement outcomes are permitted to substitute for a court ordered prison sentence).

With these assumptions, in the initial year of operation the proposal results in 24 offenders not going to prison, growing to 653 offenders by 2030–31. To provide context, 9,431 defendants received a custodial order in higher courts and Magistrates Court in 2017–18, of which 6,929 orders were for custody in a correctional institution.

Table 14.3 Illustrative potential demand, higher courts and Magistrates Court

	Assum	ptions	Impact: case	es/offenders
Demand components	2020–21 (%)	2030–31 (%)°	2020–21 (no.)	2030–31 (no.)°
Maximum potential cases <sup>a</sup>			32,386	41,290
Gradual roll-out strategy: per cent of cases where restitution/restorative justice option is available	30	100	9,716	41,290
Victims who choose pathway <sup>b</sup>	10	40	972	16,516
Given a victim's choice, offenders who agree to participate	50	70	486	11,561
Cases reaching agreement with conditions fulfilled	70	80	340	9,249
Cases leading to a custodial sentence in a correctional institution under normal court processes <sup>d</sup>	21	21	73	1,979
Assume threshold test set at a level so that one-third of completed cases fall below the threshold	33	33	24	653
Reduction in imprisonment from substitution effect (no. of offenders who do not go to prison per year)			24	653
Conversion to prisoner Full-Time Equivalent basis <sup>e</sup>			17	453

a Assumes that the maximum potential number of cases is the 2017–18 finalised defendants numbers for higher and magistrates courts described in Table 14.2 incorporating finalisations for ANZSOC divisions 1 to 8.

Source: QPC estimates.

b 40 per cent take-up by 2030–31 is likely to be a conservative estimate as NZ evidence indicates this level of interest for restorative meetings between the victim and offender. As the proposal encompasses a broader range of processes than face-to-face meetings, which may be difficult for many victims (and offenders), take-up may be higher.

c For the 2030–31 figure, it has been assumed that underlying crime rates for acts against the person and their property continue to decline, plus some positive impacts of a reduction in recidivism rates due to restorative justice are observed. Overall, the rate of offences against property and persons are assumed to stay constant and offences increase in line with population.

d Derived by using data from Table 14.2 (30,621 finalised defendants proven guilty divided by 6,929 defendants who received a custodial sentence in an adult correctional institution from Higher and Magistrate courts).

e Downward adjustment applied to take account of those cases where there is particularly high harm within an offence classification with an average ranking of relatively low harm. Conversion to prisoner Full-Time Equivalent basis using average sentence lengths (for example '17' means 17 prisoner beds occupied for 365 days each).



## Significant cost savings

The proposal has the potential to contribute to a reduction in recidivism. It can also reduce criminal justice system costs:

The effects of RJCs on the frequency of repeat offending are especially clear as a supplement to conventional justice, with less certainty about its effects when used as a substitute. Yet RJCs may be seen as most appealing when they can both reduce crime and save money—starting with diversion from expensive court processes. (Strang et al. 2013, p. 47)

The fiscal impacts of the proposal are difficult to predict. There are multiple effects, some of which require resources and some that save resources.

The main budget impacts will come from:

- increased expenditure resulting from the provision of mediation (for example, RJC) services
- reduced court costs where agreements between victim and offender substitute for or reduce the need for court services and expenditure
- reduced recurrent prison costs to the extent that victim-offender agreements substitute for a sentence of imprisonment
- reduced prison system capital costs if restitution/restorative justice processes help address the state of congestion in prisons over time, thereby delaying investment in new infrastructure.

The potential budgetary implications of these impacts are significant (illustrated in Table 14.4). The proposal might, by 2030–31, reduce annual government expenditure by upwards of \$40 million in real terms—under the Table 14.3 assumptions above, and assuming that by then the program is fully implemented and victim and offender confidence in the process has increased. The financial impact would comprise:

- savings from avoided court costs being more than offset by new mediation costs, increasing expenditure by over \$9.6 million
- reduced annual prison costs of some \$50.4 million, driving an overall reduction in system expenditure.



Table 14.4 Illustrative expenditure savings from the proposal

	2020–21	2030–31
Take-up of option <sup>a</sup>		
Mediations (no.)	486	11,561
Mediations avoiding court action (no.)	160	3,815
Court and mediation expenditure		
Real criminal court expenditure <sup>b</sup>	-\$81,599	-\$1,941,951
Expenditure on mediations <sup>c</sup>	\$485,796	\$11,561,295
Net expenditure on mediations	\$404,197	\$9,619,344
Prison expenditure		
Avoided imprisonment (no. of offenders)	17	453
Average annual real cost of imprisonment (\$)d	\$111,247	\$111,247
Operating expenditure on prisons	-\$1,854,282	-\$50,433,685
Net expenditure impact	-\$1,450,086	-\$40,814,341

a Take-up assumptions are discussed in Table 14.3.

Sources: ABS 2019e; New Zealand Government 2016, pp. 1, 5; SCRGSP 2019a; QPC estimates.

There will be impacts on other criminal justice system expenditures, including:

- reductions in victim assistance expenditure programs, to the extent that victim-offender agreements reduce the demand for such programs
- a potentially sizeable benefit in cost savings if the proposal contributes to reducing prison congestion over time and this results in delaying investments in a new prison(s), or reducing the scale of needed investments.

b Assumes court costs avoided are all Magistrates Court costs at \$509 per finalisation (which are lower than District or Supreme courts' real recurrent expenditure per finalisation) and that real costs remain constant to 2030–31.

c Assumes an average real mediation cost of \$1,000 per mediation. Average RJC costs will be higher, but restitution-focused (compensation-focused) mediations will usually be lower.

d Includes real net operating expenditure per offender per day plus capital costs.



## Evidence from other jurisdictions on the cost-effectiveness of restorative justice

In the case of New Zealand, the average unit cost per conference was estimated at \$2,500 per completed presentence conference (in 2015–16 NZ dollars). Specialist conferences for family violence were estimated to cost about \$2,900 and sexual offending conferences an average of \$4,500. Nonetheless, restorative justice was found to be cost-effective, particularly when used as a substitute to the relatively more costly traditional court process (New Zealand Government 2016, p. 1 and 5).

Evaluations of RJCs have found that they are a cost-effective way to reduce re-offending:

[O]n average, RJCs cause a modest but highly cost-effective reduction in repeat offending, with substantial benefits for victims. A cost-effectiveness estimate for the seven United Kingdom (UK) experiments found a ratio of 8 times more benefit in costs of crimes prevented than the cost of delivering RJCs. (Strang et al. 2013, p. 2)

The estimated cost-effectiveness of RJCs is relatively higher in more recent studies, which take into account differences in the severity (cost or harm) of crimes (rather than using simpler count measures of crime). They also take into account economy- or community-wide impacts and not just impacts on the criminal justice system (Strang et al. 2013, pp. 44–46).

Demand for restorative justice could be expected to grow over time. If victims perceive that the options available to them under the proposal are successful in terms of victim restoration and/or offender restoration, then victims will more frequently choose those options. Mediators will play a role in this process, given their knowledge of previous outcomes, as will evaluations of the reforms.

## Other benefits

Other benefits of the proposal include improved protection for the liberty of victims, reduction in the level of coercion over offenders and improved economic efficiency (Table 14.5). The proposal is unlikely to do worse than the current system in terms of reoffending, and in many contexts is likely to do better. It will perform significantly better in terms of victim restoration and avoiding prison for some relatively low harm offenders. For these offenders, the costs of imprisonment will often outweigh the benefits (Chapter 7).



Table 14.5 Assessment against other evaluation criteria

Evaluation criteria	Assessment
Offsetting the harm of crime	The objective is to restore victims to the state they were in prior to the crime, to the extent possible. The restitution and restoration of the victims of crime is given priority in sentencing over the interests of the criminal justice system, the state and offenders. The restoration of victims requires an active response on the part of offenders.
Liberty and coercion	By focussing more on victims, there is an opportunity to reduce the overall level of coercion exercised through the criminal justice system, and to reduce the interactions of offenders with the system. This is balanced against the stronger incentives to report crime.  The victims may benefit from the partial transfer of authority in sentencing. Harm is more fully addressed which accords with conceptions of liberty based on the right not to be harmed. Offenders are more frequently given the choice to actively right the wrongs through restitution to victims or restorative justice processes. They may personally benefit from these actions. Their liberty is enhanced where imprisonment is only used in those situations where the harm done is sufficient to justify the level of state coercive powers implied in exercising the option of imprisonment.
Economic efficiency	Cost effectiveness: empirical evidence suggests restorative justice conferencing is a cost-effective option for reducing recidivism.  Substitution effect: for offences below the test threshold, restitution/restorative justice practices replace imprisonment. This can reduce instances where the benefits from imprisonment are outweighed by its costs, including indirect costs, such as, impacts on the employability of offenders, with flow-on effects to future decisions to commit crime.  Incentives to commit crime: the proposal changes incentives for victims to report crime increasing the certainty of punishment and lowering the would-be offender's expected net gain from offending. If deterrence is held constant, the proposal allows for a reduction in the severity of sentencing to achieve the existing level of deterrence.  Reduction in information problems: some of the informational impediments to efficient judicial decision-making, such as understanding the harm to victims, are reduced or overcome, which should support a closer balancing of the severity of punishment with the harm done.  Allocative efficiency: if restitution/restorative justice processes are found to provide better outcomes for victims and offenders over time, then the proposal provides a demand-driven mechanism for increasing their relative importance in sentencing. If evidence does not support improved outcomes, then the option of restitution/restorative justice will only expand for use in those situations where evidence is favourable. Resource allocation across the criminal justice system where resource decisions are made by those who 'supply' court and other criminal justice system services.  Experimentation with community solutions: victim involvement in sentencing, and the potential
Legitimacy of the law	for community contracting models for the provision of restorative justice services, makes possible a wider range of community solutions to offending.  The proposal better reserves the stigma and denunciation value of the criminal law to those behaviours/acts which warrant community condemnation. The proposal helps reduce the problem of prisons being used for relatively low harm repeat offenders.



Evaluation criteria	Assessment
Community- stay and last resort principles	The <i>Penalties and Sentences Act 1992</i> states that, in sentencing an offender, a court must have regard to the principles that a sentence of imprisonment should only be imposed as a last resort, and a sentence that allows the offender to stay in the community is preferable. The proposal is consistent with both these principles as the actions under victim-offender agreements does not include custodial sentences, and the agreements, at least for harms below the threshold, will result in offenders remaining in the community.
	Sentencing involves two main and important types of errors: the error of convicting an innocent person; and the error of not convicting a guilty person. Criminal law processes provide safeguards against these errors.
Errors in sentencing	Restorative justice processes are more likely to result in successful outcomes when there is agreement on the basic facts of the case between participants. Like early plea bargaining, restorative justice can be subject to the criticism that it reduces offender safeguards making sentencing errors more likely. This criticism also applies to early plea bargaining, strict liability offences and deferred prosecution agreements. However, under the proposal the offender's agreement is necessary to commence the restitution/restorative justice process and both the offender and victim must come to a negotiated settlement. Further, some ninety-five per cent of offenders plead guilty, so the proposal is unlikely to lead to any net addition in the probability of errors occurring from reducing safeguards.

# 14.7 Summary

The proposal for a more victim-focused criminal justice system would result in a system that differs from the current one in the following key ways:

- Restorative justice processes (including more narrowly focused restitution processes) would be more central in responding to offences—capacity would need to be scaled up significantly to deliver these and supporting services. But, the necessary expenditures are more than offset by prison savings.
- The views of victims would be the driving force behind expansion. Restorative justice processes could perhaps
  expand only modestly, or more slowly over time than anticipated, depending on how the process comes to be
  viewed by the public.
- Restorative justice processes are commonly seen as an adjunct to existing sentencing policies. What is proposed, is providing for the restoration of victims, and a strong mechanism that allows for victim-offender agreements to substitute for prison for low harm offenders.

Prioritising victim restoration over other purposes, including the sentencing purposes currently contained in the *Penalties and Sentences Act*, is likely to better achieve those purposes incidentally. By prioritising the victim's claim over the state's claim and allowing victims to choose a sentencing pathway, benefits are likely to be achieved for victims and offenders compared to current outcomes:

- For individual victims, there is a significantly enhanced opportunity for restoration.
- For lower harm recidivists committing an offence against an identified victim, there is an increased likelihood of restoration and a lower likelihood that 'punishment'—or making amends—will take the form of imprisonment.
- For medium to high harm offenders, there is an expanded opportunity for restoration and for having agreement outcomes taken into account by the judiciary when sentences are determined.



It is important to note that the proposal is unlikely to displace imprisonment as a punishment for most offences—the option is voluntary and may not be accessed by a large number of victims, particularly during its initial phase. It will also need to be carefully designed and implemented. Overall, however, the proposal is likely to improve outcomes, reduce imprisonment, reduce recidivism and increase community confidence.

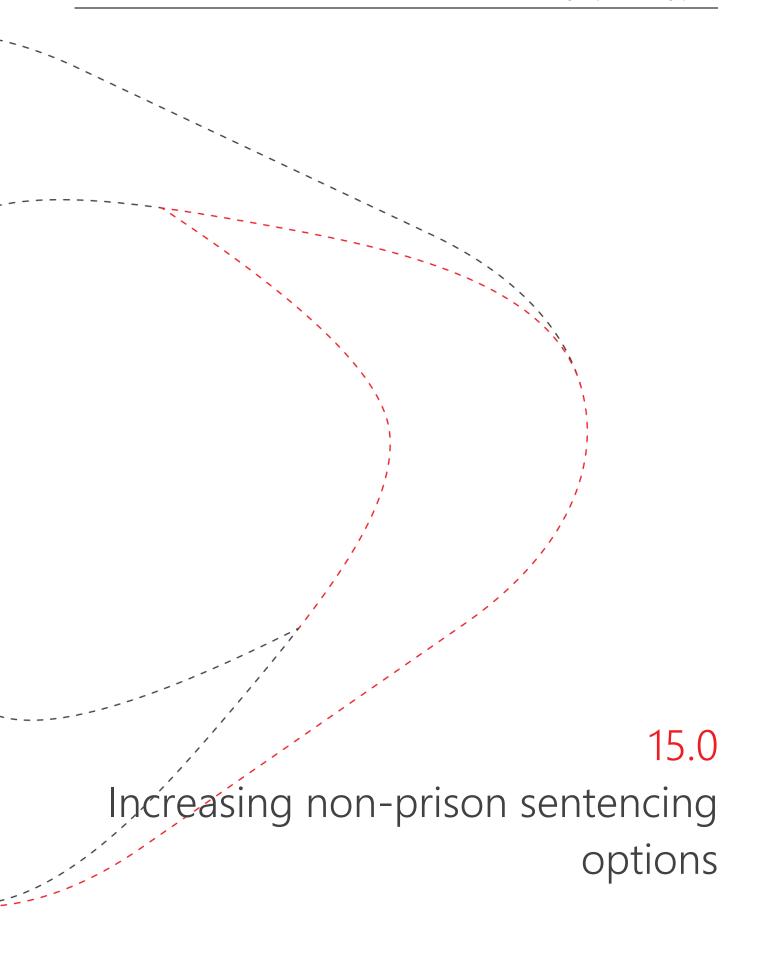
#### Recommendation 8

The Queensland Government should introduce victim-focused restitution and restoration into the sentencing process. This system should:

- give victims the option of engaging in a process of restitution and restoration with the offender prior to sentencing
- provide victims and offenders with sufficient options for achieving restoration for harms inflicted, including financial and non-financial compensation
- take into account, through charging and/or the sentencing process, agreements that are reached between the victim and offender
- provide mechanisms to ensure that courts consider any residual public interest in final sentencing
- allow normal court processes to proceed where victims choose not to pursue restitution or restoration, or where victims and offenders cannot reach agreement
- include appropriate protections for victims and offenders
- be supported by inclusion of restorative justice principles into the *Penalties and Sentences Act 1992*.

Victim-focused restitution and restoration should be made available for any offence where a victim is identifiable.







This chapter explores ways of improving the effectiveness of non-custodial sentencing options, so that they can more widely replace terms of imprisonment for some offenders. It also looks at ways to build community confidence in sentencing through appropriate accountability mechanisms.

## Key points

- Sentences are effective and efficient when they achieve the sentencing purposes at least cost and result in a net benefit to the community. This requires enough sentencing options for courts to best address the offence and the offender's circumstances. The costs and benefits of sentences should also be considered.
- For many perpetrators of serious offences, a lengthy sentence in high security prison may be the appropriate sentence. For less serious offences, non-custodial sentences can be more effective.
- However, existing non-custodial options are limited or subject to restrictions that reduce their use and effectiveness, including:
  - a lack of flexibility in how and what community-based sentences can be imposed
  - insufficient support, including the use of technologies, that would give the community greater confidence in community supervision
  - no 'intermediate' or alternative supervisory options to prison, which often results in a short prison sentence as the only available option
  - an inadequate system to support monetary penalties, including the ability to set penalties at an effective level and non-financial options for offenders to 'pay their debt' to the community,
- Sentencing outcomes can be improved by:
  - improving the effectiveness of monetary penalties
  - removing unnecessary restrictions on the use of non-custodial sentences
  - supplementing non-custodial sentencing with technological solutions
  - ensuring that sufficient resourcing is made available to support community-based corrections.
- Community corrections orders should include a residential option with a focus on rehabilitation as an alternative to short-term prison sentences.
- A strong evidence base on the effectiveness and efficiency of sentencing options, and more rigorous pre-sentence screening of offenders would support better sentencing outcomes.
- Community confidence in sentencing is important for the proper functioning of the criminal justice system. However, responding to community concerns with mandatory minimum sentencing and other restrictions on judicial independence can have unintended consequences and may result in increases in imprisonment that provide little, if any, benefit to the community.
- Generally, legislative restrictions on judicial discretion in sentencing should be avoided. Existing restrictions should also be reviewed to ensure they are working as intended.
- Community confidence in sentencing can be enhanced through studies on how actual sentencing practice accords with community expectations. Monitoring the consistency of court sentencing should also be considered.



# 15.1 Assessment of custodial and non-custodial penalties

A range of adult sentencing options are available to courts under the *Penalties and Sentences Act 1992* (Box 15.1). Penalties may be combined into a single sentence, although there are some legislative restrictions in doing so.

### Box 15.1 Existing sentencing options

**Absolute release**—release without a recorded conviction or any further penalty.

**Good behaviour bonds**—a promise of good behaviour for a set period, which may include a surety (guarantee or amount of money) and other conditions.

**Restitution or compensation order**—an order to pay for property taken or damaged, or to compensate someone for an injury. This order can be added to another sentencing order.

**Non-contact or banning order**—a ban on contacting the victim of the offence or another person, or going to particular places for a set time. This order can be added to another sentencing order.

Fine—an order to pay a fine as punishment for the offence. The amount depends on the type of offence.

**Community service order**—an order to do unpaid community service for between 40 to 240 hours (usually in one year) and comply with reporting and other conditions.

**Graffiti removal order**—an order of up to 40 hours to remove graffiti, usually within 12 months.

**Probation**—an order between six months and three years, allowing the offender to remain in the community and report regularly to a probation officer. The court may set other requirements, such as participating in programs and counselling.

**Intensive correction order**—a prison sentence of one year or less, served in the community under intensive supervision. The offender reports to a supervisor regularly, attends rehabilitation programs and counselling, and performs community service.

**Suspended sentence of imprisonment**—if the offender is sentenced to up to five years in prison, the court may suspend all, or part, of the sentence; if the offender commits another offence punishable by imprisonment while on a suspended sentence, the offender must serve the original suspended prison period plus the sentence for the new offence.

**Imprisonment**—a sentence served in prison. If a court sentences an offender to prison for three years or less, and the offence is not a sexual or serious violent offence, a parole release date is set. For longer prison terms or for sexual or serious violent offences, the court may set a parole eligibility date with the parole board to consider whether parole should be granted at that time.

Source: QSAC 2018a.

The predominant non-custodial penalty imposed by courts is a fine, which represented 62 per cent of penalties imposed during the period 2005–06 to 2016–17. Other non-custodial penalties represented less than 10 per cent of penalties imposed, while imprisonment represented 13 per cent of penalties imposed. Approximately 9,000 people are in Queensland prisons, compared to 21,000 in community corrections, which includes offenders on parole (ABS 2019c).

<sup>&</sup>lt;sup>98</sup> Calculated from Queensland Sentencing Advisory Council data (QSAC 2018a, 2018b).



# Assessment of penalties

The custodial and non-custodial penalties available to judges and magistrates are each effective in some ways and less so in others. To assess their effectiveness, the major categories of penalties—imprisonment, monetary penalties (fines, restitution and compensation) and community services (including graffiti removal orders), and community-based orders (probation and intensive correction orders)—are compared against the sentencing purposes in the *Penalties and Sentences Act 1992* and other criteria, such as cost and flexibility (Table 15.1).

Table 15.1 Assessment of the effectiveness of penalties

Sentencing	Custodial	Non-custodial		
purpose/other effectiveness criteria	Imprisonment	Monetary/Community service	Community-based orders	
Punishment and denunciation	Regarded as the most severe punishment and clearest expression of denunciation	Penalties can be severe, though limited by the capacity of the offender to pay	Penalties can be severe if tight conditions are able to be imposed	
Community protection	Community is safe during the term of imprisonment	Offender usually has few, if any, restrictions on movement	Some geographic restrictions can be imposed	
Deterrence	Punishment has an overall deterrent effect on crime. However, at the margin, the deterrence effect is generally weak and dependent on the type of offence. The perceived probability of arrest has a stronger deterrent effect than the severity of the punishment.			
Rehabilitation	Rehabilitation may be impacted by the prison environment. Adverse impacts on protective factors such as employment, housing and relationships	No rehabilitation usually provided. Employment, housing and relationships are more likely to be preserved	Treatment in social environment can be effective. Employment, housing and relationships are more likely to be preserved	
Flexibility	Imprisonment is normally in high security environment. Flexibility mainly in duration	Flexibility in the size of fine and duration of community service	Duration, supervision, treatments and conditions can all be varied	
Direct costs	High capital and operating costs of imprisonment. High post-sentence costs to the offender through lost employment, housing and relationships	No costs or offset by monetary or service penalty. Lower post- sentence cost to the offender	Community supervision significantly less costly than imprisonment. Lower post-sentence cost to the offender	



#### Punishment, denunciation and deterrence

Imprisonment is a severe form of punishment and therefore a clear expression of community denunciation of an act. It is also a very effective way to incapacitate an offender and prevent them from reoffending in the community. Research suggests the threat of imprisonment deters crime and that the deterrent effect is strengthened with increased certainty of apprehension and punishment. As discussed in Chapter 7, evidence indicates that increased use of imprisonment provides only a relatively small general deterrence effect, and, for much offending, these benefits do not justify the costs that imprisonment imposes on the community. There is also limited evidence that imprisonment acts as a specific deterrent—that is, it deters a particular offender from further criminal acts—and may have a criminogenic effect in some instances.<sup>99</sup>

Non-custodial penalties may be considered less severe, although that depends on the size of the monetary penalty, the duration of the community service and the duration and severity of the conditions and supervision imposed with a community-based order.

#### Rehabilitation

Prison terms are often not conducive to rehabilitation, particularly for short-term sentences. Prisoners on sentences under 12 months and those assessed as low risk do not have access to rehabilitation programs in Queensland prisons (Sofronoff 2016, p. 90).

Even short terms in prison can increase the likelihood of reoffending due to the loss of protective factors—offenders can lose their jobs and accommodation; education and health and psychological treatment can be disrupted; and relationships with family and friends can break down. The loss of these protective factors can seriously undermine rehabilitation efforts. A study of the prison-to-community transition experience of prisoners with severe mental illness and co-occurring substance use disorder found:

As adults, the impact of repeated short–term incarceration meant that participants experienced ongoing "structural violence" in terms of a cluster of poverty, unstable housing, unemployment, social isolation and stigma... which may have contributed to their ongoing drug use and associated risk behaviours. It is clear that the participants in this study experienced low levels of social capital prior to their involvement in the criminal justice system and that the impact of repeated short-term incarceration contributed to a depletion of any social capital that they were able to achieve in their brief periods of living in the community. (Denton sub. 4, p. 18)

Generally, rehabilitation programs can be more effectively delivered in the community than in prison divorced from the realities of public life. An example gives insight into the limitations of the prison environment:

Southern Queensland Correctional Centre has a guide dog program, where some prisoners get to be the caretaker for a young dog, providing the initial training for these future assistance animals. This is a fantastic program that should be expanded, but the point is that these dogs have to leave the prisons on weekends since the environment in the prison is so superficial and under-stimulating, that they could never learn to be a proper guide dog while in there. For example, stopping in front of every door waiting for it to be unlocked; there is no traffic, a lack of colour and diversity, too much concrete and too little green spaces. The point is, that if we think that prisoners who spend years or even decades in such an environment are well prepared for a life in the wider community, then we are very much mistaken. (Eriksson sub. 5, p. 4)

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<sup>&</sup>lt;sup>99</sup> See Carrington & Hogg sub. 3, p. 13; QAMH, sub. 21; Ritchie & Ritchie 2011, p. 23; Sydes et al. 2018, p. 19; Trevena & Poynton 2016; Trevena & Weatherburn 2015; Weatherburn 2010.



## Flexibility

Non-custodial sentences can be more flexible than imprisonment and include the use of monetary penalties, community service, restrictions on movement, rehabilitative treatment and suspensions of penalties, among others. While imprisonment is a blunt instrument, this array of non-custodial options provides courts with the potential to calibrate non-custodial sentences to better meet the requirements of community protection, rehabilitation, deterrence, and punishment. This flexibility can be directed to constructing a sentence that better fits the offence and the offender's circumstances. Ways of further extending the set of non-custodial options and flexibility is discussed later in the chapter.

#### Cost

Imprisonment is also costly for the community. A 12-month term in a prison costs the public around \$111,000, while community supervision costs around \$5,000 (SCRGSP 2019d). In terms of efficient resource allocation, the opportunity exists to divert resources from the prison system to the community corrections system to deliver better outcomes at less cost to the community than does imprisonment.

#### Overall assessment

For many perpetrators of serious offences, lengthy sentences in high security prisons are the appropriate sentence. The community's safety is preserved through the incapacitation of these offenders, and the public has a strong expectation that anything less than a long prison sentence would not reflect just punishment. However, in many cases, custodial sentences are unlikely to provide a net benefit to the Queensland community (Chapter 7). For many less serious offences, where punishment and incapacitation are less critical factors and rehabilitation is more likely to be beneficial, non-custodial sentences can be more effective (by better achieving the sentencing purposes) and/or more efficient (by achieving the sentencing purposes at a lower cost).

During consultations, many stakeholders concurred with this view, including the Aboriginal and Torres Strait Islander Legal Service (Queensland) (sub. 35, p. 6):

With respect to non-violent offenders, we question whether imprisonment is a proportionate or cost-effective response to the offending in most instances, and question whether stronger custodial penalties have a meaningful deterrent effect. Again, non-custodial sentences, including community service orders, are likely to be more appropriate, and far less costly to the taxpayer. Non-custodial sentences can be used in conjunction with fines and compensation orders to enhance deterrence.

The evidence on the benefits and costs of community corrections relative to imprisonment, discussed in Box 15.2, supports this assessment.



## Box 15.2 Benefits and costs of community-based corrections relative to prison

#### **Benefits**

The evidence as to whether community-based sentences are as effective at keeping the community safe as imprisonment is still emerging. However, the literature suggests that, for at least some offences, the use of community-based corrections orders can be as effective as custodial sentences.

While prison is particularly effective in preventing crime in the community by physically incapacitating offenders, there is little evidence that community corrections, used appropriately, are less effective at deterring offending behaviour (Sydes et al. 2018; Trevena & Poynton 2016; Trevena & Weatherburn 2015). There is also emerging evidence that they are more effective than prison terms at breaking the cycle of reoffending.

Wang and Poynton (2017) find an 11–31 per cent reduction in the odds of reoffending for an offender who received an intensive correction order (ICO) compared with another who received a prison sentence of up to 24 months. This is consistent with earlier studies of Ringland and Weatherburn (2013), which showed lower rates of reoffending for recipients of ICOs, compared to those serving their sentences in prison.

This result is qualified by Drake (2011) who found that intensive supervision focused on surveillance achieves no reduction in recidivism; but intensive supervision coupled with treatment achieves about a 10 per cent reduction. Wan et al. (2014) examined the relationship between parolee supervision and reoffending and found more active supervision can reduce parolee recidivism, but only if it is rehabilitation-focused.

#### **Costs**

The costs of community-based corrections are typically a fraction of the cost of imprisonment. The annual cost of keeping a person in jail in Queensland is more than 20 times the costs of supervising a person in the community (\$111,000 per year compared to \$5,000 per year).

The indirect costs associated with the use of community corrections is also likely to be significantly lower than for imprisonment. When offenders are given the opportunity to serve their sentences in the community, it is easier for offenders to keep their homes and retain their community and family ties. It is also avoids exposure to any of the criminogenic environment associated with prisons (Bartels et al. 2018).

#### Net benefits

The evidence presented above suggests the use of community corrections may present greater net benefits than prison sentences for a range of cases. In particular, the evidence suggests that community corrections may be a preferred option where they replace prison sentences for non-violent offenders.

There are, however, a range of intangible costs and benefits that need to be considered. Morgan (2018) tracked a small cohort of 804 Victorian prisoners and community corrections offenders over a five-year period. The approach considered a broad range of indirect costs including lost productivity, lost earnings, supported accommodation costs, medical costs, government payments, value of community work and changes in the use of drugs and alcohol. The study found:

- The total costs of the original sentence were \$61,179 for those who served a prison term and \$6,516 for those who served a community sentence.
- Over a five-year period, the net present value of costs associated with the prison cohort was \$144,480 compared to \$49,633 for the cohort who were originally sentenced to a community corrections sentence.

Despite the study's limitations, its results highlight an important point: that there may be significant cost advantages in moving some offenders from prison to community corrections.



## Assessing effective and efficient sentencing

There is a problem if prison sentences are imposed when non-custodial sanctions are expected to be more effective and efficient than imprisonment. It may indicate:

- Courts are not using the most effective and efficient sentences available to them.
- Restrictions on non-custodial sentencing options are limiting their use. These restrictions may include the limited range of non-custodial options available, legislative restrictions on how they are applied, or legislative or other requirements that imprisonment be applied.

It is difficult to assess whether courts are imposing the most effective and efficient sentence in individual cases, although the proportion of non-custodial penalties to all penalties has declined over the last decade in the Magistrates Court—with a commensurate increase in custodial penalties (QSAC 2018a).

One impediment to effective and efficient sentencing is if the sentencing decision has not considered all the relevant costs and benefits. 100

An assessment of the benefits and costs of imprisonment shows that for some offences, the costs of imprisonment exceed the benefits (Chapter 7). That is, the community interest would have been better served if the offender had been given another sentence instead of prison.

While it cannot be expected that courts will undertake a formal cost–benefit analysis when sentencing, it would be a concern if sentencing procedures systematically led to under- or overimprisonment.

Despite this, sentencing legislation requires courts to consider the benefits of imprisonment (achieved through deterrence, community protection, punishment, denunciation and rehabilitation—the sentencing purposes), but does not require them to consider some of the costs of imprisonment, such as the substantial financial costs of imprisonment to the community, or the effect of imprisonment on criminalisation.

The result appears to be a systematically biased assessment process for determining the public interest. By considering the benefits of imprisonment but not all the costs, courts could be expected to imprison beyond what is in the community's interest.

If governments are reluctant either to invest further in prison infrastructure (rather than schools and hospitals) in order to accommodate court decisions to imprison, or to take other measures to reduce imprisonment, then the inevitable outcome is prison overcrowding.

Several states in the United States are considering including the costs of imprisonment as a consideration when sentencing. The state of Missouri provides this financial data to the judge, although it is not required to be a consideration (Eisen 2013).

Section 9(2) of the *Penalties and Sentencing Act 1992* provides a list of matters that the court must have regard to in sentencing an offender. In neither that section nor section 9(1) (the sentencing purposes) is there a requirement for the court to consider the costs of the sentence. While there is a provision that a sentence of imprisonment should only be used as a last resort<sup>101</sup>, it would be beneficial if the court also considered the financial cost of the sentence to the community.

Adding a requirement to section 9(2) that the financial cost of imprisonment to the community be considered in sentencing would be the most straightforward approach. However, as the financial cost does not have a direct relation to the sentencing purposes, its effect may be subdued. It should, nevertheless, be included to signal to courts the need to consider the wider costs to the community in sentencing choices.

<sup>&</sup>lt;sup>100</sup> Including personal and social factors, as well as financial and economic factors.

<sup>&</sup>lt;sup>101</sup> Although this does not apply if the offence involves violence.



# 15.2 Extending non-custodial sentencing options

The victim-focused system outlined in Chapter 14 will help make sentencing outcomes more effective and efficient. Restitution to victims and restorative justice processes can provide effective substitutes to imprisonment when victims and offenders participate.

However, restitution and restorative justice approaches are unlikely to cover all cases, and even where it is used, there will often be a significant public interest component that will require sentencing. The judiciary will continue to play a primary role in sentencing, and the effectiveness and efficiency of sentencing will be determined by the decisions judges and magistrates make.

With a sufficient array of sentencing options and flexibility, judges and magistrates will be more able to set an effective and efficient sentence in individual cases. Further, if judges and magistrates are provided with more non-custodial sentencing options in which they have confidence, they are more likely to impose those more efficient and effective sentences.

Other states have recently reconsidered their non-custodial penalties and examined the possibility of providing their courts with a broader range of options. For example, in 2015 South Australia undertook a public consultation process to consider alternative sentences to imprisonment (Box 15.3).

## Box 15.3 South Australian review of sentencing options

In 2015, the South Australian Attorney-General's Department released a discussion paper *Better Sentencing Options: Creating the Best Outcomes for Our Community*, as part of a broader initiative of criminal justice reform.

The discussion paper presented options for the community's consideration including:

- intensive correction orders
- home detention
- forfeiture and restitution
- restorative justice.

Through the discussion paper, the South Australian Government asked the community to consider what purpose is served from imprisonment and whether serving a sentence in the community can provide better long-term outcomes.

Following that consultative process, legislation was passed to:

- require that the primary consideration for a court in sentencing be the protection of the safety of the community, together with a series of secondary considerations
- allow the court to impose community-based orders and intensive correction orders, including providing greater flexibility in the use of home detention.



## Monetary penalties

Imposing a monetary sanction can be an effective and efficient penalty, as it can:

- impose a significant punishment
- be an effective deterrent
- compensate the community for harm done
- avoid the criminogenic effects of imprisonment
- usually be imposed at relatively low cost to the criminal justice system.

Possibly for these reasons, the monetary fine is the most commonly applied penalty in the criminal justice system.

The advantages of monetary penalties suggest they could be more widely used. Restitution by offenders could address the harm to victims of crime (Chapter 14), and the greater use of monetary penalties may also have the potential to replace or reduce some custodial sentences.

However, monetary penalties have limitations that restrict their use. Chief among these limitations is that collection of monetary penalties can be problematic.

The State Penalties Enforcement Registry (SPER) is responsible for the collection and enforcement of unpaid infringement notice fines; court-ordered monetary penalties, including restitution to victims; offender debt recovery orders; and offender levies.

SPER has a broad range of sanctions available to it including:

- driver licence suspension
- fine collection from the offender's wages or bank account
- SPER registering an interest in the offender's property
- vehicle immobilisations
- seizure of property
- imprisoning a debtor, which is rarely used (QAO 2018a, p. 16).

Despite these powers, as at June 2017, there were 4.2 million unpaid fines, totalling \$1.2 billion (QAO 2018a, p. 1).

Court-ordered monetary orders relate to the use of monetary fines as a penalty for criminal activity. Monetary orders include court fines and compensation of restitution to a victim, and are collected by SPER.

In its performance audit, the Queensland Audit Office (QAO) found that, as of 30 June 2017, only 54.6 per cent of all monetary penalties issued by Queensland Courts between 2011–12 and 2016–17 (934,976) had been fully paid, with 7.8 per cent partly paid, 0.7 per cent written off or withdrawn, and 36.9 per cent remaining unpaid (QAO 2018a, p. 50).<sup>102</sup>

<sup>&</sup>lt;sup>102</sup> Of monetary orders imposed between 2011–2012 and 2013–14, 30.5 per cent of restitution and compensation orders and 26 per cent of court-ordered fines remained unpaid as at 30 June 2017 (QAO 2018a, p. 51).



SPER's ability to collect unpaid monetary orders is limited by the capacity of the offender to pay. Offenders may be unemployed, have a criminal history or be in prison (QAO 2018a, p. 50). Imposing monetary penalties can also impact on the dependents of offenders and exacerbate levels of disadvantage. Aboriginal and Torres strait islander people are overrepresented as fine recipients and incur large debts (ALRC 2018, p. 387). The Australian Law Reform Commission expressed the view that

when a fine defaulter is unable to pay a fine or infringement notice; has not applied for time to pay or other payment options; has no income or property to be the subject of civil orders; and is unable to complete a [community service order], that person requires assistance, not prison (ALRC 2018, p. 389).

Discussions with stakeholders also indicated support for these views.

The challenge of increasing the integrity of the monetary fine as a penalty is to increase effectiveness of fines incurred without further exacerbating disadvantage. Greater disadvantage is not only undesirable in itself but can also lead to increased offending behaviour.

SPER introduced work and development orders in December 2017, which provide eligible debtors with the option of converting unpaid fines into unpaid community work at the rate of \$30 per hour (Queensland Government 2018h). Other activities such as attendance at medical or mental health treatment, educational, vocational or life skills courses or other counselling, drug or alcohol treatment or mentoring programs may also be acceptable in certain circumstances.

SPER's work and development orders is a means to substitute unpaid work for monetary penalties when the offender is suffering financial hardship, and to facilitate the use of rehabilitative treatments and programs as a means to address underlying dysfunction. This would improve the effectiveness of monetary fines as a sentence to meet the sentencing purposes. However, their use is dependent on availability, which is constrained.

Another approach could be to introduce a system of 'day fines' 103, that is, the imposition of fines that are dependent on the income and wealth of the recipient (Box 15.4). Such an approach aligns fines with ability to pay—potentially increasing both the deterrent effect and collection rate, making the fine more effective as a penalty. Day fines are used in some European countries including Finland, Germany, Sweden and France (Kantorowicz-Reznichenko 2018).

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<sup>&</sup>lt;sup>103</sup> Also called structured or unit fines.



## Box 15.4 Day fines

Day fines can be applied in different ways, but essentially the level of fine is intended to align with the offender's ability to pay.

For example, in Finland a fine penalty is nominated in terms of days of fine. A day equivalent of fine is set at one sixtieth of the offender's average monthly salary after taxes and other deductions, or approximately fifty percent of the offender's daily net income. Thus an offender on an income of €100 euros per day who is sentenced to 50 days of fine would be fined €2,500, while an offender with a daily income of €10 receiving the same sentence would be fined €250 (Kantorowicz-Reznichenko 2018, p. 338).

In Germany, the determination of day fines is less formulaic, with judges able to account for assets and other financial considerations when setting the daily fine (Kantorowicz-Reznichenko 2018, p. 341).

The offences to which day fines apply can vary. In Finland, while fixed fines apply to minor offences, most offences can attract a day fine. In Germany, pecuniary sanctions apply to offenses such as theft, fraud, battery, embezzlement and forgery, and crimes against persons (Kantorowicz-Reznichenko 2018, p. 341).

The arguments in favour of day fines include:

- They can reduce imprisonment, especially for short terms. For example, a combination of restrictions on short sentences and the introduction of day fines reduced the number of offenders on short prison terms in Germany by over 80 per cent (Kantorowicz-Reznichenko 2018, p. 341).
- They can increase the deterrence effect of fines for some individuals by allowing higher fines to be issued.
- They can be more affordable for lower income offenders, and are therefore more likely to be paid.

Arguments opposing the introduction of day fines include:

- They can be time-consuming and complex to administer.
- They can result in fines that do not relate to the seriousness of the offence. For example, in 2002, a Finnish executive received a €116,000 fine for speeding on his motorcycle (George Arnett 2015).
- Ability to pay can be difficult to calculate because of lack of information or complexity in financial arrangements.

Day fines have been trialled in England and Wales, and in some locations in the United States, but have not been adopted (Kantorowicz-Reznichenko 2018, pp. 335, 339).

It is apparent that the current system of collecting monetary penalties does not provide a solid foundation to expand the use of monetary penalties.

There is a need to increase collection rates for monetary sanctions to be an effective deterrent to criminal activity, provide an effective basis for restitution and compensation to victims and the community, and be an alternative to custodial sentences. The QAO made recommendations in its report, *Finalising unpaid fines* (2018a), to improve the collection and finalisation of monetary penalties. These recommendations include:

- Develop a plan to improve the end-to-end fines collection process.
- Conduct analysis to identify opportunities to improve debt recovery and develop options to manage problematic debtors.
- Develop processes and practices to provide magistrates with access to offender debt history to help determine a person's capacity to pay.



• Develop processes and measures to assess the cost and effectiveness of enforcement actions.

A broader consideration is how the framework of monetary penalties can be redesigned to allow monetary penalties to be a more effective sentencing option. As discussed earlier, the imposition of fines on offenders who cannot pay them is likely to be ineffective, but may also exacerbate disadvantage and increase the likelihood of reoffending. To a degree, section 48(1) of the *Penalties and Sentences Act 1992*<sup>104</sup> should assist courts in setting appropriate fines in these circumstances but how frequently it is used is not clear. On the other hand, the current level of some monetary fines may not be acting as a sufficient deterrent for some potential offenders. The introduction of day fines is a possible response to these issues, but their desirability is disputed.

The Australian Law Reform Commission has considered day fines but rejected them on the basis that they would be time-consuming and complex to administer, and may not operate equitably for all offenders (ALRC 2006, p. 110). The New South Wales Law Reform Commission had previously come to a similar conclusion (NSW Law Reform Commission 1996, p. 53).

The underlying advantages of monetary sanctions make them an attractive sentencing option, which has the potential to reduce imprisonment. Thus, the Commission recommends that the Queensland Government should make monetary penalties more effective by:

- removing restrictions on the use of monetary penalties by courts
- making greater opportunities available for offenders to pay down fines through community service or other work and development orders.

Given the complexity of issues, the Commission has not been able to arrive at a firm conclusion on day or income-based fines. Nevertheless, this is an issue worthy of further investigation. To this end, it is recommended that the Queensland Sentencing Advisory Council (QSAC) or another suitable body be appointed to investigate further, and report back to government.

## Community-based sentences

There is potential to make community-based sentences more effective sentencing options, especially for low-level crime that would normally attract only short sentences. Three avenues could be pursued to make them more effective sentencing options—that is, through more flexibility, use of technology to enhance community safety, and reallocation of resources.

#### Increasing flexibility

Sentences should not only fit the offence but also the circumstances of the offender. Offenders are diverse, with different backgrounds, histories, aptitudes and attitudes. They come from and return to different community environments. When sentencing, judges and magistrates must be conscious of the need for equality before the law and consistency of sentencing, but also that the effect of a sentence on one offender may be very different for another.

High security prison facilities offer little flexibility—they are all very similar in the environment they provide and the daily routine they require of prisoners. Because community-based sentences provide more options and can access the resources of the community, they can be used to more directly address the underlying risk factors that contribute to offending, while maintaining or building the protective factors that can support rehabilitation.

However, lack of flexibility in community-based sentencing may be resulting in unnecessary prison sentences. The Queensland Parole System Review suggested that:

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<sup>&</sup>lt;sup>104</sup> Section 48(1) states that '[i]f a court decides to fine an offender, then, in determining the amount of the fine and the way in which it is to be paid, the court must, as far as practicable, take into account (a) the financial circumstances of the offender; and (b) the nature of the burden that payment of the fine will be on the offender'.



It is a difficult task for sentencing judges to impose a sentence that is fair and appropriate for the offender, the victim and the public and within the established sentencing range. Courts should have the greatest possible range of sentencing options available to carry out this task. It is possible that the reason so many offenders are sentenced to imprisonment with court ordered parole is due to the lack of flexibility available to the Court when sentencing. (Sofronoff 2016, p. 96)

Broadening the range of non-custodial sentencing options will assist in augmenting this 'greatest possible range of sentencing options', but this needs to be supplemented with sentencing flexibility and a stronger evidence base regarding their effectiveness.

Rigidities in the way sentences can be made are restricting the ability of the judiciary to impose efficient sentences. For example, probation orders cannot be less than six months or more than three years and cannot be combined with a prison term longer than one year (s. 92 of the *Penalties and Sentencing Act 1992*).

The Victorian Community Correction Order offers a possible model on which a more flexible sentencing instrument could be based (Box 15.5).

## Box 15.5 Victorian Community Correction Order

The Victorian Community Correction Order (CCO) provides a flexible sentencing option that the offender serves in the community. It allows for the full consideration of sentencing purposes, including retribution and rehabilitation, and therefore can be a more effective alternative to imprisonment. A court can impose a community correction order on its own or in addition to imprisonment or a fine, and it can be applied for up to five years (for multiple offences). At least one condition must be applied, including:

- complete unpaid community work of up to a total of 600 hours
- reside (or not reside) at a specified address
- abide by a curfew, remaining at a specified place for between 2 and 12 hours each day
- stay away from nominated places or areas
- not enter, remain within or consume alcohol in licensed premises (such as a hotel, club or restaurant)
- abstain from contact or association with particular people (for example, co-offenders)
- undertake medical treatment or other rehabilitation
- be supervised, monitored and managed by a corrections worker
- be monitored and reviewed by the court to ensure compliance with the order
- pay a bond—a sum of money that may be given up wholly or partly if the offender fails to comply with any condition imposed (Victorian Sentencing Advisory Council 2018a).

A court must not impose a custodial sentence if the purpose or purposes of the sentence can be achieved by a community correction order combined with certain conditions. Certain offences cannot receive a CCO including murder, causing serious injury, rape, drug trafficking and aggravated home invasion.

QSAC's preliminary view in its review on sentencing orders, imprisonment and parole was that 'the ability to provide for different packages of conditions that can be combined within the one order has potential to improve the ability of such an order to respond to the individual factors contributing to offending'. QSAC supported an option to introduce community correction orders to replace probation, community service orders and intensive correction orders (QSAC 2019, p. 139).



## Better use of technology

Non-custodial sentences may never be a suitable option for a proportion of the prison population. However, the use of technology such as electronic monitoring can reduce the community safety risk to a level that community supervision (sentences involving probation and parole) may be a viable option for those offenders who would present a lower risk to the community.

Queensland already uses electronic monitoring (on sexual offenders and parolees<sup>105</sup>, and, most recently, for some on bail), as do most other Australian states. Some overseas jurisdictions use electronic monitoring to a much greater extent than Australia—in 2016, the United States used electronic monitoring for 125,000 offenders and defendants at any one time; England and Wales for 13,210; and New Zealand for 4,021. This compares to Australia where around 1,000 offenders and defendants used electronic monitoring (Martinovic 2017).

Electronic monitoring can take the form of a device (usually GPS) attached to the offender's ankle or wrist to allow the offender's movements in the community to be monitored to help ensure that locational restrictions, such as proximity to schools, are observed.

#### **Home detention**

In other jurisdictions, electronic monitoring is often used with home detention, in which the offender is restricted to their home, being able to leave only with the approval of the supervising officer to go to prescribed locations such as those for work, education and rehabilitation. In South Australia, other conditions can apply, such as the banning of drugs, alcohol, gambling and firearms. Supervision involves visits and telephone calls by their community corrections officer at any time and requires attendance at a community corrections centre. Electronic monitoring provides real time data and can detect offenders who attempt to remove their ankle bracelet, allowing for an immediate response (SA Department for Correctional Services 2018). To support home detention, South Australia has the Home Detention Integrated Support Services program which aims to provide individually tailored rehabilitation and reintegration support to home detainees.

The potential of electronic monitoring to be used in conjunction with community supervision and rehabilitation is illustrated in a recent New South Wales study (Williams & Weatherburn 2018), which found that home detention with electronic monitoring and prescribed rehabilitation for offenders of non-violent and non-serious offences reduced the probability of reoffending within 24 months by 16 percentage points compared to serving a prison sentence. This reduction in reoffending persisted for five years. There were cost savings of nearly \$30,000 for each eligible prisoner from reduced supervision and future court and prison costs.

Other studies support the potential for electronic monitoring to reduce reoffending, at least in some situations. A systematic review of the literature (Belur et al. 2017) found that electronic monitoring can produce positive effects for certain offenders (such as sex offenders), at certain points in the criminal justice process (after trial as an alternative to prison), and in combination with other conditions (for example, geographic) and therapeutic components.

A study of the roll-out of electronic monitoring (with a home requirement) in France between 2000 and 2003 found that converting short prison sentences into electronic monitoring resulted in estimated reductions in the probability of reconviction of 6 to 7 percentage points (9 to 11 per cent) over five years, with evidence of offences being less serious. The study concluded that electronic monitoring can be a very cost-effective alternative to short sentences (Henneguelle et al. 2016).

#### Beyond electronic location monitoring

Technological advancements are making electronic monitoring more reliable and flexible as an option. For example, if a condition of probation is a limitation on alcohol consumption, an ankle bracelet can be fitted to

Queensland Productivity Commission

<sup>&</sup>lt;sup>105</sup> As at 4 October 2018, 121 offenders and 224 parolees were subject to electronic monitoring conditions under the *Dangerous Prisoner* (Sexual Offenders) Act 2003 and Corrective Services Act 2006, respectively (Queensland Government sub. 43, p. 73).



detect alcohol consumption and transmit measurements to a control centre. The widespread availability of mobile phones means that offenders are almost always contactable.

Professors Bagaric and Hunter of Swinburne University and Gabrielle Wolf of Deakin University suggest that concrete prison walls should be replaced by the real-time monitoring of offenders, and by technology that can remotely immobilise offenders who are in the process of misbehaving. They argue that technological and surveillance devices can achieve all of the appropriate objectives of imprisonment, including the imposition of proportionate punishment and community protection. This could be achieved at a much lower cost than imprisonment. Implemented properly, they believe technological incarceration could result in the closure of all but a small fraction of existing prisons (Bagaric et al. 2017).

Although electronic monitoring should not be regarded as a panacea, opportunities exist for the greater use of technology to support a shift from prison to community management for some of the offender population.

#### Reallocating resources to better support community-based sentencing

While 70 per cent of the offenders managed by Queensland Corrective Services (QCS) are under some form of community supervision, community corrections receives only 10 per cent of total QCS expenditure, with the remainder being spent on prisons. Expenditure on community supervision in Queensland is the lowest in Australia—in 2017–18, Queensland spent \$13.79 per day for each offender on community supervision, compared to \$22.38 in New South Wales, \$32.40 in Victoria and \$32.81 in Western Australia. Queensland also has the highest ratio of offenders to community corrections staff in Australia (SCRGSP 2019d).<sup>106</sup>

The judiciary may not have confidence in community-based sentencing if there is a resourcing shortfall in the services. As suggested by the Aboriginal and Torres Strait Islander Legal Service:

Further, courts can only impose meaningful community-based conditions where:

1) appropriately funded support service providers actually exist in the locality in question; and
2) the court is actually aware of their existence (and e.g. of any qualifying criteria). (ATSILS sub. 35, p. 10)

To support the increasing substitution of community-based sentences for prison sentences, resources will need to be allocated from the prison system to the community corrections system.

# 15.3 Net-widening

The introduction of new sentencing options risks net-widening. This occurs when courts impose new sentencing options on offenders who previously would not have received so severe a sentence. For example, the introduction of home detention may result in its imposition not only on offenders who would otherwise have received imprisonment, but also on offenders who would have otherwise received a less stringent community-based sentence.

One view on net-widening is that it can produce a positive result if offenders receive a more appropriate sentence. Using the above example, a judicial officer may, in the absence of home detention, have imposed the less stringent community-based sentence simply because a term of imprisonment was considered much too severe—a sentence somewhere between the two produces the appropriate sentencing balance.

A contrary view is that net-widening can produce a negative result. A new sentencing option intended to reduce imprisonment can result not only in offenders receiving harsher sentences than they would have otherwise received, but can also create another avenue to imprisonment if the strict conditions of the new sentencing option are breached. Using the earlier example, courts may impose home detention on a large pool of offenders, many of whom would have otherwise received a less stringent community-based sentence. A significant proportion of that

<sup>&</sup>lt;sup>106</sup> At the same time, Queensland has one of the highest completion rates of community corrections orders. However this is only a partial measure of effectiveness, and does not take into the quality of the supervision and rehabilitation, and reoffending rates.



pool of offenders then breach the strict conditions of home detention and find themselves imprisoned. The result is imprisonment for many offenders who may have otherwise avoided it.

Net-widening can be reduced if diversionary options are introduced at earlier stages of the criminal justice process which diminishes the group of offenders who would benefit from non-custodial corrective approaches. Further, a more evidence-based approach to sentencing, discussed below, should result in sentencing that is more appropriate for the particular offender.

# 15.4 A community residential supervision option

The options available for a community corrections order are broad and, with enhanced flexibility in their use, community-based orders have the potential to be an alternative for some offenders who currently face imprisonment.

However, in some cases, it may not be appropriate or possible for offenders to remain in the community. For many offenders, such as those with mental health issues, cognitive impairments, drug dependence or where remoteness makes it difficult to restrict offender movements, greater supervision may be required than would be possible under the proposed community corrections orders.

Under the current system, these offenders would be imprisoned, which, in Queensland, usually means being detained in a high security prison. As discussed earlier, high security prisons are not conducive to rehabilitation and often criminogenic. As one stakeholder put it:

Our current prison system largely adopts a 'one size fits all' approach with far too many short-term prisoners being churned through high security facilities at great financial cost with little or no rehabilitation outcomes. That is, the 'one size fits all' is tailored to the highest common denominator of high security prisoners, which is essential for their incapacitation but counterproductive to outcomes of deterrence, retribution, rehabilitation for less serious offenders. (Hamburger sub. 14, p. 16)

To provide a further sentencing option, community corrections orders should be further enhanced with a residential option where offenders are accommodated in a low security residency with a strong emphasis on rehabilitation and reintegration.

Sentencing options need to balance supervision of offenders with their rehabilitation. Imprisonment in state prisons tends to accentuate security, but by doing so compromise its capacity to rehabilitate offenders. The residential supervision option can provide a different balance—one with an emphasis on rehabilitation and reintegration. Because of this, residential supervision facilities should be an option under community corrections orders, rather than in the prison system.

These residential facilities would have the advantage of being of flexible design. While prisons in Queensland, with their generally heavy emphasis on security, are of similar build and operation, residential supervision facilities could adopt different design approaches depending on the type of offender that is being targeted. The potential diversity of residential supervision facilities would support courts constructing a sentence to address the circumstances of the offender with a view to reducing the risk of reoffending and enhance community safety in the long term. Residential supervision orders would fit between normal community corrections options and imprisonment (Figure 15.1).



**OLD WAY NEW WAY** Better rehabilitation • Reduced recidivism • Less imprisonment Prison **Treatment** Treatment Prison In prison but better options Reinvest in better options available Treatment Treatment Education/ Education/ **Employment** training **Employment** 

Figure 15.1 Proposed community corrections residency option

Without being too prescriptive of the facilities' design, the key features of the community corrections residency would be:

- Security levels would be low to medium.
- Facilities would be relatively small and produce a setting conducive to rehabilitation.
- Intensive rehabilitation programs would be provided.
- The location of facilities would be chosen to facilitate rehabilitation and reintegration with the community, possibly by allowing offenders to interact with the community at some level (for example, to attend work).

The costs of residential supervision could be significant, especially if rehabilitation programs are provided on-site at remote locations. However, where they reduce reoffending rates, there will be long term savings for the community. Business cases that properly identify life-cycle benefits and costs would need to be developed as part of investment decision-making.

Importantly, residential supervision orders would provide an avenue for innovation in the corrections system that currently does not exist. To maximise innovation, private and non-government sector organisations should be invited to submit proposals, and, if they are considered promising, business cases. Applications and business cases should be considered in the context of a broader infrastructure strategy that is open to a reduced emphasis on large-scale, high security prison infrastructure (see Chapter 20).

It may be possible to draft contracts with payment based on outcomes of reduced recidivism. Social impact investment, which leverages capital and expertise across the public, private and non-for-profit sectors, could also be sought in some circumstances. As experimentation will be a feature of this approach, some failures can be expected, although the benefits could prove to be substantial over time. An example of a possible model is provided in Box 15.6.



## Box 15.6 Example of possible community corrections residency model

Hamburger (sub. 14, p. 18) presented an example of one possible model for such a residency. The features of this model are:

- The residential facility would be small, in the range of 12 to 24 beds.
- It would be supervised 24/7.
- It would provide healing and rehabilitation options seamlessly linked to family and community strengthening programs, mentoring and other support services for individual offenders.
- The facility and services would be delivered by First Nation enterprises on Traditional lands and by community agencies in other lower socio-economic communities.
- Offenders would be diverted to this option having regard to the nature of the offence and on the basis of pre-sentence reports from relevant professionals.

Residential supervision facilities would be an option for offenders who would otherwise receive a short prison term. Because of unavailability of programs for short-term prisoners and the prison environment, the prison system has found it challenging to significantly reduce recidivism for these offenders. Even with the development of a more effective throughcare system (discussed in Chapter 17), prisons will always struggle to make their generally 'one size fits all' approach to rehabilitation and reintegration effective over short time periods.

Specialised residential facilities could be designed for those for whom periods in prison are often ineffective or detrimental in reducing recidivism. For example, many Indigenous offenders may benefit from within-community rehabilitation (Hamburger sub. 14). Specialised residential facilities may also be more effective for those suffering from intellectual disabilities, such as those arising from fetal alcohol spectrum disorder (FASD). For instance, Russell (Cairns public hearing, p. 6) stated that FASD offenders should be held in a farm-type environment that is strict and productive, where there is routine and structure.

The corrections system needs to be more innovative with cohorts it has been ill-equipped to deal with. For example, under current sentencing arrangements the only way an offender with a mental health issue or a cognitive impairment can avoid prison is to receive a forensic health order. This is generally only used in exceptional circumstances and is rarely lifted.

Because of the unique and specialist nature of these facilities, judges may require pre-sentence advice (possibly, though not necessarily, from QCS) on the suitability of this option for individual offenders and the availability of places. Pre-sentence advice would also reduce the risk that courts may fill places in those residential facilities not with offenders who would otherwise be in prison, but with offenders who would have been in the community corrections system anyway. To further reduce this risk, legislation should be amended so that residential supervision orders:

- can only be applied for offences with a possible sentence of imprisonment
- are considered a sentence of imprisonment for the purposes of section 9(2)(a) of the *Penalties and Sentences Act* 1992, which requires that imprisonment should only be imposed as a last resort and that allowing the offender to stay in the community is preferable.

Over time, if this residency option is successful and is able to be sufficiently scaled up, a presumption for courts to use community corrections orders in favour of short-term sentences should be introduced for most cases.

Development of this new corrections option will take time, and thus places will be limited at first. If successful, the option should be expanded, taking further pressure off the prison system. The residency option should be scaled up as far as it can successfully deliver outcomes in which the benefits (better recidivism outcomes, justice system savings, enhanced community safety) exceed the costs (infrastructure and operational costs).



# 15.5 Better information to support sentencing

While more sentencing options and greater sentencing flexibility can make the sentencing task more effective and efficient, it can also make it more complex. To maximise the opportunities while mitigating the risks, sentencing can be supported with a stronger evidence base to help guide the judiciary. This is sometimes referred to as evidence-based sentencing.

Evidence-based sentencing refers to:

judges using information about offender risk, needs and responsivity to inform the most appropriate sentence for a convicted offender. This information, provided to judges prior to sentencing, improves judicial decision—making by identifying sentences and treatments that are most effective and cost efficient in reducing an offender's future risk to the community. (Kleiman 2012, p. 299).

A more evidence-based approach can:

- balance the sentencing purposes of incapacitation, rehabilitation and deterrence when crafting a sentence to maximise the community's safety in the long term
- reassure the community, as well as the victim, that the sentence is well-considered and based on the best information
- reassure the offender that the sentence is not arbitrary and their rehabilitation needs have been considered.

The evidence base available for the judicial officer when sentencing can take two forms:

- evidence on the effectiveness and efficiency of different sentences in achieving the sentencing purposes
- information regarding the relevant circumstance of the offender.

## Evidence on sentencing

In many jurisdictions specialist expert bodies are responsible for determining the effectiveness of sentencing options in achieving the sentencing purposes. The New South Wales Bureau of Crime Statistics and Research and the Victorian Sentencing Advisory Council (VSAC) have roles in improving the evidence base of sentencing, having produced a number of studies or reviews on the effectiveness of different sentences. For example, they have produced papers examining the effect of prison and non-prison sentences on achieving the sentencing purpose of general and specific deterrence. This evidence can then be used by courts when crafting a sentencing to achieve certain sentencing purposes more effectively.

Although research has the potential to improve sentencing, it is less clear how such research affects sentencing in practice. For example, VSAC research shows that while increases in the severity of punishment have no corresponding increased general deterrent effect on offending, judges and magistrates most often prioritised general deterrence as the most important purpose for the sentences they imposed (Victorian Sentencing Advisory Council 2018b; Ritchie & Ritchie 2011).

In Queensland, QSAC provides independent research and advice, seeks public views and promotes community understanding of sentencing matters. The Crime Statistics and Research Unit (CSRU) in Queensland Treasury has a function to build an evidence base to support decision-making and policy development for government. QSAC and CSRU also have roles in informing the public and the judiciary of the effectiveness and efficiency of sentencing options.



## Pre-sentence screening

The pre-sentencing stage is an opportunity for all relevant information to be made available to help ensure that the sentence imposed is effective and efficient.

Victoria has a process in which the court receives more comprehensive information on the offender and the services available before imposing a community corrections order (Box 15.7).

The prosecution and defence counsel provide the judicial officer with information on the personal details of the offender, including details about the offender's physical and mental health, and advise on the desirable sentence. Judges can also seek further information in the form of pre-sentence reports, which can provide information on the social background of the offender. A pre-sentence report may also be requested from QCS, which may include information on the offender's criminal and traffic history (*Corrective Services Act 2006*, s. 344).

### Box 15.7 Victorian pre-sentence reports

In Victoria, the court needs to obtain a pre-sentence report from Corrections Victoria before imposing a community corrections order. This pre-sentence report can include information on:

- the offender's age, social, medical and/or psychiatric history and any special needs
- the offender's level of education and employment history
- the offender's financial circumstances, including if they can afford to pay a bond
- the offender's drug or alcohol use
- the circumstances surrounding any other offences on the offender's record
- the services available that may help to reduce the risk of the offender offending again, including any courses, treatments or programs that may assist
- whether the offender is able to do any unpaid work
- how long any intensive correction period should last
- any other information that is relevant.

It may also be possible to perform the health and psychological tests usually conducted on an offender's reception into a prison at the pre-sentence stage so that the judicial officer has all the relevant information to help ensure the sentence fits the offence and the offender's circumstances.

Catalano (sub. 25, p. 11) submitted that there are advantages for the criminal justice process of early screening and identification of persons with intellectual and cognitive impairment, and that it can lead to diversion from prison to more appropriate alternatives for some offenders.

A process where relevant information is assembled and the broad parameters of the most effective treatment approach is considered at sentencing would help ensure that the sentence is consistent with the most appropriate post-sentence treatment of the offender.

A risk is that the requirement for pre-sentence reports and testing can lead to court delays. Victorian pre-sentence reports can usually be prepared on the same day they are ordered (Sofronoff 2016, p. 99), although if further tests are required to be conducted, this could further delay proceedings.



QSAC is considering this issue of pre-sentence reports in relation to its current inquiry on community-based sentencing orders, imprisonment and parole. In its options paper, QSAC has highlighted the risk that a requirement (or presumption in favour) of a pre-sentence report may act as a barrier to courts making community-based sentencing orders for offenders who might otherwise benefit from the making of such orders. QSAC acknowledges that in the absence of good pre-sentence advice, courts may not always be able to sufficiently tailor and target conditions to address the underlying causes of offending. However, in relation to community corrections orders, QSAC considers it should be possible to cast many of the conditions a court may be able to impose in broad enough terms to enable the individualisation of interventions, treatment and program requirements to occur post-sentence once the offender has been assessed by Queensland Corrective Services (QSAC 2019, p. 275).

If necessary to reduce undesirable delays, pre-sentence assessment of offenders could prioritise offenders facing prison sentences, although, as QSAC notes, this would still require pre-sentence reports in over 12,000 cases per annum (QSAC 2019, p. 271).

There would be benefits in increasing the use of pre-sentence reports in certain particular complex situations, particularly those involving the potential imprisonment of offenders with a mental illness or intellectual disability. Because of the potentially detrimental impacts of imprisonment on mental illness and impairment, expert advice is warranted. Therefore, if there is reason to believe the offender is suffering from a mental illness or intellectual disability and the court is considering imposing a prison sentence, there should be a presumption in favour of courts seeking a pre-sentence report, which would include a psychological assessment and sentencing and treatment options.

# 15.6 Judicial accountability

The independence of the judiciary is both a fundamental component of the criminal justice system and a key element of the doctrine of the separation of powers that is a feature of our system of democratic government. Judicial discretion also responds to the more practical issue that legislation cannot be drafted to properly reflect every circumstance of an offence and the offender—the judiciary is required to interpret the legislation and apply it to specific cases.

However, judicial discretion in sentencing can lead to community concerns about how this discretion is being applied and whether courts are imposing appropriate sentences. Parliaments can respond to these community concerns by passing legislation that gives more explicit direction to courts in the sentences they impose. Sometimes this involves restricting the courts' discretion in bringing down sentences.



# Mandatory minimum sentencing

In Queensland, there are mandatory minimum prison sentences for murder, repeat serious child sex offences and certain offences associated with serious organised crime. There are also mandatory non-parole periods for a range of offences including serious violent offences. During consultations, stakeholders told the Commission that there are many other legislative provisions that have the effect of requiring courts to impose terms of imprisonment. <sup>107</sup>

Such restrictions limit the capacity of the court to impose the sentence that, in the court's view, based on the individual circumstances of the case and the offender, is the most appropriate. Many submissions to the inquiry were critical of mandatory sentencing <sup>108</sup>, with the Bar Association of Queensland illustrating the problems that can arise in relation to the offence of trafficking in illicit drugs:

This offence can be committed in an extraordinarily wide range of circumstances—from truly cynical operations involving millions of dollars, to the desperate few efforts of hopeless addicts attempting to support a habit over which they have no control. Many of the people serving sentences for drug trafficking were involved in selling to support their own addiction. While judges exercise their sentencing discretion taking into account the individual circumstances of the offender, the laws make it very difficult to avoid imposing large sentences which are of little or no social benefit. The illusion that the trade in illicit drugs can be stamped out by heavy sentences results in a large prison population of people who are, themselves, victims. (Bar Association sub. 42, p. 4)

Balanced Justice (sub. 1, p. 16) summarised many of the arguments expressed, when it suggested that mandatory sentencing can:

- be harsh and unfair and does not reduce crime
- disproportionately affect Aboriginal and Torres Islander and other marginalised groups<sup>109</sup>
- fail to consider an offender's circumstances
- lead to harsh and unfair sentences
- shift discretion from the courts to police and prosecutors.

While mandatory sentencing can be a response to perceived leniency by the judiciary, often it is a reaction to exceptional cases, rather than being a problem with judicial sentencing in general (IPA sub. 11). Research in other jurisdictions suggest that while respondents tend to note a general dissatisfaction with sentencing outcomes, when confronted with relevant information about sentencing, they tend to suggest sentences that are on par with or more lenient than the sentence imposed by the judge (Bartels et al. 2018, p. 279).

Legislated mandatory sentencing can result in unintended consequences and reduce the ability of judges and magistrates to impose sentences that align with the sentencing purposes. Generally, while Parliament has the role of setting the legislative framework for sentencing—through, for example, setting the sentencing purposes—the evidence suggests that the judiciary is best placed to impose sentences in individual cases based on legal principles and the evidence of the effectiveness of sentences.

Legislative provisions that have the effect of requiring a term of imprisonment risk inefficient sentencing and other unintended consequences. As a general rule, legislative prescriptions should be avoided, and there would be benefit in reviewing existing provisions to ensure they are having the effect that was intended.

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<sup>&</sup>lt;sup>107</sup> For example, ATSILS sub. 35, p. 6.

<sup>&</sup>lt;sup>108</sup> For example, Balance Justice sub. 1; IPA sub. 11; PWC sub. 13; ATSILS sub. 35; Amnesty International sub. 37; Sisters Inside sub 39; Bar Association sub 42.

 $<sup>^{109}</sup>$  A view supported in other submissions, including PWC sub. 13, p. 39.



## Abolition of short prison sentences

Discussions with stakeholders indicated a dissatisfaction with the value of short prison terms. As discussed elsewhere, short terms do not provide an opportunity for rehabilitation, while being destructive of protective factors, such as family relationships, employment and accommodation, that help reduce recidivism.

One approach is to remove the option of short sentences of imprisonment. Western Australia has adopted the approach of not allowing terms of imprisonment of less than six months, except in certain circumstances. There is some debate as to the effect of this provision, with some suggesting that it has resulted in sentence creep, while others have disputed this (ALRC 2017, p. 88).

While such an approach has its attractions, it has similarities to mandatory minimum sentencing in that it disallows courts from imposing what could be the most effective and efficient sentence in a particular case. An approach in which courts have a wider array of sentencing non-custodial options, with the flexibility for their adoption and the evidence base on which to base sentencing decisions, is likely to deliver better outcomes. If the evidence does not exist for short sentences, this evidence-based approach should result in a reduction of short imprisonment sentences over time, without the need for outright abolition.

## Building public confidence through accountability

While the judiciary should be provided with the discretion it needs to decide the appropriate sentence in any individual case, it is important for community confidence that sentencing is evidence-based and broadly consistent with community norms. If discretion is to be provided to the judiciary, it should be coupled with an appropriate degree of accountability.

### Alignment with community expectations

There is already a large degree of self-regulation by the judiciary that helps ensure the courts' sentences accord with legal principles, community values, and a strong evidence base that the sentences being imposed are achieving their purposes.

This is recognised by the courts, including the High Court:

A judge's sentence and reasons are usually exposed to public scrutiny through publication or media reporting. Public responses to sentencing, although not entitled to influence any particular case, have a legitimate impact on the democratic legislative process. Judges are aware that, if they consistently impose sentences that are too lenient or too severe, they risk undermining public confidence in the administration of justice and invite legislative interference in the exercise of judicial discretion. For the sake of criminal justice generally, judges attempt to impose sentences that accord with legitimate community expectations. (cited in Findlay et al. 2014, p. 272).

What constitutes 'community expectations' can be contentious, but a generally accepted view is that it should reflect the views of members of the public who are informed of the facts of a case to a similar extent to the judge, rather than public opinion based on media reports.

QSAC can play a valuable role in informing the public and the courts of how actual sentencing aligns with community expectations and with the evidence base. While QSAC already does this to a certain extent through programs such as 'Judge for Yourself', this function could be expanded to provide more rigorous analysis, as is done by the Victorian and Tasmanian sentencing advisory councils.

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<sup>&</sup>lt;sup>110</sup> Sentencing Act 1995 (WA), section 86.



#### Sentencing consistency

Consistency in applying the law is a fundamental legal principle and courts already seek to avoid inconsistencies in sentencing by referring to precedent in similar cases. During consultations, some stakeholders raised the issue of consistency of sentencing, particularly in the Magistrates Court.

Inconsistency can reduce the community's confidence in the criminal justice process; it may also suggest that some sentences are not optimal. However, consistency in sentencing does not require the same penalty for the same offence—since there is wide diversity in the circumstances of offences and offenders (for example, repeat offenders), an efficient system would be expected to exhibit diversity in the sentences that are brought down.

While the appeal process is intended to provide a mechanism to review sentences, it can be impractical to access for many defendants. Other mechanisms to reduce inconsistency, such as mandatory sentencing and strict sentencing guidelines, can reduce judicial discretion. Providing the judiciary with better information on precedents and the evidence base for sentences are information-based approaches.

An initial step is to monitor sentencing consistency to support better sentencing practice and to inform the public of the performance of the court. Mechanisms to provide this monitoring in a way that would not infringe the courts' independence include:

- self-monitoring by the courts, possibly using a process of periodic peer review of selected cases
- ongoing or periodic external review, possibly by a body like QSAC or a university, using broader statistical techniques to measure consistency, perhaps with interjurisdictional comparisons.

The Commission notes the existence of the Judicial Commission of New South Wales, whose principal functions are to:

- assist the courts to achieve consistency in sentencing
- organise and supervise an appropriate scheme of continuing education and training of judicial officers
- examine complaints against judicial officers.

The Judicial Commission promotes sentencing consistency by providing:

- guidance on the sentences that other judicial officers have given in particular circumstances through the sentencing statistics included on the online Judicial Information Research System (JIRS)
- information on sentencing principles and practice in the Sentencing Bench Book and JIRS
- information on sentencing trends and patterns through sentencing publications, bench books and JIRS (Judicial Commission of New South Wales 2019).

A judicial commission along these lines could be considered for Queensland.

#### Victim-initiated appeals

A more victim-focused system would assist in reassuring the public that the criminal justice system is being responsive to those most directly affected by criminal acts (Chapter 14).

Even so, where the process is not used or not successful, the victim may not be satisfied with the sentence imposed by the court.

One stakeholder suggested victims of crime be given the right to instruct the Director of Public Prosecutions (DPP) to seek leave to appeal against a sentence handed down by a District or Supreme Court (IPA sub. 11). Currently only the defendant and the state can appeal the sentence given by a court in criminal cases.



The main features of the proposal include:

- The victim would not appeal on his or her own behalf. Instead the victim would have the right to direct the DPP to appeal the sentence.
- The victim could make an appeal for relatively serious offences. In homicides, the right to seek appeal would reside with the next of kin.
- The grounds of appeal would be the same as those ordinarily brought by the DPP; that is, the sentence is manifestly inadequate and some substantial wrong has occurred in fixing the sentence.
- The office of the DPP would make itself available to consult with the victim and provide advice on the sentence imposed.
- If the victim directs the DPP to seek leave to appeal, the application would be drafted by the office of the DPP and public prosecutors would appear at the hearing. The victim would not have separate representation.
- The office of the DPP would bear the costs of the appeal.

The proposal could strengthen both the public's confidence in the judiciary and the position of the victim in the criminal justice process.

However, there are significant issues that would need to be overcome to make such a proposal work in practice. The primary challenges is that as there are no direct costs to the victim, there is limited deterrence for inefficient or frivolous appeals.

The risk is that scarce legal resources could be diverted to appeals that have little or no chance of succeeding. This would reduce the capacity of the criminal justice system to deal with cases that may be more in the community's interest.

This form of victim appeal has not been introduced elsewhere, although variations have been applied by South Australia, Germany and India (IPA sub. 11). South Australia provides victims with the right to request that the DPP make such an application. This right does not trigger an appeal but does commit the DPP to consulting in regards to the request (IPA sub. 11).



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#### Recommendation 9

The Queensland Government should establish a community corrections order that:

- provides options for home detention
- removes restrictions on the use of community-based orders, or on the combination of these orders with other sentences, including monetary fines, community service, and options for victim restoration and restitution
- is supported by appropriate services to address the causes of offending behaviours and to minimise breaches of these orders.

To encourage the appropriate use of non-custodial sentencing, the government should:

- establish mechanisms to ensure that resources are reallocated to community corrections to support changing court sentencing practices
- amend section 9(2) of the Penalties and Sentences Act 1992 to include a consideration of the costs of sentencing options, including the financial costs imposed on the community.

To ensure sentencing options support community safety and rehabilitation, the government should create a presumption in favour of courts seeking pre-sentence assessment, including psychological assessment, where there is reason to believe the offender is suffering from a mental illness or intellectual disability and the court is considering imposing a prison sentence.

#### Recommendation 10

To provide better rehabilitation options for offenders with cognitive impairment, mental illness, drug problems or other relevant circumstances, the Queensland Government should introduce a community corrections order with a residential supervision option. This option should be enabled by facilities that:

- have an emphasis on therapeutic treatment of offenders who would otherwise be given a term of imprisonment
- allow for the supervision of offenders by non-government providers.

Queensland Corrective Services should seek business cases from interested parties to support this proposal. These business cases should be assessed in the context of a broader infrastructure strategy (Recommendation 28).

#### Recommendation 11

The Queensland Government should make monetary penalties more effective by:

- removing restrictions on the use of monetary penalties by courts
- creating more opportunities for offenders to pay down fines through community service or other work and development orders.

The Queensland Sentencing Advisory Council or another suitable body should investigate options for the introduction of income-based fines, and report back to the government.

#### Recommendation 12

The Queensland Government should review legislated restrictions on judicial discretion, to ensure they are serving their intended purpose. The review should be undertaken by an independent body, such as the Queensland Sentencing Advisory Council, and be completed within 24 months.

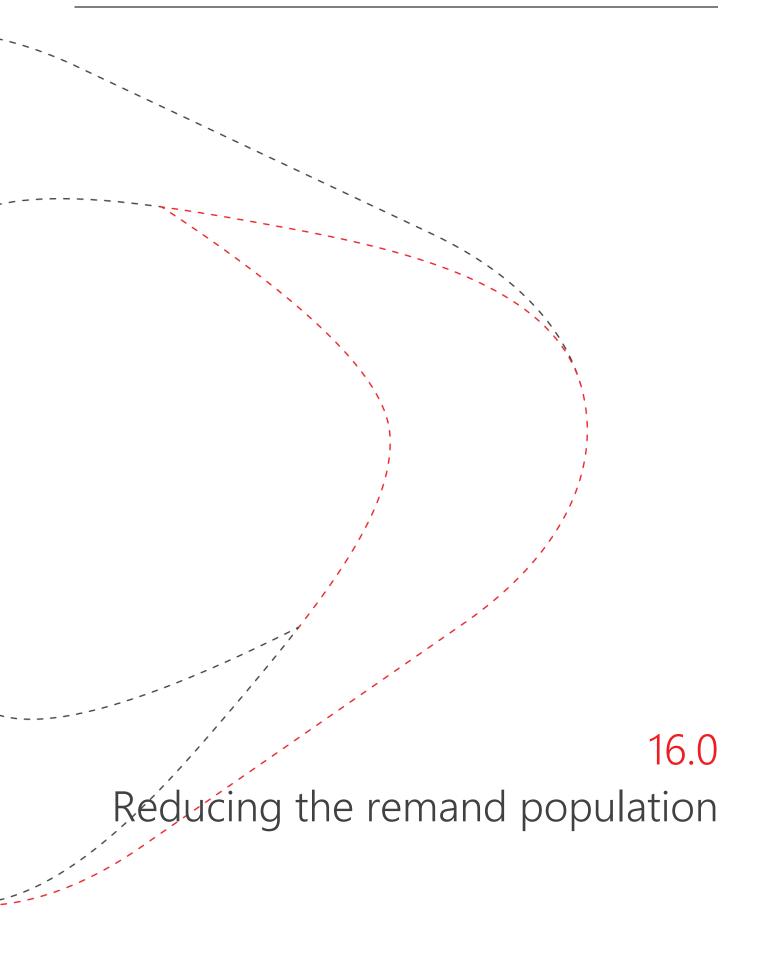


### Recommendation 13

To strengthen community confidence in sentencing, the Queensland Government should:

- expand the role of the Queensland Sentencing Advisory Council in producing and communicating an evidence base for sentencing and assessing sentencing in Queensland against this evidence
- introduce judicial self-monitoring, independent external review or other appropriate mechanisms to improve the consistency of sentencing outcomes for lower-level offences, for which appeal mechanisms are infrequently used.







This chapter discusses factors that lead to people being remanded in prison, and ways of reducing the growth in remand numbers

#### Key points

- Remand in custody is the holding of an individual, usually in prison, prior to trial and sentencing. Remand can help ensure the individual attends court or does not interfere with witnesses and the victim, and can protect the community from further offences.
- Remand in custody can present problems, as it:
  - incarcerates someone who, until they are convicted, is presumed innocent
  - makes it more difficult for the defendant to prepare their defence
  - imposes high personal and resource costs on the defendant
  - can add to an overcrowded prison population
  - limits the opportunity to provide the remandee with rehabilitation services
  - makes preparing the defendant's re-entry into the community more difficult.
- Nearly five times as many people are in Queensland prisons on remand as there were twenty years ago. The proportion of the prisoner population on remand has also been growing, from under 10 per cent in the 1980s to 30 per cent at present.
- The key reasons behind the growing proportion of prisoners on remand are likely related to policy and decision-making pressures, and court workloads leading to longer periods on remand.
- There are opportunities to reduce the use of remand in custody by:
  - making bail decision-making more robust, through a clearer articulation of the objectives and considerations of that decision and use of a more evidence-based and transparent risk management framework
  - facilitating the defendant staying in the community through the greater use of non-custodial options, addressing accommodation needs and providing rehabilitation opportunities
  - reducing court delays. Implementing the recommendations in this report, such as decriminalising certain offences and supporting restitution, restorative justice and diversion options would assist in reducing court workloads.
- The negative, often criminogenic, effects of remand in custody can be mitigated by giving defendants greater access to rehabilitation opportunities.



# 16.1 Issues with remand in custody

The decision to grant bail or remand in custody is one of the most important decisions in the criminal justice process. As the decision takes place before conviction, a presumption of innocence exists. Yet if the decision is made to remand a defendant in custody, it results in imprisoning someone, who may later be found not guilty, or given a non-custodial or shorter prison sentence. The bail process is described in Box 16.1.

The benefits associated with placing a defendant on remand include:

- securing the accused person's attendance at court proceedings
- protecting the community and victim from further offending by the defendant, at least for the period that the defendant is in custody
- increasing the celerity of punishment; that is, imposing the punishment earlier and closer to the time of the offence—increased celerity can enhance the deterrence effect of punishment (Chalfin & McCrary 2017, p. 6).

However, significant problems are also associated with remanding a defendant in custody:

- It incarcerates someone who, until they are convicted, is presumed innocent. Both the defendant and the community can be said to have suffered a loss if the presumption of innocence is diminished.
- For the defendant, the costs of being remanded into custody can be high, including:
  - loss of their liberty and exposure to the hardship, violence and possible criminogenic effects of high security prisons, often for a longer period than they would otherwise have been subject to
  - the potential loss of employment, disruption of education, loss of accommodation, breakdown of relationships, and cessation of any therapeutic treatment that was being received. Where the defendant is the primary wage earner, parent or carer in a family or group, it can result in hardship for others
  - the defendant's defence potentially being jeopardised. Preparing their case becomes more difficult when access to their legal representative is restricted.
- While the community is protected during the period of remand, it can become more vulnerable to a higher risk of the defendant reoffending upon release, since defendants:
  - can experience adverse changes to social circumstances, such as employment, accommodation and personal relationships, that may increase their risk of offending in the future
  - have only limited access to education, training and rehabilitation programs while on remand
  - can lose the opportunity for supported re-entry into the community if they are released on or soon after the
    day of sentencing. The limited notice of a prisoner's actual release date can make referrals to intensive
    programs and intervention services difficult, as prisoners generally need to be engaged in the program or
    intervention for at least six months for it to be effective (Queensland Government sub. 43, p. 13).
- For the government, the cost of remanding a defendant in custody is high—each additional day a person unnecessarily spends in prison costs \$305 (SCRGSP 2019a). Remand can exacerbate the problems of prison overcrowding, with consequences for other prisoners and prison employees.

A period on remand in custody contributes to the overall prison population if the period on remand is longer than the prison sentence the defendant would have received if the defendant had not been on remand.

In 2015–16, of the 5,568 prisoners admitted on remand, almost 30 per cent were released from remand to freedom or to a non-custodial sanction, with 70 per cent sentenced to imprisonment. Of those, 43 per cent were released on the same day to court ordered parole (Sofronoff 2016, pp. 59–60). As courts can be inclined to equate a prison sentence to time served rather than nominate a lesser prison term, it is possible that in some of those cases the remandees would have received a shorter term if sentencing had occurred earlier. Thus, of those remandees who



are released from prison on the day of sentence (around 60 per cent of those on remand), a significant proportion may be spending excessive time in prison.

Remand in custody has the potential to increase the likelihood of a defendant receiving a prison sentence. A study of the impact of decisions at first bail hearings in New South Wales found that the marginal effect of bail refusal was associated with a 10 percentage point increase in the likelihood of the court imposing a custodial sentence for that charge (controlling for other factors). That is, remanding ten additional defendants increases the number imprisoned by one (Rahman 2019). There may be effects on other aspects of sentencing, such as leading to longer sentence lengths. These effects impose costs to both the defendant and the government, which need to be weighed against the reduced likelihood of the defendant offending while on bail or failing to appear at court.

#### Box 16.1 The bail and remand process

The use of bail is legislated under the Bail Act 1980 (Qld).

In Queensland, a person accused of committing a criminal offence will usually be given a notice to appear, which requires the defendant to appear at court on a certain date. If the offence is more serious, the police may choose to arrest the person.

If the person is arrested, the police may grant bail (watch-house bail) or remand the person in custody to appear in court for a bail hearing. Once before the court, the defendant may apply for bail (court bail) to remain in the community during later court proceedings.

While there is a general presumption in favour of bail (s. 9 of the *Bail Act 1980*), bail can be refused if the court or police are satisfied there is an unacceptable risk that the defendant will fail to appear at court, commit a crime, endanger the victim of the crime or interfere with witnesses. Defendants can also be remanded in custody for their own protection (s. 16(1)).

In assessing this risk, considerations to be taken into account (ss. 16(2)–16(3)) include:

- the nature and seriousness of the offence
- the character, antecedents, associations, home environment, employment and background of the defendant
- the history of any previous grants of bail to the defendant
- the strength of the evidence against the defendant
- if the defendant is an Aboriginal or Torres Strait Islander person—any submissions made by a representative of the community justice group in the defendant's community
- if the defendant is charged with a domestic violence offence—the risk of further domestic violence being committed by the defendant
- if the defendant is charged with certain serious crimes, bail is refused unless the defendant can show why detention is not justified.

The granting of bail may come with a monetary surety and conditions (including prohibitions on the defendant's movements) to help ensure the defendant appears in court on a specified date, does not commit a further offence and does not interfere with witnesses. However, the conditions are not to be 'more onerous for the person than those that in the opinion of the court or police officer are necessary having regard to the nature of the offence, the circumstances of the defendant and the public interest' (s. 11). If any bail conditions are breached, bail may be revoked and a conviction for breaching bail may follow.

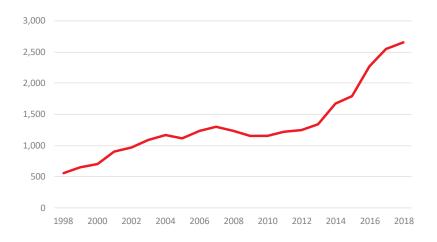
If bail is not granted, the alleged offender will usually be transferred to a high security remand centre.



### 16.2 Trends in remand

Nearly five times as many people are in Queensland prisons on remand as there were twenty years ago. After being stable in the 2000s, the remand population has grown sharply in the last six years (Figure 16.1). Over that period the number of people remanded in custody has more than doubled—from 1,250 in 2012 to 2,652 in 2018.

Figure 16.1 Unsentenced prisoners, Queensland

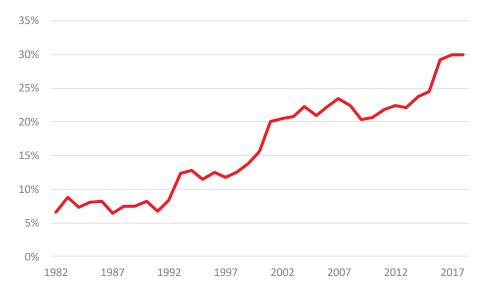


Source: ABS 2018k.

This increase means the prison remand population now represents nearly a third of the prison population.

The proportion of the prisoner population on remand has been growing for several decades, from under 10 per cent in the 1980s to 30 per cent currently (Figure 16.2). Between 2012 and 2018, the remand population increased 112 per cent (1,402 prisoners), compared to the growth in the sentenced population of 42 per cent (1,844 prisoners). This growth in the remand population is a significant driver in the overall growth of the prison population.

Figure 16.2 Unsentenced prisoners (as a proportion of prison population), Queensland



Sources: ABS 2018k; Carcach & Grant 2000.



Just as Aboriginal and Torres strait islander people are disproportionately represented in the prisoner population, they also make up a disproportionate share of the remand population—29 per cent of the remand population are Indigenous. Currently, 29 per cent of Indigenous prisoners are on remand and 35 per cent of female prisoners are on remand (QCS 2018i).

High rates of remand are not only an issue for the adult corrections systems, but also for the youth justice system. Youth remand rates in Queensland have been increasing in recent years, such that currently 80 per cent of children in Queensland detention centres are on remand (Atkinson 2018, p. 52).

Queensland is not alone in experiencing strong growth in its prison remand population. Remand populations in all states and territories represent a similar or higher proportion of the prison population. Similarly, remand populations have grown rapidly in recent years across Australia (Table 16.1).

Table 16.1 Unsentenced prisoners, interjurisdictional comparison

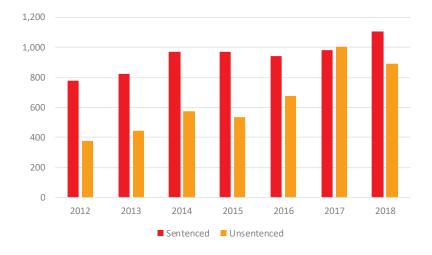
	NSW	Vic	Qld	WA	SA	Tas	NT	ACT
Rate per 100,000 adult population	76.1	60.5	72.6	99.8	78.4	42.8	293.8	74.9
Proportion of prison population (%)	33.5	35.3	30.0	27.8	37.3	28.8	28.9	37.8
Growth in unsentenced prisoners, 2012–2018 (%)	86	172	112	96	72	101	46	104

Sources: ABS 2018k, 2019c.

# 16.3 Why is remand growing?

A major driver of the increase in the remand population has been the number of unsentenced prisoners whose most serious charge is assault, representing half of the total increase in prisoners on remand. From 2015 to 2018, this category of remand prisoners grew 68 per cent. Moreover, the growth in the number of prisoners on remand on an assault charge has significantly outpaced growth in the number of sentenced prisoners whose most serious offence was assault (Figure 16.3).

Figure 16.3 Prisoners with assault as most serious offence/charge



Source: ABS 2018k.



A secondary driver of the increase in remand in Queensland is the growing number of bail breaches.<sup>111</sup> Breaches of bail conditions increased markedly after 2011–12. Between 2011–12 and 2015–16, the annual number of breaches of bail conditions as the most serious offence increased by 59 per cent. Over the same period, the number for female offenders increased by 82 per cent and by 30 per cent for Indigenous offenders (QSAC 2017).

The data is not available to determine precisely the underlying causes of these drivers, but recent events and the literature point to possibilities:

- Legislation, policy and decision-making—a combination of policy change, public pressure and changing defendant characteristics can influence the decision to place defendants on remand.
- Court processes—increasing court delays can lead to remandees spending more time in prison.

### Legislation, policy and decision-making

It has been argued that throughout Australia the purpose of remand has been shifting from trial integrity to community safety (Brown 2013, p. 85; Collins 2000, p. 3). That is, the emphasis has shifted from ensuring that the defendant's trial is not compromised (by absconding or interfering with witnesses) to protecting the community from further offence.

This shift is evident in legislation where, for some offences, the presumption has been reversed from being in favour of bail, to the defendant having to show cause why remand in custody is not warranted. A recent example in Queensland of the growing application of reverse onus has been the amendment to the *Bail Act 1980* in 2017, which reversed the usual presumption in favour of granting bail for those charged with a serious domestic violence offence.<sup>112</sup>

There are several reasons why changes in policy may be more strongly reflected in changes in the number of prisoners on remand than in the number of sentenced prisoners.

First, it can be a timing issue. If there is an increase in arrests due to a change in policy, there is likely to be an associated increase in the number of defendants remanded in prison. If court procedures are such that there are substantial delays in the commencement and conduct of trials, and therefore sentencing, growth in the remand population may initially outpace growth in sentenced prisoners. Over time, growth in the number of sentenced prisoners is likely to converge with that of prisoners on remand.

Second, substantial discretion is accorded to police and judicial officers in relation to bail decisions. Decisions on bail occur at the point of apprehension, when police can arrest or issue a notice to attend court; or at the police station, when police can grant or refuse bail; or in the court, when the judicial officer can grant bail or require the alleged offender to be remanded in custody. At each point, police and judicial officers must apply their judgment, which can be shaped by the legislative, social and organisational contexts in which they operate (King et al. 2009, p. 24).

Bail decisions allow for more discretion than judicial judgments of defendant guilt and sentencing, where discretion is more constrained by the facts of the case, a more clearly defined burden of proof, the precedents set by previous cases and the opportunity for appeal. Thus, bail decisions can be more susceptible to organisational policy and practices. For example, a study in South Australia found that it was not uncommon for operational policies to encourage arrests rather than summons or to use remand as a strategy to achieve crime reduction goals (Sarre et al. 2006).

These factors may help explain the growth in recent years in the number of unsentenced prisoners whose most serious charge is assault, especially in the period after 2015.

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<sup>&</sup>lt;sup>111</sup> Bail breaches are breaches of bail conditions that may include, for example, restrictions on entering licenced premises, imposition of a curfew, a requirement to report to a police station, or a ban on contact with certain people.

<sup>&</sup>lt;sup>112</sup> For example, one punishable by a maximum penalty of seven years imprisonment, or involving threats to enter or damage a dwelling, dangerous operation of a vehicle, deprivation of liberty, unlawful stalking, or injury to animals.



Discretion in bail decision-making can also be affected by factors other than official policy:

• Community attitudes: Bail decisions can be affected by community, political and media attitudes, and the consequences if the decisions do not meet the expectations of some:

No magistrate or judge enjoys being singled out for public criticism by the government for a bail or sentence decision that upsets the shock jocks or tabloid media ... Judges and magistrates may be independent, but they are not insensitive to public, political and media criticism. If politicians keep demanding tougher penalties, courts will eventually deliver them. (Weatherburn 2016, p. 149)

Specific public incidences can also affect bail decision-making. In explaining increased remand numbers in Victoria, the 2017 Victorian Bail Review referred to 'increased risk aversion by police and other decision-makers as a result of high profile cases such as the murders of Jill Meagher and Luke Batty', and the deaths of pedestrians in Bourke Street, Melbourne, by a motor vehicle driver (Coghlan 2017, p. 22).

• Defendant characteristics: It has been suggested that the prevalence of drug and mental health problems has been a significant driver of the increase in remand (Sarre et al. 2006). The escalating use of methamphetamines with its association with violent behaviour<sup>113</sup> is likely to have made the decision to grant bail to illegal drug users more problematic. The number of unsentenced prisoners on remand for illicit drugs offences increased 374 per cent over the six years to 2018.<sup>114</sup>

### Court processes

Court delays increase the time those on remand spend in prison. This makes it more likely that they spend more time in prison than they otherwise would have and therefore contributes to an increase in the prison population.

Increases in the duration and backlog of criminal cases in the Magistrates Court since 2012–13 suggest that there may be excessive criminal case workloads (Table 16.2). This may be resulting in longer court delays and the time that defendants are spending remanded in custody.

Table 16.2 Magistrates Court, criminal cases (weeks)

	2010–11	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18
Duration (weeks) <sup>a</sup>								
Mean	12.0	12.2	10.5	10.0	10.7	11.4	13.1	15.1
Median	4.0	4.1	4.1	4.3	4.6	4.9	5.0	5.4
Backlog indicator (%) <sup>b</sup>	28.1	25.0	26.4	29.8	31.3	33.0	36.8	35.5

a Duration from initialisation to finalisation.

b Defined as the number of cases greater than six months as a percentage of the court's total active pending caseload. Sources: ABS 2019e; SCRGSP 2019a.

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<sup>&</sup>lt;sup>113</sup> One study found that frequent methamphetamine use increases the odds of violent behaviour ten-fold, much more than heavy alcohol consumption (McKetin et al. 2014).

<sup>&</sup>lt;sup>114</sup> Although there has been similar growth in the number of sentenced prisoners for that category.



Time on remand has shown an increase since 2013 (Table 16.3).

Table 16.3 Unsentenced prisoners, time on remand (months)

	2011	2012	2013	2014	2015	2016	2017	2018
Mean	6.0	6.3	5.5	5.7	5.9	5.8	6.0	6.1
Median	3.4	3.9	3.5	3.7	3.5	3.5	3.7	3.6

Source: ABS 2018k.

# 16.4 Opportunities for reform

International comparisons show a wide disparity between prison remand populations across the world (Table 16.4). While circumstances in nations differ, it still suggests that jurisdictions may have a substantial degree of policy influence in relation to remand.

Table 16.4 Rates of remand in custody, international comparison

Country	Rate of remand prisoners (per 100,000 population)	Remand population (% of prison population)
Japan	4	10.8
Norway	14	22.9
UK—England and Wales	15	10.7
Germany	17	21.9
Sweden	18	30.6
Singapore	24	11.9
UK—Scotland	31	20.7
France	30	29.0
Canada	42	38.7
Australia	55	32.2
New Zealand	70	34.3
United States	135	20.3

Note: 'Rates of remand prisoners' are not comparable with Table 16.1 as rates are based on total populations rather than adult populations. Source: World Prison Brief n.d.

The investigation of the underlying causes of the growth in remand (section 16.3) implies that the opportunities for reform lie first in focusing on the factors that influence the bail decision, and second in improving court processes to reduce the time prisoners spend on remand.



### Develop guiding principles and risk assessment tools

The Victorian Bail Review stated in relation to the bail–remand decision that '[u]ltimately, the question is how to ensure that the right people are on remand' (Coghlan 2017, p. 20). From an economic perspective, this question is best answered through the consideration of all the costs and benefits when an application for bail is made.

Section 9 of the *Bail Act 1980* has a presumption in favour of bail. Notwithstanding this, section 16(1) requires bail to be refused if police or courts assess unacceptable risk exists in relation to trial integrity or community safety. Other impacts on the defendant and the community are not specifically listed for consideration. Similarly, section 16(2) lists considerations in the assessment of risk, but that list is narrow even in relation to community safety—for example, the potential criminogenic effects of short terms of imprisonment are not a consideration.

The Victorian Parliament recently inserted guiding principles into its bail legislation, which recognise the importance of:

- maximising the safety of the community and persons affected by crime to the greatest extent possible
- taking account of the presumption of innocence and the right to liberty
- promoting fairness, transparency and consistency in bail decision-making
- promoting public understanding of bail practices and procedures.

The Victorian guiding principles provide a good base for a set of guiding principles for the Queensland legislation.

However, it appears incongruous that the Victorian guidance principles accept the presumption of innocence but then do not recognise the impact of imprisonment on the defendant. If guiding principles are adopted, they should take into account a wider range of considerations, specifically the impact on the defendant and their dependents of being remanded in custody, including the potentially criminogenic effects of a term in prison. Such principles would then be consistent with maximising the safety of the community but would take a longer-term view.

In a similar way, the costs to the community of imprisonment should be taken into account. Imprisonment incurs an opportunity cost, that is, a cost in terms of the forgone benefit of using the resources for other purposes—for example, health care or education.

Considerations listed in section 16 of the *Bail Act 1980* may need to be amended to support the guiding principles, including the need for consideration of the impact of the defendant being remanded in custody on his or her accommodation and employment status. These are important protective factors for an individual in relation to offending behaviour, and they should not be unduly placed in jeopardy.

In practice, decision-makers, such as police and the judiciary, are unlikely to be able to undertake a detailed cost-benefit analysis for every bail application, although courts may be in a better position to make a more considered bail decision than police. Bail assessment tools should be developed to assist decision-makers to make this assessment. It should be based on an analysis of the risks associated with granting and refusing bail, including the likelihood of breaching bail by bail recipients. Such guidance could include:

- principles underlying the making of the bail decision
- decision flowcharts that step through the key considerations
- supporting evidence underlying the bail assessment guidance
- case studies.

The bail assessment tool should not be overly prescriptive and should allow the reasonable use of discretion by decision-makers. For example, decision-makers need to use their judgment in relation to the strength of the evidence against the defendant (a consideration listed in section 16 of the *Bail Act 1980*), an important factor in assessing the risk of granting bail.



The development of evidence-based risk assessment tools could allow for the reverse onus provisions to be reconsidered. The higher risks associated with certain violent offenders would be reflected in the risk assessment tool. This would simplify decision-making required for bail, at least partly offsetting any greater complexity associated with additional considerations required by the guiding principles.

Risk assessment guidance would have the additional advantages of improving transparency and consistency in bail decision-making.

### Provide alternative non-custodial options

Chapter 15 includes a discussion of the options available to judicial officers in sentencing. One suggestion is that judges would be more likely to decide on sentences that do not involve imprisonment if they had community-based options that allowed them to achieve the sentencing purposes at least as effectively and efficiently as a term of imprisonment.

A similar approach can be adopted for bail. In particular, the greater use of electronic monitoring, including its application in home detention, can be used as a restriction on the movements of those on bail who would otherwise be remanded in custody. The ability to monitor the movement of those higher risk bail recipients should give greater confidence to police and courts to give bail. The 2018–19 State Budget provided \$3.3 million over two years to provide courts the capacity to impose a condition under the *Bail Act 1980* for an electronic tracking device to be worn by defendants (Queensland Government sub. 43, p. 4).

A risk with the wider use of electronic monitoring is that it might lead to net-widening—the overuse of electronic monitoring to a wider cohort of bail recipients than otherwise warranted. This will continue to be a risk, although a reduced one, if the relevant recommendations are adopted—that is, to develop guiding principles and supporting risk assessment tools that would provide guidance on the appropriate use of bail conditions.

### Increase availability of bail support services

Decision-makers' concerns regarding the risk of offending, the defendant's own protection and the likelihood of the defendant meeting bail conditions (including attendance at court) can be mitigated if bail support services are improved. Given the high cost of policing bail breaches and the remand of defendants in high security prisons, the diversion of resources for this purpose would likely be financially sound and would deliver benefits to the community and defendant.

Bail support programs involve interventions that increase the likelihood of accused people being granted bail and completing their bail period without breach (Willis 2017, p. 5).

Based on the international literature, the Australian Institute of Criminology suggested best practice principles for bail support programs (Box 16.2).



#### Box 16.2 Best practice principles for bail support programs

Best practice principles suggest that bail support programs should:

- be voluntary, ensuring that the client is at least somewhat motivated and willing to engage with treatment and make changes to their life
- be timely and individualised—that is, available immediately upon bail being granted and responsive to the accused person's immediate needs, even before they have left the court
- be holistic, addressing the full range of the individual's criminogenic needs
- be collaborative, using interagency approaches involving other government and non-government service providers
- consistently apply a strong program-wide philosophy, at the individual case-manager level
- prioritise support over supervision, and emphasise the response to and treatment of an individual's criminogenic needs over monitoring
- be localised and make use of local community resources and knowledge
- have a court-based staffing presence and establish good working relationships with court officers and service providers. Working relationships with court officials and the judiciary are important for establishing credibility and instilling judicial confidence
- be based on sound guidelines and processes that assist clients to engage with the structured processes of the courts and the requirements of court orders while maintaining program integrity.

Source: Willis 2017, p. iv.

In Queensland, existing bail programs for adult defendants include:

• Court Link—an integrated court assessment, referral support program that connects participants to treatment and support services to address housing, employment, drug and alcohol, health and other social needs. Court Link is available in Brisbane, Cairns, Ipswich and Southport. A person can be assessed to participate in Court Link if they are charged with any criminal offence before the Magistrates Court, and regardless of whether they are guilty or not guilty. The court may consider a participant's positive engagement when determining a sentence (Queensland Courts 2018a).

Court Link is modelled on a Victorian program, the Court Integrated Services Program (CISP). An evaluation in 2009 found that those who completed CISP offended less frequently and less seriously, and spent less time in prison. A cost–benefit analysis of CISP indicated a benefit–cost ratio of 2.6 after five years (on a net present value basis) and 5.9 after 30 years (PricewaterhouseCoopers 2009). This suggests that funding bail support programs has the potential to represent a good investment for the community.

Court Link received additional funding in the 2019–20 State Budget to extend the program to Maroochydore, Redcliff and Caboolture. As Court Link has commenced only recently, it may be premature to undertake an evaluation of its performance. However, once evaluations are undertaken, they should form the basis of government consideration of further extending their operations to other locations across Queensland.

Queensland Magistrates Early Referral Into Treatment (QMERIT)—a 12–16 week voluntary, bail-based diversion
program for defendants charged with an offence relating to illicit drug use. The program offers medically
supervised and community-based withdrawal and in-house residential rehabilitation. It operates in the
Maroochydore and Redcliffe Magistrates Courts only (Queensland Courts 2018d).



- Sisters Inside Supreme Court Bail Program—Queensland Corrective Services (QCS) initiated the Supreme Court Bail Program to support remanded women prisoners to apply for and achieve bail. The program commenced in March 2016 and is currently delivered by Sisters Inside at Brisbane Women's, Numinbah and Townsville Women's correctional centres. QCS is currently working with Sisters Inside to expand the program to the Southern Queensland Correctional Centre (Queensland Government sub. 43, p. 68).
- QCS Men's Bail Program—in the 2018–19 State Budget, QCS received funding of \$3.931 million over three years to support the continuation of the Supreme Court Bail Program and to trial a bail support program for male remanded prisoners to assist male prisoners apply for and achieve bail, thereby reducing the number of prisoners on remand (Queensland Government sub. 43, p. 68).

Understanding the experience of defendants on bail will provide insights into how to help ensure that bail conditions are breached less often. The Queensland Government is undertaking research into the factors that help and hinder defendants in keeping to their bail conditions to inform the development of future bail programs (Box 16.3).

#### Box 16.3 Bail Adherence Research Project

In May 2018, the Integrated Criminal Justice program in the Department of Justice and Attorney-General (DJAG) commenced behavioural insights research to understand the barriers and enablers of defendants' behaviour while on bail and how the systems that surround them behaves to support or hinder compliance.

The purpose of this research is to inform strategies to reduce the demand on the system by better supporting defendants to adhere to their bail conditions. In turn, by supporting defendants to adhere to their bail conditions, the risk is reduced that further charges are laid that may result in more fines or incarceration. The research is overseen by an Advisory Group made up of members from the Queensland Police Service, Office of the Director of Public Prosecutions, Legal Aid Queensland and DJAG.

Source: Queensland Government sub. 43, p. 64.

There may be simple ways to assist defendants on bail. For example, in New York, a pilot scheme was introduced to send text messages to remind defendants of upcoming court appointments. The Queensland Government introduced a similar trial last year in Mackay, with SMSs being issued for court appearance date reminders, targeting clients with a watch-house bail undertaking (Chamberlin 2017).

### Provide alternative accommodation options

A lack of safe, stable and secure accommodation can often result in defendants being refused bail, especially if they suffer from mental illness, drug addiction, homelessness or difficult home environments. Because of this absence of suitable accommodation, they are directed to high security prisons, with minimal freedoms, limited access to services, and exposure to hardened criminals.

Not only is such accommodation inappropriate for at least some remandees, it is also very costly. As ATSILS (sub. 35, p. 5) pointed out:

Obviously, keeping accused remanded in custody in preference to anywhere else is the most expensive option. Immediate relief to the overcrowding in prisons could be created by more suitable alternatives for remand, such as bail hostels.



Professor Carrington and Professor Hogg (sub. 3, p. 4) expressed similar views:

Custodial remand (whether of juveniles or adults) is very costly, has harmful effects especially on children and probably does little to enhance community safety ... Remand drives up imprisonment rates. Many adults and juveniles are remanded in custody, not because they have been accused of offences that would warrant a prison sentence upon conviction, but because of the lack of alternatives to incarceration for disadvantaged people with multiple problems such as homelessness, unemployment, mental health problems and or drug addiction. Increasing safe affordable community housing options for these juvenile and adults cohorts (with gender and Indigenous appropriate options) would considerably reduce the use of remand and relieve the crisis in the Qld juvenile and criminal justice systems.

Bail accommodation is currently being established for the Queensland youth justice system (Caldwell 2017). Extension of bail hostels to the adult system could provide accommodation that is supervised, has support services and allows the defendants to continue working, continue their education and maintain other social and economic relations. It can also provide support, for example by reminding defendants of court and other appointments, which reduces the risk of the defendant breaching bail conditions.

The use of bail hostels can raise some concerns, including:

- net-widening—where defendants who would have been bailed into the community are instead bailed into a bail hostel (Willis 2017, p. 21)
- location—balancing community concerns about proximity to residential areas and the need for bail hostels to be close enough to defendants' families, services and employment
- security risk—ensuring the assessment of defendant risk aligns with the security of the hostel.

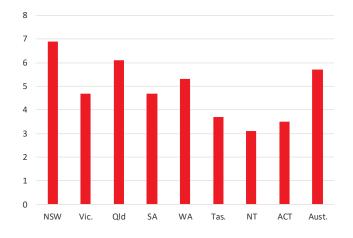
These issues could be considered and addressed using a trial.

In the absence of available bail hostels, remand in a low security facility (if places are available) could be an option for the court when the defendant is being remanded for their own protection, rather than because they present a risk to the community.

### Work with the courts to improve processes and procedures

The time that prisoners spend on remand has been increasing in recent years. Queensland's unsentenced prisoners spent the second-longest time on remand in Australia, after New South Wales (Figure 16.4).

Figure 16.4 Unsentenced prisoners, average time on remand (months)



Source: ABS 2018k.



Reducing the time on remand, all other things being equal, would reduce the remand population. A reduction in the time on remand can be achieved by reducing court delays, which, in turn, can be achieved by additional resources or finding ways to make the court procedures more efficient without compromising the justice process.

One indicator of the courts' resourcing is their staffing relative to their workload. Queensland is the jurisdiction with the fewest judicial officers and staff per 1,000 finalisations (Figure 16.5), suggesting that, at least in comparison with other jurisdictions, Queensland courts may be under-resourced.

Figure 16.5 Judicial officers and full-time equivalent staff per 1,000 finalisations, 2017–18, Criminal Courts



Source: SCRGSP 2019a.

An examination of court procedures may find that more resourcing is required at certain stages to improve the effectiveness and efficiency of decision-making with regard to bail and remand. In a court observation study conducted in 2002 and 2003, it was found that the median time taken for a contested hearing in Victoria was 18 minutes, while in South Australia it was five minutes (Sarre 2016, p. 200). The longer period in Victoria was largely the result of police being required to give evidence to the court to justify their decision not to grant bail and the extra time for the court to scrutinise the evidence. The study concluded that this resulted in the police being more inclined to grant bail in the first place if they thought their decision could be later overturned by the court.

Moreover, an examination may find that resourcing to deliver more efficient decision-making is best applied to other aspects of the court system, such as providing better legal assistance to defendants to navigate through the criminal process.

The Commission is unable to ascertain the capacity to generate greater efficiencies in the court process. The benefits of additional court funding and greater efficiencies, such as lower remand, need to be carefully examined against the opportunity costs and any adverse, possibly unforeseen, consequences. This means any proposals to amend court procedures will need to involve consultation with court officials and other relevant parties.

However, implementing other recommendations in this report could release court resources. Initiatives such as the decriminalising of certain existing offences and greater use of alternatives to court processes such as restitution, restorative justice and diversion away from judicial processes would relieve the strain on court resources. These resources could then be applied to reducing court delays and allowing courts to give greater time to the consideration of the granting of bail.



### Provide access to programs while on remand

One of the problems of remand in custody is the remandees' lack of access to rehabilitation programs. Since around 60 per cent of remandees are released from prison on the day of sentence (Sofronoff 2016), many remandees can be released without any opportunity for rehabilitation. Even for longer-term prisoners who have spent a substantial part of their sentence on remand, the opportunity for effective rehabilitation post-sentence will have been curtailed, resulting in either release without adequate treatment, or rejection of their parole application (a criticism that has arisen in the Matthew James Ireland case (Kyriacou 2019)). In the absence of rehabilitation opportunities, the experience of remand in custody is a wholly negative one, where loss of relationships, accommodation and employment and interaction with hardened criminals can be potentially criminogenic.

The lack of access to rehabilitation opportunities can be due to:

- the generally short and indeterminate periods of remand in custody, as rehabilitation programs are focused on longer term-prisoners
- participation in programs that directly relate to the offence the remandees are being charged with, possibly being prejudicial to their chances of being found not guilty.

The lack of access to rehabilitation of remandees contrasts with those on bail, who can often access programs such as Court Link. Their participation in the Court Link program does not require an admission of guilt and can be used by the court as a positive consideration at the time of sentencing.

Issues with the rehabilitation of short-term prisoners are considered further in Chapter 18. However, being on remand should not, by itself, prevent access to rehabilitation they could have otherwise received. Consideration should be given to remandees receiving opportunities for rehabilitation in the same way as for other prisoners, without negatively prejudicing the outcome of their trial.

#### 16.5 Conclusion

The rising rate of defendants on remand is contributing to growing prison populations. However, because of the complex interaction between judicial sentencing and remand in custody, it is not known how large that contribution is. Moreover, the decision whether to give bail or remand in custody is itself complex, having to balance considerations of preserving the integrity of court processes, community safety, presumption of innocence and the potential impacts on individuals, including the victims and the defendant.

There are opportunities to reduce the use of remand in custody by:

- making bail decision-making more robust, through a clearer articulation of the objectives and considerations of that decision and use of a more evidence-based and transparent risk management framework
- facilitating the defendant staying in the community through the greater use of non-custodial options, addressing accommodation needs and providing rehabilitation opportunities
- reducing court delays. Implementing the recommendations in this report, such as decriminalising certain
  offences, and supporting restitution, restorative justice and diversion options, would assist in reducing court
  workloads.

The negative, often criminogenic, effects of remand in custody can be mitigated by giving defendants greater access to rehabilitation opportunities.



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#### Recommendation 14

To encourage confidence in bail, and its efficient use, the Queensland Government should:

- · develop evidence-based risk assessment tools to assist police and courts when considering bail applications
- make available, through legislative amendment, a greater range of non-custodial options to courts, including electronic monitoring and home detention
- establish a mechanism to allocate resources to support any changes in the use of community-based supervision
- trial remand accommodation options for homeless offenders, including bail hostels and low security custodial facilities
- consider extending the operations of Court Link to more locations.

#### **Recommendation 15**

To provide greater guidance to courts, the Queensland Government should insert guiding principles into the *Bail Act 1980*, based on the following principles:

- Preserving the integrity of the court process.
- Preserving the safety of the community and persons affected by crime.
- Taking account of the presumption of innocence and the right to liberty.
- Taking account of the cost of imprisonment to the community, including the defendant.
- Promoting transparency and consistency in bail decision-making.

Further, the government should amend section 16 of the *Bail Act 1980* to ensure that this section is consistent with these guiding principles.

#### Recommendation 16

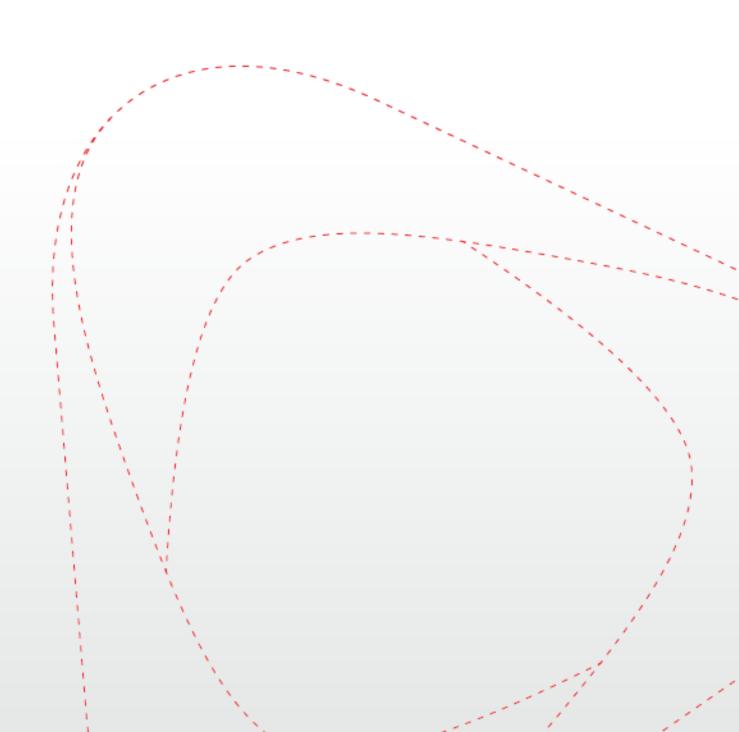
To reduce remand levels, the Queensland Government should investigate opportunities for reducing delays between bail hearings and sentencing.

#### Recommendation 17

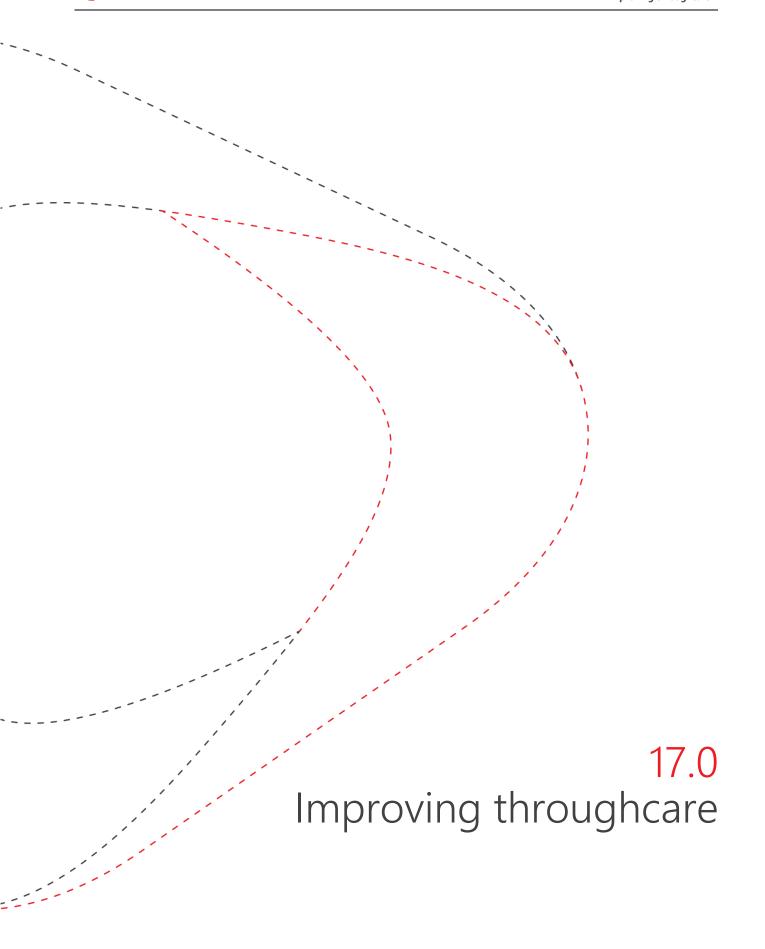
To assist the rehabilitation of prisoners, the Queensland Government should ensure that prisoners on remand are able to access suitable programs and other activities likely to aid their rehabilitation.

Queensland Productivity Commission











This chapter discusses how to strengthen the incentives to improve throughcare in Queensland.

#### Key points

- Throughcare is an integrated process of rehabilitation and reintegration designed to reduce reoffending, through services provided in prison and after release. Queensland Corrective Services (QCS) has a legal obligation to provide these services.
- There is no single best throughcare model—jurisdictions have different approaches, with varying success. However, effective throughcare arrangements commonly share seven features, relating to objectives, incentives, resourcing, prisoner assessment, responsibility for decision-making, coordination and continuous development. These features provide a framework for assessing QCS's approach to in-prison rehabilitation and reintegration.
- There are many ways to improve throughcare, including by increasing resources for programs, or reforming the way that services are delivered. However, without first reforming the foundational governance arrangements that incentivise performance and provide accountabilities for outcomes, these are unlikely to be effective.
- Under current arrangements, QCS has few incentives for providing effective throughcare for prisoners since they do not suffer consequences if a prisoner is not rehabilitated and they have few responsibilities beyond the prison gate once a sentence is served.
- To improve matters the Minister for Corrective Services should issue a Statement of Intent, which provide clear direction on government priorities for throughcare, including how QCS would contribute to and be held accountable for delivering these priorities.
- To strengthen incentives to deliver this plan, QCS, in collaboration with the Justice Reform Office should, within 12 months:
  - establish and report on performance indicators in the Statement of Intent to increase QCS's accountability and enable its contribution to government objectives to be assessed
  - extend its performance framework to individual prisons, and negotiate service agreements with them
  - include performance indicators for reducing recidivism in senior executives' performance agreements
  - assist the government to establish its priorities for throughcare by ensuring that policy options are assessed within an effective risk management framework
  - develop strategic and operational priorities that achieve the features of effective throughcare.
- QCS should be more transparent, publishing more details about its strategies for achieving its strategic and operational objectives.



### 17.1 Introduction

Throughcare is an integrated process of rehabilitation and reintegration designed to reduce reoffending, through services provided in prison and after release. Queensland Corrective Services (QCS) has a legal obligation to provide these services. <sup>115</sup>

First introduced in South Australia in 1998 and subsequently in the other Australian jurisdictions, throughcare is based on extensive research and evidence that offenders often have multiple and complex problems that need to be addressed as part of their rehabilitation (Griffiths et al. 2016, pp. 2, 10).

Offenders gain if the coordinated provision of services helps them to improve personally while in prison and to lead more worthwhile lives after release, including enabling them to contribute to the economy. Correctional facilities gain if the services contribute to safety and security in the facilities, creating a more positive environment (Allen 2017, p. 5). Society gains when less crime leads to a safer community and less call on government resources by the criminal justice system. Conversely, society pays a high price when throughcare is ineffective. Queensland's stubbornly high rate of recidivism implies that Queenslanders are paying that price.

A throughcare approach recognises that interwoven, long-term problems often require integrated solutions (Lloyd et al. 2013, p. 33). The underlying issues that lead to reoffending vary between offenders and require a variety of strategies and services. Ideally, throughcare begins from the first contact with prison, and involves a personal plan, backed by resources, which encourages a prisoner to desist from offending. The support required to help a person to stop offending is typically sourced from many agencies and service providers, including correctional services.

There will never be enough resources to provide all the services that could assist prisoners' rehabilitation and reintegration. This means resources need to be allocated to where they generate the biggest return. Throughcare can be at a disadvantage in this respect, since the benefits from it are more difficult to measure than the benefits from other services that receive resources, such as prison security maintenance. The challenge is to create an environment that encourages efficient decision-making in relation to the amount, timing and type of services available for throughcare, when the returns from investment are uncertain.

Two features of effective throughcare are that there is a suitable objective that motivates those involved in providing and using throughcare services, and that incentives are aligned with that objective. While QCS has adopted a broad objective, and developed more specific goals, strategies and performance indicators in its strategic and business plans, there is room for improvement.

Five other features of effective throughcare deal with resourcing, prisoner assessment, responsibility for decision-making, coordination and continuous development. These features are assessed in Chapters 18 (in-prison rehabilitation) and 19 (prisoner reintegration). The results of this assessment, together with an overview of the impact of prison infrastructure on rehabilitation (Chapter 20), demonstrate that while Queensland has elements of an effective throughcare model, there are significant gaps in design and implementation. Changes could improve the current approach to throughcare and, once these changes are bedded down, could provide the foundation for broader reforms involving changes in the government's role as purchaser, funder and frequently provider of throughcare services.

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<sup>&</sup>lt;sup>115</sup> Section 266(1)(b)–(d) of the *Corrective Services Act 2006* requires QCS to establish programs and services: to help prisoners to reintegrate into the community after their release from custody, including by acquiring skills; to initiate, keep and improve relationships between offenders and members of their families and the community; and to help rehabilitate offenders.



# 17.2 Features of effective throughcare

There is no single best throughcare model—jurisdictions have different approaches, with varying success. However, effective throughcare arrangements commonly share the following features.

First, there should be a **clear and well-understood objective**, which specifies what throughcare is intended to achieve and what the acceptable levels of risk are. A good objective is a powerful motivator. It provides the 'what' of throughcare, while the other features describe how to achieve it. A clear objective allows the accountabilities for achieving the objective to be assigned.

Second, **incentives should be aligned with the throughcare objective**, encouraging prisoners to desist from crime; case managers to provide the best opportunity to prevent reoffending; and service providers to offer and deliver effective and efficient services (ERA 2015; Rallings sub. DR1). Incentives may be strengthened by, for example:

- clearly and consistently defining roles, responsibilities and accountabilities
- introducing performance agreements to hold decision-makers accountable for their decisions
- independent and public assessment of prison performance and quality.

Third, each throughcare service needs to be **adequately resourced**. There are many interdependencies in throughcare, and each element needs to be adequately resourced and implemented. Throughcare is a chain that is as strong as its weakest link. For example, effective in-prison services can be undone by weaknesses in out-of-prison support. Since resources are limited, throughcare services need to be 'prioritised, targeted and delivered at the right time' (Department of Justice 2016, p. 5).

Fourth, **effective assessment of prisoners** helps to target resources to those who need them most. A large proportion<sup>116</sup> of individuals who go to prison never return—providing equivalent services to all prisoners might be inefficient, since some will reintegrate effectively without them. Because all prisoners are different, throughcare should address individual requirements (MacDonald et al. 2011, p. 5). Each prisoner should have a rehabilitation plan, attached to resources and based on early risk assessment and the prisoner's input. Plans that outline programs and services should be developed as soon as possible after prison reception (Borzycki & Baldry 2003, p. 4). Continuous assessment keeps plans up to date.

Fifth, responsibility for decision-making should be located where decisions are made most efficiently (UK Ministry of Justice 2016). Decisions affecting the entire system for providing throughcare—for example, deciding accommodation standards—should be made centrally. Decisions about how to provide services to groups of prisoners or to individuals are likely to be faster, more flexible and more responsive to prisoners' rehabilitation requirements when decentralised to those on the ground who better understand the local situation.

Sixth, a **system for coordinating throughcare services** ensures that the right services are delivered in the correct combination, when and where they are needed. There are two related parts to this requirement. The first is consistent and responsive case management of prisoners' plans throughout prison and reintegration, delivered by suitably skilled case managers (Walsh 2004, pp. 7–9). The second part is coordination between service providers. Timely exchange of information within Corrections, other agencies and service providers avoids duplication and improve individual outcomes (Department of Justice 2016, p. 5). Information exchange requires 'clear procedures on communication, information and data sharing and data protection' (MacDonald et al. 2011, p. 35).

Seventh, evaluation of processes and services **enables continuous development** and provides information about how to target resources. Evaluations are important because they:

<sup>&</sup>lt;sup>116</sup> It is difficult to assess the proportion of prisoners who never return. However, the Commission's analysis of QCS administrative data shows that, of people born in 1985 who went to prison in Queensland, 50.5 per cent had been admitted only once.



identify how well the client's needs were met; assess service outcomes or impacts; identify the extent objectives were met; assess efficiency and cost-effectiveness. Above all, evaluation helps identify 'what works' and 'what does not work' in reducing reoffending. (MacDonald et al. 2011, p. 53)

Continuous development involves more than generating ideas about how to do things better. It may require discarding old approaches in the face of opposition from those who support them, and a willingness to take risks.

# 17.3 Clear and well-understood objectives improve throughcare

### Why objectives are important

Clearly defined objectives are fundamental to achieving policy outcomes, because they guide those who interpret and implement policy. Without a clear objective, the outcome will depend on the discretion of people who may interpret in different ways what the government wants them to achieve. The view has been expressed that 'corrections/prisons lack clarity and/or focus about their reason for existence', and that this has led to investment in unnecessary or inappropriate infrastructure (Hamburger sub. DR17, p. 9).

The objective sets out the desired outcome of government intervention, once the problem that requires intervention and its causes have been identified. With the problem understood and the objective set, the standard policy cycle next involves: identifying and assessing options; developing an implementation plan—including timing and how to manage the risks that might arise; and monitoring and evaluating performance.

Clear objectives enable the development of: strategies and plans for achieving them; indicators to measure whether the objectives are being achieved; and performance management frameworks that create incentives for achieving them. Clear objectives are:

vital for successful policies programmes and projects ... A lack of clear objectives limits effective appraisal, planning, monitoring and evaluation. (HM Treasury 2018, p. 14)

A high-level objective can be developed into more specific objectives for those responsible for delivering parts of a policy or program. This focuses attention on the necessary tasks and assists with coordinating different contributors, when policies need to be implemented or coordinated across different agencies, units or officers.

### Throughcare objectives in Queensland

A hierarchy of objectives is linked to throughcare in Queensland. At the apex is the broad legal purpose of corrective services—community safety and crime prevention—specified in the *Corrective Services Act 2006* (Qld) (s. 3). Rehabilitation is one of three contributors (together with humane containment and supervision) to this purpose.

QCS adopts this purpose—in a slightly amended form that may give more weight to rehabilitation—in its strategic plan for 2019–23:

Our purpose: to provide safe, modern and responsive correctional services which rehabilitate prisoners and offenders and prevent crime, making Queensland safer. (QCS 2019b)

The plan sets out four lower-level strategic objectives through which QCS seeks to achieve this purpose:

- safer correctional environments
- partnering and community collaboration
- humane management of prisoners and offenders
- stopping crime (QCS 2019b).



QCS supports each objective through various strategies. A set of performance indicators is linked to each strategy. Rehabilitation features strongly in the strategies and indicators (Box 17.1).

# Box 17.1 QCS strategies to promote rehabilitation, and their corresponding performance indicators

#### Strategies

- Foster collaborative relationships with government agencies and non-government organisations and communities to promote efficient service delivery and coordinated approaches to rehabilitation and reintegration.
- Deliver evidence-based, professional and responsive management of prisoners and offenders through streamlined service delivery and case management.
- Increase prison capacity, reduce overcrowding and focus on therapeutic correctional approaches.
- Recognise, value and embed Aboriginal and Torres Strait Islander peoples' perspectives across our [QCS's] business.
- Reduce recidivism through prisoner and offender centred assessment, end-to-end case management and program delivery.
- Improve responses to prisoners and offenders who are vulnerable or over-represented in the criminal justice system, with a focus on Aboriginal and Torres Strait Islander offenders and prisoners.

#### Linked performance indicators

- Financial value of work performed in the community by prisoners and offenders under QCS's supervision.
- In-prison and post-release re-entry support.
- Meaningful activity.
- Prisoners returning to corrective services with a new correctional sanction within two years (per cent).
- Offenders discharged from community corrections orders who returned with a new correctional sanction within two years (per cent).
- Successful completion of orders (per cent).
- Program completion rate, pre- and post-release re-entry support and of prisoners participating in education or employment (per cent).

Source: QCS 2019b.



QCS also publishes business plans that set out its priorities for the year ahead. Its plan for 2018–19 set out 13 operational priorities—essentially, short-term objectives—for the first year of the 2018–22 strategic planning period.<sup>117</sup> It gave less weight than the strategic plan to rehabilitation, as only two objectives related directly to rehabilitation:

- Foster collaborative relationships with government agencies and non-government organisations to promote efficient service delivery and coordinated approaches to rehabilitation and reintegration.
- Reduce recidivism through the delivery of evidence-based rehabilitation and reintegration programs, education, training and support services (QCS 2018a).

### Assessment of current arrangements

This cascading structure—broad legal obligation; high-level QCS purpose; strategies with performance indicators linked to them; and short-term priorities—appears well-designed. It provides a logical framework for linking and measuring short- and medium-term strategies and actions that contribute to QCS's long-term purpose.

Nevertheless, there is limited evidence that this structure has led to effective and efficient throughcare. Meetings with QCS staff, NGOs and other stakeholders, as well as submissions (Rynne sub. DR8; Together Australia sub. DR14), indicated that containment and supervision of offenders are higher priorities than rehabilitation. A long-term prisoner wrote:

I would like to make one point that I feel underpins all of the failures of Queensland's prisons: QCS emphasises punishment over rehabilitation. Everything that is acknowledged as being central to the rehabilitation process has been approached from the most punitive and restrictive manner conceivable. Education, training, progression, integration, substance intervention, connections with support networks, living conditions, have all been eroded in the name of community expectations. QCS have taken the position that society wants inmates punished and not rehabilitated. (sub. DR37, p. 1)

Analysis of the approaches to in-prison rehabilitation and reintegration has identified deficiencies and apparent under-funding in both areas (Chapters 18 and 19). The lack of progress towards lower recidivism is discouraging too

It could be argued that the strategies and actions, set out in QCS's strategic and business plans, have not had time to take effect. However, the 2018 and 2019 plans were not the first to set out these types of strategies. QCS's predecessors have targeted recidivism since at least 2006 (Box 17.2), and yet recidivism is higher now than it was then (Chapter 5).<sup>118</sup>

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<sup>&</sup>lt;sup>117</sup> The business plan for 2019–20, which would support the first year of the 2019–23 strategic plan, was not published in time to be included in this report.

<sup>&</sup>lt;sup>118</sup> As discussed in Chapter 5, legislative changes may also have contributed to the increase in recidivism.



### Box 17.2 Previous recidivism-related targets

The strategic plans of QCS's predecessors targeted reducing re-offending.

- The third goal in QCS's 2006–2010 plan was to 'minimise the risk of re-offending through targeted and coordinated intervention services'.
- QCS's 2008–12 strategic plan noted that 'the Agency is developing and implementing a throughcare
  approach to strengthen the integrated management of offenders and to provide them with the
  opportunity to address their re-offending and develop pro-social behaviour that will allow them to
  integrate with the community'.
- A performance indicator in the Department of Community Safety's 2012–16 strategic plan was 'prisoners and offenders returning to corrective services'.

Sources: Department of Community Safety 2012, p. 12; QCS 2006b, p. 17, 2008, p. 3.

The history of failed strategies to reduce recidivism could have several explanations. One view is that external pressures have reduced the system's capacity to rehabilitate prisoners:

currently in Queensland the ongoing extraordinary growth in prisoner numbers and concomitant systemic infrastructure stress forces greater emphasis of the Punishment principle to ensure safety and security. While rehabilitation remains a goal of the system and prisoner participation in programmes and education is included in operational data, programme delivery and effectiveness is curtailed by insufficient resources to cope with prisoner numbers. Further, accommodating prisoner numbers beyond a prison's built capacity creates a security risk that necessitates and prioritises prisoner oversight and safety risk management. As indicated in the QPC draft report and other research, the Punishment approach is highly inefficient being hugely expensive, criminogenic, and a significant contributor to recidivism, particularly given the prevalence of short sentences. (Rynne sub. DR8, p. 4)

Overcrowding in high security prisons and consequent concerns about safety help to explain why the pendulum has swung towards containment and away from rehabilitation. The top three operational priorities in QCS's 2018–19 business plan focused on prison safety, while rehabilitation-specific priorities were ranked eighth and eleventh. While a safe prison environment contributes to rehabilitation, in overcrowded facilities, prison officers are likely to focus on containment rather than rehabilitation. Lock-downs may be preferred over training courses. One prisoner's perspective is that the current balance is inappropriate:

Inmates understand that punishment is one of the purposes of prison. We accept this. What we do not accept is that punishment should be the sole role of the prisons. Rehabilitation and restoration need to begin to play a larger role. For this to occur the conditions under which inmates live need to be improved and opportunities need to be expanded. (Anonymous life sentenced prisoner sub. DR37, p. 1)

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<sup>&</sup>lt;sup>119</sup> The top three priorities were to provide leadership, training and professional development to promote safe, healthy and supportive workplaces; ensure behaviour management policies support safer correctional environments; and work collaboratively with key stakeholders to build and maintain a mature, corruption-resistant culture (QCS 2018a, p. 5).



# 17.4 Improving objectives and incentives

While QCS's objectives, plans and actions are sound on paper, their contribution to reducing recidivism could be strengthened.

### Make government priorities clear through a statement of intent

The statutory purpose of corrective services does not identify the relative importance of containment, supervision and rehabilitation, nor how they contribute to reducing recidivism. Some imprecision is appropriate, as governments would otherwise need to seek legislative change whenever their priorities shift or there is new evidence about problems and how best to address them. However, imprecision makes it difficult to specify accountability for achieving government objectives, making it less likely that they will be realised.

The government seeks to resolve this dilemma through the Portfolio Priorities Statement (PPS) that the Premier sends to the Minister for Corrective Services. The PPS set out three broad priorities—progress implementation of supported recommendations from the Queensland Parole System Review (QPSR); facilitate progress of agreed infrastructure expansions; and reduce demand across the criminal justice system (Palaszczuk 2018). The Queensland Government's *Agency Planning Requirements* require QCS to ensure PPS priorities are 'reflected in its plans where appropriate'. They do not require the Minister to approve QCS's strategic plan, although ministerial consultation is recommended (Performance Unit Cabinet Services 2018, pp. 6, 8). QCS's strategic plan states that QCS contributes to the Advancing Queensland priorities. It does not set up the PPS as a key driver of its strategy or describe how QCS's strategies would contribute to the PPS's three priorities, although some would do so (QCS 2019b).<sup>120</sup>

The absence of a close alignment between the high-level PPS and QCS's strategic plan contrasts with New Zealand, where the Minister of Corrections presents the Corrections Department's Statement of Intent (SOI)—a strategic document explaining the government's objective, key issues facing the department and how it will address them. The minister certifies that the SOI is 'consistent with the policies and performance expectations of the Government'. The minister's foreword to the SOI also states:

This document outlines the key areas that I expect Corrections to lead and also informs Parliament and the public about Corrections' activities and how they contribute to wider justice sector outcomes. (Department of Corrections, New Zealand 2018, p. 3)

The New Zealand Government's goal—to reduce the prison population by 30 per cent over 15 years—and the minister's priorities in relation to the goal drive the SOI. The SOI explains how the department will pursue the government's goal and the minister's priorities, directly linking the department's actions and the government's priorities in a way that is missing in QCS's strategic plan. Publishing the SOI strengthens the accountability of both the minister and the department for delivering the goal and priorities.

Publishing an SOI certified by the minister is not the only way to link Queensland government priorities with QCS strategies. The minister could, for example, issue a statement of expectations, building on the PPS. However, it would also be possible, working within the framework established in the *Agency Planning Requirements*, for QCS's strategic plan to be turned into an SOI of what the government expects QCS to deliver over the planning period, expressing precisely the government's objectives and priorities and how they will be attained. This could be accomplished through the minister taking responsibility for the SOI by certifying in it that QCS's strategic plan is consistent with the government's objectives, and through QCS using the document to explain how it will achieve those objectives.

<sup>&</sup>lt;sup>120</sup> For example, QCS lists strategies to increase capacity, reduce recidivism and disrupt crime, which would contribute to the PPS priorities of facilitating progress of agreed infrastructure expansions and reducing demand across the criminal justice system (QCS 2019b).



If the government accepts the view of this inquiry that throughcare should be improved to reduce recidivism, it should make effective throughcare a key objective for QCS. The recommendations for improving throughcare (Chapters 17, 18 and 19) could become the basis for a new SOI, certified by the minister, setting out how QCS will achieve this objective and how its performance will be measured. The SOI would be a report for Parliament that outlines the minister's 'ownership' of the plan and explaining how QCS would contribute to and be held accountable for delivering the government's objectives.

The direction for throughcare set out in an instrument such as this would need to be consistent with the government's overall strategy for the prison service and for the wider criminal justice system. For example, the New Zealand SOI explains how the prison service contributes to the outcomes that the government is seeking for the justice sector (Chapter 9).

### Improve accountability through performance measurement

An SOI would increase accountability by including performance indicators that measure QCS's contribution to the achievement of government objectives.

#### Effective indicators should:

- promote stability—QCS's predecessors changed performance indicators frequently between strategic plans. A more stable set of indicators would facilitate assessment of QCS's performance, contributing to accountability
- be attributable to activities for which QCS is responsible, as this will also facilitate assessment and contribute to accountability
- be outcome-focused, since it is outcomes that the government seeks to achieve.<sup>121</sup> When outcome-focused measures are not attributable, indicators of outputs may be required. For example, because prisons have little control over many factors that influence rehabilitation outcomes, their performance indicators may need to focus on output indicators such as prisoner participation in programs (ERA 2015, p. 145).

QCS's performance and reporting unit is responsible for developing, reviewing and analysing key performance measures and indicators (QCS 2018c, p. 18). QCS should review whether the performance indicators set out in its annual report (QCS 2018c) adequately reflect its contribution to government objectives. It could also provide more explanation of its targets for individual indicators. For example, its target for facility utilisation of high security facilities in 2017–18 was 90 to 95 per cent, while the outcome was 129.9 per cent. In spite of this discrepancy, the target for 2018–19 is unchanged (Queensland Government 2018e, p. 4). Retaining a target that is unlikely to be achieved undermines the value of the indicator.

In addition to providing system-wide indicators, there is scope for more performance reporting for individual prisons. Because indicators at this level have not been published, the Commission is not aware of how much performance measurement there is.<sup>122</sup> QCS advised that it is currently reviewing the way it 'measures the performance of prisons to create a consistent approach using agreed standards across the corrective services system'.<sup>123</sup> It is not clear whether the review is considering using performance indicators to benchmark prison performance.<sup>124</sup>

<sup>&</sup>lt;sup>121</sup> For example, the Queensland Anti-Discrimination Commission argued that one of the barriers to prisoner participation in rehabilitation programs is that QCS measures participation rather than outcomes and so does not measure what makes a program successful (sub. DR13, p. 8).

<sup>&</sup>lt;sup>122</sup> QCS advised that it has payment by outcome arrangements with external providers to the Borallon Training and Correctional Centre. <sup>123</sup> QCS personal communication by email to the Commission, 18 April 2019.

<sup>&</sup>lt;sup>124</sup> To enable comparisons between prisons, the Economic Regulation Authority of Western Australia designed a weighted scorecard approach system of benchmarking for use in a published 'league table' of prisons, with benchmark targets adjusted to reflect differences in the composition of each prison's population. New Zealand and the United Kingdom use similar approaches (ERA 2015, p. 7).



QCS should work with the Justice Reform Office in conducting this review. The review should be transparent and open to independent assessment, to increase the potential that its performance indicators will remain fit-for-purpose for long enough for them to be used to enable accurate judgements about progress.

QCS should also report regularly on its progress in delivering the supported recommendations of the QPSR and of this inquiry. Reporting of progress towards the QPSR recommendations has been patchy (Chapter 18).

### Develop service agreements between QCS and individual prisons

QCS should use its review of how it measures the performance of prisons as the basis for developing its management framework for individual prisons. Associate Professor Rynne commented that:

prison performance can, and should be, measured. In the two international jurisdictions most closely aligned with the Queensland criminal justice system (i.e., the UK and the USA), such reviews are considered part and parcel of good corrections practice ... The development of an evidence-based reporting structure will allow improved understanding of what factors in prison performance currently exist at the individual prison level, as well as, at the system level, and how these factors influence recidivism. (sub. DR8, pp.11–12)

Service level agreements, which set out the responsibilities of QCS and the prisons, financial arrangements and the performance framework, would be a crucial component of the management framework. Performance targets would establish prisons' objectives and expected outputs and outcomes. Doing this for each prison within an overall planning framework would clarify the role that each prison performs in the context of the prison system, helping to align the objectives being pursued by individual prisons with system-wide objectives.

Service agreements would clarify roles and responsibilities, increase transparency about the performance of each prison and ensure greater accountability. To clarify how each prison contributes to the corrections system, it is important to:

clearly define the objectives of each prison in the prison system in order to support robust planning. This will help to ensure that the combined objectives of individual prisons align with the objectives of the prison system, allowing the use of prison resources and infrastructure to be optimised. (ERA 2015, p. 5)

Service agreements should be published, and reported against, as this would help to:

- hold the agency accountable for establishing effective agreements
- hold prison managers accountable for their performance
- ensure that methods and measures used to assess performance are clearly articulated and widely understood
- provide external stakeholders with information to assess the performance of prisons and the department (ERA 2015, p. 119).

Service agreements may enable the introduction of incentives to reduce reoffending, which has been experimented with in contracts with private prisons. For example, the contract with Ravenhall prison in Victoria provides for a performance payment if the prison outperforms others in reducing reoffending. Similarly, the operators of the Melaleuca Remand and Reintegration Facility in Western Australia will reportedly receive a \$15,000 bonus for each prisoner who does not offend within two years of release (IPA sub. DR30, p.3).

<sup>&</sup>lt;sup>125</sup> The only QCS publication that the Commission has seen which sets out the roles of prisons was published in 2006 (QCS 2006a).



QCS's review of prison performance measurement could consider the scope for including incentives into these agreements for prisons to reduce reoffending.

The costs of establishing prison-level agreements will depend on the arrangements that are already in place and the scope for QCS to build on the agreements it had with the two private prisons. QCS would need to consider these establishment costs when developing service agreements.

### Build performance indicators into staff performance agreements

QCS should strengthen the incentives for staff to pursue the government's objectives by including rehabilitation and recidivism performance indicators in senior managers' performance agreements. This would build on existing practice, given that QCS senior managers are already held accountable for delivering operational priorities by their respective deputy commissioners through their Senior Executive Officers Performance Agreements (QCS 2018a, p. 5). Existing guidelines for service delivery could be useful as:

Queensland Corrective Services has done considerable work in developing evidence-based contract and service delivery frameworks that could usefully inform rehabilitation incentives for managers and course providers. (Rallings sub. DR1, p. 5)

The increased incentives could be strengthened by other incentives, such as linking funding of some projects to performance and the frequency of auditing or monitoring (ERA 2015, pp. 127–128).

### Improve the risk management framework

QCS could assist the government to establish its priorities for throughcare by ensuring that policy options are assessed within an effective risk management framework. Risk is often perceived to be associated with negative outcomes. However:

Risk can also be a positive force, even in a jail setting, where the primary focus is on controlling negative risk consequences ... Most successful endeavours involve taking risks with the intention of achieving positive outcomes, but often with an element of uncertainty. The uncertainty comes from the fact that the actual outcome (i.e., the risk consequence) may turn out to be good or bad or may even include both good and bad elements ... Failure to take advantage of an opportunity is a loss of progress towards a better future. Maintaining the status quo is not always the best option ... The essence of risk management is to identify, manage and control risk to minimise negative risk consequences and maximise positive ones. (Martin & Reiss 2008, pp. 1–2)

There are many examples of positive and negative risks associated with throughcare activities. While in-prison programs can reduce reoffending (Chapter 18), exposure to treatment that is not matched to offenders' needs can have criminogenic effects (Nagin et al. 2009, pp. 127–128). Releasing prisoners on parole creates the risk that they will reoffend while on parole on the one hand and the possibility of more successful reintegration on the other. Identifying risks such as these can help both to choose between options and to suggest ways to manage the risks. Effective risk management both preserves and enhances resources (Martin & Reiss 2008, p. 5).

QCS is developing a new risk management framework that will include new policy and revised risk register templates, practices and tools (QCS 2018c, p. 57). Given that risk management is a fundamental part of operating prisons, it is extremely important that the government has confidence in QCS's risk management capability. Otherwise, the government may focus on the negative rather than positive risk consequences of throughcare policies and be less willing to shift its priorities towards them.



### Align strategic and operational priorities with the features of effective throughcare

Throughcare services are provided through a complex system that needs to be continuously maintained and improved. One way to recognise improvement opportunities is to identify gaps between the current situation and practices that are accepted as being most effective (section 17.2).

Table 17.1 indicates that, while QCS has strategies to improve throughcare services:

- neither the 2019–23 strategic plan nor the 2018–19 business plan refers to aligning incentives with the throughcare objective, or to efficient location of decision-making
- the proposal to foster collaborative relationships may help with coordinating diverse services, although that would depend on what the strategy involves.

QCS should identify what it considers to be the features of a best practice throughcare model and align its strategic and operational priorities with achieving that model.

Table 17.1 Alignment of features of effective throughcare with the QCS strategic plan for 2018–22 and operational priorities 2018–19

Feature of effective throughcare	QCS strategic plan 2019–23	QCS operational priorities 2018–19
Adequate resources	Optimise the investment of resources in world-class equipment, technology and facilities to meet current and future challenges within the correctional system	Optimise the investment of resources in world-class equipment, technology and facilities to meet current and future challenges within the correctional system
Effective assessment of prisoners	Reduce recidivism through prisoner and offender-based assessment	Not mentioned
Incentives aligned with the throughcare objective	Not mentioned	Not mentioned
Efficient location of decision- making	Not mentioned	Not mentioned
System for coordinating diverse services	Foster collaborative relationships with government agencies and non-government organisations and communities to promote efficient service delivery and coordinated approaches to rehabilitation and reintegration	Foster collaborative relationships with government agencies and non-government organisations to promote efficient service delivery and coordinated approaches to rehabilitation and reintegration
Procedures to enable continuous development	Deliver evidence-based, professional and responsive management of prisoners	Reduce recidivism through the delivery of evidence-based rehabilitation and reintegration
	Using evaluations to enhance staff, prisoner and offender safety	programs, education, training and support services

Source: QCS 2018a, 2019b.



#### Increase transparency

QCS should increase the transparency of its operational activities.

The proposed improvements to performance measurement will have greater impact if they are published. To this end, QCS should publish more information about the performance of the department and of individual correctional facilities. This would increase the quality of public discussion about corrections, enable assessments to be made about whether government and community objectives are being achieved, and strengthen incentives to find ways to improve the system and how it is operated.

In addition, while publishing strategic and business plans is useful, QCS should build on this by publishing more details on how it intends to achieve its strategic and operational objectives and about the reviews it is undertaking. That would help it to:

- harvest ideas from outside the department
- increase its understanding of risks associated with proposals and of strategies for managing them
- test the robustness of its proposals with a broader audience
- build community trust in the sector
- persuade stakeholders who may otherwise oppose change
- develop collaborative external relationships.

Some security-related issues may need to be confidential. However, given the advantages of transparency, QCS's approach should be to ask: 'Are there any strong reasons why we should not be transparent about this issue?', rather than to ask: 'Are there any reasons why we should be transparent about this issue?'

#### Recommendation 18

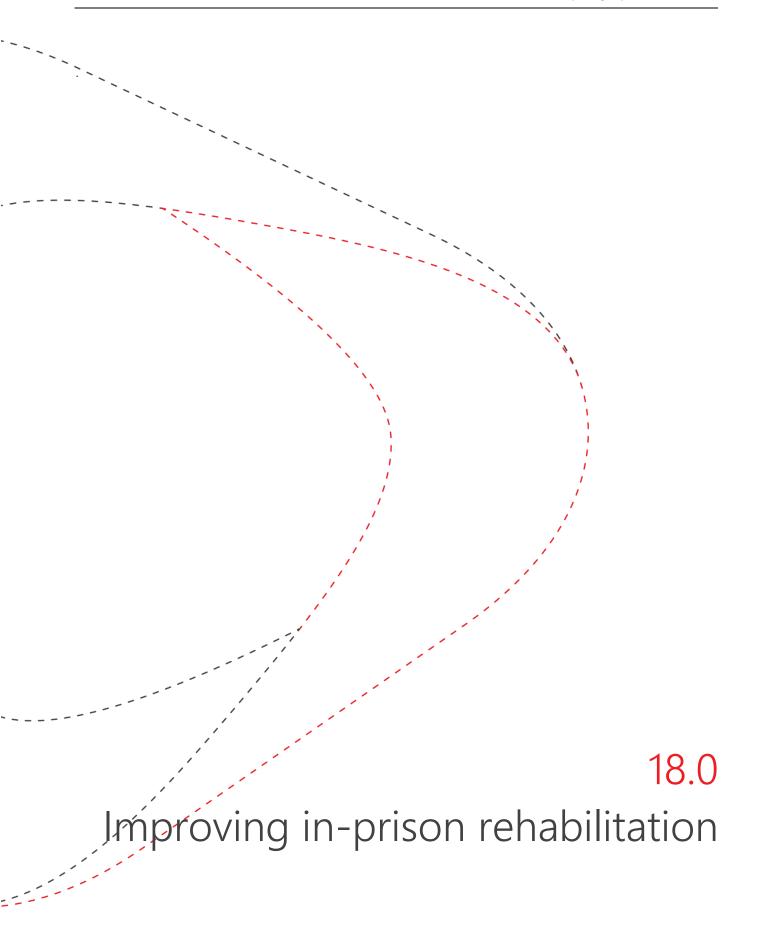
Queensland Corrective Services should publish a statement of intent, certified by the Minister for Corrective Services as a report to Parliament, which sets out ways in which it will contribute to, and be accountable for, government objectives, including ways to reduce imprisonment by improving rehabilitation and reintegration.

#### **Recommendation 19**

Queensland Corrective Services should, within 12 months:

- establish and report against performance indicators in the statement of intent to increase accountability and report on performance
- extend its performance framework to individual prisons and negotiate service agreements with them
- include performance indicators for reducing recidivism in senior executives' performance agreements
- assist the government to establish its priorities for throughcare by ensuring that policy options are assessed within an effective risk management framework
- align its strategic and operational priorities more closely to actions that would make throughcare more effective
- publish information on its strategies for achieving its objectives including the progress and results of any reviews it is undertaking.







This chapter highlights the importance of improving the approach to rehabilitation in Queensland prisons.

### **Key Points**

- Successful rehabilitation not only reduces crime but also saves the state at least \$111,000 per prisoner for every year of imprisonment avoided.
- Imprisonment affects rehabilitation through the quality of the day to day environment and programs and activities in which prisoners engage.
- Few evaluations of Queensland's in-prison programs have been published. However, the stubbornly high recidivism rate, previous reviews and submissions to this inquiry all point to considerable scope for improvement.
- Problems with the approach to rehabilitation include over-crowded prisons, disjointed case management, narrow eligibility for in-prison programs, inadequate catering for the needs of specific groups, and governance arrangements that lead to weak incentives for rehabilitation.
- The government has accepted recommendations from the Queensland Parole System Review to address some of these issues; however, other changes would yield additional benefits.
- QCS is reviewing its approach to case management, assessment, mental health programs and aspects of governance. Understanding the issues faced by remand and short-sentenced prisoners should be a focus of these reviews. QCS should undertake these reviews through a public process; commit to timelines for completing them; and in each case publish a plan with timelines for implementing actions to improve each area suggested by the reviews.
- QCS should also:
  - provided that the benefits exceed the costs, work with the State Penalties Enforcement Registry to make Work and Development Orders available in prisons as soon as is practicable
  - publish its implementation plan for moving individuals under its care onto the National Insurance
     Disability Scheme, and report regularly on its progress in implementing it
  - ensure that prisoners have incentives for successfully participating in rehabilitation activities
  - consider a process that will help prisoners to deal with some of the barriers they face in addressing financial matters, particularly debt, due to their imprisonment, when this can improve behaviour and help to reduce reoffending.
- So that the public is informed about the health of Queensland's prisons, the government should establish a properly resourced independent Inspectorate of Prisons. It should have information gathering powers and be required to publish its reports.
- QCS should work with the Justice Reform Office to ensure that there are appropriate capabilities, resources, role allocations and accountabilities to implement reforms to in-prison rehabilitation.



### 18.1 Introduction

This chapter considers the role of Queensland's prisons in rehabilitating prisoners and reducing recidivism. Those activities that are specific to re-entry, including those carried out in prison, are covered in the next chapter.

The Queensland Government (sub. 43, p. 10) considers that prison has an important role to play in the rehabilitation of offenders. If rehabilitation reduces reoffending, it benefits offenders, reduces crime and saves the state at least \$111,000 per prisoner for every year of imprisonment avoided (Chapter 7). Andrew Beck, Queensland Corrective Services (QCS) deputy commissioner, told a public hearing that it is 'vital' that each prisoner returns to society:

... having grown as a person, addressed the issues behind their offending and taken responsibility and to some extent repaired some of the damage they have caused. (Andrew Beck, QCS, Cairns public hearing, p. 43)

The prison environment influences rehabilitation in four main ways:

- The day-to-day environment—which may be affected by, for example, prison size, whether it is a high or low security facility, operational practices and standards, and the behaviour of corrections officers.
- The activities—such as work—in which prisoners engage, can help them to develop skills and good practices, reduce boredom and create an environment closer to what would occur outside prison. All Queensland prisons have some employment for prisoners, such as to maintain the prison (in the laundry, kitchen or as a cleaner), or in prison industries. 126
- Prisons provide specific programs that aim to address offending behaviours, including programs aimed at violent offenders, sexual offenders, substance abuse problems, and mental health issues.
- Training and education programs seek to improve employability.

The contribution of in-prison rehabilitation activities to reducing recidivism depends on how well they are linked with services that help prisoners to re-integrate with the community after release (Chapter 19), and whether they are provided in appropriate facilities (Chapter 20).

While there is little publicly available information—other than the high recidivism rate—about the impact of imprisonment on rehabilitation in Queensland, stakeholders raised concerns about the current approach. QCS is working to address some of them. It has implemented changes and is reviewing case management, assessment, aspects of governance, and mental health programs. This chapter discusses how QCS could consider further initiatives, broaden the scope of some reviews, and set out timetables for actions based on them.

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<sup>&</sup>lt;sup>126</sup> Some prison jobs provide opportunities to work with trade instructors and learn skills. QCS determines pay structures based on minimal payments and prisoners are not protected by industrial laws. There is no power to compel a prisoner to work, but most choose to do so to earn money to pay for telephone calls and personal items. Prisoners' willingness to work is factored into considerations about their progress through the prison system and can affect their chances of being released on parole. Prisoners who are willing to work, but for whom there is no job available or who have a disability, are entitled to a small unemployment allowance (Caxton Legal Centre 2019).



# 18.2 Lessons from research

### Rehabilitation programs are not a panacea

Competing criminogenic and rehabilitative forces shape the impacts of imprisonment on prisoner rehabilitation.

Prison has criminogenic effects: it provides opportunities to develop criminal expertise, disrupts family and other relationships, and reduces post-release employment opportunities. Imprisonment changes prisoners' opportunities and incentives and can exacerbate the social disadvantages many offenders face.

Time in prison usually makes prisoners less employable—their skills deteriorate, and the ex-prisoner 'label' also puts off many potential employers. This loss of earning capacity, combined with the impacts of pro-criminal attitudes and skills learnt in prison, strengthens incentives to reoffend after release.

[I]ncarceration could increase re-offending if it builds criminal expertise and limits post-release employment opportunities, either through skill atrophy or labour market stigma. (Council of Economic Advisers 2016, p. 39)

Alternatively, a healthy prison environment and well-timed combinations of rehabilitation programs seek to work against these criminogenic effects. International research indicates that rehabilitation activities program can help, although the results are mixed (Council of Economic Advisers 2016, p. 39).

While there are significant challenges in measuring the effects of these programs (Box 18.1), the evidence suggests that in-prison rehabilitation is unlikely to be a panacea for dealing with offending behaviours. For example, a recent survey of meta-analyses of research concludes that while prison education programs reduce recidivism, the effect sizes vary widely, but are often modest (Duwe 2017, pp. 6–8).<sup>127</sup>

### Key contributors to effective rehabilitation

While debate about how imprisonment affects rehabilitation will continue, the **quality of the prison environment** is important. If the aim is that prisoners emerge from prison with a civil disposition, this is more likely to happen if they experience a civil environment in prison. Hence the quality of staff-prisoner relationships is crucial (Liebling 2018). Rehabilitation programs are also more likely to have a positive impact when delivered in a healthy prison environment.

In a healthy prison system positive change can happen. Prisoners can change their attitudes, their behaviours, and with the right support, and particularly around health, mental health, and particularly around the needs of Aboriginal prisoners. (QCS, Cairns public hearing, p. 49)

<sup>&</sup>lt;sup>127</sup> Some studies have large impacts, for example, one survey (cited in Duwe 2017) showed that participation in education programs reduced recidivism by 43 per cent. Moreover, research suggests that educational programming produces a relatively high return on investment (Duwe 2017, p. 7).



### Box 18.1 Challenges in measuring the effectiveness of rehabilitation programs

The effectiveness of rehabilitation programs is typically measured by their impact on reoffending. However, causality is difficult to determine because many factors affect reoffending, including:

- The prison environment, prisoner age, Indigenous status, sentence length, education, prior employment, drug and alcohol dependence, and family connections (Callan & Gardner 2005, pp. 33–34; ERA 2015, p. 144).
- Prison configuration—for example, one view (Hamburger sub. 14, p. 39) is that Queensland's large
  prisons and prison precincts impede rehabilitation and increase recidivism. Differences in prison
  configuration and composition of prisoners may mean that what works in one jurisdiction may not
  work elsewhere.
- Sentencing options—graduated release and alternatives other than incarceration can improve prisoner rehabilitation (Walsh 2017, p. 4). 128 If these options available overseas do not exist in Queensland, estimates of the benefits of overseas rehabilitation programs may over-state the likely benefits of the programs in Queensland.
- Prisoners' home environment—the Family Responsibilities Commission considers that rehabilitation is 'of little assistance when gaol offers a more inviting environment than the communities to which they must return' (sub. 23, p. 1). Jeff Nelson, a clinical psychologist, told the Commission that:

So many of my guys come in to me after being out for two weeks saying I just want to go back. Cause being back is so simple. It works. So when I say jail as an alternative environment I see that as far as recidivism going as the disincentive to offend isn't there. Or it's marginally there. (Nelson, Cairns public hearing, p. 27)

Good quality studies isolate the impacts of different environmental and other contributors to reoffending. However, many studies do not. Randomised control trials are rare, selection bias is common and sample sizes are often small (Duwe 2017, p. 6).

Four meta-analyses of program evaluations undertaken in other countries support the positive effects of some programs within prisons, while identifying methodological problems that apply to some of the research (Aos et al. 2006a; Davis et al. 2013; Duwe & Clark 2014; Gaes 2008).

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<sup>&</sup>lt;sup>128</sup> The Corrective Services Act 2006 abolished sentencing options that provided alternatives to full-time incarceration.



Rynne (sub. DR8, pp. 2, 7) described research supporting this view:

Research on prison performance (i.e., high or low performing) clearly indicates that programme success and recidivism outcomes are significantly determined by a prison's quality, that is, its institutional climate (Auty & Liebling, 2019; Day, Casey, Vess, & Huisy, 2011; Harding, 2014). The higher the prison quality the better the programme effectiveness and an increased likelihood of lower recidivism. ... [R]ecent research indicates that prisons low in moral quality significantly and negatively impact on staff and prisoners' lives and prisoners' capacity to engage and learn from programs. The consequence of this negative environment is a reduction in the likelihood of positive recidivism outcomes (Auty & Liebling, 2019; Day et al., 2011; Harding, 2014).

The contribution of rehabilitation activities depends on how closely they match individual offenders' rehabilitation needs (Buitrago 2017, p. 4) and whether they address the factors predisposing a person to criminal activity. These needs and factors are likely to change as the composition of the prison population—for example, the type of offence, health characteristics, age, race or gender—changes over time. Effective **assessment and case management** of prisoners and their needs is required to achieve this.

Proper assessment and management of offenders is critical to reducing re-offending and therefore protecting the community. (Sofronoff 2016, p. 107)

In-prison programs are more likely to be effective if they are **coordinated** with other activities in prison and after release (Travis et al. 2001, cited in Borzycki & Baldry 2003, p. 2).

Whether they have had all the bells and whistles in prison it doesn't make any difference if you are going into a very impoverished environment where you have got unstable accommodation, where you don't have emotional support, where you are lonely, using substance abuse. (Denton, Brisbane public hearing, p. 41)

Corrections agencies that seek **continuous development** can get better results, through:

- implementing programs based on 'fidelity to a research-based model' (Taylor 2017, p. 8). As noted by Mazerolle (Brisbane public hearing p. 39), 'where we probably come unstuck is the translation from research then to policy and practice on the ground and to thinking'
- evaluating the returns from programs (Council of Economic Advisers 2018)<sup>129</sup>
- experimenting with new approaches, which is particularly important given that many strategies will fail. This means that a 'willingness to try new things, and rigorously test whether they are working, will be the key to finding effective solutions in this policy space' (Doleac 2018, p. 9).

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<sup>&</sup>lt;sup>129</sup> For example, the Council of Economic Advisers found that United States programs that address prisoners' mental health or substance abuse generated a total return of \$1.47 to \$5.27 per dollar of expenditure. However, for many programs—such as those for which the primary focus is education—the evidence is inconsistent and the rate of return more uncertain (Council of Economic Advisers 2018, p. 1).



# 18.3 What is the evidence on rehabilitation in Queensland prisons?

Little has been published about the outcomes of in-prison rehabilitation activities in Queensland. This is partly because few evaluations of the effectiveness of QCS's rehabilitation programs have been made public (Sofronoff 2016, p. 140). It is also because some desired outcomes—for example, remediating any harm caused by imprisonment (Rallings sub. DR1, p. 3)—are difficult to measure. And, as was pointed out above, there are considerable methodological challenges in measuring the effectiveness of rehabilitation activities.

One outcome on which data is available is the high and growing recidivism rate (Chapter 5). Almost 64 per cent of prisoners have been previously imprisoned, higher than the Australian average of 57 per cent. Recidivism rates are even higher for Indigenous Australians, with 80 per cent of Indigenous prisoners having been imprisoned before.

Recidivism rates of over 70 per cent for First Nation people and over 40 per cent for non-First Nation people point to system failure in the important area of rehabilitation. This failure as evidenced by the recidivism rates is catastrophic and is a significant driver of crime. (Hamburger sub. 14, p. 13)

The high recidivism rate does not prove that in-prison rehabilitation activities have failed—recidivism and desistance from reoffending may have been even higher without these activities.

Published information about program attendance rates, completion rates, reasons for non-completion, or outcomes of programs in individual prisons, or about how QCS and prisons use such information, is incomplete, although some information on program participation is available (Box 18.2). The Queensland Parole System Review (QPSR) noted the relatively small number of completions of programs for Aboriginal and Torres strait islander people (Sofronoff 2016, p. 150). The Queensland Audit Office reported that:

QCS measures the actual time prisoners spend in structured activity in its privately operated prisons, but does not do this for its publicly operated prisons. This impedes its ability to compare and analyse a part of the performance of all its prisons. (QAO 2016, p. 47)

This lack of information has made it difficult to assess the performance of in-prison rehabilitation in Queensland. The Commission visited several correctional facilities, although we did not have the opportunity to observe prisoners participating in programs that would address their offending behaviours. <sup>130</sup> We did, however, observe the day to day operations of correctional centres. These visits, together with consultations during the inquiry and submissions, suggest that:

- correctional facilities generally offer a range of work opportunities, although these are heavily restricted because of prisoner overcrowding
- the assessment of prisoner rehabilitation needs on entry appears to focus on the risk of harm to self or others
- there appears to be little formal ongoing assessment of rehabilitation needs
- correctional facilities are mainly designed around containment principles, with rehabilitation largely a secondary consideration
- there are limited facilities for prisoners with mental health or other needs.

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<sup>&</sup>lt;sup>130</sup> Most program facilities were not in use during Commission site visits.



### Box 18.2 Program participation

Many prisoners participate in Queensland Corrective Services (QCS) rehabilitation programs. In 2017–18:

- 5,315 individuals participated in literacy programs, 4,552 participated in vocational training and 655 participated in tertiary education (Queensland Government sub. 43, p. 10)
- QCS had 3,646 program completions, including 2,212 substance use interventions and 410 sexual offending programs
- 7,694 prisoners participated in one or more training and education courses; 36.2 per cent of eligible prisoners participated in accredited education and training courses under the Australian Qualifications Framework (QCS personal communication by email to the Commission, 18 April 2019)
- QCS supported prisoners to engage in distance education (tertiary and high school equivalent), directly funded the delivery of education and vocational training, and to use the state-based Certificate 3 Guarantee program (QCS personal communication by email to the Commission, 18 April 2019)
- Prisoners from low security facilities completed more than 270,000 hours of community service. Prison industries are available at every correctional centre in Queensland (Queensland Government sub. 43, p. 10).

In Queensland prisons during 2017–18:

- 36.2 per cent of eligible Queensland prisoners were involved in education and training, <sup>131</sup> above the national average of 34.0 per cent (16.2 per cent were in pre-certificate level 1 courses; 3.2 per cent in secondary school education; 15.0 per cent in vocational education and training; and 7.1 per cent in higher education)
- 67.0 per cent of eligible prisoners were employed; below the national average of 80.5 per cent. 30.6 per cent of prisoners were employed in commercial industries and 36.6 per cent in service industries (SCRGSP 2019d).

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<sup>&</sup>lt;sup>131</sup> These data do not include participation in non-accredited education and training programs or in offence-related programs, such as drug and alcohol programs, psychological programs, psychological counselling and personal development programs.



# 18.4 What are the views of inquiry participants?

Participants in the inquiry commented on factors that they consider reduce rehabilitation outcomes in Queensland prisons.

### Prison overcrowding impedes rehabilitation

Queensland secure prisons in 2017–18 operated at 118.6 per cent of design capacity, the second highest for the five jurisdictions for which data was available (SCRGSP 2019d). About 4,000 male prisoners are sharing cells designed for one person (Andrew Beck, QCS, Cairns public hearing, p. 41).

Both QCS and the leading industrial union representing QCS employees pointed out that overcrowding works against rehabilitation by reducing access to education opportunities, exacerbating mental health and chronic health conditions, and reducing safety:

Over-crowded correctional centres ... reduce access to rehabilitation opportunities, which compromises community safety and critically, presents workplace health and safety risks for correctional centre staff. (QCS 2018q, p. 7)

And this environment is fundamentally not suited to fostering rehabilitation and reintegration. ... Overcrowding also exacerbates any existing mental health and chronic health conditions a prisoner may have. (Andrew Beck, QCS, Cairns public hearing, p. 41)

Our members report that overcrowding is making the issues identified in the report considerably worse. Activities and programs are being routinely cancelled to reduce overtime. Community engagements in low-custody farms, key activities in the rehabilitation process, are being reduced due to inadequate staffing and prison officer to prisoner engagement is drastically limited. (Together ASU sub. DR14, p. 3)

Everything we do about rehabilitation at the moment in prisons is fundamentally undermined by overcrowding. ... we're bringing people into the system that aren't getting access to the programs and activities that would rehabilitate, and are getting brutalised ... our members talk about we have gone from a rehabilitation model in Queensland Corrective Services to a rack and stack model. (Together Union, Brisbane public hearing, pp. 16–18)

### The prison environment works against rehabilitation

In addition to the problems caused by overcrowding, several submissions argued that other features that affect the quality of the prison environment work against rehabilitation. For example, most offenders are held in high security prisons, even when their time in prison is short.

For rehabilitation to have a chance to be successful, it needs to take place in physical and social environments that supports this, and which are characterised by values of responsibility, respect, certainty, hope, trust and humanity ... almost all prisoners are released from high security prisons ... effective rehabilitation programs are difficult to organise in high security, since the total character and lack of normalisation practices in such institutions, quickly negate the positive effects of good programs and education initiatives. ...

For much of the non-violent offending, community corrections, fines and suspended sentences can be much better options. Such sentencing alternatives provides better access to treatment (particularly around drugs-alcohol and gambling addictions), allows people to maintain family links, work, education and so on. (Eriksson sub. 5, pp. 2–3)



Queensland Advocacy Incorporated (sub. 16, p. 13) and the College of Forensic Psychologists—Queensland Branch (sub. 27, p. 5) make a similar point.

Hamburger (sub. 14, p. 16) argued that:

Queensland's large prisons are disconnected from prisoners' community of interest, they are silos that inhibit joined up service delivery (throughcare) and of necessity are highly regimented and bureaucratic with limited time or resources for rehabilitation programs. They are structured to work against quality staff interaction with prisoners and are a significant cause of high recidivism rates.

An anonymous submission provided a life sentence prisoner's perspective on how the quality of the prison environment affects the potential for rehabilitation:

The majority of prisoners see violence as a way of life and drugs as a source of entertainment. They simply see no reason in day to day gaol life to change their behaviour. If they could be shown that if they could get a job and curb their violence and drug use they could have better living conditions in gaol, then there is a chance that they would continue that behaviour upon release. But those conditions and incentives have to be great enough to drag them away from their old way of life. ...

We learn nothing of use in prison and spend our lives in a place that reinforces how worthless we are. I just want to be able to support myself and live as a successful member of the community. I don't want to just live on the dole and be a drain on society. From what I have seen from those long term inmates who have come before me, I am not confident that I will be able to achieve my goal. (Anonymous long-term prisoner sub. DR40, p. 2)

#### There are concerns about the assessment of rehabilitation needs

QCS procedures require that prisoners are assessed on admission, to inform prisoner management and progression planning, and that progress be reviewed regularly (QCS 2018d). These procedures include estimating the prisoner's risk of reoffending (for prisoners whose sentence exceeds 12 months); determining eligibility for intervention programs; identifying and prioritising literacy and numeracy needs; and developing and reviewing of progression plans, including re-entry to the community. QCS procedures require that a progression plan be completed within three weeks of relevant assessments being made.

Assessment of prisoners on remand is based on safety and placement. Rehabilitation is not considered. Sentenced offenders with sentences less than 12 months are only assessed as to whether they are low, moderate or high risk. These prisoners are eligible for programs, but allocation is difficult in the absence of detailed up-front assessment. The exceptions are when there is a drug and alcohol assessment and at Borallon prison, where every prisoner receives detailed assessment.

The assessment of prisoners with sentences exceeding 12 months enables development of a progression plan, which sets goals to assist prisoners to complete recommended interventions, increase skills, plan for reintegration into the community and manage their days while in prison.

The QPSR's detailed discussion of the assessment and management of offenders concluded that QCS should reform its approach (Sofronoff 2016, pp. 107–130). Stakeholders also raised concerns:

- Ellem et al. (sub. 7, p. 4) submitted that there is a lack of systematic screening of people with cognitive disability at all stages of the criminal justice system and that QCS should invest in standardised brief psychometric screening tools that can assess the likelihood of intellectual impairment, and in other resources to make these tools more relevant to people with cognitive disability.
- Debbie Kilroy (Brisbane public hearing, p. 72) suggested that risk assessment tools have existed for a long time without any proof that they improve decision-making in a way that reduces imprisonment. She considered that



they can conflate need with risk, and that this leads to Aboriginal and Torres Strait Islander women being classified as risky.

• Australian Community Support Organisation (sub. DR35, p. 8) submitted that prisoners are requested to write a letter to request a place in a 'facility' and many do not have the literacy skills or information to do this.

### Case management would help with rehabilitation

Case management can be divided into three parts: the management of an offender's rehabilitation whilst in custody; management of an offender's application and preparation for parole; and the management of an offender while on parole (Sofronoff 2016, p. 121). The first segment is largely the responsibility of prison guards, who QCS considers are:

... best positioned to monitor the behaviour of prisoners and motivate/encourage participation in employment/education/vocational training and to challenge inappropriate behaviour. (QCS 2018e, p. 2)

The case management of prisoners is shared between these officers and nominated intervention specialists (QCS 2018e, p. 5).

One corrections officer commented that:

True case management is being able to see somebody, identify their barriers, work with them closely, potentially see them every day, potentially some might need once a fortnight ... (Davis, Brisbane public hearing, p. 22)

However, current practice does not appear to be consistent with such an approach. The time available for prison managers to perform the case management role has fallen as overcrowding has increased the ratio of offenders to staff. Officers can carry up to 70 prisoners on their caseloads, restricting their ability to apply their professional skills, leading instead to a compliance approach (Andrew Beck, QCS, Cairns public hearing, p. 47). Given that many prisoners move within and between prisons, case managers may change frequently. Together Union pointed out that because of overcrowding, 'we are bringing people into the system now and there is no capacity for ... the Corrections officers to engage with them' (Together Union, Brisbane public hearing, p. 17).

Case managing the cohort of prisoners that moves through the system quickly, who are released on probation or parole and often return to prison, is particularly challenging. There is little time to properly assess them or to manage data about them, and this reduces the effectiveness of rehabilitative efforts. Criticisms of the current approach included that giving prison guards the main responsibility for case management is 'badly flawed' (Hamburger sub. DR17, p. 20), and that:

case management needs to be done by a dedicated group of properly-trained professionals, not prison officers who may be moved around to address overcrowded conditions. (Mt Isa Family Support Service, sub. DR9, p. 1)

These comments raise three issues: appropriate caseloads; whether prison officers have the skills required to identify the appropriate management of prisoners' needs; and whether there is continuity of case management throughout their sentences. They are consistent with the QPSR's conclusion, that case management in Queensland prisons is disjointed and:

There is no person, or small unit of people, with the necessary qualifications and experience in case management, who has direct contact with the prisoner and is responsible for managing the prisoner while the prisoner is in custody so as to ensure the prisoner is prepared for parole by the prisoner's parole release date or parole eligibility date. (Sofronoff 2016, p. 108)



Case management also requires an information system for recording the case information about prisoners. One view is that the Integrated Offender Management System, which supports QCS's case management system, is 'archaic' and unlikely to support the recommendations in the draft report (Rallings sub. DR1, p. 3).

### Prisoners do not always have access to appropriate programs

#### Remand and short sentence prisoners

A large proportion of Queensland's prisoners are on remand or serving short sentences. During 2017–18, 48 per cent of all new prisoners were remanded (ABS 2019c). A further 31 per cent of all prisoners entering prison had sentence lengths of less than six months (ABS 2019e).

This means that many prisoners are either not eligible for in-prison programs or, if they are eligible, do not complete them. Hence the system-wide numbers on program participation disguise significant groups of prisoners who do not participate and are exposed to the criminogenic effects of imprisonment without any offsetting impacts of in-prison programs. It is difficult to see how programs could be meeting the needs of these groups of prisoners. Several submissions commented on this.

Submissions argued that eligibility for programs is unduly restricted for prisoners with short sentences, for those on remand and for some classes of prisoners:

- The Anti-Discrimination Commission Queensland (ADCQ) noted that in 2017–2018, the most common length of stay in custody was 1–2 months, with more than 50 per cent of the prisoner population serving less than four months in custody. This, coupled with the fact that QCS knows only a small proportion of the prisoners' release dates, means that referring prisoners to programs and intervention services is very difficult. The ADCQ observed that many programs offered to women in prison are not fit for purpose, as they are designed for people who are in prison for long periods of time (sub. DR13, p. 6).
- The APS College of Forensic Psychologists (sub. 27, pp. 3, 6) commented that rehabilitation is 'often not available via programs as people spend extended periods of time on remand and then may be released on time served or receive a sentence length that does not provide them access to programs. This likely increases risk of further imprisonment'. It considers that there should be options for prisoners on remand, focusing programs on psychosocial issues rather than on offences.
- Mt Isa Family Support Services noted that:

Prisoners on short sentences are often released before they complete rehabilitation programs, therefore work must be done on shortening programs and concentrating on creating habits of work and constructive routines. (sub. DR9, p. 2)

Hamburger (sub. 14, p. 17) argued that many short-term prisoners are held in secure prisons, but could be accommodated in appropriately located, designed and staffed community custody options where they could access therapeutic programs.



#### Addressing specific needs

The effectiveness of programs depends on how closely they address offenders' needs. The disproportionate representation of Aboriginal and Torres strait islander people and people with mental health and substance abuse problems, mean that programs for these groups are particularly significant. While QCS is trying to address specific needs, stakeholders suggested more should be done, including considering alternatives to imprisonment, additional programs, recognising the needs of prisoners with cognitive disability and those who are mentally ill, and examining the potential for the National Disability Insurance Scheme (NDIS) support in prison:

- Rallings (sub. DR1, p. 3) argued that 'careful thought should be given to the implications of throughcare for First Peoples prisoners'. Assuming that prison is a healthy environment for some prisoners may 'lead to underestimating throughcare needs of some prisoners'
- Ellem et al. (sub. 7, pp. 9, 12) submitted that prisoners with cognitive disability may have difficulties accessing appropriate rehabilitation programs within prison that can assist early release. They considered that QCS and Youth Justice should develop rehabilitation programs for these prisoners
- The Queensland Alliance for Mental Health (sub. 21, pp. 1–2) pointed out that 49 per cent of prisoners have mental health issues and that all parts of the criminal justice system need to consider their needs (including alternatives to imprisonment).
- Denton (Brisbane public hearing, pp. 85, 88) noted that the criminal justice system, with its focus on risk, containment, control, punishment and sometimes rehabilitation 'rub(s) up against' the mental health focus on recovery, and that fragmentation of services between prison and community services and between mental health and substance abuse services contributes to poor reintegration outcomes.
- Queensland Advocacy Incorporated (sub. DR33, p. 4) submitted that 'The glaring omission from the QPC Draft Report is that it overlooks the potential for NDIS-funded supports in prison and in transition to reduce the likelihood that people will return to prison'.
- Dooris (Brisbane public hearing, p. 76) indicated that there is confusion between the NDIS and Centrelink's support pension and that to 'detangle that is tricky'.
- The APS College of Forensic Psychologists (sub. 27, p. 5) is concerned that there are insufficient rehabilitation programs and qualified staff for young offenders in custody.
- A long-term prisoner (sub. DR41, p. 2) submitted that such prisoners would benefit from training in basic technology skills, because 'long termers are so left behind with technology and we don't know how to live in the world today. I have never used a mobile phone yet if I get out and miss a call from parole, they will send me back to prison and that scares me'.

### Debt problems may impede future reintegration

Prisoners may leave prison with more debt than when they went in; for example, if outstanding bills or fines are unpaid, and accumulate interest. QCOSS noted that this may lead to homelessness and reoffending when prisoners are released. Other possible consequences are:

Barriers to rental accommodation due to possible rent arrears, inclusion on TICA (rental blacklist), poor credit rating or unexplained gap in employment.

If a creditor has taken enforcement action to recover a debt, a person may have a new court ordered penalty such as a suspended licence, an additional fine, or assets repossessed. This acts as a further barrier to housing and employment. (sub. DR24, p. 14)

The ADCQ (sub. DR13, p. 7) noted that many women come into prison with unpaid fines, reducing their capacity to manage their finances when they are released.



### More incentives could be used to encourage prisoners to engage in rehabilitation

Submissions and consultations pointed to two main ways in which prisoners' incentives to participate and complete in-prison programs are being weakened.

First, the incentives for participating in programs or work are reduced by:

- the lack of diversity in courses—for example, offering hairdressing but not woodwork, welding, forklift driving or fitness courses—and limited opportunities for prisoner employment that provide useful preparation for post-prison work. Together Union (sub. DR14 p. 3) supported a comprehensive overhaul of training, programs and industries to ensure they support rehabilitation beyond incarceration
- a disconnect between training inside and outside prison and an inability to finish courses: 'there was an example given by one of our delegates where someone was a week away from graduating and was released' (Together Union, Brisbane public hearing, p. 19)
- the absence of work release programs, involving temporary release from prison to attend employment
- not properly measuring whether programs successfully deliver outcomes (Queensland Anti-Discrimination Commission sub. DR13, p. 8)
- the absence of arrangements with employers to offer work for prisoners on release, except at Wolston Correctional Centre (Parole Board sub. DR31, p. 15)
- the pre-certificate level 1 course—a key contributor to Queensland's performance on prisoners involved in education—is not seen as a useful qualification
- insufficient reward—an anonymous long-term prisoner submitted that 'the pay in prison is not enough. Some jobs only pay enough for three or four 10-minute phone calls. If the prisons paid inmates fairly we wouldn't have to break rules to earn extra money' (sub. DR41, p. 2)
- the inability to progress to medium security, which would 'allow life sentenced inmates to show some form of progression prior to release while minimising the harms associated with prolonged exposure to high security environments' (Cox sub. DR2, p. 1)
- restricted access to the internet constrains training opportunities.

Second, they suggested that the costs to prisoners of participating are increased by:

- having to pay for some programs
- information collected about the capacity of individual prisoners, including information about impairments, does not follow them through the criminal justice system (QADC sub. DR13, p. 8)
- prisoners who have progressed to a farm, for example, must return to a high security facility to complete the program because programs are not available in low security facilities
- barriers to prisoners achieving an apprenticeship in custody (Parole Board sub. DR31, p. 15)



- prisoners being asked to go in at a program level that is well above their education level (Together Union, Brisbane public hearing, p. 20)
- inadequate language skills, as 'people with unrecognised speech, language and communication needs are likely to struggle to access treatment and rehabilitation programmes which are typically delivered verbally' (Speech Pathology Australia sub. DR19, p. 6) 132
- breaches of discipline can lead to a loss of privileges, including not attending a course or activity (QCS 2018b, p. 10). Dr Rallings argued that 'punishment for an infraction should not result in a prisoner's suspension or expulsion from rehabilitation activities' (sub. DR1, p. 5).

### Staff training and work practices could be improved

The College of Forensic Psychologists (sub. 27, p. 6) considered that the number and qualifications of staff are barriers to program effectiveness. Several stakeholders, including correctional staff, made the same point to the Commission.

Rallings (sub. DR1, p. 2) considered that professionalisation of the custodial officer role would support rehabilitation. Eriksson (sub. 5, pp. 4–5) argued that staff training, education, and ongoing support and mentoring are crucial for achieving better rehabilitation outcomes:

Currently, strong staff cultures exist that dehumanise prisoners, that actively discourage prisoners to enrol in education programs, and who maintain a very large distance between staff and prisoner groups, as well as between uniformed and non-uniformed staff, all contributing to a culture of risk management that undermines rehabilitation. ... For this to change, several things need to be taken into account, but perhaps the first is a much more comprehensive training and education of new prison staff.

As mentioned by a staff member in one prison, and which was echoed across two States: 'Being a Prison Officer is a very unsupported profession, both by the government and by society ... It is seen as low-status but it is one of the most important jobs in society.'

Prison procedures and policies also affect rehabilitation. For example, where prisoners are locked down in the middle of the day (for staff lunch breaks), the lockdown process takes considerable time and means that educational and training facilities are empty for significant parts of the day. At the same time, there are shortages of facilities at other times owing to overcrowding. Submissions supported extended correctional centre and Probation and Parole Service operating hours (Rallings sub. DR1, p. 2) and increased funding to industries and programs to maximise prisoner involvement, including a return to 7-day industries across all correctional centres, and increased prison staffing to support correctional officer engagement and interaction with prisoners in a safe environment (Together Queensland sub. DR14, p. 3).

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<sup>&</sup>lt;sup>132</sup> For example, one research study found that approximately 40 per cent of offenders had communication difficulties such that they would be unable to access and benefit from verbally-mediated rehabilitation programmes, such as anger management or drug rehabilitation courses which has consequences for re-offending (Speech Pathology Australia sub. DR19, p. 6).



# 18.5 Improving in-prison rehabilitation

The QPSR's recommendations to improve in-prison rehabilitation included increasing the number and diversity of programs and improving the evidence base for program development. To assist specific groups, it proposed:

- reviewing the resourcing of prison and community forensic mental health services and of provision of mental health services for Aboriginal and Torres Strait Islander people and for women
- developing new rehabilitation programs specifically designed for Aboriginal and Torres Strait Islander people, by Aboriginal and Torres Strait Islander people
- providing substance misuse rehabilitation to all prisoners and offenders as required in accordance with their assessed risk and need (Sofronoff 2016).

The government accepted these recommendations, indicating that expanding rehabilitation, drug and alcohol and mental health treatment services in prison was a priority, and committed to developing a long-term plan to implement them (Queensland Government 2017b, pp. 1–2). While the plan has not been published, there is evidence that some progress has been made (Box 18.3).

### Box 18.3 Progress on rehabilitation reform

The Queensland Government committed \$265 million over six years to address reforms suggested by the QPSR—it is not clear how much of this was allocated to support in-prison rehabilitation. However, funding was provided for an additional 18 full-time equivalent staff for Queensland Health to support rehabilitation, drug, alcohol and mental health services (QAO 2018b, p. 56).

QCS pointed out that implementing many of these recommendations depends on infrastructure capacity (QCS 2018g, p. 8). However, it has progressed reforms including:

- partnering with KPMG and Swinburne University to review and replace existing risk and need assessments with validated assessment tools suitable for prisoners in custody and offenders under supervision in the community
- re-establishing a dedicated research and education team responsible for leading and managing complex research projects, evaluating outcomes from the QPSR, and other research activities for QCS, including program evaluations, research events and publications
- deploying additional rehabilitation programs, training and re-entry services to correctional centres and offenders in the community (QCS 2018c, p. 31)
- rolling out substance abuse programs from January 2019
- commencing a review of mental health programs in prisons to ensure services available to prisoners are equivalent to that which is available to the community
- commencing consultations about delivering a greater variety of rehabilitation programs developed and provided by Aboriginal and Torres Strait Islander people (Queensland Government sub. 43, p. 79)
- reviewing its governance arrangements with the aim of ensuring assessment and rehabilitation efforts are evidence based and that practices, processes and procedures that support offender management and rehabilitation align with the evidence base and processes are in place to monitor delivery and outcomes (QCS personal communication by email to the QPC, 18 April 2019).

The Department of Child Safety Youth and Women is investing in service responses to help manage the increasing demand on the correctional system, specifically in relation to the increasing number of women in custody (Queensland Government sub. 43, p. 12).



The rest of this chapter builds on the QPSR recommendations, setting out the Commission's responses to the issues raised during the inquiry.

### Prison overcrowding and the quality of the prison environment

There is limited public information on the quality of the prison environment.

The Office of the Chief Inspector (OCI)—located in QCS— holds significant information about the quality of the prison environment. It provides regular reviews of Queensland's correctional facilities based on the concept of a healthy prison set out by the World Health Organisation (WHO). These reviews assess whether prisoners are held safely, treated with respect, can engage in purposeful activity, and are prepared for release into the community. There are detailed performance standards for each area and the results are used to determine ratings of performance against inspection criteria and the WHO Healthy Prison Test. However, the most recent report on the OCI's website was published in 2013, and more recent information was not seen by the Commission.

The only data that the Commission was able to find on the health of Queensland prisons is in the Productivity Commission's annual *Report on Government Services*. In 2017–18, Queensland prisons:

- had a significantly higher proportion of prisoners in secure custody than the national average (92.3 per cent versus 80 per cent, respectively), and a higher offender to operational staff ratio (29.1 versus 18.7)
- were the most dangerous, in terms of serious prisoner-on prisoner assaults, although they performed better in terms of prisoner assaults on officers
- provided prisoners with less time out of cells than in four other jurisdictions. The percentage of prisoners in education and training was middle ranking, but the percentage in employment was the lowest in Australia (SCRGSP 2019d).

These indicators—while not comprehensive—suggest that Queensland's prisons are performing less well than other jurisdictions. Although overcrowding is not the only determinant of prison health, it has knock-on effects on the prison environment, as it:

- hampers prisoner classification and separation of low risk prisoners from violent offenders
- reduces the provision of efficient and effective health care to prisoners
- diminishes prisoners' capability for a meaningful constructive day, allowing boredom to set in and anger and
  frustration to develop, increasing the risk of conflict, violence and serious assaults against prisoners and staff
- is related to decreases in prisoner employment and time out of cells, which is related to more prisoner-on-prisoner assaults, self harm incidents, and incidents requiring the use of force (Crime and Corruption Commission 2018, pp. 5–6).

By working against rehabilitation, overcrowding contributes to an unfortunate cycle in which overcrowding reduces rehabilitation, which increases recidivism and, in turn, worsens overcrowding.

QCS has implemented operational changes to help it to manage overcrowding and has received additional funding to cover the additional costs of accommodating prisoners above the built capacity (Sofronoff 2016, pp. 63–64).

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<sup>&</sup>lt;sup>133</sup> With the current doubling up arrangements, two prisoners are locked up in eight square metres for an average 13 hours per day (Andrew Beck, QCS, Cairns public hearing, p. 42).



### Options for reducing overcrowding

To expand prison capacity, the Government has committed:

- around \$620 million (Ryan 2019b) towards an expansion of the Southern Queensland Correctional Precinct, to 'deliver a correctional facility with a focus on health and rehabilitation' (Queensland Treasury 2019b, p. 2)<sup>134</sup>
- funding of \$143 million over four years (\$43.7 million per annum ongoing) to commission and operate the expanded Capricornia Correctional Centre (Queensland Treasury 2019a, p. 6)
- to installing 2,000 bunk beds across Queensland correctional centres (Queensland Treasury 2019b, p. 2).

The expansion in bunk beds will occur through doubling up in cells which were designed to hold single prisoners. Moreover, pressure will continue to build unless the growth in prisoner numbers declines. At the current rate of growth, slated expansions are unlikely to meet future demand. The Commission estimates that, to allow prisons to operate at their designed capacity, Queensland would need an extra 3,200 to 4,400 prison cells by 2025.

Several recommendations of this inquiry would reduce overcrowding in the medium-term by, for example, decriminalising some offences, supporting alternative sentencing approaches and providing victims with options for achieving restoration for harms inflicted. However, these initiatives are unlikely to be implemented overnight, meaning that strategies to manage the impacts of overcrowding are required.

QCS's current approach to minimising the impacts of overcrowding includes: violence prevention strategies; adapting prisoner movements and activities to manage competition for unit amenities and reduce known points of conflict and high risk periods; providing additional exercise equipment; increased cell access for prisoners; and extending the operation of prison industries from five to seven days in some locations (QCS 2018g, p. 11).

There are some additional measures QCS either could use now or could be given the ability to use. While the Commission has not assessed these options, most appear to have problems:

- The remission system, which was an administrative arrangement under which the Prisons Department could release a prisoner on the grounds of good behaviour, could be reintroduced. However, while this helped in managing prisoner numbers, it was abolished in the *Corrective Services Act 2000*, because it encouraged short sentenced prisoners to wait for their remission eligibility date rather than apply for parole (Sofronoff 2016, pp. 53–54).
- Better use could be made of spare capacity in low security prisons. However, as only about 150 places are
  available (Queensland Government sub. 43, pp. 66–67), this would not have a significant short-term impact on
  overcrowding. Moreover, the Government has rejected proposals to move some classes of prisoners to low
  security prisons.<sup>135</sup>
- In other countries, containers have been used as classrooms and funds from fines paid by offenders have been used to renovate unused space (United Nations Office on Drugs and Crime 2017, p. 24).
- Work-release programs could reduce overcrowding and improve reintegration. However, this would have to be from high security prisons to have a significant impact on overcrowding.
- Better use could be made of existing prison infrastructure by, for example, having a later lock-down time or allowing half of the prisoners out of their cells at a time. This could involve more training facilities to be offered

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<sup>134</sup> The government has not released details of how the focus on health and rehabilitation will be achieved.

<sup>&</sup>lt;sup>135</sup> The policy decision to exclude sexual offenders, life sentenced prisoners, those convicted of manslaughter, or those with a serious violent offence declaration from placement in low security is one reason for the spare capacity. While the QPSR recommended that the government should review its policy decision (Sofronoff 2016, p. 184), it rejected this recommendation, noting that the policy was introduced following the escape of a convicted murderer and that the possibility of escape by prisoners convicted of sexual offences or subject to life imprisonment has 'high potential' to undermine confidence in the low security program (Queensland Government 2017b, p. 12).



for a longer time each day. Programs could also be made available during weekends (ADQC sub. DR13, p. 7; Civil Liberties Australia sub. DR5, p. 11).

Extending the hours of operation of more educational and training activities is likely to be one of the main ways to make better use of infrastructure. This would improve opportunities for prisoners to change their behaviour, improving the quality of the prison environment in the short term and in the longer term would reduce overcrowding to the extent that it reduces recidivism. Extending the operating hours would require additional funding, changes in prisoner management and in the work practices of correctional officers.

QCS should assess whether there are further opportunities to extend the hours of operation of educational and training activities in its correctional facilities.

#### Prisoner assessment

The QPSR recommended replacing the risk and need assessments used by QCS with validated assessment, drawing on external expert advice, and establishing a body with the expertise to ensure that risk assessments, staff training, and interventions are regularly evaluated and supported by research (Sofronoff 2016, pp. 118, 120).

QCS is developing its assessment tools, with the assistance of KPMG and the Centre for Forensic Behavioural Science at Swinburne University of Technology (Box 18.3). The Commission understands that this is part of a broader review, but QCS has not published its scope. The scope of this review should be published and include:

- how remanded and short sentence prisoners should be assessed
- the frequency of assessments
- who should undertake them
- how their results are used
- risks of bias (James 2018, p. 8).

Information generated through assessment must be stored, processed and shared if it is to be useful. Hence analysis of whether QCS's information technology systems enable effective use of assessment results should complement the review of assessment tools.

Because the issues in this review are complex, it should be conducted in public, to enable new ideas to be gathered and tested. So that it leads to practical improvements within a reasonable time frame, QCS should:

- publish the completion date for the review and regular progress updates during the review
- publish as one of the main outputs of the review a plan with timelines for implementing actions to improve assessment
- seek feedback through public consultation
- report regularly on its progress in implementing this plan.

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<sup>&</sup>lt;sup>136</sup> While there may have been operational reasons for this, the Commission observed that educational facilities and gym equipment were not being utilised during its visits to correctional facilities.



### Case Management

In February 2019, QCS began its End to End Case Management Project to develop:

an end to end throughcare approach that is intended to provide people with consistent case management at all stages of the Corrective Services journey and ... in the community to provide continuity of support and promote rehabilitation. (QCS, Cairns public hearing, p. 44)

This is consistent with the QPSR's recommendation (which the Government supported) that QCS should implement a dedicated case management system that begins assessing and preparing a prisoner for parole at the time of entry into custody (Queensland Government 2017b, p. 5).

QCS is also undertaking related projects, including reviewing its rehabilitation service models and re-entry services, rolling out new substance misuse programs and services, procuring a post-release housing model, and using the opportunity to 'join up rehabilitation services in correctional centres and community corrections' (QCS personal communication by email to the Commission, 18 April 2019).

This is a significant work program that could lead to major changes in case management, although the details have not been released and, as yet, there have been no obvious changes to QCS's approach.

The scope of QCS's review of case management should include issues such as:

- · whether the objective of case management set out in the daily operations procedures remains fit for purpose
- lessons from other jurisdictions 137
- reviewing the job description for case management, setting out the functions of the role and the skills required<sup>138</sup>
- considering whether the case manager is best placed to assist prisoners to navigate through different services or whether specialist 'navigators' should perform this role
- whether certain types of prisoners, such as short-term prisoners, have different requirements for case management
- determining who should perform the case management role, including the advantages and disadvantages of having a dedicated group of case managers, or an individual who stays with prisoners throughout their sentence
- how well prison procedures support case management
- the effectiveness of systems (such as information management) for supporting case management
- whether there are ways to improve continuity between entry, prison and reintegration into the community
- the costs of different options.

As in the case of QCS's related review of assessment, its review of case management should be conducted in public. When the review is completed, QCS should publish its plan, with a timetable of actions, for improving case management.

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<sup>&</sup>lt;sup>137</sup> The QPSR considered that the approach in Victoria, where Corrections Victoria takes the lead role in working consistently with prisoners throughout incarceration to prepare them for parole, is a good one, although it noted that Victoria is significantly better resourced than Queensland. The Victorian approach involves a multidisciplinary case management committee, which ensures prisoners are aware that they are actively involved in preparing for parole and completing programs as required and that Corrections Victoria is proactive in assisting prisoners to prepare for release (Sofronoff 2016, pp. 127–128).

<sup>&</sup>lt;sup>138</sup> The Commission heard different views about this. Professor Mazerolle commented that 'we need to have staff that are committed to therapy. What I mean by that is reading literature, reading what works, reading what effective treatment programs are' (Brisbane public hearing, p. 35). The QPSR noted that practice is different: 'There is, of course, constant supervision by custodial staff. However, the scrutiny is not aimed at rehabilitation efforts but at security' (Sofronoff 2016, p. 9).



The Parole Board, while acknowledging QCS's work program on case management, pointed out that it:

would be assisted in its decision-making by evidence regarding the real value of programs in reducing recidivism, and information to support that recommendations for programs have taken into account the individual offenders' rehabilitation needs and what alternatives might be available in the community. (sub. DR31, p. 15)

A requirement for QCS to provide this information would not only assist the Parole Board but would strengthen incentives for QCS to improve its approach to case management.

### The allocation of effort across the prison population

#### Remand and short sentence prisoners

The Commission's recommendations in previous chapters would reduce the numbers of prisoners on remand and with short sentence lengths. Their numbers will, however, remain high for the foreseeable future. The QCS Commissioner considers that the high proportion of prisoners who are remanded and generally ineligible for programs is a 'significant opportunity that needs to be exploited and is now an organisational priority for Queensland Corrective Services' (Martin 2018).

The Commission agrees that there should be further efforts regarding the rehabilitation of short-sentence prisoners, given their large numbers and the few programs available to them. However, research is required to provide information about the aspirations of short-term prisoners; their reoffending rates; their characteristics and whether assessment tools can predict reoffending; gaps in the programs available to them; and how to fill them. The research should involve national experts in education, training and work, and obtain feedback from serving and/or former prisoners (United Nations Office on Drugs and Crime 2017, pp. 11–12).

Options that it could consider include:

- specially developed short modular courses (United Nations Office on Drugs and Crime 2017, p. 30)
- implementing high intensity program units for short-sentenced prisoners
- a local coordinated multi-agency offender management service aimed at helping persistent reoffenders
- improving the preparation of remand and short sentenced prisoners for release through specialty re-entry services (Sofronoff 2016, p. 27)
- therapeutic approaches (Hamburger sub.14 and sub. DR17).

The research should be published; draw on external expert advice and lead to a plan, with a timetable of actions, for improving the rehabilitation of remandees and short-sentence prisoners.

Commissioning research may seem too slow to address the pressing need to stop the revolving door through which short-term prisoners quickly return to prison after reoffending, turning short sentences to de facto long-term sentences punctuated by short stays back in the community. Given this urgency, QCS should not postpone worthwhile initiatives to reduce reoffending by these offenders until the research is completed.

#### **Prisoners with specific needs**

The government has accepted that expanding rehabilitation, drug and alcohol and mental health treatment services in prison is a priority and has committed to developing a long-term plan to implement them (Queensland Government 2017b, pp. 1–2). <sup>139</sup> QCS has begun a review of mental health programs in prisons to ensure services available to prisoners are equivalent to that which is available to the community and is commencing consultations about delivering a greater variety of rehabilitation programs developed and provided by Aboriginal and Torres Strait Islander people (Queensland Government sub. 43, p. 79).

<sup>&</sup>lt;sup>139</sup> With two exceptions, which were not about in-prison rehabilitation programs.



#### It should:

- conduct the review in public
- publish regular progress reports, detailing its proposed initiatives, and invite comments on them
- publish a plan, with a timetable of actions, based on the review.

QCS should also seek to ensure that prisoners who may be eligible for the National Disability Insurance Scheme (NDIS) are not excluded from it. The Queensland Audit Office reported in 2018 that QCS had not implemented changes to its business practices needed to integrate with the NDIS business model. This was despite between 170 to 460 prisoners being potentially eligible for the NDIS each year and even though the federal parliament's joint standing committee on the NDIS concluded that it could decrease imprisonment rates for people with complex disability support needs (particularly Aboriginal and Torres Strait Islander people) (QAO 2018b, pp. 10–11).

The Audit Office recommended that agencies affected by the NDIS in Queensland should strengthen their internal governance and reporting arrangements at the service level so that heads of agencies can provide the lead agency—the Department of Communities, Disability Services and Seniors—with accurate assessments about their agencies' readiness for the NDIS and any emerging risks. QCS agreed with this recommendation and told the QAO that it has established a QCS NDIS implementation plan and is working on initiatives to ensure the NDIS is effectively implemented in correctional centres and for offenders transitioning to the community (QAO 2018b, pp. 15, 81).

Some stakeholders are either not aware of these initiatives or consider that QCS has made little progress in implementing them. To ensure that it is maximising NDIS assistance to prisoners and those who have been released, QCS should publish its implementation plan and report regularly on its progress in implementing it.

#### Prisoners with debt problems

Prison is a complete separation from friends, family and—if the prisoner was employed—a job. As noted by QCOSS and the ADCQ, financial issues add to the discontinuity caused by imprisonment, increasing the problems that prisoners face after release. Prisoners also face the prospect of leaving prison with unpaid utility and other bills, and debts to Centrelink, housing departments, the Child Support Agency, the Tax Office, and unpaid fees and fines. These debts make it more difficult for prisoners to start afresh when leaving prison. Research suggests that exprisoners with debts are more likely to return to prison (Financial Counselling Australia 2018, p. 11).

A recent initiative has the potential to help prisoners to pay fines. In December 2017, the State Penalties Enforcement Registry (SPER) implemented Stage 1 of the new Work and Development Order (WDO) scheme, which is a non-monetary debt finalisation option for those who for cannot pay fines (Box 18.4). SPER consulted with QCS during the development of the WDO scheme. Stage 1 of the scheme makes unpaid work available through probation and parole. Stage 2 of the scheme could make WDOs available in prisons.

### Box 18.4 Work and development orders

Activities that can be completed as part of a WDO are unpaid work; medical or mental health treatment provided by approved practitioners; educational, vocational or life skills courses; financial or other counselling; and drug or alcohol treatment. Mentoring programs are included for persons under 25 years of age and culturally appropriate programs for Aborigines or Torres Strait Islanders living in remote areas.

Approved sponsors assess individuals' eligibility for a WDO, prepare activity plans, submit applications to SPER, deliver the plan (or arrange for it to be delivered) and report to SPER progressively as the activities are undertaken.

Source: Queensland Parliament Finance and Administration Committee 2017.



Prisoners would satisfy the financial hardship criterion for eligibility for WDOs as they are not able to undertake salaried employment while in custody. QCS advised that activities that could be performed under a WDO while in custody could include educational, vocational or life skills courses, drug and alcohol counselling and unpaid work, and that WDOs would assist rehabilitation by providing an incentive to participate in non-mandatory programs. However, QCS also considered that implementing WDOs in correctional facilities could require 'significant adjustment to prisoner management processes and procedures' (Queensland Parliament Finance and Administration Committee 2017, pp. 45–46).

Making WDOs available in prisons would support rehabilitation by strengthening prisoners' incentives to participate in programs and enabling them to leave prison with less debt. The question is whether these benefits exceed the costs of required changes to prison procedures that QCS has identified. SPER and QCS should work together to develop the best way to make WDOs available in prisons, provided that the benefits exceed the costs. As this matter has been under consideration for some time, a decision about whether WDOs should be available in prisons should be made within six months. Implementation should occur as soon as is practicable after that.

Many prisoners also have other debts. A report based on the experiences of financial counsellors and other experts working in prisons suggests that barriers within the prison system make it difficult for prisoners to address their debts. These include difficulties for people on remand to negotiate with creditors; lack of documentation or information making it hard to cancel services or negotiate; lack of access to the internet; and prison processes (Financial Counselling Australia 2018). QCOSS pointed out that:

There are limited financial counsellors in Queensland and accessing legal advice for financial matters can also be limited, leaving a person without access to advocacy and support services.

Financial counsellors attending prisons can help prisoners advocate with creditors; revoke or establish power of attorney, negotiate with utility companies, banks and other institutions to access long-term hardship payment plans. This includes writing applications to banks for financial hardship. Banks, for example, can put a halt on mortgage payments and then capitalise the arrears (sub. DR24, p. 14).

The Financial Counselling Australia report suggests that changes that would help prisoners to address their debts include adding the National Debt Hotline phone number to the free call list; a mandatory financial health check for prisoners one week into their sentence; a toolkit of resources for families of prisoners about how to manage debt issues; training other prisoners to provide peer-to-peer financial capability information; and offering financial capability workshops for people in prison (Financial Counselling Australia 2018, p. 4).

Concerns about their rising debts combined with an inability to address financial matters may cause stress for prisoners that worsens their behaviour and, if debts increase, could increase the risk of reoffending after release. While resource constraints may limit the scope for action, QCS should compare steps that it could take in this area against others to improve behaviour and reduce reoffending. It would need to avoid perverse effects, such as creating a perception that offenders can deal with debt or secure financial advice by going to prison.

Nevertheless, there is a prima facie case for assisting prisoners to deal with some of the barriers they face in addressing financial matters due to their imprisonment, when this can improve behaviour and help to reduce reoffending. To this end, QCS should consider developing a cost-effective process for reducing barriers that prison imposes on prisoners dealing with financial problems. Options include:

- an initial assessment to identify issues that may need to be addressed
- opportunities for making it easier for prisoners to notify creditors
- access to financial counselling.

The resourcing for this process should be considered against other priorities for rehabilitation. QCS could encourage applications for a research project under its research guidelines (QCS 2018f), to assist it develop the best options for helping prisoners to manage financial problems.



# 18.6 Improving governance arrangements and incentives

Governance arrangements shape the incentives of people working in corrections and can indirectly affect prisoners' incentives. QCS has advised that it is reviewing its governance arrangements, including examining new governance arrangements for the delivery of rehabilitation services to:

provide high-level advice concerning agency assessment and rehabilitation strategy, planning, operations and outcomes

recommend strategies for improvement in efforts to break the cycle of reoffending [and]

promote an organisational culture that supports the rehabilitation of offenders. 140

This section discusses issues that the Commission considers should be part of this governance review.

### Assign decision-making authority

Governance arrangements should assign decision making authority to those who can make decisions most efficiently and should align their objectives with the overall system objective (Chapter 17).

Decisions that affect the whole corrections system and require system-wide information are likely to be made most effectively by those in head office who oversee the corrections system.

Most operational decisions, on the other hand, can be made more effectively if decentralised to correctional facilities. For example, while decisions about whether to fund increased prisoner participation in training programs may need to be made by head office, prison staff have better information about which prisoners might benefit most from participation in these programs and at what stage of their sentence.<sup>141</sup>

There are strong arguments for decentralising many decisions affecting prisoner rehabilitation, since prison managers can influence prisoner participation in and completion of programs by:

taking opportunities to encourage prisoners to attend and persist with programs, by ensuring prisoners are able to get to programs on time and ensuring that education and programs go ahead as scheduled. (ERA 2015, p. 144)

Instruments of delegation and limitation set out authorities of QCS officers for making decisions under relevant legislation (for example, QCS 2019a). All instruments were under review following the machinery of government changes in 2018 (QCS 2018g, pp. 28–29). QCS should ensure that the delegations are consistent with the performance management framework and service agreements with prisons, proposed in Chapter 17.

### Develop better performance indicators for rehabilitation

Agreements between QCS and prisons would need to include measures of successful performance. It is, however, difficult to measure the contribution of prisons to recidivism, which is also affected by factors outside prisons' control. A challenge is to find the right balance between outcome measures, which capture what the government wants to achieve but may not be directly linked to what a provider does, and output measures, which are measurable but may not provide the right incentives.

For this reason, the Economic Regulation Authority of Western Australia, after detailed review, proposed that performance indicators relating to rehabilitation should focus on matters that prisons can control. The measures it proposed include: offering support to prisoners who test positive to an illicit drug; provision of prisoner individual

<sup>&</sup>lt;sup>140</sup> QCS personal communication by email to the QPC, 18 April 2019.

<sup>&</sup>lt;sup>141</sup> The efficient location of decision-making is not always clear, and such situations need to be considered on a case-by-case basis. For example, should decisions about prisoner movements be made centrally, to optimise system-wide capacity use, or decentrally, so that prisoners are not moved when this would disadvantage their rehabilitation?



management plans within 28 days of sentencing; prisoner participation in education and training; prisoner completion of education and training; prisoner basic education participation; prisoner literacy and numeracy; prisoner employment; prisoner hours in employment; prisoner attendance in clinical intervention programs; prisoner completion of clinical intervention programs; prisoner health management on release; prisoner mental health; time spent in constructive activity; and out-of-cell hours. It proposed reviewing the impact of measures on incentives two years after they were introduced (ERA 2015, pp. 168–173).

QCS already measures some performance indicators for the corrections system (Chapter 17). It should develop performance indicators for individual prisons. In doing so it should have regard for the cost of developing additional indicators and applying them to individual prisons, which would depend on factors such as whether the data is already available and the difficulty of developing new data. Given that 'what is measured gets done', it should review the impact of any new indicators on incentives within two years of implementation to avoid any unintended consequences that they might have.

### Improve prisoners' incentives

Participation in in-prison rehabilitation services is compulsory for some prisoners. Compulsion ensures participation but not active involvement that leads towards changes in offender behaviour. Other activities are voluntary.

Parole, which is the only form of early release from prison, affects prisoners' incentives to change their behaviour while in prison. Parole Board discretion is 'an important lever for creating incentives and motivations for offenders to change and access effective treatment in prison' (Mazerolle, Griffith University, Brisbane public hearing, p. 34). The QPSR considered the impact of parole at length, noting that the most recent research suggests that paroled prisoners are less likely to reoffend than prisoners released without parole and that 'in truth, parole is nothing more than a method that has been developed to prevent reoffending' (Sofronoff 2016, pp. 1–2).

Given that many QPSR recommendations affect the parole system, they will also affect prisoners' incentives. Its discussion of court ordered parole illustrates the complexity of the issues that need to be considered. The QPSR concluded that court ordered parole should be retained despite concerns that it weakens prisoners' incentives to improve their behaviour or participate in programs designed to address offending behaviour. These concerns were outweighed, in the QPSR's view, by its expectation that: abolishing court-ordered parole would increase the burden on the Parole Board, requiring extra resources; lead to a rapid expansion of prisoner numbers; and that concerns about the impacts on prisoners' incentives could be addressed by giving the Parole Board, in exceptional circumstances, the power to cancel the issuing of a parole order by the Chief Executive that would otherwise have taken effect pursuant to court ordered parole (Sofronoff 2016, p. 85).

As noted earlier, the QPSR also made recommendations relating to case management and assessment which the government accepted, and which are presumably being considered in the reviews that QCS is undertaking. The impact on prisoners' incentives to change their behaviour should be a central consideration in these reviews.

There are several other ways that QCS could improve active participation by prisoners in rehabilitation services.

First, QCS should ensure that prison procedures do not inadvertently reduce prisoners' incentives to participate in rehabilitation activities. This would require analysis of:

- whether the impact on participation is material (for example, whether limitations on access to computers materially affect involvement in useful rehabilitation programs)
- whether relaxing these limitations would have adverse side effects (for example, on security)

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<sup>&</sup>lt;sup>142</sup> Under court ordered parole, the date for parole is set by the court at sentencing. It is only available to those sentenced to three years or less imprisonment, and who are not sex offenders or serious violent offenders.



 whether decisions about these matters need to be made centrally or should be decentralised (for example, whether there needs to be a system-wide procedure for the use of computers or whether local discretion is appropriate)

This analysis should find ways to reduce any adverse impacts on rehabilitation from moving prisoners between facilities (for example, as occurs during procedures for optimising capacity utilisation).

Second, QCS should use the new performance management framework described in Chapter 17 to reward prison managers for enabling and encouraging prisoners to participate in rehabilitation activities, provided that their capacity to do this was backed up by delegation of decision-making authority.

Third, QCS should use measures of program outcomes to demonstrate to prisoners the value of successfully completing programs. It should increase the credibility of these measures by involving prisoners in developing them. Currently, 'the only KPI that QCS has is about programs. Not about employment, meaningful activities, or anything like that, that we know aids recidivism' (Together Union, Brisbane public hearing, p. 20).

Fourth, QCS should build outcome performance indicators into the contracts of program providers—where feasible—to encourage them to deliver these outcomes.

Fifth, QCS should commission regular independent evaluation of programs, and be prepared to terminate poorly performing programs. This would assist with bringing in new ideas and continuous improvement of the 'syllabus', making it more attractive to prisoners, as well as yielding higher returns on taxpayers' investment. This would help to avoid situations such as taking a 'one size fits all' approach to domestic violence perpetration even though there is 'good evidence that they don't work' (Mazerolle, Brisbane public hearing, p. 35).

# 18.7 Establish an independent Inspectorate of Prisons

The Office of the Chief Inspector is an important source of information about the quality of the prison environment. The absence of up to date independent reports from the Office is concerning, given the international evidence that the quality of the prison environment is a significant determinant of prisons' impact on reoffending. External, credible, public scrutiny by the Office would be a powerful motivator across the corrections system and would build community confidence in it. Associate Professor Rynne noted that:

Of most importance to the QPC recommendations is that open access to all independent inspection reports is a proven vehicle of system reform that fosters cross-fertilization (i.e., bilateral information exchange), improves overall service delivery, and system effectiveness that, ultimately, encourages positive prisoner treatment outcomes and lower recidivism. (sub. DR8, p. 13)

The QPSR recommended an Independent Inspectorate of Correctional Services, which would report to Parliament on the findings of each review and work collaboratively with the Office of the Queensland Ombudsman (Sofronoff 2016, p. 248). The Crime and Corruption Commission supported this recommendation and highlighted the importance of transparency:

Transparency and the proactive disclosure of information is an important standard in government administration generally, but the closed prison environment and the high risk of corruption make it particularly important in the prison setting (Crime and Corruption Commission 2018, p. 52).

The Government accepted this recommendation and is working on the implementation of an independent inspectorate for places of detention (Ryan 2019b).

An independent inspectorate would need to be carefully designed, but could draw on models in other states (Sofronoff 2016, p. 247). Because it would be located outside QCS, it might have less access to information than does the current Office of the Chief Inspector.



The Government should establish a properly resourced independent Inspectorate of Prisons as soon as possible. The Inspectorate's key roles should be to regulate the humane containment of prisoners. It should have information gathering powers and be required to publish its reports.

# 18.8 Delivering reforms to in-prison rehabilitation

QCS is working through a large reform program suggested by the QPSR and accepted by the government and has committed to reviewing a substantial part of its 'architecture' for in-prison rehabilitation. The Commission's proposals would broaden the scope of some of these reviews and add new obligations. Completing the implementation of the QPSR recommendations while also turning these reviews and obligations into actions in a timely way will test QCS's research, planning and implementation capabilities and resources.

QCS should work closely with the Justice Reform Office, which the Commission proposes would be responsible for overseeing justice system reforms (Chapter 9), to ensure that there are appropriate capabilities, resources, role allocations and accountabilities to implement significant reforms in this important area.

#### Recommendation 20

Queensland Corrective Services should develop policies and procedures to minimise the impacts of overcrowding on rehabilitation outcomes. These should include changes to work practices that:

- allow prisoners greater access to work and educational opportunities
- improve infrastructure utilisation.

#### Recommendation 21

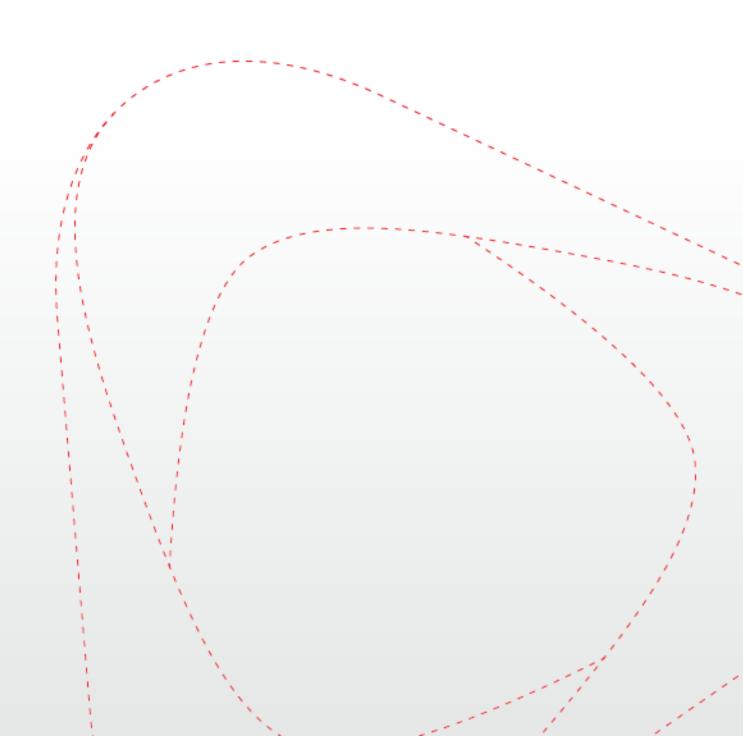
To improve rehabilitation outcomes, Queensland Corrective Services should:

- ensure that prisoners have incentives to participate successfully in rehabilitation activities
- improve the measurement and reporting of in-prison rehabilitation, including performance indicators for individual prisons. It should review the impact of these indicators on incentives within two years of implementation
- work with the State Penalties Enforcement Registry, to determine within six months, whether there is a costeffective option to make work and development orders available in prisons
- publish its implementation plan for moving individuals under its care onto the National Insurance Disability Scheme, and report regularly on its progress in implementing it
- undertake public reviews of its assessment, case management and mental health programs and publish review reports and outcomes
- develop initiatives for reducing recidivism among remand and short-sentence prisoners, by commissioning research, drawing on expert advice and developing an implementation plan
- consider a process that will help prisoners to deal with the barriers they face in addressing financial matters, particularly debt, due to their imprisonment, where that would help to reduce reoffending.

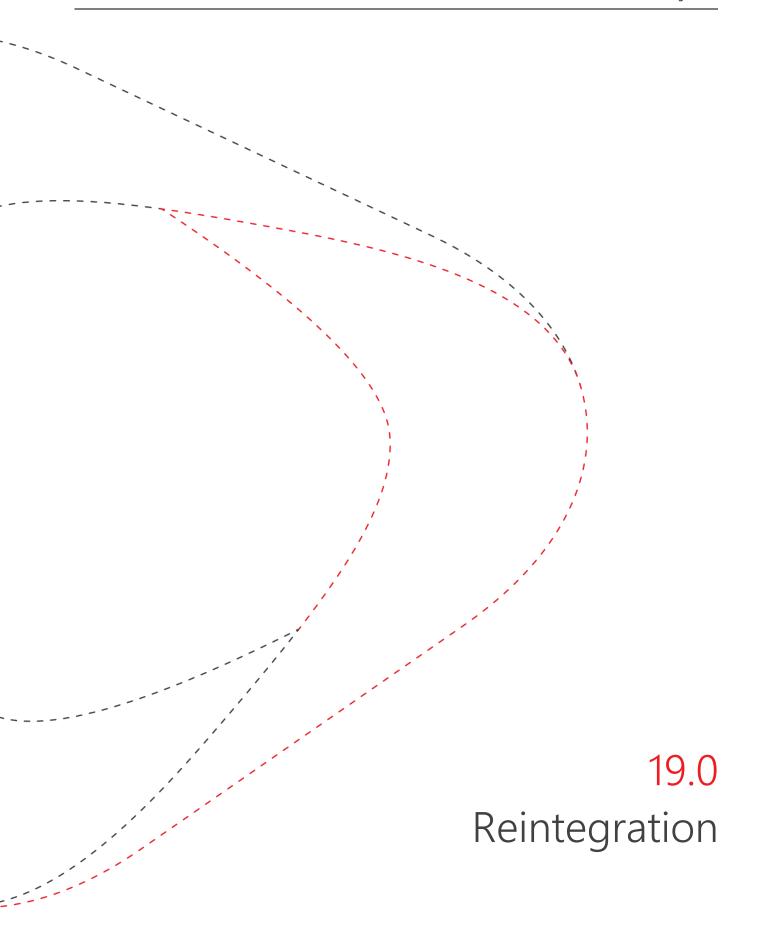
#### Recommendation 22

The Queensland Government should establish a properly resourced, independent Inspectorate of Prisons. It should have information-gathering powers and be required to publish its reports.











This chapter discusses how to improve the reintegration of prisoners to reduce recidivism in Queensland.

### Key points

- Currently a large proportion of prisoners return to prison—around half of people who serve a prison sentence will return to prison at least once in their life, and many will return several times. The pattern of repeated offending imposes high social and financial costs on the community.
- The reasons prisoners return to jail are complex, but may include:
  - prison experience not providing a deterrent effect to future offending
  - difficulty finding employment—less than 16 per cent of prisoners had organised paid employment two weeks after release
  - a lack of financial resources
  - an untreated or ongoing drug problem or mental health issue
  - homelessness—in Queensland, around 39 per cent of prison entrants in 2015 were homeless in the four weeks prior to imprisonment, and 47 per cent of dischargees either did not know where they would stay or were expecting to stay in short-term or emergency accommodation on release
  - a lack of family support on release
  - inadequate personal identification, resulting in delays in accessing welfare benefits and other services.
- Reintegration services benefit the community by lowering crime, restoring family units fractured by imprisonment and bolstering the economy through restoring people to meaningful work.
- It is difficult to assess the adequacy of reintegration services provided to prisoners on release.
   However, it appears that many prisoners receive little formal support through a reintegration service.
   As a priority, QCS should commission an independent evaluation of the adequacy of these services to ensure they are delivering value for money.
- To reduce the risks of prisoners reoffending immediately after release, QCS should be assigned responsibility for the provision of a minimum standard of support. QCS should regularly report against this standard.
- Although there are various initiatives to assist prisoners to develop skills, few prisoners engage in work
  that might develop industry-relevant experience or skills. To address this problem, a system of work
  release programs should be enabled in legislation and developed by QCS.
- The public housing system does not have the capacity to accommodate the prisoners released back into the community each month. Given the importance of housing to the reintegration of prisoners, there is a strong case for strengthening Corrective Services' accountability for outcomes relating to prisoner access to housing after release.



# 19.1 Reintegration risks

Most Queensland prisoners will one day return to the community—currently, more than 1,000 prisoners are released back into the community every month (ABS 2019c). The treatment that prisoners receive while they are in prison and the support they receive after leaving has a significant bearing on whether they will commit further offences, return to prison or reform.

Currently a large proportion of prisoners return to prison—just under 50 per cent of people who serve a prison sentence will return to prison at least once in their life, and many will return several times.<sup>143</sup> The pattern of repeated offending imposes high social and financial costs on the community.

A former Commissioner for Corrective Services observed:

Around Australia and internationally there has been a failure of large high security prison precincts to reduce recidivism rates. Queensland's large prisons are disconnected from prisoners' communities of interest, they are silos that inhibit joined up service delivery (throughcare). (Hamburger, sub. 14, p. 16)

The reasons prisoners return to jail are complex, but may include:

- prison experience not providing a deterrent effect to future offending
- difficulty finding employment—in Queensland less than 16 per cent of prisoners had organised paid employment two weeks after release (AIHW 2019c)
- a lack of financial resources (Payne 2007)
- an untreated or ongoing drug problem or mental health issue (Cutcher et al. 2014; Winter et al. 2016)
- homelessness—in Queensland, around 39 per cent of prison entrants in 2019 were homeless in the four weeks prior to imprisonment, and 41 of dischargees were expecting to stay in short-term or emergency accommodation on release and 6 per cent did not know where they would stay (AIHW 2019c)
- a lack of family support on release (Brunton-Smith & McCarthy 2016)
- inadequate personal identification, resulting in delays in accessing welfare benefits and other services (Payne 2007).

Several studies have tracked prisoners after discharge from prison (Box 19.1). In these studies, the single biggest issue for prisoners when they leave prison is trying to secure stable accommodation. This is also commonly identified as a short-term risk factor for reoffending.

The reality hits that you might not have a house or roof over your head. Prison at that point looks like a pretty good option—clean bed, three meals a day, you go to work [in prison] and come home at night, you're with your mates and apart from the violence and a few other things, it's not a bad option rather than being homeless. (Victorian Ombudsman 2015, p. 108)

[B]eing able to find accommodation and set up a stable life after imprisonment is a monumental ask for many vulnerable and disadvantaged women who are leaving prison. (Women's Legal Service Queensland, sub. 17, p. 3)

Little empirical evidence that assesses how homelessness impacts on recidivism is available in Australia, but a longitudinal study in the United Kingdom showed that those who were homeless prior to imprisonment were much more likely to reoffend than those who had stable accommodation (a reoffending rate of 79 per cent versus 47 per cent) (AIHW 2015).

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<sup>&</sup>lt;sup>143</sup> Based on QCS unpublished data 50.5 per cent of people born in 1985 who were imprisoned, were admitted only once.



### Box 19.1 Post-prison experience

Several studies have tracked the experiences of prisoners after release. These studies are summarised below.

#### Post-release outcomes (Kinner 2006)

In a study of post-release outcomes for Queensland prisoners, the author found:

- Most prisoners stated an intention to use illicit drugs (49 per of males and 35 per cent of females) or alcohol (60 per cent for both genders) after release. After release, 75 per cent of participants were using alcohol, and 42 per cent of them drank at hazardous or harmful levels at some time.
- Around a quarter of male prisoners showed signs of high or very high levels of psychological distress prior to release. One month after release, psychological distress levels had increased. Females were more likely to show high or very high levels of distress before release but improved steadily with time.
- Prior to release, 19 per cent of males and 15 per cent of females had not made firm arrangements regarding accommodation, and 44 per cent of males and 33 per cent of females had no income arrangements.

#### Mental disorders (Cutcher et al. 2014)

The authors interviewed 1,324 adult Queensland prisoners before and after release. They found:

- 43 per cent of participants reported a lifetime diagnosis of a mental disorder (LDMD) (the authors think this is understated and that a significant proportion of prisoners have undiagnosed mental health issues)
- prisoners with a LDMD were more likely to have worse outcomes after release across a wide range of
  measures, including unstable housing, rearrest, hospitalisation and psychological distress. The
  prevalence of diagnosed mental health disorders was higher for women (51 per cent) than for men (41
  per cent)
- 59 per cent of prisoners with a LDMD reported receiving no pre- or post-prison support.

#### Resumption of drug use (Winter et al. 2016)

The authors examined drug use amongst Queensland prisoners after release through interviews with 533 adult prisoners with a history of injecting drug use. They found that:

- 41 per cent of participants had resumed injecting drug use at a median 98 days after release
- those released on parole were much less likely to resume injecting drug use but other studies had shown this effect to wear off once the supervision period was over
- methamphetamine was the most commonly reported drug used amongst ex-prisoners.

#### Post-prison release in NSW (Schetzer & StreetCare 2013)

Members of StreetCare, with support from the Homeless Person's Legal Service, conducted interviews with prisoners after release.

A bloke's suddenly let out of jail, no money, nowhere to go. He had no idea what to do. He had no home, no clothing, no accommodation, no family support ... What do they do? They commit a crime and go back to jail because at least they get four walls and a roof and a meal. (Schetzer & StreetCare 2013, p. 47)



# 19.2 Reintegration services

Prisoner reintegration services aim to minimise the difficulties of adjusting back to life in the community and, in so doing, reduce the risk of reoffending. Reintegration services benefit the community by lowering crime, restoring family units fractured by imprisonment and bolstering the economy through restoring people to meaningful work.

Ideally, prisoner reintegration is part of the throughcare process (see Chapter 17), which spans an assessment of needs on prison entry, rehabilitation during imprisonment and prisoner release. This process should be seamless and address basic needs such as housing, employment and income; provide ongoing treatment for mental illnesses and substance addictions; and provide help with relationships and behavioural change. Reintegration services complement rehabilitation—without effective reintegration, rehabilitation programs cannot reach their potential for reducing recidivism.

Reintegration services are separated into two broad categories:

- dedicated reintegration services, which provide case management and referral services to assist prisoners with accessing services that will help with their reintegration
- parole supervision, which ensures that prisoners adhere to the conditions of their parole until the end of their sentence.

### Dedicated reintegration services

Four reintegration services are currently available in Queensland (Table 19.1).

Queensland Corrective Services (QCS) has offered dedicated re-entry services since 2008; however, informal arrangements existed prior to this (Sofronoff 2016). Funding to increase reintegration services was made available to QCS following the Queensland Parole System Review (Sofronoff 2016), and from 2016–17, a new suite of reentry services became available:

- CREST—a regionally based re-entry service for men. This service is delivered by several service providers contracted to QCS
- MARA—a reintegration service for women in SEQ, run through a contract with QCS
- Borallon Training and Correctional Centre (BTCC)—a contracted reintegration service provider undertakes assessment on all prisoners, from which a throughcare plan is developed by BTCC staff. As prisoners approach release, staff and service providers work together to determine who should access post release services. The transactional needs of prisoners are not incorporated into the reintegration services (such as accessing forms for identification and referrals to post release services), with these needs met by BTCC staff.

The degree of assistance provided to prisoners varies widely. For example, during consultation Australian Community Support Organisation (ACSO)—the service provider of CREST—advised that an in-prison contact will generally be a one-off meeting in the prisoner's unit during which the prisoner receives information and referral support.

A contact can occur in prison to create a plan for release. Once a prisoner is released, contact includes face-to-face and phone-based assistance. A post-release contact can involve assistance to attend appointments and meetings, and to arrange access to services included in their post-release plan.

Although there are specialist services for women, limited specialist reintegration services are provided for Indigenous prisoners. The Aboriginal and Torres Strait Islander Legal Service (ATSILS) provides reintegration support for some Indigenous prisoners. This service is funded by the Australian Government.



Table 19.1 Reintegration services—at correctional facilities and post release, 2018–19

Service	Description	Prisoners assisted <sup>a</sup>	Funding (\$m)	Availability	Provider <sup>b</sup>
Community Re-entry Services Team	In-prison information and referral service, case management and crisis support services for prisoners assessed as having a high risk of reoffending	Pre-release: 6,805 Post-release: 2,621	6.7	Correctional facilities in Far North, Northern, Central, North Coast and South East Queensland	ACSO—SEQ Lives Lived Well— Central and Far Northern Open Minds— Northern (male and female) Bridges Health and Community Care (North Coast)
MARA	Reintegration program designed specifically to meet the needs of women prisoners	Pre-release: 1,372 Post-release: 357	1.4	Women's correctional facilities, and probation and parole offices in South East Queensland	MARA
ВТСС		Pre-release: 311 Post-release: 299	0.87	Borallon Training and Correctional Centre	Max Solutions
Prisoner Throughcare Program	Indigenous prisoners and youth detainees before and after prison at high risk of reoffending	na	na (funding provided by the Australian Government)	Selected correctional facilities	ATSILS, contracting to the Australian Government

a Number of individuals assisted to the end of March 2019. Data provided by QCS.

Sources: QCS, unpublished; ATSILS, unpublished.

There are also several smaller specialised programs, which target a particular reintegration service—such as employment or housing—or target group (Table 19.2). For example, Youth CONNECT is targeted to youth exiting statutory care or custody. The Aurukun program is an example of a reintegration service targeted at a specific place. The outcomes from these programs will provide useful information to guide the design of future reintegration programs.

b All providers contract to QCS.



Table 19.2 Reintegration services—post release

Service	Description	Prisoners assisted	Funding (\$m)	Availability	Provider
From Jail to Jobs (pilot)	Transitions female and male Aboriginal and Torres Strait Islander offenders, over 17 years old, from prison into ongoing employment in the resource sector and provide two years of post-release support	60	na	na	Department of Aboriginal and Torres Strait Islander Partnerships
Next Step Home (three-year pilot)	Access to housing and coordinated support services of women at risk of being homeless on release from custody	69	3.85	SEQ and Townsville	Department of Housing and Public Works
Youth CONNECT	Three years of wrap-around support and affordable housing to young people exiting statutory care or prison	Up to 300 over 7 years	5ª	SEQ and Townsville	Churches of Christ
Aurukun adult and youth reintegration program	Location-based post-release support and dedicated case management	na	0.65 <sup>b</sup>	Aurukun	Department of Aboriginal and Torres Strait Islander Partnerships

a This is a Social Benefit Bond which commenced on 1 December 2017. The \$5m relates to the bond size. b Funding for 2019–20.

Sources: DHPW correspondence to the Commission, Queensland Government, sub. 43; Queensland Government 2019a.



#### Parole

In 2006, the *Corrective Service Act 2016* (Qld) and the *Penalties and Sentences Act 1992* (Qld) were amended so that prisoners could only be released before the end of their sentence by being granted parole. Prior to this, prisoners could be released into the community without supervision (QCS 2013). In 2017–18, just over 73 per cent of offenders completed their supervision orders, roughly in line with the national average (SCRGSP 2019d).

Reintegration services can be therapeutic (although the services provided extended beyond therapy for physical and mental conditions) and compliance-oriented. In Queensland, the compliance role is undertaken by the Parole Service. The responsibility for therapeutic services is shared across several agencies (Table 19.1 and Table 19.2). In practice, the division between the compliance system and the therapeutic system is not so distinct. During consultation, the Commission heard stories about parole officers organising accommodation for parolees.

Under parole, prisoners are released into the community to serve the remainder of their sentence. Prisoners are supervised by a parole officer (employed by QCS) who monitors their behaviour (depending on the conditions of their parole) until the end of their sentence. Parole can be effective in reducing recidivism (Box 19.2).

A large proportion of offenders on parole are sent back to prison because the risk that they may offend is deemed to be high. This decision can be because of a new charge but can also occur because an offender loses secure housing, is unable to access support or has some other change of circumstance that the supervising officer deems makes it more likely that they will commit an offence.

If the Parole Service were responsible for providing support and compliance, then parole violations triggered by support needs might not result in a return to prison, but would result in the offender's need being addressed. A benefit of such an approach would be that the Parole Service would be able to allocate the funding between compliance and therapeutic services to achieve the greatest impact on recidivism.

However, some stakeholders indicated that the parole service was not an appropriate body to deliver therapeutic services because prisoners would always be reluctant to confide in a parole officer for fear of incurring a parole breach.

Few criminalised women will willingly engage with services which function in a way which reminds them of prison, or whose staff behave in a similar way to child protection, prison or parole officers. (Sisters Inside, sub. 39, p. 13)

On balance, the arguments for a separate therapeutic element of parole are persuasive. To be successful, a reintegration service provider must have the trust of the prisoner and the joint delivery of compliance and therapeutic services would place conflicting responsibilities on the Parole Service.

### Box 19.2 Effectiveness of parole

The evidence on the effectiveness of parole is mixed. There is strong evidence that it reduces recidivism during the parole period (Ringland & Weatherburn 2013), as well as after (Wan et al. 2014). More active supervision of offenders has been shown to reduce recidivism, but only if it is focused on addressing the criminogenic needs of the offender (Wan et al. 2014).

The best available quantification of the benefits of parole comes from an American study (Kuziemko 2013), where natural experiments were used to determine the effectiveness of supervision after release (such as parole). It found strong positive effects, and the author estimated that removing supervised release would increase the prison population by 10 per cent. The US supervised orders examined were much more discretionary than our court-ordered regime and, unlike Queensland's system, were said to provide strong incentives for prisoners to engage in rehabilitation during prison.



## Adequacy of services

It is difficult to assess how many prisoners receive pre- and post-support to reintegrate back into the community, and how adequate these services are. However, it appears that many prisoners receive little formal support through a reintegration service.

The current reporting metrics used by QCS do not adequately convey how many prisoners are accessing post-release services, or how adequate these services are for addressing criminogenic needs.

In 2017–18, QCS' re-entry services had 19,691 in-prison re-entry support contacts and 5,086 post release re-entry support contacts. Access to services after release is continuing to grow, with improvements expected to continue into the next financial year. (Queensland Government, sub. 43, p. 14)

During consultation, the Commission was advised by ACSO that around 5,000 prisoners used the CREST re-entry service; around 25 per cent of these prisoners access case-managed reintegration support. Given the potentially important role these services play in reducing recidivism, there should be public reporting on performance, including the number of prisoners receiving assistance, offender satisfaction with the services and reoffending rates by offenders who receive the service.

In Queensland, access to case-managed support is limited to prisoners assessed to have a high risk of reoffending and is provided three months before and after release. Several submissions suggested that eligibility should be broader.

The additional, common problem is that for some prisoners no re-entry or through-care assistance is available at all. That might be because a prisoner does not meet the criteria, or because he or she is going home to a regional location without such services. (Parole Board Queensland, sub. DR31, p. 20)

In our experience there is an alarming lack of effective pre-release planning and post-prison support services available for young people. Several post release services we have had contact with lack basic knowledge of available government and community services and have limited experience advocating for young people and navigating within and across systems. (Brisbane Youth Service, sub. DR22, p. 1)

Only highest risk prisoners are eligible to participate in pathways programs, including the substance abuse program. During our consultation we became aware of many women who were prevented from – but wanted to participate in and would have benefited from – this program. (Anti Discrimination Commission Queensland, sub. DR13, p. 7)

A restriction of eligibility for reintegration services is reasonable given that resources are limited. Many prisoners are unlikely to reoffend, and many also have strong family support they can draw on. These prisoners do not need intensive reintegration support to prevent reoffending. According to the AIHW (2019c), 96 per cent of Queensland prisoners feel prepared or very prepared for release from prison.

An important question is whether widening eligibility would provide benefits greater than the costs. This is far from a straightforward question to answer.

Reintegration programs can be a risky investment, since their efficacy is often unknown and effectiveness is likely to vary widely from prisoner to prisoner. The lack of evaluation of the reintegration programs offered in Queensland also does not help. This is evident in Parole Board Queensland's submission:

The Board would be assisted in its decision-making by evidence regarding the real value of programs in reducing recidivism, and information to support that recommendations for programs have taken into account the individual offenders' rehabilitation needs and what alternatives might be available in the community. (sub. DR31, p. 15)



In the absence of performance data, a comparison with other jurisdictions has been undertaken.

Around 8,500 prisoners receive a pre-release reintegration service and around 3,300 are supported with post-release services (Table 19.1). This equates to around 25 per cent of the number of prisoners released each year. Box 19.3 shows that the proportion of prisoners receiving post release reintegration services in New Zealand and Victoria is similar to Queensland.

## Box 19.3 Reintegration services in other jurisdictions

#### **New Zealand**

Around 16,000 people are released from New Zealand prisons each year. In 2017–18, nearly 7,440 referrals were made to reintegration service providers. From these referrals, there were over 4,290 program starts.

#### **Victoria**

In 2016–17, just over 10,000 prisoners were released from Victorian prisons. The 2017–18 State Budget expanded post-release support services for those prisoners being discharged from prison who require assistance, with a focus on remand and short-sentence prisoners. Program delivery is on track to increase places from 990 per year to 3,000 per year in 2021.

Sources: NZ Department of Corrections 2018, pp. 95-97; Victorian Department of Justice and Regulation 2018.

While there is a prima facie argument for increasing the availability of reintegration services, in the absence of information on the effectiveness of these services, it is not possible to arrive at a conclusion on the adequacy of services.

To provide information on effectiveness, QCS should commission an independent evaluation of its contracted reintegration services. This evaluation should assess:

- the outcomes of the services in terms of recidivism
- the value of the services from the prisoners' perspective
- the benchmarking of the services against similar programs interstate
- the reporting framework
- the appropriate length of time to provide reintegration services.

The evaluation should be completed and publicly available by June 2021.

The effective and efficient operation of the Probation and Parole Service is also an important part of successful reintegration of prisoners to the community. Expenditure on community supervision in Queensland is the lowest in Australia. Queensland also has the highest ratio of offenders to community corrections operational staff in Australia—the Queensland ratio is 29.1, compared to 18.7 for Australia (SCRGSP 2019d).

As discussed in Chapter 15, there is a need to ensure that funding arrangements are adequate to support the supervision of offenders in the community.



## Accountability

Except for the small number of prisoners who receive post-release services, there is no direct accountability for successful prisoner reintegration (see Chapter 17). Stakeholders identified that this lack of accountability results in prisoners being released into the community who are ill-prepared for the adjustment from a highly structured prison life to independent living.

The Commission received several stories of prisoners released into the community with inadequate regard for prisoner well-being.

Mr Smith was released from custody having been granted parole by the Board. He was approved to live in a boarding house. For operational reasons, Mr Smith was not released from custody until the afternoon. By the time he had caught public transport to the boarding house, having stopped at Centrelink along the way to arrange an emergency payment (because that cannot be arranged prior to release), the boarding house reception had closed. Mr Smith slept outside the boarding house that night. (Parole Board Queensland, sub. DR31, p. 18)

Submissions noted several areas of potential improvement in planning and coordination and seemingly simple changes than can be made to facilitate reintegration.

If prisoners could be assisted to ensure they have a current Driver's licence, Medicare card, ID (Birth Certificate) and as many Certificates for courses completed whilst in prison, this would go a long way toward reducing recidivism. (Pack, sub. 24, pp. 1–2)

A lack of basic planning for release is exacerbated by uncertainty about release dates. Release of prisoners on parole can occur either through court-ordered parole or through a successful application by a prisoner to the Parole Board Queensland. Under court-ordered parole, the date for parole is set by the court at sentencing. Court-ordered parole is only available to those sentenced to three years or less imprisonment, and who are not sex offenders or serious violent offenders. Court-ordered parole may also include immediate release on parole—around 40 per cent of those who receive court-ordered parole are paroled directly from court (QCS 2013, p. 1).

During consultation, prison managers stated that this was an impediment to prisoner reintegration. As a consequence, prisoners were released with limited reintegration planning. As noted by the Queensland Government:

[A]t any given time, the release date for only a small proportion of the total prison population is known to QCS. For example, on 31 August 2018, 13.1% of the prisoner population had an actual known release date ... (sub. 43, p. 13)

While there is likely a range of administrative arrangements that could be put in place to address the concerns about release dates, no action has been taken, despite this being a known issue for many years.

Mr Brown was released on parole having served more than 25 years in prison. He had arranged post-release support through CREST. Once released, Mr Brown discovered that his allocated case worker was on leave. He relied on other parolees to assist him with basic needs, including procuring a mobile phone and Go-Card to meet his parole commitments. He was overwhelmed by being in the community after such a long time with very little formal support. Despite the significant distress this caused Mr Brown, he has been successful on parole. That is not always the case. (Parole Board Queensland, sub. DR31, p. 18)

The reason basic support at the time of release has not been addressed is that no agency carries the responsibility to make sure the immediate needs of prisoners are met on release.



To address this, the Commission recommends that QCS should be assigned responsibility for the provision of a minimum standard of post-release support. This minimum standard should include providing:

- short-term housing for prisoners who do not have accommodation on release
- adequate documentation for proof of identity to open bank accounts and apply for other services and a Medicare card to access health services
- assistance to establish an email account and procure a mobile phone
- copies of educational qualifications attained in prison (or obtained before prison)
- information about support services available to assist with their reintegration including information about employment agencies and social welfare support
- financial support for the first week of release
- appropriate transport to take them to their accommodation.

The Queensland Government should require QCS to regularly report against this standard.

#### Focus on risk

A substantial proportion of parolees are sent back to prison because of the risk that they could offend is deemed to be high. The decision to revoke parole can result from a new charge or a change of circumstance that the supervising officer considers makes it more likely they will commit an offence. Examples of changed circumstances are when an offender loses secure housing or is unable to access support services. These examples emphasise the value of providing reintegration services to avoid the financial and social costs of imprisonment.

The Commission also heard stories from case workers demonstrating the inflexibility of the compliance system that resulted in parole breaches based on procedural rather than public safety considerations.

Although recent legislative changes have removed discretion from parole officers to suspend or cancel parole, and placed this power with the Parole Board, structural issues such as inadequate and unstable housing and lack of access to substance use and mental health counselling see women continue to be criminalised and returned to prison on parole. (Sister Inside, sub. 39, p. 11)

To clarify matters, the government should provide clearer direction to QCS on how it expects the service to manage technical breaches of parole. This guidance should be provided through a statement of intent.



## 19.3 Other services

Three reintegration services are critical to successful reintegration:

- accommodation
- mental health
- · employment.

Change is required to policy and the assignment of responsibility for service outcomes, to improve reintegration outcomes.

#### **Accommodation**

Several studies have tracked prisoners after discharge from prison (for example, Cutcher et al. 2014; Kinner 2006; Morrison & Bowman 2017). Prisoners participating in these studies identified securing stable accommodation as their single biggest issue after release. Several submissions commented on the importance of accommodation.

ACSO adopts a Housing First approach and focuses on this as a primary goal for all people leaving custody in acknowledgement that stable housing is part of the solution in successful community reintegration (ACSO, sub. DR35, pp. 5–6).

In our Women in Prison Report we also suggested that the lack of housing is a major contributing factor to women offending and reoffending (Anti Discrimination Commission Queensland, sub. DR13, p. 8).

There is a shortage of suitable accommodation for prisoners leaving custody (whether on parole or at the end of their sentence). This contributes to recidivism. (Parole Board Queensland, sub. DR31, p. 2)

Little empirical evidence is available that assesses how homelessness impacts on recidivism in Australia, but the issue was repeatedly raised with the Commission in consultation.

Moving often, lack of family and professional support, lack of employment and worsening drug use were all associated with poor housing and return to prison. (Ellem, sub. 7, p. 11)

The Queensland Government supports prisoner accommodation through its reintegration services, public housing services and a limited number of specific accommodation programs for prisoners. The Queensland Government stated in its submission that:

DHPW gives a high priority to providing appropriate housing assistance to offenders leaving correctional facilities who would otherwise be facing homelessness, such as social housing or private housing assistance products, including RentConnect, bond loan or rental grant, either at the time of their exit from the correctional centre or prior to their release as part of their transition process. (sub. 43, p. 37)



Prisoners are supported to apply for public housing before release. ACSO provided the following examples in its submission.

It was recently observed that people in custody were becoming frustrated by the rate of their Department of Housing applications being rejected due to not being completed properly. This has established a collaboration between CREST and Inala Housing (Department of Housing and Public Works) to co-facilitate 1-hour group workshops to provide additional support with understanding the application process, assistance with completing required forms and being provided tenancy information in Wolston Correctional Centre and Brisbane Correctional Centre. The sessions commenced in October 2018 and to date there has been approximately 80 incarcerated people attend these sessions. (ACSO sub. DR35, p. 7)

The example also demonstrates the additional challenge a prisoner might face accessing public housing. The Department of Housing and Public Works (DHPW) has a much broader client group than prisoners and prioritising the needs of prisoners likely means less housing for other vulnerable groups in the community. Data provided by DHPW shows that access to housing through general housing services is extremely small (Table 19.3).

Table 19.3 Prisoners applying for social housing, 2013–14 to 2017–18

	2013–14	2014–15	2015–16	2016–17	2017–18
Housed in social housing	20	23	29	19	29
Number of new applicants for long-term social housing	656	952	1,036	1,088	1,179

Source: Information provided by DHPW to the Commission.

In this context, the delivery of accommodation services for released prisoners will need to be met through the private rental market. However, programs may be needed to help overcome the disadvantage and stigma carried by released prisoners. A program based on personal housing plans is worthy of further consideration in this regard (see Box 19.4).

## Box 19.4 Personal Housing Planning (PHP)

A PHP is an individualised personal plan, providing a clear and accountable basis for a set of actions based on a mutual responsibility agreement between government and the individual. The plan connects the client to required government supports through a single point of contact (PHP Facilitator). PHPs have been applied to public housing tenants to enable them to transition from public housing to other affordable housing.

This model has several desirable features for potential application to prisoner reintegration:

- an active and enduring housing plan for prisoners released from prison
- support for prisoners to maintain their tenancy
- a pathway to a stable accommodation solution.

Source: Information provided by the National Affordable Housing Consortium to the Commission.



DPHW also noted two specific programs. The Queensland Government's Next Step Home—Women on Parole pilot program assists women who would otherwise be homeless or at risk of homelessness on release from custody with reintegration services. As of February 2019, 67 women had been supported by the program (Anti-Discrimination Commission Queensland sub. DR13, p. 8).

The Queensland Government also operates a Youth CONNECT Homelessness Social Benefit Bond (sub. 43, p. 40). This program provides housing and other support for youths exiting statutory care or custody. The program began in December 2017 and 53 young people have been referred, with approximately 60 per cent being Aboriginal or Torres Strait Islander.

Several submissions also noted that upon release many prisoners are housed in boarding houses. Although several submissions questioned the appropriateness of this type of accommodation, it appears to be the major housing option for prisoners leaving prison.

Of the 5,200 annual clients passing through the program, one in every four are requesting support for finding a place to live. Boarding houses in South East Queensland are prominently privately owned and considered 'for-profit'. Our understanding is that they do not engage in risk assessing or formal intake processes when allowing an individual to move in, and do not offer supports to be able to assist the person to manage tenancy and generally result in fast paced evictions if an issue arises. Frequently, short term accommodation is sourced within boarding houses because it is accessible and affordable. However, high density housing is problematic ... (ACSO, sub. DR35, p. 6)

Other submissions noted both the importance and undersupply of accommodation.

There is a shortage of accommodation options for people leaving prison without family support. Having identified the high instance of prisoners being refused parole, solely on the basis of lack of suitable accommodation, the Board decided to change its practice. (Parole Board Queensland, sub. DR31, p. 18)

Further there is insufficient housing available to support bail applications, parole outcomes and successful reintegration into the community. This is particularly an issue in rural and remote regions meaning that available accommodation is unlikely to be near social and other welfare supports. (APC College of Forensic Psychologists, sub. 27, p. 3)

Increasing safe affordable community housing options for these juvenile and adult cohorts (with gender and Indigenous appropriate options) would considerably reduce the use of remand and relieve the crisis in the Qld juvenile and criminal justice systems. (Carrington and Hogg, sub. 3, p. 4)

The critical issues for duty lawyers impacting on the capacity for clients to apply for bail are often related to matters such as accommodation or the availability of counselling for drug issues. Addressing these issues is as likely to produce positive outcomes as any further legislative reforms. (Legal Aid Queensland, sub. DR36, p. 2)

With over 1,000 prisoners returning to the community each month, the demand for government-funded housing exceeds supply.

Since 2001, Corrections Victoria have been responsible for arranging access to housing. An evaluation of the Corrections Victoria Housing Program (CVHP) in 2013 found that:



[T]he CVHP has been successful in reducing housing disadvantage for those clients successfully placed in housing, although it noted that this was in the context of a much larger group of offenders who had left prison without receiving CVHP services and who may have experienced homelessness and housing stress (Ross et al. 2013). An analysis of recidivism outcomes based on comparisons between CVHP participants and others who were referred to CVHP but did not receive tenancies through the program indicated that CVHP contributed to reduced recidivism for medium- and high-risk offenders, but not for low-risk offenders. (Willis 2018, p. 2)

In conclusion, the public housing system does not have the capacity to accommodate the number of prisoners released back into the community each month. Given the importance of housing to the reintegration of prisoners, there is a strong case for strengthening QCS accountability for ensuring that prisoners with medium or higher risk of reoffending have access to appropriate housing on release.

Evaluations of the programs in Victoria suggest that a similar program in Queensland would reduce recidivism (Willis 2018). Any new program should be developed in consultation with stakeholders and potential providers.

#### Mental health

Submissions noted that a high proportion of prisoners have substance addictions and mental illnesses. The prevalence of untreated mental illness and substance addiction among the prison population are factors that work against successful desistance from crime at the completion of their sentence.

Our recent research (Stewart, 2019) indicates that the majority of prisoners (52%) under the age of 25 were maltreated, had a mental health disorder or both (19% substantiated child maltreatment; 17% hospital admission with a mental health diagnosis; 16% maltreated and mentally ill). (Stewart and Allard, sub. DR32, p. 1)

Sydes et al. (2018) show that most aftercare drug and alcohol programs were able to demonstrate a reduction in relapse or reoffending. Their conclusion was that the available studies provide promising results for the use of aftercare programs for substance-using offenders. However, these evaluations suggest that reductions in offending behaviours are not large.

Reports by the New Zealand Department of Corrections (2018) show similar results. The department publishes the results of evaluations of its in-prison and in-community programs. It has two in-community programs dealing with alcohol and drugs. In 2017, both reported reductions in reoffending (and reconviction) by participants in the program, although only one study was statistically significant, and the reduction was less than 3 per cent.

A clear theme in submissions was that there was insufficient support for prisoners who are released into the community.

There is a need for a more integrated response between Probation and Parole and the alcohol and other drug treatment sector to ensure a person can be linked with appropriate, specialist treatment if and when they need it. Obviously, this strategy would require further investment in the specialist treatment sector to ensure capacity to meet need. (QNADA, sub. 30, p. 7)

[T]hey are in short supply particularly for mental health and substance abuse. Also, most of these services are not delivered as part of a holistic family and community approach thus negating the effectiveness of what could otherwise be a valuable service. (Hamburger, sub. 14, p. 38)

The Queensland Government announced a modest increase in funding in the 2018–19 State Budget for in-prison services (sub. 43, p. 4).

Several submissions commented favourably on the transition program provided by Queensland Health, which targets prisoners with severe and persistent mental illness (QAMH, sub. 21; APS College of Forensic Psychologists, sub. 27; RANZCP, sub. 31). However, as noted by the Queensland Parole System Review, only 15 per cent of prisoners under the care of the Prisoner Mental Health Service access this program (QAMH, sub. 21, p. 4).



Although the current services offered by the Queensland Government are well accepted by stakeholders, the level of funding seems out of proportion to the scale of the problem. Queensland Health has broader health responsibilities and it is plausible that prisoner mental health is not high among the department's priorities. The problem is again the assignment of a specific responsibility for prisoner mental health treatment while serving sentences in the community. Although prisoner mental health transition services are well-regarded, these services are unlikely to be able to successfully compete for additional funding against competing programs within the Department of Health. A key point is that the Department of Health has no direct responsibility for reducing prisoner recidivism.

However, QCS will be accountable for prisoner recidivism under the accountability framework proposed in Chapter 17. To align the provision of post-release mental health service with prisoner recidivism outcomes, the responsibility for the provision of these services to prisoners should be assigned to QCS. To enable the transfer of responsibility, QCS should be provided with funding to procure services from public or private sector providers. It appears the collaborative relationships between Queensland Health and QCS are already in place and the transition to QCS as a direct purchaser should be uncomplicated.

## **Employment**

The available evidence on employment programs, largely drawn from United States studies, is mixed. Former prisoners who find employment are less likely to reoffend. However, it matters what type of job they have.

In the United States literature, placing prisoners in subsidised employment on release has no impact on the likelihood of reoffending. In contrast, former prisoners who find employment in industries which demand labour with their skills are less likely to reoffend (Sydes et al. 2018, p. 75). The implication here is that in-prison training should equip prisoners with the skills that are in demand in the labour markets in which they will be released. TAFE Queensland (sub. 8, p. 1) observed that 'VET courses have maximum impact and contribute to rehabilitation when prisoners are pre-screened for suitability to the industry and likely job opportunities post-release'.

Although there are a range of initiatives to assist prisoners to develop skills, evidence of the efficiency or effectiveness of current approaches to reintegrate prisoners into work is insufficient.

At the Borallon Training and Correction Facility, private sector businesses have operated from within the facility.

In January 2017, workRestart brought the first of several business into Borallon Training & Correctional Centre. Since then, close to 400 prisoners have been employed in these enterprises. (workRestart, sub. DR18, p. 4)

The number of prisoners able to participate in this program is a small proportion of the prison population. Further, operating a business within a prison environment encounters many impediments (workRestart, sub. DR18, pp. 4–5). The programs at Borallon might be suitable for prisoners who are not suitable for work release, but they are unlikely to meet the objective of transitioning prisoners to paid employment after their release. 144

Work release programs are used extensively in the United States. For example, work release was established as a prison-to-community transition program in Florida over 40 years ago. Evaluations of these work release programs indicate that they can reduce recidivism and help former prisoners to find and maintain employment (Bales et al. 2016). Given that a proportion of prisoner income is charged as fees to offset the cost of their incarceration, these programs can also reduce the costs of incarceration to the community.

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<sup>&</sup>lt;sup>144</sup> The Commission understands few prisoners have been employed after release.



Several submissions advocated for work release programs in Queensland.

Most of the recidivist prisoners are being released with little or no money, this effectively forces their hand into reoffending behaviour. Having a work release program would alleviate this issue ... (Hurst, sub. DR3, p. 2)

Allow Work Release for inmates that have served at least 50% of their non parole period. This is only on the basis that the inmate has no breaches, positive UT results or serious case notes. This allows the inmates to have a gradual, supervised reintegration. It allows inmates to be self sufficient and non reliant on crime or tax payer dollars to support their lives. (Smith, sub. DR6, p. 1)

We support removing unnecessary restrictions on work release orders, where that is likely to lead to improved rehabilitation and reintegration. (Mt Isa Family Support Service & Neighbourhood Centre Inc, sub. DR9, p. 2)

Because there is no work-release program inmates get out with half a Centrelink payment. This couple of hundred dollars buys them some clothes, a feed and then they're broke. If inmates are going to get out and not commit crime we need to get out with money. Because there are no qualifications you can get in prison work release would give inmates the chance of not just earning money, but learning some skills we could use when we get out. (Anonymous, sub. DR41, p. 1)

The Commission notes that there may be several impediments to this objective:

- The Corrective Services Act 2006 (Qld) (CS Act) provides the chief executive the power to grant a prisoner leave from a correctional facility for a number of reasons. There is no specific provision in the Corrective Services Act to grant a prisoner leave from a correctional centre for 'work'. Depending on a prisoner's specific circumstances, the chief executive or their delegate could grant a prisoner leave for work-related purposes as either leave 'for another purpose' or 'community service'.
- Being able to work while detained in prison provides an opportunity for prisoners to apply the knowledge gained in training and to prepare for the adjustment to a normal routine when released from prison.
- Currently only a very small proportion of prisoners engage in work that might develop industry-relevant experience or skills.

To improve the likelihood that prisoners will find work after release—and to provide a less abrupt reintegration—the Commission considers that the *Corrective Services Act* should be amended to include work release as a reason for granting a prisoner leave from prison. QCS, in collaboration with the Department of Employment, Small Business and Training, should develop a work release policy with the goal of providing prisoners with the opportunity to participate in paid work on a day release program.



#### Recommendation 23

To improve reintegration of prisoners, Queensland Corrective Services should:

- remove regulatory impediments to reintegration, including those that impede the use of work release and day release options
- introduce measures to ensure that parole worker caseloads support effective community supervision
- investigate options for a prisoner housing program similar to the Corrections Victoria Housing Program, and report on housing outcomes for released prisoners
- establish a panel of providers who can deliver reintegration services.

To support these changes the Queensland Government should amend the *Corrective Services Act 2006* to include work release as a reason for granting a prisoner leave from prison.

#### Recommendation 24

To ensure prisoners have access to mental health and substance addiction treatment services after their release, Queensland Corrective Services should be assigned the responsibility for arranging and funding treatment to ensure continuity of in-prison and post-prison treatment. The responsibility should exist until a prisoner's sentence is completed.

#### Recommendation 25

To lower the risk of an offender reoffending immediately following release, Queensland Corrective Services should be assigned the responsibility for the provision of a minimum standard of post-release support. This should include:

- short-term housing for prisoners who do not have accommodation on release
- adequate documentation for proof of identity to open bank accounts and apply for other services and a Medicare card to access health services
- assistance to establish an email account and to procure a mobile phone
- copies of educational qualifications attained in prison (or obtained before prison)
- information on support services available to assist with reintegration including employment agencies and social welfare support
- financial supports for the first week of release
- appropriate transport to accommodation.

The government should require Queensland Corrective Services to regularly report against this standard.



## Recommendation 26

To ensure value for money, Queensland Corrective Services should commission an independent evaluation of its contracted reintegration services. This evaluation should assess:

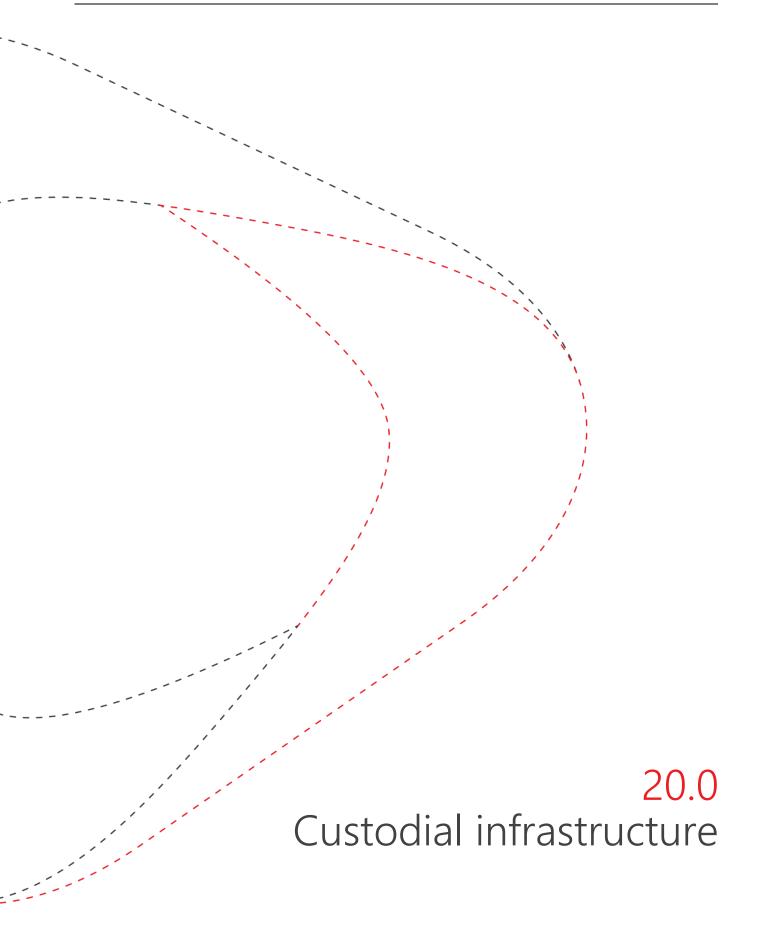
- the outcomes of the services in terms of recidivism
- the value of the services from the prisoners' perspective
- benchmarking the services against similar programs interstate
- the reporting framework
- the appropriate length of time to provide reintegration services.

Queensland Corrective Services should complete this evaluation and make it publicly available by June 2021.

## Recommendation 27

The Queensland Government should provide clearer direction to Queensland Corrective Services on how it expects the service to manage technical breaches of parole. This guidance should be provided through the statement of intent.







This chapter discusses a long-term strategy for the utilisation, maintenance and expansion of corrections infrastructure.

## Key points

- The capacity, composition and design of correctional facilities shape the outcomes of the corrections system.
- High security facilities make-up almost 90 per cent of Queensland's prison capacity, much higher than in other jurisdictions.
- Several challenges need to be addressed in the planning and design of future corrections infrastructure, including reducing overcrowding, improving in-prison rehabilitation and meeting the needs of prisoners with specific requirements for rehabilitation and supervision.
- These challenges present a more complex environment for infrastructure planning than in the past, when incapacitation was accepted as the absolute priority, largely limiting options to high security facilities.
- This more complex environment suggests a need to reform the approach to infrastructure planning to:
  - reflect more diverse government objectives for the corrections system and criminal justice system and how infrastructure contributes to these objectives
  - assess the full range of options to meet those objectives through a robust and transparent process
  - set out deliverables, timetables and accountabilities
  - provide a framework for regular review.
- In this context, QCS should develop a long-term public strategy for the utilisation, maintenance and expansion of corrections infrastructure. It should:
  - ensure that its infrastructure objectives are aligned with government objectives for the criminal justice system
  - embed best practice infrastructure planning that is integrated with QCS's overall planning framework
  - base its approach to planning and decision-making on guiding principles
  - build its competencies in forecasting and project evaluation
  - be open to involving non-government entities in infrastructure provision
  - regularly update its long-term correctional infrastructure strategy.



# 20.1 Introduction

The capacity, composition and design of correctional facilities help shape the outcomes of the corrections system.

The design of correctional facilities is an expression of their purpose. Prison design is 'the process which determines, in large part, how the goals of a prison system are materially expressed' (Moran et al. 2015, p. 1). This purpose has changed significantly over time. In the eighteenth century, the prison itself was the means of punishment. However, rehabilitation-orientated design concepts were introduced following prison reform movements at the end of the 19th century (Lopez 2014, p. 1).

Given the long lives of corrections assets, the 'corrections estate' changes slowly, and needs to evolve through a long-term infrastructure strategy for ensuring that it is fit to meet the requirements of the criminal justice system, including any changes in the composition of the offender population.

This infrastructure strategy should be both consistent with the government's broader strategy for the criminal justice system and evident to decision-makers and stakeholders. Currently, there is little evidence that there is a strategy in place to meet future requirements, or that decision-making relating to infrastructure has been subject to sufficient scrutiny by stakeholders.

The broad thrust of this report is to shift policy towards constraining the growth in the number of prisoners, partly through better rehabilitation and reintegration. This would require changing prison design and introducing more diversity in the types of facilities in which offenders are supervised. More successful rehabilitation and reintegration will result in less capacity expansion being required over time.

Whether or not the government accepts this change in direction, QCS should set out its long-term infrastructure strategy, including options for involving the community sector in managing these assets, particularly options with a rehabilitation focus.

# 20.2 How infrastructure affects outcomes

Infrastructure housing offenders (including prisoners) needs to support 'community safety and crime protection through the *humane containment, supervision and rehabilitation* of offenders' (emphasis added) (*Corrective Services Act 2006* (Qld), s. 3).

Containment covers a broad spectrum of situations, from home detention to high security prisons, each with advantages and disadvantages in relation to security, rehabilitation and cost. High security is essential for prisoners who pose an unacceptable risk to the community, but may be less important for offenders who pose less risk, and whose prospects for rehabilitation may be improved by being housed in other types of facilities.

Security has many dimensions. Some—such as high-technology barriers—directly require infrastructure investment. Others—such as prison procedures and the way corrections officers interact with staff—do not always require specific investment, but are still affected by the prison design.

Containment, supervision and rehabilitation must be *humane*, and this is significantly affected by prison design.<sup>145</sup> The United Nations Technical Guidance for Prison Planning begins with the statement that:

In all cases and to every possible extent, prisons should be planned and designed to comply with the legal norms and principles intended to preserve the basic human rights and dignity of all persons. (United Nations Office for Project Services 2016, p. 11)

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<sup>&</sup>lt;sup>145</sup> Humane containment is a requirement of the Corrective Services Act (Queensland Parliament 2017, p. 25).



Infrastructure affects the prospects for rehabilitation of offenders in at least six ways.

- The composition of custodial corrections facilities into maximum security, high security, low security, work camps and community custodial centres affects opportunities for reintegration (Chapter 18; Hamburger sub. 14 and sub. DR17; Rallings sub. DR1).
- Rehabilitation needs to take place in supportive physical and social environments. In one view, prisoners released from high security institutions are often ill-equipped for a life in the community, because the 'total character and lack of normalisation practice in such institutions, quickly negate the positive effects of good programs and education initiatives' (Eriksson sub. 5, p. 3).
- Facility design needs to reflect the profile of the offenders to be supervised and provide adequate facilities for rehabilitation services (United Nations Office for Project Services 2016, p. 28).
- Overcrowded prisons that are operated above their design capacity work against rehabilitation (Chapter 18).
- The location of correctional facilities affects opportunities for supervised offenders to maintain linkages with family and friends, or to participate in reintegration activities through work release leave. Remote locations also reduce access to relevant non-government organisations and increase the cost of external monitoring.
- Suitable facility designs are likely to vary between groups of offenders, and where there is a poor match, it can work against rehabilitation outcomes. Indigenous, female and young offenders may have requirements that affect their opportunities for rehabilitation.

Design also has a significant impact on the cost of building, maintaining and operating custodial facilities and other infrastructure used to supervise offenders. In addition to capital and maintenance costs, other impacts include the cost of transporting offenders to and from court, which is affected by the location of infrastructure.

Having a diverse infrastructure portfolio enables different custodial options to be matched with the rehabilitation and supervision requirements of different categories of prisoners. Such a setup can provide absolute security in the case of those who pose an unacceptable risk to the community and greater opportunities for rehabilitation of those who do not pose such risks. The costs of building, maintaining and operating infrastructure differ between different types and combinations of infrastructure and this needs to be factored into planning decisions.

The benefits of a diverse portfolio of custodial facilities need to be weighed against the operational restrictions that a diverse portfolio can impose. Given that prisoners must be accommodated in facilities at least matching their security risk level, a diverse portfolio may not be operationally as flexible as a similar sized portfolio with a higher proportion of high security accommodation, which may enable prisoners to be more readily moved between facilities.

# 20.3 Queensland's correctional facilities

# Capacity and location

Queensland's correctional estate consists of high security prisons, low security facilities, work camps and secure psychiatric facilities (Table 20.1). On average 92 per cent of all prisoners were housed in high security correctional centres in 2017–18 (SCRGSP 2019d).<sup>146</sup>

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<sup>&</sup>lt;sup>146</sup> The proportion of total capacity that is high security is slightly lower than this because high security facilities are overcrowded relative to lower security facilities.



**Table 20.1 Correctional facilities in Queensland** 

Correctional centre	Date opened	Capacity	No. in custody <sup>a</sup>	Male	Female	Youth	Remand
High security facilities		6,382	8,327				
Arthur Gorrie CC	1992	890	1,176	•			•
Borallon CC <sup>b</sup>	1990 2016	492	689	•			
Brisbane CC	2008	560	812	•		•	•
Brisbane Women's	1999	267	263		•	•	•
Capricornia CC	2001	410	578	•			•
Lotus Glen CC	1989	696	829	•		•	•
Maryborough CC	2002	500	638	•			•
Southern Queensland CC	2012	302	213	•			
Townsville CC (Male)	1893	503	702	•		•	•
Townsville CC (Female)	2008	154	220		•	•	•
Wolston CC	1999	600	791	•			
Woodford CC	1973	1,008	1,416	•			
Low security facilities		815	658				
Capricornia CC	2001	96	55	•		•	
Helena Jones CC	1989	29	25		•	•	
Lotus Glen CC	1989	124	127	•		•	
Numinbah Women's CC	1940	119	98		•	•	
Palen Creek CC	1934	170	169	•		•	
Townsville CC (Male)		78	68		•	•	
Townsville CC (Female)		42	31	•		•	
Male work camps		136	75				
Female work camps		21	10				
Queensland total	1: 1000	7,197	8,995				

a As at 1 October 2018; b first opened in 1990, closed in 2002, reopened in 2016.

Source: QCS 2006a; QCS 2018c; QCS sub. 43, pp. 67-68.

Work camps are low security supervised prison facilities where resident inmates can be called on at short notice to provide community services to surrounding communities. This could include cleaning up after flooding, providing assistance for annual events and maintaining fences and other infrastructure facilities in parks, playgrounds or public cemeteries. Strict eligibility rules govern work camps residency. The 13 work camps spread around the state accommodated 86 low risk prisoners in 2017–18.

There are two youth detention centres—the 96-bed Cleveland Youth Detention Centre (CDYC) in Townsville and the 261-bed Brisbane Youth Detention Centre (BYDC) in Wacol, south of Brisbane. These facilities provide custody services to young people aged 10 to 18 given prison sentences by the courts, or refused bail.



The government has announced that capacity will be increased by 12 beds in CDYC and 16 beds in BYDC by the end of 2019 (Farmer 2019a; Farmer 2019b).

## Infrastructure choices are generally confined to one type of facility

Most Queensland prisons are secure correctional centres, with designs incorporating internal physical barriers and perimeter fences to prevent escapes. The internal design of most secure facilities incorporates cell and residential style accommodation. Low security centres do not have the same level of perimeter security (QCS 2018c, p. 4).

QCS has at various times set out its approach to design in guidelines and principles. In 2006, it proposed that planning for future prison infrastructure should be premised on the following principles, which prioritise high security at least cost:

- the benefits of economies of scale
- community and victim expectations about the secure containment of prisoners
- achieving optimal utilisation of existing correctional sites
- efficient and effective models for service delivery (QCS 2006a, p. 6).

QCS's priorities may have changed since 2006, as it has advised the Commission that its architectural design guidelines include the following vision statement, which gives more weight to rehabilitation:

The design of any correctional centre should facilitate opportunities for prisoners to address their offending behaviour. Key design issues should recognise the following prisoner needs:

- Rehabilitation should have high priority
- Opportunities to gain new lifestyle and vocational skills through education, programs and industry
- Medical / health needs are higher than those of persons in the general community. 147

QCS also advised that its current correctional facility design supports the delivery of rehabilitation services to offenders in several ways<sup>148</sup>, and that its guidelines contain specific requirements for women within correctional centres.<sup>149</sup>

The dominant features of the Queensland prison system place the highest priority on prisoner security, possibly to the detriment of the rehabilitation element of its purpose. Secure facilities dominate, making up 89.2 per cent of the design capacity of custodial facilities, compared with the national average of 83.0 per cent (SCRGSP 2019d). The relatively high proportion of high security facilities means that there has been less scope in Queensland than in some other jurisdictions to implement different approaches to design that could be built into different types of facilities. And with only one facility having opened in the last 10 years, the application of the design guidelines in recent times has been limited to retrofitting existing facilities.

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<sup>&</sup>lt;sup>147</sup> QCS personal communication by email to the Commission, 18 April 2019.

<sup>&</sup>lt;sup>148</sup> These include cultural meeting places including prayer rooms and Aboriginal and Torres Strait Islander meeting places; education facilities for the delivery of vocational education and training as well as offender intervention programs; industry workshops to provide prisoner employment and skill development; medical facilities for the treatment of prisoners with physical and mental health issues; safety units to provide targeted treatment for at risk prisoners, and prisoner recreational facilities (QCS personal communication by email to the Commission, 18 April 2019).

<sup>&</sup>lt;sup>149</sup> These include the need to accommodate children up to school age; accommodation provided with discreet areas for children; contact visits to include separate play area for children; recognising that generally a higher level of program facilities will be required rather than industry spaces; recognising that a higher percentage of women are less destructive than men in prison; recognising that women's medical and health needs are higher than men's needs (QCS personal communication by email to the Commission, 18 April 2019).



The Commission has found only one independent review of prison design in Australia, which was an Australia-wide historical review. It therefore does not discuss Queensland prison design in detail, although it does conclude that Queensland has adopted a 'one size fits all' approach (Grant & Jewkes 2015, p. 16).<sup>150</sup>

A similar view was expressed in a submission:

Our current prison system largely adopts a 'one size fits all' approach with far too many short-term prisoners being churned through high security facilities at great financial cost with little or no rehabilitation outcomes. That is, the 'one size fits all' is tailored to the highest common denominator of high security prisoners, which is essential for their incapacitation but counterproductive to outcomes of deterrence, retribution, rehabilitation for less serious offenders. (Hamburger sub. 14, p. 16)

Another stakeholder argued that Queensland has too few low security facilities and its reliance on high security prisons is detrimental to the effective reintegration of prisoners (Eriksson sub. 5, p. 3).

# Correctional facilities have not kept up with demand, compromising rehabilitation outcomes

The growth in adult prison capacity has not kept up with the expansion in prison population, with the result that prisons currently accommodate about 25 per cent more prisoners than they were built to contain (Queensland Government sub. 43, p. 67). In the absence of policy changes that reduce the need for imprisonment, large investments in infrastructure will be needed for QCS to meet its facility utilisation rate target of 90 to 95 per cent (Queensland Treasury 2019b, p. 5).

In the meantime, QCS will be forced to increasingly resort to doubling up of prisoners in cells. Overcrowding puts a strain on prison infrastructure, leads to increasing violence in prisons and works against rehabilitation (Chapter 18). Recently announced projects will help, but overcrowding will remain a problem, particularly if the number of offenders continues to grow, and there remains a reliance on double-bunking to meet demand.

# 20.4 Meeting future challenges

## The challenges are considerable

Meeting the corrections system's future infrastructure needs poses significant challenges.

Reducing overcrowding in the context of a growing prison population is particularly pressing. Improving in-prison rehabilitation and reintegration at the same time as addressing overcrowding would require a new infrastructure strategy, particularly if there is movement towards small, low security, community residential facilities focused on rehabilitation (proposed in Chapter 15). This would involve designing specialised residential facilities for those for whom periods in prison are often ineffective or detrimental in reducing recidivism. A move in this direction would be a considerable change for QCS, who would be shifting away from infrastructure planning and construction based around large high security prisons to more frequent, smaller-scale construction projects.

Expectations about improving the quality of prison infrastructure coexist with community concerns that prison security is maintained and that the system delivers value for money. QCS needs to manage these expectations in a budgetary environment where there is competition for scarce budget funds. Governments need to be persuaded about the case for funding prisons, which historically has been an area that that does not readily attract funding support.

<sup>&</sup>lt;sup>150</sup> More positively, the review noted that the Brisbane Women's Correctional Centre is an example of 'women specific' architecture with domestic style architecture (Grant & Jewkes 2015, p. 17).



These challenges constitute a complex environment in which to make long-term infrastructure decisions. To this end, QCS needs to develop a long-term, convincing strategy for the utilisation, maintenance and expansion of corrections infrastructure. The strategy would:

- reflect more diverse government objectives for the corrections system and criminal justice system and how infrastructure contributes to these objectives
- assess the full range of options to meet those objectives through a robust and transparent process
- set out deliverables, timetables and accountabilities
- provide a framework for regular review.

The advantages of this approach include that it would:

- build government and community confidence that QCS has the capability to provide the type and amount of infrastructure required to meet government objectives
- avoid delays that might otherwise occur by identifying early the issues that need to be addressed and encouraging the development of plans for addressing these issues
- keep the plan up to date as circumstances change.

To achieve these benefits, QCS needs to ensure that its infrastructure objectives are aligned with government objectives for the criminal justice system. QCS also needs to ensure that its approach to infrastructure planning is consistent with its overall planning framework and that decisions are based on sensible guiding principles. It needs to be competent in forecasting, project evaluation and review. Further, to enable the supervised residential facilities envisaged in Chapter 15, QCS needs to be open to involving non-government entities in infrastructure provision.

# Building a strategy to meet the challenges

## Align infrastructure objectives with the system-wide objectives

A strategy typically involves a plan to achieve an organisation's goal. Hence, the first step for QCS in developing its infrastructure strategy is to set out its objective.

This goal should be aligned with the government's overall objective for the criminal justice system (Chapter 9). For example, if the government were to signal an increased focus on rehabilitation (Chapter 18), this would be reflected in a different infrastructure objective and strategy for QCS than if secure containment remains the government's priority.

An infrastructure objective focused on rehabilitation could lead QCS to re-design existing facilities and introduce different types, such as community residential facilities, that might be more successful in fostering rehabilitation, but with a slightly bigger escape risk. A containment-focused strategy, on the other hand, is more likely to see expansion of high security facilities, with reduced outcomes for rehabilitation (and potentially greater reoffending).

QCS's infrastructure strategy must not be developed in isolation. The criminal justice system is an integrated system—developments in one part of the criminal justice system will impact on other parts (discussed in Chapter 9). QCS needs to work with the Justice Reform Office to ensure that the objective it is pursuing through its infrastructure strategy is consistent with the system's objectives and supports, and is supported by, the actions of other criminal justice agencies to achieve system-wide objectives.



## Integrate infrastructure planning into QCS's overall planning framework

It is difficult to assess from QCS's strategic and business plans how closely infrastructure planning is currently integrated with other parts of QCS's business (QCS 2018a; QCS 2019b).

When QCS develops its infrastructure strategy, it needs to ensure that this is integrated with its planning for other parts of the organisation. This is because infrastructure decisions affect other parts of QCS's business, and the converse is also true. For example, if an infrastructure strategy involved replacing high security capacity with community custodial facilities, planning for the implementation of this strategy should consider the implications for:

- QCS's budget forecasting and financial management, as the timing, size and duration of funds required could change considerably
- the roles of other correctional facilities, which may need to be adjusted as their low risk prisoners move to community custodial centres
- case management, which might operate differently in community custodial centres
- prisoner assessment, which may need to be amended to ensure appropriate prisoner allocation to the new facilities
- opportunities to develop reintegration strategies such as work release programs, which would increase, depending on the locations of the new facilities
- recruitment and training of staff, and their work practices
- facility operating procedures
- processes for allocating prisoners between different types of facilities
- performance agreements between facilities and the department
- information technology requirements.

In addition to the interdependencies within QCS that necessitate a department-wide approach to planning, there are many interdependencies between the corrections system and the criminal justice system. The Justice Reform Office needs to work with QCS<sup>151</sup>, to ensure that its planning has a system-wide perspective that recognises these interdependencies and is focused on achieving the government's objective for the system.

### Develop guiding principles for infrastructure planning and decision-making

Prison infrastructure programs are large, as illustrated by the government's decision to provide funding of \$143 million over four years (\$43.7 million per annum ongoing) to commission and operate the expanded Capricornia Correctional Centre (Queensland Treasury 2019b, p. 4).

Infrastructure Australia—the independent statutory body that advises Australian governments about infrastructure issues—notes that 'Australians expect decisions on public infrastructure to be robust, transparent and accountable'. It has proposed a set of principles to guide infrastructure decision-making, which the community can use as a 'clear set of expectations with which to hold decision-makers to account' (Infrastructure Australia 2018, p. 1). Adherence to the decision-making processes set out in these principles can help to assure the community that projects provide value for money.

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<sup>&</sup>lt;sup>151</sup> As discussed in Chapter 9, the Justice Reform Office should be required to endorse all significant budget or policy proposals prior to their submission to cabinet. To enable this, it will need to work closely with agencies.



#### The principles include:

- Quantify infrastructure problems and opportunities as part of long-term planning processes.
- Identify potential infrastructure needs in response to quantified infrastructure problems.
- Invest in development studies to scope potential responses.
- Take steps to ensure potential responses can be delivered efficiently and affordably.
- Undertake detailed analysis through a full business case.
- Project proposals should be independently assessed by a third-party organisation.
- Undertake meaningful stakeholder engagement at each stage.
- Publicly release all information supporting infrastructure decisions.
- Develop and release post-completion reviews (Infrastructure Australia 2018).

These principles aim to achieve a high-quality decision-making process. They differ from the principles that QCS published in 2006 (QCS 2006a), which emphasised the desired outcomes of infrastructure decisions, such as economies of scale and efficient service delivery. A difficulty with focusing on an outcome such as economies of scale is that it leads towards a design—large prisons—that has cost advantages because of its scale economies but distracts attention from the disadvantages of this type of prison.

For example, evidence-based research 'shows that large, crowded spaces increase an offender's sense of isolation and anxiety. Accordingly, to aid in rehabilitation, facilities should be broken down into small units appropriately sized in accordance with security risk and needs' (Lopez 2014). Because they emphasise a good decision-making process, principles such as the ones proposed by Infrastructure Australia would encourage decisions about the scale of prisons that would be transparent, evidence-based, test different options, and directed at a clearly specified problem as part of a long-term planning process. Whether this leads to large prisons will depend on the evidence.

Careful application of these principles would assure the government, the community and QCS that its infrastructure decisions comply with legal obligations. For example, QCS must accommodate Aboriginal and Torres Strait Islander prisoners as 'close as practicable to the prisoner's family' unless the chief executive is satisfied the prisoner does not want to be accommodated near the prisoner's family (*Corrective Services Regulation 2017*, section 3(1)). If QCS were able to show that its infrastructure decisions are based on a robust, transparent, consultative process—including with the Indigenous community—this would help it to make a case that prisoners are accommodated 'as close as practicable' to their families.

QCS should develop and publish guiding principles for infrastructure decisions, with reference to principles developed by Infrastructure Australia.

## Develop the tools to assist effective planning

#### **Forecasting**

Because QCS does not control the number of prisoners remanded in custody or sentenced to prison, accurate forecasts of prisoner numbers are critical for effective prison management. Such forecasts also provide the basis for funding requests to Government (Victorian Auditor General's Office 2012, p. 27). However, forecasting prisoner numbers is challenging:

The size of the prison population at any point in time is a complex function of the number of people offending, the risk of arrest for offending, the risk of bail refusal given arrest, the risk of conviction given arrest, the risk of imprisonment given conviction, the amount of time spent in custody and the likelihood of return to custody. These factors can change very rapidly. (Athanasopoulos & Weatherburn 2018, p. 1)



Projections of the composition of the prison population—remand and sentenced prisoners, male and female, Indigenous and non-Indigenous—are equally important for assessing the types of facilities required and their cost but even more challenging to do. Ideally, forecasting models would provide separate forecasts for each of these subpopulations as well as the total (Athanasopoulos & Weatherburn 2018, p. 12).

QCS uses statistical modelling to provide forecasts of prisoner numbers that it revises each quarter (Sofronoff 2016, p. 63). It has not, however, published its forecasting model, its forecasts or the assumptions underlying them. It has also not published any independent assessments of its forecasting model. Publishing this information would provide more transparency about trends in the criminal justice system and how they are affecting prisoner numbers and could encourage public debate about and independent scrutiny of its approach to forecasting.

An enhanced modelling capacity developed by the Justice Reform Office (discussed in Chapter 9) will be an important tool to support forecasting. Developments in one part of the criminal justice system will impact others, including the corrections system. In a period of reform, it will be important that prisoner forecasts incorporate the impacts of changes.

To further improve the robustness of its approach to forecasting, QCS—or the Justice Reform Office, if it took on the forecasting role<sup>152</sup>— should publish its forecasting model and commission regular independent reviews of it.

#### **Project evaluation**

Project evaluation techniques are required to compare infrastructure projects, enabling prioritisation. QCS needs to have strong capability in this area so that it can make an effective case to government that funding proposed projects will generate higher returns than alternatives.

The Queensland Government provides agencies, through its Project Assessment Framework (PAF), with tools and techniques to assess projects throughout their lifecycle. Departments such as QCS must have regard for PAF in preparing evaluations concerning the acquisition, maintenance or improvement of significant assets (Queensland Treasury 2015).

The development and assessment of options is an early part of a PAF. This should take a broad approach to costs and benefits. For example, the costs per prisoner of new facilities with a stronger rehabilitative focus, such as community residential facilities, could be higher than for regular prisons. However, if those facilities reduce reoffending rates of prisoners assessed as being suited to them, there could be long-term savings for the community compared with housing these prisoners in high security facilities. As for other investments in infrastructure, business cases that properly identify lifecycle benefits and costs would need to be developed as part of investment decision-making.

### Allow for the involvement of non-government entities

Community residential facilities are a future design option that would provide a new avenue for innovation in the corrections system (Chapter 15). To maximise innovation, private and non-government sector organisations should be invited to submit proposals and, if they are considered promising, business cases. Many non-government organisations have been working with distinct client groups and understand what works in rehabilitation for those groups. This specialist knowledge should be leveraged by QCS to create a more effective corrections system.

QCS should consider these applications and business cases in the context of its broader infrastructure strategy that is open to a reduced emphasis on large-scale, high security prison infrastructure. It would depend on the proposal whether the proponent or QCS would provide the infrastructure. Outcome-based contracts could also be considered to incentivise performance.

Community residential facilities will allow for the participation of local communities, including Indigenous communities. Local communities are best placed to know the problems of their members and what solutions will

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<sup>&</sup>lt;sup>152</sup> The Justice Reform Office might have more capacity to develop forecasting expertise, if it was also required to develop forecasts for other parts of the criminal justice system. It would still, however, benefit from working with QCS, which would have better on the ground information about key determinants of offender and prisoner numbers.



work best. They are also best placed to understand which approaches are culturally appropriate and to provide the support required when offenders return to community. By operating these rehabilitative facilities and providing the follow-up reintegration support, they can effectively provide a comprehensive throughcare program for the members of their community.

### Keep the strategy up to date

Lead times for prison infrastructure are long. Planning needs to begin early but it is possible that circumstances can change considerably over the life of an infrastructure strategy. Processes are needed to keep the strategy up to date.

Strategies should be regarded as living documents. This does not mean that they should be changed with every change in the environment, as that would undermine long-term decision-making. However, they should be refreshed from time to time, in response to major events such as a change of government and according to a specified cycle.

There needs to be a plan outlining specific actions needed to deliver the strategy's objectives, including a timetable and accountability for delivering these actions. Regular reporting of progress against the timetable is important, because it strengthens incentives for on-time delivery and builds the confidence of the government in QCS's capability to deliver the plan.

If some parts of the plan are not being delivered on time, this can lead to a useful discussion of the reasons why this is happening, which could include:

- inadequate funding
- a barrier that needs to be addressed
- changed circumstances that mean this part of the plan now has a lower priority or may no longer be justified.

In most cases, these matters could be addressed by minor alterations to the plan or by dealing with the specific issue. If the cause of non-delivery was something more significant, this could indicate that it is time to review the strategy.

QCS should ensure that it has processes for keeping its long-term correctional infrastructure strategy up to date.



## Recommendation 28

Queensland Corrective Services should develop and implement a long-term correctional infrastructure strategy in partnership with the Justice Reform Office that:

- describes how the correctional infrastructure portfolio will evolve to meet the objectives of the criminal justice system
- is based on robust forecasts of the future numbers and composition of both offenders and prisoners
- uses the best available evidence on the effect of infrastructure on rehabilitation
- considers all feasible infrastructure options
- allows for the involvement of non-government entities in developing innovative solutions to supervise and rehabilitate offenders
- sets out deliverables, timetables and accountabilities.

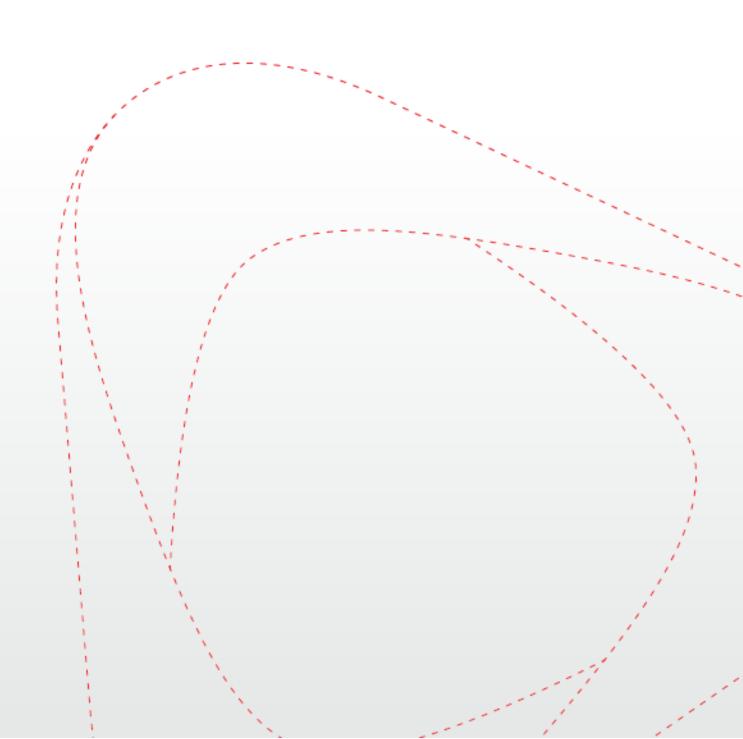
The Queensland Government should review and revise the correctional infrastructure strategy periodically to ensure it remains consistent with the objectives of the criminal justice system.

#### Recommendation 29

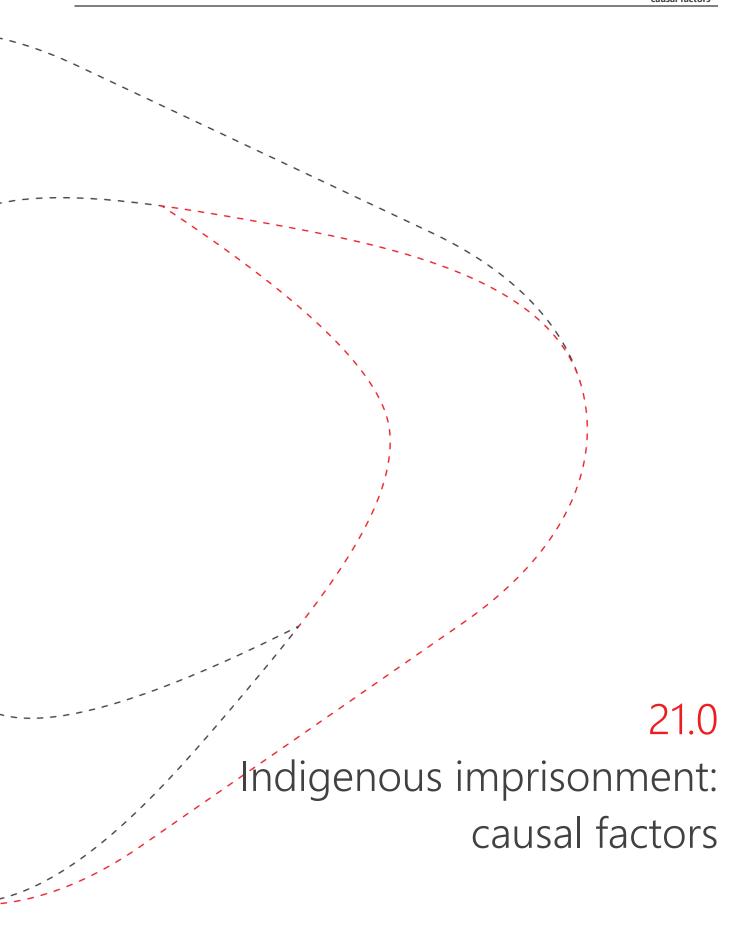
Queensland Corrective Services should:

- ensure that its planning for infrastructure is closely integrated with planning across the department, which in turn needs be integrated with planning for the criminal justice system as a whole
- develop and publish guiding principles for infrastructure decisions, with reference to principles developed by Infrastructure Australia
- publish its forecasting model and commission regular independent reviews of it.











This chapter examines the underlying causes of the overrepresentation of Aboriginal and Torres strait islander people in Queensland prisons, and the costs of imprisonment and offending.

## Key points

- Aboriginal and Torres strait islander people are overrepresented in the criminal justice system:
  - Indigenous Queenslanders are 10 times more likely to be imprisoned than non-Indigenous people.
     They comprise 31 per cent of the Queensland prison population, but only 4.6 per cent of the total state population.
  - Indigenous Queenslanders are also overrepresented in youth detention. On an average day in 2017–18, 72 per cent of those in youth detention in Queensland were Aboriginal and Torres Strait Islander youth.
  - Approximately 80 per cent of Indigenous prisoners have been imprisoned more than once.
- Despite efforts to address the high levels of incarceration, the number of Indigenous people in Queensland prisons increased by more than 80 per cent between 2008 and 2018.
- The economic and social costs of Indigenous offending and imprisonment are high—estimates suggest it accounts for 40 per cent of total criminal justice system costs.
- The scale of Indigenous imprisonment is so high that in some communities it may no longer serve as a deterrent to offending. It is contributing to a cycle of disengagement, disadvantage and further imprisonment that can have lasting intergenerational impacts.
- The level of Indigenous incarceration is predominantly caused by greater exposure to risk factors leading to elevated rates of offending. These risk factors reflect entrenched social and economic disadvantage that has its roots in historical policies.
- Key risk factors include unemployment, low levels of educational participation and attainment, alcohol
  abuse, child abuse and neglect, mental health issues and cognitive disabilities. The prevalence of these
  risk factors is greater in remote and discrete communities where social and economic disadvantage is
  entrenched.
- While it is likely that there are some inherent biases in the criminal justice system that disadvantage Aboriginal and Torres strait islander people, these are unlikely to be a large contributor to the level of Indigenous overrepresentation in the criminal justice system.
- The growth in incarceration rates cannot be explained by changes in offending. There is no evidence
  to suggest that offending rates amongst Aboriginal and Torres strait islander people have risen—the
  Commission's estimates of underlying offending rates suggest offending has fallen over the last
  decade.
- This suggests that other factors are driving rising imprisonment rates. These factors (such as policy changes) are likely to be similar to those driving the increase in imprisonment across the general population; however, given the scale of incarceration in many Indigenous communities, these factors are likely to disproportionately affect Aboriginal and Torres strait islander people.



# 21.1 Background

# Imprisonment rates are higher and growing faster for Indigenous people

Aboriginal and Torres strait islander people comprise 4.6 per cent of the state's population, but 31.1 per cent of the prison population (ABS 2018f, 2018k). They are 10 times more likely to be imprisoned than non-Indigenous Oueenslanders.

In 2018, the average daily number of Aboriginal and Torres strait islander people in Queensland prisons was 2,781 (ABS 2019c). In all of 2018, there were 4,622 Aboriginal and Torres strait islander people received into full-time custody in Queensland prisons, of which 51 per cent were sentenced prisoners and 49 per cent were unsentenced (ABS 2019c).

Imprisonment rates for Aboriginal and Torres strait islander people are higher than for the general population and have also risen more quickly (Figure 21.1). Between 2008 and 2018, the Indigenous age standardised imprisonment rate increased by around 45 per cent, compared to around 31 per cent for non-Indigenous Queenslanders. The total number of Indigenous people in Queensland prisons increased by more than 80 per cent over the same period.

2.500 40% 2,000 30% 1,500 20% 10% 1,000 500 -10% -20% 0 Qld Indigenous Qld Non-Indigenous Australia Indigenous Australia Non-Indigenous

Figure 21.1 Rate and growth of age standardised imprisonment per 100,000 adults, by indigeneity

Note: Age-standardised rates are adjusted for differences in the age distribution of the Indigenous and non-Indigenous populations. Source: ABS 2018k.

Indigenous overrepresentation is higher among female prisoners (35 per cent of the female prison population) than male prisoners (31 per cent of the male prison population) (ABS 2018k). The age-standardised imprisonment rate for Indigenous women is over 11 times that of non-Indigenous women.

Recidivism is higher among Indigenous prisoners. Eighty per cent of Indigenous prisoners have previously been imprisoned, compared to 56 per cent of non-Indigenous prisoners (ABS 2018k) (see Chapter 5).

<sup>&</sup>lt;sup>153</sup> Growth in Queensland imprisonment rates reflect changes in the national rates over the same period (45 per cent for the Indigenous population and 29 per cent for non-Indigenous population).



## Offending rates are higher

The age-standardised rate of offending among Aboriginal and Torres strait islander people is 5.5 times the rate for non-Indigenous people (ABS 2019g). The data also indicates that Indigenous people tend to commit different types of offences (see Chapter 6). Based on a cohort of Queenslanders born in 1990, assaults, public order offences and offences against justice procedures make up a much larger proportion of all Indigenous offending and Indigenous offending leading to prison compared to non-Indigenous offending. Most offences against justice procedures are either breaches of bail and breaches of violence orders. Illicit drug offences make up a much larger proportion of non-Indigenous offending.

## Victimisation rates are higher

Aboriginal and Torres Strait Islander people are more likely to be the victims of crime. Despite being 4.6 per cent of the state population, 14 per cent of reported victims in Queensland identified as Aboriginal and Torres Strait Islander in 2017–18. The reported victimisation rate for Indigenous Queenslanders (1,907 per 100,000 people) was more than three times the non-Indigenous victimisation rate (591 per 100,000 people) (QGSO 2019, p. 83).

Indigenous people are more likely to be victims of domestic and family violence, and more likely to be offended against by a partner or ex-partner (AIHW 2019b, p. 106; QGSO 2019). In 2016–17, Indigenous people were 32 times as likely to be hospitalised for family violence, compared with non-Indigenous people (AIHW 2019b, p. 106). Indigenous females were more than six times as likely to be victims of serious assault and more than 17 times as likely to be victims of grievous assault than non-Indigenous females (QGSO 2019, p. 90).

In 2017–18, females accounted for 65 per cent of all reported Indigenous assault victims in Queensland (QGSO 2019, p. 86).

## Overrepresentation starts young

On average, Indigenous prisoners were younger when they first interacted with police and when they were first convicted, compared to non-Indigenous prisoners (see Chapter 6).

During 2017–18, 10 per cent of all individual Indigenous offenders proceeded against by police in Queensland were aged between 10 and 14. By comparison, only 4 per cent of non-Indigenous offenders were aged between 10 and 14 (ABS 2019g).

Aboriginal and Torres Strait Islander people are also overrepresented in youth detention—on an average day in 2017–18, 72 per cent of those in youth detention in Queensland were Indigenous (Department of Child Safety, Youth and Women 2018).

# Aboriginal and Torres Strait Islander people are more likely to live in regional and remote areas

Two-thirds of Indigenous Queenslanders reside outside major cities—this is the opposite of the non-Indigenous population where only one third live outside of major cities (ABS 2018f).

Aboriginal and Torres Strait Islander people are much more likely to live in remote parts of Queensland—17 per cent of Indigenous Queenslanders live in remote or very remote regions, compared to only 2 per cent of non-Indigenous Queenslanders (ABS 2018f).

A significant proportion of Indigenous Queenslanders live in discrete communities (Box 21.1).



#### Box 21.1 The remote and discrete communities

Around 20 per cent (or 40,000) of Indigenous Queenslanders live in remote and discrete Aboriginal and Torres Strait Islander communities.

Remote communities are those communities within the area defined as 'remote' or 'very remote' under the Australian Bureau of Statistics' Standard Geographical Classification Remoteness Structure.

Discrete communities are bounded geographical locations inhabited predominantly by Aboriginal and Torres Strait Islander people, with housing or infrastructure owned or managed on a community basis.

The Commission completed an inquiry into service delivery in remote and discrete Aboriginal and Torres Strait Islander Communities in 2017. As noted in the Commission's final report, outcomes for people living in these communities are generally worse when compared to other Indigenous and non-Indigenous Queenslanders in the rest of the state.

Economic indicators in the remote and discrete communities show high and persistence rates of unemployment, welfare dependency and little private sector activity compared to other Australian and Queensland communities. Intergenerational disadvantage is concentrated.

Source: QPC 2017.

## Problems are more severe in remote communities

The imprisonment rate for Indigenous people who live in remote areas is more than 40 per cent higher than for those not living in remote areas (ABS 2018f; QCS unpublished data; QPC analysis). Rates of harm and offending in discrete Indigenous communities are also significantly higher than for the rest of the state—in 2016–17, the overall rate of reported offences against the person in communities was at least twice the total state-wide rate for all Queenslanders (DATSIP 2018).

National data (Table 21.1) shows that Indigenous people in remote communities are more likely to have experienced physical or threatened physical violence, been arrested or been incarcerated in the past five years than Indigenous people living in non-remote communities.

Table 21.1 Community safety—percentage of Indigenous people who have experienced selected indicators, 2014–15

	Non-remote (%)	Remote (%)
Experienced physical or threatened physical violence in the last 12 months	21.9	23.2
Experienced physical violence in the last 12 months	13	14.5
Has been arrested in the last 5 years	13.2	19.3
Has been charged by police in their lifetime	33.4	40.2
Has been incarcerated in their lifetime	7.4	13.6
Has been incarcerated in the last 5 years	2.4	6.2

Source: ABS 2016c.



# 21.2 The high costs of Indigenous imprisonment

## Direct expenditure on crime and imprisonment is high

The Australian Productivity Commission estimates that in 2015–16, total direct expenditure on public order and safety<sup>154</sup> in Queensland was \$5.4 billion, of which an estimated \$900 million (17 per cent) was spent for Aboriginal and Torres strait islander people (SCRGSP 2017).

On a per person basis, public order and safety expenditure for Aboriginal and Torres Strait Islander persons is more than four times the expenditure for non-Indigenous persons (\$4,208 per Aboriginal and Torres Strait Islander person compared to \$969 per non-Indigenous person), a consistent trend over the last decade (SCRGSP 2017).

Unpublished research by the Griffith Criminology Institute (sub. DR32, p. 2) suggests that, when considering just the criminal justice system, the magnitude of this difference is even greater. The researchers followed the offending trajectories of a Queensland cohort born in 1983 and 1984 to 31 years of age and found that Indigenous offending accounted for 40 per cent of total criminal justice costs imposed by this cohort. They found that, on average, Indigenous chronic offenders will cost \$381,000 in justice system costs by age 31, compared to \$75,000 for non-Indigenous chronic offenders.

Research suggests that a small number of offenders accounts for a large proportion of offending and imprisonment costs—3.3 per cent of all offenders born in 1990 accounted for 41.8 per cent of prison costs (Chapter 6). These offenders tend to be concentrated in a small number of geographic areas. Research by Allard et al. (2013, p. 29) found that 10 per cent of postcode locations accounted for 50.5 per cent of the criminal justice system costs of chronic offending in Queensland. Many of these locations tended to be characterised by extreme social and economic disadvantage, had a high proportion of Indigenous youth and were in regional areas, including in remote and very remote areas.

## Social costs are high

The scale of Indigenous overrepresentation is so high that it is perpetuating a cycle of disengagement, disadvantage and imprisonment. An Indigenous male has an almost 30 per cent chance of being imprisoned by the age of 25 (Stewart 2019). According to the National Aboriginal and Torres Strait Islander Social Survey (ABS 2016c), 13.6 per cent of Indigenous Australians in remote areas have been to prison in their lifetime, and 6.2 per cent have been to prison in the five years preceding the survey. Intergenerational impacts and the development of societal norms are more likely to evolve in these circumstances.

This reflects the views of some stakeholders who consider that prison is an ineffective crime deterrent and may even be preferred to community life when it offers clean and secure shelter, regular meals and relative safety from violence and abuse. The Commission was also told that imprisonment is at times a 'rite of passage' among male Indigenous youth:

Gaol is frequently a 'rite of passage' for young Indigenous males who wish to be with their mates and other male role models or family. (FRC sub. 23, p. 1.)

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<sup>&</sup>lt;sup>154</sup> Public order and safety expenditure includes spending on police services, fire protection services, criminal courts services, other courts and legal services, access to justice services, juvenile corrective institutions, other prisons and corrective services, and other public order and safety services. It therefore includes expenditure on services that are not directly related to criminal justice matters.



## Reducing Indigenous overrepresentation would deliver large savings

Based on estimated imprisonment costs of \$111,247 per prisoner per year, Indigenous overrepresentation is costing around \$272 million per year in imprisonment costs alone. A 20 per cent reduction in the Indigenous imprisonment rate would free up \$61 million of imprisonment costs for other uses. Proponents of justice reinvestment contend that these potential savings would be better invested in prevention.

PWC estimated that by reducing the Indigenous imprisonment rate nationally to match the non-Indigenous rate by 2040, economic savings of \$18.9 billion could be generated over the same period (PwC 2017, p. 7).

# 21.3 What drives Indigenous overrepresentation?

## Offending is the proximate cause of Indigenous incarceration

The proximate cause of Indigenous overrepresentation in Queensland prisons is higher rates of offending. As previously noted, the age-standardised rate of offending among Indigenous people is 5.5 times the rate for non-Indigenous people (ABS 2019g). The offending profiles of Indigenous and non-Indigenous people also differ (see Chapter 6), which may also contribute to higher imprisonment rates among Aboriginal and Torres Strait Islander people.

Some policies within the criminal justice system may also contribute to Indigenous overrepresentation, but to a lesser extent. As Weatherburn and Holmes (2010, p. 569) noted:

The leading proximate cause of Indigenous overrepresentation in prison, however, is Indigenous overrepresentation in serious crime, particularly intra-communal violence.

However, higher offending rates do not explain the *growth* in the Indigenous imprisonment rate.

# The growth in imprisonment rates is driven by policy changes rather than offending

Policy changes over recent decades have driven increases in imprisonment rates across the community. Among other things, increased reporting and policing of crime and greater use of imprisonment over other options have contributed to rising imprisonment rates for both Indigenous and non-Indigenous people.

The evidence suggests that the underlying rate of offending amongst Aboriginal and Torres Strait Islander people has fallen over the last decade. Data suggests that the *reported* rate of Indigenous offending has not changed significantly over the period 2008–09. This suggests that the *underlying* rate has fallen, given the increased propensity to report crime over the same period (see Chapter 4). The Commission estimates that a proxy for the underlying offending rates for Indigenous Queenslanders fell between 2009 and 2018 by around 27 per cent (Figure 21.2). At the same time, imprisonment rates of Indigenous Queenslanders rose by 31 per cent.



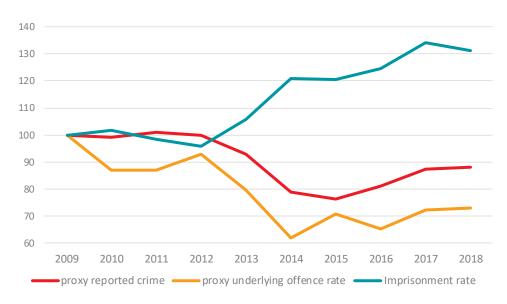


Figure 21.2 Indices of Indigenous imprisonment, and estimated reported offending and underlying offending rates

Notes: Proxy reported crime is the weighted average of reported physical assault, theft, property damage and break ins. The underlying offence rate is calculated by adjusting each of the reported offence rates to account for unreported crime. Indigenous offence rates are estimated using offence ratios calculation from court finalisation data.

Source: ABS 2018k, 2019d, 2019g; QPS 2019, Commission estimates.

# 21.4 Social and economic disadvantage

Numerous inquiries and reviews have sought to identify the underlying causes of Indigenous overrepresentation in the criminal justice system (Appendix L), with perhaps the most seminal of these being the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) (Johnston 1991), which was conducted from 1987 to 1991. These reviews consistently attribute Indigenous overrepresentation to entrenched disadvantage and disempowerment and, to a much lesser extent, the operation of the criminal justice system.

[C]hanges to the operation of the criminal justice system alone will not have a significant impact on the number of Aboriginal persons entering into custody or the number of those who die in custody; the social and economic circumstances which both predispose Aboriginal people to offend and which explain why the criminal justice system focuses upon them are much more significant factors in over-representation. (Johnston 1991, vol. 4, ch. 26)

CYI noted in its submission:

This oppression is rooted in the history of colonisation of Australia, and the dispossession and racial discrimination—the stolen wages, land and children, the discriminatory laws and exclusion—that have helped create and perpetuate Indigenous disadvantage (CYI, sub. DR39, p. 10).

The measures of disadvantage experienced by Aboriginal and Torres Strait Island peoples are broad; identifying the precise and inter-related impacts of each on criminal involvement is virtually impossible. However, many are known risk factors for participation in criminal behaviour, and their impacts can be cumulative and interrelated (see Chapters 6 and 10).



Some risk factors may increase the likelihood of engaging in offending behaviour more than others. However, it is important to note that there are also many factors that serve to protect individuals against involvement in criminal behaviour, including effective parenting and strong communities (see Chapter 10).

## Economic participation

Aboriginal and Torres Strait Islander people have lower participation rates, higher rates of unemployment (Table 21.2) and lower household incomes than non-Indigenous Australians. Aboriginal and Torres Strait Islander people are more likely to have welfare as their main source of income compared to non-Indigenous Australians (AIHW 2017a). Welfare dependency increases with remoteness, a trend that is not reflected in the non-Indigenous population (AIHW 2017a).

Table 21.2 Workforce indicators for Indigenous and non-Indigenous people

	Non-Indigenous	Indigenous
Proportion of working age population employed (%)		
Major cities	72.7	57.4
Very remote	85.6	35.5
Proportion of labour force unemployed (%)		
Major cities	5.7	14.4
Very remote	2.9	28.0

Source: AIHW 2017a.

National survey-based data indicates nearly three-quarters (72 per cent) of Indigenous prison entrants were unemployed or unable to work in the month before their imprisonment (AIHW 2019c). Imprisonment compounds problems, as it can reduce an individual's employment prospects following release. Stakeholders in remote communities frequently highlighted the impact of blue card ineligibility following a criminal conviction. Even when a released prisoner may be eligible for a blue card, misconceptions about eligibility and an inability to navigate the application processes may prevent individuals from obtaining blue cards.

## Educational participation and attainment

Despite improvements, the educational attainment of Aboriginal and Torres Strait Islander people in both the general and prison populations is lower than that of non-Indigenous people (AIHW 2019c, p. 17). Only 12 per cent of Indigenous prisoners (nationally) had completed Year 12, and nearly half (47 per cent) had only completed Year 9 or lower. By comparison, 24 per cent of non-Indigenous prisoners had completed Year 12, and 25 per cent had only completed Year 9 or lower (AIHW 2019c).

The attendance rates of Aboriginal and Torres Strait Islander children at pre-school and school are lower than in the case of non-Indigenous children (SCRGSP 2016, pp. 4.18, 4.36). The attendance rates tend to decline as remoteness increases—Department of Education data (2018), shows attendance rates below 60 per cent in some remote Indigenous communities between 2015 and 2018.

On average, Aboriginal and Torres Strait Islander children in Queensland are more likely to receive a school disciplinary absence (suspension, exclusion or cancellation) than non-Indigenous children—Indigenous children accounted for over 20 per cent of all incidents of disciplinary absence in Queensland state schools between 2014 and 2018 (Department of Education 2019).



Educational participation and attainment can be impacted by a range of factors which may be more prevalent in Indigenous communities, including overcrowded housing and health issues. Socio-economic disadvantage and poor health outcomes in communities are known risk factors for students' learning, development and well-being (PC 2016).

#### Health issues

In 2018, 41.3 per cent of all Indigenous Australian children in their first year of school were categorised as developmentally vulnerable on one or more of five key domains, compared to 20.4 per cent of their non-Indigenous counterparts (Department of Education and Training 2019).

Amnesty International (sub. 37, p. 14) highlighted the impact of Indigenous health issues on student learning, behaviour and school engagement. Hearing disorders such as otitis media (middle ear infections) are highly prevalent among Aboriginal and Torres Strait Islander children and can impact cognitive development and speech and language development. This in turn contributes to poorer education outcomes. Queensland Health (2019) reports that Aboriginal and Torres Strait Islander children experience the world's highest rate of middle ear disease and conductive hearing loss.

Many stakeholders also raised concerns about the prevalence of undiagnosed cognitive disabilities among Indigenous populations and the impact this has on student learning and educational engagement. An assessment program undertaken in Cape York communities found that in some locations around one-quarter of students met the criteria for a diagnosis of intellectual impairment (Nelson et al. 2016, p. 20).

A submission to the Queensland Disability Review commissioned by the Department of Education noted the limitations of mainstream approaches for identifying and responding to disabilities in remote and discrete communities:

The capacity of the current mainstream system to identify and respond to special needs in Cape York and the Torres Strait is very limited. (Nelson et al. 2016, p. 13)

# The child protection system

There are links between involvement in the child protection system and subsequent imprisonment (Chapter 6). Aboriginal and Torres Strait Islander prisoners are disproportionately more likely than non-Indigenous prisoners to have entered the child protection system as children. A comprehensive longitudinal study by Griffith University (Stewart 2019) that examined 45,432 individuals born in Queensland in 1990 found this was most pronounced among Indigenous women, with 60 per cent of prisoners having a child protection history (compared to 47 per cent of Indigenous males).

Aboriginal and Torres Strait Islander children are overrepresented in all stages of Queensland's child protection system. In 2017–18, nearly 12 per cent of Indigenous children in Queensland received child protection services<sup>155</sup>, compared to less than 2 per cent of non-Indigenous children (AIHW 2019a). Aboriginal and Torres Strait Islander children were seven times more likely to be subject to a child safety substantiation<sup>156</sup> than non-Indigenous children and eight times more likely to be in out of home care (AIHW 2019a). Of the 5,884 children subject to a child safety substantiation in Queensland, 37 per cent were Indigenous.

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<sup>&</sup>lt;sup>155</sup> Children receiving child protection services include those children in the reporting period who were the subject of an investigation or a notification, and/or on a care and protection order, and/or in out-of-home care (AIHW 2019a, p. 10).

<sup>&</sup>lt;sup>156</sup> Child protection notification made to relevant authorities during the current year (for example, 1 July 2017 to 30 June 2018) that was investigated (with the investigation finalised by 31 August), and where it was concluded that there was reasonable cause to believe that the child had been, was being, or was likely to be, abused, neglected, or otherwise harmed (AIHW 2019a).



The rate of child safety substantiations in remote and discrete communities is higher than the state-wide Indigenous average (AIHW 2019a; DATSIP 2018; QPC 2017, p. 65). However, it should be noted that the incidence of substantiations varies between individual communities.

### Alcohol use

Alcohol consumption in Australia is widespread and is linked with criminal behaviour (ABS 2018b; Morgan et al. 2018, p. 1).

Based on national surveys, Aboriginal and Torres strait islander people are more likely to abstain from drinking alcohol that non-Indigenous Australians. However, of those that drink, a greater proportion do so at risky levels (AIHW 2017b, p. 108). Data from the 5th National Prisoner Health Data Collection (NPHDC) indicates that 46 per cent of Indigenous prison entrants were at high risk of alcohol related harm during the previous 12 months, compared to 26 per cent of non-Indigenous prison entrants (AIHW 2019c).

Weatherburn (2014, p. 132) posited that 'alcohol abuse is by far the biggest problem in Indigenous communities'. The links between alcohol abuse and crime, violence, family breakdowns, and child abuse and neglect are widely reported (SCRGSP 2016; Weatherburn 2014; Morgan et al. 2018).

Consistent with previous reviews<sup>157</sup>, alcohol was frequently identified during consultation as a key driver of Indigenous crime and imprisonment, particularly in the remote Indigenous communities visited by the Commission.<sup>158</sup> In describing the impact of alcohol on communities, stakeholders recalled a time before alcohol was readily available, and attributed the rise in violence and crime to the increased availability of alcohol in communities.<sup>159</sup>

Alcohol is a key situational issue for violence in remote and discrete communities (QPC 2017). Over two-thirds (68 per cent) of Aboriginal and Torres Strait Island peoples who experienced physical violence indicated that alcohol or other substances contributed to the most recent incident. This proportion rises to 76 per cent in remote areas (ABS 2016). National data from 2014–15 shows the alcohol-related hospitalisation rate for Aboriginal and Torres Strait Islander Australians was highest in remote areas (SCRGSP 2016, p. 11.7).

In the remote communities visited by the Commission, stakeholders suggested that alcohol is a means of self-medicating in an environment characterised by disadvantage. Balanced Justice (sub.1, p. 9) said 'alcohol has become somewhat of a panacea for Aboriginal and Torres Strait Islander people's pain, with many using it as a means of escape and solace'. However, others (CYI sub. DR39; Weatherburn 2014) contended that alcohol abuse is an epidemic in its own right, not merely a symptom of Indigenous disadvantage.

The impacts of alcohol abuse may be intergenerational. Excessive alcohol use increases the risk of child abuse and neglect and foetal alcohol spectrum disorder (FASD) (see Chapter 10 for a description of FASD). These too are risk factors for engagement in criminal behaviour and are discussed further in this chapter.

### Mental health disorders

The rate of incidence of high and very high levels of psychological distress in Indigenous Australian adults in 2014–15 was 32.8 per cent, more than twice the age adjusted rate for non-Indigenous adults (SCRGSP 2016, p. 8.35). The hospitalisation rate for mental and behavioural disorders for Indigenous Australians over the same period was nearly double that of non-Indigenous Australians (SCRGSP 2016, p. 8.35):

<sup>&</sup>lt;sup>157</sup> For example, see ALRC 2018; Johnston 1991.

<sup>&</sup>lt;sup>158</sup> For example, see Balanced Justice sub. 1; CYI sub. DR39.

<sup>&</sup>lt;sup>159</sup> For example, see Noel Pearson, Brisbane public hearing, pp. 4–6.



It is well established that Queensland's Aboriginal and Torres Strait Islander people experience higher levels of morbidity from mental illness, assault, psychological distress, and self-harm and higher rates of suicide than other Queenslanders. (Queensland Health 2017, p. 40)

Mental health was identified as a contributing factor (either directly or indirectly) to Indigenous offending in a number of submissions. <sup>160</sup> In Indigenous communities, it was suggested that historical trauma and concentrated disadvantage contributed to mental health issues. These issues are compounded by substance abuse and exposure to trauma such as family dysfunction, violence and neglect. Diagnosis and access to mental health services may be limited in some communities.

Data on the prevalence of mental disorders among Indigenous prisoners varies. At the national level, Indigenous prison entrants were less likely than non-Indigenous prison entrants to report having had a previous diagnosis of a mental health disorder (33 per cent compared to 44 per cent) (AIHW 2019c). However, longitudinal and diagnostic studies suggest the incidence of mental health disorders among Queensland Indigenous prisoners is actually much higher.

The Griffith University longitudinal study (Stewart 2019) found that a history of previous mental health hospital admissions was higher among Indigenous prisoners than non-Indigenous prisoners, and higher for Indigenous female prisoners (46 per cent) than Indigenous male prisoners (31 per cent).

A 2008 study found that the prevalence of mental health disorders among incarcerated Indigenous adults in Queensland was very high compared to the general Australian population (Heffernan et al. 2012). Approximately 73 per cent of Indigenous men and 86 per cent of Indigenous women suffered from at least one mental health disorder in the previous 12 months, well above the 20 per cent prevalence rate of the general Australian population (ABS 2008; Heffernan et al. 2012, pp. 37, 39).

Results of the Griffith University longitudinal study show that relatively high proportions of Indigenous prisoners have experienced both a mental health hospitalisation and child safety involvement, which suggests these risk factors are interrelated.

### Cognitive disability

Stakeholders highlighted concerns about the prevalence and underdiagnosis of cognitive disability among Aboriginal and Torres strait islander people within the criminal justice system.<sup>161</sup>

Evidence suggests levels of cognitive impairment among Indigenous prisoners are higher than among non-Indigenous prisoners and the general population (Baldry et al. 2015; Shepherd et al. 2017, p. 2). A study of Victorian prisoners (Shepherd et al. 2017) found that Indigenous prisoners with a cognitive disability offended earlier, had committed more offences and were more likely to reoffend than those without a cognitive disability.

Cognitive disability is a risk factor for criminal behaviour, but it also affects an individual's ability to navigate the criminal justice system. Cognitive assessments in Cape York communities point to high rates of cognitive impairment in some Indigenous communities (Chapter 10). Even where a diagnosis of cognitive impairment is made, access to disability services may be limited.

Stakeholders raised concerns about the prevalence and underdiagnosis of FASD amongst Indigenous offenders. <sup>162</sup> Despite limited national data on the prevalence of FASD, studies suggest it is higher among Aboriginal and Torres strait islander people (ALRC 2018, p. 433; Department of Health 2018, p. 10; Blagg & Tulich 2018, p. 2). A study in the West Kimberley region of Western Australia indicated FASD prevalence may be as high as 12 per cent among some cohorts in high-risk Indigenous communities (Blagg & Tulich 2018, p. 2). In their study of the Banksia Hill

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<sup>&</sup>lt;sup>160</sup> For example, see Balanced Justice sub. 1, p.8; CYI, sub. DR39, p. 9; RANZCP Qld Branch, sub.31, p.2

<sup>&</sup>lt;sup>161</sup> For example, see Queensland Family and Child Commission, sub 36; RANZCP Qld Branch, sub.31, p. 2.

<sup>&</sup>lt;sup>162</sup> For example, see Amnesty International sub. 37, p. 14; Catalano, sub .25, p. 2; CYI, sub. DR39, p. 9; Jan Hammill, Brisbane public hearing; Queensland and Child Commission, sub. 36, p. 32.



Youth Detention Centre in West Australia, Bower et al. (2018) found the rate of FASD among Indigenous detainees (47 per cent) was nearly six times the rate of non-Indigenous detainees (8 per cent).

### The intergenerational nature of Indigenous imprisonment

As noted by Tzoumakis et al (2019, p. 5), 'the experiences, life events, and decisions of members of one generation can significantly impact those of the next'. The intergenerational impacts of imprisonment may be amplified among Aboriginal and Torres strait islander people due to the scale of Indigenous incarceration. As ATSILS noted:

It is impossible to overstate the impact which over-incarceration now has on families and communities and the intergenerational impact that is having. (sub. DR16, p. 3)

Of the Indigenous prison entrants participating in the 2018 National Prisoner Health Data Collection survey (AIHW 2019c), nearly one in three (31 per cent) reported having had at least one parent or carer in prison during their childhood and nearly half (47 per cent) had dependent children themselves. Both these rates were higher than for non-Indigenous prison entrants (11 per cent and 33 per cent respectively) (AIHW 2019c).

The proportion of Indigenous women prisoners with dependent children is likely to be higher, with some reported estimates as high as 80 per cent (Human Rights Law Centre & Change the Record 2017, p. 13).

Based on the Australian prison population on 30 June 2018, one in every 23 Indigenous adults males in Australia is in prison at any given time (ABS 2018k). Among Indigenous men aged 30–39, the rate increases to one in every 14. As already noted, over 13 per cent of Aboriginal and Torres strait islander people living in remote areas have, at some stage, been incarcerated (ABS 2016). This means that in some communities there is a strong likelihood that each community member knows or is related to someone who has been to prison. As these rates rise, there is the potential for imprisonment to be normalised.

### 21.5 Interactions with the criminal justice system

Changes within the criminal justice system are driving increases in criminal justice interactions and imprisonment rates, regardless of indigeneity. However, some factors within the criminal justice system may affect Indigenous offenders to a greater extent. This is likely to occur when governments adopt a 'one-size fits-all' approach to policy development. As the Commission was advised, mainstream approaches to problems often do not work for Indigenous people and can have unintended consequences.

It is clear that the system is not designed with them in mind, and does not respond well to the complex and specific needs of Aboriginal and Torres Strait Islander women in prison. (ADCQ 2019, p. 10)

Stakeholders have suggested that systemic or institutional bias and discrimination may contribute to Indigenous imprisonment and recidivism. <sup>163</sup> Institutional bias may exist intentionally or unintentionally and can include systems, processes, practices, attitudes and behaviours that produce racially disparate outcomes.

Most major inquiries into Indigenous imprisonment have considered institutional bias and many have recommended reforms to laws and legal frameworks. Weatherburn and Holmes (2010, p. 560) contended there is now little evidence that bias by the police or the courts is a significant contributor to Indigenous overrepresentation in prison.

However, stakeholders indicated that criminal justice system policies and practices still affect Aboriginal and Torres strait islander people differently than the rest of the population, particularly those in remote and discrete Indigenous communities. Given the growth in imprisonment rates relative to the change in offending rates (Figure

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<sup>&</sup>lt;sup>163</sup> For example, see CYI, sub. DR39, p .6; Balanced Justice, sub.1, p. 9.



21.2), it is likely that reductions in Indigenous imprisonment can be achieved by giving better consideration to the way that the criminal justice system interacts with Indigenous communities.

### Rehabilitation and reintegration

### The prison environment

High rates of recidivism among Indigenous Queenslanders raises questions about the effectiveness of the high-security prison model for rehabilitating inmates.

The location of Queensland's prisons means many inmates are many hundreds of kilometres from their home, with little prospect of family visits or other community contact. Consistent throughcare is challenging under these circumstances.

Submissions suggested community custody or the introduction of smaller Indigenous-focused facilities could better support rehabilitation and reintegration, particularly if they are located closer to communities.<sup>164</sup>

Another key factor [that has driven the increase in Indigenous incarceration rates] is the current practice of imprisoning First Nation people in culturally inappropriate high security prisons remote from their communities and where it is impossible to engage them in meaningful rehabilitation. (Hamburger, sub. 14, p. 20).

### Returning to community

During visits to remote and discrete communities, stakeholders raised concerns about the difficulties that individuals, families and communities face when an individual returns from prison.

For an individual returning to community, the challenges that existed before their imprisonment usually remain. Overcrowded housing, unemployment, violence and alcohol abuse may still be prevalent.

There is danger in releasing prisoners back into the same socio-economic disadvantage from which their offending behaviour emerged—this is inviting a conditioned response to the same stimulus.

Boredom then leads them to reconnect with their past associates and dysfunctional relationships, and before long they have breached their release conditions and are sent back to gaol. (FRC, sub. 23, p. 1)

The isolation of many communities means support services and programs may not be available or accessible. Where services and programs are provided (often on a fly-in, fly-out basis), these may be infrequent or culturally insensitive.

The lack of support for, and involvement of, families and the broader community, both when an offender is in prison and following the offender's release, was also noted by community stakeholders and in public hearings (Glasgow, Townsville public hearing, p. 48). Even the best intentions to take a more productive life pathway can be undermined if the returning offender is not aided by supportive friends and family.

In cases where the Courts, Correctional Centres and Community Corrections have done good work with individual First Nation offenders, it is often undone when they return to their debilitating family, associates and community circumstances. Hence, they reoffend, more crime, community safety is compromised and we have high recidivism rates. (Hamburger, sub. 14, p. 20)

<sup>&</sup>lt;sup>164</sup> For example, see Civil Liberties Australia, sub. DR5, p.13; Hamburger, sub. 14, p. 16; Monash University, sub. 5, p. 5.



### Eligibility and breaches of orders

Stakeholders told the Commission that the technical conditions attached to orders can disproportionately affect Aboriginal and Torres strait islander people by limiting eligibility for bail and parole or increasing the likelihood of a breach of orders.

In Queensland, Aboriginal and Torres Strait Island people are more likely to be imprisoned for breach of bail offences and domestic violence orders than non-Indigenous people (DJAG unpublished data).

#### Bail

Of offenders born in 1985, 17.5 per cent of Indigenous offenders have been convicted of a breach of bail offence, compared to just 3.6 per cent of non-Indigenous offenders. Of all offenders who had received a prison sentence, 25.6 per cent of Indigenous offenders had been sentenced to prison for breach of bail at least once, compared to 19 per cent of non-Indigenous offenders (DJAG, unpublished data).

Eligibility for bail may be impacted by factors such as previous criminal history, accommodation arrangements, drug or alcohol problems, and employment, all of which can disproportionately disadvantage Aboriginal and Torres strait islander people.

When bail is granted, Indigenous people may be more susceptible to breaches of standard bail conditions, such as curfews, place of residence and reporting requirements (that is, technical breaches). This may be due to cultural obligations or challenges arising from disadvantage such as disability. For example, participation in Sorry Business following the death of a family member may prevent an Aboriginal and Torres Strait Islander person from complying with bail conditions including curfews and court appearances.

Sanderson et al. (2011, pp. 2–3) reported that bail conditions were problematic for many:

Several interviewees also maintained that compliance with bail conditions was often difficult for Indigenous people because of their inability to comply with "standard" bail conditions (e.g. curfews, residence restrictions, reporting requirements and alcohol bans). Failure to comply with these conditions along with the stringent policing of minor breaches in some locations increased the risk of custodial remand for Indigenous defendants, with court delays then contributing to the length of time defendants remained in remand.

### Parole

Of Indigenous people born in in 1985 who have been to prison, 48.4 per cent have returned to prison at least once because of a breach of parole, compared to 29.7 per cent on non-Indigenous people of the same cohort (QPC analysis of QCS unpublished data).

If you looked at the breach of parole and the return to prison and the cost of doing that it's quite phenomenal. If you can break that and get people to spend a little more time working their parole within community that's a great investment. (Glasgow, Townsville public hearing, p. 52)

Like bail conditions, parole conditions can be challenging for prisoners, affecting both eligibility and compliance. Accommodation requirements can be particularly limiting for Indigenous parole applicants (ATSILS, sub. 35, p. 9). The Commission was told of individuals who were released from prison in Cairns with little or no ability to make their way back to their communities in Cape York. These arrangements 'set individuals up for failure' and increase the likelihood of reoffending or breaching parole.



In his review of the Queensland parole system, Sofronoff noted the challenges faced by Indigenous prisoners returning to community on parole:

The requirements of successful parole for this group simply cannot be met by the application of a general system designed for people in completely different circumstances. The communities to which they will return, whether on parole or upon discharge, are not at all like the communities to which other prisoners will return. The challenges they will face are entirely different. Treatments and courses must address the specific risks and stresses that these prisoners face. (Sofronoff 2016, p. 9).

#### Domestic violence orders

Legislative changes and inflexible application of domestic violence orders and breaches in remote Indigenous communities result in disproportionate rates of Indigenous incarceration (Glasgow, Townsville public hearing, p. 48; FRC, sub. 23, p. 2). Without adequate consideration of an individual's circumstances and the living conditions within communities, technical breaches of domestic violence orders may be more probable and result in imprisonment. This issue was also raised by the Anti Discrimination Commission Queensland (2019, p. 42) in respect of Aboriginal and Torres Strait Islander women.

In 2013–14, 34 per cent of defendants facing criminal charges for contravening a domestic violence order in Queensland identified as Indigenous. Although the proportion of defendants found guilty did not differ significantly for Indigenous and non-Indigenous offenders, a greater proportion of Indigenous defendants received a custodial order (43 per cent), compared with all defendants (27 per cent) (Douglas & Fitzgerald 2018, cited in AIHW 2019b, p. 111).

Carrington and Hogg (sub. 3, p. 5) also noted that changes to apprehended violence orders may be leading to more offenders being refused bail. As domestic violence rates are higher among Aboriginal and Torres strait islander people (AIHW 2019b, p. 106), any such changes leading to greater refusal of bail may impact Indigenous offenders to a greater extent. Consideration of these issues should form part of the government's evaluation of its domestic and family violence strategy discussed in Chapter 11.

### Policing of particular criminal offences

The Commission heard from many stakeholders that some offences disproportionately impact Indigenous people and contribute to their criminalisation. These include offences such as public order (or nuisance) offences, traffic offences and breaches of alcohol restrictions.

### Public order offences

Public order offences capture a broad range of offending behaviour. In practice, the vast majority of public order offences in Queensland relate to offensive behaviour.

For Indigenous prisoners in Queensland, public order offences make up a greater proportion (3.9 per cent) of all offences to which a prison sentence was attached, compared to non-Indigenous prisoners (1.2 per cent) (DJAG unpublished data).

ATSILS (sub. 35, pp. 3–4) noted that the misuse and overuse of public nuisance offences leads to short periods of imprisonment for repeat offenders. ATSILS argued that imprisonment should not be a sentencing option for such offences and should instead be a summary offence. This issue is discussed in Chapter 12.



A 2006 study considering offensive behaviour offences in Queensland found public nuisance offences acted as a 'gateway offence', whereby further charges were ultimately laid (Walsh 2006, p. 14). The study also found that at that time, Indigenous people were significantly overrepresented among public nuisance prosecutions, owing perhaps in part to their greater tendency to occupy public spaces, but more so to 'structural racism', whereby Indigenous people were specifically targeted for public nuisance offences (Walsh 2006, p. 19). Cognitive, behavioural and psychological impairment and alcohol consumption were also identified risk factors.

### Driving offences

Stakeholders in remote communities considered that Aboriginal and Torres strait islander people may be at greater risk of being convicted for driving without a licence or driving an unregistered vehicle. As the Australian Law Reform Commission (2018, p. 413) noted, some Indigenous people face obstacles to obtaining a driver licence, including access to a registered vehicle, availability of licensed drivers to supervise learner drivers, and difficulties obtaining documentation for identification purposes. At the same time, transport options in remote areas are extremely limited.

Although traffic offences account for around 20 per cent of all Indigenous offending, they only make up a very small proportion of crimes for which Indigenous people are imprisoned (around 1.5 per cent) (DJAG unpublished data).

### Alcohol Management Plans

As Alcohol Management Plans (Box 21.2) are only in place in Indigenous communities, the risk of a potential breach is much greater for Aboriginal and Torres strait islander people. Between their introduction in 2002 and 30 June 2017, 8,456 people were convicted for breaches of alcohol carriage limits (DATSIP 2018, p. 6).

A 2013 review of AMPs (Queensland Treasury and Trade 2013) found almost all individuals convicted of a breach of AMPs were Indigenous (97 per cent). However, the review also found that most people convicted of an AMP breach (85 per cent) also had a conviction recorded for another type of offence during the 10-year study period. It could be contended that the 15 per cent (860 offenders) who did not obtain a conviction for another offence type obtained a criminal history solely due to a breach of AMP. However, it should be noted that 177 of these offenders had multiple convictions for AMP breaches. Further, there is insufficient data to demonstrate whether the rise in AMP breaches was at all offset by reductions in other crime types resulting from alcohol restrictions.



### Box 21.2 Alcohol Management Plans

Alcohol Management Plans (AMPs) were introduced from 2002 across 19 discrete communities to address alcohol-related violence, particularly against women and children (DATSIP 2019a). The AMPs impose alcohol restrictions (either outright bans or limited carriage limits) within restricted areas. The introduction of AMPs followed requests in some communities for restrictions to be imposed on the sale of alcohol.

Support for AMPs is mixed and it appears they have had both intended and unintended consequences.

Survey results from 10 communities (Clough et al. 2017) revealed only slim majorities agreed that under AMPs violence had reduced, community was a better place to live and children were safer. A larger majority agreed that school attendance had improved, and awareness of alcohol's harms had increased. There was generally stronger agreement about the unfavourable impacts of AMPS. That is, alcohol availability had not reduced, drinking had not reduced, cannabis use had increased, binge drinking had increased, discrimination increased, and fines and convictions had increased.

Stakeholders responses about AMPs varied between communities. Many acknowledged that AMPs had contributed to reduced violence but noted that alcohol was still accessible and a problem within communities. Stakeholders noted that AMPs were never intended to be a permanent solution to alcohol problems and their introduction was not supported by services to address addiction. Over time, individuals have found ways around the AMPs, including through 'sly grogging'.

Some stakeholders considered changes to individual AMP's are warranted, while others preferred to see strong restrictions remain in place. In Aurukun, a proposed trial of limited alcohol consumption was recently cancelled due to concerns raised by the community (Aurukun Shire Council 2019).

The Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP) undertook to review the AMPs in 2012. In July 2019, DATSIP announced that this review was now complete. At the time of writing, the independent review is yet to be publicly released, however the government has reported that the review found AMPs have been effective in ensuring community safety, however positive impacts had been undermined by sly-grogging and homebrewing (DATSIP 2019b).

The government has announced it will work with communities to deliver tailored strategies for each community which will include:

- co-designing community-specific safety plans that emphasise shared accountability
- building community capacity to actively manage alcohol
- continuing to implement targeted strategies to reduce illicit alcohol
- ensuring effective, coordinated and well targeted service delivery through targeted investment.

### 21.6 Why have problems persisted?

Despite concerted effort to address Indigenous disadvantage, little progress has been made to 'close the gap' between Indigenous and non-Indigenous Australians. This is evidenced in the 2019 Closing the Gap Report (PMC 2019), which showed only two of the seven targets to improve outcomes for Indigenous Australians were on track to be met. According to the report, Queensland is not on track to meet any of the targets.

The Commission's 2017 inquiry into service delivery in remote and discrete Aboriginal and Torres Strait Islander communities gives insight as to why efforts to address Indigenous disadvantage have not produced desired



results. The Commission found that communities that demonstrated better socioeconomic outcomes through various indicators such as education and unemployment were supported by governance arrangements that afforded them greater autonomy (QPC 2017, p. 70). The Commission found this was also consistent with international evidence (Box 21.3).

### Box 21.3 What works—governance in Indigenous communities

The evidence about what works in service delivery in remote Indigenous settings in Australia is scant. However, the evidence that is available suggests that the active involvement of Indigenous residents is a crucial condition for success, particularly for those services attempting to address the underlying causes of dysfunction in communities (Hunt 2016).

More robust evidence is available from overseas, particularly from research into Indian reservations in the US and Canada. This research shows that:

- Community control of primary health care is associated with improved health outcomes—the longer primary health care is in community control, the larger the effect on outcomes (Lavoie et al. 2010).
- External controls imposed on communities stunt long-run income growth—tribal sovereignty and economic growth tend to co-align (Frye & Parker 2016).
- Research conducted in British Columbia demonstrated that those communities that had achieved a
  measure of self-government—that is, those which had exercised land rights, promoted women into
  positions of leadership, preserved culture and worked to gain control over their civic lives (health,
  policing, education and child-welfare services)—had very low rates of suicide compared to those
  communities that did not (Lalonde & Chandler 2008).
- A significant body of international evidence suggests that self-determination and strong governance structures are linked to better outcomes in Indigenous communities:

It is striking that the measurable progress achieved by First Nations is not a result of government programs. It comes from self-determination: taking control of their own affairs and making the most out of their assets. The most effective government intervention has been legislation to remove roadblocks and create opportunities that First Nations can exploit under their own initiative. (*Flanagan 2016, p. ii*)

• The Harvard Project on American Indian Economic Development examined social and economic development on American Indian reservations to identify why some American Indian nations are more economically successful than others. They found that the best predictors of economic success were not those factors that are classically thought of as "economic", such as education, natural resource endowments, location or access to capital. While these had value, their contributions to economic development depend on a prior set of largely political factors—practical self-rule; capable governing institutions; and culturally appropriate governance (Cornell & Kalt 2003).

When Native nations make their own decisions about what development approaches to take, they consistently out-perform external decision makers—on matters as diverse as governmental form, natural resource management, economic development, health care and social service provision. (*HPAIED 2015*)

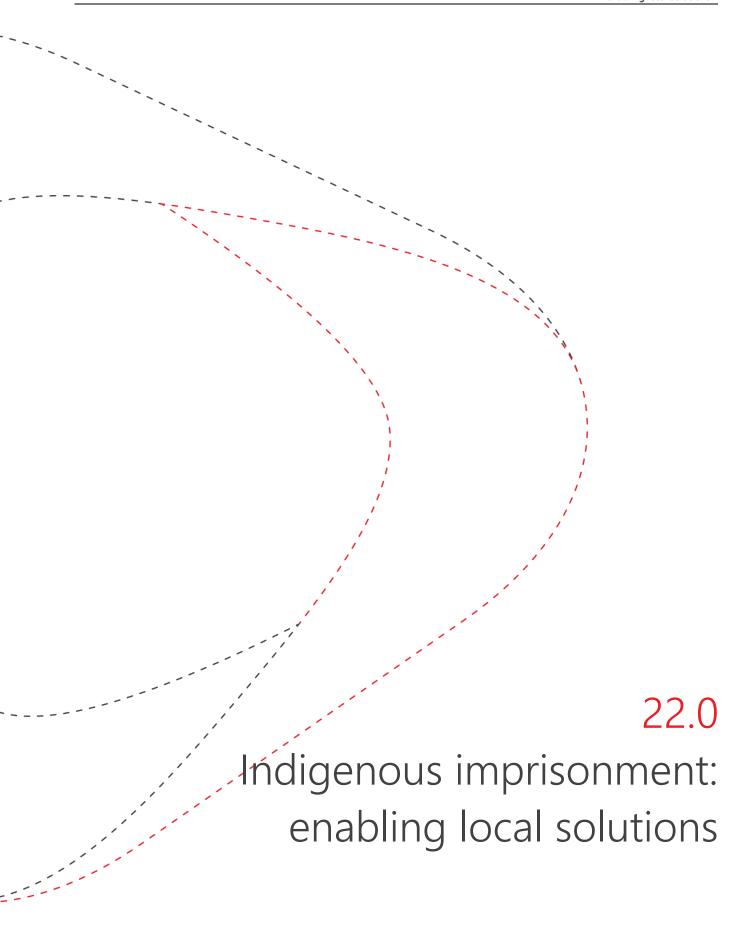


The inquiry identified that the key was to reduce Indigenous communities' dependence on centrally managed service delivery and to enable Aboriginal and Torres strait islander people to take increasing responsibility for outcomes in their communities. This conclusion was supported by stakeholders to this inquiry:

[The single most important thing that Queensland can do to reduce the over-representation of Aboriginal and Torres Strait Islander young people in the criminal justice system is] [I]isten to Aboriginal and Torres Strait Islander families and communities, and give them the authority and resources to take the action they advise needs to be taken. (Youth Advocacy Centre sub. 34, p. 20)

The centralised top-down approach to policymaking in the criminal justice system means decisions have continued to be made in an environment removed from the many individuals and communities they impact. The result has been a range of unintended consequences and a limited impact on rising incarceration. Mechanisms for change are explored in the next chapter.







This chapter identifies the reforms needed to allow Aboriginal and Torres strait islander people to develop the solutions that will help address high incarceration rates in their communities.

### Key points

- Despite efforts from government and service providers, Indigenous incarceration rates continue to rise. There are 80 per cent more Aboriginal and Torres strait islander people in prison today than there were ten years ago, and an Indigenous Queensland male born today faces almost a 30 per cent chance of being imprisoned by the age of 25.
- High imprisonment rates are reinforcing dysfunction and disempowerment, perpetuating the cycle of offending and imprisonment. The longer high incarceration rates persist, the more entrenched the norms that cause offending will become, and the more difficult and expensive they will be to address.
- The main driver of Indigenous incarceration is exposure to risk factors that are exacerbated by entrenched social and economic disadvantage.
- There are no simple service delivery changes that will alter existing outcomes; a fundamental change in approach is required. This approach should aim to transfer accountability and decision-making to local communities wherever this can be achieved.
- Rather than directing service delivery, government should seek to set outcomes and accountabilities through formal justice agreements with communities. These agreements should include:
  - the outcomes to be achieved and the resourcing that will be transferred to communities to commission services to reduce offending and imprisonment
  - the nature and delivery of the government services that contribute to reducing offending and imprisonment, such as police actions and prisoner reintegration services
  - opportunities for a local authority to be established, for example through the operation of community-based residential facilities
  - incentives for the achievement of milestones or outcomes
  - rigorous monitoring and evaluation, including agreed reporting arrangements.
- Given its operation across the criminal justice system, the Justice Reform Office is placed well to negotiate justice agreements with Indigenous communities.
- For Indigenous communities outside remote and discrete areas, there are opportunities to progressively support similar arrangements, to encourage and foster the establishment of local Indigenous capability to participate in the negotiation of agreements.
- Public reporting against Indigenous justice targets would focus reform efforts and strengthen accountability.



### 22.1 An urgent need for reform

### Indigenous communities are caught in a cycle of entrenched disadvantage

Despite enormous effort, Aboriginal and Torres Strait Islander incarceration rates continue to rise. Currently, Indigenous incarceration rates are more than 10 times the non-Indigenous rate, and the number of Aboriginal and Torres Strait Islander prisoners has risen more than 80 per cent over the last ten years.

Our analysis (see Chapter 6) shows that an Indigenous male has an almost 30 per cent chance of being imprisoned by the time he is 25 years old. In some communities, this probability is much higher.

In some communities, imprisonment is no longer a deterrent, and for some people it can have appeal. For some young people, prison has become a rite of passage. For others, life in community can be so difficult that time in prison can provide a form of respite and an opportunity to escape a dysfunctional family life; a place where they will be comparatively well-fed and accommodated, and where they can reunite with friends and relatives who are already imprisoned.

When prison is normalised to this extent, it acts to reinforce dysfunction and disempowerment, continuing the cycle of offending and imprisonment. As explained by Weatherburn (2014), crime and imprisonment are embedded in this vicious cycle:

Parents exposed to financial or personal stress, or who abuse drugs and/or alcohol are more likely to abuse or neglect their children ... Children who are neglected or abused are more likely to associate with delinquent peers ... and do poorly at school ... Poor school performance increases the risk of unemployment ... which in turn increases the risk of involvement in crime and imprisonment, both of which reduce the chances of legitimate employment ... while at the same time increasing the risk of drug and alcohol abuse... And so the process goes on, a vicious cycle of hopelessness and despair transmitted from one generation of Aboriginal people to the next. (pp. 86–87)

The longer high incarceration rates of Indigenous people persist the more entrenched the norms that cause offending will become, and the more difficult and expensive they will be to address. Hamburger (Brisbane public hearing, p. 54) described the urgency required:

If this was a natural disaster we would act with extreme urgency. For example, a cyclone, a flood or a bush fire and everything possible would be done to rectify the situation as quickly as possible. What we have here is a human, social and economic disaster of immense proportions that needs to be treated with the same sense of extreme urgency.

### Mechanisms are needed to enable the active involvement of Indigenous communities

It has been almost 30 years since the Royal Commission into Aboriginal Deaths in Custody (RCADIC 1991) identified the need to address the entrenched social and economic disadvantage that underpin the rate of Indigenous incarceration.

Multiple reviews in the intervening period have stressed the need to actively involve Indigenous people, to reduce Indigenous communities' dependence on centrally managed service delivery and to empower Aboriginal and Torres strait islander people to take increasing responsibility for outcomes in their communities.

These concepts are embodied in almost every government policy and strategy document. However, there are still few mechanisms in place for achieving this. Without these mechanisms, it is difficult to see how government can address the complex problems that Indigenous communities face.



### 22.2 The mechanisms to address Indigenous incarceration

The main driver of Indigenous overrepresentation in the criminal justice system is the high exposure of Aboriginal and Torres Strait Island peoples to the risk factors that lead to elevated levels of offending (discussed in Chapter 21). Many of these risk factors are the result of entrenched economic and social disadvantage that has its roots in historical dispossession and disempowerment (QPC 2017). These risk factors are exacerbated by the way that the criminal justice system interacts with Aboriginal and Torres strait islander people.

Despite enormous expenditures and effort, governments have made limited progress in addressing the drivers of high Indigenous incarceration rates. As discussed in the Commission's *Service Delivery in Remote and Discrete Indigenous Communities* report (QPC 2017), the evidence suggests this is because government has not been able to find ways to step away from centralised planning and policy-making that keeps Indigenous people from exerting control and responsibility over their own lives (Box 22.1).

## Box 22.1 Findings from the Commission's final report into service delivery in remote and discrete Indigenous communities

Around 40,000 Aboriginal and Torres Strait Islander people live in remote or very remote parts of the state. Outcomes for Aboriginal and Torres strait islander people living in these communities are significantly worse than in other parts of the state.

The Queensland Government spent around \$1.2 billion on service delivery in 2015–16. Services relating to community safety—including policing, courts and prisons—represented the highest expenditure item, accounting for 37 per cent of all expenditures. Despite this expenditure, rates of reported offences against the person in Queensland's discrete Indigenous communities were much higher than for Indigenous people in the rest of the state.

The report found that the service delivery system in remote and discrete communities was a large network of administrative silos, with overlaps in roles and responsibilities, unclear lines of accountability, and 'difficulties getting things done'. As a result, services were not as effective or efficient as they could be.

The Commission found that, in the discrete communities, the government essentially operates the market, with individual choice, markets, rewards and responsibilities having a limited role. This has created a created a system where there are:

- poor incentives for service providers, with little accountability to service users
- information gaps between policy makers, service providers and communities, which has resulted in services which do not match people's real needs
- little reward for effort, resulting in welfare dependency.

The Commission's assessment was that fundamental changes to the overarching governance, funding and policy architecture would be required to improve outcomes.

Source: QPC 2017.



Successive attempts to embed greater community involvement in service delivery—through consultation and codesign, strategy plans and joint commitments—have not been able to overcome the incentives inherent in the system. Even where gains have been made, the system tends to quickly revert whenever obstacles arise. As Moran (2016) noted, this has resulted in a policy cycle that:

- purges—reforms tend to discredit everything that come before it
- swings—policies come and go with regularity, often overreaching before being replaced
- mimics—if something is found to work it is replicated in areas without taking into account the factors that determine success
- contradicts—not only do programs and policies overlap, they often contradict each other.

Cape York Institute (sub. DR39) described its view of how government failure has manifested itself in relation to Indigenous policy:

[T]he current system of top-down government control and management of Indigenous communities and lives results in a level of frenetic chopping and changing, and policy pulsing, that comes with electoral cycles and as the political pendulum swings from left to right. Key decision makers ... are averse to taking risks and genuine innovations and are rarely in it long enough to learn from their decision-making ... Fresh-faced ministerial enthusiasms at the state and national level ensure that decision-making in Indigenous policy feels much like a merry-ground—replete with the same old traps and reinvented wheels. (p. 20)

Addressing these failures will require a fundamental shift in the way things are done. This approach needs to recognise the following:

- Issues are best dealt with at the most immediate or local level that is consistent with their resolution—this means that a central authority should have a subsidiary function, performing only those tasks that cannot be performed at a more local level (DPMC 2014).
- Decisions are best made when they are devolved to those most affected by them—where governments need to intervene, there needs to be a recognition that there is a high risk of government failure when there are information asymmetries (government does not know the needs, wants and priorities of individuals) and principal—agent problems (the government's actions do not align with the interests of the people they are supposed to serve).
- Any change should be sufficiently durable for the long term—addressing entrenched disadvantage and
  improving social norms cannot be achieved over political cycles and reforms must avoid the ad hoc decisions
  that have plagued Indigenous affairs.
- Accountabilities need to be established—both government and Indigenous communities need to be held accountable for outcomes.
- Communities need to be empowered—Aboriginal and Torres strait islander people need the capability and capacity to represent their own interests.



In its final report on service delivery in Indigenous communities (QPC 2017), the Commission set out a reform agenda for remote and discrete Aboriginal and Torres Strait Islander communities that was based on three reform elements:

- 1. Structural reforms that transfer accountability and decision-making to regions and communities
- 2. Service delivery reforms that focus more on the needs of individuals and communities, such as user-driven services and place-based models
- 3. Economic reforms that support community development, enable economic activity and make communities more sustainable.

In June 2018, the Queensland Government agreed to these reforms, including establishing the authorising bodies and an independent oversight body to oversee the implementation of reforms (Queensland Government 2018).

The evidence identified during this inquiry is consistent with, and confirms the case for, these reforms. Stakeholders reinforced the need to go beyond co-design and strategies to genuine structural and economic reform. Cape York Institute (Brisbane public hearing, p. 10) expressed the need to:

put in place a new architecture that actually gives people on the ground decision-making power about funding, about programs, about shifting investment from one area to another for their community so they can try different things, learn over the long term rather than having every government come in, change of personnel, change of people, change of approach ... and still just complete disconnect between where we want to get to and how funding hits the ground.

The Queensland Government is progressing a number of policy and service delivery changes for Aboriginal and Torres Strait Islander people. However, several stakeholders noted that it is not clear how these changes will result in the devolution of decision-making authority and economic reforms envisaged in the Commission's Indigenous service delivery report. For example, the Mayor of Torres Shire Council, noted:

There have been some initial consultations we were not even invited to... we are concerned (Thriving Communities) will be another layer of bureaucracy to take away some of our independence. "No one will answer: What is Thriving Communities and what is it supposed to achieve?" (Elks 2019)

Given the urgent need for reform, and to address stakeholder concerns, the Commission recommends the Queensland Government implement the structural and economic reforms as outlined in the Commission's Indigenous service delivery report as a priority.

As discussed in the Indigenous service delivery report, independent oversight is required to keep reforms on track over the long term and to ensure that the reforms are working to improve outcomes. To this end, the government should appoint an independent body to report on progress against each of the recommendations. A report on progress should be made public within 12 months.



### Remote and discrete Aboriginal and Torres Strait Islander communities

The remote and discrete Aboriginal and Torres Strait Islander communities are unique in that they have very high concentrations of Indigenous people; clear geographical boundaries; a high proportion of land that is under some form of Indigenous tenure<sup>165</sup>; and unique local government structures. They are, generally, disconnected from the rest of the state by large distances.

In the final report on service delivery in Indigenous communities, the Commission proposed structural reform to devolve decision-making to these remote and discrete Indigenous communities. The key features of these reforms are:

- the transfer of decision-making and accountability to communities through formal agreement-making processes based on community-determined priorities
- formal, community-owned authorising bodies to work with, and support communities to coordinate service delivery and funding
- independent oversight of reforms, including the monitoring of agreements and reporting on progress
- government pulling back from the direct commissioning of services to focus on outcomes.

This same decision-making architecture can be used to support devolved community decision-making on justice related issues. A first step would be for the community, with support from its authorising body, to develop community plans (Figure 22.1). These community plans could include:

- justice-related priorities
- identification of justice system issues
- identification of service gaps
- innovative solutions to these gaps and problems
- performance targets, measures and timeframes to monitor progress
- mechanisms to report back to the community on a periodic basis.

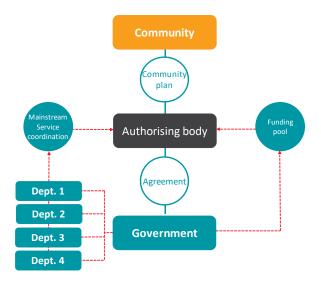
These community plans provide the basis for negotiation of an agreement through each community's authorising body. These agreements should underpin the objectives and outcomes desired by government, with communities enabled to determine the best way to deliver them.

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<sup>&</sup>lt;sup>165</sup> The level of control Aboriginal and Torres Strait Islander people are able to exert over this land may be extremely limited because of the complex relationship between native title and land tenure, planning restrictions on land use, and uncertainties over tenure.



Figure 22.1 Funding and resourcing arrangements to support the devolution of decision-making and accountability



To progress the transfer of decision-making and accountability to communities, the Queensland Government should negotiate local Indigenous justice agreements with those Indigenous communities that are ready to do so (discussed in section 22.3).

### Other Indigenous communities

The same basic principle of devolved decision-making could apply in other Indigenous communities.

It will be difficult to establish agreements in other Indigenous communities without some representative decision-making structure in place. However, across Queensland there is an evolving capacity amongst Indigenous communities to engage in negotiations with the government. For example, community justice groups already exist in many communities and are active in negotiating community-based responses with police and courts.

Where possible, the Queensland Government should seek to support similar arrangements in these communities, to encourage and foster the establishment of local Indigenous capacity, with the aim of finding solutions to reducing their high rates of offending and imprisonment.

Agreement-making processes have been used in other jurisdictions for both discrete and non-discrete Indigenous communities (Box 22.2). These experiences can provide guidance to agreement-making with Indigenous communities in Oueensland.



### Box 22.2 Recent examples of Indigenous agreement-making

### **Groote Archipelago, Northern Territory**

In November 2018, the Groote Island Local Decision Making Agreement was signed to provide a platform for transitioning service delivery areas to community control (NT Government 2018). The Agreement includes key performance indicators and will be independently evaluated after three years (Anindilyakwa Land Council & Northern Territory Government 2018).

In June 2019, the first implementation plans were signed for Housing, Economic Development and Law, Justice and Rehabilitation (NT Government 2019). The Law, Justice and Rehabilitation plan sets out how services will be delivered (for example, through a community residential rehabilitation centre as an alternative to imprisonment) and the level of funding contributions (from community and government).

#### Murdi Paaki Regional Assembly, New South Wales

The Murdi Paaki Regional Assembly (MPRA) is the regional Aboriginal governance body representing the interests of a number of Aboriginal and Torres Strait Islander communities across western New South Wales. Each community in the region has a community working party which determines community priorities, negotiates service delivery agreements with government agencies and elects a representative to the Regional Assembly.

In 2015, the NSW Government and Murdi Paaki entered into a formal accord, the Murdi Paaki Accord (NSW Government & MPRA 2015), to work together to achieve outcomes against five key priorities—housing, economic development, education, early childhood services and governance capacity and support.

The Accord also provides for a monitoring and evaluation group to oversee the agreement. The Accord states that outcomes and performance measures will be made public. The first stage of an evaluation study of the Regional Assembly and Accord found that it was working well and that government services are more likely to be held to account (Katz et al. 2018).

#### **Bourke Justice Reinvestment**

The Maranguka Justice Reinvestment Project in Bourke, New South Wales, undertook substantial capacity building beginning with the establishment of the Bourke Tribal Council. The Council established priority areas including early childhood, youth, the role of men and service sector reform.

Strategic working groups were established to reflect these priorities, and a cross-sector leadership group was formed from government, non-profits, philanthropy and the Bourke community (KPMG 2018).

Initiatives have included child development checks, family and youth support, school based support, a men's group focused on healing and connection to country, a learner driving program and police and community protocols around bail conditions (KPMG 2018).



### 22.3 Local Indigenous justice agreements

Where agreements can be negotiated and implemented, justice reforms affecting local Indigenous communities should be negotiated through agreements. Formal agreements are preferred to other arrangements (such as plans and strategies) because they can deliver:

- more robust processes of engagement whereby government formally commit to decision-making being devolved to local communities
- reciprocity, in which both the government and the community commit to making contributions to the achievement of shared objectives
- a high level of accountability and ownership, with performance measures being used to monitor achievement and compliance by the parties.

If reforms are to succeed, key lessons from past experience need to be heeded (Box 22.3). This means that any new agreement-making process needs to ensure that:

- parties have sufficient authority to enter into agreements, and those most affected by changes are likely to accept the agreed outcomes (Andrews et al. 2017)
- sufficient capacity is established in government and communities to allow effective decision and agreement-making (Aboriginal Affairs (NSW) 2014)
- good governance arrangements are established including those that effectively deal with local factionalism (Fisher et al. 2011)
- agreement-making happens at a pace that fit with community processes (Australian Government 2014)
- sufficient incentives exist for parties to enter into agreements and meet their agreed obligations (World Bank 2017)
- agreements are entered into in good faith, and reviewed periodically as lessons are learned (Rio Tinto 2016)
- effective dispute-resolution mechanisms exist (Fisher et al. 2011).

In addition to these conditions, any agreements on justice issues should have the following key features.

#### Agreements need to have a sufficiently local focus

State-level agreements, by themselves, are unlikely to achieve the desired outcomes on the ground.

Allison and Cunneen (2013, p. 3) suggest 'in order to achieve quality community engagement, an [agreement] must have relevance at regional and local levels'. The Crime and Misconduct Commission concluded that 'robust and carefully executed local-level planning is an unavoidable and necessary tool if crime and violence are to be reduced in Queensland's Indigenous communities' (2009, p. 332), and recommended that planning and development of strategies at the local level should be 'a priority placed ahead of any further high-level or overarching policy frameworks' (p. 334).

Local level agreements recognise that every community is different, with different history, problems, priorities, strengths, social structures and economic opportunities. Local-level agreements can identify local problems and solutions, and enable the local community to engage in the implementation of those solutions.



### Box 22.3 Lessons from past attempts at agreement-making

### The Queensland Aboriginal and Torres Strait Islander Justice Agreement (QIJA)

The QIJA was a statewide agreement, established in 2000, with an Aboriginal and Torres Strait Islander Advisory Board and the Queensland Government as co-signatories. The agreement aimed to reduce the rate of overrepresentation of Indigenous people in custody in Queensland by 50 per cent by 2011. It focused on changes to the criminal justice system, such as providing alternatives to court, diversion, legal assistance, and community input into sentencing (CMC 2009, p. 17). The QIJA was not renewed after it expired in 2011, having failed to reach its goal.

An assessment of the QIJA in 2011 concluded that it did not achieve its central aims because there was:

- an insufficient focus on preventing and reducing crime at the local level
- a lack of local focus on what works to reduce offending
- a failure to target effort
- fractured governance and accountability. The lessons learnt were that a future strategy should:
  - be accorded stable, high level governance arrangements across government
  - ensure ongoing involvement, consultation and negotiation with Indigenous people at the local level
  - include short-term and place-based targets and/or performance measures (Queensland Government 2011, pp. 13–20).

### **Community safety plans**

The Crime and Misconduct Commission (CMC) recommended in its report *Restoring order: crime* prevention, policing and local justice in Queensland's Indigenous communities that local level planning and the development of strategies be implemented at the local level to reduce crime and violence, and this should be a priority placed ahead of any further high level frameworks. The local level plans should be led by people living locally, with police taking a supporting role (CMC 2014, pp. 2–3). When the CMC visited communities three years later, progress on developing and implementing the local level plans had largely stalled.

The CMC identified the factors that had been impeding progress, which included:

- the planning environment was complex and confusing—many other reforms were being implemented
- community safety planning was not considered a high priority
- communities were suffering from 'planning fatigue'
- community leadership was variable
- consultation was geared to information gathering rather than engagement in decision-making.

Those community safety plans that had been developed suffered from:

- responsibility and accountability for strategy implementation being unclear
- performance measurement being poorly understood—the plans which had performance measures did not allow the determination of which strategies contributed to a reduction in an indicator
- monitoring and reporting progress not being a clear priority (CMC 2014, pp. 7–14).

### Agreements need to focus on reducing offending and imprisonment



The negotiation of agreements could consider many of the reforms in this report (as in earlier chapters and Chapter 23) for implementation at a local level. Items to possibly include in agreements are:

- prevention and early intervention activities (Chapter 10)
- establishing protocols for policing actions, such as the setting of bail conditions or the use of deferred prosecutions (Chapter 11)
- local involvement in the operation of the criminal justice system, such as through restorative justice processes (Chapter 14)
- local initiatives focused on rehabilitation through the operation of residential supervision facilities (Chapter 15).

#### Agreements need to be robust and durable

To be effective, local Indigenous justice agreements need to be long-lived agreements that set the framework for reform. Some elements of the agreements may take years before they have a discernible effect on offending and imprisonment rates, and reform will need to be sustained if they are to be successful. At the same time, agreements need to be flexible enough to allow adjustments for when problems arise or initiatives fail.

Agreements should set ambitious but attainable targets. Realistic intermediate targets can motivate action, allow progress to be monitored and demonstrate achievement.

To give initiatives a strong basis for success, they should be based on a clear and robust program logic that links activities with outputs, intermediate impacts and longer-term outcomes. The setting of priorities and risk assessments will help guide efforts in implementing agreements.

#### Agreements should include clear accountabilities with effective performance monitoring and evaluation

Clear lines of accountability in justice agreements will allow each party to easily determine who is accountable for the achievement of each initiative. This accountability will need to apply to government agencies, but to the community as well.

Performance monitoring will also help determine:

- whether initiatives are being properly implemented. This will require linking accountabilities to the measurement of inputs and outputs of individual initiatives
- the effectiveness of individual initiatives and the local Indigenous justice agreement overall. Indicators of justice-related outcomes should be released publicly for each individual community at least biannually, and the overall success of the local Indigenous justice agreement assessed on a periodic basis to ensure that it is effectively contributing to the achievement of its objective.

Justice agreements should be reciprocal in the sense that they should allow for both the government and the local community to be accountable for the achievement of milestones and outcomes. Ministerial endorsement will aid accountability.

The local Indigenous justice agreement could also include specified incentives, such as payments to communities on the achievement of key milestones or outcomes, and penalties, such as financial compensation by the government if the government fails to meet a service obligation.

The strongest incentives for the local community and the government to work to ensure the success of the justice agreements, however, will be through the reduction in offending and imprisonment. This will produce large welfare gains for the community and cost savings for the government justice sector and other agencies.



### 22.4 Governance arrangements to underpin agreement-making

### The community-owned authorising bodies should negotiate on behalf of communities

To support agreements, communities will require some kind of authorising body to provide the legal basis for entering into agreements with government.

The community-owned authorising bodies, as recommended in the Commission's final report on service delivery in remote and discrete Indigenous communities, would have the key function to support and empower community decision-making. Such a body's authority is derived through community participation and ownership, and government's delegated decision-making powers (QPC 2017).

Having a single entity negotiate across both service delivery generally and justice-related issues will remove duplication and allow more holistic solutions. The complex interactions between justice outcomes and other service delivery areas (such as mental health and education) mean that siloed approaches are likely to be counterproductive.

Outside of the discrete communities, similar authorising bodies will need to be established if communities wish to engage in agreement-making processes. These may be existing bodies (such as community justice groups or other Indigenous-owned bodies), or new ones.

Communities may need support to develop capacity to participate fully in negotiation and implementation of agreements.

### The Justice Reform Office is placed well to broker agreements

As discussed earlier in this report, the Justice Reform Office is an independent statutory body that is responsible to a suitably constituted board that includes representation from each of the core criminal justice agencies and independent members of the community.

The Justice Reform Office would be in a good position to broker the negotiation of local Indigenous justice agreements on behalf of governments, since it would:

- have formal representation from justice agencies
- be seen by communities as having some level of independence from government
- have a broad perspective that covers the criminal justice system—it will have a thorough understanding of the
  activities and capacities of the core justice agencies and can exploit any synergies among them to develop
  more innovative solutions to local problems
- be focused on the reform of the criminal justice system, having the motivation and understanding of justice reform that will allow it to support effective reform in local communities and to integrate it with the wider reform effort
- have expertise on justice issues which, when combined with local knowledge and involvement in program design and implementation, has the potential to deliver a new level of best practice
- be able to deliver a sustained commitment to the success of local Indigenous justice agreements, as it is intended to be long-lived and have a long-term focus on reform.

Just as capacity is required in communities, capacity may need to be developed in government to enable the negotiation of efficient and effective agreements with Aboriginal and Torres Strait Islander communities.



### Independent oversight is required

It is important for the success of the local Indigenous justice agreements that parties will be held to account for the terms of the agreement—that is, the parties to the agreement can have confidence that all will make their agreed contribution to the best of their ability. To ensure this happens, independent oversight is required.

The independent oversight body proposed by the Commission to support the structural reforms in the Commission's Indigenous service delivery report should oversee the implementation of the local Indigenous justice agreements and measure performance indicators. To support accountability, these performance indicators should be made public on a periodic basis.

### Existing funding can be reallocated to support new initiatives

The development of local initiatives could largely be funded through the reallocation of existing resources.

The Commission's Service Delivery in Remote and Discrete Indigenous Communities (2017) report found that reform of service delivery in these communities will deliver large savings that can be directed to activities that communities value more highly.

Weatherburn (2014) confirms the potential to better use existing funding for Indigenous services rather than inject new funds into reform:

[W]hen contemplating the amount governments spend on Indigenous Australians, it is important to bear in mind that lack of funding may not be the only or even the principal impediment to reducing the rate of Indigenous imprisonment. There is good reason to believe that the funds currently being spent on Indigenous services and programs are neither optimally allocated nor efficiently used. More specifically, spending on Indigenous programs and services appears to be characterised in many instances by: (a) waste, inefficiency and a lack of coordination in the development, implementation and administration of Indigenous programs and services; (b) a paucity of rigorous programs evaluations; and (c) the absence of any articulated strategy for tackling the problem of Indigenous over-representation in prison. (pp. 152–153)

It will be the job of government, the Justice Reform Office and communities with their representative bodies to identify how funding can be efficiently reallocated to better meet community needs.

There may, however, be circumstances where greater up-front investments would be expected to deliver future savings (such as interventions that would mitigate future imprisonment). These would need to be negotiated, along with suitable evaluation and monitoring arrangements to ensure outcomes are delivered. There are several options for funding these initiatives including:

- new funding from government, if a business case could be made. This could take the form of justice reinvestment (Chapter 10)
- private funding, possibly through an impact investment, such as a social benefit bond. Impact investment is investment, usually by private sector investors in organisations or programs, in which a beneficial social or environmental impact is sought alongside a financial return.



### 22.5 Decision-making on Indigenous issues at a state level

While a greater focus on local perspectives is likely to improve outcomes, many justice issues are determined centrally (such as through legislative changes). Many stakeholders told the inquiry that centrally determined changes to law and policy often fail to consider the impacts on Indigenous people.

[A] radical shift away [is required] from Indigenous issues being an 'after-thought', a targeted group or an additional consideration in youth justice service provision to instead Indigenous leadership and views being inherently intertwined in and central to the strategic planning, policy and service delivery of youth justice services. (yourtown sub. 15, p. 2)

The justice impact tests (recommended in Chapter 9) will assist government to better consider how policy changes will affect Indigenous communities. Given the size and problems associated with Indigenous incarceration, it is recommended that an explicit requirement be included to assess the impact of any proposal on Indigenous people and communities, including any unintended consequences. This requirement should include regional consultation and publication of findings.

Targets help to clarify the objectives of policy, support motivation, set a benchmark for performance measurement and strengthen accountability. Targets should be meaningful, with a timeframe; ambitious but achievable; and measurable on a frequent basis. Interim targets can help to track performance.

The Justice Reform Office is placed well to advise on and implement ambitious targets and performance indicators across the criminal justice system, including adult Indigenous imprisonment rates.

The Queensland Government, through the Justice Reform Office, should publicly release:

- an annual report on progress in meeting state Indigenous justice targets, including *Closing the Gap* justice targets
- regular independent assessment of progress in implementing Indigenous justice reforms
- results of evaluations, where available, of the impact of state and local reforms on Indigenous offending and imprisonment
- justice-related statistics at a suitable level of regional disaggregation, to monitor local progress and support local Indigenous justice agreements (reported at least biannually)
- a reform implementation plan for the coming year.

In December 2008, the Council of Australian Governments (COAG) pledged to address Indigenous disadvantage in key areas and set targets across a range of education and employment outcomes.

It is envisaged that the next iteration of the *Closing the Gap* will include additional measures, among which will be new justice-related targets. Incorporating justice targets in *Closing the Gap* will raise the profile of the Indigenous adult incarceration and youth detention issues, and the accountability of state governments, including Queensland, in meeting the targets.

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<sup>&</sup>lt;sup>166</sup> Draft justice targets include reducing the rate of Aboriginal and Torres Strait Islander young people in detention by 11–19 per cent and adults held in incarceration by at least 5 per cent by 2028.



### Recommendation 37

As a priority, the Queensland Government should implement the recommendations of the Commission's *Service delivery in Queensland's remote and discrete Indigenous communities* report.

Implementation should prioritise:

- structural reform to transfer decision-making and accountability for service delivery to remote and discrete communities
- economic and land tenure reform to address economic and social disadvantage that contributes to offending in these communities.

A suitable independent body should be authorised to report on progress against each of these recommendations. A report on progress should be made public within twelve months.

Where appropriate, the government should extend the reforms to other Indigenous communities, with a priority focus on those communities with high levels of offending or imprisonment.

### Recommendation 38

To progress the transfer of decision-making and accountability to communities, the Queensland Government should negotiate local Indigenous justice agreements with those Indigenous communities that are ready to do so.

These agreements should include:

- the outcomes to be achieved
- the resourcing that will be transferred to communities to commission services to reduce offending and imprisonment
- the nature and delivery of government-provided services, such as policing actions and prisoner reintegration services
- opportunities for local authority to be established, for example through the operation of residential supervision facilities
- incentives for the achievement of milestones or outcomes
- rigorous monitoring and evaluation, including agreed reporting arrangements.

The Justice Reform Office should be given responsibility for negotiating agreements with local Indigenous communities. The independent body should oversee implementation of agreements and report on progress and achievement of outcomes.

The government should progressively foster decision-making capacity and negotiate local justice agreements with other Indigenous communities with high offending and imprisonment rates

### Recommendation 39

To ensure that policy-makers are fully informed of all potential policy impacts, the Queensland Government should require that all legislative and policy changes are assessed against their impacts on Indigenous communities in remote and regional areas. This should form part of the justice impact test in Recommendation 4.



### Recommendation 40

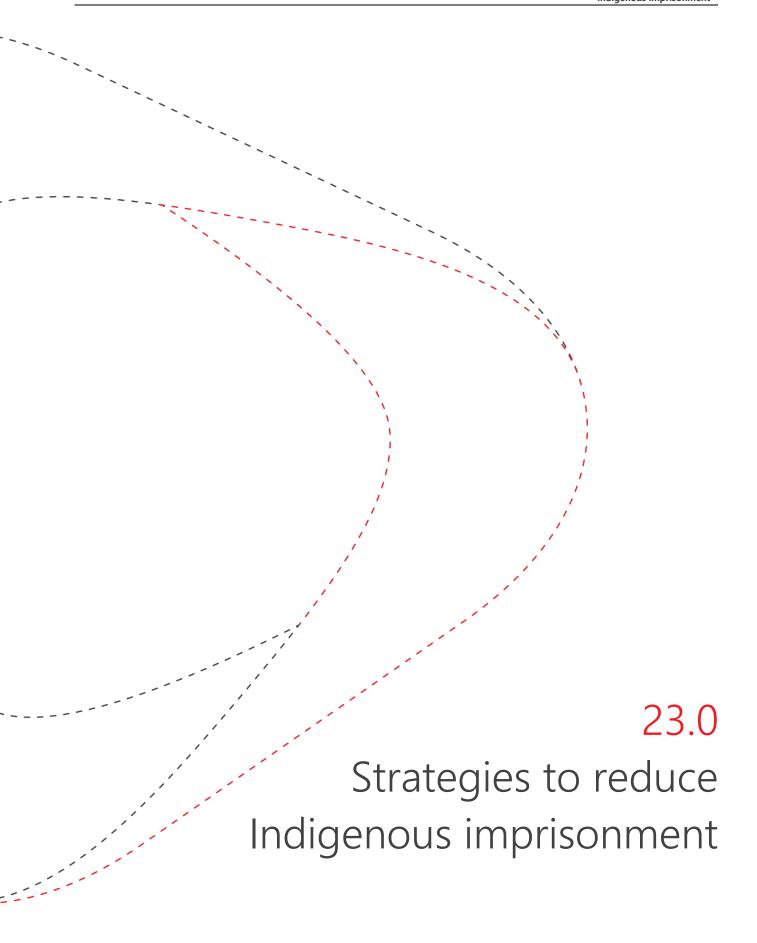
To improve accountability and inform policy development, the Queensland Government should provide:

- justice-related statistics at a suitable level of regional disaggregation, to monitor local progress and support local Indigenous justice agreements (reported at least biannually)
- an annual report on progress in meeting state Indigenous justice targets, including *Closing the Gap* justice targets
- regular independent assessment of progress in implementing Indigenous justice reforms
- results of evaluations, where available, of the impact of state and local reforms on Indigenous offending and imprisonment.











This chapter considers a range of specific actions that could be used to reduce Indigenous imprisonment, and how these actions fit with the reforms discussed in Chapter 22.

### Key points

- As discussed in Chapter 21, actions to reduce Indigenous imprisonment can be thought of on three fronts:
  - reducing Indigenous disadvantage, especially the risk factors that are associated with offending
  - improving rehabilitation and reintegration
  - developing better criminal justice processes.
- Reducing Indigenous disadvantage is likely to have the largest impact, but actions taken today may take generations before they affect imprisonment rates.
- It is broadly accepted that actions to address Indigenous imprisonment will be most effective when they are developed and implemented by Aboriginal and Torres Strait Islander communities themselves. As established in Chapter 22, formal agreements with Indigenous communities provide opportunities to enable the development of Indigenous-led solutions.
- While there are many ways to address Indigenous disadvantage, actions in remote and regional communities will need to be underpinned by:
  - economic and community development, and the creation and exploitation of job opportunities. The reform of land tenure should be a priority
  - management of alcohol abuse—alcohol management plans should be finalised as soon as possible, with future alcohol management incorporated into local Indigenous justice agreements
  - fostering of community norms that support positive behaviours, such as higher rates of school attendance and effective parenting.
- The corrections system has had little success in reducing Indigenous recidivism—80 per cent of Indigenous prisoners have previously been imprisoned. Improving the rehabilitation and reintegration of Indigenous prisoners requires a new approach.
- This new approach needs to include Indigenous-led solutions to address the rehabilitation and reintegration needs of Aboriginal and Torres strait islander people. This may require Indigenous communities to be active partners in the development, management and operation of community residential facilities that provide alternatives to prison.
- Better criminal justice approaches can be developed with Indigenous communities. This will require communities to be more actively involved in justice processes including through the development of local policing plans, the management of deferred prosecution agreements and victim restoration and restitution processes.
- Local justice agreements will give Indigenous communities an opportunity to work with courts, police and other government agencies to improve how the justice system interacts with Aboriginal and Torres Strait Island peoples.



### 23.1 Reforms to address Indigenous imprisonment

The main reason Indigenous people experience higher levels of incarceration than non-Indigenous people is that they are, on average, significantly more exposed to the risk factors that lead to elevated rates of offending (Chapter 21). These include high rates of unemployment, exposure to alcohol abuse and family dysfunction. Poor outcomes from rehabilitation and reintegration, and a criminal justice process that sometimes disadvantages Indigenous people are other causes for Indigenous overrepresentation in Queensland prisons.

These problems are best addressed when Aboriginal and Torres Strait Island peoples are actively involved in decision-making in the development and implementation of the solutions. These community-led solutions should be negotiated through formal agreements between Indigenous communities and government. Local Indigenous justice agreements (Chapter 22) are proposed as a mechanism to establish these formal agreements. Communities may also seek agreements with government agencies through other processes.

Through local agreements, Indigenous communities and government agencies can agree to partner in a number of ways, for example, to:

- establish protocols to improve the interaction between police and communities
- involve communities in the reintegration of offenders back into the community
- establish locally-based justice initiatives, such as restorative justice conferencing, a community justice group or a Remote Justices of the Peace (Magistrates Court) Program
- implement community-led initiatives to reduce alcohol abuse, including alcohol management plans
- facilitate local business initiatives to create job opportunities in the community.

The Commission has identified a range of actions that should be considered by communities and government to address the overrepresentation of Aboriginal and Torres strait islander people in the criminal justice system. The actions are not intended to be exhaustive—Indigenous communities are best placed to consider the most effective solutions to the problems they face.

### Actions to address the drivers of Indigenous imprisonment

Actions need to reflect the drivers of Indigenous imprisonment; that is, they need to address:

- Indigenous disadvantage, particularly the risk factors that lead to offending
- · rehabilitation and reintegration
- the criminal justice process.

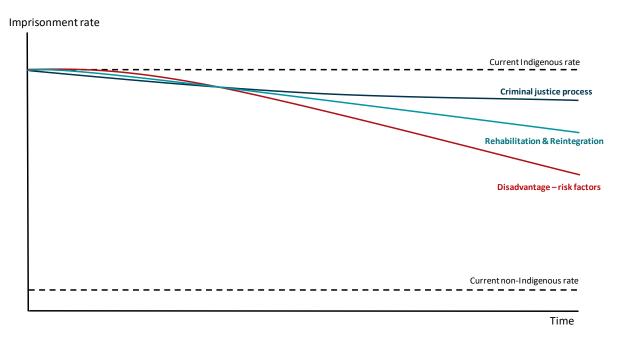
Addressing the underlying causes of Indigenous overrepresentation—that is, the exposure to risk factors identified in Chapter 21 that lead to offending—is likely to have the most impact in reducing Indigenous incarceration. However, many of the actions required to address these underlying causes are likely to take a long time before they have a discernible effect on incarceration rates. For example, an early childhood program may take a decade before it has a noticeable impact on youth offending, and almost two decades in the case of adult offending. Similarly, sustained local economic development that reduces Indigenous unemployment may take years.

Rehabilitation, reintegration and criminal justice issues may not be the major drivers of the overrepresentation of Aboriginal and Torres strait islander people in prisons. However, a focus on rehabilitation, reintegration and criminal justice issues is likely to have a more immediate effect, because it focuses on groups who are more immediately at risk of reoffending or being subject to justice system processes that may result in imprisonment.



The likely impacts from addressing each of the three drivers of Indigenous incarceration (disadvantage, rehabilitation and reintegration, and criminal justice processes) are shown in Figure 23.1. Addressing disadvantage might have the most impact, but reforms to the criminal justice process and improvements to rehabilitation and reintegration are likely to have more immediate effects. However, all three approaches will be necessary to 'close the gap' on Indigenous representation in Queensland prisons.<sup>167</sup>

Figure 23.1 Impacts of addressing the drivers of Indigenous imprisonment



Many of the reforms already discussed in this report will help to reduce the levels of Indigenous incarceration if implemented with sensitivity to Indigenous circumstances. These reforms can be supported through local agreements and used, where possible, to facilitate the transfer of responsibility and accountability to Aboriginal and Torres Strait Islander communities.

<sup>&</sup>lt;sup>167</sup> Figure 23.1 does not show the possible interactions among the three approaches. For example, the full benefits of improved rehabilitation and reintegration of Indigenous prisoners will not be able to be realised without significant reductions in Indigenous disadvantage.



# 23.2 Actions to address Indigenous disadvantage that leads to imprisonment

One of the basic objectives of reform must be to make life in the community more attractive than life in prison.

Making crime less attractive means giving people more to live for, through education, employment, participation in the community and in spiritual organisations, the creation of stable families, and physical safety. These are the basics of a good life in a modern society. (Institute of Public Affairs sub. 11, p. 164)

Prevention and early intervention strategies can help achieve this objective and, in particular, address the risk factors that lead to offending and imprisonment. The key risk factors (identified in Chapter 21) for Aboriginal and Torres Strait Island peoples are:

- low economic participation
- alcohol abuse
- poor school attendance and performance
- family problems, history of abuse
- health issues
- mental health disorders
- cognitive disability.

The protective factors that reduce the risk of offending are corollaries of these risk factors—employment, education, effective parenting, health and resilience, and positive influences from family, friends and work.

If Indigenous imprisonment is to be reduced, Aboriginal and Torres Strait Islander communities require the capacity to address these risk factors and build the protective factors. This can be developed by supporting Indigenous communities to identify the key issues in their communities and assisting them to develop prevention and early intervention strategies to tackle them.

Chapter 10 discussed targeted preventative and early intervention measures to address offending behaviours (Table 23.1). In that chapter we recommended justice reinvestment projects that support community-led prevention and early interventions. Given the levels of offending in many Indigenous communities, the initial focus should be to establish projects that aim to reduce Indigenous offending.

Table 23.1 Reforms that will address risk factors

Recommendation	Benefit for Indigenous people
Investments in community- led prevention and early intervention <sup>a</sup>	Given the high concentrations of disadvantage and offending in these communities, reforms will likely focus efforts in Indigenous communities.
	Focusing on addressing risk factors will reduce the onset and frequency of Indigenous offending (and reoffending) and subsequent incarceration.

a See Chapter 10.



There are a wide range of specific actions that could be taken to address risk factors that lead to offending and imprisonment. However, the focus here is on three key actions that should underpin any approach to prevention and early intervention in Indigenous communities:

- facilitate economic development
- manage alcohol abuse
- foster positive community norms.

These actions provide a foundation for other actions on prevention and early intervention. In the longer term, attempts to reduce Indigenous incarceration are likely to stall if there is no significant progress on these three actions.

### Facilitate economic development

The lack of economic opportunity, particularly in the discrete Indigenous communities, is a fundamental cause of community dysfunction and ongoing reliance on government support. Indigenous communities need the capacity to create the economic opportunities that lead to greater independence, self-respect and aspiration, as well as the private wealth and freedom to purchase the services to address the problems they face. Greater economic opportunity has also been linked with:

- better mental health (Sareen et al. 2011)
- reduced child abuse and neglect (Bywaters et al. 2016).

Higher incomes also support protective factors such as community cohesion, family support and personal resilience. It will directly reduce welfare dependency and support attempts to reduce alcohol abuse.

Facilitating economic opportunity requires government to move away from being a service provider to an enabler. This requires government getting the economic framework right. This framework needs to support individuals to take initiative and encourage businesses to invest in communities.

In the Commission's *Service delivery in remote and discrete Indigenous communities* report (the Service Delivery report) (QPC 2017), a range of factors are identified that need to be resolved in order to generate greater economic development in remote and discrete communities. These factors include finding ways to:

- incentivise individuals to benefit from work and volunteering (where the policy levers are primarily controlled by the Australian Government)
- ensure that the right infrastructure is in place to allow investments to occur
- allow communities to better use their land to support economic development
- generate community economic and market initiatives
- maximise job opportunities for community members.

There has been significant progress on these issues over the past few decades, including in resolving land tenure and improving infrastructure (such as road access) in Indigenous communities. However, there remains more work to be done. The same issues are relevant in many other Indigenous communities throughout the state.



#### Land tenure reform

If Indigenous communities are to secure a self-determined future, they will need to take advantage of the opportunities they have available. This includes being able to utilise land assets.

Although there has been significant progress in improving land administration in the discrete communities (such as resolving land tenure boundary issues in the discrete communities), history has left a patchwork of tenure arrangements and resource rights, particularly in the Far North. This has constrained economic development and home ownership (QPC 2017).

Key issues include:

- Separate native title interests co-exist with land tenure arrangements and may be held by different organisations. The resolution of competing interests is critical to enable land use.
- Indigenous councils remain trustees over township land in the discrete communities, which may cause conflicts of interest and constrain economic activity.
- While capacity is emerging amongst Indigenous land holding bodies, they often lack the capability to effectively negotiate economic and/or community development opportunities.
- Statutory planning schemes that prioritise conservation values over development prospects can hinder communities in taking advantage of economic and community development opportunities.

In our Service Delivery report (QPC 2017), we recommended the development of a land tenure reform plan to set out a desired land administration system, with an associated roadmap for reform and timeframes for completion. The Commission is not aware of progress on this reform since the 2017 report.

Given the importance of land tenure as a source of economic and social development opportunity, the development of a land tenure reform plan remains an outstanding task for government.

#### **Economic and market initiatives**

The most sustainable form of economic growth in Indigenous communities will be that generated by local Aboriginal and Torres Strait Island peoples through business initiatives they develop and implement.

In the discrete Indigenous communities, it is currently difficult to launch new business initiatives. Because of high unemployment and welfare dependency, incomes are low and thus demand for new goods and services is also low. These difficulties are exacerbated by an approach of dependency, which pervades the way governments of all levels operate in the communities (QPC 2017).

There are ways for government to assist. One way is for government to be willing to vacate the field when a viable locally generated enterprise arises that could replace it. This could relate to service provision—that is, if a local Indigenous business puts forward a strong business case for providing a service currently provided by government, the government should consider ways of transitioning away from providing the service.

For example, the Queensland Government currently owns retail stores on Cape York and the Torres Strait—as discussed in QPC 2017, these could be transitioned to local Indigenous businesses. Similarly, there are a range of government funded services operating in many communities which could be run by Indigenous-owned enterprises.

There is likely to be a good case for transitional arrangements to support the growth of Indigenous enterprises in regional and remote areas. This may mean that governments need to provide some transitional supports where these will assist enterprises to overcome start-up issues and be willing to accept failure where it is part of a process of learning.

Government also needs to ensure that it removes regulatory impediments to growth—these may include unnecessary administrative burdens and environmental and planning barriers.



### **Employment and procurement opportunities**

Many jobs exist in and around Indigenous communities, but ways need to be found to get more local Indigenous people into these jobs. During consultations, reasons were given why these jobs may not be provided to locals:

- Locals lack the required education and training.<sup>168</sup>
- Service contracts are awarded to external providers who tend to use their own labour.
- The demand for a service in one community may not justify employing a local person, but rather a person across several communities.
- Job descriptions are not specified appropriately; they attract external people and are awarded to them.
- Local jobs are perceived by some external people to be desirable for career advancement purposes.
- Locals are not sufficiently motivated to apply for the jobs that are available, possibly due to welfare dependence.
- Criminal records rule out previous offenders from some jobs.
- Discrimination against local Indigenous people.

There are no easy way to resolve these issues. For private sector opportunities, government may be able to facilitate or encourage local employment, however care needs to be taken that conditions do not impede genuine economic opportunities (for example by licencing or contracts conditional on the use of local labour that impedes efficiency and competitiveness, undermining future growth or viability).

The Queensland Government can support local community-led initiatives through its public service employment policies. The government has two policies in place that could assist in reducing Indigenous unemployment:

- Moving Ahead—a whole-of-government aggregate 3 per cent target on the direct employment of Aboriginal and Torres Strait Islander staff by 2022 (DATSIP 2016)
- Queensland Indigenous (Aboriginal and Torres Strait) Procurement Policy (QIPP)—a whole-of-government framework to increase procurement with Indigenous businesses to be 3 per cent of the value of government procurement contracts by 2022 (DATSIP 2018b).

These initiatives should be monitored and evaluated to gauge whether they are leading to meaningful public sector employment being generated in areas of high Indigenous unemployment.

Government can also seek to address the supply side of the labour market. These might include:

- encouraging mobility to take up job opportunities outside of the community—this might need to include portability of housing entitlements, changing eligibility requirements for social assistance or providing incentive payments
- improving labour matching
- building social capital, including by changing social norms, building individual capacity and skills, and addressing basic work readiness
- removing unnecessary regulatory barriers (or assisting locals overcome them), such as uniform national standards (such as labour market or credential requirements) that do not provide benefits in communities.

<sup>&</sup>lt;sup>168</sup> Sometimes this is due to increasing professionalisation of positions, which raises qualification requirements, as opposed to skill requirements.



## Manage alcohol abuse

In consultations with stakeholders in Indigenous communities, the issue of alcohol restrictions were raised repeatedly. There are divergent views within and between communities about the form of restrictions that should be applied to alcohol purchase, possession and consumption.

As for other reforms, Aboriginal and Torres Strait Island peoples are best placed to determine how alcohol consumption is best managed in their community.

Currently, the main tool to control alcohol consumption in discrete Indigenous communities is alcohol management plans (AMPs). These AMPs are applied differently in communities, with some communities imposing full prohibition, while others allow some carriage limits.

Policy over the purchase, possession and consumption of alcohol has generated a wide range of intended and unintended consequences, including:

- a reduction in hospitalisations from assault in the five years following the restrictions
- an increase in the rate of criminal convictions (for AMP offences) and accordingly, increased contact with the justice system and risks to employment
- creation of illegal trade in sly grog, with high prices and covert consumption further encouraging binge drinking (high alcohol content and swift consumption reduce the risk of detection)
- illicit trade in alcohol combined with driving, increasing the risk of serious road incidents
- increases in the consumption of illegal substitute drugs, such as ice, marijuana and kava
- increases in the production of homebrew
- migration of problem drinkers from dry to wet communities
- negative effects on tourism (QPC 2017, pp. 356-357).

These mixed outcomes are reflected in community views on the efficacy of alcohol management plans (see Chapter 21).

In July 2019, the Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP) announced that its review of AMPs (commenced in 2012) had been completed (Trad 2019). It was also announced that the Queensland Government would be working directly with individual communities and local leaders to tailor AMPs to local needs.

Given the importance of alcohol management as an issue in these communities, the Queensland Government needs to develop a new approach to alcohol management that includes a focus on:

- effective and efficient ways to manage the consumption of alcohol in discrete Indigenous communities
- devolving control of alcohol management to communities.

To ensure that communities and other stakeholders are well informed, the government should publicly release the review of the overall effectiveness of alcohol management plans.



Communities should be able to consider the use of other mechanisms to help manage alcohol abuse. To date, there has been a strong reliance on a single policy instrument—regulation of alcohol through AMPs. More consideration could be given to other levers to support management of alcohol consumption:

- demand management through greater education, rehabilitation and treatment, possibly combined with the establishment of stronger community norms that emphasise responsible drinking or abstinence from alcohol
- community-managed permit systems, in which permits are issued to buy or consume takeaway alcohol. Communities design the rules for determining the basis on which permits to drink are allocated and the basis on which people lose their permits. An evaluation of such permit systems on Groote Eylandt and Bickerton Island in the Northern Territory found that their introduction led to community functioning markedly improving, violence decreasing and engagement in the workforce improving (Northern Territory Government 2014)
- alcohol-monitoring ankle bracelets to monitor and record alcohol consumption remotely of convicted offenders of alcohol laws or voluntarily by people as a form of diversion from more severe sanctions.

Management by the community of strategies to address alcohol abuse needs to be accompanied with periodic and timely information so that communities can monitor and respond to issues as they develop.

The revision of AMPs and other initiatives to manage alcohol consumption should preferably be undertaken within the context of the local Indigenous justice agreements.

#### Foster positive community norms

Community norms (that is, the set of behaviours expected in a community) have an important role to play in Indigenous imprisonment. For example, the Families Responsibilities Commission (sub. 23, p. 1) noted that prison is frequently a 'rite of passage' for young Indigenous males. Further, when imprisonment rates are high, as is the case in some communities, the deterrent effect of prison can dissipate.

Fostering community norms can also help address risk factors associated with offending and imprisonment, such as unemployment and substance abuse discussed earlier. Community norms that value employment, education and business entrepreneurship will help generate economic development and reduce welfare dependence. Community norms that value moderation in alcohol consumption will help reduce alcohol abuse. Community norms that value strong parenting will help build the next generation of Indigenous leaders.

It is necessarily the role of the communities themselves to be deeply involved in the establishment of positive community norms. However, in many communities these norms have broken down (CMC 2009; QPC 2017, FRC sub. 23), and communities need the tools to re-establish positive norms. These tools are likely to need to include both 'carrot' and 'stick' approaches to reward good behaviours and punish the bad, as well as the tools for supporting individuals to change.

The Family Responsibilities Commission (FRC), established in 2008 as part of the Cape York Welfare Reforms, was an attempt to empower local communities to establish positive social norms (see Box 23.1). The FRC's approach is to facilitate the rebuilding of community social norms and to encourage behavioural change through attaching reciprocity and communal obligations to welfare and other government payments (Family Responsibilities Commission n.d.).

Currently, it is unclear whether the Australian and Queensland Government intends to continue support for the FRC (or the boarder Cape York Welfare reforms). Nevertheless, the principles at the heart of this approach (equipping communities with tools to establish positive social norms) should continue to be supported and be made available to communities where they are required to support the growth of positive norms.

The broader agreement-making process will also provide mechanisms for communities to establish strong, positive social norms. This might occur through agreements on policing and schooling practices, the establishment of local initiatives to encourage positive behaviours (such as rewards for attending school) and the establishment of greater local authority on justice issues.



#### Box 23.1 Family Responsibilities Commission

The Family Responsibilities Commission (FRC) is a statutory body, whose purpose is to support welfare reform community members restore socially responsible standards of behaviour, local authority and well-being. Commission members are appointed by the government, with local commissioners being Elders and respected community members.

The objectives of the FRC include:

- to support the restoration of socially responsible standards of behaviour and local authority in welfare reform communities
- to help people in welfare reform communities to resume primary responsibility for the well-being of their communities and the individuals and families of their communities.

The FRC operates in the communities of Aurukun, Coen, Doomadgee, Hope Vale and Mossman Gorge. The FRC may conference a community member who is a welfare recipient living in a welfare reform community if the person, or their partner, is in receipt of certain welfare payments.

The FRC holds conferences to encourage clients, individuals and families to engage in socially responsible standards of behaviour. The FRC may receive notices from government agencies if a community member is not meeting pre-determined obligations in relation to school attendance, an allegation of harm or risk to a child, conviction of an offence, a domestic violence protection order, or breach of their social housing tenancy agreement.

During the conferencing process, the FRC Commissioners may refer the client to support services. At the conclusion of the conference, Commissioners may decide that no further action is necessary, reschedule the conference, issue the client with a warning, encourage the client to enter into a Family Responsibilities Agreement, direct the client to relevant community support services or place the client on a Conditional Income Management order. Clients who enter into an agreement, or who are ordered to attend community support services are monitored by the Commission.

Source: Family Responsibilities Commission n.d.



## 23.3 Actions to improve rehabilition and reintegration

Rehabilitation and reintegration strategies in the corrections system focus on correcting the behaviour of offenders to reduce the probability of reoffending and the severity of any future offending.

Indigenous prisoners have significantly higher recidivism rates than non-Indigenous prisoners—80 per cent of Indigenous prisoners have previously been imprisoned, compared to 56 per cent of non-Indigenous prisoners (Chapter 6). Acting to reduce the risk of reoffending could take many Indigenous offenders off a path of repeat offending, thereby reducing Indigenous imprisonment and making Indigenous communities safer.

Reforms that aim to improve rehabilitation and reintegration for the general prison population will benefit Indigenous offenders (Table 23.2). However, these reforms should be supported by action at the community level to increase the effectiveness of these reforms for Aboriginal and Torres Strait Islander people.

Table 23.2 Reforms that will improve rehabilitation and reintegration

Recommendations	Benefit for Indigenous people
Expanding diversion options <sup>a</sup>	Deferred prosecution agreements will allow Indigenous communities (via community justice groups) to have a greater role in helping Indigenous offenders to address underlying risk factors.
Sentencing reforms <sup>b</sup>	More flexible non-custodial options will reduce imprisonment and allow sentencing that better fits the circumstances of the offender, including those of Indigenous people.
	Orders that provide for residential supervision will allow more specialised treatment for offenders, including Indigenous offenders from remote and regional areas. This should help address the high levels of recidivism amongst Indigenous offenders.
In-prison rehabilitation <sup>c</sup>	Improved reporting and accountability are likely to improve the performance of rehabilitation programs and outcomes for Indigenous prisoners.
	Making work and development orders available in prisons and improving integration with NDIS is likely to benefit Indigenous prisoners.
Reintegration <sup>d</sup>	Improved reintegration of prisoners, including provision of a minimum standard of post-release support, will reduce the risk of Indigenous reoffending.

a Chapter 11; b Chapter 15; c Chapter 18; d Chapter 19.

#### Improve prisoner rehabilitation and reintegration

Rehabilitation and reintegration strategies seek to change the behaviour of individuals in a positive way. However, individuals and their circumstances can vary widely, making it unlikely that a 'one size fits all' approach will work. If the offending behaviour of a person is to be reduced, rehabilitation and reintegration needs to be attuned to the characteristics and circumstances of the offender.

The West Kimberly Regional Prison is an example of a prison that adopts an approach that is oriented to local Indigenous people (Box 23.2). It was 'sited for proximity to land and family, was designed with a strong connection to land and nature, that kinship and family responsibilities was respected through visits and phone connections,



and that daily life skills, education, training, recreation, programs, and reintegration services also helped prepare prisoners for resettlement back into the community' 169.

#### Box 23.2 West Kimberley Prison philosophy

The West Kimberley Regional Prison's design and operating philosophy draw from the following philosophical statements published in *The Kimberley Custodial Plan – An Aboriginal Perspective – Stage 1 Report: Custodial Facilities*:

- Cultural responsibilities—there is recognition of and respect afforded to traditional law and cultural
  obligations, and support provided to Aboriginal prisoners maintaining and fulfilling their cultural
  obligations and responsibilities.
- Spiritual relationship to land, sea and waterways—there is recognition and acceptance of the cultural and spiritual connection to their country, and recognition that they have custodial rights and interests.
- Kinship and family responsibilities—there is recognition and acceptance that familial responsibilities are central to the fabric of Aboriginal society and critical to the well-being of the community and the individual, and that there is recognition and acceptance of customary protocols that link kinship ties with reciprocal obligations.
- Community responsibilities—there is recognition and acceptance by the Aboriginal community of its
  responsibility to address issues identified by Aboriginal people. Issues such as substance abuse and
  other anti-social behaviour and the development of skills to assist prisoners after release are necessary
  to promote the social and economic well-being and independence of Aboriginal people in the
  Kimberley.

Source: WA Department of Corrective Services 2012.

A way to improve rehabilitation and reintegration is to ensure prisons and other service providers have the incentives, resources, authority and accountability to create and operate a more effective prison system and throughcare system that is sensitive to the circumstances of Indigenous offenders, cultural needs and the realities of Indigenous life.

With the right incentives in place, Queensland Corrective Services (QCS) and other service providers should also be more open to partner with Indigenous communities to support the rehabilitation and reintegration of Aboriginal and Torres strait islander people while they are in prison. Given the limited resourcing available, the active involvement of communities in the rehabilitation and reintegration of returning offenders is essential.

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<sup>&</sup>lt;sup>169</sup> A lack of robust data makes it difficult to assess the performance of West Kimberley Regional Prison in delivering better outcomes. A 2015 report into the efficiency and performance of Western Australian prisons attempted to measure the comparative performance of Western Australian prisons across twenty-six performance indicators related to safety and security, rehabilitation, prisoner quality of life, and management. However, a lack of robust data prevented it from doing so.

The report found that West Kimberley Regional Prison was one of the most costly prisons (on a per prisoner per day basis). However, the report noted that it was a new prison and that its high cost per prisoner per day may reflect its start-up costs and that it had been under capacity (ERA 2015, pp. 54, 56, 143–149, 160–161, 307).

In 2017, the Western Australian Inspector of Custodial Services reported that implementation of the prison model had fallen short of its ambitions in some regards—for example, 52 per cent of prisoners in a pre-inspection survey responded that staff did not understand their culture, and 43 per cent did not believe staff respected their culture (WA Office of the Inspector of Custodial Services 2017, p. 40).



Stakeholders said in consultations that a prisoner returning to the same disadvantaged circumstances and dysfunctional family and community life had little hope of taking a more beneficial path, no matter the person's intention. While addressing Indigenous disadvantage generally will assist to improve reintegration, a community could also establish protocols to improve the process of reintegration of returning offenders. This could include measures such as:

- using restorative justice conferencing to heal relationships
- preparing the family and friends for the return of community members
- ensuring the returning community member has suitable accommodation and meaningful activity.

#### Increase options for diversion to rehabilitation

Communities and local police can partner to establish protocols in local agreements to increase the use of diversion as an option in appropriate circumstances. To support the increased use of diversion, local Indigenous communities could establish protocols for working with support services in their community, for example for substance abuse or mental illness.

Deferred prosecution agreements can be a mechanism to redirect offenders away from the criminal justice system towards rehabilitation options in the community (Chapter 11). They provide a means for the local community to work with an offender to address factors that contribute to their offending. In Indigenous communities, community justice groups could fulfil the local role of developing a course of actions with the offender (though the role should also be available to other organisations that have sufficient capability to manage the agreed actions). This provides another opportunity for local Indigenous communities to contribute to the rehabilitation of their members, rather than see them enter the criminal justice system.

## Establish local residential supervision facilities

Proposed residential supervision orders (Chapter 15) provide an opportunity for Indigenous communities to lead the rehabilitation and reintegration of offenders. These orders have the potential to create more flexible residential options that can deliver improved rehabilitative outcomes for those that the prison system is currently failing, including Indigenous people. Under these orders, a court can impose an order on suitable offenders to reside in a low security facility that will provide 24/7 supervision and intensive rehabilitation services in an environment conducive to rehabilitation. For example, an Indigenous community could establish a residential supervision facility operated by the community. As noted by Hamburger (sub. 14, p. 18-19) community members could be accommodated in residential facilities on Traditional lands, with a rehabilitation regime that preserves connection to local culture and a program of reintegration to facilitate the member's return to community.

This has the potential to provide an alternative to imprisonment that deals more effectively with the causal factors of individual offending behaviours and helps preserve the protective factors (such as family and community relationships) that reduce offending behaviour.



# 23.4 Actions to improve criminal justice processes

Stakeholders suggested that systemic or institutional bias and discrimination in the criminal justice system may be contributing to higher rates of Indigenous imprisonment and recidivism (Chapter 21). Institutional bias stems from systems, processes, practices, attitudes and behaviours that produce racially disparate outcomes.

Many of the reforms recommended in this report will assist in addressing the effect of the justice reform process on Indigenous people (Table 23.3).

Table 23.3 Reforms that will address the criminal justice process

Recommendations	Benefit for Indigenous people
Expanding diversion options <sup>a</sup>	Local policing plans will allow Indigenous communities to develop culturally safe pathways for Indigenous offenders away from the criminal justice system.
The scope of crime <sup>b</sup>	The types of offences where alternative policy approaches might be preferred over the criminal law include offences that bring many Indigenous persons into contact with the police and the criminal justice system, such as public nuisance offences. Reform may help reduce interactions, reducing the likelihood of imprisonment.
Drug reforms <sup>c</sup>	Reforms will prevent people, including Aboriginal and Torres Strait Islanders, from entering prison for drug possession and supply. There may be further reductions in imprisonment linked to less violent offending from the control of black markets and substitution away from alcohol. Better access to health-based treatments will support rehabilitation.
Victim-focused reforms <sup>d</sup>	Expansion of adult restorative justice links more closely with traditional Indigenous concepts of justice and, if community-led services is adopted, allows restorative justice solutions tailored to local needs.
Sentencing reforms <sup>e</sup>	Reviewing legislated restrictions on judicial discretion will benefit Indigenous people, who often suffer from unintended consequences of mandated criminal sanctions.
	Measures to help ensure consistency in sentencing will reduce concerns of bias in sentencing affecting outcomes for Indigenous people.
Remand reforms <sup>f</sup>	Given the high numbers of Indigenous offenders remanded in custody, bail reforms—for example, introducing accommodation options such as bail hostels—will help to reduce Indigenous incarceration.
	Evidence-based risk assessment tools to aid bail decision-making will assist in reducing any biases that may affect outcomes for Indigenous people.

a Chapter 11; b Chapter 12; c Chapter 13; d Chapter 14; e Chapter 15; f Chapter 16.

However, for the benefits of the reforms to be realised for Aboriginal and Torres strait islander people, they should be implemented so that:

- unintended consequences are avoided, by considering their impacts on Indigenous people
- the reforms are effective for Indigenous people, by providing additional supports where required.

This can best be ensured by devolving their development and implementation to the lowest level possible, ideally to the local or individual level.



While many reforms require statewide legislative and policy change, this should not preclude the active involvement of Aboriginal and Torres strait islander people in policy development, and in the development of measures to offset any unintended consequences and to ensure the effectiveness of the reform for Indigenous people.

## Improve justice system interactions with Indigenous communities

Indigenous communities have an opportunity to improve interactions with the criminal justice system through local agreements with government agencies. Initiatives that could be incorporated into agreements include:

- development of protocols with local police, including:
  - the use of cautioning and diversion
  - involvement of senior members of the community to help diffuse situations
  - joint police-community action to respond to certain forms of offending behaviour
  - legal representation of community members who are taken into custody
- use of community-based justice approaches for their community, such as restorative justice processes, support from community justice groups and the Justice of the Peace (Magistrates Court) Program.

The Family Responsibilities Commission noted the potent effect of community-based justice approaches:

A community led response to halting recidivism may have a more positive effect—specifically by the Elders in community ... Elder shaming is often of far more significance to Indigenous offenders than norms imposed by Government organisations or a society far removed from their day to day reality. (FRC sub. 23, p. 1)

Restorative justice represents a community-based justice option. Stakeholders spoke during consultations of the benefits of a restorative justice approach that provides an opportunity for the offender and victim to reconcile and restore damaged relationships. In many instances, this could reduce the need for a formal judicial court to impose a prison sentence, which can often be less effective and does little to restore harmony in the community.

A restorative justice project conducted on Mornington Island has produced positive results, with people feeling safer, and mediation being seen as helping both sides of a dispute more than police and courts do (Colmar Brunton 2014, p. 20; also see Chapter 14).

A local community organisation could facilitate restorative justice conferencing in a way that uses the strength of the local culture while also being sensitive to that culture. However, the government needs to find ways to step away from the provision of the service to allow local organisations the opportunity to become involved in providing these services.

Another community-based justice option is provided by community justice groups (CJGs). CJGs are run by members of the local Aboriginal and Torres Strait Islander community. One of their roles is to make cultural submissions to the Magistrates Court on behalf of defendants to help magistrates in their bail and sentencing decision-making. CJGs can also add cultural context and personal information to the court decision-making process. CJGs are in over 50 locations in Queensland (Queensland Courts 2017a). Their role can be expanded, for example through a role in the provision of deferred prosecutions (Chapter 11), but also in developing other local justice initiatives.

A third community-based justice option is the Remote Justices of the Peace (Magistrates Court) Program. This program allows Justices of the Peace to constitute a Magistrates Court in the absence of a magistrate in discrete Queensland communities. Remote JP courts are intended to improve access to the criminal justice system for remote communities, and enable Indigenous community members, Elders and Respected Persons to play positive roles in the criminal justice system. Remote JP courts can encourage diversionary processes, and develop networks



with government and non-government agencies, to ensure issues affecting Indigenous communities are addressed (Queensland Courts 2017b).

#### **Recommendation 41**

In implementing the recommendations of the Commission's *Service delivery to Queensland's remote and discrete Indigenous communities report*, the Queensland Government should prioritise those recommendations that seek to address the entrenched economic disadvantage that is a causal factor behind offending, including:

- removing barriers to local economic activity, including ensuring that procurement and job requirements do not exclude local participation
- developing a land tenure reform plan that better supports economic development in remote communities
- reforming policies that facilitate the growth of the Indigenous private sector
- investigating ways to develop community and market initiatives in Indigenous communities, including through the use of arm's length funding arrangements that devolve authority to communities.

#### Recommendation 42

The Queensland Government should implement a new approach to alcohol management that includes a focus on:

- effective and efficient ways to manage the consumption of alcohol in discrete Indigenous communities
- · devolving control of alcohol management to communities
- supporting community decision-making with timely information through which communities can measure the effectiveness of their strategies
- alternative strategies, such as the use of community-controlled alcohol permits.

To ensure that communities and other stakeholders are well informed, the government should publicly release the independent review of the overall effectiveness of alcohol management plans.



