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4 June 2021

Submission to the Legal and Social Issues Committee of the Legislative Council (Victoria)

Inquiry into Management of Child Sex Offender Information

1. The Legal and Social Issues Committee of the Victorian Legislative Council (**Committee**) is inquiring into the use of child sex offender information in Victoria.

Liberty Victoria

2. Liberty Victoria has worked to defend and extend human rights and freedoms in Victoria for more than eighty years. Since 1936 we have sought to influence public debate and government policy on a range of human rights issues. Liberty Victoria is a peak civil liberties organisation in Australia and advocates for human rights and civil liberties. As such, Liberty Victoria is actively involved in the development and revision of Australia's laws and systems of government.

Supplementary Submission

3. This supplementary written submission addresses matters taken on notice by Senior Vice-President of Liberty Victoria, Sam Norton, during the inquiry hearings on 13 May 2021. Liberty Victoria thanks the Committee for the opportunity to provide this submission, which should be read in conjunction with Mr Norton's oral evidence.

4. This submission addresses three matters that were taken on notice during the hearing:

4.1 What is Liberty Victoria's position on the effectiveness of public sex offender registration schemes in deterring sexual offenders?

4.2 Can Liberty Victoria provide its previous submissions and past work relating to the *Sex Offender Registration Act* (**SORA**)?

4.3 Can Liberty Victoria provide evidence to support the claim that publicly available sex offender registries may result in increased offending?

5. One additional matter was raised by the Hon Stuart Grimley MP following the hearing:

5.1 In relation to your verbal submission that the WA limited disclosure scheme is "rubbery, vague, it's meaningless" on its requirement, among other things, for there to be a threat to people's safety in order for information to be disclosed: If a threat for someone/the community's safety is not a good enough reason to disclose partial information to a selected group of people, what do you think the circumstances would be for information on child sex offenders should be made public?

6. Mr Grimley's question unfortunately inaccurately states the evidence given by Mr Norton. In respect of the WA scheme, Mr Norton's evidence was as follows:[1]

> There was reference earlier on to the Western Australian scheme in a question. I am not utterly familiar with it. I am, however, familiar with the fact that one of the circumstances in which information can be released is if a person has been convicted of an offence punishable by imprisonment for five years or more and there is concern that this person poses a risk to the lives or sexual safety of one or more persons or persons generally. Firstly, the five-year imprisonment covers just about every relevant offence and, secondly, the term 'there is concern that this person poses a risk' is so rubbery and vague as to be meaningless.

7. What Mr Norton referred to was that there need only be 'concern' that there is such a threat. As was demonstrated in the hearing – and in particular in the evidence given by the witness immediately prior to Mr Norton – 'concern' regarding sex offenders is wide-spread and arises regardless of whether there is in fact any *real* risk or threat. This demonstrates why the mandatory registration regime is inapt and ought to be repealed. In relation to the release to the public of sex offender registration – consistent with the oral evidence of Mr Norton, Liberty Victoria's position is that there should not be a public register of sex offenders.

8. We deal with Liberty Victoria's past work first before addressing the other matters in the order listed above.

Liberty Victoria's position on the SORA

9. It has long been Liberty Victoria's position that there are fundamental problems with the scheme established by the SORA. This position has been articulated in numerous submissions and position papers in recent years:

9.1 on 29 March 2016, Liberty Victoria published comments on the Sex Offenders Registration Amendment Bill 2016 (as it then was);[2]

[1] Transcript of Evidence of Mr Sam Norton (Liberty Victoria) dated 13 May 2021.
[2] https://libertyvictoria.org.au/file/313.

9.2 on 31 May 2017, Liberty Victoria published comments on the Sex Offenders Registration Amendment Bill 2017 (as it then was);[3] and

9.3 on 25 January 2021, Liberty Victoria provided a submission to the Victorian Law Reform Commission in relation to an inquiry into Improving the Response of the Justice System to Sexual Offences (**recent VLRC submission**).

10. We attach for the Committee's benefit the recent VLRC submission (**Attachment A**). We draw particular attention to paragraphs [53]–[76] which are relevant to this inquiry. The other documents listed above can be provided to the Committee on request, and are otherwise available on Liberty Victoria's website.

11. In short, and as explained in Mr Norton's evidence to this Committee, there are three fundamental problems with the current system for registration of sex offenders in Victoria:

11.1 The ever-expanding number of registrants

11.2 The absence of judicial discretion as to whether a person should be placed on the register; and

11.3 The complexity of reporting obligations and the over prosecution of minor breaches which cause no level of risk whatsoever.

12. For the avoidance of repetition, Liberty Victoria refers to and adopts its recent VLRC submission.

Sex offender registration and deterrence

13. Liberty Victoria urges this Committee not to endorse the introduction of a public sex offender register in Victoria. Any attempt to deter offenders by way of a public register would be misguided, and would likely have unintended negative consequences. This is because:

13.1 there is very limited evidence that public sex offender registration schemes work in deterring registered and unregistered offenders;

13.2 there is some evidence that public registers actually *increase* recidivism; and

13.3 in addition to being ineffective, recasting the SORA as a punitive regime that pursues deterrence through 'public shaming' would undermine the sentencing process.

Deterrence and the criminal justice system

14. Deterrence has long been a governing principle of criminal punishment.

15. When a judge sentences an offender in Victoria, one of the chief objectives of the sentence (whether it is imprisonment or a fine) is to 'deter the offender or other

[3] https://libertyvictoria.org.au/content/sex-offenders-registration-amendment-miscellaneous-bill-2017.

persons from committing offences of the same or a similar character'.[4] Respectively, these aims are described as 'specific' and 'general' deterrence.

16. The criminal justice system pursues deterrence through punishment. This aspect of sentencing is premised on the theory that if a person is subjected to sufficient punishment for their actions, the suffering caused by that punishment will discourage that offender, and others, from offending in the future. On this view, the severity of a punishment is generally said to correlate with its deterrent force. The harsher the penalty, the stronger the message. This may be called 'deterrence theory'.

17. Despite its intuitive appeal and historical significance, aspects of deterrence theory rest on thin empirical ice. Chief among these is the claim that increasing the severity or duration of a punishment will lead to a more significant deterrent effect.

18. We enclose the report **"Does Imprisonment Deter? A Review of the Evidence"** prepared for the Sentence Advisory Council by Donald Ritchie in April 2011 (**Attachment B**). We urge you to carefully consider this report including the various resources referred to within it. As indicated the studies demonstrate that there is no evidence that supports the hypothesis that harsher penalties reduce crime through deterrence. The premise of deterrence theory is based on the economic theory that individuals weigh up the costs and benefits of their actions prior to engaging in them. It presumes that there is a rational and detached process undertaken prior to the commission of the offence – as such the logical conclusion is the harsher the sentence the less likely the person is to commit the crime. This of course ignores the realities of offenders – particularly those engaged in 'crimes of passion', offenders with cognitive issues or those who are alcohol and/or drug affected. This represents a very large portion of registrable offenders.

19. We do not intend to repeat Mr Ritchie's findings – we again urge you to consider them carefully. We do however say that an argument based on deterrence theory is simplistic and simply will not lead to a decrease in offending.

20. Liberty Victoria is not suggesting that deterrence should no longer be a principle that guides sentencing in Victoria. Rather, we suggest that general appeals to the deterrent effect of post-sentence punishment should be met with significant scepticism. This is especially the case with public sex offender registration schemes.

Sex offender registration and deterrence

21. In addition to the lack of general evidence in support of deterrence theory described above, studies show that there is limited evidence that public sex offender registries deter offenders.

22. In 2018, the Australian Institute of Criminology (**AIC**) reviewed the latest evidence from Australia and overseas regarding the effectiveness of public and non-public sex offender registries (**Attachment C**). The authors found that:[5]

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[4] *Sentencing Act 1991* s 5(1)(b).

[5] Sarah Napier, Christopher Dowling, Anthony Morgan and Daniel Talbot, 'What impact do public sex offender registries have on community safety?' in *Trends and issues in crime and criminal justice* (No 550, May 2018), Australian Institute of Criminology (available at https://www.aic.gov.au/sites/default/files/2020-05/ti_what_impact_do_public_sex_offender_registries_have_on_community_safety_220518_0.pdf)

> while public sex offender registries may have a small general deterrent effect on first time offenders, they do not reduce recidivism. Further, despite having strong public support, they appear to have little effect on levels of fear in the community.

23. The studies of public registries reviewed by the AIC overwhelming found no significant differences in recidivism between sex offenders on public registries and unregistered sex offenders (drawing from data before and after the introduction of public registries in the United States).

24. Of the dozens of studies reviewed in one meta-analysis conducted in the United States, only a small handful found any evidence of public sex offender registries correlated with general reductions in sexual offending. Since that meta-analysis was undertaken, however, 'several studies have subsequently concluded that [public sex offender registration schemes] did not reduce sex offence recidivism or prevent sexual offending in the general community'.[6]

25. In 2011, Professor Amanda Agan of the University of Chicago analysed a range of crime data sets and concluded that public sex offender registration schemes:[7]

    25.1 Failed to reduce sexual offending rates generally

    25.2 Failed to reduce recidivism in registered sex offenders and

    25.3 Failed to assist users in successfully predicting or anticipating the locations of sexual offending.

26. Also in 2011, researchers from the University of Michigan and University of Columbia studied the effectiveness of public sex offender registries.[8] While the authors found some evidence that registers may deter first-time offenders, it also found that the public notification aspect of these registries may actually *increase* recidivism.

27. The authors conclude that this is likely a result of the fact that the grave costs of being publicly identified (or 'shamed') actually come to outweigh the benefits of foregoing criminal activity. It should come as no surprise that permanently branding a sex offender as a pariah of the community results in an entrenchment of their criminality, and undermines prospects for rehabilitation. As referred to in the Ritchie report[9] harsher prison sentences may exert a criminogenic effect – that occurs through imprisonment by entrenching criminal identity, removing employment and other pro-social opportunities, labelling and stigmatisation of offenders as criminals and increased isolation – each of these would be brought about by the introduction of a public registration scheme.

28. Liberty Victoria urges the Committee to have regard to these findings, particularly the risk that public notification may have the perverse effect of increasing recidivism. Decades of public sex offender registration schemes in the United States have achieved little, if anything, by way of reducing the harms arising from sexual offending. Indeed, in some cases, registration can make matters worse.

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[6] Napier et al, above n 2, 6.
[7] Amanda Agan, 'Sex Offender Registries: Fear without Function?', (2011) Journal of Law and Economics 54(1), p 207–239.
[8] J Prescott and Jonah Rockoff, 'Do Sex Offender Registration and Notification Laws Affect Criminal Behaviour?', (2011) Journal of Law and Economics vol 54, pp 161-206.
[9] Donald Ritchie, 'Does Imprisonment Deter? A Review of the Evidence (2011) p 49.

Punitive deterrence should be left to the sentencing judge

29. This submission has thus far considered the practical effectiveness of public sex offender registration schemes in deterring offenders. That is not, however, the only reason why the Committee should avoid endorsing an approach that uses the SORA as a tool of punitive deterrence.

30. It is also important to emphasise that punitive deterrence is not, and has never been, an objective of the SORA. While there is no doubt that the SORA has punitive effects which compound the punishment that has already been imposed on an offender (especially mandatory registration), this is not its stated aim.

31. The SORA is principally aimed at:[10]

    31.1 monitoring the movements and activities of registered offenders so that they are less likely to offend;

    31.2 facilitating the investigation and prosecution of offences by registered offenders; and

    31.3 preventing registrable offenders working in child-related employment.

32. With respect to the first of these aims, when the SORA was first introduced, the Minister for Police and Emergency Services stated it would reduce the likelihood of a registered sex offender committing offences by 'requiring specified sex offenders to keep police informed of relevant personal information'.[11]

33. Importantly, however, this 'deterrence' is not said to arise from continued punishment, but rather by an increased threat of detection. The SORA has never been, and in our view should never be, conceived as a mechanism of punishment that sends a 'message' to would-be offenders, while imposing further suffering on an offender. That is the role of the sentencing process.

34. If the SORA were to be reoriented around punitive deterrence, this would require a radical recasting of the entire sentencing process. Under the current regime, a sentencing judge is **not permitted** to have regard to the consequences that may be imposed on an offender under the SORA.[12] This reflects the view that the SORA is not to be conceived as a form of continuous post-custodial punishment. If general deterrence were to be a relevant factor in the implementation of the SORA scheme this must – as a matter of logic, common sense and fairness lead to a decrease in the sentences imposed. This must be so as the sentencing aim of general deterrence will have been in part effected by the making of the registration order.

35. This demonstrates the need for the registration scheme to be directed at its aims – as set out above.

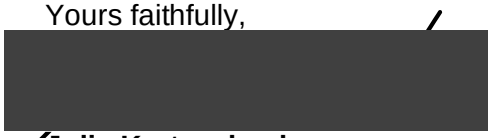
36. Thank you for the opportunity to make this further submission.

37. If you have any questions regarding this submission, please do not hesitate to contact Liberty Victoria President, Julia Kretzenbacher or Liberty Victoria Senior

[10] See SORA, s 1(1). Other objectives listed in this section are omitted as they are less relevant to the issue of deterrence.
[11] Victoria, *Parliamentary Debates*, Legislative Assembly, 3 June 2004, 1850 (Andre Haermeyer).
[12] SORA, s 5(2BC).

Vice President, Sam Norton through the Liberty Victoria office on 9670 6422 or info@libertyvictoria.org.au.

Yours faithfully,



Julia Kretzenbacher
President
Liberty Victoria

Attachment A

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25 January 2021

Submission to the Victorian Law Reform Commission

Improving the Response of the Justice System to Sexual Offences

1. The Victorian Law Reform Commission (**VLRC**) has been asked by the Victorian Government to make recommendations to improve the response of the justice system to sexual offences.

2. Liberty Victoria welcomes the opportunity to provide this submission to the VLRC. Thank you for granting an extension of time to make this submission.

About Liberty Victoria

3. Liberty Victoria has worked to defend and extend human rights and freedoms in Victoria for more than eighty years. Since 1936 we have sought to influence public debate and government policy on a range of human rights issues. Liberty Victoria is a peak civil liberties organisation in Australia and advocates for human rights and civil liberties. As such, Liberty Victoria is actively involved in the development and revision of Australia's laws and systems of government.

4. The members and office holders of Liberty Victoria include persons from all walks of life, including legal practitioners who appear in criminal proceedings for both prosecution and the defence. More information on our organisation and activities can be found at: https://libertyvictoria.org.au.

5. The focus of our submissions and recommendations reflect our experience and expertise as outlined above. Some of the following is drawn from work undertaken by Liberty Victoria in response to previous inquiries and proposed legislative reforms.

6. This is a public submission and is not confidential.

Background and Grounding Principles

7. The VLRC recognises that:[1]

- Sexual harm is widespread and considerably under-reported;
- Sexual harm is gendered: women are more likely to experience sexual violence. Women and men also experience sexual harm in different contexts.
- There are different patterns of sexual harm. Sexual harm can overlap with other types of violence, such as family violence or child abuse.
- Some people and groups experience sexual harm at much higher rates than others.
- People's experiences of sexual harm and seeking justice are diverse. They can also be shaped by factors such as their culture, sexuality, gender, age, class, ability, religion and employment, including a combination of these factors.
- The historical context of dispossession, removal and trauma is an important part of Aboriginal people's experience of sexual harm.

[1] VLRC, Guide to the Issues Papers, 5 October 2020, 7 (citations omitted).

8. Liberty Victoria acknowledges and accepts those issues.

9. As we submitted to the VLRC Inquiry into the Role of Victims in the Criminal Trial Process, Liberty Victoria:

> … strongly supports the view that victims of crime should be treated with courtesy, respect and dignity throughout the criminal trial process. We similarly support the governing principles set out in the *Victims' Charter Act 2006* in relation to treatment of persons adversely affected by crime.[2]

10. It should also be noted Liberty Victoria supported the introduction of intermediaries to ensure that persons with cognitive impairments and children are afforded equal participation in the criminal trial process.[3]

11. Liberty Victoria has also supported appropriate directions on the law of consent and in particular consent-negativing circumstances.[4] Such directions are now reflected in Part 5, Division 1 of the *Jury Directions Act 2015* (Vic), together with s 36 of the *Crimes Act 1958* (Vic).

12. Liberty Victoria acknowledges that victim-survivors of sexual offending can suffer immeasurable and enduring harm in a manner that can never be adequately remedied by the justice system. Further, victims of sexual offending have suffered violations of their human rights as protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (***Charter***), including potentially the rights to freedom from torture and cruel, inhuman or degrading treatment (s 10), to freedom of movement (s 12), to privacy, family and home life (s 13(a)), to protection of families and children (s 17), and to liberty and security (s 21).

13. Those alleged of having committed criminal offences, including sexual offences, are entitled to the common law rights of the presumption of innocence and to have a

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[2] Liberty Victoria Submission to VLRC Inquiry into the Role of Victims in the Criminal Trial Process (Web Page, 26 April 2016), <https://libertyvictoria.org.au/sites/default/files/LibVicSub-Victims-of-Crime-Crim-Trial%20-VLRC-2016web.pdf>, [15].
[3] Ibid, [24]-[25].
[4] Liberty Victoria Submission: Review of Sexual Offences (Web Page, 17 January 2014), <https://libertyvictoria.org.au/sites/default/files/LV%20Subm%20Sexual%20Offences%20Jan%202014%20web.pdf>, [26]-[27].

contested hearing or a trial that is not unfair.[5] Such common law rights are now also protected and extended by the *Charter*, including the right to a fair hearing (s 24), and rights in criminal proceedings (s 25).[6]

14. In *Kracke v Mental Health Review Board*,[7] Bell J observed that the right to a fair hearing is not "…a mere procedural right standing apart from the general scheme of human rights protection. It is a fundamental principle of the rule of law", which is a "bedrock value" of the *Charter*.[8]

15. Liberty Victoria understands that, as is often the case in human rights discourse, there needs to be a proper and proportionate balance between competing rights in relation to the investigation and prosecution of alleged sexual offences.

16. However, given the consequences of a potentially innocent accused person being found guilty of sexual offending, including potential imprisonment, registration under the *Sex Offenders Registration Act 2004* (Vic) (***SORA***) and post-sentence detention or supervision under the *Serious Offenders Act 2018* (Vic) (***SOA***), it is vitally important that reforms to the law relating to sexual offences do not result in an increase in the potential for unfair trials and substantial miscarriages of justice.

The Need for Careful Reform

17. As we said in our 2014 submission to the Department of Justice Review of Sexual Offences:

> Liberty Victoria submits that care needs to be taken to ensure that the proposals for reform, no matter how well-intentioned, do not increase the risk of injustice. In that context, Liberty Victoria would advocate a very cautious and selective evolution of the criminal law …
>
> The past decades of reform to the law of sexual offences have demonstrated that adding ever greater complexity to an already very difficult jurisdiction can result in great injustice to accused persons, complainants, and less protection

[5] See *DPP v Mokbel* [2010] VSC 331, [161]-[163] (Whelan J).
[6] Ibid. See further *Re an application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 425 [40] (Warren CJ).
[7] (2009) 29 VAR 1.
[8] Ibid, 102 [460].

to the wider community through adding to the potential for judicial error and miscarriages of justice.

Liberty Victoria has a particular interest in the development of restorative justice measures that would improve access to just outcomes for complainants, offenders, and the wider community. To that end, we would value being consulted with regard to any proposals for law reform or with regard to any pilot project in that field.[9]

18. Often the criminal justice system is ill-equipped, even with the best endeavours of legislators, judicial officers and legal practitioners, to provide just outcomes that are fair to complainants and accused persons. Sexual offences cases are often fraught, regularly considering events having occurred a long time ago, in circumstances where there is often limited if any corroborative evidence, and where there is often a clear conflict in the evidence of the complainant and the accused person in circumstances where the fact-finder needs to be satisfied beyond reasonable doubt of the elements of the offence. In part, that is why other avenues such as restorative justice may provide the best outcome for both complainants and accused persons in some cases. The issue of restorative justice will be considered in more depth below.

Terminology

19. On occasion Liberty Victoria uses the term “complainant” in this submission. That means no disrespect to people who are victim-survivors. However, it is important to recognise that when a criminal allegation is made against a person, it is for the finder of fact (be it a jury or judicial officer) to determine whether the evidence of a complainant is accepted and whether an alleged offender is guilty of an offence. It is important not to subvert the proper role of the fact-finder in this regard. This is consistent with the language employed by the Court of Appeal, even in conviction appeals after a person has been convicted of an offence.

[9] Liberty Victoria Submission to the Department of Justice Review of Sexual Offences (Web Page, 17 January 2014), <https://libertyvictoria.org.au/sites/default/files/LV%20Subm%20Sexual%20Offences%20Jan%202014%20web.pdf>, [52]-[54].

20. As we submitted to the 2016 VLRC Inquiry into the Role of Victims in the Criminal Trial Process:

> It should be noted that in criminal proceedings that proceed to trial or contested hearing it is for a fact-finder, whether jury or magistrate, to determine whether a complainant is a victim. There is an increasing move towards describing complainants as victims or survivors prior to any such fact-finding process. While that is understandable, it inverts the presumption of innocence.[10]

Submission of the Criminal Bar Association

21. Liberty Victoria has had the considerable advantage of reading and considering the submission of the Criminal Bar Association (**CBA**).

22. We adopt the CBA's submission in relation to Issues Papers B, C and E, expect in one respect.

23. Liberty Victoria does not oppose the retention of judge-alone trials, a model first introduced in Victoria in response to the COVID-19 pandemic. However, Liberty Victoria only supports the retention of judge-alone trials where the accused's consent remains mandatory in order to proceed by judge-alone (as is presently the case). Further, Liberty Victoria only supports the retention of judge-alone trials provided that jury trials are properly resourced so there is no pressure on an accused person to proceed by judge-alone trial because there would otherwise be a significant delay to proceed to trial by jury. This is because in Liberty Victoria's submission, a choice between a judge-alone trial now and a jury trial in two years' time means there is no real choice for accused persons.

24. Retaining judge-alone trials would also have the advantage of comity with other jurisdictions, and there may be some matters (including some high-profile allegations of sexual offending where there has been saturating and adverse media

[10] Liberty Victoria Submission to VLRC Inquiry into the Role of Victims in the Criminal Trial Process (Web Page, 26 April 2016), <https://libertyvictoria.org.au/sites/default/files/LibVicSub-Victims-of-Crime-Crim-Trial%20-VLRC-2016web.pdf>, [10].

reporting) where an accused person may elect to proceed with a judge-alone trial[11] (noting this course can be opposed by the prosecution and determined by a judge).[12]

25. Liberty Victoria otherwise agrees with the CBA's submission and wishes to emphasise that practices have changed significantly with regard to how legal practitioners and judicial officers approach the hearing of allegations of sexual offences, including cross-examination of complainants. Section 41 of the *Evidence Act 2008* (Vic) provides that a court must disallow questioning that is misleading or confusing; unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; belittling, insulting or otherwise inappropriate; or has no basis other than a stereotype. Our experience is that the courts take the duty to protect witnesses very seriously and the stereotype of the barrister challenging a complainant through confusing and/or belittling cross-examination is very much the exception and not the rule.[13]

26. Liberty Victoria also wishes to emphasise the CBA submission that significant delays in the prosecution of sexual offences are often caused by a failure of timely disclosure by the Crown and/or delays with regard to the obtaining of expert evidence.[14]

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[11] See further Justice Phillip Priest, 'Trial by Judge Alone: Time for a Rethink?' (2020) 94 ALJ 110, 111:

> It must be acknowledged that there has been general satisfaction with jury verdicts over a great many years. The experience of most trial judges is that juries of old coped well with large drug trials, complex frauds, terrorism cases and underworld murders. Times, however, have changed. Lack of restraint by traditional news media, and the ubiquity of incensed, overwrought and uncontrolled comment in social media, pose significant challenges to the integrity of trial by jury in sex offences, drugs and other cases. In some cases, judicial direction simply will not be adequate to nullify the prejudice engendered by pretrial publicity (or ongoing prejudicial publication on social media).

[12] See further *Criminal Procedure Act 2009* (Vic), s 420D; *DPP v Combo (Application for trial by judge alone)* [2020] VCC 726, [37]-[66] (Chief Judge Kidd), adopted in *DPP v Wang (Ruling No 1)* [2020] VSC 438, [3] (Hollingworth J).

[13] Liberty Victoria Submission to VLRC Inquiry into the Role of Victims in the Criminal Trial Process (Web Page, 26 April 2016), <https://libertyvictoria.org.au/sites/default/files/LibVicSub-Victims-of-Crime-Crim-Trial%20-VLRC-2016web.pdf>, [12]-[13].

[14] In the judgment of *Roberts v The Queen* (2020) 60 VR 431 the Court of Appeal (Osborn and T Forrest JJA, and Taylor AJA) held at 444 [56]:

> It is now accepted that it is fundamental that there must be full disclosure in criminal trials. It is a 'golden rule'. The duty is to disclose all relevant material of help to an accused. It is owed to the court, not the accused. It is ongoing. It includes, where appropriate, an obligation to make

27. Liberty Victoria agrees with the CBA on other matters in its submission, including:

(1) its opposition to the creation of a specialist court for sexual offences;

(2) its opposition to professional jurors;

(3) the need for proper funding for sexual offence matters;

(4) its observation concerning the unfortunate reluctance of the Crown to discontinue weak prosecutions in sexual offences;

(5) the need to consider the impact of ground-rules hearings and intermediaries before introducing further reforms;

(6) the adequacy of current directions on consent and the criminal standard of proof after recent reforms;

(7) the need for special care before concluding that the conviction rate for sexual offences should be increased, including the need to have regard to the number of matters that are resolving after recent reforms; and

(8) the need to preserve the rights of appeal to protect against substantial miscarriages of justice.

28. Liberty Victoria makes some additional submissions on other topics below.

Issues Paper C – Defining Sexual Offences

29. As we said in our 2014 submission to the Department of Justice Review of Sexual Offences:

> Liberty Victoria submits that criminal offences, and particularly serious criminal offences, should as a matter of principle have a subjective fault element (and with regard to rape, more than the subjective fault element of intending to

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enquiries. *It is imposed upon the Crown in its broadest sense*. And a failure in its discharge can result in a miscarriage of justice.
(Emphasis added and citations omitted.)
At 446 [64] the Court concluded that "…the duty of disclosure is a significant element of a fair trial and a conspicuous aspect of the Crown's duty to ensure that the case against an accused is presented with fairness".

> engage in an act of sexual penetration). While there are exceptions to this principle in the criminal calendar, that is often in the circumstance of gross negligence, and not of itself a reason to further diminish the importance of subjective fault elements in the criminal law.[15]

30. Liberty Victoria strongly opposes the creation of a "lesser" offence of sexual assault that does not require a subjective mental element. The consequences of being found guilty of such an offence are severe, and an unintended consequence of such a lesser offence is that it may result in plea negotiations that depend on decisions made by prosecutors without adequate transparency.

31. Liberty Victoria is strongly opposed to the charging of multiple offences in the one charge, including the creation of "course of conduct" charges (now reflected in Schedule 1 of the *Criminal Procedure Act 2009* (Vic). We have noted the significant issues such charges create with regard to potential duplicity and the obfuscation of inconsistent verdicts.

32. As we submitted in the 2014 Department of Justice Review of Sexual Offences:

> Where there is inconsistency or irrationality in jury decision-making it is of the utmost importance that be made transparent so that injustices can be remedied. The price of conflating multiple events under a single count, and then not requiring a jury to be unanimous about which events occurred … is that it will invariably result in an obfuscation of jury decision-making. That will inevitably conceal injustice in some cases.[16]

33. Such charges also cause acute difficulties when it comes to determining the factual basis for sentencing, because it can be unclear which events constituting the "course of conduct" were accepted by members of the jury.

Issues Paper E – Tendency and Coincidence Evidence

34. Liberty Victoria has stated that it strongly opposes the Victorian Government's announced reforms to the law of tendency and coincidence evidence, which are

[15] Liberty Victoria Submission to the Department of Justice Review of Sexual Offences (Web Page, 17 January 2014), <https://libertyvictoria.org.au/sites/default/files/LV%20Subm%20Sexual%20Offences%20Jan%202014%20web.pdf>, [21].
[16] Ibid, [37]-[51].

intended to be based on the *Evidence Amendment (Tendency and Coincidence) Act 2020* (NSW).[17]

35. As we have previously stated, if enacted in Victoria, those reforms would amongst other things:

    (1) Create a presumption of admissibility for certain categories of tendency evidence in proceedings involving child sexual offences;

    (2) Prohibit the Court, when considering the admissibility of such evidence, from having regard to whether such evidence may be the result of collusion, concoction or contamination; and

    (3) Lower the threshold for the admissibility of tendency and coincidence evidence in all cases, not just proceedings involving child sexual offences.

36. Liberty Victoria understands that the New South Wales legislation was motivated, in part, by the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.

37. Liberty Victoria acknowledges the need to ensure that properly admissible evidence is placed before juries as fact-finders.

38. However, there is a real danger that by relaxing the threshold for admissibility of tendency and coincidence evidence, and indeed creating a presumption of admissibility in certain cases, that this may impact on the fair trial of accused persons and undermine the presumption of innocence. There is a genuine risk of innocent people being convicted of crimes they have not committed.

39. The Courts have long recognised the dangers posed by tendency evidence. By necessity, tendency evidence results in fact-finders considering events other than the circumstances of the given offence. There is a real danger that tendency evidence can lead to what has been described as “rank propensity” reasoning by

[17] Liberty Victoria Media Release, ‘Liberty Victoria Oppose Reforms to Tendency and Coincidence Evidence’ (Web Page, 3 March 2020), <https://libertyvictoria.org.au/content/media-release-liberty-victoria-oppose-reforms-tendency-and-coincidence-evidence>.

fact-finders, including juries. That kind of reasoning holds that because an accused person has engaged in certain criminal or other discreditable conduct in the past, he or she is the kind of person that would have committed the given offence before the Court. There are obvious dangers with that kind of reasoning, and by lowering the threshold for the admissibility of tendency and coincidence evidence, there is a real danger that innocent people will be convicted based on their past conduct rather than direct evidence concerning the offending conduct.

40. Liberty Victoria holds the position that the prosecution should retain its current onus, in all cases, to demonstrate why such tendency or coincidence evidence has significant probative value and is therefore admissible. There should not be categories of cases where such evidence is presumed to be admissible. It should not fall on the defence, at the first hurdle, to contend why such evidence is inadmissible. Further, Liberty Victoria notes that over the past three years there have been important judgments by the High Court that have clarified the admissibility of this kind of evidence and which have, in effect, made in less difficult for the prosecution to adduce such evidence in appropriate cases.[18] Those supporting such reforms should be required to demonstrate why such reforms are necessary in light of the recent jurisprudence of the High Court.

41. Further, Liberty Victoria submits that judicial officers should be entitled, when considering the admissibility of such evidence, to consider whether such evidence may be the result of collusion, concoction or contamination. In the High Court judgment of *R v Bauer*,[19] the Court held that there was a category of case where the risk of collusion, concoction or contamination was so great that it could affect the probative value of the evidence, namely in circumstances where it would not be open to the jury rationally to accept the evidence.[20] The reforms, if enacted, would appear to remove that exception. It is an important function of judicial officers, in appropriate cases, to consider whether such evidence should be placed before the

[18] See, eg, *R v Bauer* (2018) 266 CLR 56; *Hughes v The Queen* (2017) 263 CLR 338.
[19] (2018) 266 CLR 56.
[20] Ibid, 91-2 [69] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

jury at all. That is a key function of the role of the judicial officer, as gatekeeper, in ensuring a fair trial of an accused person.

42. Finally, Liberty Victoria notes that the proposed reforms would reduce the threshold of admissibility of tendency and coincidence evidence in all criminal cases, not just those proceedings involving child sexual offences. In short, the current requirement is that such evidence cannot be used against the accused unless the probative value of the evidence "substantially outweighs" any prejudicial effect it may have on the accused. The reforms, if enacted, would provide that such evidence is admissible if "the probative value of the evidence outweighs the danger of unfair prejudice to the defendant", removing the requirement that the probative value "substantially" outweigh the prejudicial effect. Given the dangers of this kind of evidence, and in particular propensity reasoning, Liberty Victoria favours the retention of the status quo as providing a proper balance between the admissibility of such evidence in appropriate cases and the right of an accused person to a fair trial.

Issues Paper F – People Who Have Committed Sexual Offences

Presumptive and Mandatory Sentencing

43. One significant matter as to why some sexual offence charges may not resolve at an early stage is that the given offence attracts a presumptive or mandatory sentence,[21] after the reforms introduced for some sexual offences by the *Sentencing*

[21] 'Presumptive sentencing' refers to criminal offences where there is a statutory presumption of a particular type and/or minimum length of sentence, subject to exceptions. This includes presumptive sentences of imprisonment with minimum non-parole periods subject to 'special reasons' exceptions. 'Mandatory sentencing' refers to criminal offences where a particular type of sentence and/or minimum length of sentence must be imposed and there are no exceptions. See Andrew Dyer, '(Grossly) Disproportionate Sentences: Can Charters of Rights Make a Difference?' (2017) 43(1) *Monash University Law Review* 195, 203 nn 55-6.

(Community Correction Order) and Other Acts Amendment Act 2016 (Vic) and the *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic).

44. Liberty Victoria has a long history of strongly opposing presumptive and mandatory sentencing and the removal of the sentencing discretion of judicial officers.[22]

45. Liberty Victoria shares the Law Council of Australia's concerns that mandatory sentencing regimes:[23]

    (1) Undermine the fundamental principles underpinning the independence of the judiciary and the rule of law;

    (2) Are inconsistent with Australia's international obligations, particularly Australia's obligations with respect to the prohibition against arbitrary detention as contained in Article 9 of the International Covenant on Civil and Political Rights (**ICCPR**); and the right to a fair trial and the provision that prison sentences must in effect be subject to appeal as per Article 14 of the ICCPR;

    (3) Increase economic costs to the community through higher incarceration rates;

    (4) Disproportionately affect vulnerable groups within the community, including Indigenous Australians and persons with a mental illness or intellectual disability;

    (5) Potentially result in unjust, harsh and disproportionate sentences where the punishment does not fit the crime;

    (6) Fail to deter crime;

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[22] See for example Liberty Victoria's Submission to the Sentencing Advisory Council's Sentencing Guidance Reference (Web Page, 8 February 2016), <https://libertyvictoria.org.au/sites/default/files/Liberty%20Victoria%20%28SAC%20Submission%29%20Web%2020160208.pdf>. See also the introduction of 'Category 1' offences (which in almost all cases must receive immediate imprisonment) and 'Category 2' offences (where there is a strong presumption of immediate imprisonment) as introduced by the *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic).

[23] Law Council of Australia, 'Policy Discussion Paper on Mandatory Sentencing' (Discussion Paper, May 2014) 6-7, 20-35 <https://www.lawcouncil.asn.au/publicassets/f370dcfc-bdd6-e611-80d2-005056be66b1/1405-Discussion-Paper-Mandatory-Sentencing-Discussion-Paper.pdf>.

(7) Increase the likelihood of recidivism because prisoners are placed in a learning environment for crime whereby inhibiting rehabilitation prospects;

(8) Wrongly undermine the community's confidence in the judiciary and the criminal justice system as a whole; and

(9) Displace discretion to other parts of the criminal justice system, most notably law enforcement and prosecutors, and thereby fails to eliminate inconsistency in sentencing.

46. Further, Liberty Victoria has observed:

> [W]hen faced with a mandatory minimum periods of imprisonment (whether with regard to the head sentence or non-parole period), accused persons are much less likely to plead guilty to offences. Accordingly, mandatory sentencing reforms are bound to see an increase in contested committals and trials which places further pressure on a Court system that is already strained and suffering from serious delays. Those delays also have a huge impact on complainants and their families and friends.[24]

47. Such pitfalls were demonstrated to be systemic in relation to the Commonwealth offences of aggravated people smuggling (which attracts a mandatory sentence of imprisonment),[25] and are likely to apply with equivalent force with regard to sexual offences that attract relevant presumptive and mandatory sentences.

48. That is not to dispute that, in many cases of serious sexual offending, immediate imprisonment is the only appropriate sentencing outcome. However, the significant restriction or, in some cases, complete removal of judicial sentencing discretion is likely to be a significant obstacle in some cases to the early resolution of sexual offences.

49. At the same time, the numbers of Victorian prisoners has greatly increased, which has placed significant pressure on the provision of education, rehabilitative services

[24] Liberty Victoria's Submission to the Sentencing Advisory Council's Sentencing Guidance Reference (Web Page, 8 February 2016), <https://libertyvictoria.org.au/sites/default/files/Liberty%20Victoria%20%28SAC%20Submission%29%20Web%2020160208.pdf>, [43].

[25] Andrew Trotter and Matt Garozzo, 'Mandatory Sentencing for People Smuggling: Issues of Law and Policy' (2012) 36(2) *Melbourne University Law Review* 553, 555, 614.

and the availability of transitional housing.[26] Further expanding offences which attract presumptive or mandatory sentences will exacerbate these issues.

Rehabilitation and Reintegration

50. In her article 'Why Mandatory Sentencing Fails', Tania Wolff (now president of the Law Institute of Victoria) said:

> The Victorian Ombudsman's report into prisons in 2015 provided the following sobering statistics about our prison population:
>
> - 75 per cent of male prisoners and 83 per cent of female prisoners report illicit drug use before going to prison
> - 40 per cent of prisoners have a mental health condition
> - 42 per cent of male prisoners and 33 per cent of female prisoners had a cognitive disability
> - 35 per cent of prisoners were homeless before their arrest
> - More than 50 per cent of prisoners were unemployed
> - More than 85 per cent of prisoners had not finished high school.
>
> The notion that the unwell, addicted and impaired will stop committing crimes without rehabilitation and therapeutic programs to deal with the underlying causes of offending is fanciful. It is well known that the motivation to satisfy a drug addiction outweighs the threat of punishment and its long-term consequences.
>
> In a growing number of jurisdictions internationally, including Texas, governments are directing resources away from prisons and towards rehabilitation programs for offenders and justice reinvestment initiatives.[27]

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[26] 'Victoria's Prison Population', *Sentencing Advisory Council* ('SAC') (Web Page) <https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-trends/victoria-prison-population>. See the table 'Number of People in Victoria's Prisons, 1871 to 2019'. As at 30 June 2019, Victoria's prison population was 8,101, compared to 4,352 in 2009 (an increase of 86.14% over the past decade). It should be noted that there has been a recent reduction in prisoner numbers due in part to the COVID-19 pandemic. As at 30 December 2020 there were 7,082 prisoners in Victorian prisons: 'Monthly Prisoner and Offender Statistics 2020-21', *Corrections Victoria* (Web Page), <https://www.corrections.vic.gov.au/monthly-prisoner-and-offender-statistics-2020-21>.

[27] Tania Wolff, 'Why Mandatory Sentencing Fails', *Law Institute Journal* (Web Page, 1 February 2018) <https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/Jan-Feb-2018/Why-mandatory-sentencing-fails>. Wolff also observes:

> In Victoria, specialist courts and programs are addressing underlying reasons for the offending with treatment and support. The Drug Court, which has had significant success in terms of recidivism,

51. In Liberty Victoria's submission to the 2014 Ombudsman's Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria, we said, amongst other things:

> All Victorian prisoners should be offered access to the Transitional Assistance Program when they are nearing the end of their sentence. For prisoners who have more complex needs, there are Intensive Transitional Support Programs that provide both pre and post release case management support. There are three streams catering for the different needs of women, men, and Aboriginal and Torres Strait Islander people.[28]

52. This applies with equal force for prisoners who have served sentences for sexual offences. It is vital, and in the interest of the community, that such offenders are not only provided with education and rehabilitation services during their imprisonment, but are properly transitioned back into the community with adequate supports.

Post-Sentence Measures for Sexual Offending

I. Sex Offender Registration

53. It is the long-held position of Liberty Victoria that there are chronic problems with the registration regime under the *SORA.*

54. We have submitted there are at least three foundational problems with the current system of registration in Victoria:

    (a) The expanding number of registrants;

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psychosocial improvement and cost effectiveness since starting in 2002, and the Assessment and Referral Court, are a far more effective response to the revolving door nature of crime and punishment.
Mandatory penalties do not deter people from committing crime, address recidivism or provide consistency in sentencing. A 'one size fits all' approach to sentencing leads to unjust outcomes as offenders with unequal culpability and circumstances are sentenced to the same minimum sentence of imprisonment.
Ultimately, mandatory sentencing is a populist, simplistic reaction to complex problems which require a more sophisticated response.

[28] Liberty Victoria's submission to the 2014 Ombudsman's Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria, (Web Page, December 2014), <https://libertyvictoria.org.au/sites/default/files/LibertyVictoria-YLLR_Submission_Ombudsman_PrisonConsultation20141231.pdf>, [60].

(b) The absence of judicial discretion as to whether a person should be placed on the register; and

(c) The complexity of reporting obligations.[29]

55. For convenience we repeat those submissions below.

A. The Number of Registrants

56. The VLRC Report on Sex Offenders Registration of 2012 estimated that there would be 10,000 registrants by 2020. Liberty Victoria endorses the recommendation of the VLRC in that report that there is a need to "strengthen the scheme by sharpening its focus".

57. The register was originally intended to be a database of information on persons who posed a significant risk to the sexual safety of the community in order to prevent offending conduct (particularly against children). It has now effectively become an unwieldy warehouse of information that may in some circumstances assist with prosecution after a crime has occurred (although that depends on the self-reporting of registrants).

58. Accordingly, the register has shifted from a proactive to a reactive model.

B. Mandatory Registration

59. For many sexual offences registration under the *SORA* is mandatory. At present, if a person is found guilty or pleads guilty to a Schedule 1 or Schedule 2 offence under the *SORA*, then registration must occur (for a duration of 8 years, 15 years, or life depending on the number of offences and the circumstances).[30] There are now limited exceptions for a person who was 18 or 19 years of age at the time during the

[29] Liberty Victoria Submission on the Sex Offenders Registration Amendment Bill 2016 (Vic), (Web Page, 29 March 2016), <https://libertyvictoria.org.au/content/sex-offenders-registration-amendment-bill-2016>; Liberty Victoria Submission on the Sex Offenders Registration Amendment Bill 2017 (Vic), (Web Page, 31 May 2017), <https://libertyvictoria.org.au/sites/default/files/SexOffendersRegistrationAmend%28Misc%29Bill%202017%20final%20web310517.pdf>.
[30] *SORA,* s 34.

commission of a specified offence, who may apply for a "registration exemption order".[31]

60. That is problematic because there will be some circumstances where an offender does not pose a substantial risk to the sexual safety of the community or where the period of registration is disproportionate to the level of risk.

61. Persons who may be assessed as posing no real risk of predatory or escalating sexual offending should not be subject to mandatory registration. Such persons, once registered, not only face significant limitations to their liberty, privacy and freedom of movement, but are prevented from engaging in a wide range of child-related employment.[32] That is even so in circumstances where the relevant offending was not related to children.

62. Accordingly, mandatory registration may also provide a disincentive to the resolution of matters.

63. A consequence of being on the register is that it is unlawful to work, amongst other things, in schools, transport services, and various clubs, religious organisations, associations or movements that provide services to children.[33] This has a significant impact on the employability and social integration of those on the register, which has the tendency to further entrench disadvantage.

64. For those persons who pose no significant risk to the community, there is a real question as to whether the stigma of being on the register is actively counter-productive with regard to their rehabilitation.

65. This not only works a serious injustice to the person made subject to the order, but also results in an ever-expanding list of persons who are placed on the register. Liberty Victoria submits that, having regard to the difficult administrative task in managing and updating the database of registered persons, it is vital that persons

[31] Ibid, Part 2 Division 2.
[32] Ibid, s 68.
[33] Ibid, s 67.

who are registered as sex offenders are those who actually pose a significant risk of engaging in sexual offending.

66. The best way to protect the community and to ensure that only persons who are a real risk of reoffending be placed on the sex offenders register, and thus preserve the value of the register itself, is to preserve the discretion of judicial officers to refuse to make orders in appropriate cases.

67. Further, judicial officers should be empowered to set shorter registration periods than the three fixed periods under the Act of 8 years, 15 years, and life. This is because the limitation to the rights of those registered will only be proportionate if the period of registration is the minimum necessary in the circumstances.[34] There may well be examples of offenders acting in ways completely out of character, where the uncontradicted expert evidence is that the person does not pose a risk to the community, or only requires a very limited period of supervision.

68. Persons who are registered as sex offenders should have a statutory right of review. There should be set periods (perhaps once every two years from the date of the registration order) during which time an order must be reviewed, with the registered person at liberty to apply for leave to review an order due to new facts or circumstances or where it is in the interests of justice. This is similar to the system of review provided for detention and supervision orders under the *SOA*,[35] and would be a much better way of ensuring that the limitation to a person's human rights is proportionate, and that the register is focused upon those who pose a real risk to

[34] See further *ARM v Secretary to the Department of Justice* (2008) 29 VR 472 at 475 [13] (Maxwell P, Nettle and Weinberg JJA) with regard to the now repealed *Serious Sex Offenders Monitoring Act 2005* (Vic). See further *Nigro & Ors v Secretary to the Department of Justice* (2013) 41 VR 359 and *Owen Daniel (a pseudonym) v Secretary to the Department of Justice* (2015) 45 VR 266.
[35] *SOA*, Part 8.

the community. The current power of the Chief Commissioner to apply to suspend reporting requirements is inadequate.[36]

69. As held in *R (on the application of F (by his litigation friend F)) and another (FC) v Secretary of State for the Home Department*,[37] in the context of the equivalent British scheme, legislation that provides for mandatory registration needs be subject to review in order to be compliant with fundamental human rights standards. While that case concerned mandatory life registration with no right of review, it is also strongly arguable that the Act, by only allowing review of life registration in the Supreme Court of Victoria after 15 years,[38] constitutes a disproportionate limitation to the human rights of registered persons.

70. In its 2012 report, the VLRC called for the Courts to determine whether a person should be placed on the register in all circumstances (and thus remove mandatory registration), and that Part 5 of the *SORA*, concerning the prohibition on child-related employment, should be removed from that Act and integrated with the *Working with Children Act 2005* (Vic). Liberty Victoria strongly agrees with those recommendations.

C. Complexity of Reporting Conditions

71. Under the reforms to the *SORA* made by the *Sex Offenders Registration Amendment Act 2014* (Vic), registrants are now required to report almost all contact with children, even when supervised. "Contact" is defined as including physical contact, oral communication or written communication if engaged in for the purpose of forming a personal relationship with the child, whether or not such contact is supervised.[39]

72. That means that a registrant who, for example, has dinner at a friend's house and speaks with their friend's child at the dinner table which could be regarded as forming a "personal relationship" with the child is obliged to immediately notify the

[36] *SORA,* s 39A.
[37] [2010] UKSC 17.
[38] *SORA*, s 39(2).
[39] Ibid, s 4A.

register, even in circumstances where all contact was fully supervised. A failure to report is punishable by imprisonment.

73. Registrants have been regularly prosecuted for failing to comply with their reporting obligations. That has included a registrant being prosecuted for failing to disclose membership of a library, which was regarded by police as an organisation with a child membership and also an "Internet Service Provider". There was no allegation that the registrant had committed any inappropriate conduct whilst at the library – the alleged criminality was a failure to report and update the register.

74. Problematically, there are now so many reporting obligations on registrants, and the matters are of such complexity, that often the real issue is whether an informant wishes to pursue breach proceedings against a given registrant.

75. That is problematic because it creates a situation where different members of Victoria Police will have different standards as to whether a person should be breached, particularly for a "technical" breach. Accordingly, the increased complexity of reporting requirements has also increased the potentially arbitrary application of the breach provisions.

76. Further, individuals on the register who suffer from mental health issues that can affect their cognitive abilities or intellectual disabilities find it more difficult to understand their obligations due to the complexities of the regime.

II. Sex Offender Detention and Supervision

77. By way of background, because of the increased rate of incarceration of offenders, and the recent reforms to the parole regime, there is a real issue with a large number of offenders being released with little or no supervision on parole.[40] This will be compounded by the restrictions on the use of Community Correction Orders (CCOs)

[40] This is also a consequence of presumptive and mandatory sentencing; see further *Esmaili v The Queen* [2020] VSCA 63, [63] (Priest and Kyrou JJA).

introduced by the *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic).

78. With regard to detention and supervision orders, Liberty Victoria has expressed its concern that:

> It must be remembered that these forms of detention and supervision orders take effect only after a person has completed a sentence of imprisonment imposed by an independent judicial officer, and where that sentence of imprisonment was found to be proportionate having regard to all sentencing considerations, including the risk of reoffending and the need for community protection. …
>
> It appears that these detention and supervision orders are in part intended to fulfil the function once intended by supervision on parole, including access to rehabilitative programs, but only after a proportionate sentence has expired.
>
> Imprisonment has a criminogenic effect, and that needs to be counteracted in the early stages of incarceration, not after a sentence of imprisonment has expired. It would be [a] much better use of public resources if greater funding was allocated to prisoners to undertake rehabilitative programs when they are serving their sentences, as opposed to the creation of an additional layer of post-sentence supervision.[41]

79. It is commonplace for persons residing at such "supervision" facilities (such as Corella Place opposite the Hopkins Correctional Centre in Ararat), who have served their sentences, to not be able to leave the facility without supervision, to have strict curfews, to not be allowed to work, and to be electronically tagged.

80. Notwithstanding the judgment of the High Court in *Fardon v Attorney-General for the State of Queensland*,[42] Liberty Victoria does not accept that such orders are not punitive in practical effect, at least in so far as offenders are concerned. As Brennan, Deane, Toohey and Gaudron JJ said in *Witham v Holloway*,[43] "[p]unishment is

[41] Liberty Victoria Comment on the Serious Offenders Bill 2018 (Vic), (Web Page, 21 May 2018), <https://libertyvictoria.org.au/sites/default/files/Liberty%20Victoria%20Comment%20-%20Serious%20Offenders%20Bill%202018.pdf>, [4]-[7]
[42] (2004) 223 CLR 575.
[43] (1995) 183 CLR 525.

punishment, whether it is imposed in vindication or for remedial or coercive purposes".[44]

81. The reality of these types of orders, even with the paramount aim of community protection and secondary aim of rehabilitation, is that they constitute a form of post-sentence punishment.

82. Further, the assessment of risk is notoriously difficult. The Human Rights Committee of the United Nations in *Fardon v Australia*[45] and *Tillman v Australia*,[46] criticised the capacity for psychiatric experts to properly predict dangerousness:

> The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an exact science. [The legislative regime] on the one hand, requires the Court to have regard to the opinion of psychiatric experts on future dangerousness but, on the other hand, requires the Court to make a finding of fact of dangerousness. While Courts are free to accept or reject expert opinion and are required to consider all other available evidence, the reality is that the Courts must make a finding of fact on the suspected future behaviour of a past offender, which may or may not materialise.

83. For completeness, it should be noted that Liberty Victoria, for reasons expressed in previous submissions,[47] strongly opposes the mandatory imprisonment for 12 months for breaches of restrictive conditions for persons subject to such orders.

84. As we said in that submission, to include conduct against the "good order" of such facilities, and relatively minor offences such as assault, criminal damage and threats indicates that the regime is designed to try to ensure compliance from persons

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[44] Ibid, 534.
[45] (UNHRC, Communication No 1629/2007, 18 March 2010).
[46] (UNHRC, Communication No 1635/2007, 18 March 2010).
[47] Liberty Victoria Comment on the Serious Offenders Bill 2018 (Vic), (Web Page, 21 May 2018), <https://libertyvictoria.org.au/sites/default/files/Liberty%20Victoria%20Comment%20-%20Serious%20Offenders%20Bill%202018.pdf>, [21]-[27].

subject to supervision orders in residential facilities rather than preventing more serious harm to members of the community.

85. Notably, this sees persons in such facilities subjected to harsher penalties for such conduct than those in prisons pursuant to s 53 of the *Corrections Act 1986* (Vic) and r 50 of the *Corrections Regulations 2009* (Vic).

86. There is significant scope for such provisions resulting in mandatory imprisonment to be misused by police or custodial officers.

Issues Paper G – Sexual Offences: Restorative and Alternative Justice Models

87. A list of questions raised by the Commission concerning Issues Paper G – Sexual Offences: Restorative and Alternative Justice Models have been published. Our submission will specifically respond to questions 1 and 2.

Question 1: Do you support adopting a restorative justice model for sexual offences? Why or why not?

88. The process of making a complaint and bringing a charge for a sexual offence through the criminal justice system is not designed to directly address the harm caused to a victim. Instead, the focus is properly on the accused person, providing a fair process and an opportunity to test the allegations made against them.

89. Restorative justice aims to improve victims' experiences of justice by considering their wellbeing and addressing specific needs, to improve victim access to justice by offering an alternative avenue for addressing harm, to support offenders in non-offending by increasing their insight into the impact of the harm caused, and to create healthy societies by strengthening social bonds.[48] It provides an opportunity for people who have been sexually harmed to explain the impact in their own words, without the constraints of the rules of evidence. Where restorative justice is 'done

[48] Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, *The Use and Effectiveness of Restorative Justice in Criminal Justice Systems following Child Sexual Abuse or Comparable Harms*, (Bolitho and Freeman, March 2016), 26.

well', it can go beyond what traditional responses can achieve.[49] As outlined above, Liberty Victoria has long supported the adoption of a restorative justice model for sexual offences to address and complement the necessary limitations of the adversarial criminal justice system, and to ensure better outcomes for all participants.

90. Professor Kathleen Daly of Griffith University has conducted extensive work in the field of innovative justice responses to sexual offending. Professor Daly's notion of 'victims' justice needs' identifies, in general terms, what people who have been sexually harmed want from the criminal justice system, namely: participation, voice, validation, vindication and offender accountability.[50] Whilst there has been significant, continual and effective reform to the area of sexual offences in Victoria, it is recognised that the traditional criminal justice system cannot meet all of these needs.

91. Liberty Victoria adopts Professor Daly's view, which is echoed by the RMIT Centre for Innovative Justice (**CIJ**), that "more constructive methods of responding to sexual offending need to be identified, methods which do not rely on increasing the criminalisation and stigmatisation of offenders but which respond more effectively to sexual assault".[51]

92. The adoption of a restorative justice processes that enhance and complement the conventional justice system, and which are better able to meet the justice needs of victims, address the rehabilitative needs of offenders and support endeavours to prevent future offending,[52] will improve access to just outcomes for victims, offenders and the wider community.

93. The value of restorative justice is widely acknowledged. As noted in Issues Paper G, the Royal Commission into Family Violence supported restorative justice for

[49] Jacqueline Larsen, Australian Institute of Criminology, *Restorative Justice in the Australian Criminal Justice System*, (vii).
[50] Centre for Innovative Justice, RMIT University, *Innovative Justice Responses to Sexual Offending - Pathways to Better Outcomes for Victims, Offenders and the Community* (Report, May 2014), 9.
[51] Ibid, 10.
[52] Ibid, 13.

family violence, the CIJ supports its use for sexual offences and the VLRC has previously recommended introducing a staged restorative justice program, including for sexual offences in the later stages.

94. As noted above, Liberty Victoria has previously argued that 'cautious and selective evolution' of the criminal justice system was necessary to avoid adding greater complexity to an already difficult jurisdiction.[53] This 'slow and steady' approach was supported by the CIJ in their report, *Innovative Justice Responses to Sexual Offending*, which submits that rather than a certain type of offender or offending being more or less appropriate for sexual offence restorative justice, a phased approach would allow time for professional and services to develop the necessary skills and expertise to appropriately assess suitability for conferencing, whilst the criminal justice system, legal culture and the wider community also adapts to this significant change in process.[54]

95. Liberty Victoria does not advocate for the blanket exclusion of certain types of offenders or offences from restorative justice processes. Eligibility should be determined according to basic criteria that do not automatically exclude specific offences or categories of offenders, instead according to established best principles, such as voluntary participation. Each case must be assessed carefully on its own facts and the accused's personal circumstances to determine suitability. It is critical to the success of any restorative justice process that it be flexible, responsive and nuanced, and conducted by highly-trained and skilled personnel.

96. Research on the impact of restorative justice has contradicted claims that benefits for one party come at the expense of the other, and instead have been relatively consistent in reporting satisfaction among victims.[55] Any challenges involved in ensuring the safety of those who participate can be met with screening for suitability, careful preparation of all participants, a flexible and variable format that can respond

[53] Ibid, n 3.
[54] Ibid, 7-8.
[55] Ibid, n 2.

to the individual circumstances of each case, and ensuring that such processes only take place with a highly-skilled and experienced facilitator.

Question 2: If a restorative justice model is adopted, what should its features be?

97. Whilst the ability to access restorative justice processes should not interfere with an accused's right to trial, nor change or substitute the normal process of criminal justice, it should be available at any point before, during or after a criminal prosecution. Indeed, such a model should be available even where there is no criminal justice process.

98. Where such processes take place before a formal finding (including admission) of guilt, anything said or done throughout the process should be subject to a codified immunity and not admissible in any pending, current or future criminal or civil proceeding, except in some circumstances. A legislative example is found in s 127 of the *Criminal Procedure Act 2009* (Vic) in respect of committal case conferences:

> (3) Evidence of—
>
> (a) anything said or done in the course of a committal case conference; or
>
> (b) any document prepared solely for the purposes of a committal case conference—
>
> is not admissible in any proceeding before any court or tribunal or in any inquiry in which evidence is or may be given before any court or person acting judicially, unless—
>
> (c) all parties to the committal case conference agree to the giving of the evidence; or
>
> (d) the proceeding is a criminal proceeding for an offence alleged to have been committed during, or in connection with, the committal case conference.

99. Liberty Victoria acknowledges the concern raised that some within the community believe that a person responsible for sexual harm should not be incentivised to participate in restorative justice. However, in cases where there is a plea or finding of guilt, genuine engagement on the part of the offender should be a factor taken into account by the Court in any sentence to be imposed. This is consistent with the Youth Justice Group Conferencing program, which has successfully operated in the criminal jurisdiction of the Children's Court across Victoria since its formal introduction in 2006.

100. How participation is to be taken into account in sentencing should be determined on a case-by-case basis, however it may be relevant to an assessment of, amongst other things, remorse, willingness to facilitate the course of justice, prospects of rehabilitation and the weight to be afforded to specific deterrence. This is analogous to the approach in the Koori Court: see *Honeysett v The Queen*,[56] where Priest, Beach and Hargrave JJA said:

> In our view, in determining the weight to be attached to an offender's participation in a Koori Court sentencing conversation as a mitigating factor, a sentencing court should consider a range of factors, including:
>
> (1) The fact that participation in the process is a voluntary one, may be confronting to the offender, and will likely involve him or her being 'shamed'. As noted in *Morgan*, participation in the process may of itself be rehabilitative.
>
> (2) The fact that the offender is, rather than 'hiding behind counsel', taking the opportunity to personally:
>
> (a) demonstrate his or her remorse for the offending;
>
> (b) demonstrate insight into the reasons for, and the seriousness and effect of, the offending; and
>
> (c) express any intention to reform and how that will be done, including by participating in available rehabilitation programs.
>
> (3) The Court's assessment of the genuineness of the offender's statements during the sentencing conversation. That assessment should take account of all the information before the Court.

[56] (2018) 56 VR 375.

> Based on the sentencing Court's assessment of the quality and genuineness of the statements made by the offender, it is a matter for the individual judge to assess weight in the circumstances of the particular case. In fixing the sentence, it is the duty of the Court to impose just punishment adapted to all the circumstances of the case by reference to the permissible sentencing purposes of general and specific deterrence, any means by which rehabilitation of the offender be facilitated, denunciation of the offending, and the need to protect the community.[57]

101. Liberty Victoria acknowledges that the Koori Court has distinct cultural significance, and the notion of 'shaming' may not be appropriate in a restorative model for sexual offences. However, the other principles expounded by the Victorian Court of Appeal appear to have direct and helpful application.

102. Liberty Victoria strongly supports the establishment and use of an independent Commission to manage and run any restorative justice model adopted. In order for the outcome to be respected and viewed as fair and just, the process must be viewed by participants as neutral. Thus, established victim or offender program providers, such as Corrections Victoria, are not appropriate agencies to run such processes. Notwithstanding any benefits that may flow from building on existing programs, such as the informal restorative justice conferencing offered by SECASA,[58] Liberty Victoria favours the establishment of a wholly independent Commission to manage restorative justice in Victoria.

103. It is essential that participation by the person harmed and the offender should be voluntary and free from pressure of any kind, and that the person responsible for harm must accept responsibility at the outset to some degree. Liberty Victoria supports the adoption of the best practice principles for restorative justice in cases involving sexual harm outlined in Table 2 of Issues Paper G, namely:

- Voluntary participation—no one is obliged or pressured to participate;
- All participants are protected from further harm—their safety is ensured;

[57] Ibid, 389-90 [54]-[55].
[58] South Eastern Centre Against Sexual Assault and Family Violence, Victoria.

- The process centres on the needs and interests of the person harmed;
- The person responsible accepts responsibility at the outset, at least to some degree;
- Power imbalances are redressed. The dignity and equality of all participants is respected;
- The process is supported by appropriate resources and highly trained and skilled personnel, including people with specialist expertise in sexual harm;
- The process is flexible and responsive to diverse needs and experiences;
- A restorative justice outcome agreement is fair and reasonable, and the person responsible is able to carry it out;
- What is said and done during restorative justice is confidential, potentially with some exceptions such as where a participant indicates an intention to offend in the future [we would add an exception where the participation in such a process is led in plea hearings as evidence of matters such as remorse, specific deterrence, and willingness to facilitate the course of justice];
- Transparency: participants are fully informed about all aspects of the process and potential outcomes; de-identified results are publicised to contribute to continuous program improvement;
- The process is part of 'an integrated justice response'—it is not a stand-alone response; other criminal and civil justice options are available, as well as therapeutic treatment programs that the person responsible can be referred to as a condition of the restorative justice outcome agreement; and
- The process is supported by a legislative framework that sets out guiding principles, provides for implementation, and explains how restorative justice interacts with the criminal justice system and how restorative justice agreements will be monitored.

104. Whilst people harmed should be able to request restorative justice, it is critical that the accused person is not compelled or pressured to participate. Similarly, referrals from other sources including Victoria Police, the OPP or judicial officers, should not place any pressure on the person harmed nor the alleged offender.

105. A restorative justice model has the potential to have a long-lasting and wide-reaching impact on criminal justice in Victoria, and improving outcomes for victim-survivors. However, we would again submit that a cautious approach needs to be taken to ensure that the appropriate referral and assessment framework coupled with therapeutic treatment programs and appropriate legislative frameworks are implemented. The importance of uptake within the profession and wider community cannot be emphasised enough, and again this is something that can only be achieved with time.

Thank you for the opportunity to make this submission with regard to improving the response of the justice system to sexual offences.

If you have any questions regarding this submission, please do not hesitate to contact Liberty Victoria President Julia Kretzenbacher or Policy Committee Member Michael Stanton or the Liberty office on 9670 6422 or info@libertyvictoria.org.au.

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Sentencing Advisory Council
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Sentencing Advisory Council

Sentencing Matters

Does Imprisonment Deter? A Review of the Evidence

Contents

Executive summary

Deterrence can be described as the prevention of crime through the fear of a threatened – or the experience of an actual – criminal sanction. General deterrence is aimed at reducing crime by directing the threat of that sanction at all potential offenders. Specific deterrence is aimed at reducing crime by applying a criminal sanction to a specific offender, in order to dissuade him or her from reoffending.

Deterrence is only one of the purposes of sentencing in Victoria, determined by section 5(1) of the *Sentencing Act 1991* (Vic). The other purposes are: punishment, denunciation, rehabilitation and community protection (incapacitation).

The scope of this paper is limited to examining the sentencing purpose of deterrence only – it does not present an analysis of the evidence of imprisonment's effectiveness in regard to other sentencing purposes. There is an overlap in some studies when measuring deterrence and incapacitation; however, the paper does not draw conclusions on the effectiveness of imprisonment as a means of reducing crime through incapacitation.

Deterrence theory is based upon the classical economic theory of rational choice, which assumes that people weigh up the costs and benefits of a particular course of action whenever they make a decision. Deterrence theory relies on the assumption that offenders have knowledge of the threat of a criminal sanction and then make a rational choice whether or not to offend based upon consideration of that knowledge.

Rational choice theory, however, does not adequately account for a large number of offenders who may be considered 'irrational'. Examples of such irrationality can vary in severity – there are those who are not criminally responsible due to mental impairment, those who are drug affected or intoxicated and those who simply act in a way that is contrary to their own best interests. Research shows that the majority of offenders entering the Victorian criminal justice system have a history of substance use that is directly related to their offending.

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That people are not perfectly rational and do not always make decisions that are in their own best interests is supported by studies in behavioural economics. Behavioural economic theory proposes that individuals make decisions on the basis of imperfect knowledge by employing 'rules of thumb', rather than strict logic, and are subject to limits on their willpower. People are also subject to a great number of patterns of deviation in judgment that occur in particular situations (known as 'cognitive biases'), which influence decision-making in predictable – but often irrational – ways.

The evidence from empirical studies of deterrence suggests that the threat of imprisonment generates a small *general* deterrent effect. However, the research also indicates that increases in the severity of penalties, such as increasing the length of terms of imprisonment, do not produce a corresponding increase in deterrence.

It has been suggested that harsher penalties do not deter because many crimes are committed in circumstances where it is difficult to identify when, or if, offenders have considered the consequences of their criminal behaviour. In addition, otherwise rational individuals are more strongly influenced by the perceived immediate benefits of committing crime and individuals 'discount' the cost of future penalties.

A consistent finding in deterrence research is that increases in the *certainty* of apprehension and punishment demonstrate a significant deterrent effect. Perceptions about the certainty of apprehension, for example, may counter the 'present bias' and reinforce the potential cost of committing crime. This result is qualified by the need for further research that separates deterrable from non-deterrable populations.

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

The empirical evidence on the effectiveness of imprisonment as a deterrent to crime suggests that the purposes of sentencing should be considered independently – according to their own merits – and that caution should be exercised if imprisonment is to be justified as a means of deterring all crimes and all kinds of offenders.

Background

Introduction

Deterrence is only one of the purposes of sentencing in Victoria. However, the intuitive basis of deterrence – that the punishment of an offender stands as a threat to both the offender and to others, and so reduces the further commission of crime – is compelling and, at first glance, seems uncontroversial.

Nevertheless, the 'intuitive appeal' (Varma and Doob, 1998, p. 167) of the effectiveness of deterrence is insufficient for the development of sound criminal justice policy and, ultimately, the imposition of just sentences. Instead, an analysis of the evidence regarding that effectiveness is required.

Sentences in Victoria may be imposed for one or more of the following purposes: punishment, denunciation, rehabilitation, community protection and deterrence. These purposes can be separated into two groups on the basis of the effects they are intended to achieve.

In the first group, punishment and denunciation can be seen as direct responses to the criminal behaviour. Punishment is a form of redress against the moral imbalance caused by crime – inflicting upon an offender a sanction that is in proportion to the harm he or she has caused. Denunciation is a statement to the offender (and to the community at large) that such criminal behaviour will not be tolerated.

In the second group, rehabilitation, community protection and deterrence act as more than simply responses to the criminal behaviour and are intended to achieve the outcome of a reduction in the future commission of crime.

There is often tension between these purposes, and they can conflict. For example, the purpose of rehabilitation may best be satisfied by the imposition of a community-based sentence, which maintains an offender's links with family and community (including possible employment) and allows broader access to drug or alcohol treatment services. However, such a sentence may fail to sufficiently punish an offender or adequately denounce his or her offending behaviour.

A sentencing court must engage in the challenging and complex task of considering the circumstances of each case and assigning a particular weight to each sentencing purpose, in light of those circumstances.

The question of what weight should be given to each purpose is informed by both precedent and by the available evidence. If a sentencing purpose is intended to result in a reduction in crime, then in order to determine what weight should be given to that purpose, it is critical to examine the evidence of whether or not – or the extent to which – that goal of crime reduction is achieved.

The significance of deterrence to sentencing in Victoria is apparent from a consideration of sentence appeals. The Sentencing Advisory Council recently undertook a statistical analysis of the grounds relied upon by the Crown in sentence appeals. That analysis reveals that, of the 34 Crown appeals in the 2008 calendar year, in addition to other grounds (such as manifest inadequacy), failure to give sufficient weight to general deterrence was raised as a ground in 73.5% of appeals and failure to give sufficient weight to specific deterrence was raised as a ground in 61.8% of appeals. In those appeals where the grounds of failure to give sufficient weight to general deterrence or failure to give sufficient weight to specific deterrence were raised, the grounds were successful or considered favourably by the Court of Appeal in 44.0% and 33.3% of cases, respectively.

Although imprisonment is only one of a number of available sanctions, it is the most severe form of penalty that can be imposed by a court when sentencing an offender in Victoria. In the year from September 2009 to September 2010, the number of people imprisoned in Victoria increased by 3.8% (Australian Bureau of Statistics, 2010a, p. 11). While Victoria had the second-lowest rate of imprisonment of any Australian jurisdiction during that year, the increase reflects a long-term trend. Since 1977, the imprisonment rate has shown a continual upward trend (Freiberg and Ross, 1999), and in the decade between 1999 and 2009 the imprisonment rate in Victoria increased by 28.7%, from 81.4 per 100,000 of the adult population (Australian Bureau of Statistics, 2001, p. 8) to 104.8 per 100,000 of the adult population (Australian Bureau of Statistics, 2010a, p. 12).

At the same time, global and local economic pressures have forced many jurisdictions to reassess the effectiveness of imprisonment and to examine the ability of imprisonment to achieve the purposes of sentencing.

In light of Victoria's increasing rate of imprisonment, the significant investment of public resources that this requires and successful submissions by the Crown to the Court of Appeal for increased imprisonment on the basis of general and specific deterrence, it is important to explore the empirical evidence as to the effectiveness of imprisonment in achieving deterrence in practice.

As deterrence is just one purpose of sentencing in Victoria, a consideration of the evidence demonstrating the deterrent effect of imprisonment does not determine the legitimacy of imprisonment for other purposes. Further, the sanction of imprisonment is only one of the sentences that may be imposed by a court for an offence. Other sanctions include intensive correction orders, community-based orders and fines. However, as imprisonment is the most severe, iconic and resource intensive, and the one most commonly believed to be effective in achieving deterrence, it is the focus of this paper.

Scope of the paper

This paper reviews the current empirical studies and criminological literature regarding the effectiveness of imprisonment as a deterrent to crime. This paper examines the empirical evidence and criminological studies that have sought to examine such questions as: Does the threat of imprisonment in fact deter potential offenders? Does an increase in the severity of penalties result in a corresponding decrease in offending? Does the experience of imprisonment deter offenders from reoffending after they are released from prison, or does it make them more likely to reoffend?

The paper examines the current role of deterrence in the sentencing process in Victoria. The paper then briefly reviews classical deterrence theory and its development by modern economic theory. It discusses the implications for deterrence of more contemporary perspectives, including the critique of classical economic theory by behavioural economics. The paper examines the findings of recent empirical research on the concept of general deterrence, including absolute and marginal deterrence and the deterrent effect of changes to punishment certainty and punishment severity. Finally, the paper examines the findings of recent empirical research on specific deterrence and the effect of imprisonment upon recidivism and reoffending. That section also includes a discussion of studies relating to the specific deterrence of young offenders.

Deterrence in Victoria

The Victorian sentencing process

The *Sentencing Act 1991* (Vic) is the principal source of legislative guidance on sentencing in Victoria. The Act sets out the purposes of sentencing, establishes a basic process of sentencing and details the various factors that the court must consider when sentencing an offender. The *Sentencing Act 1991* (Vic) is supplemented by a number of other Acts that prescribe and set out the maximum penalties for criminal offences.

The courts are also guided by sentencing principles established in common law (Fox and Freiberg, 1999, p. 29), including the principles of totality and proportionality. Although there is relatively broad judicial discretion in Victoria, allowing a court to determine a sentence that is particular to the offender being sentenced, the courts have been restricted by the legislature to sentence only for the purposes listed in the *Sentencing Act 1991* (Vic).

Deterrence in sentencing

Section 5(1) of the *Sentencing Act 1991* (Vic) states that the only purposes for which a sentence may be imposed in Victoria are to provide just punishment, to manifest denunciation, to facilitate rehabilitation, to protect the community from the offender and – in section 5(1)(b) – 'to deter the offender or other persons from committing offences of the same or a similar character'.

Even prior to its statutory formulation as one of the purposes of sentencing, the Victorian Court of Appeal identified deterrence as having an important role in sentencing. In *R v Williscroft*,[1] the court quoted the New Zealand case of *R v Radlich*,[2] stating:

> one of the main purposes of punishment … is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment … The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only a light punishment.[3]

The court has recognised that general deterrence is more likely to have an effect on crime where there is an identifiable choice – or in effect, a series of choices – that requires consideration on the part of the offender of the costs and benefits of the crime. In the case of *R v Perrier*,[4] McGarvie J stated:

> There is reason to doubt whether, with some crimes and some types of persons, sentences in reality have any general deterrent effect. There is no reason to doubt that substantial sentences do deter people who might otherwise be inclined to engage as principals in the commercial importation of heroin. Those who run businesses, legitimate or illegitimate, are constantly guided in deciding whether to take particular commercial courses by their assessments of the economic and other risks and costs involved. In deciding whether to run the risk of pursuing the high returns obtainable from the commercial importation of heroin, the non-addict with the intelligence and ability to organise and operate such a business must count the potential cost. If the contingent cost includes that of forfeiting the whole or a large part of one's remaining life to the prison system, clearly it will operate substantially to discourage selection of the heroin option.[5]

Similar comments on the application of general deterrence to particular types of crimes were made in *R v Poyser*.[6] In that case, Murphy J stated that deterrence assumed greater importance when sentencing for 'deliberate, calculated, carefully designed and avaricious crimes, committed by … confidence men masquerading as men of worth' and that 'deterrence in such cases is not a difficult concept to understand, however artificial it may appear to be in … crimes of passion or drug-related crimes'.[7]

The Victorian Court of Appeal has acknowledged the difficulty of advancing general deterrence. In *Winch v The Queen*,[8] Maxwell P and Redlich JA suggested that the effectiveness of deterrence hinges upon *communication* of the threat of punishment to potential offenders:

> [The prevalence of glassing offences and the community's concern] alone heighten the importance of general deterrence as a sentencing objective. They also highlight the urgent need for sentencing decisions in cases such as this to be communicated to those most likely to commit this kind of offence. How to make general deterrence effective remains one of the great challenges in the administration of criminal justice.[9]

1 *R v Williscroft* [1975] VR 292.
2 *R v Radlich* [1954] NZLR 86, 87.
3 *R v Williscroft* [1975] VR 292, 298–299; citing *R v Radlich* [1954] NZLR 86, 87.
4 *R v Perrier [No 2]* [1991] 1 VR 717.
5 Ibid 721.
6 *R v Poyser* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Murphy, Gray and Nathan JJ, 15 September 1988).
7 Ibid 5.
8 *Winch v The Queen* [2010] VSCA 141 (17 June 2010).
9 Ibid [43].

In a speech to the Melbourne Press Club in April 2010, Chief Justice Marilyn Warren drew attention to knowledge of penalties being an essential requirement, saying 'deterrence within the community will not be achieved unless knowledge of the sentences is conveyed to the community' (Warren, 2010, p. 6).

The decision of the High Court of Australia in *Veen v The Queen (No 2)*[10] also affirmed the importance of deterrence as a sentencing purpose but drew attention to the fact that deterrence is just one of a number of purposes of sentencing and that sometimes those purposes can conflict with one another. In that case, Mason CJ, Brennan, Dawson and Toohey JJ said:

> The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.[11]

While deterrence is enshrined in common law and in Victorian sentencing legislation, there remains judicial scepticism about the effectiveness of deterrence and in particular the effectiveness of *imprisonment* to act as a deterrent. In the South Australian case of *R v Dube,*[12] it was acknowledged by King CJ that:

> there is no proven correlation between the level of punishment and the incidence of crime and that there is no clear evidence that increased levels of punishment have any effect upon the prevalence of crime.[13]

Despite accepting the lack of clear evidence of the effectiveness of deterrence, His Honour remarked:

> the criminal justice system has always proceeded upon the assumption that punishment deters and that the proper response to increased prevalence of a crime of a particular type is to increase the level of punishment for that crime. I think that courts have to make the assumption that the punishments which they impose operate as a deterrent.[14]

Similarly, in the case of *Pavlic v The Queen,*[15] Green CJ stated:

> there is no justification for the view that there exists a direct linear relationship between the incidence of a particular crime and the severity of the sentences which are imposed in respect of it such that the imposition of heavier sentences … will automatically result in a decrease in the incidence of that crime.[16]

According to Green CJ, 'general deterrence is only one of the factors which are relevant to sentence and must not be permitted to dominate the exercise of the sentencing discretion to the exclusion of all the other factors'.[17] However, the continuing importance of considerations of deterrence to sentencing in Victoria is evident from the recent analysis by the Sentencing Advisory Council of the grounds relied upon by the Crown in sentence appeals, discussed above.

Deterrence and sentencing young offenders

In Victoria, the Children's Court has jurisdiction if the offender was under 18 years old at the time of the alleged commission of an offence, and is under 19 years old at the time when proceedings are commenced. The sentencing of offenders in the Children's Court is governed by the *Children, Youth and Families Act 2005* (Vic), providing a particular set of matters to which the court must have regard.

Section 362(1) of the *Children, Youth and Families Act 2005* (Vic) outlines the priorities and aims of sentencing in the Children's Court, including:

1. preserving relationships between the child and his or her family;
2. the desirability of the child living at home, allowing the continuation of education, employment or training;
3. minimising stigma from the court's determination;
4. the suitability of the sentence to the child;
5. the need to ensure the child is accountable; and
6. the need to protect the community.

In *H v Rowe,*[18] Forrest J affirmed that general deterrence is not applicable to sentencing offenders in the Children's Court, stating: 'The principle of specific deterrence is incorporated within [the need to protect the community]; general deterrence is not a relevant sentencing principle'.

10 *Veen v The Queen (No 2)* (1988) 164 CLR 465.
11 Ibid 476.
12 *R v Dube* (1987) 46 SASR 118.
13 Ibid 120.
14 Ibid.
15 *Pavlic v The Queen* (1995) 83 A Crim R 13.
16 Ibid 16.
17 Ibid.
18 *H v Rowe* [2008] VSC 369.

In the adult courts, the sentencing of 'younger' or 'youthful' offenders (although still adults for the purposes of the jurisdiction) also involves a focus on rehabilitation rather than general deterrence. This issue was discussed in the recent case of *Winch v The Queen*[19] where Maxwell P and Redlich JA quoted the general statement of principle from Batt, JA in *R v Mills*:[20]

> In the case of a youthful offender rehabilitation is usually far more important than general deterrence. This is because punishment may in fact lead to further offending. Thus, for example, individualised treatment focusing on rehabilitation is to be preferred. (Rehabilitation benefits the community as well as the offender.)

Their Honours, however, also cited Batt JA in *Director of Public Prosecutions v Lawrence*[21] (with whom Winneke P and Nettle JA agreed) and affirmed that this general principle does not always prevail. Instead, it is sometimes the case that:

> [y]outh and rehabilitation must be subjugated to other considerations. They must take a 'back seat' to specific and general deterrence where crimes of wanton and unprovoked viciousness (of which the present is an example) are involved … This is because the offending is of such a nature and so prevalent that general deterrence, specific deterrence and denunciation of the conduct must be emphasised.[22]

Deterrence and proportionality

As the court in *Veen v The Queen (No 2)*[23] observed, the purposes of imposing a sentence act as guideposts, which may sometimes 'point in different directions'.[24] This conflict of purposes becomes apparent when comparing the sentencing principle of proportionality with the purpose of general deterrence.

The common law sentencing principle of proportionality requires that, when offenders are sentenced, the overall punishment must be proportionate to the gravity of the offending behaviour. General deterrence, on the other hand, is concerned with threatening potential future offenders who might engage in the same criminal conduct with the same criminal sanctions. As von Hirsch and Ashworth (1998, p. 48) note, if general deterrence takes precedence over proportionality, then the 'convicted offender's punishment is being determined entirely by the expected future behaviour of other persons, not by his own past behaviour'. The authors (von Hirsch and Ashworth, 1998, pp. 46–47) point out that:

> a major objection [to deterrence] has been that since its distinctive aim and method is to create fear of the penalty in other persons, it may sometimes require … excessive punishment of an offender in order to achieve this greater social effect.

In other words, deterrence theory might require that a disproportionate punishment be imposed in order to achieve the effect of general deterrence. The problem with this, the authors argue, is that doing so would be to ignore individual justice and 'regard citizens merely as numbers to be aggregated in an overall social calculation' (von Hirsch and Ashworth, 1998, p. 47). Their argument is not that deterrence is irrelevant, only that it cannot be the sole justification for the imposition of a sentence, and there must be 'both a link with the general social justification for the institution of punishment and principles which … place limits on the amount of punishment' (von Hirsch and Ashworth, 1998, p. 47; citations omitted).

Summary

This section has examined the sentencing process in Victoria and the purposes for which a sentence may be imposed. Specific and general deterrence form one of the purposes prescribed by the *Sentencing Act 1991* (Vic) for which a sentence may be imposed, reflecting an assumption that deterrence can reduce crime. Courts have expressed scepticism regarding the efficacy of deterrence for at least some types of offenders, and the High Court of Australia has determined that deterrence is but one of a number of considerations to be made when sentencing.

In Victoria, the sentencing of young persons operates under a model that provides for specific deterrence but excludes general deterrence as a purpose of sentencing. Deterrence can conflict with the principle of proportionality, and seeking to impose a sentence that deters the public at large from the commission of an offence may result in a disproportionate sentence for the individual offender.

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19 *Winch v The Queen* [2010] VSCA 141 (17 June 2010) [39].

20 *R v Mills* [1998] 4 VR 235, 241.

21 *Director of Public Prosecutions v Lawrence* (2004) 10 VR 125.

22 *Winch v The Queen* [2010] VSCA 141 (17 June 2010) [44]; citing *Director of Public Prosecutions v Lawrence* (2004) 10 VR 125, 132.

23 *Veen v The Queen (No 2)* (1988) 164 CLR 465.

24 Ibid 476.

Deterrence theory

What is deterrence?

At its most basic, deterrence can be described as the avoidance of a given action through fear of the perceived consequences. In the context of the criminal law, deterrence has been expressed as 'the avoidance of criminal acts through fear of punishment' (von Hirsch et al., 1999, p. 5) and not through any other means (Beyleveld, 1979, p. 207).

Implicit in this definition is the assumption that individuals have a choice whether or not to commit criminal acts and, when successfully deterred, deliberately choose to avoid that commission through fear of punishment. The critical focus of deterrence is on the individual's knowledge and *choice* and the way in which the criminal justice system – through the threat and imposition of punishment – informs, and so (it is presumed) influences, that choice.

The reliance upon choice also distinguishes deterrence from the sentencing purpose of incapacitation. While both purposes seek to bring about an effect upon subsequent offending, incapacitation seeks to prevent offenders from reoffending through the fact of their imprisonment, and as a result, their lack of capacity to commit offences in the community. Deterrence, on the other hand, seeks to prevent individuals from offending through the threat of punishment.

General and specific deterrence

The criminal justice system as a whole has been shown to exert an *absolute* general deterrent effect. Historical events – such as police strikes – where there has been a lack of enforcement of the law, coincide with a significant increase in the commission of crime (von Hirsch and Ashworth, 1998, p. 51). However, research suggests that individuals are most often deterred from the commission of crime through internalised personal and social norms and the threat of social stigmatisation or non-legal consequences – collectively known as *informal* deterrence, or 'socially-mediated deterrence' (Wenzel, 2004, p. 550).

Some therapeutic courts – such as the Koori Court Division of the Magistrates' Court in Victoria – endeavour to build upon the strength of informal deterrence by involving members of the offender's cultural group in the proceedings. This aims to confer on the court cultural legitimacy and also moral authority (Sentencing Advisory Council, 2010, p. 17), combining elements of both formal and informal deterrence.

Historically, research has focused on *general* deterrence and *specific* deterrence, rather than absolute or informal deterrence. *General* deterrence refers to the way in which the threat of punishment may deter the public at large from committing criminal acts. *Specific* (sometimes called 'special') deterrence refers to the way in which the experience of a particular sanction may deter a particular offender from committing further criminal acts.

The two concepts overlap: a sentence can act both as a specific and a general deterrent – specifically deterring the offender him- or herself, but also standing as an example or threat to the community at large, and so acting as a general deterrent. Similarly, an offender may be generally deterred from the commission of crime by the threat of punishment to the same extent as a non-offender, separate from the experience of a previous sanction.

Research into general deterrence has often focussed on the effect that changes to punishments (such as changes to the severity of penalties or changes to the level of enforcement) have upon deterrence, rather than the mere existence of punishments themselves. Studies into general deterrence usually seek to measure the 'marginal' deterrent effect of particular changes to the law, rather than the 'initial' deterrent effect of prohibiting conduct that was previously not a crime (von Hirsch et al., 1999, p. 5).

Knowledge and deterrence

Both general and specific deterrence are subjective concepts – they rely upon the knowledge and perceptions of the individual. Williams and Gibbs (1981, p. 591) emphasise that the claim that 'certain, swift and severe legal punishment prevents crimes' ignores the fact that deterrence theory 'is primarily a *perceptual* theory' (emphasis added). The authors question how the 'threat of legal punishments deter potential offenders unless they *perceive* those punishments as sufficiently certain, swift, and severe' (Williams and Gibbs, 1981, p. 591, emphasis added).

For any sanction by the criminal justice system to act as a deterrent, the potential offender must be aware of a number of considerations and act on the basis of that awareness. In order to be deterred by a sanction, a potential offender must:

1. realise that there is a criminal sanction for the act being contemplated;
2. take the risk of incurring that sanction into account when deciding to offend;
3. believe that there is a likelihood of being caught;
4. believe that the sanction will be applied to him or her if he or she is caught; and
5. be willing (and able) to alter his or her choice to offend in light of the criminal sanction (adapted from von Hirsch et al., 1999, p. 7).

This analysis applies not only to the *existence* of sanctions, but also to changes in their severity or certainty (discussed further below). For deterrence to work in *any* manner, the conditions above must be satisfied, as 'knowledge of penalties logically precedes perceptions of the certainty and severity of penalties' (Williams and Gibbs, 1981, p. 591).

For deterrence to influence the decision-making process, the offender must have both knowledge of the threat of punishment for the offence and a choice whether or not to commit the offence.

Economic theory and rational choice

The classical theory of deterrence assumes that the commission of criminal acts is the result of a *rational choice.* The classical theory was developed by eighteenth-century philosophers Jeremy Bentham (1948 [1776]) and Cesare Beccaria (1994 [1764]) and drew upon utilitarianism, a theory that held that 'human behaviour results from the pursuit of pleasure and the avoidance of pain' (Bodman and Maultby, 1997, p. 884).

This theory of rational choice, known in economics as 'expected utility theory' (Mongin, 1997), assumes that any behaviour is the result of 'careful thinking and sensible decisions' (Felson, 1993, p. 1497), and criminal behaviour in particular is a result of the 'calculation of individual advantage' (Beyleveld, 1979, p. 205). It assumes that individuals are rational beings who 'engage in conscious and deliberate cost–benefit analysis such that they maximize the values and minimize the costs of their actions' (Ward, Stafford and Gray, 2006, p. 572).

Rational choice theory suggests that crime results from a 'rational calculation of the costs and benefits of criminal activity' and individuals will 'commit crimes … when the benefits outweigh the costs' (Spohn, 2007, p. 31). Therefore, according to the theory, an individual will be deterred from committing a crime if he or she perceives the costs to outweigh the benefits. In other words, a person will be deterred from offending 'if they perceive that they are certain to be punished, with a severe penalty, and soon after the offence has been committed' (Spohn, 2007, p. 31; citing Paternoster, 1991, p. 219).

Punishment avoidance and deterrence

Classical deterrence research has also been criticised for overlooking what might be described as the 'other side' of the cost–benefit equation, having 'focused on punishments for crime with little regard to the rewards for crime, or the rewards and punishments for noncrime' (Ward, Stafford and Gray, 2006, pp. 573–574). In other words, deterrence theory has failed to consider the gains and losses that people receive when they do not commit a criminal act, and how those considerations affect deterrence.

An expansion of deterrence was proposed by Stafford and Warr (1993), in order to address some of the limitations of classical deterrence theory. Their approach was to include the direct and indirect effects of both punishment and 'punishment avoidance' (Stafford and Warr, 1993, p. 125) – where an individual has had the experience of committing a crime and then avoiding punishment. The authors assert that specific deterrence needs to be considered as the direct effect on the individual of both his or her experience of punishment and his or her experience of punishment avoidance. The experience of punishment avoidance is assumed to reduce the effect of deterrence.

Similarly, it is proposed that general deterrence should be seen as the effect of the indirect experience of punishment – through knowledge of others being punished – and, again, indirect punishment avoidance – where an offender has knowledge that others have committed a crime but avoided punishment. The effect of general deterrence is also assumed to be reduced by the experience of indirect punishment avoidance.

This reformulation is significant, for it has been proposed that 'punishment avoidance does more to encourage crime than punishment does to discourage it' (Stafford and Warr, 1993, p. 125). Although the consideration of 'punishment avoidance' broadens classical deterrence theory, it does not address the primary issue of how decisions to offend are made in the first place.

Limitations of rational choice theory

Rational choice theory has been criticised because of its highly 'normative' stance, assuming that an individual makes a purely rational, utilitarian calculation of costs and benefits, without being influenced by individual, subjective perceptions. As a result, the model does not adequately account for offenders who do not exhibit that level of rationality.

For the purposes of this paper, different levels of irrationality can be broadly separated into three groups.

First, at the most extreme are the examples of crimes committed by people who are subsequently found to be not criminally responsible due to mental impairment.[25] By definition those offenders do not satisfy rationality or rational choice theory and so lack a necessary element for deterrence.

Second, many offenders may be considered 'irrational' under the traditional model, though not so irrational as to be not criminally responsible. This grouping might include offenders who are drug-affected or intoxicated with alcohol, intellectually disabled or suffering from a mental disorder. Also, it might

25 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 20.

include those who have behavioural problems, such as poor 'anger management', or who lash out impulsively if provoked. Although all of these offenders are properly considered criminally responsible, their offending behaviour is not easily reconciled with rational choice theory.

A 2003 report for Corrections Victoria on substance use treatment found that two-thirds of all first-time offenders entering the Victorian criminal justice system had 'a history of substance use that is directly related to their offending behaviour' (FPRG, 2003, p. 3). The report (p. 3) further noted that:

> For second and subsequent incarcerations, this figure increases to 80% for men and 90% for women (Victorian Prison Drug Strategy, 2002). Excessive alcohol use has also been implicated in the offending cycle, with research suggesting that between 41% and 70% of violent crimes committed in Victoria are done so under the influence of alcohol (Office of the Correctional Services Commissioner, 2000).

A more recent (2007) Victorian study found a high prevalence of mental illness among people detained in police cells (Department of Justice, 2010, p. 14; citing Corrections Victoria, 2007). Of that group, 70% had some form of substance use or dependency, 53% were registered in the Victorian public mental health database and 25% reported a psychiatric history. Another Victorian study of prisoner mental health found that 28% of prisoners had diagnosed mental health conditions (Department of Justice, 2003, p. 26).

Often, these offenders have multiple conditions (described as 'co-morbidities'). For example, substance use and mental illness are strongly correlated (Mullen, 2001, p. 17). While the presence of mental illness and substance use or dependency does not by itself indicate an inability to make a rational choice, it does suggest that the general assumption of rationality, required by classical economic theory, is problematic for an overwhelming majority of offenders.

Third, more subtle forms of irrationality – in the strict sense of individuals not acting in their own best interests – can be observed in much of human behaviour. This challenge to rational choice theory has been the particular focus of behavioural economics.

Behavioural economics theory

Behavioural economics explores the ways in which people depart from the 'rational actor' model of classical economics and instead seek satisfaction (which may be against their own interests), rather than maximising utility as classical economics presumes (Simon, 1955). Behavioural economics proposes that decision-making is based upon imperfect knowledge and often employs the use of experience-based techniques for problem solving – such as using 'rules of thumb' and intuitive judgments – known as 'heuristics', rather than strict logic. Further, it is argued that our thinking is subject to patterns of deviation in judgment that occur in particular situations described as 'cognitive biases' (Tversky and Kahneman, 1974, p. 1124). Numerous cognitive biases have been proposed; however, this discussion will be limited to those biases that have a particular bearing upon decision-making in the context of deterrence.

For example, despite offenders knowing that there may be a severe penalty for committing a particular offence, they may overestimate their own ability to complete the offence successfully, without being apprehended, compared to others. McAdams and Ulen (2009) argue that this reflects the cognitive bias known as the 'optimism' or 'overconfidence' bias. Along with other biases (such as the 'present bias' discussed below) the optimism bias creates deviations from perfect rationality and affects the decision to offend (McAdams and Ulen, 2009).

The study of cognitive biases has also suggested an explanation for why, in some cases, there is a significant relationship between punishment and an *increased* likelihood of reoffending. The bias known as the 'gambler's fallacy' suggests that offenders may reoffend soon after being caught and punished. This may be due to a 'resetting effect', which causes an offender to lower his or her estimation of being apprehended, believing (irrationally) that being apprehended again is extremely unlikely (Piquero and Pogarsky, 2002, pp. 180–181).

Bounded rationality and bounded willpower

In its classical form, rational choice theory does not take into account the subjectivity inherent in decision-making. However, modern versions of rational choice theory argue that people intuit the values and costs of an action, but because they are imperfect processors of information, they pursue what they perceive as most satisfying (Ward, Stafford and Gray, 2006, p. 572). This 'subjective expected utility' form of rational choice theory still assumes that people perceive and evaluate the costs and benefits of a particular course of action; however, they are bound by the 'limits of their abilities' (Ward, Stafford and Gray, 2006, p. 572) and so exhibit limited or *bounded* rationality.

Despite the reliance of bounded rationality upon intuition, rather than knowledge, it is argued (von Hirsch et al., 1999, p. 6) that deterrence theory will still apply:

> if [people] consider benefits and costs, to some degree, within parameters influenced by their attitudes, beliefs and preferences; and if they are affected by the information (however incomplete or inaccurate) available to them.

Alongside bounded rationality, the theory of 'bounded willpower' refers to the fact that people often take actions that are in conflict with their own long-term interests, despite being aware of this conflict. At play are two forms of decision-making: on the one hand, thinking that is deliberative and forward-looking, concerned with some future goal and, on the other hand, thinking that is impulsive and short-sighted and that seeks only to satisfy an immediate need.

Robinson and Darley (2004, p. 179; citations omitted) found that:

> potential offenders as a group are people who are less inclined to think at all about the consequences of their conduct or to guide their conduct accordingly. They often are risk-seekers, rather than risk-avoiders, and as a group are more impulsive than the average. Further, conduct decisions commonly are altered by alcohol and drug intake.

Present bias and discounting future penalties

As Jolls, Sunstein and Thaler (1998, p. 1538) note, '[a] central feature of much criminal behaviour is that the benefits are immediate, while the costs (if they are incurred at all) are spread out over time—often a very long time'. Bounded willpower creates what is known as the 'present bias' – where greater value is placed on the immediate circumstances (whether it be a cost or a reward) and the future consequences are 'discounted'. As a result, the degree to which individuals devalue those delayed consequences is described as their 'discount rate' (Jolls, Sunstein and Thaler, 1998, pp. 1538–1539).

Research has shown that potential offenders may have unusually high discount rates. In other words, the 'cost' of a penalty of years in prison, imposed far in the future, will be heavily discounted when compared to the immediate benefit of committing a crime. One study found that, on a scale of severity, offenders considered a five-year term of imprisonment as only twice as bad as a one-year term (Spelman, 1995, p. 120). These findings suggest that offenders may demonstrate a diminishing sensitivity to increasingly severe punishments, with serious implications for deterrence theory.

Robinson and Darley (2004, p. 174) comprehensively summarise the present challenges to deterrence theory from behavioural science:

> Potential offenders commonly do not know the legal rules … Even if they know the rules, the cost-benefit analysis potential offenders perceive … commonly leads to … violation rather than compliance, either because the perceived likelihood of punishment is so small, or because it is so distant as to be highly discounted … And, even if they know the legal rules and perceive a cost-benefit analysis that urges compliance, potential offenders commonly cannot or will not bring such knowledge to bear [because of] a variety of social, situational or chemical influences. Even if no one of these three hurdles is fatal to the law's behavioural influence, their cumulative effect typically is.

The challenges to rational choice theory posed by behavioural economics suggest that models of decision-making – and consequently, the theory of deterrence – must be broad enough to include a range of characteristics that have been ignored in the classical model, including such things as low self-control, shame, moral beliefs and even the 'pleasure of offending' (Piquero and Tibbetts, 1996, p. 482).

Decision-making theories

The examples above of bounded rationality, bounded willpower and a number of the cognitive biases that affect the commission of criminal acts, only touch upon the complexity that surrounds decision-making theory. There is significant controversy between philosophers (Dennett, 2003), behavioural economists (Kahneman and Tversky, 2000), psychologists (Plous, 1993) and neuroscientists (Walton, Devlin and Rushworth, 2004) regarding the processes of thinking involved in decision-making.

As a result, for the purposes of this paper, the only definitive conclusion necessary is that the rationality required for deterrence theory to operate is not something that can be assumed; nor is it likely to be satisfied for a significant number of offenders and for particular kinds of offences.

Deterrence in practice

The question of whether deterrence *actually works* is critical to any evaluation of the philosophical or moral principles underlying its use. As Doob and Webster (2003, p. 148) note, in 1987 the Canadian Sentencing Commission evaluated the available evidence and expressed its scepticism over the legitimacy of general deterrence, finding that 'the evidence did not support the deterrent impact of harsher sentences'.

The Commission's conclusion that harsher sentences did not deter became 'one of the justifications for its proposal that sentences be proportionate to the harm done rather than based on deterrence' (Doob and Webster, 2003, p. 148). The following section examines the most recent empirical evidence on the effectiveness of imprisonment as a general deterrent.

Measuring deterrence

If successful, deterrence should prevent the commission of criminal offences. How then can we measure this 'counterfactual' figure? In other words, how do we measure the crime that does not occur? McAdams and Ulen (2009) caution that those studies that focus on prisoners are by definition focusing on individuals whom deterrence has failed to influence, and as a result may not be representative of those individuals for whom deterrence works. Nevertheless, there has been much empirical research on general and specific deterrence.

The various studies have adopted a number of approaches:

- 'ecological' or 'association' models, which compare crime rates in different jurisdictions that have different penalties;
- interrupted time–series studies of jurisdictions where there has been a change in penalty (or changes in the certainty of apprehension from different enforcement methods); and
- experimental survey data of targeted offenders or potential offenders, and less common experimental data from both designed experiments (such as assigning an offender to either probation or incarceration) and 'natural' experiments (such as the effect of mass releases resulting from clemency decrees).

When examining the various studies it is important to recognise, as Durlauf and Nagin (2010, p. 14) note, that:

> because there is no settled theory on the causes of crime … choices about control variables in the deterrence literature are necessarily ad hoc to some degree and so the influence of such judgments needs to be assessed.

Despite these constraints inherent in criminological research, there are consistent themes that emerge from the research on deterrence to be explored.

Summary

This section has defined deterrence as the avoidance of criminal acts through fear of punishment. Deterrence exists in a number of forms, including absolute, general and specific deterrence. Deterrence theory is based on the economic theory of rational choice, which suggests that individuals will weigh up the costs and benefits of committing crime. Individuals will be deterred when they have knowledge of – and consider – those costs, in the form of certain, swift and severe legal punishments. Deterrence theory has also been expanded to encompass the rewards of crime, the benefits of non-crime and the experience of punishment avoidance.

Rational choice theory fails to account for a large number of 'irrational' offenders, including those affected by drugs or alcohol and those with mental illness or suffering a mental disorder. Research shows that these offenders comprise a majority of the prison population. Rational choice theory has also been challenged by behavioural economics, which asserts that people are not perfectly rational. Instead, individuals make decisions on the basis of imperfect knowledge, employing rules of thumb, and subject to bounded rationality, bounded willpower and influenced by cognitive biases.

Finally, essential to an assessment of the use of deterrence as a purpose of sentencing is an evaluation of whether or not there is evidence that deterrence works in practice.

General deterrence

Introduction

This section examines the empirical studies and criminological literature from the last 10 years on the effectiveness of imprisonment as a general deterrent. The analysis shows that imprisonment has a small positive deterrent effect.

The section then examines the evidence for the effects of two forms of marginal general deterrence – changes to the *severity* of punishment and changes to the *certainty* of punishment. The research demonstrates that an increase in the severity of punishment (particularly imprisonment) has no increased deterrent effect upon offending. However, increases in the certainty of apprehension consistently show a significant positive deterrent effect.

This section also examines the emerging research which suggests that studies that aggregate different populations – combining 'deterrable' and 'non-deterrable' individuals – may overstate the significance of the deterrent effect of the certainty of apprehension and the certainty of punishment as a deterrent factor.

Measuring general deterrence

Nagin, Cullen and Jonson (2009, p. 119; citations omitted) have noted the difficulty in measuring general deterrence when compared to its conceptual basis:

> The theory of general deterrence is clear and particularly well articulated in economic theory. It is the empirics that remain unclear. What is the magnitude of the effect? How does it vary across sanction types, crimes and people?

While there is substantial literature examining the effect on general deterrence of changes to the severity and certainty of punishments (particularly imprisonment), generally speaking there have been two approaches to measuring the effect of general deterrence: individual-level perceptual studies and broad population-level aggregate studies.

Perceptual studies

A number of perceptual, questionnaire-based studies have been used to survey populations and measure their anticipated responses to existing laws or experimental scenarios. The studies usually involve self-reporting of past behaviour and predictions of future behaviour and, as a result, are susceptible to self-reporting bias and may not reflect the participants' true behaviours. However, these studies avoid some of the problems associated with aggregate studies (discussed below).

A recent Australian study by Watling et al. (2010) sought to examine the general deterrent effect of new 'drug-driving' laws introduced in Queensland in December 2007. The authors surveyed 899 members of the public, including individuals who had been referred to a drug treatment program, gauging the subjects' knowledge of, and experience with, the drug-driving laws. The study also examined direct and indirect experience of drug-driving behaviour and direct and indirect experience of punishment and punishment avoidance.

The study found that experiences of punishment *avoidance* (both direct and indirect) were related to increases in the likelihood of drug-driving and were a significant predictor of the intent to drug-drive. However, the indirect experience of punishment – from knowledge of others being apprehended for drug-driving – was not a significant deterrent.

The potential punishment included the loss of a driving licence and the imposition of fines, rather than imprisonment; however, these studies are of value in examining the deterrent effect from the threat of a sanction in general. The study is consistent with the theory developed by Stafford and Warr (1993), referred to above, that the experience of avoiding punishment for an offence does more to encourage crime than being punished does to discourage it.

These results may seem contradictory: if knowledge of indirect punishment *avoidance* is a predictor of behaviour, then why wouldn't knowledge of indirect punishment act in the same way?

A possible answer may lie in the cognitive biases that can apply to this situation. The present bias may favour knowledge of punishment avoidance, and subsequent decision-making may prefer the immediate reward (drug-driving without punishment) over a potential, and seemingly doubtful, threat of apprehension and subsequent punishment. Similarly, the optimism bias – whereby offenders overestimate their ability to complete the offence successfully without being apprehended, compared to others – might explain why knowledge of other individuals' punishment experiences did not deter.

An earlier study by Watson (2004) analysed the survey responses of 290 people charged with unlicensed driving or driving while disqualified, seeking to measure their predicted deterrence from self-reported future offending. The study used a number of classical deterrence variables, including predicted risk of apprehension, knowledge of punishments and the perceived severity, certainty and swiftness of punishment. The results for those variables were that none predicted the frequency of unlicensed driving. The perceived risk of apprehension was the only variable that approached significance.

The study also used a number of variables based on the expanded deterrence theory of Stafford and Warr (1993), including direct and vicarious exposure to punishment avoidance (driving unlicensed without apprehension or knowing people who had) and vicarious exposure to punishment (knowing family or friends punished for unlicensed driving). The results showed that punishment avoidance was the strongest predictor of the frequency of unlicensed driving.

Although these studies were limited to driving offences (and did not involve the threat of imprisonment), the results were isolated to deterrence and did not combine deterrence and incapacitation effects.

Meta-analyses and aggregate studies

A recent meta-analysis by Dölling et al. (2009) examined 700 studies on the general preventive effect of deterrence (not specifically the effect of imprisonment as a general deterrent). For this meta-analysis, each deterrence study was given an 'estimation' score based upon how strongly the hypothesis in each study was supported by the results of each study. The meta-analysis showed that over half of the studies (53%) found a 'general preventive effect of deterrence' (Dölling et al., 2009, pp. 202–204); however, the average deterrent effect was negligible and had no statistical significance.

While a meta-analysis may provide a broad picture, the synthesis of evidence through such analysis may 'obscure important subtleties related to large differences in quality across studies' (Nagin, Cullen and Jonson, 2009, p. 143).

Another, more problematic approach (Piquero and Blumstein, 2007, p. 279) to measuring the general deterrent effect – but one that focuses on imprisonment – involves:

> measuring both the crime rates and incarceration rates in multiple places, finding that places with higher incarceration rates have lower crime rates, and using econometric analysis to assess the 'elasticity' of crime rates to changes in incarceration rates.

The elasticity refers to the amount by which the crime rate changes in response to changes in the rate of imprisonment. The results of measurement of general deterrence across multiple jurisdictions and in the form of aggregate studies suggest that there is a small general deterrent effect of imprisonment.

A recent review of six aggregate studies by Donohue (2009; cited by Durlauf and Nagin, 2011, pp. 24–25) found that each study showed a negative association between the imprisonment rate and the crime rate – in other words, as the imprisonment rate increased, the crime rate decreased. However, there has been criticism of the methodology used in aggregate studies (Durlauf and Nagin, 2011, pp. 24–26; Piquero and Blumstein, 2007, p. 268).

Piquero and Blumstein (2007, p. 279) have noted that there may be a two-way relationship between crime and incarceration – one in which 'not only does incarceration influence crime, but crime may also influence incarceration'. For example, higher crime rates may saturate the prison system and so reduce the use of imprisonment as a sentencing option when capacity has been reached. As a result, a lower imprisonment rate does not always correlate with a lower crime rate. To control for this variable, 'one needs to identify factors that contribute to crime, but not incarceration and others that contribute to incarceration' (Piquero and Blumstein, 2007, p. 279).

Further, Durlauf and Nagin (2010, p. 8) criticise the aggregate studies for the fact that they were actually measuring a combination of deterrent and incapacitation effects, and as a consequence:

> it is impossible to decipher the degree to which crime prevention is occurring because of a behavioral response by the population at large or because of the physical isolation of crime-prone people.

Deterrence and incapacitation

While the aim of deterrence is to prevent future offending through the threat of punishment, incapacitation seeks to prevent an offender from committing crimes in the community by means of physical incarceration (although further offending may occur while in prison, for example, assaults on other prisoners or theft).

The rationale for incapacitation is that it denies the offender the opportunity to commit those crimes that would have been committed had the offender been free in the community.

Incapacitation is a purpose of sentencing in Victoria, incorporated in section 5(1) of the *Sentencing Act 1991* (Vic). That section provides that one of the purposes for which an offender may be sentenced is 'to protect the community from the offender'.

As discussed above, a number of aggregate studies of general deterrence that compare imprisonment rates to crime rates do not distinguish between incapacitation and deterrent effects. In other words, any change in the crime rate as a result of changes to the imprisonment rate may be a consequence of the incapacitation of offenders (and their physical inability to offend outside of prison), rather than a result of a general deterrent effect acting upon other individuals living in the community.

To separate incapacitation effects from the effect of general deterrence, complex methodologies (based on criminal surveys) are used to estimate the number of offences that particular offenders *would have* committed across their criminal 'career' – focussing on estimates of the frequency of offending and the estimated duration of that offending (Donohue and Siegelman, 1998, p. 9).

There has been very little research in Australia on incapacitation as a purpose of sentencing and the effect of incapacitation upon crime. A 2006 study of the incapacitation effect of prison on burglary adopted the following methodology (Weatherburn, Hua and Moffatt, 2006, p. 3; citations omitted):

> Instead of looking at the correlation between the rate of offending and the rate of imprisonment, [researchers] estimate its effect using a mathematical model … This model assumes there is a finite population of offenders who, when they are free in the community, commit crimes at a certain rate and remain involved in crime over a certain period (known as their criminal career) … the larger the fraction of an offender's criminal career spent in prison, the less crime they are able to commit.

In that study, the authors found that imprisonment was an effective method of crime control for the offence of burglary, estimating that 'the incapacitation effect of prison on burglary (based upon the assumption that burglars commit an average of 38 burglaries per year when free) [was] 26 per cent' (Weatherburn, Hua and Moffat, 2006, p. 8). However, the authors acknowledged that their results were based upon a methodology that made significant assumptions – including the primary assumption that there was a finite population of offenders.

This assumption is questionable when the imprisonment of certain offenders who provide a market with goods that are high in demand – such as stolen goods in the case of burglars, or drugs in the case of traffickers – is likely to result in other individuals commencing offending in order to meet that continuing demand. The effect of incapacitation policies are therefore likely to vary depending upon the type of offences and the types of offenders that are targeted.

Deterrence and increasing the *severity* of punishment

In response to the small positive effect of imprisonment as a general deterrent, lawmakers have often sought to achieve an increased deterrent effect by strengthening the threat – that is, by increasing the severity and certainty of punishment.

If, as classical deterrence theory contends, the existence of the criminal justice system (and the sanctions it imposes) acts as a general deterrent to the commission of crime, then it would seem reasonable that an increase in the severity of those sanctions would correspondingly result in an increased deterrent effect and thus a decrease in crime.

As discussed above, the presumption of deterrence from the economic perspective of decision-making theory holds that 'an increase in the probability and/or severity of punishment (representing costs of criminal behaviour) will reduce the potential criminal's participation in illegitimate activities' (Bodman and Maultby, 1997, p. 885) – in other words, the greater the severity of punishment, the greater the potential 'cost' to be weighed up by the offender when contemplating the commission of a crime.

Implicit in the ability to weigh up the cost of a crime is the assumption that a potential offender has knowledge of the actual punishment. If a punishment level has been increased for the purposes of increasing deterrence, it follows that the increase must also be known to the offender in order to have any increased effect. In 2005, a study that tested the relationship between actual punishment levels and an individual's perception of punishment (Kleck et al., 2005, p. 653) found that:

> [t]here is generally no significant association between perceptions of punishment levels and actual levels … implying that increases in punishment levels do not routinely reduce crime through general deterrence mechanisms.

This study confirmed Doob and Webster's 2003 review of sentence severity and deterrence, which argued that the empirical evidence simply did not sustain the hypothesis that an increase in the severity of penalties generated a marginal increase in deterrence (and therefore a reduction in crime). Doob and Webster (2003) comprehensively reviewed major studies of the deterrent effect of changes to penalty severity from a period of 10 years and concluded that they 'could find no conclusive evidence that supports the hypothesis that harsher sentences reduce crime through the mechanism of general deterrence' (Doob and Webster, 2003, p. 187).

A few years earlier, in their comprehensive paper 'Criminal Deterrence and Sentence Severity: An Analysis of Recent Research', von Hirsch et al. (1999) conducted a similar review of the empirical studies and literature on the marginal deterrent effect of changes to the severity of punishment and concluded that the research 'fails … to disclose significant and consistent negative associations between severity levels (such as the likelihood or duration of imprisonment) and crime rates' (von Hirsch et al., 1999, p. 47).

These findings have been confirmed in subsequent studies, including one that examined the striking difference in the severity of punishments as a result of the change in jurisdiction from the juvenile court to an adult court. Lee and McCrary (2009) examined crime histories for young offenders in Florida in order to see if there was a marked decline in offending at the age of 18, when prosecution of offending moves from the juvenile court to the adult court. If identified, such a decline might be evidence of the deterrent effect of the potential for more severe penalties in the adult court.

Lee and McCrary (2009, p. 8) were able to use data on the precise timing of arrests, in order to separate deterrence from incapacitation effects, and found that there was a small decline, but it did not achieve statistical significance, confirming the 'null' effect that increasing the severity of penalties has on general deterrence (Doob and Webster, 2003). The study's findings contradicted those of Levitt (1998), who found a significant deterrent effect for the same change from a juvenile to an adult court. However, Levitt's study used annualised data, and Lee and McCrary (2009, p. 7) argue that, as a result, this may have combined incapacitation and deterrence effects resulting in a larger deterrence estimate.

Why don't harsher penalties deter more crime?

As emphasised by Kleck et al. (2005, p. 653), the studies on changes to sentence severity do not imply that punishment does not generate any deterrent effect at all. Instead, the authors demonstrate that the deterrent effect does not increase or decrease according to the actual punishment level to any substantial degree. The authors propose that this is because – as their findings demonstrated – the *perceptions of risk* upon which deterrence depends do not change according to the actual punishment levels imposed (Kleck et al., 2005, p. 653).

Durlauf and Nagin (2011, p. 31) suggest that another reason why an increase in the severity of penalties does not generate an increased deterrent effect is that 'most research on sentence length involves increases in already long sentences'. For example, if the threat of a fifteen-year imprisonment penalty does not deter a potential offender, it is questionable how much more a twenty-year imprisonment penalty will generate a deterrent effect. This is particularly relevant in light of the 'present bias' and the resulting 'discounting' of future penalties, discussed above. If potential offenders irrationally regard a penalty that is five times as severe as being only twice as severe (Spelman, 1995, p. 120), then it is likely that similar discounting would occur (and have even less of a deterrent effect) when a penalty is increased by one third.

This suggests that, for changes in sentence severity to have a noticeable effect upon deterrence, those changes would have to be extremely severe to counteract the discounting caused by the present bias. For example, a 15%–20% specific deterrent effect described by Helland and Tabarrok (2007, p. 326) (discussed further below) was associated with an increase in the expected sentence of at least 300% (Lee and McCrary, 2009, p. 6). It has been argued that the resources required to impose such sanctions would have a greater effect in reducing crime if spent on policing, parole and probation monitoring systems (Durlauf and Nagin, 2011, p 38).

Critical to deterrence theory is the potential offender's perception of the penalty that he or she will face, including knowledge of the penalty and, if a change in penalty severity is to influence the crime rate, knowledge of that change. Darley (2005) returns to the fundamental question of whether considerations of future punishment are in fact represented in most offenders' decisions to commit a crime.

If, as Darley (2005, pp. 195–198) suggests, crimes are committed by 'persons with somewhat disordered personalities who are characterized by a predilection for impulsive behaviour', or while under the influence of drugs and/or alcohol, or in the company of social peers who form a crime-prone group (or indeed, all three), then the considerations required for deterrence – let alone marginal deterrence from changes to the severity of penalties – are unlikely to be satisfied.

Those people who are characterised by their impulsive behaviour, drugs and alcohol use or criminal peers, make up a significant proportion of offenders. For example, a recent statistical profile by the Sentencing Advisory Council on sentencing for armed robbery for the period 2006–07 to 2007–08 found that, of the 517 charges for which motivation was known, the overwhelming majority (84.3%) were related to drug or alcohol use (Woodhouse, 2010, p. 14).

Even if none of these factors influencing offending behaviour is present, however, a 'rule known by a rational [individual] and perceived to carry a meaningful penalty nonetheless will not deter if the chance of getting caught is seen as trivial' (Robinson and Darley, 2004, p. 205). The *certainty* of apprehension and punishment is therefore critical to any general deterrent effect.

Deterrence and increasing the *certainty* of punishment

That the deterrent effect of the certainty of punishment far outweighs the deterrent effect of the severity of punishment has been described as 'one of the most prominent empirical regularities in criminology' (Pogarsky 2002, p. 435; citations omitted).

Numerous studies have confirmed this effect. Durlauf and Nagin's (2010) review of aggregate studies of police presence 'consistently [found] that putting more police officers on the street … is associated with reductions in crime' (Durlauf and Nagin, 2010, p. 25). However, it is not merely the presence of police, but the necessary consideration in the potential offender's mind that apprehension is a genuine threat, that will generate a deterrent effect.

A 2005 Australian study by Tay demonstrated that an increase in the number of random breath tests conducted (even though the apprehension rate was low) would result in a significant decrease in the number of serious road crashes caused by alcohol (Tay, 2005, pp. 220–221). In other words, the threat of certainty of apprehension would operate as a general deterrent against drink-driving (evidenced by the reduction of crashes), rather than as a specific deterrent through the apprehension of more offenders.

Another Australian study by Briscoe (2004) found that, despite an increase in the severity of drink-driving penalties in New South Wales in 1998, there was a statistically significant *increase* in vehicle accident rates after the introduction of the penalties. When exploring why this seemingly paradoxical result occurred, Briscoe noted that there was a reduction in the 'intensity of drink-driving enforcement around the [same] time that the drink-driving penalties were raised' (Briscoe, 2004, p. 925), suggesting that the level of perceived certainty of apprehension declined just as the new penalties were introduced. The reduction in perception of the certainty of apprehension seems to have trumped the increase in the severity of penalties.

Nagin and Pogarsky's experimental study of cheating, the self-serving bias and impulsivity (2003, pp. 182–185) explored the effects of variation in the threatened certainty and severity of punishment and found that, consistent with earlier research, the deterrent effect of certainty of punishment was larger than that of the severity of punishment.

That the *certainty* of apprehension deters to a greater extent than the *severity* of punishment confirms the cognitive bias known as the 'availability heuristic'. This cognitive bias proposes that people will judge the likelihood of uncertain events (such as being apprehended for a crime) by how readily examples of the event can be called to mind and that this may depend on factors that are unrelated to the actual probability of the event (Jolls, Sunstein and Thaler, 1998, p. 1477). For example, rare but highly publicised events – such as a terrorist attack – are often incorrectly judged as being more likely to occur than under-reported but very common events – such as a car accident.

Recent incidents of police enforcement (or a visible police presence) are more likely to be called to mind by a potential offender than the particulars of a (real or imagined) example of the imposition of a severe sentence for the crime being contemplated. As a result, Darley (2005, p. 204) notes that:

> in contrast to attempts to reduce crime rates by increasing the severity of the sentence for the crime, campaigns that make salient in the mind of the public the possibility of being caught … are often successful.

Deterring the deterrable

While the deterrent effect of the certainty of apprehension has been confirmed by numerous studies, Pogarsky (2002) has challenged the basis on which this strong effect has been observed. Pogarsky proposes that potential offenders should be assigned to three different populations (Pogarsky, 2002, pp. 432–433): *acute conformists,* who comply with the law for reasons other than the threat of sanction, the *incorrigible,* who cannot be dissuaded, regardless of the sanction, and the *deterrable,* who occupy the middle ground and who 'are neither strongly committed to crime nor unwaveringly conformist' (Pogarsky, 2002, pp. 432–433; citing Nagin and Paternoster, 1993, p. 471).

Deterrence theory necessitates that only those deterrable individuals will be affected by changes in either the severity of threatened sanctions or the certainty of apprehension. Jacobs (2010, p. 417) emphasises this critical requirement of 'deterrability':

> If deterrence describes the perceptual process by which would-be offenders calculate risks and rewards prior to offending, then deterrability refers to the offender's capacity and/or willingness to perform this calculation.

Studies comparing the deterrent effect of severity to the deterrent effect of certainty of apprehension have 'aggregated deterrable and undeterrable individuals alike, even though the latter heed *neither* aspect of sanction threats' (Pogarsky, 2002, p. 435; emphasis in original). Instead, 'the most probative evidence would come from studies that directly compared any deterrent effect among groups differing in criminal propensity' (Wright et al., 2004, p. 186). Currently, there is a lack of such targeted research.

The willingness (and, arguably, the ability) to engage in the 'calculation' Jacobs (2010) describes – and on which deterrence depends – will vary widely according to the type of offender and the kind of offence. For example, at one end of the spectrum of 'consideration' prior to offending may lie commercial drug trafficking by a non-addict, run as an illegitimate business, involving the offender making ongoing calculations of the costs and benefits of crime. At the other end of the spectrum may lie a violent assault by an intoxicated young offender, reacting impulsively to a perceived threat or provocation.

Even within the limitations of bounded rationality and bounded willpower, it is difficult to imagine the offender in the latter example engaging in even negligible consideration of the consequences of his or her criminal behaviour, let alone weighing up the threat of a future penalty. Research (Giancola and Corman, 2007, p. 649) has shown that alcohol intoxication:

> disrupts cognitive functioning … creating a 'myopic' or narrowing effect on attentional capacity. Consequently, alcohol presumably facilitates aggression by focusing attention on more salient provocative, rather than less salient inhibitory, cues in a hostile situation.

In other words, alcohol may exaggerate and distort the present bias to the point that the consequences of criminal behaviour (both immediate and future consequences – including the discounted cost of a future penalty) simply do not enter into the offender's decision-making process. In those circumstances, it is very unlikely that the offender will be deterred, even if he or she has knowledge of there being a severe penalty for the particular offence, or knowledge that he or she is certain to be apprehended and punished, or indeed both.

Although the estimates vary considerably, Australian research suggests that alcohol is involved in 23% to as much as 73% of all assaults (Morgan and McAtamney, 2009, p. 2; citations omitted) and around 44% of all homicides (Morgan and McAtamney, 2009, pp. 2–3; citations omitted). In light of those estimates and estimates of the prevalence of mental illness among prisoners (discussed above), there are significant limitations on general deterrence and the number of offences and, in particular, the type of offenders, that the threat of punishment can possibly deter.

Summary

This section has examined evidence of the strength of imprisonment as a general deterrent. The research suggests that imprisonment has a negative but generally insignificant effect upon the crime rate, representing a small positive deterrent effect.

Deterrence studies have most often examined two forms of marginal general deterrence – changes to the severity of punishments and changes to the certainty of apprehension. The research demonstrates that increases in the severity of punishment (most commonly by lengthening sentences of imprisonment) have no corresponding increased deterrent effect upon offending.

It has been proposed that harsher punishments do not deter for a number of reasons, including a lack of impact of actual punishment levels on perceptions of punishment and the 'present bias' of most offenders, who discount the severity of distant punishments in favour of meeting immediate needs. Where changes in severity have demonstrated a deterrent effect, the lengthy terms of imprisonment required may represent a disproportionate response to the criminal behaviour. It has also been suggested that the allocation of resources needed for lengthy terms of imprisonment could reduce more crime (than that generated by a general deterrent effect) if reallocated to enforcement, parole or community-based sentences.

Increases in the certainty of apprehension consistently show a significant positive general deterrent effect. However, emerging research has qualified the strength of those findings, suggesting that studies should separate (and then compare) 'deterrable' and 'non-deterrable' populations. Research also suggests that the prevalence of 'non-deterrable' offending – for example, offending in the context of alcohol intoxication – may significantly impact the effectiveness of general deterrence.

Specific deterrence

Introduction

This section examines the empirical studies and criminological literature from the last 10 years on the effectiveness of imprisonment as a *specific* deterrent. It briefly outlines the theory of specific deterrence and its basis in the subjective experience of imprisonment. An examination of the evidence of the effects of imprisonment on reoffending follows. This examination suggests that imprisonment has no effect on deterrence, and in a number of studies imprisonment is shown to be criminogenic – in other words, it causes or is likely to cause criminal behaviour. The section also includes a discussion of specific deterrence and young offenders and presents the similar conclusions that the empirical research in that area provides.

The scope of specific deterrence

As discussed above, *general* deterrence holds that the imposition of sanctions by the criminal justice system will act as a threat to all potential offenders. *Specific* deterrence holds that an individual offender's experience of an actual criminal sanction – particularly imprisonment – will deter that individual from reoffending.

Specific deterrence is therefore less likely to be a relevant purpose of sentencing when the risk of reoffending is very low. This is particularly so for those offenders whose offending behaviour was the result of circumstances that are highly unlikely to be repeated – such as a momentary lapse in attention while driving that results in an offence of culpable driving. While the sentence imposed against such an offender may potentially operate as a *general* deterrent (although, as discussed, this may be unlikely), specific deterrence of the individual concerned may be redundant.

Critics have argued that, compared to general deterrence, the logic behind specific deterrence is 'murky' (Nagin, Cullen and Jonson, 2009, p. 119) and that confusion has been generated by the described overlap between 'the impact of punishment on potential offenders' and 'the impact of punishment on the offender' when these processes are separate and distinct (Nagin, Cullen and Jonson, 2009, p. 119; citations omitted). The critical focus of specific deterrence – at least from an economic perspective – is whether punishment influences an offender's perceptions of the costs of future offending.

The experience of imprisonment

The experience of imprisonment in influencing the perceptions of the costs of future offending is highly subjective, and '[t]he precise effects on perceptions or expectations of being in prison … are not straightforward and likely to hinge on a number of contingencies' (Nagin, Cullen and Jonson, 2009, p. 124).

It is conceivable that the subjective experience of imprisonment may vary considerably between offenders, particularly in minimum-security prisons, where the regular (and mandated) provision of food, shelter and some limited autonomy may constitute a better day-to-day experience for some inmates than the life they experienced outside. For those offenders, the experience of imprisonment may not act as a specific deterrent to reoffending. It is unlikely, however, that the experience of an offender in a supermaximum-security (or 'supermax') prison, involving frequent isolation and severe physical controls, is subjectively preferable to an offender's experience of life outside of prison.

In those circumstances, specific deterrence theory would suggest that, all things being equal, an offender released from a supermax prison would be specifically deterred from reoffending to a greater degree than a similar prisoner who had experienced a non-supermax prison. However, a recent study of supermax inmates in the United States did not find evidence of a specific deterrent effect (Mears and Bales, 2009). After controlling for a wide range of variables, including demographic characteristics, disciplinary infractions, time served, offence seriousness and prior criminal record, the authors found that supermax inmates were equally as likely to reoffend as non-supermax inmates. Additionally, it was found that supermax offenders were more likely to reoffend for violent crimes than non-supermax inmates. This finding confirmed the results of a study that compared prisoners on either side of the cut-off between different security levels – and the assignment of prisoners to those prisons with corresponding conditions – and found 'no evidence that harsher confinement conditions reduced recidivism' (Chen and Shapiro, 2007, p. 3).

It appears that harsher prison conditions do not necessarily discourage future offending and that, paradoxically, the experience of imprisonment may exert a criminogenic effect – in other words, a crime-producing effect – by providing a criminal learning environment, by labelling and stigmatising offenders as criminals or by simply constituting an ineffective way of addressing the underlying causes of crime, as discussed further below (Nagin, Cullen and Jonson, 2009, pp. 127–128).

Imprisonment and reoffending

The failure of imprisonment to act as a deterrent for a significant number of offenders is evident in both the post-imprisonment recidivism rate, and the number of prisoners in custody who have served a prior term of imprisonment.

A 2007 study on recidivism in Victoria showed that, of the prisoners released from a sentence of imprisonment in 2002–03, over 34.7% were convicted of further offences and returned to prison within two years of release (Holland, Pointon and Ross, 2007, p. 13). The proportion of offenders returning to prison was highest for young offenders, with 55.7% of offenders aged 17–20 years returning to prison within two years (Holland, Pointon and Ross, 2007, p. 15).

In Victoria, almost half (49%) of all adult prisoners in custody at 30 June 2010 had a known prior sentence of adult imprisonment (Australian Bureau of Statistics, 2010b, p. 34). At a national level, over half (54.6%) of all adult prisoners in custody on that date had also served a sentence in an adult prison prior to the current episode (Australian Bureau of Statistics, 2010b, p. 37).

A number of literature reviews examining the effects of imprisonment on reoffending have been conducted over the last 10 years. One of the most recent, by Nagin, Cullen and Jonson (2009), found that imprisonment had either no effect or a mildly criminogenic effect upon reoffending when compared to non-custodial or community-based sanctions. The authors concluded that their analysis of the evidence of the deterrent effects of imprisonment 'casts doubt on claims that imprisonment has strong specific deterrent effects' (Nagin, Cullen and Jonson, 2009, p. 115).

The results confirm the review from a decade earlier by Gendreau, Goggin and Cullen (1999), who examined 50 studies dating from 1958, using quantitative methods to determine whether prison reduced criminal behaviour or recidivism. The result of this meta-analysis demonstrated that imprisonment generated slight increases in recidivism. The study also showed that lower risk offenders in particular could be negatively affected by being in prison. The authors concluded that imprisonment could not be expected to reduce criminal behaviour through a specific deterrent effect. Instead, they argued that prison should be used to punish and incapacitate chronic, higher risk offenders (Gendreau, Goggin and Cullen, 1999).

Although the results of specific deterrence studies tend to demonstrate that imprisonment has no deterrent effect or a slightly criminogenic effect upon offenders, it is useful to separate the studies into their different methodologies for the purpose of analysis and comparison.

Experiments and 'natural experiments'

The 'gold standard' for measuring the effect of imprisonment upon specific deterrence would be to conduct an experiment and randomly assign half the similar offenders to imprisonment and half to a non-custodial sentencing order. While such a proposal would seem ethically questionable, one such example of this experimental design has occurred, as described by Killias, Aebi and Ribeaud (2000). In that study, eligible offenders were randomly assigned to either 14 days' imprisonment or a 14 day community-based order. In the two-year follow-up period both groups (and a further comparison group of community corrections offenders) were measured on the frequency of the offenders' reoffending or their subsequent contact with police. No difference was found between the three groups in relation to subsequent police contact, and so imprisonment showed no specific deterrent effect.

A more recent study by Green and Winik (2010, p. 359) took advantage of a 'natural experiment' in the form of the random assignment of offenders to a panel of nine judges. The judges varied widely in terms of their punitive approaches and their tendency to sentence offenders to either imprisonment or probation. After accounting for incapacitation effects, the study found that imprisonment seemed to have little net effect on the likelihood of reoffending, and so demonstrated no specific deterrent effect, confirming the results of Tait (2001).

Another two recent studies have taken advantage of large-scale natural experiments, where there has been an external variation in prison sentences at the individual level. The experiments allowed researchers to identify the specific deterrent effects of imprisonment, separate from their incapacitation effects.

The first, a 2009 study by Maurin and Ouss (2009), examined the consequences of a French collective pardon granted to inmates on Bastille Day in July 1996. Individuals in prison before 14 July 1996 received a reduction in their sentence of one week, along with an additional week for every month remaining on their sentence at 14 July 1996 (up to a maximum of four months). Five years after release, the rate of recidivism for inmates released after Bastille Day – who had received a reduced sentence – was about 12% greater than the rate of recidivism for those released before Bastille Day – who had received no reduction in sentence.

The second, a 2009 study by Drago, Galbiati and Vertova (2009), examined 22,000 prisoners whose sentences were 'commuted' under the Collective Clemency Bill passed by the Italian Parliament in July 2006. That legislation reduced the sentences for all offenders who had committed a crime before 2 May 2006 by three years. Those prisoners with less than three years to serve on their sentence – approximately 40% of the

prison population at the time – were immediately released. The law provided, however, that if the former prisoners reoffended within a five-year period, in addition to any new sentence, they would have to serve the amount of their sentence that had been, in effect, suspended.

The authors found that for every one month that was suspended – in other words, for every one month that the former prisoner would have to serve if convicted for reoffending within the following five years – there was a 1.3% reduction in the probability of reoffending. Unlike the French study (Maurin and Ouss, 2009), in which the prisoners received a reduction in sentence without the condition of suspension, the Italian study (Drago, Galbiati and Vertova 2009) examined a release of prisoners where the threat of an increased sanction for reoffending continued after their release. The immediacy of this threat may have countered the future discounting effect of the present bias. Also, it was found that the longer the time that was served, the less deterrent effect, which 'points to an overall criminogenic effect' (Nagin, Cullen and Jonson, 2009, p.167) of imprisonment.

Matching studies

Matching studies involve comparing the reoffending rates of offenders sentenced to imprisonment with a similar population sentenced to a punishment other than imprisonment, controlling, as much as possible, for all other factors.

In an Australian study released in 2010 on the effect of prison on adult reoffending, Weatherburn (2010) examined the specific deterrent effect of imprisonment for offenders convicted of either burglary or non-aggravated assault. The study matched pairs of offenders convicted of each offence using a number of variables – including offenders having the same priors, the same number of appearances, the same number of concurrent offences and the same bail status – with the critical difference being that one member of the pair received a full-time prison sentence while the other did not.

The author then measured the length of time until reoffending for the matched pairs and found that, for the offence of burglary, prison exerted no significant effect on the risk of recidivism. For non-aggravated assault, however, imprisonment appeared to increase the risk of further offending, at least for that particular offence. The author concluded that – while the results may not generalise to other types of offenders – as a result of these findings, 'it would be unwise to imprison offenders when the only reason for doing so is a belief in the specific deterrent effect of prison' (Weatherburn, 2010, p. 10).

This finding confirms the result of a 2002 study that evaluated the deterrent effect of imprisonment by comparing recidivism rates for a sample of offenders sentenced to prison with a matched sample of offenders placed on probation (Spohn and Holleran, 2002). The offenders were matched on the basis of their background characteristics, prior criminal record and predicted probability of incarceration, in order to isolate imprisonment as the one differing variable. That study (Spohn and Holleran, 2002, p. 350) found:

> Contrary to deterrence theory, offenders who were incarcerated were significantly more likely than those who were put on probation to be arrested and charged with a new offense.

The findings of the French experiment (Maurin and Ouss, 2009) that simple release has no specific deterrent effect, and the findings of the Italian experiment (Drago et al., 2009) that release on a suspended sentence demonstrated a specific deterrent effect, are in accordance with the findings of Lulham, Weatherburn and Bartels (2009), which examined the issue of breach of suspended sentences. That study matched the rates of reoffending for offenders on a suspended sentence to the rates of reoffending for those released from imprisonment. The authors found that 'there was a significant tendency for the prison group to re-offend more quickly on release than the suspended sentence group' (Lulham, Weatherburn and Bartels, 2009, p. 10).

Another example of where the threat of an increased sanction – specific to an individual offender – has had a measurable deterrent effect is the study by Helland and Tabarrok (2007) of the Californian 'three-strikes' laws. Those laws provided that for a third strike-eligible offence a mandatory penalty of 25 years to life (with a minimum to serve of 20 years before parole) would be imposed.

This study compared the future offending of individuals convicted of two strike-eligible offences with offenders convicted of one strike-eligible offence who were then charged with a second strike-eligible offence but were ultimately convicted of a non-strike-eligible offence. In other words, the study compared offenders with two strikes to those with just one, but whose initial conditions (both groups having originally been charged with a second strike-eligible offence) were similar. Using these two groups provided data that were easily matched, with few differences in observable characteristics.

The authors found that arrest rates were 15%–20% lower for the group of offenders convicted of two strike-eligible offences, compared to those convicted of one strike-eligible offence (Helland and Tabarrok, 2007, p. 326). However, the authors then went on to calculate the imprisonment costs for California of the 'three-strikes legislation' required to obtain this level of reduced recidivism, and reached the staggering figure of US$4.6 billion (Helland and Tabarrok, 2007, p. 328).

Why doesn't the experience of prison deter reoffending?

There are a number of reasons why the experience of prison may result in a greater rate of reoffending, rather than having a deterrent effect upon offenders. Nagin, Cullen and Jonson (2009, p. 126) identify three main reasons:

- First, prisons can act as a *criminal learning environment* in which prison sub-cultures – acting in opposition to the 'pro-social' or rehabilitative environment intended by the state – encourage and reinforce criminal behaviour. Prisons are 'marked by the presence of cultural values supportive of crime that can be transmitted through daily interactions' and, as a result, 'criminal orientations are potentially reinforced' (p. 126).
- Second, prisons may exert a *labelling effect*. This results from both publicly stigmatising a person as a 'criminal', which reinforces a criminal identity, and the subsequent reaction from society to that criminal identity. The consequences include denying future opportunities (such as employment), enforcing prolonged association with offenders and eroding social 'ties to family and to the conventional social order' (p. 126). The severing of social ties reduces the offender's 'stakes in conformity' resulting in a reduced incentive for law-abiding behaviour (Spohn, 2007, p. 31).
- Third, prison may simply be an inappropriate response to the criminality of most offenders, failing to treat the underlying causes of criminal behaviour. Research to identify what form of treatments might address the factors predicting recidivism suggests that 'deterrence-oriented interventions' and 'mere incarceration absent a treatment component' are inappropriate interventions because they fail to achieve 'meaningful reductions in recidivism' (Nagin, Cullen and Jonson, 2009, pp. 127–128). Prison may be appropriate for high-risk offenders (p. 128), but:

  > [t]he danger is that inappropriate treatments—including imprisonment—can have a criminogenic effect on low-risk offenders, transforming those with low chances of [reoffending] into those destined to offend again.

Additionally, Jacobs (2010) identifies a number of responses by offenders to punishment (including imprisonment) that may result in recidivism. Offenders may commit additional crimes as a way to 'lash out' at what might be perceived as 'capricious, unjust, or unfair' sanctions (Jacobs, 2010, p. 419; citations omitted); offenders may be subject to the 'resetting' effect of the gambler's fallacy (discussed above), thinking that 'lightning won't strike twice' (Jacobs, 2010, p. 419; citations omitted); offenders may think they have learned from their experience of crime and lower their perceived certainty of detection when subsequently offending (emboldened by the optimism bias, discussed above); and finally offenders who have been imprisoned are, by that fact, subject to a selection bias and may be 'simply the most committed offenders who … report a greater likelihood of future offending' (Jacobs, 2010, p. 419; citations omitted).

A recent Victorian study of recidivism (Holland, Pointon and Ross, 2007) found that particular groups of prisoners were at greater risk of reoffending within two years of release, including younger offenders and Indigenous offenders. These findings were also confirmed by Smith and Jones (2008) and Zhang and Webster (2010). The higher rate of recidivism among younger offenders suggests that, particularly for vulnerable groups, imprisonment does not create a specific deterrent effect.

Specific deterrence and young offenders

In Victoria, the sentencing of young offenders in the Children's Court does not include the purpose of general deterrence. However, the purpose of specific deterrence may be justified by the 'suitability' and 'accountability' principles in sections 362(1)(e)–(f) of the *Children, Youth and Families Act 2005* (Vic) (Power, 2011, [11.1.4]).

A recent New South Wales study of 206 juvenile offenders measured the extent to which offenders perceived the court hearing in which they were sentenced to be a deterrent, and whether they felt either stigmatised or reintegrated by the process (McGrath, 2009). These interview data were then compared to the offenders' subsequent reoffending. The study tested two hypotheses: first, that individuals who rated their risk of arrest in the event of future offending as being higher would be less likely to reoffend (measuring estimates of *certainty* as a deterrent) and second, that those individuals who received what they considered to be a more severe sentence would be less likely to reoffend (measuring *severity* as a deterrent).

The results of the study confirmed the first hypothesis, because perceived certainty of apprehension acted as a deterrent. However, the results failed to support the second hypothesis, and the imposition of a penalty perceived to be severe by the offender did not act as a deterrent. This is in accordance with previous research (Doob and Webster, 2003; Nagin, 1998; von Hirsch et al., 1999). McGrath (2009, pp. 37–38) noted that:

> The failure to observe a relationship between any of these measures of severity and recidivism comprises strong evidence against the proposition that harsh punishments are an effective deterrent to future criminal activity.

Another study by Weatherburn, Vignaendra and McGrath (2009) found that juveniles given custodial orders were no less likely to reoffend than juveniles given non-custodial orders. The study found no statistically significant criminogenic effect;

however, it confirmed the finding that prison exerts no specific deterrent effect, consistent with evidence from previous studies. The authors concluded that custodial penalties 'ought to be used very sparingly with juvenile offenders' given 'the absence of strong evidence that [custodial penalties] act as a specific deterrent' (Weatherburn, Vignaendra and McGrath, 2009, p. 6).

The recent Australian findings may be explained in part by Canadian researchers Cesaroni and Bala (2008, p. 450; citations omitted), who note the potential risks associated with imprisonment of young offenders:

> Those youths who have pro-social values at the time of incarceration may be placed with others who have anti-social attitudes; after their release, youths may be more likely to associate with other adolescents whom they have met in custody, and may therefore be more likely to join gangs. Being in custody also appears to have a negative effect on their long-term job stability, and hence may contribute to reoffending.

A study by Ashkar and Kenny (2008) showed that where imprisonment did seem to generate a specific deterrent effect in juveniles, it was as a result of 'bullying and victimisation, dislocation from important others and fearful perceptions of adult corrections' (Ashkar and Kenny, 2008, p. 594). These effects exist independently of the intent of the state to rehabilitate the juvenile offenders and have significant human rights implications. Instead of rehabilitation, the authors found that 'the incarceration experience failed to provide … the necessary skills to promote and sustain positive change' and the author concluded that 'incarceration alone is unlikely to have any significant impact on recidivism' (Ashkar and Kenny, 2008, p. 595).

Summary

This section has examined literature reviews and recent empirical studies on the effectiveness of imprisonment as a *specific* deterrent. The available research suggests that imprisonment has either no effect upon reoffending or a criminogenic effect. There are a number of reasons for the failure of the experience of imprisonment to deter offenders from reoffending, including that imprisonment may create a criminal learning environment, imprisonment may label and stigmatise offenders and imprisonment may be an inappropriate way to address the underlying causes of crime.

Humane conditions within prison itself do not appear to contribute to the lack of a deterrent effect, as harsh prison conditions have been shown to generate a similar lack of deterrent effect and, for some crimes, a greater rate of recidivism. As with adult offenders, young offenders do not appear to be deterred by imprisonment, and some studies show a criminogenic effect. Given the aims of rehabilitation and reintegration, the lack of evidence for a specific deterrent effect suggests that custodial penalties for young offenders should be used sparingly and for purposes other than specific deterrence.

Concluding remarks

The evidence from empirical studies suggests that the threat of imprisonment generates a small general deterrent effect. However, the research also indicates that increases in the severity of penalties, such as increasing the length of imprisonment, do not produce a corresponding increase in the general deterrent effect.

A consistent finding in deterrence research is that increases in the certainty of apprehension and punishment demonstrate a significant increase in the deterrent effect. This result is qualified by the need for further research that separates deterrable from non-deterrable populations. It has been suggested that the significance of certainty of apprehension exhibiting a deterrent effect may be overstated in studies that combine these populations.

The research shows that imprisonment has, at best, no effect on the rate of reoffending and is often criminogenic, resulting in a greater rate of recidivism by imprisoned offenders compared with offenders who received a different sentencing outcome. Possible explanations for this include: prison is a learning environment for crime, prison reinforces criminal identity and may diminish or sever social ties that encourage lawful behaviour and imprisonment is not an appropriate response to the needs of many offenders who require treatment for the underlying causes of their criminality (such as drug, alcohol and mental health issues). Harsh prison conditions do not generate a greater deterrent effect, and the evidence shows that such conditions may be criminogenic.

In Victoria, deterrence represents only one of the purposes for the imposition of a sentence to be considered by a court alongside punishment, rehabilitation, denunciation and community protection. The purposes of punishment and denunciation are essentially ends in themselves, referable directly to the offender and the criminal behaviour, without need of justification by reference to the potential crime-reducing consequences of punishment and denunciation. However, the other purposes of sentencing – deterrence, rehabilitation and community protection – do not merely respond to the criminal behaviour, but also aim to achieve a reduction in crime.

Imprisonment has its place in the criminal justice system. Lengthy terms of imprisonment may be justified to achieve the purposes of punishment and denunciation, to protect the community by the incapacitation of an offender or to provide time for rehabilitative treatment.

In light of the empirical evidence, however, it is critical that the purposes of sentencing be considered independently – according to their own merits – and that caution be exercised when imprisonment is justified as a means of deterring all crimes and all kinds of offenders.

Glossary

Absolute deterrence
The manner in which crime is reduced or prevented by the existence of the criminal justice system as a whole, rather than through the threat or imposition of a particular criminal sanction.

Aggregate study
In sentencing, an aggregate study is a research methodology that compares overall rates of crime and imprisonment across a jurisdiction, or between jurisdictions, rather than at the level of individual offenders.

Cognitive bias
A cognitive bias is the human tendency to make systematic errors in judgment, knowledge and reasoning. Such biases can result from the use of information-processing shortcuts called 'heuristics' (defined below).

Criminal learning environment
Social learning theory suggests that people learn behaviour from their own immediate environment, through reinforcement, punishment and observation of social influences (including the influence of peers, superiors and role models). A criminal learning environment is one in which a person learns criminal, rather than law-abiding, behaviour.

Criminogenic
A criminogenic effect is one that produces – or tends to produce – crime or criminality.

General deterrence
A sentencing purpose aimed at the reduction of crime by the threat or example of a criminal sanction, directed at all potential offenders.

Heuristic
An experience-based technique for problem solving, learning or processing information. Heuristic methods are used to find solutions quickly, when an exhaustive process is impractical. Examples of this method include using a 'rule of thumb', an educated guess, an intuitive judgment or 'common sense'.

Incapacitation
A sentencing purpose aimed at the reduction of crime by physically preventing offending, usually through imprisonment of the offender.

Informal deterrence
The manner in which crime is reduced or prevented through the influence of social norms that generate the threat of informal (non-legal) sanctions, such as the prospect of rejection by peers or of ostracism from a social group.

Labelling effect
Labelling theory (also known as social reaction theory) suggests that labels that describe behaviour may further lead to that behaviour, particularly if the label is negative or stigmatising. One effect of labelling a person as 'criminal' may be that the person then conforms to that description. Another effect of labelling may be that the person labelled is then subjected to prejudice; for example, by being labelled an 'offender', a person may find it more difficult to maintain employment or social relationships, thereby increasing the risk of criminal behaviour.

Matching study
A research methodology in which pairs of offenders are matched for as many identical variables as possible and are differentiated only by the experimental variable. The matching of offenders attempts to isolate any difference in measured outcomes to the experimental variable.

Meta-analysis
A systematic review that combines and analyses findings from pre-existing studies, providing a summary or synthesis of an area of research.

Perceptual study
A research methodology that involves collecting data from individuals by measuring their responses to questions in the form of interviews or questionnaires. Perceptual studies often use scenarios to elicit individuals' predicted future behaviour.

Proportionality
A common law sentencing principle requiring that, when offenders are sentenced, the overall punishment must be proportionate to the seriousness of the offending behaviour.

Specific deterrence
A sentencing purpose aimed at the reduction of crime through the imposition of a criminal sanction that discourages a particular offender from reoffending.

Totality
A common law sentencing principle requiring that, where an offender is at risk of serving more than one sentence, the overall effect of the sentences must be just, proportionate and appropriate to the overall criminality of the total offending behaviour.

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Other publications of the Sentencing Advisory Council

Measuring Public Opinion about Sentencing
This paper is designed to consider some of the methodological issues that arise when measuring informed public opinion about sentencing.

Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing
The *Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing* research paper provides analyses of both the substantive and methodological issues in the field, with discussion of the way to progress the capacity of the Council to gauge public opinion on sentencing in Victoria.

More Myths and Misconceptions
More Myths and Misconceptions revisits some of the key messages derived from the original *Myths and Misconceptions* paper and updates these findings with the most recent research available.

Gender Differences in Sentencing Outcomes
Gender Differences in Sentencing Outcomes considers differences in sentencing outcomes for men and women. The report examines research literature and presents data from Victoria on police recorded offending and police statistics.

Mandatory Sentencing
This *Sentencing Matters* research paper aims to inform people about mandatory sentencing, which is an ongoing topic of debate in the community.

Alternatives to Imprisonment
One of the statutory functions of the Sentencing Advisory Council is to gauge public opinion about sentencing matters. This report presents evidence of community views in Victoria about the use of alternatives to imprisonment.

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Attachment C

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Trends & issues in crime and criminal justice

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Abstract | Sexual offending has a significant impact on victims and can cause considerable angst within the community. The effective management of sex offenders in the community is of paramount importance.

This paper reviews the latest empirical evidence from Australia and overseas regarding the effectiveness of public and non-public sex offender registries. Results show that while public sex offender registries may have a small general deterrent effect on first time offenders, they do not reduce recidivism. Further, despite having strong public support, they appear to have little effect on levels of fear in the community.

While the evidence is limited to a small number of US studies, non-public sex offender registries do appear to reduce reoffending by assisting law enforcement.

The review concludes by highlighting important considerations to help inform future decisions about the feasibility of a public register in Australia.

What impact do public sex offender registries have on community safety?

Sarah Napier, Christopher Dowling, Anthony Morgan and Daniel Talbot

Sexual offending is a serious and harmful crime, particularly when it affects children, and often sparks significant community interest in the response by law enforcement and government. The modus operandi of sex offenders can vary widely, and the causes of sexual offending are complex, which means combating sexual offending can present significant challenges. A variety of policies and programs have been trialled internationally with the goal of preventing sexual offending and deterring convicted sex offenders from reoffending once released back into the community. One of these policies has been the adoption of public sex offender registries.

In the United States, information on the name, appearance and location of high-risk sex offenders has been available to the public for 20 years. In 1994, the *Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act* was introduced, requiring convicted sex offenders released into the community to register with law enforcement. In 1996, Megan's Law was passed federally as a subsection of the Jacob Wetterling Act. Megan's Law requires law enforcement agencies to make information on registered sex offenders available to the public, which enables individuals to search for registered sex offenders living in their community.

Since 2000, when legislation was first introduced in New South Wales (NSW), Australia has operated under a different model. This has involved non-public registration, the primary purpose of which is to support monitoring of convicted sex offenders by law enforcement agencies. More recently, a restricted public sex offender registry was introduced in Western Australia (WA). However, recent calls for a national public sex offender register in Australia (ABC 2014; Skinner 2016) and for a state register in Victoria (Bell 2017) have brought the issue into public debate. Further, the Royal Commission into Institutional Responses to Child Sexual Abuse has brought into focus the lasting and tragic impact that child sexual assault can have on victims, and the importance of criminal justice responses to offending behaviour (Royal Commission into Institutional Responses to Child Sexual Abuse 2016).

The aim of this paper was to review the available empirical evidence to address three key research questions:

- To what extent do public and non-public sex offender registries reduce sexual offending and reoffending?
- To what extent do public sex offender registries influence perceptions of safety among the wider community?
- What additional issues need to be considered when discussing the feasibility of a national public sex offender registry?

Background

There were 21,380 victims of sexual assault recorded by police in Australia in 2015, the highest recorded number in six years (ABS 2016). While there is significant media focus on sexual assault incidents committed by strangers, the vast majority of sexual assaults are perpetrated by someone known to the victim, and a large proportion by a family member. In 2015, around three-quarters of sexual assault victims knew their offender, while for around one-third of sexual assault victims the offender was a family member (ABS 2016).

Contrary to popular belief, recidivism rates among convicted sex offenders are generally low compared with those of other offenders, even accounting for the potential for under-reporting or low detection rates (Lievore 2004; Richards 2011). Lievore (2004) examined 17 studies on sexual offending conducted in five different countries, several of which produced recidivism rates lower than 10 percent. Conversely, relatively few produced recidivism rates higher than 20 percent (Lievore 2004). A meta-analysis of 82 studies by Hanson and Morton-Bourgon (2005) found that, overall, 14 percent of sex offenders had committed a further sexual offence, although certain offenders—such as those with antisocial orientation—are more likely to reoffend.

While the risk may be lower than for other crimes, the impact on victims may be much greater, with evidence showing that victims of child sexual abuse can experience serious mental health and adjustment problems, which have long-term effects well into adulthood (Cashmore & Shackel 2013). Further, when a sex offender does reoffend, it can create significant angst and concern within the community. For these reasons, the management of sex offenders in the community has received considerable attention.

Registration in the United Kingdom

In 1997, the United Kingdom passed the *Sex Offenders Act*, whereby convicted sex offenders were required to keep police notified of their address (Beard & Lipscombe 2016). In 2003 the *Sexual Offences Act (UK)* repealed and replaced the earlier legislation, mandating a more stringent register, although still without provision for public disclosure (Beard & Lipscombe 2016). In 2008 limited disclosure was piloted in four UK police districts, with the scheme being rolled out nationally in 2010. The amendment enabled members of the public to request information from police regarding whether an individual had a record for child sexual abuse (Beard & Lipscombe 2016); this differs from the United States and South Korea, where information is made accessible to the community via the internet (Day, Carson, Boni & Hobbs 2014)

Registration in Australia

The UK *Sex Offenders Act 1997* formed the basis for Australian registration legislation. New South Wales was the first to implement the *Child Protection (Offenders Registration) Act 2000*, mandating that child sex offenders report to police their whereabouts and personal information (AIFS 2013). The NSW Act served as a model for future legislation (Victorian Law Reform Commission 2014), with all other Australian jurisdictions following suit between 2004 and 2007 (AIFS 2013). Although the legislation differs between states and territories, sex offenders are generally required to report similar types of information to police. This includes addresses and other contact details, and information on motor vehicles, employment, club memberships and any children with whom the offender has contact (AIFS 2013). This information is not made available to the public. The aims of the various acts are also similar—most notably:

- to reduce the likelihood that sex offenders will reoffend; and
- to facilitate the investigation and prosecution of any future offences they may commit (AIFS 2013).

The legislation in each state and territory forms the basis of the Australian Child Protection Offender Reporting scheme. In support of this scheme, the Australian Criminal Intelligence Commission maintains the National Child Offender System, a web-based application that enables police to record, case manage and share information on registered child sex offenders between police agencies (ACIC 2016). Although each jurisdictional registration scheme is based on the same model, differences do exist between the schemes. While some models focus exclusively on sexual offenders against children, others also register those who sexually offend against adults. Differences also exist in the offences included as criteria for mandatory registration, as well as the reporting obligations for offenders (Victorian Law Reform Commission 2014).

Powell et al. (2014a) interviewed police staff responsible for managing non-public sex offender registries in three Australian jurisdictions, identifying two distinct models. The first is a compliance model, whereby police ensure offenders comply with management conditions via face-to-face interviews, which is reportedly the more common approach. The second is a more intensive and proactive model whereby police engage regularly with offenders via face-to-face interviews and monitor their behaviour through observation, including home visits and covert surveillance. This involves an individualised case management plan designed to reduce the risk of reoffending, and requires significantly more policing resources and expertise.

There have been some recent developments towards making registries more accessible to the public. In 2012, a restricted access public sex offender registry was established in Western Australia, in which local residents are required to enter their name and drivers licence to request information on missing registered sex offenders and sex offenders living in their area. Parents may submit a request as to whether an individual who has contact with their child is a registered offender (Taylor 2017). In the Northern Territory, a bill was proposed that would introduce a public sex offender registry similar to those in the United States, in which the names, whereabouts, physical descriptions and photographs of convicted serious sex offenders would be made available to any member of the public (not just local residents who submit a request) via a website. The bill was to be named 'Daniel's Law', in memory of 13-year-old Daniel Morcombe, who was sexually assaulted and murdered by a sex offender released on parole (Elferink 2014). However, following concerns raised by stakeholder groups the legislation was deferred in 2015 (Elferink 2015).

Public registration in the United States

In the early 1990s non-public registration of sex offenders was introduced in the US, a model that had not been in place since the 1930s, when criminals involved in gangs were required to register (Logan 2011). Then in 1994, seven-year-old Megan Kanka was sexually assaulted and murdered by her neighbour, a convicted sex offender who had been released into the community. This incident sparked considerable outcry among the American public, which resulted in the introduction of Megan's Law. Megan's Law required all US states to notify the public of details relating to registered sex offenders in the community, hereafter referred to as sex offender registration and community notification (SORN).

The considerable speed at which community notification was implemented across the United States has been noted (Logan 2011; Pawson 2002; Pawson 2006). By 2011, approximately 700,000 sex offenders were subject to SORN across the United States (Logan 2011). Later, the US Congress passed the *Adam Walsh Child Protection and Safety Act 2006,* which categorised sex offenders into three tiers, according to the type of sexual offence they had committed. Under this Act, sexual offences involving both adult and child victims can result in public registration and each tier has different requirements. Tier 3 offenders are registered for life (with 3-monthly reporting), Tier 2 offenders are registered for 25 years (with 6-monthly reporting) and Tier 1 offenders are registered for 15 years (with annual reporting) (*Adam Walsh Child Protection and Safety Act 2006*).

Although the overall goals of US SORN policies—to deter sex offenders from reoffending, enhance law enforcement investigations and increase public safety (CSOM 2001)—are similar to those of non-public registration in Australia (Vess et al. 2011), the two approaches have different underlying theoretical bases. In undertaking a theory-driven review of US SORN policies to better understand how it was supposed to work, Pawson (2002) concluded that some of the key theories behind SORN policies centred on deterrence and opportunity reduction. Notifying people of the location of known sex offenders in their neighbourhood is expected to encourage community members to take precautionary measures, thereby reducing opportunities for offending. Similar to non-public registries, police are able to more closely monitor convicted sex offenders, meaning the real and perceived risk of arrest is likely to be higher, which in turn is expected to deter reoffending. Further, community members are empowered to provide additional surveillance of sex offenders to

monitor suspicious behaviour and report it to police, which is also expected to aid deterrence. Finally, public shaming is expected to deter sex offenders from reoffending, while the perceived risk of public shaming may also deter first time offenders (Pawson 2002). Whether SORN actually works in these ways has been the subject of extensive empirical study.

Review of empirical studies

Effectiveness of non-public registration

The effectiveness of non-public sex offender registration has received considerably less attention, largely because of the difficulties of separating the effects of non-public registration and community notification among the US studies (Vess et al. 2014). Prescott and Rockoff (2011) were the first to adopt statistical models that distinguished the effects of the two components in their study of 15 US states. They found non-public registration of convicted sex offenders significantly decreased the overall number of sex offences. The reductions were primarily observed for sexual offences against victims who were known to the offender—namely friends, acquaintances and neighbours—rather than among strangers (Prescott & Rockoff 2011).

In a later study, Agan and Prescott (2014) conducted a geographical analysis using addresses of registered sex offenders in Baltimore County to determine whether the concentration of non-publicly registered sex offenders in an area was associated with the frequency of sexual offending. They found that, for some types of sexual offences against adults, non-public registration of sex offenders was associated with a decreased risk of sex offence victimisation. This relationship was not apparent for forcible rape or child sexual offences (Agan & Prescott 2014). The authors noted moderate limitations to their study, including 'spillovers' of sex offenders into other areas and alternative definitions of neighbourhoods (Agan & Prescott 2014). However, the study was unique in its specific targeting of non-public registration in the United States, and together with the earlier study provides some evidence of the benefits to law enforcement of having information about known sex offenders.

It is more difficult to determine the impact of non-public sex offender registration in Australia without any extensive reviews or evaluations having been conducted. Day, Carson, Newton and Hobbs (2014) conducted interviews with professionals who work with sex offenders in the community in Western Australia. They found there was broad support for non-public registration schemes; however, participants largely felt Western Australia's current non-public registration model was over-inclusive and placed 'unfair restrictions on some offenders' (Day, Carson, Newton & Hobbs 2014: 183). Their findings supported the adoption of a tiered, risk-based model in which scope, registration periods and monitoring requirements are dependent on each individual offender's level of risk to the community (Day, Carson, Newton & Hobbs 2014). Nevertheless, there have been calls for more research into the effectiveness of non-public registries to be conducted (Victorian Law Reform Commission 2014).

Effectiveness of public sex offender registries

In the United States, where SORN has been operating under Megan's Law for 20 years, a number of studies have investigated the impact of the legislation on rates of sexual offending. Generally speaking, these studies have focused on two specific outcomes:

- specific deterrence (effect on recidivism among convicted sex offenders); and
- general deterrence (effect on general rates of sexual offending in the community).

In 2002, Pawson conducted a systematic review of studies measuring the effectiveness of Megan's Law. Pawson found that, prior to 2002, only one reliable outcome study existed that tested the effects of Megan's Law (Schram & Milloy 1995). This compared recidivism rates between two matched groups of sex offenders convicted pre-Megan's Law and post-Megan's Law, finding no significant difference in sex offence recidivism in the 4.5 year follow-up period (22% pre-Megan's Law vs 19% post-Megan's Law; Schram & Milloy 1995).

Seven years after Pawson's study, Drake and Aos (2009) conducted a systematic review of all published studies measuring the effect of Megan's Law on sexual offending and recidivism. They used a meta-analytic approach to measure effect sizes and compare the outcomes across studies. They included studies that used a non-treatment or treatment-as-usual comparison group that was well matched to the treatment group. The authors identified nine studies that were of sufficient methodological rigour for inclusion. Seven studies did not show any effect on sexual recidivism among convicted sex offenders as a result of SORN (ie no specific deterrent effect). The two remaining studies indicated a reduction in sex offences occurring in the general community among non-convicted sex offenders (ie a small general deterrent effect). While drawing these tentative conclusions, the authors suggested regarding the findings with caution due to the small number of studies (Drake & Aos 2009).

Since Drake and Aos' systematic review, several studies have subsequently concluded that SORN did not reduce sex offence recidivism (Letourneau et al. 2009; Letourneau et al. 2010; Prescott & Rockoff 2011; Tewksbury, Jennings & Zgoba 2012; Zgoba, Veysey & Dalessandro 2010) or prevent sexual offending in the general community (Ragusa-Salerno & Zgoba 2012). Further, one study found no difference in sex offence recidivism between offenders who registered and those who did not (Levenson et al. 2010).

Conversely, Letourneau et al. (2010) analysed crime trends and the timing of legislation in South Carolina, finding SORN reduced first time sexual offences (general deterrence) by 11 percent from 1995 to 2005. Similarly, a well-cited study by Prescott and Rockoff (2011) found that community notification of sex offenders (as distinct from registration) was associated with a reduction in the frequency of sexual offences (general deterrence), but not a reduction in sex offence recidivism among registered sex offenders (specific deterrence). In fact, they found that an increase in the number of sex offenders subjected to community notification was associated with an increase in sex offence recidivism (Prescott & Rockoff 2011). These findings were replicated in Agan and Prescott's (2014) study of geographic variation, in which community notification was associated with an increased risk of victimisation in some neighbourhoods with a higher concentration of registered sex offenders.

Explaining these findings

Overall, the findings from a review of studies into the effectiveness of SORN suggest mixed results. Several explanations for these findings have been offered.

In Schram and Milloy's (1995) study, the post-Megan's Law group of sex offenders (those subjected to SORN) reoffended at a significantly faster rate than the pre-Megan's Law group. Similarly, Letourneau et al. (2009) found that SORN increased the risk of sex offence recidivism among juveniles. Both Pawson (2002) and Letourneau et al. (2009) suggest these findings indicate a surveillance or detection effect, whereby police monitor sex offenders on a register more closely and, as a result, detect a higher number of offences or detect offences more quickly among monitored offenders than their non-monitored counterparts.

Prescott and Rockoff (2011) offered an alternative explanation, instead suggesting that convicted sex offenders are more likely to reoffend when their personal and offending information is made public due to the 'associated psychological, social, or financial costs' (Prescott & Rockoff 2011: 164). For example, research has found that being placed on a public sex offender registry can result in exclusion from a neighbourhood or residence, job loss, anxiety and other psychological problems (Lasher & McGrath 2012; Levenson & Cotter 2005), all of which are counterproductive in terms of reducing reoffending.

Public registries may also impact different types of offenders differently. Megan's Law was largely geared towards preventing sexual assaults committed by strangers. SORN assumes that members of the public can better protect themselves and their children when they become aware of a convicted sex offender in their neighbourhood. However, research shows that the majority of child sexual offences are committed by individuals known to the victim. Bureau of Justice Statistics figures from 12 US states showed that, among those who sexually assaulted a child (aged 0–17), 34 percent were a family member of the victim, 59 percent an acquaintance of the victim, and the remaining eight percent were not known to the victim (Snyder 2000). These findings are supported by more recent research (Ragusa-Salerno & Zgoba 2012). Thus, for the majority of incidents it is likely that any previous sexual offending history is already known to family members. Further, offenders who target family members are the least likely to reoffend (Hanson & Morton-Bourgon 2005). Community notification therefore offers fewer benefits in these cases.

Importantly, similar patterns of offending have been observed in Australia, where 83 percent of child victims of sexual assault aged 0–14 years are assaulted by someone they know (ABS 2016). Only 10 percent of child victims are assaulted by someone unknown (in the remaining 7% of cases the relationship was unknown; ABS 2016).

US SORN policies are also based on the assumption that sex offenders are likely to reoffend once released into the community. However, a study by Sandler, Freeman and Socia (2008) found that 95 percent of sexual offences occurring in New York were committed by those without prior sexual assault convictions. Overall, around one in seven sex offenders will go on to reoffend, and this varies by offender type (Hanson & Morton-Bourgon 2005). Some commentators have therefore argued that sex offender management in the United States would be improved by using risk assessment strategies to identify those at highest risk of recidivism and by reserving more intensive restrictions and interventions for these offenders (Levenson & D'Amora 2007).

Finally, as Prescott and Rockoff (2011) argue, the majority of studies conducted thus far do not separate the effects of non-public registration from the effects of community notification. In practice, these two components of Megan's Law activate different mechanisms, and may work in conflict with one another. At best, the apparent negative consequences of community notification may cancel out the specific deterrent effect of sex offender registration. At worst, these consequences may lead to higher rates of sexual recidivism in some neighbourhoods.

Australian perspectives

The recent introduction of a semi-public sex offender register in Western Australia has been the subject of some qualitative research exploring the perceived benefits of the registry among police and other professionals. Whitting, Day and Powell (2016) conducted interviews with specialist police officers responsible for the registration and monitoring of sex offenders in the community, and for managing the WA community notification scheme. They found police participants were sceptical as to whether the public registry would increase community safety, with some feeling the scheme could deter some offenders from reoffending, while potentially increasing the risk of reoffending for others (Whitting, Day & Powell 2016). There were mixed views overall—some police officers felt the scheme may increase perceptions of safety within the community, while others felt it could create a 'false sense of security' by focusing the community's attention towards individuals on the registry and away from non-convicted individuals who pose a potential threat (Whitting, Day & Powell 2016).

Similar concerns were raised in an earlier study involving police working in three jurisdictions. Specifically, police officers felt that registered sex offenders being publicly named and shamed and, as a result, denied social support would increase their risk of reoffending (Powell et al. 2014a). Similarly, in another study involving interviews with staff working with sex offenders in the community, participants generally viewed the planned WA public sex offender registry as 'counter-rehabilitative' (Day, Carson, Newton & Hobbs 2014: 182).

Impact on perceptions of safety

While reducing reoffending among sex offenders is often cited publicly as a key outcome, a vital part of the impact of sex offender registries is on perceptions of safety in the community. While a number of media opinion polls and petitions have gauged support for a public sexual offender registry in Australia (eg Daniel Morcombe Foundation 2016; Hinch 2013), almost no empirical studies have been conducted. Taylor (2017) conducted a web-based survey of 162 users of Western Australia's online public sexual offender registry. Around two-thirds of respondents were supportive of an Australia-wide online public registry (67%) and believed that the public had a right to know if convicted child sexual offenders were living in the area (65%), while half believed that the community had a right to know the identity of all convicted child sexual offenders (56%). However, less than one in five respondents believed that this online public registry would prevent child sexual abuse (14%). Around one-quarter believed it would help police detect more sex offenders or offending (23%), and one-third felt that it would protect children from registered sex offenders (32%). Importantly, less than one-quarter reported that the registry made them feel safer (23%). This disparity between levels of support and feelings of safety could be due to a perceived lack of disclosure—only 19 percent of respondents felt that they had enough information about offenders, while another 51 percent were undecided.

In the United States, where public notification schemes (including online public sexual offender registries) typically disclose more detailed information on offenders, levels of support, and perceptions of safety and effectiveness, are somewhat higher. Rates of support among the US public typically exceed 75 percent (Brannon et al. 2007; Harris & Socia 2016; Koon-Magnin 2015; Lieb & Nunlist 2008; Schiavone & Jeglic 2009), while between 60 and 90 percent of those surveyed indicated they thought that some form of public notification scheme reduces sexual offending or recidivism and that it increases their feelings of safety (Brannon et al. 2007; Lieb & Nunlist 2008; Koon-Magnin 2015; but see Schiavone & Jeglic 2009).

However, a number of studies have found that, upon notification of a sexual offender residing nearby, community members on average indicate either no change in levels of fear (Harris & Cudmore 2016; Zevitz & Farkas 2000) or a moderate increase in fear (Koon-Magnin 2015; Levenson et al. 2007). Similarly, studies comparing groups of notified and non-notified community members have also found no differences in levels of fear (Beck et al. 2004; Beck & Travis 2004). Interestingly, some studies in which respondents were asked to gauge their feelings of *safety* upon notification of a nearby sexual offender, as opposed to fear or concern, have found that community members feel safer upon notification (Anderson & Sample 2008; Boyle et al. 2014; but see Harris & Cudmore 2016; Taylor 2017). This inconsistency may in part reflect differences in question wording across studies. Additionally, measures of fear and safety could be tapping into two different constructs, with increases in the former reflecting a heightened awareness of the danger of sexual victimisation, and increases in the latter reflecting an increased confidence in one's ability to monitor and respond to this danger. If this is the case, then a simultaneous increase in both upon notification of a sexual offender residing nearby is entirely plausible.

Other issues associated with public sex offender registries

There are a number of other issues associated with the adoption of public sex offender registries, which are explored briefly below.

Adolescents and young people

One issue that would need to be resolved in developing a national public sex offender register in Australia is the response to adolescents and young people. For example, juveniles and young adults in the US have been convicted of child pornography offences and placed on public sex offender registries due to 'sexting', the taking and sending of nude photographs of themselves or others to their peers (Harripersad 2014). In response, some US states have attempted to address these legal complications by introducing (or attempting to introduce) legislation that reduces the penalty for juveniles convicted of child pornography offences or ensures they are not placed on sex offender registries (Harripersad 2014).

Similar legal problems with young people and 'sexting' have been highlighted in Australia (Brady 2011; Crofts & Lee 2013; Lee et al. 2015). In a survey of 2,000 young Australians, almost half reported they had sent a sexually explicit photo of themselves to another individual, with two-thirds reporting they had received one (Lee et al. 2015). Young people who send sexually explicit photos to one another are at risk of child pornography charges and being added to a sex offender registry (Lee et al. 2015). This is despite the fact that many (but not all) young people who engage in this activity may be above the age of consensual sex, according to current legislation. Similar legal implications apply to young people convicted of sexual offences for engaging in consenting sexual relationships with individuals in mid-adolescence, under the age of 16 years.

Being placed on a public sex offender registry can have a number of negative implications for a young person, particularly regarding future study and employment opportunities, and the permanent social stigma attached to being a registered sex offender (Richards & Calvert 2009). There have been calls in Australia to develop a way to protect juveniles and young people caught sexting from being placed on a sex offender registry, and some jurisdictions have responded to the issue. In Victoria, for example, the inclusion of juveniles is a discretionary decision—juveniles convicted of a sexual offence, including child pornography, are not automatically included on a sex offender registry but may be included by court order (Victorian Law Reform Commission 2014). New legislative changes in Victoria will also allow 18 and 19 year olds on the sex offender register to apply to the courts to have their name removed if they were in a consenting relationship with someone under the age of 16 (Preiss 2017). However, a nationally consistent approach has not yet been established and the protection of juveniles and young people from being unnecessarily stigmatised would be an important consideration in the implementation of a national public sex offender registry.

Community and housing impact

One commonly overlooked implication of public sex offender registries is their potential impact on property values. When choosing where to live, homebuyers typically pay close attention to the risk of crime in a given area, as evidenced by the negative relationship between property sale prices and neighbourhood crime/perceptions of crime (Gibbons & Machin 2008). While few studies have examined this in relation to publicly registered sexual offenders, those that have report a two to eight percent decrease in the sale prices of residential properties near a registered sexual offender's residence (Linden & Rockoff 2008; Pope 2008; Wentland, Waller & Brastow 2014; Yeh 2015), along with an 84 percent increase in the time residential properties spend on the market (Wentland, Waller & Brastow 2014). This is broadly consistent across properties of different type and value, and across different neighbourhoods, although the effect tends to be highly localised (ie limited to properties within 200 or 500 metres of a registered sexual offender's residence) and time-dependent (ie limited to registered sexual offenders who have lived in an area for longer than six months). Examining the latter finding in further detail, Yeh (2015) found that the negative impact of a registered sexual offender on nearby residential property sale prices initially appeared after they had lived in the area for just under six months, with the downward price trend increasing in magnitude until they had lived there for just over two years. It has also been found that property sale prices return to original levels soon after registered sexual offenders leave an area, providing further evidence of a causal relationship (Pope 2008; Wentland, Waller & Brastow 2014; Yeh 2015).

Implications for law enforcement

Prior research has found that public sex offender registries can place additional burden on the law enforcement agencies responsible for their operation (Whitting, Day & Powell 2014). Zevitz & Farkas (2000) undertook a survey of 188 police and sheriff agencies and an observation of law enforcement agencies in Wisconsin. Over two-thirds of the sample felt labour expenditure had become an issue of concern since community notification was introduced; 58 percent said it had increased their workload and more than one-quarter felt it placed a strain on agency resources (Zevitz & Farkas 2000).

Police officers across Australia have noted the complexity of maintaining the non-public registries in their state/territory jurisdictions, which require extensive knowledge of sexual offending and risk assessment, along with time to dedicate to checking and maintaining them (Powell et al. 2014a). Critically, many expressed support for the establishment of specialised teams with advanced training in order to more effectively manage and exploit these registries. Expansion to a public registry would have additional resource implications.

This additional cost associated with public sex offender registries is a second key impact noted in prior research. In their evaluation of New Jersey's public registry (which includes community notification schemes such as pamphlet drops in addition to an internet registry), Zgoba et al. (2008) found that, between its establishment in 1995 and 2007, running costs increased from slightly over US$500,000 to US$3.3 million.

Lastly, it has been argued that the increased agency focus towards registered sex offenders, many of whom may pose a low risk to the community, could result in decreased allocation of resources towards other crime and undetected sex offenders who pose a high risk to the community (Sandler, Freeman & Socia 2008; Vess et al. 2014; Whitting, Day & Powell 2014). There would therefore need to be a balance found between these competing priorities.

Vigilantism

Critics of public sex offender registries often highlight the potential for widespread public vigilantism, and concerns for the physical safety of registered sexual offenders. This is a plausible argument given the extremely negative public attitude towards sexual offenders in Australia. In the United States, Lasher & McGrath's (2012) review of multiple studies found that, on average, 44 percent of registered sexual offenders reported experiencing threats or harassment by neighbours, while around 20 percent experienced threats or harassment in general. Importantly, 16 percent of offenders reported that their family members or other cohabitants had been harassed, attacked or had property damaged as a result of their registration. Physical vigilantism (ie physical attack) targeting registered sexual offenders was less common, with (on average) eight percent experiencing physical attacks and 14 percent reporting some form of property damage. Policymakers and law enforcement should therefore be aware of the potential for a variety of forms of vigilantism to occur with a public sexual offender registry, along with the potential for vigilante activity targeting those related or otherwise close to registered sexual offenders.

Notably, a number of unofficial, community-run registries that attempt to compensate for the absence of a public registry in Australia have been established to keep members of the public informed of sexual offenders. These registries, while unreliable, essentially constitute online forms of vigilantism that have arguably resulted from the lack of a public sexual offender registry in Australia.

Public awareness and use of registries

The effectiveness of an online public sex offender registry in preventing sexual offending is arguably reliant on the public's awareness and use of the information. The findings of US research in relation to public awareness vary widely, with 50 to 90 percent of samples indicating some knowledge of the existence of a public registry (Anderson & Sample 2008; Boyle et al. 2014; Schiavone & Jeglic 2009). However, among those who are aware of public registries, fewer than half ever access them, although those people at higher risk of sexual victimisation (ie females and those with children) are more likely to do so (Anderson & Sample 2008; Boyle et al. 2014; Harris & Cudmore 2016; Mancini 2014). Those who have accessed public registries, regardless of whether they find a sexual offender residing nearby, more often report being generally safety conscious in relation to sexual victimisation and aware of their surroundings, while around 30 to 60 percent implement prevention strategies to protect themselves and/or others from sexual offending (Anderson & Sample 2008; Harris & Cudmore 2016; Lieb & Nunlist 2008).

Becoming aware of a sexual offender residing nearby is also associated with an increase in the use of prevention strategies to protect oneself and/or others (Beck et al. 2004a; 2004b; 2006). Again, those people at higher risk of victimisation are more likely to adopt/use these strategies upon notification (Anderson & Sample 2008; Beck et al. 2004; Lieb & Nunlist 2008). Prevention strategies most often adopted by respondents include increased monitoring and education of children, and sharing the information they have on nearby sexual offenders with others, while changes to daily routines (eg avoiding certain areas, not going out alone at certain times) and improvements to home security are less common. Public sex offender registries appear to be somewhat effective at encouraging those who view them to be safety conscious and adopt simple prevention measures, although this does not apply to the relatively large number of people (in the United States at least) who are unaware of or do not use them. Increasing public awareness of public sex offender registries, and encouraging their use, is therefore important—but must be balanced against the risk of increasing levels of fear among users.

Conclusion

This paper has summarised the evidence relating to the effectiveness of public and non-public sex offender registries in increasing public safety and reducing sex offending, and described several important issues to consider when discussing the feasibility of a national public sex offender registry in Australia. In doing so, this paper aims to help inform discussion surrounding the role of public sex offender registries in Australia, and also guide future empirical studies into both the prevention of and risk factors for sexual reoffending.

Research findings on the effectiveness of public sex offender registries are mixed. There is little evidence that the US SORN policies have reduced reoffending among registered sex offenders; in fact, some studies have shown that SORN increased sex offence recidivism. Conversely, there is some evidence that SORN has a general deterrent effect on first time or non-convicted sex offenders in the community, likely due to the perceived risk of being placed on a public register. The WA semi-public sex offender registry's impact on recidivism has yet to be measured. However, interviews with key stakeholders, including police and practitioners, have raised concerns that public registration is counter-rehabilitative and could increase the risk of reoffending.

Non-public sex offender registration and its impact on reoffending have received relatively little attention, largely because of the speed at which SORN policies were rolled out across the US. Where studies have been conducted, they provide some evidence that sex offender registration may reduce reoffending through specific deterrence. The most likely explanation for this is that information on local sex offenders aids law enforcement and increases the risk, both real and perceived, of apprehension.

The findings in terms of community safety are mixed. There are high levels of support for public sex offender registries within the broader community. While there is no evidence that they have any impact on the level of fear of becoming a victim, there is some evidence that they make people feel safer. This seemingly contradictory finding is likely the result of people feeling empowered and able to make informed decisions, based on the information they can access.

This paper has highlighted a number of significant issues that need to be considered when discussing the feasibility of a national public sex offender registry in Australia, including the impact on law enforcement resources, property markets and adolescents and young people caught 'sexting', the potential for vigilantism and the under-use of registries. What this highlights is the need to be clear about the goals of any future national public registry, should one be developed. It is important to take into account both the benefits and drawbacks of such a scheme, informed by empirical research.

In the event that a decision is made to develop a national public sex offender registry, it would be paramount to consider a model whereby police have discretionary power to decide which individuals are placed on the registry, as suggested by Whitting, Day and Powell (2016) in relation to the WA scheme. Under this model individuals who are particularly compliant, cooperative with rehabilitation and considered to have a low risk of reoffending could be exempt from being placed on a public registry. Adopting these suggestions would likely increase the feasibility of a national public sex offender registration scheme and ensure it only targets sex offenders who pose a risk to the community.

This paper has identified several gaps in the literature on sex offender registration, with regard to both US SORN policies and non-public registration in Australia. Among the evaluation studies into US SORN policies, very few separate the effects of non-public registration from community notification, with the majority of research to date measuring the melded effects of both initiatives. Of benefit would be more research focused specifically on the effects of community notification (public sex offender registries) on sex offence recidivism while controlling for the effects of non-public registration and monitoring.

Even less evidence exists that focuses specifically on the effects of non-public registration on sex offence recidivism, with no studies having evaluated Australia's current model in terms of its impact on reoffending. It is apparent the non-public nature of registration will remain a feature of the Australian legal system, at least for the time being, which brings with it a responsibility for best practice. Australia may provide an ideal context for a recidivism study focused on non-public registration and monitoring of sex offenders, given data from most jurisdictions has not been compromised by additional effects from community notification. In any case, it is imperative that any future policies be supported by an impact evaluation, something that has long been advocated in this area.

In the interim, given the limited evidence of the effectiveness of current registration models, researchers have suggested developing multi-agency risk-management initiatives that are tailored to individual offenders and their varying levels of reoffending risk and susceptibility to rehabilitation (Day, Carson, Newton & Hobbs 2014).

The high rate of under-reporting and attrition of sexual offences in the justice system makes responding to sexual offending particularly complex. Australian figures suggest that less than one-third of sexual assault victims report to police (ABS 2017) and that only one in 10 sexual assaults reported to police results in a conviction (BOCSAR 2015; Fitzgerald 2006). Preventing and responding to the vast majority of sexual offences occurring in the community therefore also requires intervention from outside the criminal justice system, and may not be influenced by the public registration of convicted sex offenders.

Ultimately, sex offender registration—be it public or non-public—represents one part of an overall response to sex offending. It needs to be considered alongside other methods for reducing sexual recidivism. That way, the right mix of responses can be implemented, taking into consideration the evidence of effectiveness and strengths and weaknesses of different approaches. For example, there is evidence that sex offender treatment, both in community and prison settings, is cost effective in reducing reoffending (Lösel & Schmucker 2005; WSIPP 2016), including in an Australian context (Woodrow & Bright 2011). Similarly, there is evidence in support of electronic monitoring of sex offenders (Padgett, Bales & Blomberg 2006), while high quality community-based supervision and parole supervision have also been shown to reduce reoffending among high-risk offenders (Drake 2011; Wan et al. 2014).

Preventing sexual offending and reoffending is complex. Sexual offending causes heightened community concern and has serious and detrimental effects on victims. However, sexual reoffending is relatively rare, and variation in sex offenders and the nature of sexual offending is not well understood. One of the key lessons learned from the US experience is that policies introduced rapidly in response to single, widely publicised incidents are generally not successful in achieving their aims. Policy responses to sexual offending need to be carefully considered and must be based on strong theoretical foundations, supported by evidence.

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