Custody, Crime and the Community†

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This paper is to be seen as something of a report card on the use of custody in Australia in the mid 1990s. Without wishing to be alarmist, it is suggested that our custodial regimes are in a state of ferment with pressures for change coming from many directions, while at the same time the numbers of people in custody are increasing and budgets for administering the custodial services are shrinking. The public mood across the whole of Australia in recent years has clearly been in favour of "getting tough" with lawbreakers and this has resulted in legislation in some jurisdictions abolishing remissions and increasing sentences, as illustrated by the so-called "truth-in-sentencing" and "three strikes and you're in" slogans. This has led to acute prison overcrowding in all mainland states. It has also led to calls for the privatisation of prisons on the grounds that they will be less expensive. Then there is the question of how best to manage AIDS infected prisoners, an issue which provokes major differences of opinion. There is continuing concern about the unacceptably high numbers of deaths in custody and the inadequate implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody. There is further anxiety about whether or not the custody we apply to illegal immigrants is humane and in accordance with United Nations protocols. Finally, there is pressure for all governments (Commonwealth, State and Territory) to enact legislation that will authorise the international transfer, both in and out of Australia, of convicted foreign offenders serving substantial prison sentences.

All of this, and much more, is happening at a time when we are less well informed about the use of custody in Australia than at any time in the past 20 years. That unfortunate information gap has been created by a decision of the Commonwealth Minister for Justice in October 1993 to establish priorities for the Australian Institute of Criminology which excluded reference to the collection, analysis and publication of the wide range of correctional statistics and other correctional data that the Institute had developed over many years. The Minister's decision was subsequently endorsed by the *Report of the Review of Commonwealth Law Enforcement Arrangements* in February 1994, on the grounds that corrections was a matter of low priority as far as the Commonwealth is concerned. In my opinion, that decision was ill conceived and contrary to the national interest. To date, no other agency has taken over the work that the Institute was ordered to terminate and it is probably already too late for the data collections to be reactivated without a substantial loss of continuity. One direct consequence of this information gap is that this article will not be as liberally sprinkled with statistics and graphs as is usually the case with my work.

More will be said about the role of the Commonwealth Government later, but it should be explained in these introductory remarks why the word "custody" has been chosen

† This is a revised version of the 1995 South Australian Justice Administration Oration delivered in Adelaide on 24 May 1995.

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rather than "prison" or "incarceration" for the title of this article. At this point in our history it is safe to say that all Australian jurisdictions have irrevocably resolved that neither capital punishment nor corporal punishment are acceptable in a society which likes to see itself as humane and civilised. Therefore, the most severe penalty that may be imposed on persons who commit even the most serious or heinous crimes is the loss of liberty. In these days we do not kill or maim offenders, but we may restrict their freedom of movement. We also do that with other categories of people, some of whom are only suspected or accused of being offenders, and all of these categories are potentially controversial. As free and responsible citizens it is argued that we all have a duty at least to know, or try to know, who it is that our representatives, our judges, police and other officials, place in custody. We also should know why they are in custody, for how long, and under what conditions. To start moving in that direction it may be useful to try to unravel the many faces of custody that are to be found in this nation.

The many faces of custody

There are at least six different types of legal custody in Australia, the most important of which is represented by the prison systems of the six States and the Northern Territory. In the days when we used to count these things, there were just over 15 000 people in prison in approximately 80 separate institutions. About 2 000, or 13 per cent, of the total were unconvicted remandees, so we should probably think in terms of two sub-systems: one for convicted prisoners serving sentences and the other for persons remanded in custody while awaiting trial. One reason for drawing a clear distinction between prisoners and remandees is that the majority of persons remanded in custody are not sentenced to prison, but are either acquitted or sentenced to non-custodial penalties, if not released on bail before coming to trial.

Probably the second most important type of custody in terms of numbers is that administered by our eight police forces. In this custodial system the numbers passing through are extremely high (much higher than through our prisons) but the numbers inside at any point in time are relatively small. Our best estimate is that between 300 000 and 350 000 incidents occur each year in which people are taken into police custody, but only between 500 and 1 000 people are being held in police cells or watch houses at any one time.[1] Until the Royal Commission into Aboriginal Deaths in Custody there was very little hard evidence or understanding about how Australia's police custody systems operated, but the basic facts are now reasonably well established. It is now also known that the distinction between prison and police custody is by no means absolute as many remandees are held in police watch houses, especially if the prisons are crowded, and in remote areas convicted offenders may serve sentences of up to three months in police custody without being transferred to a prison.

Similarly with the third category of custody, juvenile detention, there is not an absolutely fixed line between institutions for juvenile offenders and prisons for adult offenders as the age cut-off point, either 17 or 18 years, varies between jurisdictions. For the most serious offences juveniles may be sentenced or transferred to prison even though younger than the cut-off age. To complicate matters further, in Victoria there are Youth Training

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1 McDonald, D, *National Police Custody Survey 1992: Preliminary Report* (1993) Deaths in Custody Australia No 2, Australian Institute of Criminology, Canberra.

Centres which take offenders between the ages of 17 and 21 years, and in all jurisdictions young people in juvenile institutions are not transferred to prison when they reach the cut-off age and so there are always people in juvenile institutions who are older than the relevant cut-off age and it is also likely that at any time there will be some younger people in prison.

The three other categories of custody that are used in Australia today are represented by immigration detention centres, military prisons or guard houses, and secure facilities in psychiatric hospitals for persons suffering from serious mental illnesses who may or may not have been accused of committing criminal offences. Without labouring the point, it is suggested that, as with prisons, police watch houses and juvenile detention centres, the distinction between these other categories is not as clear as might be imagined. Illegal immigrants may be held in prison if other, more appropriate, facilities are not available; offenders in the defence forces may also be found in police or prison custody; and mentally ill offenders are not infrequently transferred between prisons and psychiatric hospitals according to their state of health and their manageability. In short, it can be seen that in a number of different ways our separate custodial systems are inter-connected and to some extent over-lapping. There may be some value therefore in thinking in terms of one overarching custodial system which is comprised of a number of different parts. If we did that, even though we do not have accurate figures for any one of the six components, a reasonable guess would be that the national total in 1995 of people in custody at any one time would be between 17 500 and 18 500.[2] That is about one person in every 1 000 in the community, or 0.1 per cent of the total population. The national total is certainly not overwhelmingly large, compared with many other nations in which proportionately four or five times as many people would be in some form of custody, but we know from studies of the relative use of imprisonment in different Australian jurisdictions that there are remarkable variations and that these are very persistent over time.

Imprisonment and crime — the lasting paradox

These studies have repeatedly shown that there are very significant differences in the imprisonment rates (prisoners per 100 000 of the population) of the six Australian States and the two mainland Territories, and these differences are largely unexplained. The largest variations are found in the Territories. The Northern Territory rate is nearly always nine or 10 times higher than the rate for the Australian Capital Territory, and, among the States, the Western Australian rate, which is the highest, is generally between two and three times higher than the Tasmanian rate, which is the lowest. For the past two or three years the New South Wales rate has been just over twice the Victorian rate, while the rate for South Australia has remained almost exactly at the national average of 86 per 100 000 of the total population or 114 per 100 000 of the adult population. (For the sake of completeness, it should be mentioned that the Queensland rate is generally below the national average, about half way between New South Wales and Victoria, but there are some doubts about the accuracy of the Queensland figures.) The details are shown in Figure 1.[3]

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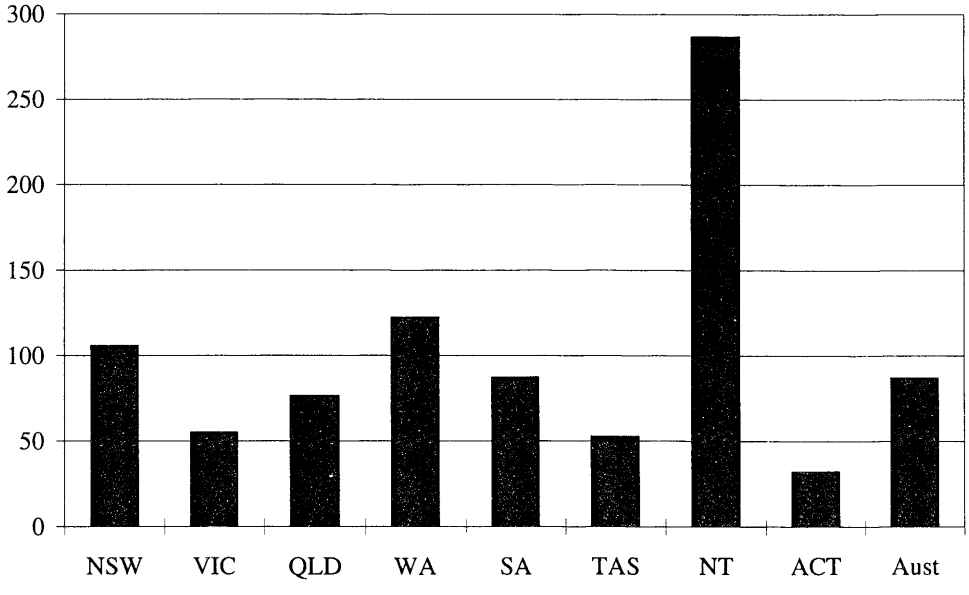
2 In addition to the prison and police figures given earlier, informal inquiries suggest that there are about 1 000 people in immigration detention, 700 in juvenile detention, from 200 to 300 in secure psychiatric hospitals, and 50 in various forms of military detention at any time.

3 *Australian Prison Trends* (October, 1994) Australian Institute of Criminology, Canberra.

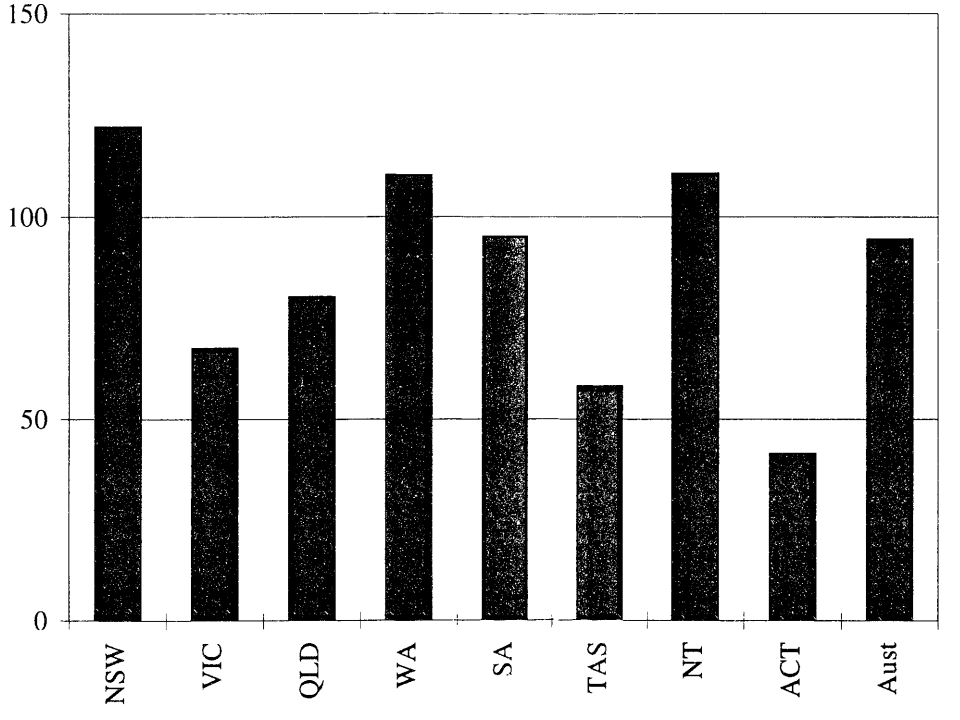
Figure 1: Australian Total Imprisonment Rates, April 1994



It is sometimes suggested that these remarkable and persistent differences may be explained by reference to the numbers of Aboriginal and Torres Strait Islander people in the general populations and in the prison figures for each jurisdiction, but this is by no means a total explanation. The suggestion can easily be tested by calculating the non-Aboriginal imprisonment rates (that is, without counting Aboriginal people in the community or in prison). When this is done the differences are considerably reduced, but the Northern Territory rate is still three times higher than the rate for the Australian Capital Territory, and the New South Wales rate is still twice as high as that of Victoria. The South Australian rate remains firmly fixed at the national average, but the Western Australian rate drops markedly below that of New South Wales and even slightly below that of the Northern Territory. This exercise identifies New South Wales as by far the most imprisoning jurisdiction in Australia with an adult non-Aboriginal imprisonment rate of 122 compared with a national average of around 94. The difference in the overall pattern can be seen in Figure 2.[4]

4 Ibid.

Figure 2: Australian Adult Non-Aboriginal Imprisonment Rates, April 1994



While the search for a convincing explanation, or explanations, for the differences in the Australian rates remains largely unsuccessful, the one thing that can be said on this topic with some degree of confidence is that the wider use of imprisonment cannot be shown to have any positive impact on the level of reported crime. The citizens of New South Wales are certainly not twice as safe as their neighbours in Victoria, nor is the Northern Territory the safest part of Australia as far as crime is concerned. Contrary to the belief of many members of the public, and nearly all politicians, within the limits that are acceptable in our type of society, we cannot buy our way to public safety by putting more and more offenders behind bars. It might perhaps be different in a totalitarian society that was prepared to impose draconian penalties on any type of offenders and was prepared to meet the enormous costs involved. But within the limits available in Australia, increasing the number of prisoners two or three times would not make any demonstrable difference to crime, though it certainly would to the budget.

It should not be surprising that this is the case. We have known for many years from the results of crime victim surveys that a very high proportion of serious offences (offences that would almost certainly result in imprisonment if they were detected and convictions were recorded) are not even reported to the police. For sexual and non-sexual assault it seems that only between 10 and 20 per cent of the offences are reported, and for nearly all categories of crime the police only "clear", or solve, a very small proportion. And of those cases that are "cleared", by no means all proceed to a court hearing, and of those that do, some result in acquittals and only a small proportion of the cases which result in convictions lead to imprisonment. The majority of convictions lead to the imposition of

fines or other non-custodial penalties. A conservative conclusion on this point might be that not more than one in one hundred imprisonable offences actually result in prison sentences being imposed. Other criminologists have suggested that the correct relationship is closer to one in one thousand. Whatever the real figure, it cannot realistically be expected that slightly shortening the odds against the offender, as by spending millions of dollars to double the imprisonment rate, would make any real difference to the probability that a particular individual would or would not commit an offence. It must be seen as quite naïve to assume that it would.

Before leaving the subject of the relationship, if any, between the use of prisons and the incidence of crime, a few more words must be said about the current state of crime in Australia. There is insufficient space available for a thorough review of the subject. It appears, however, that we are at a fascinating period of our history as an array of evidence from scattered sources tends to show that, for the first time in decades, the rates for many offences are actually declining in many parts of the country. The total picture is not at all clear at this time, but the indications of falling crime come from both official reports of reported crime as well as from crime victim surveys, thus increasing one's confidence in the validity of the trend. At the same time as this evidence was emerging from agencies in different States, the first report of the National Crime Statistics Unit of the Australian Bureau of Statistics was published.[5] That was in May 1994. This report did not show trends over time but it does, for the first time, allow reasonably valid comparisons to be made between Australian jurisdictions on the levels of reported crime in the calendar year 1993. It shows that, in general terms and disregarding minor variations, the reported rates for violent offences in the Northern Territory are many times higher than the national average. The rates for most offences for Tasmania and the Australian Capital Territory are noticeably, but not necessarily dramatically, lower than the national average. All of the other differences between jurisdictions seem to be less significant, but it must be said that the South Australian rates tend to be on the high side of the average.

If one compares this national picture of crime in Australia in 1993 with the data on the comparative use of imprisonment presented earlier, it seems reasonable to conclude that imprisonment rates are driven by crime rates, rather than the opposite. In other words, where crime rates are high there will also be a high use of prison, and where crime rates are low the prison figures will be correspondingly low. It is suggested that this is quite a useful observation as far as the extremes of crime rates and imprisonment rates are concerned, but it does not help us to understand the other large differences in the use of custody that we have seen between those extremes, for example between New South Wales and Victoria.

Nevertheless, from this brief and sketchy review of the information available, it is suggested that it would be reasonable to conclude that a democratic and compassionate society is one which would keep the use of custody to the lowest possible level consistent with public safety and tolerance. As was stated most powerfully by the Royal Commission into Aboriginal Deaths in Custody, both in prisons and in police cells, custody must only be used as a "last resort". It is a matter of considerable regret, almost to the point of despair, that since the release of the final report of the Royal Commission in May 1991 the number of people in prison has increased dramatically, even though the numbers in police custody

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5 Castles, I, *National Crime Statistics: January–December 1993,* (1994) Australian Bureau of Statistics, Canberra, Catalogue No 4510.0.

seem to have come down. The increase in prison numbers may well be due to the hardening of public attitudes referred to earlier. Even if there was total agreement with the proposition that custodial numbers should come down, there may well be some disagreement about how that is to be achieved. For example, there is widespread support for the idea that making a range of alternatives to imprisonment available to the courts would reduce the number of convicted offenders sentenced to prison. This is an attractive idea that obviously has some validity, but as a solution to the problem of high prison numbers the evidence is not encouraging. In fact, the notion of alternatives to imprisonment may well be a myth.

The myth of alternatives

It seems contrary to common sense, but the non-custodial measures that are usually referred to as "alternatives to imprisonment", such as fines, probation and parole orders, community service orders, home detention and suspended sentences, seem to be often used as alternatives to each other, rather than as measures that genuinely reduce the flow of offenders into our prisons or reduce the time that they spend inside. Before proceeding, it must be stressed that full support is given to the wide use of all of these measures, especially if they incorporate programs, such as anger management or drug treatment, that aim to correct the underlying cause of the unacceptable behaviour. The dedicated work of community corrections officers who supervise and administer these schemes is to be greatly admired and respected, but doubt must be raised about whether the availability of these options has had much impact on the actual use of custody. If it did so impact one would expect that those jurisdictions which recorded higher-than-average relative use of non-custodial penalties would have lower-than-average use of imprisonment, and vice-versa, but quite the opposite is revealed by an examination of the facts.

The facts are not as readily available now as they were a few years ago, but every time that the full range of correctional statistics previously published by the Australian Institute of Criminology are examined in detail, it is strikingly clear that the high imprisoning jurisdictions also had the highest rates for the use of probation and community service orders. Conversely, the low imprisoning jurisdictions, the Australian Capital Territory, Tasmania and Victoria, were shown to have the lowest rates for the use of non-custodial or community-based penalties. This unexpected finding creates the impression that perhaps the Australian jurisdictions are more or less *generally* punitive, to a large extent irrespective of the level of crime. Certainly, the greater use of the so-called "alternatives" does not seem to have fulfilled its promise.

There is a real danger with some of the non-custodial measures towards the upper end of the hierarchy of penalties, that the inevitable proportion of failures will actually boost prison numbers. This could happen because a breach of the conditions of a very strict order will almost certainly result in a period of imprisonment, whereas the breach of a less strict order may well result in the offender being given a second or even third chance in the community. It is not proposed that we should use non-custodial penalties less frequently, but it is seriously suggested that we should cease referring to them as "alternatives to imprisonment". They should be seen as penalties in their own right, and the principle of the lowest level of intervention that is compatible with the public interest should always guide their application.

Before leaving the subject of non-custodial penalties, the question may be raised of why the services that administer them have not yet been embroiled in the privatisation debate. If there is merit in privatising the operation of prisons and court escort services, one would have thought that probation and parole officers and community service order supervisors might be considered for the same fate. Perhaps the answer is that community corrections offer meagre pickings compared with the high costs involved in full-time custody.

Private prisons — coming ready or not

Whether we like it not, there seems to be no doubt that private prisons have found a place in Australia and that place seems destined to increase greatly over the next few years. At the present time there are three private prisons in Australia, two in Queensland and one in New South Wales. The latter, at Junee, with accommodation for 600 male prisoners is the largest prison in Australia. These three prisons hold approximately seven per cent of all of the prisoners in Australia. This is a much higher proportion than any other country in the world, and, is likely to reach between 25 and 30 per cent by the end of this century. By that time, Victoria will be the most privatised jurisdiction in Australia with at least half of its total prison population in three private institutions, and some of the other States will each have one or more private prison.

It would be fairly easy to develop an argument against this trend on the grounds that the punishment of offenders is a matter of such grave significance that it must only be undertaken by the State itself. Furthermore, for private companies to profit from the suffering of others is seen by many people as unseemly, if not immoral. This can be a powerful argument, but it is not totally convincing in a society which allows, and in fact encourages, private schools and private hospitals and has also for many years accepted juvenile detention centres run privately by such organisations as the Catholic Church and Salvation Army. The opponents of prison privatisation constantly run the risk of being interpreted as saying that the status quo is acceptable, or that our current prison systems are as effective and as economical as they could possibly be. That is not a conclusion that an experienced criminologist would happily accept. Some level of prison privatisation may therefore be welcomed on the grounds that it may improve the total system by the injection of new ideas and new methodologies, but it is suggested that this support be subject to two major qualifications.

In the first place it is absolutely vital that all private prisons are continuously and rigorously monitored to ensure that the human rights of the prisoners are being respected and that adequate provision is made for security, safety, health care, nutrition, work, recreation, education and training. Who should be responsible for the monitoring is a question which will be explored later. The second qualification is that private prisons must be independently evaluated to assess their relative effectiveness in terms of outcomes or recidivism. Monitoring and evaluation are not the same. Monitoring examines the day-to-day operations of the institution, and is primarily concerned with standards, whereas evaluation examines the long-term impact of the institution in terms of post-release behaviour. Both will display the relative costs of private and government-run prisons.[6]

One aspect of prison privatisation which has considerable potential is the provision of services, or even complete institutions or parts of institutions, for Aboriginal and Torres Strait Islander prisoners. The fact of Aboriginal over-representation in prisons, in non-custodial corrections, and in police custody is a matter of grave concern throughout Australia, highlighted by the Royal Commission into Aboriginal Deaths in Custody. This issue deserves close scrutiny, as does the challenge of responding to the special needs of these people.

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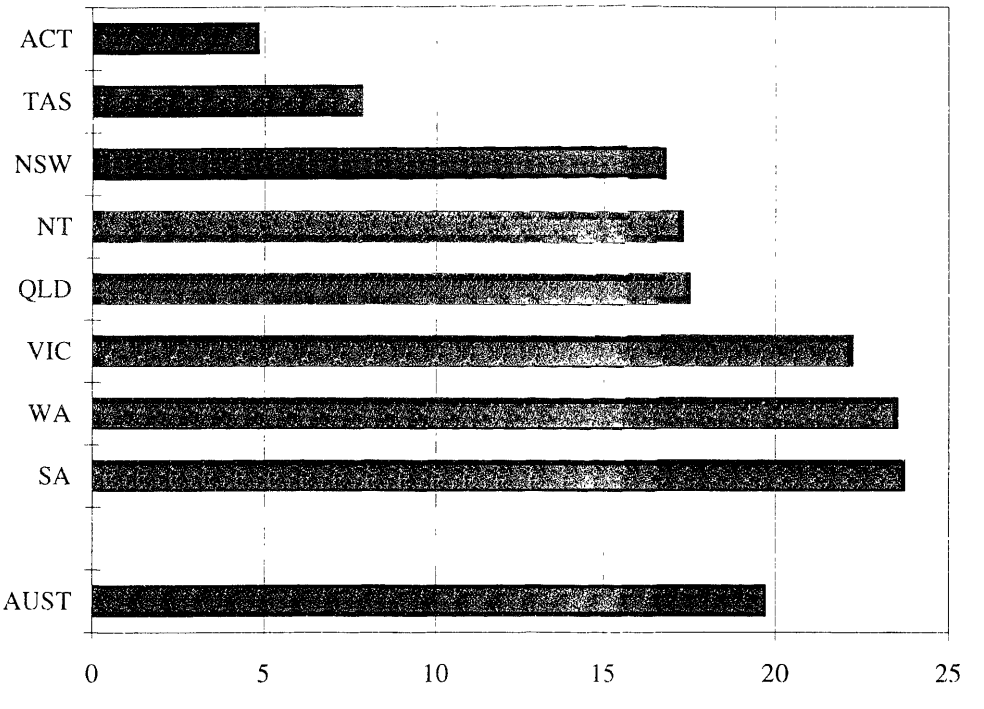
6 Interestingly, the Melbourne *Age* of 10 February 1995 reported that the recurrent costs per prisoner in Pentridge and Fairlea had fallen by 19 per cent and 42 per cent in the past three years.

Aboriginal over-representation

Possibly one of the most unexpected findings of the Royal Commission into Aboriginal Deaths in Custody was the fact that Aboriginal and Torres Strait Islander people who were in either prison or police custody, once they were there, were no more likely to die than were non-Aboriginal people in custody. There are many other relevant factors, such as the poor state of Aboriginal health, but the overwhelming reason why an unacceptably high number of Aboriginal men and women died in prison and in police cells was the extraordinarily high levels of Aboriginal over-representation in both forms of custody. Throughout the period covered by the inquiries of the Royal Commission, January 1980 to May 1989, the proportion of all prisoners who were identified as Aboriginal increased from just over 10 per cent to around 14.5 per cent. Since then, that trend has continued with Aboriginal prisoners comprising 17.8 per cent of the national total in April 1994. These percentages are to be seen against the background figure of approximately 1.1 per cent of the adult Australian population who are Aboriginal or Torres Strait Islander. The actual level of over-representation, calculated as the ratio of the adult Aboriginal imprisonment rate to the equivalent non-Aboriginal rate, for each Australian jurisdiction in April 1994 is shown in the Figure 3.[7]

Figure 3: Aboriginal Over-representation in Prison, April 1994



7 Above n3.

It can be seen from this illustration that, for Australia as a whole, an adult Aboriginal person was at that time nearly 20 times more likely to be in prison than was an adult non-Aboriginal person. For three jurisdictions, South Australia, Western Australia and Victoria, that ratio was well over 20. An appropriate reaction would be shame.

In the light of these figures it is probably not surprising to find that Aboriginal people are also significantly over-represented in non-custodial corrections, but what is perhaps unexpected is the fact that in this field the level of over-representation is considerably lower than it is in prisons. One study that was undertaken for the Royal Commission using 1987 data found that:

> [F]or Australia as a whole, adult Aboriginal people [were at that time] 15.1 times more likely than non Aboriginal people to be in prison, but they [were] only 8.3 times more likely to be serving non-custodial correctional orders.[8]

This finding prompted the speculation that perhaps the difference was due to the possibility that some magistrates, judges, and parole authorities, held the view that Aboriginal offenders were either less able or less willing to comply with the requirements of non-custodial orders than were non-Aboriginal offenders. That speculation is consistent with the fact that Aboriginal prisoners generally serve shorter prison terms than non Aboriginal prisoners.

The data from the two arms of corrections are bad enough, but the data from police custody create an even worse picture. The second national police custody survey was conducted during the month of August 1992 and it found that of the 25 654 people placed in custody (not just arrested) during that month 28.8 per cent were identified as Aboriginal or Torres Strait Islander. That percentage is almost exactly the same as found in the first survey in 1988. The actual levels of over-representation are shown in Figure 4. From this it can be seen that the national level of over-representation is much higher than it is for prisons (the actual ratio is 26.2) but the level for Western Australia is a remarkable 51.9. In other words this survey shows that in Western Australia at that time an Aboriginal adult was very nearly 52 times, or 5 190 per cent, more likely to be subjected to custody in police cells than was a non-Aboriginal adult.[9] This survey also showed that there was an overall reduction in the use of police custody between 1988 and 1992, but that the proportion who were Aboriginal remained virtually unchanged. It is relevant to note at this point that since the tabling of the report of the Royal Commission on 9 May 1991 there has been a significant decrease in the numbers of Aboriginal deaths in police cells, but the numbers of deaths in prisons, of both Aboriginal and non-Aboriginal prisoners, have reached higher levels than at any time since these data have been collected.[10] Clearly, much more needs to be done but most of the changes that are needed lie outside the operation of the criminal justice system, and also lie outside the scope of this paper.

Before leaving the subject of Aboriginal custody, reference will be briefly made to a specific case. It is the case of James Savage, a young Aboriginal man who was convicted a few years ago for a very serious crime in Florida in the United States. He was initially sentenced to death, but that sentence was changed on appeal to one of life imprisonment.

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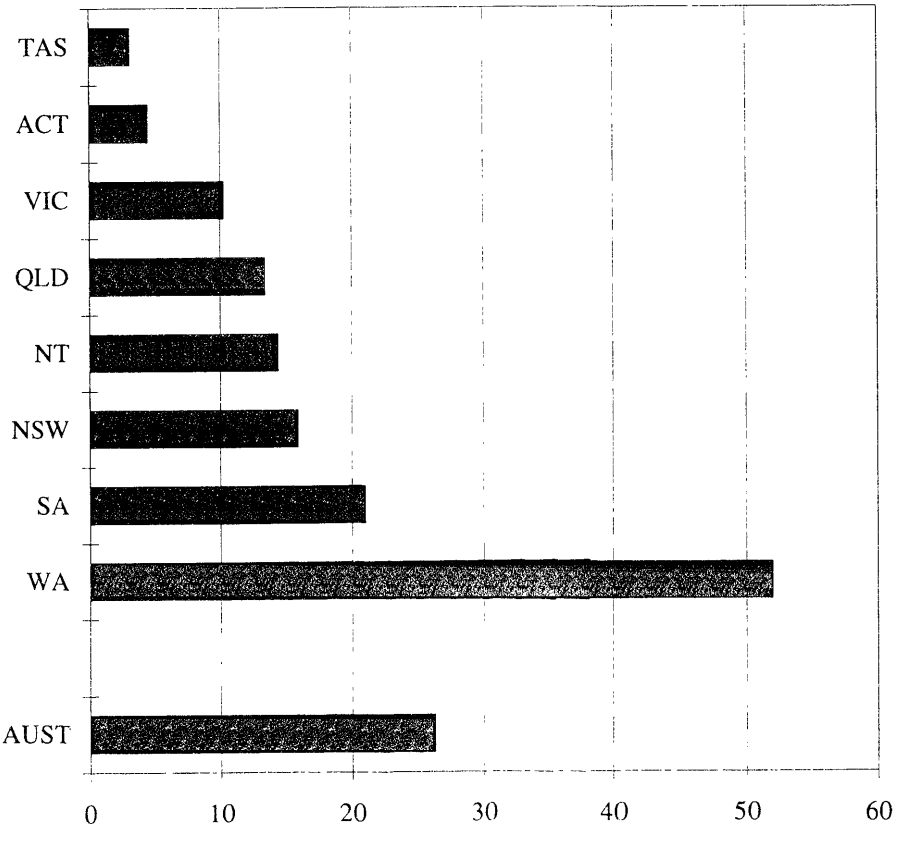
8 Biles, D and McDonald, D, 1990, "Aboriginal People in Prisons and Non-Custodial Corrections" in Biles, D and McDonald, D (eds), *Deaths in Custody Australia 1980–1989: Research Papers,* Australian Institute of Criminology, Canberra at 477–505.

9 Above n1.

10 Halstead, B, McDonald, D and Dalton, V, *Australian Deaths in Custody & Custody-related Police Operations, 1993–94* (1995) Deaths in Custody Australia No 8, Australian Institute of Criminology, Canberra.

A number of Aboriginal organisations then proposed that he be transferred back to Australia so that he could serve his sentence in closer proximity to his family and friends, but that proposal foundered because there was no lawful basis for it to be done. Australia does not have any bilateral or multilateral treaties that would allow for the transfer of foreign prisoners between nations.

Figure 4: Aboriginal Over-representation in Police Custody, August 1992



The international transfer of prisoners

The international transfer of prisoners is an initiative that is strongly supported by the United Nations, the Council of Europe, the Commonwealth of Nations, Amnesty International and the International Committee of the Red Cross. Within Australia, it also now has the support of the Standing Committee of Attorneys-General and legislation at the Commonwealth, State and Territory level is expected on this subject later this year. The central idea is that convicted offenders serving substantial prison terms in foreign countries may be permitted (if they apply and if the authorities in both nations agree) to serve a part of their sentences in prison in their home nations. The motivation for this initiative is essentially

humanitarian, as the transferred prisoners will be spared the additional stress caused by a foreign language, and culturally different food and living conditions, and they will also be closer to their families. From Australia's point of view it will also save money as all of the estimates suggest that slightly more foreign prisoners will leave than Australian prisoners overseas will come home. Even though the proposal seems sensible and straight-forward, in practice it will require considerable diplomatic effort as, especially in the beginning, each case will need to be negotiated separately. A high level of cooperation between the Commonwealth and the States will also be required as it will be the Commonwealth that does the negotiating but it will be the States and Territories who will be receiving or sending the prisoners. It will in fact be necessary for the relevant authorities at the Commonwealth and State level to agree, as well as the overseas nation and the prisoner himself or herself, before any transfer could take place.

It is possible that some people will suggest that the effort involved in arranging the international transfer of foreign prisoners will not be justified, especially as the number of cases, both in and out, will not be more than a few dozen each year. In response to this it must be said that most nations in the Western world, and many developing nations as well, have had transfer treaties operating for many years. It is surely time that we showed the rest of the world that Australia is also willing to participate in this type of international cooperation.[11]

The United Nations protocols on the treatment of offenders

There is no obligation on Australia at this time to pursue the matter of the international transfer of prisoners as there is as yet no treaty on the subject. There is, however, a model agreement on the transfer of foreign prisoners which was accepted by a United Nations congress in 1985. This has considerable influence, if not authority. There is also a *Council of Europe Convention on the Transfer of Sentenced Persons* which Australia may choose to join.

Other United Nations instruments or protocols do impose obligations, and probably the most relevant of these is the *International Covenant on Civil and Political Rights* which was ratified by Australia in 1981 and also incorporated into Australian law.[12] Article 10 of the Covenant requires that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". Such a requirement must surely be beyond argument, but there may be difficulty in ensuring the extent to which it is met. Certainly, the Royal Commission into Aboriginal Deaths in Custody found numerous examples which could not by any standard be described as exemplifying humanity, and respect for the human dignity of people in custody.

Compliance with the International Convention and similar protocols is the subject of quinquennial implementation reports prepared by the Commonwealth Attorney-General's Department and considered by the Standing Committee of Attorneys-General. Thus, the States and Territories, who are responsible for the administration of nearly 95 per cent of all custody in Australia, have an opportunity to express their views on the matter of compliance with this and other international obligations. But the question must be raised: how could an Attorney-General possibly know whether or not all persons deprived of their liberty in

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11 Biles, D, "The international transfer of prisoners: issues and challenges for the 1990's" (1994) 51 *The Criminal Lawyer* at 3–5.

12 *Human Rights and Equal Opportunity Act* 1986 (Cwlth).

his or her jurisdiction were always being treated with humanity and respect? Short of having a continuous Royal Commission, or a very thorough independent inspection procedure, it is suggested that the question is unanswerable.

There are other international protocols which potentially raise similar problems as far as the reporting requirements are concerned. In particular, compliance with the *Standard Minimum Rules for the Treatment of Prisoners,* which is also the subject of a report every five years, has always been based in Australia on the views of the correctional administrators themselves. No attempt has ever been made to obtain an independent view on how closely we do in fact comply with the specifications set out in the rules. There is now an Australian version of the rules, known as the *Standard Guidelines for Corrections in Australia* which was published in 1989, after more than a decade of debate and discussion, but those guidelines make no provision for the reporting of compliance or independent assessment. It must therefore be doubtful if they have any impact on Australian correctional policy or practice.

There has been increasing criticism by the States and Territories of the Commonwealth's readiness to enter into treaties which cover areas of government which are clearly the responsibility of the States and Territories. It is said that the Commonwealth acts without adequate consultation. That may well have been a valid criticism in the past, but since 1991, when the Special Premiers' Conference established a Standing Committee on Treaties, there has been a much more open and cooperative approach. It is probably still the case, however, that there is room for closer collaboration and mutual respect between all tiers of government.

That observation leads to the question of what is the proper role of the Commonwealth Government in relation to the use of custody?

The role of the Commonwealth Government?

It has already been said that the Commonwealth is directly responsible for two of the six forms of custody: immigration detention centres and military prisons. There must also be a small number of cases where the Australian Federal Police hold suspects in custody, apart from the cases in the Australian Capital Territory where the Australian Federal Police operate under contract to the ACT Government. It is estimated that all of these categories would comprise only from five to six per cent of the national total. Then there are Federal prisoners who are held in State prisons as required by section 120 of the Constitution. At the last count there were just over 550 Federal prisoners, almost exactly half of whom were in New South Wales prisons.

It would seem highly unlikely in the present economic climate, but it might just be possible in different circumstances, for the Commonwealth Government to establish its own prison system. The Americans did this mainly in the 1920s and 1930s, in order to express dissatisfaction with the State prison systems. The main reason why this is highly improbable is that, unlike the United States before the Federal Bureau of Prisons was established, the States in Australia are not paid for housing Federal prisoners. It has been suggested, however, that this matter is taken into account in the general distributions of the Commonwealth Grants Commission. The reality is that there is no economic incentive for the Commonwealth to become more actively involved.

It is argued that the principal roles for the Commonwealth Government in relation to custody should lie in information gathering and dissemination, the coordination and facilitation of relevant international activities, and in providing assistance with the monitoring of custodial standards. As far as information gathering is concerned, it is suggested that the

Commonwealth should act quickly to re-establish the collections of national correctional statistics that were terminated just over a year ago. Apart from many other considerations, it surely makes a mockery of our commitment to human rights if we claim that all persons who are deprived of their liberty in Australia are treated with respect and dignity when we cannot with any confidence state how many people we are talking about. Currently, we don't know who they are, where they are, or why they are in custody, but we are quite sure they are treated humanely! It is relatively unimportant whether this work is done by the Australian Institute of Criminology, the Australian Bureau of Statistics, or by some other body. It is much more important that the actual work is done and the results are widely disseminated.

As far as relevant international activities are concerned, the Commonwealth must clearly continue to play a central role, and hopefully a more collaborative and cooperative role, in the negotiation of treaties and the reporting on their implementation. The imminent start to the program of transfer of foreign prisoners will bring a sharpened focus to the need for international treaties. It will also greatly increase the workload of our diplomats, as well as increasing public understanding of the need for international activity in relation to custody.

At a rather more radical level it is suggested that the Commonwealth should offer to assist the States and Territories with the monitoring of custodial standards. What is proposed is the creation of a new body which might be called a National Custodial Standards Agency or Council.

A National Custodial Standards Agency

If such a body were to be created it could only be on the basis of the full cooperation and support of the States and Territories. As the States and Territories have the major responsibility for custody it is argued that they should have a dominant role in making appointments to the agency. They would then have some sense of ownership or control. It is suggested, however, that the Commonwealth should provide the necessary funds, or a major part of them, because it is the Commonwealth that signs the United Nations protocols and reports on their implementation on behalf of the whole nation. Also, as was indicated earlier, the Commonwealth does have some direct responsibility in this area.

The major aim of such an agency would be to ensure compliance with the *Standard Minimum Rules for the Treatment of Prisoners*, the *International Covenant on Civil and Political Rights*, and other relevant international protocols, possibly including the *Council of Europe Convention on the Transfer of Sentenced Persons.* The agency would conduct regular inspections of all custodial facilities, including private and public prisons, police watch houses, immigration detention centres, and juvenile detention centres and would prepare detailed reports on its findings. It is suggested that drafts of the reports should, as a matter of courtesy, always go to the relevant custodial agency for comment before release. The reports would consider matters such as: security, safety (of staff as well as inmates), classification procedures, health services, nutrition, hygiene, the provision of appropriate work, education, recreation, training and treatment programs, freedom of religious observance, and the adequacy of grievance and discipline procedures. It would not be part of the agency's role to try to settle individual grievances, but to ensure that appropriate grievance resolution mechanisms are in place.

It would not be possible for any single agency to inspect every custodial facility in the country every year. It would be especially difficult to inspect police facilities, of which there are over 500 across Australia,[13] but for all larger facilities annual inspection would seem appropriate. Priority for inspection would clearly be given to facilities of greatest

potential for public concern such as private prisons and immigration detention centres, but priorities would obviously change from time to time. In addition to physical inspections, the work of the agency might well include the regular collection of other information, such as the national statistical collections mentioned earlier.

For a custodial standards agency to be effective it must be seen to be both independent and authoritative. It must also be practical and realistic. Custodial authorities will understandably be cautious about giving their support to the creation of an agency which in the future may criticise them. Caution will be greater if the agency is seen as too ideological and setting standards that are not realistically achievable. Such an agency should not, however, be viewed as a threat to operational managers and, in time, could be seen as of considerable value in that it will identify what is being done well and where improvements are needed. The reports of the agency may therefore avert future political crises in relation to custody, and may even reduce the need for future Royal Commissions in this area. If it did only that, a National Custodial Standards Agency would save many times over the costs that it would itself incur.[14]

Conclusions

In conclusion, the view is reiterated that we all have a public duty to ensure that custody, the most severe penalty or form of control that may be imposed in this country, is always used wisely and humanely. It is not advocated that any of the forms of custody mentioned in this paper be abolished, but it is confidently asserted that we would not place the community at risk if most of these forms were used less often and for shorter periods of time.

The management of people in custody is never easy. If their numbers decrease in the future, as they should, their management will be even more difficult and challenging as only the most dangerous and the most intractable will be behind bars. A thought must therefore be spared for the custodians, the staff of the custodial institutions, who are one of the most under appreciated and under recognised occupational groups in our society. Some very worthwhile work is done in nearly all of our institutions, especially in education, training and treatment programs. This work is important as, if custody is unavoidable, we must do all that we can to make it a positive and constructive experience.

Finally, it is suggested that the way a society deals with its failures is the ultimate test of its humanity. How we respond to and treat those who are accused or convicted of committing crimes, those who arrive unlawfully on our shores from overseas, and those suffering from serious mental illnesses, reveals the extent of our compassion as well as the limits of our professionalism. When we look into the recesses and corridors of our custodial institutions ... we are looking at a mirror of ourselves.

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13 The National Police Custody Survey of August 1992 identified 506 locations at which people were in the custody of police. It is likely that there was a small number of other police facilities that had no persons in custody during that month.

14 The Royal Commission into Aboriginal Deaths in Custody, which ran from October 1987 to May 1991, cost approximately $40 million, largely paid for by the Commonwealth. Most of the States have also conducted expensive Royal Commissions or other inquiries into their correctional systems in recent years.