NON-CUSTODIAL SANCTIONS, PRISON COSTS AND PRISON OVERCROWDING

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KEEPING PEOPLE OUT OF GAOL IS NOT AS FASHIONABLE AS IT USED TO BE. Part of the reason for this is a growth in general disillusionment with the notion of rehabilitation. Part of it too has to do with a possibly related increase in public antipathy towards crime and criminals. There is nothing new in this. It is not caused by recent media hype or law and order rhetoric.

The trend to harsher law enforcement and penal policies around Australia, I think fairly reflects the prevailing mood of the general community toward offenders. If we believe John Walker (1985), we go through cycles of retributive and rehabilitative attitudes toward offenders.

Presently we have moved into a conservative phase in which the penal attitudes and values of the recent past are looked on with the same sense of disapprobation which marked the historical perspective of reformers in the early 1950s and 1960s. It has been said that the cycle of penal reform and reaction is governed, like everything else, by economic factors. According to this view when times are good everyone feels more tolerant toward offenders but when economic winds are harsh we become more punitive in our outlook.

Whether or not this theory is true, there is no doubt that the present cycle of penal conservatism occurs at an inconvenient time economically. Most state governments are experiencing extreme pressure to cut back on spending. But everyone knows that among the criminal sanctions available to the courts, far and away the most expensive is that of imprisonment.

Professor Richard Harding reported in 1987 the annual per capita cost of imprisonment in New South Wales at over $26,000. The annual per capita cost of community supervision, on the other hand, he estimated at about $1,300.

We have reached a point in Australia then, when the political imperative of governments in fashioning penal policy is to some extent in conflict with their economic imperatives.

The conflict may be attenuated by looking at more efficient ways by which to manage our penal systems, though a nagging problem of public administration is the fact that control over the input to the penal system is substantially out of the hands of executive government. It is the courts not the government which determine who should go to gaol and for how long.
Parliament usually has to content itself with establishing various sentencing options in the hope that the courts will feel moved to use them on the appropriate sorts of offenders. There are all sorts of good reasons why the executive does not and should not play a direct role in shaping sentencing policy. The doctrine of the separation of powers under the Westminster System is one. The need for judicial discretion in the sentencing of individual offenders is another. Whatever the reason, it is plain the tension between the need to curtail government expenditure on prisons and the need to fashion a penal policy which preserves the confidence of the public are goals not easily pursued simultaneously. To make matters worse, if penal policy cannot be used as the vehicle for reducing prison populations the only arm of policy left is law-enforcement.

Rising rates of arrest over the last decade in New South Wales are largely responsible for the growth in court congestion and prison overcrowding in that state (NSW Bureau of Crime Statistics Research 1989). If fewer offenders were arrested, fewer would be convicted and fewer then sent to gaol.

What, then, is to be done? The purpose of this paper is to discuss the issue of prison costs and overcrowding in relation to the use of non-custodial sanctions. The paper proceeds in four parts.

The first part quickly traces the history of alternatives to custody in New South Wales and examines the evidence on their success in diverting people from gaol. The second part makes some attempt to explain why community service orders and periodic detention have not been used by the courts as alternatives to prison.

The third part looks at the scope for and benefits to be expected from diversion if a suitable method for diverting offenders can be found. The final part offers some brief suggestions on how we should go about assessing the diversionary potential of various non-custodial options.

The Use of Non-Custodial Sanctions in New South Wales

With the notable exception of Tasmania, the proportion of the prison population made up of prisoners on remand, that is unconvicted prisoners (and, in some states, prisoners who have lodged an appeal) is large in every Australian jurisdiction (Australian Institute of Criminology 1989).

Figure 1 shows the percentage of various prison populations on remand as at October 1989. In New South Wales for example, the remand component of the prison population is 19.4 per cent; in the Northern Territory the remand percentage is even higher, at 29.7 per cent.

An obvious suggestion for reducing prison costs and overcrowding is to reduce the number of unconvicted prisoners in New South Wales and other state’s gaols. Unfortunately, the potential for reducing gaol populations through measures directed at the remand population is rather more limited than is commonly supposed.
Non-Custodial Sanctions

Figure 1

Remand Population by Jurisdiction 1989

The fact of the matter is that the vast majority of remandees, in New South Wales at least, end up sentenced prisoners with their date of sentence backdated to the point of entry on remand. The NSW Bureau of Crime Statistics and Research Criminal Court Statistical Collection shows that only about 11 per cent of those defendants refused bail are acquitted or given a non-custodial penalty. The actual figure is probably lower than this because many of those we record as bail refused have had it refused only consequent upon conviction. It is possible that a few of these prisoners might not have been given custodial sentences if they had not been held on remand. It is also possible that some of them might have been given shorter custodial sentences if they had not been held on remand.

For this reason, the focus of this paper is going to be on the scope for reducing the prison costs and population through efforts directed at sentenced prisoners, specifically, those given non-custodial penalties.

The term 'non-custodial sanctions' is not used in this paper to include fines and various forms of bond, all of which on any literal reading of the term, are clearly non-custodial sanctions. Bonds and fines are excluded simply because they are not presently conceived of as alternatives to imprisonment. Periodic detention centre orders could also be included because, although they are nominally custodial sentences, they are generally considered to be an alternative to full-time custody. Whatever their form, all of these non-custodial sanctions were introduced with the intention of reducing the rate at which people were being sent to prison.

In this respect they are sometimes called front-end mechanisms for reducing prison overcrowding and contrasted with rear-end mechanisms which are designed to reduce prison numbers by increasing the rate at which people exit from prison (Weatherburn 1989).

The first of the front end options introduced in New South Wales was periodic detention. It was introduced in 1971 with some reference in the second reading speech to
the need to reduce the economic costs of imprisonment but more to the need for a broader range of sentencing options (Hansard, vol. 90, November 1987, p. 8041).

For reasons having little to do with the introduction of periodic detention, the prison population fell in the early 1970s but began to rise again during the second half of the decade. The increased demands on government spending this created were exacerbated at the time by a marked increase in the per capita costs of housing prisoners (Mukherjee 1981).

In November 1979, the then NSW Labor Government introduced the Community Service Orders Bill, the second reading speech which expressly identified as one of its objectives the goal of reducing the state's prison population. In 1981, the eligibility criteria for periodic detention orders were widened and the number of periodic detention centres substantially increased (Hansard, vol. 163, March 1981, pp. 4972–4974).

Since that time there has been a progressive increase in the availability of both periodic detention and community service orders. So what effect have these options had on the imprisonment rate they were partly intended to reduce? Figure 2 shows the imprisonment rate in New South Wales since 1960 and the points at which periodic detention and community service orders were introduced.

The data do not provide very compelling evidence that the rate of imprisonment dropped abruptly when these options were introduced.

Chan and Zdenkowski (1986) compared imprisonment rates around Australia with rates of offenders subject to various non-custodial sanctions and found little or no correlation between the two. They argued that if non-custodial sanctions had diverted people from prison then there should have been a negative correlation between the imprisonment rate and the rate of use of non-custodial sanctions.

Since no such relationship existed, they were drawn to the familiar conclusion that net widening—already familiar from the United States experience—had occurred here (Hylton 1981). Their conclusions echoed earlier findings established by a different route in Victoria by Fox and Challinger (Fox & Challinger 1985).

Whatever their stated object, non-custodial sanctions in practice seemed to end up being used as not as alternatives to custody but as alternatives to sanctions such as fines. Before enquiring as to why this might be so, we need to take a critical look at the argument leading to Chan and Zdenkowski's conclusion.

Rates of imprisonment, or the use of non-custodial sanctions as Chan and Zdenkowski calculated them, confound the number of people given the relevant sanction and the duration of the sanction (Weatherburn 1987). Two jurisdictions may send the same proportion of their offenders to gaol but differ in their imprisonment rate because one jurisdiction sends them there for longer.
Equally, two jurisdictions may impose non-custodial sanctions on the same proportion of their offenders but differ in their apparent use of these sanctions because the average duration of community service orders in one jurisdiction is longer than that of the other state. Within a given jurisdiction, rising rates of imprisonment might be found together with rising rates of community service orders, not because the orders are failing to divert people from gaol but because, despite the diversion, those who do go to gaol, are going there for longer periods. The reliance on imprisonment and community service order rates has reduced the effectiveness of several analyses of the efficiency of various diversionary schemes (Harding 1987). An obvious way around the problem is to determine sanction usage rates by calculating the relative frequency with which particular sanctions are imposed rather than the number of people subject to a particular sanction (see Figure 3).

In South Wales has not occurred at the expense of the percentage of people imprisoned (almost all of this growth is due to the increased popularity of community service orders rather than any increase in the popularity of periodic detention. Its use has remained steady at about 15 per cent of dispositions.)

Can we conclude from this that non-custodial sanctions have failed to divert people from gaol? Not quite: suppose over the period since 1979 that there had been a growth in the proportion of serious as against minor offences disposed of by courts. Since, in terms of severity, non-custodial sanctions are meant to lie between custodial penalties and penalties such as fines and bonds, one might expect a growth in both custodial and non-custodial penalties at the expense of fines and bonds. On this argument, the effect of non-custodial sanctions might have been to slow the growth in the proportion of prison penalties handed down, or keep it lower than it might otherwise have been.
Keeping People out of Prison

Percentage usage of different Dispositions by Magistrates in New South Wales

How do we rule out this possibility? Rohen Bray at the New South Wales Judicial Commission tested it (Bray 1989) by carrying out a regression analysis on trends in the use of custodial and non-custodial penalties within each of the major offence categories encountered in local courts.

Figure 4 shows the results of his analysis. If the diversion hypothesis had been correct, one might have expected to see, within each offence category, an inverse relationship between the size of the percentage change in the use of custodial as against non-custodial sanctions.

Figure 4 shows little evidence of such a relationship other than for offences against the person. For this offence, the increased use of non-custodial penalties is matched by roughly similar decrease in the proportional use of imprisonment. Otherwise, the effects appear meagre.

Now, if you were really determined to save the diversion hypothesis, you might criticise Bray’s conclusions by arguing that the growth in offence seriousness occurred within, rather than between, offence categories. However, Bray’s data provides pretty cogent evidence that, in New South Wales at least, non-custodial penalties have not been effective in reducing the use of imprisonment by magistrates. The real question is why judicial officers have not been drawn to non-custodial penalties as an alternative to imprisonment.
The Reason for their Failure to Divert

There seems to be little direct evidence on this question. A simple explanation sometimes heard is that the sentencing practices of judicial officers can only be altered by clearly directing required change in the exercise of their discretion. The solution on this account is explicit guidance from the legislature as to the kinds of offenders and circumstances under which non-custodial sanctions should be used (Knapp 1986).

Another better, though still incomplete, explanation lies in the administrative support provided to implement alternatives to imprisonment. It is one thing to create legislative alternatives such as periodic detention and community service orders. It is another to build periodic detention centres and provide community service orders work (Pratt 1987). Without the administrative backup, the legislative options cannot be used.

Periodic detention centres are still much more common in the city than in the country, despite the big increase in the number of facilities in recent years. Although work for those given community service orders is now fairly easily obtained, this may not always have been the case.

These practical considerations help explain the low overall use of non-custodial sanctions, but they do not explain why they are generally used instead of bonds and fines rather than imprisonment. To understand why non-custodial sentences have not been used as alternatives to imprisonment, two things need to be considered:

- one has to do with a tendency among judicial officers to move repeat offenders up the sanction hierarchy;
- the other is a big gap between the perceived severity of custodial versus non-custodial penalties.
Once non-custodial options have already been explored and the first custodial sentence has been imposed, there is considerable reluctance to impose a less severe penalty for a repetition of the same general kind of offence. In practice, this means that the pool of those able to be diverted into non-custodial penalties from custodial penalties consists of a fairly small group: those whose penalty experience and prior record has led them to the point where they are at risk for the current offence of going to gaol for the first time.

The research in this area shows a sharp jump in perceived severity between custodial and non-custodial penalties and not as much difference in the perceived severity of various non-custodial penalties (Erickson & Gibbs 1979). This means that someone who has reached the point where they are deemed unsuitable for bond, they are quite likely also to be deemed unsuitable for any other form of non-custodial penalty. To divert people from gaol through the use of non-custodial sanctions requires the creation of sanctions whose perceived severity is substantially higher than that of existing non-custodial penalties if less than that of prison.

To provide some evidence for this conclusion, your attention is drawn to a study conducted by Rohen Bray (1989) and presented at the last Australia New Zealand Criminology Conference. It is a study which deserves to be repeated in every Australian jurisdiction.

The argument about existing non-custodial penalties 'splitting the vote' is true, then we would expect to find much more similarity among offenders given various forms of non-custodial penalty than between them and those given custodial sanctions. Of course, a fair test of the proposition requires that we restrict our custodial comparisons to those at the least severe end.

We cannot compare the characteristics of offenders given long gaol sentences with those given bonds or fines. However, if we were to compare the characteristics of those given bonds or fines, those given periodic detention or community service orders and those given gaol sentences of six months or less, we might have a reasonable test of the hypothesis.

That is exactly what Rohen Bray did. First he chose two groups of offences which each account for a fair spread of different types of penalty. The two types of offence were break, enter and steal and drive while disqualified. Cases in each of these groups were then divided on the basis of whether the offender got a bond or fine, a periodic detention or community service order or a prison sentence.

Using discriminant analysis, he then examined the questions of how far the three groups in each offence category could be distinguished from each other in terms of the following sentence relevant factors:

- employment status
- legal representation
- gender
- age
- whether they were subject to a court order at the time of their offence
- whether they had previously experienced prison, community service orders or periodic detention
- the length and character of their prior criminal record
and the characteristics of their current offence.

The results of the study showed much greater similarity between those who got bonds or fines and those given community service orders or periodic detention than between either of those groups and those who received a prison sentence of six months or less.

Table 1 shows the relationship between penalty type and the discriminant variables for the break, enter and steal cases. The column on the right labelled Cramer's V simply measures the strength of the relationship between the categorical variables. The eta coefficient is used for the same purpose in relation to the continuous variables. The cell entries for categorical variables show the proportion of cases in each penalty group possessing the attribute shown on the left. The cell entries for continuous variables show the mean value on each attribute of each penalty group. There are two important points to note about the table: one is the greater similarity between columns one and two than between either of these columns and column three.

The results of the discriminant analysis confirm the visual impression in the table. Where AO was combined with FB, 88.7 per cent of the cases were correctly classified by the prediction equation, whereas when AO was combined with PR the prediction accuracy dropped to 63.1 per cent.

Table 1

<table>
<thead>
<tr>
<th>Predictor Variables</th>
<th>FB</th>
<th>AO</th>
<th>PR</th>
<th>Cramer's V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Categorical</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employed (163)</td>
<td>40%</td>
<td>36%</td>
<td>13%</td>
<td>.15</td>
</tr>
<tr>
<td>Represented (165)</td>
<td>88%</td>
<td>83%</td>
<td>93%</td>
<td>.09</td>
</tr>
<tr>
<td>Males (165)</td>
<td>90%</td>
<td>88%</td>
<td>87%</td>
<td>.04</td>
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<tr>
<td>25 years or less (165)</td>
<td>69%</td>
<td>78%</td>
<td>80%</td>
<td>.10</td>
</tr>
<tr>
<td>Guilty Plea (165)</td>
<td>89%</td>
<td>95%</td>
<td>93%</td>
<td>.10</td>
</tr>
<tr>
<td>Subject to Order (150)</td>
<td>17%</td>
<td>28%</td>
<td>83%</td>
<td>.41</td>
</tr>
<tr>
<td>Prior Prison (150)</td>
<td>20%</td>
<td>21%</td>
<td>58%</td>
<td>.24</td>
</tr>
<tr>
<td>Prior PD or CSO (148)</td>
<td>8%</td>
<td>9%</td>
<td>45%</td>
<td>.30</td>
</tr>
<tr>
<td>Continuous</td>
<td></td>
<td></td>
<td></td>
<td>Eta</td>
</tr>
<tr>
<td>Num. Priors</td>
<td>6.7</td>
<td>7.8</td>
<td>15.3</td>
<td>.28</td>
</tr>
<tr>
<td>Num. Similar Priors</td>
<td>0.7</td>
<td>0.6</td>
<td>1.7</td>
<td>.20</td>
</tr>
<tr>
<td>Property Value</td>
<td>$1,230</td>
<td>$1,760</td>
<td>$981</td>
<td>.15</td>
</tr>
<tr>
<td>Concurrent Offences</td>
<td>1.2</td>
<td>1.0</td>
<td>2.2</td>
<td>.16</td>
</tr>
<tr>
<td>Number of Counts</td>
<td>1.2</td>
<td>1.2</td>
<td>1.1</td>
<td>.05</td>
</tr>
</tbody>
</table>

Note: For categorical variables, the percentage figures indicate the percentage of people receiving that outcome who were employed, legally represented, etc. and the figures in brackets are frequencies. Figures in brackets next to the variable name indicate the number of cases which returned data for that variable (i.e. were not missing). For continuous variables, the figures indicate the mean number of priors, etc. for people receiving that outcome.

The second point to note is the propensity for those who have committed their offence while already subject to a court order or who have already served a prison sentence to be given another prison sentence.
The results of the analysis for drive while disqualified cases show a somewhat greater similarity in the penalty characteristics of the three groups though the results of the discriminant analysis once again support the hypothesis of greater similarity between groups AO and FB (see Table 2).

Notice, too, that the biggest differences between PR and the other groups are to be found on those attributes having to do with the prior criminal record of the offender. This seems to provide indirect support for the proposition that, once a person reaches a point where, because of their prior record, they are usually considered underserving of any other non-custodial option.

The one caveat to this conclusion is that, because of the low frequency of periodic detention orders, Bray was forced to combine them with community service orders. The vast majority of cases in the AO group for both offences received community service orders.

Table 2

Analysis of Bivariate Relationships between Outcome and Predictor Variables for Sample Drive Whilst Disqualified Offenders

<table>
<thead>
<tr>
<th>Predictor Variables</th>
<th>FB</th>
<th>AO</th>
<th>PR</th>
<th>Cramer's V</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employed (405)</td>
<td>73% (101)</td>
<td>65% (100)</td>
<td>46% (51)</td>
<td>.22</td>
</tr>
<tr>
<td>Represented (417)</td>
<td>85% (124)</td>
<td>81% (128)</td>
<td>79% (89)</td>
<td>.05</td>
</tr>
<tr>
<td>Males (417)</td>
<td>95% (139)</td>
<td>98% (155)</td>
<td>99% (111)</td>
<td>.12</td>
</tr>
<tr>
<td>25 years or less (417)</td>
<td>59% (86)</td>
<td>65% (102)</td>
<td>63% (70)</td>
<td>.05</td>
</tr>
<tr>
<td>Guilty Plea (417)</td>
<td>99% (145)</td>
<td>97% (153)</td>
<td>97% (109)</td>
<td>.05</td>
</tr>
<tr>
<td>Subject to Order (377)</td>
<td>15% (21)</td>
<td>18% (27)</td>
<td>30% (28)</td>
<td>.15</td>
</tr>
<tr>
<td>Prior Prison (393)</td>
<td>19% (27)</td>
<td>21% (32)</td>
<td>47% (47)</td>
<td>.26</td>
</tr>
<tr>
<td>Prior PD or CSO (387)</td>
<td>17% (24)</td>
<td>21% (32)</td>
<td>36% (35)</td>
<td>.17</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Predictor Variables</th>
<th>Eta</th>
</tr>
</thead>
<tbody>
<tr>
<td>Num. Priors</td>
<td>9.0 (141)</td>
</tr>
<tr>
<td>Num. Similar Priors</td>
<td>4.0 (141)</td>
</tr>
<tr>
<td>Concurrent Offences</td>
<td>1.2 (147)</td>
</tr>
<tr>
<td>Number of Counts</td>
<td>1.0 (141)</td>
</tr>
</tbody>
</table>

For explanation of figures, see note for Table 1.

The comparability of persons receiving periodic detention to those receiving community service orders or imprisonment remains an open question. This is an important point because periodic detention is often considered to be a tougher penalty than community service orders. Bray's results should not be taken as providing evidence that this is not the case.

What advantages might we expect to accrue if non-custodial sanctions could divert people from prison?

The Scope for and Benefits for Diversion

At this point we need to make a distinction between reducing the cost of imprisonment and reducing the size of the prison population. The two are not linked in a straightforward way.
As everyone knows, although large numbers of people are sent to prison each year, most of them stay only a (relatively) short period. This means that the prison tends to fill up with people with (relatively) long sentences.

Technically, we refer to the characteristics of those we send to prison as characteristics of its flow, whereas characteristics of those who are held in prison are referred to as characteristics of its stock. The distinction is important because the offence profile of those who are sent to prison is quite different to that of those who, on any given day, are held there.

To help illustrate the point, refer to Figures 5 and 6. Figure 5 shows the distribution of prison sentence lengths handed down by the NSW courts, and Figure 6 shows the distribution of prison sentence lengths being served by people in NSW prisons.

**Figure 5**

Sentences imposed by New South Wales Courts

![Figure 5](image)

**Figure 6**

Sentences being served in New South Wales Prisons

![Figure 6](image)
In order to understand the potential impact of non-custodial sentences on imprisonment, we need to consider what sorts of custodial sentences they might reasonably be expected to divert people from. This is a somewhat arbitrary business, but clearly any diversion which does occur must make its impact at the low end of the distribution of sentence lengths.

For the sake of argument, we will assume that we develop a non-custodial sanction whose impact is felt most in the region of sentences up to six months imprisonment. To assess the maximum possible reduction in prison populations, suppose then we divert all prisoners given sentences of less than six months.

If we go back to Figure 5, the effects on the flow of people into gaol are quite dramatic. If every offender given a sentence of less than six months gaol was diverted, there would be a 25 per cent reduction in the number of people being sent to gaol. In 1988, this would have meant about 1,500 fewer offenders going to gaol.

In terms of the effect on the stock of people held in gaol, though, the results are quite disappointing. Even if all offenders given sentences of less than six months were diverted, there is only potential for a 3.6 per cent reduction in the gaol population. In other words, the gaol population would decrease only by about 187 prisoners.

On the whole, the results do not suggest there is much scope for reducing the gaol population through alternatives to fulltime custody. It turns out, however, that the size of the potential reduction in prison population is extremely sensitive to the class of offender you expect your non-custodial sanction to divert. If we make a slightly more generous assumption about diversion and assume that prisoners given sentences of up to a year are potential candidates for non-custodial sanctions, the minimum achievable reduction in prison population rises from 3.6 per cent to nearly 15 per cent.

The size of the effect, in other words, depends critically on two things. One is the willingness of courts to divert or, looked at another way, the diversionary capacity of a particular option. The other is the sentence structure of the prison population and, in particular, the proportion of it serving short sentences.

Notice then, that to the extent that individual states differ in these things—and they obviously do—the diversionary potential of various options will differ from state to state. This is a point which needs to be borne in mind by policy makers interested in the possibility of reducing the gaol population through the use of non-custodial sanctions. So much for reducing the prison population: the next question we need to ask is what savings we can expect under different diversionary schemes.

There are a few simple points that deserve the attention of prison financial controllers contemplating the savings potential of non-custodial sentences. If you will forgive the rudimentary approach, let us assume that prison costs consist of two components, one relatively fixed and the other variable. Fixed costs include the cost of buildings, for example, and variable costs include the cost of meals for prisoners, the cost of guarding them and all those other costs affected by the length of time people spend in prison.

Obviously, today's fixed costs are as variable next year as the prison population, but consider the variable costs as being those incurred over a reasonably short period. It is probably reasonable to assume that the variable cost component of most prison systems is very large.

If we divide the prison population on the basis of sentence length into those serving prison sentences of less than six months who we think can be diverted and those serving longer periods who we think cannot be readily diverted, then the variable costs of imprisonment might then be expressed in the following way:
Non-Custodial Sanctions

Figure 7

\[ VCP = a[(Ns \times Ds) + (N1 \times D1)] \]

where:

- \( VCP \) = the variable costs of imprisonment
- \( a \) = the cost of prison per man year served
- \( Ns \) = the number of offenders given sentences of less than six months
- \( Ds \) = the average duration of sentences less than six months
- \( N1 \) = the number of offenders given sentences of more than six months
- \( D1 \) = the average duration of sentences of more than six months

It is possible to give values for all of these parameters but for the moment let us concentrate on the variables in brackets. If we substitute values for these parameters from the Bureau of Crime Statistics Higher Court collection, we get:

Figure 8

\[ VCP = a[(1,562 \times 3) + (4,729 \times 18)] = a(4,686 + 85,122) \]

The ratio between the two figures in brackets shows the relative contribution to the variable cost of imprisonment of those in gaol for less than six months compared to those in gaol for six months or more.

In percentage terms, prisoners serving sentences of less than six months constitute only about five per cent of the variable cost of imprisonment. The variable cost saving of diverting prisoners given sentences of less than six months away from gaol does not look large. However, if we apply a higher diversion criterion (of less than twelve months) and enter the relevant values for the parameters we get:

Figure 9

\[ VCP = a[(3,239 \times 6) + (3,052 \times 18)] = a(19,434 + 54,936) \]

In this situation, short-term prisoners account for some 26 per cent of the variable costs of imprisonment.

Now the point of all this is not to justify the validity of the actual estimates of proportional expenditure reduction given here. To make reliable estimates, you would need more reliable data on actual custodial periods served than are currently available. It is also necessary to know what proportion of total prison cost is dependent on the aggregate demand for prison time.

The point of the exercise is to illustrate how sensitive the variable cost of imprisonment is to small variations in the assumed diversion threshold. In practice, the sensitivity may be even greater than depicted here once fixed costs are taken into account. A 10 per cent reduction in the gaol population, for example, might open the possibility of selling off a gaol and reducing the prison officer staffing costs by a correspondingly large amount. The result
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may well be a considerably larger than 10 per cent reduction in the overall cost of imprisonment to the state.

To summarise, then, both in terms of the size of the prison population and the cost of running a prison, small diversionary differences have the potential to produce quite large effects. There is ample reason, therefore, despite our past failures, to continue the search for front-end strategies for gaining reductions in prison numbers and prison costs. In the meantime, it would be well worth estimating the potential savings of differing amounts of diversion much more rigourously than has been suggested in this paper. This brings us finally to the question which has been ignored so far. What can we do to create non-custodial options that courts use as genuine alternatives to prison? This paper will conclude with a couple of points about this issue.

Creating Viable Non-Custodial Alternatives

Earlier it was noted that non-custodial options would have to be made more frequently as alternatives to gaol. This is not quite true. However, the same effect might be achieved if greater publicity were given to the onerous qualities of the existing non-custodial options. It is doubtful that many people, particularly in the media, stop to think about the embarrassment and disruption caused by a long stretch of periodic detention. Maybe the down side of staying out of gaol needs to be published.

At all events, the present climate toward offenders in Australia is certainly conducive to more onerous non-custodial sanctions. New South Wales has recently raised the maximum duration of periodic detention orders and the maximum number of hours which may be served by way of community service orders. Whether these initiatives will have the effect of diverting people from gaol or further splitting the non-custodial vote is something which remains to be seen.

Certainly, the aim of the initiatives was to strengthen their diversionary potential and for this reason they may be regarded as a step in the right direction. It would be preferable, nevertheless, to be able to formulate proposals for prison diversionary schemes on the basis of some understanding of their potential to divert. This may sound a fanciful hope, but the crucial piece of information we need to enable the required understanding is not, at least in principle, that difficult to obtain.

What is required is a standard scaling study of the how the courts perceive the severity of different amounts of different penalties varying in duration. There are plenty of examples of this kind of study carried out to determine the inter-penalty sensitivity of the general population. If they were carried out among judicial officers, we could determine for example, the periodic detention equivalent of twelve months imprisonment, information which we could then use to assess the diversionary scope of that option.

Scaling studies of this type may also be expected to yield valuable information about which sorts of offenders are most likely to be regarded by the courts as potential candidates for diversion. It is unlikely that the community service orders equivalent of twelve months gaol is the same regardless of the type of offence. If we find offence based differences, we may be better able to target our non-custodial options.

Of course, it is not known whether judges and magistrates in Australia could be persuaded to participate in the kind of study being envisaged, though they often say they would like greater consultation in the formulation of law reform proposals. It may be that this sort of consultation is a bit too close for comfort.
Non-Custodial Sanctions

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