The Road to Nowhere: An Account of the Increase in New Zealand's Rate of Incarceration between 1999 and 2009

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I INTRODUCTION

> On the whole, people tend to take prisons for granted. It is difficult to imagine life without them. At the same time, there is reluctance to face the realities hidden within them, a fear of thinking about what happens inside them. Thus, the prison is present in our lives and, at the same time, it is absent from our lives.[1]

Imprisonment is central to the story of crime and punishment in the cultural imagination of 21st century New Zealand. While the presence and necessity of prisons are scarcely ever questioned, there is a notable hole in the narrative about what happens inside prisons and about what function prisons serve. A criminal is apprehended, convicted and upon being sentenced, vanishes. While as a society we are quite willing to deposit our "undesirables" out of view into the "abstract site" of the prison,[2] the obvious problem is that " ... in all but a small number of cases at some point the offender must re-enter society".[3] Unfortunately, released prisoners are not reformed by the same magic that makes them disappear. Nor, indeed, are the systemic social issues that contributed to their imprisonment in the first place. A recent study by the Department of Corrections found that 71 per cent of released prisoners were re-convicted of an offence within 5 years, and that 52 per cent were re-imprisoned.[4] Given the Office of the Ombudsmen's critical assessment of the availability of drug rehabilitation and employment opportunities for New Zealand prisoners, such rates of recidivism cannot be surprising.[5]

Furthermore, imprisonment is not effected by a snap of the fingers as its magical function might suggest. Rather, the cost of imprisoning a person for a year is over $90,000. Spending on the justice sector has

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* BA/LLB(Hons). Many thanks to Khylee Quince and Professor Jane Kelsey.

1 Angela Y Davis *Are Prisons Obsolete?* (Hushion House, Toronto, 2003) at 15.

2 Ibid, at 16.

3 Sian Elias, Chief Justice of New Zealand "Blameless Babes" (Annual 2009 Shirley Smith Address, Victoria University, Wellington, 9 July 2009) at [13].

4 *Reconviction patterns of released prisoners: A 60-months follow-up analysis* (Department of Corrections 2009) at 7.

5 *Ombudsmen's Investigation of the Department of Corrections: in Relation to the Detention and Treatment of Prisoners* (Office of the Ombudsmen 2005) at 40–47.

doubled between 1994 and 2009, increasing at a rate of seven per cent annually, adjusted for inflation.[6] Indeed, in 2010 Minister of Finance Bill English announced that within three years the Department of Corrections will be New Zealand's largest government department.[7]

Matching this increase in spending is the growth in New Zealand's rate of imprisonment which, not including home detention, grew from 151 to 190 prisoners per 100,000 people between the 1999 and 2009 fiscal years[8] — the second highest rate of imprisonment in the developed world,[9] and the fifth highest in the OECD.[10] Before delving into these statistics, it is evident from the outset that there is a legitimate case to be answered as to the effectiveness of incarceration in New Zealand, especially given its enormous financial cost and the expansion of its already significant use.

While constraints of time and space preclude this article from directly evaluating the underlying philosophy, efficacy and costs of a punitive penal policy, it aims instead to explicate systemically the increase in New Zealand's rate of incarceration from 1999 to 2009. The rationale of this objective is that the increasing rate of incarceration is a serious public policy issue. In the abstract, such an increase is indicative of either a significant increase in criminality and, therefore, a failure of other social institutions; or, of a policy environment in which incarceration has been decoupled from the rate of criminal offending. In the latter case, irrespective of whether one accepts the rationale of punitive incarceration per se, any increase in incarceration that cannot be accounted for in terms of increased criminal offending requires an auxiliary justification as to why more punishment or incapacitation is necessary. On either ground, New Zealand's increasing rate of incarceration warrants examination.

The focus of this article is limited to the period between 1999 and 2009. The 1999 citizen initiated referendum on law and order was a defining event in the history of New Zealand's penal policy, and continues to provide an important touchstone for both public discourse and policy development. Subsequent to this referendum, New Zealand has undertaken major changes in its legislative and policy frameworks for the punishment of crime. Still more significant reforms remain on the statute books awaiting implementation with the next change of the political tide. During this period, New Zealand's custodial population increased at a greater rate than the general trend in OECD countries.[11]

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6 *Challenges and Choices: New Zealand's Long-term Fiscal Statement* (New Zealand Treasury 2009) at 40–42 [New Zealand Treasury].

7 Derek Cheng "Corrections to become monster department" *The New Zealand Herald* (New Zealand, 2 July 2010).

8 See Figure 1 in Part II Statistical Analysis.

9 Julia Tolmie "Crime in New Zealand over the last ten years: a statistical profile" in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 39 at 66.

10 New Zealand Treasury, above n 6, at 41.

11 John Pratt "Punishment, Politics and Public Opinion: The Sorcerer's Apprentice Revisited" in *Beyond Retribution: Advancing the Law and Order Debate: PFNZ National Conference 2006 Report* (Prison Fellowship of New Zealand, Upper Hutt, 2007) 51 at 51.

The first section of this article will analyse a selection of the available statistical data on the operation of the criminal justice system. The analysis will begin by comparing the rate of incarceration over the previous decade with the relatively static levels of reported offending over the same period. It will then proceed to a statistical examination of the trends and developments at each step of the criminal justice process, with a view to identifying the specific changes in the operation of the criminal justice system that this article argues have caused the increase in New Zealand's incarceration rate.

The second section will set out the nature of the relationships — if and when such exist — between the identified statistical trends and the policy developments, legislative initiatives and political climate of the previous decade. The outcome of this analysis will be an account of both how and why New Zealand's incarceration rate has increased so significantly between 1999 and 2009.

II STATISTICAL ANALYSIS

The criminal justice system in a liberal democracy such as New Zealand is often compared to the proverbial ambulance at the bottom of the cliff: where social norms and bureaucratic systems fail to constrain behaviour, offending individuals become subject to the coercive regulation of the criminal law. The mandate for the state's intervention is to minimalise disruption and mitigate further harm to the public. In recognition of the inherent difficulties in regulating the breakdown of social order, it should be expected that the criminal justice system will not run as a seamless and predictable mechanism. As a result, statistics as to its operations ought to be taken with a grain of salt. This caveat applies in respect of both the reliability of criminal justice data as well as the degree to which it can properly form the basis of any inferences or conclusions drawn. Nonetheless, every effort has been taken in the following section to disclaim any potentially misleading features of the statistical data presented.

Incarceration rate

Between 1999 and 2009, New Zealand's rate of incarceration increased dramatically. The raw data analysed to establish this proposition comes from the *Offender Volumes Report 2009* published by the Department of Corrections.[12]

Between the 2000 and 2009 fiscal years, the average number of inmates held in New Zealand's prisons increased from 5,802 to 8,170,

12 *Offender Volumes Report 2009* (Department of Corrections 2010).

while the rate of imprisonment grew by 26 per cent, rising from 151 to 190 per 100,000. However, as the prison population does not take into account the number of offenders held on home detention, its growth does not present a complete picture of incarceration in New Zealand. Because home detention is not "imprisonment" in the traditional sense of the word, for the sake of clarity, the terms "incarceration" and "custodial population" will be used to refer to both prison inmates and home detainees.

Home detention became available as a means of incarceration in New Zealand on 1 October 1999, with the commencement of the Criminal Justice Amendment Act 1999. This amendment to the Criminal Justice Act 1985 allowed sentences of imprisonment to be served in a suitable home, under electronic monitoring, in the capacity of either "front-end" or "back-end" home detention upon successful application to the New Zealand Parole Board. This regime was abolished by the Sentencing Amendment Act 2007, which made home detention a sentence in its own right. Under this amendment, judges are empowered to order a sentence of home detention in circumstances where they would otherwise impose a short-term sentence of imprisonment.

Between 1999 and 2009, the number of incarcerated people per 100,000 increased by 40.8 per cent, rising from 150.8 to 223.3. This increase is significantly greater than the increase in the rate of imprisonment from 150.8 to 190.3 would suggest. The relevant data is set out below. The highlighted entries are approximations of the home detention population prior to 2007 extrapolated from the limited sources available.

Table 1: Incarceration data by fiscal year 1999–2009

	1999–2000	2000–2001	2001–2002	2002–2003	2003–2004	2004–2005	2005–2006	2006–2007	2007–2008	2008–2009
Prison population	5802.3	6020.5	5945.6	6099.3	6472.5	6952.1	7566.8	7873.3	8026	8169.9
Home detainees under post-2007 regime	n/a	n/a	n/a	n/a	n/a	n/a	n/a	1	531.9	1415.2
Back-end home detainees under pre-2007 regime	n/a	n/a	n/a	43.8	72.3	70	90.5	119	69.5	n/a
Front-end home detainees under pre-2007 regime	n/a	n/a	n/a	163.3	396.5	298.9	232.9	247.9	131.1	n/a
Total average custodial population	5802.3	6020.5	5945.6	6306.4	6941.3	7321	7890.2	8241.2	8758.5	9585.1
Average general population by fiscal year	3848600	3872200	3915400	3989600	4060600	4113100	4164900	4209300	4251200	4292400
Rate of imprisonment per 100,000	150.8	155.5	151.9	152.9	159.4	169	181.7	187	188.8	190.3
Rate of incarceration per 100,000 (includes HD)	150.8	155.5	151.9	158.1	170.9	178	189.4	195.8	206	223.3

Although the rate of imprisonment on these figures flattened after home detention became a distinct sentence in 2007, it is significant that the overall rate of incarceration continued to increase. This increase is consistent with the growth trend in the rate of incarceration for the period between the 2002 and 2007 fiscal years, and would suggest that the introduction of home detention as a distinct sentence is functioning — as intended — as a substitute for short-term sentences of imprisonment without affecting the overall size of the custodial population.

Figure 1: Rates of imprisonment

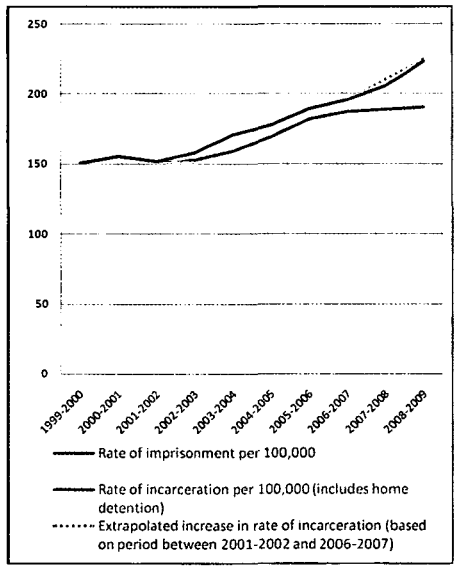
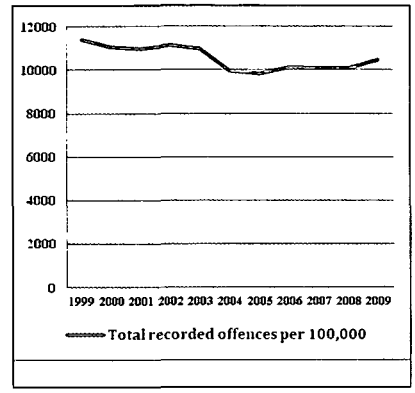


Figure 2: Total recorded offences



Crime Rate

The main source of statistics on the incidence of crime in New Zealand is the record of offences reported to the police. This data, while useful, does not necessarily reflect the true incidence of crime in New Zealand. This is primarily because unreported crimes are not included in the record. Furthermore, not all crime reported to the police is subsequently recorded. Data from the 2009 crime and safety survey[13] — the most recent of four five-yearly victimisation studies undertaken by the Ministry of Justice — indicate that only 41 per cent of crimes committed in New Zealand became known to the police,[14] while the number of recorded crimes accounted for only 32 per cent of those that victims claimed to have reported.[15] Because

13 *The New Zealand Crime and Safety Survey: 2009: Main Findings Report* (Ministry of Justice 2010) [*Main Findings Report*].

14 Ibid, at 35 (Table 3.7).

15 Ibid.

of this vast under-representation of offending in police statistics, changes in the reported level of crime do not necessarily indicate an actual increase in criminal offending.[16] Rather, systemic factors pertaining to the reporting of crime are likely to be equally influential on this figure. Despite the shortcomings of police crime statistics, some reassurance may be taken from the fact that the general trends they establish as to the level of criminal offending in New Zealand have, to some extent, been corroborated by the Ministry of Justice victimisation surveys.[17]

Between 1999 and 2009, the total number of reported crimes per 100,000 decreased 8.49 per cent, from 11,420 to 10,450. The percentage change in the recorded incidence (per 100,000) of each of the seven categories of crime used in the police statistics are set out below:

Table 2: Percentage change in number of reported crimes per 100,000, by category

Violence	47.6%	**Property Damage**	23.5%
Sexual	9.5%	**Property Abuse**	-23.1%
Drugs and Anti-Social	11.6%	**Administrative**	-6.9%
Dishonesty	-24.5%	**Total**	-8.5%

Special care should be taken in interpreting the significant increase in reported violent crime, as the high public and political profile accorded to this type of offending since 1999 will have affected inevitably rates of reporting and policing. The incidence of violent crime is addressed in a subsequent subsection. The increase in the rate of sexual offending should also be treated with caution as the absolute number of reported sexual offences was significantly lower than the other categories and therefore subject to greater relative variation.

Prosecution rate

The rate of prosecution is the number of prosecuted charges per 100,000 in a given calendar year, and has been calculated here using the criminal conviction and sentencing data available on the Statistics New Zealand website. Between 1999 and 2009, this figure increased by 24 per cent, from 6,906.7 to 8,564.6. The percentage change in the rate of prosecution for each of the 14 categories into which the source data is divided is set out in the table overleaf.

16 Tolmie, above n 9, at 40.

17 Ibid, at 48.

Table 3: Percentage change in percentage of prosecutions per 100,000, by category

Homicide and Related Offences	20.5%	**Fraud, Deception and Related Offences**	13%
Acts Intended to Cause Injury	55.2%	**Illicit Drug Offences**	7.2%
Sexual Assault and Related Offences	12.2%	**Prohibited and Regulated Weapons and Explosives Offences**	49.2%
Dangerous or Negligent Acts Endangering Persons	0.9%	**Property Damage and Environmental Pollution**	27.7%
Abduction, Harassment and Other Offences Against the Person	78.4%	**Public Order Offences**	67.2%
Robbery, Extortion and Related Offences	32.5%	**Traffic and Vehicle Regulatory Offences**	20.8%
Unlawful Entry With Intent/ Burglary, Break And Enter	1.7%	**Offences Against Justice Procedures, Government Security and Government Operations**	47.8%
Theft and Related Offences	5.3%	**Miscellaneous Offences**	52.2%

To the extent that the rate of reported crime declined slightly between 1999 and 2009, the overall increase in the number of prosecutions per 100,000 would seem to indicate that the police and other prosecutorial bodies have become more proactive in bringing reported offences to charge. However, this increase is not distributed evenly across the 14 offence categories. Rather, most of the overall percentage growth can be accounted for by increases across the most minor — yet numerically most frequent — offence categories: "Public Order"; "Traffic"; "Offences against justice"; and "Miscellaneous". Between 1999 and 2009, the number of charges per 100,000 in these categories increased by 39.1 per cent, while the overall rate of the remaining offence categories increased by only 13.3 per cent. These four offence categories, which overwhelmingly constitute the overall increase in the rate of prosecutions, very rarely result in the imposition of custodial sentences (1.2, 5.6, 11.5 and 1 per cent respectively — see Table 5 below). Moreover, of the remaining offence categories, the "Homicide"; "Acts intended to cause injury"; "Sexual assault"; "Abduction"; and "Robbery" categories are all "violent" crimes, suggesting that the increase in the rate of prosecution across these categories may be the result of the significant increase in the number of reported violent offences per 100,000. Although this is a plausible conclusion, it should be remembered that the definition of violent offending in the police crime data may not correspond exactly to the five categories of offending listed above.

For these reasons, it can be concluded that the impact of the 24 per cent increase in the overall rate of prosecution has not been as influential on the custodial population as that figure would suggest if taken at face value. Rather, the increase in the number of prosecutions between 1999 and 2009 will only have had a minor influence on the increase in New Zealand's rate of incarceration in and of itself.

Percentage of charges resulting in a conviction

Between 1999 and 2009, the proportion of prosecutions resulting in a conviction was relatively flat, increasing from 40.3 to 40.8 per cent — an increase of 1.2 per cent. In the same period, the number of convictions per 100,000 increased by 26.9 per cent, from 4,657 to 5,911. Because there has been little shift in the proportion of charges resulting in a conviction, the significant percentage increase in convictions per 100,000 can mostly be attributed to the proportionately similar increase in the rate of prosecution.

The percentage change in the proportion of prosecuted charges resulting in conviction (Column A) and the percentage change in the number of convictions per 100,000 (Column B) are set out below for each of the 14 offence categories.

Table 4: Percentage change of proportion of charges resulting in conviction, by offence

	Column A	Column B		Column A	Column B
Homicide and Related Offences	-12.5%	23.8%*	**Fraud, Deception and Related Offences**	-9.8%	-21.7%
Acts Intended to Cause Injury	-0.8%	54%	**Illicit Drug Offences**	-8.8%	-2.3%
Sexual Assault and Related Offences	-10.2%	0.8%	**Prohibited and Regulated Weapons And Explosives Offences**	14.1%	42.1%
Dangerous or Negligent Acts Endangering Persons	-8.3%	-7.5%	**Property Damage and Environmental Pollution**	2.4%	30.8%
Abduction, Harassment and Other Offences Against the Person	11.7%	99%	**Public Order Offences**	-11.3%	88.5%
Robbery, Extortion and Related Offences	-4%	26.9%	**Traffic and Vehicle Regulatory Offences**	5.9%	27.9%
Unlawful Entry With Intent/Burglary, Breaking and Entering	0.7%	5.2%	**Offences Against Justice Procedures, Government Security and Government Operations**	11.3%	64.5%
Theft and Related Offences	2.6%	8%	**Miscellaneous Offences**	20.1%	83%

* Because the homicide rate in 1999 was a significant outlier, I used the figure from 2000 to calculate the percentage change.

These figures show that although the overall percentage of charges resulting in a conviction has slightly increased, the percentage change of the different offence categories is not uniform. This is significant for the increase in New Zealand's rate of incarceration to the extent that the categories, for which the conviction rate has grown, are predominantly those that are least likely to result in custodial sentences, while the conviction rates for the offence categories most likely to result in custodial

sentences have either stagnated or declined. This phenomenon is sufficient for present purposes to exclude this step in the criminal justice process as having had an effect on New Zealand's increased rate of incarceration. The average probabilities that an offence in a given offence category will result in a conviction is set out below for the period between 1999 and 2009. The highlighted values indicate the offence categories in which the rate of conviction increased over the same period (Column A, Table 4).

Table 5: Average percentage of convictions resulting in custodial sentences 1999–2009, by offence category

Homicide and Related Offences	86.30%	**Fraud, Deception and Related Offences**	14.60%
Acts Intended to Cause Injury	16.80%	**Illicit Drug Offences**	16.80%
Sexual Assault and Related Offences	72.40%	**Prohibited and Regulated Weapons and Explosives Offences**	11.30%
Dangerous or Negligent Acts Endangering Persons	1.40%	**Property Damage and Environmental Pollution**	5.80%
Abduction, Harassment and Other Offences Against The Person	20.30%	**Public Order Offences**	1.20%
Robbery, Extortion and Related Offences	80.10%	**Traffic and Vehicle Regulatory Offences**	5.60%
Unlawful Entry With Intent/ Burglary, Breaking and Entering	46.50%*	**Offences Against Justice Procedures, Government Security and Government Operations**	11.50%
Theft and Related Offences	11.20%	**Miscellaneous Offences**	1%

* Although the proportion of custodial sentences imposed under this category is significant, the increase in the percentage of burglary sentences resulting in a custodial conviction between 1999 and 2009 was very low (0.7 per cent — see Table 4 above).

Percentage of convictions resulting in a custodial sentence

The data upon which this statistic is based is the same as that used in the subsections on prosecuted charges and convictions above. A custodial sentence for the purposes of this statistic is either a sentence of imprisonment or from 2007 onwards, a sentence of home detention. Between 1999 and 2009, the percentage of convictions resulting in a custodial sentence increased from 9.1 to 11.6 per cent, indicating a 27.5 per cent increase. This overall increase cannot be accounted for in terms of a shift in the offence composition of convictions, as the previous subsection establishes that, if anything, the shift in composition was towards offence categories less likely to result in custodial sentences. Over the same period, the number of custodial convictions per 100,000 grew by 51 per cent, from 181.7 to 274.4. This 51 per cent increase is greater than the 26 per cent growth in convictions per 100,000 because of the 27.5 per cent increase in the proportion of convictions resulting in custodial sentences.

Figure 3: Custodial sentences as percentage of convictions

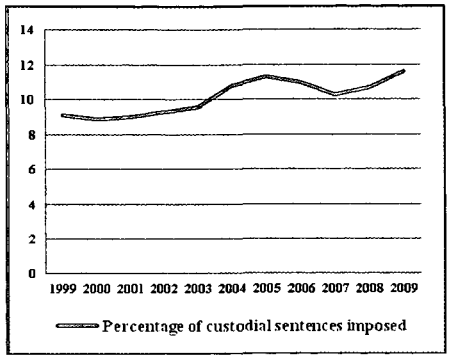
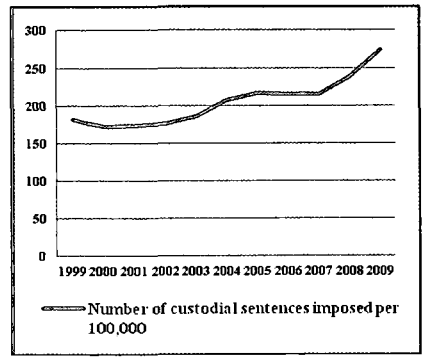


Figure 4: Custodial sentences imposed per 100,000



In order to explicate these figures further, I have set out below the percentage change in the proportion of convictions resulting in a custodial sentence (Column A), and the percentage change in the number of custodial sentences imposed per 100,000 (Column B), for each of the 14 offence categories.

Table 6: Percentage change in custodial sentence data, by offence category

	Column A	Column B		Column A	Column B
Homicide and Related Offences	3.9%*	43.7%	**Fraud, Deception and Related Offences**	242.3%	104.2%
Acts Intended to Cause Injury	21.1%	66.8%	**Illicit Drug Offences**	81.7%	42.4%
Sexual Assault and Related Offences	13.3%	12.4%	**Prohibited and Regulated Weapons And Explosives Offences**	30.2%	70%
Dangerous or Negligent Acts Endangering Persons	200%	144.4%	**Property Damage and Environmental Pollution**	67.3%	160%
Abduction, Harassment and Other Offences Against the Person	9.1%	93.1%	**Public Order Offences**	-7.1%	75%
Robbery, Extortion and Related Offences	10.3%	22.9%	**Traffic and Vehicle Regulatory Offences**	6.9%	36.3%
Unlawful Entry With Intent/Burglary, Breaking and Entering	16.8%	21.1%	**Offences Against Justice Procedures, Government Security and Government Operations**	39%	111.1%
Theft and Related Offences	26%	33.6%	**Miscellaneous Offences**	-34.8%	500%

* Because 1999 was a significant outlier, I used 2001 as the reference year to calculate the percentage increase for homicide.

These figures show that the rate at which custodial sentences are imposed has increased across the full range of offences (excluding the "Public Order" and "Miscellaneous" categories). This trend accordingly would negate any suggestion that the overall increase is the result of a major spike in a particular category of offence or group thereof. Rather, it could be concluded that the increase in the proportion of convictions resulting in custodial sentences is a significant factor in the growth of New Zealand's incarceration rate.

Violent crime

Having set out the data on charges, convictions and custodial sentences, it is now possible to examine the significant increase in recorded violent offending evident in the police crime statistics. Conceivably, this statistic could be the product of a simple increase in the reporting of violent crime. However, the concomitant increases in the rates of charges, convictions and custodial sentences per 100,000 for "violent" offence categories ("Homicide"; "Acts intended to cause injury"; "Abduction"; and "Robbery") lend some limited support to the proposition that the actual number of violent crimes committed may have increased. An unfounded increase in the reporting of violent crime would presumably have expanded the pool of reported offending so as to include crimes of a relatively less serious nature, and therefore, to have decreased the rates of prosecution, conviction and custodial sentencing for violent offences. However, these rates have increased significantly both in absolute terms and when compared against the upwards trend in the overall rates of prosecuted charges, convictions and custodial sentencing.

Table 7: Comparison between percentage increases in rates of violent offence categories as against overall trends

	Percentage change in number of charges prosecuted per 100,000	Percentage change in number of convictions per 100,000	Percentage change in number of custodial sentences imposed per 100,000
"Violent" offence categories	76%	69.6%	75.4%
All offence categories	**24%**	**26.9%**	**51%**

Custodial sentences

The data in this subsection is taken from a request to the Ministry of Justice under the Official Information Act 1982 (the OIA request). It is necessary to rely on this data as information about the average nominal length of imposed sentences of imprisonment has not been made available publicly since the report *Conviction and Sentencing of Offenders in New Zealand:*

1997 to 2006, published by the Ministry of Justice in 2007.[18] Unfortunately, the OIA request only provides data from 2004 to 2009. This is because sentence length data recorded prior to 2004 was gathered using a different methodology from that in the OIA request, such that the two data sets are not comparable.[19] I have therefore restricted my analysis in this subsection to the period from 2004 to 2009. Another unfortunate limitation of the OIA request data is that it is not broken down into the different categories of offending, which means that it is impossible to ascertain whether the composition of custodial sentences has shifted in such a way as to explain the change in average custodial sentence length.

Between 2004 and 2009 the average length of imprisonment sentences increased by 8.8 per cent, from 14.8 to 16.1 months. These averages were calculated to include the indeterminate sentences of life imprisonment and preventative detention, and exclude sentences of home detention.[20] In order to determine the nature of the changes in the determinative sentencing spectrum that have contributed to the increase in the average length of imprisonment sentences, I analysed the OIA request data in terms of the nine sentencing bands into which it is divided.

Table 8: Shift in composition of determinate sentencing bands, 2004–2009

	Number of months imposed in 2004	Percentage of total months imposed in 2004	Number of months imposed in 2009	Percentage of total months imposed in 2009	Change between 2004–2009 as proportion of total months imposed (in percentage points)
≤ 3 months	2638.5	2.2	3310.5	2.4	0.2
>3 to 6 months	7794	6.6	7722	5.7	-0.9
>6 to 12 months	18927	16.1	16956	12.5	-3.6
>1 to 2 years	28440	24.2	24786	18.2	-6
>2 to 3 years	18900	16.1	23700	17.4	1.3
>3 to 5 years	17952	15.3	23184	17.1	1.8
>5 to 7 years	9936	8.5	12672	9.3	0.8
>7 to 10 years	8874	7.6	15504	11.4	3.8
> 10 years	4050	3.4	8100	6	2.6

The significance of these statistics is that the overall growth in the average length of determinate sentences can be attributed primarily to the imposition of longer sentences in the 7–10 and 10+ year categories. Because these increases are at the higher end of the sentencing spectrum, they will only now be beginning to affect New Zealand's rate of imprisonment and these effects will not be realised fully until 2019.

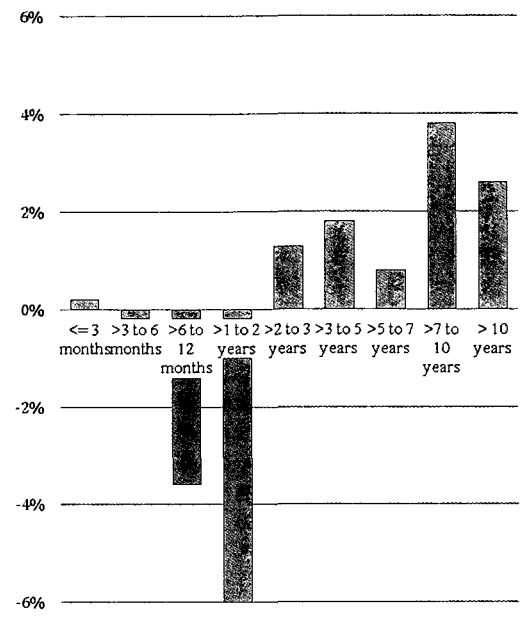
18 *Conviction and Sentencing of Offenders in New Zealand: 1997 to 2006* (Ministry of Justice 2007).

19 Ibid, at 113.

20 Email from Ministry of Justice to the author regarding the inclusion of home detention in the OIA request data (20 October 2010).

The relative decline in the proportion of total months imposed in the sentencing bands shorter than two years can most likely be attributed to their being substituted for sentences of home detention, which became available as a separate sentence in 2007.

Figure 5: Percentage point change in proportion of total months imposed, 2004–2009



Unlike the analysis of determinate sentences above, there is little useful information that can be extracted from the OIA request data regarding the use of indefinite sentences of imprisonment. In respect of the sentence of life imprisonment, this is primarily because the rate at which life sentences are imposed is primarily dependent upon the small and variable number of convictions for offences that are punishable by that sentence (murder, manslaughter and serious offences against s 6 of the Misuse of Drugs Act 1975). As for preventative detention, the number of these sentences imposed each year (as recorded in the OIA request and set out below in Table 9) has varied so dramatically that it is impossible to identify any discernable pattern in its application.

Table 9: Preventative detention, 2004–2009

	2004	2005	2006	2007	2008	2009
Number of preventative detention sentences imposed	33	14	15	9	23	18

Average percentage of nominal custodial sentence served

Under the Sentencing Act 2002, offenders who are sentenced to two or more years of imprisonment are not entitled to release before the end of their nominal sentence, but can still apply for parole after having served one third of their imprisonment term. At the time of writing there was no data available on the average percentage of a nominal sentence served by long-term inmates. This is unfortunate, as any increase or decrease in that statistic would have had a significant effect on New Zealand's rate

of imprisonment. The best available figure on this point is 62 per cent, as stated by the New Zealand Law Commission (the Law Commission) in its 2006 report *Sentencing Guidelines and Parole Reform*.[21]

Figure 6: Composition of custodial population

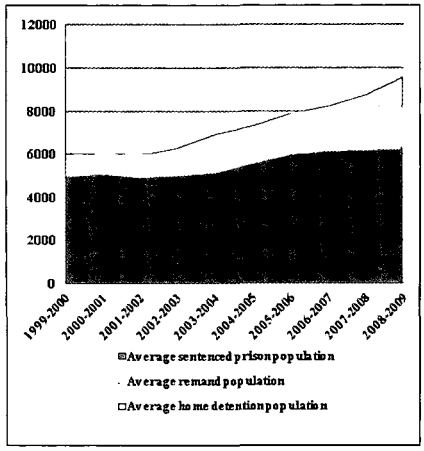
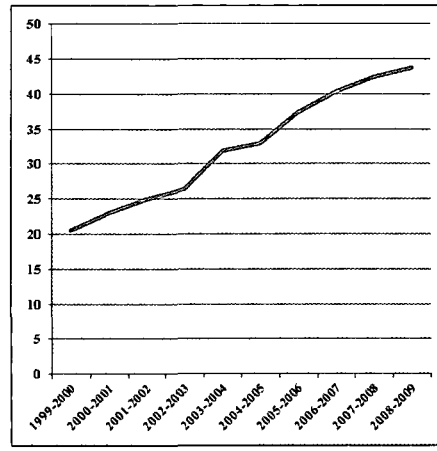


Figure 7: People remanded in custody per 100,000



Remand in Custody

Where the subsections above roughly follow the chronological progression of offenders through the criminal justice system, the remanding in custody of alleged criminals is a phenomenon distinct from the incarceration of convicted offenders. Between the 2000 and 2009 fiscal years, the average number of people remanded on custody grew by 138 per cent, from 788 to 1,874, thereby increasing from 13.6 to 22.9 per cent of the total custodial population. Over the same period, the number of people remanded in custody per 100,000 increased by 113 per cent, from 20.5 to 43.7. In comparison, the number of sentenced prisoners per 100,000 increased only 12.6 per cent, from 130.3 to 146.7 per 100,000.

At the same time as the dramatic increase in the remand population, the average length of custodial remand periods increased 57 per cent from 35 days to 55 days within the 1999–2009 decade.[22] Because this very significant increase cannot account entirely for the 113 per cent growth in the number of people remanded in custody per 100,000, it must be concluded that the proportion of alleged offenders who are remanded in custody has also increased significantly between 1999 and 2009.

21 Law Commission *Sentencing Guidelines and Parole Reform* (NZLC R94, 2006) at [129].

22 *2007 Justice Sector Prison Population Forecast: Forecast Report* (Ministry of Justice 2008) at 9; Simon Power "The Criminal Justice System: Reform is coming" (press release, 23 July 2009).

Conclusion

On the basis of the statistical analysis in this section, the follow inferences can be drawn:

Although the rate of imprisonment has plateaued since the introduction of home detention as a distinct sentence, the rate of incarceration has continued to increase. This increase is most likely the result of a certain class of offenders being sentenced to home detention rather than to short-term sentences of imprisonment. This outcome was the desired effect of the 2007 home detention regime.

The overall number of reported offences per 100,000 has declined between 1999 and 2009. However, the number of reported violent offences has increased. This growth in reported violent offending has flowed through the criminal justice system, as evidenced by the increased rates at which perpetrators of violent offences are charged, convicted and receive custodial sentences. The fact that the increase in reported violent crime has filtered through the criminal justice process suggests that the increased levels of reported violent crime may reflect an increase in actual violent offending rather than, or in addition to, a shift in the level of reporting.

The total number of charges prosecuted per 100,000 increased by 24 per cent, despite an 8.8 per cent decrease in the level of reported crime. Significantly, this figure can be attributed primarily to large increases in four categories with a low rate of custodial sentencing, therefore ameliorating the effect of this increase on the rate of incarceration. The increased rate of prosecution for five of the nine remaining offence categories can furthermore be explained in terms of the growth in reported violent offending.

The overall proportion of prosecuted charges resulting in a conviction increased very slightly between 1999 and 2009. A shift in the proportion of charges resulting in convictions cannot, therefore, have been significant in contributing to the increase in New Zealand's incarceration rate. Rather, the 26 per cent increase in the number of convictions per 100,000 can be attributed primarily to the increased rate of prosecuted charges over the same period.

The proportion of convictions resulting in a custodial sentence increased by 27 per cent between 1999 and 2009, despite a shift in the composition of convictions towards offences less likely to result in a custodial sentence. Moreover, this growth was distributed across 12 of the 14 offence categories. This increase explains the 51 per cent growth in the number of custodial sentences per 100,000 as against the 26 per cent growth in the number of convictions per 100,000. The increased rate of custodial sentencing is, therefore, a significant causal factor in the growth of New Zealand's custodial population.

The average length of determinate sentences of imprisonment handed down by the courts increased by 10.1 per cent between 2004 and

2009. This increase was caused by significant growth in the number of 7–10 and 10+ year sentences of imprisonment imposed.

Although the average length of short-term sentences of imprisonment decreased by 11.1 per cent between 2004 and 2009, this decrease was most likely the result of a shift in the composition of short-term sentences subsequent to the availability of home detention as an alternative sentence.

There was no discernable pattern in the number of indeterminate sentences imposed per year between 2004 and 2009. The lack of any consistent trend may be explained by a natural variation in the small yearly number of offences punishable by life imprisonment and the erratic frequency with which sentences of preventative detention have been imposed. Although the significant variation in the number of indeterminate sentences imposed in a given year will undoubtedly have had a significant effect on the rate of incarceration, this correlation cannot be expressed as a trend. The uncertainty of this variable constitutes an unavoidable constraint on any statistical explication of New Zealand's rate of incarceration.

Even if it were possible to identify a trend in the imposition of life sentences, there has been no significant variation in the average length of minimum non-parole periods imposed between 2004 and 2009.

The number of people remanded in custody has increased significantly, both as a percentage of the total custodial population and when indexed against the general population. This growth can be attributed to both a 57 per cent increase in the mean length of remand periods, and to a significant increase in the proportion of alleged offenders remanded in custody.

From these propositions, six causal factors in the increase of New Zealand's rate of incarceration can be identified: (i) a probable increase in the level of violent offending; (ii) a modest increase in the number of prosecuted charges per 100,000 (for the reasons stated earlier, this phenomenon will have had only a minor effect on New Zealand's custodial population); (iii) an increase in the proportion of convictions resulting in custodial sentences; (iv) an increase in the average length of imprisonment sentences (an increase that will only now be beginning to have an impact on New Zealand's rate of imprisonment); (v) an increase in the proportion of alleged offenders remanded in custody; and (vi) an increase in the average length of custodial remand periods.

III POLICY DEVELOPMENTS

This section of the article explains the six noted causal factors of New Zealand's increased rate of incarceration in terms of changes in policy, legislation and the political climate between 1999 and 2009.

Violent offending

The increase in the yearly number of recorded violent offences per 100,000 cannot easily be attributed to any tangible policy or societal change. This is primarily because of the manifest uncertainty in the statistic, which could equally be explained by changes in reporting practices as by an increase in the incidence of violent crime. Furthermore, it would be beyond the scope of this article to hazard an opinion on the reasons for any increase in the actual incidence of violent crime. This is because an analysis of the endless factors causative of criminal offending as well the origins of such in wide-ranging social, political and economic phenomena would require far more space than is afforded by the nature of this article. Nonetheless, it is possible to make some preliminary comments as to the possible causes of a shift in the *reporting* of violent crime.

In order for a crime to be "reported" for the purposes of the police crime statistics, it must be either brought to the attention of the police by a member of the public or directly observed by an officer. The author suggests that between 1999 and 2009, the prevailing public mood (actual and perceived) regarding violent crime may have influenced the rate at which such crimes were reported to the police[23] and the percentage of cases notified to the police that were then recorded. The latter proposition is borne out by changes in the relationship between police statistics and victimisation survey data between 2005 and 2009: the percentage of crimes that victims claimed to have reported to the police, crimes which were subsequently recorded, increased from 27 to 32 per cent for crime generally, and from 12 to 19 per cent for assaults.[24]

Violent offending was prominently constructed as a major issue in the public mind during the study period of this article and, indeed, continues to be so. The salience of violent offending in the popular consciousness may have caused the increase in the number of reported violent crimes considered under the preceding statistical analysis. A convenient starting point for discussion of this phenomenon is the citizens initiated referendum on criminal justice (the referendum) that was undertaken concurrently with the 1999 general election. The question posed to voters by the referendum was:[25]

> Should there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offenders?

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23 Tolmie, above n 9, at 41 supports the proposition that public perceptions can affect the rate at which crime is reported.

24 Pat Mayhew and James Reilly *The New Zealand Crime & Safety Survey: 2006: Key Findings* (Ministry of Justice 2007) at 36 (Table 2.2); *Main Findings Report*, above n 13, at 35 (Table 3.7).

25 John Ip "Crime, criminal justice, and the media" in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 389 at 403.

The origin of the referendum was the 1997 violent attack against an elderly shopkeeper in Christchurch. The son of the victim, Norm Withers, with the backing of the now-defunct Christian Heritage Party, drafted the referendum as a response to what sympathetic groups perceived as a "tide of violent crimes".[26] Aided by the heavy media coverage of the case, the petition initiating the referendum gained over 300,000 signatories,[27] while the referendum itself was supported by 92 per cent of voters. Although the drafting of the referendum question was obscure — and further, "loaded" towards a vote in the affirmative[28] — it has since served as a touchstone for media and political discourse on criminal justice policy and fuelled a popular movement focused against sexual and violent crime.[29] Indeed, Withers and subsequently, Garth McVicar — who founded the Sensible Sentencing Trust (Sentencing Trust) in 2001 and has prominently advocated for the implementation of the referendum's "mandate" — have been treated by the New Zealand media as "de facto experts"[30] on criminal justice policy, and are regularly sought for comment on law and order issues.

Ip has described the criminal justice discourse in New Zealand in terms of a "social construction",[31] a process that:[32]

> ... begins with claims-makers — for example, activists, experts, or spokespersons — making claims about the world, such as "crime is skyrocketing because the criminal justice system is soft on criminals". The goal for claims-makers is to have their claim become accepted as the dominant construction of reality. Whether a particular constructed reality becomes accepted and therefore dominant does not depend on how closely it approximates objective reality, but rather on external social and cultural forces, which are dynamic.

On Ip's analysis, McVicar is a "paradigmatic" claims-maker, and has been undeniably successful in shaping the social construction of crime in New Zealand. Essential to the discourse of the Sentencing Trust is the wide publication of dramatic — and dubious — statistical claims that "... reinforce in the minds of the public the perception that crime is spiralling out of control, thus laying the groundwork for the Sentencing Trust's policy agenda".[33] Against the backdrop of the referendum and the influence of the Sentencing Trust's political lobbying, New Zealand's media and mainstream politicians have propagated a social construction where crime,

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26 "Referendum urged" *The Press* (Christchurch, 8 July 1997) at 4, cited in John Pratt and Marie Clark "Penal populism in New Zealand" (2005) 7 Punishment and Society 303 at 314.

27 Ip, above n 25, at 403.

28 Ibid.

29 Pratt and Clark, above n 26, at 316.

30 Ibid.

31 Ip, above n 25.

32 Ibid, at 397.

33 Ibid, at 398.

especially violent crime, is perceived as a major and ever-increasing risk to the security of the New Zealand public. The disconnect between the reality and social construction of crime in New Zealand is reflected in a recent study, which found that although 60 per cent of respondents disagreed that crime was a serious problem in their neighbourhoods, more than 80 per cent believed that it was serious problem nationally. Similarly, although only 24.2 per cent of respondents considered that crime was rising in their neighbourhoods, 79.8 per cent believed that crime was rising across the country as a whole. The authors of the study suggested that these discrepancies could be accounted for by the fact the respondents' local knowledge was derived from direct experience and engagement with the local community, whereas knowledge of national crime problems was "almost always" derived from media coverage.[34]

Such has been the ubiquity of media reporting on violent crimes over the previous decade, combined with the tenor of political comment on the issue, that the social construction of violent offending in New Zealand has developed the character of a "moral panic":[35]

> A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to.

This description accords with the social construction of violent crime during the study period of this article: the prevailing media narrative promoted a sympathetic view of victims of crime whilst perpetuating a "stereotypical iconography"[36] of offenders as being "wicked or irresponsible 'others'".[37] This social construction of violent crime clearly influenced changes in penal policy, including the new rights afforded to victims of crimes[38] as well as the readiness with which the criminal justice system incarcerated convicted or alleged offenders. A further illustration of this social construction of crime in New Zealand is the denigration of public figures — including the Governor-General[39] and the Chief Justice[40] — for stating positions contrary to the sensationalist and punitive rhetoric of the law

34 Trevor Bradley, Michael Rowe and Charles Sedgwick "Not in my Backyard? Crime in the Neighbourhood" (2011) 50 Howard Journal 34 at 38–40.

35 Stanley Cohen *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (3rd ed, Routledge, Abingdon, 2002) at 1 cited in Ip, above n 25, at 404.

36 Ibid, at 405.

37 Pratt and Clark, above n 26, at 313.

38 See Victims' Rights Act 2002.

39 Pratt and Clark, above n 26, at 306.

40 "Call for chief justice to resign" *The Dominion Post* (New Zealand, 17 July 2009).

and order lobby. This phenomenon is consonant with what David Brown describes as the "uncivil politics of law and order":[41]

> [The] celebration of being "tough" or "hard" is linked to the denigration of those urging restraint or a more considered response, who seek to emphasise the complexity of issues and their social and economic roots.

The foregoing analysis should not be interpreted as discounting the possibility that the actual level of violent offending has increased — as noted earlier, the available data suggests that it has — nor that violent crime is not a very real problem for both victims and the community generally. Rather, it is suggested that the media "through publicising the claims of certain interest groups, or making its own claims by devoting particular attention to a certain issue" may have created "an artificial sense of salience in the minds of the public"[42] as to the nature and extent of violent offending in New Zealand. It is suggested that to a limited extent, this social construction may have caused the increased level of reported violent crime between 1999 and 2009.

Rate of prosecution

Where the overall increase in the rate of prosecution is primarily composed of growth across offence categories that are unlikely to result in custodial sentences, and while the increased rate at which violent offence categories are prosecuted can be attributed to the growth in reported violent offending, the increased rate of prosecution across the non-violent offence categories will nonetheless have had some impact on New Zealand's custodial population between 1999 and 2009.

The decision to initiate proceedings on a criminal matter is made by the police. The file is then entrusted to either the National Prosecution Service of the New Zealand Police or to a Crown Solicitor. Having received a file, these prosecutorial bodies have discretion to decide whether to drop the charges or proceed with the prosecution.[43] Because the statistics on the prosecution rate used in this article are concerned with the number of charges laid and not with their eventual outcome, the discretionary practices of these two prosecutorial bodies do not explain the increase in New Zealand's rate of prosecution. Therefore, the analysis has been restricted to changes in the capacity of the New Zealand Police to lay criminal charges.

As it would be impractical to delve into the receding horizon of the

41 David Brown "Recurring themes in contemporary criminal justice developments and debates" in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 7 at 24.

42 Ip, above n 25, at 405.

43 Peter Sankoff "Constituents in the trial process: the evolution of the common law criminal trial in New Zealand" in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 193 at 202.

organisational priorities and internal practices of the New Zealand Police, it is sufficient for present purposes to indicate that there has been an increase in the number of police staff between 1999 and 2009 such as to affect their capacity to investigate, process and ultimately prosecute criminal charges. Between 30 June 1999 and 30 June 2009, the number of police staff per 100,000 grew by 17 per cent, from 235 to 275. The increase in police staff in recent years has been described as "unprecedented".[44] It is suggested that this significant increase as against the general population may have caused, at least partially, the increase in the number of prosecutions per 100,000 during the study period of this article.

Rate of custodial sentencing

The 27.5 per cent increase in the rate at which convicted offenders receive custodial sentences has been a major factor in the increase in New Zealand's rate of incarceration between 1999 and 2009. The decision on whether or not to impose a custodial sentence is exercised exclusively by judicial officers. However, this discretion does not exist in a vacuum: it is shaped by the procedural and substantive requirements of statutory and appellate authority. The aim of this subsection is to explain how changes in the sentencing framework, as well as the political context within which those changes were made, affected the rate at which custodial sentences were imposed between 1999 and 2009.

During the study period of this article, the legislative framework of the criminal justice system changed significantly with the enactments of, and subsequent amendments to: the Bail Act 2000, the Parole Act 2002, the Sentencing Act 2002 and the Victims' Rights Act 2002. These legislative reforms were introduced by the Labour-led government as an explicit response to the perceived mandate of the 1999 referendum. Indeed, press releases issued by Hon Phil Goff MP — Minister of Justice between 1999 and 2005 — consistently attributed increases in the rate of imprisonment to these Acts, and took credit for these Acts being indicative of the government's responsiveness to the punitive public mood:[45]

> As intended, the Sentencing Act 2002 has resulted in longer sentences being imposed. At the same time, the Parole Act 2002 is expected to increase the proportion of sentences that inmates actually serve. Under the Bail Act 2000, more high-risk defendants are being denied bail.
>
> The projected increase in the prison population is not the result of increasing crime. It comes at a time when New Zealand's crime rate, and total recorded crime, has dropped substantially from a peak in 1996. There has also been little change in the average

44 Bradley, Rowe and Sedgwick, above n 34, at 35.

45 Phil Goff "Tougher laws driving up prison population" (press release, 9 March 2004).

> seriousness of offences over that period, according to Ministry of Justice research ... .
>
> The public referendum in 1999 showed New Zealanders wanted tougher measures taken against criminals, and the government has acted on that. These figures are the proof.

This tough-talking rhetoric is symptomatic of what Brown describes as the "law and order 'auction', in which politicians [engage] in ever more extreme promises and policies aimed at ensuring that they and their party [are] seen as 'tough on crime'".[46] Indeed, despite the punitive and populist edge evident in Goff's statement above, the Labour government's penal policies were dismissed only months later by Don Brash as being too soft. Brash, then leader of the National Party, stated at an SST conference that:[47]

> For too long, lawmakers have gone soft on crime when the public wanted policy to get tougher — much tougher, as was made abundantly clear when 92% voted for longer sentences in the referendum of 1999. The public was right. Policy-makers were wrong. And the Labour Government has simply ignored you.

The enactments that could potentially have been causative of the increased rate of custodial sentencing are the Sentencing Act 2002 and the Victims' Rights Act 2002. The relevant features of these statutes are briefly canvassed below. I have singled out these provisions because they are neither restatements of standard sentencing practice, nor technical minutiae of the sentencing regime. Rather, they are idiosyncratic features of the legislation that appear at first glance to have the potential to tangibly affect the exercise of judicial sentencing discretion.

The features of the Sentencing Act 2002 that may have been causative of the increased rate at which custodial sentences are imposed include: s 8(f), which requires judges to take into account victim impact statements when sentencing; s 8(g), which requires judges to impose the "least restrictive outcome that is appropriate in the circumstances" (a requirement specifically reflected in ss 15A and 16 in respect of sentences of home detention and imprisonment); s 11(1), which requires judges to consider explicitly discharging an offender with or without conviction, or convicting an offender and conditionally declining to impose a further sentence; and s 26(1), which empowers the court to order pre-sentence reports prepared by probation officers.

Upon examination of these provisions, it is evident that they are not uniformly oriented towards either expanding or contracting the number of custodial sentences imposed. Where s 8(f) incorporates the typically punitive expectations of victims of crime into the deliberation

46 Brown, above n 41, at 24.

47 Don Brash "Law & Order — A National Priority" (speech to the Sensible Sentencing Trust, 4 July 2004).

of the sentencing judge, the remaining provisions would tend to reduce the amount of custodial time imposed by the court. Most significantly, s 8(g) requires explicitly that a sentencing judge impose the least restrictive sentence appropriate to the circumstances of a case.

Section 11 is significant insofar as it mandates judicial consideration of non-custodial orders and sentences, thus reaffirming the general obligation to impose the least restrictive appropriate outcome. Moreover, by facilitating the provision of pre-sentence reports, s 26 would tend to operate as a factor towards less punitive sentences. This is because pre-sentence reports, as considered and personalised accounts of an offender's circumstances, function to potentially uncover mitigating factors that would reduce the punitiveness of a sentence. A pre-sentence report would also tend to humanise an otherwise two-dimensional offender, thereby providing a wider foundation for empathy on the part of the sentencing judge.

The Victims' Rights Act 2002 was enacted to "improve provisions for the treatment and rights of victims of offences".[48] To this end, the Victims' Rights Act 2002 sets out victims' entitlements to information, privacy and support services. However, for present purposes, the major feature of this Act is its provision for victim impact statements to be provided to the judge for consideration upon sentencing in accordance with s 8(f) of the Sentencing Act 2002. The information that must be sought by a prosecutor for inclusion in a victim impact statement are accounts of any physical injury, emotional harm, loss or damage of property suffered by a victim, or any other effects arising out of the offending.

The advent of the victim impact statement regime in New Zealand is symptomatic of a broader trend towards increased concern for interests of crime victims. Brown calls this phenomenon the "rise of the victim": a subset of the trend in the law and order discourse towards "visceral" emotiveness being perceived as lacking in the "rationalist tone of professional expertise".[49] Commenting on this phenomenon in its application to sentencing, British criminologist Garland has written that:[50]

> The introduction of the victim's voice *repersonalizes* criminal justice, and recasts the sentence not as a finding of law but as an expression of loyalty. ... [C]rime victims are led to regard the severity of punishments as a test of this loyalty and a mark of personal respect.

On this analysis, the voicing of victims' perspectives through victim impact statements is likely to have affected the exercise of judicial discretion, as judges must take into account the punitive expectations of crime victims.

48 Victims' Rights Act 2002, s 3.

49 Brown, above n 41, at 31.

50 David Garland "The cultural uses of capital punishment" (2002) 4 Punishment and Society 459 at 464–465 (emphasis in the original).

Subsection 21(2)(b) of the Victims' Rights Act 2002, which creates a presumption that victims may personally read their victim impact statement in court, is likely to have compounded this effect.

Of the statutory provisions outlined above, the general and specific requirements to impose the least restrictive sentences; the obligation of judges to consider discharging an offender; and the empowerment of judges to order pre-sentence reports would, in themselves, operate to reduce the rate at which custodial sentences were imposed upon offenders. Conversely, the provision for victims' participation in the sentencing deliberation would tend — though indirectly and on a case-by-case basis — to result in the imposition of a greater number of custodial sentences.

Reviewing the analysis above, the author suggests that the effects of the Sentencing Act 2002 and the Victim Rights' Act are neither uniformly oriented towards the expansion nor the contraction of the number of custodial sentences imposed. Accordingly, the combined effects of these provisions on the rate of custodial sentencing may have been mutually antagonistic and therefore relatively minor. Reviewing the substantive legislation in isolation, it could certainly not be expected that the application of new penal policies should have resulted in a 27.5 per cent increase in the rate of custodial sentencing between 1999 and 2009. It is therefore posited that the shift in judicial discretion as to the imposition of custodial sentences can be attributed not to the substantive content of the Sentencing Act 2002 or the Victims' Rights Act 2002 but, rather, to the increased pressure placed on judges by the public, the media and politicians towards more punitive sentencing practices. This conclusion is consistent with the analysis of Dr Warren Young, the Deputy President of the Law Commission, who has stated that:[51]

> Rather than attributing the growth to legislative change, it seems more plausible to suggest that judicial sentencing patterns have shifted in response to the prevailing political and public mood.

Similarly, a paper by Pratt and Clark supports the proposition that New Zealand judges have become subject to increased populist political pressure during the study period of this article:[52]

> Judges, though, in the aftermath of the [2002] election ... have certainly followed the new penal direction that had been demanded. Indeed, they had earlier been warned by the Labour Justice Minister [Phil Goff] to take note of public sentiment and expectations when sentencing. They risked losing their discretion and autonomy if they did not: "public opinion does not take kindly to being

51 Warren Young "Sentencing and Parole: A New Paradigm" in *Beyond Retribution: Advancing the Law and Order Debate: PFNZ National Conference 2006 Report* (Prison Fellowship of New Zealand, Upper Hutt, 2006) 37 at 38.

52 Pratt and Clark, above n 26, at 306–307.

> ignored, particularly when there is a suspicion it is being dismissed arrogantly" ... . (footnotes omitted)

Average length of imprisonment sentences

The provisions of the Sentencing Act 2002 outlined above that require judges to impose the least restrictive appropriate sentence and consider the effect of the offending on victims are likely to also have influenced the growth in the average length of determinate custodial sentences between 2004 and 2009. It is also probable that the decision on the length of determinate sentences has been affected further by the requirements of ss 8(c) and 8(d) of the Sentencing Act 2002: namely, that maximum and near-maximum sentences be imposed respectively for the most serious and near-to-most serious instances of any given offence.

It is suggested that the combined effect of these Sentencing Act provisions may have been a small upward displacement in the average length of nominal sentences of imprisonment, but that such can also be accounted for in terms of the increased public and political pressure on judges to exercise their sentencing discretion in a more punitive manner.

Number of people remanded in custody

The decision as to whether an offender or alleged offender is to be remanded in custody pending either trial or sentencing is administered by the courts in accordance with the Bail Act. Goff, during his tenure as Minister of Justice, cited repeatedly this enactment as "toughening" the bail system, resulting in a significant increase in the number of people remanded in custody.[53] As shown in the statistical analysis above, the number of people remanded in custody per 100,000 has indeed increased dramatically — by 113.2 per cent between the 1999 and 2008 fiscal years.

However, a causal nexus between the provisions of the Bail Act 2000 and the increased remand population cannot be established as clearly as the former Minister's statements would suggest. In order to demonstrate this causal disconnect, the provisions of the Bail Act as applicable to the remanding in custody of alleged offenders are briefly canvassed below. Sections relating to the granting of bail after conviction but prior to sentencing have not been included in this account, as the Parole Act deems any custodial time served by an offender awaiting sentence to be "pre-sentence detention" and accordingly "time served" for the purposes of calculating the overall length of an offender's imprisonment term.[54] The total amount of time served by an offender — and, it follows, the overall

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53 Phil Goff "Tougher laws, better policing push up jail numbers" (press release, 23 January 2005); Phil Goff "Statistics, review show Sentencing Act working well" (press release, 6 September 2004); Phil Goff "Tougher laws driving up prison population", above n 45.

54 Parole Act 2002, ss 90–91.

size of the custodial population — is not, therefore, affected by whether a convicted offender is remanded in custody pending the imposition of a sentence.

The Bail Act creates three broad classes of accused, each with different entitlements regarding the granting of bail on committal to trial. The first class of accused, established by ss 7(1) to 7(3), are entitled to bail as of right. The second class of accused "must be released by a court on reasonable terms and conditions unless the court is satisfied that there is just cause for continued detention".[55] The considerations relevant to determining whether there is a just cause for continued detention are contained in s 8 of the Act, which for the most part, simply restate standard bailing practice. The sole idiosyncratic feature of this provision is s 8(4), which requires the court to take into account victims' views on the granting of bail.[56]

The third class of accused in the application of the Bail Act comprises those whose alleged offending constitutes any of the following: treason or espionage, serious violent offences (as defined in s 10(2)), drug dealing and offending that carries a maximum sentence of three or more years' imprisonment committed by persons with certain defined criminal records. Alleged offenders who fall within this class either cannot be granted bail without an order from the High Court, or must satisfy an onus placed upon them to prove to a judge that there is no just cause for their continued detention.[57] Further, the accused must show on the balance of probabilities that they will not commit violent or dangerous offences while on bail.[58]

Summarising the analysis above, it can be observed that the only features of the Bail Act that would tend to result systemically in alleged offenders being remanded in custody are s 8(4) (which facilitates victims' participation in the decision on whether bail is granted), and the regime operative on the third class of accused above. It is submitted that while s 8(4) may have had a limited causal effect on the increase in the rate at which alleged offenders are remanded in custody between 1999 and 2009, the provisions operative on the third class of offenders cannot, in themselves, have been determinative of this increase. The reasoning behind this proposition is that an analogous regime in respect of the third class of accused was in force prior to the implementation of the Bail Act 2000: specifically, the list in s 10(2) corresponds to s 318(7) of the Crimes Act 1961; the treason and espionage provisions correspond to s 318(1) of the Crimes Act 1961; and ss 16–17 are analogous to ss 30 and 30A of the Misuse of Drugs Act 1975.

The causal relationship between the enactment of the Bail Act 2000 and the increased remand population can be further repudiated by

55 Bail Act 2000, s 7(5).

56 Ibid, s 8(4); see also Victims' Rights Act 2002, ss 29–30.

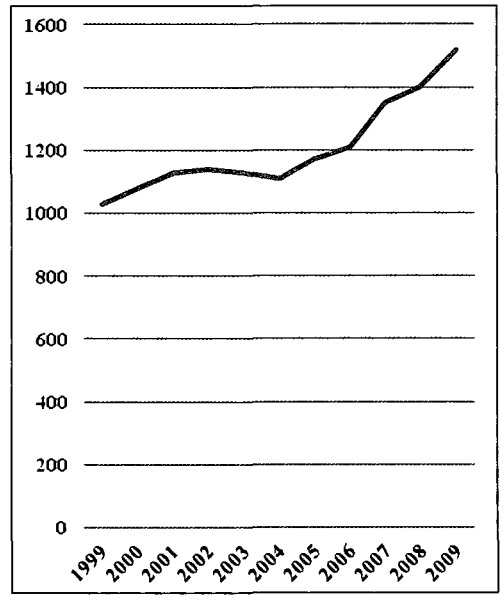
57 Ibid, ss 9–10, 12 and 16–17.

58 Ibid, ss 10(5) and 12(5).

analysis of the growth trend in the number of people remanded in custody per 100,000. As there have been no amendments to the Bail Act 2000 such as to affect the substance of the bail regime, one would expect that if features of that legislation were to have affected the remand population such would be evident in a population spike subsequent to enactment followed by a stable trend. However, the number of people remanded in custody per 100,000 has increased at a relatively constant gradient between 1999 and 2009 (Figure 7). This phenomenon would suggest, therefore, that the increased rate at which alleged offenders are remanded in custody is caused by factors extrinsic to the enactment of the Bail Act 2000.

One suggested cause for the increased rate at which alleged offenders are remanded in custody is the significant increase in reported violent crime between 1999 and 2009. This increase is likely to have had a significant effect on the remand population as far as violent crimes are more likely to result in alleged offenders being remanded in custody than other categories of offending. This proposition is evident both in terms of the s 8 considerations for determining a just cause for continued imprisonment, and in the character of specified offences in s 10(2) for which the granting of bail is restricted. Support for the proposed relationship between the increased rate of reported violent crime and the increased remand population can be taken from the similar growth trends of these two figures. This correlation is evident upon comparison of Figures 7 and 8.

Figure 8: Recorded violent offences per 100,000



A further possible factor in the increase in the proportion of alleged offenders who are remanded in custody is the impact — in the same manner as suggested above in respect of judicial sentencing discretion — of increased public and political pressure on judges to incarcerate offenders.

Average length of custodial remand periods

The factors that contribute to the decision as to whether an alleged offender is remanded in custody are entirely distinct from the factors causing the amount of time that an offender will spend on remand. Whereas the former

is determined by the exercise of judicial discretion, the latter depends on the amount of time it takes for an offender's case to come to trial, and on how long it takes for that trial to conclude in a verdict. Any increase on the average amount of time taken for a criminal case to progress from committal to verdict would, therefore, go some way to explaining the 57 per cent growth in the average length of custodial remand periods. The best available indication of the trend in the average disposal time of criminal trials is taken from a Law Commission commentary document accompanying a draft of what eventually became, at the time of writing, the Criminal Procedure (Reform and Modernisation) Bill.[59]

According to this source, the median time taken to dispose of a District Court jury trial from first appearance until sentencing increased from 10.75 to 12 months from 2004 to 2009; the median time to dispose of a High Court jury trial increased from 11 to 16.5 months; and the median time to dispose of a summary defended hearing decreased from 176 days in 2004 to 157 days in 2009.[60] Because this data covers only half of this article's study period, any analysis of this data will necessarily be incomplete. Moreover, because of several limitations of the statistical usefulness of this data, the 12 and 50 per cent increases in the median disposal times of District Court and High Court jury trials are only capable of providing a very rough and incomplete indication of whether increased court delays may have been causative of the growth in average custodial remand periods. This factor, however tenuously established, is likely to have been itself caused in part by the 24 per cent increase in the number of charges brought per 100,000 between 1999 and 2009.

Conclusion

Summarising the analyses in the preceding subsections, the following inferences can be drawn:

The increase in the number of reported violent crimes per 100,000 may overstate the incidence of actual violent offending between 1999 and 2009. During this period, the widespread social construction of violent crime in New Zealand likely contributed to the increased rate at which police recorded reported violent offending. This increase might also be accounted for by increases in the number of police staff per 100,000.

The increase in the number of prosecutions per 100,000 can be explained both in terms of a possible increase in actual violent crime and by the growth in police numbers.

The only feature of the Sentencing Act 2002 likely to have increased systemically the rate at which custodial sentences are imposed is the requirement that judges take into account the subjective impact of crimes on

59 Criminal Procedure (Reform and Modernisation) Bill 2010 (243-2).

60 Law Commission "Criminal Procedure (Simplification) Project: Reforming Criminal Procedure" (NZLC LP0, 2009) at [4].

victims in their sentencing deliberation. As this factor cannot itself explain the significant increase in the custodial sentencing rate, and in the absence of any other potential causal factors, the more plausible explanation is that the increased rate of custodial sentencing is a result of judges' responses — intentional or otherwise — to an increasingly punitive public and political environment.

The requirement that judges impose either maximum or near-to-maximum sentences for the worst instances of a given offence may have had an effect on the increase in the average length of determinate custodial sentences. This provision is the only point of difference between the features of the Sentencing Act 2002 applicable to the imposition of custodial sentences as against the determination of sentencing length. It can therefore be concluded that, in the same manner as the increase in the custodial sentencing rate, judicial responsiveness to public and political pressure is the most significant factor in the increased average length of custodial sentences.

Of the provisions of the Bail Act most likely to have increased systemically the rate at which alleged offenders are remanded in custody, only the requirement that judges consider the opinion of victims was not already present in the previous bail regime. Accordingly, only this provision could possibly have caused the increased rate of remand between 1999 and 2009.

The growth in the number of reported violent offences will likely have had a significant impact on the increase in the rate at which alleged offenders were remanded in custody between 1999 and 2009. This impact may be explained by the fact that those accused of committing violent crime are less likely to receive bail than those accused of non-violent offences.

The shift towards a more punitive public and political mood has likely been influential on judges' discretion on the granting of bail in the same manner as suggested above in respect of judicial sentencing practice.

The increase in average custodial remand periods between 1999 and 2009 can be attributed partially to increases in the median amount of time taken to dispose of a criminal jury trial from committal to sentencing. However, this conclusion should be read with great caution as it relies on problematic and incomplete data.

V CONCLUSION

On the basis of the foregoing sections of this article, it is argued that the primary driver of the increase in New Zealand's rate of incarceration between 1999 and 2009 has been the increase in punitive public and political pressure brought to bear on judicial discretion in imposing sentences and the granting of bail. Accordingly, any policy intervention

aimed at reversing the upward trend of New Zealand's rate of incarceration should target the operation of this judicial discretion.

One means by which such an intervention could occur would be a concerted effort on the part of the government, the community and voluntary sectors towards moderating the national discourse on crime and punishment, and forming a public and professional commitment not only to lower the rate of incarceration but also to increase the use of rehabilitative and restorative sentencing practices.

Another means of reducing New Zealand's rate of incarceration would be to bring sentencing practice under the regulation of a centralised policy mechanism rather than leaving it to individual discretion and appellate judicial authority. Such a measure was attempted by the Labour government under Helen Clark between 2006 and 2008 in the form of the proposed "Sentencing Council". This council was to be a hybrid body of the executive and judiciary, empowered by the legislature, to set presumptive guidelines for sentencing. This initiative was based on the Law Commission's report *Sentencing Guidelines and Parole Reform*[61] and was passed into legislation by the Sentencing Council Act 2007, the Sentencing Amendment Act 2007, the Parole Amendment Act 2007, the Victims' Rights Amendment Act 2007, and Bail Amendment Act 2007.

However, the operative provisions of these Acts in respect of the Sentencing Council had not been commenced by Order in Council at the time of the 2008 general election. The National Party, which opposed the Sentencing Council in opposition, has declined to commence the operation of these provisions since coming into government. Indeed, the establishment of the "three strikes" sentencing regime by the Sentencing and Parole Reform Act 2010 indicated that the National government under John Key was set to continue the "law and order auction" unabated. However, the Deputy Prime Minister Bill English has recently indicated a possible change in policy direction when he referred to prisons as a "moral and fiscal failure" in a speech to a Families Commission forum.[62] This comment provides some hope for the future of New Zealand's criminal justice policy, and for the reversal in the trend of an ever-increasing rate of incarceration.

61 Law Commission, above n 21.

62 Editorial "Prisons: 'moral and fiscal failure'?" *Otago Daily Times* (Dunedin, 24 May 2011) at 8.