

Tough on crime is not smart on crime

United States Judge Peggy Hora has seen the impact of 'tough on crime' policies in California, where overcrowding of prisons has been found to breach the Constitution. Such policies also breach fundamentals of justice and rehabilitation, she says, noting that the most effective criminal justice initiative in decades in Australia have been drug treatment courts.

The shibboleth 'tough on crime' is one politicians find quite appealing. The problem is that being tough – without being smart and effective – makes the community less safe and also costs money better spent on other services that have been squeezed dry by the global financial crisis.

California, for example, enacted the toughest 'three strikes' law in the United States. Not only did juvenile offences count as strikes but the third strike could be a conviction of any felony. For instance, a 17-year-old who stole bicycles from two attached garages and at age 18 stole a candy bar could be sentenced to life in prison. How could that be? Felony strikes under that state's law included not only violent crimes but 'serious' offences as well such as residential burglaries. Once convicted of a theft crime for which jail time was imposed, any future theft can be charged as a felony. Thus, the juvenile convictions for two residential burglaries, serious felonies that were strikes, and the theft of the candy bar was a felony so the Three Strikes law applied.

The California Supreme Court upheld such sentences for an offender who stole a slice of pizza and another who stole a DVD as the third strike. It was a distraught father whose daughter was murdered by a recent parolee who led the fight to enact the Three Strikes law. He also led the fight to modify it last year when he learned of the incredible human and economic cost the law had brought. Even the prison guards' union supported the modification.

When prisons became so overcrowded in California that inmates were triple bunked in cafeterias, lawsuits challenging such conditions were brought against the authorities. Another major lawsuit challenged the lack of mental health treatment in custody. Thirty percent of California's prison population of 119,542 (about the population of Darwin) has a mental illness.¹ Despite spending upwards of \$8.6 billion on prisons every year, the lack of services got so bad that two years ago the US Supreme Court, hardly a bastion of soft-on-crime adherents, found the inhumane conditions constituted 'cruel and unusual punishment' in violation of the 8th Amendment of the US Constitution. The District Court judge's order requiring better services and the release of 30,000 prisoners to ease overcrowding must be complied with by December 2013. Failure to do so will subject the governor and other authorities 'individually and collectively' to a finding of contempt of court.²

'CATCH AND RELEASE'

In South Australia the 'tough on crime' rhetoric reached a crescendo when then Treasurer and Deputy Premier Kevin Foley said the way to address jail reform was to 'rack 'em, pack 'em and stack 'em' in prison. He said he and his party were 'clearly walking the walk on law and order.'³ The general public's support for such rhetoric is waning in Australia and abroad. The proportion of Australians who agree that stiffer sentences are needed has gradually declined.⁴ Few offenders receive a life term; most serve their sentence and return to the community. Do they return ready to reintegrate and become productive? Alas no, and the community knows it. 'The majority of Australians have little or no confidence in the prison system to rehabilitate prisoners (88 per cent), as a form of punishment (59 per cent) or in teaching prisoners skills (64 per cent).'⁵



The current criminal justice system of 'catch and release' is expensive and ineffective. While incarceration temporarily contains the problem it does not act as a general deterrent nor does it guarantee a crime-free life for those who experience it. More than one third (39 per cent) of Australian prisoners are re-arrested and returned to correctional services within two years of their release.^{6,7}

There are many strategies to address this problem, from reduction of the prison population through community corrections to justice reinvestment initiatives.⁸ It is clear that people who end up in prison have social deficits that must be addressed if there is a hope of keeping them out of custody. Australian prisoners are economically disadvantaged, stigmatised, experience social exclusion and have poor physical and mental health. These problems are exacerbated when the offender is Aboriginal.⁹

SUBSTANCE ABUSE AND OFFENDING

Alcohol and other drugs it seems fuel crime worldwide. The tangible costs attributable to alcohol and illicit drugs in Australia each year are around \$19 billion.¹⁰ According to the Australian Institute of Criminology, a number of recent Australian studies have found strong links between illicit drug use and offending among both adult and juvenile prisoners.¹¹ In New South Wales, for example, burglars using heroin commit a median of 13 burglaries per month.¹² Although drug users constitute two thirds of the prison population,¹³ few prisons adequately address dependence. One glowing exception is the Compulsory Drug Treatment Correctional Centre in Sydney.¹⁴ In 2006 the NSW Drug Court, Justice Health Services and the Department of Corrective Services developed the first penal institution in Australia focused on treatment and recovery.

However, in-custody treatment is just a first step. While treatment can begin in prison, social reintegration into the community to which the offender returns is a must. A supportive environment with clean and sober housing, outpatient chemical dependence treatment and other ancillary services are necessary if these persons are to stay out of custody. Upon exit from prison there should be a reintegration plan, agreed to by the offender, which addresses these concerns.

The most effective criminal justice initiative in decades, drug treatment courts (DTC), began in Australia in 1999. The first drug treatment court started and is still going strong in Parramatta, NSW. Two other sites in that state also have drug treatment courts. Lawyers in Wollongong are currently pushing for a fourth NSW court to be established there.¹⁵ Adelaide opened its first Drug Court in 2000. All but one state or territory has at least one drug court. There are other 'solution focused' courts in Australia that concern mental health, Aboriginal sentencing issues (the Nunga Court in Adelaide and the Koori Court in Melbourne), youth and, soon, child abuse and neglect issues, with a family drug treatment court pilot planned for Melbourne from 2014. The Victorian Association of Drunk and Drug Driver Services held a conference last year to look at the development of an impaired driving court initiative.

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SPECIALIST COURTS

A drug treatment court focuses on the alcohol and other drug dependence that acts as a catalyst for crime. The offender is offered the opportunity to participate in substance abuse treatment instead of going to prison. Over 20 years of research have shown that drug treatment courts not only reduce crime by as much as 35 per cent but cost less than traditional court processes as well.¹⁶ The drug treatment court judge is the head of a team consisting of the prosecutor, defence counsel, treatment providers, community corrections officer, coordinator and case manager. Some teams include police, housing specialists, mental health care professionals and others representing services the offender may need. Working in a non-adversarial context, every team member weighs in on recommended incentives and sanctions for compliance or non-compliance with the participant's treatment plan. The judge makes the final decision and engages with the offender to increase his or her internal motivation to do well. This matrix forces all members of the team to step outside their traditional role, an uncomfortable situation for some. There are over 2,700 drug treatment courts in the US and similar entities in over 20 countries. New Zealand is one of the newest to come on line with two courts opening in Auckland in 2012.

The United Nations Office on Drugs and Crime (ONODC) has been very supportive of drug treatment courts and has developed guidelines for their operation. These 12 guidelines (see breakout) mirror the Ten Key Components followed since 1994 in the US¹⁷ plus add two additional ones.

Twelve principles for court-directed treatment and rehabilitation programs

1. The programs should integrate substance dependency treatment services with justice system case processing.
2. A non-adversarial approach should be used, in this manner prosecution and defence lawyers promote public safety while protecting offenders' due process rights.
3. Eligible offenders should be identified early and promptly integrated into the program.
4. The programs should ensure access to a continuum of substance dependency treatment and other rehabilitation services.
5. Compliance should be monitored objectively through frequent substance abuse testing.
6. A coordinated strategy should govern responses of the court to program non-compliance (and compliance) by offenders.
7. Ongoing judicial interaction with each offender in a program is essential.
8. Monitoring and evaluation should be carried out to measure the achievement of program goals and gauge effectiveness.
9. There should be continuing interdisciplinary education to promote effective planning, implementation and operation of these court-directed programs.
10. Partnerships should be forged among courts directing treatment programs, public agencies, and community-based organisations in order to generate local support and enhance program effectiveness.
11. Ongoing case management should include the social support necessary to achieve social reintegration.
12. There should be appropriate flexibility in adjusting program content, including incentives and sanctions, to achieve better program results with particular groups, such as women, indigenous people and minority ethnic groups.

Source: Informal Expert Working Group on Drug Treatment Courts, United Nations Office on Drugs and Crime, 1999.





Although most drug treatment courts in Australia are doing well, and new ones are opening, there have been two major setbacks which will, hopefully, not become a trend. The first came in July 2012 when, without notice, the NSW Government closed the state's Youth Drug and Alcohol Court, leaving the legal community and the magistrate who presided over it angry and baffled. 'About 20, 21 young people a year graduated from the program. I know for a fact that many of them are now working productively, they're good members of the society,' said Magistrate Hillary Hannam. 'A number of them even say, in the feedback I get to this day, that it was drug court that literally saved their lives.'¹⁸ The newly-elected Government said it was closed as an austerity measure.

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The second blow to solution-focused courts in Australia came in Queensland in September 2012. The Murri Court serving Indigenous offenders, Special Circumstances and Drug courts were all closed, again purportedly for fiscal reasons. As the Queensland Law Society president pointed out, however, instead of costing the Government, the Drug Court alone saved over \$6 million a year.¹⁹

Australia has adopted international best practices by promoting drug treatment courts for alcohol and other drug dependent offenders. Although there have been some steps backwards, it appears that the remainder of the courts are moving forward in the right direction. Smart on crime, not tough on crime, saves money, reduces crime and saves lives.

Judge Hora retired from the California Superior Court after serving 21 years. She was one of the founders of the drug treatment court movement and is a global leader in justice reform. In 2009-2010 she was South Australia's Thinker in Residence studying the justice system. Over 85 per cent of her recommendations were accepted by the Attorney General. Her report may be found at: http://www.thinkers.sa.gov.au/lib/pdf/hora/smartjustice_lo.pdf



1. Editorial, 'Mental Illness in California Prisons,' *The New York Times*, 10 April, 2013.
2. 'California governor has 20 days to fix overcrowded prisons or be put on trial,' *RT*, 12 April 2013, available at <http://rt.com/usa/prisons-state-court-california-775/>
3. K Wheately, 'Packing our prisons just doesn't stack up,' *The Advertiser*, 8 (May, 2008).
4. L Roberts, D Indermaur, *What Australians think about crime and justice: results from the 2007 Survey of Social Attitudes*, Australian Institute of Criminology, 2007.
5. Ibid.
6. Productivity Commission, *2010 Report on Government Services*, Volume 1, Commonwealth of Australia, 2010.
7. In the Northern Territory the rate is 47.3 per cent, ibid.
8. A colloquium titled "Is Justice Reinvestment needed in Australia" took place at Australia National University in Aug 2012; The Australian Senate's legal and Constitutional Affairs Committees is due to report later in June on the 'value of a justice reinvestment approach to criminal justice in Australia'.
9. Australian Institute of Health and Welfare, *Australia's Health 2008*, Canberra.
10. DJ Collins, HM Lapsley, *The costs of tobacco, alcohol and illicit drug abuse to Australian society in 2004-05*, Commonwealth of Australia, 2006.
11. L Forsythe, *Measuring mental health in criminology research: Lessons from the Drug Use Monitoring in Australia program, Technical and background paper series no.54*, Australian Institute of Criminology, 2013.
12. RJ Stevenson & LMV Forsythe, *The stolen goods market in New South Wales: An interview study with imprisoned burglars*, New South Wales Bureau of Crime Statistics and Research, 1998.
13. J Payne, A Gaffney, *How much crime is drug or alcohol related? Self-reported attributions of police detainees*, Australian Institute of Criminology, May 2012.
14. A Birgden, 'A compulsory drug treatment program for offenders in Australia: Therapeutic jurisprudence implications', *Australian Journal of Correctional Staff Development*, 2010.
15. E Spillett, 'Lawyers push for drug court in Wollongong,' *Illawarra Mercury*, 8 April 2013.
16. See, for example, Australian Institute of Criminology, *New South Wales Drug Court Evaluation: Cost-Effectiveness*, 2002.
17. National Drug Court Resource Center, *Defining Drug Courts: The Key Components*, at <http://www.ndcrc.org/content/defining-drug-courts-key-components>
18. A Harvey, 'Anger as NSW axes youth drug court', *ABC News*, July 4, 2012.
19. T Moore, 'Diversionary courts fall victim to funding cuts', *brisbanetimes.com*, Sept. 13, 2012.

