The Case Against Prisons
EXECUTIVE SUMMARY

In a recent NZ Herald interview, Minister of Justice Andrew Little argued that New Zealand’s criminal justice processes are not working. The approach of locking up ever-increasing numbers of people hasn’t made our communities any safer, and evidence shows that some of our policies are in fact harming our communities in the long term. His comments come at a time when the Government is actively considering the expansion of New Zealand’s prison estate through a new facility in Waikeria.

Among the public, there are several prominent arguments that drive the belief in prisons as institutions that promote and maintain public safety. These include assumptions that prisons are necessary to deter offending, to rehabilitate, and to grant restitution to victims and survivors. All of these assumptions are contradicted by research and by the experiences of people who have been directly affected by this system.

This paper examines these arguments from a theoretical perspective and looks to contribute to the conversation by critiquing the evidence behind the use of prison as a criminal justice tool. While this paper does not focus on current prison practices in Aotearoa, JustSpeak acknowledges the historical and cultural context that has resulted in the hyperincarceration of Māori within the New Zealand prison system.

New Zealand’s history of colonisation has contributed to the layers of structural inequality faced by Māori, who make up over 50% of the prison population despite being 15% of the population. One in every 142 Māori New Zealanders are in prison, compared to one in every 808 non-Māori. In 2017, Māori were more likely to be sent to prison than non-Māori in every category of offending. Two thirds of Māori are reconvicted within two years of being released from prison, compared to just over half of Pākehā, a disparity upheld by
the Waitangi Tribunal as a breach of the Government’s Treaty of Waitangi obligations. Structural discrimination against Māori is evident at every level of the criminal justice system, from apprehension to sentencing and beyond.

Although criminal justice policies of the past may lead some to believe that prisons promote public safety, they in fact promote significant and self-perpetuating harm. In this paper, we discuss the evidence around prisons as an institution in the international context. We examine the capacity of prisons to deter crime, their inherently damaging nature, and the effectiveness of rehabilitation in a prison setting. We also briefly discuss alternative methods of restitution, and the process of coming to terms with harmful behaviours for offenders as well as victims. Finally, we conclude by comparing the reliance on prisons with our approach to public policy in other sectors of life, ultimately arguing in support of decarceration.

Within this paper, JustSpeak continues to approach research in a new way, with the expectation of continued active engagement. This paper serves as a springboard: a brief, theory-focussed, international case against the institution of prisons. The paper will be presented at a number of public forums which will include a focus on the current New Zealand prison context, including the impending question of whether the current government will stop the planned rebuild of Waikeria prison.

JustSpeak hopes that this paper helps to debunk the idea that prisons facilitate safety for the New Zealand public, and that it will make a contribution to broader work which focuses on investing in genuinely effective efforts to reduce harm in our communities.
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INTRODUCTION
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In New Zealand, the argument primarily used in favour of prisons is that of public safety. That is: prisons are to keep the non-offending public safe from those who would do harm.

Public safety is one of the key principles of the Corrections Act 2004\(^1\) and the Department of Corrections’ ‘bottom line’. Elsewhere people argue economically that prisons divert the costs of crime for the period the criminal is incarcerated\(^2\).

In addition to public safety; deterrence, restitution, and rehabilitation have all been used as arguments in support of prison over the last three decades. We can see this in the Sentencing Act 2002 and the Department of Corrections’ better public services targets.\(^3\)

The logic behind deterrence is that, as prisons are unpleasant places; a rational person is discouraged from engaging in antisocial behaviour in the knowledge that prison is the likely outcome. Comparatively, restitution involves a balancing of the scales. A victim has been harmed in some way, and so punishing the injurer by denying them their liberty fulfils the duty of the state to acknowledge the original harm. Rehabilitation recognises the state’s obligation to ensure that the offender is equipped for a life without crime.

However, no matter how well-meaning these arguments are, they do not factor in prison’s inherent harmfulness and ineffectiveness in rehabilitating. We must consider the nature of abuse - physical, sexual and emotional - that has often been perpetrated against the incarcerated person. ‘Victims’ and ‘offenders’ are often the same people within our society, and imprisonment exacerbates the harms that many people in our criminal justice system have already experienced.

This argument is not a new one. Sir Clinton Roper’s Ministerial Committee of Inquiry in the 1980s also recommended significant and transformational change to the justice sector. The report Te Ara Hou – The New Way condemned the NZ prison system as being over-populated, generally destructive of human personality, violent,
and a waste of taxpayer money. Roper’s assessment holds true thirty years on: today we see an exploding prison population, intergenerational offending patterns, and a stark failure to achieve an ambitious Better Public Services policy goal to reduce recidivism by 25% by 2017.

**Figure 1: Prison population 2000 - 2017**

Source: Justice Sector Outlook Monitoring Report, 2016; Department of Corrections Prison Facts, 2017

These issues remain at the heart of our justice system. Consider the burgeoning prison muster and the current pressure to build what would be the largest prison ever constructed in New Zealand; it is now time to revisit the questions that underpinned the Roper report and consider whether prisons keep people safe in the long term.

Our focus on public safety begs the question: has an approach of low risk tolerance in fact become one that undermines public safety? The investment of state resources into prison building and incarceration has led to more people being imprisoned - and when imprisonment increases the likelihood of reoffending, any investment in the prison system only exposes our communities to higher levels of risk and further criminal activity.

In this report, we examine prisons’ incapacity to deter crime, their innately damaging nature, and the effectiveness of rehabilitation in a prison setting. We also discuss alternative methods of restitution, and the process of coming to terms with harmful behaviours for offenders as well as victims. Finally, we conclude by critiquing New Zealand’s approach to criminal justice and contrasting it with other sectors of life; ultimately arguing in support of decarceration.
ARE PRISONS REALLY ABOUT PUBLIC SAFETY?

Photo credit: Christian Bardenhorst
ARE PRISONS REALLY ABOUT PUBLIC SAFETY?
Investigating the case against prisons

DETERRENCE

The concept of deterrence is straightforward. Prison sentences function as a form of punishment, and we assume that people wishing to avoid this punishment are deterred from criminal acts they might otherwise consider carrying out.8

The deterrent effect, in theory, applies both to individuals who are being sentenced - a reason not to offend again - and to others who observe this process and think twice about committing crimes in the future. However, evidence demonstrates that in the majority of circumstances, deterrence is almost entirely ineffective. Simply put, most people do not pause to consider the possibility of imprisonment when they engage in criminal activities.9

There are some situations where risk of imprisonment is an effective criminal deterrent. However, research from the United States suggests that these cases most often involve white middle class men committing white-collar crimes, which comprise a small minority of criminal cases. Within this demographic and type of offence, prisons and the risk of imprisonment do have a deterrent effect.10 This is due to the rational, profit-oriented criminality of white-collar crime, in which the risks and rewards are carefully evaluated by risk-averse potential offenders.11

However, besides this demographic, prisons and punishment do not deter people from offending and reoffending, and in many cases actually increase the risk of reoffending.12

Mental health and substance abuse disorders are common issues within the prison population. High-risk behaviours can be motivated by poor mental health, and underlying issues such as addiction often prevent people from making
the connection between risky behaviours and the consequences.\textsuperscript{13} 91\% of people in prison have been diagnosed with a mental health or substance abuse disorder, and 42\% face multiple conditions, which often remain undetected or are not treated appropriately within the prison.\textsuperscript{14}

For individuals who are returning to prison, the deterrent effect is complicated by their past experience in prison. Criminal attitudes, networks, and strategies are learned and developed in a prison setting, which can have the effect of creating familiarity and reducing the deterring effect of the prospect of future incarceration.\textsuperscript{15}

In some circumstances, people sentenced to prison will not perceive it as punishment in the way that others do. For some people, prison may offer a better quality of life than what they have experienced in the community.\textsuperscript{16} This is particularly true for people who repeatedly find themselves homeless between short prison sentences for low-level offences. The punitive impact of prison is undermined by dire personal circumstances, and it becomes unlikely that incarceration will act as a deterrent.\textsuperscript{17}

Despite our reliance on incarceration as a response to a wider range of offenses, prison is often an inappropriate sentence for those who have engaged in harmful behaviour. The concept of deterrence is scientifically unsupported and further challenged by the reality of the complex and harmful consequences of prison sentences on prisoners and their whānau.

**RESTITUTION**

A key argument for prison, and sentencing in general, is restitution or a balancing of the scales. With imprisonment, the deprivation of an offending individual’s liberty and autonomy is intended to provide closure to the victim. However, this approach is far from cost free - it carries significant negative consequences that are often under emphasised.

First and foremost, the fiscal cost of imprisonment is the highest of all sentencing options at approximately $90,000 per prisoner per year\textsuperscript{18}. Compare that to annual costs of $21,000 for home detention and $6,000 for community detention\textsuperscript{19}. 
Moreover, a sentence of imprisonment can:20

• break down social and family bonds which are often key relationships that could reduce the risk of reoffending
• remove adults from families, leaving children without their parents;
• deprive communities of income;
• reduce future employment opportunities for the individual imprisoned (noting also that employment reduces the risk of reoffending);
• engender resentment to the justice system; and
• increase the likelihood of reoffending.

Social and family bonds are broken down because the sentenced individual is taken away from their whānau and community. As a result, family - and especially children - are deprived of the support and companionship of the imprisoned individual. This is estimated to effect 20,000 children in New Zealand.21 A child whose parent is in prison is 8-10 times more likely to end up in prison themselves.22

Imprisonment can also have ripple effects on an imprisoned person's broader community. The removal of an individual from a community deprives it of income. Individuals are no longer available to work and provide financial support for their family, nor are they able to contribute to the local economy. This effect lasts beyond prison because a conviction makes it more difficult for the individual to obtain new employment when their sentence is complete.

The desire to balance the scales through punishment is ultimately unjustifiable in face of the ongoing and immediate costs of incarceration. These costs are often disproportionate to the effects of the offending and perpetuate cycles of harm.

**VICTIMS’ RIGHTS**

For victims, imprisonment may be seen as the state acknowledging the suffering that has been caused by the offending. In this sense, the knowledge that someone has been sent to prison may act as a catharsis for the victim. While perhaps intuitively attractive, this oversimplifies a complex situation. This is because prison sentences
often do not reconcile the harms between offenders and victims. Reconciliation, the focus of restorative justice processes, is far more effective at healing and closure for a victim after experiencing harm.

It is important to consider the place and rights of victims in the criminal justice system. The Victims Rights Act 2002 (VRA) sets out victims’ participation rights when defendants appear before the courts or the Parole Board. Under the VRA, victims of certain offences can participate in parole decisions as well as give their view on whether the defendant should be released on bail and obtain name suppression.

Most significantly, during sentencing victims also have the right to provide Victim Impact Statements (VIS), which can be read out in court. These statements serve two main purposes: an “informative” purpose (providing further information to the court) and an “expressive” purpose (as a means of catharsis for the victim).

Research from a number of jurisdictions overseas suggests that some victims have positive responses after making a VIS. But there are still severe limitations on what the VIS model can achieve for a victim’s recovery. There are legal limits on what victims can say in a VIS and statements often have to be vetted by Crown prosecutors. Furthermore, the formal atmosphere of a courtroom is not conducive to victims fully expressing themselves. In that respect it is not surprising that they do little to improve people’s experiences of, and satisfaction with, the criminal justice system.

Given the participation rights that victims have, a sentence of imprisonment is unlikely to ever result in a meaningful reconciliation between offender and victim. Therefore, if one of the purposes of imprisonment is to “balance the scales”, then there are far more effective alternatives that are currently being underutilised. One of these is restorative justice, which is discussed in more detail later.

REHABILITATION

The strategic objectives of the Department of Corrections include “[c]reating lasting change by breaking the cycle of re-offending” with a goal “[t]o reduce reoffending by
and ensure that public safety always remains a key goal. It is an unfortunate fact that the goals of New Zealand’s prison system - to both rehabilitate and incapacitate - are often contradictory in nature. The key issue is whether prison conditions are conducive to rehabilitation. In fact, the Department of Corrections itself acknowledges that community-based rehabilitation programmes are twice as effective as prison-based programmes. The same research finds that, for programmes to be effective in reducing reoffending, staff must be empathic, respectful, warm, confident and persuasive. Prison conditions can make this extremely difficult to achieve.

This was demonstrated most recently in a 2017 report on an unannounced inspection of Christchurch Men’s Prison by the Office of the Ombudsman. Charged with rehabilitating and protecting inmates, the report documents a high prevalence of prisoner on prisoner, and prisoner on staff violence within the prison.

In addition to rehabilitative programs, New Zealand prisons have invested significant resources into education and employment training, in an attempt to improve prisoners’ employment prospects. This is important since secure employment significantly reduces the risk of reoffending. While these programs often teach important skills, a sentence of imprisonment makes it much harder to find work, and any of the benefits of education and employment training could be achieved with less cost and fewer negative side effects in the community.

Where rehabilitation is the aim, the evidence demonstrates that community-based programmes are more effective, cheaper, and have fewer negative effects, such as separating parents from children or forcing people into unemployment. While prison-based rehabilitation is not impossible, it is substantially more challenging and less successful than alternatives.
ALTERNATIVES TO PRISON
Decarceration and the future

RESTORATIVE JUSTICE

This paper has so far shown that sentences of imprisonment do not provide proper catharsis for victims, nor do they effectively rehabilitate those who offend. Restorative justice can achieve both of these goals. Restorative justice is victim-centred. It seeks to resolve the impact of criminal offending by addressing the harms done to victims and to the community, while also holding the offender personally to account for their actions and the consequences.29

Restorative justice has proven effective in supporting the recovery of victims following an offence. In 2016, the Ministry of Justice conducted a survey measuring victims’ experience of, and satisfaction with, restorative justice processes.30 The survey found that 84% of victims were satisfied with the restorative justice conference they attended. 64% of participants said they felt better afterwards, and 81% said they would be likely to recommend restorative justice to others in a similar situation.31

Furthermore, another Ministry of Justice study found that participants in restorative justice processes were less likely to reoffend than those that did not.32 Restorative justice processes are better for victims and better at keeping the public safe.

JustSpeak would like to see increased funding and training to ensure the wider use of restorative justice in the criminal justice system, including greater use in the High Court. We recognise that such changes require increased investment in restorative justice service providers, but also recognise the better outcomes for victims, offenders, and the community.

The evidence suggests that the greater the trauma in a given situation, the more powerful restorative approaches can be.33 While this may seem counterintuitive, a Ministry of Justice survey reports that 71% of victims in family violence cases
reported feeling better after their conference, compared to 61% for non-family violence cases. Restorative justice conferences require significant preparation and involvement, and do not provide an “easy out” for defendants who are often confronted directly with intense (and justified) pain and anger felt by victims.

There is sometimes speculation that defendants only participate in these conferences to get a reduced sentence. However, concerns about cynical appearances by defendants do not seem to square with victims’ generally positive experiences, or the fact that restorative justice reduces reoffending.

In our view, restorative justice must be used as a “real alternative to the adversarial process.” This will provide a way victims can be genuinely involved in the dispute resolution process and that restitution can be provided to the victims.

**COMPARATIVE FRAMEWORKS**

It is interesting to compare the low tolerance to risk approach in criminal justice with other areas of public policy. With some issues, such as obesity, managing risk is seen largely as an issue for education and personal responsibility - notwithstanding the high costs put on the State - and by extension all people in New Zealand.

It is also worth examining road safety; a similar area of public policy where the behaviour of one individual unduly impacts other individuals, rather than the state as a proxy. Here, while there is a degree of enforcement, education and community-based penalties are the primary tools in limiting harm.

Understanding that road crashes are inevitable, policy and legislative change has sought to reduce the potential risks of alcohol-related road crashes by imposing laws reducing blood alcohol limits for adult drivers. During this period, community based penalties such as mandatory licence suspension, vehicle impoundment for disqualified drivers, zero-alcohol licence suspensions, and testing for ‘drug drivers’ also were imposed to combat casualties.
These community based approaches operated alongside television advertisements where prosocial behaviour was promoted as the State response to keeping the public safe from road crashes.

Another area where the public can be harmed by the behaviours of others is that of workplace health and safety. Like road safety, there is a comfortable acceptance of risk and its trade-offs. Far from a low tolerance to risk of harm in the workplace; under the new Health and Safety at Work Act all employers have to do is take all “reasonably practicable” steps to ensure workplace safety.

Section 22 of the Act therefore gives a certain amount of tolerance to employers in terms of what they have to do to eliminate workplace risks. This is in stark contrast to the lack of leniency to risk in the criminal justice system when decisions about bail, sentencing and parole are being made. In those situations there is a narrow - and as seen in this paper - ultimately counterproductive approach to risk.

**CONCLUSION**

The low tolerance to risk in the criminal justice system is now a high risk to public safety. It has given us an ever-expanding prison population and is ineffective at:

- providing restitution to victims compared to community-based restorative justice;
- rehabilitating compared to community-based programmes; and
- deterring unwanted behaviour.

All the while imprisonment costs far more than community-based programmes, which reduces the money available for health and education, but requires a new prison every half decade.

There must be - and there is - a better way.
ENDNOTES

14 New Zealand Department of Corrections, 2016: 79
25 Department of Corrections. (2018). About Us. Retrieved from http://www.corrections.govt.nz/about_us.html. The goal was originally to be achieved by 2017; however, having failed to achieve this goal a new timeframe has not been announced.
31 It should be noted that this represents a drop from the 2011 survey where 74% of victims reported feeling a positive impact from attending a restorative justice conference.
We are shaping the future of Aotearoa.