

## Sentencing Matters

# How Much Does Imprisonment Protect the Community Through Incapacitation?

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## Summary

Sentences in Victoria may be imposed for one or more of the following purposes (*Sentencing Act 1991* (Vic) s 5(1)):

1. punishment;
2. denunciation;
3. rehabilitation;
4. deterrence; and
5. community protection.

As part of the Council's statutory function of conducting research and disseminating information on sentencing matters, this paper examines the effectiveness of imprisonment in achieving community protection through incapacitative methods. While deterrence and rehabilitation also seek to protect the community from further offending, incapacitation is a means of protecting the community by removing or reducing the physical *capacity* of an offender to offend.

The most obvious form of incapacitation is a sentence of imprisonment. However, there are other forms of limited or partial incapacitation, including curfews and restrictions on movement (such as home detention), monitoring and reporting requirements as well as forms of drug therapy.

This paper focuses on imprisonment, as it is the most severe, iconic and resource-intensive form of incapacitation. It is the form most commonly assumed to be effective and is the focus of most empirical research into this subject.

The incapacitative effect of imprisonment presents a compelling logic: while in prison, an offender cannot offend in the community. Consequently, the incapacitation of an offender may be expected to prevent crime that an offender would commit were he or she at liberty in the community.

Incapacitation research generally takes two forms: collective incapacitation and selective incapacitation. They differ according to the extent to which they are focused on predictions of an offender's risk of committing further offences. In a system of collective incapacitation, such predictions are not relevant to decisions to imprison or the determination of the length of a term of imprisonment, whereas they are the primary focus of selective incapacitation.

Sentences of imprisonment exert a significant incapacitative effect on offenders for the duration of their imprisonment. The findings from studies into incapacitation, however, suggest that a system of collective incapacitation that increases the use of imprisonment or the length of prison terms without distinguishing between offenders who exhibit varying degrees of risk of future offending will generally be ineffective in achieving significant long-term reductions in crime. The findings indicate that the costs of such policies may outweigh the initial benefits, and that, as the imprisonment rate increases, those benefits may even be reversed to a point where the crime rate begins to increase due to the criminogenic influence of imprisonment.

Research findings suggest that policies of selective incapacitation might be more effective in reducing crime. Such policies attempt to identify those offenders who are likely to commit numerous serious crimes in the future and sentence them to lengthy prison terms. However, there are a number of legal, moral and practical difficulties in determining which individuals should be selectively incapacitated, and estimates of the future risk of offending are not precise.

The most definitive indicator of probability of future offending is prior history of offending; however, it necessarily takes time to accumulate a lengthy criminal record. Criminal career research suggests that, over time, and with increasing age, there is a decline in criminal activity for most offenders. This suggests that the ideal time within most criminal careers to effectively incapacitate an offender may be very difficult to identify prospectively.

Research to date indicates that optimistic assessments of the crime-reducing benefits that might be expected from the use of imprisonment as a means of incapacitation must be weighed against an appreciation of its limitations.

Imprisonment serves purposes other than incapacitation. Increases in the imprisonment rate or lengths of imprisonment may be appropriate to achieve other sentencing purposes, such as punishment and denunciation.

## Incapacitation in Victoria

### Incapacitation and sentencing adults

The *Sentencing Act 1991* (Vic) ('the Act') is the principal source of legislative guidance on sentencing in Victoria. Section 5(1) of the Act states that the only purposes for which a sentence may be imposed in Victoria are to provide just punishment, to manifest denunciation, to facilitate rehabilitation, to act as a deterrent<sup>1</sup> and to 'protect the community from the offender' (section 5(1)(e)).

The purposes are not expressed in a hierarchy, and one purpose is not considered paramount. Similarly, a sentence may be imposed that seeks to achieve a combination of purposes.

The first two purposes can be seen as direct responses to the offence committed. Punishment is a form of redress of the moral imbalance caused by crime – inflicting on an offender a sanction that is in proportion to the harm he or she has caused. Denunciation is a statement to the offender (and to the community at large) that such criminal behaviour will not be tolerated.

Protecting the community from an offender does not necessarily require imprisoning that offender, and this purpose may be fulfilled through the imposition of other sentencing orders.<sup>2</sup> For example, a community correction order that requires the offender to attend drug or alcohol treatment will protect the community insofar as it assists in the rehabilitation of the offender and reduces the likelihood of reoffending.

Section 5 of the *Sentencing Act 1991* (Vic) identifies 'the protection of the community' as a specific purpose of a sentence and not merely a consequence of a sentence imposed to achieve other purposes. The particular rationale for the use of imprisonment to achieve the purpose of community protection is that it denies the offender the opportunity to commit those crimes that the offender would commit were he or she free in the community. As a result, community protection (while it is arguably the ultimate goal of all the purposes of sentencing)<sup>3</sup> is the one most commonly associated with incapacitation.

<sup>1</sup> In 2011 the Council published a review of the evidence on the deterrent effect of imprisonment (Ritchie, 2011). Sections of this report replicate material from that report.

<sup>2</sup> *Director of Public Prosecutions v Buhagiar* [1998] 4 VR 540, 547.

<sup>3</sup> *R v Williscroft* [1975] VR 292.

The courts are also guided by sentencing principles established at common law, including the principles of totality and proportionality. Another principle under which courts must sentence is that of parsimony, expressed in both the common law and section 5(3) of the *Sentencing Act 1991* (Vic).

The principle of parsimony requires that a court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed.

### Community protection and incapacitation under the common law

In the case of *Brewster*, the United Kingdom Court of Criminal Appeal affirmed community protection in the form of incapacitation as a purpose of sentencing. The court stated:

In all the circumstances of this case the sentence ... was the right one, the reason being this. There is no hope of rehabilitating this man. There is no hope that he will be deterred by prison sentences. All that the courts can do with him and his like is to ensure that they do not carry out raids on other people's houses for very substantial periods. That is the justification for this sentence.<sup>4</sup>

Australian courts emphasise that community protection, as with all other sentencing purposes, should not offend the sentencing principle of proportionality. That principle requires that, when offenders are sentenced, the overall punishment must be proportionate to the seriousness of the offending behaviour.

In *R v Roadley*, Crockett, O'Bryan and McDonald JJ referred to the High Court decision of *Veen v The Queen [No 1]*<sup>5</sup> and affirmed that:

the protection of the public does not alone justify an increase in the length of a sentence. Such protection is undoubtedly a factor to be taken into account. But it cannot be allowed to produce a sentence that is disproportionate to the offence. The sentence must be fixed by the application of well-established principles of sentencing.<sup>6</sup>

In *Veen v The Queen [No 2]*, Mason CJ and Brennan, Dawson and Toohey JJ said:

It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.<sup>7</sup>

Making this distinction is not an easy task, and consequently:

the practical observance of a distinction between extending a sentence merely to protect society and properly looking to society's protection in determining the sentence calls for a judgment of experience and discernment.<sup>8</sup>

The prohibition on the extension of a sentence for the purpose of 'preventive detention' was also confirmed in *Chester v The Queen*, where the court stated that:

it is now firmly established that our common law does not sanction preventive detention. The fundamental principle of proportionality does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender.<sup>9</sup>

### Community protection and incapacitation in legislation

The common law principles do not preclude parliament from providing to the contrary, and a number of legislative measures in Victoria permit the incapacitation of offenders, through the imposition of imprisonment, detention or supervision, for the express purpose of community protection.

<sup>4</sup> *Brewster* (1980) 2 Cr App R (S) 191, 376.

<sup>5</sup> *Veen v The Queen [No 1]* (1979) 143 CLR 458.

<sup>6</sup> *R v Roadley* (1990) 51 A Crim R 336, 343.

<sup>7</sup> *Veen v The Queen [No 2]* (1988) 164 CLR 465, 473.

<sup>8</sup> *Ibid* 474.

<sup>9</sup> *Chester v The Queen* (1988) 165 CLR 611.

### **Serious offender provisions**

In addition to being listed as a sentencing purpose in section 5 of the *Sentencing Act 1991* (Vic), the protection of the community is also relevant for the purposes of the serious offender provisions in Part 2A of the Act.

Part 2A concerns the sentencing of offenders who have previously been convicted of (and sentenced to a term of imprisonment for) arson, drug, sexual or violent offences. In sentencing an offender under this Part, the court must regard 'the protection of the community from the offender' as the principal purpose of the sentence, and may, contrary to the common law principle discussed above, impose a sentence 'longer than that which is proportionate to the gravity of the offence'.<sup>10</sup>

Further, Part 2A reverses the general statutory presumption that sentences are to be served concurrently,<sup>11</sup> instead stating that every term of imprisonment imposed on a serious offender for a relevant offence must, unless otherwise directed by the court, be served cumulatively on any uncompleted sentence or other sentence imposed.<sup>12</sup>

This provision acts as a form of selective incapacitation, targeting those repeat offenders who, by their prior offending, demonstrate an identified risk to the community, to the extent that protection of the community from the offender is to be not simply one purpose, but the *principal* purpose of the sentence imposed.

### **Indefinite sentences**

While the common law does not allow preventive detention, the rationale for an indefinite sentence under the *Sentencing Act 1991* (Vic) is precisely on the basis of a continuing risk.

Under section 18B of the Act, a court may impose an indefinite sentence on an offender convicted of a serious offence (as defined by section 3) if it is satisfied, to a high degree of probability, that the offender is a serious danger to the community. The indefinite imprisonment of such an offender acts as a means of selective incapacitation.

Considering the indefinite sentence provisions in Victoria, Winneke P, in the case of *Moffatt*, stated:

It cannot be denied that the concept of preventive detention is at odds with the fundamental sentencing principle that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender ... None the less, it is, in my view, the clear intent of the legislation that the power should be exercised sparingly and only in the exceptional case where the nature of the offence viewed in the context of the offender's past history and/or criminal disposition compels the court to the conclusion that the offender is a serious danger to the community.<sup>13</sup>

### **Continuing criminal enterprise provisions**

Under Part 2B of the *Sentencing Act 1991* (Vic), certain offenders who are convicted of two or more specified property-related offences are subject to a maximum penalty on their third conviction of either double the ordinary maximum penalty or 25 years (whichever is the lesser).<sup>14</sup> Although the rationale for this enhanced penalty is not stated as being for the purpose of protecting the community, the increased sentence that may result could be seen as a way of incapacitating such repeat property offenders.

### **Other schemes**

There are a number of other schemes that seek to protect the community through means of incapacitating an individual that are not strictly considered to be sentences but are related to the sentencing process.

Under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic), certain offenders who have served custodial sentences for particular sexual offences and who present 'an unacceptable risk'<sup>15</sup> of harm to the community (by committing a relevant offence) may be subject to ongoing supervision or detention.

As with an indefinite sentence, the legislative scheme established by the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) represents a policy of incapacitation that seeks to remove or limit the capacity of an offender to offend within the

<sup>10</sup> *Sentencing Act 1991* (Vic) ss 6D(a)–(b).

<sup>11</sup> *Sentencing Act 1991* (Vic) s 16(1).

<sup>12</sup> *Sentencing Act 1991* (Vic) s 6E.

<sup>13</sup> *Moffatt* (1997) 91 A Crim R 557, 561–562.

<sup>14</sup> *Sentencing Act 1991* (Vic) ss 6G–6J.

<sup>15</sup> *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ss 9(1), 35(1).

community as its primary rationale. The legislation expressly states that the treatment and rehabilitation of such offenders are the 'secondary purpose'.<sup>16</sup>

Similarly, the *Sex Offenders Registration Act 2004* (Vic) requires certain sex offenders to comply with ongoing reporting requirements by providing information to police concerning their employment, accommodation and living arrangements and other similar details.

A recent report by the Victorian Law Reform Commission examined the operation of the sex offenders registration scheme (Victorian Law Reform Commission, 2012, p. xii) and recommended that the scheme should operate as a means of selectively incapacitating particular offenders, stating:

The Commission considers that the registration scheme should be refined and strengthened in order to concentrate upon those people who pose the most risk to children.

Another recent report, by the Law Reform Commission of Western Australia (2012a) into that jurisdiction's sex offender registration scheme, also favoured an approach that would generate an increased level of selective incapacitation. The Commission recommended 'a discretionary approach whereby the sentencing court can take into account the circumstances of the offence and the offender' (Law Reform Commission of Western Australia, 2012b, p. ix), effectively targeting those offenders who pose the greatest risk of reoffending.

Another legislative scheme in Victoria, established by the *Working with Children Act 2005* (Vic), requires people who work with, or care for, children to have their suitability to do so checked by a government body. This requirement represents an attempt to protect children from sexual or physical harm by selectively limiting the capacity of people who may pose a risk of reoffending from working with children.

Other powers under the *Mental Health Act 1986* (Vic) require an assessment of whether members of the public may be 'endangered', for the purposes of particular decisions, suggesting that an individual may be incapacitated when that danger is substantiated.

While the rationale for these various schemes may be the same as that for 'community protection' as a purpose of sentencing, they are not strictly sentencing matters and are beyond the scope of this paper.

<sup>16</sup> *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 1(2).

## Incapacitation and sentencing young offenders

In Victoria, the Children's Court has jurisdiction to hear and determine most offences committed by children, if the offender was under 18 years old at the time of the alleged commission of an offence and is under 19 years old at the time when proceedings are commenced.<sup>17</sup> The sentencing of offenders in the Children's Court is governed by the *Children, Youth and Families Act 2005* (Vic).

The purposes of sentencing in the *Children, Youth and Families Act 2005* (Vic) differ 'in kind and emphasis' from those in the *Sentencing Act 1991* (Vic) (Sentencing Advisory Council, 2012, p. 51) with the rehabilitative purposes given priority when sentences are imposed on children.

Section 362(1) of the *Children, Youth and Families Act 2005* (Vic) outlines the principles to which the Children's Court must have regard when sentencing a child, among which is included 'if appropriate, the need to protect the community or any person from the violent or other wrongful acts of the child'.

This 'community protection' purpose is the last on the list of seven purposes. The policy behind this sentencing purpose appears to be one of selective incapacitation, allowing the court to identify a particular child offender as being at risk of, in particular, further violent offending within the community, and providing justification on that basis for the imposition of a more severe sanction.

<sup>17</sup> Seven death-related indictable offences are excluded from the jurisdiction of the Children's Court: *Children, Youth and Families Act 2005* (Vic) s 516(1)(b).

## Incapacitation and imprisonment

### Collective and selective incapacitation

Research into incapacitation has been divided into two forms: collective incapacitation and selective incapacitation. Greenberg (1975, p. 542) first elaborated this distinction, establishing that:

By selective incapacitation, we mean the prevention of crime through physical restraint of persons selected for confinement on the basis of a prediction that they, and not others, will engage in forbidden behaviour in the absence of confinement. By contrast, collective incapacitation refers to crime reduction accomplished through physical restraint no matter what the goal of confinement happens to be (deterrent, rehabilitative, incapacitative, etc.), and where decisions about who is to be imprisoned need not necessarily entail predictions as to future conduct.

Policies of collective incapacitation may, for example, involve increasing sentence severity for all offenders convicted of a particular offence and preventing crime through traditional forms of sentencing, focusing on the seriousness of the offence in question without attempting to gauge future risk.

On the other hand, sentencing under a policy of selective incapacitation is less influenced by the particular offence and more dependent on a scheme or system that identifies 'dangerous', 'risky' or 'recidivist' offenders and subjects those offenders to longer periods of imprisonment than for others (Auerhahn, 2003). The focus is shifted from the offence to the offender, and a policy of selective incapacitation seeks to apply longer sentences to those 'identified as high-rate offenders by some prediction method' (Chan, 1995, p. 1).

The various studies have generally examined incapacitation using this conceptual distinction, separating 'collective' from 'selective' incapacitation. Consequently, a similar distinction is adopted below.

It should be noted, however, that a 'three-strikes' policy, for example, that 'selectively' incapacitates an offender sentenced for a third conviction may essentially become, over time, a policy of collective incapacitation, as the number of offenders that satisfies this threshold becomes the majority. While conceptually distinct, it is difficult to argue that, in practice, a 'three-strikes' policy that targets habitual drug offenders, for example, is 'selective' in any legitimate sense, if the majority of such offenders will go on to be sentenced for a third conviction.

### Collective incapacitation

As described above, collective incapacitation involves increasing sentence severity for all offenders convicted of a particular offence, and preventing crime through traditional forms of sentencing, focusing on the seriousness of the offence in question without attempting to gauge an individual's future risk. A collective incapacitation strategy would require similar sentences for offenders convicted of the same offence.

The ability of the criminal justice system to detect, investigate, prosecute, convict, sentence and ultimately imprison offenders demonstrates, at each of those stages, an attrition effect, as fewer offenders progress to each subsequent stage. Consequently, the extent to which collective incapacitation can prevent crime is dependent (as with any sentencing policy) on the number of offenders who are ultimately sentenced to imprisonment.

### Selective incapacitation

Selective incapacitation seeks to identify those offenders who pose the greatest risk of reoffending and select them for imprisonment (or for longer terms of imprisonment) on the basis of that prediction.

Spelman (1994, p. 100) notes that targeting this group of offenders should theoretically result in significant crime reduction, as:

The distribution of offense rates is highly skewed—a few offenders commit crimes at much higher-than-average rates. Thus incarcerating the most frequent 10 percent of offenders could prevent the commission of between 40 and 80 percent of personal crimes, and between 35 and 65 percent of property crimes.

Auerhahn (2003) comprehensively studied the Californian prison system's 'three-strikes' laws, which are considered a form of selective incapacitation in that a third-strike offender (that is, an offender convicted of a third offence) is selectively incapacitated in comparison with a first-strike offender. In practice, however, the application of the sentencing enhancement (over time) to a significant proportion of drug offenders, for example, suggests that the policy is one of 'mass incarceration' (Auerhahn, 2003) rather than targeted, selective incapacitation.

As part of that study, Auerhahn identifies the challenges for selective incapacitation policies that claim to effectively target dangerous offenders. Auerhahn (2003, p. 157) notes that:

First, they need to make clear what a dangerous offender *is*, taking seriously the input of the public in formulating this definition. Second, they need to ensure that these dangerous offenders are actually the ones targeted for selective incapacitation.<sup>18</sup>

The particular kind of dangerous offender targeted by a selective incapacitation policy requires careful attention. Spelman (1994, p. 109) notes that:

About two-thirds of active offenders are specialists, committing only property crimes or only personal crimes. But the typical generalist—an offender who commits crimes of both types—is 3 to 5 times as dangerous as the typical specialist. The most frequent offenders are also most likely to be versatile. As a result, selective methods that predict high-rate generalists are likely to be especially effective at reducing crime.

Often legislative prescriptions that seek to implement selective incapacitation do so by focusing on recidivist offenders who repeatedly commit the same type of crime (repeat sex offenders, for example) rather than the ‘generalists’ that Spelman describes.

Auerhahn also cautions against placing too high an expectation on the success of this approach, stating that (at least in respect of the United States) many people are attached to the belief that selective incapacitation of particularly dangerous offenders ‘can provide a solution to all of our crime problems’ and that this persists ‘[d]espite the lack of empirical confidence that can be mustered for policies based on the principle of selective incapacitation’ (Auerhahn, 2003, p. 36).

Selective incapacitation need not solve *all* crime problems, however; in order to be an effective crime-reducing strategy, and indeed the criminal justice system already acts effectively as a system of selective incapacitation. Piquero and Blumstein (2007, p. 281) considered that:

the goals of selective incapacitation are achieved just by chance alone because the [offenders with the highest offending frequency] are more likely to be arrested, convicted, and incarcerated because they ‘roll the dice’ more often such that their higher offending frequency puts them at a greater annual risk of experiencing the variety of criminal justice interventions leading to incarceration.

It can be argued that the consideration of prior offending history as part of sentencing (which a court in Victoria must consider when sentencing as part of an offender’s ‘previous character’)<sup>19</sup> effectively generates predictions of future risk, as the most definitive predictor of future offending is prior offending (Kurlychek, Brame and Bushway, 2006).

### **Selective incapacitation and Victorian sentencing practices**

The Council recently conducted research into the sentencing practices and the predictors of sentencing outcomes for three offences: aggravated burglary (Sentencing Advisory Council, 2011a), intentionally causing serious injury and recklessly causing serious injury (Sentencing Advisory Council, 2011b).

The Council’s analysis shows that, after accounting for all other factors, a person with prior offences, and in particular prior imprisonment, is much more likely to receive a custodial sentence for any of the three offences than someone without prior offences or prior imprisonment.

The research on the two offences of causing serious injury went on to examine predictors of the length of imprisonment. It found that neither prior offences nor prior imprisonment significantly affected the length of imprisonment. That is, while prior criminal history affects the initial decision to imprison, it does not also affect the determination of the length of the imprisonment term.

The research indicates that, at least in relation to these three offences, there is a degree of selective incapacitation in Victorian sentencing practice, in that offenders who are considered at higher risk of reoffending (based on past offending behaviour) are more likely to be sentenced to a term of imprisonment.

<sup>18</sup> Emphasis in original.

<sup>19</sup> *Sentencing Act 1991* (Vic) s 5(2)(f).

## Measuring incapacitation

Community protection does not simply focus on the offence committed but seeks to prevent future offending. The extent to which particular sentences or sentencing policies are successful in preventing future offending is measurable, though there are considerable difficulties in generating estimates.

If imprisonment is an effective means of protecting the community from crime through incapacitation, it should prevent the commission of criminal offences. The challenge for researchers is to estimate the number of crimes that did not occur due to incapacitation alone, accounting, where possible, for all other influences that affect the crime rate.

## Modelling incapacitation

In order to account for a number of variables that influence crime rates, researchers have developed complex models that are 'attempts at generating plausible counterfactuals' (Bhati, 2007, p. 2). Mathematical models are employed, often based on the work of Avi-Itzhak and Shinnar (1973) and Shinnar and Shinnar (1975). More recent detailed estimates generated by Weatherburn, Hua and Moffatt (2006) have expanded on these models and seek to identify the various elements that influence the effect of incapacitation. Each of these elements and how they relate to incapacitation theory are discussed below.

### The rate at which offenders commit crimes

One of the significant challenges facing research into incapacitation is identifying the rate of offending for an offender who is free in the community, described as 'lambda' ( $\lambda$ ). This measure is critical for generating the estimate of crime averted by incapacitation.

#### Identifying lambda ( $\lambda$ )

Zimring and Hawkins (1995) identify three main research methods that have been used to measure the frequency of offending and, as a result, incapacitation: survey research, official-record studies and community-level studies.

#### Survey research

Survey research relies on data from self-reported surveys of offending behaviour. The surveys seek to estimate offending frequency by asking offenders how many times they have

committed an offence within a period leading up to their present imprisonment. For example, Salmelainen (1995) surveyed 247 juvenile offenders in detention in New South Wales, asking them whether they had ever committed a particular offence (in this case burglary), and if so, how many times within the six months prior to the arrest that eventually led to their detention.

Salmelainen's study found that 71.5% of the respondents had committed a burglary offence within the period of analysis, and the average frequency of offending was just over one offence every three weeks (Salmelainen, 1995, p. 23). As other studies have shown (Farrington, 2003), a small number of offenders are responsible for a large proportion of the offences. The most prolific offenders (20% of the respondents) were responsible for 76.1% of the offences committed during the measurement period (Salmelainen, 1995, p. 24).

Zimring and Hawkins (1995) note that the margin of error associated with offender survey-based estimates of incapacitation is large, and that most overestimate the incapacitative effect by failing to account for the replacement effect, including the effect of 'group persistence' where a criminal group recruits new members to replace those who have been imprisoned.

Johnson and Raphael (2006, p. 3) confirmed the problem of the margin of error, stating that:

Results from this [survey] research vary considerably across studies (often by a factor of ten), a fact often attributable to a few respondents who report incredibly large amounts of criminal activity.

#### Official-record studies

Another method of estimating offending frequency and incapacitation is through official-record studies. This requires identifying a particular offender at a point in his or her criminal career, and using one of two methods to generate estimates of his or her prevalence of crime while at liberty.

One method is to count forward (prospectively) the number of arrests for that offender, from the event that led to his or her inclusion. Alternatively, the official record can be studied backwards (retrospectively), examining the prior criminal career of the offender. This is done in order to determine whether that offender would not have been at liberty to commit intervening offences if he or she had been subjected to a harsher sentence (such as a longer term of imprisonment) as a result of earlier offending.

Zimring and Hawkins (1995) note that these individual crime rate estimates cannot overcome the problem of the replacement effect, as it cannot be determined how many offences, in retrospect, would have been committed by another person, for example. Similarly, prospective studies may include crimes that would have been committed by others.

Because official-record estimates cannot include offences that are not detected, Zimring and Hawkins (1995, p. 88) note that they:

tend to underestimate the volume of crime committed by individual sample members, and thus the potential extent of incapacitation. On the other hand, survey estimates tend toward overestimation.

### **Community-level studies**

In addition to measures that seek to identify 'lambda', some broader scale, community-level studies seek to estimate incapacitation by comparing crime rates in two different areas at the same time (described as 'cross-sectional' or 'comparative' research) or alternatively in the same area at different times (described as 'temporal' or 'time series' studies).

The challenge for community-level studies is that they measure an incapacitative effect indirectly, and so to isolate incapacitation as the causal influence on any change in crime, the studies must account for all other influences on crime (for example, rehabilitation efforts, deterrence, changes in demographics, economic and employment conditions and so forth).

As a result of these many and complex variables, Zimring and Hawkins (1995) considered that it was highly unlikely that a single temporal or cross-sectional study could produce a definitive estimate of incapacitation.

The authors note that community-level studies may be of significant value 'in communities where large shifts in incarceration policy have recently occurred' (Zimring and Hawkins, 1995, p. 79). They also identify such 'natural experiments' as being of significant value to incapacitation research.

Each method of research has its own strengths and weaknesses, and Zimring and Hawkins suggest that the best approach to considering the results of this research is by 'combining individual-level and community-level studies and treating offender surveys and official-record analyses of individual crime rates as cumulative contributions rather than competing approaches' (Zimring and Hawkins, 1995, p. 79).

### **The fraction of crime avoided as a result of incapacitation**

Incapacitation is only concerned with the crimes that may have been committed by the individual offender who is incapacitated. This is, necessarily, a fraction of all crimes that may occur. Reuter and Bushway (2007, p. 260) draw attention to this point, and distinguish incapacitation from deterrence, stating that:

Incapacitation is potentially less efficient than deterrence, since one bed will only incapacitate one criminal at a time; in theory one prison bed might *deter* multiple potential criminals. But incapacitation is also more concrete than deterrence, which is notoriously difficult to measure. Therefore, incapacitation effects are often viewed as providing lower bounds on the crime-reduction benefits of prison.<sup>20</sup>

Further, where more than one offender is responsible for the commission of a single crime, for example, where two co-offenders are responsible for a series of burglaries where one acts as a lookout while the other breaks into properties to steal items, the incapacitative effect of imprisoning both offenders does not necessarily double the number of offences prevented.

### **Replacement effect**

The fraction of crime avoided as a result of incapacitation must also account for the 'replacement' or 'substitution' effect. This refers to the way in which the effect of incapacitation on the commission of crime may be negated when those offences that would have been committed by the offender who is incapacitated are instead committed by another person who is still at liberty in the community.

The extent of the replacement effect is believed to depend strongly on the type of offending for which the incapacitated offender has been convicted. Those offences that meet a 'demand' in a market are more likely to provide an incentive to others to engage in criminality where an offender has been removed from the community. For example, the demand for drugs, stolen goods and weapons may be independent of supply, and consequently the removal of an offender from the supply side of the transaction may have no effect on continuing demand.

Some research, however, suggests that this effect should not be overstated. In examining the role of targeted policing, Weisburd (2008) noted that enforcement efforts concentrated on a particular location, for example, do not always result in the mere displacement of criminal activity to other locations.

<sup>20</sup> Emphasis in original.

Reliable data on this limitation of incapacitation are not widely available. As Piquero and Blumstein (2007, p. 277) commented:

No information exists concerning how groups deal with imprisoned members, and whether this varies across crime types. We certainly know that drug markets recruit replacements for imprisoned participants (Blumstein 1993), and so few transactions are averted through incarceration. Some burglars operating in the service of a fence [being a person who incites or procures the stealing of property] might be replaced by the fence, but it is likely that most predatory crimes do not see much in the way of replacement.

Commonly, this limitation on the success of incapacitation as a general crime-control strategy cannot be estimated when researchers attempt to model the incapacitative effect of imprisonment. In order to make incapacitation estimates, the number of offenders in the community is often assumed to be finite (see, for example, the study by Weatherburn, Hua and Moffatt, 2006), and so the removal from the community of offenders (who are not replaced) may result in an overestimation of the incapacitation effect.

### **Offending within prison**

While imprisonment incapacitates an offender from committing offences within the community, which will go to the fraction of crime prevented, it does not prevent all offences that may occur *within* prison.

A recent New South Wales study reported that the rate of assault is 'more than 14 times higher inside prison than in the outside community' (Grunseit, Forell and McCarron, 2008, p. 244). Further, the report describes how, due to prison culture and the fear of reprisal from fellow inmates, 'many incidents of intentional violence ... go unreported' or are reported as 'accidents' (Grunseit, Forell and McCarron, 2008, p. 245).

In Victoria, in 2010–11 the rate of assault on prisoners by other prisoners was 14.9 per 100 prisoners and the rate of assault on staff or other persons by prisoners was 2.7 per 100 prisoners (Department of Justice, 2011). These figures do not include the incidence of other crimes, for example, drug possession and drug trafficking, within prison. A research paper by the New South Wales Department of Corrective Services found that, in a sample of 307 prisoners surveyed in 2003, 63.0% reported illicit drug use on at least one occasion during their current term of imprisonment (Kevin, 2005).

In addition to incidents of the most serious forms of offending, such as homicide, the widespread use of illicit drugs and the high rates of assault in prison demonstrate that imprisonment cannot entirely incapacitate offenders from committing offences.

### **The probabilities of being apprehended, convicted and sentenced to prison if convicted**

In order to estimate the effectiveness of imprisonment as a means of incapacitation, it necessarily follows that only those offenders who ultimately receive a sentence of imprisonment will be incapacitated. Accordingly, incapacitation (as with all sentencing purposes) is limited in the way in which it can influence the crime rate by the fact that only those offenders who are apprehended, convicted and sentenced can be the subject of the sentencing order.

At each stage of the criminal justice process, there is a diminishing effect. At the outset, not all crimes are reported, representing the 'dark figure' of crime (Skogan, 1977). Fewer crimes are successfully investigated resulting in the arrest of an offender. Fewer still are successfully prosecuted resulting in a conviction, and fewer again receive a sentence of imprisonment.

Each stage of the process leading to a sentence of imprisonment represents a separate element to be considered when estimating the effect of incapacitation. For example, changes to the arrest rate or to the rate of offenders receiving a sentence of imprisonment will have a significant influence on incapacitation.

### **The average time spent in custody**

Another element that must be considered when estimating the effect of incapacitation is the amount of time that an offender is incapacitated. The longer an offender is imprisoned, the less opportunity that offender has to commit offences in the community, and the bigger the 'slice' that may be taken out of an offender's criminal career (Blumstein, Cohen, Roth and Visher, 1986).

The most basic estimate of the amount of crime averted by incapacitation would be a multiplication of the amount of time an offender spends in custody (for example, in months) by the estimated number of crimes that an offender would commit (for example, in number of offences per month) if that offender were free in the community.

### **The average time offenders will remain involved in crime**

The point of time within an offender's criminal career at which the offender is imprisoned will have a considerable influence on the number of crimes that imprisonment is able to avert. The length of the offender's criminal career may also be affected by the criminogenic influence of imprisonment.

#### ***Criminal career research***

A policy of selective incapacitation that involves estimating a measure of future risk of offending is likely to rely on the offender's prior history of offending: the greater the prior history of offending, the more likely that the offender will reoffend (Kurlychek, Brame and Bushway, 2006). However, the accumulation of prior convictions over time necessarily means the offender has aged. As more convictions accumulate, the measure of future risk may seem to become more certain. Yet this does not account for the fact that, as offenders age, on average they tend to desist from crime (Farrington, 2003).

Piquero and Blumstein (2007, p. 277) comment that:

If the total time remaining in the career is less than the total time served, the time served after the career would have terminated represents a waste of prison space from an incapacitation perspective.

In other words, by the time an offender is targeted for selective incapacitation based on a confident measure of future risk (as a result of substantial prior offending), the offender may be at the point in his or her criminal career when he or she would naturally begin to desist from crime due to age. Desistance, however, is not uniform across all types of offenders, and there are offenders who continue to offend well into old age.

### ***Prison as a criminogenic influence***

It is widely accepted that, separate from offending within prison, imprisonment has an immediate incapacitation effect on the individual offender who is imprisoned, representing the 'individual impact' discussed above (Leipold, 2006). The effect of imprisonment on the *subsequent* offending behaviour of a prisoner after his or her release, however, is not as certain.

This is an important consideration, as almost all offenders sentenced to imprisonment in Victoria will, at some stage, be returned to the community, either at the completion of their sentence or when paroled. Whatever gains are made in the reduction of crime through the incapacitation of an offender must be considered in light of any increase in crime that results from that incapacitation after the offender is released.

In a meta-analysis of studies on the effect of imprisonment on recidivism, Smith, Goggin and Gendreau (2002) found that imprisonment was associated with an increase in recidivism when compared with community-based sanctions, and that longer terms of imprisonment (compared with shorter sentences of imprisonment) were associated with higher rates of subsequent reoffending.

There are a number of reasons why the experience of prison may result in a greater rate of reoffending upon release, in other words, that imprisonment has a *criminogenic* effect. Nagin, Cullen and Jonson (2009, p. 126) identify three main reasons:

- First, prisons can act as a criminal learning environment in which prison subcultures – acting in opposition to the ‘pro-social’ or rehabilitative environment intended by the state – encourage and reinforce criminal behaviour. Prisons are ‘marked by the presence of cultural values supportive of crime that can be transmitted through daily interactions’ and, as a result, ‘criminal orientations are potentially reinforced’ (Nagin, Cullen and Jonson, 2009, p. 126).
- Second, prisons may exert a labelling effect. This results from both publicly stigmatising a person as a ‘criminal’, which reinforces a criminal identity, and the subsequent reaction from society to that criminal identity. The consequences include denying future opportunities (such as employment), enforcing prolonged association with offenders and eroding social ‘ties to family and to the conventional social order’ (Nagin, Cullen and Jonson, 2009, p. 127). The severing of social ties reduces the offender’s ‘stakes in conformity’ resulting in a reduced incentive for law-abiding behaviour (Spohn, 2007, p. 31).
- Third, prison may simply be an inappropriate response to the criminality of most offenders, failing to treat the underlying causes of criminal behaviour. Research into identifying what form of treatments might address the factors predicting recidivism suggests that ‘mere incarceration absent a treatment component’ is an inappropriate intervention because it fails to achieve ‘meaningful reductions in recidivism’ (Nagin, Cullen and Jonson, 2009, pp. 127–128). Prison may be appropriate for high-risk offenders (Nagin, Cullen and Jonson, 2009, p. 128), but:

The danger is that inappropriate treatments—including imprisonment—can have a criminogenic effect on low-risk offenders, transforming those with low chances of [reoffending] into those destined to offend again.

Additionally, Jacobs (2010) identifies a number of responses by offenders to punishment (including imprisonment) that may result in recidivism. Offenders may commit additional crimes as a way to ‘lash out’ at what might be perceived as ‘capricious, unjust, or unfair’ sanctions; offenders may be subject to the ‘resetting’ effect of the ‘gambler’s fallacy’, thinking that ‘lightning won’t strike twice’ and that they will not be caught, punished and sentenced for subsequent offending; offenders may think they have learned from their experience of crime and lower their perceived certainty of detection when subsequently offending; and finally offenders who have been imprisoned are, by that fact, subject to a selection bias and may be ‘simply the most committed offenders who ... report a greater likelihood of future offending’ (Jacobs, 2010, p. 419, citing Wood, 2007, p. 9).

In a recent study, DeFina and Hannon (2010) examined the effect that imprisonment has on crime rates, taking into account the fact that the experience of imprisonment (as a criminogenic effect) cumulates in a population that includes, over time, more and more people released from prison. Their study notes that the overwhelming majority of people who are imprisoned will either complete their sentence or be paroled, and in either event return to living in the community. This is also the case in Victoria. The authors note that ‘[i]ncapacitation only happens in the fleeting present, whereas the criminogenic impact of prison may linger from the whole past’ (DeFina and Hannon, 2010, p. 1013).

DeFina and Hannon (2010, p. 1013) have identified a critical feature for modelling the effectiveness of incapacitation that has to date been overlooked in most research, stating that:

While the incapacitation function of incarceration is accurately captured by the proportion of the population *currently* constrained behind bars, the potential counterbalancing crime-promoting effect is not limited to current year values, but rather would be best estimated as the proportion of the population that has *at some point previously* experienced incarceration.<sup>21</sup>

Given the criminogenic influence of imprisonment, the success of incapacitation will not merely depend on increasing the length of prison sentences. The short-term benefit of incapacitating offenders for longer may be offset by the long-term consequence of extending the criminal career of some offenders who will continue to offend upon release.

<sup>21</sup> Emphasis in original.

## Research findings

The findings on the effectiveness of imprisonment as a means of incapacitation must be considered in light of the elements discussed above. Very few studies can account for all of those elements, in part because such elements are interrelated within a complex, dynamic system. Changes to any one element, such as increased resources for arrest and apprehension or the time within a criminal career at which an offender is imprisoned, will necessarily influence the incapacitative effect of imprisonment.

Further, it is important to note that findings on the effectiveness of imprisonment as a means of incapacitation are necessarily concerned with only one of the purposes of imprisonment. Regardless of the evidence of an incapacitative effect, in many cases imprisonment for substantial periods may be necessary in order to achieve other purposes of sentencing, such as denunciation and just punishment.

## Collective incapacitation

Spelman's exhaustive account of incapacitation in the United States (Spelman, 1994, p. 227) concluded that, despite the policies of 'mass incarceration' that have been adopted in many criminal jurisdictions within that country:

The present adult criminal justice system incarcerates between 6 and 12 percent of active offenders at any given time; the most reasonable single figure is 8.5 percent. This practice reduces the aggregate crime rate by anywhere from 16 to 28 percent, with a most reasonable value of 21 percent. As a result, a 1-percent increase in adult jail and prison populations would probably produce a 0.12- to 0.20-percent reduction in crime. Benefit/cost analysis suggests that, for most states and the nation as a whole, constructing additional jails and prisons is a risky investment with a very uncertain payoff.

Spelman's later review of research on crime and imprisonment (Spelman, 2000) reported the results of four studies that sought to account for the *simultaneity* effect (in other words, the corresponding effect that the criminal justice system has on crime and not simply the effect that crime has on the criminal justice system). By separating out the effect of imprisonment on the crime rate, the results of those studies provide a more accurate estimate of the incapacitation effect.

Spelman (2000) cited studies by Devine, Sheley and Smith (1988), Cappell and Sykes (1991), Marvell and Moody (1994) and Levitt (1996), each showing that an increase in the imprisonment rate of 1% would produce corresponding estimated decreases in the crime rate, of 0.16% (Marvell and Moody, 1994), 0.26% (Cappell and Sykes, 1991) and 0.31% (Levitt, 1996). Spelman also cites the results of Devine, Sheley and Smith (1988), who identified a 2.2% reduction in crime; however, the results were, as Spelman (2000, p. 481) describes, 'deviant by an order of magnitude' and relied on fewer controls than the other studies.

Wilson and Ashton's (2001) analysis of sentencing in the United States concluded that the increase in rates of imprisonment during the 1980s and 1990s did not lead to a simultaneous reduction in crime levels.

This finding was confirmed by Hannon and DeFina's (2009) study, which accounted for both the simultaneity effect described above and the potential criminogenic effect of imprisonment through prisoner releases. The authors analysed state-level data from the United States for the period 1978 to 2004 and concluded that the impact of imprisonment on property and violent crimes was different. Higher imprisonment rates translated into less property crime; however, the crime-reducing effect of imprisonment for this offence was significantly offset by the criminogenic effect of prison. For violent offences, the authors found that higher imprisonment levels resulted in higher rates of violent crime (Hannon and DeFina, 2009).

Although the study did not separate out the deterrent effect from the incapacitation effect of imprisonment, the results indicate that, at least for violent crimes, increases in the rate of imprisonment did not result in a decreased crime rate. Consequently, the authors questioned the effectiveness of collective incapacitation in the form of 'mass incarceration' as a crime-control strategy (Hannon and DeFina, 2009, p. 2), stating:

Indeed, if concern with violent crime was the principal motivator for the mass incarceration policies of the last few decades, the results suggest that these policies have been more than just inefficient, they have been counterproductive.

Another example of a study that measured the ability of the criminal justice system to collectively incapacitate offenders (absent increases in sentencing severity) is one of the few Australian studies to focus on incapacitation. Weatherburn, Hua and Moffatt (2006) estimated the existing incapacitation effect of imprisonment on burglary offenders in New South Wales, based on data of self-reported offending frequency collected by Salmelainen (1995). The imprisonment of burglary offenders was not a result of a deliberate policy that isolated a cohort of offenders and made a prediction about their future risk of offending that determined the sentencing outcome. Rather, imprisonment was a consequence of the ordinary process of sentencing in New South Wales.

Weatherburn, Hua and Moffatt (2006, p. 8) concluded that the rate of imprisonment in New South Wales at the time of the study kept the number of burglaries about 26% lower than it would otherwise have been, which they estimated equated to the prevention of approximately 44,700 domestic and commercial burglaries. The authors also estimated the potential effect of an increase in the average sentence length for burglaries on the number of burglaries committed each year (Weatherburn, Hua and Moffatt, 2006, p. 6), concluding that:

as the average sentence length increases from one year (its current level) toward two years, the incapacitation effect steadily increases from about 26 per cent, to a little over 34 per cent.

This incapacitation effect was calculated as equivalent to preventing a further 10,188 burglaries (Weatherburn, Hua and Moffatt, 2006, p. 6).

The authors qualified these findings by acknowledging a number of assumptions. Aside from the reliability of the self-reported data used to ground the estimates, the model used by the authors could not account for the replacement effect, discussed above. For an offence such as burglary, which may feed stolen property to secondary markets or is often used as a source of income for drug-affected offenders (Clare and Ferrante, 2007), the replacement effect may limit any net reduction in crime resulting from incapacitation.

Countering the replacement effect is the fact that a small number of offenders are extremely prolific (Wolfgang, Figlio and Sellin, 1972). If selective incapacitation results in prolific offenders being removed from the community, the offenders who replace them may not necessarily offend at the same rate.

Increases in sentencing severity across-the-board, directed at all potential offenders, will have significant and ongoing associated costs. The question of whether the benefits obtained through such a policy of collective incapacitation are worth the costs is an important consideration.

In their recent study on the effect of arrest and imprisonment on crime, Wan, Moffatt, Jones and Weatherburn (2012) concluded that, after accounting for increases in arrest and imprisonment likelihood, there is no evidence that increases in the length of imprisonment have any short- or long-term impact on crime rates. Consequently, the authors recommended that policy makers should focus more attention on those strategies that increased the risk of detection and arrest rather than the severity of punishment.

Estimating the marginal benefit of increasing the severity of sentences is the focus of Johnson and Raphael's (2006) study on the amount of crime estimated to be reduced for every additional 'marginal' prisoner. For the period studied, between 1978 and 1990, the authors found that a 1% increase in imprisonment resulted in a decrease of between 0.06% and 0.11% for violent crimes and between 0.15% and 0.21% for property crimes. The authors estimated that from 1978 to 1990, each additional prisoner year resulted in a reduction of approximately 30 crimes, while for the period 1991 to 2004, that estimate declined to eight crimes.

The authors (Johnson and Raphael, 2006, p. 32) explain that this decline:

suggests that the most recent increases in incarceration have been driven by the institutionalization of many inmates who, relative to previous periods, pose less of a threat to society. Indeed, given the much lower crime-abating effects for the most recent period, it is likely the case that for many recent inmates, the benefits to society in terms of crime reduction are unlikely to outweigh the explicit monetary costs of housing and maintaining an additional inmate.

This lack of benefit 'at the margins', however, does not negate the present strength of the criminal justice system to collectively incapacitate offenders, absent increases in sentencing severity.

A United States study by Liedka, Piehl and Useem (2006) found that the marginal benefits of increased imprisonment reach a point after which the increased imprisonment rate is in fact associated with a *higher* crime rate. The authors used state-level prison and crime data from 1972 to 2000, and found that higher crime rates were observed when a state's imprisonment rate reached between 3.25 and 4.92 inmates per 1,000 persons in the general population. This result may be associated with the criminogenic influence of imprisonment, and a cumulation of this influence within the community upon the release of former prisoners.

In Victoria, the rate of imprisonment at 30 June 2011 was 1.08 inmates per 1,000 persons in the general population (Australian Bureau of Statistics, 2011, p. 34).

In DeFina and Hannon's study of property and violent offending, the authors concluded that much of incapacitation research (even research that accounted for the criminogenic effect of prison) did not account for the cumulative effect of former prisoners re-entering the community (DeFina and Hannon, 2010).

DeFina and Hannon (2010, p. 1005) concluded that, after accounting for the build-up in the community of ex-inmates who have been exposed to the criminogenic influence of prison, the significant reduction in crime gained through incapacitation:

is completely offset by the cumulative positive and significant effect of reentry. That is, once lagged effects are accounted for, imprisonment has no net impact on property crime. The results for violent crime are even more contrary to the notion that mass [imprisonment] has improved public safety. Not only has mass [imprisonment] failed to reduce violent crime, mass reentry has significantly increased the overall violent crime rate.

Collective incapacitation policies also ignore the emerging finding from criminal career research that documents the decline in offending as offenders age. Lippke (2002, p. 24) notes that:

there are many individuals currently in our prisons who are dangerous and who would commit numerous serious crimes were they released. But there are also many individuals currently incarcerated who are unlikely to commit serious crimes were they released, or who would not commit many such crimes. The problem is that we have few reliable ways of distinguishing those in the former group from those in the latter groups, especially prior to their committing further crimes. Also, it seems likely that, given the effects of aging, many prisoners fall into the latter groups.

Collective incapacitation policies capture both the dangerous, recidivist offenders and those who are less likely to reoffend. Such policies are likely to initially provide a greater immediate reduction in crime than a policy of selective incapacitation; however, such gains cannot be assessed without considering both the cost of collective incapacitation in achieving that reduction in crime and the long-term effect of the criminogenic influence of imprisonment. Spelman (1994, p. 289) concludes that:

Collective incapacitation is a gamble. The direct benefits are much less than the direct costs[.]

## Selective incapacitation

Piquero and Blumstein (2007, p. 282) note that incapacitation research has primarily focused on collective incapacitation and has 'largely ignored selective incapacitation'. The basis for this is that 'few criminal justice policies have selective incapacitation as their goal' (Piquero and Blumstein, 2007, p. 282) and the criminal justice system already effectively acts as a system of selective incapacitation through the imprisonment of recidivist or repeat offenders.

A 2007 study on recidivism in Victoria showed that, of the prisoners released from a sentence of imprisonment in 2002–03, over 34.7% were convicted of further offences and were returned to prison within two years of release (Holland, Pointon and Ross, 2007, p. 13). The proportion of offenders returning to prison was highest for young offenders, with 55.7% of offenders aged 17–20 years returning to prison within two years (Holland, Pointon and Ross, 2007, p. 15).

In Victoria, almost half (47.9%) of adult prisoners in custody at 30 June 2011 had a known prior adult imprisonment (Australian Bureau of Statistics, 2011, p. 30). At a national level, over half (54.6%) of all adult prisoners in custody at 30 June 2011 had also served a sentence in an adult prison prior to the current episode (Australian Bureau of Statistics, 2011, p. 42).

While a prior history of offending may operate as an aggravating factor in sentencing and so as a means of selectively incapacitating offenders, similarly a reduction in sentence for a first-time offender could also be seen as a policy of selective incapacitation (Vollaard, 2011). As the 'non-discounted' penalty is applied to the repeat offender, the practical effect is that courts identify a prior history of offending as a risk factor for the repeat offender, and consequently apply a greater penalty.

Vollaard's study (2011) considered a policy of selective incapacitation of burglary offenders in the Netherlands in 2001. Habitual offenders with 10 or more offences on their record faced sentence enhancements of around 1,000%. This extraordinary increase was possible because prior sentences for these offences had been 'a few weeks or months', while under the new policy those offenders received sentences of 24 to 36 months (Vollaard, 2011, p. 10). The policy was rolled out in different regions at different times, which allowed the researchers to account for other possible influences that might have affected the reduction in crime that was observed.

The researchers concluded that 'the sentencing policy lowered the rate of burglary and theft from car by an estimated 40 percent through the incapacitation effect alone' (Vollaard, 2011, p. 33).

The policy was very narrowly applied, essentially being used as a sentencing option of last resort, such that (Vollaard, 2011, p. 8):

Only drug-using, older individuals who had many more than the minimal number of ten offenses on their record and were practically immune to treatment had a chance of being sentenced under the law.

Whether the success of such sentence enhancements could be replicated in other jurisdictions is questionable. The rate of imprisonment in the Netherlands in 2001 was equivalent 'to the rate in the beginning of the 1970s in the US' (Vollaard, 2011, p. 34).

The very large percentage increase in sentences was only possible because the pre-existing sentence levels were so low. An equivalent percentage increase in the median sentences for burglary or aggravated burglary in Victoria, for example, would result in totally disproportionate sentences that would be impossible to implement. Vollaard (2011, p. 33) also noted that:

The marginal crime-reducing effect of incapacitating another prolific offender declines by more than half from the lowest to the highest rate of application of the law. The benefit-cost ratio drops sharply when more offenders are serving time under the habitual offender law.

Another study (Blokland and Nieuwbeerta, 2007) used data from the Netherlands Criminal Career and Life-Course Study to estimate the incapacitative effect of alternative selective prison policies using simulation studies. The simulation (Blokland and Nieuwbeerta, 2007, p. 331):

compares the actual observed number of offences for some offender population under prevailing policy with those that would have been prevented under a hypothetical selective policy in that same population.

The study showed that a selective policy of imprisoning offenders for two years after their third conviction led to a decrease in convictions of 7.5%; however, each additional year of incapacitation made a smaller contribution to the decrease in convictions (Blokland and Nieuwbeerta, 2007). Under the strictest regime simulated by the researchers, measuring only incapacitative effects, a 25% reduction in crime was predicted.

This reduction required, however, an unfeasible increase in the prison population of 'up to 45 times the population under [the] prevailing non-selective policy' (Blokland and Nieuwbeerta, 2007, p. 349) resulting in costs that far outweighed the crime-reduction benefits. Further, the study did not account for the criminogenic effect of imprisonment nor the replacement effect.

Sweeten and Apel's (2007) study used the US National Longitudinal Survey of Youth 1997 to obtain estimates of the number of crimes avoided through the imprisonment of both juveniles and adults. Imprisoned offenders were matched with comparable non-imprisoned offenders using a wide variety of variables, including 'sex, race, ethnicity, urban or rural residence, condition of residence, region, type of living arrangement ... substance use, parental background ... and household income' (Sweeten and Apel, 2007, p. 307). By matching and controlling for these variables and data for self-reported offending, the study attempted to match offenders based on a 'propensity score' and consequently isolate the effect of selective incapacitation.

The results of the study were that between 6.2 and 14.1 offences would be prevented for every year of juvenile incarceration, while 4.9 to 8.4 offences would be prevented for every year of adult incarceration. These results were lower than in prior incapacitation effect studies, and the authors (Sweeten and Apel, 2007, p. 321) commented that this decrease in the marginal effect of incapacitation may reflect the high rates of existing imprisonment in the United States:

Because earlier bottom-up studies recruited offenders in the 1970s and 1980s, when U.S. incarceration was but a fraction of its current rate, we can anticipate a decline in crime frequency of offenders on the margin because of the diminishing returns phenomenon.

The effect that selective incapacitation may have on crime rates depends on the particular modelling that is used (see 'Measuring incapacitation' above). Spelman's model required three principal assumptions: that the criminal justice systems he studied were the same in each jurisdiction, that the policies and programs implemented would not change the characteristics of the offending population and that the only alternative to incapacitation was to do nothing (Spelman, 1994).

### Selective incapacitation and determining the risk of reoffending

The ability of selective incapacitation to reduce crime is dependent on selecting particular offenders for imprisonment (or longer terms of imprisonment) based on their individual risk of reoffending. Consequently, the strength of a policy of selective incapacitation will depend on the accuracy of that assessment of risk.

In its discussion and options paper on high-risk offenders, the Council examined the large body of research concerned with estimating the risk of reoffending, including the use of actuarial assessment tools (Sentencing Advisory Council, 2007).

The Council (Sentencing Advisory Council, 2007, p. 14) noted the ethical issues that arise from such assessments of risk, and the danger of generating 'false positives', stating that:

Categorising high-risk offenders solely by reference to the type of crime committed may result in people who pose no continued threat to the community being inappropriately included. Offences against the person differ in their severity according to the circumstances of the case. In addition, many people who commit the most serious offences such as murder do not necessarily pose a high risk of reoffending. It has been argued that the 'question of penalties for serious [offences]—even for the worst cases of such offences—must not be confused with the question of protecting the public from the few serious offenders who do present a continuing risk and who are likely to cause further serious harm'.<sup>22</sup>

Further, the Council (Sentencing Advisory Council, 2007, p. 20) noted the limitations of the tools employed to estimate the level of risk, stating that:

Assessment tools cannot predict the circumstances under which people will reoffend; without such information on the nature of potential triggers or situations that may lead to reoffending, predictions of risk can do little to inform approaches to prevention. Indeed, some have suggested that 'predictions as to the likelihood of future offending remain at best an educated guess'.<sup>23</sup>

Despite these cautions, some criminologists remain optimistic that researchers could still develop a 'lambda' or frequency of offending estimate for various populations (including the population of prisoners) that may allow incapacitation to be more selectively applied (Piquero and Blumstein, 2007).

<sup>22</sup> Quoting Floud, 1982, p. 216.

<sup>23</sup> Quoting Drabsch, 2006, p. 44. Other citation omitted.

## Selective incapacitation and juveniles

In most jurisdictions the incapacitation of juveniles is considered a measure of last resort, to be imposed when the use of other diversionary, community-based and non-custodial sentencing options has been exhausted, or the nature of the offence is so serious that detention is required to effect just punishment or denunciation.

In that sense, the criminal justice system acts to selectively incapacitate those juveniles who represent, and have demonstrated through prior or very serious offending, the greatest risk to the community.

Criminal career research into juvenile crime suggests that the peak age for the onset of offending is between 8 and 14 years old, that the prevalence of offending peaks in the late teenage years, between 15 and 19 years old, and the peak of desistance from offending is between 20 and 29 years old (Farrington, 2003).

Piquero and Blumstein (2007, p. 275) comment that, despite these identified age bands, relatively little is known about the stability of juvenile offending frequency, and as a result:

the incapacitation model does not provide a complete picture of the amount of crime reduction via incapacitation for juveniles.

As with adults, only a small fraction of juvenile offenders become chronic, recidivist offenders (Farrington, 2003). The dilemma facing policy-makers, if considering a selective incapacitation strategy for juvenile offending, is that any evaluation of future risk of offending must be robust enough to avoid 'false positives' that could incapacitate offenders who would not have reoffended.

The failure of a selective incapacitation policy in Western Australia, for example, that targeted offenders, including juveniles, solely based on three convictions for a property crime was highlighted by Harding (1995) as 'fundamentally misconceived'. This 'three-strikes' approach to selective incapacitation through mandatory imprisonment, aside from ignoring parsimony, made no distinction between the criminal careers of the individual offenders. Morgan (2001, p. 4) commented that initially the sentencing laws requiring mandatory sentences 'were justified on the basis that they would "excise hard core offenders"', representing a policy of selective incapacitation.

Broadhurst and Loh (1993, p. 255), however, commented that:

As a method of selective incapacitation the (WA) Act fails to address properly the problems of identifying and classifying high risk offenders ... [as] two key elements in identifying 'high risk' offenders, the timing and frequency of offending, are poorly defined ... The number of offenders caught by [the Act's] inconsistent logic was reckoned to be between 40 and 400 depending on which data source or authority one relied.<sup>24</sup>

## Concluding remarks

One of the legislated purposes of sentencing in Victoria, under section 5 of the *Sentencing Act 1991* (Vic), is the 'protection of the community'. This encompasses, but is not limited to, the incapacitation of offenders in prison in order to prevent them from offending in the community.

Alongside deterrence and rehabilitation, the protection of the community through incapacitation is a purpose of sentencing that is specifically aimed at reducing crime.

Studies suggest that the marginal benefit of increases in sentences for offences (as opposed to increasing sentences for specific offenders) may not be justified by the cost, and policies of collective incapacitation that result in blanket increases in the rate or lengths of imprisonment are unlikely to be the most efficient use of resources in order to achieve a reduction in the crime rate.

Selective incapacitation holds more promise in identifying frequent offenders at risk of reoffending. Yet these offenders are difficult to identify, the incapacitation effects are likely to diminish as these offenders age and only some of these incapacitation effects translate into actual crime-reduction effects.

The strength of incapacitation estimates is based on identifying individual crime behaviour, and further research on criminal careers and knowledge of the patterning of criminal careers are central for better estimating the number of crimes avoided by removing an offender from society.

As imprisonment can exert a criminogenic influence, the dilemma encountered in fashioning a policy of selective incapacitation is that, should the prediction of future risk of reoffending be too broadly made, an offender who was not likely to reoffend may, as a result of imprisonment, *become* more likely to reoffend.

Similarly, an evaluation of future risk of reoffending, based on a prior history of offending, may result in the incapacitation of offenders at the point of their criminal career when they would ordinarily begin to desist from crime. The criminogenic influence of imprisonment at that point may, if it increases the likelihood that they will offend upon release, lengthen their criminal career.

The efficacy of a policy of selective incapacitation will depend greatly on the time within a criminal career that it is imposed. Further, this will vary from offender to offender and depend on the types of offences committed.

Assessments of the relative success or failure of incapacitation do not account for the other purposes of imprisonment. A lengthy prison sentence may, for example, be legitimately justified solely on the basis that it is required to punish an offender or to effect sufficient denunciation for his or her criminal conduct.

While policies of highly targeted selective incapacitation may hold the best promise for the most efficient use of imprisonment resources, there is scant research, and in particular Australian research, on the possible benefits.

Until the necessary research has been conducted, far-reaching expectations regarding the crime-reducing effects that might be expected from the use of imprisonment as a means of incapacitation must be tempered with an appreciation of its limitations and cost.

## Glossary

### **Criminal learning environment**

Social learning theory suggests that people learn behaviour from their own immediate environment, through reinforcement, punishment and observation of social influences (including the influence of peers, superiors and role models). A criminal learning environment is one in which a person learns criminal, rather than law-abiding, behaviour.

### **Criminal career**

The sequence of offences committed by an individual offender during his or her lifetime.

### **Criminogenic**

A criminogenic effect is one that produces – or tends to produce – crime or criminality.

### **Deterrence**

A sentencing purpose aimed at the reduction of crime by the threat or example of a criminal sanction, directed at all potential offenders (general deterrence) or an individual offender (specific deterrence).

### **Incapacitation**

A sentencing purpose aimed at the reduction of crime by physically preventing offending, usually through imprisonment of the offender.

### **Labelling effect**

Labelling theory (also known as social reaction theory) suggests that labels that describe behaviour may also lead to that behaviour, particularly if the label is negative or stigmatising. One effect of labelling a person as 'criminal' may be that the person then conforms to that description. Another effect of labelling may be that the person labelled is then subjected to prejudice; for example, by being labelled an 'offender', a person may find it more difficult to maintain employment or social relationships, thereby increasing the risk of criminal behaviour.

### **Meta-analysis**

A systematic review that combines and analyses findings from pre-existing studies, providing a summary or synthesis of an area of research.

### **Parsimony**

A sentencing principle requiring that a court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed.

### **Proportionality**

A common law sentencing principle requiring that, when offenders are sentenced, the overall punishment must be proportionate to the seriousness of the offending behaviour.

### **Totality**

A common law sentencing principle requiring that, where an offender is at risk of serving more than one sentence, the overall effect of the sentences must be just, proportionate and appropriate to the overall criminality of the total offending behaviour.

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## Other publications of the Sentencing Advisory Council

### **Does Imprisonment Deter? A Review of the Evidence**

This *Sentencing Matters* paper considers research into whether sentences of imprisonment are effective in deterring crime. The paper examines a number of empirical and criminological studies conducted over the last 10 years in Australia and internationally.

### **Alternatives to Imprisonment**

One of the statutory functions of the Sentencing Advisory Council is to gauge public opinion about sentencing matters. This *Sentencing Matters* paper presents evidence of community views in Victoria about the use of alternatives to imprisonment.

### **Purposes of Sentencing: Community Views in Victoria**

This *Sentencing Matters* paper considers people's preferences for the main purposes of sentencing for offenders in a range of case studies. The paper is based on the Victorian component of a national survey of public attitudes to sentencing, supported by the Australian Research Council.

### **Community Attitudes to Offence Seriousness**

This report presents key findings from community panels conducted throughout Victoria and outlines the judgments of participants on offence seriousness.

### **Gender Differences in Sentencing Outcomes**

This report considers differences in sentencing outcomes for men and women. The report examines research literature and presents data from Victoria on police recorded offending and police statistics.

### **Mandatory Sentencing**

This *Sentencing Matters* research paper aims to inform people about mandatory sentencing, which is an ongoing topic of debate in the community.

### **Sentencing Children and Young People in Victoria**

This report covers the operation, functions and philosophy of the Criminal Division of the Children's Court of Victoria.

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