

Ben Brooks

# From Tough Justice to Smart on Crime

## criminal justice lessons from the Lone Star State

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### Abstract

New Zealand has one of the highest rates of imprisonment in the OECD. The current Labour prime minister and the most recent National prime minister have both expressed support for addressing the rate of imprisonment. Nonetheless, New Zealand's prison population continues to grow and is forecast to continue growing. This article investigates Texas's experience of criminal justice reform; in particular, how they achieved a bipartisan consensus in favour of reform. It then looks at what lessons Texas's experience might offer New Zealand. Finally, it highlights shortcomings of the Texan approach and what these might mean for New Zealand.

**Keywords** prison, reform, corrections, justice, Texas

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### Texas: tough on crime and back again

In the 1970s Texas's imprisonment rate was only marginally higher than New Zealand's current rate of imprisonment. Texas wasn't the most progressive state in America, but it had a lower rate of imprisonment than other large states such as California and Florida.

All that changed in the early 1990s when Texas enthusiastically embraced a tough on crime approach to law and order (see Figure 1). Although similar approaches had already been taken in other states, Texas was one of the most enthusiastic adopters. By the end of the 1990s its imprisonment rate had tripled, leaving it with more prisoners than any other state in a country with the highest rate of imprisonment in the OECD (Duffin, 2019).

But all that changed in the mid-2000s, with Texas turning away from a tough on crime approach to (at times hesitatingly) embrace criminal justice reform. Since 2006 Texas has managed to reduce its prison population by nearly 15,000 and its imprisonment rate by over 23%. Over the same period the crime rate dropped by

nearly 45% and the violent crime rate by nearly 20%.

**Meanwhile, in New Zealand ...**

New Zealand's recent history has been very different (see Figure 2). Like Texas, New Zealand has experienced a steady decline in crime rates. However, New Zealand's imprisonment rate has been steadily increasing. Directly comparing Texas and New Zealand, while both countries experienced large drops in the crime rate between 2002 and 2014<sup>1</sup> (43% in Texas and 30% in New Zealand), Texas's imprisonment rate declined by 17%, while New Zealand's increased by 33%.

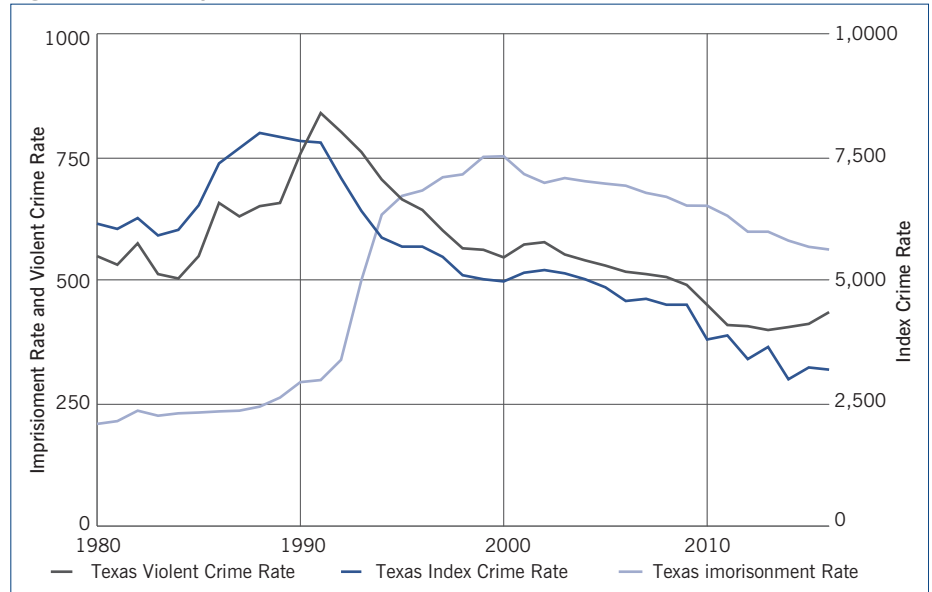
Despite the fact that New Zealand's crime rate is expected to continue to decline, the most recent justice sector forecast, shown in Figure 3, suggests that the prison population will continue to rise, albeit at a slower rate than previous forecasts (Ministry of Justice, 2018). This is a continuation of a long-term trend that commenced in the late 1980s, before which New Zealand's prison population had grown at around the same rate as the population for nearly 30 years (Ministry of Justice Criminal Policy Justice Group, 1998).

This article focuses on two narrow questions: how did Texas reduce its prison population; and what lessons, if any, might this have for New Zealand? The article does not address other important questions relating to New Zealand's imprisonment rate, including whether it should be reduced. However, both the current prime minister, Jacinda Ardern, and former prime minister Bill English have made comments supportive of addressing the imprisonment rate. This suggests that a discussion of a similar jurisdiction that has reduced its imprisonment rate would be a useful addition to the policy discussion.

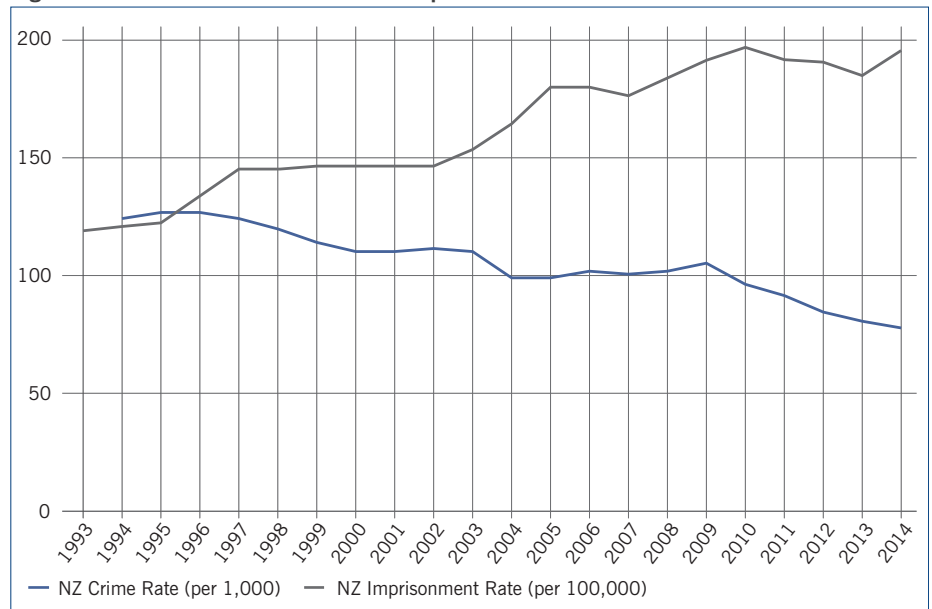
**But ... Texas?**

Even for those who accept that New Zealand's high imprisonment rate is a problem that needs to be addressed, Texas may not be the most obvious model. Instead, the Scandinavian countries are often held up as the best model to follow. They are much more successful at rehabilitating prisoners: their two-year reoffending rates are 20–35%; New

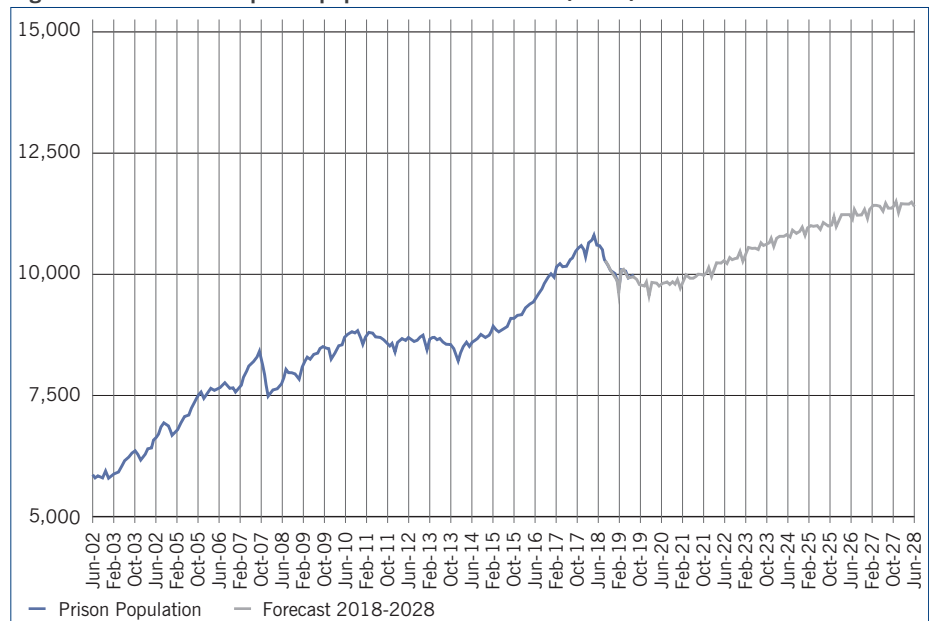
**Figure 1: Texas imprisonment rate and crime rates**



**Figure 2: New Zealand crime rate and imprisonment rate (1993-2014)**



**Figure 3: New Zealand prison population and forecast (2018)**



**Table 1: Comparability of Scandinavia and Texas to New Zealand**

	Scandinavia	Texas
English-speaking	✗	✓
Large minority population	✗	✓
Significant recent drop in imprisonment	✗	✓
Rapidly growing population	✗	✓
History of ‘tough on crime’ policies	✗	✓

**Table 2: Murder rates of various jurisdictions (2016)**

Australia	0.94
England and Wales	1.22
United States	5.35
Texas	5.3
OECD average	3.7
New Zealand	1.06

Source: United Nations Office on Drugs and Crime Intentional Homicide Victims database, 2018 (Australia, England and Wales, United States); NZ Police, 2018a; OECD, 2016; Texas Department of Public Safety, 2017 (Texas).

Zealand’s rate is around 60%. They do this while having a low rate of imprisonment and prison conditions that are less harsh than those in most Western countries.

Many New Zealand researchers have investigated the Scandinavian model and returned with valuable information (for instance, Sinclair, 2017; Ministry of Justice Criminal Policy Justice Group, 1998; Pratt et al., 2013). However, to the degree that they were hoping to change the trajectory of the prison population their efforts haven’t been a success. New Zealand’s prison population has continued to grow.

There are two obvious potential explanations for this:

- the Scandinavian countries are simply too different from New Zealand for their model to be easily adopted;
- their model is adoptable but looking there provides information on what we should aim for, but no guidance on how we should get there.

Texas can help address both of these issues. As Table 1 shows, it is similar to New Zealand in some important respects. These similarities may mean that it is easier to implement aspects of the Texas model in New Zealand, or that there are lessons that can be taken from Texas that cannot be taken from Scandinavian countries.

The other advantage of investigating Texas is that it can offer evidence of how to begin the journey to a lower level of imprisonment. In this respect, research on the Scandinavian countries has provided

valuable information on the end point, but no guidance on how to start making changes to get there. Research on Texas will help to fill this gap and provide a more complete picture of the changes needed.

No jurisdiction is a perfect analogue of New Zealand and Texas is different in important ways. However, differences between New Zealand and other jurisdictions generally and Texas in particular are often overstated. For instance, the Department of Corrections paper ‘Where New Zealand stands internationally: a comparison of offence profiles and recidivism rates’ (Boomen, 2018) is often cited as a demonstration that New Zealand’s high imprisonment rate is a response to more serious offences or that other jurisdictions have only succeeded in reducing their imprisonment rate because they are managing less serious offenders. However, there are a number of factors that prevent these conclusions from being drawn.

The Corrections paper’s initial promise is to investigate a factor that may influence New Zealand’s high imprisonment rate. However, the factor chosen – prison offence profile – has very little explanatory power. It should not be surprising that a country with a high rate of imprisonment responds to offending, particularly serious offending, with harsher penalties. For this to be even a partial explanation for New Zealand’s high rate of imprisonment these types of offences would have to be more common in New Zealand than in other jurisdictions.

Comparing crime rates between jurisdictions can be challenging (see, for instance, Alvazzi del Frate, 2010). Murder is sometimes used as a proxy for overall crime because it is subject to fewer of these challenges. Table 2 shows murder rates in a variety of jurisdictions.

These figures support the contention that rather than New Zealand’s high imprisonment rate being a reaction to serious crime, New Zealand sentences are harsher than those of other countries for similar offences.

There is also some evidence that New Zealand takes a broader definition of violent crime than other countries. For instance, Segessenmann (2002) finds that taking definitions at face value, New Zealand’s violent crime rate in 2000 was around twice that of the United States, but, adjusting for definitional differences, New Zealand’s violent crime rate is actually around one fourth of the United States’.

‘Where New Zealand stands internationally’ also makes the claim that ‘the high proportion of prisoners sentenced for violence offences means New Zealand lacks the same high numbers of non-violent offenders other jurisdictions (such as Texas, Portugal, Georgia, and Italy) have targeted to reduce their prison numbers’ (Boomen, 2018). This is based on analysis of a paper from 2009 from the Council of State Governments which assessed Texas’s 2007 reforms. This was one part of a large package of reforms passed in Texas in 2007. This means that the Corrections paper ignores the reforms passed in the six subsequent legislative sessions. Reforms that were ignored include measures that achieved a nearly 80% reduction in the number of young people in prison – a group typically at higher risk of reoffending and with clear relevance to New Zealand (achieving the same outcome here would result in a roughly 3.5% reduction in the prison population). Even looking solely at the 2007 reforms, it is unreasonable to conclude that Texas focused primarily on ‘decreasing technical violations and recalls’, given that they also included measures such as prison and community-based drug treatment and pre-trial diversion.

A valuable point that the paper could have made is to highlight the challenge of path dependency. New Zealand may have

similar overall levels of offending, but our response to this offending has tended to be harsher than in comparable jurisdictions and this has likely been the case for over 30 years. In this scenario, it is valuable to have an example of a jurisdiction that has followed a similar path to New Zealand and has managed to change course. This is one of the respects in which Texas's experience may hold useful lessons for New Zealand.

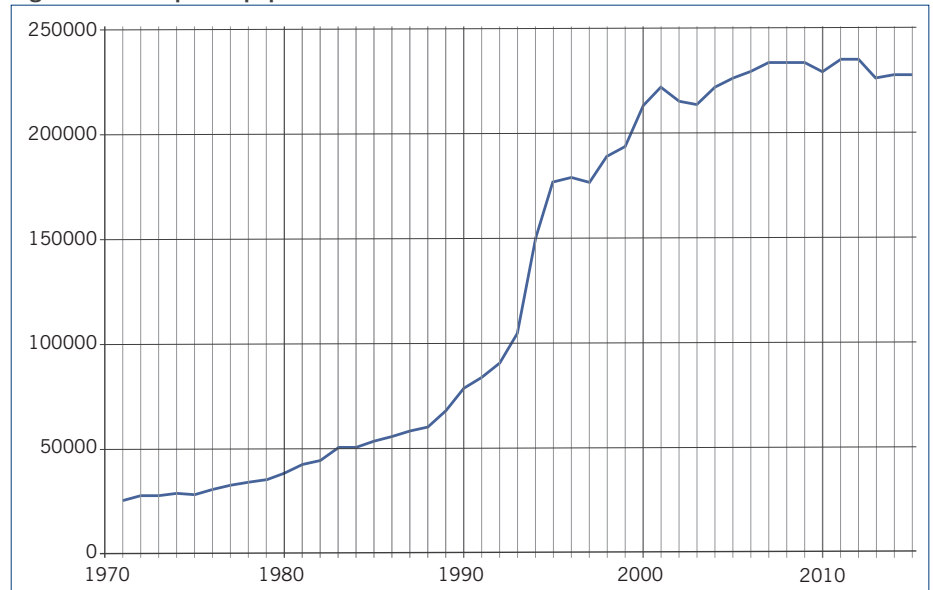
**Key questions**

Achieving a durable change to New Zealand's criminal justice system will require gaining and maintaining the confidence of at least two of: the Labour Party, the National Party and the public. The word 'confidence' is chosen deliberately. Enthusiastic support isn't necessary; even indifference from the public or opposition can be enough, as long as the party in power is motivated to act.

For instance, Finland reduced its rate of imprisonment by over 50% between 1950 and the late 1990s. This was achieved after the public lost confidence in the status quo,<sup>2</sup> giving experts and politicians permission to overhaul the system to address their concerns without requiring a deep understanding of or involvement in the details of the overhaul (Younge, 2001).

In the case of Texas it appears that the two political parties reached a consensus that reform was needed. Therefore, one of the key questions this article seeks to answer is: how did Texas reach a bipartisan consensus on the need for criminal justice reform? The model of reform described above is obviously a simplification. For instance, the three parties aren't independent of each other – a major loss of confidence by the public would be likely to undermine the confidence of one or both major political parties. This is a substantial challenge to any reform because, by their nature, reforms involve making large changes to a complex and dynamic system designed to manage risk rather than certainty. Problems and unforeseen issues should be seen as an inevitable part of any reform of the scale of the criminal justice system. So, the second key question is: how did Texas maintain public confidence in the changes being implemented and the broader criminal justice system through the process of reform?

**Figure 4: Texas prison population**



Source: Bureau of Justice Statistics National Prisoner Statistics Program, 2018

**Figure 5: Texas imprisonment rate and crime rates**



Answering these questions will help New Zealand in its efforts to commence an overdue reform of our criminal justice system.

*How did Texas reach a bipartisan consensus?*

To understand how Texas decided it needed to reduce its imprisonment rate, it is necessary to consider how it reached such a high rate of imprisonment in the first place (see Figure 4).

In the 1970s Texas's prison population was substantially lower. While its rate of imprisonment wasn't one of the lowest in America, it was lower than in other large

states such as California and Florida. In the 1990s a range of factors came together to drive a massive increase in the prison population. First, crime rates, particularly violent crime rates, sharply increased from the mid-1980s to the early 1990s, leading to increasing punitiveness and support for harsh punishments, such as the death penalty (Siegel, 2016). Second, there was a growing pessimism about the ability to reform offenders (known as the 'nothing works' movement) (Miller, 1989). Even though this pessimism was well on the way to being disproved, it had received substantial publicity and held sway over

policymakers. This led to bipartisan support for tough on crime policies: Bill Clinton provided \$12.5 billion for new prisons for states that passed harsher sentencing laws (Chettiar and Eisen, 2016), while Texas's Democratic governor built 100,000 new prison beds between 1990 and 1994 (Wilson, 2014).

As Figure 5 shows, growth in the prison population continued at a slower rate in the late 1990s, falling to a (relative) trickle in the early 2000s.

In 2005 Jerry Madden, a Republican, was appointed to lead the House Corrections Committee, with one instruction from the ultraconservative Republican speaker: 'don't build new prisons, they cost too much'. Colleagues advised him that the expert on criminal justice reform was Democratic senator John Whitmire. Madden and Whitmire realised that new prisons would be required unless substantial reform was implemented. Together Madden and Whitmire crafted a package of reforms that they thought could receive support from both their parties.

Madden's instruction not to build new prisons reflected a concern among Republicans that prison costs would undermine their ability to pursue other priorities, such as keeping the size of government (and taxes) small. Republican support was also driven by an emerging loss of faith in prisons. There was no debate around prison for the most serious offenders, but Republicans had begun to doubt whether the prospect of prisons was deterring crime, or whether prisons were the best place to reform, particularly for people whose offending was a symptom of more fundamental mental health needs or drug and alcohol addiction.

Democratic support was easier to achieve. Democrats were out of power in the House and Senate and did not hold any of the six elected statewide offices. Criminal justice reform was not one of their key priorities, but it aligned with their values and they were willing to offer their support.<sup>3</sup>

For both parties the decision was made easier by a steady decline in the crime rate, which meant that while the public still generally supported tough on crime policies, it was not an issue of major concern to most voters. This was consistent with surveys of public attitudes which found that key voting

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groups were open to reform, particularly regarding moving to a rehabilitative rather than punitive focus for people whose offending was related to mental health or drug and alcohol addiction.

However, things did not progress smoothly. In 2005 Governor Rick Perry vetoed their legislation after it had passed both the Texas Senate and House with bipartisan support (Henson, 2005). Since the Texas legislature sits only in odd-numbered years, this meant reform couldn't be put in place until 2007 at the earliest.

To improve the likelihood of success the two key legislators assembled a bipartisan group of think tanks and advocacy groups to develop a package of reforms. The group included five organisations, ranging from the American Civil Liberties Union to the Koch brothers-funded Texas Public Policy Foundation. The two legislators promised to consider any package of reforms the

group produced, with two conditions: the package had to be evidence-based, and every measure had to have consensus support.

Reforms were given added impetus by projections that Texas would need an additional 17,000 beds in five years, at a cost of \$2 billion to build and operate. Texas has to operate a balanced budget (i.e. they are not allowed to run a deficit), meaning funding this prison expansion would have required tax hikes, which was anathema to the Republicans who controlled the legislature, or extreme spending cuts that would have been unpopular and difficult to pass. This fact coupled with the reform proposals that had been crafted by the think tanks finally meant progress could be made. In 2007 a \$241 million package of reforms was passed by the House and Senate and signed into law by Governor Perry.

Reflecting on the 2007 reforms and subsequent efforts, both Madden and members of the coalition (subsequently formalised and expanded as the Texas Smart-On-Crime Coalition (Texas Smart-On-Crime Coalition, 2019)) believed that the bipartisan coalition and the focus on consensus were essential to the reforms. Different members of the group were able to use their relationships and credibility with different members of the legislature to build support and the focus on consensus guaranteed that only reforms with broad support progressed.<sup>4</sup>

The think tanks also, particularly among liberal groups, highlighted the value of drawing on lived experience. A large number of the people involved in policy development and advocacy had personal experience of imprisonment and drug and/or alcohol addiction, or being a victim of crime. These experiences gave them increased credibility with legislators and the media and helped to put a human face to those in the criminal justice system. This made it easier to build support for reform and has resulted in profound changes in the views of some legislators.

#### *How did Texas maintain public confidence?*

As in New Zealand, the media is one of the public's key sources of information on criminal justice in Texas. However, because the media in Texas tends to operate at either the city or national level, it is less

likely that a high-profile crime will result in a widespread loss of support for reform among legislators. For instance, a high-profile crime in Dallas will be covered in detail in local Dallas media, but is less likely to be covered in Fort Worth media and very unlikely to be covered in Houston media.

However, many individual reforms operate at the county level, meaning there is a greater risk of local reforms being derailed by a loss of public confidence. The first critical step in reducing the risk of a loss of public confidence is to engage the public prior to a high-profile event occurring. For instance, providing some basic factual information in an engaging manner either directly or through the media can help to build general support for the criminal justice system. This is consistent with New Zealand research which found a correlation between low levels of self-reported knowledge of the criminal justice system and low levels of confidence in its effectiveness (Colmar Brunton, 2016).

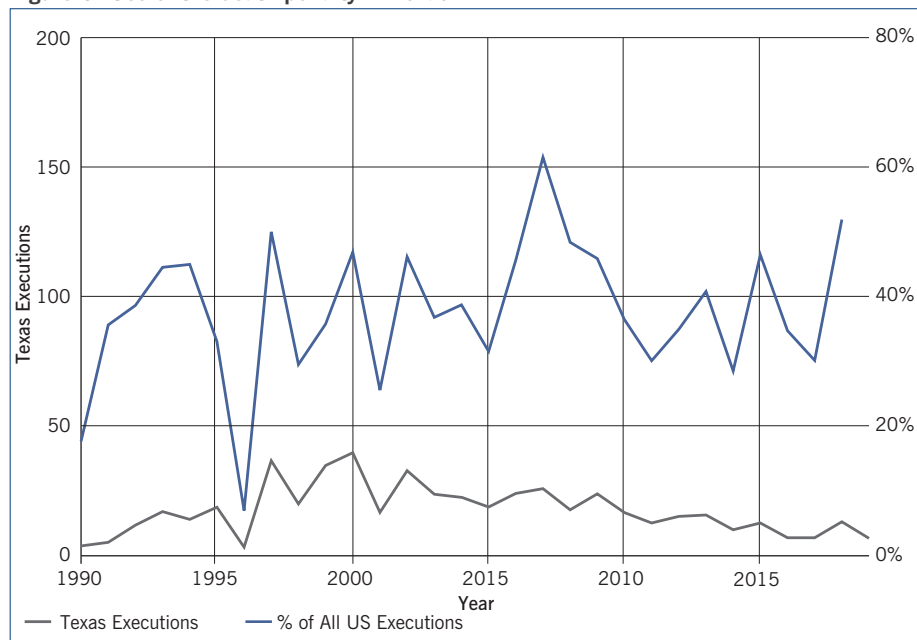
Highlighting success stories from community-based programmes can also help to ensure that the public have a source of information on the extremely high success rates of community-based programmes. As in other areas, this is also an example of Texas making use of lived experience to help engage and inform the public and decision makers.

Advocates in Texas also worked directly with key figures in the media to ensure they had some basic knowledge of the criminal justice system and access to key factual information. This ensures that negative media is placed within a broader context. This often results in failures being presented as isolated cases rather than indicative of broader systemic failures.

Unfortunately, the criminal justice system fundamentally involves dealing with risk; even a perfectly functioning system will not be able to prevent all harm. Where serious harm has occurred there is a risk of a public loss of confidence, particularly when the individual has previously committed a serious offence (even if the individual was unlikely to offend, the public and media are more focused on seriousness than risk) or has a large number of previous offences.

Texas has not been able to identify any easy response to this situation. However,

**Figure 6: Use of the death penalty in Texas**



Source: Death Penalty Information Center, 2018

there were two recurring themes – leadership and credibility. It is essential that the person ultimately responsible for a programme is confident in the programme and willing to work hard to maintain it in the face of obstacles. Second, the person needs credibility. In general, this seemed to refer to basic things such as being able to front media credibly. This is usually less of an issue in New Zealand, but can be problematic in Texas where there are a much larger number of elected officials who may feel an obligation to engage with the media.

Importantly, being willing to persevere shouldn't be confused with a refusal to make changes. There were numerous examples of changes made to programmes after failures both large and small. However, these failures and the consequent changes were always seen as isolated and not indicative of more fundamental systemic issues.<sup>5</sup>

#### Problems and limitations with Texas's approach

Although there is a lot for New Zealand to learn from what has happened in Texas, it is also important to highlight problems they have faced and limitations to their approach.

#### The death penalty

Advocacy groups from the left and right of Texas politics have been able to work together by focusing on their common

goal of reducing the prison population. On the right this goal is driven by fiscal and effectiveness concerns, while on the left it is driven by concerns over inequity and unfairness. These different motivations mean that they disagree on some important issues or their relative priority, which is reflected in limited progress addressing these issues.

One example is the death penalty (see Figure 6), where Texas consistently accounts for between a third and half of all executions in the United States (for comparison, Texas accounts for nearly 9% of the United States population and around 10% of all prisoners). For the left this is an important area where reform is required. For the right, the fiscal impact of the death penalty is negligible and the evidence on effectiveness is ambiguous.

This demonstrates that while Texas has forged a bipartisan consensus on the need to reduce the imprisonment rate, this consensus is based on a narrow area of agreement and progress has been limited in areas where the two groups' priorities do not align.

#### Racial inequality

In New Zealand, Māori make up around 15% of the population but around 50% of the prison population. In Texas, African Americans make up around 12% of the population but around 33% of the prison population.<sup>6</sup>

The African American imprisonment rate has declined slightly in recent years. However, it is clear that progressive groups in Texas saw addressing this as a much greater priority than did more conservative groups. Again, this indicates a difference in priorities: those primarily interested in reducing the number of people in prison will be less interested in racial inequality than those driven by concern for inequity and fairness.

This is a critical issue for New Zealand. For instance, the expansion of home detention (as has recently been discussed) would reduce the prison population, but based on the existing approach this would most likely be by releasing primarily Pākehā prisoners (Horwood, 2012). For anyone concerned simply with reducing the prison population this would be a success, but for anyone concerned about the extremely high rate of Māori imprisonment concerns would remain.

#### Long-term investment in prevention

Finally, Texas has struggled to build support for large investments in early intervention even when these can be shown to have a long-term pay-off in terms of preventing offending. This has tended to be less of an issue for New Zealand. For example, the social investment model championed by Bill English could be seen as an attempt to develop a rigorous approach to early intervention and prevention.

#### Conclusion

The aim of my research was to answer two key questions: how did Texas reach a bipartisan consensus, and how did Texas maintain public confidence?

Texas formed a bipartisan consensus on the need for reform, but not on the reasons why this was necessary. Republicans were primarily driven by concerns about the cost of prisons and a loss of confidence in prisons' ability to effectively reform (particularly in comparison to programmes in the community). Democrats were driven by concerns about inequality and fairness.

For New Zealand, this suggests that seeking to appeal to conservatives primarily on the basis of inequality or fairness, or liberals primarily on the basis of fiscal responsibility, is unlikely to be successful. Instead, the need for reform should be argued for on the basis of their existing values: arguments aimed at conservatives should primarily focus on the cost of prison and its ineffectiveness at improving public safety, while arguments aimed at progressives should primarily focus on fairness and equality.

At the state level the media landscape in Texas made it harder for public confidence to be undermined statewide. Local officials worked hard to build public confidence by proactively educating the public and media on the effectiveness of programmes, making particular use of lived experience. Unfortunately, there is no

magic bullet for maintaining public confidence in the face of a crisis; the only approach that worked in Texas was to make use of credible people who could lead a public response.

New Zealand currently has around 10,000 people in prison, costing around \$1 billion per annum just to manage the prison system. Texas has demonstrated that it is possible to make significant reductions in the imprisonment rate, realising large savings and simultaneously improving public safety. A similar opportunity is available to New Zealand, if politicians, the media and the public are willing to take it.

- 1 NZ Police changed the way it recorded crime in late 2014, focusing on victim and offender numbers. This makes it difficult to make longitudinal comparisons after this date.
- 2 Interestingly, the reasons for this contain echoes of the Texan experience – see Lahti, 2017.
- 3 This is not to say that no Democrats were interested in criminal justice reform or that no Republican was concerned about equity. These are generalisations about the overall parties. Within each party there will be individuals and factions with slightly different viewpoints and priorities. While there were subtle differences in approach, this section provides a high-level overview of the approach taken to gaining support from the parties.
- 4 The description of reform efforts and reflections on them are primarily based on personal conversations with Jerry Madden, Marc Levin from the Texas Public Policy Foundation, Doug Smith from the Texas Criminal Justice Coalition and Nick Hudson from the American Civil Liberties Union, Texas.
- 5 For an example of the opposite approach, consider Corrections' decision, subsequently deemed unlawful, to substantially limit access to the Release to Work programme after Phillip John Smith absconded: see Fitzgerald, 2019.
- 6 The Latino imprisonment rate is similar to their overall proportion of the population, but this represents a significant increase in Latino imprisonment levels compared to historical levels.

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