

# From Tough Justice to Smart on Crime: Criminal Justice Lessons from the Lone Star State



**Winston Churchill**  
Memorial Trust  
*New Zealand*

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*The good life is one inspired by love and guided by knowledge*

For Claire and Mary, as it always was

## **Note to Readers**

This is one of two papers summarising an investigation of the lessons for New Zealand from Texas' criminal justice reforms. This version provides a detailed discussion of the investigation and findings, including a discussion of the background and context for the reforms. A shorter version summarising the findings is available from the Winston Churchill Memorial Trust - [www.communitymatters.govt.nz](http://www.communitymatters.govt.nz), or by contacting the author - [bpwbrooks@gmail.com](mailto:bpwbrooks@gmail.com).

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## Summary

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%.

In New Zealand the imprisonment rate has been growing since the late 1980s. Our current rate of imprisonment is significantly higher than many similar countries, such as Australia or England. Despite the leaders of both National and Labour agreeing at the last election that our current approach to criminal justice is not working, the prison population is forecast to continue growing for the foreseeable future. Given Texas managed to unite Republicans and Democrats in support of criminal justice reform that was successfully implemented, perhaps there are lessons New Zealand could take from their experience.

The purpose of this paper is to answer three questions:

- How did Texas reach a bipartisan consensus on the need for criminal justice reform?
- How did Texas maintain public confidence through the process of reform?
- What specific policies did Texas implement to reduce their imprisonment rate?

Based on research and interviews with key figures in Texas the following lessons were identified.

### Key Lessons

- There are strong progressive *and* conservative arguments in favour of criminal

justice reform

- Arguments designed purely to appeal to progressives will not appeal to conservatives and vice versa
- Conservatives in New Zealand should be appealed to on the basis of values *they already hold*, such as fiscal responsibility and public safety. They are unlikely to be convinced by arguments based on progressive values they do not share
- Likewise, progressives should be appealed to on the basis of their existing values, such as equity and fairness.

#### **Key Lessons - Public Confidence**

- Don't wait for a crisis - engaging and informing the public and the media will help to build confidence in the criminal justice system, ensure the public hear about successes in community corrections and humanise people in the criminal justice system
- In the event of a crisis it is essential that there is a credible leader who has faith in the reforms and is willing to defend the reforms.

#### **Key Lessons - Policies**

- Texas' reforms were underpinned by three principles:

- to substantially reduce the prison population it is necessary to send fewer people to prison (i.e. it is not possible to reduce the prison population simply by reducing the prison recidivism rate)
- it is easier and more cost-effective to reduce the risk of further offending in the community than in prison
- where it is necessary to send someone to prison this should be for the shortest period necessary.
- Texas implemented programs at every point in the criminal justice system to make small reductions in imprisonment that were cumulatively significant.

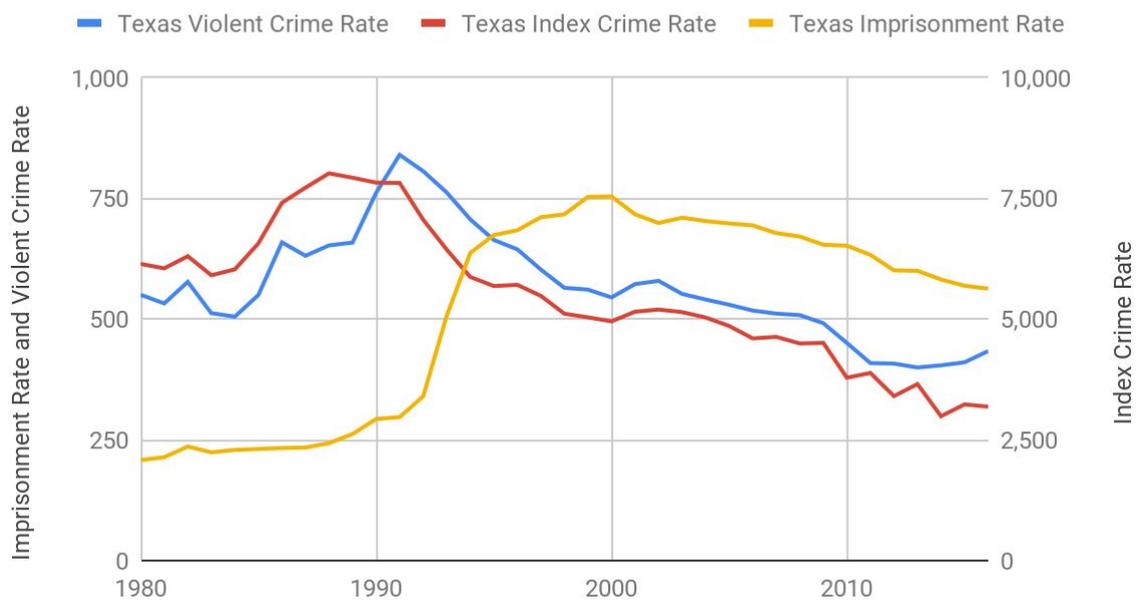
While there are useful lessons for New Zealand to draw from Texas, it is also important to note problems with their approach. In particular, Texas continues to make extensive use of the death penalty, has not focussed on the problem of African-American overimprisonment, and has avoided major public investments that would result in a large long-term reduction in imprisonment.

## Texas - Tough on crime and back again

In the 1970s Texas' 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. Although similar approaches had already been taken in other states, leading to America's overall imprisonment rate skyrocketing, Texas was one of the most enthusiastic adopters. By the end of the 90s their imprisonment rate had tripled, leaving them with more prisoners than any other state in a country with the highest rate of imprisonment in the OECD<sup>1</sup>.

### Texas Imprisonment Rate and Crime Rates

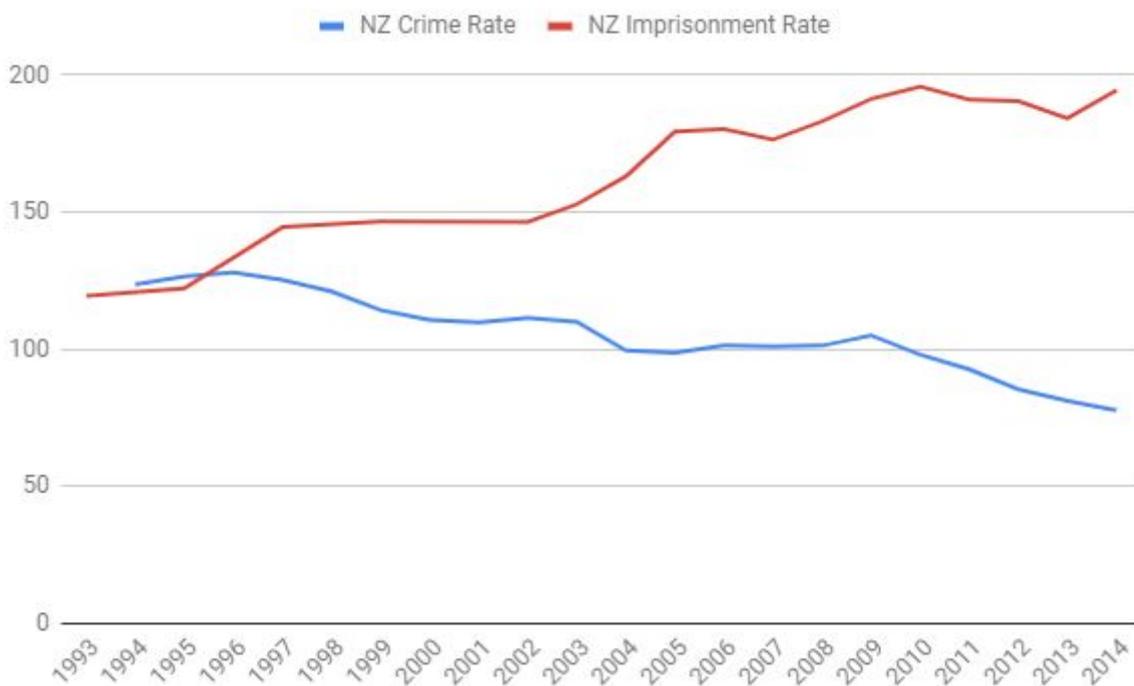


<sup>1</sup> Duffin, 2019.

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%.

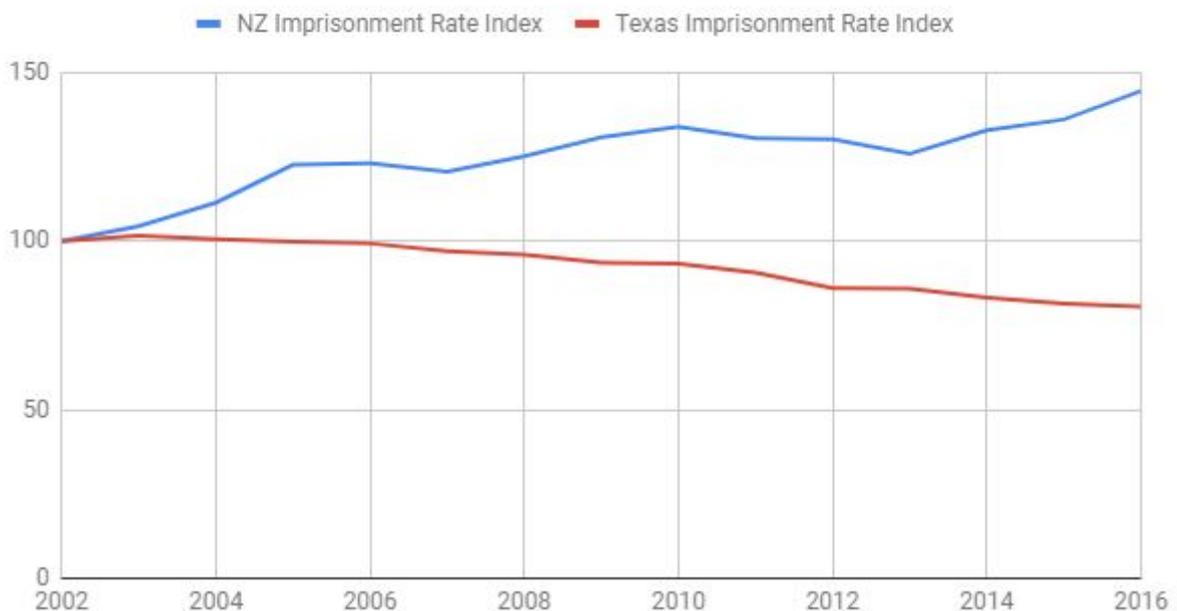
### Meanwhile, in New Zealand...

New Zealand's recent history has been very different. Like Texas, New Zealand has experienced a steady decline in crime rates since the early 1990s. 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>2</sup> (43% in Texas and 30% in New Zealand), Texas' imprisonment rate declined by 17%, while New Zealand's increased 33%.

### Texas vs NZ Imprisonment Rate Index



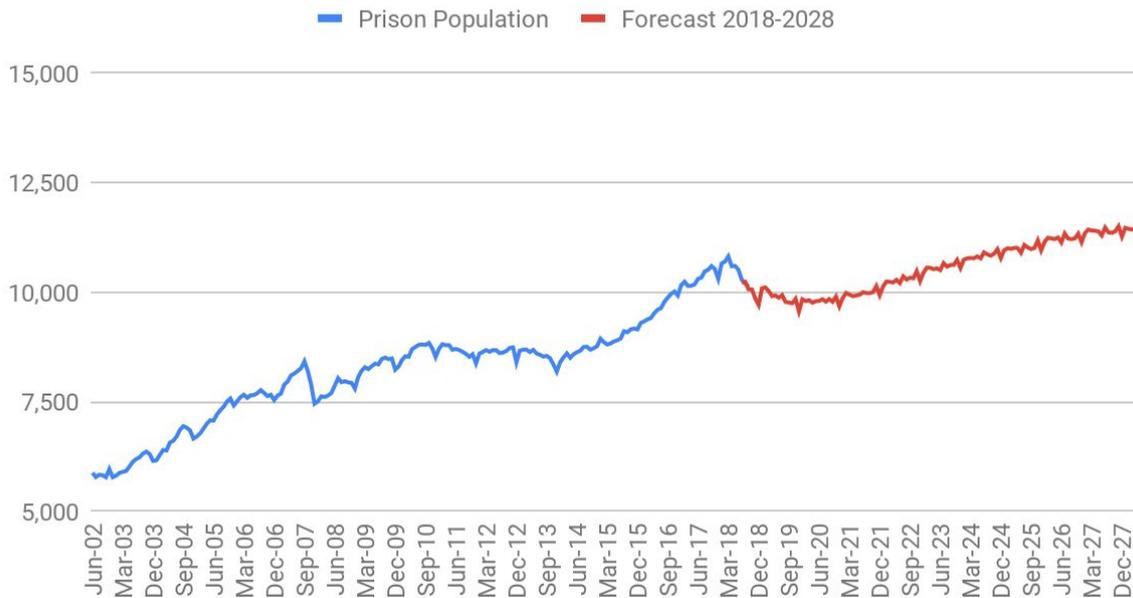
Despite the fact that New Zealand's crime rate is expected to continue to decline, the most recent Justice Sector forecast suggests the prison population will continue to rise, albeit at a slower rate than previous forecasts<sup>3</sup>. This is a continuation of a long-term trend that commenced in the late 1980s before which New Zealand's prison population had grown at around the same rate as the population for nearly 30 years<sup>4</sup>.

<sup>2</sup> NZ Police changed the way they record crime in late 2014, focussing on victim and offender numbers. This makes it difficult to make longitudinal comparisons after this date.

<sup>3</sup> Ministry of Justice, 2018c.

<sup>4</sup> Ministry of Justice, 1998.

## NZ Prison Population and Forecast (2018)



### *An aside - who cares?*

Many New Zealanders will be unmoved by all this information. Part of this may be due to a lack of knowledge - a 2016 survey found that 70% of New Zealanders said they knew ‘a little’ or ‘nothing at all’ about how much crime is happening in New Zealand<sup>5</sup>. However, efforts to build support for change based on knowledge of the crime rate have been unsuccessful. This is consistent with a growing body of work showing that giving the public accurate factual information doesn’t change deeply held beliefs, and can in fact strengthen incorrect beliefs<sup>6</sup>.

The following section briefly addresses three key arguments in favour of New Zealand’s high rate of imprisonment - that high crime levels drive high levels of imprisonment,

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<sup>5</sup> Colmar Brunton, 2016.

<sup>6</sup> For more discussion of this research see Shermer, 2016 or Kolbert, 2017.

that harsh punishment is recompense for victims and that a large prison population helps to maintain public safety.

*Do the crime...*

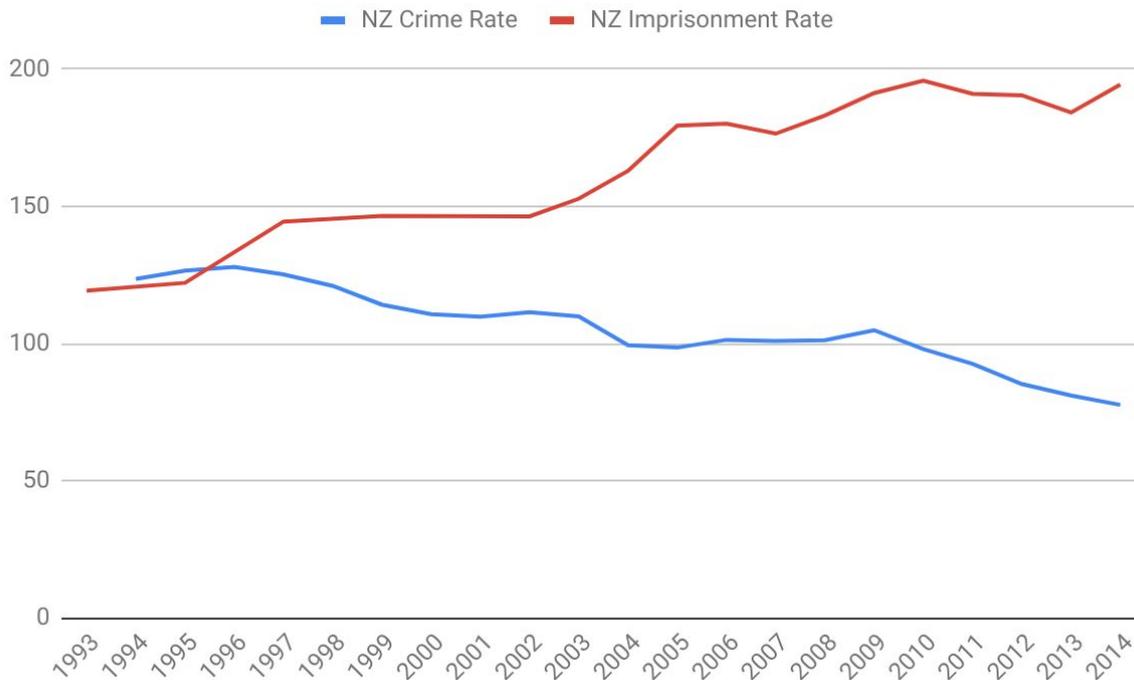
One argument in favour of New Zealand's high rate of imprisonment is that it simply reflects the underlying crime rate. This is sometimes expressed as 'do the crime, do the time'.

However as can be seen below New Zealand's crime rate has been declining while our imprisonment rate has been rising - there's a lot less crime but a lot more time<sup>7</sup>. In the early 1990s New Zealand's crime rate and imprisonment rate were similar, if they had stayed in alignment our prison population would now be around 40% of the current level<sup>8</sup>.

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<sup>7</sup> Crime rates can be a somewhat unreliable measure of actual crime. For instance, there has historically been significant underreporting of crimes involving sexual violence. The recent increase in reports of sexual violence is more likely to represent an increase in the number of people willing to report this type of offending than an increase in how often it occurs. There are also crimes that go undetected, even by the victim. For instance, the victim of successful financial crimes is usually unaware that they have been a victim of a crime at all. For this reason murder is sometimes used as a rough proxy for the actual level of crime, since it is virtually always detected and reported. While New Zealand's murder rate experiences large fluctuations, it has also shown a long-term decline.

<sup>8</sup> This is based on analysis of data from 2014. After this the police changed the way they report data, making it difficult to make longitudinal comparisons. However, the 2018 murder rate was the lowest in 40 years (New Zealand Police, 2018a), suggesting the estimate above is conservative.



Finally, even if it was true that the crime rate and the imprisonment rate were closely linked, the ‘do the crime’ argument misses the point. With the exception of cannabis use, where there is overwhelming public support for medical use and substantial support for recreational use<sup>9</sup>, the debate isn’t about ceasing to respond to crimes but what the appropriate response should be. New Zealand has nine sentencing options, only one of which is prison. In essence, the debate isn’t whether people who do the crime should do the time, it’s how much time and doing what.

### *Victims*

There is also a view among the public that longer sentences are owed to victims, and that not imposing a harsh sentence is disrespectful to victims and their families. Part of this

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<sup>9</sup> Young, 2018.

view is presumably that crimes that have a significant impact on a victim are more serious than those that do not. But part of it seems to be driven by a desire to remedy the harm done - that imposing a harsh sentence is the most effective way to help victims.

One way of assessing this argument is to look at the impact of the harshest possible sentence - the death penalty. A 2012 study compared outcomes for victims' families where prisoners were sentenced to death in Texas compared to prisoners sentenced to life without parole in Minnesota<sup>10</sup>. If harsher sentences help victims then the Texan families should be better off than their Minnesotan counterparts. Instead this study found that the physical, mental and behavioural health of victim's families was significantly better in Minnesota - 42% of families in Texas reported ongoing psychological problems, while only 20% of families in Minnesota did so.

In New Zealand victims and their families have lower levels of confidence in the criminal justice system, despite New Zealand having harsher sentences than most comparable countries<sup>11</sup>. This suggests that harsher sentences may not be what victims or their families want.

This is consistent with research from Victoria, Australia that found victims of crime do not impose harsher sentences than non-victims<sup>12</sup>. It is also consistent with a number of surveys undertaken by an American advocacy group that found victims rejected the notion that poor prison conditions prevent crime, weren't concerned that the system didn't help victims, but were worried that prisons don't prevent recidivism and believed that people with drug,

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<sup>10</sup> Armour & Umbreit, 2012.

<sup>11</sup> Colmar Brunton, 2016.

<sup>12</sup> Victorian Sentencing Advisory Council, 2018.

alcohol or mental health problems who committed crime should receive treatment not incarceration.

New Zealand could, and should, be doing much more to help victims and their families, but the misplaced belief that harsher penalties are a balm is likely to do more harm than good.

### *Public safety*

Finally, there is a view that a large prison population, and the sentences that achieve this, help to keep the public safe. This view could draw support from the fact that New Zealand's crime rate has steadily declined while our imprisonment rate has been rapidly growing - perhaps the growing imprisonment rate has been driving the crime rate down<sup>13</sup>.

However, looking at Texas they have managed to reduce their imprisonment rate at the same time as their overall and violent crime rates declined. Australia's imprisonment rate is around 30% less than New Zealand's, while England's is around 50% of New Zealand's; all three countries have had similar, and declining, crime rates for more than a decade<sup>14</sup>. This experience is consistent with the recent academic literature on imprisonment and crime<sup>15</sup>.

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<sup>13</sup> Note that this argument is fundamentally inconsistent with the 'do the crime' argument - New Zealand's high rate of imprisonment can't both be a result of high crime rates and the cause of low crime rates.

<sup>14</sup> World Bank, 2016. England's murder rate has increased in recent years. The reasons for this are unclear, but the rate is still lower than any year since the late 1990s to the mid-2000s.

<sup>15</sup> For instance, Criminology and Public Policy, 2011; Spelman, 2000; Stemen, 2017; Lofstrom & Raphael, 2016; Dhondt, 2018 even suggests that incarceration in America has reached a level where it is starting to modestly increase overall crime rates.

There will always be a place for prison for the most serious offenders, the real question facing New Zealand is whether a large portion of the 10,000 plus prison population could be safely managed in the community. This could still entail intensive oversight, treatment and an element of punishment, but would be less costly and more effective at reducing crime.

*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 for New Zealand to follow. They are much more successful at rehabilitating prisoners - their two-year reoffending rates are 20%<sup>16</sup> to 35%<sup>17</sup>; New Zealand's rate is around 60%<sup>18</sup>. They do this while having a low rate of imprisonment and prison conditions that are less severe than most Western countries.

Many New Zealand researchers have investigated the Scandinavian model and returned with valuable information. However, to the degree that they were hoping to achieve significant change their efforts haven't been a success - New Zealand's prison population has continued to grow.

There are two obvious potential explanations for this:

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<sup>16</sup> Butorac, Gracin, & Stanić, 2017.

<sup>17</sup> Brottsförebyggande rådet (Swedish National Council for Crime Prevention), 2011.

<sup>18</sup> RNZ, 2018.

- 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 the table shows, it is more similar to New Zealand in some important respects.

	<b>Scandinavia</b>	<b>Texas</b>
English-speaking	✗	✓
Large minority population	✗	✓
Significant recent drop in imprisonment	✗	✓
Rapidly growing population	✗	✓
History of 'tough on crime' policies	✗	✓

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. There are also some important differences, one of the most significant of which is that the criminal justice system operates at the federal, state and local level. A brief explanation of how this functions is included in Appendix 1.

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.

### *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 per cent between 1950 and the late 1990s. This was achieved after the public lost confidence in the status quo<sup>19</sup>, giving experts and politicians permission to overhaul the system to address their concerns, without requiring a deep understanding or involvement in the details of the overhaul<sup>20</sup>.

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 research will seek to answer is:

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<sup>19</sup> Interestingly, the reasons for this contain echoes of the Texan experience - see Lahti, 2017.

<sup>20</sup> Younge, 2001.

- 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, they 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?

Finally, one of the limitations of research on the Scandinavian countries is that it can't offer advice on how to start the process of reform. While there are important differences between New Zealand and Texas, there are also similarities that mean we may be able to learn valuable lessons from the specific policies they implemented. So the final question is:

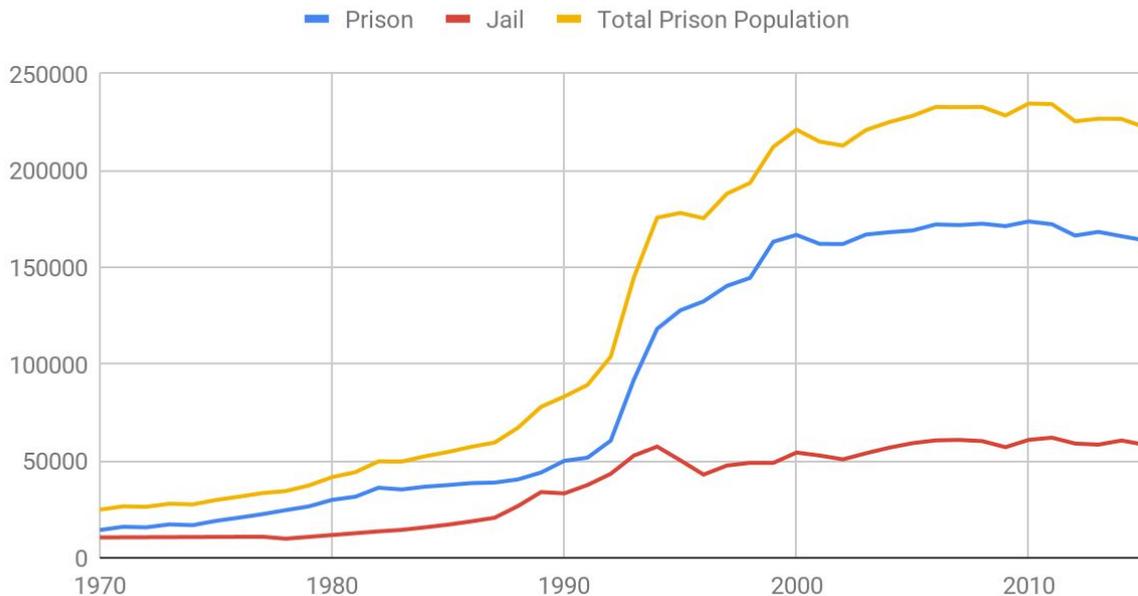
- What specific policies did Texas implement to reduce its rate of imprisonment?

Answering these three key 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's necessary to understand how it reached such a high rate of imprisonment in the first place.

### Texas' Prison and Jail Population



In the 1970s Texas' prison population was substantially lower. While their rate of imprisonment was higher than New Zealand's current rate of imprisonment, it was lower than other large American states such as California and Florida.

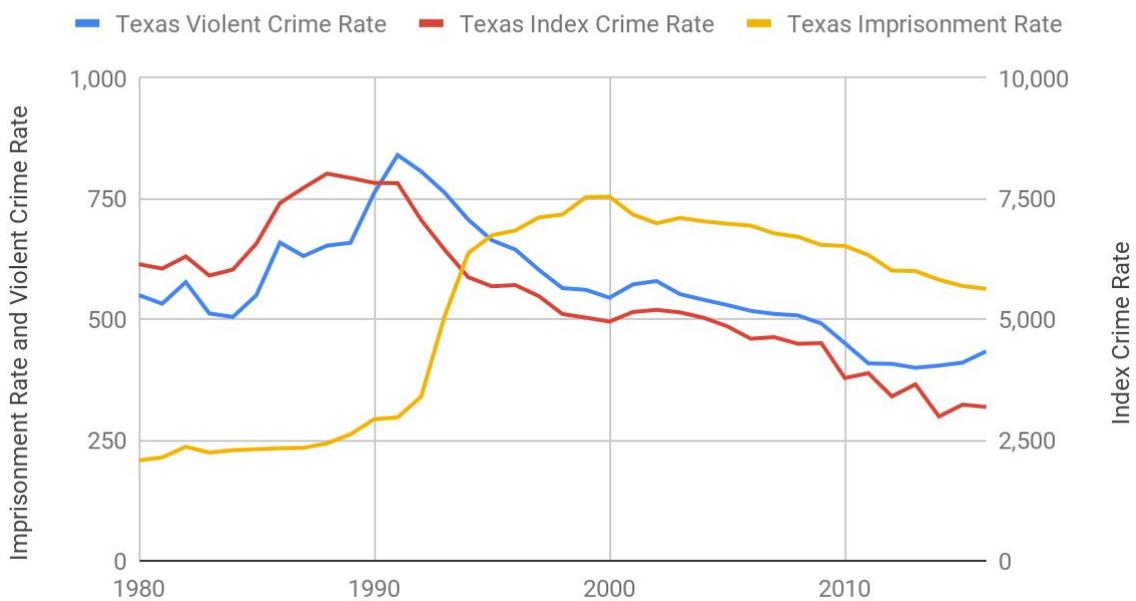
In the 1990s a range of factors came together to drive a massive increase in the prison population. Firstly, crime rates, particularly violent crime rates sharply increased from the mid-1980s to the early 1990s, leading to increasing punitiveness and support for

harsh punishments, such as the death penalty<sup>21</sup>. Secondly, there was a growing pessimism about the ability to reform offenders (known as the ‘nothing works’ movement)<sup>22</sup>. Even though the movement 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 \$US12.5 billion for new prisons for states that passed harsher sentencing laws<sup>23</sup>, while Texas’ Democratic Governor built 100,000 new prison beds between 1990 and 1994<sup>24</sup>.

Growth in the prison population continued at a slower rate in the late 1990s, falling to a (relative) trickle in the early 2000s.

### Texas Imprisonment Rate and Crime Rates



<sup>21</sup> The Opportunity Agenda, 2016.

<sup>22</sup> Miller, 1989.

<sup>23</sup> Chettiar & Eisen, 2016.

<sup>24</sup> Wilson, 2014.

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'. Madden, an engineer with no justice background, quickly realised that new prisons were inevitable unless substantial reform was implemented.

Colleagues advised him that the expert on criminal justice reform was Democratic Senator John Whitmire. Together Madden and Whitmire crafted a package of reform 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 easier to achieve because of an emerging loss of faith in prisons. There was no debate around prisons 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.



John Whitmire and Jerry Madden (l-r)

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 state 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>25</sup>.

For both parties the decision was made easier by a steady decline in the crime rate that 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 that found key voting 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.

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<sup>25</sup> 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.

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<sup>26</sup>. Since the Texas legislature only sits 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.

However, in 2007 Texas was projected to need an additional 17,000 beds in five years, at a cost of \$US2billion to build and operate<sup>27</sup> (as in New Zealand this did not represent the true cost to the state or society of the prison system, see Appendix 2 for a more detailed discussion of this issue). 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 reforms that had been crafted by the think-tanks in a manner that guaranteed they were evidence-based and had broad support finally meant progress

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<sup>26</sup> Henson, 2005.

<sup>27</sup> Council of State Governments, 2012.

could be made. In 2007 a \$US241million package of reforms was passed by the House and Senate and signed into law by Gov. Perry.

Reflecting on the 2007 reforms and subsequent efforts both Rep. Madden and members of the coalition (subsequently formalised and expanded as *Smart on Crime*) believed the bipartisan coalition and the focus on consensus was essential to the reforms. Different members of the group were able to use their relationships with different members of the legislature to build support and the focus on consensus guaranteed only reforms with broad support progressed<sup>28</sup>.

The think-tanks themselves agreed that there was value in using the access and credibility of members of the group from other points of the political spectrum. They also, particularly among liberal groups, highlighted the value in drawing on lived experience. A large number of the people involved in policy development and advocacy had personal experience of imprisonment, 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.

### **Key Lessons**

- There are strong progressive *and* conservative arguments in favour of criminal

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<sup>28</sup> The description of reform efforts on reflections on them are primarily based on personal conversations with Rep. 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.

justice reform

- Arguments designed purely to appeal to progressives will not appeal to conservatives and vice versa
- Conservatives in New Zealand should be appealed to on the basis of values *they already hold*, such as fiscal responsibility and public safety. They are unlikely to be convinced by arguments based on progressive values they do not share
- Likewise, progressives should be appealed to on the basis of their existing values, such as equity and fairness
- Bringing together both conservative and liberal think-tanks and advocacy groups with a focus on consensus was essential.

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

Maintaining public confidence in statewide reforms is less challenging in Texas. As in New Zealand, the media is one of the public's key sources of information on criminal justice. However, because the Texas media tends to operate at either the city or national level a statewide loss of confidence in criminal justice reform is less likely.

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 that found a correlation between low levels of self-reported knowledge of the criminal justice system and low levels of confidence in its effectiveness<sup>29</sup>.

Highlighting success stories from community based programs can also help to ensure that the public have a source of information on the extremely high success rates of these programs. 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.

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<sup>29</sup> Colmar Brunton, 2016.



Image from a post on Drug Court graduates on the Harris County Community Supervision & Corrections Department Facebook page

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 focussed on seriousness than risk) or have a large number of previous offences.

Texas has not been able to identify any easy response to this situation. However, there were two recurring themes - leadership and credibility. It is essential that the person ultimately responsible for the program is confident in the program and willing to work hard to maintain it in the face of obstacles. Secondly, that the person has 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 even if they have not been given the resources and support to do this effectively.

Importantly, being willing to persevere shouldn't be confused with a refusal to make changes. There were numerous examples of changes made to programs 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.

### **Key Lessons**

- Don't wait for a crisis - engaging and informing the public and the media will help to build confidence in the criminal justice system, ensure the public hear about successes in community corrections and humanise people in the criminal justice system
- In the event of a crisis it is essential that there is a credible leader who has faith in the program and is willing to defend the reforms.

## **What specific policies did Texas implement to reduce its imprisonment rate?**

This section will describe Texan programs from the entire criminal justice spectrum. However, before this it will be useful to describe some of the fundamental beliefs underlying Texas approach to reform.

### *Texas' Approach to Reform*

Texas' experience with an extremely high rate of imprisonment and high recidivism, plus evidence from America and overseas demonstrated that prisons are not an ideal environment for reform and in many cases can increase the risk of further offending. In addition, holding someone in a prison is extremely costly. These two facts lead to three principles that underlay Texas' approach to reform:

- to substantially reduce the prison population it is necessary to send fewer people to prison (i.e. it is not possible to reduce the prison population simply by reducing the prison recidivism rate)
- it is easier and more cost-effective to reduce the risk of further offending in the community than in prison
- where it is necessary to send someone to prison this should be for the shortest period necessary.

## *Programs and Policies*

Prison reform in Texas has been in progress for over a decade, and think-tanks and advocacy groups have been developing policy for substantially longer. Given this it isn't possible to give a comprehensive account of the policies that have been implemented; instead this section will use the Sequential Intercept Model to provide examples of policies from a variety of parts of the system.

The chart below is a simplified version of the Sequential Intercept Model used to identify opportunities to intervene with people in the justice system with mental health or drug and alcohol needs<sup>30</sup>. Although people will generally move down through the stages, individual journeys will vary and often include returning to earlier stages.

<b>Stage</b>	<b>Interventions at this stage will generally have a...</b>
Community	<ul style="list-style-type: none"><li>• low cost per participant</li><li>• very large pool of potential participants</li><li>• broader range of positive outcomes</li><li>• longer timeframe before criminal justice outcomes are seen</li></ul>
Law Enforcement <sup>31</sup>	<ul style="list-style-type: none"><li>• low cost per participant</li><li>• large pool of potential participants</li><li>• broader range of positive outcomes</li></ul>

<sup>30</sup> Adapted from Policy Research Associates, 2018. For a more detailed discussion of the Sequential Intercept Model see Munetz & Griffin, 2006.

<sup>31</sup> In New Zealand nearly 10% of prosecutions are undertaken by a government agency other than the police (Safe and Effective Justice: Hāpaitia te Oranga Tangata, 2018). Although this section focuses on the police, the potential role of other prosecutorial agencies should not be ignored.

Courts	<ul style="list-style-type: none"> <li>● moderate cost per participant</li> <li>● small pool of potential participants</li> <li>● broader range of positive outcomes</li> </ul>
Prison	<ul style="list-style-type: none"> <li>● high cost per participant</li> <li>● small pool of potential participants</li> <li>● narrow range of positive outcomes</li> </ul>
Community Corrections	<ul style="list-style-type: none"> <li>● moderate cost per participant</li> <li>● large pool of potential participants</li> <li>● broader range of positive outcomes</li> </ul>

### *Community Interventions*

The focus of this research was interventions in the criminal justice system. However, it is important to highlight that broader community interventions are likely to have the biggest impact on the criminal justice system. For instance, the government’s recently announced investment of \$1.9billion in mental health and addiction support, the increases in benefit levels under the current and former government, and the National government’s move to eliminate GP and prescription fees for under 13s<sup>32</sup> will have long-term impacts on the size of New Zealand’s prison population.

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<sup>32</sup> For instance Doleac, 2018 shows that improved access to healthcare reduces crime among adults, primarily due to increased access to mental health and drug and alcohol treatment. It is reasonable to assume that reducing barriers to healthcare for under 13s will allow mental health and issues that increase risk of drug and alcohol addiction to be identified and addressed earlier, although this does rely on having access to effective secondary and tertiary care.

It is essential that New Zealand maintains and enhances supports to improve social outcomes for New Zealanders. However, while these will achieve some positive outcomes relatively quickly, community interventions often take around a decade to start having an impact in the criminal justice system and around two decades until the impact is significant.

### *Law Enforcement*

A variety of counties in Texas have established programs encouraging police to divert people arrested for nuisance crimes directly into programs. For instance, in Houston anyone arrested for low level drug or alcohol offences is taken to the Houston Recovery Center<sup>33</sup>.

The Center is a non-custodial facility, so once at the Center people are free to leave at any time. While there they are offered a meal, a chance to wash their clothes (or new clothes if needed) which can be particularly valuable given that a large number are homeless. They are then given a bed in a communal dorm until they are safe to leave. Before they leave individuals are offered the chance to connect to appropriate support services. If accepted they are taken directly to the provider or are allowed to stay at the Center until a place is available. 48% of clients requested a referral to housing or treatment services<sup>34</sup>.

The Center has annual funding of around \$NZ3.8million, which includes an intensive 18 month program for low-income, uninsured clients with complex needs and three or more

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<sup>33</sup> The only exceptions are people using Phencyclidine (commonly known as PCP or angel dust), synthetic drugs or who have a history of violence at the Center.

<sup>34</sup> Jarvis, Kincaid, Weltge, Lee, & Basinger, 2019.

sobering center admissions. At full capacity the cost of placing someone at the Center is 44% of the cost of the previous approach of placing someone in the county jail (the per person cost is higher when the Center is operating below full capacity).



One feature of the Center is the employment of people with lived experience of drug or alcohol addiction. These people are trained and work jointly with clinical staff. They play a particularly critical role around ensuring people feel safe and motivating them to participate in programs.

Similar centres exist for people with mental health needs and operate using a similar model. This is part of a broader work to improve police responses to people with mental health needs, which includes making mental health crisis training a part of police basic training and establishing a specialised mental health crisis response team.

These programs result in better outcomes for participants than involvement in the criminal justice system<sup>35</sup>. Unlike some similar programs the Houston Recovery Center has a rigorous data collection system that allows them to evaluate broader outcomes. Initial analysis of the data indicates positive results, with a formal analysis soon to be published<sup>36</sup>.

Between 2010, when the Center was approved, and 2017 the number of jail admissions for public intoxication declined from 20,508 to 835<sup>37</sup>.

### *Courts*

New Zealand currently has two types of therapeutic courts - alcohol and drug treatment courts and homelessness courts.

In Texas all counties with a population larger than 220,000 are legally required to establish a drug court and a sex trafficking (prostitution) court (they may cooperate across counties)<sup>38</sup>.

Currently 24 counties meet this requirement. In addition Texas has therapeutic courts focussing on mental health, veterans, homelessness, family violence and public safety employees (for firefighters, police, prison and jail guards, and emergency medical services employees who have suffered an injury or illness on the job that contributed to their offending). These courts operate under statute, but are not legally required. In total there are 192 specialty courts operating in Texas<sup>39</sup>. By comparison New Zealand has three. To have a similar proportion to Texas on a population basis New Zealand would need at least 32.

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<sup>35</sup> Camilletti, 2010.

<sup>36</sup> Personal conversation with Leonard Kincaid, Executive Director, Houston Recovery Center.

<sup>37</sup> Other measures were also introduced during this period and admissions had begun to decline between the Center being approved and its opening, indicating the Center is not responsible for all of this decline, see Jarvis, Kincaid, Weltge, Lee, & Basinger, 2019.

<sup>38</sup> Texas Constitution and Statutes, 2017.

<sup>39</sup> Office of the Texas Governor, 2019.

In New Zealand people are referred to the alcohol and drug court either by their lawyer or the judge. Evaluations have indicated that as knowledge increases the flow of referrals has improved, although the evaluation still found referrals to be inconsistent<sup>40</sup>. In Texas referrals can be accepted from law enforcement, jail staff, judges, defense attorneys, prosecutors, mental health professionals and family or friends.

One interesting feature of these courts is how they deal with people who have successfully completed the court program. In New Zealand people who have successfully completed the court program are returned to court for sentencing. While the sentence is likely to take into account changes in circumstance associated with completing the program (such as ceasing to use drugs or being in secure housing), there are still a range of potential sentencing outcomes. In Texas the outcome is typically that the person is discharged and their record sealed (meaning it is available to the police but not the public and the individual does not have to disclose the offence) or expunged (meaning the offence is removed from their record). This has the effect of providing a more significant incentive to complete the program, but more importantly removes a significant barrier to employment and housing, both factors that are likely to further reduce the risk of reoffending. This is particularly important in Texas where substantially more information on prisoners is publicly available.

### *Prison*

In the prison system one of the key moves made in 2007 was to significantly expand treatment programs. Prior to this prisoners had been forced to spend longer than necessary in prison while they waited to access programs that were required before they could be

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<sup>40</sup> Smith, 2016.

released. Within two years the waitlist was entirely eliminated<sup>41</sup>, producing annual savings of around \$US15million.

Similar issues exist in New Zealand<sup>42</sup>, although the recently announced expansion of mental health and alcohol and drug treatment services should help to reduce waiting lists for some programs.

### *Community Corrections*

Young men tend to be at a higher risk of offending, with the risk of offending peaking in the late teens to early twenties and then declining (women are less likely to offend but display a similar trajectory). However, a small proportion continue to offend unless they participate in a successful intervention program. This makes young men challenging to deal with, but also means that successful interventions can prevent a significant amount of offending.

In the mid-2000s Texas consistently held over 4,000 young people in secure facilities. Since 2007 they have managed to reduce this to around 850. This has been done while achieving a slight reduction in the overall youth recidivism rate and no change in the recidivism rate for youths in secure facilities, even though these facilities are now managing a higher risk and more complex population<sup>43</sup>.

The programs needed to achieve this reduction cost around \$US142.5million, but Texas is now looking to close up to five former youth facilities and the smaller youth population could save them as much as \$US63million per annum.

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<sup>41</sup> Ward, 2009.

<sup>42</sup> Office of the Inspectorate - Department of Corrections, 2019.

<sup>43</sup> Pew Charitable Trust, 2013 and Rovner, 2019.

To help keep young people in the community the Tarrant County Advocate Program offers a continuum of community-based programs. For lower risk individuals this tends to involve counselling, community service or youth development programs, through to non-residential sex offender treatment and intensive supervision for higher risk individuals. The program has a 78% success rate at keeping young people from being placed in secure facilities<sup>44</sup> and operated at 40% of the cost of placement in a secure facility<sup>45</sup>.

In general, community corrections has not been a major focus in Texas, but it has been identified as a key area for future reforms. Areas being investigated include reducing sentence lengths and reconsidering the level of supervision for low risk offenders to enable more resources to be invested in complex or high risk cases.

### **Key Lessons**

- Texas' reforms were underpinned by three principles:
  - to substantially reduce the prison population it is necessary to send fewer people to prison (i.e. it is not possible to reduce the prison population simply by reducing the prison recidivism rate)
  - it is easier and more cost-effective to reduce the risk of further offending in the community than in prison
  - where it is necessary to send someone to prison this should be for the shortest period necessary.
- Texas implemented programs at every point in the criminal justice system to

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<sup>44</sup> National Gang Center, 2019.

<sup>45</sup> Skogan & Rosenbaum, 2004.

make small reductions in imprisonment that were cumulatively significant.

## **Problems and Limitations with Texas' 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 priorities 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, 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.

## Texas Executions



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>46</sup>.

The African American imprisonment rate has declined slightly in recent years. However, it was clear that progressive groups in Texas saw addressing this as a greater priority than more conservative groups. Again, this is indicative of a difference in priorities - those

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<sup>46</sup> 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.

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, recent discussion of the expansion of home detention would reduce the prison population, but based on the existing approach this would most likely be by releasing primarily Pakeha prisoners<sup>47</sup>. 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 payoff 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.

#### **Key Lessons**

- Texas conservatives and progressives agree on the need to reduce imprisonment, but disagree on other important issues such as the death penalty, racial inequality and investment in early intervention
- This is reflected in limited progress addressing issues where there is not agreement.

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<sup>47</sup> Horwood, 2012.

## Conclusion

The aim of this research was to answer three key questions:

- How did Texas reach a bipartisan consensus?
- How did Texas maintain public confidence?
- What specific policies did Texas implement?

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 their ability to effectively reform (particularly in comparison to programs 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.

This is also reflected in the critical role played by the advocacy groups and think-tanks that came together to argue for reform, without resolving their underlying disagreements.

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 programs, 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 figures who could lead a public response.

Finally, the policies implemented in Texas were based on three principles:

- to substantially reduce the prison population it is necessary to send fewer people to prison (i.e. it is not possible to reduce the prison population simply by reducing the prison recidivism rate)
- it is easier and more cost-effective to reduce the risk of further offending in the community than in prison
- where it is necessary to send someone to prison this should be for the shortest period necessary.

Policies were implemented at every point in the criminal justice system based on robust evidence and broad support.

Lastly, it's important to point out some of the limitations of the consensus that has allowed Texas to progress criminal justice reform. The differing reasons for their support mean Republicans and Democrats still disagree on some major issues in criminal justice. For instance, Republicans' focus on cost and the ineffectiveness of prison-based reform means their support for the death penalty is undiminished - in 2018 Texas carried out nearly half of all executions in America.

Similarly, given the level of African-American imprisonment it is hard to significantly reduce the imprisonment rate without benefiting African-Americans. However, while Texas has made progress in this area, it has not been a priority.

Similarly, Texas' focus has been on reducing the prison population, rather than public programs, such as free GP visits and prescriptions for under 13s that New Zealand has introduced which will have broad public benefits, including reducing the prison population in the long-term.

New Zealand currently has around 10,000 people in prison, costing around \$1billion per annum just to manage the prison system. Texas has demonstrated that it is possible to make large 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.

## Appendix 1 - The State Justice System

This is a short aside for those unfamiliar with the differences between the state and federal government in the American criminal justice.

Congress only has the power to legislate with regard to matters listed in the Constitution (known as enumerated powers). This means that the federal government's role in criminal justice is relatively limited, as the Constitution has little to say in this area. Even criminal justice areas where the federal government does legislate are not always obviously related to the Constitution. For instance, federal drug laws are justified under the Constitution's provision allowing the federal government to regulate interstate commerce as there is an interstate market for drugs.

The Tenth Amendment means that any power not explicitly given to the federal government is held by the states. This includes 'police power', the authority to regulate behaviour and enforce order for the health, safety and general welfare of residents. This gives states enormously broad powers, although they must legislate consistently with:

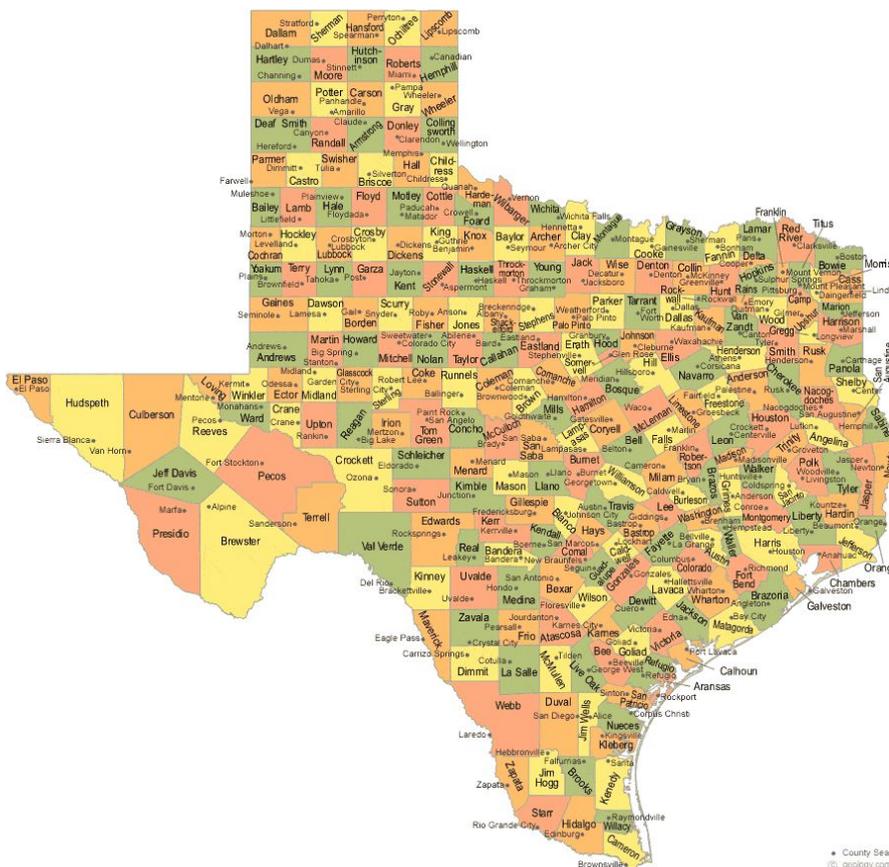
- the United States Constitution
- the state constitution
- federal law<sup>48</sup>.

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<sup>48</sup> This can create complicated scenarios. For instance, although some states have legalised marijuana it is still illegal at the federal level. This means that someone could be arrested by federal police and imprisoned in a federal prison for using or possessing marijuana in a state where it is legal to use and possess. So far this is a showdown that the federal government has avoided, although enforcement has become more aggressive under President Trump.

According to the most recent data, less than 10% of prisoners are held in federal prisons. Among the states, Texas has the largest number of prisoners (larger than the number of federal prisoners), but it's imprisonment rate is now only sixth equal.

However, to further complicate matters. Within the states there is an important distinction between the state and county - broadly, the state prisons manage people sentenced to prison for more than a year, while county jails hold people awaiting trial or sentenced to less than a year<sup>49</sup>. This split is also reflected in the programs each is responsible for, meaning that counties play a key role in police and court diversion programs. The state/local distinction is also reflected in other parts of the justice system. For instance, courts are run at the county level as are sheriffs<sup>50</sup>.



For this paper the various levels of governance introduce a lot of complexity. The paper is primarily focused on the state level, since this is where much of the drive to reduce the imprisonment rate originated. However, in many cases this

<sup>49</sup> Given that New Zealand does not have jails phrases such as 'Texas' prison population' should be taken to refer to both the prison and jail population unless explicitly stated otherwise.

<sup>50</sup> Texas has a total of 254 counties, although 63% of the population lives in the 12 largest counties.

played out through innovative county programs. Ultimately it has not been possible to undertake a full review of Texan criminal justice policy, but this paper seeks to balance both an overview of the state level experience with highlights of useful lessons and innovative policies from the county level.

## Appendix 2 - The Real Cost of Prisons

Prisons are incredibly costly to build and operate. The figure often referenced in public discussion is around \$100,000 per prisoner per annum<sup>51</sup>. But this is a dramatic underestimate of the costs of sending someone to prison. It's an estimate based on averaging the prisons budget over the number of prisoners being managed. There's nothing wrong with this, as far as it goes, but it doesn't include the broader costs to the justice system, such as:

- police costs such as investigation and apprehension
- court costs.

There are other costs to government that are ignored, such as:

- taxes that would have been paid by the person who was imprisoned
- benefits and other support that have to be paid to families whose breadwinner has been imprisoned.

Lastly, there are broader costs to the government and society that are not considered, such as:

- the cost of any increase in crime caused by imprisonment (both the 'school of crime' effect, and the fact that having a parent imprisoned is one of the best predictors of poor life outcomes, including being imprisoned)<sup>52</sup>
- poor employment opportunities following release (and consequent impacts on taxes and benefit payments)

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<sup>51</sup> For instance Stewart, 2018, Morrah, 2018 or Gattey, 2018.

<sup>52</sup> Social Policy Evaluation and Research Unit, 2015.

- the cost of poor prisoner health following release.

Note that some of these costs will be incurred if a person is remanded to prison while awaiting trial, even if they are subsequently found not guilty. Between March 2012 and March 2019 the number of remand prisoners increased by over 80%, rising from 21.9% of the prison population to 34.3%.

On the other hand, it also misses any savings from:

- avoided crimes
- ceasing benefit and other payments to people who have been imprisoned
- the reduced life expectancy of prisoners (meaning they receive less or no pension, and may use fewer other government funded services).

No one in New Zealand knows the net cost to society of imprisonment (including any savings)<sup>53</sup>. However, an American study found that for every dollar in corrections costs, there are an additional \$10 of costs to society<sup>54</sup>. This suggests that the cost to New Zealand society of sending someone to prison could be over \$1.1million per annum. Given the number of people in New Zealand prisons this means the cost to society is \$11billion *per annum*.

Unfortunately there are some challenges in realising savings from reducing the prison population. Firstly, only large scale reductions are likely to realise savings - the marginal

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<sup>53</sup> This raises obvious questions about how it is possible to provide robust advice to Ministers on the costs and benefits of increasing the size of the prison system and how this compares to alternative options. However, the Treasury has confirmed they do not have this information and ignored two requests for information on whether they had any plans to gather it.

<sup>54</sup> McLaughlin, Pettus-Davis, Brown, Veeh, & Renn, 2016. January, Henrichson, & Delaney, 2012 found that the cost was 13.9% higher than indicated by the traditional measure, but this took a much narrower approach, excluding a number of important costs covered in the cited report.

value of reducing the prison population will be negligible. The largest component of prison costs is infrastructure and large savings will mainly be realised when reductions are sufficient to avoid constructing new infrastructure or eliminating existing infrastructure. Secondly, it is easier to realise savings through avoiding expansion than by reducing the prison population. This is because the assets will have depreciated (in many cases the age of New Zealand prisons means that it has been a generation or more since they fully depreciated). Therefore, savings from reducing the prison population will primarily be from efficiency improvements, any reduction in staff numbers and sale of surplus land.

Notwithstanding the caveats above, it is possible to estimate the savings if New Zealand's imprisonment was more similar to other OECD countries. The most recent data from the OECD suggests New Zealand has the fifth highest rate of imprisonment of the 35 OECD countries<sup>55</sup>. Using the very conservative estimate of \$100,000 per prisoner per annum it's possible to estimate how much New Zealand could save if it's imprisonment rate was the same as other countries:

- Australia - \$197million per annum
- England and Wales - \$352million per annum
- France - \$517million per annum
- Germany - \$644million per annum
- Japan - \$813million per annum
- Iceland - \$832million per annum

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<sup>55</sup> Duffin, 2019.

These savings are simply for the prison system. For example, the savings to society at large of having an imprisonment rate equivalent to Australia's could be as high as \$2.2billion per annum.

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