

# Community sentence patterns in New Zealand

An international comparative analysis

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## Executive summary



Community sentences are sentences other than imprisonment or monetary penalties, that have conditions that are served or performed in the community, and which involve regular oversight or management by a corrections official (Ministry of Justice 1999).

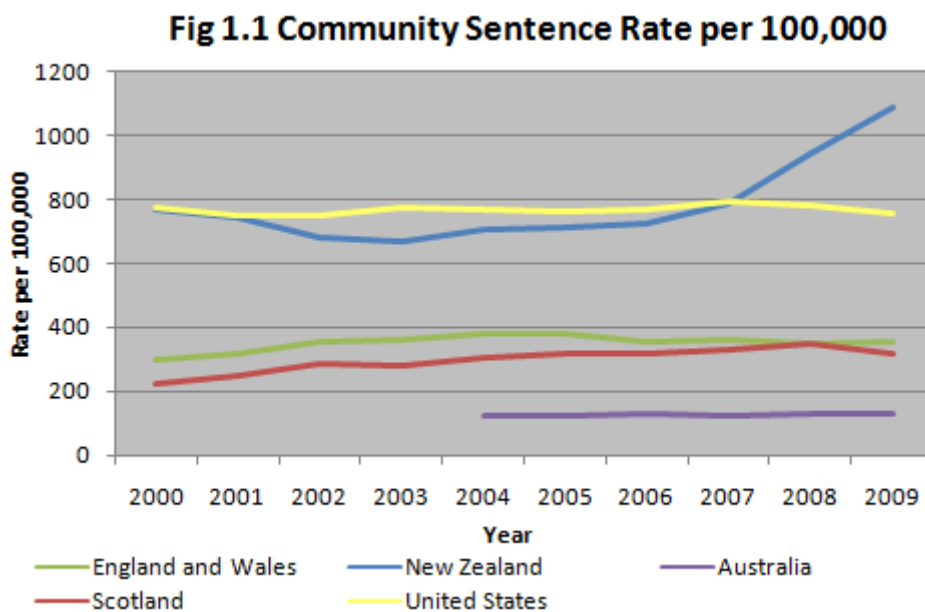
There are relatively high volumes of offenders on community sentences in New Zealand compared with other jurisdictions. This feature has become even more pronounced since the introduction of new community sentencing options in late 2007. This paper investigates the reasons for the disparity by comparing criminal justice statistics from New Zealand to other jurisdictions, including England/Wales, Australia, Scotland and the United States.

Despite difficulties in comparing the statistics from different criminal justice systems, a number of key findings emerge from the analysis. Evidence, although somewhat circumstantial, suggests that New Zealand's high rate of community sentencing can be largely attributed to differences in sentencing practice. New Zealand courts are more likely to impose community sentences rather than monetary penalties or other forms of non-custodial sanctions. This holds true when considering other factors such as the use of pre-sentencing disposals, the makeup of offending in each jurisdiction, or differences in legislation. This preference towards community sentences has progressively been embedded over three decades of legislative change.

## 1. Introduction

Many Western countries have seen significant growth in their respective prison populations over the last three decades. New Zealand has not been exempt from this growth, where the rate of imprisonment has increased from 139 per 100,000 in 1981 to 217 per 100,000 by 2008/09. In fact, this rate has grown more sharply than many similar countries, to make New Zealand's imprisonment rate one of the highest in the Western world.

However, this growth in the imprisonment rate has often been viewed as a development in isolation. Somewhat less well known is that, per capita, New Zealand also has a high rate of offenders on community sentences. Figure 1.1 below shows rates of community-sentenced offenders per 100,000 of population. Relative to other international jurisdictions, it would seem New Zealand also has a high rate of community sentencing<sup>1</sup>, and one that has fluctuated in recent years. This finding not only requires explanation itself, but also has relevance for understanding the high imprisonment rate.



**Note:** The community sentence rate for the United States is likely to be overestimated in this figure, and the rate for Australia is likely to be underestimated. See Appendix One for information sources and other important notes relating to this figure.

The aim of this report is to shed light on why New Zealand's community sentences rate is higher than similar countries. The report first establishes how flows through the justice system impact on each jurisdiction's community sentence numbers. The second aspect of this report identifies whether New Zealand's high community sentence rate is a product of an increased tendency to use community sentences over other sentences. These two aims are related and this report will look to disentangle the extent each has on community sentence trends. These aims are

<sup>1</sup> Data are based on the definition of community sentences defined in the following section.

discussed within the context of significant differences in the data and criminal justice systems compared. Community sentences were reviewed by Ministry of Justice in 1999 (Ministry of Justice 1999), the last time these sentences were analysed in depth.

### ***Community sentences defined***

Community sentences in this paper refer to ‘sentences other than imprisonment and monetary penalties that have conditions that are served or performed in the community’ (Ministry of Justice 1999), and which involve regular oversight or management by a corrections official. This definition covers a broad range and mix of sentences with an array of purposes. This definition excludes:

- monetary penalties such as fines and reparation
- prohibition-type penalties such as disqualification from driving
- discharges following conviction or discharges without convictions
- supervision-type orders or sentences which commence immediately after release from prison
- suspended custodial sentences (i.e. a custodial sentence that is avoided if non-offending behaviour is maintained for a certain period of time).

Community sentences can be sub-categorised into three types<sup>2</sup>:

- Punishment sentences, usually involving unpaid work.
- Treatment sentences, involving participation in some form of rehabilitation, usually monitored and supported by a correctional officer.
- Surveillance sentences, often utilising electronic monitoring and restrictions on movement within the community.

A sentence is defined as a community sentence if it satisfies the conditions outlined above. This is irrespective of whether the community sentence is an alternative to imprisonment or not. Therefore sentences such as home detention are defined as community sentences in this report, despite some interpretations of these sentences as custodial sentences. For a full list of community sentences used in this report, see appendix two.

Community sentences matching the above description have been available to criminal courts in most Western countries for many decades. While generally embraced as a lower-cost alternative to imprisonment, community sentences have at times been controversial. Advocates for their use maintain that community sentences allow offenders to maintain family and employment ties in the community, improve rehabilitation outcomes, result in lower recidivism rates, and are cost-effective when compared with imprisonment (May and Wood 2005). Critics however claim that community sentences seldom achieve the objective of reducing growth in

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<sup>2</sup> See for example Mackenzie and Souryal 1997; Bottoms 2001; Gideon and En-Sung 2010

the prison population, can serve to “widen the net” of criminal justice sanctioning, and are “soft options” that fail to deter or protect the public from criminals (Worrall and Hoy 2005; Petersilia 1997).

### ***Data sources and limitations***

This report compares New Zealand’s criminal justice statistics to official statistics, available through government websites, from the jurisdictions of five Western countries. The countries compared with New Zealand are Australia, United States, Scotland, and England/Wales. All data sources used in this report are cited in appendix one, which also includes important notes pertaining to the use of data.

Criminal justice data is often presented in two forms: a snapshot perspective, giving the number of offenders under management or the number of active sentences at a given point in time, and “throughput” perspectives, such as the number of offenders starting a sentence between two points in time, usually over twelve months. This report used both types of data. However, care has been taken to ensure consistent data was presented from each jurisdiction so meaningful comparisons are made. Wherever possible, figures were used which relate to the same years or period of time.

Nevertheless, a number of problems emerge when comparing crime and criminal justice statistics of different countries. The five jurisdictions selected for analysis in this report each have varying counting rules relating to the reported statistics. These differences need to be understood when interpreting the data. Criminal justice statistics can either relate to counts of individual offenders, or counts of events such as charges, prosecutions, or convictions. While much of the data in this report is based on case-based<sup>3</sup> counting units within courts, what constitutes a case can differ.

There are also significant differences in legal systems and sentencing practices between jurisdictions. Differences in the way criminal justice systems legally define and deal with offences can impact on the statistics. Criminal incidents in one country may not be defined as criminal in others; they may be defined differently; or they may be dealt with in an infringement-based system. For example, England/Wales and Scotland summarily prosecute large numbers of people for television licensing evasion (in England/Wales, this accounted for over 10 percent of all prosecutions in 2010), an “offence” for which New Zealand has no equivalent.

The distinction between juvenile and adult criminal justice systems also presents challenges. This report focuses on the flows of offenders through each jurisdiction’s adult criminal justice system. This raises an issue for comparability as definitions of

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<sup>3</sup> In general, a case based counting unit is a grouping of charges that are tried before the court. Broadly, an offender convicted of three charges on a single day is counted as one conviction; an offender who appeared in court twice in one year, on each occasion being convicted of one or more distinct offences, count as two convictions.

an 'adult' offender differ, as well as how they are dealt with. Each jurisdiction's definition of an adult offender is as follows:

- New Zealand – 17 years and older
- Australia – 18 years and older (except Queensland - 17 years and older)
- England/Wales – 18 years and older
- Scotland – 21 years and older
- United States – varies by State (18 years and older in 38 States).

The inclusion of 17 year-olds for New Zealand has a significant impact on the overall figures – this age group is the most highly represented in police apprehensions over the period 2005/06 to 2008/09 (Statistics New Zealand 2010).

The types and definitions of crime categories reported in statistical series can also affect comparison between jurisdictions. While New Zealand and Australia use the same offence classification, other countries classify offences differently.

Additionally, countries differ on whether they include or exclude the following:

- infringement type offences (e.g. speeding)
- attempted offences (e.g., attempted burglary, attempted robbery)
- common or minor assault within the violence category (some include these offences in a "summary" offences category)
- breaches of various sentences (such as community work) as a specific offence (some relate the breach back to the original offence, and/or omit such offences entirely).

Jurisdictions sometimes use different time periods for counting, for example, fiscal versus calendar year. Offences may be included or excluded from a count because they capture the date of the first court hearing rather than the final sentencing hearing. Jurisdictions are also variably affected by time lags in the recording of events. Finally, each jurisdiction is subject to changes in any of the above processes over time (many jurisdictions change counting rules, IT systems, offence classifications, and sentence types), which can all impact on statistical comparability (Aebi 2011).

Although care has been taken to minimise the impact of the above issues, conclusions reached on the analysed data should be indicative rather than conclusive. This is more of an issue when comparing the data in absolute terms rather than trend terms (Sheptycki and Wardak 2005). For additional caveats around the data used in this report, please refer to the cited references.

### ***Hypotheses***

Factors falling within two broad categories are hypothesised to have potential to inflate New Zealand's community sentence population rates above those of other jurisdictions. These are as follows:



*(1) New Zealand has high volumes of offenders progressing through various stages of the criminal justice system, as a result of one or more of the following:*

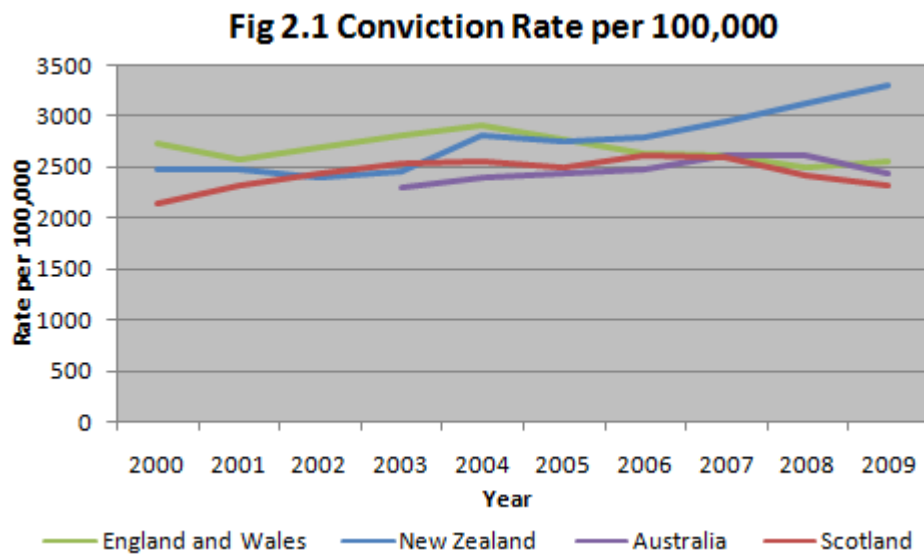
- There is more crime which means more cases progressing through the various stages of the criminal justice system; this in turn might reflect that more crime is reported; more crime is resolved; accused people are more likely to be prosecuted; or a greater proportion of offenders are convicted.
- A wider range of conduct and behaviour is classified as criminal in legislation (as a hypothetical example, a graffiti offence defined as criminal in New Zealand but not elsewhere).
- The age of criminal responsibility is lower in New Zealand than other countries, meaning younger people are subject to community sentences.

*(2) New Zealand courts impose community sentences in preference to other penalties, as a result of one or more of the following:*

- Sentencing legislation encourages preference for community sentences over alternatives.
- Prior to sentencing, more New Zealand offenders are dealt with via pre-sentencing alternatives than occurs in other countries, resulting in sentenced offenders being dealt with for offences of higher-than-average seriousness.
- Offences reaching the sentencing stage fall within a (higher) seriousness range that makes community sentences more likely (rather than fines or other lower-level sentences).
- Fewer people have the means or inclination to pay fines, and/or courts have less confidence in their use
- Reconviction rates are higher, or dealt with more harshly, resulting in more rapid escalation up the sentencing hierarchy.
- The New Zealand public is generally more punitive than other jurisdictions, imposing pressure for punitive sentencing.

## 2. Numbers progressing through the criminal justice system

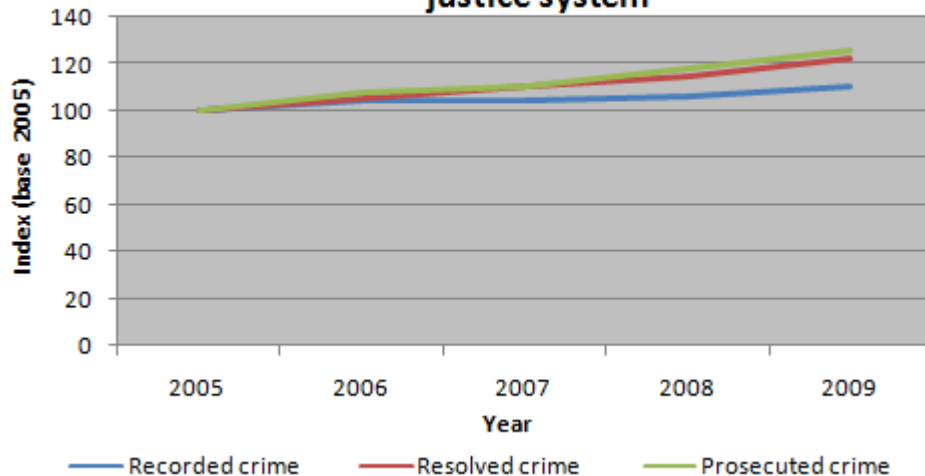
The first hypothesis, that New Zealand has an unusually high volume of offenders entering the criminal justice system, can be dealt with simply by comparing annual rates of criminal convictions across jurisdictions. The figures presented in Figure 2.1 are constructed on an approximate case-based counting unit. In general, an offender convicted of three charges on a single day is counted as one conviction; an offender who appeared in court twice in one year, on each occasion being convicted of one or more distinct offences, counts as two convictions.



**Note:** See appendix one for information sources and important notes relating to this figure.

Figure 2.1 suggests that New Zealand, until recently, has had a similar rate of offenders convicted in the criminal courts each year compared to England/Wales, Australia and Scotland. Between 2006 and 2009, however, the conviction rate per 100,000 has increased relative to the other jurisdictions. Figure 2.2 shows this increase is reflected in prior stages of the justice system, including numbers of police recorded crime, police resolutions, and court prosecutions. An index is used to highlight the relative contribution of each stage to the increase in the conviction rate, with 2005 as the base year. The main offences influencing this increase have been exceeding the alcohol limit while driving, breach of community-based orders, and assault.

**Fig 2.2 Index trends for initial stages of criminal justice system**



**Note:** See appendix one for information sources and important notes relating to this figure.

The fact the increase in the conviction rate compared with other countries is a recent phenomenon, however, suggests that the high rates of community sentencing over the last decade is potentially more likely to be attributed to factors other than high volumes, including:

- an increased likelihood to use community sentences relative to other countries
- more use of pre-sentencing disposals, such as infringements and police cautions
- a combination of increased recidivism rates, less effective fines system, and greater public appetite for community based sentences.

The following section will examine which of these factors, or combination thereof, are most likely to be involved.

### 3. Community sentencing practice

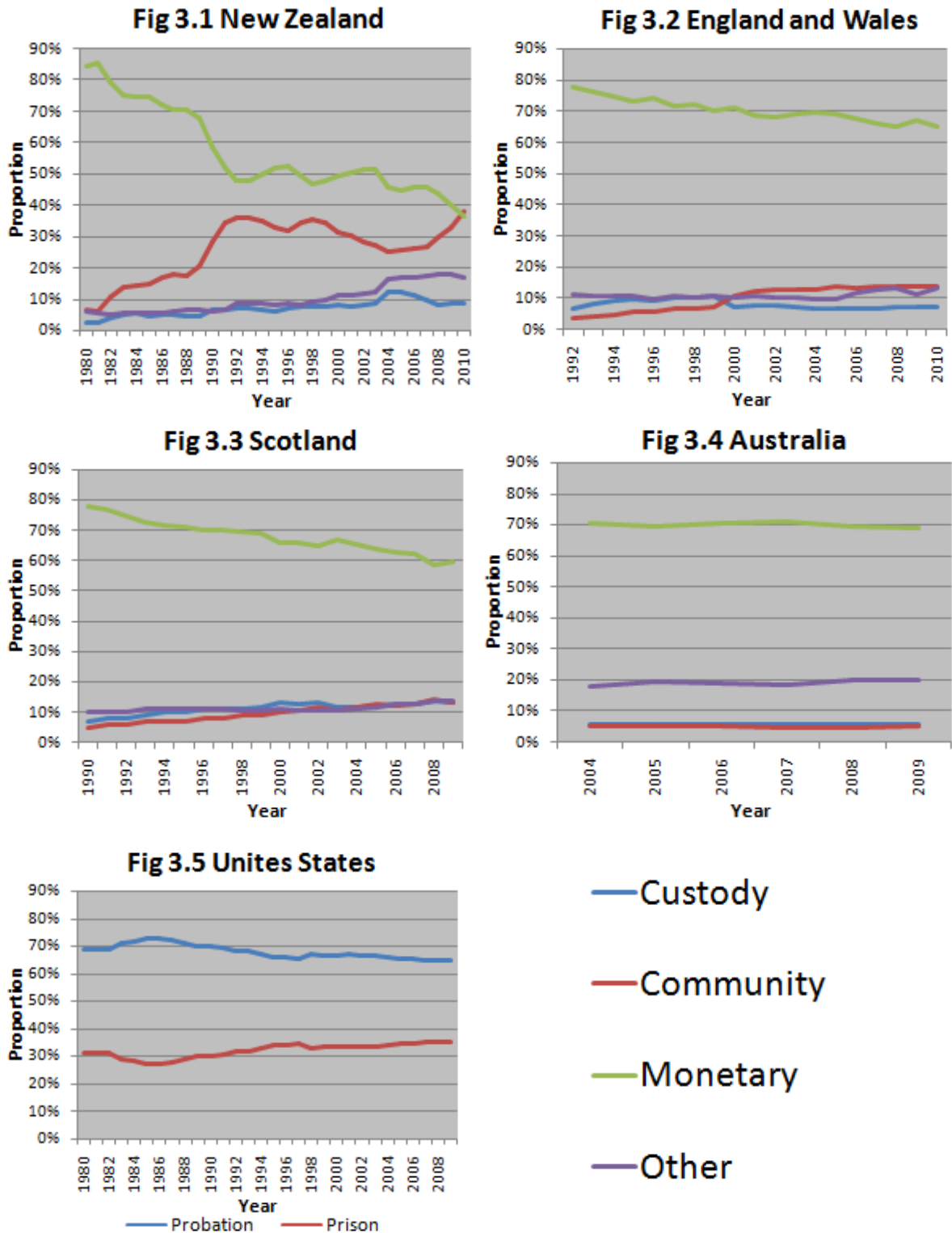


The second domain for analysis relates to sentencing practices by courts, and the characteristics of cases moving through the courts. If New Zealand's criminal justice system diverts more offenders to community sentences relative to other sanctions, then the large community sentence population may be accounted for. Therefore, it is important to compare the extent to which community sentences are imposed across the different international jurisdictions. This section looks at differences between countries of:

- the impact of policy and legislative developments
- the use of non-community based alternatives to imprisonment
- differences in the mix of offences moving through the system.

As discussed in the introduction, comparing sentencing practices across jurisdictions is difficult. This is due to the different contexts in which sentencing types and practice have been established within different jurisdictions. Figures 3.1 to 3.5 show the proportion of convicted offenders given community sentences, relative to other sanctions in New Zealand and other countries.

Figures 3.1 to 3.5 - Sentencing trends by country



Note: See appendix one for information sources and important notes relating to these figures.

Figures 3.1 to 3.5 strongly suggest that the New Zealand court system impose community sentences on a significantly higher proportion of offenders than other countries. It is also apparent that New Zealand’s rate of community sentences has been increasing over the last three decades, and this looks to be at the expense of

monetary penalties. While this trend is also evident in England/Wales and Scotland, it is not nearly as pronounced as in New Zealand.

These patterns are possibly due to a combination of policy, legislative and social factors and their development over time. A brief discussion of relevant developments follows.

### ***Differences in policy and context***

#### **History of community sentences**

Current trends in community sentencing need to be viewed in the context of each country's legislative, policy and social history. A brief discussion on patterns of sentencing in the context of legislative and policy changes follows.

#### **New Zealand**

Legislation and policy developments over the past three decades have had a direct impact on sentencing patterns in New Zealand. These changes are reflected in the trends shown in figure 3.1. Between 1980 and 1992 a large fall in monetary penalties was accompanied by a corresponding rise in community sentences. The decrease in the use of monetary penalties during this period, and subsequent decrease since then, can be attributed to a number of factors:

- The Criminal Justice Act (1985) introduced new community sentences, which intended to reduce the volume of custodial sentences, but instead appear to have replaced monetary penalties. Community sentences have been applied more frequently for low-seriousness offences (Ministry of Justice 2000).
- A large number of offences, usually dealt by court fines, were reclassified as infringements, such as "driving having never held a license" (1989) and "failing to register a dog" (1996). Infringements are not counted in New Zealand conviction statistics.
- The expansion of the Police adult diversion scheme in 1988 led to more people being diverted before sentencing.
- The Transport Amendment Act (No. 2, 1988) allowed community sentences to be substituted for driving disqualification for traffic offences (Ministry of Justice 1999).

It is also possible that this period coincided with a decrease in the capacity of offenders to pay fines, and judges' reluctance to impose them.

Therefore, for a range of possible reasons, the period between the 1980s and early 1990s established the trend of high usage of community sentences in New Zealand. Community sentences accounted for 15 percent of all disposals in 1985, rising to 31 percent by 1992. Subsequently, changes to community sentence options brought about by the 2002 Sentencing Act (the sentence of "community work" replaced both periodic detention and community service), appear not to have had impacts in either

direction (Ministry of Justice 2010). Use of community sentences after 2002 was relatively stable, up to the introduction of the Sentencing Amendment Act 2007. This introduced home detention as a sentence option, along with community detention and intensive supervision. These changes were associated with a further sharp increase in the use of community sentences. While a proportion of the growth appears to be at the expense of custodial sentences (the proportion of all convictions resulting in imprisonment fell from 10% to 9%), the substantial volume of new community sentences imposed since late 2007 appears to have impacted primarily on monetary penalties.

In summary, the introduction of several new community sentences in New Zealand over the last three decades has generally been driven by the desire to reduce the prison population. However, the net effect of this trend has been a minimal fall in custodial sentences, but a significant decline in the use of monetary penalties.

### **England and Wales**

Sentencing trends in England and Wales show some similarities to New Zealand. First, although monetary penalties are still extensively used in England and Wales, figure 3.2 shows use has been decreasing over the last two decades. Like New Zealand, the decrease in the use of monetary penalties has been accompanied by a corresponding increase in community sentencing. Further, despite an increase in community sentences, the use of custodial sentences has continued to rise.

The increased use of community sentences in England/Wales can also be traced through a range of legislative developments over this period. The introduction of the Criminal Justice Act 1991 established a 'tougher' range of community sentences (such as introducing more restrictive conditions and greater enforcement), and encouragement of their use (Ashworth 2010; Tonry 2007). A 'unit fine'<sup>4</sup> policy was abolished in 1993 and it is argued that this has contributed to the decline in the use of fines (Ashworth 2010). Subsequently, the large range of community sentences was consolidated into the overarching "community order" within the Criminal Justice Act 2003. These developments have embedded community sentences as an important sentencing option in England/Wales.

### **Scotland**

Scotland's recent sentencing trends follows England and Wales very closely. There is a heavy reliance on monetary penalties, although a notable decrease in the use of fines has occurred in the last two decades (figure 3.3). As with the other countries analysed so far, the introduction and restructuring of community sentences has failed to impact on the imprisonment rate (McNeill 2010).

Criminal justice policy in Scotland has historically developed independently from the central United Kingdom government, and the criminal justice system differs in

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<sup>4</sup> A unit fine is where a fine imposed is proportionate to the offender's income.

important ways (McAra 2010; Millie et al. 2007). Social work has tended to have a central role in criminal justice in Scotland, which has had implications for the development of community sentences. National standards for criminal justice social work were introduced in 1991, with the aim to increase the use and quality of community based sentences (Millie et al. 2007). This standard has been associated with a substantial climb in probation and community sentences, from around 10,000 in 1991, to around 16,000 in 2009/10.

### **United States**

It is difficult to generalise from United States sentencing patterns, as states develop legislation separately. This results in a number of different criminal justice systems (Burrell 2005). The high rate of imprisonment relative to other countries is the most obvious characteristic of United States sentencing. This began in the 1970s with the move from an indeterminate to determinate sentencing model (removing sentencing discretion from judges), the 'war on drugs', and various other 'get tough' policies (White et al. 2011; Tonry 2007). Yet figure 3.5 suggests probation is also heavily used.

The absence of monetary penalties in figure 3.5 reflects the fact that, in the United States, fines supplement other sanctions rather than function as a stand-alone penalty. There is considerable discretion in their use, and fines are used often as a means to extract court costs (Beckett and Harris 2011).

The term 'probation' in the United States, however, covers a very broad range of sentences, governed by over 2000 separate agencies (Petersilia 1997). In many instances, probation is a relatively mild punishment for offenders, involving minimal supervision and placing few requirements on the offender (Bottoms 2001; Petersilia 1997). On the other hand, probation often follows, or is preceded by, a period of imprisonment (Glaze and Bonczar 2010).

With the increasing cost of custodial sentences in the United States, many states have established alternatives to imprisonment, for example, drug courts, of which there are now over 2000 in the United States (King 2009; White et al 2011).

### **Australia**

It is also difficult to generalise from Australian sentencing patterns, due to the federal-state composition of the country, where each of the states develops separate legislation in regards to criminal justice. Figure 3.4 seems to show that Australia currently has the highest reliance on fines of all the analysed countries, and utilises community sentences the least. The low use of community sentences can potentially be attributed to a number of factors:



- Australian states make widespread use of suspended sentences and good behaviour bonds<sup>5</sup> (which are excluded from community sentences as defined in this report).
- Marcus and Wayne (2010) and Freiburg (2010) have suggested that high levels of judicial discretion are evident in Australian courts, in that courts are less bound by strict sentencing guidelines to maintain consistency (although it is difficult to compare the relative use of this discretion between jurisdictions).
- As with the United States, Australia has utilised a range of alternative processes such as drug courts, indigenous courts and family violence courts<sup>6</sup> (Marcus and Wayne 2010).

## Summary

This section provides an overview of the wider legislative and policy developments that have impacted on sentencing trends in each country. It appears there are a number of similar developments that could account for the sentencing trends in the countries analysed. The amendments to sentencing acts over the last three decades, for New Zealand and United Kingdom jurisdictions in particular, have driven an increase in the use of community sentencing. These jurisdictions introduced community sentences primarily to reduce pressure on the prison population. Instead the changes have had the unintended effect of displacing monetary sentences.

As these legislative developments have been common to all these jurisdictions, there must be other factors that account for the deviation in New Zealand's sentencing practice. This deviation could be due to differences in the use of monetary penalties, the use of pre-sentencing disposals, or the mix of offences moving through each system. These factors are explored in depth in the next section.

## ***Differences in offence mix***

Differences in how offences are categorised and legislated between different jurisdictions make direct comparisons of total offending very difficult. To account for the mix of offences, exploring sentencing patterns by specific offence types can provide additional insight.

Figures 3.6 to 3.10 look at sentencing patterns by offence types. Legal definitions differ between jurisdictions for the offence types analysed here, so some degree of caution is recommended. There seems to be wide sentencing variation between jurisdictions, but the general trends remain consistent as before. New Zealand is much more likely to impose community sentences in all offence categories relative to other countries, particularly for drugs, assaults, and theft. In contrast, New Zealand is less likely to impose monetary and 'other' sentences for all offence categories.

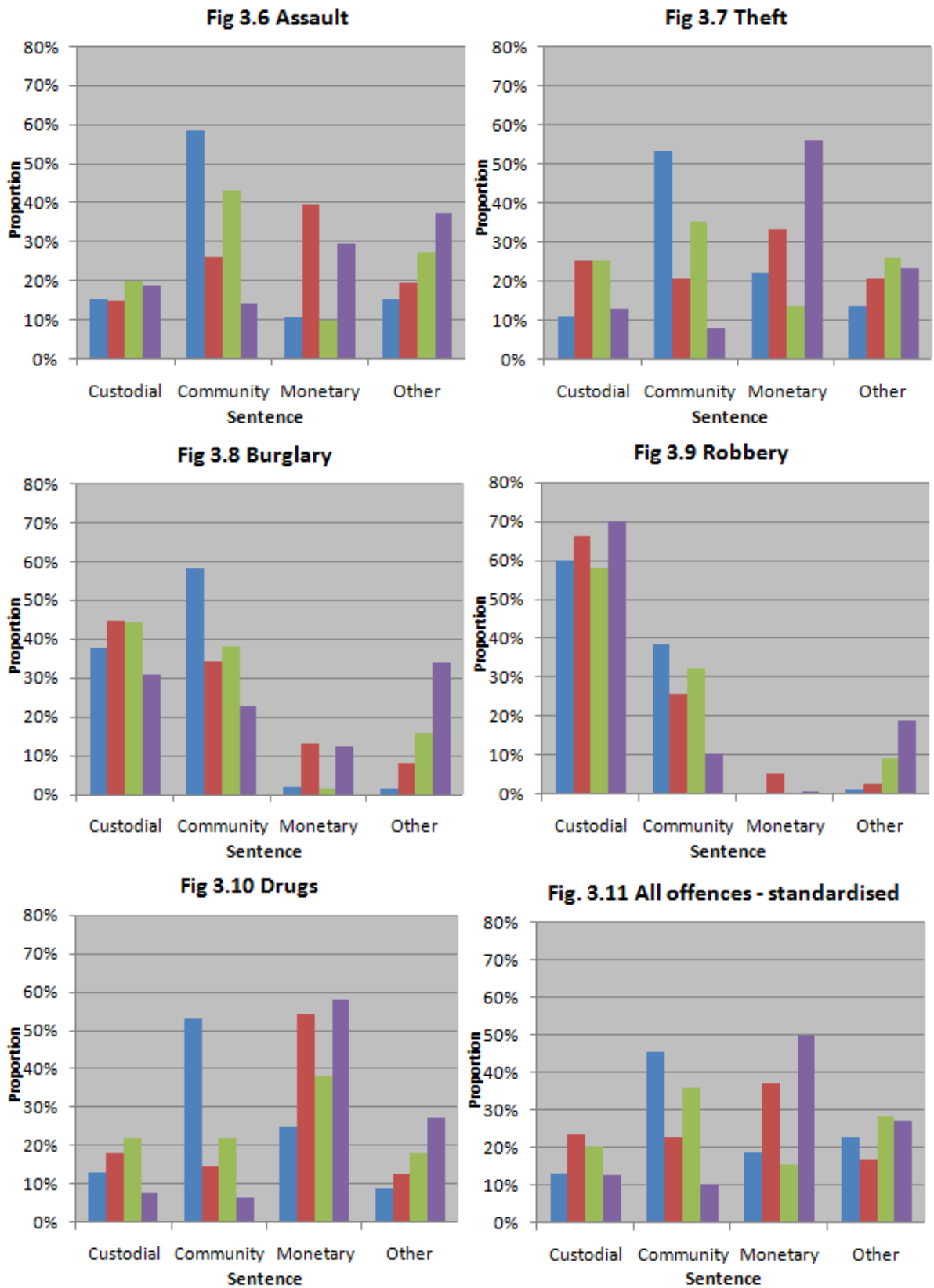
<sup>5</sup> Offenders subjected to good behaviour bonds are required to be of 'good behaviour' for a set period of time, and may have to satisfy other conditions such as counselling.

<sup>6</sup> Specialist courts deal with the risk factors of certain types of offending before sentencing.

Offence mix is still an issue for these offence categories. For example, the drug offence category for England/Wales consists of a higher proportion of less serious drug possession type offences than New Zealand. This could account for the higher proportion of less serious sentencing options used in England/Wales in comparison to New Zealand. Of all offence categories, robbery shows the most consistency amongst the jurisdictions in terms of sentencing trends, although this may only reflect similarity in legislative definition and offence mix in comparison to the other offence groups analysed.

Figure 3.11 attempts to provide the most consistent representation of total offending across the jurisdictions. Offences excluded from this data include traffic offending, public order offences, all offences against justice such as breaches of community sentences, and miscellaneous offences such as telecommunications act offences.

Figures 3.6 – 3.11 - Sentence type by offence



Note: See appendix one for information sources and important notes relating to these figures.

***Differences in non-community based alternatives to imprisonment***

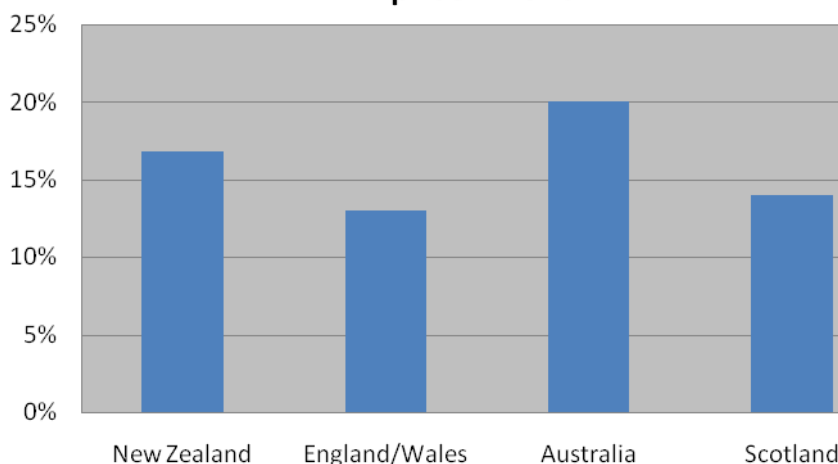
A focus on snapshot data at sentencing neglects the important filtering of offenders and offending through different points in the criminal justice process. Sentencing is not the only manner in which criminal justice systems can manage offenders. Various pre-sentencing options exist to deal with offenders. These include infringements or fixed penalties, police diversion, police warnings and cautions, and family group conferences (for young offenders). Differences in the way each jurisdiction implements these alternative sanctions can significantly affect sentencing statistics. For instance, if New Zealand utilised these alternative sanctions more than other countries, offences reaching the sentencing stage may be on average more serious. This could result in less use of fines and greater use of higher-tariff penalties.

Similarly, at the sentencing stage, non-community based alternatives to imprisonment may be available. These include suspended sentences, mixed sentences, and good behaviour bonds. It is possible that other jurisdictions utilise these sentences more than in New Zealand.

An international comparison in this area showed, however, that analysis was limited due to the various differences in counting rules, offence categories and data sources. This was confounded by various differences in the criminal justice systems, particularly differences in the way infringements, traffic offences and youth offenders are dealt with. These issues particularly affected the analysis of pre-sentencing disposals. Although statistics on pre-sentencing disposals exist, the extent of differences between jurisdictions renders analysis difficult to interpret. Available evidence suggests each country make extensive use of pre-sentencing disposals.

Figure 3.12 identifies the proportion of all other non-community based alternatives at sentencing, such as conviction and discharge, suspended sentences and good behaviour bonds (excluded are court imposed fines and imprisonment). The evidence is mixed to support the conclusion that other jurisdictions have a greater focus on non-community alternatives at sentencing. New Zealand utilises these sentences more than England/Wales and Scotland, but less than Australia. Again, these figures should be interpreted as only indicative.

**Fig 3.12 Non-community alternatives to imprisonment**



**Note:** See appendix one for information sources and important notes relating to this figure.

### ***Unquantifiable factors***

A number of other factors may significantly influence New Zealand's high rate of community sentences relative to other countries, but it is not possible to quantify them. This is primarily due to a lack of good quality data, and inconsistency between jurisdictions. The possible influence of these factors is summarised below.

### **Differences in the use of monetary penalties**

The results analysed so far suggest that New Zealand utilises court-imposed monetary penalties much less than the other jurisdictions analysed in this report.

It is possible offenders in New Zealand are less inclined or have less ability to pay fines, or sentencers are less confident in their willingness to pay, than other jurisdictions. A survey of judges undertaken by the Ministry of Justice in 2003 suggests judges impose alternative sentences to fines in a large proportion of cases due to the inability of offenders to pay fines (Searle 2003). The declining use of monetary penalties is apparent in other countries also, such as England/Wales and Scotland. This has been attributed to a lack of confidence in their enforcement and the perceived inability of offenders to pay (Millie et al. 2003; Raine et al. 2004).

The non-payment of fines in New Zealand can also lead to community sentencing. When court-imposed fines are not paid, an offender can be arrested or summonsed before the court. The judge then has the authority to sentence the offender to community work, if other means to extract the fine have been exhausted, such as a warrant to seize property<sup>7</sup>. Therefore, an increase in the number of fine defaulters over time can lead to an increase in the number of offenders on community work. This type of sentence escalation is also an issue in other jurisdictions.

<sup>7</sup> Section 88 of the Summary Proceedings Act 1957

### **Differences in recidivism and offender history**

The likelihood that an offender receives a sentence short of a community sentence decreases as the offender commits more offences. It is possible that high community sentence volumes are related to a higher proportion of offenders being recidivists who have exhausted the court's willingness to impose lesser sanctions.

### **Differences in public opinion**

It is possible that New Zealanders hold more punitive attitudes towards sentencing than is the case in other countries and that the high rate of community sentencing reflects public demand for this form of sentencing. It is difficult to robustly determine an overall public opinion on the matter of sentencing, however. As McNeill (2011 pg. 15) puts it "there is no public opinion, there are different opinions from different members of the public; different opinions from the same people depending on what you ask them, how you ask them, what mood they are in and probably, what has happened to them in the last 24 hours."

### **Summary**

It was hypothesised that New Zealand's high rate of community sentencing could be caused by a systemic bias towards community sentencing. The results presented in this section, although complex and somewhat speculative, support this hypothesis – offenders are more likely to be given a community sentence (rather than other sentences short of imprisonment) in New Zealand than in the other countries analysed in this report.

Although there have been similar legislative developments in the jurisdictions considered, the last three decades have seen the New Zealand justice system adopt community sentences more than other countries. The increase in community sentences in New Zealand has been accompanied by a reduction in the use of monetary penalties. This reduction can be attributed to the increased use of the infringement system and pre-sentencing disposals of minor offences.

Although evidence is limited, it is also possible that, over time:

- Cases at sentencing have moved closer to the threshold required of community sentences (in addition to that threshold widening).
- Other countries have utilised non-community based alternatives at sentencing, such as good behaviour bonds.
- The number of recidivists in New Zealand have increased relative to other jurisdictions, or have been dealt with more punitively.

## 4. Conclusions

This paper has sought to shed light on why New Zealand's rate of community sentencing seems very high relative to jurisdictions in England/Wales, Australia and Scotland. It was hypothesised that the high community sentencing volumes in New Zealand could be due to high volumes of offenders progressing through the criminal justice system, or a bias towards community sentences at sentencing.

This analysis has been hampered by the complexity of comparing criminal justice systems and the statistics collected by these systems. These difficulties include differences in the way jurisdictions categorise and deal with offending, particularly minor and youth offending; the different historical contexts in which these sentencing practices have developed; and the different statistical counting rules within and between jurisdictions. However, despite these shortcomings, the report points to a number of possible explanations.

First, by investigating the rate of convictions, New Zealand has had, at least until recently, a similar rate of convictions as other jurisdictions analysed in this report. This suggests that New Zealand's high community sentencing rate can be primarily attributed to factors other than volume flow, such as sentencing practice, offence mix, and legislative differences.

The history of community sentences in New Zealand shares some similarities with that of the other countries analysed in the report. Over the last three decades new community sentences have been introduced and embedded in all jurisdictions, mainly with the intention of alleviating prison population growth. The growing rate of community sentences, however, has mainly served to displace monetary penalties rather than custodial sentences. Despite these similarities however, community sentencing has been embedded more strongly in New Zealand than in other countries.

It is also problematic to look at community sentences in isolation. In understanding the drivers behind community sentence trends it is necessary to consider the broader interactions within the whole justice system – not just the sentencing stage. All countries analysed made liberal use of pre-sentence disposals for minor offences, and have made widespread use of non-community based alternatives at sentencing. It is evident each of the criminal justice systems has developed its pre-sentencing and sentencing options in its own unique context to best manage the flow of offenders through the justice system. Despite this, there is some evidence to suggest that New Zealand has a mix of offences at sentencing more likely to attract a community sentence.

When the above factors are taken into account, New Zealand is arguably more likely to impose community sentences than other jurisdictions. This is particularly noticeable when considering sentencing patterns by offence types such as assault and burglary, although limitations on offence mix and legal definitions with these offence categories are recognised. The high use of community sentences in New Zealand has become even more pronounced since the introduction of new community sentencing options in 2007.

Given the limitations of the data used in this report, a number of important factors have not been explored in depth. In particular, the impact of recidivism and offender histories at sentencing, and how this has changed over time, should be explored further.



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## Appendix one – Data sources and caveats for report




Figure 1.1

### Data Sources:

- New Zealand: Ministry of Justice (unpublished) – equivalent ‘person’ based data can be obtained from [www.stats.govt.nz](http://www.stats.govt.nz)
- England and Wales: Ministry of Justice (2011)
- Australia: Australian Bureau of Statistics (2011)
- Scotland: The Scottish Government (2011)
- United States: Glaze and Bonczar (2011)

### Population estimates:

- New Zealand: Statistics New Zealand (2010). *Estimated resident population by age and sex (Annual Dec)*. Retrieved August 2011 from [www.stats.govt.nz](http://www.stats.govt.nz).
- England and Wales: Statistics New Zealand (2011). *Demographic trends: 2010*. Wellington: Statistics New Zealand. Retrieved August 2011 from [www.stats.govt.nz](http://www.stats.govt.nz).
- Australia: Australian Bureau of Statistics (2010). *3201.0 Population by Age and Sex, Australian States and Territories, June 2010*. Australian Bureau of Statistics.
- Scotland: General Register Office for Scotland (2011). *Mid-year population estimates: Scotland and its council areas by single year of age and sex 1981 – 2010*. General Register Office for Scotland.
- United States: U.S. Census Bureau (2011). *Preliminary Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico : April 1, 2000 to July 1, 2010*. U.S Census Bureau. Retrieved August 2011 from <http://www.census.gov/popest/eval-estimates/eval-est2010.html>

Note 1: Out of necessity, population estimates have been derived from the total population, rather than the adult population defined by each jurisdictions’ adult court. This is a limitation as there is potential differences in the age distribution of each country, as well as the age of criminal responsibility. The most widely available population estimates have been for fiscal year, end 30 June.

Note 2: Community sentence numbers have been obtained from categories within the relevant statistical publications as follows:

- Australia: Magistrate and Higher courts; custody in the community + community supervision/work orders. Note that the community sentence rate for Australia excludes categories such as good behaviour bonds, which likely underestimates the community sentence rate for Australia.
- New Zealand: Includes all sentences defined as ‘community’ on Table Builder + home detention.

- England/Wales: All offences; community sentences.
- Scotland: Community sentence.
- United States: Probation. Note that probation reflects a category broader than community sentences as defined in this report, including cases where probationers spend time in prison as part of their sentence. Therefore the 'community sentence' rate for the United States is likely to be overestimated.

Note 3: In respect to New Zealand data, caution should be exercised with case based data due to a change to the definition of a case with a system changeover in 2004.

*Figure 2.1*

Data sources: Data sources and population estimates as per figure 1.1.

Note 1: Not all outcomes counted in this figure will result in a conviction. For example, in England and Wales, a conditional discharge will not result in a conviction.

*Figure 2.2*

Data Sources: Statistics New Zealand (2011)

*Figures 3.1 to 3.5*

Data sources: As per figure 1.1, and in addition:

- England and Wales: Home Office (2002)
- Scotland: The Scottish Government (2001)
- United States: Glaze (2010)

Note 1: To ensure comparability, sentences have been rearranged from the original official reports to suit the classification used within this report. This reclassification is outlined in the table below.

	<b>Custody</b>	<b>Community</b>	<b>Monetary</b>	<b>Other</b>
<b>New Zealand</b>	Custodial inc. HD excluding Home Detention SA2007	Community including Home Detention SA2007	Monetary	Other including Conv. & Discharge
<b>England and Wales</b>	Immediate Custody	Community Sentences	Fines	Suspended sentences + Other disposals
<b>Australia</b>	Custody in a correctional institution	Custody in the community + Community Supervision / Work Orders	Monetary orders	Fully suspended sentence + Other non-custodial sentences
<b>Scotland</b>	Custody	Community sentence	Financial penalty	Other sentence

*Figure 3.6 to 3.11*

Data sources: As per figure 1.1

Note 1: The table below show how the offence types used were obtained from each jurisdictions statistical publications.

	<b>Assault</b>	<b>Theft</b>	<b>Burglary</b>	<b>Robbery</b>	<b>Drugs</b>
<b>New Zealand</b>	Acts intended to cause injury	Theft and related offences	Unlawful entry with intent	"Robbery extortion and related offences"	Illicit drug offences
<b>England and Wales</b>	Violence against the person + Assault on constable + Common assault etc	Theft and handling stolen goods	Housebreaking	Robbery	Drug offences
<b>Australia</b>	Acts intended to cause injury	Theft and related offences	Unlawful entry with intent	Robbery	Illicit drug offences
<b>Scotland</b>	Serious assault and attempted murder + Common assault	Crimes of dishonesty excluding Housebreaking and Fraud	Burglary	Robbery extortion and related offences	Drugs

Note 2: For figure 3.11, the following offence categories were excluded:

#### New Zealand and Australia

- Public Order Offences
- Traffic And Vehicle Regulatory Offences
- Offences Against Justice Procedures, Government Security And Government Operations
- Miscellaneous Offences

#### Scotland

- Other crimes
  - Crimes against public justice
  - Other
- Miscellaneous offences
  - Breach of the peace
  - Drunkenness
  - Other
- Motor vehicle offences

#### England/Wales

- Indictable Motoring
- All "Other Indictable (Not Motoring)" other than:
  - 67 Perjury
  - 81 Firearms Act Offence
  - 82 Revenue Law Offence
  - 84 Trade Descriptions Act and Similar Offences
- Summary Motoring

- All “Summary Non-Motoring” other than:
  - 104 On Constable
  - 105 Common, etc
  - 115 Firearms Acts
  - 126 Interference with Motor Vehicles
  - 130 Unauthorised Taking of a Conveyance
  - 131 Summary Aggravated Vehicle Taking
  - 149 Summary Criminal or Malicious Damage Offence
  - 193 Drug Offence


*Figure 3.12*

Data sources: As per figure 1.1

Note 1: Non-community alternatives to imprisonment have been obtained as followed:

- New Zealand: disqualification from driving, conviction and discharge, and to come up for sentence if called upon
- England/Wales: suspended sentences, absolute or conditional discharge
- Australia: fully suspended sentence, good behaviour bond, forfeiture of property, nominal penalty, disqualification
- Scotland: absolute discharge, admonishment, guardianship and compulsion order.

## Appendix two – List of community based sentences



### New Zealand

- Post 2007
  - Home detention
  - Community detention
  - Intensive supervision
  - Community work
  - Supervision
- 1985 to 2007
  - Periodic detention
  - Community service
  - Community programme
  - Supervision

### Australia

- Custody in the community
  - Intensive supervision
  - Home detention
- Community supervision of work orders
  - Community service orders
  - Probation orders
  - Treatment orders
  - Referral to conference

### England/Wales

- Community rehabilitation order
- Supervision order
- Community punishment order
- Attendance centre order
- Community punishment and rehabilitation order
- Curfew order
- Reparation order
- Action plan order
- Drug treatment and testing order
- Referral order
- Community order
- Youth Rehabilitation order

### United States

- Probation is used as a proxy measure for community based sentences, defined as “a court-ordered period of correctional supervision in the



community, generally as an alternative to incarceration. In some cases, probation can be a combined sentence of incarceration followed by a period of community supervision.” (Glaze and Bonczar 2010 pg. 1).

### **Scotland**

- Probation
- Community service order
- Supervised attendance order
- Restriction of liberty order
- Drug treatment & testing order
- Community reparation order
- Anti Social Behaviour Order