*Where to Begin Cutting the New South Wales Prison Population**

Public debate about the acceptability of the present rate of imprisonment usually ends in stalemate. Some people are troubled by what they consider to be the technical and human folly of the recent 60 per cent expansion in the prison population. Others are untroubled by the size of the prison population, believing the more relevant consideration to be that those who should be in are in. Add to these opposing views the nervousness of politicians about altering the "truth in sentencing" legislation responsible for much of the growth in prison numbers for fear of being labelled "soft on crime", and the sense of stalemate is near complete.

Eventually, pendulums have a habit of doing what they know best but, in the short term, do the contending parties share any common ground? One area of overlapping opinion is that the prisons should be used with discernment. Without tampering with "truth in sentencing", those who do not need to be in should be punished for their offences in other ways. If all this amounted to was a restatement of the familiar case for developing a wider range of "alternative" punishments of different degrees of severity, then one would be in danger of contributing to a litany whose very clamour seems at times to replace practical action. The fact is, however, that there are some eminently practical starting points for reducing the prison population in ways that are consistent with the common ground of public opinion. Thanks to cooperation received from the Research and Statistics section of the Department of Corrective Services and the New South Wales Bureau of Crime Statistics and Research, data on the current prison population and also on sentencing practices throws some light on the strategic possibilities.

The first group of detainees I want to focus on is one which, periodically, people of all political persuasions declare has no place in our prisons. Then the issue disappears from sight and the numbers climb again, with consequences not only for the size of the prison population but also in the form of devastating effects on the lives of the individuals concerned. I refer to fine defaulters. A recent statistical bulletin issued by the Department of Corrective Services[1] mentions the moratorium on the reception of fine defaulters into correctional centres at the end of 1987 and the fact that legislative amendments introduced in January 1988 reduced the number of receptions of fine defaulters. However, that number has generally increased since 1988 so that literally thousands of people each year are exposed, for brief periods, to abuse of various forms (physical, sexual, financial) while in detention (see Table 1 following).

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1 NSW Department of Corrective Services, *The New South Wales Inmate Population: Visualising the Trends* (1993).

Table 1: Sentenced inmates received into NSW correctional centres[2]

Financial Year	Fine Defaulters	Other Sentenced	Total Sentenced
1988/89	180	4 850	5 030
1989/90	510	5 944	6 454
1990/91	1 609	6 281	7 890
1991/92	2 850	6 454	9 304
1992/93	3 920	6 173	10 093
1993/94	3 108	6 191	9 299

A moratorium on the execution of fine default warrants applied from April to July of last year and the number of receptions dropped dramatically. In August they climbed again. This kind of stop-start approach has been going on too long. It is time to initiate a firm principle and find practical solutions that uphold it. If prison is to be restricted to those who should be in, it should not be possible for people who have committed offences which are not serious enough to warrant a custodial sentence in the first place, to "arrive in prison through the back door".[3]

The second group to which I wish to draw attention comprises people serving short sentences. Any weighing of the social gain of short term, full-time punishment by incarceration, against the deterioration so frequently induced in offenders, as well as the harm caused to their families, should dictate an alternative course of action. In the community's interests, we must substitute other, less noxious forms of punishment for the relatively short sentences that currently swell our prison numbers in New South Wales. In round figures, our prison population has increased by about 2 500 in recent times. A goodly proportion of those inside, 1 046 or 18.4 per cent of those under sentence, are serving aggregate sentences of less than a year.[4] More pointedly, 448 men and women (8 per cent of the total under sentence) are serving aggregate sentences of six months or less. These are the groups which should be the prime targets for alternative forms of punishment. An international review which has just been published [5] reveals the wide range of punitive measures now being used in different countries and highlights the relative efficacy of some, including "unit fines" and varied forms of intensive supervision. The latter can hardly be regarded as "soft" options for, in one recent evaluation, 25 per cent of prisoners chose to remain in prison rather than avail themselves of intensive supervision! A similar comment applies with respect to the New South Wales diversion scheme for incest perpetrators, based at Cedar Cottage, Westmead. In a recent evaluation study I found that many of the men on the program had seriously considered the advantages of a prison sentence over the exacting Cedar Cottage regime. Clearly, the opportunities afforded for correction and social benefit are among the main advantages of alternative punishments but the latter cannot be dismissed as lacking "sting".

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2 Unpublished data, NSW Department of Corrective Services.

3 National Association for the Care and Resettlement of Offenders, *Strategies to Promote Community Based Penalties* (1989) at 51.

4 Department of Corrective Services, Research and Statistics Unit, 1994 Census, 30 June 1994.

5 Junger-Tas, J, *Alternatives to Prison Sentences: Experiences and Developments* (1994).

Against this background and given the local figures, is it not time to require sentencers who are contemplating the imposition of short prison sentences, rather than community based forms of punishment, to formally justify that course of action? Following the lead of the English reform organisation, National Association for the Care and Resettlement of Offenders (NACRO),[6] legislation should create a clear presumption in favour of community based sanctions in such cases if imprisonment is really only going to be used for the most serious offenders. Experience shows that simply multiplying the range of alternatives does not necessarily result in their use.

If some other general encouragement is needed for us to adopt such an approach, perhaps it is provided by a closer look at the social composition of the short sentence group. Aborigines and Torres Strait Islanders, representing 1 per cent of the NSW population, account for 25 per cent of the women and 20 per cent of the men serving aggregate sentences of three to six months in our state's prisons.[7] This compares with the overall picture of Aboriginal/Torres Strait Island men accounting for just under 12 per cent of male prisoners and Aboriginal women accounting for almost 18 per cent of female prisoners.

Because of their disenchantment with short sentences many countries, including France, Germany, Portugal, Austria and Hungary, have adopted unit fines as an important alternative to short sentences. The fines are calculated according to the ranked seriousness of offences and an offender's capacity to pay. In Germany, the legislators decided that short prison sentences (up to six months) must in all but rare cases be replaced by unit fines. Before that reform in 1975, 110 000 offenders in West Germany were sentenced each year to a short term of imprisonment; subsequently, this number fell to 10 000. It is true that a recent unit fines experiment in England was considered unsuccessful. However, lessons have been learnt from many countries about the successful operation of unit fines; they must be commensurate with the paying capacity of the offender (although there should be a sting in the tail of the sanction), and payment by instalment must be possible (although the payment period must not be too long). Nevertheless, the case for substituting alternative sentences does not rest on the perceived efficacy of a limited range of measures. Indeed, there is current European interest in a composite sanction ("limit of freedom") which actually requires the offender to follow a number of legally defined instructions at specified times within a specified period. Some instructions can take the form of community service, others reparation. Some can focus on the offender's participation in work and others can focus on intensive probation. In the words of its devisers, the "limitation of freedom penalty can thus be customised according to both the nature of the offence and the character of the offender".[8]

So far, the attempt to identify segments of the prison population which a discerning community might wish to punish in some alternative way has focussed on two groups: those who have no place being in the prisons and those whose imprisonment causes more harm than good to the community and individual. An obvious third way of exploring the common ground of public opinion is to look at the types of offences for which people are imprisoned, in the light of their previous criminal histories. Unfortunately, at this point, we come up against the limitations of the currently available data, which is a pity given

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6 Above n3 at 51.

7 Above n4.

8 Netherlands Ministry of Justice/Penal Reform International, *The Alternative Target, Community-Orientated Prisons and Community Based Sanctions* (1993).

the magnitude of the social and economic issues at stake. We really need to make much finer analyses in terms of prisoners' criminal antecedents and I think that warrants a special project. Still, I will push the analysis as far as I reasonably can in order to focus attention on a principle which will need to be observed if the right people are going to finish up in our prisons. There is a central question involved and I admit that it taxes the presumed consensus more than the issues which I earlier raised. However, that may be because the matter has been insufficiently aired in the past or has not been calmly thought through.

At present we use prisons for those whose offending is persistent rather than of the most serious kind. NACRO argues that the idea of a "penal ladder" should be discarded and that courts should be encouraged to use community based sanctions on more than one occasion.[9] The reasons for that view will be considered in a moment, but does the notion of a "penal ladder" apply in New South Wales? As already stated, the issue warrants a special study but certain of the Higher Criminal Courts statistics for 1993 are consistent with the operation of a "ladder". Confining the analysis to property offences and comparing penalties imposed on offenders with (i) no previous convictions, (ii) previous convictions of the same type and (iii) previous convictions of the same type with imprisonment, the following general picture emerges: the percentage of offenders imprisoned increases somewhat between (i) and (ii), and there is a two- to three-fold increase in the percentage imprisoned in (iii) compared with (i).

Table 2: Imprisonment rates for property offenders with varying criminal histories[10]

	No previous convictions	Previous similar offence(s)	Previous similar offences with imprisonment
Break, enter, steal	21/48 (43.8%)	60/115 (52.2%)	166/224 (74.1%)
Fraud/Misapprop.	55/246 (22.4%)	25/43 (58.1%)	22/31 (71.0%)
Receiving	10/31 (32.3%)	13/56 (23.2%)	25/41 (61.0%)
Vehicle theft	4/15 (26.7%)	13/31 (41.9%)	35/46 (76.0%)
Other theft	5/22 (22.7%)	11/29 (37.9%)	24/35 (68.6%)
Property damage	6/41 (14.6%)	8/30 (26.7%)	7/14 (50.0%)

It seems reasonable to assume for the present purposes that a community based penalty is the lowest rung on the penal ladder reflected in the foregoing statistics. Perhaps some of the early "selling" of alternatives in Australia went along too unquestioningly with the idea that failure to comply with "lenient" community based sentences should result in almost automatic progression up the ladder. Is this what the community wishes or requires? Citizens' primary interest in property offences is that further offending should be prevented. Because someone has reoffended after experiencing a community based penalty, does not mean that custody is the most effective measure. Hence the recent English rec-

9 Above n3 at 51.

10 Unpublished data, NSW Bureau of Crime Statistics and Research.

ommendation that custody "should be used only where (the current) offence warrants it. In other cases there should be an emphasis on flexible options which allow the courts to choose the most appropriate community based penalty".[11]

If, within our society, there is a core consensus that we should use our prisons sensibly, that only those who need to be in are in, then wider ideological differences and debates need not prevent us from moving forward on the matters upon which we agree. The selective but greater use of alternative punishments would help avoid major problems for the community, the families of prisoners and offenders themselves. But we need to do more than just talk about these alternative punishments. We need purposeful strategies. I have suggested a combination of target groups and basic principles which, if heeded, would hardly constitute radical measures. Their adoption would, however, help to ensure that a sizeable number of prisoners who do not need to be in, were being dealt with in more constructive ways.

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11 Above n4 at 51.