WAYS OUT OF THE ABYSS? REFLECTIONS ON PUNISHMENT IN WESTERN AUSTRALIA

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In this article, an overseas commentator looks at the problems and pitfalls of penal legislation of the kind enacted in Western Australia earlier this year to combat juvenile crime. It is argued that more emphasis should be placed on two different kinds of strategy - commitment to community prevention of crime and the structuring of sentencing practice.

The previous issue of this *Law Review* contains three forcefully argued critiques of the criminal justice system in Western Australia.[1] The State has a relatively higher prison population than the other States of Australia, despite the extensive use of parole and remissions. Aborigines are grossly over-represented within the prisons. And early in 1992 the State's Parliament responded to public anxiety about crime by enacting the Crime (Serious and Repeat Offenders) Sentencing Act 1992 ("the Sentencing Act"), a draconian statute aimed chiefly, though not exclusively, at incarcerating certain young offenders who steal cars and then drive them dangerously. The mandatory minimum sentences and discretionary release provisions of the Sentencing Act raise deep issues of justice in punishment, as three official reports have already recognised.[2] The Sentencing Act could also result in increases in both

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1. R W Harding "The Excessive Scale of Imprisonment in Western Australia: The Systemic Causes and Some Proposed Solution" [1992] 22(1) UWAL Rev 72; N Morgan "Parole and Sentencing in Western Australia" [1992] 22(1) UWAL Rev 94; M Wilkie "Crime (Serious and Repeat Offenders) Sentencing Act 1992: A Human Rights Perspective" [1992] 22(1) UWAL Rev 187.
2. WA Parliament 1992 *First Report of the Review Committee on The Crime (Serious and*

the prison population and Aboriginal over-representation. Professor Richard Harding ends his article by urging that "[t]he time has come to try in Western Australia the more advanced penological policies which have had some real success elsewhere".[3] It is in the hope of drawing attention to some further possibilities of this kind that the present article has been written.

THE SENTENCING ACT

The relatively high prison population and the over-representation of Aborigines in prisons have been enduring features of West Australian penal practice for some years, and the Sentencing Act should therefore be seen in that context. The provisions of the Sentencing Act must be outlined first, but it is the assumptions that underlie legislation of this kind which are more significant.

The social and political background to the Sentencing Act lies in public concern about youths taking cars and driving them dangerously, often during hot pursuit by the police, and sometimes with fatal consequences. There was a mass public demonstration of concern in September 1991, held on the steps of the Western Australian Parliament, and the issue became even more pressing after the death of a mother and child resulted from such a car chase in December 1991. The Sentencing Act was somewhat hastily conceived, and passed through Parliament rapidly, despite expressions of doubt that this was the right way to deal with the problem. The original strategy was to target young offenders for harsh penalties, but when it was pointed out that this would be in breach of international conventions,[4] some of the provisions were extended to adults in order to avoid the argument that juveniles were being singled out for more severe sanctions.

The strongest provisions in the Sentencing Act are sections 6 and 8, which are aimed at repeat violent offenders. For juveniles who fall within this category, sections 6 and 7 provide a minimum custodial sentence of 18 months, with subsequent detention until release is authorised by the Supreme Court. For adults falling within the category, sections 8 and 9 provide a

Repeat Offenders) Sentencing Act 1992 ("*Review Committee Report*"); WA Standing Committee on Legislation (Chair: G Kelly) *First Report on The Crime (Serious and Repeat Offenders) Sentencing Act 1992 and The Criminal Law Amendment Act 1992* (Perth: Parliament of WA, 1992) ("*Standing Committee First Report*"); WA Standing Committee on Legislation (Chair: S Kelly) *Second Report on The Crime (Serious and Repeat Offenders) Sentencing Act 1992 and The Criminal Law Amendment Act 1992* (Perth: Parliament of WA, 1992) ("*Standing Committee Second Report*").

3. Harding supra n 1, 93.

4. See Wilkie supra n 1, and, more generally, H Jackson infra n 9.

minimum custodial sentence of 18 months with subsequent detention at the Governor's pleasure. Part 2 of Schedule 1 of the Sentencing Act defines "violent offences" for the purposes of the Act, and includes dangerous driving causing death and dangerous driving causing bodily harm committed with a stolen car. Schedule 2 sets out the qualifications of a "repeat offender", which depend to some extent on the manipulable concept of "conviction appearances".

The Sentencing Act also makes special provision in section 5 for juvenile repeat offenders who commit "prescribed offences" as defined in Part 1 of Schedule 1, and in section 10 for juveniles convicted of offences involving stolen cars. Where either section 5 or 10 applies, a court is required to apply the sentencing guidelines set out in Schedule 3. These guidelines make it clear that the welfare of the juvenile, usually regarded as the primary factor in sentencing, should be "balanced" against "the protection of the community and property" in these cases, which presumably means that severe sentences aimed at deterrence or incapacitation may be imposed. From a theoretical point of view, the Sentencing Act seems to represent an amalgam of three rationales for sentencing - deterrence of the individual offender (in sections 6 and 8, and in Schedule 3 paragraph (d)); deterrence of potential offenders in general (by means of the mandatory minimum sentences introduced by sections 7 and 9); and the incapacitation of repeat and "dangerous" offenders (by means of the mandatory minima and the additional discretionary detention). Perhaps strangely, the Act ends with a two-year "sunset clause" (section 12).

SOME POTENTIAL PROBLEMS WITH THE SENTENCING ACT

The social problem which gave rise to the new legislation is not specific to Western Australia. Taking and racing cars, sometimes with death or serious injury as the consequence, has become a source of concern in many jurisdictions. In England and Wales, for example, a statute called the Aggravated Vehicle-Taking Act 1992 was enacted at about the same time in response to similar activities.[5] Like many other so-called "crime waves", this one raises the question of how best to respond. Without attempting an historical analysis of the strands of argument which held sway in Western Australia, some potential problems with the Sentencing Act's approach may

5. For a discussion of its provisions see J N Spencer "The Aggravated Vehicle-Taking Act 1992" [1992] Crim LR 699.

be briefly considered.

1. Legal processes may not be the most effective way of dealing with the problem

Tougher sentences in the courts may be a high-profile response to the problem, and may satisfy various political constituencies, but is the result likely to be a reduction in the prevalence of the criminal behaviour? Greater attention to the potential of crime prevention strategies might be a more productive approach. There are plenty of examples of preventive measures having a noticeable effect on crime rates,[6] and of changes in sentencing levels having little or no effect on crime rates. Social crime prevention strategies are based on the view that much crime is a product of social circumstances and opportunities, so that altering the circumstances and expanding the opportunity for other (lawful) activities might be expected to reduce crime.[7] Situational crime prevention strategies[8] may involve "target hardening", which in the present instance means making cars harder to steal - an approach which is likely to require the co-operation of manufacturers and which may take several years to encompass the majority of vehicles on the road. Systems of crime prevention are being tried world-wide. If, as they say, prevention is better than cure, does it not make sense to take vigorous steps in this direction before resorting to greater punitiveness? Does it not make even greater sense if the prescribed "cure" is tougher sentences, which themselves are uncertain to "work" and may add to the problems of the penal system?

These points are echoed in the two reports of the Western Australian Legislative Council's Standing Committee on Legislation. The first report documents various criticisms along these lines, notably those advanced by Judge Jackson (President of the Children's Court of Western Australia) and by Chief Justice Malcolm.[9] The second report shows enthusiasm for the family-orientated approach of the New Zealand legislation on juvenile

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6. Historically, probably the best known example was the introduction of steering locks for cars, which significantly reduced the incidence of car thefts in many countries in the mid-1960's.
7. For a comparison of strategies in France and Britain, see M King "Social Crime Prevention à la Thatcher" (1989) 28 How J 291; see further I Waller "Victims, Safer Communities and Sentencing" (1990) 32 Can J of Crim 461.
8. See K Heal and G Laycock (eds) *Situation Crime Prevention: from theory into practice* (London: HMSO, 1986).
9. *Standing Committee First Report* supra n 2, paras 60-65. See also H Jackson "Juvenile Justice - The Western Australian Experience", a paper delivered at the National Conference on Juvenile Justice, Adelaide, September 1992.

justice, the Children Young Persons and their Families Act 1989, which is far less repressive than the 1992 legislation in Western Australia.[10] It is fair that the Minister for Justice in Western Australia should reply, in his two reports, that the Sentencing Act does not constitute the whole of the State Government's policy on juvenile crime, and to point to the development of initiatives on police cautioning, suspended prosecution and reparation.[11] The Minister describes the Sentencing Act as a "circuit-breaking measure" in relation to juvenile crime, but that does not rebut the doubts about its necessity and its fairness.

2. Tougher sentences may not deter individual offenders or other potential offenders

The basic problem here is one of evidence. Even if it is accepted that it may be justifiable to impose disproportionately harsh sentences on some offenders in order to deter others - and that is open to debate[12] - there is little evidence to suggest that introducing a minimum 18 month sentence will operate as a deterrent. This proposition would strike some people as odd, so it is worth developing the point a little. In order to deter any particular individual, he or she must know what the penalty is; must believe that the risk of getting caught is not so low as to counterbalance the penalty; must fear imprisonment for that length of time; must think, at the time of offending, that the penalty outweighs the excitement or gain or kudos from committing the crime; and so on.[13] This may all happen in some crimes where most of the perpetrators are rational calculators,[14] but there are probably far more situations in which other factors (for example, pressure from other youths or the promise of excitement) have a stronger influence.[15] Stronger police action

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10. *Standing Committee Second Report* supra n 2, paras 165-187.
11. WA Minister for Justice (D Smith) *First Report on The Crime (Serious and Repeat Offenders) Sentencing Act 1992* (Perth: Parliament of WA, 1992) ("*First Smith Report*"); WA Minister for Justice (D Smith) *Second Report on The Crime (Serious and Repeat Offenders) Sentencing Act 1992* (Perth: Parliament of WA, 1992) ("*Second Smith Report*").
12. For discussion, see A von Hirsch and A Ashworth (eds) *Principled Sentencing* (Boston: Northeastern University Press, 1992) ch 2.
13. See further F E Zimring and G J Hawkins *Deterrence: The Legal Threat in Crime Control* (Chicago: The University of Chicago Press, 1973); D Beyleveld *A Bibliography of General Deterrence* (Farnborough: Saxon House, 1980).
14. See R W Harding "Rational-Choice Gun Use in Armed Robbery: The Likely Deterrent Effect on Gun Use of Mandatory Additional Imprisonment" (1990) 1 Crim L Forum 427.
15. Cf the judgment of Seaman J in *McKenna* (Court of Criminal Appeal, 19 May 1992), first accepting this point and then assuming the opposite: see case note by N Morgan [1992]

or some forms of community pressure might have greater effect than the prospect of a higher legal penalty. Where higher penalties do appear to have a deterrent effect, that might wear off quite soon.

Moreover, even if tougher sentences do have a marginal deterrent effect, in terms of deterring slightly more offenders than the previous penalty level,[16] the crime-preventive effect must be balanced against the possible crime-productive effect of custodial institutions. Many criminologists would agree with the two propositions that "imprisonment provides many opportunities to learn criminal skills from other inmates" and that prison "can be an expensive way of making bad people worse".[17] Those two propositions are not taken from any radical tract: they are to be found in a White Paper from the British Government in 1990.[18] They underlie some of the key provisions in the UK's Criminal Justice Act 1991, though they seem to have been forgotten when the higher penalties in the Aggravated Vehicle-Taking Act 1992 were introduced. In Britain, as in Western Australia, the political attraction of harsher penalties overcame any doubts about whether they would actually work. It is still too early to determine whether the Western Australian legislation has had any effect on crime patterns: there were significant reductions in both car thefts and high speed police pursuits recorded in the early months of 1992, but the figures have now begun to climb back towards their former level, as some deterrence research might have suggested.[19]

3. A policy of selective incapacitation may have more undesired effects

Sections 6, 7, 8 and 9 of the Sentencing Act introduce a policy of selective incapacitation. That is, they define a group of persistent offenders as the target, and prescribe for them lengthy (and indeterminate) periods of custody

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16. The WA Department of Community Services made an effort to draw the Sentencing Act to the attention of juveniles who might be at risk of its provisions, in an attempt to enhance its deterrent effect: see *First Smith Report* supra n 11, 2.
17. There are some who are sceptical of these claims: compare N Walker *Sentencing: Theory, Law and Practice* (London: Butterworths, 1985) 159-169 with A Ashworth *Sentencing and Criminal Justice* (London: Weidenfeld & Nicolson, 1992) 214-215.
18. Great Britain *Crime, Justice and Protecting the Public* (London: HMSO, Cm 965, 1990) para 2.7.
19. For the statistics, see the *Second Smith Report* 3-4; for the research, see L Ross *Deterring the drinking driver* (Lexington, Mass: Lexington Books, 1984); R Homel *Policing and punishing the drinking driver* (New York: Springer-Verlag, 1988); and generally supra n 13.

in order to keep them out of circulation whilst they are perceived as presenting a danger to the public. On this view the length of detention is admittedly undeserved for the crime, or crimes, committed. It can be justified only on the basis that it protects probable future victims, and that their protection from undeserved crimes is more important than the undeserved detention of people who have transgressed the law. This is debatable in theory, and the American research which revived the idea of selective incapacitation as a viable strategy has been subjected to severe criticism.[20]

One necessary precondition if a policy of selective incapacitation is to succeed is that the targeted group must be sufficiently well focussed. The definition of "violent" in Part 2 of Schedule 1 of the Sentencing Act is very wide, including some fairly minor offences: both the Western Australian Legislative Council's Standing Committee on Legislation[21] and the Review Committee[22] have criticised this overbreadth. In order to qualify under Schedule 2 as a "repeat" offender, a person must have been prosecuted repeatedly, as distinct from having offended repeatedly: this bestows considerable power on the police, and to some extent also on prosecutors and defence lawyers, and such a key concept needs urgent refinement.[23] The reports have also commented on deficiencies in recording procedures.[24] Persistent *serious* offenders may well, in any event, receive sentences of a length which makes it unlikely that they will be free to be re-convicted often enough to qualify under it.[25] If that is true, then one possibility is that hardly anyone will qualify as a "repeat offender" under the Sentencing Act. Another possibility is that some of those who do qualify will be minor offenders whose previous criminal record would mark them out as social nuisances rather than social menaces. This fate has befallen many other attempts to legislate against repeat offenders.[26]

20. See A Blumstein, J Cohen, J Roth and C Visher (eds) *Criminal Careers and "Career Criminals"* (National Academy of Sciences, Washington DC, 1986) and generally von Hirsch and Ashworth supra n 12, ch 3.
21. *Standing Committee Second Report* supra n 2, para 29, recommending that (WA) Criminal Code 1913, s 318 be deleted from Schedule 1 of the Sentencing Act. See also paras 30-37.
22. *Review Committee Report* supra n 2, 8 also recommending that (WA) Criminal Code 1913, s 318 be deleted from Schedule 1 of the Sentencing Act.
23. See *Standing Committee Second Report* supra n 2, para 51; also *Review Committee Report* supra n 2, 9 calling for a scrutiny mechanism for police charges against juveniles.
24. See *Review Committee Report* supra n 2, 13-14; *Standing Committee Second Report* supra n 2, paras 53-74.
25. For an example, see the recent case of *McKenna* supra n 15; cf *Chester* (1988) 165 CLR 611.
26. See the example listed by Ashworth supra n 17, 141-143.

4. Sentencers may regard the mandatory minimum as unjust

Sentencers and others may regard the mandatory minimum as unjust in some cases and may adopt methods of circumventing it. Judges the world over seem to reject the idea of mandatory minimum sentences. This is apparent from sources as far apart as a twenty year old decision of the Australian High Court[27] and a recent study of judges' attitudes to the many mandatory minima in the United States federal system.[28] The judiciary of Western Australia are not an exception.[29] It is not simply that judges like to have wide discretion, although that is true. The real point is that they experience strong feelings of injustice when they have to impose a sentence which they regard as unduly harsh in view of the circumstances of the case and the characteristics of a particular offender. The mandatory minimum sacrifices a just sentence in such cases, either in the hope of deterring a greater number of potential offenders, or in the hope that longer incarceration for this offender will prevent offences he or she would otherwise have committed.

In practice, the imposition of the new mandatory minima will depend largely on the charging policy of the police, a point which demonstrates that the Sentencing Act has the effect of transferring discretion from the judges (exercised in open court, with reasons and open to appeal) to the police (exercised behind closed doors).[30] By the same token, the judges may have an opportunity to avoid the provisions of the Sentencing Act if the prosecutor takes a similar view and alters the charge. The American studies show that police and prosecutors sometimes avoid charging an offence that carries a mandatory minimum, or perhaps use it as a bargaining tool, in order to secure a guilty plea to another offence which has no such minimum.[31] This reluctance to perpetrate the injustice of an unduly harsh sentence was also evident in jury decisions in capital cases in eighteenth century Britain. Thus, whatever effect the mandatory minima might have in deterring more poten-

27. *Palling v Corfield* (1970) 123 CLR 52; the High Court of Australia upheld the constitutionality of the mandatory minimum, but its distaste for this approach was apparent.
28. Federal Courts Study Committee *Report* (US Congress: Washington, 1990) ch 7; see the masterly article by M Tonry on mandatory minimum sentences in *Crime and Justice* Vol 16 (Chicago: University of Chicago Press, 1992).
29. See the comments of Walsh J and Malcolm CJ, set out in *Standing Committee First Report* supra n 2, paras 79-81.
30. See the *Review Committee Report* supra n 2, 9 proposing to tackle this point by introducing greater police accountability.
31. M Tonry *Sentencing Reform Impacts* (Washington DC: National Institute of Justice, 1987) ch 3.

tial offenders - and the American evidence on that is discouraging also[32] - it seems possible that they may generate some strategies of avoidance among criminal justice professionals.

FALSE TRAILS AND TRUE PATHS

The previous section has raised some doubts about whether the Sentencing Act will achieve its objectives. It may already have achieved the objective of placating those elements of the public, media and politicians who were demanding tougher measures. For some, a political response which defuses a political problem might be sufficient. But whether it will have the consequence of altering patterns of offending in society will depend on several factors, and the criminological omens seem unfavourable.

If fully enforced, the Sentencing Act would increase Western Australia's punitiveness in general, and towards Aborigines in particular.[33] Even if it is not fully enforced, the broader problems of Western Australian penal policy will remain. Are there any paths out of the abyss? The first point - and one made strongly over the years by leading Australian criminologists[34] - is that the issue must be confronted directly, and that "front door" policies which deal with sentencing and the provision of non-custodial alternatives are preferable to "back door" policies such as parole and remission. A system which allows the courts to go on imposing lengthy custodial sentences whilst the parole and remission mechanisms are manipulated so as to release prisoners earlier and earlier may be indulging in a kind of dishonesty. As a Victorian court put it, early release mechanisms may become "an elaborate charade designed to conceal from the public the real punishment inflicted upon an offender".[35] It might be thought that the only way to avoid this charade is to adopt "truth in sentencing" and abolish both parole and remission. The problem here is that prison sentences effectively would become longer overnight, unless there were some corresponding reduction in their length.[36] And reducing the length of sentences imposed by the courts

32. Ibid.
33. Many of the alleged "hard core" of juveniles against whom the Sentencing Act is aimed are Aboriginals, and the Sentencing Act would reverse some of the key policies recommended in respect of criminal justice for Aborigines: see *Standing Committee First Report* supra n 2, para 51-58 and *Review Committee Report* supra n 2, 12.
34. R W Harding "Prison Overcrowding: Correctional Policies and Political Constraints" (1987) 20 ANZJ Crim 16; D Chappell "Sentencing of Offenders: A Consideration of the Issues of Severity, Consistency and Cost" (1992) 66 ALJ 423.
35. *R v Yates* [1985] VR 41, 44.
36. Chappell supra n 34, assumes that greater punitiveness goes hand-in-hand with the

brings formidable problems of judicial and public acceptance.

A different path, based not only on pragmatic compromise but also on the belief that supervised early release may be beneficial in terms of preventing future crime,[37] would be to make it clear that the sentence announced in court means so many months or years of liability to imprisonment, with the offender obliged to serve a portion, but then being released under supervision with the threat of having to serve the remainder if there is further offending.[38] If this path is chosen, it must be accompanied by publicity to sentencers and to members of the public about what is being done and how it is justified.[39]

Therefore, rather than expanding the availability of remission and discretionary parole, the early release system should be regularised so as to put it into a form which can be openly defended. One consequence of doing this might be to increase the actual amount of time spent in prison for a given custodial sentence. Since there is no sound reason for increasing further the level of punitiveness in Western Australia, this means that any regularisation of early release must be accompanied by a revision downwards of sentencing levels. This has been attempted recently in both Victoria and England and Wales.[40] One way or another, the matter comes down to an alteration in sentencing practice.

This is a sensitive issue. Judges and magistrates have sometimes regarded statutory provisions on sentencing as "interference" in "their discretion". Indeed, this may be the reason why some of those provisions are so broad as to impose hardly any constraint on courts at all. Section 19A of the Western Australian Criminal Code 1913, added in 1988, lays down that imprisonment should be used as a sentence of last resort. This formula is used in several jurisdictions,[41] but it is vague unless refined by judicial decisions. Does it

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adoption of "just deserts" as the leading rationale for sentencing. For a refutation of this view, see A von Hirsch "The Politics of 'Just Deserts'" (1990) 32 Can J of Crim 397.

37. See R G Broadhurst and R A Maller "The Recidivism of Prisoners Released for the First Time: Reconsidering the Effectiveness Question" (1990) 23 ANZJ Crim 88.

38. See WA Parliament 1991 *Report of the Joint Select Committee on Parole* (Chair: J Halden) ("*Halden Report*"). The approach was previously recommended in England by the Carlisle Committee: Great Britain Parliamentary House of Commons Parole Review Committee *Report on The Parole System in England and Wales* (London: HMSO, 1988) and subsequently adopted in Part II of the (UK) Criminal Justice Act 1991.

39. See the *Halden Report* ibid, 87-88; see also Harding supra n 1, 89-90.

40. Compare s 10 of the (Vic) Sentencing Act 1991 with Lord Chief Justice Taylor's Practice Direction in England and Wales: *The Times Law Report*, 7 October 1992.

41. The same formula was used in draft Resolution VIII of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in Havana Cuba, 27 August - 7 September 1990.

mean, for example, that custody should be reserved for offences which are serious enough, or does it also cover persistent minor offenders who have experienced several non-custodial measures and have continued to offend? Turning to Schedule 3 of the Sentencing Act, this refers to courts "balancing" several factors. It lists a few, and adds an invitation to take account of any further factors, but gives no clear framework for decision-making. As the Legislative Council's Standing Committee on Legislation puts it, the Schedule 3 guidelines are "at best vague and at worst meaningless".[42] Perhaps the high-water mark of pusillanimity is section 16A of the Commonwealth Crimes Act 1914, as amended in 1989, which bears a closer resemblance to a laundry list than to coherent guidance on how courts should approach the task of sentencing. It mentions several conflicting considerations (for example, deterrence, rehabilitation of the offender, "adequate" punishment) without giving a clue as to how courts should deal with them.

Criticism of systems which leave judges with a wide choice at the sentencing stage has often been the prelude to advocacy of a "guideline" system of sentencing in the American style. State and federal authorities in the United States have now devised and introduced a range of different systems for constraining the sentencing decisions of courts. Some leave little discretion to the courts at all or leave some discretion but include a number of mandatory minimum penalties. Others indicate guideline sentences and leave courts with a discretion to depart from these on giving reasons;[43] and still others have sought to confine sentence levels within prison capacity.[44] However, these American models are not the only ones "on the market", and it would certainly be wrong to assume that they are the most suitable for Western Australia.

At least three other jurisdictions have introduced statutory sentencing

42. *Standing Committee Second Report* supra n 2, para 100.

43. For surveys, see A von Hirsch, K Knapp and M Tonry *The Sentencing Commission and Its Guidelines* (Boston: Northeastern University Press, 1987); M Tonry "Structuring Sentences" in *Crime and Justice* Vol 10 (Chicago: University of Chicago Press, 1988); A Ashworth "Sentencing Reform Structures" in *Crime and Justice* Vol 16 (Chicago: University of Chicago Press, 1992). For a clear and authoritative analysis of the problems of the US federal sentencing guidelines, see D J Freed "Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers" (1992) 101 Yale LJ 1681.

44. Minnesota is well-known for the "prison capacity constraint" built into its original sentencing guidelines: compare D G Parent *Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines* (Stoneham: Butterworths, 1988) with R S Frase "Sentencing Reform in Minnesota, Ten Years After: Reflections on Dale G Parent's *Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines*" (1990) 75 Minnesota LR 727.

reforms of a different kind. Finland in 1976 and Sweden in 1988 introduced legislation which established a clear hierarchy of purposes for sentencing. Sentences here are primarily governed by what is deserved on the basis of the seriousness of the offence: the court is required to calculate the "penal value" of the offence, taking account of certain factors, but there is no statutory guidance on length (other than maximum sentences). In certain situations, courts may give effect to deterrence or to limited rehabilitative considerations, but in general they are not free to do so. The statutes therefore provide clear structures, with judicial discretion to individualise the factors according to the circumstances of each individual case.[45] The recent reform in England and Wales follows similar lines. The Criminal Justice Act 1991, which came into force in October 1992, introduces proportionality to the seriousness of the offence as the leading principle in English sentencing. Disproportionate sentences based on deterrence are ruled out and rehabilitation may only be pursued within proportionate sentences.[46] One feature of the legislation is that it attempts to induce courts to use more community sanctions and fewer custodial sentences, by erecting statutory hurdles based on the seriousness of the offence.[47]

It is not suggested that the Finnish, Swedish or English models could be transposed simply and successfully into Western Australia. The penal politics and legal tradition of each particular jurisdiction will determine what is likely to work best. But there are some useful pointers in these recent experiences elsewhere, even though the practical impact of the English reforms is not yet known. The first pointer is that sentencing reform can be achieved without the numerical "sentencing grids" which have become common in the United States. Judicial discretion to respond to the varying facts of cases can be preserved and should be preserved: what is important is that judges and magistrates should approach the task of sentencing with the same aims, principles and policies in mind. It is in this latter respect that the Finnish, Swedish and English reforms lead in a promising direction.

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45. For further discussion, see A von Hirsch "Guidance by Numbers or Words? Numerical versus Narrative Guidelines for Sentencing" in K Pease and M Wasik (eds) *Sentencing Reform: Guidance or Guidelines* (Manchester: Manchester University Press, 1987). On Finland, see T Lappi-Seppala "Penal Policy and Sentencing Theory in Finland" (1992) 5 *Canadian J of Law & Jurisprudence* 95; on Sweden, see A von Hirsch and N Jareborg "Sweden's Sentencing Statute Enacted" [1989] Crim LR 275.

46. There is limited provision for "public protection" sentences imposed on certain violent or sexual offenders: ss 1(2)(b), 2(2)(b) of the (UK) Criminal Justice Act 1991.

47. For discussion of the (UK) Criminal Justice Act 1991 in its context, see Ashworth supra n 17, ch 9 and passim.

A second, more controversial pointer is that the reform process in England began with the Government forming the view that custodial sentences were both unproductive and expensive, and then realising that the courts were not even making full use of existing facilities for community sentences. What the Government did in 1988 was to ask sentencers what kinds of non-custodial sentences they would be prepared to use more extensively.[48] The process of consultation revealed that many sentencers thought that the existing measures were not sufficiently demanding, and were not properly enforced, and so could not be regarded as severe enough sentences for many of the crimes which have to be dealt with. The result is that the Criminal Justice Act 1991 introduces tougher, more demanding non-custodial sentences, under the banner "punishment in the community", and supports them with national standards for the content and enforcement of these orders.

There is a third pointer from England which is probably the most significant of the three. In the 1980's, when the use of custody for juvenile offenders declined so dramatically in England,[49] one strategy for achieving this successful result was the Government's provision of money to local authorities to develop community-based programmes, while another was the involvement of magistrates in the direction of those programmes. The Government clearly tried to build on this by its wide consultation with sentencers between 1988-1989 about possible forms of community sanction. Gaining the support of the judiciary was seen as essential to the success of the new system. It appears, however, that much of this support has subsequently been lost in arguments about the technical nature of some provisions in the Criminal Justice Act 1991 in England and Wales. Despite several crusading speeches by Government ministers, Home Office officials and others, the wording of this Act now seems to attract more attention than its policies, and its implementation was accompanied by a sense of foreboding rather than a vision of positive change. Somehow, the processes of reform seem to have lost their way between conception and delivery. Without a fair wind from judges and magistrates, the prospects for genuine change seem much reduced.

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48. Great Britain *Punishment, Custody and the Community* (London: HMSO, 1988).
49. See R Allen "Out of Jail: The Reduction in the Use of Penal Custody for Male Juveniles 1981-88" (1991) 30 How J 30; Harding supra n 1, 40.

CONCLUSIONS

One strongly contested aspect of the debate on the Western Australian Sentencing Act is whether or not it breaches international conventions on criminal justice for juveniles.[50] Whatever the outcome of that debate, that Act certainly shows scant respect for the spirit of those conventions or for the ideals that they embody. Even if there is technically no breach of the international norms, the Act would escape only narrowly. Moreover, its policies have already been criticised within the State as "irredeemably flawed"[51] and as "unworkable and unsustainable".[52] It has been argued here that, whatever its suitability as a political response to an undoubted social problem, the Sentencing Act may give rise to greater difficulties than it solves. Legal processes may not be the most effective way of dealing with the problem; tougher sentences may not deter individual offenders or other potential offenders; selective incapacitation may have more undesired than desired effects; and there may be resistance in the courts and elsewhere to the mandatory minimum sentences, leading to some circumvention.

Steps towards a more restrained use of custody can only be taken if there is a realisation that custody is not the most efficacious, cost-effective or fair way of preventing crime, and then a determination to pursue different policies. "Back-door" methods of dealing with the prison problem, through remission and parole, tend to erode judicial and public confidence in the criminal justice system and fail to confront the real issue. A "front-door" approach would require even greater commitment to crime prevention,[53] together with some well-considered sentencing reform. The need is to devise a new structure suited to Western Australia, drawing on the strengths and avoiding the weaknesses of the many reforms in other jurisdictions. The State has geographical problems which many other jurisdictions do not experience, such as the difficulty of providing viable community sanctions in extremely isolated communities. But it may also have problems which other

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50. Compare Wilkie supra n 1; *Standing Committee First Report* supra n 2, paras 16-50; and the *Review Committee Report* supra n 2, 11 with the *First Smith Report* supra n 11, 5-8.
51. *Review Committee Report* supra n 2, 17 calling for urgent parliamentary amendment if the Sentencing Act is not to be repealed.
52. *Standing Committee Second Report* supra n 2, paras 195-196 calling for immediate repeal or for an amending statute (as appended to the *Report*).
53. Compare the *First Smith Report* supra n 11, emphasising at 3 the existing measures of prevention, and justifying at 1 the Sentencing Act as a "circuit-breaker" for "a small number of serious and repeat offenders". In H Jackson supra n 9, Jackson J demonstrates and explains the considerable difference between juvenile justice policies in WA and in other jurisdictions.

jurisdictions *have* experienced, such as a lack of confidence among sentencers in the content and enforcement of community sanctions.

The 1991 *Report of the Western Australian Parliamentary Joint Select Committee on Parole* has already showed a keen appreciation of the need to harness sentencing reform to any alterations in early release mechanisms, and its recommendation that the Western Australian Chief Justice should be empowered to report to State Parliament on any matters affecting sentencing is a clear institutional recognition of the need for a partnership between judiciary and legislature.[54]

A more thoroughgoing reform would be to introduce a new statutory framework for sentencing, with a clear priority of aims and a clear enunciation of principles and policies for sentencing. The Swedish statute might be a relevant model. Arrangements could then be made for guidance to be given to judges and magistrates on sentence levels for the different types of crime: this might be done by the Chief Justice in the Court of Criminal Appeal by means of guideline judgments (if the business of office allowed sufficient time for this), or through a "State Sentencing Commission" consisting of a senior judge, another judge, a magistrate, a member with a background in corrections, and an academic criminologist.[55] The important task would be to devise coherent guidance for trial courts, with starting points and other guidelines for most of the frequent crimes. The authority of this guidance would depend on the statute, but it should leave sentencers with a discretion to depart in individual cases on giving reasons, which could then be tested on appeal. If there were sufficient judicial input into, and enthusiasm for, this approach, it could prove to be a step of far more enduring significance than the Sentencing Act.

54. *Halden Report* supra n 38, 126, Recommendation 23.2; see also Harding supra n 1, 89.

55. For elaborate proposals of this kind in an English setting, see Ashworth supra n 17, 319-328; for a proposal for an "Australian Sentencing Commission" see Chappell supra n 34.