THE EXCESSIVE SCALE OF IMPRISONMENT IN WESTERN AUSTRALIA: THE SYSTEMIC CAUSES AND SOME PROPOSED SOLUTIONS

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Western Australia has recently received national and international attention over the controversial Juvenile Crime and Repeat Offenders legislation. This article critically examines the already high level of incarceration in Western Australia, especially within the Aboriginal population. The author attributes this to the wide acceptance of the "custodial free lunch" and the general reluctance of the lower courts to utilise community-based correction orders when sentencing. The solution advocated is a cap on the state's custodial population no higher than the national average. Practical measures successfully employed overseas are also proposed for the improvement of Western Australia's penal system.

1. THE SCALE OF IMPRISONMENT IN WESTERN AUSTRALIA

Since 1977, when the Australian Institute of Criminology commenced publishing its monthly series, *Australian Prison Trends*, Western Australia has continuously had a rate of adult imprisonment which has been no less than 35 per cent and sometimes as much as 80 per cent above the national average. To capture the flavour of this, at that one isolated moment (in July 1984) when the national rate dropped momentarily below 60 prisoners per one hundred

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thousand general population, the Western Australian rate was 107 per one hundred thousand.[1]

The rate as at 30 November 1991 was 117, representing 1 977 prisoners.[2] However, even that is an underestimate, for it does not take account of convicted prisoners serving their sentences in police lockups. At any given moment, this is of the order of one hundred persons, which adds six per one hundred thousand to the overall rate.[3] By contrast to this composite rate of over 120, the average national rate as at 30 November 1991 was 81.4 per one hundred thousand.[4]

In summary, Western Australia has a long-established and continuing tradition of high rates of imprisonment. They are "high" in that they markedly exceed the rates which have consistently been normal across a nation whose component state entities are culturally, socially, economically and politically much more similar to each other than dissimilar.

2. CRIME RATES IN WESTERN AUSTRALIA

It is widely accepted that the link between general crime rates and general imprisonment rates is extremely loose. David Biles has found, in relation to Western Australian data spanning the 18 year period 1961-1979, that "changes in the imprisonment rate do not seem to influence the later levels of crime."[5] With regard to Australia as a whole, Biles found that two states showed negative correlations between imprisonment and future crime and

1. This pattern, measured annually rather than monthly, has been present at least since 1961; see D Biles *Crime and Imprisonment: An Australian Time Series Analysis* (1982) 15 Aust & NZJ Crim 133, Table 2.
2. Australian Prison Trends, No 186 (Canberra: Australian Institute of Criminology, 1991).
3. The precise figure on 30 November 1991 was not known. However, on 31 December 1990 it had been 120, representing a rate of 7 per one hundred thousand.
4. Supra n 2. This national rate may be slightly understated inasmuch as some other jurisdictions also fail to report their lock-up rate as part of their imprisonment rate. However, it is thought that this component is much lower in other jurisdictions, and is unlikely to account for more than an additional 300 prisoners (plus the WA lockup population). Probably the true national rate is, at any given time, about 3 per one hundred thousand higher than the reported rate whereas the true WA rate is about 6 per one hundred thousand higher. The general pattern is thus maintained that the WA rate is about 50% higher than the national rate.
5. Supra n 1, 147.

two others the exact opposite, though in none of these cases to the point of statistical significance. He commented:

> This mixed bag of results on the crime preventing (or crime reducing) effects of differing levels in the use of imprisonment must at least be interpreted as casting doubt on the assumption that sentencing large numbers of offenders to prison will necessarily reduce the crime rate.[6]

No other study has convincingly reached any firmer conclusion than this, one way or the other. For example, a more recent cross-national study found that "neither victim surveys nor recorded statistics give unqualified support for the argument that the differences in rates of imprisonment are explainable by differences in crime rates."[7]

The obverse question - what would be the impact upon the crime rate of a mass early release of offenders? - has not been definitively settled either. However, there has, within Australia, been one study which strongly suggests that this also has no measurable adverse impact upon the crime rate.The study in question - arising out of the effects of the 35 day prison officers' strike in New South Wales in 1984 - also focussed on the fact that the courts arranged their business and tuned their dispositions so as to reduce the numbers of offenders sentenced to imprisonment during that time. The authors concluded:

> The large number of accused or convicted offenders who were at large during the strike and who 'normally' would have been in custody did not significantly affect the overall crime rate for New South Wales nor for the [Sydney] metropolitan area. There may have been an effect for particular offences, but we were unable to eliminate other non-random effects that could have produced the changes and so are unable to draw any firm conclusions in this area.[8]

In this context, then, what are Western Australian crime rates? On the basis of admittedly imperfect official figures, it seems that for the bulk of the period 1977-1991, our violent crime rate has been somewhat below and our property crime rates somewhat above the national average. Consolidated, this gives us a total index crime rate which is currently somewhat above the national average. Yet that overall rate has fluctuated, so that from time to time

6. Ibid, 153.
7. J Walker, P Collier and R Tarling "Why are Prison Rates in England and Wales Higher than in Australia?" (1990) 30 Brit J Criminol 24, 27.
8. J David and P Ward *Effect of the Five Week Prison Officers' Strike in New South Wales in 1984* Criminology Research Council Report 1986, 119.

it has been below or comparable to the national average.[9] However, as already stated, the imprisonment rate has consistently been significantly higher. There is thus no evidence to suggest that penal policy and practice has done anything to make Western Australia, on the one hand, safer or, on the other hand, more dangerous. The two phenomena - crime rates and imprisonment rates - seem to run along tracks which seldom, if ever, intersect.

3. OFFICIAL PENAL POLICY

Since 1988, when the Western Australian Criminal Code 1913 was amended, official penal policy has been that imprisonment shall be a punishment of last resort. Specifically, section 19A provides as follows:

> Where a person is convicted of an offence punishable by imprisonment and the court has an option whether or not to imprison the offender the court shall consider -
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> (a) the seriousness of the offence;
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> (b) the circumstances of the commission of the offence;
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> (c) the circumstances personal to the offender; and
>
> (d) any special circumstances of the case,
>
> and shall not imprison the offender unless it considers that no other form of punishment or disposition available to the court in the case is appropriate.

What imprisonment rates seem to indicate is either that this section is being widely disregarded by the judiciary or that Western Australians are a particularly unpleasant lot, in terms of the seriousness of the crimes they commit or the circumstances in which they do so. The most likely of these explanations is that the statutory instruction is being disregarded.

9. S K Mukherjee and D Dagger *The Size of the Crime Problem in Australia* (Canberra: Australian Institute of Criminology, 1990) passim. It is necessary to make such statements in a guarded manner because strict inter-jurisdictional data comparability has not yet been achieved, as well as for the usual reasons concerned with differential reporting patterns by area and crime type.

4. SENTENCING PATTERNS: OFFENCES, OFFENDERS AND COURTS

(a) Offences

Looking first at the stock of prisoners on the annual census day, the distribution of Western Australian prisoners, in percentage terms, seems to show no distinctive patterns of any significance.[10] However, when those percentages are turned into imprisonment rates by offence per one hundred thousand relevant population, it does appear that male imprisonment rates are significantly in excess of the comparable national rates with regard to the following offences: assault; sex offences; robbery; break and enter; justice procedures; driving offences; and licensing and registration offences.[11]

It should be emphasised again that for some of these offences Western Australia has a lower than average recorded crime rate and for others a higher rate. In other words, if one is tempted to try to argue that, for example, the fairly low robbery-crime rate is attributable to the high robbery-imprisonment rate, one will also have to face the fact that the high break and enter imprisonment rate has not brought about a low break and enter crime rate. To say this is simply to reiterate that the link between crime rates and imprisonment rates is extremely imprecise.

(b) Offenders

With regard to imprisoned offenders, the most striking pattern is the proportion of Aborigines. The scandalous nature of Aboriginal over-representation in Western Australian prisons has been documented many times - most recently by the Crime Research Centre in its report on Aboriginal Justice Programs.[12] Suffice to say that about 35 per cent of the stock of prisoners held in prisons at any given time are Aborigines. This figure compares with the 2.7 per cent of Aborigines within the adult population of

10. See J Walker *Australian Prisoners* 1990 (Canberra: Australian Institute of Criminology, 1991) 39-43. Results from the 1991 national census of prisoners were not available at the time of writing. Those from 30 June 1990 were used.
11. Ibid, 44-45.
12. M Wilkie *Aboriginal Justice Programs in Western Australia* (Research Report No 5, Crime Research Centre of The University of Western Australia, July 1991).

the State.[13] This figure has not varied significantly during the last 20 years, almost as if it were somehow pre-determined. In addition, Aborigines invariably constitute the overwhelming majority of convicted prisoners serving sentences in police lockups; the figure as at 31 December 1990 was 81.7 per cent.[14]

The other outstanding feature is that young males form part of the prison population in this State at significantly higher rates per one hundred thousand relevant population than nationally.[15] This is partly, but not entirely, a function of the excessive Aboriginal imprisonment rate.

(c) Courts

There were 12 583 receptions of sentenced prisoners into Western Australian prisons and lockups in 1990 - 5 475 into prisons and 7 108 into lockups.[16] These receptions related to 4 405 distinct persons into prisons and 4 355 into lockups, a total of 8 760.[17] In addition, there were 1 233 receptions of remand prisoners into prisons.[18]

It is not known to what extent the prison and lockup figures overlap because of the fact that the mode of exit from the lockup is to prison (and occasionally vice-versa). However, any such overlap would certainly have been minimal; it is unlikely to have distorted the overall significance of the available figures.

That significance is as follows. With regard to sentenced prisoners, out of 8 760 receptions of distinct persons into custodial detention during 1990, only 747 were sentenced by the higher courts.[19] To put it the other way, 8 013

13. Ibid, 275.
14. R G Broadhurst, A M Ferrante and N P Susilo *Crime and Justice Statistics for Western Australia. 1990* (Statistical Report 1990(2), Crime Research Centre of The University of Western Australia, December 1991) 105, Table VI. The actual numbers were 98/120.
15. Supra n 10, 20.
16. Supra n 14, 96, 105.
17. Ibid, 101, 105.
18. Ibid, 96. It is worth noting that there could be as many as a further 60 000 receivals (not distinct persons but distinct custodial contacts) into police lockups each year: see D McDonald *National Police Custody Survey August 1988* (Research Paper No 13, Royal Commission into Aboriginal Deaths in Custody, March 1990) 5.
19. Ibid, 66, Table 3.7.

(91.5 per cent) of such persons were sentenced to imprisonment by the lower courts.[20] This is an unacceptably high figure. It raises questions central to the whole administration of criminal justice, including that of the "custodial free lunch",[21] which in turn is at the fulcrum of decarceration strategies, to be discussed later.

5. SENTENCING ALTERNATIVES AND THEIR UTILISATION BY THE COURTS

The question arises: are lower court sentencers using imprisonment in this way because there are insufficient alternatives available to them? The 1991 *Report of the Joint Select Committee on Parole* conveniently sets out sentencing options for each Australian jurisdiction.[22] Primary community-based corrections orders[23] are probation, community service orders, and work and development orders, as well as such orders as binding over and conditional or absolute discharges. Though modes differ in detail from state to state, Western Australia has as wide a range of options as anywhere else.

However, the problem is the extent of their utilisation. If one takes the figures of persons serving terms of imprisonment and those serving community-based corrections orders (other than post-prison orders) as at 30 June 1989,[24] it can be calculated that of all the mainland States, Western Australia used community-based orders the least. At that time, whereas 71.4 per cent of all sentenced offenders Australia-wide were serving community-based orders, in Western Australia only 62.9 per cent fell into that category.

20. The trend which these figures signal is confirmed by data as to sentence-length and offence-type: 99, Table III, and 107, Table VII. However, it is possible that as many as 2 400 of those receptions may be as a consequence of default of a work and development order - the mechanism introduced in 1988 to forestall direct imprisonment for fine default. Imprisonment in default of such an order is not ordered by the courts but by the chief executive officer of the Department of Corrective Services. Nevertheless, the main point as to the overuse of imprisonment by the lower courts remains a substantial one: infra n 52.
21. See FE Zimring and G Hawkins *The Scale of Imprisonment* (Chicago: University of Chicago Press, 1991) 211-215, who use the term "correctional free lunch".
22. WA Parliament 1991 *Report of the Joint Select Committee on Parole* (J Halden, Chairman) 30-58 ("Halden Report").
23. That is, those which do not follow upon imprisonment, such as parole, work release, home leave or home detention.
24. This is the most recent date for which comprehensive national data on each matter are available; see F Debaecker and J Chapman *Australian Community-Based Corrections 1989* (Canberra: Australian Institute of Criminology, 1990) 13 and J Walker *Australian Prisoners 1989* (Canberra: Australian Institute of Criminology, 1990) 19.

This general pattern seems to have improved markedly. As at 31 December 1990, 73.9 per cent (5 163 / 7 003) of offenders convicted in this State were serving community-based sentences.[25] On the other hand, 50.7 per cent of new orders made during the six month period preceding that date were sentences of imprisonment, whilst only 49.3 per cent were community-based. This suggests that the increase in the stock of offenders serving such orders was partly attributable to the fact that the duration of such orders may have been rather long, particularly in the case of probation (3 078 / 4 606 such orders).

The Royal Commission into Aboriginal Deaths in Custody examined the question of use of non-custodial sentences. Commissioner Johnston stated:

> [W]hilst the lack of understanding of Aboriginal culture is a factor likely of itself to diminish the ability of justices [of the peace] to make proper sentencing decisions, equally alarming was an apparent lack of awareness or willingness to apply non-custodial sentencing options in circumstances where they appeared appropriate. Indeed, one [West Australian] justice told Commissioner Dodson:
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> *I don't think I've ever given anybody a community service order - I don't think I ever would. the idea of community service is probably a good thing but the operation of it is not so good.*[26]

Needless to say, the imposition of community-based corrections orders upon Aborigines has historically been much lower proportionately than the imposition of prison sentences. In other words, though they are over-represented at this point, they are even more over-represented at the most intrusive end of the penal continuum.[27]

25. Supra n 14, ch 5 passim.
26. E Johnston *National Report of the Royal Commission into Aboriginal Deaths in Custody* Vol 3 (Canberra: AGPS, 1991) para 22.4.10.
27. See Wilkie supra n 12. Tables 11.1 and 11.2, with regard to higher courts sentencing; and Debaecker and Chapman, supra n 24, Table 5. Broadly speaking it is possible to calculate that whereas Aborigines are about 26 times over-represented (that is, in terms of sanctioned population to general population) in prisons, they are only about 12 times over-represented in community-based corrections.

6. THE "CUSTODIAL FREE LUNCH" AND THE INADEQUATE ACCOUNTABILITY OF THE LOWER COURTS

What can be seen quite clearly, then, is that an enormous proportion of Western Australian imprisonment is attributable to sentencers who are in a position of comparative irresponsibility in terms of their accountability for the social and financial costs of imprisonment. That is what is meant by the *custodial free lunch*. In practical terms, Courts of Petty Sessions are virtually immune from appellate review as to their imposition of custodial sentences. This point is so important that it is necessary to spell out in some detail how it has come about. The background against which this will be done is that of an analysis of all such appeals heard during the 1990 court calendar.[28]

Until 1 June 1991, appeals against decisions of the lower criminal courts were governed by sections 183 to 206I of the Western Australian Justices Act 1902 . Two procedures were available: an ordinary appeal and an appeal by way of order to review. In each case, the appellate body is the Supreme Court.[29]

In the context of an appeal against sentence, the ordinary appeal under section 183 was only available where the defendant pleaded not guilty and received, after conviction, a sentence of imprisonment without option of a fine. This double gateway has the practical effect of making the provision otiose insofar as the question of reviewing the use of imprisonment by the lower courts is concerned, inasmuch as the overwhelming majority of such cases, particularly those heard by justices of the peace, involve a plea of guilty. In fact, there was only one such appeal in 1990, and this was dismissed.

The appeal by way of order to review involved no such procedural gateway; it was in principle available whatever the plea and whatever the sentence. Although precise figures are not available to validate the point, the

28. This is only possible by examining the files of unreported Supreme Court decisions. I would like to express my thanks to my research assistant, Ms Marianne Wells, for her work on this project.

29. S 16 of the (WA) Justices Amendment Act 1989 has repealed these provisions. New ss 183-206E substitute a unified procedure, that of appeal by leave of the Supreme Court. There are no procedural gateways to struggle through, in contrast to those found in old s 183 and old s 197. A ground of appeal against sentence (the new s 186(1)(a)(iii)) is simply that the trial court "imposed a penalty that was inadequate or excessive". Release mechanisms pending the determination of the appeal seem to have been somewhat streamlined. There is no information available to date to indicate how this new procedure is working out in practice.

supposition is that in relation to short sentences there were practical disincentives, notably the greater technicality and thus potentially greater costs of the procedure and the fact that by the time the process might effectively be got under way some part of the sentence would often already have been served. There was no provision for release until the appellate procedure had been properly commenced.

There were 69 such appeals in 1990; 31 of them involved appeals which were wholly (28) or partially (3) against sentence. Eleven of these appeals were successful, either wholly or partly. All of them involved minor technical matters rather than issues of sentencing principle, and the single largest category involved motor vehicle offences and sentences. All judgments were delivered ex tempore; some of them appear in the unreported decisions in little more than note form. None were reported in any of the relevant Law Report series. Indeed, only 17 cases arising out of this part of the Supreme Court's jurisdiction have been reported in the last twenty years, the majority of these relating to questions of conviction rather than sentence.[30]

These figures lend support to the view that the Supreme Court has not been an active player in establishing the sentencing jurisprudence of the lower courts. In practical terms, there seems to be a hiatus; the lower courts do not discharge their day-to-day functions against a background of clear principle and ongoing accountability. Yet the thousands of mundane dispositions which they make constitute the principal source of what seems to be a major distortion of the sentencing system, over-use of imprisonment.

By contrast, there are approximately one hundred sentencing appeals annually from the higher courts to the Court of Criminal Appeal. Of these, only about twenty are normally reported. Nevertheless, it is evident that the levels of the judiciary which in a sense should least require supervision - because of their superior training and the lesser throughput of offenders - are more accountable in their sentencing decisions and work against a backdrop of more comprehensive guidelines.

Finally, it is also worth noting that the very fact that custodial free lunches are so readily available to lower court sentencers, particularly in non-Metropolitan areas, may mean that insufficient effort is put into community crime prevention and rehabilitation programs at the very point where its potential is greatest - right there where the anti-social conduct is occurring.

30. Four sentencing cases from the 1970's can be found; *Cameron v Josey* [1970] WAR 66; *Green v Josey* [1970] WAR 70; *Hill v Katich* [1973] WAR 11; *Walsh v Giumelli* [1975] WAR 114.

Imprisonment is, in a real sense, a soft option for sentencers. Thus it is that the throughput of offenders sentenced to imprisonment remains so high in Western Australia.

7. REDUCING THE PRISON POPULATION

Ten years ago, the Report of the Dixon Committee stated that "it is clearly not the *length* of prison sentences which is causing Western Australia's high imprisonment rate, but rather the *frequency* with which people are imprisoned."[31] Many of the Committee's recommendations were accordingly directed towards encouraging the greater use of community-based sentences and discouraging the use of imprisonment, particularly by the lower courts.[32] Yet the over-use of imprisonment has, if anything, become even more marked since then.

Subsequent observation and research has served to confirm that Committee's view that the surest way to reduce the prison population is, indeed, to reduce the frequency of the imposition of custodial sentences. This key point will be illustrated by brief reference to three recent studies.

The first concerns the reduction in the prison population of Germany (at that time West Germany) between 1983 and 1988.[33] During that period, the overall imprisonment reception rate decreased by about 3.5 per cent a year, whilst in Western Europe generally it was increasing by about 3 per cent annually. The average daily imprisonment rate also fell significantly though less dramatically, by 12.5 per cent over the whole period. At the same time, the crime rate continued to increase modestly and the clear-up rate also increased at about the same rate. The parole rate remained steady.

However, the average length of prison sentences increased. This was epitomised by the fact that the number of long prison sentences (that is, those in excess of five years) nearly tripled[34] - an immensely important observation when the argument has to be addressed - as it must be in Western Australia - that to reduce the imprisonment rate is somehow to be "soft" on crime. On the contrary, it seems that more severe punishment for serious offenders is reconcilable with an overall strategy of reducing the prison population.

31. *Report of the Committee of Inquiry into the Rate of Imprisonment* (Perth: WA Government Printer, 1981) 80.
32. Ibid. See in particular Recommendations 1, 2, 16, 17, 18, 19, 21, 24.
33. See J Graham "Decarceration in the Federal Republic of Germany" (1990) 30 Brit J Criminol 150.
34. Ibid. 166. Medium-long sentences, between 2 and 5 years, also doubled during this period.

How was this achieved? Quite simply, by a combination of prosecutorial discretion to bring fewer cases before the courts[35] plus, crucially, *a reduction in the proportion of offenders coming before the courts who were sentenced to imprisonment.* Specifically, with regard to young adult offenders, the percentage of those convicted who were sentenced to imprisonment fell from 10 per cent to 8 per cent during the relevant period, and with regard to adult offenders the percentage fell from 7.8 per cent to 6.8 per cent.[36]

It is not possible to pinpoint one single basis for this change in judicial approach. However, the author of the study upon which I am drawing states that "this shift in [sentencers'] thinking appears to have been initiated through a fundamental questioning of the legitimacy of pre-trial detention, especially for young offenders, and the rehabilitative efficacy of short-term imprisonment."[37] In the specific case of young offenders, the author says:

> So it looks as if judges have fundamentally altered the basis upon which they sentence young offenders aged between 14 and 20. Prison is increasingly being used as a final resort and is avoided wherever possible. The overall approach to young offenders is one of patience, until they grow naturally out of crime. Prison, it seems, has no place in this scheme, which requires keeping the young offender in the community as long as possible and out of closed institutions which reinforce rather than inhibit the development of criminal careers.[38]

The second study has virtually identical findings. It is a comparison of the imprisonment rates of Australia and England and Wales - Australia being the somewhat improbable paragon and England and Wales the villain of this saga. Having controlled for the key variables of crime rates and clear-up rates, the authors state:

> Disaggregating the prison statistics for both countries, nearly half the difference was made up of unsentenced prisoners, and just over half of sentenced prisoners. For both groups, the number received into prison was greater in England and Wales than in Australia. This appears to be a more important factor than the length of time prisoners spent in prison; per one hundred thousand population, receptions of unsentenced prisoners were 70 per cent higher in England and Wales and receptions of sentenced prisoners were 37 per cent higher.[39]

35. A key mechanism in modern attempts to reduce the use of incarceration but one which common law systems still have difficulty accommodating. However, the growth of Director of Public Prosecution systems, with their control over prosecutorial discretions, and the development in most States of the police power to administer formal cautions should soon begin to make a tangible impact along these European lines.
36. In each case, these percentages are in fact already lower in WA. However, the group at risk, ie coming before the courts at all, is so much greater that the rates of custodial sentence are themselves greater.
37. Supra n 33, 167.
38. Ibid, 162.
39. Supra n 7, 34.

Finally, reference should be made to the astonishing reduction in the juvenile incarceration rate which was achieved in England and Wales between 1981 and 1988. In that time the daily average fell by two-thirds - from 1 637 to 547. To some extent this was attributable to changing demographics: in a word, fewer kids. But controlling for that factor and for known offending rates, the key factor has, once more, been "the reduction in the numbers of potential candidates appearing for sentence."[40] The proportion of those appearing in court who were sentenced to detention did not significantly drop; but the numbers going through the court system did - from 7 700 to 3 200. The principal mechanism for bringing this about was that of the formal caution by police.

8. AN APPROPRIATE SCALE OF IMPRISONMENT FOR WESTERN AUSTRALIA

It is quite evident that, as a community, we have made absolutely no effort to *manage* the scale of imprisonment in Western Australia. It has just been permitted to happen, willy-nilly. Yet our own data, and experience elsewhere, strongly suggest that we have achieved no social benefits whatsoever - by way of reduced crime rates, lower recidivism, less community concern about crime, or in any other way - from our high rates of imprisonment.

The countervailing detriments are more tangible: high correctional costs, both capital and recurrent; the marginalisation of young people and Aborigines; and a failure to address the constructive opportunities which exist for crime prevention and community-based reintegration programs. The sentencing system, particularly at the lower court level, has been permitted to operate in such a way as to flout one of the very laws which their oath of office requires judicial officers to uphold - to sentence offenders to imprisonment only as a last resort. Clearly, the scale of imprisonment can be managed, if not with the precise production targets of an automobile factory at least with the broad performance indicators of, say, a public hospital or a broadcasting organisation. The time has come to do so - now, here, in Western Australia. The scale of imprisonment can no longer be left unregulated. What is the appropriate scale must be debated and agreed, then ways must be found of beginning to achieve it.

40. R Allen "Out of Jail: The Reduction in the Use of Penal Custody for Male Juveniles 1981-88" (1991) 30 How J 30, 33.

First, then, what should be the scale of imprisonment? I would strongly urge that it should be *no more than the national Australian average*. Western Australia has gained nothing through its previous unorthodoxy, and there are no special features to suggest that this society is any less "Australian" than any other Australian State. The State is now populous enough not to suffer under the "small numbers" yoke which distorts scales or rates in such places as the Northern Territory, nor is the relatively high Aboriginal population base an acceptable basis for trying to justify major departures from the norm.

Specifically, then, the scale of imprisonment should be set at 80 per one hundred thousand population. This would lead to a maximum permissible prison population, or cap, on today's figures of 1 360. *That means that, as at 30 November 1991, the State's adult custodial population held in prisons and lockups was about 740 in excess of the proposed cap.* It should be emphasised that this scale is not related directly to the rated capacity of the prison system. In many places, particularly the United States, where upper limits have been imposed (by court order[41]) on prison numbers it has been in the context of over-crowding. This has been a sensible and pragmatic response to crisis, though sometimes it has brought about unintended consequences, as will be mentioned later.[42]

Rather, the principled question is: "[H]ow much, *apart from the availability of resources*, the state ought to rely upon the prison sanction".[43] As Zimring and Hawkins have written: "The use of available capacity as a measure of, and a limit on, the use of imprisonment is essentially arbitrary and unprincipled, although these terms are used in a descriptive and not a pejorative sense."[44]

In Western Australia, capacity constraints have not driven down the prison population in the past. With the de-commissioning of Fremantle Prison on 7 November 1991, rated prison capacity was 1 973 places. It had been hoped that capacity would not be an issue for some years, but as noted

41. See eg (1989) 20(1) Criminal Justice Newsletter 4.
42. See J Austin "The Consequences of Escalating the Use of Imprisonment: The Case Study of Florida" (Focus, The National Council on Crime and Delinquency, June 1991) 6, where the unintended consequence of imposing a cap on the prison population of Florida, the State with the highest imprisonment rate in the United States, has been that "non-violent, petty property and drug offenders are sentenced inappropriately to prison while dangerous criminals are released early".
43. A von Hirsch "Structure and Rationale: Minnesota's Critical Choices" in A von Hirsch, K A Knapp and M Tonry (eds) *The Sentencing Commission and Its Guidelines* (Boston: Northeastern University Press, 1987) 94 (emphasis added).
44. Supra n 21, 203.

earlier by the end of that month the number of prisoners was already in excess of that capacity at 1 977. Of course, the very nature of some of the minimum security institutions means that the capacity is somewhat elastic, whilst police lockups also provide additional and equally elastic capacity.

One further word about the proposed cap. There should be a sub-quota or special cap with regard to Aborigines. The proposed new system must not be permitted to operate so as to consolidate existing inequities. Elsewhere[45] I have suggested a cap of 300, as opposed to the present Aboriginal population of about 650.[46] The reasons are self-evident, concerned with eliminating gross inequities as well as drawing upon the general arguments about the over-use of imprisonment in this State.

9. STRATEGIES TO ACHIEVE THIS SCALE OF IMPRISONMENT

It is evident that a systemic approach is best. A critical factor within the total system is the status and credibility of non-custodial sentencing modes.

The literature on the West German experience, for example, emphasised not only the key roles of prosecutors and judges but also the availability of a wider range of non-custodial sanctions of a kind which commanded the respect of sentencers.[47] In England and Wales, with regard to male juveniles, the reduction in detention rates was achieved not only by the introduction of a formal cautioning system but also by the extension of credible non-custodial sentences and by a huge welfare investment to set up Intensive Intermediate Treatment Schemes.[48] To the extent that Australian states have successfully contained or reduced their prison populations from time to time, it has likewise been shown that the availability of non-custodial alternatives which are acceptable to the public and to sentencers has been an important factor.[49]

The question of incarceration of unsentenced prisoners is also central. Each of the studies referred to illustrates the destructive impact of remands in custody upon imprisonment rates. At present, about one in eight prisoners

45. Supra n 12, ix.
46. See supra n 14, 96, 105.
47. Supra n 33, 168.
48. Supra n 40, 42-49.
49. R Harding "Prison Overcrowding; Correctional Policies and Political Constraints" (1987) 20 Aust and NZ J Crim 16; D Porritt "The New South Wales Prison Population, 1967-87: Growth and Counteraction" (unpublished, NSW Department of Corrective Services, 1988).

in Western Australia is awaiting trial - a percentage figure which is better than the national average but which, because of the overall greater use of imprisonment, translates into a rate per one hundred thousand population which is slightly higher than the national average.[50]

The position of victims is also relevant. It would seem to be self-evident that better treatment of victims, and in particular, the pursuit of such objectives as reparation and mediation, would mitigate the punitiveness which some sentencers understandably feel as an expression of community frustration at the incidence and nature of some crimes. In Western Australia, the question of victims' rights has tended to be approached as if it were somehow a self-contained issue. But in reality it spills over into the whole of penal policy - something that is increasingly being recognised in Europe, the United States and, nearer home, in South Australia.

Another factor is the decriminalisation of certain conduct or, at any rate, its removal from the list of imprisonable offences. A problem can be that of unintended consequences - bringing about a greater level of imprisonment as a second resort than previously occurred as a first resort. A prime example of this is found in Western Australia's own Work and Development Order ("WDO") system, brought in as a way of heading off imprisonment as a virtually automatic outcome of fine default.[51] Since that provision was passed, the number of persons admitted to prison for fine default has actually *increased*, not decreased, and it is partly because of this that the total prison population has continued to rise.[52]

At this stage, and in the absence of a proper evaluation, one can only speculate as to why and how this has occurred. However, it seems likely that the failure of Western Australian law to take account of offenders' ability to pay when setting the level of fines, or ability to pay within the specified time, plus the fact that default per se rather than *wilful* default can activate imprisonment for failure to comply with a WDO, may each have contributed.

50. As at 1 November 1991, 234 of the 1 960 prisoners held in Western Australian prisons were remandees, ie 11.9%; see Australian Prison Trends, No 186, supra n 2.

51. See (WA) Justices Act 1902 ss 171AA-171AI inserted by the (WA) Acts Amendment (Community Corrections Centres) Act 1988.

52. Precise figures are not yet available. However, during 1991 approximately 5 600 WDOs were made and about 2 400 offenders were received into prison for failure to complete the order; as yet unpublished figures supplied to the author by the Department of Corrective Services.

A purported decarceration measure has thus probably added to the total level of incarceration.[53]

Following on from this, it is known that certain strategies do *not* work to achieve a desired scale of imprisonment. One such is amnesties. Zimring and Hawkins, in their review of the evidence, conclude that the effect of amnesties is generally short-lived.[54] Clearly, the sentencing infrastructure and ethos needs to be changed also if the effects of such a strategy are to hold. Echoing Mathiesen,[55] Zimring and Hawkins state:

> ...the prospect of a decarceration policy having a significant impact upon prison population would be substantially increased when decarceration had supporters throughout the administrative wing of state government, within the state legislature, and among those private and public sector lobbies that are an integral part of the state administrative and legislative process.[56]

10. THE REPORT OF THE JOINT SELECT COMMITTEE ON PAROLE

This observation naturally leads to a consideration of the recent Western Australian parliamentary report - an interesting *all-party* report which has not yet received the attention that it deserves. Whilst nominally concerned with the operation of the parole system, the Committee correctly recognised that this end-of-the-line sentencing matter cannot be considered in isolation from the question of the use of imprisonment generally.[57]

First, the Committee recommends the abolition of short sentences, except in relation to offences of violence against the person. Specifically, no

53. A similar scheme in Victoria has been a notable success. The most obvious contrast is indeed that *wilful* default is required to activate imprisonment. Also, the matter must be returned to the sentencing court, whereas in Western Australia default procedures are administrative only, within the discretion of the Department of Corrective Services. In California in 1989 nearly 40 000 "technical" parole violators were returned to prison, thus adding considerably to the strains of an already overcrowded system. A key factor in bringing about this unintended consequence seems to have been the fact that the matter of revocation is handled administratively by parole officers, rather than with due process; see (1991) 22(18) Criminal Justice Newsletter 1-2.
54. Supra n 21, 195-197.
55. T Mathiesen *Prison on Trial* (London: Sage Publications, 1990) 154 et seq.
56. Supra n 21, 204.
57. This conclusion is also shared by N Morgan "Parole and Sentencing in Western Australia", infra 94.

sentence of less than three months should normally be imposed.[58] Second, without ever using the phrase, the Committee recognised the pernicious effect of the "custodial free lunch" upon the scale of imprisonment.[59]

To counteract this, it was recommended that the control of the Court of Criminal Appeal upon lower court sentencing patterns should be strengthened; in other words, that there should be an effective centralisation of judicial sentencing power to a point in the total system where the inappropriate use of prison is visible as a cumulative effect. Accordingly, the Supreme Court should be empowered to give guideline judgments about sentencing. In contrast to the traditionally narrow legalistic approach whereby decisions purportedly are confined to the very issue before the court on appeal, such judgments should be able to deal with sentencing in a systemic or holistic way. Moreover, the Court should be empowered to give such judgments of its own motion, rather than await the fortuitous event of an applicant in a suitable case having the determination, knowledge and resources to initiate an appeal on his own account.[60]

This recommendation would begin to meet the procedural deficiencies, identified above, which at present work so as to make sentencing decisions of the lower courts almost immune in practical terms from review. To fortify the notion that the use of imprisonment is a general community responsibility, not that merely of the judiciary, the Committee also recommended that the Chief Justice should have power to report to Parliament on any sentencing matter that he thinks fit.[61] This is, of course, a radical proposal in that it tiptoes onto the hallowed ground of the separation of powers. However, in the absence of some preferable mechanism for keeping sentencing issues in community focus it seems to be perfectly sensible.

The Committee also addressed the question of making parole a more credible form of punishment, picking up in this recommendation the general point that all community-based sentencing options must have a wide measure of judicial and community confidence.[62] Related to this is the recommendation that there should be a widespread public education and awareness

58. Supra n 22, 90-91. In West Germany, sentences of less than one month were abolished, and strict guidelines were established for the use of sentences of between 1 and 6 months' imprisonment so as to forestall possible upward drift of custodial sentences generally: see Graham supra n 33, 165.
59. Ibid, 91-93.
60. Ibid, 125, Recommendation 23.1.
61. Ibid, 126, Recommendation 23.2.
62. Ibid, 80.

campaign as to the operation and objectives of the current sentencing system, particularly parole.[63]

The *Report of the Joint Select Committee on Parole*, being an all-party report, does, then, suggest that the beginnings of a consensus may be emerging at the key legislative and administrative levels, that the over-use of imprisonment cannot be allowed to continue indefinitely. Judicial pronouncements and the deliberations of such bodies as the State Government Advisory Committee on Young Offenders fortify this perception. The prerequisite for change identified by Zimring and Hawkins and many others may almost be with us.[64]

11. THE MECHANICS OF ATTAINING AND MAINTAINING AN ACCEPTABLE SCALE OF IMPRISONMENT

Western Australian imprisonment rates are presently so out of kilter that a circuit-breaker is needed. Even if the recommendations of the Joint Select Committee were enacted into law tomorrow, there would probably be a lead-time of several years before the scale of imprisonment was markedly affected. Moreover, there would be no guarantee, or even expectation, that the scale I have suggested above would be reached. This is particularly so when prison capacity, though near the maximum, still may possess some elasticity.[65] The mechanisms I would suggest, both as a circuit-breaker and thereafter as ongoing features in the prison-sentence system, are *early release* and *queueing*.

Early release would be necessary to start progressively bringing the population back to the agreed scale. This could not be achieved in one hit, nor

63. Ibid, 87-88.

64. Since this was written, the (WA) Crime (Serious and Repeat Offenders) Sentencing Act 1992 and the (WA) Criminal Law Amendment Act 1992 have been passed by the WA legislature. Each sets out to incarcerate categories of juvenile offenders for substantially longer periods than has previously been the case. The slight optimism expressed in the text may thus be misplaced. On the other hand, it is possible that these laws represent the high water-mark of laws in this State predicated on the assumption that imprisonment per se has a desirable and certain impact upon crime patterns. At this stage, however, it is premature to make any firm predictions. For a description of the legislative scheme and sentencing guidelines, see M Wilkie "Criminal (Serious and Repeat Offencers) Sentencing Act 1992; A Human Rights Perspective", infra 187.

65. The debate as to whether the scale of imprisonment is "capacity-driven", in the sense that available capacity is normally taken up, is a very complex and technical one. A good overview is found in Zimring and Hawkins supra n 21, 76-77.

indeed would there be community support for doing so in such a way. Targets would have to be set: say, 1 800 in the first year, 1 600 by the end of the second year, and 1 360 by the end of the three-year program. There would have to be subsidiary targets along the way, and also sub-quotas for the reduction in Aboriginal imprisonment.

Meanwhile, the system would not be standing still. Even if the annual number of potential receptions of sentenced prisoners were reduced by, say, 50 percent from the current figure of about 12 500,[66] there would be a real danger that the prisons would be filling up almost as fast as they were being emptied. That being so, a queueing or "call-up" system would have to be introduced. Just as we are accustomed to wait for hospital beds for non-emergency surgery, so non-emergency offenders would have to wait for a prison place. On the other hand, "emergency cases" - dangerous or violent offenders - would go to the head of the queue or, more accurately, would not have to queue at all.

There is nothing all that radical about either of these suggestions. Early release is an integral part of at least 37 out of 50 United States prison systems, though as mentioned previously[67] it has not always been implemented sensibly. We have already seen, however, that in New South Wales this has occurred on one occasion without countervailing detriment to crime rates, and it is also an integral, though minor, aspect of the use of imprisonment in South Australia.[68]

As for queueing, this happens in The Netherlands and Finland.[69] Apart from its impact upon the scale of imprisonment, the queueing or call-up system would seem to have some advantages in that offenders can make (possibly with the assistance of community corrections officers) family and employment arrangements which may assist their subsequent reintegration into the community.

66 Constituting about 8 700 distinct persons; supra 76-78.

67. See Austin supra n 42.

68. Supra n 22, 98. The statement contained there is not quite accurate. Three mechanisms were available in South Australia at that time to try to minimise overcrowding. These were: (i) early release, up to 30 days' before the official release date by order of the Director-General; (ii) the use of temporary leave provisions contained in the Corrective Services Act, but as this was not an intended use of the provisions it has subsequently been discontinued; and (iii) the use of faxed warrants of release in relation to prisoners in police lockups. The attempts to control the prison population were not as structured and policy-driven as the Halden Report seems to suggest.

69. See D Downes *Contrasts in Tolerance: Post-war Penal Policy in the Netherlands and England and Wales* (Oxford: Clarendon Press, 1988) 46-47.

Proposals such as these require a great deal of practical detail and ongoing management and fine-tuning. Such matters should be dealt with by a publicly accountable body. An existing body which would naturally seem to be well-placed to perform these functions is the Parole Board, particularly if it is reformed and re-constituted in the sorts of ways recommended by the *Joint Select Committee Report* so as to give it full authority over the whole range of community corrections under the new name of the Community Sentences Board.[70] The criteria and processes which this body could develop for early release and queueing should be public and could thus be openly debated.

Matters which would be factored into the formulae should include: (a) seriousness and type of offence; (b) length of head sentence; (c) court of conviction; (d) judge's recommendations upon passing sentence; (e) length of time left to serve; (f) availability of family, community and welfare support in the community; (g) employment situation; (h) age or youth; (i) Aboriginality; (j) previous record, including recidivism. Others can doubtless think of further factors. It would not be a simple task, but it is viable.

The Community Sentences Board could also be a forum for the review from time to time of the proposed cap, or the scale of Western Australian imprisonment. Possibly, this would cut across the role envisaged for the Chief Justice and the judges of the higher courts in the recommendations of the Select Committee.[71] If so, that is a detail which could readily be sorted out. Possibly, a Sentencing Commission could consolidate the range of tasks, though at this stage in Western Australia's history I am reluctant to suggest the creation of an additional statutory authority.

12. CONCLUSIONS

Western Australia needs to change the ethos of sentencing in this State and to cap its prison population. If this were done, some prisons would be able to be closed. Even if these were only minimum security institutions (the cheapest to run per capita), such a move would start to put a brake on that most expensive and least productive part of our correctional system.

However, whilst that would save money, that factor is not the driving force behind this proposal. Rather, it is that of greater equity, more principled use of imprisonment, and better use of human resources - whether of offenders or of correctional staff. All this could be done in a way which

70. Supra n 22, 80-81b.
71. Ibid, 125-126, Recommendations 23.1 and 23.2, discussed above.

protected the community better than is the case at present. Of course, community support would be needed if such a strategy were to be sustained. Drawing upon the sorts of material contained in this paper, it should be possible to produce, if not consensus, then at least some understanding that the previous arid path of an excessive scale of imprisonment has run into a cul-de-sac. The time has come to try in Western Australia the more advanced penological policies which have had some real success elsewhere.