



**OUTCARE  
AGM 2014**

*Prison as a Last Resort: what are the options?*

by

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## **Introduction**

It is a great honour and a privilege to have been invited to address this annual general meeting, not least because of my respect and admiration for all that Outcare does (I had the benefit of a briefing on Outcare work from CEO Amanda Wheeler a couple of weeks ago), but also because the work in which you are engaged is very dear to my heart as I hope will become clear during the course of my address.

## **The Traditional Owners**

Before I go any further though I would like to thank Josh Collard for a very generous and moving Welcome to Country and acknowledge the traditional owners of the land on which we meet, the Whadjuk people, who form part of the great Noongar clan of south-western Australia and pay my respects to their Elders past and present. I gratefully acknowledge their stewardship of these lands for tens of thousands of years before Governor Stirling sailed up the Derbarl Yerrigan on that fateful day.

It is particularly important to acknowledge the role of Aboriginal people this evening for a number of reasons, not least, of course, because we meet at a football stadium, and Aboriginal people have been significantly over-represented in feats of extraordinary athleticism, skill and courage on that football ground, but also because, tragically, Aboriginal people are significantly over-represented amongst the clients of Outcare and amongst the people who regularly come before our courts.

## **Prison as a Last Resort**

The topic of my address is in fact "*Prison as a Last Resort – the options*". As I am sure most of you would be aware, almost all Australian jurisdictions, including Western Australia, have legislation which requires that a sentence of imprisonment cannot be imposed by a judge or a magistrate unless and until all other options have been ruled to be unsuitable. In other words, prison has to be a last resort. Sometimes when sentencing options other than imprisonment are discussed, they are referred to as alternatives to imprisonment. I have some hesitation about that expression because it might undermine the fundamental concept to which I have referred. "Alternatives to imprisonment" rather suggests that the default penalty is imprisonment, and under the legislation nothing could be further than the truth. The default sentence is not imprisonment; imprisonment is and must be seen as a last resort, to be utilised only when all other options have been excluded.

## **The Objectives of Sentencing**

I will briefly touch upon the objectives of sentencing in order to put imprisonment and other sentencing options in their context. The objectives of sentencing are, of course, many and varied and have been described by the courts as inconsistent and incommensurable. They include punishment or retribution, embodied in the biblical reference to the taking of an eye for an eye. They include the denunciation of conduct that is offensive to a civilised community. They include the vindication of victims, and they include the protection of the community by removing people who are prone to breaking society's laws from contact with community – sometimes

called the incapacitation effect, probably most evident in contemporary Western Australia in legislation like the dangerous sexual offenders legislation under which offenders are removed from the community not as punishment for their offending behaviour, but because of the assessment of their propensity to reoffend in the future. The objectives of sentencing also include deterrence of course; specific deterrence – deterring the offender from reoffending – and general deterrence which is deterring other people from committing similar offences. I, and a number of my judicial colleagues think that deterrence is significantly overrated as a sentencing objective for a number of reasons. Consideration of those reasons would require a more detailed conversation on another day. The other major objective of sentencing is rehabilitation or therapeutic intervention – seizing the opportunity to try to change behaviour, other than by punishment, so as to improve community safety.

As I mentioned earlier, those objectives can be, and often are, contradictory. Punishment can and often does interfere with rehabilitation and deterrence can have that effect as well. To take an obvious example, suspension of a person's driver's licence very often interferes with their capacity to earn a living which in turn interferes with their capacity to live as a law-abiding member of the community. Imprisonment dramatically interferes with a person's life in a way that is not always beneficial in terms of their prospects of rehabilitation. The task of the sentencing judge or magistrate is a difficult one. It requires the court to balance those competing and sometimes inconsistent objectives. Sometimes imprisonment is inevitable; sometimes the last resort of imprisonment has to be imposed because

the combination of considerations like punishment, retribution, denunciation, and the vindication of victims requires a significant penalty. The seriousness of the offending conduct and the offender's culpability leave no other appropriate outcome.

### **Imprisonment – Some Facts**

As many of you would know, prison is a very expensive remedy. For adults it cost about \$334 per day to keep somebody in prison during the last financial year in Western Australia. For juveniles it was a staggering \$814 per day to keep a juvenile in detention in Western Australia last year. The cost of community-based orders for an adult last year was \$46 per day; for juveniles \$90 a day. There is a dramatic financial difference between the cost of imprisonment and its alternatives.

So, if we are going to pay a lot more money to imprison someone, how effective is it in keeping our community safer, acknowledging of course, that community safety is not the only reason for sending people to prison. There is also a significant role for punishment and retribution in our justice system.

### **Recidivism Rates**

Less than two weeks ago a significant report was published by the Department of Corrective Services.<sup>1</sup> I have to say that there is a lot of data, graphs and numbers in it and I am still getting my head around it, but it seems to me to contain some good news and some bad news.

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<sup>1</sup> Department of Corrective Services, *Recidivism trends in Western Australia with comparisons to national trends* (16 October 2014) available at: [www.correctiveservices.wa.gov.au/files/about-us/statistics-publications/statistics/DCS-recidivism-trends-WA-October2014.pdf](http://www.correctiveservices.wa.gov.au/files/about-us/statistics-publications/statistics/DCS-recidivism-trends-WA-October2014.pdf) (accessed 5 November 2014).

The bad news is that recidivism rates remain high. There are various measures of recidivism rates within the publication. Taking people who leave prison and return to prison within two years, which is a commonly adopted measure, for adults in the most recent figures, it was 39%; for juveniles it was 49%. That is a very high rate of return to prison within two years of release. The good news is that although there has been some volatility in recent years, comparing 2009-10 and 2013-14, the rates, for adults and juveniles, are down by about 5% and 10% respectively – and for adults this may be part of a longer-term trend, although unfortunately the underlying trend for juveniles appears to be rising.

In another area covered by the report, the bad news is that recidivism rates are much higher for Aboriginal people. Using a different measure, which is not return to prison within 2 years, but the percentage of people received into prison who have been to prison before, for Aboriginal prisoners, about 80% of those received into prison last year had been to prison before, compared to 50% of non-Aboriginal prisoners.

There is also some mixed news about these statistics, and that is that both of those rates have increased. In other words, the percentage of people who have been to prison before, for both Aboriginal and non-Aboriginal prisoners, has increased. Why do I describe that as mixed? At one level it is bad news because it suggests that we have an intractable core of repeat offenders. But at another level it is good news because it suggests that people who are going to prison for the first time are reducing as a percentage of the total prison intake.

Another area covered by the report concerns the effect which completing a programme during the term of imprisonment has upon the likelihood of return either to prison or to corrective services' supervision within 2 years. The bad news is that programme completion – that is, completing at least one programme – does not seem to make a huge difference to the likelihood of that person returning either to prison or to corrective services' supervision within the 2 years following release. The good news is that it does make some difference, and that difference has been positive for 9 of the last 10 years. So it seems either that the programmes are having some beneficial effect or that people who elect to have programmes and have the determination to complete those programmes are more likely to succeed than those who do not.

The things that have not been covered in this very interesting report include the relationship between the length of time served in prison and the likelihood of returning. There has been a lot of criminological material in that area and it demonstrates quite convincingly that the longer you lock someone up, the more likely they are to return to prison. I would be surprised if the same was not revealed by the Western Australian data.

The other interesting area that is not covered by the report is whether those who are released on parole compared to those who are just released without parole return to prison at a greater rate. That would be a very interesting piece of data, particularly given the significant changes that have occurred in relation to the rate at which people are released from prison on to parole in Western Australia over the last 5 or 6 years. That is a topic to which I will return.

## **Sentences other than Imprisonment**

What are the alternatives to prison? More correctly, what are the options that have to be exhausted before we reach imprisonment as a last resort? A lot of those options are presented through solution-focused courts. I discuss this topic with some trepidation because I am in the presence of Dr Michael King who knows much more about this topic than practically anybody in Australia.

### **Solution-focused Courts**

There are a number of solution-focused courts operating in Western Australia. They are based upon an intuitive premise – the premise that given that most offending is caused by an underlying problem, the best way of reducing the likelihood of reoffending is by addressing the underlying problem rather than simply addressing the symptom caused by that underlying problem. If you go to a doctor with a cough, giving you a lozenge that will ease your throat for a moment might stop you coughing while the lozenge is taking effect but it will not stop coughing in the longer term. You have got to address what is happening in the lung. That is the same philosophy that underpins solution-focused courts. Its logic is undeniable.

### **Drug Court**

One of the solution-focused courts that would be well known to all here is the Drug Court. The data on that court establishes that it works. The most recent report that I saw showed that those who went through the Drug Court were about 20% less likely to reoffend than those who went to prison. Putting someone through the Drug Court for a year (this report was done some years ago) was \$16,000

compared to \$100,000 for a year in prison. So it is about a sixth of the cost and 20% more effective. Courts like this do work. One of the problems is that there are limited opportunities for people to go to these courts.

### **Mental Health Court**

Another court of a similar kind is the START (Mental Health) Court which has been in operation in Perth for about 2 years. I am not aware of any current statistics in relation to recidivism rates for that court but again it is intuitively likely that a court of this sort would have the same sort of beneficial effect as we have seen in the Drug Court. Tragically, far too many of the people in the criminal justice system suffer some form of mental impairment. At the pathological end of that system, within our prisons at least 35% of the prison population have reported being told they have a mental illness or cognitive disability or some other form of mental impairment. Given the likelihood of under-diagnosis that suggests that probably at least 50% of the people in the prison system are suffering from one or other of those conditions. That means that the prison system of Western Australia is by the far the largest provider of residential or institutionalised mental health care in the State, and it is probably the least appropriate place for that sort of care to be provided because the nature of the prison environment is not conducive to therapy for mental illness. The START Court recognises this fact and tries to treat people in a much more therapeutic environment outside the prison system.

But again there are too few places for people who need services of this kind. Just to give you some feel for the numbers of which we are

speaking, a pilot study for that court before it went live, as it were, showed that during one week in the Central Law Courts, 240 of the 1,100 people before the Central Law Courts either were currently patients of the Mental Health Commission or had been patients of the Mental Health Commission.

There is a massive area of need for speciality courts of this kind. Plainly the court that we currently provide is incapable of meeting anything more than a relatively small proportion of this need.

### **Family Violence Court**

Other solution-focused courts are Family Violence Courts – that is, courts focused upon people who have been convicted of family violence. There was a lot of criticism of those courts when they first started on the basis that they were providing a soft option for male offenders who were attacking women and children, and one can certainly see the force in that criticism. The problem, of course, with the more conventional way of dealing with those things is that the male offender might be sent to prison for let us say 9 or 12 months, during which time there would be no opportunity for behavioural change. For example, there would be no opportunity for exposure to the stresses and strains that might lead to the family violence in the first place, and no capacity for offenders to learn how to cope with those stresses and strains or change the dynamics of their relationships and behaviour. When the offender is released 9 to 12 months later, all is "forgiven" and the offender returns home and, of course, the offending behaviour recurs. Family Violence Courts are aimed at producing lasting changes in behaviour.

## **Aboriginal Community Courts**

Aboriginal community courts also have a solution focus. We have only one of these courts with a general criminal jurisdiction which is in Kalgoorlie. It operates in conjunction with panels of Aboriginal Elders who actively participate in the court process.

## **Recidivism Rates**

The recidivism statistics on the Family Violence Courts and the Aboriginal Court are very mixed in the sense that not only in Western Australia, but throughout Australia, there is a tendency for those statistics to not show significant improvements in reoffending rates as compared to putting people through conventional courts. I, myself, have serious reservations about the usefulness of those studies because I am not at all sure that they compare apples with apples. Put yourself, for example, in the shoes of a lawyer in Kalgoorlie who has an Aboriginal client who is charged with an assault, but it is a minor assault and he or she has limited prior convictions and is unlikely to go to prison but is more likely to receive a fine or a community-based order, or a fine that is likely to be commuted into a community-based order. You have the option of putting the client through a community court which will involve perhaps an hour and a half of their time being shamed by Elders in their own language or, alternatively, turning up in front of the magistrate and entering a plea which will take 3 or 4 minutes before a fine is imposed and then may be commuted into a work order and there are no more consequences. Why would you go to community court? The only reason you would suggest your client go to community court is if they are at real risk of going to prison because of the circumstances of the offence or because of their prior

offending record. It is of the nature of these courts that they are likely to attract the more problematic cases simply because they are likely to be people who would otherwise go to prison. I think we need to be very careful about using recidivism statistics as a measure of the success of these courts, and particularly to make sure that we are comparing apples with apples.

Intuitively I cannot see any logical reason why courts of the kind that I have described should not improve outcomes. They just have to help. They have to be better than the almost perfunctory way in which many offenders are dealt with by the conventional court system, especially in the lower courts which handle such a large volume of matters. It is important that courts and punishment do no harm. We should learn from the medical profession in that regard. I think unfortunately that a lot of things which we do in courts do tend to harm the people with whom we deal and because of that we are not actually advancing the cause of making the community safer.

## **Options**

### **Diversion**

Diversion is based on keeping people out of the court system altogether if we can. In the juvenile area we have lost a bit of ground in terms of diversion away from court. I think that is unfortunate. Hopefully we will win that ground back. Children ought only be brought to court if there is no other viable alternative. There are often much better ways of dealing with a lot of minor offending behaviour than referring people to a court.

## **Court-based Options**

### ***Conditional bail***

If the case is in court, there are a number of options that courts have that can assist to address the offender's underlying problem rather than simply responding to the symptom and imposing punishment that is unlikely to be effective in changing behaviour. They include conditional bail, so that an offender is granted bail during which time they are subject to conditions which require them to do certain things which might include participation in a programme. The case is adjourned and the court can then monitor the offender's performance during the period they are on bail and the offender to see how they are progressing. The offenders appreciate while they are on bail that if they do not perform it is going to go worse for them when they do get sentenced.

### ***Pre-Sentence Orders***

A variant which is only available to a limited category of offenders, that is offenders who would otherwise be sentenced to prison, is a pre-sentence order which is available under the *Sentencing Act 1995* (WA). The court can decide not to impose the penalty of imprisonment which would otherwise be imposed, but instead to defer sentence, again subject to certain conditions.

### ***Community-based Orders***

Other options include, of course, community-based orders. The advantage of these orders is that if somebody is in the community, there is an opportunity to sort out their accommodation; an

opportunity to sort out their employment; an opportunity to sort out their relationships. None of those opportunities exist if they are in prison. There is much greater opportunity for behavioural change if an offender remains in the community.

### ***Bail***

I have mentioned conditional bail. One of the areas where I think there is room for significant improvement is in the provision of greater support, including accommodation, for those who are on bail. The proportion of prisoners on remand in our prison population has increased significantly over the last 2 to 3 years. I am not at all sure why that is. I do not think the Department of Corrective Services is sure why it is, nor are the magistrates to whom I have spoken sure why it is. I think it is something to do with the lack of accommodation for people who would be granted bail if there was a safe and secure place for them to live.

### ***Contracts***

There are other options. A recent trend in the UK has been to require offenders to enter into contracts with the government to behave in a certain way, and there have been some favourable reports on that programme. Plainly, this will not be a suitable solution for a lot of offenders. It is not going to work for people who are illiterate or who lack educational sophistication or the opportunities to change their lives, but for some offenders this type of approach might have some advantage.

## *Fines*

Fines are the most common outcome for criminal prosecutions in WA by a large majority and in most instances provide an effective sentencing option. However, I mentioned earlier that there are too many people in prison on remand and there also appears to be too many people in prison as a consequence of non-payment of fines. In 2008, about 200 people were received in prison as a result of fine default only. Last year 1,300 people were received into prison for fine default only. Over that 6 year period, a total of 6,300 people were received into Western Australian prisons – probably a few of those were counted more than once – but there were 6,300 entries into prison of people who were only there because they failed to pay a fine. You have to ask yourself if that is a sensible use of taxpayers' money.

## *Driving Licence Suspension*

The same is true of the way in which we use driving licence suspension as a means of punishment. It is used for certain traffic offences but it is also a very common means of trying to enforce fine payment; some 235,000 licence suspensions took place last year for fine default, although some of those licences would have been suspended more than once. Of course, people who do not have a fixed place of residence or do not get mail regularly, may not know their licence has been suspended. So when they are picked up and police discover that their licence has been suspended, they have got another charge of driving whilst under suspension, and another period of automatic disqualification on top of the suspension they already have. If they are from a remote area, as some of them will be, there aren't any taxis or buses, so they drive again during that period and get

picked up again, and another period of automatic disqualification has to be added. The downward spiral continues and quite often these people end up in prison as a result of multiple driving offences, none of which involve driving either dangerously or recklessly or whilst intoxicated.

### *Parole*

Parole is, of course, a system of supervised release. Prisoners are released on a supervised basis subject to conditions with someone hopefully assisting them to find somewhere to live, to find somewhere to work, monitoring their peer contacts, perhaps monitoring urine analysis to see if they are relapsing into substance abuse. The alternative is to simply take the offender to the door of the prison, give them their personal belongings and say "off you go".

Now, if you ask yourself which of those two mechanisms of release is likely to be more effective in protecting the community from that person reoffending, I believe the answer is clear. So why then have we significantly reduced the number of people who are released on parole in Western Australia over the last 5 or 6 years? In 2008 or 2009, there were about 1,400 people in Western Australia on parole; the number now is around 400 or 500. That is 1,000 less people who are on parole – that is 1,000 less people who have been released under some form of supervision.

In my view, part of the issue is that we have been too averse to the risk of parolees reoffending. Some parolees will reoffend; that is what former prisoners do. Some 40% of the people released from our prison reoffend within 2 years. So if you are going to release people

on parole, you have to accept that there is a risk that they will reoffend. Accepting that risk is the price that you pay for releasing prisoners on a supervised basis which is more likely to be effective at changing their behaviour and reducing the risk to the community in the longer term.

The other problem is that because parole has been seen as a "discount offer" on a full sentence, it has been regarded as a privilege so that we give parole to people who least need it. The offenders who are least likely to reoffend are those who have a good prior record, who have not committed serious offences, so we give them parole, but we do not give parole to the people who most need it – the people who have bad prior records and have committed serious offences, and from whom the community really does need to be protected. I think there are some serious policy issues in the parole area that we need to confront.

### **Conclusion**

As I mentioned earlier, there is obviously a very important role for imprisonment in the criminal justice system. But it must be seen as a last resort. There are many other options, which if utilised in an appropriate case, can reduce the risk of reoffending and thereby prove more effective in improving community safety.