



## **SIR RONALD WILSON LECTURE**

**19 MAY 2011**

### **THE DELIVERY OF CRIMINAL JUSTICE: BUILDING ON THE PAST TO MEET THE CHALLENGES OF THE FUTURE**

#### **INTRODUCTION**

Mr President, distinguished guests, ladies and gentlemen. It is a very great honour to have been asked to deliver the Sir Ronald Wilson Lecture this year, although I appreciate that I am very much the second choice, and that I only got the gig because his Honour the Chief Justice is in Europe, attending a Court of the Future Program on courthouse design in the perhaps over-optimistic expectation that what he learns will be useful when, or if, the Supreme Court is provided with new accommodation of an appropriate standard to go with the 1903 Courthouse and to replace our tenancy in the former Royal Commission into WA Incorporated premises in an office building in the city.

Of course, the mention of those premises recalls another link to Sir Ronald Wilson who, with the Hon Justice Kennedy, seconded from the Court, and the then recently retired judge, the Hon Peter Brinsden QC, served on that Royal Commission, which made such momentous findings on a wide range of Government activities and the people involved in them.

I feel particularly intimidated when I observe that previous presenters of this lecture include people such as Sir Ronald himself, the Rt Hon Lord MacKay of Clashfern, the Rt Hon Sir Ninian Stephen, the Rt Hon Sir Zelman Cowen, Justice Michael Kirby, as he then was, and others, including local luminaries, the Hon Justice Robert French, as he then was, the Hon Justice Carmel McLure, Chief Judge Antoinette Kennedy, and the Hon Justice Michael Barker.

It is a particular pleasure to have been asked to deliver this lecture at this time, for three reasons. The first is that I attain the ripe old age of 70 on 16 January 2012, and will by then have retired. Thereafter, in all likelihood, I would be represented by the dead parrot in the brilliant skit by John Cleese and Michael Palin in Monty Python's Flying Circus.

In the second place, I have been involved for the Court this year in organising our Sesquicentenary Celebrations. It is 150 years since the establishment, by ordinance, of the Supreme Court of which, as I am sure you are all aware, the first Chief Justice was Sir Archibald Paul Burt, Kt, who, when he was appointed, was, of course, not only the first Chief Justice, but the first Judge, and indeed the only Judge, serving on the Court. Since then there have, in all, been 76 Judges appointed to serve on the Court.

As has been said, I was appointed at the beginning of 1990. Prior to that I was Crown Counsel for WA, and before that, Crown Prosecutor for WA, the equivalent in those days of the Director of Public Prosecutions, without the benefit of statutorially secured independence of office. Indeed, throughout the whole of my time in practice, from the time of my admission on 24 December 1965, I was employed in the Crown Law Department as an advocate.

I have said that in the 150 years since the Supreme Court was established, there have been 76 Judges appointed to the Court. A mere 15 of them are Judges before whom I have neither appeared as counsel, nor with whom I have served as a Judge. In my view, that says something significant about the expansion of the Court, and it implies an expansion of legal services in this State which, during my time in practice and on the bench, a period merely of just over 45 years, has been astonishing.

At this time, 150 years after the establishment of the Supreme Court, the people of this State have access to legal services which are vastly improved from those formerly available. The sophistication of the

delivery of legal services is much greater than when I commenced in practice. The law is not more complicated, but it is better understood and, I am convinced, with the aid of the work done by organisations like the Law Society, legal services are more accessible by ordinary people.

The third thing which makes it such a pleasure for me to deliver this lecture is that it is delivered as a memorial to Sir Ronald Wilson. He was a senior member of the Crown Law Department when I was admitted to practice and commenced to work there.

He was then Crown Counsel for WA, and I was hugely fortunate to be assigned to work with him on a great number of the cases in which he was involved, in the civil jurisdiction and the criminal jurisdiction, at first instance, on appeal to the Supreme Court (because there was then no District Court), and to the High Court.

I regret to say that as the years went by I missed out on trips to London to appear before the Privy Council, in much the same way as is indicated by the fact that I stand before you here and the Chief Justice is in Europe. But that is an unworthy observation which I immediately withdraw.

I owed Sir Ronald a debt which I could never repay. He taught me much about the art of advocacy, and he was a true generalist who inculcated in me the value of careful detailed preparation and familiarity with the full range of legal subject matter which might arise in the cases that one undertook. He had a reputation as a determined and courageous advocate, including during his service as Solicitor-General in 1969, the first holder of that officer under the *Solicitor-General Act 1969* (WA).

When he became the first Western Australian to be appointed to the High Court in 1979, his distinguished career continued unabated. Upon his retirement, he continued to be involved in profoundly important judicial tasks, not the least of which was the inquiry which led to the publication of the "Bringing Them Home" report.

I served on the Senate of Murdoch University during the years when Sir Ronald was its Chancellor. For six years I was Pro Chancellor under him, and had the opportunity to observe his consummate performance of the role of the leader of that University. It is a delight for me to be able to deliver this lecture.

I cannot aspire to the academic excellence of previous presenters, and so it has seemed to me that the cobbler should stick to his last, and I should talk to you about something with which I have a passing familiarity: the administration of criminal justice.

## **THE VALUE OF THE JURY**

By Article 39 of the Magna Carta (on one translation):

No free man shall be seized or imprisoned, or disseised of his freehold, or of his liberties, or of his free customs, or be outlawed, or exiled, or in any way destroyed, nor will we proceed against him by force or proceed against him by arms, but by the lawful judgment of his peers and by the law of the land.

It is sometimes said that that undertaking by King John represents the origins of the jury system, albeit in a form which would be unrecognisable today. Nonetheless, today in Australia for serious crime, crime punishable on indictment rather than summarily in the lower Courts, the process of trial by jury is regarded as a fundamental entitlement of the citizen. As a judicial process it is today unique. It is the only situation in which an ordinary member of the community is afforded the opportunity to participate directly in the judicial process.

The system of trial by jury does not, of course, apply to the vast majority of criminal and quasi criminal cases. A system of trial by jury in the multitude of matters which are currently dealt with in the Magistrates Court would overwhelm the system of the administration of criminal justice. We could not accommodate it. The community could not support it. Therefore, for pragmatic reasons of that kind, a great number of lesser offences are dealt with by judicial officers, generally Magistrates.

The question arises, however, whether the jury system should be preserved for serious matters. In relation to Federal matters there is, of course, the constitutional guarantee provided by s 80 of the Australian Constitution, which provides that:

The trial on indictment of any offence against any law of the Commonwealth shall be by jury. ...

There is no such constitutional guarantee in relation to criminal offences against the law of the State, which are triable on indictment. But given

that the only acceptable mode of bringing proceedings against individuals for serious crimes against the State is official prosecution by the Director of Public Prosecutions, State or Federal, and, in rare cases, by other Government agencies, trial by jury provides an appropriate check and immediate oversight directly by the members of our community as to whether the individual accused person is to be subjected to punitive processes administered by the superior courts. Their participation, in a real sense, validates the criminal process with respect to allegations of serious crime.

The system of trial by jury is regularly challenged, as it should be. Associate Professor Judith Fordham has, with the cooperation of my court and the District Court, recently completed an extensive investigation into the prevalence and nature of jury intimidation in WA in 2007. The data obtained has been analysed and she has published the results.

In an article published in Brief magazine, vol 37 No 5, June 2010, Ms Fordham provided a convenient summary of the work done by the academics which she had assembled. The investigation was concerned with the intimidation felt by jurors derived from the process of jury service itself, the openness of the court, the presence, sometimes, of an intimidatory accused, their exposure to public view, as well as intimidation attempted by those who identified with the accused and, in some cases, the alleged victim.

Professor Fordham concluded that such activity made jury service more stressful than it needed to be. But she was impressed with the way in which jurors consciously identified the dangers and refused to allow such matters to influence their judgment about the case they were trying. However, rather more worrying, she concluded, was the fact that, in some cases, jurors identified intimidatory behaviour by some among their number in the jury room during the process of deliberation.

In the same issue of the magazine, Malcolm McCusker AO QC repeated the views he had expressed in a paper delivered to the 36th Australian Legal Convention held here in Perth in September 2009. He argued for the abolition of the jury system, where possible (ie, where the process of trial by jury was not secured as a constitutional right).

Without, I hope, doing an injustice to the views expressed by his Excellency, the Governor Designate, his concern is that the jury may go

their own way in the course of their deliberations, and may not properly perform the process of debate and deliberation which is expected of them. They may be subject to intimidation in the jury room and, when verdicts are delivered, they are delivered without reasons, whereas a Judge is required to give reasons and the reasoning process may be tested on appeal. But, at the very least, the reasons provide an explanation to an unsuccessful litigant as to why he lost.

Mr McCusker expresses concern that jurors may be incapable, despite the best efforts of the trial judge, of properly handling the fact-finding process and applying legal principles which may be complex and difficult to understand.

Further, he argues that the inconvenience and economic loss suffered by those compelled to serve on the jury may make jurors resentful and may distract them from the task at hand. I must say about this latter observation that it does not accord with my experience as an advocate and as a trial judge in the criminal court. Overwhelmingly, jurors are interested and keen to serve, and those who may feel resentful about being required to serve, nonetheless, I think, give every appearance of taking seriously their obligations as jurors.

The recent *Juries Legislation Amendment Act 2010* (WA) adopts a number of the recommendations made in the final report of the WALRC: Project No 99, "Selection, Eligibility and Exemption of Jurors". It seeks to broaden community representation on juries by removing or modifying many of the disqualifications for jury service or grounds upon which exemption from jury service or excusal from jury service may be sought. The idea is to make eligibility for jury service, and the incapacity to avoid that service, more generally applicable across the whole spectrum of our community.

The legislation introduces a capacity to defer the obligation to serve on a jury, rather than necessitating an application to be excused from service entirely. The intention, clearly, is to amend the system to expose a greater proportion of the community to the obligation and privilege of service upon a jury.

Mr McCusker has expressed concern, and justifiably so, about the way in which information is disseminated in the community by Facebook, and instantly by the process of Twitter. Suppression orders may be made, but

they may well be too late to avoid the dissemination of information from the courtroom to the community at large.

Jurors may be, and are, instructed by both Sheriff's Officers and judges, not to access the internet to research any aspect of the case in which they may be involved. Jurors are told that the purpose of that instruction is to preserve the integrity of the judicial process. Judges regularly instruct juries that they must not seek access to information about the case except insofar as it comes to them in the courtroom, subject to the rulings of the trial judge as to admissibility and the form in which the jury are to receive the information.

Are these instructions effective? If they are not, then it is undoubtedly the case that the decision of the jury may be based upon information which they ought not to receive, and there have been cases where the trial has been aborted where it seems that the members of the jury have been exposed to information which they ought not to have received, when the interests of justice appear to require it: *Hansen v WA* [2010] WASCA 180.

In England there have been cases where trials have been aborted for disobedience of that kind to instructions given by the trial Judge. In one case, a juror responded to a question by a friend on Facebook, "Did he do it?" by discussing the case and receiving that person's views. In another, a juror, in a sexual assault case, used Facebook to conduct a survey of her friends as to whether the accused was guilty. She said on Facebook, "I do not know which way to go so I am holding a poll."

In my view, such difficulties are not new. It is merely the machinery by which the difficulty is created which is new. Particularly in trials conducted in circuit towns in the country, it would be rare if members of the jury had not already been subjected to gossip and the expression of views, in one form or another, about a high profile or interesting case in which they were involved. Jurors cannot be asked to put that sort of information out of their minds. But a sufficient instruction, in my opinion, is one which reminds the jurors that that is not evidence upon which they may act. If exposure of that kind is held to be fatal to the jury process, then it is indeed doomed.

## **JURY MANAGEMENT**

It will be evident that I am a strong advocate of the retention of the system of trial by jury in relation to serious crime and the proof of guilt. But that is not to say that we must not be vigilant to ensure that the judges give to the jury every possible assistance to enable them to properly perform, without undue stress, the task of determining whether the guilt of an accused person has been proved to the required standard, having regard to the applicable law as directed by the trial judge and the assistance provided by the comments of the trial judge upon the evidence.

When I commenced in practice, the trial process was entirely oral except where a confessional statement in written form was adopted by an accused person, usually by signature. It could then be tendered in evidence, but only one copy was provided, and so presumably, if they wanted to review what had been said in the jury room, one of their number would have been given the task of reading the recorded questions and answers in the record of the interview. What we blithely overlooked in those days was that most of us do not absorb information well when it is imparted entirely orally. Concentration is aided by a combination of visual and oral receipt of information.

That is now becoming recognised. The Victorian Law Reform Commission, in its report No 17, "Jury Directions" (2009), makes sensible recommendations for the use of visual aids, eg, a written outline of the relevant law and the elements of the offences charged; a decision-tree, evidence in documentary form. Others have made similar recommendations.

Around the country such aids are now more often used. The academics Najdovski-Terziovski, Clough and Ogloff, reported a survey of trial judges around the country and in New Zealand. Of those who responded, the percentage of trial judges who use such aids on a regular basis were - Vic 13%, NSW 22%, Qld 26%, SA 30%, WA 50%, Tas 75% and NZ 41%: "In Your Own Words: A Survey of Judicial Attitudes to Jury Communication" (2008) 18 JJA 65.

It seems to me that in most States there is already an adequate legislative framework to permit visual aids to be employed, or to enable modification, where appropriate, of the rules of evidence. In WA, the *Criminal Procedure Act 2004* (WA), s 110, provides:



***Jury may be given records etc. to assist understanding***

- (1) On the application of a party or on his or her own initiative, the judge may order that the jury be given, on any conditions the judge orders, any record (including any document in the court's record) or thing that may assist the jury to understand the issues or the law, or to understand and assess the evidence.
- (2) Such an order may be made at any time in a trial before the jury gives its verdict.

Those directions may be given as part of the pre-trial management process. The debate about the appropriateness of such processes and the decision to make an order of that kind need not be a part of the trial conducted in the absence of the jury: CPA, ss 98 and 137.

The provisions of the *Evidence Act 1906* (WA), which enable modification, where desirable, of the ordinary rules of evidence as to the manner in which evidence should be given are ss 27A and 27B:

***27A. Form of evidence***

- (1) Evidence may be given in the form of a chart, summary or other explanatory document if it appears to the court that the document would be likely to aid comprehension of other evidence that has been given or is to be given.
- (2) Nothing in this section affects the operation of section 27B.

***27B. Manner of giving voluminous or complex evidence***

- (1) If a court is satisfied that particular evidence that a party to a proceeding proposes to adduce is so voluminous or complex that it would be difficult to assess or comprehend it if it were adduced in narrative form, the court may direct the party to adduce the evidence in another form, including in the form of a chart, summary or other explanatory document.

Those powers were introduced into the *Evidence Act* in 2000. In my view, they are too seldom used.

I consider that the following matters should be part of the trial process, either invariably, or routinely when they would improve the way in which information is communicated to the jury:

1. The judge, in opening remarks, should deal with housekeeping matters, the trial process and, briefly, what are the anticipated issues.
2. There should invariably be a clear instruction about the prohibition against jurors undertaking their own investigations.
3. Each juror should have a copy of the indictment.
4. Note-taking should be uniformly facilitated.
5. Where it appears to be necessary or useful, the jury should be provided with an edited transcript of all, or material parts, of the evidence.
6. The jury should be given, as the evidence is adduced, any written or expert reports, or documents modifying the form in which evidence is given.
7. The jury should have edited transcripts of video or audio records of interview, telephone surveillance evidence and the like.
8. Apart from the indictment and a document providing directions of law, each juror should be given any other visual aid and a flow-chart or decision tree, if thought to be useful. A document setting out the available verdicts and how they will be taken should be provided.

I chair a Jury Advisory Committee comprised of two judges of the Supreme Court, two judges of the District Court and a representative of the Office of the Sheriff. That Committee has done a lot of work designed to improve the processes of handling juries employed within the Sheriff's Office.

It is a stressful obligation which a juror undertakes. Procedures have been devised and information is provided (under constant review for their effectiveness) which are designed to fully inform jurors about their obligations, what is expected of them and what will happen to them during their performance of this most important civic duty. The stressful nature of the experience is recognised and a debriefing process is available. Every effort is made to protect their privacy and preserve them from any threat or intimidation, including from each other.

## **THE SENTENCING PROCESS**

A good statement about the aims of the sentencing process is to be found in the judgment of McHugh J in *AB v The Queen* [1999] HCA 46; (1999) 198 CLR 111, 120 - 121 [14]:

Many, probably the large bulk of, sentences reflect compromises between conflicting objectives of sentencing. One objective is to impose a sentence that reflects adequate punishment for the culpability of the convicted person, having regard to the community's view concerning the need for retribution, denunciation, deterrence, community protection and sometimes vindication. Another objective is to impose a sentence, with or without conditions, that will further the public interest by encouraging and not discouraging the convicted person to renounce criminal activity and to re-establish himself or herself as a law-abiding citizen. Still another objective is that the sentence should reflect an allowance for those circumstances, personal to the convicted person, which call for mitigation. These objectives and others have to be achieved within a conceptual framework that requires that there should be parity between sentences, that the sentence should be proportional to the circumstances of the crime and that, where more than one sentence is involved, the total sentence should not exceed what is appropriate for the overall criminality of the convicted person.

More and more, it seems to me that the courts are expressing their recognition that the overarching objective of the sentencing process is to achieve an adequate measure of protection for the community from the criminal activity of the kind which has brought the offender before the court, subject always to our natural instinct, which is reflected in the law, that the punitive response of the court ought to be proportionate to the criminality involved, the culpability of the offender being measured by reference to the nature of the offence or offences committed, and the type of person the offender is.

In the quite different context of *Hogan v Hinch* [2011] HCA 4; (2011) 85 ALJR 398, French CJ, in the context of a discussion about the power to make extended supervision orders under the *Serious Sex Offenders Monitoring Act 2005* (Vic), and the power to make suppression orders concerning such cases, said:

In determining whether to make a suppression order with respect to identification of an offender, the court must consider the extent, if any, to which the order would enhance the protection of the community. It must also consider its effect upon the offender's prospects of rehabilitation. Rehabilitation, if it can be achieved, is likely to be the most durable guarantor of community protection and is clearly in the public interest [32].

A therapeutic approach, sometimes referred to as a problem-solving approach, to the sentencing process is often advocated and sometimes implemented by the establishment of specialist courts, such as drug courts, indigenous courts, domestic violence courts, and courts concerned with mentally impaired offenders, those who are mentally ill, psychologically disturbed or intellectually compromised.

The idea is that by taking a treatment-oriented and rehabilitative approach to the sentencing disposition, often involving continued supervision by the court, the offender can, within the reasonable bounds of proportionality, be brought to a point where the danger which he or she represents to the community or to particular individuals or groups within the community, is substantially alleviated.

Good recent discussions of the value of such courts include a paper published by Andrew Cannon, Deputy Chief Magistrate and an Adjunct Professor of Law (SA), entitled "Smoke and Mirrors or Meaningful Change: The Way Forward for Therapeutic Jurisprudence" (2008) 17 JJA 217; a paper by Dr Michael King, now of the Faculty of Law at Monash University, and formerly a WA Magistrate serving in Geraldton and on the Perth Drug Court, entitled "Judging, Judicial Values and Judicial Conduct in Problem-solving Courts, Indigenous Sentencing Courts and Mainstream Courts" (2010) 19 JJA 133; and a paper by Dr Zafirakis, a lecturer at RMIT University, Vic, entitled "Curbing the 'Revolving Door' Phenomenon with Mentally Impaired Offenders: Applying a Therapeutic Jurisprudence Lens" (2010) 20 JJA 81.

It will be recalled that, in *Hinch*, French CJ spoke of the achievement of the rehabilitation of an offender as being, "the most durable guarantor of community protection". The search is, as Dr Zafirakis says, to identify and apply processes of control and treatment and other rehabilitative processes to close the revolving door and reduce recidivism, thereby, hopefully, reducing the crime rate.

Such speciality courts are often concerned not only with particular types of criminality or particular types of offender, but also limit the seriousness of the matters which may be dealt with by those courts. And yet it seems to me that the principles which I have been discussing, and the emphasis which I would place upon the achievement of the rehabilitation of an offender to provide the best prospect of protection for the community, has an application, potentially, across the whole spectrum of sentencing problems.

It is, of course, the case that the court must have regard to all relevant factors when striving for the appropriate sentencing disposition, and it is well accepted that the responsibility of the judge is to exercise the sentencing discretion by achieving a synthesis (sometimes referred to misleadingly as an instinctive synthesis) of a complex web of matters affecting the sentencing disposition of a particular case, whether they be aggravating or mitigating in their tendency, and whether they be concerned with the offending behaviour or matters personal to the offender: *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357.

While taking a rehabilitative or treatment-oriented approach to the sentencing process may often result in a less punitive disposition, it will sometimes, in cases where the objective of securing a reasonable degree of protection for the community cannot otherwise be met, result in a more punitive disposition of the case.

### **BACK END SENTENCING**

Section 98 of the *Sentencing Act 1995* (WA) provides:

**98. Indefinite imprisonment: superior court may impose**

- (1) If a superior court -
  - (a) sentences an offender for an indictable offence to a term of imprisonment;
  - (b) does not suspend that imprisonment; and
  - (c) does not make a parole eligibility order under Part 13 in respect of that term,

it may in addition to imposing the term of imprisonment for the offence (the *nominal sentence*), order the offender to be imprisoned indefinitely.

- (2) Indefinite imprisonment must not be ordered unless the court is satisfied on the balance of probabilities that when the offender would otherwise be released from custody in respect of the nominal sentence or any other term, he or she would be a danger to society, or a part of it, because of one or more of these factors:
  - (a) the exceptional seriousness of the offence;

- (b) the risk that the offender will commit other indictable offences;
- (c) the character of the offender and in particular —
  - (i) any psychological, psychiatric or medical condition affecting the offender;
  - (ii) the number and seriousness of other offences of which the offender has been convicted;
- (d) any other exceptional circumstances.

The difficulty, of course, of making that judgment is that it is a "front end" sentencing judgment which is required. The court is required to make a prediction about whether, at the conclusion of the finite term, perhaps many years into the future, the offender will continue to present such a danger to the community that he must be kept in custody until he can demonstrate that it is safe to release him on parole. The courts have required cogent evidence, persuasive of that conclusion to the ordinary criminal standard: *Chester v The Queen* (1988) 165 CLR 611; *McGarry v The Queen* [2001] HCA 62; (2001) 207 CLR 121.

Certainly the courts have long sanctioned a treatment-oriented or rehabilitative approach to sentencing mentally impaired offenders who fall into the categories to which I have previously referred. The approach by no means involves the abandonment of ordinary sentencing principles, but it is a matter of the weight to be placed upon the aims of the sentencing process. For example, the courts recognise that it is pointless, when offending behaviour is causally linked to mental impairment, to seek by a sentence to deter the offender from re-offending or to use him as an example to deter others: in this State see such cases as *Thompson v The Queen* (2005) 157 A Crim R 385, and *Krijestorac v WA* [2010] WASCA 35.

If the indeterminate sentencing process does not, because of the difficulty of long-distance prognostication, offer a sentencing court a reasonably workable process, directed by the imposition of a sentence to protect the community by allowing for the imposition of controls over the offender until there may be reasonable satisfaction that he no longer presents a significant danger to the community of the commission of further serious offences, what should be done?

A new knight in shining armour has appeared over the horizon, at least in relation to serious sexual offenders. In all of the Australian jurisdictions legislation has been enacted to enable what is effectively a "back end" sentencing process. The Vic legislation was the subject of the decision in *Hinch*. More Draconian Queensland legislation has been upheld by the High Court as a valid exercise of power: *Fardon v Attorney-General (Qld)* [2004] HCA 46; (2004) 223 CLR 575.

There is similar legislation in this State in the form of the *Dangerous Sexual Offenders Act 2006* (WA). The powers of the Supreme Court under that Act are to be exercised if, upon an application by the DPP, before or after the release of the offender, absolutely or on parole, the court, acting on cogent evidence, is persuaded to a high degree of probability that the offender is a serious danger to the community in that there is an unacceptable risk that, if an order were not made under the Act, the person would commit a serious sexual offence: s 7.

No element of prognostication about the future is required. What is necessary is a judgment by the court about the risk presently posed by the offender.

The central provision of the Act is s 17:

**17. Division 2 orders**

- (1) If the court hearing an application for a Division 2 order finds that the offender is a serious danger to the community, the court may -
  - (a) order that the offender be detained in custody for an indefinite term for control, care, or treatment; or
  - (b) order that at all times during the period stated in the order when the offender is not in custody the offender be subject to conditions that the court considers appropriate and states in the order.
- (2) In deciding whether to make an order under subsection (1)(a) or (b), the paramount consideration is to be the need to ensure adequate protection of the community.

If a supervision order is to be made, s 18 provides that it must contain specified terms, and adds:

- (2) The supervision order may contain any other terms that the court thinks appropriate —
  - (a) to ensure adequate protection of the community; or
  - (b) for the rehabilitation or care or treatment of the person subject to the order.

It will be noticed that the governing criterion is effectively the need to ensure an adequate degree of protection of the community to be achieved by maintaining control over the offender, in custody if necessary, but otherwise in the community, for the purpose of securing the rehabilitation of the offender by what the Act generally describes as "treatment", which may be of any kind relevant to the sort of person the offender is and the sort of offences he commits.

There would seem to be no reason in principle why such an approach should not be taken in relation to a propensity to commit serious offences of kinds other than serious sexual offences. Such legislation might be applied particularly in respect of the back end control of a perceived danger of the commission of further violent offences of a serious kind.

The philosophy behind such an approach is that the offender renders himself liable to the imposition of such controls by his commission of serious offences, within a statutory definition, and, although the initial sentencing may be designed with rehabilitation in mind within the bounds of proportionality, where that aim has not been achieved at the end of service of the sentence of imprisonment, further controls may legitimately be imposed over and above the requirements of parole, where that is available, but subject to the safeguard that the controls would be imposed by the court and then administered by community corrections officers employed in the Department of Corrective Services.

### **MODIFICATION OF THE PAROLE SYSTEM**

For a long time, since well before my appointment to the bench, I have advocated the modification of the parole system as an adjunct to sentencing adult offenders to imprisonment, the punishment of last resort. The modification required would have been greater in earlier times, when the imposition of sentences of imprisonment by way of finite terms



required the setting of a minimum term to be served before eligibility for parole, or provided for a statutory formula of remission of sentences. More recently, the move has been towards the abolition of remission under the banner of "truth in sentencing", a move which I must say, although I probably should not, in view of my present position, I regard favourably.

The proposed scheme would apply to offenders sentenced to terms of imprisonment of more than a year. It would have only limited application to young offenders who would continue to be dealt with under the special regime provided by the *Young Offenders Act 1994* (WA). As will be seen from what follows, I would regard the proposal as being generally in line with the present system which would continue in operation, applicable to persons sentenced to life terms and indeterminate terms, terms which may only be terminated once the minimum period required to be served is completed, by the release of the offender on parole.

Further, the system would operate in relation to the general run of offenders sentenced to finite terms of imprisonment unless a special regime, such as that created by the *Dangerous Sexual Offenders Act*, was invoked in respect of a particular prisoner where release of the offender into the community would be pursuant to the terms of a court-fixed supervision order.

The proposal is based on some fundamental propositions which, I think, are either self-evidently correct or are as advised by the accumulated experience of penologists and correctional officers.

If it is accepted that imprisonment is a part of the process of seeking to rehabilitate the prisoner and prevent recidivism, then rehabilitative or treatment programs will necessarily be a focus of prison management. Prisoners should have the opportunity to participate in programs suitable to their needs when they wish to be involved. Parole is part of that process. Its aim should be, not to reduce the term to be served, but to promote rehabilitation by aiding the transition from prison back into the community in the context of a process of imposing control over the offender's behaviour, supported by advice and assistance, and treatment where required.

Discipline and good order in prisons is only effectively achieved by rewarding good behaviour with better conditions, and by penalising bad behaviour by the imposition of disciplinary punishment and the removal

of privileges. It is not necessary (or indeed currently possible) to have a capacity to reduce the sentence to be served, except by the limited powers of early release which are available under the *Prisons Act 1981* (WA), s 31, or are available to the Prisoners Review Board.

On the contrary, effective prison management is aided if the general run of prisoners are able to predict their release date with certainty. A system which gives to the Prisoners Review Board a power to defer or deny parole is questionable. In effect, it is a back end sentencing process carried out by a body which is not a court and does not function like a court, the court being subject to the checks and balances of legal process and the fact that it carries out its functions, generally speaking, under public scrutiny.

Finally, if there was to be an amendment to modify the parole system, it is clear that the existing system could be changed without adverse impact upon the length of time to be served under sentence of imprisonment, or upon the overall prison population.

Briefly, the modifications which, in my view, should be considered would result in a system which would bear the following general features:

1. The term of imprisonment imposed, whether as one sentence or an aggregate of sentences, would be the term to be served without remission, subject only to limited early release orders of the kind to which I have referred - absolute truth in sentencing would be achieved.
2. The prisoner would then be released, either finally or subject to parole for terms longer than a year, and the period of parole would be a period equal to the length of the term, up to a maximum of 2 years.
3. The terms and conditions of the release on parole would be set by the Prisoners Review Board which would have full discretionary power, from no or minimal supervision to the imposition of detailed program requirements.
4. Breach of parole, whether by a failure to observe a condition of parole or by reoffending, would be an offence punishable in the Magistrates Court in the ordinary way by a term of imprisonment (which would not, itself, be long enough to attract parole) or other

punishments available under the *Sentencing Act*. Alternatively, the terms and conditions of the existing parole order might be varied. The process would be not dissimilar from the enforcement process currently provided in respect of community based orders.

I hope it may be seen that the courts would not, when sentencing, make or refuse to make an order of eligibility for parole. All longer terms would have attached to them a period of post-release supervision in the community to better enable prisoners to make the transition to a law-abiding way of life. The more recalcitrant or resistant to reform such a prisoner is, the more that person needs the guidance and coercive requirements to comply with a parole order.

Failure to do so would carry its own punitive sanction. On the other hand, those who might be judged to be able to manage the return to the community without any particular intervention by a parole officer would be permitted to do so with minimal or no supervision.

I have no idea whether that would require substantially increased resources within the community corrections area of the Department of Corrective Services. But I think it is likely that in overall terms under the proposed system, the prison population would be reduced, and it is well-known that it costs immeasurably more to maintain an offender in custody than to provide suitable programs to which access may be had in the community.