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and  
Criminal Lawyers' Association

CPD Weekend Seminar

*"Future Directions for Criminal Law"*

Address by

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I am pleased to have been given this opportunity to address those engaged in the practice of criminal law in this State. It is impossible to exaggerate the importance of the practice of criminal law to the rule of law and to the order and stability of our community, and therefore to its general health and wellbeing. Gatherings like this provide a rare opportunity for those toiling at the coal-face to look up from the detail of our daily labours, to gaze into the distance, note where we are heading, and review whether our course is on the best alignment. At a gathering such as this, however, it would also be particularly remiss not to acknowledge the traditional owners of the lands upon which we meet, the Noongar people of south western Australia, and to pay my respects to their Elders, past and present. As you would all be too well aware, the rate of incarceration of the Aboriginal peoples of this State is nothing short of a tragedy — a tragedy for the victims and their families (all too often also Aboriginal), for the offenders and their families, and for the broader community.

The organisers of this conference kindly chose a title for my address which is so general that it provides me with the opportunity to gaze into the future in relation to any topic within the broad ambit of criminal law. I have exercised the prerogative generously conferred by choosing to talk on the subject of parole. I should emphasise that the views expressed in this paper are my personal views, and should not be taken to reflect a collective position of the courts or the judiciary. Recent times have reminded us that parole policy and practice can have a profound effect upon the prison population very quickly. Put another way, a lot of attention is focused, rightly, on the front end of the sentencing process,

but for many prisoners and the community, what happens at the back end of the sentence is just as important.

### **Parole – time for review?**

It is not unusual for parole to become topical. Public attention has been focused on parole a number of times during my time in the law, and over the last 30 years or so there have been a number of public inquiries and reviews into the systems relating to parole.

The relationship between parole practices and the prison population is perhaps not as well known as it should be. Neil Morgan, currently the Inspector of Custodial Services, drew particular attention to this relationship in his work "Sentencing Trends for Violent Offenders in Australia", identifying a substantial increase in prison numbers in the late 1990s although there had been no changes in the laws or court sentencing. And it is the rate of increase in that population over the last 12 months or so that has again drawn public attention to the parole system.

Recent trends in prison numbers and parole are vividly illustrated in graphs attached to this paper. They reveal that over the last 10 years or so, the population of sentenced prisoners was at its lowest during the first half of 2002 when it numbered about 2,300. By the last quarter of 2009, the population of sentenced prisoners had risen to a little over 4,000 – an increase of about 75%. Over the last 18 months, for which figures are available, between the second quarter of 2008 and the fourth quarter of 2009, the population of sentenced prisoners went from a little below 3,000, to a little over 4,000 – an increase of about one-third in just 18 months.

Of course, there were factors other than parole at work over this period – the numbers on parole increased during the first nine months of that period, at the same time as the number of sentenced prisoners also increased. However, since the second quarter of 2009, the numbers on parole have decreased significantly and rapidly, while at the same time the number of sentenced prisoners increased significantly, and rapidly.

Reviewing the total number of sentenced prisoners over time does not tell the entire story. That is because the total prison population includes those under sentence and those on remand awaiting sentence. And if comparisons over time are to be taken, fluctuations in population also need to be taken into account.

The second graph I have attached makes allowance for these factors, by using rates per head of population, and including figures for both sentenced prisoners, and the total rate of imprisonment (including remand prisoners).

This graph shows that the significant increase in sentenced prisoners over the last eight years is part of a continuing trend. The rate of imprisonment in Western Australia in the fourth quarter of 1978 was a little over 100 per 100,000. Some 21 years later, in the fourth quarter of 2009, it had almost trebled, to 280 per 100,000. Over the same period, the parole rate has not increased as significantly – it was a little over 40 per 100,000 in the last quarter of 1978, and about 50 per 100,000 in the last quarter of 2009. However, as the graph shows, while the parole rate has fluctuated over the last 10 years, it has generally lain in the band between 70 and 90 per 100,000 – that is, more than 150% of the rate achieved in the last quarter of last year.

Taking the particular figures over the year to December, the rates were:

- as at 1 December 2008 the rate of imprisonment was 241.4 and the rate of parole was 82.5 per 100,000; and
- by 1 December 2009 (the most recent available data) the rate of imprisonment was 283.4 and the rate of parole was 46.7 per 100,000

The significant increase of persons in custody over this period has placed an already stressed prison system under greater stress. It has resulted in chronic overcrowding, which has in turn attracted the attention of the Inspector of Custodial Services.

It has also attracted the attention of those interested in public expenditure. Last financial year, the cost per prisoner per day, within the existing prison facilities, was \$275, or over \$100,000 p.a. In very rough terms, if we were to provide additional appropriate institutional facilities for the increase in prison population (which is about 40% above design capacity), it would also cost about \$1,000,000 per head in capital. So, if the prison population increases by 1,000, that is \$1 billion in capital, and \$100,000,000 per annum in recurrent expenditure. In a State budget with limited resources, that necessarily means less funding available for hospitals, schools, roads and other infrastructure items. Questions are legitimately raised as to whether expenditure at these levels is justified, and whether there may not be more cost effective ways of protecting our community.

There is nothing new in these issues. A brief historical sojourn shows that prison overcrowding, the public expense resulting from incarceration, and systems to enable prisoners to be released prior to completion of their

sentence, have been topical issues for more than 200 years, and were instrumental in the colonisation of Australia.

### **Australia – the "Thief Colony"**

Transportation had its origins in a law passed in 1597, during the reign of Queen Elizabeth I, and at a time when there had been a serious deterioration in economic circumstances, combined with a decline in more traditional forms of charitable assistance. It was entitled "An Acte for Punyishment of Rogues, Vagabonds and Sturdy Beggars". It declared that obdurate idlers "shall ... be banished out of this Realm ... and shall be conveyed to such parts beyond the seas as shall be ... assigned by the Privy Council". If a "rogue so banished" returned to England without prior permission, he would be executed. At that time transportation was a system of forced exile and, in place of the more traditional punishments including mutilation, it was used in conjunction with the Elizabethan Poor Law to prevent starvation and to control public order.

During the 17<sup>th</sup> century, convicts under sentence of death commuted through the exercise of the royal prerogative of mercy were transported across the Atlantic to the American colonies to provide the labour needed to establish those colonies.

Further legislation passed in 1717 enabled minor offenders to be transported to America for seven years instead of being flogged and branded, while men on commuted sentences of death, could be sent for 14 years. Rights to their labour were sold by English prison owners (many of the prisons in England at that time were privately run – there is recurrent theme of déjà vu in much of this!) to plantation owners in the Caribbean and the American colonies.

During the 18<sup>th</sup> Century, imprisonment increasingly evolved as an alternative to corporal and capital punishment. Its increasing use, and the increase in crime as a consequence of the industrialisation and urbanisation of English society, led to prison overcrowding. Transportation was the solution and over 60 years, about 40,000 people were subjected to this form of virtual slavery – 30,000 from Great Britain and about 10,000 from Ireland. This exodus prevented prison overcrowding in England reaching crisis levels.

However, in 1775, the American colonies rebelled. Those colonies were no longer dependent upon convict labour, because the role of convicts in the fledgling economy had been overtaken by African slaves. As Robert Hughes records in "*The Fatal Shore*"<sup>1</sup>, just prior to the American Revolution, about 47,000 African slaves were arriving in America every year, which is more labour than the English gaols had provided over the preceding half century.

The English did not expect the American Revolution to be successful. However, the war necessitated a halt to the transportation of convicts to America, which the English assumed would be temporary. Overcrowded prisons were eased by placing convicts in ships – in fact, old hulks of ships, pending the restoration of good sense and order in the American colonies, when transportation could be resumed. Lawful authority for this practice was provided by the Hulks Act of 1776. (Interestingly convicts were released unconditionally from the Hulks after serving a little over half of their nominal sentence.)

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<sup>1</sup> Much of this material is taken from Mr Hughes' excellent work.

However, by 1783, the English had been forced to recognise the United States, and transportation to that part of the new world became a lost opportunity. Somewhere else was needed to enable England to divest itself of its unwanted felons. Australia was chosen.

As Hughes points out, the Georgians did not see imprisonment as a mechanism for reformation of character or rehabilitation. On the contrary, they recognised that the gathering of criminals in one place was more likely to bring about the reinforcement of criminal behaviour than discourage reoffending. This was well expressed by Dr Johnson, writing in 1759, when he observed:

"The misery of gaols is not half their evil ... In a prison the awe of publick eye is lost, and the power of the law is spent; there are few fears, there are no blushes. The lewd inflame the lewd, the audacious harden the audacious. Everyone fortifies himself as he can against his own sensibility, endeavours to practice on others the arts which are practised on himself, and gains the kindness of his associates by similitude of manners. Thus some sink amidst their misery, and others survive only to propagate villainy."

(Contemporary Australians, with their misplaced confidence in the capacity of imprisonment to reduce reoffending would do well to heed Dr Johnson's prescient words.)

John Howard, the pioneer of penal reform (after whom the Howard League is named – not the former Prime Minister) conducted a survey of Britain's prisons which he published under the title "*The State of the Prisons in England and Wales*" in 1777. In that work he reported the gross overcrowding, darkness, disease, famine and cruelty prevalent in



the prisons. In response to that report, and the lack of transportation to America, two large prisons were planned for London. Hughes states that the English authorities talked incessantly about the need for new gaols, legislated for their urgent construction, but did not actually build them.

Eventually, instead of spending the money on those institutions, it was decided in 1786 to return again to transportation, but this time to Australia.

In this context, Hughes has described Australia as England's cloaca – the unmentionable conduit through which the filthy, despicable and unmentionable dregs of society were removed to protect the health of the remainder. The same excremental analogy was drawn by Jeremy Bentham, writing in 1812, where he argued that transportation:

"was indeed a measure of *experiment* ... but the subject-matter of experiment was, in this case, a peculiarly commodious one; a set of *animae viles*, a sort of excrementitious mass, that could be projected, and accordingly was projected – projected, and as it should seem purposely – as far out of sight as possible."

But despite Bentham's colourful analogies, there was considerable popular support for transportation, driven by concerns of the middle and upper class over a perceived escalation of crime which has a contemporary resonance. One passage cited by Hughes from 1775 records an observation in the following terms:

"I sup with my friend; I cannot return to my home, not even in my chariot, without danger of a pistol being clapped to my breast. I build an elegant villa, ten or twenty miles distant from the capital:

I am obliged to provide an armed force to convey me thither, lest I should be attacked on the road with fire and ball."

These then were the policy issues which directly resulted in the first fleet sailing into Sydney Harbour on January 26, 1788. When the colourful imagery of that seminal event is invoked (as it was, for example, on the occasion of the bicentenary), there is a tendency to overlook the fact that of the 1,030 on board the eleven vessels making up the First Fleet, 736, or about 70%, were convicts. Despite our fondness for imaging our forefathers as political rebels or protestors, or perhaps waifs resorting to self-help to avoid starvation, the vast majority were petty thieves. Over the ensuing 80 years or so, more than 160,000 convicts were transported from England to Australia, which was then not uncommonly described as "the thief colony".

### **Early Release in Colonial Australia**

Once the felonious excrement had been removed from the body of the mother country, much of the policy objectives behind transportation were achieved. Extended incarceration in the colonies was, to an extent, unnecessary. The early Australian settlers were in desperate need of forced labour, without the American expedient of slavery (although there was some cooption of Aboriginal labour, particularly in WA prior to the advent of convict transportation). So, systems of early release after serving only a portion of the sentence imposed were prevalent in colonial Australia. The "ticket of leave" system provided free settlers with a ready supply of cheap labour and saved the State the cost of containing and feeding prisoners.

The *Ordinance enabling transportation of convicts to Western Australia* of 29 December 1849, which set out the terms on which transportation of convicts to Western Australia would operate, included “special instructions whereby such offenders are to be exempt in the first instance, and during good behaviour, from imprisonment and forced labour”. W B Kimberly's *History of West Australia* (1897) provides a graphic illustration of how transported prisoners in fact served their sentence in colonial Western Australia. The table below sets out the scale applied to sentences of transportation imposed prior to July 1857:

SENTENCE.	SEPARATE CONFINEMENT.		PUBLIC WORKS.		TICKET OF LEAVE.		LICENSE OR CONDITIONAL PARDON.	
	Years.	Mths.	Years.	Mths.	Years.	Mths.	Years.	Mths.
7 years ...	—	9	1	3	1	—	3	—
10 " ...	—	9	2	—	1	3	4	—
12 " ...	—	9	2	6	1	9	5	—
14 " ...	—	9	3	—	2	3	6	—
15 " ...	—	9	3	3	2	6	6	6
18 " ...	—	9	4	—	2	9	7	6
20 " ...	—	9	4	3	3	—	8	—
21 " ...	—	9	4	6	3	3	8	6
Life ...	—	9	5	3	4	—	10	—

It will be noted that sentences were broken down into four components. The first was separate confinement – which was nine months for every prisoner, no matter how long their sentence. That period of confinement was followed by a period served undertaking public works, during which time the prisoner would be maintained and fed by the colony, but required to undertake public works throughout the State. That period was then followed by a period of "ticketed leave" during which time prisoners were free to seek employment or to seek their own work. However, they were not allowed to leave the district to which they had been assigned, and were required to report to the local resident Magistrate once per

month. If that period was completed without further conviction, the prisoner would then receive a licence or conditional pardon covering a component of the unexpired period of their term, or, in the case of life prisoners, 10 years.

As Kimberly points out, after 1857, a more flexible approach was taken, under which convicts could earn their ticket of leave by good behaviour. Their conduct was assessed each day, and marks awarded, on a scale of one to four, for conduct ranging from indifferent to exemplary. A ticket of leave could be obtained once a certain amount of marks were achieved. However, history suggests that this system was not particularly effective in encouraging good behaviour, and it eventually fell into disuse.

The point I would draw from this historical review is that there is nothing at all new about systems enabling the release of prisoners prior to the expiry of their sentence. On the contrary, during most of the 19<sup>th</sup> century, prisoners in Western Australia were incarcerated for only a very small proportion of their sentence, and spent the vast majority of their sentence working in the community under various forms of early release.

The existence of a significant gap between the sentence imposed by the court, and the sentence served by the prisoner is venerated by long history. Consideration of more contemporary history shows that the "gap" has probably never been narrower than at present.

### **The Recent History of Parole**

Contemporary systems of parole in Western Australia might be traced to the introduction, in 1918, of the indeterminate sentence. Under the old

section 661 of the Criminal Code, "habitual criminals" (who had at least two previous convictions for indictable offences) might be detained at the Governor's pleasure in certain circumstances. The Indeterminate Sentences Board was created to determine the date and conditions of release. That Board can be seen, in many respects, as the forerunner to the Parole Board, which was established in Western Australia in 1963 (following, in Australia, Victoria which established its Parole Board in 1956). The indeterminate sentence was abolished when the Sentencing Act was passed in 1995, although, in a practical sense, most sentences of life imprisonment have an element of indeterminacy, as does indefinite imprisonment under the provision of Part 14 of the *Sentencing Act 1995*, or detention pursuant to the provisions of the *Dangerous Sexual Offenders Act 2006*.

The passage of the *Offenders Probation & Parole Act 1963* (WA) appears to coincide with two phenomena:

- (a) a rapidly increasing prison population; and
- (b) increasing faith in the prospects of reform and rehabilitation, promoted by the developing sciences of psychology and social work.

Under the provisions of that Act, if a sentence was less than one year, there was a general discretion as to whether or not to set a minimum period prior to eligibility of parole. However, if the sentence was longer than one year, a minimum period had to be set, except in specific and exceptional circumstances. So, under the original legislation, eligibility for parole for longer sentences was the default position. While the minimum period prior to eligibility for parole was set by the court, the

decision as to whether parole was to be granted was, as today, vested in a Board, not the court.

Little or no guidance was provided to the courts as to the proportion of the head sentence which should be served prior to eligibility for parole. Nor was any direct guidance provided to the Board as to how it should exercise its discretion in relation to the grant of parole. In this legislative vacuum, practices evolved which, very generally speaking, were to the effect that the minimum period prior to eligibility for parole was customarily about one-third of the head sentence, and parole was customarily granted. These practices led to public disquiet. It became common for the media to report the term set as the minimum period prior to eligibility for parole as if it were the head sentence. This in turn led to public concern that sentences were too lenient (*déjà vu* all over again!).

In this context, Kevin Parker QC was appointed to conduct an inquiry into the parole system in 1979. He concluded that parole should be retained, because it contributed to the rehabilitation of some offenders, and because it reduced the cost of incarceration for the community. He recommended greater legislative direction in respect of the criteria to be taken into account when setting the minimum and maximum terms, and discontinuance of the practice of remitting 10% of the minimum term.

A committee of the Law Society which comprised a number of senior and influential criminal law practitioners also took up the subject. It recommended that parole be abolished for sentences of 12 months or less, that sentences between 1 to 2 years should have equal periods of detention and parole, and that sentences of more than 2 years should have parole supervision of up to 2 years. It also recommended that the courts

should have a discretion not to order parole in certain circumstances. Those recommendations were, generally speaking, taken up by legislation passed in 1985, modified by legislation passed in 1988.

Any evaluation of the parole system during this time must also take into account the system of remission of sentences. In 1981, a committee chaired by Mr Oliver Dixon conducted an inquiry into the rate of imprisonment. At that time remission was granted on up to 10% of the minimum term (despite Mr Parker's recommendation) and one-fourth of the head sentence. It recommended that remission of sentences be retained, and increased to one-third, on both minimum and maximum sentences. However, only the increase of remission on the head sentences was enacted by s 29 of the *Prisons Act 1981* and this was retained when the *Sentencing Act* was enacted in 1995. The 10% remission on minimum terms remained in place.

So, until the late 80s, in very general terms, the sentencing regime would involve the virtually automatic remission of one-third of the head sentence, with eligibility for parole after service of half the remaining period (less 10%) – that is, one-third remitted, one-third on parole, and one-third served.

In 1991, a select joint committee of the Parliament again reviewed parole. It relied upon a study which showed that parole reduced the likelihood of reoffending. The imprisonment rate at that time was about 100 per 100,000 (compared to 280 per 100,000 last year).

The committee shared the views of Dr Johnson, expressed more than two centuries earlier, to the effect that imprisonment generally did not rehabilitate offenders. It considered that the primary purpose of

imprisonment was to punish and remove offenders from the community. It saw supervision within the community as a more effective means of rehabilitating offenders and reducing the risk of reoffending than incarceration. It recommended that legislation expressly provide that protection of the community was to be the paramount consideration when considering supervision within the community. It also questioned the efficacy of short-term sentences, and recommended the abolition of sentences of 3 months or less. Conscious of the public concern over discrepancies between the court sentence and time served, the committee also reiterated that the 10% remission on minimum terms should be abolished, and this occurred in 1994.

However, public concern at the gap between the head sentence imposed and time actually served continued to mount. In 1998, Chief Judge Kevin Hammond was appointed to inquire into parole and remission. The committee which he chaired recommended the retention of parole, the abolition of the automatic remission of one-third of the sentence, and the conferral of a greater discretion on courts in determining eligibility for parole. It also concluded that the data supported the conclusion that parole did contribute to reduction in rates of reoffending.

Speaking very generally, and leaving to one side some important nuances in the statutory provisions, the recommendations I referred to were implemented by the so-called truth in sentencing legislation passed in 2003. Although that legislation abolished automatic remission of one-third of the sentence imposed, in order to avoid an explosion in the prison population, its general effect was to reduce all maximum sentences (other than life) by one-third. So the element of public deception was still present – just differently effected. Under this regime, it was the courts



which bore the brunt of public criticism when sentences were considered to be too lenient having regard to the statutory maximum in the Criminal Code which now overstated the real maximum available to the court by 50%. For example, a court could only lawfully impose a sentence of 13 years and 4 months for manslaughter, when the statutory maximum specified in the Code was 20 years.

The statutory formula specifying the minimum period to be served prior to eligibility for parole was also modified to allow for the abolition of remission, and 50% was required to be served on sentences of 4 years or less, and for longer sentences, the head sentence less 2 years.

In 2005, the Hon Dennis Mahoney QC was appointed to inquire into and report upon various aspects of the justice system, including parole. He concluded that parole was "the most important of the procedures directed to the resocialisation and reform of prisoners". He considered the main objective of parole to be to reduce recidivism and rehabilitate the offender. He rejected the proposition that parole should be used to reward prisoners for good conduct in prison, or as a form of remission or reduction in the length of sentence imposed. He observed:

"It is proper to emphasise that if a prisoner is not granted parole, he will at the end of the 2-year period be released from prison. He will not have had the advantages of having been supervised on parole. On release he cannot then be forced to accept the restraints of parole. He will be free to reoffend. The benefit to be obtained by giving to a parolee such early (conditional) release is that the community has the opportunity to attempt to dissuade him from reoffending."

If that view is correct, it arguably informs the legislative mandate requiring the Prisoners Review Board to regard the safety of the community as the paramount consideration when considering whether or not to release an offender on parole (*Sentence Administration Act*, s 5B). Under the statutory formula, offenders serving finite sentences will be released within 2 years or less of their first eligibility for parole. For those offenders (who comprise the vast majority), the question is not whether they will be released, but when, and in what circumstances. If it is the case that parole does reduce the risk of reoffending, it can be cogently argued that the safety of the community is enhanced if prisoners are released on parole, notwithstanding that some will inevitably reoffend while on parole.

As I have noted, every inquiry into this subject has concluded that parole is effective in reducing the risk of reoffending. However, Mahoney observed that hard data supporting that proposition was somewhat scant – in this State being drawn largely from a study undertaken by Broadhurst and Maller in 1991, when the focus of parole was considerably different to the surveillance focus it has now. He recommended that a comprehensive long-term study be undertaken on the impact of parole on recidivism. If such a study is being conducted, I am not aware of any results of that study having yet been released.

### **Criticisms of Parole**

Having set the historical context for an evaluation of our current system of parole, it is now appropriate to review and assess some of the criticisms that have been directed toward that system. However, it is first necessary to establish what one takes to be the objectives of the parole

system, because the validity of any particular criticism will turn critically upon the assumptions one makes as to the objectives of the system.

Of course, reasonable people may differ in their views as to the primary objectives of a parole system. My view, for what it is worth, coincides exactly with that expressed by the Hon Dennis Mahoney QC. Although, as we have seen, parole has long been associated with the various systems which have been utilised over time to enable prisoners to be released prior to completing the sentence imposed by the court, it is this characteristic of parole which has repeatedly led to public disquiet. It has been seen, with some justification, as a part of the systems which have, historically, deceived the public as to the true effect of a sentence imposed by the court. For my part, I would entirely reject the proposition that one of the proper objectives of parole is to enable the early release of prisoners. I would also reject the proposition that one of its objectives is to encourage good conduct by prisoners during their sentence. There are various other means available to secure that end which have been shown to be effective, including most notably prison-based privileges awarded for good behaviour, and sanctions imposed for bad behaviour.

In my view, the primary objective of parole should be seen as the provision of support and encouragement to prisoners re-entering the community following imprisonment, so as to reduce the risk of reoffending and protect the community. As I have said, for all but a handful of prisoners, the question is not whether they should re-enter the community, but when and under what circumstances. Given the limited rehabilitative effect of incarceration (vide: Dr Johnson), parole provides an opportunity for the supervision of offenders within the community so as to discourage the behavioural patterns which led to their offending.

Parole provides an opportunity for support, through counselling and assistance in relation to important issues like accommodation and employment, and the discouragement of negative behaviours, such as substance abuse, through the imposition of conditions. It is unrealistic to suppose that parolees will never reoffend – of course many of them will, and the risk of reoffending must be accepted. However, study and experience establish that community re-entry through parole decreases that risk to some extent.

So, with that objective in mind, I will turn now to some of the criticisms which have been expressed in relation to our system of parole.

### **1. Parole is de facto remission**

Although remission has now been abolished, parole has traditionally been seen as one of the systems engaged to deceive the public as to the time which is actually to be served by prisoners. The sentence imposed by the court is primarily intended to match the seriousness of the crime committed. Release prior to the service of that sentence in full is seen as detracting from the principle that the punishment should fit the crime, and as conferring undeserved benefits on those who transgress the laws of society.

### **2. Parole erodes the authority of the Court**

Under our current system, once a court decides that an offender is to be eligible for parole, decisions as to the time actually to be served are not made by the court, but by an executive body. In the case of prisoners sentenced to terms between 12 months and 4 years (which is a significant body of the prison population), the Prisoners Review Board will determine whether or not they serve 50% of the sentence imposed by the

court. From the perspective of those prisoners, the decision of the Board is as important as the decision of the court at the time of sentence. But the processes of the Board lack the transparency of the court process – there are no rights of appeal and no entitlement to natural justice or procedural fairness (*Sentence Administration Act*, s 115).

So, from the perspective of the community, parole erodes the authority of the court to determine the period of imprisonment an offender will serve. From the perspective of the prisoners, vital decisions as to their liberty are made by processes which lack the transparency and procedural fairness of the court process.

### **3. The wrong people get parole**

Section 89 of the *Sentencing Act* identifies the criteria to be taken into account by a court when deciding whether or not to make a parole eligibility order. They include the seriousness of the offence, criminal record of the offender, and previous non-compliance with parole orders. These are all factors which obviously bear directly upon the risk of reoffending. So, the higher the risk of reoffending, the less likely the court will make a parole eligibility order. Conversely, the lower the risk of reoffending, the more likely it is that the offender will be made eligible for parole.

A similar approach is taken by the Board when deciding whether or not to grant parole. Because of the statutory obligation to give paramount consideration to the safety of the community, prisoners seen to be at significant risk of reoffending are unlikely to be given parole. Of course, it follows that they are more likely to be released into the community at

the end of their sentence without any of the support or supervision that might reduce their risk of reoffending.

This approach is understandable while parole is seen as a discount of sentence, or a privilege or benefit. However, if the primary objective of parole is to reduce the risk of reoffending, it is a perverse outcome. Those who are at least risk of reoffending are most likely to get parole, whereas those at greatest risk of reoffending are unlikely to be subjected to any system intended to reduce that risk. To put it bluntly, those who need parole most are least likely to get it, and those who need it least are most likely to get it. The current approach to parole eligibility and grant impedes the objective of protecting the community by reducing the risk of reoffending because it allocates parole resources to those least in need of those resources.

#### **4. "Surveillance parole" encourages reoffending**

Associate Professor Guy Hall, of Murdoch University Law School, has spoken and written at length on the subject of what he calls "surveillance parole". This is the form of parole which imposes significant conditions and restrictions upon the lives of parolees – curfew conditions, substance use, non-association with other offenders, etc. He makes the point that the more conditions imposed, the more likely it is that one or other of them will be breached, with the result that parole is forfeited, and the prisoner returns to prison to complete their sentence, disrupting any positive steps that might have been taken by way of obtaining accommodation, employment, resuming education or whatever. He suggests that in the longer run, this approach to parole is likely to encourage reoffending, because a parolee returned to prison for breach will ultimately be released without any support or supervision whatever.

## **5. The sanctions for breach of parole are too blunt**

The basic sanction for breach of parole is revocation and reimprisonment. This sanction is applied to everything from the commission of a serious offence (which will, of course, attract additional punishment in its own right), to a breach of condition. The sanctions available to the Board in the event of breach of parole are much narrower in scope than the range of penalties available to a court when imposing sentence. In some cases this has the consequence that the penalty for a breach can be disproportionate to the seriousness of the conduct resulting in the revocation of parole.

### **A possible solution**

It seems to me that many of these criticisms would be averted if the parole system was restructured so that, instead of parole being a discount from the head sentence, parole was seen as a period of community supervision added on to the head sentence. Under such a system, a court would impose a term of imprisonment which would match the seriousness of the crime while taking into account all relevant mitigatory factors. That sentence would be served by every prisoner, in all circumstances. However, where the court considered that the safety of the community would be enhanced by the imposition of a period of community supervision following release, the court would impose a parole order upon an offender at the time of sentence.

Under a regime of this kind, parole would be more likely to be imposed upon offenders committing serious crimes or with significant criminal records, or previous histories of breach of community supervision orders – in other words, those at greatest risk, and therefore those for whom community supervision is most likely to be of benefit. Because each

offender would already have completed their sentence at the time of release on parole, breach of parole would not necessarily result in reimprisonment, but would be a separate statutory offence, for which the entire range of sentencing options would be available, enabling a court to impose a sanction proportionate to the seriousness of the breach.

Such a system would seem to me to have the following advantages:

- It would finally introduce truth in sentencing – there would be no gap between the sentence imposed and time served – the term imposed by the court would be served in each and every case. There would be no basis for the outrage often now expressed whenever a parolee reoffends, because all parolees would, by definition, have served their sentence, and would be in the community on their own time – not time when they would have been in prison but for parole.
- There is no erosion of the responsibility and authority of the court. It is the court which would decide whether an offender would be released on parole, and for how long. The role of the executive, through the Board, would be to specify the conditions appropriately imposed, and to provide supervision. Sanctions for breach of condition would be imposed by the court, not the Board.
- Parole would be targeted at the people whose risk of reoffending was most likely to be affected by community supervision and support.
- Surveillance parole would be less likely – rather, the focus would be upon positive support and assistance, given that the parolee was not receiving a discount of sentence or privilege.
- Flexible sanctions would be available for breach of parole, not just the blunt instrument of revocation.



Adoption of such a system would, of course, raise transitional issues of some significance. It is difficult to see how it could be imposed retrospectively on those already sentenced, as their sentences have been imposed under quite a different regime. Further, in order to avoid an explosion in the prison population, a court imposing parole on an offender should be expressly authorised to take account of the additional obligations thereby imposed when setting the term of imprisonment. Consideration of the likely term of imprisonment actually to be served under previous sentencing regimes would also be relevant in setting any prison term — a similar provision was included in the legislation modifying the "truth in sentencing" legislation in 2008, and would be necessary to avoid a sudden spike in terms of imprisonment

If serious consideration were to be given to the restructure of parole along the lines I have suggested, questions would arise as to the approach properly taken to those sentenced to life imprisonment. There would be a number of options. One would be to provide for automatic release after service of any minimum period specified by the court, with the terms and conditions of release to be set by the Prisoners Review Board. However, that would effectively convert a sentence of life imprisonment into a sentence of the minimum period prior to eligibility for parole, and would be unlikely to be acceptable to the community.

Another alternative would be to treat a life sentence as analogous to a period of indeterminate detention of the kind imposed under the *Dangerous Sexual Offenders Act*. Under that legislation, the continued detention of the offender is regularly reviewed by the court, which makes determinations as to whether that detention is necessary in the interests of protecting the community. This would enable a transparent evaluation of

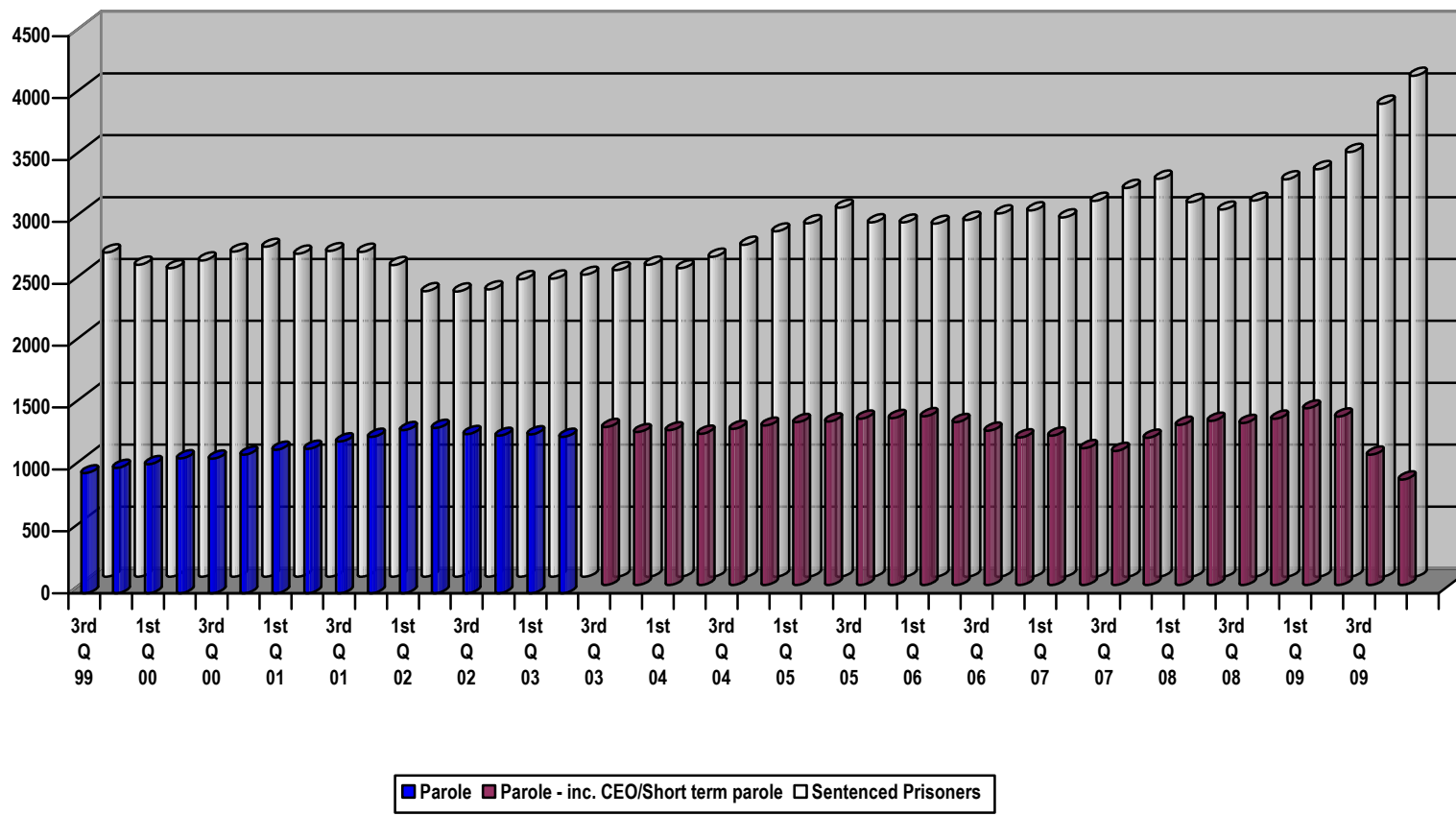
risk independent of executive government in which prisoners would have an entitlement to procedural fairness.

The third alternative would be to retain the current system, whereby decisions in respect of the release on parole of life prisoners are made by executive government, which is politically accountable for those decisions. I expect that this is the option that would be most palatable to the community and its elected representatives.

### **Summary**

In my view, many of the current criticisms directed at our parole system derived from the retention of its historical origins as a system for discounting sentence and providing a privilege or benefit to an offender, while at the same time endeavouring to serve the primary objective of protecting the community by reducing the risk of reoffending. It seems to me that there is an inescapable tension between these two characteristics of a parole system. That tension could be avoided by removing any element of discount or privilege, so that parole is served only after the term of imprisonment has been fully served, enabling the resources to be directed toward those from whom the community most needs protection.

**WA — No of adults — 1999-2009**  
 ABS Corrective Services (4512.0) data (1<sup>st</sup> day of the month per quarter)



**WA — Adult Rates — 1999-2009**  
 ABS Corrective Services (4512.0) data (1<sup>st</sup> day of the month per quarter)  
 1978 data Report of the Joint Select Committee on Parole 1991

