ROYAL AUSTRALIAN AND NEW ZEALAND COLLEGE OF PSYCHIATRISTS

JOHN POUGHER MEMORIAL LECTURE

16 October 2010

"The challenges of reporting psychiatric opinions to the court"

The Hon Justice Murray, Senior Judge, Supreme Court of WA

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Introduction

Members of the Organising Committee, distinguished members of the Social and Cultural Psychiatry Section of the RANZCP.

It was with enormous pleasure that I received (from Dr Geoff Smith) your kind invitation to address you this morning. My pleasure is made even greater by the fact that you have entitled this address "The John Pougher Memorial Lecture". It must be close to the inaugural lecture under that title, given that John Pougher passed away only in April last year. I do hope that it will be cemented in as a regular annual event, in much the same way that we in the legal profession, for the same reasons, have the annually presented "Sir Ronald Wilson Memorial Lecture".

It does all of us good to have the opportunity, from time to time, to recall the great leaders of our profession and the contribution they made, so that we may aspire to improve our performance in all the areas of endeavour that mark out what it means to be members of our respective professions. It is certainly a remarkable testament to his professionalism and his dedication to expanding knowledge and understanding in his chosen field, that he attended his last conference as a fellow of your College just over three weeks before his death at the age of 84.

The involvement of a court in mental impairment

When I refer to the courtroom involvement of psychiatrists and psychologists as expert witnesses, and the crucial role they play in the decisions made by the courts, I am referring principally to criminal courts or courts which are specialist tribunals operating as part of a diversion process which seeks to achieve a measure of protection for the community by a court-supervised treatment process.

I am talking, in other words, about situations where the conduct of the person who is subjected to coercive orders by the court is such that it would constitute the commission of a criminal offence if the person's criminal responsibility remained intact or, in a case where criminal responsibility does remain, and the person may be subjected to the criminal process, it is felt that a treatment-oriented approach in which the offender participates voluntarily, or may be required to participate against his or her will, offers the best chance of achieving a measure of protection for the community.

I do not want, in this paper, to get involved in questions of the propriety of subjecting people to involuntary treatment processes under the civil law, as

expressed in the *Mental Health Act 1996* (WA), although it is necessary to note that, under s 4 of that Act, "a person has a mental illness if the person suffers from a disturbance of thought, mood, volition, perception, orientation or memory that impairs judgment or behaviour to a significant extent", but not such a state which is the manifestation of intellectual disability, and not where any such impairment of function is simply an expression of antisocial behaviour, most often as a result of consumption or abuse of drugs or alcohol.

What is the law doing here? I would suggest that it is endeavouring to draw a line. On one side of the line are those whose malbehaviour it is felt we must simply accept as part of the ordinary rub of social interaction in our community. On the other side of the line, are those who are thought to be so impaired in their mental processes and functioning (in a treatable way) as to justify intervention and treatment designed to rectify the problematic behaviour, even though the person may be committed for that treatment involuntarily.

Where a criminal offence appears to have been committed, it is accepted that there is justification for such an intervention. But the problem arises in different ways.

Fitness to stand trial

At the first level, the law demands the assurance that a person is competent to participate in the processes of the court before he or she may be subjected to a process of adjudication which may lead to conviction and punishment. That process endeavours to strike a balance between the right of the accused person to their liberty, and the right of the community and the victim of criminal behaviour to have the offender brought to account and dealt with in a way which exacts an appropriate measure of retribution, condemnation and punishment, and seeks to provide a measure of protection for the community by deterring the particular offender and like-minded individuals from offending in the manner of the case before the court.

We are entering the realm of the *Criminal Law (Mentally Impaired Accused) Act 1996*, a statute which had a lengthy gestation period, but upon its enactment vastly improved the position of an accused over the situation under the common law which, with the aid of some rather primitive statutory provisions, simply resulted in an accused, found unfit to stand trial, being condemned to indeterminate detention in a prison at the whim of the Executive.

In the first place, as has always been the case, the court should be alert to see whether an accused's fitness to stand trial is in question. The accused is presumed to be fit to stand trial: s 10. But the question of fitness to stand trial

may be raised at any time and from time to time by the court or by any party to the proceedings: s 11.

If the question of fitness to stand trial is to be decided, the decision-maker is the judicial officer. A jury no longer decides such a matter: s 12. In any event, under ss 15 - 19, the procedure for determining fitness to stand trial is slanted towards discharge, without the making of a custody order, in cases where the judicial officer concludes that the custody order should not be made, having regard to the strength of the evidence available, the nature of the alleged offence and the alleged circumstances of its commission, and the personal circumstances of the accused, including his or her health and mental condition.

Basically, the statutory provisions are weighted in such a way that an accused should not be subject to custodial processes, whether directed towards treatment or otherwise, where there is not a fair prospect of conviction or where, in all the circumstances of the case, including those concerning the offence and personal to the accused, if that person is convicted, it is unlikely that he or she would be subjected to a custodial disposition.

Further, under the statutory provisions, if mental unfitness to stand trial is determined, the provisions of the Act are designed to prevent the accused being held in custody by a Magistrates Court unless there are prospects that the accused may become fit to stand trial in respect of an offence for which, on the evidence, he or she might well be convicted and sentenced to imprisonment within 6 months of the making of the determination.

The same approach is taken where the matter is to be dealt with by a superior court. And so it is abundantly clear that the Act is strictly framed to prevent a person being held in custody, whatever may be done if the patient becomes an involuntary patient under the *Mental Health Act*, except on a strictly limited basis designed to allow for treatment to produce mental fitness to stand trial.

However, in a proper case, a custody order may be made which will have a longer period of operation directed to what, in the judgment of the Mentally Impaired Accused Review Board, is required before the former accused may be released under a release order, either unconditionally or subject to conditions: s 38.

As I have said, the policy of the Act is clearly directed towards custodial treatment for the purpose of achieving fitness to stand trial, and then only in certain defined circumstances. Otherwise the policy is simply that the criminal proceedings should be brought to an end, abandoned and the accused released,

leaving to the civil law the options for care and treatment, whether in the community or as an involuntary patient.

In ***WA v Tax*** [2010] WASC 208, at [18], Martin CJ was critical of the starkness of the choice in a case where the mental unfitness of the accused resulted from mental impairment which, on the psychiatric evidence before the court, was likely to be permanent. His Honour thought that it was desirable that there be an intermediate course available to the court, eg, conditional release in the nature of the power available to the Board.

Perhaps that is something which should be further considered, although I must say that for myself the question is one of some complexity, particularly in a case such as that of Mr Tax, where his mental impairment was permanent and in which the only option for his "care" might well be effectively a permanent custodial placement in some place other than a prison, if there was such a place where an appropriate degree of supervision could be provided, available as a declared place under the Act or otherwise. The cost of that care would presumably have to be met by the State.

I have spent some time on this legislation because it provides an example of efforts made to ameliorate the effect of continuing exposure to the criminal process in cases where criminal responsibility cannot be established.

Insanity

The same conundrum arises, of course, in relation to a person who, although fit to stand trial, may negate the presumption of criminal responsibility by reason of insanity, within the meaning of the *Criminal Code* (WA).

By that, as you will all know, is meant any "mental impairment", defined in s 1(1) to mean, "Intellectual disability, mental illness, brain damage or senility". It is this definition which appears in s 8 of the *Mentally Impaired Accused Act*, and mental illness, defined in the same way in both Acts, is included in it, but does not mark out the limits of the concept of mental impairment in the context of the Code. That effectively repeats the position, as it was before these definitions were inserted in the law, under the common law in relation to unsoundness of mind.

The establishment of unfitness for trial

Section 9 of the *Mentally Impaired Accused Act* sets out the content of the concept of mental unfitness to stand trial. There are seven incapacities or inabilities referred to. Each relates to an aspect of the process of trial. Any one inability or incapacity will require the court to conclude that the accused is not

mentally fit to stand trial if the inability results from mental impairment. This is the nub of the matter. An accused is not to be submitted to the jeopardy of being exposed to the processes of the criminal law and, if convicted, to punishment as a criminal unless the person is capable of full participation in the criminal process.

Unfitness to stand trial is for the accused to establish, but only upon the balance of probabilities in an inquisitorial proceeding where the ordinary rules of evidence need not be applied: s 12. The inquisitorial nature of the proceedings to establish unfitness for trial is a matter to which I shall return shortly, in relation to the court's involvement in procuring and acting upon psychiatric and/or psychological evidence.

There is one fundamental difference between the way in which that question is handled by the court and the handling of the question of insanity affecting criminal responsibility. For an accused who is fit to be tried before a Magistrates Court, of course the trial will be before a judicial officer. In a superior court, that may be the case if both parties agree that the matter should be tried by a judge alone, but the standard mode of trial for serious crime, in the District Court and the Supreme Court, is trial by jury and, as I am sure you will know, in relation to crime of that type at the Federal level, there is a guarantee of trial by jury: *Commonwealth Constitution*, s 80.

The establishment of insanity

The question of insanity will ordinarily be tried by a jury in a jury trial where the ordinary rules of evidence apply, and the evidence of a psychiatrist or psychologist will be received as expert evidence in the ordinary way, subject to ordinary rules of admissibility, and the ordinary rules of disclosure under the *Criminal Procedure Act 2004* (WA).

On the basis that the accused is fit to stand trial, the issue is the effect of unsoundness of mind to negate criminal responsibility. But criminal responsibility is presumed and the burden to establish operative insanity rests on the accused, again, however, to the standard of proof on the balance of probabilities.

I have used the term "operative insanity". What is involved is mental disorder or impairment other than by the voluntary consumption of drugs or alcohol which deprives the accused of one of three capacities which mark out the concept of criminal responsibility - the capacity of the accused at the time of the alleged commission of the offence to understand what he is doing, the capacity to control his actions or the capacity to know that his conduct is wrong in a moral sense: *Code*, s 27.

Again, any one incapacity will be sufficient to enable an accused to establish that he was not, at the relevant time, criminally responsible for his actions so as to expose him to conviction and punishment. That will be the outcome of the adversarial process of criminal trial, a process distinct from the trial of the issue of the accused's fitness to stand trial.

Expert psychiatric and psychological evidence

So far as a psychiatrist and psychologist called upon to provide a report and give evidence is concerned, however, the difference in the trial process is not a material one. In relation to the question of fitness for trial, the expert witness may have been nominated by the court to examine (a compulsory process so far as the accused is concerned) and report upon the accused directly to the court: *Mentally Impaired Accused Act*, s 12.

In relation to insanity affecting criminal responsibility, the report will be commissioned by one or other of the parties and the accused cannot be compelled to submit to examination by an expert engaged by the prosecution or, indeed, by an expert who is introduced to him upon the advice of his lawyers. The reports will then be exchanged and the expert will be available as a witness at trial for either party: eg, *Criminal Procedure Act 2004* (WA), ss 62 and 96..

You do not need me to remind you of the importance for the psychiatrist and the psychologist always to bear in mind your independent status, effectively as officers of the court, when you examine and report upon an accused person in either of the circumstances under discussion. In each mode of trial, the report may be accepted and put to the court without the need for the expert witness to be called for cross-examination.

On the other hand, the process of testing the evidence in the ordinary way will be available. I would encourage you to understand that that process of questioning is not an attack upon you or the worth of your opinion, but an endeavour to expose the nature of the evidence and the expert opinion adequately for the benefit of the decision-maker, whether that be a judge or jury.

There are two important considerations to be borne in mind in relation to reports of this kind. The first is that although the ordinary rules of evidence governing the receipt of expert evidence preclude a witness from offering an opinion about the existence of a fact which it is the ultimate responsibility of the court to decide, that is not the case in relation to the issue of unfitness for trial or insanity affecting criminal responsibility. In those cases, the expert witness is permitted to be asked for an opinion directly affecting the existence of the fact ultimately in issue. Indeed, the witness is encouraged to give an opinion in those terms.

For example, when speaking about the question of fitness for trial, in a case where the opinion is that the accused is unfit, the matters or the aspects of the trial process set out in s 9 of the *Mentally Impaired Accused Act* should be directly addressed. For example, if it is the case, it should be said that in the opinion of the witness, the accused is unable to follow the course of the trial and/or unable to understand the substantial effect of the evidence against him. There should, of course, be a reference to the factual material upon which such an opinion is based, whether that be supplied by a history given by the accused, what he said to investigating police officers, his conduct, or whether it has some other derivation, and the reasoning behind the opinion must be adequately explained.

Similarly, for example, if it be the case in relation to criminal responsibility, that the opinion is that the accused was, at the time of his conduct alleged to constitute the commission of the offence with which he is charged, unable to understand that what he was doing was morally wrong, then that opinion should be offered in those terms, the cause of the incapacity by way of expert diagnosis of impairment being referred to and all matters of fact which bear upon the opinion being set out. Again, the reasoning of the witness to arrive at that opinion must be adequately set out.

It is helpful if the terminology of the Act is directly referred to in the report and evidence of the expert witness. You may be surprised to learn how seldom an expert witness, who is a psychiatrist or psychologist, translates the jargon of your professions into words relating to the issue to be decided by the court.

The final observation I would make in relation to this aspect of the process of giving evidence is, of course, that the court's capacity to accept the opinion as that of an independent expert is enhanced if you take the time and trouble to deal directly with matters of fact and uncertainties which may tend to support a view contrary to that expressed in the opinion which you hold. You would no doubt do so by discussing those matters and giving reasons why a contrary view of the facts, in line with the opinion which you have reached, is the preferred view. By taking that course you strengthen your credibility as a witness, remove any doubt that you are being one-eyed about it or that you have an agenda to support one side of the debate or the other, and you assist the court to perform the decision-making process.

That brings me to the second important matter which should not be overlooked in relation to your expert evidence, and that is that, although the court is not bound to accept your opinion and is entitled, indeed obliged, to test it against all the available evidence, the decision-maker, whether it be a judge or

jury, is not entitled effectively to set itself up as an expert and to second-guess your expert opinion. If your view is to be rejected, it must be upon grounds which, in effect, show the invalidity of your reasoning process and the opinion it has produced.

A very good example of the limitation of this process is the decision of the Court of Appeal in ***Hone v WA*** [2007] WASCA 283. The appeal was against a decision of mine (as the trial judge) in a dreadful case where the accused, who was undoubtedly mentally ill, was charged with the wilful murder of his mother and small sister. I took the view that on the accused's own evidence he remained criminally responsible for his conduct because he admitted that he knew it was wrong to carry out these killings, despite the fact that, as I have said, he was undoubtedly mentally ill at the time. Time does not permit more full discussion of the case, but the judgments will repay careful reading.

Disposition of an insane accused

Finally, it is noteworthy, in relation to an accused acquitted on account of insanity within the meaning of the Code, that the *Mentally Impaired Accused Act* pays careful attention to the orders which may be made. It would have been unthinkable, in earlier times, that an insanity defence would be raised in a court of summary jurisdiction because the inevitable outcome of doing so successfully would be an order for the indefinite detention of the accused at the Governor's Pleasure, a fate far worse than conviction and sentence. Now, however, the Magistrates Court will acquit the accused and release him unconditionally, or utilise a supervision process by making a form of community based order as described in the *Sentencing Act 1995* (WA), although, of course, the accused would not otherwise be subject to such an order.

If the accused is acquitted on this ground in a superior court, again either of those courses may be taken by the court, unless the offence is a serious violent offence, eg, homicide, serious assaults, sexual assaults, kidnapping or deprivation of liberty, robbery. In that case, a custody order must be made, and the accused left to the oversight of the Mentally Impaired Accused Review Board.

Potential liability of the expert witness

I turn away then from these important matters which I have discussed at some length for the purpose of showing the importance of the evidence of psychiatrists and psychologists in relation to the issues I have been discussing.

The giving of evidence of this character, of course, does not involve prediction of the future. It involves the expert assessment of current matters or matters which have occurred in the past. The expert assessment is made of a person who voluntarily submits to the process of examination or who does so compulsorily, within the terms of a court order. In my opinion, there is no greater risk of liability arising out of such a process than that to which a psychiatrist or psychologist would be exposed in any case of professional negligence. In other words, the risk to a psychiatrist or psychologist who properly applies their expertise to give an opinion on the questions asked of them as to the existence of any mental illness or mental impairment and its effect on the trial process or the person's criminal responsibility, is negligible.

Expert opinions in sentencing

I turn then to an area where expert psychiatric and psychological reports may be most important, from the point of view of the court, but where the expert opinion will involve, not only diagnosis of mental illness or mental impairment, but prognosis or prediction of future behaviour and the provision to the court of opinions about risk management in an effort to treat and rehabilitate an offender and reduce the likelihood of recidivism.

I speak, of course, of the involvement of psychiatrists and psychologists in the sentencing process. That may be by examination and production of a report ordered by a party, usually the offender, but most often it will be in the context of the provision of a court-ordered psychiatric or psychological report.

The importance of this role and the extent to which sentencing courts rely upon such expert opinions, is confirmed by the increasing frequency with which sentencing magistrates and judges order the provision of such reports. In my opinion, this reflects an awareness by the court of the need to enhance the sophistication of its approach to the control of crime by reflecting, in the orders made by the court and the sentence passed, an effort to protect the community, not only by imprisonment or by making a coercive order which will subject an offender to sanctions or punishment if breached, but also by endeavouring to use a coercive order, such as parole or a community based order, to impose conditions for treatment and rehabilitation which will be calculated to prevent recidivism indefinitely into the future.

The pressing demand for the court to recognise this approach to the sentencing process is well-supported by psychiatric and psychological empirical research. An American Department of Justice Survey found that the prevalence of mental illness, defined to include personality disorders, was five times higher in American prisons than in the general population: Grann, M., Danesh, J. &

Fazel, S. (2008). The association between psychiatric diagnosis and violent re-offending in adult offenders in the community. *BMC Psychiatry*, 1 - 7.

The identification of antisocial personality disorder, as a potentially treatable condition, is very significant for sentencing purposes and a psychotic state related to the commission of a criminal offence in a causal way may still be relevant although self-induced as a result of alcohol and drug abuse. In those circumstances, it will not be relevant to negate criminal responsibility, but it will generally be highly material for sentencing purposes.

In that regard, the predictive task of the expert psychiatrist and/or psychologist will most usefully not be so much concerned with static predictors or historical variables, but with dynamic predictors such as sexual preferences and cognitive distortions acutely enhanced by intoxication by drugs and alcohol, habitually or on a particular occasion, and by emotional stressors: McCarthy, J. (2001). Risk assessment of sexual offenders. *Psychiatry, Psychology and Law, 8*, 56 - 64.

I would suggest that the difficulty of the task of providing a useful expert opinion is increased by the need to prognosticate about future risk. But again, if the task is approached by the application of accepted principle, the psychiatrist is not at risk, to any substantial degree, of civil liability at the suit of the offender.

Often the content of such a report will be determined by the request made by the sentencing court to focus attention upon a particular aspect of the offender's likely behaviour. But in relation to a sentencing case where that is not done, you need only bear in mind that the order for the provision of such a report is made under s 21 of the *Sentencing Act 1995* (WA) which provides that in the absence of specific instructions from the court ordering the report, an expert report of this character, "is to set out matters about the offender that are, by reason of this Act or sentencing practice, relevant to sentencing the offender": s 21(2).

These will include matters which are concerned with the risk of future offending, of the like or any character, recommendations as to the management of that risk tailored to meet the specific needs of the particular offender the subject of the report and the likelihood of success in the adoption of a particular treatment program, with advice about its availability, either in the custodial setting or in the community.

Your report should be a robust document. It is not an academic treatise. It need only expose the application of your expert professional knowledge to the extent necessary to explain to the sentencing court the foundation for your

opinions, bearing in mind that you are talking to a judge or magistrate, a layman, who is interested in devising a just disposition of a particular offender before the court.

The areas of the application of sentencing discretion with which your report will be concerned will be those related to rehabilitating the offender, deterring him or her from further offending, and providing him or her with the mechanisms and equipment to enable an offender, motivated not to offend again, to amend his or her behaviour. You will be concerned with the protection of the community by the achievement of the goal of preventing further offences.

You will necessarily be concerned with the availability of the programs which you judge to be required in the particular case before the court. I note that very recently, on 23 September 2010, the Department of Corrective Services has advised the court, under the hand of the Deputy Commissioner of Offender Management and Professional Development, about the establishment of a new capacity to deliver rehabilitation programs for offenders in prison and on parole or pursuant to a community based order in the community.

I hope that this will be an effective change. Although initially limited to the metropolitan area it will, if effective, enhance the availability of rehabilitation programs, including for indigenous and female offenders. I am sure that you will all agree that investment of public funds in this way is a much more cost-effective process of correction and rehabilitation than simply providing additional prison accommodation.

The approach of the sentencing court

In my opinion, the leading authority in this jurisdiction in relation to the question of the relevance of mental illness and disability to the sentencing process remains the case of ***Lauritsen v The Queen*** [2000] WASCA 203; (2000) 22 WAR 442. The principal reasons were those of Malcolm CJ, Wallwork J agreeing. I dissented in relation to the question whether the sentencing judge had erred in fixing the minimum term in respect of a sentence of strict security life imprisonment for wilful murder, but I agreed with the majority in relation to the statement of principle.

In that case, the court wrestled with the proper approach to the application of sentencing principles where it appeared that mental illness or impairment of the offender was to be considered. It might have relevance in two ways which were not mutually exclusive.

If, in a general sense, the mental impairment was causally related to the offending behaviour, it might reduce or, in limited circumstances, increase the

culpability of the offender. That could lead to a reduction of sentence, if moral culpability was reduced, or to a greater sentence if moral culpability was increased. In this regard, the court is searching for a disposition of the case which is properly proportionate to the seriousness of the offending behaviour in the context of the moral culpability of the particular offender.

Whether or not there is that causal relationship between the offending behaviour and the mental impairment, it may be that that impairment will make more difficult or punitive a particular sentencing disposition (which will result, at least, in a less punitive disposition), or will show that a disposition, eg, by imprisonment, is simply too harsh to be appropriate or to be regarded as properly proportionate to the offending behaviour in the circumstances applicable to the particular offender before the court, rather than having regard to the seriousness of the offence committed.

In the ten years since ***Lauritsen*** was decided, the law has not really moved on to any extent. The current state of the law is exemplified by two decisions of the Court of Appeal, both given on 31 May 2010.

Butler v State of Western Australia [2010] WASCA 104 was a case of wilful murder which attracted a term of life imprisonment, with a minimum term of 19 years, for an offender whose crime was causally related to drug-induced psychosis, rather than mental illness as such. The court made the point clear that sentencing is not concerned to make a distinction between mental impairment and mental illness, as such. But the critical factor in that case was the fact that the psychosis was induced by the voluntary abuse of drugs. The court referred to earlier Victorian decisions, which held that such a condition might nonetheless be held to reduce the offender's moral culpability in certain limited circumstances. The one which is most often cited is the case where the psychotic state was not anticipated or foreseen by an offender who had not experienced that reaction before, and did not know that it was likely.

In my view, there was some differences in the expression of views by members of the court. Owen and Pullin JJA seemed more inclined to consider a psychotic state brought about by the voluntary consumption of drugs or the abuse of alcohol as a mitigating factor than was the third member of the court, McLure P, who repeated a view she had expressed in an earlier case that, "where a condition is self-induced, it is not generally to be regarded as mitigating the offence because the offender may be regarded as morally responsible for his or her condition" [8].

For myself, with respect, I think it may not be such a black and white area as that observation would suggest. But it is certainly the case and in my

opinion, should be the case, that the mere voluntary consumption of alcohol or drugs, producing a state in the offender which is causally related to the commission of the offence, at least in the sense that it explains why it occurred, should not give the offender the benefit of being considered to be less culpable for the offence.

The second of the two cases to which I should refer is ***Wheeler v The Queen [No 2]*** [2010] WASCA 105. In that case, the offender suffered from a psychiatric condition at the time of the commission of the offence, but he was not diagnosed until after he was sentenced. On appeal, leave to adduce that additional evidence was refused, but nonetheless the court took the opportunity, usefully, to restate the applicable general principles followed in this State, again following two Victorian decisions: ***R v Tsiaras*** [1996] 1 VR 398, 400, and ***R v Verdins*** (2007) 16 VR 269.

Suffice it to say that a condition of mental impairment, however caused (except in some limited circumstances of voluntary behaviour producing impairment) may affect the sentencing process by affecting the offender's moral culpability. It may make the offending behaviour more serious or less serious, and it might affect the sentencing disposition which is proportionate to the case, having regard to what may be done with the offender to alleviate the condition or what needs to be done to achieve an appropriate measure of protection for the community from the offending behaviour.

In relation to that consideration, the notion of a causal connection is a broader concept than would ordinarily inform the decision of a court where some question of causation is in issue. There may be no more of a link between the offending behaviour and the condition from which the offender suffers than that the condition provides an explanation for the commission of the offence.

In ***Krijestorac v State of Western Australia*** [2010] WASCA 35, Wheeler JA, Owen JA agreeing, said that the offender's culpability may be reduced if, at the time of the commission of the offence, his ability to exercise appropriate judgment was impaired, his ability to think clearly was impaired, he was disinhibited, he had reduced notions of the wrongness of his conduct or he was inclined to act impulsively [18].

The significance of the approach of the court for a reporting psychiatrist or psychologist

The approach of a reporting psychiatrist or psychologist in relation to a report about a mentally impaired offender, for sentencing purposes, should be very much the same as that to which I have previously referred in discussing reports and the expression of opinions about fitness for trial and the defence of

insanity. I will not go over the ground again, but I do wish to emphasise that the most useful report will be that which clearly expresses the diagnosis or the findings about the relevant condition of impairment suffered by the offender.

The report will go on from there to explain, if it be the case, by reference to the history provided by the offender and the nature of the condition, how it may be regarded as being causally related to the offending behaviour in the wider sense to which I have referred. There should be an explanation of how the condition is to be best treated and managed, and what the likely prognosis is.

You should bear in mind at all times that where a sentencing court sees the need to modify the application of ordinary sentencing principles to the case, by reason of the mental impairment of the offender, whether causally related or not, it will be seeking, so far as it is able within the statutory framework of its powers, to take a treatment-oriented approach to the sentencing disposition. The court will take the view that if it provides, to the extent that it is able to do so, an effective regime by which the offender's rehabilitation may be assisted, it will be by that means that it may best provide for the ultimate aim of the imposition of sentence, the protection of the community from the commission of further offences of the kind before the court.

The court will not be content, if it can do more, to simply lock an offender away for a period of time, anticipating that the offender will come out of prison in much the same state as, or worse than, he or she was when they went in. That would hardly seem to be an effective use of the very substantial public funds expended on corrective services, particularly by way of imprisonment.

Available resources

When I referred to the case of ***Tax***, in the context of my discussion about the processes in relation to fitness for trial, I mentioned the criticism of Martin CJ about the lack of a capacity for the court to make structured conditional release orders.

In his judgment in ***Lauritsen***, Malcolm CJ added a postscript (465 - 466 [73] - [80]). In it, he discussed the lack of a power for a sentencing court to make, either in lieu of or as part of a sentencing process, a hospital order or some other form of institutional custodial order which would keep an offender, who needed such a facility, out of prison by the decision of the court. His Honour referred to the existence of such powers by legislation in Victoria, NSW, the Northern Territory and Tasmania. The *Crimes Act 1914* (Cth) makes a provision of that kind for hospital orders and psychiatric probation orders to be imposed on Commonwealth offenders.

Of course, the CEO of the Department of Corrective Services may exercise a power to remove a sentenced prisoner out of prison for treatment purposes. That power was exercised, upon my recommendation, very recently as part of a sentencing process in the case of ***Ariyaratnam*** (INS 44 of 2010), a case involving a young woman who, while suffering from a critical episode of clinical depression, killed her baby twins. The fact that it had to be dealt with in that way, rather than the court directly making an order for her continuing detention in the Frankland Centre, did, I thought, reveal a lack of power of the kind discussed by Malcolm CJ in ***Lauritsen*** which, had it existed, would have enabled me to give effect to what I considered to be the proper application in that case of sentencing principle which directed the sentencing process towards the offender's treatment and rehabilitation at the expense of what would otherwise have been a more punitive disposition.

Recently, as I have mentioned, the court received a letter dated 23 September 2010, under the hand of the Acting Deputy Commissioner, Offender Management and Professional Development, of the Department of Corrective Services. It promised improvements for the delivery of rehabilitation programs for offenders in prison and in the community, either on parole or upon the making of a form of community based order. It would be inappropriate here to discuss the terms of the letter in any detail, but the initiative announced is to be applauded, being made, as the Deputy Commissioner says, in pursuit of the Department's "key focus to contribute to community safety by positively influencing offender behaviour to reduce re-offending". It is vital that the appropriate facilities be available. If it is otherwise, for the court to recommend particular courses of treatment and rehabilitative programs becomes a sham.

So far as your reporting process is concerned, the court will find it most useful if, where treatment or engagement in a rehabilitative program tailored to suit the needs of a particular offender is recommended, the recommendations should be made in specific terms to enable the court to understand what is required and translate that requirement directly into a speaking order by the court or, where appropriate, into the terms of a recommendation which will no doubt be implemented, if at all possible, by officers of the Corrective Services Department engaged in the delivery of custodial programs and community based programs.

Dangerous sexual offenders

The *Dangerous Sexual Offenders Act 2006* (WA) is of recent origin in this State. It came into operation on 13 May 2006 (Government Gazette 12 May 2006, p 1781). It is at present undergoing a process of review by Government. A great many changes have been recommended. It would be inappropriate for

me to discuss them in this presentation. The legislation has statutory precursors from other jurisdictions, particularly in Queensland. The constitutional validity of the legislation has been upheld: ***Fardon v Attorney-General (Qld)*** [2004] HCA 46; (2004) 223 CLR 575.

At a number of points, the legislation in its current form either mandates or permits recourse to psychiatric reports. They are required to be ordered by the court prior to conducting the main hearing, at which the court will have to find whether or not an offender who is approaching the completion of service of a term of imprisonment for a serious sexual offence or offences (or indeed who has served such a sentence) is, within the meaning of s 7 of the Act, a serious danger to the community in that there is an unacceptable risk that, if the person were not subject to a continuing detention order or a supervision order under the Act, he would commit a serious sexual offence.

If the court so finds, it must make one or the other of a continuing detention order or a supervision order: s 17. If the court makes a supervision order, it must impose conditions which, importantly, will be directed to ensure the provision of an adequate degree of protection of the community, or will be directed to, "the rehabilitation or care or treatment of the person subject to the order": s 18.

If such an offender is committed to continuing detention in a prison, that detention is reviewed annually, and to assist that review, the court may require the provision of psychiatric reports directed to assist the court to determine whether the person subject to the order remains a serious danger to the community, in which case the court may elect to continue the detention, or may make a supervision order of precisely the same kind as might be made in the first instance.

If psychiatric reports are required, then the statute empowers the psychiatrists to examine the offender. He need not cooperate, but if he does not do so that fact is to be reported to the court and its significance discussed by the reporting psychiatrist. The CEO of the Corrective Services Department will provide to the reporting psychiatrist all the relevant information about the offender in that officer's possession.

Questions have been raised about the level of protection from suit provided to a reporting psychiatrist who again, in this context, acts essentially as an officer of the court. In my view, it would be useful to have more comprehensive specific provisions in the legislation in this regard, but I consider that, under the present statutory scheme, the level of risk for the psychiatrist engaging in a process of assessment and report is minimal. The same

observation may be made in relation to a psychological report sought and obtained for the purpose of proceedings under this Act.

The meaning and effect of this statutory scheme has been thoroughly reviewed by the Court of Appeal: ***Woods v DPP (WA)*** [2008] WASCA 188; (2008) 38 WAR 217; ***DPP (WA) v GTR*** [2008] WASCA 187; (2008) 38 WAR 307. Particular attention was given in those cases to psychiatric evidence. The admissibility of such evidence was held to be secured by the terms of the Act, although its weight in relation to the questions addressed was a matter for the judge hearing the application under the Act. That is particularly critical in relation to the need to predict recidivism. It was held that the psychiatrists preparing such reports were entitled to base their opinions upon their clinical interviews with the offender and on accepted risk assessment tools, although again, as in the case of reports about the insanity defence, the court will be searching particularly for an understanding of the factors affecting the gravity of risk applicable to the particular offender before the court.

I think I may say that the process of review by the Act will be concerned to strengthen the position of a reporting psychiatrist or psychologist and to ensure that they are able to do their difficult work free of concern about potential liability in relation to the content of their report.

Again, this is a reporting process which looks to have the expert witness directly address issues raised by the statute. There is specific provision for a psychiatric report to give the psychiatrist's assessment of the level of risk that, if the person were not subject to a continuing detention order or a supervision order, he would commit a serious sexual offence, and the reasons for that assessment: s 37(2). In other words, the report (and the same may be said of a psychological report) is to address, within the area of the witness's expertise, the test for the court to find that the offender is or remains a serious danger to the community, within the meaning of the Act.

The task is undoubtedly a difficult one. It must have regard to any mental illness or impairment, and what has been done to deal with that and rehabilitate the offender during the service of the sentence originally imposed. Inevitably, the predictive element of the judgment made in the expression of the expert opinion will be considerable. The prediction will be based upon the nature of any illness or disability, the offender's past behaviour, the nature of the offences committed, their progression, and whether or not it appears to the expert witness that the offender has a propensity to commit serious sexual offences in the future.

In the background is the tension inherent in the statutory scheme. Its object is to provide a mechanism to control, care for and treat dangerous sexual offenders for the purpose of ensuring an adequate degree of protection for the community: s 4. But the court is required to make no more coercive order than would appear to provide acceptably for the attainment of the object of the Act. In other words, the court should not make a continuing detention order if a supervision order, appropriately framed, will do the job.

Further, the court will not intervene to make either form of order unless it is satisfied that the offender meets the test to be declared a serious danger to the community by acceptable and cogent evidence and to a high degree of probability: s 7(2). The challenge for a psychiatrist or psychologist making a report in that environment is considerable.