ADULT PAROLE EVIDENCE BOARD – NSWLRC SUBMISSION – Australian Catholic University Law Faculty

Submission re Parole

1. The principles of sentencing including the imposition of a non-parole period are well known.

2. A sentencing judge synthesises any aggravating and mitigating feature for the sentence to be imposed.

3. Protection of the community and impact on victims are important such features. A sentencing judge on the material for both the head sentence and the non-parole period is required by law to impose a sentence which reflects these features amongst others.

4. Appeal Courts in general terms allow a sentence within a range of possible sentences. Sometimes a tariff for the particular offence is recognised at sentence and on appeal. In other words, sentences are not idiosyncratic to a particular judge, but the collected judgment of the criminal justice system.

Parole

5. Protection of community is one of the matters considered for parole. If there is an assessed risk to the community, parole would and should be denied.

6. A problem with the assessment of risk is the standard of proof. The civil standard should apply. But in some jurisdictions the standard has been challenged – e.g. "less than a likelihood of more likely than not" of reoffending supports an order under the Victorian *Serious Sex Offenders (Detention and Supervision) Act 2009,* s 9 (5).

7. Arguably, in Australia the best practice in the treatment of offenders, including the assessment of the risk of reoffending, is for serious sex offenders. This is consistent with the "world's best practice" for sex offenders, which only allows for an educated guess to be made as to the likelihood of an individual prisoner reoffending. At best the prisoner can be banded with other similar prisoners, a percentage of whom can be predicted to reoffend.

See RJE v Secretary to the Department of Justice [2008] 21 VR 526 [70] – [81]

8. The great majority of reports to the board by psychiatrists, psychologists, social workers and parole officers can only include an educated guess in relation to any risk of reoffending by a particular prisoner.

9. It is difficult to see how a parole system could operate without predictions being made by the above contributors and the board itself. These predictions are made on the material, usually including an assessment of the prisoner, while bringing to bear a reasonable appreciation of the issues for parole.

10. A parole board has a "gravity factor" similar to the Briginshaw test available to it. The seriousness of possible offending on parole is properly a consideration.

11. What is not reasonable, it is submitted, is to revisit punishment, community condemnation, impact on victims and the like. These matters have been dealt with on sentence, and the sentence is a "given" for parole consideration.

Criticism of Parole

12. Parole decisions are most times under pressure not so much for a system failure, but for parole "failures" due to serious, even particularly serious, offending on parole.

13. The danger for the present review is that consideration of noteworthy breaches of parole is given too much weight.

14. There is a growing tendency to take the sentencing discretion away from Judges. Fixed term sentences, "three strikes and you are out" sentences, and civil commitment for serious sexual offences after the expiration of a sentence (by analogy) are examples.

15. This tendency in general terms takes parole away from prisoners and emphasises condemnation. The parole discretion may be similarly under challenge.

16. Any tendency to remove the parole discretion from the board should be resisted, as in our submission, it is unreasonable to limit this discretion which already has the protection of the community as a prominent consideration.

17. The rationale for such measures is that the protection of the community is paramount, and community disquiet or even outrage requires legislative intervention.

18. One gauge for the community viewpoint is popular opinion presented through media outlets. Sectors of the press appear to be regularly outraged at "lenient" sentences, and "inappropriate" parole decisions.

19. Irresponsible press and other media rarely, in our experience and opinion, make measured judgments. The basis for the outrage can range from a proper cause for community concern to xenophobia. Measured judgments are a more substantial basis for parole decisions, and for the assessment of the risk of reoffending.

20. The present review should, in our submission, keep firmly in mind that a non-parole period of imprisonment has already been served prior to any parole. All other matters being equal, the best community protection is achieved by a graduated release into the community under supervision.

21. Reasonable accommodation and employment, with oversight and support, reduce the risk of reoffending.

22. It is difficult to see how a release after a sentence without the possibility of parole protects the community. In general terms, the more serious the initial offence, the longer the sentence, and consequently the more need for supervision in the community.

23. There does not seem to be any support for the proposition that deterrence would be more effective if parole were abolished or reduced.

24. Furthermore, unless and until better predictive measures are developed it should be recognised that presently the best that can achieved is by appointing seasoned and capable people to the various parole functions, and by supporting the decisions made unless there are very clear reasons not to do so.

25. We contend that it is not possible to eliminate a risk of reoffending. In the end parole is a risk/benefit exercise for the community. However, the benefit to the community to have prisoners under supervision for a period in the community, including reducing the risk of reoffending, is self –evident.

Suggestions

26. Appoint, or continue to appoint, persons to the various parole functions and support their decisions unless there are compelling reasons not to do so.

27. Recognise that prisoners are individuals, with a wide range of characteristics including the risk of reoffending. It is important not to base changes to parole, particularly significant changes, on a worst case scenario. To do so would be to ignore the learning on parole, and an example of a "hard case making bad law".

27. Monitor the rate of reoffending against comparable systems within Australia, and comparable systems internationally. While no system of parole is perfect, if the rate is comparable it is likely it is functioning at an acceptable level.

28 Review parole "failures", and make necessary adjustments and changes to improve the system.

29. A well- resourced and intelligent prison system directed towards rehabilitation, with a reasonably resourced parole system would almost certainly improve parole outcomes.

29. Legislative prescription for parole is inconsistent with the learning in relation to a reasonable parole system. Such a system is the community's best chance of protecting itself from prisoners to be released from gaol.

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About the Authors

Ms Brianna Chesser is an Associate Lecturer in the Faculty of Law at Australian Catholic University. Brianna was admitted as a Barrister and Solicitor of the Supreme Court of Victoria in 2010 and has experience in both criminal and civil jurisdictions. She is also a registered provisional Psychologist with the Australian Health Practitioners Regulation Authority and the Psychology Board of Australia. Brianna has undertaken extensive study in several areas including Law, Psychology and Music, and has obtained the following qualifications, Master of Laws (Legal Practice) (Australian National University), Bachelor of Laws (La Trobe University), Bachelor of Psychology (La Trobe University), Bachelor of Music (Honours) (Australian Catholic University), Bachelor of Arts (Australian Catholic University), Postgraduate Diploma of Psychology (Charles Sturt University), Graduate Diploma of Legal Practice (Australian National University), Graduate Diploma of Professional Psychology (Cairnmillar Institute), Associate Diploma in Classical Voice (AMEB) and a Certificate of Church Music (Australian Catholic University). She is currently undertaking a Doctor of Philosophy (Law) in the area of Forensic Psychology, focusing on the recent emergence of the Mental Health Court and the rise of therapeutic jurisprudence. Brianna is a member of the Law Institute of Victoria, the Australian Psychological Society and the British Psychological Society College of Forensic Psychologists.

Mr Graham Thomas SC is the Legal Professional Mentor within the Faculty of Law at Australian Catholic University. He qualified in both social work and law from Melbourne University.
He was Superintendent of Turana Youth Training Centre from 1973-6. Turana was a remand classification and training centre for Victoria's young offenders aged 14-21. He chaired classification, and pre-parole planning meetings for this period.
He practised in crime at the Victorian Bar from 1976 to 2012, taking silk in 2003. He appeared in many trials and appeals. He appeared in a number of hearings in relation to the Serious Sex Offenders legislation in Victoria. For such hearings he considered closely the various predictive instruments available to psychologists.