THE CASE FOR DUE PROCESS IN REVIEWABLE SENTENCES

Peter Svensson
Legal Consultant
Attorney-General's Department
Queensland

Given the apparent public concern about violent and dangerous offenders, the aims of this paper are to briefly traverse the various Australian jurisdictions possessing legislation governing dangerous offenders, persons considered to be incapable of controlling their sexual instincts, and habitual criminals. On the basis that legislation is thought to be necessary to regulate dangerous offenders, this paper will then propose a skeletal model for consideration which will attempt to tread the fine line between the civil liberties of the offender and the protection of the public.

It is suggested that the general community believes, rightly or wrongly, that there is an increasing tide of violent crime endemic in Australian society. While it may be true that there is no sound statistical basis for such a perception, it is contended that the perception itself becomes a significant political dynamic which may compel governments to deal with the problem of violent offenders being released back into the community.

In a democracy, and all that that entails in regard to political sensitivity to public opinion, it may be said that the majority view on matters of crime (as of any other topic) should prevail; even over the enlightened views of legal, medical or sociological experts because it is perceived in a democracy that the will of the majority is paramount. In regard to dangerous and violent offenders, a balance needs to be struck between the sentencing, detention and release processes on the one hand, and the need to protect the community on the other.

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1 This paper was presented by an officer of the Queensland Attorney-General's Department and, therefore, the views expressed in this paper are those of the writer alone and do not reflect the views of the Queensland State Government, the Attorney-General, the Honourable Dean Wells MLA, or the Department of the Attorney-General.
In this paper, it is not intended to debate the three main philosophies of punishment; that is, retribution, deterrence and rehabilitation. While it is inevitable that aspects of those philosophies and the broader concept of punishment generally may impinge upon the stated aims of this paper, the principal focus is to assess and suggest a legislative scheme which aims to protect society and safeguard the rights of the offender.

Thus it is not intended to engage in any philosophical debate or take on such eminent jurisprudential writers such as Professors Williams and Campbell. Similarly, while it is accepted that there are substantial difficulties in predicting 'dangerousness', it would be presumptuous of this paper to further review the literature (for example, Mestrovic & Cook 1986, pp. 443–69; Task Force of the American Psychiatric Association 1974). The references are noted and recommended.

It must be acknowledged that the skeletal legislative scheme which is proposed in this paper may be seen to cut across the concept of proportionality of sentences, but the paper is principally directed to the practical issue of protection of society rather than concern with the philosophy of sentencing per se. Thus this paper poses no danger or challenge to the entrenched philosophy of proportionality as reflected in R v. Veen (No. 1) ([1979] 143 CLR 458) or, more particularly, R v. Veen (No. 2) ((1988) 164 CLR 465).

The focus of this paper is on the protection of society by the development of an appropriate legislative scheme. The main feature of the proposed scheme is the availability of reviewable sentences coupled to due process in order to monitor, not only the imposition of the reviewable sentence at first instance, but also to monitor continuity of that sentence and determine the release of an offender from a reviewable sentence. The central concept is to balance the perceived need for public protection with review by due process; especially in the release determination which is believed to be better vested in the courts—who are most experienced in administering concepts of natural justice and individual liberties—than in the executive by way of Governor's or Sovereign's Pleasure.

Proportionality versus Protection

To proceed further without acknowledging the issue of proportionality of sentencing would be unwise. The clearest expression of the principle of proportionality can be found in R v. Veen (No. 2) ((1988) 164 CLR 465) per Mason CJ, Brennan, Dawson and Toohey JJ at 472:

The principle of proportionality is now firmly established in this country. It was the unanimous view of the court in R v. Veen (No. 1) that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender.

In the writer's view, that now famous dicta can only be read as applying to courts imposing sentences in the normal way. That view becomes clear when regard is paid to various other expressions falling from that court in R v. Veen.
which clearly leaves the door open for legislation to provide for sentences to be imposed on the basis that society needs to be protected from the offender. See, for example, Wilson J at 482: '... the complaint being that the Court of Criminal Appeal had embarked on a policy of preventive detention without legislative warrant...'. At 486: 'I find myself fundamentally opposed to the notion that, in the absence of expressed statutory authority, courts should find in the common law of Australia a power to impose sentences of preventive detention'. Further down the same page: 'Of course, it is always open to a legislature to provide for preventive detention' [emphases added].

Turning to Mr Justice Deane, at p. 495:

There is one further matter which I would briefly mention. That is the protection of the community obviously warrants the introduction of some acceptable statutory system of preventive restraint to deal with the case of a person who has been convicted of a violent crime and who, while not legally insane, might represent a grave threat to the safety of other people by reason of mental abnormality if he were to be released as a matter of course at the end of what represents a proper punitive sentence.

Justice Gaudron, at p. 496, said:

I am fundamentally opposed to the idea that a sentence of preventive detention may be imposed in the absence of expressed statutory authority [emphases added].

It is therefore suggested that the learned Judges in *R v. Veen (No. 2)* clearly intended their remarks on sentencing and punishment to be confined to those sentences recognised by the common law; but also recognised that the traditional common law concepts of punishment may be inadequate to deal with persons who may be a 'continuing danger to society'. Those words quoted are taken from the judgment of the majority in *R v. Veen (No. 2)* at 470 and it is suggested form the best basis upon which, in the following legislative model, a court may assess the danger to society from the activities of an offender.

Thus an offender who is found by a court to 'constitute a constant threat to the community' (per the High Court in *R v. Chester* ((1988) 36 A Crim R 382 at 385) may become subject to the imposition of a reviewable sentence. In *Chester*, the High Court was considering the principles to which a court should look in administering a legislative scheme of indeterminate sentences provided by section 662 of the Western Australian Criminal Code. Further consideration of the judgment in *Chester* will be given as a preamble to the proposed model for reviewable sentences.

In the final analysis, it is suggested that the expressions of proportionality found in *R v. Veen (No. 2)* must be augmented by a legislative scheme which has two foci: protection of the individual offenders’ civil rights by way of review by due process and, as far as possible, ensuring that offenders found to be a constant danger to society be detained.

The need for legislation to protect the community was also recognised by Jobson and Ferguson in their review of the Canadian sentencing structure. At the
time of their review in 1987, the Canadian Criminal Code (section 687) permitted the prosecution to seek a special hearing following the conviction of a person for a 'serious personal injury offence'. At that hearing, a determination of whether the person was a dangerous offender could be made. In the event of the court concluding that the person was dangerous as defined, the court could impose an order of preventive detention for life. It should be noted that, since the review, section 687 appears to have been repealed and replaced in the Canadian Criminal Code by Part XXIV (sections 757–61).

In their overall review of sentencing provisions throughout Canada, Jobson and Ferguson (1987) said:

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\text{We are of the opinion that sentencing provisions must address the incarceration of particularly dangerous individuals \ldots It must be noted that the reliability of predictions of dangerousness is far from accurate, and further, that the provisions are presently applied in a very inconsistent fashion \ldots The apparent reluctance of courts in some provinces to use the provisions, the excessive length of the indeterminate term, and the need for a periodic judicial review of such sentences require a re-examination of the Code provisions [emphasis added] (Jobson & Ferguson 1987, p. 20).}
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While it is accepted there are substantial difficulties in predicting 'dangerousness' as a criterion for preventive detention of violent offenders in order to protect society, if the democratic expression of a community requires a parliament to legislate for such protection, it is the central thesis of this paper that such mechanisms of preventive detention be attended by due process, openness and accountability.

**Review of Legislation**

It is now intended to very briefly review current Australian legislation dealing with the imposition of indeterminate sentences or other legislative provisions concerned with habitual offenders, dangerous offenders and persons adjudged incapable of controlling their sexual instincts. It will be seen that while there is some degree of commonality in Code jurisdictions, there is not discernible any concept of uniformity or even consistency across the nation. The review herein is brief and is undertaken, not only to assess what is currently available, but also to consider possibilities in choosing an appropriate model legislative scheme which could draw on the best elements currently available, consistent with review by due process. It will be noted that, in a number of jurisdictions, the release decisions are made by a process which is neither clear nor widely understood by the societies in which they operate.

**Queensland**

Chapter LXIV A of the Queensland Criminal Code makes provision for the declaration and detention of persons designated habitual criminals. Without going into too much detail, section 659A of the Code permits a Judge to declare a convicted person an habitual criminal if that person is convicted of designated offences and has been previously convicted on two or three occasions (depending on the offence). Section 659D requires that, at the
conclusion of an habitual offender's sentence, the offender be detained during Her Majesty's Pleasure. The discharge of such an offender is regulated by section 659G which permits the habitual offender to apply to the Supreme Court for a recommendation that: '...such person having sufficiently reformed, or for other sufficient reason, may be discharged'. Upon application, the court may make inquiry in such manner as it seems fit and, on being satisfied that the applicant has 'sufficiently reformed or that there is some other sufficient reason to warrant his discharge', may recommend to the Governor accordingly who may direct the discharge of the offender.

Section 18 of the Criminal Law Amendment Act 1945 provides for the detention of persons incapable of controlling sexual instincts. The application of the section is restricted to cases where an offender has been found guilty of an offence of a sexual nature relevant to a child under sixteen years.

The judge may direct an examination of the offender by two or more medical practitioners (one of whom may be a psychiatrist) to inquire whether the offender is capable of exercising proper control over his sexual instincts. If not, the judge may, either in addition to or in lieu of imposing any other sentence, declare that the offender is incapable of controlling his sexual instincts and direct that the offender be detained during Her Majesty's Pleasure. Section 18(5) provides that the offender shall not be released until the Governor in Council is satisfied that it is expedient.

In each enactment, although the courts are empowered to make the declaration confining the offender to (effective) preventive detention, the courts have no powers of review during the period of detention and only a limited advisory role in regard to the release of habitual criminals. Thus due process, having been utilised to incarcerate the offender, has little or no effective role in monitoring the detention or the release of the offender.

Northern Territory

Section 397 of the Northern Territory Criminal Code provides for the declaration and detention of habitual criminals. Where a person has been convicted and it appears by reason of the number of times he has been convicted previously, the nature of such convictions or the 'manner of his life revealed by the evidence of such previous convictions' indicate that it is 'likely' he is an habitual criminal, the court in addition to sentencing the offender may call upon him to show cause why he should not be dealt with as an habitual criminal. Should the offender fail to discharge that onus, section 397(3) permits the court to declare the offender an habitual criminal, and section 398 requires the habitual criminal to be detained in prison during the administrator's pleasure. Section 399 provides for the discharge of an habitual criminal by way of application to the Supreme Court which may make inquiry in such manner as is deemed fit and, if 'satisfied that the applicant has sufficiently reformed or there is some other sufficient reason to warrant his discharge', empowers the court to recommend to the administrator that the offender be discharged. The administrator is vested with a discretionary power, after having received a recommendation from the Supreme Court, to direct the discharge of the offender.
Section 401 permits the detention of persons incapable of controlling sexual instincts. Section 401(1) provides that where a person has been convicted on indictment of offences of a sexual nature or 'for any other reason that the offender may be incapable of exercising proper control', a judge may direct that two or more legally qualified medical practitioners inquire into the medical condition of the offender to determine whether he is so incapable. After having received the report, a judge may declare the offender is so incapable and may direct that the offender be detained during the administrator's pleasure.

Section 403 provides for the discharge of the offender by a similar mechanism to that applicable to the discharge of an habitual criminal in the Northern Territory. Again, in each enactment, the ultimate decision for release is vested in the administrator, and it is apparent that there is only a limited advisory role for due process.

Western Australia

The Western Australian Criminal Code, section 661, provides that a person convicted of any indictable offence, who has been previously so convicted on at least two occasions, may be subject to the declaration by a court that he is an habitual criminal. The court may direct that on the expiration of the term of imprisonment imposed, the offender be detained during the Governor's Pleasure.

Section 662 appears even more draconian. When any person is convicted of an indictable offence, whether such person has been previously convicted of any indictable offence or not, the court may either direct that at the expiration of the term of imprisonment imposed, the offender be detained during the Governor's Pleasure; or without imposing any term of imprisonment, immediately sentence the offender to imprisonment during the Governor's Pleasure. The effect of this latter section has, to some extent, apparently been modified by *R v. Chester* ((1988) 36 A Crim R 382). The High Court concluded it was not appropriate for an indeterminate sentence to have been given in that case, because the applicant's record did not establish that he posed a constant danger of violent injury to the community.

South Australia

This state has provided for sentences of indeterminate duration applicable to habitual criminals by way of section 22 of the Criminal Law (Sentencing) Act 1988. Depending on the classes of offences previously committed, an offender who has been convicted on two or three previous occasions may, on application by the Crown, be made the subject of an habitual criminal declaration in addition to any other sentence imposed. The offender is detained in custody until further order by the court (see section 22(7)). It is worthy of note that, in contradistinction to Queensland, Northern Territory and Western Australia, the habitual criminal in South Australia is discharged by the Supreme Court being moved on application by the Crown or the offender.

Section 23 of the Criminal Law (Sentencing) Act, provides for the detention of persons incapable of controlling sexual instincts. In such cases, upon conviction of the specified offence/s, the Supreme Court may, before
determining sentence, direct that at least two legally qualified medical practitioners inquire into the offender's mental condition and report back to the court on whether the offender is capable of controlling sexual instincts.

If the court is satisfied that the defendant is so incapable, the court may declare accordingly and direct that the offender be detained in custody until further order. However, by section 23(11), it is the Supreme Court, after having been moved by either the Crown or the offender, that has the power to discharge the order for detention. It is apparent that in South Australia due process in the release procedure has been ensured.

Tasmania

Section 329 of the Tasmanian Criminal Code provides for the indeterminate detention of 'dangerous criminals'. If an offender has at least one previous conviction 'involving an element of violence', then upon his second conviction of an offence 'involving an element of violence', the judge before whom he is convicted may declare that the offender is a dangerous criminal. The judge must be 'of the opinion' that the subject offence and the previous offence warrant such a declaration for the protection of the public. In determining whether the offender is a dangerous criminal, the judge may have regard to the nature and circumstances of the crimes, the antecedents or the character of the person, medical or other opinion and any other matter that the judge considers relevant. Upon being so satisfied, the judge is required to order that the person be detained during the Governor's Pleasure. It does not appear as though due process has any significant role in the decision to release an offender so declared.

A recent unreported decision of Green CJ in *R v. McCrossen* (Serial Number 2/1991; 18 January 1991) illustrates how widely the provisions of section 329 may be read. M. pleaded guilty to wilfully, and with intent thereby to intimidate (a female), did cause her to receive a letter threatening to kill her, contrary to section 162 of the Tasmanian Code. It was held that the making of a threat to kill with the intention of intimidating someone is capable of constituting a 'crime involving an element of violence' for the purposes of section 329. While the court considered *R v. Chester* ((1988) 36 A Crim R 382), that case was distinguished having regard to the different formulae set out in Western Australian Code section 662. Thus M., a 19-year-old with a criminal history which included five sets of offences involving violence, was detained during the Governor's Pleasure. At the time of writing, it does not appear as though an appeal has been heard. The evident lack of due process in reviewing either the imposition or continuity of detention, or in determining release from such a sentence, is most significant.

Victoria

It is understood that in Victoria there are no provisions dealing with habitual criminals or persons incapable of controlling their sexual instincts. However, the *Community Protection Act 1990* illustrates quite clearly the perceived need of a community to be protected from a particular person.
The purposes of the Act are to provide for the safety of members of the public and for the care or treatment and the management of that one individual. The Act specifically states in section 5(2) that the named offender 'must not be discharged or released from' detention except in accordance with an Order of the Supreme Court.

Section 8 provides that, if the Supreme Court is satisfied 'on the balance of probabilities' that this person 'is a serious risk to the safety of any member of the public' and is 'likely to commit any act of personal violence to another person', the Supreme Court may order that this person be placed in preventive detention. This person 'must not be discharged or released from preventive detention except in accordance with an Order of the Supreme Court' (section 12).

While it is apparent that due process is given the pivotal role in the imposition and discharge of the indeterminate sentence, the most disturbing feature of the legislation is that it has been specifically designed to restrain a single individual. Without going into the merits or otherwise of this particular case, as a general proposition, it appears unpalatable that legislation has to be designed to deal with an individual rather than an identifiable class of offender.

New South Wales

New South Wales appears to have very little by way of preventive detention provisions. The Habitual Criminals Act 1905 which did permit a court to impose an indeterminate sentence was repealed in 1957. Shortly put, the Habitual Criminals Act 1957 permits a judge to impose an additional sentence on a person found to be an habitual criminal. However, unique in Australia, the period of detention subsequent to the finding that an offender is an habitual criminal is confined to a period of not less than five years and no more than fourteen years. As the period is flexible and has a floor of five years, it cannot be described as an indeterminate sentence. In any event, inquiries revealed that, in common with habitual criminals provisions in Queensland, the Act is now effectively in disuse.

Reviewable Sentence Model

Having conducted that brief review of legislation across Australia, it is now intended to give a skeletal outline of a legislative scheme for a form of preventive detention, designed to balance competing interests of protection of society against the civil rights of the individual offender.

It is intended in the model to ensure due process at all levels of determination involving the imposition, continuity of, and release from, a reviewable sentence. It is not intended to echo the existing uncertain release mechanisms authorised under vague criteria which currently appears to apply in Queensland, Northern Territory, Western Australia and Tasmania.

The model seeks to draw into the release mechanism the best features of due process seen in South Australia's legislation and which is central to Victoria's Community Protection Act. It is suggested that the executive play no role in releasing an offender from a reviewable sentence.
The court, having imposed that sentence, should maintain scrutiny of it and retain the power to end the reviewable sentence. As noted earlier, the courts have had extensive experience in administering natural justice and in protecting individual rights, therefore it is proposed the executive no longer undertake the pivotal role in the release process. As the Queensland Attorney-General, the Honourable Dean Wells has said:

If the protection of society demands that dangerous prisoners be confined, so they should be, with the courts not the State—making the decision. The protection of society is an overriding consideration [emphasis added] (Courier Mail, 27 June 1991, p. 9).

In proposing the model, it is respectfully suggested that it replace existing provisions dealing with 'dangerous offenders', habitual criminals and persons adjudged incapable of controlling their sexual instincts.

There appear to be three significant points raised by the High Court in *R v. Chester* ((1988) 36 A Crim R 382) relevant to a model of reviewable sentence legislation. The first is that the court (Mason CJ., Brennan, Deane, Toohey and Gaudron JJ) considered (at 385) unless an offender had shown himself to constitute a danger to the public or that his release 'will expose the community to the real likelihood of violent harm or sexual offences, an order for his indefinite detention should not be made'. Thus the 'mere probability' that an offender will offend again is not enough to sustain an order for indeterminate detention.

Secondly, the High Court considered that the propensity of an offender to commit crimes not amounting to crimes of violence did not provide a sound basis for imposing an indeterminate sentence. The third point was that the court considered: 'The exercise of the power should be reserved for those very exceptional cases which do not attract the operation of 'habitual offenders or mental health legislation' and in which the sentencing judge is satisfied by acceptable evidence that the convicted person is, by reason of his antecedents, character, age, health or mental condition, the nature of the offence or any special circumstances, so likely to commit further crimes of violence (including sexual offences) that he constitutes a constant danger to the community.' The criteria therein embedded will be sought to be expressed in the proposed legislative model.

'Serious personal injury' offence

At the outset, it will be necessary to define the sort of offence/s, a conviction for which may render an offender liable to a reviewable sentence application. Part XXIV of the Canadian Criminal Code, section 752 provides one guide. The term 'serious personal injury offence' has been adopted herein, borrowed from Canada; but the formulation of a definition will doubtless vary across jurisdictions. For this paper, the following definition is advanced:

An indictable offence involving (i) the use or attempted use of violence against another person, or (ii) conduct endangering or likely to endanger
the life or safety of another person, and for which the offender may be sentenced to imprisonment for life.

In some jurisdictions, offences involving sexual misconduct do not carry a maximum penalty of life imprisonment, and it is suggested that consideration be given to specifically identifying offences to which the model may be applied.

**Application**

It is proposed the legislation would apply when any person is convicted of a 'serious personal injury offence'. However, whether the legislation should be capable of application after conviction for a single serious personal injury offence, or whether it should apply only if the offender has been previously convicted of serious personal injury offences, there appear to be equally compelling considerations. They may be summed in the question: should a reviewable sentence be capable of being imposed on a 'first offender' solely on the grounds that the serious personal injury offence for which the offender has been convicted discloses features which may indicate the offender is a constant threat to the community? *Contra:* should the offender have committed at least one previous serious personal injury offence before being placed in jeopardy of the legislation? The writer finds both merits and demerits in both propositions and thus here avoids the answer by leaving it open to be determined by any enacting legislature.

**Sentence and criterion**

The legislation would empower a court before whom the offender was convicted, instead of passing a fixed (or 'term') sentence of imprisonment, to impose the sentence of a reviewable period of imprisonment; which shall be reviewed each two years (or such lesser period by special application). The sole criterion for the imposition of the reviewable sentence should be that expressed in *R v. Chester* ((1988) 36 A Crim R 382): '. . . whether the (offender) constituted a constant threat to the community' (p. 385); applied by the Western Australian Court of Criminal Appeal in *R v. Gooch* ([1989] 43 A Crim R 382).

**Imposition**

The logic of a reviewable sentence effectively compels such a sentence to be imposed at the outset, rather than being imposed after an offender has completed—or nearly completed—a proportionate term sentence. It may have been noted from the remarks of Mr Justice Dean (*R v. Veen (No. 2)* (1988) 164 CLR 465 at 495) that His Honour appeared to imply that the statutory system of preventative restraint he contemplated could be a type which would be imposed at the end of what represents a proper punitive sentence, whether or not that is what His Honour thought appropriate. This paper contends that a reviewable sentence should be imposed immediately after conviction, in lieu of a proportionate term sentence, rather than after the expiry of such a term sentence.
That proposition is based on three main considerations. The first is that it appears unfair to sentence an offender to a proportionate sentence and then, toward the completion of that term, reserve the right to further retain the prisoner beyond the term served. Such a regime denies the prisoner from knowing, at the outset of his/her detention, the full basis for the deprivation of liberty and appears to contain a degree of intellectual dishonesty.

Secondly, the system of reviewable sentences herein contemplated provides a periodic review from the commencement of imprisonment, whereas a proportionate term sentence contains no judicially reviewable mechanism during its currency, thus denying an early review of the continuity of the sentence in the light of any unchanged circumstances. Finally, even if it was thought any injustice may flow from the imposition of a reviewable sentence in lieu of a term sentence, the suggested model compensates for any perceived injustice by effectively back-dating the substituted term sentence when a court is no longer satisfied the prisoner is a constant danger to the community.

Procedure

In order to prevent 'ambush' of the offender, two strategies are proposed:

- if the prosecution seeks to invoke the legislation, the prosecution must first obtain the written permission of the Attorney-General. The court must stay further hearing of the application for at least twenty-eight days;
- if the sentencing judge considers the legislation may be applicable in the interests of community safety, the judge must notify the parties and again be prohibited from further hearing the matter for at least twenty-eight days.

Relevant conditions

It may be desirable for the model to set out a number of issues which must be taken into account by the judge upon hearing a resumed application on whether the offender is a constant danger to the community:

- the exceptional nature of the offence or offences;
- the antecedents, age and character of the offender;
- any medical, psychiatric, psychological, welfare, social, anthropological, prison or other relevant reports in relation to the offender;
- the risk of physical harm to members of the public in general if a sentence proportionate to the offence were to be imposed;
• the need to protect the members of the community in general from the risk referred to above; or

• any other matter that the court deems appropriate.

Evidence

The model should include a provision that the court shall hear evidence called by either party; and the ordinary rules of evidence should apply.

Reasons

Upon imposition of a reviewable sentence, the court should be compelled to publish specific reasons upon which the reviewable sentence was based, such publication of reasons should be made at the time of passing the reviewable sentence.

Onus and standard of proof

In contradistinction to the provisions contained in the Northern Territory, it is suggested that the model indicate clearly that the onus of proving that the offender is a constant danger to the community will at all times remain on the prosecution. The standard of proof applicable may be that the court is 'satisfied' that the offender is a constant danger to the community. Having regard to the judicial flexibility of 'satisfied' as a term, the standard of proof may perhaps be better described as being higher than the 'balance of probabilities', but less than 'beyond a reasonable doubt'. See, for example, New South Wales Bar Association v. Livesey ([1982] 2 NSWLR 240).

Review

It is suggested that there be an automatic review of the continuation of the sentence, by the sentencing court, within a period of not more than two years from the date upon which the reviewable sentence was imposed. Periodic reviews of the continuation of the reviewable sentence at periods of no more than two years thereafter should be required. The insertion of such provision is recommended to ensure that there is regular assessment of the continuing danger (or otherwise) to the community. It is thought that a period of two years may be appropriate, having regard to the need to balance the individual rights of the offender with practical considerations of court administrations.

It is also proposed that the model contain a provision permitting the two year period to be abridged, upon application by the offender, in cases of exceptional circumstances.

It is proposed that the model will effectively compel the sentencing court, upon a biennial review of the continued detention of the prisoner, to vacate the reviewable sentence and substitute a fixed sentence unless the court is satisfied that the offender is still a constant and continuing danger to the community. The onus of proof, the standard of proof, the criteria and the rules of evidence will be the same in any biennial review as those to be
applied at the hearing of the initial application. To ensure that the court, on its biennial review, is provided with up to date information, it is proposed that the model contain a provision requiring the prosecuting authority, and enabling the offender, to provide the court with reports which must cover the period which has elapsed since the last review.

Release

Upon the hearing of a biennial review, where a court is not satisfied that the offender constitutes a constant and continuing danger to the community, it is proposed the court must order that the reviewable sentence be vacated and that the offender shall be sentenced to a fixed sentence.

It is also recommended a provision be inserted to provide that, upon a court substituting a fixed sentence for a reviewable sentence, that the fixed sentence be deemed to have been commenced upon the date upon which the reviewable sentence was first imposed.

Appeals

It is suggested that the model provide for substantive rights of appeal, not only from the imposition of the original reviewable sentence, but also upon the biennial review, to the Court of Criminal Appeal. The appeal should be available to both the prosecution and the offender.

It will be seen that the skeletal outline of the model proposed ensures that due process, administered by a court of appropriate jurisdiction, is central to the scheme. While the model purports to permit both reports and verbal evidence to be given by any class of expert, the ultimate decision is removed from non-accountable bodies such as parole boards or other committees of experts, and furthermore avoids granting to the executive the decision to release an offender.

Conclusion

In conclusion, while it is acknowledged that there exists substantial and grave reservations in legal, medical, psychiatric and other disciplines on both the efficacy and civil liberty aspects of indeterminate sentences, it is suggested that the model legislation providing for reviewable sentences avoids most of the dangers of existing systems, ensures that the rights of the individual offender are protected by due process and goes some distance to meeting public perceptions that society must be protected from the depredations of dangerous and violent offenders.

References
