IMPRISONMENT AS A LAST RESORT: SECTION 19A OF THE CRIMINAL CODE AND NON-PECUNIARY ALTERNATIVES TO IMPRISONMENT

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In recent years both the legislature and the courts have espoused the policy of imprisonment as a last resort. This article examines the impact of section 19A of the Criminal Code 1913 (WA) before exploring the rationale and use of probation, community service, discharges and bonds. From a detailed analysis of legislative changes and recent case law, the author develops criticisms of the legislature for failing to provide either a coherent and consistent statutory framework or the mechanisms for properly implementing the policy of section 19A. It is argued that the Supreme Court has an important role to play in enhancing the use of alternatives to custody, particularly community service. Practical suggestions are made as to how the Supreme Court may seek to ensure the maximisation of this and other options.

Numerous factors contribute to Western Australia's excessive imprisonment rate.[1] Some might argue that prison sentences are too long but the majority of sentences of 12 months or more are very substantially reduced by the operation of the "back door mechanisms" of parole and remission, and longer sentences may be even further reduced by Community Based Work Release.[2] Furthermore, official statistics reveal particularly acute pressure from short term sentences. From the mid 1980's until 1990-1991 around 60 per cent of prisoners received into the prison system were serving less than three months and around 75 per cent were serving six months or less. Primarily as a result of a decline in the number of default terms, the figures

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1. For a recent discussion of rates of imprisonment see R Harding "The Excessive Scale of Imprisonment in Western Australia: The Systemic Causes and some Proposed Solutions" (1992) 22 UWAL Rev 72.
2. For a discussion of parole see N Morgan "Parole and Sentencing in Western Australia" (1992) 22 UWAL Rev 94.

for 1991-1992 were around 50 per cent and 63 per cent respectively.[3] In terms of alternatives, the Court of Criminal Appeal has increasingly emphasised the punitive and deterrent value of the fine[4] and in 1989 the legislature introduced Work and Development Orders to allow offenders to "work off" a fine. However, the rate of imprisonment for default remains high; indeed the number of fine defaulters as a percentage of all sentenced prisoners received into the Western Australian prison system increased from around 45 per cent in 1988-1989 to 53.4 per cent in 1990-1991.[5] Although the figures for 1991-1992 show an encouraging decline to 44 per cent,[6] this is still high and, in the longer term, serious attention should be given to the introduction of a unit fine system in which the initial level of the fine is more carefully adjusted to the offender's means, rather than simply developing alternative enforcement mechanisms.[7] There is also a well-charted need to develop new alternatives, with input from Aboriginal communities.[8] In 1991, a Joint Select Committee of the Western Australian Parliament even recommended the abolition of prison sentences of less than three months but made few concrete suggestions as to how this was to be achieved.[9] Whether this is done or not, it is important to maximise the use of alternatives both to immediate custody and to imposing fines which all too often result in imprisonment for default.

After examining the impact of section 19A of the Criminal Code, which provides that imprisonment is the option of last resort, this article explores the scope of existing non-pecuniary dispositions such as community service, bonds and discharges and evaluates the scope for enhancing their use.

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3. These figures are calculated from the WA Dept of Corrective Services *Annual Reports* (Perth, 1985/1986–1991/1992).
4. *James* (1985) 14 A Crim R 364; *Wilhelm* (1988) 39 A Crim R 469; *Sgroi* (1989) 40 A Crim R 197; *Lloyd* (1991) 53 A Crim R 198.
5. Figures calculated from the WA Dept of Corrective Services *Annual Reports* (Perth, 1990/1991 & 1991/1992).
6. The percentage figures are almost equal for Aboriginal and non-Aboriginal offenders.
7. In late 1992 the Labor government introduced amendments to the Justices Act 1902 (WA) to reduce reliance on Work and Development Orders by those who could afford to pay the fine. The prosecution may request a warrant of execution authorising the seizure and sale of assets to meet the fine (id, ss 158 & 169–171AA).
8. See M Wilkie *Aboriginal Justice Programs in WA* Res Rep 5 (Perth: UWA Crime Research Centre, 1991); see also WA Parliament *Report of the Joint Select Committee on Parole* (Perth, 1991) (J Halden, Chair). Malcolm CJ lent further support in *R v S (No 2) (A Child)* (1992) 7 WAR 434, 448.
9. Ibid.

A FRAMEWORK FOR ANALYSIS

In his seminal monograph, *Discretionary Justice*, Professor K C Davis wrote, of administrative bodies, that:

> When [discretion] is too broad, justice may suffer from arbitrariness or inequality. When it is too narrow, justice may suffer from insufficient individualising.[10]

To Davis, justice requires a careful balance between rules and discretion, and he convincingly refutes the view that the "rule of law" requires the elimination of discretion in favour of fixed rules.[11] His arguments have particular pertinence to the sentencing debate. For example, the mandatory nature of sentences under the Crime (Serious and Repeat Offenders) Sentencing Act 1992 (WA) permits "insufficient individualising".[12] On the other hand, since consistency is a fundamental requirement of justice,[13] we should, in Davis' terms, aim at the elimination of *unnecessary* discretionary power and the "better control of necessary discretionary power."[14] "Unnecessary" discretion is limited by being "*confined*"; the parameters of the field of discretion must be clearly set in advance. To fulfil this crucial role, sentencing legislation should satisfy certain fundamental criteria; it should be written in such a manner that the basic principles are both clear (they can be readily identified) and consistent (they are followed through logically). In the context of non-custodial sentences, legislation should set clear and consistent ground rules on matters such as time limits, maximum penalties, monetary limits and, in general terms, the use of conditions. Beyond this, the courts should further confine their own discretion by adjudicating on specific issues which cannot be determined in advance, such as the appropriateness of specific conditions in a probation order.

Once discretion has been properly confined, the "necessary" discretion which remains must be regulated. Davis suggests that it should first be "structured", inter alia, by means of openly stated general policies and reasons for particular decisions. Secondly, the exercise of discretion should be "checked" by appropriate processes of appeal or review. We are moving

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10. K C Davis *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State UP, 1969) 52.
11. Id, ch II.
12. See A Ashworth "Ways Out of the Abyss? Reflections on Punishment in Western Australia" (1992) 22 UWAL Rev 257, esp 264; Morgan supra n 2, 117–120; M Wilkie "Crime (Serious and Repeat Offenders) Sentencing Act 1992: A Human Rights Perspective" (1992) 22 UWAL Rev 187.
13. See eg *Lowe* (1984) 58 ALJR 414; Mason J, 415.
14. Supra n 10, 55.

in Western Australia to a more effective structuring and checking of sentencing discretion. In recent years the Court of Criminal Appeal has developed an increasingly sophisticated sentencing jurisprudence on matters of general principle[15] and also with respect to particular dispositions[16] and particular types of offences.[17] In addition, there are incipient "guideline judgments".[18] Although these are generally phrased — as if they were simply descriptive of existing practice — in terms of "the range of sentences commonly imposed", they are obviously also intended to provide guidance for future cases and their existence makes it more likely that leave to appeal will be granted where there has been an apparent departure from the "commonly imposed range". New procedures have also been introduced for appeals from courts of summary jurisdiction. In place of rather convoluted procedures, which generated little caselaw on sentencing,[19] the Justices Act 1902 (WA) now provides for a general right of appeal on the basis, inter alia, that the penalty was "inadequate or excessive."[20] These changes should generate more sentencing appeals involving matters of daily relevance to sentencers in courts of summary jurisdiction. It is to be hoped that this will, in due course, include more detailed guidelines from the Supreme Court on the use of non-custodial options.[21]

However, if the right balance is to be struck, it is important that the roles of all participants are fully respected. The legislature, in rushing through the Crime (Serious and Repeat Offenders) Sentencing Act 1992 (WA) simply did not wait for the Court of Criminal Appeal to decide some pending Crown

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15. Eg *Rogers & Murray* (1989) 44 A Crim R 301 and *Juli* (1990) 50 A Crim R 31 on sentencing Aboriginal offenders; and *Punch* (unreported) WA Court of Criminal Appeal 31 May 1993 no 930307 on the question of whether sentencing involves a "two stage approach" or is a matter of "instinctive synthesis"; *Jarvis* (unreported) WA Court of Criminal Appeal 14 June 1993 no 930341 and *Bowman* (unreported) WA Court of Criminal Appeal 18 June 1993 no 930356, on concurrent and cumulative sentences.
16. Eg *McHutchison* (1990) 48 A Crim R 179 (on binding over).
17. For examples on manslaughter see *Wicks* (1989) 44 A Crim R 147; *McKenna* (1992) 7 WAR 455 & *S (No 2) (A Child)* supra n 8, discussed by N Morgan (1993) 17 Crim LJ 120–129.
18. Eg *Podirsky* (1989) 43 A Crim R 404 (on sexual assaults) and *Cheshire* (unreported) WA Court of Criminal Appeal 7 Nov 1989 no 7924 (on breaking and entering), discussed in N Morgan "McHutchison" (1991) 15 Crim LJ 299, 304.
19. See Harding supra n 1, 80–81.
20. Justices Act 1902 (WA) s 186. Under s 187 leave to appeal must be granted unless the judge who hears the application considers the case to be frivolous or vexatious or that it raises no arguable case and there is an appeal against a refusal to grant leave.
21. This question is further explored below at infra pp 307–309 in the context of community service orders.

appeals and to perform, as it duly did,[22] its checking role. Furthermore, the processes of structuring and checking, however effective they may be, come only after sentencing discretion has been clearly and properly *confined*. This is initially the responsibility of the legislature, but the following analysis suggests that the current legislative structure leaves much to be desired.

CRIMINAL CODE 1913 (WA) SECTION 19A

Introduced in 1988, section 19A(1) provides that:

> Where a person is convicted of an offence punishable by imprisonment and the court has an option whether or not to imprison the offender the court shall consider -
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> (a) the seriousness of the offence;
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> (aa) the protection of the community;
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> (b) the circumstances of the commission of the offence;
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> (c) the circumstances personal to the offender; and
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> (d) any special circumstances of the case,
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> and shall not imprison the offender unless it considers that no other form of punishment or disposition available to the court in the case is appropriate.

Some would regard section 19A as unnecessary, or even undesirable, on the grounds that it restates the obvious.[23] However, it is submitted that there is nothing wrong in principle (constitutionally[24] or otherwise) with the legislature emphasising the proper role of imprisonment. The more damning criticism is the *form* of section 19A. The first point is that it lacks any clear statement of the over-riding purpose of sentencing and represents a "smorgasbord" of vague and competing principles.[25] Paragraphs (a) and (b) reflect offence seriousness or desert; (aa), inserted in 1992, involves incapacitation and deterrence; (c) appears to be primarily about rehabilitation; and (d) is a catch all, though, given the breadth and flexibility of the other subsections it is far from clear that it was needed.

However, the problems with section 19A run significantly deeper. At a time when the High Court and the Court of Criminal Appeal have developed increasingly sophisticated notions of proportionality,[26] legislative intent is

22. See esp *McKenna & S (No 2) (A Child)* supra n 17.
23. The basic principle had already been pronounced in cases such as *James* supra n 4; *Duncan* (1983) 9 A Crim R 354 and *Morgan* (1983) 9 A Crim R 289. In *Skipper* (1992) 64 A Crim R 260, the WA Court of Criminal Appeal confirmed that s 19A reflected the existing position.
24. *Palling v Corfield* (1970) 123 CLR 52, esp Barwick CJ, 65.
25. See Ashworth supra n 12.
26. See *Wicks* supra n 17 for a discussion of this principle by the WA Court of Criminal

confused and shows little understanding of and sensitivity towards practical sentencing problems.[27] The factors in section 19A are presumably set out in some order of priority; but the seriousness of an offence (factor (a)) cannot be properly determined except by reference to "the circumstances of its commission" (factor (b)).[28] It is nonsensical to have interposed the protection of the community ((aa)) and sentencers will simply be unable to treat the factors in the legislature's order of priority. More than this, they may be hindered by the constraints of the legislation in their own development of principle. Technically, section 19A governs only the decision to imprison but this decision should not proceed on different considerations from those which apply in determining the duration of a custodial sentence. In determining duration it is well established that "a sentence should not be increased beyond what is proportionate to the crime merely to extend the period of protection of society";[29] to afford "protection of the community" priority over consideration of the circumstances of the commission of the offence would clearly violate this principle.

Coherence and the consistent application of principle at interdependent decision-making stages are therefore hindered rather than enhanced by section 19A; designed to regulate sentencing discretion, it ultimately leaves it more vague, less amenable to judicial structuring and subject to political idiosyncrasies. It is hardly surprising that the substantial number of cases which have discussed section 19A have added little to the jurisprudence on the "in/out line".[30] As Professor Andrew Ashworth discussed in a previous issue of *The Review*, sentencing reforms in other jurisdictions have emphasised proportionality as the over-riding principle.[31] As part of this, imprisonment should only be imposed where the seriousness of the present offence requires it. A clear legislative statement of such basic principle is sadly lacking in

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Appeal. The major High Court cases are *Veen [No 1]* (1979) 143 CLR 458; *Veen [No 2]* (1988) 164 CLR 465; *Walden v Hensler* (1987) 163 CLR 561; *Chester* (1988) 165 CLR 611; *Baumer* (1988) 166 CLR 51.

27. Interestingly, in *R v T (A Child)* (unreported) WA Court of Criminal Appeal 10 June 1993 no 930327; Murray J expressed similar sentiments — albeit in more guarded terms — in respect of the guidelines for sentencing certain juveniles which are set out in schedule 3 of the Crime (Serious and Repeat Offenders) Sentencing Act 1992 (WA).

28. See *Walden v Hensler* supra n 26 where the High Court rejected the view that the seriousness of offences could be determined by reference to statutory maxima; infra p 311.

29. *Veen [No 2]* supra n 26, Mason CJ, Brennan, Dawson and Toohey JJ, 472, explaining *Veen [No 1]* supra n 26.

30. See eg *Papworth & Papworth* (1988) 36 A Crim R 24; *O'Connor* (1989) 41 A Crim R 360; *Nevermann* (1989) 43 A Crim R 347; *Lloyd* supra n 4.

31. Supra n 12, 265–269.

Western Australia.

Section 19A also now requires that in the case of sentences of imprisonment of less than six months the court must generally give written reasons why no other form of punishment or disposition was appropriate.[32] In theory, this suggests that there may be more thorough structuring of the decision to imprison and greater checking by appellate review. In practice, the section may prove of limited effect. To some extent it is weakened because a failure to comply with section 19A does not invalidate the sentencing decision.[33] More fundamentally, it will not be difficult for a sentencer to draw out a reason for imprisonment from the broad wording of section 19A.

PROBATION AND COMMUNITY SERVICE

The role of probation has been the subject of vigorous debate in recent years but it was conceptualised in traditional terms in *Wingo*[34] as "rehabilitation through supervision". The maximum probation period is five years[35] but such long terms are rare as it is generally thought that the benefits of supervision diminish if extended too long. The maximum should be reduced to two years, in line with the normal maximum parole period.

Courts may wish to impose conditions to "toughen up" the traditional requirements of probation. There is express statutory authority for conditions of residence in an institution or for medical, psychiatric or psychological treatment.[36] In other respects courts have a virtually unfettered discretion to impose "such requirements as the court ... considers necessary for securing the good conduct of the probationer or for preventing a repetition by him of the same offence or other offences."[37] Although the use of conditions has not generated significant case law to date[38] it is submitted that certain inherent

32. Criminal Code 1913 (WA) s 19A(1a), introduced by Criminal Law Amendment Act (No 2) 1992 (WA). The only exceptions to the duty to give reasons are cases of cumulative sentences totalling more than 6 months or prison offences under the Prisons Act 1981 (WA). Previously the duty to give written reasons for imprisonment had applied only to Courts of Petty Sessions (supra n 20 s 150A).
33. Id, s 19A(2).
34. (Unreported) WA Court of Criminal Appeal 2 May 1990 no 8318.
35. Offenders Community Corrections Act 1963 (WA) s 9(1).
36. Id, s 9(6)(a) & (7).
37. Id, s 9(6).
38. The procedural hurdles which faced an appeal from a court of summary jurisdiction (supra n 19) were compounded by the fact that there was at one time no right of appeal by an accused against a probation order. The rationale was that probation was not a sentence and that the offender had consented to the order. The defendant can now appeal; supra n 20

limitations apply. First, since probation orders are made "instead of sentencing" the offender,[39] and for rehabilitative purposes, conditions should not be imposed which amount in effect to the imposition of a "sentence"[40] or which are incompatible with rehabilitative objectives. Some other considerations arise from the South Australian case of *Temby v Schultze*[41] where a term of imprisonment was suspended on condition that the female offender, who had been convicted of assaulting her two year old daughter, did not supervise anyone else's child until she had taken a course in parenting. Olsson J upheld the woman's appeal, holding that where such unusual conditions were imposed, two requirements had to be satisfied. First, as a matter of natural justice, the sentencer should indicate what was intended so that counsel could make appropriate submissions. Secondly, "it is vital that any condition be expressed in unambiguous and definitive language, so that the person submitting to it is left in no doubt as to what are the precise obligations."[42] These procedural safeguards and substantive limitations are equally applicable to probation orders — and indeed to other orders — and would preclude, for example, a condition to "refrain from alcohol abuse"[43] on the basis of imprecision.

The Community Service Order ("CSO"), which was introduced in 1976, is potentially the most important addition to the sentencer's armoury in recent years. It appeals to those advocating alternatives to imprisonment on humanitarian or economic grounds and has the added attraction of being more "punitive" than other non-custodial options and of containing an element of reparation to the community. Criticism that community service is suspect as lacking a single clear aim can be overstated because the order is, in a crucial sense, unique. All too often the word "retribution" is treated synonymously with "revenge" when literally it means to "give back" or repay.[44] Community service is the only general sentencing option which casts the offender to any significant degree in the role of an active giver rather than the passive recipient of society's wrath.[45]

s 185; supra n 32 s 668(1a)(b) & s 703.

39. Supra n 35, s 9(1).

40. See *Cullen v Rogers* [1982] 1 WLR 729 where the House of Lords held that it was not permissible, in the absence of express statutory authorisation, to impose a condition requiring attendance at a "Day Centre".

41. (1991) 57 A Crim R 284.

42. Id, 287.

43. Such conditions have occasionally been imposed in parole orders but parole orders should also comply with the same criteria.

44. *Oxford Latin Dictionary* definition of "retribuere".

45. A clear recognition of this uniqueness also has ramifications for the implementation of

The legislature, and particularly the courts, have a role to play in enhancing the use of community service. By statute, CSO's, like probation, are imposed "instead of sentencing" the offender.[46] Yet to regard community service as anything other than a sentence seriously undermines the commitments which may be involved in completing its requirements. The maximum period of community service is 240 hours, which must be completed within a year.[47] This equates to 30 days, or around six weeks, of full-time work, a serious imposition, especially on the leisure time of offenders who are already in work. Prima facie there is a strong case for the legislature to recognise community service as a sentence but this would dramatically impact on current sentencing practice. The vast majority of CSO's are combined with probation ("combined orders"). In 1990, probation accounted for 27.5 per cent of the non-custodial dispositions other than fines imposed by the higher courts, combined orders accounted for around 60 per cent and community service alone for just 6.3 per cent.[48] If community service were to be regarded as a "sentence" but probation remained an order "in lieu of sentence", a combined order could not be made in respect of a single offence. There are certain advantages in combined orders which emphasise "rehabilitation" as well as "repayment" to the community. However, community service and probation are so different, both conceptually and in terms of the obligations they place on offenders, that they should not be regarded as inseparable Siamese twins. Community service should be designated a sentence, both to recognise the reality of the order and to stress its use in lieu of imprisonment. In the absence of further legislative amendment, combined orders would not then be available in respect of single offences but there is no reason in principle why separate probation and community service orders could not be made in appropriate cases in respect of multiple offences.[49] Furthermore, courts may already require part of the community service obligations to be met by attendance at educational courses.[50]

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community service; it should not involve demeaning, pointless or punitive labour. It may also be noted that this conceptualisation accords with the movement within the new Ministry of Justice in WA to regarding the "offender as citizen" with a duty to take responsibility for his/her offending behaviour.

46. Supra n 35, s 20B(1).
47. Id, s 20E.
48. R Broadhurst, A Ferrante & N Susilo *Crime & Justice Statistics for WA: 1990* Stat Rep 1990(2) (Perth: UWA Crime Research Centre, 1991). Unfortunately the same breakdown is not available in the later reports from the same source.
49. This has long been the position in England: see *Harkess* (1990) 12 Cr App R (S) 366.
50. Supra n 35 s 20A(6a) & (6b).

Even without legislative reform, the Supreme Court and Court of Criminal Appeal should take a proactive checking role, both by emphasising the potential of community service as an alternative to custody in its own right and by promulgating general guidelines on its use and on the appropriate duration of orders. Community service in Western Australia was, to some extent, modelled on the English experience, but in England the order constitutes a sentence and the evidence suggests very different perceptions of its role. The English Court of Appeal, working from the same maximum of 240 hours, has clearly identified a dual role for community service. "Short" periods of community service are considered appropriate in cases where imprisonment is not merited and longer terms where it is used in lieu of custody.[51] The elastic terms "short" and "long" have been further refined. In several cases the Court has imposed 60 hours where immediate imprisonment was not justified.[52] It has used longer orders, generally of 150 hours upwards, for relatively serious offences otherwise deserving of imprisonment. In *Lawrence*,[53] concurrent sentences of 18 months' imprisonment were imposed on counts of taking a motor vehicle and burglary. In the circumstances there was:

> [N]o doubt that the offence ... was serious.... It is possible that the length of the custodial sentence was a little high. *It may be that 9 to 12 months would have been sufficient, but no-one could have complained at that sentence being imposed apart from the possibility of a community service order....*[54]

The Court held that 190 hours of community service would have been the appropriate sentence but reduced this to 150 hours to take account of time already spent in custody. In *West*,[55] a truck driver who lost his temper at another driver was sentenced to six months' imprisonment for criminal damage and assault. The Court substituted 150 hours of community service with the striking homily that "it is abundantly clear to this Court that his conduct merits punishment. He should not be allowed to get away with such outrageous behaviour."[56]

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51. *Lawrence* (1982) 4 Cr App R (S) 69.
52. *Davies* (1984) 6 Cr App R (S) 224; *Hamilton* (1988) 10 Cr App R (S) 383; *Barley* (1989) 11 Cr App R (S) 158; and *Zaman* (1991) 12 Cr App R (S) 657. However, there have been other cases which seem to have adopted a higher "tariff" for cases which do not deserve imprisonment, notably *Cordner* (1992) 13 Cr App R (S) 570 where 100 hours was upheld for a very trivial offence.
53. Supra n 51.
54. Id, Lord Lane CJ, 70 (emphasis added).
55. (1983) 5 Cr App R (S) 206.
56. Id, 207.

Reflecting its statutory basis as a sentence, community service has therefore developed in England as an order quite distinct from probation. Even in the case of multiple offences the Court of Appeal has sounded a note of considerable caution about combining probation and community service.[57] Orders of 150 hours upwards apparently equate to prison sentences of 6-12 months and short orders are used in lieu of non-custodial options. In Western Australia the very large number of short prison sentences and the almost invariable use of CSO's in combination with probation "instead of sentencing" indicate that it is not performing the same role. It is striking, too, that the Court of Criminal Appeal has made virtually no reference to community service in the cases on section 19A.[58] It is submitted, with respect, that the time has come for the Supreme Court and Court of Criminal Appeal in Western Australia to redirect community service as a positive and punitive alternative to immediate imprisonment and, in appropriate cases, to the fine. Beyond general guidelines on the use and duration of orders, there will be other issues of principle to confront. For example, does "proportionality" require "like" offenders to undertake the same number of hours, or does "equality of impact"[59] suggest that the unemployed — who have more "free time" on their hands — should receive longer periods than the employed? The answers to this sort of question will be open to criticism, whichever approach is adopted; but the present lack of guidance almost certainly results in unequal treatment from variations between sentencers. Two further benefits may result from the wider use of community service in its own right. First, the resources of community corrections personnel may be less thinly stretched than they are by the supervisory requirements of combined orders. Secondly, offenders who successfully complete community service will thereby have worked off the sentence and will not be subject to probation supervision; this may reduce the number of breaches resulting in imprisonment.

THE FIRST OFFENDER SECTION

Section 669 of the Criminal Code 1913 (WA) gives courts the discretion to exercise leniency towards a "first offender" provided that the offence in question is not punishable with more than three years' imprisonment. There are three options; dismissal without proceeding to conviction ("dismissal"),

57. *Harkess* supra n 49.

58. See eg *McHutchison* supra n 16, discussed in detail below, where the Court of Criminal Appeal rejected bonds and probation but made no reference to community service.

59. See A Ashworth *Sentencing & Criminal Justice* (London: Weidenfeld & Nicolson, 1992) 78 & 179–182.

absolute discharge, and a discharge conditional on entering a recognisance under section 19(6), (7) or (8) (a "conditional discharge"). A "first offender" is defined more restrictively for the dismissal option as opposed to the conviction followed by discharge.[60]

Although the influential Murray Report of 1983[61] recommended only a few "tidying up" amendments to section 669, it appears ripe for more radical surgery. Conditional discharges are considered below in the context of bonds.[62] The following changes should be considered in respect of the dismissal and absolute discharge. First, the options should not be considered appropriate only to "first offenders", however that phrase is defined. As the High Court has stated, the primary consideration should be offence seriousness rather than prior record;[63] if an offence is trivial, then dismissal or an absolute discharge may well be appropriate irrespective of the person's antecedents. At one time "first offenders" were defined as those with no convictions other than by the Children's Court. In order to avoid this restriction, Courts of Petty Sessions developed the practice of "convicting and cautioning" offenders guilty of trivial offences. This practice was halted by *Walsh v Giumelli*[64] where the Full Court held that Courts of Petty Sessions have no inherent jurisdiction simply to convict and refrain from imposing punishment; their powers are derived only from statute. In *Sassella v Jones & Berry*[65] Burt J, as he then was, reluctantly held that a magistrate therefore had no power to discharge two young men with minor prior records for a "silly" offence involving stealing a potted wattle tree. The WA Law Reform Commission reported as a matter of urgency and recommended the abolition of the first offender limitation.[66] However, the legislation which followed simply effected a limited broadening of the definition of "first offender". In the case of dismissals, Children's Court offences may now be ignored and in the case of discharges both Children's Court offences and certain minor convictions are disregarded. The better approach would be to remove the "first offender" limitation and to reorientate the section to give primacy to triviality.[67]

60. Supra n 32, s 669(1a) & (1b).
61. WA A-G's Dept *The Criminal Code: A General Review* (Perth, 1983).
62. Infra pp 312–313.
63. See *Baumer* supra n 26.
64. [1975] WAR 114.
65. [1976] WAR 207.
66. WA Law Reform Commission Project No 60 *Report on Alternatives to Cautions* (Perth, 1975).
67. Removing the first offender limitation would, as the section is currently worded, leave a general discretion to the effect that the court shall have regard to the "youth, character, or antecedents of the offender, or the trivial nature of the offence, or to any extenuating

A second major limitation is that section 669 applies only to offences which are not punishable with more than three years' imprisonment. This embodies a fundamental misconception that the statutory maximum is a reliable guide for assessing offence seriousness. As Brennan J explained in *Walden v Hensler*:[68]

> [T]riviality cannot be ascertained by the statutory maximum ... Triviality must be ascertained by reference to the conduct which constitutes the offence for which the offender is liable to be convicted and to the actual circumstances in which the offence is committed.[69]

The problem of the three year cut off has been exacerbated by recent legislative reforms which have tended to increase maximum penalties above the three year threshold. Until 1985, assaults occasioning bodily harm and assaults on public officers were potentially subject to section 669. Now even "negligent acts causing bodily harm" under section 306 are outside its scope.[70] Both stealing and wilful damage formerly carried a general maximum penalty of three years, with enhanced maxima for "special cases". As part of the rationalisation of the Code the general maxima have been increased and the "special cases" have been either repealed (criminal damage) or reduced in number (stealing).[71] However, another development is the increasing provision of lower maximum penalties for indictable offences which are dealt with summarily. For example, the summary conviction penalty for stealing is two years as opposed to the normal maximum of seven years.[72] A threshold question is whether, in such cases, a court of summary jurisdiction can use section 669 or whether the three year limitation in section 669 refers to the general statutory maximum. In *Ross v Baker*,[73] a first offender was charged with stealing a wallet valued at $20.00 from a Target store. She was dealt with summarily at the election of the prosecution[74] and was fined $150

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circumstances under which the offence was committed." This language could be retained with a reversal of the order to make "triviality" the primary consideration.

68. Supra n 26.
69. Id, 653. The same view was confirmed in *Beahan v McDermott* (unreported) WA Supreme Court 24 April 1991 no 8830.
70. The maximum penalty for such offences having been increased from 2 to 5 years by the Criminal Law Amendment Act (No 2) supra n 32, s 6.
71. By Act No 101 of 1990.
72. Ss 378 & 426; other examples are also s 317 (assaults occasioning bodily harm) and s 318 (assaults on public officers).
73. (Unreported) WA Supreme Court 31 March 1992 no 920180.
74. Under the terms of Criminal Code 1913 (WA), s 426(2a), which was inserted in 1991 with no public debate, the prosecution has the power to request that minor stealing charges be dealt with summarily; if that request is made, the charge must be so dealt with.

with costs. On appeal it was surprisingly assumed by counsel, including the Crown, that section 669 could apply. Murray J quite rightly questioned this assumption but proceeded on the basis that section 669 could apply, ultimately upholding the fine. However, if the reasoning of the South Australian case of *Weetra v Beshara*[75] is followed, section 669 could not apply; put simply, the offence is "punishable" with more than three years' imprisonment notwithstanding the limitation on summary penalty. This interpretation is further supported by the special provisions relating to criminal damage. When dealt with summarily, such offences carry a maximum of two years as opposed to 10 years on indictment. However, magistrates have been given an express power under section 467 to grant a discharge (not a dismissal) in such cases, a power which would clearly be unnecessary if section 669 applied.

Section 669 proceeds on fundamentally different assumptions from related powers. The crucial issue in section 467 is triviality and the section is not restricted to first offenders. The same is true of section 137 of the Police Act 1892 (WA) — a power which appears limited to Police Act offences — under which Justices are not bound to convict if the offence is "of so trivial a nature as not to merit punishment." The problems in this area are further compounded by *Walsh v Giumelli* where the Full Court stated that the jurisdiction of Courts of Petty Sessions "is statutory, and they have no inherent jurisdiction such as is possessed by superior courts of unlimited jurisdiction."[76] This strongly implies that superior courts have the power to "convict and caution" offenders. An inherent power of this sort — if it exists — could by-pass the limitations in section 669.[77]

There is, therefore, no consistency in the legislative objectives of discharges and related dispositions. The legislative provisions should be urgently rationalised to provide all courts with the power to dismiss a charge without proceeding to conviction or to grant an absolute discharge. These powers should not be restricted either to "first offenders" or to limited categories of offence and should be firmly based upon triviality. Broad powers of this sort would also remove the rather galling prospect of an undefined inherent power.

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75. (1987) 29 A Crim R 407, 416. This involved the interpretation of the Crimes Act 1914 (Cth).

76. Supra n 64, 116.

77. The Murray Report supra n 61, 442 was of the view that s 669 was intended to "fulfil the role of providing for all courts the circumstances in which they might, despite a plea or finding of guilt, decline to punish." The Report did not mention the possibility of an inherent jurisdiction. On the inherent powers of the court see *McHutchison* supra n 16, discussed infra p 313.

BONDS AND CONDITIONAL DISCHARGES

Sections 19(6) and (7) of the Criminal Code 1913 (WA) deal with "good behaviour bonds" and section 19(8) with bonds to "come up for judgment." Since the powers in sections 19(6), (7) and (8) are applicable to all offenders for all offences, the power to discharge first offenders under section 669 upon condition that they enter a bond under sections 19(6), (7) or (8) is otiose and should be repealed. It is clear that sections 19(6), (7) and (8) should not be used where probation is the appropriate disposition[78] and in *Wingo*[79] the Court of Criminal Appeal provided a general ranking of sentences; bonds were considered "lesser sanctions than probation because probation may subject the offender to a variety of conditions which place him under varying degrees of restraint or supervision" including requirements as to residence or drug/alcohol treatment.

1. Binding over to come up for judgment

Section 19(8) empowers any court to discharge an offender upon that person giving a recognisance to appear and receive judgment at some future sitting of the court. In both *McHutchison*[80] and *Wingo*[81] sentencers used section 19(8) for offenders with substantial criminal records and in respect of relatively serious current offences (primarily breaking and entering in both cases). In so doing, they were, no doubt, attempting to give effect to the policy of section 19A. In *McHutchison*, the offender appeared to be making a genuine effort to come off drugs. Crown appeals were upheld in both cases. In *McHutchison*, a term of imprisonment was substituted and in *Wingo* a probation order. Both cases raised some important and difficult questions.

In *McHutchison*, the Court of Criminal Appeal held that section 19(8) involved the *deferral* of sentence rather than a final disposition of the case and stated that, by contrast, sections 19(6) and (7) constituted punishments in their own right.[82] The Court considered that the powers in section 19(8) were based upon the common law and gleaned guidance from that source. Unfortunately, the common law is ill-defined and obscure.[83] The position of

78. Supra n 35, s 10; see also *McHutchison* supra n 16 and *Wingo* supra n 34.
79. Supra n 34.
80. Supra n 16.
81. Supra n 34.
82. Supra n 16, 184.
83. See English Law Commission *Working Paper on Binding Over: The Issues* WP 103 (London, 1987) discussed by N Morgan "Binding Over: The Law Commission Working Paper" [1988] Crim LR 355.

such bonds is rendered even less clear by the Court's view that it has, quite independently of section 19(8), a common law power to make such an order[84] and by the existence of a separate statutory power which seems to serve no valid purpose.[85]

In *McHutchison* the Court also explored the rationale of section 19(8), stating that it was for cases "where the prospects of the rehabilitation of the offender are such that they outweigh all other considerations relating to punishment and there is no need for the kind of community supervision associated with a probation order."[86] This focus on rehabilitation was reflected in *Wingo* where the Court stated that section 19(8) orders would be rare, given the existence of probation. It is submitted, with respect, that section 19(8) hinges more upon the thinly veiled threat of heavier punishment than upon rehabilitation. When viewed as a "sword of Damocles" type of option, with less emphasis on rehabilitation, section 19(8) may therefore offer something conceptually different from probation. Compliance with conditions is crucial to section 19(8) and the common law suggests almost open slather with respect to the conditions which may be imposed. Whilst it is disappointing that in *McHutchison* the Court approved without critical comment some cases which imposed controversial and draconian conditions,[87] there may be some scope for the use of section 19(8) to be developed, particularly by the use of conditions[88] which may be incompatible with the rehabilitative, supervisory rationale of probation.

However, if deferment of sentence is considered an appropriate option, it would certainly be preferable to introduce — as recommended by the Murray Report — an express statutory power to that effect. The statute should set out the maximum period of deferment (either six months or one year), the maximum amount of any recognisance and a general description of and general limitations upon the conditions which may be imposed. Within this legislative structure the Supreme Court and Court of Criminal Appeal should further confine and structure the discretion by issuing narrative guidelines. Even under the present section 19(8) it is particularly important that the offender be given a clear idea of what is expected, especially in terms

84. Supra n 16, 188. This also supports the possibility of an inherent power of discharge discussed supra p 312.

85. Criminal Code 1913 (WA), s 656 the repeal of which was recommended by the Murray Report supra n 61.

86. Supra n 16, 195.

87. These have even included a condition requiring the offender to leave the country for a substantial period: see *Williams* (1982) 4 Cr App R (S) 240 and cases cited therein.

88. See supra n 41.

of compliance with unambiguous conditions. If called upon to receive judgment, the court should ask whether "the defendant has substantially conformed or attempted to conform with the proper expectations of the deferring court ... If he has, then the defendant may legitimately expect that an immediate custodial sentence will not be imposed."[89]

2. The suspended sentence

The power to bind offenders over to come up for judgment has been termed the "common law suspended sentence".[90] However, the suspended sentence as it is more commonly understood is a different creature. It involves the sentencer pronouncing a term of imprisonment for a certain duration period but then ordering that the sentence be held in abeyance for a specified period. Both the length of sentence and the period of suspension are limited by statute. The prison sentence is activated (in full or in part) only if the offender is subsequently convicted of an offence committed during the period of suspension. The case for the suspended sentence in Western Australia is that we currently lack a well defined "sword of Damocles" sentencing option. The suspended sentence differs significantly from section 19(8) in that it is a final disposition of the case and the threat to the offender is far more explicit and uncomplicated. The case against its introduction is its enormous potential to backfire. The challenge is to develop sanctions which serve as genuine alternatives to imprisonment rather than new forms of prison sentences. For example, there is considerable evidence that, despite the English Parliament's intention and despite the strictures of the Court of Appeal on the correct use of the sentence, sentencers there have frequently used suspended sentences in lieu of other non-custodial dispositions such as probation and fines rather than in lieu of immediate custody.[91] There is also evidence that when suspending the sentence, sentencers were imposing longer terms than in the case of immediate imprisonment.[92] This raises the ugly spectre of an increase in the use of imprisonment when such offenders are in breach - with offenders serving prison sentences where none is deserved or serving longer than is merited.[93]

89. *George* (1984) 6 Cr App R (S) 211, 213 where the English Court of Appeal delivered an important guideline judgment on deferring sentence.
90. D G T Williams "The Suspended Sentence at Common Law" [1973] PL 441.
91. See A E Bottoms "The Suspended Sentence in England 1967-1978" (1981) 21 BJ Crim 1; N A Morgan "Non-Custodial Penal Sanctions: A New Utopia?" (1983) 22 Howard J of CJ 148.
92. Id, Bottoms.
93. It may be noted that the suspended sentence recently came close to abolition in England:

3. Good behaviour bonds

Section 19(6) of the Criminal Code 1913 (WA) gives superior courts the power to bind an offender over to be of good behaviour and to keep the peace when the case is dealt with on indictment. Subject to some differences explored below, courts of summary jurisdiction have the same power under section 19(7). In *McHutchison*, the Court indicated — strictly obiter as the case concerned section 19(8) — that the powers contained in sections 19(6) and (7) are derived from ancient English powers and consequently regarded the common law as a guide. The rationale is one of "preventive justice" but clear guidance on key matters is hard to find and sometimes questionable in principle.[94] The Murray Report recommended the updating and amalgamation of sections 19(6) and (7) into a "good conduct order" requiring the offender to commit no further offence, but this has not yet been done.[95]

Numerous criticisms and comments may be made about the present powers. The requirements to "keep the peace and be of good behaviour" have never been clearly defined. It is unacceptable in principle to impose such vague conditions on an offender; they would fall short of the precision which is generally required[96] and were even regarded as unconstitutional in one United States case.[97] In practice, the order is considered to be breached if the offender commits a further offence and, as the Murray Report recommended, it should be spelt out as such. Furthermore, a consequence of using the common law to interpret sections 19(6) and (7), is that courts cannot impose any conditions under sections 19(6) and (7) other than the requirements to keep the peace and be of good behaviour.[98] This was not acknowledged in *McHutchison* but significantly limits the potential use of sections 19(6) and (7) orders; it is also somewhat paradoxical that in *putting off* sentence under section 19(8) there is no limit on conditions. The Murray Report recommended that courts be empowered to impose a variety of conditions in good conduct

see Ashworth supra n 59, 275–276.

94. See supra n 83.

95. The power of Justices to issue an "order to keep the peace" under s 172 of the Justices Act 1902 (WA) falls outside the scope of this paper. Often called "restraining orders", these preventive justice powers are not dispositions which are dependent upon the proof of a criminal offence.

96. See supra n 41.

97. In *Commonwealth v Franklin* (1952) 82 A 2d 272, 282, a bond based on the English Justices of the Peace Act 1361 was "on its face, under the decided cases and as administered, fatally defective because of vagueness."

98. See *Randall* (1986) 8 Cr App R (S) 433 where conditions requiring psychiatric treatment and a commitment not to teach or seek to teach any person under the age of 18 were held invalid.

orders and there is much to be said for this provided that there is an effective checking of such conditions by way of appellate review.

Other basic matters are also unregulated. Section 19(6) places no time limit on the order in respect of cases dealt with by indictment, though summary cases are subject to a one year limit under section 19(7). In one Western Australian case in the 1960's a sheep rustler was even bound over for life.[99] A minimum of six months and a maximum of five years would appear appropriate.[100] Furthermore, the amount of any recognisance under sections 19(6) and (7) is largely unregulated. The Murray Report recommended that courts should have the power to require, in a good conduct order, monetary security from an offender and/or sureties but did not suggest any limitations. It is submitted that care must be taken to monitor the amount of any undertaking under the present or revamped provisions. The common law has established that natural justice requires that an offender should not be bound over in anything other than a trivial sum unless the court has examined the means to pay and given an opportunity to make representations.[101] However, the amount is otherwise unlimited and in some English cases this has resulted in the imposition of a sum far in excess of the maximum fine permitted for the offence in question. In *R v Sandbach; Ex parte Williams*[102] the defendant was convicted of obstructing a constable in the exercise of his duty, by warning a street bookmaker of the approach of the police. He had already been convicted of the same offence several times and the magistrate, who was clearly of the view that the maximum fine (£5) was too low, bound him over in the sum of £20 with two sureties of £10 each. As a result, any such offence in the future would, in effect, be visited with a punishment which the offence itself did not deserve. Such a back-door enhancement of statutory maxima by means of a "suspended fine" is unacceptable in principle.

Further difficulties concern the nature of the order. The Court of Criminal Appeal sees sections 19(6) and (7) as punishments, by contrast with the deferral power under section 19(8).[103] This seems right in principle but is not easy to reconcile with the statute which states that orders under section

99. See also *Edgar* (1913) 9 Cr App R 13.
100. The Murray Report supra n 61, recommended a maximum of 5 years and a minimum of 1 year for all courts in line with the restrictions which existed on probation at that time. The minimum for probation is now 6 months and the maximum is 5 years. Even if the maximum for probation is reduced to 2 years as suggested supra p 305, a maximum of 5 years seems suitable for a good conduct order.
101. *R v Central Crown Court; Ex parte Boulding* [1984] QB 813.
102. [1935] 2 KB 192.
103. See *McHutchison*, discussed supra p 313.

19(6) may be used "instead of or in addition to any punishment" whereas an offender is given an order under section 19(7) "instead of being sentenced to any punishment." What does seem clear, however, is that section 19(6) may be combined with "punishments" such as a fine,[104] but orders under section 19(7) cannot be so combined. The English Law Commission found that many magistrates favoured combining fines and bind overs.[105] We should adopt the Murray Report's recommendation to move away from conceptualising bonds in "contractual" terms and to recognise them as orders imposed by the courts; in other words as sentences or punishments in their own right. In order to encourage the use of alternatives to custody magistrates in Western Australia should also be given the express power to combine such options with a fine.

CONCLUSION

This review of non-custodial, non-pecuniary penalties in Western Australia has revealed a need for legislative reform and for a more proactive role by the Supreme Court if "imprisonment as a last resort" is to become more than a somewhat pious aspiration. Section 19A itself may generate more problems than it solves and recent amendments to that section illustrate the dangers of political tinkering. The discharge and binding over powers should be amended so that they are less obscure, more widely available, more up-to-date and more comprehensible to sentencers, the offender and the community. Community Service has particular potential to be further enhanced as an alternative to imprisonment by being recognised as a serious punishment in its own right.

Some important general lessons also emerge. The courts have tended to bear the brunt of criticism about sentencing but they must be given more clearly defined and confined powers. Within such a framework, appeal courts should seriously consider a more pioneering approach - not merely "checking" the case before them, but issuing general guidelines, on the applicability of particular sentencing options, particularly for courts of summary jurisdiction. This would raise the hackles of some judges and magistrates. For example, Lord Chief Justice Hewart, although a great advocate of judicial review of *administrative* discretion,[106] was not prepared to review the *magistrate's* decision in *Sandbach*:

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104. "Punishments" are defined by Criminal Code 1913 (WA), s 18.
105. Supra n 83.
106. G Hewart *The New Despotism* (London: Benn, 1929).

> [T]he matter is discretionary and the limits are to be found in discretion. We should assume that judicial powers, when given, will in all cases be exercised properly, as they have been in this case.[107]

It is submitted that such defensiveness may obstruct the development of consistent and structured sentencing principles. What is required is a balance in which the roles of all participants are confined, checked and respected. A final, and troubling lesson concerns the process of criminal law reform in Western Australia. Section 19A was introduced, to considerable publicity, without any concomitant reforms to non-custodial dispositions, even though the Murray Report had adverted to many of the issues canvassed here and even though it should have been obvious that many existing powers were antiquated and their role unclear. We have seen a barrage of piecemeal reforms rather than a holistic approach, one feature of which has been a consistent trend to "rationalising" (ie, normally increasing) maximum penalties without apparent regard to the fact that this removes the availability of certain dispositions.

107. Supra n 102, 196.