REPORT OF
THE REVIEW OF
REMISSION AND PAROLE

Western Australia Ministry of Justice
March 1998
# CONTENTS

<table>
<thead>
<tr>
<th>Foreword</th>
<th>iii</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive Summary</td>
<td>v</td>
</tr>
<tr>
<td>Summary of recommendations</td>
<td></td>
</tr>
<tr>
<td><strong>Chapter 1: Background, Establishment and Process</strong></td>
<td>1</td>
</tr>
<tr>
<td>1.1 Background</td>
<td></td>
</tr>
<tr>
<td>1.2 Establishment</td>
<td></td>
</tr>
<tr>
<td>1.3 Terms of reference</td>
<td></td>
</tr>
<tr>
<td>1.4 Process</td>
<td></td>
</tr>
<tr>
<td><strong>Chapter 2: Parole in Western Australia</strong></td>
<td>3</td>
</tr>
<tr>
<td>2.1 1964 - 1988</td>
<td></td>
</tr>
<tr>
<td>2.2 1988 - Present</td>
<td></td>
</tr>
<tr>
<td>2.3 Court of Criminal Appeal</td>
<td></td>
</tr>
<tr>
<td><strong>Chapter 3: Does Parole Work?</strong></td>
<td>7</td>
</tr>
<tr>
<td>3.1 The rationale for parole</td>
<td></td>
</tr>
<tr>
<td>3.2 Effectiveness of parole</td>
<td></td>
</tr>
<tr>
<td><strong>Chapter 4: Parole Provisions in Other Jurisdictions</strong></td>
<td>9</td>
</tr>
<tr>
<td>4.1 The United Kingdom</td>
<td></td>
</tr>
<tr>
<td>4.2 Other Australian jurisdictions</td>
<td></td>
</tr>
<tr>
<td><strong>Chapter 5: Remission</strong></td>
<td>15</td>
</tr>
<tr>
<td>5.1 Background</td>
<td></td>
</tr>
<tr>
<td>5.2 Remission in other Australian States</td>
<td></td>
</tr>
<tr>
<td>5.3 Earned remission</td>
<td></td>
</tr>
<tr>
<td><strong>Chapter 6: Discretionary Minimum Terms: Inherent Problems</strong></td>
<td>19</td>
</tr>
<tr>
<td>6.1 Background</td>
<td></td>
</tr>
<tr>
<td>6.2 <em>Sentencing Act 1995</em> - sentencing principles</td>
<td></td>
</tr>
<tr>
<td>6.3 Assessment of discretionary minimum terms</td>
<td></td>
</tr>
<tr>
<td><strong>Chapter 7: A Direction for Change</strong></td>
<td>23</td>
</tr>
<tr>
<td>7.1 Simplifying sentencing</td>
<td></td>
</tr>
<tr>
<td>7.2 Options considered</td>
<td></td>
</tr>
<tr>
<td>7.3 Fixed 50% minimum terms</td>
<td></td>
</tr>
</tbody>
</table>
REFERENCES 33

APPENDIX I 35
Parole options considered

APPENDIX II 43
Summary of public submissions to the review

APPENDIX III 45
Summary of comments of key stakeholders on the recommendations of the report
Members of the community and some judges have expressed concern that Western Australia's existing system of remission and parole reduces the credibility and effectiveness of sentences. In particular, the view has been put that, under the current system, the discrepancy between sentences imposed by the court and terms actually served is too great, and that the discretion of the court in sentencing is unduly limited.

Given these concerns I determined that a review was necessary to examine:

- linking access to parole to prisoner participation in programs aimed at reducing the risk of re-offending;
- restoring judicial discretion to set a minimum term during which a prisoner is not eligible for release on parole;
- post release supervision of prisoners ineligible for release on parole; and
- reducing the rate of remission.

The Chief Judge of the District Court, His Honour K J Hammond, kindly agreed to chair a committee to undertake the review. The Committee commenced its work in October 1996 and presented an interim report setting out a range of options in December 1996. At my request the Committee then examined some of these in greater detail. A second report submitted in July 1997 was used as a basis for consultation with key stakeholders. Having received and considered these comments, the Committee reported finally in February 1998.

I should like to thank the Chief Judge and the members of the Committee for their thorough and well-researched report. Their work throws considerable light on this complex and important area and will serve as a valuable guide to policy development.

In view of the extent of community interest it is appropriate to provide members of the community with an opportunity to express their opinions since this will assist me and the Government to reach a final position on the recommendations. Accordingly, I have pleasure in releasing the report for public comment.

Hon Peter Foss QC MLC
ATTORNEY GENERAL
MINISTER FOR JUSTICE; THE ARTS
EXECUTIVE SUMMARY

Arising out of concerns expressed by the Chief Justice, other members of the judiciary and some members of the wider community, the Attorney General determined to commission a review of the system of remission and parole in Western Australia. For this purpose, on 2 October 1996 the Attorney established a Committee under the chairmanship of the Chief Judge of the District Court, His Honour Judge K J Hammond.

The terms of reference were:

"To examine and report by 20 December 1996 on arrangements for -

a) basing remission on sentences, access to “early release” programs, and release to parole on completion or satisfactory progress towards completion of programs aimed at reducing the risk of re-offending and cooperation with prison rules;

b) restoring to the judiciary a discretion to set a minimum term during which a prisoner is not eligible for release on parole subject to the prisoner serving no less than one third of his or her term in custody;

c) the post-release supervision of prisoners in respect of whom a parole eligibility order has not been made;

d) reducing the rate of remission so that the time actually served by a prisoner more closely approximates the term imposed by the court while ensuring that a prisoner sentenced under any new remission regime spends no longer in custody than he or she would have spent had he or she been sentenced before the commencement of the new provisions for a similar offence in similar conditions;

while having regard to -

i) general principles governing the release of prisoners;

ii) procedural fairness, consistency and certainty in the management of offenders;

iii) the legitimate expectations of the community and community confidence in the system;

iv) the effects of any proposed changes on the rate of imprisonment and the resource implications of any proposed changes;

and to assist in the development of necessary legislative change."

(N.B. The time frame was not achievable and from the outset the Committee adopted the stance that the concept of parole was not under scrutiny.)

The members of the Committee were:

- **His Honour Judge K J Hammond**
  Chief Judge of the District Court of WA (Chairman)

- **Mr Jim Hosie**
  Secretary of the Parole Board

- **Mr Robert Mazza**
  Law Society of Western Australia
• Mr Neil Morgan  
  Senior Lecturer in Law, Law School, University of Western Australia

• Ms Evelyn Vicker  
  Office of the Director of Public Prosecutions

• Dr Robert Fitzgerald  
  Executive Director, Policy & Legislation Division, Ministry of Justice

• Mr Gerry Gibson  
  Director, Offender Management Division, Ministry of Justice

• Mr Malcolm Penn  
  Senior Policy Officer (Legislation), Policy and Legislation Division, Ministry of Justice (Executive Officer).

This paper is the report of the deliberations of that Committee which included examination of systems of remission and parole in other Australian States and the United Kingdom and consideration of submissions from members of the public and key stakeholders including the Chief Justice of Western Australia, the Chief Stipendiary Magistrate, the Chairman of the Parole Board and the Law Society. Within the parameters set by the Terms of Reference, alternative models of remission and parole which might be suitable for adoption in Western Australia are considered and a recommended approach presented.

Particular attention is given to the issue of the possible re-instatement of some form of minimum term regime (that is, giving the sentencer a discretion to set both the sentence and the minimum term to be served). On this issue the Committee has concluded that neither the inclusion of a provision for a discretionary minimum term within the range of one third to two thirds of the term (that is, a minimum term set at the discretion of the court within the range of one third to two thirds of the term) nor of a provision for a presumptive 50% minimum term (that is, a minimum term set by statute at 50% of sentence, but which, in exceptional circumstances, may be varied by the court to fall within the range of one third to two thirds of the term) is satisfactory.

In particular, the Committee considers that:

a) in the context of the Sentencing Act 1995, the concept of a discretionary minimum term regime is not sound:

(i) the Sentencing Act 1995 states that a sentence imposed on an offender must be commensurate with the seriousness of the offence and specifies aggravating and mitigating factors which may affect the seriousness of the offence and hence the length of sentence; and

(ii) as pointed out in 1979 by Mr Kevin Parker (as His Honour then was), the court when fixing both sentence and minimum term would be faced with the conundrum of applying the same criteria to determine separately both the sentence and the minimum term;

and

b) in practice such arrangements would be problematic and would:

(i) involve an increase in the number of appeals by both the prosecution and the defence against either the sentence, the minimum term, or both; and

(ii) complicate the requirement for the court to adjust sentences so that the actual time served is no greater than that which would have been served if the existing provisions still applied.
RECOMMENDATIONS

The Committee recommends that:

1. A system of parole be retained.
   Parole facilitates community reintegration and protects the community by lessening the risk of recidivism.

2. The one third remission of sentence be abolished.
   Abolition of remission will address community concern that sentences imposed appear to bear little relationship to sentences actually served, but note Recommendation 12 below.

3. The sentencing court be given greater discretion to determine that an offender is ineligible for parole and that statutory provision be made to this effect.
   This change is of critical importance since it will restore to the sentencing court greater discretion to determine whether or not to allow parole which discretion currently is severely constrained as a consequence of the Court of Appeal interpretation of s37A of the Offenders Community Corrections Act (now s89 of the Sentencing Act) that only in exceptional circumstances can a parole eligibility order be refused.

4. The existing formula be modified so that, where a parole eligibility order is made, the offender will become eligible for consideration for release on parole after serving one half of the term, except in the case of sentences of more than 12 years, where the offender will become eligible for release after having served 2 years less than two thirds of the term.
   This will serve to address community concern about the proportion of the sentence that is actually served relative to the term imposed. The effect of the sentence will be clear to both the public and offenders. The regime is consistent with the current sentencing principles of the Sentencing Act. Although it places some limits on the exercise of judicial discretion, the benefits outweigh this possible disadvantage.

5. Offenders serving sentences of less than 12 months be eligible for automatic release either with or without conditions after serving one half of the term and remain at risk for the remainder of the term.
   In the case of offenders serving less than 12 months there is generally no need for supervision. However, supervision may sometimes be appropriate in the interests of community protection and/or community reintegration. Where required, in the interests of community protection or to facilitate community reintegration, short term offenders could be placed under supervision.

6. Clear statutory guidelines ought to be established setting out the factors to be considered by the Parole Board in determining the release of an offender on parole.
   This would improve public understanding and confidence in the parole system.

7. An offender who has been released on parole will remain under supervision for a period equivalent to one third of the term up to a maximum of two years.
   This arrangement applies at present and affords a reasonable balance between ensuring compliance and reducing over intrusion in an offender’s life which can “set them up to fail”. The offender will also remain “at risk” for the whole of the balance of the sentence (see Recommendation 11 below).

8. Work Release be abolished for offenders subject to parole eligibility orders.
As offenders released on parole may be required to undertake or seek work as a condition of their parole order, Work Release serves little purpose for this group.

9. Home Detention for offenders serving terms of less than 12 months be abolished.

   It is doubtful that Home Detention is of significant assistance in the community reintegration of prisoners serving short sentences.

10. A period of community re-integration be provided for offenders not subject to parole eligibility orders serving terms of 12 months or more.

   This would take the place of the existing Work Release (which will be abolished, see Recommendation 8 above) and would clearly reflect the purpose of the release order.

11. Offenders released on parole or to community re-integration be at risk of being returned to prison for the commission of any offence committed during the remainder of the sentence.

   This arrangement applies in the case of juveniles under the Young Offenders Act 1994 and in the United Kingdom (Criminal Justice Act 1991 (UK)). The Committee believes this recommendation would improve public confidence in the system.

12. The sentencing court be required by statute to adjust sentences so that the actual time served is no greater than that which would have been served if the existing provisions relating to remission and parole still applied.

   This approach appears to have been applied largely successfully in Victoria to prevent unintended prison population growth consequent upon sentencing changes. This recommendation has caused the Committee great concern in that it will be most difficult to implement but its inclusion is necessary under terms of Reference (d). Notwithstanding such perceived difficulty the Committee believes it is an attainable goal.
CHAPTER 1
BACKGROUND, ESTABLISHMENT AND PROCESS

1.1 Background

For several years there has been a simmering disquiet in the community and amongst members of the judiciary concerning the sentencing system in Western Australia. Community disquiet has related primarily to the length of time offenders actually spend in custody relative to the sentence that was originally imposed by the courts. For example, a 6 year sentence with eligibility for parole could result in the offender being released from custody after just 18 months if mechanisms such as work release and parole are granted. Many consider that this differential is too great.

The concerns of the judiciary have largely centred around giving back to the judiciary the discretion to determine whether or not to fix a minimum term and a discretion to fix the length of that term in the light of the head sentence imposed. The Chief Justice has also proposed that any such scheme should be coupled with a significant reduction in the rate of remission for good behaviour. The latter would restore the effectiveness of sentences and enhance the credibility of the system.

In response to these concerns the Attorney General for Western Australia, the Hon Peter Foss QC MLC determined to commission a review of the system of remission and parole in Western Australia.

1.2 Establishment

At the request of the Attorney General, the Chief Judge of the District Court of Western Australia, His Honour K J Hammond agreed to chair the review. Other experts in the field, from the Parole Board, Office of the Director of Public Prosecutions, the University of Western Australia Law School, the Law Society and the Ministry of Justice were invited to participate as members of the Review Committee.

The members of the Committee were:

- **His Honour Judge K J Hammond**
  Chief Judge of the District Court of WA (Chairman)

- **Mr Jim Hosie**
  Secretary of the Parole Board

- **Mr Robert Mazza**
  Law Society of Western Australia

- **Mr Neil Morgan**
  Senior Lecturer in Law, Law School, University of Western Australia

- **Ms Evelyn Vicker**
  Office of the Director of Public Prosecutions

- **Dr Robert Fitzgerald**
  Executive Director, Policy & Legislation Division, Ministry of Justice
Mr Gerry Gibson  
Director, Offender Management Division, Ministry of Justice

Mr Malcolm Penn  
Senior Policy Officer (Legislation), Policy and Legislation Division, Ministry of Justice (Executive Officer).

1.3 Terms of reference

The terms of reference of the review were:

"To examine and report by 20 December 1996 on arrangements for -

a) basing remission on sentences, access to "early release" programs, and release to parole on completion or satisfactory progress towards completion of programs aimed at reducing the risk of re-offending and cooperation with prison rules;

b) restoring to the judiciary a discretion to set a minimum term during which a prisoner is not eligible for release on parole subject to the prisoner serving no less than one third of his or her term in custody;

c) the post-release supervision of prisoners in respect of whom a parole eligibility order has not been made;

d) reducing the rate of remission so that the time actually served by a prisoner more closely approximates the term imposed by the court while ensuring that a prisoner sentenced under any new remission regime spends no longer in custody than he or she would have spent had he or she been sentenced before the commencement of the new provisions for a similar offence in similar conditions;

while having regard to -

i) general principles governing the release of prisoners;

ii) procedural fairness, consistency and certainty in the management of offenders;

iii) the legitimate expectations of the community and community confidence in the system;

iv) the effects of any proposed changes on the rate of imprisonment and the resource implications of any proposed changes;

and to assist in the development of necessary legislative change."

The time frame was not achievable and from the outset the Committee adopted the stance that the concept of parole was not under scrutiny.

1.4 Process

Public submissions were called by way of advertisements placed in The West Australian newspaper and local community newspapers. In addition, key stakeholders were invited to formally provide submissions for the Committee's consideration.

The Committee also examined the current law, provisions applying in other Australian jurisdictions and the United Kingdom, research into the effectiveness of parole, and alternative models to address the Terms of Reference. Copies of the draft Report were provided to the Chief Justice, the Chief Stipendiary Magistrate, the Chairman of the Parole Board and the Law Society for comment.
CHAPTER 2
PAROLE IN WESTERN AUSTRALIA

2.1 1964 - 1988

"Conditional release for prisoners in general was introduced into Western Australia in 1964 under the then Offenders Probation and Parole Act 1963, which also provided for probation for adults on a statutory basis for the first time. Stewart and Thomas argue that the inspiration for changes in the law in respect of penal methods in Western Australia did not come from an awareness of the changing composition of the criminal, or more specifically the prison population. The changes were drawn from a welter of international assumptions about the best methods of dealing with crime, which were an amalgam of reformers’ care for the oppressed, a distaste for imprisonment and a persistent faith in the successful outcome of a search for the ‘scientific’ treatment of the criminal.

Whilst the ideology of reform was important, two “managerial” problems were increasingly apparent: prison control and population levels. The late 1950’s and 1960’s saw changes in prisoners’ attitudes towards confinement, reflecting a change in the make-up of the prison population and an increasing willingness to question authority. In particular, the average age declined and there was a disturbing rise in the number of Aboriginal prisoners. Parole had obvious potential as a means of encouraging good behaviour over and above any system of remission. Prison population levels grew significantly for both males and females for most of the 1960’s and increased rapidly from 1960 to 1963. Parole provided not only an attractive ideological approach to the treatment of offenders but also held considerable attraction as a potential management tool in the changing prison environment.

The basic scheme of the 1963 Act was simple. Whilst its introduction may have been motivated in part by managerial concerns, its form reflected the rehabilitative ideology with some concessions to tradition. A major concession to tradition was that the judiciary should play a key role in the system. This was achieved in two main ways. First, a judge was the chairman of the Parole Board. More importantly, there was no “automatic” eligibility for parole. Offenders were only eligible for parole on the expiry of a “minimum term”, and only if the sentencer decided to set such a term. In the case of sentences of less than one year, sentencers originally had a general discretion whether or not to set a minimum term. In the case of longer sentences, a minimum term had to be set unless both the nature of the offence and the antecedents of the offender rendered it inappropriate....

In 1985, legislative amendments restricted parole eligibility, partly in response to the influential 1979 Parker Report (see Chapter 6 for a consideration of the findings of that report). Reflecting disquiet with the previous position, there was no longer any “presumption” of a minimum term for sentences of twelve months or more; instead, sentencers were given a general discretion to set a minimum term if it was considered appropriate in view of the "nature of the offence ... or the circumstances of its ... commission or the antecedents of the convicted person or any of those things

---

1 This section is taken from N. Morgan (1992) Parole and Sentencing in Western Australia, Western Australian Law Review, 22, 94, pp 101-103
considered together". In the case of sentences under twelve months, sentencers no longer had a general discretion and were to set a minimum term only if (undefined) "special circumstances" justified it. Although the Parole Board had a discretion throughout this period to direct the release on licence of those for whom a minimum term was set, the majority came, over time, to be released at or close to the expiry of the minimum term."

2.2 1988 - Present

The legislation was further amended in 1988 by the Acts Amendment (Imprisonment and Parole) Act 1987 to meet criticisms of the minimum term regime and other problems encountered with the legislation. These reforms included:

i) inserting a formula for the determination of the earliest eligibility date for consideration for release on parole;

ii) instituting minimum and maximum parole periods;

iii) making release on parole virtually automatic in most cases; and

iv) giving part credit for "clean street time" to offenders who breached their orders.

The Second Reading Speech on the Acts Amendment (Imprisonment and Parole) Bill noted that, under the 1963 legislation, minimum terms were, on average, a little over 40% of their head sentences, and asserted that, under the 1987 provisions, prisoners convicted of more serious offences would spend more time in custody and those convicted of less serious offences would spend less time in custody.

The formula decided upon and inserted in the legislation (s37A(2) of the Offenders Community Corrections Act 1963) was that:

"Where an order is made under subsection (1) in respect of a term of imprisonment the convicted person is eligible to be released from prison on parole -

i. where the term is not more than 6 years - after having served one third of the term;

or

ii. where the term is more than 6 years - after having served 2 years less than two thirds of the term." 4

A Joint Select Committee on Parole appointed in September 1989 to inquire into and report on parole5 reiterated the earlier criticisms of minimum terms and accepted the existing statutory formula for the setting of parole terms. On the basis of a forecast substantial increase in prison bed requirements if the parole eligibility date were to be changed from one third to one half of sentence, and doubts about the effectiveness of imprisonment as a mechanism for the reform of offenders, the Committee recommended against any change to the 1988 formula. However, the Committee supported abolition of the 10% reduction of the Non-parole period. In the interests of ensuring public safety, the Joint Select Committee called for greater scrutiny of "special term" prisoners to underlie the priority of public safety and recommended that:

---

4 By contrast, the 1979 Parker Report recommended that: "a person declared eligible for parole must serve half of the sentence imposed by the court before being eligible for release on parole; and.. as an alternative.. where a Court finds there are exceptional circumstances, it may fix a minimum term during which the prisoner is not eligible for release on parole, which term must not be less than 6 months, and must be less than 3/4 of the sentence."

5 Joint Select Committee (1991) Report of the Joint Select Committee on Parole, Parliament of Western Australia, Perth. The Report included, among other things, a comparison of the present system with that it superseded, the formulae which determine the date of eligibility for consideration for release or consideration for release on parole, the impact of parole on a sentence, and the impact of sentences of the combined effect of parole, remissions, work and other forms of release.
"The 'special term' currently defined in s. 40b(1) of the Offenders Community Corrections Act as a sentence of not less than 5 years or more imposed in respect of offences of violence against the person, should be amended to include sentences of not less than 3 years for offences of that nature."

This recommendation was subsequently adopted in the Sentencing Act 1995. Commencing in November 1996, the Sentencing Act 1995 introduced the following reforms to parole:

i) the definition of a special term prisoner was amended to include prisoners serving terms of imprisonment of three years or more for defined violent offences. Prior to the Act, only prisoners serving five years or more were included. Prisoners under this widened definition must receive special consideration by the Parole Board;

ii) parolees may be subjected to electronic monitoring in appropriate cases;

iii) the Non-parole period may be extended by loss of remission imposed under the Prisons Act (this is on top of the 10% reduction of parole terms which was abolished in November 1994); and

iv) aggregation of parole terms of cumulative prison sentences which will make it easier to determine sentence lengths and understand the effects of parole sentences.

2.3 Court of Criminal Appeal6

"It is not surprising that the broad wording of section 37A(3) [of the Offenders Community Corrections Act, now section 89 of the Sentencing Act] immediately generated substantial case law. Two key points have emerged from both Crown and defence appeals. First, the sentence must be calculated without reference to the possibility of parole or its mechanics: "[t]he question of eligibility for parole must be considered once the sentence of imprisonment appropriate to the gravity of the offence in the light of the antecedents of the offender has been determined".7 Thus, it is incorrect for a court to set a lower sentence than would otherwise be appropriate because no order is made under section 37A(1). Conversely, it is inappropriate for the sentence to be "inflated" because of the possibility of parole release. The general principle which underpins this approach is that courts should disregard executive policies in determining the sentence.

Secondly, although the statute gives courts a general discretion to consider "all or any" of the factors in section 37A(3), the Court of Appeal has held that "the philosophy behind section 37A requires detailed consideration of all the criteria set out therein for the purpose of exercising the discretion involved." However, there appear to be differences in emphasis on the relative weight to be afforded to these factors. Some have emphasised, in line with Power8, that rehabilitative concerns remain pivotal, and Rowland J. observed in R v Shaw9 that "the circumstances that would negate the prospect of rehabilitation by way of supervision in the community, that is parole, would need to be exceptional". Malcolm C.J., in line with his reservations about the applicability of Power, has, more clearly than the other judges, indicated that there will be cases where the seriousness of an offence could, of itself, outweigh all the other factors."

---

6 The first and second paragraphs of this section are from Morgan (1992), ibid at 108-109.
With the enactment of the *Sentencing Act 1995*, despite calls for change from the judiciary, there has been no change to the laws governing the granting of eligibility for parole. The provisions previously contained in section 37A of the *Offenders Community Corrections Act* can now be found in section 89 of the *Sentencing Act 1995*. Although the law gives the courts a general discretion it has become clear that it will be *exceptional* for a parole eligibility order to be refused.
CHAPTER 3
DOES PAROLE WORK?

Before proceeding to consider alternatives to the present system, it is relevant to ask the question whether parole “works”.

3.1 The rationale for parole

Parole is a mechanism whereby a prisoner may be released from prison upon completion of the minimum term of his/her sentence and thereby serve the balance in the community. The primary purposes of parole are to: (1) support the re-integration of offenders from prison to the community, and (2) reduce the risk of re-offending. Parole also serves as an important “ally” of victims of crime, keeping victims informed of the offenders’ release status, and often soliciting victims’ views on release conditions. Given adequate support, parole may also serve as a means of satisfying public desire for a system that protects both its safety and “peace of mind”.

Abolition of parole has re-emerged, particularly in the United States, as a response to public concerns about crime. Parole abolition has failed to produce more severe sentencing and to reduce crime, and this failure has led to its re-instatement in a number of States of the United States. Parole can actually toughen sentencing: instead of automatic release under “reform” policies, discretionary parole can keep dangerous and violent offenders in prison for longer periods. Moreover, parole is a strong and comprehensive approach to controlling violent and dangerous offenders because of its constant review of offenders in prison; continual re-evaluation of risk; leverage of offenders before release to ensure good behaviour in the community; supervision after release; and potential to re-imprison parolees who appear to present a threat to the community.

Conceptually, at least, there would seem to be a sound basis for a system of parole.

3.2 Effectiveness of parole

Evaluations of parole are scarce and therefore comparing the effectiveness of different parole systems is inexact. Comparative analysis is difficult due to differences in legislative frameworks, definitions of failure, release eligibility criteria and the nature of supervision regimes and conditions. By one measure, the percentage of offenders released on parole who complete their parole orders successfully, parole may be judged to be effective. The 1996/97 Annual Report of the Ministry of Justice\(^\text{10}\) shows that 78% of offenders released on parole completed their orders successfully. However, recidivism (the proportion of those released who subsequently re-offend) is generally regarded as the accepted measure of the effectiveness of parole.

General estimates of recidivism were calculated in a study undertaken in 1988 by Broadhurst et al.\(^\text{11}\) These estimates are compared with a subsequent follow-up study conducted in 1990 by Broadhurst and Maller\(^\text{12}\). Both studies were based on the population of prisoners released for the first time from Western Australian prisons between July 1975 and June 1987 and involved some 16,400 prisoners. Summary details of general recidivism found in both studies appear in Table 1 below.

---

\(^{10}\) Ministry of Justice (1997), 1996/97 Annual Report, Ministry of Justice, Perth


Table 1
General Recidivism in Western Australia

<table>
<thead>
<tr>
<th>Category</th>
<th>Probability (%)</th>
<th>Median Fail Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year</td>
<td>1984</td>
<td>1984</td>
</tr>
<tr>
<td>Male Aboriginal</td>
<td>80%</td>
<td>11 mths</td>
</tr>
<tr>
<td>Male non-Aboriginal</td>
<td>48%</td>
<td>18 mths</td>
</tr>
<tr>
<td>Female Aboriginal</td>
<td>75%</td>
<td>16 mths</td>
</tr>
<tr>
<td>Female non-Aboriginal</td>
<td>29%</td>
<td>20 mths</td>
</tr>
</tbody>
</table>

Some 16 per cent of the study population were released to parole on their first term of imprisonment. Broken down by release type, the data (Table 2) show that there is strong evidence that the failure of parole prisoners is significantly less than that of prisoners released unconditionally.

Table 2
Recidivism by Release Type (Males only) 1975-87

<table>
<thead>
<tr>
<th>Release Type</th>
<th>Aboriginal</th>
<th>Non-Aboriginal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parole</td>
<td>67%</td>
<td>32%</td>
</tr>
<tr>
<td>Finite</td>
<td>77%</td>
<td>49%</td>
</tr>
<tr>
<td>Fine</td>
<td>70%</td>
<td>46%</td>
</tr>
</tbody>
</table>

On the basis of these data, Broadhurst and Maller\(^{13}\) concluded that:

"... those released unconditionally (after serving finite sentences) had higher reincarceration than those released on parole, while those released after the payment of fines fell between. This suggests that parole has positive effects in reducing the probability of returning to prison and/or that parole procedures select for a group with improved prospects."

Much of the public concerns about parole centres on procedural faults and failures particularly by offenders with notoriety. It must be remembered that parole does not prevent offenders from committing crimes, although, the data relating to successful completion rates whilst under parole supervision and the data in Table 2 above suggest that it may assist in doing so. As the majority of offenders will eventually be released into the community these data would suggest that it is preferable for them to be released under some form of parole supervision and support. For this reason it is important that a system of parole be retained.

Recommendation 1

It is recommended that a system of parole be retained.

\(^{13}\) Broadhurst and Maller, op cit
CHAPTER 4
PAROLE PROVISIONS IN OTHER JURISDICTIONS

This Chapter considers parole provisions in the United Kingdom and the other Australian States and Territories.

4.1 The United Kingdom

In the United Kingdom, the concept of parole (early release on licence, and subject to recall) goes back to the 19th century, although modern arrangements date from the Criminal Justice Acts of 1948 and 1967. The present arrangements for early release were introduced in the Criminal Justice Act 1991. Briefly, they are as follows:

i) prisoners sentenced to less than 12 months imprisonment are released automatically and unconditionally after serving half of their sentence. Except in the case of prisoners aged under 21 years (who are subject to compulsory supervision), they are not subject to supervision but remain “at risk” of being returned to prison to serve the balance of their sentence if convicted of further imprisonable offences which were committed before the end of the original sentence;

ii) prisoners sentenced to 12 months or more but under 4 years are released automatically on licence after serving half of their sentence. They are supervised by the Probation Service until the expiry of the licence (normally at the three quarters point of the sentence), and remain “at risk” of being returned to prison if they fail to comply with the terms of their licence or if they are convicted of a further imprisonable offence committed before the end of the original sentence;

iii) prisoners sentenced to 4 years or more become eligible for release on licence after serving half of their sentence. If refused discretionary release on licence, they are automatically released on licence at the two thirds point, and remain “at risk” of being returned to prison if convicted of a further imprisonable offence until the end of the original sentence. They are also at risk of recall for breach of the conditions of their licence, which normally expires at the three quarters point; and

iv) the entitlement to automatic release can be delayed to take account of punishments of additional days imposed by the prison governor for disciplinary offences.

The 1996 Home Office White Paper "Protecting the Public" commented that there has been a considerable level of dissatisfaction with the current system of early release from prison, whether automatic or discretionary conditional release. The Paper declared that “it is common knowledge that offenders do not serve the term actually imposed by the court ... As a result the public, and sometimes even courts, are frequently confused and increasingly cynical about what prison sentences actually mean”. In order to overcome these perceived problems, abolition of “parole” was proposed as a means of introducing “... greater honesty and clarity into the sentencing process, so that the sentence actually served will relate much more closely to the sentence passed by the court”. Instead of being released from custody automatically after two thirds of the sentence, prisoners would be able to “earn” early release of up to 72 days a year (equivalent to 16.5% of a six year sentence); half for co-operating with the prison regime and half for showing positive signs of good behaviour, notably “hard work and effective and diligent compliance with prison programmes related to his/her offending behaviour”.

After release (whether or not early release has been earned) those serving 12 months or more would be placed under the supervision of the Probation Service for a period equivalent to 15% of the length of the sentence imposed. The Parole Board would have no part to play in determining when the prisoner would be released or in making arrangements for, or imposing conditions on, supervision in the community. Thus the prisoner’s release date would depend entirely on a calculation made by the prison staff of the number of days the prisoner has earned as a remission of his/her sentence.

Importantly, the White Paper intended that these changes should be made without a general increase in the period of time offenders serve in prison. As a means of ensuring that this did not occur, the courts would be expected to take into account, when passing sentence, the abolition of parole and the changes in early release arrangements. Thus, if the period to be served in custody were to remain the same as that prior to the new arrangements, sentences passed under the new regime would need to be substantially reduced. A practice direction to be issued by the Lord Chief Justice was eventually determined as an appropriate mechanism to give effect to this.

By the time of its passage in Parliament, some of the detail of the Act had changed. The new United Kingdom Government has not moved to implement the parts of the Act abolishing parole and have stated that they have no intention of doing so. There are plans to have sentencers read out in court the “effective” sentence an offender will serve (specifically, the time to be spent in custody, the period of supervision after release and the period during which the offender might be recalled to prison).15

4.2 Other Australian Jurisdictions

4.2.1 General

There has been a considerable shift in all Australian jurisdictions over recent years towards the adoption of “truth in sentencing” where the time actually served in custody more closely equates to the term imposed. New South Wales16 was the first State (in 1988) to implement such a regime. An unintended consequence of that system was a massive growth in the size of the prison population in that State. However, this difficulty seems to have been overcome to a large extent by the scheme subsequently introduced in 1991 in Victoria17. South Australia and Queensland have also adopted similar schemes, although it can be argued that the Victorian model has received the most critical appraisal. The New South Wales and Victorian models are considered in greater detail later in this Chapter.

As shown in Table 3, there is considerable variability in the schemes which operate in each of the States and the Northern Territory. All have retained parole in some form, but several have abolished remission on the head sentence.

15 J. Straw, Home Secretary, coi6951d.oik at www.coi.gov.uk
16 The Sentencing Act 1989 (NSW) removed prisoners’ entitlements to remissions with a view to promoting “truth in sentencing”.
17 The Sentencing Act 1991 (Vic), as part of more wide-ranging reforms to sentencing in that State, abolished remissions and included a statutory mechanism to compensate for the effect of abolition of remission on sentence lengths.
### Table 3
Overview of Australian parole eligibility systems (as at July 1996)

<table>
<thead>
<tr>
<th>NT</th>
<th>WA</th>
<th>NSW</th>
<th>QLD</th>
<th>SA</th>
<th>TAS</th>
<th>VIC</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Length of Non-parole period</strong></td>
<td>Discretionary on sentences &lt; 12 months. Compulsory on sentences &gt; 12 months - minimum 8 months or 50% of head sentence (70% for sex offenders)</td>
<td>No eligibility on sentences of &lt; 12 months. 1/3 on head sentence between 1 and 6 years. 2/3 less 2 years if head sentence 6 years +</td>
<td>Can only be set when sentence exceeds 6 months. Must be 3/4 of head sentence unless court decides there are special circumstance s and states reasons.</td>
<td>1/2 of head sentence or as recommended by the court.</td>
<td>Compulsory Non-parole period on head sentences of 12 months + Period at discretion of court.</td>
<td>Longer of 6 months or 1/2 head sentence. Courts can fix compulsory. Non-parole period but do so infrequently.</td>
</tr>
<tr>
<td><strong>Remission on non parole period</strong></td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td><strong>Effect of suspension or cancellatio n</strong></td>
<td>Loss of 1/3 remission on cancellation. When suspension lifted parole continues.</td>
<td>Required to serve balance owing on sentence as at effective date of cancellation</td>
<td>Return to custody until expiry of parole order or re-release on original order. If cancelled may be released on new order.</td>
<td></td>
<td></td>
<td><strong>Individual determination of Adult Parole Board</strong></td>
</tr>
<tr>
<td><strong>Credit for clean Street Time</strong></td>
<td>Yes. Prior to Nov. '96 Offenders Community Corrections Act 1963 half period prior to breach. Since Nov. 1996, Sentence Administration Act 1995 - full credit.</td>
<td>Yes. Time from the date of release on parole to the effective cancellation date nominated by the Board.</td>
<td></td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

---

11.
4.2.2 New South Wales

The Sentencing Act 1989 (NSW) was intended to bring certainty to sentencing and restore "truth in sentencing". The Act requires a judge or magistrate to:

i) impose a fixed sentence which specifies precisely the period of imprisonment; or

ii) set a minimum term of imprisonment that the prisoner must serve, and an additional term during which the prisoner may be released on parole.

The Act abandoned the use of such terms as "head sentence" and "Non-parole period", and inserted the terms "fixed term", "minimum term" (the minimum period which a person must serve before being considered for release on parole), and "additional term" (that part of a sentence during which a prisoner may be released on parole). All forms of remission were abolished.

The effect of the introduction of these changes including the abolition of remission was a massive increase in the prison population from around 4400 before proclamation of the Sentencing Act 1989 (NSW) to 5,800 in 1991. Since then the rate of imprisonment in New South Wales has increased only gradually. The increase in the rate of imprisonment between 1988 and 1991 occurred despite statements in the Second Reading Speech to the Sentencing Act 1989 that the "Bill ... is not seeking to make sentences longer" or to "increase the actual time served by prisoners in gaol."

The problem seems to have been that the courts reacted to the abolition of remissions in a manner consistent with general sentencing principles. The New South Wales Court of Criminal Appeal noted that it was not the intention of the Government to lengthen the actual sentences served but stated that:

"The primary task of the sentencing judges is to apply the new sentencing system according to the terms of the statute paying due deference to established general principles of sentencing. It is not their prime function to do their best to replicate what they would have done under the old system ... In carrying out the task of fixing a minimum term in such a case as the present, the sentencing judge should address the prescribed maximum penalty fixed by statute, and the gravity of the offence, paying due regard to the objective features of the case and subjective considerations relevant to the particular offender." 19

In other words, the Court ruled that a court in sentencing was not entitled to adjust the sentence to take account of the abolition of remission under the new legislation.

4.2.3 Victoria

Victoria on the other hand appears to have been more successful in avoiding this unintended consequence of "truth in sentencing". Noting the views of the Office of Corrections, the Victorian Sentencing Committee in its 1988 report stressed that implementation of its recommendation relating to the abolition of remissions was contingent upon prison sentences being reduced "so that the actual time served by prisoners under those sentences is at the very least kept to the same amount as at the present time, but preferably slightly reduced. If this is not done then prison overcrowding will become an intolerable and insoluble problem." 20

---


At the same time that it abolished remissions, the Victorian legislation also included a provision, s10 of the Sentencing Act 1991 (Vic), to ensure that offenders spent no longer inside gaol. An impediment which needed to be overcome was the common law rule that courts are required not to take account of the existence, or non-existence, of remissions in determining sentences. For this reason, s.10 of the Sentencing Act 1991 (Vic) requires the Court to take into account the effect of abolition of remission on sentences. As a result, in Victoria, sentencers are required to adjust their sentences downwards so that the actual time served is identical to that which would have been served if the provisions relating to remission still applied.

Specifically, s.10 provides:

“(1) When sentencing an offender to a term of imprisonment a court must consider whether the sentence it proposes would result in the offender spending more time in custody, only because of the abolition of remission entitlements by section 3(1) of the Corrections (Remissions) Act 1991, than he or she would have spent had he or she been sentenced before the commencement of that section for a similar offence in similar circumstances.

(2) If the court considers that the sentence it proposes would have the result referred to in sub-section (1) it must reduce the proposed sentence in accordance with subsection (3).

(3) In applying this section a court -

(a) must assume that an offender sentenced before the commencement of section 3(1) of the Corrections (Remissions) Act 1991 would have been entitled to maximum remission entitlements; and

(b) must not reduce a sentence by more than is necessary to ensure that the actual time spent in custody by an offender sentenced after the commencement is not greater, only because of the abolition of remissions, than it would have been if the offender had been sentenced before the commencement for a similar offence in similar circumstances.”

The approach adopted in Victoria would seem largely to have had the intended effect. Between 1990/91 and 1994/95, there was little change in the rate of imprisonment in Victoria which remains the lowest in Australia. In 1990/91 the rate was 69.1 per 100,000 adults while in 1994/95 the rate was 71.8 per 100,000. According to Freiberg:

“The aggregate data reveal that the average aggregate prison term for all prison receptions dropped from 14.7 months in the 24 months prior to the Act to 10.8 months in the six months after the Act, a drop of 27%. The average Non-parole period decreased from 10.4 months to 8.8 months, a reduction of 16%. The average estimated time in custody for all offences remained about the same.”

It is evident from this discussion that changes to systems of parole and remission can lead to major unintended increases in prisoner numbers. Western Australia’s rate of imprisonment is already above the national average and the rate of imprisonment of Aboriginal people is particularly high. The potential impact on the prison population of any new sentencing arrangements needs to be carefully considered.

5.1 Background

The 1981 Report of the Committee of Inquiry into the Rate of Imprisonment\(^{22}\) (the “Dixon Report”) argued that the granting of remission was essential to the maintenance of discipline within the prison system. The Dixon Report formed the view that removal of remission was “quite impractical” because it was such an entrenched part of the system. The majority position was that the rate of remission on finite sentences should be increased from one quarter to one third, and the rate of remission on minimum sentences should be increased to one third. The rationale for these changes was that they would assist in reducing the rate of imprisonment and “have no material bearing on the protection of the rights of the community.” This increased rate of remission was enacted by s29 of the Prisons Act 1981.

The 1991 Joint Select Committee on Parole\(^{23}\) made little comment on this matter. The Committee observed that the one third remission of head sentence is sufficient incentive for a prisoner to behave and recommended that: “One-third remission of head sentence should remain but on the basis of being a privilege which can be lost for breaches of the law.” Apparently, no consideration was given to whether remission should be earned rather than automatic.

5.2 Remission in other Australian States

Table 4 compares remission systems in each of the Australian States and the Northern Territory. Four of the Australian jurisdictions, including Western Australia, provide for 1/3 remission while three do not.

<table>
<thead>
<tr>
<th>Remission on non parole period</th>
<th>NT</th>
<th>WA</th>
<th>NSW</th>
<th>QLD</th>
<th>SA</th>
<th>TAS</th>
<th>VIC</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Remission on head sentence</th>
<th>NT</th>
<th>WA</th>
<th>NSW</th>
<th>QLD</th>
<th>SA</th>
<th>TAS</th>
<th>VIC</th>
</tr>
</thead>
<tbody>
<tr>
<td>No. For sentences of &lt; 12 months, courts must take former 1/3 remission into account.</td>
<td>Automatic 1/3. May lose remission for prison offences.</td>
<td>No</td>
<td>1/3 may be granted at discretion of Corrective Services Commission.</td>
<td>No</td>
<td>1/3 of sentences over 3 months to maximum of 3 months.</td>
<td>No</td>
<td></td>
</tr>
</tbody>
</table>

---


\(^{23}\) Joint Select Committee (1991), op cit
5.3 Earned remission

Under the current provisions of the *Prisons Act 1981*, remission is granted automatically but may be lost as a result of the commission of prison offences. In practice, most prisoners receive full, or close to full, remission. An alternative approach would be to require prisoners to earn their remission on the basis that this may provide them with an incentive to cooperate with prison staff, and motivation to participate in work and rehabilitation programs. Such an approach might not only increase the level of participation in these programs but also enhance the credibility of the system in the eyes of the community.

A system established in the *Prison Regulations* whereby prisoners were required to earn points in order to gain remission operated in Western Australia several years ago. It was abandoned because it was time consuming to administer, and, in practice, the granting of remission was virtually automatic. For similar reasons, New South Wales discarded the use of remission to reward prisoners for good behaviour by the enactment of the *Sentencing Act 1989* (NSW). Clearly, for a system of earned remission to be worthwhile it must be capable of being administered objectively and effectively.

The Home Office’s 1996 White Paper *Protecting the Public*\(^\text{24}\) sets out an arrangement whereby through “cooperation” and “positive good behaviour” a prisoner may earn a reduction of up to one fifth of the head sentence. The paper proposes that for the first 12 months of sentence a prisoner may earn 6 days per month through “cooperation”, and, thereafter, 3 days each month through cooperation and a further 3 days for “positive good behaviour”. Arguably, this approach would provide an incentive for prisoners to cooperate with the prison administration and motivation for prisoners to complete successfully programs aimed at reducing the risk of reoffending.

The New South Wales Law Society in its submission to the New South Wales Law Reform Commission in November 1995 commented that the absence of any opportunity to earn remissions was an absence of incentive to education, good work or good behaviour. The Society was also of the view that if the opportunity were created, at least some prisoners would seize it. In response to the Law Society’s comments, the NSW Law Reform Commission commented that although earned remissions could work and be acceptable to the community, because it would rely on behavioural and other reports from within the prison system, with all the potential for abuse which that involves, it may not work in practice.

In 1986 the Victorian Office of Corrections in its submission to the Victorian Sentencing Committee argued that the system of remissions, then in place in Victoria, was not just a sentence shortening practice but “by far the most influential means of promoting good conduct and sanctioning unacceptable behaviour”. These comments of course relate to remissions that although in theory were earned, in practice were granted automatically and could be forfeited for poor prison conduct. Most remission regimes are based on this premise and are generally claimed to work well.

The recent proposals in United Kingdom to abolish parole and provide for release dependent upon earned remissions has received considerable criticism from a number of quarters. When queried in 1996, the proponents of the scheme in the Prison Service (which was scheduled to commence in 1999 but is now unlikely to be proclaimed) were still unsure as to the mechanics of earned remissions and how it would operate. While the concept of earning release has merit, earned remissions is fraught with problems. The arguments put forward in United Kingdom in favour of earned remissions centred on public accountability and the recommendations of the Learmont Report on prison

\(^{24}\) Home Office (1996), op cit
security which commented on the positive effects on security and control in prisons if prisoners are given a clear incentive to behave well.

It is the view of this Committee that remission or the threat of its removal can provide a degree of positive influence over a prisoner’s behaviour and may therefore assist in the day to day management of prisoners whilst in custody. However, the Committee notes that since the abolition of the 10% reduction form the Non-parole period in November 1994, the Western Australian prison system has been able to resort successfully to other sanctions when punishing prisoners for unacceptable behaviour. There has not been a demonstrable increase in prisoner misconduct. In the view of the Committee, this demonstrates that the “remission sanction” is not necessary as a motivator of positive prison conduct.

There are also arguments that some form of incentive should apply to prisoners who cooperate with prison authorities. The one issue that the Committee could agree on in relation to this matter is that the introduction of such an arrangement could further “muddy the waters” in respect of the public’s understanding of sentencing. The Committee is aware that a separate Committee has been formed by the Ministry of Justice to review the Prisons Act 1981 and believes that issues relating to sanctions for poor conduct and/or rewards for good conduct, which are more appropriately a prison management issue, would more properly be addressed by that Committee.

Recommendation 2

It is recommended that the one third remission of sentence be abolished.
CHAPTER 6
DISCRETIONARY MINIMUM TERMS: INHERENT PROBLEMS

6.1 Background

As stated in Chapter 2, the sentencing system prior to 1988 required the court to pass not one but two sentences on an offender. The first sentence was called the “maximum sentence” and reflected the court’s view of the seriousness of the offence. The second sentence was called the “minimum term” to be served before the offender was eligible for consideration for release on parole. In fixing the length of the minimum term the courts took into account the offender’s record, antecedents and other relevant facts.

The 1979 report of Mr Kevin Parker QC (as the Hon Justice Parker then was) identified two major sentencing problems with the minimum term regime in place at that time. The first related to the decision to set (or, under the original wording, to refuse to set) a minimum term. The second problem concerned the relationship between the head sentence and the minimum term. Parker argued that requiring the Court to set both a head (maximum) sentence and a minimum term created a “conundrum” of “multiple reckoning” because the same set of determinants applied to the making of both decisions. It is difficult to understand how there can be two sentences (a maximum term and a minimum term) which are appropriate for an offence, where both are determined on the basis of the same set of factors but which may vary independently of each other.

“In respect of the second problem, Parker noted that there were “undesirable” variations in practice and that whilst the (ill-defined) legislative intent may originally have been for minimum terms to be one half of the head sentence, they were often a third or less. In his report he was particularly critical of the imposition of short minimum terms on the grounds that they allowed too little time for a prisoner to adjust to prison life, for reports to be compiled relevant to the decision to release the prisoner, and for a suitable parole plan to be drawn up.”

Subsequently, a report by an ad hoc committee appointed by the Law Society of Western Australia to comment on the Parker Report, and the 1981 Report of the Committee of Inquiry into the Rate of Imprisonment (the “Dixon Report”) reinforced these criticisms of the minimum term regime.

Victoria and New South Wales appear to have overcome the conundrum of minimum and maximum terms by providing a two-tiered system whereby the court sets a minimum term and a period to be served on parole. Even so, there has been a lot of conjecture in New South Wales about the methodology in setting the minimum terms. The NSW Law Reform Commission in its April 1996 Discussion Paper on Sentencing commented that:

---

25 This Chapter, in particular sections 6.2 and 6.3 draws largely on discussion papers prepared for the Committee by Mr Neil Morgan.


27 N. Morgan at 104

28 Op cit

"... Does the section require the minimum term to be calculated in isolation from the additional term? Or should the court focus on the total sentence, determining the minimum term as a component of the total sentence? The weight of authority favours the view that an appropriate total sentence should be set as a starting point. Other authority asserts that a minimum term be set before the additional term. A third view suggest a provisional assessment focussing on the minimum term. A fourth view is that the court should not be constrained by any particular approach."

6.2 Sentencing Act 1995 (WA) - sentencing principles

Any proposal to change the current system of statutory minimum terms (or Non-parole periods) must be considered alongside the provisions of the Sentencing Act which relate to setting the "head" sentence. Section 6 of the Sentencing Act states that a sentence must be commensurate with the seriousness of the offence. According to subsection 6(2), seriousness of offence is determined by taking into account, inter alia, any aggravating and mitigating factors. Consideration needs to be given to how discretionary minimum terms might operate in conjunction with the Sentencing Act.

Under the Sentencing Act the sentencing court must take account of "mitigating factors". Under section 8 these are "factors which in the court's opinion decrease the culpability of the offender or decrease the extent to which the offender should be punished". On what basis would a court be tempted to set a short minimum term? Presumably it would be where a person commits an objectively serious offence which should be marked by a lengthy sentence, but where there are individual circumstances which indicate that a short minimum term should be set. An example might be where an elderly infirm person is convicted of sexual offences committed some years earlier, and where the accused suffers from a serious illness.

The Committee has some problems with setting a short minimum term in these circumstances - at least as the Sentencing Act currently stands. Under the current definition of mitigating factors, the "head" sentence should be reduced to take account of any matters which decrease the extent to which the person should be punished. This raises two related problems:

i) it would seem to suggest that the sentencing court will visit the same factors twice. This seems both complicated and wrong in principle; and

ii) it raises the prospect that a person will have a "double dip" of mitigating factors. In the example above of the elderly sex offender, the "head" sentence will be reduced and then the minimum term will be set at a reduced proportion of this reduced "head" sentence.

Likewise the Committee also sees problems in respect of long minimum terms. Under section 7 of the Sentencing Act, aggravating factors are factors which increase the culpability of the offender. It is further stated that an offence is not aggravated by the fact that the person pleaded not guilty or by the fact that a previous sentence has not achieved its purpose. The question therefore arises as to why a court would set a long minimum term. The criteria for setting a long minimum term must be considered alongside the criteria for refusing parole because the same considerations will feed into the question of denial and the question of setting a long minimum term.

Clearly, seriousness of the offence, coupled with other factors, is one possible ground for refusal to make a parole eligibility order. The question is whether the seriousness of the offence should be relevant to setting a long minimum term as well as refusing to make a person eligible for parole. Both as a matter of principle and under the terms of the Sentencing Act, the gravity of the offence is one of the determinants of the "head" sentence and should therefore not be relevant to the question of the minimum term.
Given this comment, the most obvious situation where the court would consider setting a long minimum term would seem to be where the offender has a poor history of community supervision. The Committee has conceptual and practical difficulties in using such a criterion. This is particularly the case in respect of Aboriginal offenders where, given their generally higher breach rates and rates of recidivism, it could lead to a “blow out” in the proportion of a custodial sentence served by Aboriginal offenders, thereby exacerbating the already high rate of Aboriginal imprisonment. In addition, it is conceptually “out of line” with the principle in the Sentencing Act to the effect that an offence is not aggravated by the fact of a criminal record.

6.3 Committee’s assessment of discretionary minimum terms

In arriving at its views in respect of discretionary minimum terms the Committee also took account of the following issues:

i) the Judge may become the subject of public criticism for setting a short minimum term or be subject to pressure to set a high minimum term;

ii) it is hard to see what factors will be taken into account in setting a minimum term which have not already been taken into account in setting the head sentence;

iii) there is potential for considerable disparity, as Judges may well adopt different views as to the principles applicable to setting a minimum term and the appropriate minimum itself;

iv) there will be an increase in appeals as both the prosecution and defence appeal against the head sentence and/or the minimum term;

v) it would be hard to dovetail a minimum term regime with the new Sentencing Act which provides that the sentence, ie the overall sentence, shall be commensurate with the seriousness of the offence (in which case, what would be the purpose of a minimum term?); and

vi) if Judges are to set the minimum term, it would be difficult to monitor whether offenders are being required to serve more time in custody.

The Committee’s considered view in relation to discretionary minimum terms is that they are neither sound conceptually nor practically. The Committee is cognizant of the fact that as part of its terms of reference, offenders sentenced under any new regime must not serve any longer in custody than under the present sentencing system. For this reason, and the problems outlined above in respect of discretionary minimum terms, the Committee believes that a simpler model along the lines of a fixed 50% minimum term would be more effective, more workable, more readily understood and therefore more “acceptable”.

21.
7.1 Simplifying sentencing

One of the main aims of the Sentencing Act was to simplify the sentencing process so that all people involved are aware of the issues that courts take into account and the effects and consequences of the range of sentencing alternatives. The Act has gone a long way to achieving this, although as pointed out earlier, issues of imprisonment and parole were left unchanged in the Sentencing Act and therefore are still to a certain extent “shrouded in mystery”.

The Committee is aware that the Government is proposing amendments to The Criminal Code and the Sentencing Act to provide a mechanism for the sentencing of offenders who reneg on promises to assist the Crown. Although the Committee has not been asked to comment on this proposal, this reform would add another element to sentencing, which adds to the argument that the core of the sentencing system needs to be clear, concise and simple to understand and implement.

It is necessary to have a simplified central sentencing regime in order that public confidence can be restored in the criminal justice system. The development of proposals such as discounting of sentences for offenders who agree to assist the Crown, and remedies for non-compliance, together with the current appeals system, provides sufficient flexibility and variation in sentencing. The enactment of the Sentencing Act 1995 provided courts with a greater range of sentencing options but did little to change the current system in relation to sentences of imprisonment.

7.2 Options considered

The Committee considered a range of alternative models of parole. In summary these were:

i) total discretionary minimum terms: (the court may determine to make a parole eligibility order and has absolute discretion to fix a minimum term anywhere in the range of the term imposed);

ii) discretionary minimum term within 1/3 to 2/3 range: (the court may determine to make a parole eligibility order and has a discretion to fix a minimum term within the range 1/3 to 2/3 of the term imposed);

iii) presumptive 50% minimum terms: (the court may determine to make a parole eligibility order, the presumption is that the minimum term will be set at 50% of the term, but the court may exercise a discretion to fix a minimum term anywhere in the range of the term imposed);

iv) fixed 50% minimum terms: (the court may determine to make a parole eligibility order, but the minimum term is fixed at 50% of the term and may not be varied by the court);

v) retention of the current system: (presumption in favour of the court setting eligibility for parole, presumption in favour of release on parole, minimum term (1/3) set by statutory formula);

vi) current Western Australian system plus “at risk”: (in addition to the current arrangements, following completion of the supervision period, the offender is “at
risk” for balance of sentence and can be returned to custody if sentenced to imprisonment for offences committed during the “at risk” period); and

vii) the current United Kingdom system: (court determines length of sentence only; no consideration given to eligibility or ineligibility for parole; sentences of under 12 months - automatic unconditional release; sentences of 12 months to 4 years - automatic conditional release; sentences of 4 years and over - discretionary conditional release).

These models are outlined in more detail and an analysis of the perceived advantages and disadvantages spelled out in Appendix I.

Following close consideration of these alternative models, the Committee formed the view that the preferred approach is one in which the Court has greater discretion whether or not to make a parole eligibility order and an offender who is made eligible for parole must serve a fixed minimum of 50% of sentence before consideration for release on parole is given by the Parole Board. This model is elaborated in the next section.

7.2 Fixed 50% Minimum Terms

7.2.1 Essential features of the model

The essential features of the preferred model are as follows:

i) Court may determine that an offender is either eligible or ineligible for parole;

ii) duration of minimum term set by statute at 50% of sentence;

iii) for a prisoner serving a sentence of less than 12 months, release will be automatic after serving 50% of sentence. Balance will generally be “at risk” although court will be given discretion to order that specific offenders should be supervised instead;

iv) criteria set for release on parole including risk to security of the public and successful completion of programs to address offending behaviour (no presumption of release on parole);

v) for a prisoner serving a sentence of 12 months or more, when released on parole the offender will be under supervision for a period equivalent to one third of the sentence up to a maximum of 2 years;

vi) following the supervision period, the offender is “at risk” for the balance of the sentence and can be returned to custody to serve the balance of the original sentence if sentenced to imprisonment for offences committed during the “at risk” period;

vii) Home Detention and Work Release no longer be available; and

viii) for Non-parole terms, a period of transition may occur in the last 10% of the sentence, up to a maximum of 6 months. Transition will be along similar lines to current Work Release regime.

7.2.2 Court may determine that offender is either eligible or ineligible for parole.

The significant factor needing to be taken into account when discussing issues related to minimum terms is that the current restrictions on eligibility for parole (s.89 Sentencing Act; formerly s37A Offenders Community Corrections Act) as interpreted by the Court
of Criminal Appeal have shifted the onus always in favour of granting eligibility for parole.

As noted in Chapter 2, section 2.3, “[t]wo key points have emerged from both Crown and defence appeals in relation to the wording of s37A(3). First, a sentence must be imposed without reference to the possibility of parole or its mechanics ... Secondly, although the statute gives courts a general discretion to consider “all or any” of the factors in s37A(3), the Court of Appeal has held that “the philosophy behind s37A requires detailed consideration of all the criteria set out therein for the purpose of exercising the discretion involved”.

With the enactment of the Sentencing Act 1995, despite calls for change from parts of the judiciary, there has been no change to the laws governing the granting of eligibility for parole. The provisions previously contained in s37A of the Offenders Community Corrections Act can now be found in s.89 of the Sentencing Act 1995. Although the law gives the courts a general discretion it has become clear that it will be exceptional for a parole eligibility order to be refused.

Unless these provisions are altered, perhaps in line with the provisions of s.32(5)(c) of the Criminal Law (Sentencing) Act 1988 (South Aust.), some of the problems currently expressed by the judiciary may not be overcome. The South Australian provisions are based on guidance to the court of the circumstances under which it may be inappropriate to order eligibility for parole.

The Committee believes that enactment of provisions along the following lines would overcome these issues:

A court may decide that parole is not appropriate because of -
(a) the seriousness of the offence;
(b) the offender’s criminal record;
(c) the offender’s behaviour when released from custody under a parole order made previously;
(d) any other factor the court decides is relevant.

The notion of 50% minimum terms would achieve little if it were not coupled with the discretion to make an offender ineligible for parole. However it must be made clear that consideration of the above issues should not be limited to considering only one criterion. The court should have regard to at least 2 or more of these factors in order to be able to make a considered decision on the refusal of parole.

Recommendation 3

It is recommended that the sentencing court be given greater discretion to determine that an offender is ineligible for parole and that statutory provision be made to this effect.

7.2.3 Duration of minimum term set by statute at 50% of sentence.

A lot can be said for introducing mandatory minimum terms for all offenders sentenced to imprisonment. Changes introduced in United Kingdom in 1991 provided for all prisoners to serve a minimum of 50% of the sentence prior to release into the community. Depending upon the length of the sentence the custodial period was followed by a period under supervision or “at risk”. Despite recent proposed changes to
the sentencing system in United Kingdom (not proclaimed), the 1991 system was well received by both the public and the judiciary.

Clarity, or a degree of “truth”, in sentencing can be achieved through providing a statutory requirement for an offender to serve a specified proportion of his/her sentence in custody prior to consideration for parole. This was in part the basis for the changes that were enacted in 1988 and carried through into the Sentencing Act 1995. Discretionary minimum terms, as previously existed in Western Australia prior to 1988, were abolished in favour of a system that was to promote greater understanding and parity of sentencing.

Recent public criticism has centred around the proportion of the sentence actually served in relation to the sentence imposed by the court. In order to maintain issues of parity, and to address concerns expressed by the public concerning the proportion of the sentence that is actually served, a system whereby all offenders who have been made eligible for release on parole would be eligible for consideration after having served 50% of the sentence may be favourably received by the community.

To a large extent this mirrors the basic structure of the current United Kingdom system and provides a considerable degree of “truth” or “clarity” in sentencing. The current United Kingdom system is based around a prisoner serving at least 50% of his/her sentence and thereafter, according to the length of the sentence, being released under some form of supervision and/or “good behaviour bond”. The Committee believes that such a system has particular merit for enactment in Western Australia. Such a system would enable clearer understanding by the public and offenders of the effect of the sentence. Although this would place some limits on the exercise of judicial discretion its practical benefits outweigh this possible disadvantage. Translation of current sentence lengths to such a new system would be easy to accommodate and such a regime also has the advantage of being able to maintain the current sentencing principles of the Sentencing Act in respect of determining the seriousness of the offence. Prisoners serving sentences of more than 12 years would become eligible for release after having served two thirds of the term less 2 years. This would ensure that prisoners serving longer sentences do not serve less time in custody than under the existing arrangements.

Recommendation 4

It is recommended that the existing formula be modified so that, where a parole eligibility order is made, the offender becomes eligible for release on parole after serving half of the term, except in the case of sentences of more than 12 years, where the offender would become eligible for release after having served 2 years less than two thirds of the term.

7.2.4 For prisoners serving terms of less than 12 months, release will be automatic after serving 50% of the sentence. Normally, release will be unconditional but supervision may be ordered by the Court. After release, offenders will be “at risk” for the remainder of the term.

The Committee has particular concerns in respect of sentences of less than 12 months. It can be argued that with such short sentences there should be no judicial discretion in setting minimum terms as not only can the period in custody be very short causing problems in preparation of parole reports, but in addition short periods of community supervision may achieve little given that the offender may only report on a few occasions before the parole period expires.
On the other hand it may also be argued that on occasions short sentences are imposed for offences of violence as a means of removing the offender from the locality of the crime scene (for example, the family home), and for these reasons some form of community supervision/monitoring may be appropriate. This issue can in part be overcome by the use of restraining orders in particular cases. The Committee also believes that in certain cases offenders may benefit from a short period of supervision/support whilst in the community. For this reason courts should have a discretion to order that in special circumstances offenders serving sentences of less than 12 months be supervised following release from custody. Prisoners sentenced to less than 12 months imprisonment should generally be released automatically and unconditionally after serving half of their sentence. They would not normally be subject to supervision, unless ordered by the sentencing court, but would remain “at risk” of being returned to prison to serve the balance of their original sentence if imprisoned for offences which were committed during the “at risk” period.

**Recommendation 5**

It is recommended that offenders serving sentences of less than 12 months be eligible for automatic release either with or without conditions after serving one half of the term and remain at risk for the remainder of the term.

7.2.5 Criteria ought to be set for release on parole including risk to security of the public and successful completion of programs to address offending behaviour (no presumption of release on parole).

In sentencing practice, a distinction needs to be drawn between the role of the courts in determining the appropriate sentence for an offence and the role of the Parole Board in determining the release of the offender back into the community after having served the custodial portion of the sentence. In making this determination, the Parole Board is required by virtue of the *Sentence Administration Act 1995* to give paramount consideration to the protection and interests of the community. The Board currently takes into account issues such as the nature and circumstances of the offence, the degree of risk that the release of the offender would present to the personal safety of an individual in the community or the community in general, and also what measures the offender has undertaken whilst in custody to address his/her offending behaviour. Participation in programs by prisoners is gaining more momentum and is considered more critical these days in the Parole Board’s consideration of cases.

However, conduct and behaviour in a prison setting are not always a good gauge of whether a prisoner has addressed their offending behaviour. The very nature of the prison system can place pressures on prisoners to behave in a manner which may be completely out of character and therefore not linked to their offending patterns. This does not mean that the Parole Board should not have regard to prison conduct in deciding whether to release a prisoner. Specifically, the Board should assess what aspects of prison conduct are linked to the nature/circumstances of the offence and the risk that the offender would present if released from custody.

However, there is considerable uncertainty in both the public’s mind and the offender’s as to the process and grounds which lead to the Parole Board’s grant or refusal of parole. Clearly the mystique surrounding the Parole Board’s deliberations needs to be removed. As previously indicated, the Parole Board already has regard to a number of issues when deciding whether to release an offender on parole. It is not always clear, to either the community or the offender, what these criteria might be.
There has been considerable commentary concerning the need for the Parole Board to be explicit in detailing the reasons for its decisions to defer or deny release on parole. The 1990 United Kingdom White Paper\textsuperscript{30} stressed the need for clear, published and readily available criteria for parole release decisions and stated that the offender should be provided with the reasons for the Parole Board's decision. This view was also argued by the NSW Law Reform Commission in 1996\textsuperscript{31} when it commented that:

"... The Commission believes that the offender is entitled to full and proper reasons for refusal of parole. The Commission therefore proposes that the Board practice be amended so as to present in a more extensive manner the reasons for which its decision to refuse parole is made."

This is not a new concept and was previously raised in 1978 by Thomas and Stewart in "Imprisonment in Western Australia: Evolution, Theory and Practice"\textsuperscript{32} where they stated:

"... a parole system has no chance whatever of even appearing moderately just, unless certain critical features are present. The first of these is the establishment of clear explicable criteria upon which decision will be based. These should be open, subject to scrutiny and susceptible to debate."

Although, as stated above, the Parole Board in Western Australia already has regard to a range of factors when deciding whether to release an offender on parole, it is not always clear, either to the community or the offender, what these criteria are. The Committee believes that a set of clearly expressed criteria, whether provided for statutorily or not, need to be publicised in order for the community and those involved directly in the criminal justice system to achieve a better understanding of the decision making process of the Parole Board. This would contribute to improved public confidence in the parole system. The criteria need not necessarily be enshrined in legislation although the Committee considers that this would be preferable. Statutory provision would demonstrate more clearly the importance attached by Parliament to the application of the criteria by the Parole Board in the determination of release.

\begin{center}
\begin{tabular}{|l|}
\hline
\textbf{Recommendation 6} \\
It is recommended that clear statutory guidelines ought to be established setting out the factors to be considered by the Parole Board in determining the release of an offender on parole. \\
\hline
\end{tabular}
\end{center}

\textsuperscript{30} Op cit \\
\textsuperscript{31} Op cit \\
\textsuperscript{32} A Stewart and J E Thomas (1978) Imprisonment in Western Australia: Evaluation, Theory and Practice. Perth, University of Western Australia Press
7.2.6 For a prisoner serving a sentence of 12 months or more, when released the offender will be under supervision for a period equivalent to 1/3 of the sentence up to a maximum of 2 years.

This reflects the current provisions of the Sentence Administration Act 1995 and the situation as it has been since 1988. There is clear support that an extensive period of supervision can have a detrimental effect on the chances of reducing recidivism. The current practice of limiting supervision to a maximum period of 2 years appears to achieve a reasonable balance between ensuring compliance and reducing over intrusion in an offender’s life which can “set him/her up to fail”.

Recommendation 7

It is recommended that an offender who has been released on parole remain under supervision for a period equivalent to one third of the term up to a maximum of two years.

7.2.7 Home Detention and Work Release no longer available.

Public confidence in sentencing needs to be restored. The low level of confidence the public currently has is attributable in part to the use of early release programs such as Home Detention and Work Release which further shorten the custodial portion of the sentence imposed by the court. Work Release in particular was originally presented as a means of offsetting the effects of long-term imprisonment. However, in recent years it has come to be regarded purely as a measure of combating the rate of imprisonment. In commenting on an earlier draft of this Report, the Chairman of the Parole Board indicated that he can see no justification in law or principle for Work Release except for those who have been refused parole and need a resocialisation time prior to release. The Committee believes that very little purpose is served by maintaining Work Release for offenders serving a sentence of which parole is a component.

Home Detention is currently used as a supervised early release mechanism for offenders serving sentences of less than 12 months. As stated above, such schemes may harm public confidence in sentencing. Figures for 1995/96 show that only 28% of prisoners released on home detention were serving sentences of which the major offence was one of violence. It is doubtful that Home Detention is of significant assistance in the community reintegration of prisoners serving short sentences. The Sentencing Act 1995 makes available a range of community based sentencing options for those offenders who do not warrant a custodial sentence. Included among these is the Intensive Supervision Order which may include a condition of electronic monitoring. Given the availability of this option the Committee can see no reason for retention of the current Home Detention provisions as they relate to sentenced prisoners.
It is clear that the abolition of early release programs such as Home Detention and Work Release will have some impact on prison musters. However, it can be expected that the impact of the abolition of Home Detention will be offset by the anticipated reduction in prison musters as a result of the reforms contained in the Sentencing Act 1995. The Victorian approach of sentence adjustment (see Chapter 4 above) would need to be adopted in order to offset some of the effects of abolishing Work Release.

**Recommendation 8**

It is recommended that Work Release be abolished for offenders subject to parole eligibility orders.

**Recommendation 9**

It is recommended that Home Detention for offenders serving terms of less than 12 months be abolished.

7.2.8 For Non-parole terms, a period of transition may occur in the last 10% of the sentence. Transition will be along similar lines to the current Work Release regime.

The Committee is strongly of the opinion that for those offenders serving sentences where eligibility for parole has been refused, some form of community transition needs to take place. This transition should be aimed primarily at offsetting the effects of long-term imprisonment but also can achieve some level of community protection by ensuring supervision of the offender while making the transition from prison to the community.

The length of the program and conditions (if any) that would apply, need to be carefully considered. The current Work Release program serves as a useful supervision and monitoring model in this regard. This element of the proposal has the general support of the Chairman of the Parole Board.

**Recommendation 10**

It is recommended that a period of community re-integration be provided for offenders not subject to parole eligibility orders serving terms of 12 months or more.

7.2.9 Following the supervision period, offender is “at risk” for balance of sentence and can be returned to custody to serve the balance of the original sentence if sentenced to imprisonment for offences committed during the “at risk” period.

As pointed out above, greater “truth” or “clarity” in sentencing is being called for by the public. The notion of remittal of 1/3 of a sentence cuts across any notion of truth or clarity. The United Kingdom system of an “at risk” component would appear to alleviate a number of these concerns although it is likely that prison musters will
increase as the result of more breaches. However, given that a breach will not occur until the offender has been sentenced to imprisonment for an offence committed during the "at risk" portion of the sentence, the offender would already be in custody on the other matter(s).

Recommendation 11

Offenders released on parole or to community reintegration be at risk of being returned to prison for the commission of any offence committed during the remainder of the sentence.

7.2.10 Minimising any unintended impact on prison musters

The Committee is concerned to ensure that prison musters are not significantly affected by any new sentencing regime. In Victoria, provision is made in the Sentencing Act 1991 (Vic) for the court to adjust sentences so that the actual time expected to be served by a prisoner under any new sentencing scheme is no greater than under the existing arrangements. An alternative approach, and one which was contemplated in the United Kingdom, would be for the Chief Justice, if he were in agreement, to issue a practice direction to the same effect. On the basis that the Victorian approach has been tested and appears to have been largely effective, the inclusion of a suitable provision in legislation is supported. This should assist in ensuring that the rapid and sizeable growth in the prison population encountered when "truth in sentencing" was introduced in New South Wales is not repeated in Western Australia. However, the purpose of any provision requiring the courts to adjust sentences would need to carefully and fully explained and the effects of the legislation would need to be very closely monitored.

Recommendation 12

It is recommended that the sentencing court be required by statute to adjust sentences so that the actual time served is no greater than that which would have been served if the existing provisions relating to remission and parole still applied.
REFERENCES


J. Straw, Home Secretary (1998) coi6951d.ok at www.coi.gov.uk

A Stewart and J E Thomas (1978) Imprisonment in Western Australia: Evaluation, Theory and Practice. Perth, University of Western Australia Press

APPENDIX I
PAROLE OPTIONS CONSIDERED

OPTION 1: TOTAL DISCRETIONARY MINIMUM TERMS

Features of System

i) Duration of minimum term at total discretion of court.

ii) Court may determine that offender is ineligible for parole.

iii) Minimum term may be extended by up to 10% for poor prison conduct.

iv) Home Detention and Work Release no longer available.

v) Criteria set for release on parole including risk to security of the public and successful completion of programs to address offending behaviour (no presumption of release on parole).

vi) When released, offender will be under supervision for a period equivalent to 1/3 of the sentence up to a maximum of 2 years.

vii) Following supervision period, offender is “at risk” for balance of sentence and can be returned to custody if sentenced to imprisonment for offences committed during the “at risk” period.

viii) For non-parole terms, a period of re-integration may occur in the last 6 months of the sentence. Re-integration will be along similar lines to current work release regime.

ix) Participation in re-integration will be awarded automatically or earned at the rate of 6 days per month served, up to a total of 180 days (6 months).

x) Release on re-integration may be delayed by poor prison conduct.

Analysis

Pros

a) Court can exercise control over the period offender spends in custody.

b) Proper function of court to determine period in custody.

c) Ability of court to refuse parole.

d) Greater understanding for court, community and offender as to when consideration of release will occur.

e) Minimum term can be tailored to reflect the individual circumstances of the offender.

f) Offender “at risk” for balance of sentence.
g) Remission abolished.

Cons

a) No parity with other offenders sentenced to same period of imprisonment.

b) Potential for increased appeals against head sentence and minimum term.

c) Judge may be subject to criticism for setting very short minimum terms and could be pressured to set high minimum terms

d) No clear guidance as to the factors to be considered in setting the minimum term.

e) Potential to increase prison population unless sentences are adjusted.

**OPTION 2: DISCRETIONARY MINIMUM TERM WITHIN 1/3 TO 2/3 RANGE**

Features of System

i) Duration of minimum term is within boundaries of 1/3 to 2/3 of sentence imposed. Length to be determined at discretion of court within these boundaries.

ii) Court may determine that offender is ineligible for parole.

iii) Minimum term may be extended by up to 10% for poor prison conduct.

iv) Home Detention and Work Release no longer available.

v) Criteria set for release on parole including risk to security of the public and successful completion of programs to address offending behaviour (no presumption of release on parole).

vi) When released, offender will be under supervision for a period equivalent to 1/3 of the sentence up to a maximum of 2 years.

vii) Following supervision period, offender is "at risk" for balance of sentence and can be returned to custody if sentenced to imprisonment for offences committed during the "at risk" period.

viii) For Non-parole terms, a period of re-integration may occur in the last 6 months of the sentence. Re-integration will be along similar lines to current work release regime.

ix) Participation in re-integration will be awarded automatically or earned at the rate of 6 days per month served, up to a total of 180 days (6 months).

x) Release on re-integration may be delayed by poor prison conduct.

Analysis

Pros

a) Court can exercise control over the period offender spends in custody.

b) Proper function of court to determine period in custody.
c) Ability of court to refuse parole.

d) Greater understanding for court, community and offender as to when consideration of release will occur.

e) Minimum term can be tailored to reflect the individual circumstances of the offender.

f) Avoids difficulty of very short minimum terms.

g) Offender “at risk” for balance of sentence.

h) Remission abolished.

Cons

a) No parity with other offenders sentenced to same period of imprisonment.

b) Potential for increased appeals against head sentence and minimum term.

c) No clear guidance as to the factors to be considered in setting the minimum term.

d) Potential to increase prison population unless sentences are adjusted.

Option 3: Presumptive 50% Minimum Terms

Features of System

i) Duration of minimum term set by statute at 50% of sentence, but, in exceptional circumstances the court may override and set minimum term within the range of 1/3 to 2/3 of sentence.

ii) Court may determine that offender is ineligible for parole.

iii) Minimum term may be extended by up to 10% for poor prison conduct.

iv) Home Detention and Work Release no longer available.

v) Criteria set for release on parole including risk to security of the public and successful completion of programs to address offending behaviour (no presumption of release on parole).

vi) When released, offender will be under supervision for a period equivalent to 1/3 of the sentence up to a maximum of 2 years.

vii) Following supervision period, offender is “at risk” for balance of sentence and can be returned to custody if sentenced to imprisonment for offences committed during the “at risk” period.

viii) For Non-parole terms, a period of re-integration may occur in the last 6 months of the sentence. Re-integration will be along similar lines to current work release regime.

ix) Participation in re-integration will be awarded automatically or earned at the rate of 6 days per month served, up to a total of 180 days (6 months).
x) Release on re-integration may be delayed by poor prison conduct.

Analysis

_Pros_

a) Court can exercise control over the period offender spends in custody.

b) Ability of court to refuse parole.

c) Greater understanding for court, community and offender as to when consideration of release will occur.

d) Minimum term can be tailored to reflect the individual circumstances of the offender.

e) Avoids difficulty of very short minimum terms.

f) For most offenders there is parity with other offenders sentenced to the same period of imprisonment.

g) Offender “at risk” for balance of sentence.

h) Remission abolished.

_Cons_

a) Potential for increased appeals against head sentence and minimum term.

b) Potential to increase prison population unless sentences are adjusted.

**OPTION ④: FIXED 50% MINIMUM TERMS**

**Features of System**

i) Duration of minimum term set by statute at 50% of sentence.

ii) Court may determine that offender is either eligible or ineligible for parole.

iii) Minimum term may be extended by up to 10% for poor prison conduct.

iv) Home Detention and Work Release no longer available.

v) Criteria set for release on parole including risk to security of the public and successful completion of programs to address offending behaviour (no presumption of release on parole).

vi) When released, offender will be under supervision for a period equivalent to 1/3 of the sentence up to a maximum of 2 years.

vii) Following supervision period, offender is “at risk” for balance of sentence and can be returned to custody if sentenced to imprisonment for offences committed during the “at risk” period.
viii) For Non-parole terms, a period of re-integration may occur in the last 6 months of the sentence. Re-integration will be along similar lines to current work release regime.

ix) Participation in re-integration will be awarded automatically or earned at the rate of 6 days per month served, up to a total of 180 days (6 months).

x) Release on re-integration may be delayed by poor prison conduct.

**Analysis**

**Pros**

a) Parity with other offenders sentenced to same period of imprisonment.

b) Ability of court to refuse parole.

c) Greater understanding for court, community and offender as to when consideration of release will occur.

d) Offender "at risk" for balance of sentence.

e) Remission abolished.

**Cons**

a) Court cannot exercise control over the period offender spends in custody except in determining the "head" sentence.

b) Minimum term cannot be tailored to reflect the individual circumstances of the offender.

c) Potential to increase prison population unless sentences are adjusted.

**OPTION 5: MAINTAIN CURRENT SYSTEM**

**Features of System**

i) Presumption in favour of court setting eligibility for parole.

ii) Eligibility for parole can only be granted on sentences of 12 months or more. Home Detention available to offenders sentenced to less than 12 months.

iii) Presumption in favour of release to parole.

iv) Minimum term set by statutory formula.

v) Minimum term can be extended by up to 1/3 for poor prison conduct.

vi) Work Release available to offenders who have served a minimum of 12 months in custody and are within 6 months of eligibility date for parole release.

vii) When released, offender will be under supervision for a period equivalent to 1/3 of the sentence up to a maximum of 2 years.

viii) If supervision period is successfully completed, balance of sentence is remitted.
ix) For Non-parole terms, offenders are released after completing 2/3 of sentence. This period may be extended by up to 1/3 for poor prison conduct. Work Release available to offenders who have served a minimum of 12 months in custody and are within 6 months of release date. Balance of sentence is automatically remitted upon discharge from custody or completion of Work Release obligations.

Analysis

Pros

a) Parity with other offenders sentenced to same period of imprisonment.

b) No necessity to adjust sentences.

Cons

a) Minimum term cannot be tailored to reflect the individual circumstances of the offender

b) Judicial discretion to refuse parole is too restrictive.

c) Discretion of Parole Board limited by presumption in favour of parole.

d) Balance of sentence remitted for no valid reason.

e) Public and judicial concern over length of time spent in custody.

Option 6: Current System + “at risk”

Features of System

i) Presumption in favour of court setting eligibility for parole.

ii) Eligibility for parole can only be granted on sentences of 12 months or more. Home Detention available to offenders sentenced to less than 12 months.

iii) Presumption in favour of release to parole.

iv) Minimum term set by statutory formula.

v) Minimum term may be extended by up to 1/3 for poor prison conduct.

vi) Work Release available to offenders who have served a minimum of 12 months in custody and are within 6 months of eligibility date for parole release.

vii) When released, offender will be under supervision for a period equivalent to 1/3 of the sentence up to a maximum of 2 years.

viii) Following supervision period, offender is “at risk” for balance of sentence and can be returned to custody if sentenced to imprisonment for offences committed during the “at risk” period.

ix) For Non-parole terms, offenders are released after completing 2/3 of sentence. This period may be extended by up to 1/3 for poor prison conduct. Work Release available to offenders who have served a minimum of 12 months in custody and are
within 6 months of release date. Following discharge or completion of Work Release, offender is “at risk” for balance of sentence and can be returned to custody if sentenced to imprisonment for offences committed during the “at risk” period.

Analysis

Pros

a) Parity with other offenders sentenced to same period of imprisonment.

b) Offender “at risk” for balance of sentence.

c) No necessity to adjust sentences.

Cons

a) Minimum term cannot be tailored to reflect the individual circumstances of the offender

b) Judicial discretion to refuse parole is too restrictive.

c) Discretion of Parole Board limited by presumption in favour of parole.

d) Public and judicial concern over length of time spent in custody.

Option 1: Current United Kingdom System

Features of System

i) Court determines length of sentence only. No consideration given to eligibility or ineligibility for parole.

ii) Automatic Unconditional Release - Under 12 months: Released automatically halfway through sentence. No supervision but “at risk” for second half of sentence.

iii) Automatic Conditional Release - 12 months to under 4 years: Released automatically halfway through sentence. Supervised up to the three-quarters point of sentence. “at risk” till end of sentence.

iv) Discretionary Conditional Release - 4 years and over: Eligible for parole at halfway point. May be released on parole at any point between half-way and two-thirds. Release at two-thirds is automatic, but release on parole or at two-thirds will be on licence till three-quarters point. “at risk” till end of sentence.

Analysis

Pros

a) Parity with other offenders sentenced to same period of imprisonment.

b) Greater understanding for court, community and offender as to when consideration of release will occur.

c) Offender “at risk” for balance of sentence.
Cons

a) Court cannot exercise control over the period offender spends in custody.

b) Minimum term cannot be tailored to reflect the individual circumstances of the offender.

c) No ability for court to refuse parole.

d) Potential to increase prison population unless sentences are adjusted.
APPENDIX II
SUMMARY OF PUBLIC SUBMISSIONS TO THE REVIEW

As indicated in Chapter 1, public submissions were called for as part of the Committee’s deliberations and the nature of the submissions and comments made reflected the public perceptions of the “failures” in the current system.

It was also obvious from the submissions that the public doesn’t have a clear understanding of the mechanics of the sentencing system and this is a matter that needs to be addressed. The philosophy behind the establishment of the Sentencing Act 1995, “simplifying sentencing so that the community and all those involved in the process, including the victim and the offender, can more readily understand the effect and extent of a sentence”, may resolve some of this uncertainty, although this will need to be monitored and built upon if required.

The following issues were raised in the public submissions received by the Committee:

⇒ greater clarity in sentencing is needed
⇒ community confidence in sentencing needs to be restored
⇒ accountability of courts and Parole Board
⇒ crime prevention
⇒ consideration of victims’ views
⇒ returning discretion to judiciary
⇒ greater penalties for violent crimes and home burglaries
⇒ more distinction between violent and non-violent crimes
⇒ mandatory minimum sentences for violent crimes
⇒ abolish parole
⇒ parole should be earned
⇒ parole should only be available to first offenders not repeat offenders
⇒ greater sanctions for breaching parole
⇒ remission should be abolished
⇒ offenders should serve the full sentence
⇒ minimum term should be set at around 75-80 % of sentence.

Clearly, several of these issues are outside the scope of the Committee’s deliberations. Issues relevant to the Terms of Reference were considered by the Committee and are addressed in this Report.
## APPENDIX III

**SUMMARY OF COMMENTS OF KEY STAKEHOLDERS**
*(CHIEF JUSTICE; CHIEF STIPENDIARY MAGISTRATE, CHAIRMAN OF THE PAROLE BOARD & THE LAW SOCIETY)*

**ON THE RECOMMENDATIONS OF THE REPORT**

<table>
<thead>
<tr>
<th>RECOMMENDATION</th>
<th>COMMENTS *</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. A system of parole be retained</td>
<td>Comment not sought on this recommendation because the Committee took the stance that the concept of parole was not under scrutiny.</td>
</tr>
<tr>
<td>2. The ( \frac{1}{3} ) remission of sentence be abolished.</td>
<td><strong>Chief Justice:</strong> expresses general support.</td>
</tr>
</tbody>
</table>
| 3. The sentencing court be given greater discretion to determine that an offender is ineligible for parole and that statutory provision be made to that effect. | **Chief Justice:** supports. In addition he comments that: the implications of guided discretion to declare that in a particular case it would be inappropriate to order parole could follow the *Sentencing Act 1991* (Vic), s.11(1) but would be subject to the decision of the High Court in *Mitchell v The Queen*. "[T]he proposal discussed by the Review Committee would not appear to have the capacity to confer upon the sentencing court a broad and relatively unfettered discretion to order ineligibility for parole otherwise provided by the statute."

**Review Committee Comment:** this matter is being addressed, in part, through current amendments pertaining to whole of life sentences in the Criminal Law Amendment Bill 1997. The Committee supports the Chief Justice’s view on this matter.

**Parole Board:** supports. Suggests that courts consider prospect of prisoners benefiting from prison and community based rehabilitation programs.

**Review Committee Comment:** agree. |
| 4. The existing formula be modified so that, where a parole eligibility order is made, the offender becomes eligible for release on parole after having served \( \frac{1}{2} \) of the term, except in the case of sentences of more than 12 years, where the offender would become eligible for release after having served 2 years less than \( \frac{2}{3} \) of the term. | **Chief Justice:** queries recommendation that present system be left in place for sentences of 12 years or more.

**Review Committee Comment:** The effect of the recommendation is that an offender sentenced to 12 years or more who is eligible for parole would not serve a shorter period in custody under the new arrangements than under the old.

**Chief Justice:** the arguments against discretionary minimum terms are thought to have merit

**CSM:** it would be worthwhile to give discretion to withhold parole eligibility only in respect of sentences longer than 12 months.

**Review Committee Comment:** proposal is that offenders only be eligible for consideration for parole when sentenced to 12 months or more.

**Law Society:** suggests that there is no cogent reason why Non-parole period should be increased from \( \frac{1}{3} \) to \( \frac{1}{2} \) of the term.

**Review Committee Comment:** mathematically, if \( \frac{1}{3} \) remission is removed, then the Non-parole period has to increase to \( \frac{1}{2} \) in order to maintain the actual Non-parole period served. |
5. Offenders serving sentences of less than 12 months be eligible for automatic release either with or without conditions after serving \( \frac{1}{2} \) of the term and remain at risk for the remainder of the term.

**Chief Justice**: does not support as inconsistent with reducing the rate of remission.

**Review Committee Comment**: taken together with recommendation 8 above, offenders serving less than 12 months can be expected to serve an equivalent period to that which they would serve under the current arrangements.

**CSM**: suggests that release should be at \( \frac{2}{3} \) of the term rather than \( \frac{1}{2} \).

**Review Committee Comment**: Since it is also proposed that Home Detention be abolished for offenders serving terms of 12 months or less, the CSM's proposal would result in these offenders serving significantly longer in custody. It is therefore not supported.

6. Clear statutory guidelines be established setting out factors to be considered by the Parole Board in determining the release of an offender on parole.

**Chief Justice**: the Parole Board should determine whether an offender eligible for release on parole should be released and, if so, on what conditions, and the prisoner should not have the capacity to decline that release.

**Review Committee Comment**: agree.

**CSM**: supports.

**Parole Board**: supports with additional suggestion for inclusion of the following criteria in legislation:

1) prisoner's conduct in prison (behaviour);
2) prisoner's involvement in rehabilitation courses in prison and under supervision

**Review Committee Comment**: agree.

**Law Society**: supports, and suggests further consideration of criteria applicable to determining ineligibility for parole.

7. An offender who has been released on parole remain under supervision for a period equivalent to \( \frac{1}{3} \) of the term up to a maximum of two years.

8. Work Release be abolished for offenders subject to parole eligibility orders.

9. Home Detention for offenders serving terms of less than 12 months be abolished.

**Chief Justice**: "... for the reasons given by the Review Committee requires no comment."

See **Law Society**'s comment in respect of recommendation 10 below.
10. A period of community re-integration be provided for offenders not subject to parole eligibility orders serving terms of 12 months or more.

**Chief Justice**: generally supported. Parole Board should administer the community reintegration of offenders.

**Review Committee Comment**: This proposal would have implications for Parole Board resources. The Committee considers that administration of this function could be conducted by the Offender Management Division of the Ministry of Justice.

**Law Society**: considers that Home Detention and Work Release or their equivalents are important particularly where a finite sentence is imposed.

**Review Committee Comment**: the proposals address the Law Societies concern that offenders released after serving a long period of imprisonment are given the opportunity of readjusting to life back in the community.

11. Offenders released on parole or to community re-integration be at risk of being returned to prison for the commission of any offence committed during the remainder of the sentence.

**Chief Justice**: at risk concept should be limited to release on parole or other form of release subject to conditions on early release. “Unless the offender is to be returned to serve a term as a sanction for breach of parole or conditions otherwise placed upon his or her early release, the at risk concept has a distinct element of double punishment attached to it.”

**Review Committee Comment**: as proposed, the at risk component has the implicit condition that the offender will not re-offend - notwithstanding the lack of supervision. The Committee considers that the at risk component should explicitly provide that the offender not re-offend.

**Law Society**: supports at risk component.

12. The sentencing court be required by statute to adjust sentences so that the actual time served is no greater than that which would have been served if the existing provisions relating to remission and parole still applied.

**Chief Justice**: care is required in relation to the transition to any new system particularly the aggregation of sentences imposed under the present system and any new system.

**Review Committee Comment**: see below.

**Chief Justice**: the proposed changes have the potential to increase the prison population unless the courts are enabled and required to have regard to the more punitive character of the new system as in the United Kingdom [where the Lord Chief Justice promulgated a Practice Direction dealing with this problem]. “[T]he experience in NSW and Victoria demonstrates that attempts to fetter judicial discretion are undesirable.”

**Review Committee Comment**: The Review Committee is seriously concerned about the possible effect of the proposed changes on the size of the prison population.

**Law Society**: considers this to be cumbersome and unnecessary. Suggests that a better way would be to maintain the present statutory formula for release on parole and abolish remission for offenders sentenced to a finite term.

**Review Committee Comment**: any change will require a period of transition, and entail either legislative change or a practice direction. Retaining existing statutory formula would not achieve objective of reducing discrepancy between sentence imposed and time actually served.
Other comments of key stakeholders

Chief Justice: Consideration should be given to having the decision about parole in the case of offenders serving an indeterminate term being made by the Parole Board rather than the Governor in Executive Council as at present.

Review Committee Comment: This proposal is outside the terms of reference of the Committee.

Chief Justice: Care would need to be taken to provide appropriately for the transition to the new system.

Review Committee Comment: agree.

Chief Justice: suggests that the proposed approach may not go far enough and that whatever change in the law is to be implemented it should provide more complete truth in sentencing than is presently the case and it must be clear and workable.

Review Committee Comment: It is considered that the proposed approach satisfies these concerns.

Law Society: Community concerns with current sentencing regime could to some extent be alleviated by judicial officers being required to explain reasons for the sentence in clear terms.

* Committee's response to comments is in italics.