PAROLE AND SENTENCING IN WESTERN AUSTRALIA

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This article considers the history and development of parole in Western Australia. Particular attention is paid to the recent report of the Parliamentary Joint Select Committee on Parole and to the impact of recent legislative changes to the sentencing of juveniles on the parole system in general. The author argues that parole has a place in sentencing but that the current system contains a number of paradoxes and is becoming too complex to be readily understood

Parole is best defined as the early release of an inmate from a custodial sentence, on licence (that is, subject to supervision and, in the event of breach, recall to custody). The date of release is determined, to an extent which varies between different schemes, by an executive decision making body. One important factor behind its introduction, in Western Australia as elsewhere, in the 1960's was a faith (at times a somewhat blind faith) in the rehabilitative treatment of offenders. Despite criticisms both of this ideological framework and of the operation of the parole system, a Joint Select Committee of the Parliament of Western Australia has recently argued for its retention, albeit under another name.[1] This paper seeks to explain the history of parole and related early release schemes in Western Australia, to assess the impact of major legislative changes in 1988, and to identify some problems and possible palliatives which were not revealed in the Joint Select Committee's

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1. Western Australia Parliament 1991 *Report of the Joint Select Committee on Parole* (J Halden, Chairman). The proposed name change to Supervised Community Sentence is potentially confusing, given that parole is, at least formally, a decision of the executive, and when there are other forms of supervisory sentence (notably probation and community service) which are imposed by the courts, 80.

review. Some of the problems which are identified have been further aggravated by recent legislation targeting repeat and violent offenders.

A. CONDITIONAL RELEASE SCHEMES PRIOR TO THE TWENTIETH CENTURY

Parole itself is of relatively recent origin, having been introduced in Western Australia in 1963. However, schemes for the conditional release of prisoners have a long history during which economic, managerial and ideological concerns have all been influential to differing degrees at different times. The principles (if not the details) of some of the more recent proposals on sentencing and parole also have interesting historical parallels. It is very common to trace the earliest precursors of parole to the "ticket of leave" system which grew up alongside transporation to Australia in the late eighteenth century.[2] However, there were related schemes in the earlier history of transportation to America and there are fundamental differences in both purpose and practice between the ticket of leave and modern parole systems.

Transportation itself involved release from punishment, in that the convicts would otherwise have been put to death, but it was a process born not of humanitarian concerns but of simple economic necessity. Thus, the candid preamble to the enabling legislation referred to the "great want of servants in many of His Majesty's Colonies".[3] An integral part of transportation was the "indenture" system which developed from around 1617; those convicts fortunate enough to survive the Atlantic crossing at the hands of private carriers were auctioned off, to become "indentured servants" who could work their way to freedom from their new masters. Negro slaves from Africa were later considered more pliable and less troublesome than the British convicts and "once transportation ceased to pay, the colonists realised that it was a shameful business unworthy of them".[4] Transportation to America ceased in around 1775 and the following decade witnessed a considerable increase in the proportionate use of the death penalty and

2. See eg *Archibald* (1989) 40 A Crim R 228 Walsh J, 237; A K Bottomley *Decisions in the Penal Process* (London: M Robertson, 1973) 194; J E Hall Williams *The English Penal System in Transition* (London: Butterworths, 1970) 180; F McClintock "The Future of Parole" in J C Freeman (ed) *Prisons Past and Future* (London: Heinemann, 1978) 124.
3. Preamble to 4 Geo I, c II.
4. G Rusche and O Kirchheimer *Punishment and Social Structure* (New York: Columbia University Press, 1939) 61; see also D Dressler *Practice and Theory of Probation and Parole* (New York: Columbia University Press, 1959) 45.

imprisonment.[5] Convicts who were not hanged and who could no longer be transported were simply warehoused in rotting prison hulks; the annual stock loss was around 25 per cent, generally by death from the squalid conditions.[6] However, there is also some rather sketchy evidence of an early form of remission as some offenders were apparently released as a reward for good conduct.[7]

Australia, which, in the chauvinistic words of one renowned English historian, Captain Cook "had merely to pick up out of the sea", was the next destination for transported felons.[8] The first convict fleet of two navy vessels and nine transport ships set sail for Australia in 1787. There were riots en route and further disorder when Botany Bay was reached. From the outset, therefore, a major problem facing the early colonists was to control and regulate the convict labour force and it is against this background that the "ticket of leave" system must be seen. Starting in around 1800, this allowed the convict to be "free within limits"; the "ticket" was signed by the Governor and the convict lived in an assigned area and was self-supporting. Continuing liberty was dependent on good behaviour. The system, which was designed to promote discipline and control, apparently failed to produce the desired results and lay semi-comatose until revitalised by Sir Alexander Maconochie in the Norfolk Island Penal Colony in 1840. Maconochie did not conceptualise the ticket of leave simply in negative terms of controlling convict labour, but believed that it had a distinct role in the process of reformation. Although often regarded as an early form of parole, the "mark" scheme had its roots in a different philosophy and the similarity appears superficial. Under Maconochie's mark system, satisfactory progress through various stages of custody, government labour and freedom within a prescribed area on a ticket of leave would lead to complete freedom. The system was predicated on an individual prisoner's power to win rewards which were, from the outset, fixed and certain; unlike modern parole systems, there was no executive decision making body exercising broad discretionary powers and making judgments about a prisoner's "response to treatment" or "dangerousness"

5. See M Ignatieff *A Just Measure of Pain. The Penitentiary in the Industrial Revolution 1750-1850* (London: MacMillan, 1978) 81. It is also arguable that the the increase in the death penalty in some years also related to growing social disorder: see G Rude *Revolutionary Europe 1783-1815* (London: Fontana, 1985).
6. Ignatieff ibid, 80.
7. See eg W Branch-Johnson *The English Prison Hulks* (London: Christopher Johnson, 1957) 103, 123 who observes that the true basis for release may have been a reward for bribing the captain.
8. G M Trevelyan *English Social History* (London: Penguin, 1964).

before awarding the *privilege* of parole. The mark system reflected the classical (or liberal) position exemplified by the writings of Cesare Beccaria (1738-1794) that humans are free willed rational creatures.[9] Classical criminal law was not concerned to identify the antecedent causes of crime and adjust the sentencing disposition with a view to "treating" these causes but, rather, to allocate a punishment which was proportionate to the wrongdoing and to eliminate arbitrary decision making in the criminal process. A striking example is Beccaria's view that a judge should decide on guilt alone and that the legislature should set up a Criminal Code prescribing exact penalties. Promptness, mildness and certainty were the core features of Beccaria's model of punishment.

In Western Australia a simpler ticket of leave scheme existed. Many convicts arrived in Fremantle with an immediate entitlement to a ticket of leave and the overt emphasis was still very much on the control of convict labour; those who were unable to find work in the private sector were required to work on public work schemes and Prison Rules stated that "idleness" was to be "severely punished".[10] However, transportation to Western Australia was relatively short-lived, lasting from 1850 to 1867, and involved comparatively few people.[11] Transportation to the Eastern colonies had ceased at an earlier date and the English Parliament was forced to enact a series of Penal Servitude Acts, commencing in 1853, under which convicts first served a sentence of Penal Servitude in lieu of transportation and were then subject to a "licence to be at large". There can be little doubt that these measures were a pragmatic response to the institutional pressures generated by the build up of convicts awaiting transportation, and were not primarily to do with offering new and more humane forms of treatment.[12] As with later parole

9. C Beccaria *Essay on Crimes and Punishment (1764)*; for a discussion of Beccaria's lasting influence see A Giuffre (ed) *Cesare Beccaria and Modern Criminal Policy* (Milan: a proceeding of the international congress under the auspices of the United Nations Organisation by the Centro nationale di premenzione e difesa sociale, 1990).
10. A Stewart and J E Thomas *Imprisonment in Western Australia. Evolution, Theory and Practice* (Perth: University of Western Australia Press, 1978) 26.
11. W J Forsythe *The Reform of Prisoners 1830 - 1900* (London: Croom Helm, 1987) 148-149; Stewart and Thomas ibid, ch 2; L W Fox *The English Prison and Borstal Systems* (London: Routledge and Kegan Paul, 1952) 44; L L Robson *The Convict Settlers of Australia* (Victoria: Melbourne University Press, 1970).
12. The Victorians were not averse to explicity recognising pragmatism as the guiding principle. The preamble to the Victorian Penal Servitude Act 1853 (16 and 17 Vict c 99) states that:

> "Whereas by reason of the Difficulty of transporting offenders beyond the Seas, it had become expedient to substitute in certain Cases, other Punishment...."

schemes there was considerable public concern over the "licence to be at large" and "[t]he Ticket of Leave men found themselves barred from most employment, harassed by the police and vilified in the Press."[13] The "discipline" theme remained paramount, with a standard condition of the licence being that the holder "shall not lead an idle and dissolute life, without visible means of obtaining an honest livelihood."[14] Another condition, in similarly vague and antiquated language, and still in use, was that the holder "shall not habitually associate with notoriously bad characters, such as reputed thieves and prostitutes." [15]

Rusche and Kircheimer provide the following account of penal change:

> In so far as the basic economic needs of a commodity producing society do not directly determine the creation and shaping of punishments, that is to say, in so far as convicts are not used to fill out gaps in the labour market, the choice of methods is largely influenced by fiscal interests.[16]

The labour provision strand of this simple economic determinism provides a particularly convincing explanation of developments during the eighteenth and nineteenth centuries. In most cases the policies of providing labour and controlling the workforce were overt. Even Maconochie's mark system aimed at artificially replicating conditions in the real world: "in life

13. Ignatieff supra n 5, 201; see also P W J Bartripp "Public Opinion and Law Enforcement: The Ticket of Leave Scares in Mid-Victorian Britain" in V Bailey (ed) *Policing and Punishment in Nineteenth Century Britain* (New Brunswich: Rutgers University Press, 1981); J J Tobias *Crime and Industrial Society in the Nineteenth Century* (Middlesex: Pelican, 1967) 248-249.
14. Penal Servitude Act 1853, Schedule A.
15. S 41(3) of the (WA) Offenders Community Corrections Act 1963 provides that every parole order shall include "a requirement that the prisoner shall not frequently consort with reputed criminals or persons of ill repute". Indeed this is the *only* condition set out as necessary in the legislation. The (WA) Offenders Community Corrections Regulations 1991 do contain a general list of requirements and conditions but this, perhaps strangely, omits the s 41(3) condition: reg 44. The condition was not considered by the Joint Select Committee supra n 1, but it is submitted that it should be removed as imprecise, unrealistic and objectionable in principle. Does *"frequently* consorting" suggest that *some* "consorting" is acceptable? Who are "reputed criminals" and "persons of ill repute"? It is inevitable that many offenders when released on parole will return to the same social environment from which they came into the prison system, and that this may include associating (and sometimes, with the Board's approval, residing) with other offenders, past or present. The Law Reform Commission of WA has proposed the repeal of ss 65(7) and (9) of the (WA) Police Act 1892 which contain consorting offences based even more closely on the Penal Servitude Act wording, arguing that "It is undesirable in principle that persons should be condemned by the company they keep"; Law Reform Commission of Western Australia *Discussion Paper on Police Act Offences*, (Project No 85, 1989) 34.
16. Supra n 4, 7.

neither the minimum of effort nor an entire lack of industry secures reward or comfort".[17] Humanitarian concerns, reflecting classical thinking did, however, play a role in shaping some of the more comprehensive and developed ticket of leave schemes.

B. 1898-1963

The latter part of the nineteenth century witnessed the development of "positivist criminology". Inspired by the burgeoning physical sciences, and especially by the work of Darwin and others, linking humans with their animal ancestors, the positivists purported to look "scientifically" at the problem of crime and its treatment. People were no longer the freely willed individuals of the classical model and their criminality was claimed to be the result of antecedent causes which were identifiable and treatable.[18] Positivist influence was apparent in the fascinating report of a Royal Commission, appointed in 1898 "to Inquire into the Penal System of the Colony", which stated:

> [W]e look forward to the time - although we do not regard it as immediately practicable - when the court, which finds a prisoner guilty, will have nothing whatever to do with the sentence imposed upon the prisoner.
>
> When one looks carefully into the matter it is obvious that in the ordinary course of things all that the court which tries a man is really competent to do, is to say whether the prisoner at the bar has, or has not, broken the law. It knows nothing and can know nothing of the prisoner's mental or physical constitution, his congenital or acquired criminal tendencies, and a hundred and one other things which must nevertheless receive consideration ....[19]

The Joint Select Committee's Report states that "The Commission upheld the classical view that the sole function of the judge should be to decide whether an accused was guilty".[20] Certainly Beccaria, the leading classicist, believed that judges should only decide on guilt, and he would have agreed both with the Royal Commission's concerns about the "obviously haphazard and irregular character of many of the sentences"[21] and with their

17. Forsythe supra n 11, 82.
18. Generally see I Taylor, P Walton and J Young *The New Criminology For a Social Theory of Deviance* (London: Routledge and Kegan Paul, 1973) chs 1-2; G B Vold *Theoretical Criminology* 2nd edn (New York: Oxford University Press, 1979) chs 1-3.
19. *Final Report of the Commission Appointed to Inquire into the Penal System of the Colony*, (Perth: WA Government Printer, 1899) 18.
20. Supra n 1, 20.
21. Supra n 19, 18.

proposal for codification of the substantive criminal law.[22] This is as far as the similarity goes. The preceding quotations demonstrate that the intellectual basis of the Royal Commission's concerns was far removed from the tenets of classical criminology. So, too, were their proposed solutions. By contrast with Beccaria's proposal for a legislative code of sentences, fixed by reference to the gravity of the offence, the Royal Commission approved the opinion of a leading positivist, Enrico Ferri that:

> When the measure of punishment is fixed beforehand, the judge ... is like a doctor, who, after a superficial diagnosis, orders a draught for the patient, and names the day when he shall be sent out of hospital, without regard to his state of health at the time. If he is cured before the date fixed he must still remain in the hospital, and he must go when the time is up, cured or not.[23]

Reflecting this, it proposed that sentences be fixed

> by a Board of Medical Jurists. The prisoner would, by order of the court, pass into custody for an indeterminate period. The board would, after due examination from time to time, decide whether and when the prisoner was in the interests of society and of himself a fit subject for release. It would further decide the class of institution in which the prisoner should be treated.[24]

This proposal rests most uneasily with an earlier section of the Report which questioned whether imprisonment could ever exercise a reformative influence, and advocated "short, sharp, and severe" terms of imprisonment.[25] Nevertheless, positivism was identified as the new path, and habitual criminals became a particular concern. Such offenders had received special mention in the 1898 Royal Commission and in 1911 another Royal Commission advocated special indeterminate sentences.[26] Special indeterminate sentences were introduced in 1918 and, though rarely used,[27] remain in force. Under section 661 an offender who is convicted of an indictable offence and has at least two prior such convictions may be declared an habitual criminal and ordered to serve a period of imprisonment for the present offence(s)

22. Ibid, 18
23. Ibid, 18
24. Ibid, 19.
25. Ibid, 13.
26. *Report of the Royal Commission into the Administration and Conduct of Fremantle Prison* (Perth: Western Australian Government Printer, 1911). Unfortunately, no copy of the Report has survived. Stewart and Thomas supra n 10, 82, explain that the Legislative Council's copy was probably eaten by ants and that the Assembly's copy has disappeared. Details of the Report must therefore be gleaned from secondary sources.
27. The High Court has held that s 662 should be used very restrictively and that *proportionality* is the key factor in determining a sentence: *R v Chester* (1988) 165 CLR 611; see also *R v Tunaj* [1984] WAR 48.

followed by detention during the Governor's pleasure in a prison; a so-called "double track" system. Section 662 is even broader, allowing either a double track penalty (section 662(a)) or simple Governor's Pleasure detention (section 662(b)) on conviction of an indictable offence (even without any prior such convictions) on the basis of the "antecedents, character, age, health or mental condition of the person convicted, the nature of the offence or any special circumstances of the case". The original idea was that such offenders were to serve their "special" sentences in a reformatory prison; but no such institution has ever been built and they have been housed instead in traditional institutions, at most being set apart from other inmates.[28] The Indeterminate Sentences Board played a pivotal role in these sentences and was the true precursor of the modern Parole Board as it decided the date and the conditions of release on the basis of the offender's fitness for release and administered the post-custody phase of the sentences. Its functions were subsequently merged into those of the Parole Board.

C. 1964-1988

Conditional release for prisoners in general was introduced into Western Australia under the then Offenders Probation and Parole Act 1963,[29] which also introduced probation for adults on a statutory basis for the first time. Commentators have generally attributed the Act to a continued belief in the reformative ideology. 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 form 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.[30]

Whilst the ideology of reform was important, two "managerial" problems were increasingly apparent: prison control and population levels. The late

28. Such segregation is described as "Kafkaesque" and a "fiction" by Stewart and Thomas supra n 10, 107-108.
29. In the (WA) Community Corrections Legislation Amendment Act (No 61 of 1990), the Western Australian legislature took the unusual step of changing the title of the (WA) Offenders Probations and Parole Act 1963 to the (WA) Offenders Community Corrections Act 1963 ("Offenders Community Corrections Act").
30. Stewart and Thomas supra n 10, 149; I Vodanovich "Has Parole a Future?" in I Potas (ed) *Sentencing in Australia: Issues, Policy and Reform* (Canberra: Australian Institute of Criminology, 1987) 285.

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 inmates.[31] Parole has obvious potential as a means of encouraging good behaviour over and above any remission which may operate for good behaviour.[32] 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. The logical culmination of positivism would have been fully indeterminate sentencing with a modern equivalent of the Board of Medical Jurists. This was not considered appropriate in Australia but a degree of indeterminacy was intended to assist in prisoners' reform. The same idea was taking root in England at around the same time where it found its expression in the empirically unfounded assertion that prisoners reached an identifiable "peak" in their training after which they would deteriorate and at which they should be released by a parole board.[33] 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.[34] More impor-

31. Stewart and Thomas supra n 10, 146-147. The trends continued during the whole decade which saw a truly disturbing increase in the proportion of Aboriginal inmates. In 1961 Aboriginal inmates accounted for 15.9% of the average daily population for males. By 1971 this had risen to 30%.

32. The High Court explicitly acknowledged this aspect of parole in *R v Shrestha* (1991) 65 ALJR 432 Deane, Dawson and Toohey JJ, 441.

33. See N Morgan "The Shaping of Parole in England and Wales" [1983] Crim LR 137, 142. A strange feature of the rehabilitative ideal was its failure to reflect its own fundamental tenets; in particular, some of its advocates were prone to make extravagant claims which, contrary to its own purported scientific method, were untested or unproven; see also Stewart and Thomas supra n 10, 149-150.

34. The chairman must now be a serving judge or a retired judge under the age of 70 under s 21A of the Offenders Community Corrections Act. There can be little reason to follow the Joint Select Committee's proposal that the chairman must be a serving Supreme Court judge "[i]n the interests of better communication between the judiciary and the Board," supra n 1, 81. Judges of the District Court may have greater exposure to day-to-day sentencing matters than members of the Supreme Court and it is absurd to imply that a Judge "loses touch" simply by virtue of retirement from the Bench.

tantly, 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.[35] Thus, the High Court in *R v Deakin*[36] held that a minimum term should have been fixed even in a case involving a serious rape by an offender with a prior record, noting that he had no previous sexual offences. After a false start it was resolved that "the nature of the offence" could refer to certain classes of offence and not merely to the manner in which the particular offence was committed.[37]

In 1985, legislative amendments restricted parole eligibility, partly in response to the influential 1979 Parker Report.[38] 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 considered together".[39] 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,[40] the majority came, over time, to be released at or close to the expiry of the minimum term.

The Parker Report identified two major sentencing problems with the minimum term regime.[41] The first was the decision to set (or, under the original wording, to refuse to set) a minimum term. Reference to antecedents and offence seriousness, the determinants of this decision, would already

35. Supra n 29, s 37(2)(a): explained in *Ugle* v *Ruthven* [1974] WAR 184; *R v Garlett* ("*Gartlett*") [1975] WAR 129; *R v Beck and Smith* [1984] WAR 127. Strangely, K H Parker *Report on Parole, Prison Accommodation and Leave from Prison in Western Australia* "Parker Report" (Perth: Crown Law Department, 1979) 14-15 indicated that only "some Judges" were of this view.
36. (1984) 54 ALR 765.
37. *Garlett* supra n 35, overruling *Ugle v Ruthven* supra n 35, on this point.
38. Parker Report supra n 35.
39. Supra n 29, s 37, as amended by No 118 of 1985 (emphasis added).
40. Supra n 29, s 40.
41. For a fuller discussion see the Parker Report supra n 35, 14-22.

have been considered in determining the head sentence. The "conundrum" of "multiple reckoning" has continued under the major amendments of 1988.[42] The second problem concerned the relationship between the head sentence and the minimum term. The Parker Report found that there were "undesirable" variations in practice and that whilst the (ill-defined) legislative intent may originally have been for minimum terms to be half of the head sentence, they were often of a third or less. The Report particularly criticised short minimum terms on the grounds that they allowed too little time for a prisoner to adjust to prison life, for relevant reports to be compiled and for the prisoner's parole plan to be drawn up.[43]

D. THE POSITION SINCE 1988

The Joint Select Committee characterises the major overhaul of parole in 1988 as "closely following" the Parker Report.[44] This is an over-simplification which masks some fundamental philosophical differences. Parker advocated a shift away from "over-using" parole as "*the best* method for most prisoners" and towards regarding it as "*an* effective method for some prisoners".[45] The reforms effected no such change. Under section 37A(1) of the Offenders Community Corrections Act a court *may* now make an order that an offender be eligible for parole (a "parole eligibility order") if it considers this appropriate. However, in line with the policy of the 1985 amendments and the criticisms of short minimum terms, no such order can be made for sentences totalling less than a year.[46] To reduce disparities, the sentencer no longer sets a minimum term and the period to be served in custody (the "non-parole period") is fixed, instead, by a statutory formula. However, the legislation did not endorse Parker's proposal for a non-parole period of half of the sentence for all prisoners. In the case of sentences ranging from one to to six years, the non-parole period is a third of the sentence. For sentences exceeding six years, the offender must serve proportionately longer; that is, two years less than two thirds of the sentence.[47] With one third

42. This is considered further below. The epithet "conundrum" was used in the Parker Report supra n 35, 19.
43. Ibid, 19-22, 95.
44. Supra n 1, 23.
45. Ibid, 92 (emphasis in original).
46. Supra n 29, s 37A(5). Thus, an order can be made where there are a number of short cumulative sentences which together add up to more than 1 year.
47. Supra n 29, s 37A(2).

remission off the total sentence,[48] this means that the maximum parole period (that is period on licence) is two years.[49]

The differences between the Parker Report and the 1988 reforms are well illustrated by the Parole Board's role. Under the minimum term regime, the Board could "in its discretion" grant parole.[50] In line with the view that parole was not the best method for most prisoners, Parker proposed that the Board should *not* order release on parole *unless* satisfied that such release would not involve undue risk, unduly depreciate the seriousness of the offence, promote disrespect for the law or adversely affect public confidence in the administration of justice.[51] These proposals were predicated on a formal consideration of every case, with a presumption against parole, and with the Board's discretion both confined and structured.[52] The position since 1988 has been very different. "Special term" prisoners (that is those serving a term of imprisonment of not less than 5 years for a violent or sexual offence)[53] are not released without prior consideration by the Board.[54] However, all other prisoners for whom a parole eligibility order is made are subject to "automatic" parole at the expiry of the non-parole period.[55] The Parole Board's powers in respect of such offenders are generally exercised, in its name, by the Secretary to the Board,[56] and they are referred formally to the Board ("a section 40B(2)(b) referral") only in exceptional cases.[57] In effect, therefore, the fact that an eligibility order is made by the court generally leads to

48. (WA) Prisons Act 1981 ("Prisons Act"), s 29.
49. Thus, leaving aside any remission off the non-parole period, a 12 year sentence works as follows. The non-parole period is 6 years (two-thirds less 2 years). If released at the expiry of the non-parole period, the parole licence runs to the two-thirds date (8 years). The final third of the sentence is remitted.
50. This remains the case for offenders who are still in the system under the minimum term regime; supra n 29, s 40(1).
51. Parker Report supra n 35, 23, 96.
52. To "confine" discretion means to restrict the boundaries of discretion within statutorily defined limits; to "structure" discretion means to control the exercise of discretion within those boundaries; see K C Davis *Discretionary Justice: A Preliminary Inquiry* (Chicago: University of Illinois Press, 1969) chs 1-2.
53. Supra n 29, s 40B(1).
54. Ibid, s 40A(8)(a).
55. Ibid, ss 40A(1)-(2).
56. Ibid, s 40A(7).
57. Typical examples would include offenders who, although eligible for "auto release", are considered by the Executive Director to pose a risk of violent or sexual reoffending; and offenders for whom special conditions of parole or special counselling are considered appropriate (eg conditions prohibiting intra familial and 'breach of trust' sex offenders from contact with the victim(s); or where the Board's agreement is required to the offender undertaking parole in another state or territory).

automatic parole. Most offenders continue to be released at their earliest eligibility date[58] and the new scheme therefore does nothing to change the view that parole is the "best method for most prisoners" serving a term over twelve months.

E. SENTENCING PROBLEMS UNDER THE NEW REGIME

Although the sentencer is spared the problem of setting a minimum term, major difficulties persist.

1. The Discretion to Make a Parole Eligibility Order

Section 37A(3) of the Offenders Community Corrections Act 1963 provides that in exercising its discretion to make a parole eligibility order under section 37A(1), the court

> may have regard to all or any of the following-
>
> (a) the nature of the offence;
>
> (b) the circumstances of the commission of the offence;[59]
>
> (c) the antecedents of the convicted person;
>
> (d) circumstances which are relevant to the convicted person or which might, in the opinion of the court, be relevant to the convicted person at the time at which the convicted person would become eligible to be released from prison if an order was made under subsection (1);
>
> (e) any other matter that the court thinks relevant.

(a) The Purposes of Parole

Chief Justice Burt observed in *R v Garlett* that in deciding whether to set a minimum term, it was essential to ask what is "the purpose sought to be achieved within the sentencing process by the fixation of a minimum term".[60] The same argument applies, mutatis mutandis, to orders under section 37A. However, the legislation only lists factors relevant to making an order without any general statement of the objectives of parole; this puts in issue the relevance of cases which analysed the objectives of parole under mini-

58. See eg *Parole Board Annual Report for the Year ending 30 June 1991* (Perth: Parole Board, 1991) 6.
59. The inclusion of sub-s (b) is further support for the view that the meaning of "nature of the offence" was correctly decided in *Garlett* supra n 35.
60. Ibid, 130.

mum term schemes. The High Court observed in the leading case of *R v Power* ("*Power*") that parole is intended "to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence".[61] Some judges in the Court of Criminal Appeal have stated, without expressing reservations, that the philosophy remains the same under the new regime.[62] However, with respect, the *Power* rationale is not directly applicable in its existing terms. First, as Chief Justice Malcolm has noted,[63] it is premised on the idea that "mitigation in favour of rehabilitation" now comes after the offender has served a non-parole period set by the *sentencer* in the interests of "justice". The most that can be said of the present regime is that it *assumes* that "justice" is satisfied by an offender serving a *legislatively* set proportion of the sentence. Secondly, whilst rehabilitation was the predominant purpose in *Power*, it is incorporated into section 37A only indirectly, as a "circumstance relevant to the convicted person".[64]

There are also recent indications of a possible shift in philosophy in *R v Shrestha* ("*Shrestha*").[65] Contrary to the doubts expressed here, the High Court held that *Power* still provided at least the starting point.[66] However, the majority also acknowledged that parole is a potential managerial tool as it affords an inducement to better prison behaviour as well as to reform. They continued: "[t]he mitigation of sentence which the parole system allows is ordinarily directed to rehabilitation. *It is not, however, exclusively so*",[67] and concluded that parole may sometimes be "justified on purely compassionate grounds". Moreover, this does not indicate that compassion is the *only* basis for parole other than rehabilitation, so that the door is clearly ajar for further refinement and reworking of general principle.

61. (1974) 131 CLR 623 Barwick CJ, Menzies, Stephen and Mason JJ, 629. This statement has been adopted in numerous subsequent cases involving a minimum term, including, in the High Court: *R v Deakin* supra n 36; *R v Watt* (1988) 165 CLR 474, 481; *R v Bugmy* ("*Bugmy*") (1990) 169 CLR 525, 530-531. In Western Australia *Power* was followed in, inter alia, *Garlett* supra n 35.
62. *R v Shaw* ("*Shaw*") (1989) 39 A Crim R 343 Rowland J, 351; *R v Archibald* ("*Archibald*") (1989) 40 A Crim R 228 Walsh J, 241.
63. *Archibald* ibid, 230 and *R v Swain* ("*Swain*") (1989) 41 A Crim R 214, 216-217.
64. Supra n 29, s 37A(3)(d).
65. Supra n 32.
66. Ibid, Brennan and McHugh JJ, 438; Dawson, Deane and Toohey JJ, 441.
67. Ibid, Dawson, Deane and Toohey JJ, 441 (emphasis added).

(b) Multiple Reckoning

Many of the same considerations are relevant at three crucial stages in fixing a prison sentence: in deciding to imprison,[68] in setting the sentence by reference to the tariff and in considering a parole eligibility order. Such repetition raises fundamental theoretical problems. For example, a major concern in "just deserts" theory is whether it is ever appropriate to impose a longer sentence on a repeat offender than on a first offender for the same offence; and, if so, the extent of the difference. Many believe that there should be a difference but that it should be reasonably limited.[69] By contrast, the legislative structure now indicates that a bad record potentially counts against a person at all three stages in setting a prison term. Furthermore, the legislation gives no clear indication of the relative significance of each factor to each of the decisions, even though it may well be that "the weight to be attached to these factors and the way in which they are relevant will differ due to the different purposes behind each function".[70]

(c) Caselaw on Section 37A(3).

It is not surprising that the broad wording of section 37A(3) immediately generated substantial caselaw. 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

68. S 19A(1) of the (WA) Criminal Code 1913 ("Criminal Code") reads:

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

69. Two of the leading contributions to this debate are A Von Hirsch *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Manchester: Manchester University Press, 1986) ch 7 and A Ashworth *Sentencing and Penal Policy* (London: Weidenfeld and Nicolson, 1983) ch 5.

70. *Bugmy* supra n 61 Mason CJ and McHugh J, 531.

offender has been determined".[71] Thus, it is incorrect for a sentencer to set a lower sentence than would otherwise be appropriate because no order is made under section 37A(1).[72] Conversely, it is inappropriate for the sentence to be "inflated" because of the possibility of parole release.[73] The general principle which underpins this approach is that sentencers should disregard executive policies in determining the sentence.[74]

Secondly, although the statute gives sentencers 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."[75] However, there appear to be differences in emphasis on the relative weight to be afforded to these factors. Some have emphasised, in line with *Power*, that rehabilitative concerns remain pivotal, and Justice Rowland observed in *R v Shaw* ("*Shaw*") 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".[76] Chief Justice Malcolm, 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.[77]

Although section 37A gives the courts a general discretion it has become clear that it will be exceptional for a parole eligibility order to be refused. The Court quickly squashed a strange Crown argument that parole was pointless for a 52 year old white collar offender with no prior convictions[78] and the most common situation in which a parole eligibility order will be refused is where the offence is serious and the offender has a significant prior record,

71. *Archibald* supra n 62 Malcolm CJ, 230.
72. *Shaw* supra n 62 and *Swain* supra n 63, both discussed by N Morgan (1990) 14 Crim LJ 118. The effects of this approach are further addressed below.
73. *Del Piano* (1989) 45 A Crim R 199 Rowland J, 218-219; see comment by I Morgan (1991) 15 Crim LJ 226.
74. This policy was recently approved by the High Court in *R v Hoare and Easton* (1989) 167 CLR 348 in the context of remissions in South Australia, even though the relevant legislation stated that in fixing the sentence regard could be had to the existence of 50% remission. In *Shrestha* supra n 32, it was also adopted in the case of foreign offenders liable to deportation on release to parole.
75. *R v Eades* (1990) 47 A Crim R 385, 389 (emphasis added). See also *Archibald* and *Shaw* supra n 62.
76. Supra n 62, 351; see also *Archibald* supra n 62 Wallace and Walsh JJ.
77. *Archibald* supra n 62, 231; *Swain* supra n 63, 218.
78. *Swain* supra n 63.

especially if there are previous breaches of supervisory orders.[79] However, there are cases which do not readily fit this pattern. In *R v Eades*[80] a 35 year old man with a "serious criminal record" since the age of 13 was sentenced to four and a half years' imprisonment for unlawfully doing grievous bodily harm to his de facto wife. The assaults, which occurred against a background of considerable previous domestic violence, resulted in her suffering two fractured ankles, a fractured wrist and a fracture to the base of the skull. The appellant had previously undertaken probation and community service. Fate smiled kindly. The court said that one period of probation had been "marred only by drink driving offences" and made an order for parole eligibility on the basis that the appellant should not released into the community without supervision. Conversely, an order was refused in *R v Tan Hai Huat*,[81] a case which provides further evidence of different perspectives on parole within the court. All agreed that the offence, which involved large scale heroin importation, was extremely serious; but it was not this fact alone which led to the majority upholding the refusal to make a parole eligibility order. Justice Wallace referred to the seriousness of the offence and to the fact that the appellant was a pawn in a larger game who had co-operated with the authorities. Nevertheless, he held that there was "insufficient information to activate consideration of section 37A(3)(c)(d)(e)".[82] Justice Franklyn also upheld the decision but on the grounds that deterrence was the prime consideration in cases of drug importation.[83] Justice Rowland, perhaps predictably in view of his comments in *Shaw*,[84] dissented on the point.

2. Parole for Foreign Offenders

A consistent theme is that parole is a privilege, not a right. It is, furthermore, an Executive privilege, and therefore the courts should be concerned only to pass the appropriate sentence without reference to the workings of parole. These arguments were prominent in the recent High Court case of *Shrestha*[85] where it was held that sentencers should not have

79. See comment on *Shaw* by Morgan supra 72, 120 referring to *R v Cox* (unreported) Court of Criminal Appeal 1988 nos 68 and 69.
80. See also supra n 75; *R v Cottrell* (1989) 42 A Crim R 31; *R v Hernberger* (1989) 42 A Crim R 40.
81. (1990) 49 A Crim R 378.
82. Ibid, 382.
83. Ibid, 394.
84. Supra n 62.
85. Supra n 65; see comment by N Morgan (1991) 15 Crim LJ 433.

regard to the likelihood that a foreign offender will, as a matter of Executive practice, be deported on release. The case should resolve a long-running dispute on the relevance of likely deportation[86] to the sentencer's decision but does nothing to clarify the Parole Board's role. On that the majority passed the buck:

> The likelihood of deportation, the lack of ties with this country and the difficulty or even impossibility of effective supervision and enforcement of parole conditions are all factors which will properly be taken into account by a parole authority when considering, at that time, whether a prisoner should be actually released on parole.[87]

Under the recently proclaimed Western Australian Prisoners (Release for Deportation) Act 1989[88] the Board is asked to consider in such a case whether it would have considered parole suitable if the offender had not been liable to deportation.[89] In reality the Board will have to make a decision without regard to a factor which is of considerable importance for "home" prisoners; namely the viability of the offender's parole plans from the point of view of supervision and enforcement. The practical effect of directing release at the expiry of the non-parole period of an offender who is immediately deported is that the whole balance of the sentence is being remitted. The effect of "equality of treatment" between offenders at the sentencing stage may be "inequality of impact" in the sentence since foreign offenders, when deported, are not subject to the supervision and recall to prison which applies to home offenders.[90]

3. Distortions in the Time Spent in Custody

A number of possible distortions arise as between prison sentences of different lengths. Sentences aggregating less than twelve months fall outside the parole scheme and there may be a consequential imbalance between sentences on either side of that divide. An example will illustrate how some prisoners given sentences of less than a year will spend longer in custody than others given considerably longer sentences. An offender who receives a sentence of 11 months (approximately 48 weeks) will be released with one

86. See eg *R v Binder and Langer* [1990] VR 563; in Western Australia see *R v Bensegger* [1979] WAR 65; *R v Zaharoudis and Salihos* (1986) 22 A Crim R 233; *R v Breuer and Chaney* (1986) 32 A Crim R 1; *R v Tan Hai Huat* supra n 81.
87. Supra n 32 Deane, Dawson and Toohey JJ, 443.
88. As amended by No 17 of 1991.
89. Ibid, s 4(3).
90. On the principle of equality of impact, see Ashworth supra n 69, ch 7.

third remission off the total sentence (that is, after approximately 32 weeks).[91] An offender who receives an eighteen month sentence faces a non-parole period of six months (approximately 26 weeks), but also receives a further remission for good behaviour of ten per cent off the non-parole period,[92] leading to probable release on parole after less than 24 weeks. When parole is "automatic" it is more than a little disingenuous to respond to this disparity by saying either that parole is a "privilege" and is not "guaranteed"; or that the offender sentenced to eighteen months is in fact "under sentence" for a longer period because the licence has to run for a period of six months.[93]

Less obvious difficulties arise from the practice of sentencers giving credit for time spent in custody prior to sentence.[94] A sentence of ten or eleven months looks unusual given the evidence that sentencers prefer multiples of three or six.[95] However, such a term may result either where it is calculated to be the appropriate tariff sentence for the offence(s) or where the sentencer decides that the appropriate sentence is, say, twelve months, but reduces the sentence to take account of time already spent in custody. The bizarre effect of "credit" in some cases would be significantly to *increase* the total period spent in custody. An offender given the full twelve month sentence (52 weeks) would be likely to be released after around 16 weeks (one third of the total sentence, less ten per cent remission from the non-parole period). If, however, the sentencer gives three months' credit and imposes a sentence of nine months (approximately 39 weeks), release would be after approximately 26 weeks;[96] and yet, of course, in the purported interests of the offender, the sentencer is not to increase the head sentence by reference to the possibility of parole. In fact the person who has spent time in custody prior to sentence is also adversely affected by the method of calculating credit. The Court of

91. Supra n 48. Under s 31(1) of the Prisons Act, the Executive Director also has the power to authorise early discharge from prison "at any time during the ten days immediately before the day when his sentence is due to expire." As a matter of practice this power has recently been used in respect of all "finite term" prisoners (ie those not eligible for parole) serving over 30 days.

92. (WA) Offenders Community Corrections Regulations 1991, reg 46(2)(a), was passed pursuant to s 39(3) of the Offenders Community Corrections Act.

93. Supra n 29, s 41(2).

94. For recent cases which indicate that the calculation of credit may be quite complex, see *R v Podirsky* (1989) 43 A Crim R 404; *R v McHutchinson* (1990) 3 WAR 261 commented on by N Morgan (1991) Crim LJ 299.

95. C Fitzmaurice and K Pease *The Psychology of Judicial Sentencing* (Manchester: Manchester University Press, 1988) ch 7.

96. This might be reduced by up to 10 days by the Executive Director's power to order early discharge; supra n 91.

Criminal Appeal has held that credit for time in custody should generally be "scaled up" to reflect the existence of the one third remission off the total sentence. Although there is no right to scaling up,[97] the three months' credit in our example will generally reflect two months in custody. In scaling up, no credit can be given to take account of parole because release on parole involves a further stage of decision making about which the courts do not wish to presume or guess; neither, therefore, can credit be given to take account of the practice of one tenth remission off the non-parole period. In our example, the person who receives a nine month sentence after credit of three months for time in custody will therefore spend approximately eight months in custody; two months pre-sentence and six months post-sentence. The person who was not in custody prior to sentence and who therefore receives the full twelve month term will almost certainly be released on parole after less than four months.

Classification as a "special term" prisoner is also sometimes affected by the same practice. For example, with credit for time in custody which may be substantial, an offender may receive a sentence of, say, four years six months for a violent or sexual offence, where the appropriate term without such credit would have been five years. This does not constitute a "special term". *As a matter of practice* such a case would almost certainly be referred to the Board by the Executive Director under section 40B(2)(b) but a further complication arises from the Board's statutory powers. Whilst it has a general discretion to delay, defer or deny parole for special term prisoners,[98] it may take such action for section 40B(2)(b) referrals only if it "considers that there are special circumstances that justify it doing so".[99]

Distortions are inevitable when the "rules of the game" vary so much according to the length of sentence - and they are distortions over which sentencers have no control if they adhere strictly to the precepts of statute and caselaw. To some extent the courts have simply washed their hands of the problem: "If this is the result, then it is a result which is occasioned by applying to the appropriate sentence the arithmetic set out in [the Western

97. See *R v Podirsky* supra n 94, explaining and distinguishing *R v Lambley* (1989) 40 A Crim R 430.

98. Supra n 29, ss 40B(3)-(4). "Delay" means ordering release at a date later than the Earliest Eligibility Date; "defer" means putting a final decision off to a future date; "deny" means ruling that the offender should not be released on parole.

99. Ibid, s 40B(5). Credit for time in custody may also have implications in terms of the formula for calculating the non-parole period, though this is unlikely to lead to a substantially increase in the overall time served in prison.

Australian Offenders Community Corrections Act 1963]".[100] These problems seem incapable of final resolution without fundamental changes to the parole scheme. However, three reforms would at least mitigate the problems. First, attention should be given to removing the twelve month limit. The Parker Report's criticisms of short minimum terms were levelled against a different regime and reflected a desire to *restrict* parole. The system has gone down a different route and when most offenders are subject to "auto-parole" there is less and less justification for the twelve month bar. Secondly, abolition of the ten per cent remission off the non-parole period, which is proposed by the Joint Select Committee,[101] would remove one source of confusion and distortion; "the credibility of the judicial system, and its efficacy in relation to criminal matters must suffer from the fact that both parts of a prison sentence, solemnly and publicly pronounced ... to have one result, nevertheless have another".[102] Thirdly, sentencers should be able to impose a sentence which reflects the true extent of the offending and which is not reduced by time in custody prior to sentence. A more appropriate way of giving the necessary credit would be either to empower sentencers themselves to "backdate" sentences to take effect from a stated date or to provide for the sentence to be reduced under Prison Regulations. Either mechanism would ensure that the "true" sentence is reflected in the operation of the parole provisions, that it appears accurately on an offender's record, and that the actual sentence is clearly reported in the media rather than an artificially reduced term. Given that parole is conceptualised as an Executive privilege it is hard to suggest any alternative method of calculating credit, even though parole is, in most cases, automatic.

4. Multiple Offenders

The rules applicable to multiple offenders are generally based on the total duration of the sentences to which they are subject. A parole eligibility order can therefore be made in respect of a number of short cumulative sentences which together add up to twelve months or more, and multiple offenders are treated as if they had been given a single, longer, sentence in calculating the period to be served in custody before release on parole. This is best illustrated

100. *R v Swain* supra n 63 Rowland J, 221 referring to a Crown argument that if parole was granted the offender would be serving too short a period in custody given the gravity of his offences.

101. Supra n 1, 85.

102. *R v Paivinen* (1985) 59 ALR 368 Fox J, 377.

by an example. Suppose an offender receives three cumulative terms of imprisonment, each of three years, for robbery. The non-parole period is calculated separately for each offence, so that it might be expected that the offender would be required to serve one third of each sentence (that is a total of three years, less one tenth remission) before being eligible for parole. However, since the general Western Australian Prisons Act 1981 remission is one third off each term (total remission of three years), this would give a potential parole period of three years between the non parole period and the two-thirds date. Pursuant to the policy that the parole period should not exceed two years, such an offender is therefore required to serve an "extended service period" which runs from the expiry of the non-parole period until such time as the offender can be released on two years' parole.[103] In the example this would mean an additional year (less one tenth remission off the extended service period)[104] in prison.

The decision to treat multiple offenders as if they were serving a single longer sentence is questionable in principle. On the one hand the terms may "add up" to more than six years; on the other, sentencing multiple offenders is not simply a mathematical exercise. Cumulative sentences should not be ordered unless the offences were distinct and did not form part of one transaction.[105] The parole system appears to change the basis of the sentence by conflating the sentences for parole purposes. A result is a back door increase in the sentence which will reflect persistence, and not necessarily offence seriousness. Nevertheless, the policy is potentially defensible if logically pursued. Yet it is not. The "special term" is not calculated on the basis of the aggregate of cumulative terms; it hinges on whether a sentence of five years or more is imposed for *an* offence of a violent or sexual nature.[106] A person who receives several cumulative sentences for violence or sexual offences, even if they together add up to more than five years, is not serving a special term but may be subject to a section 40B(2)(b) referral.

103. Supra n 29, s 39(4), s 41(2c).
104. (WA) Offenders Community Corrections Regulations 1991, reg 46(2)(b).
105. For general descriptions of the one transaction rule, see D A Thomas *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division*, 2nd edn (London: Heinemann, 1979) 52-62; R Fox and A Freiberg *Sentencing State and Federal Law in Victoria* (Oxford: Oxford University Press, 1985) 363-378.
106. Supra n 29, s 40B(1).

5. Indeterminate Sentences

In Western Australia formal responsibility for release on parole from indeterminate sentences lies with the Governor. The Board's role is to furnish reports at specified times and intervals to the Minister.[107] Generally the legislation sets a minimum period which must be served before consideration by the Board. Prisoners undergoing strict security life imprisonment for wilful murder will be first reviewed after twenty years, unless the court imposing the sentence has ordered that the person is not to be eligible for parole.[108] Life sentences for wilful murder are first reviewed after 12 years and other life sentences after seven years. Some kind of "legislative tariff" is therefore set out which, in terms of *Power*, might be said to represent the minimum time which the offender should serve in the interests of justice before parole is considered in the interests of rehabilitation. However, in most other cases the Board must review the case annually.[109] An example which causes some difficulty is an order of strict custody at the Governor's pleasure imposed on a juvenile for murder or wilful murder.[110] On the one hand, some concession to youth is appropriate. On the other, the Board has no indication, either from the legislation or the sentencer, of the time which "justice"suggests should be served in custody. Nor is it appropriate for the Board to make such an assessment; it is not a sentencing authority and lacks the expertise of and the full information which is available to a sentencing court. If the Board's role is primarily to consider whether there is a significant risk of an offender reoffending and whether the offender has made efforts to address her/his offending behaviour, there are potentially great disparities between the time spent in custody between a 17 year old given "strict custody" and an 18 year old for whom the usual review dates exist.

Two partial solutions suggest themselves. First, the Parker Report suggested that the Board could be called upon, when reporting to the Minister, to express its general views as to "whether the considerations of punishment and deterrence have been satisfied by the period spent in prison".[111] The difficulty with this is that it places the Board in a position akin to that of a sentencer. A second possibility would be for the courts to give some

107. Ibid, s 34.
108. Ibid, ss 40D(2a)-(2b).
109. Ibid, s 34.
110. Criminal Code ss 282(c)-(d). Other examples are detention at the Governor's pleasure of those found insane or unfit to stand trial: ibid, s 34(2)(a)(i); Criminal Code ss 652, 653, 693(4).
111. This was proposed in the Parker Report supra n 35, 98.

indication of a "minimum" at the sentencing stage. It may be noted in this respect that the courts have made little use of their power under section 282(c) and (d) of the Western Australian Criminal Code 1913 to order a determinate prison sentence for juveniles convicted of murder or wilful murder. The statute reads that juveniles are "liable" for such offences to strict security life imprisonment, life imprisonment or Governor's pleasure detention. At first glance, a determinate sentence does not seem possible. However, being "liable" to a punishment means, in the absence of other words, that it is a *maximum* and not a mandatory penalty.[112] It might be appropriate for courts to use this option more frequently, at least in the most serious cases. The Board would be in a less difficult position and the offender could commence the sentence in a detention centre[113] with later transfer to an adult prison.

6. The Impact of Recent Legislative Amendments

The difficulties in the area of indeterminate sentences have been much heightened by recent controversial legislative changes. First, a maximum of twenty years' imprisonment has been introduced for offenders who cause death or grievous bodily harm by dangerously driving a stolen vehicle.[114] The legislation affects both adults and juveniles but its real target is juveniles. If the courts "steer" by the new maximum and the tariff for such offences consequently increases, a juvenile offender given a long determinate sentence for such an offence may not be eligible for parole until several years have elapsed; however, those convicted of more calculated (and traditionally more blameworthy) killings which amount to murder or wilful murder, and who are sentenced to safe custody will continue to be reviewed by the Board on an annual basis. This puts the Board in a most difficult position and could lead to further disparities between offenders.

A second matter of concern is the introduction of further forms of indeterminate sentences under the Western Australian Crime (Serious and

112. Criminal Code s 19(1); contra s 282(a) - (b) which state that in the case of adults, life or strict security life is "mandatory". See also *Sillery* (1981) 35 ALR 227.

113. (WA) Child Welfare Act 1947, s 34.

114. Ordinarily the maximum under the (WA) Road Traffic Act 1974 for dangerous driving causing death or grievous bodily harm is 4 years: ss 59 and 59A. However, the (WA) Criminal Law Amendment Act 1992 (No 1 of 1992) has increased the penalties for such offences if the vehicle was being unlawfully driven without the consent of the owner or person in charge. In such circumstances, the maximum if death is caused is 20 years as for manslaughter under s 287 of the Criminal Code; if grievous bodily harm is caused, the maximum is 14 years, where the normal maximum for unlawfully doing grievous bodily harm under s 297 of the Criminal Code is 7 years.

Repeat Offenders) Sentencing Act 1992 ("the Sentencing Act").[115] This legislation provides, inter alia, a dual track system for repeat offenders who are convicted of a prescribed offence of violence.[116] If they are juveniles, such offenders will be required to serve a period of detention at the end of their ordinary sentence, until released by order of the Supreme Court.[117] Juveniles are therefore subject to review by the Supreme Court according to procedures determined by that Court,[118] and not by the Parole Board. Adult repeat offenders who are convicted of an offence of violence must be directed by the sentencing court to undergo detention at the Governor's pleasure at the expiration of any term of imprisonment imposed for the latest offence.[119] They are then subject to review by the Parole Board. With both juveniles and adults there is effectively a minimum period of eighteen months in custody because release must not take place before the "prescribed day"; that is, the day on which the indeterminate detention commences or eighteen months after conviction, whichever is the longer. The first report from the Board to the Minister is due "within three months before the prescribed day"[120] and, if not released, the offender is then subject to, at minimum, an annual report.[121] Offenders detained at the Governor's Pleasure under section 661 of the Criminal Code are reviewed two years after the detention commenced and those under section 662 after one year of detention.

In terms of the parole system, the measures produce particular concerns.[122] One is that juveniles sentenced to safe custody for wilful murder or murder remain the Parole Board's concern whereas juveniles sentenced under the new legislation are subject to an entirely different process of release. This has the potential to cause further disparities and differences in

115. No 3 of 1992.

116. Repeat offenders are defined in Schedule 2 as having, in the preceding 18 months, either 6 or more "conviction appearances" for prescribed offences of any kind; or 3 or more conviction appearances for violent offences. The criteria do not, therefore, depend on the number of convictions since on 1 conviction appearance a person may be convicted of a number of offences. "Prescribed" and "violent" offences are defined in Schedule 1.

117. Supra n 115, s 6(2).

118. Ibid, s 7(8).

119. Ibid, s 8(2).

120. Ibid, s 9(5).

121. S 9(4) achieves this result by equating offenders under the new Sentencing Act with those given a sentence under s 661 of the Criminal Code who are subject to annual reporting under s 34 of the Offenders Community Corrections Act.

122. For a critique of this policy of "mandatory indeterminate custody" from a different perspective, see M Wilkie "Crime (Serious and Repeat Offenders) Sentencing Act 1992: A Human Rights Perspective", infra 187.

approach, especially if the Supreme Court (more naturally a sentencing authority) sees its role differently from that of the Parole Board. As far as both juveniles and adults are concerned, the effective minimum of eighteen months involves yet another erosion or clouding of the sentence imposed by the court. A sentencer may now impose, say, a six month sentence on a repeat and violent offender based on the gravity of the latest offence. However, under the legislation, that offender will have to serve not four months (six months less one third remission) but a *minimum* of eighteen months and possible Governer's Pleasure detention. Furthermore, apparently identical sentences will have widely different consequences. An offender sentenced to three years for fraud offences is eligible for automatic release on parole after one year less one tenth remission (that is, after less than eleven months). A repeat offender sentenced to three years' imprisonment for an offence classified as "violent" under the new legislation (for example assaulting a public officer[123] "shall not be released from prison [on parole or otherwise] before the prescribed day".[124] By comparison with the fraud offender given the same sentence, the "violent" offender must therefore serve a minimum of eighteen months before being eligible for release. Release will be far from "automatic" from such a sentence, as it requires review by the Board and a report to the Minister. Furthermore, the "violent" adult offender is likely to face a longer parole period than the fraudster.[125]

Finally, it must be noted that the policy in the new legislation is fundamentally at odds with the approach of the High Court in *R v Chester* ("*Chester*") where a unanimous court held that:

> [t]he stark and extraordinary nature of punishment by way of indeterminate detention, the term of which is terminable by executive, not by judicial, decision, requires that the sentencing judge be clearly satisfied by cogent evidence that the convicted person is a constant danger to the community.[126]

123. Criminal Code s 318, categorised as a "violent" offence under Schedule 1 of the Sentencing Act.
124. Supra n 115, s 9(6).
125. Under s 9(4) of the Sentencing Act, adult offenders subject to the new form of detention are generally regarded as if the detention had been imposed under s 661 and s 9(4) lists a number of specific sections of the Offenders Community Corrections Act which apply. The section of the Offenders Community Corrections Act which deals with parole periods is s 41. This does not appear in the list in s 9(4) of specific sections to which the detainees are subject; but it would appear that, following s 41 of the Offenders Community Corrections Act, the parole period is up to a maximum of 2 years at the Governor's discretion.
126. Supra n 27, 619.

It could be argued that *Chester* involved section 662(a) but the point is that the High Court's fundamental approach to sentencing is now one of proportionality.[127] The previous examples illustrate that the new legislation has nothing to do with proportionality or with the *sentencer* being satisfied that the offender poses a constant danger to the community.

F. CONCLUSIONS: THE NEW SCHEME IN CONTEXT

It would be easier to place developments in context with the benefit of a longer period of hindsight but some general observations may be made. First, the once secure ideological base of reformation has largely evaporated. Parole has shifted away from, in its positivist-influenced infancy, the *selection* of particular parolees by the *parole board* for reformative purposes and to the *automatic release* of most of those declared eligible for parole after a *statutorily* fixed time. The demise of positivist notions of rehabilitation has left something of an ideological vacuum, as evidenced by the High Court's reflections on the purposes of parole and by the manifest differences which have been noted between different members of the Court of Appeal of Western Australia. At the same time, pragmatic and economic concerns have been increasingly recognised as relevant.[128]

Recent reports have consistently acknowledged that parole cannot simply be viewed as an executive or bureaucratic matter, but that it is a "sentencing" matter too. The Joint Select Committee deserves credit in this regard for stepping outside its apparent terms of reference and making several important recommendations with respect to the sentencing policy of the courts - in particular, the recommendation to abolish all prison sentences of less than three months.[129] Unfortunately their proposals will do little to eliminate the disparities identified in this paper. Matthew Goode has said of remissions that "a part of the price paid is inevitably incoherence in sentencing".[130] One does not have to agree with this observation in its entirety to realise that there are

127. Ibid. The High Court has reiterated this approach on many occasions; see also *Veen v The Queen [No 1]* (1979) 143 CLR 458, 467; *Veen v The Queen [No 2]* (1988) 164 CLR 465, 472-474; *Walden v Hensler* (1987) 163 CLR 561; *R v Baumer* (1988) 166 CLR 51.

128. See eg the High Court's reference to parole as a management tool in *Shrestha* supra n 65. Such arguments were used prior to the 1988 amendments in the Parker Report supra n 35, and the statement of Government policy by Hon J Berinson in a Ministerial Statement to the Legislative Council on 27 October 1987.

129. Supra n 1, 90-91. This conclusion is supported by R W Harding "The Excessive Scale of Imprisonment in Western Australia: The Systemic Causes and Some Proposed Solutions", supra 72.

130. M Goode "Comment on *Hoare and Easton*" (1990) 14 Crim LJ 62, 66.

serious problems in Western Australia. Sentences have become very hard to calculate without a detailed knowledge of complex law and too often do not mean what the sentencer appears to say. Furthermore, sentencers are expected to ignore the effect of the sentence when determining its appropriate duration; even though, for example, a three year sentence may mean 11 months in custody for one offender but eighteen months plus Governor's Pleasure detention for another.

Current trends are symptomatic of a strategy of "bifurcation" in which certain categories of offender are subject from the outset to a different set of rules from the "run of the mill offenders".[131] Such a policy was most clearly first evident in Western Australia in the 1988 parole reforms which drew distinctions between ordinary and special term prisoners and which changed the proportion of the sentence which was to be served in custody according to the length of that sentence. It continued in the Joint Select Committee's Report which, whilst advocating leniency for less serious offenders, wanted to tighten up on parole for others.[132] It is most obvious with the 1992 Sentencing Act. Such a policy is very attractive politically. Those who feel the system is too soft may be appeased by the tougher approach to the "really bad"; those who criticise the system as too tough will welcome the leniency extended to "ordinary" prisoners.

However, despite its political and pragmatic attractions, a policy of bifurcation has a highly questionable foundation. First, it is apparently based on the selective incapacitation of those considered dangerous on the basis of their past behaviour, even though the evidence is that we do not have the ability accurately to predict future human behaviour. Secondly, the demarcation line between the "run of the mill" and "serious" offenders is both obscure and inconsistent. "Special term" prisoners for parole purposes are those serving a *current* sentence of five years or more for *an* offence of a violent or sexual nature. The new Sentencing Act identifies the "serious" as those with a relevant *prior* record over the preceding eighteen months and a latest conviction for *any* violent offence. This pays no regard to the seriousness of the latest offence, even though many so-called "violent" offences -

131. See eg A E Bottoms "An Introduction to The Coming Crisis" in A E Bottoms and R H Preston (eds) *The Coming Penal Crisis: A Criminology and Theological Exploration* (Edinburgh: Scottish Academic Press, 1980); N Morgan "Non-Custodial Penal Sanctions in England and Wales" (1983) 22 Howard Journal of Penology and Crime Prevention 148 [now called the Howard Journal of Criminal Justice].

132. Note especially the proposals for reducing the period of the "special term" to not less than 3 years (supra n 1, 82-83) and for tightening up parole conditions for such offenders (supra n 1, 85-86).

notably assaulting a public officer - can embrace relatively trivial incidents. Nor does the eighteen month period have any regard to the time at which the offender was "at risk" of being re-convicted; those previously convicted of the most serious offences of violence may well have received substantial custodial sentences in respect of those offences and will therefore be very unlikely to clock up the requisite number of conviction appearances. Furthermore, the offences which trigger a "special term"[133] are defined differently from those which can trigger the new preventive sentences.[134] For example, dangerous driving causing death is included under the new Sentencing Act but not in the special term list; incest is a special term offence but not a "violent" offence under the new Act. The Joint Select Committee simply relied on rhetoric and undefined terminology when it stated that "public safety" should be "uppermost in the minds of the judiciary and correctional authorities"[135] and that victims should be more involved in decisions on the release of "prisoner convicted of serious violent crime".[136]

Such inconsistent and woolly thinking can lead to unjust results. As the High Court has recognised, a just sentencing system is not primarily based on "public safety"[137] but on proportionality. In Western Australia the period of imprisonment actually served seems in many cases to bear less and less relationship to the sentence apparently imposed by the sentencing court and to depend increasingly on the application of executive policies and, most recently, legislatively prescribed minima. As the Australian Law Reform Commission has cogently argued, parole has an important role to play as an integral part of a custodial sentence[138] but it should be part of an approach to sentencing which is more simple, more consistent and more easily understood, and which involves less distortion of the sentence originally imposed by the court. Unless the legislative framework of sentencing policy is clear and follows a rational and consistent philosophy, the judiciary (who bears the brunt of media criticism of sentencing) cannot reasonably be expected to develop rational and consistent sentencing principles and patterns. We would all do well to remember Beccaria's desire for mildness, certainty and the elimination of unnecessary arbitrary decision making in the criminal process.

133. Supra n 29, s 40B(1).
134. Supra n 115, Schedule 1.
135. Supra n 1, 80.
136. Ibid, 87.
137. Supra n 127.
138. Australian Law Reform Commission Sentencing (Report No 44 1988) 37, para 77.