Business as Usual or a 'New Utopia'? Non-Custodial Sentences Under Western Australia's New Sentencing Laws[1]

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Western Australia's sentencing laws have recently been overhauled by a comprehensive package of legislation. This paper provides a practical guide to the legislation to the extent that it deals with non-custodial sentences. It also explores the new measures against the background of general principles of sentencing, the previous non-custodial dispositions and Western Australia's high rate of imprisonment. It concludes that while there is much of merit in the legislation, there are several potential problems which will require effective monitoring and evaluation.

THE 'league table' of the rate of imprisonment across Australia continues to pose some stark and uncomfortable questions for Western Australians. In terms of the overall rate of adult imprisonment, Western Australia is placed second behind the Northern Territory, a long way ahead of third placed New South Wales and 45 per cent above the national average.[2] On the table relating to Aboriginal imprisonment rates, Western Australia sits well clear of the field, with a rate which is approximately twice that of the Northern Territory and again around 45 per cent above

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1. The title is partly derived from seminal articles by Professor Stan Cohen: see S Cohen 'Community Control: A New Utopia' (1979) 47 New Society 609-611; S Cohen 'The Punitive City: Notes on the Dispersal of Social Control' (1979) Contemporary Crises, vol 3, 339-364. His ideas are more fully discussed infra p 380-381.
2. For the latest figures: see A Ferrante & N Loh *Crime and Justice Statistics for WA: 1995* (Perth: UWA Crime Research Centre, 1996) 111. Cf R Harding, R Broadhurst, A Ferrante & N Loh *Aboriginal Contact with the Criminal Justice System* (Sydney: Hawkins Press, 1995) chs 5-6.

the national average.[3]

This ignominious position reflects the interplay of many factors.[4] One part of the equation is the fact that the courts have had relatively few alternatives to imprisonment and have arguably made insufficient use of those options which have existed.[5] However, Western Australia's sentencing laws have been thoroughly overhauled by the Sentencing Act 1995 and related legislation which came into force on 4 November 1996.[6] One of the most significant aims of this comprehensive legislative package is to provide a range of non-custodial sentences which are more accessible and more workable and which will have the confidence of both the courts and the public. This paper examines these measures and argues that the legislation is generally to be welcomed; indeed, it is long overdue. There are, however, some specific problems, notably with respect to certain aspects of the Sentencing Act's general 'principles of sentencing' and the provisions dealing with suspended sentences. Moreover, at the end of the day, the success of the new non-custodial sentences will depend not on what the legislation says but on effective resourcing and implementation.

It is also important at the outset to record the fact that the Western Australian Parliament swiftly made unnecessary and unjust inroads into the basic objectives of the Sentencing Act. Just 10 days after the Sentencing Act finally came into force, the government, in pre-election mode, proclaimed 'three strikes' legislation to combat what were called 'home invasions' (ie, burglaries). Under the Criminal Code Amendment Act (No2) 1996, a person who is classified as a 'repeat offender' because of a record of burglary offences faces a mandatory minimum twelve month sentence.[7] It is likely that this Act alone will double or treble the number of juveniles in detention and will lead to a considerable increase in the number of adults incarcerated.[8]

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3. Ibid.
4. See R Harding 'The Excessive Scale of Imprisonment in WA: The Systemic Causes and Some Proposed Solutions' (1992) 22 UWAL Rev 72.
5. N Morgan 'Imprisonment as a Last Resort: Section 19A of the Criminal Code and Non-Pecuniary Alternatives to Imprisonment' (1993) 23 UWAL Rev 299.
6. The Sentence Administration Act 1995 (WA) and the Sentencing (Consequential Provisions) Act 1995 (WA).
7. A repeat offender is defined in the new s 400(3) of the Criminal Code as a person who '(a) committed and was convicted of a relevant offence in respect of a place ordinarily used for human habitation, and (b) subsequent to that conviction again committed and was convicted of such an offence.' A 'relevant offence' is basically an offence of burglary: s 400(4).
8. These are unofficial 'guestimates' which have been given to the author by people in the Ministry of Justice. It is striking that no figures were provided by the government during the swift formulation of and passage of the legislation. This has regrettable parallels with the Labor Party's rushed and ill-conceived Crime (Serious and Repeat Offenders) Sentencing Act 1992 (WA): see R Harding (ed) *Repeat Juvenile Offenders: The Failure of Selective Incapacitation in WA* 2nd edn (Perth: UWA Crime Research Centre, 1995).

The 'three strikes' legislation is unjust as it does not permit the courts to have regard to either the gravity of the current offence or the person's particular circumstances. Consequently, it cuts across both the potential use of tougher community-based alternatives and the principle of proportionality, two matters which lie at the heart of the Sentencing Act.[9] It is unnecessary in that both statistics and court decisions clearly show that custodial sentences have been readily imposed for burglary offences.[10]

GENERAL PRINCIPLES

The provisions of the Sentencing Act which deal in detail with specific dispositions can only be understood and assessed in the light of the overall structure of the Act and the general principles contained therein.

1. The abolition of sentences of three months or less

The legislation seeks to encourage sentencers to avoid short custodial sentences not only by providing the 'carrot' of new non-custodial options but also by abolishing prison sentences of three months or less except in limited circumstances.[11] Under section 86 a term of three months or less can only be imposed if the aggregate of sentences exceeds three months, if the offender is already serving another term or if the term is imposed for a prison disciplinary offence under section 79 of the Prisons Act 1981.[12]

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9. Infra p 368 et seq. The principle of proportionality is offended in 2 ways: first, in that some offences which are, in themselves, relatively trivial will attract heavy sentences and, secondly, in that some less serious offenders will be dealt with in the same manner as more serious offenders. See generally N Morgan 'The Sentencing Act 1992: Subverting Criminal Justice' in Harding supra n 8, ch 3.
10. For the statistics: see Ferrante & Loh supra n 2, Tables 3.9, 5.4. Almost 66% of offenders who were dealt with in the higher courts for burglary in 1995 received a term of imprisonment. The Court of Criminal Appeal has also summarised the 'sentences commonly imposed' for burglary in terms of a custodial starting point: see *Cheshire* (unreported) Ct Crim App 7 Nov 1989. It is interesting that in the first case of a juvenile who qualified as a repeat offender, the President of the Children's Court, Fenbury J imposed a sentence of 12 months' detention under traditional sentencing principles and *not* because of the '3 strikes' law: see C Fitzpatrick 'Boy Avoids Dubious Fame' *West Australian* 29 Jan 1997, 9. In another case, Fenbury J declined to make an order under the 3 strikes legislation because he found that, as a matter of interpretation, the legislation did not preclude the making of certain other orders under the Young Offenders Act 1994 (WA): see C Fitzpatrick 'Jail Was Only Option: Judge' *West Australian* 11 Feb 1997, 27.
11. The abolition of sentences of imprisonment of 3 months or less was proposed in WA Parl *Report of the Joint Select Committee on Parole* (the 'Halden Report') Aug 1991.
12. S 79 deals with 'aggravated' prison offences, as defined in s 70. Such offences include assaults, escaping or preparing to escape, being in possession of a weapon (or facsimile thereof) and being in possession of or under the influence of drugs or alcohol.

2. Giving reasons for custodial sentences

The Sentencing Act extends the circumstances in which a sentencer is required by statute to give written reasons for a custodial sentence.[13] Under section 35 a court which imposes a sentence of 12 months or less is generally required to give written reasons why no other sentencing option was appropriate. The exceptions are where the sentence is mandatory, where the aggregate term exceeds 12 months or where the sentence is for an offence under section 79 of the Prisons Act.

3. Reviewing custodial sentences imposed by Justices of the Peace

The Royal Commission into Aboriginal Deaths in Custody and others have long expressed concern at the power of Justices of the Peace to imprison offenders and especially at the impact of this on Aboriginal imprisonment rates.[14] One option, at a time of wholesale sentencing reform, would have been to abolish the imprisonment powers of JPs and to require JPs to remand a person for sentence by a magistrate if they consider a term of imprisonment to be a likely outcome. However, this was not done, partly because of the practical problems which were thought to arise in remote areas of the State. Instead, section 38 of the Sentencing Act establishes procedures for the review of custodial sentences (including suspended sentences) which have been imposed by JPs. A magistrate is to 'review' any such sentence within two days.[15] Such a review is based only on an examination of court papers in the absence of the parties and does not involve a rehearing.[16] At this stage the magistrate is not called upon to re-sentence the person but simply to confirm or cancel the sentence. If it is cancelled, the offender is to be bailed or remanded in custody for sentence by a magistrate at a future date.[17]

Whether this mechanism proves to be successful or not will obviously depend on the way in which magistrates approach the notion of 'reviewing' a sentence. When dealing with appeals against sentence, the courts have always emphasised that sentencing is a discretionary exercise and that a

13. Previously s 19A(1a) of the Criminal Code required written reasons for sentences of 6 months or less. The Court of Criminal Appeal, however, had also made the point that full reasons were essential in order for an appellate court to deal properly with appeals: *Nevermann* (1989) 43 A Crim R 347.
14. Royal Commission into Aboriginal Deaths in Custody *National Report* (Canberra: AGPS, 1991) recommendation 98, was as follows: 'Those jurisdictions which have not already done so should phase out the use of Justices of the Peace for the determination of charges or for the imposition of penalties for offences'. Cf Harding et al, supra n 2, 123.
15. S 38(1). This is an improvement on the 7 day period originally suggested in the Sentencing Bill 1995 (WA).
16. S 38(2).
17. S 38 (3)-(4).

sentence should not be overturned simply because the members of the appellate court are of the view that they would have imposed a different sentence if they had been dealing with the case.[18] In principle, the process of magisterial *review* is quite different from an *appeal* and the Act specifically preserves a right of appeal subsequent to any review.[19] It is submitted that reviewing magistrates must therefore be ready to cancel custodial sentences imposed by JPs if they believe that a different sentence should have been imposed, even if the original sentence was within the range of discretion.

A potential problem with the process of review is that there is no hearing and the reviewing magistrate must rely solely on court papers. It will be necessary for this process to be monitored and evaluated. Overall, however, there is reason to be optimistic about the impact of the legislation on the use of imprisonment by JPs; the combined effect of the abolition of prison sentences of three months or less, the requirement to give written reasons for custodial sentences and the prospect of magisterial review will mean that imprisonment is no longer an 'easy way out'.

4. Guideline judgments

Since January 1995 the Supreme Court has had the power to issue 'Guideline Judgments' containing guidelines for lower courts in the sentencing of offenders.[20] This power is now contained in section 143 of the Sentencing Act. In a number of cases before 1995 the Court of Criminal Appeal was prepared to describe, in fairly general terms, 'the range of sentences commonly imposed' for particular types of offence[21] but has not yet gone any further. It is beyond the scope of this paper to examine guideline judgments in detail but it is submitted that the new regime for non-custodial sentences is more likely to be effective if the Supreme Court becomes more proactive in issuing guideline judgments. These could include guidance on the use of the different non-custodial options in the context of particular types of offences (eg, drug possession, burglary and criminal damage).[22] Properly constructed guideline judgments can promote greater consistency without unduly fettering judicial discretion and can foster a better understanding of sentencing practices. They can also go some way to redressing any perception, driven by the media's obsession with specific instances of unusually lenient sentences, that sentences

18. Eg *Grein* (1988) 35 A Crim R 76, 78; *McHutchison* (1990) 48 A Crim R 179.
19. S 38(9).
20. The Supreme Court was given the statutory authority to issue guideline judgments under the Criminal Law Amendment Act 1994 (WA). It may be noted that the English Court of Appeal has, for around 15 years, issued guideline judgments without specific statutory authority: eg *Aramah* (1982) 76 Cr App R 190; *Barrick* (1985) 81 Cr App R 78; *Billam* [1986] 1 All ER 985.
21. Eg *Podirsky* (1989) 43 A Crim R 404 on sexual assault; *Cheshire* supra n 10 on burglary.
22. The English cases (supra n 20) have tended to focus more on the range of *custodial* sentences than on the use of different non-custodial options.

in general are too lenient.[23]

5. Proportionality: the core principle

The Sentencing Act largely re-enacts the 'Principles of Sentencing' which were contained in the Criminal Law Amendment Act 1994 (hereinafter termed the '1994 principles'). The most important statement of general principle is the principle of 'proportionality', which is enshrined in section 6(1): 'A sentence ... must be commensurate with the seriousness of the offence'. Section 6(2) then states that the 'seriousness' of the offence is to be determined by taking into account the statutory penalty, the circumstances of the offence and any aggravating and mitigating factors. Aggravating factors are defined in section 7(1) as factors which 'increase the culpability of the offender'. Under section 8(1), mitigating factors are those factors which, in the court's opinion, 'decrease the culpability of the offender or decrease the extent to which the offender should be punished.'

I shall return shortly to some of these definitions.[24] The key point to note at this stage is that all 'sentences' are governed by the principle of proportionality in section 6(1). Under the 'old regime', most of the non-custodial dispositions which were available to the courts under both the Criminal Code and the Offenders Community Corrections Act 1963, including various types of bond, probation and community service, were not, technically, 'sentences'.[25] This fallacy has now been removed; since the new community-based measures are generally accorded the status of sentences, they are therefore subject to section 6(1).[26]

6. Justifying custody: the 'in/out line'

Although section 6 does not contain a direct statement of the principle that imprisonment is the option of last resort, that principle is reflected in many of the provisions.[27] Section 6(4) specifically addresses the 'in/out line':

> A court must not impose a sentence of imprisonment on an offender unless it decides that
> (a) the seriousness of the offence is such that only imprisonment

23. A clear guideline judgment might, for example, have gone some way to redressing apparent misconceptions with respect to burglary sentences: see supra p 366.
24. See infra pp 371-372.
25. They were orders which were imposed 'instead of sentence' or 'instead of punishment'. For a fuller discussion: see Morgan supra n 5.
26. This also accords with the shift in the new community based measures away from rehabilitation and towards punishment and monitoring/control: see infra pp 377-380.
27. Eg, the abolition of sentences of 3 months or less, the requirement for a magistrate to review custodial sentences imposed by justices and the ranking in s 39(2): see infra pp 370-371.

can be justified; or

(b) the protection of the community requires it.

The conjunction 'or' which links paragraphs (a) and (b) appears to sanction the use of imprisonment for the 'protection of the community' even if the 'seriousness of the offence' would not require such a sentence. This presents some problems of interpretation, logic and justice. As a matter of interpretation section 6(4) appears inconsistent with the unequivocal language of section 6(1) which requires sentences to be commensurate with the seriousness of the offence (ie, the language of para (a) of section 6(4) alone). One possible interpretation would be to say that sections 6(1) and 6(4) are consistent because they deal with different questions. In other words, it might be argued that section 6(4) deals with the 'in/out line' and section 6(1) with the *duration* of any sentence.[28] This argument is unconvincing. First, it is illogical; how can the court fix the duration of a custodial sentence by reference to proportionality if the initial decison to use such a sentence was based on different grounds, namely grounds of public protection? Secondly, it would be unjust; whilst the element of 'public protection' may be incorporated within a proportional sentence, it is not permitted to 'inflate' a sentence.[29]

A further problem with section 6(4) is that the concept of 'public protection' is not defined. It begs two obvious questions: 'protection from what?' and 'protection from whom?' Parliament no doubt intended offences against the person to be covered, but what about protection from fraud or entrepreneurial crime? Overall, the inclusion in section 6(4) of the phrase 'public protection' is therefore dangerously imprecise, potentially unjust and clearly inconsistent with the plain language of section 6(1).

7. The hierarchy of sentences

Section 39 is pivotal to the working of the Sentencing Act. It sets out, for the first time in Western Australia, a statutory 'ranking' of the various sentencing options with respect to 'natural persons'.[30] Section 39(2) lists

28. DA Thomas *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* 2nd edn (London: Heinemann, 1979) does suggest that the two stages may attract different responses from a sentencing court. However, his reasoning is quite different from that which is suggested in the Sentencing Act.

29. The High Court has consistently held this line: see *Baumer* (1988) 63 ALJR 113; *Veen No 1* (1979) 143 CLR 458; *Veen No 2* (1988) 164 CLR 465; *Chester* (1988) 63 ALJR 75. It is, of course, possible for specific sentencing provisions to be enacted for protective sentences which are not restricted by the principle of proportionality. Ss 98-101 of the Sentencing Act contain the option of 'indefinite imprisonment' for those considered a 'danger to society' but it is expressly stated that the general principles of sentencing are irrelevant to such a determination: s 98(3)(a). The existence of these provisions is therefore of no assistance in explaining the relationship between ss 6(1) and 6(4).

30. S 40 also lists the options with respect to corporations.

the options and section 39(3) requires the courts to 'work through' all those options before imposing a custodial sentence. The court must not use any option unless it is satisfied, having regard to the general principles of sentencing,[31] that it is not appropriate to use any of the previously listed options. The options are discussed in detail below. In rank order, they may be summarised as follows:

(a) Impose no sentence and order the release of the offender.
(b) Impose a Conditional Release Order (CRO).
(c) Impose a fine and order the release of the offender unless an order is made for imprisonment until the fine is paid.
(d) Impose a Community Based Order (CBO).
(e) Impose an Intensive Supervision Order (ISO).
(f) Impose a Suspended Sentence of imprisonment.
(g) In the case of a 'Young Adult' impose a term of imprisonment and order the person's detention at a 'Detention Centre'.[32]
(h) Impose a term of immediate imprisonment.

In the case of options (a) to (d), the court may also make a 'Spent Conviction Order', the purpose of which is to relieve the person of the adverse effects of a conviction.[33]

8. Mitigating factors and the 'in/out line'

As we have seen, sentences are to be based on the seriousness of the offence and this is determined by taking account of a range of matters, including both aggravating and mitigating factors. In borderline cases mitigating factors obviously play a particularly important role in tipping the balance in favour of a non-custodial disposition. The statutory definition of such factors therefore requires careful analysis. Under the 1994 principles, mitigating factors were defined as factors which, in the court's opinion, decreased the culpability of the offender. They have now been more broadly defined in section 8 as factors which either decrease the offender's culpability or *decrease the extent to which the offender should be punished.*[34]

Although the Supreme Court has given little consideration to the 1994 principles,[35] the differences between the two formulations are potentially significant, as illustrated by the case of *Hodder.*[36] The appellant and his

31. In other words, ss 6-8.
32. A young adult is one aged between 18 and 21 at the date of sentence: s 81. Reference to a 'detention centre' is a reference to the possibility of 'special' institutions for such offenders. However, the Camp Kurli Murri 'Work Camp', set up in 1995, was adandoned in December 1996.
33. See infra pp 375-376.
34. Emphasis added.
35. The only case to attract a detailed discussion seems to be *Verschuren* (unreported) Ct Crim App 31 Oct 1996.
36. (Unreported) Ct Crim App 20 Jun 1995.

wife had been out to a hotel and had been drinking. He became jealous of what he claimed was her behaviour towards other men. He violently assaulted her in the car on the way home. When they got home he kicked her in front of the children. Later he forced her to take his penis in her mouth, using such violence that she vomited blood. He then raped her anally before masturbating and ejaculating over her face and hair. The trial judge had before him a passionate plea from Mrs Hodder that her husband should not be imprisoned. She stated that she had forgiven him, that he had sought counselling, that their relationship was improving and that she would suffer terrible hardship if he was imprisoned. He was the sole breadwinner and she would probably be forced to move house. Furthermore, she had no family support to help her with the children and she was pregnant. The trial judge nevertheless sentenced him to three years' imprisonment. Hodder appealed and the Court of Criminal Appeal, by a majority, upheld the appeal and substituted a probation order with conditions relating to counselling. The main basis for their decision was the plea from Mrs Hodder.

The Court of Criminal Appeal referred to general common law principles of sentencing but not to the 1994 principles. This may be explained on the basis that the offences occurred before the statutory principles were enacted. However, the important question for our present purposes is how such a case should be dealt with under the statutory principles. Under the 1994 principles, it is well arguable that most of the matters raised in Mrs Hodder's letter were irrelevant; they were essentially extrinsic to the commission of the offence and had nothing to do with Mr Hodder's culpability. However, under the broader language of section 8 these matters would be relevant if the court considers that they are matters which 'decrease the extent to which the offender should be punished.'

This raises some fundamental questions. The wide definition of mitigating factors in section 8 certainly reflects the majority view in *Hodder*. However, a crucial question remains: even if matters are *considered* in mitigation, how much *weight* should be placed on them? It is submitted that in answering this question, the courts must consider and develop the concept of proportionality. If proportionality is to be the key principle, it is submitted that only limited weight should be placed on factors such as 'hardship' or 'old age', where these factors have nothing to do with the objective seriousness of the offence.[37] This seems also to have been the view of Murray J in his dissent in *Hodder*. His Honour did not ignore Mrs Hodder's plea but considered that the objective seriousness of the offence required a custodial sentence of the duration imposed by the trial judge

37. I acknowledge that there may appear to be a certain circularity in the argument in that s 6(2) states that the seriousness of an offence is determined by a number of factors, including mitigating factors. However, the point is that if proportionality is really to mean anything, the weight afforded to some mitigating factors must be limited.

and that this outweighed the consideration of hardship. This approach would not, of course, preclude consideration of matters relating to the offender's background which can be said to have affected culpability.[38]

COMMUNITY BASED MEASURES: THE OLD AND NEW LAWS COMPARED

1. A general comparison

It is clear from what has already been said that a central plank of the Sentencing Act is the provision of a wider range of genuine alternatives to imprisonment. In this section I shall examine these new measures in some detail. However, before doing this, it is important to understand their relationship with the old law. This is best set out in the form of a table (see Table One on page 374).

2. Section 46 of the Sentencing Act compared with section 669 of the Criminal Code

Section 669 of the Criminal Code empowered the court to dismiss a charge without proceeding to conviction or to discharge an offender unconditionally. However, the section's application was limited to 'first offenders'[39] and was not available if the offence was 'punishable' with more than three years' imprisonment. This latter restriction became a particular problem over the past decade as the maximum sentences for many offences moved above the three year limit. It was not even clear whether section 669 could be used in cases where the general maximum exceeded three years but the offence was being dealt with summarily and attracted a summary conviction penalty of three years or less.[40]

Such limitations are out of line with the principle of proportionality in two respects: first, an offence may be trivial even though the statutory maximum is high[41] and, secondly, a person's prior record should not of itself preclude the use of such options.[42] It is therefore consistent with the

38. See eg *Juli* (1990) 50 A Crim R 31, where the Court of Criminal Appeal had regard, inter alia, to the very deprived socio-economic circumstances of the offender and the fact that a long history of substance abuse contributed to a 'diminished responsibility' for his offending.
39. 'First offenders' were given a complicated definition in s 669, a definition which differed according to whether the court was using the power of dismissal or the power of discharge.
40. In *Stokes* (1994) 71 A Crim R 75, Nicholson J held that s 669 could not be used in such cases because the offence was still 'punishable' with more than 3 years. However, in *Pratt* v *Denton* (1995) 13 WAR 482, Walsh J drew the opposite conclusion. Generally see Morgan supra n 5.
41. *Walden v Hensler* (1987) 61 ALJR 646.
42. *Sassella v Jones and Berry* [1976] WAR 207.

Table One: The Old And New Laws

Pre-Sentencing Act	Sentencing Act 1995
Dismissal without proceeding to conviction; only available for a 'first offender' convicted of an offence punishable with three years' imprisonment or less: s 669(1)(a). Unconditional Discharge; only for a 'first offender' convicted of an offence punishable with three years' imprisonment or less: s 669(1)(b)(i)	Impose no sentence and order release of offender, with or without making a spent conviction order: s 46, read with s 45.
Discharge on condition of entering a recognisance under ss 19(6)(7) or (8); only for a 'first offender' convicted of an offence punishable with three years' imprisonment or less: s 669(1)(b)(ii). Recognisance to be of good behaviour and to keep the peace under s 19(6) or (7): available for all offenders and offences. Recognisance to come up for judgment: s 19(8). Possibly an inherent common law power to bind an offender over: see McHutchison (1990) 48 A Crim R 179.	Impose a Conditional Release Order (CRO), with or without making a spent conviction order: ss 47-52, read with s 45. Common law bonds are abolished: s 12.
Probation, imposed in lieu of sentence under Offenders Community Corrections Act: s 9. Community Service Orders (CSO); also imposed in lieu of sentence (Offenders Community Corrections Act s 20B).	Community Based Order (CBO), made with or without a spent conviction order: ss 61-67, read with s 45.
	Intensive Supervision Order (ISO), in respect of which a spent conviction order cannot be made: ss 68-75. The ISO overlaps with but goes further than probation/CSO.
	Suspended Sentence of Imprisonment: ss 76-80.

proportionality principle in section 6(1) that section 46 of the Sentencing Act, the rough equivalent of section 669, is not hedged around with such restrictions. In deciding to impose no sentence and to release the offender, the court simply considers whether it would be unjust to use another option in view of the fact that the offence is trivial or technical and having regard to the offender's character, antecedents, age and health and any other matters

considered proper.

Section 46 represents a significant improvement on section 669 in that it is not restricted to first offenders or to limited types of offence. However, in another respect it seems unduly complicated. The main attraction of section 669 was not so much the unconditional discharge but the ability to avoid a conviction.[43] The fact that the charge had been dismissed without conviction did appear on a person's criminal record if (s)he appeared before the criminal courts in the future, not least so that it was known that the person was not a first offender. However, the person had a clean record for all other purposes. Under section 46, it would appear that a similar result is achieved but through a far more convoluted route. The offender must be convicted but the court may then decide to release the person without *sentence*. Having decided to do this, the court must then give separate consideration to making a 'spent conviction order'.

3. Spent conviction orders

Spent conviction orders are covered by section 45, which presents a number of hurdles to a court. First and foremost, the presumption is *against* making such an order; the court must not make a spent conviction order unless it is satisfied that the person is unlikely to commit such an offence again *and* that he should be relieved of the adverse effects of a conviction because of the triviality of the offence and his previous good character.

The process of reasoning required by the section poses some problems. In deciding to release the offender without sentence under section 46, the court will already have considered questions of triviality and character. Section 45 requires the court not only to revisit those factors but also to make a prognosis as to the likelihood of the person re-offending in a similar way. It is submitted that this structure is out of line with the general principle of proportionality which should permit a court to make a spent conviction order because of triviality alone. In *Haggie v Meredith*[44] a young man with a long record of violent behaviour was convicted of an assault. However, at the time of the offence he was under the influence of drugs which he had taken in an attempt to commit suicide. Although this did not provide him with an excuse under the Criminal Code, Scott J considered that he did not deserve punishment.[45] Under the Sentencing Act it might be possible for the court to use section 46 in such a case, but it seems inconceivable that the court could go on to make the 'clean' prognosis required for a spent

43. Eg the discussion in *Stokes* supra n 40, where both defence and prosecution agreed that a dismissal was, on the facts, an appropriate result.
44. (1993) 9 WAR 206.
45. Ibid, 214.

conviction order under section 45.[46]

One possible explanation for the hurdles in section 45 is that a spent conviction order can also be made with respect to other sentences, including CROs, fines and CBOs. However, whilst it may be appropriate to restrict the use of a spent conviction order in cases which merit these punishments, there is a need for greater flexibility and simplicity in the context of section 46. It would have been preferable if section 45 had applied only to CRO's, fines and CBO's and the legislation had given the courts a more general discretion in trivial cases to dismiss without proceeding to conviction.[47] What ought to be a simple procedure has become an unnecessary obstacle course.

4. Conditional release orders under the Sentencing Act compared with bonds under the Criminal Code

Prior to the Sentencing Act the law relating to various types of bonds was unnecessarily complicated and antiquated.[48] The Criminal Code contained powers to discharge offenders on their entering a recognisance to be of good behaviour and to keep the peace[49] or to come up for judgment if required.[50] The cases also suggested that the District Court and the Supreme Court retained certain common law powers in this area.[51] The Sentencing Act sensibly abolishes both the Criminal Code and the common law powers[52] and substitutes the Conditional Release Order (CRO). This order may be made either with or without a spent conviction order[53] and has a maximum duration of two years.[54]

Under section 47, a court may impose a CRO if it considers that:

(a) there are reasonable grounds for expecting that the person will not re-offend during the term of the CRO; and
(b) that the offender does not need supervising by a CCO [Community Corrections Officer].

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46. There is some flexibility in the fact that the court must ask not whether the person is likely to re-offend in a general sense, but whether he is likely to re-offend 'in a similar way'. However, this hardly gives sufficient leeway in cases such as *Haggie v Meredith* supra n 44.
47. The position is further complicated by the fact that s 46 triggers the Spent Convictions Act 1988 (WA). This Act was never devised with reference to sentences at the point of their imposition but was geared towards people making later application for their convictions to be spent.
48. Generally see Morgan supra n 5.
49. S 19(6)-(7).
50. S 19(8).
51. *McHutchison* supra n 18, 188.
52. S 12.
53. S 45; supra pp 371-372.
54. S 48(3).

Section 49 provides that a court which makes a CRO 'may impose any requirements it decides are necessary to secure the good behaviour of the offender'. The offender may be required to enter a recognisance, with or without a surety,[55] but the essence of the CRO is that the offender does *not* require supervision by a community corrections officer.[56] The idea is that the court should monitor the person's compliance, if necessary by requiring the person to re-appear before it.[57] Breach of a CRO renders the person liable to forfeit any bond[58] and to be re-sentenced for the original offence as well as for any breaching offences.[59]

The most interesting questions with respect to the CRO relate to the type of conditions which can and should be imposed. The general effect of the various provisions is that the courts should no longer impose very general conditions to 'keep the peace and/or be of good behaviour.' Under section 47, the *purpose* of the CRO is to secure good behaviour and conditions should be specified which are directed to that end. A general condition to be of good behaviour would be insufficient as it would merely state the purpose of the order. It is also clear that if the courts are to have the ability to monitor compliance in an effective and just manner, the conditions must be spelt out with precision.[60]

5. Community-based orders and intensive supervision orders compared with probation and community service orders

It must be emphasised that the CBO and the ISO do not merely replicate probation and community service orders under a new label. They offer significant improvements which should ensure that they are more widely utilised than their predecessors. An important preliminary point is that probation and community service orders were imposed 'instead of sentence'.[61] This designation failed to recognise that community-based sanctions can be both punitive and intrusive and that both the CBO and the ISO are quite properly designated sentences.[62] The differences between the CBO and the ISO are set out in Table Two.

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55. S 51.
56. Ss 47, 49(2).
57. S 50.
58. S 52(2).
59. Ss 128-135.
60. Eg *Temby* v *Schulze* (1991) 57 A Crim R 284, where the SA Supreme Court held that a condition that the person undertake a parenting course was too vague. Generally on conditions in good behaviour bonds: see Morgan supra n 5, 316-318.
61. Offenders Community Corrections Act 1963 (WA) ss 9, 20B(1).
62. Sentencing Act s 39.

Table Two: CBOs and ISOs compared

	CBO	ISO
Pre-sentence report	Optional: s 61.	Mandatory: s 68.
Spent conviction order	May be made.	May not be made.
Maximum duration	24 months.	24 months.
Standard obligations: ss 62-63, 69-70	Report to community corrections centre within 72 hours; Notify change of address; Not to leave WA without permit; Comply with lawful directions under section 76 Sentence Administration Act.[63]	All those which apply to a CBO and mandatory supervision requirement.
Primary requirements: ss 64, 72	At least one of: (a) Supervision requirement (b) Programme requirement (c) Community service.	All or any of: (a) Programme requirement (b) Community service (c) Curfew requirement.
Supervision requirement	Report to community corrections officer (CCO) as directed but at least once every eight weeks: s 65(4).	Report to CCO as directed but at least once every 28 days: s 71(4).
Programme requirement	The offender can be required to undertake counselling and treatment, including residential programmes: s 66.	As for the CBOs: s 73 (identical in effect to s 66).
Community service	40-120 hours, as set by the court, of unpaid community work: s 67.	40-240 hours, as set by the court, of unpaid community work: s 74.
Curfew requirement	Not an option.	S 75; maximum of 6 months from commencement of ISO and may include electronic monitoring for 2-12 hours per day.

The ISO is considerably more onerous than the CBO. As Table Two demonstrates, this is reflected in three main ways. First, the court must obtain a pre-sentence report before imposing an ISO but no such report is

63. This section requires an offender to satisfy a number of requirements, including any direction as to the performance of community work or as to drug testing.

required for a CBO.[64] Secondly, the court may make a spent conviction order in respect to a CBO but not an ISO.[65] Thirdly, as discussed more fully below, there are differences in terms of the nature and intensity of the conditions which may be imposed. As with the CRO, any breach of a CBO or ISO renders the person liable to be re-sentenced for the original offence.[66]

It is also significant that the Sentencing Act sets out the basic objectives of the various conditions. These are set out in Table Three.

Table Three: CBOs and ISOs—aims of the requirements

Supervision (ss 65 and 71)	To allow offender to be regularly monitored and to receive regular counselling, in a way and to an extent decided by a CCO, for the purpose of rehabilitating the offender and/or ensuring compliance with any direction by the court.
Programme (ss 66 and 73)	To allow for the factors which contributed to the offending behaviour to be assessed and to provide an opportunity for the offender to recognise, to take steps to control and, if necessary, to receive treatment for those factors.
Community service (ss 67 and 74)	To punish or rehabilitate the offender by making him or her do unpaid community work.
Curfew (s 75)	To allow for the movements of an offender to be restricted during periods when there is a high risk of the person offending and to subject the offender to short periods of detention at the offender's home or some other place.

These tables clearly demonstrate how far the new measures have moved from traditional conceptualisations of probation. Even in recent cases, probation was conceptualised primarily in terms of rehabilitation.[67] However, reform and rehabilitation now play second fiddle to notions of managing and monitoring offenders. Although 'programme requirements' reflect rehabilitative thinking, the primary purpose of supervision is acknowledged to be monitoring the offender. Although it must be noted that the legislation does not permit full-time 'home detention' via electronic monitoring,[68] the possibility of a 'curfew condition' in an ISO encapsulates this trend.

The tables also show a significant shift with respect to community

64. Sentencing Act ss 61, 68.
65. Sentencing Act s 39(2).
66. Sentencing Act ss 125-133.
67. *Wingo* (unreported) Ct Crim App 2 May 1990.
68. 24 hour per day monitoring may, however, occur as a condition of 'home detention bail' or if a prisoner is released under a 'home detention order'.

service which is recognised as being punitive in effect. This recognition is long overdue. Community work obligations are generally calculated in three hour blocks; based on a six hour day, 240 hours of community service therefore equates to 40 days' (eight weeks') work. This is a very significant imposition on an offender's time. Community service also remains the only sentencing mechanism whereby the offender is cast in the role of active giver and not merely the passive recipient of society's wrath.[69]

Some important practical consequences arise from these conceptualisations and from the general structure of the legislation. The most important is that sentencing courts need to work carefully through the various conditions and dovetail the sentence to the seriousness of the offence and, to the extent that this is appropriate within a proportional sentence, the treatment needs of the person.[70] A good example, and a good comparison with previous practice, is the use of a community service requirement. In the past courts rarely used community service without also imposing probation supervision. This may have been, in part, a reflection of the fact that both were orders imposed in lieu of sentence and appeared superficially complementary. However, the earlier Tables show that the supervision requirement has a different purpose from the community work requirement and that although a supervision requirement must be included in an ISO, a CBO could consist solely of the standard obligations and a community work condition. There may well be cases (eg, some cases of shoplifting and other property offences) where an appropriately punitive sentence would be for a person to be required simply to undertake between 40 and 120 hours of community service. It is also important for the courts to be selective in the imposition of conditions in CBOs and ISOs so that resources are not expended on unnecessary supervision but are devoted to effective supervision and enforcement.

NET WIDENING

Although there can be no doubt that the new measures can provide genuine alternatives to imprisonment, there are also some potential dangers. In the late 1970s, Professor Stanley Cohen expressed concern at the problem of 'net widening'; in other words, the danger that more people become enmeshed in the net of social control and that those who are caught are subjected, unnecessarily, 'to a degree of intervention higher than they would have received under previous non-custodial options like fines, conditional discharge or ordinary probation'.[71] Put simply, tough new community-

69. See Morgan supra n 5.

70. It must be remembered that the requirement of proportionality in s 6(1) applies to all sentences, and that this includes CBOs and ISOs.

71. Cohen 'The Punitive City' supra n 1, 347.

based measures may tend to displace other, less onerous non-custodial dispositions rather than displacing custody. The abolition of sentences of three months or less goes some way to reducing the prospect of net widening but it clearly remains a danger; as argued above, sentencers should justify each condition which is included in a CBO or an ISO and avoid the temptation to 'load up' the order with conditions.

Professor Cohen also cautioned that net widening is difficult to detect and guard against because community-based measures appear more humane than incarceration: 'the benevolently intentioned move towards the community may sometimes disguise the intrusiveness of new programmes'.[72] More recently, Professor Andrew Von Hirsch has developed some similar themes.[73] Von Hirsch cautions against the assumption that 'anything is better than prison'; community-based sanctions, he says, must be justified in their own right and not by assuming or asserting that they are not as 'bad' as another alternative. He also points out that community-based measures, particularly those which involve electronic monitoring, can involve enormous intrusion on the privacy and living arrangements of both the offender and those people with whom he lives. In Western Australia we have introduced electronic monitoring of curfews as a condition of an ISO without any local research on the impact of such measures on offenders and their families. However, local experience has shown that prisoners are well aware of the fallacy that 'anything is better than imprisonment.' Very few short-term prisoners have been prepared to accept early release from prison under a 'Home Detention Order' where such an order has involved 24 hour a day electronic monitoring.[74] Once again the message is that the various conditions, and particularly the curfew condition, must be used with caution.

THE SUSPENDED SENTENCE

The suspended sentence is really nothing more than a strong and rather unsophisticated threat; the offender is sentenced to a term of imprisonment but that sentence is suspended for a period. If the person re-offends during the period of suspension the sentence is likely to be activated. Since the suspended sentence requires the court to fix the term of imprisonment, it is ranked in section 39(2) as the most serious option other than immediate imprisonment. Unfortunately, despite its apparent simplicity, the suspended sentence creates many problems. Before discussing these, it is necessary to understand the background and the statutory framework.

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72. Cohen 'Community Control' supra n 1, 611.
73. A Von Hirsch 'The Ethics of Community Based Sanctions' (1990) 36 Crime and Delinquency 162-173.
74. In 1995 there were only 191 such orders: see Ferrante & Loh supra n 2, 129.

1. Imposition

Section 76(1) provides that a court which sentences a person to a term or an aggregate term of imprisonment of *five years or less* may order that the sentence be suspended for a period *not exceeding two years*. The suspended sentence is not to be used if the person is currently serving a custodial sentence; this includes offenders who were on parole or a Work Release Order at the time of the offence.[75]

The suspended sentence proved to have a significant net widening effect in England where it was frequently used not as an alternative to immediate imprisonment but as an alternative to non-custodial measures.[76] When imposing a suspended sentence, courts also tended to impose longer sentences than they would have imposed if they had sentenced the person to an immediate custodial term. Since breach of a suspended sentence generally resulted in the activation of the suspended sentence in addition to any sentence imposed for the new offence, the suspended sentence almost certainly led to an *increased* use of imprisonment in England.

Section 76(2) of the Sentencing Act seeks to address the problem of net widening by providing that a term of imprisonment is not to be suspended unless 'imprisonment for a term or terms equal to that suspended would, if it were not possible to suspend imprisonment, be appropriate in all the circumstances.'

2. Activation

Section 80(1) provides that if the offender is convicted of 'an offence punishable with imprisonment' and the offence was 'committed during the suspension period', the court which deals with the matter[77] has a number of choices:

(a) Unless an order has already been made under either para (a) or para (b), the court may activate the suspended sentence in full;

(b) Unless an order has already been made under para (a) or para (b), the court may activate the suspended sentence in part;

(c) Provided that the period of suspension has not already ended, the court may substitute a further period of suspension of up to two years;

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75. S 76(3).

76. See AE Bottoms 'The Suspended Sentence in England 1967-1978' (1981) 21 Brit Journ of Crim 1.

77. The Sentencing Act contains detailed provisions relating to the procedures for dealing with such a breach: ss 78-79.

(d) The court may fine the offender up to $6 000 and make no other order.

However, the court does not have a 'free choice'. Under section 80(3), the presumption is that the sentence will be activated in full; the court *must* make an order under para (a) unless it would be unjust to do so in all the circumstances which have arisen or which have become known since the suspended sentence was imposed.[78] Under section 80(4), if the court uses another option it must state its reasons.

The legislation does not set out the factors which are relevant to the decision to use an option other than activation in full but the two most obvious considerations will be the seriousness of the breaching offence (assessed in accordance with the general principles of sentencing under sections 6-8) and how close to the end of the suspension period it occurred.[79]

If the sentence is activated, it must be served immediately and concurrently with any other term the person is serving or has yet to serve.[80] When activating a suspended sentence in full or in part, the court must consider the question of parole eligibility.[81]

3. Some issues and problems

(i) The ranking of the suspended sentence

The first question which arises is whether the suspended sentence justifies its ranking as a tougher option than measures such as the fine, the CBO and the ISO. On the face of it, there are serious problems with such a ranking. The suspended sentence relies simply on a threat whereas the CBO and the ISO involve both a threat and an imposition on an offender's free time. The threat is that an offender who either breaches the conditions of a CBO or an ISO or re-offends during their operational period is liable to be re-sentenced for the original offence.[82] The offender's freedom is significantly restricted by the requirements of supervision, programmes and community work. There is no difference in the duration of the various orders as they can all last for two years. The key feature which sets the suspended sentence apart is that the threat is more concrete in the sense

78. In other words, the court cannot 'revisit' the original decision but is able to take into account matters which exisited at the time of the original sentence but which have only just become known. It will be interesting to see how this is interpreted; for example, in cases where the person was suffering a serious illness at the time of the offence but this has only been diagnosed in the time between imposition and breach.

79. *Ithell* [1969] 1 WLR 272; *Saunders* (1970) 54 Cr App R 247; *Moylan* [1970] 1 QB 143; *O'Donnell* (1982) 4 Cr App R (Sentencing) 96.

80. S 80(6).

81. S 80(5); infra pp 385-387.

82. Ss 128-133.

that the consequences of further offending are spelt out. However, it is not easy to conclude that this difference of itself justifies the difference in ranking.

(ii) Combining sentences

In some situations it might be appropriate for a sentencer to seek to combine the benefits offered by the concrete threat of a suspended sentence with the supervision, programme or community work requirements of a CBO or ISO. It is not possible to combine such measures with respect to a single offence[83] but combinations would be possible with respect to an offender who is convicted of a number of offences.

(iii) Imposing a suspended sentence: the process of reasoning

The Sentencing Act seems to require courts to take the following steps in deciding to impose a suspended sentence:

- Under section 6(4), considerations of 'proportionality' or 'public protection' must point to the use of imprisonment rather than any other option. In the context of the suspended sentence it will be proportionality which is at issue as the offender will remain in the community.
- The court must have decided, under the terms of section 39(2)-(3), and in accordance with the general sentencing principles in sections 6-8, that all other options such as a fine, CRO, CBO and ISO are not appropriate.
- The court must set the length of the prison sentence by reference to notions of proportionality: section 6(1).
- Having decided that imprisonment of a certain length is the only option, the court may decide not to send the person to prison but to suspend the sentence.
- Finally, the court must consider the appropriate period of suspension.

It is submitted that this process of reasoning involves an extraordinary exercise in intellectual gymnastics. It also suggests that suspended sentences should be relatively rare. The only situation in which they would appear to be justified is where the gravity of the offence merits a tough (or apparently tough) response but a fine is inappropriate and a supervisory order is unnecessary. This might perhaps be the case in some situations —

83. S 39(4) prohibits the use of more than one of the options in s 39(2) where an offender is sentenced for '*an* offence', subject to ss 41-42. Consequently, where an offender is sentenced for more than one offence, combinations are allowed. The basic effect of ss 41-42 is that a fine may be combined with another sentence (except the imposition of no sentence under s 39(2)(a)) in respect of *an* offence.

for example, in the case of some property offences committed by a single parent or in the case of some relatively serious but 'one off' offences. However, generally, there would be very few situations in which a court could truly decide that all other options are inappropriate, that the person should therefore be sentenced to a term of imprisonment and yet that the sentence may be suspended. Nevertheless, experience in other jurisdictions suggests that the courts are likely to embrace the suspended sentence with enthusiasm.[84]

(iv) The length of the sentence and the period of suspension

The problems I have already discussed are compounded in Western Australia by the fact that very long sentences, of up to five years, may be suspended[85] and that the maximum period of suspension is only two years, far less than the sentence itself. Two questions arise. First, it is hard to see how it would ever be possible to conclude that an offence is so serious that it merits a sentence of imprisonment as long as five years and yet that the sentence can still, for some reason, be suspended. Secondly, there is a complete disjunction between the length of the sentence which is suspended (five years) and the period of suspension (two years). Even if a reason was found for suspending a five year sentence, how can it be appropriate to suspend for less than half that time? Although it might be possible to conjure up rare examples, the legislation seems, if anything, to be 'the wrong way round'; it would be easier to justify the suspension of a two year sentence for five years than the suspension of a five year sentence for just two years. It would probably have been better simply to have empowered the courts to suspend sentences of up to *two* years for a maximum period of two years.

(v) Activating the suspended sentence concurrently with any other term

When a suspended sentence is activated in full or part, the Act requires the activated term to run *concurrently* with any other term which the person is serving or has yet to serve.[86] By contrast, in England activated terms

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84. See Bottoms supra n 76. Some members of the judiciary in WA also fought hard for the inclusion of the suspended sentence in the Sentencing Act. Newspaper reports since November 1995 also suggest the courts in WA have already made considerable use of the suspended sentence.
85. Eg, in England the maximum which could be suspended was 2 years and the maximum period of suspension was 2 years.
86. S 80(6).

must be ordered to run *cumulatively* unless it would be unjust to do so.[87]

The Western Australian model may have been motivated by a desire to reduce the danger of net widening. However, it has two rather bizarre consequences. The first may be termed the 'wipe out effect'. Suppose that offender X is sentenced in June 1997 to a period of two years' imprisonment, held in suspense for two years ('sentence one'). She is then convicted of a further serious offence committed in September 1997. The court decides that the latest offence deserves a two year sentence of immediate imprisonment ('sentence two'). In accordance with section 80, the court decides to activate sentence one in full. However, because sentence one must run concurrently with sentence two, it is effectively 'wiped out'; the total owed by offender X is two years.

The second problem is one of 'relative proportionality'. Compare the case of offender X which I have just set out with that of offender Y. Y is also sentenced to two years, suspended for two years ('sentence one'). He too breaches shortly after the imposition of sentence one but his offence is less serious that that committed by offender X and he is therefore sentenced to a term of immediate imprisonment of six months ('sentence two'). The court decides, in accordance with the presumption in section 80(1), to activate sentence one in full. Offender Y (whose totality of offending merited two and a half years) now 'owes' a total of two years. This is, of course, the same as that owed by offender X (whose totality of offending merited four years).

(vi) Aggregate suspended sentences

Section 76 permits 'aggregate' terms of imprisonment to be suspended. The logic of the legislation is that the court should decide whether the terms in question should run concurrently or cumulatively in setting the overall term and then decide on suspension. Since suspended terms must not be any longer than an immediate term would have been in the circumstances,[88] the court must avoid any temptation to order the terms to run cumulatively rather than concurrently because it intends to suspend the sentences rather than directing that they be served immediately.

There is, however, a flaw in the overall logic. The Sentencing Act permits the court, when imposing an immediate custodial sentence on a multiple offender, to order that the sentences be served concurrently, wholly cumulatively or *partly* cumulatively.[89] The purpose of partially cumulative sentences is to permit the courts to 'fine tune' their sentences. However, there is no power to impose partly cumulative suspended sentences in

87. Powers of Criminal Courts Act 1973 (UK) s 23. See also *Ithell* supra n 79.
88. S 76(2).
89. S 88.

respect of suspended sentences.[90] This seems to cut across the requirement that a suspended term be equivalent to the term the court would have imposed if it had not suspended the sentences.

(vii) Parole eligibility

We have seen that section 76(2) seeks to address the issue of net widening by providing that a suspended sentence is not to be any longer than the term would have been if it had not been suspended. However, the actual time that a person spends in custody depends not merely on the 'head sentence' but on whether the person is made eligible for parole or not. A court which activates a suspended sentence must consider the question of parole eligibility according to the normal parole criteria.[91] The question inevitably arises, therefore, as to how much weight should be placed in determining the question of parole eligibility on the fact that the person has already breached a sentence. This is a matter upon which Supreme Court guidance may be needed. However, there seem to be three reasons why breach of a suspended sentence should not, in itself, be regarded as a factor militating strongly against parole. First, the current statutory criteria render it very unusual for a person not to be made eligible for parole;[92] breach of a suspended sentence should not generally be sufficient reason to refuse parole eligibility. The second, closely related reason is that parole supervision is conceptually quite different from the unsupervised suspended sentence. Finally, there is the problem of net widening; if courts did refuse parole eligibility, there would be a significant increase in the use of imprisonment, an increase which would be masked behind the fact that the court is merely activating the original sentence.

CONCLUSIONS

The title of this paper posed two rather simplistic alternatives: does the Sentencing Act herald a new utopia or will it simply be business as usual? The preceding analysis has shown that neither description is accurate and also that the Act is something of a 'mixed bag'. The two features within the legislation which cause most concern are the provisions relating

90. S 88(6).
91. S 80(5). The criteria for making a person eligible for parole are set out in s 89, which reiterates the previous law on this point.
92. See *Archibald* (1989) 40 A Crim R 228; *Shaw* (1989) 39 A Crim R 343; *Swain* (1989) 41 A Crim R 214; *Eades* (1990) 47 A Crim R 385; *Thompson* (1992) 8 WAR 387. For a discussion: see N Morgan 'Parole and Sentencing in WA' (1992) 22 UWAL Rev 94, 108-110.

to the suspended sentence and the extraordinary dissonance, within the general principles of sentencing, between sections 6(1) and 6(4).

The most important benefits of the new Act lie in the somewhat belated provision of realistic, workable and up to date alternatives to sentences of imprisonment. In this respect, the ball lies very much in the hands of the courts. The Supreme Court will play a pivotal role, both in promoting the use of the new sentences and in monitoring their implementation. In furtherance of this role, the court must be prepared to issue guideline judgments on matters such as the use of conditions in CROs, CBOs and ISOs, the imposition and activation of suspended sentences and the use of different measures in the context of particular offences.

The court and other agencies will also have to monitor the use of short custodial sentences to ensure that the abolition of sentences of three months or less does not result in an increase in the use of sentences of, say, four months. Another area for further research will be the way in which magistrates exercise their power to review sentences imposed by JPs.

It is also essential to remember that, at the end of the day, effective sentencing depends on consistency in legislation and a spirit of cooperation between parliament, the courts and the executive. Concern must be expressed at both of these matters. Parliament has already chosen, with its three strikes law, to subvert the principles of the Sentencing Act and has shown scant regard for the complexity of individual cases which reach the courts. This begs the question of whether the Western Australian parliament treats even its own laws seriously.

The other crucial unknown at this stage is whether there will be adequate resourcing for non-custodial measures. The rate of imprisonment — and the Aboriginal imprisonment rate in particular — will only be reduced if the new measures are fully resourced and applied in an energetic and imaginative fashion.

It may be significant, in terms of the concerns raised in this paper, that the Chief Justice has been given the power to 'report to Parliament on any matter connected with sentencing'.[93] Since such reports are to be tabled in both Houses, this provides a more open mechanism for loopholes to be filled and problems to be rectified. Such reports cannot, of themselves, overcome the excesses of political parties which seem quite unable to avoid making law and order a prime issue in State elections; but they may go some way to redressing the balance.

93. S 144.