Now You See It, Now You Don't: Truth and Justice Under the New Sentencing Laws

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Since 1988, many prisoners in Western Australia have been released after around one-third of their sentence as a result of remission, parole and home detention. Some have been released even earlier under a work release order. The various orders have been unduly complex and 'untruthful', eroding the authority of the courts and distorting the impact of sentences. In late 1999, legislation was enacted to address these concerns. Some facets of the new laws are to be welcomed but, unfortunately, the new scheme is even more complex than its predecessor, and it raises serious problems of principle and practice. Sentencing courts face particular problems as a result of the general complexity of the scheme and of the specific requirement that sentences be 'adjusted' to take account of the new laws. In a measure of doubtful constitutional validity, the Ministry of Justice is effectively empowered to impose a community-based sentence of six months on some offenders, to run ***after*** *the expiration of the sentence imposed by the court. The new laws also undermine the presumption of innocence and impose unnecessary and anomalous fetters on the discretion of the Parole Board. Overall the scheme owes more to political will and compromise than to simplicity, transparency and justice.*

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THERE is nothing new in the executive arm of the state permitting prisoners to be released prior to the expiration of the sentence imposed by a court. For centuries, the exercise of the royal prerogative served to mitigate the severity of the criminal law through individual petitions.[1] In 19th century Australia, ticket-of-leave systems allowed the conditional release of convicts and, during the course of the 20th century, schemes of remission and parole became commonplace in the developed world.[2] However, by the 1990s in Western Australia, the extent and complexity of early release schemes was quite remarkable. As a result of the operation of remission, parole, work release and home detention prisoners were generally eligible for release after serving no more than one-third of their sentence.[3] Those offenders who were released at an early stage remained under supervision in the community for some time but, in most cases, the final one-third of the sentence was simply remitted. Like similar regimes elsewhere, this attracted significant criticisms, which were neatly encapsulated by the Supreme Court of Victoria:

> An intelligent observer who was told about the sentence passed and the period of incarceration actually served would be likely to conclude either that the court had no authority because little notice was taken of the sentence passed or that the court was engaged in an elaborate charade designed to conceal from the public the real punishment being inflicted upon an offender.[4]

During the 1980s and early 1990s, criticisms of this sort had prompted legislation to promote greater truth in sentencing in a number of jurisdictions. These changes commonly involved the abolition of remission and/or the introduction of more restrictive parole systems.[5] By the mid-1990s, it was almost inevitable that Western Australia would follow suit. However, this State's high rate of imprisonment continued to operate as a powerful counterweight to change.[6]

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1. Classic discussions of such practices are to be found in D Hay 'Property, Authority and the Criminal Law' in D Hay, P Linebaugh & EP Thompson (eds) *Albion's Fatal Tree* (London: Allen Lane, 1975); EP Thompson *Whigs and Hunters* (London: Allen Lane, 1975). The royal prerogative was expressly preserved when sentencing laws were rationalised: Sentencing Act 1995 (WA) s 137.
2. For the position in WA: see N Morgan 'Parole and Sentencing in Western Australia' (1992) 22 UWAL Rev 94.
3. In some cases, it was only one-fifth: see N Morgan 'The Crime (Serious and Repeat Offenders) Sentencing Act 1992: Subverting Criminal Justice' in RW Harding (ed) *Repeat Juvenile Offenders: The Failure of Selective Incapacitation in Western Australia* (Perth: UWA Crime Research Centre, 1993) 39.
4. *Yates* [1985] VR 41, 44.
5. For a summary, see *Report of the Review of Remission and Parole* (chaired by KJ Hammond, Chief Judge of the District Court of WA) (Perth: Ministry of Justice, 1998) ch 5 (the 'Hammond Report').
6. The State's general imprisonment rate is well above the national average and its rate of Aboriginal imprisonment is the highest in Australia: see AM Ferrante, NSN Loh & J Fernandez

The Sentence Administration Act 1999 (WA) and the Sentencing Legislation Amendment and Repeal Act 1999 (WA) aim to balance these concerns by providing greater truth in sentencing without causing an explosion in the prison population. The original Bills also contained a proposal for a sentencing 'matrix' but this was subsequently removed to its own Bill, and, at the time of writing, remains before the parliament.[7]

The legislation is expected to come into force in late 2000 or early 2001. It abolishes remission — and, with it, the loss of remission penalty for prison disciplinary offences. However, it retains, in a modified form, three forms of Early Release Orders,[8] parole, Home Detention Orders and Work Release Orders. The administration of all these orders will change in several key respects. For example, parole previously applied only to sentences of 12 months or more but now applies to sentences of any duration. The courts have also been given greater scope to determine that a person is not eligible for release on parole. Hitherto, those prisoners made eligible for parole by the courts have been required to serve at least one-third of their sentence before possible release on parole (the 'non-parole period'); under the new laws, the non-parole period is one-half of the sentence. The rules governing Work Release and Home Detention Orders have changed and there are significant amendments with respect to breaches of Early Release Orders. A crucial ingredient of the new laws is that the courts are directed to 'adjust' sentences in order to ensure that 'the offender does not, by reason only of the new provisions, spend more time in custody' than would have been the case under the old law.[9]

In addition to these Early Release Orders, the legislation has introduced a new measure — the Release Programme Order — which will apply to some of those offenders who are not eligible for parole. This is not an Early Release Order but an order which requires treatment programmes to be undertaken in the community *after* the sentence of imprisonment has expired. It will already be clear that the terminology is extremely complex and that there is a multiplicity of orders. By way of assistance, a glossary of terms is included as an Appendix to this article.

Crime and Justice Statistics for Western Australia: 1998 (Perth: UWA Crime Research Centre, 1999) 142.

7. The matrix proposal is currently before the Legislation Committee of the Legislative Council which has heard a number of witnesses whose evidence can be found through <http://www.parliament.wa.gov.au/parliament/home.nsf>. See also K Warner 'Sentencing Review 1998' (1999) Crim LJ 364; N Morgan 'Accountability, Transparency and Justice: Do We Need a Sentencing Matrix?' (1999) 28 UWAL Rev 259; G Zdenkowski 'Sentencing Trends: Past, Present and Prospective' in D Chappell & P Wilson (eds) *Crime and the Criminal Justice System in Australia: 2000 and Beyond* (Sydney: Butterworths, 2000) 161.
8. This term is used to refer to parole, work release and home detention: Sentence Administration Act 1999 (WA) s 4(2).
9. Sentencing Legislation Amendment and Repeal Act 1999 (WA) s 15.

This article comprises five main parts. Part One examines the law prior to amendment. This is necessary for three reasons: (i) to explain the background to and evolution of the new laws; (ii) to understand the 'adjustment of sentences' which is now required; and (iii) because offenders sentenced prior to commencement date will be subject to a mixture of the old and new laws.[10] Part Two examines the work of the Committee to Review Remission and Parole ('the Hammond Committee'),[11] from which many of the changes were derived. Part Three provides an overview of the operation of the new regime and explains the main differences between the new regime, the old regime and the Hammond Committee's proposals. Part Four provides a detailed analysis and critique of key aspects of the new laws. Finally, Part Five examines the question of sentence 'adjustment' by the courts. The article concludes that some aspects of the new scheme, including the abolition of remission, are welcome. However, the new scheme is unnecessarily complicated and may cause significant practical problems. Major issues of principle also arise. For example, the Release Programme Order amounts to a form of sentencing by the executive and, in addition, there are inroads on the presumption of innocence in cases where a person who is already on an Early Release Order is charged with a further offence.

PART ONE: THE OLD MODEL

1. Remission

For many years, all prisoners have received one-third remission of their sentences.[12] Remission was introduced as a measure to improve prison discipline. It was automatic in the sense that it did not have to be earned through good behaviour in prison, but it could be lost as a punishment for prison disciplinary offences. For example, a prisoner sentenced to six years' imprisonment without parole was released after four years, subject to any loss of remission penalty.[13] Likewise, a prisoner who was made eligible for parole on a six year prison sentence had to be released after four years even if the Parole Board declined to make a parole order. Since the balance of the sentence had been 'remitted' and the sentence had expired, there were no conditions on the person's release. The remission rules also dictated the parameters of the parole system.

10. Such prisoners will be subject to a mixture of the old and new laws: infra pp 279.
11. Supra n 5.
12. Prisons Act 1981 (WA) s 29; see infra pp 261-262 and n 51 for further explanation.
13. The prisoner would have been eligible for a Work Release Order after 3.5 years.

2. Parole

Parole was introduced in Western Australia in 1963.[14] It is quite different from remission in that the offender *remains under sentence* in the community, and is subject to conditions by way of supervision, monitoring and treatment. Further offending or breach of the parole conditions can result in the person being returned to prison. The original rationale of parole was to assist in the rehabilitation of longer term prisoners through a period of conditional freedom following release. Consequently, it has hitherto been limited to sentences of 12 months or more and has been discretionary rather than automatic.

In some parts of the world, parole has always been regarded purely as an executive practice over which the courts have no say. However, the Australian philosophy has been for sentencers to have some degree of control. Prior to 1988, West Australian courts set both a head sentence and a minimum term to be served by the offender prior to becoming eligible for parole. In other words, they decided *whether* the person was eligible for release on parole and also *when* that might occur. Since then, they have decided only the question of eligibility and, in practice, most prisoners have been made eligible.[15] The period to be spent in prison prior to consideration for parole (the 'non-parole period') has been fixed by a legislative formula rather than by a judicial decision in each case. The formula was designed to reflect two matters: first, the fact that, with remission, sentences would only run to the two-thirds date and, secondly, the view that supervision in the community should be for a maximum of two years.[16] In the case of sentences of six years or less, the non-parole period has been one-third of the total sentence.[17] On longer sentences, it has been two years less than two-thirds of the total. Thus, on a nine year sentence, the non-parole period was four years, the parole period was two years, and the final three years were remitted on completion of parole.[18] For reasons

14. Morgan supra n 2.
15. Ibid.
16. It has been thought that longer periods would be unlikely to produce benefits in terms of supervision and would simply generate breaches of supervision requirements.
17. For example, a 3 year sentence involved a non-parole period of one year; if released after one year, the offender was then on parole (the 'parole period') for the next year. Provided the order was not cancelled, the final year was remitted.
18. The situation was different if a parole order was cancelled. In such a case, the offender would still 'owe' the balance of the sentence. Take the example of a sentence of 9 years' imprisonment imposed in January 1993. The total sentence would run to January 2002 but the person could be released on parole in January 1997. If so, the parole period would run for 2 years, to January 1999, and the final 3 years would be remitted on completion of this period. Suppose, however, that the order was cancelled in October 1998 for failure to comply with the reporting requirements. If the Board decided to release the person again in April 1999, the new parole order would be for a further 2 years (Apr 1999-Apr 2001).

that will be developed later, it is also important to note that prior to November 1994, there was a further 10 per cent remission of the non-parole period.[19]

The fact that a person was made eligible for parole by the courts did not, of course, mean that the person would necessarily be released on parole on the expiration of the non-parole period. It was for the Parole Board to decide on release, and the Board has always been able to defer or deny release on parole. However, the legislation did, in effect, provide a presumption that parole would be granted at the person's earliest eligibility date.[20] Consequently, under the old law, the majority of prisoners serving sentences of 12 months' imprisonment or more were made eligible for parole by the courts and were then released on parole at or around their earliest eligibility date.

3. Work Release Orders

Work Release Orders were introduced in 1988 and have applied to both parole and non-parole sentences.[21] Offenders released on Work Release Orders live in the community but are subject to a more stringent regime than parole and must complete unpaid community work as well as complying with other reporting requirements and treatment programmes. There is no requirement for the person to have confirmed employment though this, together with strong community support, greatly assists any application. Work Release has only been available in the case of prisoners who have actually served at least 12 months in prison and the maximum duration of the order has been six months.[22]

For example, a person sentenced to six years' imprisonment with parole has been eligible for work release after serving 18 months, and for parole after serving two years. Work Release Orders have been administered by the Parole Board but have not been frequently made. The major limitation has been that the Board cannot make an order unless satisfied that the person 'would pose a *minimum risk* to the personal safety of people in the community or of any individual in the community'.[23] As a result of this provision, Work Release Orders have proved, in practice, to be primarily the preserve of serious property offenders — especially those with strong community ties and a record of employment.

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19. One serious white collar offender was sentenced to 5 years' imprisonment, giving a non-parole period of 20 months. With 10% remission of the non-parole period, he was eligible for parole after 18 months. In fact, he was released under a Work Release Order after just 12 months.
20. Morgan supra n 2.
21. Sentence Administration Act 1995 (WA) Pt 4.
22. Ibid, s 46.
23. Ibid, s 48 (emphasis added). *Klavins* (unreported, WA Sup Ct , 21 Apr 1995, no 950178) held that risk to the community was not to be equated with a prisoner's 'security rating' within the prison system.

4. Home Detention Orders

Home Detention Orders have only applied to sentences of less than 12 months. The system came into force in 1991 and prisoners have been eligible to apply for home detention after serving one-third of their sentence.[24] The Ministry of Justice has administered the scheme independently of both the courts and the Parole Board. Home detention has always involved a high level of supervision and monitoring, and initially required electronic tagging. Although tagging has not been mandatory since November 1996, the conditions have remained onerous.[25] For example, the offender has been required to stay put at the place nominated in the order except for limited purposes, including seeking work, engaging in community corrections activities, urgent medical treatment or to 'avert or minimise a serious risk of death or injury'.[26] Because of their intrusiveness, Home Detention Orders have not proved popular, most inmates preferring simply to serve their sentence in prison.[27]

5. Overview

As well as feeling that the system involved something of a charade, the 'intelligent observer'[28] might well have raised other serious concerns. The automatic remission of one-third of a sentence would have seemed an extremely generous concession, and one which, in truth, had more to do with 'muster control' (limiting the number of people in prison)[29] than with the discipline of individual prisoners.[30] The 12 month cut off for parole caused particular anomalies. A prisoner sentenced to 12 months' imprisonment was almost certain to be released on parole after four months. However, the less serious offender who was sentenced to nine months' imprisonment had to serve more time (six months) in custody unless released under a Home Detention Order, involving far more intrusive supervision than parole. Quite apart from issues of fairness to individuals, this would have seemed a quite irrational allocation of resources. Finally, work release not only added to the charade but appeared discriminatory in impact, in the sense that white collar criminals invariably met the statutory criteria but less privileged prisoners were far less likely to do so.

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24. Ibid, s 59.
25. This was when the Sentence Administration Act 1995 (WA) came into force.
26. Sentence Administration Act 1995 (WA) s 61.
27. Ferrante et al supra n 6, 159.
28. *Yates* supra n 4, and accompanying quote.
29. Regrettably, many correctional staff still persist in talking of the prison 'muster' (a word properly used with respect to counting cattle) rather than the prison 'population'.
30. Infra pp 261-262.

PART TWO: THE HAMMOND COMMITTEE

The Hammond Committee reported in March 1998.[31] Its terms of reference were a testament to the competing pressures of truth in sentencing and muster control. They appeared to request the impossible, namely a scheme whereby —

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

Largely for the reasons just outlined,[32] the Committee rejected the option of retaining the current model. It also rejected the abolition of early release schemes, accepting the philosophy that conditional release generally serves the interests of both the offender and the community more effectively than releasing a person without constraints or conditions. It found support for this in the fact that the majority of parole orders (around 70 per cent) and Work Release Orders (around 80 per cent) are completed without being cancelled[33] and in local research which shows that sex offenders who are released without parole are more likely to re-offend — and to do so more quickly — than those who are released on parole.[34]

The Committee recommended widespread reform and simplification. It concluded that the one-third remission could not be justified and should be abolished,[35] but that a parole system should be retained for sentences of 12 months or more. It recommended that the courts should have greater scope to deny parole eligibility[36] and that the non-parole period should generally be one-half of the total sentence.[37] Offenders released on parole were to be supervised for one-third of the sentence, up to a maximum of two years, and were then to be at risk for any remaining balance. The term 'at risk' reflected the same principles as the suspended

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31. Hammond Report supra n 5. The Report followed on from two Options Papers in December 1996 and June 1997 (circulated to the Chief Justice of the Supreme Court, the Chief Stipendiary Magistrate and the WA Law Society). The Hammond Committee included representatives of the Parole Board, the Ministry of Justice, the Director of Public Prosecutions and the legal profession.
32. The Committee's views were rather less forthright.
33. Parole Board (WA) *Annual Report* (Perth, 1999); Hammond Committee supra n 5, ch 3.
34. R Broadhurst & R Maller *Sex Offending and Recidivism: Research Report No 3* (Perth: UWA Crime Research Centre, 1991) 56-57.
35. Infra pp 261-262.
36. Infra pp 270-273.
37. The Committee rejected a return to a system where judges set the 'minimum term' on the grounds that this was likely to generate complexity and inconsistency and would be at odds with the general principles of sentencing contained in the Sentencing Act 1995 (WA): Hammond Report supra n 5, ch 6.

sentence of imprisonment. It meant that the person would not be supervised but, if imprisoned for an offence committed during the 'at risk' period, would be liable to serve the balance of the sentence.[38] In the interests of prisoners, the Parole Board and public understanding, the Committee called for statutory criteria to guide decisions about parole.

In the case of sentences of less than 12 months' duration, the Committee recommended the abolition of Home Detention Orders in favour of a simpler, less restrictive regime. It proposed that all prisoners serving less than 12 months would be automatically released after one-half of their sentence and would then simply be at risk for the balance.[39] In a sense, all sentences of less than 12 months would have become 'partly suspended' sentences.

The Committee saw no justification for the continuation of Work Release Orders in their existing form and proposed their abolition. However, it did recommend a similar system to assist in the reintegration into the community of prisoners who were not eligible for parole. It proposed that this 'reintegration period' should be for the last 10 per cent of the sentence, up to a maximum of six months.[40]

If these proposals had simply been grafted onto existing sentencing practices, they would have seen a dramatic increase in the prison population. In order to avoid this, and to meet its terms of reference, the Committee concluded that the courts would need to 'adjust' their sentencing practices to take account of the abolition of remission and the new parole formula. Subject to a number of other considerations being taken into account,[41] this would generally have involved a reduction of one-third in the sentence.[42] Like the Committee's terms of reference, the proposed model invited the comment that it was nothing more than a sleight of hand — promising much but making no real change. However, the model did meet a

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38. For example, on a 6 year sentence, the non-parole period would be 3 years. If released on parole at this time, the offender would be supervised for 2 years and then be 'at risk' for the final year. He would be liable to serve the 'balance' if he was sentenced to imprisonment for an offence committed during that year. The balance in this context was to be the period from the date of the breaching offence to the end of the sentence unless the Board decided to make another release order: see also Tables 1 and 2, infra pp 263 and 268.
39. Unless, for special reasons, the sentencing court made an order requiring supervision.
40. For example, on a sentence of 5 years without parole, the last 6 months would be served in the community under a regime devised to meet the situation of the offender, but probably including gratuitous community work and treatment programmes.
41. Such as changes in sentencing practices for reasons unrelated to the new laws: infra pp 280-284.
42. Under the existing laws a 3 year sentence meant 2 years given the remission rules. Under the Committee's proposals, the court would have imposed a 2 year sentence, giving the same non-parole period (1 year) as the old laws. Similarly, a 6 year sentence would have been reduced to 4 years, and 18 months to 12 months.

number of criteria. It returned more authority and control to the courts with respect to parole eligibility. It was far simpler and more comprehensible in that early release mechanisms were to be reduced in number and complexity; and, although sentences would generally be reduced, the scheme was more truthful in that offenders would serve the whole sentence, either in prison or in the community. Finally, it promised greater transparency as a result of its relative simplicity and the enactment of criteria to guide the Parole Board.

Although the Committee considered that its proposed model was an improvement on the existing system, and that it potentially met its terms of reference, it also expressed some serious concerns. The most important of these was the likely impact on imprisonment rates, and especially Aboriginal imprisonment rates. The most obvious pressure points were the proposal that parole would be denied more frequently by the courts and a likely increase in breaches as a result of people serving longer periods on parole (ie, whilst 'at risk'). Although the Committee believed that sentences could, in theory, be adjusted to accommodate the changes, it also expressed concern about the appropriateness, practicality and effectiveness of legislation to this effect.[43] It therefore suggested that consideration be given to phasing in the changes to allow further detailed research and consultation on these matters.[44] However, by October 1998 it had become clear that the Coalition government intended to implement the full package, subject to a number of differences of detail and two major riders: first, that the Parole Board should no longer be able to 're-release' a person who had committed 'any serious criminal offence while on parole';[45] and, secondly, that some offenders who were not eligible for parole should face compulsory supervision after the expiration of the sentence.

PART THREE: OVERVIEW OF THE NEW REGIME

The rest of this paper examines the new legislation in detail. Due to the complexity of the terminology and the law, this task is approached in three stages. First, this Part provides an overview, discussing the abolition of remission and explaining the operation of the various orders that apply under the new scheme. Part Four then assesses the new laws by reference to their stated goals of greater truth, simplicity and transparency and examines some specific issues of principle and practice. Finally, Part Five considers the question of sentence adjustment.

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43. Infra pp 280-284.
44. Hammond Report supra n 5, Appendix 3.
45. <http://www.wa.gov.au/cabinet/mediast/dg98-44/fossente.html>.

1. The abolition of remission

In line with the Hammond Committee's recommendations, remission has been abolished. This is of enormous significance because it means that loss of remission is no longer available as a penalty for prison offences. Loss of remission penalties have always posed problems both in principle and in practice. Prison superintendents and Visiting Justices (usually JPs, not legally qualified magistrates) have been empowered to extend a person's stay in prison through such penalties. More bluntly, they have been imposing additional prison sentences — up to three days per offence for superintendents and up to 28 days for Visiting Justices. This power had become increasingly questionable by the mid 1990s, when legislation prohibited sentences of three months or less and required any sentence of imprisonment imposed by a JP to be reviewed by a magistrate.[46] Loss of remission penalties also operated particularly harshly in that the additional custody time did not attract either remission or parole; in other words, 28 days' loss of remission meant what it said — an extra 28 days in prison.[47] These problems were compounded by the vague parameters of prison 'offences' and the lack of legal representation, procedural safeguards and systematic external review.[48]

These arguments are compelling but hardly new. So what prompted change? By far the most important factor was practical experience. In November 1994, the Coalition government abolished the 10 per cent remission that had previously applied to non-parole periods.[49] As a consequence, those prisoners who were eligible for parole (who were, of course, the majority of prisoners serving 12 months or more) no longer faced any loss of remission penalty. There was no evidence to suggest that this had caused problems in terms of discipline or disorder. The prisons had survived without major incident and Prisons Act offences had simply been punished in other ways, such as separate confinement or loss of privileges. Put simply, there was no evidence that the loss of remission penalties was required for effective prison management.[50]

Loss of remission penalties again applied to parole sentences from November 1996, when the Sentencing Act 1995(WA) came into force. This allowed the non-

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46. Sentencing Act 1995 (WA) ss 38 and 86; s 36 also requires 'written reasons' for a prison sentence.
47. Ibid, ss 85(3)(a)(ii) and (b)(iii). Twenty-eight days actual custody time equated to a period of almost 3 months of a sentence of imprisonment with parole.
48. Such concerns have frequently been raised by the Ombudsman: see *Annual Reports of the Ombudsman for Western Australia*. Prisoner disciplinary proceedings have also been subject to a detailed review during 2000 by Magistrate Paul Heaney, who is proposing significant procedural changes.
49. Supra pp 255-256 and n 19.
50. Hammond Report supra n 5, 17.

parole period to be extended to take account of any loss of remission penalty.[51] It was quite conceivable that the same approach would be taken under the new law. However, the Sentencing Legislation Amendment and Repeal Act 1999 (WA) has repealed the provisions relating to the extension of time in prison and has removed from the Prisons Act 1981 (WA) the power of superintendents and Visiting Justices to impose loss of remission penalties.[52] This means that no prisoner — whether sentenced under the old or the new laws — can be subject to such penalties. These changes are likely to alter significantly the nature of prison-based adjudications and may see an increase in the number of prison offences coming before the courts. This is a valuable reform in that serious prison offences will be dealt with in a more neutral environment[53] and with greater procedural safeguards; however, it remains to be seen how many cases are referred to the courts and whether the penalties are ultimately any different.[54]

2. Summary of the new orders

Table 1 (opposite) summarises the operation and evolution of the new laws. It shows that the scheme reflects many of the principles of the Hammond Committee (especially the principle that the offender should be subject to the whole of the sentence imposed by the court) but that it is far more complex than that Committee anticipated. The courts must now consider parole eligibility on *all* sentences of imprisonment, not just those of a year or more. They also have greater scope to deny parole eligibility and must adjust sentences to take account of the new laws with respect to Early Release Orders.[55] Where an order is made for parole eligibility (a 'parole sentence'), the non-parole period is 50 per cent of the sentence and, if the person is released on parole, the remaining 50 per cent is served on parole. Parole may now be either 'supervised' or 'unsupervised'. After parliamentary debate,

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51. For many years, the one-third remission was governed by s 29 of the Prisons Act 1981 (WA). S 29 was repealed by the Sentencing Act 1995 (WA) and was replaced by a set of Yes Ministerish provisions. Under s 95(1), a prisoner who was serving a non-parole sentence was discharged from that sentence at the two-thirds date and had to be released at that time. At first sight, this appeared to mean that prisoners could not 'lose' remission as they had done under the old system. However, tucked away in s 85(3) was a formula under which two-thirds did not necessarily mean two-thirds; it was calculated by subtracting one-third of the sentence from the total imposed and then adding 'any days which the offender has forfeited through loss of remission under the Prisons Act'. S 85(4) made similar provision for calculating the non-parole period.
52. Sch 1.
53. PM Quinn 'Adjudications in Prisons: Custody, Care and a Little Less Justice?' (1993) 32 Howard Journal 191 provides an eloquent critique, from the perspective of a UK prison governor, of the role of governors as adjudicators.
54. It should not be assumed that the courts will be more lenient.
55. Infra pp 270-273, 280-284.

Table 1: Comparison of the old and new schemes

Length of sentence	The old law	Hammond Committee	The new law
Less than 12 months	One-third remission. Not eligible for parole. Eligible to apply for a Home Detention Order after one-third of the sentence.	No remission. Not eligible for parole. Home Detention abolished in favour of automatic release after 50% of sentence. 'At risk' for balance of term.	No remission. Court to determine parole eligibility. (i) *If eligible for parole:* Automatic release after 50% of sentence. Subject to 'unsupervised parole' for balance of term. (ii) *If not eligible for parole:* Eligible for Home Detention after two-thirds.[56] Possible 'Release Programme Order' for 6 months after expiration of prison sentence.
12 months or more	One-third remission. Court to determine parole eligibility (offender generally eligible).	No remission. Court to determine parole eligibility (greater scope to refuse).	No remission. Court to determine parole eligibility (greater scope to refuse).
• **Parole Sentences** (a) Non-parole period (b) Parole period (c) Work Release Order	(a) One-third on sentences up to 6 years; 2 years less than two-thirds on longer terms. (b) If released, parole period generally to the two-thirds date. (c) Eligible for Work Release Order for up to 6 months prior to parole, provided at least 12 months already served in prison.	(a) 50% of sentence. (b) Parole supervision for one-third of the sentence, up to a maximum of 2 years. 'At risk' for any remaining balance of term. (c) Work Release abolished.	(a) 50% of sentence. (b) Parole supervision for one-third of the sentence, up to a maximum of 2 years. Unsupervised parole for remaining balance. (c) Eligible for Work Release for up to 6 months prior to parole, provided at least 12 months already served in prison.
• **Non-Parole Sentences**	One-third remission. Eligible for Work Release Order for up to 6 months prior to release date, provided at least 12 months already served in prison.	No remission. Eligible for 10% 'reintegration period' to a maximum of 6 months.	No remission. Eligible for Work Release Order for up to 6 months prior to release date, provided at least 12 months already served in prison. Possible Release Programme Order for 6 months after expiration of prison sentence.

56. This applies to sentences of 12 months or less (in other words, it now applies to sentences of exactly 12 months as well as those of less than 12 months).

Work Release and Home Detention Orders were modified and retained rather than abolished. Last, but not least, those who are not eligible for parole may be subject to post-sentence supervision through the Release Programme Order.

3. Early Release Orders

(i) Parole

There are two distinct forms of parole under the new scheme. *Supervised* parole is 'parole as we know it'; the parolee is subject to conditions and supervised by a community corrections officer. Supervised parole is automatically cancelled if the parolee is sentenced to imprisonment for an offence committed during the term of the order. It can also be breached where the person re-offends in a minor way, and receives a non-custodial sentence or fails to comply with the supervision conditions. Breaches of this sort may — depending on the circumstances — lead to cancellation of the order.[57] *Unsupervised* parole reflects the Hammond Committee's concept of a person being simply 'at risk'. Like supervised parole, it is automatically cancelled if the parolee is sentenced to a term of imprisonment for an offence committed during the order. However, the order is not breached in any other way.[58]

Courts must now consider the question of parole eligibility on all sentences of imprisonment, including those of less than 12 months.[59] Where the sentence is less than 12 months and the court makes an order for parole eligibility, the person *must* be released after 50 per cent of the sentence unless he or she declines the offer. The person will then remain on unsupervised parole for the balance of the term.[60] Where the court declines to make a person eligible for parole, that person may nevertheless apply for home detention after serving two-thirds of the sentence.[61]

The non-parole period is also 50 per cent where the sentence is 12 months or more. However, in these cases the Parole Board has a discretion whether or not to release the person on parole.[62] If the person is released, the parole period lasts for the balance of the sentence and will generally consist of a supervised portion followed by an unsupervised portion. The minimum period for supervision is six months and the maximum is two years. Subject to those limitations, the supervised period is one-third of the sentence. Thus, on an 18 month sentence, the non-parole

57. Under the new laws, the Parole Board may also cancel an order where the parolee has been charged with further offences: infra pp 274-276.
58. Where a supervised or unsupervised parole order is cancelled, the person is liable to serve the balance of the term unless released again by order of the Parole Board: infra pp 274-276.
59. Infra pp 270-272.
60. There is no provision for the court to order supervision on such a parole period.
61. Supra p 257.
62. Infra pp 273-274.

period will be nine months and the parole period will also be nine months — six months of which will be supervised and three unsupervised. A prisoner sentenced to 10 years' imprisonment will serve a non-parole period of five years. If released immediately after the non-parole period has expired, the person will face a parole period of five years — two years of which are supervised and three years unsupervised.[63]

(ii) Work Release Orders

As before, Work Release Orders can be made in the case of both parole and non-parole sentences for a maximum of six months, provided the person has already served at least 12 months in prison.[64] There is, however, an important change with respect to the criteria for the order. The issue for the Parole Board will no longer be whether the person is a *minimum* risk to the community but whether there is a *low* risk.[65] The Parole Board assesses risk by reference to the seriousness of the current offence(s), any criminal record, reports from the facilitators of treatment programmes such as the Sex Offender Treatment Programme and, where relevant, psychological and psychiatric reports. The new wording is unlikely to have much effect in cases where the assessment of risk primarily reflects the person's record for violent or sexual offences. However, it may well have an impact in those cases where expert reports play a particularly important role; these reports are rarely prepared to state that a person poses only a 'minimum' risk, but do, more frequently, speak in terms of 'low risk'.

(iii) Home Detention Orders

Home detention has been retained in a modified form. It applies to non-parole sentences of 12 months or less and permits the person's release after two-thirds of the sentence.[66] Home Detention Orders are likely to be infrequent because most prisoners serving less than 12 months will probably be eligible for parole[67] and experience suggests that home detention will not prove popular amongst those who are eligible. The prospects of those who decide to apply for home detention will also, presumably, be limited by virtue of the fact that the court has deemed them unsuitable for parole.[68] Given this, how can the executive then justify an early

63. If the sentence is one of exactly 12 months, the offender will be eligible for release on parole after 6 months and will then be subject to supervised parole for the remaining 6 months.
64. Sentence Administration Act 1999 (WA) s 49.
65. Ibid, s 51(2).
66. Sentence Administration Act 1999 (WA) s 62; previously it applied only to sentences of less than 12 months.
67. Infra pp 270-272.
68. Home Detention is not a matter over which sentencing courts have any control and its existence should not be used as a reason to deny parole eligibility.

release under a different order? It is not easy to answer this question because the legislation does not enunciate either the aims of home detention or the criteria for its use. The answer would seem to be that onerous monitoring for the final one-third of a sentence may occasionally be appropriate even if unsupervised parole for one-half the sentence is not. However, it must be questioned whether this justifies the retention of an order which continues to apply the most intrusive monitoring to the shortest sentences and which will cause considerable problems in terms of simplicity and sentence adjustment.[69]

4. Release Programme Orders

The Release Programme Order ('RPO') is not an Early Release Order but is an order which requires the person to be supervised and to undertake treatment programmes for a period of six months *after* the expiration of the prison sentence. The RPO only applies to non-parole sentences but it can work in conjunction with either Home Detention or Work Release Orders.[70] It requires the person to comply with certain reporting requirements and also to undertake treatment programmes to address the 'personal factors which contributed to the person's offending behaviour' and to 'facilitate reintegration into the community'.[71] Breach of the conditions of an RPO is an offence[72] and is enforced by way of complaint to a court by the relevant Chief Executive Officer. Since the prison sentence has expired, the sanction is not a return to prison but a fine of up to $3 000.

Where the sentence is less than two years, an RPO can only be made in cases where the sentencing court has first made a Programme Assessment Order.[73] Where the court makes a Programme Assessment Order, and in the case of all non-parole sentences of two years or more, the CEO *must* make an RPO on the offender's release unless it is considered that 'such an order is not warranted'.[74] Where the sentence is more than two years, the CEO is further directed to consider whether, 'to help achieve the purpose' of the RPO, the person should first undertake a pre-release programme in prison.[75]

As a matter of practice, it remains to be seen how the RPO will interrelate with home detention and work release. The orders are somewhat different in theory, in that the RPO focuses on treatment programmes whereas Work Release Orders focus on community work and home detention on 'monitoring'. However, it is clear that

69. Infra pp 267-269, 280-284.
70. See Table 1, supra p 263; Table 2, infra p 268.
71. Sentence Administration Act 1999 (WA) ss 84-85.
72. Ibid, s 6.
73. Sentencing Act 1995 (WA) s 89A.
74. Sentence Administration Act 1999 (WA) s 82.
75. Ibid, s 82. If there is a pre-release programme, the CEO must 'take the steps necessary to ensure the offender completes it before being released': s 83(2).

there is also substantial overlap. For example, treatment conditions are very common in Work Release Orders, and all of the orders involve varying degrees of supervision. Consequently, although the statutory presumption is that an RPO will be made, we can predict that the CEO is more likely to regard it as 'unwarranted' if the person has successfully completed a period under home detention or work release.

PART FOUR: ISSUES OF PRINCIPLE AND PRACTICE

Having described the various orders that now exist, it is time to evaluate the new laws by reference to their stated goals of truth, simplicity and proportionality and to discuss some issues of principle and practice.

1. Truth, simplicity and proportionality

It may well be that the truth is 'never pure and rarely simple'.[76] Nevertheless, an explicit aim of these laws was to enhance both truth and simplicity. It must be questioned whether they achieve either goal. First, as far as simplicity is concerned, the new scheme is significantly more complicated than its predecessor; all the old options have been retained and the RPO has been added. The examples in Table 2 show the complex permutations which now arise, especially with respect to shorter sentences. A nine month sentence ought to be a simple proposition and, under the Hammond Committee's proposals, would have meant just one thing for all prisoners: four-and-a-half months in prison and four-and-a-half months 'at risk'.[77] Table 2 shows that a sentence of nine months' imprisonment with parole does mean this under the new regime. However, as we have seen, the court may decide that the person is not eligible for parole. In this case, the actual 'meaning' of the sentence is dependent upon three variables: first, whether the court makes a Programme Assessment Order; secondly, if a Programme Assessment Order is made, on whether the Ministry of Justice actually imposes a Release Programme Order; and, thirdly, on whether the person is also granted a Home Detention Order. The extraordinary result is that a nine month sentence can involve five different outcomes, reached by seven different routes.[78]

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76. Oscar Wilde *Lady Windermere's Fan: A Play About a Good Woman.*
77. Subject to the possibility of supervision in exceptional cases: supra p 258.
78. Table 2 shows the 7 different routes; however, some of these routes do end up at the same 'outcome' (eg (b)(i) and (c)(ii)). The result reflects parliamentary compromise. The government was committed from an early stage to the RPO, which appeared in the first version of the Bill. Some of the opposition parties were uncomfortable with the RPO but, apparently because of concerns about imprisonment rates, wanted to retain home detention and work release. The compromise was to retain all the existing orders and to have the RPO as well.

Table 2: What do sentences really mean?

The sentence imposed by the court	The meaning of the sentence
Nine months' imprisonment	
(a) With parole eligibility.	(a) 4.5 months in custody plus 4.5 months' unsupervised parole (unless offender declines).
(b) Without either parole or a Programme Assessment Order.	(b) (i) 9 months in custody; or (ii) 6 months in custody, then 3 months on home detention.
(c) Without parole but with a Programme Assessment Order.	(c) If the Ministry of Justice implements a Release Programme Order: (i) 9 months in custody and 6 months under a RPO; or (ii) 6 months in custody, 3 months on home detention and 6 months under a RPO. If the Ministry of Justice does not implement a RPO: (i) 9 months in custody; or (ii) 6 months in custody and 3 months on home detention.
Three years' imprisonment	
(a) With parole eligibility (assuming Parole Board does not defer or deny parole).	(a) (i) 18 months in custody, then 12 months' supervised parole and 6 months' unsupervised parole; or (ii) 12 months in custody, followed by 6 months' work release, 12 months' supervised parole and 6 months' unsupervised parole.
(b) Without parole.	(b) If the Ministry of Justice implements a Release Programme Order: (i) 3 years in custody and 6 months under a RPO; or (ii) 2.5 years in custody, 6 months on work release and 6 months under an RPO. If the Ministry of Justice does not implement a RPO: (i) 3 years in custody; or (ii) 2.5 years in custody and 6 months on work release.

Truth in sentencing is an illusive concept. At times, it is little more than a populist catchcry for offenders to serve the whole of a sentence of imprisonment in custody. Clearly, the new scheme does not involve this. At first sight, it appears to involve 'truth' in the Hammond Committee's more limited sense that offenders should serve the whole of the sentence, either in prison or in the community. However, the effect of the RPO is that some offenders will serve *more* than the whole of the sentence. Serving more is just as untruthful as serving less.

This is not a question of semantics but cuts to the core of just and consistent sentencing practice. The courts have been solemnly enjoined by legislation to

impose sentences that are 'commensurate with the seriousness of the offence'.[79] Commensurate sentences should not just be about the 'paper sentence' pronounced in court: in principle, sentences of equal length should have equal impact and sentences of different lengths should have different impacts.[80] As Table 2 shows, the existence of so many variables destroys that fundamental principle.

2. Release Programme Orders: unconstitutional executive sentences?

Few would dispute the view that it is desirable for offenders to be supervised for a period of time after release, even if they are not eligible for a lengthy period on parole. Indeed, the Hammond Committee suggested that non-parole sentences should involve a short 'reintegration period'. However, the RPO applies after the sentence has expired, raising fundamental questions of principle.[81]

Although the RPO is triggered by a sentence of imprisonment by a court, it is a separate order, the imposition of which ultimately lies in the hands of the executive. It is also important to note that most of the statutory wording has been lifted directly from the legislation governing the Community Based Order, a sentence which may be imposed by a court. In effect, therefore, the RPO can be characterised as a form of sentencing by the executive; the prisoner is subjected to an additional sentence, equivalent to a six month Community Based Order, by order of the Ministry of Justice. This decision is taken without an open court hearing (involving legal representation and other procedural safeguards) or the decision of an independent body such as the Parole Board.

In the aftermath of the High Court's decision in *DPP (NSW) v Kable*,[82] this generates some intriguing constitutional issues. These cannot be fully developed here but the basic argument is simple. It can be argued that that the RPO undermines the nature and effect of the sentence imposed by the court. It does so because the executive is allowed to impose conditions and sanctions outside and beyond the terms of the original sentence. In this sense, the RPO is quite different from early release schemes, all of which operate within the confines of the sentence. As we have seen, the RPO also creates serious distortions in the actual meaning of

79. Sentencing Act 1995 (WA) s 6.
80. A Ashworth *Sentencing and Criminal Justice* (London: Weidenfeld & Nicolson, 1992) 74-75.
81. It is served on the offender (Sentence Administration Act 1999 (WA) s 82) and, unlike early release orders, does not depend on the offender's consent. This runs contrary to the philosophy that effective treatment programmes depend on willing participation and is likely to cause difficulty where a person refuses to engage in treatment programmes either during or after the prison sentence.
82. (1996) 189 CLR 51.

sentences, especially those imposed on short-term prisoners. In terms of *Kable*, it can well be argued that, by undermining the integrity of the court order, the RPO undermines the independence and integrity of the court itself.[83]

3. The role of the courts: making Parole Eligibility Orders and Programme Assessment Orders

Whenever a court imposes a sentence of imprisonment, it must also decide whether the person is eligible for parole. Where the sentence is less than two years, and the court decides that the person is not eligible for parole, it must consider whether to make a Programme Assessment Order. These two important decisions have a particular impact on the practices of Courts of Petty Sessions.

Prior to legislative amendment, the courts were required, when considering parole eligibility, to consider both 'static' factors (such as the seriousness of the offence and the offender's criminal record) and 'circumstances ... which, in the court's opinion, might be relevant to the offender at the time when the offender would be eligible for release on parole.' Since it is difficult to know what the future holds, courts almost always ruled in favour of parole eligibility.[84] Section 89(2) of the Sentencing Act 1995 (WA) now reads:

> A court may decide not to make an parole eligibility order ... if the court considers that the offender should not be eligible for parole because of at least two of the following four factors:
> (a) the offence is serious;
> (b) the offender has a significant criminal record;
> (c) the offender, when released from custody under a release order made previously, did not comply with the order;
> (d) any other reason the court considers relevant.

Given the complexity of the new scheme and the potential for a large number of appeals, it may prove helpful for the Supreme Court to issue a 'guideline judgment' for the assistance of all courts.[85] There appear to be four main matters upon which

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83. For fuller discussion on the application of *Kable* to related areas: see M Flynn 'Fixing a Sentence: Are There Any Constitutional Limits?' (1999) 22 UNSWLJ 280; N Morgan 'Accountability, Transparency and Justice: Do We Need a Sentencing Matrix?' (1999) 29 UWAL Rev 259, 288-290. Generally on *Kable*: see P Johnston & R Hardcastle 'State Courts: The Limits of *Kable*' (1998) 20 Syd LR 214; G Zdenkowski 'Community Protection Through Imprisonment Without Conviction: Pragmatism Versus Justice' (1997) 3(2) AJHR 8.

84. Amongst the cases are *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.

85. The court may wish to arrange for a number of cases to be heard together to assist in the

clarification will be required. The first is the general gist and philosophy of section 89. The section does provide greater flexibility by removing reference to future circumstances and focusing primarily on 'static' factors, but this should not be interpreted to mean that there is now any presumption against parole eligibility. The philosophy remains that parole is generally preferable to release without parole, and the new scheme was not intended to cause a significant increase in the prison population. Furthermore, since section 89 is couched in terms of a 'discretion to deny' parole for particular reasons, it can be argued that parole should still generally be granted. It should also be stressed that the legislation restricts the discretion to refuse parole eligibility by requiring the court to be satisfied that parole is inappropriate for 'at least two' reasons. Unlike South Australia, a single factor, such as the seriousness of the offence or a person's criminal record, does not suffice.[86]

The second area for potential guidance is the interpretation of paragraphs (a) to (d). Paragraph (a) seems, at first sight, to be superfluous; after all, the court should not have imposed a prison sentence in the first place if the offence was not serious. To have any meaning, the phrase must therefore be interpreted more restrictively. The proper interpretation would appear to be that the offence should be one which can be categorised as serious *when judged against other offences attracting a prison sentence*. If this is right, it follows that courts — and especially Courts of Petty Sessions — should not refuse parole eligibility on sentences of less than 12 months[87] unless this is clearly justified by the rest of the section (in other words, by the criteria in paragraphs (b) to (d)). There is no reason in principle for the terms 'serious' offence (paragraph (a)) and a 'significant criminal record' (paragraph (b)) to be restricted to offences against the person, though it is more likely, in practice, that the courts will refuse eligibility in cases where the current offence is one of violence.

Paragraph (c) refers simply to failure to comply with a previous release order. This should be approached with caution. First, the court should examine the nature of any previous breach and the reasons behind it before using this as a ground for refusing parole eligibility. Secondly, paragraph (c) should generally come into play where the offender has a significant history of non-compliance, not just where there has been a breach of 'a release order.' Under this interpretation, a history of non-compliance may quite properly include any breaches of restraining orders and sentences involving community supervision as well as previous release orders.[88]

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promulgation of general guidelines: *Jurisic* [1998] NSWSC 597: see N Morgan & L Murray 'What's in a Name? Guideline Judgments in Australia' (1999) 23 Crim LJ 90.

86. Hammond Report supra n 5, 24-25.

87. Given the need to 'adjust sentences', 12 months under the new regime will equate to around 18 months under the old system: infra pp 280-284.

88. Breaches of restraining orders will be particularly pertinent if they relate to the victim of the current offence.

Paragraph (d) allows consideration of any other relevant factors. It is difficult to think of many situations where a court would be justified in refusing parole eligibility outside factors (a) to (c). The most likely scenario is where the person has no prior record but has been convicted of a very serious offence of violence — perhaps against a spouse or de facto — and expert reports indicate that he or she poses a continuing risk to that victim or to others. This case would meet the requirement in paragraph (a) but would not meet paragraphs (b) or (c). Even here, however, the court may decide to make the person eligible for parole, clearly flag its concerns and specifically call upon the Parole Board to assess risk at the time of possible release.[89]

The third area for clarification is whether the existence of other orders is relevant to decisions on parole eligibility. Under the old law, sentencers sometimes commented, in borderline cases, that they were prepared to make the offender eligible for parole in order to ensure supervision on release. Under the new regime, the sentencer might be minded to deny parole eligibility in such a case, in the knowledge that the offender is likely to be released under a RPO and, depending on the length of the sentence, may also be subject to either home detention or work release. However, the scheme of the legislation seems to require that the court should decide the question of parole eligibility solely according to the criteria in section 89 and without regard to the possibility that other orders may apply.

Finally, in the absence of legislative criteria, judicial guidance should be provided as to when a court should make a Programme Assessment Order on non-parole sentences of less than two years. As we have seen, a Programme Assessment Order may result in the Ministry of Justice imposing a RPO of six months' duration. It would obviously be tempting for the courts to make Programme Assessment Orders as a matter of standard practice whenever they decline to make a person eligible for parole. However, in the author's view, this temptation should be firmly resisted; the RPO is questionable in principle and, as suggested, is liable to distort the meaning and impact of sentences, especially those of a shorter duration.[90]

4. Deciding to make a release order: greater transparency?

The Hammond Committee found that there was a lack of public understanding about Parole Board decision-making and therefore recommended that there should be statutory criteria with respect to decisions about release on parole. It made this recommendation in the context of a simple system in which parole was to be the only discretionary Early Release Order. The legislation does provide criteria with respect

89. It would be a good idea in such cases to spell out to the offender that release on parole is not automatic and will depend on the criteria in s 16 of the Sentence Administration Act 1999 (WA).

90. Supra pp 267-270.

to release on parole but none for Work Release (administered by the Parole Board) or Home Detention and Release Programme Orders (administered wholly within the Ministry of Justice). This suggests a very shallow commitment to transparency and superficial parliamentary scrutiny of legislation.

The old laws directed that offenders were to be released on their earliest eligibility date unless there were 'special circumstances' to justify parole being either deferred or denied.[91] The Sentence Administration Act 1999 (WA) simply directs the Board to consider 'whether the prisoner should be released on parole'[92] according to the 'parole considerations' in section 16. They are —

(a) the circumstances of the commission of, and the seriousness of, the offence for which the sentence was imposed;
(b) the behaviour of the prisoner when in custody serving the sentence in so far as it may be relevant to determining how the prisoner is likely to behave if released on parole;
(c) whether the prisoner has participated in programmes available to him or her when in custody and if not the reasons for not doing so;
(d) the prisoner's performance when participating in any such programme;
(e) the behaviour of the prisoner when subject to any release order ... made previously;
(f) the likelihood of the prisoner offending when he or she is on parole;
(g) the likelihood of the prisoner complying with the standard obligations and any additional requirements of a (supervised) parole order;
(h) the degree of risk that the release of the prisoner would appear to present to the personal safety of people in the community or of any individual in the community;
(i) any other consideration that is or may be relevant to whether the prisoner should be released on parole;
(j) any remarks by a court that has sentenced the offender to imprisonment that are relevant to any of the above matters.

The court will already have considered factors (a) and (e) in considering parole eligibility but they obviously remain relevant to the Board. Broadly speaking, the other factors relate to prison conduct and programme participation (factors (b), (c) and (d)) or to a prognosis of risk and likely compliance with the order (factors (f), (g) and (h)). Paragraph (j) highlights the importance the Board already places on any sentencing remarks made by the court. Now that the parole criteria have been spelt

91. Sentence Administration Act 1995 (WA) s 26.
92. Ibid, s 22.

out, it would be helpful if courts were, as a matter of standard practice, to draw the offender's attention to these factors, in broad terms, at the time of sentencing.

Although the formal structure of the legislation has changed with the removal of the presumption in favour of parole, section 16 directly reflects existing practices. It is therefore unlikely to cause major changes with respect to decisions about release on parole. Indeed, the proportion of eligible prisoners released on parole ought logically to increase as a result of more 'poor bets' being denied by the courts.

It is unfortunate that the Sentencing Administration Act 1999 (WA) has done little to clarify or explain Parole Board procedures. It still proclaims in stark terms that neither the Board nor any other body or agency under the Act is subject to the rules of natural justice.[93] In reality, however, the position is less one-sided than this would seem to indicate. The Board must give the prisoner reasons for any adverse decision and these reasons must be sufficiently detailed to allow the prisoner to appeal against the decision.[94] In practice, the Board also gives prisoners the right to a personal hearing where work release or parole is denied or deferred for a period of six months or more.[95]

5. Eroding the presumption of innocence: cancellation and suspension of Early Release Orders

If an Early Release Order is *suspended*, the person must be returned to custody, but the order has not ended. This means that the person can be released again, under the same order, if the suspension is lifted. Where an early release order is *cancelled*, it comes to an end and the person can only be released again if a new order is made.[96] Both suspension and cancellation are strong sanctions, involving the offender being returned to custody. It is therefore essential that appropriate criteria are applied and consistent practices adopted.

All Early Release Orders, including unsupervised parole, are automatically cancelled if the person is sentenced to a term of imprisonment for an offence committed during the period of the order.[97] Early Release Orders which involve

93. Ibid, s 128.
94. *Forbes* (1996) 89 A Crim R 139.
95. Under the old legislation 'special term prisoners' (ie, those serving 3 years or more for a violent or sexual offence) could not be released on parole unless the Parole Board itself had considered the case. Other prisoners were released by an order signed by the secretary of the Parole Board unless it was considered necessary to refer the case to the full Board for its consideration of denial, deferral or the imposition of special conditions. The Sentence Administration Act 1999 (WA) does not adopt this system, but it is likely that the same model will be adopted by regulations pursuant to s 121.
96. Infra pp 276-278.
97. Sentence Administration Act 1999 (WA) s 73.

supervision are also breached by a failure to comply with the terms of the order.[98] Here, however, there are a range of sanctions, depending on the seriousness of the breach. These include cancellation, suspension or a warning. In the case of Home Detention Orders, the CEO has the power both to suspend and cancel.[99] In the case of parole and Work Release Orders, the CEO has the power to suspend for non-compliance but must then refer the case to the Parole Board which has the final say in whether an order is cancelled. When speaking of the CEO's powers, it should be noted that these are delegated to the managers of local community corrections centres.

The new legislation adds a specific third ground for the cancellation or suspension of supervised parole, work release or home detention — the fact that a person has been *charged* with a further offence. In theory, this power always existed but it was never explicit. Table 3 summarises the law and procedures.

Table 3: Suspension/cancellation when 'charged with an offence'

	Home detention	**Work release**	**Supervised parole**
Suspension	CEO may suspend (under the terms of s 69 and by extension of the power to cancel).	CEO may suspend for up to one month (s 58). Must lift the suspension if the person is acquitted and refer to Board if matter not dealt with. Board may also suspend.	CEO may suspend (under the terms of s 38). Must report this to the Board. Board may also suspend.
Cancellation	CEO may cancel (s 70).	Only Board may cancel (s 60(2)).	Only Board may cancel (s 44(2)).

The power to cancel or suspend an order solely because a person has been charged with another offence raises some important issues of principle and practice. Hitherto, the Parole Board has regularly — and necessarily — suspended parole or work release where the person has been remanded in custody to face further charges.[100] However, if a person has been granted bail, the Board's view has been that it would be wrong in principle to suspend parole except in the most exceptional circumstances. The fact that the person is subject to an Early Release Order does not deprive that person of the presumption of innocence and bail decisions should

98. Ibid, ss 38, 44, 58-60, 69-70.
99. Ibid.
100. This is for the obvious reason that a person who is remanded in custody cannot comply with the requirements of the order.

be for the courts, not the Parole Board. It remains to be seen how far Parole Board practices will evolve given the explicit terms of the new laws, but it is suggested that these general issues of principle will remain paramount.

It is less clear how managers of community corrections centres will exercise this power. Already, it is evident that some managers act more quickly on breaches than others and there are likely to be differences in this area too. Some may follow the same arguments of principle as the Board and suspend only in very limited circumstances. However, others will more regularly exercise the power to suspend. Managers' suspensions of parole and work release are at least reviewed by the Parole Board. In the case of home detention there is no independent review. In none of these cases is there an open hearing or legal representation.

Depending on how they are administered, the new laws therefore give enormous power to the police. The only question is whether the person has been *charged* with an offence. There is, in theory, no limit on the type of offence which can generate suspension, no requirement for the strength of the evidence to be tested, and no process by which this can occur. Decisions by the executive can effectively override judicial decisions about bail.

6. Release following the cancellation of an Early Release Order

Work Release Orders and Home Detention Orders are always of short duration. Consequently, it is rare that any issue will arise of a further release following cancellation. However, that issue frequently arises with parole orders. Hitherto, the Parole Board has been entrusted with a broad discretion to make another parole order when an earlier order has been cancelled. The Sentence Administration Bill 1998 (WA) signalled dramatic change, providing that the Board 'must not make another parole order' where an earlier order was cancelled as a result of the person being imprisoned for 'an indictable offence (whether or not it was tried on indictment).'[101] This tough stance no doubt appeared politically attractive, but it was open to the same objections as mandatory sentences.[102] It was extremely broad (almost all offences under the Criminal Code are indictable and yet they often cover trivial incidents such as criminal damage and minor shoplifting) and would not have allowed proper consideration of the facts of the particular case. If enacted,

101. Cl 49.

102. See the collection of essays in (1999) 22 UNSWLJ 256-314, especially R Hogg 'Mandatory Sentencing Legislation and the Symbolic Politics of Law and Order' 262; N Morgan 'Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories' 267; G Zdenkowski 'Mandatory Imprisonment of Property Offenders in the Northern Territory' 302. For an American perspective: see M Tonry *Sentencing Matters* (New York: Oxford UP, 1996).

this provision would have seen some offenders serving extremely long periods in custody as a result of minor breaching offences.[103] It would also have had a significant impact on imprisonment rates in general and Aboriginal imprisonment rates in particular.[104]

Following discussions between the Coalition government and the opposition parties, a more limited provision was enacted. Section 78 of the Sentence Administration Act 1999 (WA) provides that where an order is cancelled by further imprisonment, and the offence was a *crime tried on indictment*, no further release order should be made unless there are *exceptional reasons* for making another order.

The requirement that there be a 'crime' creates serious anomalies. Under section 3 of the Criminal Code, crimes are, in theory, the most serious offences, followed by misdemeanours and simple offences. Taken together, crimes and misdemeanours constitute indictable offences. It was stated during debate in parliament that section 78 refers to 'crimes' in the strict sense of section 3.[105] However, classification as a crime is not a consistent indicator of seriousness even under the Criminal Code. It seems absurd that section 78 may be triggered by offences of stealing, criminal damage or gross indecency between consenting adults (all crimes)[106] but that the Board will retain a broad discretion in the case of unlawful wounding (a misdemeanour).[107] Furthermore, legislation other than the Criminal Code generally avoids reference to crimes and misdemeanours and merely distinguishes between indictable and non-indictable offences. Consequently, none of the serious offences under the Misuse of Drugs Act 1981 (WA) (such as possession with intent to sell or supply) or the Road Traffic Act 1974 (WA) (such as dangerous driving causing death) will trigger section 78 because they are not 'crimes'.

Like all mandatory and quasi-mandatory sentencing prescriptions, section 78 also has the potential to subvert proper legal processes and defendants' rights by making pre-trial decisions the crucial factor in the outcome of cases.[108] For example, pleading guilty to a charge of dangerous driving causing death rather than contesting a charge of manslaughter will avoid section 78. In the case of crimes 'triable either

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103. Suppose, for example, that a person was released on parole after 4 years of an 8 year sentence, but was subsequently sentenced to 4 months' imprisonment for stealing, the offence being committed a year after release. He would have been required to serve the balance of 3 years as well as the new sentence.
104. The statistics show that Aboriginal offenders tend to breach parole more frequently than non-Aboriginals and also tend to attract short custodial sentences for relatively minor offences, often of a public order nature: Parole Board of WA *Annual Reports* (Perth).
105. *Hansard* (LC) 19 Oct 1999, 2181, Hon P Foss QC (A-G).
106. Criminal Code (WA) ss 378 and 444.
107. Ibid, s 301.
108. Morgan supra n 102.

way', defendants would be well advised to negotiate to have the matter dealt with in the Court of Petty Sessions rather than pursue their paper right to jury trial.

Section 78 does not prohibit further releases but requires that there must be 'exceptional reasons' if further release is to be made. Exceptional reasons provisions have tended to cause problems even for courts.[109] They call for a consideration of the particular facts of the case but, over time, through the development of precedent, the parties to court proceedings can develop a fairly clear sense of how the law is likely to apply in a given case. This will be far more difficult with Parole Board decision-making (let alone that by the CEO). Prisoners are not legally represented and establishing 'exceptional reasons' is likely to prove easier for better-educated, more articulate prisoners who feel more comfortable with the prospect of a personal hearing. Since personal hearings are held only in the metropolitan area, the system is very likely to disadvantage prisoners from other areas of the State.

As a matter of interpretation, it is not clear what will constitute 'exceptional reasons' but the phrase clearly requires something over and above what is required for parole release under the terms of section 16.[110] It may be that, as where a court decides whether to activate a suspended sentence,[111] it will be important to consider 'circumstances that have arisen or become known' since the first order was made. This would include consideration of the offender's general compliance with the terms of the earlier order and, given the longer periods 'at risk', the length of time before the breaching offence occurred. By analogy with general sentencing principles, it may also be that 'exceptional hardship' to the offender and/or the family by reason of illness will be a matter that is considered.

7. Transitional provisions

The Sentencing Legislation Amendment and Repeal Act 1999 (WA) contains some convoluted provisions with respect to people who were sentenced to a term of imprisonment before the commencement of the new legislation and who are still under that sentence. If the person is already on an Early Release Order on the commencement date, the rule is simple: the old laws apply to all matters that may arise.[112] However, where the person is not subject to an Early Release Order on the commencement date, the position is more complicated. Table 4 shows that the old laws continue to apply in calculating the relevant dates. Generally, the more restrictive new laws apply to decisions about release, suspension or cancellation and re-

109. Eg Road Traffic Act 1974 (WA) s 76 re 'extraordinary licences'. However, there are statutory criteria to guide the courts on this question: s 76(3).
110. Supra pp 273-274.
111. Sentencing Act 1995 (WA) s 80.
112. Sentencing Legislation Amendment and Repeal Act 1999 (WA) s 19.

Table 4: Transitional provisions[113]

	Calculating the relevant dates	**Deciding to release**	**Grounds for suspension/ cancellaion**	**Release after cancellation**
Parole	**Old** laws (including remission) apply to calculating non-parole and parole periods (s 18).	**New** laws apply[114] — ie, Board to apply s 16 of the Sentence Administration Act 1999 (s 18(2)(b)).	**New** laws apply — including suspension or cancellation if charged with an offence (s 18(2)(d)).	**New** laws apply — ie, less discretion to release if earlier order cancelled by imprisonment for a crime tried on indictment (s 18(2)(d)).
Work Release	**Old** laws apply re date of release and duration of order (s 20).	The stricter **old** laws apply – ie, 'minimum' rather than 'low' risk (s 20(1)(b)).	**Old** laws apply (s 20(1)(b)).	**New** laws apply (s 20(2)).
Home Detention	**Old** laws apply re date of release and duration of order (s 21(a)-(b)).	**Old** laws apply (s 21).	**New** laws apply (s 21(c)).	**New** laws apply (s 21(c)).

release but there is no logical symmetry to the legislation. To the extent that the transitional provisions retrospectively change the rules about release and enforcement, they will disadvantage some prisoners.

PART FIVE: THE ADJUSTMENT OF SENTENCES†

1. Basic principles

Section 15 of the Sentencing Legislation Amendment and Repeal Act 1999 (WA) addresses the question of the adjustment of sentences which underpins the new scheme. When imposing a sentence of imprisonment, the court must consider whether the sentence it proposes would 'by reason only of the new provisions,

113. Section numbers refer to the Sentencing Legislation Amendment and Repeal Act 1999 (WA) unless otherwise stated.

114. Supra pp 273-274.

[† Note: Some of the legislative provisions discussed in this Part may be superseded if a government Bill introduced into State parliament in September 2000 becomes law: see the author's Postscript, infra p 286, for details. — Ed.]

result in the offender spending more time in custody' than would have been the case under the old laws.[115] If the sentence would have this effect, the court is to 'adjust the sentence so that the offender does not spend more time in custody.'[116] In considering these questions, the court must assume that the person would have been released 'at the earliest opportunity' under the old laws and would also be released at the earliest opportunity under the new laws.[117] In addition, the court must state, as part of the 'explanation of sentence' required by section 34 of the Sentencing Act 1995 (WA), 'the minimum period that the offender, as a result of the sentence and the operation of this Act, will serve in custody' in respect of the sentence.[118] These developments mark a fundamental philosophical shift away from the previously accepted principle that, when setting a sentence, the courts should ignore the impact of executive practices on the time a person is likely to spend in custody.[119]

2. The mechanics

It should be stressed that the question is whether the person would spend more time *only* because of the new laws. Sentencing practices obviously shift over time, perhaps because of a change in the statutory maximum, a firming up of sentences by the judiciary or the issue of a guideline judgment. The section will 'not apply' if any of these things have occurred after the commencement date.[120] Consequently, pure calculations will not necessarily suffice.

Where adjustment is required, the legislation involves a four-stage process. The court must first work out its 'proposed sentence'; it must then ask what this 'means' in terms of custody time under the new laws and what it would have meant in terms of custody time under the old laws; finally, it must decide what adjustment, if any, is needed. Two technical points should be made about these calculations. First, it appears that the courts are to disregard the more restrictive rules about parole eligibility. For example, if the court is considering adjustment to a sentence of three years without parole, it is irrelevant that it would have made the person eligible for parole under the old laws. Secondly, the adjustment rules look only to the question of time in custody and not to the combined impact of both custody and supervision.

115. Sentencing Legislation Amendment and Repeal Act 1999 (WA) s 15(1).
116. Ibid, s 15(3).
117. Ibid, s 15(2).
118. The new s 34(2)-(3).
119. *Hoare and Easton* (1989) 167 CLR 348; *Shrestha* (1991) 65 ALJR 432.
120. Sentencing Legislation Amendment and Repeal Act 1999 (WA) s 15(4)-(5).

Tables 5 and 6 provide 'ready reckoners' for the calculation of sentence impact and adjustment according to the statutory requirements. The next section discusses some of the problems to which the scheme gives rise.

Table 5: Sentence adjustment – sentences of more than 12 months

Proposed sentence	Earliest opportunity for release under the new law	Earliest opportunity for release under the old law on the same sentence	Sentence to be imposed (so that the custody time is no more than that in column 3)
15 years without parole	14.5 years to WRO	9.5 years to WRO (10 with remission)	10 years*
15 years with parole	7 years to WRO (7.5 years to parole)	7.5 years to WRO (8 years to parole)	No adjustment needed[121]
12 years without parole	11.5 years to WRO	7.5 years to WRO (8 years with remission)	8 years*
12 years with parole	5.5 years to WRO (6 years to parole)	5.5 years to WRO (6 years to parole)	No adjustment needed (but parole period now 6 years not 2)
9 years without parole	8.5 years to WRO	5.5 years to WRO (6 years with remission)	6 years*
9 years with parole	4 years to WRO (4.5 years to parole)	3.5 years to WRO (4 years to parole)	8 years (but parole period will be 4 years not 2)
6 years without parole	5.5 years to WRO	3.5 years to WRO (4 years with remission)	4 years*
6 years with parole	2.5 years to WRO (3 years to parole)	1.5 years to WRO (2 years to parole)	4 years[122]
3 years without parole	2.5 years to WRO	1.5 years to WRO (2 years with remission)	2 years*
3 years with parole	1 year to WRO (1.5 years to parole)	1 year to parole (WRO not available)	No adjustment needed: but new laws most likely to mean 1.5 years' custody rather than 1 year

* The person may also face a Release Programme Order of six months' duration on top of the sentence imposed by the court.

121. In fact, because of the calculation of the non-parole period, the old laws gave *more* custody time. Under the new regime, the court would need to impose a longer sentence (16 years) in order to achieve the same custody time as a 15 year sentence under the old laws.
122. This gives the same custody time, but the last portion of the parole period will be unsupervised rather than supervised.

Table 6: Sentence adjustment – sentences of less than 12 months

Proposed Sentence	Earliest opportunity for release under the new law	Earliest opportunity for release under the old law on the same sentence	Sentence to be imposed (so that the custody time is no more than that in column 3)
1 year without parole	8 months to HDO	8 months with remission (HDO not available)	No adjustment needed but in fact the new laws are most likely to mean 12 months' custody as opposed to 8.*
1 year with parole	6 months to parole	4 months to parole.	8 months (parole period will no longer be supervised).
9 months without parole	6 months (26 weeks) to HDO	3 months (13 weeks) to HDO	Adjustment to 20 weeks (around 5 months) would be required to permit HDO after 13 weeks.*
9 months with parole	4.5 months to parole	No such sentence	Must be adjusted to accord with the adjustments to non-parole sentences (previous row). A reduction to 6 months would give 13 weeks' custody and 13 weeks' unsupervised parole.
6 months / 26 weeks without parole	4 months/17 weeks to HDO	8.5 weeks to HDO	Adjustment to 13 weeks (around 3 months) would be required to permit HDO after 8.5 weeks.*
6 months / 26 weeks with parole	3 months to parole	No such sentence	Must be adjusted to accord with the adjustments to non-parole sentences (previous row).

* The person may also face a Release Programme Order of six months' duration on top of the sentence imposed by the court.

3. The problems

(i) The mechanics of adjustment

The first set of problems relates to the process of sentence adjustment. The Hammond Committee proposed that consideration should be given to the adjustment of sentences, but did so in the context of a simple model which would have involved relatively easy calculations.[123] The first and most obvious problem with the new laws is that of complexity. Tables 5 and 6 show that, as a result of the retention of Work Release, Home Detention and Release Programme Orders, the calculations are difficult. Furthermore, there is no simple rule of thumb that can be applied to all sentences. Table 6 also reveals that the problems of calculation and sentence

123. Supra pp 258-260.

adjustment are particularly acute for Courts of Petty Sessions. In part, this is due to the fact that sentences of less than 12 months may now attract parole whereas they did not do so previously. This means that if the court now proposes a sentence of, say, nine months' imprisonment with parole, there is no point of comparison with the old laws.

However, there is a more important, and potentially fatal, flaw. The calculations are to be based upon 'the earliest opportunity for release' under the old and new laws. This takes no account of the fact that remission was automatic and other orders discretionary; nor of the fact that some discretionary orders (such as parole) are far more likely to be granted than others (such as a WRO or HDO). Consequently, a sentence that is calculated in accordance with the requirements of section 15 will, in some situations, result in the person spending far longer in custody. This is best illustrated by reference to a sentence of three years' imprisonment with parole. The 'earliest opportunity for release' on such a sentence under the old laws was on parole after 12 months. The 'earliest opportunity for release' under the new laws would also be after 12 months on a Work Release Order. Under the legislation, it would therefore be wrong for any adjustment to be made. However, Work Release Orders are far less likely to be granted than parole. The result is that the person will almost certainly spend 18 months in custody rather than 12 months.

This, of course, is directly at odds with the purpose of the legislation. There are two possible means to alleviate this particular difficulty. The more palatable option is for the legislation to be amended so that the calculations are made simply by reference to the dates at which the person would become eligible for parole and that Home Detention and Work Release Orders should be ignored in the calculations. The unpalatable alternative, if the laws are proclaimed in their current form, is for the courts to ignore the technical legal requirements and to fiddle the calculations so that the laws meet their purpose whilst breaching their letter.

(ii) Long term problems

Even if the mechanics are tightened up, two other issues are likely to cause long-term difficulty. First, unlike in Victoria,[124] there has been no adjustment of statutory maximum penalties to accommodate the new regime. Table 5 shows that this is defensible on the grounds that sentences for the most serious offences will stay at present levels, or could even be increased without infringing section 15.[125] However, the changes are likely to give rise to problems of public and political perception. For example, in looking at the proposed 'sentencing matrix', the

124. A Freiberg & S Ross *Sentencing Reform and Penal Change: The Victorian Experience* (Sydney: Federation Press, 1999) 23.

125. See calculations in Table 5 with respect to sentences of 12 and 15 years with parole.

Legislation Committee of the Legislative Council of State parliament drew the attention of witnesses to what it saw as a large gap between the statutory maximum penalty for many offences and the 'median sentence'.[126] The result of the new scheme is that this gap is likely to widen as a consequence of most sentences being reduced.

Secondly, it is not clear how the provisions will operate in the long term. The legislation appears to require an on-going process of calculation by reference to the old laws, even after the new laws have become established. This appears both convoluted and contrived. The process of sentence adjustment would have been better governed by a general statutory provision, a process of consultation with the judiciary and the sensible exercise of judicial discretion.

CONCLUSION

The new laws do address some concerns with respect to 'truth' and 'transparency' in sentencing. It will no longer be possible for people to be released after one-third of a sentence or less, and the legislation sets out general parameters for release on parole. However, the scheme creates some serious issues of principle, especially with respect to the Release Programme Order, the potential for orders to be suspended or cancelled where a person is merely *charged* with an offence, and the restrictions on release following cancellation of an order. The introduction of the Release Programme Order and the retention of work release and home detention have resulted in a scheme that is far too complex to be considered transparent. Truth and transparency are subverted by the fact that sentences of the same length will mean quite different things for different people. It is of particular concern that the most serious difficulties will arise in the Court of Petty Sessions.

The extraordinary proliferation of orders and the changes with respect to suspension and cancellation also undermine the aim of producing a scheme that will not result in an increase in imprisonment. The evidence before the Hammond Committee at the start of its deliberations indicated that a prescription for sentence adjustment had proved effective in Victoria where, as a result of lengthy consultations, the courts agreed with and understood the changes.[127] However, more recent research indicates that this may have been less successful than first thought.[128] It remains to be seen whether sentence adjustment can meet its expected aims in Western Australia given the labyrinthine nature of the system.

It is impossible to avoid the conclusion that the new regime owes more to political pressures and compromises than it does to rational and systematic reform.

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126. Supra n 7.
127. A Freiberg 'Sentencing Reform in Victoria: A Case Study' in CMV Clarkson & R Morgan *The Politics of Sentencing Reform* (Oxford: OUP, 1995).
128. Freiberg & Ross supra n 124.

Appendix: Glossary

Early Release Order	Under the new laws any order which allows an offender to be released early from a prison sentence (ie, parole, work release or home detention).
Home Detention Order	An order made by the Ministry of Justice which involves a high level of monitoring of an offender but usually no treatment conditions. Home detention applies to shorter sentences to which parole is inapplicable.
Non-Parole Period	The period (set by statute) that the offender must serve in prison before being considered for release on parole.
Parole Eligibility Order	An order made by the court that the offender is eligible for consideration for release on parole at the expiration of the non-parole period.
Parole Period	The period that the offender spends on parole.
Parole (supervised)	An order made by the Parole Board which allows an offender (i) to be released before the expiration of the prison sentence, subject to supervision, monitoring and treatment conditions; and (ii) to be recalled to prison in the event that the person re-offends or breaches the conditions of the order.
Parole (unsupervised)	A period on parole during which the offender is not supervised but can still breach the order by re-offending.
Programme Assessment Order	An order which may be made by a court which has imposed a sentence of less than two years' imprisonment and has determined that the offender is not eligible for parole. If the court does make a programme assessment order, a release programme order (see below) is likely to apply.
Release Programme Order	A new order made by the Ministry of Justice which applies to those prisoners who are not made eligible for parole by the courts. If made by the Ministry, it operates for six months after the expiration of the sentence imposed by the court. It aims to enforce participation in treatment programmes. On sentences of less than two years, a release programme order can only be made if the sentencing court has first made a programme assessment order (see above).
Remission	The process whereby part of a prison sentence (traditionally one-third) is remitted for good behaviour.
Work Release Order	An order made by the Parole Board which applies to longer sentences (ie, where the offender has actually been in custody for at least 12 months) and which involves more stringent supervision that parole — notably the requirement to undertake unpaid community work.

POSTSCRIPT

In response to submissions made during the first half of 2000, the government has recently accepted the 'mechanical' points raised in Part Five of this article — namely, that sentence adjustment under the provisions of the 1999 legislation will not achieve its objectives.[129] Implementation of the new laws has therefore been deferred and the Sentencing Amendment (Adjustment of Sentences) Bill 2000 has been introduced into State parliament (September 2000).[130] The Bill proposes to amend the 1999 legislation so that it will contain a broad statement of principle with respect to sentence adjustment rather than a detailed process for calculation. However, the matter will not then be left to judicial discretion; instead, regulations will prescribe the required adjustments — probably in the form of narrative guidelines and numerical charts.[131] Since the changes are designed merely to 'tidy up' the mechanics of the laws, they are most unlikely to encounter political opposition. However, whilst mechanical changes may make sentence adjustment more workable, they do nothing to address the other issues of principle and practice raised in this article.

129. According to the Attorney-General, as a result of the retention of home detention and work release, 'we inadvertently mucked up the rest of the legislation': *Hansard* (LC) 21 Sept 2000, 738.

130. *Hansard* (LC) 6 Sept 2000, 738.

131. If adopted, these Regulations will be discussed in a future article.