THE *SENTENCING ACT* 1989*

Joe Ford
Chair, New South Wales Crime Commission
Formerly a Judge of the District Court of New South Wales

In 1972, Dr Evelyn Shea[1], when comparing the operation of the parole structure under the *Criminal Justice Act* (1967) of the United Kingdom with that under the American Model Penal Code remarked, in passing, "Fortunately, both the *Criminal Justice Act* and the Model Penal Code have avoided the mistake of several continental jurisdictions which allow parole only after the offender has served three quarters or more of his sentence". The author did not pause to give reasons why the 75 per cent rule was a "mistake", presumably because it was taken for granted that the parole provisions of the *Criminal Justice Act* were near enough to ideal. The *Criminal Justice Act* specified that an offender should serve one third of the sentence or one year (whichever was longer) before being admitted to parole. On the basis that one third of the (head) sentence would be remitted, an offender would be subject to the sentence for the first third of the period thereof (or for at least a year) in custody and if then released to Parole for the second third of the period, subject to recall to custody in the event of breach(es) of the Parole conditions.

In a broad sense, this division of the sentence was thought to be a fair compromise between punishment/deterrence and rehabilitation of an offender.

The one third rule under the *Criminal Justice Act* was not adopted in New South Wales legislation but it may have afforded some informal guidance to the sentencing courts in this state after the enactment of the *Parole of Prisoners Act* 1966.[2]

In New South Wales, sentencing courts until the *Sentencing Act* 1989 exercised a discretion as to the length of the minimum term (non-parole or non-probation period) and its relationship to the head sentence. Broadly, that relationship was required to be reasonable, with due regard being given to the maximum penalty for the offence. When the *Sentencing Act* 1989 was introduced it was not preceded or accompanied by any report of the Law Reform Commission or any other published study of an advisory committee of which I am aware. Whether the notion of the 75 per cent minimum term was derived from one of the "several continental jurisdictions" mentioned by Dr Shea[3] or from some other source is unknown.[4]

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* Paper presented at a professional seminar entitled "The *Sentencing Act* 1989", convened by the Institute of Criminology at Sydney University Law School, 8 August 1991.

1 Shea, E, "Parole Philosophy in England and America", in West, D J (ed) *The Future of Parole* (1972).

2 It may be remarked that what I have referred to as "the one third rule" meant, in effect, that an offender would be eligible for consideration for release to parole after completing one half of the sentence to be actually served, the (head) sentence as pronounced by the Court being subject to remission of one third.

3 Ibid.

4 It is noted that in s21A of the *Probation and Parole Act* 1983 a requirement was introduced that in sentencing for "serious" offences (Sch 5) the non-parole period should be three quarters of the head sentence unless there were "special" or "exceptional" circumstances. In the 1989 Act the rule for a 75 per

Before, and at the time of the enactment of the 1989 Act, attention amongst commentators was focused, in part, on whether the new law could or would tend to result in offenders being incarcerated for longer periods, for similar or comparable offences, than was the case under the preceding legislation and regulations, which provided for substantial remissions of sentences imposed by the courts. The abolition of remissions, it was said, would result in "truth" in sentencing. A sentence of so many months or years would, under the 1989 Act, be an accurate statement of the period of incarceration to be served and not that period as diminished by remissions, as it would have been under the superseded legislation, the *Probation and Parole Act* 1983.

It is not my present concern to review the pros and cons of the debate[5] as to whether, as a matter of law, the 1989 Act could necessarily result in longer sentences being served than would have been served under the 1983 Act for similar or comparable offences. That debate may have been rendered academic, at least in part, by the subsequent decisions of the Court of Criminal Appeal and the High Court which His Honour Justice Michael Campbell will expound in his paper.

It is important to know whether the 1989 Act has resulted, in fact, in significantly longer periods of incarceration being served for similar or comparable offences than were served under the 1983 Act. I must leave that matter to persons who have access to the relevant records and the statistical competence to make the comparison between the actual length of the sentences served under the Act of 1989 and the Act of 1983.

Is it possible that the knowledge that 75 per cent of a sentence must be served in custody under the 1989 Act will have a restraining or softening effect upon the courts in this State? Other states provide eligibility for release to parole before the 75 per cent mark of the total sentence.[6] There has in recent years been some discussion of the need for a uniform Criminal Law throughout Australia. If there were such uniformity, the task of introducing parity of sentencing as between offenders in the various jurisdictions in Australia would become so much easier. In my experience, as regards crimes which warrant imprisonment, sentencing courts have endeavoured to achieve, within the legislative structure set up from time to time, a fair proportion or balance between the punitive, deterrent and retributive component of a prison sentence and its rehabilitative component. Rehabilitation may commence in prison but will usually assume greater importance if and when an offender is released to parole.

The *Sentencing Act* 1989 under the 75 per cent rule, so it seems, tells a sentencing court to deal first with the punitive (custodial) component of a sentence (which must be not less than 75 per cent of the overall sentence), and rehabilitation may have what is left over, that is, 25 per cent unless "special circumstances" exist to warrant an increase of the "additional" term beyond one third of the minimum term.

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cent minimum term is inflexible and there is no scope for reduction unless reduced, in effect, by an extension of the additional term when there are special circumstances (see later).

5 See NSW Judicial Commission, "Discussion Papers" (July/August 1991).

6 See, for example, *Offenders Probation and Parole Act* (Qld) s53 referred to in *Abdi* [1987] 10 NSWLR 294.

It has already been decided that "special circumstances" exist where the special needs of young persons or those who have drug or alcohol dependency may require a more protracted period of supervision than is provided by a period fixed at one third of the minimum term. There will no doubt be other instances of "special circumstances".

In the absence of "special circumstances" will there be many persons who will be deprived of a more protracted period of (beneficial) parole supervision than would be available under the one third requirement for the additional term? Experience may suggest that offenders generally, who have served relatively short sentences (such as a minimum term of nine months) would benefit by (parole) supervision for a period of, say, 12 months after release to parole. This period may be crucial in determining whether an offender will revert to criminal pursuits. Yet the one third requirement would restrict the period of supervision to three months in the absence of "special circumstances".

If such an offender were sentenced on the one occasion for more than one offence, the sentencing court might provide supervision (for twelve months after the expiration of the sentence) as a condition of a Bond for one of the offences, whilst at the same time imposing the sentence of imprisonment for the other(s). A person committing a single offence would not be so fortunate. This type of case could have been readily accommodated under the Act of 1983. If the courts are not given a broader discretion than one limited to the existence of "special circumstances" the process of rehabilitation may be thwarted in many such cases unless, of course, the expression "special circumstances" is given an expansive range of application.

In those cases where the "additional term" is increased beyond one third of the minimum term the increase will be intended for the benefit of the offender but he will also be exposed for a longer period to liability to revocation of parole and return to prison in the event of breach of parole. Helpful dicta in *R v Moffitt*[7] indicate that the increased period of the additional term may be taken into account in fixing the length of the minimum term, which nonetheless must itself be a true measure of the criminality involved.

Another important feature of the 1989 Act is that s9 requires that any cumulative sentence upon a previous sentence consisting of a minimum term and an additional term must commence at the end of the minimum term or, if more than one minimum term, at the end of the minimum term that last expires.[8] The necessity for this provision is strikingly evident where the term of the previous sentence was three years or less. In respect of such a term the court will have been required under s24 to direct the release of the prisoner to parole at the end of the minimum term. If the cumulative sentence were to take effect from the expiration of the term of the sentence (that is, minimum term plus additional term) there would be a time gap between the expiration of the minimum term (at which time the prisoner should be released to parole pursuant to the order of the court which imposed the previous sentence) and the commencement of the cumulative sentence. Expressing the matter more simply, the cumulative sentence would take effect at a time later than his previous release to parole (hence the time gap) unless the new sentence is expressed to commence at the end of the minimum term imposed by the previous sentence.

7 CCA 21 June 1990, (1990-91) 20 NSWLR 114.
8 See s9(1)(2).

If the term of the existing sentence (that is, minimum term plus additional term) were in excess of three years and if the cumulative sentence was expressed to commence at the expiration of the term, the Offender Review Board would be called upon to consider the prisoner's release to parole knowing that if released to parole he would be recalled to prison at the expiration of the additional term to serve the cumulative sentence. Such an absurdity could not occur because s9(4) provides that if the cumulative sentence is imposed so as to commence other than at the end of the previous minimum term it is deemed to commence as the section, s9(1) and (2), requires. (Compare s4(5) of the *Commonwealth Prisoners Act* 1967.)

The CCA in Victoria identified this sort of problem (time gap) in respect of sentences imposed for State and Commonwealth offences in *R v Kidd.*[9] Winneke CJ said:

> ... it is quite unacceptable and impracticable to contemplate the possibility of release in the midst of a State sentence (that is, release to parole before the head sentence has expired) and recall at the end of a successful period of parole for the purpose of commencing the Commonwealth sentence."

The court was there considering a sentence for a Commonwealth offence expressed to be cumulative upon a State sentence (a head sentence) in respect of which a non-parole period had been specified. For a head sentence, one should read "term of the sentence" to express the point in the terminology of the *Sentencing Act* 1989.

It is necessary to observe that s9 "has effect despite s444 of the *Crimes Act* (dealing with cumulative sentences) and any other law".[10] The consequences of this provision are systematically elaborated in the Sentencing Information System compiled by the Judicial Commission of New South Wales. It is noteworthy that the *Prisons Act*, s34, is affected. This section provides that every sentence for escape must be imposed cumulatively upon the sentence being served at the time of the escape. If at the time of sentence the offender is serving a sentence of which the minimum term is current, the sentence for the escape must, pursuant to s9(1)(2), commence at the end of the minimum term. But if at the time of sentence the minimum term has expired then, pursuant to s9(3), the sentence for the escape must commence on the day it is imposed or an earlier day. If the escape occurs during the currency of a fixed term only (no minimum term entering into consideration) then the sentence for the escape must be accumulated on the fixed term in accordance with s34 of the *Prisons Act* and s444 of the *Crimes Act.* Could these provisions give rise to some anomalies?

One merit of the Act of 1989 is that it is a credit to the Parliamentary Draftsman. Regarded as a set of instructions for sentencing courts as to what may or may not be done, it will not, I trust, give rise to the sort of errors known as "patent errors" which were not uncommon under the 1983 Act. Tribute should also be paid to the authors of the commentary on the 1989 Act appearing in several issues of the Judicial Officers Bulletin, especially that dealing with techniques for framing sentences.[11]

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9 [1972] VR 728.

10 See s9(5).

11 Vol 1 No 15, July 1989. I also express my sincere appreciation to His Honour Judge W T Ducker and His Honoure Judge G J Graham for valuable papers on this subject presented at seminars of the Judges of the District Court of New South Wales.