

DECARCERATION AND IMPRISONMENT IN NEW SOUTH WALES: A HISTORICAL ANALYSIS OF EARLY RELEASE

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I. INTRODUCTION

"Decarceration" is a generic term which, in the context of Criminology, has been used to describe a variety of state-sponsored policies to reduce the use of imprisonment for criminal offenders.¹ Although it has been seen as a contemporary phenomenon, closely linked with the "community corrections" movement, decarceration itself is not a new practice. This paper examines the historical roots of one type of decarceration policy in NSW: the mitigation of sentences by executive decision. It illustrates the various forms decarceration took (e.g., pardon, ticket of leave, licence, remission, parole and early release) and analyses the origin and development of the 20th century system of remission and conditional release. The paper argues that the recent "truth in sentencing" legislation in New South Wales is a mystification which ignores the

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1 See A. Scull, *Decarceration*, Polity Press (1984).

historical basis of penal policies. It is suggested that, in spite of the "tough talk" by politicians, decarceration policies are likely to continue as governments are faced with the fiscal and practical consequences of a large increase in the prison population.

Less than 12 years after the Nagle Royal Commission² in New South Wales recommended that imprisonment be used only as a "last resort" and prison conditions be humanised, the government has brought in legislation³ and policies⁴ which have been described as "disastrous"⁵ and "barbaric".⁶ In spite of fiscal constraint in the public sector, the State will be spending millions on a building program to house the rapidly rising number of prisoners in the system. These events may have signalled the death of decarceration, if not of prison reform in general.⁷ There are many signs that the evangelical zeal that was once part and parcel of the decarceration "movement" had all but fizzled out. In NSW, even before the 1988 State election, "tough talk" on the punishment of criminals had been the order of the day.⁸ The election campaign itself was a fine example of a see-who-can-talk-the-toughest race to embrace "law and order". The Coalition government, in its promise to "restore truth in sentencing", has decided to abolish all forms of remissions and tighten parole and licence release criteria.⁹ The Opposition, sensing the popularity of such policies among the electorate, has kept an unusually low profile throughout.¹⁰ Only the Independents and the Democrats have spoken out in strong terms

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- 2 See *Report of the Royal Commission into New South Wales Prisons*, NSW Government Printer (1978).
 - 3 See *Sentencing Act 1989* and various commentaries: J. Chan, "The New South Wales Sentencing Act 1989: Where does Truth Lie?" (1990) 14 *Criminal Law Journal* 249; D. Brown, "What Truth?" (1989) 14 *Legal Services Bulletin* 161, and A. Gorta and S. Eyland, "Truth in Sentencing: Impact of the Sentencing Act 1989", Report 1 (1990) NSW Department of Corrective Services.
 - 4 See "Yabsley cracks down on prison property", *Sydney Morning Herald*, 10 September 1990, and "Crisis in our prisons: the inside investigation", *Sydney Morning Herald*, 15 to 17 October 1990.
 - 5 See T. Vinson, "Lessons we missed on prison reform", *Sydney Morning Herald*, 14 November 1990.
 - 6 Criticism from the NSW Bar Association, quoted in "Lawyers attack prisons policy", *Sydney Morning Herald*, 27 October 1990.
 - 7 For a comparison overseas, see B. Hudson, "The Rising Use of Imprisonment: The Impact of 'Decarceration' Policies" (1984) 11 *Critical Social Policy* 46.
 - 8 See "Young offenders face a tough talker", *Sydney Morning Herald* 13 October 1987, on the Director-General's advice to his staff in Youth and Community Services "to be less squeamish about locking kids up".
 - 9 See *Sentencing Act 1989*.
 - 10 For a critique, see J. O'Neill, "Prison bug gives NSW Opposition laryngitis", *Sydney Morning Herald*, 26 September 1990.

against the prison policy.¹¹ Even the prison riots as a result of the removal of prisoners' personal property and the millions of dollars required to repair the damage did not put a dent in the confidence of the Minister for Corrective Services, who defended the policy as "absolutely right".¹² Such a political climate does appear to contradict any policy to keep offenders out of gaol or reduce the use of imprisonment. This paper argues, however, that decarceration is precisely the way the government needs to go.

To explain this paradox, we need to look at the term "decarceration" more closely. As it has been used in the context of Criminology, the term refers to a variety of government initiated policies to reduce the use of imprisonment. It is generally seen as a relatively recent phenomenon which originated in the United States in the 1960s. The "movement" arose from the prison riots of the '60s and '70s which highlighted the appalling conditions of prisons in many western countries. The popularity of decarceration increased as policy makers gradually recognised that imprisonment was a costly and ineffective instrument for crime control.

In practice, decarceration policies have taken many forms: from decriminalisation of offences to diversion of offenders from the criminal justice system, from non-custodial sentencing options to conditional releases, the only commonality among them being the apparent concern with "reducing the prison population". In NSW, what may be considered decarceration initiatives includes a variety of sentencing options, e.g. community service orders, attendance centre orders, and periodic detention, although good behaviour bonds and fines can also be used as alternatives to imprisonment. These so-called "front end" methods are being used in conjunction with other "back end" measures, such as parole, and other forms of conditional release. Since the prison population on any given day is directly affected by lengths of sentence served, remissions (up to the time they were abolished) were being used for decarceration purposes, although, strictly speaking, they were disciplinary devices for prison management.

I have argued elsewhere¹³ that decarceration can be viewed along three dimensions: the *ideological commitment* to minimise or reduce the use of imprisonment, the *institutional or organisational requirement* for cost control and resource management, and the *practical devices* to reduce the prison population.¹⁴ In this paper I would suggest that, in spite of the apparent change

11 See "Yabsley must go, say independents", *Sydney Morning Herald*, 14 November 1990.

12 See "Yabsley ignored jail riot warning", *Sydney Morning Herald*, 26 September 1990.

13 See J. Chan, "Decarceration: A Case for Theory Building Through Empirical Research" (1990) 8(1) *Law in Context* 32.

14 There is, in fact, no necessary linkage between a commitment to use "prison as a last resort" and the achievement of reduction in the prison population. See Chapter 4 in J. Chan, *The Release on Licence program 1982-1983: A Case Study of Decarceration in New South*

in rhetoric to "getting tough", far from dying a premature death, decarceration is alive and well in NSW. More important, it is argued that the practice of decarceration has long and established roots in the penal history of NSW, although its justifications have changed over the years. In effect, every government has participated more or less actively in efforts to contain the prison population to a manageable level.¹⁵ In that sense, decarceration has always been part of prison management, and, unless drastic changes are introduced in the way we punish offenders, it is likely to remain so.

The present rhetoric of restoring "truth in sentencing" reflects our collective amnesia or collective ignorance of history. For example, how did we end up with a system of remission and release Mr Greiner once called "an absolute bloody outrage"?¹⁶ Was there ever much "truth" in sentencing? I will try to answer both of these questions in this paper.

II. HISTORICAL FORMS OF DECARCERATION IN NSW

The most controversial and frequently criticised aspect of decarceration has been the "back end" methods i.e., mitigation of sentence by executive authority in the form of remission, parole or conditional release. The main argument against "early" release is precisely its *timing*: prisoners are "supposed" to serve the entire sentence set by the courts. This "obligation" is usually justified by appealing to tradition (early releases undermine the traditional authority of the courts to decide on sentence), the public interest (early releases allow criminals to be at large when they should be locked up to protect the public), justice (it is unfair that criminals are allowed to go free while their victims suffer), and deterrence (imprisonment no longer deters criminals because they know they will not be severely punished). These arguments assume that, somehow, judges are able to determine *precisely* the correct length of sentence necessary for deterring criminals, protecting the public and meting out justice. They also assume that court-imposed sentences were always served in full in the "good old days".¹⁷ Ironically, the historical evidence shows that executive

Wales (1989), Ph.D. thesis, Faculty of Law, University of Sydney, for a more detailed discussion of how reform rhetoric became translated into managerial goals.

15 See D. Porritt, "The New South Wales Prison Population 1967-87: Growth and Counteraction", unpublished manuscript, NSW Department of Corrective Services (1988) for evidence of such efforts in recent history.

16 See "Why prisoners in NSW usually come out in front", *Sydney Morning Herald*, 4 May 1988.

17 Recently published historical studies have shown that mechanisms for mitigating punishments prescribed by the law were widely available in the 18th century in England. See: J. Beattie, *Crime and the Courts in England 1660-1800*, Princeton University Press (1986) and D. Hay, "Property, Authority and the Criminal Law" in D. Hay et al, *Albion's*

modification of judicial sentences has always been part of the NSW tradition: remission and conditional release were in fact two of the oldest institutions of prison management in this State.

Running through the penal history of New South Wales has been the concern to reduce the cost of punishment without jeopardising political support or penal objectives such as deterrence, retribution and public protection. This balancing of efficiency with political and penal consideration is never a precise exercise. Consequently, penal policies are constantly in need of repair or correction, having gone too far towards cost-efficient measures which may be politically difficult to defend, or towards punitive measures which may lead to a vast escalation of costs. One method of refining this balancing act has been the *differentiation* of prisoners, selecting the "lower risk" prisoners for early release or conditional liberty.

According to one historian, the British government's transportation of criminals to Australia was justified in the 18th century on the basis of economy and deterrence.¹⁸ There was also evidence that overcrowding in prisons was becoming a serious problem in England when transportation to America ended in the 1770s.¹⁹ However, even after it became clear that transportation did not achieve the desired deterrent effect, and in spite of the increasing popularity of the idea of the penitentiary, the government would not give up transportation until the mid 1800s. Again, the consideration of costs appeared to have dictated this course:

To build the penitentiaries, which did not exist, would be costly. The prison hulks and many of the old gaols would have to be replaced and the whole prison system remodelled. This was an expense which for years no British government was prepared to countenance; until it did so, transportation had to remain. It was defended as a cheap punishment.²⁰

These concerns with costs, overcrowding and deterrence appeared to have been transported to the penal colony. Successive governments and prison administrators in NSW have tried to balance the goals of punishment with efficient management of available resources. The result has been the development of various decarceration devices. These devices have often been justified by appealing to the dominant penological theories at the time of introduction.

Fatal Tree: Crime and Society in Eighteenth-Century England, Pantheon (1975). The benefit of clergy, reprieves and pardons were used by juries, judges and kings to show mercy to selected criminals who were saved from the death penalty. The application of criminal punishment was never an "automatic" or rigid process.

18 A.G.L. Shaw, *Convicts and the Colonies*, Melbourne University Press (1977) at 17.

19 J. Beattie, *Crime and the Courts in England 1660-1800* (1986) at 596.

20 A.G.L. Shaw, *Convicts and the Colonies* (1977) at 18.

A. PARDONS AND TICKETS OF LEAVE

When transportation did not turn out to be as economical as originally envisaged, the British government repeatedly put pressure on the colonial governors to economise.²¹ One innovation adopted early in NSW history was a system of *rewards* which promised both cost reduction and improved conduct on the part of the transported convicts:

In New South Wales, the major incentive to reform was the 'pass', a certificate which excused men from compulsory labour, and allowed them to work all their time on their own. Later known as the 'ticket of leave', this was an innovation of King's. The governor granted it at his discretion, usually as a reward for good conduct; but since the ticket-of-leave men cost the government nothing, in order to reduce expenditure he, and his successors, sometimes gave tickets to convicts whether or not they were reformed or meritorious, if they were able to earn their own living and take themselves 'off the stores'.²²

Governors were also given the power, since 1790, to remit transported prisoners' sentences, absolutely or conditionally, in whole or in part. This power was later severely limited by the New South Wales Act 1823, which allowed the governor the power to recommend, but not to grant, pardons for convicts.²³

The ticket-of-leave system attracted many critics, especially in Britain. Both King and Macquarie were criticised for being too lenient in granting pardons and tickets of leave, thus removing the supposed deterrent effect of the punishment of transportation. Although Macquarie had laid down rules about the criteria for granting tickets of leave, in practice he did not obey his own rules, sometimes ignoring the magistrates' recommendations, and granting personal applications without consulting the magistrates.²⁴ Both the 1812 Select Committee on Transportation and the 1819 Bigge Commission recommended a more restrictive use of the ticket-of-leave incentive, which were to be granted only for good behaviour.²⁵ However, as Hirst²⁶ points out, the large influx of convicts after 1816 and the absence of central records on convict behaviour made it difficult to implement a policy of granting tickets only to the well-behaved.

Under Governor Brisbane the ticket-of-leave system was made much stricter, with a minimum term of servitude set down by regulations. However, Brisbane also issued tickets to reward police informants and those who caught bushrangers. Darling restricted this latter practice by reducing the period of

21 *Id.* at 60.

22 *Id.* at 73.

23 *Id.* at 82-83.

24 *Id.* at 83-84.

25 *Id.* at 105.

26 J.B. Hirst, *Convict Society and Its Enemy: A history of early New South Wales*, Allen and Unwin (1983) at 86-87.

eligibility for tickets in proportion to the number of runaways or bushrangers caught.

In the early years a major consideration in granting pardons and tickets of leave was the social status of the convict in Britain:

Gentlemanly convicts, who frequently brought private means and letters of introduction with them, were often given conditional pardons or tickets-of-leave immediately on their arrival.²⁷

Despite the tightening of the system in later years, the British government still asked for occasional exceptions to be made:

Men of standing and influence would mention to the secretary of state the names of individuals in whom they or their friends were interested and he would pass the word to the governor to do what he could for them.²⁸

The support of the convict's master was initially helpful, but not mandatory, for the successful application to obtain a ticket of leave. When Brisbane tightened the ticket system, he made the master's support a requirement. Darling, however, reversed this decision since it was in danger of being abused by masters who might withhold support in order to retain the convict's service. Masters could make their opposition known to the magistrates, but the magistrates could still make an independent recommendation regarding the granting of tickets. As the influence of the masters was reduced, the magistrates' influence became primary. However, with the improvement of centralised records of offences, the success of the application depended "less on anyone's support or endorsement and more on the bare facts of the convict's record".²⁹

Ticket holders, however, were not free citizens. In law they remained convicts and their tickets could be revoked for misbehaviour.³⁰ They were, nevertheless, considered to be the "elite of the workforce and were preferred as constables and overseers in private employment"³¹ Under Darling, ticket-of-leave men were forbidden "to hold publicans' licences or to have convict labour assigned to them". They were also to remain in a specified district unless given permission to travel outside.³² A British Act in 1832 took away the right of ticket holders to acquire or hold property or sue for its recovery. Although Governor Bourke and his successors repeatedly protested to the colonial office against the destructive effect of this law on the ticket-of-leave system, the provision was not repealed until 1842.³³

27 *Id.* at 85.

28 *Id.* at 90.

29 *Id.* at 130.

30 *Id.* at 102.

31 *Ibid.*

32 *Id.* at 103.

33 *Id.* at 124-125.

B. PRISON DISCIPLINE

The earliest penal regime in NSW was split between dealing with transported convicts and those who committed crimes in the colony.³⁴ The use of prison-like facilities to confine criminals were built as early as 1788, although the first strong log buildings (Sydney and Parramatta Gaols) were not completed until 1797.³⁵ Prison discipline had traditionally been maintained by a combination of punishment and reward measures.

The 1840 Prison Act provided for Visiting Justices to sentence prisoners to confinement on bread and water or corporal punishment for repeated offences.³⁶ In the early years physical coercion was not uncommon. Sheriff Maclean, later appointed the first Comptroller-General of Prisons, sanctioned the use of irons and the "gag" for serious prison offences, subject to the discretion of the gaoler.³⁷

Although the use of irons and gags had long been discontinued, the use of physical coercion had not stopped, as evidenced by the Nagle Commission. Other types of punishment for breach of prison discipline still being used included cellular confinement, deprivation of privileges, loss of remission³⁸ and sometimes transfer to other institutions.³⁹ Two of the most important incentive measures which had a long history in NSW were the granting of remission and the granting of release on licence. This was supplemented later by other forms of conditional release, the most important of which was the granting of parole.

C. REMISSION

Remission of sentences was available in the early 1800s only by petition to the governor and such a privilege was restricted to certain classes of prisoners.⁴⁰ Regulations regarding remission were formalised following the enactment of the Prisons Act of 1840. In 1858, new Regulations concerning remission were issued, and these operated concurrently with the Regulations of 1841, even though they contained provisions which were in substantial conflict. The latter regulation, aimed at making the system more punitive, abolished partial remission for good conduct. This resulted in "much insubordination..."

34 M. Sernack Cruise, *Penal Reform in NSW: Frederick William Nietenstein 1896-1909*, (1980), Ph.D. thesis, Department of Government, University of Sydney, at 2.

35 *Id.* at 7.

36 *Id.* at 18; Prisons Act 1840; and *id.* Appendices 26 and 27, NSW Prisons Department, *Corporal Punishment Register 1880 to 1963*.

37 *Id.* at 26.

38 Until the abolition of remissions in the *Sentencing Act 1989*.

39 See *Report of the Royal Commission into New South Wales Prisons*, NSW Government Printer, 1978.

40 *Id.*, at 12; *Report of the Select Committee on Gaols 1819*, Minutes of Evidence NSW, at 66-69.

culminating in escape attempts and mass revolts".⁴¹ A Board had to be appointed in 1862 to visit the metropolitan gaols and recommend the release of eligible prisoners:

Following the Board's report all prisoners who had served two-thirds of their sentences were by order of the Colonial Secretary on 17 May 1862 simultaneously discharged. The rationale for this action was the Government's desire "to show that the door of hope... is always open... and that invariable good conduct will be certain of meeting its reward".⁴²

However, it appeared that no further remission was granted for some time and the number of prisoners rapidly increased. Prisoner discontent was suppressed by "the most severe measures... even firearms having had to be resorted to".⁴³

Remission regulations were again drawn up in 1865, and codified in 1867. Prisoners became eligible for remission "by continuous good conduct and industry". The remission scale was proportionate to the term of imprisonment: one-sixth for sentences of five years or less; one-fifth for sentences of over five and less than ten years; one-fourth for sentences of more than ten years. Remission did not apply to prisoners serving under a third conviction or whose capital convictions were commuted. Prisoners serving under a second conviction lost half the remission period.⁴⁴ An amendment three months later to the 1867 Gaol Regulations took away remission privileges from prisoners serving sentences of less than 12 months.⁴⁵ Prisoners generally lost remission days for every "disorderly" or "idle" mark, for not being "industrious" and for each day placed in punishment for misbehaviour. Conditions for forfeiture of remission were amended in 1868 to reduce the number of days lost. The loss of remission for recidivists was removed in an amendment to the Regulation in 1881.

The remission scale was repeatedly refined during Neitenstein's era in 1898, 1901 and 1904-5, to "set an attractive but equitable scale".⁴⁶ Remission was once again available to short-term prisoners (three to twelve months). The earning of remission was based on a sliding scale, favouring first offenders against those with prior convictions. According to Neitenstein:

Under the old method there was no differentiation between first offenders and professional criminals, and the longest sentenced prisoners were allowed the highest scale of remission. The new regulation applies the highest scale to the first offender, viz., one-fourth of the sentence, with a gradual decrease in the amount earnable by others according to the number of previous sentences, until, in the case of the habitual criminal, no remission can be gained on the first or fixed portion of his sentence. In the case of a female prisoner without any previous

41 M. Sernack Cruise, *Penal Reform in NSW*, 1980, at 19.

42 *Id.* at 273.

43 *Id.* at 274.

44 *Id.* at Appendix 18: Gaol Regulations 1867 No.79.

45 *Id.* at Appendix 19: Additional Gaol Regulations 1867-1886.

46 *Id.* at 272.

conviction, the very liberal remission of one-third can be earned. Wherever possible this differential treatment in favour of the lesser offender has been applied to other parts of the routine, such as the earning of gratuities, the progressive stages, the allotment of privileges, indulgences, and so forth.⁴⁷

Neitenstein regarded this reform as one of the most important and far-reaching, as well as effective, measures in relation to prison management.

Remission regulations since Neitenstein did not depart from this approach in any significant way. The distinction between "remediable" prisoners, "recidivists" and "habitual criminal" remained for years, although these remissions had become "automatic" by virtue of the Prisons Regulations in 1968,⁴⁸ while additional remissions can be "earned" through "excellence in conduct, training and industry".

The remission system came under close scrutiny during the Nagle Commission. Although the original objective of the system was "to provide an incentive to good behaviour by the inmates and a rehabilitative effect on prisoners working towards a goal", the system was no longer serving its original purpose.⁴⁹ While considering remissions to be worthwhile, the Nagle Commission outlined some of the criticisms of the system which was operating. It was, first of all, seen to be a deceptive system, which was not well understood by the general public, who would be surprised at the substantial reduction of the sentence through automatic remission. Prisoners, on the other hand, regarded the reduced sentence as the maximum time they would serve, and any loss of remission through disciplinary offence as extra punishment. In effect, the remission system no longer provided any real inducement for the inmates to observe discipline, since remissions did not apply to the non-parole period of a sentence. The Nagle Commission recommended the adoption of the Victorian system of earned remissions, which applied both to the head sentence and the non-parole period.⁵⁰ This recommendation was supported by the Muir Committee Report⁵¹ and later adopted by the government. These developments are discussed in a later section.

D. RELEASE ON LICENCE

The other incentive measure used since colonial days was the release on licence system. The granting of licences to "well-conducted" prisoners was provided for by section 409 of the Criminal Law Amendment Act 1883, which was a modification of the ticket of leave system.⁵² Under this section, the

47 *Id.* at 276; Appendix 56, Gaol Regulations, September 1905.

48 Part XV which granted remission of one-third of the sentence to prisoners who had not been imprisoned for three months or more, one-quarter to the rest, except for "habitual criminals" who got one-sixth.

49 *Report of the Royal Commission into NSW Prisons*, 1978 at 302.

50 *Id.*, 302-305.

51 *Report of the Committee Appointed to Review the Parole of Prisoners Act 1966*, 1979.

52 M. Sernack Cruise, *Penal Reform in NSW*, 1980, Appendix 33.

Governor was empowered to grant remission of sentence in whole or in part by issuing a licence to the offender, allowing the offender to be at large within specified limits and prescribing additional conditions for release. A licence could be revoked at the discretion of the Governor on breach of conditions and the offender might be required to serve the balance of his sentence.

In 1886 Regulations were drawn up to give effect to the licence scheme.⁵³ These were to be "Licenses [sic] for Public Works". Prisoners became eligible for licences towards the end of their sentences (less remission), from six to eighteen months before they were due for release, depending on the length of sentence. Licence-holders were employed at Trial Bay Prison and were confined to the boundary of the prison, occupying quarters assigned to them. They were given additional rations as well as wages, a third of which could be allowed for the purchase of "extra articles of consumption". Licence-holders were not allowed to travel beyond the prison boundaries without a pass from the Superintendent. However, only those physically fit for "quarrying or other such labour" were eligible for licences. To compensate for this, prisoners who were not eligible for physical or other reasons were allowed additional remissions to their sentences. Prisoners whose death sentences were commuted were eligible for such licences at the discretion of the Governor. Comptroller-General Maclean also envisaged that licence-holders with families could be joined by them, although "it seems unlikely that this latter idea was ever put into effect given the controversy which it provoked".⁵⁴

The licence provision remained in the Crimes Act 1900 as Section 463. Neitenstein saw release on licence as a satisfactory way to implement the Habitual Criminals Act 1905, which subjected prisoners with three felony convictions or more to incarceration for an indeterminate period.⁵⁵ Release on licence remained the only method by which prisoners sentenced to life imprisonment and those detained under the Governor's Pleasure could be released. It appeared from the Gaol Regulations of 1908 that Neitenstein had also made use of the licence provision to release female prisoners, and male prisoners under 25 years of age, subject to certain conditions of good behaviour and non-association with "persons of bad character".⁵⁶ Unfortunately, information regarding the use of licence in this way was not available in the secondary sources consulted. The scheme was apparently part of Neitenstein's policy of differentiation of prisoners: women prisoners and young male prisoners were released under the licence provision in a way similar to parole in later years.⁵⁷

53 *Id.* at Appendix 19.

54 *Id.* at 56, fn 93.

55 *Id.* at 430.

56 *Id.* at Appendix 58, Gaol Regulations, May 1908.

57 *Id.* at 492-3; Sernack Cruise called it "probation".

The Parole Board established under the Crimes (Amendment) Act 1950 was in fact a release on licence board, whose duty it was to "consider the case of any prisoner referred to it by the Minister with a view to making a recommendation to the Minister as to whether the prisoner should be granted a written licence to be at large and as to the limits of residence and the conditions which should be specified in or endorsed on the license".⁵⁸

When a system of parole was introduced in 1966, Section 464A was removed, so that the newly defined Parole Board was not directly involved with the release on licence of prisoners. Section 463 was then used primarily to release life-sentence or Governor's Pleasure prisoners. At the time of the Nagle Commission, these cases were considered by the Life Sentence and Governor's Pleasure Review Committee, which reported to the Minister regarding prisoners who should be released. The Minister then referred the matter to the Parole Board, and upon the recommendation of the Parole Board referred the matter to the Executive Council. All releases were signed by the Governor-in-Council.⁵⁹ The Nagle Commission recommended that legislation be enacted to permit Judges to set non-parole periods when imposing life sentences and that the Life Sentence and Governor's Pleasure Review Committee be disbanded and decisions relating to life prisoners be left to the Parole Board.⁶⁰

In 1981, the Indeterminate Sentence Committee was established to review life-sentence cases, and later Governor's Pleasure detainees, and make recommendations for release on licence to the Corrective Services Commission and the Minister. The Committee consisted of nine members, three from outside the Department of Corrective Services and six senior officers representing the Department.⁶¹ The same legislative provision (Section 463 of Crimes Act 1900) formed the basis of the 1982-83 Release on Licence Program. The scheme, which involved a large-scale release of prisoners after serving a fraction of their sentences, was "spectacularly successful" in reducing the prison population before it fell into disrepute.⁶² The termination of the Program following allegations of corruption led to the establishment of the Release on Licence Board in 1983.⁶³ The Board has been reconstituted and renamed the Serious Offender Review Board since 1989.

58 Section 464A(4) Crimes Act 1900 as amended.

59 *Report of the Royal Commission into NSW Prisons*, 1978 at 407.

60 *Id.* at 408.

61 NSW Department of Corrective Services *Annual Report 1981-1982*.

62 D. Weatherburn, "Reducing the N.S.W. Prison Population: Sentencing Reform and Early Release", (1986) 10 *Criminal Law Journal* at 119.

63 For a more comprehensive analysis of the Release on Licence Program see J. Chan, *The Release on Licence Program 1982-1983: A Case Study of Decarceration in New South Wales*, 1989.

III. EVOLUTION OF THE PRESENT SYSTEM

Parole was originally introduced as part of an individualised approach in sentencing: to reconcile the "objective" (the crime) and the "subjective" (the criminal) elements of punishment.⁶⁴ Parole officers were responsible for the after-care service of discharged prisoners, helping them with the difficult transition from prison to the community. Parole was distinguished from pardon, clemency and reward for good behaviour:

The purpose of parole is to restore a measure of freedom to the prisoner and to give him guidance and supervision during the period of transition from controlled to uncontrolled living: to give it to him at that particular moment when there is the best chance of his returning to the community, fitting into its pattern and becoming a useful member.⁶⁵

The Parole of Prisoners Act 1966 reconstituted the Parole Board as an independent body with power to grant, refuse, defer and revoke parole. At the same time, it allowed the court to set a non-parole period which had to be served by the prisoner. Non-parole periods were generally "relatively short", from 25 percent to half of the head sentence, and not linked to the head sentence by a formula.⁶⁶

While meeting the rehabilitative rhetoric popular at the time, the introduction of parole coincided with an openly expressed concern regarding prison overcrowding:

About the middle of the year 1956, the daily prison population of the State first exceeded 3,000 people; since then, it has seldom been below 3,000, and when it has it has been only for very short periods. It remained, however, below 3,500 until early in 1967 when it exceeded that number.⁶⁷

A possible cause of overcrowding was said to be the increase in the length of prison sentence. However, the introduction of parole did not see any drop in the prison population. Instead, the population increased to over 4000 before dropping off again between 1973 and 1974.

The 1970s saw repeated attempts to change the parole system. The Nagle Commission and the Muir Committee both proposed drastic changes. These proposals were debated for years without implementation. It can be argued that repeated delay in the implementation of these reforms created the immediate conditions for the introduction of the Release on Licence Program in 1982. Ironically, the collapse of the Licence Program in turn expedited the enactment of the Probation and Parole Act 1983.

A. THE NAGLE COMMISSION

64 J.A. Morony, *A Handbook of Parole in New South Wales*.

65 NSW Hansard, 20 September 1966 at 972-3.

66 See J.A. Morony, *A Handbook of Parole in New South Wales and R. V. Portolesi* [1973] 1 NSWLR 105.

67 NSW Department of Prisons *Annual Report*, 1966, at 3.

The Nagle Commission saw parole as an alternative to imprisonment and accordingly examined the parole system at some length. It noted the "danger" in "handing over the sentencing process to an administrative body", as seen by some members of the judiciary. It reported that a number of prisoners were critical of the parole system. Prisoners often regarded the refusal of parole as an additional sentence. Other complaints arose from the failure on the part of the Parole Board to give adequate reasons for the refusal or deferral of parole.⁶⁸ The Commission concluded that the workload of the Parole Board was such that "an average of less than five minutes is spent by the Board considering each case".⁶⁹ Based on this conclusion, the Commission recommended a radical change in the parole system:

All prisoners with head sentences of less than four years should be released on parole automatically at the end of their non-parole period, unless it is proved to the satisfaction of a Court the release of the prisoner would constitute a danger to the public. Prisoners serving a sentence of four years and over should be considered by the Parole Board as at present.⁷⁰

More important perhaps than the above proposal was the Commission's recommendation that:

the fundamental principle underlying parole should be that it is preferable to have a prisoner in the community than in gaol. The relevant issue for the Parole Board or the Court should be: 'Are there any reasons why this prisoner should not be able to adapt to a normal community life?'

The Commission also recommended that the refusal of parole should be subject to appeal to a Court and that the Parole Board should give detailed reasons for its decision. In addition, the prisoner was to have access to all material considered by the Parole Board, except for that withheld for security reasons, and if parole was revoked, the time spent by a prisoner on parole was to be deducted from the time remaining to be served.⁷¹ As mentioned previously, the Commission also recommended that remissions should apply to both the head sentence and the non-parole period.

68 *Report of the Royal Commission into NSW Prisons*, 1978, at 402.

69 *Ibid.*

70 *Id.* at 476, Recommendation 210.

71 *Id.* at 476.

B. REACTION OF THE PAROLE BOARD

The Parole Board reacted strongly to the recommendations of the Nagle Commission. It noted, first of all, that the Royal Commission had gone outside of its Terms of Reference in considering matters relating to parole. It criticised the Commission for receiving evidence or submissions regarding the practices of the Parole Board, and apparently accepting the validity of these submissions, without seeking the comment of the Board.⁷² It then went on to challenge the observations and recommendations of the Nagle Report concerning parole. With regard to Nagle's recommendations to release "more prisoners (automatic parole) earlier (remission of non-parole periods) with less investigation of merit (automatic parole) for lesser periods of conditional liberty ('street-time') and with less rigid enforcement of sanctions (abolition of mandatory revocation)", the Board replied that it had been receiving complaints that it already released "too many prisoners too early".⁷³

The Parole Board regarded Nagle's conclusion that it spent less than five minutes on average in considering each case as "wholly misleading": "[t]o suggest that the many hours spent by the Chairman and members alike studying files separately from one another is in some way less efficient than studying the same files round a Board table is simply absurd".⁷⁴

The Board also severely criticised Nagle's recommendation for "automatic" parole of prisoners serving sentences of less than four years. It noted that such a proposal, borrowed from Britain, could run into problems in New South Wales:

In New South Wales every eligibility date is an ad hoc decision by the Court. If a Court were to sentence a person, knowing that he would be automatically released at the expiration of the non-parole period, it would introduce a new and untried factor into the art of sentencing. With variations in the non-parole periods in New South Wales, as against the uniformity of the British terms, application of the "automatic" principle would be difficult.⁷⁵

The Board argued that if, as Nagle suggested, parole was to be automatic only for those judged not to be a "danger to the public", then there would be no reduction in workload since each case would require an investigation or assessment similar to the assessment of parole carried out by the Board. Moreover, it maintained on the basis of empirical data from 1977 that the 285 parole refusals (for those serving less than four years) were based on sound reasons. Its conclusion was that "the adoption of the proposal for automatic parole would either shift the decision from the Board to the Court, with no

72 *Report of the Committee Appointed to Review the Parole of Prisoners Act, 1966, 1979*, Appendix C.

73 *Id.* at 46.

74 *Id.* at 47

75 *Id.* at 48.

diminution in the volume of work, or would serve no interests except those of the worst prospects for parole".⁷⁶

The Board, however, conceded that since parole systems throughout the world were under scrutiny, "twelve years after the setting up of this State's present parole system may be an opportune time for an examination of parole generally and of its operations in this State in particular".⁷⁷ Such a review, it was suggested, should be carried out by an expert committee with clear and adequate Terms of Reference to make recommendations for improving the parole system.

C. THE MUIR COMMITTEE

A committee consisting of representatives from the magistracy, Department of the Attorney-General and of Justice, Department of Corrective Services, Parole Board and other bodies was soon appointed in 1978 to review the parole of Prisoners Act 1966. However, since it was only given two months to submit its report, the Committee, citing inadequate time and lack of data as reasons, shied away from considering the proposal by the Probation and Parole Service to abolish parole and adopt a system of determinate sentencing.⁷⁸ Instead, the Committee suggested extensive amendments to the Parole of Prisoners Act, in an attempt to balance the conflicting interests and take into account the "widely divergent points of view held by those employed within the criminal justice system, prisoners, interested organizations and of course the public...".⁷⁹

A sample of the submissions listed in Appendix A of the report provides an idea of the divergent viewpoints of the critics of the parole system. *Prisoners* were dissatisfied because of the secrecy and uncertainty of parole decisions, the lack of incentive for good behaviour under the present system, and the inadequacy of rehabilitation and counselling services. *Probation and parole officers* felt that the parole system operated with unreliable predictive methods, in a distorted assessment setting, on the basis of contradictory punishment rationales and without adequate legal safeguards, resulting in a severe strain on parole resources. Members of the *judiciary* generally wanted more judicial control over sentencing. *Prison officers* and the *police* generally favoured a system of remissions instead of parole. Representatives of *banking organisations* wanted prisoners to remain in prison longer.

Recommendations of the Muir Committee did contain "something for everyone". In recognition of the "widespread concern in the community in respect of crimes of violence and the release of such criminals on parole", the Committee recommended that "a person who commits a crime which results in a sentence greater than 6 months being imposed, should not be eligible to have a

76 *Id.* at 49.

77 *Id.* at 52.

78 *Id.* at 64-66 Minority Report.

79 *Id.* at 6.

further non-parole period specified" unless the Court found reasons to do so.⁸⁰ Balancing the arguments in favour of and against Nagle's recommendation of "automatic" parole, the Committee recommended that the cut-off point should be three years rather than four, and that the prisoner be released on "probation" rather than parole.

Admitting the difficulties of predicting dangerousness, the Committee eliminated Nagle's recommendation that "automatic parole" be granted only when the prisoner did not pose a danger to the public. Breach of probation conditions became an offence in itself, punishable summarily.⁸¹ Noting that the wide variations in the length of the non-parole periods (from 10 per cent to over 70 per cent of the head sentence) created uncertainty and discontent among prisoners, the Committee recommended the setting of a statutory non-parole period at 60 per cent of the aggregate sentence less remission, longer for those who had been imprisoned previously for two years or more. The Court had the discretion to vary this proportion but was required to give reasons. In any case, remissions were to apply to non-parole periods.⁸²

Other recommendations included greater prisoner access to material on which parole decisions are based, the right to have a decision reviewed, and an inquiry into allegations of breach of parole conditions.⁸³ The Committee did not accept Nagle's recommendation that parole decisions should be subject to appeal to a Court, nor that "street-time" should be counted as time served when parole was revoked.⁸⁴

D. THE MINORITY REPORT

A Minority report, submitted by K. Lukes, then Director of Probation and Parole Service, recommended that the Parole of Prisoners Act be repealed and the parole system be substituted by a form of determinate sentencing, since "the major problems afflicting the present parole system could not be remedied simply by amending the present Act".⁸⁵

The Report listed seven deficiencies of the existing parole system "affecting and expressed by prisoners" which included secrecy, lack of procedural safeguard, uncertainty and subjectivity. It also mentioned nine deficiencies "affecting and expressed by officers" which stemmed from the artificial and distorted environment of parole assessments, the concentration of power in the hands of the officer, and the situations of tension and conflict it created between the prisoners and the parole officers.

80 *Id.* at 12-13.

81 *Id.* at 14-16.

82 *Id.* at 19-21.

83 *Id.* at 24-31.

84 *Id.* at 28-30.

85 *Id.* at 64.

The Report also asserted that members of the community were justifiably confused and puzzled by the often wide gap between the head sentence and the non-parole period.

Finally, the Report recommended a court-based system of determinate sentencing:

...it is recommended that the Courts be empowered to fix the particular prison sentence that an offence should attract, and then to specify, in those cases in which the Court considers it warranted, a term of supervised liberty to which the offender will be subject by way of a probation order following release from prison. The prisoners would be entitled to earn remissions on their term of imprisonment and the Probation and Parole Service would be given authority to suspend or terminate supervision prior to the expiry of the probation order if such supervision was considered no longer required.⁸⁶

Such a system was almost identical to the one proposed by the Majority Report for those serving three years or less; the Minority wanted it to operate over the full range of sentences.

E. THE PROBATION AND PAROLE ACT 1983

The Muir Report received general support from the Corrective Services Commission. Chairman Tony Vinson saw the automatic release to probation for prisoners sentenced to three years or less as a way to "help overcome the frequently criticised element of subjectivity in parole reports and appraisals based on institutional behaviour".⁸⁷ The ability of prisoners sentenced to longer than three years to earn remissions on the non-parole period was also seen to be "sufficiently attractive as an incentive to good behaviour and industry if handled on a positive, accumulating credit basis".⁸⁸ Both proposals, Vinson observed, would help to reduce the prison population. Such an approach was consistent with the management objectives of the administration:

In the wake of the Royal Commission we did our utmost to replace the 'stick' with the 'carrot' in day-to-day prison management. Not only would the development of incentive-based alternatives solve some of the major resource problems but it would contribute greatly to fostering reasonable order and industry in our prisons.⁸⁹

Members of the Probation and Parole Service and their union, the Probation and Parole Officers' Association, were concerned that the Muir recommendations would create a "*clumsy and complex system* of prisoner release which will be difficult to explain to the public". They would like to have the new after-care "probation" defined and its relationship with the "probation" (recognizance) sentencing option clarified. In addition, they were concerned about the Muir recommendation to allow prisoners access to parole

⁸⁶ *Id.* at 65.

⁸⁷ See T. Vinson, *Wilful Obstruction: The frustration of prison reform*, 1982, at 215.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

officers' reports, citing the need "both to protect the officer from mischievous complaint and to detail the obligations of a supervised offender".⁹⁰

The Parole Board, while generally supportive of the Muir Report's recommendations, had serious reservations about recommendations 37 to 42, concerning outside parties' access to material before the Board.⁹¹

One major criticism of the Muir Report was that it attempted the impossible task of *liberalising* parole along the lines of the Nagle Commission, while at the same time *tightening* it as a reaction to media and public pressure. Some of the proposals, such as the setting of statutory non-parole periods at 60 per cent or more of the aggregate sentence, automatic revocation of parole and non-eligibility for parole following a serious breach, and the loss of "street-time", carried the risk of significantly increasing the prison population.

These matters were debated following the tabling of the Muir proposals, but no agreement was reached for years. Decision was made in 1981 to repeal the old Parole of Prisoners Act and to prepare a new Probation and Parole Act. However, it was the collapse of the Release on Licence scheme and the continuing controversy surrounding the scheme which precipitated the rapid introduction of parole reforms which had been bogged down for years. The Probation and Parole Bill was introduced in November 1983 together with other amendments to existing legislation as a package to eliminate the exercise of "ministerial or individual discretion to effect a prisoner's release".⁹²

The Probation and Parole Act was largely based on the recommendations of the Muir Committee Report. It abolished parole for sentences of three years or less, and introduced the concept of after-care "probation", where the court would specify a "non-probation period" to be served in prison and the remainder to be served in the community under a probation order. Courts were given the discretion not to specify a non-probation period, provided that reasons for refusal were given. For sentences over three years, the setting of non-parole periods by the courts remained largely unchanged. Prisoners with non-parole periods would be considered for release by the Parole Board, which was reconstituted under the chairmanship of a District Court judge. The Act also included a right of appeal to the Court of Criminal Appeal for prisoners who had been refused parole by the Parole Board.

The Regulation of the Act specified a formula for reducing non-probation and non-parole periods by approximately the same proportion as normal remission entitlements in relation to the sentence.

Soon after its implementation, the Probation and Parole Act was found to be deficient in many ways. It had been called "ill-conceived", "abysmal",

90 Letter from Probation and Parole Officers' Association to members of the Cabinet dated 22 October 1981.

91 Letter from Parole Board to Minister for Corrective Services dated 11 July 1979.

92 NSW Hansard, 30 November 1983, at 3999.

"complex and clumsy", "a nightmare" and "causing massive confusion".⁹³ Some of the problems were documented and amendments to the Act had been frequent.⁹⁴ In September 1989, the government repealed the Probation and Parole Act and replace it with the Sentencing Act.

F. THE SENTENCING ACT 1989

The difference between the head sentence and the non-parole period had always been substantial in New South Wales.⁹⁵ As a result of the Probation and Parole Act and the introduction of a remission applied to the non-parole period, the gap between the actual time served by a prisoner and the head sentence imposed became even larger. Although the new remission served its purpose as a way of controlling the prison population both in terms of numbers and in terms of discipline, the situation was politically volatile. The 1983 Act carried the stigma of the Jackson release on licence schemes. Media reports citing cases of prisoners released after serving a fraction of the head sentence were often embarrassing for the government.⁹⁶ A 1987 amendment to the 1983 Act made it mandatory for the non-parole period to be at least 75 per cent of the head sentence for certain "serious offences".⁹⁷ The concept of "truth in sentencing" gained currency among reformers and politicians alike.⁹⁸

Early draft of the 1989 Sentencing Act removed remissions from the non-parole period (now called the minimum period) but did not totally abolish all forms of remissions. The final legislation, however, eliminated the concept of remission altogether, and removed the presumption in favour of parole for certain prisoners. The 75 per cent rule in relation to serious offences in the old Act was transplanted to the new Act, introducing a universal fixed ratio between the minimum term and the full sentence. The government was, of course, aware of the danger of sentences becoming longer as a result of these changes. The Minister for Corrective Services emphasised in the Act's Second Reading Speech that the government's intention in the new legislation was *not* to make

93 Comments from practitioners in the system, source: interview data collected as part of research on early release. See J. Chan, *The Release on Licence program 1982-1983: A Case Study of Decarceration in New South Wales*, 1989.

94 See N. Stoneman, "Probation and Parole Act NSW: More Problems than Prospects" in I. Potas (ed.) *Proceedings of Sentencing: Problems and Prospects*, Australian Institute of Criminology, 1986. See also D. Weatherburn and R. Howie, "Disappearing Non-parole Periods and the Sentencer's Dilemma" (1985) 9 *Criminal Law Journal* 72.

95 See J. Chan, "The New South Wales Sentencing Act: Where does truth lie?", 1990.

96 See, for example, "Why prisoners in NSW usually come out in front", 4 May 1988, *Sydney Morning Herald*, on the outrage relating to the release of the "Woolworth's bomber" after his having served six of a 20 year head sentence.

97 Probation and Parole (Serious Offences) Amendment Act 1987, s.20(A).

98 See, for example, Australian Law Reform Commission, Report No.44, *Sentencing*, 1988, at 37.

sentences longer.⁹⁹ It appeared, however, that sentences have become longer and overcrowding in prison has worsened since the Act's introduction.¹⁰⁰ By eliminating all forms of remissions, the present government has in effect severely limited its options for managing the size of the prison population.

IV. THE POLITICS OF PRISON POLICIES

Prison issues have always carried enormous political mileage in NSW politics. Opposition Members of Parliament throughout history have had no trouble using early release, parole, remission and similar issues to make life difficult for governments. Many instances of Ministers being embarrassed by released prisoners who committed serious crimes can be found among the records of parliamentary debates and media reports. The scoring of political points was often so important that progressive reforms and outrageous abuses were treated in virtually the same fashion.

Governments, on the other hand, often reacted swiftly and excessively to these episodes.¹⁰¹ Inquiries, new laws or new regulations were often implemented immediately to defuse political pressures. When new programs were introduced, however, governments rarely explained properly their intentions. This crisis-management approach to reform has resulted in some ill-thought-out or even disastrous laws and policies.

There has also been a tendency for governments to be silent about the implications of their penal policies. Politicians appear to assume that any program can be sold to the public if a tough enough label is put upon it. The introduction of the Probation and Parole Act 1983 was a case in point. There was little public understanding of the 1983 Act when it was brought in. A survey of the newspapers at the time shows that the majority of news stories had ignored or were ignorant of the fact that changes to the parole system had been considered and discussed since 1978, and, in fact, the Department of Corrective Services had been gearing up for the new Act since March 1983. The proposed changes to parole were reported and interpreted in a variety of ways, some blatantly inaccurately, by the media. For example, one newspaper used the

99 *NSW Hansard*, 10 May 1989, at 7906.

100 See *R. v. Maclay*, unreported, Court of Criminal Appeal, 16 February 1990, for the Court's interpretation of the Act and A. Gorta and S. Eyland, "Truth in Sentencing: Impact of the Sentencing Act 1989", Report 1, 1990.

101 Some examples of government over-reactions were cited in N. Stoneman, "Probation and Parole Act NSW: More Problems than Prospects", 1986, e.g., restrictions on Work Release following isolated incidents in 1978; implementation of the Muir Committee proposals as a result of political pressure over the release on licence scheme in 1983; and amendments to the Probation and Parole Act allowing judges to take away remissions, following several grisly crimes in New South Wales.

headline, "Parole clamp: Wran slams 'violent' crims" to introduce the story. The details of the changes were described this way:

Drastic changes to end the early release of long-serving prisoners will be rushed into NSW Parliament. Parole periods for sentences of three years or less will be abolished. And only the courts will determine when prisoners serving longer sentences are released. A State Government spokesman said yesterday: "It means that if you get three years, you are in for three years. "If a sentence is 10 years with a non-parole period of seven years, you're in for seven years - not out in 12 months."¹⁰²

The changes, in effect, were seen to be a swing back to longer sentences and non-parole periods which must be served in full. This was actually quite far from the truth. The abolition of parole meant that prisoners were automatically released, without having to be approved by the Parole Board. The new parole proposals also allowed for remissions off the non-parole periods. Both of these measures would tend to shorten the length of time being served, unless judges compensated by increasing the length of the minimum period to be served.

The proposals appeared to be so badly understood that in one newspaper, a cartoonist depicted a prisoner pleading to the sentencing judge, "Three years... fair go Your Honour, couldn't you make it more, so I'll be eligible for parole...?"¹⁰³ Parole, it seems, had been so much identified with leniency in the public consciousness that its abolition was automatically interpreted as a severity measure.

When the provision of remission off the non-parole period was formally announced, the Premier, Neville Wran, minimised its significance by saying that judges would be aware of this and could therefore "control the length of time a person spent in jail by handing down the appropriate sentence." He also justified it in terms of "rehabilitation", as an incentive to good behaviour in jail.¹⁰⁴

The 1983 Act, then, was seen as a tightening of early release. The abolition of parole for prisoners sentenced to three years or less was interpreted as a crackdown on the system, when in fact it meant that prisoners were automatically released, and thus serving much shorter sentences. The introduction of remission off the non-parole period was not openly discussed; the emphasis was on the "earning" of such remissions, when in fact these were additional to the "automatic" ones. No wonder, then, that the Act, introduced in haste in the aftermath of the release scheme, had been severely criticised and repeatedly amended to close off loopholes and stave off political problems before it was finally repealed in 1989.

Likewise, the 1989 Sentencing Act was brought in as a "tough" measure,¹⁰⁵ although the Minister insisted that it was never the government's intention for

¹⁰² *Sun-Herald*, 28 August 1983.

¹⁰³ *Sun*, 29 August 1983.

¹⁰⁴ *Daily Telegraph*, 31 August 1983.

¹⁰⁵ See, for example, "Tough new law on jail terms", *Sydney Morning Herald*, 27 April 1989.

sentences to increase in length. The notion of "truth in sentencing", while politically popular, is in fact a difficult concept for the public to comprehend. As I have pointed out elsewhere,¹⁰⁶ even without adjusting for the loss of remissions, sentences under the new Act would necessarily appear much shorter than the old "head" sentences, given the "bottom-up" approach and the fixed 3:1 ratio between the minimum and the additional term. Yet this was never properly explained to the public. Not surprisingly, the media made much of the "leniency" of the transitional provisions of the Act which give parity to prisoners sentenced under the old Act by applying approximately one-third remissions to their sentences.¹⁰⁷

V. CONCLUSION

This brief review of the historical evidence suggests that decarceration mechanisms have existed in New South Wales since its beginning as a penal colony. These mechanisms functioned primarily as a managerial strategy to control costs, although each was justified by the dominant penal ideology at the time. For example, remission and release on licence were originally justified on the basis of giving prisoners incentives to "reform" themselves. Similarly, parole was introduced in 1966 as a way of individualising punishment through rehabilitation, replacing licence release as the main form of conditional release. Remission, meanwhile, had become "automatic" and ineffective as a disciplinary device. Overcrowding and the pressure to cut costs in the 1980s were partly responsible for the introduction of the Release on Licence scheme. The Nagle Commission's recommendation to use prison as a last resort became a convenient and convincing justification for such a program. The termination of the scheme forced the government to bring in the 1983 legislation which authorised remission to be applied to the non-parole period. The new "truth in sentencing" legislation was partly a reaction to the large gap between the head sentence and the actual time served under the old system, and partly a display of "toughness" characteristic of the present government's law-and-order policy. The new Act abolished all forms of remissions and introduced a fixed proportion between the minimum term and the full sentence. Presumption in favour of parole was also removed.

The present system of parole, then, is a product of political reactions as well as repeated attempts to refine and repair the original system. The organisational imperative to control costs and manage resources is severely constrained by the political risks of early release policies. The truth is that there has never been any "truth in sentencing" in the history of NSW. The provision of early release is as old as the State itself. The abolition of remission under the Sentencing Act

106 See J. Chan, "The New South Wales Sentencing Act: Where does truth lie?", 1990.

107 "Yabsley Cuts Jail Terms By a Third", *Sunday Telegraph*, 6 August 1989.

is expected to increase the prison population substantially.¹⁰⁸ Ironically, "tough talk" on prison policies can only deepen the government's crisis. The necessity for decarceration is likely to remain, although the government is rapidly running out of available options to do so.¹⁰⁹

108 A. Gorta and S. Eyland, "Truth in Sentencing: Impact of the Sentencing Act 1989", Report 1, 1990.

109 The policies being considered at this stage include the expansion of periodic detention (see "Weekend Jail for Criminals", *Daily Mirror*, 11 October 1989), privatisation of prisons (see "Profit-driven prisons in NSW", *Sydney Morning Herald*, 10 November 1989) and/or other corrective services and home detention (see "Trial plan will let 40 prisoners stay home", *Sydney Morning Herald*, 4 November 1989) as a front-end measure.