# STANDING COMMITTEE ON LEGISLATION

## SENTENCE ADMINISTRATION BILL 2002 AND SENTENCING LEGISLATION AMENDMENT AND REPEAL BILL 2002

**TRANSCRIPT OF EVIDENCE TAKEN**
**AT PERTH**
**ON WEDNESDAY, 19 MARCH 2003**

**Hon Jon Ford (Chairman)**
**Hon Giz Watson (Deputy Chairman)**
**Hon Kate Doust**
**Hon Peter Foss**
**Hon Bill Stretch**

**Committee met at 9.45 am**

**MORGAN, DR NEIL**
**Director of Studies, Crime Research Centre,**
**University of Western Australia, examined:**

**The CHAIRMAN**: I welcome you to the meeting. Please state the capacity in which you appear before the committee.

**Dr Morgan**: I am based at the Crime Research Centre at the University of WA. I appear wearing a number of hats. I am director of studies at the research centre and have worked on sentencing over the years. I am also a Parole Board member, although I am somewhat reluctant to admit that today.

**The CHAIRMAN**: You have received a document entitled "Information for Witnesses". Have you read and understood that document?

**Dr Morgan**: Yes.

**The CHAIRMAN**: These proceedings are being recorded by Hansard, and a transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document to which you refer during this hearing. Please be aware of the microphones and try to talk into them. Also, ensure that you do not make any noise near them and avoid covering them with papers.

I remind you that your transcript will be a matter for public record. If for some reason you want to make a confidential statement during today's proceedings, you should request that the evidence be taken in a closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that premature publication or disclosure of public evidence may constitute a contempt of Parliament, and may mean that the material published or disclosed is not subject to parliamentary privilege.

Would you like to make an opening statement?

**Dr Morgan**: Yes. Perhaps I could read it and give copies to committee members if that is useful as we go through. Members of the committee should already have copies of a written submission I provided to the committee. It was in two parts: one was a copy of a submission I made to the Attorney General in October last year that was based on presentations previously made to judges of the District and Supreme Courts; and the second was a letter in January in which I canvassed some of the changes made to the Bill in the lower House. I will summarise the key areas in the statement and raise a couple of additional matters that have come to my attention since I last wrote to you in January.

I welcome the broad aims of the legislation to bring about greater truth in sentencing and to seek to reduce the State's prison population and to simplify the system in some respects. I welcome some specific measures, including the fact that the courts are to be given greater power to deny parole to certain offenders. The current legislation, as interpreted by the courts, makes parole eligibility almost inevitable. If the courts are to retain any say over parole eligibility, much can be said for broadening their discretion.

I also welcome that the provisions of the Bill set out a number of matters to be considered by the Parole Board, which is welcome in the interests of transparency. I welcome in principle the abolition of remission, and in principle the abolition of home detention orders for short-term sentences. It has been absurd that under the current law the most intrusive levels of monitoring in

our system are reserved for the least serious offenders. But I have major concerns that I will canvass briefly this morning about the proposal for chief executive officer parole.

The main problems areas are, first, the PSO, or pre-sentence order. I raise one matter here that I have not previously raised with my submissions. The PSO, as mentioned in the submission, seems destined to generate confusion in the options open to the court. It seems to be intended to be the toughest option other than immediate imprisonment, and can only be used when the court eliminates all other options. I find it impossible to understand how a court will impose a PSO if it has already eliminated as inappropriate all other options, like a community-based order and an intensive supervision order that contain precisely the conditions to then be placed in a pre-sentence order.

Another difficulty that crystallised in my mind over the last couple of months concerns the role of the PSO. I was unsure when I first read the Bill about the point of the provision. It appeared to be designed to meet the needs of the Drug Court; this was confirmed by the Attorney General in the second reading debate. However, it is on paper a generic order that is not limited to the Drug Court. Based on my recent research, it would not seem to meet the Drug Court's needs. I stress it will change the basis of the Drug Court's operation. I do not think it has been picked up in my previous submission or in anything else I have read. Basically, the PSO will target serious offenders on the cusp of immediate imprisonment whether they plead guilty or not guilty. At the moment, the Drug Court is dealing with a different cohort of offender; that is, less serious offenders as it primarily focuses on Court of Petty Sessions matters, and it is essential that a person pleads guilty. The PSO, if it comes in, and if it is designed to meet the needs of the Drug Court, will change the operation of the Drug Court. It does not seem to be fully thought through in terms of what the Drug Court needs, how it operates at present and how to best solidify it for the future.

**Hon PETER FOSS**: Why does it change it? Nothing says you cannot go to the Drug Court until you plead guilty. The PSO will not come up until such time that a person has pleaded guilty.

**Dr Morgan**: There are two possibilities. I am not sure what the Government intends. One is that the PSO will replace the existing Drug Court regime. Second, it will be an alternative means of accessing the Drug Court. In other words, the current system based on bail can be used.

**Hon PETER FOSS**: I do not think it is either. I think it is an opportunity to still get into the Drug Court on the same basis if one pleads guilty. It would then give a wider range of things that the Drug Court could do.

**The CHAIRMAN**: Perhaps we could let Dr Morgan finish his statement.

**Hon PETER FOSS**: I did not understand that statement.

**Dr Morgan**: That is fine. I think it changes the basis of the Drug Court because it is pitched at all the courts across the State, which is not necessarily a bad thing, but it must be understood that it may mean that the Drug Court may pick up a different cohort of offender. It may or may not be a good thing, but I wanted to place that view on the record.

I also have concerns about the abolition of six-month sentences, which I have teased out in previous submissions. It seems to me to be a bad move to abolish six-month sentences when we have no formal evaluation of what happened when we abolished three-month sentences. Anecdotal evidence suggests a lot of four-month sentences, and sentences of three months and a day are around. I would like to see an evaluation made of that result before we move to the abolition of six-month sentences. It is made particularly complicated because it is accompanied by a requirement for the judiciary to adjust sentences to take account of the abolition of the one-third remission. In effect, therefore, the Government is proposing to abolish sentences of nine months and under, because current sentences of nine months will be reduced to six - sentences of six months cannot be given. Effectively, the Government would abolish nine-month sentences rather than six-month sentences.

The Bills also would have an exponential impact on custody time. The head sentence is one thing, but the time people spend in custody is the real crunch question. Under the proposed laws, people will spend 50 per cent of their time in custody as a minimum. In future, the minimum sentence will be seven months, and prisoners will have to spend at least three and a half months in custody. Under the current system, the minimum sentence is, say, four months, which gives a minimum actual custody time of about five weeks. In other words, the minimum head sentence doubles, but the minimum time in custody virtually trebles.

**Hon PETER FOSS**: I did not think there was parole for 12 months.

**Dr Morgan**: They can get home detention after one-third of the sentence.

**Hon PETER FOSS**: They are in home detention. Custody remains. One of the anomalies under the system is that with a 12-month sentence, one does not get parole.

**Dr Morgan**: No, but home detention means someone is in the community and is subject to monitoring - however, that prisoner is still in the community and released from prison. In my view, the abolition of six-month sentences seriously distorts the sentencing ladder. There should be a set of neat rungs the courts can climb in terms of severity. If the proposal goes through, one will move from a mere suspended sentence up to a seven-month immediate term. It seems too big a jump.

Re-entry release orders are also an issue. The re-entry release order will replace the work release order. To wear my Parole Board hat for a moment, the current system of work release orders is a problem. The orders are unnecessary and discriminatory in impact. Why are they unnecessary? Most offenders who get a work release order will get at least 15 months on parole. A good deal is knocked off the sentence by parole. Work release orders give them an extra six months early release. It is my view, and that of the Hammond committee, the Parole Board and all the judges to whom I have spoken, that prisoners eligible for parole get a sufficient benefit and do not need another six months under work release conditions. Work release orders are discriminatory in practice for a very simple reason: under the legislation, work release orders can be given only to people who are a minimum risk to public safety. White-collar criminals are often more than a minimum risk to one's money, but not to one's safety. Therefore, white-collar criminals invariably are almost guaranteed to get a work release order. If they get a six-year sentence, chances are they will be out after 18 months on work release and then on parole after two years. It is not surprising if you visit prisons - I am not suggesting the committee do so, but it is an interesting exercise to talk to prisoners - to find work release is a major source of discontent in the prison system as a result. On the other hand, some offenders are not eligible for parole because of the nature of their offence and their prior record. It must be remembered that if the Bill is passed, more prisoners will be ruled ineligible for parole by the courts. A bigger group of non-parole prisoners will be in the prison system. I think it is too easy to say that they just do their time and walk free - it does not do a lot for community protection. A lot can be said for supervising serious long-term prisoners on release and for thinking about the best mechanism to achieve that goal.

Back in 1997-98, the Hammond committee, of which I was a member, looked at parole and recommended, for this very reason, that there should be what we called a reintegration order for prisoners who did not have parole. We recommended that it apply for the last 10 per cent of the sentence up to a maximum of six months. Importantly, it was designed for non-parole prisoners who we thought needed some process of supervision and monitoring on release. We could be talking about serious sex offenders or people with serious records of violence. Under the current Bill, and the current law, those people can walk out of prison at the end of their sentence without any form of supervision and monitoring. Unfortunately, the re-entry release order does not deal with the problem; it simply revises the work release order. We will face the same problems and have an order that is unnecessary that will primarily pick up the white-collar offenders, but do nothing about the more serious, long-term, non-parole prisoners.

The fourth issue I draw to the committee's attention is in my submission; namely, my concerns about the proposal for chief executive officer parole. I said at the outset that I agree in principle with the abolition of home detention that currently applies to short-term sentences. A simpler system of parole is to be welcomed, but I have major concerns and difficulties with the proposal that the CEO of the Department of Justice has responsibility for release on the short-term sentences. Perhaps I should spell out why I have those concerns.

Many discretionary decisions are to be made. First, under the legislation, as I read it, the CEO will have discretion about whether some prisoners will be released at all. There will be a schedule of offences for which release will be discretionary. Second, if the person is released, the CEO will have a discretion about whether the order is to be supervised. That will mean the CEO will decide what type of conditions are imposed on release. The CEO has responsibility, again in a discretionary decision, to monitor the compliance with those decisions. This would give the CEO the capacity to pull people back to prison, cancel orders and so on for non-compliance.

My view, as expressed forcefully on paper to the Attorney General, and as was picked up in the lower House debate by Ms Sue Walker, is that it is wrong for the discretionary decisions to be vested in the government department responsible for administering prisons and community corrections. Some distance is needed in the decision-making process. I have outlined in my submission an alternative option; that is, that the Parole Board take responsibility for these matters. I do not believe this proposal would cost much money; in fact, it could well be cheaper than having a new department or division in the Department of Justice with responsibility for this decision making.

The fifth point I raise briefly is the question of sentence adjustment. This is a difficult problem, as Mr Foss would agree.

**Hon PETER FOSS**: I agree entirely with that.

**Dr Morgan**: We all want truth in sentencing and simplicity, but the difficulty is to know how to manage it without a blow-out in the prison population. The submission by the Parole Board raised an alternative proposition. The current proposal is that the non-parole period be set at 50 per cent across the board - that is, at least 50 per cent will be served in prison, and up to 50 per cent in the community on parole.

[10.05 am]

This will create some anomalies. Other options that have been canvassed in the past will also create anomalies. It is very difficult to know how best to address this issue. The Parole Board submission suggests that this committee might consider a proposal whereby all sentences would be reduced by the judiciary by one-third and that the non-parole period be not set at 50 per cent across the board but that the maximum is generally 50 per cent and the maximum parole period should be two years.

**Hon PETER FOSS:** Then you have the problems of the old one, of course.

**Dr Morgan:** It is possible nobody can work it out, but it is also possible to work it through. Basically, a nine-year sentence means six years, in effect, because one-third is remitted.

**Hon PETER FOSS:** Once you get over six years, it is six, but not before parole.

**Dr Morgan:** When the court says nine, these days it really means six at the outset because of the one-third remission. The non-parole period on a nine-year sentence is currently four years, and they do two on parole. Under the Bill as it stands a nine-year sentence will be reduced to eight years, because to get four years in custody on a 50 per cent basis they will have to impose eight years, so the person would get four years in prison and four years on parole.

**Hon PETER FOSS:** That is if they were with parole?

**Dr Morgan:** Yes. The Parole Board's proposal is that consideration be given to setting the maximum parole period at two years. In other words, it will generally be 50 per cent, but once they get to longer sentences they do more of the time, like they do at present.

**Hon PETER FOSS:** People never understand that. The problem we had was that everyone thought they did one-third. It did not matter when they got up to 12 or 20 years that it was far more than that. When you tried to explain it to people their eyes glazed over. The Press always came out and said that it was one-third. I bet what they will do now is see it as one-half.

**Dr Morgan:** That certainly is an issue. There are a whole lot of issues around the role of the Press, and indeed that of politicians. At this time there is enormous pressure on the courts, the parole boards and everybody else to be tough on sentencing, and we are expecting the courts to reduce the sentences. That is a real stab in the dark. If it were a different sort of political and media climate I would have more confidence that it would work. At a time when there is real pressure on the courts, do we really expect that a court will reduce nine years to six? It is very difficult to be certain that that will happen.

In summary, the Bills have much merit, but they also bring a number of difficulties. In my view it would be better to delete the provisions relating to the pre-sentence order and await the outcome of the evaluation that is taking place at the Drug Court. If we want to get the Drug Court right, let us sit back and think about that problem rather than compound the current difficulties by adding the pre-sentence order. I believe that the proposal to abolish sentences of up to six months should be put on hold until there is an evaluation of what happened in 1996 with the abolition of three-month sentences. The provisions relating to the re-entry release order should be removed and consideration should be given to the difficult problem of addressing the re-entry of long-term non-parole prisoners.

**Hon PETER FOSS:** You almost seem to suggest that the re-entry release order should stay there for non-parole prisoners and be adapted to them.

**Dr Morgan:** It would need significantly more adaptation than it has at present. Perhaps I will return to that. The concept of parole for all sentences is a good one. It should be retained, but it should be vested in the Parole Board and not in the CEO of the Department of Justice. It is a difficult problem, but I am uncomfortable with the current sentence adjustment provisions. I am sorry if I have taken a bit longer than I expected.

**The CHAIRMAN:** I have a number of questions to ask and then members will ask their own questions. The Parole Board submission indicates that members of the board met with prison staff and prisoners at Wooroloo Prison Farm in 2002 and that during the meeting concerns were expressed by prison staff and prisoners about the vesting of parole decisions in the Department of Justice. Are you able to provide the committee with any further information about these discussions, including their purpose and context?

**Dr Morgan:** The reason the Parole Board listed Wooroloo was just part of a general process that we have for consultations with prisoners and prison staff. We try to do a bit of a circuit each year to get to at least all the metropolitan prisons and one or two of the regional prisons. It came up in that context. It was a discussion first of all with prison staff and then with peer support prisoners. There were major concerns by both groups. Subsequently, in other discussions that I have had with other groups of prisoners and prison staff, the same view has been expressed. I spent much of last week at Acacia Prison and again, in discussions with groups there, there was a concern that there needed to be an independent decision-making body. I have not found anybody who has supported the CEO parole principle.

**The CHAIRMAN:** The Parole Board has submitted that CEO parole should be vested in the Parole Board rather than the Department of Justice. As part of this submission, the Parole Board

states that this could be accomplished by the development of the auto parole regime. Can you please describe to the committee the following -

(a) the current operation of the auto parole regime, including the offences it relates to; and

(b) how the auto parole regime could be extended to apply to CEO parole, including any advantages and disadvantages of such an extension of the auto parole regime?

**Dr Morgan:** Perhaps I will try to explain the operation of auto parole. As the Parole Board submission states, this is perhaps a confusing term - there is nothing automatic about anybody being released on parole; it is a discretionary decision. Basically the legislation at present divides prisoners into two main categories. There are special term prisoners, who are people serving three years or more for offences of a violent or sexual nature. In the case of all those prisoners the Parole Board itself - the full Parole Board - must consider their possible release. It must come before the board, and they are called special term prisoners. In the case of other prisoners the Parole Board itself does not need to consider the case. A process is authorised by legislation for the secretary of the Parole Board to be the person who formally issues the parole order. However, there is also a process whereby, if there is any concern about the release of that prisoner, the case will be referred to the board itself. Basically, the Department of Justice prepares the file, including prison reports, reports from community direction staff, reports from any specialist who has been involved with the prisoner and reports from the victim mediation unit. If everything looks straightforward the secretary can issue the parole order. If there is any problem at all, that will be referred to the Parole Board. Out of an average of, say, 40 to 50 files per meeting we will probably have about eight or nine cases to do of so-called auto paroles that have been referred to the board. The reasons they are referred may include concern about victim protection or threats to the community at large; it might include concern about whether the person actually has somewhere to live on release. A whole host of factors would generate a referral to the board. That system seems to work fairly well. Obviously the Parole Board has delegated its authority, as it is entitled to by statute, but it retains the ultimate responsibility. Should anything go wrong when the person is on parole, the Parole Board deals with the breaches. In other words, if the person fails to report or fails to comply with other conditions of parole, the matter comes back to the Parole Board.

**Hon PETER FOSS:** That decision of breaching remains with the department.

**Dr Morgan:** The department can take a number of decisions; one is that it can simply send a report to the Parole Board to say that this person has breached the order in the following ways -

**Hon PETER FOSS:** It can choose to not even do that. The problem with all of this is ultimately that the Department of Justice decides whether to breach a person, because a breach is not a breach until they fill in a form saying it is a breach.

**Dr Morgan:** Correct.

**Hon PETER FOSS:** I will give you the other side of this, because I have seen both sides. Taking auto parole, you will not need a new area of the department, because it currently has sentencing management people and whether you liked it or not - and I often did not like it - they had their own policies for who got out and who did not. The documentation that went to the Parole Board was adjusted by their view of the world. I actually tried to shift somebody out of that area about three times, because that person had their own firm views about who should get out and who should not; but they nonetheless used to work it. The second thing about it is the question of the breaching policy, because a breach is not a breach until it is declared to be a breach by a Department of Justice person. The problem we found with this was that the practices could vary, or they could be very slack, or they could be very tight. A person could arrive late because the bus was late, and theoretically could be in breach. A person could be reported as having broken into 12 houses and if he did not put a breach in on it, it was not a breach. In the end the discretion depends, firstly, on

whether the Parole Board approves it - I do not criticise the Parole Board at all because it can only operate on the documents it gets - and if it is a minor offence it will not go through the whole file. Secondly, once the person is out on parole it is entirely in the hands of the Department of Justice whether it totally ignores everything that the person does or whether it comes down on them like a ton of bricks. I do not have a problem with that, but if they want to take responsibility for it that is fine. In the end I do not think it will make much difference. Whether they get out on parole or whether they do not will be up to the Department of Justice - the sentence management people - and whether they go back on a breach again will generally be up to the Department of Justice. If you want to take responsibility for it, that is your lookout.

**Dr Morgan:** Thank you. I will make a couple of comments on that. It is certainly the case that the Parole Board operates largely on files that are produced by the Department of Justice, and the people in sentence management are very important in that role. However, it is not the case that the Parole Board necessarily goes along with what sentence management people say. There are many times when the Parole Board says it will release the person despite what sentence management says, or it will not release the person despite what sentence management says. I take the view that that reinforces the reason for having somebody else having a look at this. There is also an issue, which has not occurred so far, about how sentence management determines what conditions are placed on release. Would that differ from what the Parole Board does? Perhaps the Parole Board is slack and sentence management is tough, or perhaps it is the other way around. I can see disparity occurring between the different groups of offenders for that reason. I fully endorse what you said about the difficulties relating to breach. The Auditor General did a review of this and, as we all know, found that there were wide disparities between different community corrections officers. I could name - but I will not in this forum - which office I would like to be supervised by if I were on parole and which one I would run away from or move address if possible. There are definite problems with that question, but when a matter is reported the Parole Board does have a role in perhaps thinking about what the consequences of that should be.

**Hon PETER FOSS:** If somebody complains that this person has been playing up and the Department of Justice has not breached him, you have the capacity to supervise it.

**Dr Morgan:** I will give you an example. The Department of Justice has the capacity to issue what is called a suspension of parole order. Only the Parole Board can cancel parole. Suspension means that the person's time keeps running, even though the order has been suspended. Cancellation means the order is finished and they cannot be released unless another order is made by the Parole Board. Sometimes it is very difficult to understand why the Department of Justice suspends some people and not others. Sometimes cases will come before the Parole Board where the person has not yet been suspended by the manager, but the Parole Board will say that this person has not been seen for months and the only option is to cancel. Again I accept what you said about this. There are huge difficulties about breach. I understand the department is trying to tighten that up and develop more consistent mechanisms, but I believe that that perhaps reinforces why we need an independent body to supervise and look at those types of issues.

**The CHAIRMAN:** In your written submission you suggest that CEO parole should be limited to automatic release decisions with an independent agency, such as the Parole Board, to be responsible for the discretionary release decisions. As indicated in the last question, the Parole Board has submitted that all parole decisions should be the formal responsibility of the Parole Board. Do you agree with the Parole Board's submission in this regard, or do you remain of the view that discretionary release decisions only should be vested in the Parole Board?

**Dr Morgan:** Perhaps my original submission was trying to steer a middle line. In principle I endorse completely the Parole Board's submission that all the decisions should be the formal responsibility of the Parole Board. In my original submission I was trying to think of a possible middle way, which was to say that if it is an entirely automatic process maybe we can delegate that

to the department, but where there are discretionary elements it should have been for the Parole Board. Either of those would be better than the current proposal, but in principle I endorse the Parole Board's stance.

**The CHAIRMAN:** Your written submission suggests that an independent agency - probably the Parole Board - be responsible for reviewing all cancellations or suspensions of CEO parole orders. In relation to this would you advise the committee of your views on the following -

(a) If CEO parole was vested in the Parole Board, would you still recommend that the Bill include a review process for all cancellations or suspension of CEO parole orders, or does the independence of the board satisfy your concerns?

(b) If CEO parole were to remain a process administered by the Department of Justice only, what type of review process do you suggest should be included in the Bill - for example, a written submission process or a hearing process?

**Dr Morgan:** Firstly, if what is currently called CEO parole becomes a matter for the Parole Board, that will not be a problem, because the Parole Board will deal with breaches of short term parole orders in the same way that it deals with breaches of longer term parole orders. If it is vested in the Parole Board there is no problem. If there is a process whereby we retain CEO parole and it is vested in the Department of Justice, then my preferred model is that the Parole Board should have responsibility over any discretionary matters.
[10.25 am]

In other words, even if the chief executive officer has automatically released the person on parole, a failure to comply or a breach of that order should be the responsibility of the Parole Board at a later stage.

I refer to the question about whether parole applications should be determined by way of hearing or written submissions. Everything the Parole Board does at the moment is done on paper and on files. Although we would like to change the way we do business to some degree, at present we simply do not have the resources to do that. We are looking at video technology and so on. We visit prisons every now and then, but we have no capacity to conduct personal hearings.

The way we do business in Western Australia is utterly different from the way it is done in Victoria, for example. I sat in on Parole Board meetings in Victoria last year. Its parole board regularly calls in parolees and reads the riot act to them. The board visits the prisons and meet prisoners before the parole date. It is actively engaged in the process. Our Parole Board sits and waits for the files to arrive. We usually get the files on a Friday afternoon. I will often get four suitcases of files consisting of around 80 cases that I have to try to read in between my other commitments for a meeting on the following Tuesday or Thursday. That is an example of the current resourcing of the Parole Board.

**Hon PETER FOSS**: I wanted to at least double the number of Parole Boards when I was in government. I do not know how we can function without them.

**Dr Morgan**: We have doubled the number of meetings since you were the Attorney General, but that has just spread the pain.

**Hon PETER FOSS**: We need at least another board. I suspect that probably another four boards are needed.

**The CHAIRMAN**: The Parole Board has submitted that the maximum period for a re-entry release order should be set at six months or 10 per cent of the sentence up to a maximum of six months. Why does the Parole Board propose this limitation on re-entry release orders?

**Dr Morgan**: The Parole Board has taken that out of the Hammond committee report. The Hammond committee, of which I was a member, identified this core problem with non-parole prisoners who ought to be assisted and supervised upon release. The Hammond committee came up

with a rule of thumb that the maximum period for a re-entry release order should be 10 per cent of a prisoner's sentence up to a maximum of six months, because it was not meant to be the same as parole. We could not recommend a longer period, otherwise we would be saying that although the courts made the offenders ineligible for parole, we would give them parole anyway. The idea was to designate a different type of order. Arguments can be had about the proper duration of that type of order. The Parole Board considers that that matter needs further discussion. However, the general rule of thumb seems to be 10 per cent of a prisoner's sentence or up to a maximum of six months. It could be argued that re-entry release orders for some long-term prisoners ought to be applied during the last 12 months or so of their sentence. However, the difficulty with that is that it looks like parole, yet those offenders have been ruled ineligible for parole. There is no particularly clear logic to the Parole Board's decision, but it was a position that seemed to fit within the overall structure of the general proposals.

**The CHAIRMAN**: The Parole Board submits that the criteria in clause 51(2) of the Sentence Administration Bill, which limits re-entry release orders to those offenders who would pose a low risk to the personal safety of people in the community or of any individual in the community, should not be included in the Bill. Before amendments were made in the Legislative Assembly, clause 51 related to work release orders, not re-entry release orders. The Bill amended clause 51 to change the criteria from minimum risk to low risk. The explanatory notes indicate that this change in phrasing is because the Parole Board preferred the term "low risk". Clause 51 was amended in the Legislative Assembly to relate to re-entry release orders. The change in the phrasing remained part of the clause. Can you please advise the committee - this is like a ministerial question - whether it is correct that following the amendment to clause 51 to relate to re-entry release orders, the Parole Board no longer considers the wording of this subclause appropriate. If the answer is yes, could you explain why it is no longer appropriate? Does the Parole Board suggest that clause 51(2) should be omitted from clause 51 or amended?

**Dr Morgan**: The Parole Board's position, my position and indeed the position of the judges to whom I have spoken, is that the current work release order is flawed and the re-entry release order is pretty much the same as the old work release order. Very little has changed. The only difference is that there is less of a focus on work. The basic view is that we would prefer it if the reference to re-entry orders were removed from the legislation. If it remains, we certainly prefer the criterion to be low risk rather than minimum risk. Our preferred option would be not to include re-entry orders in the legislation or that it be completely recast to meet the needs of the people I have just been talking about; that is, the long-term, non-parole prisoners. The difficulty is that if the prisoners must be low risk, nothing will change. Those people who are denied parole by the courts will be the high-risk offenders. It will be almost inconceivable that a person will be denied parole but given a work release order by the Parole Board. If the board did that, it would fly in the face of what the judicial officer had decided at the point of parole eligibility.

**Hon PETER FOSS**: The prisoner might have had a damascene conversion while in jail.

**Dr Morgan**: We have to be careful of those; a lot of them happen in jail. I am not sure whether that fully answers the question. Basically, the position is that we would prefer a new type of order that is geared at a different type of offender. If that is done, reference to low-risk prisoners will have to be removed. Members will have to be prepared to say that they want to release offenders, even if they are high-risk offenders, under supervision orders rather than release them cold turkey at the end of their sentence.

**Hon PETER FOSS**: Some of the work release orders work on the basis that the offender will be released for 12 hours.

**Dr Morgan**: There are different types of orders. For instance, leave of absence from prison, which is sometimes called section 94 activities, means out-of-prison activities. Therefore, the offenders go back to prison. Home leave allows offenders to spend a period outside of the prison but they must

go back. Work release orders mean that offenders live in the community. They live at home and they go to work. If I were inside prison for defrauding the university and I received a work release order, I could live at home and continue to do my job. Every so often I would report and do some gratuitous community-based work.

**Hon PETER FOSS**: Long-term offenders need to be released into the community gradually. They might not be given a work release order and told to live in the community straight away, but they could be given a day release order so that they could be released for a period. That period could be gradually expanded so that by the time they leave prison, they would be able to work and live in the community. This amendment is not the answer to it. It might be the end of all that.

**Dr Morgan**: It is the end of all that. Towards the end of a long-term prisoner's sentence, he should be given home leave and sent to out-of-prison activities. Ideally, the prisoners should be on minimum-security placements.

**Hon PETER FOSS**: That is provided for under the Prisons Act rather than the Sentence Administration Act.

**Dr Morgan**: Yes, but then in the last six months, which is what we are talking about, the prisoner could live in the community subject to supervision and monitoring. It would be exactly as the member conceptualised it. It would be a gradual transition. At the moment we are throwing prisoners straight out of maximum-security prisons. We do not even know whether they have anywhere to live. We hope that Outcare Inc will pick them up, but the community has no guarantee of that. We have no capacity to put any electronic monitoring conditions on them and they are not required to report to any agency upon release.

**Hon PETER FOSS**: A post-release order was contemplated at some stage and that posed all sorts of problems. It was to be added on at the end of a prisoner's sentence. It tended to pick up prisoners who were told they were not eligible for parole. However, somehow we have to get them back into the community without reoffending.

**Dr Morgan**: I understood the purpose of that order. The difficulties were twofold. First, it was six months after the sentence had expired, which would arguably generate some constitutional problems.

**Hon PETER FOSS**: Because they were not sentenced.

**Dr Morgan**: Correct, they were not under sentence any more. Secondly, it was focused more on programs, whereas the Parole Board's angle is that although programs are very useful, ideally, by the time an offender is released, he should have completed most of the programs in prison. The main issue upon release is the monitoring and supervision of the offender.

**Hon PETER FOSS**: Deinstitutionalising.

**Dr Morgan**: That is why we consider the last 10 per cent or six months off the prisoner's sentence is not too much of a concession; rather, we consider that it provides an opportunity for a smooth transition.

**Hon PETER FOSS**: What are you suggesting? You do not like the re-entry release order. What are you suggesting should be in place for non-parole prisoners?

**Dr Morgan**: Basically, as I have outlined, the non-parole prisoners should be eligible for a period of what could be called a re-entry release order, a reintegration order or a community transition order. It does not matter what the name of it is, but it must give prisoners the capacity to work their way down from maximum to medium and finally minimum-security prisons. They should be given the opportunity to have spent time on home leave and then a six-month period during which they would be subject to fairly stringent supervision by the Department of Justice. The Parole Board could administer that; it currently administers work release orders.

**Hon PETER FOSS**: A prisoner has to request parole; he cannot be forced into parole. I am thinking aloud at the moment. Could a prisoner who had a non-parole period commute the remaining five or six months of a prison term to a 12-month supervision order with the consent of the Parole Board?

**Dr Morgan**: I had not thought of that possibility. At least one difficulty with that would be that the 12-month supervision order would take the offender's sentence beyond the sentence imposed by the court.

**Hon PETER FOSS**: But the prisoner would have requested it to be commuted.

**Dr Morgan**: I appreciate that. However, I would have to think through that problem.

**Hon PETER FOSS**: A 12-month supervision order is better than six months in jail.

**Dr Morgan**: I would have to think that through carefully because the difficulty is that if an offender is given a 12-month period that is commuted, what would happen if he breached the order? How much time would he owe?

**Hon PETER FOSS**: That is something you would have to work out.

**Dr Morgan**: Would he owe more time than he started with?

**Hon PETER FOSS**: I imagine he would not. He would owe only the remainder of the six months, but he would use it up as one month of supervision for every two months of jail. If an offender breached the order after two months, he would go back to jail for four months.

**Dr Morgan**: I can see the argument. At the moment I prefer the idea of the defined part of the sentence being the community transition. The Hammond committee recommended that when dealing with long-term prisoners, six months or 10 per cent of a prisoner's sentence with a six-month maximum is not too much time. Indeed, it is the equivalent of what offenders can already receive on a work release order. The problem is simple: work release orders are given to the wrong offenders. The concept of work release is probably quite good, but white-collar criminals do not need work release orders; they do not need training for work. They might well be happy with parole, but they do not need any more than that. The concept of the work release order is much more inherently suitable for the long-term, non-parole prisoners whom we are considering for community transition. The current difficulty is that the Parole Board cannot administer it. Almost every week a case will come before the Parole Board, for example, of a person who has a serious record of violence and who has been denied parole by the courts. These types of prisoners will nevertheless apply for work release orders. The Parole Board is between a rock and a hard place. Does it defy the statute and release the prisoners because it is a good idea for them to have a period under supervision in the community, or does the board leave them in jail for another six months? The prisoners might have already served six or eight years. Should the prisoners be left in jail for another six months, which makes no difference to them? We have to choose the latter option; we have to leave them inside because we cannot release such prisoners.

**Hon PETER FOSS**: The test must be what minimises the risk to the public.

**Dr Morgan**: It would be a much better test to ask whether it would be in the interests of public protection to release the prisoner at that stage.

**Hon PETER FOSS**: Given that they would be free shortly anyway.

**Dr Morgan**: The public protection can be enhanced rather than reduced by supervision and monitoring.

**Hon BILL STRETCH**: Dr Morgan has answered my question in his previous comments. The program to allow low-security prisoners out on work release orders seems very good.

**The CHAIRMAN**: Clause 61 of the Bill, which relates to the cancellation of a re-entry release order, permits cancellation by the Parole Board if the offender is charged with or convicted of an

offence. The same criteria are used with regard to the cancellation of parole orders in clause 44. This formulation does not appear to be a feature of the Sentence Administration Act 1995 with regard to parole or work release orders. The committee has received a submission to the effect that the cancellation of re-entry release orders by the board should not be permitted simply when an offender is charged with an offence, on the basis that the presumption of innocence should be preserved. Can you please advise the committee of the following: do you think -

**Hon PETER FOSS**: Maybe you should give the questions to Dr Morgan so that he can read them.

**Dr Morgan**: Perhaps that would be advisable.

**The CHAIRMAN**: Can you please advise the committee of the following: do you think this criteria with regard to the cancellation of re-entry release orders and parole orders is of concern? From the Parole Board's perspective, are you able to advise the committee whether presently parole orders and work release orders are cancelled when an offender is charged with an offence rather than being convicted of the offence?

**Dr Morgan**: It is very useful to have the questions in front of me. I will answer the questions in inverse order. The Parole Board does not cancel parole or work release orders when an offender is merely charged with an offence. The Parole Board will cancel orders only when a person has breached the terms of the order, for instance, if the offender fails to report. We will also suspend, rather than cancel, a parole order when a person is charged with an offence and is remanded in custody. We have to suspend the parole order under those circumstances for the simple reason that the offender cannot comply with the order; offenders are under 24-hour supervision when in prison. In those circumstances, we suspend the order. I said earlier that the suspension means that the order continues. Therefore, if the offender gets bail, we will lift the suspension and he will be released. We do not cancel parole when a person is charged with an offence. We regard the issue of what to do with the charges as a judicial matter for the magistrate or the judge to decide. If a magistrate has granted bail and we cancel or suspend a parole order simply because the person is charged with an offence, we would undermine that judicial decision.

**Hon PETER FOSS**: The second schedule of the Bail Act provides that a person who is charged with a second offence while on parole or bail for a second genuine offence is not entitled to bail. The net result is that if an offender is charged with a second offence while on bail, his parole order will be suspended and the prisoner would be unlikely to get released.

**Dr Morgan**: That is limited to schedule 2 offences. One of the difficulties with this Bill is that it is not limited to any particular offence; it is applied when a person is charged with any offence.

**Hon PETER FOSS**: It could be a parking offence.

**Dr Morgan**: It could be anything. As far as I know, it is not defined or limited. Presently we do not do that. That partly answers the first question about whether I think this criterion is of concern. I do think it is a concern because it is not the Parole Board's job to undermine or alter judges' or magistrates' decisions about bail. In many cases, after having been charged with an offence, an offender stops reporting to the parole officer or starts taking drugs or whatever. That would give the Parole Board a legitimate reason for suspending or cancelling the order. However, merely being charged with an offence would not be sufficient.

**Hon PETER FOSS**: Often people commit offences because they have started taking drugs in jail and have caught the habit.

**Dr Morgan**: There are issues of major concern. I voiced these concerns with regard to the 1999 legislation. A great deal of power therefore is in the hands of the police. If a person is charged with an offence, it might generate knock-on consequences.

[10.45 am]

Perhaps the other reason I oppose the Bill covering situations in which a person is charged with an offence is that through our legislation we have delegated to community justice service managers the power to suspend orders. This Bill will give them rather than the Parole Board the power to suspend an order if a person is charged with an offence, even if that person has been granted bail. I am not saying they will do that very often, but they might do it. As I have explained, the Parole Board would not take that view.

**Hon PETER FOSS:** Where does it say they can suspend it?

**Dr Morgan**: I am not sure of the section, but the Sentence Administration Act gives the -

**Hon PETER FOSS:** I have found it. It is on the basis of what they can cancel. They can suspend.

**Dr Morgan**: For example, section 66 of the Sentence Administration Act 1995 gives the chief executive officer the power to suspend a work release order.

**Hon PETER FOSS:** It is also in section 69(3) and (4).

**Dr Morgan**: It is less of a problem to delegate to managers the power to suspend in the event of a clear breach of the order. Some, including the Victorians, would argue that that power should never be delegated; that it should always remain a Parole Board power. In 1995 we made the decision to delegate that level of authority. I would not give community justice service managers the power to suspend simply if a person were charged.

**Hon PETER FOSS:** What if he were charged with a second genuine offence?

**Dr Morgan**: In a sense that would take care of itself because the offender has not got bail. The person would be in custody. The period for which he is remanded in custody will run concurrently with the parole order. The parole order will be suspended because the person would have been charged with those offences and put in custody. The issue will arise only if the magistrate grants bail. This seems to allow the Parole Board or the executive to have a different view. I do not think we should be second-guessing or commenting on the appropriateness of bail.

**Hon PETER FOSS:** There is less of a problem with the suspension than with the cancellation.

**Dr Morgan**: I think both are an issue. I do not think a parole order should be suspended or cancelled simply because a person is charged with an offence. The only circumstance in which I think the order should be suspended is one in which the person is charged and remanded in custody. As I say, practically, we have to suspend in those circumstances because the offender cannot comply.

I am sorry; this issue of suspension and cancellation is a bit complicated, but I hope it basically makes some sense to you.

**The CHAIRMAN:** We move on to question 9. At pages 5 and 6 of its submission, the Parole Board sets out the potential difficulties arising from the sentencing adjustment provisions. Can you explain to the committee the problems created by the current sentencing adjustment provisions? If the problems that are foreshadowed are correct, it would assist the committee to understand the potential number of offenders who could be affected by a sentence calculated on the presumption that they will be released on parole as soon as they are eligible. Are you able to advise the committee of the number of offenders who were denied parole by the Parole Board in the past 12 months?

**Dr Morgan**: We have touched on the problems created by the current sentencing adjustment provisions. I say at the outset that I have a generic problem with it. It will be very hard for judges to start imposing shorter sentences at a time when there is public and political pressure on them to be tough. There is a real danger with this. For example, we sometimes try to measure the court's lack of toughness by measuring how far the median sentences fall below the statutory maximum. If there is a general one-third reduction in sentences, the median sentence will fall further below the statutory maximum. That is a political and public perception problem. If I were a judge dealing

with a serious sexual assault case and there were victims in court and a lot of concern, I would find it very difficult to impose a sentence of four years instead of six. The message that the judge gives in court is really important in that regard.

**Hon PETER FOSS:** We could add a third and double the remission.

**Dr Morgan**: We could, but where would truth be?

**Hon PETER FOSS:** Is that not the point?

**Dr Morgan**: That is exactly the problem: If you want to get rid of remission, the judges will have to reduce sentences. The other difficulty I have canvassed in my submissions is that I do not believe enough is being done to get the judges on side. You are asking a huge amount of the judiciary; yet with this and the 1999 legislation I was the one who spoke to the judges. They asked to speak to me because they said they had not been consulted. It does not look good for the success of something like this if the judges are left out of the loop and given something with which they may feel uncomfortable.

**Hon PETER FOSS:** Hammond headed the committee for many years.

**Dr Morgan**: Hammond headed the review of remission and parole; that is true. He was certainly across that. However, this latest set of proposals was not put before the Hammond committee. Like the 1999 legislation, the provisions in this legislation draw upon but are not the same as the recommendations of the Hammond committee. They are different in many respects. There is a need to get the judges on side with those changes.

**Hon PETER FOSS:** The judge most offended by it all was the Chief Justice. He did not agree with Hammond or us at all.

**Dr Morgan**: I do not want to go over past history. There was a difficulty at the time because two sets of Bills were going through the Parliament. One was the sentencing matrix Bill, which the judiciary vehemently opposed, and the other contained the changes to parole and remission. I think it was a little difficult to pick exactly where people stood on those different issues. The issue at present is that we all know what the problem is. If you want truth in sentencing, you will need some kind of adjustment of sentences.

**The CHAIRMAN:** A difficulty I have experienced over the past couple of years in this role is that judges and magistrates tend to value the separation of powers. The opening statements of submissions we have received have been to the effect that legislating is the role of politicians and for them to decide. The judges then present their view. I think we should avoid that path and go down the one you recommend.

**Dr Morgan**: We must have faith at this stage that there will be an adjustment. The technical problems, if I could put it that way, are outlined on page 5 of the Parole Board's submission in the form of a table. That is probably the best way to explain some of the anomalies that might arise with the current proposal.

**Hon PETER FOSS:** The current proposal is the old proposal, which was deemed to be unworkable.

**Dr Morgan**: There have been a lot of different proposals and that has created difficulties.

**Hon PETER FOSS:** I cannot see a difference between the current proposal and the first proposal, which is that the judge works on the basis of how much time the person spends in jail. The problem identified by the judges was the difference between people with and without parole. The judge might end up giving a shorter sentence to a person without parole than he gives to a person with parole. That certainly is a difficulty. The other alternative is that we do not change the system, but we end up with a calculation that no-one can work out. We cannot make change without making a change. Somebody will do better and somebody will do worse as a result of that change.

**Dr Morgan**: Yes, we are simply pointing out certain anomalies. The current Bill has some advantages over the 1999 legislation. The difficulty with the 1999 legislation is that it includes early release orders, which makes the calculations incredibly convoluted and difficult.

**Hon PETER FOSS:** You could just tell them to leave those out.

**Dr Morgan**: The example of an anomaly that is given on page 5 is exactly as Hon Peter Foss has suggested. It is a scenario in which a person who gets parole on a long sentence will get a longer total sentence than the person who is not eligible for parole. The person with parole could end up spending longer in prison. The example we have given is of someone sentenced to what is currently a 15-year sentence. It is very unusual to get that. What is currently 15 years will become either 16 years with parole or 10 years without parole. The judge will try to impose the same custody time as he does at present. The difficulty is that the person who gets parole will do at least eight years in prison and may face eight years on parole. It is a serious offence to warrant 15 years imprisonment. It is quite possible that the Parole Board might not release the offender after eight years. It might keep him in for 16 years, or release him after 14 years with a two-year parole period.

**Hon PETER FOSS:** He might make it out, commit a little breach and be back in again.

**Dr Morgan**: He might be back in for a prolonged period. There are difficulties with this. We could talk around these issues forever and a day. The alternative might be the proposed solution set out on page 6 of the submission, which is that the judiciary should be required to reduce all sentences by a third. In the example, a 15-year sentence would become a 10-year sentence. The recommendation is that the parole period be set at 50 per cent of the total sentence, to a maximum of two years; that is, the period on parole at the end of the sentence would be a maximum of two years. In that example, the non-parole prisoner, who is the worst bet, would get 10 years straight, and the person made eligible for parole would do eight years inside and two years on parole. Hon Peter Foss earlier mentioned the difficulty of explaining and calculating this. Yes, it is difficult, but I do not think it is completely unmanageable.

**Hon PETER FOSS:** There are two problems. One is remission. There seems no point in imposing a sentence if it is instantly taken off. Taking one-third off the total sentence because the offender will never serve that time seems to make some sense. That is the first problem. It is compounded by the fact that nobody ever knows how much time people spend on parole. For a short explanation, everybody used to say it was one-third, one-third and one-third. That applied to all sentences between 12 months and six years. That was correct for the majority of sentences because very few people receive a sentence of over six years. The difficulty is that the cases in which people did not understand the sentence were the cases in which it really mattered. If somebody received 15 years, we would assume that he would be in prison for 15 years, but in fact he would be in for 10 years, which is two-thirds of the sentence, and he would get two years off on parole.

**Dr Morgan**: Or he would do eight years inside and then two on parole.

**Hon PETER FOSS:** Yes. That was the net result. The problem is the public never understood that. It might have been true sentencing but nobody had the faintest idea what people were being sentenced to. Another question that occurs to me - this was considered by the Hammond committee - is how much parole a person should be given. Would it make sense for the court to determine that someone is eligible for parole and fix the date that person will be eligible for parole, as long as it is not more than 50 per cent of the sentence? One of the problems is that if there were completely free rein on when someone became eligible for parole, a person could be given a 10-year sentence and made eligible for parole after one year. That seems another possibility. Under this proposal there would be truth in sentencing because the judge would have to say at the time of sentencing that he was sentencing the offender to 10 years, and he would only be eligible for parole after nine years. However, that might lead to an increase in the time spent in jail because judges may increase the non-parole period by about 50 per cent. What are your comments?

**Dr Morgan**: I suppose I still prefer the idea of judges setting just the head sentence, and having the non-parole periods set by a formula.

**Hon PETER FOSS:** Why is that?

**Dr Morgan**: I think that if we are not careful, we will end up with disparity. At the moment there is a lot of concern - I think much of it is overstated - that judges have different tariffs. Some judges are softer or tougher than others. If the judges decided not only the head sentence but also the non-parole period, those issues would be compounded. This is why the Hammond committee did not want the judiciary to set the minimum term. I also have other concerns about that. I cannot see what a judge would think about when setting the minimum term that he did not consider when he set the head sentence. The difficulty is that it is double-dipping. The person who has been to the right school and done all the right things in his life and has many mitigating factors on his side would get a double benefit. I think that is unfair. Similarly, the person who has not been dealt a particularly good set of cards in his life would potentially receive a double punishment. Those kinds of issues make me feel more comfortable with a set period, so that all the judges have to do is focus on one question - how long?

**Hon PETER FOSS:** It sounds like mandatory sentencing.

**Dr Morgan**: I will not be drawn into that one. I am not sure what I can add to what is there, except to say that it will ultimately be your call as politicians as to which way you go on this. If you go with the current proposal, there will be some anomalies. If you are prepared to wear those, fine. The Parole Board's proposal may remove some of those anomalies, but it may create some difficulties of understanding. It is not for me to say. I am simply putting those issues on the table and saying that that is the problem you have.

**Hon PETER FOSS:** Another aspect of the current method that concerns me is that we will always have to make the translation. The good thing about taking one-third off the sentences is that it would be like changing from the imperial to the metric system. In several years we will simply have a new tariff. If we go by the current method, I cannot see how we will ever escape having to do the calculation.

**Dr Morgan**: Do you mean if you go on the current -
[11.05 am]

**Hon PETER FOSS:** There will always have to be the calculation. The judge would work it out. I am actually giving you what was 10 years without parole and then working it out. I cannot see how you could ever get to work out the case with a 10-year sentence with or without parole because they will be all over the place. One will have to ensure those anomalies remain.

**Dr Morgan**: I would agree with you on that. I think the answer lies in a one-third reduction. The difficulty with an automatic one-third reduction across the board - this was a problem generated in the 2000 Act - is that 15 years would become 10. If it were set at 50 per cent, it would suddenly be down to only five years. This is why the Parole Board's proposal has some merit.

**Hon PETER FOSS:** It does not solve the problem.

**Dr Morgan**: It does not solve that problem, but I think the legislation contains a provision that says that the judiciary should be explaining in court what the sentence will mean. One would hope that the media does not just walk out when 10 years is proposed, but will sit there and hear that 10 years means eight years inside prison and two years on parole.

**The CHAIRMAN:** They will walk out of court and talk to people and say, "How many years do you think it is?"

**Hon PETER FOSS:** And they will say "About 50 per cent of the time stated."

**The CHAIRMAN:** We will move to question 11 because I think you have answered 10. Question 11 seeks clarification. In your submission relating to the abolition of sentences of six months and less, under the heading "Actual Custody Time", you submit that -

> Whilst the minimum paper sentence will double, the minimum custody time has increased closer to three-fold. For example, the minimum custody time on a four-month sentence is currently 1.3 months. On a seven-month sentence, it will be 3.5 months.

However, the committee understands that on a four-month sentence, an offender would currently be in custody for two-thirds of the sentence based on a one-third remission. This is because there is currently no parole for sentences of less than 12 months, and home detention is not considered to be a release from custody. On this analysis, it would follow that the minimum custody time on four-month sentences is currently 2.6 months, and this will be increased to 3.5 months on a seven-month sentence. Can you please comment on this analysis?

**Dr Morgan**: I will firstly clarify what home detention means. The comment outlines that "home detention is not considered to be a release from custody". In fact, people on home detention are living at home but are subject to electronic monitoring usually and the other sorts of conditions that apply to parole. So it is actually a release from custody; they are not in prison. Therefore, if they get home detention, they are subject to electronic monitoring but are actually at home. If you get a three-month sentence at the moment, you could be out on home detention after one month; that is, one month inside, one month on home detention and the last month be remitted. Therefore, it is a release from custody in that sense. It is fair to say that most prisoners do not want home detention. Many prisoners say they would rather do their time inside than at home because it is horribly intrusive on their families. One has major problems: if a bloke beats his wife, the last thing to do is put him on home detention and lock him up in the house and generate more problems. Many prisoners decline home detention, but in principle they can be out of custody after one month. Even if they do not go for home detention - as pointed out in the question - they will be out after two months because of remission.

Basically, all I say in my submission is that, in effect, the minimum actual custody time now will be three and a half months. Therefore, it is a very significant increase. Does that answer the concerns of the committee?

**The CHAIRMAN:** It does. We will move to question 13, which is the last written question.

**Hon PETER FOSS:** They are still correct on the basis that it increases the amount of time, does it not? It is virtually still a nine-month sentence to have that person stay in jail for the same amount of time - that is, a seven-month sentence if you take one-third off.

**Dr Morgan**: Are we talking about question 11?

**Hon PETER FOSS:** Previously, a sentence of three months was still a sentence of three months. One-third might be taken off. If one-third is taken off now, somebody could not be sentenced for six months unless you have been sentenced to a sentence of six months unless it were a sentence of nine months.

**Dr Morgan**: In effect, we are abolishing sentences of nine months or less.

**Hon PETER FOSS:** Whether they are in custody or not does not matter.

**Dr Morgan**: That might cover some fairly serious stuff, such as assaults, for example, that might get six or nine months at the moment. If a person currently gets nine months for an assault, the Bill seems to state that the sentence must be cut by one-third.

**Hon PETER FOSS:** You cannot do that.

**Dr Morgan**: You cannot give him six months. An amendment was made in the lower House that one cannot give a sentence of six months, but if you really think they should go to prison, you can give them more. It was moved by Sue Walker. Therefore, a nine-month sentence would not be

reduced to a non-custodial sentence, but would become a sentence of seven months. Again, it is confusing. However, the purpose of that provision makes some sense. One might be saying that some fairly serious offenders are getting nine-month sentences, but should go to prison. I am talking about some domestic violence-type cases, for which nine to 12 months is not an uncommon sort of sentences.

**Hon PETER FOSS:** It would be a gloss on the reduction of one-third; that is, in no circumstances would it result in the person not going to jail, but you think they should go to jail.

**Dr Morgan**: My personal view is that I would not abolish six-month sentences. If it is left as it is with three-month sentences abolished, this would not be a problem. What is now nine months would simply become six. It would not be nine becomes six; I cannot use six, so I will give seven.

**The CHAIRMAN:** Question 13: in your submission you set out problems with clause 88 of the Bill. It would be of assistance to the committee to explain your understanding of how section 88 of the Sentencing Act 1995 currently operates; the problem with the wording arising out of R v Mitchell, which appears to be the impetus of this amendment; the problem with the operation of the section; and the option you see to resolve the problems with this section.

**Dr Morgan**: In a sense, clause 88 is intended as a tidying-up provision. I will have to refer again to my notes as I have not looked at this for a little while. Basically, in the courts, probably in the majority of cases, the offender is being convicted for more than one offence - we call them multiple-offenders. When imposing terms of imprisonment, the court has two options open to it: basically, to make those sentences concurrent or make them cumulative. Concurrent sentences run together; cumulative sentences run one after the other. However, some difficulties arise with that. Sometimes the courts take the view that if sentences were made cumulative, the person would end up serving too much time. It can be argued, for instance, that if a person is in court for 15 burglaries, each one deserves a sentence of a year. They are each separate incidents and separate premises. It could be said that a year be given for each burglary, and add them all up. That is a 15-year sentence. The courts feel very uncomfortable with that notion because they think that 15 burglaries cannot be equated with, for example, a couple of extremely serious sexual assaults, which might also attract a 15-year sentence.

**Hon PETER FOSS:** Or even one.

**Dr Morgan**: Indeed. That is why they have tended in the past to reduce the sentences. In that type of situation, they say we will make five of them cumulative to give a total of five years, and the rest can run concurrently with those five. They have fiddled the maths in the past to get a result that seems about right. If that does not sound very scientific, nonetheless, that is basically how it operates.

The purpose of the Sentencing Act in 1995 was to allow courts to make what were called “partly cumulative sentences”. I think the language is right. I have not looked at it all for a while. One example that might be relevant in this context would be two cases of sexual assault, each of which the court believes merit a six-year sentence. Under the traditional sentencing rules, the court has two options: it gives 12 or it gives six. Six is too low, and they may think 12 is a bit high because murderers may get less than that. Therefore, a lot of these things are pegged by what the most serious offences may attract. The purpose of the 1995 Act was to give the courts the power to make sentences partly cumulative, but the provisions are very convoluted. I will not go through them today. Committee members can try to read them and work them out.

The court will specify the period of the first sentence to be served before the partly cumulative sentence is to commence. In other words, the court must get into the calculations of when the person might be released on the first sentence. If the first sentence is six years for sexual assault, the court must work out when might the person be released. They have been saying that they might be released after two years on parole. Nobody seems to have taken work release into account,

which in theory they might get - in practice they will not. However, they are eligible for work release after 18 months in the legislation.

**Hon PETER FOSS:** The problem is that one cannot make it less cumulative than that. They will not get it but it affects the court.

**Dr Morgan**: It affects the court. I suggest that in terms of the questions posed there: how does section 88 of the Sentencing Act currently operate? First, it hardly operates. The courts hardly use this provision. They go back to the old way of fiddling the maths, if I can put it that way, to get the result. They do that because they do not want to get into this business of working out what period the person might serve before they might be released on the first sentence.

**Hon PETER FOSS:** And you work back from the totality principle.

**Dr Morgan**: Yes. It would be easier if they said "We think six years on count one and six years on count two, but we want them to be partly cumulative so that is the total sentence of 10 years." Does that make sense? That would be a perfectly simple way to do it but the legislation does not allow that. It says that one must set the date at which the person moves onto the second sentence. That date can be no later than the first date upon which they might be released from the first sentence. You can understand why the courts do not do that. They do not want to buy into all this stuff about parole calculations. It might be worth the committee's time to speak to members of the District Court, who have the most direct dealing with this matter. Most of them will not use it. In answer to your question about how it is currently operating, it largely does not.

The second question is the problem with wording arising out of R v Mitchell, which appears to be impetus for the amendments. I am still confused what all that was about, and you would probably need to ask Malcolm Penn or someone else in the Department of Justice about that problem. In terms of the options to resolve the problems with the section, it is quite simply in theory. There may be a hidden problem that I have not seen. However, I cannot see why the court cannot say that each of these sexual assault offences get a sentence of six years, but the sentencing will be partly cumulative so that the total effect is a 10-year sentence.

**Hon PETER FOSS:** How do you know which ones they are serving at the time they breach parole?

**Dr Morgan**: That is probably why the sentence information people get worried about it. I cannot see the problem.

**Hon PETER FOSS:** I am not sure that is the reason.

**Dr Morgan**: That is probably where it comes from, but does it really matter?

**Hon PETER FOSS:** You like to know why you are holding someone in jail. They are held on a conviction, not on an overall sentence. I understand what you are saying. I can see that they would like to know what that person is in for, and the particular conviction. It is one of those two.

**Dr Morgan**: I understand that. You might need to talk to Malcolm Penn or somebody involved in sentencing.

**Hon PETER FOSS:** I do not see the problem with being held for both of them.

**Dr Morgan**: The difficulty in a sense is that the tail is wagging the dog. What the court wants is simple: the tail - which is "calculating what sentences mean" - has assumed such significance that it actually impinges on our ability to give the courts a simple outcome.

**Hon PETER FOSS:** If the person is in jail beyond the shortest period they were sentenced for, and they are deemed to be held on a longer sentence, they should be held on bail for anything beyond that shorter period.

**Dr Morgan**: It sounds okay. There may be a hidden problem with it. I do not understand fully the issues with the Mitchell case. I cannot see that changing this from being partly cumulative to partly concurrent does anything.

**Hon PETER FOSS:** I find it hard to understand.

**Dr Morgan**: I cannot say any more than that, really.

I did not address one matter the committee asked me about; namely, question 9(b). We did not discuss that aspect. How many offenders are knocked back for parole? The answer is that I am not sure. If the committee were to contact the Parole Board, it would keep such records. Part of the difficulty in coming up with numbers is the point I made earlier: the Parole Board deals with a certain number of cases, and there are also a number of auto releases for which the secretary releases the order. At every Parole Board meeting, out of 20 or 30 people eligible for release on parole, the board will probably knock back maybe 50 per cent of cases. A significant number are processed automatically without reference to the board. I will clarify what I mean when I say that we "knock them back". The committee used the words "denying parole" in the question, but the Parole Board has a number of options available to it. Denial means "never release on parole". More commonly, we defer parole. If somebody has a six-year sentence and a non-parole period of two years and is coming up for parole, the board is unlikely to say at a two-year assessment date that it will never look at the case again. We are more likely to put it off, defer it, and look at the case in another 12 months. It is not just Parole Board practice - it is dictated by the Supreme Court decisions. We cannot just write people off on the first date. We must keep their cases under review. Therefore, the question unfortunately is not as simple to answer as I would have liked. The Parole Board secretary will be able to provide information. The annual Parole Board report is a public document and contains information on the percentage of cases of parole denied or deferred.

**The CHAIRMAN:** Thank you very much for appearing at the hearing. We appreciate your candour.

**Committee adjourned at 11.23 am**