

BETWEEN:



GREGORY JOHN YATES
Appellant

and

THE QUEEN
Respondent

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APPELLANT'S SUBMISSIONS

Part I:

I certify that this submission in a form suitable for publication on the internet.

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Part II:

The issues that the Applicant contends that the Application presents are:

- a) The appropriateness of the making of the order pursuant to s662 of the *Criminal Code* in circumstances where the offender is intellectually disabled and has little relevant prior criminal history.
- b) Whether in the circumstances of his case and having regard to the criteria outlined in s.662 of the *Criminal Code* the Applicant should have been made the subject of such an order.
- c) The appropriateness of the use of s.662 of the *Criminal Code* to obtain an outcome relating to the length of parole that the offender may be expected to complete.

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Part III:

I certify that I have considered whether any notice should be given in compliance with s.78B of the *Judiciary Act 1903*. I have concluded that such notice is not required in the circumstances of this matter.

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Part IV:

Court at first instance:

No 1112 of 1986 CLD No 11614186. *Regina v Yates*

Court of Criminal Appeal:

Yates v The Queen (1987) 27 A Crim R 361 (CCA No 35 of 1987) (1987 WASCA Lib No. 6809 A-C).

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Part V:

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- a) On 7 August 1986 the Applicant, a 25 year old intellectually disabled man, was charged with one count of deprivation of liberty and one count of aggravated sexual assault (s.333 and s.324E of the *Criminal Code*).
 - b) The facts of the charges were that the Applicant had detained a 7½ year old girl in a female toilet at a suburban shopping centre and had sexually assaulted her by putting his penis in her mouth. He ejaculated into her mouth, and thereafter hit her over the head. She managed to run away from him. The circumstances of aggravation for the s.324E offence were the victim's age, and the assault upon the victim (s.324H(a) and (e) *Criminal Code*).
 - c) Whilst the charges were the subject of pleas of not guilty and proceeded to trial on 11 February 1987, the Appellant changed his plea to one of guilty to both charges on 12 February 1987 in the course of giving evidence in chief.
 - d) On 13 February 1987, the Applicant was sentenced to seven years imprisonment in respect to each count and at the expiration of those terms the Applicant was ordered to be detained at the Governor's pleasure in accordance with the provisions of s.662 of the *Criminal Code*. The seven year terms were ordered to be served concurrently.
 - e) The Applicant appealed against his sentence on the basis that the seven year finite term failed to reflect time he had spent in custody awaiting trial, and against the making of the order pursuant to s.662 of the Code.
 - f) On 29 July 1987, the Court of Criminal Appeal unanimously upheld the appeal in the first part and reduced the finite term to six years and three months, but the majority would not interfere with the order made by the sentencing Judge pursuant to s.662 of the Code.

30 **Part VI:**

- a) The Applicant submits that the order made pursuant to s.662 and upheld by the majority on appeal was in error in that the order was not justified having regard to the antecedents, character, age, health or mental condition of the Applicant, and the nature of the offence.
 - b) The Applicant submits that there were no "special circumstances" pertaining to this case that would justify indefinite detention by way of a s.662 order.
 - 40 c) The Applicant's sentence predated the decision of this Court in ***Veen v The Queen*** (No.2) (1988) 164 CLR 465 ("***Veen*** No. 2").
 - d) At the time that the Applicant was sentenced, reference was made to ***Tunaj v R*** (1984) WAR 48 ("***Tunaj***"), ***Ciciora v R*** (1986) CCA (WA) (unrep) Del 3/2/1986 Lib No. 8691047 ("***Ciciora***") and ***Veen v The Queen*** (1979) 143 CLR 458.
 - e) The Applicant's case predated ***Veen*** (No. 2), ***Chester v R*** (1988) 165 CLR 611 ("***Chester***") and ***McGarry v The Queen*** (2001) 207 CLR 121 ("***McGarry***").
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- f) The fundamental principle of proportionality in sentencing does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender (**Chester; Veen** No. 2).
- g) Put at their highest, the materials and expert reports available to the Court at first instance and to the Court of Criminal Appeal indicated that:
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- the Applicant was intellectually disabled;
 - the Applicant had prior convictions, mainly of a minor nature and none involving violence;
 - the Applicant had only once previously been charged with an indictable offence (gross indecency pursuant to s.188 of the *Criminal Code*);
 - the psychiatric assessment was equivocal, as the author, Professor German, only had "a few minutes" with the Applicant;
 - the Applicant had a history of poor social functioning, primarily due to his disability;
 - the Applicant was at risk of reoffending; and
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- the Applicant's disability meant that he required a considerable amount of support and supervision within the community to function effectively.
- h) Notwithstanding that the Applicant's offences were of a particularly serious nature, there was no cogent evidence available to either of the Courts below that the Applicant's circumstances were so exceptional as to indicate, and firmly indicate, that having regard to his antecedents, character, age, health, mental condition, the nature of his offending and any special circumstances, an order pursuant to s.662 should be made.
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- j) Orders pursuant to s.662 of the *Criminal Code* are only appropriate in exceptional circumstances where a danger to the public is probable (**Tunaj; Ciciora**).
- k) Subsequent decisions of this court (**Veen** No. 2; **McGarry; Chester**) have followed this approach.
- l) The issue to be decided therefore was whether the Applicant's circumstances were so exceptional as to indicate, and firmly indicate, that the Applicant had shown himself to constitute a danger to the public.
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- m) With respect to the learned sentencing Judge and the majority in the Court of Criminal Appeal, there was no cogent evidence of the Applicant's danger to the public. The Applicant's previous offending did not indicate any prior violence and was primarily in the nature of "nuisance" type offending, and his intellectual disability could not, of itself, justify a finding that he was a danger to the public and that his detention was demonstrably necessary to protect society from physical harm (see **Chester** at p.666).
- n) In sentencing the Applicant at first instance, the learned sentencing Judge
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- stated:

“It may be that you can receive and accept counselling and treatment for your unfortunate deviant conduct whilst you are incarcerated and in that event earn your release upon a reasonable period of parole to be served within the community. That will be up to you.” (transcript p 125)

- 10 o) In the Court of Criminal Appeal, Brinsden J, with whom Smith J agreed, stated that “Counsel for the Applicant, as well as the experts who have examined him, have expressed little confidence that he could undergo a long period of parole without reoffending. The provisions of s.662 coupled with the *Offenders Probation and Parole Act 1963* enable the Parole Board to fix a term of parole more readily suitable to his requirements than would be so if a minimum term had been fixed which could not have been less than three years” (judgment p.10).
- p) In his dissenting judgment, Burt CJ quoted the remarks of the learned sentencing Judge at paragraph (k) above and continued:
- 20 “On the facts it seems that the Applicant’s “deviant behavior” is caused by factors including brain damage which are permanent. They are beyond the reach of treatment. Hence when the Applicant has finished his sentence less remissions his condition is likely then to be as it is now and if that condition now justifies detention to protect the public it will continue to justify detention for evermore. And with respect, that can not be right. (see *Veen v R (No 1)* (1979) 143 CLR 458 at p.468 per Mason J and at pp 494 – 495 per Murphy J).”
- 30 q) The learned sentencing Judge and the Court of Criminal Appeal had concerns that the Applicant, because of his intellectual disability, may struggle to successfully complete a period on parole.
- r) In imposing an order pursuant to s.662 of the *Criminal Code* at first instance, and upholding it by a majority on appeal, the learned sentencing Judge and the majority of the Court of Criminal Appeal commented and considered that an indeterminate sentence would benefit the Applicant by affording him a shorter parole term.
- 40 s) The reasoning behind this calculation was that, at the time, had the Applicant been sentenced to a seven year term and had a minimum term been set, s.37 *Offenders Probation and Parole Act 1963* (as it was between 7/2/1985 and 15/6/1988) would have resulted in a 3½ year parole period to be served.
- t) Had the Applicant been paroled pursuant to an indeterminate sentence, s.41(c) of the *Offenders Probation and Parole Act 1963* provided that the parole period would not exceed two years.
- 50 u) Insofar as the learned sentencing Judge and the majority of the Court of Appeal were persuaded that an indeterminate sentence would benefit the Applicant by affording him a shorter parole period they were in error. As Burt CJ states in his judgment “I note that essentially pragmatic idea simply to put

it to one side. The considerations underlying it have nothing to do with the policy underlying s.662 of the *Criminal Code* and the use of that section for that reason cannot be sustained.”

- v) The Applicant submits that the sentence of six years and six months imprisonment was adequate punishment for the Applicant’s offending and the order pursuant to s.662 at the expiration of that term was not justified and should be quashed.

10 **Part VII:**

See Annexure 1

Part VIII:

The Applicant applies for orders that:

- 20 (a) The time period prescribed in Rule 41.02.1 of the High Court rules commencing a special leave application be dispensed with.
- (b) Special leave to appeal from part of the judgment of the WA Court of Criminal Appeal given on 29 July 1987 be granted.
- (c) The appeal against part of the judgment of the WA Court of Criminal Appeal given on 29 July 1987 be upheld.
- (d) The order made against the Applicant pursuant to s.662(1)(b) of the Criminal Code be quashed.

30 **Part IX:**

I estimate that the presentation of the Appellant’s argument should be approximately 30 minutes.

Dated:


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ANNEXURE 1

No.	Description of Document	Enacted	Repealed	Repealed By
1.	s.43 <i>Police Act 1892</i> (WA)	18/3/1982	1/7/07	s.64 No. 59 of 2006
2.	s.184 <i>Criminal Code</i> (WA)	30/12/1913	21/9/2002	s.35(1) No. 3 of 2002
3.	s.333 <i>Criminal Code</i> (WA) *penalty amended to 10 years 21/10/1960	1/1/1914	14/2/1991	s.14 No. 101 of 1990
4.	s.324E <i>Criminal Code</i> (WA)	1/4/1986	1/8/1992	s.6 No. 14 of 1992
5.	s.324H <i>Criminal Code</i> (WA)	1/4/1986	1/8/1992	s.6 No. 14 of 1992
6.	s.662 <i>Criminal Code</i> (WA)	24/12/1918	4/11/1996	s.26 No. 78 of 1995 *1
7.	s.37 <i>Offenders Probation and Parole Act 1963</i> (WA)	17/02/1986	15/6/1988 4/11/1996	s.12 No 129 of 1987, s.77 No 78 of 1995 *2
8.	s.41(1)(c) <i>Offenders Probation and Parole Act 1963</i>	1/10/1964	15/6/1988 4/11/1996	s.12 No 129 of 1987, s.77 No 78 of 1995 *2

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¹ Indeterminate sentences are now legislated for in the *Sentencing Act 1995* s.98-101

² Transitional provisions for parole on indeterminate sentences are contained in the *Sentencing (Consequential Provisional) Act 77* of 1995 at s.91

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³ Copies of provisions regarding the applicable statute provisions are annexed hereto and marked Annexure 1

ANNEXURE 1

1. s.43 Police Act 1982 (WA)

- (1) Any officer or constable of the Police Force, without any warrant other than this Act, at any hour of the day or night may apprehend any person whom he may find drunk, or disorderly, or using profane, indecent, or obscene language, or who shall use any threatening, abusive, or insulting words or behaviour, with intent or calculated to provoke a breach of the peace, in any street, public vehicle, or passenger boat; and also any person who shall ride or drive on or through any street, so negligently, carelessly, or furiously that the safety of any person may thereby be endangered; and also any person who shall cruelly or wantonly beat, ill-treat, overdrive, overload, abuse or torture any living thing, or cause the same to be done, and also any person who shall convey or carry any living thing in any street, in such a manner or position as to cause unnecessary pain or suffering, and all persons whom he shall have just cause to suspect of having committed or being about to commit any offence, or of any evil designs, and all persons whom he shall find or who shall have been lying or loitering in any street, yard, or other place, and not giving a satisfactory account of themselves, and shall detain any person so apprehended in custody, until he can be brought before a Justice, to be dealt with for such offence, or until he shall have given bail for his appearance before a Justice, in the manner hereinafter mentioned.

- (2) Any officer or constable of the Police Force, without any warrant other than this Act, at any hour of the day or night, may apprehend any person whom he shall have just cause to suspect of having committed an offence in any place other than the State which, if committed in the State, would be an indictable offence (including an indictable offence that may be dealt with summarily) and shall detain any person so apprehended in custody, until he can be brought before a Justice to be dealt with according to law, and the apprehension of a person pursuant to this subsection shall not be taken to be unlawful only by reason that it subsequently appears or is found that the person apprehended did not commit the offence alleged.

CRIMINAL INVESTIGATION (CONSEQUENTIAL PROVISIONS) ACT 2006

PART 12 – *Police Act 1892* amended

Division 1 – Amendments

PART 111 – Special constables

SECTION 64

Part V repealed

Part V is repealed

2. s. 184 Criminal Code (WA)

184. Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years, with or without whipping.

ACTS AMENDMENT (LESBIAN AND GAY LAW REFORM) ACT 2002 (NO. 3 of 2002)

PART 7 – The Criminal Code

SECTION 35

Section 184 repealed and consequential amendment to the Evidence Act 1906

(1) Section 184 is repealed.

3. s.333 Criminal Code (WA)

333. Any person who unlawfully confines or, detains another in any place against his will, or otherwise unlawfully deprives another of his personal liberty, is guilty of a crime and is liable to imprisonment with hard labour for ten years.

CRIMINAL LAW AMENDMENT ACT 1990 Pt. 2 No. 101 of 1990

Sections 332 and 333 repealed and sections substituted

SECTION 14

Sections 332 and 333 of the Code are repealed and the following sections are substituted.

4. s.32E Criminal Code (WA)

Aggravated sexual assault

32E Any person who sexually penetrates another person with the consent of that person and in circumstances of aggravation is guilty of a crime and is liable to imprisonment for 20 years.

ACTS AMENDMENT (SEXUAL OFFENCES) ACT 1992 No. 14 of 1992

PART 2 – THE CRIMINAL CODE

Chapter XXXI inserted and consequential amendments

6.(4) Chapter XXXIA of the Code is repealed.

5. s. 324(H) The Criminal Code (WA)

Nature of circumstances of aggravation

324H. For the purposes of sections 324C and 324E “circumstances of aggravation” means circumstances in which -

- (a) at or immediately before or immediately after the commission of the offence, the offender does bodily harm to any person;
- (b) at or immediately before or immediately after the commission of the offence, the offender is armed with any dangerous or offensive weapon or instrument or pretends to be so armed;
- (c) at or immediately before or immediately after the commission of the offence, the offender does an act which is likely seriously and substantially to degrade or humiliate the victim;
- (d) at or immediately before or immediately after the commission of the offence, the offender is in company with another person or persons; or
- (e) the person assaulted or sexually penetrated is under the age of 16 years or is of or above the age of 60 years.

[Section 324H inserted by No. 74 of 1985 s.8; amended by No. 70 of 1988 s.30]

ACTS AMENDMENT (SEXUAL OFFENCES) ACT 1992 No. 14 of 1992

PART 2 – THE CRIMINAL CODE

Chapter XXXI inserted and consequential amendments

6.(4) Chapter XXXIA of the Code is repealed.

6. s.662 Criminal Code (WA)

662 When any person is convicted of any indictable offence, not punishable by death (whether such person has been previously convicted of any indictable offence or not), the court before which such person is convicted may, if it thinks fit, having regard to the antecedents, character, age, health, or mental condition of the person convicted, the nature of the offence or any special circumstances of the case:

- (a) direct that on the expiration of the term of imprisonment then imposed upon him he be detained during the Governor's pleasure in a prison; or,
- (b) without imposing any term of imprisonment upon him sentence him to be forthwith committed to a prison, and to be detained there during the Governor's pleasure.

SENTENCING (CONSEQUENTIAL PROVISIONS) ACT 1995 No. 78 of 1995

Other amendments

SECTION 26

The Code is amended as set out in the Table to this section

TABLE

s.662 Repeal the section

37 Offenders Probation and Parole Act (as at between 17/2/86 and 15/6/88)

(1) Subject to subsection (2), where a person is sentenced to be imprisoned for an offence, the court-

- (a) if the term of imprisonment is not less than 12 months and the court considers that the nature of the offence or the circumstances of its commission or the antecedents of the convicted person or any of those things considered together renders the fixing of a minimum term appropriate; or
- (b) if the term of imprisonment imposed is less than 12 months and the court considers that there are special circumstances that justify the court doing so,

may, as part of the sentence fix a minimum term, being a lesser term than the term of imposed, at the expiration of which minimum term the convicted person shall be eligible to be released on parole.

(2) The Court shall not fix a minimum term in respect of a term of imprisonment imposed-

- (i) on an habitual criminal if, at the expiration of that term of imprisonment, he is to be detained during the Governor's pleasure in a reformatory prison; or
- (ii) on a person if, on the expiration of that term of imprisonment, he is to be so detained otherwise than as an habitual criminal; or
- (iii) on a person, for life whether with or without hard labour.

(3) Where a person is before a court to be sentenced upon convictions of two or more offences that court, notwithstanding that it sentences the person to be imprisoned in respect of all or any of those offences for which he is convicted and is then to be sentenced, shall not fix a minimum term in respect of each of the offences for which he is sentenced to be imprisoned but if the court is of opinion that a minimum term should be fixed in respect of those offences, it shall fix a minimum term in respect of the aggregate period of imprisonment the person shall be liable to serve under all the sentences then imposed.

(4) Where a person is convicted by a court of one or more offences and is sentenced to be imprisoned by the court for the offence or offences, if-

- (a) the court directs that the term or terms of imprisonment then imposed by it in respect of the offence or offences shall take effect cumulatively with a term or terms of imprisonment that the person is then undergoing or liable to undergo and in respect of which no minimum term has been fixed; and
- (b) the aggregate period of imprisonment that consequently remains to be cumulatively served by the person after the court so directs, amounts to not less than twelve months,

the court, subject to subsection (2) of this section, and if the court considers that the nature of the offence or offences or the circumstances of its or their commission or the antecedents of the convicted person or any of those things considered together renders the fixing of a minimum term appropriate, may fix a minimum term in respect of the aggregate of the terms of imprisonment that the court so directs are to take effect cumulatively.

(5) Where a person is convicted of one or more offences by a court of petty sessions and is sentenced by the court to a term of imprisonment for the offence or offences and the circumstances are such that subsection (4) applies to empower the court in its discretion to fix a minimum term, the court, if it does not fix a minimum term pursuant to that subsection, shall endorse the appropriate court record accordingly.

(6) Where a court of petty sessions fails to comply with a requirement imposed on it by subsection (5), the court shall be deemed to have fixed a minimum term of one-half of the aggregate period of imprisonment referred to in subsection (4).

(7) This section, as amended by the Offenders Probation and Parole Amendment Act (No. 2) 1985, applies to persons who, whenever convicted, are sentenced to imprisonment after the coming into operation of the Act.

37A

In fixing a minimum term under this Part in respect of any term of imprisonment, the court shall have regard to the part, if any, of the term of imprisonment that would, in the ordinary course of events, have been remitted pursuant to section 29 of the Prisons Act 1981 if the application of that section had not been excluded by this Act and the court shall not fix the minimum term to extend beyond the date at which the prisoner in respect of whom the minimum term is being fixed would have been eligible for release under that section.

12. Sections 37, 38, 39 and 40 of the principal Act are repealed and the following headings and sections are substituted—

*Division 5—Eligibility for parole after
service of part of term of imprisonment*

Effect of minimum terms previously fixed

37. Notwithstanding section 12 of the *Acts Amendment (Imprisonment and Parole) Act 1987*—

- (a) the repeal of this section as enacted before the commencement date does not affect a minimum term fixed or deemed to have been fixed under or by this Act as enacted before the commencement date;
- (b) section 40 as enacted before the commencement date and any Rules of Court made under section 40 (3) as so enacted, shall continue to have effect in relation to the purported fixation of a minimum term under this Act as enacted before the commencement date; and
- (c) a person who has been sentenced to a term of imprisonment in respect of which a minimum term was fixed is eligible to be released from prison on parole at the expiration of the minimum term.

Parole eligibility by order of the court

37A. (1) Where a court sentences a person convicted of an offence to a term of imprisonment the court may, if it considers that the making of an order under this subsection is appropriate, order that the convicted person be eligible for parole.

(2) Where an order is made under subsection (1) in respect of a term of imprisonment the convicted person is eligible to be released from prison on parole—

- (a) where the term is not more than 6 years—after having served one-third of the term; or
- (b) where the term is more than 6 years—after having served 2 years less than two-thirds of the term.

(3) In determining whether the making of an order under subsection (1) is appropriate the court may have regard to all or any of the following—

- (a) the nature of the offence;
- (b) the circumstances of the commission of the offence;
- (c) the antecedents of the convicted person;

- (d) circumstances which are relevant to the convicted person or which might, in the opinion of the court, be relevant to the convicted person at the time at which the convicted person would become eligible to be released from prison on parole if an order was made under subsection (1);
- (e) any other matter that the court thinks relevant.

(4) Where a convicted person is before a court for sentencing in respect of more than one offence and the court sentences the convicted person to more than one term of imprisonment, the court may—

- (a) make an order under subsection (1) in respect of one of those terms; or
- (b) make orders under subsection (1) in respect of 2 or more of those terms,

but shall not make an order under subsection (1) in respect of a term of imprisonment comprising the aggregate of 2 or more terms, whether cumulative or concurrent.

1987] *Acts Amendment (Imprisonment and Parole) Act* [No. 129

(5) The court shall not make an order under subsection (1) in respect of a term of imprisonment of less than one year except where—

- (a) the convicted person is already serving or liable to serve a term of imprisonment in respect of which—
 - (i) a minimum term was fixed; or
 - (ii) an order was made under this section; or
- (b) the order is one of 2 or more orders made pursuant to subsection (4) (b) and the aggregate of the terms in respect of which those orders are made is not less than one year.

(6) The court shall not make an order under subsection (1) in respect of—

- (a) a term of imprisonment imposed in respect of a prison offence within the meaning of the *Prisons Act 1981*;
- (b) a term of imprisonment imposed on a prisoner in respect of the escape of the prisoner from lawful custody;
- (c) a term of imprisonment imposed on a person together with a direction under section 661 or 662 of *The Criminal Code* that the person is to be detained during the Governor's pleasure in a prison;
- (d) a term of imprisonment imposed on a person who is undergoing or liable to undergo detention during the Governor's pleasure in a prison pursuant to a direction or sentence under section 661 or 662 of *The Criminal Code* given or passed before that term of imprisonment was imposed; or
- (e) strict security life imprisonment or life imprisonment.

Division 6—Order of service, and remission, of sentences

Order of service of finite terms of imprisonment

38. (1) Where a person has been sentenced to a term of imprisonment in respect of which a minimum term was fixed and, before the expiration of that minimum term, has been sentenced to a further term of imprisonment in respect of which a minimum term was fixed, then the minimum term fixed in respect of the

further term is cumulative upon or concurrent with that fixed in respect of the prior term according as the further term is cumulative upon or concurrent with the prior term.

(2) Where a person has been sentenced to a term of imprisonment in respect of which a minimum term was fixed and, before the expiration of that minimum term, is sentenced to a further term of imprisonment in respect of which an order is made under section 37A, then the non-parole period of the further term is cumulative upon or concurrent with the minimum term fixed in respect of the prior term according as the further term is cumulative upon or concurrent with the prior term.

(3) Where a person has been sentenced to a term of imprisonment in respect of which an order was made under section 37A and, before the expiration of the non-parole period of that term, is sentenced to a further term of imprisonment in respect of which an order is made under section 37A, then the non-parole period of the further term is cumulative upon or concurrent with the non-parole period of the prior term according as the further term is cumulative upon or concurrent with the prior term.

(4) Where pursuant to section 37A (4) (b) orders are made under section 37A in respect of 2 or more terms of imprisonment the non-parole periods of those terms are cumulative upon or concurrent with each other according as the terms are cumulative upon or concurrent with each other.

(5) In subsection (6)—

“fixed term” means a term of imprisonment in respect of which—

- (a) no minimum term was fixed; and
- (b) no order was made under section 37A;

“mandatory period” means—

- (a) a minimum term;
- (b) a non-parole period;
- (c) an aggregate of minimum terms in accordance with subsection (1);
- (d) an aggregate, in accordance with subsection (2), of a minimum term or minimum terms and a non-parole period or non-parole periods; or
- (e) an aggregate of non-parole periods in accordance with subsection (3) or (4).

(6) Where an offender has been sentenced to several terms of imprisonment the offender shall serve those terms in the following order—

- (a) firstly, any fixed term or fixed terms;
- (b) secondly, any mandatory period;
- (c) thirdly, unless and until released on parole, the balance of any term or terms after the expiration of any mandatory period.

(7) Where during the service of any term of imprisonment an offender is sentenced to a further term of imprisonment that service shall, if necessary, be suspended in order that the terms may thereafter be served in the order required by subsection (6).

(8) Nothing in subsection (6) or (7) affects the operation of section 20 of *The Criminal Code*.

Remission of sentences

39. (1) Subject to subsection (5), section 29 of the *Prisons Act 1981* does not apply to a term of imprisonment in respect of which—

- (a) a minimum term was fixed; or
- (b) an order is made under section 37A.

(2) Regulations under this Act may provide for the reduction of minimum terms and non-parole periods as an incentive to good conduct or industry and where a prisoner is entitled to such a reduction the term or period as so reduced shall be the minimum term or non-parole period for the purposes of this Act.

(3) Regulations made under this Act may provide, in cases to which section 41 (2c) applies, for the reduction of extended service periods as an incentive to good conduct or industry.

(4) In subsection (3) “extended service period” means the period for which, under section 41 (2c), a prisoner is required to remain in prison after the completion of the aggregate of the non-parole periods.

(5) Notwithstanding Division 7, where a prisoner who—

- (a) has served the minimum term or non-parole period in respect of a term of imprisonment; and
- (b) has not been previously released on parole in respect of that term of imprisonment,

is not released on parole before the date on which the prisoner would have been released from prison, having regard to the part, if any, of that term of imprisonment that would have been remitted under section 29 of the *Prisons Act 1981* if that section had been duly applied to or with respect to the term, the prisoner shall be released from prison on that date or as soon as is practicable after that date unless the prisoner is then liable to serve or continue serving any other term of imprisonment or to be detained during the Governor's pleasure in a prison.

Division 7—Release on parole, breach of parole, cancellation and variation of parole, and transitional provisions

Release on parole after minimum term

40. (1) The Board may in its discretion by order in writing direct that a prisoner serving a term of imprisonment in respect of which a minimum term was fixed be released from prison on parole at the time determined under the order and the prisoner shall be released accordingly.

(2) The time of release on parole under the order shall be at or after the expiration of the minimum term.

(3) If at the expiration of the minimum term the prisoner is liable to serve or continue serving any other term of imprisonment or to be detained during the Governor's pleasure in a prison, an order shall not be made under subsection (1) unless—

- (a) the prisoner becomes entitled to be released from prison in respect of the other term of imprisonment or the detention; or
- (b) an order is also made for the release of the prisoner on parole in respect of the other term of imprisonment or the detention,

before the prisoner becomes entitled to be released from prison under section 39 (5) in respect of the term of imprisonment in respect of which the minimum term was fixed.

Release on parole after non-parole period

40A. (1) The Board shall by order in writing direct that a prisoner serving a term of imprisonment in respect of which an order was made under section 37A be released from prison on parole at the time determined under the order made under this subsection and the prisoner shall be released accordingly.

(2) The time of release on parole under the order made under subsection (1) shall be at the expiration of the non-parole period of the term of imprisonment.

(3) If at the expiration of the non-parole period the prisoner is liable to serve or continue serving any other term of imprisonment or to be detained during the Governor's pleasure in a prison, the prisoner shall not be released under an order made under subsection (1) unless—

- (a) the prisoner becomes entitled to be released from prison in respect of the other term of imprisonment or the detention; or
- (b) an order is also made for the release of the prisoner on parole in respect of the other term of imprisonment or the detention,

before the prisoner becomes entitled to be released from prison under section 39 (5) in respect of the term of imprisonment in respect of which the order was made under section 37A.

(4) Where the release on parole relates to 2 or more terms in respect of which orders were made under section 37A, orders may be made under subsection (1) in respect of each of those terms but an order shall not be made in respect of the aggregate of those terms.

(5) The prisoner, by notice in writing to the Board, may decline to be released on parole under this section and where the Board has received such a notice the prisoner shall not be so released and an order shall not be made under subsection (1) in respect of the prisoner unless that notice is withdrawn by the prisoner by further notice in writing to the Board.

(6) The prisoner shall not be released on parole under an order made under this section unless a declaration in writing that the prisoner understands the requirements specified in the order and undertakes to comply with them has been made by the prisoner.

(7) The powers of the Board under subsection (1) may be exercised by the secretary to the Board, or a member, on behalf of and in the name of the Board.

(8) The secretary or a member—

(a) shall not make an order under subsection (1) in respect of a special term as defined in section 40B (1);

(b) shall not make an order under subsection (1) if—

(i) a report has been made to the Board under section 40B (2) (b); or

(ii) the Board has made a determination under section 40B (5) (b); and

(c) shall not make an order of a kind referred to in section 40B (5) (a).

(9) Unless authorized to do so by the Board, the secretary or a member shall not make an order under subsection (1) imposing any requirement other than—

(a) a prescribed requirement; or

(b) a requirement that the prisoner named therein shall not frequently consort with reputed criminals or persons of ill-repute.

(10) The Board may issue guidelines to be observed by the secretary and members in relation to the making of orders under subsection (1).

(11) Nothing in this section limits the powers of the Board under section 44.

Board may postpone or withhold parole
after non-parole period

40B. (1) In this section—

“prisoner” means a prisoner serving a term of imprisonment in respect of which an order was made under section 37A;

“special term” means a term of imprisonment of not less than 5 years imposed in respect of an offence under Chapter XXVIII, XXIX, XXX, XXXIA, XXXII, XXXIII, or XXXVIII, or section 197, of *The Criminal Code*.

(2) The permanent head may make a report in writing to the Board for the purposes of this section—

- (a) concerning the release of a prisoner from prison on parole in respect of a special term;
- (b) concerning the release of a prisoner from prison on parole in respect of a term of imprisonment other than a special term if the permanent head considers that there is a special need to make such a report.

(3) The Board may if it thinks fit—

- (a) make an order under section 40A (1) directing that a prisoner be released from prison on parole in respect of a special term at a time that is later than the time at which the prisoner would otherwise be required to be so released under section 40A; or
- (b) determine that an order should not be made under section 40A (1) in respect of a special term or that the making of such an order in respect of a special term should be deferred.

(4) In exercising its discretion under subsection (3) the Board may have regard to all or any of the following—

- (a) the nature and circumstances of the offence in respect of which the special term was imposed;
- (b) the degree of risk that the release of the prisoner appears to present to the community or to any individual in the community;
- (c) the contents of a report made to it under subsection (2) (a) or other information concerning the prisoner that is brought to its attention.

(5) Where the Board, having regard to the contents of a report made to it under subsection (2) (b) or to other information concerning a prisoner that is brought to its attention, considers that there are special circumstances that justify it doing so, it may—

(a) make an order under section 40A (1) directing that the prisoner be released from prison on parole in respect of a term of imprisonment other than a special term at a time that is later than the time at which the prisoner would otherwise be required to be so released under section 40A;

or

(b) determine that an order should not be made under section 40A (1) in respect of a term of imprisonment other than a special term or that the making of such an order in respect of such a term should be deferred.

(6) Where the Board has made a determination under subsection (3) (b) or (5) (b) it is not required to make an order under section 40A (1) in respect of the prisoner, but the determination does not prevent the Board from subsequently making such an order.

(7) Where the Board has made an order containing a direction under subsection (3) (a) or (5) (a) or a determination under subsection (3) (b) or (5) (b)—

(a) the Board shall notify the prisoner; and

(b) the prisoner may make representations in writing to the Board with respect to the direction or determination.

(8) Subject to section 49A the notification under subsection (7) (a) shall inform the prisoner of the reasons for the direction or determination and of the right to make representations under subsection (7) (b).

Release on parole during indeterminate sentence

40C. (1) An order in writing under this subsection may direct that—

(a) a prisoner, being an habitual criminal who is being detained in a prison during the Governor's pleasure pursuant to the direction of a court under section 661 of *The Criminal Code*;

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- (b) a prisoner who is being detained otherwise than as an habitual criminal in a prison during the Governor's pleasure pursuant to a direction of a court under section 662 (a) of *The Criminal Code*; or
- (c) a prisoner detained in prison otherwise than as an habitual criminal pursuant to a sentence of a court under section 662 (b) of *The Criminal Code*,

be released from prison on parole at the time determined under the order and the prisoner shall be released accordingly.

(2) An order under subsection (1) may be made—

- (a) by the Board in its discretion, in the case of detention pursuant to a direction or sentence given or imposed before the commencement date; or
- (b) by the Governor following the furnishing of a report by the Board under section 34 (2) (b) or (d) or (3), in the case of detention pursuant to a direction or sentence given or imposed on or after the commencement date.

(3) The time of release on parole under an order under subsection (1) (a) shall be after the prisoner has been detained pursuant to the direction during a period of 2 years or such lesser period as the Governor, having regard to the circumstances of the case, on the recommendation of the Board, thinks fit.

(4) The time of release on parole under an order under subsection (1) (b) or (c) shall be after the prisoner has been detained pursuant to the direction or sentence for any period.

(5) Notwithstanding section 665 of *The Criminal Code* where a prisoner is serving or liable to serve a term of imprisonment in respect of which a minimum term was fixed, or in respect of which an order was made under section 37A, and has also been directed or sentenced to be detained during the Governor's pleasure in a prison under section 661 or 662 of *The Criminal Code*, for the purposes of this section the detention pursuant to the direction or sentence is deemed to commence at the expiration of the minimum term or non-parole period, as the case may be.

Release on parole during life sentence

40D. (1) Subject to subsection (2), following the furnishing of a report by the Board under section 34 (2) (b) or (d) or (3) the Governor may by order in writing direct that a prisoner undergoing a sentence of strict security life imprisonment or a sentence of life imprisonment be released from prison on parole at the time determined under the order and the prisoner shall be released accordingly.

(2) In the case of a prisoner undergoing a sentence of strict security life imprisonment, an order under subsection (1) shall not be made earlier than 20 years after—

- (a) the date when the sentence was commuted from a sentence of death; or
- (b) the date when the prisoner was sentenced to strict security life imprisonment,

as the case may be, except where the Governor is of the opinion that special circumstances exist.

(3) The Minister shall cause every order made under subsection (1) in respect of a prisoner undergoing a sentence of strict security life imprisonment, together with an explanatory note as to the circumstances, to be tabled in each House of Parliament within 15 sitting days of that House after the making of the order.

(4) Notwithstanding section 44 or 45, whenever a prisoner undergoing a sentence of strict security life imprisonment or a sentence of life imprisonment has been released from prison on parole (whether before, on or after the commencement date) and his parole is thereafter cancelled, he shall not be further released on parole otherwise than under this section. ”.

PART 56 — OFFENDERS COMMUNITY CORRECTIONS ACT 1963

Division 1 — Repeal

Act repealed

77. The *Offenders Community Corrections Act 1963* is repealed.

Division 2 — Transitional provisions

Interpretation

78. (1) In this Division —

“commencement” means the commencement of the *Sentencing Act 1995*;

“repealed Act” means the *Offenders Community Corrections Act 1963*.

(2) For the purposes of this Division a person is in custody even if at the relevant time he or she is at large or if under Part VIII of the *Prisons Act 1981* he or she is absent from a prison.

Indeterminate sentence under Criminal Code, s. 661 or 662

91. (1) If immediately before commencement a person is in custody and subject to a direction or sentence under section 661 or 662 of *The Criminal Code*, then on and after commencement the repealed Act, and in particular sections 34 and 40C of it, continue to operate in respect of the person and the direction or sentence, but —

(a) any release of the person on parole in accordance with the repealed Act is to be by means of a parole order made by the Governor under Division 6 of Part 3 of the *Sentence Administration Act 1995*;

(b) the parole period for the parole order is that provided by section 25 (5) of the *Sentence Administration Act 1995*; and

(c) Divisions 6, 7 and 8 of Part 3 and Parts 4 to 11 of the *Sentence Administration Act 1995* apply to and in respect of the person and the parole order.

(2) Subsection (1) does not affect the operation of section 665 of *The Criminal Code*.

(3) If immediately before commencement a parole order is in effect in respect of a person subject to a direction or sentence under section 661 or 662 of *The Criminal Code*, then if, on or after commencement, the person is returned to custody, subsection (1) applies to the person.

8. s.41(1)(c) Offenders Probation and Parole Act (WA)

41 (1) The Board may in its discretion by order in writing direct that:

- (a) a prisoner undergoing a sentence of imprisonment in respect of which a minimum term has been fixed, be released from prison on parole at the time specified in the order, being a time that is after the expiration of the minimum term;
- (b) a prisoner, being an habitual criminal who is being detained in a prison during the Governor's pleasure pursuant to the direction, whether given before or after the coming into operation of this Part of this Act, of a court under section six hundred and sixty-one of The Criminal Code, be so released on parole at the time specified in the order, being any time after the prisoner has been so detained during a period of two years or such lesser period as the Governor, having regard to the circumstances of the case, on the recommendation of the Board, orders;
- (c) a prisoner who is being detained otherwise than as an habitual criminal in a prison during the Governor's pleasure pursuant to a direction whether given before or after the coming into operation of this Part of this Act, of a court under paragraph (a) of section six hundred and sixty-two of The Criminal Code, be so released on parole at the time specified in the order, being any time after the prisoner has been so detained for any period; and
- (d) a prisoner detained in a prison otherwise than as an habitual criminal pursuant to a sentence, whether imposed before or after the coming into operation of this Part of this Act, of a court under paragraph (b) of section six hundred and sixty-two of The Criminal Code, be so released on parole at the time specified in the order, being any time after the prisoner has been so detained for any period,

and the prisoner shall be released accordingly.

Section 41 amended

13. Section 41 of the principal Act is amended by repealing subsections (1), (1a), (2) and (3) and substituting the following subsections—

“ (1) Before a prisoner has been released from prison under a parole order made by or on behalf of the Board, the order may be cancelled, amended or varied by the Board by order in writing signed by any 2 members, and, if a parole order is so amended or varied, it applies accordingly.

(1a) Where a prisoner's parole is cancelled under subsection (1) the prisoner—

- (a) may make representations in writing to the Board with respect to the cancellation; and
- (b) shall, subject to section 49A, be informed by the Board of the reasons for the cancellation and of the right to make representations under paragraph (a).

(1b) Before a prisoner has been released from prison under a parole order made by the Governor, the order may be cancelled, amended or varied by the Governor by order in writing, and, if a parole order is so amended or varied, it applies accordingly.

(1c) Where a prisoner's parole is cancelled under subsection (1b) the prisoner—

- (a) may make representations in writing to the Minister with respect to the cancellation; and
- (b) shall, subject to section 49A, be informed by the Minister of the reasons for the cancellation and of the right to make representations under paragraph (a).

(2) Subject to subsection (2e), a prisoner released from prison under a parole order described in column 1 of an item in the Table to this subsection shall, after release, be under the supervision of a parole officer for the period determined under column 2 of that item.

TABLE
Parole Periods

	Column 1	Column 2
Item	Type of parole order	Period of supervision after release
1.	Order under section 40	Whichever is the lesser of— (a) the period from release until the expiration of the term of imprisonment in respect of which the order is made; or (b) 2 years.
2.	Order under section 40A	Whichever is the lesser of— (a) the period from release until the expiration of the term of imprisonment in respect of which the order is made; or (b) the period calculated by deducting from the prescribed period a period equal to the pre-release period.
3.	Order under section 40C	Such period not exceeding 2 years as the Board or the Governor, as the case may be, thinks fit and specifies in the order.
4.	Order under section 40D	Such period not exceeding 5 years as the Governor thinks fit and specifies in the Order.

Note

In item 2 of this Table—

“prescribed period” means a period calculated by reference to the term of imprisonment in respect of which the parole order was made so that where that term is—

- (a) less than 18 months and section 40A (4) does not apply to the parole order—the prescribed period is 6 months;
- (b) less than 18 months and the parole order is one of 2 or more parole orders to which section 40A (4) applies—the prescribed period is equal to one-third of that term;
- (c) not less than 18 months but less than 6 years—the prescribed period is equal to one-third of that term;
- (d) not less than 6 years—the prescribed period is 2 years;

“pre-release period” in relation to a term of imprisonment means the period (if any) that began at the expiration of the non-parole period, and ended when the prisoner was released on parole but does not include any period during which the prisoner was not serving that term of imprisonment.

(2a) Subject to subsections (2b) and (2f) the parole period shall have effect from the date of release of the prisoner and where the prisoner is released under 2 or more orders the respective parole periods shall have effect concurrently.

(2b) Notwithstanding section 40A (1) or (2), if the prisoner is released under 2 or more parole orders to which section 40A (4) applies the parole periods shall have effect cumulatively or concurrently according as the terms of imprisonment are cumulative upon or concurrent with each other and, where it is necessary in order to resolve any doubt, the relevant parole orders may specify the sequence in which any cumulative parole periods shall have effect.

(2c) Notwithstanding section 40A, if the aggregate parole period that would result from the operation of subsection (2b) would exceed 2 years the prisoner shall not be released on parole until such time as release can be effected under an order or orders in respect of which the parole period does not exceed 2 years.

(2d) If the extended service period as defined by section 39 (4) is reduced under the regulations the aggregate parole period referred to in subsection (2c) shall be reduced by the same amount.

(2e) If the prisoner is released under 2 or more parole orders to which section 40A (4) applies and the aggregate of the terms of imprisonment in respect of which the parole orders were made is less than 18 months the parole period for each of those terms shall be the period calculated in accordance with the formula—

$$\frac{A \times B}{C}$$

where—

A is the period calculated by deducting from 6 months a period equal to the period (if any) between the completion of the mandatory period under section 38 (6) (b) and release on parole;

B is the length of that term; and

C is the aggregate of those terms.

(2f) Where the prisoner is released under a parole order under section 40 and a parole order or orders under section 40A the parole periods shall have effect cumulatively or concurrently according as the terms of imprisonment are cumulative upon or concurrent with each other.

(2g) If the aggregate parole period that results from the operation of subsection (2f) exceeds 2 years the parole period in respect of each of the parole orders shall be deemed to have been completed for the purposes of this Part if and when the prisoner has been on parole for 2 years.

(2h) Where 2 or more parole orders are made in respect of the prisoner they may be made in the same document.

(2i) During the parole period the prisoner shall comply with the requirements specified in the parole order.

(3) A parole order shall specify prescribed requirements and such other requirements as the Board or the Governor, as the case may be, considers necessary in any particular case, but in every parole order there shall be inserted a requirement that the prisoner shall not frequently consort with reputed criminals or persons of ill-repute. ”.

Section 41A amended

14. Section 41A of the principal Act is amended by repealing subsection (6).

Section 42 repealed

15. Section 42 of the principal Act is repealed.

PART 56 — OFFENDERS COMMUNITY CORRECTIONS ACT 1963

Division 1 — Repeal

Act repealed

77. The *Offenders Community Corrections Act 1963* is repealed.

Division 2 — Transitional provisions

Interpretation

78. (1) In this Division —

“commencement” means the commencement of the *Sentencing Act 1995*;

“repealed Act” means the *Offenders Community Corrections Act 1963*.

(2) For the purposes of this Division a person is in custody even if at the relevant time he or she is at large or if under Part VIII of the *Prisons Act 1981* he or she is absent from a prison.

Indeterminate sentence under Criminal Code, s. 661 or 662

91. (1) If immediately before commencement a person is in custody and subject to a direction or sentence under section 661 or 662 of *The Criminal Code*, then on and after commencement the repealed Act, and in particular sections 34 and 40C of it, continue to operate in respect of the person and the direction or sentence, but —

(a) any release of the person on parole in accordance with the repealed Act is to be by means of a parole order made by the Governor under Division 6 of Part 3 of the *Sentence Administration Act 1995*;

(b) the parole period for the parole order is that provided by section 25 (5) of the *Sentence Administration Act 1995*; and

(c) Divisions 6, 7 and 8 of Part 3 and Parts 4 to 11 of the *Sentence Administration Act 1995* apply to and in respect of the person and the parole order.

(2) Subsection (1) does not affect the operation of section 665 of *The Criminal Code*.

(3) If immediately before commencement a parole order is in effect in respect of a person subject to a direction or sentence under section 661 or 662 of *The Criminal Code*, then if, on or after commencement, the person is returned to custody, subsection (1) applies to the person.