

# **NSW SENTENCING ACT**

**1989**

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## PREFACE

The *Sentencing Act 1989*, like its predecessor, the *Probation and Parole Act 1983* has been the subject of some controversy. The major change to sentencing introduced by the *Probation and Parole Act* was to create a system of remissions on the minimum period required to be spent in custody by an offender. Previously remissions had applied only to the aggregate or head sentence. Because most prisoners were released on parole before the end of their aggregate sentence, remissions made little difference to the period actually served in prison by most offenders. This limited their effectiveness as a prison management tool. The justification given for applying remissions to minimum periods, then, was to remedy this defect. The remissions system created by the *Probation and Parole Act*, however, was the subject of widespread public criticism. Two commonly expressed concerns were that the remissions system eroded public confidence in the sentencing process and that it allowed unwarranted interference by the Executive in the sentencing discretion of the courts.

The *Sentencing Act* tackled these problems by abolishing the system of remissions altogether. In addition, it significantly altered certain other key aspects of the sentencing process, most notably the length of time expected to be served in custody relative to the period to be spent on conditional release. The stated intention behind the new legislation was said not to be to 'make sentences longer'. It was clear at the time of its introduction, however, that this effect would only be avoided if the courts responded to the abolition of remissions by imposing shorter custodial terms. One reason for expecting just such an effect lay in the fact that the introduction of remissions on minimum periods had been accompanied by a general increase in their average length. Against this consideration, however, lay the fact that the NSW Court of Criminal Appeal, in the case of *R. v. O'Brien*, had stated that, save in certain special circumstances, sentencers generally ought not to have regard to the effect that the remissions system might have when choosing the sentence which should be imposed in a particular case.

The main finding of this report is that the courts do not appear to have reacted to the abolition of remissions under the *Sentencing Act* by shortening minimum custodial periods. This is consistent with the general principles enunciated by the NSW Court of Criminal Appeal in the recent case of *R. v. Maclay*. It makes an interesting contrast, however, with the court response to the introduction of remissions under the *Probation and Parole Act*. Whatever the cause of the difference, the general result is likely to be an increase in the size of the NSW prison population. It should be noted, nevertheless, that the present level of prison overcrowding is attributable more to growth in the number of people arrested (and sent to gaol) than to the longer periods now being served in custody by those sent to prison under the *Sentencing Act*. Problems of prison overcrowding in recent years have also been compounded by the fact that the shortage of court capacity has led to a growth in the number of prisoners on remand (i.e. awaiting trial). The advent of increased court capacity should, by reducing criminal court delays, also make some contribution to reducing the size or rate of growth of the gaol population.

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## SUMMARY OF FINDINGS

For the samples of cases studied, comparing custodial sentences under the *Probation and Parole Act 1983* with custodial sentences under the *Sentencing Act 1989*, it was found that:

- In the Local Courts the proportion of convictions resulting in custodial sentences does not appear to have changed. This information was not available for the Higher Courts.
- In both the Local and Higher Courts the proportion of head sentences of six months or less has increased. The increase was 16.6 percentage points for the Local Courts and 11.1 percentage points for the Higher Courts.
- The proportion of fixed term sentences (both under and over six months in length) has increased in both the Local and Higher Courts.
- When sentences of six months or less are excluded, the proportion of fixed term sentences has declined by 4.2 percentage points in the Local Courts and has increased by 2.0 percentage points in the Higher Courts.
- The median length of the head sentence (for the principal offence) for the Local Courts was six months both before and after the introduction of the Sentencing Act. In the Higher Courts the median head sentence length (for the principal offence) was 3.1 years under the *Probation and Parole Act* but decreased to 2.5 years under the Sentencing Act.
- When only those sentences involving non-probation periods or minimum terms were compared, in the Local Courts the median non-probation period was six months and the median minimum term was one year. In the Higher Courts the median non-probation/parole period was 1.6 years compared with the median minimum term of two years.
- In both the Local and the Higher Courts the distribution of non-probation/parole periods (or determinate sentences where non-probation/parole periods were not specified) closely resembles the distribution of minimum terms (or sentence lengths where fixed terms were specified). This suggests that sentences under the Sentencing Act are not being systematically discounted to compensate for the abolition of remissions.
- In the Local Courts sample, 7.9% of cases where a minimum and additional term were specified had an additional term which was longer than a third of the minimum. In the Higher Courts sample, the proportion of such cases was 13.0% of the cases where minimum and additional terms were specified.





# 1 INTRODUCTION

On 25 September 1989 the *Sentencing Act 1989* commenced operation. It replaced the *Probation and Parole Act 1983*, and its purpose, as stated in Parliament, was 'to restore truth in sentencing', in order 'to ensure that the public and prisoners know exactly when a sentence shall commence and exactly when a prisoner will be eligible for consideration for parole'.<sup>1</sup>

In pursuing this aim, according to the Minister for Corrective Services, it was not the intention of the Government to make sentences longer.<sup>2</sup> Nevertheless, it has been suggested that the Act will have this effect.<sup>3</sup> The purpose of this study is to identify the changes in sentencing practices, if any, which have occurred under the Sentencing Act.

## 1.1 THE PROBATION AND PAROLE ACT AND THE EFFECT OF REMISSIONS

The Probation and Parole Act was introduced in 1983 to amend the previous system of parole.

The principle underlying parole is that the sentencing of offenders should have a rehabilitative component. This aim is served by releasing those sentenced to prison at a certain point in the rehabilitative process so that they can re-adjust to life in the community while under the supervision of the authorities.

Under the Probation and Parole Act a certain portion of a sentence was to be served in the community to allow for this re-adjustment to society. During this time the offender was supervised and had to be of good behaviour. Failure to abide by the conditions of release could result in a return to prison for the remainder of the original sentence.

Release on probation for sentences of between six months and three years was automatic under the Probation and Parole Act, but for sentences over three years release on parole was subject to the discretion of the Parole Board. Release on probation was not available for sentences of six months or less.

Subject to several constraints, the length of the non-probation or non-parole period was determined by the court. For non-probation periods the constraint was that they should expire no less than six months from the expiry date of the aggregate sentence. Thus the non-probation period on a head sentence of 12 months could be up to six months in duration.

For non-parole periods, under the Probation and Parole Act, the constraints were that they should be no shorter than six months and no longer than the aggregate sentence length, except for 'serious offences', in which case they had to be at least 75% of the aggregate sentence. Thus, for a sentence of four years, under the Probation and Parole Act the non-parole period could be anything from six months to four years (except for 'serious offences').

The Probation and Parole Act also provided for remissions to be subtracted from the non-probation or non-parole period (or the actual sentence for fixed terms longer than

one month). Previously remissions had applied only to the aggregate or head sentence. The purpose of remissions was to provide an incentive for good behaviour while in prison. Misbehaviour could result in loss or reduction of remission. Two types of remissions were available. The first type of remission was an automatic reduction at the rate of one-third for first offenders and one-quarter for second and subsequent offenders unless they were deemed 'habitual offenders', in which case the remission was one-sixth. The second type was the 'earned remission' whereby further reduction in sentence could be gained, at a specified rate, for 'excellence in performance in industry or education (or both)'.<sup>4</sup> In addition, remissions could be gained through the application of the Royal Prerogative or if the prisoner suffered deprivation due to (say) a prison officers' strike.<sup>5</sup>

Under a subsequent amendment to the Probation and Parole Act, entitlement to remissions could be refused on the grounds of the nature of the offence or the antecedent character of the offender.

## 1.2 THE SENTENCING ACT

The Sentencing Act changed procedures in two key respects. First, in place of the system of probation (for offenders with sentences of three years or less), and parole (for those with sentences over three years) the new Act introduced a system of minimum and additional terms. The minimum term is analogous to the non-probation and non-parole periods under the old Act. It is the term which must be spent in prison. The additional term is the period which may be served on parole. Except under special circumstances, the additional term can be no longer than one-third of the minimum term (i.e., as stated above, 75% of the sentence is spent in prison). Thus, for example, under the new Act, the minimum term on a sentence of 12 months will be *no less* than nine months (except under special circumstances).

As with the Probation and Parole Act, sentences of six months or less must be served in prison. The court reserves the right to set a determinate sentence if it sees fit (this is equivalent to the court declining to set a non-probation or non-parole period).

The second important change introduced by the Sentencing Act was to abolish remissions. This means that the minimum term set by the court will now, without qualification, be spent in prison.

At first glance, the abolition of remissions alone would seem to imply that, all other things being equal, the amount of time which offenders spend in prison should increase. This would occur if the courts simply imposed minimum terms equal in length to the non-probation or non-parole periods previously specified. This would be expected, given the NSW Court of Criminal Appeal decision in the case of *O'Brien* that the effect of remissions was not to be regarded as relevant in the determination of a head sentence or non-parole period.<sup>6</sup>

It is possible, however, that in the past the effects of remissions *were* taken into account by the courts and sentences were adjusted accordingly. In fact Weatherburn, in a study on the effects of the Probation and Parole Act on sentences, showed that the non-probation/parole period increased after the Act was introduced, apparently to compensate for the new procedure of deducting remissions from the non-probation/parole period.<sup>7</sup>

If the courts do take the abolition of remissions into account, we would expect to find that, under the Sentencing Act, the average minimum term would be shorter than the average non-probation/parole period imposed under the Probation and Parole Act. The explanation for this effect would be that, under the Sentencing Act, sentences were being discounted to compensate for the loss of the remission which would have applied in the past.

Another possibility is that, rather than striving to maintain consistency between non-probation/parole periods and minimum terms, the courts will attempt to maintain consistency in head sentence lengths. If this were the case, the new requirement under the Sentencing Act that minimum terms must (normally) be at least 75% of the head sentence would suggest that the minimum term served in prison would increase. This is because in the past the non-probation/parole period was, on average, considerably less than 75% of the head sentence.

Another way in which the 75% rule could conceivably affect the length of time spent in prison is if the courts, in seeking to provide an adequate period of release under supervision, responded by increasing the minimum term in order to provide for this.<sup>8</sup> Thus, for example, if the court decided that an offender required, say, a two year additional term for adequate rehabilitation they would (except under special circumstances) be required to specify a minimum term of six years (making a total sentence of eight years) in order to achieve this.

There are, of course, other possibilities. It may be, as suggested by Chan, that the reduction in head sentence length necessary to maintain parity between non-probation/parole periods and minimum terms will be considered to be too great in the light of the objective facts of the case and the statutory maximum penalty for the offence.<sup>9</sup> While head sentences may be found to be shorter they might not be reduced enough to compensate for the '75% rule'. As a result we might expect to see, in some cases at least, an increase in minimum terms over non-probation/parole periods.

### 1.3 AIM OF THE EVALUATION

The aim of the Bureau's evaluation of the Sentencing Act was to determine what impact, if any, the Act has had on sentencing practice in NSW. The issues addressed in this report are:

- 1) Has the proportion of offenders imprisoned changed?

Among those imprisoned:

- 2) Has the proportion of those given head sentences of six months or less changed?
- 3) Has the proportion of fixed term sentences changed?
- 4) Has the median length of the sentence for the principal offence changed?<sup>10</sup>
- 5) Has the minimum time to be spent in prison changed?
- 6) In what proportion of cases is the additional term more than one-third of the length of the minimum term?

The evaluation of the effects of the Sentencing Act on sentencing practice was conducted in two phases. The first phase examined cases dealt with in the Local Courts, while the second examined District and Supreme Court cases. The aim was to compare the range of minimum terms imposed under the Sentencing Act with the range of non-probation or non-parole periods imposed under the Probation and Parole Act. Both phases involved comparing all cases involving custodial sentences to come before the courts in a three month period after the introduction of the Sentencing Act with all cases in the corresponding three month period in the previous year. The two phases will be discussed separately.

## 2 LOCAL COURTS

### 2.1 METHOD

The Local Courts data were taken from October, November and December of 1988 and 1989. The sentence information was derived from the Local Courts data base of the NSW Bureau of Crime Statistics and Research. The sentence examined for each case was the one handed down for the principal offence for each offender. The principal offence here refers to the offence which attracted the most severe penalty.<sup>11</sup> A number of cases were excluded because the offender was already in prison for another offence when sentenced. This factor would influence the period set for probation, and it was considered to be better to exclude these cases rather than unnecessarily complicating matters by having to take the adjusted non-probation periods into account.

### 2.2 RESULTS

Table 1 presents the breakdown of head sentence types from the two samples into those of six months or less, those over six months of a determinate length, and those over six months with either a non-probation period or a minimum term specified. In the 1988 sample there were 958 cases, while in the 1989 sample there were 991.<sup>12</sup> The table also includes the total number of convictions for each of the three month periods.

**Table 1: Local Courts convictions 1988, 1989 (October to December)**

<i>Head sentence length</i>	<i>Year</i>			
	<i>1988</i>		<i>1989</i>	
	No.	%	No.	%
6 months or less	621	64.8	807	81.4
Over 6 months (fixed)	108	11.3	49	4.9
Over 6 months (non-probation/ parole period or minimum term specified)	229	23.9	127	12.8
Unknown	0	0.0	8	0.8
Total custodial sentences	958	100	991	100
Total convictions (October to December)	22,420		25,060	

#### 2.2.1 Has the proportion of offenders imprisoned changed?

The custodial sentences included in the sample made up 4.3% of all convictions for October to December 1988, and 4.0% of all convictions for October to December 1989.

### 2.2.2 Has the proportion of those given head sentences of six months or less changed?

As can be seen from the table, under the Sentencing Act there has been an increase of 16.6 percentage points in the proportion of cases where the head sentence is six months or less.

### 2.2.3 Has the proportion of fixed term sentences changed?

If we disregard cases involving sentences of six months or less in Table 1, the proportion of fixed term sentences has declined from 32.0% to 27.8% (excluding the eight unknowns). However, if all determinate sentences (both under and over six months) are combined, there is a net increase in determinate sentences from 76.1% in the 1988 sample to 87.1% in 1989.

### 2.2.4 Has the median length of the sentence for the principal offence changed?

When all sentences were included in the analysis the median head sentence length for the principal offence was six months for each sample. This is to be expected given the high proportion of sentences of six months or less in both samples.

When only those sentences involving non-probation periods or minimum terms were compared, the median minimum term was one year and the median non-probation period was six months. For both groups, however, the median head sentence was 15 months. **That is, for these types of sentences, proportionally more of the sentence was to be spent in prison for the 1989 sample.**

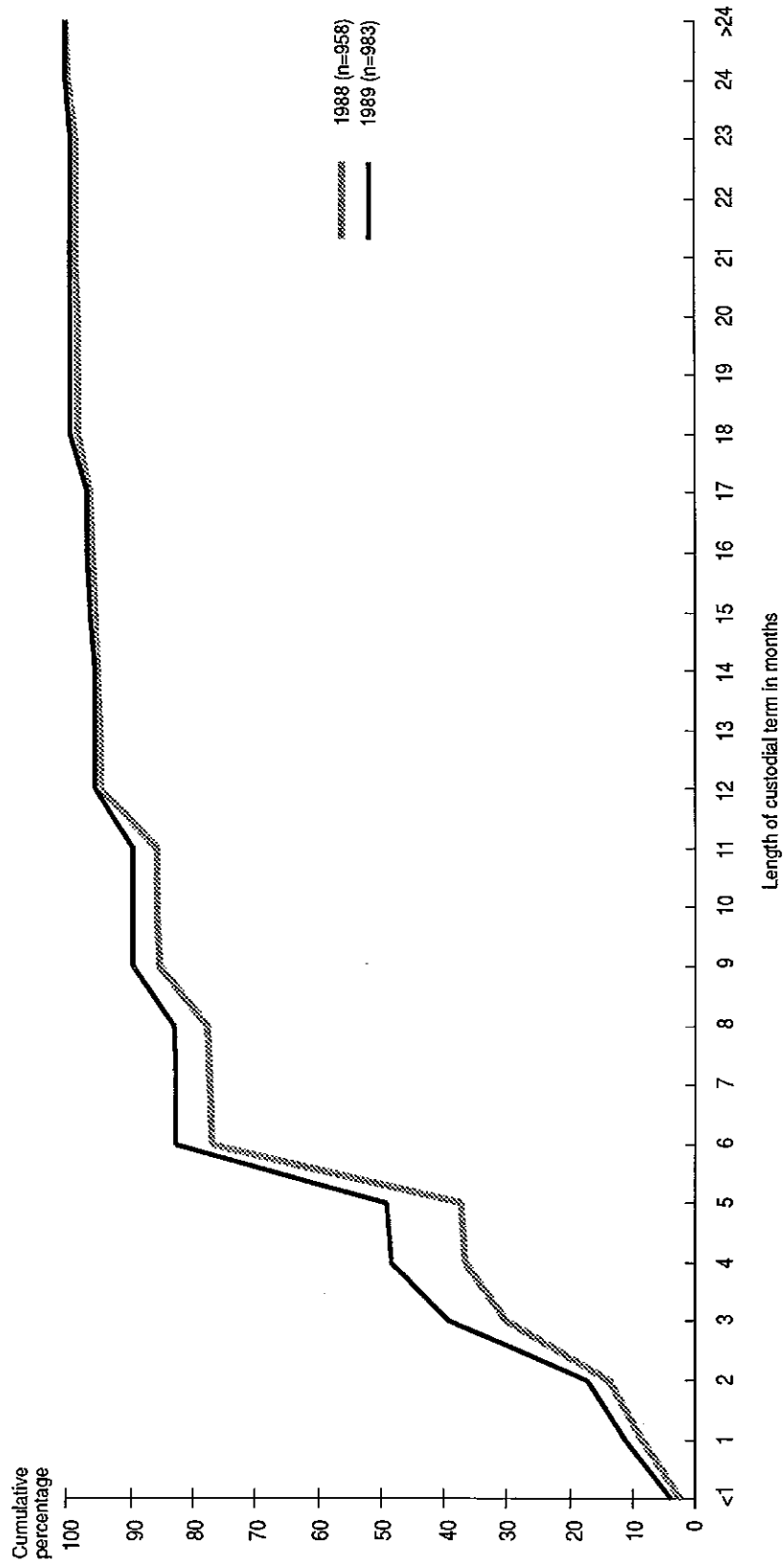
### 2.2.5 Has the minimum time to be spent in prison changed?

From an examination of sentences handed down in court it is not possible to determine precisely the extent to which the length of time spent in custody has changed. This is because the sentences specified in court under the Probation and Parole Act would have been reduced by variable amounts of remission. We can, however, compare the minimum period to be spent in prison which was specified by the courts under the Probation and Parole Act with the minimum period specified under the Sentencing Act. The expression 'custodial term' will be used to refer to this period (i.e. both the non-probation periods and determinate sentences specified under the Probation and Parole Act and the minimum and fixed terms specified under the Sentencing Act). In order for the actual time in prison to remain constant, the length of custodial terms specified by the courts under the new Act should be systematically shorter than under the old Act to make up for the abolition of remissions.

Figure 1 compares the distribution of custodial terms for the two samples of cases. The distributions are presented as cumulative percentages of the two samples. By presenting the distributions in this way we can see the proportion of sentences in each distribution which fall at and below any particular point.

The two distributions shown in Figure 1 are significantly different.<sup>13</sup> From the figure it can be seen that the major difference between the distributions is that, as noted in section 2.2.2, under the Sentencing Act there are proportionally more sentences of six months or less. If we compare the cumulative distributions for only those custodial

**Figure 1: Custodial terms specified by the Local Courts**  
 October to December 1988, October to December 1989  
 Length of custodial term in months by cumulative percentage of offenders



terms over six months, as in Figure 2, we can see that after the six month point there is a very close correspondence between non-probation periods/determinate sentences and minimum/fixed terms and the two distributions are not significantly different.<sup>14</sup>

It is possible, then, that magistrates are attempting to compensate for the abolition of remissions by giving more shorter (fixed term) sentences. If this is the case, however, as shown in Figures 1 and 2, the effects are only apparent at the lower end of the sentence-length distribution.

It should be noted that, whereas under the Probation and Parole Act it was possible to impose a non-probation period of less than six months, under the Sentencing Act minimum terms must be at least six months long. It follows that magistrates wishing to impose a custodial term of less than six months must now specify a fixed term. It may be this factor which accounts for the increase in the proportion of fixed term sentences of six months and less, rather than any uniform attempt to compensate for the abolition of remissions.

#### **2.2.6 In what proportion of cases is the additional term more than one-third of the length of the minimum term?**

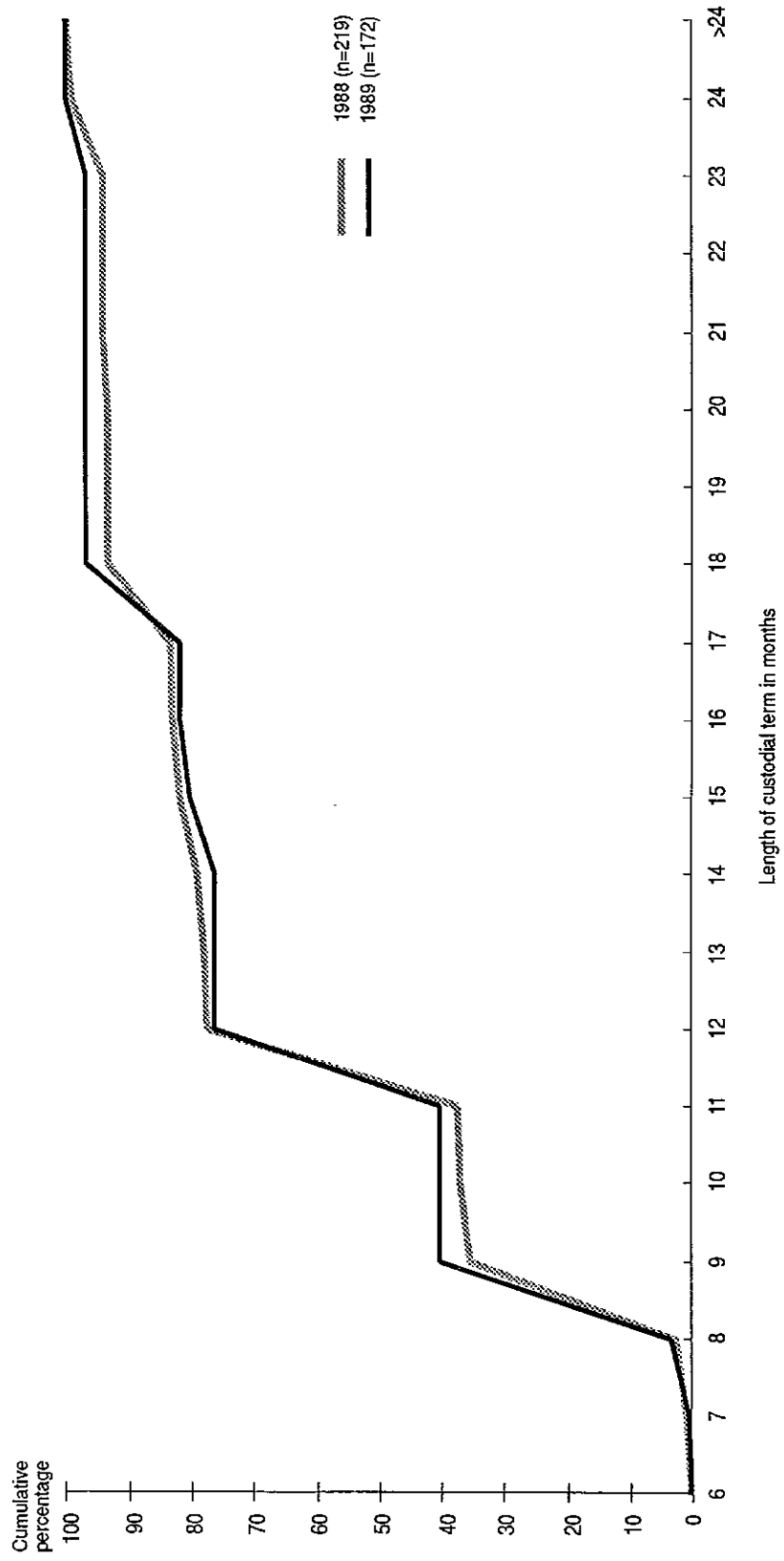
For the sample of cases sentenced under the Sentencing Act, there were 10 where the additional term was longer than one-third of the minimum term. This represents 7.9% of the 127 cases where a minimum and additional term were specified.



**Figure 2: Custodial terms over six months specified by the Local Courts**

*October to December 1988, October to December 1989*

*Length of custodial term in months by cumulative percentage of offenders*



## 3 HIGHER COURTS

### 3.1 METHOD

The data for the evaluation of the Sentencing Act in the Higher Courts consisted of cases sentenced during February, March and April of 1989 and 1990. The choice of time period was constrained by the availability of data for 1990.

The nature of the data available for 1990 also constrained the type of analysis which was possible. When the analysis was conducted in August 1990, reliable information on minimum and additional terms was only available per offence, not in terms of the aggregate sentence. This was because the Higher Court data checking process had not been completed and the aggregate sentence data may have been unreliable. While the information for the 1990 sample related only to principal offence, the information available on sentences from 1989 involved non-probation/parole periods which were calculated on the *aggregate* sentence. In order to make sensible comparisons, it was therefore necessary to analyse only those cases from 1989 where the aggregate sentence was the same as the sentence for the principal offence. The non-probation/parole period for these cases may be regarded as equivalent to the minimum term specified for the principal offence under the Sentencing Act.

The information presented here compares non-probation/parole periods with minimum terms handed down for the principal offence (i.e. the offence attracting the most severe penalty). In addition the nature and distribution of fixed term sentences has been compared for the two samples. This information has been combined with the information on non-probation/parole periods and minimum terms to provide an overall picture of the terms of imprisonment being handed down by judges under the current and previous legislation.

### 3.2 RESULTS

Table 2 presents the proportion of cases in each sample involving fixed terms versus those specifying non-probation/parole periods or minimum terms.

#### 3.2.1 Has the proportion of offenders imprisoned changed?

For the Higher Courts data it was not possible to determine whether the proportion of offenders imprisoned had changed. This was because of new data collection procedures introduced at the start of 1990.

#### 3.2.2 Has the proportion of those given head sentences of six months or less changed?

Table 2 shows that the proportion of offenders being given head sentences of six months or less has increased from 3.3% in the 1989 sample to 14.4% in the 1990 sample.

**Table 2: Higher Courts convictions 1989, 1990 (February to April)**  
*Custodial sentences*

<i>Head sentence length</i>	<i>Year</i>			
	<i>1989</i>		<i>1990</i>	
	No.	%	No.	%
6 months or less	13	3.3	43	14.4
Over 6 months (fixed)	53	13.3	40	13.4
Over 6 months (non-probation/ parole period or minimum term specified)	334	83.5	215	72.1
Total sample used	400	100	298	100
Excluded cases	96*		14 #	
Total custodial sentences	496		312	

\* For the 1989 sample 81 cases were excluded because the aggregate sentence was greater than the sentence for the principal offence (see section 3.1 above). A further 15 cases were excluded because of missing data.

# For the 1990 sample 14 cases were excluded because of missing data or because the convictions were for offences under Commonwealth law.

### 3.2.3 Has the proportion of fixed term sentences changed?

For head sentences over six months the proportion of fixed terms has increased marginally from 13.7% to 15.7%. As with the Local Courts, the overall proportion of fixed term sentences (both under and over six months) has increased (from 16.5% to 27.9%).

### 3.2.4 Has the median length of the sentence for the principal offence changed?

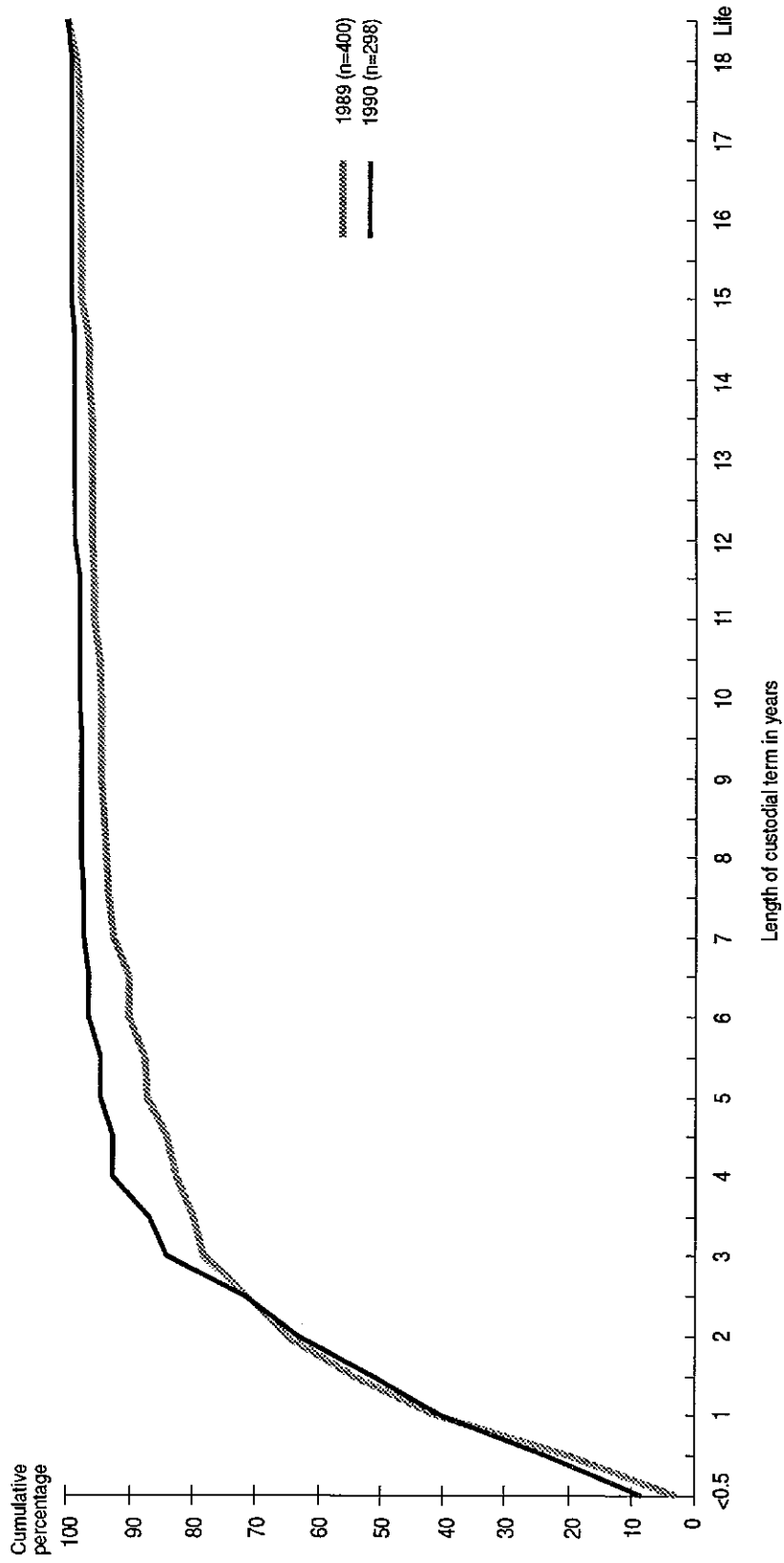
In the 1989 sample there were seven 'life' sentences (1.8%), while in the 1990 sample there were three (1.0%). When life sentences (being of indeterminate duration) are excluded, the head sentences in the 1989 sample had a median of 3.1 years, a minimum of four months and a maximum of 24 years. For the 1990 sample the median head sentence length was 2.5 years, the minimum was one month and the maximum was 15 years. The cases in the 1989 sample were much more widely dispersed. The variance for the 1989 sample was 15.41 (standard deviation = 3.93), whereas for the 1990 sample the variance was 4.74 (standard deviation = 2.18).

When only cases involving non-probation/parole periods or minimum terms were considered, the median minimum term was two years, compared with 1.6 years for the non-probation/parole period. The shortest minimum term was, not surprisingly, six months, and the longest was 11 years. In contrast, the shortest non-probation period was one month and the longest non-parole period was 18 years. Again, the variance for the 1990 sample was much smaller than that for the 1989 sample (1.98 compared with 8.25).

**Figure 3: Custodial terms specified by the Higher Courts**

*February to April 1989, February to April 1990*

*Length of custodial term in years by cumulative percentage of offenders*



### 3.2.5 Has the minimum time to be spent in prison changed?

Figure 3 presents the cumulative percentages of each sample by the length of the custodial term specified by the courts. From the figure it can be seen that the pattern of sentences in the two periods is similar. In fact, there is no statistically significant difference between the two distributions.<sup>15</sup>

As with the Local Court samples, this distribution is not what we would expect if judges were compensating for the abolition of remissions under the Sentencing Act. If the lack of remissions were being compensated for in sentencing, we would expect the sentences for the 1990 sample to be generally shorter than those for the 1989 sample. In fact, as illustrated in Figure 3, the median custodial term under the Sentencing Act is slightly *longer* than it was under the Probation and Parole Act. This difference is even more marked when determinate sentences and fixed terms are excluded, as in Figure 4. Figure 4 illustrates the greater variability in the lengths of non-probation/parole periods, which ranged from one month to 18 years, compared with minimum terms, which ranged from six months to 11 years (as noted in section 3.2.4. above). Despite the greater variation, there is no significant difference between the two distributions in Figure 4.<sup>16</sup>

In general, then, since there is no significant difference between the distributions, there is no evidence that the effect of remissions is being taken into account. Consequently, the actual time being spent in prison may have increased.

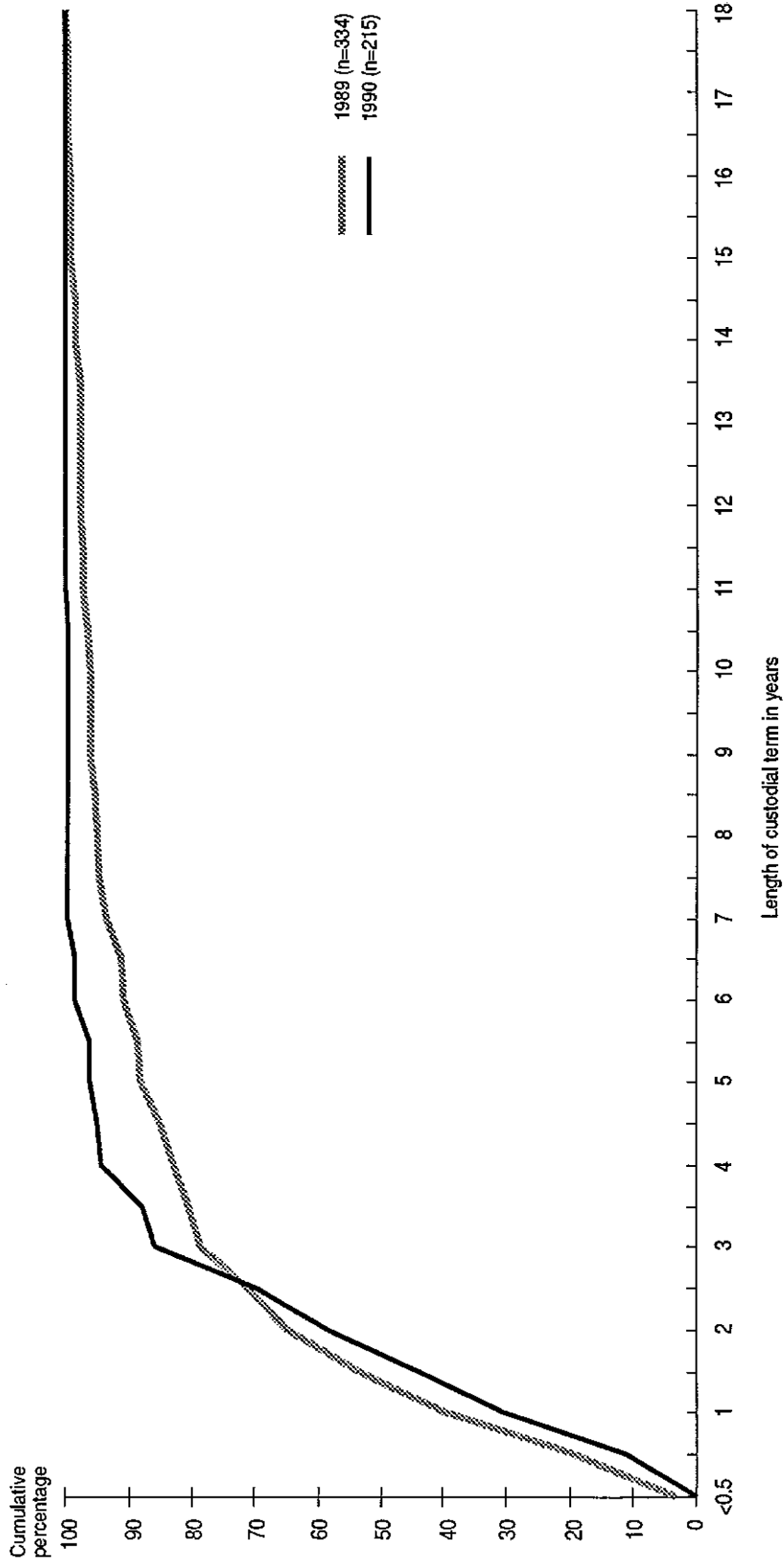
It is worth noting, however, that for cases involving minimum terms, there were fewer very long sentences. The longest specified minimum term in the sample was 11 years, compared with the longest non-parole period of 18 years. It is possible that for a few very long sentences, the courts *are* taking account of the fact that the minimum term will not be subject to any remission, but that the sample size used here is too small to detect any significant effect.

### 3.2.6 In what proportion of cases is the additional term more than one-third of the length of the minimum term?

For the 1990 sample, there were 28 cases where the additional term was longer than one-third of the minimum. This represents 13.0% of the cases where a minimum and additional term were specified. To ensure that these were genuine cases and not computer coding errors, the files were checked in each case. Special circumstances were described or alluded to in 25 cases. For the other three cases, the sentence was confirmed as being disproportionate but reasons were not mentioned. The appendix lists the minimum and additional terms specified in these cases, together with the reasons (if any) stated on the indictment.

**Figure 4: Custodial terms, excluding determinate sentences and fixed terms, specified by the Higher Courts**

*February to April 1989: Length of non-probation/parole period in years by cumulative percentage of offenders*  
*February to April 1990: Length of minimum term in years by cumulative percentage of offenders*



## 4 DISCUSSION

Caution must be used in interpreting these results. No attempt has been made to control for offence type or the characteristics of the individuals sentenced. In addition, the Local Court data were taken from the first three months immediately following the introduction of the Sentencing Act. It is possible that sentencing practices in the Local Courts have undergone adjustments since then.

Two key effects have emerged from the study. First, in both the Local and Higher Courts there has been an increase in the proportion of fixed sentences of six months or less. This increase was sufficient to produce a significant change in the distribution of custodial sentence lengths in the Local Courts but not in the Higher Courts.

Secondly, counterbalancing the increase in short fixed term sentences in the Local Courts, is the fact that the combined distribution of minimum and fixed terms *over* six months appears to correspond closely to the combined distribution of non-probation periods and determinate sentences over six months. In other words, there does not appear to be a systematic reduction in the length of minimum terms when compared with non-probation periods as we would expect if magistrates were attempting to compensate for the abolition of remissions.

Under the Probation and Parole Act a head sentence of over six months could carry a non-probation period of less than six months whereas under the Sentencing Act it is not permissible to specify a sentence with a minimum term of less than six months. Sentencers now wishing to impose a custodial term of less than six months must specify a fixed term of imprisonment. This limitation on sentencing may account for the increase in fixed sentences of six months or less observed in the sample data.

In the Higher Courts, the length of very long sentences may have been reduced, possibly to offset the loss of remission entitlements. This observation is, however, based on a very small sample of long sentences and should be treated with caution, as there was no statistically significant difference between the sentence-length distributions.

On the basis of the present study alone it is not possible to say what the net effect of the factors described above will be in terms of any overall change in the average length of time spent in custody. It is worth noting, however, that the finding that minimum terms have not been reduced to compensate for the abolition of remissions supports the results of the study by Gorta and Eyland on the impact of the Sentencing Act.<sup>17</sup>

Gorta and Eyland found a 35.7% increase in the average length of minimum terms under the Sentencing Act over the average length of time *actually spent in custody* under the Probation and Parole Act. The increase was offset by a 9.6% decrease in the average length of the minimum term when compared with the average length of non-probation/parole period when remission was not deducted. This is not sufficient, however, to prevent a rise in the average length of time spent in custody. If the average length of sentences rises then, all other things being equal, we might expect an increase in the size of the prison population. Gorta and Eyland found that prisoners were, on average, spending longer in custody under the Sentencing Act and estimated a consequent rise

in the prison population on any particular day of between 525 and 831 prisoners.<sup>18</sup>

It needs to be remembered, however, that while the effect of the Sentencing Act has, at least for the moment, been to increase the average length of time spent in prison and consequently the number of people in custody, prison numbers in NSW over the last few years have risen mainly because of an increase in the numbers of people arrested. Due to limitations of court capacity this led to a doubling of the remand population over the ten years prior to the introduction of the Sentencing Act. The remand population rose from 12% of all inmates in 1977 to around 23% in 1988. The increase in arrests has subsequently led to an increase in the sentenced prisoner population.<sup>19</sup> If the strategies designed to reduce court delay are successful, the effects of the Sentencing Act in increasing the prison population should be offset to some extent by reductions in the remand population. It is impossible to say at this stage whether the net effect will be a slowing down in the rate of growth of the NSW prison population or a reduction in its actual size.<sup>20</sup>



## NOTES

<sup>1</sup> The Honourable Mr Yabsley, Minister for Corrective Services, second reading speech, NSW Hansard, 10 May 1989, p. 7910.

<sup>2</sup> *ibid*, p. 7907.

<sup>3</sup> The Honourable Mr Langton MLA, NSW Hansard, 11 May 1989, p. 8131.

For examples of the media response to the legislation see the editorial in the Sydney Morning Herald of 24 February 1988 'Liberal Answer to Crime'; and the article 'Former judge condemns Yabsley's 'truth' sentences' also in the Sydney Morning Herald, 26 September 1989.

<sup>4</sup> NSW Prisons Regulations 1968, Section 111.

<sup>5</sup> Weatherburn, D., 1985, *Disappearing Non-parole Periods and the Sentencer's Dilemma*, Criminal Law Journal, Vol. 9 No. 2, p. 74.

<sup>6</sup> *R. v. O'Brien* [1984] 2 NSWLR 449.

Note that the Court of Criminal Appeal decided in *R. v. Maclay* (unreported, 16 February 1990) that sentences under the new Act should *not* attempt to replicate what would have been imposed previously, with or without regard to remissions. This implies that the abolition of remissions should not be considered when sentencing.

<sup>7</sup> Weatherburn, D., 1985, *Appellate Review, Judicial Discretion, and the Determination of Minimum Periods*, ANZ Journal of Criminology, Vol. 18, pp. 272 - 283.

<sup>8</sup> See Chan, J., 1989, *Sentencing of Violent Offenders: Where Does Truth Lie?* (Paper presented at the National Conference on Violence, 10 - 13 October 1989, Canberra).

<sup>9</sup> See Chan, *op. cit.*, for a comment on the likely public response to such a reduction in head sentences and the consequent dilemma for sentencers.

<sup>10</sup> The median and the average are both measures of the central tendency of a distribution. The median can be thought of as the 'half-way point' - that is, half the sentences in the distribution are shorter than the median and half are longer. Where a distribution is skewed rather than symmetrical, for example where there are a few unusually long sentences, the median gives a better measure of central tendency than does the average because, unlike the average it is not unduly weighted by the few extreme cases.

<sup>11</sup> The Local Courts data base only records sentence information on the principal offence, not on aggregate sentences.

<sup>12</sup> Note that this figure differs slightly from that given in a preliminary report on these results, which showed 996 custodial sentences. The reason is that when these cases were checked with the courts it was found that in five cases the penalty was actually periodic detention not a normal prison sentence.

<sup>13</sup> Kolmogorov-Smirnov test.

<sup>14</sup> Kolmogorov-Smirnov test.

<sup>15</sup> Kolmogorov-Smirnov test.

<sup>16</sup> Kolmogorov-Smirnov test.

<sup>17</sup> Gorta, A. and Eyland, S., 1990, *Truth in Sentencing - Impact of the Sentencing Act, 1989. Report 1*. Research and Statistics Division, NSW Department of Corrective Services, June 1990.

<sup>18</sup> *ibid*, p. 14.

<sup>19</sup> NSW Bureau of Crime Statistics and Research, 1989, **Court Delay and Prison Overcrowding** (Crime and Justice Bulletin Number 6), NSW Bureau of Crime Statistics and Research, Sydney.

<sup>20</sup> Note that although most people remanded in custody at final appearance are convicted and given custodial sentences, reducing court delays should still have an impact on the prison population. The reasons for this are that, a) many of those remanded in custody are, at present, likely to spend longer in prison than they would had they been sentenced immediately, and b) a proportion of prisoners remanded in custody are eventually acquitted or given non-custodial sentences.

## APPENDIX

### REASONS GIVEN BY JUDGES ON THE INDICTMENT FOR SPECIFYING AN ADDITIONAL TERM OF GREATER THAN A THIRD OF THE MINIMUM

**Case 01:** minimum: 18 months; additional: 36 months

Special circumstances: "age of prisoner, prospects for self-rehabilitation and benefits of lengthy supervision."

**Case 02:** minimum: 27 months; additional: 33 months

Special circumstances: "assistance to police, great efforts at self-rehabilitation plus desirability of lengthy period of supervision on parole."

**Case 03:** minimum: 9 months; additional: 6 months

Special circumstances: "In the light of his history I am of the view that it is essential that he have a significant period of supervision on his release."

**Case 04:** minimum: 12 months; additional: 36 months

Special circumstances: to allow for "close and quite possibly residential counselling for drug rehabilitation and additional general psychological counselling."

**Case 05:** minimum: 30 months; additional: 36 months

Special circumstances: "prospects for rehabilitation, abandonment of drugs, genuine remorse, and information provided to police about co-offender."

**Case 06:** minimum: 30 months; additional: 18 months

Special circumstances: Unclear. The Judge states that he has applied the "Totality of Criminality concept in sentencing."

**Case 7:** minimum: 12 months; additional: 12 months

Special circumstances: "I am satisfied of special circumstances which exist and warrant such additional term: age; possibility of rehabilitation."

**Case 8:** minimum: 8 months; additional: 18 months

Special circumstances: "1) Age of prisoner and prior history  
2) Need for lengthy supervision on release."

**Case 9:** minimum: 12 months; additional: 24 months

Special circumstances: Judge said for "reasons alluded to in my remarks on sentence."

**Case 10:** minimum: 12 months; additional: 24 months

Special circumstances: Judge said for "reasons in remarks on sentence."

**Case 11:** minimum: 23 months; additional: 9 months

Special circumstances: Judge noted additional term was slightly longer than a third and said it was "to make for administrative convenience and to provide a significant period of supervision."

**Case 12:** minimum: 36 months; additional: 24 months

Special circumstances: "I have been persuaded that it is in the public interest that there be a lengthy period of supervision and guidance on his release from prison if he is to be rehabilitated."

**Case 13:** minimum: 9 months; additional: 39 months

Special circumstances: "mental health of prisoner."

**Case 14: minimum: 9 months; additional: 12 months**

Special circumstances: "by reason of the prisoner's age, [illegible] background, need for alcohol rehabilitation..."

**Case 15: minimum: 36 months; additional: 36 months**

Special circumstances: "... particularly the rehabilitation you have achieved thus far, warrant an extended time during which, after your release, supervision may be maintained to ensure that your extraordinary [sic] long and damaging criminal career is brought to an end."

**Case 16: minimum: 24 months; additional: 12 months\***

Special circumstances: Not stated. Sentence confirmed, "subject to any provisions of the Sentencing Act, 1989."

**Case 17: minimum: 24 months; additional: 12 months\***

Special circumstances: Not stated. Sentence confirmed, "subject to any provisions of the Sentencing Act, 1989."

\*Note that these are separate matters (different arrest dates etc.) involving the same person.

**Case 18: minimum: 12 months; additional: 12 months**

Special circumstances: To allow for medical and psychological treatment.

**Case 19: minimum: 9 months; additional: 12 months**

Special circumstances: assist with drug usage and abuse: to allow for drug rehabilitation.

**Case 20: minimum: 18 months; additional: 12 months**

Special circumstances: to assist with drug and alcohol abuse; Judge recommended Salvation Army rehabilitation centre.

**Case 21: minimum: 12 months; additional: 12 months**

Special circumstances: to enable offender to attend drug rehabilitation.

**Case 22: minimum: 30 months; additional: 18 months**

Special circumstances: due to addiction.

**Case 23: minimum: 24 months; additional: 15 months**

Special circumstances: because of drug dependence.

**Case 24: minimum: 36 months; additional: 24 months**

Special circumstances: drug and alcohol dependence.

**Case 25: minimum: 12 months; additional: 24 months**

Special circumstances: "I fix an additional term of two years (REASONS GIVEN)."

**Case 26: minimum: 12 months; additional: 36 months**

Special circumstances: "consent of victim, intellectual limitations, prior character, little likelihood of recidivism, prospects of rehabilitation."

**Case 27: minimum: 12 months; additional: 36 months**

Special circumstances: "...specified in remarks on sentence."

**Case 28: minimum: 12 months; additional: 36 months**

Special circumstances: "referred to in remarks on sentence."