

IMPACT OF THE *SENTENCING ACT 1989* ON THE NSW PRISON POPULATION*

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In this paper I am going to describe the results of an empirical study looking at the effects of the *Sentencing Act* on the size of the New South Wales prison population and on the numbers on post-release community supervision.

The *Sentencing Act* was described as turning “the sentencing process on its head”.¹ The language of sentencing changed under the new Act which no longer used the terms “head sentence”, “non-parole period” and “non-probation period” but rather introduced the terminology “fixed term”, “minimum term” and “additional term”. The “minimum term” is that period which must be served in custody. The “additional term” is that part of the sentence during which the person may be released on parole. The sum of the minimum term and the additional term now called the total sentence would be equivalent to that which used to be termed “head sentence”. The “fixed term” is similar to the minimum term in that it is the period which must be served in custody, however unlike the minimum term, it has no additional term specified. Sentences of six months or less are required, under the Act, to be fixed terms.

Described as “revolutionary”² this Act abolished all forms of remission, established a 1:3 ratio of the additional term to the minimum term and removed the presumption in favour of parole for certain prisoners.

Because the *Sentencing Act* simultaneously changed so many of the parameters concerning custodial sentencing in New South Wales, it was not possible for all aspects of sentencing to remain unchanged after the introduction of the new legislation. That is, it was not possible for new total sentences to follow the same pattern as old head sentences and for the periods in custody, and for the time on post-prison community supervision to each remain the same under the *Sentencing Act 1989* as under the *Probation and Parole Act 1983*. Before the introduction of the *Sentencing Act* no one was sure what its impact would be. When asked to predict the possible impacts, we suggested four scenarios:

- i) if the head sentence had previously been the most important part of the sentence to the sentencers, then the old head sentence would become the new sentence. The new minimum term (time to serve in custody) would be three-quarters of the

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

† I would like to thank the staff of the Computer Services Division of the Department of Corrective Services who provided the data which form the basis of this paper. I would also like to acknowledge the contribution of Simon Eyland who assisted with the data analysis and data presentation.

1 *New South Wales Hansard* (1989) Sentencing Bill Second Reading, 10.5.89 at 7906.

2 Above n1, 11.5.89 at 8143.

length of the old head sentence. This would have the effect of keeping the head sentence/total sentence constant but vastly increasing the time spent in custody;

- ii) if the non-parole (or non-probation) period had been the most important aspect of sentencing to the sentencers, the new minimum terms would approximate the old non-parole periods. This would have the effect of increasing the time spent in custody by the length of the remission which previously would have been deducted. Additional terms would be one-third the length of the old non-parole period. Hence the new total sentence would, on average, be much shorter than the old head sentence;
- iii) if the time in custody (non-parole period less remission) had previously been the most important aspect of sentencing, then the time in custody would not change before versus after the legislation. The new minimum term would be set as the old non-parole period less remission. The new total sentence would be equivalent to eight ninths of the old non-parole period,³ and hence would be much shorter than the head sentence under the previous legislation;
- iv) none of the three scenarios, listed above, would hold.

A fifth scenario (based on the time on post-prison community supervision previously being the most important aspect of sentencing to the sentencer), though a logical possibility, was considered unlikely.

When introducing the legislation the potential effect of the *Sentencing Act* on the size of the New South Wales prison population was of concern. In the Act's Second Reading Speech the Minister for Corrective Services emphasised that "the Government is not seeking to make sentences longer".⁴ This was echoed by the guide to the *Sentencing Act* which was published by the Department of Corrective Services in which it was stated that it was "not the Government's intention that, as a consequence of the *Sentencing Act*, longer sentences be served. It will mean that the operation of the Act will not heighten the overcrowding problem with which we are currently dealing."⁵ In contrast, the member for the Opposition stated: "As the legislation now stands, the surest outcome will be a massive growth in the number of people in prison".⁶ In Chan's paper on sentencing violent offenders she argued

"that unless the Government gives express legislative direction to the judiciary to adjust their sentences to take into account the abolition of remission and accepts responsibility for educating the public about the consequences of the Act, prison sentences in New South Wales are likely to increase dramatically, especially for those sentenced to lengthy periods of imprisonment".⁷

3 This is based on the new minimum term being equivalent to the old non-parole period less remission or two thirds of the old non-parole period. The new total sentence would be four thirds of the minimum term or four thirds times two thirds of the old non-parole period.

4 Above n1, 10.5.89 at 7907.

5 New South Wales Department of Corrective Services, *The Sentencing Act 1989: An Introduction* (1989) at 7.

6 Above n1, 11.5.89 at 8135.

7 Chan, J B L, "The New South Wales Sentencing Act 1989: Where Does Truth Lie?" (1990) 14 *CrimLJ* at 249.

During the Second Reading speech for the Sentencing Bill, concern was expressed by the member for the Opposition about: the lack of guidelines for the judiciary in how its members should amend their sentences; the curtailment of the discretionary powers of judges to vary sentences according to circumstances of individual cases; the likely massive growth in the number of people in prison and the treatment of parole as an optional extra.⁸

PUTTING THE IMPACT IN CONTEXT

To begin with, I would like to put the effects of the *Sentencing Act* into context by looking at some longer term trends in the size of the New South Wales prison population.

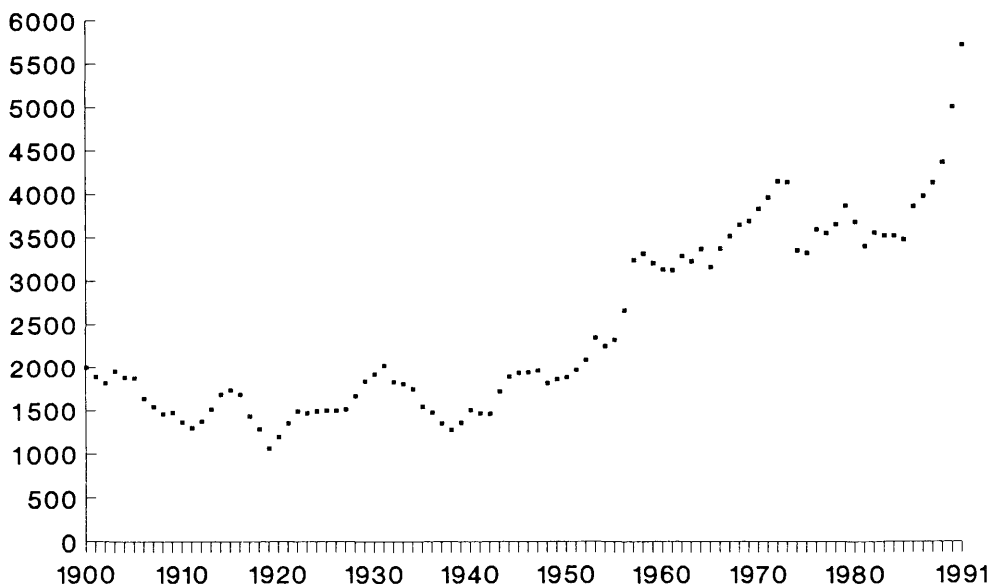


Figure 1: Daily Average Prison Population, 1900–1991

This graph shows the daily average prison population in New South Wales each year from 1900 up to the end of the 1990/91 financial year. From this graph it can be seen that historically, the average prisoner numbers have fluctuated quite widely. However, the overall trend in prisoner numbers from the beginning of the century has been one of increasing prisoner numbers. Average prisoner numbers for recent years have actually

8 Above n1, 11.5.89

been higher than the general upward trend shown this century. In 1990/91 the daily average number of prisoners held was 5,712. This is 710 prisoners more on average each day in 1990/91 than there were in 1989/90 when, in turn, there were 644 more prisoners on average than there were in 1988/89. That is, on average there were 1,354 prisoners more each day in 1990/91 than there were on average two years earlier.

It should be noted that graphs such as these vastly oversimplify what is happening to prisoner numbers. Because there is only one point plotted for each year, there is no consideration of the fluctuation in prisoner numbers within any year. In some years the fluctuations in numbers are huge, for example, in 1983–84 the highest weekly state differed from the lowest weekly state by 903 prisoners, in 1984–85 the highest weekly state differed from the lowest weekly state by 828 prisoners. Such fluctuations in each of these years, which represented a difference of more than four times the design capacity of Parklea Prison, posed considerable planning problems for prison administrators.

Figure 2 shows the daily average prison population for each month from January 1988 to June 1991.

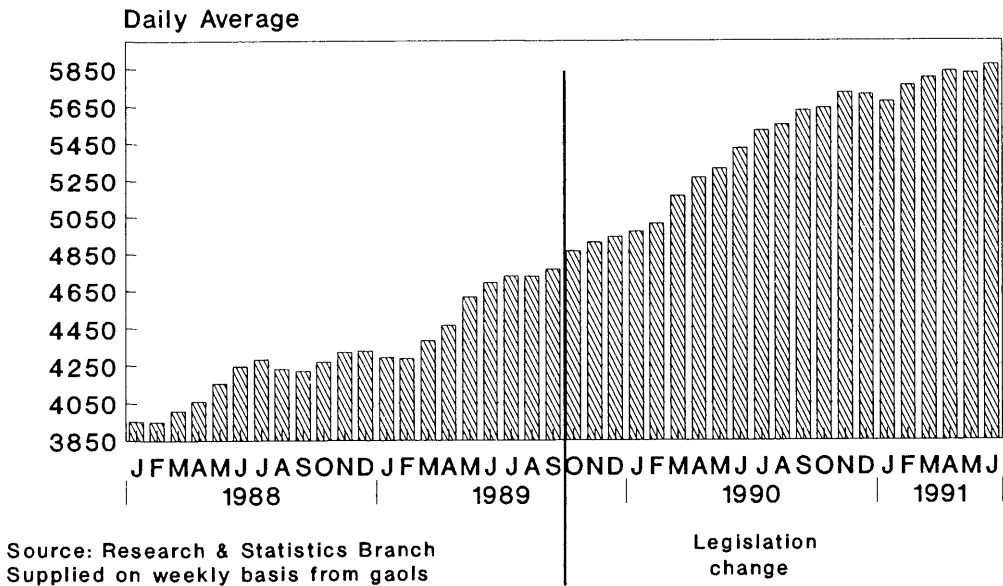


Figure 2: Daily Average Number of Prisoners in New South Wales Gaols January 1988–June 1991

Stating the obvious, as we all know, the prison population has been increasing. To put this rate of increase in perspective, consider Parklea Prison. Although it is currently holding approximately 350 prisoners, Parklea was originally designed to hold 210 prisoners. The distance between each of the pairs of horizontal lines on this graph is 200 prisoners, or approximately the design capacity of Parklea.

We can see from this graph that in 3.5 years the daily average prison population has increased by the equivalent of nine times the design capacity of Parklea. To have kept up with this increase at this time we would have had to have been building at the rate of more than one Parklea every four to five months.

These graphs illustrate that the New South Wales prison population was increasing prior to the introduction of the *Sentencing Act*. The prison population may well have continued to increase had there been no legislative change. The question to be addressed is how much, if any, of the increase in the prison population which has subsequently occurred can be attributed to the effects of the *Sentencing Act* 1989.

AN OUTLINE OF THE STUDY

We conducted a study specifically to answer the question "What will be the likely effect of the Act on the size of the New South Wales prison population?" More generally, we were interested in what ways judicial officers have changed their sentencing patterns since the change in legislation.⁹

In order to determine the effects of the *Sentencing Act* 1989 on the size of the New South Wales prison population and the sentencing practices of judicial officers, it is necessary to compare the sentences imposed and time served for those sentenced before the change in legislation with those sentenced after the change in legislation. Hence we had a "Before" Group and an "After" Group.

The "Before" Group in this analysis were sentenced prisoners discharged from New South Wales gaols during the six month period 1 January 1989 to 30 June 1989. Excluded from this analysis were prisoners who had been discharged from a period of imprisonment in default of payment of a fine (fine defaulters), life sentence prisoners, forensic patients, offenders sentenced only for offences against Commonwealth legislation and periodic detainees. Also excluded were prisoners whose period of imprisonment had been interrupted by a period at large in the community such as escapees and offenders returned to gaol for breach of parole or licence. Since prisoners in this "Before" Group had already been discharged, their actual time served in custody was known. The use of a discharge cohort for the "Before" Group had a further advantage of excluding all prisoners who would have been in custody at the time the *Sentencing Act* was introduced ("Transition Prisoners") and whose sentences had to be modified to take into consideration the transitional remission entitlements.

9 For more details of this study refer to Gorta, A, & Eyland, S, *Truth in Sentencing: Impact of the Sentencing Act 1989 — Report 1* (1990), NSW Department of Corrective Services Research Publication No 22.

The "After" Group were new sentenced receptions received after the change in legislation. The "After" Group keeps growing as we are able to collect more data. An initial analysis included those received between 1 October 1989 and 31 March 1990.¹⁰ These data have subsequently been extended to include the period 1 April 1990 to 30 June 1991.¹¹ It is intended that the monitoring will continue. Excluded from the "After" Group were prisoners received into New South Wales gaols who did not come under the scope of the *Sentencing Act*, that is, fine defaulters, forensic patients, offenders sentenced only for offences against Commonwealth legislation and periodic detainees. Also excluded were prisoners received into custody to resume serving the balance of a previous sentence such as recaptured escapees and offenders returned to gaol for breach of parole or licence.

All data were obtained from the Department of Corrective Services' computerised Offender Records System by staff of the Computer Services Division.

In addition to sentencing information (including aggregate head sentence, actual time served in custody, time under supervision, most serious offence for the "Before" Group and aggregate minimum or fixed term, aggregate additional term, total sentence and most serious offence for the "After" Group), data were extracted on basic demographic factors such as age and sex so that any difference in the "Before" and "After" Groups on these factors could be allowed for and not attributed to the *Sentencing Act*.

ESTIMATING THE IMPACT OF THE *SENTENCING ACT*

Time in custody

The graph on the following page provides a comparison of the time actually served in custody by those in the "Before" Group and the minimum time to be served by the "After" Group. The important thing to note from this graph is that a higher percentage of those in the "Before" Group are serving shorter periods, whereas a higher percentage of those in the "After" Group are serving longer periods, even if they are held no longer than their minimum terms. The average minimum or fixed term for those in the "After" Group was 290 days. This is significantly longer than the average term of 244 days actually served by those in the "Before" Group. This is an overall increase of 46 days or 19 per cent in the average time to be served.

Size of the prison population

This leads to the question: What does this average increase of 46 days in time to be served represent in the size of the New South Wales prison population?

The following estimates of projected prison population increases are based on the sentencing patterns of prisoners received between October 1989 and June 1990 being representative of the sentencing patterns of prisoners received in future months.

10 Ibid.

11 Gorta, A, "Truth in Sentencing". Paper presented at the Sixth Annual Conference of the Australian and New Zealand Society of Criminology, Sydney, September 1990.



Figure 3: Comparison of time in custody before and after legislation change

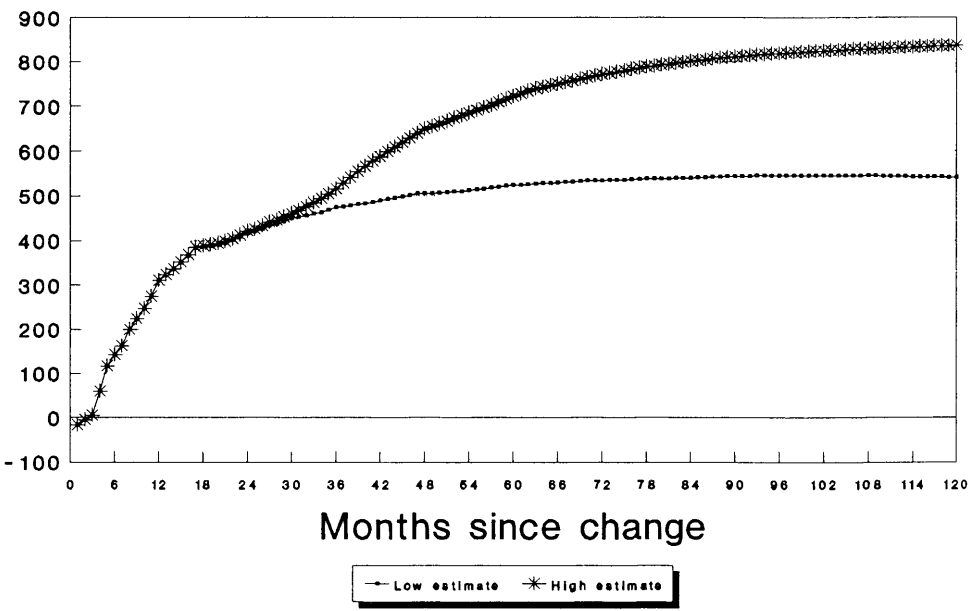


Figure 4: Estimated prison population increase due to change in legislation

The overall increase of 46 (290–244) days (or 19 per cent) in the average time to serve is equivalent to an eventual overall increase in the prison population of approximately 490 additional sentenced prisoners held on any day. It was estimated that the increase in the prison population will be most marked during the period 4–17 months after the introduction of the legislation, that is, February 1990 to March 1991.

It should be noted that this estimated increase in the sentenced prison population is likely to be an underestimate in that it is based on all members of the “After” Group being released at the expiry of their minimum period. Not all prisoners will be released at the expiry of their minimum (or fixed) terms. It is possible, though expected to be a rare occurrence, that Visiting Justices may extend the sentences of some prisoners for infringements of prison rules. Those prisoners whose minimum plus additional terms sum to more than three years (189 prisoners or 6.5 per cent of the “After” Group) are not released automatically at the end of their minimum period, rather they are considered for release by the Offenders Review Board. If, considering the other extreme, all of those whose release depended upon the discretion of the Offenders Review Board were held in custody for the maximum period (that is, until the expiry of their additional period) this would result in an increase of 76 (320–244) days in the average time to serve which is equivalent to an increase of approximately 800 additional sentenced prisoners held on any day.

Hence, if future sentencing patterns remain unchanged, the expected increase in the size of the prison population due to the effect of the *Sentencing Act* would be between approximately 490 and 800 additional sentenced prisoners.

As I stated earlier, the estimates of projected prison population increases shown in Figure 4 were based on the sentencing patterns of prisoners received between October 1989 and June 1990 being representative of the sentencing patterns of prisoners received in future months. If sentences handed down are shorter in future months then it follows that the overall increase in the prison population will be less.

Post-prison community supervision

I would now like to look at other effects of the *Sentencing Act* during the first six months of its operation.

Fewer prisoners are being given community supervision after the change in legislation. More than half of those in the “Before” Group (56.0 per cent) were discharged to community supervision (after-care probation or parole). After the change in legislation a significantly smaller proportion (30.9 per cent) had sentences which included a period of community supervision (that is, had an additional term).

The periods of community supervision considered here are “maximum potential” periods of supervision. The average number of days on community supervision was calculated only for those who were given community supervision. For the “Before” Group, the number of days on community supervision was calculated as the number of days between release to parole or after-care probation and the expiry of the head sentence. In practice an offender may not have been supervised for this entire period as the Probation and Parole Service maintained the right of discretionary or early termination of

community supervision. For the “After” Group, the number of days on supervision was equated to the number of days in the additional term. Once again this is “maximum potential” period to supervision since not all prisoners will necessarily be released on community supervision at the expiry of their minimum terms.

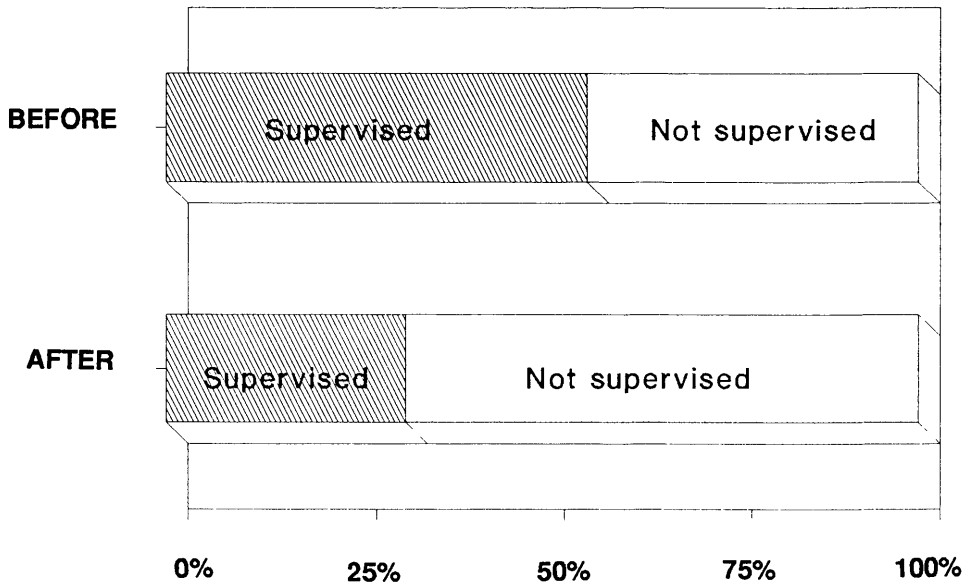


Figure 5: Comparison of supervision before and after legislation change

It was found that the average period on community supervision, for those given any community supervision, was much shorter following the change in legislation (208 days) than prior to the change in legislation (799 days). This represents a reduction of 74 per cent in the average maximum period of supervision handed down prior to the change in legislation.

Section 5.3 of the *Sentencing Act* states that the “additional term must not exceed one-third of the minimum term unless the court decides that there are special circumstances”. There was no such provision in the earlier *Probation and Parole Act 1983*.

The ratio of the period on community supervision to the period confined in gaol has decreased since the *Sentencing Act* was introduced. For those given community supervision, the period on supervision was, on average, almost two and a half (2.40) times as long as the period spent in custody prior to the change in legislation and just over one-third (0.39) as long as the period in custody following the change in legislation.

CONCLUSION

As stated in the introduction, because the *Sentencing Act* simultaneously changed so many of the parameters concerning custodial sentencing in New South Wales, it was not possible for all aspects of sentencing to remain unchanged. Unlike the first three scenarios postulated in the introduction, no one aspect of sentencing (that is, head sentence, non-parole period, time in custody) has directly been maintained following the commencement of the *Sentencing Act*. Rather, judicial officers in general have tended to significantly reduce their total sentence from the average head sentence which would have been handed down under the *Probation and Parole Act* 1983; and the length of post-prison community supervision. Minimum terms tend to be shorter than non-parole periods set under previous legislation. Despite these reductions, however, the average time to be spent in custody is longer under the *Sentencing Act* than under the *Probation and Parole Act* 1983.

To summarise, we have found that following the change in legislation:

- prisoners will be serving longer periods in custody;
- fewer are being given sentences including periods of community supervision;
- those with additional periods are spending much less potential time on community supervision.