THE *SENTENCING ACT* 1989: IMPACT AND REVIEW*

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We have now had sufficient time to gauge the impact of the *Sentencing Act* 1989 which commenced on 25 September 1989, and one cannot avoid noticing that we are running out of room in our prisons. In New South Wales the prison population has risen from 4,691 in 1987/88 to 6,366 in 1989/90, an average rate of increase of 12 per cent per annum for the last three years. While there may be other factors, such as increasing crime and police clearance rates which may be contributing to the burgeoning prison population, there is little doubt that the *Sentencing Act*, as translated into practice, has meant that "real time" served for those sentenced to imprisonment has increased.[1]

Prison overcrowding, which has become a very serious problem in New South Wales, is a function of *prison capacity*, the *number of offenders* being sentenced to terms of imprisonment and the *length of time* required to be served by sentenced prisoners. Logically, the problem of prison overcrowding can be addressed by building more penal institutions, reducing the number of offenders being sentenced to imprisonment and/or reducing the length of prison sentences.

BUILD MORE PRISONS?

Gaol construction is a slow and costly process. It is not necessarily a good solution to prison overcrowding because it is often said that the use of imprisonment increases with the availability of space.[2] More prisons mean more imprisonment. An ambitious prison building program ultimately means less money for other essential services, such as health and education. Further, and at best, imprisonment may be regarded as a necessary evil which is designed to protect society by deterring would-be offenders and by putting behind bars (punishing and incapacitating), for a period of time, those who have committed the most serious offences.

In the criminological literature the value and effectiveness of imprisonment is hotly debated. Imprisonment has failed as a rehabilitating measure, its effectiveness as a deterrent is questionable, and it contributes significantly to the maintenance of a criminal sub-culture which works against the very objects for which it is designed. It is for these

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1 See Gorta, A and Eyland, S, *Impact of the Sentencing Act, 1989 Report 1*, Research Publication No 22 (1990). Also see Matka, E, *NSW Sentencing Act 1989*, Legislative Evaluation Series (1991).

2 See, for example, Blumstein, A, "Prison Populations: A System Out of Control" [nd] 10 *Crime and Justice: A Review of Research* 231 at 259.

reasons, and particularly for the humanitarian and fiscal considerations that apply to incarceration, that courts have recognised the principle that imprisonment is a sanction which should be used only as a last resort.[3]

CRIME RATES

In attempting to evaluate the impact of the *Sentencing Act* on the rate of imprisonment, it is important also to keep in mind the level of crime in the community. By "level of crime" is meant the level of crime as reported or recorded in official statistics (usually police statistics) rather than the real level of crime which would, for example, take into account the "dark figure" of crime. It is the response to the official statistics that most directly impinges on the workload of the criminal justice system.

As illustrated in Figure 1, both reported and cleared crime have been steadily increasing, although property crime appears to have stabilised and fallen slightly in recent years.

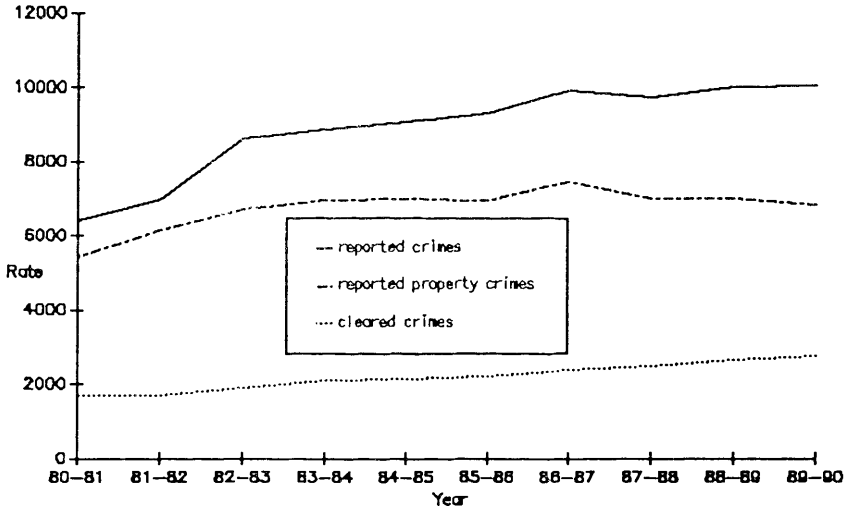


Figure 1: Reported, cleared and property crime rates
(NSW, per 100,000 adult population)

Over the same period reported offences against the person have increased quite dramatically. Figure 2 illustrates this increase as well as the increase in imprisonment.

3 Australian Law Reform Commission, "Sentencing", Report No 44 (1988) at 28.

While further analyses of these statistics would be desirable it may not be unreasonable to infer that some of the increase in imprisonment is a consequence of the general increase in the perceived level of violent crime. This is a warning to those who would seek to attribute all the increase in the rate of imprisonment exclusively to the effect of the *Sentencing Act*.

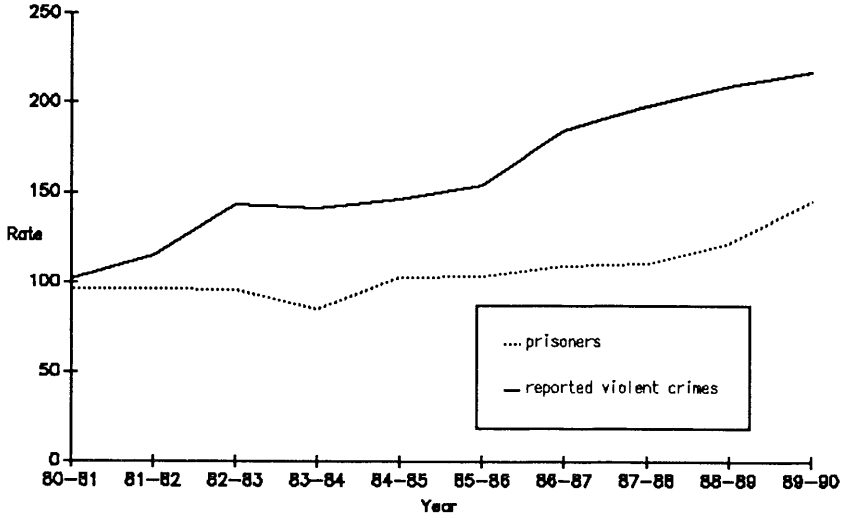


Figure 2: Prisoner and reported violent crime rates
(NSW, per 100,000 adult population)

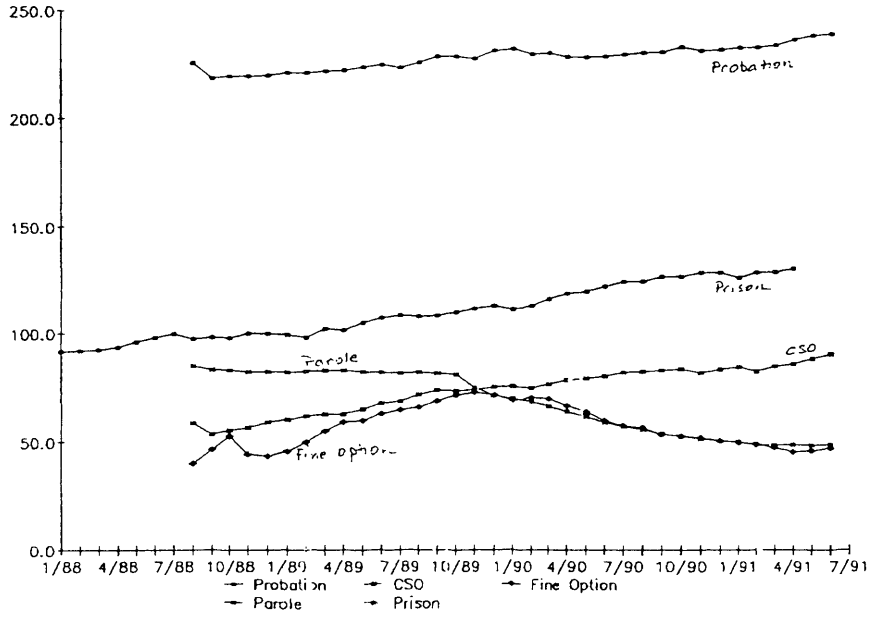
THE CHANGING PATTERN OF SENTENCING

As both Figure 2 and Figure 3 illustrate, imprisonment rates began to rise prior to September 1989. This may in part be attributable to the *Probation and Parole (Serious Offences) Amendment Act* 1987, which introduced s20A into the *Probation and Parole Act* 1983. That section, which commenced to apply on 1 January 1988, required sentencers, in the normal course of events, to set a non-parole period which was three-quarters of the head sentence.[4] As a consequence of this, and having regard to the principle in *O'Brien*,[5] namely, that remissions were to be disregarded when determining the length of sentences, non-parole

4 For a brief background to the changes prior to the *Sentencing Act* 1989, see Potas, I, *Sentencing Robbers in New South Wales* (1990) at 2-6.

5 [1984] 2 NSWLR 449.

and non-probation periods, 1 January 1988 could be regarded as the dawn of a more punitive period in sentencing.



Source: F. Debaecker, *Australian Community Based Corrections*, Australian Institute of Criminology

Figure 3: Sentencing Trends (NSW, per 100,000 of the Adult Population)

As Figure 3 shows, as well as imprisonment, there has been a dramatic increase in the use of Community Service Orders. The Community Service fine default scheme, introduced with great gusto after the near-fatal assault at Long Bay Gaol of fine-defaulter Jamie Partlic, reached a peak at the end of 1989 and has since been steadily declining.[6] Parole also has been declining steadily since the introduction of the *Sentencing Act*, although if the imprisonment rate continues to increase at present levels, the rate of parole should also begin to rise.

6 See Houghton, G, *Community Service Orders: Views of Organisers in NSW* (1991), Judicial Commission of NSW Monograph Series No 2 at 6-7.

MORE SENTENCING ALTERNATIVES?

A significant strategy for reducing our reliance upon imprisonment has been the provision of so called "alternatives to imprisonment" sanctions. These include such sentencing options as Periodic Detention (an alternative to full time imprisonment), and more significantly because of prevalence of use, Community Service Orders.[7]

While these may alleviate some of the pressure on imprisonment rates there is some evidence suggesting that sentencers do not always use these as a true alternative to imprisonment. Such sentences are often treated as sentences in their own right and thus lead to the problem of "net-widening".[8] Indeed in a recent survey conducted by the Judicial Commission, about one third of the judicial officers interviewed reported some ambivalence towards using them as true alternatives to imprisonment, often preferring to treat them as intermediate sanctions in a sentencing hierarchy ranging from a bond to imprisonment.[9]

Thus whatever may be the other benefits of "alternative to imprisonment" options, their ability to diminish the flow of offenders into penal institutions should not be over-estimated. While such alternatives are important and likely to retrieve some offenders who are at the very brink of incarceration, may unnecessarily or inadvertently push others to the brink. Indeed, having received the benefit of an alternative disposition, such offenders may find themselves incarcerated at a later stage, either because:

(1) they have failed to comply with the terms of an unnecessarily onerous order; or

(2) they have committed a subsequent offence which might not have carried a sentence of imprisonment but for the fact that they had previously had the benefit of "an alternative to imprisonment" sanction.

While the prudent sentencer will be aware of the problems associated with net-widening and labelling, and use alternative sentencing dispositions in accordance with the legislative intent, remedies beyond those relating purely to sentencing should also be pursued. Only in this way can significant reductions in the use of imprisonment be achieved.

THE CHILDREN'S COURT

The Research section of the Judicial Commission is currently undertaking a study of the sentencing practices of the Children's Court. This study is based on data supplied by the research unit of the Department of Community Services. The study will analyse sentencing trends dating from June 1982 to December 1990. It will take into account the impact of the

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7 Section 4(1) of the *Community Service Orders Act* 1979, for example, states as follows:
Where a person —
(a) who has committed an offence punishable by imprisonment (whether or not it is also punishable by a fine) ... is before a court for sentencing after being convicted of an offence, the court may, instead of imposing a penalty of imprisonment make an order requiring the person to perform community service work.

8 See Bray, R, *The Use of Custodial Sentences and Alternatives to Custody by NSW Magistrates* (1990), Judicial Commission of NSW Monograph Series No 1 at 7.

9 See Bray, R, and Chan, J, *Community Service Orders and Periodic Detention as Sentencing Options* (1991), Judicial Commission of NSW Monograph Series No 3.

various changes to the remission schemes applying to juvenile offenders who were detained in institutions during this period. It will also examine in some detail the impact of the *Sentencing Act* on the actual time served by young offenders committed to institutions.[10]

Before revealing some of the key findings of the study, it is important to keep in mind the distinction between the sentence imposed and the actual term served. Our analysis looks at both these concepts, although our main concern is with the question of whether the average actual term of custody has increased as a result of the *Sentencing Act*. If it has increased we would also wish to know the extent of the increase.

The analysis involved a comparison of all sentences imposed for a principal offence upon children dealt with in the Children's Court for a period of 15 months prior to the commencement of the *Sentencing Act* (25 September 1989), with all sentences imposed upon children for a principal offence 15 months after the commencement of the *Sentencing Act*.

The number of children in each of the pre and post *Sentencing Act* groups were particularly well balanced, consisting of 1,278 and 1,255 detainees, respectively. The pre *Sentencing Act* custodial terms constituted 6.5 per cent and post *Sentencing Act* custodial terms constituted 6.2 per cent of all principal sentences imposed in the Children's Court.

Michael Cain and Garth Luke, who are the principal researchers of the study, have found that while there are no significant differences in variables such as age and sex of the before and after groups, the post *Sentencing Act* offenders had committed significantly fewer property offences and more offences against the person than their pre *Sentencing Act* counterparts. Further the post *Sentencing Act* offenders consisted of significantly fewer offenders with no prior convictions, fewer offenders with only one or two prior convictions, but more offenders with a large number of priors. There was no statistically significant difference in the two groups in respect of offenders who had been committed to an institution on a previous occasion.

In general it may be concluded that those who received a control order after the *Sentencing Act* tended to involve more serious cases than those who received control orders before the Act, thereby inviting the view that the Courts are being more discerning about whether an individual offender should be committed to an institution. Equally, however, it should be pointed out that there is no significant difference in the groups, with regard to the proportion of offenders being committed to institutions.

Figure 4 displays the average sentence lengths together with the non-parole periods and minimum custodial terms, as they applied to the two periods. The large disparities between the average head sentences and the average non-probation periods and the average time served in custody in the pre *Sentencing Act* group stands in stark contrast to the post *Sentencing Act* group. Head sentence lengths have been halved since the introduction of the Act, but the actual term that young offenders must serve in detention has increased.

Figure 5 illustrates the increase in the average time served by children who received control orders. Whereas prior to the *Sentencing Act* the average time served in custody

10 Note that section 43 of the *Sentencing Act* 1989 states that the Act applies to children.

was 3.7 months, the average post *Sentencing Act* custodial term was 4.9 months, an average increase of 5 weeks.

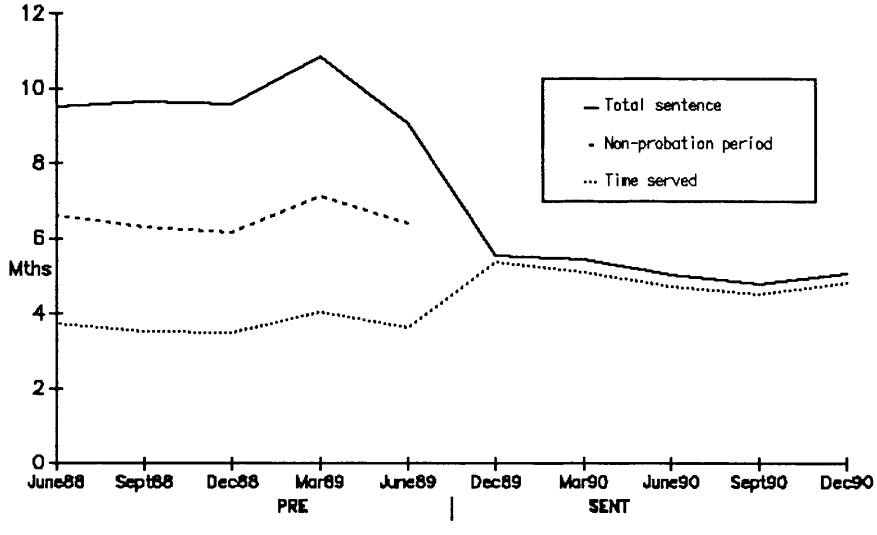


Figure 4: Mean length of sentence and time served by period (Children's Court, June 1988 to December 1990)

The fact that since the *Sentencing Act* the vast majority of control orders are for fixed terms (and therefore additional terms are seldom imposed), it is not surprising to find that there is little difference between the average custodial term and the average overall sentence.[11]

Finally, Figures 6 and 7 help explain the increase in the average actual time served by juvenile offenders since the commencement of the *Sentencing Act*. Figure 6 simply records the sentences (control orders) as handed down by the Children's Court both before and after the Act. This includes fixed terms, non-probation periods or minimum terms, as the case may be. An examination of this figure shows that the pattern of sentences are remarkably similar in the two periods, although sentences (or non-probation periods) tended to be slightly longer prior to the *Sentencing Act*.

Figure 7 provides the same information except that for the pre *Sentencing Act* data remissions have been deducted in order to more accurately reflect the actual or real period that these offenders were likely to serve in custody. It is now possible to compare the

11 Only 10 per cent of custodial terms are greater than six months and less than 2 per cent are greater than 12 months; see Cain, M, "The Children's Court" (1991) 1 *Sentencing Trends* at 6.

groups with an eye for determining which of the two groups was required to serve longer in custody. It shows that those committed to institutions prior to the Act generally served less time in detention than their post *Sentencing Act* counterparts.

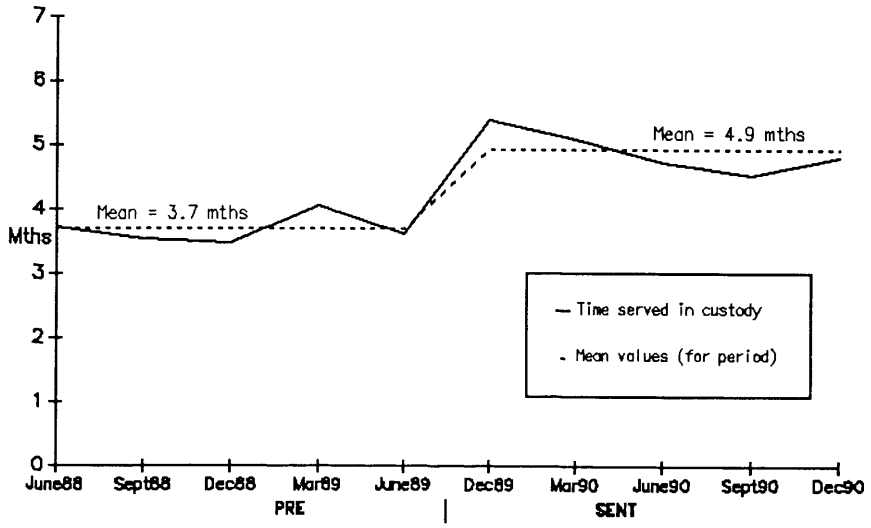


Figure 5: Time served — quarterly and period mean values
(Children's Court, June 1988 to December 1990)

SOME REFORM PROPOSALS

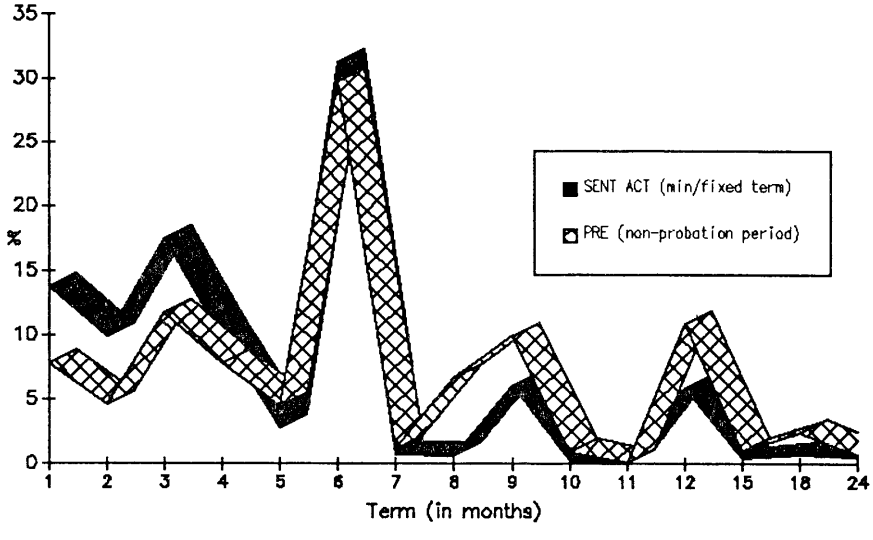
In the United States a number of jurisdictions which use sentencing guideline systems (for example, Minnesota and Washington) have developed guidelines which take account of overcrowded correctional facilities. In Oregon for example, legislation was passed in 1987 which provides that factors relevant to the determination of an appropriate sentence should include a consideration of "the effective capacity of state and local facilities" as well as the availability of other sentencing sanctions.[12] One American commentator has claimed that States which are "blind" to capacity have exacerbated crowding in their prisons and those which have the legislation have avoided the problem.[13]

While New South Wales has not had the need to follow the highly structured sentencing systems of the United States it would be possible to legislate for a principle which provides

12 Brogan, K M, "Structuring Felony Sentencing Guidelines in an Already Crowded State: Oregon Breaks New Ground" (1990) 36/467 *Crime and Delinquency* at 469.

13 Ibid.

that a sentencing judge or magistrate should be permitted to reduce or discount the otherwise appropriate sentence if he or she is satisfied that the prisons are overcrowded.



Firgure 6: Distribution of court-ordered sentences
(June 1988 to December 1990, All Offences)

In my submission such a principle should not be any more controversial than one which provides a prisoner with a sentencing discount for co-operating with authorities pleading guilty, or turning police informer. Such a principle could also be seen as another rationale for treating imprisonment as a sanction of last resort.

Another potential method for reducing our reliance on imprisonment is to examine our penal legislation with a view to reducing maximum penalties. As members of the Advisory Council on the Penal System in the United Kingdom pointed out: "The normal range of penalty, known to the judges and reinforced by the decisions of the Court of Appeal (by implication, the Court of Criminal Appeal in New South Wales), is the point from which the complex sentencing process begins".[14] An acknowledgement of this fact should not prevent policy-makers from reviewing statutory penalties with a view to making statutory penalties more meaningful and relevant to sentencing practice. The "bottom-up" approach of the *Sentencing Act* 1989, and the abolition of remissions together ensure that most maximum penalties are totally out of step with sentencing practice, certainly even more out of step than

14 Advisory Council on the Penal System, *Sentences of Imprisonment: A review of Maximum Penalties* (1978) at 73.

under the old sentencing regime. A reduction in maximum penalties might also be interpreted as an indication by the legislature that certain prison sentences are too high. If most penalties in the Crimes Act were halved they would immediately assume more relevance to sentencing practice. An adequate review of maximum penalties is long overdue.[15]

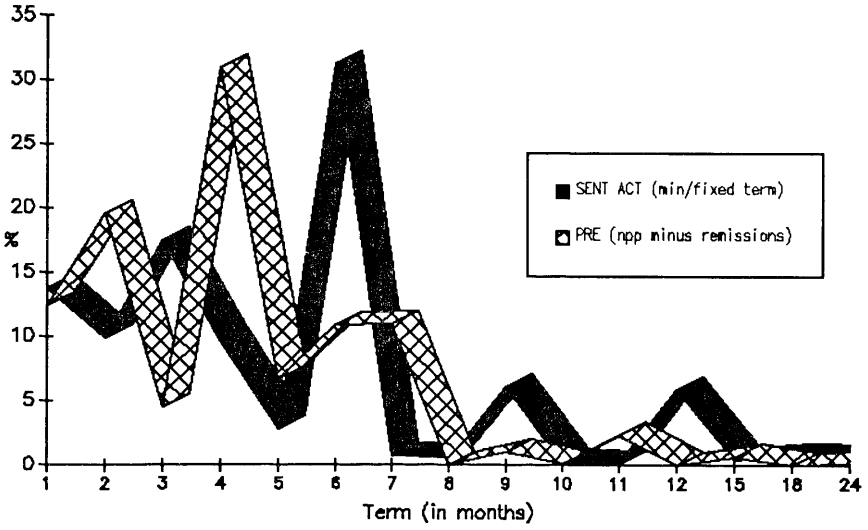


Figure 7: Distribution of time served in custody by period
(June 1988 to December 1990, All Offences)

Other options should also be explored. For example the Australian Capital Territory boasts the lowest imprisonment rate in Australia, yet its crime rate is not significantly different from other jurisdictions.[16] It does not have its own prison system (those sentenced to imprisonment serve their sentences in New South Wales) and this is sometimes used to explain why judges use imprisonment so sparingly. Although the ACT has adopted and applies the *Crimes Act* 1900 (NSW) it has amended the legislation in a number of important respects. One important difference is the availability of the suspended sentence (including the partially suspended sentence). Although I am unaware of any relevant research relating to its effectiveness, perhaps legislators should be examining this sword of Damocles. If it works for other

15 See for example Chan, J, "The New South Wales Sentencing Act 1989, Where Does Truth Lie" (1990) 14/249 *Crim L J* at 250-254; see also Sentencing Task Force, *Review of Statutory Maximum Penalties in Victoria* (1989).

16 See Mukherjee, S, et al, *Crime and Justice in Australia* (1990) at 46.

jurisdictions it should be added to the sentencing armoury of New South Wales in an effort to reduce our reliance on imprisonment.

Finally it may be possible to mitigate sentence severity by amending the *Sentencing Act* itself. While personally I am not in favour of re-introducing remissions, I see little merit in the "bottom-up" approach which has been introduced by the *Sentencing Act*. It is an unduly cumbersome system and generally requires sentencers to specify two terms and numerous dates in order to indicate what the sentence is. Equally, fixed term sentences are generally undesirable because they lack the deterrent or supervisory aspects of conditional release. For these reasons I would far prefer a system which required the sentencer to set a single sentence, and, based on a statutory formula of "two-thirds in and one-third out," all offenders would be eligible for release after they had served two thirds of their sentences. This would not offend the concept of 'truth in sentencing' so long as the public were informed, as they should be informed, about the practical effects of such a sentence.

For short term sentences of up to three years, conditional release would be automatic unless the offender was penalised for breaching prison regulations. For longer sentences release would be contingent on satisfying the Parole Board (or Serious Offenders Board) that it would be safe to release the offender. Even so there would be a presumption in favour of granting parole after two thirds of the sentence had been served. Any amending legislation should contain a provision indicating that sentences should not be increased in order to compensate for the availability of conditional release. For administrative convenience only those sentenced to imprisonment for less than six weeks should be subject to fixed term sentences.

The system proposed is not the same as one employing a scheme of remissions. There is no discounting of the sentence. All that would happen is that part of the prison sentence, the last one-third, would be served in the community and be subject to parole or parole-like conditions. Those not complying with their release conditions would be subject to recall to serve the balance of their sentence in custody. An offence committed during the parole period would be ordered to commence from the expiration of the parole period. Clean street time would count as part of the sentence. If there are special circumstances, courts could be empowered to recommend that offenders be considered for conditional release at any time after they have served half their sentences. This would be an exception to the general formula and would apply only where, in the court's view, the prisoner would benefit from a longer period of supervision than under the two thirds formula. It would replace the "special circumstances" exception in Section 5 of the *Sentencing Act* 1989. In most instances however, a sentence of imprisonment would simply mean that two-thirds would be served in full-time custody and one-third on conditional release.

The present system and the one proposed here, are not far apart. The reforms proposed have the advantage of simplicity and the potential for promoting greater consistency in sentencing. Judges in the ordinary course of events would not need to concern themselves with setting minimum, additional or fixed terms. All sentences would be treated uniformly and it would be easier to compare sentence lengths one with the other. For the benefit of the prisoner and in the interests of public disclosure (or "truth in sentencing") courts could continue to specify commencement and parole eligibility release dates.