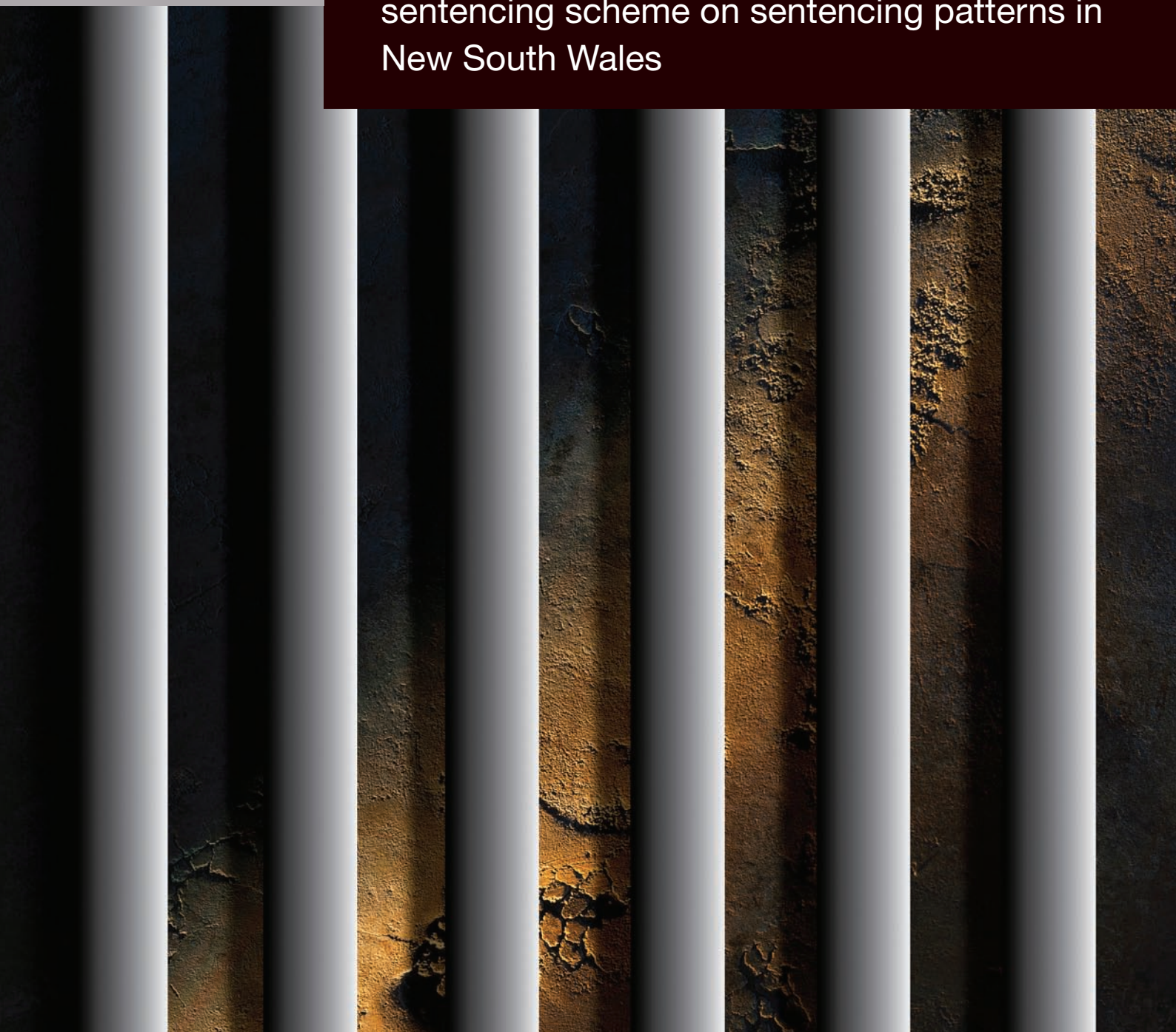




Judicial Commission of NSW

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## The impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales



The impact of the standard non-parole period  
sentencing scheme on sentencing patterns in  
New South Wales

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# Introduction

New South Wales was set apart from other Australian jurisdictions when standard non-parole periods were introduced as part of its sentencing law. Sufficient time has elapsed to allow for a comparison between sentences imposed before and after the introduction of the standard non-parole period legislation. This study investigates whether the use of full-time imprisonment has increased; whether the lengths of non-parole periods and head sentences have increased; and whether greater consistency in sentencing has been achieved. The study also examines appeal results for standard non-parole period offences.

## 1.1 Background

On 1 February 2003, a new standard non-parole period statutory scheme for specified indictable offences commenced in New South Wales (referred to below as the statutory scheme). Part 4, Div 1A (ss 54A–54D) was inserted into the *Crimes (Sentencing Procedure) Act 1999* by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*. It introduced standard non-parole periods for a broad range of serious indictable offences. The offences originally listed in the Table to Div 1A included:<sup>1</sup>

- murder
- wounding or grievous bodily harm with intent
- sexual intercourse without consent
- sexual intercourse with a child under the age of 10 years
- aggravated indecent assault
- robbery with arms and wounding
- break, enter and commit serious indictable offence in circumstances of aggravation and circumstances of special aggravation
- the manufacture or supply of commercial quantities of prohibited drugs.

A standard non-parole period “is the non-parole period set out opposite the offence in the Table”<sup>2</sup> and “represents the non-parole period for an offence in the middle of the range of objective seriousness”<sup>3</sup> before adjustment for purely subjective considerations.<sup>4</sup> The standard non-parole period applies to offenders convicted after trial.<sup>5</sup> It still remains relevant as “a reference point, or benchmark, or sounding board, or guidepost”<sup>6</sup> where the offender pleads guilty and also where the judge finds that the particular offence falls below the middle of the range of objective seriousness. The standard non-parole period only applies to offences committed on or after 1 February 2003 — the commencement date of the statutory

---

1 For a comprehensive list of offences see **Table 1** on p 5. The offence to which a particular standard non-parole provision applies is identified by the section of the statute which is found opposite the standard non-parole period in the particular item in the Table to Div 1A, not the words within the brackets in the Items: *Hosseini v R* [2009] NSWCCA 52 at [48].

2 *Crimes (Sentencing Procedure) Act*, s 54A(1).

3 *Crimes (Sentencing Procedure) Act*, s 54A(2).

4 *R v Way* (2004) 60 NSWLR 168 at [141].

5 *ibid* at [68] and [71].

6 *ibid* at [122]. See also *R v AJP* (2004) 150 A Crim R 575; [2004] NSWCCA 434 at [18]; *R v Simon* [2005] NSWCCA 123 at [30]; *Vu v R* [2006] NSWCCA 188 at [32]; *R v El-Chammas* [2009] NSWCCA 154 at [25].

scheme.<sup>7</sup> The scheme does not apply<sup>8</sup> to the sentencing of an offender to imprisonment for life or for any other indeterminate period, or to detention under the *Mental Health (Forensic Provisions) Act 1990*,<sup>9</sup> or for indictable matters dealt with summarily.<sup>10</sup>

There were further amendments to the statutory scheme by the *Crimes (Sentencing Procedure) Amendment Act 2007* and the *Crimes Amendment (Sexual Offences) Act 2008*. The former amending Act, which commenced on 1 January 2008 and applied retrospectively,<sup>11</sup> created standard non-parole periods for 11 further offences and increased the standard non-parole period for aggravated indecent assault of a child under the age of 10 years.<sup>12</sup> The latter amending Act, which commenced on 1 January 2009, introduced a new aggravated offence of sexual intercourse with a child under the age of 10 years,<sup>13</sup> and assigned it a standard non-parole period of 15 years. The Act also excluded from the statutory scheme offenders who were under 18 years of age at the time of the offence.<sup>14</sup>

The study is based on the Table to Div 1A in Pt 4 of the *Crimes (Sentencing Procedure) Act* as it stood from the commencement of the statutory scheme on 1 February 2003 until 31 December 2007 (referred to below as the Table to Div 1A). There were simply insufficient cases to analyse the sentencing patterns for the additional offences added to the Table to Div 1A in 2008 and 2009 referred to above, or to assess the effect of the increase in the standard non-parole period for aggravated indecent assault.<sup>15</sup>

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7 *Crimes (Sentencing Procedure) Act*, Sch 2, Pt 7, cl 45(1).

8 *Crimes (Sentencing Procedure) Act*, s 54D(1).

9 Known as the *Mental Health (Criminal Procedure) Act 1990* before 1 March 2009.

10 *Crimes (Sentencing Procedure) Act*, s 54D(2).

11 The 11 new standard non-parole periods and the increase in the standard non-parole period for offences under s 61M(2) of the *Crimes Act 1900* (aggravated indecent assault — child under 10) apply to the determination of sentences for offences “whenever committed”; that is, before the commencement of the amendments on 1 January 2008. These amendments did not apply if the court had already convicted the person being sentenced or the court had accepted a plea of guilty and the plea had not been withdrawn.

12 In *GSH v R* [2009] NSWCCA 214, the appellant was convicted on a number of counts of aggravated indecent assault contrary to s 61M(2) of the *Crimes Act*. At the time the offences occurred in 2006, the standard non-parole for an offence under s 61M(2) was 5 years. However, the appellant was sentenced on 19 September 2008, after the commencement of the *Crimes (Sentencing Procedure) Amendment Act 2007*, which increased the standard non-parole period for the offences (“whenever committed”: see *Crimes (Sentencing Procedure) Act*, Sch 2, Pt 17, cl 57) from 5 to 8 years “as and from 1 January 2008”. The Court of Criminal Appeal held that the sentencing judge erred by referring to the 5-year standard non-parole period, and it could not be assumed that this error “exerted no influence on the sentence ultimately imposed”: at [46]–[47]. An application for special leave to appeal to the High Court was refused on 12 March 2010 on the basis there were insufficient prospects of success. The applicant unsuccessfully argued, among other things, that the standard non-parole period was “an aspect of the penalty” for aggravated indecent assault and that the transitional provision in Sch 2, Pt 17, cl 57, which applied the standard non-parole period increase to offences “whenever committed” was contrary to s 19 of the *Crimes (Sentencing Procedure) Act*. That section provides: “If an Act or statutory rule increases the penalty for an offence, the increased penalty applies only to offences committed after the commencement ...”.

13 *Crimes Act*, s 66A(2), which carries a maximum penalty of life imprisonment. The effect of the amendment was that the repealed s 66A became s 66A(1).

14 See *Crimes (Sentencing Procedure) Act*, s 54D(3), inserted by the *Crimes Amendment (Sexual Offences) Act 2008*, Sch 2.4[4]. The exclusion of offenders under 18 years in murder cases was not met with support in *R v KR* [2010] NSWSC 188. In that case, Howie J said at [17]: “there is much to commend the return of the standard non-parole period in cases of murder by juveniles ... the offence is so serious that it is important that the standard non-parole period be a relevant consideration when sentencing any offender for that crime despite his or her age. I think that it is particularly arbitrary that the standard non-parole period of 20 years will apply to a person just over the age of 18 but not to a person just under that age, as was the offender”.

15 There were 24 items included in the original Table to Div 1A.

The Table to Div 1A current as at 30 April 2010 is included in Appendix A. Appendix A also shows the relationship with the statutory maximum penalties. A list of amendments affecting the Table to Div 1A since its commencement on 1 February 2003 up to 30 April 2010 is included in Appendix B.

It is instructive to begin the legal discussion with the straightforward question: what impact was the statutory scheme expected to have on sentencing patterns?

## 1.2 The stated rationale and general effect of standard non-parole periods

The purpose of the statutory scheme was to make sentencing more consistent and transparent. In his Second Reading Speech for the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill, the then Attorney General (NSW), the Hon RJ Debus said:

“At the outset I wish to make it perfectly clear that the scheme of sentencing being introduced by the Government today is not mandatory sentencing. The scheme being introduced by the Government today provides further guidance and structure to judicial discretion. These reforms are primarily aimed at promoting consistency and transparency in sentencing and also promoting public understanding of the sentencing process.”<sup>16</sup>

He said later:

“By introducing a regime of standard non-parole periods for a specified number of serious offences the Government will ensure not only greater consistency in sentencing but also that proper regard is given to the community expectation that punishment is imposed that is commensurate with the gravity of the crime.”<sup>17</sup>

According to the Attorney General (NSW), the standard non-parole periods:

“... have been set taking into account the seriousness of the offence, the maximum penalty for the offence and current sentencing trends for the offence as shown by sentencing statistics compiled by the Judicial Commission of New South Wales”.<sup>18</sup>

The Court of Criminal Appeal in *R v Way*,<sup>19</sup> sought, among other things, to establish whether the statutory scheme evinced a legislative dissatisfaction with sentencing levels:

“There was no mention in the Second Reading Speech of any dissatisfaction with the general level of sentencing for the Table offences, or of any intention to increase the time that persons convicted of them should remain in custody.”<sup>20</sup>

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16 NSW, Legislative Assembly, *Debates*, 23 October 2002, p 5813.

17 *ibid* p 5815.

18 *ibid* p 5816.

19 (2004) 60 NSWLR 168 at [141]–[142].

20 *ibid* at [141].



The court emphasised in *R v Way* that simply comparing existing sentencing statistics with the standard non-parole periods in the Table to Div 1A would be misleading. Sentencing statistics take into account subjective features and are *final* sentences, whereas the standard non-parole periods assigned in the Table to Div 1A are not. Therefore:

“... it is hardly surprising that the standard non-parole periods specified in the Table are generally longer than those that have been imposed in the past, since they were set as reference points *before* adjustment for the purely subjective features which almost certainly influenced the outcome of the cases included in the statistics”.<sup>21</sup> [Emphasis in original.]

Similarly, the statistical mid-range of sentences imposed for convictions recorded does not necessarily correlate or equate with “mid-range culpability”.<sup>22</sup>

The court has held since *R v Way* that “the effect of the standard non-parole period will generally be to increase the level of sentencing for offences to which it applies”.<sup>23</sup> In *Des Rosiers v R*,<sup>24</sup> Latham J declared that:

“Where the legislature has fixed the standard non-parole period at a level significantly above that imposed for offences committed before 1 February 2003, it is inevitable that sentences for these offences committed after 1 February 2003 will increase, despite no apparent legislative intention to that effect; *R v AJP* (2004) 150 A Crim R 575 at [36] and [37]; *R v Mills* (2005) 154 A Crim R 40 at [53].”<sup>25</sup>

### 1.3 An absence of a consistent proportion between standard non-parole periods and maximum penalties

The list of standard non-parole period offences together with the standard non-parole period and the maximum penalty for each is displayed in **Table 1**. **Table 1** shows the relationship (or ratio) between the standard non-parole period and the maximum penalty.

Clearly, the ratio between the standard non-parole period and the statutory maximum penalty will have an effect on whether sentencing patterns increase or not. **Table 1** shows that the ratio between the standard non-parole period and the statutory maximum penalty for individual offences ranges from 21.4% for Item 20: s 7 of the *Firearms Act* 1996 (unauthorised possession or use of firearms),<sup>26</sup> to 71.4% for Item 9A: s 61M(1) of the *Crimes Act* 1900 (aggravated indecent assault).<sup>27</sup>

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21 *ibid*.

22 *Perry v R* (2006) 166 A Crim R 383 at [26].

23 *R v AD* [2005] NSWCCA 208 per Howie J at [43], citing *R v AJP* (2004) 150 A Crim R 575; [2004] NSWCCA 434.

24 (2006) 159 A Crim R 549.

25 *ibid* at [36].

26 On 14 February 2004, the *Crimes Legislation Further Amendment Act* 2003 amended s 7(1) of the *Firearms Act* and inserted s 7A to create two separate offences for possession or use of an unauthorised firearm: Sch 5[2]–[6]. Prior to this date, offences that now fall within s 7A were considered standard non-parole period offences attracting a maximum penalty of 5 years with a standard non-parole period of 3 years (or 60% of the maximum penalty). The standard non-parole period and the maximum penalty for the use of a prohibited firearm or pistol under s 7(1) remained the same.

27 **Table 1** does not include ratios for standard non-parole periods where the maximum penalty is life imprisonment because of the indeterminacy of a life sentence.

Table 1: Table to Div 1A as at 1 Feb 2003 — showing relationship with statutory maximum penalties

Item No	Offence	Standard non-parole period	Statutory maximum penalty	% of statutory maximum
1A <sup>a</sup>	Murder — where the victim was a police officer, emergency services worker, correctional officer, judicial officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation	25 years	Life	n/a
1	Murder — in other cases	20 years	Life	n/a
2	Section 26 of the <i>Crimes Act</i> 1900 (conspiracy to murder)	10 years	25 years	40.0
3	Sections 27, 28, 29 or 30 of the <i>Crimes Act</i> 1900 (attempt to murder)	10 years	25 years	40.0
4	Section 33 of the <i>Crimes Act</i> 1900 (wounding etc with intent to do bodily harm or resist arrest)	7 years	25 years	28.0
5	Section 60(2) of the <i>Crimes Act</i> 1900 (assault of police officer occasioning bodily harm)	3 years	7 years	42.9
6	Section 60(3) of the <i>Crimes Act</i> 1900 (wounding or inflicting grievous bodily harm on police officer)	5 years	12 years	41.7
7	Section 61I of the <i>Crimes Act</i> 1900 (sexual assault)	7 years	14 years	50.0
8	Section 61J of the <i>Crimes Act</i> 1900 (aggravated sexual assault)	10 years	20 years	50.0
9	Section 61JA of the <i>Crimes Act</i> 1900 (aggravated sexual assault in company)	15 years	Life	n/a
9A	Section 61M(1) of the <i>Crimes Act</i> 1900 (aggravated indecent assault)	5 years	7 years	71.4
9B	Section 61M(2) of the <i>Crimes Act</i> 1900 (aggravated indecent assault — child under 10)	5 years	10 years	50.0
10	Section 66A of the <i>Crimes Act</i> 1900 (sexual intercourse — child under 10)	15 years	25 years <sup>b</sup>	60.0
11	Section 98 of the <i>Crimes Act</i> 1900 (robbery with arms etc and wounding)	7 years	25 years	28.0
12	Section 112(2) of the <i>Crimes Act</i> 1900 (breaking etc into any house etc and committing serious indictable offence in circumstances of aggravation)	5 years	20 years	25.0
13	Section 112(3) of the <i>Crimes Act</i> 1900 (breaking etc into any house etc and committing serious indictable offence in circumstances of special aggravation)	7 years	25 years	28.0
14 <sup>c</sup>	Section 154C(1) of the <i>Crimes Act</i> 1900 (car-jacking)	3 years	10 years	30.0
15 <sup>c</sup>	Section 154C(2) of the <i>Crimes Act</i> 1900 (car-jacking in circumstances of aggravation)	5 years	14 years	35.7
15A	Section 203E of the <i>Crimes Act</i> 1900 (bushfires)	5 years	14 years	35.7
16	Section 24(2) of the <i>Drug Misuse and Trafficking Act</i> 1985 (manufacture or production of commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug	10 years	20 years	50.0

(cont overleaf)

Item No	Offence	Standard non-parole period	Statutory maximum penalty	% of statutory maximum
17	Section 24(2) of the <i>Drug Misuse and Trafficking Act 1985</i> (manufacture or production of commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug	15 years	Life	n/a
18	Section 25(2) of the <i>Drug Misuse and Trafficking Act 1985</i> (supplying commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug	10 years	20 years	50.0
19	Section 25(2) of the <i>Drug Misuse and Trafficking Act 1985</i> (supplying commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug	15 years	Life	n/a
20 <sup>d</sup>	Section 7 of the <i>Firearms Act 1996</i> (unauthorised possession or use of firearms)	3 years	14 years	21.4

- a On 26 May 2006, the *Crimes (Sentencing Procedure) Amendment Act 2006* extended the provisions to include voluntary work. The expression “or voluntary work” was added to the phrase “where the offence arose because of the victim’s occupation”: Sch 1[3].
- b At the same time that the standard non-parole legislation was introduced, the statutory maximum penalty was increased from 20 years to 25 years: *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*, Sch 2[1].
- c On 1 September 2006, the *Crimes Amendment (Organised Car and Boat Theft) Act 2006* extended offences of car-jacking under s 154C of the *Crimes Act* to include vessels: Sch 1[5].
- d On 14 February 2004, the *Crimes Legislation Further Amendment Act 2003* amended s 7(1) of the *Firearms Act 1996* and inserted s 7A to create two separate offences for possession or use of an authorised firearm: Sch 5[2]–[6]. Prior to this date, offences that now fall within s 7A were considered standard non-parole period offences attracting a statutory maximum penalty of 5 years. The standard non-parole period in such cases is 60% of the statutory maximum penalty.

Table 1 also shows that there is an absence of any consistent proportion in the standard non-parole periods assigned to offences with a maximum penalty of life imprisonment. Of the five items, three have a standard non-parole period of 15 years (Items 9, 17 and 19); one has a standard non-parole period of 20 years (Item 1); and one has a standard non-parole period of 25 years (Item 1A).

The standard non-parole period is sometimes equal to, or more than, half of the maximum penalty, and sometimes considerably less than half the maximum penalty.<sup>28</sup>

The court in *R v Way* predicted that the impact of the statutory scheme on sentencing patterns would vary and depended in part upon the proportion of the standard non-parole period relative to the maximum penalty:

“The outcome for individual cases will depend upon the range of objective and subjective considerations that are to be taken into account. Given the absence of any consistent proportion between the non-parole period and

28 *R v Mitchell* (2007) 177 A Crim R 94 at [36]. See also *SKA v R* [2009] NSWCCA 186 at [159] where the court noted that the sentencing judge “referred critically to the ratio of the prescribed standard non-parole periods to the maximum penalties. He said that, while he was required to follow the law, he did not have to ‘agree that it was just’; and that he found the proportions between the standard non-parole periods and the maximum penalties ‘difficult to understand’”.

maximum penalties prescribed for the Table offences, and the absence of any consistent relativity between those non-parole periods apparent from an examination of the statistics, it may be that for some offences the sentencing pattern will move upwards, while for others it will not.”<sup>29</sup>

Since this general statement, the Court of Criminal Appeal has commented on particular offences in the Table to Div 1A.

For the offences of sexual intercourse with a child under 10 years<sup>30</sup> and aggravated indecent assault,<sup>31</sup> the court has held that it was the intention of the legislature that sentences would increase given the proportion of the standard non-parole period to the maximum penalty.

Although the standard non-parole period for the offence of supply a commercial quantity of a prohibited drug is set at 10 years — exactly half the maximum penalty — it nevertheless has “the consequence of increasing the range of sentences from that which existed before the provision was introduced”,<sup>32</sup> and “will result in an upward adjustment to sentences for such offences”.<sup>33</sup>

For the offence of solicited murder, where the standard non-parole period is 40% of the maximum penalty, the court has held that the “sentencing pattern developed [before February 2003] is of little value”<sup>34</sup> and “the specification of the standard non-parole period evinces a clear legislative intention in regard to a sentence level”.<sup>35</sup>

There are also three first instance Supreme Court decisions which hold that the sentences for murder either will or have increased.<sup>36</sup>

Conversely, where the standard non-parole period as a proportion of the maximum penalty for an offence is well below half, the court has said there is a “difficulty in determining the rationale of parliament in specifying a standard non-parole period that is well above or well below half the maximum penalty”.<sup>37</sup> According to Howie J in *Marshall v R*:<sup>38</sup>

“One would expect as a matter of logic and the application of ordinary sentencing principles that, if an offence was hypothetically of the mid-range of seriousness, it would carry a sentence of half the maximum penalty, that is a total term of ten years [for an offence under s 112(2) of the *Crimes Act*] and, according to the statutory proportion under s 44 of the *Crimes (Sentencing Procedure) Act*, a non-parole period of seven and a half years.”<sup>39</sup>

29 *R v Way* (2004) 60 NSWLR 168 at [142].

30 See *R v AJP* (2004) 150 A Crim R 575; [2004] NSWCCA 434, where Simpson J at [36] described the contrast between the sentencing statistics before the standard non-parole period regime was introduced as “striking and disturbing”, and later at [37] stated: “... the legislature having fixed 60% of the statutory maximum as the standard non-parole period for s 66A offences, it is inevitable that sentences for these offences will increase”. It should also be noted that the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 which introduced the standard non-parole periods also increased the statutory maximum penalty for s 66A offences from 20 years to 25 years. This fact alone may contribute to an increase in sentences for this offence.

31 *R v Sangalang* [2005] NSWCCA 171 at [28]–[29] applied in *NT v R* [2007] NSWCCA 143 at [34].

32 *R v Burgess* [2006] NSWCCA 319 per Howie J at [52].

33 *Biermann v R* [2009] NSWCCA 165 per Latham J at [23].

34 *Bou-Antoun v R* [2008] NSWCCA 1 per Grove J at [42].

35 *ibid* at [41].

36 *R v Youmaran* [2008] NSWSC 762 at [4]; *R v O'Connor* [2008] NSWSC 1297 at [49]; *R v LR* [2010] NSWSC 22 at [30].

37 *R v Henry* [2007] NSWCCA 90 at [26].

38 [2007] NSWCCA 24.

39 *ibid* at [34].

Section 44(2) of the *Crimes (Sentencing Procedure) Act* provides that the balance of the term of the sentence (parole period) must not exceed one-third of the non-parole period, or put another way, the non-parole period must not be less than three-quarters of the full term of the sentence, unless there are special circumstances. General sentencing principles dictate that ordinarily the parole period will not be less than one-third.<sup>40</sup> Therefore, the view expressed in *Marshall v R* is that the standard non-parole period should be 75% of half the maximum penalty (or 37.5% of the maximum penalty) for any given offence which falls within the middle of the range of objective seriousness.

The court has recognised the difficulty of applying a standard non-parole period which is set at 7 years where the maximum penalty for the offence is 25 years. This is the case for the offences of robbery with wounding<sup>41</sup> and wounding with intent to inflict grievous bodily harm.<sup>42</sup> The same difficulties would presumably apply to the aggravated break, enter and commit serious indictable offence in circumstances of special aggravation, which has the same standard non-parole period to maximum penalty ratio.<sup>43</sup> The court has held that by this 7:25 year structure, Parliament has changed the way that the courts are to punish because:

“... the punishment for offences at the higher end of the range of seriousness must be proportionately greater when compared with the maximum penalty than offences falling toward the lower end of the range”.<sup>44</sup>

It may be that the standard non-parole period is set at much less than half the maximum penalty for some offences because of the wide range of conduct that can fall within a particular offence. So much was conceded by the Crown in an appeal against the asserted inadequacy of a sentence for an offence of wound with intent to commit grievous bodily harm under s 33 of the *Crimes Act*.<sup>45</sup> On the other hand, for other standard non-parole period offences such as solicit to murder “there is less scope for significant variation in the factual basis for the offence or the degree of culpability of the offender”.<sup>46</sup>

The court has been critical of Parliament setting the standard non-parole period of 5 years as against a maximum penalty of 20 years for aggravated break, enter and commit serious indictable offence, holding that “it is not an easy task to make sense of, and apply, the standard non-parole period provisions in relation to s 112(2) offences”.<sup>47</sup> In the case of break, enter and commit a serious indictable offence in circumstances of aggravation under s 112(2) and special aggravation under s 112(3) of the *Crimes Act*, the variation in the ingredient of “serious indictable offence” is very wide — between offences with a maximum of 5 years imprisonment and offences carrying life imprisonment. What exactly is “the middle of the range of objective seriousness” for those offences is not straightforward. What the court has said is that the fact that the offence just falls within the scope of a “serious indictable offence” (that is, has a 5-year maximum) does not prevent a finding that the s 112(2) offence falls in the mid-range of seriousness.<sup>48</sup>

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40 *R v GDR* (1994) 35 NSWLR 376 at 381; *MLP v R* (2006) 164 A Crim R 93 at [33].

41 *Crimes Act*, s 98; *R v Henry* [2007] NSWCCA 90 at [26].

42 *Crimes Act*, s 33; *XY v R* [2007] NSWCCA 72 at [56]; *Anderson v R* (2008) 187 A Crim R 542 at [17].

43 *Crimes Act*, s 112(3).

44 *Anderson v R* (2008) 187 A Crim R 542 per McClellan CJ at CL at [17], applied in *R v Wright* [2009] NSWCCA 3 at [19] and *Sproates v R* [2009] NSWCCA 29 at [43].

45 *Director of Public Prosecutions (NSW) v Lombard* (2008) 184 A Crim R 565 at [26]. Earlier Hoeben J said with support in *Heron v R* [2006] NSWCCA 215 at [54]: “Section 33 covers a wide variety of offences and a diversity of injuries ...”.

46 *Louizos v R* [2009] NSWCCA 71 per Howie J at [80], McClellan CJ at CL and Grove J agreeing.

47 *Marshall v R* [2007] NSWCCA 24 at [34].

48 *Micklesson v R* [2009] NSWCCA 61 at [18], citing Simpson J with approval in *R v Huynh* [2005] NSWCCA 220.

The 3-year standard non-parole period and 14-year maximum penalty for the possession and use of firearms was described in one case as “two irreconcilable standards”.<sup>49</sup>

If the facts place the offence well above “the middle of the range”, the standard non-parole period loses some of its importance or force as a guide to determining the appropriate sentence and more attention should be directed to the maximum penalty.<sup>50</sup>

#### 1.4 Scope for departure from standard non-parole periods and sentencing patterns

The degree to which the statutory scheme limits the discretion of a sentencing judge, or put another way, the scope it gives a judge to depart from it, is relevant to the question of whether sentences have increased, or should increase. The scheme requires the judge to follow a process of reasoning involving a series of findings. However, there is much scope for legitimate departure from the standard non-parole period in the Table to Div 1A.<sup>51</sup> Section 54B(3) of the *Crimes (Sentencing Procedure) Act* provides:

“The reasons for which the court may set a non-parole period that is longer or shorter than the standard non-parole period are only those referred to in s 21A [of the *Crimes (Sentencing Procedure) Act*].”

The use of the word “may” in s 54B(3) confers a discretion on the court to depart from a standard non-parole period. The factors “referred to in s 21A” are not limited. Although various aggravating and mitigating factors are listed in ss 21A(2) and 21A(3) respectively, s 21A(1) also permits consideration of “any other objective or subjective factor that affects the relative seriousness of the offence” and states that the matters specifically listed in the section are to be considered “in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law”. The court in *R v Way* said that “statutory and common law factors may still properly be taken into account in determining a sentence even though they are not listed in s 21A(2) or (3)”,<sup>52</sup> including the fundamental principle of individualised justice.<sup>53</sup> Therefore, the matters that may justify a departure from the standard non-parole period may include those recognised by the common law but not mentioned in s 21A, such as hardship to third parties, hardship to the offender as a result of protective custody, the offender’s ill health, and the principles of parity and totality. A factor which may justify setting a non-parole period that is shorter than a standard non-parole period is a finding of “special circumstances” under s 44.<sup>54</sup>

Any discussion about sentencing patterns for offences in the Table to Div 1A should make allowance for how the standard non-parole provisions are applied in practice. There is a danger of assuming that a court has not followed the legislation simply because a non-parole period is less or more than a particular standard non-parole period assigned in the Table to Div 1A. Unless more is known about the sentencing exercise, including whether there was a legitimate reason for setting a shorter or longer non-parole period (s 54B(3)), it is not possible to draw definitive conclusions about whether sentencing judges are properly applying the provisions.

49 *R v Najem* [2008] NSWCCA 32 at [38], referred to in *Thalari v R* [2009] NSWCCA 170 at [84].

50 *R v Mitchell* (2007) 177 A Crim R 94 at [37]; *Micklesson v R* [2009] NSWCCA 61 at [15].

51 *Crimes (Sentencing Procedure) Act*, s 54B(2).

52 *R v Way* (2004) 60 NSWLR 168 at [104].

53 *ibid* at [55], [58]. See also *R v Whyte* (2002) 55 NSWLR 252 at [147].

54 *Crimes (Sentencing Procedure) Act*, s 44(2), provides that the non-parole period must not be less than three-quarters of the full term, unless there are special circumstances.

## 1.5 The non-parole period is “one aspect of the sentence”

Given the focus of the study, it is unnecessary to set out in detail the extensive case law that has developed about how a judge must apply the statutory scheme. Some of the case law seeks to resolve the issue of precisely which matters constitute the “objective seriousness” of an offence and how to go about assessing the objective seriousness of particular offences in the Table to Div 1A. Justice Kirby outlined the issues that a judge must address for standard non-parole period offences in *MLP v R*.<sup>55</sup> These observations have been described as a “helpful summary of steps to be taken”<sup>56</sup> and “a staged approach”,<sup>57</sup> and have been repeatedly approved.<sup>58</sup> A list of sequential steps was also set out by Simpson J in *SKA v R*.<sup>59</sup> However in *MLP v R*, Kirby J, in the course of identifying the various issues to be considered, observed that the “non parole period is, of course, but one aspect of the sentence”.<sup>60</sup> There is a natural inclination to focus on non-parole periods, but they do not by themselves properly describe the punishment of an offender. Five members of the High Court recently affirmed this important sentencing principle:

“It may greatly be doubted that the punishment imposed on an offender is sufficiently described by identifying only the term which the court fixes as the least period of actual incarceration that must be served. Rather, the punishment imposed on an offender will be better identified, at least for most purposes, as both the head sentence (here, life imprisonment) and the non-parole period that is fixed, for it is always necessary to recognise that an offender may be required to serve the whole of the head sentence that is imposed.”<sup>61</sup>

Any assessment of the effect of the statutory scheme must keep this principle firmly in mind. The statutory scheme may result in not just an overall increase in the non-parole periods, but also an overall increase in the terms of the sentences, sometimes referred to as head sentences. It would be myopic in a study of this kind to simply focus on non-parole periods that have been imposed before and after the enactment of the legislative scheme.

## 1.6 Previous studies of the statutory scheme

A review of the standard non-parole provisions was required two years after the commencement of the provisions.<sup>62</sup> The Sentencing Council of New South Wales, which had been established following the introduction of the statutory scheme,<sup>63</sup> conducted a review.

55 (2006) 164 A Crim R 93 at [33].

56 *Louizos v R* [2009] NSWCCA 71 at [97].

57 *R v King* [2009] NSWCCA 117 per Howie J at [31].

58 *Eedens v R* [2009] NSWCCA 254 at [23]; *Mack v R* [2009] NSWCCA 216 at [39]; *R v Barker* [2009] NSWCCA 225 at [42]; *R v Thawer* [2009] NSWCCA 158 at [36]; *Mencariou v R* (2008) 189 A Crim R 219 at [105].

59 [2009] NSWCCA 186 at [125]–[137].

60 (2006) 164 A Crim R 93 at [33]. Some of the matters include the appropriate term of imprisonment having regard to the offence and the circumstances of the offender; whether the offences should be characterised as being in the mid-range of objective seriousness; whether there are other reasons in the matters identified in s 21A for departing from the standard non-parole; and whether the judge should (or should not) find special circumstances under the *Crimes (Sentencing Procedure) Act*, s 44(2).

61 *PNJ v The Queen* (2009) 83 ALJR 384 per French CJ, Gummow, Hayne, Crennan and Kiefel JJ at [11]. The comment was made in the course of a discussion of South Australian legislation.

62 *Crimes (Sentencing Procedure) Act*, s 106. That section also sets out the procedure to be adopted and the terms of reporting.

63 *Crimes (Sentencing Procedure) Act*, Pt 8B (ss 100I–100L). The Sentencing Council is required to monitor and report annually on sentencing trends and practices, including the operation of standard non-parole periods: s 100J(1)(c).

After examining the sentencing statistics provided by the Judicial Commission of NSW on its Judicial Information Research System (JIRS) for each of the standard non-parole period offences for the period 1 January 1998 to 30 December 2005, the Sentencing Council found that of the 14 “scheme”<sup>64</sup> offences with sufficient numbers to analyse:

- 11 showed an increase in the percentage of offenders sent to prison,<sup>65</sup> and
- 10 showed an increase in the non-parole period and 4 showed no change.<sup>66</sup>

In a more recent report on sentencing trends and practices, the Sentencing Council conducted a further analysis of the statutory scheme using, among other things, JIRS data. It found that of the 15 “scheme”<sup>67</sup> offences with sufficient numbers to analyse:

- 8 showed an increase in the percentage of offenders sent to prison,<sup>68</sup>
- there had been some increase in the non-parole period,<sup>69</sup> and
- the range of sentences had narrowed indicating a greater consistency in sentencing.<sup>70</sup>

The Sentencing Council’s analysis was based on an interpretation of published JIRS data which shows trends/changes at a broad level.<sup>71</sup>

However, when JIRS data is used for the purpose of showing changes in sentencing patterns that were caused by, or were directly attributable to, the commencement of the statutory scheme, it is important to consider the following:

- The base group should not include cases dealt with under different sentencing regimes. The *Crimes (Sentencing Procedure) Act* commenced on 3 April 2000 replacing the *Sentencing Act* 1989. The new sentencing regime reintroduced suspended sentences as an alternative to full-time imprisonment.<sup>72</sup> This change may have had an impact on the “base” rate of full-time imprisonment for particular offences.
- The base group should not include sentences imposed after the commencement of the statutory scheme without considering any possible flow-on effects that it may have had for offences not subject to the statutory scheme.
- The analysis should exclude cases where the standard non-parole period does not apply: that is, where an offender is sentenced to life imprisonment or to detention under the *Mental Health (Forensic Provisions) Act*,<sup>73</sup> or the offender is under 18 years at the time of the offence.<sup>74</sup>

64 NSW Sentencing Council, *Report on Sentencing Trends and Practices 2005–2006*, Sydney, 2007, pp 13–16, 46–99. The “after 1/2/03” period referred to in the Report included sentences imposed under the statutory scheme from 1 February 2003 to 31 December 2005.

65 *ibid* p 13.

66 *ibid*.

67 NSW Sentencing Council, *Report on Sentencing Trends and Practices 2006–2007*, Sydney, 2008, pp 25–46. The “after 1/2/03” period referred to in the Report included sentences imposed under the scheme from 1 February 2003 to 31 December 2006.

68 *ibid* p 28.

69 *ibid* p 32.

70 *ibid* pp 32–33. The Sentencing Council noted in its *Report on Sentencing Trends and Practices 2008–2009*, Sydney, 2010, that as a detailed analysis formed part of the Council’s Report for 2006–2007, it has deferred the statistical analysis of standard non-parole scheme offences for two years to allow any significant trends to emerge.

71 Published JIRS statistics are not unit data but rather a compilation of individual sentencing outcomes. JIRS statistics are used as a guide by judicial officers.

72 *Crimes (Sentencing Procedure) Act*, s 12.

73 Known as the *Mental Health (Criminal Procedure) Act* 1990 before 1 March 2009; *Crimes (Sentencing Procedure) Act*, s 54D(1).

74 *Crimes (Sentencing Procedure) Act*, s 54D(3).



The analysis of sentencing patterns before and after the commencement of the statutory scheme should include all non-parole periods imposed and should not be limited to those which are served wholly concurrently. The exclusion of consecutive sentences might bias the results.<sup>75</sup> Further, the analysis should consider the extent to which other sentencing factors may have contributed to the differences observed.

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75 Non-parole periods which are served consecutively or partly consecutively are not displayed on JIRS. JIRS users are provided with a document, "Explaining the Statistics", which sets out the counting rules and what is displayed in the sentencing statistics. See also I Potas, "The use and limitations of sentencing statistics", *Sentencing Trends & Issues*, No 31, Judicial Commission of New South Wales, Sydney, 2004.

# The study — the aims and research questions

## 2.1 The aims

Part 1 of the study analyses the impact of the statutory scheme on sentencing patterns for the standard non-parole period offences. It compares sentences imposed before and after the introduction of the statutory scheme. It seeks to determine whether there has been an increase in full-time imprisonment rates, and whether the length of non-parole periods and terms of sentence have increased. The study analyses whether the stated aim of the statutory scheme of promoting greater consistency in sentencing has been achieved.

Part 2 of the study examines the rate, nature and outcomes of sentence appeals to the Court of Criminal Appeal for the purpose of comparing the pattern of Crown and severity appeals before and after the commencement of the statutory scheme.

## 2.2 The research questions

Part 1 of the study addresses the following questions:

- Has there been an increase in the severity of penalties imposed in terms of:
  - the percentage of offenders sentenced to full-time imprisonment?
  - the length of the term of sentence?
  - the length of the non-parole period?
- Has there been greater consistency in sentencing?

Part 2 of the study addresses the following questions:

- Has there been a change in the pattern of sentence appeals in the Court of Criminal Appeal in terms of:
  - the rate of appeal?
  - the type of appeals?
  - the outcomes (success) of appeals?



# Part 1: Severity and consistency

## 3.1 The method

### 3.1.1 The data

The data for this study are based on information recorded for use in JIRS and relate only to the offences originally listed in the Table to Div 1A on its commencement on 1 February 2003. The data comprises first instance sentencing outcomes finalised in the District Court of New South Wales and the Supreme Court of New South Wales,<sup>76</sup> “corrected” to take account of all successful appeals to the Court of Criminal Appeal and the High Court of Australia in the study period.<sup>77</sup> Sentencing outcomes are provided for the principal offence only.<sup>78</sup>

### 3.1.2 The study period

In order to meet the aims of the study, the analysis compares sentencing data in what will be referred to as the *pre-period* (3 April 2000<sup>79</sup> to 31 January 2003<sup>80</sup>) and the *post-period* (1 February 2003 to 31 December 2007).

3 April 2000 was chosen as the start date of the pre-period so that the base group would not include cases determined at a time when suspended sentences were not an available sentencing option. The pre-period was not extended beyond 31 January 2003 in order to eliminate the possibility of the base group containing cases which, while not subject to the statutory scheme, may nevertheless have been influenced by the introduction of the statutory scheme. For example, a comparison between sentencing patterns for:

- offenders sentenced on or after 1 February 2003 for offences committed before 1 February 2003, and
- offenders sentenced before 31 January 2003,

(that is, both groups not subject to the legislation) revealed statistically significant differences for a number of offences. Another reason for not merging these groups of offenders was to obtain an accurate picture of the pattern of sentencing before commencement of the statutory scheme on 1 February 2003.

While the post-period commences on the date the statutory scheme commenced on 1 February 2003, the first sentence actually imposed for any offence subject to the scheme was 1 August 2003. The end date of 31 December 2007 was chosen to allow sufficient time to consider the results of appeals to the Court of Criminal Appeal.

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76 First instance data are provided by the Bureau of Crime Statistics and Research (BOCSAR). The data exclude accused persons acquitted following a trial.

77 Where an appeal to the Court of Criminal Appeal or the High Court resulted in an acquittal, a new trial or was remitted to the lower court, the record was removed from the data. However, if the appeal resulted in a new sentence, then the new sentence replaced the first instance penalty on JIRS. Sentences imposed after a retrial or after being remitted for resentence are included if they fall within the study period.

78 If an offender is convicted of more than one offence, the offence receiving the highest penalty, in terms of the type and duration of sentence is selected as the principal offence. If two or more offences attract the same penalty, the offence with the highest statutory maximum penalty is selected as the principal offence. If two or more offences have the same statutory maximum penalty, the offence with a Form 1 attached is selected as the principal offence. In the absence of a Form 1, the offence subject to the statutory scheme is selected as the principal offence.

79 The date the *Crimes (Sentencing Procedure) Act* commenced.

80 The day before the statutory scheme commenced.

### 3.1.3 The exclusions

As the statutory scheme did not apply to offenders sentenced to imprisonment for life or for any other indeterminate period, or to detention under the *Mental Health (Forensic Provisions) Act*,<sup>81</sup> during the study period, these cases have been excluded from the data.<sup>82</sup>

Cases involving juvenile offenders have also been excluded from the data. Section 54D(3) of the *Crimes (Sentencing Procedure) Act* provides that the statutory scheme does not apply to offenders who were under 18 years of age at the time of the offence.<sup>83</sup> Even though this 2009 exclusion did not apply to juveniles sentenced in the post-period, there are nevertheless special principles that apply to the sentencing of these offenders.<sup>84</sup> It was for this reason that juvenile offenders have been excluded from the data.

There was a degree of uncertainty as to how the statutory scheme would apply to the law of complicity and inchoate offences.<sup>85</sup> The standard non-parole provisions have previously been held to apply in cases of aiding and abetting,<sup>86</sup> but not in cases of attempt<sup>87</sup> and conspiracy.<sup>88</sup> These cases have also been excluded from the data because this uncertainty may have resulted in an inconsistency of approach in particular cases.

### 3.1.4 Groupings and relevant factors

#### *Sentences imposed following a trial or plea*

To make meaningful comparisons, the study differentiates between guilty plea matters and trial matters for those standard non-parole offences where there were sufficient numbers for analysis. A preliminary study conducted by the Judicial Commission in 2007 comparing guilty plea rates for offenders sentenced before and after the commencement of the statutory scheme, found that overall, the guilty plea had significantly increased from 78.7% to 87.8%, whereas it remained stable for all sentencing cases over the same period (88.6% before and 89.4% after).<sup>89</sup> While the current study does not address this issue in detail,<sup>90</sup> it was nevertheless decided to distinguish between matters resolved by plea and those that proceeded to trial.<sup>91</sup> Another good reason for separating these groups is that the statutory scheme applies to offenders convicted after trial, and operates as a reference point or benchmark in those cases where the offender pleads guilty.

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81 Known as the *Mental Health (Criminal Procedure) Act* 1990 before 1 March 2009.

82 *Crimes (Sentencing Procedure) Act*, s 54D(1).

83 This section was inserted by the *Crimes Amendment (Sexual Offences) Act* 2008, Sch 2.4[4], which commenced on 1 January 2009. See *R v LR* [2010] NSWSC 22 where Howie J noted at [28] that in *R v MB* [2006] NSWSC 1164 “the standard non-parole period of 20 years applied to juvenile offenders”, and commented later at [30]: “There is little doubt that since the introduction of the standard non-parole period sentences for murder have increased. Care should be taken not to allow that increase to be reflected in cases of juveniles where the standard non-parole period now does not apply”.

84 See *Children (Criminal Proceedings) Act* 1987, s 6.

85 See discussion in A Dyer and H Donnelly, “Sentencing in complicity cases: Abettors, accessories and other secondary participants (Part 2)”, *Sentencing Trends & Issues*, No 39, Judicial Commission of New South Wales, Sydney, 2010.

86 *DJB v R* [2007] NSWCCA 209; *R v Merrin* (2007) 174 A Crim R 100.

87 *DAC v R* [2006] NSWCCA 265.

88 *Diesing v R* [2007] NSWCCA 326.

89 H Donnelly and T Poletti, “Guilty plea rates for offenders sentenced before and after the standard non-parole period legislation” (2007) 19(4) *JOB* 34.

90 To determine what impact the statutory scheme had on guilty plea rates requires a different research method that takes into account the time it takes to finalise guilty plea cases compared with not guilty plea cases. Since guilty plea cases are finalised more expeditiously, the before and after time-frames would need to be adjusted so that neither period has an over-representation of either trial or plea cases. See H Donnelly and T Poletti, above n 89, at 34–35.

91 A guilty plea attracts a utilitarian discount at sentencing. Controlling for how an offender pleads removes the need to take into account the effect the statutory scheme has on the guilty plea rate.

***Other known factors***

Information is also compared on a number of other known factors, such as age, gender, number of offences before the court, whether Form 1 matters were taken into account, and prior convictions. For certain offences, other factors were also considered, including the aggravating features for aggravated forms of offences, the types of serious indictable offences committed in connection with break and enter offences, whether the victim of a sexual or indecent assault was a child, and the type of drug involved in drug offences. Unless stated, there were no statistically significant differences between the two periods for these factors.

***Unknown factors***

Unfortunately, there are many sentencing factors where the information is unknown and for the purposes of this study, it is presumed that there was no difference between the two periods for these factors. These include factors relevant to an assessment of the objective seriousness of the offence – such as the offender’s role, his or her motivation, the degree of planning, the level of violence, and the extent of injuries sustained by a victim. Similarly, the study did not have access to information about subjective factors – such as whether the offender was subject to conditional liberty at the time the offence was committed, any mental health issues, and the offender’s prospects of rehabilitation. Other factors for which information was not available include the discounts for a guilty plea or assistance to the authorities, and the time already served by the offender in pre-sentence custody.

**3.1.5 Measuring sentence severity and consistency of sentences**

For data that is normally distributed, the arithmetic mean and standard deviation are used as measures of central tendency and variability. However, the mean and standard deviation may be distorted if the distribution is skewed or contains extreme values in the tails. Since the sentencing exercise takes into account a multiplicity of objective and subjective factors – covering a wide range of conduct and criminality – it often results in prison terms at the extreme ends of the sentencing range.

For data containing these extreme values, the median length of sentence is a better estimator of sentence severity than the mean. The median refers to the midpoint value (or 50th percentile) in the distribution of sentences where 50% of sentences lie above and 50% lie below the midpoint value.

This study employs two measures to assess consistency: the interquartile range (IQR) and the median absolute deviation (MAD). Both estimators measure the variability, or spread, of the distribution and are more stable than the standard deviation.

The interquartile range (IQR) refers to the *middle 50% range of sentences*. The lower limit of this range is the first quartile (or 25th percentile) and the upper limit is the third quartile (or 75th percentile). The IQR is the difference between the upper and lower limits and measures the variability of values near the centre.

The median absolute deviation (MAD) is more robust than the IQR. It measures the variability in the tails as well, without giving undue weight to extreme values. It simply means that half the values are closer to the median than the MAD and half are further away.<sup>92</sup>

The smaller the IQR or MAD the closer the sentences are clustered around the median and the more consistent or uniform the distribution of prison sentences. Consistency of sentencing is an important measure in any system of criminal justice bearing in mind that variations

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92 For the calculation of the MAD, see Note 1 below the sample box plot on p 24.

within permissible boundaries “do not constitute a relevant inconsistency or impermissible disparity”.<sup>93</sup> Sentencing patterns can of course be consistently high or consistently low. This is why it is necessary for the study to also measure the relative severity of the sentences imposed before and after the statutory scheme commenced.

### 3.1.6 Statistical tests

Various statistical techniques are used to make meaningful comparisons of the sentences imposed in the pre-period and the post-period. These are primarily descriptive in nature. However, non-parametric tests<sup>94</sup> of significance are used when the analysis involves studying the relationship between the sentences imposed (and other factors), and determining whether there are any statistically significant differences between the two periods. Predominantly, the chi-square test<sup>95</sup> is used for categorical data (such as the plea) and the Mann-Whitney U test is used for non-categorical data (such as the length of prison sentences). Unless stated otherwise, a confidence level of 95%<sup>96</sup> is used throughout the study.

The statistical analysis has been undertaken using the software application PASW<sup>97</sup> Statistics (previously known as SPSS<sup>98</sup>).

### 3.1.7 Minimum sample size

To ensure sufficient numbers for statistical analysis of particular offences, the minimum sample size selected for the purposes of this study is at least 10 cases in each of the cells broken down by period and plea. The findings should be treated with caution where the sample sizes for particular offences are small and approach the minimum sample size.

## 3.2 The results

Offences in the Table to Div 1A accounted for 16.9% of all higher court sentencing cases on JIRS over the study period (13.9% in the pre-period and 18.6% in the post-period).<sup>99</sup> The analysis which follows excludes offenders referred to in 3.1.3 above.

### 3.2.1 Overview

There were 991 offenders sentenced in the pre-period and 1535 offenders sentenced in the post-period for offences in the Table to Div 1A. During the study period, a further 855 offenders who were not subject to the statutory scheme were sentenced on or after 1 February 2003. As mentioned earlier, these offenders were excluded from the analysis.

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93 JJ Spigelman, “Consistency and sentencing” (2008) 9(1) *TJR* 45 at 46.

94 Non-parametric tests make fewer assumptions about the data than parametric tests. For example, non-parametric tests do not assume that the data is normally distributed.

95 Where the analysis involves a 2 x 2 contingency table (for example, between plea and period) and the expected frequency of at least one of the cells is less than 5 (that is, too small for a chi-square test), a Fisher’s Exact test is used instead.

96 That is an alpha level of 0.05.

97 Predictive Analytics Software.

98 Statistical Package for the Social Sciences.

99 This figure was calculated before the exclusion of cases where the scheme does not apply. The post-period figure includes 6.7% of offenders who were not subject to the statutory scheme because the offence was committed before 1 February 2003.

***Plea rate***

The overall guilty plea rate was significantly higher in the post-period (86.1%) compared with the pre-period (78.2%).<sup>100</sup> However, there were no statistically significant differences in the guilty plea rate when it was disaggregated by offence. **Table 2** shows the number of sentencing cases by plea and period for each offence.

By way of comparison, the overall guilty plea rate for offences *not* in the Table to Div 1A was 90.0% in the pre-period and 91.3% in the post-period.

***Full-time imprisonment rate (or prison rate)***

The vast majority of offenders were sentenced to full-time imprisonment (83.9% in the pre-period and 82.1% in the post-period). By way of comparison, the prison rate for offences *not* in the Table to Div 1A was 64.2% in the pre-period and 65.8% in the post-period.

The prison rate significantly increased for two offences in the Table to Div 1A — Item 9A: s 61M(1) of the *Crimes Act* 1900 (aggravated indecent assault) from 37.3% in the pre-period to 59.3% in the post-period,<sup>101</sup> and Item 9B: s 61M(2) of the *Crimes Act* 1900 (aggravated indecent assault — child under 10) from 57.1% in the pre-period to 81.3% in the post-period,<sup>102</sup> while it significantly decreased for one offence in the Table to Div 1A — Item 12: s 112(2) of the *Crimes Act* 1900 (aggravated break, enter and commit serious indictable offence) from 74.9% in the pre-period to 67.6% in the post-period.<sup>103</sup>

Comparable increases in the prison rate were observed for offenders who pleaded guilty. However, the decline in the prison rate observed for Item 12 was no longer found to be statistically significant. There were no statistically significant differences in the prison rate for offenders who pleaded not guilty. **Table 3** shows the percentage of offenders sentenced to full-time imprisonment by plea and period for each offence.

***Length of prison sentence (or sentence severity)***

Where an offender was sentenced to full-time imprisonment, there was no difference in the overall median term of sentence imposed in the pre-period and the post-period (5 years). While the median term of sentence was the same in both periods for offenders who pleaded guilty (4 years 6 months), there was a 33.3% increase in the median term of sentence for offenders who pleaded not guilty; from 6 years in the pre-period to 8 years in the post-period. This difference was found to be statistically significant.<sup>104</sup>

By way of comparison, the median term of sentence for offences *not* in the Table to Div 1A was 3 years in the pre-period and the post-period. Controlling for how an offender pleaded produced the same results for offenders who pleaded guilty. For offenders who pleaded not guilty, the median term of sentence increased from 3 years 9 months in the pre-period to 4 years in the post-period, representing an increase of 6.7%.<sup>105</sup>

100 Chi-square test,  $p < 0.000$ .

101 Chi-square test,  $p < 0.020$ .

102 Chi-square test,  $p < 0.042$ .

103 Chi-square test,  $p < 0.041$ .

104 Mann-Whitney U test,  $p < 0.009$ .

105 Mann-Whitney U test,  $p < 0.007$ .



**Table 2: Number of sentencing cases by plea and period for each offence**

Item No	Offence	Pre-period					Post-period				
		3/4/00–31/1/03					1/2/03 <sup>a</sup> –31/12/07				
		Guilty		Not guilty		Total	Guilty		Not guilty		Total
n	%	n	%	n	n	%	n	%	n		
<b>Crimes Act 1900</b>											
1A	s 19A – prescribed victim <sup>b</sup>	0	0.0	1	100.0	1	0	–	0	–	0
1	s 19A – other cases	31	37.8	51	62.2	82	31	48.4	33	51.6	64
2	s 26	8	61.5	5	38.5	13	9	100.0	0	0.0	9
3	ss 27–30	4	66.7	2	33.3	6	2	16.7	10	83.3	12
4	s 33	54	68.4	25	31.6	79	99	78.0	28	22.0	127
5	s 60(2)	21	87.5	3	12.5	24	10	100.0	0	0.0	10
6	s 60(3)	1	100.0	0	0.0	1	4	100.0	0	0.0	4
7 <sup>c</sup>	s 61I	50	60.2	30	36.1	83	55	57.9	38	40.0	95
8 <sup>d</sup>	s 61J	70	66.7	35	33.3	105	59	71.1	23	27.7	83
9 <sup>e</sup>	s 61JA	0	0.0	1	100.0	1	5	55.6	4	44.4	9
9A	s 61M(1)	52	88.1	7	11.9	59	43	79.6	11	20.4	54
9B	s 61M(2)	24	85.7	4	14.3	28	30	93.8	2	6.3	32
10	s 66A	29	76.3	9	23.7	38	23	76.7	7	23.3	30
11	s 98	26	81.3	6	18.8	32	39	83.0	8	17.0	47
12	s 112(2)	218	94.4	13	5.6	231	584	97.0	18	3.0	602
13	s 112(3)	10	100.0	0	0.0	10	26	96.3	1	3.7	27
14 <sup>f</sup>	s 154C(1)	0	–	0	–	0	4	80.0	1	20.0	5
15 <sup>f</sup>	s 154C(2)	5	100.0	0	0.0	5	24	88.9	3	11.1	27
15A <sup>g</sup>	s 203E	0	–	0	–	0	1	100.0	0	0.0	1
<b>Drug Misuse and Trafficking Act 1985</b>											
16	s 24(2) – commercial quantity	11	78.6	3	21.4	14	8	100.0	0	0.0	8
17	s 24(2) – large commercial quantity	4	100.0	0	0.0	4	10	90.9	1	9.1	11
18	s 25(2) – commercial quantity	90	92.8	7	7.2	97	147	94.2	9	5.8	156
19	s 25(2) – large commercial quantity	51	86.4	8	13.6	59	63	85.1	11	14.9	74
<b>Firearms Act 1996</b>											
20 <sup>h</sup>	s 7	16	84.2	3	15.8	19	46	95.8	2	4.2	48
	<b>Total<sup>i</sup></b>	<b>775</b>	<b>78.2</b>	<b>213</b>	<b>21.5</b>	<b>991</b>	<b>1322</b>	<b>86.1</b>	<b>210</b>	<b>13.7</b>	<b>1535</b>

- a There was a delay or time lag after this date before the first offence subject to the standard non-parole legislation was finalised on 1 August 2003.
- b The prescribed victim in this case was a police officer.
- c The totals include 3 cases in the pre-period and 2 cases in the post-period that were a result of a finding of not guilty to s 61J but guilty to the statutory alternative (s 61I).
- d The totals include 1 case in the post-period that was a result of a finding of not guilty to s 61JA but guilty to the statutory alternative (s 61J).
- e Commenced on 1 October 2001. Inserted by the *Crimes Amendment (Aggravated Sexual Assault in Company) Act 2001*, Sch 1[2].
- f Commenced on 14 December 2001. Inserted by the *Crimes Amendment (Gang and Vehicle Related Offences) Act 2001*, Sch 1[10].
- g Commenced on 19 July 2002. Inserted by the *Crimes Amendment (Bushfires) Act 2002*, Sch 1.
- h On 14 February 2004, the *Crimes Legislation Further Amendment Act 2003* amended s 7(1) and inserted s 7A. Prior to this date, s 7A offences were considered standard non-parole period offences.
- i The overall totals include 3 cases in the pre-period and 3 cases in the post-period that were a result of a finding of guilty to the statutory alternative.

**Table 3: Percentage of offenders sentenced to full-time imprisonment by plea and period for each offence**

Item No	Offence	Pre-period						Post-period					
		3/4/00–31/1/03						1/2/03 <sup>a</sup> –31/12/07					
		Guilty		Not guilty		Total		Guilty		Not guilty		Total	
		n	%	n	%	n	%	n	%	n	%	n	%
<b>Crimes Act 1900</b>													
1A	s 19A – prescribed victim <sup>b</sup>	–	–	1	100.0	1	100.0	–	–	–	–	–	–
1	s 19A – other cases	31	100.0	51	100.0	82	100.0	31	100.0	33	100.0	64	100.0
2	s 26	7	87.5	5	100.0	12	92.3	9	100.0	–	–	9	100.0
3	ss 27–30	4	100.0	2	100.0	6	100.0	2	100.0	10	100.0	12	100.0
4	s 33	49	90.7	24	96.0	73	92.4	92	92.9	28	100.0	120	94.5
5	s 60(2)	11	52.4	2	66.7	13	54.2	4	40.0	–	–	4	40.0
6	s 60(3)	1	100.0	–	–	1	100.0	3	75.0	–	–	3	75.0
7 <sup>c</sup>	s 61I	40	80.0	29	96.7	72	86.7	51	92.7	36	94.7	89	93.7
8 <sup>d</sup>	s 61J	67	95.7	35	100.0	102	97.1	58	98.3	22	95.7	81	97.6
9 <sup>e</sup>	s 61JA	–	–	1	100.0	1	100.0	5	100.0	4	100.0	9	100.0
9A	s 61M(1)	20	38.5	2	28.6	22	37.3	27	62.8	5	45.5	32	59.3
9B	s 61M(2)	12	50.0	4	100.0	16	57.1	24	80.0	2	100.0	26	81.3
10	s 66A	26	89.7	9	100.0	35	92.1	22	95.7	7	100.0	29	96.7
11	s 98	25	96.2	6	100.0	31	96.9	37	94.9	8	100.0	45	95.7
12	s 112(2)	160	73.4	13	100.0	173	74.9	392	67.1	15	83.3	407	67.6
13	s 112(3)	10	100.0	–	–	10	100.0	25	96.2	1	100.0	26	96.3
14 <sup>f</sup>	s 154C(1)	–	–	–	–	–	–	4	100.0	1	100.0	5	100.0
15 <sup>f</sup>	s 154C(2)	5	100.0	–	–	5	–	22	91.7	2	66.7	24	88.9
15A <sup>g</sup>	s 203E	–	–	–	–	–	–	1	100.0	–	–	1	100.0
<b>Drug Misuse and Trafficking Act 1985</b>													
16	s 24(2) – commercial quantity	11	100.0	3	100.0	14	100.0	8	100.0	–	–	8	100.0
17	s 24(2) – large commercial quantity	4	100.0	–	–	4	100.0	10	100.0	1	100.0	11	100.0
18	s 25(2) – commercial quantity	83	92.2	7	100.0	90	92.8	136	92.5	9	100.0	145	92.9
19	s 25(2) – large commercial quantity	50	98.0	8	100.0	58	98.3	62	98.4	11	100.0	73	98.6
<b>Firearms Act 1996</b>													
20 <sup>h</sup>	s 7	8	50.0	2	66.7	10	52.6	35	76.1	2	100.0	37	77.1
	<b>Total<sup>i</sup></b>	<b>624</b>	<b>80.5</b>	<b>204</b>	<b>95.8</b>	<b>831</b>	<b>83.9</b>	<b>1060</b>	<b>80.2</b>	<b>197</b>	<b>93.8</b>	<b>1260</b>	<b>82.1</b>

- a There was a delay or time lag after this date before the first offence subject to the standard non-parole legislation was finalised on 1 August 2003.
- b The prescribed victim in this case was a police officer.
- c The totals include 3 cases in the pre-period and 2 cases in the post-period that were a result of a finding of not guilty to s 61J but guilty to the statutory alternative (s 61I).
- d The totals include 1 case in the post-period that was a result of a finding of not guilty to s 61JA but guilty to the statutory alternative (s 61J).
- e Commenced on 1 October 2001. Inserted by the *Crimes Amendment (Aggravated Sexual Assault in Company) Act 2001*, Sch 1[2].
- f Commenced on 14 December 2001. Inserted by the *Crimes Amendment (Gang and Vehicle Related Offences) Act 2001*, Sch 1[10].
- g Commenced on 19 July 2002. Inserted by the *Crimes Amendment (Bushfires) Act 2002*, Sch 1.
- h On 14 February 2004, the *Crimes Legislation Further Amendment Act 2003* amended s 7(1) and inserted s 7A. Prior to this date, s 7A offences were considered standard non-parole period offences.
- i The overall totals include 3 cases in the pre-period and 3 cases in the post-period that were a result of a finding of guilty to the statutory alternative.

These overall figures do not, however, take into account differences in the offence and the offender characteristics that make up the cases in each period. For example, the proportion of offenders sentenced to full-time imprisonment with prior convictions was significantly higher in the post-period (77.5% compared with 66.2% in the pre-period).<sup>106</sup> On the other hand, the composition of offences is significantly different between the pre-period and the post-period.<sup>107</sup> For example, Item 12: s 112(2) of the *Crimes Act 1900* (aggravated break, enter and commit serious indictable offence) accounted for 20.8% of the offences in the pre-period and 32.3% of offences in the post-period.

Consequently, the following analysis focuses on sentencing patterns for individual offences. It shows that there has been a dramatic change in the severity of sentences imposed for some offences.

### 3.2.2 Particular offences

Of the standard non-parole offences originally listed in the Table to Div 1A (24 items), only 5 met the sample size requirement for both guilty pleas and not guilty pleas.<sup>108</sup> Items 1, 4, 7, 8 and 12.<sup>109</sup> A further 7 offences met the sample size requirement for guilty pleas only: Items 9A, 9B, 10, 11, 13, 18 and 19.

#### *Fixed terms*

The non-parole period includes fixed terms. In this study, there were 29 cases (1.4%) where the sentencing judge imposed full-time imprisonment but declined to set a non-parole period for the principal offence. The sentence imposed in 2 cases was 6 months or less.<sup>110</sup> While the court may decline to set a non-parole period for terms of sentence longer than 6 months, there is no discretion to refrain from setting a non-parole period in respect of a standard non-parole period offence.<sup>111</sup> Section 45 of the *Crimes (Sentencing Procedure) Act*, which permits a court to decline to set a non-parole period, expressly excludes standard non-parole period offences. However, a fixed term was recorded in 7 cases in the post-period because the offender had already served his sentence, or the bulk of it, and no parole period was required (4 cases), or the sentence was subsumed in an existing sentence being served by the offender (1 case), or the sentence was subsumed in the overall sentence imposed for multiple offences (2 cases).

#### *Consecutive sentences and special circumstances*

Section 44(2) of the *Crimes (Sentencing Procedure) Act* provides that the non-parole period for a sentence of full-time imprisonment should not be less than three-quarters (75%) of the full term of sentence unless there is a finding of special circumstances. When an offender

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106 Chi-square test,  $p < 0.000$ . Note that the proportion of offenders with prior convictions was also significantly higher in the post-period for offences *not* in the Table to Div 1A (77.2% compared with 70.3% in the pre-period); Chi-square test,  $p < 0.000$ .

107 Chi-square test,  $p < 0.000$ .

108 Only these five items had at least 10 cases of full-time imprisonment in each of the four cells broken down by period and plea.

109 Due to the wide range of serious indictable offences that can fall within Item 12, the analysis for Item 12 was restricted to the offence of aggravated break, enter and *steal*, as stealing was the most common serious indictable offence, accounting for 72.3% of Item 12 offences. This meant that there were too few of these cases to permit an analysis of the sentences imposed where the offender pleaded not guilty.

110 *Crimes (Sentencing Procedure) Act*, s 46. Both cases were finalised in the pre-period.

111 *Crimes (Sentencing Procedure) Act*, s 45; *SGJ v R* [2008] NSWCCA 258 at [78].

has committed multiple offences, the judicial task of setting an appropriate non-parole period is influenced by whether other consecutive sentences are imposed at the same time. There has been a conventional sentencing practice since at least 1992 of finding special circumstances and adjusting the non-parole period downwards to ensure a sufficient period of parole supervision.<sup>112</sup> This is also done to apply the principle of totality. In such cases, the ratio between the non-parole period and the full term of the sentence often does not accord with the statutory ratio of 75%, or with the ratio between the overall (or aggregate) non-parole period and the full term. Typically, the non-parole period for the principal offence, and hence the ratio, is understated.

In this study, there were 475 cases (22.7%) involving consecutive sentences.<sup>113</sup> In the vast majority of cases (438 or 92.2%), the sentencing judge set a relatively short non-parole period due to accumulation. In other words, the ratio of the non-parole period to full term for the principal offence was less than the ratio of the aggregate non-parole period to the aggregate sentence. The post-period contained almost twice as many consecutive sentences (28.2% compared with 14.4% in the pre-period).<sup>114</sup> Since the proportion of cases involving multiple offences was only slightly higher in the post-period (51.5% compared with 49.3% in the pre-period),<sup>115</sup> the difference between the two periods may be that there has been a more diligent application of *Pearce v The Queen*<sup>116</sup> in the post-period, and the recorded difficulties of applying that case<sup>117</sup> were not as prominent as they were before 1 February 2003.

Overall, special circumstances were found in 84.4% of cases where full-time imprisonment was imposed.<sup>118</sup> The figure for the post-period (87.3%) was significantly higher than the figure for the pre-period (80.0%).<sup>119</sup> The most common ratio between the non-parole period and the full term of sentence was 50%, which occurred in 19.8% of cases. The median ratio was 57.1%. Similar ratios were found in both periods.

Given the high proportion of special circumstances, it is not possible to restrict the analysis to cases without special circumstances. Due to the effect of both consecutive sentences and special circumstances on non-parole periods, the full terms of sentences may paradoxically be a more reliable indicator of changes in sentencing patterns. After all, the court in *R v Way* predicted an increase not just in non-parole periods but in the length of the terms of sentences.<sup>120</sup>

112 *Hejazi v R* [2009] NSWCCA 282 at [35]–[36].

113 A sentence has been defined as consecutive if either the full term or the non-parole period for the overall or aggregate sentence exceeds the full term or non-parole period for the principal offence.

114 Chi-square test,  $p < 0.000$ . By way of comparison, the proportion of cases involving consecutive sentences for offences *not* in the Table to Div 1A was 23.1% in the post-period compared with 11.0% in the pre-period.

115 By way of comparison, the proportion of cases involving multiple offences for offences *not* in the Table to Div 1A was 48.9% in the post-period compared with 48.3% in the pre-period.

116 (1998) 194 CLR 610.

117 See *R v Knight* (2007) 176 A Crim R 338 where McClellan CJ at CL said at [2] that *Pearce v The Queen* was causing “continuing problems”.

118 It should be noted that in some cases, the ratio between the non-parole period and the full term of sentence came very close to (without exceeding) 75%. It may be that the calculation of ratios in some cases has been affected by sentences that have taken into account pre-sentence custody and/or by rounding up sentences into complete months. It is also common for judges to sentence in years and months rather than in years, months and days.

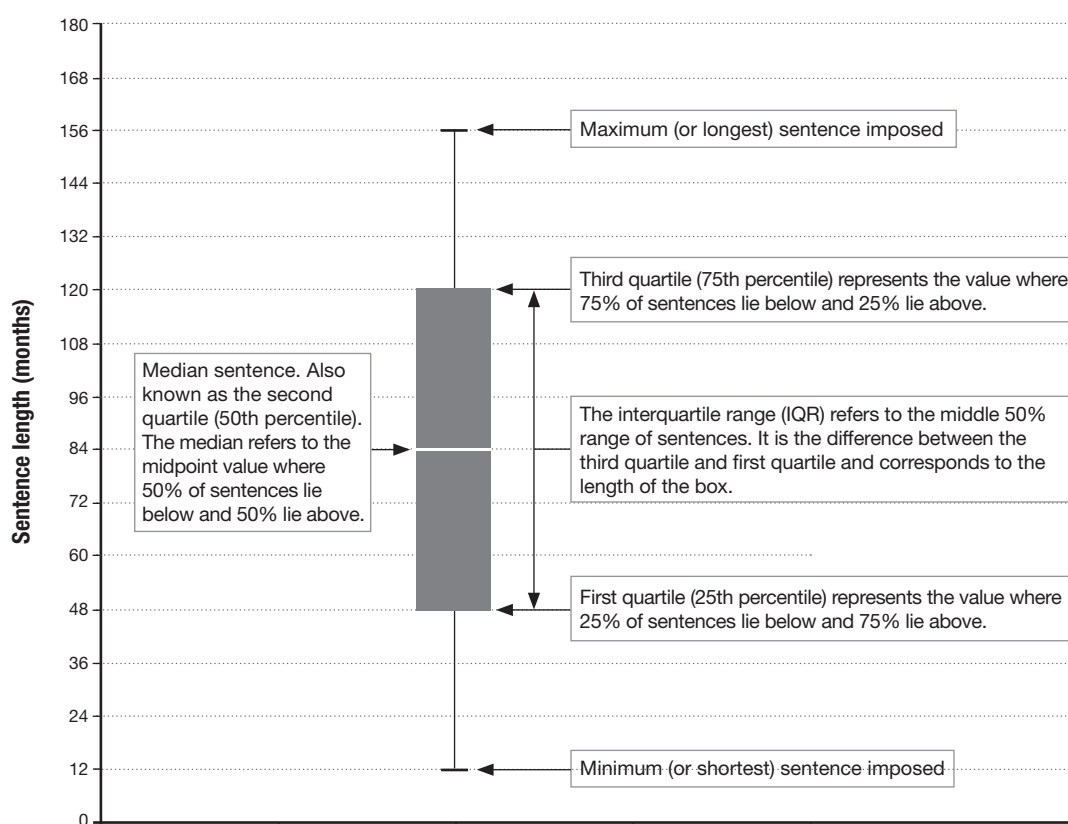
119 Chi-square test,  $p < 0.000$ .

120 See *R v Way* (2004) 60 NSWLR 168 at [54] where the court said the offences included in the statutory scheme “may well result in some change in the established sentencing pattern for these offences, or at least some of them, with an overall increase in the non-parole periods and terms of the sentences”.

The following analysis provides information on the sentencing patterns for particular offences, including the number of cases, the guilty plea rate, the prison rate and the “characteristics” — the statistically significant differences in the offence and offender characteristics between the pre-period and the post-period for offenders who were sentenced to full-time imprisonment.

The study uses box plots to depict the severity and consistency of sentences imposed in relation to the full term of sentence and the non-parole period: see **Figures 1–12** below. Each box plot shows the median, quartiles, and minimum and maximum values. The IQR corresponds to the length of the box. A sample is provided below by way of explanation.

**Sample box plot**



**Note 1:** The value of the median absolute deviation (MAD) is also provided.

The MAD is defined as:

$$MAD = \text{median} (|x_i - \tilde{x}|)$$

where  $\tilde{x}$  is the median of all sentences

where  $x_i$  is the value of each individual sentence

Calculate the difference between each individual sentence and the median of all sentences. Regardless of whether this value is positive or negative, it is expressed as a positive value (that is, the absolute value). Then find the median of the set of differences.

**Note 2:** For each box plot the horizontal axis is labelled either “Guilty plea” and “Not guilty plea”, or simply “Guilty plea”, depending on whether the offence met the sample size requirement for both guilty pleas and not guilty pleas, or for guilty pleas only.

**Note 3:** A legend is provided for each box plot indicating the full term and non-parole period for the pre- and post-periods.

***Guilty and not guilty pleas***

The following offences met the sample size requirement for both guilty pleas and not guilty pleas:

**Item 1: Murder – “in other cases”<sup>121</sup>**

*Crimes Act 1900*, s 19A. Maximum penalty: Life; SNPP: 20 years.

Number of cases:	82 pre-period; 64 post-period
Guilty plea rate:	37.8% pre-period; 48.4% post-period
Prison rate:	100% regardless of period and plea
Characteristics:	For offenders who pleaded guilty, there was a large increase in the proportion of offenders with prior convictions (from 38.7% in the pre-period to 74.2% in the post-period). <sup>122</sup> There were no other statistically significant differences between the two periods.

As **Figure 1** shows, prison sentences for murder have significantly increased since the commencement of the statutory scheme. The increase was more pronounced for offenders who pleaded not guilty. Generally, there was little change in the spread of sentences imposed.

***Sentence severity***

The median length of both the full term and the non-parole period was longer in the post-period, regardless of the plea.

- For offenders who pleaded not guilty, the median full term increased by 27.8% from 18 years to 23 years,<sup>123</sup> and the median non-parole period increased by 17.9% from 14 years to 16 years 6 months.<sup>124</sup> Before the commencement of the statutory scheme, only 17.6% of offenders received a full term of 23 years or more compared with 51.5% of offenders in the post-period. Previously, 27.5% of offenders in the pre-period compared with 57.6% of offenders in the post-period received a non-parole period of 16 years 6 months or more.
- For offenders who pleaded guilty, the median full term and the non-parole period increased by 8.3% from 18 years to 19 years 6 months,<sup>125</sup> and 7.4% from 13 years 6 months to 14 years 6 months,<sup>126</sup> respectively.

***Consistency***

- For offenders who pleaded not guilty, there was a slight expansion of the IQR in relation to full terms from 6 years (middle 50% range: 16 years – 22 years) to 6 years 4 months (middle 50% range: 20 years 6 months – 26 years 10 months). The MAD was also larger in the post-period (3 years compared with 2 years in the pre-period). The IQR widened for non-parole periods from 4 years 6 months (middle 50% range: 12 years – 16 years 6 months) to 5 years (middle 50% range: 15 years – 20 years). However, the MAD was smaller in the post-period (18 months compared with 24 months in the pre-period).

121 Cases where there is not a “prescribed victim” for the purposes of Item 1A: see **Table 1** on p 5. For this study, there was only one “prescribed victim”: a police officer in the pre-period.

122 Fisher’s Exact test,  $p < 0.010$ .

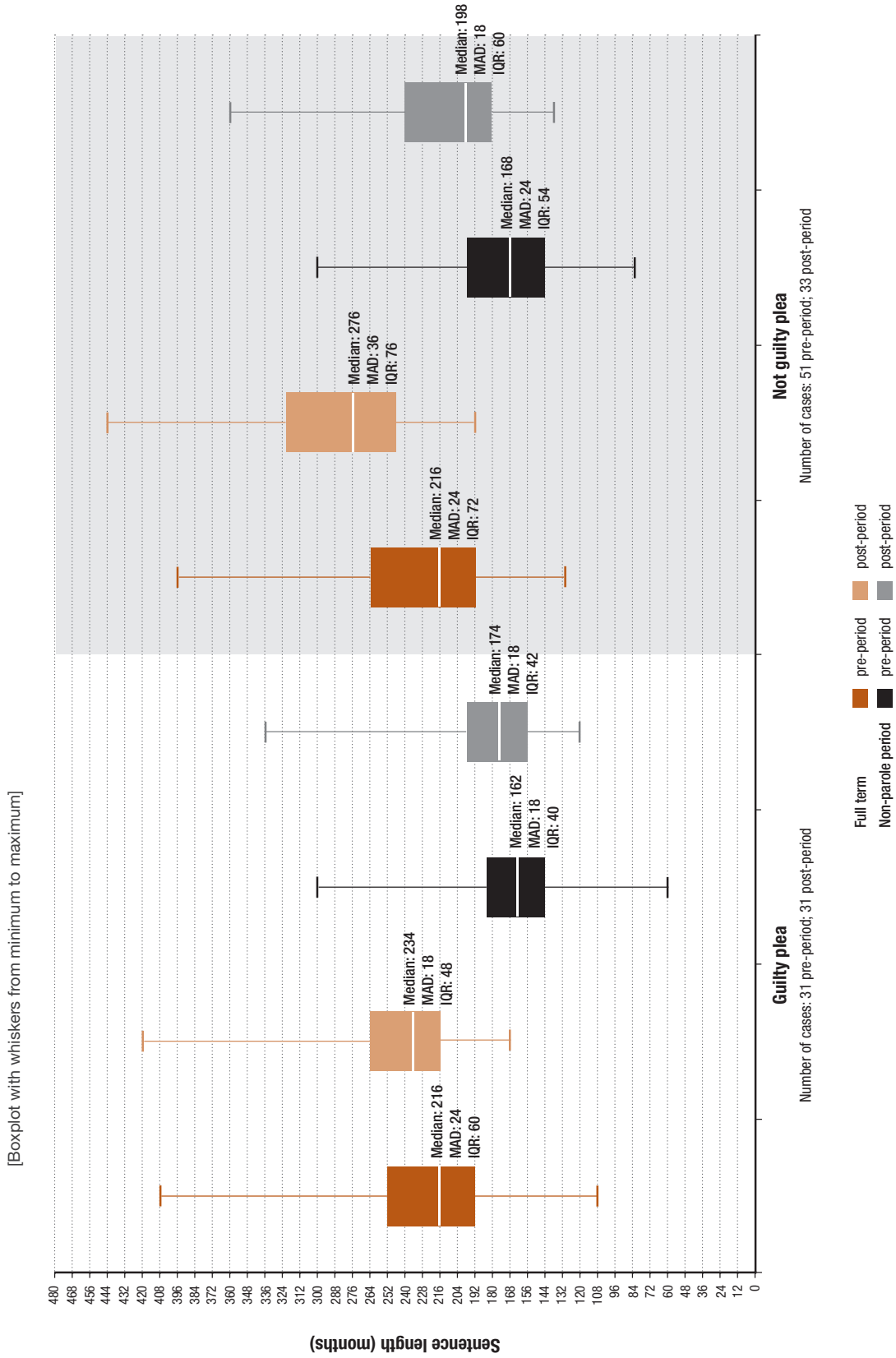
123 Mann-Whitney U test,  $p < 0.000$ .

124 Mann-Whitney U test,  $p < 0.000$ .

125 Mann-Whitney U test,  $p < 0.059$ . This difference was statistically significant at the 0.1 alpha level.

126 Mann-Whitney U test,  $p < 0.044$ .

Figure 1: Severity and consistency of prison sentences — Item 1: s 19A of the Crimes Act 1900 (murder — in other cases)



- For offenders who pleaded guilty, there was a narrowing of the IQR in relation to full terms from 5 years (middle 50% range: 16 years – 21 years) to 4 years (middle 50% range: 18 years – 22 years). The MAD was also smaller in the post-period (18 months compared with 24 months in the pre-period) indicating greater consistency in sentencing. However, there was no appreciable difference between the pre-period and the post-period in relation to non-parole periods.

#### *Special circumstances*

Special circumstances were found much less frequently for murder than for other offences. As a consequence, the non-parole periods for murder are more likely to reflect the impact of the scheme than for other offences. Nonetheless, special circumstances were found in almost half of the guilty plea cases (45.2% in the pre-period and 48.4% in the post-period) and in almost a quarter of the not guilty plea cases (21.6% in the pre-period and 27.3% in the post-period).

#### **Item 4: Wounding etc with intent to do bodily harm or resist arrest**

*Crimes Act 1900, s 33. Maximum penalty: 25 years; SNPP: 7 years.*

Number of cases:	79 pre-period; 127 post-period
Guilty plea rate:	68.4% pre-period; 78.0% post-period
Prison rate:	92.4% pre-period (guilty plea: 90.7%; not guilty plea: 96.0%) 94.5% post-period (guilty plea: 92.9%; not guilty plea: 100%)
Characteristics:	There were no statistically significant differences between the two periods on known factors.

As **Figure 2** shows, there has been a dramatic increase in the severity of prison sentences imposed for this offence, particularly in relation to offenders who pleaded not guilty. It also shows that the spread of sentences imposed for these offenders is more consistent when compared with the pre-period.

#### *Sentence severity*

The median length of both the full term and the non-parole period was longer in the post-period regardless of the plea.

- For offenders who pleaded not guilty, the median full term increased by 60.0% from 5 years to 8 years,<sup>127</sup> and the median non-parole period increased by 125.0% from 2 years 6 months to 5 years 7.5 months.<sup>128</sup> Prior to the commencement of the statutory scheme, 29.2% of offenders received a full term of 8 years or more compared with 57.1% of offenders in the post-period. Previously, only 16.7% of offenders in the pre-period compared with 50.0% in the post-period received a non-parole period of 5 years 7.5 months or more.
- For offenders who pleaded guilty, the median full term and the non-parole period increased by 14.3% from 5 years 3 months to 6 years,<sup>129</sup> and 16.7% from 3 years to 3 years 6 months,<sup>130</sup> respectively.

127 Mann-Whitney U test,  $p < 0.002$ .

128 Mann-Whitney U test,  $p < 0.000$ .

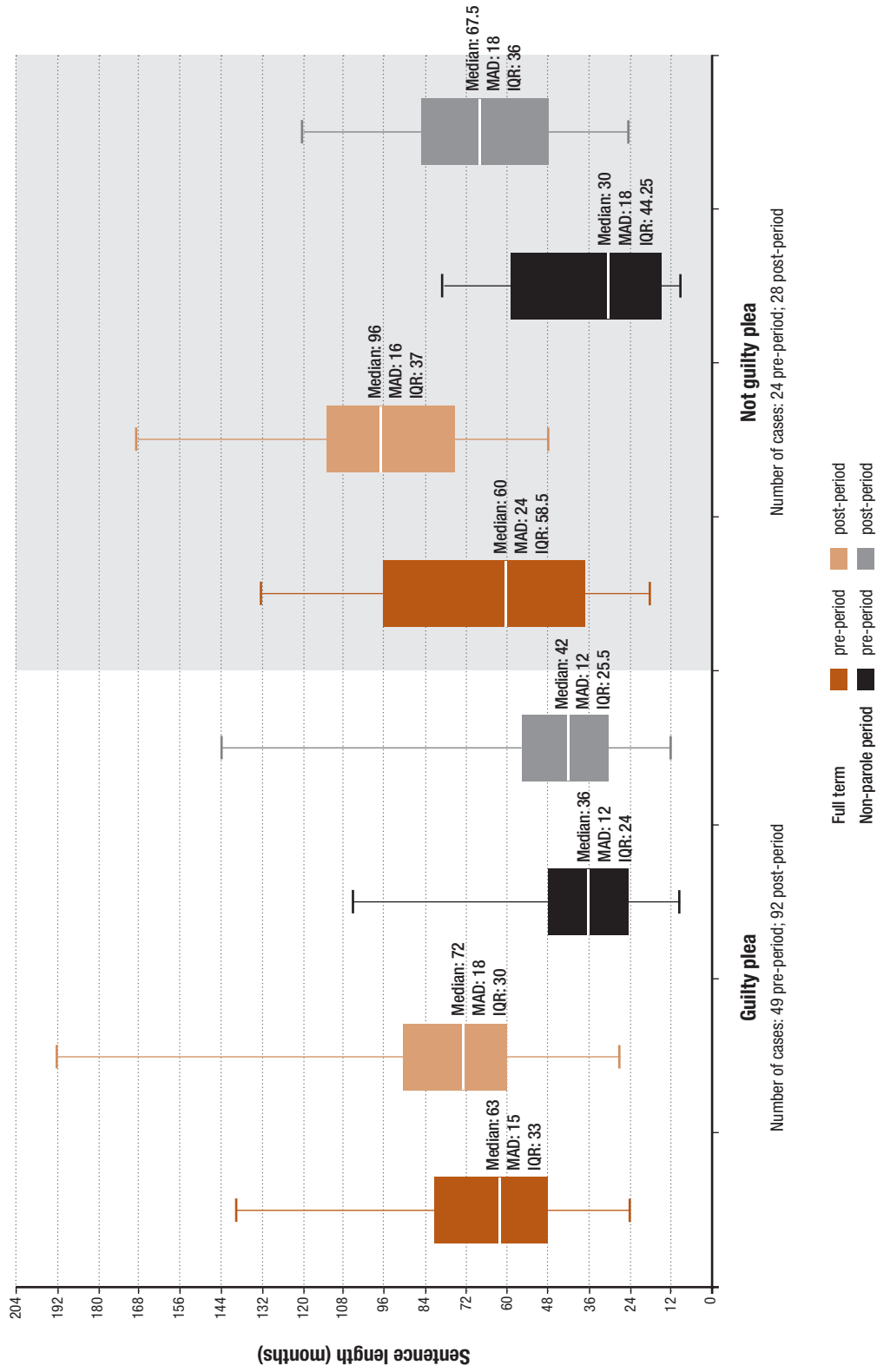
129 Mann-Whitney U test,  $p < 0.070$ . This difference was statistically significant at the 0.1 alpha level.

130 Mann-Whitney U test,  $p < 0.127$ . This difference was not statistically significant.



**Figure 2: Severity and consistency of prison sentences — Item 4: s 33 of the Crimes Act 1900 (wounding etc with intent to do bodily harm or resist arrest)**

[Box plot with whiskers from minimum to maximum]



*Consistency*

- For offenders who pleaded not guilty, there was a marked narrowing of the IQR in relation to full terms from 4 years 10.5 months (middle 50% range: 3 years 1.5 months – 8 years) to 3 years 1 month (middle 50% range: 6 years 3 months – 9 years 4 months), and non-parole periods from 3 years 8.25 months (middle 50% range: 14.25 months – 4 years 10.5 months) to 3 years (middle 50% range: 4 years – 7 years). While the MAD for full terms was noticeably smaller in the post-period (16 months compared with 24 months in the pre-period), it was unchanged in relation to non-parole periods (18 months).
- For offenders who pleaded guilty, there was a slight narrowing of the IQR in relation to full terms from 2 years 9 months (middle 50% range: 4 years – 6 years 9 months) to 2 years 6 months (middle 50% range: 5 years – 7 years 6 months). The MAD, however, was slightly larger in the post-period (18 months compared with 15 months in the pre-period). There was no appreciable difference between the pre-period and the post-period in relation to non-parole periods.

**Item 7: Sexual assault**

*Crimes Act 1900, s 61I. Maximum penalty: 14 years; SNPP: 7 years.*

Number of cases:	83 pre-period; 95 post-period
Guilty plea rate:	60.2% pre-period; 57.9% post-period
Prison rate:	86.7% pre-period (guilty plea: 80.0%; not guilty plea: 96.7%) 93.7% post-period (guilty plea: 92.7%; not guilty plea: 94.7%)
Characteristics:	There were no statistically significant differences between the two periods on known factors.

It is evident from **Figure 3** that sexual assault offenders, especially those convicted after trial, received longer prison sentences following the commencement of the statutory scheme. Generally, there was little change in the spread of sentences imposed.

*Sentence severity*

The median length of both the full term and the non-parole period was longer in the post-period regardless of the plea.

- For offenders who pleaded not guilty, the median full term increased by 28.6% from 4 years 8 months to 6 years,<sup>131</sup> and the median non-parole period increased by 60.0% from 2 years 6 months to 4 years.<sup>132</sup> Prior to the commencement of the statutory scheme, only 24.1% of offenders received a full term of 6 years or more compared with 63.9% of offenders in the post-period. Previously, only 20.7% of offenders in the pre-period compared with 55.6% in the post-period received a non-parole period of 4 years or more.
- For offenders who pleaded guilty, the median full term and the non-parole period increased by 12.5% from 4 years to 4 years 6 months,<sup>133</sup> and 11.1% from 2 years 3 months to 2 years 6 months,<sup>134</sup> respectively.

131 Mann-Whitney U test,  $p < 0.000$ .

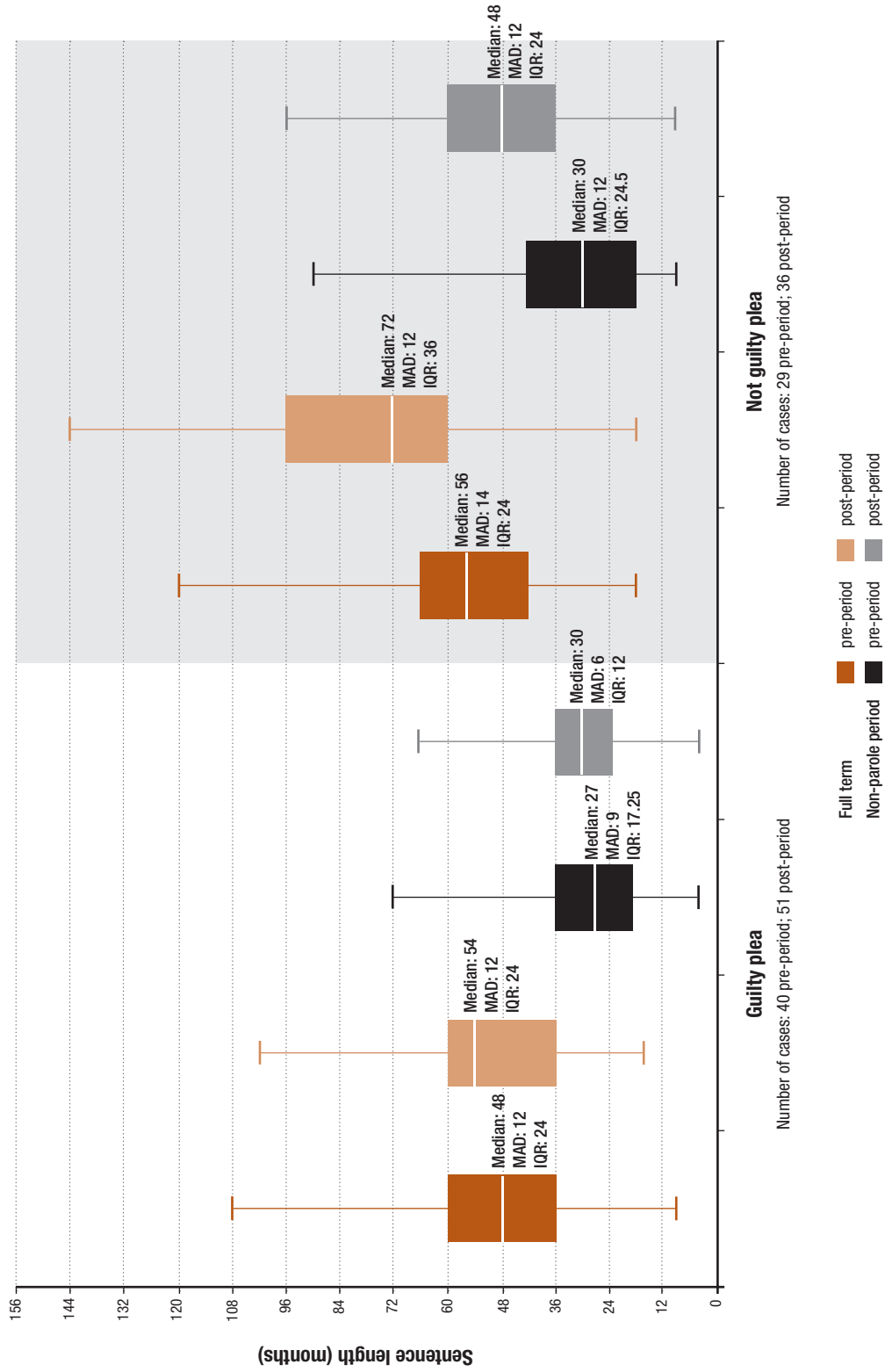
132 Mann-Whitney U test,  $p < 0.001$ .

133 Mann-Whitney U test,  $p < 0.336$ . This difference was not statistically significant.

134 Mann-Whitney U test,  $p < 0.323$ . This difference was not statistically significant.

**Figure 3: Severity and consistency of prison sentences — Item 7: s 611 of the Crimes Act 1900 (sexual assault)**

[Box plot with whiskers from minimum to maximum]



*Consistency*

- For offenders who pleaded not guilty, there was an expansion of the IQR in relation to full terms from 2 years (middle 50% range: 3 years 6 months – 5 years 6 months) to 3 years (middle 50% range: 5 years – 8 years). The MAD, however, was slightly smaller in the post-period (12 months compared to 14 months in the pre-period). There was no appreciable difference between the pre-period and the post-period in relation to non-parole periods.
- For offenders who pleaded guilty, there was a narrowing of the IQR in relation to non-parole periods from 17.25 months (middle 50% range: 18.75 months – 3 years) to 12 months (middle 50% range: 2 years – 3 years). The MAD was also smaller in the post-period (6 months compared with 9 months in the pre-period) indicating greater consistency in sentencing. The IQR (24 months) and MAD (12 months) were the same in both periods in relation to full terms.

**Item 8: Aggravated sexual assault**

*Crimes Act 1900, s 61J. Maximum penalty: 20 years; SNPP: 10 years.*

Child victims under 16 years of age accounted for 45.2% of offences under this section (48.6% in the pre-period and 41.0% in the post-period).

Number of cases:	105 pre-period; 83 post-period
Guilty plea rate:	66.7% pre-period; 71.1% post-period
Prison rate:	97.1% pre-period (guilty plea: 95.7%; not guilty plea: 100%) 97.6% post-period (guilty plea: 98.3%; not guilty plea: 95.7%)
Characteristics:	There were no statistically significant differences between the two periods on known factors.

Figure 4 shows that prison sentences handed down after the commencement of the statutory scheme have increased for this offence, although the effect was not as significant as for some of the other statutory scheme offences. The spread of sentences imposed appears to have narrowed for offenders who pleaded guilty, but widened for offenders convicted after a trial.

*Sentence severity*

The median length of both the full term and the non-parole period was longer in the post-period regardless of the plea:

- For offenders who pleaded not guilty, the median full term increased by 20.8% from 6 years to 7 years 3 months,<sup>135</sup> and the median non-parole period increased by 12.5% from 4 years to 4 years 6 months.<sup>136</sup>
- For offenders who pleaded guilty, the median full term and the non-parole period increased by 33.3% from 6 years to 8 years,<sup>137</sup> and 17.9% from 3 years 6 months to 4 years 1.5 months,<sup>138</sup> respectively.

135 Mann-Whitney U test,  $p < 0.118$ . This difference was not statistically significant.

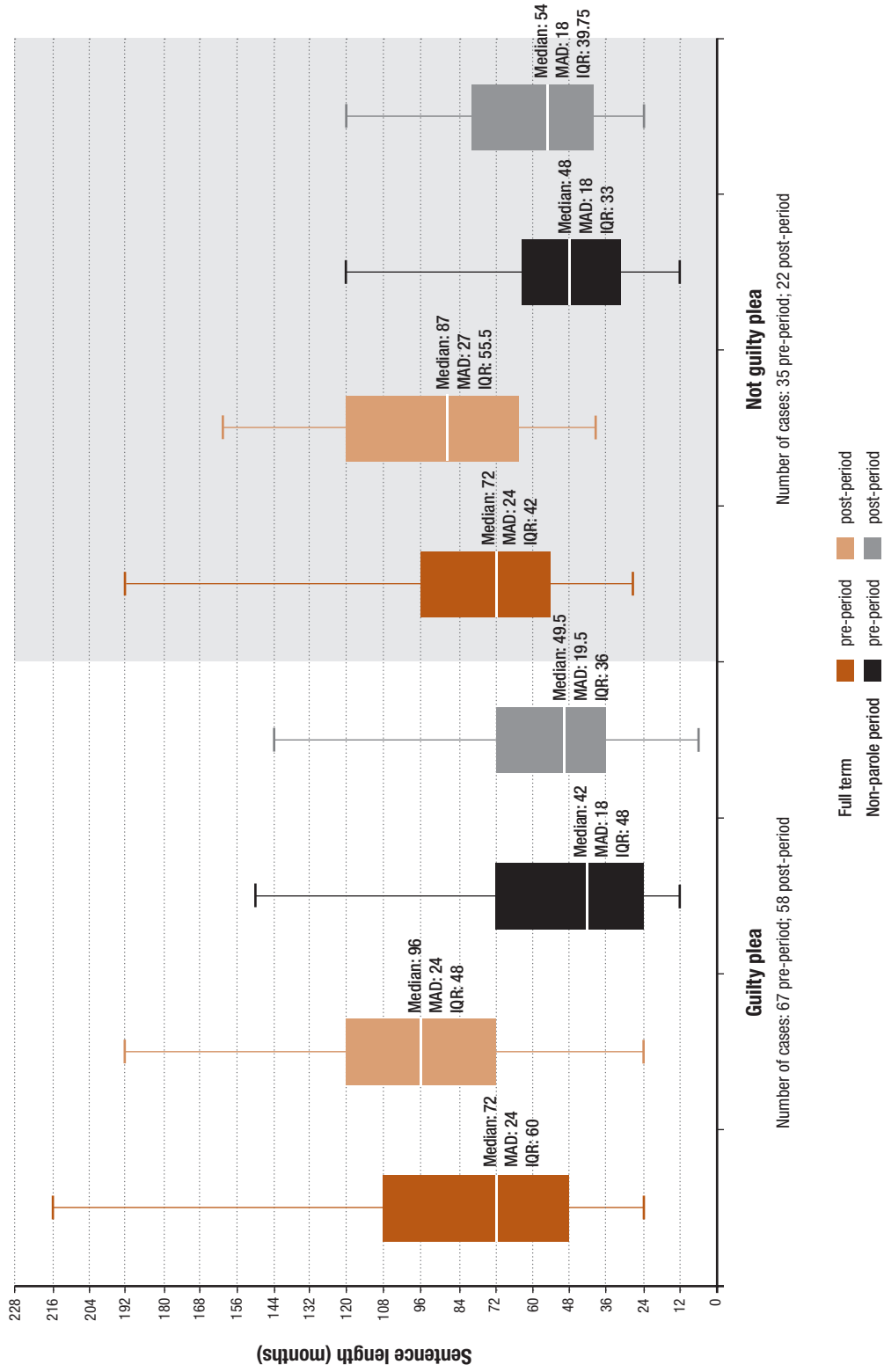
136 Mann-Whitney U test,  $p < 0.092$ . This difference was statistically significant at the 0.1 alpha level.

137 Mann-Whitney U test,  $p < 0.060$ . This difference was statistically significant at the 0.1 alpha level.

138 Mann-Whitney U test,  $p < 0.245$ . This difference was not statistically significant.

**Figure 4: Severity and consistency of prison sentences — Item 8: s 61J of the Crimes Act 1900 (aggravated sexual assault)**

[Box plot with whiskers from minimum to maximum]



*Consistency*

- For offenders who pleaded not guilty, there was an expansion of the IQR in relation to full terms from 3 years 6 months (middle 50% range: 4 years 6 months – 8 years) to 4 years 7.5 months (middle 50% range: 5 years 4.5 months – 10 years), and non-parole periods from 2 years 9 months (middle 50% range: 2 years 6 months – 5 years 3 months) to 3 years 3.75 months (middle 50% range: 3 years 3.75 months – 6 years 7.5 months). The MAD in relation to full terms was slightly larger in the post-period (27 months compared with 24 months in the pre-period) and unchanged in relation to non-parole periods (18 months).
- For offenders who pleaded guilty, there was a narrowing of the IQR in relation to full terms from 5 years (middle 50% range: 4 years – 9 years) to 4 years (middle 50% range: 6 years – 10 years), and non-parole periods from 4 years (middle 50% range: 2 years – 6 years) to 3 years (middle 50% range: 3 years – 6 years). The MAD in relation to full terms was the same in both periods (24 months) and slightly larger in the post-period in relation to non-parole periods (19.5 months compared with 18 months in the pre-period).

*Guilty pleas only*

The following offences met the sample size requirement for guilty pleas only:

**Item 9A: Aggravated indecent assault**

*Crimes Act 1900, s 61M(1). Maximum penalty: 7 years; SNPP: 5 years.*

Overwhelmingly, the victims of aggravated indecent assault were children under 16 years of age (90.9% in the pre-period and 96.9% in the post-period).

Number of cases:	59 pre-period; 54 post-period
Guilty plea rate:	88.1% pre-period; 79.6% post-period
Prison rate:	37.3% pre-period (guilty plea: 38.5%) 59.3% post-period (guilty plea: 62.8%)
Characteristics:	There were no statistically significant differences between the two periods on known factors.

The sentencing pattern for this offence has dramatically changed following the commencement of the statutory scheme. As mentioned earlier, there has been a marked increase in the use of full-time imprisonment. This could have had the effect of stabilising or reducing the median length of prison sentences because those who previously may have received a more lenient type of penalty may now receive a relatively short prison sentence. However, as **Figure 5** illustrates, prison sentences for offenders who pleaded guilty have, in any event, increased since the commencement of the statutory scheme. There was a slight expansion in the spread of sentences imposed.

*Sentence severity*

The median length of both the full term and the non-parole period was longer in the post-period:

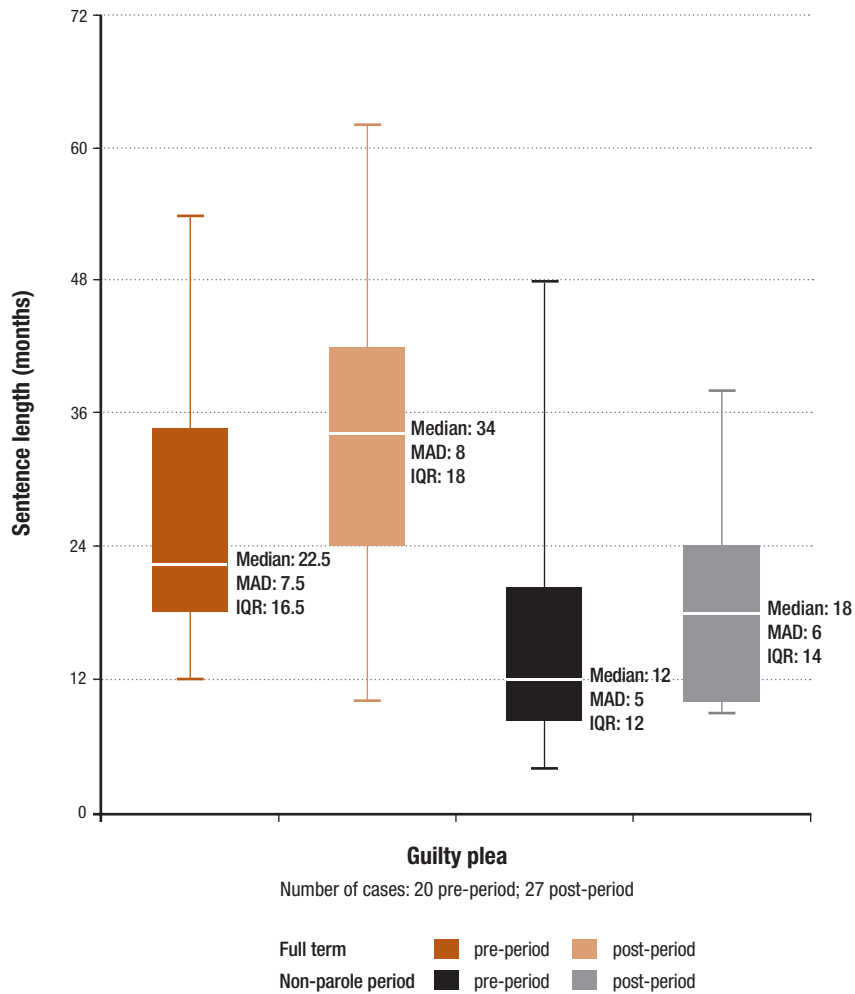
- For offenders who pleaded guilty, the median full term increased by 51.1% from 22.5 months to 2 years 10 months.<sup>139</sup> Following the commencement of the statutory scheme, twice as many offenders received a full term of 2 years 10 months or more (51.9% compared with 25.0% of offenders in the pre-period). In relation to non-parole periods, the median non-parole period increased by 50.0% from 12 months to 18 months.<sup>140</sup>

139 Mann-Whitney U test,  $p < 0.030$ .

140 Mann-Whitney U test,  $p < 0.114$ . This difference was not statistically significant.

**Figure 5: Severity and consistency of prison sentences — Item 9A: s 61M(1) of the *Crimes Act 1900* (aggravated indecent assault)**

[Box plot with whiskers from minimum to maximum]



**Consistency**

- For offenders who pleaded guilty, there was a slight expansion of the IQR in relation to full terms from 16.5 months (middle 50% range: 18 months – 2 years 10.5 months) to 18 months (middle 50% range: 2 years – 3 years 6 months), and non-parole periods from 12 months (middle 50% range: 8.25 months – 20.25 months) to 14 months (middle 50% range: 10 months – 2 years). There was also a slight expansion in the MAD in relation to full terms (8 months compared with 7.5 months in the pre-period) and non-parole periods (6 months compared with 5 months in the pre-period).

**Item 9B: Aggravated indecent assault – child under 10**

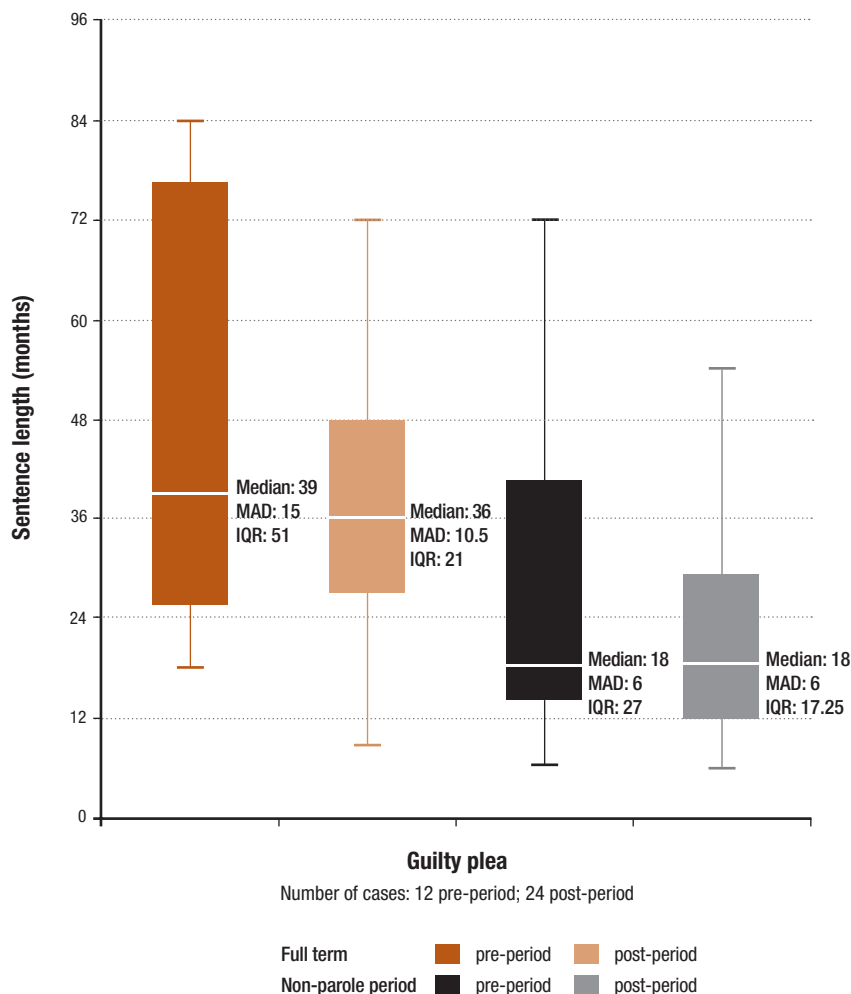
*Crimes Act 1900*, s 61M(2). Maximum penalty: 10 years; SNPP: 5 years.

Number of cases: 28 pre-period; 32 post-period  
 Guilty plea rate: 85.7% pre-period; 93.8% post-period  
 Prison rate: 57.1% pre-period (guilty plea: 50.0%)  
 81.3% post-period (guilty plea: 80.0%)  
 Characteristics: There were no statistically significant differences between the two periods on known factors.

This offence was the only scheme offence not to show an increase in the length of prison sentences. However, given there was a large increase in the proportion of offenders sentenced to full-time imprisonment, this may have had the effect of stabilising the median sentence. While the spread of sentences imposed appear more consistent, caution should be exercised in drawing firm conclusions given that there were only 12 cases in the pre-period. See Figure 6.

**Figure 6: Severity and consistency of prison sentences – Item 9B: s 61M(2) of the *Crimes Act 1900* (aggravated indecent assault – child under 10)**

[Box plot with whiskers from minimum to maximum]





### *Sentence severity*

The median length of the full term was slightly shorter in the post-period.

- For offenders who pleaded guilty, the median full term decreased by 7.7% from 3 years 3 months to 3 years.<sup>141</sup> The median non-parole period, however, was unchanged at 18 months.<sup>142</sup>

### *Consistency*

- For offenders who pleaded guilty, there was a marked narrowing of the IQR in relation to full terms from 4 years 3 months (middle 50% range: 2 years 1.5 months – 6 years 4.5 months) to 21 months (middle 50% range: 2 years 3 months – 4 years), and non-parole periods from 2 years 3 months (middle 50% range: 13.5 months – 3 years 4.5 months) to 17.25 months (middle 50% range: 12 months – 2 years 5.25 months). There was also a narrowing in the MAD in relation to full terms (10.5 months compared with 15 months in the pre-period), while it remained the same in relation to non-parole periods (6 months).

### **Item 10: Sexual intercourse – child under 10**

*Crimes Act 1900, s 66A. Maximum penalty: 25 years; SNPP: 15 years.*

Number of cases: 38 pre-period; 30 post-period

Guilty plea rate: 76.3% pre-period; 76.7% post-period

Prison rate: 92.1% pre-period (guilty plea: 89.7%)  
96.7% post-period (guilty plea: 95.7%)

Characteristics: For offenders who pleaded guilty, there was a large decrease in the proportion of offenders with prior convictions (from 50.0% in the pre-period to 18.2% in the post-period).<sup>143</sup> There were no other statistically significant differences between the two periods.

As **Figure 7** shows, this offence recorded one of the largest increases in the length of prison sentences for offenders who pleaded guilty. It also recorded one of the largest expansions in the spread of sentences imposed.

### *Sentence severity*

The median length of both the full term and the non-parole period was longer in the post-period.

- For offenders who pleaded guilty, the median full term increased by 60.0% from 5 years to 8 years.<sup>144</sup> Before the commencement of the statutory scheme, only 15.4% of offenders received a full term of 8 years or more compared with 54.5% of offenders in the post-period. In relation to non-parole periods, the median non-parole period increased by 41.7% from 3 years to 4 years 3 months.<sup>145</sup> Prior to the commencement of the statutory scheme, only 15.4% of offenders received a non-parole period of 4 years 3 months or more compared with 50.0% of offenders in the post-period.

141 Mann-Whitney U test,  $p < 0.624$ . This difference was not statistically significant.

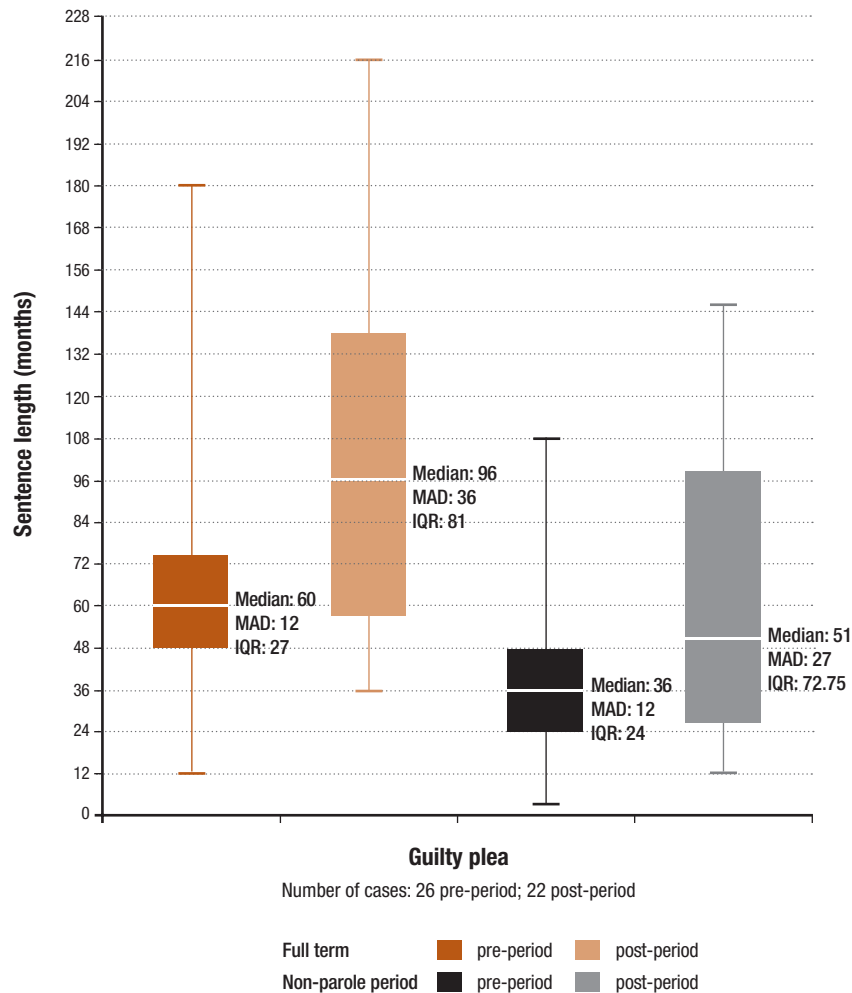
142 Mann-Whitney U test,  $p < 0.341$ . This difference was not statistically significant.

143 Fisher's Exact test,  $p < 0.034$ .

144 Mann-Whitney U test,  $p < 0.023$ .

145 Mann-Whitney U test,  $p < 0.053$ .

**Figure 7: Severity and consistency of prison sentences – Item 10: s 66A of the *Crimes Act 1900* (sexual intercourse – child under 10)** [Box plot with whiskers from minimum to maximum]



**Consistency**

- For offenders who pleaded guilty, there was a marked expansion of the IQR in relation to full terms from 2 years 3 months (middle 50% range: 4 years – 6 years 3 months) to 6 years 9 months (middle 50% range: 4 years 9 months – 11 years 6 months), and non-parole periods from 2 years (middle 50% range: 2 years – 4 years) to 6 years 0.75 months (middle 50% range: 2 years 2.25 months – 8 years 3 months). There was also a marked expansion in the MAD in relation to full terms (3 years compared with 12 months in the pre-period) and non-parole periods (2 years 3 months compared with 12 months in the pre-period).

When standard non-parole periods were introduced, the statutory maximum penalty for s 66A offences increased from 20 years to 25 years, representing an increase of 25%. To account for this increase, the prison sentences in the pre-period were adjusted upwards by 25% and then compared with prison sentences imposed in the post-period. As a result of the adjustment, the median length of both the full term (6 years 3 months) and the non-parole period (3 years 9 months) remained below those observed in the post-period. However, the differences between the two periods were no longer found to be statistically significant.<sup>146</sup>

<sup>146</sup> This is a conservative way of accounting for the increase in the maximum penalty because it does not necessarily follow that a 25% increase in the maximum penalty results in an identical increase in each subsequently imposed sentence of imprisonment. The fact that the sentences remained below those imposed in the post-period is important.

**Item 11: Robbery with arms etc and wounding**

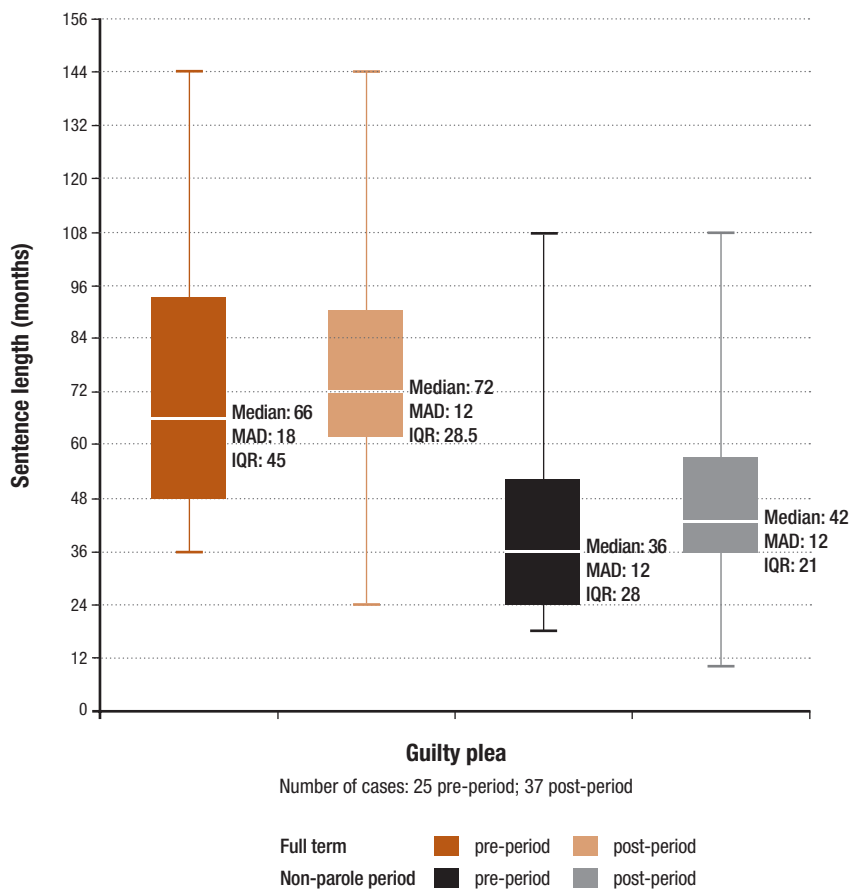
*Crimes Act 1900, s 98. Maximum penalty: 25 years; SNPP: 7 years.*

Number of cases: 32 pre-period; 47 post-period  
 Guilty plea rate: 81.3% pre-period; 83.0% post-period  
 Prison rate: 96.9% pre-period (guilty plea: 96.2%)  
 95.7% post-period (guilty plea: 94.9%)  
 Characteristics: There were no statistically significant differences between the two periods on known factors.

Figure 8 shows that prison sentences handed down after the commencement of the statutory scheme have increased for this offence, although the effect was not as pronounced as for some other statutory scheme offences. Figure 8 also shows that the spread of sentences imposed has become more consistent.

**Figure 8: Severity and consistency of prison sentences – Item 11: s 98 of the *Crimes Act 1900* (robbery with arms etc and wounding)**

[Box plot with whiskers from minimum to maximum]



*Sentence severity*

The median length of both the full term and the non-parole period was longer in the post-period:

- For offenders who pleaded guilty, the median full term increased by 9.1% from 5 years 6 months to 6 years,<sup>147</sup> and the median non-parole period increased by 16.7% from 3 years to 3 years 6 months.<sup>148</sup>

*Consistency*

- For offenders who pleaded guilty, there was a narrowing of the IQR in relation to full terms from 3 years 9 months (middle 50% range: 4 years – 7 years 9 months) to 2 years 4.5 months (middle 50% range: 5 years 1.5 months – 7 years 6 months), and non-parole periods from 2 years 4 months (middle 50% range: 2 years – 4 years 4 months) to 21 months (middle 50% range: 3 years – 4 years 9 months). There was also a narrowing in the MAD in relation to full terms (12 months compared with 18 months in the pre-period), while it remained the same in relation to non-parole periods (12 months).

**Item 12: Aggravated break, enter and commit serious indictable offence**

*Crimes Act* 1900, s 112(2). Maximum penalty: 20 years; SNPP: 5 years.

This offence was the most common standard non-parole offence, accounting for 23.3% of offences in the pre-period and 39.2% of offences in the post-period. Stealing (or larceny) was the most common serious indictable offence,<sup>149</sup> accounting for 72.3% of Item 12 offences (69.7% in the pre-period and 73.3% in the post-period). As noted earlier, a very wide range of offences was committed under the “serious indictable offence” ingredient found in this section.<sup>150</sup> For this reason, the following figures relate only to the offence of aggravated break, enter and *steal*. Given the very high guilty plea rate for this offence, there were too few cases to permit an analysis of the sentences imposed where the offender pleaded not guilty.

Number of cases:	161 pre-period; 441 post-period
Guilty plea rate:	95.7% pre-period; 96.8% post-period
Prison rate:	73.9% pre-period (guilty plea: 72.7%) 70.7% post-period (guilty plea: 70.3%)
Characteristics:	For offenders who pleaded guilty, there was a statistically significant increase in the proportion of offenders with prior convictions (from 86.6% in the pre-period to 95.0% in the post-period). <sup>151</sup> On the other hand, significantly more offenders in the pre-period had Form 1 matters taken into account at sentencing (58.9% compared with 46.3% in the post-period). <sup>152</sup> Furthermore, there were differences in

147 Mann-Whitney U test,  $p < 0.080$ . This difference was statistically significant at the 0.1 alpha level.

148 Mann-Whitney U test,  $p < 0.225$ . This difference was not statistically significant.

149 A serious indictable offence is defined in s 4 of the *Crimes Act* as “an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more”. The offence of larceny under s 117 of the *Crimes Act* has a statutory maximum penalty of 5 years imprisonment.

150 The serious indictable offences committed under this section were grouped into the 16 broad categories of offences set out in Australian Bureau of Statistics, *Australian standard offence classification* (ASOC), 1997, cat no 1234.0, ABS, Canberra. Eight ASOC categories of offences were recorded.

151 Chi-square test,  $p < 0.004$ .

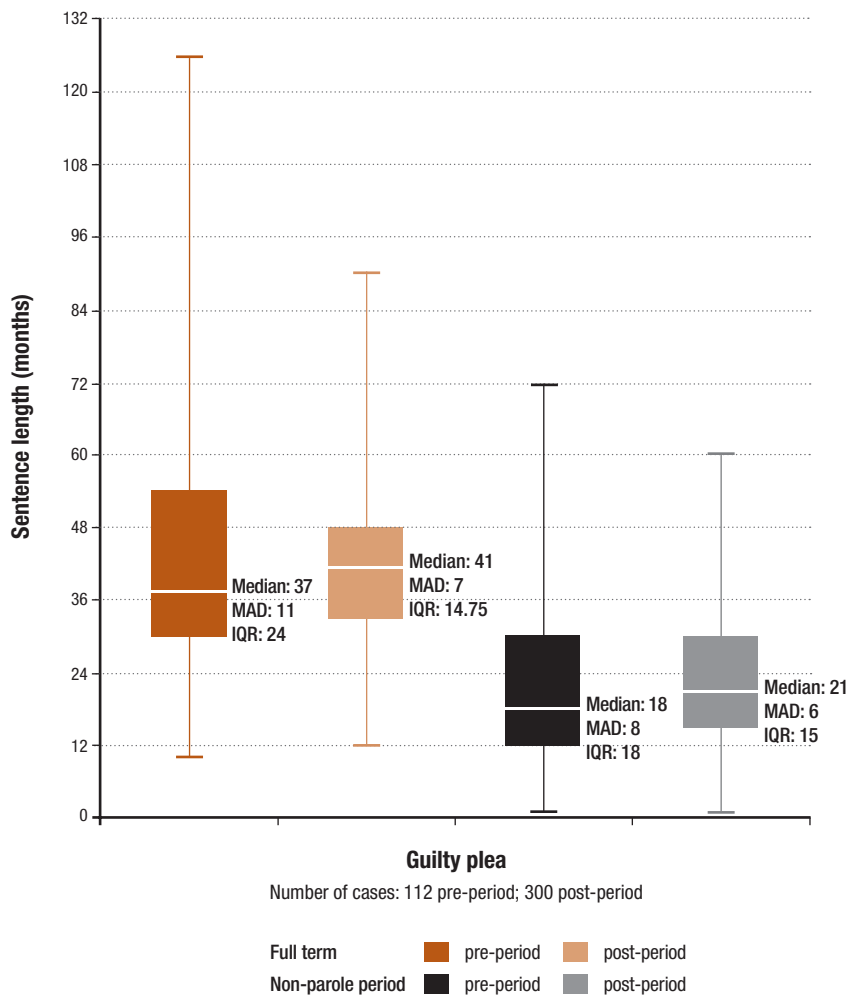
152 Chi-square test,  $p < 0.023$ .

the aggravating circumstances of the offence.<sup>153</sup> The most common aggravating circumstances in both periods were being in the company of a co-offender, or knowing that there was a person(s) present in the place where the offence was committed. However, there were disproportionately more offenders in the post-period charged with these aggravating circumstances (60.0% compared with 43.2% in the pre-period, and 27.7% compared with 21.6% in the pre-period, respectively). Offenders in the pre-period were disproportionately more likely to be armed with an offensive weapon or instrument (18.0% compared with 3.7% in the post-period) and inflict actual bodily harm (8.1% compared with 3.3% in the post-period).

Since the commencement of the statutory scheme, there has been a slight increase in the length of prison sentences imposed for this offence. At the same time, the spread of sentences imposed has become more consistent. See Figure 9.

**Figure 9: Severity and consistency of prison sentences — Item 12: s 112(2) of the *Crimes Act 1900* (aggravated break, enter and steal)**

[Box plot with whiskers from minimum to maximum]



153 Chi-square test,  $p < 0.000$ . The “circumstances of aggravation” for this offence are defined in the *Crimes Act*, s 105A. It should be noted that an offence under this section may involve more than one circumstance of aggravation, even

*Sentence severity*

The median length of both the full term and the non-parole period was longer in the post-period:

- For offenders who pleaded guilty, the median full term increased by 10.8% from 3 years 1 month to 3 years 5 months,<sup>154</sup> and the median non-parole period increased by 16.7% from 18 months to 21 months.<sup>155</sup>

*Consistency*

- For offenders who pleaded guilty, there was a narrowing of the IQR in relation to full terms from 2 years (middle 50% range: 2 years 6 months – 4 years 6 months) to 14.75 months (middle 50% range: 2 years 9.25 months – 4 years), and non-parole periods from 18 months (middle 50% range: 12 months – 2 years 6 months) to 15 months (middle 50% range: 15 months – 2 years 6 months). There was also a narrowing in the MAD in relation to full terms (7 months compared with 11 months in the pre-period) and non-parole periods (6 months compared with 8 months in the pre-period), indicating greater consistency in sentencing.

**Item 13: Specially aggravated break, enter and commit serious indictable offence**

*Crimes Act 1900, s 112(3)*. Maximum penalty: 25 years; SNPP: 7 years.

Almost two-thirds (64.9%) of offences committed under this section involved stealing (or larceny). Assaults intended to cause injury accounted for 21.5% of the serious indictable offences committed. The most common circumstance of special aggravation was wounding or inflicting grievous bodily harm (70.3%).<sup>156</sup>

Number of cases:	10 pre-period; 27 post-period
Guilty plea rate:	100% pre-period; 96.3% post-period
Prison rate:	100% pre-period (guilty plea: 100%) 96.3% post-period (guilty plea: 96.2%)
Characteristics:	There were no statistically significant differences between the two periods on known factors.

Figure 10 shows that there has been a slight increase in the length of prison sentences following the commencement of the statutory scheme. There has also been a slight expansion in the spread of sentences imposed.

*Sentence severity*

The median length of both the full term and the non-parole period was longer in the post-period.

- For offenders who pleaded guilty, the median full term increased by 8.3% from 5 years 6.5 months to 6 years,<sup>157</sup> and the median non-parole period increased by 12.0% from 3 years 1.5 months to 3 years 6 months.<sup>158</sup>

*Footnote 153 continued*

when charged with only one aggravating circumstance. If charged with more than one circumstance of aggravation, the aggravating feature considered the most serious was selected. For example, if the offender was armed and in company, armed was selected.

154 Mann-Whitney U test,  $p < 0.672$ . This difference was not statistically significant.

155 Mann-Whitney U test,  $p < 0.611$ . This difference was not statistically significant.

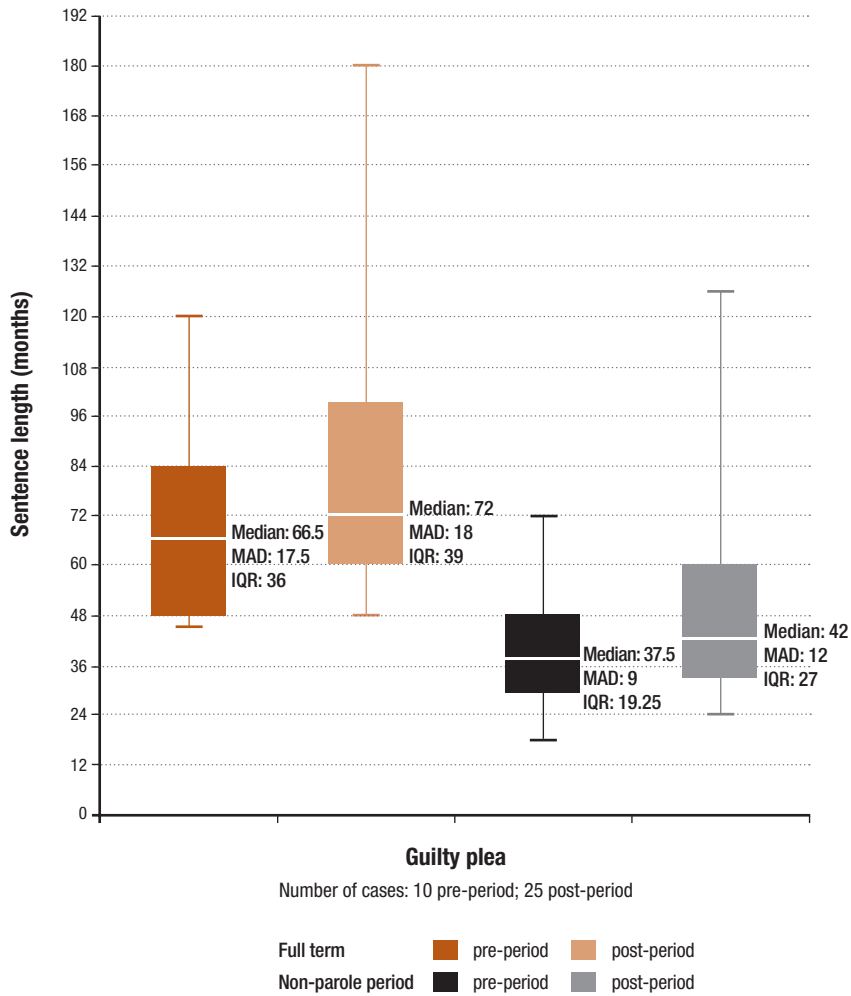
156 The “circumstances of special aggravation” are defined in the *Crimes Act*, s 105A.

157 Mann-Whitney U test,  $p < 0.272$ . This difference was not statistically significant.

158 Mann-Whitney U test,  $p < 0.378$ . This difference was not statistically significant.

**Figure 10: Severity and consistency of prison sentences — Item 13: s 112(3) of the *Crimes Act 1900* (specially aggravated break, enter and commit serious indictable offence)**

[Box plot with whiskers from minimum to maximum]



*Consistency*

- For offenders who pleaded guilty, there was a slight expansion of the IQR in relation to full terms from 3 years (middle 50% range: 4 years – 7 years) to 3 years 3 months (middle 50% range: 5 years – 8 years 3 months). There was no appreciable difference in the MAD. In relation to non-parole periods, there was an expansion of the IQR from 19.25 months (middle 50% range: 2 years 5.25 months – 4 years 0.5 months) to 2 years 3 months (middle 50% range: 2 years 9 months – 5 years). There was also a slight expansion in the MAD (12 months compared with 9 months in the pre-period).

**Item 18: Supply commercial quantity of prohibited drug<sup>159</sup>**

*Drug Misuse and Trafficking Act 1985*, s 25(2).<sup>160</sup> Maximum penalty: 20 years; SNPP: 10 years.

The most common drug supplied was amphetamines (35.6%), followed by heroin (30.8%) and ecstasy (23.7%). However, the composition of drug types is significantly different between the pre-period and the post-period. In particular, significantly more offenders in the pre-period supplied heroin (43.3% compared with 23.1% in the post-period),<sup>161</sup> whereas ecstasy was more likely to be supplied in the post-period (34.0% compared with only 7.2% in the pre-period).<sup>162</sup> A preliminary analysis of the sentences imposed by drug type showed that regardless of the period, offences involving heroin attracted the longest prison sentences, while offences involving ecstasy attracted the shortest prison sentences. Since these differences were found to be statistically significant,<sup>163</sup> it was decided to control for the type of drug. The only drug types with sufficient cases to analyse were heroin and amphetamines.

The following figures relate to offences of supplying a commercial quantity of *heroin*.

Number of cases:	42 pre-period; 36 post-period
Guilty plea rate:	88.1% pre-period; 86.1% post-period
Prison rate:	97.6% pre-period (guilty plea: 97.3%) 97.2% post-period (guilty plea: 96.8%)
Characteristics:	There were no statistically significant differences between the two periods on known factors.

As **Figure 11** shows, prison sentences for supplying a commercial quantity of *heroin* have significantly increased since the commencement of the statutory scheme. The spread of sentences imposed has expanded.

*Sentence severity*

The median length of both the full term and the non-parole period was longer in the post-period:

- For offenders who pleaded guilty, the median full term increased by 44.8% from 4 years 10 months to 7 years.<sup>164</sup> Before the commencement of the statutory scheme, only 13.9% of offenders received a full term of 7 years or more compared with 56.7% of offenders in the post-period. In relation to non-parole periods, the median non-parole period increased by 47.7% from 2 years 8.5 months to 4 years.<sup>165</sup> Prior to the commencement of the statutory scheme, only 22.2% of offenders received a non-parole period of 4 years or more compared with 60.0% of offenders in the post-period.

159 Being an offence that does not relate to cannabis leaf, and if a large commercial quantity is specified for the prohibited drug concerned, involves less than the large commercial quantity.

160 See also penalty provision in *Drug Misuse and Trafficking Act*, s 33(2).

161 Chi-square test,  $p < 0.001$ .

162 Chi-square test,  $p < 0.000$ .

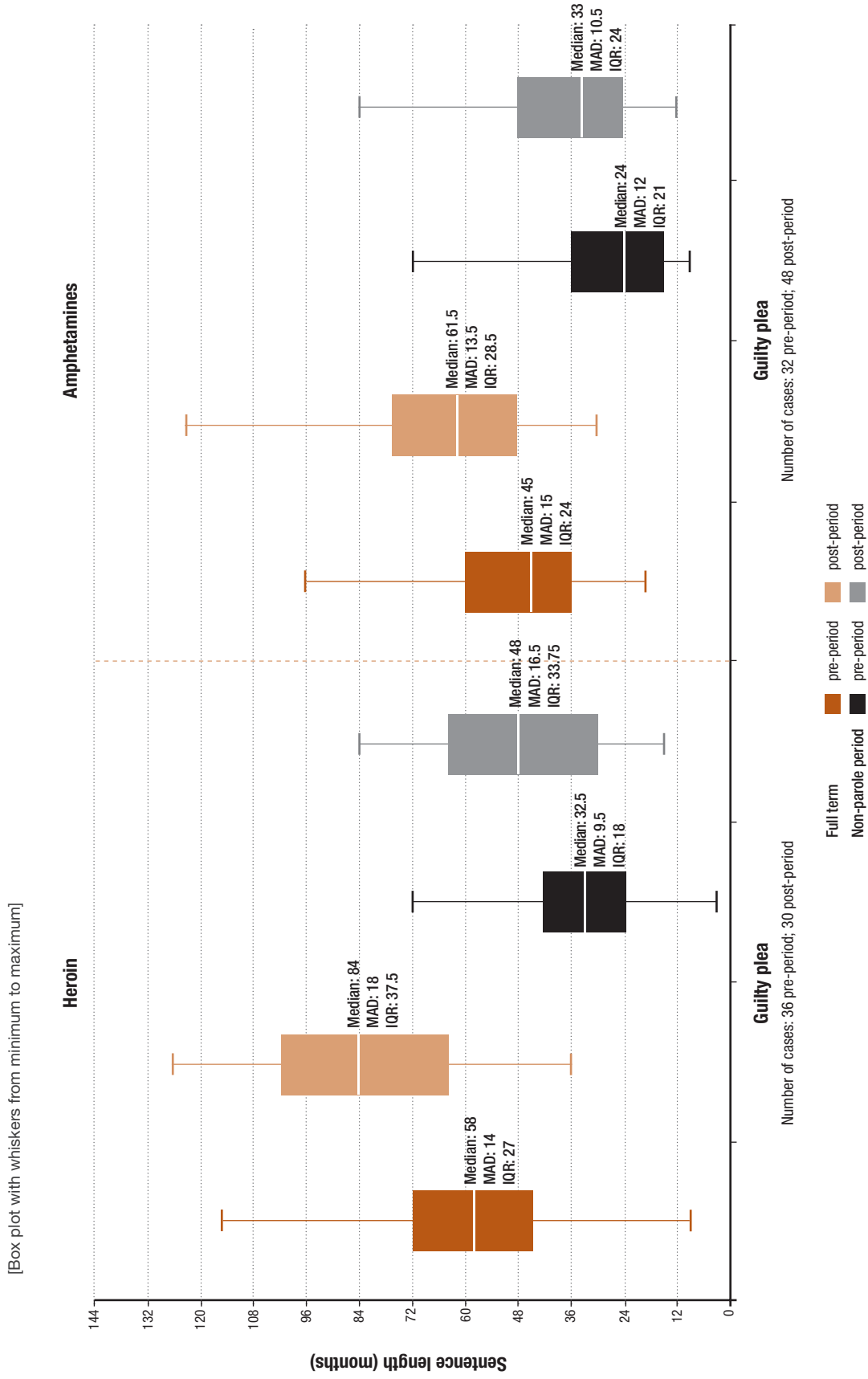
163 Mann-Whitney U test,  $p < 0.000$ .

164 Mann-Whitney U test,  $p < 0.000$ .

165 Mann-Whitney U test,  $p < 0.008$ .



**Figure 11: Severity and consistency of prison sentences — Item 18: s 25(2) of the Drug Misuse and Trafficking Act 1985 (supply commercial quantity of heroin and amphetamines)**



### Consistency

- For offenders who pleaded guilty, there was an expansion of the IQR in relation to full terms from 2 years 3 months (middle 50% range: 3 years 9 months – 6 years) to 3 years 1.5 months (middle 50% range: 5 years 3.75 months – 8 years 5.25 months), and non-parole periods from 18 months (middle 50% range: 2 years – 3 years 6 months) to 2 years 9.75 months (middle 50% range: 2 years 6 months – 5 years 3.75 months). There was also an expansion in the MAD in relation to full terms (18 months compared with 14 months in the pre-period) and non-parole periods (16.5 months compared with 9.5 months in the pre-period).

The following figures relate to offences of supplying a commercial quantity of *amphetamines*.

Number of cases:	37 pre-period; 53 post-period
Guilty plea rate:	94.6% pre-period; 96.2% post-period
Prison rate:	91.9% pre-period (guilty plea: 91.4%) 94.3% post-period (guilty plea: 94.1%)
Characteristics:	There were no statistically significant differences between the two periods on known factors.

Figure 11 shows that while prison sentences for supplying a commercial quantity of *amphetamines* have also significantly increased since the commencement of the statutory scheme, there was little change in the spread of sentences imposed.

### Sentence severity

The median length of both the full term and the non-parole period was longer in the post-period:

- For offenders who pleaded guilty, the median full term increased by 36.7% from 3 years 9 months to 5 years 1.5 months.<sup>166</sup> Before the commencement of the statutory scheme, only 21.9% of offenders received a full term of 5 years 1.5 months or more compared with 50.0% of offenders in the post-period. In relation to non-parole periods, the median non-parole period increased by 37.5% from 2 years to 2 years 9 months.<sup>167</sup> Prior to the commencement of the statutory scheme, 53.1% of offenders received a non-parole period of 2 years or less compared with 29.2% of offenders in the post-period.

### Consistency

- For offenders who pleaded guilty, there was a slight expansion of the IQR in relation to full terms from 2 years (middle 50% range: 3 years – 5 years) to 2 years 4.5 months (middle 50% range: 4 years – 6 years 4.5 months), and non-parole periods from 21 months (middle 50% range: 15 months – 3 years) to 2 years (middle 50% range: 2 years – 4 years). However, there was a slight narrowing in the MAD in relation to full terms (13.5 months compared with 15 months in the pre-period) and non-parole periods (10.5 months compared with 12 months in the pre-period).

<sup>166</sup> Mann-Whitney U test,  $p < 0.003$ .

<sup>167</sup> Mann-Whitney U test,  $p < 0.011$ .

### Item 19: Supply large commercial quantity of prohibited drug<sup>168</sup>

*Drug Misuse and Trafficking Act 1985*, s 25(2).<sup>169</sup> Maximum penalty: Life; SNPP: 15 years.

The most common drug types supplied were ecstasy (36.8%), heroin (30.4%) and amphetamines (24.2%). However, as with Item 18 (supply commercial quantity of prohibited drug), there were significantly more offenders in the pre-period who supplied heroin (52.0% compared with 12.9% in the post-period),<sup>170</sup> and significantly more offenders in the post-period who supplied ecstasy (54.8% compared with 16.0% in the pre-period).<sup>171</sup> Since an examination of the sentences imposed by drug type did not reveal any statistically significant differences, and in order to retain sufficient cases to analyse, the following figures include *all* drug types.

Number of cases:	59 pre-period; 74 post-period
Guilty plea rate:	86.4% pre-period; 85.1% post-period
Prison rate:	98.3% pre-period (guilty plea: 98.0%) 98.6% post-period (guilty plea: 98.4%)
Characteristics:	Other than drug type, there were no other statistically significant differences between the two periods on known factors.

As Figure 12 shows, not only have prison sentences for this offence increased since the commencement of the statutory scheme, but there has also been an expansion in the spread of sentences imposed.

#### *Sentence severity*

The median length of both the full term and the non-parole period was longer in the post-period:

- For offenders who pleaded guilty, the median full term increased by 12.3% from 6 years 9.5 months to 7 years 7.5 months,<sup>172</sup> and the median non-parole period increased by 18.8% from 4 years to 4 years 9 months.<sup>173</sup>

#### *Consistency*

- For offenders who pleaded guilty, there was an expansion of the IQR in relation to full terms from 2 years 7.5 months (middle 50% range: 5 years 4.5 months – 8 years) to 5 years (middle 50% range: 6 years – 11 years), and non-parole periods from 19.5 months (middle 50% range: 3 years 4.5 months – 5 years) to 3 years 6 months (middle 50% range: 3 years 6 months – 7 years). There was also an expansion in the MAD in relation to full terms (22 months compared with 14.5 months in the pre-period) and non-parole periods (21 months compared with 12 months in the pre-period).

168 Being an offence that does not relate to cannabis leaf, and if a large commercial quantity is specified for the prohibited drug concerned, involves not less than the large commercial quantity.

169 See also penalty provision in the *Drug Misuse and Trafficking Act*, s 33(3).

170 Chi-square test,  $p < 0.000$ .

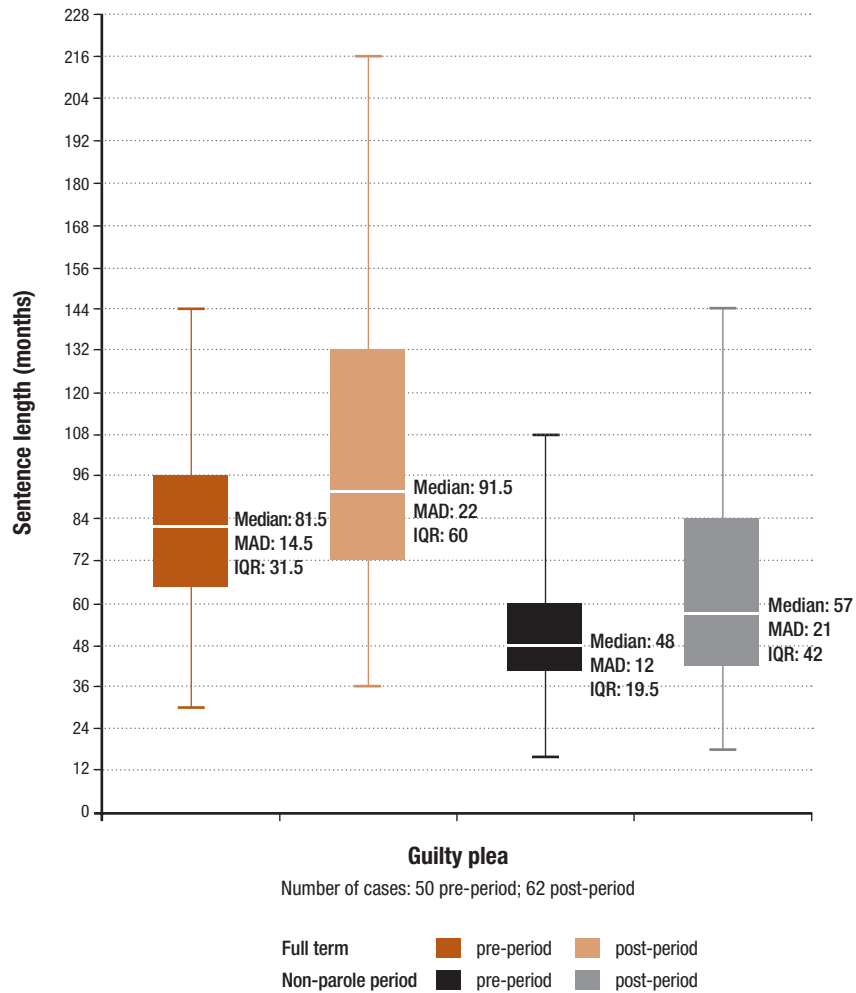
171 Chi-square test,  $p < 0.000$ .

172 Mann-Whitney U test,  $p < 0.021$ .

173 Mann-Whitney U test,  $p < 0.086$ . This difference was statistically significant at the 0.1 alpha level.

**Figure 12: Severity and consistency of prison sentences — Item 19: s 25(2) of the *Drug Misuse and Trafficking Act 1985* (supply large commercial quantity of prohibited drug)**

[Box plot with whiskers from minimum to maximum]





## Part 2 — Pattern of Court of Criminal Appeal sentence appeals

When a novel statutory scheme is introduced into the criminal justice system, it is inevitable that first instance decisions applying the legislation will be tested on appeal. The Court of Criminal Appeal not only corrects legal errors and re-sentences in individual cases, but also plays an important role in providing guidance by laying down general sentencing principles. In doing so, it has provided, and will no doubt continue to provide, first instance judges with guidance about where the statutory scheme fits within sentencing law and the effect it has, or will have, on sentencing patterns.<sup>174</sup> The following analysis examines the impact that the statutory scheme has had on the appellate system, focussing on Court of Criminal Appeal decisions relating to offences in the Table to Div 1A.

A person convicted on indictment must file a notice of intention to apply for leave to appeal against the severity of sentence within 28 days after the sentence,<sup>175</sup> after which time the applicant must apply for leave to appeal out of time. In the case of Crown appeals, there is no equivalent 28-day limit, but any excessive delay is a matter relevant to the court's exercise of its discretion to intervene.<sup>176</sup>

### 4.1 The method

Subject to the following paragraph, the method used in Part 2 of the study replicates the method used in Part 1 at 3.1.1 to 3.1.3 above.

To determine whether there has been a change in the pattern of sentence appeals to the Court of Criminal Appeal before and after the commencement of the statutory scheme, the cohort of offenders in the pre-period and the post-period were followed up for a period of two years from their first instance sentence.<sup>177</sup> As there were offenders in the post-period who were sentenced near the end date (31 December 2007), it was not possible to employ a longer follow-up period.

### 4.2 The results

**Table 4** presents the outcomes of severity and Crown appeals within two years from the first instance sentence. The Table compares the pattern of appeals in the pre-period and the post-period.

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174 See the discussion in the “Introduction” section above.

175 *Criminal Appeal Act* 1912, s 10(1)(a). See also *Criminal Appeal Rules*, r 3B.

176 *R v Ohar* (2004) 59 NSWLR 596 at [62]–[65] and the cases cited therein.

177 For example, the nature and outcome of any appeal for an offender who was sentenced on 3 April 2000 was determined as at 3 April 2002, whereas the nature and outcome of any appeal for an offender who was sentenced on 31 December 2007 was determined as at 31 December 2009. It should be acknowledged that the cohort of offenders in the pre-period had more time to have their appeal heard and finalised by the Court of Criminal Appeal. It is unlikely that any further sentence appeals for this cohort will arise. On the other hand, it is likely there will be further sentence appeals determined by the Court of Criminal Appeal for the cohort of offenders in the post-period. An analysis of past appeal figures — assuming that there is no change in the propensity to appeal after two years — projects that in the next two years or so, there may be a further 14 severity appeals and 6 or 7 Crown appeals determined for this cohort.

#### 4.2.1 The rate of appeal against sentence for statutory scheme offences

The rate of appeal is simply the frequency with which an offender or the Crown appeals against a first instance sentence. Table 4 shows that there has been a decline in the rate of appeal against the severity of sentence from 15.0% in the pre-period to 12.6% in the post-period. On the other hand, there has been an increase in the rate of Crown appeals against the asserted inadequacy of sentence from 2.8% in the pre-period to 3.9% in the post-period.

**Table 4: Court of Criminal Appeal sentence appeals within two years of first instance sentence – rate, type and outcomes of appeals<sup>a</sup>**

	Pre-period		Post-period	
	N = 991		N = 1535	
	n	%	n	%
<b>Severity appeals</b>				
Rate	149	15.0	194	12.6
Dismissed	93	62.4	102	52.6
Allowed	56	37.6	92	47.4
– reduced <sup>b</sup>	52	–	90	–
– backdated <sup>c</sup>	4	–	2	–
<b>Crown appeals</b>				
Rate	28	2.8	60	3.9
Dismissed <sup>d</sup>	9	32.1	20	33.3
Allowed	19	67.9	40	66.7
– increased <sup>e</sup>	19	–	38	–
– advanced <sup>f</sup>	0	–	2	–
<b>Total sentence appeals<sup>g</sup></b>				
Rate	177	17.9	254	16.5
Severity	149	84.2	194	76.4
Crown	28	15.8	60	23.6

- a Does not include Court of Criminal Appeal (CCA) cases remitted to the District Court for re-sentencing offenders or offenders who committed an offence in the Table to Div 1A before 1 February 2003 (when the legislation came into effect) but were sentenced after that date and then appealed.
- b Includes 2 cases (one in each of the pre- and post-periods) where the sentence was reduced after the CCA substituted the verdict: *R v ITA* (2003) 139 A Crim R 340 and *Topcu v R* [2007] NSWCCA 274. There were 2 severity appeals for one of the matters in the pre-period: *Wray v R* (2007) 171 A Crim R 583. The earlier appeal was dismissed: *R v GJW* [2003] NSWCCA 277.
- c The commencement date of the sentence of imprisonment was backdated to take into account a period of pre-sentence custody. The length of the sentence did not change.
- d There were 2 Crown appeals for one of the matters in the pre-period. The earlier appeal was allowed: *R v Markarian* (2003) 137 A Crim R 497. However, the High Court remitted the matter to the CCA: *Markarian v The Queen* (2005) 228 CLR 357, which then dismissed the appeal: *R v Markarian* [2005] NSWCCA 264.
- e There were 2 Crown appeals for one of the matters in the post-period. The earlier appeal was allowed: *R v Chaaban* [2006] NSWCCA 107. However, the respondent did not comply with his undertaking to provide assistance. The Crown then appealed against the discount he was given for assistance: *R v Chaaban* (2006) 166 A Crim R 406.
- f The commencement date of the sentence of imprisonment was advanced or post dated to reduce the degree of concurrency with existing sentences. The length of the sentence did not change.
- g In 6 matters (one in the pre-period and 5 in the post-period), the Crown and the offender appealed against sentence at the same time. In one matter in the post-period, the Crown and the offender appealed against sentence at different times.

A comparison of the appeal rate between the two periods by offence (see Table 5) reveals a number of differences.<sup>178</sup> The appeal rate has risen for several offences in the Table to Div 1A, but fallen for others. For three statutory scheme offences the appeal rate for both severity appeals and Crown appeals increased:

- Item 18: s 25(2) of the *Drug Misuse and Trafficking Act 1985* (supply commercial quantity of prohibited drug)
- Item 19: s 25(2) of the *Drug Misuse and Trafficking Act 1985* (supply large commercial quantity of prohibited drug)
- Item 20: s 7 of the *Firearms Act 1996* (unauthorised possession or use of firearms).

#### ***Some notable observations about severity appeals***

The largest increase in the rate of severity appeals observed was for Item 9A: s 61M(1) of the *Crimes Act 1900* (aggravated indecent assault), which rose by 11.6 percentage points (from 5.1% in the pre-period to 16.7% in the post-period). Other scheme offences which showed an increase in the appeal rate include:

- Item 11: s 98 of the *Crimes Act 1900* (robbery with arms etc and wounding) increased by 7.6 percentage points (from 9.4% in the pre-period to 17.0% in the post-period)
- Item 20: s 7 of the *Firearms Act 1996* (unauthorised possession or use of firearms) increased by 7.2 percentage points (from 5.3% in the pre-period to 12.5% in the post-period)
- Item 7: s 61I of the *Crimes Act 1900* (sexual assault) increased by 5.1 percentage points (from 9.6% in the pre-period to 14.7% in the post-period)
- Item 18: s 25(2) of the *Drug Misuse and Trafficking Act 1985* (supply commercial quantity of prohibited drug) increased by 2.6 percentage points (from 13.4% in the pre-period to 16.0% in the post-period)
- Item 19: s 25(2) of the *Drug Misuse and Trafficking Act 1985* (supply large commercial quantity of prohibited drug) increased by 2.3 percentage points (from 22.0% in the pre-period to 24.3% in the post-period).

The largest decrease in the rate of severity appeals observed was for Item 13: s 112(3) of the *Crimes Act 1900* (specially aggravated break, enter and commit serious indictable offence) which declined by 11.5 percentage points (from 30.0% in the pre-period to 18.5% in the post-period). Other offences which showed a decrease in the appeal rate include:

- Item 5: s 60(2) of the *Crimes Act 1900* (assault of police officer occasioning bodily harm) declined by 8.3 percentage points (from 8.3% in the pre-period to 0% in the post-period)
- Item 12: s 112(2) of the *Crimes Act 1900* (aggravated break, enter and commit serious indictable offence) declined by 6.0 percentage points (from 13.0% in the pre-period to 7.0% in the post-period)
- Item 1: s 19A of the *Crimes Act 1900* (murder — in other cases) declined by 4.8 percentage points (from 22.0% in the pre-period to 17.2% in the post-period).

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<sup>178</sup> Differences have been reported only where there were at least 10 cases in each period.



**Table 5: Court of Criminal Appeal sentence appeals within two years of first instance sentence — rates of appeal<sup>a</sup>**

Item No	Offence	Pre-period						Post-period						Difference		
		Cases	Severity	Crown	Total	Cases	Severity	Crown	Total	Cases	Severity	Crown	Total	pp	pp	pp
<b>Crimes Act 1900</b>																
1A	s 19A — prescribed victim	1	0	0.0	1	100.0	0	—	—	—	—	—	—	—	—	—
1	s 19A — other cases	82	18	22.0	1	1.2	64	11	17.2	3	4.7	14	21.9	—	—	—
2	s 26	13	3	23.1	1	7.7	9	2	22.2	0	0.0	2	22.2	—	—	—
3	ss 27–30	6	3	50.0	0	0.0	12	0	0.0	1	8.3	1	8.3	—	—	—
4	s 33	79	12	15.2	2	2.5	127	17	13.4	8	6.3	25	19.7	—	—	—
5	s 60(2)	24	2	8.3	0	0.0	10	0	0.0	0	0.0	0	0.0	—	—	—
6	s 60(3)	1	0	0.0	0	0.0	4	1	25.0	0	0.0	1	25.0	—	—	—
7	s 61I	83	8	9.6	2	2.4	95	14	14.7	1	1.1	15	15.8	—	—	—
8	s 61J	105	26	24.8	6	5.7	83	19	22.9	4	4.8	23	27.7	—	—	—
9	s 61JA	1	0	0.0	0	0.0	9	5	55.6	0	0.0	5	55.6	—	—	—
9A	s 61M(1)	59	3	5.1	1	1.7	54	9	16.7	0	0.0	9	16.7	—	—	—
9B	s 61M(2)	28	3	10.7	0	0.0	32	3	9.4	0	0.0	3	9.4	—	—	—
10	s 66A	38	6	15.8	0	0.0	30	5	16.7	1	3.3	6	20.0	—	—	—
11	s 98	32	3	9.4	3	9.4	47	8	17.0	4	8.5	12	25.5	—	—	—
12	s 112(2)	231	30	13.0	1	0.4	602	42	7.0	7	1.2	49	8.1	—	—	—
13	s 112(3)	10	3	30.0	1	10.0	27	5	18.5	3	11.1	8	29.6	—	—	—
14	s 154C(1)	0	—	—	—	—	5	0	0.0	0	0.0	0	0.0	—	—	—
15	s 154C(2)	5	1	20.0	0	0.0	27	2	7.4	3	11.1	5	18.5	—	—	—
15A	s 203E	0	—	—	—	—	1	0	0.0	1	100.0	1	100.0	—	—	—
<b>Drug Misuse and Trafficking Act 1985</b>																
16	s 24(2) — commercial quantity	14	1	7.1	0	0.0	8	1	12.5	0	0.0	1	12.5	—	—	—
17	s 24(2) — large commercial quantity	4	0	0.0	1	25.0	11	1	9.1	0	0.0	1	9.1	—	—	—
18	s 25(2) — commercial quantity	97	13	13.4	3	3.1	156	25	16.0	13	8.3	38	24.4	—	—	—
19	s 25(2) — large commercial quantity	59	13	22.0	5	8.5	74	18	24.3	8	10.8	26	35.1	—	—	—
<b>Firearms Act 1996</b>																
20	s 7	19	1	5.3	0	0.0	48	6	12.5	3	6.3	9	18.8	—	—	—
<b>Total</b>		<b>991</b>	<b>149</b>	<b>15.0</b>	<b>28</b>	<b>2.8</b>	<b>1535</b>	<b>194</b>	<b>12.6</b>	<b>60</b>	<b>3.9</b>	<b>254</b>	<b>16.5</b>	<b>-2.4</b>	<b>1.1</b>	<b>-1.3</b>

<sup>a</sup> Difference shown only for offences with at least 10 cases in each period. Figures have been rounded to one decimal point. In this Table, pp refers to percentage points.

***Some notable observations about Crown appeals***

The largest increase in the rate of Crown appeals observed was for Item 20: s 7 of the *Firearms Act* 1996 (unauthorised possession or use of firearms) which rose by 6.3 percentage points (from 0% in the pre-period to 6.3% in the post-period). Other scheme offences which showed an increase in the appeal rate include:

- Item 18: s 25(2) of the *Drug Misuse and Trafficking Act* 1985 (supply commercial quantity of prohibited drug) increased by 5.2 percentage points (from 3.1% in the pre-period to 8.3% in the post-period)
- Item 4: s 33 of the *Crimes Act* 1900 (wounding etc with intent to do bodily harm or resist arrest) increased by 3.8 percentage points (from 2.5% in the pre-period to 6.3% in the post-period)
- Item 1: s 19A of the *Crimes Act* 1900 (murder — in other cases) increased by 3.5 percentage points (from 1.2% in the pre-period to 4.7% in the post-period)
- Item 10: s 66A of the *Crimes Act* 1900 (sexual intercourse — child under 10) increased by 3.3 percentage points (from 0% in the pre-period to 3.3% in the post-period)
- Item 19: s 25(2) of the *Drug Misuse and Trafficking Act* 1985 (supply large commercial quantity of prohibited drug) increased by 2.3 percentage points (from 8.5% in the pre-period to 10.8% in the post-period).

**4.2.2 Change in the type of sentence appeals**

In light of the above results, a question worth posing is whether the severity appeal to Crown appeal share (colloquially known as “the pie” of appeals) has altered since the commencement of the statutory scheme. The increase in the rate of Crown appeals and the decrease in the rate of severity appeals observed above has in fact resulted in Crown appeals comprising a larger portion of all sentence appeals following the commencement of the statutory scheme (from 15.8% in the pre-period to 23.6% in the post-period).

**4.2.3 Change in the outcomes (success) of sentence appeals**

As can be seen in **Table 4**, Crown appeals were more likely than severity appeals to be successful, regardless of period. However, since the commencement of the statutory scheme, there has been an increase in the success rate of severity appeals (from 37.6% in the pre-period to 47.4% in the post-period). This may be due to the initial technical difficulties faced by first instance judges in correctly applying what was regarded as novel legislation. The court in *R v Way* provided substantial guidance but said there were still areas of the law requiring further development.<sup>179</sup> The court has also recognised that one of the results of the statutory scheme is that sentencing is “complicated” and “[v]ery experienced judges can fall into the traps that Parliament has unconsciously set for sentencing courts ...”.<sup>180</sup>

179 *R v Way* (2004) 60 NSWLR 168 at [87].

180 *R v Rossi-Murray* [2009] NSWCCA 177 per Howie J at [44].



# Summary of findings and conclusions

Despite the fact that the stated object of the statutory scheme was limited to “promoting consistency and transparency in sentencing”,<sup>181</sup> the view held by its opponents<sup>182</sup> was that it evinced a legislative intention to increase sentences for offences with a standard non-parole period. The Court of Criminal Appeal in *R v Way* made it clear that, at the very least, Parliament did intend to increase sentences for those offences where the standard non-parole period was a high percentage of the maximum penalty. It was unclear what effect the statutory scheme would have where Parliament set the standard non-parole period at less than half, or as a low percentage, of the maximum penalty.<sup>183</sup> This study carefully compared sentencing patterns for the offences that first appeared in the Table to Div 1A in 2003 with those which existed before its introduction. The following summarises the key findings. The sample size for individual offences varied and this must be taken into account in considering these conclusions.

## Part 1: Severity and consistency

### 5.1.1 Severity

#### *Guilty plea rate*

Overall, the guilty plea rate for persons convicted and sentenced for offences that became standard non-parole period offences significantly increased in the post-period (86.1%) compared to the pre-period (78.2%). By comparison, there was little change in the guilty plea rate during the same period for offences not found in the statutory scheme.<sup>184</sup> While the guilty plea rate was significantly higher in the post-period, this study did not attempt to determine the extent to which it has increased as a result of the statutory scheme. To achieve this, the before and after time-frames for each offence would need to be reasonably comparable and consideration would need to be given to lag times.<sup>185</sup> However, the plea data is compatible with a hypothesis<sup>186</sup> that more accused are pleading guilty as a result of the commencement of the statutory scheme.

#### *Special circumstances*

There was an increase in findings of special circumstances under s 44(2) of the *Crimes (Sentencing Procedure) Act* whereby the balance of the term of sentence exceeded one-third of the non-parole period: 87.3% of cases for the post-period compared with 80% of cases in the pre-period. This difference is statistically significant. However, this finding

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181 See Explanatory Note to the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002, at <[www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/0/9AE8469165F3BEF9CA256C5B001E5141?Open&sho wnotes](http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/0/9AE8469165F3BEF9CA256C5B001E5141?Open&sho wnnotes)>, accessed 22 April 2010.

182 The Director of Public Prosecutions (NSW), the Public Defenders Office, Legal Aid NSW, the New South Wales Bar Association and the Law Society of NSW all opposed the legislation; see discussion in H Donnelly and I Potas, “Way’s case confirms individualised justice” (2004) 16(6) *JOB* 41.

183 See earlier discussion of the case law in 1.2 and 1.3 above.

184 90% in the pre-period and 91% in the post-period.

185 H Donnelly and T Poletti, “Guilty plea rates for offenders sentenced before and after the standard non-parole period legislation” (2007) 19(4) *JOB* 34. This preliminary study set out the method for measuring the before and after guilty plea rate. See also above n 90.

186 A hypothesis which still needs to be properly tested: see above n 90.

may be explained by the increase in the number of cases involving consecutive sentences, where the sentencing judge set a relatively short non-parole period (less than 75%) due to accumulation, rather than to the commencement of the statutory scheme. Accumulation by itself is a basis for a finding of special circumstances.

**Use of full-time imprisonment**

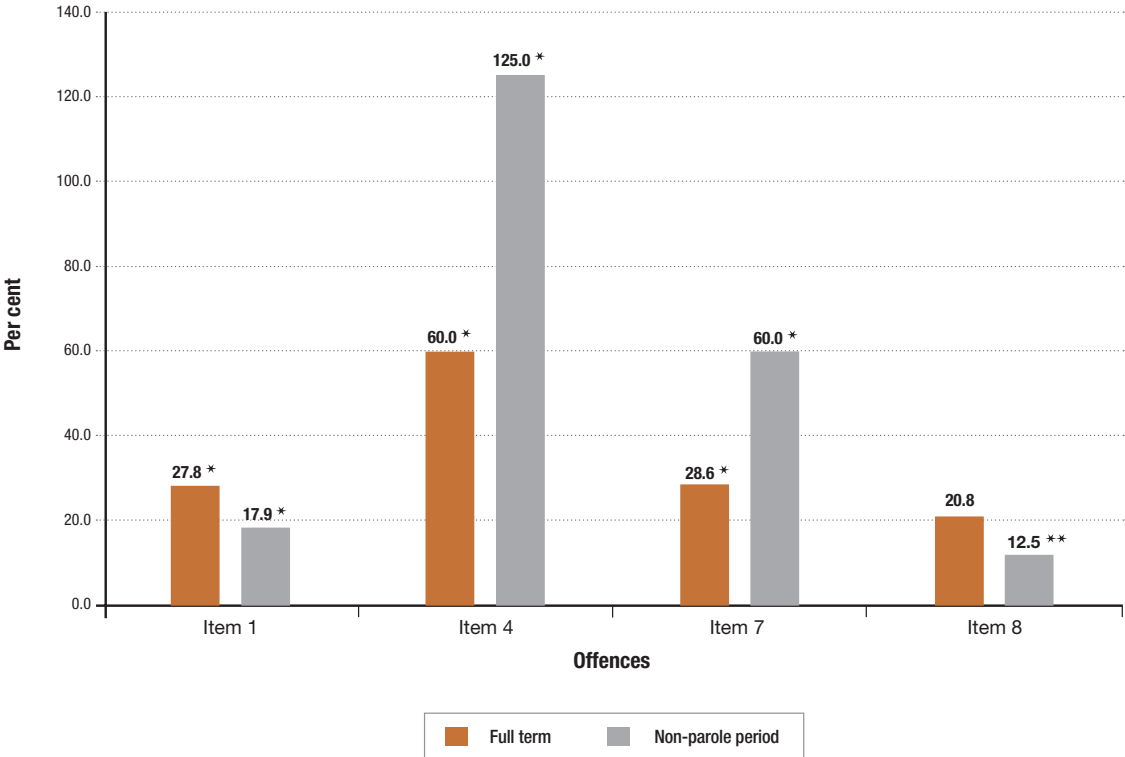
Most of the offences in the Table to Div 1A already had a high rate of full-time imprisonment before the statutory scheme commenced, so there is limited scope for any significant change in the use of full-time imprisonment. However, in the case of aggravated indecent assault under Item 9A: s 61M(1) of the *Crimes Act* 1900 and Item 9B: s 61M(2) of the *Crimes Act* 1900, before the statutory scheme commenced, full-time imprisonment was utilised in 37.3% and 57.1% of cases respectively. After the statutory scheme commenced, the use of imprisonment increased to 59.3% and 81.3% respectively.

**Duration of full-time imprisonment**

*Trial/Not guilty plea cases*

Only 4 of the offences in the Table to Div 1A had sufficient numbers to warrant a comparison between both periods. Both the length of the non-parole period and the full terms of sentence increased for these offences. **Figure 13** sets out the percentage change in the severity of sentences imposed between the pre-period and the post-period.

**Figure 13: Severity of prison sentences where not guilty plea – percentage change in the median full term and non-parole period between the pre-period and post-period<sup>a</sup>**



\* Statistically significant at the 0.05 alpha level  
 \*\* Statistically significant at the 0.10 alpha level  
 a Refer to Table 1 on p 5 for description of Items

The largest increase occurred for Item 4: s 33 of the *Crimes Act* 1900 (wounding etc with intent to do bodily harm or resist arrest). The term of sentence increased by 60.0% from 5 years to 8 years, and the median non-parole period more than doubled from 2 years 6 months to 5 years 7.5 months.

For Item 7: s 61I of the *Crimes Act* 1900 (sexual assault), the median full term increased by 28.6% from 4 years 8 months to 6 years, and the median non-parole period increased by 60.0% from 2 years 6 months to 4 years.

For Item 1: s 19A of the *Crimes Act* 1900 (murder — in other cases), the median full term increased by 27.8% from 18 years to 23 years, and the median non-parole period increased by 17.9% from 14 years to 16 years 6 months.

Item 8: s 61J of the *Crimes Act* 1900 (aggravated sexual assault) also showed increases in the sentences imposed, but these were not statistically significant. The median full term increased by 20.8% from 6 years to 7 years 3 months, and the median non-parole period increased by 12.5% from 4 years to 4 years 6 months.

#### *Guilty plea cases*

**Figure 14** sets out the percentage change in the severity of sentences imposed between the pre-period and the post-period, and also arranges the Table to Div 1A Items in descending order according to the proportion of the standard non-parole period to the maximum penalty for the offence.<sup>187</sup> The Court of Criminal Appeal predicted that the higher the proportion, the greater the effect on sentencing patterns. **Figure 14** shows that all offences except for Item 9B: s 61M(2) of the *Crimes Act* 1900 (aggravated indecent assault — child under 10) increased. Item 9B had a substantial increase in the use of full-time imprisonment.<sup>188</sup> It also shows that the offences with the most pronounced increases had the greatest standard non-parole period to maximum penalty ratio.

Twelve offences in the Table to Div 1A had sufficient numbers to make a comparison between both periods. The differences in sentencing patterns for Items 10, 9A, 18, 8, 1 and 19 were found to be statistically significant.

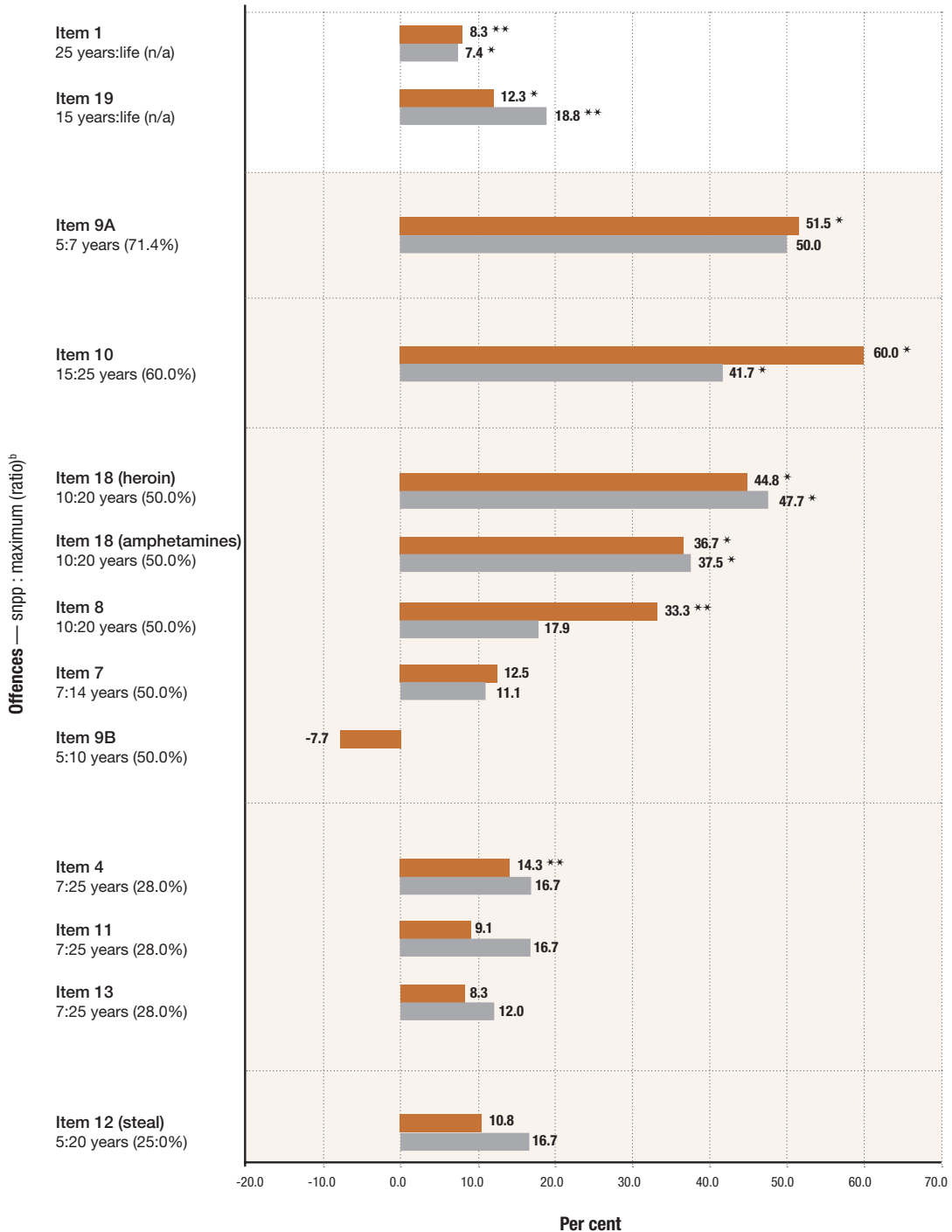
The largest increase was for Item 10: s 66A of the *Crimes Act* 1900 (sexual intercourse — child under 10). It is to be noted that the introduction of the standard non-parole period was accompanied by an increase in the maximum penalty from 20 to 25 years. This alone may have had an impact on sentencing practice. The median full term increased by 60.0% from 5 years to 8 years, and the median non-parole period increased by 41.7% from 3 years to 4 years 3 months, for these offences.

For Item 9A: s 61M(1) of the *Crimes Act* 1900 (aggravated indecent assault), the median full term increased by 51.1% from 22.5 months to 2 years 10 months, and the median non-parole period increased by 50.0% from 12 months to 18 months.

<sup>187</sup> Items with the same ratio have been ordered first according to the maximum penalty, and second according to the standard non-parole period. There are no ratios provided for Item 1 and Item 19 as the offences carry a maximum penalty of life imprisonment. These Items have been included for completeness.

<sup>188</sup> This may have affected the duration of sentences because the imposition of shorter sentences in lieu of alternative penalties drags down the average.

**Figure 14: Severity of prison sentences where guilty plea – percentage change in the median full term and non-parole period between the pre-period and post-period arranged in descending order of proportion of standard non-parole period to maximum penalty<sup>a</sup>**



\* Statistically significant at the 0.05 alpha level  
 \*\* Statistically significant at the 0.10 alpha level  
 a Refer to Table 1 on p 5 for description of Items  
 b Standard non-parole period to maximum penalty and (ratio)



For Item 18: s 25(2) of the *Drug Misuse and Trafficking Act 1985* (supply commercial quantity of prohibited drug), the median full term and the non-parole period increased. For supplying a commercial quantity of *heroin*, the median full term increased by 44.8% from 4 years 10 months to 7 years, and the median non-parole period increased by 47.7% from 2 years 8.5 months to 4 years. For supplying a commercial quantity of *amphetamines*, the median full term increased by 36.7% from 3 years 9 months to 5 years 1.5 months, and the median non-parole period increased by 37.5% from 2 years to 2 years 9 months.

For Item 8: s 61J of the *Crimes Act 1900* (aggravated sexual assault), the median full term increased by 33.3% from 6 years to 8 years, and the median non-parole period increased by 17.9% from 3 years 6 months to 4 years 1.5 months.

Offences carrying a maximum penalty of a life sentence have no proportion to the standard non-parole period, but nevertheless showed sustained increases. For Item 1: s 19A of the *Crimes Act 1900* (murder – in other cases), the median full term increased by 8.3% from 18 years to 19 years 6 months, and the median non-parole period increased by 7.4% from 13 years 6 months to 14 years 6 months.

For Item 19: s 25(2) of the *Drug Misuse and Trafficking Act 1985* (supply large commercial quantity of prohibited drug), the median full term increased by 12.3% from 6 years 9.5 months to 7 years 7.5 months, and the median non-parole period increased by 18.8% from 4 years to 4 years 9 months.

These findings support the conclusion that the greater the proportion of the standard non-parole period to the maximum penalty, the greater the increase in the sentences imposed.

Furthermore, a comparison of prison sentences imposed by plea shows that the increases in the severity of sentences were generally greater for offenders convicted after trial than for offenders who entered a guilty plea.

### 5.1.2 Consistency/uniformity of sentences

#### *Trial/Not guilty plea cases*

The spread of sentences for Item 4 offences: s 33 of the *Crimes Act 1900* (wounding etc with intent to do bodily harm or resist arrest) has become more uniform and consistent as indicated by the smaller IQR and/or MAD measures. This uniformity may be explained by the relatively low standard non-parole period to maximum penalty ratio of 7:25 years which gives less scope for departure by the judge.

#### *Guilty plea cases*

Item 8: s 61J of the *Crimes Act 1900* (aggravated sexual assault), Item 9B: s 61M(2) of the *Crimes Act 1900* (aggravated indecent assault – child under 10), Item 11: s 98 of the *Crimes Act 1900* (robbery with arms etc and wounding), and Item 12: s 112(2) of the *Crimes Act 1900* (aggravated break, enter and steal) had smaller IQR and/or MAD measures for both the non-parole period and full terms. For Item 7: s 61I of the *Crimes Act 1900* (sexual assault), the IQR and/or MAD measures indicate(s) that the non-parole periods were more uniform after the commencement of the statutory scheme. No change was detected in the full terms. Conversely, for Item 1: s 19A of the *Crimes Act 1900* (murder – in other cases), the IQR and/or MAD measures indicate(s) that full terms were more uniform after the commencement of the statutory scheme. There was no appreciable change in the non-parole period.



Generally, it can be said that where the statutory scheme did not have a significant effect on the severity of sentences, there is evidence that sentencing outcomes became more uniform.

Where there were larger IQR and/or MAD measures — as there were for Item 10: s 66A of the *Crimes Act 1900* (sexual intercourse — child under 10), Item 18: s 25(2) of the *Drug Misuse and Trafficking Act 1985* (supply commercial quantity of prohibited drug), and Item 19: s 25(2) of the *Drug Misuse and Trafficking Act 1985* (supply large commercial quantity of prohibited drug) — the standard non-parole period and the maximum penalty were relatively high. There is more scope for the imposition of a wider range of sentences for these offences.

## Part 2: Pattern of Court of Criminal Appeal sentence appeals

It cannot be assumed that every appeal in the post-period involved a purported error in the application of the statutory scheme. However, the vast majority of the appeals did involve grounds of appeal that concerned the legislation.<sup>189</sup>

The study found an increase in Crown appeals and a decrease in severity appeals. It also found that there was an increase in the success rate of severity appeals. This may confirm that at least initially the statutory scheme was not easy to apply in the absence of appellate guidance. A decline in severity appeals reflects the difficulty of an applicant showing, within the terms of s 6(3) of the *Criminal Appeal Act 1912*, that notwithstanding the error at first instance, some other sentence is warranted in law.<sup>190</sup>

The study found an increase in overall appeals for the offences found in Item 9A: s 61M(1) of the *Crimes Act 1900* (aggravated indecent assault), Item 11: s 98 of the *Crimes Act 1900* (robbery with arms etc and wounding), Item 18: s 25(2) of the *Drug Misuse and Trafficking Act 1985* (supply commercial quantity of prohibited drug), and Item 20: s 7 of the *Firearms Act 1996* (unauthorised possession or use of firearms).

## Conclusion

The findings of this study confirm that the statutory scheme has generally resulted in a greater uniformity of, and consistency in, sentencing outcomes. It also confirms the early claims that there would be an increase in the severity of penalties imposed and the duration of sentences of full-time imprisonment. This is, in part, a result of the relatively high levels at which the standard non-parole periods were set for some offences. However, the study also found significant increases in sentences for offences with a proportionately low standard non-parole period to maximum penalty ratio. Of course, it is not possible to conclude that the statutory scheme has only resulted in a benign form of consistency or uniformity whereby

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189 *R v Knight* (2007) 176 A Crim R 338 where McClellan CJ at CL at [2] stated: “The application of the standard non-parole period to the sentence to be imposed is also causing problems (see eg *Reaburn v R* (2007) 169 A Crim R 337; *MLP v R* (2006) 164 A Crim R 93; *Lovell v R* [2006] NSWCCA 222)”. In the 5-judge bench case, *R v JW* [2010] NSWCCA 49, Spigelman CJ at [116] described the standard non-parole period provisions as “somewhat convoluted provisions” which in the experience of the court are a source of error which “arise frequently ... in appeals by both the Crown and by offenders”. See also the discussion of standard non-parole period appeals in RN Howie, “Sentencing update” (2010) 22(1) *JOB* 1.

190 For example Grove J remarked that where the standard non-parole period applies (and there is no reason to depart from it) an error in relation to taking into account an aggravating factor “would lose any significance” and “will be irrelevant”: *Dean v R* (2006) 166 A Crim R 341 at [80].

like cases are being treated alike and dissimilar cases differently. To put it another way, it is not possible to tell whether dissimilar cases are now being treated uniformly in order to comply with the statutory scheme.

This study examined the offences (24 items) first inserted in the Table to Div 1A. These offences accounted for 16.9% of all cases in the District and Supreme Court over the study period. The subsequent addition of 11 further offences in 2008<sup>191</sup> will, on current figures, result in an approximate increase of 5 percentage points to that figure. This, combined with the fact that the standard non-parole period was increased and extended for aggravated indecent assault,<sup>192</sup> will probably further increase sentencing levels.

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191 *Crimes (Sentencing Procedure) Amendment Act 2007*. The ratio between the standard non-parole period and the maximum penalty ranges from 21.4% to 50%.

192 For Item 9B the standard non-parole period is now 80% of the maximum penalty (8 of 10 years). Item 9B was expanded by the *Criminal Legislation Amendment Act 2009* to include an aggravated indecent assault committed against a child between the ages of 10 and 16 years.



## Appendix A: Table to Div 1A as at 30 April 2010 — showing relationship with statutory maximum penalties

Item No	Offence	Standard non-parole period	Statutory maximum penalty	% of statutory maximum
1A	Murder — where the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work	25 years	Life	n/a
1B	Murder — where the victim was a child under 18 years of age	25 years	Life	n/a
1	Murder — in other cases	20 years	Life	n/a
2	Section 26 of the <i>Crimes Act</i> 1900 (conspiracy to murder)	10 years	25 years	40.0
3	Sections 27, 28, 29 or 30 of the <i>Crimes Act</i> 1900 (attempt to murder)	10 years	25 years	40.0
4	Section 33 of the <i>Crimes Act</i> 1900 (wounding etc with intent to do bodily harm or resist arrest)	7 years	25 years	28.0
4A	Section 35(1) of the <i>Crimes Act</i> 1900 (reckless causing of grievous bodily harm in company)	5 years	14 years	35.7
4B	Section 35(2) of the <i>Crimes Act</i> 1900 (reckless causing of grievous bodily harm)	4 years	10 years	40.0
4C	Section 35(3) of the <i>Crimes Act</i> 1900 (reckless wounding in company)	4 years	10 years	40.0
4D	Section 35(4) of the <i>Crimes Act</i> 1900 (reckless wounding)	3 years	7 years	42.9
5	Section 60(2) of the <i>Crimes Act</i> 1900 (assault of police officer occasioning bodily harm)	3 years	7 years	42.9
6	Section 60(3) of the <i>Crimes Act</i> 1900 (wounding or inflicting grievous bodily harm on police officer)	5 years	12 years	41.7
7	Section 61I of the <i>Crimes Act</i> 1900 (sexual assault)	7 years	14 years	50.0
8	Section 61J of the <i>Crimes Act</i> 1900 (aggravated sexual assault)	10 years	20 years	50.0
9	Section 61JA of the <i>Crimes Act</i> 1900 (aggravated sexual assault in company)	15 years	Life	n/a
9A	Section 61M(1) of the <i>Crimes Act</i> 1900 (aggravated indecent assault)	5 years	7 years	71.4
9B	Section 61M(2) of the <i>Crimes Act</i> 1900 (aggravated indecent assault)	8 years	10 years	80.0
10	Section 66A(1) or (2) of the <i>Crimes Act</i> 1900 (sexual intercourse — child under 10)	15 years	25 years <sup>a</sup> or Life <sup>b</sup>	60.0 or n/a
11	Section 98 of the <i>Crimes Act</i> 1900 (robbery with arms etc and wounding)	7 years	25 years	28.0
12	Section 112(2) of the <i>Crimes Act</i> 1900 (breaking etc into any house etc and committing serious indictable offence in circumstances of aggravation)	5 years	20 years	25.0
13	Section 112(3) of the <i>Crimes Act</i> 1900 (breaking etc into any house etc and committing serious indictable offence in circumstances of special aggravation)	7 years	25 years	28.0
14	Section 154C(1) of the <i>Crimes Act</i> 1900 (taking motor vehicle or vessel with assault or with occupant on board)	3 years	10 years	30.0
15	Section 154C(2) of the <i>Crimes Act</i> 1900 (taking motor vehicle or vessel with assault or with occupant on board in circumstances of aggravation)	5 years	14 years	35.7

(cont overleaf)

Item No	Offence	Standard non-parole period	Statutory maximum penalty	% of statutory maximum
15A	Section 154G of the <i>Crimes Act</i> 1900 (organised car or boat rebirthing activities)	4 years	14 years	28.6
15B	Section 203E of the <i>Crimes Act</i> 1900 (bushfires)	5 years	14 years	35.7
15C	Section 23(2) of the <i>Drug Misuse and Trafficking Act</i> 1985 (cultivation, supply or possession of prohibited plants), being an offence that involves not less than the large commercial quantity (if any) specified for the prohibited plant concerned under the Act	10 years	20 years	50.0
16	Section 24(2) of the <i>Drug Misuse and Trafficking Act</i> 1985 (manufacture or production of commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug	10 years	20 years	50.0
17	Section 24(2) of the <i>Drug Misuse and Trafficking Act</i> 1985 (manufacture or production of commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug	15 years	Life	n/a
18	Section 25(2) of the <i>Drug Misuse and Trafficking Act</i> 1985 (supplying commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug	10 years	20 years	50.0
19	Section 25(2) of the <i>Drug Misuse and Trafficking Act</i> 1985 (supplying commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug	15 years	Life	n/a
20	Section 7 of the <i>Firearms Act</i> 1996 (unauthorised possession or use of firearms)	3 years	14 years	21.4
21	Section 51(1A) or (2A) of the <i>Firearms Act</i> 1996 (unauthorised sale of prohibited firearm or pistol)	10 years	20 years	50.0
22	Section 51B of the <i>Firearms Act</i> 1996 (unauthorised sale of firearms on an ongoing basis)	10 years	20 years	50.0
23	Section 51D(2) of the <i>Firearms Act</i> 1996 (unauthorised possession of more than 3 firearms any one of which is a prohibited firearm or pistol)	10 years	20 years	50.0
24	Section 7 of the <i>Weapons Prohibition Act</i> 1998 (unauthorised possession or use of prohibited weapon) — where the offence is prosecuted on indictment	3 years	14 years	21.4

a Offence under s 66A(1).

b Aggravated offence under s 66A(2).

## Appendix B: Legislative amendments affecting the Table to Div 1A since commencement<sup>1</sup>

The Items below are reproduced from the Table to Div 1A as at 30 April 2010 (see Appendix A).

**Item 1A:** Murder—where the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim’s occupation or voluntary work

- Item included in original table: Act 90 of 2002 (commenced 1 February 2003).
- Definition of “grievous bodily harm” in s 4(1) of the *Crimes Act 1900* amended to include the destruction of a foetus of a pregnant woman: Act 14 of 2005 (commenced 12 May 2005).
- “The victim’s occupation” omitted and replaced with “the victim’s occupation or voluntary work”: Act 27 of 2006 (commenced 26 May 2006 and applying retrospectively).
- Definition of “grievous bodily harm” in s 4(1) of the *Crimes Act 1900* amended to include transmission of grievous bodily disease: Act 38 of 2007 (commenced 15 February 2008).
- Item amended to include “council law enforcement officer”: Act 28 of 2009 (commenced 9 June 2009). Previously, the murder of a council law enforcement officer was included in Item 1 below.

**Item 1B:** Murder—where the victim was a child under 18 years of age

- Item inserted: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively). Previously, the murder of a child victim was included in Item 1 below.
- Definition of “grievous bodily harm” in s 4(1) of the *Crimes Act 1900* amended to include the destruction of a foetus of a pregnant woman: Act 14 of 2005 (commenced 12 May 2005); and transmission of grievous bodily disease: Act 38 of 2007 (commenced 15 February 2008).

**Item 1:** Murder—in other cases

- Item included in original table: Act 90 of 2002 (commenced 1 February 2003).
- Definition of “grievous bodily harm” in s 4(1) of the *Crimes Act 1900* amended to include the destruction of a foetus of a pregnant woman: Act 14 of 2005 (commenced 12 May 2005); and transmission of grievous bodily disease: Act 38 of 2007 (commenced 15 February 2008).

**Item 2:** Section 26 of the *Crimes Act 1900* (conspiracy to murder)

- Item included in original table: Act 90 of 2002 (commenced 1 February 2003).
- Definition of “grievous bodily harm” in s 4(1) of the *Crimes Act 1900* amended to include the destruction of a foetus of a pregnant woman: Act 14 of 2005 (commenced 12 May 2005); and transmission of grievous bodily disease: Act 38 of 2007 (commenced 15 February 2008).

**Item 3:** Sections 27, 28, 29 or 30 of the *Crimes Act 1900* (attempt to murder)

- Item included in original table: Act 90 of 2002 (commenced 1 February 2003).
- Definition of “grievous bodily harm” in s 4(1) of the *Crimes Act 1900* amended to include the destruction of a foetus of a pregnant woman: Act 14 of 2005 (commenced 12 May 2005); and transmission of grievous bodily disease: Act 38 of 2007 (commenced 15 February 2008).

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<sup>1</sup> Up to 30 April 2010, excluding minor amendments which added prohibited drugs to the *Drug Misuse and Trafficking Act 1985*, Sch 1, and some minor definitional amendments.

**Item 4:** Section 33 of the *Crimes Act* 1900 (wounding etc with intent to do bodily harm or resist arrest)

- Item included in original table: Act 90 of 2002 (commenced 1 February 2003).
- Definition of “grievous bodily harm” in s 4(1) of the *Crimes Act* 1900 amended to include the destruction of a foetus of a pregnant woman: Act 14 of 2005 (commenced 12 May 2005).
- Definition of “grievous bodily harm” in s 4(1) of the *Crimes Act* 1900 amended to include transmission of grievous bodily disease; offences under s 33 of the *Crimes Act* 1900 restructured to reflect the omission of “maliciously” and to separate the offence of causing grievous bodily harm from the offence of resisting or preventing arrest or detention; offence relating to discharging firearms transferred to s 33A (previously offence of discharging firearms included in Item 4): Act 38 of 2007 (commenced 15 February 2008).

**Item 4A:** Section 35(1) of the *Crimes Act* 1900 (reckless causing of grievous bodily harm in company)

- Item inserted: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).
- Definition of “grievous bodily harm” in s 4(1) of the *Crimes Act* 1900 amended to include the destruction of a foetus of a pregnant woman: Act 14 of 2005 (commenced 12 May 2005).
- New s 35 of the *Crimes Act* 1900 inserted (to reflect the omission of the term “maliciously”); maximum penalty for offences committed in company increased from 10 years to 14 years: Act 38 of 2007 (commenced 27 September 2007).
- Definition of “grievous bodily harm” in s 4(1) of the *Crimes Act* 1900 amended to include transmission of grievous bodily disease: Act 38 of 2007 (commenced 15 February 2008).

**Item 4B:** Section 35(2) of the *Crimes Act* 1900 (reckless causing of grievous bodily harm)

- Item inserted: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).
- Definition of “grievous bodily harm” in s 4(1) of the *Crimes Act* 1900 amended to include the destruction of a foetus of a pregnant woman: Act 14 of 2005 (commenced 12 May 2005).
- New s 35 of the *Crimes Act* 1900 inserted (to reflect the omission of the term “maliciously”); maximum penalty for recklessly causing grievous bodily harm increased from 7 years to 10 years: Act 38 of 2007 (commenced 27 September 2007).
- Definition of “grievous bodily harm” in s 4(1) of the *Crimes Act* 1900 amended to include transmission of grievous bodily disease: Act 38 of 2007 (commenced 15 February 2008).

**Item 4C:** Section 35(3) of the *Crimes Act* 1900 (reckless wounding in company)

- Item inserted: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).
- New s 35 of the *Crimes Act* 1900 inserted (to reflect the omission of the term “maliciously”): Act 38 of 2007 (commenced 27 September 2007).

**Item 4D:** Section 35(4) of the *Crimes Act* 1900 (reckless wounding)

- Item inserted: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).
- New s 35 of the *Crimes Act* 1900 inserted (to reflect the omission of the term “maliciously”): Act 38 of 2007 (commenced 27 September 2007).

**Item 5:** Section 60(2) of the *Crimes Act* 1900 (assault of police officer occasioning bodily harm)

- Item included in original table: Act 90 of 2002 (commenced 1 February 2003).

**Item 6:** Section 60(3) of the *Crimes Act* 1900 (wounding or inflicting grievous bodily harm on police officer)

- Item included in original table: Act 90 of 2002 (commenced 1 February 2003).
- Definition of “grievous bodily harm” in s 4(1) of the *Crimes Act* 1900 amended to include the destruction of a foetus of a pregnant woman: Act 14 of 2005 (commenced 12 May 2005).
- Definition of “grievous bodily harm” in s 4(1) of the *Crimes Act* 1900 amended to include transmission of grievous bodily disease; and “maliciously” replaced with “recklessly” for offences under s 60(3) of the *Crimes Act* 1900: Act 38 of 2007 (commenced 15 February 2008).

**Item 7:** Section 61I of the *Crimes Act* 1900 (sexual assault)

- Item included in original table: Act 90 of 2002 (commenced 1 February 2003).

**Item 8:** Section 61J of the *Crimes Act* 1900 (aggravated sexual assault)

- Item included in original table: Act 90 of 2002 (commenced 1 February 2003).
- Definition of “maliciously” repealed from the *Crimes Act* 1900 and replaced with “intentionally or recklessly” for offences under s 61J: Act 38 of 2007 (commenced 15 February 2008).
- “Intellectual disability” replaced with the broader concept of “cognitive impairment” for offences under the *Crimes Act* 1900: Act 74 of 2008 (commenced 1 December 2008).
- Two additional circumstances of aggravation for sexual assault offences inserted under s 61J of the *Crimes Act* 1900 (the offender broke and entered the building with the intention of committing a serious indictable offence; and the offender deprived the victim of his or her liberty): Act 105 of 2008 (commenced 1 January 2009).
- “Subdivision 4 of Division 1” omitted from s 61J(3) and replaced with “Division 4” so that it reads “in this section, *‘building’* has the same meaning as it does in Division 4 of Part 4”: Act 99 of 2009 (commenced 22 February 2010).

**Item 9:** Section 61JA of the *Crimes Act* 1900 (aggravated sexual assault in company)

- Item included in original table: Act 90 of 2002 (commenced 1 February 2003).
- Definition of “maliciously” repealed from the *Crimes Act* 1900 and replaced with “intentionally or recklessly” for offences under s 61JA: Act 38 of 2007 (commenced 15 February 2008).

**Item 9A:** Section 61M(1) of the *Crimes Act* 1900 (aggravated indecent assault)

- Item included in original table: Act 90 of 2002 (commenced 1 February 2003).
- “Intellectual disability” replaced with the broader concept of “cognitive impairment” for offences under the *Crimes Act* 1900: Act 74 of 2008 (commenced 1 December 2008).
- “Age of 10 years” omitted from s 61M(2) of the *Crimes Act* 1900 and replaced with “the age of 16 years”; aggravating circumstance that “victim is under 16 years” in s 61M(3)(b) omitted: Act 105 of 2008 (commenced 1 January 2009). The effect of the amendment is that aggravated indecent assault offences with a child under 16 years are now included in Item 9B (previously under Item 9A).

**Item 9B:** Section 61M(2) of the *Crimes Act* 1900 (aggravated indecent assault)

- Item included in original table: Act 90 of 2002 (commenced 1 February 2003).
- Standard non-parole period increased from 5 to 8 years: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).
- “Intellectual disability” replaced with the broader concept of “cognitive impairment” for offences under the *Crimes Act* 1900: Act 74 of 2008 (commenced 1 December 2008).
- “Age of 10 years” omitted from s 61M(2) of the *Crimes Act* 1900 and replaced with “the age of 16 years”; aggravating circumstance that “victim is under 16 years” in s 61M(3)(b) omitted: Act 105 of 2008 (commenced 1 January 2009). The effect of the amendment is that aggravated indecent assault offences with a child under 16 years are now included in Item 9B which carries a longer maximum penalty and standard non-parole period than existed previously under s 61M(1) (Item 9A).
- “Child under 10” deleted from Item 9B (to clarify that the standard non-parole period for an aggravated indecent assault against a child between the ages of 10 and 16 years is 8 years): Act 27 of 2009 (commenced 19 May 2009).



**Item 10:** Section 66A(1) or (2) of the *Crimes Act* 1900 (sexual intercourse—child under 10)

- Item included in original table: Act 90 of 2002 (commenced 1 February 2003).
- Section 66A of the *Crimes Act* 1900 repealed and new aggravated offence of sexual intercourse with a child under 10 years was created under s 66A(2) (maximum penalty of life imprisonment); repealed s 66A is now s 66A(1) (maximum penalty of 25 years). Section 66A omitted from the Table to Div 1A and replaced with 66A(1) or (2): Act 105 of 2008 (commenced 1 January 2009).
- Section 66A(3) amended to provide an additional circumstance of aggravation for aggravated sexual intercourse with a child under 10 years (that the offender breaks and enters with the intention of committing the offence or any other serious indictable offence): Act 27 of 2009 (commenced 19 May 2009).

**Item 11:** Section 98 of the *Crimes Act* 1900 (robbery with arms etc and wounding)

- Item included in original table: Act 90 of 2002 (commenced 1 February 2003).
- Definition of “grievous bodily harm” in s 4(1) of the *Crimes Act* 1900 amended to include the destruction of a foetus of a pregnant woman: Act 14 of 2005 (commenced 12 May 2005); and transmission of grievous bodily disease: Act 38 of 2007 (commenced 15 February 2008).

**Item 12:** Section 112(2) of the *Crimes Act* 1900 (breaking etc into any house etc and committing serious indictable offence in circumstances of aggravation)

- Item included in original table: Act 90 of 2002 (commenced 1 February 2003).

**Item 13:** Section 112(3) of the *Crimes Act* 1900 (breaking etc into any house etc and committing serious indictable offence in circumstances of special aggravation)

- Item included in original table: Act 90 of 2002 (commenced 1 February 2003).
- Definition of “grievous bodily harm” in s 4(1) of the *Crimes Act* 1900 amended to include the destruction of a foetus of a pregnant woman: Act 14 of 2005 (commenced 12 May 2005); and transmission of grievous bodily disease: Act 38 of 2007 (commenced 15 February 2008).

**Item 14:** Section 154C(1) of the *Crimes Act* 1900 (taking motor vehicle or vessel with assault or with occupant on board)

- Item included in original table: Act 90 of 2002 (commenced 1 February 2003).
- Offence under s 154C of the *Crimes Act* 1900 extended to include vessels: Act 26 of 2006 (commenced 1 September 2006).
- “Car-jacking” omitted from Item and replaced with “taking motor vehicle or vessel with assault or with occupant on board”: Act 50 of 2007 (commenced 1 January 2008).

**Item 15:** Section 154C(2) of the *Crimes Act* 1900 (taking motor vehicle or vessel with assault or with occupant on board in circumstances of aggravation)

- Item included in original table: Act 90 of 2002 (commenced 1 Feb 2003).
- Offence under s 154C of the *Crimes Act* 1900 extended to include vessels: Act 26 of 2006 (commenced 1 September 2006).
- “Car-jacking” omitted from Item and replaced with “taking motor vehicle or vessel with assault or with occupant on board”: Act 50 of 2007 (commenced 1 January 2008).
- Definition of “maliciously” repealed from the *Crimes Act* 1900 and replaced with “intentionally or recklessly” for offences under s 154C(2): Act 38 of 2007 (commenced 15 February 2008).

**Item 15A:** Section 154G of the *Crimes Act* 1900 (organised car or boat rebirthing activities)

- Item inserted: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).
- Offence of facilitating organised car or boat rebirthing activities created under s 154G of the *Crimes Act*: Act 26 of 2006 (commenced 1 September 2006).

**Item 15B:** Section 203E of the *Crimes Act* 1900 (bushfires)

- Item included in original table: Act 90 of 2002 (commenced 1 February 2003).
- Renumbered from Item 15A: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).

**Item 15C:** Section 23(2) of the *Drug Misuse and Trafficking Act* 1985 (cultivation, supply or possession of prohibited plants), being an offence that involves not less than the large commercial quantity (if any) specified for the prohibited plant concerned under that Act

- Item inserted: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).
- The expression “cannabis plant” in Sch 1 of the *Drug Misuse and Trafficking Act* 1985 was replaced by two new categories of prohibited drugs: “cannabis plant cultivated by enhanced indoor means” and “cannabis plant – other”; and a definition of “cultivation by enhanced indoor means” was inserted in s 3(1) of the *Drug Misuse and Trafficking Act*: Act 57 of 2006 (commenced 14 July 2006). *Note:* The commercial and large commercial quantities for indoor cannabis production are lower than for that occurring outdoors to reflect the higher yields produced by this method.

**Item 16:** Section 24(2) of the *Drug Misuse and Trafficking Act* 1985 (manufacture or production of commercial quantity of prohibited drug), being an offence that:

- (a) does not relate to cannabis leaf, and
- (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug
- Item included in original table: Act 90 of 2002 (commenced 1 February 2003).

**Item 17:** Section 24(2) of the *Drug Misuse and Trafficking Act* 1985 (manufacture or production of commercial quantity of prohibited drug), being an offence that:

- (a) does not relate to cannabis leaf, and
- (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug
- Item included in original table: Act 90 of 2002 (commenced 1 February 2003).

**Item 18:** Section 25(2) of the *Drug Misuse and Trafficking Act* 1985 (supplying commercial quantity of prohibited drug), being an offence that:

- (a) does not relate to cannabis leaf, and
- (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug
- Item included in original table: Act 90 of 2002 (commenced 1 February 2003).

**Item 19:** Section 25(2) of the *Drug Misuse and Trafficking Act* 1985 (supplying commercial quantity of prohibited drug), being an offence that:

- (a) does not relate to cannabis leaf, and
- (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug
- Items included in original table: Act 90 of 2002 (commenced 1 February 2003).

**Item 20:** Section 7 of the *Firearms Act* 1996 (unauthorised possession or use of firearms)

- Item included in original table: Act 90 of 2002 (commenced 1 February 2003).
- Section 7A inserted into the *Firearms Act* 1996 and s 7 amended to create two separate offences for the possession or use of an unauthorised firearm: Act 85 of 2003 (commenced 14 February 2004). Possession and use of a prohibited firearm or pistol under s 7(1) attracts a maximum penalty of 14 years. The lesser offence of possess and the use of firearms “generally” under s 7A attracts a maximum penalty of 5 years but is not subject to a standard non-parole period.

**Item 21:** Section 51(1A) or (2A) of the *Firearms Act* 1996 (unauthorised sale of prohibited firearm or pistol)

- Item inserted: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).

**Item 22:** Section 51B of the *Firearms Act* 1996 (unauthorised sale of firearms on an ongoing basis)

- Item inserted: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).
- Offence under s 51B *Firearms Act* 1996 amended: Act 92 of 2003 (commenced 15 December 2003). “During any period of 30 consecutive days” replaced with “over any consecutive period of 12 months”. A consecutive period of 12 months may include a period which occurs before the commencement of the amendment so long as that period does not exceed 30 days.

**Item 23:** Section 51D(2) of the *Firearms Act* 1996 (unauthorised possession of more than 3 firearms any one of which is a prohibited firearm or pistol)

- Item inserted: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).

**Item 24:** Section 7 of the *Weapons Prohibition Act* 1998 (unauthorised possession or use of prohibited weapon)— where the offence is prosecuted on indictment

- Item inserted: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).

## Other amendments

### 1. Offenders under 18 years

*Crimes Amendment (Sexual Offences) Act* 2008 (commenced 1 January 2009) inserted s 54D(3) into the *Crimes (Sentencing Procedure) Act* 1999, which excludes offenders who were under 18 years at the time of the offence from the operation of Div 1A. This amendment did not affect any sentence that was imposed before the commencement of that amendment.

### 2. *Mental Health Legislation Amendment (Forensic Provisions) Act* 2008

The *Mental Health (Criminal Procedure) Act* 1990 was renamed in s 54D(1)(b) as the *Mental Health (Forensic Provisions) Act* 1990 (commenced 1 March 2009).

## Acts

Act 90 of 2002: *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002

Act 85 of 2003: *Crimes Legislation Further Amendment Act* 2003

Act 92 of 2003: *Firearms and Crimes Legislation Amendment (Public Safety) Act* 2003

Act 14 of 2005: *Crimes Amendment (Grievous Bodily Harm) Act* 2005

Act 26 of 2006: *Crimes Amendment (Organised Car and Boat Theft) Act* 2006

Act 27 of 2006: *Crimes (Sentencing Procedure) Amendment Act* 2006<sup>2</sup>

Act 57 of 2006: *Drug Misuse and Trafficking Amendment (Hydroponic Cultivation) Act* 2006

Act 38 of 2007: *Crimes Amendment Act* 2007

Act 50 of 2007: *Crimes (Sentencing Procedure) Amendment Act* 2007<sup>3</sup>

Act 74 of 2008: *Crimes Amendment (Cognitive Impairment — Sexual Offences) Act* 2008

Act 105 of 2008: *Crimes Amendment (Sexual Offences) Act* 2008

Act 27 of 2009: *Criminal Legislation Amendment Act* 2009

Act 28 of 2009: *Crimes (Sentencing Procedure) Amendment (Council Law Enforcement Officers) Act* 2009

Act 99 of 2009: *Crimes Amendment (Fraud, Identity and Forgery Offences) Act* 2009

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2 The amendments made apply to the determination of a sentence for an offence whenever committed, unless: (a) the court has convicted the person being sentenced of the offence, or (b) a court has accepted a plea of guilty and the plea has not been withdrawn, before the commencement of the amendments.

3 *ibid.*

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