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# **Sentencing Juvenile Offenders and the Sentencing Act 1989 (NSW)**

*The impact of legislative and administrative  
change in the Children's Court 1982—1990*



**JUDICIAL COMMISSION OF NEW SOUTH WALES**

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AND THE SENTENCING ACT 1989 (NSW)**

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change in the Children's Court 1982 — 1990

*by*

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Judicial Commission of New South Wales

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The views expressed in this paper are purely the views of the authors. Similarly, the Executive Summary represents the views of the Research Director. They do not necessarily represent any official views of the Judicial Commission of New South Wales, nor are they necessarily shared by the members of staff of the Commission.

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## EXECUTIVE SUMMARY

The *Sentencing Act 1989* (NSW), often referred to as the vehicle for restoring "truth in sentencing" in New South Wales, applies with equal force to both adult and juvenile offenders. Studies attempting to gauge the impact of the *Sentencing Act* on sentencing practice have concluded that the Act has led to an increase in the average custodial term served, or likely to be served, by adult prisoners. Until now no similar study has been undertaken in order to assess the impact of the *Sentencing Act* on sentencing practice in the Children's Court.

This summary is included in order to assist an interpretation or understanding of the content of this report.

### THE SUBJECT OF THE STUDY

The study is divided into two parts.

The first part analyses the impact of the *Sentencing Act* by comparing 15 months of Children's Court sentencing data determined prior to the commencement of the Act (ie prior to 25 September 1989), with 15 months of similar data imposed after the commencement of the Act.

The second part takes a longer and much broader perspective of sentencing practice in the Children's Court. Here, attention is paid to the various sentencing regimes that existed during the 1980s with the focus upon the execution of custodial sentences. More particularly, there is an examination of the effect of the legal and administrative processes which impinged, and to a significant extent determined, the actual time that young offenders served in custody.

### PRINCIPAL FINDINGS

#### **Part I: The Impact of the Sentencing Act 1989 on Juvenile Offenders**

The pre and post- *Sentencing Act* groups were found to be particularly well matched. The number and proportion of children sentenced to custodial terms in both periods were about the same (ie for the pre- *Sentencing Act* period 6.5% or 1,278 outcomes resulted in a custodial sentence; for the post- *Sentencing Act* period 6.2% or 1,255 outcomes resulted in a custodial sentence).

There was some variation in the type or composition of offences in the two periods. The post- *Sentencing Act* custodial sentences consisted of about 6% more "offences against good order", 2% more violent offences and just under 8% fewer property offences. This variation was estimated to have reduced the post- *Sentencing Act* average sentence by about half a week and was compensated for in the analysis.

No significant differences were found between the two groups in the composition of the age, gender and bail status of offenders. However, a significant difference was found in the prior record of offenders. When compared with the pre- *Sentencing Act* group, the post-

Sentencing Act group had fewer first offenders, fewer with one or two prior appearances, and more with five or more prior appearances. The post-Sentencing Act group of offenders also had more serious outcomes for their prior proven offences. This variation was estimated to have reduced by about three days the post-Sentencing Act average minimum sentence and was controlled for in the analysis.

A time series analysis of the pre and post-Sentencing Act custodial data disclosed three main changes. Since the commencement of the Act:

- (1) head sentences have almost halved;
- (2) minimum sentences have decreased by about one-quarter;
- (3) time served has increased by about one-third.

Another significant change has been the extent to which young offenders are eligible for consideration for post-release supervision. Prior to the Act nearly two out of every three juveniles had non-probation periods specified when committed to an institution. In the post-Sentencing Act group of offenders, additional terms were set for only 8% of custodial sentences.

The vast majority of children (83%) in the post-Sentencing Act group received fixed terms of six months or less and, hence, were not eligible for an additional term. The analysis shows that where sentences exceeded six months and an additional term was specified, the additional term complied with the statutory formula of no more than one-third of the minimum term in three out of every four cases.

Prior to the Sentencing Act juveniles generally served in custody no more than 60% of their non-probation periods. This was a consequence of the application of remissions. After the Sentencing Act remissions no longer applied and juveniles were expected to serve their minimum sentences in full.

Although it was found that the pattern of court ordered minimum sentences in both periods were roughly comparable, the application of remissions in the pre-Sentencing Act period meant that those sentenced after the Act would serve (on average) about one-third longer in custody.

## Part II: A Decade of Sentencing in the Children's Court

When the pattern of sentencing juvenile offenders was placed in a wider context and reviewed over a decade, a number of different sentencing and administrative regimes were identified. These were as follows:

- **pre remissions** (up to 26 February 1984);
- **automatic remissions** (27 February 1985 to 8 September 1987);
- **earned remissions** (9 September 1987 to 24 September 1989);
- **no remissions** under the Sentencing Act (from 25 September 1989).

When each of these periods were examined, substantial differences in the average head sentence, minimum sentence and actual time served in custody were discovered. Indeed, over these periods sentences have taken "a roller coaster ride".

In general, it was found that the system of automatic remissions had the shortest minimum sentences and the shortest time served but the longest head sentences. Under the *Sentencing Act*, the head sentences were at their lowest, but actual time served in custody was much higher than where automatic or earned remissions had applied. In fact, the actual time served under the *Sentencing Act* has returned to levels comparable to that of the pre remission system which operated prior to the *Probation and Parole Act 1983*.

### **Policy Implications**

From the evidence presented in this report it may be inferred that remissions have a profound impact on the actual time served by juvenile offenders.

Despite its express application in the legislation, one may question whether the *Sentencing Act* was framed with sufficient consideration for the special needs of children.

The two key concerns which emerge from this study are the increase in the length of time served by juvenile offenders and their reduced opportunity for post-release supervision.

It is submitted that both these issues may be resolved by a greater use of the "special circumstances" clause in s 5(2) of the Act. This could be accomplished without legislative change by acknowledging youth and rehabilitation in the community (and particularly in relation to children without extensive criminal records) as constituting "special circumstances". Where appropriate, the Children's Court would then be in the position to reduce the custodial component, or minimum term, of the sentence and set or enlarge the additional term, thereby ensuring a reasonable period of parole is possible, without altering the overall term of the sentence.

As there may be some uncertainty as to the general application of "special circumstances", it would, of course, be preferable for the Government to intervene with amending legislation which ensures that juveniles are given appropriate aftercare supervision in the community.

**Ivan Potas**  
Research Director

Sydney, October 1991.

## INTRODUCTION

### Sentencing Juvenile Offenders and The Sentencing Act 1989

#### 1.1 BACKGROUND

On the 25 September 1989 the *Sentencing Act 1989* commenced in New South Wales. This system was introduced by the Government to replace, what it saw as, a deceitful system under which prisoners were granted remissions and released from custody well before the expiration of their sentences.

Under the new Act, children and adults sentenced to custodial terms were no longer to receive remissions from their sentences. For those receiving terms of six months or less, sentences are for a fixed term. For sentences over six months, normally, a minimum term of custody is specified as well as an additional term during which time the prisoner may be kept in custody, or if released to parole, would be supervised in the community for the balance of the term of the sentence. This additional period should be no more than one-third of the minimum term unless "special circumstances" provide the court with a justification for departing from this statutory formula.

The Act effected a dramatic change from the previous system and was more akin to the system operating at the beginning of the decade. Indeed, before the commencement of the *Probation and Parole Act 1983*, prisoners were required to serve their minimum or non-parole period in full. Remissions applied only to the head sentence or to the determinate sentence if a non-parole period was not specified. However, where a non-parole period was specified, that term normally represented the minimum period of time the prisoner would serve in custody.

The *Probation and Parole Act* changed this by also enabling remissions to be deducted from the non-probation period or non-parole period. These remissions were automatic and thus not dependent on the good behaviour of the prisoner.

This was modified in 1987 to an "earned" remission system in which remission days were earned for good behaviour. Prisoners could normally earn up to 17 days remission for each month served. The bottom line of this system was that most prisoners served two-thirds of their non-probation period or non-parole period, or about one-third of their head sentence.

Under this scheme, the court had the discretion to set a non-probation period for sentences over one month, and were obliged to set one where the sentence exceeded six months, unless adequate reasons were given.

Remission schemes for children in custody followed the same general pattern as for adults. With the introduction of the new *Children (Criminal Proceedings) Act* in January 1988, the rules for custodial sentences for children were directly linked to the adult legislation.

Up to that time any similarities between the children's and adult's schemes were maintained administratively.<sup>1</sup> As it was generally agreed (and later specified in the *Children (Criminal Proceedings) Act* legislation) that children should be treated no more harshly than adults, the Department of Community Services (the agency then responsible for children's corrections) attempted to maintain for children the remission benefits that were available to adults.<sup>2</sup>

In reality, the children's systems were a little more generous than those for adults. The broad powers of release given in legislation to the Director-General of the Department of Community Services were used to provide early discharge for many young offenders up to 1984, a generous analogy of the adult remission system from 1984 to 1987, and used to grant an extra 14 days "terminal" remission on top of the earned remissions during the 1987 to 1989 scheme.<sup>3</sup>

In summary the four schemes which spanned the 1980s were:

- \* **Pre Remissions** — Operated up to 26 February 1984. Under this system children on sentences of more than six months were generally released after serving two-thirds of their sentence. The discharge was at the discretion of the institutional superintendent and was applied more or less universally.<sup>4</sup>
- \* **Automatic Remissions** — Operated from 27 February 1984 to 8 September 1987. Under this system courts still gave a single sentence but children were automatically given a remission of two-thirds of the sentence to mimic the non-probation period of the adults. One-third of the remaining sentence was then deducted to make up for the range of remissions available to adults under the *Probation and Parole Act* 1983. The time served thus equalled two-ninths of the sentence.

1 The very small number of children sentenced to imprisonment were covered by the adult legislation. However, the vast majority of children sentenced to juvenile institutions were not covered by the adult legislation. The administratively based remission schemes and their rules were communicated to the courts by memorandum from the then Department of Youth and Community Services. This communication was generally through the Senior Children's Court Magistrate.

2 The Department of Community Services has had various titles during the 1980s including the Department of Youth and Community Services and the Department of Family and Community Services. This department had responsibility for juvenile corrections during the period of this study. This responsibility was transferred to the Department of Corrective Services in 1991.

3 Since the mid-1970s the Director-General of the Department of Community Services has used his discretionary powers to grant some children on control orders conditional release to attend an intensive day attendance counselling program, called the Community Youth Centre (CYC) program. In the last few years, the number of children on conditional release to CYCs have made up about 10% of those on institutional orders (Data provided by Senior Counsellor, Blacktown CYC, 23/9/91). As the level of use of CYCs has been largely independent of the particular remission system, its effect has been excluded from this study.

4 This early discharge procedure was standard practice for at least two decades. The discharge was made at the recommendation of the superintendent under s 54 of the *Child Welfare Act* 1939. In some circumstances, particularly for co-operative behaviour, children were discharged before two-thirds of the sentence had elapsed. In cases where the juvenile was uncooperative or did not have accommodation upon release the discharge was delayed.

The authors have not been able to locate written guidelines for this practice but it has been verified by a number of past and present staff of the Department of Community Services. For the purposes of this study, the time served in custody for sentences greater than six months has been calculated at two-thirds of the sentence or six months whichever is the greater.

- \* **Earned Remissions** — Operated from 9 September 1987 to 24 September 1989. Under this system the courts could set a non-probation period. Children earned up to 17 days remission per month served for good behaviour and industry plus an extra two days per month if they were serving their sentence in a low security centre. This was the same as for adults except that the extra two days per month for those in low security units applied to almost all children because of the low security classification of their institutions. Children were also granted a further 14 day "terminal" remission (ie they were released 14 days prior to the expiration of their sentence after all other remissions had been deducted).<sup>5</sup>
- \* **Sentencing Act** — Began operation on 25 September 1989. This Act applied to adults and children equally. Remissions are no longer available as the court now sets a minimum term of imprisonment that must be served in full: s 5(1)(a). Additional terms (periods of parole) are available as an option for sentences over six months: s 7(1). The additional term must be equal to one-third of the minimum term unless special circumstances are cited: s 5(2).

The ways in which the courts responded to these release schemes has been the subject of both appellate and criminological review. In *R v O'Brien*<sup>6</sup> the High Court held that, generally, sentencers were not to increase the sentence to take account of any anticipated remissions. Nonetheless, this was not necessarily the practical experience. For example, in a study of sentences after the introduction of the *Probation and Parole Act 1983*, Weatherburn found there had been an increase in the length of the average non-parole period which appeared to be in response to the introduction of remissions.<sup>7</sup>

The introduction of the *Sentencing Act* caused much debate in sentencing circles. While the then Minister for Corrective Services, the Hon Mr M Yabsley, did state that it was not the intention of the Act to increase the time prisoners spent in custody there was no specific legislative instruction to this effect. Some sentencers argued that without such specific direction from the legislature the loss of remissions should be ignored in keeping with the principle enunciated in *O'Brien*.<sup>8</sup>

To date, two studies of the *Sentencing Act* have been released which have looked at whether sentencers in the adult jurisdictions have attempted to compensate for the loss of remissions.<sup>9</sup> Both found that there has been some drop in sentence length but not enough to totally compensate for the loss of remissions.

5 Department of Community Services, Memorandum from Director of Operations: Guidelines for the Operation of the New Remission Scheme for Committed Young Offenders, 7 September 1987.

6 *R v O'Brien* [1984] 2 NSWLR, 449.

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

8 The Hon Mr Justice Hunt, "Sentencing Act 1989 - a direction to reduce the length of sentences?" *Sentencing Act Discussion Papers*, July 1989, Judicial Commission of New South Wales.

9 Gorta A and Eyland S 1990 *Truth in Sentencing - Impact of the Sentencing Act 1989*. Report 1. Research and Statistics Division, NSW Department of Corrective Services, June 1990. Also Matka E 1991 *NSW Sentencing Act 1989*. NSW Bureau of Crime Statistics and Research.

This study will complement those already completed by focusing on the impact the *Sentencing Act* has had on the Children's Court. It also goes further than the other two studies by looking at the effect of remissions over a much longer time period, and by adequately controlling for other factors which may influence sentence length such as changes in patterns of offending and changes in the characteristics of offenders. This is possible because the juvenile justice database, the Children's Court Information System (CCIS), provides much more comprehensive information than any of the adult court data systems.<sup>10</sup>

## 1.2 AIMS

This study has two main aims:

- (1) to identify any changes to Children's Court sentencing caused by the *Sentencing Act 1989*;
- (2) to identify and seek to explain patterns in Children's Court sentencing under the four different remission schemes operating during the 1980s.

### 1.2.1 Our Approach

The present study is divided into two parts. Part I of the study compares custodial sentences ordered by the Children's Court in the 15 months before and the 15 months after the commencement of the *Sentencing Act*. The first part, thus, attempts to evaluate what general and specific effects the new legislation has had on Children's Court custodial sentences.

Part II provides a broader view of the operation of the Children's Court by looking at the nature of custodial sentences ordered since 1982. It attempts to identify changes in sentencing practices that may have occurred under the four different sentencing regimes.

In both parts of the study, custodial sentences refer to those sentences served by children in juvenile institutions. It does not relate to those sentences served by juveniles in prisons.

The data used in this report come from the Department of Community Services Children's Court Information System (CCIS). The CCIS is a computer based criminal record system which records complete details about every finalised appearance in the Children's Court in New South Wales since January 1982. This information is obtained from forms completed by Department of Community Services staff in most full time Children's Courts and by the Clerk of the Court elsewhere. Also recorded on the CCIS are details of official police cautions. This information is supplied by the NSW Police Department.

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<sup>10</sup> The Children's Court Information System is used both for statistical data and criminal records. It is the source of criminal records for the full time Children's Courts and for those Department of Community Services officers who provide pre-sentence reports to the courts. The day-to-day use of the data has the advantage of operating as a self-check of its accuracy and ensures that the identity of the offender is attached to each appearance on the data base. This means that comprehensive information about the key area of criminal record is readily available for sentencing and recidivism studies. Despite its importance this is not obtainable from the adult data systems.

In this study the basic unit of measurement is the finalised appearance. This is defined as any appearance at which one or more matters are finalised by the Children's Court. For example, a young person is charged with three counts of car theft and pleads guilty to two counts and not guilty to the third. If the first two are dealt with immediately and the third is remanded to another date then the young person will appear in the data twice. The outcomes recorded in the system are the most serious penalty handed down at each appearance.

In order to check the accuracy of the data, staff of the Judicial Commission identified all custodial orders with uncommon or seemingly illogical outcomes and checked these against the original returns and court lists where possible. The small number of these orders which could not be checked were excluded from the study.

As the CCIS records only the sentence given and not the actual time served it was not possible to obtain this directly from the data. For those periods with "automatic" remission or no remissions this was easily derived. For sentences given during the period of "earned" remissions, the average young offender serving a custodial sentence lost only one day of remission per month.<sup>11</sup> The general figure of 18 days remission for every full month served in custody was used to estimate the time juveniles served in custody.

In Part I of this study, custodial sentences were compared in a series of three monthly periods commencing 15 months before the introduction of the *Sentencing Act* (25 September 1989) and extending for a further 15 months to December 1990. Factors likely to affect the frequency and length of custodial sentences such as the offence, age, gender, and criminal background of the population of young offenders were tested to ensure that any changes in sentencing practice were likely to be attributable to the change in legislation.

In Part II of the study, custodial sentences were examined in less detail but over a longer period of time - back to the establishment of the CCIS in January 1982. Major sentencing trends in the Children's Court are identified and the question of whether the various remission or sentencing schemes influenced sentences is considered.

### 1.2.2 Terminology

In order to reduce confusion and more conveniently discuss the key concepts with which the study is concerned, the following terms are used in this report:

- \* **Head sentence:** the term of the sentence specified by the court;
- \* **Minimum sentence:** the non-probation period;  
or the determinate sentence, if a non-probation period was not set;  
or the minimum term;  
or the fixed term, if an additional term was not set.
- \* **Time served:** the time actually spent in custody.

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11 FACS' Remissions System

## PART I

### The Impact of the Sentencing Act 1989

#### 2.1 INTRODUCTION

The first part of this study investigates the impact the *Sentencing Act* has had on custodial sentences imposed by the Children's Court. It examines to what extent the Act has affected:

- (1) the time juvenile offenders serve in custody;
- (2) the minimum sentence; and
- (3) the head sentence (ie the full term of the sentence).

The issue of whether the aims of the new legislation have been achieved is also considered.

#### 2.2 METHOD

Sentencing information for all juvenile criminal matters finalised by the Children's Court during the 30 month period from 26 June 1988 to 23 December 1990 were obtained from the CCIS.

The sentencing information used in this part of the study relate only to those records<sup>12</sup> where:

- (1) the sentence was for a principal offence, and
- (2) a term in custody (ie a control order) was specified.

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<sup>12</sup> A record contains information on the appearance of a juvenile before the Children's Court on a criminal matter.

For those sentenced to a term of custody, a record provides detail of the following:

- the juvenile offender (ie via an indexed identifying code);
- the offender's age and sex;
- the principal offence for which the offender was sentenced;
- the date the offence was committed;
- the offender's prior criminal history detailing -
  - number of previous proven appearances,
  - most serious previous conviction,
  - number of prior police cautions,
  - number of previously served community service orders;
- the offender's bail status -
  - following the arrest,
  - immediately before finalisation of the matter;
- the sentencing court;
- the custodial sentence specified in terms of -
  - total (or head) sentence,
  - minimum sentence (minimum or fixed term, or non-probation period).

Two periods were compared. The first period comprised all custodial sentences (determined under the *Probation and Parole Act 1983*) for the 15 month period immediately prior to the introduction of the *Sentencing Act 1989*, that is prior to 25 September 1989. The second period comprised all custodial sentences determined by the Children's Court for the first 15 months after the commencement of the *Sentencing Act*. These periods are labelled the pre-SA period and the post-SA period, respectively.

Each 15 month period was divided into periods of three months so that a time-series analysis of custodial sentences imposed by the Children's Court could be conducted. The analysis focused on both the sentence handed down by the Children's Court and the minimum time that offenders would be expected to serve in custody.

### **2.2.1 Validation of records**

In order to ensure the accuracy and reliability of details for custodial sentences recorded on the CCIS, a comprehensive process of auditing was performed.<sup>13</sup> For the pre-SA period, 1,278 (of 1,308) or 97.7% of records which specified a custodial sentence during the period 26 June 1988 to 24 September 1989 were successfully validated.<sup>14</sup> For the post-SA period, 1,255 (of 1,261) or 99.5% of records which specified a custodial sentence during the period 25 September 1989 to December 1990 were successfully validated.<sup>15</sup> Unmatched records and records involving unresolved discrepancies were excluded from the study.

### **2.2.2 Comparability of the groups**

In order to make valid statements concerning any changes to sentencing or sentences resulting from the *Sentencing Act*, the samples being compared should be "matched" in terms of those factors which could independently affect sentences. The problem, expressed colloquially, is one of ensuring that the study compares "apples with apples".

For example, suppose that in the post-SA period there was a substantial increase in the proportion of serious assaults committed by juveniles. It would be expected that the average length of sentences for that period would increase on the basis that sentences for serious assaults tend to be longer than for most other offences.

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13 All pre-SA custodial sentences were checked with the sentence recorded, for the same conviction, on the separately maintained "Remissions System". This database, also held by the Research and Data Analysis Unit of FACS, covered the period when offenders earned remissions from their custodial terms (ie August 1987 to September 1989). The function of this collection was to maintain a record of remissions for juvenile detainees so that detention centres knew of the time remaining to be served by their inmates. Where a discrepancy existed for the sentence details recorded on the CCIS and the "Remissions System", the court card recording the original sentence details was used.

14 The unvalidated records for the pre-SA period largely involve those with a missing value for the non-probation period of the sentence. These records were excluded from the sample as it could not be determined whether the missing value was a coding error, or the court had, in fact, declined to set a non-probation period.

15 The records excluded from the post-SA sample were those found to have an incorrectly recorded outcome (eg fines recorded as control orders), or where there was an unresolved discrepancy between the length of term recorded on the card and that recorded on the CCIS.

The data, in fact, record many factors which could affect the length of custodial sentences. Among these are possible inter-period differences in the age of offenders, their sex and prior record, as well as inter-period differences in the type of offences committed. Variations occurring from one time period to the next in the profile of such factors must be accounted for before any observed changes to custodial sentences can be attributed to the sentencing reforms of the *Sentencing Act*. These factors and their possible influence are examined below.

### Sentences

Have custodial sentences increased as a proportion of all sentences? A rise in the proportion of custodial sentences does not necessarily mean that there will be an increase in the average length of sentences. However, it may reflect an underlying change in law-enforcement or sentencing policy that indirectly impacts on the length of custodial sentences. For example, a "get tough" policy on street offences, such as offensive behaviour, may *increase* the number of custodial sentences but *reduce* the average length of sentence because such offences, typically, receive relatively short custodial terms.

Table 1 presents a breakdown of the proportion and number of custodial and non-custodial outcomes across the two periods. It shows that, for both periods, custodial sentences represent less than 7% of all outcomes for appearances in the Children's Court.

**Table 1**  
Pre- and post- Sentencing Act custodial and non-custodial outcomes  
(Children's Court, June 1988 to December 1990)

| Outcome       | pre-SA |         | post-SA |         |
|---------------|--------|---------|---------|---------|
|               | %      | N       | %       | N       |
| Custodial     | 6.5    | (1278)  | 6.2     | (1255)  |
| Non-custodial | 93.5   | (18310) | 93.8    | (18885) |
| Total         | 100    | (19588) | 100     | (20140) |

In fact, there is no significant difference<sup>16</sup> between the two periods in terms of the proportion or number of juveniles receiving custodial or non-custodial sentences. Therefore, it may be safe to assume that this factor has no bearing upon any observed differences in custodial sentences across the two periods.

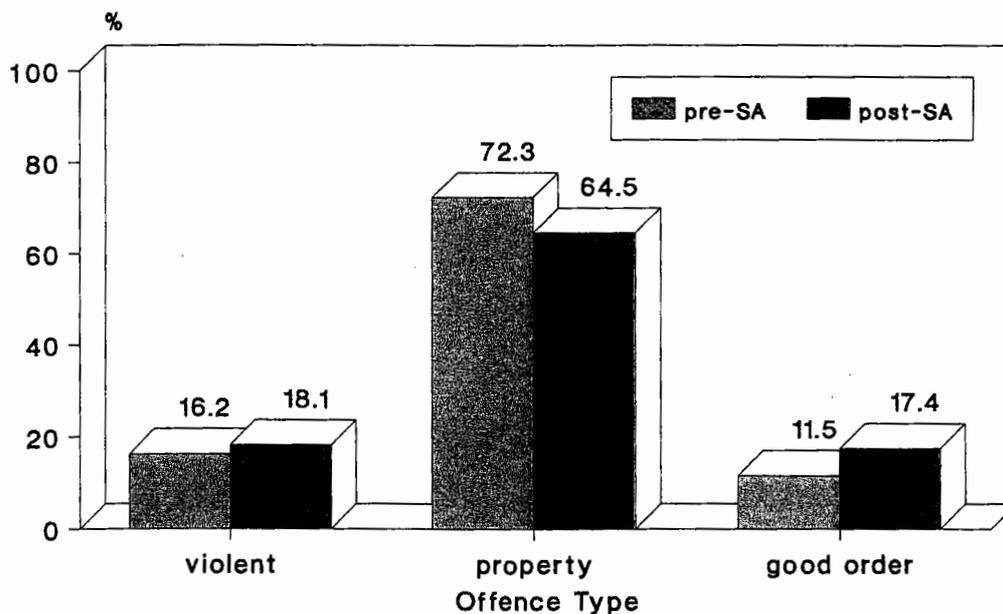
<sup>16</sup> Chi-square = 1.41, df=1, p > .05.

## Offences

What if the proportion of custodial sentences remained the same *but* the composition of offences receiving custodial sentences changed from one period to the next? Such a pattern may affect the average length of sentences. For instance, average sentence length may increase as a result of a proportional increase in those offences which tend to receive longer custodial sentences (eg violent offences).

Figure 1 indicates that the composition of custodial sentences has changed in terms of the general pattern of offences for which such orders were directed. Principally, the post-SA custodial sentences consist of substantially more "offences against good order" (+5.9%), a slightly increased number of "violent offences" (+1.9%), and a greatly reduced number of "property offences" (-7.8%).<sup>17</sup>

Figure 1: Profile of offences  
for custodial sentences  
(Children's Court, 26/6/88 to 23/12/90)



<sup>17</sup> "Violent offences" include assaults causing grievous bodily harm, assaults causing actual bodily harm, malicious wounding, abduction, robbery, assault and rob, extortion and sexual offences. "Property offences" include break enter and steal, fraud and forgery, receiving, goods in custody, shoplifting, theft, and steal or ride in stolen motor vehicle. "Offences against good order" include offensive behaviour, offensive language, drunkenness, prostitution, trespassing, fare evasion, drug offences, traffic offences, drink-drive offences and justice offences such as escape from lawful custody, resist arrest and breach of an existing court order.

The variation in the profile of offences across the two periods is significant<sup>18</sup> making it necessary to account for its likely impact on sentence length.

An estimate of how sentence length may have been affected by the different offence profile may be obtained by assessing to what degree the pre-SA mean sentence would have varied had the post-SA offence profile been applicable.<sup>19</sup> Using this method, we note that the pre-SA mean sentence would have been some three to four days lower and it may be argued that the post-SA period has an offence profile which, on average, has affected sentences by this margin. Thus, in order to compensate for the changes in the profile of offences, the average minimum sentence for the post-SA period would need to be increased by approximately half a week.

### Offenders

If the relevant subjective attributes of offenders receiving custodial sentences varied markedly from one period to the next then a change in the length of sentences may have resulted.

For example, suppose during the post-SA period there was a substantial increase in the proportion of *younger* offenders sentenced to serve time in custody. As youth is a mitigating factor in determining the degree of criminal responsibility, relatively lighter sentences may have been ordered. Alternatively, if those sentenced in the post-SA period had proportionally longer or more serious criminal histories, then more lengthy custodial sentences would be anticipated - again affecting the mean length of custodial sentences.

Variables relating to the age, gender, bail status and criminal record of juveniles given custodial sentences are contained in the data. These variables are potentially capable of bringing about changes to the length of custodial sentences.

18 Chi-square = 23.23, df=3, p < .01.

19 This estimate is calculated using pre-SA mean values and the post-SA profile of offences. For the pre-SA period, the average minimum sentence for each offence category is:

| Offence type                | Mean sentence |
|-----------------------------|---------------|
| Offences against the person | 7.27 mths     |
| Property offences           | 6.71 mths     |
| Offences against good order | 4.33 mths     |

Taking into account the post-SA offence profile, results in the following approximation of the overall mean minimum sentence for the pre-SA period:

|                                 |                    |
|---------------------------------|--------------------|
| Offences against the person     | 7.27 mths x 18.09% |
| Property offences               | 6.71 mths x 64.46% |
| Offences against good order     | 4.33 mths x 17.45% |
| <b>Estimated pre-SA average</b> | <b>6.40 mths</b>   |
| <b>Actual pre-SA average</b>    | <b>6.52 mths</b>   |

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**Mean difference** **-0.12 mths (3.6 days or half a week)**

One may infer that, all other things being equal, the average minimum sentence for the post-SA period is some three to four days lower than expected had the offence profile not changed.

**Age:** There is no significant difference<sup>20</sup> between the two periods in terms of the age of offenders committed to juvenile institutions. In both periods, around 65% of juveniles receiving custodial sentences in the Children's Court were 16 years of age or older. Younger offenders (10 to 15 year olds) made up only 35% of all juveniles given custodial sentences.

**Gender:** Offenders receiving custodial sentences in the pre-SA period were predominately male (93.6%). While the post-SA period contained proportionally fewer male offenders (92.0%), the difference is not statistically significant<sup>21</sup> and unlikely to have altered the average length of sentence in the post-SA period.

**Bail status:** Where a criminal matter remains to be finalised by the court, the juvenile may be either released unconditionally, granted bail, or have bail refused (ie the offender remains in custody). Bail involves an undertaking by the offender that he or she will honour the conditions of release while awaiting the final decision of the court. A refusal to grant bail often provides some indication of the court's view of the seriousness of the crime and/or the perceived risk of the offender to society. If one period has proportionally more criminal matters where bail is refused, this may indicate that that period contains more serious criminal matters and/or more dangerous offenders. In turn, this could translate into longer sentences.

Nonetheless, there is no significant difference<sup>22</sup> between the periods in the proportion of juveniles who were ultimately committed to a detention centre and were originally refused bail. In both periods, around 50% of such juveniles appearing before the Children's Court were not released to bail.

**Criminal record:** Generally, offenders sentenced to time in custody under the *Sentencing Act* have more extensive histories of proven criminal activity. This is evidenced in the data in two ways.

First, there is a significant difference<sup>23</sup> in relation to the number of prior proven appearances for juveniles incarcerated in each period. When compared with the pre-SA period, the post-SA period contains:

- \* fewer detainees with no prior proven court appearances;
- \* fewer detainees with only one or two prior appearances;
- \* more detainees with five or more prior appearances.

Secondly, the post-SA period is comprised of detainees who have significantly more serious *outcomes* for prior proven offences.<sup>24</sup> Whilst the differences do not relate to the proportion of detainees having previously served a custodial sentence, the post-SA period has relatively:

- \* more detainees who previously received a supervised recognizance;
- \* more detainees who previously received a community service order.

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20 Chi-square = 0.69, df=1, p > .05.

21 Chi-square = 2.29, df=1, p > .05.

22 Chi-square = 3.16, df=1, p > .05.

23 Chi-square = 12.18, df=3, p < .05.

24 Chi-square = 20.01, df=4, p < .001.

As with the observed differences between the periods in the profile of offences, it is possible to estimate what effect differences in the profile of offenders may have had on custodial sentences. Once again, the average minimum sentence should have been around three days higher had it not been for the particular offender profiles present in the post-SA period.<sup>25</sup>

### Summary

The two populations are very well matched. The post-SA period has a similar number and proportion of custodial sentences as the pre-SA period. Further, in each period the juveniles for which custodial sentences were ordered are generally alike in terms of their age, sex and seriousness or "risk" status (as measured by whether or not the court granted bail).

However, the presence of differences between the two populations in terms of a number of factors capable of altering sentences suggests that sentences handed down in the post-SA period are somewhat lower than otherwise would have been expected.

There is a difference between the two populations in the pattern of offences committed by juveniles ordered into custody. Also detainees sentenced under the *Sentencing Act* generally have more serious criminal histories than their pre-SA counterparts. However, it is estimated that the sum effect of these differences on the length of custodial sentences is minimal.

<sup>25</sup> Adopting the same method for estimating the effect of the inter-differences in the profile of offences (see footnote 19):

|                                      |                                     |
|--------------------------------------|-------------------------------------|
| <b>Prior proven appearances</b>      | <b>Mean sentence</b>                |
| No priors                            | 6.93 mths x 4.46%                   |
| One or two priors                    | 6.23 mths x 16.02%                  |
| Three to five priors                 | 6.52 mths x 33.07%                  |
| Over five priors                     | 6.60 mths x 46.45%                  |
| <b>Estimated average</b>             | <b>6.43 mths</b>                    |
| <b>Pre-SA average</b>                | <b>6.52 mths</b>                    |
| <b>Mean difference</b>               | <b>-0.09 mths (2.7 days)</b>        |
| <br>                                 |                                     |
| <b>Most serious previous outcome</b> | <b>Mean sentence</b>                |
| Custodial term                       | 6.76 mths x 59.92%                  |
| CSO                                  | 6.88 mths x 7.89%                   |
| Recog with supervision               | 5.61 mths x 9.88%                   |
| Recog                                | 6.21 mths x 14.50%                  |
| Acquitted/other/none                 | 6.02 mths x 7.81%                   |
| <b>Estimated average</b>             | <b>6.52 mths</b>                    |
| <b>Pre-SA average</b>                | <b>6.52 mths</b>                    |
| <b>Mean difference</b>               | <b>0.00 mths (ie no difference)</b> |

That is, in order to compensate for the variations in the profiles of offenders which occur in the post-SA period it would seem necessary to raise the average minimum sentence length for the post-SA period by around three days.

Assuming always that sentencing policy had not changed, compensating for the differences in the profile of offences and offenders would suggest that the mean value for minimum sentence length in the post-SA period be *increased* by approximately one week. This adjustment, in fact, permits more legitimate inferences to be made when comparing custodial sentences ordered under the disparate sentencing regimes.

It is crucial to note that it is upon the custodial sentences ordered by the court that the inter-period differences in the profile of offences and offenders directly impacts. The actual time offenders must serve in custody, however, is also influenced by other considerations. In particular, time served in custody is directly affected by the presence or absence of remissions.

### **2.3 RESULTS**

Figure 2 presents by way of quarterly figures a time series of the sentences determined by the Children's Court in the 15 month periods before and after the introduction of the *Sentencing Act*.

As this figure shows, three major changes to custodial sentences have resulted from the operation of the sentencing reforms:

- (1) a dramatic *decrease* in the average length of the head sentence ordered by the court;
- (2) a marked *decrease* in the length of minimum sentences ordered by the court;
- (3) a conspicuous *increase* in the actual time juvenile offenders serve in custody.

**Figure 2: Mean length of sentence  
and time served in custody  
(Children's Court, 26/6/88 to 23/12/90)**

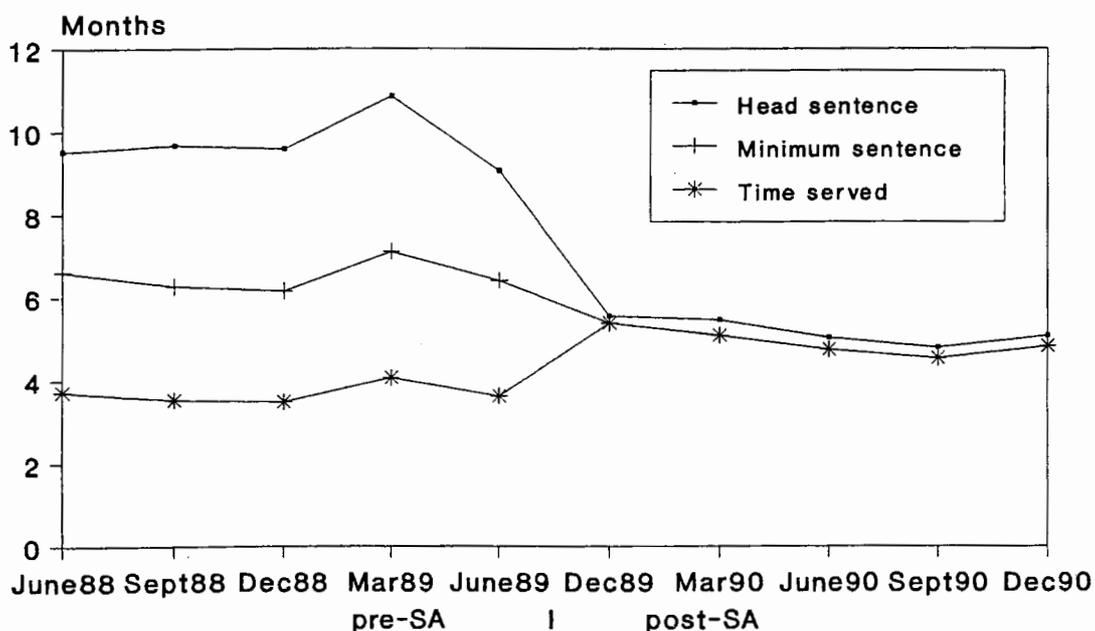


Table 2 presents data on the differences between the two sentencing regimes in terms of the measures of average head sentence length, average minimum sentence length, and average time served. The differences are discussed in detail in the sections that follow.

**Table 2  
Pre and post- Sentencing Act custodial sentences  
(Children's Court, June 1988 to December 1990)**

| Term             | pre-SA<br>(average) | post-SA<br>(average) | difference                | % change          |
|------------------|---------------------|----------------------|---------------------------|-------------------|
| Head sentence    | 9.75 mths           | 5.21 mths            | -4.54 mths<br>(-21 weeks) | 46.6%<br>decrease |
| Minimum sentence | 6.52 mths           | 4.94 mths            | -1.58 mths<br>(-6 weeks)  | 24.2%<br>decrease |
| Time served      | 3.69 mths           | 4.94 mths            | +1.25 mths<br>(+5 weeks)  | 33.9%<br>increase |

### 2.3.1 Head sentence

The average head sentence has fallen by 47% from 9.75 months under the *Probation and Parole Act* to 5.21 months under the *Sentencing Act*, with the 21 week difference being statistically significant.<sup>26</sup>

The decrease in the length of the head sentence appears to be partly a function of:

- (1) a change in the procedure for determining the term of a sentence - the "bottom-up" approach - that stems from the *Sentencing Act*.

Previously, the head sentence was the focus of the sentence in the sense that only after it was set could the non-parole period, as an element of the whole sentence, be determined. In effect, the new legislation has changed this focus. Under s 5, judicial officers must first set a minimum term and only then, if appropriate, specify an additional term.<sup>27</sup>

- (2) the operation of s 7 of the *Sentencing Act* - this section provides that only sentences in total longer than six months may contain an additional term (courts must order a fixed term for all sentences not exceeding six months in length); and,
- (3) the fact that the greater majority of sentences determined in the Children's Court are for full terms of six months or less and thus do not allow minimum terms to be set.

<sup>26</sup> Kruskal-Wallis test,  $p < .001$ . Note that for convenience, the very few sentences greater than two years are grouped with those sentences of 24 months but only in graphical displays of sentences. Their values remain unchanged in the data.

<sup>27</sup> See the Hon Mr Justice Hunt, "Sentencing Act 1989 - a direction to reduce the length of sentences?" *Sentencing Act Discussion Papers*, July 1989, Judicial Commission of NSW at pp 1-3:

"Prior to the commencement of the Sentencing Act 1989, a court's task in sentencing an offender has been to determine the length of the head sentence and then to specify . . . the non-parole period . . . Section 5 of the new Act requires the court to determine first the minimum period which the offender must actually spend in imprisonment and only then to determine the additional period during which he may be released on parole (and thus only then to determine the total sentence to be imposed for the crime he has committed)."

However, compare *R v Moffit* [1990] 20 NSWLR 114 where the Court of Criminal Appeal held that s 5 did not necessarily require that the sentencer apply his mind first to the minimum term and then to the additional term, particularly where there are "special circumstances" (see the Hon Mr Justice Campbell, "Changing Horses: the Sentencing Act 1989 - a Review and Reappraisal", *Judicial Officers Bulletin*, vol 3, no 8, Judicial Commission of NSW, September 1991.

### 2.3.2 Minimum sentence

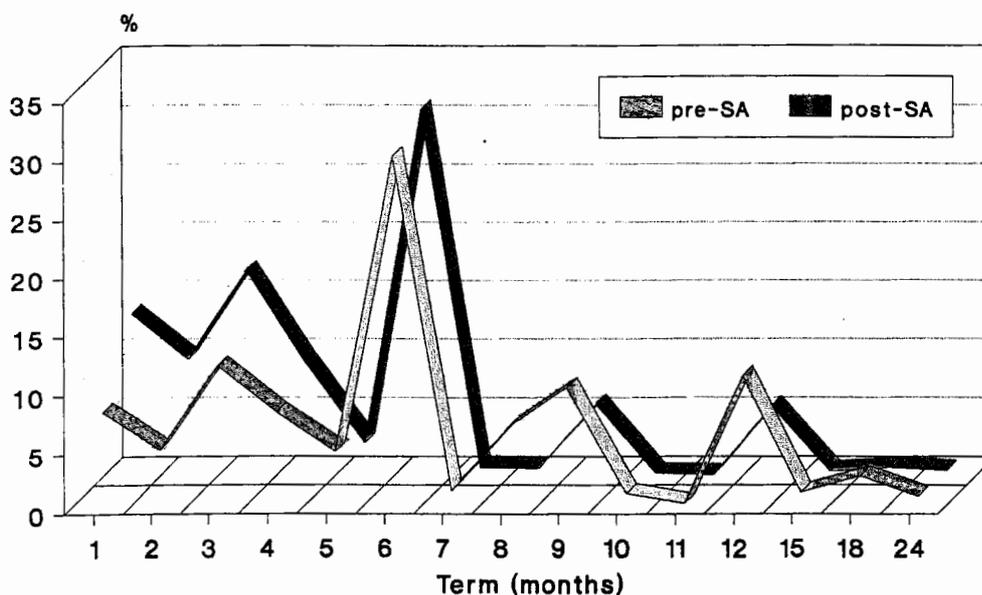
The average minimum sentence has *decreased* by 24% from 6.52 months before the Act to 4.94 months after the Act. Even making adjustment for the noted differences in offence and offender characteristics between the two groups (as discussed in 2.3), the post-SA minimum sentences are, on average, significantly lower (ie five weeks lower) than the pre-SA's corresponding minimum sentences.<sup>28</sup>

Thus, the statistics indicate that Children's Court Magistrates have given comparatively lighter minimum sentences since the introduction of the *Sentencing Act*. This perhaps indicates that there is an attempt to compensate for the loss of remissions. However, as will be illustrated, the 24% reduction in sentence length is not sufficient. Juveniles are serving *more* time in custody despite the nominally shorter sentences imposed.

It should be noted that there is nothing in the *Sentencing Act* which could be taken as an indication that judicial officers should reduce their sentences in order to offset the loss of remissions.

The mean minimum sentence imposed by the court is but one measure of how sentences may have changed since the *Sentencing Act*. Figure 3 indicates that the overall *pattern* of sentences handed down in the Children's Court has changed very little despite the decrease in the average length of sentences imposed.

Figure 3: Minimum sentence by period  
— all offences  
(Children's Court 26/6/88 to 23/12/90)



<sup>28</sup> Kruskal-Wallis test,  $p < .001$ .

Certainly there has been an increase in the proportion of minimum sentences of less than four months and a decrease in the proportion of minimum sentences greater than six months. Yet there has been no change in relation to the most frequently ordered custodial sentence - a term of six months. This indicates that, while there has been some trend towards lower sentences since the Act, there appears to have been no systematic, across-the-board discounting of sentences by judicial officers in order to compensate for the loss of remissions.

In addition, there is the possibility that the subtle differences in the pattern of sentences are partly due to the variations in the profile of offences documented in 2.2.2. In theory, an increase in the proportion of "good order" offences would produce a corresponding increase in the proportion of shorter sentences, while a decrease in "property" offences would reduce the proportion of longer sentences. Nonetheless, while this explanation fits the data it should be remembered that the observed variations in the offence profile could not account for all variation in the observed pattern of minimum sentences.

Without doubt, sentences have changed since the introduction of the *Sentencing Act*. Sentences in the Children's Court have tended to be shorter - although there appears not to have been a systematic, across-the-board reduction in the length of minimum sentences. Therefore, while one may speculate that a trend to lower sentences is a direct consequence of the legislated reforms, it does not appear that judicial officers have lowered sentences in order to compensate, or certainly to fully compensate, for the abolition of remissions.

### 2.3.3 Post-release supervision

Under the old legislation the difference between the head sentence and the non-probation period indicated the potential duration of the probation period. Similarly, under the new legislation the difference between the term of the sentence and the minimum term (ie the additional term) indicates the potential duration of the non-custodial portion of the sentence.

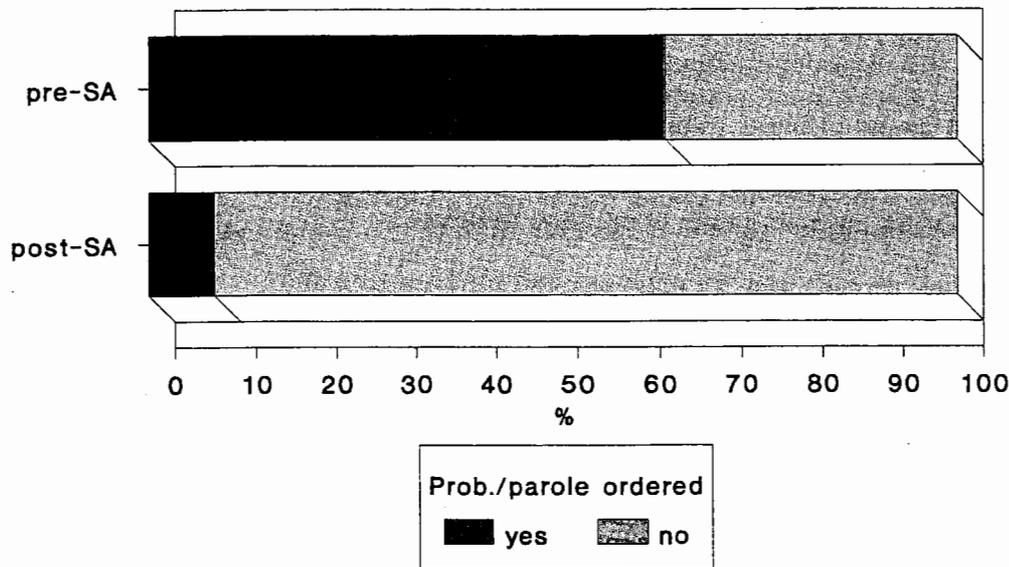
Referring again to Figure 2, we note that far more of the sentence is now served in custody and far less is served in the community. This indicates that for juveniles sentenced under the new Act there appears reduced opportunities for rehabilitation in the community. This is most unfortunate as the Department of Community services now has the resources to provide an adequate supervision service.<sup>29</sup> It should also be noted that before the *Sentencing Act* supervisory resources were, in fact, almost exclusively allocated to non-custodial community based orders.

Before the change in legislation, almost 64% of sentences for juvenile offenders contained a period of probation. Under the *Sentencing Act* only 8% of custodial sentences included an additional term, and therefore, an option for post-release supervision (see Figure 4).

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<sup>29</sup> See Blackmore, R *The Children's Court of NSW Information Bulletin* No 25, September 1991 which indicates that the Department of Community Services anticipated an increase in supervisory workload arising from the operation of the new Act and allocated 22 additional guidance officers. This allocation was in fact "a special dispensation by the Premier . . . just prior to the implementation of the *Sentencing Act*" (Blackmore, R, personal correspondence, 14/10/91).

Figure 4: Supervision component  
of custodial sentences  
(Children's Court 26/6/88 to 23/12/90)



In fact, as less than 17% of post-SA sentences ordered by the Children's Court are for terms of more than six months, the great majority of juvenile offenders simply do not qualify for release to probation supervision.

But what aspect of the new legislation brought about this dramatic change? Section 5(2) of the *Sentencing Act* stipulates that the additional term (except under special circumstances) should be no greater than one-third of the minimum term. In effect, this means that the additional term makes up only one-quarter of the term of the sentence. It is obvious that Children's Court Magistrates are closely adhering to this mandate as almost three of every four post-SA sentences that carry an additional term comply exactly with this statutory formula.

In contrast, under the previous sentencing regime the order for post-release supervision generally comprised a larger part of the sentence. In 28% of pre-SA cases the probationary period was set at one-third the head sentence; in 33% of cases it was set at one-half the head sentence; and in 13% of cases it was set at a level greater than half the head sentence. Further, prior to the *Sentencing Act* the average term intended for supervised probation was 5.1 months or 20 weeks. Since the Act the average term of parole has dropped to 3.4 months or 13 weeks - that is, for those few who do receive an additional term. This represents a decrease of 33% in the time juveniles, in theory, spend on post-release supervision.

The greatly diminished opportunity for juveniles to receive a sentence containing a reasonable period of post-release supervision is a direct product of the reforms introduced by the *Sentencing Act*. Furthermore, where an additional term is specified, the period of post-release supervision is typically much shorter than under the previous legislation.

#### **2.3.4 Time served in custody**

As previously described, under the *Probation and Parole Act* remissions were deducted from the non-probation period. Indeed in relation to juveniles a system of "earned" remissions generally applied to all sentences greater than one month.

Remissions operated in the following way: for every month served in custody, juvenile offenders "earned" an average of 18 days remission from the remaining term of the sentence. In addition, juveniles were given a further 14 days terminal remission (ie they were released 14 days prior to the expiration of their sentence after all other remissions had been deducted). The relationship between the court ordered minimum sentence and the amount of remission normally earned is set out in Appendix A.

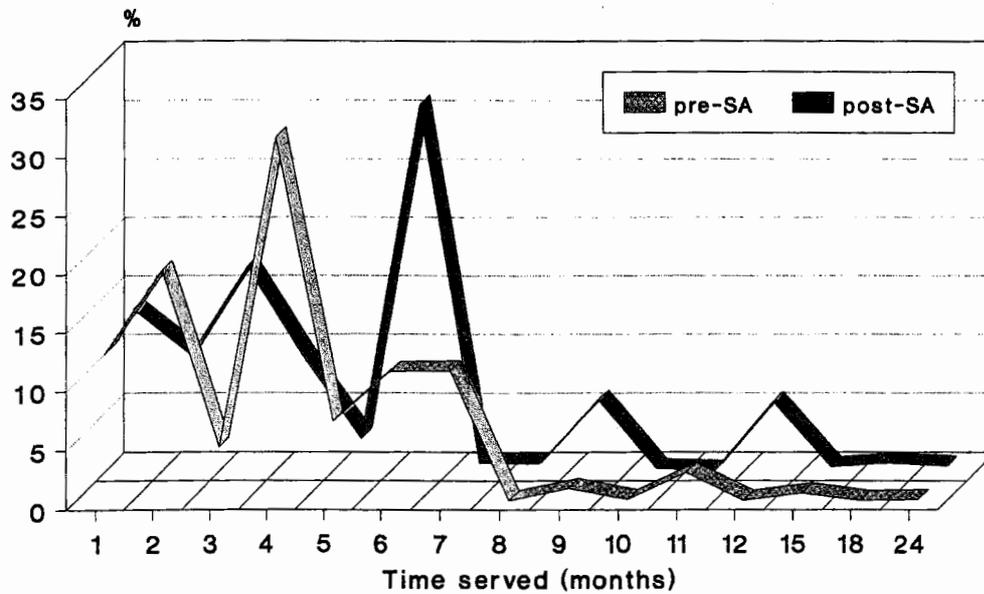
As a result of this system of remissions which applied before the introduction of the *Sentencing Act*, juveniles served as little as 48% of the non-probation period (ie for a three month sentence), although generally the time served in custody was around 60% of the non-probation period.

All other things being equal, any increase in the time juveniles spend in custody following the introduction of the *Sentencing Act* may reasonably be attributed to the abolition of remissions.

Table 1 indicates that juveniles are now spending an average of five months in custody whereas prior to the new Act they were spending less than four months in custody. In fact, there has been an average increase of 34% (or five weeks) in the actual time children must spend in custody. Furthermore, the five week increase in the average time juveniles serve has occurred despite a decrease of around five weeks in the mean length of minimum sentences.

Figure 5 reveals that since the commencement of the *Sentencing Act* there has been a global shift towards juveniles serving longer in custody. Previously, it was most common for juvenile detainees to serve four months in custody. Since the *Sentencing Act* the most commonly served term in custody is for six months.

Figure 5: Time served in custody  
by period — all offences  
(Children's Court 26/6/88 to 23/12/90)



Also it is apparent that the *Sentencing Act* has resulted in an increase in the number of juveniles who are required to serve periods of nine and twelve months in custody. Such longer periods were relatively rare under the *Probation and Parole Act* because the system of "earned" remissions effectively reduced these longer terms by around 60%.

### 2.3.5 Offence-specific differences

Aside from the period in which the sentence was determined, the type of offence is statistically the most important factor in the determination of the length of a sentence.<sup>30</sup> This being the case, there is the possibility that the observed differences between the periods in terms of sentences (Figure 3) and time served (Figure 5) arise from changes in the way in which the court deals with particular offences rather than the reforms of the *Sentencing Act*. For example, the courts may now be giving shorter custodial sentences for juvenile offenders convicted of the offence of break, enter and steal.

To investigate this possibility, the overall data were divided according to the type of offence committed. First, the data were categorised under the general offence groups of "violent offences", "property offences" and "good order offences" (see Footnote 17 for an explanation of these offence groups). Secondly, from each general offence group a more specific type of offence was selected.

The specific offences selected represent the most commonly occurring offences in each group and together make up 63% of all offences receiving a custodial sentence. Break, enter and steal represents 30.0% of all offences; steal motor vehicle represents 18.3% of all offences; common assault represents 12.1% of all offences; and public order offences represent 2.4% of all offences. As juveniles commit far more property offences than any other type of crime, two offences - "break, enter and steal", and "steal motor vehicle" - were chosen for examination from this category. "Common assault", which does not include serious assaults or sexual assaults, was selected from the set of "violent" offences. "Public order (or street) offences" (which includes offensive behaviour, liquor offences, prostitution, etc) was chosen from "offences against good order".

**Minimum sentence length:** A more comprehensive picture of the patterns of court-ordered minimum sentences before and after the *Sentencing Act* is made possible by controlling for different offences.

Figure 6 indicates that the distribution of minimum sentences after the *Sentencing Act* has varied very little from the general pattern of minimum sentences handed down before the Act. The similarity in the pattern of sentences for the periods persists for the grouped offences as well as the specific offences.

30 ANOVA (Main Effects Model) for unbalanced data. In order of significance, the length of the court-ordered minimum sentence is a function of the following main effects:

| Source            | df | SS     | F value | Pr > F |
|-------------------|----|--------|---------|--------|
| period            | 1  | 1284.9 | 100.7   | 0.0001 |
| offence           | 2  | 2213.7 | 86.7    | 0.0001 |
| sex               | 1  | 236.9  | 18.6    | 0.0001 |
| prior outcome     | 4  | 146.4  | 2.9     | 0.022  |
| age               | 1  | 35.7   | 2.8     | 0.090  |
| bail status       | 1  | 26.2   | 2.1     | 0.150  |
| prior appearances | 3  | 6.2    | 0.2     | 0.92   |

There is strong evidence of sentencing consistency in the determination of minimum sentences, particularly for the general categories of violent and property offences. In addition to the clearly modal sentence of six months, there are matching, smaller "peaks" that correspond to sentences of three, nine and twelve months.

The same pattern of sentences endures at the level of specific offence types occurring regardless of whether the offence involved assault, break enter and steal, or motor vehicle theft. It is only sentences for offences against good order that show a departure from the general pattern. Figure 6 indicates that there are proportionally more sentences of one, two and three months associated with this group of offences. Clearly, however, the differences are offence-specific and not period-specific. That is, offences against good order have their own characteristic set of typically shorter sentences, but the pattern of sentences for offences against good order has remained largely the same in both periods.

A further consideration relating to offences against good order is that this group of offences is made up of two very different types of offence: offences "against justice", and offences "against public order". The bulk of the offences against justice relate to the crimes of escaping or absconding from lawful custody. For such offences there is an existing sentence confounding the determination of the present penalty. Normally, the court deals with these matters by extending the existing custodial term by imposing a short cumulative sentence.

When justice offences are taken out of the good order offence category and only public order (or "street") offences are examined, a source of extraneous variation is removed. Figure 6 indicates that this process of statistical control, in part, re-establishes the familiar pattern of sentences found for the other offences examined.

In summary, there exists a great deal of comparability in the *pattern* of sentences for the two periods. It matters little whether specific offences are examined or offences are examined in terms of broader categories. Minimum terms ordered under the regime of the *Sentencing Act* reflect in their pattern the non-probation periods ordered under the *Probation and Parole Act*. The *Sentencing Act* has not produced wholesale changes to the general pattern of custodial sentences handed down by the Children's Court.

**Time served in custody:** Time served in custody, like the minimum sentence ordered by the court, appears not to vary greatly as a function of the type of offence committed. It is apparent that the changes wrought by the *Sentencing Act* have altered the amount of time juveniles serve in custody. In relation to each offence type, a manifest increase in time served accompanied the change in legislation.

Figure 7 indicates that branching down from the level of all offences to the level of specific offence types may highlight offence-specific variations in the pattern of custodial terms served by offenders. However, these variations are overshadowed by the magnitude of the differences between the periods in the time actually served. At all levels, juvenile offenders are serving longer in custody under the *Sentencing Act* than under the previous sentencing regime.

Generally speaking, under the old Act a juvenile typically would serve four months in custody. This has increased to six months under the present legislation. In addition, longer terms (ie terms in custody of nine months or more), which were uncommon under the *Probation and Parole Act*, now occur more regularly in all offence categories.

Figure 6: Minimum sentence by offence type and period (Children's Court, 26/6/88 to 23/12/90)

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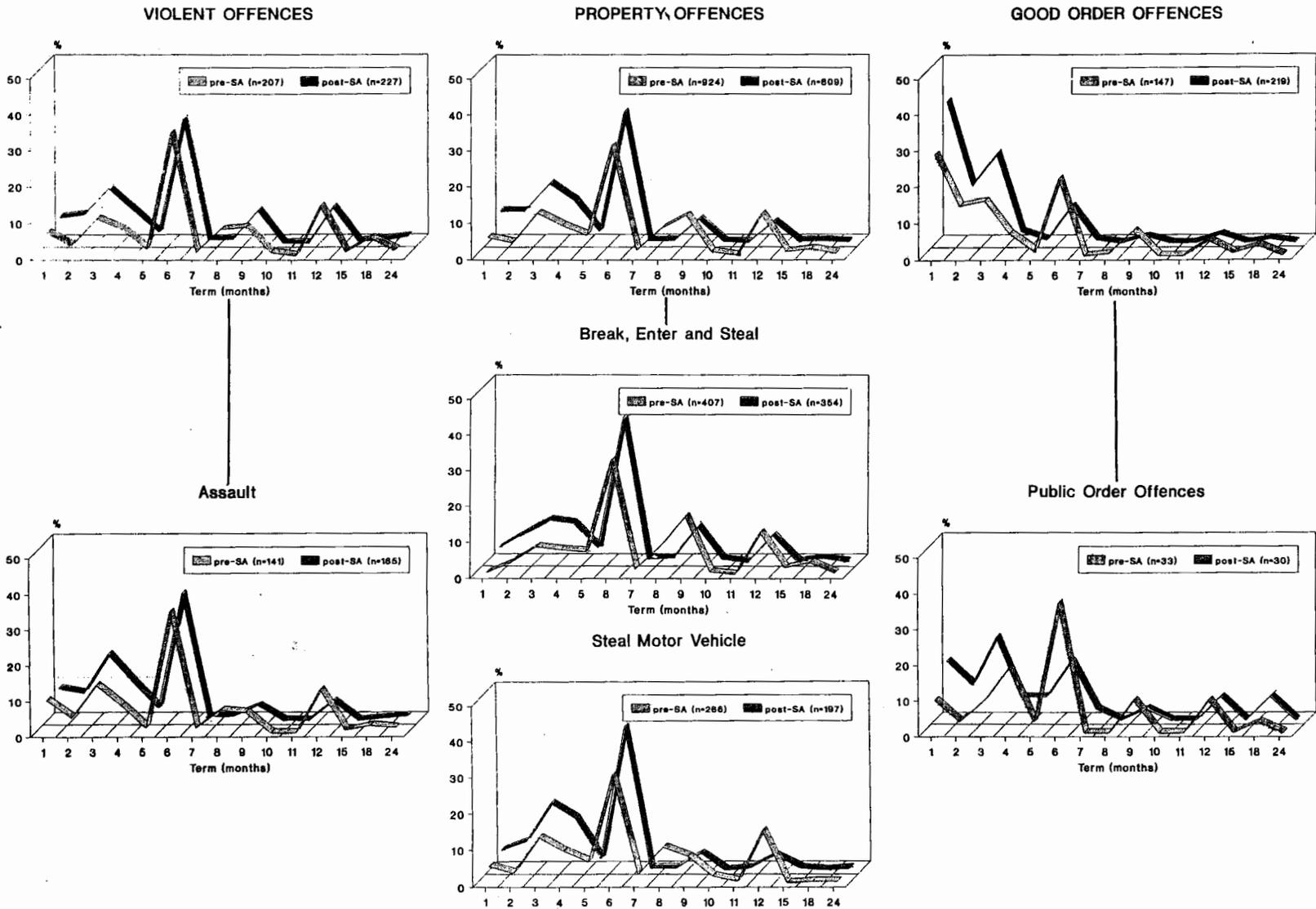
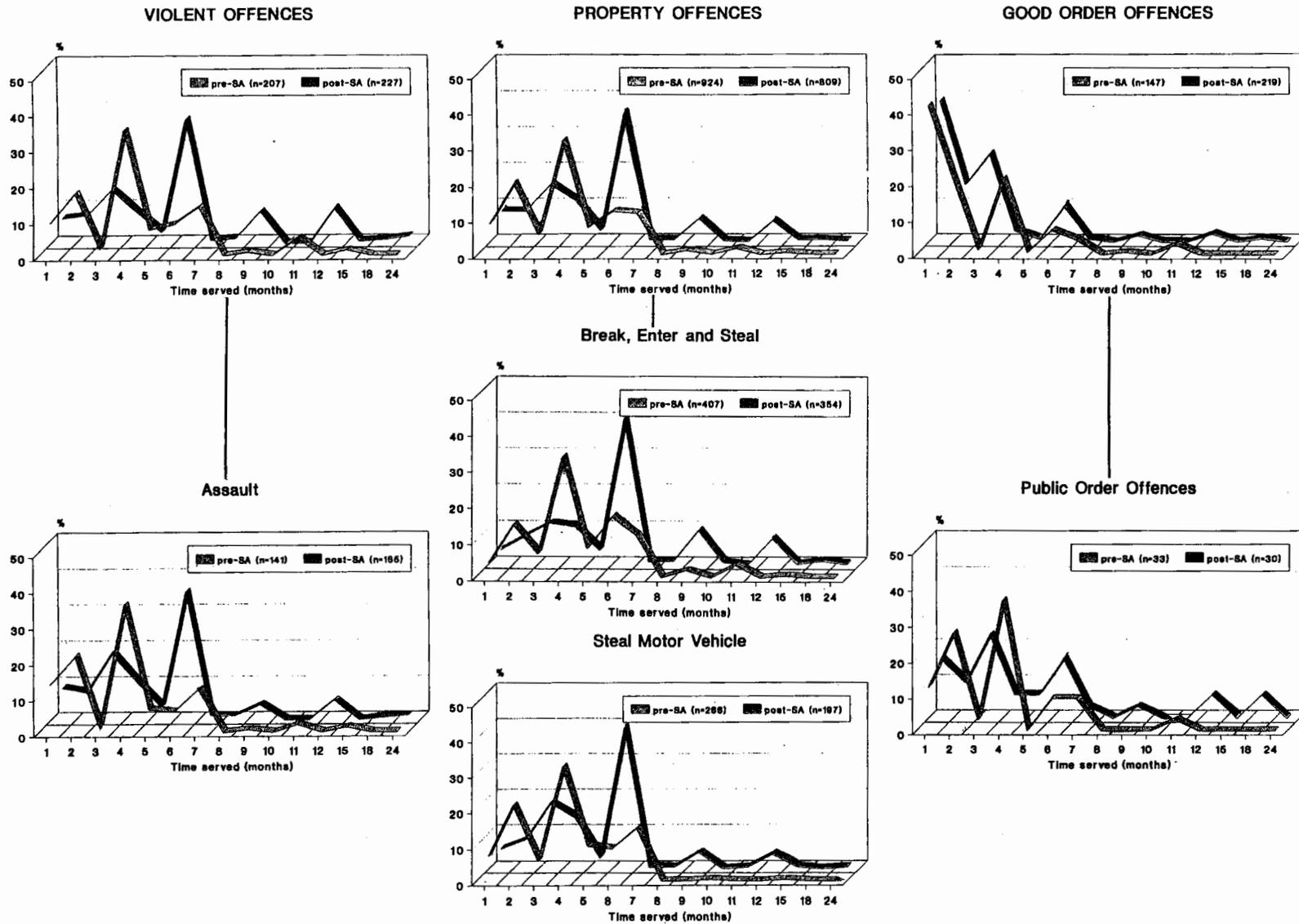


Figure 7: Time served in custody by offence type and period (Children's Court, 26/6/88 to 23/12/90)



## 2.4 DISCUSSION

The principal aim of the *Sentencing Act* is to promote "truth in sentencing". It seeks to allow "the public and prisoners (to) know exactly when a sentence shall commence and exactly when a prisoner will be eligible for consideration for parole".<sup>31</sup>

Certainly, the *Sentencing Act* has provided the courts with the power to determine the actual minimum time the offender is to serve in custody. Prison sentences are no longer affected by remissions, and convicted offenders now "serve in prison (without any reduction) the minimum or fixed term of imprisonment set by the court".<sup>32</sup> In so far as "truth in sentencing" is measured by whether the minimum sentence fixed by the court is served by the prisoner then the *Sentencing Act* has achieved its principal aim.

Has the operation of the *Sentencing Act* produced other effects? Effects which are perhaps unintended, unforeseen, or undesired?

During the Second Reading Speech, the then Minister for Corrective Services Mr Yabsley emphatically stated that the intention of the *Sentencing Act* was not "to make sentences longer".<sup>33</sup> However, a number of critics and commentators predicted that it was inevitable that the new Act would bring about an increase in the time offenders would spend in custody.<sup>34</sup> The critics were right.

Our analysis suggests that the *Sentencing Act* has had a profound impact on the time offenders spend in custody. It shows that juveniles sentenced under the current legislation are spending on average 34% longer in custody than juveniles sentenced under the old sentencing regime. This amounts to an average increase of five weeks of custody for every juvenile incarcerated since the 25 September 1989.

Gorta and Eyland (1990) identified a similar increase in relation to adult prisoners. Under the *Sentencing Act* adult prisoners are on average spending 19% longer in prison than under the old legislation. Predictably, this increase has exacerbated the problem of prison overcrowding.<sup>35</sup>

Unless judicial officers were prepared to compensate for the loss of remissions by discounting sentences, the new Act could only bring about an increase in the actual time prisoners would have to serve in custody. As Mr Justice Hunt warned when commenting on the *Sentencing Act* prior to its commencement:

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31 The Hon Mr Yabsley, Minister for Corrective Services, Second Reading Speech, NSW Hansard, May 1989, p 7910.

32 NSW *Sentencing Act*, s 3.

33 The Hon Mr Yabsley, Minister for Corrective Services, Second Reading Speech, NSW Hansard, 10 May 1989, p 7907.

34 The Hon Mr Langton MLA, NSW Hansard, 11 May 1989, p 8131. Also see Chan, J "Sentencing of Violent Offenders: Where Does Truth Lie?" Paper presented at the National Conference on Violence, October 1989.

35 Gorta, A and Eyland, S *Truth in Sentencing - Impact of the Sentencing Act, 1989* (Report 1). Research and Statistics Division, NSW Dept of Corrective Services, June 1990. Also see Gorta, A "Impact of the Sentencing Act 1989 on the NSW Prison Population", Paper presented at the Institute of Criminology Professional Seminar, *The Sentencing Act 1989: A Review and Reappraisal*, August 1991.

"The only way, in practical terms, by which that hope or expectation of the Government can be realized is by a substantial reduction in the sentence imposed by the courts, a consequence to which neither the Minister nor the statute has made any express reference."<sup>36</sup>

The *Sentencing Act* simply does not provide any statutory direction for the discounting of sentences to compensate for the loss of remissions. Further, there is overwhelming judicial authority for the view that courts should not regard the effect of remissions, or the loss of remissions, as relevant in the determination of a sentence.<sup>37</sup>

Nonetheless, there is prima facie evidence that, since the commencement of the Act, Children's Court Magistrates have reduced sentences. Minimum terms imposed under the *Sentencing Act* are on average 24% lower than non-probation periods specified under the old legislation. Also, more terms of six months or less are being ordered and there are now fewer longer terms of nine and twelve months.

While it is possible that Children's Court Magistrates are systematically adjusting sentences in order to compensate for the loss of remissions there remains some ambiguity in the data. A calculated decision by magistrates to compensate for the abolition of remissions should result in an across-the-board reduction of sentences. That is, all points on the sentence length distribution would shift towards the lower end of the scale by a factor equal to, on average, the perceived value of remissions. To fully compensate for the loss of remissions would require a 43% decrease in sentence length. What has occurred is a 24% decrease in average sentence length not a consistent reduction of all sentences.

As already illustrated in Figure 3, there is a high level of concordance between the pattern of minimum terms and the pattern of non-probation periods. Most notably, the most popular sentence ordered by the Children's Court under the old legislation, a term of six months, is also the most frequently ordered sentence under the new legislation despite the decrease in average sentence length.

Nonetheless, we hesitate to say there is no evidence of a process of systematic sentence reduction arising from the operation of the *Sentencing Act*. It is obvious that sentences ordered in the Children's Court are not evenly distributed along a continuous scale (ie from one to twenty-four months). Under both Acts, sentences appear to be largely distributed along a scale characterised by intervals of three months. In particular, under the *Sentencing Act* there appears a natural tendency for sentencers to set minimum terms divisible by a factor of three in order to more easily determine both the additional term and the actual dates on which those terms end.

The reduced proportion of sentences of nine and twelve months which occurred after the introduction of the *Sentencing Act* may indicate that some longer sentences have been reduced and absorbed at the six month level (where fixed term sentences only apply). Equally, it may be that for an unknown number of cases, where previously a non-probation period

36 The Hon Mr Justice Hunt "Sentencing Act 1989 - a direction to reduce the length of sentences?" *Sentencing Act Discussion Papers*, July 1989, Judicial Commission of NSW, p 1.

37 For example see *R v O'Brien* [1984] 2 NSWLR 449; *R v Macleay* [1990] 19 NSWLR 113; and *Hoare v R* (1989) 167 CLR 348.

of six months had been imposed, shorter fixed term sentences are now being ordered. In summary, some judicial officers (and perhaps only some of the time) may be reducing sentences, which they might otherwise impose, to the next lowest three monthly interval to compensate for the loss of remissions.

It should be noted that this explanation may account for the overall reduction in average sentence length. It also indicates that the *Sentencing Act*, in effect, maintains a pattern of minimum terms similar to the pattern of non-probation periods imposed under the *Probation and Parole Act*, albeit with relatively fewer terms of over six months and relatively more terms under six months.

As suggested earlier, the Children's Court would have had to discount sentences by an average 43% in order to ensure that juveniles sentenced under the new legislation served no longer in custody than juveniles sentenced under the old legislation. In practice, in order to achieve such parity, a non-probation period of nine months, for example, would need to be "reduced" to a minimum term of 5.1 months.

Magistrates may be reluctant to impose such substantially reduced sentences because of their perceived leniency. In addition, the court may consider a sentence that is reduced by around 40% as fundamentally inadequate. Yet, it is important to note that because juveniles previously served as little as 48% of the minimum sentence in custody it is upon young offenders, even more than for adult offenders, that the burden of longer custodial terms falls. Sentences of six months or less may appear short but are comparatively severe when remissions no longer apply.

The *Sentencing Act* has also resulted in shorter head sentences. A consequence of this is the new appearance it brings to an offender's criminal record. Offenders incarcerated under the new legislation will have criminal records that may appear much less serious than for those offenders given large head sentences under the *Probation and Parole Act*. This may affect the way in which offenders are "labelled". In practical terms, however, it also means that sentencers (and others who have an interest in the criminal history of offenders) need to be acutely aware of conviction dates and the prevailing sentencing currency when considering the weight to be given to the prior record of an offender.

There have been other changes too. The Children's Court has set very few custodial sentences with parole since the *Sentencing Act* came into effect. Only 8% of sentences imposed under the new legislation contain an additional term, whereas under the old legislation almost two-thirds of sentences contained a non-probation period and thus opportunity for post-release supervision prior to the expiration of the sentence.

One may question whether the *Sentencing Act* was framed with sufficient consideration for the special needs of young offenders. If rehabilitation is a major aim of children's sentences then it may be that post-release supervision is a very important tool for the courts. As most juveniles receive a sentence of six months or less, the statutory rule limiting the option of parole to sentences of over six months may be viewed as fundamentally inappropriate for children. The *Sentencing Act* has, in effect, made post-release supervision unavailable for the vast majority of juvenile offenders who receive detention orders.

In addition, the flexibility of imposing reasonable periods of post-release supervision, available under the old legislation, has disappeared. The "75% rule" embodied in the new legislation

has effectively restricted the time juveniles spend on parole to one-quarter of the term of the sentence. In fact, for those few who did receive an additional term, the average time intended for post-release supervision is down one-third.

Nonetheless, previously, all supervisory resources were allocated to non-custodial community based orders. It is only since the introduction of the *Sentencing Act* that staff have actually been allocated to the supervision of juveniles released on parole. In fact, an extra twenty-two Community Services guidance officers were appointed at the time of implementation of the *Sentencing Act* in expectation of an increase in the supervisory workload resulting from its application.<sup>38</sup>

There is no doubt that the "75%" rule is not a practical formula to apply to the predominantly short sentences imposed in the Children's Court. In fact, the court may be loathe to set a substantial period of parole, say of three months, as this would normally need to be coupled with a mandatory minimum term of nine months and may greatly exceed the penalty which is proportionate to the offence. On the other hand, the court may question the value of shorter parole periods and in preference impose a fixed term sentence, hence, depriving the young offender of the opportunity for rehabilitation under the guidance of a parole officer. In part, this may account for the preponderance of fixed terms of six months or less imposed by the Children's Court under the Act.

But is the Children's Court bound by the new legislation to continue to give children relatively longer terms in custody and little if any opportunity for parole supervision?

It is submitted that the New South Wales Children's Court, in many cases, could take better advantage of the "special circumstances" clause of s 5(2) which reads:

"The additional term must not exceed one-third of the minimum term, *unless the court decides there are special circumstances* (italics added)".

The expression "special circumstances" has been judicially considered in *R v Moffit*.<sup>39</sup> In that case, Badgery-Parker J said that while a judge may not give rein to his own personal views that short periods of incarceration followed by long parole periods should be the norm, if there were reasons identified in the particular case that a longer period of parole supervision was warranted, the judge was entitled to regard that as a special circumstance justifying a departure from the one-third rule. Similarly, Samuels J A considered that special circumstances means those circumstances which justify enlarging in the prisoner's favour the rehabilitative purposes implied in s 5. This entails considering all the factors which "make the case special and bear upon the suitability of a longer than normal additional term".<sup>40</sup> In the same case, Wood J accepted that it may be desirable that the period of parole supervision be extended for young offenders with clear prior records and good prospects of rehabilitation who would clearly benefit more from parole supervision than from incarceration.

38 Blackmore, R *The Children's Court of NSW Information Bulletin* No 25, September 1991, p 5.

39 *R v Moffit* [1990] 20 NSWLR 114.

40 *Griffiths v The Queen* (1989) 63 ALJR 585). Also see Gee, K QC "'Special Circumstances' in The Sentencing Act". *Judicial Officers Bulletin* Vol 2 No 10, Judicial Commission of NSW, July 1990 for a critical review of the issues.

Clearly, youth is an important consideration in determining the degree of culpability of an offender. Similarly, the prospect for rehabilitation is of vital concern, particularly in relation to many young offenders.

On these grounds, the court may decide that there are special circumstances and set a sentence comprising an additional term in excess of the mandatory one-third of the minimum term. So long as the court records its reasons and sets a sentence, in total, that exceeds six months the legislation has been complied with. Therefore, if the court decides that rehabilitation is a factor of special importance for the youth in question - as it should be in relation to many juvenile offenders - then it can legitimately set a minimum term of, say, two months and an additional term of, say, four months and one day.

This strategy would aid in reducing the time that young offenders must serve in custody. It would also reinstate rehabilitation through post-release supervision as an important feature of sentencing juveniles. In a real sense, the Act would operate more fairly in relation to children by acknowledging their youth and special needs. This change would be achieved without resort to legislative intervention if, and only if, the courts were prepared to regard youth and rehabilitation as constituting "special circumstances" under the Act.

## PART II

### A Decade of Sentencing in the Children's Court

#### 3.1 INTRODUCTION

This part of the study examines the long term picture by comparing Children's Court sentences under all the different "remission" schemes operating during the 1980s.

As described at the start of this paper, Children's Courts have operated under four different schemes during the last decade. They are:

- (1) **Pre Remissions** - up to 26 February 1984 - one sentence given. Children on sentences of six months or less served the full term; those on longer sentences were discharged after completing two-thirds (or a minimum of six months) of the sentence.
- (2) **Automatic Remissions** - from 27 February 1984 to 8 September 1987 - one sentence given and an administratively determined remission was automatically deducted from this;
- (3) **Earned Remissions** - from 9 September 1987 to 24 September 1989 - courts specified a head sentence with an optional non-probation period from which remissions could be earned for good behaviour;
- (4) **Sentencing Act** - from 25 September 1989 - for sentences of six months or less a fixed term is set by the court; normally, for sentences of greater than six months a minimum term is set with an additional term typically set at one third of the minimum term for community supervision or extended custody for poor behaviour. No remissions are available under the *Sentencing Act*.

Table 3 records how time served in custody varied according to the prevailing remission system.

**Table 3**  
**The four remission systems for juveniles during the 1980s\***

| <b>Pre Remissions</b><br>(up to Feb 84)   | <b>Automatic Remissions</b><br>(Feb 84 to Sept 87)                      | <b>Earned Remissions</b><br>(Sept 87 to Sept 89)                 | <b>Sentencing Act</b><br>(Sept 89 onwards)                               |
|---|---|--|--|
| Time served:<br>no reduction for sentences of six months or less; others discharged on completion of 2/3rds of sentence | Time served:<br>equivalent of 2/9ths of the court ordered head sentence | Time served:<br>approx 1/2 to 2/3rds of the non-probation period | Time served:<br>as designated by the court ordered minimum or fixed term |

\* Our analysis covers the period January 1982 to December 1990.

### 3.2 METHOD

Comprehensive data were available from January 1982 - the commencement of the Department of Community Services Children's Court Information System.

As with Part I of this study, this allowed comparison of mean head sentences, minimum sentences and time served under the four remission systems, as well as allowing comparison of the actual sentence length distributions. Data included offence information as well as the following offender details: age, sex, number of previous proven criminal appearances and most serious previous outcome. Bail status was not available for the whole period and thus was excluded from the analysis.

Calculation of the actual time served for the Earned Remission and the *Sentencing Act* periods was as in Part I of this study. For the Pre Remission system time served was calculated (as described in Footnote 4) as the full term of the sentence for sentences of six months or less, and at two-thirds of the sentence or six months, whichever is greater, for sentences over six months. For the Auto Remissions system it was calculated in line with the administrative arrangements at that time of two-ninths of the head sentence.

For the purpose of comparison the terms applied to sentences under the four systems is presented in Table 4.

**Table 4**  
Meaning of sentencing terms during the 1980s

| Terminology      | Pre Remissions  | Automatic Remissions | Earned Remissions                               | Sentencing Act                              |
|------------------|---|----------------------|---|---|
| Head sentence    | sentence  | sentence             | head sentence                                   | minimum plus additional terms or fixed term |
| Minimum sentence | sentence  | 1/3rd of sentence    | non-probation period                            | minimum or fixed term                       |
| Time served      | sentence for terms of six months or less; 2/3rds of sentence for others | 2/9ths of sentence   | non-probation period less calculated remissions | minimum or fixed term                       |

One complexity with calculating time served in custody was the indeterminate or "general term" (GT) sentence available to the courts until January 1988 when the *Child Welfare Act 1939* was replaced. This sentence gave the power to the state welfare department to determine the length of custody up to a maximum of three years. Until recently the order was a very popular one. During the Pre Remission period 47% of institutional orders were for general terms. This dropped to 25% during the Auto Remission period and then to only 2% during the period of Earned Remissions.

By the 1980s it had become the general practice of the welfare department to apply a constant period to all general term institutional sentences. This period was 3.5 months up until the introduction of Automatic Remissions.<sup>41</sup> At that time the administration determined that a general term sentence would equate with a sentence of 12 months, and by applying the standard Automatic Remission rules the non-probation period was four months and the time in custody 81 days.<sup>42</sup>

This changed dramatically when "earned" remissions were introduced. The absence of a non-probation period set by the court for general term sentences meant that remissions were lost from the full 12 months resulting in a time served of 215 days.<sup>43</sup>

All general term sentences have been converted to months using these figures.

### 3.3 RESULTS

Table 5 summarises the mean sentence lengths under the four different systems.

**Table 5**  
Differences in mean length of custodial sentences  
(Children's Court, January 1982 to December 1990)

| Term             | Pre Remissions | Automatic Remissions | Earned Remissions | Sentencing Act |
|------------------|----------------|----------------------|-------------------|----------------|
| Head sentence    | 6.12 mths      | 11.58 mths           | 10.10 mths        | 5.21 mths      |
| Minimum sentence | 6.12 mths      | 3.86 mths            | 6.64 mths         | 4.94 mths      |
| Time served      | 5.03 mths      | 2.57 mths            | 3.81 mths         | 4.94 mths      |

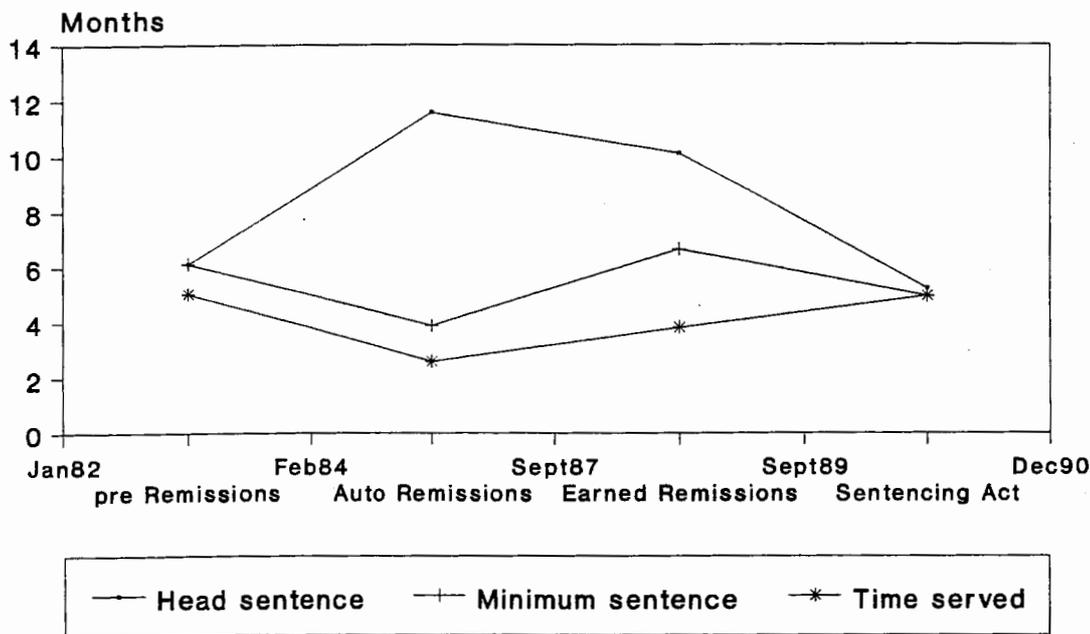
41 Information supplied by Juvenile Justice Unit, Department of Community Services.

42 Department of Community Services, Ministerial Memorandum: Remissions, 20 January 1984.

43 Department of Community Services, Memorandum from Director of Operations: Guidelines for the Operation of the New Remission Scheme for Committed Young Offenders, 7 September 1987.

The graphical form of this table appears below in Figure 8.

**Figure 8: Mean length of sentence and time served by remission scheme (Children's Court, 1/1/82 to 23/12/90)**



In order to determine any *intra*-period changes in sentence length each remission period was split into two periods and their mean sentence lengths compared. The only significant differences that were found for head sentence, minimum term or time served were in the last period under the *Sentencing Act* where small decreases were shown in the mean head sentence, minimum sentence and time served in the second half of the period.<sup>44</sup>

### 3.3.1 Head sentence

Large and significant differences<sup>45</sup> in mean head sentence can be seen under the four systems. The change to the Automatic Remission system saw an 89% increase in mean head sentence length from 6.12 months to 11.58 months. This change was partly due to the redefinition of general term sentences from 3.5 to 12 months, but even when these sentences are excluded from the analysis the same pattern applies.<sup>46</sup>

<sup>44</sup> Kruskal-Wallis,  $p < 0.01$ .

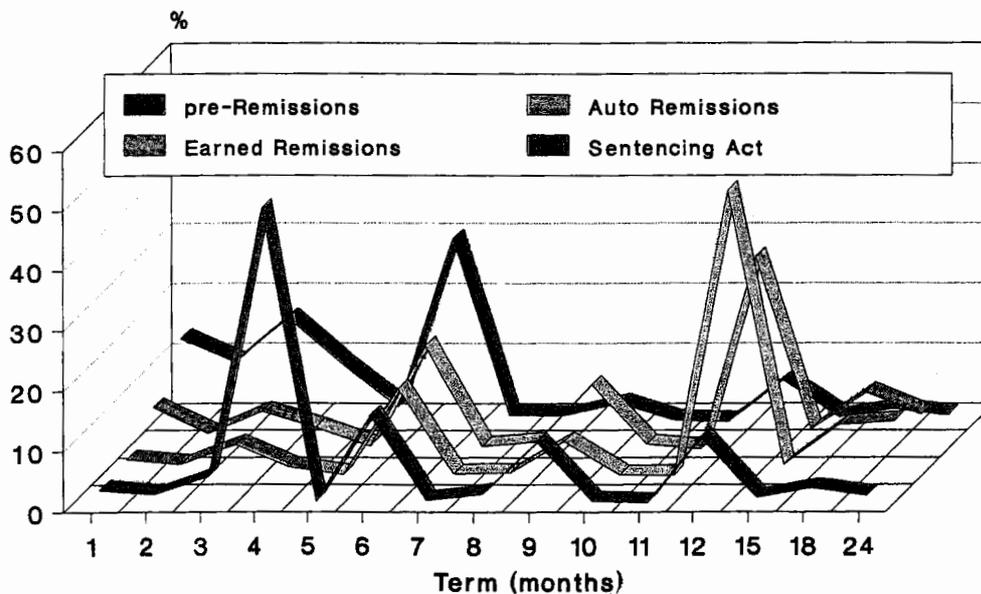
<sup>45</sup> Kruskal-Wallis,  $p < 0.01$ .

<sup>46</sup> When general term (GT) sentences are excluded the mean head sentences are: Pre Remissions 8.47 mths; Auto Remissions 11.44 mths.

When earned remissions were introduced the mean head sentence then dropped by 12.8% to 10.1 months. This at first seems hard to understand as the Earned Remission system offered just as generous remissions as the automatic system, at least for those well behaved. But unlike the Automatic Remissions system the non-probation period was able to be set by the courts and was not automatically one third of the head sentence. The subsequent drop to 5.21 months under the *Sentencing Act* has been described in Part I of this paper.

Figure 9 shows the distribution of head sentences for the four periods. The massive shift in sentences with the introduction of the Automatic Remission system is clearly visible. The presence of one or two peaks under each system highlights the popularity with the courts of a small number of standard sentences.

Figure 9: Head sentence  
by remission scheme  
(Children's Court 1/1/82 to 23/12/90)



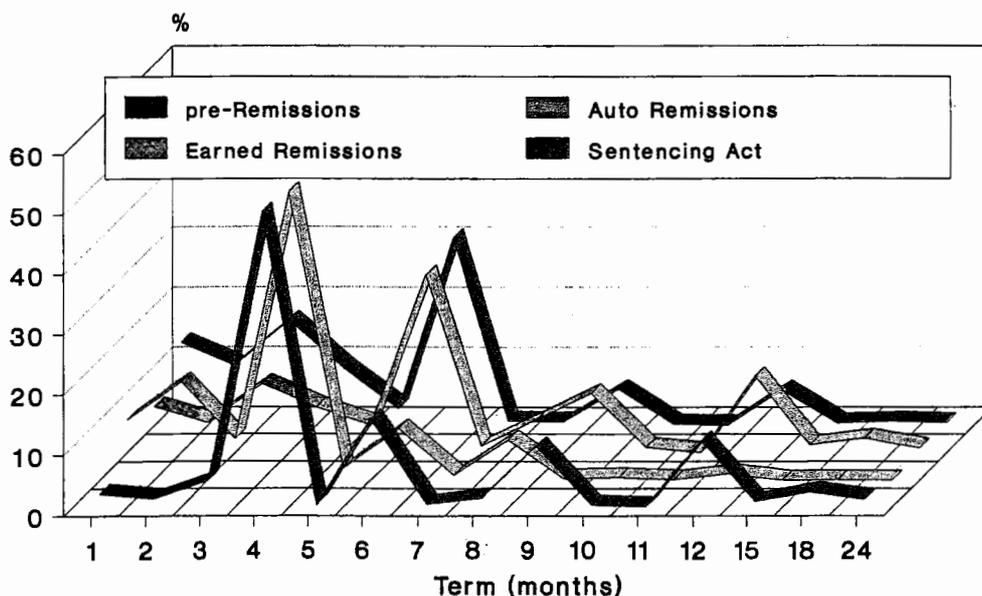
### 3.3.2 Minimum sentence

Under Automatic Remissions the minimum sentence was by definition one third of the head sentence. Despite the large increase in head sentence length when Automatic Remissions were introduced, minimum sentences were at their lowest level. The mean minimum sentence under Automatic Remissions of 3.86 months is only 63% of the mean sentence of 6.12 months under the Pre Remission system.

With the introduction of the Earned Remission system, and the power to set minimum sentences at court, the average minimum sentence increased by some 72% to 6.64 months. This then dropped to 4.94 months under the *Sentencing Act*, a decrease of 25.6%.

As can be seen from the graph of the minimum sentence distribution (Figure 10), the Auto Remissions system calculation of the minimum term at one-third of the head sentence brought the majority of orders down to four months or less. The distribution is similar to that for the Pre Remission system except that the automatic reduction generated many more one and two month minimum terms. This was quite rare under the previous system.

Figure 10: Minimum sentence by remission scheme (Children's Court 1/1/82 to 23/12/90)



### 3.3.3 Post-release supervision

The introduction of non-probation periods created a period for possible post-release supervision. As is shown in Figure 8, this period - the time between release from custody and termination of the head sentence - was nine months or over three times the mean time served during the Auto Remission period, and 6.2 months or almost twice the mean time served during Earned Remissions.

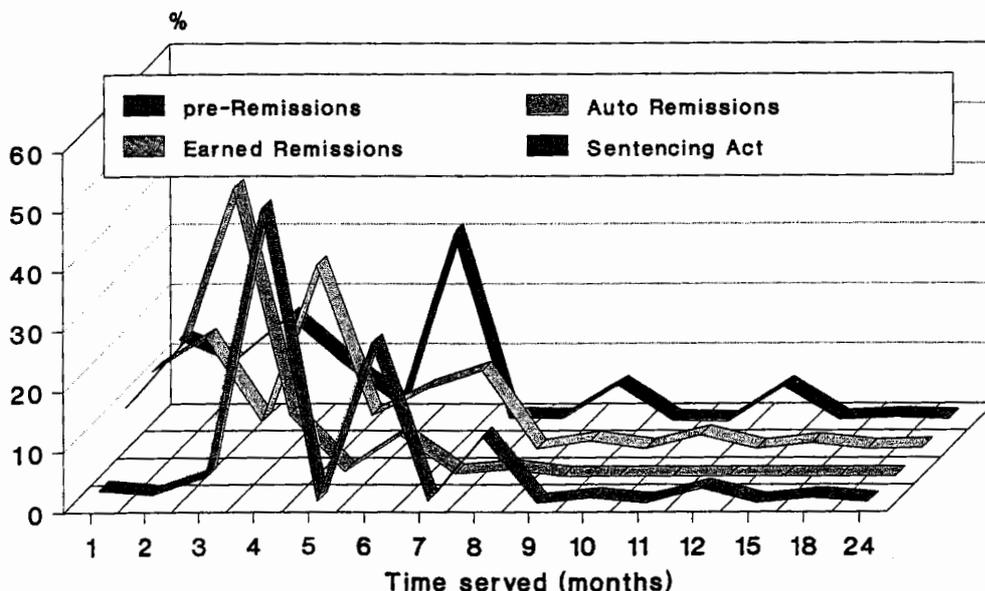
However, this does not indicate the amount of actual supervision provided. In fact the Department of Community Services provided virtually no post-discharge supervision during either of these periods.<sup>47</sup> Only with the introduction of the *Sentencing Act* were staff actually allocated to this task.

### 3.3.4 Time served in custody

The mean time served dropped dramatically with the introduction of the Automatic Remission system. The drop was from 5.03 months to 2.57 months - a 49% reduction. Time served in custody then increased by 48% to 3.81 months under Earned Remissions and rose again by 30% to 4.94 months under the *Sentencing Act*.

The pattern of time served is shown in Figure 11. The popularity of particular orders and their effect on the mean time served can be clearly seen.

Figure 11: Time served in custody  
by remission scheme  
(Children's Court 1/1/82 to 23/12/90)



<sup>47</sup> The Juvenile Justice Unit indicated that the limited community supervision staff were almost exclusively devoted to those on non-custodial orders.

### 3.3.4 Comparability of the groups

While significant changes in sentencing patterns appear to be linked to the different remission systems it may be that the root causes of the changes are not to do with remission systems but rather with changing characteristics in the population being sentenced. The analysis so far has not attempted to control for these.

As was found in Part I of this paper, significant differences do exist in the two populations sentenced under the Earned Remission system and the *Sentencing Act*. It was necessary to control for these to give a better idea whether sentencing changes were really due to the different sentencing regimes.

As this part of the study is comparing groups over a much longer period (and one in which other major reforms to the juvenile justice system were taking place)<sup>48</sup> it is even more important to attempt to isolate the effects of remissions schemes.

A comparison of relevant background variables shows significant differences, over the nine year period, in all of the following: sentences, offences, and the offender characteristics of age, gender and criminal record (see Appendix B).

Because of the large number of complex interactions and the categorical nature of much of the data it was decided not to attempt statistical control, or adjust for the differences, but rather to compare groups that are matched in terms of the above characteristics for each period.

Four of the most common offence types were chosen: steal motor vehicle, break, enter and steal, common assault and public order offences. For each of these offence types for each period, all cases with the following offender characteristics were drawn: males, 16 years or older, with three or more previous appearances. That is, those most likely to be committed to a term in custody in an institution.

In this way it was possible to compare "like-with-like" despite the many and massive changes to the system over time. These matched samples make up over 3,000 sentences or about 27% of all those sentenced during the period.

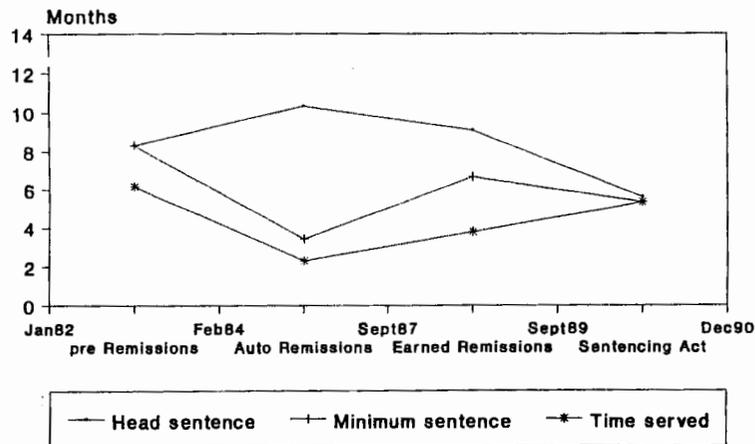
It can be seen from Figure 12, the same general pattern of sentence lengths is exhibited for each of the selected offence types as for the overall population.

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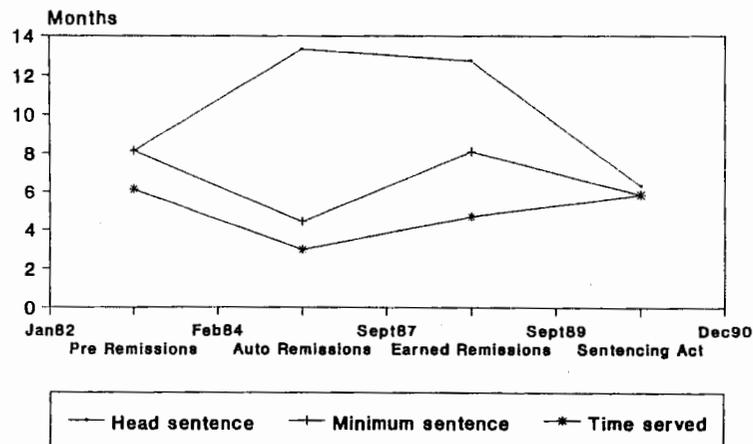
48 From 1984 onwards the Department of Community Services has worked under a specific policy of using institutions only as a last resort. This resulted in the closure of a number of detention centres, the introduction of community service orders and upgraded community supervision resources, and the development of data systems to monitor the effectiveness of the policy.

Figure 12: Mean length of sentences and time served — matched groups (Children's Court, 1/1/82 to 23/12/90)

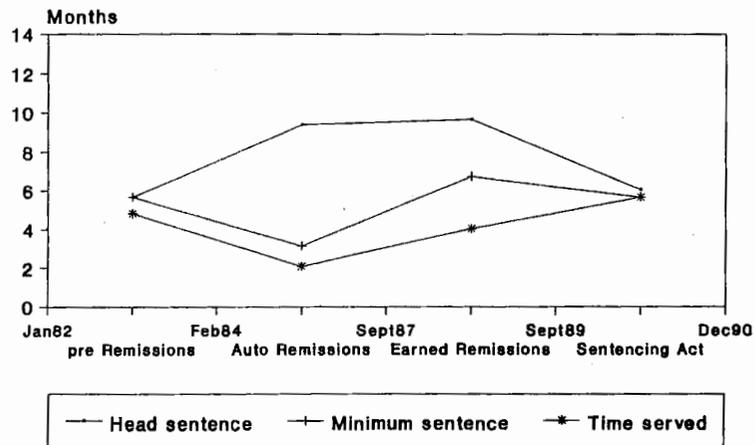
**Assault**  
(males, over 15 yrs, 3 or more priors)



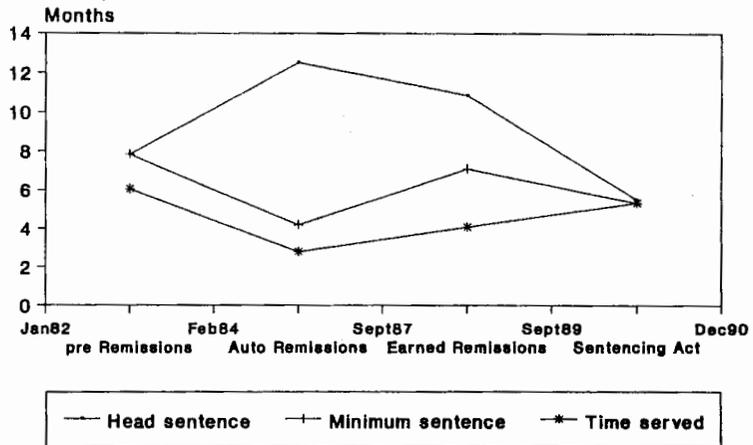
**Break, Enter and Steal**  
(males, over 15 yrs, 3 or more priors)



**Public Order Offences**  
(males, over 15 yrs, 3 or more priors)



**Steal Motor Vehicle**  
(males, over 15 yrs, 3 or more priors)



### 3.4 DISCUSSION

Part I compared the systems under Earned Remission and the *Sentencing Act* and found that time served had increased by around 34%. This verified the claims made by many commentators that the *Sentencing Act* would result in increased periods in custody.

Part II has helped to put this situation in a wider context. By looking at sentences given before the introduction of remissions we find that the *Sentencing Act*, while increasing time in custody, has not created unprecedented sentences. In fact, it appears as if the *Sentencing Act* may have acted to bring sentences back to the level that existed before remissions were introduced back in 1984.

If one looks at the "roller coaster ride" that head sentences have taken during the 1980s it becomes clear that they have been shaped more by the sentencers' desire to achieve a particular custodial period than by the decisions of the Courts of Criminal Appeal. No changes to offender or offence patterns can account for the extreme differences in mean head sentence between the different remission systems.

It is this pragmatic or homeostatic quality which has dominated Children's Court sentencing during the 1980s. The sentencers had an idea of how long they wanted offenders to serve in custody and they adjusted their sentences in order to achieve this.

But there is another important feature which emerges from the decade of data - the substantial decrease in the use of custody by the Children's Court and the move towards using custody as truly a sentence of last resort. As can be seen in Appendix B, during the 1980s custodial orders have decreased from 11.0% of outcomes to 6.3% of outcomes. As the data suggests, this has been achieved by generally restricting custody to the older, more serious, and more recidivist offenders, and by ensuring that alternatives such as community service orders are used for those less serious offenders who would have otherwise been incarcerated.

## CONCLUSION

### 4 CONCLUSION

This section draws together the main points which emerge from this critical review of sentencing in the Children's Court. The main points are:

- (1) There has been a decrease in the mean length of sentences given by the Children's Court since the introduction of the *Sentencing Act*. As has been found with the adult courts, this decrease has not been sufficient to totally compensate for the abolition of remissions. The result has been a 34% increase in the average time served by juvenile offenders.
- (2) It is very likely that this decrease in sentence length is a response by the courts to compensate for the loss of remissions. No known changes to offender or offence profiles can explain this decrease.
- (3) The 34% increase in average time served by children since the introduction of the *Sentencing Act* is much greater than the 19% increase found for adults.<sup>49</sup>

It may be that this difference is due to the fact that sentencers were largely unaware that children received more generous remissions than adults. Thus, a greater level of sentence reduction was required in order to more adequately compensate for the loss of remission entitlements. That children and adults both had a similar decrease in mean head sentence (47% for children and 51% for adults) lends support to this explanation.

- (4) When one takes a wider perspective and examines the sentencing of children over the last decade it becomes clear that the time served in custody under the *Sentencing Act* is not unprecedented. In fact, it appears that the Children's Courts have deliberately modified sentences in order to achieve long term stability in the time juvenile offenders must serve in custody.
- (5) The present legislative arrangements make it difficult (but not impossible) for courts to provide an adequate period of post-release supervision for juveniles.

#### 4.1 Policy issues

A number of implications arise from the findings of this study which are worthy of further consideration:

- (1) Children are not adequately catered for by the *Sentencing Act*. Legislating that sentences of six months or less must be of fixed term simply fails to recognise

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<sup>49</sup> For children the 34% increase translates, on average, to an extra five weeks in custody. For adults, the 19% increase means, on average, an extra seven weeks in prison (Gorta, A and Eyland, S *Truth in Sentencing - Impact of the Sentencing Act 1989* (Report 1). Research and Statistics Division, NSW Dept of Corrective Services, June 1990).

that the majority of children sentenced in the Children's Court will be denied all opportunity for parole. Furthermore, it means that children will serve longer in custody than their predecessors because the Act provides no legislative direction to the courts to reduce sentences in order to offset the loss of remissions.

- (2) There is a solution under the Act. The "special circumstances" clause of s 5(2) of the *Sentencing Act* can be utilised more effectively by the Children's Court. The court may legitimately take into account the youth and special needs of juvenile offenders. In turn, this provides the court with the option of specifying a period of parole in excess of the mandated "one-third of the minimum term". Therefore, in relation to many juvenile offenders, the court is within its rights under the legislation to set a sentence which contains a relatively short term of custody and a relatively long period of parole - so long as the full term of the sentence exceeds six months and the court states the reason for the decision.
- (3) Finally, it should be pointed out that this study has only been possible because of the high quality and comprehensiveness of the Children's Court data. In particular, the inclusion of complete criminal record information for each offender has allowed us to isolate changes produced by the *Sentencing Act* from those due simply to any changes in those appearing before the courts.

This is not possible with the adult court collections which do not provide adequate information on the very important area of criminal record. Without this information one cannot adequately monitor the effectiveness of sentences or the legislation which shapes them.

It is this ability to monitor the effectiveness of sentencing law and administrative policies which has provided the basis of the success of the children's criminal justice system in controlling the use of custody in New South Wales at a time when its use for adults has reached unprecedented levels.<sup>50</sup>

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<sup>50</sup> Luke, G "Keeping Alternatives as Alternatives", Paper presented at the Australian Institute of Criminology Conference, *Keeping People out of Prison*, Hobart 27-29 March 1990.

## Appendix A

Remissions earned by juvenile detainees under the Earned Remission System \*  
(9 September 1987 to 24 September 1989)

| Minimum Sentence<br>(in months) | Time served in custody<br>(in days) | Time served as<br>% of sentence |
|---------------------------------|-------------------------------------|---------------------------------|
| 1                               | 30                                  | 100%                            |
| 2                               | 30                                  | 49%                             |
| 3                               | 43                                  | 48%                             |
| 4                               | 62                                  | 51%                             |
| 5                               | 81                                  | 53%                             |
| 6                               | 100                                 | 55%                             |
| 7                               | 119                                 | 56%                             |
| 8                               | 138                                 | 57%                             |
| 9                               | 157                                 | 57%                             |
| 10                              | 176                                 | 58%                             |
| 11                              | 196                                 | 59%                             |
| 12                              | 215                                 | 59%                             |
| 14                              | 253                                 | 59%                             |
| 15                              | 272                                 | 60%                             |
| 16                              | 291                                 | 60%                             |
| 18                              | 329                                 | 60%                             |
| 20                              | 367                                 | 60%                             |
| 21                              | 386                                 | 60%                             |
| 22                              | 406                                 | 61%                             |
| 24                              | 444                                 | 61%                             |
| 30                              | 558                                 | 61%                             |
| 36                              | 673                                 | 61%                             |

\* These figures are based on the average remission level of 18 days per month served.

Under the Earned Remission system children with minimum sentences of more than one month were eligible for up to 19 days per month remissions. The remissions were determined by the institutional superintendent and were made up of a maximum 15 days per month for good behaviour and industry, two days per month for those in lower security centres, and 2 days per month for excellence. Remissions could not reduce the time served to less than one month.

As remissions were granted for each month served with good behaviour and not simply for each month of the minimum sentence the determination of the discharge date in individual cases involved a complex calculation at the end of each month served. On average children were granted 18 days for each month served and thus received  $18/(18 + 30.4) \times$  **minimum sentence** days remission. This works out at about a 37% reduction of the minimum term. On top of this children received a 14 day terminal remission which was deducted from their calculated discharge date. Thus, children on shorter sentences served as little as 48% of the minimum sentence.

## Appendix B

**Court outcomes by remission system  
(Children's Court, January 1982 to December 1990)**

(% breakdown, frequencies in brackets)

|                 | Pre<br>Remissions | Auto<br>Remissions | Earned<br>Remissions | Sentencing<br>Act |
|-----------------|-------------------|--------------------|----------------------|-------------------|
| Institution     | 11.0 (2773)       | 9.8 (5124)         | 7.0 (2208)           | 6.3 (1261)        |
| CSO             | 0.1 (18)          | 0.9 (480)          | 3.6 (1135)           | 4.6 (923)         |
| Recog wt super  | 19.5 (4944)       | 8.0 (4171)         | 10.8 (3426)          | 13.1 (2646)       |
| Recog w/o super | 24.0 (6077)       | 27.7 (14502)       | 23.7 (7517)          | 24.3 (4890)       |
| Other           | 45.5 (11517)      | 53.7 (28178)       | 55.0 (17490)         | 51.8 (10426)      |
| <b>TOTAL</b>    | 100.0 (25329)     | 100.0 (52455)      | 100.0 (31776)        | 100.0 (20146)     |

Chi-square = 4808.0, df=12, p < 0.01

**Characteristics of juvenile offenders  
given custodial orders  
(Children's Court, January 1982 to December 1990)**

| Gender       | Pre<br>Remissions | Auto<br>Remissions | Earned<br>Remissions | Sentencing<br>Act |
|--------------|-------------------|--------------------|----------------------|-------------------|
| Female       | 8.3 (225)         | 5.6 (281)          | 6.6 (140)            | 8.0 (100)         |
| Male         | 91.7 (2496)       | 94.4 (4769)        | 93.4 (1969)          | 92.0 (1155)       |
| <b>TOTAL</b> | 100.0 (2721)      | 100.0 (5050)       | 100.0 (2109)         | 100.00 (1255)     |

Chi-square = 24.4, df=3, p < 0.01

| Age*         | Pre Remissions | Auto Remissions | Earned Remissions | Sentencing Act |
|--------------|----------------|-----------------|-------------------|----------------|
| 10-15 yrs    | 56.6 (1540)    | 47.3 (2390)     | 35.5 (749)        | 34.1 (428)     |
| 16-18 yrs    | 43.4 (1181)    | 52.7 (2660)     | 64.5 (1360)       | 65.9 (827)     |
| <b>TOTAL</b> | 100.0 (2721)   | 100.0 (5050)    | 100.0 (2109)      | 100.0 (1255)   |

\* Recorded in whole years as at date of final court appearance.

Chi-square = 291.5, df=3, p < 0.01

#### Number of Previous Proven Appearances

|              | Pre Remissions | Auto Remissions | Earned Remissions | Sentencing Act |
|--------------|----------------|-----------------|-------------------|----------------|
| None         | 15.7 (426)     | 9.5 (477)       | 6.8 (144)         | 4.5 (56)       |
| 1-2          | 33.4 (909)     | 23.1 (1167)     | 20.6 (435)        | 16.0 (201)     |
| 3-5          | 31.1 (845)     | 32.3 (1632)     | 32.8 (691)        | 33.1 (415)     |
| 6 or more    | 19.9 (541)     | 35.1 (1774)     | 39.8 (839)        | 46.5 (583)     |
| <b>TOTAL</b> | 100.0 (2721)   | 100.0 (5050)    | 100.0 (2109)      | 100.0 (1255)   |

Chi-square = 535.8, df=9, p < 0.01

**Most Serious Previous Outcome**

|                        | <b>Pre<br/>Remissions</b> | <b>Auto<br/>Remissions</b> | <b>Earned<br/>Remissions</b> | <b>Sentencing<br/>Act</b> |
|------------------------|---------------------------|----------------------------|------------------------------|---------------------------|
| <b>Institution</b>     | 52.5 (1428)               | 62.8 (3169)                | 59.6 (1256)                  | 59.9 (752)                |
| <b>CSO</b>             | 0.0 (1)                   | 1.2 (60)                   | 6.5 (137)                    | 9.9 (124)                 |
| <b>Recog wt super</b>  | 15.8 (430)                | 11.2 (564)                 | 10.2 (214)                   | 14.5 (182)                |
| <b>Recog w/o super</b> | 13.0 (353)                | 12.7 (643)                 | 13.9 (293)                   | 7.8 (98)                  |
| <b>Other</b>           | 18.7 (509)                | 12.2 (614)                 | 9.9 (209)                    | 7.9 (99)                  |
| <b>TOTAL</b>           | 100.0 (2721)              | 100.0 (5050)               | 100.0 (2109)                 | 100.0 (1255)              |

Chi-square = 648.9, df=12, p < 0.01