

# THE IMPACT OF TRUTH IN SENTENCING

## Part 1 – The Higher Courts

Michael Cain Senior Research Officer  
Veronica Roby Research Assistant

**T**he purpose of this study is to identify whether sentencing in the District and Supreme Courts (ie the higher courts) has changed as a consequence of the reforms introduced by the Sentencing Act 1989 (NSW) which commenced operation on the 25 September 1989. It also examines the extent to which changes in sentencing patterns may be accounted for by coincidental variations in the composition of offences, the profile of offenders and concurrent legislative amendments. Amongst other things, the changing pattern of sentencing, the use of alternatives to imprisonment and the phenomenon known as “net-widening” are discussed.

### The Data

Data for this study were obtained from the Judicial Commission's *Sentencing Information System* (SIS). The SIS is a computerised information system which contains, inter alia, statistics on court appearances finalised in the local and higher courts since 1988. These data were originally derived from the statistical collections held by the New South Wales Bureau of Crime Statistics and Research.

The data consist of 10,853 records. Each record relates to the appearance of an offender found guilty and sentenced in the higher courts during the period from 1 January 1988 to 30 June 1991.<sup>1</sup> Approximately half of the records (5,672 or 52.3%) relate to appearances finalised before the introduction of the *Sentencing Act* 1989 (ie prior to 25 September 1989). The remaining records (5,181 or 47.7%) relate to appearances finalised after the commencement of the *Sentencing Act*. This permits a comparison of 21 months of pre- *Sentencing Act* data with 21 months of post- *Sentencing Act* data.

### Profile of Offences

In order to determine whether there has been any change in the nature of offending across the periods examined, offences were grouped initially

into the three major offence categories: “offences against the person”, “property offences”, and “offences against good order” (which includes drug and traffic offences).

This process revealed that, in the higher courts prior to the *Sentencing Act*, the most common type of offence was offences against the person (36.2%), followed by property offences (34.7%), and offences against good order (29.1%). Following the *Sentencing Act* there was a slight increase (3.1%) in offences against the person (39.3%), a slight decrease (2.6%) in property offences (32.1%) and a very small decrease (0.5%) in good order offences (28.6%).

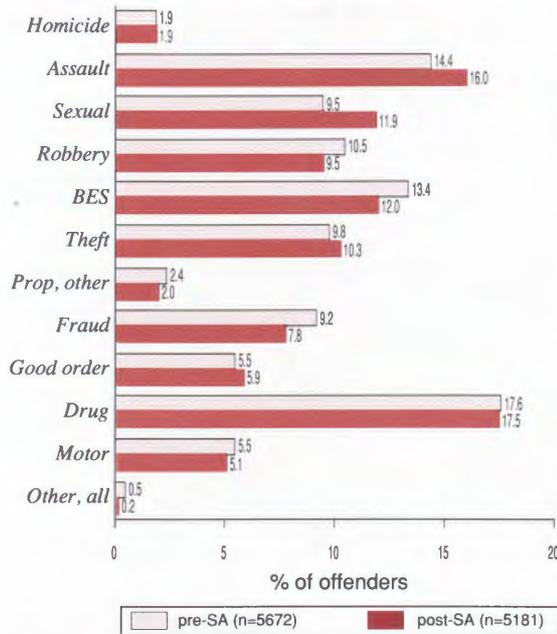
At a more specific level, drug offences were the most frequently dealt with type of offence in the higher courts. Assaults, break enter and steal, theft, robbery, and sexual offences also figured prominently. Figure 1 provides a profile of offences for which sentences were handed down in the higher courts. It indicates that over the 42 month period examined there has been very little change in the makeup of offences for which offenders were sentenced. Small proportionate increases in the incidence of sexual offences (2.4%) and assaults (1.6%), and small proportionate decreases in break enter and steal offences (1.4%) and fraud offences (1.4%) were the only notable variations.

#### Note 1

Records relate to trial and sentence cases only – appeal cases have been excluded. A record on the SIS comprises sentence information on the principal offence for each offender at a finalised court appearance. The principal offence is defined as the offence attracting the most severe penalty.



**Figure 1**  
**Offence Profile by Period — Higher Courts**  
 (Pre 1.1.88 - 24.9.89, Post 25.9.89 - 30.6.91)



Note: "Assault" includes "Person, other"

### Offender Characteristics

Having regard to the large number of complex interactions and the categorical nature of much of the data, it is extremely difficult, if not impossible, to statistically determine the effect that variations in the characteristics of offenders may have had on sentencing in the higher courts. Consequently, observed differences in the makeup of offenders sentenced in the higher courts are presented descriptively. It may be said, however, that the noted variations in the profile of offenders over the two periods appear minimal and so may be assumed to have had little impact on the pattern of sentences, generally.

**Note**<sup>2</sup>

Under these sections, the court, if it thinks fit, can take all or any of the offences in respect of which guilt has been admitted into account when imposing a penalty for another offence: s 21(2). However, the maximum sentence that may be imposed cannot exceed the maximum sentence for the offence for which the offender has been found guilty: s 21(3).  
 A sentence which takes outstanding charges into consideration is, in law, passed for the offence for which the defendant has been found guilty. There is no conviction in respect of the offences taken into account: s 23(b).

**TABLE 1** Age of Offender by Period — Higher Courts  
 (Pre 1.1.88 - 24.9.89, Post 25.9.89 - 30.6.91)

AGE	Pre %	Pre n	Post %	Post n	Diff %	Diff n
< 21	21.5	(1181)	22.2	(1122)	0.7	(-59)
21-30	43.9	(2415)	43.3	(2191)	-0.6	(-224)
31-40	23.0	(1265)	21.2	(1070)	-1.8	(-195)
> 40	11.7	(643)	13.3	(675)	1.6	(32)
Total	100.0	(5504)	100.0	(5058)	0.0	(-446)

Age missing: Pre 3.0%, Post 2.4%.

**Age** There were small changes in the age composition of offenders sentenced in the higher courts following the introduction of the *Sentencing Act*: see Table 1. Proportionately, there were more offenders over 40 years and more offenders under 21 years in the post- *Sentencing Act* period. Nonetheless, individuals aged 21 to 40 continued to represent around two thirds of all sentenced offenders.

**Prior record** The proportion of individuals with a record of prior offending remained relatively constant at around two thirds of all sentenced offenders. However, there was a small increase in the number of offenders with no previous convictions (up 2.7%) in the period after the introduction of the *Sentencing Act*.

**TABLE 2** Prior Record of Offender by Period — Higher Courts  
 (Pre 1.1.88 - 24.9.89, Post 25.9.89 - 30.6.91)

PRIOR RECORD	Pre %	Pre n	Post %	Post n	Diff %	Diff n
No prior	34.2	(1801)	36.9	(1852)	2.7	(51)
Prior, diff offence type	23.8	(1255)	22.2	(1115)	-1.6	(-140)
Prior, same offence type	25.8	(1361)	25.9	(1299)	-0.1	(-62)
Prior, same with prison	16.2	(854)	15.0	(753)	-1.2	(-101)
Total	100.0	(5271)	100.0	(5019)	0.0	(-252)

Prior record missing: Pre 7.1%, Post 3.1%.

**Plea** Slightly more than four out of every five offenders sentenced in the higher courts pleaded guilty: Pre 83.6% (4,657), Post 82.9% (4,269). A small proportional increase (0.7%) in a plea of not guilty occurred in the post-*Sentencing Act* period.

**Other offences taken into account**

In the period following the *Sentencing Act* there was a slight increase in the number of offenders admitting to outstanding crimes in order to "wipe the slate clean" under ss 20 to 23 of the Criminal Procedure Act 1986 (NSW).<sup>2</sup> An additional 2.9% of offenders had their sentence for the principal offence determined with outstanding offences taken into consideration. Overall, about one in ten offenders sentenced in the higher courts had outstanding offences taken into account: Pre 8.7% (496), Post 11.6% (600).

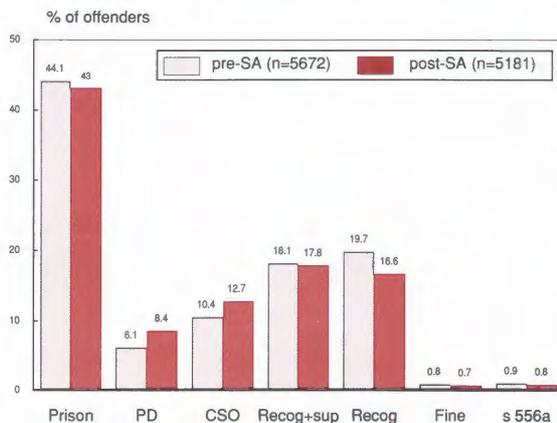
## Sentencing Outcomes

As the higher courts mainly deal with serious (indictable) criminal matters, it is not surprising to find that the lesser penalties such as “offence proven, charge dismissed”, and “fines” are not frequently ordered.

Figure 2 shows that a high proportion of offenders sentenced in the District and Supreme Courts received prison sentences. More than four out of every ten offenders were sentenced to a term of imprisonment.

Together, recognizances with and without supervision were ordered for just over one-third of all proven offenders. Community service and periodic detention were also reasonably popular penalties and were together handed down to approximately one in every five proven offenders.

**Figure 2**  
Sentencing Outcomes by Period — Higher Courts  
(1.1.88 - 30.6.91)



s 556A includes rising of the court, s 19B Crimes Act (Cwth) charge dismissed and s 20 Crimes Act (Cwth) release by recognizance after imprisonment.

Following the introduction of the *Sentencing Act* a number of changes in the proportionate use of the various sentencing options occurred. In particular, there was:

- (1) a small decrease (1.1%) in the use of imprisonment (this equates to 274 fewer offenders going to prison than in the previous 21 month period);
- (2) an increase (2.4%) in the use of periodic detention (an additional 92 offenders serving this sentence);
- (3) an increase (2.3%) in the use of commu-

nity service orders (an additional 69 offenders were given a CSO);

- (4) a decrease (3.1%) in the use of unsupervised recognizances;
- (5) practically *no change* in the use of supervised recognizances, fines and dismissals.

The increased use of periodic detention and community service orders and the concurrent decrease in the use of imprisonment since the *Sentencing Act* appear to indicate that the higher courts are tending to use imprisonment more economically and more as an option of last resort. Among the likely reasons for this are:

- (1) a growing recognition of the unprecedented high number of adult prisoners and the associated high costs of imprisonment;
- (2) a possible concern amongst some judges that the *Sentencing Act* has exacerbated the prison overcrowding problem by increasing the actual time sentenced prisoners must serve in custody.<sup>3</sup> If this concern exists, the courts may be more inclined to divert from imprisonment into semi- and non-custodial programs those offenders who present least risk to the community;
- (3) recent legislative amendments making both periodic detention and community service more severe penalties and, therefore, more suitable alternatives to imprisonment;
- (4) additional opportunities for the making of semi- and non-custodial orders arising from increased resources in these areas.

It appears that the use of periodic detention and community service orders have contributed to a reduction in the use of imprisonment as a sentencing option. Clearly, however, not all of the increase in the use of alternatives to imprisonment can be explained by the drop in the number of sentenced prisoners. The decrease in the proportionate use of unsupervised recognizances means that “net-widening” has occurred. As can be seen from Figure 2, the 3.1% decrease in unsupervised recognizances together with the 1.1% decrease in imprisonment virtually accounts for all the rise in the proportionate use of periodic detention and community service orders.

### Note <sup>3</sup>

See Cain M and Luke G 1991 *Sentencing Juvenile Offenders and the Sentencing Act 1989 (NSW)*. Monograph Series No 4, Judicial Commission of NSW, December 1991. Also see 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. And Maika E 1991 *NSW Sentencing Act 1989*. NSW Bureau of Crime Statistics and Research.

## Imprisonment

Table 3 shows a substantial increase in the use of minimum and fixed term sentences of 12 months or less since the introduction of the *Sentencing Act*. The increase is comprised of a 7.8% rise in minimum sentences<sup>4</sup> of up to six months and a 2.7% rise in sentences of six to twelve months. Almost all other minimum sentences have either remained at a comparable proportionate level or are down, albeit slightly.

**Note 4**

The term "minimum sentence" refers to the non-parole period or determinate sentence and the minimum term or fixed term, as the case may be. It is intended to refer to the minimum period of custody that the prisoner must serve having regard only to the court's pronouncement on sentence.

**Note 5**

Includes non-parole periods and determinate sentences. See Note 4.

**Note 6**

Section 7 of the *Sentencing Act* provides that courts must order a fixed term for all sentences not exceeding six months in length. In addition, s 5(2) stipulates that an additional term (except under special circumstances) must be no greater than one-third the minimum term. In practice, because of this 75% rule, sentences shorter than 12 months normally would have a parole period of less than three months. Such short additional terms may be viewed as impractical by not comprising a reasonable and worthwhile period of post-release supervision.

**TABLE 3** Minimum and Fixed Term Sentences<sup>5</sup> by Period – Higher Courts (Pre 1.1.88 - 24.9.89, Post 25.9.89 - 30.6.91)

MINIMUM TERM	Pre %	Pre n	Post %	Post n	Diff %	Diff n
6 mths	11.1	(279)	18.9	(422)	7.8	(143)
12 mths	21.7	(543)	24.4	(543)	2.7	(0)
18 mths	17.3	(432)	13.9	(310)	-3.4	(-122)
24 mths	12.9	(324)	12.8	(285)	-0.1	(-39)
36 mths	15.2	(381)	13.7	(305)	-1.5	(-76)
48 mths	7.9	(198)	6.4	(142)	-1.5	(-56)
5 yrs	4.1	(103)	3.5	(77)	-0.6	(-26)
6-10 yrs	6.9	(172)	4.3	(95)	-2.6	(-77)
11-15 yrs	1.6	(41)	0.7	(16)	-0.9	(-25)
16-20 yrs	0.2	(4)	0.2	(5)	0.0	(1)
+ 20 yrs	1.0	(26)	1.3	(29)	0.3	(3)
<b>Total</b>	<b>100.0</b>	<b>(2503)</b>	<b>100.0</b>	<b>(2229)</b>	<b>0.0</b>	<b>(-274)</b>

**Figure 3** Minimum Sentence by Period — Higher Courts Length of custodial term by cumulative percentage of offenders (Pre 1.1.88 - 24.9.89, Post 25.9.89 - 30.6.91)

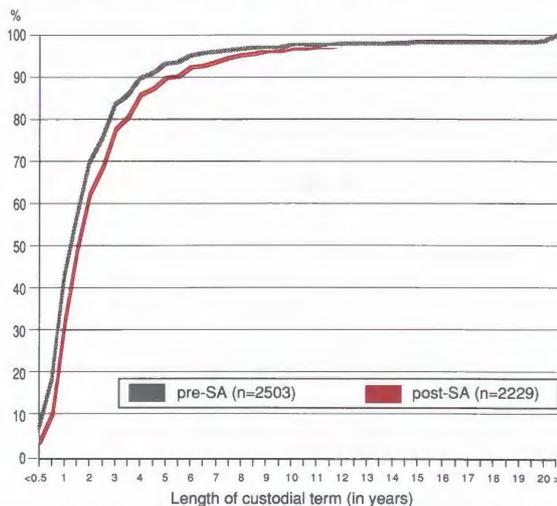


Figure 3 reveals that, aside from the increased level of shorter minimum sentences characterizing the post- *Sentencing Act* period, the pattern of sentencing in the higher courts was highly consistent.

There was, however, one notable decrease in the post- *Sentencing Act* period, a 3.4% drop in minimum sentences of between 12 and 18 months. It seems likely that such sentences were "absorbed" by the increase in the lower level terms (ie by those of 12 months or less). This may mean that the courts have partially compensated for the loss of remissions arising from the *Sentencing Act*.

By reducing longer sentences to the level where fixed terms are mandatory (ie six months or less) or more practical (ie six to twelve months)<sup>6</sup>, judicial officers may have been attempting to establish a degree of parity in the time served under both sentencing regimes. That the average length of the minimum sentence has decreased by 12.0% (from 33.4 months to 29.4 months) following the abolition of remissions lends support to this theory.

The *Sentencing Act* has also affected the courts' use of parole. There are observable differences in both the proportion of custodial sentences which contain a parole component and the potential length of parole. Following the *Sentencing Act* the proportion of sentences without a parole component increased by 30.3%. Further, the average (potential) parole period has dropped from 25.7 months to 15.3 months — a reduction of 40.5%.

Generally, the proportionate use of imprisonment was down. For robbery it was down by 10.6%; for break enter and steal it was down 5.4%; but for sexual offences and homicide it was up by 3.3% and 3.1%, respectively.

## Periodic Detention

Table 4 shows that there have been changes in the use of periodic detention.

**TABLE 4** Periodic Detention by Period – Higher Courts  
(Pre 1.1.88 - 24.9.89, Post 25.9.89 - 30.6.91)

TERM OF PD	Pre %	n	Post %	n	Diff %	n
6 mths	7.3	(25)	14.5	(63)	7.2	(38)
12 mths	29.4	(101)	27.4	(119)	-2.0	(18)
18 mths	63.3	(217)	31.0	(135)	-32.3	(-82)
24 mths	0.0	(0)	13.3	(58)	13.3	(58)
30 mths	0.0	(0)	5.3	(23)	5.3	(23)
36 mths	0.0	(0)	8.5	(37)	8.5	(37)
<b>TOTAL</b>	<b>100.0</b>	<b>(343)</b>	<b>100.0</b>	<b>(435)</b>	<b>0.0</b>	<b>(92)</b>

In the post- *Sentencing Act* period there was a one-third decrease in the proportionate use of 18 month periodic detention terms and an increase of 27.1% in the proportionate use of the longer terms of 24 to 36 months. This shift can be explained by the fact that the maximum term for periodic detention was raised from 18 months to 36 months by the *Periodic Detention of Prisoners (Amendment) Act 1989* which took effect on 6 September 1989, just prior to the commencement of the *Sentencing Act*.

The amendments to the legislation also appear to have contributed to an overall increase in the use of periodic detention from 343 orders in the 21 month period before the *Sentencing Act* to 435 orders in the 21 month period after the *Sentencing Act*. This represents an increase of 26.8% in the actual number of offenders ordered into periodic detention.

However, not all of the 26.8% increase in the use of periodic detention orders should be attributed to the legislative changes. The 7.2% increase in the shorter (six month) orders suggests that some offenders are now being given periodic detention in preference to some other sanction. As the proportionate use of periodic detention was up for all offences (except assault and good order offences), it may be that the less serious offenders, who previously would have received a short full-time prison term, were being diverted into periodic detention. Alternatively, as noted earlier, offenders who may previously have received probation may now be receiving periodic detention.

The more notable offence-specific increases in the proportionate use of periodic detention were in relation to motoring offences (up 8.6%), fraud (up 6.3%) and sexual offences (up 3.2%).

## Community Service Orders

**TABLE 5** Community Services by Period – Higher Courts  
(Pre 1.1.88 - 24.9.89, Post 25.9.89 - 30.6.91)

Length of CSO	Pre %	n	Post %	n	Diff %	n
1-50 hrs	3.9	(24)	1.4	(9)	-2.5	(-14)
51-100 hrs	10.9	(64)	12.5	(82)	1.6	(18)
101-200 hrs	31.9	(187)	27.7	(182)	-4.2	(-5)
201-300 hrs	53.3	(313)	34.2	(225)	-19.1	(-88)
301-500 hrs	0.0	(0)	24.2	(159)	24.2	(159)
<b>TOTAL</b>	<b>100.0</b>	<b>(588)</b>	<b>100.0</b>	<b>(657)</b>	<b>0.0</b>	<b>(69)</b>

Table 5 shows that the proportionate use of 101 to 300 hour community service orders decreased by 23.3%, while the use of longer (301 to 500 hour) community service orders increased to 24.2%. It seems that since the commencement, on 25 February 1990, of the *Community Service Orders (Amendment) Act 1989* which increased the maximum number of hours of community service from 300 to 500 hours, more offenders (up by 12% from 588 to 657) were receiving CSOs and for longer terms.<sup>7</sup> The fact that there were fewer offenders receiving CSOs of two to three hundred hours suggests that the courts have been more punitive towards those offenders who might have otherwise received a less severe measure of the same penalty. In a sense, this could be described as a form of “net-widening”.

There were increases in the proportionate use of CSOs for all offences except for sexual offences, which was down by 3.4%. The largest increases in the use of CSOs were for fraud offences (up 8.2%), drug offences (up 2.6%) and offences against good order (up 4.8%).

## Recognizance with Supervision

It can be seen from Table 6 that prior to the *Sentencing Act* 51.2% of all dispositions of this type were for three year terms. Since the introduction of the *Sentencing Act*, the proportion increased by 6.2% to 57.4%. There were slight decreases in the proportionate use of

### Note <sup>7</sup>

There has been a steady increase in the number of community service orders since the introduction of the CSO scheme. From 1982 to 1990, excluding orders resulting from fine-default legislation, there has been a 357% increase in the number of court-ordered CSOs (Houghton G 1991 *Community Service Orders: Views of Organisers*. Judicial Commission of NSW, March 1991).

**TABLE 6 Supervised Recognizance by Period – Higher Courts**  
(Pre 1.1.88 - 24.9.89, Post 25.9.89 - 30.6.91)

Term of Recog	Pre		Post		Diff	
	%	n	%	n	%	n
6 mths	0.1	(1)	0.2	(2)	0.1	(1)
12 mths	2.0	(21)	2.6	(24)	0.6	(3)
18 mths	1.0	(10)	1.2	(11)	0.2	(1)
24 mths	14.8	(152)	13.0	(120)	-1.8	(-32)
36 mths	51.2	(525)	57.4	(530)	6.2	(5)
48 mths	14.4	(148)	10.7	(99)	-3.7	(-49)
60 mths	15.9	(164)	14.2	(131)	-1.7	(-33)
+60 mths	0.8	(8)	0.7	(6)	-0.1	(-2)
<b>TOTAL</b>	<b>100.0</b>	<b>(1029)</b>	<b>100.0</b>	<b>(923)</b>	<b>0.0</b>	<b>(-106)</b>

two year, four year and five year terms. It is of interest to note that sentencers prefer to specify orders for supervised recognizance in terms of yearly, rather than six monthly, intervals.

With the exceptions of break, enter and steal (up 4.3%) robbery (up 3.5%), theft (up 1.9%) and motor offences (up 1.3%), most offences saw decreases in the proportionate use of recognizances with supervision. The more notable decreases in the proportionate use of this disposition were for property (malicious damage) offences (down 9.6%) and fraud (down 6.0%).

## Conclusion

The *Sentencing Act* introduced a new sentencing regime. By reforming the meaning and administration of custodial sentences through its policy of establishing “truth in sentencing”, the legislators sought to regain public confidence in the sentencing process.

This report supports the findings of earlier studies by showing that the *Sentencing Act* has affected the sentencing behaviour of judicial officers.<sup>8</sup>

It shows that, in the higher courts, there was a slight reduction in the proportionate use of imprisonment and simultaneously an increase in the use of both periodic detention and community service orders. This may suggest that the *Sentencing Act* has heightened the appreciation that imprisonment should be used as a sanction of last resort.

About the same time that the *Sentencing Act*

1989 commenced, other legislative reforms were taking effect. In particular, the *Periodic Detention of Prisoners (Amendment) Act 1989* and the *Community Service Orders (Amendment) Act 1989* widened the availability of periodic detention and community service orders. These sanctions became potentially more severe and their diversionary impact may be witnessed in their extended use as alternatives to imprisonment. However, there is also evidence that “net-widening” continues to take place.

While it may not be possible to separate and identify the individual effects produced by the different legislative reforms, their combined impact, in practical terms, has been substantial. They include:

- a reduction in the use of orders involving unsupervised recognizance (down 3.1% or 256 offenders);
- an additional 69 higher court offenders (up 2.3%) ordered to perform community service;
- an additional 92 higher court offenders (up 2.4%) ordered to serve a custodial term through periodic detention;
- a small (1.1%) decrease in the use of imprisonment. This translates into 274 fewer higher court offenders going to gaol. (This does not detract from the fact that, generally, prisoners sentenced under the *Sentencing Act* are serving longer in custody);
- a proliferation of shorter fixed term sentences, particularly of six months or less. In total, an additional 10.5% or 143 prisoners sentenced in the higher courts under the *Sentencing Act* will be released from gaol within one year of commencing their sentence;
- a heightened appreciation that imprisonment should be used as a last resort despite evidence of a continuing process of “net-widening”.

### Disclaimer

This paper was prepared by officers of the Judicial Commission for the information of the Commission and for the information of judicial officers. The views expressed in the report do not necessarily reflect the views of the Judicial Commission itself but only the views of those officers of the Commission who have prepared this report for the Commission.

### Note<sup>8</sup>

For a detailed review see Cain M and Luke G 1991 *Sentencing Juvenile Offenders and the Sentencing Act 1989 (NSW)*. Monograph Series No 4, Judicial Commission of NSW, December 1991.