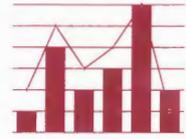


Sentencing Trends

An Analysis of New South Wales Sentencing Statistics



Judicial Commission of New South Wales



Editor: Donna Spears, Research Director

SENTENCING HOMICIDE:

The effect of legislative changes on the penalty for murder

by

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Introduction

As part of a wider project on homicide offences in New South Wales in the 1990's, the Judicial Commission has recently conducted a systematic audit of all Supreme Court homicide files for the period from January 1990 to December 1993. The information collected allowed the Commission to separate s.19 murder sentences, from s.19A sentences. Previous to this audit, all statistical information in relation to murder sentences had been collected solely on the basis of the short title of the charge, and the particular section pursuant to which the offence was prosecuted was not recorded. The results of this audit will ultimately be used as the basis of a much more detailed monograph on homicide sentencing in the 1990's.

In order to understand the significance of this paper, it is useful to examine the history of the murder penalty in New South Wales. At common law murder was a felony punishable by death. In New South Wales, with the enactment of the *Crimes Act* 1900, the penalty for murder was prescribed as death pursuant to s.19 of that Act. The Governor was granted power to commute or mitigate such sentence pursuant to ss.459 and 460 of that Act.

Section 19 was amended in 1955 (*Crimes (Amendment) Act* No.16 of 1955) when the death penalty was abolished and a mandatory penalty of penal servitude for life was substituted. The amendment also expressly excluded the operation of s.442 and thus precluded the sentencing court from imposing any sentence other than penal servitude for life.

In 1982, following much public debate, the New South Wales legislature enacted the *Crimes (Homicide) Amendment Act* which removed the mandatory sentence for murder of penal servitude for life and substituted for it a limited discretion to impose a lesser penalty where "... it appears to the Judge that the person's culpability is significantly diminished by mitigating circumstances." In the absence of such a finding of "special circumstances", a sentencer was required to impose a sentence of penal servitude for life.

As a part of set of sentencing reforms which commenced with the introduction of the *Sentencing Act* 1989, a new section 19A was inserted into the *Crimes Act* On 12 January 1990, replacing the old s.19. It reads -

Punishment for murder

19A. (1) A person who commits the crime of murder is liable to penal servitude for life.

(2) A person sentenced to penal servitude for life for the crime of murder is to serve that sentence for the term of the person's natural life.

(3) Nothing in this section affects the operation of section 442 (which authorises the passing of a lesser sentence than penal servitude for life).

(4) This section applies to murder committed before or after the commencement of this section.

(5) However, this section does not apply where committal proceedings (or proceedings by way of ex officio indictment) for the murder were instituted against the convicted person before the commencement of this section. In such a case, section 19 as in force before that commencement continues to apply.

(6) Nothing in this section affects the prerogative of mercy.

This enactment created two types of "life" murder sentences - those imposed under the old s.19 with such offenders being eligible for determination of such life sentences after the expiration of 8 years of its duration pursuant to s.13A of the *Sentencing Act* 1989 as distinct from "natural life" sentences under the new s.19A of the *Crimes Act* 1900.

This paper examines the practice of sentencing of murderers in New South Wales during the early 1990's. It compares s.19 and s.19A sentencing patterns revealing the extent to which legislative reform has affected both the number of persons who have pleaded guilty and the severity of sentences imposed. In certain of the graphs and tables, manslaughter sentence ranges have been included by way of contrast.

Definitions and qualifications

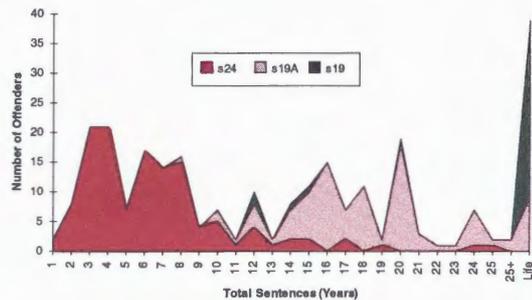
The statistics refer to cases sentenced between January 1990 and December 1993. The data is composed of first instance sentencing results and has not been corrected by variations made by the Court of Criminal Appeal. As well, all cases involving *cumulative sentences* have been excluded from this study.

When comparing types of penalty within a particular offence, the expression "average" is used to denote the median, or the mid-point of a range of penalties. A "typical range" refers to the middle 50% of penalties or the inter quartile range, ie there is an even chance of any given result falling in that range, and an even chance of falling above as below.

Total sentences for murder (ss.19 and 19A) and manslaughter (s.24)

The following graph shows the total, ie. full terms, of sentences imposed in all cases of murder (ss.19 and 19A) and manslaughter (s.24) that were finalised between January 1990 and December 1993.

It should be noted that no non-custodial sentences has ever been imposed for murder in New South Wales. There have been a small number of non-custodial sentences for manslaughter, but these are not statistically significant in this context and have therefore been excluded.



- The graph indicates that almost all murderers dealt with under s.19 were sentenced to penal servitude for life (30 out of 35 cases, or 87%), whereas sentences under s.19A typically ranged from 16 to 20 years penal servitude (49 cases fell within this range, which was 52% of all cases under s.19A).
- Only 9 offenders were sentenced to penal servitude for life ("natural life") under the new provisions of s.19A. However, two offenders received determinate sentences longer than 25 years (ie 26 years and 30 years respectively), and some 23 offenders in all (24%) received sentences greater than 20 years under this section.
- Apart from one sentence of 20 years penal servitude, all of the determinate sentences under s.19 since January 1990 fell within the range of 12 years to 14¼ years.

While the number of cases involved was small, these relatively short sentences are consistent with the provisions of s.19, which indicate that determinate sentences should only be imposed in cases of substantial mitigation. In any event,

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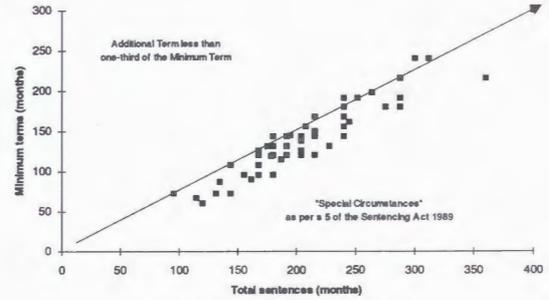
unlike the life sentences imposed under s.19, these sentences are not subject to redetermination, and therefore one would expect them to be similar to sentences imposed under s.19A in similar cases of substantial mitigation.

Overall, these statistics support the view that the old s.19 tended to produce a sharp division between the vast majority of murderers (who were punished with penal servitude for life), and a small number of cases in which there was a significant degree of mitigation warranting leniency.

- Generally speaking, total sentences for manslaughter were less severe than total sentences for murder. The average (median) sentence imposed for manslaughter during this period was 63 months (5¼ years). The average sentence for murder (s.19A) on the other hand was 216 months (18 years), and only about 25% of murder cases received sentences less than 16 years. Sentences for manslaughter typically ranged from 42 months (3½ years) to 96 months (8 years).
- Only 37 offenders in cases of manslaughter (27%) were sentenced to penal servitude for 8 years or more. However, two of these cases involved penalties of 24 years and 25 years respectively. Such sentences are not only at or near the maximum penalty available under s.24, but are also higher than most sentences for murder. Such cases would typically be aggravated homicides in which diminished responsibility was successfully argued as a defence.

Minimum terms for murder under s.19A

The following graph displays the relationship between minimum terms and total sentences imposed under s.19A, except for the 9 cases in which a life sentence was imposed. Each dot indicates one or more cases. The diagonal line indicates where cases would be if the additional term were one third of the minimum term. Cases above the diagonal line have additional terms less than one third of the minimum term, including any cases with a fixed term. Cases below the diagonal line involve a finding of "special circumstances" under s.5 of the *Sentencing Act 1989*.



As the graph shows, minimum terms imposed under s.19A typically depart from the one-third formula of s.5 of the *Sentencing Act*. On average, when special circumstances were found, the minimum term was reduced by about two years.

The average minimum term imposed under s.19A was 12 years, and around half of the minimum terms fell within a range from 10 years to 15 years. Consequently, the "typical" sentence for murder under s.19A might be described as a minimum term of 12 years and an additional term of 6 years, making a total sentence of 18 years.

Guilty plea

One of the most obvious changes in the characteristics of offenders convicted of murder under s.19 and s.19A concerns the nature of the plea entered. Since January 1990, only one offender sentenced under the old s.19 pleaded guilty to murder (3%), whereas more than a third of the offenders sentenced under s.19A pleaded guilty. By way of comparison, 54% of offenders convicted of manslaughter pleaded guilty. It may be that this increase in guilty pleas in murder cases, has resulted in savings in court time.

PLEA	Man-slaughter s.24	Murder s.19A	Murder s.19
Guilty	75	35	1
Not guilty	64	59	34

It is not possible to compare the length of prison terms for guilty and not guilty plea under s.19, as only one offender had pleaded guilty since January 1990 and in any case nearly all the offenders were sentenced to penal servitude for life.

In relation to murderers sentenced under s.19A, an analysis of the data indicates that there is no clear difference in the distribution of sentences for guilty and not guilty plea under s.19A, possibly owing to the objective seriousness of the offence. For both groups of offenders the average term of penal servitude was 18 years. It should be also noted that only 2 of the 9 offenders sentenced to penal servitude for life under s.19A (that is, "natural life") pleaded guilty.

Other sentencing factors

- *Multiple counts.* 5–10% of offenders convicted of murder had multiple counts. The proportions were similar under both s.19 and s.19A. For manslaughter, however, less than 2% were convicted of multiple counts
- *Other offences taken into account.* Five offenders convicted of manslaughter (about 4%) had other matters scheduled on a Form 2. No offenders under ss.19 or 19A had matters on a Form 2 taken into account during sentencing.
- *Prior record.* It is interesting to note that murders dealt with under s.19A included a high proportion of cases where the offender had no prior record (64%) – in fact slightly more than was the case with manslaughter (62%). In contrasts under s.19, only 49% had no prior record. Conversely, 26% of s.19 offenders had a prior record of violent offences with imprisonment, as opposed to only 10-11% for s.19A and manslaughter.
- *Liberty status.* Not surprisingly, offenders convicted of manslaughter were more likely to have been at liberty when they committed their

offences (96%) than was the case for murderers sentenced under s.19A (87%) or s.19 (86%). By way of contrast, three offenders were sentenced for murders that occurred while they were in detention of some kind or were escapees (1 under s.19, and 2 under s.19A), while no offenders were convicted of manslaughter while in detention or as escapees.

Summary

The legislative changes in the murder penalty has had two obvious effects on the sentencing of murder. First, most offenders under s.19A receive determinate sentences, typically of 18 years penal servitude, with a minimum term of 12 years. Under s.19, the vast majority of offenders were sentenced to penal servitude for life.

Secondly, there has been a marked increase in the number of guilty pleas for murder. This increase appears a consequence of the fact that it is no longer mandatory to impose a sentence of penal servitude for life in the absence of significant "mitigating circumstances."

It appears that the granting of judicial discretion in this area has allowed a more flexible approach to be taken to the sentencing of murderers, one that allows sentences to reflect both the objective facts of the offence and subjective features of offenders.

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.

