TRUTH IN SENTENCING

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This afternoon I am going to look at the effects of the Sentencing Act which was introduced in N.S.W. last year.

Before I get into the paper proper, I would like to acknowledge the contribution of Simon Eyland who assisted with the data analysis and data presentation.

Many of us here are familiar with the background and provisions of the Sentencing Act. However for the benefit of those who are not, I am going to give a very brief overview of the Act and how we have gone about investigating the effects of the new legislation.

Overhead 1

The Sentencing Act commenced on 25th September, 1989, replacing the Probation and Parole Act, 1983. This Act was introduced to "restore truth in the sentencing system in New South Wales" (Hansard, 10.5.89, p. 7906). It was designed "to bring certainty to sentencing in this State ... (and) ... to ensure that the public and prisoners know exactly when a sentence shall commence and exactly when a prisoner will be eligible for consideration for parole" (Hansard, 10.5.89, p. 7910). The objects of this Act are stated to be:

"(a) to promote truth in sentencing by requiring convicted offenders to serve in prison (without any reduction) the minimum or fixed term of imprisonment set by the court; and
(b) to provide that prisoners who have served their minimum terms of imprisonment may be considered for release on parole for the residue of their sentences."

Overhead 2

The Act was described as turning "the sentencing process on its head" (Hansard, 10.5.89, p. 7906). The language of sentencing changed under the new Act which no longer used the terms "head sentence", "non-parole period" and "non-probation period" but rather introduced the terminology "fixed term", "minimum term" and "additional term". The "minimum term" is that period which must be served in custody. The "additional term" is that part of the sentence during which the person may be released on parole. The sum of the minimum term and the additional term now called the "total sentence" would be equivalent to that which used to be termed "head sentence". The "fixed term" is similar to the minimum term in that it is the period which must be served in custody, however unlike the minimum term, has no additional term specified. Sentences of six months or less are required, under the Act, to be fixed terms.

Overhead 3

Described as "revolutionary" (Hansard, 11.5.89, p. 8143) this Act abolished all forms of remission, established a 1:3 ratio of the additional term to the minimum term and removed the presumption in favour of parole for certain prisoners. Not all prisoners
will be released at the expiry of their minimum term. Instead of using remission as an incentive for good behaviour while in gaol, the Act provides for Visiting Justices dealing with major breaches of prison discipline to increase, by up to 28 days, the period which a prisoner must spend in gaol. Prisoners whose minimum plus additional terms sum to more than three years are not released automatically to parole at the expiry of their minimum period, rather they are considered for release by the Offenders Review Board.

The potential effect of the Sentencing Act on the size of the NSW prison population was of concern. In the Act's Second Reading speech the Minister for Corrective Services emphasized that "the Government is not seeking to make sentences longer". This was echoed by the guide to the Sentencing Act which was published by the Department of Corrective Services in which it was stated that it was "not the Government's intention that, as a consequence of the Sentencing Act, longer sentences be served".

Overhead 4

The specific aim of this study was to answer the question "What will be the likely effect of the Act on the size of the NSW prison population? More generally, we were interested in what ways judicial officers have changed their sentencing patterns since the change in legislation. In order to do this we had a "Before Group" and an "After Group".
The "Before Group" was comprised of sentenced prisoners discharged from NSW gaols between 1.1.89 and 30.6.89. The "After Group" keeps growing as we are able to collect more data. In our first set of comparisons the After Group included sentenced prisoners received between 1.10.89 and 31.3.90. These data have subsequently been extended to include the period 1.4.90 – 30.6.90.

N.B. We excluded those who did not come under the Sentencing Act from both the Before and After Groups i.e. those received for fine default, offenders sentenced only for offences against Commonwealth legislation lifers, forensic patients were excluded from the analysis.

Overhead 5

This graph provides a comparison of the time actually served in custody by those in the Before Group and the minimum time to be served by the After Group.

Note that those in the Before Group are represented by the darker columns with diagonal hatching. Those in the After Group are represented by the lighter columns with spots.

The important thing to note from this graph is that a higher percentage of those in the Before Group are serving shorter periods, whereas a higher percentage of those in the After Group are serving longer periods, even if they are held no longer than their minimum terms.
The question to be asked is: How much longer are they spending in custody following the change in legislation?

Overhead 6

The average minimum or fixed term for those in the After Group was 290 days. This is significantly longer than the average term of 244 days actually served by those in the Before Group.

This is an overall increase of 46 days or 19% in the average time to be served.

This leads to the question: What does this average increase of 46 days in time to be served represent in the size of the NSW prison population?

Overhead 7

The overall increase of 46 (290-244) days (or 19%) in the average time to serve is equivalent to an eventual overall increase in the prison population of approximately 490 additional sentenced prisoners held on any day. It is estimated that the increase in the prison population will be most marked during the period 4-17 months after the introduction of the legislation, i.e. February, 1990 to March, 1991.
It should be noted that this estimated increase in the sentenced prison population is likely to be an underestimate in that it is based on all members of the After Group being released at the expiry of their minimum period. Not all prisoners will be released at the expiry of their minimum (or fixed) terms. It is possible, though expected to be a rare occurrence, that Visiting Justices may extend the sentences of some prisoners for infringements of prison rules. Those prisoners whose minimum plus additional terms sum to more than three years (189 prisoners or 6.5% of the After Group) are not released automatically at the end of their minimum period, rather they are considered for release by the Offenders Review Board. If, considering the other extreme, all of those whose release depended upon the discretion of the Offenders Review Board were held in custody for the maximum period (i.e. until the expiry of their additional period) this would result in an increase of 76 (320-244) days in the average time to serve which is equivalent to an increase of approximately 800 additional sentenced prisoners held on any day. Hence, if future sentencing patterns remain unchanged, the expected increase in the size of the prison population due to the effect of the Sentencing Act would be between approximately 490 and 800.

Overhead 8

When we analysed the first six months of data following the change in legislation, we observed there were differences in the average minimum or fixed terms handed down during the months following the introduction of the legislation. More specifically, the average minimum terms and fixed terms handed down for
prisoners whose sentences commenced in January 1990 and March 1990 were less than those handed down for prisoners whose sentences commenced in October, November and December, 1989. The average minimum and fixed terms handed down for those whose sentences commenced in November, 1989 and February, 1990 were both less than that handed down for those whose sentences commenced in October, 1989. However, this trend does not seem to have continued.

The estimates on projected prison population increases which I gave earlier were based on the sentencing patterns of prisoners received between October 1989 and June 1990 being representative of the sentencing patterns of prisoners received in future months. If sentences handed down are shorter in future months then it follows that the overall increase in the prison population will be less.

I would now like to look at other effects of the Sentencing Act during the first six months of its operation.

Recall that the Sentencing Act changed a number of the rules for Sentences.

Overhead 9

It was found that the average aggregate sentence handed down following the change in legislation (355 days) was significantly shorter than the average aggregate head sentence prior to the
change in legislation (738 days). This is a reduction of 52% in the average aggregate head sentence given prior to the change in legislation.

Overhead 10

Fewer are being given community supervision after the change in legislation. More than half of those in the Before Group (56.0%) were discharged to community supervision (after-care probation or parole). After the change in legislation a significantly smaller proportion (30.9%) had sentences which included a period of community supervision (i.e. had an additional term).

Overhead 11

The periods of community supervision considered here are "maximum potential" periods of supervision. The average number of days on community supervision was calculated only for those who were given community supervision. For the Before Group, the number of days on community supervision was calculated as the number of days between release to parole or after-care probation and the expiry of the head sentence. In practice an offender may not have been supervised for this entire period as the Probation and Parole Service maintained the right of discretionary or early termination of community supervision. For the After Group, the num-
ber of days on supervision was equated to the number of days in
the additional term. Once again this is "maximum potential"
period to supervision since not all prisoners will necessarily be
released on community supervision at the expiry of their minimum
terms.

It was found that the average period on community supervision,
for those given any community supervision, was much shorter fol-
lowing the change in legislation (208 days) than prior to the
change in legislation (799 days). This represents a reduction of
74% in the average maximum period of supervision handed down
prior to the change in legislation.

Overhead 12

The ratio of the period on community supervision to the period
confined in gaol has decreased since the Sentencing Act was intro-
duced. For those given community supervision, the period on su-
pervision was, on average, almost two and a half (2.40) times as
long as the period spent in custody prior to the change in legis-
lation and just over one-third (0.39) as long as the period in
custody following the change in legislation.

As stated previously, Section 5.3 of the Sentencing Act states
that the "additional term must not exceed one-third of the mini-
mum term unless the court decides that there are special
circumstances". It is of interest to note that for those
prisoners whose sentence commenced between 1st October 1989 and
31st March 1990, in only 7.1% of cases of those with an additional term did the additional term exceed 0.34 time of the minimum term.

To summarise: We have found that following the change in legislation:

* prisoners will be serving longer periods in custody;
* fewer are being given sentences including periods of community supervision;
* those with additional periods are spending much less potential time on community supervision.
THE SENTENCING ACT, 1989

• Commenced 25th September, 1989

• Objects of the Act:

a) to provide truth in sentencing by requiring convicted offenders to serve (without any reduction) the minimum or fixed term of imprisonment set by the court; and

b) to provide that prisoners who have served their minimum terms of imprisonment may be considered for release on parole for the residue of their sentences
• Minimum term - that period which *must* be served in custody

• Additional term - that part of the sentence during which the person *may* be released on parole

• Fixed term - that period which *must* be served in custody, where *no* additional term is specified
SENTENCING ACT

• Abolished all forms of remission

• Established a 1:3 ratio of the additional term to the minimum term

• Removed the presumption in favour of parole (for certain prisoners)

• "The Government is not seeking to make sentences longer"
IMPACT OF THE SENTENCING ACT
RESEARCH QUESTIONS

1. What is the effect of the Act on the size of the N.S.W. prison population?

2. More generally, in what ways have Judicial Officers changed their sentencing patterns since the change in legislation?

"Before Group" - sentenced prisoners discharged from N.S.W. gaols between 1.1.89 - 30.6.89

"After Group" - sentenced prisoners received into N.S.W. gaols between 1.10.89 - 31.3.90
Comparison of time in custody before and after legislation change

Time spent in custody

- 0% - 5% - 10% - 15% - 20% - 25% - 30% - 35% - 40%
Comparison of time in custody before and after legislation change

Average time held in custody (days)
Estimated prison population increase due to change in legislation

![Graph showing the estimated prison population increase over time. The graph includes a line for the low estimate and a line for the high estimate, with the y-axis representing the population increase and the x-axis representing months since the change in legislation.]
AVERAGE MINIMUM TERM
BY MONTH RECEIVED

Following Sentencing Act, 1989
Comparison of aggregate sentences before and after legislation change

After - minimum & additional sentence
Before - total head sentence

Total aggregate sentence
Comparison of supervision before and after legislation change

BEFORE

- Supervised
- Not supervised

AFTER

- Supervised
- Not supervised

0% 25% 50% 75% 100%
Comparison of time under supervision before and after legislation change

Excludes those with no supervision
Comparison of supervision to custody before & after legislation change

Legislation: Sentencing Act, 1989
Daily Average Number of Prisoners in N.S.W. Gaols
January 1988 to August 1990

Daily Average

Source: Research & Statistics Division
Supplied on weekly basis from gaols

Legislation change