CHANGE AND STABILITY IN SENTENCING

A VICTORIAN STUDY

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ACKNOWLEDGEMENTS

This study could not have been undertaken or completed without the assistance of a number of people and organizations. We are grateful to the Criminology Research Council for its generous funding and forebearance through numerous extensions as we sought to catch up with the ever moving legislative goal posts. The Office of Corrections, now the Correctional Services Division of the Department of Justice, supported the initial grant application and provided a deal of the data used in the evaluation. In particular, Malcolm Feiner, the Manager of the Department's Resource Centre was unstinting in his help, providing access to vast amounts of obscure and difficult to obtain information and gracious in his hospitality to one of the researchers who squatted in his already overcrowded library.

Mr Bill Johnston and his staff at the Department of Justice provided much assistance and co-operation in making data available in relation to the courts.

To our honours and graduate students, Clare Cahill, Sarah Wise and Liz McDonnell we express our thanks for being co-opted in our research. Our employers and various host institutions, the University of Melbourne, the Office of Corrections, the Australian Bureau of Statistics, Carelton University, Ottawa, provided support, leave and refuge to various of us at different times.

We thank La Trobe University Press for permission to use extracts from 'Change and Stability in Sentencing: A Victorian Study' (1995) 13 *Law in Context* 107, Oxford University Press in relation to a chapter by Freiberg, 'Sentencing Reform in Victoria: A Case Study' in Clarkson, C., and Morgan, R. (eds), *The Politics of Sentencing Reform*, Oxford, Clarendon Press, 1995, and the Australian and New Zealand Journal of Criminology, in relation to an article by Tait, `The Invisible Sanction: Suspended Sentences in Victoria 1985 - 1991' (1995) 28 *ANZJ Crim* 143.

Responsibility for the report lies variously amongst the authors. David Tait collected and analysed the vast amount of data and produced most of the numerous graphs, charts and tables. The empirical material on suspended sentences was written by him, as was part of the analysis of the use of fines. Stuart Ross was mainly responsible for the text relating to Aboriginal imprisonment rates, prison receptions and sentence lengths and shares equal responsibility for the identification, selection

and interpretation of the data and for shaping the nature and direction of the research. Arie Freiberg was responsible for the remainder of the text and some of the tables.

Finally, to our families whose sentences have no remission or parole, our thanks for surviving yet another project which seemed a good idea at the time.

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June 1996

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CHAPTER 1

INTRODUCTION

INTRODUCTION

Victoria is a criminologically undistinguished jurisdiction, other than for the fact that it has, for many decades, maintained one of the lowest imprisonment rates in Australia if not the world. With the Netherlands' imprisonment rate reaching 61 per 100,000 of population in 1994 (Tak, 1994:5) and Sweden's rate standing at 60 in 1992-3, Victoria's rate of approximately 54 per 100,000 in 1994 compares well with countries often held up as examples of penological moderation (Downes, 1988). Only Japan, with a rate of 36 per 100,000, stands significantly lower in the list of countries whose criminal justice systems have been the subject of scrutiny (Mauer, 1994). With a rate ten times lower than that of the United States (519), half that of Canada (116) and significantly lower than the Australian average (91), England and Wales (93) and New Zealand (135), the Victorian experience may offer some insights into the complexities of the sentencing process.

This book commenced life as an attempt to evaluate the impact of the *Sentencing Act* 1991 (Vic) and the later changes brought about by a radically conservative government. The *Sentencing Act* 1991 ('the 1991 Act') was the third major piece of sentencing legislation enacted by the Victorian Parliament in a ten year period[1] representing Victoria's efforts to grapple with the ubiquitous problems facing the common law world, identified variously as discretion, disparity, desert, severity and veracity. It came into effect on April 22, 1992, six months before a Labor government, ten years in office, was comprehensively ejected by the electorate and replaced by a conservative Liberal/National Party coalition government. Within six months of coming into office, that government, responding to what it perceived to be the community's concerns over the inadequacy of custodial sentences passed upon sexual and violent offenders, rushed amending legislation through Parliament. The primary purpose of the new legislation was to increase the length of custodial sentences for violent and sex offenders.

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1 See also *Penalties and Sentences Act* 1981 (Vic) and *Penalties and Sentences Act* 1985 (Vic).

With the re-election of that government in March 1996 on a platform of further reform of the sentencing legislation, sentencing remains a highly contested issue. Public concern over sentences, and the process of sentencing, remains unabated. As Tonry observes of the United States, 'sentencing matters in the 1990s more than ever before' (Tonry 1996:3). This applies with equal force to Victoria. But where the United States, at both state and federal levels, have responded by legislation which confines judicial discretion and increases the length of prison sentences, resulting in an explosion in the incarcerated population (Wicharaya 1995), Victoria's reformers have shied away from enhancing the legislature's role in sentencing. Parliamentary and public trust in the judiciary is fragile, but is not yet completely destroyed.

Compared with the American tide of mandatory minimum sentences, mandatory sentences, 'three strikes' legislation and the building of thousands of new prison cells, Victoria's reforms have been relatively modest.[2] They have not, to date, produced a massive increase in the prison population.

The 1991 Act, together with related legislation,[3] introduced a comprehensive set of reforms to the principles, practices and sentencing options of Victoria. One of its main features was the abolition of remissions in the name of 'truth in sentencing'.[4] This was coupled with a direction that sentencers take into account the removal of remissions when imposing sentence in order to ensure that the time to be served in custody would be no longer than it would otherwise have been prior to the introduction of the legislation. The legislation substantially revised statutory maximum penalties, created a new sentencing disposition, the intensive correction order and revised provisions relating to community-based orders, suspended sentences and fines. It also effected some changes in the distribution of cases between the higher courts and the Magistrates' Court by amending the *Magistrates*

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2 The American reform agenda is vastly different to that in Victoria. It has been described as an attempt 'to impose legislative control over official decisions in determining the use of confinement, the period of confinement, and the termination of confinement in the sanctioning process for a wide variety of offenses committed by different types of offenders under varying circumstances' (Wicharaya 1995:41). The various reform mechanisms include mandatory minimum sentencing laws, mandatory determinate sentencing laws, presumptive determinate sentencing laws, presumptive sentencing guidelines and voluntary guidelines.

3 *Corrections (Remissions) Act* 1991 (Vic).

4 'Truth in sentencing' refers to the attempt to link more closely the sentence imposed by a court and the period of time actually served by the offender.

Court Act 1989 (Vic) so that all offences punishable by imprisonment for 10 years or less may be tried summarily, thus increasing the jurisdiction of that court.[5]

The 1993 Act, which came into effect in August of that year, was intended to increase custodial sentences by creating new classes of offenders: 'serious sexual offenders' and 'serious violent offenders' to whom special rules applied. If these offenders commit certain nominated offences (serious sexual or violent offences), then the court is required to regard the 'protection of the community' as the principal purpose of sentencing and may, 'in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence considered in the light of its objective circumstances.' In addition, the ameliorating effects of the transitional remission provisions do not apply, effectively increasing sentences by a third. Further, sentences imposed upon serious sexual offenders are presumptively cumulative. Sentence lengths were also intended to be increased by the introduction of 'indefinite sentences' for adult offenders who are proved, to a high degree of probability, to be a 'serious danger to the community' and who have been convicted of specified 'serious offences' (Fox, 1993).

April 22, 1992 should provide a clear date from which to observe the impact of major sentencing changes. Yet experience has shown that complex systems are difficult to change over short periods of time. It is rare to be able to alter deeply ingrained patterns of behaviour, especially judicial behaviour, particularly where the changes have not been universally welcomed. Measuring change precisely is even more difficult. Legislative change may reflect, rather than lead, changes in the climate of opinion. Alternatively, behavioural change may lag legislative change while persuasion, education and influence take their course.

THE STUDY

This study was originally conceived as a short, and relatively simple, one to two year, pre- and post-legislative reform evaluation, intended to measure the effects of the *Sentencing Act* 1991 (Vic). However, as the project developed, it became clear to us that such a time frame would not provide an adequate basis for understanding

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5 Offences punishable at penalty level 8 or above (36 months imprisonment) are presumed to be indictable. Offences between level 4 and level 8 are presumed to be indictable offences triable summarily with the consent of the accused and the court: *Magistrates Court Act* 1989 (Vic), Schedule 4.

the nature of the system or evaluating the impact of both sets of reform. This was not only because, as we have come to believe, institutions, attitudes and practices take much longer to evolve, adapt and change, but because we came to understand that notions of continuity were as important as notions of change. Moreover, we considered it important to understand how previous transformations had shaped sentencing practice. How did the Victorian system adapt to the introduction of probation and parole in 1956 and to the change from probation to the community-based order three decades later? How and why did the attendance centre order, born in the early 1980s, die soon after, but be resurrected in the form of the intensive correction order? Was its experience in the 1990s substantially different from that of the early 1980s? How was the system shaped by the larger forces of demography, crime patterns and enforcement practices?

For answers to all of these questions, and more, we found ourselves delving into the deeper recesses of Victoria's penology. In the case of the prison, a full picture could only be obtained by returning to the origins of the colony to find that massive decarceration had taken in the earlier part of this century had and that what had occurred over recent years was, in comparison, a relatively minor change. In the case of sanctions such as bonds, we found that there was almost a total absence of information, not only in Victoria, but world-wide. Here was a sanction so trivial as to be almost invisible. In the case of the suspended sentence, it too had risen from the dead after decades of disuse to become a major disposition, but in a way that was significantly different not only from its own past parochial history, but from practice elsewhere in the world.

These explorations confirmed what we had already suspected, that Victoria's experience of sentencing was different to that of other states of Australia, to England and most of all, the United States. Yet we have tended to absorb the experiences of other jurisdictions without critically analysing the differences in social, political and judicial culture and in administrative infrastructures. Sadly, the English and, more recently, the American intellectual hegemony has distorted the vision of our own social reality. As McMahon (1992) has so convincingly demonstrated, the American experience of sentencing, with its multiple versions, is not necessarily the same as the local experience.

This book is thus an attempt to evaluate the impact of recent changes in sentencing law and practice in the context of long term sentencing patterns. The contemporary nature of these changes, their relevance to sentencing reform (see Morgan and Clarkson, 1995), the extensive documentation and the ready availability of data, together with the rapidity of change, provide a rare opportunity to observe a criminal justice system in transition.

The book is not about evaluating the effect of sentences upon the rate of crime in general or upon individual offenders. In other words, it does not purport to measure the 'effectiveness' of criminal sanctions (cf Wicharaya 1995; Zimring and Hawkins 1973). Although sentencing is concerned with the effect of punishment on crime, that is not its only purpose. Questions of 'just punishment' are moral, rather than utilitarian issues. Nor does it attempt to establish whether sentences now are more or less disparate than they were before the reforms. Nor whether they are more 'just', more denuciatory or more protective. Rather it focuses upon the process of sentencing itself in order to understand how sentencing systems operate.

A comprehensive evaluative study of sentencing reform requires a multi-dimensional approach (Cohen and Tonry, 1983:306; Blumstein et al, 1983:28). Ideally it requires the identification of the goals of the reformers and a consideration of the extent to which these goals were achieved. It requires an examination of sanctioning rates and the distribution of sanctions, of changes in the flow of cases within and between courts, of guilty pleas, trial rates, dismissal rates and charging rates, taking into account the results of adaptive behaviours of officials. Ideally, it would study the effects of the changes on crime rates, on public attitudes, opinions and morale and upon the attitudes and behaviours of those who work within the system, the judges, lawyers and defendants. It would measure the extent of compliance with the legislation over a lengthy period of time. One common shortcoming of impact studies is that the observation periods tend to be limited to short periods of time before and after the implementation of the relevant change, periods which tend to preclude the identification of pre-existing trends and which do not provide sufficient time to measure the full impact of the change (Blumstein et al 1983:31). For various reasons, this study has had the advantage of being able to observe the impact of sentencing changes for over four years, in the case of the *Sentencing Act* 1991 (Vic), and over two years, in the case of the 1993 amendments. It was, however, limited in its methodology. It relies primarily on observations of the system as a whole and

makes little use of the perceptions of those who work within it, be they legislators, sentencers, victims or offenders. It thus lacks that key human dimension which often explains what appear to be strange statistical findings.

The study focuses upon three key aspects of sentencing:

- the number and length of prison sentences;
- the relationship between custodial and non-custodial sanctions;
- the use of intermediate sanctions

However, we go beyond these indicators to examine, in various degrees of detail, the use of all of the sentencing options available under the *Sentencing Act* 1991 (Vic) to determine how they have been affected by the legislative changes. The complex interactions between the sanctions and between the 1991 and 1993 legislation mean that any evaluation of their operation cannot operate on any simple linear or additive model. It is not possible to disaggregate the components of the legislation and separately measure the effect of each component. Rather, our general strategy will be one of multiple, interacting evaluative methods.

Underlying this research approach is the notion that sentencing practices and patterns within any jurisdiction are the product of a complex, interacting system of internal and external pressures exerted by a multiplicity of formal and informal agencies. Governments, and the bureaucrats who advise them, tend to view legislative reforms as policy levers that can be pushed and pulled to produce the desired changes. Our view is that sentencing legislation is simply a relatively formalised set of pressures that act on the criminal justice system. The influence that such legislation exerts may supplement, or be opposed by, other factors. Some factors, such as rising crime rates, may influence sentencing practices both directly, by bringing more offenders before the courts, and indirectly, by generating a governmental climate that brings about legislative reform. Thus, one of the fundamental questions that this research sets out to answer is what linkages exist between legislative reform and sentencing practices, and how are these linkages mediated by the other factors at work on the criminal justice system.

To an extent the study is a response to Blumstein's call for more research into the impact of changes in sentencing policy and practice (Blumstein et al, 1983:38):

> Often valuable research opportunities arise from natural experiments associated with the many changes in sentencing policies... Each of these changes represents an opportunity to discern how the various actors involved in the sentencing process react to the change and how the change affects their practices. Such knowledge is valuable in providing feedback both to the jurisdiction making the change and to other jurisdictions considering similar policies. In choosing among the possible research opportunities available for these purposes, one must look to jurisdictions where a change is likely to generate compliance; where adequate 'before' data are available that characterize practice prior to the introduction of the change; and where there is - or can be developed with some technical assistance - a valid research design, so that the direct and indirect consequences of the change can be adequately estimated.

There is one more reason for undertaking this study. As all of the authors had, in some way, been connected with the process of reform[6] it was also an attempt to put into practice what academics have often preached, namely that those who propose new programs or legislation are under an obligation to evaluate their reforms. Blind faith and political intuition are no substitute for a moderate dose of old-fashioned criminological positivism.

A broad view of sentencing

Sentencing is not only about imprisonment. Although the prison has tended to be emblematic of the sentencing in particular, and the criminal justice system as a whole, we seek to take seriously the fact that imprisonment is, in contemporary Victoria, a rarely used sanction, especially in courts of summary jurisdiction. To the extent that we do not focus exclusively upon the prison we approach the question of sentencing reform somewhat differently to other recent commentators (McMahon, 1992:76). Rather than conceiving of the problems of penology as being the role of imprisonment and its alternatives, our approach regards the modern prison as the

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6 Arie Freiberg had been involved in the drafting of the final versions of the 1991 Act; Stuart Ross had, for many years, been a senior officer in the Office of Corrections and had been involved in the implementation and evaluation of a number of the sentencing measures, while David Tait had undertaken a major research project on imprisonment for the Victorian Sentencing Committee in the mid-1980s which laid the foundations for the 1991 Act.

alternative to other dispositions. We see imprisonment in the modern age as being merely one of a range of dispositions which may be proportionate or appropriate for a particular offence, but one which plays a special role as a sanction of last resort. For that reason, we are interested not only in primary dispositions, but the processes and outcomes of breaches of sentence, for what occurs after the imposition of the sentence will determine the credibility of those sentences, how they will be used in the future and, ultimately the rate of imprisonment. Nor do we necessarily focus upon the concept of 'intermediate' sanctions (cf Morris and Tonry, 1990), for that carries with it the danger of ignoring the extremities, particularly the lower order sanctions. Whilst welcoming the highly significant shift away from regarding all mid-range sanctions as 'alternatives' to imprisonment, rather than sanctions in their own right, we view them as playing a relatively minor role within the sentencing structure, if not symbolically, then certainly numerically.

This book does not examine how intermediate sanctions affect individual offenders or what impact they have on the crime rate. Nor does it discuss their cost-effectiveness relative to prisons. Although these are important matters (Davies, 1993; Tonry, 1995), the focus here is more specific. We seek to explore the place of such sanctions within the sentencing hierarchy: which sanctions they replace on introduction, to what extent and why.

Our aim is to provide a holistic picture of sentencing practice and the impact of change in Victoria. In doing so, we acknowledge the courageous call of both Cohen and McMahon to maintain a 'sensitivity to success' (McMahon, 1992:75), to examine not only expansionism in prison but reductionism. We are interested, both sociologically and criminologically, in the way that the mix of sanctions fluctuates over time. Victoria has seen possibly four waves of incarceration and decarceration, one in the 1860s, one in the 1890s, another in the 1930s and most recently in the 1970s. Imprisonment rates and trends are neither fixed nor inexorable. Nets can not only expand and contract and change shape, they can also catch very different fish.

AN OVERVIEW

This study of the recent changes to Victoria's sentencing laws commences with the founding of the Victorian colony in the early 1850s. In Chapter 2 we trace the legislative history of sentencing from its earliest days and present some long-term data relating to the changing use of imprisonment. Chapter 3 examines Victoria's

prison population and the major factors which may influence its size, either by way of increase or decrease.

Chapter 4 explores the use of what have come to be known as 'intermediate sanctions'. One of the purposes of the 1991 Act was to affect the relative mix of sanctions, with a declared preference for the use of the least restrictive option available in all the circumstances of the case.[7] In evaluating any changes we will look at the extent of any changes in the relative mix of sanctions, the nature of those changes and how they have affected existing sentencing options.

Chapter 5 provides a brief discussion of two of the lower range sanctions, the fine and conditional and unconditional releases (bonds) and the concluding chapter summarises the findings of the study and attempts to forecast the state of sentencing and corrections in the near to medium term future.

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7 *Sentencing Act* 1991 (Vic), s.5(3).

CHAPTER 2

HISTORY

INTRODUCTION

Unlike New South Wales and Tasmania, Victoria did not commence its existence as a penal colony. Despite two early attempts in 1803 and 1826 to establish convict settlements, it was free settlers who gave the colony its start in 1836 (Johnston and Fox, 1965:119). Eleven years later, it had its first permanent gaol with the first offender in the colony being sentenced in June 1837.

In 1839 there were 38 convictions in a population of 8,500 and in 1845 Melbourne had its first permanent gaol opening with 59 male and 9 female prisoners (Johnston and Fox, 1965:120). Although it could accommodate 150 prisoners, it soon became overcrowded. The Pentridge Stockade was commenced in 1850. In 1851, gold was discovered in central Victoria and the flood of immigrant, male, gold-seekers saw the colony's population rise rapidly. This free-wheeling, itinerant and relatively impoverished abundance of men required, among other things, a massive increase in gaol accommodation. In 1853 various stockades were built to cope with the 955 prisoners in custody and it was estimated that in the 1850s, Victoria'a imprisonment rate was over 400 per 100,000 of the population (Johnston and Fox 1965:6). The use of hulks was authorised: (Johnston and Fox, 1965:122) and in that year, prison capacity reached 1093 places. In 1873, the imprisonment rate was 210 per 100,000 of the population with approximately 1600 persons held in custody. In the decade and a half following the gold rush, a prison building operation was commenced, the scale of which has not been equalled since and by the year 1900, the colony's prison capacity stood at 2,445, only slightly smaller than the state's present capacity, but serving over four times the general population.

Although the history of sentencing is not synonymous with the history of imprisonment, in the early life of the colony it was almost the only sanction used by the higher courts and was the dominant sanction in the courts of summary jurisdiction. In this chapter we briefly trace the changes in Victoria's sentencing laws over the past century and a half. Although now imprisonment is only one of a number of sentencing options available to the courts, it is one of the few sanctions

for which we have an unbroken series of data for over a century. The changes in its use over that time, both absolutely, and in comparison with other sanctions, provides a foundation for our analysis.

The legislative history of Victoria's sentencing laws (although not of its sentencing practice) can notionally be divided into six phases.

- 1850 - 1907: the establishment of the colony
- 1907 - 1956: the indeterminate sentence experiment
- 1956 - 1973: the 'modern' era
- 1973 - 1991: the search for alternatives
- 1991 - present: the *Sentencing Act* and beyond

In the first part of this Chapter we briefly set out a history of the state's imprisonment numbers and rates, while in the second part, we outline the legislative changes and other factors which may have affected sentencing practices.

IMPRISONMENT NUMBERS AND RATES

Figures 2.1 and 2.2 and Appendix 2.1 present a picture of Victoria's imprisonment rate and prison population over the last one hundred and twenty years.[1]

FIGURE 2.1
PRISON POPULATION 1872 - 1993

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1 The data from which these figures were prepared are found in Appendix 2.1. There is a range of sources which have been used to obtain data about prisons and the use of incarceration. Sentencing data for higher and Magistrates' Courts are available from official handbooks such as the Victorian Year Books (VYB), with a few breaks in the series, for the years 1872 to 1994. Prison receptions and daily averages are available over a similar period from that source and from the Annual Reports of the Inspector-General of Prisons from the mid-nineteenth century. Annual prison census data have been available since 1971. Data relating to prison numbers were compiled by the Australian Institute of Criminology from 1976 to 1995. For more detailed information in this book, unit record files have been used for higher court sentencing (from 1965), magistrates' sentencing (from 1990), and the prison census (from 1986). In general, only very broad information is available for earlier periods, and reasonably comprehensive data for the period since 1990. Wherever possible, more than one indicator is used to test the existence of a trend.

FIGURE 2.1

PRISON POPULATION 1872 - 1993

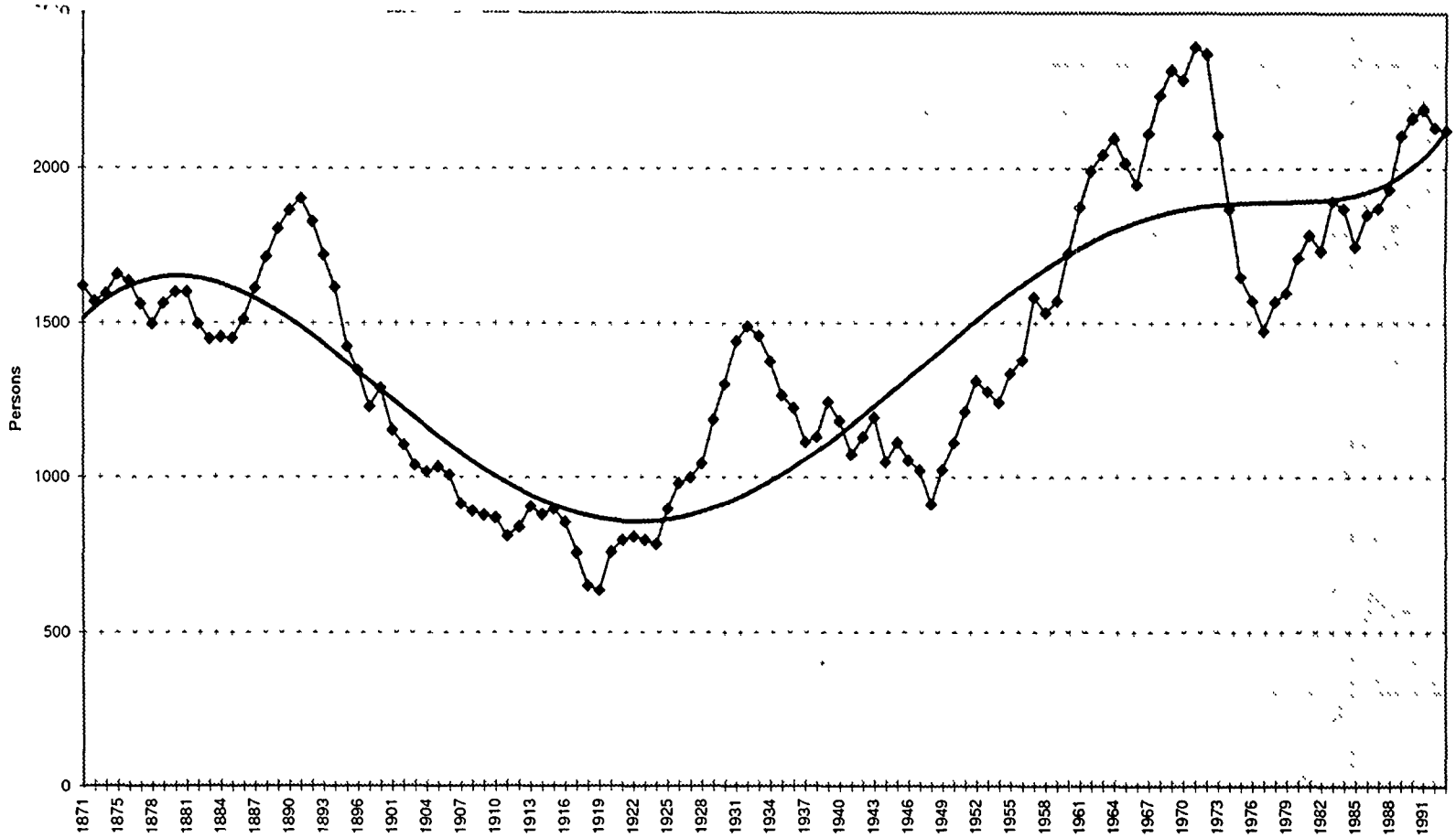

FIGURE 2.2

IMPRISONMENT RATE 1873 - 1993

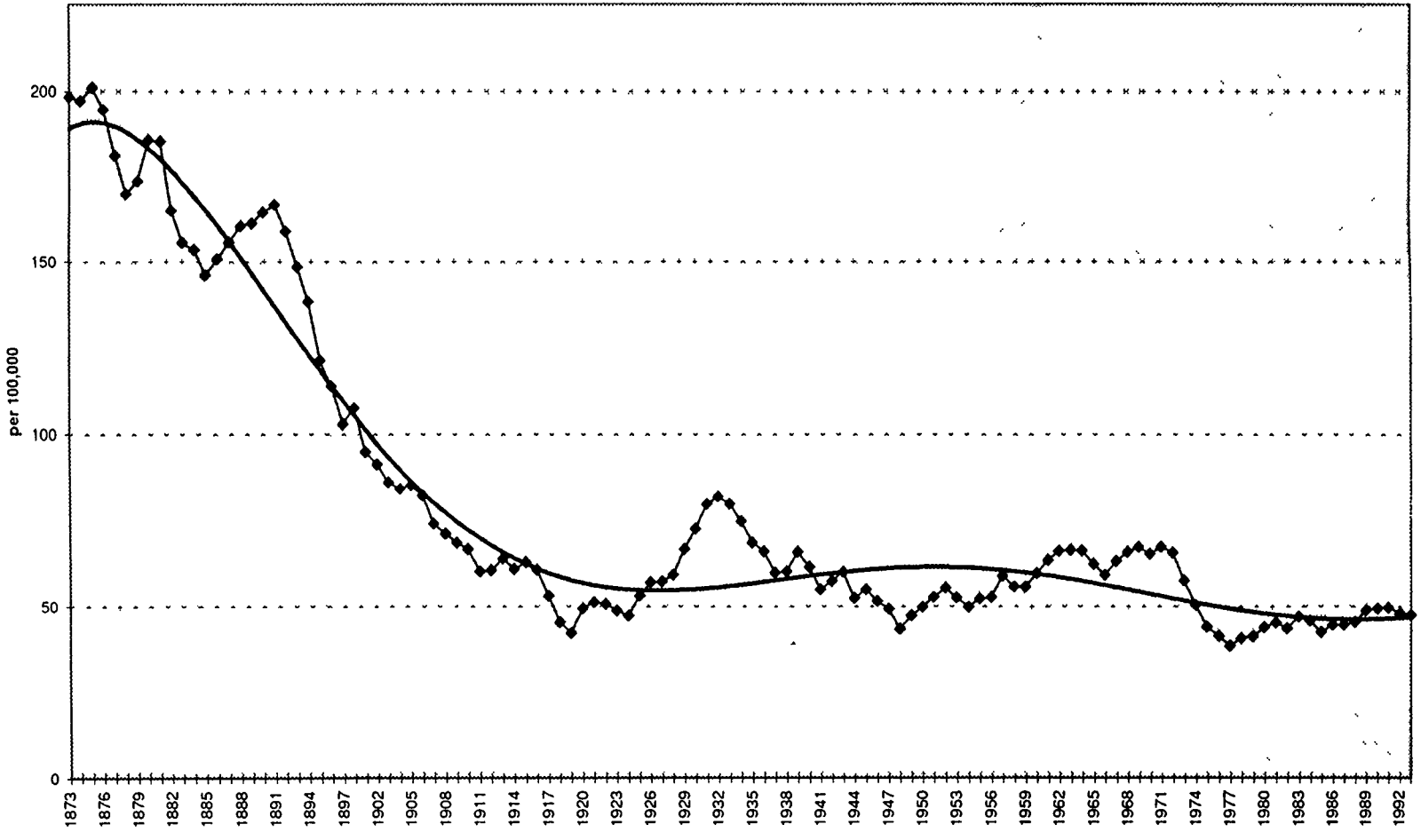

FIGURE 2.2
IMPRISONMENT RATE 1873 - 1993

Nineteen century prison numbers in Victoria reached their peak in 1891, when 1,901 prisoners were in custody, a prison population which was not reached again until 1962. In terms of numbers, the population has followed a cyclical pattern, with peaks in 1891, 1932 and 1972, and troughs in 1919, 1948 and 1977. The peak years were those of major depression while the first two troughs occurred in the immediate post-war years.

During the last century, the population of Victoria has increased from about 750,000 to some 4.5 million. It is thus important to consider the prison population in relation to this expansion of the general population. A more accurate picture of changing patterns of imprisonment in Victoria is shown by the change in the imprisonment rate.

When the use of imprisonment is measured in terms of the proportion of the population in prison rather than absolute numbers, the process of 'decarceration' evident after 1890 can be seen to extend well into the middle of the 20th century. Between 1900 and 1920, the rate of imprisonment more or less halved, from 120 prisoners per 100,000 of the population[2] to around 60, falling to about 50 per 100,000 by the 1970s.

In the 1890s the number of female prisoners also reached a peak, with some 350 women being imprisoned in a total prison population of 1,900.[3] From the last decade of the nineteenth century, prison numbers dropped sharply until, by the end of World War 1, the number of prisoners stood at only a third of its 1891 level, at 795 prisoners in 1921. During the 1920s the numbers doubled to 1,500, still well below the 1891 peak, after which it again fell to a post-war low of 912 in 1948. Female prisoners numbered around 50, less than one-sixth of the numbers late in the nineteenth century.

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2 Mukherjee uses rates based on the state population aged 10 years and over.

3 This amounted to 18% of the prison population.

From their post-war lows, prison numbers rose moderately through the 1950s, although the imprisonment rate rose more slowly in a time of rapid population growth. In 1960 the daily average number of females in custody was only 33. However, the growth in numbers accelerated through the 1960s and reached a peak of 2389 prisoners in 1971,[4] which was followed by a nearly 40% decline in the following six years. The decade of the 1970s saw the commencement of a second period of substantial decarceration. In just six years, between 1971 and 1977, the number of Victorian prisoners fell from around 2,400 to under 1,500. This represented a fall of 40%, and constitutes what is arguably the most dramatic period of change experienced by the Victorian prison at any time. Victoria was not alone in experiencing a reduction in prison numbers during this period. All Australian jurisdictions saw imprisonment rates fall, although to different degrees.[5]

The social, demographic and criminological forces that were acting to produce the changing patterns of imprisonment in Victoria in the period after 1900, were also determining imprisonment rates in other states. Figure 2.3 shows that the patterns evident in Victoria were also evident in New South Wales and in the Australian national rate of imprisonment. However, it is also apparent that Victorian imprisonment rates were consistently lower that both New South Wales rates and the average Australian rate.

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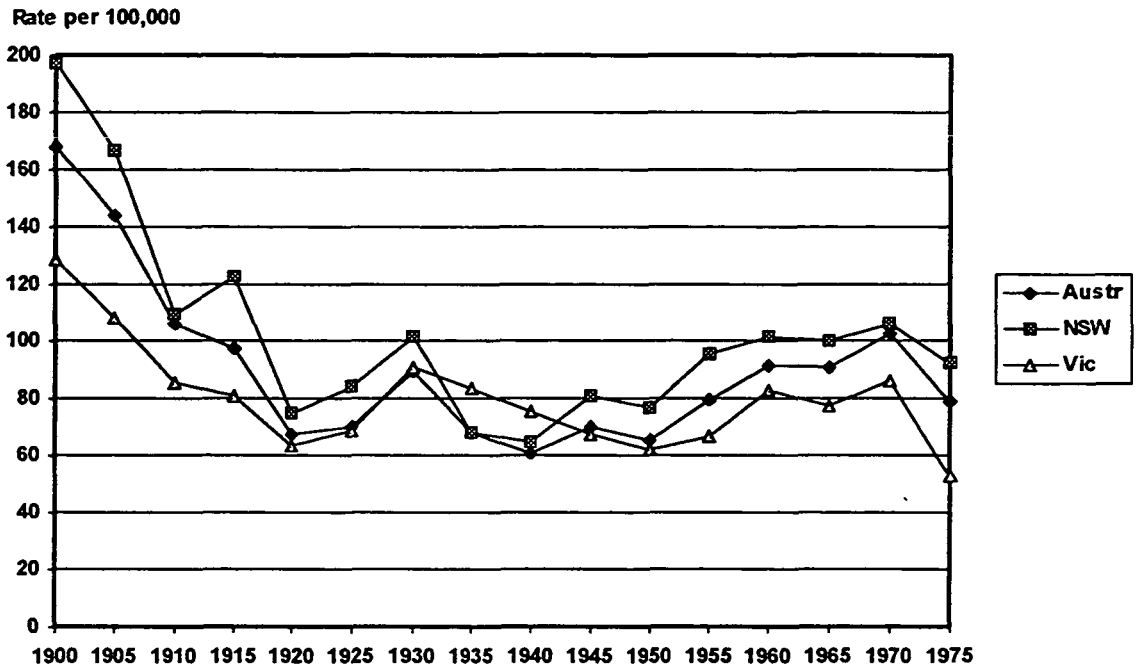
4 The highest number of prisoners held on one day in that year was 2,444. Prison capacity was 2,666 places.

5 This phenomenon was also evident in other countries. McMahon's study of Ontario's rate of imprisonment also shows a large decrease in prison admissions around this time (McMahon, 1992:95), however, her study shows that the fall in prison numbers commenced in the early 1960s, reaching a low point in 1972, increasing in 1972 and falling to it lowest post-war level in 1974, three years before Victoria reached its lowest point.

FIGURE 2.3
IMPRISONMENT RATE PER 100,000 POPULATION
VICTORIA, NEW SOUTH WALES AND AUSTRALIA, 1900-1975[6]



From the mid-1970s imprisonment rates began to climb, from around 40 per 100,00 in 1976 to around 50 per 100,000 in 1992 when the 1991 Act came into force, although the magnitude of that rise is small in comparison with changes which had taken place earlier in the century.[7]

LEGISLATIVE HISTORY

1850 - 1907: Establishing the sentencing system

The criminal law of Victoria was comprised of a series of English Acts made applicable to the colony. The two major sentencing options were imprisonment and the fine. In general, sentences of imprisonment were governed by a statutory maximum penalty structure which reflected the values of the mother country over

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6 Source : Mukherjee, 1981.

7 See further, Chapters 3 and 6.

the previous two centuries or more. Release prior to the expiration of the sentence imposed by the court could take place under a system of 'ticket of leave', an early form of parole which had been operating since the founding of Australia. Originally, the ticket of leave was a 'conditional discharge from government servitude of convicts whose good conduct or meritorious service warranted them being allowed to seek private employment within a specified district. Later a policy was adopted requiring the prisoners to first serve a minimum period ... before obtaining a ticket of leave' (Fox and Freiberg, 1985:339). Under the ticket of leave, the prisoner could live and work in a specified district but was liable to have the leave revoked for misconduct to be returned to the stockade to complete the full sentence. In the 1850s, between 20 - 43% of a sentence could be served by way of a ticket of leave. For a three year sentence, 33% could be served on leave, for a 7 year sentence, 43%, for a 10 year sentence, 25%, and for a 15 year sentence, 20%.

The 'ticket of leave' system was discontinued in August 1860 and was replaced by a system of absolute remissions. Remissions were set by regulation and were based upon a points system. Points could be earned through hard work and good behaviour and by the latter part of the nineteenth century, prisoners serving sentences of two years or more could gain a remission of up to one quarter of their sentence (Johnston and Fox, 1965:127). It is evident that from the inception of sentencing in Victoria, a sentence of imprisonment was rarely, if ever, served in full. The system was never 'truthful', but neither was that a political issue until the 1980s.

The major sentencing issues of the early years of the colony were those relating to imprisonment: about the nature hard labour, solitary confinement, gaols and houses of correction. In general, imprisonment in default of payment of a fine was the norm although fines were also recoverable by distress. Courts had the power to discharge offenders from conviction in certain cases, to dismiss or adjourn cases on recognisance and to order corporal or capital punishment, although, as will become evident, the last two options had little impact upon overall sentencing patterns.

The imprisonment boom which accompanied the gold rush may partly be explained by the composition of the population. In 1854, there were 188 males for every 100 females, and more than half the population was aged between 20 and 44. In criminological terms, this is a potent combination, for it has been amply demonstrated that crime is predominantly a young, male phenomenon. By 1881 the

masculinity ratio was down to 188 males for every 100 females and it was not until the early 1900s that the gender balance was equalised. The following table indicates the changing proportion of the sexes in the population (VYB 1903):

TABLE 2.1
RATIO OF FEMALES TO 100 MALES

YEAR	RATIO
1861	64.41
1871	82.40
1881	90.75
1891	90.57
1901	98.94
1903	99.68

As the population grew,[8] Victoria became a relatively safer place to live. The proportion of males between 20 and 35 decreased and the actual number of such males in the population decreased by nearly 49,000.[9]

In 1872, there were twelve gaols in Victoria, three in the metropolitan area and nine in rural locations. Overcrowding was severe, but in the last quarter of the nineteenth century, the *rate* of imprisonment started to fall, and by the end of the century it had fallen by over 50%, although the actual *numbers* in prison fell by approximately 27%. This reflects the increase in population, the declining use of the prison as a sanction and the decreasing duration of sentences.[10] It also reflects a major decrease in the rate of crime during that period. 'Crime rates' are notoriously difficult to estimate and nineteenth century data are somewhat problematic. However, the Victorian data have the advantage of some degree of continuity, although their comparability varies over the decades as counting rules were changed and changes in the nature of offences.[11]

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8 Victoria's population in 1870 was approximately 713,000. Over the next decade it grew by 19%, to 850,000, and in the boom period of the 1880s it grew by 31% to 1,118,000 by 1890 (VYB).

9 VYB 1873. A number of these males left Victoria in search of gold elsewhere.

10 See VYB 1885-86 and below.

11 For example, changes in legislation relating to the age of consent for certain sexual offences affected the arrest rates: see VYB 1895-98. Up to 1893, Year Book data were based on each separate *charge* laid against an arrested person. From that year they were based on each separate *arrest*, with only the most prominent charge being

A number of measures of the Victorian 'crime rate' are available:

- the number of crimes reported to police
- the number of arrests
- the number of convictions

Each of these showed a consistent decline from the 1870s through to the late 1920s. The data presented in Appendix 2.2 and Appendix 2.3 indicate that the decline in the rate of the more serious cases coming before the courts, the arrest cases before the Magistrates' Court. From a high of 3.38 per 100 of the population in 1887, it dropped to 1.70 in 1897 and declined to an all-time low of 0.56 in 1918. Although the number of arrest cases coming before the Magistrates' Courts increased in the post war years, the rate never exceeded 2 per 100. Arrest rates for major offences such as homicides, rapes and robberies declined, though arrests for drunkenness increased through the latter part of the nineteenth century. In 1876, the Victorian Statistician noted that the number of arrests as a proportion of the population fell; from 1:26 in 1866; 1:32 in 1871 and 1:33 in 1876 (VYB, 1876). Drunkenness was perceived to be the major social problem of the late nineteenth century in Victoria. In 1882, 44% of all arrests were for drunkenness, compared with only 10-12% of arrests for serious crimes. Drunkenness was a genuine social problem and was the subject of continuing and intense concern (Sturma, 1983:142). Although the statistics for the number of arrests for drunkenness may have reflected more the extent of policing and public concern than its actual incidence, there is little doubt that it was the major 'law and order' pre-occupation of the time. Sturma's study of such offences in New South Wales concluded that arrests for drunkenness and assaults were directly related: the higher the consumption of alcohol, the higher the number of arrests for violent crimes. He also suggested that the better the economic conditions, the greater the alcohol consumption.

The early 1880s were also years of severe commercial depression, resulting in a small decrease in the total number of arrests, including arrests for drunkenness. By the mid-1880s, reforms to the licensing laws restricted the number of pubs in an attempt to curb the drinking problem and in 1898 there was a Royal Commission

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counted. This would have the effect of artificially decreasing the crime rate: see McConville, 1985:86

into the Prevention and Cure of Drunkenness. However, the problem remained intractable, and in 1928-29 the Victorian Statistician reported that in 1926, 53% of all arrests were for drunkenness. These offenders were often sentenced to very short periods of imprisonment, resulting in high reception rates, but having relatively impact upon the stock of prisoners.

This period is also notable for the number of females arrested, convicted and imprisoned. Until the early years of the twentieth century, females made up approximately 20% of those arrested and imprisoned. Women tended to be arrested and imprisoned mainly for offences of good order, mainly vagrancy and prostitution[12]. In 1882, nearly one-third of females arrested were arrested for prostitution. In the Magistrates' Court, between 1888 and 1901, women made up 44% of all vagrancy defendants, and for a short period, between 1890 and 1892, more women than men were tried for vagrancy (Davies 1994:147). Women tended to be re-arrested and imprisoned frequently, an indication of their social and economic vulnerability at the time.

The late 1880s were boom years. Property speculation resulted in skyrocketing land values and an increase in property crimes, but by 1889, the speculative bubble collapsed, leaving thousands of victims in its wake. Overall, however, the crime decreased, as it did over the next thirty years. This decrease in crime was also experienced in cities in Britain and the United States (McConville, 1985:70; Gurr et al 1982).[13] In Melbourne, increased urbanisation, decreases in 'larrikinism',[14] prostitution, drunkenness, petty street crime all contributed to the rise of order.[15]

However, the total number of cases coming before the courts increased greatly, as did the number of convictions. Figure 2.4 shows the total number of persons convicted by the courts for non-traffic cases between 1872 and 1965. Although it

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12 On prostitution in late nineteenth century Melbourne see McConville, 1985:76.

13 The period between the 1860s and the 1920s was remarkable for the decrease in crime in England and Wales (Gattrell 1980), the United States (Monkonnen 1975), Toronto (Boritch and Hagan 1980), New Zealand (Fairburn 1989) and elsewhere.

14 Larrikins were the nineteenth century equivalents of today's youth gangs who hang around street corners.

15 For a discussion of the some of the reasons for the changing crime environment see McConville, 1985.

appears to show a startling increase in crime in the post-Second World War years, the picture it reveals is less concerning.

FIGURE 2.4
PERSONS CONVICTED BY COURTS 1872 - 1965 (NON-TRAFFIC OFFENCES)

The rate of convictions per 100,000 of the population shows a similar pattern, but the increase is accounted for by the change in the nature of the cases which came before the courts.

FIGURE 2.5
NUMBER OF CONVICTIONS PER 100,000 POPULATION 1872 - 1965

Interstate differences

By the 1870s it was possible to discern some fundamental differences between the colonies, differences which were so notable as to warrant a comment by the Victorian Statistician as early as 1876. Compiling comparative data as best he could between the Australian colonies and England, he found wide variations between the colonies. In 1876, for example, there were 5.1 arrests and summonses per 10,000 of the population in Victoria, compared to 4.3 in South Australia, 5.5 in Queensland, 7.3 in New South Wales, 8.8 in Tasmania and 27.7 in Western Australia. Conviction rates were 4.62 in Victoria, compared to 5.69 in South Australia, 7.17 in Queensland, 13.3 in New South Wales and 17.4 in Western Australia. He concluded that crime was more prevalent in those jurisdictions which had been subject to the convict taint than those which had been free of it.

A decade later, the Victorian statistician was again moved to compare criminal justice systems. In 1886-87, he noted that at that time, in New South Wales, there were approximately 2,500 prisoners (about 250 per 100,000) compared to 1,532 prisoners in Victoria, or about 153 per 100,000. This difference in imprisonment rates

FIGURE 2.4

PERSONS CONVICTED BY COURTS 1872 - 1965 (NON-TRAFFIC OFFENCES)

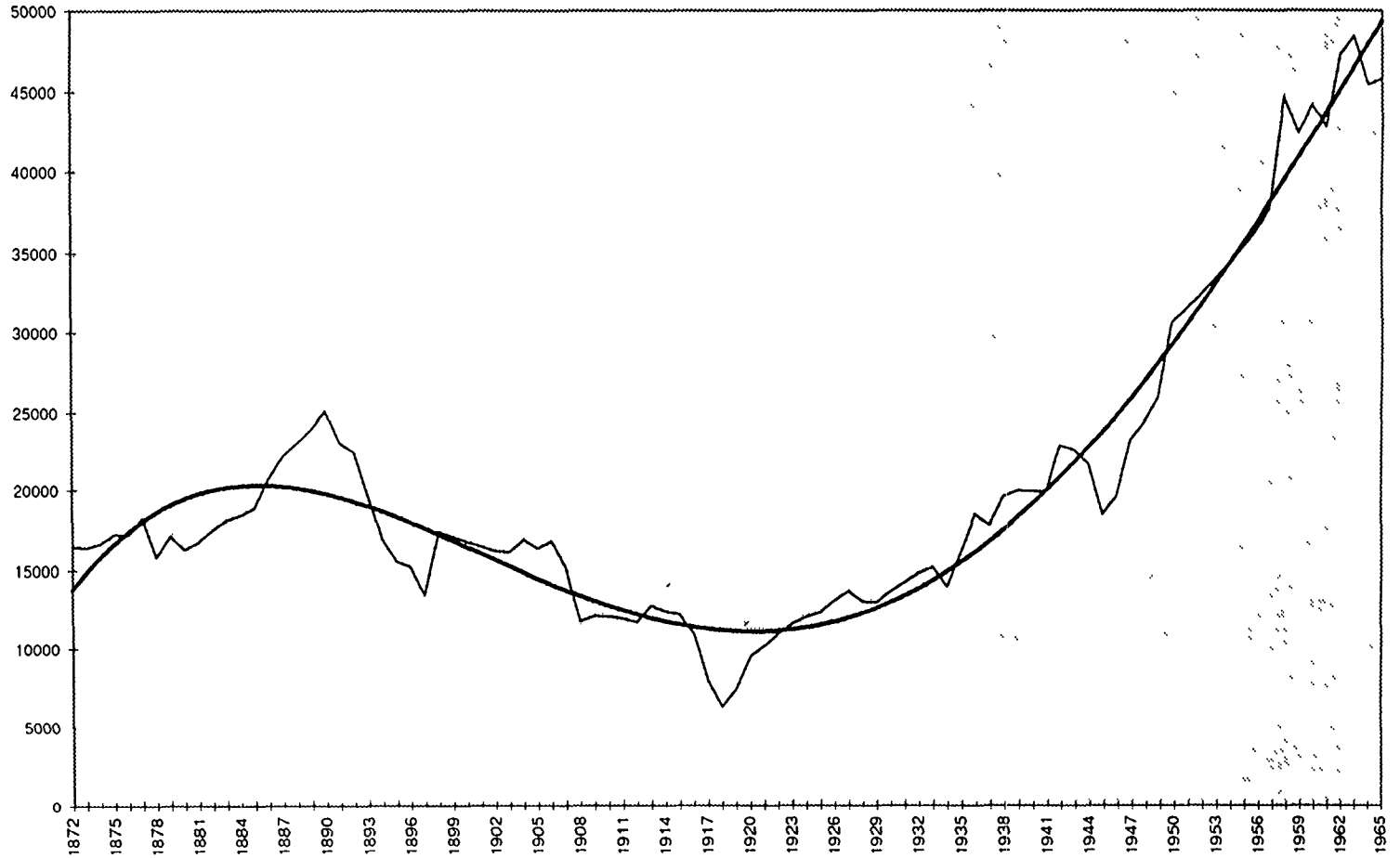
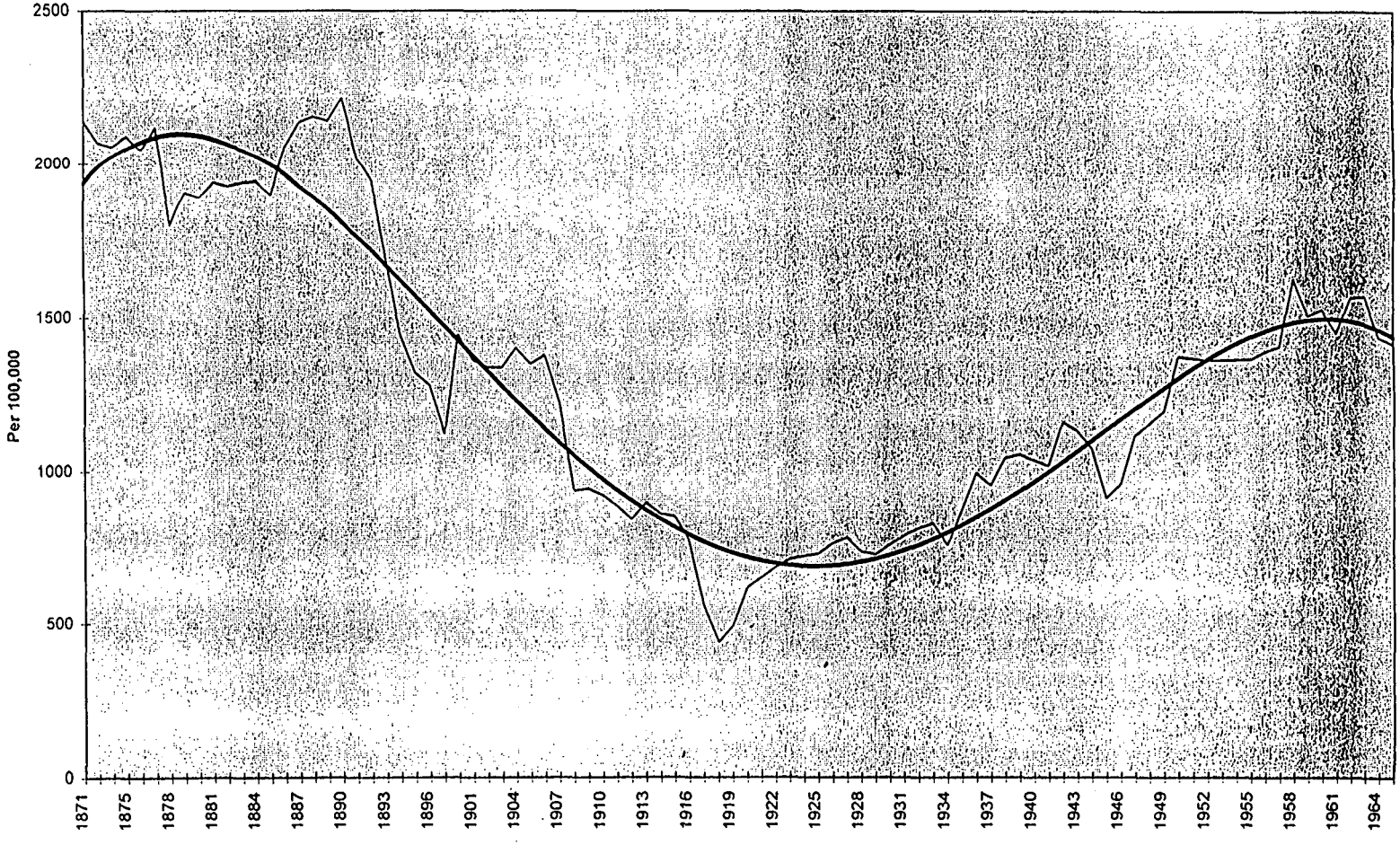


FIGURE 2.5

NUMBER OF CONVICTIONS PER 100, 000 POPULATION 1872 - 1965



between the two jurisdictions has persisted for well over a century, although its magnitude has varied.[16]

Arrest vs summons cases

As well as crime rates and demographic factors, imprisonment rates are affected by the structure of the criminal justice system itself, in particular, the method by which offences are processed. As noted above, the 'crime rate' may be variously measured: by number of reported offences, arrests, convictions or other indices. As measured by the total number of offences reported to the police, Victoria's crime rate appears to have increased massively in the twentieth century. In 1900, 57,797 offences were reported to police. In 1920, 56,698 were reported; in 1940, 86,287 rising to 97,201 in 1950 and 258,108 in 1960. However, this increase did not signal a massive increase in lawlessness. Rather, the creation of a raft of regulatory offences[17] and, later in the century, traffic offences, created new categories of crime and criminals.[18]

Not all offences reported to the police proceed to arrest or trial. Where an offender is identified, police may decide to proceed by way of summons rather than arrest. Summons cases are generally the less serious cases and their outcome is likely to be a non-custodial sentence, probably a fine on conviction. The proportion of offenders arrested, compared with those proceeded against on summons may affect the numbers ultimately sent to prison. It will certainly affect our understanding of the courts' exercise of their sentencing powers. The Victorian Year Books have always reported sentencing data in the Magistrates' Court only in relation to arrest cases. Yet arrest cases make up only a proportion of all cases which come before the courts. In 1904, for example, the Victorian Statistician reported that of all offenders reported as having committed offences in that year, about 40% were summoned, 50% were arrested and 10% were still at large at the end of the year in which the offence was reported. Over the years, the proportion of arrest to summons cases has decreased

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16 See also Figure 2.3 above. In 1907, the difference was about 20-30%, with the Victorian rate being about 20% under the Australian average at that time (VYB 1907-08).

17 In the early part of the century many of these prosecutions were laid under the licensing and pure foods legislation, as well as the *Education Act* which made attendance at school compulsory.

18 The increase in the number of offences and the rate of offending is detailed in Appendix 2.4, Reported offences and rates: 1877 - 1978.

markedly. Table 2.2, compares the VYB data for 'Reported Crime' and 'Arrests'. It shows the following changes:

TABLE 2.2
ARREST CASES AS PERCENTAGE OF REPORTED OFFENCES

YEAR	PER CENT
1877	51.0
1887	53.1
1897	38.0
1907	34.0
1917	18.5
1927	22.2
1937	27.8
1947	33.9
1957	18.3
1967	18.1

Over the years, as the amount in minor crime increased, the proportion of arrest cases to all crime decreases. Apparently nothing is known of the disposition of summons cases, as the statisticians did not report their outcomes in court. From the earliest days of the Victorian Year Books until the series was discontinued in the 1970s, only the outcomes of arrest cases were reported.

The jurisdiction of the courts

Another factor affecting sentencing patterns and therefore, ultimately, imprisonment rates, is the distribution of business between the courts. Offences in Victoria are divided into three categories: indictable offences, indictable offences triable summarily and summary offences. Indictable offences are heard in either the Supreme Court or the County Court, whilst summary offences are heard in the Magistrates' Court. The Magistrates' Court also conducts preliminary hearings in relation to indictable offences. The County Court is the major trial court for indictable offences and can hear all cases except treason, murder and certain other offences. Currently, the Supreme Court confines itself to trials of murder and certain complex or lengthy cases.

The powers of the Magistrates' Court to order imprisonment are more limited than the higher courts, being restricted to two years imprisonment for a single offence

and five years for multiple offences. It could be expected that the greater number of cases heard in the higher courts, the more likely it is that longer sentences of imprisonment will be imposed and therefore the higher the imprisonment rate.[19]

Figure 2.6[20] charts the changing share of court business between the higher and lower courts between 1872 and 1994.

FIGURE 2.6
SHARE OF COURT BUSINESS (CONVICTIONS) HIGHER COURTS
1872 - 1994

This figure indicates that the higher courts in Victoria deal with only a small proportion of all criminal cases, somewhere between 2% and 5% of cases. Although the data are incomplete and problematic, particularly over the period of the 1960s and 1970s, it would appear that since the 1980s, the proportion of cases heard by the higher courts has fallen. Table 2.3 indicates not only how the share of business has changed between the courts over the last decade or so, but also how the volume of business has declined since the early 1990s.

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19 However, cf Willis (1995b) who has produced data which indicate that in relation to serious offences such as robbery, there has been a significant shift to hearing cases in the Magistrates' Court and that that court is imprisoning a higher proportion of defendants than the higher courts. However, there is no indication of the length of sentences imposed.

20 See also Appendix 2.5

FIGURE 2.6

SHARE OF COURT BUSINESS (CONVICTIONS) HIGHER COURTS

1872 - 1994

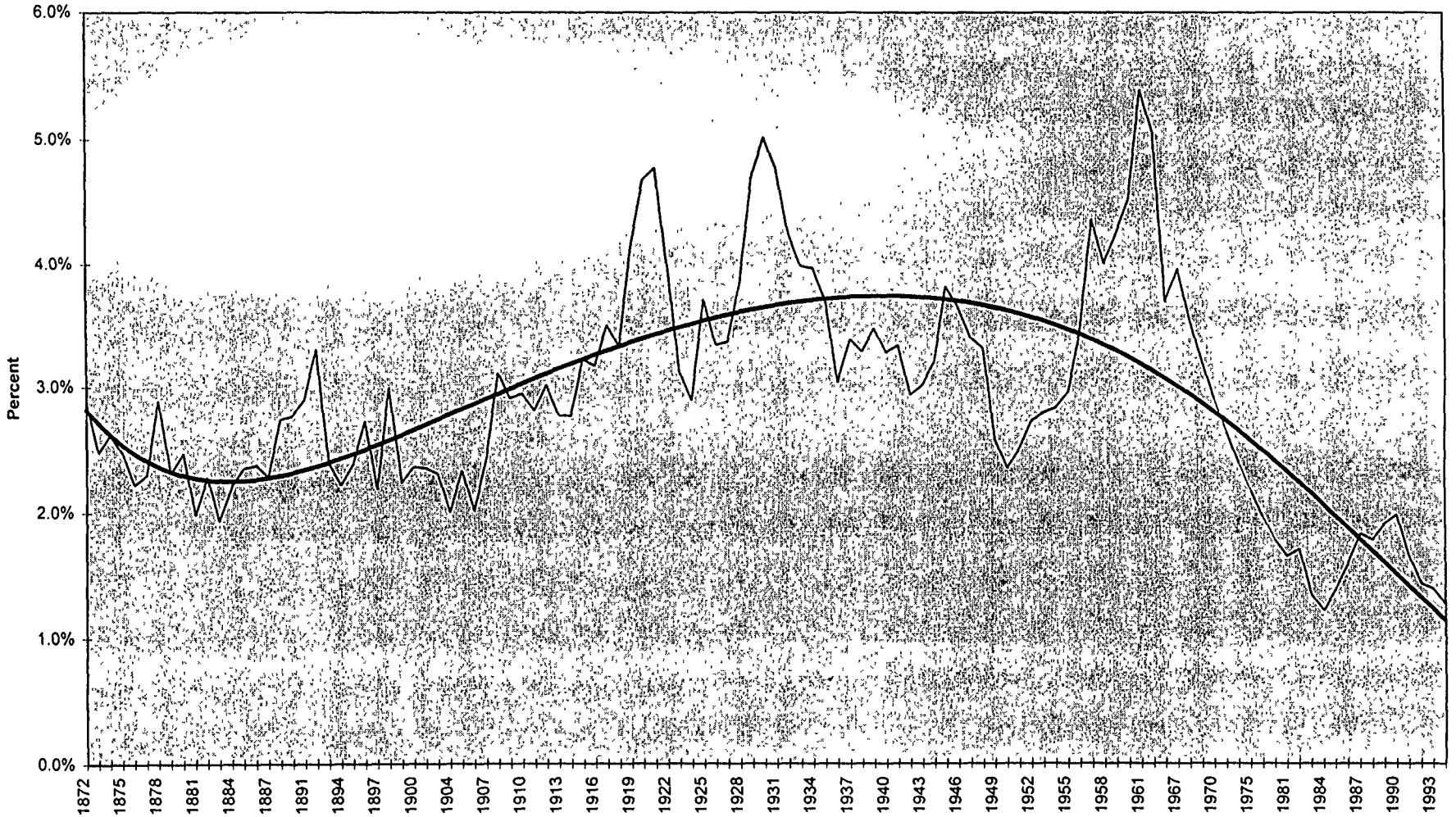

TABLE 2.3
PERSONS CONVICTED, HIGHER AND LOWER COURTS AND PER CENT SHARE OF BUSINESS 1981 - 1994

	HIGHER CRT	MAG COURT	PER CENT
Year	PERSONS	CONVICTED	
	NO	NO	
1981	1076	64026	1.7
1982	1186	68175	1.7
1983	1030	75733	1.3
1984	941	76188	1.2
1985	998	70712	1.4
1986	1191	73717	1.6
1987	1434	76722	1.8
1988	1451	79727	1.8
1989	1613	82732	1.9
1990	1738	85737	2.0
1991	1524	90367	1.7
1992	1352	92837	1.4
1993	1276	90037	1.4
1994	1137	87842	1.3

Over the years, the jurisdiction of the Magistrates' Court has increased. In February 1963, Courts of Petty Sessions were given the power to deal summarily with certain offences previously dealt with by the higher courts. The 1991 Act effected some changes in distribution of cases between the higher courts and the Magistrates' Court. The Act amended the *Magistrates Court Act* 1989 (Vic) so that all offences punishable by imprisonment for 10 years or less may be tried summarily. Offences punishable at penalty level 8 or above (36 months imprisonment) are presumed to be indictable. Offences between level 4 and level 8 are presumed to be indictable offences triable summarily with the consent of the accused and the court.[21] This change meant that a far wider range, and larger number, of serious offences could be heard in the Magistrates' Court. However, the *Magistrates Court Act* 1989 (Vic) does not provide any criteria to guide a magistrate in determining which offences should be heard summarily. According to data produced by the Director of Public Prosecutions, there is some indication that the change in jurisdictional limits may

21 See also *Magistrates Court Act* 1989 (Vic), Schedule 4.

also have led to a decrease in the number of committals for trial in the higher courts.[22]

Prison profiles

In the late nineteenth century, the composition of the prison population was also a cause for concern. In the 1880s a growing number of people were committed to prisons more on account of their medical and social condition than because of their offending. The Victorian statistician noted in 1886-87 some 744 people in that year were admitted to prison on account of their destitute condition. The prison was a substitute for the provision of social services and the offence of vagrancy was the means by which entry was usually obtained (Davies, 1994:153). In the 1888 1358 destitute offenders were received into prison, with the number climbing to 1416 in 1888-89. In that year it was estimated that there more than 1000 vagrancy cases were brought before the Magistrates' Court, with over 3000 arrests in 1889. Almost one-quarter of the prison population was made up of vagrants (Davies, 1994:155). Over the next decade, however, the appropriateness of these dispositions came into question. The cost and effectiveness of imprisonment for such cases was a topic for contemporary debate and generally, short sentences came to be seen as expensive and ineffective. Magistrates turned away from imprisonment as a method of dealing with vagrants. Increasingly, vagrancy charges were discharged, or offenders were acquitted after trial. By the early 1900s, over half of this group of offenders were being discharged (Davies, 1994).

Prison accommodation

The legacy of the building boom of the period between 1850 and 1870 was a glut of prison accommodation. As prison numbers fell in line with the decreasing crime rate and decreasing receptions, decisions had to be made as to what to do with the gaols. In 1904 there were nine gaols in Victoria, with three having been closed in the latter part of the previous century. At that time, there was twice the amount of accommodation available that the average number of prisoners.

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22 This was based upon only 2 months evidence to 30 June 1992; see Director of Public Prosecutions, Victoria, *Annual Report 1991/92* p.19.

An ongoing penological debate concerns the relationship between imprisonment rates and the amount of prison accommodation. Two models have been propounded (Blumstein, 1983:35):

- a reactive or population model which suggests that construction of new facilities occurs as a response to increases in prison population (homeostatic theory);
- a capacity model which hypothesises that prison construction is itself a stimulus to prison population growth so that more prison capacity results in sentencing of more prisoners to fill that capacity (the build and fill theory).

The notion of 'prison capacity' is an ambiguous one. Prison administrators distinguish between:

- 'maximum', 'rated' or 'authorised' capacity: this is the extent that cells can be utilised as single or multiple units of accommodation (OOC Master Plan, 1983:397). Thus dormitories can vary in capacity and individual cells can hold one, two or three prisoners. It describes every available bed in an institution.
- 'Operational' or 'functional' capacity refers to the day to day capacity of the prison system which takes into account the daily operational requirements of the system such as fluctuations in receptions, prison hospital accommodation, prisoner management including the need to protect and isolate certain groups of prisoners on health or safety grounds.

In Victoria it is estimated that the operational capacity is about 10-15% below the maximum capacity (OOC Master Plan, 1983:397).

For some years, in the United States, Blumstein's homeostatic theory (1973) seemed to be ascendant. Blumstein argued that the United States in the early to mid-half of the twentieth century, prison populations were adjusted so as not to exceed the space available (Young and Brown, 1993:34). Whatever validity this theory may have had, the experience of the past decade which has seen the United States prison population soar to unprecedented heights has robbed it of any contemporary

explanatory power. In California, for example, prison populations are at over 170% of rated capacity and in Hawaii they are over 180% of capacity.

Victoria provides an interesting case study in the relationship between capacity and imprisonment rates. Table 2.4 traces the relationship between prison accommodation and prison numbers.

TABLE 2.4
VICTORIA: PRISON ACCOMMODATION AND OCCUPANCY RATES[23]

YEAR	ACCOM	DAILY AV NO PRISONERS	OCCUPANCY RATE
1853	1093	955[24]	87%
1900	2445	1185	48%
1910	2097	876	42%
1920	2157	756	35%
1930	1758	1301	74%
1940	1631	1181	72%
1950	1630	1081	66%
1960	2057	1875	91%
1965	2252	1949	87%
1970	2666	2389	90%
1975	2320	1605	69%
1979-80	1964	1727	88%
1984-85	2006	1821	91%
1987-88	2192	2017	92%
1994[25]	2864	2509	88%

As noted above, Victoria's imprisonment rate (not number) achieved its historical peak in the early years of the colony. In addition to embarking upon a major prison

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23 From Mukherjee et al 1989.

24 Number of prisoners in December of that year: Johnston and Fox, 1965:122.

25 November 1994.

building programme, four hulks were also operating to cope with the numbers. Accommodation number peaked in 1900, when the system could house 2,445 prisoners, yet the occupancy rate that year was less than half. By 1920, the occupancy rate had fallen to 35% of capacity, and in the following decades, the state shed approximately 40% of its capacity (2445 to 1630 in 1950).

During the 1950s the growth in prison numbers resulted in a growth in accommodation, whilst in the 1970s, falls in numbers again resulted in closure of prisons. Although not conclusive, the Victoria data, to that date indicated that it was prison numbers which determined the level of accommodation and not vice versa. To argue this however, is not to argue that the level of accommodation cannot, and has not, influenced prison numbers.

The relatively high occupancy rates from the late 1970s pushed prison operations to their limits. The Office of Corrections Master Plan in 1983 commented that there was little surplus space available and recommended the construction of new prisons to cope with the projected growth in prison numbers. The Attorney-General, Mr Kennan was keenly aware of the 'build and fill' phenomenon, commenting in 1986 that one of the reasons that Victoria had one of the lowest prison populations in Australia was that it had carefully limited the expansion of prison beds (Kennan in Harding 1986). Prison construction had primarily been concerned with renovation and replacement rather than increasing capacity.

The overcrowding phenomenon of that period created a number of compensatory mechanisms. In some cases, short term prisoners were held in police cells. This has been a constant bone of contention between the police and prison authorities, but in June 1993, there were 300 prisoners in police cells. In June 1994 175 prisoners, formally the responsibility of the prison service, were held in police cells. To the extent that these prisoners do not appear in the formal prison musters, they disguise the true rate of imprisonment.

Another mechanism for dealing with overcrowding is for judges to impose fewer sentences of imprisonment. Yet another is for the correctional authorities to utilise early release mechanisms such as remissions and pre-release programmes. Both of these were used extensively in the 1980s.[26]

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26 See below Chapter 3.

In sum, we tend to agree with Young and Brown's conclusion (1993:34) that in the long run, prison capacity does not have a significant bearing on the size of the prison population and nor does it explain differences between jurisdictions. And while capacity may act, in the short term, to limit prison numbers, if the political imperative is sufficiently strong, capacity limitations will become irrelevant and, as is clearly evident in the United States, prisons will be filled to well over capacity pending the construction of new prisons.

Calls for sentencing reform

Calls for sentencing reform commenced in the mid-1880s. In his 1885 Annual Report, the Inspector-General of Prisons recommended the substitution of whipping for imprisonment for juvenile offenders in order to avoid the evils of imprisonment (VYB, 1886-87). That recommendation was given effect by the *Juvenile Offenders Act* 1887 which give magistrates power to impose corporal punishment upon boys aged under fifteen in addition to, or in lieu of, imprisonment. The punishment could be inflicted by a cane or birch by a police constable.

In 1887 the Council of Judges had endorsed the Inspector-General's call for probation along the lines of the Massachusetts system which had been introduced in 1878 (Fox and Freiberg, 1985:290). In the same year, the *Juvenile Offenders Act* permitted the conditional discharge of first offenders under the age of 21 convicted of offences punishable by not more than three years imprisonment. Although it described release as being on 'probation', it did not require any form of direct supervision. In addition to the courts' probation powers, the Governor was given the power to release prisoners who had been convicted and received into prison when under the age of 25. Probation for adults was not introduced until 1956.

The probation power was little used and had an insignificant impact upon the imprisonment rate. In 1888, 16 males were released under these provision, and 18 offenders were released in the following year. However, the use of probation increased in 1890, with 96 prisoners being released under these provisions and 113 in 1892.

1907 - 1956: the indeterminate sentence experiment

The first major change in the sentencing structure came in 1907 with the introduction of the *Indeterminate Sentences Act* 1907 (Vic), which came into operation on 1 July 1908. This Act created an Indeterminate Sentences Board, a class of 'reformatory prisons' and a form of unsupervised probation for both adults and juveniles (Johnston and Fox, 1965:129). The 'unsupervised probation' power was, in fact, a form of suspended sentence and was a precursor to the suspended sentence legislation of 1985. Under the 1907 legislation, a judge had the power to suspend the execution of sentence on a first offender convicted of an indictable offence, or an offence punishable on summary conviction and imprisoned for not more than three years, having regard to the antecedents, character, associates, age and health or mental condition of the offender, the trivial nature of the offence and the extenuating circumstances under which it was committed.

The major thrust of the legislation was directed at the 'habitual criminal', a class of offender who was considered either socially inadequate or highly motivated and contemptuous of the law. Most habitual criminals were property offenders with multiple appearances before the courts.

The major innovation of the legislation was to allow judges to impose on offenders over seventeen years of age, who had previously been convicted on at least two occasions of any indictable offence, a sentence of indeterminate reformatory imprisonment instead of a fixed term of imprisonment, if they considered that the 'antecedents, character, associates, health and mental condition, nature of the offence, or any special circumstances of the case' so warranted. The legislation required the judge to impose a term of imprisonment, but to declare the offender an 'habitual criminal' and direct, as part of the sentence, that on the expiration of the term, that the person be detained during the Governor's pleasure, in a reformatory prison.

It permitted magistrates who sentenced certain offenders to terms of more than three months to direct that prior to the completion of the sentence, they be brought before a court which could to decide to impose an indeterminate sentence at the expiration of the first sentence (Fox and Freiberg, 1985:339).

The Board had three major duties:

(a) to inquire as to whether any persons detained in any reformatory prison were sufficiently reformed to be released on probation or whether there were any good reasons for the release on probation of any persons so detained;

(b) to consult with the Inspector-General of Penal Establishments as to whether any person should be transferred from a gaol to a reformatory prison; and

(c) to make recommendations to the Governor in Council as to the release on probation of any person detained in a reformatory prison

Despite the potential of the indeterminate sentence to increase imprisonment rates, Victoria's prison population decreased from its post-gold rush high in 1891 of 1,900 offenders (167 per 100,000) to its lowest historical level, in absolute terms, of 795 prisoners in 1921 (52 per 100,000 of population).

The indeterminate sentence remained a little used option, with the courts choosing to remain firmly within the traditional framework of fixed term sentences.[27] Between the years 1907 and 1955, just prior to their abolition, 6,382 men and 59 women were committed to reformatory prisons, an average of about 137 per year. In comparison, the average number of prison receptions each year was between 6,000 and 10,000. In its last five years, approximately 95 prisoners were so dealt with, or approximately 3% of all sentences imposed. In announcing its demise in 1955, the then Chief Secretary, Sir Arthur Rylah identified its problems as follows. First, many of those who may have benefited from such a sentence were ineligible to receive it, or did not receive it. Secondly, many offenders upon whom such sentences were imposed were unsuitable for it. Finally, the indeterminate nature of the sentence depressed offenders. Rather than aiding reform or rehabilitation, it worsened their condition. Part of the blame for its failure could be attributed to the failure of governments to provide it with support. The buildings were unsuitable, programs were non-existent and multiple recidivism, mostly for minor offences, highlighted its inefficacy. Slowly

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27 In 1915, the *Indeterminate Sentences Act* was amended to give the Board the power to parole a prisoner temporarily for purpose of testing reform, to impose conditions of release to enable transfer between reformatory prisons and to create a system of temporary leave.

the courts lost faith in the system and stopped using the sentence (Victoria, Parliamentary Debates, Hansard, 1955).

The general consolidation of the Victorian statutes in 1928 provides a snapshot of the sentencing powers of justices in the first quarter of the century. A magistrate had a general power to adjourn a case or to dismiss it if the offence was trifling and it was considered inexpedient to inflict punishment.[28] Fines could be substituted for imprisonment (s.71) and could be enforced by distress or commitment to prison for up to six months. Imprisonment for a maximum of two years could be imposed with hard labour or served in solitary confinement. Whipping was also an option. Under the *Crimes Act* 1928, certain first offenders could be released on recognisance (s.532), young offenders could be committed to a reformatory school (ss.336 & 356) and indeterminate sentences could be imposed on habitual criminals.

The sentencing system remained almost unchanged for almost half a century. As has been seen, from the period from the turn of the century was one of decreasing crime, decreasing prison numbers and decreasing business for the courts. Other than the short, sharp increase in prison numbers during the depression years, the citizens of Victoria could feel safer than at any time in the existence of the state. However, the post-war years saw an increase in the number of arrest cases coming before the courts, increasing numbers of convictions, particularly for regulatory offences, and increases in personal and property crimes. From a low of 912 prisoners in 1948, prison number also began to grow, reaching 1380 by 1956.

1956 - 1973 The modern era

In 1951, a report by the Inspector-General of Penal Establishments, Mr A.R. Whatmore, recommended the abolition of the Indeterminate Sentences Board, a new correctional system for youthful offenders and a range of other measures (Victoria 1951). Whatmore's report marked the beginning of the modern era in sentencing in Victoria. What is recognisably the modern structure of sentencing emerged in the mid-1950s with the passage of the *Penal Reform Act* 1956 (Vic), which came into operation on 1 July 1957. This Act dissolved the Indeterminate Sentences Board and introduced the modern system of supervised adult probation, together with a parole

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28 *Justices Act* 1928

system which let sentencers fix a minimum period during which an offender could not be eligible for parole.[29]

Victoria's probation legislation was modelled upon the *Criminal Justice Act* 1948 (UK), which replaced the *Probation of Offenders Act* 1907 (UK). Its introduction was motivated by a desire to decrease the use of imprisonment and thereby to save money. New South Wales had introduced probation in 1951. Probation could be ordered by a court in respect of any imprisonable offence, if the court considered it expedient to do so, having regard to the circumstances, including the nature of the offence and the character and antecedents of the offender. A probation order was an order made 'in lieu of' any sentence on the charge and could run for up to five years. In its first eighteen months, 2,800 persons were admitted to probation and by the early 1980s, approximately 12% of sentences imposed by the higher courts were probation orders.

The 1956 legislation also introduced the modern parole system. A sentence would now be comprised of both a maximum and minimum term, the non-parole period. Release on parole would be the function of the Parole Board. Habitual criminal legislation replaced the indeterminate sentence and provided for preventive detention for certain repeat offenders aged over 21 years. The suspended sentence provisions for juveniles were repealed and replaced by the probation order.

The first major new sanction to be introduced to the adult courts for some years was created in 1965. This was the youth training centre order, a measure available in respect of young adults aged between 17 and 21 and unique in Australia. It arose from the desire to promote rehabilitative rather than punitive policies, particularly for young offenders

1973 - 1991 The search for alternatives

The decade of the 1970s was a time of extreme social and political unrest in Victoria as elsewhere. In 1971 the prison population reached a post-war high of 2,389. Crime rates, as measured by the police indices, had increased steadily from at least the early 1960s, if not before.[30]

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29 This was the first parole system in Australia.

30 See Appendix 2.6, Crimes Reported to the Police 1960 - 1995.

According to police statistics, total major crime increased from 62,240 in 1960 to 112,724 in 1970, with most of the increase being in property offences. Over the next decade, major crimes continued to increase, reaching 170,044 offences in 1980 and 295,336 by 1990. The number of persons convicted by the Magistrates' Courts increased from 42,132 in 1960 to 59,097 in 1970 to over 85,000 by 1990.

In 1972 major riots broke out in Pentridge Prison, Victoria's central penal institution. In May of that year a Board of Inquiry was established to investigate allegations of brutality and ill-treatment of prisoners, the report of which was tabled late in 1973 (Jenkinson, 1973).

Influenced by the penal reform debates of that period (McMahon, 1992:4) which called for the introduction of alternatives to imprisonment on humanitarian, fiscal and utilitarian grounds, Victoria introduced legislation to create periodic detention centres, weekend imprisonment and work-release hostels.[31] None of these options, however, became operational. Despite this, prison numbers plunged by over 40%, from 2,389 to 1475 in 1977.[32] During this period, two prisons were closed[33] and capital punishment was abolished.[34]

This phenomenon of the early 1970s, of massive decarceration without statutory intervention, during a period of apparent increases in recorded crime, is remarkable, if generally unremarked upon. Contemporary explanations for this phenomenon were few. In 1973 the Social Welfare Department noted in its Annual Report that it was 'surprising and also pleasing' to report a fall of 259 in daily average numbers in prison, which provided a relief from overcrowding. With the daily average number of female prisoners dropping to 32, the second lowest rate in that century,[35] representing 1.5% of the total prison population,[36] there was talk of setting a world standard in Victoria by totally abolishing imprisonment for females. The following

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31 *Social Welfare Amendment Act* 1973 (Vic).

32 This stands in contrast to the situation in other countries where prison populations grew markedly in the 1970s (Junger-Tas, 1994:2).

33 McLeod Prison farm in 1974 and Cooriemungle in August 1976.

34 *Crimes (Capital Offences) Act* 1975 (Vic).

35 It was 30 in 1962-3.

36 Cf 20% in 1894.

year's report noted another major fall in numbers, some 325 in daily average terms, and hypothesised that this may have been due to a drop in major crimes, particularly larceny, breakings and illegal use of motor cars. It noted a large decrease in the number of receptions into prisons.

The 1975 Annual Report again noted falls in prisoner numbers, together with falls in the number of probationers, youth trainees and wards of the state. The major decrease in the number of prisoners aged under 21 years was noted and one Division of Pentridge prison was closed and demolished. Female prisoner numbers fell to 24, described by the Department as an 'astonishing fact'. In 1977 the Annual Report noted that it was the sixth year in succession in which the prison population had declined, a decline which, in its view, could not be attributed to the introduction of any alternatives to imprisonment. It attributed the decrease to changing community attitudes, changes in police activity and changes in the sentencing policy of the courts with regard to the treatment of minor offenders, in particular changes in the law relating to imprisonment for vagrancy and the creation of alternatives to imprisonment for alcoholics.

Biles' analysis of crime and imprisonment rates (Biles, 1982:143) could not find any convincing explanation for the decline in imprisonment rates around Australia. One explanation suggested for Victoria's decline was that it was partly a reaction to the report of a judicial inquiry into allegations of brutality and ill-treatment of prisoners (Jenkinson Report, 1973) which was established following major riots in 1972. It was suggested that the awareness of the poor prison conditions may have made judicial officers reluctant to impose prison sentences. A slightly more liberal remissions regime, introduced in 1973 may also have contributed to the decline, but it is unlikely that they would have caused such a large drop in numbers.

Piecing together the available data does not clarify matters greatly. In the period between 1968 and 1978, the number of offenders convicted in the Magistrates' Court increased from 48,335 to 88,327. Although, during that period, the proportion of offenders sentenced to imprisonment fell, although in absolute terms, the decline was relatively small, from 9,366 sentences of imprisonment in 1968 to 8,345 in 1975, but increasing again to 9,609 in 1978. Unfortunately, reliable data from the higher courts are not available for that period.

Prison reception data also shed little light on the phenomenon. According to one source, the Office of Corrections Master Plan data, receptions in 1971 totalled 11,917, rose to 13,288 in 1973 and then fell steadily to 8,443 by 1979. In other words, while prison receptions appeared to be on the increase, prison numbers started to fall.[37]

Other jurisdictions proffered different explanations for the fall in prison numbers during that period. South Australia suggested that its decline was due to an increase in the use of suspended sentences, Western Australia attributed it to changes in public attitudes and Tasmania to the introduction of community work orders, parole and a more liberal use of the remission system.

From around 1976, Victoria's imprisonment rate again began to rise. Figure 2.7 shows the changes in the Victorian imprisonment rate over the period between 1976 and 1992. The single most evident feature in the graph is the rise in the imprisonment rate over the period, from around 40 per 100,000 in 1976 to around 50 per 100,000 in 1992. This is equivalent to a 25% increase in the imprisonment rate over the sixteen years. The state's population also grew steadily over the same period, so that the total number of Victorian prisoners went from 1609 in June 1976 to 2247 in June 1992, an increase of about 40%.

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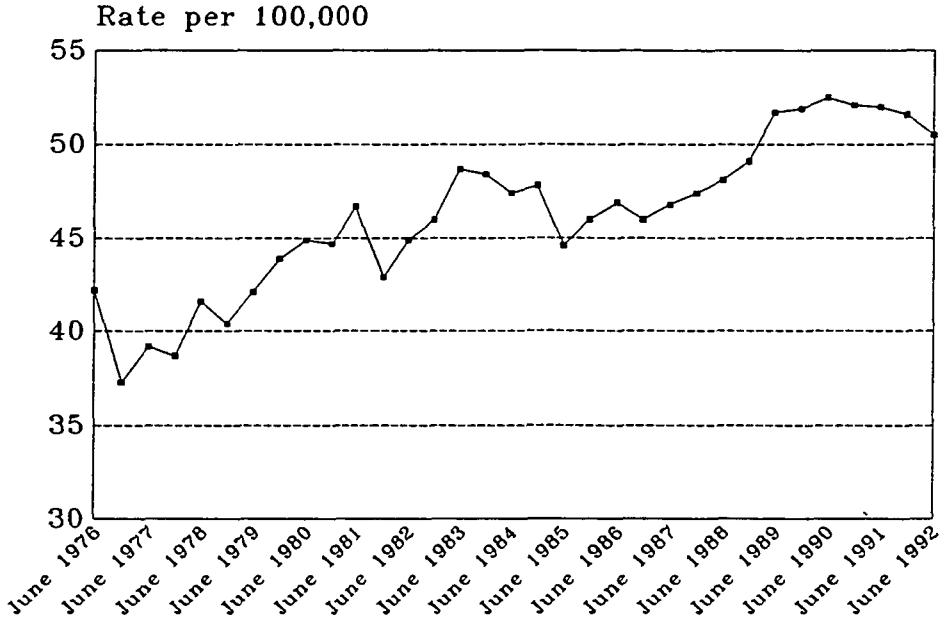
37 However, we believe that these reception data are highly unreliable and would not place too much store on them.

FIGURE 2.7
IMPRISONMENT RATE : 1976 - 1992



Source: Australian Prison Trends, Australian Institute of Criminology

This rise was neither steady nor uninterrupted. There appear to have been at least four distinct phases. From 1976 to 1983, the rate showed a more or less continuous pattern of increase, with one dip at the end of 1981. However, from 1983 until the end of 1987 the imprisonment rate declined slightly, from about 49 to 46 per 100,000. The period from 1987 to 1990 was also one of steady growth, but was followed by two years of slowly declining rates.

Ironically, it was not until June 1976 that the first community based program designed specifically to divert offenders from imprisonment came into operation in three metropolitan regions. The *Social Welfare (Amendment) Act* 1975 (Vic) renamed the never proclaimed periodic detention centres as 'attendance centres' and imposed limits upon the numbers which could attend at any one centre. These orders required offenders to report for a certain number of hours at regular intervals each week at a nominated centre.

By the late 1970s, sentencing reform was gaining considerable momentum.[38] When the Australian Law Reform Commission received a reference in August 1978 to review a wide range of issues relating to federal laws concerning the imposition of punishment for offences, the cause of sentencing reform in Australia received a major impetus. Although there had been at least one comprehensive review of state sentencing laws in South Australia,[39] a number of specific inquiries into prisons, parole and alternatives to imprisonment (New South Wales, 1978; New South Wales, 1979; Western Australia, 1979; Victoria ,1979), as well as the development of a nascent sentencing literature modelled on David Thomas' work in England (Daunton-Fear, 1977; Daunton-Fear, 1980; Newton, 1979; Potas, 1980), sentencing in Australia had not yet emerged from its role as 'Cinderella's illegitimate baby' (Walker, 1969:1). Professor Duncan Chappell's Interim Report for the Commission, published in 1980 (ALRC, 1980), was a comprehensive document which, for the first time, placed the 'renaissance of retribution' controversy then fomented in the United States by von Hirsch (von Hirsch, 1976), Van den Haag (Van den Haag, 1975), Wilson, (Wilson 1975) and others (Twentieth Century Fund Task Force, 1976; Morris 1974) on the political agenda in Australia. In particular, it highlighted the issues of discretion, disparity, 'truth in sentencing' and the quantum of punishment.[40]

However, because Australian sentencers had always operated under a determinate sentencing system, many of the problems which were being addressed by the prison reform movement in the United States had little relevance here. The failings of the indeterminate sentencing system which produced demands for statutory determinate sentences, the control of plea bargaining, sentencing guidelines (whether presumptive or prescriptive, mandatory or voluntary), sentencing councils, parole guidelines, appellate review of sentences, reasons for sentences and the like (Blumstein et al, 1983:2) were not the cause of prison riots, nor did they particularly concern criminal justice practitioners. What did concern them was prison overcrowding, prison conditions and methods of keeping prison numbers

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38 The following material is drawn from Freiberg, 1994.

39 Which did not come to legislative fruition for over fifteen years: see South Australia 1973.

40 For a number of reasons, the final report of the Australian Law Reform Commission did not emerge for another eight years (ALRC, 1988), following the publication of an extensive series of discussion papers (ALRC, DP 29: 1987; DP 30 1987; DP 31 1987).

under control. In Victoria, In 1978 there were major disturbances in some prisons and future accommodation requirements became a concern for the government as numbers began to rise.

In 1981, the community service order was added to the armoury of Victorian sentencers by the *Penalties and Sentences Act* 1981 (Vic). The idea of community work as a sanction came from the recommendations of the Report of the Victorian Sentencing Alternatives Committee (1979), which drew its inspiration from the United Kingdom where community service orders had made their appearance in 1973. This sanction came into operation in September 1982 and was based upon the performance of community work as form of punishment and restitution to the community. It was established on a trial basis in one metropolitan region and only 40 offenders were under this program by the end of 1984.

The pace of sentencing reform quickened in the early to mid-1980s. In 1982, a Labour government was elected to office in Victoria on a wide-ranging platform of reform. Its concern over the state of the prison system, following a highly critical report it had received in April 1983 from an American correctional consultant, led it, in August 1983, to commission a project to develop a twenty year master plan for the state's correctional services system. One of the requirements of the consultancy was the production of 'an integrated Master Plan for the Office of Corrections outlining goals, phases, and development strategies for correctional facilities, programs and systems' (Victoria, 1983:4). The consultants were required, among other matters, to project the future correctional population by sex, age and security classification, taking into account demographic patterns, criminality rates, detection rates, sentencing patterns, legislative changes and alternatives to imprisonment. The Report was submitted in December of that year.

Contemporaneous with the development of the Master Plan Report, the government decided to remove the administration of prisons and other correctional services from the Department of Community Welfare Services and give it to a newly established Office of Corrections.[41] At that time the most pressing problem facing the correctional system was severe overcrowding, so severe, in fact, that early in that

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41 *Community Welfare Services (Director-General of Corrections) Act* 1983 (Vic).

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41 *Community Welfare Services (Director-General of Corrections) Act* 1983 (Vic).

year the prisons were, for a time, unable to accept new receptions.[42] In response, the government introduced the *Community Welfare Services (Pre-Release) Program) Act* 1983 (Vic) which enabled certain longer term prisoners to be released into the community up to six months prior to the expiration of their minimum, or non-parole period.

The separation of the Office of Corrections from the Social Welfare Department at that time provided its staff with an opportunity to reconsider its philosophies and programs (Kidston, 1988; Wynne-Hughes, 1988). The Office sought to regain the confidence of both the courts and the community in community-based programs, in particular by limiting the inappropriate use of administrative discretions. It aimed to provide appropriate community programs which might divert people from the criminal justice system and set an imprisonment rate of 50 per 100,000 as an appropriate planning base. It embarked on a new prison building program, but it was a program intended to modernise and upgrade a decaying building stock rather than to increase in the total capacity of the system. Finally, it regarded it as important that all forms of adult corrections operate within an integrated system.

Crucially, however, it was at this time that the public debate was gradually turning from a predominant concern with the 'alternatives' to imprisonment debate, which concentrated on decarceration and the ills of imprisonment, to focus upon the nature of the sentencing system itself and the relationship between the various sentencing authorities. Contemporary concern with executive modifications of sentences, and in particular with the gap between sentences imposed and the periods of time actually spent in prison, had surfaced in Australia the late 1970s (see Freiberg, 1992). In its 1980 Interim Report (ALRC, 1980:211) the Australian Law Reform Commission had recommended the abolition of parole, although only partly for reasons to do with 'truth'.[43] The Commission later resiled from this position, but in its final report (ALRC, 1988) it recommended that truth in sentencing be enhanced, not by the abolition of parole, but by the abolition of remissions. In 1982, the abolition of remissions had been considered and rejected in Victoria by the Nelson Committee

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42 For some periods, persons sentenced to forty-two days' or fewer imprisonment were accepted and discharged from prison almost immediately as a result of the combination of remissions and the Director-General's power to order early release.

43 Citing a minority opinion in New South Wales 1978 to the effect that members of the community regarded parole as a 'charade'.

(Victoria, 1982) on the grounds it would generate resentment and discontent among prisoners and that the danger of adverse public reaction to the apparent public leniency was not sufficient to warrant overturning a system which had functioned reasonably well for many years.

By the mid-1980s, however, a significant swing against remissions was perceived (Victorian Sentencing Committee, 1987:111). Increasingly, the debate focused upon the expanding range of executive modifications of sentence, including parole, remissions, pre-release, temporary leave and the like (Fox, 1984). The genesis of the 1991 Act can be traced back to one controversial case decided by a Full Bench of five judges of the Supreme Court of Victoria in 1985 which centred upon this emerging political issue of 'truth in sentencing'.[44] The central issue in this case was whether a court should take into account the effect of remissions when imposing sentence. The Full Bench refused to overrule its previous policy that remissions were irrelevant to sentencing.[45] However, in passing judgment, the Court observed acerbically:[46]

> An intelligent observer who was told about the sentence passed and the period of incarceration actually served would be likely to conclude either that the Court had no authority because little notice was taken of the sentence passed or that the Court was engaged in an elaborate charade designed to conceal from the public the real punishment being inflicted upon an offender... The authority of the court is eroded whenever the Executive is authorised to interfere with its orders.

The result in this case sparked a fierce debate about the nature of the sentencing process and the relationship of subordinate sentencing authorities such as the Parole Board and the correctional agencies to the courts.

Following the decision in *Yates'* case, the Victorian government amended the sentencing legislation to permit a court to take remissions into account in sentencing. In addition, in October 1985, the then Attorney-General, Mr Jim Kennan, appointed a Committee chaired by Sir John Starke Q.C., a retired Supreme Court

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44 *Yates* [1985] V.R. 41.

45 See *Douglas* [1959] V.R. 182; *R. v. Governor of Her Majesty's Gaol at Pentridge; Ex parte Cusmano* [1966] V.R. 583; *Campbell* [1970] V.R. 120.

46 *Yates* [1985] V.R. 41, 47.

judge and erstwhile Chair of the Parole Board, to review current sentencing policy and practice in Victoria. The Committee's wide-ranging brief also required it to examine the purposes of sentencing, the impact of custodial and non-custodial sentences, the length of sentences, the impact of remissions, pre-release, parole, temporary leaves and other sentencing shortening practices on such matters as correctional administration, police administration, prisoner morale, staff morale, the community, victims and the offender and his family. In addition it was to review Governor's Pleasure prisoners, youth training centres, the role of the media and the provision of information for the courts.

Pending the Committee's report, however, the government hurriedly proceeded to legislate a new *Penalties and Sentences Act* in 1985. This Act relocated the main sentencing provisions of general application previously scattered in a range of legislation.[47] It introduced suspended sentences into Victoria, permitting courts to suspend a sentence of imprisonment of up to one year, either totally or partially. It also introduced a new measure, the community-based order, which replaced probation, attendance centre orders and community service orders. Finally, the Act required the courts in sentencing an offender to have regard to that person's plea of guilty, whether or not it was indicative of remorse.[48]

The Sentencing Committee's Report was tabled in April 1988 and contained a comprehensive set of recommendations together with a draft Penalties and Sentences Bill.[49] The Committee recommended the establishment of a Judicial Studies Board to assist the courts in sentencing and to undertake research on sentencing.[50] It also recommended that further research be carried out in relation to

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47 See *Community Welfare Services Act* 1970; *Crimes Act* 1958 (Vic), *Magistrates (Summary Proceedings) Act* 1975 and *Penalties and Sentences Act* 1981. (Vic).

48 At the same time there were major changes in the jurisdiction of the Magistrates' Court. Douglas and Naylor 1995 describe these as professionalisation, geographic centralisation, procedural efficiency and increases in jurisdiction. For a detailed study of the impact of the reforms of the 1980s in the Magistrates' Court up to 1991, see Douglas & Naylor, 1995.

49 Between the tabling of the Report and subsequent legislation an election was called for late 1988 which returned the incumbent government.

50 These recommendations were accepted and the Board was established by the *Judicial Studies Board Act* 1990 (Vic). The functions of the Board are to conduct seminars for judges and magistrates on sentencing matters; to conduct research on sentencing matters; to prepare sentencing guidelines and circulate them among judges and others; to develop and maintain a computerised statistical sentencing database for

the sensitive matter of statutory maximum penalties. 1988 was an election year and the government ran a strong 'law and order' campaign. It was particularly sensitive to the issue of 'truth in sentencing'. Following intense media publicity relating to some high profile prisoners who had been released on temporary leave, the program was suspended and two inquiries instituted (Murray, 1989; Victoria, Ministerial Advisory Committee, 1989).

As noted earlier, the period between 1985 and 1989 was one of steady increases in prison numbers. In the absence of any change to the sentencing system, there were two possible scenarios that could, at that time, be envisaged for the 1990s. One possibility was that the general upward movement in numbers over the previous seventeen years was the product of some fundamental trend in offending patterns, prosecution outcomes, sentencing patterns. On this basis, if the long term pattern of growth were to reassert itself, then numbers could be expected to grow at around 1.5-2.5% per year, or around 30 to 60 additional prisoners each year. Alternatively, if the engine of growth was that of demographic change, specifically in the number of young males in the community, as suggested by Walker (Walker 1985), then a somewhat slower rate of growth might have been expected, since age-cohorts in the critical 15 to 25 age groups had been in decline since the late 1980s.

Upon its re-election in 1988, one of the government's first responses to the Sentencing Committee's report was the *Corrections (Amendment) Bill* 1989 which proposed to replace remissions with earned 'merit time'. The Bill also provided for the phasing out of the pre-release scheme and a home detention programme for selected prisoners in the last six months of a sentence. Criticisms of the Bill, on the basis that it was not in fact abolishing remissions, ultimately led to its withdrawal (Freiberg, 1989).[51]

Criticisms of the Victorian Sentencing Committee's recommendations for what appeared to be very low statutory maximum penalties for a range of sexual offences

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use by the courts; to provide sentencing statistics to judges, magistrates and lawyers; to monitor present trends and initiate further developments in sentencing; to assist the courts to give effect to the principles contained in the *Sentencing Act* 1991 (Vic); to consult with the public, government departments and other interested people, bodies or associations on sentencing matters and to advise the Attorney-General on sentencing matters. Board members were appointed, but it never became operational.

51 See further Chapter 3.

resulted in a new Attorney-General establishing an ad hoc Sentencing Task Force under the chairmanship of a prominent Queen's Counsel, Mr. Frank Costigan. The Task Force, commissioned in April 1989, reported in September of that year and recommended a rationalisation of statutory maximum penalties under the *Crimes Act* 1958 (Vic) as well as a number of changes in the form of statutory maxima (Sentencing Task Force, 1989).

In November 1989, a Penalties and Sentences Bill was placed before Parliament which embodied many of the recommendations of the Sentencing Committee and the Sentencing Task Force. Because of the controversial nature of the combined set of recommendations, that Bill was in turn subject to a comprehensive review in 1990 which compared each clause with the provisions of the *Penalties and Sentences Act* 1985 (Vic), the recommendations of the Victorian Sentencing Committee and the recommendations of the Sentencing Task Force. This Review produced the Sentencing Bill 1991.

1991 - present: the Sentencing Act and beyond

The 1991 Act, as finally enacted, extensively revised the structure of statutory maximum penalties, abolished executive modifications of sentences such as remissions and pre-releases, created a new sentencing option - the 'intensive correction order', revised the provisions relating to community-based orders, suspended sentences, fines and fine default and significantly rationalised and simplified the provisions relating to dismissals, discharges and adjournments.

The Victorian Sentencing Committee had devoted a considerable part of its report to the question of statutory maximum penalties. After reviewing the maximum penalties provided in the *Crimes Act* 1958 (Vic), the Committee concluded that those engaged in the workings of the criminal justice system in Victoria were 'acting in a system where many of the maximum penalties set by statute were developed centuries ago, and have no rational basis or relevance to modern views on the seriousness of crimes, the seriousness of penalties and the appropriate policies that ought to guide sentencing'.[52] It was obvious to any student of the criminal justice

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52 Victorian Sentencing Committee, 1988:.675.

system that the penalty structure was inadequate. It was anachronistic,[53] internally inconsistent,[54] divisive,[55] unjust[56] and unduly complex.[57] One of the Committee's recommendations was that the maxima set by statute be reviewed. Its suggestions were that a seven part scale be adopted ranging from six months to life. The scale was considerably lower than the existing scale, primarily because the need to adjust for the progressive abolition of remissions[58] and partly because of its views of current community values. The Committee's recommendations were not adopted. Rather, a Sentencing Task Force was appointed to undertake a more comprehensive review.

What eventually emerged from Parliament in the *Sentencing Act* 1991 (Vic), ss.109-110 was a fourteen level scale ranging from a fine of $100 to life imprisonment. The scale can be presented as follows:[59]

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53 In that too many of the penalties and many of the offences reflected outdated values and attitudes.

54 In that there was a lack of congruence between the level of penalty set for similar offences.

55 In that they create a tension between Parliament and the courts which attempt to create a coherent sentencing practice within an incoherent penalty structure.

56 In that inconsistent penalties tend to create inconsistent sentences which can lead to a justifiable sense of grievance in offenders whose sentences are unawarrantedly disparate.

57 In that the range of sanctions, options and combinations had proliferated unnecessarily.

58 Which was its recommended technique for adjusting for the abolition of remissions.

59 From Fox 1991:119. This is not how it appears in the legislation

TABLE 2.5
VICTORIAN PENALTY SCALE
SENTENCING ACT 1991, S.109

Level	Maximum Prison Term	Maximum Fine Penalty Units	Community Based Order Maximum Hours of Unpaid Community Work
1	Life	-	-
2	240 months	2400	500 over 24 months
3	180 months	1800	500 over 24 months
4	150 months	1500	500 over 24 months
5	120 months	1200	500 over 24 months
6	90 months	900	500 over 24 months
7	60 months	600	500 over 24 months
8	36 months	360	
9	24 months	240	375 over 18 months
10	12 months	120	250 over 12 months
11	6 months	60	125 over 6 months
12	-	10	50 over 3 months
13	-	5	-
14	-	1	-

There are a number of notable features of the scale. First, the penalty scale is expressed in terms of levels rather than the traditional prescription of a specific maximum penalty for each individual offence. Secondly, the scale is used to distinguish indictable from summary offences. Offences punishable by levels 1 to 8 inclusive are indictable offences; offences from levels 5 to 8 inclusive are indictable offences triable summarily while those at levels 9 to 14 are summary offences. Thirdly, the sanction unit for imprisonment is expressed in terms of months rather than years. This was intended to smooth out the range of maxima and it made use of psychological evidence on the effect of `least noticeable differences' produced by Fitzmaurice and Pease which suggested that sentencers might be more discriminating in the use of imprisonment when the sanction unit was smaller.[60] It

60 Fitzmaurice and Pease 1986:Chapter 7.

also set up a connection between imprisonment and fine scales. The fine scale in Victoria is expressed in terms of `penalty units' each of $100. The *Sentencing Act* 1991 (Vic) equates one month of imprisonment with 10 penalty units ($1000) and has standardised the fine/imprisonment, imprisonment/fine correlations, which had previously showed no consistency at all. Fourthly, the general level of fines has been increased considerably as the consequence of the policy both to enhance the credibility of the fine as an alternative sanction and to reinforce the policy explicit in the Act that imprisonment is a sanction of last resort. Finally, the application of the scale to the offences in the *Crimes Act* 1958 (Vic) attempted to rationalise the offence/penalty relationship. Unlike the Victorian Sentencing Committee's massive reductions,[61] the re-allocations showed a wide range of changes. Thirty-one offences had their maxima increased, 59 were decreased, and for the majority of offences, there was no change at all. Overall, the general level of maxima has been reduced, but this is accounted for by the reduction in the large number of maxima which were never actually used. Many of the changes in fact reflected the current judicial sentencing practices and brought the statutory maxima more in line with the prevailing `tariffs'.[62] In particular, there were major reductions in offences against property and some increases in respect of offences against the person.

The introduction of the penalty scale has not been problem free. The application of the scale to offences outside the *Crimes Act* 1958 (Vic) remains to be done.[63] Parliament has already broken from the mould in respect of some sexual offences by assigning a maximum penalty of twenty-five years, which is severely out of line with the scale.[64] As yet, no comprehensive set of guidelines have been created by which Parliamentary Counsel can be guided in creating future offences and setting

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61 Which were also intended to compensate for the abolition of remissions.

62 On the relationship between statutory maxima and judicial sentencing practices see Douglas 1987.

63 There are some thousands of statutory offences, but the bulk of cases in fact dealt with by the courts are offences under the *Crimes Act* 1958 (Vic) and the *Road Traffic Act* 1986 (Vic).

64 This penalty level was the result of a `trade-off' in Parliament in relation to concern expressed by the then Opposition that sentences for sexual offences were too low. The Opposition had proposed that sentences for sexual offences be made cumulative.

penalty levels and legislation passed subsequent to the *Sentencing Act* 1991 (Vic) has not adopted the style introduced by s.109. As well, there remains the conceptual problem of penalty equivalence for the courts to solve, for although the Task Force clearly did not intend the sanctions to be equivalent all the way up the scale,[65] it does, at the lower levels, starkly raise the question of how penalties are to be combined or substituted.

The Act was introduced during a period when prison numbers had ceased rising. Between 1990 and 1992, prison numbers were almost static. The upward trend which had seen numbers rise from 1484 in 1977 to 2206 in 1989 ceased. Crime rates, as measured by the police, had also peaked and commenced to decline from 1990-91.[66] It was a propitious time for sentencing reform.

The Act was structurally significant because it represented the culmination of the decade-long process of consolidating all of the major general sentencing provisions in the one piece of legislation. Section 1(b) states that one of the purposes of the Act is

> to have within the one Act all general provisions dealing with the power of the courts to pass sentence.

The Act generally met this aim. Sentencers at all levels of courts in Victoria now draw their sentencing power from this single piece of legislation which was intended by its framers to be clear, logical, intelligible[67] and easy to use.[68] It was intended to be understandable not only to those whose function it was to administer

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65 Sentencing Task Force, 1989:87; Fox 1991:124.

66 From 440,023 offences to 379,487 offences in 1994-95.

67 The drafters of the Act had in mind the problems created by the convoluted and difficult drafting style adopted by the Commonwealth in its recent reforms. For the deprecating observations of some judges upon this legislation see *Paull* (1990) 20 N.S.W.L.R. 427, 437; 49 A. Crim. R. 142 ('unnecessarily complicated and opaque'); *Muanchukingan* (1990) 52 A. Crim. R. 354, 358 ('convoluted, opaque and unnecessarily time consuming.'); *El Karhani* (1990) 21 N.S.W.L.R. 370, 372.

68 In particular the Act consolidated sentencing powers relating to the mentally disordered (see *Sentencing Act* 1991 (Vic), ss.90-94 and the *Mental Health Act* 1986 (Vic)); the intellectually disabled (see *Sentencing Act* 1991 (Vic), ss.80-83 and the *Intellectually Disabled Persons' Services Act* 1986 (Vic)) and the alcoholic and drug-dependent (see *Sentencing Act* 1991 (Vic), s.28 and the *Alcoholics and Drug-Dependent Persons Act* 1968 (Vic)).

it, but also to those who were subject to the its provisions. The drafting principles underlying the Act were that provisions of general application, such as sentencing guidance, would precede specific provisions, and that all provisions relating to each sanction should be grouped within the one division. Provisions guiding the use of a specific sanction precede the sanction provisions and administrative and procedural matters, where they relate to any particular sanction follow the sanction provisions.

Secondly, the Act set out the general aims of sentencing. Section 5 of the Act provides that:

> (1) The only purposes for which sentences may be imposed are -
>
> (a) to punish the offender to an extent and in a manner which is just in all of the circumstances; or
>
> (b) to deter the offender or other persons from committing offences of the same or a similar character; or
>
> (c) to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated; or
>
> (d) to manifest the denunciation by the court of the type of conduct in which the offender engaged; or
>
> (e) to protect the community from the offender; or
>
> (f) a combination of two or more of those purposes.

Thirdly, the Act lists all of the courts' sentencing powers in one section in the form of a sentencing hierarchy, thus providing courts not only with a clear description of their powers, but with a logical framework within which to make decisions about which sanction will provide the least restrictive alternative. Finally, the Act states clearly whether a sentencing order is conviction or non-conviction based and provides a basis upon which a court is to exercise its discretion whether or not to convict. This is found in s.7 of the Act:

> If a court finds a person guilty of an offence, it may, subject to any specific provision relating to the offence and subject to this Part -
>
> (a) record a conviction and order that the offender serve a term of imprisonment; or

(b) record a conviction and order that the offender serve a term of imprisonment by way of intensive correction in the community (an intensive correction order); or

(c) record a conviction and order that the offender serve a term of imprisonment that is suspended by it wholly or partly; or

(d) record a conviction and order that the offender be detained in a youth training centre; or

(e) with or without recording a conviction, make a community-based order in respect of the offender; or

(f) with or without recording a conviction, order the offender to pay a fine; or

(g) record a conviction and order the release of the offender on the adjournment of the hearing on conditions; or

(h) record a conviction and order the discharge of the offender; or

(i) without recording a conviction, order the release of the offender on the adjournment of the hearing on conditions; or

(j) without recording a conviction, order the dismissal of the charge for the offence; or

(k) impose any other sentence or make any order that is authorised by this or any other Act.

Section 7 must be read together with s.5 which provides that:

(3) A court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed.

(4) A court must not impose a sentence that involves the confinement of the offender unless it considers that the purpose or purposes for which

the sentence is imposed cannot be achieved by a sentence that does not involve the confinement of the offender.

(5) A court must not impose an intensive correction order unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a community-based order.

(6) A court must not impose a community-based order unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by imposing a fine.

(7) A court must not impose a fine unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a dismissal, discharge or adjournment.

The sentencing hierarchy is represented in diagrammatic form in Figure 2.8.

FIGURE 2.8
VICTORIAN SENTENCING HIERARCHY

These matters of form and structure created the foundation upon which a coherent sentencing system could be built and, although not spectacular in themselves, had the effect of sweeping away decades of accumulated anomalies, inconsistencies and ambiguities.

The Act did not represent a revolutionary change in sentencing options, nor did it require fundamental changes in sentencing practices. Its options were familiar to sentencers, who had been intimately involved in the process of reform, and it represented a continuation of policies which had been in place for over a decade (Sallmann, 1991; Douglas, 1988; Freckelton and Thacker, 1991). Its statement of the purposes of sentencing was a pragmatic recognition that no agreement was possible as to whether there could or should be one dominant purpose of sentencing.

On April 22, 1992, it came into operation. However, within six months, the continuity of sentencing change was about to change dramatically with the election of the conservative Liberal/National Party to government in October of that year, a party which campaigned partly on a 'law and order' platform and was strongly antagonistic when in Opposition to many of the provisions in the 1991 Act.

FIGURE 2.8

VICTORIAN SENTENCING HIERARCHY

IMPRISONMENT Crimes Act 1958 offences, Levels 1–11 (life to 6 months) other imprisonable offences	CONVICTION
INTENSIVE CORRECTION ORDER **1 YEAR** Crimes Act 1958 offences, Levels 1–11[a] other imprisonable offences	CONVICTION
SUSPENDED SENTENCE **2 YEARS** Crimes Act 1958 offences, Levels 1–11[b] other imprisonable offences	CONVICTION
YOUTH TRAINING CENTRE (17–21-year-old) **3 YEARS** all imprisonable offences	CONVICTION
COMMUNITY-BASED ORDER **2 YEARS** Crimes Act 1958 offences, Levels 2–12 all imprisonable offences or those punishable by a fine of > 5 p.u.	CONVICTION OR NON-CONVICTION
COMMUNITY SERVICE: MAX 500 HOURS OVER 24 MONTHS SUPERVISION: MAX 24 MONTHS EDUCATION PROGRAMMES: MAX 12 MONTHS OTHER: MAX 12 MONTHS	
FINE Crimes Act 1958 offences, Levels 2–14 all other offences	CONVICTION OR NON-CONVICTION
DEFAULT $100=1 DAY: MAX 24 MONTHS $20=1 HOUR COMMUNITY WORK: MAX 500 HOURS	
DISMISSAL/DISCHARGE/ADJOURNMENT all offences CONVICTION ADJOURNMENT:MAX 60 months CONVICTION DISCHARGE	CONVICTION CONVICTION
NON-CONVICTION ADJOURNMENT MAX 60 MONTHS NON-CONVICTION DISMISSAL	NON-CONVICTION NON-CONVICTION

[a] Available at these levels to a maximum of 1 year

[b] Available at these levels to a maximum of 2 years

In May 1993, responding to what it perceived to be the community's concern about the inadequacy of custodial sentences imposed upon sexual and violent offenders, the new government rushed through Parliament the *Sentencing (Amendment) Act* 1993 (Vic) (Fox, 1993). In contrast to the intensive consultation which took place prior to the introduction and implementation of the 1991 Act, the 1993 Act was introduced into Parliament and passed within a matter of weeks with almost no community input.[69] Even the government dominated Parliamentary Scrutiny of Acts and Regulations Committee was opposed to some aspects of the legislation on the ground that it unduly trespassed on individual rights and freedoms. Nonetheless, the Bill passed through Parliament in less than six hours.

Its purpose was to increase custodial sentences in a number of ways. The first is to create a two new classes of offenders: 'serious sexual offenders' and 'serious violent offenders'. Both of these groups are elaborately and widely defined. If such an offender commits certain nominated offences (serious sexual or violent offences), then the court is required to regard the 'protection of the community' as the principal purpose of sentencing and may, 'in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence considered in the light of its objective circumstances.' In addition, s.10 of the *Sentencing Act* 1991 (Vic) does not apply to these offenders, effectively increasing their sentences by a third. Further, sentences imposed upon serious sexual offenders are presumptively cumulative. The current legislative presumption is that all sentences are to be served concurrently.

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69 See *The Age* 14 May 1993: 'Bill Rushed Through in Defiance of Advice; 'Libs Rush Jail Term Bill Through House' *The Herald-Sun* 14 May 1993. Freiberg, A. 'A Flawed Approach to a Tougher Sentencing Act' *The Age* 6 May 1993; Father Peter Norden, 'Cabinet Should Rethink Sentencing Legislation' *The Age* 27 April 1993; Feminist Lawyers, Helen McKelvie, 'Sentencing Bill Won't Help Women' *The Age* 11 April 1993; Law Council of Australia, 'Jailing Bill 'Breaches Rights' *The Age* 24 April 1993; the Victorian Criminal Bar Association, Mr Brind Woinarski, 'Government Must Act on Penal System' *The Age* 28 April 1993; Professor Richard Fox, Monash University, 'Bill Means Many Will Die in Prison' 8 May 1993; *The Age* Newspaper itself; Editorial 'Sentencing Bill Goes Too Far' 10 May 1993. A public meeting was held to oppose this, and other similar legislation which were seen to attack human rights in Victoria. The groups supporting the public forum included the Criminal Justice Coalition; the Federation of Community Legal Centres; Feminist Lawyers; International Commission of Jurists; Victorian Council for Civil Liberties; Victorian Council of Social Services; Victorian Criminal Bar Association; Youth Affairs Council of Victoria; the Department of Criminology, the University of Melbourne.

The second method whereby sentence length can be increased is the introduction of indefinite sentences. Adult offenders, who are proved, to a high degree of probability, to be a 'serious danger to the community' and who have been convicted of specified 'serious offences' can, at the discretion of the court, be sentenced to indefinite imprisonment. A court in such cases is required to set a 'nominal sentence', equal to the previous non-parole period, at the expiration of which a judicial review must take place. If the offender is deemed still to be a serious danger to the community, he or she must remain in custody for at least another three years, the minimum period between reviews. The Act came into operation in August 1993.

The abolition of remissions was accompanied by a legislative requirement that sentencers take into account the abolition of remissions so as to ensure that the time spent in custody by offenders sentenced after the introduction of the 1991 Act would serve no longer period in custody than those who had been sentencing prior to the Act but who would have been entitled to their full remission entitlement.[70] However, in February 1994, the case of *Boucher*[71] the Supreme Court of Victoria ruled that the section has no application to any offence, of which there are many, whose maximum penalty had been altered by the 1991 Act. Despite the anomalies created by this ruling, and clearly contrary to Parliament's stated intention, the High Court of Australia, the final court of appeal, refused to disturb the judgment[72] and the courts were left in a state of confusion as to how the remission rules should operate. The system was once again drifting into an entropic state.

By late 1995, public dissatisfaction was again on the increase, this time fuelled by the perception that the length of prison sentences was too short, particularly in relation to sex offences. The judiciary was perceived to be unresponsive to the government's direction to take a more severe approach to sentencing. In early 1996, the Attorney-General announced that the general public would be polled as to their views of what 'appropriate' sentences would be for a range of serious offences. These views would be transmitted to the various sentencing authorities and could possibly be translated into statutory form. On 30 March, 1996, the Coalition government was re-elected,

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70 *Sentencing Act* 1991 (Vic), s.10.

71 (1993) 70 A. Crim. R. 577.

72 The difficulties that this case creates for the evaluation of abolition of remissions are discussed further below.

with the promise of community input into sentencing forming a major plank of its justice policy. In May 1996, it announced that it would commission a review of the *Sentencing Act* 1991 (Vic), to be undertaken by a senior Crown prosecutor.

During the period 1993 to 1995, prison numbers by about 250, from around 2,200 to around 2450. However, that rise was concentrated in a short period between 1993 and 1994 and once again, the prison population has entered a period of stability, although for how long is uncertain.[73] Victoria is currently embarking upon one of the most ambitious prison building programmes in its history, a programme which is linked to the transformation of the system from one which is completely in public hands to one in which 45% of total prison bed will be privately owned in the next three to five years (Prison Profiles, 1994:41). Although estimates vary, it is predicted that will be a net gain of between 200 and 250 beds when the process is completed. How that spare capacity will be used is a issue which will vex correctional administrators. Given the financial commitment to private operators, Victoria may once again see a wave of public prison closures, leaving with the most highly privatised prison system in the world.

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73 See below Chapter 3.

CHAPTER 3

IMPRISONMENT

INTRODUCTION

Since the abolition of capital punishment in 1975, the most severe sentence available to Victorian courts is the deprivation of liberty. This chapter provides a broad picture of the changing patterns of imprisonment in the state since the 1870s, focusing on the role of the courts in the sentencing process. The level of imprisonment is described, both in terms of the general population and the population coming to the attention of the legal authorities. The use of incarceration by the two levels of court is examined. Trends in the length of prison sentence imposed by the courts are presented. While the number of people imprisoned and the length of sentences are the major determinants of the size of the prison population, there are other influences: the number of remand prisoners, the use of remission and other administrative modifications to sentence length, such as parole.

Victoria was for a long period proud of its record in having one of the lowest imprisonment rates in Australia if not internationally. Although the significance of such rates has been questioned (Nutall and Pease 1994:316) the level of use of imprisonment within jurisdictions remains an important symbolic measure of a society's level of punitiveness (Young and Brown 1992:1). Imprisonment is also important because it is a sanction which consumes relatively large amounts of public expenditure: in excess of $100 million each year in Victoria and around $600 million nationally.

In Victoria, the common law principle that imprisonment be a sanction of last resort has been enshrined in statutory form since at least the early 1980s when s.13C of the *Penalties and Sentences Act* 1981 (Vic) provided that courts of summary jurisdiction were not to impose sentences of imprisonment unless they had considered all available alternative sanctions and decided that no other measures were appropriate in all the circumstances. This direction was carried over into s.11 of the *Penalties and Sentences Act* 1985 (Vic) and is presently manifested in s.5(3) of the *Sentencing Act* 1991 (Vic).[1]

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1 See Chapter 2.

Imprisonment is a relatively little used sanction in Victoria. It amounts to approximately half of all sentences in the higher courts, which deal with about five per cent of all criminal cases and approximately 5% of sentences in the Magistrates' Court. As the Office of Corrections Master Plan wryly observed (1983:54):

> it is quite difficult for an offender to get himself/herself imprisoned in Victoria, and that either repeated or very serious offences must be committed before imprisonment is considered a desirable course of action by the courts.

THE INTERNATIONAL AND NATIONAL CONTEXT

The best simple index of imprisonment practices in any jurisdiction is the imprisonment rate. However, while the imprisonment rate is a useful index for comparing aggregate prison populations across jurisdictions, it provides little information about how sentencing practices give rise to those populations. In any jurisdiction, the imprisonment rate is a function of both the number of persons sentenced to imprisonment, and the length of the sentences of imprisonment imposed. A state may have a large prisoner population because it sentences a large number of offenders to prison, or because, on average, it sentences them to long terms of imprisonment, or a combination of the two.

Imprisonment rates are typically measured as the number of persons held in prison for every 100,000 persons in the population. Imprisonment rates vary markedly between jurisdictions. At a national level, countries that use imprisonment frequently, like the USA, the USSR and South Africa, may imprison ten times the proportion of their population as do those that use it infrequently, such as Japan or the Netherlands. There are substantial disparities in imprisonment rates even within Australia. The residents of the Northern Territory are imprisoned nearly ten times as frequently as are the residents of the Australian Capital Territory.

A comparison of incarceration rates across twenty countries undertaken by the Sentencing Project, in the United States (see Mauer 1994) reveals wide disparities in rates.[2]

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2 We accept that there are significant problems with international comparisons in terms of counting rules, notions of custody, admission rules and in definitions of institutions: see Nuttall and Pease 1994:317. However, for our general purposes we are satisfied that these figures indicate the relative rankings of nations and relative orders of magnitude. The Victorian rate has been added.

TABLE 3.1
INCARCERATION RATES FOR SELECTED NATIONS 1992-93

COUNTRY	RATE PER 100,00 POPULATION
Russia	558
USA	519
Sth Africa	368
Singapore	229
Hong Kong	179
Poland	160
New Zealand	135
Canada	116
Mexico	97
England/Wales	93
Australia	**91**
Spain	90
France	84
Germany	80
Sweden	69
Denmark	66
Victoria	**50**
Netherlands	49
Japan	36

In this ranking, Victoria ranks below the Scandinavian countries and at about the same level as the Netherlands. However, it might be noted that most of the New England states in the United States had imprisonment rates below Victoria's until the drug-led prison boom of the 1980s. What is remarkable about Victoria's prison rate is not that it is low, but that it has remained relatively low at a time when

sentencing fads are promoting massive increases in punishment as a means of solving social problems.[3]

Within Australia, Victoria's prison population is low in comparison.

TABLE 3.2
AUSTRALIAN PRISON POPULATIONS
JUNE 1995[4]

JURISDICTION	DAILY AV POP'N	RATE PER 100,000 ADULT POP'N
NORTHERN TERRITORY	473	397
WESTERN AUST	2139	167
NSW	6412	139
SOUTH AUSTRALIA	1392	123
QUEENSLAND	2848	117
VICTORIA	**2458**	**72**
TASMANIA	240	68
AUSTRALIA	15,986	118

It has for long, and frequently, been noted that the differences between imprisonment rates in Australia is not a transient phenomenon (Biles 1974). New South Wales, for example, has historically maintained an imprisonment rate approximately 25% higher than that of Victoria, although this rate has fluctuated markedly over the decades. The current rate of 72 prisoners per 100,000 adult population puts Victoria above Tasmania, but below all the other mainland states. The Northern Territory rate of almost 400 per 100,000 is at the same level as was Victoria's in 1880, while the New South Wales rate of just over 140 per 100,000 was last reached by Victoria in 1900.

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3 In New South Wales, prison numbers increased sharply as a result of the sentencing reforms of the late 1980s, and more recently, in both Queensland and South Australia, prisoner numbers are currently undergoing a similar pattern of growth.

4 Source: National Correctional Statistics : Prisons July 1994 to June 1995, National Correctional Services Statistics Unit, Australian Bureau of Statistics.

IMPRISONMENT RATES AND REMAND RATES

This study is primarily concerned with evaluating the impact of changes in sentencing policy upon the sentencing behaviour of judicial officers and the effect of their decisions on the operation of prisons and community corrections. For this purpose, the use of imprisonment numbers and rates, per se, is too crude an instrument, for the imprisonment rate, as calculated in Australia, includes both sentenced prisoners and remand prisoners.

A major component of the prison population in all Australian jurisdictions is persons charged with an offence and remanded in custody.[5] On average, about one in eight prisoners in Australian gaols is a remandee, but this figure varies from one in five in South Australia and the ACT to one in ten in Western Australia and Tasmania (see Table 3.3). In general, jurisdictions that use prison sentences frequently also have a high remand rate (number of remandees per 100,000 population). However, there are some exceptions to this: Western Australia has a total imprisonment rate that is 40% higher than South Australia, but a remand rate that about the same.

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5 Substantial numbers of persons are also held in custody in places other than prison. Police gaols hold substantial numbers of prisoners awaiting trial or bail hearings, or transfer to prison. In March 1996, 164 persons were held in police custody, of whom 62 were sentenced prisoners and 94 were on remand. Prisoners who are mentally ill may be held in a secure psychiatric facility rather than prison. Juvenile offenders are generally held in special juvenile detention centres, and there are substantial differences between jurisdictions in juvenile incarceration rates. The national rate of juvenile imprisonment (that is, the rate per 100,000 persons aged 10 to 17 years) was 52.1 in 1992, while the Victorian juvenile rate was only about one-third of the national rate, at 18.2 per 100,000.

TABLE 3.3
AUSTRALIAN REMAND PRISONERS AND REMAND RATES BY STATE: JUNE 1995[6]

State	Remandees	% of Prisoners	Rate per 100,000 adults
NSW	801	12.6	17.3
VIC	348	14.2	10.2
QLD	344	12.1	14.2
WA	279	12.6	21.8
SA	225	16.0	19.9
TAS	29	11.9	8.2
NT	61	12.6	51.2
ACT	26	24.8	11.5
AUST	**2,113**	**13.1**	**15.6**

Young and Brown (1993:8) have argued that amongst the many problems in making comparisons between the imprisonment rates of different jurisdictions; the relative influence of remand and sentenced populations differs. In France, for example, 42% of the prison population is estimated to be on remand, whereas in Australia about 13% of prisoners were remandees in 1995. In England, in 1988, remand prisoners made up 21% of the total prison population (Vass 1990:24).

The length of time spend on remand has varied across time according both to the efficiencies of the court process and the law relating to access to bail. Remand in custody can be considered a form of advance punishment. For those who receive a prison sentence on conviction, the time spent on remand is usually taken into account in the sentencing process. However, for those found not guilty, or given a non-custodial sentence, the remand in custody amount to a form of unwarranted legal detention.[7] From a monetary perspective, the amounts spent on remand prisoners not subsequently imprisoned represents a waste of public moneys.

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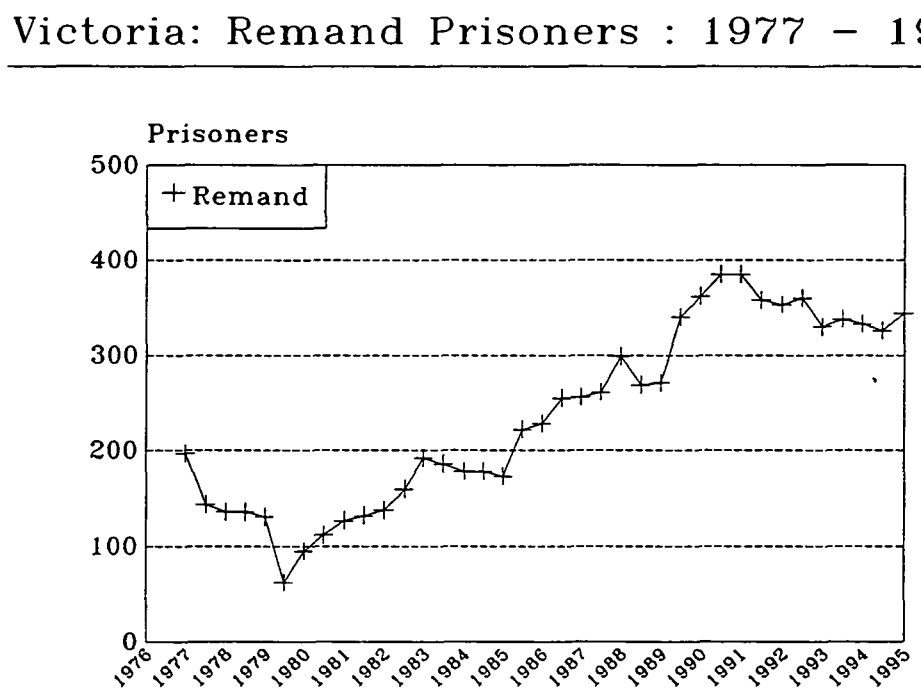
6 Source: National Correctional Statistics : Prisons July 1994 to June 1995, National Correctional Services Statistics Unit, Australian Bureau of Statistics.

7 Unless the primary purpose of the remand was to ensure the offender's appearance in court.

Since 1977, the Australian Institute of Criminology (and since 1994, the Australian Bureau of Statistics) has produced estimates of the remand rate, the number of persons on remand per 100,000 of the adult population.

FIGURE 3.1
VICTORIA: REMAND PRISONERS: 1977 - 1995



Source: Australian Prison Trends. (AIC) & National Correctional Statistics: Prisons (NCSSU;ABS)

In Victoria, the trend shows an upward trajectory over the seventeen year period 1977 to 1994 from about 4 per 100,000 to almost three times that level by 1993. In 1977, one out of ten prisoners was on remand; in 1993 this figure was up to one out of seven prisoners.

Other states used remand even more frequently than Victoria: New South Wales increased its use of remand over this period from about 12 per 100,000 of the adult

population to about 30,[8] while South Australia increased its use from 12 to 24 per 100,000 over this period.

The increase in Victoria seems to have been partly related to capacity. Remand accommodation in Victoria was, for many years, a disgrace. Remand prisoners were kept in open yards during the day in D Division of Pentridge Prison. Despite numerous campaigns to close the division, they remained as a blot on the penological landscape. As a result, remand in custody rates were kept relatively low as judges and magistrates were loathe to condemn untried offenders to inhumane conditions. However, the opening of the modern Metropolitan Remand Centre in April 1989 Centre opened in Melbourne with a capacity of 229 prisoners. Prior to its opening, remands averaged about 270 - 290 per month. After the opening, numbers increased to around 340 - 360 per month, reaching 416 in August 1990. It was clear that judicial officers, aware of the improvement in remand conditions, were more willing to refuse bail after the centre opened. During the period of this study, (1991 - 1995), the number of prisoners on remand seems to have stabilised at around 340 remandees, or approximately 15% of the total prison population.

This growth in the number of remand prisoners helped to drive the growth in overall prison numbers. Australia wide, the total prison population increased by 60% between 1978 and 1993. The number of sentenced prisoners increased by about 50%, while the number of remand prisoners more than doubled. The average remandee spent about four months on remand in Victoria, a similar time to that reported for New South Wales (Biles 1990; Babbs 1992).

FACTORS INFLUENCING SENTENCED PRISONER NUMBERS

It would appear that there are two sets of factors that influence imprisonment rates: those that bring about changes over time, and those that generate inter-jurisdictional differences. Consequently, in order to understand what impact the *Sentencing Act* 1991 has had on imprisonment in Victoria, we need to address two distinct questions. Firstly, how did the Victorian imprisonment rate vary prior to the introduction of the 1991 Act, and what factors contributed to this variation? And

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8 More recent figures indicate that the trend in New South Wales has been reversed and that the remand population has fallen from 15.5% of the prison population in 1988 to 9.2% in 1995 (Spears 1996).

secondly, why is there so much less reliance on imprisonment in Victoria than in other states? Obviously, it is likely that some of the factors that determine changes in imprisonment rates over time will also be responsible for inter-state differentials.

The level of custodial and non-custodial populations is the result of a very large number of factors, only some of which can be explored in this study. Trends in imprisonment can relate to crime rates, unemployment rates, psychiatric hospitalisation and the age, gender and racial composition of the population. As McMahon observes, the substantial literature on the interrelationships between these factors and sentencing patterns is contradictory and inconsistent and tends to overlook the 'complex dynamics and processes of social change' as well as being overtly functionalist and ahistorical (McMahon 1992:125; Young 1986). Furthermore, these factors tell us little about the absolute level of imprisonment within a jurisdiction and why jurisdictions vary in that level.

Crime rates

Looking at imprisonment rates simply in terms of the rate per 100,00 of the general population is of limited value. Just as we would work out football injury rates only for person playing football, so it makes more sense to express prison rates in relation to persons at risk of imprisonment.

The level of crime, and variations in that level, would seem to provide the most obvious explanation for the level of imprisonment (Zimring and Hawkins 1991:121). Yet the studies which attempt to correlate crime rates with imprisonment rates have proved to be contradictory and confusing (Young and Brown 1993:23). In their comprehensive comparison of rates of imprisonment, Young and Brown concluded that the volume of recorded crime seemed to account for only a small part of the jurisdictional differences and that the relative rates of imprisonment showed a remarkable degree of stability (Young and Brown 1993:27). In addition, they found that even intra-jurisdictionally, the influence of crime rates on imprisonment rates was relatively small.

This lack of relationship may be partly to do with the concept of 'crime rate' itself. Most offences reported to the police are relatively minor and many are not cleared. Only a few offences are 'imprisonable', that is, are likely to be serious enough to result in a court imposing a sentence of imprisonment, even if the statute permitted it. Mukherjee's long term study of Australia crime trends (Mukherjee 1981)

concluded that although the number of offenders brought before the courts, and the convictions recorded by the courts, both absolutely and by rate, increased over the decades, much of this was due to an increase in traffic offences and other petty offences. In his view, most of the changes could be accounted for on the basis of changes in the age/sex structure of the population.

Some of the more sophisticated analyses of the crime/imprisonment correlation focus upon the relationship between the rates of offences such as homicide, robbery, rape and serious assaults and levels of imprisonment. Blumstein, for example, argues that rather than measuring incarceration rates per capita, it would be preferable to measure the incarceration rate per crime. Thus, he suggests, that when the level of prison eligible crimes such as homicide is correlated with the level of imprisonment for those crimes, then the United States appears far less punitive than the general international imprisonment rate comparisons indicates (Blumstein 1988:233). However, after examining some of these studies, Young and Brown (1993:27) concluded that these correlations were of a relatively low order.

Despite a public perception to the contrary, crime rates in Victoria have generally dropped since 1989. From a peak of 440,323 major crimes in 1990-1, the overall rate has decreased to 379,487 offences in 1994-95.[9] The offences which create a flow of prisoners showed a decrease: robberies decreased from 1,995 to 1,765 and burglaries from 94,201 to 78,927. Thefts remained steady at around 133,000 whilst serious assaults increased from 4,206 to 7,108. The impact of these changes upon prison reception rates is discussed further below.

Aboriginal imprisonment

Approximately one in five Australian prisoners is an Aboriginal or Torres Strait Islander. The rate of Aboriginal imprisonment greatly exceeds the non-Aboriginal rate in all jurisdictions (see Table 3.4 below): nationally, Aboriginal people are 17.5 times more likely to be in prison than non-Aboriginals, and in some states and territories Aboriginal people are up to 24 times more likely to be in prison than non-Aboriginals. As a consequence, in jurisdictions like the Northern Territory, Queensland and Western Australia that have relatively large Aboriginal

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9 See Appendix 2.6

populations, the high level of Aboriginal imprisonment is a significant contributing factor to their high general imprisonment rates.

While Victoria is at the bottom end of the scale in relation to the imprisonment of non-indigenous people, it is about the middle of the range for imprisoning Aboriginal people. Western Australia and South Australia are the most punitive states in terms of imprisoning Aboriginal offenders. Interestingly, the Northern Territory, which has the highest general rate of imprisonment in Australia, is less punitive towards Aboriginal offenders than most jurisdictions.

Thus, part of the explanation for Victoria's low overall imprisonment rate is that it has a relatively small Aboriginal population. The influence exerted by differing levels of Aboriginal imprisonment can be examine by comparing the Victorian situation with that in Queensland. Superficially, Queensland is a substantially more punitive jurisdiction: Queenslanders are around 60% more likely to be in prison than Victorians. However, the difference between both the Aboriginal and non-Aboriginal rates is much smaller: the Queensland non-Aboriginal imprisonment rate is around 40% higher than the equivalent Victorian rate (93 per 100,000 compared with 67.5), and the Queensland Aboriginal imprisonment rate is only 14% higher (1429 and 1249 per 100,000 respectively). Thus, around one-third of the difference in overall imprisonment rates between Victoria and Queensland is attributable to the much larger number of Aboriginal people living in Queensland. If Victoria had an Aboriginal population the same size as that of Queensland (that is, 70,000 persons instead of 17,000[10]), its total prisoner population would be increased by around 650. While this would still leave Victoria in the position of having a lower general imprisonment rate than other Australian jurisdictions, it would mean that this position would not be nearly as clearly evident as it is.

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10 1991 Census of Population and Housing: Australian Bureau of Statistics

TABLE 3.4
ABORIGINAL AND NON-ABORIGINAL INCARCERATED POPULATIONS JUNE 1995[11]

JURISDICTION	Non-Aboriginal Prisoners	Aboriginal Prisoners	Aboriginal Imprisonment Rates per 100,000 adult indigenous pop	Ratio of Indigenous to Non-Indigenous rates
NT	142	344	1294.7	8.4
NSW	5515	820	1796.2	14.7
WA	1480	733	2790.9	23.6
SA	1148	255	2413.2	23.6
Qld	2208	644	1429.6	15.4
Tas	232	11	195.0	2.9
Vic	2306	138	1249.8	18.5
Aust	*13166*	*2915*	*1717.7*	*17.5*

Tonry (1994:108) uses the ratio of rates to examine the relative over-representation of minority groups in the prison population. In the United States, blacks are six times more likely than whites to be imprisoned, and in Britain, blacks are seven times more likely to be in prison than whites. In Australia, Aboriginal people are 17.5 times more likely to be in prison. Despite this disparity, an Aboriginal person in Australia still has less than half the probability of being incarcerated than a black person in the United States.

Understanding changing patterns of Aboriginal imprisonment is made more difficult because of changing patterns of self-identification by Aboriginals. Estimates for the Australian Aboriginal population have grown at a much faster rate in the past decade than can be accounted for by normal population growth. At the same time, initiatives arising from the Royal Commission Into Aboriginal Deaths in Custody have meant that prison authorities have placed greater emphasis on identifying Aboriginal persons in custody. As a result, the sharp increases in the

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11 National Correctional Statistics: Prisons, July 1994 to June 1995, National Correctional Services Statistics Unit, Australian Bureau of Statistics

number of persons classified as (or identifying as) Aboriginal may be partly or wholly attributable to more accurate identification (see Table 3.5)[12]

TABLE 3.5
VICTORIA: NUMBER OF ABORIGINES IN CUSTODY (MALES)

YEAR	NO. ABORIGINAL	PERCENTAGE
1987	50	2.69
1988	58	2.98
1989	75	3.52
1990	80	3.65
1991	81	3.68
1992	96	4.44
1993	98	4.54
1994	135	5.65
1995	138	5.61

Age structure of population

Braithwaite (1989) has proposed that any credible general theory of crime must explain a number of well-established, strong relationships between crime and other variables. One of the strongest of these relationships is that crime is committed disproportionately by 15 to 25 year olds. This relationship holds not only across most types of criminal activity, but also across different sexes and across different cultures (Hirschi & Gottfredson, 1985). Custodial populations show an age structure that is shifted towards older offenders: around one-third of all Australian prisoners are aged between 17 and 24 years, and a further third are aged between 25 and 34 years.

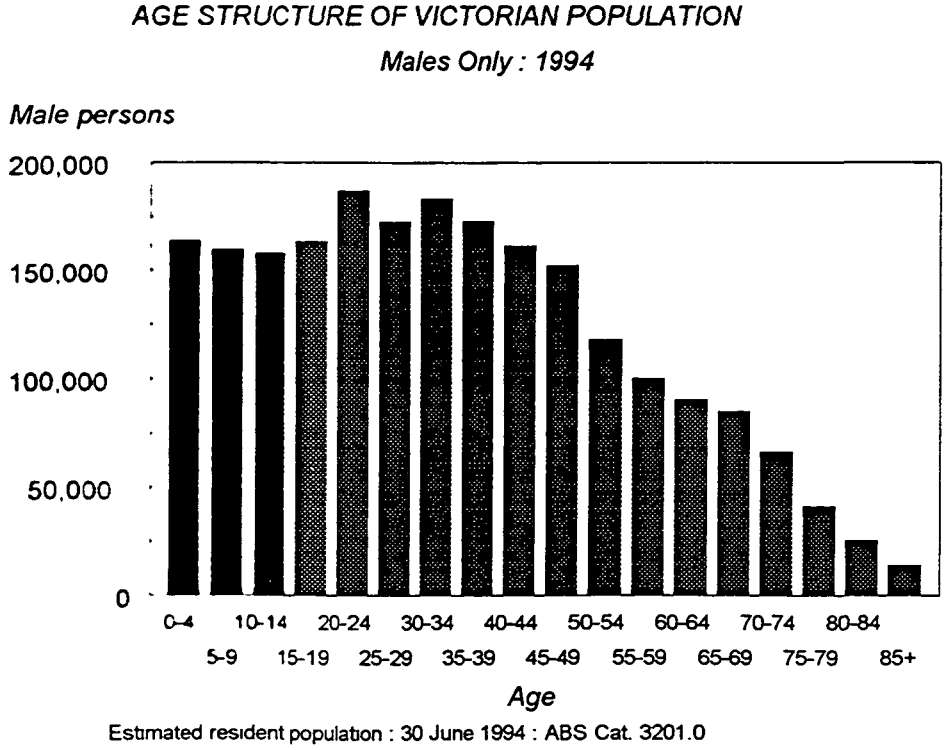
There are two factors that account for the older age structure of custodial populations compared with all offenders. The first is that offenders in the earlier stages of their criminal career tend to commit less serious offences that are not usually punished by imprisonment. As they grow older, the majority of offenders desist (ie their offending rate slows or ceases) but a few go on to commit more

12 From Victoria, *Prison Profiles* 1994:12.

serious crimes which, if detected, are likely to result in them going to prison. The second factor is that young offenders have generally not progressed through the system of intermediate sanctions (bonds, fines, community orders) to a point where a custodial sanction becomes inevitable.

The age structure of the general population is thus an important determinant of both the total level of activity in the criminal justice system and the size of custodial populations. The rapid increases in recorded crime rates, court case flows and custodial populations evident across Australia throughout the decades of the 1970s and 1980s was substantially attributable to the post-war period of elevated birth rates known as the 'baby boom'. Conversely, the fall-off in crime rates observed in many jurisdictions since 1990 is also at least partly due to the reduced size of post-1970 birth cohorts. These changes in the age structure of Victoria' population are clearly shown in the figure below.

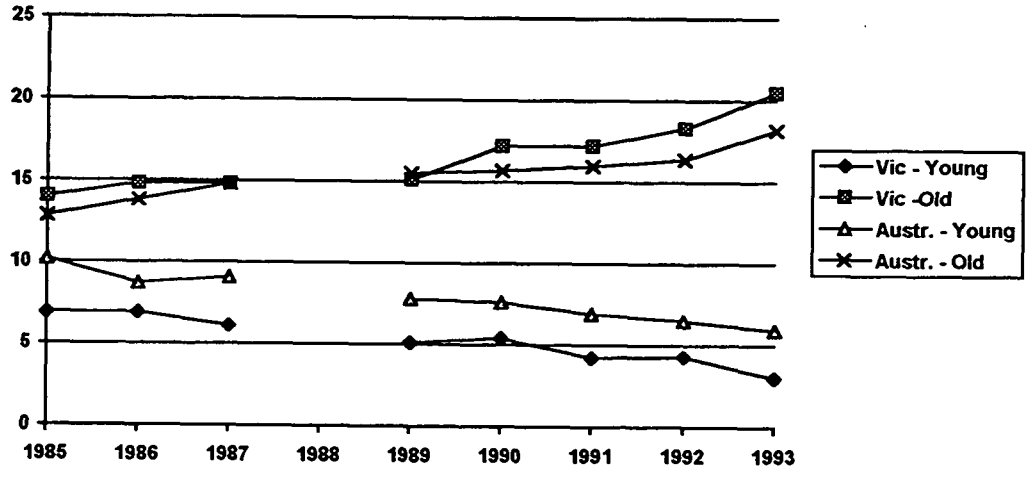
FIGURE 3.2
AGE STRUCTURE OF VICTORIAN POPULATION



Estimated resident population : 30 June 1994 : ABS Cat. 3201.0

This ageing of the national population has been matched by a similar ageing in prison populations. Figure 3.2 shows the proportion of young (under 20 years) and old (over 40 years) prisoners in Victoria and Australia. Nationally, the proportion of young prisoners halved in the eight years between 1985 and 1993, falling from 10% to 5%. While Victoria had a smaller proportion of younger prisoners than the national prisoner population, the fall in the size of the age group in Victoria was of the same magnitude, from around 7% in 1985 to 3% in 1993. The total national prison population increased from around eleven to nearly sixteen thousand over the same period, but even so the number of young prisoners nationally declined over the eight years from 1,100 to just over 900. Over the same period, the proportion of prisoners over the age of 40 increased by around one-third, from 15% in 1985 to 20% in 1993, and the number of older prisoners doubled, from around 1400 to 2,900.

FIGURE 3.3
PROPORTION OF YOUNGER AND OLDER PRISONERS IN VICTORIAN GAOLS



The changes in both the old and young groups within the prison population appear to be greater than can be accounted for by demographic change alone. In particular, the fall in the number of prisoners under 20 years preceded the reduced post-1974 birth cohorts (See Walker 1985). This raises the possibility that other factors were acting to keep young offenders out of prison. One obvious possibility is the increasing use of "diversionary" sentencing options. In theory at least, jurisdictions that use imprisonment only for more serious offenders should have older

populations than those that use imprisonment less selectively. Similarly, jurisdictions that require offenders to pass through more intermediate sentencing stages should have older populations. One way to test this proposition is to examine whether jurisdictions with a low imprisonment rate have older prison populations than those with a high rate.

Table 3.6 shows the mean ages of prisoners held in each Australian jurisdiction at the 1993 prison census. It is evident that, while Victoria and the Northern Territory conform to the predicted pattern, the equivalence between age and imprisonment rate is not particularly close.

TABLE 3.6
MEAN AGE OF AUSTRALIAN PRISONERS NATIONAL PRISON CENSUS 1993

State / Territory	Mean Age (Years)	Proportion < 20yrs
Northern Territory	28.21	8.5%
South Australia	29.98	7.0%
Queensland	30.21	9.7%
Western Australia	30.33	9.2%
Tasmania	30.58	10.6%
New South Wales	31.51	4.3%
Victoria	32.29	3.0%
AUSTRALIA	31.08	6.0%

Recent research in the United States indicates that age at risk is not necessarily a good predictor of prison populations (Zimring and Hawkins 1991:74). They found that changes in the prison population had been too rapid and abrupt to fit any demographic distributions. However, this may be due to growing use of three strikes legislation, mandatory sentencing and other techniques which have overtaken age/structures and crime rates and major contributors to the prison population. Three strikers and habitual prisoners are likely to be older than the normal offender.

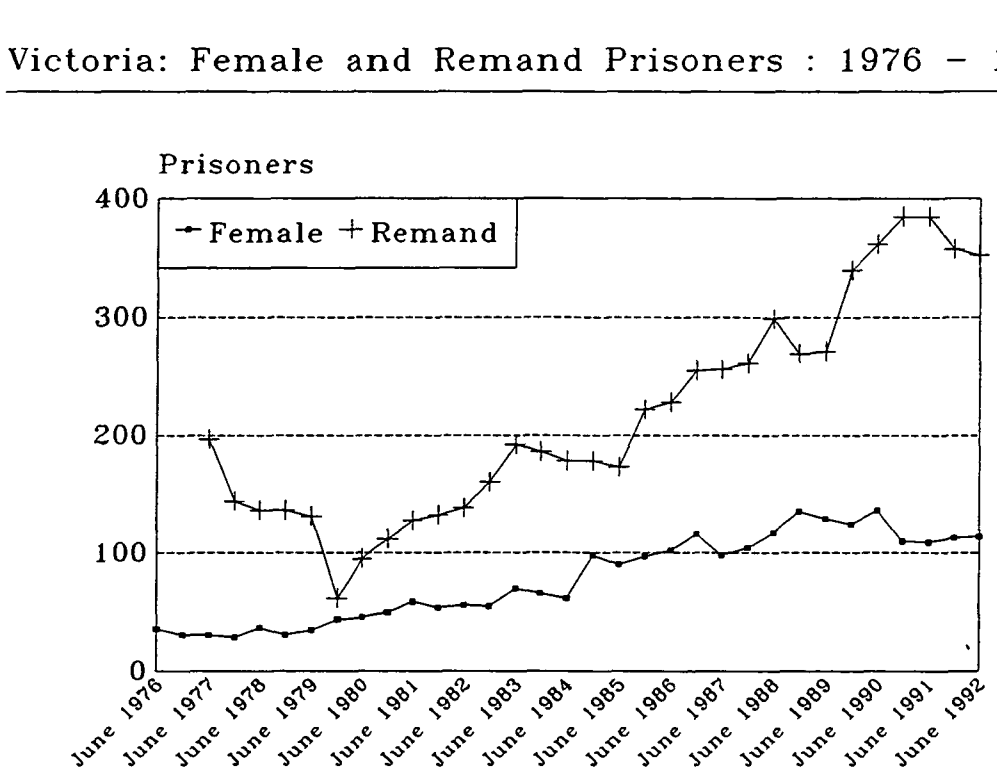
Gender

In the late nineteenth century, females comprised between 15 and 20% of the prison population. In 1891 there was a daily average of 350 women in prison and it was until the 1930s that the proportion of women in prison fell to modern levels of around 5%. The large decline in women prisoners was obviously one factor in the overall decline in prison numbers, but the low rate of female imprisonment is not confined to Victoria.

June 1976, there were only 36 women in Victorian prisons, comprising 2% of the total. Over the next decade their numbers nearly trebled, rising to 59 in June 1981, then to 102 in June 1986. This strong growth in female numbers continued for another four years, peaking in late in 1989 at a total in excess of 140 women prisoners. At this point, the total number of women prisoners was nearly four times as high as it had been in 1976, and they comprised over 6% of all prisoners. Over the next three years, female numbers declined and then stabilised at around 110 to 120. Over the thirteen year period 1976 to 1989 when women prisoner numbers showed their highest rates of growth, the number of male prisoners increased from 1570 to 2180, a rise of about 40%. Thus, the number of women in prison increased at nearly ten times the rate of men. Unlike men, this increase was essentially uninterrupted.

A complicating feature of Victorian imprisonment patterns between 1976 and 1992 is that some components of the prisoner population - most notably women and remand prisoners - showed a quite different patterns of change. Women prisoners have traditionally made up only a small proportion of custodial populations.

FIGURE 3.4
VICTORIA: FEMALE & REMAND PRISONERS 1976 - 1992



Source: Australian Prison Trends, Australian Institute of Criminology

Prison receptions

It is trite penology that the size of the prison population is a function of the number of admissions and the lengths of sentences. However, the relative contributions to prison numbers of prison sentence length and admission rates - the 'stock' and 'flow' problem - is problematic and is, as yet, unresolved.

Young and Brown (1993) surveyed imprisonment rates across a number of jurisdictions and concluded that interjurisidictional comparisons were difficult to make (1993:14), particularly in attempting to disentangle the relative influence of admissions and length of detention (McMahon 1992). The conventional wisdom has been that prison sentence lengths, rather than the number of admissions, affects the overall size of the prison population. Weatherburn (1991:71) has argued that the diversion of those sentenced to less than six months imprisonment will have little impact upon prison populations and this is supported by Young and Brown's survey which concludes that jurisdictions that have a comparatively low prison

population, or have achieved a reduction in that population, are those that manage to regulate or effect changes to prison rates through sentence length rather than through admissions (Young and Brown, 1993:18). They note that in most jurisdictions an expansion in the use of community based sanctions has been accompanied by a significant reduction in the *proportion*, although not necessarily the *number*, of offenders sent to prison. To the extent that intermediate punishments are used as alternatives to custody, they are inevitably directed at those who would have served short terms. It will not make substantial inroads into prison populations, unless accompanied by decrease in the length of sentence of the remainder.

Obtaining estimates of prison sentence lengths is difficult. If one examines total prison populations one would expect that if decarceration were successful at the short end of the range, then the average length of imprisonment of the remainder of those in prison would increase. There is some evidence that reception rates can influence prison numbers. In West Germany, imprisonment rates decreased significantly following a reduction in admissions of minor offenders (Graham, 1990) and McMahon's Ontario study showed that if the volume of short term sentences is high to start with, a reduction in their number can substantially affect the prison count (McMahon, 1992:102).

To some extent, the uncertainty about the relative influence of prisoner flows and sentence lengths in determining the size of the prisoner population results from difficulties associated with the measurement of these variables. The next two sections examine trends in prison receptions and sentence lengths in Victoria over time and consider some of the methodological issues associated with their measurement.

Measuring prison receptions

Fluctuations in the number of persons received into prison arise from two fundamental factors. The first is the total number of persons found guilty or convicted by the courts, which in turn is dependent upon the total number of persons coming before the courts and the number of offences of which they are

convicted.[13] The second is the degree to which the courts use the prison sanction in relation to other sanctions available on conviction. Less significant influences include the extent to which custodial sentences are served in institutions other than prisons, such as police gaols and juvenile custodial institutions, and the degree to which the courts apply prison sentences to persons already in custody.

Measuring the number of prisoner receptions directly is problematic because one is measuring an administrative process susceptible to variability arising from purely administrative procedures. For example, when a person is remanded in custody and subsequently receives a prison sentence, typically only one reception is counted. However, if court or prisoner transport delays are such that several days elapse between the movement to court as a remandee and receipt back as a sentenced prisoner, two receptions may be counted. Another source of variability arises when prisoner flows include large numbers of short stay fine defaulters who have little influence on prisoner stocks. Changes in prison record-keeping processes can also give rise to variation in reception counts. In the last decade, sentenced prisoner reception counts in Victoria have been particularly inaccurate, due largely to the inability of computer-based information systems to count prisoners received initially as remandees and subsequently sentenced.

An alternative measure of prisoner receptions is the number of persons sentenced to imprisonment by the courts. To some extent, a court flow measure should *overcount* prisoner receptions because some persons sentenced to imprisonment will already be in prison and will not constitute a new reception. On the other hand, the number of court sentences can also underestimate prison receptions because they do not take account of persons who do not come directly from court to prison, such a fine defaulters and prisoners returned after parole breaches.

The Victorian Year Books provide a statistical series of the number of persons sentenced to prison by the courts and the number of sentenced prisoner receptions recorded between 1872 and 1962 (see Figure 3.5). For most of this series, and particularly in the years after 1945, the number of prisoner receptions exceeds the number of prison sentences recorded by the courts. However, in general it is clear that the two series are highly inter-related. For the whole period 1872 to 1962, the

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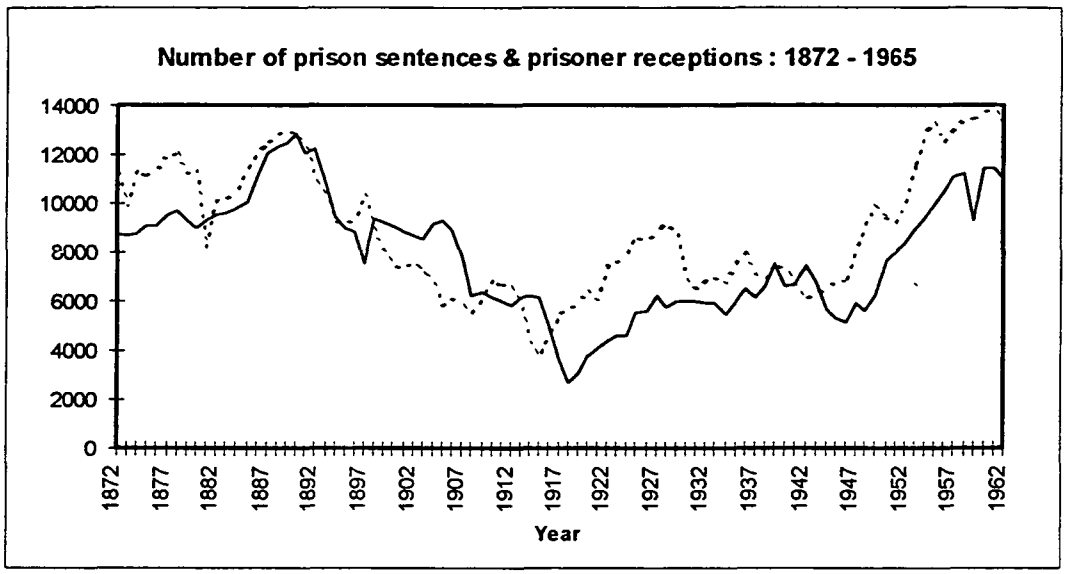
13 This, in turn, will be affected by such matters as crime rates, police discretion, charging practices and the like.

correlation between the two series is 0.78, while for the years after 1920, the correlation is 0.87. If only the post-war years 1945 to 1962 are considered, the inter-relationship between court sentences and receptions is even higher, at 0.94. Thus, where accurate prison reception figures are not available, court prison sentence flows provide a fairly reliable trend measure. Moreover, their power as an estimate is greater over shorter time periods.

FIGURE 3.5
NUMBER OF PRISON SENTENCES AND PRISONER RECEPTIONS 1872 - 1965

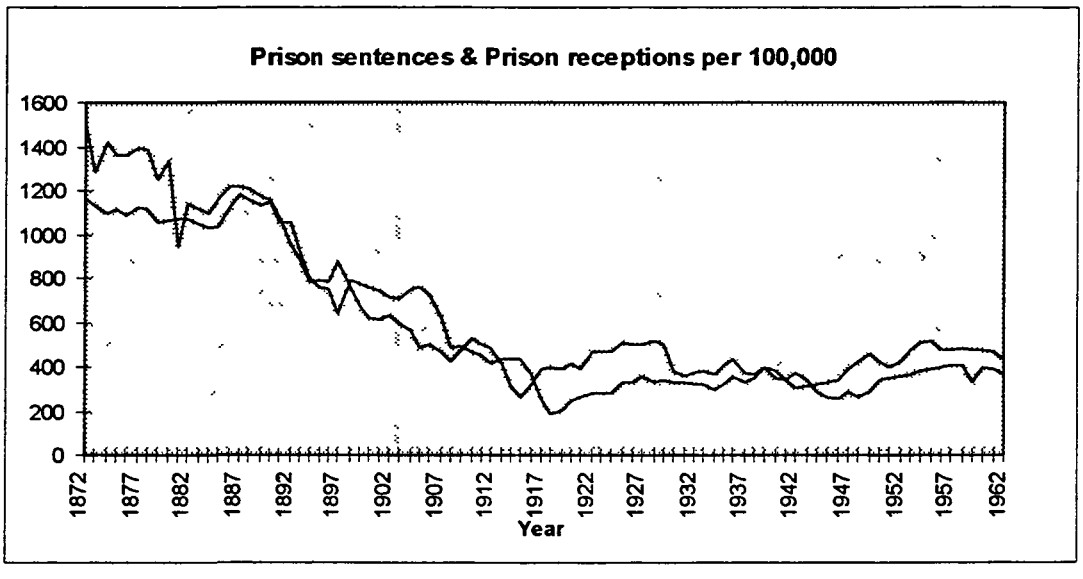


Trends in prison receptions

It will be recalled that the major features of the rate of imprisonment in Victoria - the number of prisoners per one hundred thousand persons in the total population - were a substantial decline after 1890, followed by long period of relative stability from about 1920 onwards. Between 1900 and 1920, the rate of imprisonment more or less halved, from 120 prisoners per 100,000 of the population to around 60. This pattern is mirrored by the rates of prison sentences and prison receptions over the period covered by the Victoria Year Book series (see Figure 3.6 below). The rate at which people received prison sentences and entered prison was far higher in the 1870s than at any time since. Reception rates in the 1870s exceeded 1,000 per 100,000: a rate equivalent to one person in every hundred receiving a prison sentence each

year. Between 1870 and 1920 the prison reception rate fell by a factor of three, to a rate of around 400 per 100,000. From 1920 through to 1965, the prison reception rate was essentially stable. Like the rate of imprisonment, the reception rate was subject to some variability in this period, falling during the two World Wars, and rising slightly during the depression of the 1930s and again in the 1950s and 1960s. Nevertheless, most evident long-term attribute of the reception rate is its stability.

FIGURE 3.6
PRISON SENTENCES AND PRISON RECEPTIONS PER 100,000
1872 - 1962

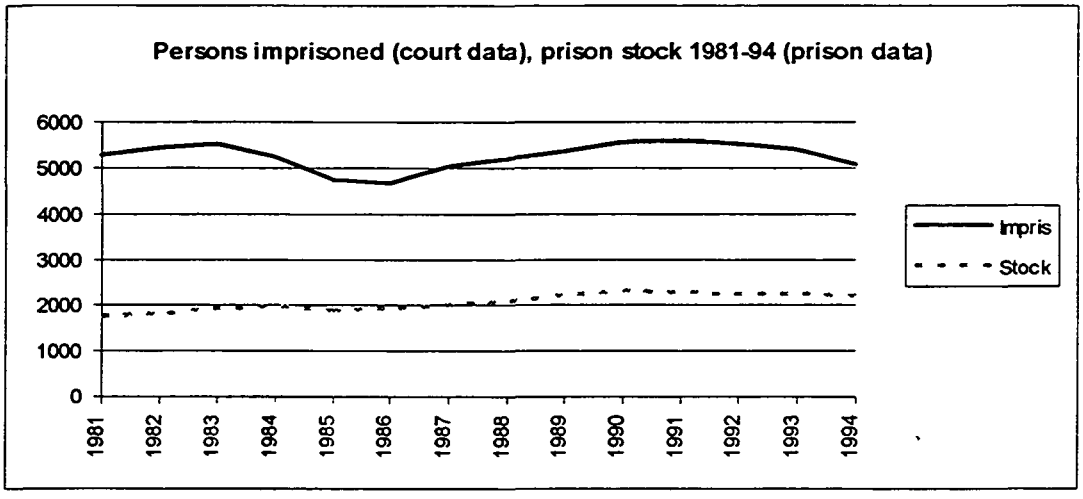


No reliable flow statistics are available for either prison receptions or the number of persons imprisoned in the latter part of the 1960s or the decade of the 1970s. At the beginning of the 1980s, a more reliable series of court statistics commenced that allow prisoner flows to be estimated, although reception numbers provided by prison authorities show extreme movements from year to year and cannot be used as a reliable index of prisoner flows.

In the period between 1965 and 1980 the flow of offenders into prison fell substantially, from around 10,000 sentences per year to about 5,500. This decline continued during the early part of the 1980s, reaching a low point around 1985 and 1986, and then increased over the next five years (see Figure 3.7 below). The degree of variability was relatively small: the difference between the highest and lowest points (1991 and 1986 respectively) is only around 20%. Nevertheless, the fall in the

flow of prisoners out of the courts did mean that the size of the prisoner population was essentially stable throughout the mid-1980s, despite an increase in the number of remandees in prison custody.

FIGURE 3.7
PERSONS IMPRISONED (COURT DATA), PRISON STOCK 1981 - 94



Prisoner receptions and the 1991 and 1993 Acts

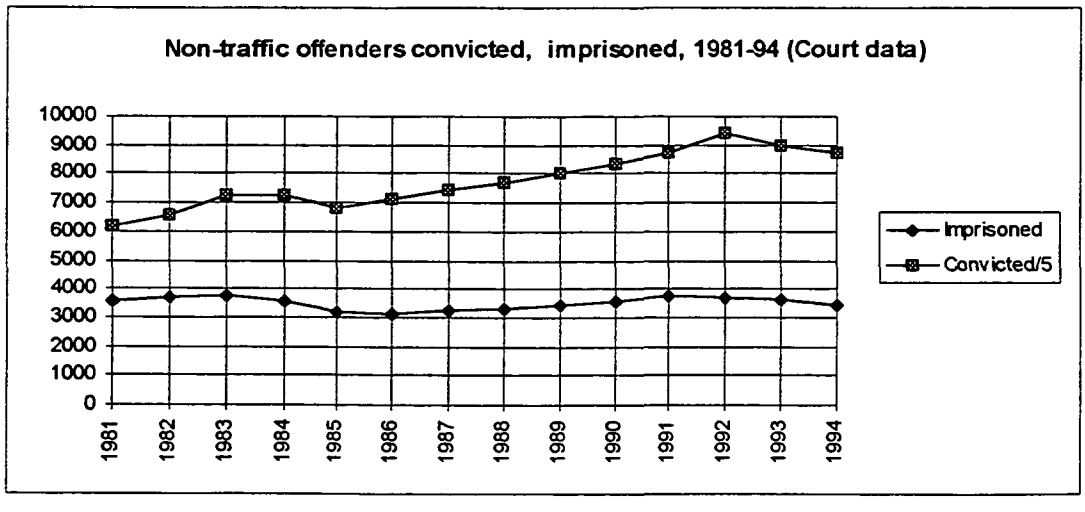
Changes in the flow of prisoners since 1990 are of particular concern to any assessment of the sentencing reforms of 1991 and 1993. During 1991 the number of prison sentences made by the courts was higher than at any time in the previous decade, peaking at slightly over 5,600 sentences. Over the next three years, the flow of prison sentences out of the courts declined by around 10%, falling to around 5,100 in 1994. At the time of writing, higher court statistics were not available for 1995, however the number of prison sentences passed by the Magistrates' Court declined by a further 5% in 1995, suggesting that the fall in prisoner flows was continuing in 1995.

While official prison reception statistics for the period between 1990 and 1994 are inaccurate, data collected specifically for this study was used to generate a prisoner reception statistic. Using this statistic, the monthly average number of receptions in the two years prior to the commencement of the 1991 Act was 203 prisoners per month, while for the two years after the Act, the monthly average was 190 prisoners

per month. This statistic therefore indicates a reduction in the flow of prisoners into Victorian prisons declined over the period 1990-94 of around 6%.

The fall in the number of prison sentences after 1991 took place at more or less the same time that the 1991 sentencing reforms were introduced. However, it seems unlikely that the 1991 Act was directly responsible. The principal cause of the fall in the number of persons imprisoned appears to be the reduction in the total flow of offenders through the courts. The total number of offenders convicted in Victorian courts peaked in 1992, when 47,000 non-traffic offenders were convicted (see Figure 3.8 below). By 1994, the total number of non-traffic offenders convicted had fallen by 7% to 43,700. Using non-traffic offenders as the index of change means that changes in the detection and enforcement of traffic offences, through the use of speed and red-light cameras, can be discounted as a source of this variation. Thus, it appears that the fall in the crime rate apparent after 1990 (as measured by the number of offences reported to police) had by 1992 had the effect of reducing the number of offenders passing through the courts, and hence the number of people entering prison.

FIGURE 3.8
NON-TRAFFIC OFFENDERS CONVICTED, IMPRISONED, 1981-94 (COURT DATA)



This pattern of marginal decline in receptions carries with it two implications in relation to the Act. The first is that the reforms to intermediate sentences had, at

best, only a small impact on the number of prison sentences imposed by the courts. The second implication is that the rise in prisoner numbers evident after mid-1993 was driven by an increase in the average time served by prisoners. One of the major changes embodied in the Act was a change in the relationship between the length of sentences passed by the courts relative to actual time served, through the abolition of the administrative mechanism of remissions. In order to examine the impact of the 1991 and 1993 Acts, it is necessary to look in some detail at the way that sentencing patterns and the period served in custody have varied over time.

Prison sentence lengths

The length of time that offenders stay in prison is the other major determinant of the size of the prison population. It has been argued that that diversionary strategies will have little impact upon prison numbers where those diversions apply to offenders serving very short periods of imprisonment (Landreville 1995:3).

The term 'sentence length' is an ambiguous one. It may refer to the maximum term of imprisonment imposed by the court. However, there are many factors which affect the length of time that a person will actually spend in prison. These factors include:

- the length of sentence imposed by the court
- the non-parole period set by the court
- the effect of remissions
- the effect of executive modifications of sentence
- the release practices of the Parole Board.

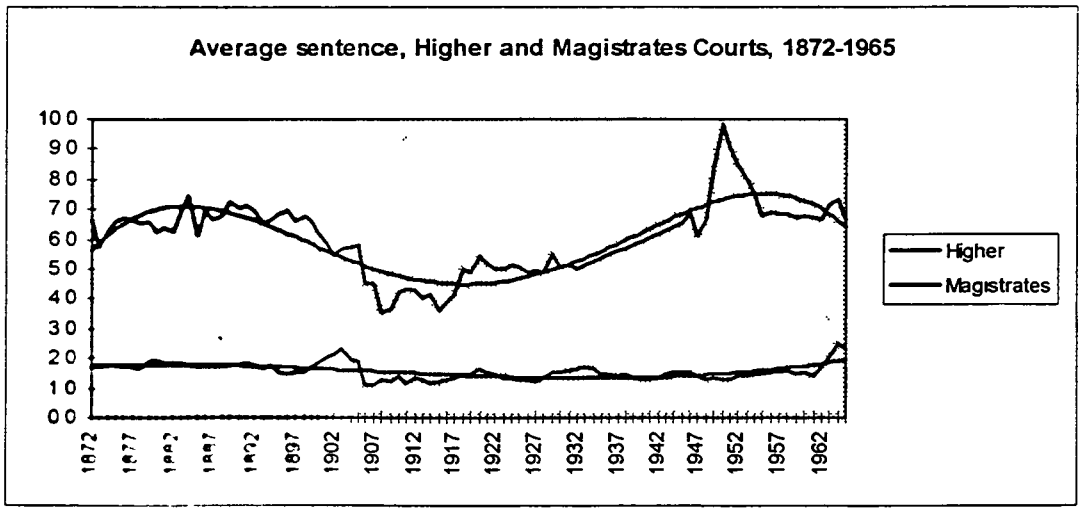
One of the consequences of the different ways that sentence lengths can be specified by courts and translated into a period in custody is that different measures of sentence length can yield apparently different patterns of change.

In the remainder of this section we first explore the historical trends in relation to sentence length, seeking to determine whether sentence lengths have changed over the last century or so. We then explore the range of executive modifications of sentence, as well as other means whereby sentence lengths, or the actual time served by a prisoner, is reduced from the sentence imposed by the court. Finally, we explore the range of sentence lengthening measures introduced by the 1993 Act.

Sentence lengths: 1872 to 1965

The Victorian Year Books provide a statistical series of sentence lengths as passed by the courts for nearly one hundred years between 1872 and 1965[14] (see Figure 3.9). One of the most obvious features of this series is that the lower (Magistrates) and higher (County/Supreme) levels of court show distinctly different sentence length patterns over this period. The average sentence imposed by the lower courts shows an extremely small degree of variation over this period. In the 1870s the average sentence was around 1.7 months. Over the next sixty years this average slowly declined to around 1.4 months. The thirty years after 1930 saw the average return to around 1.8 months. Higher court sentences showed rather more volatility over the same period, declining from an average of six to seven months in the 1870s, to between four and five months at around the time of the First World War, then increasing again to six to seven months by the 1960s.

FIGURE 3.9
AVERAGE SENTENCE, HIGHER AND MAGISTRATES COURTS, 1872-1965

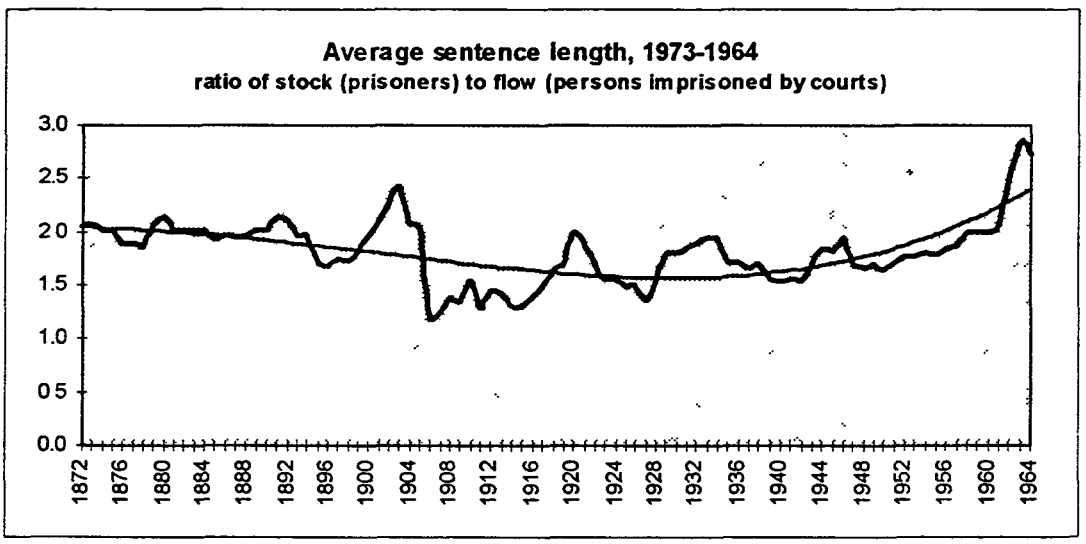


An alternative picture of changes over time in the length of prison sentences can be gained by examining the average time served by prisoners. The ratio between the number of persons in prison at any one time (the stock of prisoners) and the annual

14 See Appendix 3.1

number of receptions (the flow of prisoners) gives a statistics equivalent to the average time served.[15] Figure 3.10 shows this statistic calculated for the period 1872 to 1965. The great majority of persons sentenced to prison come from the lower courts, so not surprisingly the average time served is roughly equivalent to the average lower court sentence. Average time served follows the same pattern observed for court sentences, declining slightly between 1870 and 1930, then increasing again until 1965.

FIGURE 3.10
AVERAGE SENTENCE LENGTH 1973 - 1964
RATIO OF STOCK (PRISONERS) TO FLOW (PERSONS IMPRISONED BY COURTS)



The changing patterns in sentence length and time served over the period 1872 to 1965 make an interesting contrast to those observed for measures of prisoner stocks and flows. Both the stock and flow parameters of imprisonment showed a marked decline in the first fifty years, up to around 1920, consistent with a declining use of imprisonment as a sentencing tool. However, the stability of sentence lengths over the same period show that the contraction in the rate of imprisonment was fundamentally a result of a more selective use of the penalty, rather than as a consequence of a general lessening in the severity of prison sentences.

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15 For example, if there are 1,000 prisoners in custody, and 2,000 prisoners are received in a year, then the average time in custody is six months.

Sentencing discounts

One of the influences most difficult to analyse is that of sentencing 'discount' for a plea of guilty. Since 1985, Victorian courts have been legislatively required to have regard to whether an offender has pleaded guilty to the offence or offences with which he or she has been charged.[16] This provision was introduced following concern over the time over the length and cost of criminal trials and the recommendations of a Shorter Trials Committee established by the Australian Institute of Judicial Administration (VBA & AIJA 1985). Among the Committee's recommendations was one which suggested that the use of a sentencing discount for a guilty plea might induce more pleas which would result in fewer trials (Willis 1985).

It would appear from the great number of appellate cases concerning the effect of a guilty on sentence[17] that the offering of substantial discounts has affected defendants' decisions whether or not to plead guilty. Although the sentencing legislation requires a court to 'have regard to' whether the offender pleaded guilty, it indicates neither the manner of, nor the degree to which, the sentence should be adjusted.[18] Victorian courts are reluctant to lay down any prescriptions which would serve to limit their wide sentencing discretion and so it if very difficult to quantify the nature and extent of the reductions in sentences. Documented discounts have ranged from 2.5%[19] to 50%,[20] but empirical data is difficult to obtain (Willis 1995:59). What little data exists would indicate that the discount is greater, and applied more frequently, in the higher courts than in the Magistrates' Courts (Willis 1995:59-60; Douglas and Naylor 1995:96).

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16 The relevant provision was first introduced by the *Penalties and Sentences Act* 1985 (Vic), s.4. A modified version is now found in *Sentencing Act* 1991 (Vic), s.5(2)(e).

17 *Morton* [1986] V.R. 863; *Pickett* [1986] 2 Qd.R. 441; *Ellis* (1986) 6 N.S.W.L.R. 603; *Stone* [1988] V.R. 141; *Dodge* (1988) 34 A.Crim.R. 325; *Giakas* (1988) 33 A.Crim.R. 22; *De Zylva* (1988) 33 A.Crim.R. 44; *Jabaltjari* (1989) 64 N.T.R. 1; *Harman* [1989] 1 Qd.R. 414; *Tierney* (1990) 51 A. Crim. R. 446; *Bulger* [1990] 2 Qd.R. 559; *Bond* (1990) 48 A.Crim.R. 1; *Dodd* (1991) 57 A.Crim.R. 349; *Winchester* (1992) 58 A.Crim.R. 345.

18 Cf. *Penalties and Sentences Act* 1985 (Vic), s.4(2).

19 *Servedio* 10/11/89 (6 months off 20-year maximum).

20 *Nicholas* 23/8/90.

In Victoria there is little evidence that the offering of substantial discounts has affected defendants' decisions whether or not to plead guilty, although given the fact that approximately 70% of offenders in the higher courts plead guilty in any case, any impact on the court system is probably marginal (Willis 1995:66). There is stronger evidence, however, that the discount has encouraged offenders who would have pleaded guilty to do so at an earlier stage in the proceedings (Willis 1995:67-70). In a paper prepared by the Chief Judge of the County Court of Victoria and the Registrar of that Court it was noted that prior to the introduction of the *Penalties and Sentences Act* 1985 (Vic), s.4, approximately 11% of accused persons pleaded guilty at committal. By 1991, approximately 21% of accused persons so pleaded. According to the Victorian Director of Public Prosecutions, there has been an increase in the percentage of guilty pleas as a proportion of total disposals of indictable offences from 51% in 1987 to 62% in 1991.[21]

Executive modifications of sentence

As we noted in Chapter 2, a sentence of imprisonment imposed by the courts has rarely been fully served. A ticket of leave system had operated from the first landing of convicts in Australia and remissions were introduced in 1860. In the 1850s, between 20 - 43% of a sentence could be served outside of gaol (Johnston and Fox 1965:123). The actual 'served' length of a prison sentence will be influenced by a range of executive modifications of sentence.

It has been argued that the most effective way of reducing prison populations is to release persons already in custody, rather than diverting those who are nominally eligible for entry (Weatherburn 1986). Weatherburn's analysis of median sentence lengths and distributions of prison populations led him to that conclusion, and Chan's study of the New South Wales release on licence scheme showed that, in 1982, the effect of the scheme was to reduce the prison population in that state from 3619 to 3420 in a ten month period (Chan 1992; Harding 1986).

In Victoria, executive modifications of sentence by way of remissions, pre-release and various forms of leave played a major role in limiting the growth of the prison population. The impact of all forms of executive modifications of sentence can be

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21 Director of Public Prosecutions, Victoria, *Annual Report 1991-2*, p.76. The percentage decreased slightly in 1992 to 59%.

seen by the structure of a sentence in 1984 which could have resulted in an offender sentenced to a maximum of six years imprisonment effectively serving two years in prison (Fox and Freiberg 1985:415).[22]

An Office of Corrections study (Victoria, OOC 1985) estimated that apart from parole, the 'real' demand for prison space in Victoria was some 500 places higher than the daily average number. This 'real' demand, it argued, was depressed by the operation of remissions, pre-release, pre-sentence detention, the Director's Special Remission (DSR), pre-discharge temporary leave and fine default leave to attendance centres. It constructed the nature of a prison sentence, excluding parole in the following manner:

- pure time in custody: 51%
- DSR 3%
- fine default transfers 1%
- pre-discharge temporary leave 4%
- pre-release 5%
- pre-release plus remission 2%
- remission 29%
- pre-sentence detention 4-6%

The study estimated that if absolutely no modifications of sentence other than parole applied, the daily average numbers in 1985 would have been approximately 3500 rather than the 1800 - 1900 that it then was. Even if these estimates are somewhat overestimated, they point to the importance of non-sentencing considerations in the determination of the prison population.

The 1991 Act, affecting as it did remission, pre-release and, indirectly, parole, could therefore have had a larger impact upon prison populations than merely through its impact on sentencing. In the following sections, we examine, in turn, measures

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22 This could have happened in the following manner. If the six year maximum was accompanied by a four year non-parole period and full remissions applied, together with the maximum 12 months pre-release, the offender would be required to serve three years in prison, but would serve one of those three years on a pre-release program and two years on parole.

intended to decrease or increase sentence lengths, either actual or nominal, and their impacts.

Pre-release programme

The state of Victorian prisons was a key concern of the Office of Correction's 1983 Master Plan. Not only was the physical state of the prisons decaying, accommodation was becoming sorely stretched as the total number of prisoners in custody grew quickly. The Department's 1983 Annual Report nominated overcrowding as its most pressing problem, so much so that in early 1983 prisoners were kept in police lock-ups rather than being transferred to the gaols which could not receive them. The Department released prisoners on seven days early release or on extended temporary leave prior to release to ease the pressure. On New Year's day, 1982, 1659 prisoners were custody, but by July the following year, the number stood at 2001. In its 1986 submission to the Victorian Sentencing Committee, the Office described the situation in the gaols in June 1983 as reaching 'crisis proportions'. Although the Office was 'totally opposed' to the use of administrative discretions to reduce prison numbers, the pressure on prison numbers required the retention of such matters.

In 1983 two schemes were devised to ease the accommodation problems. The *Community Welfare Services (Pre-Release Programme) Act* 1983 (Vic), which came into operation in April 1984, was described in the full title of the Act as 'an Act to provide for a community-based pre-release programme to better integrate prisoners back into the community during the final portion of their prison sentences...' It sought to achieve this integration by locating the programme at Attendance Centres or at Office of Corrections regional centres preceding release on parole for prisoners serving maximum/minimum sentences, or final discharge for those serving straight sentences. The power to grant permits was vested in the Parole Board (Fox and Freiberg 1985:414; Fox 1984).

The second scheme, the *Community Welfare Services (Attendance Centre Permits) Act* 1983 (Vic) permitted the Office of Corrections to permit an offender undergoing a term of imprisonment in default of payment of a fine to serve all or part of the term by way of attendance at an attendance centre.[23]

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23 See further Chapter 4.

Originally, the pre-release permit could be granted for a period of up to 12 months[24] and was calculated on top of remissions. The sentencing court could veto an offender's participation in the scheme.[25] The scheme applied to prisoners serving sentences of 12 months or more and who had at least three months, but nor more than twelve months of the prison sentence remaining to be served. The period of the permit could not exceed one-third of the sentence which the prisoner was undergoing.

Table 3.7 charts the number of pre-releases under this scheme from its inception to its demise in 1993.

TABLE 3.7
VICTORIA: PRE-RELEASE PERMITS AND CANCELLATIONS
1983 - 1993[26]

YEAR	PERMIT RELEASES	CANCELLATIONS (RATE)
1983-84	150	17 (11%)
1984-85	465	133 (29%)
1985-86	458	104 (23%)
1986-87	467	116 (25%)
1987-88	311	51 (16%)
1988-89	251	41 (16%)
1989-90	274	42 (15%)
1990-91	308	22 (7%)
1991-92	270	31 (12%)
1992-93	188	23 (12%)
1993-94	85	11

An internal Office of Corrections study carried out of the first nine months of the programme (Higgins et al 1985) estimated that the programme reduced the prison

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24 The length of the permit was later decreased to six months.

25 *Penalties and Sentences Act* 1981 (Vic), s.11A.

26 From Adult Parole Board, *Annual Report 1993-94*, Figure 4.

population between April and December of 1984 by 6 - 8%, although it noted that its impact would be modified by the effect of additional time served by releasees whose permits had been cancelled.[27] The study also found that in the first six months of the first year (April to October 1984) most offenders were released for periods of less than six months. 88% of those had a parole period to serve when the permit expired (Higgins et al 1985).[28]

An examination of the monthly prison data shows that from a peak of 1854 *sentenced* prisoners held in April 1984, numbers steadily declined to a low of 1652 in July 1985 and fluctuated in the 1650 - 1750 range for three years until they broke the 1800 barrier in July 1988. In January 1986, the Office of Corrections noted (Information Sheet No. 11) that the decrease in numbers up to 1985 was totally due to the temporary effect of the various early release programmes, particularly pre-release.

The 1991 Act abolished pre-release, along with remissions and, based upon the estimates of prison space saved, it might have been expected that anywhere between 85 and 120 prison places would have been required for those not released under this scheme. However, it is apparent from the daily average prison numbers that the effect of the abolition of this scheme was far less than would have been expected.

Temporary and special leave

Until the commencement of the 1991 Act, the Director-General of Corrections could order the release of prisoners on leave in either of two ways. First, the Director could permit an offender to take temporary leave of absence for limited periods for employment, educational, family, sporting medical, police or other purposes. For some years, the period of leave was not limited in time, but after a revamp of the scheme in 1989 following community concern (Victoria 1989), a limit of three days was put on the scheme, although the period may be extended if the purpose of the leave is unpaid community work or participation in a rehabilitation programme. In addition, *Corrections Act* 1986 (Vic), s.57(5) now provides that prisoners detained for

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27 These estimates are quite complex, for if the permits were cancelled for further offending, some additional time was likely to be added to the non-parole period. Estimated gross and net savings of time is difficult.

28 In estimated the amount of prison years saved, it is probably safe to calculate that for about every 2.2 releases, one person-year in gaol is freed [includes cancellation rate and based upon an average of 6 months' pre-release].

fine default may be permitted to be released under a custodial community permit for the whole of their remaining term of imprisonment.

The second form of leave, which did not survive the changes in leave policy, was the power of the Director-General to order the release of a prisoner from custody up to seven days prior to the official expiry date of the sentence, allowing for remission, or seven days earlier than the parole date fixed by the Parole Board.

As noted above, these schemes were estimated by the Office of Corrections to save up to 3% of a sentence for the Director's special remission and about 4% for pre-discharge temporary leave. In its 1986 submission to the Victorian Sentencing Committee, the Office estimated that the temporary leave provisions saved approximately 50 imprisonment years annually and the Director-General's early release, about 70 places. Once again, their abolition seems to have had a minimal impact.

Parole

Another factor influencing prison populations is the availability of parole. In Victoria where an offender is sentenced to life imprisonment or for term of 24 months or, the court must fix a non-parole period 'unless it considers that the nature of the offence or the past history of the offender make the fixing of such a period inappropriate.'[29] If the sentence is between 12 and 24 months, the court *may* fix a non-parole period, but if the sentence is less than 12 months, no non-parole period may be set. The non-parole period must be at least 6 months less than the term of the sentence.

Together, the parole and remissions regimes (prior to the latter's abolition) accounted for the greater part of the non-custodial component of a Victorian sentence of imprisonment. As has been noted, parole policies, as 'back end' release mechanisms, can have a substantial impact upon prison populations (Young and Brown 1992:21).

The concept of parole in Victoria can be traced to the release of transported convicts on tickets of leave and to Victorian legislation allowing probationary release from reformatory prisons under the *Indeterminate Sentences Act* 1907 (Vic). The modern Victorian parole system dates from the establishment of an Adult Parole Board by

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29 *Sentencing Act* 1991 (Vic), s.11(1).

the *Penal Reform Act* 1956 (Vic) and, despite some questioning of its role (Victoria 1982), it has remained substantially unaltered in concept since its inception.

Victoria possesses three independent paroling authorities: the Adult Parole Board with power over all offenders serving prison sentences carrying non-parole periods, the Youth Parole Board with jurisdiction over all offenders sentenced to detention in a youth training centre and a Youth Residential Board with jurisdiction over offenders sentenced to detention in a youth residential centre. A high degree of interchangeability is possible between prisons, youth training centres and youth residential centres, and if a transfer from one type of custody to another takes place, there will be a corresponding transfer of parole responsibilities from one Parole Board to the other. Only the Adult Parole Board is of immediate concern.[30]

The influence of parole upon prison populations is manifested in four major ways:

- the proportion of time in custody to the maximum term: or, in Victorian terms, the relationship between the term of imprisonment imposed by the court and the non-parole period;
- the rate of release;
- the revocation rate; and
- disposition after revocation.

Unlike many other jurisdictions, Victoria does not require the court to set a fixed proportion of the sentence as the non-parole period. Rather it allows the court to set the non-parole period within the parameters of the legislation, with an option not to set such a period. In Victoria, approximately 60% of sentences imposed by the higher courts have non-parole periods set at about 50 - 70% of the effective sentence.

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30 In Victoria the Adult Parole Board is a statutory body chaired by a judge of the Supreme Court. It is made up of 2 judges of the Supreme Court , a judge of the County Court, a retired magistrate, a full time member, the secretary to the Department of Justice and 8 part time members representing the community.

TABLE 3.8
HIGHER CRIMINAL COURTS
MINIMUM TERM AS A PERCENTAGE OF EFFECTIVE SENTENCE

YEAR	<20	20<30	30<40	40<50	50<60	60<70	70<80	80<100
1992	0.2	1.1	3.8	8.2	28.8	29.9	21.9	6.2
1993	0.0	2.4	5.8	7.2	26.1	30.9	17.2	10.5

Changes in these relativities can have a major impact upon prison populations. As the above table indicates, the distribution of minimum terms did not change dramatically after the 1991 Act. This is not surprising, as the Act left the parole provisions substantially undisturbed. However, in New South Wales, the *Sentencing Act* 1989 (NSW) not only abolished remissions, but also required judges first to fix a 'prison sentence', the non-parole period and then to impose a parole term of not more than 25% of the total sentence. The effect of this legislatively mandated ratio was expected to have an impact because it was estimated that under the previous legislation, non-parole periods were between 33% - 50% of sentence (Brown 1992:329; Chan 1990:199). In 1992, Gorta estimated that the changed legislation would result in prisoners serving 19% longer in prison which translated into an increase in the prison population of about 490 - 800 prisoners. Similarly, in South Australia, changes to the parole rules which saw the introduction of fixed non-parole periods in 1983 which increased the length of the non-parole period by 50% resulted in higher prison numbers. Morgan (1988:88) reported that soon after the introduction of this legislation the population of sentenced prisoners decreased dramatically (December 1983 - July 1984) but then increased to new higher levels by 1986 as the flow of sentenced prisoners increased.

The length of the non-parole period can be gauged from an examination of the prison population. The following table sets out the length of the effective minimum sentences for males from 1987 to 1995.

TABLE 3.9
OFFICE OF CORRECTIONS :PRISON PROFILES
EFFECTIVE MINIMUM SENTENCE (MALES)
PER CENT OF PRISONER

YEAR	<1M	1-3M	3-6M	6-12M	1-2Y	2-3Y	3-5Y	5-10Y	10-15Y	15-20Y	LIFE/GP
87	0.74	2.64	6.94	9.15	10.56	8.96	14.92	22.22	10.99	4.17	8.16
88	0.80	2.89	7.33	15.27	14.84	11.39	15.58	17.24	5.97	1.97	6.71
89	0.40	3.72	7.74	15.64	16.50	11.75	14.38	17.42	5.67	1.95	4.81
90	0.76	3.71	9.21	11.07	12.27	10.41	15.43	18.54	8.07	4.14	4.80
91	1.20	5.73	9.27	17.39	14.07	9.43	12.49	13.69	5.89	1.15	5.29
92	1.37	6.07	10.12	16.58	15.59	11.16	13.35	13.29	6.40	1.91	3.28
93	0.79	4.07	12.37	18.93	22.53	11.00	11.53	8.2	5.02	1.48	2.49
94	1.06	5.85	11.59	18.94	17.34	10.97	13.48	9.28	6.38	1.93	1.98
95	1.68	5.88	10.78	10.38	10.63	8.55	17.45	19.38	5.04	5.44	1.78

These data about the length of effective non-parole periods reveal some interesting features about the prison population. Between 1987 and 1994, the proportion of offenders with non-parole periods of twelve months or less increased from 19.42% to 37.44%. In 1995, that proportion fell to 28.72%, indicating that sentence lengths increased. Whether the fall in sentence length, as reflected in these non-parole periods, was also reflected in sentences without non-parole periods, is unclear, but is crucial to an understanding of parole releases during that period which is discussed below.

Another factor which affects the imprisonment rate is the rate of release. In Victoria, approximately 86% of prisoners are released within 3 months of their expected eligibility date, unless the offender has previously breached parole or has committed offences in prison. This rate has been relatively stable over the years (OOC Master Plan 1983:256). In other jurisdictions, such as Queensland, release at the expiration of the non-parole period is not guaranteed (Nicholson 1988:47). Because of the

stability of release rates and non-parole periods, the number of releases tends to follow the number of persons imprisoned.

TABLE 3.10
PAROLE BOARD
RELEASE AND CANCELLATION RATES[31]

YEAR	RELEASES	CANCELLATIONS (RATE)
1981-2	681	154 (23%)
1982-3	637	215 (34%)
1983-84	728	191 (26%)
1984-85	593	175 (29%)
1985-86	645	212 (33%)
1986-87	763	198 (26%)
1987-88	866	204 (24%)
1988-89	947	249 (26%)
1989-90	1018	321 (31%)
1990-91	1024	293 (29%)
1991-92	1018	271 (27%)
1992-93	760	232 (30%)
1993-94	651	214 (33%)
1994-95	746	183 (25%)

As we have seen, the number of prisoners in Victoria has remained relatively stable, with a short, but sharp increase of approximately 250 prisoners between 1993 and 1995. However, the parole board figures in the table above indicate significant decrease in the number of offenders released on parole between 1991-92 and 1992-93, which followed a major increase in parole releases between 1985-86 and 1991-92. The latter is partly explicable by the small growth in prison numbers and partly be a change in release policy in respect of long-term prisoners who had been denied parole.[32] However, the former phenomenon is more difficult to explain. Either the

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31 From Adult Parole Board, Annual Reports, Figure 3.

32 According to the Chair of the Parole Board, Mr Justice Vincent, from around 1987, the Board was more willing to release prisoners who had previously been in breach

Board tightened its release policy, which apparently was not the case, or the numbers eligible for parole decreased. The latter explanation is more likely. As we have seen, with falls in reception rates, the number of prisoners being gaoled has fallen. However, it may be possible that the 1991 Act wrought an unintended change upon the work load of the Parole Board. If there were a short, but marginal reductions in the nominal length of gaol sentences, sufficient to bring a significant number of offenders below the twelve month non-parole period requirement of the legislation, then a large number of offenders who would previously have been eligible for parole no longer qualified.

A third factor which will affect imprisonment rates is the breach rate. In some jurisdictions, the recall rate of parole violators can contribute significantly to the numbers in prison. In California, in 1981, parole violators made up 8% of admissions to prison, but by 1989, approximately half of all admissions in that state were parole violators, who accounted for about 16% of the prison population (Young and Brown 1993:21; Davies 1993:14).

Breach of parole in Victoria may consist of a failure to comply with the conditions of the order or the commission of an offence. Upon breach, the Board may take no action, issue a warning, add further conditions to the parole order or may cancel the order. In the last case, the offender is liable to serve the unexpired portion of the original sentence, although he or she may be re-released during this period. As indicated by Table 3.10 above, the breach rates have remained relatively stable over the decades at about 25 - 30% of parolees. The decreasing number of offenders being released on parole because of the shorter terms resulting from the *Sentencing Act* 1991 (Vic) may also mean fewer breaches of parole and possibly, therefore, fewer numbers serving longer sentences owing to the combination of the unexpired term and the sentence for the new offence.

Remission

Perhaps the most important of all the measures which affect the length of time prisoners serve is the remissions system. Until April 22, 1992 almost all persons[33] sentenced to imprisonment under state law in Victoria had a portion of their

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of parole. However, this had the effect of increasing the number of subsequent breaches, as these were high-risk offenders (Personal communication, 1996).

33 The exception was a person convicted of murder: *Corrections Act* 1986 (Vic), s.60(5).

sentences remitted for good behaviour whilst in custody (Fox and Freiberg 1985:416ff). The law provided that a prisoner was entitled, at the beginning of his or her sentence, to be credited with his or her remission entitlements in respect of that sentence calculated in accordance with the regulations.[34] The regulations provided that the remission entitlement was to be one-third of the sentence of imprisonment, if no minimum term was fixed, or one-third of the minimum term and one-third of the period between the minimum term and the term of imprisonment.[35] Remissions could be lost for bad behaviour.[36] The *Corrections (Remissions) Act* 1991 (Vic) abolished all forms of remissions, but introduced a new concept of 'Emergency Management Days' to replace the special remissions awarded in cases of industrial dispute.[37]

Remissions played a crucial role in the size of the Victorian prison population. Although some have argued that the impact of remissions is effectively negated by judicial responses which increase nominal sentence lengths (Young and Brown 1993:21; Weatherburn 1985; South Australia 1989), in Victoria, the entrenched nature of the remission system, together with the prevailing legal doctrine, made it likely that any changes in the remission system would have a significant impact upon prison numbers.

When the Victorian Sentencing Committee flagged its intention to abolish remissions, the Office of Corrections, in its submission to the Committee argued that their complete abolition, together with that of other executive modifications of

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34 *Corrections Act* 1986 (Vic), s.60(3).

35 The period during which the person is eligible for parole: Regulation 97(3). Remission in respect of the latter period did not apply if the person was in fact released on parole.

36 See *Corrections Act* 1986 (Vic), s.50.

37 The Act inserted a new s.58E into the *Corrections Act* 1986 (Vic) which provides: `(1) The Director-General may, in accordance with the regulations, reduce the length of a sentence of imprisonment being served by a person or the length of the non-parole period (if one has been fixed in respect of the sentence) on account of good behaviour while suffering disruption or deprivation - (a) during an industrial dispute or emergency existing in the prison or police gaol in which the sentence is being served; or (b) in other circumstances of an unforeseen and special nature.' Remissions may also be granted under the royal prerogative by the state Governor to mark some special state occasion such as a royal visit: see now s.106 *Sentencing Act* 1991 (Vic) and generally *Kelleher* v *Parole Board of NSW* [1983] 3 NSWLR 50; *Green* v *Corrective Services Commission of NSW* [1982] 1 NSWLR 327.

sentences would result in a 63% increase in the prison population (Office of Corrections 1986). It forecast an increase in the imprisonment rate from 47 per 100,000 to 77 per 100,000, requiring five new prisons with an estimated capital cost of $150m. The Office argued further that the system of remissions was not just a sentence shortening practice by 'by far the most influential means of promoting good conduct and sanctioning unacceptable behaviour.'

One of the major purposes of the 1991 Act was the introduction of 'truth in sentencing' into Victoria.[38] The combination of remissions, pre-release and special leave provisions had created a crisis of confidence in the penal system resulting in the government's decision to abolish both remissions and pre-release.[39]

In its final report, The Victorian Sentencing Committee was critical of the operation of the remission system in Victoria (Victorian Sentencing Committee, 1988: Chapter 18) and recommended the phasing out of remissions over a five year period. However, the Committee noted the effect of abolishing remissions in prison numbers, noting the Office of Corrections' concern over rising prison numbers. Consequently, the Committee emphasised that its recommendation relating to the abolition of remissions (1988:655)

> can only be given effect to if the prison sentences imposed by the courts are reduced by a sufficient amount so that the actual time served by prisoners under those sentences is at the very least kept to the same amount as at the present time, but preferably slightly reduced. If this is not done then prison overcrowding will become an intolerable and insoluble problem.

The Committee believed that the level of prison populations should be controlled and this could be achieved by, among other things (1988:653)

- ensuring that prison accommodation and other economic issues were acknowledged as relevant policy considerations and given due weight in the setting of maximum penalties;
- introducing a new set of maxima which were reduced by a sufficient degree to allow for the abolition of administrative interventions;

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38 Portions of this discussion are drawn from Freiberg, 1992.

39 See above Chapter 2.

- ensuring that there was proportionality between the sentences imposed for different types of offences with greater weight being given to offences involving violence; and
- developing a significant data base of sentencing statistics.

It was implicit in the Committee's recommendations concerning maximum penalties that a decrease in the statutory maximum of a certain amount would be reflected in a concomitant decrease in the length of sentences imposed by the courts.

Six months after the release of the Sentencing Committee's report and with an election looming, the government released its criminal justice policy entitled, *BLAST - Building a Law Abiding Society - Together*, which partly served as a response to the Committee's Report. The policy was to abolish all prisoner early release programs, abolish automatic remission and replace it with 'merit time' and to change sentencing terminology. The government was re-elected and soon after introduced a bill to replace remissions with 'earned merit time' to a maximum of one-seventh of the sentence. It rejected the Sentencing Committee's recommendations on the basis that complete abolition would 'seriously compromise the capacity of prison administrators to maintain discipline and order.' It proposed to reduce the rate of merit time over five years in two steps, from January 1990 from one day in three to one day in four, and from July 1994, from one day in four to one day in seven. It was intended that the phasing down of the level of merit time would 'provide an opportunity for the effective review of the efficacy of remission on prisoner management.'

Public reaction to the Bill was swift and adverse. In April 1989 the Victorian Association for the Care and Resettlement of Offenders held a seminar on *Sentencing, Correction and the Community*[40] at which Sir John Starke and others were critical of the Bill, in particular, of the introduction of merit time, a measure not recommended by the Starke Committee. Sir John, in his characteristically frank fashion, called the Bill a 'somewhat dishonest exercise in political opportunism'. The Bill never passed through Parliament and it was not until the *Sentencing Act* 1991 (Vic) that remissions were finally abolished, not gradually, but instantaneously.

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40 See VACRO, 1989.

The Victorian government was acutely aware of the experience of New South Wales regarding the abolition of remissions. In 1989, the newly elected conservative Liberal/National party government changed its sentencing system. The *Sentencing Act* 1989 (NSW) removed prisoners' entitlements to remissions (Judicial Commission of NSW:1991:5).[41] The stated object of this legislation was:[42]

> 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.

Despite repeated statements by the government that sentence lengths were not intended to increase (Gorta, 1990),the number of persons imprisoned significantly increased. When the Liberal/National Party came to power in New South Wales in March 1988 the prison population was 3,950. In 1989, the daily average prison population in New South Wales was 4,358. By late 1991 this had grown to 5,800, an increase of about 45% (Brown 1991)[43] and by 1993-4 it stood at 6,423 (Spears 1996).[44] Although not all of this increase could be attributed to the effect of the *Sentencing Act* 1989 (NSW), the impact of this legislation appears to have been significant.

A study by Dr. Angela Gorta, then Chief Research Officer of the New South Wales Department of Corrective Services showed that there had been an increase of 19% in the average time to be served by sentenced prisoners, which was equivalent to an overall increase in the prison population of approximately 490 additional sentenced prisoners held on any one day (Gorta, 1990). Although there was an early indication

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41 The Act also introduced a formula whereby for sentences of over six months, a minimum term of custody was to be specified by the courts as well as an 'additional term' during which the offender could be released on parole or remain in custody. The additional period is required to be not more than one-third of the minimum term unless 'special circumstances' exist which would allow the court to depart from the formula.

42 *Sentencing Act* 1989 (NSW), s.3(a).

43 In the same period the Victorian prison population grew by 15.3%. The average increase across Australia was 22.5%. However, the rate per 100,000 in Victoria only increased 2% between March 1989 and March 1991, compared with 23.5% in New South Wales. The New South Wales imprisonment rate of 143 per 100,000 is almost double that of Victoria.

44 Between 1989 and 1994, sentenced prisoners increased by 36.6%; unsentenced prisoners increased by 29.9% (Spears 1996). Spears makes the point that the prison population was on the increase prior to the introduction of the *Sentencing Act* 1989. However, the rise following the Act was significant and marked.

that average minimum and fixed terms handed down by the courts were lower than those set before the Act, this trend did not continue, so that the total result of the changes to sentencing patterns consequent upon the Act was a massive overcrowding in New South Wales prisons necessitating the building of a number of new prisons.

However, more recent work by the Judicial Commission of New South Wales disputes the suggestion that the *Sentencing Act* 1989 (NSW) was solely, or even substantially responsible for the growth in prison numbers in that jurisdiction, a growth which only ceased in 1995 (Spears 1996).

The Victorian government's response to these events was found in s.10 of the *Sentencing Act* 1991 (Vic). Introducing the *Sentencing Act* 1991 (Vic), the then Attorney-General, Mr Jim Kennan, stated: [45]

> Abolition of remissions without corresponding adjustments in sentencing law would increase sentences and cause a concomitant increase in the prison population of up to one-third. Indeed, abolition of remissions in New South Wales has led to an explosion of the prison population and severe problems in prison. Victoria has learned from this unhappy experience. The legislation must make it clear that it is not intended that the abolition of remissions will in itself lengthen the period served.

Section 10 of the *Sentencing Act* 1991 (Vic) accordingly provides:

> (1) When sentencing an offender to a term of imprisonment a court must consider whether the sentence it proposes would result in the offender spending more time in custody, only because of the abolition of remission entitlements by section 3(1) of the *Corrections (Remissions) Act* 1991, than he or she would have spent had he or she been sentenced before the commencement of that section for a similar offence in similar circumstances.
>
> (2) If the court considers that the sentence it proposes would have the result referred to in sub-section (1) it must reduce the proposed sentence in accordance with sub-section (3).

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45 Victoria, *Parliamentary Debates, Hansard*, Legislative Assembly, Tuesday 19 March 1991, p.336.

(3) In applying this section a court -

(a) must assume that an offender sentenced before the commencement of the *Corrections (Remissions) Act* 1991 would have been entitled to maximum remission entitlements; and

(b) must not reduce a sentence by more than is necessary to ensure that the actual time spent in custody by an offender after that commencement is not greater, only because of the abolition of remissions, that [sic] it would have been if the offender had been sentenced before that commencement for a similar offence in similar circumstances.

(4) For the purposes of this section -

(a) 'remission entitlements' are entitlements to remission under section 60 of the *Corrections Act* 1986 or regulation 97 of the *Corrections Regulations* 1988; and

(b) 'term of imprisonment' includes -

(i) a term that is suspended wholly or partly; and

(ii) any non-parole period fixed in respect of the term.

(5) This section expires on the fifth anniversary of the day on which it comes into operation.

(6) It is intended that the expiry of this section will not of itself have any effect on sentencing practices and that after the expiry a court will, as required by section 5(2)(b), have regard to sentencing practices current immediately before then as if this section had not expired.

The concept of 'truth in sentencing,' as embodied in this Act, related therefore to the *method* by which sentences were expressed rather than affecting their length. Truth, under the *Sentencing Act* 1991 (Vic), did *not* mean that the sentencing patterns prevailing prior to the proclamation of the Act were intended to continue so that subsequent to the abolition of remissions prisoners would serve the whole of the court's announced, albeit unadjusted term of imprisonment, a term which was effectively never served in practice. If this latter concept of 'truth' were applied, then,

all other things being equal, the actual length of time served in custody would increase by one third.

The peremptory nature of s.10 was also due to the state of the law concerning the relationship between remissions and sentencing. In Victoria, courts were required to ignore the existence of remissions in the imposition or review of sentences. The existence of remissions has not been regarded as being, of itself, a circumstance justifying an increase in the sentence imposed so as to counter the effect of any remissions which may be granted.[46] Accordingly, if courts were required ignore the *existence* of a remissions regime in sentencing, they would also be required to ignore the *absence* of such a regime. In the absence of any compensatory mechanism, the complete abolition of remissions[47] would have had the practical effect of increasing the length of time served by a prisoner in gaol with a consequential increase in the number of offenders held in prison. However, judicial interpretations of s.10 varied.[48] Because no procedure was set out in the statute for the sentencer to specify how the abolition of remissions has been taken into account and the manner in which the sentence has been affected and it provided some difficulty for sentencing judges.[49] Appellate courts could infer from the length of the sentence imposed whether it was manifestly excessive, in that a sentence well above the prevailing sentencing pattern may indicate that the sentencing court has not taken into account the abolition of remissions and the Court of Criminal Appeal has done this on a number of occasions.[50]

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46 *Maguire* (1956) 40 Cr. App. R. 92; *Menz* [1967] S.A.S.R. 329; *Morgan* (1980) 7 A Crim R 146; *Yates* [1985] VR 41; *Paivinen* (1985) 158 CLR 489; *O'Brien* (1984) 2 NSWLR 449.

47 This would also be true for any reduction in the rate of remissions.

48 *Pillay* 1/4/93; because the sentencing legislation does not require a court to take into account the possibility of early release under a scheme abolished along with remissions, the sentence to be served by some offenders, namely those who would have been eligible for this scheme, may be longer than it would have been under the previous legislation, but courts may have regard to the effect of pre-release in seeking to give effect to the policy of the *Sentencing Act* 1991 (Vic) not to increase the general level of sentences by virtue of the abolition of remissions: *Pillay* 1/4/93; *Chen* 6/4/93. For a description of the pre-release scheme, see Fox and Freiberg, 1985:9.8.

49 *Pillay* 1/4/93.

50 See *O'Donnell and Jacobs* 11/8/92; *Wayland* 14/9/92 (notional sentence was too high); *Williams* 17/9/92 (total sentence was too great having in mind total sentence and requirements of s.10); *Robson* 2/10/92; *Tine* 8/10/92 (failure to invoke s.10 evidenced by fact that neither judge nor counsel mentioned it and by the very fact of

Measuring the impact of s.10 upon judicial sentencing practices and upon prison populations has been made difficult for two reasons. Firstly, in February 1994, the Court of Criminal Appeal's decision in *Boucher's* case meant that s.10 only applied to those offences whose maximum penalty had not been changed by the *Sentencing Act* 1991 (Vic). As approximately 90 offences had been changed (Fox, 1992), its impact was unpredictable, depending upon the number of those offences brought before the courts, the level of court in which the case was heard and finally, the attitude of the court to the spirit of the legislation. Secondly, the *Sentencing (Amendment) Act* 1993 (Vic) provided that s.10 did not apply to the categories of serious sexual offenders and serious violent offenders.

The abolition of remissions was expected to result in a 33% decline in the length of non-parole periods. In other words, there was to be no change in the actual length of time a prisoner was expected to serve. In order to examine the effects of the abolition of remissions on sentence lengths, we first examine general sentence lengths for the decade before the 1991 Act and then, more specifically, the effect of s.10.

Sentence lengths: 1981 - 1994

It was noted previously that the flow of offenders into prison fell between 1965 and 1981 by approximately one-half. In contrast, the average sentence length of prisoners increased from 2.5 months in 1965 to 4 months in 1981. The rise in average sentences continued during the early 1980s, reaching about 5 months in 1986, and then stabilising until the early 1990s, when a further rise became evident.

It is worth noting at this point an important limitation in using stock to flow ratios as a measure of average sentence length. The flow of prisoners is primarily made up of offenders serving short terms: 40% of receptions are of offenders with an expected time to serve of less than 3 months, and 85% have an expected sentence of less than 1 year. On the other hand, the prison stock consists largely of persons serving long sentences: at the 1992 prison census, 54% of prisoners had an expected time to serve

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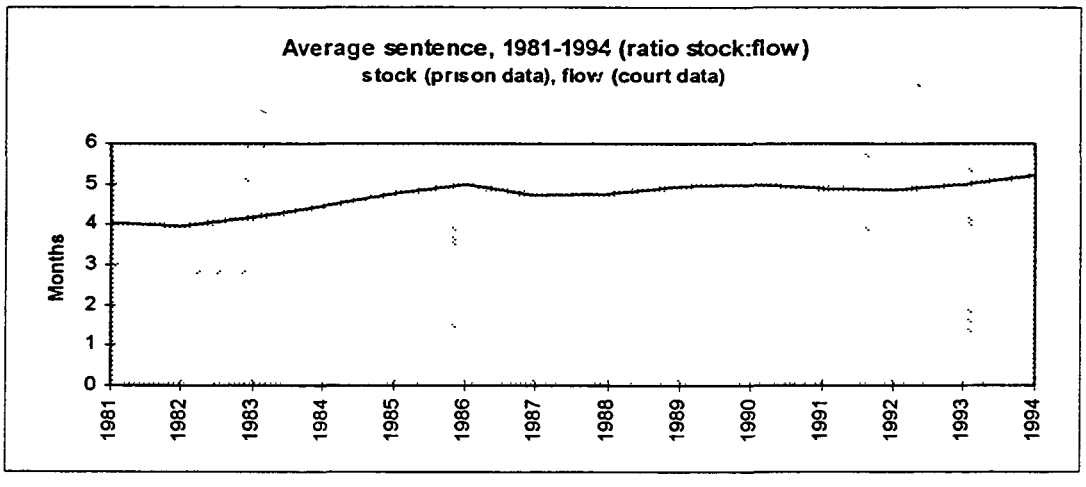
the sentence itself). *Walker* 1/4/93 (notional sentence for armed robbery would compare with sentence for murder); *King and Los* 6/4/93 (notional sentence for robbery 'very high'); *Pillay* 1/4/93; *McColl* 12/2/93 (sentence significantly higher than equivalent sentence); c.f. *Dean* 28/5/93 (changes in sentencing patterns for some offences make it difficult to establish previous sentencing patterns). In *Stanbrook* 16/3/93* the 'notional' sentence would have been higher than the statutory maximum penalty.

of 12 months or more. Thus, the stock to flow ratio includes substantial hysteresis so that it does not accurately track year to year changes in sentencing patterns. Accordingly, while average sentence calculated using a stock to flow ratio are a useful measure over long time periods, the measurement of sentencing change over short time periods requires that actual sentence lengths distributions are used. Fortunately, the improvement in court sentencing data resulting from the recommencement of Magistrates' Court statistics in 1990 provides a basis for monitoring actual sentencing patterns.

FIGURE 3.11

AVERAGE SENTENCE 1981 - 1994 (RATIO STOCK:FLOW)



Sentence lengths and the abolition of remissions

If the courts had adhered strictly to the provisions of s.10 of the 1991 Act, one would have expected to see a reduction in the length of both straight and minimum terms of one-third: one year sentences would have become 8 month terms, three years become two years and so forth. In effect, the distribution of sentence lengths as passed by the courts should have moved down to the distribution of time in custody.

However, the changes observed in sentence lengths do not indicate a straightforward response to the 1991 Act (see Table 3.11). In the Higher Courts, the

average minimum term declined by around 7%, from 2.13 years over the period from January 1990 to April 1992, to 1.97 years in the period from April 1992 to July 1993, when the reforms in the 1993 Act took effect. After the proclamation of the 1993 Act, the average length of minimum terms increased to 2.35 years, or 10% greater than it had been before the 1991 Act took effect. If one estimates the actual time likely to be served by prisoners - that is the minimum term less one-third for sentences passed before the 1991 Act, and the minimum term unremitted for those passed after - it is apparent that both the 1991 and 1993 Acts brought about substantial increases. Prior to the 1991 Act, prisoners sentenced by the Higher courts could expect to serve 1.42 years on average. Over the 15 months after the proclamation of the 1991 Act, the average time served increased by 39%, to 1.98 years. The 1993 Act saw a further increase in time served to 2.35 years.

TABLE 3.11
ALL OFFENDERS SENTENCED BY HIGHER COURTS : 1985 - 1994
MAXIMUM, MINIMUM TERMS & TIME EXPECTED TO SERVE

Date of hearing

Sentence length (Years)	1985-1990	1990-Apr. 1992	Apr. 1992 - Jul.1993	Aug.1993 - Dec. 1994
Maximum term	3.33	3.15	3.17	3.74
Minimum term	2.37	2.13	1.98	2.35
Time to serve	1.58	1.42	1.98	2.35

The pattern of sentence length change in the Magistrates Court is similar to that in the Higher courts. Minimum terms declined by about 20% between 1991 and 1993, and then increased marginally in 1994. However, the fall in the length of sentences passed by the courts was insufficient to make up for the effect of the abolition of remissions, with the result that the expected time to serve for offenders rose substantially, from about 3.1 months in 1990/91 to 3.6 months in 1993/94.

TABLE 3.12
ALL OFFENDERS SENTENCED BY MAGISTRATES COURTS : 1990 - 1994
SENTENCE IMPOSED & TIME EXPECTED TO SERVE

Date of hearing

Sentence length (months)	1990	1991	1992	1993	1994
Sentence imposed	**4.71**	**4.55**	**4.01**	**3.59**	**3.64**
Time to serve	**3.16**	**3.05**	**3.41**	**3.59**	**3.64**

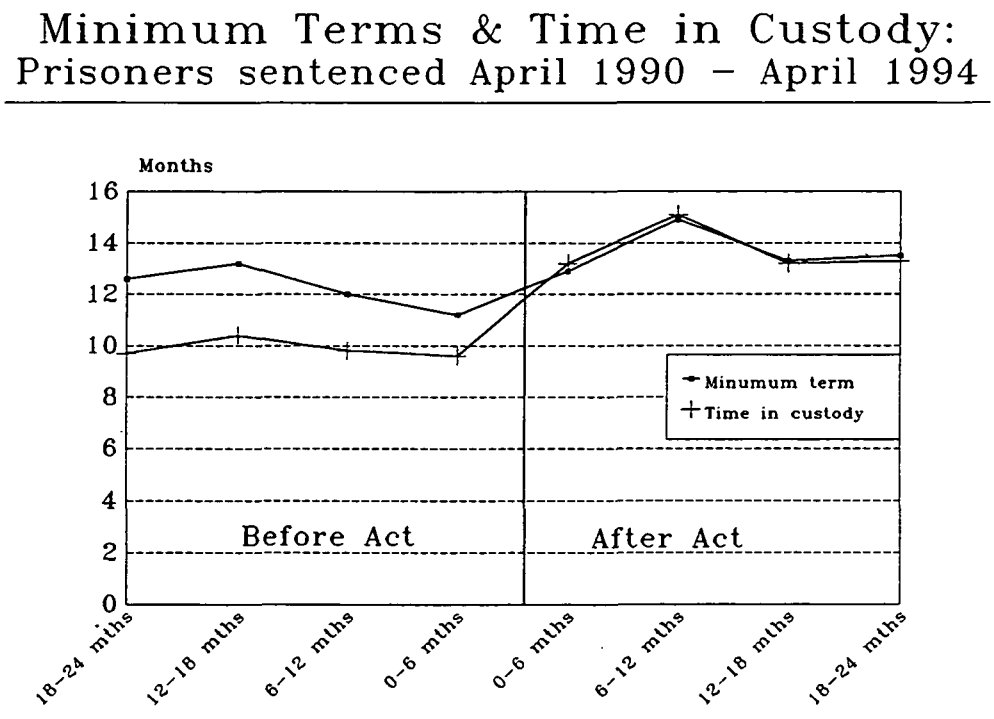
Any assessment of sentence length changes in the Higher and Lower courts arising from the 1991 Act is complicated by the transfer of business from the County Court to the Magistrates Court. This process was only partly the result of the 1991 Act. A substantial movement of less serious indictable matters to the summary jurisdiction had been taking place since at least 1990. The number of sentences of imprisonment made by the Higher Courts fell from 850 in 1990 to 550 in 1994. In theory, this transfer of business should have given rise to an increase in sentence lengths at both levels of court. That is, the transfer of less serious matters from the Higher Courts should have resulted in those courts dealing with matters that were, on average, more serious, and hence attracted higher sentences. At the same time, the matters transferred to the Magistrates' Court should have been at the upper end of seriousness in that jurisdiction, and hence have led to an increase in average sentence lengths as well.

A further complicating factor is that the sentence length changes evident in the courts statistical series are derived from principal offences and do not take account of changing patterns of cumulacy and concurrency that determine actual time served by offenders.

In order to get a clearer picture of the impact of sentencing changes on custodial populations it is necessary to examine the patterns of sentences as served by prisoners. Figure 3.12 shows the change in straight/minimum terms for prisoners sentenced in the 24 months prior to the proclamation of the Act and the 24 months

following proclamation.[51] It can be seen that the average length of straight/minimum terms remained more or less unchanged after April 1992, while average time served increased to match court sentences[52]. That is, the change in the relationship between sentence length and time served was the reverse of that intended by the 1991 Act.

FIGURE 3.12
MINIMUM TERMS AND TIME IN CUSTODY:
APRIL 1990 - APRIL 1994



51 For prrisoners discharged before 31 December 1994, time served is calculated directly, and for those not yet dfischarged at the end of 1994, time served is calculated based on their estimated date of release. Two corrections have been applied to thewse calculation. Short sentences under 1 month have been excluded: many such sentences may be served entirely in police custody, and the number served in this manner is varies with police custody numbers. All Natural Life sentences and Governor's Pleasure sentences have also been excluded on the basis that time served cannot be calculated with accuracy.

52 The apparent increase in average straight/minimum terms from around 11 months before the Act to 13 months after the Act is not statistically significant.

Sentence lengthening measures

The 1993 Act was intended to increase the severity of sentences in relation to certain groups of offenders. Responding to perceived public pressure, the Act not only negated the impact of the abolition of remissions for a range of offences, but also required courts to cumulate sentences and to identify certain classes of offenders as being dangerous, and therefore subject to indefinite detention.

Cumulative sentences

Under the 1993 Act, a person who has been deemed to be a serious sexual offender,[53] and who has been convicted of a sexual offence or a violent offence 'must, unless otherwise directed by the court, be served cumulatively on any uncompleted sentence or sentences of imprisonment imposed on that offender, whether before or at the same time as that term.'[54] This direction runs contrary to the normal presumption under the *Sentencing Act* 1991 (Vic) that sentences of imprisonment are to run concurrently.

As yet there have been no data as to the number of offenders who have been declared 'serious sexual offenders'. One newspaper report notes a case of a rapist who was so declared, in relation to whom the court handed down a sentence of twelve years with a non-parole period of ten years. This is the equivalent of an eighteen year sentence with a minimum of 13.3 years under the pre-remissions law, as *Sentencing Act* 1991 (Vic), s.10 does not apply to serious sexual offender or serious violent offenders. Despite the disproportion of the sentence to the offence, the judge stated that he was constrained by the legislation to impose such a sentence.[55]

These provisions re-inforce a trend which had already been underway, of distinguishing between more and less serious offenders. Before 1991, less serious offenders, that is, those with few priors and few counts, were the major beneficiaries

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53 Defined as a person ' who has been convicted of two or more sexual offences for each of which he or she has been sentenced to a term of imprisonment or detention in a youth training centre; or who has been convicted of at least one sexual offence and at least one violent offence arising out of the one course of conduct for each of which he or she has been sentenced to a term of imprisonment or detention in a youth training centre'; *Sentencing Act* 1991 (Vic), s.3.

54 *Sentencing Act* 1991 (Vic), s.16(3A).

55 See *The Age* 30 September 1994.

of a major diversion from prison. Our data indicate that in the higher courts, offenders with 2 or fewer prior convictions and one count were only half as likely to be imprisoned in 1991 as they had been in 1985.[56] At the other end of the scale, more serious offenders, that is, those with three or more prior convictions, were just as likely to be imprisoned in 1991 as in 1985.

Sentence lengths for violent offences

The discussion to this point has focused on aggregate changes across the whole population of offenders sentenced by the courts. As we have noted, the 1993 reforms in particular were directed at a particular class of offender - persons convicted of repeated violent offences - and it is important to examine changing sentencing patterns for these offences. The following two table examine specifically offences of rape and armed robbery.

TABLE 3.13
RAPE OFFENDERS SENTENCED BY HIGHER COURTS : 1985 - 1994
MAXIMUM, MINIMUM TERMS & TIME EXPECTED TO SERVE

Date of hearing

Sentence length (Years)	1985-1990	1990-Apr. 1992	Apr. 1992 - Jul.1993	Aug.1993 - Dec. 1994
Maximum term	6.09	5.35	4.95	5.84
Minimum term	4.37	3.59	3.21	4.01
Time to serve	2.91	2.39	3.21	4.01

56 The imprisonment rate fell from 63% to 28%.

TABLE 3.14
ARMED ROBBERY OFFENDERS SENTENCED BY HIGHER COURTS : 1985 - 1994
Maximum, minimum terms & time expected to serve

Date of hearing

Sentence length (Years)	1985-1990	1990-Apr. 1992	Apr. 1992 - Jul.1993	Aug.1993 - Dec. 1994
Maximum term	**5.45**	**4.09**	**3.79**	**4.33**
Minimum term	**3.93**	**2.83**	**2.31**	**2.64**
Time to serve	**2.62**	**1.89**	**2.31**	**2.64**

These data confirm that although nominal terms for principal offences declined after the 1991 Act, time to serve increased, and continued to increase quite significantly following the 1993 Act.

Indefinite sentences

The 1993 legislation is not the first legislation in Victoria to provide for preventive detention. Section 192 of the *Community Welfare Services Act* 1978 (Vic) dealt with offenders who had at least two previous convictions in the higher courts since the age of 17 and were over 25 years of age at the time of sentence. A court was empowered to pass a sentence of imprisonment of up to ten years instead of the sentence that would have been appropriate for the offence in question. The court was required to fix a non-parole period. However, this legislation had little or not impact upon prison populations as it was almost never used. Similar legislation exists in other states, but again it is used in only the rarest of circumstances.

An indefinite sentence may be imposed by the Supreme Court or County Court on its own initiative or on an application by the Director of Public Prosecutions, providing that the appropriate criteria are met. Section 18B of the *Sentencing Act* 1991 (Vic) sets out the criteria:

(1) A court may only impose an indefinite sentence on an offender in respect of a serious offence if it is satisfied, to a high degree of

probability, that the offender is a serious danger to the community because of--

(a) his or her character, past history, age, health or mental condition; and

(b) the nature and gravity of the serious offence; and

(c) any special circumstances.

(2) In determining whether the offender is a serious danger to the community, the court must have regard to--

(a) whether the nature of the serious offence is exceptional;

(b) anything relevant to this issue contained in the certified transcript of any proceeding against the offender in relation to a serious offence;

(c) any medical, psychiatric or other relevant report received by it;

(d) the risk of serious danger to members of the community if an indefinite sentence were not imposed;

(e) the need to protect members of the community from the risk referred to in paragraph (d)--

and may have regard to anything else that it thinks fit.

The nature of a 'serious offence' is defined in *Sentencing Act* 1991 (Vic), s.3 and the number of offences and offenders which and whom may potentially become liable under these provisions is very large, numbering in the hundreds. At the time the legislation was introduced, it was estimated that some 40 to 50 sex offenders per year could be affected by the legislation, particularly as it applied not only to serial offenders, but to those who were convicted at the one hearing on more than two counts of a serious sexual offence. It was argued by those opposed to the legislation that the combined effect of the cumulative sentence and indefinite sentence provisions could lead to an increase of some 400 in the prison population.

In the event, none of the predicted events occurred. Despite the large number of potential offenders, to date there has been only one successful application for an indefinite sentence before the courts. Kevin Carr, a 37 year old man of Aboriginal

descent with a long history of sexual and other offending, pleaded guilty to the rape of a 72 year old woman and was awarded an indefinite sentence, with a 'nominal' sentence of twelve years before he would be reviewed. An appeal against the sentence was unsuccessful. In May 1996, a second application for an indefinite sentence was been made in respect of a 28 year old man convicted of four counts of rape, recklessly endangering life, assault and unlawful imprisonment.[57] The offender, Geoffrey Moffatt, committed the offences whilst on parole and had spend almost all of the last twelve and a half years in gaol. Moffatt had five prior convictions for rape-related offences and, like Carr, had a history of institutionalisation. The court imposed an indefinite sentence, with a nominal term of twelve years.

Increased maximum penalties

The background to the reform of statutory maximum penalties is set out in Chapter 2. The *Sentencing Act* 1991 (Vic) increased the maxima for 31 offences by amounts ranging from 7% to 150%, 59 were decreased by 10% and 83% and for the majority of offences, there was no change at all. Overall, the general level of maxima were been reduced, but this was accounted for by the reduction in the large number of maxima which were never actually used. Many of the changes in fact reflected the current judicial sentencing practices and brought the statutory maxima more in line with the prevailing 'tariffs'.[58] In particular, there were major reductions in offences against property and some increases in respect of offences against the person. As Fox notes (Fox 1991:128):

> For the majority of offences, there has been alteration at all. A close analysis shows a slight overall tilt towards reduction in maximum prison terms, but this is largely accounted for by high maxima, never used in practice, being brought into closer alignment with current sentencing tariffs. Counterbalancing such reduction is the fact that the scale raises the shortest

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57 *Herald Sun*, 24 May 1996, 'Lock-up bid on sex offender'; *Sunday Herald Sun*, 26 May 1996, 'Indefinite prison bid on rapist'.

58 On the relationship between statutory maxima and judicial sentencing practices see Douglas, 1989.

maximum period of imprisonment from three days to six months and dramatically increases the upper limit of fines right across the board.

The impact of changed maxima upon sentencing practices is hard to gauge. Whether Parliament leads the judiciary, or the judiciary senses changes in the climate of opinion or whether the judiciary ignores both is not known. However, it does appear that in relation to some offences, such as the sexual offences and offences against children, judicial attitudes are hardening.

In examining the judgments of the Court of Criminal Appeal over recent years, we detect what appears to be a major change in sentencing policy in which the Court, in a piecemeal fashion, is significantly increasing the 'tariff' for a number of offences. Commencing with cases of incest in 1992[59] the Court has made a number of strong pronouncements in relation to offences over which there has been community disquiet. In some cases, the range has been significantly extended. In relation to the offences of obtaining property by deception and theft the Court has signalled a much more condign approach[60] as it also has in relation to aggravated burglary and sexual offences such as rape.[61] Although the Court has accepted that such offences are higher than any comparable sentences, it has ruled that they are not, on that account, manifestly excessive. The Court's view is that the 'Courts must be allowed greater flexibility to do what they consider appropriate.'[62] A few examples will suffice to indicate the changes in attitude.

In *Lakeland*[63] the Court, in upholding a total effective sentence of 14 years, with a non-parole period of 11 years in relation to a series of offences committed against a woman which were not only terrifying, but designed to humiliate and degrade her, signalled a more severe approach by the Courts to sexual offences:

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59 See comments in *Wayland* 14/9/92. In *Taylor* (1992) 58 A. Crim. R. 337 the court imposed a sentence of 15y4m/12y8m which was equivalent to a sentence of 23/19 in pre-remission adjustment terms; see below.

60 *Gibson* 18/10/93 (total effective sentence (TES)) 12/9, or 18/13y6m in pre-remission adjustment terms); *Kiss* 19/11/93 TES 8/6, or 12/9 in pre-remission adjustment terms).

61 *Lakeland* 19/11/93 (8 years and 10 years respectively; 7 counts in total; TES 14/11 or 21/16y6m in pre-remission adjustment terms).

62 *Lakeland* 19/11/93.

63 19/11/93.

> In recent years, victims of rape have received a great deal more community support than they did in the past. This support is manifest in significant changes to the criminal code which remove the requirement of corroboration and disallow unfair denigration of persons who allege that they have been raped... It is recognised that rape is a crime to which there are witnesses only in rare cases. This support is also manifest in the modern development of crisis centres, counselling services and training of officers of enforcement authorities to ensure ready receipt of complaints and their prompt investigation. A result is the provision of greater confidence in victims that a report by them of their experiences will be received with understanding and carefully investigated. A further by-product has been increased awareness in the community of the prevalence of the crime of rape and of the depth of suffering and permanent damage to the happiness, welfare and self esteem of the victims. This awareness has extended to the Courts with the consequence that an even more serious view of the offence must now be taken than perhaps it has been in the past. While rape and its attendant crimes have always been regarded by the Courts as ones of great gravity, it is now necessary to consider whether more severe penalties, applied in cases of multiplicity of offences, should not be affirmed. The requirement of community support and protection for its female members, in our opinion, has not proved to have been sufficiently met. Sentences which take account of general deterrence are not only required in rape cases but are required to be of sufficient severity to be effective as a deterrent...

In relation to incest, the Court has, over recent years, indicated its view that the 'tariff was too low. In *Bahen*[64] the Court stated:

> There has been in recent times a growing awareness by the courts of the prevalence of child sexual abuse by persons ... in positions of trust, and a clearer understanding by the courts of the devastating damage to the lives of the victims. As a result, the courts have found it necessary to impose somewhat more severe penalties than they have imposed in the past. It may be noted that this approach also appears to be that of the legislature, which

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64 28/6/93.

recently has dramatically increased the maximum penalty for incest and widened definitions of conduct which may attract it.

Our data indicate that these changes have had an impact in the courts, with sentences for most sex offences increasing slowly, but significantly, over recent years. Tables 3.13 above indicates that the effective terms for rape have increased to a greater degree than sentences for other offences. However, it is unlikely that changes in the maximum penalties would have any significant impact upon the sentencing practices of the Magistrates' Court, as they have always had to sentence within the jurisdictional limits imposed upon them, which, in the case of indictable offences triable summarily, is twenty-four months.[65]

Prison populations and the 1991 and 1993 Acts

Figure 3.13 plots the total Victorian prison population over the 15 months immediately prior to the proclamation of the *Sentencing Act* 1991 (Vic) and the 40 months following it. It can be seen that numbers remained more or less steady for the first year after proclamation, and then commenced to increase rapidly, rising from around 2,250 in mid-1993 to 2,400 by the end of that year and reaching 2,500 by late 1994. Prisoner numbers peaked at the end of 1994, then fell back slightly to around 2,450, where they remained until mid-1995. The rate of increase over the 18 months from mid-1993 to the end of 1994 was 12% overall, or 8% per annum. The increase in prisoner numbers represented an increase in the Victorian imprisonment rate from 50.5 to 56 per 100,000. This was as large a rise as had taken place during the whole decade of the 1980s.

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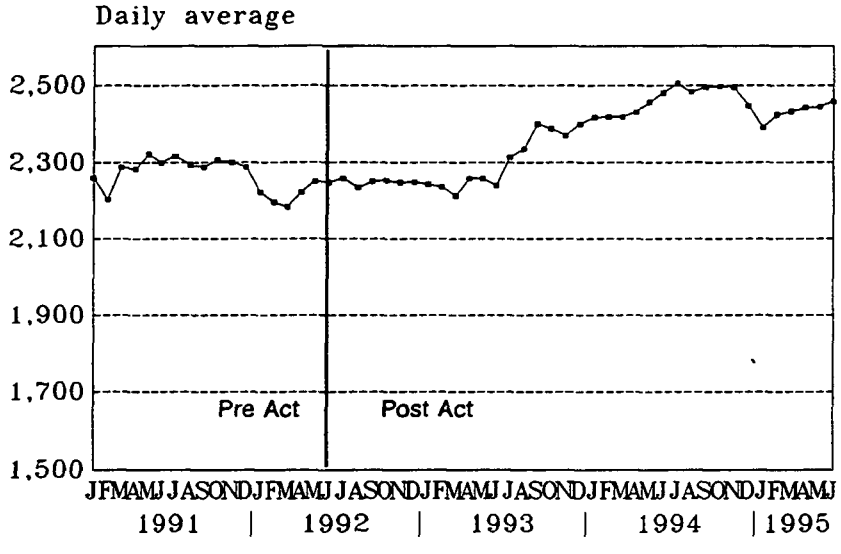
65 *Sentencing Act* 1991 (Vic), s.113. This is subject to a contrary intention appearing elsewhere

FIGURE 3.13
VICTORIAN PRISON POPULATION 1991 - 1995



To summarise the changes arising out of the 1991 and 1993, we can say that:

- prisoner flows declined by around 10-15%;
- nominal sentence lengths (that is, maximum and minimum terms) remained essentially stable. There was a small fall in all levels of court between 1991 and 1993, then an increase in the higher courts after 1993;
- time served significantly increased, by around 30%. For violent offences, time served increased even more markedly;
- the prison population increased between 1991 and 1993, but subsequently was stable or slightly declining.

At first glance, these changes to sentencing patterns and custodial populations appear to be at variance with one another. The relatively small increase in prisoner numbers seem to indicate that the s.10 mechanism effectively curtailed the explosion

in prisoner numbers that had accompanied similar reforms in New South Wales. The same small increase also appears to indicate that the 1993 reforms were ineffective at increasing the length of time served by serious violent offenders. On the other hand, court sentence length data provides a distinctly different picture. Nominal sentence lengths were reduced, but not to the full extent which would have been consistent with s.10, and average periods in custody increased significantly following the 1991 Act. The 1993 Act produced a further rise in both sentence lengths and time in custody for offenders convicted of violent crimes.

There are two factors that contribute to the apparently conflicting pictures derived from court and corrections data. The first is the counter-balancing influence exerted by the fall in the flow of offenders into prison after 1991. While the largest component of this decline involved persons sentenced to short terms in the Magistrates' Court, a significant element was the continuing fall in the number of higher court cases. The fall in lower court cases is important in that the lesser number of short sentences translates into an immediate reduction in the requirement for prison places. As explained below, the fall in prison sentences made by the Higher Courts may have a greater long term effect on the number of persons in prison, but its impact is likely to be delayed.

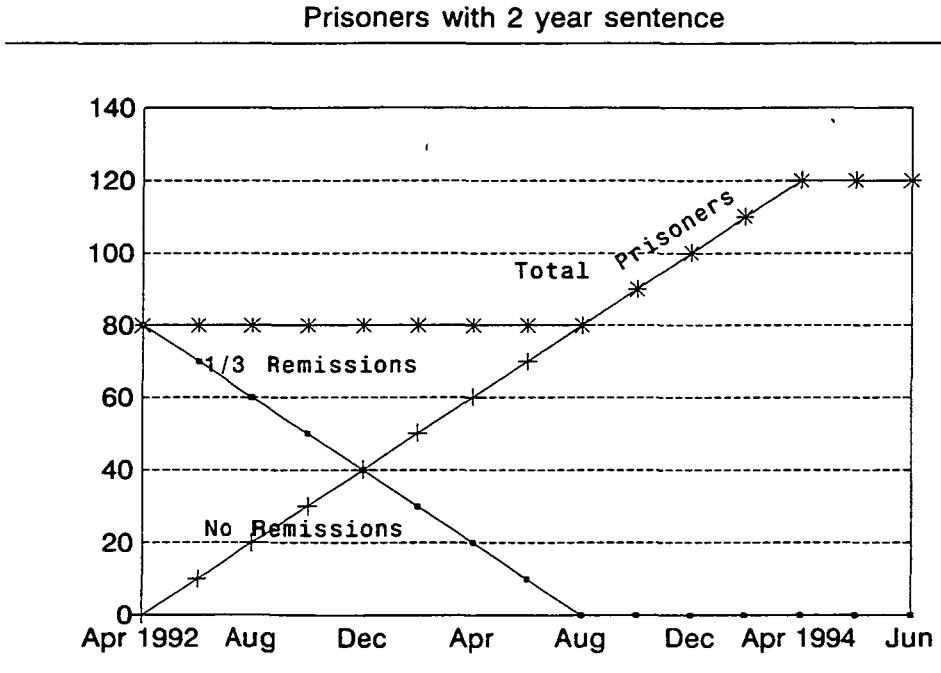
The second factor is the way that the impact of changes in sentence length distributions on custodial populations are subject to time lags arising from the carryover of 'old' prisoner stock from year to year. This can illustrated by considering the way that the abolition of sentence remissions influences prisoner numbers for a cohort of offenders sentenced to a term of 2 years (see Figure 3.14 below).

The model shows what happens when sentence remissions are abolished (in April 1992) for a population of prisoners sentenced to 2 years. At the point of abolition it is assumed that the size of the cohort is stable. The flow of prisoners into the system is equal to the flow out 60 prisoners are received each year and 60 discharged. Prisoners sentenced prior to abolition serve 16 months of their sentence in prison and have 8 months remitted Those sentenced after abolition must serve the full 24 months.

On the date of abolition, in April 1992, there are 80 prisoners in the 2-year sentence cohort. Each month, 5 of the remitted sentence prisoners are discharged, and

replaced by 5 prisoners serving an unremitted sentence. For the first 16 months, the total number of prisoners remains at 80. However, at this point all remitted sentence prisoners have been discharged, but the unremitted sentence prisoners first received in April 1992 still have 8 months to serve before they can be discharged. Accordingly, the total number of prisoners in the cohort accumulates until April 1994, when the population again stabilises at a total of 120 prisoners. Thus, the full effect of abolishing remissions for this cohort is not apparent until 24 months after the date of abolition.

FIGURE 3.14
ABOLITION OF SENTENCE REMISSIONS



The consequence of the time-lag inherent in sentencing change is evident if one examines the changing distribution of expected time to serve for Victorian prisons using prison census data (see Table 3.15). This table shows clearly the accumulation of prisoners serving relatively long terms. While the number of prisoners serving short terms (under 12 months) fell by around 10%, the numbers in all longer sentence length categories rose substantially. The largest increase (63%) is evident in the 2 to 5 year category. Prisoners serving very long terms over 10 years increased

by nearly 40%, although at least some of this is attributable to the conversion of Natural Life terms to fixed minimum sentences.

TABLE 3.15
EXPECTED TIME TO SERVE
PRISON CENSUS: 1991 - 1994

Expected Time To Serve	1991	1992	1993	1994
Under 12 months	906	867	740	810
1 - 2 years	352	367	440	436
2-5 years	335	354	420	547
5-10 years	139	149	152	159
10+ years	100	116	131	138
Life/GP	80	57	47	59
Total sentenced[66]	1912	1910	1930	2149

Thus it can be seen that the real effect of the 1991 and 1993 reforms may have not yet taken effect. The extent to which the accumulation of long sentence prisoners will ultimately translate into a larger prison stock will depend partly on whether the fall in prisoner receptions is sustained. While it is impossible to predict this with any assurance, it seems unlikely that reception rates will continue to fall significantly. The number of prison sentences passed in 1994 was lower than at any time since the mid-1980s, which in turn was probably lower than at any time in Victoria's history. Once reception rates stabilise, it seems inevitable that the post-1992 receptions of long sentence prisoners will push imprisonment rates to higher levels than are currently observed.

66 Excludes prisoners with missing expected time to serve.

Dispositional outcomes

The number of prison receptions is influenced not only by the number of offenders appearing before the courts but also by the dispositional outcomes. In other words, what the courts do with offenders can be as important as how many they deal with. The historical data we have collected and analysed indicate that in Victoria there was a long term decline in the use of the sanction of imprisonment, a change which occurred at both the higher and lower court levels.

Higher courts

In 1872, prison was almost the only sanction used in the higher courts. The historical data reveal that there was a long term decline in the use of the sanction of imprisonment from the 1850s in Victoria, a change which occurred at both the higher and lower court levels.

FIGURE 3.15
HIGHER COURTS, VICTORIA, 1872 - 1965
PER CENT OFFENDERS IMPRISONED (ARREST CASES)

Some 97% of offenders who were classified as arrest cases were sentenced to a term of imprisonment. This gradually declined to about 66% by 1922 and to just over 40% by 1965 when this series ends.

The relative growth of non-prison sentences over this period is shown in Figure 3.16.[67]

FIGURE 3.16
HIGHER COURTS 1872 - 1965
SENTENCES PASSED ON OFFENDERS

This figure reveals that the major decline in the use of prison sentences was first accompanied by the growing use of bonds, with fines playing almost no part in the sentencing repertoire of the higher courts. Right up until the 1950s, when the volume of offenders coming before the courts increased sharply, and the probation order was introduced, sentencers had limited choice. Although the probation order

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67 See also Appendix 3.2

FIGURE 3.15
HIGHER COURTS, VICTORIA, 1872 - 1965
PER CENT OFFENDERS IMPRISONED (ARREST CASES)

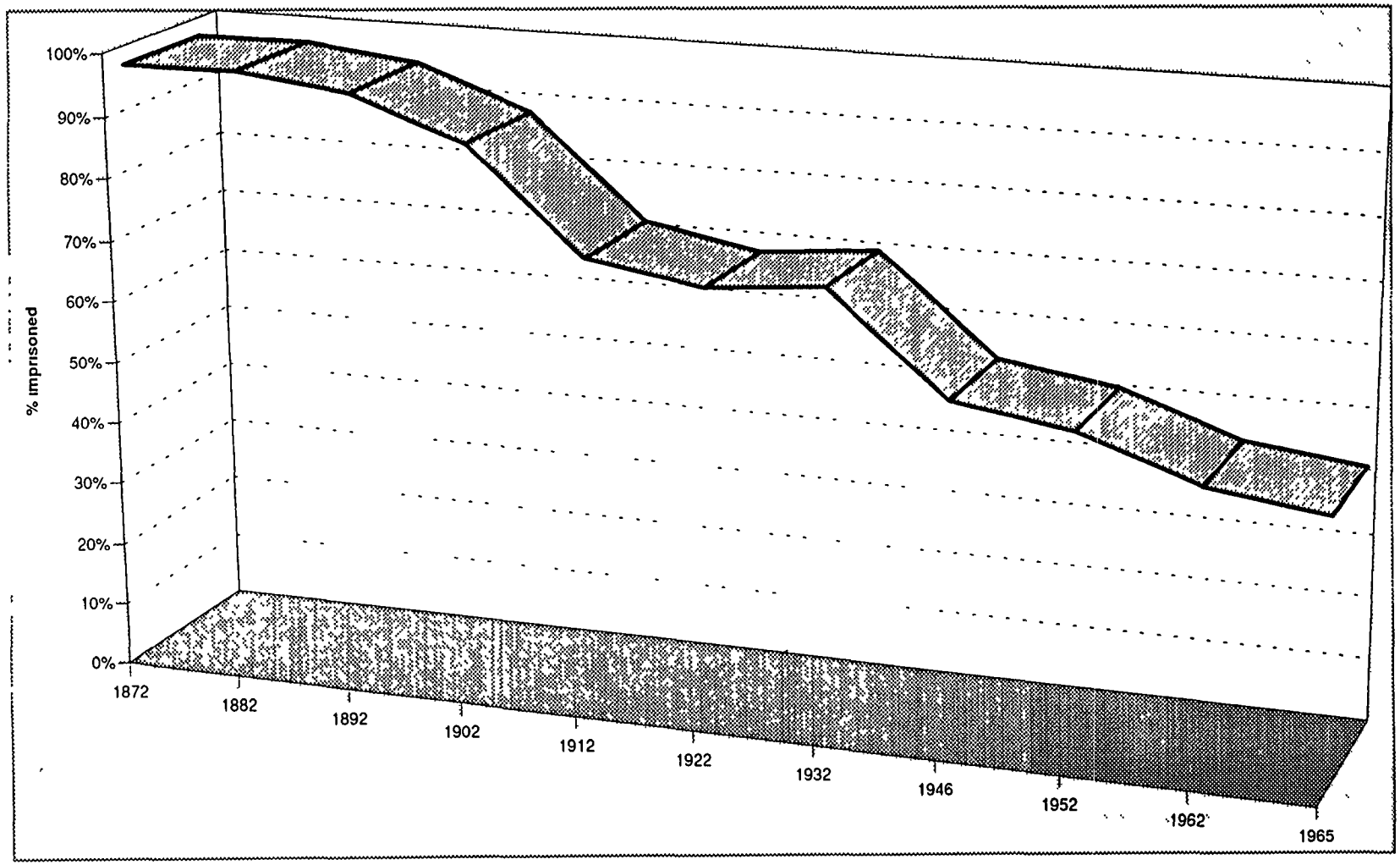
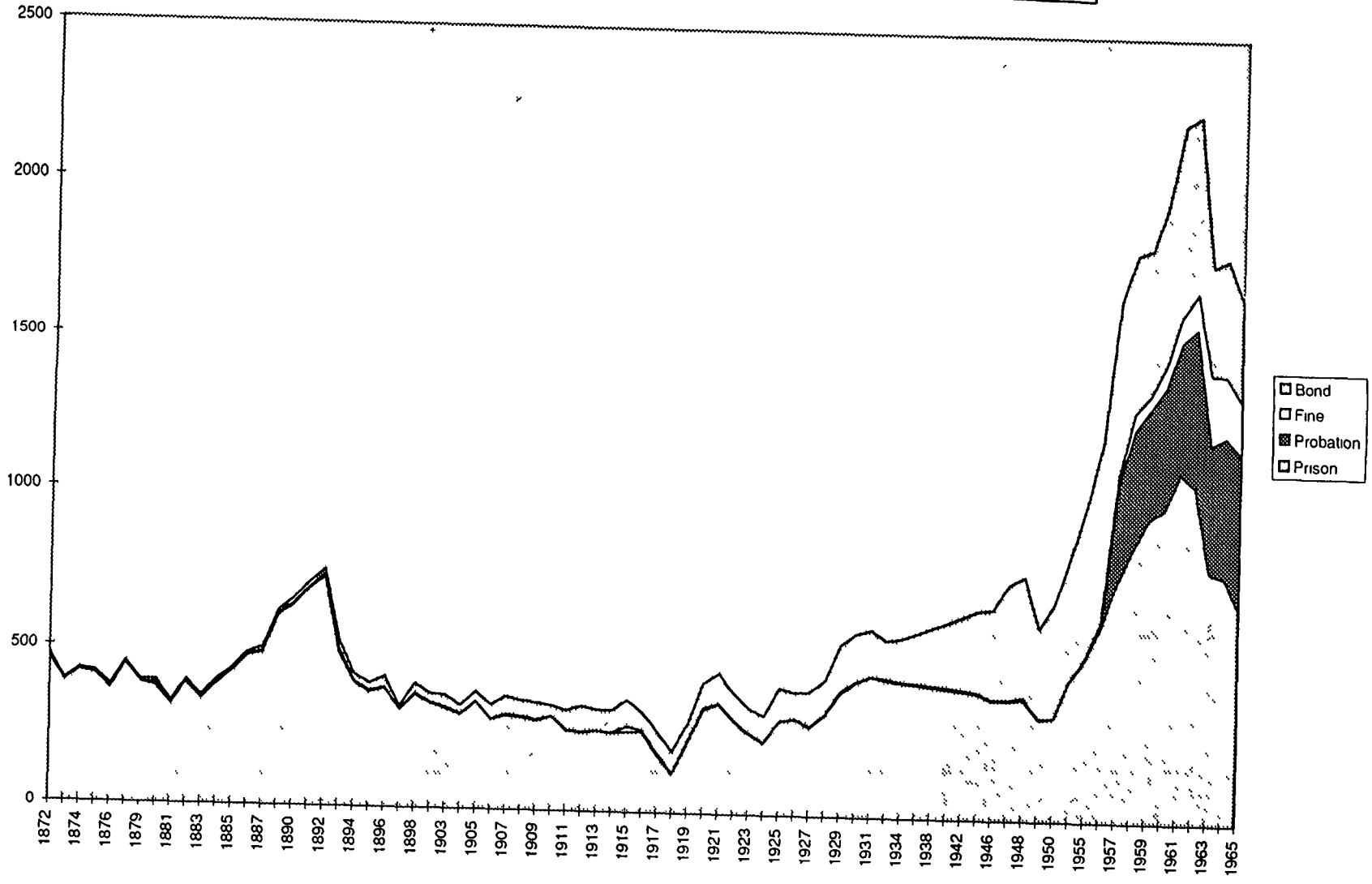


FIGURE 3.16
HIGHER COURTS 1872 - 1965
SENTENCES PASSED ON OFFENDERS



reinforced the decline in the relative use of imprisonment, it is apparent that from the 1950s, bonds and fines were also increasingly utilised to cope with the growing number of offenders appearing before the higher courts.

More reliable data for the Higher courts is available from the mid 1970s.

TABLE 3.15

PERCENTAGE OF SENTENCES IMPOSED FOR PRINCIPAL OFFENCES

VICTORIAN HIGHER COURTS

	1976-80	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994
Bond	21.3	21.8	23.1	*	22.9	20.6	19.6	17.5	16.2	17.7	18.0	15.2	12.4	6.7	5.5
Fine	11.4	9.6	9.6		6.9	6.6	5.7	4.3	4.6	4.7	3.9	3.3	2.2	2.0	3.1
Susp	-	-	-		-	NA	NA	12.0	15.0	15.6	18.4	20.7	28.0	29.2	35.0
Probation*/CSO/ CBO	15.9*	12.3	11.9		10.0	9.4	4.4	6.8	9.6	6.7	9.7	11.4	8.3	8.3	6.7
ACO/ICO	1.9	3.7	3.5		3.5	4.1	1.5	NA	NA	NA	NA	NA	1.4	1.8	1.5
Imprisonment	48.9	52.5	51.1		54.7	58.3	50.4	57.6	55.2	54.1	48.5	47.9	46.6	50.9	46.8
Other					0.2	0.1	NA	1.1	0.5	0.4	0.8	0.9	0.7	0.9	1.2

CSO (Community Service Order) CBO (Community-based Order
ACO (Attendance Centre Order) ICO (Intensive Correction Order)

Table 3.16 and Figures 3.17 and 3.18 reveal that there have been some major changes in the relative use of the major sanctions in the higher courts over the last twenty or so years. Figure 3.17 shows the decline in the percentage of offenders imprisoned.

FIGURE 3.17
HIGHER COURTS, VICTORIA 1981 - 94
OFFENDERS: PER CENT IMPRISONED

The use of imprisonment has fluctuated over an approximately 11% band, between about 47% to 58% of all sentences, although a declining trend was evident from 1984 through to 1992. Both fines and 'bonds' have declined significantly, the former from 11.4% of sentences in the late 1970s to a meagre 1.8% in 1993. Similarly bonds decreased from a substantial 23.1% of sentences in 1981 to just 5.5% in 1994.

FIGURE 3.18
OFFENDERS SENTENCED BY HIGHER COURTS
PENALTIES, 1981 - 94 (ESTIMATES BASED ON ABS AND COURT DATABASE)

The most significant change in sentencing patterns came with the introduction of the suspended sentence. Although few data are available for the first two years, the sentence increased its share of sentences from zero per cent in 1985 to 35% in 1994. On its face, it would appear that this sentence has replaced the lower order sanctions, but had less influence on the use of imprisonment, its intended use.[68]

The traditional intermediate sanction, the probation order and the community-based order play only a small part in the sentencers' repertoire, around 5-10% over the last decade or so, while the attendance centre order and the intensive correction order are sentences reserved for a tiny minority of cases.

Lower courts

In the courts of summary jurisdiction, the sanction of imprisonment was far less dominant than in the higher courts. Figure 3.19 shows that from its peak use of

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68 See below, Chapter 4.

FIGURE 3.17
HIGHER COURTS, VICTORIA 1981 - 94
OFFENDERS: PER CENT IMPRISONED

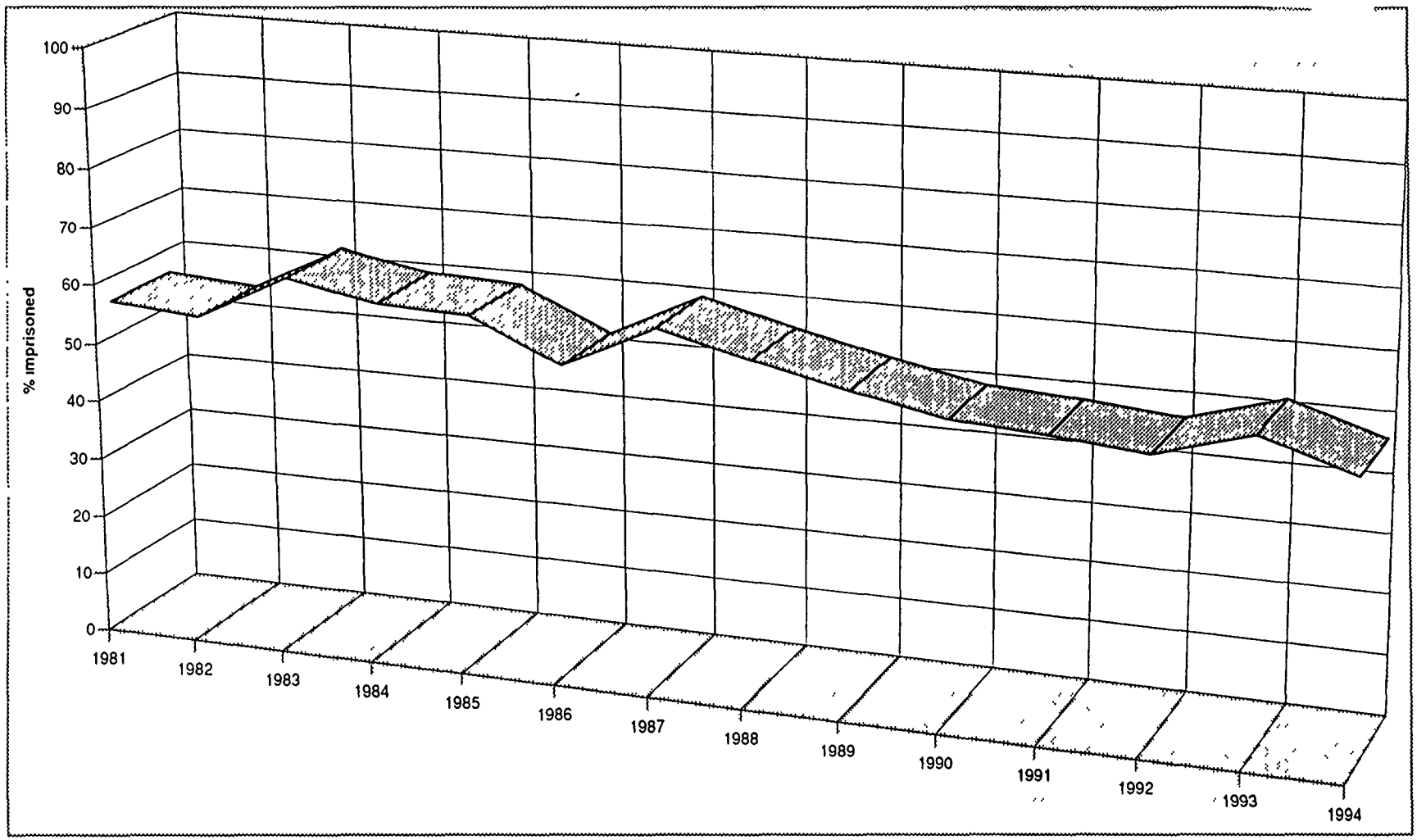
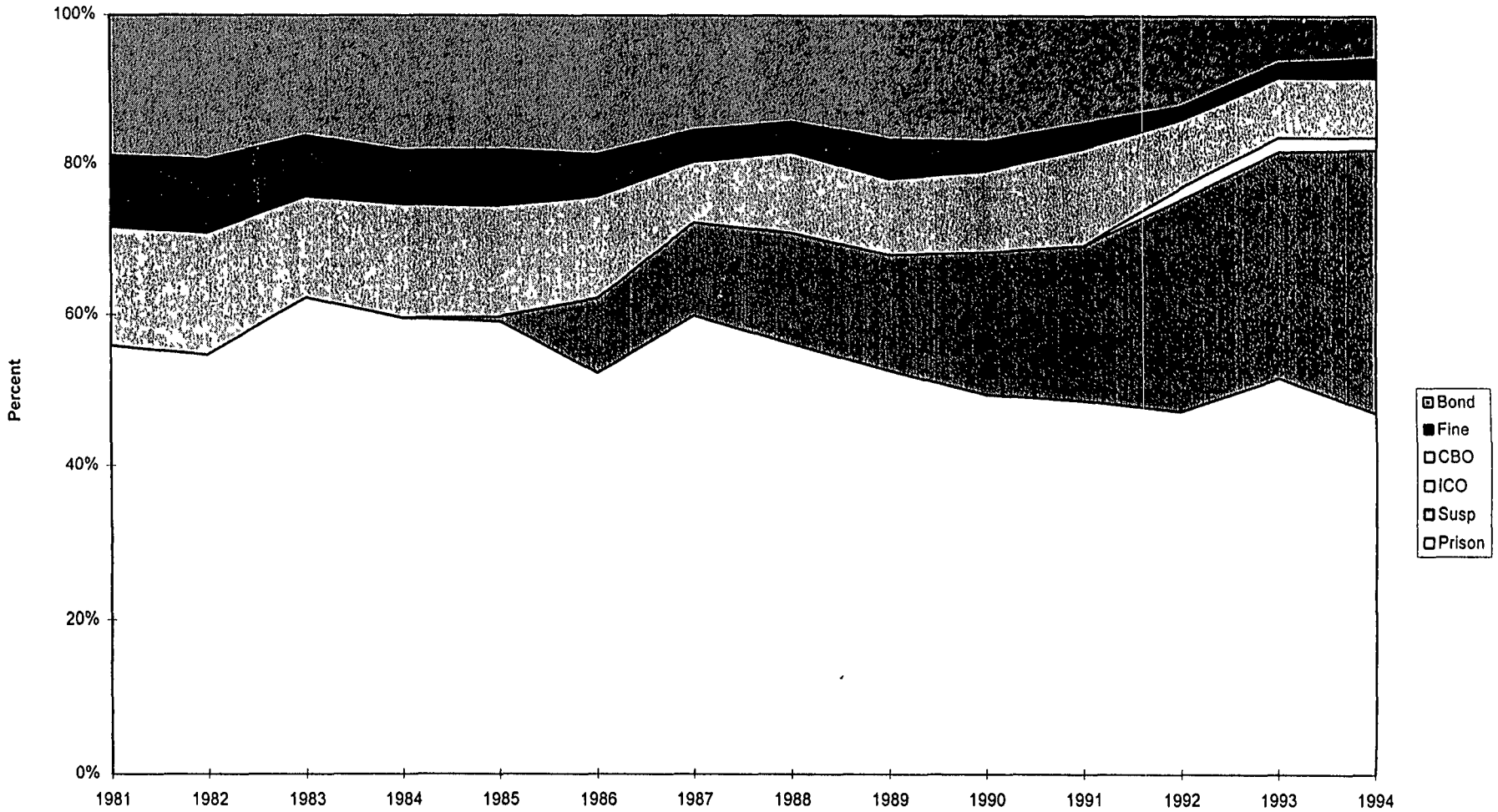


FIGURE 3.18
OFFENDERS SENTENCED BY HIGHER COURTS
PENALTIES, 1981 - 94 (ESTIMATES BASED ON ABS AND COURT DATABASE)



about 60% of all sentences in the mid-1890s, the use of imprisonment in the lower courts gradually declined, falling to about 20% of cases in 1958 before rising slightly again during the 1960s.[69]

FIGURE 3.19
MAGISTRATES COURTS, VICTORIA, 1874 - 1965
PER CENT OFFENDERS IMPRISONED (ARREST CASES)

The two periods which showed a reversal of the trend were the two depression periods of the 1890s and 1930s. The limitation of this series to arrest cases does restrict the confidence which can be placed in any conclusions. It is likely that the use of arrest by police varied in its application over the course of the century. However most imprisonable offences were likely to have been dealt with by arrest rather than summons: in 1972 (one of the years for which data for both categories is available), 17 per cent of arrest cases resulted in a prison sentence compared to less than 1 per cent of summons cases.

Once again, it was the fine which filled the sentencing space vacated by the prison sentence. Until the mid-1950s in Victoria, sentencers had limited choice: imprisonment, fines and dismissals

Unlike the higher courts, and, unsurprisingly, given the nature of their jurisdiction, magistrates made greater use of non-custodial sentences.

FIGURE 3.20
MAGISTRATES COURTS 1872 - 1960, PENALTIES[70]

However, whereas bonds were primarily used to fill the sentencing space vacated by imprisonment, in the Magistrates' Court, the fine was widely used in addition to the imprisonment sanction. It was not until the early part of the century that bonds began to play a major role in sentencing in the lower court and, as Figure 3.20 indicates, as the number of cases coming before the courts increased, so did the use

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69 Although this series is limited to arrest cases, and excludes summons cases, it is probable that most imprisonable offences were likely to have been dealt with by arrest rather than summons. In 1972, one of the few years for which data for both categories was available, 17% of arrest cases resulted in a prison sentence, compared to less than 1% of summons cases.

70 See also Appendix 3.3

FIGURE 3.19
MAGISTRATES COURTS, VICTORIA, 1874 - 1965
PER CENT OFFENDERS IMPRISONED (ARREST CASES)

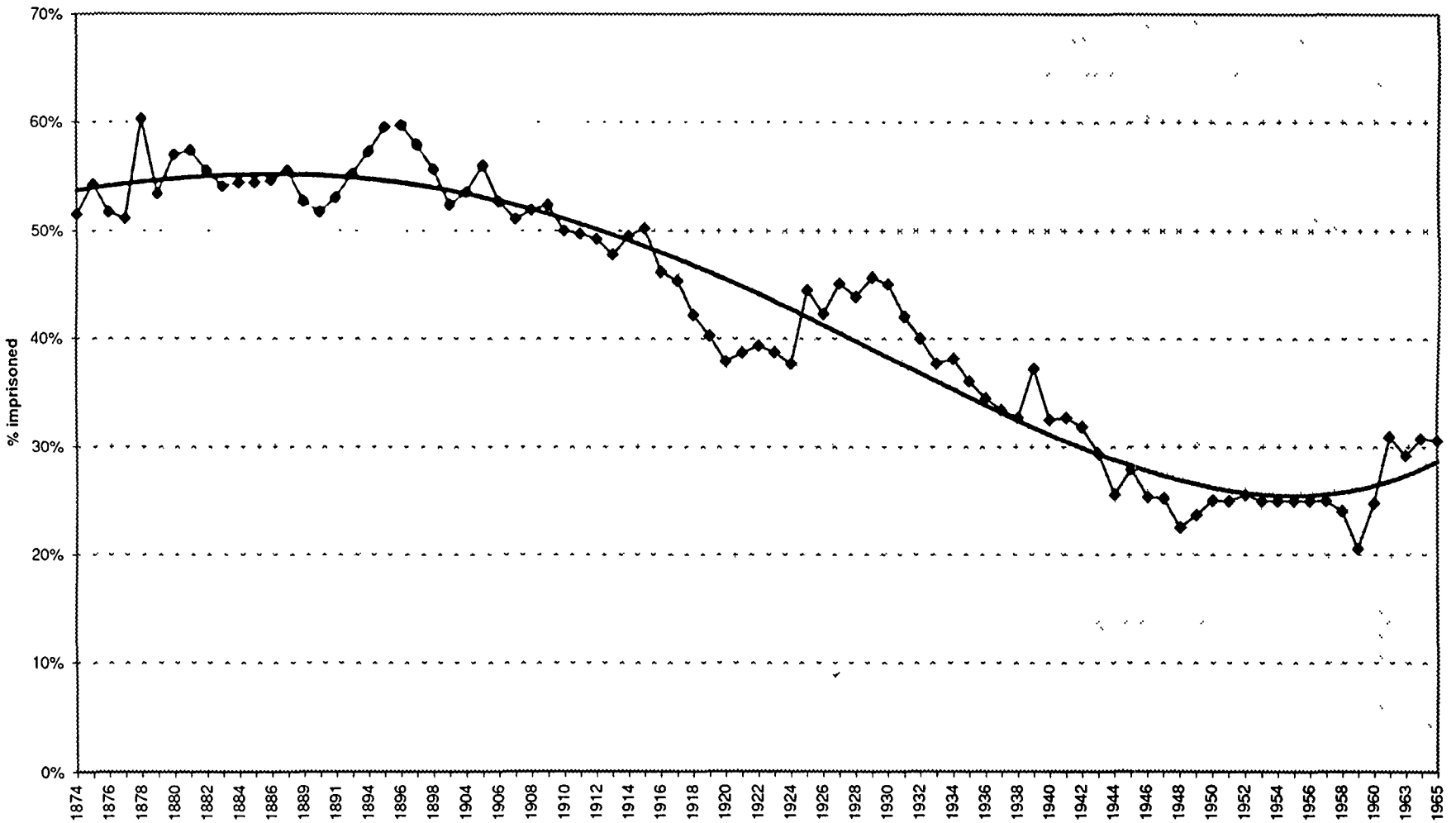
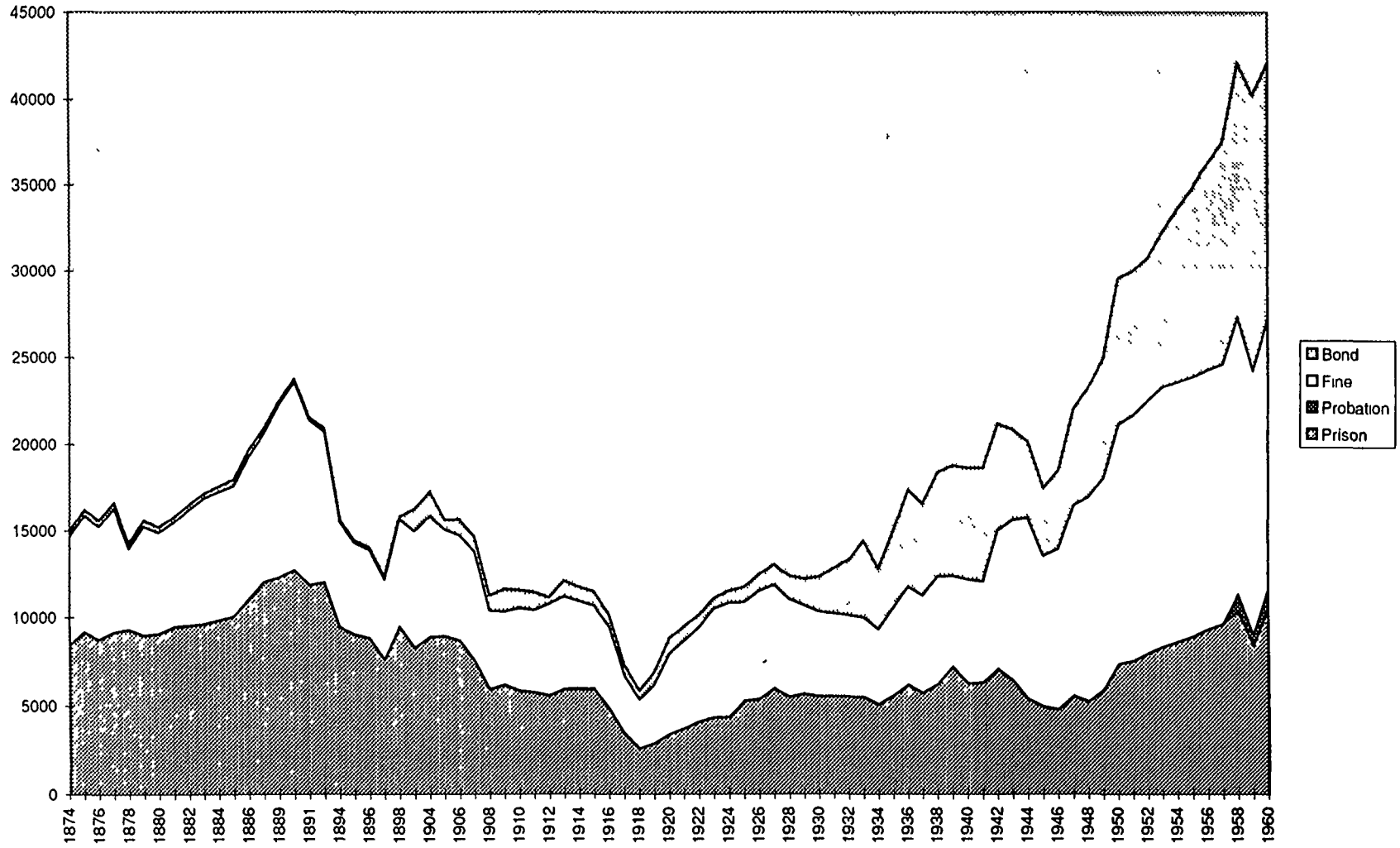


FIGURE 3.20
MAGISTRATES COURTS 1872 - 1960, PENALTIES[1]



of fines and bonds. In absolute terms, the number of prison sentences imposed by courts grew only marginally from the 1930s, with the major 'alternative', the probation order, having only a marginal effect on sentencing practices.

During the 1960s, magistrates sharply decreased their use of imprisonment.

FIGURE 3.21
OFFENDERS: PENALTIES IMPOSED, MAGISTRATES COURT 1961 - 78 (EXCLUDING DRUNKENNESS)

The decarceration trend continued from the 1980s. In 1981 they imprisoned 8% of offenders.[71]

FIGURE 3.22
OFFENDERS SENTENCED BY MAGISTRATES COURT PER CENT IMPRISONED, 1981 - 94

From 1990 onwards, more precise data are available in respect of sentencing patterns and trends.

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71 Reliable information about sentencing patterns in the Magistrates' Court over a long period of time is difficult to obtain. From 1981 to 1984 the Australian Bureau of Statistics collected data about court appearances in Victoria. These referred only to proceedings brought by the police (except traffic matters). Data were entered manually from form sent by individual courts. In 1984 data were collected but not published. From 1985 until Courtlink began recording court data in 1989/90, no systematic data about magistrates' sentencing practices were collected (Tait 1994).

FIGURE 3.21
OFFENDERS: PENALTIES IMPOSED, MAGISTRATES COURT 1961 - 78
(EXCLUDING DRUNKENNESS)

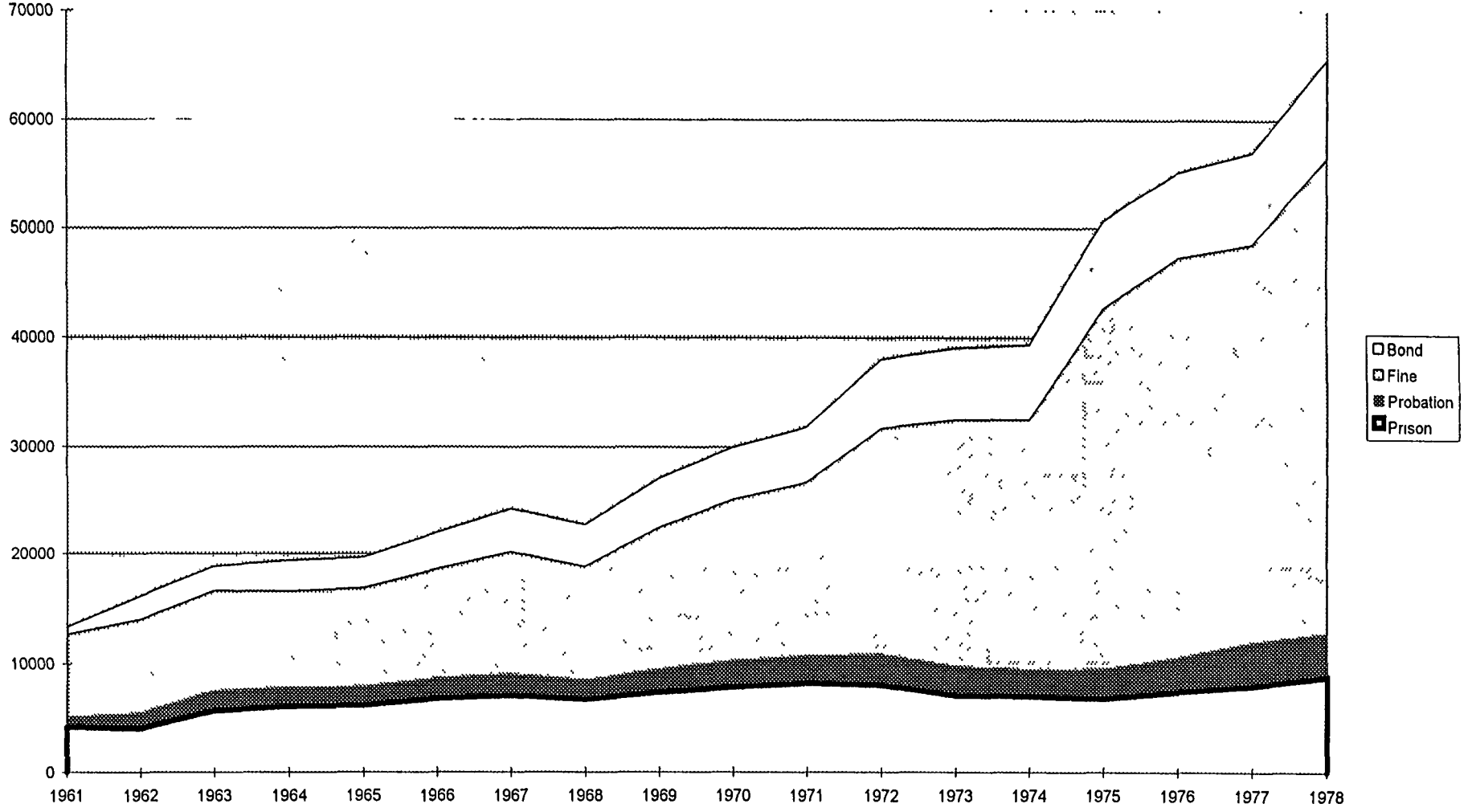

FIGURE 3.22
OFFENDERS SENTENCED BY MAGISTRATES COURT
PER CENT IMPRISONED, 1981 - 94

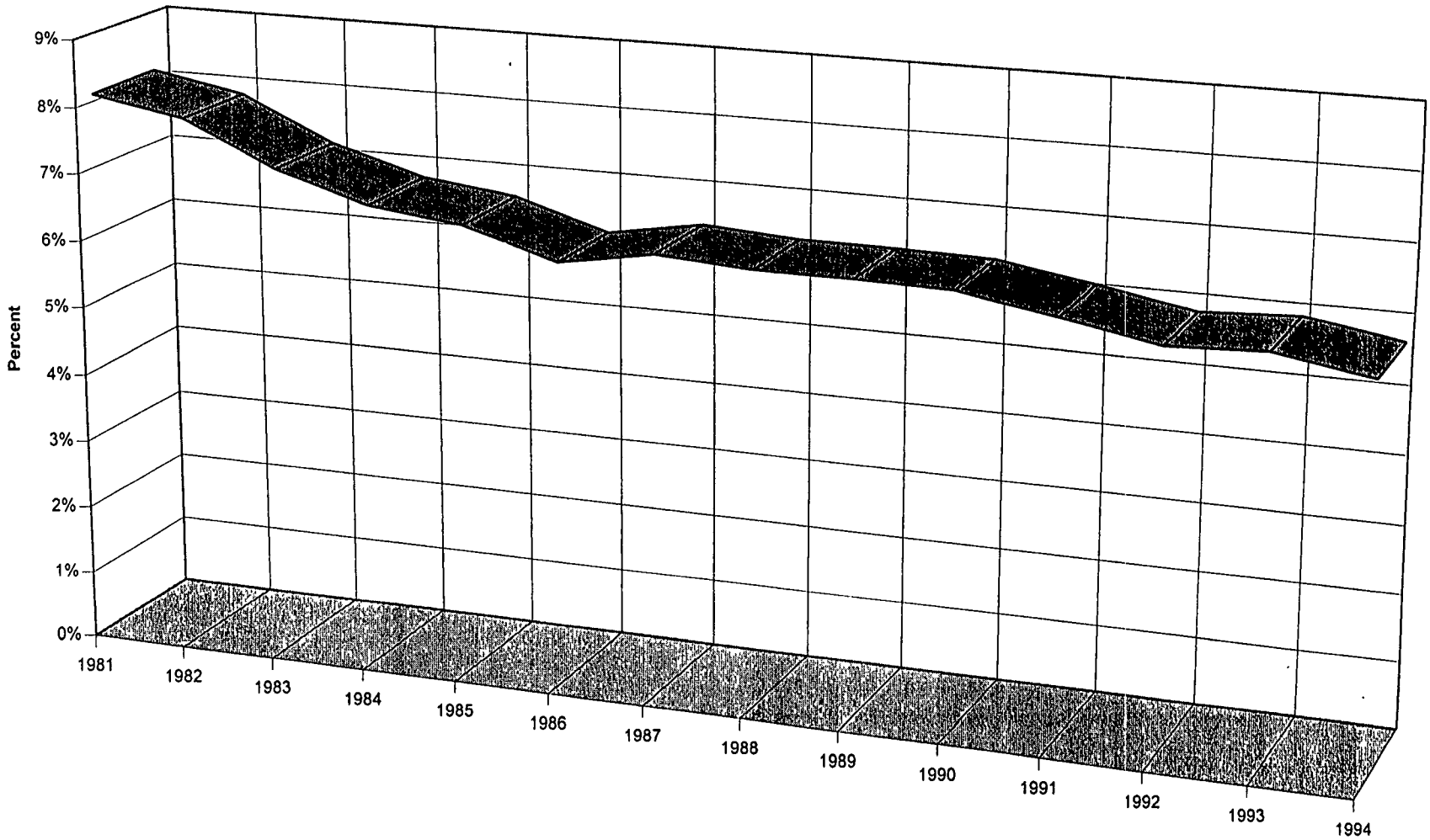

TABLE 3.16
VICTORIA: MAGISTRATES' COURT
PERCENTAGE OF SENTENCES IMPOSED FOR PRINCIPAL OFFENCE

	1990	1991	1992	1993	1994	1995
Bond	19.3	20.5	19.7	18.4	19.3	18.3
Fine	42.8	43.8	44.9	44.8	44.5	44.1
CBO	3.3	5.0	6.0	6.8	6.4	6.12
Susp Sent	3.6	4.7	5.1	5.0	5.4	6.09
ICO	NA	NA	0.5	0.7	0.7	0.9
Imp/YTC	4.5	5.3	5.4	5.5	5.3	4.96
Licence[72]	26.5	20.9	18.5	18.9	18.4	19.4

CBO (Community Based Order) ICO (Intensive Correction Order)
YTC (Youth Training Centre Order)

FIGURE 3.23
OFFENDERS SENTENCED BY COURTS FOR NON-TRAFFIC MATTERS
SENTENCES FOR MOST SERIOUS OFFENCE, 1991 -94

These data indicate that, like the higher courts, the Magistrates' Court has found the suspended sentence an attractive option, although it only accounts for a relatively small number of cases. Fines and bonds still make up the majority of sanctions, around 65% of all sentences, with imprisonment accounting for around 5% of cases. The intensive correction order seems to have made almost no impact upon sentences.

We examine the use of the various non-incarcerative sanctions in the following chapters.

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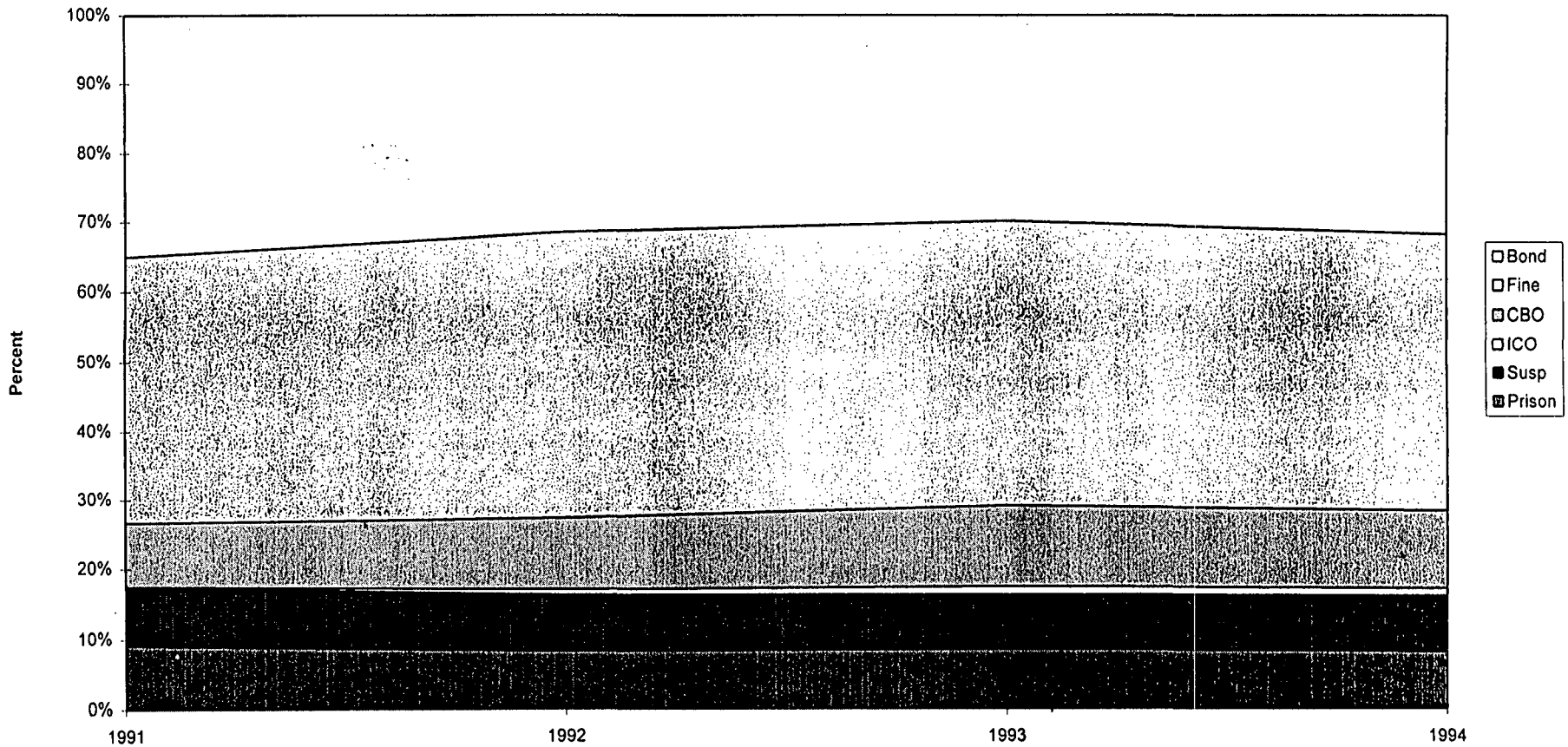
72 NB that although licence suspension or disqualification are not normally regarded as sentencing options, the Department of Justice sentencing statistics for the Magistrates' Court present them as such. Their exclusion would provide an inaccurate picture of the relative use of the various sanctions.

FIGURE 3.23
OFFENDERS SENTENCED BY COURTS FOR NON-TRAFFIC MATTERS
SENTENCES FOR MOST SERIOUS OFFENCE, 1991 - 94



CHAPTER 4

INTERMEDIATE, SUBSTITUTE OR ALTERNATIVE SANCTIONS

INTRODUCTION

The decline in the use of the prison sanction from the late nineteenth century has been documented in both Chapters 2 and 3. We have argued that not only did the rate of imprisonment drop, but that its relative use declined as courts made increasing use of sanctions such as fines and bonds, sanctions which today would not be regarded as intermediate or substitute sanctions.

When, in Victoria, the first of the modern 'alternatives' to imprisonment, the probation order, was introduced in 1956, imprisonment numbers had commenced their post-war rise. From a post-war low of 912 prisoners in 1948, they had increased by 46% to 1335 in 1955. Much of this increase was due to growth in population, so that the rate was much lower.[1] Much of the rise in prisoner numbers was concentrated in the years 1948 to 1952 (912 to 1311), with a plateau between 1953 and 1957 in the 1300 - 1380 prisoner range.

The probation order was specifically intended to decrease the use of imprisonment. Ironically, it was not a sentence of a court, but an order *in lieu of* a sentence; in effect, a form of deferred sentence, but one which subjected the offender to a number of conditions, including supervision. It was not a completely new sanction, for a form of probation had been introduced in Victoria in the nineteenth century, but not available to all adult offenders.[2]

With the introduction of probation, the modern structure of sentencing was established. The courts now had available to them four basic types of disposition:[3]

- some form of conditional or unconditional release, before or after conviction;
- fines, or other similar forms of monetary exaction or compensation;

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1 See Chapter 2.

2 See Chapter 2.

3 Corporal and capital punishment, though highly symbolic and emotive, had little role to play in the day to day activities of the courts.

- some form of supervised release;
- imprisonment

However, by this stage in the evolution of sentencing, imprisonment was no longer the dominant sanction. With no more than about 25% of the lower court sentencing 'market' and just over half of the higher court sentences, imprisonment was now just one of the range of sentences which could be considered a proportionate and appropriate sentence for the wide range of offences which came before the courts. If it were ever true, then by the 1950s, it was certainly neither true, nor useful, to conceive of all sanctions other than imprisonment as its 'alternatives'. With the introduction of a new sanction, lying somewhere in the sanction hierarchy between fines and the prison, it became crucial to understand not only the relationship between the prison and other sanctions, the so-called 'in-out' decision, but between the other sanctions themselves.

There is no accepted definition of what constitutes an 'alternative' or 'intermediate' sanction, nor is the terminology adequate. The term 'non-custodial' sanction is unhelpful and misleading, because, by implication, it considers all sanctions other than imprisonment as being somehow less worthy or proper. The centre of sentencing gravity remains the prison, which, since at least the middle of this century, it is clearly not. The term 'alternative' sanction again suffers from its focus on the prison and tends to draw attention away from the interchangeability of sanctions.

The term 'intermediate' sanction is currently in vogue. The United States Department of Justice (1990, cited in Junger-Tas, 1994:1) defines it as 'a punishment option that is considered on a continuum to fall between traditional probation supervision and traditional incarceration'. This conception betrays its cultural foundations. Whereas in Victoria, an intermediate sanction would be regarded as falling between dismissals, discharges and adjournments, at the lower end of the sentencing scale, and immediate imprisonment at the other, the United States' conception of the sanction commences at what would already be considered an intermediate sanction in Victoria. This difference may also reveal something about the overall scale of punishments in the two cultures. Victorian sentencing is very much weighted towards the lower end of the scale and we would therefore reject the notion of an 'intermediate' sanction as lying between the community-based order

and imprisonment. In Victoria, the majority of lower court sentences, and therefore all sentences, are fines and bonds. Sentences of imprisonment, when they are imposed, tend to be relatively short. In the United States, although comparative data are difficult to evaluate, it would appear that overall sentence lengths are greater, and more use is made of imprisonment as a sanction.

The movement by sentencers between sentencing options is a process which is little understood. Whereas movements within sanctions can be explained in terms of the relative seriousness of individual instances of offending, changes in maximum penalties or the impact of executive implementation or modification of sentences, movements between sanctions require an understanding of the range of options available to a sentencer at any particular time, the legislative or common law conditions upon their use, the way they are perceived by sentencers and the resources available to support them.

In Chapter 3, we portrayed the decline of the relative use of the prison sanction over the last century. We noted that in the lower courts, the use of imprisonment remained relatively stable as fines, bonds, and ultimately probation, grew in line with the as number of cases coming before the courts, most of them relatively trivial, grew.

Sentencing paradigms

In order to explain the nature of sentencing in the post-war era in Victoria, it is necessary to replace the simplistic, 'custodial/non-custodial' dichotomy, or the ambiguous concepts of 'intermediate' or 'community' penalties with a more complex conceptualisation which distinguishes between four different categories of case in which imprisonment may or may not be used. Though it is formalistic, rather than substantive in conception, it is likely to have more explanatory power under local conditions.

[1] In the first category lie those offences for which imprisonment is not available at all as a primary sanction: these are minor offences usually punishable by fine.

[2] In the second category lie offences which are, by law, *punishable* by imprisonment, but in respect of which a sentencer is empowered to impose

any one of the range of dispositions. This category encompasses the vast majority of offences which come before the courts.

[3] The third category, in effect a subset of the second, covers those cases in which an offender has, in fact, been *punished* by a sentence of imprisonment, but in relation to which the law permits the sentencer to alter the form of imprisonment. These transformations were once found in the attendance centre order and currently include the suspended sentence, the intensive correction order and the hospital security order.

[4] In the final category lie those offences for which imprisonment is available as a default sanction, whether or not it was available as the primary sanction.

A major source of confusion in relation to the role of imprisonment and its 'alternatives' lies in the lack of clarity in the distinction between the second and third categories. For the vast range of offences which now come before the courts, particularly the Magistrates' Court, the appropriate and proportionate sentence will be a dismissal, discharge or adjournment, a fine or a community-based order. In the Magistrates' Court, some 90% of all convictions are dealt with in this manner. Although most of these offences are, in theory, *punishable* by imprisonment, imprisonment is not the desired, desirable nor presumptive sentence.[4] The 1991 Act ranked the sanctions in an hierarchical order and directed sentencers to be parsimonious in their use. Hence, it is as correct to argue that each sanction is an alternative to the other as it is to say that the non-custodial sanctions are alternatives to the custodial sanction.

Category [3] offences form a relatively small group of sanctions. In the strictest sense of the term, they are the 'alternatives' to imprisonment in that they permit the courts to alter the form of imprisonment. For the sake of clarity, we refer to these as

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4 The nature of this confusion is evident in a recent Dutch publication summarising the experience around the world with community sanctions (Junger-Tas, 1994:55). Writing of the community service order in England and its failure to provide a major alternative to imprisonment, the author observes that the original Act 'stipulated that community service could be imposed for offences which were 'imprisonable', in other words, for offences for which imprisonment would be an appropriate sentence' (Junger-Tas, 1994:55). The fact that an offence is an imprisonable offence does not necessarily mean that imprisonment is warranted. The link between community service is formalistic rather than substantive.

'substitutes' for imprisonment.[5] Prior to the introduction of suspended sentences of imprisonment, these substitutional sentences represented a very small proportion of all sanctions. For these purposes, we distinguish these 'substitutes' from executive modifications of sentence such as parole, remissions and pre-release because they are judicially imposed at the time of the imposition of the sentence. The distinction is, of course, not quite so clear cut. A partially suspended sentence, or a prison/parole sentence which is set by a court and which does not rely upon a parole board for the release decision, or other forms of split sentences represent hybrid forms of prison 'substitutions', but which nonetheless are transformations of forms of custody.

One of the purposes of the 1991 Act was to affect the relative mix of sentencing options, with a declared preference for the use of the least restrictive option available in all the circumstances of the case. As we have argued, however, the impact of the Act can only be appreciated the light of the changes which preceded it. In the following sections, we discuss the history and use of the various categories of sanctions other than imprisonment. Fines and dismissals, discharges and adjournments are discussed in the following Chapter.

We now turn to examine each of the categories of the modern 'mid-range' sanction in turn. First we examine the 'substitutional' sanctions which have been used in Victoria, the attendance centre order, the suspended sentence and the intensive correction order. Then we examine the 'alternative' sanctions, the probation order, the community service order and the community-based order. Finally, we attempt to theorise the process of change by developing the concept of 'sentencing space' and the location of sanctions within that space.

SUBSTITUTIONAL SANCTIONS

Attendance Centre Orders

The 1960s in Victoria saw a steady rise in prison numbers and the imprisonment rate. From a daily average of 1571 prisoners in 1959, the number rose to its peak of 2389 in 1971. The reduction in accommodation in the previous decades resulted in

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5 Note that a partially suspended sentence, or a prison/parole sentence which is set by a court and which does not rely upon a parole board for the release decision, or other forms of split sentences represent hybrid forms of prison 'substitutions'.

occupancy rates reaching critical levels during the this decade[6] and a search for ways of relieving pressures on the prison system.

The concept of subjecting offenders to a form of intermittent custody in a centre other than a gaol is derived from an English scheme brought into being in 1950 under s.19 of the *Criminal Justice Act* 1948 (UK) (McClintock, 1961).[7] This was confined to offenders under twenty-one facing sentences of imprisonment and was designed as a measure to fall between probation and custodial treatment. This itself emerged from a proposal for some form of weekend or part-time imprisonment at lock-ups or gaols. When this was rejected as impracticable, it was decided to design a sanction making use of other premises and emphasising supervision rather than custody. Offenders were required to attend a special centre for up to three hours a day to a maximum of twelve. English attendance centres fell into disuse in the 1960s but were revived in the late 1970s and were used predominantly for juveniles (Gelsthorne and Morris, 1983).

In Victoria, the immediate precursor of the attendance centre order also was a proposal for periodic detention. This option appeared on the statute books, together with that of weekend imprisonment, in 1973.[8] Neither measure was ever implemented in its original form, but in 1975 periodic detention was re-styled 'attendance at an attendance centre'.[9] It relied on special centres rather than lock-ups and gaols but, unlike the English arrangement that calls for a fixed number of hours to be served, the Victorian sanction was calculated in months.

The stated purpose of the attendance centre order was to allow persons sentenced to a term of imprisonment to serve the time not in custody, but by regular attendance during the week and weekends at an attendance centre within the community. It was a sanction with both punitive purposes (loss of leisure time) and rehabilitative

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6 See Chapter 2.

7 The following discussion is taken from Fox and Freiberg, 1985:312.

8 *Social Welfare (Amendment) Act* 1973.

9 *Social Welfare (Amendment) Act* 1975.

ones (counselling and education) and was said to offer the following benefits (Reiman, 1978; Berry, 1980):[10]

- The offender was able to continue in his or her family environment and support his or her family by continuing in employment;
- He or she was required to participate in some worthwhile community service, as directed by the superintendent of the attendance centre;
- The cost involved in including an offender in the attendance centre programme was significantly less than that for confinement in a prison.

Attendance at an attendance centre could be ordered in three ways: judicially by an order made in the course of sentencing an offender; administratively, either by a permit issued by the Director-General of Corrections, or as a condition of a pre-release permit granted by the Adult Parole Board. The sentence was 'substitutional' in nature because there was a direct nexus with imprisonment. The legislation required that, before a sentencer could make such an order, he or she had to first sentence the offender to a term of imprisonment. Only then could they allow that term to be served by way of attendances at an attendance centre. The overwhelming majority of those participating in attendance centre programmes did so as the result of a judicial order.

There were real conceptual difficulties with the nexus between attendance centre orders and imprisonment. Serving a term of imprisonment full-time in custody was undoubtedly an entirely different proposition from serving the same sentence by tri-weekly appearances at an attendance centre. Nonetheless the law treated the two as equal and allowed a court to grant access to the second option only by first formally sentencing the offender to a matching period of imprisonment. The treatment of attendance centre orders as equivalent to prison carried with it the risk of unintended escalation of penalties. First, there was the tendency to threaten imprisonment in order to achieve the supervision offered at an attendance centre when, in reality, probation would have been ordered if actual incarceration was the only other option. Secondly, even if prison was warranted, the announced term might carry a loading beyond the deserts of the case simply so that it might be

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10 Mrs. P. Toner, Minister for Community Welfare Services, *Victorian Parliamentary Debates* 1983, 4623.

converted into an attendance centre order of meaningful length. Thirdly, breach of an attendance centre order exposed the offender to the risk of being ordered to serve the unexpired portion of this initially inflated sentence, plus any other term imposed for the breach itself.

The first centres were opened in June 1976, by which time prison numbers had decreased significantly. The order was not available on a state-wide basis until February 1985. The use of the order was very much related to the number of places available in the new centres. Table 4.1 shows the use of the order:

TABLE 4.1
VICTORIA: ATTENDANCE CENTRE ORDERS: 1976 - 1984[11]

YEAR ENDING JUNE	NO OF ATTENDERS	DAILY AVERAGE	DAILY AVERAGE (AIC)[12]
1976	17	NA	
1977	63	58	
1978	126	76	133
1979	149	138	139
1980	147	151	143
1981	163	151	180
1982	268	238	253
1983	278	263	266
1984	NA	NA	274

It is apparent from both the prison reception data and the court sentencing data that the attendance centre order played only a minimal part in sentencing. With prison reception rates at over 8,000 per year[13] the diversion of a few hundred offenders for short periods would have had little impact upon prison populations.

There are few studies of the impact of the attendance centre order upon sentencing practices. In the year ended 30 June 1983 a total of 545 persons were allowed to serve their terms of imprisonment by attendance at an attendance centre. Approximately 20% of participants had been convicted of driving offences (including disqualified or drink/driving offences carrying mandatory penalties), over 50% were convicted of

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11 From OOC Master Plan, 1983:104.

12 Based on calendar year: 'Attendance Centre Orders not included in Daily Average Prison Numbers'.

13 See Chapter 2.

offences against property (including some 8% convicted of theft of motor vehicles) and about 13% were convicted of offences against the person. Disorderly conduct, street offences and other categories accounted for the balance. Though sex and drug offenders were, in general, regarded as suitable for the programme, some were allowed to serve their sentence at an attendance centre. Almost 80% of those at attendance centres had one or more prior convictions as an adult.

During its first year, the programme had a 24% breach rate (Iaquinto, Crowe and Hall, 1981) and a study of the disposition of those who had breached the order found that some 63% of offenders were sentenced to imprisonment upon breach (Fox and Challinger, 1985). The study also found that 64% of those who were considered unsuitable for admission to the order[14] received a sentence of imprisonment as an alternative. However, the study found that there was a great deal of variation between courts, with the higher courts more likely to view the order as an alternative to the prison than did the Magistrates' Court.

The attendance centre order was ultimately subsumed in the community-based order by the *Penalties and Sentences Act* 1986 (Vic). Under the new legislative scheme, it was not a pre-requisite to the making of the new community-based order that it be made only in circumstances in which the court would otherwise have made an order that the offender be imprisoned. What was formerly a 'substitutional' sanction became an 'alternative', in the sense that the community-based order was available for all offences punishable by imprisonment. However, the attendance centre order, was to be revived in its substitutional form, by way of the intensive correction order in 1991.

Suspended Sentences

The option to suspend prison sentences dated back to the inherent jurisdiction of superior courts (Osborough, 1982) which was later codified into statute law. As noted in Chapter 2, in Victoria, a form of suspended sentence was available to the courts in the early part of this century, but was of limited use (Tait 1995).

The sanction re-emerged in the mid-1980s. The changes introduced by the *Penalties and Sentences Act* 1985 (Vic) were preceded by short Discussion Paper produced by

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14 A form of pre-sentence report was required to ensure that facilities were available for the offender and that the person was a fit person to be sent there.

the Attorney-General's Department in May 1985. In a relatively cursory discussion of the suspended sentence, the paper noted that this disposition was used in Australia and elsewhere,[15] that it was a sanction which ought to be available to the courts and that its introduction would be entirely consistent with the principle that imprisonment be a sanction of last resort.

The suspended sentence, as introduced by sections 20 to 24 of the *Penalties and Sentences Act* 1985 (Vic) was intended as a substitutional sanction, for it requires that the court first impose a sentence of imprisonment and then suspend it. In the 1985 legislation the maximum period of suspension was 12 months, but this period was extended to two years by the 1991 Act.[16] The following description is based upon the legislation as it now stands.[17]

At present, the power to suspend a sentence of imprisonment is available to all levels of court. In imposing a suspended sentence, a court must first take into account the statutory direction that sentences of confinement be used only when no other sentences are appropriate[18] and bear in mind the requirement that a suspended sentence should not be used unless the sentence, if unsuspended, would be appropriate.[19]

The suspended sentence is paradoxical in two senses. First, it requires the court to form a considered view that imprisonment for the whole term is actually necessary in order to be free to decide that all or part of it need not be served in custody. This paradox highlights the difference between an alternative and a substitutional sanction, succinctly stated by Mitchell A.C.J in *Palliaer*:[20]

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15 In Australia see Rinaldi, 1973; Dengate, 1978; on England see Bottoms, 1979, 1981, 1987; Dignan, 1984; Sparks, 1971; on Europe see Ancel, 1971; on Israel see Shoham and Sandberg, 1964; on Ireland see Osborough, 1982.

16 See *Sentencing Act* 1991 (Vic), s.27.

17 The *Sentencing Act* 1991 (Vic) in fact contains two forms of suspended sentence. The first, which is the subject of the following discussion, is the general power of suspension. The second deals with a form of suspension in relation to alcohol and drug-dependent persons and is little used: *Sentencing Act* 1991 (Vic), s.28. The origins of this power can be found in the *Alcoholics and Drug Dependent Persons Act* 1968 (Vic), s.13.

18 *Sentencing Act* 1991 (Vic), s.5(4) and see discussion in Chapter 2.

19 *Sentencing Act* 1991 (Vic), s.37(3).

20 (1983) 35 S.A.S.R. 569, 571 (emphasis added); see also *P* (1992) 39 F.C.R. 276, 285.

> The proper approach was to decide first whether there was any appropriate *alternative* to imposing a sentence of imprisonment; if the answer to that was in the negative then to decide what was the proper term of imprisonment to be imposed; and then, and only then, to decide whether it would be appropriate or inappropriate to *suspend* the term of imprisonment.

Secondly, although the sentence is, in theory, the greatest penalty that the courts can impose, short of immediate imprisonment, there are no restrictions placed upon the offender's time or resources (Bottoms, 1989:92), thus rendering it even less onerous than a conditional adjournment and consequently creating potential for confusion between the two theoretically disparate sanctions.

The length of the suspended sentence and its length should be no greater than the length of the sentence of imprisonment which would have been imposed if the sentence were unsuspended,[21] even though a court may recognise that a sentence of immediate imprisonment is, in reality, a more severe penalty.[22] The court must consider that the offender may be called upon to serve every day of the sentence in prison.[23]

The decision to suspend a sentence of imprisonment will depend upon a number of factors. Although it is not permissible in Victoria to divide the sentencing process into stages a court may look to the 'objective' circumstances of the case to determine whether the character of the offence requires a custodial penalty, and then take into account the personal circumstances of the offender in deciding whether or not to suspend the sentence.[24] The personal circumstances of the offender may include the fact that the offender has no prior convictions,[25] is young, or has not been

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21 *McKaye* (1982) 30 S.A.S.R 312; *Marsh* (1983) 35 S.A.S.R. 333, 336 (the fact that a sentence is suspended cannot justify the imposition of a head sentence which is in excess of what is appropriate to the offence and the offender within the bounds of a sound exercise of discretion).

22 *Leaf-Milham* (1987) 47 S.A.S.R. 499, 506 per White J.; *Weetra v. Beshara* (1987) 46 S.A.S.R. 484.

23 *Bennie v. Glenn* (1985) 121 L.S.J.S. 281, per Olsson J.

24 *Martiensen* 7/5/91 (serious offence, but offender was 51 years old with no prior convictions). These factors may also render the fixing of a non-parole period inappropriate: see In *Director-General of Corrections v. Sweeney & McGrath*, Supreme Court of Victoria, 21 August 1992.

25 *Gillan* (1991) 100 A.L.R. 66; *Jones* 30/10/92.

imprisoned before, has the care of young, dependent children,[26] has steady, continuing employment[27] or is likely to be rehabilitated if not sent to prison.[28]

A sentence of imprisonment may be wholly or partly suspended.[29] A *wholly* suspended sentence is treated as one of immediate imprisonment for all statutory purposes except disqualification for or loss of office, or forfeiture or suspension of pensions or other benefits.[30] A *partially* suspended sentence is deemed to one of imprisonment for the whole of the announced term for all purposes.[31] When a court imposes a suspended sentence of imprisonment it must also specify a period during which the offender must not commit another offence punishable by imprisonment if he or she is to avoid being dealt with for breach of the suspended sentence. This period (known as the operational period[32]) must not be more than 24 months from the date of the suspended sentence order, but need not necessarily be equivalent in length to the term of imprisonment that has been suspended.[33]

The order accompanying the suspended sentence of imprisonment only requires the offender not to commit another offence punishable by imprisonment during the currency of the operational period.[34] There is no general statutory power, such as is found in relation to community-based orders which allows the court to add other conditions regarding reparation, supervision, or treatment. Though, within the

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26 *Sinclair* (1990) 51 A. Crim. R. 418 (mother of two young children convicted of social security fraud given sentence of immediate imprisonment, but court considered that in appropriate case a suspended sentence could be imposed which would serve the purposes of deterrence); *Jones* 30/10/92.

27 *Gillan* (1991) 100 A.L.R. 66.

28 *Flaherty* (1981) 28 S.A.S.R. 105; *Jarrett* (1992) 58 S.A.S.R. 457 (all of the above factors applied).

29 Under the 1985 legislation the court could only partly suspend a sentence for a period between a quarter and three-quarters of the total period.

30 *Sentencing Act* 1991 (Vic), s.27(5) & 28(6).;

31 *Sentencing Act* 1991 (Vic), s.27(8).;

32 *Sentencing Act* 1991 (Vic), s.3.;

33 *Sentencing Act* 1991 (Vic), s.27(6).;

34 In relation to sentences suspended under *Sentencing Act* 1991 (Vic), s.28(7)(a), an offender must not, during the treatment period, fail to comply with any of the conditions set. There is no power to attach conditions of good behaviour to suspended sentences: *Townsend* (1992) 59 A. Crim. R. 244.

hierarchy of sanctions, this measure appears to be designed for use upon the more serious class of offender than community-based orders, the degree of supervision in the community is less.

As a sentence of imprisonment, the suspended sentence can be combined with any other sanction that an unsuspended sentence can be combined with. It may be coupled, for example, with a fine, but these other penalties may be regarded as 'additional' penalties to compensate for what may, in law, erroneously be regarded as an unduly benevolent sentence.

An offender who fails to comply with the conditions of a suspended sentence of imprisonment risks being committed to prison for the full term originally imposed. Breach of a suspended sentence occurs if, during the period of suspension or within the operational period, the offender commits another imprisonable offence.[35]

Though the Act directs that, in the event of breach, the court should restore the sentence or part sentence held in suspense and order the offender to serve it,[36] there is a discretion not to do so. The court may, instead, activate only part of the suspended portion of the sentence, or extend a wholly suspended sentence for up to a year, or take no action and, in addition, impose a fine.[37] Although there is no presumption that the court must activate a suspended sentence on breach, the legislative policy would appear to be that a breach should result in the offender serving the sentence imposed.[38] As King C.J. observed:[39]

> A sentence of imprisonment is imposed and suspended only where imprisonment is fully merited but the court considers it appropriate to give the offender a last chance to avoid imprisonment by leading a law-abiding life. It is intended to be a sanction suspended over the head of the offender

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35 *Sentencing Act* 1991 (Vic), s.31(1).

36 *Sentencing Act* 1991 (Vic), s.31(7).

37 *Sentencing Act* 1991 (Vic), s.31(5). Unlike the provisions in relation to community-based orders and intensive correction orders, a court is not required to take into account the extent to which the offender had complied with the order before its cancellation.

38 See e.g. *Walker* (1981) 27 S.A.S.R. 315 (court should 'pause long, and have knowledge of grave and weighty matters in mitigation' before trusting the offender with a further suspension.

39 *Buckman* (1988) 47 S.A.S.R. 303, 305 per King C.J.

> which is to be activated if there is a lapse into non-law-abiding ways. The court will not lightly interfere with the ordinary consequences of a breach ...

Activation can be avoided if the court can be persuaded that, 'it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed.'[40] The relatively trivial nature of the offence constituting the breach, its proximity to the expiry of the operational period of the suspended sentence, and the disproportion between the seriousness of the offence constituting the breach and the sentence which would be activated are relevant considerations.[41] The fact that the subsequent offence is different in character from the offence for which the suspended sentence is imposed is not, in itself, a ground for refraining from activating the suspended sentence.[42] If an immediate custodial sentence is passed for the latest offence, then the suspended sentence should normally be activated.[43]

The impact of suspended sentences

The suspended sentence has had a greater impact upon the pattern of sentencing in Victoria than any other newly introduced sentencing option (Tait, 1995).[44] As we have seen in Chapter 3, within three years of the re-introduction of this sanction in 1985, some 14% of offenders were given a suspended sentence, by 1991-2, the figure was up to 24%, and by 1994, 35% of sentences for principal offences in the higher courts were suspended sentences of imprisonment. Table 4.2 below indicates the categories of offences for which suspended sentences were imposed.

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40 *Sentencing Act* 1991 (Vic), s.31(7).;

41 *Buckman* (1988) 47 S.A.S.R. 303, 305 per King C.J.

42 *Saunders* (1970) 54 Cr. App. R. 247.

43 *Campbell* (1984) 4 F.C.R. 137 (noting the limited options available to a court in such cases).

44 The following material is drawn from Tait 1995, for which see a discussion of the data sources for the following material.

TABLE 4.2
HIGHER COURTS: PER CENT GIVEN SUSPENDED SENTENCES 1985 - 1994

	1985-6	*1987-8*	*1989-90*	*1991-92*	*1993-4*
Total	**6.0%**	**14.0%**	**17.0%**	**24.0%**	**32.0%**
Offence type, most severe penalty					
Homicide	1.0%	5.0%	5.0%	12.0%	8.0%
Culpable driving	0.0%	11.0%	15.0%	24.0%	14.0%
Assault	6.0%	20.0%	23.0%	30.0%	33.0%
Rape	3.0%	5.0%	4.0%	6.0%	10.0%
Other sexual offences	4.0%	13.0%	9.0%	17.0%	21.0%
Indecent assault	7.0%	12.0%	29.0%	22.0%	36.0%
Armed robbery	1.0%	6.0%	11.0%	16.0%	26.0%
Robbery	4.0%	16.0%	16.0%	28.0%	39.0%
Theft	7.0%	19.0%	20.0%	31.0%	45.0%
Burglary	6.0%	10.0%	20.0%	31.0%	44.0%
Other stealing	12.0%	17.0%	27.0%	38.0%	49.0%
Deception	11.0%	14.0%	29.0%	32.0%	54.0%
Property damage	5.0%	17.0%	11.0%	21.0%	44.0%
Drug Trafficking	5.0%	10.0%	11.0%	26.0%	32.0%
Possess/cult cannabis	10.0%	14.0%	9.0%	18.0%	17.0%
Other drug offences	10.0%	16.0%	25.0%	18.0%	32.0%
Public order offences	4.0%	12.0%	26.0%	34.0%	55.0%
Justice offences	0.0%	5.0%	10.0%	27.0%	17.0%

In 1993-94 suspended sentences were used most frequently for offenders convicted of public order offences (55%) fraud or deception (54%), 'other stealing' (e.g. receiving stolen goods) (49%), theft (45%) and burglary (44%). They were used less frequently for more minor offences, such as justice offences and using cannabis (both 17%), and for more serious offences such as homicide (8%) and rape (10%). It would appear that in the higher courts, the suspended sentence is being used in the white-collar crime area, particularly in relation to offences of obtaining property and financial advantage by deception. However, in recent years it is also apparent that in relation to serious offences against the person, such as armed robbery, its use has increased, from 1% of cases in 1985-86 to 26% in 1993-94.

Its impact in the Magistrates' Court has been somewhat less, at around 5% of all principal sentences, although the absolute number of sentences is, of course, much greater.[45] Table 4.3 shows the use of the suspended sentence in the Magistrates' Court.

TABLE 4.3
PERSONS SENTENCED BY MAGISTRATES, VICTORIA 1990-94: PER CENT GIVEN SUSPENDED SENTENCES

The pattern of use of suspended sentences in the lower courts is significantly different to that in the higher courts. In 1994, in the lower courts, suspended sentence were mostly used in relation to drug trafficking offences (30.1%), robbery (25.6%) and driving whilst disqualified (20.9%). In relation to offences such as theft, fraud, they were used in only a minority of cases, perhaps indicating that in that court, such cases were numerous and, overall, relatively less serious.

In both the higher and lower courts, the form of suspension has been similar. Sentences of under three months tend to be wholly suspended, with the proportion of the period suspended tending to fall as the sentence imposed is longer. In the higher courts, in 1994, 87% of sentences between 4 and 6 months were wholly suspended, 69% of those between 7 and 9 months, 65% of those between 10 to 12 months, and 54% of those between 11 and 24 months. In the Magistrates' Court in

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45 One of its most important uses is in relation to the offence of driving whilst disqualified, for which imprisonment is the mandatory sentence for a second offence. The suspension for such a sentence permits the court to obey the letter of the law whilst at the same time keeping people out of prison.

TABLE 4.3
PERSONS SENTENCED BY MAGISTRATES, VICTORIA 1990-94: PER CENT GIVEN SUSPENDED SENTENCES

	1990	*1991*	*1992*	*1993*	*1994*
Other nei	0.2%	0.3%	0.4%	0.4%	0.4%
Assault	8.5%	9.1%	10.6%	10.4%	11.7%
Sexual offences	13.1%	12.8%	13.0%	13.1%	16.8%
Robbery	9.8%	23.0%	22.9%	24.2%	25.6%
Theft of car	0.0%	0.0%	18.1%	17.7%	17.0%
Theft	7.8%	9.4%	7.8%	7.2%	7.5%
Aggravated burglary	0.0%	11.1%	18.5%	54.5%	11.5%
Handling/receiving goods	12.5%	12.8%	12.7%	13.5%	12.0%
Burglary	19.3%	18.3%	18.0%	16.3%	16.1%
Fraud/ deception	10.2%	11.2%	12.3%	12.3%	11.6%
Property damage	3.9%	5.1%	5.8%	4.0%	4.8%
Use/cultivate	1.2%	0.9%	0.7%	0.9%	1.3%
Drug Trafficking	25.6%	29.6%	31.1%	26.7%	30.1%
Other drug offences	1.8%	2.7%	2.3%	2.1%	2.5%
Public order offences	0.6%	0.7%	0.6%	0.7%	0.8%
CBO/ICO Breach	3.2%	1.9%	1.0%	1.4%	0.0%
Bail breach	11.1%	11.2%	10.6%	12.8%	11.1%
Justice procedure offences	11.7%	14.6%	16.7%	17.7%	14.9%
Drive while disqualified	17.7%	19.6%	18.8%	17.9%	20.9%
Drink/driving	2.4%	3.9%	4.4%	4.5%	4.8%
Drive without licence	1.2%	1.7%	2.0%	2.5%	3.2%
Dangerous driving	0.3%	0.5%	0.6%	0.4%	0.5%
Total	**3.6%**	**4.8%**	**5.0%**	**4.8%**	**5.1%**

1993, 85% of suspended sentences between 4 and 6 months were wholly suspended, 40% between 7 and 9 months and 57% of those between 10 and twelve months. Thus, even when suspended sentence are imposed, their diversionary impact is mediated by the level of suspension.

The growth in suspended sentences

Where did the growth in suspended sentences come from? Did it represent horizontal transfer, the substitution of one intermediate sanction by another, or was it penalty escalation, the replacement of fines, bonds or community based orders? Or was it decarceration, the use of threatened prison sentences in place of actual ones? Some part of each of these stories is true and the answer varies over time (Tait 1995). It is important to examine which of the patterns obtained for each group of offenders and offences.[46]

One way to test this is to examine, on a year by year basis, whether the increase in the use of suspended sentences was matched by an equivalent decline in the use of immediate sentences.

TABLE 4.4
SENTENCES, VICTORIAN HIGHER COURTS 1985 - 1991

For higher courts, there was a decline in the use of immediate imprisonment from 63 per cent in 1985 to 51 per cent in 1991. Over the same period, there was an even greater increase in the use of suspended sentences: while the imprisonment rate from higher courts fell by 12 percentage points, suspended sentences went up from none in 1985 to 20 percent of the sentencing market in 1991. This is consistent with a dual movement, both diversion and net widening. If we assume all the diversion from prison went to suspended sentences (it did not seem to go into other intermediate options which were fairly stable over the period), then some 60 per cent of suspended sentences represented diversion. This pattern is fairly similar to that reported by Bottoms in England for an earlier period (Bottoms, 1981).

It is important to use caution in interpreting this change. The decline in the proportion of offenders sentenced to prison may have resulted from changes in the

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46 The following material draws from Tait 1995, which examines the use of suspended sentence until 1991, but includes follow up material on breaches until 1994, together with further analysis of more recent data.

TABLE 4.4
SENTENCES, VICTORIAN HIGHER COURTS 1985 - 1991

	1985	1986	1987	1988	1989	1990	1991
			Per cent				
Imprisonment	63	57	62	60	56	53	51
Suspended sentence	0	9	11	13	14	18	20
Community based order	13	12	8	9	9	10	12
Fine/bond	24	22	19	17	21	20	17
Total	100	100	100	100	100	100	100
Persons	1053	1279	1469	1555	1714	1799	1576

characteristics of offenders. This did change slightly, but in the opposite direction to that required to explain the change in sentencing: some less serious offences (particularly burglaries and robberies) were transferred down to magistrates' courts. Or, it could be argued, judges and magistrates may have been becoming less punitive, perhaps because of changes in their cohort, or simply as part of the cycle of leniency and harshness (Walker, 1985, Nuttall & Pease, 1994). We cannot conclude from these data alone that the availability of suspended sentences *produced* the downward push in use of prison. The new option may have had this impact, or the judiciary riding a diversionary wave may have used whichever options were on offer at the time.

Magistrates' courts showed a similar pattern, with a decline in the use of imprisonment by about a third between 1983[47] and 1992, or 6 percentage points, while suspended sentences captured 12 per cent of the market for offences for which comparable data are available. The lower courts data for the two years were collected slightly differently, so no more than general directions can be derived from the comparison.[48] However the pattern is fairly similar to that for higher courts: about half of the suspended sentences appear to represent diversion, and about half penalty escalation.

TABLE 4.5
PERSONS SENTENCED BY MAGISTRATES
CHANGES IN SENTENCING PATTERNS 1983, 1992

To try to explain the pattern further, it is useful to examine which offenders were diverted and which ones were likely to experience penalty escalation. In his 1995 article, Tait examined five offence groups, homicide/rape, other crimes against the person (including robbery and other sexual offences), armed robbery, property crimes and other (drug trafficking, escape from custody etc.) with various levels of criminal history (Tait 1995).

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47 Two years prior to the introduction of the suspended sentence.

48 Documentation for the ABS collections is skimpy, but there are probably differences in how most serious offences is defined. The ABS collected data only for offences brought by police; Courtlink has all offences (theft therefore includes theft under Commonwealth legislation). Two offences for which suspended sentences are used for are driving while disqualified and drink driving; the ABS did not record data for these offences. The ABS manually coded police records, Courtlink is based on magistrates entering data directly via terminals.

TABLE 4.5
PERSONS SENTENCED BY MAGISTRATES
CHANGES IN SENTENCING PATTERNS 1983, 1992

	% 1983	% 1992	% Change
Assault			
Prison	18%	9%	-9%
Suspended	0%	10%	10%
Fine	48%	51%	3%
Other	34%	31%	-3%
Burglary,theft etc			
Prison	17%	11%	-5%
Suspended	0%	13%	13%
Fine	42%	31%	-11%
Other	42%	44%	3%
Damage			
Prison	6%	4%	-2%
Suspended	0%	5%	5%
Fine	72%	60%	-12%
Other	23%	32%	9%
Total, selected offences			
Prison	16%	10%	-6%
Suspended	0%	12%	12%
Fine	45%	38%	-7%
Other	39%	40%	1%

Note:
1. 1992 estimate for Jan 1- April 21 only. (On April 22 new Act came into effect).
2. 1983 data from ABS, Cat no. 4501.2
3. 1992 data from Courtlink, unit-record file provided by Department of Justice

TABLE 4.6
HIGHER COURTS, VICTORIA 1985 AND 1991
OFFENCE CATEGORY, SENTENCE TYPE AND PRIOR RECORD

Up to 1991-92 he found a pattern of bifurcation, with first-offenders being diverted and seasoned offenders being treated more harshly. There was a consistent pattern, with all but one offence category showing a substantial drop in the proportion imprisoned where offenders had fewer than three prior convictions. This ranged from drugs/public order (down 27 points) and personal crimes (down 26 points) to property crimes (down 19 points) and armed robbery (down 12 points). Suspended sentences were apparently being targeted at those who were often first-time (or less experienced) offenders. As might be expected with the offences which drew mostly long sentences (homicide and rape) the imprisonment rate did not fall, in fact it increased still further, regardless of number of prior convictions.

There was one exception to this pattern. It appeared that property offenders with less than 3 priors were less likely to receive fines and bonds than they would have been in 1985 (down 8 points), with suspended sentences showing a corresponding increase. This was explained on the basis that many of the less serious burglaries and robberies were transferred down to the magistrates' courts, leaving the 'hard core' of offenders who were more likely to get prison or intermediate sanctions for judges to sentence. Offenders with a longer criminal history were treated more harshly. For the two largest groups (personal and property) there was no change in the imprisonment rate, but an apparent penalty escalation effect, with suspended sentences appearing to come from a reduction in the use of fines and bonds. For armed robberies the imprisonment rate went up. The pattern in the miscellaneous category seems to suggest both diversion and net-widening (perhaps due to the heterogeneous composition of this category). There was thus evidence that suspended sentences served as a means of diversion from prison (at least at point of initial sentencing). This diversion was largely confined to offenders with few or no prior convictions. There was also apparent penalty escalation, largely confined to more serious offenders or those with an extensive criminal record.

With further data available on sentencing practices up to 1994, further analysis was undertaken of the use of suspended sentences. For these purposes, two groups of

TABLE 4.6
HIGHER COURTS, VICTORIA 1985 AND 1991
OFFENCE CATEGORY, SENTENCE TYPE AND PRIOR RECORD

		Total offenders		*Percent imprisoned*		*Percent suspended*		*Percent other*		*Flow to suspended*	
		1985	1991	1985	1991	1985	1991	1985	1991	*From Prison*	*From Other*
Murder/rape											
	0-2 priors	29	46	85%	94%	0%	2%	15%	4%	0%	2%
	3 or more priors	56	23	93%	100%	0%	0%	7%	0%	0%	0%
Armed robbery											
	0-2 priors	33	47	67%	55%	0%	15%	33%	30%	12%	3%
	3 or more priors	51	108	75%	82%	0%	5%	25%	12%	0%	5%
Personal crimes											
	0-2 priors	85	179	65%	39%	0%	26%	35%	35%	26%	0%
	3 or more priors	121	186	66%	64%	0%	17%	34%	19%	2%	15%
Property crimes											
	0-2 priors	97	68	51%	32%	0%	27%	49%	41%	19%	8%
	3 or more priors	90	58	55%	52%	0%	21%	45%	28%	3%	17%
Drug use/public order											
	0-2 priors	53	45	53%	26%	0%	21%	47%	53%	21%	0%
	3 or more priors	48	45	51%	41%	0%	34%	49%	25%	10%	24%
Total											
	0-2 priors	297	385	60%	41%	0%	24%	40%	35%	19%	5%
	3 or more priors	366	420	66%	66%	0%	16%	34%	19%	0%	16%
	Total	***663***	***805***	***63%***	***51%***	***0%***	***21%***	***37%***	***29%***	***12%***	***8%***

offences were used to analyse the sentencing trends: offences against property and offences against persons. In this comparison, offences against persons are restricted to robbery (including armed robbery) and burglary (including aggravated burglary). This leaves out the rather disparate and smaller group of offenders convicted of arson, fraud and other theft. Offences against person include assault, threatening to kill, and sexual offences, but not murder or manslaughter where a prison sentence is usually used.

The broad groupings allow finer disaggregations to be made by number of counts. One of the major considerations used by judges in sentencing is the number of counts of the principal charge, also available on the sentencing database. Two groups are distinguished here, offenders being sentenced on only one or two counts, and those convicted on three or more counts of the principal charge.

Burglary and robbery

Suspended sentences were used with increasing frequency for robberies and burglaries over the late 1980s, reflecting a gradual decrease in the use of imprisonment during that period.

TABLE 4.7
HIGHER COURTS 1985 - 1994
OFFENDERS CONVICTED OF ROBBERY OR BURGLARY: SENTENCE TYPE

After 1989, the decrease in use of prison continued for the less serious offenders (those with 1 or 2 charges), but stopped for the more serious offenders (those with 3 or more charges).[49] However the growth in the use of suspended sentences continued for both groups, getting a particular boost after April 1992 when the 1991 Act took effect.[50] For the less serious offenders, the use of suspended sentences almost doubled from 18% to 34%. For the more serious offenders, there was a similar sharp rise from 16% to 27%, before falling back to 20% in 1994. At the end of the period less serious offenders were about twice as likely to get a suspended sentence as more serious offenders.

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49 This was referred to above as bifurcation in sentencing, increasing disparity between treatment of more and less serious offenders.

50 The years presented in the table have been adjusted to reflect this legislative change. 1991 includes data until April 21 1992, while the rest of calendar year 1992 is listed under '1992'.

TABLE 4.7
HIGHER COURTS 1985 - 1994
OFFENDERS CONVICTED OF ROBBERY OR BURGLARY: SENTENCE TYPE

1 or 2 counts	*1985*	*1986*	*1987*	*1988*	*1989*	*1990*	*1991*	*1992*	*1993*	*1994*
Prison	60%	60%	67%	59%	58%	53%	53%	46%	51%	41%
Suspended sentence	0%	5%	9%	12%	18%	18%	18%	34%	36%	42%
CBO/ICO	21%	14%	11%	14%	12%	16%	16%	12%	8%	14%
Fine/bond	19%	21%	13%	15%	12%	13%	13%	8%	5%	3%

3+ counts	*1985*	*1986*	*1987*	*1988*	*1989*	*1990*	*1991*	*1992*	*1993*	*1994*
Prison	92%	77%	82%	86%	70%	75%	75%	68%	76%	76%
Suspended sentence	0%	8%	7%	9%	14%	10%	16%	27%	22%	20%
CBO/ICO	4%	11%	7%	3%	6%	11%	6%	2%	2%	4%
Fine/bond	4%	5%	4%	2%	10%	5%	3%	3%	0%	0%

The source of the flows to suspended sentences can be understood more easily in graphical form.

FIGURE 4.1
BURGLARY/ROBBERY OFFENDERS WITH 1 OR 2 COUNTS

FIGURE 4.2
BURGLARY/ROBBERY OFFENDERS WITH 3 OR MORE COUNTS

With the less serious offenders (those with one count), the prison line showed fluctuations but no general decline before 1989, so suspended sentences were used mostly in place of community sanctions or monetary penalties in that period. However after 1989, the continued expansion of suspended sentences was at the expense of both immediate prison sentences and other sanctions. In 1989, the non-prison part of the market (40% of the total) was divided roughly equally between fines and bonds, community-based orders and suspended sentences. By 1994, the non-prison share was up to 60%, of which two-thirds went to suspended sentences.

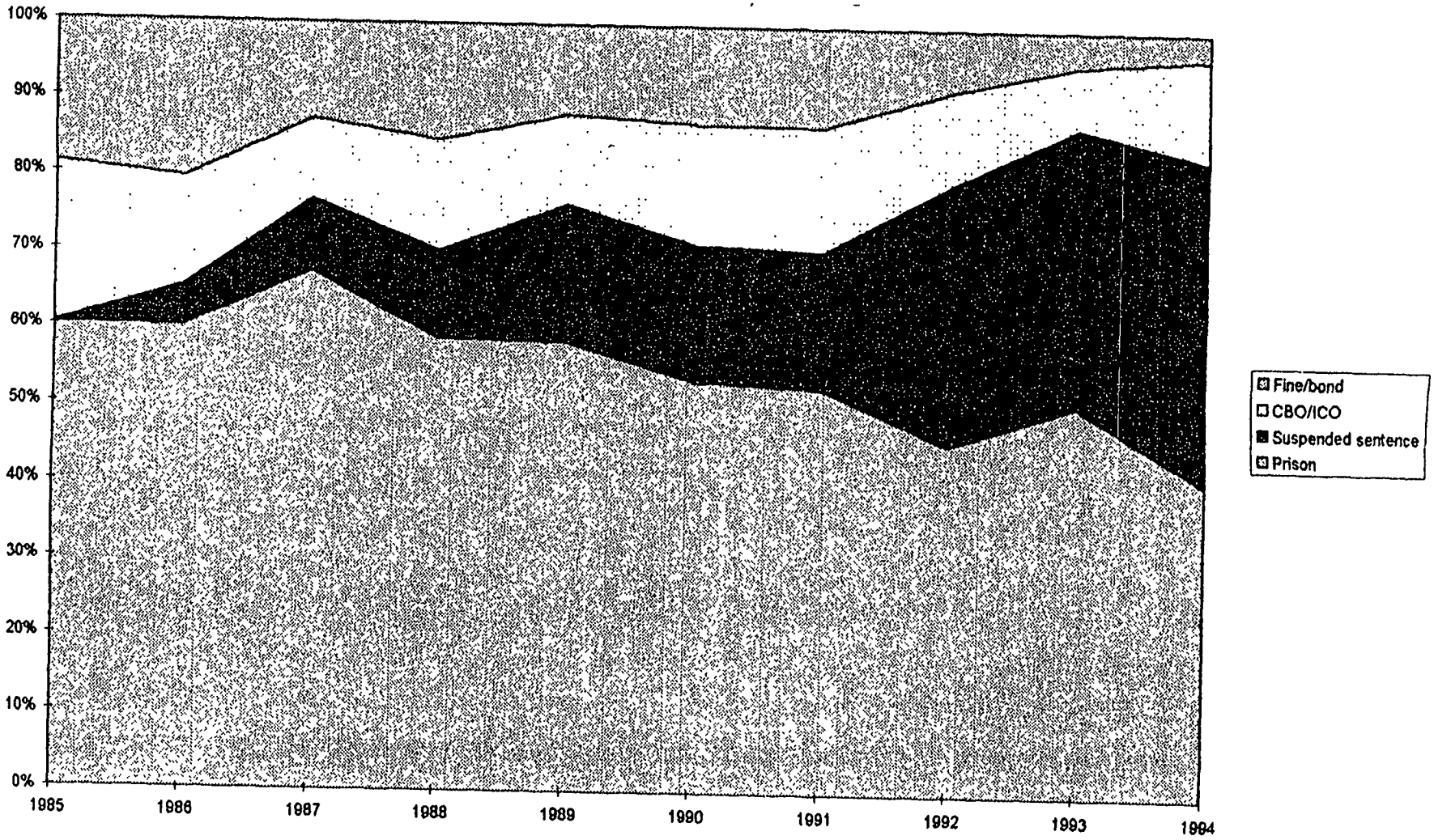
With more serious offenders on the other hand, the prison line declined until 1989 (suggesting decarceration until that point), then remained fairly steady after 1989. For this group, the growth in the use of suspended sentences after 1989 seems to have come at the expense of both community-based orders and fines and bonds (which virtually disappeared as a sentencing option for this group of offenders). The non-prison part of the market was less than 25%, and four-fifths of this went to suspended sentences.

With both groups of offenders, suspended sentences largely crowded out the other sanctions towards the bottom of the hierarchy. The overall patterns of flow to suspended sentences was fairly similar: about half of the flow seems to have come 'downwards' from prison, and about half 'upwards' from community and monetary sanctions. The timing was rather different, with flows from prison more likely for serious offenders before 1989, and for less serious offenders after 1989.

Offences against the person

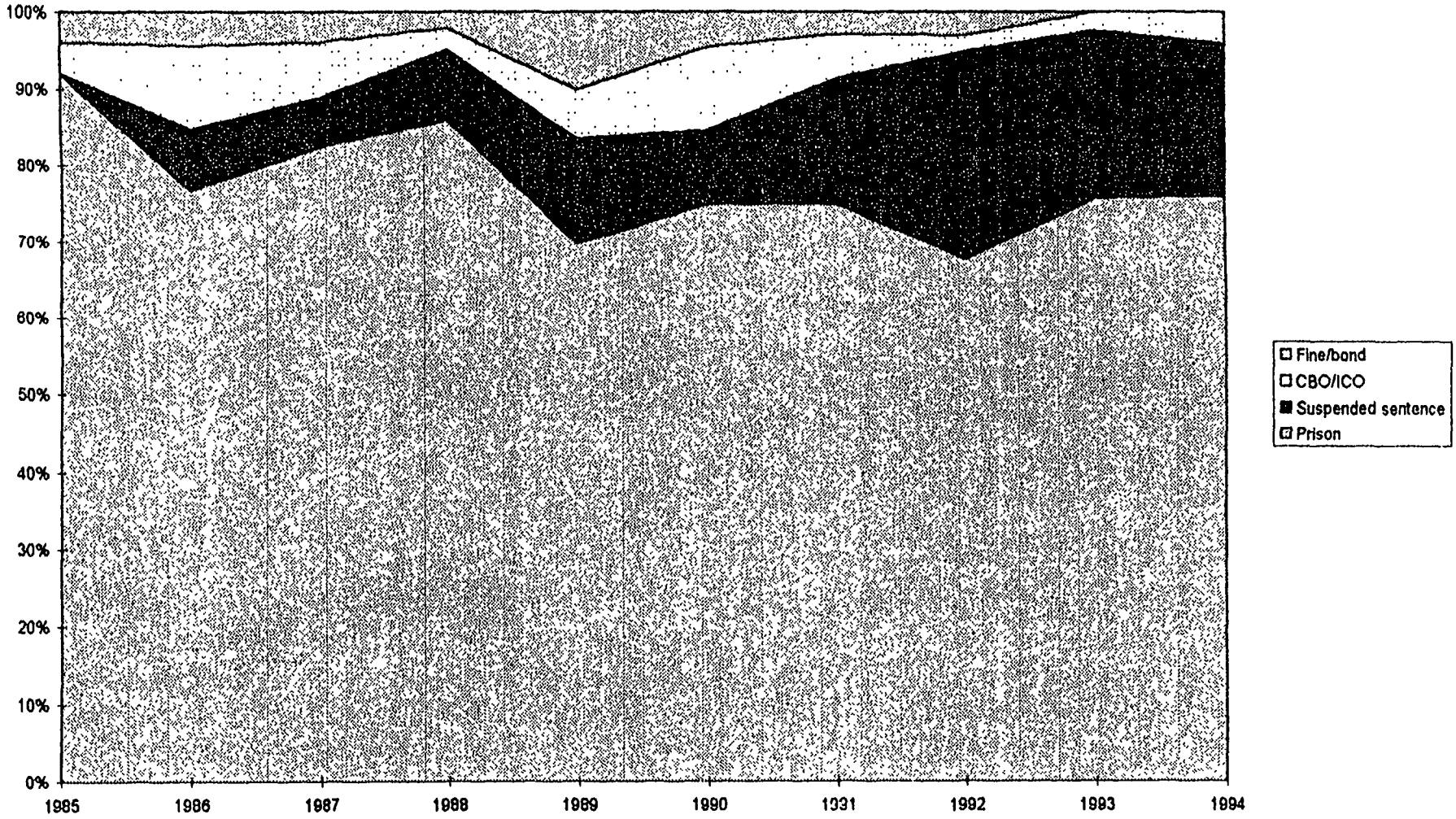
Suspended sentences were used almost as widely to sentence offenders convicted of offences against the person as they were for property offenders.

FIGURE 4.1
BURGLARY/ROBBERY OFFENDERS WITH 1 OR 2 COUNTS



Note: Armed robbery and aggravated burglary included

FIGURE 4.2
BURGLARY/ROBBERY OFFENDERS WITH 3 OR MORE COUNTS



Note: armed robbery and aggravated burglary included

TABLE 4.8
HIGHER COURTS, 1985-1994
OFFENDERS CONVICTED OF OFFENCES AGAINST PERSON, SENTENCE TYPE

FIGURE 4.3
OFFENDERS AGAINST THE PERSON, WITH 1 OR 2 COUNTS

FIGURE 4.4
OFFENDERS AGAINST THE PERSON, WITH 3 OR MORE COUNTS

By 1994, a third of those convicted of 1 or 2 offences against the person received a suspended sentence, and a quarter of those convicted on 3 or more counts. The important difference between personal and property offenders is where these flows came from: less from prison and community-based orders and more from fines and bonds.

For property offenders with one or two charges, there had been a steady decline in use of prison, much of this decline fuelling the growth of suspended sentences.

For assault and sexual offenders with one or two charges there had been a short decline (from 1989 to 1992) in the use of prison, then in 1993 and 1994 the use of prison returned to its 1989 level. During the years 1989 to 1992 the increase in suspended sentences was at the expense of prison, after that suspended sentences seemed to come more from fines and bonds.

Fines and bonds lost market share rapidly, seeing their proportions halved in five years. Community-based orders meanwhile maintained their small share of about 10% of the market (unlike the situation with property offences where these sanctions were partly squeezed out by suspended sentences).

This comparison of the use of suspended sentences for property and personal offenders has indicated the rather complex patterns of flows to suspended sentences. The long wave of decarceration which characterised the 1970s and 1980s had largely come to an end by 1989. The last few years of this decline can be seen for three of the groups examined, but not for more serious personal offenders. The decreasing use of prison for the three groups partly accounted for the increase in

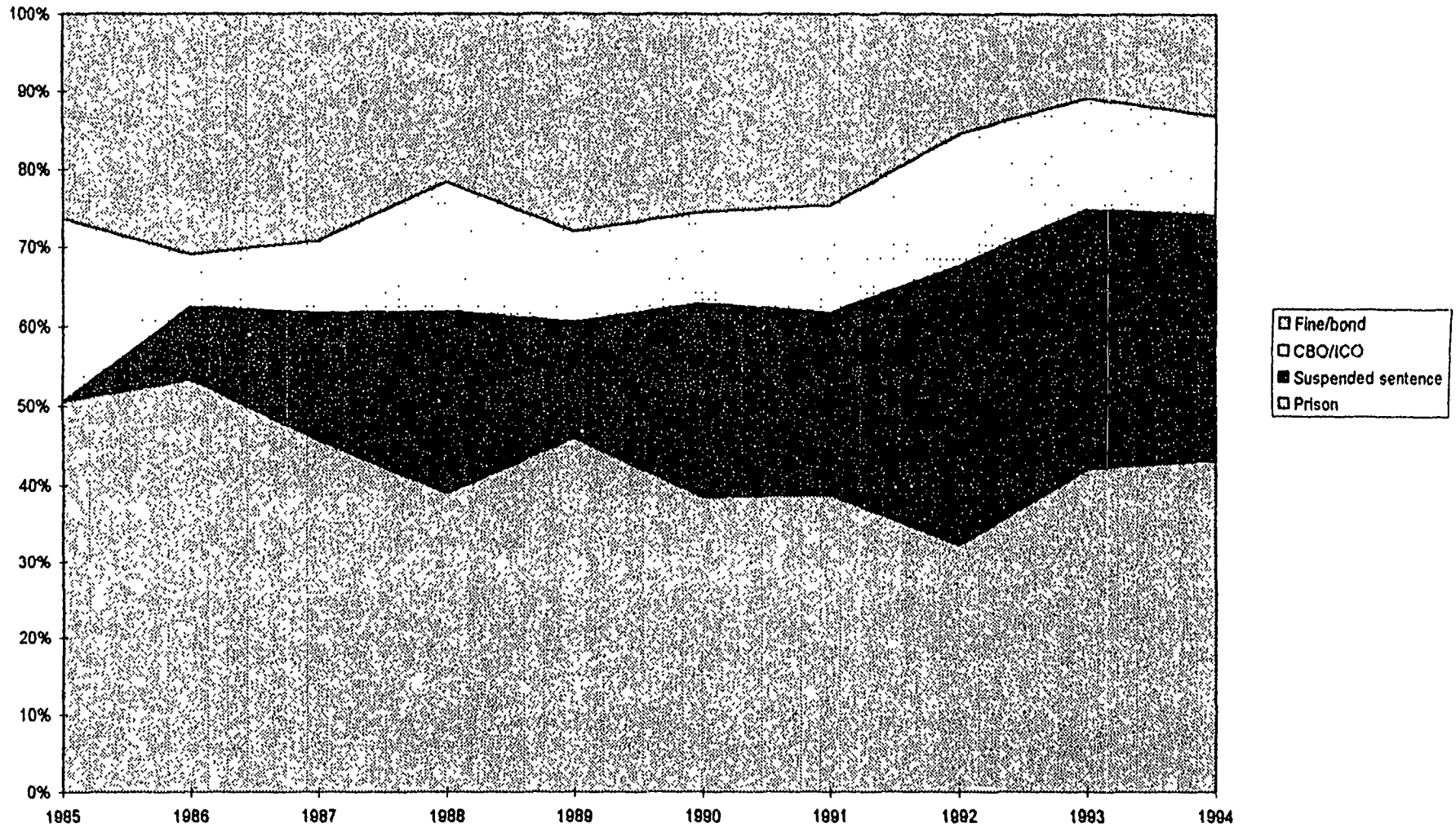
TABLE 4.8
HIGHER COURTS, 1985-1994
OFFENDERS CONVICTED OF OFFENCES AGAINST PERSON, SENTENCE TYPE

1-2 counts	*1985*	*1986*	*1987*	*1988*	*1989*	*1990*	*1991*	*1992*	*1993*	*1994*
Prison	51%	53%	46%	39%	46%	38%	39%	32%	42%	43%
Susp sentence	0%	9%	16%	23%	15%	25%	23%	35%	33%	31%
CBO/ICO	23%	7%	9%	17%	11%	12%	14%	17%	14%	13%
Fine/bond	26%	31%	29%	22%	28%	26%	25%	15%	11%	13%

3+ counts	*1985*	*1986*	*1987*	*1988*	*1989*	*1990*	*1991*	*1992*	*1993*	*1994*
Prison	70%	72%	74%	70%	67%	64%	62%	50%	69%	61%
Susp sentence	0%	9%	12%	11%	16%	18%	19%	23%	16%	23%
CBO/ICO	13%	9%	5%	10%	6%	9%	8%	12%	9%	11%
Fine/bond	17%	10%	9%	9%	12%	10%	10%	15%	6%	5%

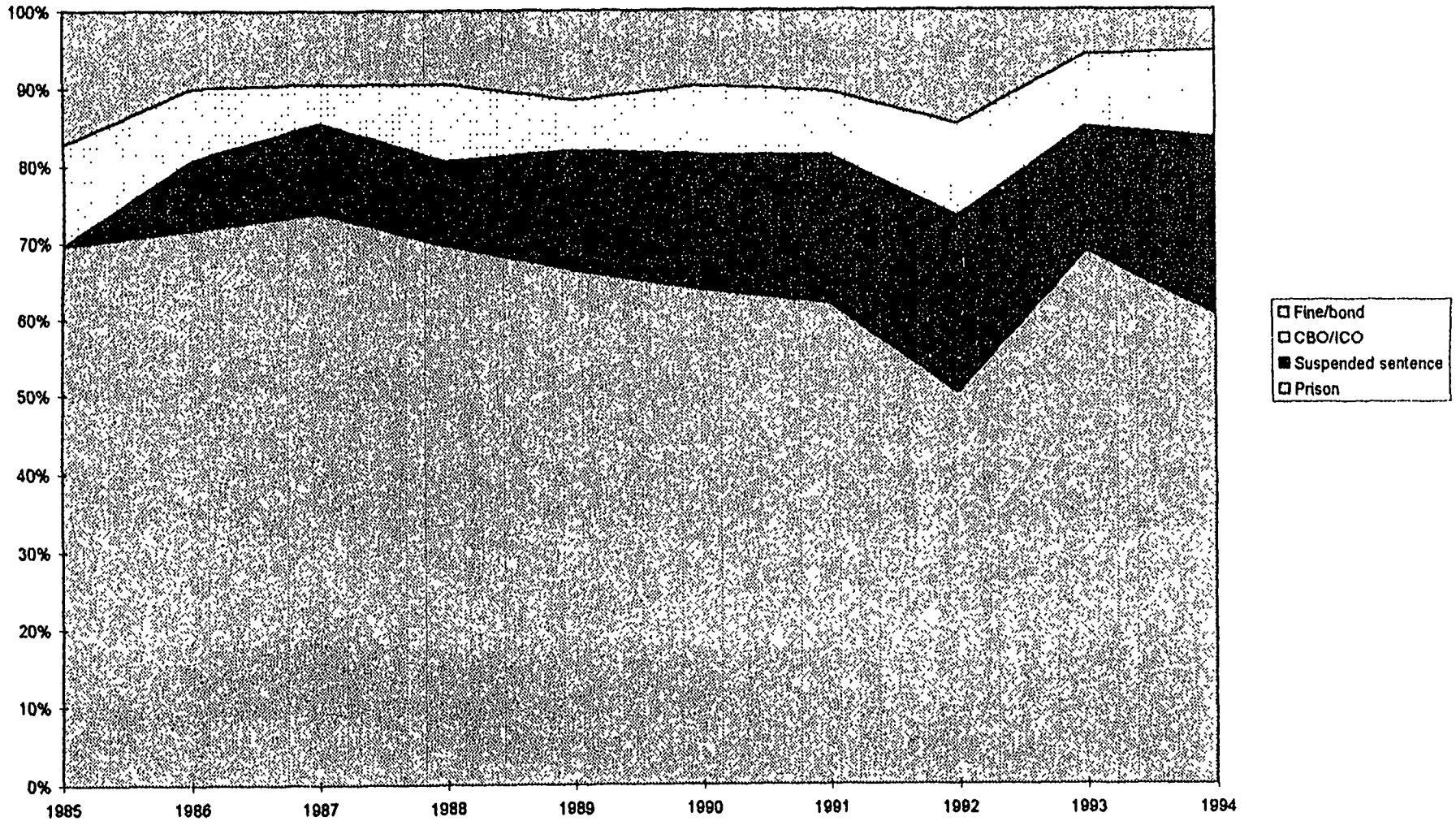
murder, manslaughter not included

FIGURE 4.3
OFFENDERS AGAINST THE PERSON, WITH 1 OR 2 COUNTS



Note: murder and manslaughter not included

FIGURE 4.4
OFFENDERS AGAINST THE PERSON, WITH 3 OR MORE COUNTS



Note: murder and manslaughter not included

suspended sentences until 1989. For the more serious offenders against the person, the flow to suspended sentences in that period was almost entirely due to penalty escalation from fines and bonds. After 1989, decarceration continued only for less serious property offenders, accounting for about half the increase in suspended sentences for that group. For both groups of property offenders, a decline in use of community sanctions (horizontal transfers) provided some of the increase in suspended sentences, but most of the increase came at the expense of fines and bonds (penalty escalation). For offenders against the person, virtually all the increase in use of suspended sentences came at the expense of financial sanctions. So the Higher Courts were increasingly distinguishing between the sanctions they handed down to various categories of offenders. Prison was used with decreasing frequency for less serious property offenders. Community sanctions maintained a steady share of the market for offenders against the person, but were being used increasingly less for property offenders. The community sanctions which were imposed were increasingly at the punitive end of the spectrum, intensive correction orders. One consistent pattern across all groups was that suspended sentences were being used in place of monetary sanctions.

The offences for which suspended sentences were targeted were rather different than those for which community sanctions were employed.[51] Suspended sentences were used as a penalty for car theft (17%) and burglary (16%), but less frequently than community based orders were used. The two offences where suspended sentences were widely employed were robbery (25%) and drug trafficking (28%). The Higher Courts made even more use of suspended sentences for these offences (39% and 32% respectively).

In the Magistrates Court, the timing in the growth of suspended sentences cannot be identified accurately as it can with Higher Courts. Data for the years 1985-1989 are not available, and the information available for 1990 refers to an incomplete set of courts. It seems there was virtually no change overall in the use of suspended sentences between 1991 and 1994. However there was a small increase in use of suspended sentences for offences against the person (assault and sexual offences) and an equivalent decline in the use of suspended sentences for some property

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51 See further below.

offences (theft and burglary). This is evidence that the patterns of bifurcation reported for Higher Courts can also be seen at work in the Magistrates' Courts as well, although at a lower and less visible part of the sentencing hierarchy.

Sentence inflation

One of the dangers in allowing prison sentences to be suspended is that the sentence length may be inflated relative to the period which would have been set if the sentence was not suspended (Sparks, 1971389). One approximate way of testing this is to compare the sentence lengths of the two penalties. If diversion occurs across the range of sentence lengths, the distributions should be fairly similar. If diversion is more frequent at the bottom end, then the distribution of suspended sentences would tend to be more concentrated near the bottom. If there is sentence inflation, a gap in immediate sentences at the bottom end may be matched by a bulge in suspended sentences further up the ladder. The pattern found in magistrates' courts is of the 'gap and bulge' variety.

TABLE 4.9
SENTENCE LENGTHS FOR PRISON AND SUSPENDED SENTENCES MAGISTRATES COURTS 1990 AND 1991

There are fewer suspended sentences of 12 months or more than immediate prison sentences (partly because of the cap on periods which could be suspended). But there are also considerably more very short prison sentences (under 1 month, 16 per cent) than suspended sentences for that period (4 per cent). Three months was the most popular period for a suspended sentence: 28 per cent were for this length, compared to 18 per cent of immediate sentences. This pattern is consistent with some penalty escalation at the point of initial sentencing.

Another way of developing an equivalence between penalties is to attempt to fit them onto the same scale or set of scales based on the mix of offence and offenders receiving each penalty (Tait, 1994). Penalties with similar groupings of offenders would be located close to each other on a multidimensional map, while penalties with quite different offender distributions would be placed further apart. For Victorian magistrates the sentence inflation with suspended sentences was

TABLE 4.9
SENTENCE LENGTHS FOR PRISON AND SUSPENDED SENTENCES MAGISTRATES COURTS 1990 AND 1991

	Sentence distribution	
Period	Prison	Susp
12 months+	13%	6%
9 months	8%	7%
6 months	18%	20%
4 months	7%	10%
3 months	18%	28%
2 months	8%	11%
1 month	12%	15%
Less than 1 month	16%	4%
	100%	100%
	5974	5348
Average (months)	4.9	4.1

Note:

1. Source: Courtlink, unit-record file provided by Department of Justice
2. Most sentences are for exact months. Others are rounded to nearest month.

estimated to be about 50% in 1990-91[52]: a 6 month suspended sentence was estimated to be equivalent to an immediate sentence of about 4 months (Tait, 1994). Those given suspended sentences of one month or less would not have received a prison sentence at all, according to this analysis; hence about 20% of the suspended sentences involved penalty escalation rather than sentence inflation.

Breach rates and treatment of breaches

Sparks estimated that about 40% of those given suspended sentences in England in 1968-69 would be re-convicted during the operational period of their sentence (Sparks, 1971:391). Between 84 and 90% of these had their prison sentence activated immediately, either in part or in full (Sparks, 1971:392). This produces a total activation rate of about 35 per 100 offenders given a suspended sentence. Bottoms produces a lower estimate of the proportion of sentences activated on breach (77%, Bottoms, 1987:189). This results in a total activation rate of about 30%.

This is the point at which the Victorian pattern appear radically different from that found in England. The breach rate for those given suspended sentences by Victorian magistrates in 1990[53] was 18% , less than half the rate reported for England.

TABLE 4.10
PERSONS GIVEN SUSPENDED SENTENCES, 1990
WHETHER BREACHED ORDER, BY ORIGINAL OFFENCE

Breaches were most frequent for those originally convicted of burglary and theft, but also possessing a drug of dependence, while breach rates were lowest for those originally convicted of indecent assault, drink driving and driving while disqualified. Those with longer sentences also appeared to breach more often (table 6), despite having similar operational periods.

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52 In a multidimensional scaling process, several dimensions can be identified. The information presented here is for the dimension which accounts for most of the variation ('inertia'), which was considered to represent seriousness or severity.

53 By mid-1994 when breach data were collected, all those given a suspended sentence in 1990 would have completed the operational period of their sentence, plus a margin of two years within which offences committed within the operational period could be prosecuted. It was not possible to undertake a survival analysis of later cohorts because the time to breach was known for only about two-thirds of those who breached.

TABLE 4.10
PERSONS GIVEN SUSPENDED SENTENCES, 1990
WHETHER BREACHED ORDER, BY ORIGINAL OFFENCE

	Whether order breached			
	Breach	No breach	Total	
	Per cent			
Most serious offence				
Other	18.0	82.0	100.0	233
Other Assault	8.3	91.7	100.0	157
Intentionally causing injui	13.2	86.8	100.0	152
Indecent assault	8.1	91.9	100.0	37
Theft	23.8	76.2	100.0	617
Receiving stolen goods	20.7	79.3	100.0	135
Burglary	25.4	74.6	100.0	504
Deception	16.3	83.7	100.0	129
Damage property	18.9	81.1	100.0	53
Drug trafficking	15.2	84.8	100.0	158
Possess drug of dep	28.6	71.4	100.0	42
CBO Breach	28.6	71.4	100.0	7
Bail breach	22.1	77.9	100.0	77
Intervention order	21.4	78.6	100.0	28
Drive while disqualified	7.8	92.2	100.0	270
Drink/driving	3.6	96.4	100.0	166
Drive without licence	12.8	87.2	100.0	39
Total	18.0	82.0	100.0	2804

TABLE 4.11
ORDERS BREACHED

Of those who breached their orders, some 54% had their prison sentence activated.

TABLE 4.12
PERSONS BREACHING SUSPENDED SENTENCES 1990 - 93
SENTENCE PASSED ON BREACH, BY NUMBER OF COUNTS

This produces a total activation rate of about 10 per 100 offenders given suspended sentences, less than a third the rate reported for England.

Most of this difference probably results from an apparently technical issue: length of operational period. In England, this could be up to three years, with a majority set in the one to two year period (and most of the rest two to three years). This was later changed to a minimum of one year and a maximum of two (Bottoms, 1987:182). In Victoria the maximum, until April 1992, was 12 months. Obviously the longer the period, the longer the person is at risk of breaching a suspended sentence. In Victoria, most suspended sentence orders in 1991 fixed operational periods of 12 months[54]. This breach rate is about the same as that estimated by Sparks for a similar operational period (Sparks, 1971:390).

The second issue is activation of sentence on breach. If a person committed only one additional offence, they had a 40% chance of going to prison; this went up to 71% for those convicted of 15 or more additional offences (table 7). While these rates are lower than those reported for England, they are considerably higher than the equivalent rates for breaching community-based orders: 13% for one additional offence and 46% for 15 or more offences[55].

Just over a quarter of the sentences restored by magistrates were for shorter periods than the time specified when the sentence was suspended. When the person was

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54 This information kindly provided by Clare Cahill, a student at the University of Melbourne and a court clerk.

55 These refer to persons breaching CBOs 1990-93, as recorded in Courtlink. The data for one additional offence refers to one offence in addition to the breach of the CBO.

TABLE 4.11
ORDERS BREACHED

Persons given suspended sentences, 1990
Whether breached order, by original sentence

Sentence length	Breach	No breach	Total	
Partly suspended	12.1	87.9	100.0	116
Sus 12-17.9 mths	25.3	74.7	100.0	146
Sus 9-11.9 mths	28.6	71.4	100.0	140
Sus 6-8.9 mths	19.3	80.7	100.0	462
Sus 3-5.9 mths	17.5	82.5	100.0	1000
Sus u.3 mths	16.0	84.0	100.0	940
Total	18.0	82.0	100.0	2804

TABLE 4.12
PERSONS BREACHING SUSPENDED SENTENCES 1990 - 93
SENTENCE PASSED ON BREACH, BY NUMBER OF COUNTS

	Number of counts found proved at breach						
	1	2	3-4	5-14	15 or more	Total	
Prison-longer	4.0	6.6	14.6	21.6	30.1	15.9	272
Prison-same	22.5	21.2	23.0	26.3	27.5	24.3	426
Prison-shorter	13.3	11.9	16.5	15.9	13.5	14.6	254
Susp-longer	4.5	4.3	3.9	5.4	7.6	5.1	88
Susp-same	4.1	7.0	8.6	7.7	5.2	6.8	120
Susp-shorter	1.0	6.4	3.6	3.7	1.7	3.3	59
ICO	2.6	2.9	5.3	5.5	3.1	4.2	73
CBO	14.5	15.6	10.6	9.2	9.4	11.4	197
Fine	30.4	22.2	13.2	4.3	1.1	13.1	226
Bond/discharge	3.2	1.9	0.8	0.5	0.8	1.3	23
Total	100.0	100.0	100.0	100.0	100.0	100.0	1738
Total	*310*	*263*	*377*	*519*	*269*	*1738*	
Activation rate	39.8	39.7	54.1	63.8	71.1	54.8	

convicted of only one additional offence the sentence length was reduced in a third of the cases. Recall that the new sentence was both for the original offences for which the suspended sentence was imposed and the additional ones leading to the breach. So there is some evidence that the original (frequently) inflated tariff was reduced at time of re-sentence. Such discretion was less possible in England, where a Court of Appeal decision required new sentences to be served consecutively with the activated suspended sentence (Bottoms, 1987:183). Whether higher court judges used their discretion to the same extent is not known from the available data.

Impact on prison population

The immediate impact of the introduction of suspended sentences seems to have been a reduction in the proportion of prisoners received who were serving short sentences.

TABLE 4.13
PRISON ENTRANTS DURING PREVIOUS YEAR AND PRESENT ON JUNE 30, 1986 - 1991
ESTIMATED ACTUAL SENTENCE AND LEVEL OF COURT

From higher courts, the proportion of prisoners serving sentences under 6 months fell at the time suspended sentences were introduced from 20% to 8%. From magistrates courts, the proportion of prisoners serving sentences under 6 months decreased from 66% to 42% of the prison entrants[56]. This is consistent with the sentencing data reported above. The timing of the change indicates that much of the drop in use of short prison sentences was taken up with suspended sentences. If we assume that half of the suspended sentences represented diversion from prison (a figure consistent with evidence from both levels of court), then in 1991 about 2400 fewer offenders were sent to prison than if they had faced the bench in 1985. Because most of these sentences were short (on average about 4 months, or 2.7 months when discounted for sentence inflation), this represented a reduction of about 540 prison places.

But what about the delayed entry of offenders who breached suspended sentences? Bottoms reported an increase in medium-length sentences in England, resulting

56 Prison entrants still in prison at census time.

TABLE 4.13
PRISON ENTRANTS DURING PREVIOUS YEAR AND PRESENT ON JUNE 30, 1986 - 1991
ESTIMATED ACTUAL SENTENCE AND LEVEL OF COURT

	1986	*1987*	*1988*	*1989*	*1990*	*1991*
Higher						
Under 3 months	5.8	2.0	2.4	2.0	2.9	5.0
3-5.9 months	14.0	5.5	8.1	9.4	11.0	10.0
6-8.9 months	18.3	5.0	7.9	8.6	13.2	10.1
9-11.9 months	14.8	14.0	12.3	15.3	17.2	15.4
12 months or longer	47.1	73.5	69.3	64.7	55.7	59.5
	100.0	100.0	100.0	100.0	100.0	100.0
Magistrates						
Under 3 months	31.2	15.0	13.0	16.6	20.8	21.4
3-5.9 months	35.1	26.6	29.3	30.7	35.5	37.0
6-8.9 months	16.0	16.8	23.0	20.0	20.8	20.7
9-11.9 months	10.3	24.5	20.8	20.8	16.0	15.2
12 months or longer	7.4	17.1	13.9	11.9	6.9	5.7
	100.0	100.0	100.0	100.0	100.0	100.0
Total						
Under 3 months	19.2	9.2	8.2	9.8	12.4	13.7
3-5 9 months	25.1	17.2	19.6	20.8	24.0	24.3
6-8.9 months	17.1	11.5	16.1	14.7	17.2	15.7
9-11 9 months	12.4	19.8	16.9	18.2	16.6	15.3
12 months or longer	26.2	42.3	39.2	36.5	29.8	31.0
	100.0	100.0	100.0	100.0	100.0	100.0

from courts giving offenders longer suspended sentences than they would have got if immediate, and then on breach activating these longer-than-expected sentences.

There was a growth in the proportion of short-term prisoners in 1989 and 1990, although not back up to the 1986 levels. (By 1991 it was two-thirds of the way back to its 1986 level). Some of this growth is likely to represent deferred entry of offenders who had previously received a suspended sentence. But the issue is how much?

Using the crude 'total activation rate' of suspended sentences of 10%, it seems likely that of the approximately 4800 suspended sentences given out in 1991 about 480 would have later resulted in prison sentences. With an average sentence length of about 5 months on breach, this translates into an extra 200 prison spaces. So with an estimated decrease of 540 places and an estimated deferred kick-back of 200, the net effect is a decline of 340 places. So perhaps just over a third of the decline in prison sentences was illusory: delay rather than diversion. Nevertheless, the use of prison was considerably lower in 1991 than 1985, so there was still a measurable impact of suspended sentences on the size of the prison population. If the 'prison activation rate' for England was applied, of 35%, the deferred kick-back would have been about 580, leading to a slight increase in the prison population. (With the longer prison sentences actually used in England, a larger increase in the prison population would be predicted).

Other offenders who had been given a suspended sentence and had offended outside the operational period could well have received harsher penalties because their previous sentence had been a suspended sentence. Because Courtlink does not have unique identifiers for individuals, it is not possible to test this out directly. The 'extra risk' however may be set in context of breaches of other penalties. For example, of those breaching CBOs with 15 or more new offences, some 46% were given immediate prison sentences by magistrates. This compares with 71% of those coming before magistrates breaching suspended sentences with 15 or more new counts. For offenders who were previously on a suspended sentence the operational period for which had expired, it might be expected that the chance of imprisonment would lie somewhere between the 'high' of those serving current suspended sentences and the 'low' of CBO breachers.

The bottom line is perhaps the prison population. Despite an increasing volume of business in the courts, the demand for prison spaces grew only marginally, and the imprisonment rate remained stable at about 45-50 per 100,000 population between 1985 and 1991. This level was less than half the Australian average. The availability and widespread use of suspended sentences must be considered one part of the explanation for this pattern.

Intensive Correction Orders

The intensive correction order was a sanction added to the Victorian sentencing hierarchy by the 1991 Act. The order was introduced to fill a perceived gap at the higher end of the sentencing range which had been created by the disappearance of the attendance centre order. In the discussions preceding the passage of the 1991 Act, the Office of Corrections had argued strongly in favour of the introduction of a form of conditional suspended sentence, responding to sentencers' concerns[57] that the sentencing range lacked a sufficiently punitive non-, or quasi-custodial sanction contiguous to imprisonment. The community-based order, introduced in 1986, which had subsumed the attendance centre order, was not considered to be sufficiently punitive. As the then head of the Office's Community-based Corrections Division, Mr Denbigh Richards, observed (Richards, 1991:23):

> There is a strong indication that many sentencers would impose a supervised community-based sanction if in so doing they could invoke an imprisonment term as the penalty suspended conditional upon certain stringent conditions being met. It is argued, of course, that such a degree of intrusiveness is required if there is to be any chance of extending further the preparedness of sentencers to see a community-based sanction as appropriate where imprisonment is currently being imposed. One would be hopeful that such guidelines would exclude a suspended sentence with conditions if the circumstances equate to those where a community-based order would currently be given.

The *Penalties and Sentences Bill* 1989, which followed the release of the Victorian Sentencing Committee's report, contained provisions for a conditional suspended

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57 As perceived by the Office of Corrections. Such concerns had not been publicly stated.

sentence. The conditions proposed to be attached to the suspended sentence were almost identical to those of the community-based order, creating a significant risk of sentence escalation. Because it was considered to be too tempting to allow sentencers to attach a suspended sentence to a community-based order, the sanction was transformed into one which more strongly emphasised the imprisonment aspect and thus more closely resembled the attendance centre order. It was intended to be more obviously a 'substitutional' than an alternative sanction.

In its final form, the intensive correction order emerged as a sanction which was directly targeted at those who were sentenced to short terms of imprisonment. In the view of the Victorian Department of Justice (1993), the new sanction needed to divert such offenders without increasing the likelihood of new widening, combine risk control and risk reduction strategies, provide the courts with a credible community-based sanction, be perceived of as more intrusive, intensive and punitive than the community-based order and be promotable as a genuine alternative to imprisonment.

In its preparations for the legislation, the Office of Corrections had identified its target populations for the new order. Those considered to be most eligible were offenders imprisoned for driving related offences,[58] those convicted of property offences such as theft and offenders who had served prior terms of imprisonment and were considered too risky for release on a community-based order.

The legal basis

Where a person has been convicted of one or more offences, and the court imposes a prison term which, in aggregate, does not exceed twelve months, it may order that the sentence be served by way of 'intensive correction' in the community.[59] The court must have first obtained a pre-sentence report on the offender and the offender must consent to the making of the order. The duration of the order is ordinarily the period of the sentence of imprisonment. Compliance with the terms of the order in the community discharges the prison term.

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58 Over 35% of prisoners received in prison for terms of less than twelve months were imprisoned for driving related offences.

59 See generally *Sentencing Act* 1991 (Vic), ss. 19-26.

The terms of the order require the offender to agree with seven core conditions which are automatically attached to all intensive correction orders. These require that during the continuance of the order the offender: (a) does not commit another imprisonable offence; (b) reports to a nominated community corrections centre within two days of the order coming into force; (c) reports to, or receives visits from a community corrections officer at least twice a week; (d) attends a specified community corrections centre for at least twelve hours a week for the purpose of performing unpaid community work for at least eight hours and spending the balance, if any, in counselling or treatment for psychiatric, psychological, drug or alcohol problems;[60] (e) notifies any change of address or employment; (f) does not leave Victoria without permission; and (g) obeys the lawful instructions of community corrections officers. The Office of Corrections expected that most offenders regarded as suitable for an intensive correction order would be open to being managed under the core conditions alone. Flexibility is allowed to adjust hours worked and hours spent in counselling or treatment in order to provide an incentive to take up treatment and counselling opportunities.

Other special conditions may be attached by the court if the pre-sentence report so recommends. The offender must also agree to these for the order to be valid. They may require the offender to attend other residential or community-based programs aimed at relieving the personal factors which contributed to his or her criminality, e.g. drug abuse or alcoholism.[61] The Office of Corrections expected that these specialist programs would generally be provided by other government or non-

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60 Offenders will generally be performing community work for the entire twelve hours. Unlike offenders undertaking work under the community-based order, who may have their hours of work determined by agreement, the number of hours for offenders on intensive correction orders are set by legislation and cannot be varied by administrative direction. The core conditions of the intensive correction order are therefore more severe than those under a community-based order.

61 Regulation 10 of the *Sentencing Regulations* 1992 provides that the following programs are prescribed programs for the purposes of s.21: (1) Alcohol and other Drug Treatment Program: Requirements - Participation in residential treatment or in intensive community-based counselling or both as directed by the officer in charge of the program or by a community corrections officer or by both officers; (2) Drink Drivers Program - Participation in residential treatment or in intensive community-based counselling or both as directed by the officer in charge of the program or by a community corrections officer or by both officers; (3) Young Adult Offenders Programme - Participation in residential training or in intensive community-based counselling or both as directed by the officer in charge of the program or by a community corrections officer or by both officers.

government agencies, but that these conditions would not be imposed very frequently. However, owing to a shortage of resources, the programme conditions have never been implemented. The fact that no specialist programs have been put in place has had a significant impact upon the usage of the order.

In 1993, the Community Based Corrections Branch commented that despite the absence of programs, it continued to receive orders with special conditions attached. It instructed its officers not to recommend these programs until these resources could be provided. However, it observed that a significant percentage of ICO offenders who have drug, alcohol, medical, psychological or psychiatric problems have been adequately managed within the four hour requirement.

Breach of the conditions of an intensive correction order without reasonable excuse may lead to the matter being referred back to the court which made the order.[62] If that court is satisfied of the breach it may take the following action: (a) cancel the order and whether or not it is still in force commit the offender to prison for the unexpired portion of the original prison sentence; (b) vary the order; or (c) confirm the order originally made. In addition a fine may be imposed. If imprisonment is ordered, it must be served immediately and concurrently with any pre-existing term unless the court otherwise orders.

The use of the order

In the first eight months of the operation of the 1991 Act (April 22 to December 31 1992, 530 intensive correction orders were made by the courts, an average of approximately 66 per month. In that same period 5895 new community-based order were made. In 1993, intensive correction orders were being made at a rate of approximately 73 per month (total approximately 873), while 5822 community-based orders were made and 3586 fine default orders were also made. At any time, there are about 250 to 350 persons on order.

It is apparent, that as was the case with its predecessor, the attendance centre order, the intensive correction order has failed to capture the imagination of sentencers and

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62 *Sentencing Act* 1991 (Vic), s.26.; A breach may occur either through failure to comply with the conditions of the order or with any requirement of the regulations: s.26(1). The court has jurisdiction even if the order is no longer in force, but proceedings must be commenced within three years of the date on which the offence is alleged to have been committed: s.26(1A).

has had very little impact on sentencing patterns, between 1 - 2% of all sentences imposed.

Tables 4.14 and 4.15 indicate the extent of use of intensive correction orders in the higher and lower courts.

TABLE 4.14
HIGHER COURTS, VICTORIA, APRIL 22 1992 - DECEMBER 1994
COMMUNITY BASED AND INTENSIVE CORRECTION ORDERS

TABLE 4.15
PERSONS SENTENCED BY MAGISTRATES 1993 - 94
PENALTY BY OFFENCE: ALL OFFENDERS

The impact of the intensive correction order

The relatively low number of ICOs imposed each year means that even if all of the offenders given ICOs would have received prison sentences, and the majority of those for less than six months, the impact upon the prison population would be relatively small. Whether such offenders would have received prison sentences, or community-based orders, is problematic. If ICOs are being used as an alternative to imprisonment (that is, if the population of ICO offenders is being drawn from persons who would otherwise have gone to prison) then one would not expect to find significant differences in offence or offender characteristics for CBOs made before and after the proclamation of the 1991 Act. Conversely, if ICOs are being systematically drawn from the offenders who would otherwise have received a CBO, then one would expect to see changes in CBO offence and offender characteristics. However, it should be noted that the small number of ICOs relative to CBOs means that such changes would need to be quite large in order to be detectable.

The evidence to date, gleaned from a number of studies, seems to indicate that the profile of ICO recipients more closely resembles prisoners than it does those receiving community-based orders.[63] In particular it indicates that:

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63 See Ross, 1993; Wise, 1993; Tomaino 1994; Department of Justice, CBC Branch Report, 1993.

TABLE 4.14
HIGHER COURTS, VICTORIA, APRIL 22 1992 - DECEMBER 1994
COMMUNITY BASED AND INTENSIVE CORRECTION ORDERS

	ICO	*CBO*	*Total*
	Per cent of offenders given selected penalty		
Homicide-related	0%	3%	3%
Assault	3%	15%	18%
Sexual offences	2%	7%	9%
Armed robbery	1%	8%	9%
Robbery	2%	7%	8%
Theft	3%	5%	8%
Burglary	2%	3%	5%
Other stealing	4%	8%	12%
Deception	0%	8%	8%
Property damage	6%	21%	27%
Drug Trafficking	1%	1%	2%
Poss/cult Cannabis	3%	13%	15%
Other drug offences	0%	8%	8%
Public order offences	3%	14%	0% 17%
Justice offences	0%	0%	0%
Total	**2%**	**8%**	**10%**

TABLE 4.15
PERSONS SENTENCED BY MAGISTRATES 1993 - 94
PENALTY BY OFFENCE: ALL OFFENDERS

	Prison	*Intermediate sanctions*			*Other*
		Suspended ICO	CBO	Total, intermediate	
Other nei	1%	0%	0%	1%	2%	97%
Assault	9%	11%	2%	12%	24%	67%
Sexual offences	9%	15%	2%	19%	36%	56%
Robbery	25%	25%	3%	20%	48%	26%
Theft of car	26%	17%	4%	25%	46%	29%
Theft	8%	7%	1%	15%	23%	69%
Burglary	23%	16%	3%	23%	42%	35%
Handling or receiving stolen goods	0% 0% 11%	0% 0% 13%	0% 0% 2%	0% 0% 17%	0% 0% 32%	0% 0% 58%
Fraud/ deception	11%	12%	1%	16%	29%	60%
Property damage	5%	4%	1%	13%	18%	77%
Use/cultivate	2%	1%	0%	4%	6%	92%
Drug Trafficking	18%	28%	4%	20%	52%	31%
Other drug offences	0% 2%	0% 2%	0% 0%	0% 5%	0% 8%	0% 90%
Public order offences	0% 2%	0% 1%	0% 0%	0% 2%	0% 3%	0% 96%
CBO/ICO Breach	1%	1%	0%	3%	3%	95%
Bail breach	16%	12%	1%	7%	20%	64%
Justice procedure offences	0% 12%	0% 16%	0% 1%	0% 7%	0% 24%	0% 64%
Drive while disqualified	0% 18%	0% 19%	0% 3%	0% 4%	0% 26%	0% 55%
Drink/driving	4%	5%	1%	5%	11%	86%
Drive without licence	0% 2%	0% 3%	0% 0%	0% 2%	0% 5%	0% 93%
Dangerous driving	1%	0%	0%	1%	2%	98%
Total	5%	5%	1%	6%	12%	83%

- offenders receiving ICOs were significantly more likely to be male: only 6% of ICO offenders were women compared with 15% of CBO offenders (Ross, 1993; Department of Justice, 1993);
- offenders receiving ICOs were also more likely to be Aboriginal: 7% of ICO offenders were Aboriginal compared with 3% of CBO offenders (Ross, 1993);
- ICO offenders were older than CBO offenders: 58% of men were aged between 25 - 49; cf CBO 45% (Department of Justice 1993; Wise, 1993);
- ICO offenders were more likely to be unemployed: 65% ICO offenders unemployed cf 56% of CBO offenders (Department of Justice 1993);
- ICO offenders were more likely to have prior convictions (Wise, 1993);
- more ICO offenders had breached non-custodial orders than offenders on CBOs (Wise, 1993).

In relation to the offence profile, it would be expected that if the ICO were being used then they would be applied to offenders convicted of more serious offences; offences whose profile matches that of the prison population rather than the community-based order population. A study by Ross 1993 of the offence distribution compared the offence distributions for all CBOs made after 22 April. The ICO offences were significantly different to CBO offences the most notable differences were:

- *Break & Enter* offences : 17% of ICOs were made for Break & Enter offences compared with 11% of CBOs;
- *Other Theft* : 18% of ICOs were for Other Theft compared with 25% of CBOs;
- *Driving Offences* (including Exceed BAC, Refuse Breath Test, Dangerous Driving): 12% of ICOs were for Driving Offences compared with 8% of CBOs;
- *Driving Administrative Offences* (including Unlicensed Driving, Drive While Disqualified, Roadworthy and Registration Offences) : 9% of ICOs

were made for Driving Administrative Offences compared with 2.5% of CBOs).

Breach rates and treatment of breaches

Whatever impact ICOs may have on the number of persons imprisoned, that effect would be mitigated by breaches of those orders which would result in those offenders being imprisoned. Estimates of the breach rate vary from 16% to 40%. In relation to those ICOs made between April 1992 and June 1993 and breached in that period, 15% received fines of less than $1,000, 90% received a period of imprisonment and 10% received a suspended sentence.

Taking these data as a whole, if it is estimated that approximately 75 ICOs are made each month, for an average of 6 months each, and possibly 70% of those are diverted imprisonment cases, then with a breach rate of say 30%, and an imprisonment on sentence rate of say 85%, then it would be expected that the ICO saves approximately 16-20 prison places per month.

Youth Training Centre Orders

Victoria is unique in Australia in having a special form of order for youths aged between 17 and 21 years. The modern youth training centre order, which came into operation in July 1965, is a substitutional sanction in that before it can be imposed by a court, the court must be satisfied that a custodial sentence is warranted for the offence. Only then can it substitute detention in a youth training centre for imprisonment. A court considering the imposition of such a sentence must obtain a pre-sentence report on the offender.[64] A youth training centre detention order may be made if the court comes to the view that there are reasonable prospects for the rehabilitation of the young person, or that he or she is particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison.[65] In

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64 *Sentencing Act* 1991 (Vic), s.32(1) & s.96(2). The pre-sentence report will address the question of whether facilities are available, the seriousness of the offence, the prospects of rehabilitation within the institution, the offender's personality and past history, in particular whether there has been prior sentences of imprisonment, the level of risk posed by the offender's detention in a low security institution, his or her mental state, nature and level of addiction, if any, and prior performance within a youth training centre: see Office of Corrections, *Suitability Assessment Criteria for Court Advice Officers*.

65 *Sentencing Act* 1991 (Vic), s.32(1). It could possibly be argued that most young offenders would be impressionable, immature or likely to be subjected to undesirable influences in an adult prison. These pre-requisites are disjunctive, thus

making use of these powers, the courts must have regard to the nature of the offence and the age, character and past history[66] of the offender.[67]

Unlike the pure forms of substitutional sanctions, such as the suspended sentence or the intensive correction order, in respect of the youth training centre order a sentencer is not required first to impose a sentence of imprisonment and then to convert it to a different form of custody. Rather, the legislation states that 'if a sentence involving *confinement* is justified in respect of a young offender a court may make a youth training centre order...' [68] (emphasis added). The distinction is subtle, but important, for it makes the order a hybrid form, somewhere between the 'substitutional' and the 'alternative' form of sanction.

A youth training centre may be made for a maximum of three years if imposed by the County Court or the Supreme Court , or two years if imposed in the Magistrates' Court.[69] The legislation treats youth training centres and prisons as custodial alternatives for younger habitual or serious offenders. Not only are sentencers allowed latitude initially to choose one or the other, there is also a high degree of interchangeability between the two systems. A young offender sentenced to one type of custody may be transferred by administrative direction to the other if the circumstances are thought to warrant such action. In the seventeen to twenty-one year old group, the most common transfer is from a youth training centre to a prison.

The theory is that the centres are seen both as a means by which young offenders are prevented from coming into contact with older criminals in a prison environment and as providing a rehabilitative environment which, through comprehensive educational and training programmes, maximises their chances of avoiding further conflict with the law.

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as long as one of these conditions is met, the court can make an order: *Jarvis and Jarvis* 15/9/92 & 16/10/92. In this case, the maker of the pre-sentence report did not consider that the offender was particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison, but the court was able to draw an inference from the report that there were prospects of rehabilitation.

66 The analogous word used in the earlier legislation was 'antecedents'.

67 *Sentencing Act* 1991 (Vic), s.32(2).

68 *Sentencing Act* 1991 (Vic), s.32(1).

69 *Sentencing Act* 1991 (Vic), s.32(3).

In the sentencing hierarchy, the youth training centre in effect stands higher than the community-based order and the intensive correction order. Thus if a young adult offender has been rejected for either of these sanctions, but could still benefit from participation in the programmes ordered in the youth training centre environment, that order should be preferred to a sentence of imprisonment in the adult system (Richards, 1991).

The so-called 'dual track' system has been called into question over recent years. In its submission to the Victorian Sentencing Committee, the then Department of Community Services argued in favour of the elimination of the system, particularly as responsibility for young offenders was divided between the Office of Corrections, when they were imprisoned, and Community Services Victoria, when they were in youth training centres. They argued that the facilities within the institutions had deteriorated and that, in view of the policy of de-institutionalisation, it was not worthwhile devoting more funds to the centres. Further, they argued, the nature of the youth training centre population had changed. The inmates were being convicted of more serious offences and the emphasis was changing from rehabilitation to containment and security.

The Victorian Sentencing Committee remained firmly in favour of the centres, despite the criticisms, noting the widespread support for the order among judicial officers. It saw the fundamental purpose of sentencing young people in the age group 17-21 to youth training centres as their segregation from adult offenders who may lead them astray. The primary focus of such orders was to rehabilitate the offender rather than simply to impose punishment. In its view, the dual track system was needed to segregate immature offenders from the more mature or adult offenders found in prisons. The Committee concluded the youth training centre should remain a custodial alternative to imprisonment, an option to be exercised in those circumstances where a term of imprisonment would be appropriate but where the court believed that there were reasonable prospects of rehabilitating the offender, or because of his or her immaturity the offender would be subjected to undesirable influences in an adult prison. A period of custody in a youth training centre, it stated, should be seen as equivalent of imprisonment, but simply being directed at achieving different aims. All of the principles applicable to choosing imprisonment, and determining the length of imprisonment, ought to be applied to the determination of the choice of youth training centre and the length of it.

The use of the order

Reference has sometimes been made to the fact that Victoria's imprisonment rate may appear lower than it otherwise would because a substantial number of offenders in the relevant age group who otherwise would be counted as part of the prison population have instead been counted in Victoria as part of the youth training centre population. However, the question has been raised as to whether the existence of the youth training centre order contributes to sentence inflation. In its submission to the Victorian Sentencing Committee, Community Services Victoria argued that the existence of the order in the hierarchy between the community-based order and imprisonment may act to deflect offenders away from the lower order. Testing this proposition has proved difficult.

Information about youth training centre sentences handed down by the courts and populations is inconsistent. However, the following table reveals the growth and decline of this order from its inception.

TABLE 4.16
YOUTHS AGED 17 -21 SENTENCED TO YTC DETENTION BY ADULT COURTS: 1966 - 1994[70]

YEAR	TOTAL	IN YTC AT 30/6
1965-66	194	
1966-67	328	
1967-68	438	
1968-69	439	
1969-70	453	
1970-71	527	
1971-72	509	
1972-73	452	
1973-74	468	
1974-75	486	
1975-76	456	
1976-77	517	
1977-78	444	
1978-79	441	
1979-80	483	
1980-81	337	170
1981-82	299	155
1982-83	348	181
1983-84	518	160
1984-85	507	145
1985-86	561	137
1986-87	566	167
1987-88	705	169
1988-89	600	147
1989-90	582	132
1990-91	568	114
1991-92	481	100
1992-93	285	56
1993-94	285	71
1994-95	316	74

This table reveals that over the three decades of its existence, the use of the YTC order has fluctuated, reaching a high of 705 sentences in 1987-88 and declining from there to 285 in 1993-94. Since the 1991 Act, two youth training centres have closed[71] and currently there are only some 60 - 70 offenders in custody. The current capacity of youth training centres is about 75 places. Victoria's imprisonment rate for young persons is significantly lower than that for other states, as it is for all age groups.

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70 Our thanks to Judith Wright, Masters student, and Lisa Ward, Assistant Director, Juvenile Justice Branch, Department of Justice, for providing these figures.

71 Langi Kal Kal and Winlaton, both in 1993.

The relative decline in the use of the prison appears to be reflected in the relative decline in the use of the YTC.

It is difficult to estimate the notional imprisonment bed savings, if any, that have been brought about by this order. In 1976 Rinaldi (1976:268) estimated that the average length of sentence of a YTC order was about 5-6 months. His analysis of receptions into prisons and youth training centres over the period 1966 to 1974 in relation to young males concluded that they had failed to keep young offenders out of prison. The percentage of young offenders committed to prison did not decline with the establishment of youth training centres. In 1966 22.7% of receptions into prison were aged 16 - 21. This went up to 28.8% by 1974. For every male offender committed to a youth training centre by an adult court, six were sent directly to prison and almost none were transferred to a youth training centre during sentence. It appeared that courts were ignorant of the nature and purposes of the sentence.

Rinaldi's pessimistic conclusion was that if it were indeed true that all those given a youth training centre order in Victoria would have been imprisoned in other states, then they should be counted as part of the prison population, in which case Victoria's rate would not look so low. He called it a dishonest political trick (Rinaldi, 1976:286):

> Victoria's self-vaunted great reform has not succeeded in keeping persons under 21 out of prison: the youth training order is merely a secondary disposition when it is used by adult courts which are today imprisoning proportionately more people under 21 than even before the legislation to eliminate such sentences was enacted.

On the other hand, Biles (1981) argued that even if the number of offenders held in youth training centres were added to the prison numbers, they would not significantly change Victoria's relative standing. In his estimation, they would, at that time, only have added approximately 3 points to the rate of imprisonment per 100,000 of the population. With small number now in such centres, this conclusion probably still holds.

ALTERNATIVE SANCTIONS

As we have conceived them, 'alternative' sanctions are those which a court may use when a prison sentence is not mandatory or when the court is not required to impose a term of imprisonment, but suspend its execution or change its form. Such sanctions are 'intermediate' in the sense that, in the sentencing hierarchy, they lie between imprisonment at the one extreme, and bonds and fines at the other.

Probation Orders

Until its demise in 1986, when the community-based order was introduced, probation was major form of 'intermediate' sanction available to Victorian courts. Probation consisted of the deferral of the imposition of a sentence for a trial period during which the defendant was subject to the supervision and guidance of a person appointed by the court. Proceedings were interrupted prior to imposition of sentence on the offender agreeing to submit himself to the supervisory control of another.

The origins of probation can be traced back to England and the United States law and practices of the mid to late nineteenth century (Fox and Freiberg, 1985; Tulett, 1991), but adult probation in Victoria is as recent as the *Penal Reform Act* of 1956 which also introduced parole.[72] The Victorian legislation was modelled upon similar English legislation and it was partly the satisfactory experience with probation reported in other jurisdictions and the estimated cost savings over the prison which motivated the government to establish an adult probation service (Fox and Freiberg 1985: para 8.203)

Although the earliest forms of probation were the primary alternatives to custodial sentences for juvenile or first offenders, it soon grew to encompass a wide range of offences and offending. Its legal forms drew from the forms of conditional release which today form the lowest rungs of the sentencing hierarchy. These forms of release require an offender to give an undertaking to be of good behaviour and to appear for sentence when and if called upon, but the release is without supervision. Probation developed as a form of supervised conditional release, and from this was created other forms of supervised release which required closer supervision or the

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72 Juvenile parole was available in Victoria from the 1880s, although it was not identical with modern forms of probation. See Chapter 2.

inclusion of more punitive components such as community work. In Victoria, the attendance centre and community service orders were later developments which expanded the range of 'intermediate' sanctions.

The probation order was regarded as one of the most important of the non-custodial measures available to the courts. It could be made in relation to any offence for which a discretionary term of imprisonment could be imposed and it was used for a wide variety of offences. It was used for offences as serious as manslaughter, infanticide, woundings, rapes, robberies, drug trafficking as well as the less serious offences of assault, theft, burglary, deception and criminal damage (Fox and Freiberg, 1985:295). It was considered particularly useful as an alternative to prison where the offender's treatment needs were large, especially for mentally disordered offenders.

Probation orders could be made for no less than one year and no more than five. In strict legal terms, they did not even qualify as a sentence, because the order was made 'in lieu of' any sentence on the charge.[73] Before releasing an adult on probation, the court was required to have regard to 'the circumstances including the nature of the offence and the character and antecedents of the offender'.[74] Unlike a true substitutional sanction, the court was not required first to impose a sentence of imprisonment and to replace it with a probation order. Breach of the order exposed the offender to the risk that he or she could be dealt with afresh for the offence in respect of which the order was made.

Table 4.17 below shows the number of probation orders made over the life of the order and the number of offenders under supervision each year. Although there were approximately 1100 - 1500 probation orders made each year, their impact upon sentences of imprisonment is difficult to estimate. As the data in Chapter 3 indicate, probation came to capture about 16 - 25% of the higher courts sentencing market in its first decade, but did so mostly at the expense of fines and bonds, rather than imprisonment. Because of difficulties with the data, the early effect in the Magistrates' Court is more difficult to gauge.

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73 *Crimes Act* 1958 (Vic), s.508.

74 *Crimes Act* 1958 (Vic), s.508(1).

At the time that the Office of Corrections was established in 1983 there were some 3,161 adults under some form of probationary supervision. There were nearly twice as many adult offenders on probation as there were in prison and in 1981, probation constituted approximately 12% of all penalties imposed by the higher courts.

TABLE 4.17

PROBATION: ADMISSIONS, DISCHARGES AND NUMBERS ON ORDER[75]

YEAR	ADMISSIONS	DISCHARGES	NO AS AT 30 JUNE
1959	1163		
1960	NA		
1961	1375		
1962	1440		
1963	1737		
1964	1676		
1965	1573		
1966	NA		
1967	NA		
1968	NA		
1969	1381		2263
1969-70	1514	1228	2153
1970-71	1456	1222	2181
1971-72	1561	1140	2326
1972-73	1678	1383	2392
1973-74	1502	1423	2224
1974-75	1507	1302	2186
1975-76	1646	1235	2326
1976-77	1824	1277	2632
1977-78			
1978-79	1597	1165	3064
1979-80	1524	1654	2952
1980-81	1513	1775	2690
1981-82	1910	1626	2974
1982-83	1912	NA	3045

75 From Office of Corrections, Master Plan 1983:90.

In the early 1980s concern was growing over the operation of the probation system. Magistrates, judges and correctional administrators were increasingly questioning the value and effectiveness of the probation service which was suffering from staff shortages resulting in an inability to supervise offenders. At that time, approximately 30% of orders were unsupervised and the average period of supervision was about one to two years (OOC Master Plan, 1983:92). Sentencers lacked confidence in the order. A review was commenced by a specially convened interdepartmental committee reporting to the Minister for Community Welfare Services which was to advise upon the continued efficacy of probation as a sentencing option, with reference to its value as an alternative to imprisonment, appropriateness as a penalty for offences and its cost effectiveness. Its report, which was due for completion in mid-1984 was overtaken by subsequent events, namely the introduction of the community-based order which amalgamated the probation order, the attendance centre order and the community service order.

Community Service Orders

The idea of community service as a sanction was introduced to Australia in 1971 in Tasmania, followed by Western Australia in 1977, Northern Territory 1979, New South Wales 1980, Queensland 1981, and South Australia 1982. The first report of the Victorian Sentencing Alternatives Committee in 1979 recommended the introduction of a form of community service order. The legislation came into operation in 1981 and the scheme commenced on a pilot basis in September 1982. It expanded to a state-wide scheme from 1 February 1985 and was abolished on 1 June 1986 with the introduction of community- based orders.

Unlike the attendance centre order, the community service order was not conceived as an alternative means of serving a sentence of imprisonment but as an independent measure. It was a true 'intermediate' sanction, rather than a substitute. Although the orders were available only in relation to imprisonable offences, they were not dependent upon the court passing a sentence of imprisonment and there was nothing in the legislation which indicated that they were meant for cases in which imprisonment was the presumptive sentence. Nonetheless, the Sentencing Alternatives Committee indicated that the order was not intended to be used in place of the fine (1979:14-15).[76] The sanction was regarded as being appropriate to a

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76 However, on the use of the order in default of payment of the fine see below.

wide range of offences, especially those with a record of prior convictions which made imprisonment a real possibility.

The community service order was a sentencing option available for both summary and indictable offences and an offender could be required to perform between 20 and 360 hours of community work at a maximum rate of 20 hours per week. They generated work activities that were almost identical to the work component of attendance centre orders. However, they differed from attendance centre orders in that the former contained no demand that the defendant regularly participate in rehabilitative programmes at special centres in common with other offenders. The introduction of the community service order led to the suggestion that it might either replace or overshadow the attendance centre order. The Sentencing Alternatives Committee commented in its second report (1979:25) that the general similarities of the two orders raised the question whether both schemes should continue to be operative in the state. The Committee's preference, if there was only to be one order, was for the community service order.

In its short period of existence as a separate order, the community service order made little impact upon the sentencing framework. At the end of June 1986, there were 613 persons under the order, whilst at the same time there were 3,899 under probation and 1704 in prison. Table 4.18 shows the total number of persons under order from 1969 to 1995.

TABLE 4.18
NUMBERS ON ORDER
PROBATION AND OTHER ORDERS 1969 - 1995

YEAR	PROBATION NO AS AT 30 JUNE	ACO	CSO	CBO	TOTAL
1969	2263				2263
1969-70	2153				2153
1970-71	2181				2181
1971-72	2326				2326
1972-73	2392				2392
1973-74	2224				2224
1974-75	2186				2186
1975-76	2326				2326
1976-77	2632				2632
1977-78	NA				NA
1978-79	3064				3064
1979-80	2952				2952
1980-81	2690				2690
1981-82	2974	268	25		3267
1982-83	3045	278	-		3323
1983-4	3345	302	42		3689
1984-5	3731	391	226		4348
1985-6	3899	555	613	290	5067
1986-7	1653	4	56	3319	5032
1987-8	461			3962	4423
1988-9	202			3726	3928
1989-90	145			3811	3956
1990-1	59			5309	5368
1991-2				5931	5931
1992-3					5884
1993-94					6275
1994-95					5802

The appeal and potential of the community service order were obvious. The Master Plan Report reviewed the progress of the then relatively new sanction. It reported the results of a study of the order in its first twelve months which had found a relatively low breach rate of 7% of all orders. Corrections staff involved in the scheme estimated that about half of the offenders would otherwise have been imprisoned (OOC Master Plan 1983:99-100)[77] and that the order had been enthusiastically received by the courts, who welcomed it as both an additional alternative to imprisonment and as a sentencing option in its own right (OOC Master Plan 1983:247). The programme was seen as being substantially punitive while at the same time providing the community with some value and the Master Plan report recommended the extension of the program on a state-wide basis, noting that even it were intended to be a complete substitute for imprisonment, and was successful in only half the cases, this would represent a substantial saving to the state.

The Report reported one substantial reservation to the operation of the order. It suggested that the community service order was more likely to become an alternative to the fine than to imprisonment in cases of poverty, noting that: 'If that practice were to become common, the scheme could quickly become overloaded with minor offenders, with a consequent loss of capacity to cater for persons who might otherwise have been imprisoned' (OOC Master Plan 1983:249). This was a prescient observation.

Community Based Orders

By February 1985 both the attendance centre order and the community-service order were fully operational throughout Victoria. While this may have been thought to be an appropriate time to evaluate the operation of both programmes before embarking upon further reform, the then Attorney-General, Mr Jim Kennan decided to push on with further changes.

In May 1985 he issued a Discussion Paper which raised a number of sentencing issues and options for consultation with community organisations before the government formulated its policy. After setting out the history of probation, attendance centre orders and community service orders, the Paper suggested that:

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77 This is probably an optimistic estimate.

> The distinction between attendance centre orders, community service orders and probation orders be abolished; that courts be empowered to impose a community-based corrections order with certain core conditions being imposed; the courts would have the power to impose such further condition as it sees fit in each particular case; and the maximum number of days or hours per year which a court can order to be served by a person on community-based order be extended. (Discussion Paper, 1985:18).

The suggestion of conflating the three previous orders into a single one seem to originate from the fact that they were all being supervised or administered by regionally based personnel (in many cases the same persons in the regional office) and thus it would be administratively simpler to have all the orders contain uniform core conditions and subject to the same administrative procedures. No reason or explanation was given for the suggestion that an increase in the maximum number of hours (or days) per year of community service which a court could impose should be made. Presumably this had to do with the concept that the order would be acceptable only if it had a potential for greater severity in non-custodial measures.

The new order came into operation in June 1986. The Victorian Sentencing Committee described it as follows (1988:para 7.2.22):

> Community based sentences include stringent program conditions that place major restrictions on an offender's behaviour, lifestyle and leisure time and deprive the individual of liberty while allowing him/her to maintain self-sufficiency and family, and social and employment links within the community. Failure to comply with conditions leads to breach action which can result in imprisonment, and programs are strictly supervised to detect such breaches. In effect, the offender's liberty in the community is severely constrained and many offenders find such community based programs as severe, and more demanding than a term of imprisonment. Further, the length of time subject to a community-based order is markedly longer than a term of imprisonment for an equivalent offence. For example, a similar property offence could entail a two-month imprisonment term or a two-year community-based order with core, supervision and other special conditions. In the latter, the individual is subject to conditions of the order and the

intrusiveness of the sanction, for a far lengthier period of time than in the former.

The nature of the order

The order as it exists today is substantially the same as it was when introduced in 1986. However, a number of changes made by the 1991 Act and by further amendments in 1993 which affected the operation of the order.

The order has three pre-conditions. First, the defendant must be convicted, or found guilty, of an offence or offences *punishable* on conviction by imprisonment, or by a fine of more than five penalty units per offence. The nexus with imprisonment is a complex one, but one which has been progressively attenuated. Whereas the attendance centre order was directly linked to the imposition of a sentence of imprisonment, the community-based order originally required only that the offence be punishable by imprisonment, thus altering it from a substitute sentence to an alternative sentence. Although a community-based order may be made in addition to a sentence of no more than three months' imprisonment, such a combination is rare. In 1991, the nexus was further weakened when the order was made applicable to offences which were only punishable by a fine of more than five penalty units.[78] The order was thus available for a wide range of offences, other than the most minor or trivial, in which case, dismissals or adjournments would be more appropriate (Sentencing Task Force, 1989:100).

The second pre-condition is that before imposing an order, a pre-sentence report must be obtained from the Community Based Corrections Branch of the Correctional Services Division of the Department of Justice indicating that the offender is a suitable person for the order, that facilities are available for the order to be implemented and providing advice on the most appropriate program conditions to be attached. No such report is required if it is intended that the community-based order contain only a condition requiring 250 hours or less of unpaid community work, or is to be used for fine defaulters. Finally, the offender must consent to the order and its conditions.

An offender offered a community-based order must be prepared to agree to six core conditions which have to be attached to all community-based orders and one or

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78 This is now found in the second half of the phrase above.

more of seven program conditions as selected by the sentencer. The obligation to observe those conditions continues for the life of the order, provided it does not exceed two years, or unless otherwise varied.

Acceptance of the core conditions is obligatory if an order is to be made. These have the offender agreeing to the following: not to commit an imprisonable offence during the currency of the order; to report to a specified community corrections centre within two days of the order coming into force; to receive visits from a community corrections officer; to notify an officer within two days of any change of address or employment; not to leave the state without the permission of a community corrections officer; and to obey all lawful directions of officers.[79] These conditions provide the bare administrative, supervisory and disciplinary requirements of the sanction. In addition, the court must attach at least one of the seven 'program conditions'.[80] These allow for the individualisation of the community-based order.

- *Community service:* This condition,[81] in effect the successor to the community service order, requires the offender to perform unpaid community work as directed by a Regional Manager of the Correctional Services Division.[82] Its stated purpose is to allow for the adequate punishment of offenders in the community.[83] The maximum number of hours that an offender may be required to perform unpaid community work is set out in the penalty scale found in *Sentencing Act* 1991 (Vic), s.109.[84] The total number of hours to be worked within any one week cannot normally exceed twenty, but can be longer with the offender's consent. This condition is the most commonly used programme condition, with over 80% of orders containing a requirement of unpaid community work.

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79 *Sentencing Act* 1991 (Vic), s.37.

80 *Sentencing Act* 1991 (Vic), s.38.

81 Defined in *Sentencing Act* 1991 (Vic), s.3 and elaborated in s.39.

82 *Sentencing Act* 1991 (Vic), s.38(1)(a).

83 *Sentencing Act* 1991 (Vic), s.39(1).

84 See Chapter 2.

- *Supervision:* This condition, which evolved from probation, requires the offender to submit to the supervision of a community corrections officer.[85] It is the second most commonly attached condition. Its statutory purpose is to:[86]

  > Allow for the rehabilitation of an offender in the community and the monitoring, surveillance or supervision of an offender who demonstrates a high risk of re-offending.

  The supervision condition is intended for use only in relation to offenders who demonstrate a high level risk of re-offending. Such risk may be established by examining the offender's past record, the seriousness and frequency of recent offending and continuing presence of factors which contributed to it.

- *Personal development:* This condition requires the offender to attend for educational or other programs as directed by a Regional Manager for a period of not less than one month or more than twelve months.[87] The statutory purpose of a personal development condition is to:[88]

  > Allow an offender with high needs in areas directly related to his or her criminal behaviour to participate in programs which will address those needs.

  About 14% of offenders are required to undergo a period of personal development.[89]

- *Assessment and treatment:* There are two related conditions, one related to assessment and/or treatment, and the other concerned with on-going testing. The offender is required to undergo assessment and treatment for alcohol or drug addiction, or to submit to medical, psychological or

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85 *Sentencing Act* 1991 (Vic), s.38(1)(b).

86 *Sentencing Act* 1991 (Vic)s, s.40.

87 *Sentencing Act* 1991 (Vic), s.38(1)(e).

88 *Sentencing Act* 1991 (Vic), s.41.

89 Office of Corrections, Victoria, *Annual Report 1991-92*, 25.

psychiatric assessment and treatment as directed by a Regional Manager.[90]

- *Justice plan:* This condition is directed towards intellectually disabled offenders and requires the offender to agree to participate in services specified in a justice plan for such offenders.
- *Residual condition:* The statute allows the sentencer to add any other condition which is considered necessary or desirable, other than one requiring the making of restitution or the payment of compensation, costs, or damages.[91]

A snapshot of the number of conditions imposed upon orders is provided in the following table.

TABLE 4.19
COMMUNITY BASED ORDERS COMMENCED BY CONDITION TYPES: 1994-95[92]

Personal Development s.38(1)(c)	268
Community Work s.38(1)(a)	9569
Supervision s.38(1)(b)	1812
Assessment and Treatment for Drug Addiction s.38(1)(d)	311
Assessment and Treatment for Alcohol Addiction s.38(1)(d)	327
Testing for Drug and Alcohol Use s.38(1)(e)	1097
Unspecified Assessment and Treatment s.38(1)(d)	1237
Psychological or Psychiatric Assessment and Treatment s.38(1)(d)	674
Abstain from Alcohol	15
Medical Assessment or Treatment s.38(1)(d)	120
Other s.38(1)(g)	364

90 *Sentencing Act* 1991 (Vic), s.38(1)(d).

91 *Sentencing Act* 1991 (Vic), s.38(1)(g).

92 Offenders may be subject to more than one kind of order

Place in the sentencing hierarchy

Having absorbed or replaced a wide range of discrete orders, namely the probation order, the community service order and the attendance centre order, the community-based order now occupies a large sector of the sanction continuum between imprisonment and fines. The *Sentencing Act* 1991 (Vic), s.5(6) places the community-based order below any of the forms of imprisonment (including a custodial sentence served in the community under an intensive correction order),[93] but above fines and dismissals, discharges or adjournments.[94] The section states that:

> A court must not impose a community-based order unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by imposing a fine.

In deciding whether to impose a community-based order in the light of the directions in *Sentencing Act* 1991 (Vic), s.5(6), a court is not required to state in open court that it has considered and rejected all non-custodial options. Nor does it have to spell out, in precise terms, its reasons for rejecting other relevant options so long as it appears, from the judgment, that the sentencer's mind has been directed to those matters.[95] The community-based order, is now accepted as a sanction in its own right, providing a significant and proportionately punitive response to offences falling within the mid-range of seriousness. Tables 4.20 and 4.21 show the use of the community-based order by both levels of courts over recent years.

TABLE 4.20
HIGHER COURT STATISTICS 1985 - 94
PERCENT GIVEN COMMUNITY-BASED ORDERS

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93 There may be occasions, however, where a court may not have determined whether a community-based order or an intensive correction order will satisfy the purposes of the sentence. There is nothing preventing the sentencer requesting an assessment for both.

94 For a discussion of the difficulties sentencers originally faced in placing the community-based order in the hierarchy of sanctions, see *O'Connor* [1987] V.R. 496 and Fox and Freiberg, 1986.

95 *O'Connor* [1987] V.R. 496.

TABLE 4.20
HIGHER COURT STATISTICS 1985 - 94
PERCENT GIVEN COMMUNITY-BASED ORDERS

	1985-6	*1987-8*	*1989-90*	*1991-92*	*1993-4*
Total	**14.0%**	**9.0%**	**10.0%**	**11.0%**	**8.0%**
Offence type, most severe penalty					
Homicide	7.0%	6.0%	10.0%	5.0%	4.0%
Culpable driving	10.0%	2.0%	4.0%	3.0%	0.0%
Assault	14.0%	12.0%	10.0%	14.0%	14.0%
Rape	3.0%	4.0%	3.0%	5.0%	4.0%
Other sexual offences	16.0%	10.0%	11.0%	7.0%	7.0%
Indecent assault	22.0%	24.0%	16.0%	19.0%	11.0%
Armed robbery	15.0%	10.0%	10.0%	10.0%	8.0%
Robbery	15.0%	8.0%	13.0%	12.0%	7.0%
Theft	16.0%	7.0%	10.0%	11.0%	5.0%
Burglary	12.0%	9.0%	12.0%	7.0%	3.0%
Other stealing	15.0%	8.0%	5.0%	15.0%	3.0%
Deception	16.0%	11.0%	5.0%	10.0%	7.0%
Property damage	26.0%	15.0%	21.0%	25.0%	13.0%
Drug Trafficking	9.0%	1.0%	4.0%	4.0%	1.0%
Possess/cult cannabis	5.0%	0.0%	4.0%	9.0%	13.0%
Other drug offences	3.0%	5.0%	10.0%	7.0%	6.0%
Public order offences	16.0%	12.0%	18.0%	19.0%	16.0%
Justice offences	0.0%	26.0%	24.0%	0.0%	0.0%

TABLE 4.21
PERSONS SENTENCED BY MAGISTRATES 1990 - 94
PER CENT GIVEN CBO BY OFFENCE

They indicate that the community-based order represents only about 6% of sentences in the Magistrates' Court and less than 10% in the higher courts.

The relationship of the community-based order to suspended sentences of imprisonment is not well defined. Sentencers who see the community-based order as an independent sanction with minimal or no connection with imprisonment will make greater use of suspended sentences of imprisonment when contemplating alternatives to immediate imprisonment. However, others who see the community-based order as still related to imprisonment, but as an alternative to immediate custody, will place it on a par with suspended sentences of imprisonment in terms of severity but with the advantage of providing direct supervision of the offender.

Magistrates used community based orders and suspended sentences with approximately equal frequency. About one in twenty offenders received each disposition. In 1994, 5.1% of offenders received a suspended sentence and 6.2% a community based order. Another 1% received an intensive corrections order. After the 1991 Act had come into force, about half of the offenders convicted of the four most serious offences handled by magistrates (robbery, car theft, burglary and drug trafficking) were given a form of intermediate sanction, a third of those convicted of sexual offences and receiving stolen goods, and a quarter of those convicted of driving while disqualified, assault and theft.

The tables immediately above indicate that in the Higher courts, the community-based order is used most frequently in relation to public order offences, assault, property damage and drug offences.

Persons found guilty of sex offences, even if serious and recidivist offenders,[96] are eligible to be considered for the order, but those displaying severe psychiatric difficulties, or suffering drug or alcohol dependency, or having a long history of property offences are unlikely to be assessed as suitable. Unemployment alone is not

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96 *McCracken* (1988) 38 A.Crim.R. 92.

Part of the reason for the expansion in the use of these orders was the significant development of the services offered by the Office of Corrections. As noted earlier, in February 1985 all services were made available fully state-wide and a properly resourced court advice service was established (Richards, 1991:19). This was part of the Office's plan to ensure that the community corrections programmes provided to the courts were credible and effective and were managed in such a way as to ensure that the courts, government, the community and offenders had some confidence in them (Kidston ,1988:19; King, 1991:103).

Despite its popularity, the community-based order had little impact upon the rate of imprisonment, because most of the sentences that it replaced were sentences of probation whose effect on the imprisonment rate remains open to doubt. In other words, the community-based order was never a real replacement for imprisonment except for those few sentences which were previously attendance centre orders. In addition, this form of intermediate sanction represents only a relatively small proportion of all sentences imposed by the courts.

Between 1985 and 1994, community based orders declined from 14 per cent of sentences passed on offenders to 8 per cent. The offences which had higher than average rates of community sanctions in 1985-6 were generally those where suspended sentences made the most inroads: the property offences, particularly theft, fraud, burglary and other stealing. Assaults were the one offence group where community based orders maintained their market share. Persons convicted of indecent assault and other sexual offences (other than rape) were less likely to get a community sanction in 1994 than they had been in 1985; in part this may have reflect the increasing harshness with which such offences were regarded, and in part it reflects coding changes resulting from the expansion of the definition of rape in 1991.

The use of the order 1992-1995

In response to this subtle sentence inflation and to the tendency of sentencers to regard all of the programme conditions as relevant and useful and so impose all or most of them in the one order, thus creating an increasing burden on community corrections officers, in the late 1980s the Office of Corrections recommended to the Attorney-General's Department that courts be given the power to order community work only: in effect, a return to a form of community service order. Its original

suggestion was that a form of 'community work' bond be introduced as a condition of an adjournment with or without conviction. The reasons behind the suggested change related to the popularity of the community work condition and the perception by many that for many offenders, no other programme was really required. In other words, only a specific, punitive, non-monetary and non-custodial sanction was required, and those offenders for whom intervention and surveillance was needed should be distinguished from the larger group of offenders.

This form of unpaid work order was not a part of the Victorian Sentencing Committee's recommendations, but found its way into the *Penalties and Sentences Bill* 1989 as a separate order to the community-based order.[100] However, the order was restricted to offences at the lower end of the penalty scale[101] and was unlikely to achieve the effect of diverting minor offenders as studies had shown that over 40% of cases dealt with in the Magistrates' Court were offences against the *Crimes Act* 1958 (Vic), the majority of these being property offences which carried maximum penalties far above the level stipulated.

The compromise achieved by the 1991 Act was the creation of a limited form of unpaid work condition within the community-based order itself. In its original form the unpaid work condition could require up to 125 hours of community if that were the only programme condition attached to the order. In such cases, the court is not required to obtain the report normally required from a community corrections officer on the suitability of offenders or the availability of facilities.[102] In 1993, the number of hours of unpaid work which could be ordered in this way was increased to 250. Unlike the normal community-based order, this order ceases when the number of hours is completed.

Another response to the tendency of sentencers to impose too many conditions which were unnecessary or inappropriate was the introduction of a statutory direction for parsimony. Section 38(3) of the *Sentencing Act* 1991 (Vic) states:

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100 See clause 41.

101 Those punishable by imprisonment of not more than six months or by a fine of not more than 60 penalty units.

102 *Sentencing Act* 1991 (Vic), s39(6) & (9).

A court must not impose any more program conditions than are necessary to achieve the purpose or purposes for which the order is made.

Table 4.22 and Figure 4.5 presents the development of the various orders in the immediate pre- and post 1991 Act period.

TABLE 4.22[103]
ICO and CBO: RECEPTIONS AND NUMBERS ON ORDERS 1991 - 1995

YEAR	ICO (receptions)	ICO (on order)	CBO (receptions)	CBO (on order)	CBO.FD (receptions)	CBO.FD (on order)	CBO.CW (on order)	TOTAL ON ORDER
APR 91				4600				4600
MAY				4847				4847
JUNE				4975				4975
JULY				5099				5099
AUG				5198				5198
SEPT				5314				5314
OCT				5385				5385
NOV				5447				5447
DEC				5485				5485
JAN 92				5470				5470
FEB				5467				5467
MAR				5481				5481
APR 92	7	6	552	5403		15		5424
MAY	54	58	689	5500		61		5619
JUNE	60	115	589	5549		100		5764
JULY	72	179	590	5700		103		5982
AUG	67	211	723	5685		82		5978
SEPT	71	267	722	5712		89		6068
OCT	78	306	762	5665		83		6054
NOV	57	310	622	5572		89		5971
DEC	64	324	646	5490		69		5883
JAN 93	37	284	448	5378		46		5708
FEB	74	303	605	5286		45		5634
MAR	94	332	802	5402	14	40		5774

103 Source: Department of Justice, Correctional Services Division, Community-based Corrections Branch.

APR 93	71	350	584	5455	28	52		5857
MAY	69	343	667	5452	9	45		5840
JUNE	94	355	771	5397	128	132		5884
JULY	79	335	328	5335	493	444		6114
AUG	72	328	379	5348	429	665		6341
SEPT	60	304	327	5342	586	927		6573
OCT	66	311	336	5371	643	1192		6874
NOV	84	325	297	3919	697	1243		5487
DEC		311	278	3863	562	1105		5279
JAN 94		303	279	3804	562	1116	1338	6561
FEB		301	786	3758	542	1092	1425	6576
MAR		315	815	3586	851	1198	1456	6555
APR 94		303	512	3480	443	1190	1491	6464
MAY		333	657	3392	722	1206	1585	6516
JUNE		315	599	3306	425	1041	1613	6275
JULY		324	609	3263	458	1026	1678	6291
AUG		301	723	3220	643	1052	1710	6283
SEPT		297	622	3159	1477	1655	1715	6826
OCT		287	589	3134	1233	1908	1731	7060
NOV		297	583	3107	1223	1885	1752	7041
DEC		294	494	3092	595	1527	1718	6631
JAN 95		267	400	2977	594	1429	1630	6303
FEB		262		2913		1387	1620	6182
MAR		273		2881		1236	1627	6017
APR 95		266		2767		1175	1680	5888
MAY		293		2757		1138	1688	5876
JUNE		324		2745		1072	1661	5802
JULY		359		2757		1128	1705	5949
AUG		383		2763		1148	1693	5987
SEPT		387		2789		1165	1664	6005
OCT		360		2824		1193	1665	6042
NOV		360		2855		1218	1665	6098
DEC		365		2920		1244	1634	6163

FIGURE 4.5
ICO and CBO: NUMBERS ON ORDERS 1991 - 1995

As is evident from Figure 4.5, the introduction of the community work only form of the community-based order resulted in significant changes in the composition of the order (Victoria, Department of Justice, 1994): (a) the number of unassessed orders, that is community-based orders with community work only conditions, increased; (b) the number of community-based orders imposed in default of fines increased and (c) there was reduction of orders with supervision requirements as courts utilised supervision for only high risk offenders.

As 'full' community-based orders decreased, the special orders increased, in particular, the fine default community work order. Overall, the number of persons under order also increased. From an average of 5230 under order in the year before the 1991 Act came into force, the number increased to an average of 5821. In the 1994 calendar year, the average number of people under order jumped to 6590 but by 1995, numbers had stabilised at around 6,000 offenders under order. The new orders appear to have resulted in an increase in total numbers under order, with some sentence inflation from the fine, but with a major decrease in the number of full community-based orders.

There has clearly been a move away from fines directly to these short community work orders. These increases in the numbers of orders made have placed severe demands upon the Office of Corrections, which has had difficulty in finding sufficient work for offenders and in supervising them.[104] According to press reports, hundreds of orders had been allowed to expire without the offender completing the required number of hours of service and others had not even commenced. Still others had the commencement of their orders deferred until work or supervision could be found.

It is highly probable that sentencers are using the community work order as a substitute for the fine, in effect short-circuiting the fine default process. Although it is wrong in law to impose a community-based order when a fine is the appropriate

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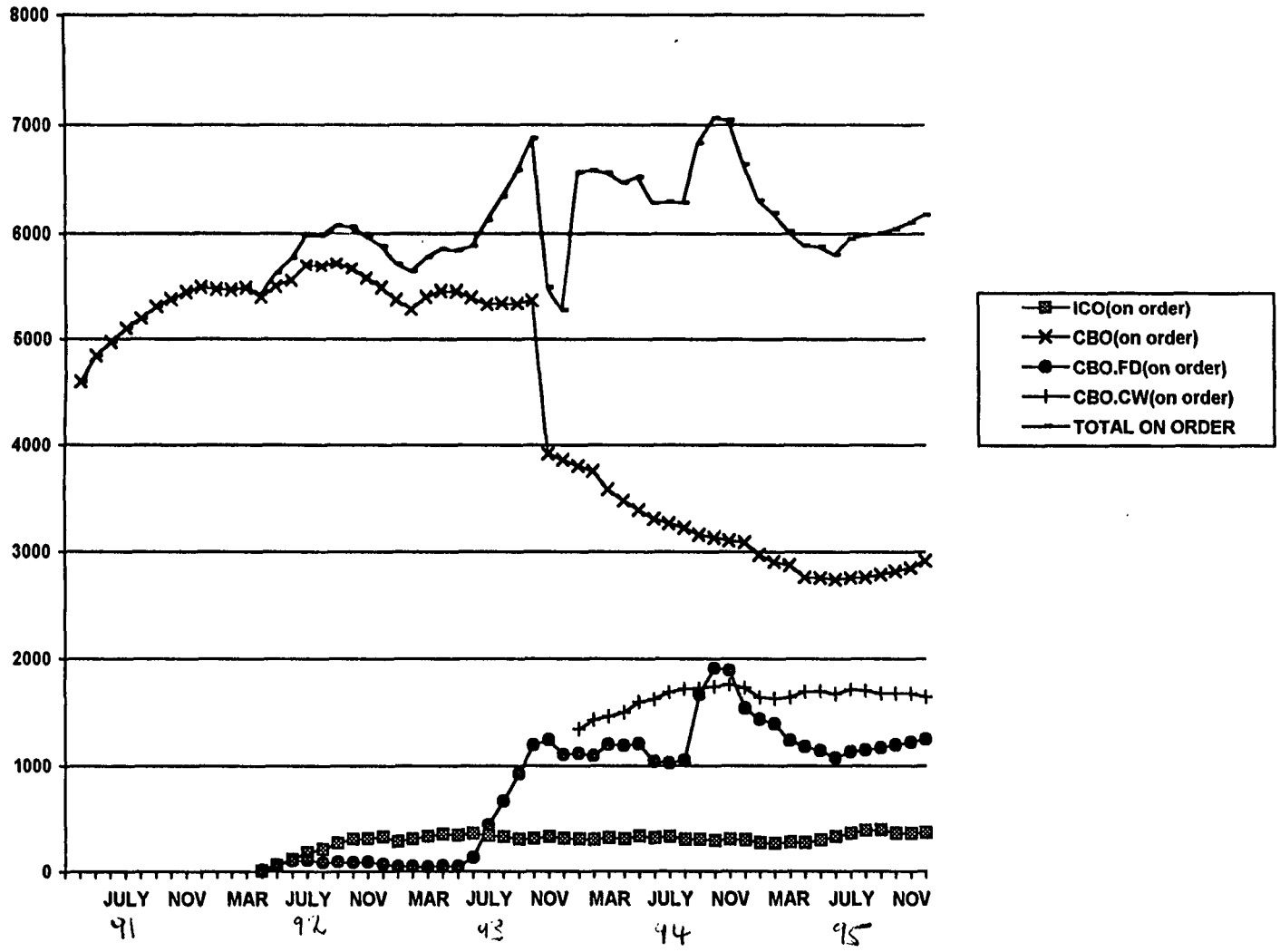
104 See 'Work Order Chaos', *Herald-Sun*, April 7, 1996.

FIGURE 4.5
ICO and CBO: NUMBERS ON ORDERS 1991 - 1995



sanction, sentencers faced with impecunious offenders, for whom a dismissal, discharge or adjournment is considered too lenient a sanction, are likely to impose the community-based order with the community work only condition rather than allow them to escape effectively unsanctioned. The knowledge that in all probability a fine would be converted to community service by the processes of law results in a pragmatic escalation of the sentence.[105] The absence of any requirement of a pre-sentence report is probably also an attractive feature of this disposition, freeing sentencers from the shackles of correctional bureaucracy and speeding up their processing of cases.

Community work orders are generally short and tend to have a higher success rate than the more intensively supervised orders imposed on the general run of offenders. The following table compares success rates across orders. The rate is calculated by taking the expired orders as a total of all discharges. For the purpose of this exercise, cancellations by breach and pending breaches are considered as 'failures'.

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105 This assumes that the sentencing hierarchy, which regards the fine as a less severe sanction than the community-based order, truly reflects how offenders perceive relative severity. It may well be that for many offenders, community work has less impact upon their lives than the payment of a fine, depending upon their financial circumstances. It could be argued that fines and community work are of equal severity, with a court being permitted to choose the appropriate sanction, so long as achieves the purpose or purposes for which the sentence is imposed: *Sentencing Act* 1991 (Vic), s.5(6).

TABLE 4.23
COMMUNITY BASED CORRECTIONS ORDERS DISCHARGED BY PROGRAM TYPE AND DISCHARGE TYPE 1994-95[106]

DISCHARGE TYPE	ICO	CBO	CBO.CW	CBO.FD
EXPIRED	503	2069	2350	6824
CANCELLED BY BREACH	98	563	322	292
BREACH PENDING	156	773	479	741
OTHER				
TOTAL	**805**	**3515**	**3256**	**7962**
'Success' rate	**62.4%**	**58.9%**	**72.1**	**85.7%**

It would appear from these data that the short, focused orders, the community work only orders have a relatively high success rate, while those orders with more requirements, and more intense supervision, and which are targeted at more problematic offenders, have a lower success rate. What is surprising however, is that that community-based orders, on these figures, seem to be more problematic than the intensive correction order.

THEORISING CHANGE

Traditionally, sentencing theorists have conceived the problem of choice dichotomously: will the offender be sentenced to imprisonment or not; the 'in/out' decision. Although this is a crucial decision, in the majority of cases in the Magistrates' Court, it is not the most common decision. In the Magistrates' Court, over 50% of principal offences and over 63% of all offences are disposed of by way of fine or dismissal, discharge or adjournment. Even in the higher courts, only half of all offenders are dealt with by way of imprisonment.

In other words, the decision to imprison may not arise in the majority of cases because the seriousness of offence does not warrant it. More importantly, inter-sanctional changes relating to sentences other than imprisonment are as vital to understanding the relationship between sentences as are the changes between

106 Source: Department of Justice

imprisonment and non-imprisonment. Viewed in this way, not every sentencing choice is a choice between imprisonment and some other sanction, but is a choice between a range of appropriate sanctions. A choice of one non-custodial sanction over another does not necessarily indicate that 'net-widening' has occurred in cases where imprisonment was not a realistic option. As Davies has observed (1993:108):

> ... in the past intermediate sanctions have been presented as alternatives to incarceration. This was a mistake. The use of community services, fines, intensive supervision, home confinement, conditions attached to probation, and routine reporting have existed, but they are not alternatives to imprisonment. They are choices available to sentencers when they seek something other than incarceration, which should be clearly reserved for the more serious offences and offenders. The introduction of this 'secondary' punishment is not an attempt to replace the primary form, but to complement it.

Historically, sentencers seeking to impose proportionate sentences upon offenders have been constrained in their choice. A stark choice between imprisonment and fine left the courts with little room to manoeuvre. The increasing use of discharges provided more choice at the lower end of the scale, but also increased to total width of the range. As more intermediate sanctions are introduced, the greater the calibration between offence and sanction, and the greater the movement between sanctions. That includes not only movements away from imprisonment, but away from any existing sanction. Understanding shifts between qualitatively different sanctions 'requires an understanding of both the objective legal and subjective psychological conceptions of sanctions and how sentencers move between them' (von Hirsch 1993).

Sentencing 'space'

The *Sentencing Act* 1991 (Vic) requires courts to impose the least restrictive sentence necessary which will achieve the purpose or purposes for which the sentence is imposed. In coming to terms with this form of guidance, they have held that where an offence is very serious, they do not have to consider and reject openly every sanction from the bottom of the hierarchy to the top, before imposing a sentence of imprisonment, so long as it appears from the judgment that the sentencer has

turned his mind to those alternatives.[107] However, they have held that these principles must be applied irrespective of the sentencer's personal opinion was as to the relative severity of the sanction.[108]

How sentencers conceive the range of sanctions is little understood. The *Sentencing Act* 1991 (Vic) creates a form of hierarchy or ladder, whereas others have argued that the range can be represented less as a ladder than a smorgasbord (Freiberg and Fox; 1986). These different conceptions are important, as they can provide an insight into how sentencers move between sanctions. The orthodox sentencing 'alternatives' theory holds that when provided with a sanction which is legislatively contiguous with imprisonment, either in terms of objective relative severity or by it being made a specific alternative to imprisonment, a sentencer should, in an appropriate case, move one step down the hierarchy, to that sanction. Others hold that sentences can be interchangeable, provided that the punitive content is equivalent (Tonry 1996:131).

Morris and Tonry (1990) and others have argued in favour of a sentencing system which sanctions can be regarded as interchangeable and used in combination. However, modern United States guideline systems too often draw unjustifiably stark distinctions between custodial and non-custodial sanctions. Most writers agree that the greatest ambiguity exists near the in/out line, but all agree that it is the overlap between sanctions which is of great importance. Morris and Tonry observe (1990:41):

> There can be no rational or workable hierarchy of punishments in which incarcerative and intermediate punishments do not overlap. Important jurisprudential issues are raised by the notion of interchangeability (how interchangeability between imprisonment and other punishments is to be justified, how the limits are to be set, whether rough equivalence between punishments is to be measured in suffering, intrusion on autonomy, or function).

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107 *O'Connor* (1986) 23 A.Crim.Rep. 50; see also *O'C* (1989) 41 A. Crim. R. 360.

108 *Hendy v Kraft* (1990) 55 S.A.S.R. 345. The magistrate in this case had said that in his view the idea that all other measures sentencing measures should be utilised before imprisonment was totally out of keeping with the expectation of the community. The Supreme Court of South Australia called these comments 'impertinent' and suggested the magistrate study the legislation more closely.

Later in their book they observe (1990:93):

> [T]he measure of punishment is not its objective appearance but its subjective impact. Our goal is to achieve a system of interchangeable punishments that the state and the offender would regard as comparable in their punitive effects on him... [W]e believe that non-incarcerative ... sentences can be devised that can meaningfully be said to be equivalent to imprisonment, and that these can be deployed within a system of guided discretion that maintains proportionality and rough equivalence between punishments imposed on different offenders.

Thus fines can be interchanged with community service or house arrest or boot camps. The idea is that the nature of the sentence is less important than its effect on the offender and that sentences can be imposed in terms of 'punishment units', which a sentencer can impose in various forms.

Sanction hierarchies

The issue of how to grade sentencing orders has long been problematic in sentencing theory (Freiberg and Fox, 1986; Wasik and von Hirsch, 1988; Morris and Tonry, 1990). The increasing acceptance of more rigorous desert models has, over recent years, resulted in a closer analysis of the relationship between offence seriousness and penalty across the entire range of summary and indictable offences. Issues of the relative severity of sanctions, of sanction equivalence and sanction additivity have absorbed more appellate time as the range of sentencing options proliferates and the question of disparity more pressing. Internationally, the ranking of sanction severity is coming to be perceived as being as important as the ranking of offence seriousness (Junger-Tas, 1994:8).

The range of sentencing orders available to Victoria courts is set out in *Sentencing Act* 1991 (Vic), s.7, set out in Chapter 2. The powers of the court to discharge offenders, to impose a community-based order, a suspended sentence or an intensive correction order are found in the *Sentencing Act* 1991 (Vic) and apply, unless specifically excluded, to all offences. Unless otherwise stated, a fine may be imposed instead of, or in addition to, imprisonment, if imprisonment is the only nominated penalty.[109] In general, therefore, most sentencing orders are available in

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109 *Sentencing Act* 1991 (Vic), 49.

relation to most offences. Only two are specifically nominated as 'substitutes' for imprisonment: the suspended sentence and the intensive correction order. In both cases, the sentences must first impose a sentence of imprisonment before invoking the powers to mitigate the sentence.

This legislative provision of alternative or substitute measures does not necessarily mean that they are of comparable severity and to be treated as interchangeable responses to crime (Sentencing Task Force 1989:28). As the Sentencing Task Force noted (1989:28), while Parliament could, in theory, enforce on the courts a concept of comparability of sanctions by deeming on form of sanction as equivalent to another, it must recognise that a court should not be prevented from choosing one sanction over another if the sentencer was of the opinion that it was better suited for the offender in the particular case. Thus, in Victoria, the penalty structure indicates that a range of sanctions is available in appropriate cases and that lesser forms of sanction are available for less serious examples of the crime.

The sanctions are linked not only horizontally, that is, by alternative or substitution, but also vertically, in cases of breach. The Victorian legislature has, over the years, been acutely conscious of the need to steer a course between the need to ensure that legal sanctions are not ignored or flouted on the one hand, and the dangers of sanction escalation on breach, on the other. Breaching law and practice provide a useful insight into the relationship between sanctions by indicating:

- what sanction might be contiguous to the primary sanction in the hierarchy and
- what the original or 'true' sanction might have been had a substituted sanction, such as a suspended sentence or an intensive correction order not been imposed.

The *Sentencing Act* 1991 (Vic) has built into it a large degree of flexibility in its breaching provisions. At the lowest level, the sanction for breach of a conditional or unconditional adjournment is a recall to the sentencing court for re-sentencing. A fine default invests the court with a wide range of options, from community work, seizure of property to imprisonment. Breach of a community-based order also enables a court to re-sentence the offender anew, albeit that it must take into account the extent to which the offender has complied with the order prior to its cancellation. Even breaches of suspended sentences and intensive correction order do not result

in automatic imprisonment, but vest the courts with a degree of discretion as to whether, and what form, imprisonment might take.

Severity

'Severity', in sentencing is, of course, subjective. What is severe to a sentencer may not be perceived as such by the offender being sentenced. What the public perceives as severe may not accord with the practices of the criminal justice system. Objectively, sentencing severity can be conceived of in two ways.[110] The first is to consider the *percentage* of offenders in particular class of offence who receive a sentence of imprisonment. Thus, a 100% imprisonment rate for offences such as murder, rape and drug trafficking, would be an indication that this was regarded as a very serious offence. The second method of conceiving seriousness is to take into account the *length* of sentences of imprisonment received. In this case, although not every person may be imprisoned, one can look at the relative severity within that sanction to determine seriousness. Clearly, each measure alone is inadequate. What is needed is a combination of measures, both qualitative and quantitative, but particularly a measure which can identify changes in the relative use of sanctions, which can then stand, perhaps, as a proxy for both the relative seriousness of offences and the relative standing, or position, of sanctions within an individual sentencer's sentencing space, or the relative place of that sanction in the collective sentencing hierarchy.

A severity index such as this is valuable for the purposes of this study such, for it may provide an insight into the nature and extent of inter-sanctional changes. It may reveal which sanctions are interchangeable with which, how much substitutability is possible and, ultimately why 'alternatives' to imprisonment may not function as intended. If, for example, the suspended sentence is considered by sentencers to be a functional equivalent to the dismissal, discharge or adjournment, rather than to imprisonment, as Parliament intended, it might explain why the use of bonds has declined so precipitately, but imprisonment less so. If the community-based order, or at least the community work component is regarded as an alternative to the fine, rather than to imprisonment, this may explain the small

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110 Accepting that imprisonment is the most severe sanction.

decline in the use of fines and the relatively small impact that the community-based order, and the probation order before it, had upon imprisonment rates.

Sanction choice

There are a number of factors which indicate how sanctions are used and how transitions are made, or not made, between sanctions. These include the range and nature of sanctions available to the sentencer, the statutory requirements of the sentence, offence and offender characteristics and the execution of the sentence itself.

Range of available sanctions

As we have discussed in Chapters 2 and 4, prior to the introduction of probation in the mid-1950s, the sentencing choices available to the courts were relatively limited. Movements between sanctions required relatively large leaps in terms of sentence severity. From the early part of this century, reductions in the use of imprisonment were concomitant with increases in the use of fines and dismissals. In Chapter 3 we saw the direct relationship between the decreasing use of prison sentences by the higher courts (expressed as a percentage of all sentences) and the increase in the use of the fine. With the increasing use of bonds, from the 1930s onwards, the increasing use of bonds complemented the decline in prison use by magistrates. The introduction of probation in the 1950s had a lesser impact on imprisonment, as it began to operate in a more complex environment. With the growth of modern sentencing options in the 1970s and 1980s, movement between sanctions was even less as the relative 'market shares' of the sanctions had begun to stabilise. In other words, as the number of sentencing options increases, the less likely it is that major changes will occur.

Possibly the major exception to this was the introduction of the suspended sentence in 1986, which captured over one-third of the sentences in the higher courts, but cannibalised sentences at both ends of the severity spectrum.

Offence characteristics

Sentences are not imposed in a vacuum. Not all sentences are seen as appropriate for all offences. Serious crimes generally warrant serious sanctions and some sanctions, no matter how severe they appear, may be regarded as inappropriate for some offences. In *The Future of Imprisonment,* Morris (1974) argued that imprisonment should only be used when any lesser punishment would depreciate

the seriousness of the crime, when it is necessary for special or general deterrence or when other, less restrictive sanctions have been frequently or recently applied (see Morris and Tonry, 1990:13). Thus while a very heavy fine may be regarded as suitable for a major white collar crime, it will not be regarded as appropriate for the offence of rape, even though nothing in the law prevents a fine being imposed for rape. Similarly, one would not expect a community-based order to be awarded for murder.

In a recent article examining the limits on the use of intermediate sanctions in Canada, Doob and Marinos (1995) have argued that the failure of intermediate punishments to replace imprisonment to the extent that was expected relates more to the *nature* of the punishments themselves than to their *severity* (1995:414). Their contention is that punishments serve a variety of functions, and that imprisonment, for example, is a particularly effective denunciatory sanction. It is therefore more appropriate for some offences which require emphasis on this element in comparison to others. Punishments, they suggest, vary qualitatively as well as quantitatively. Some punishments are not considered, by either the courts or the public as 'appropriate' for certain offences, and thus will not be used, whatever the objective rationale for their application. Therefore, (Doob and Marinos, 1995:214):

> in order to understand which punishments are appropriate, one has to examine them within the particular social context in which they are imposed.

In order to test their theory on the limitation of the application of certain sanctions, Doob and Marinos examined the pattern of sentences imposed upon young offenders in Canada charged with federal offences. They found, not unexpectedly, that as the apparent severity of offences increased, the proportion of those receiving intermediate punishments (fines, compensation orders or community service orders) increased. However, more interestingly, they found that for some offences, some intermediate sanctions, such as the fine, were used more frequently than others and the same was true for community service orders (Doob and Marinos, 1995:428-9).[111] For example, fines were regarded by sentencers as being more appropriate for less serious property or violent offences, but inappropriate for sexual assaults.

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111 Leaving aside the question of the ability to pay the fine.

In an attempt to explore this relationship between offences and sanctions, the sentencing patterns of the Victorian Supreme Court and Magistrates' Court were examined. Earlier in this chapter, we examined the larger movements between sanctions over a number of years and have seen the decline of bonds and fines and the simultaneous growth of the suspended sentence. However, these movements over time do not indicate how sanctions change according to the nature and seriousness of the offence.

The following tables rank a number of the most commonly prosecuted or important offences in the higher courts of Victoria by the relative use of imprisonment. Strict hierarchy theory would predict that as sentencers step down the seriousness ladder, they would tend to use more sanctions closer to the sentence next above until finally, at the lowest end of the range, they would use only bonds and fines. However, the reality is different.

TABLE 4.24
HIGHER COURTS: RELATIVE SEVERITY OF SENTENCES BY OFFENCE 1993
SENTENCE FOR EACH OFFENCE

OFFENCE	IMP %	AV LENGTH	SUSP %	ICO %	CBO %	FINE %	DDA %
MURDER	100	17y	-	-	-	-	-
MANSLTR	96	5y	-	-	-	-	3
INCEST	96	3y10m					
AGG RAPE	95	8y7m	5	-	-	-	-
RAPE	92	4y5m	5	-	1	-	-
DRUG TRAFF Opiates	88	3y8m					
CULP DRIV	79	3y3m	15	3		3	
SEX PEN 10-16	77	2y4m	8	-	1	1	13
OBT PROP	75	1y5m	10	-	11	-	3
SEX PEN < 10	75	3y2m	4	6	10	-	6
ARMED ROBB	68	3y11m	21	2	3	-	3
BURGLARY	67	1y4m	20	2	7	-	4
THEFT	67	1y1m	20	2	6	1	3
INT CAUSE SI	61	2y9m	19	1	13	-	5
AGG BURG	58	3y8m	30	1	7	-	1
HANDLING	54	8m	31	2	3	8	2
ROBB	53	2y5m	38	1	1	-	3
RECK CA INJ	52	1y1m	30	7	-	4	7
INT CAUSE INJ	49	1y	18	1	20	2	9
NEG CAUSE SI	47	1y9m	16		16	16	5
RECK CAUS SI	41	2y1m	32	2	19	1	3

It is apparent from this table that the length of sentences of imprisonment imposed by the courts does not necessarily accord with the percentage of sentences which receive a sentence of imprisonment. In other words, it is not the case that the less likely an offender is to receive a prison sentence, the shorter the likely sentence. Thus the average length of imprisonment for manslaughter, five years, with a 96% likelihood of imprisonment, is less than the average length of imprisonment for aggravated rape, which is eight years seven months, but has an imprisonment 'rate' of 95%. Similarly, robbery, with an imprisonment rate of 53%, carries an average length of two years five months, compared with the offence of handling, the average length of which was eight months, but with a similar imprisonment rate (54%).

Secondly, it is apparent that for some offences, substitutional or alternative sanctions are considered inappropriate. Sexual offences against minors are less likely to result in the imposition in a suspended sentence than offences against property, although the fact that an offence involves some element of violence or potential violence does not disqualify it from the chance of a suspended sentence. Thus armed robbery, aggravated burglaries and burglaries, robberies and recklessly causing injury all have high rates of suspended sentence. This may indicate that for some offences, the substitutional effect of the suspended sentence is high.

Thirdly, it is clear that the community-based order plays relatively little part in the sentencing armoury of the higher courts, it being a significant option only for the lesser offences of personal violence (intentionally, recklessly and negligently causing serious injury and recklessly causing injury). Finally, the fine is seen as inappropriate for almost all the most serious offences in the higher courts.

A similar exercise was carried out in respect of the twenty most frequent offences heard in the Victorian Magistrates' Court.

TABLE 4.25
MAGISTRATES' COURT: MOST FREQUENTLY HEARD OFFENCES 1993
PERCENTAGE PENALTY FOR EACH OFFENCE[112]

OFFENCE	IMP	SUSP	ICO	CBO	FINE	DDA	LIC DISQ
BURGLARY	33	15	0	25	5	6	
UNLFL POSS	22	11	4	17	32	10	
DRIV DISQ	22	15	4	5	24	0	24
FAIL ANS BAIL	22	12	0	16	29	15	
THEFT	20	12	1	28	15	15	
OBT PROP	18	21	4	37	8	8	
HANDLING	17	17	3	25	20	14	
INT CSE INJ	14	20	3	18	28	13	
ASS POLICE	11	6	1	12	56	13	
INT DEST PROP	10	11	2	39	19	16	
ASSAULT	10	8	2	15	42	21	
UNL DRIVE	6	4	1	8	59	3	
POSS DR DEP	6	4	1	10	41	37	
USE DR DEP	5	2	1	10	44	40	
EXC PCA > 3 HR	4	3	1	0	2	9	76
DRUNK IN PUB PLACE	0	0	0	0	30	64	
CARELESS DR	0	0	0	0	61	9	29

This table reveals even more clearly the offence sensitivity of sanctions. Drug offences (unlawful possession, possession of drugs of dependence, use of drug of dependence) appear to be 'fineable' offences (32%, 41% & 44%) respectively, whereas burglary, theft and obtaining property by deception are lesser candidates for the fine. In these cases, the community-based order seems to be the more popular choice. Although lower order sanctions such as fines and bonds seem

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112 Percentages are calculated in relation to total convictions, not total charges. Percentages do not total 100% as some minor sanctions, including licensing sanctions have been omitted. Imprisonment percentage excludes youth training centre orders and mixed imprisonment and suspended sentence, as the nature of the exercise requires a clear distinction to be made.

related, a fine is highly likely for the offence of unlicensed driving, but a bond seems inappropriate. A similar scenario applies to the offence of careless driving (61% fine cf 9% bond).

The suspended sentence appears to be operating as a suspended sentence across the range of offences, but is particularly popular for the offence of driving whilst disqualified, where it operates as the legislative equivalent of a sentence of imprisonment for the purposes of a mandatory sentence for second or subsequent offences.

Both the Magistrates' Court and the Higher Court data indicate that the intensive correction order has had only limited success in its stated aim of providing a substitutional sanction for the courts. Although it is significantly more intrusive than the suspended sentence, it is in fact the less punitive sanction which has proved to be the more popular.

These findings tend to support Doob and Marinos' findings that it is not possible automatically to substitute any intermediate punishment for imprisonment as a way to avoid using imprisonment (1995:430) and that more complex models are required to understand the use of intermediate sanctions.

Other factors

The legislative design of the sentencing structure will also determine how sanctions will operate. If an 'alternative' sanction is only available in respect of imprisonable offences[113] it will not operate in relation to offences which are punishable only by a fine. Its scope will be limited. If the legislation requires a court to actually impose a sentence of imprisonment before substituting it, it may limit its use. Some sanctions, such as the youth training centre order, may be limited to certain age groups.

Implicit sentencing hierarchies are seen to operate in relation to the progress of offenders through the criminal justice system. Young offenders will be given the benefit of their youth, so that courts will strive to avoid the prison. However, offenders who are persistent in their offending, who breach or flout previous orders, or who have shown their unwillingness to carry out orders such as community service may find that their sentences escalate with each appearance. As we have

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113 For example, until the *Sentencing Act* 1991 (Vic) a community-based order could only be imposed in respect of offences punishable by imprisonment.

noted previously in this chapter, suspended sentences are favoured in respect of offenders with no, or few prior convictions, whereas intensive correction orders are more commonly used in respect of recidivist offenders who might otherwise have received an immediate sentence of imprisonment.

The relationship between the primary sentence and the default provisions will also be relevant in the determination of sentence. This is most evident in the operation of the community work only order and the community work in default of fines provisions. It has been speculated that these sanctions have become popular because, if it is known to the court that an offender will not be able to pay a fine and is likely to undertake community work in default, the court may impose community work as the primary sanction to pre-empt the default process.

Finally, one should not underestimate the influence that the execution of the orders has on sentencers' choices. If the facilities to carry out a sentence is not available, a court cannot impose it. In Victoria, for some years, certain sanctions were offered only in some regions, often by way of trial, sometimes because of resource constraints. What then appears as a massive increase in the use of sanction may be due to the fact that it has become available on a state-wide basis.

Similarly, some sanctions may decline if sentencers lose faith in the executive arm of government. If services are not provided, if supervision is absent, if offenders are not returned to court on breach and if programs are understaffed, sentencers will turn to other sanctions. The failure of the intensive correction order to find a significant place in the sentencing range is a clear indication of this phenomenon. The failure to provide appropriate programs for offenders clearly in need of them has turned sentencers away and forced them to find other sanctions. Whether they be the community-based order, the suspended sentence or the prison is not clear. What is clear is that the form of a sanction, without any substance, will wither and fail without support. That failure should not be seen as a failure of the sanction itself, or how it was conceived, but of the government which is responsible for it.[114]

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114 The same problem is apparent in relation to conditional suspended sentences for alcoholic and drug dependant persons. The failure to provide facilities for such offenders,and indeed, the closing of a number of facilities because of the alleged fiscal crisis of the state, has meant that few such orders are made.

CHAPTER 5

FINES AND 'BONDS'

FINES

Monetary sanctions have long been used as a punishment. During the Middle Ages, fines together with penance represented the major forms of punishment used in Europe (Rusche & Dinwiddle, 1978). In the seventeenth century in England, fines were used extensively extract money from disadvantaged groups (Searle, 1986; Manning, 1975). The Church made use of fines as well, whether in the form of tithes or indulgences.

From Victoria's earliest days fines were one of the major sanctions for minor offences dealt with by courts of summary jurisdiction, to which they have been largely confined. Today, the fine plays a central role in the administration of criminal justice in Victoria. Each year some 2.5m fines are imposed by way of infringement notices with a face value of approximately $150m (Fox 1996). In the Magistrates' Court, nearly 45% of all sanctions imposed are fines. In 1991-92 115,251 fines were imposed by the Magistrates' Court with a total value of approximately $42.7m. However, only $19m of that amount was collected, giving an overall 'effectiveness' rate for that sanction of 44%. The large majority of fines are imposed for traffic offences, blurring the distinction between 'real' crimes and administrative infractions. Most citizens do not commit 'real' crimes, but nevertheless come into contact with the criminal justice system through the fining mechanism.

The jurisprudence of fines is an impoverished one. If the suspended sentence has been invisible, the more ubiquitous sanction of fine has merely been 'neglected' (Bottoms 1983). It is a sanction whose penal impact tends to emerge more in its breach than in its imposition. The very high rate of non-compliance with fines, far higher than any other sanction, is a cause for concern, not only for its fiscal implications for governments, but for the criminal justice agencies responsible for their enforcement. Depending upon the nature of the breach hierarchy, non-payment of fines will affect prisons, community-based corrections and the office of the Sheriff.

In the first part of this chapter we examine the changing use of the fine in Victoria and the changing mechanisms for its enforcement.

Imposition of fines

The fine is generally regarded as regarded as one of the more flexible, humane and less costly of the unsupervised dispositional sanctions available to the courts. While it is considered to be unequivocally punitive it is readily adaptable to reflect differing degrees of wrong-doing (Morgan and Bowles, 1981; Young, 1989; Ashworth, 1992:252). From an administrative point of view, fining is regarded as an inexpensive sanction, with revenue generation an increasingly important secondary advantage. On the other hand, the actual costs of fine imposition and collection are not known and to raise revenue in this manner frequently involves enrichment of the state to the detriment of victims since fining reduces the defendant's assets available for victim compensation.[1]

The 1991 Act made a number of changes in the way sentences were to be imposed:

- all courts were given the power to make non-conviction fines;
- courts were given the power to impose one fine for multiple offences;
- the place of the fine in the sentencing hierarchy was more clearly defined;
- default provisions were streamlined.

Fines in the sentencing hierarchy

In Victoria, if a person is found guilty of any summary or indictable offence, the court may fine the offender in addition to, or in lieu of, any other permitted punishments.[2] There are numerous statutory provisions which allow for the imposition of both a fine and a term of imprisonment as punishment for the same offence. The fact that these sanctions may be imposed either as alternatives or simultaneously is reinforced by the *Sentencing Act* 1991 (Vic), s.49(1) and the penalty scale contained in s.109(3) which allow the offender to be fined 'in addition to or instead of' imprisonment or any other penalty to which the offender may be liable.

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1 cf. *Sentencing Act* 1991 (Vic), s.50(4) (preference to be given to restitutional compensation over a fine if offender has insufficient means to pay both restitution or compensation and a fine).

2 *Sentencing Act* 1991 (Vic), s.49(1). The fine may be imposed with or without conviction.

Section 5(3) of the *Sentencing Act* 1991 (Vic) requires a court not to impose a sentence more severe than that necessary to achieve the purpose or purposes for which the sentence is imposed. Furthermore, in the hierarchy of sentences contained in s.5(3), s.5(7) places the fine at almost the lowest level of the hierarchy by directing courts not to impose a fine unless they consider that the purpose or purposes cannot be achieved by a dismissal, discharge, or adjournment. The fact that the Parliament of Victoria rationalised and markedly increased the severity of fines when enacting the *Sentencing Act* 1991 and expressly directs that imprisonment is to be used as a sanction of last resort[3] is a clear manifestation of its policy of encouraging courts to regard fines as an alternative sanction of great potential power (Sentencing Task Force, 1989:87). Although there are difficulties in comparing one sanction type with another, particularly those as distinct as imprisonment and fine, their traditional coupling requires the relationship to be taken at face value as possible alternative sanctions. As the Sentencing Task Force observed (Sentencing Task Force 1989:88):

> If, as in the past, the legislature is going to allow a substitute maximum sentence in the form of a fine, that monetary exaction must have the potential to reach a level which, though it acts upon an offender's goods and chattels, also has a similar impact on their psychological well-being, personal liberty and economic autonomy. . . . . We are . . . of the view that it is simplistic to demand a direct correlation between the maximum fine penalty and the maximum imprisonment because they are not set side by side in legislation in order to be strictly comparable. The fine is there to extend the range of sentencing options from which a judge or magistrate can make a selection, and is there to deal with different types of case.

A fine may be imposed simultaneously with a prison term in order to force the disgorging of any fiscal benefits derived by the offender as a result of the offence.[4] Though the courts have been adamant that the wealthy should not be given an opportunity of buying themselves out of being sent to prison,[5] '[t]he sentencing judge may, by imposing a fine on an offender who is able to pay, feel able to reduce

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3 *Sentencing Act* 1991 (Vic), s.5(4).

4 *Sentencing Act* 1991 (Vic), s.50(5)(b).

5 *Markwick* (1953) 37 Cr.App.R. 125; *Sgroi* (1989) 40 A.Crim.R. 197, 200.

the sentence of imprisonment which would otherwise be imposed. He may feel that this is desirable in the particular case and that such an order best achieves the purposes of punishment in that case'.[6] This is supported by the direct 10:1 relationship between penalty units and months of imprisonment contained in the penalty scale found in s.109 of the *Sentencing Act* 1991 (Vic). It was designed to indicate to sentencers the legislative view of the 'exchange rate' between these two forms of sentence when they were being used alternatively or simultaneously. A sentencer considering the imposition of a combination of fine and imprisonment is required, under s.50(1) of the *Sentencing Act* 1991 (Vic), to take into consideration the financial circumstances of the offender. If it appears that the prisoner is without the means of paying the fine, or that the only effect of imposing the fine will be to increase the length of the custodial term to be served, then a fine in combination with a sentence of imprisonment ought not to be imposed.[7] Fining in combination with imprisonment would only ultimately produce a disproportionately severe prison sentence.[8]

So long as the level of fine available to the court is sufficiently high to accommodate the gravity of the crime, a fine may legitimately be used as punishment for an imprisonable offence. There is no restriction on the use of a fine as appropriate punishment for any class of offence or crime, save level 1 offences.[9] The fine need not be reserved for cases in which a prison sentence could not, on the facts and in the fair exercise of discretion, be imposed.[10] In *Wilhelm*,[11] Walsh J. observed in respect of a fine imposed in relation to an extortion attempt:[12]

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6 *Belcher* (1981) 27 S.A.S.R. 46, 49 per King C.J.

7 *Rogers* (1987) 8 N.S.W.L.R. 236, 240 per Street C.J

8 *Belcher* (1981) 27 S.A.S.R. 46, 51.

9 *Sentencing Act* 1991 (Vic), s.109(2). This applies to murder, *Crimes Act* 1958 (Vic), s.3 and treason.

10 *James* (1985) 14 A.Crim.R. 364, 366; *Papworth & Papworth* (1988) 36 A.Crim.R. 24 (substantial fine may be appropriate for serious offences).

11 (1988) 39 A.Crim.R. 469, 473.

12 In this instance the Court of Criminal Appeal decided that a fine of $30,000 imposed upon a defendant with no criminal record was insufficient and substituted a sentence of nine months' imprisonment.

> Fines are generally used in cases where a deterrent or punitive sentence is necessary, but either the inherent gravity of the offence is insufficient to justify a sentence of imprisonment, or the presence of mitigating factors justifies the sentencer in avoiding a sentence of imprisonment. The first consideration for a sentencer contemplating the imposition of a fine is whether the offence and surrounding circumstances require the imposition of a custodial sentence.

As has been seen in Chapter 4, fines are rarely used in the higher courts. In that jurisdiction, the level of substitutability of the fine for imprisonment is very low. Though the legislature places heavy reliance on the fine as a sanction, legislation or case law specifically defining the principles which are to govern the exercise the discretion to make use of this particular sanction is sparse. There are governing principles of a general nature in s.5, s.7 and s.8 of the *Sentencing Act* 1991 (Vic). The division dealing with fines contains, in s.50, further general guidance. It identifies as relevant the financial burden the fine may impose upon the offender,[13] the fact that confiscation, restitution or compensation orders may be made,[14] and that any loss or destruction of, or damage to, property suffered by a person as a result of the offence may be taken into account in setting the fine, as well as the value of any benefit derived by the offender as a result of the offence.[15] In general, principles of sentencing dictate that an appropriate level of a fine within the statutory limits for the particular offence is one determined by the gravity of the offence, after allowing for any mitigating considerations, with the heaviest fine being reserved for the worst possible case.[16]

The use of the fine

Magistrates' Court

Magistrates use fines extensively for a range of offences and offenders. In 1994, just over half of all offenders convicted by magistrates were given a fine as the most

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13 *Sentencing Act* 1991 (Vic), s.50(1)&(2)

14 *Sentencing Act* 1991 (Vic), s.50(3)&(4).

15 *Sentencing Act* 1991 (Vic), s.50(5)

16 *Messana* (1981) 3 Cr.App.R. (S.) 88.

severe penalty. Over 99 per cent of all fines imposed by Victorian courts for criminal (non-traffic) matters were imposed by magistrates.

A substantial proportion of fines are imposed and collected without the intervention of the courts. 'On the spot fines', mostly for parking violations, speeding or traffic light infractions, bypass the court system altogether. But they represent a public and visible part of the criminal justice system, which emphasises the centrality of the fine to the state's system of law enforcement (Fox 1995). This followed a period of 'alternative procedure' cases in which magistrates decided similar low severity cases in chambers based on the written evidence.

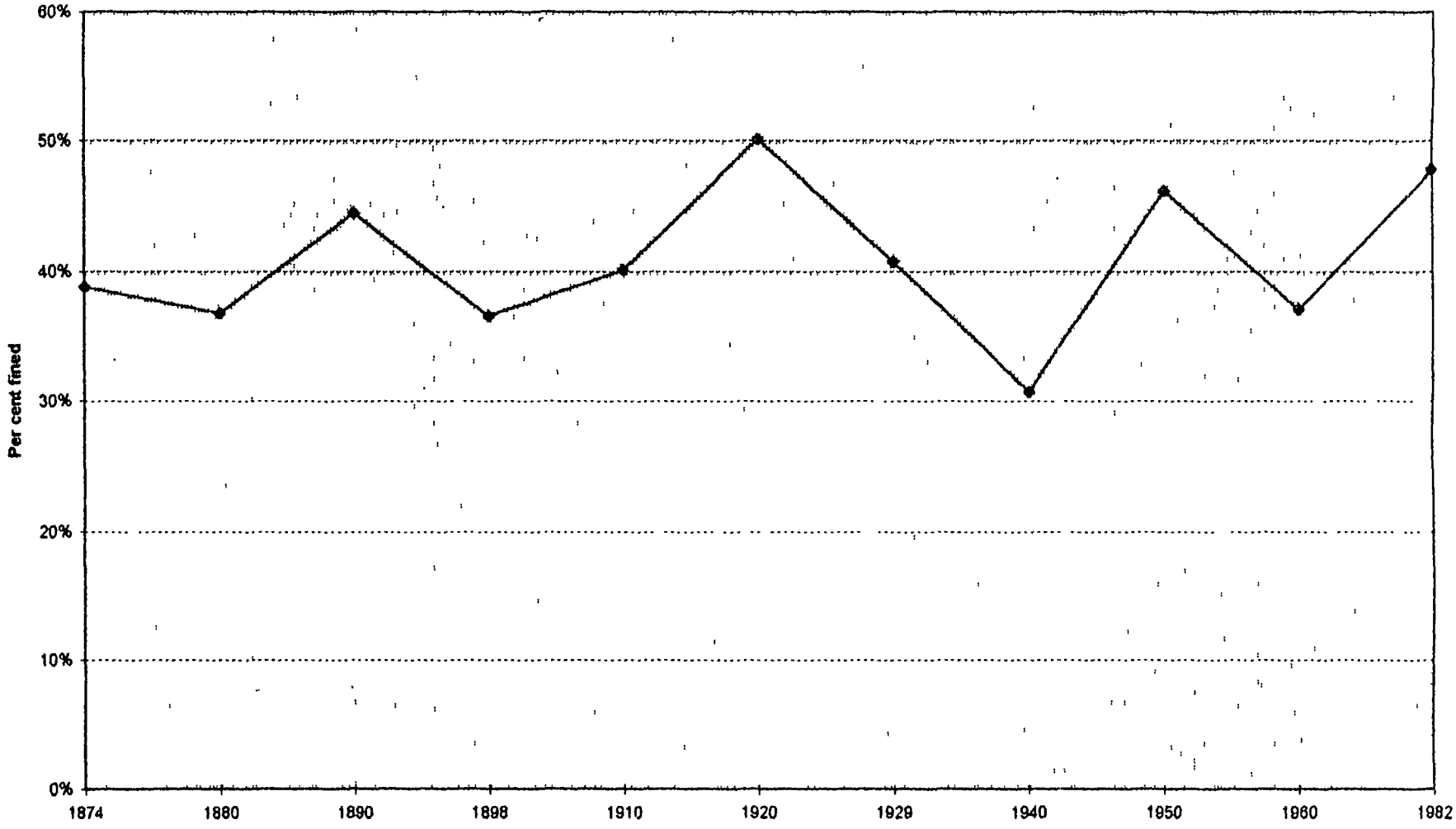
Since the 1870s, magistrates have used fines in about half the arrest cases which came to them.

FIGURE 5.1
MAGISTRATES' COURTS, 1874 - 1982
PROPORTION OF ARREST CASES RESULTING IN FINE

The estimates fluctuate between 35% and 50%. Some of this variation may be due to differences in counting procedures, and to the proportion of cases which are handled by way of arrest. However the increase in the use of fines between 1910 and 1920 did accompany a corresponding decline in the use of imprisonment (Chapter 3), while the decrease over the next twenty years accompanied the rapid growth in the use of bonds and adjournments. So the first period can be considered one of decarceration, the second period represented a transfer from one type of non-custodial sanction to another.

Before the 1990s, summons cases were not usually included in the statistics. A disproportionate share of these cases related to motor vehicle matters. In 1982, for example, magistrates dealt with 240,000 cases. Two thirds of all cases came by way of summons (150,000) and over half of these summons cases referred to motor vehicle offences (90,000). Fines were the overwhelming sanction of choice in relation to motor vehicle matters, some 93 per cent of motor vehicle convictions coming by way of summons resulted in a fine. The ABS court statistics for the period 1981-1985 also exclude the offences for which fines were most widely employed.

FIGURE 5.1
MAGISTRATES' COURTS, 1874 - 1982
PROPORTION OF ARREST CASES RESULTING IN FINE



During the early 1980s the use of fines declined, from 53% of non-traffic matters to 41%[17], displaying the same general pattern as the Higher Courts, although this decline was within the range of fluctuations displayed in earlier periods. The decline in the early 1980s was evident across all categories of offender, although it was most dramatic with drug offenders. This was also a period of decarceration (the use of prison by magistrates fell from 12 per cent to 10 per cent of offenders in these categories), but before suspended sentences were re-introduced. So the decline in fines resulted in increases in the number of community orders (such as probation and the community service order) and, possibly, bonds. Unfortunately the statistics available from that period do not distinguish these rather different sanctions, so it is not possible to say whether the change represented net-widening (to community sanctions) or increased leniency (to bonds). Community service orders, albeit on a minor scale, were introduced during that period, so it is likely that at least some of those who would otherwise have received a fine were given such an order.

After 1985, the proportion of offenders receiving a fine as the principal penalty remained fairly constant at about 41 per cent of non-traffic offenders. However this overall continuity conceals some rather different patterns. The use of fines continued to fall for theft-related and property damage offences, precisely the offences where the use of a currency metric makes most sense. On the other hand fines were used with increasing frequency for good order, justice and drug-related offences.

More detailed data for all offenders sentenced by magistrates (including traffic offenders, but excluding infringement notices) are available from 1990 from Courtlink.[18] Fines were used as the principal sanction for most of those convicted of driving without a licence, for two-thirds of those caught driving while disqualified and for half of the offenders convicted of assault, property damage, using or cultivating marijuana, public order offences, and breaching bail. On the other hand fines were used for only 5% of those convicted of car theft or drink-driving. Car theft is a 'top end' offence with high use of imprisonment and suspended sentences,

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17 Non-traffic matters brought by Victoria Police. The offences listed are those used by the ABS 1981-1985, the data for 1990-1994 are classified in accordance with the published ABS data.

18 Recall that data for only a limited number of courts in available for 1990, and from all courts in 1991.

while the majority of drink-drivers have their licences suspended as the most serious recorded penalty.

Magistrates generally make more use of fines for offenders convicted on only one or two counts. Fines are still the preferred sanction for these less serious offenders. Some 27% of those convicted of one or two counts of burglary were given a fine in 1994, compared to only 9% of those with three or more counts. Similarly, 43% of those convicted of one or two theft charges (excluding car theft) were given a fine as the most serious penalty, compared to 22% of those with three or more charges proven.

Table 5.1 shows the use of both fines and bonds from 1990 to 1994.

TABLE 5.1
MAGISTRATES' COURTS 1990 - 94
FINES AND BONDS

There was very little change over the early 1990s in the use of fines. The only detailed categories displaying any change were breaches of community-based orders (increasing use of fines) and for persons convicted of drug trafficking (an apparent decline in use of fines).[19] While there were marked changes in the relative use made of different sanctions, for magistrates these changes had already been made by 1991.

Higher Courts

In contrast to the courts of summary jurisdiction, fines are relatively little used in the Higher Courts and their use is rapidly declining. In the 1870s, the Higher Courts imprisonment the overwhelming majority of offenders who came before them.

FIGURE 5.2
VICTORIA, HIGHER COURTS 1872 - 1965
SENTENCE TYPE, ARREST CASES

Fines were imposed in only 1 per cent of cases, and bonds in another 1 per cent. Although the use of both fines and bonds increased over the decades, reaching some

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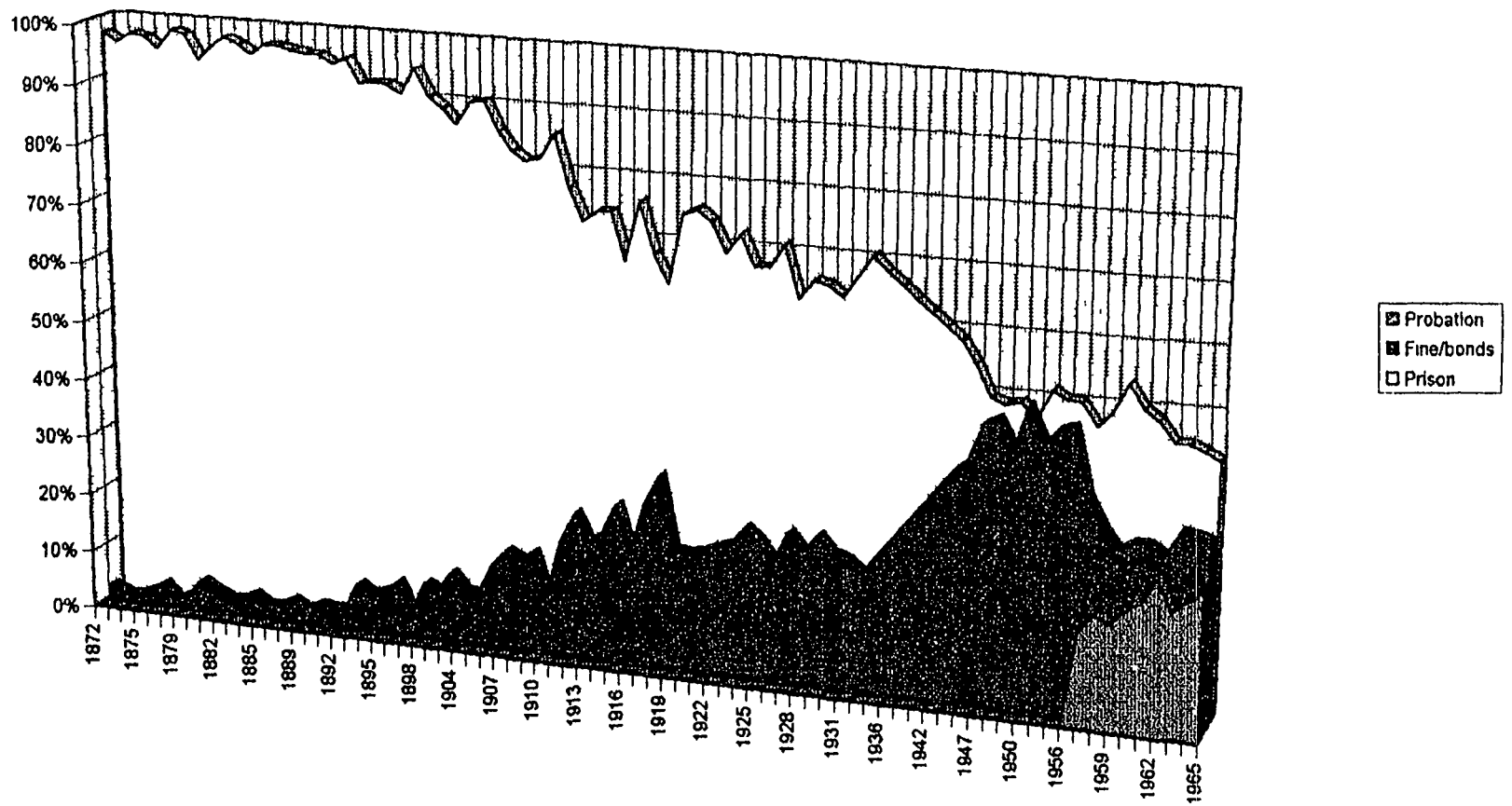
19 However there is a similar increase in the use of fines for 'other drug offences' suggesting that part of the difference may result from changes in classifying drug offences.

TABLE 5.1
MAGISTRATES' COURTS 1990 - 94
FINES AND BONDS

	1990	*1991*	*1992*	*1993*	*1994*
Other nei	79%	87%	85%	83%	82%
Assault	77%	73%	66%	64%	64%
Sexual offences	60%	53%	54%	53%	51%
Robbery	21%	15%	19%	15%	21%
Theft of car	n/a	n/a	17%	17%	14%
Theft	67%	63%	68%	66%	67%
Burglary	35%	34%	30%	29%	31%
Handling or receiving stolen goods	67%	64%	61%	54%	57%
Fraud/ deception	64%	63%	62%	56%	58%
Property damage	82%	79%	76%	74%	75%
Use/cultivate	90%	94%	92%	90%	89%
Drug Trafficking	40%	37%	29%	29%	27%
Other drug offences	92%	90%	90%	88%	88%
Public order offences	55%	64%	60%	60%	56%
CBO/ICO Breach	11%	12%	23%	30%	24%
Bail breach	54%	52%	49%	54%	53%
Justice procedure offences	51%	47%	51%	58%	60%
Drive while disqualified	43%	38%	37%	37%	35%
Drink/driving	16%	15%	20%	18%	21%
Drive without licence	91%	88%	87%	84%	82%
Dangerous driving	74%	74%	74%	75%	74%
Total	**67%**	**69%**	**67%**	**66%**	**66%**

NB: Data for 1990 are from a limited number of courts

FIGURE 5.2
VICTORIA, HIGHER COURTS 1872 - 1965
SENTENCE TYPE, ARREST CASES



40% of higher court sentences in the mid-1950s, the advent of probation saw their use decline, indicating a considerable degree of sentence escalation. By the late 1970s, fines were used in approximately 11% of all higher court cases (See Chapter 3), but their use began to decline from the early 1980s. In 1981, some 10% of offenders sentenced by judges were given a fine as their most serious sanction. The use of fines fell sharply over the next decade to 5 per cent in 1988 and only 2 per cent by 1994.[20]

FIGURE 5.3
HIGHER COURTS 1981 - 94
PROPORTION OF OFFENDERS GIVEN FINE AS THE MOST SEVERE PENALTY

The two categories for which fines were used for about one in ten cases in 1981 are presented in the graph; both offences against persons and burglary/theft show a similar decline over the whole period. For the first part of this period, from 1981 to 1988, the use of prison remained fairly constant at about 55-60% of all offenders sentenced, so the decline in fines was probably made up by an increase in the use of community service orders or probation up to 1985. After 1985, when court-based unit record files allow more precise tracing of the sentencing flows, suspended sentences took up much of the transfer from other sanctions.

A more detailed breakdown of offence type is available from unit record files from 1985.

TABLE 5.2
HIGHER COURTS 1985 - 94
OFFENDERS GIVEN FINES AND BONDS AS MOST SEVERE PENALTY

The largest declines in the use of fines over the last decade have been in relation to property offences (19% down to 0%), drug offences (16% to 4%) and order/justice offences (12% to 3%).

The introduction of the *Sentencing Act* 1991 (Vic) seemed to have reinforce the decline in the use of fines. From 3.3% of sentences in 1991 the fine fell to a negligible

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20 These data are presented using the broad categories provided by the ABS in published data for 1981-85. The 1985 ABS tables have not been published, but follow the same format as the previous years. The authors are grateful to the ABS for making available these unpublished data.

FIGURE 5.3
HIGHER COURTS 1981 - 94
PROPORTION OF OFFENDERS GIVEN FINE AS THE MOST SEVERE PENALTY

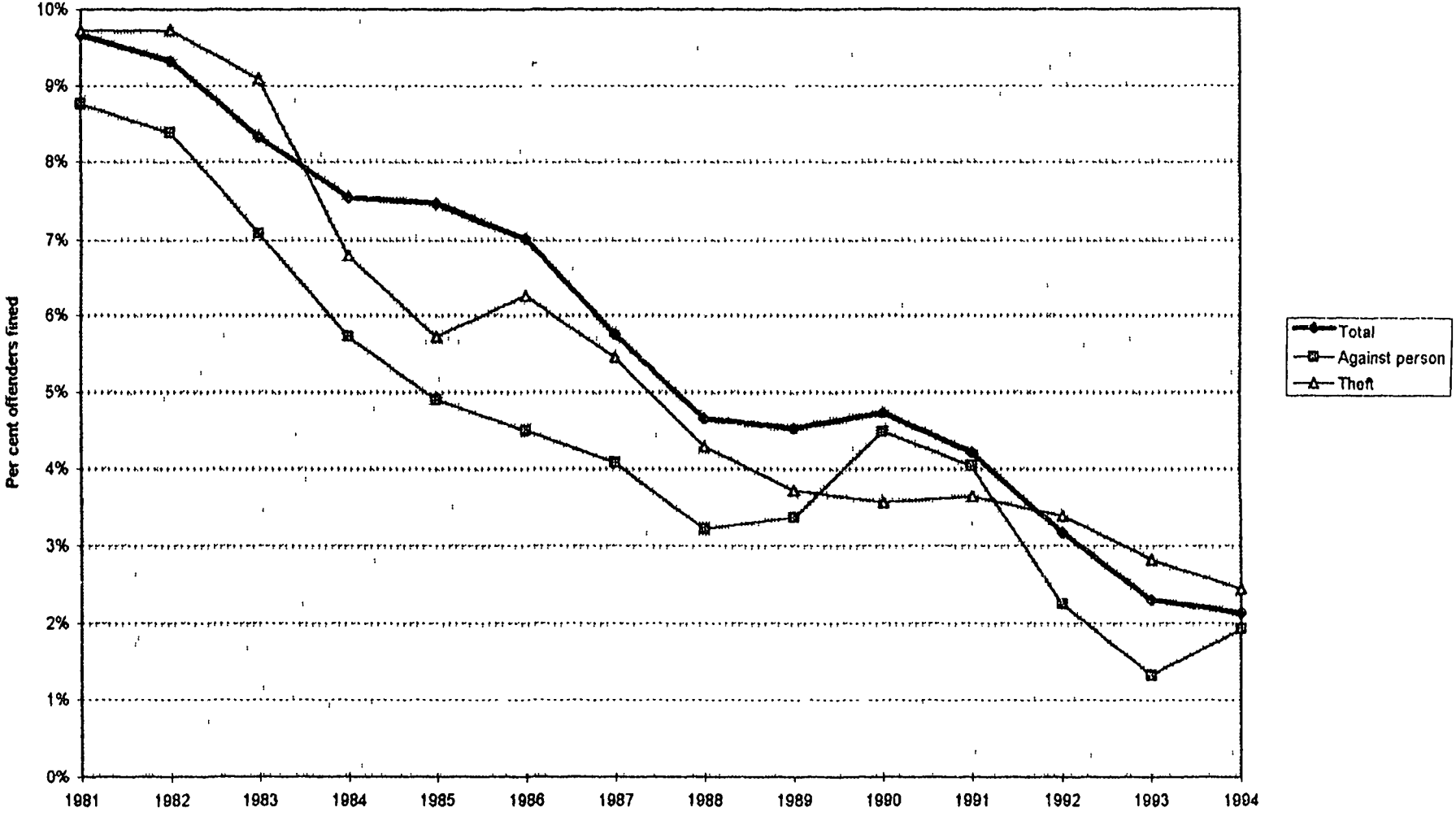

TABLE 5.2
HIGHER COURTS 1985 - 94
OFFENDERS GIVEN FINES AND BONDS AS MOST SEVERE PENALTY

Fines as proportion of all sanctions

	1985	*1986*	*1987*	*1988*	*1989*	*1990*	*1991*	*1992*	*1993*	*1994*
Total	**8%**	**6%**	**5%**	**4%**	**5%**	**4%**	**3%**	**2%**	**2%**	**3%**
Against person	5%	4%	3%	2%	6%	4%	2%	1%	2%	4%
Robbery	1%	1%	0%	2%	0%	0%	0%	1%	0%	0%
Theft	7%	5%	4%	4%	3%	4%	4%	3%	3%	2%
Property damage	19%	8%	10%	4%	7%	6%	9%	0%	5%	0%
Drug offences	16%	12%	11%	6%	8%	4%	8%	6%	2%	4%
Order/Justice offences	12%	13%	9%	15%	20%	13%	9%	5%	6%	3%

Bonds as proportion of all sanctions

	1985	*1986*	*1987*	*1988*	*1989*	*1990*	*1991*	*1992*	*1993*	*1994*
Total	**18%**	**19%**	**15%**	**14%**	**17%**	**17%**	**14%**	**12%**	**6%**	**6%**
Against person	16%	17%	16%	12%	13%	14%	16%	14%	6%	5%
Robbery	12%	15%	8%	9%	10%	10%	7%	8%	3%	2%
Theft	20%	20%	17%	18%	19%	19%	15%	10%	7%	8%
Property damage	32%	27%	26%	28%	34%	31%	19%	13%	11%	12%
Drug offences	14%	13%	9%	7%	17%	18%	18%	8%	7%	5%
Order/Justice offences	21%	30%	21%	14%	22%	24%	15%	20%	9%	11%

Total, monetary sanctions

	1985	*1986*	*1987*	*1988*	*1989*	*1990*	*1991*	*1992*	*1993*	*1994*
Total	**25%**	**24%**	**20%**	**18%**	**22%**	**21%**	**18%**	**14%**	**8%**	**8%**
Against person	21%	21%	19%	15%	18%	18%	18%	15%	8%	9%
Robbery	13%	16%	8%	11%	11%	10%	7%	9%	3%	2%
Theft	28%	25%	21%	21%	22%	23%	18%	12%	10%	10%
Property damage	51%	35%	35%	32%	41%	37%	28%	13%	16%	12%
Drug offences	29%	25%	19%	12%	25%	22%	26%	14%	9%	9%
Order/Justice offences	32%	43%	29%	29%	42%	37%	25%	26%	15%	14%

1.8% of sentences in 1993. The reason for the decline in the use of fines is not clear, but some possibilities suggest themselves. First, the changes in the jurisdiction of the higher courts has meant that an increasing proportion of less serious indictable offences are now heard in the Magistrates' Court, resulting in the 'lower end' of the tariff being used less. Secondly, it appears that both fines and bonds have been replaced by the suspended sentence, which, despite its high statutory ranking in the sentencing hierarchy, has come to be regarded as being equivalent to, or interchangeable with, these lower order sanctions.

Thirdly, there is the possibility that fines lost some of their credibility with sentencers once fine defaulters were no longer imprisoned after 1986 (except in very rare cases). However at both levels of court, the decline in use of fines had largely occurred by this time, so the treatment of fine default is not strong explanation. Finally, it may be that in time of economic recession, fines are less likely to be imposed upon the increasing number of indigent offenders who come before the courts. However, this also is unconvincing because the decline in use of fines occurred during a period of reasonably high employment, and did not change much during a period of sharply rising unemployment.

Non-compliance with fines

Criminologists have for long been more interested in the failure of fines than in their success. Because fines figure so dominantly in sentencing in absolute numbers, even relatively small proportions of fine defaults can have a significant impact upon the default sanctions, in particular the prison and community-based orders. The history of law reform in relation to fine default in Victoria is the history of the removal of the prison as the primary default sanction. To some extent, this explains Victoria's relatively low imprisonment rate.

Evolution of Victoria's law

Historically, the prison was the presumptive means of enforcing the payment of fines. At common law, a person sentenced to pay a fine by a superior court could be immediately imprisoned to be detained until the amount of the fine was paid; the threat of imprisonment having always been regarded as incidental to the recovery of fines (Fox and Freiberg, 1985: Chapter 4). At the summary court level, most fines were, until the mid-1970s, enforced by the seizure and sale of the offender's goods

and chattels, but this was only of value when used against those with sufficient resources which could be seized and realised to pay the fine, which was rarely the case. Although a law reform committee in 1971 recommended the greater use of imprisonment in lieu of distress warrants (Victoria 1971), a recommendation which was not fully adopted, the realisation that imprisonment in default of payment of fines had resulted in the almost automatic imprisonment of the indigent and poor led to a search for alternatives to imprisonment as the primary fine default mechanism. What was of most concern was that the failure to take the means of offenders into account at either the sentencing stage or during the enforcement process produced an inegalitarian sentencing system which, for the poor, controverted the initial sentencing assumption that the offence for which the fine was imposed did not warrant a custodial disposition.

The use of imprisonment in default has been the subject of sustained criticism for decades. The objections have been generally accepted by criminal justice administrators. The complaints can be briefly summarised (Queensland, 1990:1). Generally imprisonment is considered to be:

- *unjust and unfair* to gaol impecunious offenders; in addition, it is unfair to imprison people for offences where either the primary offence does not carry a sentence of imprisonment or the sentencer did not consider that a prison sentence was warranted;
- *dangerous* in that it exposes offenders who have committed perhaps minor offences to danger of personal violence within the prison;[21] it may also cause psychological harm to defaulters;
- *expensive:* estimates of the cost of imprisonment vary. It has been estimated that it costs an average of $71.50 per day to keep person in prison in New South Wales (Miller and Gorta, 1990:8). To this must be added the costs of apprehension, reception and discharge. As well as the expense of actually imprisoning and physically maintaining an offender, the cost of imprisonment also includes the revenue foregone

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21 South Australia has established a Fine Default Centre. It is estimated that the cost of custody per prisoner per annum is $22,500 or $62 per day.

through the substitution of the body for payment (Victoria, 1994:314).[22]

- *administratively inconvenient*: fine defaulters must be processed in the same way as ordinary offenders, but their stay is very short.

In view of the various criticisms which have been levelled at imprisonment as a default option it is suggested that imprisonment should be a default sanction of last resort. However, it is unlikely that imprisonment can be completely abolished, as for some offenders, the threat imprisonment is an effective tool in obtaining payment (Hillsman, Sichel and Mahoney, 1984), and for a small minority, namely those who fail, or refuse to perform the lesser default options such as community work, some further threat is required (Miller and Gorta, 1990:49).

Fines and means

The attack upon the number of fine defaulters in gaol took two forms. The first was founded upon the realisation that fine default could not be seen in isolation, but had to be regarded as part of the broader process of sentencing, enforcement and punishment (Freiberg and Fox, 1994:4). The evidence was overwhelming that fines which are set at levels that offenders cannot meet, or which cannot be paid over reasonable periods of time, are less likely to be paid than those which are set at levels which are within the means of the offender.

In 1984, an amendment to the *Penalties and Sentences Act* 1981 (Vic) made it obligatory for sentencers at all levels of court to consider the financial circumstances of an offender before imposing a monetary penalty.[23] In addition, courts were given the power to grant time to pay and to allow payment by instalments. Applications

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22 The relationship between the amount foregone and the cost of imprisonment is found in the fine/imprisonment default rate. These have varied widely over time and between jurisdictions. In New South Wales, in 1931 the cut-out rate was $1 per day, in 1967 $2/day; in 1971 $5/day; in 1978 $25/day and in 1986, $50/day (Miller and Gorta 1990:9) In Victoria, the current default rate is $100 per day; in South Australia it is $50 per day. The New South Wales Public Accounts Committee estimated the cost of revenue foregone in 1983 at $2.363m, but conceded that this may be an overestimate as some of those locked up may never have been able to pay (NSW, Public Accounts Committee, 1986:7.2). South Australia has estimated that approximately $8m per year in potential payments is written to imprisonment or community service: SA 1994:2).

23 s.13E(1).

for payment by instalments could also be made to a court officer after the imposition of the fine.

These provisions were carried over into the *Penalties and Sentences Act* 1985 (Vic) and again into the *Sentencing Act* 1991 (Vic) so that the concept of ability to pay is now well-entrenched in Victorian law. In this respect, it is of interest to note that the average fine imposed by the Magistrates' Court is approximately $370.

Default sanctions

In 1979, the Victorian Sentencing Alternatives Committee recommended the enactment of legislation to allow offenders who had been fined, and who lacked the means to pay, the option of performing some form of community service in lieu of the imprisonment in default of payment that would otherwise follow (Victoria 1979: paras 55 - 78). The Committee offered this as a more constructive and cost-effective alternative to imprisonment, and one which possessed the advantage of providing a disposition for defaulters which was consistent with the view of the legislature or the sentencing court that a custodial sentence is not appropriate for the offence in question. This recommendation was taken up, for adults, through the use of community service order and attendance centre permits.

The *Penalties and Sentences Act* 1981 (Vic) allowed a community service order to be made in cases where a court had directed that the offender be imprisoned in default of payment of a fine, if the court was satisfied that the person in default had the capacity to pay the penalty and wilfully, and without an honest and reasonable excuse, refused to do so. The legislation also allowed offenders other than those whose default was wilful and unreasonable, to perform unpaid community work pursuant to a community service order, although the legislation gave no guidance as to the equivalence between community service orders and fines.

In 1983, the *Community Welfare Services Act* 1970 (Vic) was amended to empower the Director-General of Corrections to grant an attendance centre permit to an offender undergoing a term of imprisonment in default of payment of a fine. This allowed the offender to serve the prison term or part of it, up to a maximum of twelve months, by way of attendance at an attendance centre. This was entirely an administrative decision and not subject to direction by the court which initially imposed the fine or which set the default period of imprisonment.

It was this latter scheme which had some impact upon prison numbers. According to the Office of Corrections (Victoria, OOC Henderson, 1985), from the inception of this scheme in mid-1983 to March 1984, some 239 prisoners were transferred to attendance centres at the rate of about 41 per month. From August 1983 to December 1984, 411 prisoners were transferred at a rate of about 91 per month. However, the impact upon the daily average prison numbers was small. Office of Corrections data indicated that although the average length of sentence on default was 24 days, when it was discounted by remissions of eight days and the Director's Special Remission of seven days, only ten prison days per prisoner was actually freed up.

Another reason for the apparent lack of impact of such provision was that many short term defaultees were held in custody in police cells and consequently never appeared in the official numbers in custody.

In June 1986, the *Penalties and Sentences Act* 1985 (Vic) came into effect which further emphasised the use of community work as an appropriate penalty for fine default (Kidston 1988:19). The Act gave the courts the power to convert an unpaid fine to a community-based order applying a statutorily pre-determined formula (Richards, 1991:21). In addition to this 'front end' diversion of defaulters, the Office of Corrections retained the power it had acquired in 1983 in relation to attendance centre orders, to release imprisoned defaulters on leave conditional on their performing community work. This is one of the few forms of executive modification of sentence which still remains.

The combination of these measures saw the use of imprisonment as a fine default option almost disappear in Victoria. In July 1985, there were 264 prison receptions for fine default. According to the Office of Corrections (Fine Default Trends, 1987), about 250 persons were received into prison in Victoria each month, amounting to approximately 40% of total prisoner receptions. In that year the average number of fine defaulters received per month was 160. Many were discharged almost immediately for the reasons outlined above. Most of the sentences were very short: about 75% were for 10 days or fewer and fewer than 3% had sentences which ran over a month. Those fine defaulters who were in prison tended to be those who were already serving other sentences or had remand warrants executed against

them. Most commonly the offences related to motor vehicle driving (60%), good order offences (17%) and property offences (10%).

By 1986, the average number of defaulters received had dropped to 124 per month, reaching a low of 72 receptions in November 1986 and by 1987, the average monthly receptions plummeted to 50, with only 14 being received in November. By November 1987, no fine defaulters were recorded as being received.

Simultaneously, the number of offenders serving fine default orders increased markedly. We noted earlier that the community service order played a relatively small part in the overall sentencing structure as a primary sanction. However, in its last year or so, almost one-third of all new community service order receptions were for fine default.

Although fine defaulters made up a larger proportion of prison receptions, they represent only a small percentage of prisoners in custody at any one time (Challinger, 1983:7). As with imprisonment rates generally, there is a wide variation between the states.

TABLE 5.3
FINE DEFAULTERS RECEIVED IN PRISON AS PROPORTION OF TOTAL PRISONERS RECEIVED BY JURISDICTION BY MONTH 1992-93

Jurisdiction	Average Receptions		Average No of FDs Received		Average % FD	
	1992	1993	1992	1993	1992	1993
SA	498	418	366	297	42	41
WA	309	307	140	172[24]	30	40
TAS	64	71	27	36	30	40
NSW	782	865	338	341	27	28
NT	110	97	40	35	26	26
QLD	366	292	127	64	26	18
VIC	122	127	12	10	9	7

24 On these figures it is estimated that some 2064 fine defaulters are received in Western Australian prisons each year. The WA Fine Enforcement project, however, estimates the number at 800-900 (WA, 1993:23).

This table reveals that in South Australia[25] and Western Australia,[26] over 40% of all admissions to prisons[27] are of fine defaulters. It also indicates that Victoria's rate of imprisoning fine defaulters is significantly lower than any other jurisdiction, although Queensland's rate has decreased markedly over recent years. The relatively limited impact that fine defaulters have on daily average prison numbers is indicated in the next table, which also reveals the variation between the states.[28]

TABLE 5.4
FINE DEFAULTERS IN PRISONS BY YEAR AND JURISDICTION[29]

	NSW	VIC	QLD	WA	SA	TAS	NT	AUST
1982	1.7	1.1	3.9	n/a	5.5	0.5	0.3	2.0
1983	1.8	1.6	6.1	n/a	6.7	1.1	4.8	2.6
1984	2.9	0.9	3.0	4.4	8.8	0.0	5.4	3.1
1985	1.8	1.6	3.2	3.9	6.3	0.0	4.4	2.6
1986	1.2	0.6	2.4	3.0	6.8	0.4	5.1	2.1
1987	1.1	0.2	3.8	4.8	5.4	0.0	0.7	2.2
1988	0.2	0.1	4.3	7.5	2.3	1.1	2.1	2.2
1989	0.3	0.0	2.1	6.2	0.9	0.5	0.7	1.4
1990	0.3	0.1	2.2	5.1	0.7	0.5	0.9	1.2
1991	1.3	0.0	1.6	6.4	1.7	0.4	0.5	1.7
Av	1.3	0.6	3.3	5.2	4.5	0.4	2.5	2.1

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25 South Australia estimates that the average length of stay is 6 days. The daily average number in prison of fine defaulters is approximately 60: SA, 1994:2.

26 It has been argued (WA, 1993:22) that the Corrective Services' data base has been overcounting imprisonment for fine defaulters in that state because remand prisoners, who have concurrently been discharging fines have been classified as being fine defaulters only. Similarly, many offenders classified as fine defaulters have in fact been imprisoned for breach of work orders.

27 These estimates do not include fine defaulters held in police lockups. In Western Australia, in 1992-93, it was estimated that some 5,000 persons were received into police lockups, of which 3129 ((61%) were discharged to a work and development order (WA 1993:23). In 1993-94, approximately 6,000 persons spent time in police lock-ups.

28 This is also the case in other jurisdictions. In Quebec, for example, it has been estimated that fine defaulters make up about 45% of admissions, yet their total removal would only reduce the prison population by 5-7%: Landreville, 1995:45.

29 Number of prisoners per 100,000 of the population. Source: Australian Institute of Criminology, *Changes in the Composition of the Prison Populations* 1981-82 to 1990-91.

It would appear from these data that in Victoria, at least, whilst the decarceration of fine defaulters may have eased the burden upon prison administrators and been more just and humane, it had little effect on the overall imprisonment rate.

The impact of the Sentencing Act

Reform of the fining provisions of the sentencing legislation was motivated as much by fiscal as humanitarian considerations. The concern was not with the cost of imprisonment, which was, by this time, a negligible consideration, but by the number of uncollected fines. In Victoria, in 1987, the amount of uncollected fines stood at $41.3m. By 1990 the amount owed reached $47m and by 1992-93, the level of outstanding fines was $131.7m in relation to 1,108,041 outstanding warrants involving 107,879 individuals and entities (Victoria, 1994:311-312).[30] This problem is not confined to Victoria. Experience in Australia and elsewhere indicates that the difficulties in collecting fines are endemic, although there are differences between the different levels of court and between different kinds of offences (Miller and Gorta, 1990:52; Western Australia 1993:21).

In 1991, the government's response was to strengthen the little used imprisonment provisions by stipulating that unless the court orders otherwise, periods of default imprisonment are to be served cumulatively upon any other terms of imprisonment or youth training centre detention imposed for fine default, but are to be concurrent with any incomplete custodial sentence imposed for other reasons.[31] This was intended to prevent the situation from occurring whereby a fine defaulter could dispose of multiple small fines by spending only a very short time in prison.

Secondly, it standardised the fine to imprisonment default rates. Fines can now be discharged by imprisonment in default at the rate of one day for each $100 or part of $100 of the aggregate amount then unpaid, up to a 24 month maximum.[32] This rate

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30 By June 1994, the Auditor-General reported that accumulated uncollected fees and fines potentially due to the state had reached $208.9m which comprised $131.7m in uncollected fines and $77.2m in execution costs. The increase is attributed to the increase in the number of infringement notices and the introduction of speed detection devices.

31 *Sentencing Act* 1991 (Vic), s.16(2).

32 *Sentencing Act* 1991 (Vic), s.63(1). At this rate, 24 months custody would discharge a fine of $73,000. No default term of imprisonment longer than 24 months can be imposed even if the fine is greater than $73,000.

also applies if the defaulter, having been permitted to discharge the fine by service of a community-based order, breaches the order and becomes subject to imprisonment under the *Sentencing Act* 1991 (Vic), s.47(5).

Finally, and this was the most significant, change, the process of enforcing fines was altered. Whereas previously, a defaulter could be returned to court after notice of default, the *Sentencing Act* 1991 (Vic) interposed an additional step in the process whereby the Sheriff, the court officer charged with enforcing fines, could arrest the offender, but only after that person had been given a number of options in relation to payment of the fine. The process is as follows. If a natural person defaults for more than one month in the payment of a fine, or any fine instalment, the defaulter may be arrested under warrant by the police, the sheriff or a sheriff's bailiff unless arrangements are already in place to discharge the fine with the offender's consent by service of a community-based order involving unpaid community work.[33] The person must not be arrested under the warrant until a demand for payment is made and a further seven days have been allowed to meet the demand for payment or to take other action.[34] A written summary of the available options must be given to the defaulter at the time of the demand for payment.[35] This is so as to seek an instalment order, or an order for time to pay, or to obtain a variation of them,[36] or if such arrangements are not already in place, the chance of discharging the fine by way of a community-based order involving unpaid community work.[37]

If the notice of the threat of arrest is ineffectual in producing payment, and the person is arrested under the warrant and brought before the court which originally sentenced him or her, the following options are available. It may:[38]

(a) make a community-based order requiring the offender to perform unpaid community work;[39]

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33 *Sentencing Act* 1991 (Vic), s.62(1)-(6).

34 *Sentencing Act* 1991 (Vic), s.62(7).

35 *Sentencing Act* 1991 (Vic), s.62(8).

36 *Sentencing Act* 1991 (Vic), s.60(1).

37 *Sentencing Act* 1991 (Vic), s.62(9).

38 *Sentencing Act* 1991 (Vic), s.62(10)(a)-(e).

39 For a number of hours fixed in accordance with the *Sentencing Act* 1991 (Vic), s.62(2).

(b) order that the offender be imprisoned;[40]

(c) order that the amount of the fine still outstanding be levied under a warrant to seize the personal property of the defaulter;[41]

(d) vary any existing arrangements for payment by instalments; or

(e) adjourn the hearing for up to six months on any terms it thinks fit.

The court may also make any order relating to costs it thinks fit, including the costs in the outstanding sums to be discharged by way of unpaid community work, instalment orders or warrants to seize property.[42] A court may exercise any of these powers even in the absence of the defaulter, if that person, having been arrested and released on bail, fails to appear before the court in answer to the bail.[43] The court must not order imprisonment if the fine defaulter satisfies the court that he or she did not have the capacity to pay the fine, or the relevant fine instalment, or had some other reasonable excuse for the non-payment,[44] and imprisonment in default must only be used as a last resort.[45]

This system of offering community work to a defaulter, first by the Sheriff, and then by the court, combined with the introduction of the community-based order, with a community work only condition, has profoundly changed sentencing patterns. As has been seen, the latter order has increased from no orders in April 1992 to 2858 orders registered in 1992-93 and 3703 orders in 1993-94. It is highly probable that sentencers are using this order, which was increased from 125 hours to 250 in 1993, as a substitute for the fine, in effect short-circuiting the fine default process. Although it is wrong in law to impose a community-based order when a fine is the appropriate sanction, sentencers faced with impecunious offenders, for whom a dismissal, discharge or adjournment is considered too lenient a sanction, are likely

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40 For a term fixed in accordance with *Sentencing Act* 1991 (Vic), s.63(1).

41 Warrants to seize property are issued under the *Magistrates' Court Act* 1989 (Vic), s.73 & s.74.

42 *Sentencing Act* 1991 (Vic), s.65.

43 *Sentencing Act* 1991 (Vic), s.62(10A). The court may also proceed in the absence of the defaulter if a warrant to arrest was neither issued nor executed because the offender was not in Victoria, s.62(10B).

44 *Sentencing Act* 1991 (Vic), s.62(11).

45 *Sentencing Act* 1991 (Vic), s.62(12).

to impose the community-based order with the community work only condition rather than allow them to escape effectively unsanctioned. The knowledge that in all probability a fine would be converted to community service by the processes of law means results in an unprincipled, but pragmatic escalation of the sentence. The absence of any requirement of a pre-sentence report is probably also an attractive feature of this disposition.

The growth in the fine default community-based order has been no less spectacular. From 15 persons on such an order in April 1992 the number peaked at 1908 in October 1994 before steadily declining to around 1200 in late 1995.[46] This option has obviously been accepted by fine defaulters when offered by the Sheriff and the court, possibly because it is economically more effective. The *Sentencing Act* 1991 (Vic) provides that if unpaid community work is ordered for fine default, the rate of discharging the fine is calculated at one hour of community work for each $20, or part of $20, of the aggregate amount then remaining unpaid. The minimum number of hours the defaulter may be required to serve in unpaid community work is eight with a maximum of 500 hours.[47] For many offenders, this amount per hour is more than they could earn for an equivalent period, net of tax.

One final method of undertaking community work is available to offenders. Even when an offender is imprisoned, there is a further discretion vested in the Director General of Corrections to issue a 'custodial community permit' to allow the defaulter leave from prison to engage in unpaid community work for any period including the whole of the remaining prison term.[48] While strictly speaking this is not a community-based order, it achieves the same effect.

Under the *Corrections Act* 1986 (Vic), s.57(1)(c), fine warrants can be converted to unpaid community work for a maximum of 30 days at 2 hours for each day of the default period remaining. This default rate is more advantageous than the community-based order fine conversion formula under the *Sentencing Act* 1991 (Vic), requiring less than half the number of hours to be served.

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46 Some of these variations are due to seasonal 'blitzes' by the Sheriff's office.

47 *Sentencing Act* 1991 (Vic), s.63(2).

48 *Corrections Act* 1986 (Vic), s.57(5).

To qualify, the prisoner must be serving a default period of not more than 30 days; have a confirmed address, agree to the conditions of the release permit including community work performance; not have any outstanding charges or be serving any other sentences of imprisonment; and not have a history of offences involving serious assaults or crimes of violence. Release under this provision may exceed the usual three days which is permitted under the Custodial Community Permit.

A large number of fine defaulters are detained in police lock-ups which may be gazetted as goals for certain purposes.[49] The community custodial permit is used to reduce the number of such prisoners held in police gaols and to keep the number of imprisoned fine defaulters to a minimum. In 1992, approximately 312 persons were granted permits under this scheme. The Department of Justice has estimated that most permits are granted for about five to ten days, saving between 6 and ten prisoner beds over a whole year.

Community work in default of payment of fines is certainly more humane than imprisonment and the cost of administering such schemes is considerably lower than the cost of imprisonment. Nonetheless, the real costs of these programmes is high, and is rising as the number of offenders utilising this option grows. In some jurisdictions, the number of fine defaulters on community service is greater than the number undertaking community work as the primary sanction. In addition, such schemes have the effect of decreasing the revenue obtained from fines. In 1993, the Queensland Auditor-General noted that the imposition of Fine Option Orders and community service orders in that state instead of monetary penalties resulted in a decrease in fine payments from $20.838m in 1991-92 to $19.762m in the following year, a loss of over $1m. A similar phenomenon was noted by the Crown Law Department in Western Australia (Western Australia 1992) which partly blamed the continued trend of offenders opting to alternatives to paying fines for a shortfall in its revenue estimates.

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49 There is considerable evidence in most jurisdictions of the use of police lock-ups to detain fine defaulters, particularly where prison accommodation is limited and the period likely to be spent in custody short. In South Australia, for example, which has one of the highest rates of imprisonment, some 7000 fine defaulters had been held and released from police cells in the 12 months prior to September 1991 (SA, House of Assembly, Hansard, 24 March 1992, p.3537). Although administratively convenient, the nature and condition of these cells renders them an unacceptable place for confining fine defaulters.

The future of fines

The growth of community work orders is of concern to governments. If a court has imposed a fine as the primary sanction, or wishes to do so, it has made a decision as to the appropriate sentence in the case before it. Conversion of that sanction to another vitiates that exercise of discretion and can render the sentence inappropriately severe. In addition, it places a great strain upon the supervisory resources of the Department of Justice. On the other hand, failure to pay fines can undermine the credibility of the criminal justice system. Offenders escaping payment may be less deterred in future and come to believe that they may in future commit similar offences with impunity. Courts may seek alternative sanctions if it becomes known that monetary penalties are unmet and ultimately, the community may call for harsher penalties as they lose faith in the sanctioning system (Cole, 1992:12; Cole, et al 1987).

Increasingly, states are turning to other default sanctions, in particular licence disqualification, although this brings with it secondary problems of its own (Freiberg and Fox ,1994:50-55).

DISMISSALS, DISCHARGES AND ADJOURNMENTS

Possibly the least studied, and least understood, of all sanctions is that group of non-monetary sentencing options which allows courts to return offenders to the community without subjecting them to any direct official supervision such as is required with community-based orders. These forms of unsupervised release have gone under a confusing variety of names, such as 'adjournment', 'absolute or conditional discharge', 'dismissal', 'deferred sentence', 'conditional release', 'good behaviour bond', 'common law or statutory bond', 'suspended sentence' and others. The terminology varies from jurisdiction to jurisdiction, and the same description often encompasses a number of quite different dispositive orders.

For many years in Victoria, these provisions, which varied from court to court, amounted to a mismatched collection of poorly drafted sections derived from United Kingdom legislation and were retained for too long without systematic revision (Fox and Freiberg, 1985:254). The Victorian Sentencing Committee called for a rationalisation of these provision (1988:354) and this occurred with the passage of the *Sentencing Act* 1991 (Vic) which comprehensively restructured the provisions

relating to dismissals, discharges and adjournments. In essence, the legislation abolished the concept of the 'bond' or recognisance, and replaced it with an enforceable undertaking, restated the purposes of these dispositions and standardised the provisions for all levels of courts.

The dispositions

Victorian courts are given three basic powers: to dismiss, discharge or adjourn cases. The *Sentencing Act* 1991 (Vic) gives highest priority to the use of sanctions involving the unsupervised forms of release.[50] The purposes for which they are to be used are:[51]

(a) to provide for the rehabilitation of an offender by allowing the sentence to be served in the community unsupervised;

(b) to take account of the trivial, technical or minor nature of the offence committed;

(c) to allow for circumstances in which it is inappropriate to record a conviction;

(d) to allow for circumstances in which it is inappropriate to inflict any punishment other than a nominal punishment;

(e) to allow for the existence of other extenuating or exceptional circumstances that justify the court showing mercy to an offender.

Consistent with the policy expressed in s.7 & s.8 of the *Sentencing Act* 1991 (Vic) and acknowledging that a conviction is a significant sanction in its own right, Division 5 of Part 3 of the Act, in dealing with the unsupervised forms of release, draws a distinction between those in which that release turns on conviction and those in which it does not. Thus, in essence, the powers of the courts are:

- to find the person guilty, but not convict, and unconditionally discharge him or her;
- to convict the person and unconditionally discharge him or her;

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50 *Sentencing Act* 1991 (Vic), s.5(7).

51 *Sentencing Act* 1991 (Vic), s.70.

- to find the person guilty, but not convict, and release the person upon adjourning the case for a period of up to five years, conditional on their good behaviour or any other specified condition;
- to convict the person and release them upon adjourning the case for a period of up to five years, conditional on their good behaviour or any other specified condition.[52]

Because these sanctions are at the lower end of the sentencing hierarchy, few cases are taken to the courts of appeal and consequently little jurisprudence has emerged which provides guidance as to their use.

Use

The dismissal and discharge powers have, for many years, represented a significant, though variable, part of the sentencer's repertoire. Surprisingly, cases which warrant no action by the courts, comprise a large proportion of dispositions. Although fines are little used in the higher courts, the use of bonds grew steadily from the late nineteenth century. By the turn of the century they were capturing 10% of the market; which rose to 20% a decade later. Sometime in the 1930s or early 1940s (the data are missing for this period), there was a jump in the use of bonds, up to over 40 per cent of all cases. This was precisely the period when there was a massive decarceration in Victoria (measured by the ratio of prisoners per 100 persons convicted). So it is likely that much of the move away from prison resulted from sentencing choices by judges rather than the discretion of prison authorities, and use of alternative sanctions rather than shorter prison sentences.

In the higher courts, until recently, bonds represented around 20% of all dispositions a figure which, given the ostensibly serious nature of the offences which are heard by that court, proportion which seems remarkable. Although it is evident that in many cases, it is the process itself which is the punishment, and at the end of the day all that may be needed is a nominal sanction, this relatively high use of the disposition lowest in the hierarchy may indicate that many cases have been inappropriately brought before the courts or that Victorian courts are relatively

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52 Under any of these provisions, a sentencer is not prevented from making any other ancillary order that might follow from a finding guilt, such as an order for restitution or compensation

lenient or that courts have not had a sufficiently wide choice between lower order sanctions.

The *Sentencing Act* 1991 (Vic) did not significantly alter the courts' sentencing powers. The reforms were intended to simplify and rationalise the existing law. Nonetheless, the years following the commencement of the legislation saw a massive decrease in the proportionate use of unsupervised releases by the higher courts. From 15.2% of sanctions imposed for principal offences in 1991, the use fell to 12.4% in 1992 and 6.7% in 1993. Together with the decrease in the use of fines in the higher courts, it is apparent that the 1980s and the early 1990s have seen the virtual disappearance of fines and bonds as sanctions in the higher courts. This was not just a result of the downloading of some less serious offences to the lower courts, because the decline was evident in all categories of offence.

In the Magistrates' Court, dismissals, discharges and adjournments have had mixed fortunes. Until the late 1920s, a remarkable average of approximately 50% of all cases which came before magistrates were dismissed, ie, did not proceed to trial or a finding of guilt. From the early 1930s, this number declined to less than 10% of cases by the early 1950s, but their place was taken by a post-guilt finding and a conviction or discharge, conditional or otherwise.

Table 5.5 indicates the patterns of use of bonds in the Magistrates' Court between 1990 and 1994.

TABLE 5.5
MAGISTRATES' COURT, 1990 - 94
USE OF BONDS

Unlike the higher courts, the use of dismissals, discharges and adjournments has remained relatively stable in the Magistrates' Court, at around 16% of all dispositions. They are used mostly in relation to 'other' drug offences, using or cultivating, theft and property offences generally.

The overall pattern of change in the distribution of higher court sanctions suggests that the suspended sentence has replaced the adjournment or discharge as a lower order sanction, despite legislative directions designed to prevent such transitions.

TABLE 5.5
MAGISTRATES' COURT, 1990 - 94
USE OF BONDS

	1990	*1991*	*1992*	*1993*	*1994*
Other nei	7%	9%	8%	7%	7%
Assault	20%	22%	17%	17%	18%
Sexual offences	30%	26%	24%	22%	23%
Robbery	12%	7%	8%	6%	10%
Theft of car	n/a	n/a	13%	11%	9%
Theft	36%	35%	31%	29%	31%
Burglary	19%	18%	14%	14%	15%
Handling or receiving stolen goods	26%	27%	23%	22%	21%
Fraud/ deception	26%	26%	22%	20%	24%
Property damage	28%	27%	22%	22%	23%
Use/cultivate	50%	56%	43%	37%	41%
Drug Trafficking	8%	7%	6%	6%	6%
Other drug offences	57%	55%	47%	43%	43%
Public order offences	10%	12%	9%	8%	8%
CBO/ICO Breach	0%	0%	0%	1%	1%
Bail breach	12%	9%	8%	8%	5%
Justice procedure offences	14%	14%	14%	20%	19%
Drive while disqualified	0%	1%	1%	1%	1%
Drink/driving	12%	12%	14%	13%	16%
Drive without licence	2%	3%	3%	2%	2%
Dangerous driving	9%	12%	10%	9%	9%
Total	15%	17%	15%	14%	15%

This may be due either to a loss of confidence in the sanction[53] or, more likely, in the improper substitution of one form of unsupervised release with another. The superficial similarity between the suspended sentence and the lowest order sanctions has often been commented upon and this may have had a greater impact upon sentencing behaviour in the higher courts than the legislative guidance.

A similar sharp decline in the use of bonds and fines occurred in the late 1950s with the introduction of probation, and again in the early 1980s. One explanation would explain this in terms of a horizon effect: from where the judges are standing, with metrics usually calculated in terms of prison years, distances at the middle and bottom end of the range are compressed. For judges, bonds and fines seem to be interchangeable with community based sanctions or suspended sentences.

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53 At the time of the legislative changes, some judicial officers were under the erroneous impression that the abolition of the common law bond had resulted in the loss of their power to order conditional adjournments.

CHAPTER 6

CONCLUSION

THE PROBLEM OF EVALUATION

Attempting to explain changes in the criminal justice system is an exercise fraught with peril. During the life of this project, and in various publications along the way, we have thought that we have detected trends or major movements in prison populations, sentencing patterns or the use of various sanctions. We have cautiously made predictions about the directions we thought the 'system' was moving in the light of the evidence we had to hand. Most have proved wrong, or at least, premature. Increases in the prison population detected in mid-1993 were considered likely to continue, given what we had suspected about changes in the interpretation of the law relating to remissions. It was not to be. Increases in community work orders seemed inexorable. They stopped. Extrapolation is a dangerous game. As we proceeded, the comments of Zimring and Hawkins took on more significance (1991:156):

> We cannot make an assumption that criminal justice policy and prison population are parts of a system which works in a manner which is both predictable and relatively uncomplicated. [We] must adopt a 'contingent' approach which emphasises the interaction of policies with complex and changeable environments and thus the variable impact of policy changes on rates of imprisonment.

The causes of change are complex, and often unknowable. The criminal justice system is intricate, subject to multiple pressures and accountable to many constituencies. In explaining its movements there is a danger in ascribing to it a will or a purpose. To anthropormorphise it. In fact what we have attempted to describe is are the actions of thousands of individuals: police, prosecutors, judicial officers, corrections officers, criminals and the public. In the face of such diversity, the tools we use are very poor indeed.

SENTENCING AND PENAL REFORM IN VICTORIA

We have argued throughout this report that modern penology's focus upon the prison has produced a distorted understanding of the way that the sentencing and sanctioning system has functioned as a whole. Though the nineteenth century sentencing system in Victoria was dominated by the sanction of imprisonment, its grip was steadily loosened over the next ninety years. The evolution and use of various sanctions, their overall reach and their internal interrelationships, must be understood in a long term historical context. There are significant hazards in analysing relatively short periods of time, possibly taking them out of historical context. The relative magnitude or size of a change or changes can be distorted by the scale against which it measured (McMahon 1992).

In Victoria, as in England and Canada, imprisonment rates and numbers have fluctuated over the years, and some of the patterns need to be measured in terms of decades, rather than years. Victoria effectively decarcerated for a period of almost seventy years (1871 to 1947) both terms of absolute prison numbers and, more particularly, rates. In the immediate post-war period the numbers imprisoned in Victoria grew steadily, but, as the 1970s showed, not inexorably. From the late 1970s prison numbers grew slowly and continue to do so.

The great modern decarceration in Victoria occurred in the early 1970s, prior to introduction to the new 'alternatives' to imprisonment. As Chan has noted (1992:14), community programmes were not introduced into Australia until the late 1970s and early 1980s, just as these policies were coming under sustained attack overseas. Scull's influential book on decarceration first appeared in 1977. Looking at the Victorian data, it would be more accurate to say that from the late 1970s the state was engaged in an effort to slow the rate of re-carceration, rather than to decarcerate. And it appeared to be a relatively successful effort.

It is a similar story in relation to the relative use of sanctions. We have very little information about the long term elasticity of relative market shares at the various levels of the courts. However, even a cursory examination of the more recent data indicates that some form of substitutional sanctions, such as the attendance centre orders and the intensive correction order have made little impact upon sentencers' dispositional patterns whilst others, like the suspended sentence seem to enjoy more popularity, but draw from a range of measures, not just imprisonment.

What is apparent is that changes occur, and can be made to occur. Within the overall level of severity or punitiveness of the system reform can succeed. The system is not inevitable, inexorable or irreversible. The Victorian experience of the last decade or so can be contrasted with that of England as described by Rutherford, 1984:171 (cited in Vass, 1990:164):

> Most contemporary prison systems are expanding through a combination of drift and design. Criminal justice administrators perpetuate the myth that the prison system is swept along by forces beyond their control or influence. The convenient conclusion is announced that, given increased rates of reported crime and court workloads, it inevitably follows that there is no alternative other than for the prison system to expand further. Strategies which might shield the prison system from increases in persons processed by criminal justice have been disregarded and administrators have preferred to proceed as though policy choices do not exist. In large part, criminal justice administrators are the architects of the crisis with which they are now confronted... Most typically, expansion occurs in the absence of coherent policy.

What then can we make of the overall change in Victoria?

Imprisonment

Imprisonment is a little used sanction in the Magistrates' Court and represents less than half of all sentences imposed in the higher courts. As David Thomas argues, the majority of people who are sentenced to imprisonment in England, and this applies as well to Victoria, fall into two main categories (Thomas 1989:38). First there are those whose offence is so serious that it demands a sentence of imprisonment on public policy grounds, irrespective of its impact on the offender. Secondly there are those whose offences are not in the first order of gravity, but who have appeared before the court so many times, and experienced so many non-custodial sentences, that there seems to be no realistic alternative.

The first group is a flexible one and is sensitive to changes in public attitudes. Over the years, the penal emphases will change, and this change may be reflected in the lengths of sentences imposed upon those offenders and in the boundaries between imprisonment/non-imprisonment. The second group encompasses not only the recidivist, but all the groups that have been seen as 'social problems' and for whom

the prison has acted as a form of communal dustbin: the alcoholics, the mentally ill, intellectually disabled, the homeless, the vagrant, the neglected young , the poor and others.

In terms of the recidivist, the Victorian response has been to lengthen the path to prison by adding more rungs and by retaining judicial discretion on breach. In the case of the social problems, many attempts have been made to remove them from the prison system. The late nineteenth century prison was full of the drunk, disorderly, the ill and many destitute women. These made up the majority of receptions but stayed for very short periods. Women disappeared almost totally from the prison population, while it took until the early 1970s for the remainder of the alcoholics, vagrants and other 'good order' offenders effectively to be decarcerated. As we noted in Chapter 3, the dramatic changes in Victoria came about through significantly lower prison receptions, not in changes in sentence lengths. The poor, in the form of fine defaulters, were dealt with by substituting community service or by effectively ignoring their default. Some of the young are found in the youth training centres and some of the mentally ill and intellectually disabled are dealt with under special legislation. Prison census data indicate that Victoria's prison population is older than that of other states, has more prior convictions and incarcerations and serves, on average, longer sentences.

Whether Victoria has reached its proper 'core' level of imprisonment is difficult to say. There are no absolute barriers at either end of the scale. As the United States has shown, imprisonment rates of over 500 per 100,000 can be socially acceptable and fiscally managed. On the other hand, the Japanese can live comfortably with 36 per 100,000. These are matters not just of crime rates, but of race, class and cultural sensitivities.

Keeping people out of gaol is one strategy for maintaining low imprisonment rates. Getting them out once they are in, is another. Victoria assiduously employed a very wide range of sentence modification measures to keep its population under control. Parole plays a major part in determining sentence length and ultimately, the size of the prison population. Unlike the 1989 reforms in New South Wales, which not only abolished remissions, but set a fixed ratio between the head sentence and the non-parole period, Victoria has always left this aspect to the discretion of the court. In our view, a large contributing factor the rapid and massive increase in the New

South Wales prison population after 1989 was due to the changes in the parole terms, with the impact of remissions being felt at a later stage.

As we have seen, other executive modifications played a significant role in keeping prison numbers within capacity. Attendance centre permits, early release schemes, pre-release and the like all played small, but useful parts. It is probably this combination of small measures, both at the back and front ends, that has distinguished the Victorian experience. These measures show a bureaucracy concerned with prison conditions, with the cost of prisons and, in many cases, informed by general critiques made the writers on prisons.

Perhaps it is naive in the extreme to argue that the Victorian ethos has been relatively benign. Since Whatmore's times, the emphasis has been on penal reform. Alexander Whatmore, the last Inspector-General of Penal Establishments and the first Director of Prisons was the prime mover behind the *Penal Reform Act* of 1956 which saw the introduction of youth training centre, parole, remissions in their modern form and other changes. Parole Board Chairmen, including Sir John Starke, Justices Nicholson, Vincent and others have generally been sympathetic to notions of penal reductivism and empathetic to the plight of prisoners, many of whom they had represented in their days as counsel.

One of the most important sources of stability in Victoria has been the relatively constant nature of its sentencing structure. Unlike the United States, which has swung dramatically between indeterminate and determinate sentencing, from the rehabilitative ideal to just deserts, from discretion to uniformity in sentencing, Victorian sentencing law has steadfastly maintained an elastic, hybrid system in which the task of sentencing is seen as an 'instinctive' or 'intuitive' synthesis of all the aims of sentencing: retribution, rehabilitation, deterrence and incapacitation. Although the internal balance between these aims may change over time, and will certainly vary between sentencers, the overall shape of the system has remained the same.

Victorian sentencers have refused to accept sentencing guidelines and have opposed presumptive, minimum or mandatory sentences. The 1991 Act was intended 'to promote consistency of approach in the sentencing of offenders'.[1] One of the

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1 *Sentencing Act* 1991 (Vic), s.1(a).

methods by which it was intended that this be done was by providing 'sentencing principles to be applied by courts in sentencing offenders'.[2] These principles are set out in Part 2 of the Act, entitled 'Governing Principles', in particular, in s.5 (see Chapter 2). The Victorian Sentencing Committee was very much concerned with the question of sentencing principles and guidance and nearly three-quarters of the first volume of its Report deal with these matters.

Victorian courts have traditionally treated sentencing as an essentially pragmatic exercise. The apotheosis of the Court of Criminal Appeal's approach is found in the leading case of *Williscroft* where Adam and Crockett JJ. stated:[3]

> Now, ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process. Moreover, in our view, it is profitless ... to attempt to allot to the various considerations their proper part in the assessment of the particular punishments presently under examination. We are aware that such a conclusion rests upon what is essentially a subjective judgment largely intuitively reached by an appellate judge as to what punishment is appropriate.

This view was recently echoed by the High Court of Australia, when the majority of the court stated:[4]

> However, sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions...

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2 *Sentencing Act* 1991 (Vic), s.1(e).

3 [1975] V.R. 292, 300.

4 *Veen (No. 2)* (1988) 164 C.L.R. 465, 476.

The Victorian Sentencing Committee was cognisant of the criticisms which had been directed at the sentencing disparities produced by such a subjective and unstructured approach but was unwilling to contemplate recommending the introduction of sentencing grids, guidelines, tariffs or fixed penalties which had been tried in other jurisdictions (Fox, 1987; Corns, 1990). The Committee's solution was to create a package of measures to guide more closely the exercise of a sentencer's discretion. This package included (1) clearly defined objectives to be pursued by the sentencing process; (2) clearly set out factors which mitigated or aggravated sentences; (3) the means of determining the seriousness of the offences; (4) the power to hand down guideline sentences and (5) a clear hierarchy of sanctions.[5] Most of these found their way into the Act.

Paradoxically, it may well be this refusal to be bound by strict guidelines in pursuit of uniformity that may spare the Victorian system from the penal excesses found in the United States. In that jurisdiction, particularly under the federal guideline system, many sentencers have found themselves forced to impose sentences which they find personally repugnant. Moreover, as the political process slowly overwhelms the 'independent' sentencing commissions and increases sentencing levels by means of wholesale changes in the sentencing grids, sentencers are locked into an escalating pattern of sentences and, ultimately, deprived of the discretion which might mitigate its effects. Discretion moves to prosecutors and to the prison administrators (Tonry 1996).

The changes introduced by the 1993 Act still leave a great deal of discretion to the courts. While this remains, the harsher effects of the legislation will not be as powerful as they may have been had discretion been effectively eliminated. It is for this reason that prediction of the effects of both the 1991 and 1993 legislation is so difficult. Sentiment is much more difficult to forecast than system.

Intermediate and lesser sanctions

We have argued that the use of intermediate sanctions in Victoria has had relatively little to do with decarceration, with the fiscal crisis of the state or with the growing control by the state over its citizens. We have suggested that in Victoria,

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5 See Victorian Sentencing Committee, 161 and clauses 5 to 10 in the Draft Bill attached to the Report.

decarceration has been influenced as much by the number of persons who come before the courts than the relative dispositions used by the courts following conviction. The decline in the relative use of the imprisonment sanction is an important, but not dominant factor in determining imprisonment rates.

In the modern era, intermediate sanctions have come to be conceived of as independent sanctions, to be understood in the light of their own histories, not merely as counterpoints to the prison (McShane and Williams 1989). The growing sophistication of desert theory requires subtle gradations of sanctions. The widening range of sanctions evident since the 1950s has allowed for more subtle calibrations of crime and punishment. Tracing the transitions, however, has proved problematic.

The bond is the least intrusive of all sanctions and has, until recently, made up over 25% of all sentences in the higher and lower courts. It is inexpensive, does not extend the power of the state and usually does not result in a reappearance before the courts. Its wide use is an indication that still, too many trivial cases come before the courts and that for many, the process is sufficient punishment. Its recent decline is puzzling, but if, as we suspect, it is being replaced in many cases by the suspended sentence, it represents a worrying form of penalty escalation, but not, paradoxically, an escalation in state control by means of surveillance. The suspended sentence, the major substitutional sanction, is a sentencing anomaly, but flies in the face of conventional 'alternatives' orthodoxy which sees every alternative to imprisonment as another form of state control. Here is a sentence in which the state does nothing and, for financial reasons, is probably happy to do so.

This paradox of penalty escalation without state control is also seen in the change from full community-based orders to community-based orders with work only conditions. What we see here is an attempt by sentencers to free themselves from the shackles of the Department of Justice (by avoiding the need to obtain pre-sentence reports), to ensure that the poor do not become the unsanctionable (inability to pay fines should not result in gaol, but should not escape any form of censure) and to limit the forms of punishment. The rapid and massive growth of these limited orders indicates that finding proportionate forms of punishment for lower to mid-range sentences is a difficult task, absent the use of the fine.

Victorian intermediate sanctions have been a pot-pourri of purposes and measures. Probation, for long, the major form of intermediate sanction represented between 10-

20% of the sentencing market until its demise in the mid-1980s. The community-based order, its successor, has captured even less. Our data tend to indicate that rather than their being a fixed or growing pool of those under 'state control' total numbers have varied over the years and that in the early 1970s, as prison numbers fell dramatically, so did the total numbers of orders made in those years. We have still to explore the full history of the total 'penal reach' of the state but it would seem to us that some of the variations between probation and community-based orders can be explained by the length of the orders as much as by the number of orders made. All the evidence seems to point to the conclusion that jurisdictions which make heavy use of imprisonment also make large use of other sanctions. In Victoria, not only are the rates of imprisonment low, but so also are the rates of persons under community-based orders.

In our analysis of non-custodial sentences, we have attempted to distinguish between substitutional and alternative sanctions. Other than the suspended sentence, the new substitutional sanctions such as attendance centre orders and intensive correction order, play a very limited part in the sentencer's repertoire. Community service was, to a large degree, a replacement for fines and probation, and only to a limited extent, for imprisonment. Even if attendance centre orders and intensive correction orders diverted only 50% from prison, that meant little, as they only captured about 3% of the market. If the suspended sentence captured 50%, this had a major impact, as it formed a larger section of the sentencing market. The changes in intermediate sanctions have, in the main, been changes within themselves. They are 'intra-intermediate' changes rather than changes at the custodial/non-custodial boundary.

We venture one other observation in relation to the penalty escalation/state control conundrum. A feature of the sentencing system even more neglected than the bond or fine is the massive growth of the use of the infringement notice or the 'on-the-spot' fine (Fox 1995). In Victoria, nearly 2.5m of such notices are issued annually. The number and value of these notices has grown steadily. In 1965, there were eleven traffic offences subject to such procedures. By 1989 these had grown to 124 and there are now 379 offences for which infringement notices can be issued, with penalties ranging from $15 to $900 (Fox 1995).

The growth in infringement notices, and the ever increasing range and levels of seriousness of offences to which they are being applied marks a quiet but significant change in patterns and methods of law enforcement. It is part of the pattern of focused punishment with decreasing levels of surveillance. Instead, the processes of surveillance changes, from probation officers or community corrections officers, to speed cameras, red-light cameras, bus or transit lane cameras, radar cameras and the like. More and more business is diverted from the Magistrates' Court to administrative procedures, while at the same time, an increasing amount of business is transferred down from the higher courts to the Magistrates' Court. Justice is becoming less majestic and more prosaic.

In the 1990s, the fiscal stringency of the state manifests itself in different ways. The first, at the lowest end of the scale, sees an increasing number of offences being removed from the courts to the infringement notice system. At first it was motor vehicle related offences, now it is a host of minor offences This may manifest itself in a drop in the number of persons being brought before the courts and a drop in bonds and court-imposed fines. The second, at the higher end of the scale, sees the state respond not by diverting people from prisons but by privatising them in the hope that this will be a less expensive option. In time, community corrections will also be increasingly privatised, or re-privatised by means of contracting out treatment and supervision services. Finally, it sees the more focused use of supervisory services by state agents as community supervision options are pared down to only what is necessary. And for the large majority, all that is needed is supervision to ensure that the community work component is completed.[6]

THE FUTURE OF CRIMINAL JUSTICE

The prison in Victoria is here to stay. There is no danger that it will fade away of its own accord. However, the role of the prison in crime control is probably changing. The prison is not longer conceived of as being remotely rehabilitative, but does what many other sanctions cannot: control, contain and incapacitate (Zimring and Hawkins 1991:88). As society turns from rehabilitative and deterrent notions to punitive and preventive ones, prison sentences will become fewer, but considerably longer. Notions of selective and collective incapacitation may replace the moral and

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6 See further discussion of penological trends below.

ethical grounds for punishment. 'This strategy aims to increase prison sentences with the object of maximising the amount of crime prevented in the community by removing offenders from society' (Zimring and Hawkins 1991:88). Unfortunately, the empirical basis of these incapacitative strategies have yet to be established.

The falling Victorian crime rate has probably contributed to the fall in prison receptions. There is evidence that property offences have declined considerably, and it is these offences which have also been the subject of decareration through the use of the suspended sentence. But the 1980s and 1990s have seen changes in penal concerns.

Over recent years there has been increasing concern over a number of offences such as sex offences generally, sexual abuse of children, drunken driving and culpable driving causing death, domestic violence and drugs (Zimring and Hawkins 1991:156). This is as true for Victoria as elsewhere where the moral panics have moved from drugs to paedophaelia, from assaults in general to sexual assaults.

The Liberal/National parties, in their election campaigns of 1992 and 1996, promised to increase order through law. In introducing the *Sentencing (Amendment) Act* 1993 (Vic) the Attorney-General, Mrs Wade, stated identified the three major aims of the legislation as being to increase penalties, to protect the community and to meet community expectations. The targets for these measures were (1) recidivist serious sexual offenders, (2) recidivist serious violent offenders and (3) anyone convicted of a serious offence. The mechanisms for achieving these purposes were:

- redefining the purposes of sentencing for serious sexual offenders and serious violent offenders;
- increasing sentences for serious sexual offenders and serious violent offenders by one-third by excluding the operation of s.10 of the *Sentencing Act* 1991 (Vic);
- reversing the common law and statutory presumptions of concurrency in relation to serious sexual offenders;
- allowing persons convicted of a serious offence to be sentenced to an indefinite term of imprisonment.

As has become apparent, these measures have not, in themselves, resulted in major changes in sentencing patterns. Yet, as we have seen, sentence lengths have

increased, and in particular for serious sexual and violent offenders. This has not been just the result of the partial implementation of s.10, but changes in the attitudes of the courts which possibly reflect changes in the political and social climate.

Changing social and political culture

The search for variables which will predict changes in the use of sanctions, in particular, the use of prisons has proven to be frustrating and if not fruitless, then at least confusing (Zimring and Hawkins, 1990; Young and Brown, 1993).

A number of observers have examined the relationship between political and social attitudes and culture and, for example, imprisonment rates. In his book, *Punishment in Modern Society* (1990:287), Garland suggest that punishment should be regarded as:

> a 'total social fact,' which on its surface appears to be self-contained, but which in fact intrudes into many of the basic spheres of social life ... [P]unishment is a distinctive social institution which, it its routine practices, somehow contrives to condense a whole web of social relations and cultural meanings...[7]

Elsewhere he has written (1991:142-3):

> The ways in which we punish depend not just on political forces, economic interests, or even penological considerations but also on our conceptions upon what is or is not culturally and emotionally acceptable. Penal policy decisions are always taken against a background of mores and sensibilities that, normally at least, will set limits to what will be tolerated by the public or implemented by the penal system's personnel.

We have already noted that there appear to be widely different penal cultures in Australia, cultures which have been in place for over a century. Differences in crime rates, imprisonment rates and usage of sanctions were noted by the Victoria statistician in the late nineteenth century, but no convincing explanation was offered. The different convict histories of each colony was suggested, but would not seem to account for the persistent nature of these differences. In what is a

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7 See also Doob and Marinos, 1995:423-4

remarkable culturally homogeneous country in other respects, this is a phenomenon worthy of further investigations.

On the narrower conceptions of 'culture', Walker has argued that in many jurisdictions in Australia rates of imprisonment increase during times of conservative governments and reduce during times of Labor, or more left-leaning governments. He writes (1994:36):

> Trends in punishment ... are related more to political change. There appears to be little direct connection between crime and punishment trends in themselves; least of all is there any evidence that of successful deterrence by tougher sentencing. In fact, one can confirm this simply by observing that New South Wales' rate of imprisonment as double that of Victoria, appears not to have provided that State with any lower crime figures than those of Victoria. Because of the lack of court data, and the lack of a nexus between police data and punishment data, we have no idea at all about the effectiveness, or the deterrent value, of the punishment or rehabilitative regimes chosen by our politicians of either side. This means, perhaps conveniently, that these different political and penal philosophies cannot be truly tested - a remarkable omission in these days of economic rationalism and cost reduction in the provision of government services.

How this occurs is not clear. Zimring and Hawkins (1990:125) failed to find a relationship between public opinion and rates of imprisonment in the United States, finding no support for the argument that increases in imprisonment occur when there is a crackdown in sentencing associated with punitive public opinion. In fact, they argue quite persuasively that, if opinion polls are anything to go by, public antipathy towards offenders is always high. In the United States, as is probably the case in Australia, polls show that most people thing that sentences are too lenient and that dissatisfaction with the criminal justice system is a chronic condition. In the United States, even as rates of imprisonment soar to unprecedented levels, the public does not feel safer or become less punitive. The experience of the United States appears to suggest

> that there is no natural level of prison accommodation or rate of imprisonment that would significantly reduce the need felt by many citizens for more prisons... As long as levels of crime are high enough to generate

> substantial anxiety, those who view increased imprisonment as a solution will continue to demand more prisons and will do so in terms that do not change markedly at any level of incarceration. Indeed, the more attenuated the link between the malady and the proposed remedy, the more insatiable will be the demand for more of the remedial measure (Zimring and Hawkins 1990:104).

Young and Brown (1993:38) in their comprehensive review of the factors which influence imprisonment rates support Zimring and Hawkins' argument that 'cultural factors have a large part to play, and neither the formal structure of the criminal law nor particular penal policies or principles supposedly underpinning it are able to explain divergent rates of imprisonment.' They point to the growing body of literature on the relationship between behavioural norms and cultural conventions and the changing use and forms of punishment in societies. 'While punishments may be justified by policy makers, judges and penal administrators by reference to their instrumental goals, their form and severity are likely to be chosen on the basis of almost instinctive feelings about what the 'right' punishment is.' (1993:40). They argue that imprisonment rates seem to be 'driven by deeply embedded sociocultural factors so that cross jurisdictional differences likely to remain fairly stable over time' although rates within jurisdictions can fluctuate substantially. They conclude (1993:45):

> This sort of analysis of imprisonment rate demonstrates the limitations of efforts at 'rational' penal reform that attempt to alter penal practices by redefining penal philosophies or offering a greater choice in the smorgasbord of sanctions. Ultimately, effecting very substantial shifts in the use of imprisonment ... involves changing a range of sociocultural attitudes and values that go well beyond the technical penological agenda.

An important aspect of Victoria's low imprisonment rate has been what might loosely be called the 'judicial culture' It is very difficult in indeed to compare the relative severity of sentences imposed by the courts in different jurisdictions. This is because of the many factors which affect the way a sentence of imprisonment is actually served and because of the vast variety of intermediate sanctions. In any case, questions of the relative severity of sanctions are highly contentious.

However, whatever the difficulties, we would hazard a guess that overall, over may years past, the Victorian judiciary, both at the Magistrates' Court and Higher Courts level, have generally taken a view that imprisonment is ultimately unproductive, has undesirable side effects and should be reserved as a sanction of last resort. They have used it sparingly, and for short periods. Until recently, other than for murder, sentences of more than 12 to 15 years were unusual, even for the most serious of non-homicide offences and, for the bulk of offenders, sentences of 5 to ten years would be considered quite severe. For many sentencers, the rehabilitative ideal has not died, and some have clung tenaciously to it despite hostile media attention to what appear to be unduly lenient sentences. Their view is summed up in the words of Starke J, in the leading case of *Williscroft*[8]

> It is often taken for granted that if leniency for the purpose of rehabilitation is extended to a prisoner when the judge is passing sentence, that this leniency bestows a benefit on the individual alone. Nothing, in my opinion, is further from the truth. Reformation should be the primary objective of the criminal law. The greater the success that can be achieved in this direction, the greater the benefit to the community.

However, it is possible to detect a change in sentiment in the judicial culture. From a wide range of judgments, it is evident that the Court of Appeal has more willing to uphold sentence lengths which far exceed any previous tariffs, to focus upon the punitive, deterrent and incapacitative aspects of sentencing and to be more responsive to victims' views than it had in the past.

The constituency of legislators and judges is changing. The state of prisons is of less concern than the state of the victim's health. The victim impact statement comes to carry more weight than the pre-sentence report. The delicate sentencing balance between the interests of the offender, the state and the victim is shifting away from the former to the latter. In sum, the greater sensitivity to the rights and interests of victims and the protection of the community in general is being reflected in more severe sentences.

There is no longer any pressure for decarceration (Zimring and Hawkins 1991:202). Elections in Australia have now become auctions in which each party attempts to

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8 [1975] VR 292, 303-4.

outbid the other in terms of how tough they will be on crime. And whereas previously law and order campaigns were a predictable and tolerated aspect the electioneering process, they have now become tinged with a form of popular hysteria, built upon and endemic and growing fear of crime and fanned by some aspects of the populist media. It is ironic that in Victoria, these 'get tough' policies have been put into place at the very time that crime rates have been dropping. The fact that these policies have been credited with the decrease in the crime rate, a decrease which preceded them by nearly four years, is more a testament to political invention than criminological theory.

However, few remain immune to the growing public fear, including the judiciary. While political imperatives are never overtly part of the judicial decision-making process, courts do feel responsible to, or see the need to be partly responsive to, public sentiment. The line between judicial independence and legal irrelevance is a fine one. As Crockett J. observed in *Treloar and Butler*,[9] 'The court, in sentencing any prisoner, has an obligation to have regard to the public's expectation of what an appropriate punitive period of imprisonment should be having regard to all of the relevant circumstances'. The courts fear that if the sentences imposed are not generally accepted, public confidence in the administration of justice will flag.[10] On the other hand, courts recognise that they have to be wary about media distortions in claiming to represent the state of current local opinion.[11] Apart from difficulties which individual sentencers may experience in accurately gauging community feeling about certain types of offence, judges and magistrates' justifiably insist that public opinion, however measured, may still have to give way to the other purposes and values served by the sentencing system.

PREDICTING, FORECASTING AND PROJECTING

From what we have learned, is it possible to predict what will happen to sentencing in general in the future, and to prison populations in particular? The answer is probably no.

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9 (1989) 43 A.Crim.R. 75, 78.

10 *Raggett* (1990) 101 F.L.R. 323, 333.

11 *Wicks* (1989) 3 W.A.R. 372, 382.

Predicting prison populations is a notoriously difficult task. The level of the prison population at any one time depends upon many decisions made by many agencies. As Mullen et al observe (cited in Billingsley and Hann, 1984:5-6):

> The decisions to put people in and take people out of prisons and jails involve scores of discretionary transactions among actors with independent goals, following policies which may or may not be uniformly defined and implemented...
>
> These decisions only begin with legislative efforts to define and prescribe sanctions for criminal behaviour. The full chain includes police decisions to arrest or ignore an offender, a prosecutor's choice of whether and how to charge, a judge's sentencing policy, and release decisions generally made by parole boards.

The complexity of this system means that useful models of the correctional system effectively probably requires a model of the entire criminal justice system (Austin et al, 1992:306).

In Australia, in the past, attempts have been made to predict or forecast prison numbers. Responsible correctional management requires such forecasts for planning purposes. They have been singularly unsuccessful. In 1983, the Office of Corrections Master Plan attempted to forecast correctional populations in Victoria for the next two decades during which new prison construction would occur, albeit constrained both by and the Attorney-General's desire not to unduly expand prison capacity. Reviewing the previous decade, the Master Plan noted the decline in numbers between 1971 and 1977 and the renewed growth up to 1983. It attributed the variations in prison population demographic changes, changing patterns of offending, the development of 'alternatives' to imprisonment and the emergence of new crimes such as drug offending.

The consultants preparing the Report commissioned Australian Institute of Criminology statistician, John Walker to prepare a projection to the year 2005. In 1994, 1995 and 1996 the Department of Justice again asked Walker to prepare a projections as aids to its new prison building programme.

In the following table we have set out Walker's projections against the actual number of prisoners, and have, as well, compared the predictions of 1983 with those

of 1994. We have also added a column to indicate the 'spread' between the highest and lowest forecasts.

TABLE 6.1
PROJECTIONS OF PRISON POPULATIONS:
PRISONERS ON HAND AT 30 JUNE 1982 - 2005

YEAR	NO CHANGE	OPTIMISTIC	ACTUAL	MOST LIKELY	PESSIM-ISTIC	SPREAD
1982	1753	1753	**1753**	1753	1753	0
1983	1915	1913	**1962**	1915	1917	4
1984	2009	1817	**1933**	1826	2017	200
1985	2098	1653	**1820**	1758	2287	634
1986	2165	1687	**1932**	1801	2376	689
1987	2213	1720	**1953**	1842	2436	716
1988	2253	1749	**2051**	1880	2486	737
1989	2292	1776	**2150**	1917	2531	755
1990	2334	1811	**2312**	1958	2557	746
1991	2372	1842	**2305**	1992	2621	779
1992	2403	1865	**2262**	2020	2662	797
1993	2429	1883	**2240**	2044	2699	816
1994	2450	1898	**2483**	2061	2730	832
1995	2467 *2627*	1906	**2426** **(march)**	2075 2649	2757 *2649*	851
1996	2484 2669	1914	**2450**	2091 *2726*	2781 *2736*	867 67
1997	2497 *2677*	1921		2101 *2874*	2808 *2995*	887 *318*
1998	2506 *2660*	1924		2110 *2865*	2828 *2985*	904 *325*
1999	2513 *2645*	1926		2115 *2851*	2841 *2972*	915 *327*
2000	2520 *2626*	1931		2120 *2833*	2851 *2952*	920 *326*
2001	*2607*			*2813*	*2933*	*326*
2002	*2589*			*2794*	*2912*	*323*
2003	*2575*			*2775*	*2891*	*316*
2004	*2562*			*2763*	*2878*	*316*
2005	*2549*			*2746*	*2863*	*314*

The various bases for these projections have been explained elsewhere (Walker 1986) and it is beyond the scope of this report to examine them in detail. However, it is clear that these projections that they have been significantly inaccurate and less than useful in planning correctional facilities. With a spread between 'scenarios' of over 700 offenders in a population of less than 3,000, its accuracy could be equalled by guessing. This model has been abandoned in other jurisdictions in which it has been

tried because it overestimated actual prison numbers (Maclachlan 1996). To be fair to Walker, most other models have also failed (Maclachlan 1996).

More recent estimates, in 1994 and 1995 also overestimated prison numbers in the very short term and have required annual revisions. Comparing the 1994 projection with actual 1995 prison numbers it was found that the number of male receptions in 1994-95 fell short of base run projections by 125 or 3.2%. The mid 1995 stock number was 125 fewer than base run projection which amounted to difference of 5%.

The Department of Justice has made a number of projections which have also proved incorrect. All of these have predicted increases in the prison population, based upon the impact of the remissions law, the predicted increase in receptions of sex offenders and the like. In 1994 it estimated that by June 1996 the prison population would stand at 2,634 and in 2001, at 2795. In April 1996 it stood at around 2,400.

It would appear that the problems of forecasting are not technical one, but ones of unpredictability in government policy and the unpredictability of the system's response.

The stability of the prison population may create some severe problems for Victorian correctional administrators. Victoria is currently embarking upon one of the most ambitious prison building programmes in its history, a programme which is linked to the transformation of the system from one which is completely in public hands to one in which 45% of total prison bed will be privately owned in the next three to five years (Prison Profiles 1994:41). Although estimates vary, it is predicted that will be a net gain of between 200 and 250 beds when the process is completed. It is also estimated that some 40% of the present custodial staff will lose their jobs and that the cost per prisoner will be lower under the new public/private mix. Major changes to working conditions have already seen a decline in the average cost per prisoner place.[12] Whereas it appears that in other jurisdictions privatisation has been a product of high imprisonment rates (Sparks 1994:24), in Victoria that privatisation movement has been motivated more by the government's ideological commitment

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12 In 1991-92 the average cost was $49,024; in 1994 it was $40,200: (Victorian Prison Service: Unit Operational Plan 1995-96).

to the private sector and its belief that that sector is more efficient and effective. What will happen to the surplus prison capacity?

We have argued in Chapter 3 that in Victoria there has not been a direct and necessary relationship between prison accommodation and prison numbers. We have seen that Victoria has, in the past, shown a readiness to close prison facilities when the situation has warranted it, and that governments have been willing to upgrade facilities without necessarily increasing them. It may well be that faced with a surfeit of prison beds, some old and some new, the government will close the old, leaving Victoria with possibly a private prison population of 60-70%, surely a world record.

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APPENDIX 2.1

A NOTE ON DATA SOURCES

Magistrates Courts: Courtlink

Courtlink is an on-line computer system which serves the administrative and information needs of Magistrates' Courts. It allows staff to schedule court appearances, record and monitor charges, , fine and restitution payments and send out notices. It allows magistrates and clerks to enter information about offenders and penalties. As a by-product of this administrative system it is also possible to extract files which can be used to provide statistics about the flows of people through the court system. Courtlink was introduced during 1989 and 1990 and by the beginnning of 1991 all Magistrates' Courts were feeding data into the system.

The system covers both State and Commonwealth offences, and indictable offences that are heard summarily, but does not cover PERIN (Penalty Enforcement by Registration of Infringement Notices) offences.

Courtlink comprises a series of integrated data-bases that cover the details of each case (prosecuting agency, charges, hearing types, applications), the management process for the case (dates, locations, pleas, evidence), and the case outcomes (adjournments, decisions and sentence details). The primary record unit is the *Charge Sheet* or *Information* that lists all charges against an individual defendant. If several Charge Sheets are issued against a single individual over a short period, these may be amalgamated into a 'super' case. In the case of committal hearings, the record source is the *Hand-up Brief.* Basic information about each case may be entered onto Courtlink by the Clerk of Courts or by a central typing pool located in Moe. Amended or new information on the case may be entered by the Clerk of Courts or the Magistrate.

Statistical data are obtained from the Courtlink system through extract programs that are run monthly and annually. The first such extract was in 1990. Prior to 1985, Magistrates' Court sentencing statistics were collected manually from court registers and published by the Australian Bureau of Statistics (ABS). The ABS ceased this collection in 1985 and, as a result, no statistical information on Magistrates' Court sentencing is available for the period between 1985 and 1990.

The Courtlink statistical program extracts a variety of offence and sentencing data from the data-base. This data-set is analysed by the Caseflow Management Section of the Department of Justice to produce statistical tables on Magistrates' Court sentencing, elapsed times, case throughputs and bail. Two statistical reports are published, both on a calendar year basis. The *Magistrates' Courts Sentencing Report* includes the following statistical measures:

for each statutory offence type: type of penalties imposed;

- for each statutory offence type: the minimum sentence, 25th percentile, median, 75th percentile, maximum, mode and mean, and the total number of penalties (all penalties imposed);
- suspended sentences: original term of imprisonment, proportion suspended, operational period;
- for the principal offence in each case: type of penalties imposed by number of penalties;
- penalties imposed for each offence type (most severe penalty only); and
- loss of motor vehicle licence by offence type and period of cancellation.
- gender of defendant

Community-based corrections data

Data on persons who receive a community corrections sentence - either a Community Based Order or an Intensive Correction Order - is collected through a census of all offenders subject to these Orders on the census date. The census program extracts data from the community corrections Offender Information System (OASIS). The data on OASIS is collected by Community Corrections staff at the time an offender is received onto the CBO or ICO program. Like the PIMS system, the OASIS information is the primary administrative record for each offender and is subject to careful checking. Offender censuses have been conducted on the 30th of June each year since 1987.

Higher Courts

The Department of Justice maintains a sentencing data-base for the County and Supreme Courts. The operations of these courts are not linked-up to any computer-based system, and information about sentencing must be manually extracted from daily reports prepared by officers of the Director of Public Prosecutions. Cases prosecuted by the Commonwealth Director of Public Prosecutions are not included in this data-base.

Information extracted includes the first date of the hearing, the offence code, the court disposition, and details of the sentence. Since July 1989, the stage at which a guilty plea occurred has been recorded, and since 1991 the gender of the defendant has also been recorded. The data-base record unit is essentially a higher court trial. In instances where more than one person is a defendant in a trial, each defendant is coded separately. However, where a person has two separate presentments heard at one trial, then the case is counted as one person.

The Case Flow Management Section of the Department of Justice (formerly the Attorney-General's Department) provided the research team with individual case record data in DBase III+ format for all County and Supreme Court cases for each calendar year from 1985 onwards.

APPENDIX 2.2 PERSONS IMPRISONED, IMPRISONMENT RATE, TOTAL POPULATION, 1871 - 1965

	Imprisonment							
Year	Rate	Year	Number	Year		Average sent	YEAR	VIC POP'N
1871	210	1871	1619	1871			1871	770727
1873	198	1873	1569	1873	0.14	0.14	1873	790492
1874	197	1874	1595	1874	0.15	0.16	1874	808437
1875	201	1875	1656	1875	0.15	0.14	1875	823723
1876	195	1876	1636	1876	0.15	0.15	1876	840300
1877	181	1877	1561	1877	0.14	0.14	1877	860787
1878	170	1878	1496	1878	0.13	0.13	1878	879442
1879	174	1879	1563	1879	0.13	0.13	1879	899333
1880	186	1880	1599	1880	0.14	0.14	1880	860067
1881	185	1881	1599	1881	0.15	0.14	1881	862346
1882	165	1882	1495	1882	0.17	0.19	1882	906225
1883	156	1883	1449	1883	0.16	0.15	1883	931790
1884	154	1884	1453	1884	0.14	0.14	1884	946100
1885	146	1885	1450	1885	0.14	0.14	1885	991869
1886	151	1886	1512	1886	0.13	0.13	1886	1003043
1887	156	1887	1613	1887	0.13	0.13	1887	1036119
1888	160	1888	1714	1888	0.13	0.13	1888	1069200
1889	161	1889	1803	1889	0.14	0.14	1889	1118028
1890	164	1890	1863	1890	0.14	0.14	1890	1133266
1891	167	1891	1901	1891	0.15	0.15	1891	1140405
1892	159	1892	1826	1892	0.15	0.15	1892	
1893	149	1893	1720	1893	0.16	0.16	1893	
1894	138	1894	1615	1894	0.16	0.16	1894	
1895	121	1895	1424	1895	0.16	0.16	1895	
1896	114	1896	1347	1896	0.15	0.15	1896	
1897	103	1897	1226	1897	0.14	0.14	1897	
1898	107	1898	1288	1898	0.13	0.12	1898	
1901	95	1901	1151	1901	0.13	0.14	1901	1209900
1902	91	1902	1105	1902	0.14	0.14	1902	1208231
1903	86	1903	1039	1903	0.14	0.14	1903	1204742
1904	84	1904	1018	1904	0.14	0.14	1904	1205608
1905	85	1905	1034	1905	0.14	0.13	1905	1210421
1906	83	1906	1007	1906	0.14	0.14	1906	1219832
1907	74	1907	913	1907	0.14	0.14	1907	1232807
1908	71	1908	890	1908	0.15	0.15	1908	1250449
1909	69	1909	876	1909	0.15	0.14	1909	1277022
1910	67	1910	868	1910	0.15	0.15	1910	1301408
1911	60	1911	808	1911	0.15	0.15	1911	1339915
1912	61	1912	838	1912	0.14	0.13	1912	1382611
1913	64	1913	904	1913	0.13	0.13	1913	1415510
1914	61	1914	877	1914	0.13	0.13	1914	1435316
1915	63	1915	896	1915	0.14	0.13	1915	1424593
1916	61	1916	853	1916	0.15	0.15	1916	1404831
1917	53	1917	754	1917	0.17	0.18	1917	1417239
1918	45	1918	652	1918	0.18	0.19	1918	1437433
1919	42	1919	635	1919	0.15	0.14	1919	1503241
1920	49	1920	756	1920	0.13	0.13	1920	1528151
1921	51	1921	795	1921	0.13	0.14	1921	1550952
1922	51	1922	806	1922	0.13	0.14	1922	1590263

1923	49	1923	795	1923	0.13	0.12	**1923**	1625380
1924	47	1924	782	1924	0.12	0.13	**1924**	1657095
1925	53	1925	895	1925	0.12	0.11	**1925**	1684017
1926	57	1926	979	1926	0.12	0.13	**1926**	1711827
1927	57	1927	999	1927	0.12	0.13	**1927**	1741390
1928	59	1928	1044	1928	0.12	0.12	**1928**	1760964
1929	67	1929	1185	1929	0.13	0.13	**1929**	1777065
1930	73	1930	1301	1930	0.14	0.14	**1930**	1792605
1931	80	1931	1441	1931	0.15	0.15	**1931**	1803570
1932	82	1932	1488	1932	0.17	0.16	**1932**	1813387
1933	80	1933	1458	1933	0.20	0.21	**1933**	1824479
1934	75	1934	1375	1934	0.21	0.22	**1934**	1837490
1935	69	1935	1264	1935	0.20	0.20	**1935**	1843023
1936	66	1936	1222	1936	0.18	0.18	**1936**	1851593
1937	60	1937	1113	1937	0.17	0.18	**1937**	1859487
1938	60	1938	1129	1938	0.16	0.15	**1938**	1873760
1939	66	1939	1242	1939	0.15	0.15	**1939**	1886356
1940	62	1940	1181	1940	0.16	0.17	**1940**	1914918
1941	55	1941	1073	1941	0.16	0.16	**1941**	1946425
1942	58	1942	1129	1942	0.15	0.15	**1942**	1962558
1943	60	1943	1191	1943	0.16	0.16	**1943**	1981616
1944	52	1944	1048	1944	0.17	0.17	**1944**	1997954
1945	55	1945	1111	1945	0.17	0.18	**1945**	2015107
1946	52	1946	1054	1946	0.17	0.17	**1946**	2039769
1947	49	1947	1022	1947	0.16	0.16	**1947**	1061689
1948	43	1948	912	1948	0.15	0.14	**1948**	2106315
1949	47	1949	1024	1949	0.14	0.14	**1949**	2164331
1950	50	1950	1112	1950	0.13	0.13	**1950**	-2231256
1951	53	1951	1211.5	1951	0.13	0.13	**1951**	
1952	56	1952	1311	1952	0.13	0.13	**1952**	
1953	53	1953	1275.5	1953	0.13	0.14	**1953**	
1954	50	1954	1240	1954	0.13	0.14	**1954**	
1955	52	1955	1335	1955	0.13	0.13	**1955**	
1956	53	1956	1380	1956	0.12	0.12	**1956**	2618112
1957	59	1957	1583	1957	0.12	0.12	**1957**	2680555
1958	56	1958	1533	1958	0.12	0.12	**1958**	2745165
1959	56	1959	1571	1959	0.15	0.12	**1959**	2811429
1960	60	1960	1727	1960	0.19	0.25	**1960**	2888290
1961	64	1961	1875	1961	0.17	0.13	**1961**	2950790
1962	66	1962	1992	1962	0.14	0.14	**1962**	3013447
1963	66	1963	2043.5	1963	0.15	0.15	**1963**	3080215
1964	66	1964	2095	1964	0.15	0.15	**1964**	3161537
1965	62	1965	2018	1965	0.16	0.16	**1965**	3233938

APPENDIX 2.3 PERSONS CONVICTED, IMPRISONED, IN PRISON 1872 - 1981; AVERAGE SENTENCE LENGTH

Persons convicted, imprisoned, in prison

Persons convicted (court sentencing data)
Persons imprisoned (court sentencing data) **Derived measures**
Prisoners (daily average prison populations)

Year	Convicted	Imprisoned	Prisoners	Ratio pr: 100 convic	Ratio Pr: p 100 imp	Prison Places	Ave sent length
1872	16476	8762	1619	9.8	18.5	1500	2.1
1873	16407	8689	1569	9.6	18.1	1500	2.1
1874	16669	8789	1595	9.6	18.1	1467	2.0
1875	17256	9112	1656	9.6	18.2	1525	2.0
1876	17234	9080	1636	9.5	18.0	1431	1.9
1877	18253	9529	1561	8.6	16.4	1496	1.9
1878	15829	9715	1496	9.5	15.4	1509	1.9
1879	17167	9340	1563	9.1	16.7	1610	2.1
1880	16273	9033	1599	9.8	17.7	1611	2.1
1881	16760	9328	1599	9.5	17.1	1563	2.0
1882	17509	9537	1495	8.5	15.7	1602	2.0
1883	18105	9622	1449	8.0	15.1	1617	2.0
1884	18415	9762	1453	7.9	14.9	1634	2.0
1885	18857	10087	1450	7.7	14.4	1613	1.9
1886	20694	11106	1512	7.3	13.6	1808	2.0
1887	22126	12067	1613	7.3	13.4	1946	1.9
1888	23028	12281	1714	7.4	14.0	2010	2.0
1889	23929	12495	1803	7.5	14.4	2102	2.0
1890	25156	12842	1863	7.4	14.5	2161	2.0
1891	23009	12071	1901	8.3	15.7	2151	2.1
1892	22404	12252	1826	8.2	14.9	2138	2.1
1893	19580	10769	1720	8.8	16.0	1763	2.0
1894	16875	9429	1615	9.6	17.1	1534	2.0
1895	15529	8991	1424	9.2	15.8	1289	1.7
1896	15183	8821	1347	8.9	15.3	1235	1.7
1897	13410	7514	1226	9.1	16.3	1099	1.8
1898	17389	9396	1288	7.4	13.7	1360	1.7
1899	17082	9220	1220	7.1	13.2	1390	1.8
1900	16777	9045	1180	7.0	13.0	1480	2.0
1901	16472	8870	1151	7.0	13.0	1560	2.1
1902	16168	8697	1105	6.8	12.7	1654	2.3
1903	16114	8567	1039	6.4	12.1	1731	2.4
1904	16891	9164	1018	6.0	11.1	1573	2.1
1905	16328	9276	1034	6.3	11.1	1566	2.0
1906	16802	8955	1007	6.0	11.2	893	1.2
1907	15125	7838	913	6.0	11.6	818	1.3
1908	11732	6193	890	7.6	14.4	708	1.4
1909	12064	6418	876	7.3	13.6	721	1.3
1910	12009	6130	868	7.2	14.2	783	1.5
1911	11877	5996	808	6.8	13.5	645	1.3
1912	11647	5813	838	7.2	14.4	699	1.4
1913	12701	6150	904	7.1	14.7	722	1.4
1914	12353	6200	877	7.1	14.1	671	1.3
1915	12133	6155	896	7.4	14.6	672	1.3
1916	10837	5101	853	7.9	16.7	594	1.4
1917	7903	3644	754	9.5	20.7	449	1.5
1918	6296	2696	652	10.4	24.2	367	1.6

1919	7401	3085	635	8.6	20.6	440	1.7
1920	9452	3738	756	8.0	20.2	623	2.0
1921	10114	4075	795	7.9	19.5	629	1.9
1922	10900	4414	806	7.4	18.3	620	1.7
1923	11568	4600	795	6.9	17.3	596	1.6
1924	11975	4607	782	6.5	17.0	594	1.5
1925	12293	5562	895	7.3	16.1	689	1.5
1926	13078	5649	979	7.5	17.3	702	1.5
1927	13639	6226	999	7.3	16.0	708	1.4
1928	12981	5795	1044	8.0	18.0	740	1.5
1929	12949	6024	1185	9.2	19.7	894	1.8
1930	13623	6011	1301	9.6	21.6	902	1.8
1931	14218	5982	1441	10.1	24.1	924	1.9
1932	14768	5921	1488	10.1	25.1	930	1.9
1933	15116	5896	1458	9.6	24.7	957	1.9
1934	13922	5493	1375	9.9	25.0	881	1.9
1935	16098	5993	1264	7.9	21.1	861	1.7
1936	18427	6560	1222	6.6	18.6	932	1.7
1937	17762	6136	1113	6.3	18.1	851	1.7
1938	19564	6595	1129	5.8	17.1	928	1.7
1939	19914	7572	1242	6.2	16.4	981	1.6
1940	19881	6648	1181	5.9	17.8	851	1.5
1941	19835	6661	1073	5.4	16.1	861	1.6
1942	22788	7440	1129	5.0	15.2	962	1.6
1943	22485	6789	1191	5.3	17.5	956	1.7
1944	21569	5726	1048	4.9	18.3	873	1.8
1945	18393	5316	1111	6.0	20.9	806	1.8
1946	19561	5158	1054	5.4	20.4	834	1.9
1947	23138	5916	1022	4.4	17.3	846	1.7
1948	24357	5596	912	3.7	16.3	774	1.7
1949	25903	6205	1024	4.0	16.5	878	1.7
1950	30626	7669	1112	3.6	14.5	1047	1.6
1951	31451	8031	1212	3.9	15.1	1145	1.7
1952	32275	8392	1311	4.1	15.6	1238	1.8
1953	33252	8898	1276	3.8	14.3	1310	1.8
1954	34222	9398	1240	3.6	13.2	1405	1.8
1955	35225	9900	1335	3.8	13.5	1476	1.8
1956	36361	10480	1380	3.8	13.2	1597	1.8
1957	37685	11099	1583	4.2	14.3	1735	1.9
1958	44637	11204	1533	3.4	13.7	1855	2.0
1959	42395	9323	1571	3.7	16.9	1554	2.0
1960	44128	11445	1727	3.9	15.1	1902	2.0
1961	42795	11475	1875	4.4	16.3	1569	2.1
1962	47232	10967	1992	4.2	18.2	1891	2.5
1963	48411	11553	2044	4.2	17.7	2164	2.8
1964	45402	10829	2095	4.6	19.3	2402	2.7
1965	45761	10431	2018	4.4	19.3	2219	

	Higher Courts		Magistrates Courts		All courts
Year	Total	Imprisonec	Total	Imprisonec	Tot imp
1872	476	462	16000	8300	8762
1873	407	389	16000	8300	8689
1874	436	423	16233	8366	8789
1875	427	413	16829	8699	9112
1876	383	364	16851	8716	9080
1877	421	407	17832	9122	9529
1878	458	449	15371	9266	9715
1879	397	387	16770	8953	9340
1880	402	376	15871	8657	9033
1881	332	315	16428	9013	9328
1882	400	389	17109	9148	9537
1883	350	338	17755	9284	9622
1884	407	387	18008	9375	9762
1885	444	429	18413	9658	10087
1886	492	473	20202	10633	11106
1887	506	485	21620	11582	12067
1888	569	545	22459	11737	12281
1889	631	604	23298	11891	12495
1890	662	633	24494	12209	12842
1891	729	687	22280	11384	12071
1892	759	722	21645	11530	12252
1893	537	486	19043	10283	10769
1894	435	394	16440	9035	9429
1895	403	364	15126	8627	8991
1896	424	364	14759	8457	8821
1897	332	309	13078	7205	7514
1898	402	356	16987	9040	9396
1899	395	350	16687	8870	9220
1900	390	345	16387	8700	9045
1901	385	340	16087	8530	8870
1902	381	337	15787	8360	8697
1903	373	321	15741	8246	8567
1904	338	304	16553	8860	9164
1905	382	340	15946	8936	9276
1906	339	288	16463	8667	8955
1907	368	301	14757	7537	7838
1908	365	292	11367	5901	6193
1909	352	287	11712	6131	6418
1910	354	301	11655	5829	6130
1911	334	258	11543	5738	5996
1912	352	253	11295	5560	5813
1913	352	255	12349	5895	6150
1914	342	250	12011	5950	6200
1915	391	257	11742	5898	6155
1916	343	260	10494	4841	5101
1917	276	186	7627	3458	3644
1918	209	131	6087	2565	2696

1919	307	228	7094	2857	3085
1920	442	327	9010	3411	3738
1921	483	351	9631	3724	4075
1922	434	298	10466	4116	4414
1923	361	259	11207	4341	4600
1924	347	232	11628	4375	4607
1925	454	304	11839	5258	5562
1926	436	308	12642	5341	5649
1927	458	285	13181	5941	6226
1928	498	326	12483	5469	5795
1929	609	395	12340	5629	6024
1930	683	432	12940	5579	6011
1931	678	453	13540	5529	5982
1932	628	442	14140	5479	5921
1933	634	438	14482	5458	5896
1934	640	433	13282	5060	5493
1935	646	429	15452	5564	5993
1936	652	425	17775	6135	6560
1937	658	421	17104	5715	6136
1938	664	416	18900	6179	6595
1939	670	412	19244	7160	7572
1940	676	408	19205	6240	6648
1941	682	403	19153	6258	6661
1942	688	399	22100	7041	7440
1943	694	395	21791	6394	6789
1944	700	390	20869	5336	5726
1945	706	386	17687	4930	5316
1946	710	386	18851	4772	5158
1947	785	386	22353	5530	5916
1948	806	389	23551	5207	5596
1949	669	328	25234	5877	6205
1950	722	332	29904	7337	7669
1951	803	393	30648	7638	8031
1952	883	454	31392	7938	8392
1953	930	480	32322	8418	8898
1954	970	500	33252	8898	9398
1955	1043	522	34182	9378	9900
1956	1249	622	35112	9858	10480
1957	1643	761	36042	10338	11099
1958	1782	871	42855	10333	11204
1959	1799	965	40596	8358	9323
1960	1996	993	42132	10452	11445
1961	2307	1109	40488	10366	11475
1962	2387	1067	44845	9900	10967
1963	1779	799	46632	10754	11553
1964	1793	784	43609	10045	10829
1965	1618	686	44143	9745	10431
1966			47360	10090	
1967			49380	9964	
1968			48335	9366	
1969			53842	9906	
1970			56441	10080	
1971			59097	10283	
1972			68792	10134	
1973			69900	8919	

1974	71995	8801		
1975	82480	8345		
1976	81767	8576		
1977	80007	8817		
1978	88327	9609		
1979				
1980				
1981	80689	13801	38579	28309

APPENDIX 2.4 MAGISTRATES' COURTS ARREST CASES AND RATES, CONVICTIONS AND RATES, OFFENCES AGAINST THE PERSON AND RATES, OFFENCES AGAINST PROPERTY AND RATES 1864 - 1978

YEAR	TOTAL POPULATION	ARR CASES MG CRT TOT	RATE	CONVICTIONS	CONVICTION RATE	CHARGES MC OFF AG	RATE	CHARGES MC OFF AG PROP	RATE
1856									
1857									
1858									
1859									
1860									
1861									
1862						1,259		4,435	
1863						1,307		4,379	
1864		23,493				1,278		4,401	
1865		25,499				1,398		4,781	
1866		24,811				1,420		4,972	
1867		23,721				1,355		4,144	
1868						1,534		4,280	
1869		24,770				1,658		4,099	
1870	713,195	23,790				1,727		3,973	
1871		22,800		15,069		1,584		3,595	
1872	752,198	23,705	3.15			1,523	0.20	3,761	0.50
1873	765,511	24,959	3.26			1,463	0.19	3,570	0.47
1874	798,688	23,856	2.99			1,932	0.24	3,768	0.47
1875	815,034	25,247	3.10			1,952	0.24	3,827	0.47
1876	830,679	25,281	3.04			1,744	0.21	3,764	0.45
1877	849,870	26,532	3.12			1,874	0.22	3,844	0.45
1878	869,040	25,544	2.94			1,915	0.22	3,982	0.46
1879	888,500	24,625	2.77			1,965	0.22	3,865	0.44
1880	850,343	23,983	2.82			2,084	0.25	3,950	0.46
1881	868,942	25,346	2.92	16,448	1 89	2,161	0.25	3,733	0.43
1882	890,470	26,423	2.97		-	2,226	0 25	3,826	0.43
1883	917,310	27,074	2.95		-	2,083	0.23	3,450	0.38
1884	946,100	27,503	2.91		-	2,099	0.22	3,425	0.36
1885	975,040	28,855	2.96		-	2,166	0.22	3,462	0.36
1886	987,094	32,011	3.24		-	2,445	0.25		-
1887	1,019,700	34,473	3.38		-	2,517	0.25	4,485	0.44
1888						2,622		4,431	
1889	1,104,300	37,321	3.38		-	2,471	0.22	4,469	0 40
1890	1,118,500	38,594	3 45		-	2,667	0.24	4,833	0.43
1891	1,146,930	35,429	3.09	22,280	1 94	2,549	0.22	4,410	0.38
1892	1,162,710	33,283	2.86	21,624	1 86	2,238	0.19	4,550	0.39
1893	1,170,330	28,623	2.45	18,408	1 57	1,892	0.16	4,166	0.36
1894	1,182,290	24,846	2.10	16,440	1.39	1,215	0.10	3,270	0.28
1895	1,185,950	23,139	1.95	15,133	1.28	1,118	0.09	2,986	0.25
1896	1,180,280	22,787	1.93	14,759	1.25	1,102	0.09	2,816	0.24
1897	1,182,710	20,105	1.70		-	885	0.07	2,408	0.20
1898	1,183,060	26,587	2.25	16,987	1 44	1,098	0.09	2,855	0.24
1899	1,189,470	24,907	2.09	15,437	1 30	966	0.08	3,202	0.27
1900	1,197,206	28,866	2.41	37,224	3 11		-		-
1901	1,201,341	30,957	2.58	36,905	3 07		-		-
1902	1,215,840	26,402	2.17	33,461	2 75		-		-
1903	1,209,125	24,268	2.01	36,031	2.98		-		-
1904	1,218,608	26,036	2 14	35,854	2.94		-		-
1905	1,218,571	23,779	1.95	34,134	2 80		-		-
1906	1,237,998	23,631	1.91	37,740	3 05		-		-
1907	1,260,468	22,679	1.80	46,731	3.71		-		-
1908	1,271,097	20,000	1.57	45,056	3 54	1,793	0.14	3,894	0.31
1909	1,291,019	19,309	1.50	39,971	3.10	1,766	0.14	3,686	0.29
1910	1,307,933	19,070	1.46	39,598	3.03	1,730	0.13	3,528	0.27
1911	1,339,102	19,398	1.45	32,494	2 43	1,738	0 13	3,125	0 23

YEAR	TOTAL POPULATION	ARR CASES MG CRT TOT	RATE	CONVICTIONS	CONVICTION RATE	CHARGES MC OFF AG	RATE	CHARGES MC OFF AG PROP	RATE
1912	1,380,561	19,814	1.44	39,688	2.87	1,708	0.12	3,431	0.25
1913	1,412,119	21,554	1.53	40,840	2.89	1,694	0.12	3,715	0.26
1914	1,430,667	15,039	1.05	42,182	2.95	1,627	0.11	3,740	0.26
1915	1,419,016	20,274	1.43	45,948	3.24	1,639	0.12	4,103	0.29
1916	1,399,779	17,599	1.26	40,246	2.88	1,418	0.10	3,421	0.24
1917	1,411,004	9,654	0.68	38,757	2.75	1,359	0.10	3,215	0.23
1918	1,430,758	8,044	0.56	44,900	3.14	1,426	0.10	3,495	0.24
1919	1,495,938	9,420	0.63	44,623	2.98	1,542	0.10	4,044	0.27
1920	1,527,909	11,387	0.75	43,088	2.82	1,919	0.13	4,895	0.32
1921	1,550,686	12,041	0.78	46,924	3.03	1,840	0.12	4,343	0.28
1922	1,590,225	12,388	0.78	49,464	3.11	1,570	0.10	3,659	0.23
1923	1,625,380	13,106	0.81	53,183	3.27	1,687	0.10	3,624	0.22
1924	1,657,095	13,750	0.83	54,376	3.28	1,767	0.11	3,649	0.22
1925	1,684,017	14,105	0.84	58,879	3.50	1,637	0.10	3,689	0.22
1926	1,711,827	14,454	0.84	60,728	3.55	1,748	0.10	3,862	0.23
1927	1,741,390	14,949	0.86	53,612	3.08	1,632	0.09	4,390	0.25
1928	1,760,964	14,354	0.82	47,865	2.72	1,615	0.09	4,225	0.24
1929	1,777,065		-	45,388	2.55	1,640	0.09	4,774	0.27
1930	1,790,817		-	45,537	2.54	1,680	0.09	5,099	0.28
1931	1,801,294	16,191	0.90	42,977	2.39	1,452	0.08	5,577	0.31
1932	1,810,637	16,464	0.91	45,664	2.52	1,553	0.09	5,351	0.30
1933	1,824,578	19,874	1.09	47,079	2.58	1,617	0.09	6,481	0.36
1934	1,837,589	18,289	1.00	45,748	2.49	1,500	0.08	6,335	0.34
1935	1,843,099	19,944	1.08	54,666	2.97	1,500	0.08	6,773	0.37
1936	1,851,593	21,016	1.14	70,752	3.82	1,503	0.08	6,975	0.38
1937	1,859,487	20,604	1.11	64,772	3.48	1,351	0.07	7,308	0.39
1938	1,873,760	23,185	1.24	68,841	3.67	1,412	0.08	8,418	0.45
1939	1,886,356	23,490	1.25	72,186	3.83	1,308	0.07	8,208	0.44
1940	1,918,660	23,072	1.20	75,712	3.95	1,346	0.07	7,784	0.41
1941	1,952,153	22,334	1.14	67,520	3.46	1,380	0.07	7,396	0.38
1942	1,969,977	25,057	1.27	66,511	3.38	1,632	0.08	8,249	0.42
1943	1,988,938	25,157	1.26	62,361	3.14	1,618	0.08	8,331	0.42
1944	2,005,593	24,096	1.20	56,931	2.84	1,660	0.08	7,946	0.40
1945	2,015,583	20,442	1.01	53,101	2.63	1,711	0.08	6,607	0.33
1946	2,040,281	22,021	1.08	56,623	2.78	1,920	0.09	6,644	0.33
1947	2,061,689	25,084	1.22	66,862	3.24	1,956	0.09	6,218	0.30
1948	2,108,125	26,627	1.26	68,243	3.24	1,972	0.09	6,439	0.31
1949	2,168,884	28,023	1.29	72,416	3.34	1,945	0.09	6,015	0.28
1950	2,237,182	33,003	1.48	87,873	3.93	2,092	0.09	6,578	0.29
1951	2,299,538	35,564	1.55	98,361	4.28	2,478	0.11	7,827	0.34
1952	2,366,719	35,840	1.51	115,534	4.88	2,590	0.11	9,371	0.40
1953	2,416,039	31,271	1.29	121,497	5.03	2,444	0.10	8,614	0.36
1954	2,480,8[illegible]	31,[illegible]	1.28	121,919	4.91	2,655	0.11	9,282	0.37
1955	2,555,0[illegible]	33,[illegible]	1.29	133,575	5.23		-		-
1956	2,632,6[illegible]	33,[illegible]	1.28	158,869	6.03		-		-
1957	2,700,6[illegible]	41,[illegible]	1.52	208,125	7.71		-		-
1958	2,770,9[illegible]	50,[illegible]	1.81	251,065	9.06	3,419	0.12	14,876	0.54
1959	2,842,9[illegible]	49,[illegible]	1.75	265,214	9.33	3,664	0.13	16,909	0.59
1960	2,885,[illegible]	51,[illegible]	1.77	245,807	8.51	4,068	0.14	20,886	0.72
1961	2,950,[illegible]	48,[illegible]	1.64	208,663	7.07	4,073	0.14	20,480	0.69
1962	3,013,44[illegible]	49,[illegible]	1.62	218,103	7.24		-		-
1963	3,080,21[illegible]	51,[illegible]	1.65	238,278	7.74		-		-
1964	3,161,5[illegible]	49,[illegible]	1.53	253,832	8.03		-		-
1965	3,195,8[illegible]	49,[illegible]	1.50	271,804	8.50		-		-
1966	3,249,84[illegible]	51,[illegible]	1.57	255,325	7.86	6,528	0.20	27,837	0.86
1967	3,303,60[illegible]	54,[illegible]	1.66	262,461	7.94	6,957	0.21	29,455	0.89

YEAR	TOTAL POPULATION	ARR CASES MG CRT TOT	RATE	CONVICTIONS	CONVICTION RATE	CHARGES MC OFF AG	RATE	CHARGES MC OFF AG PROP	RATE
1968	3,356,827	53,896	1.61	267,483	7.97	7,207	0.21	28,982	0.86
1969	3,421,178	61,017	1.78	271,992	7.95	7,950	0.23	32,476	0.95
1970	3,482,031		-	269,500	7.74	8,152	0.23	36,121	1.04
1971	3,536,948	67,632	1.91	265,849	7.52	8,814	0.25	38,074	1.08
1972	3,686,136			292,299	7.93	9,936	0.27	41,421	1.12
1973	3,730,824			312,415	8.37	11,627	0.31	39,252	1.05
1974	3,779,587			326,412	8.64	11,899	0.31	42,657	1.13
1975	3,800,656			323,771	8.52	11,793	0.31	41,693	1 10
1976	3,823,941			328,286	8.59		-		
1977	3,852,589			324,655	8.43				
1978	3,874,501			343,791	8.87				
1979									
1980									
1981									
1982									
1983									
1984									
1985									
1986									
1987									
1988									
1989									
1990									
1991									
1992									
1993									
1994									

APPENDIX 2.5 CONVICTIONS, HIGHER AND LOWER COURTS, PER CENT SHARE OF BUSINESS 1871 - 1994

Convictions, Magistrates and Higher Courts, 1871-1965

YEAR	Con rate	VIC POP'N	pop/100	Year	Convicted		Higher		Magistrates		% of bus h
1871	2138	770727	7707	1872	16476	1872	476	1872	*16000*	1872	2.9%
1873	2076	790492	7905	1873	16407	1873	407	1873	*16000*	1873	2.5%
1874	2062	808437	8084	1874	16669	1874	436	1874	16233	1874	2.6%
1875	2095	823723	8237	1875	17256	1875	427	1875	16829	1875	2.5%
1876	2051	840300	8403	1876	17234	1876	383	1876	16851	1876	2.2%
1877	2120	860787	8608	1877	18253	1877	*420*	1877	17832	1877	2.3%
1878	1800	879442	8794	1878	15829	1878	458	1878	15371	1878	2.9%
1879	1909	899333	8993	1879	17167	1879	397	1879	16770	1879	2.3%
1880	1892	860067	8601	1880	16273	1880	402	1880	15871	1880	2.5%
1881	1944	862346	8623	1881	16760	1881	332	1881	16428	1881	2.0%
1882	1932	906225	9062	1882	17509	1882	400	1882	17109	1882	2.3%
1883	1943	931790	9318	1883	18105	1883	350	1883	17755	1883	1.9%
1884	1946	946100	9461	1884	18415	1884	407	1884	18008	1884	2.2%
1885	1901	991869	9919	1885	18857	1885	444	1885	18413	1885	2.4%
1886	2063	1003043	10030	1886	20694	1886	492	1886	20202	1886	2.4%
1887	2135	1036119	10361	1887	22126	1887	506	1887	21620	1887	2.3%
1888	2154	1069200	*10692*	1888	23028	1889	631	1889	23298	1889	2.7%
1889	2140	1118028	11180	1889	23929	1890	662	1890	24494	1890	2.8%
1890	2220	1133266	11333	1890	25156	1891	729	1891	22280	1891	2.9%
1891	2018	1140405	11404	1891	23009	1892	759	1892	21645	1892	3.3%
1892	1949		*11494*	1892	22404	1893	537		*21867*	0	2.4%
1893	1690		*11584*	1893	19580	1894	435	1894	16440	1894	2.2%
1894	1446		*11674*	1894	16875	1895	403	1895	*15126*	1895	2.4%
1895	1320		*11764*	1895	15529	1896	424	1896	14759	1896	2.7%
1896	1281		*11854*	1896	15183	1897	332	1897	13078	1897	2.2%
1897	1123		*11944*	1897	13410	1898	402	1898	16987	1898	3.0%
1898	1445		*12034*	1898	17389	1899	*390*		*16999*	1899	2.2%
1901	1361	1209900	12099	1901	16472		*390*		*16082*	1900	2.4%
1902	1338	1208231	12082	1902	16168	1902	381		*15787*	1902	2.4%
1903	1338	1204742	12047	1903	16114	1903	373	1903	15741	1903	2.3%
1904	1401	1205608	12056	1904	16891	1904	338	1904	16553	1904	2.0%
1905	1349	1210421	12104	1905	16328	1905	382	1905	15946	1905	2.3%
1906	1377	1219832	12198	1906	16802	1906	339	1906	16463	1906	2.0%
1907	1227	1232807	12328	1907	15125	1907	368	1907	14757	1907	2.4%
1908	938	1250449	12504	1908	11732	1908	365	1908	11367	1908	3.1%
1909	945	1277022	12770	1909	12064	1909	352	1909	11712	1909	2.9%
1910	923	1301408	13014	1910	12009	1910	354	1910	11655	1910	2.9%
1911	886	1339915	13399	1911	11877	1911	334	1911	11543	1911	2.8%
1912	842	1382611	13826	1912	11647	1912	352	1912	11295	1912	3.0%
1913	897	1415510	14155	1913	12701	1913	352	1913	12349	1913	2.8%
1914	861	1435316	14353	1914	12353	1914	342	1914	12011	1914	2.8%
1915	852	1424593	14246	1915	12133	1915	391	1915	11742	1915	3.2%
1916	771	1404831	14048	1916	10837	1916	343	1916	10494	1916	3.2%
1917	558	1417239	14172	1917	7903	1917	276	1917	7627	1917	3.5%
1918	438	1437433	14374	1918	6296	1918	209	1918	6087	1918	3.3%
1919	492	1503241	15032	1919	7401	1919	307	1919	7094	1919	4.1%
1920	619	1528151	15282	1920	9452	1920	442	1920	9010	1920	4.7%
1921	652	1550952	15510	1921	10114	1921	483	1921	9631	1921	4.8%
1922	685	1590263	15903	1922	10900	1922	434	1922	10466	1922	4.0%
1923	712	1625380	16254	1923	11568	1923	361	1923	11207	1923	3.1%
1924	723	1657095	16571	1924	11975	1924	347	1924	11628	1924	2.9%
1925	730	1684017	16840	1925	12293	1925	454	1925	11839	1925	3.7%
1926	764	1711827	17118	1926	13078	1926	436	1926	12642	1926	3.3%
1927	783	1741390	17414	1927	13639	1927	458	1927	13181	1927	3.4%
1928	737	1760964	17610	1928	12981	1928	498	1928	12483	1928	3.8%
1929	729	1777065	17771	1929	12949	1929	609	1929	12340	1929	4.7%
1930	760	1792605	17926	1930	13623	1930	683	1930	*12940*	1930	5.0%
1931	788	1803570	18036	1931	14218	1931	678	1931	*13540*	1931	4.8%
1932	814	1813387	18134	1932	14768	1932	628	1932	*14140*	1932	4.3%
1933	829	1824479	18245	1933	15116	1933	*600*	1933	14482	1933	4.0%
1934	758	1837490	18375	1934	13922	1934	550	1934	13282	1934	4.0%
1935	873	1843023	18430	1935	16098	1935	596	1935	15452	1935	3.7%
1936	995	1851593	18516	1936	18427	1936	*560*	1936	17775	1936	3.0%
1937	955	1859487	18595	1937	17762	1937	*600*	1937	17104	1937	3 4%

1938	**1044**	1873760	18738	1938	19564	1938	642	1938	18900	1938	3.3%
1939	**1056**	1886356	18864	1939	19914	1939	690	1939	19244	1939	3.5%
1940	**1038**	1914918	19149	1940	19881	1940	651	1940	19205	1940	3.3%
1941	**1019**	1946425	19464	1941	19835	1941	*660*	1941	19153	1941	3.3%
1942	**1161**	1962558	19626	1942	22788	1942	*670*	1942	22100	1942	2.9%
1943	**1135**	1981616	19816	1943	22485	1943	*680*	1943	21791	1943	3.0%
1944	**1080**	1997954	19980	1944	21569	1944	*690*	1944	20869	1944	3.2%
1945	**913**	2015107	20151	1945	18393	1945	*700*	1945	17687	1945	3.8%
1946	**959**	2039769	20398	1946	19561	1946	710	1946	18851	1946	3.6%
1947	**1116**	1061689	*20730*	1947	23138	1947	785	1947	22353	1947	3.4%
1948	**1156**	*2106315*	*21063*	*1948*	24357	1948	*806*	1948	*23551*	*1948*	3.3%
1949	**1197**	2164331	21643	1949	25903	1949	669	1949	25234	1949	2.6%
1950	**1373**	2231256	22313	1950	30626	1950	722	1950	29904	1950	2.4%
1951	**1367**		*23013*	1951	31451	1951	*790*	1951	*30661*	1951	2.5%
1952	**1361**		*23713*	1952	32275	1952	883	1952	31392	1952	2.7%
1953	**1362**		*24413*	1953	33252	1953	*930*	1953	*32322*	1953	2.8%
1954	**1363**		*25113*	1954	34222	1954	*970*	1954	*33252*	1954	2.8%
1955	**1365**		*25813*	1955	35225	1955	1043	1955	*34182*	1955	3.0%
1956	**1389**	2618112	26181	1956	36361	1956	1249	1956	*35112*	1956	3.4%
1957	**1406**	2680555	26806	1957	37685	1957	1643	1957	*36042*	1957	4.4%
1958	**1626**	2745165	27452	1958	44637	1958	1782	1958	42855	1958	4.0%
1959	**1508**	2811429	28114	1959	42395	1959	1799	1959	40596	1959	4.2%
1960	**1528**	2888290	28883	1960	44128	1960	1996	1960	42132	1960	4.5%
1961	**1450**	2950790	29508	1961	*42795*	1961	2307	1961	*40488*	1961	5.4%
1962	**1567**	3013447	30134	1962	47232	1962	2387		*44845*	1963	5.1%
1963	**1572**	3080215	30802	1963	48411	1963	1779		*46632*	1965	3.7%
1964	**1436**	3161537	31615	1964	45402	1964	1793		*43609*	1967	3.9%
1965	**1415**	3233938	32339	1965	45761	1965	1618		*44143*	1968	*3.5%*
					48261		*1548*		*46743*	1969	*3.2%*
					50761		*1478*		*49343*	1970	*2.9%*
					53261		*1408*		*51943*	1971	*2.6%*
					55761		*1338*		*54543*	1973	*2.4%*
					58261		*1268*		*57143*	1975	*2.2%*
					60761		*1198*		*59743*	1977	*2.0%*
					63261		*1128*		*62343*	1979	*1.8%*
					65102		1076	1981	64026	1981	1.7%
					69361		1186	1982	68175	1982	1.7%
					76763		1030	1983	75733	1983	1.3%
					77129		941	1984	76188	1984	1.2%
					71710		*998*	1985	70712	1985	1.4%
					74908		1191	1986	73717	1986	1.6%
					78156		1434	1987	76722	1987	1.8%
					81178		1451	1988	79727	1988	1.8%
					84345		1613	1989	82732	1989	1.9%
					87475		1738	1990	85737	1990	2.0%
					91891		1524	1991	90367	1991	1.7%
					94189		1352	1992	92837	1992	1.4%
					91313		1276	1993	90037	1993	1.4%
					88979		1137	1994	87842	1994	1.3%

APPENDIX 2.6 CRIMES REPORTED TO THE POLICE 1960 - 1995

YEAR	MICIDE	SERIOUS ASSAULT	OBBERY	RAPE	JOR CRIME AG PERSON	URGLARY	THEFT	MOT VEH THEFT	FRAUD	MAJOR CRIME AG PROPERTY	TOTAL MAJOR CRIME	TOTAL OFFENCES
1960	87	2,040	241	97	**2,465**	14,415	37,764	6,319	4,277	**62,775**	**65,240**	
1961	115	2,384	284	114	**2,897**	17,118	40,281	6,597	4,763	**68,759**	**71,656**	
1962	108	2,831	202	155	**3,296**	18,152	41,440	7,084	5,541	**72,217**	**75,513**	
1963	87	3,399	222	115	**3,823**	16,876	46,502	7,084	5,216	**75,678**	**79,501**	
1964	96	3,142	262	133	**3,633**	19,940	45,337	8,059	4,530	**77,866**	**81,499**	
1965	102	3,429	324	136	**3,991**	21,109	50,193	7,887	4,549	**83,738**	**87,729**	
1966	95	1,288	365	96	**1,844**	22,051		8,957	4,013	**35,021**	**36,865**	
1967	57	1,388	395	138	**1,978**	24,451		8,348	3,367	**36,166**	**38,144**	
1968	96	3,922	483	168	**4,669**	28,818	48,284	10,185	5,006	**92,293**	**96,962**	
1969	114	4,576	664	144	**5,498**	29,901	56,777	10,702	4,766	**102,146**	**107,644**	
1970	150	5,365	773	172	**6,460**	31,752	55,568	12,980	5,964	**106,264**	**112,724**	
1971	136	6,563	810	216	**7,725**	37,047	57,836	14,515	6,506	**115,904**	**123,629**	
1972	176	7,124	969	237	**8,506**	38,964	59,549	13,577	6,759	**118,849**	**127,355**	
1973	124	1,235	843	264	**2,466**	34,208	55,079	11,144	5,169	**105,600**	**108,066**	150,912
1974	122	1,073	917	266	**2,378**	33,035	51,914	10,999	9,777	**105,725**	**108,103**	131,919
1975	114	1,324	826	276	**2,540**	33,072	53,331	10,912	10,333	**107,648**	**110,188**	133,961
1976	108	1,299	897	341	**2,645**	36,075	54,313	11,814	11,291	**113,493**	**116,138**	141,432
1977	103	1,362	1,018	312	**2,795**	40,954	60,918	14,897	9,600	**126,369**	**129,164**	176,240
1978	110	1,763	1,148	235	**3,256**	49,150	67,259	15,268	9,680	**141,357**	**144,613**	199,731
1979	145	1,809	1,240	318	**3,512**	54,443	75,297	16,286	13,836	**159,862**	**163,374**	222,104
1980	115	1,730	1,282	328	**3,455**	59,336	76,012	16,264	14,977	**166,589**	**170,044**	224,514
1981	117	1,967	1,245	410	**3,739**	61,360	80,749	17,550	12,120	**171,779**	**175,518**	229,369
1982	140	2,107	1,213	550	**4,010**	67,888	83,957	19,537	14,595	**185,977**	**189,987**	247,651
1984-85	114	2,497	1,595	527	**4,733**	78,710	93,164	22,990	23,228	**218,092**	**222,825**	222,825
1985-86	132	2,968	1,666	467	**5,233**	76,372	105,460	26,334	35,714	**243,880**	**249,113**	249,113
1986-87	147	3,124	2,090	510	**5,871**	87,045	115,889	32,598	42,263	**277,795**	**283,666**	373,307
1987-88	242	3,723	1,811	458	**6,234**	90,569	118,416	32,777	62,538	**304,300**	**310,534**	395,893
1988-89	168	4,483	1,818	564	**7,033**	88,527	118,954	35,574	64,667	**307,722**	**314,755**	434,946
1989-90	143	3,930	1,776	553	**6,402**	87,128	124,792	34,951	42,063	**288,934**	**295,336**	397,584
1990-91	155	4,206	1,995	590	**6,946**	94,204	133,049	35,721	58,871	**321,845**	**328,791**	440,323
1991-92	146	4,285	1,933	728	**7,092**	87,834	132,237	31,368	47,681	**299,120**	**306,212**	429,725
1992-93	149	6,551	1,920	786	**9,406**	86,025	128,215	29,034	42,880	**286,154**	**295,560**	415,915
1993-94	170	7,108	1,765	1,308	**10,351**	78,927	133,016	33,086	25,082	**270,111**	**280,462**	390,612
1994-95	154	8,165	1,718	1,191	**11,228**	69,201	124,165	30,156	26,718	**250,240**	**261,468**	379,487

APPENDIX 3.1 SENTENCES OF PERSONS ARRESTED, TRIED AND CONVICTED, HIGHER COURTS, 1872 - 1965

SENTENCES OF PERSONS ARRESTED, TRIED AND CONVICTED - SUPERIOR COURTS																							
													IMPRISONMENT										
YEAR	FINED		FIND .	RECOG		SCHL	DEATH	OTHER		PROBATI		LUNATIC	0.3	2	8	15	30	60	120				
		Fines			Bonds,				Other		Probation		< 1m	1-6m	6-12m	1-2y	2-4y	4-10y	> 10y	0-12	12 or	% 12 months +	
1872	4	0.8%	6	0	1.3%	0	3	1	0.8%		0	0	17	38	44	120	148	79	16	99	363	79%	*462*
1873	2	0.5%	1		0.2%		12	3	3.7%		0		14	28	38	75	160	68	6	80	309	79%	*389*
1874	0	0.0%	4	0	0.9%	0	2	7	2.1%		0	0	12	30	46	96	154	77	8	88	335	79%	*423*
1875	6	1.4%	2	0	0.5%	2	4	0	1.4%		0	0	9	39	63	99	130	64	9	111	302	73%	*413*
1876	8	2.1%	5	0	1.3%	0	4	2	1.6%		0	0	9	33	54	102	123	42	1	96	268	74%	*364*
1878	2	0.4%	2	0	0.4%	0	4	1	1.1%		0	0	10	30	60	114	149	86	0	100	349	78%	*449*
1879	0	0.0%	8	0	2.0%	0	2	0	0.5%		0.0%	0	8	25	54	105	148	45	2	87	300	78%	*387*
1880	10	2.5%	9	0	2.2%	0	7	0	1.7%		0.0%	0	10	43	29	100	146	46	2	82	294	78%	*376*
1881	7	2.1%	4	0	1.2%	0	3	0	0.9%		0.0%	3	4	49	62	77	102	18	3	115	200	63%	*315*
1882	4	1.0%	5	0	1.3%	0	1	0	0.3%		0.0%	1	12	65	67	94	119	32	0	144	245	63%	*389*
1883	5	1.4%	1	2	0.9%	0	4	0	1.1%		0.0%	0	7	22	65	86	96	59	3	94	244	72%	*338*
1884	7	1.7%	6	1	1.7%	0	6	0	1.5%		0.0%	0	10	44	107	113	83	26	4	161	226	58%	*387*
1885	3	0.7%	2	3	1.1%	0	7	0	1.6%		0.0%	0	32	88	79	103	103	23	1	199	230	54%	*429*
1886	2	0.4%	6	2	1.6%	0	0	6	1.2%		0.0%	3	22	84	95	136	90	41	5	201	272	58%	*473*
1887	3	0.6%	10	3	2.6%	0	3	0	0.6%		0.0%	2	15	86	124	121	112	26	1	225	260	54%	*485*
1889	2	0.3%	7	4	1.7%	0	14	0	2.2%		0.0%	0	8	86	155	171	125	54	5	249	355	59%	*604*
1890	5	0.8%	14	2	2.4%	0	7	0	1.1%		0.0%	1	12	111	155	171	125	54	5	278	355	56%	*633*
1891	4	0.5%	14	2	2.2%	0	14	7	2.9%		0.0%	1	23	108	199	185	122	48	2	330	357	52%	*687*
1892	8	1.1%	14	1	2.0%	0	6	5	1.4%		0.0%	3	15	143	174	194	132	57	7	332	390	54%	*722*
1893	13	2.4%	27	1	5.2%	0	3	2	0.9%		0.0%	5	12	92	129	104	95	51	3	233	253	52%	*486*
1894	4	0.9%	20	2	5.1%	0	9	0	2.1%		0.0%	6	6	58	99	88	104	30	9	163	231	59%	*394*
1895	4	1.0%	24	0	6.0%	0	5	0	1.2%		0.0%	6	8	65	83	95	73	38	2	156	208	57%	*364*
1896	1	0.2%	36	0	8.5%	0	4	0	0.9%		0.0%	19	10	67	92	99	71	23	2	169	195	54%	*364*
1897	0	0.0%	12	0	3.6%	0	6	0	1.8%		0.0%	5	10	74	66	81	58	19	1	150	159	51%	*309*
1898	4	1.0%	33	0	8.2%	0	2	0	0.5%		0.0%	7	12	70	95	89	67	19	4	177	179	50%	*356*
1902	2	0.5%	29	0	7.6%	7	6	0	3.4%		0.0%	0	0	0	183	1	135	13	5	183	154	46%	*337*
1903	5	1.3%	38	0	10.2%	7	2	0	2.4%		0.0%	0	0	0	183	0	105	30	3	183	138	43%	*321*
1904	1	0.3%	28	0	8.3%	1	4	0	1.5%		0.0%	0	0	0	168	1	98	32	5	168	136	45%	*304*
1905	0	0.0%	32	0	8.4%	2	3	0	1.3%		0.0%	5	0	0	186	1	108	37	8	186	154	45%	*340*
1906	1	0.3%	46	0	13.6%	1	1	0	0.6%		0.0%	2	14	44	111	0	92	26	1	169	119	41%	*288*
1907	3	0.8%	58	0	15.8%	2	1	0	0.8%		0.0%	3	18	51	113	0	90	25	4	182	119	40%	*301*
1908	4	1.1%	52	0	14.2%	9	4	0	3.6%		0.0%	4	11	63	56	0	139	20	3	130	162	55%	*292*
1909	4	1.1%	55	0	15.6%	3	2	0	1.4%		0.0%	1	6	42	69	0	160	8	2	117	170	59%	*287*
1910	0	0.0%	35	0	9.9%	11	4	0	4.2%		0.0%	3	11	51	98		120	17	4	160	141	47%	*301*
1911	2	0.6%	63	0	18.9%	4	7	0	3.3%		0.0%	0	9	47	88	0	97	13	4	144	114	44%	*258*
1912	2	0.6%	83	0	23.6%	11	3	0	4.0%		0.0%	0	6	34	79	0	106	27	1	119	134	53%	*253*
1913	1	0.3%	68	0	19.3%	18	6	0	6.8%		0.0%	4	1	38	81	0	127	8	0	120	135	53%	*255*
1914	0	0.0%	73	0	21.3%	13	3	0	4.7%		0.0%	3	4	32	83	0	121	9	1	119	131	52%	*250*

1915	18	4.6%	85	0	21.7%	27	3	0	7.7%		0.0%	1	4	51	61	0	133	8	0	116	141	55%	*257*
1916	4	1.2%	59	0	17.2%	15	5	0	5.8%		0.0%	0	3	47	67	0	123	19	1	117	143	55%	*260*
1917	6	2.2%	69	0	25.0%	10	4	1	5.4%		0.0%	0	1	30	55	0	87	11	2	86	100	54%	*186*
1918	0	0.0%	67	0	32.1%	10	1	0	5.3%		0.0%	0	4	18	66	0	36	7	0	88	43	33%	*131*
1919	3	1.0%	58	0	18.9%	18	0	0	5.9%		0.0%	0	5	48	108	0	57	8	2	161	67	29%	*228*
1920	6	1.4%	81	0	18.3%	21	1	0	5.0%		0.0%	6	0	66	196	0	62	3	0	262	65	20%	*327*
1921	1	0.2%	97	0	20.1%	29	1	0	6.2%		0.0%	4	1	75	185	0	78	9	3	261	90	26%	*351*
1922	4	0.9%	88	0	20.3%	43	1	0	10.1%		0.0%	0	0	51	157	0	89	1	0	208	90	30%	*298*
1923	2	0.6%	78	0	21.6%	20	1	0	5.8%		0.0%	1	0	42	133	0	79	5	0	175	84	32%	*259*
1924	2	0.6%	85	0	24.5%	27	1	0	8.1%		0.0%	0	1	45	127	0	58	1	0	173	59	25%	*232*
1925	0	0.0%	105	0	23.1%	40	5	0	9.9%		0.0%	0	3	52	159	0	80	10	0	214	90	30%	*304*
1926	3	0.7%	84	0	19.3%	40	0	0	9.2%		0.0%	1	9	55	148	0	85	9	2	212	96	31%	*308*
1927	3	0.7%	112	0	24.5%	58	0	0	12.7%		0.0%	0	3	55	145	0	77	5	0	203	82	29%	*285*
1928	1	0.2%	110	0	22.1%	59	2	0	12.2%		0.0%	0	8	75	159	0	73	10	1	242	84	26%	*326*
1929	6	1.0%	147	0	24.1%	61	0	0	10.0%		0.0%	0	5	60	232	0	82	13	3	297	98	25%	*395*
1930	3	0.4%	150	0	22.0%	98	0	0	14.3%		0.0%	0	6	64	224	0	125	12	1	294	138	32%	*432*
1931	0	0.0%	146	0	21.5%	79	0	0	11.7%		0.0%	0	3	66	248	0	132	4	0	317	136	30%	*453*
1932	4	0.6%	120	0	19.1%	60	2	0	9.9%		0.0%	0	4	69	219	0	132	15	3	292	150	34%	*442*
1946	2	0.3%	282	0	39.7%	37	3	0	5.6%		0.0%	0	2	146	116	103	13	6	0	264	122	32%	*386*
1947	3	0.4%	359	0	45.7%	35	2	0	4.7%		0.0%	0	4	164	116	74	19	7	2	284	102	26%	*386*
1948	6	0.7%	376	0	46.7%	31	3	0	4.2%		0.0%	0	0	159	125	90	5	9	1	284	105	27%	*389*
1949	2	0.3%	284	0	42.5%	55	0	0	8.2%		0.0%	0	0	33	185	87	16	7	0	218	110	34%	*328*
1950	0	0.0%	360	0	49.9%	24	6	0	4.2%		0.0%	0	0	40	119	157	7	6	3	159	173	52%	*332*
1952	1	0.1%	389	0	44.1%	37	1	1	4.4%		0.0%	0	0	44	152	168	75	14	1	196	258	57%	*454*
1955	4	0.4%	482	0	46.2%	33	2	0	3.4%		0.0%	0	0	0	338	0	0	184	0	338	184	35%	*522*
1956	16	1.3%	574	0	46.0%	33	4	0	3.0%	0	0.0%	0	0	0	430	0	0	192	0	430	192	31%	*622*
1957	26	1.6%	568	0	34.6%	22	1	1	1.5%	264	16.1%	0	0	0	516	0	0	245	0	516	245	32%	*761*
1958	56	3.1%	507	0	28.5%	3	1	3	0.4%	341	19.1%	0	0	0	571	0	0	300	0	571	300	34%	*871*
1959	47	2.6%	463	0	25.7%	0	2	1	0.2%	321	17.8%	0	0	0	583	0	0	382	0	583	382	40%	*965*
1960	73	3.7%	522	0	26.2%	0	3	4	0.4%	401	20.1%	0	0	0	625	0	0	368	0	625	368	37%	*993*
1961	91	3.9%	597	0	25.9%	0	2	7	0.4%	501	21.7%	0	0	0	679	0	0	430	0	679	430	39%	*1109*
1962	115	4.8%	556	0	23.3%	0	7	17	1.0%	625	26.2%	0	0	0	611	0	0	456	0	611	456	43%	*1067*
1963	229	12.9%	344	0	19.3%	0	6	33	2.2%	368	20.7%	0	0	117	139	271	272	0	0	256	543	68%	*799*
1964	202	11.3%	369	0	20.6%	0	4	29	1.8%	405	22.6%	0	0	148	163	267	206	0	0	311	473	60%	*784*
1965	170	10.5%	331	0	20.5%	0	1	28	1.8%	402	24.8%	0	0	166	172	180	168	0	0	338	348	51%	*686*

	Higher Court, Sentences passed, 1872-1965						
	Probation	Fine/bond	Prison	Fines	Bonds		Persons
1872	0%	2.10%	97.06%	0.84%	1.26%	1872	476
1873	0%	0.74%	95.58%	0.49%	0.25%	1873	407
1874	0%	0.92%	97.02%	0.00%	0.92%	1874	436
1875	0%	1.87%	96.72%	1.41%	0.47%	1875	427
1876	0%	3.39%	95.04%	2.09%	1.31%	1876	383
1878	0%	0.87%	98.03%	0.44%	0.44%	1878	458
1879	0%	2.02%	97.48%	0.00%	2.02%	1879	397
1880	0%	4.73%	93.53%	2.49%	2.24%	1880	402
1881	0%	3.31%	95.78%	2.11%	1.20%	1881	332
1882	0%	2.25%	97.50%	1.00%	1.25%	1882	400
1883	0%	2.29%	96.57%	1.43%	0.86%	1883	350
1884	0%	3.44%	95.09%	1.72%	1.72%	1884	407
1885	0%	1.80%	96.62%	0.68%	1.13%	1885	444
1886	0%	2.03%	96.75%	0.41%	1.63%	1886	492
1887	0%	3.16%	96.25%	0.59%	2.57%	1887	506
1889	0%	2.06%	95.72%	0.32%	1.74%	1889	631
1890	0%	3.17%	95.77%	0.76%	2.42%	1890	662
1891	0%	2.74%	94.38%	0.55%	2.19%	1891	729
1892	0%	3.03%	95.52%	1.05%	1.98%	1892	759
1893	0%	7.64%	91.43%	2.42%	5.21%	1893	537
1894	0%	5.98%	91.95%	0.92%	5.06%	1894	435
1895	0%	6.95%	91.81%	0.99%	5.96%	1895	403
1896	0%	8.73%	90.33%	0.24%	8.49%	1896	424
1897	0%	3.61%	94.58%	0.00%	3.61%	1897	332
1898	0%	9.20%	90.30%	1.00%	8.21%	1898	402
1902	0%	8.14%	88.45%	0.52%	7.61%	1902	381
1903	0%	11.53%	86.06%	1.34%	10.19%	1903	373
1904	0%	8.58%	89.94%	0.30%	8.28%	1904	338
1905	0%	8.38%	90.31%	0.00%	8.38%	1905	382
1906	0%	13.86%	85.55%	0.29%	13.57%	1906	339
1907	0%	16.58%	82.61%	0.82%	15.76%	1907	368
1908	0%	15.34%	81.10%	1.10%	14.25%	1908	365
1909	0%	16.76%	81.82%	1.14%	15.63%	1909	352
1910	0%	9.89%	85.88%	0.00%	9.89%	1910	354
1911	0%	19.46%	77.25%	0.60%	18.86%	1911	334
1912	0%	24.15%	71.88%	0.57%	23.58%	1912	352
1913	0%	19.60%	73.58%	0.28%	19.32%	1913	352
1914	0%	21.35%	73.98%	0.00%	21.35%	1914	342
1915	0%	26.34%	65.98%	4.60%	21.74%	1915	391
1916	0%	18.37%	75.80%	1.17%	17.20%	1916	343
1917	0%	27.17%	67.39%	2.17%	25.00%	1917	276
1918	0%	32.06%	62.68%	0.00%	32.06%	1918	209
1919	0%	19.87%	74.27%	0.98%	18.89%	1919	307
1920	0%	19.68%	75.34%	1.36%	18.33%	1920	442
1921	0%	20.29%	73.50%	0.21%	20.08%	1921	483
1922	0%	21.20%	68.66%	0.92%	20.28%	1922	434
1923	0%	22.16%	72.02%	0.55%	21.61%	1923	361
1924	0%	25.07%	66.86%	0.58%	24.50%	1924	347
1925	0%	23.13%	66.96%	0.00%	23.13%	1925	454
1926	0%	19.95%	70.87%	0.69%	19.27%	1926	436

1927	0%	25.11%	62.23%	0.66%	24.45%	1927	458
1928	0%	22.29%	65.46%	0.20%	22.09%	1928	498
1929	0%	25.12%	64.86%	0.99%	24.14%	1929	609
1930	0%	22.40%	63.25%	0.44%	21.96%	1930	683
1931	0%	21.53%	66.81%	0.00%	21.53%	1931	678
1932	0%	19.75%	70.38%	0.64%	19.11%	1932	628
1934	0%	23%	*68%*	*0.64%*	*21%*	1934	640
1936	0%	*26%*	*66%*	*0.64%*	*24%*	1936	652
1938	0%	*29%*	*64%*	*0.64%*	*27%*	1938	664
1940	0%	*32%*	*62%*	*0.64%*	*30%*	1940	676
1942	0%	*35%*	*60%*	*0.64%*	*33%*	1942	688
1944	0%	*38%*	*58%*	*0.64%*	*36%*	1944	700
1946	0%	40.00%	54.37%	0.28%	39.72%	1946	710
1947	0%	46.11%	49.17%	0.38%	45.73%	1947	785
1948	0%	47.39%	48.39%	0.74%	46.65%	1948	806
1949	0%	42.75%	49.03%	0.30%	42.45%	1949	669
1950	0%	49.86%	45.98%	0.00%	49.86%	1950	722
1952	0%	44.17%	51.42%	0.11%	44.05%	1952	883
1955	0%	46.60%	50.05%	0.38%	46.21%	1955	1043
1956	0%	47.24%	49.80%	1.28%	45.96%	1956	1249
1957	16.07%	36.15%	46.32%	1.58%	34.57%	1957	1643
1958	19.14%	31.59%	48.88%	3.14%	28.45%	1958	1782
1959	17.84%	28.35%	53.64%	2.61%	25.74%	1959	1799
1960	20.09%	29.81%	49.75%	3.66%	26.15%	1960	1996
1961	21.72%	29.82%	48.07%	3.94%	25.88%	1961	2307
1962	26.18%	28.11%	44.70%	4.82%	23.29%	1962	2387
1963	20.69%	32.21%	44.91%	12.87%	19.34%	1963	1779
1964	22.59%	31.85%	43.73%	11.27%	20.58%	1964	1793
1965	24.85%	30.96%	42.40%	10.51%	20.46%	1965	1618

APPENDIX 3.3 MAGISTRATES COURTS, SENTENCES PASSED, 1874 - 1965

YEAR	OTHER	INDUSTL SCHOOL	FINE	ADMON-ISHED	FIND BAIL/ SUSP SENTENCE	ADJ W/O PROB	PROBATION	LUNATIC ASYLUM	CHILD WELFARE DEPT	IMPRISONMENT						TOTAL
										0-1M	1-6M	6-12M	1-2Y	2+Y	Total imp	
1874	554	667	6300	0	346			0		5520	2172	449	210	15	8366	16233
1875	106	568	6713	0	307			436		5667	2339	491	198	4	8699	16829
1876	596	649	6535	0	355			0		5677	2473	382	176	8	8716	16851
1877	565	661	7119	0	365			0		5961	2552	448	157	4	9122	17832
1878	506	581	4671	0	347			0		6033	2683	376	160	14	9266	15371
1879	548	614	6296	0	359			0		5592	2649	445	250	17	8953	16770
1880	92	571	5829	0	325			397		5346	2538	469	278	26	8657	15871
1881	119	545	6065	0	268			418		5746	2534	436	265	32	9013	16428
1882	76	545	6685	0	295			360		5810	2620	436	254	28	9148	17109
1883	120	531	7228	0	272			320		5805	2800	391	267	21	9284	17755
1884	56	430	7394	0	331			422		5954	2792	352	262	15	9375	18008
1885	84	399	7526	0	386			360		6153	2915	337	244	9	9658	18413
1886	90	429	8245	0	405			400		6476	3567	350	228	12	10633	20202
1887	91	570	8618	0	333			426		7311	3564	411	283	13	11582	21620
1889	223	557	10019	0	225			383		7720	3346	503	303	19	11891	23298
1890	183	515	10911	0	224			452		8026	3303	541	324	15	12209	24494
1891	171	575	9546	0	176			428		7625	2846	503	396	14	11384	22280
1892	113	620	8744	0	212			426		7805	2817	533	359	16	11530	21645
1894	116	620	6122	0	158			389		6281	2053	375	297	29	9035	16440
1895	*55*	*621*	*5288*	*0*	*163*			*372*		*6332*	*1814*	*254*	*214*	*13*	8627	*15126*
1896	92	630	5072	0	156			352		6257	1725	311	156	8	8457	14759
1897	59	742	4573	0	131			368		5222	1516	298	156	13	7205	13078
1898	127	1050	6205	0	156			409		6747	1704	341	234	14	9040	16987
1903		212	6732	739	546					6406		1693	147		8246	15741
1904	212		6974	904	502					7214		1595	51		8860	16553
1905	298		6168		532					7312		1599	25		8936	15946
1906	91	704	6090	751	160			0		7229	1147	205	86	0	8667	16463
1907	35	75	6263	671	176			0		6237	1018	206	76	0	7537	14757
1908	68	79	4460	612	247			0		4708	930	166	97	0	5901	11367
1909	85	53	4193	967	283			0		4904	959	167	93	8	6131	11712

1910	77	46	4678	815	210	0	4545	914	268	94	8	5829	11655
1911	84	60	4649	694	318	0	4657	857	163	56	5	5738	11543
1912	113	76	5195	63	288	0	4198	1116	170	70	6	5560	11295
1913	206	84	5283	509	372	0	4388	1280	155	66	6	5895	12349
1914	203	98	4953	433	374	0	4600	1145	166	34	5	5950	12011
1915	197	107	4740	419	381	0	4520	1134	225	16	3	5898	11742
1916	264	107	4628	302	352	0	3723	891	185	36	6	4841	10494
1917	228	125	3218	245	353	0	2643	609	183	21	2	3458	7627
1918	163	107	2765	137	350	0	1826	570	153	12	4	2565	6087
1919	93	110	3325	228	481	0	1940	753	160	2	2	2857	7094
1920	110	87	4514	262	626	0	2228	896	271	12	4	3411	9010
1921	81	81	4942	272	531	0	2465	1018	231	7	3	3724	9631
1922	273	70	5308	289	410	0	2896	957	259	2	2	4116	10466
1923	59	68	6136	283	320	0	3086	1042	211	1	1	4341	11207
1924	47	101	6435	297	373	0	3115	1032	221	2	5	4375	11628
1925	89	63	5591	416	422	0	3832	1198	222	2	4	5258	11839
1926	117	85	6143	536	420	0	3754	1389	196	0	2	5341	12642
1927	70	96	5880	663	531	0	4327	1452	162	0	0	5941	13181
1928	53	91	5555	746	569	0	3738	1529	200	0	2	5469	12483
1929	61	109	5027	903	611	0	3567	1764	289	3	6	5629	12340
1930													
1931													
1932													
1933	9	65	4531	3465	954	0	3497	1610	253	93	5	5458	14482
1934	382	134	4258	2937	511	0	3362	1369	246	81	2	5060	13282
1935	286	182	4999	3898	523	0	3921	1361	221	61	0	5564	15452
1936	271	191	5609	4937	632	0	4247	1567	277	43	1	6135	17775
1937	371	174	5501	4798	545	0	4048	1393	239	34	1	5715	17104
1938	325	226	6139	5497	534	0	4308	1561	264	46	0	6179	18900
1939	302	183	5191	5780	628	0	5144	1708	282	26	0	7160	19244
1940	309	290	5901	5917	548	0	4541	1479	189	30	1	6240	19205
1941	328	206	5763	6073	525	0	4585	1414	238	21	0	6258	19153
1942	629	287	7972	5617	554	0	5013	1748	259	21	0	7041	22100
1943	676	268	9243	4646	564	0	4307	1799	253	34	1	6394	21791
1944	686	30	10414	3876	527	0	3498	1554	242	42	0	5336	20869

1945	249	17	8591	3486	414			0		3255	1426	220	29	0	4930	17687
1946	336	34	9160	4073	476			0		3151	1343	251	26	1	4772	18851
1947	181	23	10923	5062	524			0	110	3945	1291	258	36	0	5530	22353
1948	136	20	11711	5915	451			0	111	3755	1251	189	12	0	5207	23551
1949	175	12	12181	6525	360			0	104	4135	1522	198	22	0	5877	25234
1950	157	17	13823	7916	498			0	156	5225	1881	210	21	0	7337	29904
1951																
1952	527	20	14620	7529	689			0	69	5454	2149	302	33	0	7938	31392
1953																
1954																
1955																
1956																
1957																
1958	730	0	16012	14423	418		939	0	0	7138	2536	495	164	0	10333	42855
1959	330	0	15247	15655	384		622	0	0	5985	1974	249	150	0	8358	40596
1960	9	0	15620	14354	658		1039	0	0	7191	2658	453	150	0	10452	42132
1961	0	0	7621	113	547		888	0	0	1089	2565	340	113	0	4107	13276
1963	189	0	9317	0	1223	1055	1868	0	0	1259	3396	686	285	0	5626	19278
1964	175	0	8729	0	1994	875	1779	0	0	1084	3601	929	408	0	6022	19574
1965	215	0	8945	0	2139	704	1783	0	0	1112	3884	812	274	0	6082	19868

APPENDIX 3.4 OFFENDERS SENTENCED, IMPRISONED, PRISON RECEPTIONS, 1872 - 1965

	Offenders sentenced (arrest cases)							*Share of magistrates courts*	
	Higher Courts		*Magistrates Courts*		*All courts*	Prisons	Recep-	of all	of all prison
Year	Total	Imprisoned	Total	Imprisoned	Tot imp	Receptions	Imprisoned	convictions	sentences
1872	476	462	*16000*	*8300*	8762	11339	2577	97%	95%
1873	407	389	*16000*	*8300*	8689	9842	1153	98%	96%
1874	436	423	16233	8366	8789	11360	2571	97%	95%
1875	427	413	16829	8699	9112	11132	2020	98%	95%
1876	383	364	16851	8716	9080	11293	2213	98%	96%
1877	*421*	*407*	17832	9122	9529	11889	2361	98%	96%
1878	458	449	15371	9266	9715	12067	2352	97%	95%
1879	397	387	16770	8953	9340	11128	1788	98%	96%
1880	402	376	15871	8657	9033	11389	2356	98%	96%
1881	332	315	16428	9013	9328	8192	-1136	98%	97%
1882	400	389	17109	9148	9537	10119	582	98%	96%
1883	350	338	17755	9284	9622	10230	608	98%	96%
1884	407	387	18008	9375	9762	10421	659	98%	96%
1885	444	429	18413	9658	10087	11361	1274	98%	96%
1886	492	473	20202	10633	11106	12033	927	98%	96%
1887	506	485	21620	11582	12067	*12400*	333	98%	96%
1888	*569*	*545*	*22459*	*11737*	12281	12826	545	98%	96%
1889	631	604	23298	11891	12495	12958	463	97%	95%
1890	662	633	24494	12209	12842	12907	65	97%	95%
1891	729	687	22280	11384	12071	12352	281	97%	94%
1892	759	722	21645	11530	12252	11091	-1161	97%	94%
1893	537	486	*19043*	*10283*	10768.5	10324	-444.5	97%	95%
1894	435	394	16440	9035	9429	9216	-213	97%	96%
1895	403	364	*15126*	8627	8991	9337	346	97%	96%
1896	424	364	14759	8457	8821	9208	387	97%	96%
1897	332	309	13078	7205	7514	10352	2838	98%	96%
1898	402	356	16987	9040	9396	*9000*	-396	98%	96%
1899	*395*	*350*	*16687*	*8870*	9220	8043 # #	-1177	98%	96%
1900	*390*	*345*	*16387*	*8700*	9045	7442	-1603	98%	96%
1901	*385*	*340*	*16087*	*8530*	8870	7404	-1466	98%	96%
1902	381	337	*15787*	*8360*	8697	7642	-1055	98%	96%
1903	373	321	15741	8246	8567	7219	-1348	98%	96%
1904	338	304	16553	8860	9164	6824	-2340	98%	97%
1905	382	340	15946	8936	9276	5869	-3407	98%	96%
1906	339	288	16463	8667	8955	6174	-2781	98%	97%
1907	368	301	14757	7537	7838	5934	-1904	98%	96%
1908	365	292	11367	5901	6193	5435	-758	97%	95%
1909	352	287	11712	6131	6418	6170	-248	97%	96%
1910	354	301	11655	5829	6130	6940	810	97%	95%
1911	334	258	11543	5738	5996	6693	697	97%	96%
1912	352	253	11295	5560	5813	6701	888	97%	96%
1913	352	255	12349	5895	6150	5885	-265	97%	96%
1914	342	250	12011	5950	6200	4484	-1716	97%	96%
1915	391	257	11742	5898	6155	3699	-2456	97%	96%
1916	343	260	10494	4841	5101	4536	-565	97%	95%
1917	276	186	7627	3458	3644	5471	1827	97%	95%
1918	209	131	6087	2565	2696	5682	2986	97%	95%

1919	307	228	7094	2857	3085	5820	2735	96%	93%
1920	442	327	9010	3411	3738	6426	2688	95%	91%
1921	483	351	9631	3724	4075	6032	1957	95%	91%
1922	434	298	10466	4116	4414	7413	2999	96%	93%
1923	361	259	11207	4341	4600	7460	2860	97%	94%
1924	347	232	11628	4375	4607	7823	3216	97%	95%
1925	454	304	11839	5258	5562	8590	3028	96%	95%
1926	436	308	12642	5341	5649	8524	2875	97%	95%
1927	458	285	13181	5941	6226	8803	2577	97%	95%
1928	498	326	12483	5469	5795	9155	3360	96%	94%
1929	609	395	12340	5629	6024	8990	2966	95%	93%
1930	683	432	*12940*	*5579*	6011	6887 # #	876	95%	93%
1931	678	453	*13540*	*5529*	5982	6465	483	95%	92%
1932	628	442	*14140*	*5479*	5921	6745	824	96%	93%
1933	*634*	*438*	14482	5458	5896	7025	1129.3	96%	93%
1934	*640*	*433*	13282	5060	5493	6655 ***6 4***	1161.6	95%	92%
1935	*646*	*429*	15452	5564	5993	7539	1545.9	96%	93%
1936	*652*	*425*	17775	6135	6560	8009	1449.2	96%	94%
1937	*658*	*421*	17104	5715	6136	7040	904.5	96%	93%
1938	*664*	*416*	18900	6179	6595	6837	241.8	97%	94%
1939	*670*	*412*	19244	7160	7572	7536	-35.9	97%	95%
1940	*676*	*408*	19205	6240	6648	7364	716.4	97%	94%
1941	*682*	*403*	19153	6258	6661	6697	35.7	97%	94%
1942	*688*	*399*	22100	7041	7440	6059	-1381	97%	95%
1943	*694*	*395*	21791	6394	6789	6297	-491.7	97%	94%
1944	*700*	*390*	20869	5336	5726	6440	713.6	97%	93%
1945	*706*	*386*	17687	4930	5316	6772	1456	96%	93%
1946	710	386	18851	4772	5158	6869	1711	96%	93%
1947	785	386	22353	5530	5916	8085	2169	97%	93%
1948	806	389	23551	5207	5596	9000	3404	97%	93%
1949	669	328	25234	5877	6205	9931	3726	97%	95%
1950	722	332	29904	7337	7669	*9500*	1831	98%	96%
1951	*803*	*393*	*30648*	*7638*	8031	9172	1142	97%	95%
1952	883	454	31392	7938	8392	9997	1605	97%	95%
1953	*930*	*480*	*32322*	*8418*	8898	11505 # #	2607	97%	95%
1954	*970*	*500*	*33252*	*8898*	9398	12741	3343	97%	95%
1955	1043	522	*34182*	*9378*	9900	13320	3420	97%	95%
1956	1249	622	*35112*	*9858*	10480	12457	1977	97%	94%
1957	1643	761	*36042*	*10338*	11099	*12900*	1801	96%	93%
1958	1782	871	42855	10333	11204	13350	2146	96%	92%
1959	1799	965	40596	8358	9323	13445	4122	96%	90%
1960	1996	993	42132	10452	11445	13679	2234	95%	91%
1961	2307	1109	40488	10366	11474.8	13919	2444.24	95%	90%
1962	2387	1067	44845	9900	10967.5	12975	2008	95%	90%
1963	1779	799	*46632*	10754	11553	*13000*	1447.002	96%	93%
1964	1793	784	43609	10045	10829.1	*13000*	2170.872	96%	93%
1965	1618	686	44143	9745	10431.2	*13000*	2568.83	97%	93%