GRANT WARDLAW

THE MEANING OF 'LIFE'

A STUDY OF LIFE SENTENCES IN AUSTRALIA

Arie Freiberg
and
David Biles

AUSTRALIAN INSTITUTE OF CRIMINOLOGY

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Canberra
July 1975

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INTRODUCTION

The demise of the death penalty in Australia, either *de jure* or *de facto* has resulted in the wide use of sentences of life imprisonment or imprisonment for an indeterminate period, but little or no systematic research has been conducted into the theoretical or actual nature of the life sentence in Australia. This same paucity of information is also evident with regard to the principal alternative disposition available to the courts in serious cases, detention during the pleasure of the Crown.[1]

This study arose from the need to clarify, both in the minds of those administering the criminal justice system and those undergoing life or purportedly equivalent sentences, what is meant by the 'life' sentence. When a prisoner is sentenced to 'life' his first question would probably be 'how long is life?'.

When Victoria recently abolished capital punishment the ten prisoners then on 'death row' had their death sentences commuted to imprisonment for the term of their natural lives. They were reported to be 'stunned'[2] by their commutations, expecting to receive either fixed term sentences or life sentences 'with the benefit of regulations'. Whether in fact they would be better or worse off with their present sentence has to date remained in the realm of prison folklore for no data has been compiled upon which comparison, both between sentences and between jurisdictions, could be made.

Similarly it seems that little consideration has been given in Australia, either in the literature or by the courts to whether the life sentence is a useful or even appropriate penalty for those offences where it may or must be imposed.

It is not the purpose of this paper to enter into the debate as to the merits of capital punishment in relation to the life sentence, however as commutation of the death sentence has been a principal source of the

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1 Known variously as 'Governor's pleasure', 'Her Majesty's pleasure' or 'Queen's pleasure'.

2 *The Australian*, 29 May 1975

life sentence it is necessary to examine the exercise of the prerogative of mercy and the effect that the death penalty has had on the disposition of offenders.

The bulk of this study concerns the examination of the subsequent history of those whose death sentence has been commuted or who received life sentences through the courts. Such things as the length of their detention, whether they died, committed suicide, were deported or became insane whilst serving their sentence will be discussed in some detail as will the fate of those found insane before or during trial. Also to be included, to provide some comparison, are those who were found not guilty on the ground of insanity at the time of the offence. There is a dearth of information regarding the indeterminate sentence in Australia. Defence counsel have not been aware of what the prospects of release may be after a successful insanity defence compared to the period of detention after conviction[3] nor whether the welfare of their clients will be better served by conviction or acquittal on the ground of insanity.

Finally this report will examine the criteria upon which release is based and the procedures pertaining in each jurisdiction. Where possible the incidence of recidivism in those released after service of their sentence or period of detention is also noted.

It has not been possible within the limits of this research to sample the perceptions of those immediately affected by the study, the prisoners themselves, and although this is not intended to be an inquiry into the effects of long term imprisonment, it is recognised that this must be an integral part of any discussion of life sentences. The reliance on secondary sources[4] is accepted as being, at best, a compromise.

THE DATA

It is customary to preface any discussion of criminological statistics in Australia with a caveat regarding their completeness, reliability or accuracy and this study is no exception. Records going back over long periods are known to be inconsistent, incomplete and tend either to be inaccessible or have been destroyed with changes of location or control. Offenders are shuttled between various authorities whose records are dispersed and usually not complementary.

The information for this study was obtained by searching the records of departments of parole, prisons, corrective services and mental health. The periods surveyed were determined mainly by the availability and accessibility of these records, thus the great disparity between jurisdictions as detailed in the following table. The commencement periods date from the date of conviction of the offender and not the date of release.

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3 See A. Goldstein, *The Insanity Defense* (Yale University Press, New Haven, 1967), p.168.

4 Such as *Psychological Survival* by Stanley Cohen and Laurie Taylor (Penguin, Victoria, 1972) and *Life* by 'Zeno' (Pan Books, London, 1970).

JURISDICTION	FROM	TO
New South Wales (including Australian Capital Territory)	March 1932	31 December 1974
Victoria	May 1928	"
Queensland	April 1900	"
South Australia (including Northern Territory)	December 1918	"
Western Australia	April 1918	"
Tasmania	February 1951	"

When considering the data in this report the above disparities must be borne in mind.

Another problem arises from the fact that although this is a study of life sentences, in not all cases was it a life sentence which was surveyed. It was decided to use as the basic criterion for inclusion death sentences which were commuted to either life imprisonment or some other period or where capital punishment does not exist, life sentences.[5] This allows finer discriminations to be made in analysis and where possible the various elements involved in calculating the averages have been separated to allow a truer picture of the 'life sentence' to emerge. For the sake of brevity the former will be termed 'commuted sentences' and the latter 'life sentences'.

It was decided to also include comparable English data where relevant, both for the reason of availability and because in many ways policies developed in England have considerable influence on Australia. Data for England were available for the period 1900-1949 and 1962-1972.

The detailed analysis of the data is presented on page 51 and following. Table 9[6] relates only to males. The female population in this study is dealt with separately under the heading 'Other Categories of Offenders'[7] solely because of the very small numbers involved. It is for this reason also that juvenile offenders are included under this category.[8]

The information relating to insane persons has been gleaned from a number of sources and emerged incidently from the search of the records of life sentence prisoners. It has been included not only for comparative purposes, but also because the scarcity of data in this area demands that any information be made available. It should, however, be treated as indicative rather than authoritative.

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5 Or in a very few cases, commutations of them.

6 p.52.

7 p.115.

8 p.118.

THE LEGAL AND ADMINISTRATIVE CONTEXT

PENALTIES

DEATH

The death penalty in Australia has been abolished in four States, Queensland, New South Wales[1], Victoria and Tasmania, for federal offences and in the Australian Capital Territory and in the Northern Territory. Western Australia and South Australia still retain capital punishment for treason and piracy, as well as wilful murder (Western Australia) and murder (South Australia).

The following table summarises the position in Australia regarding capital punishment from 1901-1975.[2]

TABLE 1 CAPITAL PUNISHMENT IN AUSTRALIA 1901-1975

State	*Abolition*	*Last Execution*	*Number of Executions*
New South Wales	1955	1939	23
Victoria	1975	1967	21
Queensland	1922	1913	18
South Australia	-	1964	18
Western Australia	-	1964	27
Tasmania	1968	1946	5
Northern Territory	1973	1952	2
Australian Capital Territory	1973	-	0
		TOTAL	114

1 Except for treason and piracy: *Piracy Punishment Act*, 1902, s. 4.

2 The information regarding the number of executions has been adapted from S.W. Johnston, 'Criminal Homicide Rates in Australia' in D. Chappell & P.R. Wilson, *The Australian Criminal Justice System* (Butterworths, Sydney, 1972), p.46, table 6.

A recent Morgan Gallup Poll[3] found that 39 per cent of those surveyed favoured the death penalty (by hanging) for murderers, while 36 per cent favoured life imprisonment and 11 per cent some other penalty; 14 per cent were undecided. Those in favour of the death penalty had decreased by 4 per cent from the previous poll held in April 1974[4] and it was found that opinion did not vary between abolitionist and retentionist states.

LIFE IMPRISONMENT

There is a diverse array of offences for which the penalty of life imprisonment[5] may be imposed and these range from sacrilege[6] to setting fire to a coal-mine[7] to impeding endeavours to escape shipwreck.[8] A complete list of offences so punishable is contained in Appendix A and a summary of the number of offences there contained is presented in Table 2.

TABLE 2 NUMBER OF OFFENCES PUNISHABLE BY LIFE IMPRISONMENT BY JURISDICTION

Jurisdiction	*Number of Offences*
New South Wales	35
Victoria	2
Queensland	49
South Australia	46
Western Australia	46
Tasmania	3
Northern Territory	65
Australian Capital Territory	33

3 *The Bulletin*, 11 January 1975, p.25.

4 cf., Gallup Poll April 1962: 54 per cent in favour of death penalty, 35 per cent imprisonment and 11 per cent no opinion. Quoted in C. Burns, *The Tait Case* (Melbourne University Press, 1962), p.161.

5 Or penal servitude for life or hard labour for life or imprisonment for term of natural life, depending on the jurisdiction.

6 *Criminal Law Consolidation Act and Ordinance* 1876-1974 (N.T.) s. 171.

7 *Crimes Act*, 1900-1974 (N.S.W.), s. 221.

8 *Criminal Law Consolidation Act*, 1935-1974 (S.A.), s. 20.

It can be seen from Appendix A that the availability of the life sentence in no way reflects its actual use, for in all jurisdictions it has been used, either by way of commutation or sentence of the court, only for the most serious offences. In New South Wales, by either of these means, these serious offences have been murder, rape, manslaughter, maliciously inflicting grievous bodily harm, wounding with intent to murder and carnal knowledge of a girl under ten; in Queensland, murder, wilful murder, rape, manslaughter and attempting unlawfully to kill and in Tasmania for murder only.

In Victoria it was used by way of commutation of the death penalty for murder, rape, wounding with intent to murder and carnal knowledge and will now, following the abolition of the death penalty be used as a sentence for murder and treason.

South Australia has used it by commutation for murder, wounding with intent to murder, manslaughter, attempted murder and wounding with intent to cause grievous bodily harm and Western Australia for murder, wilful murder and rape.[9]

When the life sentence has been used by sentence of the court it has usually been because no other penalty has been permitted. In New South Wales where a person is made liable to a sentence of hard labour for life[10] the judge may nevertheless pass a sentence of penal servitude or imprisonment of less duration[11] except for the crime of murder.[12]

Similar interpretation clauses allowing mitigation of life sentences appear in the laws of Queensland[13], Western Australia[14], South Australia[15],

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9 In England since the abolition of the death penalty in 1965, the life sentence is mandatory for murder and discretionary for robbery, wounding with intent to murder, manslaughter, arson, rape and buggery. In the United States of America all States may impose a life sentence for murder, where there is no death penalty. Other crimes so punishable are usually rape, robbery, kidnapping, treason and being an 'habitual criminal' or 'persistent offender'. See E. Powers, *Parole Eligibility of Prisoners Serving a Life Sentence* (Massachusetts Correctional Association, 1969). Compare U.S. National Council on Crime and Delinquency. Advisory Council of Judges. Model Sentencing Act, Article 3, Section 7: 'Only those convicted of murder in the first degree should be committed for a term of life'.

10 Or for a fixed term.

11 *Crimes Act*, 1900-1974 (N.S.W.), s. 442(1).

12 *Crimes Act*, 1900-1974 (N.S.W.), s. 19 which expressly excludes the operation of s. 442.

13 *Criminal Code* (Qld.), s. 19(1).

14 *Criminal Code* (W.A.), s. 19(1).

15 *Criminal Law Consolidation Act*, 1935-1974 (S.A.), s. 5(1) which states that 'liable to be imprisoned for life' means liable to be imprisoned for life or any less term.

the Northern Territory[16], the Australian Capital Territory[17], and Tasmania.[18]

However for certain offences such mitigation is not permitted. In Queensland these are treason[19] attempting piracy with personal violence[20] and murder.[21] In Western Australia the most serious offences are punishable by death, though murder[22] is made punishable by imprisonment for life and a person 'shall not be sentenced to imprisonment for any shorter term'.[23] In Tasmania the life sentence is made mandatory for treason[24] and murder[25] by stating that the offender 'shall be sentenced to imprisonment for the term of his natural life'.[26]

Section 5 of the *Criminal Law Consolidation Act and Ordinance* 1876-1974 (N.T.) makes the life sentence mandatory for murder by use of the phrase 'shall be sentenced to imprisonment for life with hard labour, which sentence cannot be mitigated or varied by the court'.

The Commonwealth Crimes Act does not have a provision dealing directly with the mitigation of life sentences and it is unclear whether under Commonwealth laws they are mandatory or discretionary.[27] However the operation of the *Acts Interpretation Act* 1903-1975 (Cth.) in this regard is uncertain. Section 41 of this Act states *inter alia* that where a penalty is set out at the foot of any section or subsection the offence

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16 *Criminal Law Amendment Ordinance* 1939-1964 (N.T.), s. 5(a). Some sections state that a person 'shall be liable to be imprisoned for life or any less term with hard labour' (emphasis added) for example ss. 111, 112 and 121 *Criminal Law Consolidation Act and Ordinance* 1876-1974 (N.T.).

17 *Crimes Act*, 1900 (N.S.W.), (as amended), s. 442(1).

18 *Criminal Code Act* 1924 (Tas.), s. 389 and *Criminal Code Act* 1968 (Tas.), s. 10.

19 *Criminal Code* (Qld.), s. 37.

20 *Criminal Code* (Qld.), s. 82.

21 *Criminal Code* (Qld.), s. 305. Each section states that the penalty of hard labour for life 'cannot be mitigated or varied under s. 19 of this Code'.

22 cf., wilful murder.

23 *Criminal Code* (W.A.), s. 282(b).

24 *Criminal Code Act* 1924 (Tas.), s. 56.

25 *Criminal Code Act* 1924 (Tas.), s. 158.

26 cf., 'Shall be liable to imprisonment ... '.

27 The *Death Penalty Abolition Act* 1973 (Cth.) does not seem to resolve this problem, stating that where it 'is provided that a person is liable to the punishment of death, the reference to the punishment of death shall be read, construed and applied as if the penalty of imprisonment for life were substituted for that punishment'. As there was never any question of there being a discretion regarding the imposition of the death penalty, it remains open to argument whether the life sentence is therefore also mandatory.

shall be 'an offence punishable upon conviction by a penalty not exceeding the penalty mentioned'. Similar interpretation clauses are found in the Interpretation Acts of other jurisdictions[28] and *prima facie* they would seem to have the same effect as the provisions allowing mitigation outlined above, seeming to reinforce the view that a penalty stated in a section is the maximum only. It could be argued however, that as many penalties are not set out at the foot of a section, but in the text itself, the general interpretation section has no effect and thus a special clause allowing mitigation is necessary.

In *Goldwater* v. *Zamicheli*[29] it was held that a penalty placed at the foot of a Commonwealth Act meant that the court has a discretion to impose a penalty up to that maximum, though in *R.* v. *Booth*[30] it was held that a penalty otherwise than at the foot of a section was 'fixed and irreducible'.

In South Australia, where capital punishment exists, it would appear that there are no mandatory life sentences, for no provisions could be found which prevent mitigation. This would also seem to be the situation in the Australian Capital Territory and in federal jurisdictions.

An interesting situation has arisen in Victoria with the abolition of capital punishment[31] where the Act states that

> 'Notwithstanding any rule of law to the contrary whosoever is convicted of treason or murder shall be liable to imprisonment for the term of his natural life.'[32]

It was the opinion of most members of the Victorian Parliament that this created a mandatory penalty[33] and it was also the opinion of Fullagar J.

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28 See *Interpretation Act*, 1897-1972 (N.S.W.), s. 44; *Acts Interpretation Act*, 1958 (Vic.), s. 26A; *Acts Interpretation Act*, 1954-1971 (Qld.), s. 41; *Acts Interpretation Act*, 1915-1972 (S.A.), s. 30; *Interpretation Act*, 1918-1974 (W.A.), s. 29; *Acts Interpretation Act* 1931 (Tas.), s. 37; *Interpretation Ordinance* 1967-1972 (A.C.T.), s. 33. The Commonwealth Act applies with modifications to the Northern Territory, *Interpretation Ordinance* 1931-1973 (N.T.).

29 [1972] V.R. 511; see also *Ellis* v. *Jackson* High Court of Australia 119 of 1974 (unreported), a successful application for leave to appeal against a finding that a penalty placed at the foot of a statute, to which Section 41 of the *Acts Interpretation Act* 1903-1973 (Cth.) applied was both the maximum and minimum. It was said that to make it the minimum penalty words such as 'not less than' should appear.

30 [1948] S.R. (N.S.W.) 16.

31 *Crimes (Capital Offences) Act*, 1975, N 8679.

32 Now *Crimes Act*, 1958, as amended s. 3.

33 The original Bill, as introduced by the Premier (Mr Hamer) contained a further clause following the now Section 3 which read 'or ... for such other term as is fixed by the court, as the court determines.' This was deleted in the final stages of the lengthy debate by an amendment moved by the Attorney-General (Mr Wilcox).

in the first case[34] under the new law in the Victorian Supreme Court, who is reported as stating that he had no power to pass any other sentence.

It appears that on a reading of Section 3 that whatever was the intention of the Victorian Parliament there is some doubt as to whether the life sentence is mandatory. The resolution of this doubt seems to rest mainly on the interpretation of the words 'shall be liable to' on which there is surprisingly little authority.[35]

There are a number of Canadian cases[36] which support the view that the words 'shall be liable' followed by a penalty import both a maximum and minimum penalty and that no discretion lies in a court to impose a lesser sentence.

In most Australian jurisdictions these words, together with the clauses allowing mitigation and/or the general interpretation clauses would indicate that there is a discretion and it would seem that it is only by the device of the 'non-mitigation' clause that penalties are made mandatory. In the Northern Territory and Tasmania the words 'shall be liable' are not used, but the phrase 'shall be sentenced' is employed instead. In Victoria the usual mode of expressing a penalty is the phrase 'liable to imprisonment for a term not more than ... years' and this has been treated as imposing a maximum only. The new Section 3 is a departure from this style, and there is no special interpretation clause concerning the meaning of the phrase 'liable to imprisonment for the term of his natural life'.

There is a strong line of authority also in Canada which runs contrary to that above, which takes the view that the phrase 'shall be liable' imposes only a discretionary maximum penalty. The general interpretation provisions in the Canadian Code are similar to those in the Australian Interpretation Acts.

In *R.* v. *Bell*[37] Beck A.J. said:

> 'It can hardly be contended otherwise than that where the Code said that a person convicted of an offence is "liable to ... years imprisonment" the meaning is that the number of years stated is "the longest term to which the offender

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34 *R.* v. *Demirok* reported in *The Age*, 5 June 1975. Unfortunately at the time of writing the transcript of the judgment is not yet available. It is understood that the judgment is being appealed on a number of points.

35 It is assumed for the purposes of the following argument that Section 26A of the *Acts Interpretation Act*, 1958 (Vic.) which allows the imposition of a penalty less than the specified maximum is inapplicable in this case because the penalty in Section 3 is not set out at the foot of the section.

36 *R.* v. *Thompson Mfg Co.* (1920) 47 O.L.R. 103; *R.* v. *Smith* 38 C.C.C. 327; *R.* v. *Harrison; R.* v. *O'Kelly* (1924) 42 C.C.C. 259.

37 (1924) 42 C.C.C. 253 at 254.

> can be sentenced" or in other words the provision fixes the maximum term of imprisonment which the Court can impose but that the Court has a discretion to impose any less term of imprisonment.'

In Beck A.J's view this was so notwithstanding that there were other sections which used the phrase 'not exceeding ... years'. Support for this view was found by the Court in the following passage from *Halsbury*

> 'The policy of the law is, as regards most crimes, to fix a maximum penalty, which is only intended for the worst cases and to leave to the discretion of the judge the determination of the extent to which the punishment awarded should approach to or recede from the maximum limit.'[38]

In a recent case[39] it was said by the Court that:

> 'I do not believe that the word "liable", in its grammatical and ordinary sense, and interpreted in a manner in conformity with its purpose and with its judicial usefulness, creates both a maximum and minimum.'

This has been the thrust of the more recent Canadian cases[40] and the view seems to be that the use of the word 'liable' together with the interpretation clause imports a discretion, but that the interpretation clause is not needed where words such as 'not more than' or 'not exceeding' are used to denote discretion. To create a mandatory penalty the word 'liable' ought not be used, as is the case in Tasmania.

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38 See 10 Hals (3rd ed), p.486.

39 *R.* v. *Duchesne* (1961) 131 C.C.C. 311 at 313.

40 For example, *R.* v. *Fraser* (1944) 81 C.C.C. 114 at 122 where Campbell C.J. said: 'it is ... clear that the expression "liable to" has a well recognised sense, perhaps its primary meaning, which may be defined as follows: "Subject to a potential obligation, which may arise upon the election of a party entitled, or upon the exercise of discretion by a Court."' In Campbell C.J's view the interpretation clause recognises that there is a discretion and that such discretion lies with the Court. See also *R.* v. *Robinson et al* (1951) 100 C.C.C. 1. The only problem which troubled the Courts was where the words 'liable to' were used in conjunction with a death penalty, and it was argued that a mandatory penalty was set because such a penalty is indivisible into periods or degrees. See *R.* v. *Bell* (1924) 42 C.C.C. 253, 255. (The Court in that case considered the life sentence also indivisible, but this seems an arguable proposition.) The only Australian case on this point is *O'Keefe* v. *Calwell* [1949] A.L.R. 381, a case concerning the construction of a section of an Immigration Act. With regard to the word 'liable' Williams J. held that: 'The ordinary natural grammatical meaning of a person being liable to some penalty or prohibition is that the event has occurred which will enable the penalty or prohibition to be enforced, but that it still lies within the discretion of some authorised person to decide whether or not to proceed with the

It would seem, on balance, that there is some doubt as to the exact status of the life sentence in Victoria. A definitive ruling by a court on this point would be welcome.

As was stated above[41], in the vast majority of offences where the life sentence may be imposed, it is never used, creating an unsatisfactory situation. Obsolete penal statutes, or more precisely obsolete penalties, which are not consonant with prevailing mores tend to bring the law into disrepute. It is '[t]he first requirement of a sound body of law ... that it should correspond with the actual feelings and demands of the community, whether right or wrong'[42], and obviously a sentence of hard labour for life for 'personating the owner of shares'[43] is hardly in keeping with present sentencing philosophy. The onus is on the legislatures, law reform commissions and other bodies concerned with the law to keep it flexible, efficient and contemporary by clearing it of anachronistic enactments.[44]

SENTENCING AUTHORITY

DISTRIBUTION

The distribution of sentencing powers among the various bodies within the sentencing hierarchy[45] raises a number of questions as to the purposes and functions of the various bodies within this hierarchy. As it stands presently the main function of the legislature is to set out the maximum penalty allowable for certain offences or to specify the various sentences

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enforcement. ... The word "liable" is sometimes used in the sense of exposure to liability, but this is not the ordinary natural grammatical meaning of the word. It would require a context to give the word this meaning', p.401.

It is not clear from this judgment whether once the discretion is invoked then only the fixed penalty must be imposed or whether there is a discretion up to the maximum. It would be intriguing to know whether the phrase '<u>may</u> be liable' instead of '<u>shall</u> be liable' would alter the position substantially as to the exercise of discretion regarding either the imposition of the penalty or the quantum of the penalty.

41 p.7.

42 O.W. Holmes, *The Common Law* (Macmillan, Melbourne, 1968), p. 36.

43 *Criminal Code* (W.A.), s. 511.

44 See Comment, 'The Challenge of Obsolete Penal Statutes' (1974) 65, 3 *Journal of Criminal Law and Criminology* 315.

45 For a fuller discussion of the 'sentencing hierarchy' see the Criminal Law and Penal Reform Committee of South Australia, *First Report, Sentencing and Corrections* (1973) (hereinafter referred to as the Mitchell Committee), p.5 ff.

available and it is usually for the courts to impose sentence within the discretion delegated them. Other administrative bodies, such as parole boards, also have a role in determining the actual length of sentence. In States without the death penalty this is generally the case[46] but in retentionist States the government of the day takes on the role of a sentencing authority directly rather than through its legislative function.

A conflict then may arise between the governmental and judicial authorities concerned with sentencing. While the legislative policy as expressed in the Act is a sentence of death, the current governmental policy of commutation runs contrary to it. It is said that the exercise of the Royal Prerogative of Mercy is an undue interference with the course of law.[47] While accepting that the pardoning power is part of the constitutional framework of this country and that some system of interference is necessary to mitigate the rigidity of the law in certain exceptional cases the question of the extent of such interference is a moot point.

The criminal justice system may be seen as a political system with the legislature, the executive, the courts and the administrative bodies all being facets of the political process. It could be argued then that commutations or remissions of sentences through the exercise of the Royal Prerogative are perfectly acceptable as Parliament is the supreme legal authority. The issue resolves itself into a decision as to what functions a society wishes to assign to the legislature on the one hand and the courts on the other. It is submitted that the only criterion of difference between them is not whether one body is 'political' and the other not, but which system provides the greater safeguards for both the individual and the community.

Before attempting to answer this question it is proposed to examine some aspects of the exercise of the prerogative in Australia as it relates to the sentence of death.

COMMUTATION

Prior to the abolition of capital punishment in Victoria, power to grant a pardon, either free, or subject to lawful conditions, a remission of sentence or a respite of execution, rested in the Governor. By Section 496 of the *Crimes Act*, 1958 (Vic.) the Governor, in all cases in which he was authorised on behalf of Her Majesty, could extend mercy on condition of such offender being imprisoned for life, or for such term as the Governor thought fit. The Governor was also empowered to fix a minimum

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46 *ibid.*, pp.6-7.

47 For a discussion of criticisms of the Royal Prerogative of Mercy see the Report of the Royal Commission on Capital Punishment (1949-1953) H.M.S.O., Cmd 8932 (London, 1953), p.15 ff and 209 ff. For a history of the development of the Royal Prerogative see F. Bresler, *Reprieve* (Harrap, London, 1965).

term during which the offender would not be eligible for parole.[48] Section 505 of the Crimes Act provides that nothing in the Act shall affect Her Majesty's Royal Prerogative of Mercy and thus the conditions set above can be later altered by the Governor. The State Executive Council acting via the Royal Prerogative of Mercy therefore retains the right to vary any sentences imposed by the courts.

In Western Australia the Governor is authorised to extend the royal mercy conditionally to an offender under sentence of death and he may extend mercy on condition of the offender being imprisoned with or without hard labour for such term as the Governor may think fit.[49] Section 21 of the *Criminal Code* (W.A.) leaves unfettered the Royal Prerogative of Mercy, having the same effect as Section 505, *Crimes Act*, 1958 (Vic.).

In South Australia the disposition of powers is essentially the same as those outlined above.[50]

In all jurisdictions however the Royal Prerogative of Mercy is expressly preserved in various enactments.

FACTORS TAKEN INTO ACCOUNT

With the almost automatic commutation of sentence the role of the Governor-in-Council has 'ceased to be its ancient one of extending mercy, ... [but has] become that of ... determining whether the case has exceptional features which make it necessary, in the interests of the community, that the death sentence should be carried out'.[51] However, it is still of some importance to examine briefly the factors expressed as being taken into account by a Governor-in-Council in commuting a sentence.

In Victoria these were specified as age, previous criminal history (if any), home life, education, antecedents, occupation, representations by interested parties, views of the trial judge and the previous treatment of like offenders.[52]

In Western Australia account is taken of 'any consideration by which the interests of justice will be best served', and any recommendation by the court (except in cases of treason or wilful murder) for the royal mercy under Section 657, *Criminal Code* (W.A.).[53] Also taken into account is the recommendation made by the jury at the trial.

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48 For a more complete discussion of this see Report, Parole Board, Victoria, 1962 pp.9-16.

49 *Criminal Code* (W.A.), s. 679.

50 *Criminal Law Consolidation Act*, 1935-1974 (S.A.), s. 301a.

51 Law Reform Commissioner, Victoria, Report No.1, *Law of Murder* (1974), para. 69, p.21.

52 Royal Commission on Capital Punishment, Minutes of Evidence, p.702.

53 *ibid.*, p.705.

South Australia takes into account the nature of the crime, the condition of the prisoner and any other relevant circumstances, as well as any information which may help in deciding whether the death penalty is to be carried out, whether it was available at the time of trial or not.[54] The trial judge and the Crown Solicitor are also consulted, and the Governor-in-Council then decides whether there are any extenuating circumstances, any defects in the trial or any hint of an undisclosed fact which makes it desirable to waive the death penalty.[55]

The expressed factors may, of course, not be the operative factors. Burns, in his book, *The Tait Case*[56] argues that there were other factors taken into account in 1962. They were a 'crime wave' (at least in the newspapers), and the reasons given by the then Chief Secretary of Victoria, Mr Rylah - the absence of a recommendation for mercy from the jury, the uniquely horrible nature of the crime and the lack of mitigating circumstances. The latter three, Burns says, were not features which were absent from other contemporaneous murderers, whose sentences had been commuted. Probably the underlying reason for non-commutation was simply the fact that the then Premier was in favour of capital punishment and wished to uphold it as a deterrent.[57]

THE PRACTICE

Whatever the stated or unstated reasons for commutation or non-commutation, it is proposed now to examine how it is exercised. In South Australia and Western Australia commutations were in most cases to life sentences, while in Victoria (and New South Wales and Queensland prior to abolition) commutations varied widely. Tables 3 to 6 summarise these practices.

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54 *ibid.*, p.695.

55 See K. Inglis, *The Stuart Case* (Melbourne University Press, 1961), p.50.

56 *op. cit.*

57 For another account of a case where politics and law at this level became dangerously intertwined in South Australia see Inglis, *op. cit.*, and for a different view of the same case see R. Chamberlain, *The Stuart Affair* (Rigby, Adelaide, 1973). The Victorian Premier resisted intense pressure for commutation five years later and Ronald Ryan who was convicted of having shot and killed a warder during a prison escape was hanged in 1967, the last execution in Australia.

TABLE 3[a] VICTORIA: ANALYSIS OF COMMUTATIONS OF DEATH SENTENCE 1928-1974

Commutation	*Number*	*Per Cent*
Life without benefit of regulations relating to remission	23	17.97
Life with benefit of regulations relating to remission	7	5.47
Life	5	3.91
Life with fixed minimum term	3	2.34
Sentence in years plus Governor's pleasure	8	6.25
Sentence in years without benefit of regulations relating to remission	5	3.91
Sentence in years with benefit of regulations relating to remission	12	9.37
Sentence in years with minimum term	55	42.97
Awaiting commutation as at 31 December 1974[b]	10	7.81
TOTAL	128	100.00

a This table is an adaptation and up-dating of the analysis of commutations presented in the Parole Board, Victoria, *Annual Report* 1962.

b Following the abolition of capital punishment in 1975 the death sentences of these 10 persons were commuted to imprisonment for the terms of their natural lives.

TABLE 4 VICTORIA: ANALYSIS OF COMMUTATIONS BY MINIMUM TERM[a] 1961-1974

Minimum Term (Years)	*Number*	*Per Cent*	
5	1	1.82)	0 - 9 years
8	1	1.82)	3.64 per cent
10	5	9.09)	10 - 19 years
12	2	3.64)	29.09 per cent
15	9	16.36)	
20	11	20.00)	20 - 29 years
25	8	14.54)	34.54 per cent
30	7	12.73)	30 - 39 years
35	3	5.45)	18.18 per cent
40	6	10.91)	
50	2	3.64)	
	55	100.00	

a The full term is usually about 5-10 years more than the minimum. It is believed that the minimum term would give a more reasonable estimate of expected release than the full term, especially for the longer term.[58]

58 See also below p.102 as to the proportion of sentence served in relation to sentence imposed.

TABLE 5 NEW SOUTH WALES: ANALYSIS OF COMMUTATIONS OF DEATH SENTENCES TO TERM OF YEARS 1932-1955

Years	*Number*	*Per Cent*	
2	1	1.89)	
5	3	5.66)	0 - 9 years
7	4	7.55)	24.53 per cent
8	5	9.43)	
10	4	7.55)	
12	21	39.62)	10 - 19 years
14	1	1.89)	64.15 per cent
15	3	5.66)	
16	5	9.43)	
20	6	11.32	20^{+} years 11.32 per cent
TOTAL	53	100.00	

TABLE 6 QUEENSLAND: ANALYSIS OF COMMUTATIONS OF DEATH SENTENCES TO TERM OF YEARS 1900-1922

Years	*Number*	*Per Cent*	
5	2	8.33)	0 - 9 years
6	1	4.17)	20.83 per cent
7	2	8.33)	
10	7	29.17)	
12	2	8.33)	10 - 19 years
15	1	4.17)	45.84 per cent
16	1	4.17)	
20	8	33.33	20^{+} years 33.33 per cent
TOTAL	24	100.00	

Table 3 reveals the wide range of commutations used by the Executive Council in Victoria in the period surveyed. In 1961-1962 the mode of commutation was altered to the sole use of the sentence in years with a minimum term, and whereas in 1962 these were only 3 out of a total of 53 commutations, or 5.66 per cent to that date, in 1974 they made up 42.97 per cent of commutations to that date.

Table 4 is an analysis of the use of this form of sentence and what emerges is the significant number of long and very long sentences. In fact, sentences with minimum terms of 20 years or more total 67.29 per cent[59] and even with the remission allowable this would mean a great increase in the length of time served by such prisoners and would place Victorian prisoners in this category at a considerable disadvantage to their counterparts in other states.

With capital punishment in Victoria being replaced with a life sentence, it would seem that persons sentenced between 1961 and 1974 would also be at a disadvantage compared with persons sentenced after that date. This is because, as will be shown below, the actual practice prior to 1961 has been a period of imprisonment of about 13 years.

This anomaly will have to be examined in some detail as the sense of injustice felt by 1961-1975 prisoners will probably lead to an increase in petitions of mercy by such prisoners for release prior to the expiration of their minimum term.

The possibility of extremely long sentences being introduced, either by the legislature or the judiciary was discussed by the Mitchell Committee which commented that such a practice 'would run counter to all current correctional practice[60] and would in our opinion be a retrograde step'.[61] In most Australian jurisdictions the trend in recent years is to a decrease of time spent in custody with a corresponding acceptance of the fact that capital offenders will eventually return to the community.

Although not in strict comparison with Victoria, because of the time differences, the practice prior to abolition in both New South Wales and Queensland was to commute a relatively small number to non-life sentences and these were in a range similar to that which the life sentence prisoner could expect to serve.[62]

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59 cf., minimum terms recommended in England. See below p.32.

60 However in New South Wales a trend towards an increase in the proportion of longer fixed term sentences (that is more than five years) between 1971 and 1973, has been noted, New South Wales Department of Corrective Services, Research and Statistics Division, *Prison Population 1973 - A Statistical Report*, Table 20, p.35.

61 *op. cit.*, p.16.

62 See Tables 5 and 6 p.18.

DISCUSSION

In general the exercise of the Royal Prerogative of Mercy has not been a great source of conflict between the executive and the judiciary. In South Australia and Western Australia Cabinets have not adopted the policy of direct 'legislative sentencing' and have commuted almost every death sentence to life imprisonment. Victoria, between 1961 and 1975 embarked on a policy of direct sentencing with results as shown in Tables 3 and 4. The draconian effects are obvious and the general practice of executive sentencing was trenchantly criticised by the Victorian Law Reform Commissioner in the following words

> 'For the Governor-in-Council to be compelled to fulfil the role of sentencing authority is open to a number of serious objections. That body has, it is true, the advantage of being in a better position than a court is likely to be, to judge community feeling as to the appropriate punishment for particular classes of crimes. But it does not have the advantage of hearing evidence and argument. It does not have the assistance towards acceptance of its decisions by the community, and by the offender, that courts enjoy by virtue of their sitting in public and giving reasons and being subject to appeal. Furthermore there is not that security of tenure and relative freedom from violent public criticism, which assist judicial sentencing bodies to make unpopular decisions when justice requires it.'[63]

While it may be arguable whether either the court or the Governor-in-Council, or for that matter, any other body can ever ascertain 'community feeling', the force of this criticism cannot be denied.

Even more serious doubt was cast upon the nature of Cabinet sentencing by the handling of the Tait case in Victoria[64] and the Stuart case in South Australia[65] where in both cases the Cabinet itself almost became litigant. As Burns stated

> 'Tait's case demonstrated the danger of leaving a question of life or death in the hands of any group of men whose decision was not open to examination in parliament[66], or to

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63 *op. cit.*, para. 70, p.21.

64 See Burns, *op. cit.*

65 See Inglis, *op. cit.*

66 It is interesting, if not disturbing, that the exercise of the Prerogative cannot even be questioned in Parliament. The Report of the Royal Commission states that 'Successive Speakers [of the House of Commons] have ruled that the advice given to the Crown by the Home Secretary with regard to the exercise of the Prerogative of Mercy in the case of persons under sentence of death may not be challenged until after the sentence has been executed.', *op. cit.*, p.15, footnote 2. Bresler quotes what he calls the 'Home Secretary's Declaration of Independence' in a speech in the Commons by Home Secretary Mathew in 1887: 'I must begin by saying ... that I think

> a direct appeal in the courts, yet who were still subject to personal emotions and prejudices.'[67]

In retentionist States, the suggestion of the Victorian Law Reform Commissioner that following commutation, the Governor-in-Council of that State ought to have the power to refer to a Court of Criminal Appeal the function of imposing an appropriate sentence in lieu of that imposed at the trial[68] has much merit, but perhaps to avoid the danger of Cabinet wishing to assume its direct sentencing power, such referral ought to be mandatory.

The system of justice that has developed over the centuries, vested primarily in the courts may be imperfect, but it is probably less imperfect than all the others. Where there exist Courts of Criminal Appeal[69] with the safeguards enumerated above, there is no place for an additional court of appeal sitting in private. As Mr Barry Jones in the Victorian Parliament argued[70] the pardoning power is undesirable and should be resorted to only because there is something wrong with the law itself.

While the death penalty remains and is not in accordance with the current governmental policy or public sentiment, the problem of commutation will also remain. Where inflexibility exists in sentencing options the need for clemency will also exist. The erosion of the powers of the judiciary increases the dangers to the individual if those powers are transferred to the Executive. In New South Wales, subsequent to abolition of the death penalty the Executive Council commuted a number of life sentences to terms of years, again taking a direct sentencing role. Where the option is open to governments there is no logical reason why, if mitigation by Cabinet occurs in some non-capital cases, it may not occur in all.

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it highly inexpedient and injurious to the administration of justice that the circumstances of a criminal case, on which the exercise of the Prerogative of Mercy depends, should be made the subject of discussion in this House.', *op. cit.*, p.62.

67 *op. cit.*, p.159.

68 *op. cit.*, para. 71, p.21.

69 In England until the Court of Criminal Appeal was established early this century the Home Secretary was acting as a final court of appeal. He not only decided 'whether mercy should stay the law's hand, but whether it landed on the right person in the first place', Bresler, *op. cit.*, p.67.

70 Basing himself on Beccaria: Victoria. 46th Parliament, *Parliamentary Debates*, Second Session 1974-75, p.4706.

THE NATURE OF THE SENTENCE

GENERAL

The sentence of life imprisonment is a misnomer in that rarely will a person actually be kept in custody for the rest of his or her life and in most penal systems such a sentence is viewed as an indeterminate sentence[71] to which legislative and administrative provisions for release are applicable. While there are some prisoners who die in custody[72] and others who are supposedly incarcerated for the term of their natural life, or who have 'never to be released' reputedly marked on their papers[73], for most there is the possibility of release at some date.

The nature and purpose of such a sentence is a matter of some importance, for although as was seen earlier, the life sentence is available for a great number of offences, it is imposed for only a few, and in those cases only because it is the mandatory penalty. But the question remains why a life sentence is not imposed in those cases where it can be and conversely, whether it is the appropriate penalty or disposition for those where it must be.

The sentencing paradox inherent in the life sentence has been expressed by the Mitchell Committee as the attempt to express the maximum community disapproval for the commission of the offence, while at the same time leaving a wide measure of discretion to the subordinate sentencing authority. Unfortunately, in Australia very little attention has been paid by the courts to the principles of sentencing relating to the imposition of life sentences.[74]

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71 Indeterminate is used here to mean a sentence without a maximum limit, cf., an indefinite sentence which has a maximum but is variable to that maximum. See the Mitchell Committee, *op. cit.*, p.12. The Committee argues that theoretically a life sentence is a definite sentence because 'it represents a definite period of time [the offender's] life span'. However it recognises that in practice it functions as an indeterminate sentence, p.16. Indefinite sentences will be referred to herein as determinate or fixed term sentences, allowing however for the variability that exists up to that fixed term by conditional release procedures.

72 See below p.95.

73 This is probably an administrative act as the courts have no power to impose a minimum term. See below p.31. Where such a statement is made by way of commutation it cannot, of course, bind a future exercise of the Royal Prerogative in determining release, for the prerogative is absolute.

74 A valuable discussion of these issues is found in the Criminal Law Revision Committee (Eng.) 12th Report, *Penalty for Murder* (1973), Cmnd 5184 and also D.A. Thomas, *Principles of Sentencing* (Heinemann, London, 1970), to both of which much of the following discussion is indebted.

The role of the indeterminate sentence in the correctional system is too vast a topic to be thoroughly canvassed in this paper but it is necessary to discuss a few aspects as it relates to the life sentence. In the Australian context the conflict between indeterminate and fixed term sentences was emphasised by the use of the latter in Victoria by commutation until 1975, when that State followed other abolitionist States in making the life sentence the sentence for murder. The question remains though whether the fixed term sentence is preferable to the life sentence and whether the court should have a choice between the two in the sentencing of offenders.

ADVANTAGES OF THE LIFE SENTENCE AS AN INDETERMINATE SENTENCE

The main argument in support of the life sentence is perhaps not the length of time actually served, but that a person is liable to be detained for life.

On the other hand the flexibility of the life sentence enables the early release of those whose case may not have been of great heinousness or from whom there would not be much danger to the public safety. This is especially so in regard to women offenders, and as will be seen below, this flexibility is one of the most striking features of the life sentence in practice.

Thomas cites a number of cases in England[75] where a life sentence was imposed on the ground that release should occur only when the offender ceased to be a danger to the public.

The Mitchell Committee viewed the life sentence as an exception to their general disapproval of indeterminate sentences mainly because it left the discretion as to release to the correctional authorities who, it was argued, could be trusted to detain persons for only a reasonable term of years.[76]

A life sentence not only enables society to isolate an offender from the community, but the considerable nominal value of being the heaviest sentence available to the courts, heavier, theoretically, than even a sentence of thirty or forty years. The deterrent aspect of this is difficult to calculate, but it cannot be denied that the term 'lifer' carries with it a connotation that few sentences do.[77]

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75 *op. cit.*, p.55.

76 This trust, however, should be reinforced by adequate review procedures. See below p.129 ff.

77 Although, as will be shown, 'life' rarely means life, the meaning of the phrase is still unclear, as the following exchange between Mr Doube and Mr Hamer in the Victorian Parliament indicates

'Mr Doube - The amendment proposes that the Bill be altered so that it will be mandatory for all persons convicted of murder to be imprisoned for the term of their natural life, whatever that expression means.

Mr Hamer - As long as they live.

DISADVANTAGES OF THE INDETERMINATE SENTENCE

The rehabilitative dream of the indeterminate sentence has turned out to be something of a penological nightmare. Primarily its purposes were reformative and preventative, however the former factor has declined in importance in recent years.[78] The reformative ideal entails release dependent on improvement or cure and it is argued that the imposition of fixed-term sentences is illogical as the Court cannot know at the time of sentence when a person will be ready for release. However in theory and in practice it has fallen down. Theoretically it was based on a medical model of crime which viewed crime as a disease and which completely ignored the socio-political nature of crime and its relation to society. In practice it allows detention for periods far out of proportion to the gravity of the offence[79], provides few adequate criteria for release (cure? dangerousness? reform?) and it allows the possibility of abuse of power where release may depend wholly on the norms of the releasing authorities.[80] There is also the danger that complete dependence by the prisoner on his custodians in regard to his fate may lead to intense hostility to what may appear injustice and arbitrariness[81] in release practices.

Finally there is the deleterious effect on the prisoner.[82]

Mr Doube - I cannot find a definition of the phrase in the Crimes Act, although it may have a common law interpretation.'

Victoria. *Parliamentary Debates, op. cit.*, p.4702. Obviously to the Premier, the life sentence expressed in this form is the heaviest penalty possible.

78 See M. Daunton-Fear, 'Sentencing Habitual Criminals' in Chappell & Wilson, *op. cit.*, and S. Cohen, 'Human Warehouses: The Future of Our Prisons?' in *New Society* (14 November, 1974).

79 This is especially so with regard to indeterminate sentences other than life sentences. These may be imposed for a wide range of offences, many being less serious than those for which a life sentence is imposed.

80 The following excerpt from a book written by a released lifer is illustrative

'My greatest concern was that the authorities might become aware that I had been involved in violence. That is the one thing which counts against a lifer more than anything else. I have seen lifers take insults from screws and prisoners that no reasonable man could be expected to swallow, simply because to punch the other man on the nose might have resulted in the lifer serving an extra couple of years, even if he had not been charged with an offence. It has only to be entered on a review report that a lifer is known to have been involved in a fight or fights for the reviewing body to consider that he is still violent, and so cannot be considered for release'. Zeno, *op. cit.*, pp.163-64..

81 See M. Daunton-Fear, *op. cit.*, p.593.

82 See also below p.125.

> 'The absence of any definite date for release induces a hopelessness and resentment which is counterproductive in correctional terms because it diminishes the offender's capacity to become fit for release.'[83]

This is especially so when he sees many others with the same sentence being released before him.

A prisoner may also be put at a disadvantage by the indeterminate sentence when correctional policy or the government changes about the time he may have been thought due for release. In this case the sentence served not only reflects the sentencing policy at the time of sentence but also at about the time of release. This may of course also be to the benefit of the prisoner where policy changes in his favour, but it would seem that the element of capriciousness inherent in the indeterminate sentence would tend to be unsettling and discouraging.

'LIFE' OR DEATH?[84]

Another argument sometimes put is the inhumanity both of the very long fixed sentence and indeterminate sentence, where there may be little

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83 Mitchell Committee, *op. cit.*, p.13. Bearing in mind the problems of deciding 'fitness' for release and the inadequacy of present criteria.

84 Although it is not the intention of this paper to argue extensively the merits of capital punishment compared with life sentences, it is instructive to note one of the arguments put against capital punishment in the Victorian Parliament

'The Hon. K.I. Wright - I should like to refer to another aspect that has not been mentioned in the debate. The Bill states that instead of the existing penalty for murder there should be substituted "imprisonment for the term of his natural life". No honourable member has examined the cost of imposing this penalty. Some weeks ago, in answer to a question on notice asked by me, it was revealed that the cost of keeping a prisoner in a prison in Victoria was approaching $2,500 a year. This includes only the actual maintenance and disregards the capital cost. I venture to say that the full cost of keeping a prisoner in prison would have to be $5,000 a year. This is surprisingly low as the article in the *Herald* of 8 July 1974, points out that Dr Waller said that in Canada it now cost Canadians $10,000 a year to keep each inmate in prison. If we take the sum of $5,000 a year as the cost of keeping each person in prison, and estimate that the average prisoner will live another 30 years, on the basis that the amount of $5,000 could be invested for 30 years at 10 per cent compounding, which is a reasonable rate of interest, it will cost the Government and the community $820,000.

The Hon. P.D. Block - Is the honourable member seriously suggesting that people should be hanged because of the cost of imprisonment?

The Hon. K.I. Wright - I am merely stating the consequences in cost to the State if the Bill is passed. I have a great concern for the victim of murder. I have been speaking of the punishment of the criminal, but I am now referring to the cost of keeping the criminal

hope of release.[85]

A report in a newspaper[86] quotes a 35 year old double murderer in England who was facing a minimum term of thirty years' imprisonment requesting the right to be executed. He wanted to die 'rather than suffer years in prison, growing old and having a death wish on my mind'. His life in prison, he said, was a 'private hell'. The same article also cites the case of a convicted South Australian murderer who unsuccessfully sought leave to appeal to the Privy Council to have his original death sentence carried out.[87]

To quote the words of a Home Office (England) Memorandum of 1930

> 'Different views will be taken of the comparative evils of a death sentence and of a long term of detention. But whichever view be taken, it should be recognised that though the dreadful character of a long sentence of detention is less

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in gaol. Each prisoner will cost the community $820,000 for the 30 years he can be expected to spend in prison. Based on the Canadian figure of $10,000 a year for each prisoner, the cost would increase to $1.6 million.

The Hon. M.M. Walton - Because of that do you think everyone should be hanged?

The Hon. K.I. Wright - I did not say that. I am informing the House of the cost of keeping each prisoner in gaol for 30 years, regardless of what is done with him.'

Victoria. *Parliamentary Debates, op. cit.*, p.5162. Another member, accounting for the current inflation rate over a period of 50 to 60 years, being the estimated length of detention for a young murderer, calculated the cost at 'possibly $25 million'. See p.4490. This calculation, of course, has not taken into account past releasing practices, even where 'for the term of his natural life' has been the sentence, nor has it taken into account methods by which prisoners can become less of an economic burden. However as Sellin writes, 'No-one would seriously suggest that people should be executed, not because of their crimes but because the State has not made it possible for them to be self supporting during imprisonment because it has taken no proper steps to achieve that end.', *The Death Penalty* (American Law Institute, Philadelphia, 1959), pp.18-19. See also H.W. Mattick, *The Unexamined Death* (Chicago, 1966).

85 The United States Appellate Courts have rejected the claim that a life sentence *per se* constitutes 'cruel and unusual punishment' in violation of the Constitution, though recently the Supreme Court has held that the death penalty is 'cruel and unusual' in certain circumstances. See Powers, *op. cit.*, p.8 and S. Rubin *et al*, *The Law of Criminal Correction* (West Publishing Co., St Paul, Minn., 1963), p.381.

86 *Adelaide Advertiser*, 26 March 1974.

87 The South Australian Supreme Court held that the convicted individual has no right to enforce the death sentence, but the person has an obligation to submit to it, only the Crown having the right to enforce sentence. *Exparte Lawrence* (1972) 3 S.A.S.R. 361 per Bray C.J.

> obvious than is the dreadful character of a death sentence, the choice between the two is a choice between evils.'[88]

This raises profound questions as to the rights of people to take their own lives, and it has been strongly argued that a person who wants to kill himself is not necessarily mentally ill[89] and that a society which values personal autonomy may well have a duty to allow persons who want to terminate their existence to do so.[90]

CRITICISMS OF THE MANDATORY LIFE SENTENCE

In England, where the average length of time served by life sentence prisoners has been approximately nine years[91] the criticism has been that a life sentence is too short a penalty and that persons who commit more serious offences and get life imprisonment are better off than persons who commit less serious offences and get long fixed term sentences.

In the case of *R.* v. *Church*[92] an appeal against a sentence of 15 years for manslaughter on the ground that a conviction for murder and the consequent life sentence would result in a lesser term of imprisonment

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There is of course the danger that the mental state of the prisoner in the time leading up to the reprieve may be such that by the time the execution draws near, he may not care less and would prefer to just end it all. The ordeal may be such that this feeling may last for up to a couple of years after the reprieve. See discussion in Bresler, *op. cit.*, p.125 ff. On the other hand the point was raised a number of times in the recent debate in the English House of Commons on the re-introduction of the death penalty that for some, who seek martyrdom for a political cause, or others who seek death as an absolution, death is a desirable thing. See generally *Weekly Hansard (Commons)*, vol.882-883, Dec 6-12, 1974.

88 Royal Commission on Capital Punishment, Minutes of Evidence, p.17. Some of the Victorian Parliamentarians considered that 'life' in prison was in fact death itself. Speaking in favour of retaining capital punishment an ex Social Welfare Minister said, 'I have seen living death in prison in which the majority of people who have been convicted for more than 20 years are surely dead by any standards'. Victoria. *Parliamentary Debates, op. cit.*, p.4330.

89 cf., D.J. West, *Murder Followed by Suicide* (Heinemann, London, 1965), who found that a high proportion of murder/suicide offenders 'were suffering from manifest psychiatric disorder at the time of their crime'. p.63.

90 See T. Szasz, 'Our Despotic Laws Destroy the Right to Self Control' in *Psychology Today* (19 December 1974), pp.23-24. This issue will be further discussed below p.97 but in a different context, that of suicides in prison.

91 See below p.58. Though it is expected to increase in the future because of the recommendations for very long minimum terms.

92 [1965] 2 W.L.R. 1220; [1965] 2 All E.R. 72 quoted in Thomas, *op. cit.*, pp.57-58.

than would a conviction for manslaughter was rejected by the Court on the grounds that, in Thomas' words:

> '[T]he attempt to compare the fixed term sentence with the effective period of confinement ... was unacceptable, the sentence of life imprisonment being governed by different principles and applied to different kinds of cases from those relevant to fixed term sentences.[93]

Another argument is that there is a certain hypocrisy involved where the judge is obliged (where the life sentence is mandatory) to impose such a sentence knowing that it will not be fulfilled. However, in answer to this, the Criminal Law Revision Committee has emphasised that it is the liability to be detained for life that is paramount, and that the length of time on parole may be considerable.

It was to bring the sentence in conformity with practice that the Committee[94] recommended that the form of sentence should be changed to: be sentenced 'to imprisonment and to remain liable to imprisonment for the rest of (his) life'. Some consideration should be given to the adoption of this form of sentence in Australia, not only for the reason of conformity with practice, but because the public, unlike judges who may be aware of current correctional practice, have a right to know and understand the exact nature of a sentence which may be imposed.

Professor Glanville Williams, a member of the Committee, has criticised the mandatory life sentence for the reason that the judge is not given enough discretion in taking into account mitigating factors and to distinguish between murders of different gravity.[95] In England however, this criticism is tempered somewhat by the fact that the trial judge has power to recommend a minimum term[96] and the fact that the judiciary is at least represented in parole decision making.

Although the life sentence has the advantage of allowing correctional

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93 *op. cit.*, p.58. For further discussion of the life sentence compared with the determinate sentence see below p.34 ff.

94 And a committee in Scotland established to investigate the law of murder.

95 The Victorian Premier said this in his second reading speech on the clause which was subsequently defeated, 'In place of the sentence of death, this Bill proposes the widest possible discretion for the judge. He may sentence the convicted person for the term of his natural life or for any lesser period that the court thinks fit. In fact, the offence will be treated in exactly the same way as any other crime under the Crimes Act except that the maximum punishment is imprisonment for the term of natural life. This wide discretion is necessary because not every offence of murder involves the same degree of blameworthiness'. Victoria. *Parliamentary Debates, op. cit.*, p.3823.

96 Although the value of this as a correctional tool is questionable, see below p.31.

authorities the early release of a non-dangerous offender[97] whose crime was less heinous, the problem of the mandatory imposition of a life sentence becomes apparent in those few cases where a sentence of imprisonment may not be appropriate, for example euthanasia of a deformed child and where a verdict of manslaughter may not be appropriate.[98]

This fault may be remedied in two ways

(a) By a change in the substantive law. Unfortunately the pitfalls of this are enormous. The Victorian Law Reform Commissioner, following the Royal Commission on Capital Punishment[99] and the Royal Commission on Capital Punishment in Ceylon in 1959 decided against any classification of murder based on 'relative heinousness'[1] because of the unsatisfactory nature of any such classification and the anomalies it would produce. For the same reasons he rejected a division of murders between 'capital' and 'non-capital' offences.[2]

(b) By a change in the dispositions available to the sentencing authority. Thomas writes

> 'The mandatory life sentence, part of the political price of the abolition of the death penalty, cannot be defended on any rational grounds in a system where every other offender is subject to the extensive discretion of the sentencing judge, and the difference between a verdict of murder and one of attempted murder or manslaughter may be the skill of the casualty officer or the sympathy of the jury.'[3]

This 'extensive discretion' may range from hospital orders, to sentences for terms of years up to the statutory maximum and in some cases, conditional discharge where it would be contrary to the interests of justice for a sentence of imprisonment to be served by the accused.

The balance is, as always, a difficult one to strike, but failing changes in the substantive law[4] it would be desirable for the mandatory life

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97 If this can be predicted with any accuracy.

98 A report in the *Sydney Morning Herald*, 22 May 1975 illustrates another situation where a mandatory life sentence may be inappropriate. The accused, an Italian, was convicted of killing his first cousin who had married the accused's daughter. Because the victim had brought disgrace and shame to the accused's people the accused felt that it was his moral duty to kill the victim in accordance with the custom of his village.

99 Though England did have a system of graduated degrees of murder for some time.

1 *op. cit.*, para. 21, p.7.

2 *ibid.*, para. 30, p.9.

3 D.A. Thomas, 'Developments in Sentencing 1964-1973' [1974] *Criminal Law Review* 685, 687.

4 As occurred over the decades in such cases as suicide pacts, infanticide, abortion, felony-murder and so on.

sentence to be abolished for the few crimes where it is available.

One of the strongest arguments advanced by the Criminal Law Review Committee in favour of the mandatory life sentence, apart from its flexibility, was that the person may be recalled at any time after release by the Home Secretary, and cites one case where a released murderer was recalled twenty-three years after the sentence was imposed when he showed signs of relapsing. In Australia this is possible in all States except Western Australia.[5]

DETERMINATE SENTENCES

Determinate, or fixed term sentences, may have the advantage of being seen as having a considerable deterrent effect when sentences of sixty years with a minimum of fifty years, or fifty years with a forty year minimum are imposed.

These suffer from the defects outlined above, that is, where the choice is seen as only between a mandatory life sentence and a mandatory fixed term sentence, and the latter is chosen, the result will be the imposition of very long sentences[6] which run counter to contemporary correctional practice and which leave too little discretion to the releasing authority. As the *Twelfth Report* pointed out, it is not necessarily the person who committed the most heinous crime who may be the most dangerous, and with a determinate sentence release is mandatory at the end of the prescribed period, even though it may be considered unsafe.

All determinate sentences, however, suffer from this flaw, but the issue in question here is when should a determinate sentence be imposed rather than a life sentence, and not to what terms of years should murderers be sentenced.

In the light of recent Victorian commuting practice, and also the actual practice in the past[7] it would seem that the life sentence with its deficiencies[8] is preferable to the fixed term sentence.

OTHER ALTERNATIVES

A number of other possibilities have been suggested, including a fixed term with an option to change it to a life sentence upon expiration if the prisoner is still considered dangerous; a fixed term with authority to extend, and fixed terms with release on licence or parole for the rest of one's life.

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5 See below p.131 ff.

6 Usually where imposed by non-judicial bodies.

7 See below p.54 ff.

8 Many of which are remediable.

These have been criticised on the basis of the artificiality of the 'determinate' portion of the sentence[9] and that it would be perhaps both unjust and distasteful to increase a sentence upon the expiration of the determinate period.

MINIMUM TERMS

The setting of minimum terms or non-parole periods for sentences has been the subject of a number of recent cases[10] and much debate[11] and is of too great a complexity to be given full justice here. However a few comments need to be made in regard to this concept as it relates to the life sentence or its equivalent in Australia.

In Western Australia[12], and the Northern Territory[13] the Court is expressly excluded from fixing a minimum term, while in South Australia, New South Wales, Queensland, Tasmania and the Commonwealth the Courts have not been known to fix minimum terms where the life sentence is directly imposed. In Western Australia and South Australia, most life sentences result from commutations of the death penalty and though there would seem to be power to fix whatever terms and conditions are thought fit, a minimum term is never fixed.[14] Victoria from 1961 to 1975, fixed both the maximum and minimum terms by commutation.

In England, under Section 1(2) of the *Murder (Abolition of Death Penalty) Act* 1965 the judge may recommend the minimum period before release is possible, such recommendations not being binding. The purpose of this, in the words of the then Lord Chief Justice, Lord Parker, is to preserve 'the right ... of the trial judge to mark the gravity of the offence, the revulsion of public feeling, in a proper case by giving what appears to be a very long sentence, which it is hoped will deter others and afford some protection to the police, in particular'.[15]

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9 Criminal Law Revision Committee, *Twelfth Report, op. cit.*, p.13.

10 *R.* v. *Portolesi* [1973] 1 N.S.W.L.R. 105; *R.* v. *Sloane* [1973] 1 N.S.W.L.R. 202; *Lyons, Selenski and Power* v. *R.* (1974) 48 A.L.J.R. 297.

11 See F. Rinaldi, *Parole in Australia* (Australian National University, Faculty of Law, Canberra, 1974), chapter VI; Mitchell Committee p.13 ff.

12 *Offenders Probation and Parole Act*, 1963-1971, s. 37(2)(b)(iii).

13 *Parole of Prisoners Ordinance* 1971, s. 4(2)(b).

14 In Victoria, as can be seen in Table 3, a very small number of life sentences were given with a fixed minimum.

15 Quoted in *Criminal Law Review Committee, op. cit.*, p.14. This was in essence the view of Blackburn J. in *R.* v. *Lyons, Selenski and Power* (1974)(unreported) Supreme Court of the Australian Capital Territory, who held that the purpose of the minimum or non-parole term of a sentence was the fixing, by the judge, of the punitive or retributive element of the sentence. Some judges have expressed their views strongly while passing sentence. For example, Mr Justice

It has been used sparingly in England; from 1965 to July 1972 recommendations were only made in 8 per cent of cases as follows: one for 10 years, two for 12 years, thirteen for 15 years, one for 17 years, thirteen for 20 years, four for 24 years, seven for 39 years and one for life.[16]

The Victorian minimum terms as set out in Table 4 show that far harsher penalties were being imposed there and were in many cases four to five times higher than the maximum recommended by the American Bar Association of 10 to 15 years for life cases only.[17]

The arguments usually advanced in favour of the imposition of a minimum term, apart from that outlined above, are that it allows the judge to determine the custodial or punitive element of the sentence[18] and that where used sparingly, the deterrent effect is enhanced by the publicity which ensues.

The need to reassure the community that dangerous offenders will not be roaming the streets is also another element and in support of this the

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Taylor in sentencing two men for life for a particularly atrocious murder said that he had no intention of fixing a non-parole period. He is reported as saying that 'This is a clear case where you two should spend the rest of your lives in jail and there you should die; this is a case where life imprisonment should mean life imprisonment.', *Sydney Morning Herald*, 21 June 1974.

16 Criminal Law Revision Committee, *op. cit.*, p.15.

17 *Sentencing Alternatives and Procedures*, pp.142 and 157.

18 The High Court in *Lyons, Selenski and Power* v. *R.* (1974) 48 A.L.J.R. 297 in essence confirmed Blackburn J's opinion in this respect. The Court held that the judge, in fixing a non-parole period, must determine the minimum period for which, in his judgment the prisoner 'should be imprisoned', and that a sentence of imprisonment cannot be regarded otherwise than a severe punishment, however enlightened the prison system may be.

However the majority of the High Court declined to accept the view that sentences can be divided into 'punitive' and 'rehabilitative' sections. It said, 'To our minds no assistance towards the construction of the Act [*Parole of Prisoners Act*, 1966-1970 (N.S.W.)] is to be had by considering the various objects of criminal punishment and by treating the non-parole period as retributive and the remainder of the time served in confinement as a period of rehabilitation. Confinement in a prison serves the same purposes whether before or after the expiration of a non-parole period and, throughout, it is punishment, but punishment directed towards reformation ... In a true sense the non-parole period is a minimum period of imprisonment to be served because the sentencing judge considers that the crime committed calls for such detention.', per Barwick C.J., Menzies, Stephen and Mason JJ. p.299. In so holding the Court disagreed with principles enunciated by the New South Wales Court of Criminal Appeal in *R.* v. *Portolesi* [1973] 1 N.S.W.L.R. 105 and *R.* v. *Sloane* [1973] 1 N.S.W.L.R. 202 to the effect that the judge sentencing a prisoner should in general fix a non-parole period no

American Bar Association[19] puts the essentially pragmatic argument that if there are not judicial minima to effect reassurance the legislature will do so instead with mandatory minima, with a far worse result.

The principal argument against the setting of minimum terms revolves around the concept of parole readiness, that is one cannot forecast the progress a prisoner will make just on the information available at the trial, and it may often happen that the time when an offender may be safe for release will not coincide with the minimum term.[20]

The Mitchell Committee has said

> '... (T)o combine an indeterminate sentence with a minimum sentence would only make the situation worse, for if there were any virtue in the unlimited discretion conferred by an indeterminate sentence, a minimum term would run counter to it.'[21]

There are also problems relating to the disparity between minimum terms and the effect that a recommendation of 'never to be released' may have on a prisoner in terms of the psychological effect on him. It may also create some perceived sense of injustice when a person is held beyond the minimum term.[22]

It would seem, on balance, that the minimum term, if appropriate at all to fixed term sentences, is completely out of place when combined with a life sentence. If minimum terms are to be imposed however, there should be the opportunity for counsel to enter a plea in mitigation and for there to be a right of appeal against it. This was one of the gravest defects of the system in Victoria, as it related to convicted capital offenders. Moreover, if there is the felt need for this measure, it should never be a mandatory part of the sentencing procedure, but left to the discretion of the judge, and even then only have a recommendatory rather than stipulatory effect.[23]

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longer than the short term that he considers would suffice to enable the paroling authority to form a proper opinion of the prisoner's prospects of rehabilitation.

19 *op. cit.*, p.155.

20 The Model Sentencing Act states, 'Lifers should be eligible for parole at any time at the discretion of the paroling authority. No minimum term should be set by the legislature for any crime, not even for the most serious offence. A minimum term prevents the Parole Board from releasing a defendant who in their judgment is suitable for release before the expiration of the minimum term of eligibility'. Comment, p.13.

21 *op. cit.*, p.14.

22 See Criminal Law Revision Committee, *op. cit.*, pp.14-19.

23 *ibid.*, p.18.

THE RELATIONSHIP BETWEEN THE LIFE SENTENCE AND DETERMINATE SENTENCE

There has been curiously little discussion in Australia of the purposes of the imposed life sentence, probably being a function of the fact that most life sentences received are either mandatory or result from commutation. However, because of the relative non-use of such sentence as a disposition it is still important to question why, or more properly, why not a life sentence should be imposed.

The relationship between the life sentence and the long, fixed term sentence has become a question of major concern in England recently, where the number of long sentences has increased markedly in the last ten years. Jackson notes[24] that in England until the early 1960s virtually all prisoners serving life sentences were convicted murderers whose death sentences had been commuted and for whom the average length of time served was about 9 to 10 years[25], which was then generally comparable to a determinate sentence of about 15 to 20 years. Cases were rare of long determinate sentences, but they were occurring. Blake received 42 years for spying and Lonsdale received 25 years for the same offence[26] while the Great Train Robbers received 25 to 30 years. It was said that it would be more advantageous to commit murder as well as treason or robbery.[27] These 'exemplary' sentences have set the tone for other very long prison sentences.

It has been reported[28] that the number of determinate sentences of more than 10 years has risen from an average of 21 per year from 1961-1970 to 36 per year from 1970-1973. With regard to life sentences, '(d)uring the four years 1959 to 1962, the number of such sentences imposed was 11, 12, nine and eight respectively. In 1963, the number increased to 17, and from that year until 1973, has averaged just over 22, with peaks of 36 and 35, respectively, in the years 1967 and 1973'.[29] These long sentences have been at the expense of the 'middle range' sentences of 7 to 10 years.

The English Court of Appeal in *R. v. Turner and Others*[30] explained some of the reasoning behind long sentences of imprisonment. After outlining the history of imprisonment the Court examined the decline of other forms of punishment such as penal servitude, hard labour and whipping. The only deterrent left, in the Court's view was very long terms of imprisonment. 'There were two reasons. Criminals had tended to become more and more sophisticated. They had become a bigger danger to the public. The death penalty had been abolished, so that the only sentence which could be imposed for the most serious crime in the criminal calendar,

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24 *Enforcing the Law*, (Penguin, Victoria, 1967), pp.214-15.

25 See below p.58.

26 For the reactions of a lifer convicted of murder to this disparity see Zeno, *op. cit.*, p.116.

27 See also above p.27.

28 (1975) 139 *Justice of the Peace* 175.

29 *ibid.*

30 (1975) *The Times*, 11 March summarised in (1975) 139 *Justice of the Peace* 189.

treason apart, was life imprisonment.'[31] If life meant in practice about 10 years 'what was the appropriate sentence for someone who was not convicted of murder but of a serious crime?'.[32]

With their point of reference as the sentence for murder, the Court divided serious crimes into two categories. The first was abnormal crimes whose circumstances were horrifying and which might lead to a danger to the State, for example, treason, the Great Train Robbers and perhaps persons involved in such political terror as bomb outrages or kidnapping. The other category was crimes which were serious in themselves but which could not be regarded as 'abnormal'. For these, relatively lower sentences were in order, the average being about 15 years, with 18 years the maximum - for example, for armed robbery. The judgment will be heavily criticised[33] but at least some attempt has been made to enunciate publicly sentencing policies which had previously been either non-existent or unknown.

What then is the situation in Australia and what should the appropriate penalty be in non-murder cases? An example of the general concern over this problem occurs in *The West Australian*.[34] The editorial discusses a case of pack rape where two of the offenders received sentences totalling 22 years' imprisonment each, but the sentences were made concurrent. Both terms for each offender carried non-parole periods of 5½ years. The newspaper commented, 'The maximum punishment for the crime of rape is life imprisonment. It is now hard to imagine circumstances in which that punishment could ever be imposed'. That is not an unfair comment for the Australian Courts have not to any great extent discussed the use of the discretionary life sentence. Thus the reliance herein on English sources.

Thomas[35] on the basis of decisions in the English Court of Appeal postulates three conditions which must be satisfied before a person can be sentenced to life imprisonment in non-murder cases:

1. that he should have committed an offence of an extremely serious nature;
2. that he should be likely to commit an extremely grave offence if at liberty; and
3. that he is in some way unstable or disordered.

Taking each in turn

1. The discussion above has indicated that gravity alone will probably not be sufficient for the imposition of a life sentence and that in England, at least, a long determinate sentence will usually follow even the gravest crime. It also seems to be the reason why in

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31 *ibid.*

32 *ibid.*, p.190.

33 See e.g., H. Klare, *As I See It*, *ibid.*, p.198.

34 9 April 1975.

35 *Principles of Sentencing*, *op. cit.*, p.274: Comment *R.* v. *Ashdown* [1974] *Criminal Law Review* 130; Comment *R.* v. *Thornton* [1975] *Criminal Law Review* 51.

Australia the life sentence has not been imposed more often, the legislative maximum being completely dissonant with the normal range of penalties invoked for other offences or what Thomas calls the 'normal range of tariff sentences'. The approximate range of the tariff seems to be about 14 to 20 years' imprisonment for serious cases of manslaughter, rape, serious wounding, violent robbery and buggery.

In an unreported decision of the Western Australian Court of Criminal Appeal[36] the applicant for leave to appeal, a 19 year old male, wished to appeal against a sentence of 10 years' imprisonment with a six year non-parole period for unlawfully doing grievous bodily harm to a police constable. The Chief Justice remarked that it was only prompt medical attention which prevented a charge of murder which would, on the jury's findings of the facts, have entailed a mandatory sentence of life imprisonment. The application was refused on the ground that serious punishment was needed for the deterrence of others.

Wickham J. in a dissenting judgment on sentence thought that 10 years was longer than necessary 'to meet various requirements of sentencing involved in the ideas of retribution, temporary prevention, individual and general deterrence and reformation'. A very long sentence would be wrong because the excess is not only purposeless but 'might be harmful in that the prisoner might become hopeless, aggressive and otherwise intractable, and thus one of the purposes of punishment will be defeated through making it more rather than less likely that he will eventually offend again'.

The judge compared this with the situation where, if a life sentence had been received, a report by the Parole Board would have been made by the Parole Board after five years[37] and release may have occurred soon after, with a parole period of not more than five years.[38] In His Honour's view a sentence of six years with a three year non-parole period would have been sufficient.[39]

This case illustrates a number of vital matters which are involved in 'life' sentencing. It seems to illustrate the vast gap that exists in sentencing philosophy in regard to the breakdown in proportionality between the cases where a life sentence is mandatory and cases where it is not, but which are similar. In the majority's view, the only relevant difference between the two in the instant case was medical science.

However Wickham J's discussion shows an encouraging awareness of the need to take into account what the actual aims of sentencing are, and how one sentence, rather than another, may serve these aims more

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36 *Thomson* v. *R.* No.45 of 1972, Jackson C.J., Wickham and Wallace JJ.

37 *Offenders Probation and Parole Act*, 1963-1971 (W.A.), s. 34(2)(ba)(ii).

38 *ibid.*, s. 42.

39 The authors are indebted to Mary Daunton-Fear for making her abstract of this case available.

satisfactorily. It is hoped that the Australian courts will further develop the principles of sentencing applicable to life sentences and their relationship to the fixed sentence.[40]

2. The life sentence as an indeterminate sentence has as one of the conditions precedent of its use that the offender is potentially violent and that the court has little confidence that, on the expiration of a fixed sentence less remission, the offender will not again be a danger to the public.[41] Neither this nor the next factor were taken into account in the Western Australian case.

3. In England it is the mental condition of the offender which is perhaps the determining factor in the balance between the other two. The greater the indication of instability and likelihood of future grave offences, the less the requirement of the seriousness of the immediate offence. Where the future risk is moderate, the immediate offence must be grave.[42]

   The indeterminate nature of the sentence has found favour with the courts in those cases where the person is suffering from some mental abnormality which is not of a kind to fall within the Mental Health Act there, so as to justify a hospital order, either because the mental illness does not fall within one of the defined categories or it is such that it is not amenable to treatment.[43]

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40 For Canadian movements in this direction see below p.38 footnote 44.

41 See Thomas, *Principles, op. cit.*, p.274.

42 Thomas, Comment *R.* v. *Ashdown, op. cit.*, p.133.

43 For a valuable discussion of the relationship in England between the life sentence, commitment to a special hospital with a restriction order, a determinate prison sentence and committal to an ordinary hospital with or without a restriction order, see N. Walker & S. McCabe, *Crime and Insanity in England* (Edinburgh University Press, 1973), vol.2, pp.97 ff. Two recent cases illustrate the relationship further. In *R.* v. *Skelding* (1974) 58 Cr. App. Rep. 313 (noted in (1975) No.153 *The Journal of Criminal Law* p.24) a persistent homosexual who had pleaded guilty to a large number of homosexual offences of a very serious nature was sentenced to life imprisonment. He had been released from a mental hospital and the medical reports indicated that a hospital order under the *Mental Health Act* 1959 (Eng.) could not be justified. The Court of Appeal as reported in the Journal concluded that:

   'The substitution of a fixed term sentence of not too long a duration, in the place of the life sentence, was hardly an available alternative, as it was almost inevitable that there would be a recurrence of these offences if the term fixed were short. It was impossible to predict whether the appellant would be "cured" and, if so, how long it would take, so it was impossible to predict how long a fixed term should be. The court therefore affirmed the life sentence as "the most merciful thing for the appellant", since this sentence allowed his case to be kept under constant review and permitted his release under licence as and when his condition justified it.'

Thomas concludes:

> '... it seems that the Court will uphold a sentence of life imprisonment as an indefinite preventive measure in the absence of medical evidence provided that the appellant has been convicted of an offence involving particularly serious violence and has a record of similar violence on at least one occasion, drawing an inference from these facts that the offender is unstable and particularly dangerous to the community.'[44]

The resolution of this sentencing dilemma is made more difficult by the fact that its existence has not fully been recognised. While the life sentence remains for so many offences, its existence must be justified. Where the life sentence is discretionary, great care must be taken to ensure that it is not used as a last resort to place those for whom no more suitable form of disposition is available. It would seem, on balance that where there is no mental disorder at all, a fixed term proportionate to the offender's responsibility should be imposed.

In the other case a man aged 30 years with a history of mental instability and showing a personality and behaviour of persistent and abnormal aggression and seriously irresponsible conduct pleaded guilty to arson and was sentenced to life imprisonment. As no conventional mental hospital would accept him, because its role would be custodial rather than therapeutic, and as there was no recommendation for a hospital order, it was felt by the court that there had to be a prison sentence, for although the immediate offence was not grave, there was a high likelihood of repetition. *R.* v. *Thornton* [1975] *Criminal Law Review* 51.

44 Thomas, *Principles, op. cit.*, p.278. The Canadian courts have vacilated as to the conditions necessary before a life sentence can be imposed and over the weight that should be given to the factor of mental instability. In *R.* v. *Head* (1971) 1 C.C.C. (2d) 436 the Saskatchewan Court of Appeal confirmed a sentence of life imprisonment for the rape of a six year old girl by an accused who had a previous conviction for indecent assault and regarding whom the psychiatric reports indicated there was a likelihood that that type of offence would be repeated. The prime factor, in the court's view, was the safety of the public and release should only come when it was safe to do so. However, in *R.* v. *Jones* (1971) 3 C.C.C. (2d) 153 the Ontario Court of Appeal by majority substituted a sentence of 12 years for one of life imprisonment where the accused had been convicted of attempting to choke with intent to commit rape. The accused had a record of 23 previous convictions though apparently none with violence. The psychiatric report indicated that he was potentially dangerous and poorly suited for treatment. The court surveyed recent comparable sentences for rape with violence and found that the range of sentences was about 6 to 10 years. Accordingly the court held that a life sentence was too severe in such a case, even if there was a risk of future danger.

The Ontario Court of Appeal in *R.* v. *Pion* and *R.* v. *McClemens* (1971) 4 C.C.C. (2d) 224 in a short, mainly *obiter* judgment seemed

ALTERNATIVE DISPOSITIONS

The area between a verdict of guilty of murder and the alternatives is one in which much confusion of thought and purpose exists and which in many cases may be ill defined. A verdict of manslaughter may be brought in because of provocation, excessive defence, or where there is an element of mental instability leading to a finding of diminished responsibility.[45]

A different charge may be entered merely because of the surgeon's skill and a verdict of not guilty on the grounds of insanity[46] may be found because a defendant has more or better psychiatric evidence than the prosecution. In England[47] a court may impose a hospital order with an indefinite restriction order (except in cases of murder) which has the same effect as a life sentence but for the fact that the person is held in a mental institution rather than a prison.

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to disapprove Thomas' formulation. It said that '... all members of the Court wish to go on record with respect to their view of the appropriateness of life sentences where it is demonstrated, without anything further, that the record and evidence before the Court discloses a continuing danger to the public from the convicted person. Where that is demonstrated and in appropriate circumstances surrounding the particular case the members of the Court, as presently constituted, hold the view that nothing else need be shown to justify a life sentence and, specifically, that mental disease or other abnormalities need not be shown'.

A differently constituted court in *R.* v. *Hill* (1974) 15 C.C.C. (2d) 145 however adopted the policy expressed by the English Court of Appeal. In substituting a sentence of life imprisonment for one of two 12 year terms (to be served concurrently) for offences of rape of a 14 year old girl and causing bodily harm the Court said, 'When an accused has been convicted of a serious crime in itself calling for a substantial sentence and when he suffers from some mental or personality disorder rendering him a danger to the community but not subjecting him to confinement in a mental institution and when it is uncertain when, if ever, the accused will be cured of his affliction, in my opinion the appropriate sentence is one of life. Such a sentence, in such circumstances, amounts to an indefinite sentence under which the parole board can release him to the community when it is satisfied, upon adequate psychiatric examination, it is in the interests of the accused and of the community for him to return to society. The policy expressed in my opinion is that of the Criminal Division of the English Court of Appeal: cf., Thomas, *Principles of Sentencing* at 272-9.', per Jessup J.A. (This decision is subject to appeal.).

45 The verdict of manslaughter has been called the 'merciful alternative' because of the jury's general power to bring in this alternative verdict where it may feel, for whatever reason, that a verdict of murder would not be appropriate.

46 Hereinafter called an 'insanity verdict'.

47 See also *Mental Health Act* 1963 (Tas.), s. 48.

As has been stated above[48] the data to be presented regarding life sentences must be treated with some caution because of the arbitrary nature of some of the dispositions made. This is best illustrated by one particular alternative disposition, the insanity verdict, whose use it appears, may be predicated on factors which should be extraneous to the legal system.

It has been treated as almost self-evident that '[a] person who has been found not guilty on the ground of insanity ... is in a different category from a person who has been convicted of a capital crime. A verdict of not guilty on the ground of insanity is a verdict of acquittal ... and the purpose of the detention in safe custody during the Governor's pleasure ... is not to punish the defendant for his act, but to protect members of the community from harm at his hands'.[49]

This bears some similarity to the purposes of the life sentence imposed on offenders where mental abnormality is found, as expressed by the English courts, but they attach considerable importance to the difference between receiving a life sentence for punitive and non-punitive detention. They have held that where it is proper, a hospital order with indefinite restriction is preferable to a life sentence, on the prisoner's behalf. This latter sentence may cause a feeling of injustice in the prisoner where he feels, and there is evidence, that the mental instability played a major role in the offence. Thus although the ultimate disposition may be the same, that is Broadmoor[50], the philosophical distinction is important.[51]

In comparison, in Victoria the treatment of insanity verdict cases has been in most cases the same as that for persons whose sentence of death was commuted, that is they are kept in prison[52], but in most other States now, special hospitals[53] have been built to accommodate them.

The confusion as to the purposes of the detention of insanity verdict people is intensified in those instances where the accused is fit to stand trial and where generally the current state of his mental health

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48 p.2.

49 Victoria, Parole Board, *Annual Report* 1962, p.15.

50 The maximum security institution for the mentally ill.

51 *R.* v. *Cox* (1968) 52 Cr. App. Rep. 130 discussed in R. Cross, *The English Sentencing System* (Butterworths, London, 1971), p.54.

52 cf., 'Mentally ill people who have committed violent and serious offenses are not a group apart from other mentally ill persons who have not translated their emotional conflicts into overt assaults upon others. They run the same gamut of psychiatric disorders as do psychiatric patients in general. Psychotic murderers respond to the same methods of care and treatment as other mental hospital patients'. Rubin, *op. cit.*, p.520. In practice though, the conflict between security and therapy is a very real problem.

53 cf., England where under the *Criminal Procedure (Insanity) Act* 1964 such persons are ordered to a hospital specified by the Secretary of State.

is not in question. If the offence occurred a long while prior to trial, at the time of disposition there may be no indications for admitting the person into a mental hospital, and theoretically, discharge should follow. Instead such cases are usually held in prison for an 'appropriate' period, perhaps near the time he would have served if he would have been convicted.[54]

In New South Wales, after an insanity verdict by the jury, the person must be kept in prison until he is certified by two medical practitioners to be mentally ill and a proper person to be taken charge of and under care and treatment. It is only then that the Governor may direct that the person be detained in a mental hospital during his pleasure.[55]

For the sake of making it clear why such persons are detained, it may be better to treat them as acquitted, but to require the state to bring civil proceedings to commit them. The onus would then be on the state to justify detention and to continue to justify detention periodically by application to a board or court for renewal of the commitment.[56]

The line between conviction and acquittal on the ground of insanity has been blurred by external political considerations. Johnston[57] has pointed out that rates of conviction and acquittal for murder, manslaughter and insanity verdicts vary in accordance with the political persuasion of the government in power in those states where capital punishment exists. Where the government had a policy of not commuting sentences of death, juries were less likely to convict persons of murder and consequently acquittals and convictions for manslaughter rose.[58]

Table 7 was compiled to test one aspect of Johnston's finding, that there will be a greater number of acquittals on the ground of insanity in States where capital punishment exists than in abolitionist States. This was done very crudely, on the basis of the percentage of such persons in

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54 See T. George, 'Commitment and Discharge of the Mentally Ill in South Australia' (1972) 4, 2 *Adelaide Law Review* 330, 355; for other justifications which have been used to detain insanity verdict persons see also Rubin, *op. cit.*, p.507 ff and Goldstein, *op. cit.*, p.146 ff.

55 *Mental Health Act*, 1958 (N.S.W.), ss. 23(3) and (4).

56 See Goldstein, *op. cit.*, p.160 and 169.

57 In 'Criminal Homicide Rates in Australia' in Chappell & Wilson, *op. cit.*, p.37.

58 Bresler, *op. cit.*, p.45 notes that ever since Blackstone's times jurors operated a 'wild kind of mercy, a sort of unofficial reprieve system'. Blackstone called it 'a kind of pious perjury'. This phenomenon was also shown experimentally with simulated juries which 'given equivalent evidence against the defendant ... rendered guilty verdicts significantly less frequently when the sentence was the death penalty than when it was a prison term'. See R.R. Hester & R.E. Smith, 'Effects of a Mandatory Death Penalty on the Decisions of Simulated Jurors as a Function of Heinousness of the Crime' (1973) 1, 4 *Journal of Criminal Justice* 319.

custody compared to the total number undergoing life sentences, commuted death sentences and insanity verdicts.

Allowing that such data must be treated with reserve, it can be seen that there are considerable differences between the States where capital punishment is in force and those where it is not. In the latter category the 'insane verdict' cases comprise only 12.6 per cent (Qld.) and 15.5 per cent (N.S.W.) of the total number of such cases in custody compared with 38.8 per cent (Vic.), 31.2 per cent (W.A.) and 21.9 per cent (S.A.) in the former category.

TABLE 7 LIFE SENTENCES, COMMUTED DEATH SENTENCES AND PERSONS FOUND NOT GUILTY ON THE GROUND OF INSANITY IN CUSTODY AT 31 DECEMBER 1974

State	*Life Sentence and Commuted Death Sentence* *A*	*Not Guilty on Ground of Insanity* *B*	*Total* *C*	*(B) as Percentage of (C)* *D*
New South Wales	180	33	213	15.5
Victoria	63	40	103	38.8
Queensland	90	13	103	12.6
South Australia	32	9	41	21.9
Western Australia	22	10	32	31.2
Tasmania	No Data	-	-	-

It must be taken into account that convictions for manslaughter instead of murder also vary according to the policy of the State in regard to capital punishment with abolitionist States having manslaughter rates well below murder rates.[59]

This could be the explanation of Table 8 which shows the detention rate of persons in Table 7 per million of population.

59 Johnston, *op. cit.*, p.41.

TABLE 8 LIFE SENTENCES, COMMUTED DEATH SENTENCES AND NOT GUILTY ON THE GROUND OF INSANITY CASES IN CUSTODY AT 31 DECEMBER 1974 AS PROPORTION OF POPULATION

State	*Life Sentence and Commuted Death Sentence*	*Not Guilty on Ground of Insanity*	*Total*	*Pop. Provisional Estimate at 30 June 1974*	*Detainees per Million*
New South Wales	180	33	213	4.75 m	44.84
Victoria	63	40	103	3.62 m	28.45
Queensland	90	13	103	1.97 m	52.28
South Australia	32	9	41	1.21 m	33.88
Western Australia	22	10	32	1.09 m	29.36
Tasmania	No Data	-	-	-	-

However, Johnston's analysis of criminal homicide convictions from 1938-1959 which encompassed murder, manslaughter and attempted murder, showed a similar rank order for the jurisdictions, with Queensland having 9.2 convictions per million, Western Australia 7.82, New South Wales 6.56, South Australia 6.36 and Victoria, again well down with 3.51 convictions per million. The only significant difference between these figures and Table 8 is Western Australia, which was in fourth place in Table 7, and this may be due to a decrease in criminal homicide in the last 15 years.

Such distortions in insanity and murder rates, seemingly based as they are on factors which should be extraneous to the legal system, can only do harm to a system of justice which should be based on sentencing practices linked to the needs of the offender and the mores of the society and not on the exigencies of the polling booth.

It will be interesting to note whether in Victoria, now after the abolition of hanging, there is a marked change in the use of the insanity disposition and whether the percentages shown in Table 7 drop to the same levels as exist in New South Wales and Queensland.[60]

The number of persons who are now detained in Victoria under the insanity verdict, and in the other States to a lesser extent, stands in marked contrast to the situation in England where the insanity defence has almost fallen into desuetude. In 1966 of the 3,000 mentally disordered offenders dealt with by the courts (out of a total of 600,000 persons

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60 Goldstein laments the lack of understanding of the consequences of an insanity verdict and the fact that at present the usual basis for the decision whether to take the insanity defence is whether the consequences of conviction would be worse. He writes, 'At present, the lawyer's inclination in the bulk of criminal cases is, unquestionably, to keep his client within the conventional criminal process - because he is more familiar with it, because he can make educated guesses about what will happen to his client at various stages, and because the fixed maximum sentence allays the haunting fear of a detention which may never end.

It may well be that this attitude will change as lawyers become more proficient in handling criminal cases. In time, they may be able to predict with reasonable accuracy - through their own experience or through the publication of statistics on release - just what the prospects of release may be after a successful insanity defense and to compare them with the probable periods of detention after conviction. Matters may develop so far that account will be taken of the therapeutic aspects of the problem: Will the offender be helped more by the mental hospital or by the prison? Is he suffering from a mental illness which can be treated? How long will the treatment take? Do the state's institutions for the criminally insane have the personnel and the facilities to provide the treatment indicated? Are such facilities equally likely to be available in the prisons, or somewhere else within the Department of Corrections? Is it possible for someone within the prison system to be treated within the mental hospital system and yet not have to be committed for an indefinite term? What is release policy for the insane? And how does it compare with parole policy for prisoners?'

proceeded against) only 0.1 per cent were found not guilty on the ground of insanity and 1.7 per cent had the murder conviction changed to manslaughter because of diminished responsibility.[61] In 1969 there were only five acquittals on the ground of insanity, 47 successful pleas of diminished responsibility and 15 of unfanticide.[62]

Although it is not appropriate to enter into a discussion of the insanity defence itself in this paper, it does appear that the artificiality of the line between 'mad' and 'bad' is strikingly evident[63] and that the resulting overlap left a large gap in the area of dispositional philosophy. The dilemma is best summed up by Norval Morris when he said that:

> 'The problem for both prison authorities and mental health authorities is reasonably and effectively to assess social dangerousness and to design processes by which these assessments can reasonably be fed into the releasing procedure. This task is not facilitated by making a porridge, a *farrago,* out of the mental health power and the police power and using this mess to avoid facing this genuinely difficult problem and trying to dispose of it.'[64]

Another side to this problem is revealed below where it is seen to be to the advantage of a person to be acquitted on the ground of insanity, as it usually results in his release considerably sooner than if he had been convicted of murder.[65]

RELEASE PRINCIPLES

GENERAL

Before examining the practice relating to the release of prisoners it is necessary first to examine some of the expressed policy reasons underlying the decision to release.

The English Parole Board in its 1970 report saw its function as assuming a sentencing character because of the indeterminate nature of the sentence.

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61 N. Walker, 'The Mentally Abnormal Offender in the English Penal System' quoted in S. Kadish & M. Paulsen, *Criminal Law and Its Processes* (2nd edn, Little Brown & Co., 1969), p.583.

62 Cross, *op. cit.*, p.51.

63 For a discussion of the relationship between the uses of prisons and mental hospitals in a community see D. Biles & G. Mulligan, 'Mad or Bad - The Enduring Dilemma' (1973) 13 *British Journal of Criminology* 275.

64 N. Morris, 'Psychiatry and the Dangerous Criminal' (1968) 45 *Southern California Law Review* 514, 525.

65 p.105.

'The question is not simply whether the conditions, bearing in mind the nature of the offence, are such as to justify granting parole. The primary question is whether the time served is appropriate to the crime.'[66] The Board was comforted in its sentencing function by the fact that it is provided with the views of the Lord Chief Justice and the trial judge before making a decision and that a High Court Judge always attends the meeting whenever life sentence cases are considered.[67]

The Home Office in its memorandum to the Royal Commission on Capital Punishment stated the following factors:

> 'He [the Home Secretary] considers, among other things, what term of detention will suffice as an adequate vindication of the law, what likelihood there is of the prisoner committing further crimes of violence if discharged and what punishment will be sufficient to deter others, and he gives weight to the prisoner's character, behaviour and medical condition.'[68]

Early release was usually granted to mercy killers, survivors of suicide pacts and in other cases 'where the circumstances of the crime [were] pathetic and there [was] no reason to keep the offender in prison for a long period'[69], while release after more than 20 years was exceptional in England and confined to cases where the offender was still dangerous, or displayed bad conduct in prison and where the character of the crime was obnoxious.[70]

Another factor which may exercise the minds of Parole Boards is the conflict between the dangers of early release and the dangers of institutionalisation. The Queensland Parole Board has said:

> 'If a prisoner is ever to be rehabilitated, it is essential that he be released before he becomes too "institutionalised". Otherwise the difficulties of readjustment to the outside world after a long period of incarceration, are likely to be too formidable to be overcome. However, in many cases the risk to the community is such that the Board cannot see its way clear to make any recommendation for release.'[71]

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66 Quoted in *Criminal Law Revision Committee, op. cit.*, p.8.

67 For the full procedure see below p.130.

68 Minutes of Evidence, para. 27.

69 Royal Commission on Capital Punishment, *Report, op. cit.*, p.227.

70 *ibid.*

71 *Annual Report* 1967, p.1.

EXAMPLES

In Victoria a petition recently to the Executive Council by the current longest serving life sentence prisoner[72] provides a good example of the interplay of the factors enumerated above, as perceived by the prisoner himself. In the petition (as reported) he pointed to the current release practice, the fact that a number of others with the same sentence[73] had been released, and said that he had 'more than paid his debt to society with 23 years of (his) life'. He had matured, he said, and was no longer a menace to society, having a home and family to return to.

Opposing release were the police, one of whom was the victim, 'A leopard doesn't change his spots' was the comment. The Minister for Social Welfare was reported[74] as refusing release because of the background of long sentences recently imposed on others for violent crimes. There was no mention (in the report) of rehabilitation or dangerousness or any of the other factors usually taken into account.

Queensland provides another illustrative example. This was the case of an aboriginal prisoner who has been in custody for about 15 years and the conflict between supporters of his release and the Minister for Justice took much the same form as in the Victorian case. The latter pointed to the prisoner's offences prior to the murder. 'These offences indicated an increasing tendency towards violence from a person who first appeared before a court at the age of 16.'[75] Supporters of release based their claim on the rehabilitation of the prisoner in gaol, pointing to his drawing, painting, debating and singing skills.[76]

Another point made is that of disparity between the instant case and that of the prisoner convicted of the same offence who was released some two years earlier.[77] This argument cuts both ways however. On the one hand it is said that one of the purposes of the indeterminate sentence is the flexibility which it allows in taking the progress of the prisoner into account. On the other hand where disparity occurs as a result of this policy, it appears that one man's justice may seem to be another's injustice.[78]

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72 Reported in *The Herald* (Melbourne), 4 March 1975.

73 Life without benefit of regulations.

74 *The Australian,* 11 March 1974.

75 Reported in *The Sydney Morning Herald,* 20 February 1974.

76 There is of course much danger in generalising from institutional behaviour to behaviour generally.

77 He was subsequently returned to prison for a breach of parole conditions.

78 Another element introduced in this particular debate was that there was racial discrimination against this prisoner, but evidence of this was difficult to obtain. See *The Australian,* 24 October 1973. See however below p.55.

An exacerbating factor heightening this feeling of injustice is that reasons for parole refusal may not be given and the principles upon which release should be based are not sufficiently enunciated or debated.[79]

CRITERIA

The Victorian Parole Board in its *Annual Report* of 1962 stated some principles upon which it based its recommendations for the release of any person whose death sentence was commuted or who was under 18 at the time of the commission of the murder and is detained during the Governor's pleasure. These are:

(a) that he has undergone substantial punishment for the offence of which he has been convicted;

(b) that there is no substantial risk that he will commit a similar crime or fail to observe the terms imposed as a condition of release;

(c) that his release will not tend

  (i) to minimise the gravity of the crime and the detestation with which it is viewed by the community;

  (ii) to affect adversely public confidence in the administration of the law;

  (iii) to affect adversely the maintenance of prison prison discipline;

(d) that in the light of all the circumstances it is just and proper for the prisoner to be released.[80]

In New South Wales, '[i]n addition to the offence, the prisoner's age, his record, the remarks of the trial judge (and the Court of Criminal Appeal) on sentence, the Board depends upon:

(a) the report of the prison superintendent and his officers;

(b) the prisoner's own representations or those made by others on his behalf;

(c) the report and conclusions of the departmental Classification Committee;

(d) the report of the parole officer; and

(e) such other matter, particularly medical and/or psychiatric reports, as are relevant to the question of release.'[81]

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79 For further discussion of the merits of the right of audience at parole board hearings see Rinaldi, *op. cit.*, p.132 ff. cf., J.A. Moroney, *A Handbook of Parole in New South Wales* (1974).

80 p.15.

81 Moroney, *op. cit.*, p.43.

Queensland, in its answer to the Royal Commission on Capital Punishment questionnaire, though perhaps a little dated now, named the following factors:

(a) The conduct and the industry of the prisoner during the period of incarceration;

(b) The nature of the offence committed and any circumstances of extenuation which may have been associated with the commission of the offence;

(c) The age and health of the prisoner concerned;

(d) The probability of rehabilitation and employment if released;

(e) The report of the trial judge.[82]

In its *Annual Report* of 1965 the Parole Board of Western Australia[83] set out its general principles for all parole releases. These are as follows:

> 'The age and history of the prisoner and when he would have been due for release if the Act had not been passed.
>
> His criminal record.
>
> The type of crime he had committed.
>
> His mentality and his conduct, work and study in prison and the extent to which he had responded to treatment, i.e.,is shown signs of reforming.
>
> His leisure activities.
>
> Whether or not his release might result in danger to property, persons or a particular person.
>
> His employment prospects.
>
> The hope of a successful parole.
>
> And the following questions:
>
> (1) Has the punitive element in his sentence been substantially satisfied?
> (2) Is there any substantial risk of his committing a similar crime or failing to observe any condition of his release?
> (3) Will the deterrent effect of his sentence on others be prejudiced if he is released?
> (4) Will his release on parole tend -
>
> (i) to minimise the gravity of his crime in the eyes of the community;

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82 p.691. The Queensland Parole Board receives a transcript of the sentence and comments, if any, made by the trial judge in every case so that references to any parole recommendation or intention of the court can receive consideration.

83 p.6.

(ii) to affect adversely public confidence in the administration of the law;
(iii) to affect adversely the maintenance of prison discipline?

(5) Whether in the light of all those circumstances, including his parole plan, it is reasonable to allow him to serve the remainder of his sentence in the community under the guidance of a parole officer.'

The fact that the Royal Prerogative of Mercy is unaffected by the *Offenders Probation and Parole Act*, 1963-1971 (W.A.) was also borne in mind by the Parole Board.

THE SENTENCE IN PRACTICE

Having examined the context in which the life sentence exists it is appropriate now to examine the manner in which the sentence has been exercised, taking into account the caution in the Introduction.

DISPOSITION

In Table 9 is presented an analysis of the disposition of commuted and life sentence male prisoners during the relevant periods which will be used as the basis of the following discussion. The upper percentage figure is the percentage of that case of the total of persons no longer in custody. This will be referred to as the 'relative rate'. The lower percentage, in italic type, is of the total number who have been or still are in this system, that is, it includes those still in custody and will be referred to as the 'absolute rate'.

Each disposition will now be examined in turn.

RELEASED

The length of time to be served by life sentence prisoners is one of the key elements in the debate between advocates and opponents of the death penalty. The former will usually only abandon their position if they can be assured that 'life' does mean 'life' and that these prisoners are never to be returned to the community.[1] However, as can be seen in Table 9, the majority do leave prison alive though there is some variation between the jurisdictions.

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1 This problem has exercised the minds of many legislators. The Victorian Parliament was generally of the mind that 'for the term of his natural life' meant just that and in consequence little regard was paid to provide appropriate release procedures. (See further below p.133 ff.) In England, the debate to reintroduce the death penalty focused largely on the problem of political terrorists such as the I.R.A. and many were worried that in not executing such terrorists the prisoners would then become a cause of further

TABLE 9 ANALYSIS OF DISPOSITION OF COMMUTED AND LIFE SENTENCES (MALE) BY JURISDICTION

Disposition	*N.S.W.*		*Vic.*		*Qld.*		*S.A.*		*W.A.*		*Tas.*	
	N	%	N	%	N	%	N	%	N	%	N	%
Released	156	77.6 *41.0*	55	83.3 *42.6*	106	70.2 *44.0*	30	88.2 *45.5*	37	71.2 *50.0*	5	83.3 *26.3*
Died in Custody	26	12.9 *6.8*	6	9.1 *4.6*	22	14.6 *9.1*	1	3.0 *1.5*	7	13.4 *9.5*	1	16.7 *5.3*
Suicide	9	4.5 *2.4*	0	0.0 *0.0*	6	4.0 *2.5*	1	3.0 *1.5*	2	3.9 *2.7*	0	0.0 *0.0*
Deported	5	2.5 *1.3*	4	6.1 *3.1*	10	6.6 *4.1*	2	5.8 *3.0*	5	9.6 *6.8*	0	0.0 *0.0*
Miscellaneous	5(a)	2.5 *1.3*	1(b)	1.5 *0.8*	7(c)	4.6 *3.0*	0	0.0 *0.0*	1(d)	1.9 *1.3*	0	0.0 *0.0*
Sub-Total	201	100.0 *52.8*	66	100.0 *51.1*	151	100.0 *62.7*	34	100.0 *51.5*	52	100.0 *70.3*	6	100.0 *31.6*
Still in Custody	180	*47.2*	63	*48.9*	90	*37.3*	32	*48.5*	22	*29.7*	13	*68.4*
Total	381	*100.0*	129	*100.0*	241	*100.0*	66	*100.0*	74	*100.0*	19	*100.0*

(a) One escaped after 1 year 5 months in 1940; 1 released after a Royal Commission in 1953 after 4 years 11 months; 3 juveniles were transferred to the Child Welfare Department and no information has been obtained as to their subsequent history.

(b) Shot and killed while escaping.

(c) These were mostly Aborigines who were transferred to Palm Island settlement; 4 in 1923 after 4 months in prison, 2 in 1929 after 4 years 3 months and the details of whom are unknown. Their subsequent history has not been readily ascertainable.

(d) Released on parole in 1969 after 21 years 11 months on condition that he went to mental hospital until the Director of Mental Health decided he could be released.

There is one other factor not shown in Table 9 which has a distorting effect on the data obtained, and this is the number of executions in each State as set out in Table 1, though some executions occurred prior to the period surveyed here. It may well have been that the persons executed would have served longer periods in custody than the non-executed and not all States executed at the same rate per population; for example Western Australia clearly has shown the greatest propensity to execute compared with Queensland. This must be borne in mind when considering the following data.

New South Wales

Prior to the abolition of the death penalty in 1955 most death sentences were commuted, either to life imprisonment, or to a fixed term of years.[2] In nine cases the life sentence was changed to a fixed term for various reasons, but these are included here.

Thus to take an overall figure from commutations would tend to distort the true picture of the length of time served by a life sentence prisoner and this is the reason for the distinction in Table 10 between 'All Offences/All Terms' and 'Life Sentences'.

The other factor influencing these data is the fact that up to 1955 many death sentences were received for rape, but most of these were commuted to fixed terms of years. Eight of the 40 rapists did, however, receive life sentences, although recently it seems that this has not been thought an appropriate sentence for this offence. Release practice apparently followed sentencing policy and the average time served by these eight was 13 years and 8 months.[3] The average time served by all rapists is shown in Table 10, as is the average time served by all who received life sentences. The categories 'Rape' and 'Life' in Table 10 are not mutually exclusive and are not additive to form the 'all offenders' category as some rapists received life and some murderers and other offenders had their death sentences commuted to fixed terms.

As can be seen in Table 10 the overall average is a misleading figure and persons serving a life sentence (for whatever offence) could expect to serve between 16 and 19 years if released over the last 2½ decades. After a peak in the 1960s, the average period expected to be served by lifers is now decreasing slightly.

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terrorism through attempts to secure release. The deterrent aspect of the life sentence, it was felt, would not be great because the terrorists expected to be freed either by further acts of terrorism, by amnesty or by political deals.

2 See Table 5.

3 cf., Moroney, *op. cit.*, p.82 who states: 'For years it was considered unofficially but with sound reason, that a life sentence for murder in New South Wales was one of 20 years, without remission or about 25 years if remission were to be allowed. Few prisoners were detained longer than that and not many were released much sooner. Life sentences for rape were about 18 years and for attempted murder about 15 years'.

TABLE 10 NEW SOUTH WALES: AVERAGE LENGTH OF IMPRISONMENT BEFORE RELEASE - COMMUTED AND LIFE SENTENCE PRISONERS (MALE) 1932-1974

Decade Released	Average Period Served								
	All Offences All Terms			Rape			Life		
	N	Years	Months	N	Years	Months	N	Years	Months
1940-49	15	6	9	7	6	4	3	8	7
1950-59	50	11	10	21	8	6	19	17	11
1960-69	57	15	4	9	9	3	37	19	0
1970-74	34	16	3	3	13	3	33	16	6
Total	156			40			92		
Average		13	7		8	7		17	6

Longest: 30 years 6 months
Shortest: 1 year 5 months

Victoria

Prior to 1949 there were 14 offences for which the death penalty was mandatory, including carnal knowledge, rape, robbery and buggery. A change in the law in that year resulted in only murder and treason left as attracting that penalty.[4]

It was postulated that offenders other than murderers would be treated less harshly than would murderers and for this reason a category of 'Other Capital Offences' is included to discriminate it from murder. In this case categories two and three are cumulative to category one 'All Offences/All Terms'.

The only other problem here is that highlighted in Table 3, that is the fact that the 'life' sentence as such comprises only a small proportion of commutations. Thus in this case it is the offence rather than the commutation which is important.

Table 11 indicates the consistent policy in Victoria towards these offences, the average being about 13 years with the tendency being towards a decrease in recent years. Although only small numbers are involved, the difference between murder and the other capital offences is clear.

4 These now attract a life sentence. Another change in that year was made regarding those under 18 who instead of being sentenced normally were to be sentenced to detention during the Governor's pleasure. For the purposes of this study a person under 18 sentenced prior to 1949 is treated as an adult offender. Juvenile offenders convicted of murder and treason are now dealt with identically to adults.

TABLE 11 VICTORIA: AVERAGE LENGTH OF IMPRISONMENT BEFORE RELEASE - COMMUTED PRISONERS (MALE) 1928-1974

Decade Released	Average Period Served								
	All Offences All Terms			Murder			Other Capital Offences		
	N	Years	Months	N	Years	Months	N	Years	Months
1940-49	7	13	7	5	15	4	2	9	3
1950-59	19	12	5(a)	12	14	2	7	9	4
1960-69	16	13	8	12	13	6	4	14	3
1970-74	13	13	0	13	13	0	-	-	-
Total	55			42			13		
Average		13	1		13	9		10	10

Longest: 24 years 1 month
Shortest: 1 year 11 months

(a) One prisoner was released after 1 year 11 months as he was suffering from tuberculosis. He died soon after.

Queensland

Queensland has been consistent in its imposition of the life sentence for murder or wilful murder only, apart from a small number for rape and recently manslaughter. Commutations prior to 1922 are shown in Table 6.

The only 'distorting' factor is a number of Aboriginal prisoners sentenced to life imprisonment which made some differences to the averages in the earlier part of the century. It must be stressed that the Aborigines included may not be the only cases actually concerned and for this table the overall average may be the most reliable statistic. As was indicated in the note to the miscellaneous column for Queensland above, a number of Aborigines were removed early in their sentence to Palm Island and were excluded.

Table 12 reveals the large increase in the length of time served in the post-war period compared with the pre-war period. During the war itself no persons were released and this 'bank-up' of years obviously had some effect on the average time served. However this lasted well into the 1950s and it is only comparatively recently that this policy seems to have stabilised.

It is also of interest to note the short period of time served in the early part of the century. Aborigines, if this table is correct, were treated more favourably in this respect in the early decades than their non-Aboriginal counterparts.

TABLE 12 QUEENSLAND: AVERAGE LENGTH OF IMPRISONMENT BEFORE RELEASE - COMMUTED AND LIFE SENTENCE PRISONERS (MALE) 1900-1974

Decade Released	*Average Period Served*								
	All Persons			*Non-Aborigines*			*Aborigines*		
	N	*Years*	*Months*	*N*	*Years*	*Months*	*N*	*Years*	*Months*
1900-09	5	6	1	1	7	0	4	5	1
1910-19	15	9	3	7	11	5	8	7	4
1920-29	10	9	8	9	9	10	1	8	3
1930-39	10	8	8	10	8	8	-	-	-
1940-49	5	18	0	5	18	0	-	-	-
1950-59	21	17	10	18	18	6	3	13	8
1960-69	25	13	10	25	13	10	-	-	-
1970-74	15	13	10	13	14	3	2	11	0
Total	106			88			18		
Average		12	11		13	10		8	6

Longest: 30 years 6 months
Shortest: 2 years 4 months

South Australia

South Australia has kept strictly to commutations to life imprisonment, the majority of these being for murder.

Table 13 reveals the wide fluctuation in practice over the years with a dramatic decrease in this decade, South Australia now having the lowest release average of 9 years 8 months.

A remarkable feature of the South Australian situation was the fact that no commuted prisoners were released between 1942 and 1969 and no life sentences were received by commutation between 1941 and 1948, even though there were a number of murders. There were, however, quite a number of convictions for manslaughter.

Western Australia

Western Australia presents a similar picture to South Australia in that most commutations were to life imprisonment and for murder and wilful murder. There were four males whose terms were commuted to terms of years, three to 20 years (two of whom were released after each serving 10 years 5 months, on a 'royal visit' remission) and one for 10 years who served 4 years 8 months before release.

Table 14 reveals the stability in policy over the last three decades on a level very similar to Victoria's.

TABLE 13 SOUTH AUSTRALIA: AVERAGE LENGTH OF IMPRISONMENT BEFORE RELEASE - COMMUTED PRISONERS (MALE) 1918-1974

Decade Released	*Average Period Served*		
	N	*Years*	*Months*
1925-29	4	4	7
1930-39	8	11	8
1940-49	3	10	3
1950-59	-	-	-
1960-69	7	15	10
1970-74	8	9	8
Total	30		
Average		11	0

Longest: 17 years 3 months
Shortest: 2 years 5 months

TABLE 14 WESTERN AUSTRALIA: AVERAGE LENGTH OF IMPRISONMENT BEFORE RELEASE - COMMUTED SENTENCES (MALE) 1918-1974

Decade Released	*Average Period Served*		
	N	*Years*	*Months*
1930-39	4	8	6
1940-49	4	13	2
1950-59	5	13	2
1960-69	14	13	5(a)
1970-74	9	14	5
Total	36		
Average		12	11

Longest: 31 years 5 months
Shortest: 1 year 8 months

(a) One prisoner was released after 3 years 7 months on compassionate medical grounds.

Tasmania

There have been only a small number of life sentence prisoners in this State and the data obtained may not be comprehensive. However, on the basis of the figures obtained, from 1951 to 1974 the average term of imprisonment before release for the five cases was 11 years 2 months.

TABLE 15 ENGLAND: AVERAGE LENGTH OF IMPRISONMENT BEFORE RELEASE - COMMUTED AND LIFE PRISONERS (MALE) 1900-1949[a] AND 1962-1972[b]

Decade Released	*Average Period Served*		
	N	*Years*	*Months*
1900-09	48	11	4
1910-19	71	11	9
1920-29	53	13	1
1930-39	67	10	5
1940-49	77	7	4
1962-72	212	9	0
Total	528		

(a) Source: Royal Commission into Capital Punishment Report, *op. cit.*, p.316.
(b) Source: Criminal Law Revision Committee, *op. cit.*, Table B, p.23.

England

It may be of interest to put the data into some historical perspective. 'In the early days of penal servitude prisoners serving life sentences were detained for periods which in the light of subsequent practice seem comparatively short. Before 1867 they were for the most part sent to Western Australia, where in the ordinary course they were released by way of conditional pardon after about 13 years. Those who were kept in England were at first required to serve 12 years before the question of release was considered and it would appear that many were in fact released soon after completing this period.'[5]

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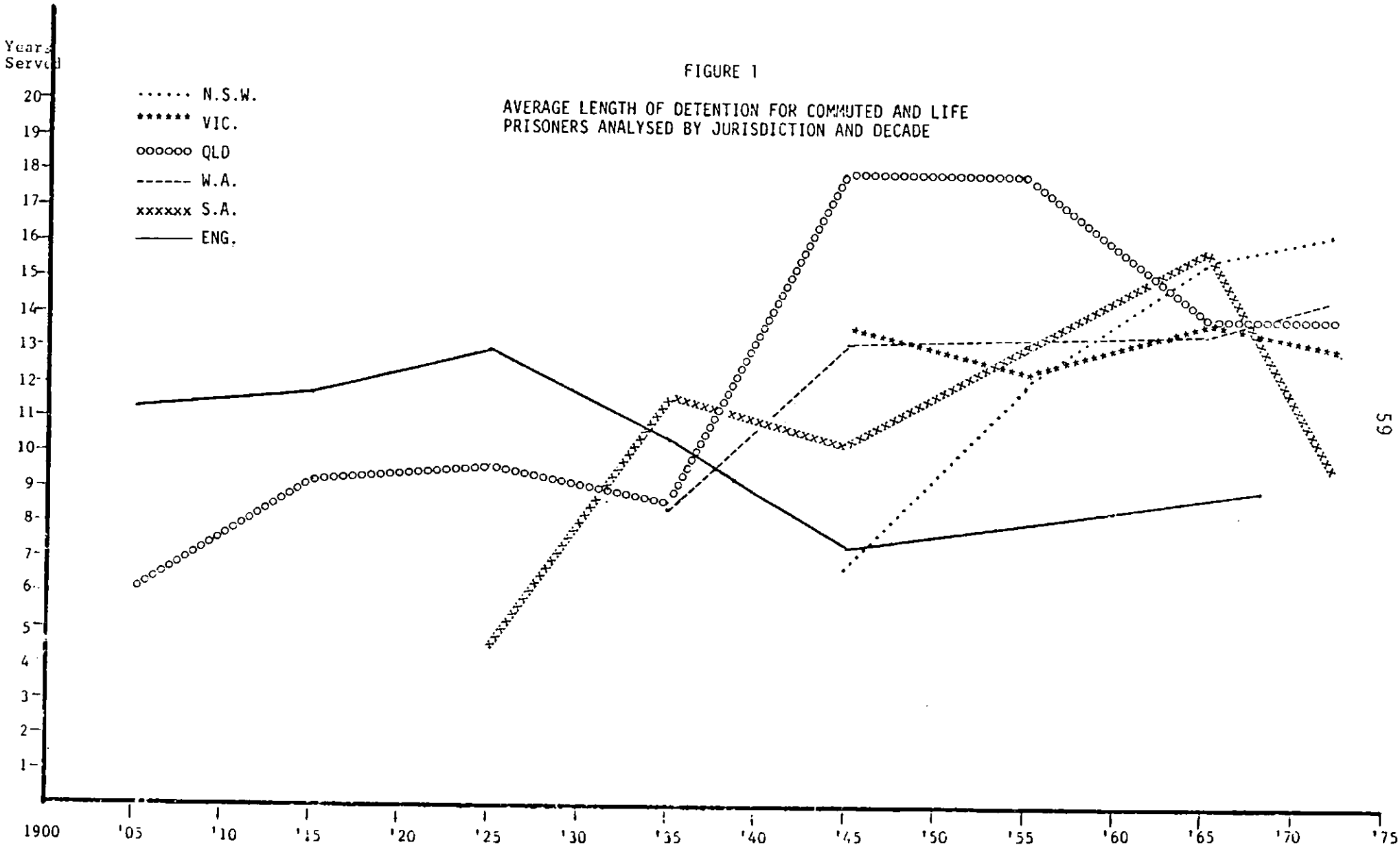
5 Royal Commission on Capital Punishment, Minutes of Evidence, p.5. This presents a full historical account of the lengths of detention in England since the last century.

FIGURE 1

AVERAGE LENGTH OF DETENTION FOR COMMUTED AND LIFE PRISONERS ANALYSED BY JURISDICTION AND DECADE



The ticket-of-leave system coexisted with the conditional pardon. Hall Williams notes[6] that in the days of transportation to Australia a life prisoner could expect to get his ticket-of-leave in 8 years, a fourteen year man in 6 years and a seven year man in 4 years. But only one-third of those eligible were granted a ticket-of-leave in Van Dieman's Land.[7]

In Table 15 the sharp drop during the war years should be noted. This reflected the early release practice which was occasioned by the need for manpower, the shortage of prison accommodation and the increase in the rate of remission from one-quarter to one-third.[8]

Tables 10 to 15 are summarised graphically in Figure 1, using the overall average in each State as the plot. The steady increase in New South Wales is clearly visible as is the dramatic post-war rise in Queensland. At present it seems obviously preferable to commit murder in South Australia rather than in New South Wales, with Victoria the next choice, at least in terms of length of time served.[9] The difference of more than five years between New South Wales and South Australia is quite considerable.

DISCUSSION

The overall averages for each decade may tend to give a misleading picture of correctional policy in each jurisdiction and a closer examination can be made of release patterns by an analysis of the range of the time spent in prison before release.

Although the problems of non-comparability are again evident and the disparity of numbers gives a not altogether accurate picture when converted to percentages, nevertheless a valuable insight into the flexibility and the indeterminate nature of the life sentence can be gained from Figures 2 to 8.

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6 *The English Penal System in Transition* (Butterworths, London, 1970), p.180.

7 In New South Wales during Governor Macquarie's time it seems that a life sentence prisoner could expect a conditional pardon after 10 years' good conduct and an absolute pardon after a further 5 years. See Moroney, *op. cit.*, p.12.

8 Royal Commission on Capital Punishment, Minutes of Evidence, p.6. Compare with the practice in some Australian States which was not to release anyone at all.

9 There may of course be great differences in the quality of imprisonment from State to State.

FIGURE 2

NEW SOUTH WALES: LENGTH OF DETENTION OF COMMUTED AND LIFE SENTENCES (MALE) 1932-1974

N = 156
Mean = 13.56
Standard Deviation = 6.22

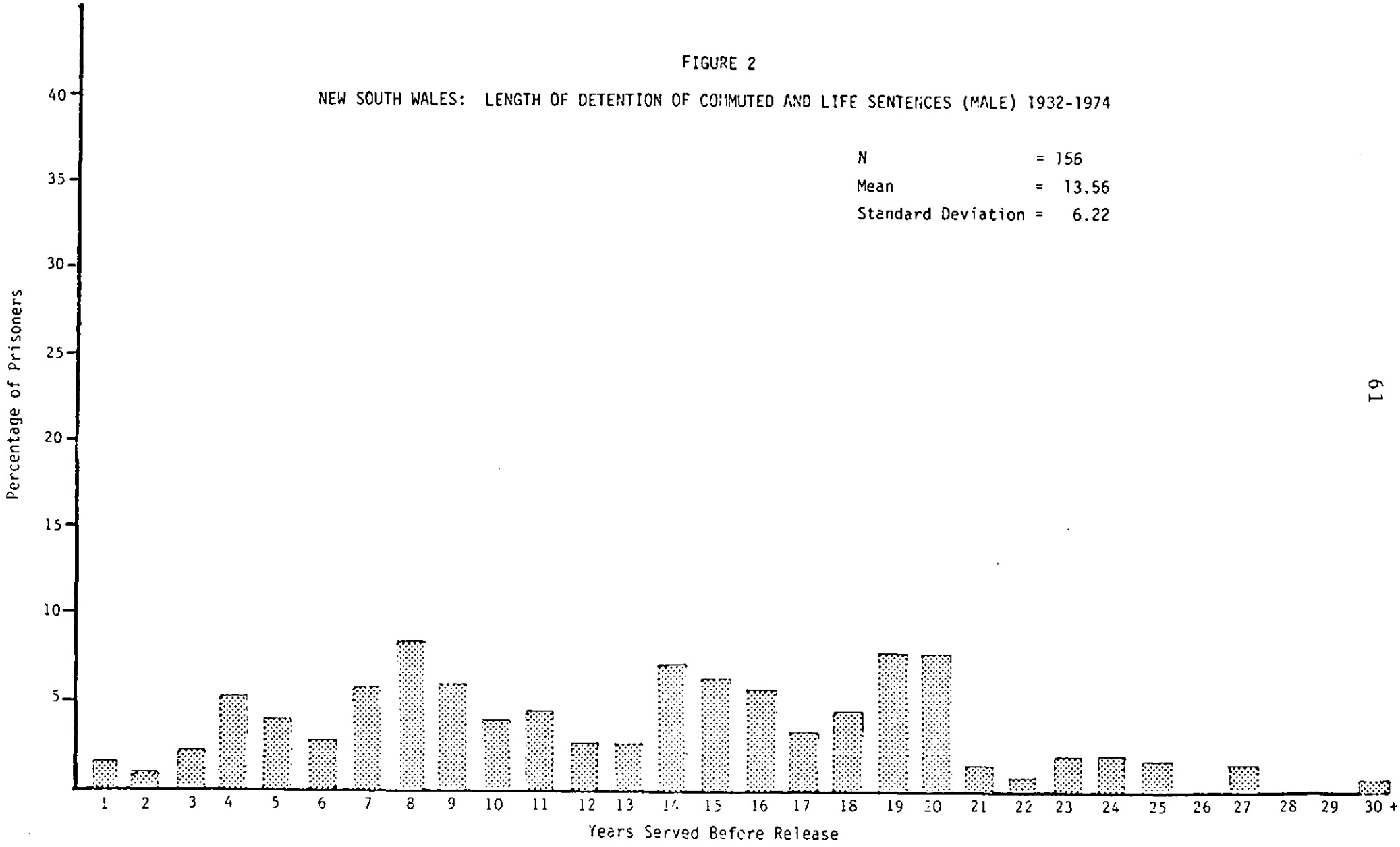


FIGURE 3

VICTORIA: LENGTH OF DETENTION OF COMMUTED SENTENCES (MALE) 1928-1974

N = 55
Mean = 13.08
Standard Deviation = 5.23

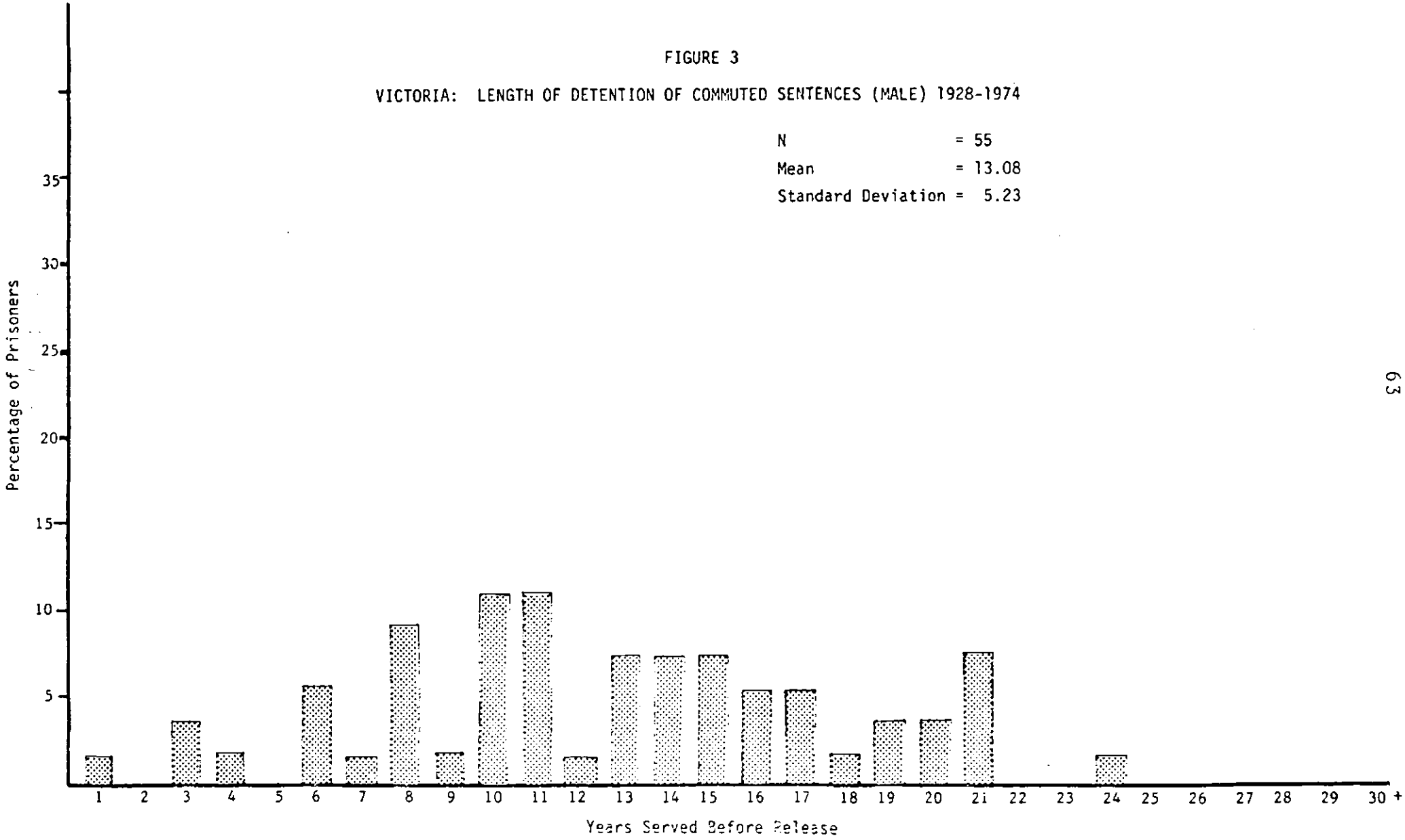


FIGURE 4

QUEENSLAND: LENGTH OF DETENTION OF COMMUTED AND LIFE SENTENCES (MALE) 1900-1974

N = 106
Mean = 12.93
Standard Deviation = 5.16

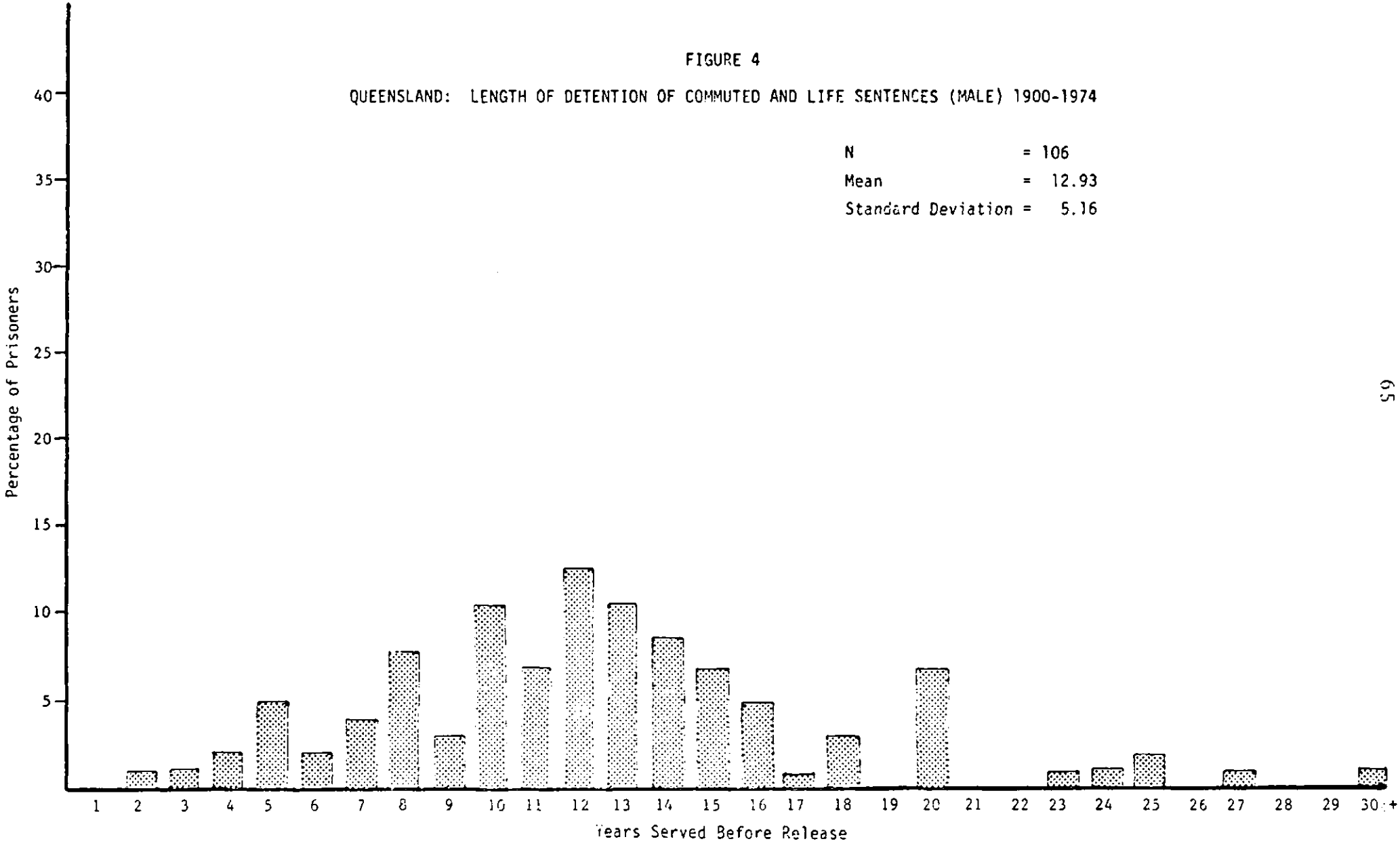


FIGURE 5

SOUTH AUSTRALIA: LENGTH OF DETENTION OF COMMUTED SENTENCES (MALE) 1918-1974

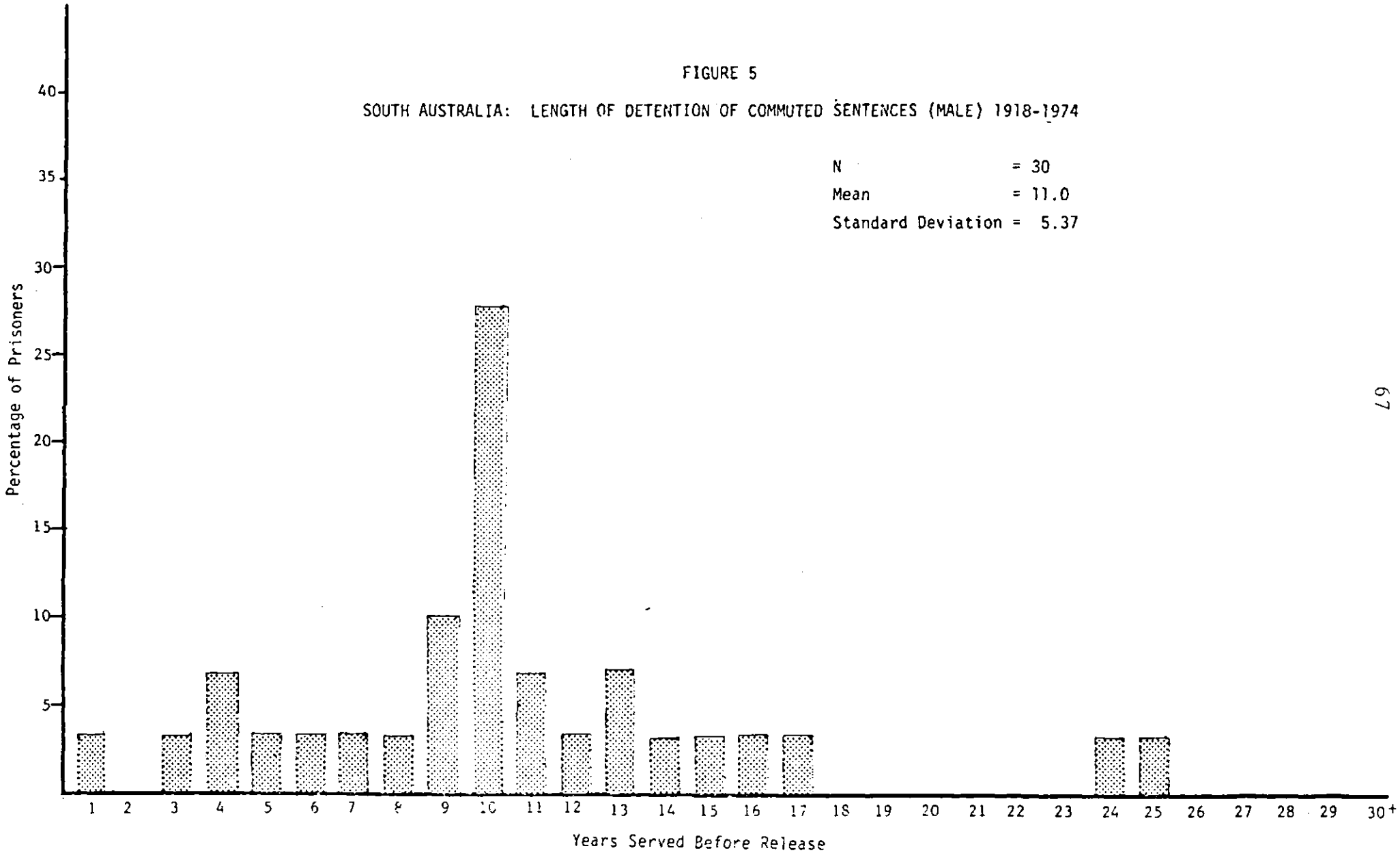


FIGURE 6

WESTERN AUSTRALIA: LENGTH OF DETENTION OF COMMUTED SENTENCES (MALE) 1918-1974

N = 36

Mean = 12.92

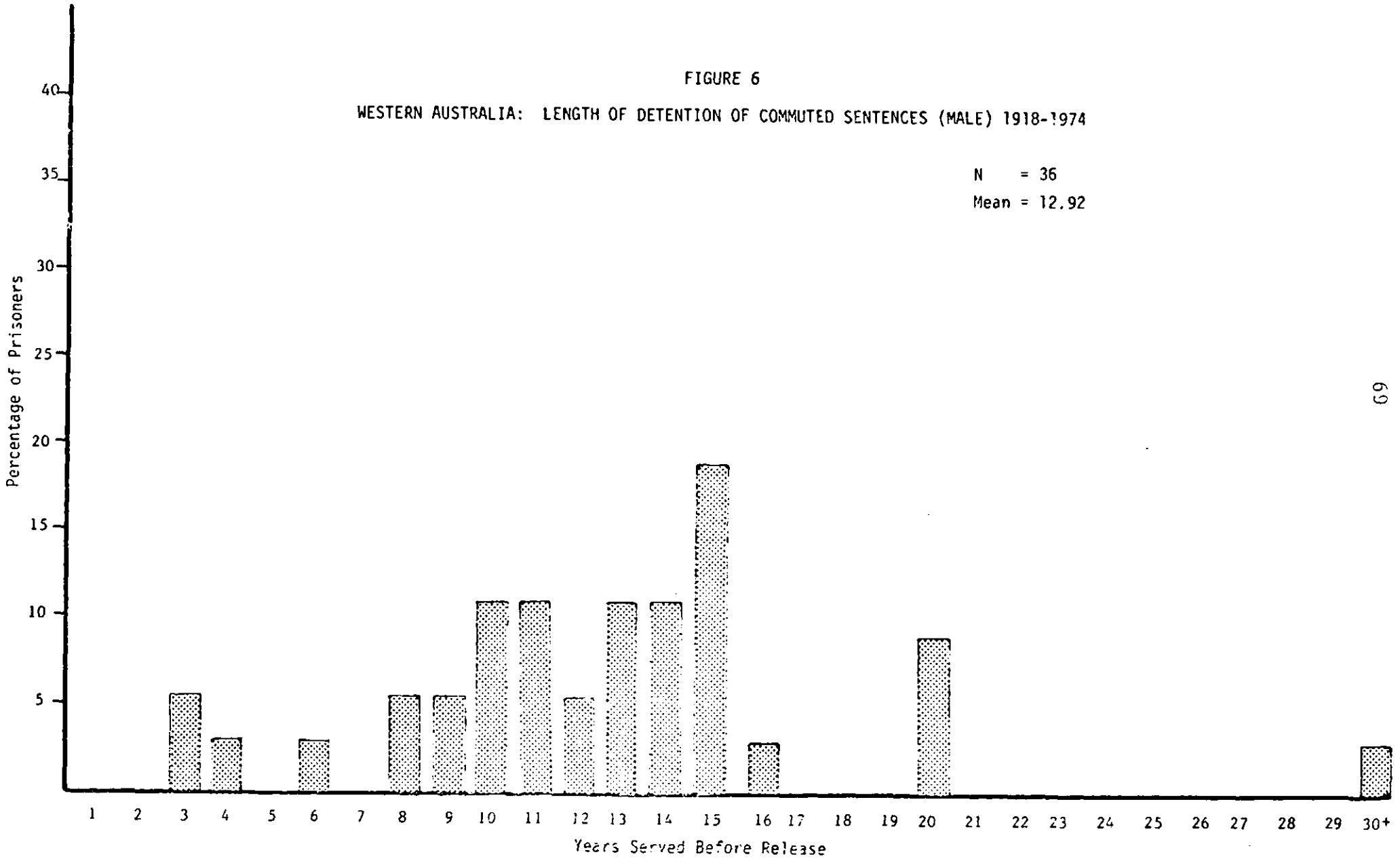


FIGURE 7

ENGLAND: LENGTH OF DETENTION OF CONVICTED MURDERERS (MALE) 1900-1949

N = 316
Mean = 10.55
Standard Deviation = 4.68

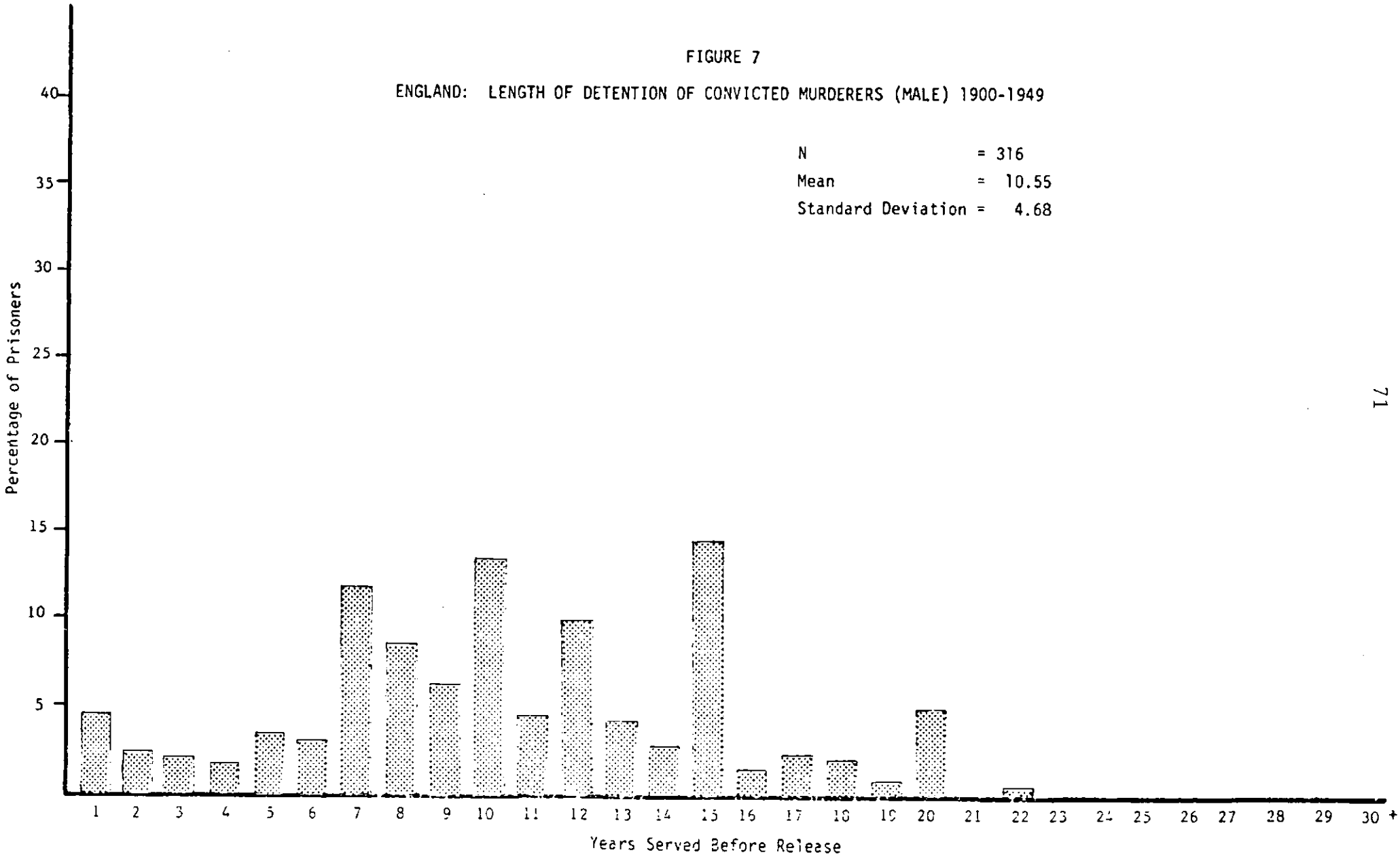
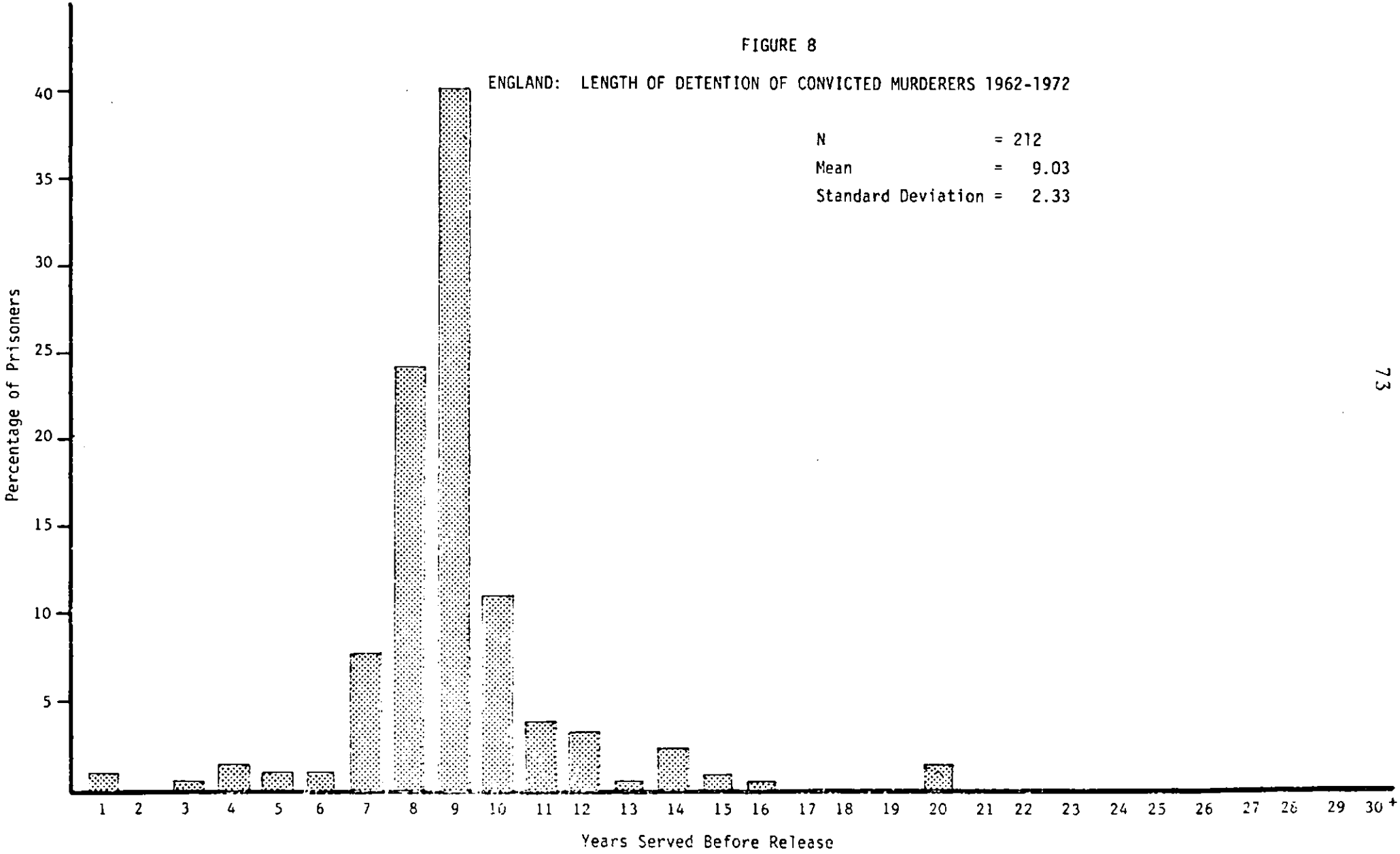


FIGURE 8

ENGLAND: LENGTH OF DETENTION OF CONVICTED MURDERERS 1962-1972

N = 212
Mean = 9.03
Standard Deviation = 2.33



The most striking feature of these figures is the contrast between Figure 8 and most of the others. The contrast between the first half century in England and the decade 1962-1972 is remarkable and one could infer from Figure 8 that a clear release policy is in operation and that many of the cases which were in fact not suitable for the life sentence have been removed, either by changes in substantive law or alternative disposition. South Australia (Figure 5) most closely resembles the 1962-1972 English situation with the great bulk of offenders being released close to the average time.

In contrast to this is New South Wales (Figure 2) which is almost tri-modal, the first, at around 8 years, perhaps reflects the rape cases and the third at about 19 years reflecting the true 'life sentence' prisoners.

The feature in common to most jurisdictions is the immense spread of possible release times, varying from less than 1 year to well over 30 years. This is at once both the strength and the weakness of the life sentence during the present state of substantive law in most jurisdictions. Its strength, as was discussed above, is the flexibility and discretion it allows the correctional authorities in deciding whether release is appropriate in view of the enunciated principles. It allows the mandatory sentence to be passed by the court or by the commuting authority, but compensates in the less heinous or less dangerous cases by allowing early release.[10] The mandatory imposition of minimum terms would, on this evidence, have a considerable effect on quite a number of cases now released well before the average.

Table 16 indicates the use of the 'extremities' of the range.[11] 'Extremities' here are defined as less than 10 years and more than 20 years.

South Australia and England in both periods confirm the preponderance of 'early' releases while the other jurisdictions vary considerably. Victoria has the greatest percentage of releases in the 'average' band, showing fewer wide fluctuations. In Australia, South Australia has the highest outside that band, but most are in the early category.

Table 16 however, also reveals the dilemma facing correctional authorities. Too many 'early' releases raises a cry from the public that murderers and

---

10 Or in another case also, where there was doubt about the original conviction. Zeno, *op. cit.*, p.109 quotes the following conversation between a new lifer and one who had served many years. The newcomer asks:

'How long is a life sentence?'
'It depends - did you do it?'
The newcomer looked blank for a second or two. 'Well, yees - yes, I did it.'
'Behave yourself then, and you might be out in nine or ten years.'
'But why did you ask me if I did it?'
The old timer grinned sardonically, 'Because it makes a difference. If you were innocent, you'd only do seven.'

11 Though it must be remembered that not all these cases are life sentences - some commutations were for comparatively short periods.

rapists are let loose to prey on the innocent again. On the other hand the other danger is that such prisoners may be kept in for a period beyond that which is strictly necessary to fulfil the aims of the sentence, and many may remain in prison simply because they have become 'lost' in the system.

The question that arises from the '20 Years Or More' column in Table 16 is whether such extremely long imprisonment is necessary. Is England a more dangerous place for not holding more than 1.42 per cent of their murderers more than 20 years than New South Wales which held 16.65 per cent of such prisoners for more than 20 years?

TABLE 16 LENGTH OF DETENTION OF COMMUTED AND LIFE SENTENCES BY JURISDICTION WHERE LESS THAN 10 YEARS AND MORE THAN 20 YEARS (MALE)

Jurisdiction	*Served 10 Years Or Less*	*Served 20 Years Or More*
	per cent	*per cent*
New South Wales (1932-1974)	39.10	16.65
Victoria (1928-1974)	25.46	12.73
Queensland (1900-1974)	34.91	12.25
South Australia (1918-1974)	66.64	6.67
Western Australia (1918-1974)	32.44	10.81
England (1900-1949)	53.94	5.06
England (1962-1972)	87.26	1.42

To be fair, there are indications in England that the trend to early release is now being reversed as following the abolition of the death penalty there is a growing number of 'hard-core' prisoners for whom early release is not likely. This is also partly a result of the use of recommendations of minimum terms.[12] In 1974 there were 850 prisoners serving life sentences compared with 120 in 1957.[13]

12 See above p.32.

13 S. Cohen, *op. cit.*, p.408.

TABLE 17 AVERAGE LENGTH OF TIME SERVED BY LIFE SENTENCE AND COMMUTED DEATH SENTENCE PRISONERS (MALE) BY AGE ON CONVICTION AND JURISDICTION

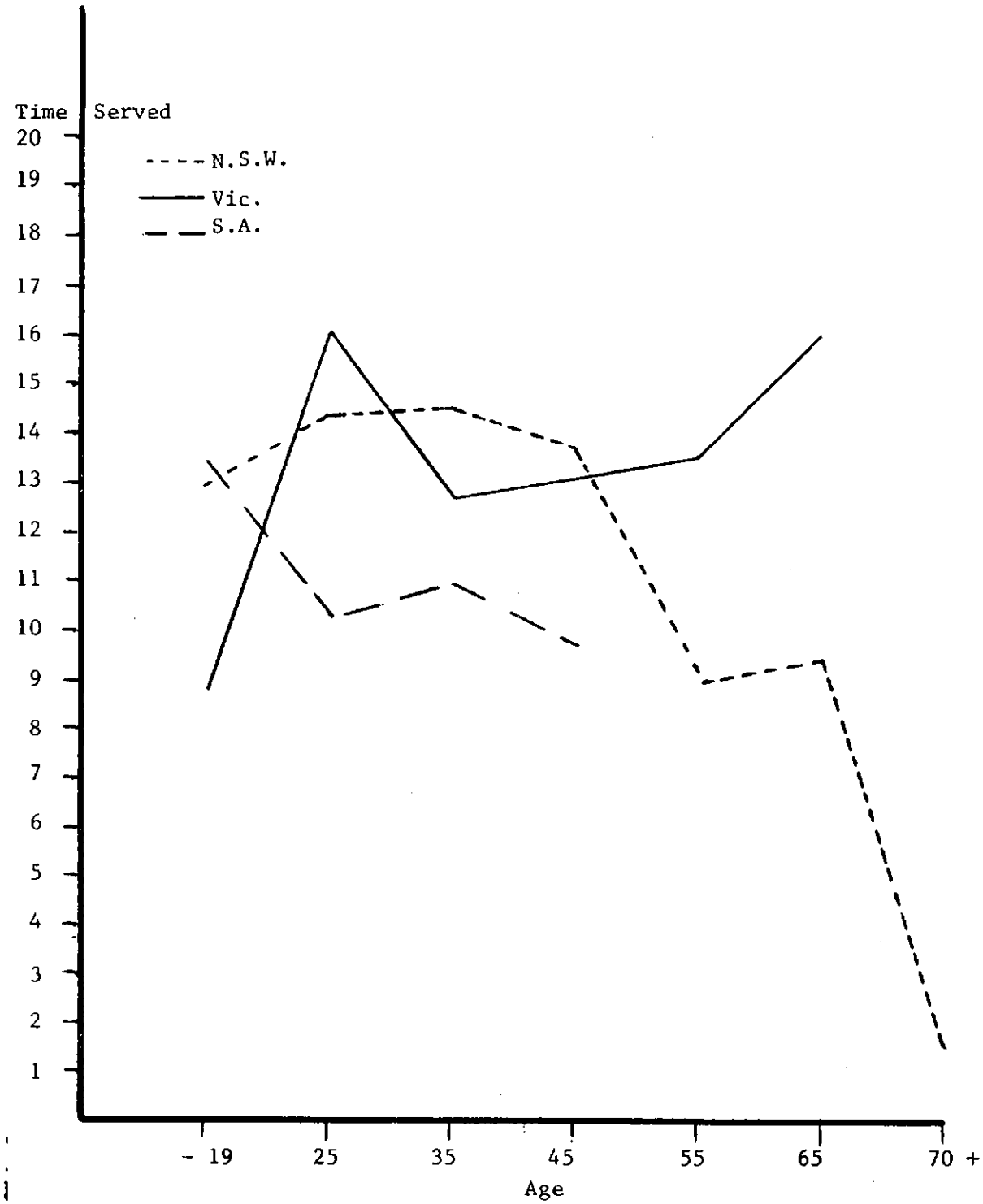
Age on Conviction	New South Wales (1932-1974)				Victoria (1928-1974)				South Australia (1918-1974)			
	N	Percentage of Total	Average Time Served		N	Percentage of Total	Average Time Served		N	Percentage of Total	Average Time Served	
			Years	Months			Years	Months			Years	Months
Less than 19	27	17.4	13	0	19[a]	30.1	8	10	7	25.9	13	3
20 - 29	65	42.0	14	4	15	23.8	16	0	13	48.2	10	5
30 - 39	31	20.0	14	4	11	17.5	12	9	4	14.8	11	0
40 - 49	21	13.5	13	7	14	22.2	13	2	3	11.1	9	9
50 - 59	7	4.5	9	3	3	4.8	13	7	0	0.0	0	0
60 - 69	3	2.0	9	8	1	1.6	16	1	0	0.0	0	0
Over 70	1	0.6	1	11	0	0.0	0	0	0	0.0	0	0
Total	155	100.0			63	100.0[17]			27[b]	100.0		

(a) Including those under 18 years detained during the Governor's pleasure.
(b) The ages of 7 life sentence prisoners were not available.

17 cf., J. Martin, People Imprisoned in Victoria for Murder and Manslaughter 1962-1971 (unpublished monograph, Research and Statistics Division, Social Welfare Department, Victoria, 1974) who found for both murder and manslaughter, 16 per cent in the under 19 group, 37.4 per cent in the 20-29 group and 19 per cent in the 30-39 group, p.17.

FIGURE 9

AVERAGE LENGTH OF TIME SERVED BY LIFE SENTENCE AND COMMUTED DEATH SENTENCE PRISONERS (MALE) BY AGE ON CONVICTION AND JURISDICTION



Cohen and Taylor comment:

> '"Life" used to mean an average of 9 years; longer periods were very unusual. However, with the abolition of capital punishment, many lifers will now, in the words of the 1968 Home Office report, "have to be detained for a very much longer than average period". In fact at the end of 1968 the number of life sentence prisoners who had served over 9 years was forty-seven, at the end of 1969 it was fifty-nine, by the end of 1970 it was seventy-one and by the end of 1971 it had increased to eighty-five of whom sixteen had served more than 13 years.'[14]

It has been noted that the use of longer fixed terms is increasing.[15] However England probably still has a long way to go before it reaches the New South Wales average and the question raised above still has some validity.

Age. A factor which is implicit in release decision making is the age of the offender. At both ends of the range age is a mitigating factor. Youths under 18 have been treated differently by law[16] and very elderly offenders have probably committed their offences for motives which are different perhaps to those persons in their mid-twenties, for example euthanasia of an ailing spouse.

Table 17 and Figure 9 were prepared to test the hypothesis that length of time served is related to age on conviction. These data are based only on those received in prison and may not accord with figures for those charged or convicted and are compiled only for States where this information was available. As can be seen from the New South Wales data, where there is a comparatively large population on which conclusions can be based, the length of time served decreases rapidly with increasing age. South Australia shows the same tendency though Victoria reveals an increase with age. This however is the effect of one case which may distort the position somewhat.

TRENDS

If a prognosis can be made as to likely future trends in Australia it may perhaps best be made on the basis of an examination of life sentence prisoners still in custody, and Figures 10 to 14 show the length of time served as at 31 December 1974. Predictions in this regard can only be made on the basis that releasing policy will remain stable.

These Figures are in some ways complementary to the previous set and also reflect current correctional policy. To extrapolate future trends for each State from this may be dangerous, but it may serve as a rough guide.

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14 *Psychological Survival, op. cit.*, p.15.

15 See above p.34.

16 See below p.119 and Appendix C.

FIGURE 10

NEW SOUTH WALES: LENGTH OF TIME SERVED BY COMMUTED AND LIFE SENTENCE PRISONERS IN CUSTODY (MALE) 31 DECEMBER 1974

N = 180

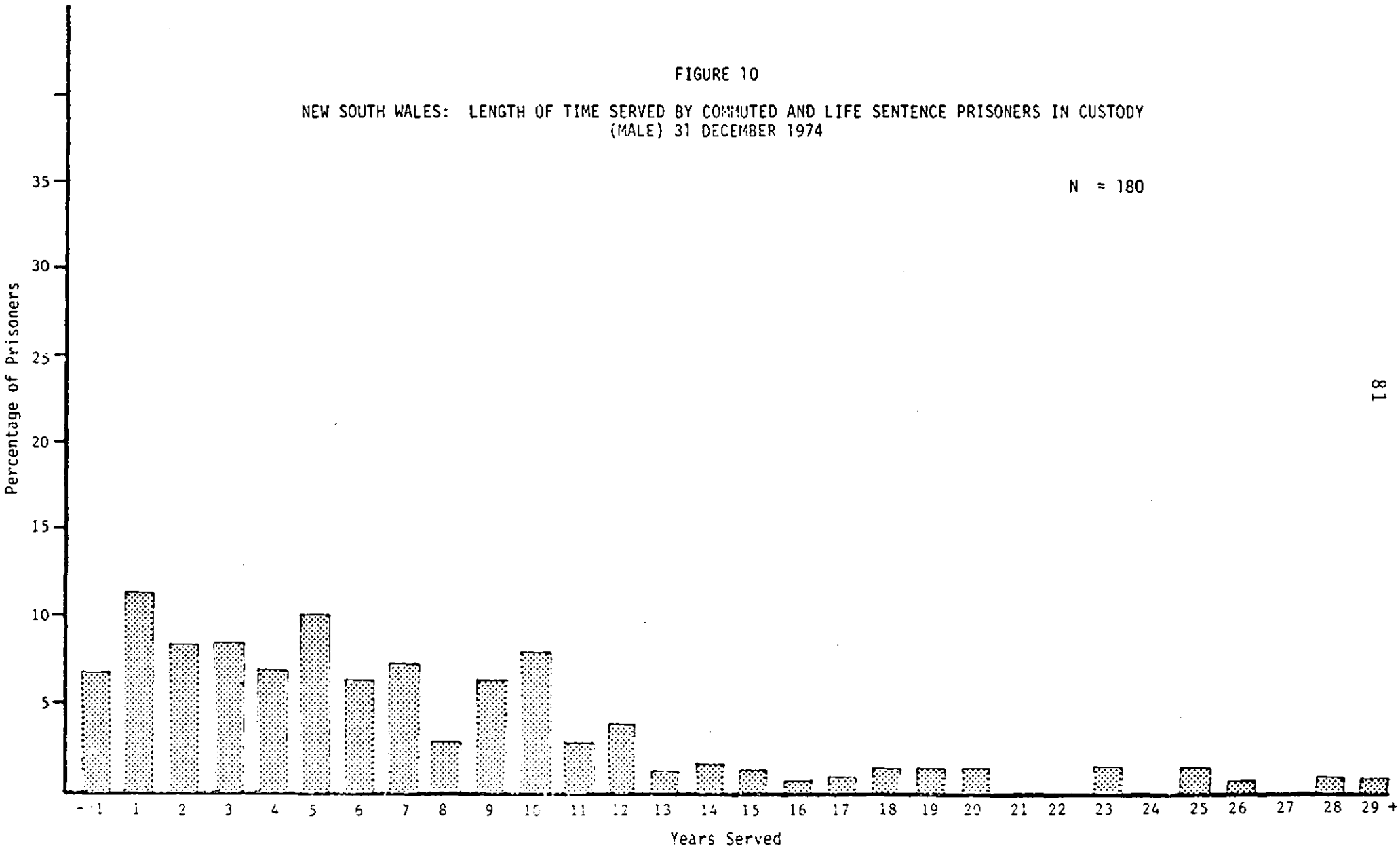


FIGURE 11

VICTORIA: LENGTH OF TIME SERVED BY COMMUTED SENTENCE PRISONERS IN CUSTODY (MALE) 31 DECEMBER 1974

N = 63

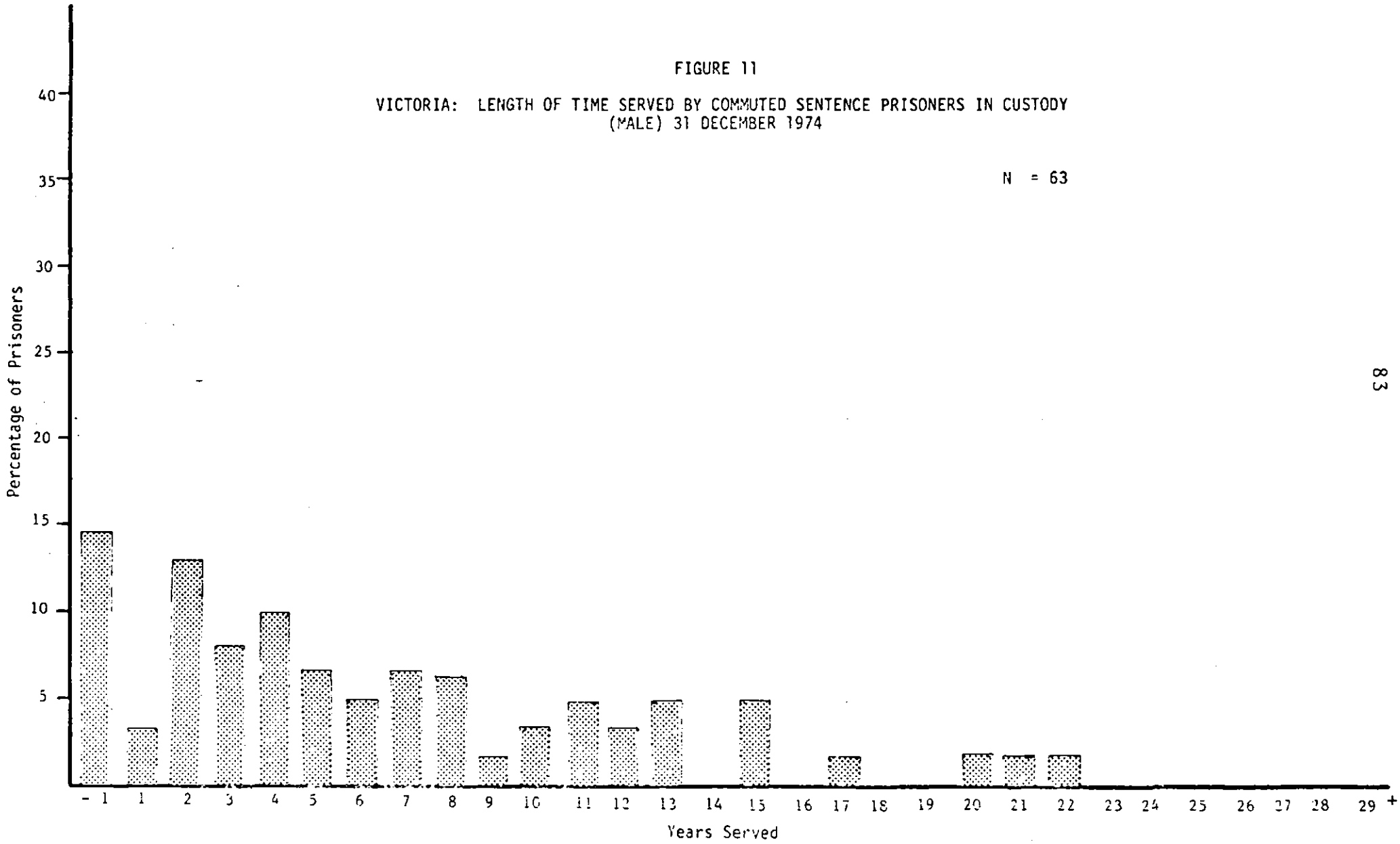


FIGURE 12

QUEENSLAND: LENGTH OF TIME SERVED BY COMMUTED AND LIFE SENTENCE PRISONERS IN CUSTODY (MALE) 31 DECEMBER 1974

N = 90

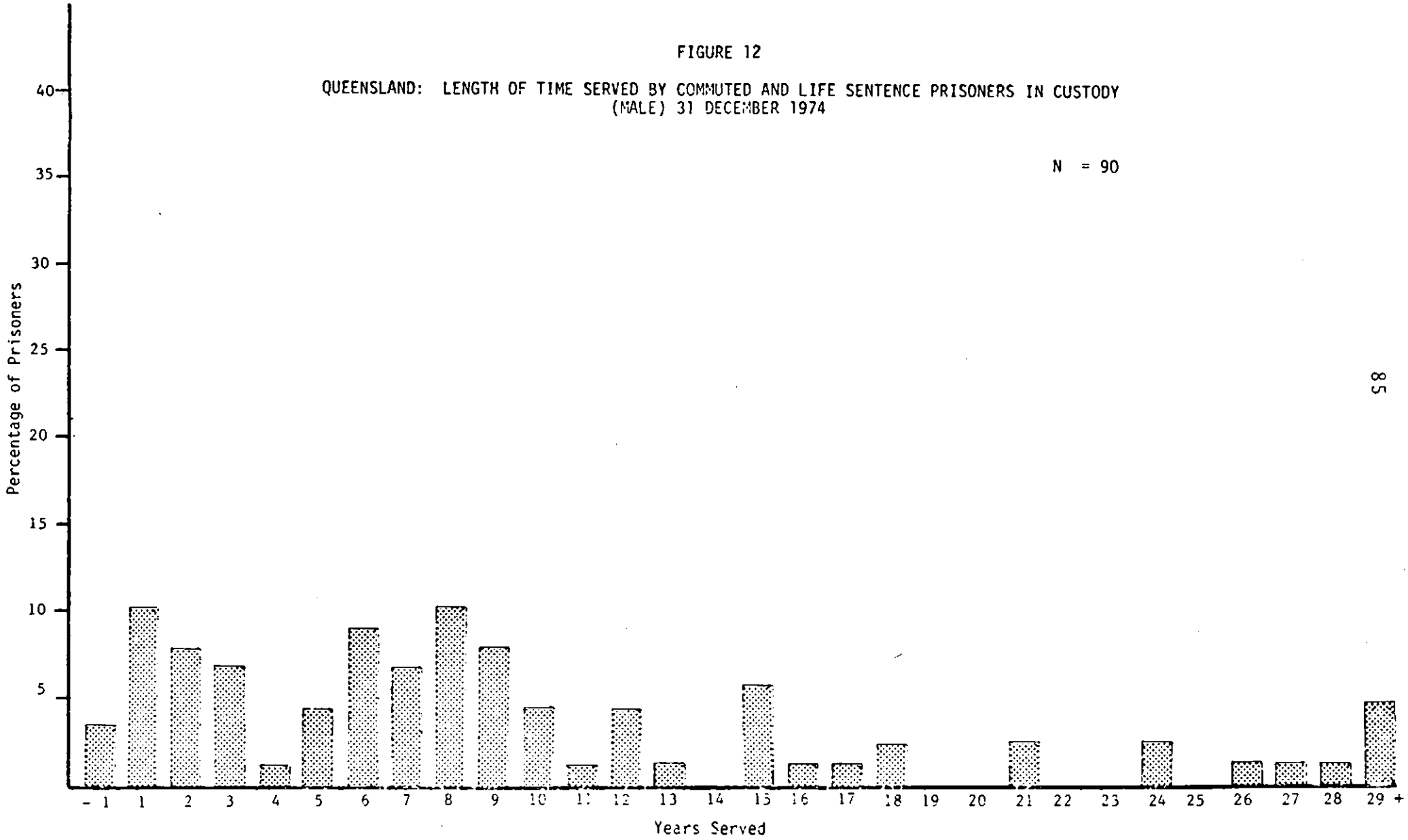


FIGURE 13

SOUTH AUSTRALIA: LENGTH OF TIME SERVED BY COMMUTED SENTENCE PRISONERS IN CUSTODY (MALE) 31 DECEMBER 1974

N = 32

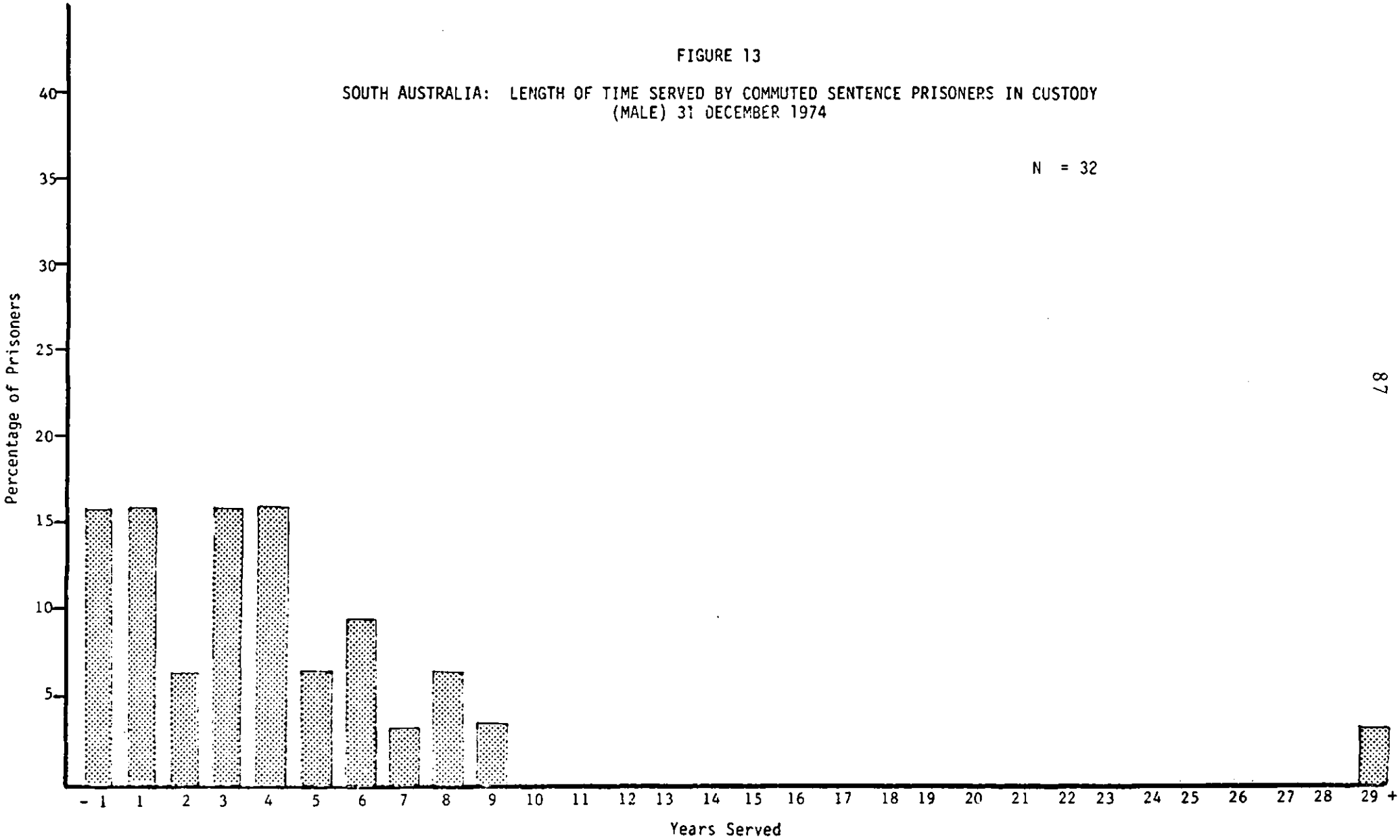
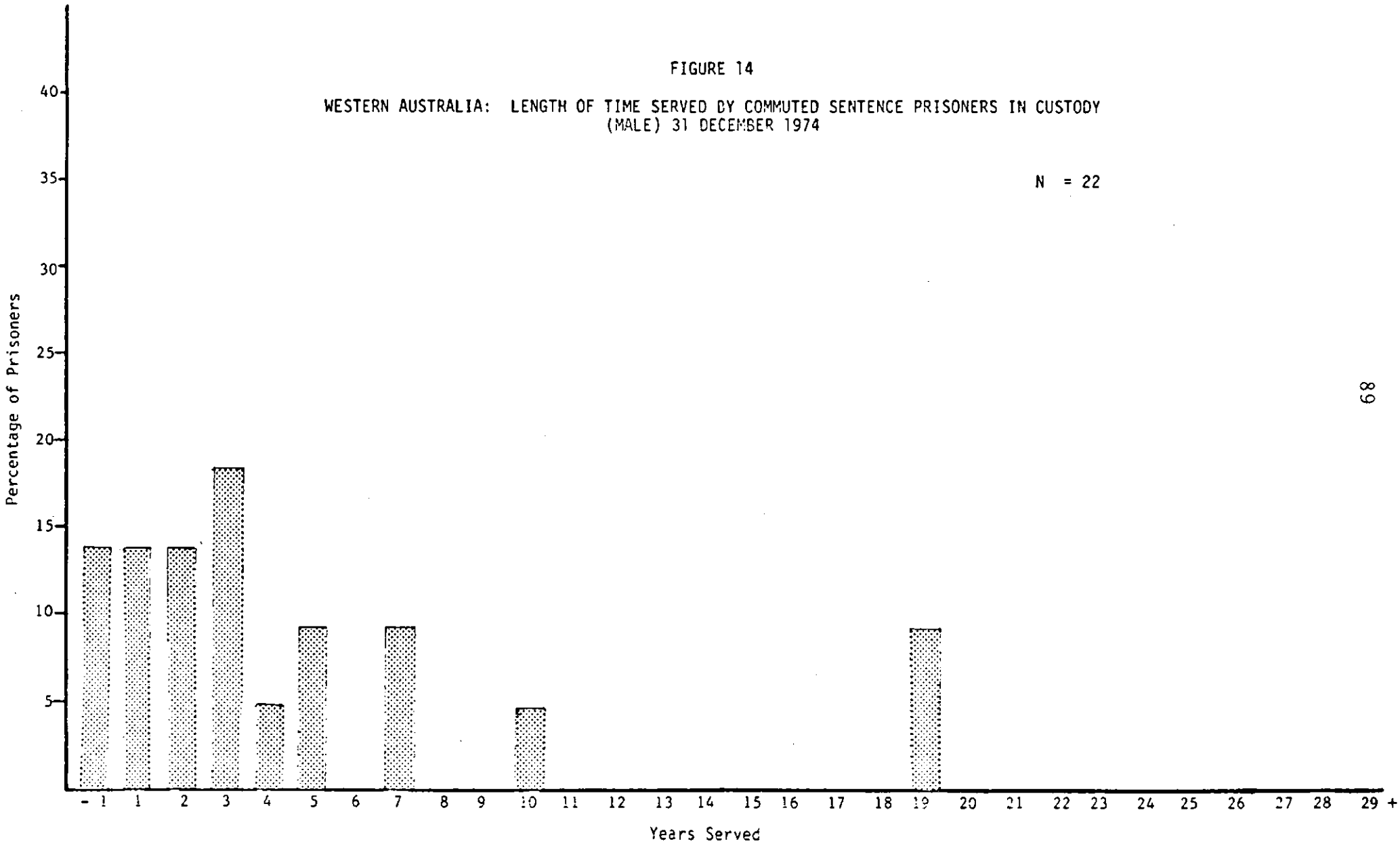


FIGURE 14

WESTERN AUSTRALIA: LENGTH OF TIME SERVED BY COMMUTED SENTENCE PRISONERS IN CUSTODY (MALE) 31 DECEMBER 1974

N = 22



It would appear from the table below that those States with the lowest percentages of those who have served more than the current term will most probably remain stable. New South Wales has a comparatively low percentage, but this is because of the very high average term. Queensland has the highest proportion of long serving prisoners and the trend there would be to increase.

TABLE 18 COMMUTED AND LIFE SENTENCE PRISONERS IN CUSTODY WHO HAVE SERVED MORE THAN CURRENT (1970-1974) AVERAGE TERM FOR JURISDICTION

State	*Current Average Term*		*Per Cent*	*Remarks*
	Years	*Months*		
New South Wales	16	3	7.78	8 have served 20-30 years 1 has served 44 years
Victoria	13	1	15.90	Longest serving prisoner - 22 years
Queensland	13	10	22.22	7 have served 20-30 years 4 served more than 30 years - 46 years 5 months, 35 years 4 months, 32 years 8 months and 30 years 5 months
South Australia	9	8	3.13	1 has served 29 years
Western Australia	14	5	9.09	2 have served 19 years

It may be appropriate here to comment on some of the extremely lengthy detentions. The prisoner in Queensland who has served 46 years 5 months, is the longest serving in Australia.[18]

18 A case in the United States has been reported of a man, now aged 89 or 90, who has been in gaol since 1908, 66 years. *The West Australian*, 6 December 1974. A lifer in Ohio served 64 years prior to being paroled in 1970. In Europe, Nazi war criminal Rudolf Hess, now aged about 81, has been in gaol since 1946, 28 years, though many of his fellows served negligible periods owing to certain political factors rather than because their crimes were less heinous.

Cohen comments on the nature and fate of the very long term prisoners by remarking that they

> '... will be the hard core, the bottom of the barrel, the ... incorrigibles: those for whom one can do nothing more than shunt away in dispersal prisons, or security wings, and now control units. Prisons for this group of offenders are destined to become *human warehouses:* places where people are stored until society can think of something else to do with them.'[19]

In Australia at present, however, one suspects some other reasons why there may be very long term prisoners. One may be the nature of the review and release procedures, but the second and more important lies in the fact that there is an insufficient delineation between the penal and mental health systems. In New South Wales, of the two longest serving prisoners, one has been in a psychiatric hospital since 1934 and is now 70. This man was convicted in the middle of the Great Depression in 1930 and has been in custody since. The other, imprisoned for 28 years, spent 23 years in a mental hospital.

The argument here is not necessarily that they should be released; they may indeed still be dangerous.[20] However the State should make it clear in what capacity it is functioning. The point of view is often heard that after a certain period of time prisoners become so institutionalised that release into the community would be unkind and doing a disservice to the prisoner. After 30 years this may be true, but two responses need be made. The first is that it is the duty of correctional authorities to monitor this process of institutionalisation and not let the prisoner continue in the system merely because it is more comfortable that way and because he may have nowhere to go. This leads to the second comment which is that prisons are not the appropriate agency to exercise the social welfare policy of the government. While deprivation of liberty continues it must be justified according to well accepted tenets of the criminal justice system and not by reference to paternalistic notions of care and protection.[21]

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19 *op. cit.*, p.408.

20 For example, in England a man named Straffen, who had been found unfit to stand trial for the killing of two young children, in 1952 escaped from Broadmoor and killed another child. He was found guilty but his death sentence was reprieved. Straffen was classed as a 'high grade mental defective', not technically insane but too dangerous ever to be released, for '[i]t is impossible to say that he would not kill again if given the chance'. See Bresler, *op. cit.*, p.190.

21 A case of a man kept in a prison in the United States of America 30 years after acquittal on the ground of insanity is quoted by F.A. Allen, 'Criminal Justice, Legal Values and the Rehabilitative Ideal' (1959-1960) 50 *Journal of Criminal Law, Criminology and Police Science* 226, 232, who remarks that in answer to a question as to why this 80 year old man was being detained, he was told that the man might kill again (so might we all) and that 'the old man is better off here' even though he had a place to go outside the institution.

The complementary part of this is seen in regard to the custody of insanity verdict cases still in custody. In Victoria most are held in prison. In New South Wales of the 33 males so held after charges of murder or equivalent seriousness, 21 were in a psychiatric hospital, but 12 or almost one-third were held in prison. Of the 8 females, 2 were held in prison.

Again, for whatever the reason, be it lack of accommodation in hospitals, security reasons or whatever, such an inter-relation confuses the purposes of each particular disposition and in many cases the patient/prisoner receives the worst of both worlds. This is in no way meant as a reflection on correctional personnel, but is an inevitable result of the confusion of philosophies.

In other States the position is probably similar, though information in many cases was not obtained. In Queensland the two longest serving prisoners (46 years 5 months and 35 years 4 months) are presently in a security patients' hospital. In summary, of the 11 prisoners who have served 20 years or more, 5 are presently in a security patients' hospital and 2 have spent considerable time in mental hospitals.

It would be reasonable to suggest that in cases of such length of detention the punitive element of the sentence has well and truly been satisfied and it would be more humane and probably more beneficial to the patient/prisoner to be transferred to the mental health service as either a voluntary or involuntary patient without a prison sentence hanging over his head.[22]

INTERNATIONAL COMPARISON

Information on length of detention in other jurisdictions has been extremely difficult to uncover and what has been found is extremely unreliable. In may be that such information is thought unimportant or on the other hand perhaps it is too well known to require reiteration.

Allen comments: 'Perhaps the case reflects that arrogance and insensitivity to human values to which men who have no reason to doubt their own motives appear peculiarly susceptible.' A valuable warning to those involved in the 'helping' or 'healing' professions.

22 This can probably be done without danger to the community. A study has shown that the older chronically ill offender can be released from a maximum security prison environment and successfully managed in other ways. It showed that the release of such men to alternative placements resulted in the fairly rapid return of a percentage of them to the community without threatening the security of the community. The important finding was that 'for a segment of the prisoner population, continued incarceration may be inhumane as well as unnecessary to the safety of society at large'. See T.B. Brelje, W.H. Craine & J. Hayes, 'The Chronically Mentally Ill Prisoner - An Alternative' (1972) 5, 3 *Correctional Psychologist* 167.

TABLE 19 LENGTH OF TIME SERVED BY LIFE SENTENCE PRISONERS IN VARIOUS JURISDICTIONS

Jurisdiction	*Period*	*Average Time*		*Remarks*	*Source*
		Years	*Months*		
New Zealand	1919-1949	14	8	Commuted Sentence	Royal Commission on Capital Punishment[23]
	1932-1949	18	1	Life Sentences	" "
Denmark	1900-1947	15	6	Max. 21 y Min. 10 y	" "
South Africa	1924	15	10		" "
Sweden	1918-1939	17-18			" "
Afghanistan	Not Known	15-20			United Nations: Capital Punishment Developments 1961-1965[24]
Chad	"	20	0		" "
Cyprus	"	11	6		" "
Ivory Coast	"	14	0		" "
Japan	"	13	10		" "
Malawi	"	10	0		" "
Malta	"	14	0		" "
Nigeria	"	14	0		" "
Trinidad	"	13	3		" "
Upper Volta	"	15	0		" "
United States of America					
Kentucky	1931-1952	10	0	N = 10	Giardini & Farrow[25]
Texas	1923-1952	11	5	N = 22	" "
Illinois	1920-1936	11	1	N = 176	Simpson[26]
Arizona	1969	17 approx.			Powers[27]
Louisiana	Not Known	6	0		"
Missouri	1965	20	2		"
	1969	15	0		"
Nebraska	1932-1969	16	3		"
Nevada	Not Known	20	0		"
New York	"	15	0		"
Oregon	"	12	0		"
Pennsylvania	1931-1966	17	7		"
Vermont	Not Known	15	0		"
United States	1965-1970	6	7		Glaser & Zeigler[28]

The English data has already been presented and in Table 19 a summary is presented of the information obtained merely for the purpose of placing the Australian data in some perspective.

Died in Custody

In theory this category should contain one hundred per cent of those sentenced to life imprisonment as a sentence of 'life' can end only with death. However, even allowing for the fact that there were quite a number of fixed term commutations in the population surveyed and allowing for recent sentencing developments in Victoria, it can be seen that in relatively few cases does a life sentence mean what it says.[29]

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23 *op cit., passim.*

24 United Nations, Department of Economic and Social Affairs, *Capital Punishment - Developments 1961-1965* (United Nations, New York, 1967).

25 G.I. Giardini & R.G. Farrow, 'The Paroling of Capital Offenders' in T. Sellin, *Capital Punishment, op. cit.*, p.183.

26 R.M. Simpson, 'Time Served in Prison Compared with Legal Sentence' (1936-1937) 27 *Journal of the American Institute of Criminal Law and Criminology* 661. This article, although now quite old gives a fascinating glimpse of the relationship between legal stipulations and actual release practices. After examining the whole range of sentences, he concluded that 'the administration of the law is not consistent with the legal penalties imposed by the law', (p.664). (A similar analysis for commuted fixed term sentences in Australia is presented below p.102.) Simpson points out the interesting fact that 22 murderers who had had previous convictions served actually less time (10 years 7 months, cf., 11 years 1 month), than those with no prior convictions.

27 Powers, *op. cit., passim.*

28 G. Glaser & M. Zeigler, 'Use of the Death Penalty v. Outrage at Murder' (1974) 20, 4 *Crime and Delinquency* 333, 336. This article sought to test the hypothesis that there is an inverse variation between the historical rate of execution and the period of confinement required before men imprisoned for homicide are paroled. It was found that 'states which in 1930-1970 executed most frequently, in proportion to their population, were most lenient in the term of confinement'. This was cited in support of the proposition that high execution rates and high murder rates (which were found to be related) reflected a 'low valuation of life, for both are associated with a state's readier forgiveness of killers as reflected in its willingness to parole them sooner', (p.336). Unfortunately the data in Australia is a little too scanty to satisfactorily test this hypothesis.

29 Cohen & Taylor, *op. cit.*, p.191, quote the case in England in 1971 of a Conservative M.P. who was pressing strongly for the disclosure of the number of lifers who actually died in prison. They comment, 'The infrequency of such events obviously reflected badly on the Home Office who, he implied, were trying to hide this dereliction of duty from the public.'

The length of time served before death in custody also has some effect on the 'release' averages discussed above. As is shown below, many prisoners are never released and spent extremely long terms in custody. If they were released just before death it would have some effect on the above averages.

Table 9 indicates the fairly wide range of death in custody rates for the various jurisdictions. Excluding Tasmania, for which the data is too small and too recent to be of value, Queensland has the highest relative rate of death in custody, 14.6 per cent, or to put it another way, approximately one in 7 of life sentence prisoners in Queensland who are no longer in custody did not leave prison alive[30] compared with South Australia where only one in 33 has not left prison because of death.[31]

Western Australia has the highest absolute rate, 9.5 per cent, followed by Queensland 9.1 per cent and New South Wales 6.8 per cent (relative rate of 12.9 per cent).

The reasons for the high relative rate in some States are difficult to ascertain. While prison conditions generally in Australia leave much to be desired at the best of times, some may be worse than others. In the Senate on 15 October 1974, there was a call by Senator Keeffe (Labor, Queensland) for a royal commission into prison conditions in Queensland. He cited a number of disturbing examples of poor medical supervision and emergency procedures in prisons and the apparent lack of concern of the authorities for certain medically ill prisoners. Though not accusing persons involved in the correctional system for this situation he did lay blame on a State government which he said was living in the last century.[32]

Another reason for these results may simply be the distortion inherent in the very low numbers involved. Unfortunately these are the only data available and international comparative data are not readily obtainable.

A final possibility for the relatively high death rates may simply be that the relatively older ages of convicted murderers dispose them more to mortality. The average ages on conviction for imprisoned for commuted and life sentences is presented as follows.

Jurisdiction	*No Longer in Custody*	*Presently in Custody*
New South Wales	32.8 years	29.9 years
Victoria	33.6 "	31.6 "
Queensland	Not Available	Not Available
South Australia	27.7 "	29.0 "
Western Australia	34.4 "	33.9 "
Tasmania	28.0 "	28.5 "

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30 Excluding suicide. If suicide is included it is almost one in 5.

31 Or including suicide, one in 17. Figures for death rates in prison are extremely difficult to obtain. However, for all prisoners who went through the prison system in South Australia for the year ending June 1972, five out of 12,346 died, or 0.04 per cent. If this was taken as a percentage of the daily average number (that is assuming that these prisoners were in prison all year, the rate would only be 0.53 per cent.)

32 See Senate, *Weekly Hansard* 15 October 1974, no.15, p.1717 ff.

Table 20 presents a summary of the lengths of time served before death and ages of such persons.

TABLE 20 AVERAGE TERM OF IMPRISONMENT BEFORE DEATH BY AGE AND JURISDICTION

Jurisdiction	*N*	*Average Age at Conviction*		*Average Time of Imprisonment*		*Longest*		*Shortest*	
		Years	*Months*	*Years*	*Months*	*Years*	*Months*	*Years*	*Months*
New South Wales (1932-74)	26	46	3	14	2	40	2	1	5
Victoria (1928-74)	6	37	2	9	8	23	3	0	11
Queensland (1900-74)	22	Not Available		14	6	47	0[a]	1	1
South Australia (1918-74)	1	42	0	12	6	–	–	–	–
Western Australia (1918-74)	7	Not Available		9	8[b]	13	9	1	8
Tasmania (1951-74)	1	39	0	14	4	–	–	–	–

(a) In a mental hospital from 1926 to 1972 when he died. Another prisoner served 35 years 8 months before his death in 1943.

(b) One prisoner was killed in a car accident in late 1974 while on special leave. He had served to that date 9 years 10 months and was eligible for release on parole soon after.

From Table 20 it can be seen that prisoners who died in custody were generally older than the average life sentence prisoner, who in turn is considerably older than the general prison population.[33] This would tend to support in part the explanation above of the death rate of lifers. In Appendix B these figures are explored a little further to examine the question whether imprisonment itself has any effect on life expectancy.

SUICIDE

Little is known of the incidence of suicide in prisons generally and Australia is no exception. Escapes, assaults against prison officers or fellow prisoners, self-mutilation and attempted suicides are all facets of the problem of violence directed against oneself or others.

Many 'potential' life sentence prisoners never reach prison, committing suicide after their offence. Martin states that in Victoria 'the suspected

33 The modal age group for prisoners received in Australian prisons 1967-1969 was 20-29. See D. Biles, 'Prisons and Their Use' in Chappell and Wilson, *op. cit.*, p.654.

killer of every fourth victim committed suicide'.[34] The Royal Commission on Capital Punishment found that between 1900 and 1949 29.1 per cent of murder suspects committed suicide[35] and between 1950 and 1959 33 per cent committed suicide.[36] West, in his study of 'Murder Followed by Suicide'[37] cites international statistics which generally show a relatively high proportion of these cases and found that many were associated with 'domestic' killings. He comments that analyses of those murderers in prisons should be seen in the context of those who did not survive that far.

In the United States a 'drastic increase' in inmate suicide and attempted suicides has been reported.[38] The author reports that in the decade 1964 to 1974 New York City gaols registered approximately 80 suicides; Albany, the state capital had a rate of approximately one death for every 1,000 inmates admitted during 1973, which was six times higher than that of the general population and twice that of the nation's gaol population.[39]

Another recent study in the United States found that there were 17.5 suicides per 100,000 prison inmates compared with 11 suicides per 100,000 of the nation's population.[40]

In England the total number of suicides for the whole population in 1968 was about 6,000 per annum, about 12 of these taking place in prisons out of a prison population of 33,000. In the years 1960-1968 there were 30 suicides in Wormwood Scrubs and Brixton prisons.[41]

Australia's suicide rate between 1966-1970, was 17 per 100,000 for males.[42]

The figures above are quoted to give some perspective to those presented in Table 9. The rates quoted there are extremely small and cover a

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34 *op. cit.*, p.8.

35 *op. cit.*, Appendix 3, table 1, 298.

36 J. Morris & L. Blom-Cooper, 'Homicide in England' in M. Wolfgang (ed) *Studies in Homicide* (Harper and Row, New York, 1967), p.31.

37 *op. cit.*

38 S. Christianson, 'In Prison: Contagion of Suicide' in *The Nation*, (21 September, 1974, p.243).

39 Another study cites statistics which show that a prisoner is 13 times more likely to commit suicide than a similar person in society. F.J. Tracy, 'Suicide and Suicide Prevention in New York City Prisons' (1972) (no vol.) 4 *Probation and Parole*, 20-29.

40 Law Enforcement Administration *Newsletter* (1974) 4, 4.

41 Figures given in answer to a question in the House of Commons 19 December 1968, quoted in D. Blair, 'Life Sentence Then Suicide' (1971) 11, 4 *Medicine Science and the Law* 162, 178-9.

42 *Year Book*, Australia, 1972 p.189

population over more than 40 years, but it can be seen, if life sentence prisoners are treatable as one population, they are far more prone to commit suicide than the 'normal' population outside prison. Unfortunately no suicide rate for the general prison population is available.

An examination of Table 9 reveals that the absolute suicide rate follows very closely the same pattern as the absolute death rate, with Western Australia having the highest, 2.7 per cent[43], then Queensland[44] with 2.5 per cent and New South Wales 2.4 per cent. In relative rates New South Wales has the highest with 4.5 per cent, with Queensland 4 per cent and Western Australia 3.8 per cent following. Victoria has reported no suicides. The significance of these very low figures is difficult to gauge, but it may be that these similarities reflect some underlying pattern in the penal systems of the various States.

Suicide raises questions as to the rights and responsibilities of various segments of society and as to the nature of society itself. Two arguments have been advanced for contrary propositions.

The first argument alluded to earlier, advanced by Szasz is that suicide is an inherent right in every human being which, if chosen to be exercised by a person, should be permitted. Earlier, one form of suicide was considered, the right to allow the State to carry out the actual act of killing by execution at the request of the prisoner. The case now is in regard to persons who, perhaps denied this right, carry out the act themselves.

This argument would contend that conditions in gaol are so abhorrent that for some the only escape is suicide. It would be even more so where it seems to the prisoner that such conditions must be endured for an indefinite period. In terms of Szasz's proposition, to deprive a patient of the right to commit suicide is to deprive him of the right to make the one decision which may form the basis of his spiritual values - whether he should 'live a meaningful life or die a meaningful death'.[45]

The argument to the contrary is that suicide can only be the product of abnormal mental functioning.[46] Thanatos, or the death wish which the Freudians postulate, may exist, but the question remains whether there can be a 'real' choice. It can be said that prison conditions never allow a 'real' choice, just as 'real' consent to 'treatment' has been said not to exist under coercive conditions. For those who do not recognise a death wish there can never be a right to die and it is their duty to prevent suicide at any time.[47]

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43 Though this is only 2 persons.

44 Two suicides of persons awaiting trial for murder in Brisbane have recently been reported. *Courier Mail*, 1 April 1975.

45 *op. cit.*, p.24.

46 For a general discussion of some of the postulated reasons for suicide see West, *op. cit.*, p.113 ff.

47 The hopelessness, despair, depression and the feeling of isolation suffered by many lifers is well described by Zeno, *op. cit.*, p.70,

This argument must remain inconclusive at this stage, though it has vast implications. But one can examine the few cases included in this study. Christiansen[48] reports that most suicides occur almost immediately after entry into gaol and to examine whether this was so for life sentence prisoners Table 21 was compiled.

Table 21 does not fully support the hypothesis above, in that only six of the 18 cases committed suicide in the first year. Obviously the explanation of 'immediate depression' is not the only reason for suicide.[49]

TABLE 21 TERM OF IMPRISONMENT BEFORE SUICIDE BY JURISDICTION

Jurisdiction	*N*	*Cases*		*Average Age*	*Average Time*	
		Years	*Months*		*Years*	*Months*
New South Wales (1932-74)	9	0	6	27.4	4	0
		0	9			
		0	10			
		3	9			
		3	9			
		4	7			
		6	3			
		6	8			
		9	1			
Victoria (1928-74)	0	-	-	-	-	-
Queensland (1900-74)	6	9 days		Not	4	8
		0	1	Available		
		3	5			
		3	6			
		8	9			
		12	3			
South Australia (1918-74)	1	2	4	" "	-	-
Western Australia (1918-74)	2	0	5	49 (one case)	-	-
		1	2			
Tasmania (Not Available)						

and in a lengthy article in *The Age* (Melbourne) by Michael Gordon titled 'A Glance at Death Row', 17 May 1975.

48 *op. cit.*, p.244. Also Tracy, *op. cit.*

49 One author however has suggested that possibly all lifers should be under some degree of psychiatric supervision during the initial period of the sentence, when some kind of support may be badly needed. D. Hewlings, 'The Treatment of Murderers' (1971) 13, 2 *Howard Journal of Penology and Crime Prevention*, 96, 98.

In a valuable case study of a 22 year old man convicted of wounding with intent to murder and sentenced to life imprisonment[50] who committed suicide soon after imprisonment, the author, a psychiatrist, makes a number of valuable observations on the judicial, correctional, medical and legal professions.[51]

He discusses some weaknesses in the system as it operates in England and probably these exist in Australia as well.

The first is the pressure of work on psychiatrists, who lack the time to gather a full case history and to consult with those closely concerned with the patient and who therefore may commit errors which in some cases may be fatal.

The second is the effect that a pronouncement that a sentence of 'life imprisonment' may have on a mentally disordered offender.[52] In Blair's opinion it was the 'horrific' effect of this on a person who, unlike the judiciary and those involved in corrections, was not aware of what a life sentence actually means, that precipitated the suicide.

The third weakness in his view was the lack of secure psychiatric facilities to deal with cases where there is not mental illness sufficient for an acquittal on the ground of insanity, nor where (in England) a hospital order can be made. Administrative procedures must ensure that there is observation of potentially suicidal prisoners.[53]

DEPORTED

A debate is continuing as to whether aliens found guilty should be deported soon after sentence or whether they should first serve the normal sentence and then be deported. Another element is whether such persons should be

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50 For 'therapeutic' purposes.

51 Blair, *op. cit.*, who writes from the point of view, presumably that suicide is a product of mental abnormality.

52 Who was not sufficiently abnormal however to be the subject of a hospital order.

53 The case under discussion was brought up in the House of Commons and following debate, the Standing Orders for prison establishments were changed to provide for the placing of prisoners into three categories in prison hospitals after medical examination:

1. Continuous supervision.
2. Close supervision but may be let out of sight for brief periods.
3. General supervision - no special arrangements.

Indicators of a suicide risk are given as:

1. Previous suicide attempts, gestures or threats.
2. History of aggressive behaviour, recent withdrawal from drugs, impulsive or hysterical temperament and complaints of anxiety and despondency.
3. Severe depressive illness, especially in older age groups.

doubly punished by being deported, that is after having 'paid their debt' they should not be allowed to remain in the country. The relations between the deporting and receiving country must also be taken into account and it can be argued that in the interests of international comity, a substantial portion of the sentence ought to be served before deportation, as parole or other supervision would not be possible in other countries.

Table 9 indicates that Western Australia has the highest relative rate of deportation, 9.6 per cent, and absolute rate, 6.8 per cent while New South Wales tends either not to have as many aliens or does not let them go, with a relative rate of 2.5 per cent and an absolute rate of 1.3 per cent. Table 22 shows the length of time served before deportation.

TABLE 22 AVERAGE TERM OF IMPRISONMENT OF COMMUTED AND LIFE SENTENCES PRIOR TO DEPORTATION

State	*N*	*Average Time*		*Maximum*		*Minimum*	
		Years	*Months*	*Years*	*Months*	*Years*	*Months*
New South Wales (1932-1974)	5	8	5	12	5	1	5
Victoria (1928-1974)	4	10	3	16	2	4	4
Queensland (1900-1974)	10	8	5	17	0	0	8
South Australia (1918-1974)	2	10	9	13	6	7	11
Western Australia (1951-1974)	5	9	2	13	9	5	3
Tasmania (Not Available)							

IMPOSED Vs ACTUAL SENTENCE

This study provided the opportunity to compare, in those cases where the commutation was to a fixed term, the difference between the imposed and the actual sentence.

No attempt will be made here to relate remission provisions, as these have changed over the period surveyed. Suffice to say that in most cases, where applicable, these usually reduced the sentence by one-quarter to one-third. Victoria will be dealt with separately in Table 24 because of the wide range of commutations used there.

As Table 23 reveals, the longer the sentence, the smaller the proportion of the sentence is likely to be served in custody.[54] Again the problem of small numbers exists, but it can be seen that for New South Wales the effective term for the shorter sentences was about 70 to 75 per cent of the sentence, for the 10 to 15 year sentences about 60 to 70 per cent, and for the longer sentences about 55 per cent. The eight Queensland 20 year sentences lasted an average of 53 per cent of the sentence, while the seven 10 year sentences lasted an average of 63 per cent, both very similar to the situation in New South Wales.

TABLE 23 LENGTH OF SENTENCE SERVED COMPARED WITH SENTENCE IMPOSED

	New South Wales (1932-1955)				*Queensland (1900-1922)*			
Sentence Imposed	*N*	*Average Period Served*		*Percentage of Sentence*	*N*	*Average Period Served*		*Percentage of Sentence*
Years		*Years*	*Months*			*Years*	*Months*	
1								
2	1	1	2	59				
3								
4								
5	3	3	9	75	2	4	0	80
6					1	3	8	61
7	4	4	10	69	2	6	0	86
8	5	5	1	64				
9								
10	4	6	11	69	7	6	3	63
11								
12	21	7	10	65	2	10	4	86
13								
14	1	6	11	49				
15	3	10	1	67	2	8	8	58
16	5	8	10	55	1	12	0	75
17								
18								
19								
20	6	11	1	55	8	10	6	53
21								
22								
Total	53				25			

54 For a detailed analysis in New South Wales of the relationship in New South Wales between sentence imposed and effective sentence served see New South Wales, Department of Corrective Services, *op. cit.*, tables 17-20.

TABLE 24 VICTORIA: AVERAGE PERIOD OF IMPRISONMENT COMPARED WITH COMMUTATION 1928-1974

Commutation	*N*	*Average Time Served*		*Percentage*
		Years	*Months*	
Life without benefit of regulations relating to remission	15	18	5	-
Life with benefit regulations relating to remission	4	15	1	-
Life	4	15	1	-
Twenty years without benefit of regulations relating to remission	2	17	3	86
Twenty years with benefit of regulations relating to remission	5	10	7	53
Twenty years without benefit of regulations relating to remission and Governor's pleasure	1	12	3	61
Eighteen years with benefit of regulations relating to remission	1	13	7	75
Eighteen years plus Governor's pleasure	1	16	3	90
Fifteen years with benefit of regulations relating to remission	4	9	7	64
Fifteen years without benefit of regulations relating to remission and Governor's pleasure	1	14	1	94
Fifteen years plus Governor's pleasure	1	10	10	72
Twelve years plus Governor's pleasure	1	9	6	79
Ten years plus Governor's pleasure	2	10	4	103
Five years plus Governor's pleasure	1	10	9	215
Two years plus Governor's pleasure	2	3	8	184
Nine years	1	6	0	67
Five years	1	3	8	73
Twenty-five years - fifteen years minimum	1	11	6	77 (a) 46 (b)
Twenty years - twelve years minimum	1	10	4	86 52
Eighteen years - twelve years minimum	1	11	10	96 66
Fifteen years - ten years minimum	4	8	2	81 54
Fifteen years - eight years minimum	1	6	7	82 44
Total	55			

(a) Calculated on full term
(b) Calculated on minimum term

The variety of commutations in Victoria has already been the subject of comment, but a few further points emerge from this analysis. What is clear is that even where 'life' was intended to mean life, that is without benefit of remission, the average term that could be expected to be served was about 18½ years. Twenty year sentence prisoners without remission were still able to be released about 3 years before the imposed term, compared with the 20 year sentences with benefit of remission prisoners who were released after just over half the sentence was served.

The addition of detention during the Governor's pleasure following a fixed term usually had the effect of increasing the effective length of sentence, in some cases quite markedly.

The few cases which are emerging of the full term with mandatory minimum variety indicate that prisoners are being held for a high proportion of the minimum term, but new remission regulations have recently been introduced and it may be too early to judge correctional policy yet.

What emerges from this is the need to investigate further the relationship between imposed and effective sentences so that the effects of parole, remission and executive clemency and the relationship between them can better be gauged.

THE INSANITY DEFENCE

It has been argued that the raising of the insanity issue at trial is fraught with danger. This is because a successful plea results in potentially indefinite detention whereas a successful plea of not guilty leads to outright acquittal, while a verdict of manslaughter usually entails a lower penalty. The 'political' nature of this plea has been discussed above and it remains now to examine the fate of those actually found not guilty on the ground of insanity and who were detected in this survey.

Tables 25 and 26 summarise the data for those released and those still in custody.

From Table 25 it can be seen that for the two States where any meaningful data has been obtained, Victoria and New South Wales, the average length of detention is considerably less than the average time served by life sentence prisoners and the range of detention is also narrower.[55]

The difference in New South Wales is up to 11 years (in comparison with a life sentence) and in Victoria, about 6 years.

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55 The Victorian Parole Board will recommend the release of such a person from safe custody 'only if it is satisfied that he is sane, and that if at liberty he will not be a danger to the community or to himself, and will comply with the requirement proper to be imposed as a condition of release'. *Annual Report* 1962, p.15.

TABLE 25 AVERAGE LENGTH OF DETENTION OF PERSONS FOUND NOT GUILTY ON THE GROUND OF INSANITY

	Male						Female					
Jurisdiction	*N*	*Average Length of Detention*		*Maximum*		*Minimum*		*N*	*Average Length of Detention*		*Maximum*		*Minimum*	
		Years	*Months*	*Years*	*Months*	*Years*	*Months*		*Years*	*Months*	*Years*	*Months*	*Years*	*Months*
New South Wales (1932-1974)	23	6	2	12	4	2	2	11	2	3	5	1	0	7
Victoria (1928-1974)	30	7	5	13	4	0	4	11	4	7	17	11	0	5
Queensland (1900-1974)	Not Available			-		-		-	-		-		-	
South Australia[56] (1918-1974)	2	See maximum/ minimum		29	4	14	4	0	-		-		-	
Western Australia (1918-1974)	12	6	7	21	3	2	0	2	See maximum/ minimum		5	1	1	3
Tasmania	Not Available			-		-		-	-		-		-	

56 The information presented here does not fully accord with that given by George, *op. cit.*, p.355 who states that, 'During the period from January, 1941 to June, 1970 10 people were detained ... after a s. 292 acquittal. [insanity verdict]. Only 2 were released during this period, after stays of 14 years and of 7 months. The remaining 8 were still hospitalised in June, 1970, and have been in ... for periods ranging from two to nineteen years'.

TABLE 26[a] ANALYSIS OF MALE PERSONS FOUND NOT GUILTY ON GROUND OF INSANITY IN CUSTODY 31 DECEMBER 1974

Length of Time	*N.S.W.*		*Vic.*[b]		*Qld.*		*S.A.*		*W.A.*		*Tas.*	
Years	*N*	*%*	*N*	*%*	*N*	*%*	*N*	*%*	*N*	*%*	*N*	*%*
5	10	30.3	29	72.5	8	61.5	3	33.3	6	60.0		
6 - 10	10	30.3	8	20.0	3	23.1	5	55.6	2	20.0	Not	
11 - 15	8	24.2	3	7.5	-	-	-	-	1	10.0	Available	
16 - 20	2	6.1	0	0	2	15.4	-	-	-	-		
20 +	3	9.1	0	0	-	-	1	11.1	1	10.0		
Total	33	100.0	40	100.0	13	100.0	9	100.0	10	100.0		

(a) This table may not give a true picture of the length of detention, not only because of omissions but because in a number of cases persons were held for some period prior to trial as being unfit to plead and this time should be included in their length of detention. The same applies to Table 25.

(b) Taken from date of Governor's order rather than date of verdict as more complete information was available. The difference is usually about 1 to 2 months, but can be up to 4 months in some cases.

Table 26 reveals the present situation in the various jurisdictions and is presented graphically for New South Wales and Victoria in Figures 15 and 16.

The interesting feature here is the greater number of persons held for an extended period of time (10 years or more) in New South Wales, compared with the other jurisdictions. In fact 92.5 per cent of male insanity verdict cases in Victoria have been detained less than 10 years, 72 per cent less than 5 years, compared with 60.6 per cent less than 10 years in New South Wales, 84.5 per cent in Queensland, South Australia 88.9 per cent and Western Australia 80 per cent, though very small numbers are involved in the last three cases.

This generally indicates that length of detention in New South Wales may tend to increase in the future while in Victoria the same position as at present regarding release practice will probably continue. In New South Wales the three cases over 20 years detention comprise one of 28 years, one of 26 years and one of 23 years; in South Australia the one case has been detained for 23 years and in Western Australia 21 years.

Table 25 however, does not give the full situation. The following are some details of the fate of others who have been found not guilty on the ground of insanity.

New South Wales

Although 23 males were released, six other males (or 17.7 per cent of the total no longer in custody or 9 per cent of all persons released or still in custody) died after serving an average period of 12 years 7 months. One female died after 19 years 2 months.

Four more males (11.8 per cent relative rate; 6 per cent absolute rate) committed suicide, one after 13 years 1 month and the other three after 2 months, 8 months and 9 months respectively. One female committed suicide after 1 year 8 months.

One person was repatriated after 3 years 8 months.

Thus in New South Wales nearly one in three of the persons no longer in detention did not leave custody alive.

Victoria

One male died after 4 years 9 months (3 per cent relative rate; 1.35 per cent absolute rate) and three were repatriated (8.8 per cent relative rate; 4.1 per cent absolute rate).

South Australia

One person was repatriated after 1 year 7 months in custody.

Western Australia

One female died after 12 years 1 month in custody and one was repatriated after 3 months.

Another interesting feature of Table 25 is the relatively large number of females held in custody and the comparatively short periods of detention they undergo.[57] It is consistently 3 to 4 years less than the males.

Martin[58] surveying murder and manslaughter cases in Victoria during the period 1962-1971 found that 83 males and 9 females were convicted of murder. Of the 83 males, forty-four (53 per cent) were sentenced to death and thirty-nine (47 per cent) were disposed of by the insanity verdict. Of the 9 females, eight were found not guilty on the ground of insanity (88.9 per cent) and only one sentenced to death.

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57 The number and length of time served by convicted females is discussed below p.115 ff.

58 *op. cit.*, p.41.

FIGURE 15

NEW SOUTH WALES: PERSONS FOUND NOT GUILTY ON GROUND OF INSANITY IN CUSTODY (MALE) 31 DECEMBER 1974

N = 33

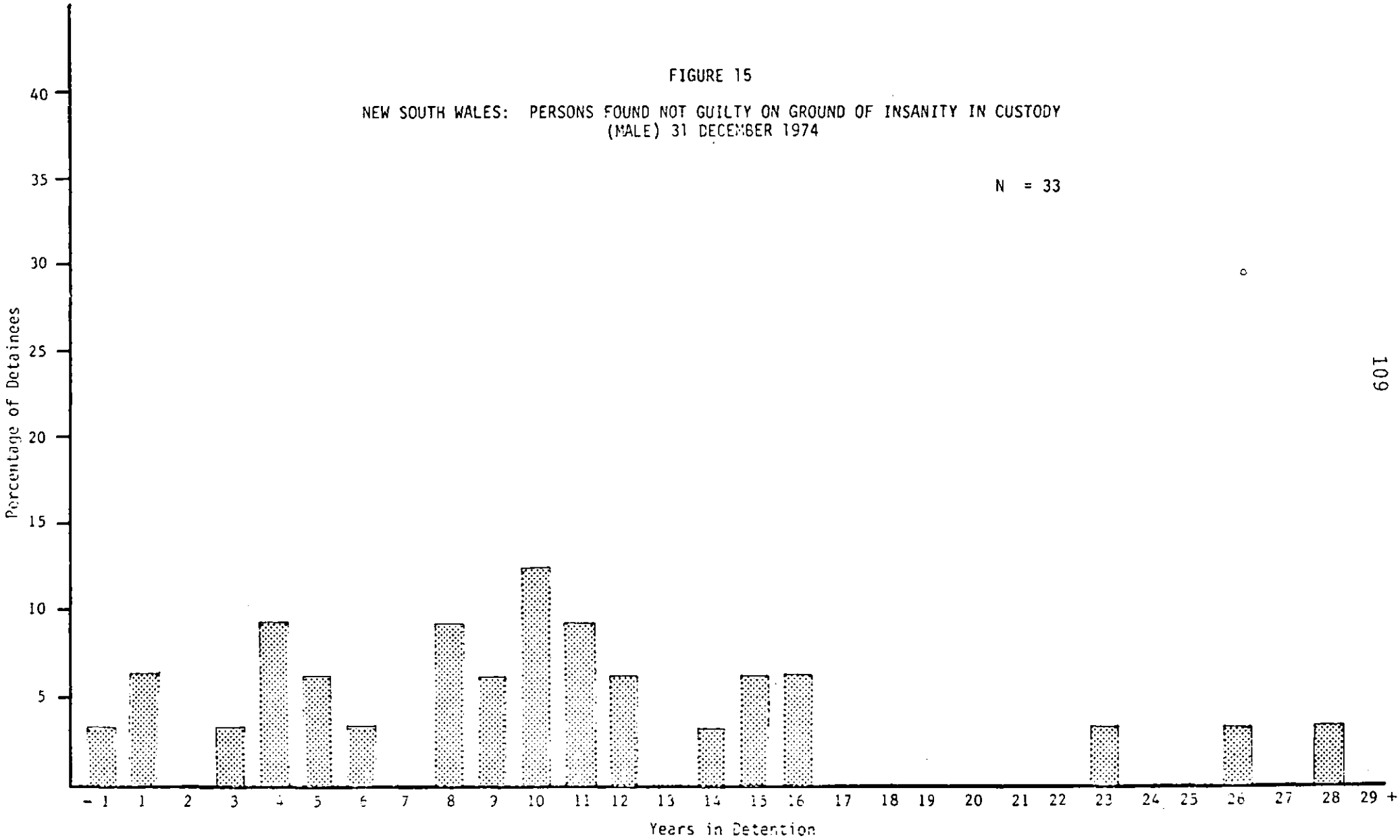
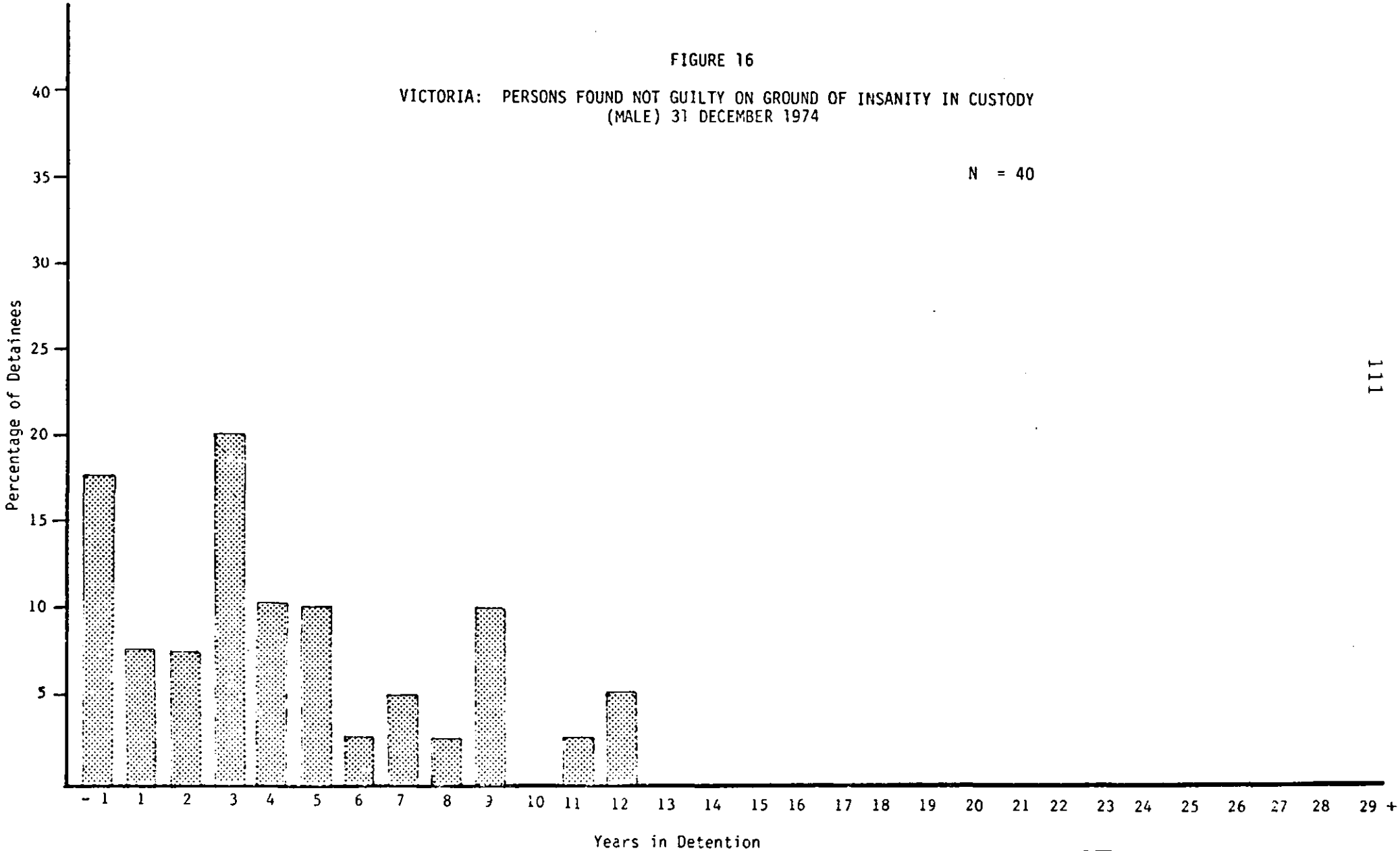


FIGURE 16

VICTORIA: PERSONS FOUND NOT GUILTY ON GROUND OF INSANITY IN CUSTODY
(MALE) 31 DECEMBER 1974

N = 40



Compared with convicted prisoners[59] persons found not guilty on the ground of insanity are generally older.

In New South Wales the average age for all males so disposed who were committed to safe custody was approximately 38 years, while the average age of those among this group who died was 43 years. The average age for the females was also about 35 years.

In Victoria the average age for males was about 40 years and for females 33 years. In Western Australia the males were aged about 37 years and females 27 years.

The pattern in Australia is consistent with that found by Rollin[60] in England who found that more than 40 per cent of offenders admitted to a mental hospital were in the 30 to 40 year age group. He attributed this to the preponderance of the diagnosis of schizophrenia 'a disease which in its active phase afflicts those in their twenties, thirties, and forties'.

INSANITY AT OR BEFORE TRIAL

While the statistics above cover generally persons who are actually dealt with by the courts whether by sentences of imprisonment or insanity acquittals, they do not give the complete picture, excluding as they do the very small proportion of cases who are found insane on arraignment or are certified insane before trial. The Royal Commission on Capital Punishment found that '[d]uring the fifty years 1900-1949, of 3,130 persons committed for trial on a charge of murder 428 [or 13.67 per cent] were found insane on arraignment'[61] and 49 or 1.57 per cent were certified insane before trial.

In Victoria in the period 1962-1971 Martin[62] found that six out of 345 'suspected offenders' or 1.7 per cent were found unfit to plead.

This matter is of some concern, despite the smallness of the numbers, for a variety of reasons. The first and most important is that there is a danger that such persons may be diverted from the legal system and may never be brought to trial to establish their guilt or innocence. The prevailing philosophy has been that an insane accused person could not be put on trial because a fair trial could not be conducted. The accused may be unable to instruct counsel properly, comprehend the course of the

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59 See above p.96.

60 *The Mentally Abnormal Offender and the Law* (Pergamon Press, London, 1969), p.27.

61 *op. cit.*, p.77 and Appendix 3, table 8, p.311.

62 *op. cit.*, table 4, p.14.

proceedings, challenge jurors, understand the details of evidence and the proceedings would degenerate into an unseemly spectacle.[63]

Though these arguments have considerable substance, it has been said, with some justification, that such persons, by not having the opportunity of trial, may be serving life sentences in mental hospitals, though neither convicted nor civilly committed.[64] A recent newspaper report[65] quotes a case in the United States of a man who spent 50 years in gaol on a charge of murder for which he was never tried and there have been a number of cases in Australia which may serve as an indication of what occurs.

A result of this, as discussed previously, is that the statistics of 'periods of detention' do not accurately reflect the actual situation.

In Victoria as at 31 December 1974, there were five persons in custody who had been found unfit to plead. One had been detained since 1967, two since 1970 and one each since 1971 and 1972.[66]

In South Australia as well as being found unfit to plead at trial[67] under the Mental Health Act[68] any person in prison for whatever reason may be certified as mentally defective and may be removed to a mental hospital. This applies also to persons held in custody awaiting trial, and who may never be brought to trial unless certified as no longer insane. Section 46 patients comprised only 1 per cent of admissions to mental hospitals in the period 1960-1969, while there were only two unfit to plead cases.[69]

George cites one case of a person charged with attempted murder in 1957 and certified under Section 46. This man sought discharge to stand trial, but failed and attempted to escape. He later committed suicide in 1971 after spending 13 years 8 months in custody without coming to trial. There are four other murder charge cases held under Section 46 who are still under detention. Three males have been detained for 22 years, 18 years and 11 years respectively and one female for 10 years.

Another case, included in the 'release from life sentence' statistics as having spent 4 years 11 months in prison was in fact convicted some five years after the offence, the intervening period being spent in a mental

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63 See generally R.A. Burt & N. Morris, 'A Proposal for the Abolition of the Incompetency Plea', (1972) 40, 1 *University of Chicago Law Review*, 66; Seminar. 'Fitness to Plead' 1967. *Proceedings of the Institute of Criminology* (Sydney), p.79.

64 See Burt and Morris, *op. cit.*, p.68.

65 *The Australian*, 27 September 1973.

66 Rinaldi, *op. cit.*, p.224 cites one case in Victoria where one person was released on parole in 1961, after 15 years in custody after being found unfit to plead.

67 *Criminal Law Consolidation Act*, 1935-1974 (S.A.), s. 293.

68 Section 46.

69 George, *op. cit.*, p.334.

hospital. The total period spent in custody coincided with the average length sentence of life sentence prisoners in South Australia. Yet another detainee spent 1½ years in custody before trial and on trial was found not guilty on the ground of insanity. One person spent more than 4 years in hospital before trial, was acquitted because of insanity and repatriated 1½ years later.

In Western Australia a similar picture emerges: one person found unfit to plead in 1954 and another in 1955 are still being detained and one is considered by the authorities unlikely to recover. Another has been held since 1972.

Three other cases are also of interest where persons found unfit to plead were transferred to the authority of the Mental Health Service, in one case being transferred from hospital to prison to hospital over a period of 8 years, without standing trial. Another died in custody without trial after 18 years detention.

The purpose of citing these examples is not to cast doubt on the *bona fides* of either the mental health or correctional personnel. These persons may well be very mentally ill and unsafe for release in any way, but they do highlight the defects of a system where a person cannot be found either 'mad' or 'bad' but is in a classificatory limbo, probably attracting the disadvantages of both states.

Burt and Morris[70] argue with some force that the law must identify and justify its aims, purposes and practices and that the fate of those incompetent to stand trial is a prime example of the failure to do so.

Suggestions have been made for procedures which would allow persons who are unlikely to recover from their illness to confront the charges against them to allow their guilt or innocence to be established and to be dealt with by the due processes of law, rather than by the amalgam of procedures now used and these suggestions warrant very close examination.[71]

OTHER CATEGORIES OF OFFENDERS

FEMALES

As was stated in the introduction, the only reason that female offenders were excluded from the main body of the data is the very small numbers involved. The relatively insignificant involvement generally in the criminal justice system of women has been often noted, though there are indications that this is changing.

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70 *op. cit.*

71 See New South Wales. Mental Health Act Review Committee, *Report*. 1974.

The majority of imprisoned murderers are male and West notes that for women murder is mainly a domestic affair with 80 per cent of women murderers killing their own children. Women also have a higher tendency than males, in England, to commit murder then suicide.[72]

When considering imprisonment rates for women for murder the relationship between abortion, infanticide and murder rates must be taken into account and the substantive law in each State must be related to its conviction rates for murder.

Smith, in her book *Women in Prison* makes the important point that '[e]xtreme and sadistic physical violence by women is ... not unknown'[73] and cites examples reported by the War Crimes Tribunals following World War II of gross cruelty and violence inflicted by the women staff of concentration camps.

During the fifty years 1900-1949 in England, 56.7 per cent of men convicted of murder and sentenced to death were executed compared with 8.89 per cent of women so sentenced.

Whether this situation arises because of the lesser heinousness of the offences or because of some irrational discrimination on the basis of sex is open to conjecture, but what is clear is that there are great differences in the treatment of males and females by the criminal justice system.

Martin's data[74] indicate that in Victoria 1962-1971, of the suspects for all murder and manslaughter cases, only 3.5 per cent could not be committed for trial because of insufficient evidence compared with 14.3 per cent of women.[75] Almost one-half of the females that did get to trial were acquitted compared with one-fifth of the males, while only one female was sentenced to death. Table 27 shows the average term of imprisonment served by convicted women.

The situation in England regarding convicted female murderers from 1900-1949 is presented below Table 27.

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72 West, *op. cit.*, p.44.

73 (Stevens & Sons, London, 1962), p.28.

74 *op. cit.*

75 West found that of 18 women offenders in his murder sample, 14 were obviously mentally ill and were found either insane or unfit to plead, *op. cit.*, p.39.

TABLE 27 AVERAGE LENGTH OF IMPRISONMENT FOR COMMUTED AND LIFE SENTENCE PRISONERS (FEMALE) BY JURISDICTION

State	N	Average Time		Maximum		Minimum		Average Age on Imprisonment	
		Years	Months	Years	Months	Years	Months	Years	Months
New South Wales (1932-1974)	8[a]	10	4	14	3	3	1	28	2
Victoria (1928-1974)	2	5	10	7	6	4	2	45	0
Queensland (1900-1974)	3	9	2	10	3	7	2	Not available	
South Australia (1918-1974)	2	5	6	7	6	3	6	-	
Western Australia (1918-1974)	3	5	0	7	0	2	9	44	2[b]

(a) One female was released in 1942 after serving 1 month but as exact details of this case could not be obtained it was excluded from this table.
(b) Calculated from only 2 of the 3 cases.

England

Year	N	Average Term of Imprisonment
1900-1909	22	7 years 8 months
1910-1919	17	6 " 11 "
1920-1929	32	5 " 0 "
1930-1939	18	3 " 11 "
1940-1949	13	3 " 5 "

Forty-eight per cent of the females were released after serving 5 years or less and 82 per cent were out in 10 years or less. Only 6.9 per cent served more than 15 years. In comparison for the same period only 12.85 per cent of men served less than 5 years and 41 per cent less than 10 years; 10.97 per cent served more than 15 years.

Additional data for Australia is as follows.

New South Wales

Two women died in custody, one after 12 years 3 months and the other after 7 years. Two are still being detained after 2 years 7 months.

Victoria

One female is still in custody having served 8 years 4 months. Her sentence of death was commuted to a term of imprisonment of 10 years with a minimum of 7 years. This woman was found unfit to plead twice before trial and was detained about two years before the trial which led to conviction.[76]

Queensland

Two females died in custody, one after 15 years and the other after 9 years 8 months. There is one female presently in custody serving a sentence of life imprisonment for manslaughter.

South Australia and Western Australia have no females in custody at present.

Thus overall, it can be seen that females are generally treated more favourably than males once they are received into prison, though many of course never reach this stage. If such discrimination in favour of women is based solely on sex then it should have no place in a system of justice based on equality of the law.

It may well be that with the breakdown of the cultural conditioning of women to undertake a 'passive' role, the number of women becoming involved in the criminal justice system will increase and their treatment equated with that of males. On the other hand, of course, the conditioning of the male to be 'aggressive' may also be broken down, perhaps leading to a decrease in crime.

JUVENILE OFFENDERS

One of the mitigating factors taken into account by the criminal justice system in regard to both criminal responsibility and punishment is that of youth. In England no person under the age of 18 has been executed since 1887 and various enactments gave that practice statutory status.[77]

It was argued before the Royal Commission that there was no strong reason for this and that there were many young persons who were especially dangerous and their crimes were as brutal and heinous as that of adults. 'Like adult murderers children are most prone to killing a family member, a friend or frequent associate ... these killers do not fit into the street gang category of delinquents and usually commit crimes alone.'[78]

The arguments in support of having such exemptions in favour of youth

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76 See *R.* v. *Jeffrey* [1967] V.R. 467.

77 Royal Commission on Capital Punishment, *Report, op. cit.*, p.66.

78 Abstract of K.A. Adams, 'The Child Who Murders: A Review of Theory and Research', (1974) 1, 1 *Criminal Justice and Behaviour*, pp.51-61 in *Crime and Delinquency Literature* (September, 1974).

points to the immaturity and instability of the offender and the greater possibilities for changes in character. There is also the argument that it is repugnant that a person of young age should be put to death but this argument, which was also put in respect of women, equally applies to all persons.

The minority of the Commission was of the view that every case should be judged on its own merits and that age should be only one factor to be taken into account and that maturity is not necessarily related to age.

The law relating to the disposition of juvenile offenders in Australia with regard to certain indictable offences is set out in more detail in Appendix C.

TABLE 28 AVERAGE TERM OF IMPRISONMENT OF JUVENILE OFFENDERS BY JURISDICTION

Jurisdiction	*N*	*Average Time Served*		*Maximum*		*Minimum*		*Still in Custody*
		Years	*Months*	*Years*	*Months*	*Years*	*Months*	*N*
New South Wales (1932-1974)	12	14	2	22	0	5	1	6
Victoria (1928-1974)	8[(a)]	7	10	10	3	5	1	6
Queensland (1900-1974)	Not Available							
South Australia (1918-1974)	4	11	7	17	3	3	11	2
Western Australia (1918-1974)	Not Available							
Tasmania	Not Available							

(a) One prisoner was shot while escaping in 1952 after 2 months in prison.

Generally in Western Australia, South Australia and Queensland[79] juveniles convicted of murder are ordered to be detained during the Governor's pleasure, while in New South Wales the penalty of imprisonment for life may be imposed, though it is not mandatory as it is for adults. In Victoria, Tasmania, the Northern Territory and the Commonwealth the abolition of capital punishment has left something of a statutory void and it seems now that in these jurisdictions juvenile murderers are

79 Where the court has a discretion to sentence to imprisonment.

treated the same as their adult counterparts. In the Australian Capital Territory the courts seem to have a wider power of disposition than in other jurisdictions.

Whether the decision to treat juveniles the same as adults in jurisdictions where capital punishment has recently been abolished was intentional is unclear. However as Table 28 reveals, in Victoria at least it appears that juveniles held during the Governor's pleasure were treated more favourably than their counterparts in New South Wales where no special disposition exists and where the average length of time served is closer to the average for all male life sentence prisoners. It should be noted that for the purposes of comparison in assessing the practice in Australia, juveniles (that is under 18) in New South Wales are included in Table 28 even though they have been included in the overall life sentence analysis in Table 9.[80]

A final comment should be made here with regard to the nature of the sentence and this applies as much to persons found unfit to stand trial and not guilty on the ground of insanity as it does to persons under 18. To quote the words of the Criminal Law Revision Committee, '... there is something objectionable about the reference to a person being detained "during Her Majesty's Pleasure"'.[81] The Committee recommended instead a formula such as a sentence to detention 'in such place and for such period and subject to such conditions as to release as the Secretary of State may direct'. In Australia the 'Secretary of State' could be replaced by 'Parole Board' or the 'Governor acting on the advice of the Parole Board', but it is submitted that the present formula is an archaic relic of a time long since past and that it is misleading both to the public and to the offender. The principle upon which a sentence should be passed is that the person actually or potentially subject to it should know what the implications of it are.

Persons who are to be held in the mental health system should be a part of the system and be subject to and have the benefits of that system.

In the Mental Health Act of Tasmania for example are found objective criteria by which justification for detention can be measured. Thus, a non-restricted patient must be released when he is not suffering from mental illness, psychopathic disorder, subnormality or severe subnormality, and where it is not necessary in the interests of the patient's health or safety or for the protection of other persons that he should continue to be detained.[82]

Thus, on this reasoning, a life sentence with all the disadvantages of indeterminate sentences is preferable to the 'Governor's pleasure' for theoretically its nature is discernible, that is for life, but the Governor's pleasure is such an amorphous concept that no-one but those intimately involved in the criminal justice system knows its meaning.

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80 Note also comments in 'Miscellaneous' in Table 9.

81 See Criminal Law Revision Committee, *op. cit.*, p.19.

82 *Mental Health Act* 1963 (Tas.), s. 76(1)(a) and (b).

RECIDIVISM

Probably the main question which arises, when the release of convicted murderers, rapists and in fact in regard to all prisoners, is whether they will repeat their offence, whether in fact the prison system has been successful in preventing a possible re-occurrence.

Studies of homicide have generally found that murder is predominantly a crime precipitated by the stress of family life or pre-existing personal relationships. Between 70 and 80 per cent of the victims are related to or acquainted with their murderers or suspected murderers[83] and offenders are more likely than not to be first offenders.[84] However this situation may be changing, especially in the United States where murders committed by strangers are becoming more frequent. Deaths caused through political violence such as killing of kidnap hostages or bomb attacks on civilian targets have become more prominent recently and although probably having a slight effect on the overall statistical picture have had a considerable psychological effect on the population, leading in England to a call for the return of capital punishment.

Lifers as prisoners have a reputation generally of being among the best behaved inmates. As the Royal Commission said in regard to murderers, who are the majority of lifers, they

> 'are no more likely than any other prisoners to commit acts of violence against officers or fellow prisoners or to attempt to escape; on the contrary it would appear that in all countries murderers are, on the whole, better behaved than most prisoners. It must be remembered too that prisoners serving life sentences have a special incentive to good behaviour, since the time they have in fact to serve depends so largely on it.'[85]

However, it is not the purpose of this study to define the complex motives or reasons for murder but rather to find what happens in practice. When considering the following information it should be remembered that some cases may have escaped attention or that some minor breaches of parole are overlooked by the authorities.

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83 See, for example unpublished paper by Professor Waller, Murder and the Death Penalty in Victoria which analysed convictions in Victoria for murder between 1950 and 1972 quoted in Victoria Law Reform Commissioner's report, *op. cit.*, pp.13-14; Mattick, *op. cit.*, pp.26-27; Royal Commission *op. cit.*, p.216.

84 See Martin, *op. cit.*, p.22; Powers, *op. cit.*, p.10. West however quotes a Home Office study in England, E. Gibson & S. Klein, *Murder* (H.M.S.O., London, 1961), which showed, 'in respect of murders known to the police, that the proportion of offenders with previous convictions has risen from 1955 to 1960 from a quarter to a third', *op. cit.*, p.57.

85 *op. cit.*, pp.216-217.

New South Wales

Of the 156 persons who have been released, thirteen, or 8.33 per cent, have in some way committed some action serious enough to warrant a return to prison. Of those, three received a second life sentence, one for a double murder, one for one murder and the other for two rapes. The statistical details of the 13 men are as follows:

Average time served before release	19 years 6 months
Average period between release and return to prison	2 years 9 months

Of those 13 returned, one died in prison after 2 years 1 month. The three who received second life sentences have served respectively 1 year 1 month, 12 years 9 months, and 12 years 8 months of their second sentences. Of the 9 remaining, two are still in custody, having served 4 years 7 months and 4 years 1 month, and seven were re-released after serving an average of 2 years 4 months. Of those seven re-released, three were returned to prison and after an average period in the community of 2 years 6 months, two of these were re-released again after serving 4 years 4 months and 1 year 3 months. The third is still in custody after 16 years 4 months.[86]

Two Governor's pleasure cases have also been returned to prison. One after being detained for 2 years 2 months, was sentenced seven years later to life imprisonment and served 10 years 3 months before his death in prison. The other was detained the first time for 2 years 9 months, was returned two years later and released 1 year 5 months later. He was returned again after 1 year 8 months and is still in custody after 15 years.[87]

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86 This last case received some publicity in October 1974 following a question in the New South Wales Legislative Assembly. He was released the first time after serving 19 years 7 months and returned 1 year 3 months later for parole violation and released the second time after 11 months. Two and a half years later he violated parole again and has spent 16 years 4 months in gaol, thus having served a total of 37 years in prison since 1934. The Minister for Justice, according to a newspaper report, has refused to say why the licence was revoked the second time.

87 Figures quoted in regard to releases from Broadmoor, the English institution where mentally disturbed offenders are held, also show a very low rate of recidivism. Between 1960 and 1972 more than 300 patients had been discharged from Broadmoor and of these only three committed homicide after leaving the hospital. In two cases, so long after discharge that active supervision of the patient had ceased. Of the 168 patients conditionally discharged in 1966-1967 (and these were mainly comprised of 43 per cent originally admitted after homicidal assaults and 28 per cent after major violence), after four years only 4 per cent were convicted of serious offences, 12 per cent were convicted of property offences, 7 per cent were recalled but not re-convicted and the remaining 77 per cent were neither recalled nor re-convicted. A further 12 were repatriated. See *Report on the Review of Procedures for the Discharge and*

Victoria

In Victoria only one case out of 55, that is 1.82 per cent, was found of a person returned to prison. He served 17 years 9 months and, two and three-quarter years after release, was returned and served a further 9 years 1 month before his release. One case found not guilty on the ground of insanity, a male, was returned after having been detained 7 years 8 months and one female who had been detained for 3 years 5 months was returned one year later and was re-detained for only 8 months before re-release. According to the Victorian Parole Board *Annual Report* 1962, no person released between 1928 and 1962 whether found not guilty on the ground of insanity, unfit to plead or under commuted sentence of death, has been convicted of an indictable offence.[88]

Queensland

Of the 106 released, eight, or 7.55 per cent were returned to prison. One, who was convicted first of murder and served 11 years 8 months, was re-convicted seven years later of attempting unlawfully to kill and for that offence received a second life sentence. He died in custody 29 years 2 months later having served a total of 40 years in prison.

The seven others served an average of 14 years 3 months before release, which is almost the same as the overall average and they were free for an average time of 2 years 6 months before return. Of those seven, two died in custody after serving 7 years 9 months and 4 years 3 months. One is still in custody after 3 years and the other four were re-released after an average of 2 years 4 months. Of those four, one was returned eleven months later and is still in custody after 1 year 1 month and another has absconded and there is a warrant out for his arrest.

To indicate the nature of some of the reasons for return to prison, the Queensland Parole Board Report of 1966 is quoted:

> 'It is worthy of note that of a total of 18 life sentence prisoners released on parole (since 1959) only two have been re-committed to prison following a breach of a parole condition. One, a South Sea Islander, was unable to abstain from the consumption of intoxicating liquor and the other failed to report his change of address and absconded from the supervision of his parole officer.'

South Australia

Two cases of the 30 released were returned to custody in this State. One person served 10 years 10 months of his sentence, was returned 1 year 3 months after his release and re-released after 1 year 3 months. One

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Supervision of Psychiatric Patients Subject to Special Restrictions (H.M.S.O., 1973), Cmnd 5191, para. 15, p.6 and Appendix 2, p.22. See also Rubin, *et al, op. cit.*, p.540.

88 p.15.

year 5 months later he was again returned and 1 year 10 months later he was again released. However two months after this he was again returned to prison and has been there for more than four years.

The other prisoner, an Aborigine, served 14½ years of a life sentence before being released on parole. About twelve months after release he was convicted on two charges of disorderly behaviour and was fined. Six months later he was convicted of illegal interference with a motor vehicle and being unlawfully on premises.[89]

Western Australia

Five of the 36 released, or 13.9 per cent, were returned to prison after an average length of detention of 13 years 8 months. The average time in freedom was 1 year 9 months. One of these is still in custody 2 years 7 months later, the other four were re-released after an average stay of 3 years 9 months. One of these was returned 4 months later and is still in custody after having served 9 months. A number of others committed minor technical breaches of their parole orders but they were not returned to prison.

The figures quoted above compare very favourably with, for example, the parole 'failure' rates in New South Wales of about 35 per cent[90], and the experience in Australia is similar to that found overseas. Rubin writes, 'The parole record is better for convicted murderers than for almost every other category of offenders'.[91] The Royal Commission on Capital Punishment said after surveying the situation in various countries and England that '[t]he evidence seems conclusive that the release of life sentence prisoners involves little risk at present'.[92] Of 112 life sentence prisoners released between 1928 and 1948, only five were re-convicted of serious offences and only one for murder. In Europe the same low rate has been found. In Sweden between 1931 and 1945, of 95 prisoners released there was only one case of recidivism. In Norway between 1908 and 1948 only four of the 17 were re-convicted and in each case the offence was theft.[93]

Giardini and Farrow quote United States statistics[94] which show that in New York from 1930 to 1961, of 63 first degree murderers paroled only three were parole violators, one for burglary and two for technical violations. From 1945 to 1961, of 514 second degree murderers paroled, 115

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89 This prisoner was re-released almost immediately. The parole board counselled him as to his behaviour and stringent conditions were added to his parole order.

90 Rinaldi, *op. cit.*, p.195.

91 *op. cit.*, p.356.

92 *op. cit.*, p.229.

93 *ibid.*, p.228.

94 *op. cit.*, p.185.

were parole violators, 65 for technical violations, 33 for misdemeanours and 17 for felonies, only two of these being for first degree murder.[95]

Thus it would seem clear that the conclusion of the Royal Commission is essentially valid and that 'any convicted murderers whom it would be unsafe ever to release are likely to be in the category of the mentally abnormal'.[96]

It is unfortunate then that so much adverse publicity is received when the rare case of a repeated offence occurs and it is reported in huge headlines. One of the New South Wales cases illustrates this point. The headline in very large print read 'Life Imprisonment for Double Murders: Death Sentence Imposed in 1948'. The first paragraph read 'A man who was sentenced to death for murder 25 years ago but later reprieved was yesterday gaoled for life on a double murder charge'.[97] A report of a statement by the Justice Minister the next day[98] was set in a small type with a headline 'Parole Murder Case 1 in 1,000 - Maddison'. The effect on the public and the correctional authorities of such headlines must be considerable and probably fear of public reaction would mean that some prisoners who would otherwise be released might not be for this reason. While accepting that such reports as the first are part of the newspaper business, the context in which such cases occur must also be borne in mind.

EFFECTS ON THE PRISONER

Opinions differ considerably as to whether prolonged detention has deleterious effects on the prisoner. It would seem obvious that after a long period of time in prison, perhaps up to 20 to 25 years, it would be difficult for a prisoner to re-establish himself in the community and

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95 See generally Royal Commission on Capital Punishment Report, Appendix 15; Rubin, *op. cit.*, p.355 and Powers, *op. cit.*, p.10.

96 *op. cit.*, p.229, quoted with approval by the Parole Board of Victoria in its *Annual Report* 1962. For an example of one such case of dangerous mental abnormality, see series of articles in the *Sydney Morning Herald*, 23-25 March 1974 with regard to a convicted prisoner who is subject to delusions that he must kill four more persons to avenge the death of his son. See also Straffen's case above p.92. There are however the professional or contract killers or 'political' murderers for whom murder may be a profession or, in the latter case, a duty and for whom release may never occur as they would probably commit the offence again, especially the latter category.

97 *The Australian*, 14 November 1973.

98 *Sydney Morning Herald*, 15 November 1973.

this may be one explanation of the number of returns to prison for non-serious violations of parole.[99]

Self-mutilation, assaults and suicides are all manifestations of what has been termed 'the all pervading depression and violence of prison life'.[1] Prison depression, Cooper writes, may be endemic or episodic, depending on the individual, but is almost universal, and is characterised by feelings of worthlessness, listlessness and a general undermining of the capacity to care for oneself.

Deterioration may be mental or physical, but probably the greatest danger is that of institutionalisation and as was discussed above, one of the rationalisations used to detain prisoners for a long period is that they could not cope in the outside world and are quite comfortable in prison where they have built status and position and have developed a way of life perfectly adjusted to their environment. It has been said that such persons upon release commit crimes just to be returned to the environment where they are most comfortable. The answer to this would be that release in these cases must be progressive and that the offenders should be cushioned against the cultural shock involved in entering the world again - in many cases at an age when they are coming to the end of their working lives.

One of the main dangers of long indeterminate sentences is the effect that the indeterminacy has on the prisoners. Where there is no hope of release[2] hopelessness and apathy may result which may lead to either violence against oneself[3] or against the environment.

Cohen and Taylor in a chapter of their book *Psychological Survival* entitled 'Time and Deterioration' describe the sensations of prisoners who must come to terms with the meaning of 20 years or 30 years. In prisoners' argot, deterioration is expressed by the saying that you must 'do your time and not let your time do you'.[4] They say that

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99 For a personal description of the unease felt by a lifer returning to society after 9 years, see Zeno, *op. cit.*, p.195 ff. He writes, 'I am afraid that there may be deteriorations in me of which I am not yet aware, and I shall have to observe myself in ordinary surroundings for a long period before I can be sure. I have been so occupied with watching the changes in others that I may well have failed to notice the total effect on myself'.

1 See H.H.A. Cooper, 'The All-Pervading Depression and Violence of Prison Life' (1974) 18, 3 *International Journal of Offender Therapy and Comparative Criminology*, 217.

2 The American Correctional Association has stated, 'No law procedure or system of correction should deprive any offender of the hope and the possibility of his ultimate return to full responsible membership in society'. No.19, *Declaration of Principles*, Revised 1960.

3 One prisoner in Cohen and Taylor, *op. cit.*, upon reflecting upon the future is quoted as remarking that, 'If I really thought that I had to do another seventeen years, I'd do myself in', *op. cit.*, p.92.

4 *op. cit.*, p.90.

that 'what appears to be totally unacceptable is the idea that one's life is experienced in prison. One may be serving life but one is not serving "my life"'.[5] There must be hope, and deterioration they write, is the great fear of the men. Adjustment to prison was possible but at what price. 'These men felt that all around them were examples of people who had turned into cabbages.'[6] It may be no wonder that most of the very longest serving prisoners end up in mental hospitals. If they were not abnormal upon entry, deterioration may make them so. Cohen and Taylor refer to such persons as the legendary birdman of Alcatraz and Nathan Leopold in the United States who served 40 to 50 years without obvious deterioration[7] but much more common is the long termer who retreats and for whom life is darkness and make-believe; 'the terrible fear is that one may be overtaken by resignation, by a desire for death'.[8] In countries where some form of conditional release is not authorised by law prisoners are said to show signs of degeneration or complete apathy after 10 to 15 years due to the fact that the date of pardon can never be foreseen.[9]

The paradox is that in the absence of capital punishment, segregation of prisoners for very long periods has been the only alternative devised but that should not mean that it is the ultimate solution or that means to make such segregation bearable should not be devised. It is important that the purposes of imprisonment be constantly scrutinised: are they detained for punitive reasons, for rehabilitation or for the protection of society? Do these elements change over time for the one sentence and do each imply a different regime for prisoners? Are those to be 'punished' and then released to have a harsher time than those who are just 'restrained'? The answers to these questions can have vast ramifications for the penal system.[10]

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5 *ibid.*, p.93.

6 *ibid.*, p.105.

7 *ibid.*, p.109.

8 *ibid.*, p.111

9 See, *Death Penalty in European Countries, op. cit.*, p.36.

10 These dilemmas in penal reform have been the subject of a recent editorial in the periodical *Justice of the Peace* (1975) 139, p.101. The editorial notes a report of an apparent decline in the health of a prisoner imprisoned for 30 years for his part in a gangland killing. It is reported that he has fallen into a deep depression and simply sits and stares into space for long periods of time. He is being nursed by his twin brother who is serving a similar sentence. The editorial goes on to say, 'The dilemma in prescribing the penal programme for criminals of this dangerous class is excruciating. Deterrence for ruthless killing demands a harsh sentence, and public safety a tight custodial control. What possible reform a sentence of 30 years without remission can effect in a man is highly debatable. It must inevitably cause a drastic change in his personality. But is it proper that a man should be completely broken psychologically in the interests of deterrence? Is it humane to reduce a man to a cabbage in order to deliver the rest of us from temptation? If a criminal cannot in the last psychological analysis help himself, how

far may the State go in subjecting him to pains and penalties to help others?

If an indeterminable sentence is considered necessary for deterrent purposes some much more constructive arrangements must clearly be made for the mental health of the prisoners so confined.'

PROVISIONS FOR RELEASE

It remains now to examine the legislative and administrative provisions relating to the review of life sentence prisoners in custody and the means whereby they are released. However, prior to this a short overview of procedures existing in various other jurisdictions will be made to place the Australian procedures in some perspective. In Europe release procedures vary depending on whether the country does or does not recognise conditional release for life sentence prisoners.[1]

In the latter cases release is usually only possible by an act of clemency, either remitting the remainder of the term or transforming the life sentence to a fixed term. In Italy it is by an act of clemency by the President. In Germany this is also the case but this will not usually occur until after 15 to 20 years. In Denmark it usually takes a form of pardon by the King, usually after 15 to 16 years, but with a probationary period of 2 to 5 years. In the Netherlands sentence is commuted by an act of clemency to a fixed term and conditional release is possible after two-thirds of the term has been served, or a minimum of 9 years. Likewise in Sweden where conversion to a life sentence may occur after 9 years and the effect is a commutation to 15 years. Release is possible after two-thirds of this sentence is served and is compulsory after five-sixths of the term, or 12 years.

In the countries which authorise conditional release an act of clemency is still available to authorise release prior to the minimum term.

In Norway release is possible after 12 years and in Switzerland after 15 years. Austria allows release after 20 years if the prisoner's conduct has been good, it being the judicial measure exercised by the court of first instance responsible for the sentence. In Belgium a prisoner may expect release after 10 years or 14 years for a recidivist, or an act of clemency may commute a life sentence to a fixed term and conditional

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1 For detailed discussion see *The Death Penalty in European Countries*, *op. cit.*, p.33 ff., which though now perhaps a little out of date is the most recent comprehensive information readily available.

release is then possible when one-third of this has been served or two-thirds for the recidivist. The releasing authorities are usually the Minister for Justice and Board of Commissioners or a Parole Board.[2]

In the United States there is considerable variability in release procedures. In eight States a lifer can be granted parole at any time after commencement of sentence. In others minima range from a low of 6 months to 5 years, 7 years and 25 years, less credit for good behaviour.[3] In quite a number of States the Governor, acting with the consent of the Executive Council, has power to grant a pardon or commutation.

In Massachusetts, before granting parole to a lifer the Parole Board must notify the Attorney-General, the District Attorney and the Chief of Police of the municipality where the crime occurred. These officials may attend the hearing and render their opinions or submit them in writing but the final decision rests with the Board.[4]

In England the release of life sentence prisoners has been described as follows:

> 'Each case is carefully considered at an early stage and the date is fixed for review, normally after four years, though in appropriate cases a review may be held earlier. Reports are called for from the prison, including reports by the Governor, the Assistant Governor, the Medical Officer and the Chaplain, and in some cases where there is an element of mental instability there will also be further psychiatric reports. This review at four years is carried out by the Home Office, its main purpose being to decide whether exceptionally the local review committee should be asked to review the case before the prisoner has served 7 years ... The practice has been to seek the views of the local review committee after an offender has served 7 years, whether or not it appears likely that a provisional release date can reasonably be fixed. The reports from the prison and the local review committee's recommendation are then considered in the Home Office and, if it is thought that there is a possibility of a provisional release date being fixed, the views of the Lord Chief Justice and the trial judge, if he is available, are obtained. All cases, whether a release date is proposed or not, are then considered by the Parole Board. The Board either recommend a provisional release date (usually 12 months ahead) or, if release is not recommended, the time of the next review.'[5]

Life sentence prisoners in England are released on licence, which remains for the rest of their life.

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2 See *Capital Punishment Developments, op. cit.*, p.32.

3 For a complete State by State analysis as at 1969 see Powers, *op. cit.*,

4 Powers, *op. cit.*, p.32. In the case in Victoria discussed above, p.47, the Police Department would probably welcome such an opportunity to formally voice their opinion.

5 Criminal Law Revision Committee, *op. cit.*, p.7.

AUSTRALIA

GENERAL

Although it may be the expressed intention of the legislature that a life sentence should be in practice what its title imports, this study has shown that this is generally not the case and that provision for release must be an integral part of the sentencing/correctional system.

Accepting that release is a normal feature, it is submitted that one of the main dangers attaching to the life sentence is that of prisoners remaining in custody beyond the period strictly necessary to fulfil the aims of the sentence, be they retributive, preventative, rehabilitative or whatever. The danger of indeterminate prisoners becoming 'lost' in the correctional system in the metaphorical sense cannot be underestimated, for they have no presumptive right to release as have fixed-term sentence prisoners and consideration of their cases can be deferred indefinitely if there is no clamour for their release, either within or without the prison. It is for this reason that for life sentence, and in fact all indeterminately held persons, there should be machinery for 'the automatic, regular and reasonably frequent review of individual cases'.[6]

It is in the light of this policy that the review and release procedures in each Australian jurisdiction should be evaluated.

New South Wales

Power to release in New South Wales rests in the Governor under the ancient head of 'tickets of leave'.[7] The section provides that the Governor may grant to any offender a written licence to be at large during the unexpired portion of his sentence, subject to such conditions endorsed on the licence as the Governor shall prescribe.[8]

Such a licence may be revoked by the Governor at his discretion, but must be revoked by a Justice on proof before him in a summary way that the

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6 Mitchell Committee, *op. cit.*, p.96. A United Nations committee of experts wrote in the same vein 'there should be periodic review of the cases of all such prisoners [that is life sentence prisoners] after they have served whatever is regarded in each country as the necessary minimum penalty for their particular crime'.

7 *Crimes Act*, 1900-1974 (N.S.W.), s. 463.

8 *Crimes Act*, 1900-1974 (N.S.W.), s. 463. Note also *Criminal Appeal Act*, 1912, s. 27, which states that in granting a licence under section 463 the Governor may upon the report of a judge and the recommendation of the Minister for Justice extend the prisoner's sentence and grant a licence for the unexpired portion of such extended sentence. While this applies to fixed term penalties only, its effect generally is unclear.

licensee has been guilty of a breach of any condition of the licence.[9] The person may then be returned to custody to serve the remainder of his sentence. A licensee suspected of breach of a condition may be arrested on such suspicion and may be brought before some Justice to be dealt with summarily.[10]

In New South Wales the Parole Board has no power to release life sentence prisoners[11] and its function in practice is to provide the Minister with reports under Section 7 of the Parole of Prisoners Act, which states that, 'The Board shall report to the Minister upon the release of any prisoner in any case where the Minister has referred such matter to the Parole Board'.

A prisoner imprisoned for life or one detained during the Governor's pleasure is not entitled to remission.[12] The Royal Prerogative of Mercy is preserved by Section 9[13] of the *Parole of Prisoners Act*, 1966-1970 (N.S.W.) and under Section 462 Crimes Act the Governor may grant at any time to an offender under sentence a remission of the whole or any portion of such sentence on condition of him entering into a recognisance for his good behaviour.

In 1967-1968 an administrative committee called the Life Sentence Committee was formed to review the progress of life sentence prisoners, but the Committee was not formed into its present composition and fully functioning until 1972-1973. The Committee is now composed of the Deputy Commissioner, the Assistant Commissioner (Administration), a member of the Probation and Parole Service (a division of the Department of Corrective Services), a criminologist and a psychiatrist.

The functions of the Committee are to assess the suitability of a person to be moved from a maximum security gaol to one of lesser security or recommending to the work release situation. The aim is to review cases when they have been in prison approximately 18 months to 2 years and then at annual intervals, though there is no statutory duty to do so. However, because of the immense backlog of cases not all cases are yet so reviewed. The Committee is advisory only and has no power to order release. It may send a report to the Minister in order that he might put it to the Parole Board for their opinion, but their power also is solely recommendatory.

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9 *Crimes Act*, 1900-1974 (N.S.W.), s. 463. In comparison with jurisdictions where revocation can be almost without notice, this provision has the advantage of affording the licensee an opportunity to contest the allegations against him.

10 *Crimes Act*, 1900-1974 (N.S.W.), s. 463(3).

11 Or persons held under *Mental Health Act*, 1958 (N.S.W.), s. 23(3), that is persons found not guilty on the ground of insanity or habitual criminals: see *Parole of Prisoners Act*, 1966-1970 (N.S.W), s. 2(2)(c), (d) and (a).

12 Regulation 112 of the Regulations under the Prisons Act.

13 Moroney states that life sentence prisoners are released under the Royal Prerogative, under this section. *op. cit.*, p.81.

The interesting feature here is the aim of having regular reviews from the start of a life sentence and not just when release is considered. The Committee is a prison programme planning committee as well as a review body and this is very important in regard to indeterminate sentences. There is a need for some person to make contact with a prisoner early in the sentence for a number of reasons; to help in the initial adjustment to imprisonment, to help maintain contacts with family and others and to help the prisoner work through his feelings and attitudes to the offence and eventually to equip himself to cope with release.

This last point is of some importance for there is a tendency (not confined to prisoners) to rationalise their situation and for this to continue over the years until the view of the crime they have after, for example, 10 years may bear little resemblance to the reality. The facts of the case may be rehearsed a thousand times until they can be lived with and perhaps a great measure of self-deception is necessary to endure indeterminate imprisonment.

These reasons form a compelling case for an annual review from the start of the sentence, not necessarily for the purpose of recommending for release but to devise a programme and to monitor progress. It is realised that there are difficulties in terms of resources and personnel to implement such a policy but this is a matter of detail rather than policy. Once the issue is recognised as important, the resources can be found.

Another objection to annual reviews is that hopes may be raised in the prisoner's mind which may be dashed when his case is reviewed and the result negative in terms of release. However, if it is made plain that such reviews are more in the nature of progress reports such an objection loses its validity and in practice the reviews can be beneficial in giving the prisoner something to aim for, some landmark in the wilderness of the indeterminate sentence.[14]

Victoria

The consequential amendments to the Victorian *Crimes Act*, 1958 following the abolition of capital punishment have, intentionally or unwittingly, left a situation where there are no provisions at all for the review of life sentence prisoners sentenced after the Act. This is perhaps not surprising as many of those in Parliament were of the view that persons sentenced to life would never be released. The Attorney-General however has stated that he will discuss with Cabinet 'a system of periodic reviews of sentences for people convicted of a capital offence'.[15]

It would seem that for those sentenced before the Act the legislative provisions remain in force. Release of persons whose death sentences were commuted to life, with or without the benefit of regulations relating to remission takes the form of release by special authority of the

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14 The authors are indebted to Mrs J. Melville of the Department of Corrective Services for her comments and advice on this subject.

15 *The Australian*, 29 May 1975.

Governor-in-Council acting with or without the recommendation of the Parole Board[16], the Parole Board having no power to order release of persons convicted of capital offences.[17]

Release of a prisoner under Section 500 can be either:

(a) on condition of his entering into a recognisance[18] with or without sureties[19], to be of good behaviour[20] to be under the supervision of a probation officer[21] and others; or

(b) on parole pursuant to Division 4 of Part VII of the *Social Welfare Act*, 1970-1975 (Vic.).[22] A life sentence parolee remains on parole for the rest of his life.[23]

With regard to those whose sentences were commuted prior to the Act, the adult Parole Board must, whenever so required in writing, furnish to the Minister a report and recommendation in regard to every prisoner for the time being undergoing a sentence commuted pursuant to Section 496 of the *Crimes Act*, 1958 whether with or without the benefit of the rules and regulations relating to remission.[24] With the repeal of Section 496 of the Crimes Act there are no longer any 'commuted' sentences and therefore the Parole Board is under no obligation to furnish any report whatsoever to the Minister, either on his request or regularly. The Parole Board will therefore cease to have any function with relation to life sentence prisoners unless the present situation is altered, and this is most unsatisfactory. As was stated above, an annual review[25] is necessary and

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16 *Crimes Act*, 1958 as amended (Vic.), s. 500. In the period July 1957 to June 1970, 15 persons were released under Section 500(b) without reference to the Parole Board. See Victoria, Parole Board, *Annual Report*, (1970), table 6, p.8.

17 Or those found unfit to plead or not guilty on the ground of insanity.

18 *Crimes Act*, 1958 as amended (Vic.), s. 500(a).

19 *Crimes Act*, 1958 as amended (Vic.), s. 501(1)(a).

20 *Crimes Act*, 1958 as amended (Vic.), s. 501(1)(b).

21 *Crimes Act*, 1958 as amended (Vic.), s. 501(1)(c)(i).

22 *Crimes Act*, 1958 as amended (Vic.), s. 500(b).

23 *Social Welfare Act*, 1970-1975 (Vic.), s. 195(3).

24 *Social Welfare Act*, 1970-1975 (Vic.), s. 188(3)(b), cf., Section 188(3)(a) *Social Welfare Act* which requires a report and recommendation once in every year in regard to persons found unfit to plead not guilty on the ground of insanity or who were under 18 and had their sentence commuted prior to the Act.

25 cf., Victorian Law Reform Commissioner's recommendation that the Parole Board submit a report and recommendation to the Minister every second year after a continuous period of detention of more than 10 years, or whenever required in writing by the Minister. For the reasons outlined above it is felt that an annual report and recommendation is to be preferred. *op. cit.*, p.22.

important and in Victoria the Parole Board would seem to be the most appropriate body to have this responsibility unless a committee along the lines of the New South Wales Committee were established to carry out this function.

A person released on parole pursuant to Section 500(b) of the Crimes Act may be returned to custody at any time during the period of supervision.[26] Where this occurs, a report must be furnished to the Minister by the Parole Board within one month, setting out the reasons for the order.[27]

Those prisoners whose sentence was commuted to a term of years with a specified minimum are released by the Parole Board, without the intervention of the Governor-in-Council following the normal effluxion of time.[28]

However, because of the extremely long sentences that were given by the Governor-in-Council it may be necessary for another method of release to be used and '[s]ince the parole legislation does not in any way abrogate the prerogative of mercy, it can be expected that the directors of penal establishments in Victoria ... would refer these cases for executive clemency after completion of a reasonable term of imprisonment'.[29]

Under the regulations made pursuant to the Social Welfare Act a commutation to life with the benefit of regulations relating to remission was deemed to be for 20 years[30] while one to life without the benefit of regulations was deemed to be for life.[31]

Those within the former category, those whose commutation was for 'life within the meaning of the Gaols Regulations 1931'[32] and those who have a fixed term with or without a minimum are entitled to remission 'not exceeding 15 days for each complete calendar month of the sentence actually served'.[33] Remission is calculated on both the full term and the minimum term.

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26 *Crimes Act*, 1958 as amended (Vic.), s. 499(b).

27 *Social Welfare Act*, 1970 (Vic.), s. 188(3)(c). Whether the Parole Board will have this duty with regard to post-Act lifers is unclear. It is assumed that such persons will be released under Section 500 of the Crimes Act.

28 *Social Welfare Act*, 1970 (Vic.), s. 195(1).

29 Rinaldi, *op. cit.*, p.228. Section 500 of the Crimes Act provides that the Governor may order the release of a prisoner notwithstanding that his minimum term has not expired.

30 Regulation 99, *Social Welfare Regulations* 1974.

31 Regulation 100.

32 This was a scale of time to be served wherein the time served was to be calculated on an actuarial scale against the age at conviction.

33 Regulation 97D.

Queensland

The Governor-in-Council may, upon the recommendation of the Parole Board, release on parole a life sentence prisoner and the provisions of the Act apply with all necessary adaptations.[34]

A person so released on parole is on parole for life, but is required to be under the supervision of a parole officer for the first five years of his parole[35] unless the Governor-in-Council upon the recommendation of the Parole Board at any time and from time to time waives this requirement.[36] He must comply with such requirements as the Governor-in-Council, upon the recommendation of the Board, considers necessary for securing the good conduct of the prisoner and as are specified in the Instrument of Release.[37] There is no duty upon the Parole Board to report periodically upon life sentence prisoners. However, there is the general provision that the Parole Board must, whenever so required, in writing furnish to the Minister a report upon any special matter relating to the operation of the Act or to the exercise of any power or function of the Board.[38]

The Royal Prerogative of Mercy is unaffected by the Offenders Probation and Parole Act.[39]

There is no mention in the regulations under the Prisons Act relating to remission of sentence for life sentence prisoners and as there is no fixed term upon which remission can be calculated, it is assumed that such regulations are inapplicable to life sentence prisoners.

South Australia

In South Australia, contrary to the situation in every other jurisdiction, the power to release life sentence prisoners is vested in the Parole Board[40], which has the power to order the release of a prisoner if, having regard to the interests of the public and the interests of the prisoner, it is satisfied that it is proper to do so.

The Royal Prerogative of Mercy however is still preserved by the Prisons Act.[41] The Parole Board has a duty to report to the Minister[42] whenever so required and in any case at least once in every year in respect of

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34 *Offenders Probation and Parole Act*, 1959-1974 (Qld.), s. 33(1).

35 See Parole Board, *Annual Report*, 1966.

36 *Offenders Probation and Parole Act*, 1959-1974 (Qld.), s. 33(2)(a).

37 *Offenders Probation and Parole Act*, 1959-1974 (Qld.), s. 33(2)(b).

38 *Offenders Probation and Parole Act*, 1959-1974 (Qld.), s. 30(2).

39 *Offenders Probation and Parole Act*, 1959-1974 (Qld.), s. 37(1).

40 *Prisons Act*, 1936-1974 (S.A.), s. 42k(1).

41 *Prisons Act*, 1936-1974 (S.A.), s. 42r.

42 There is no duty to make a recommendation.

every prisoner serving a life sentence or one of indeterminate duration.[43]

A person released upon parole remains on parole for the remainder of the term of his sentence. A life sentence parolee would be liable to the same terms and conditions regarding cancellation and variation of parole orders as other parolees.

Under the regulations made pursuant to the Prisons Act there is no remission of sentence for life sentence prisoners.[44]

Western Australia

A person undergoing a sentence of life imprisonment, with or without hard labour, may be released on parole by order of the Governor on such terms and conditions and for such parole period not exceeding five years as the Governor thinks fit and the provisions of the Offenders Probation and Parole Act with such necessary adaptations apply to such a prisoner.[45]

A person so released from prison under this section whose parole has been cancelled may be re-paroled by the Parole Board without reference to the Governor-in-Council.[46]

The court is not able to fix a minimum term of imprisonment in respect of a person sentenced to life imprisonment[47], nor did the Parole Board have power during the transitional period when the Act came into operation to fix a minimum term for a life sentence prisoner, whether one serving a life sentence imposed by the court or one commuted under Section 679 of the *Criminal Code*.[48]

The powers and duties of the Parole Board are as follows:

1. It must, whenever requested in writing by the Minister, furnish a written report and recommendation with regard to every prisoner undergoing a life sentence, including a life sentence commuted pursuant to Section 679 of the *Criminal Code*, from a sentence of death.[49]
2. Whether requested or not, it must furnish a written report with or without a recommendation with regard to:
   (a) a person undergoing a commuted life sentence as soon as practicable after ten years from date of commutation and thereafter each five years.[50]

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43 *Prisons Act*, 1936-1974 (S.A.), s. 42g(2).

44 Regulation 19(B)(a).

45 *Offenders Probation and Parole Act*, 1963-1971 (W.A.), s. 42(1).

46 *Offenders Probation and Parole Act*, 1963-1971 (W.A.), s. 42(3).

47 *Offenders Probation and Parole Act*, 1963-1971 (W.A.), s. 37(2)(b)(iii).

48 *Offenders Probation and Parole Act*, 1963-1971 (W.A.), s. 47(1)(a).

49 *Offenders Probation and Parole Act*, 1963-1971 (W.A.), s. 34(2)(b)(i).

50 *Offenders Probation and Parole Act*, 1963-1971 (W.A.), s. 34(2)(ba)(i).

(b) a person undergoing a non-commuted life sentence as soon as practicable after five years from the date of sentence and thereafter each five years.[51]

With regard to this legislative stipulation of minimum periods after which review must take place, it is submitted that the distinction between commuted and imposed life sentences is an invalid one and that both classes of prisoners should be treated equally.

In accordance with the principle discussed above, it would be preferable for an annual review and recommendation to be mandatory from the beginning of the sentence and not after the minimum period, whether five or ten years, as is presently the case. However, it is not necessary for the Parole Board to wait five years after a review before submitting another report, as the Parole Board may suggest to the Minister that he ask the Parole Board for a report and recommendation. It would be preferable for the Parole Board to have power to make a report and recommendation at any time, and under proposed amendments to the Act this will be possible.

Section 705 of the *Criminal Code* gives power to the Governor to extend the Royal Prerogative of Mercy to an offender under sentence of imprisonment on condition of the offender entering into a recognisance or submitting to release on parole under the Offenders Probation and Parole Act for a period not exceeding five years. The provisions of the Offenders Probation and Parole Act apply to every person released on parole pursuant to Section 705, *Criminal Code*, as if he were released from prison on parole under that Act.[52]

It is specifically stated that nothing in the Offenders Probation and Parole Act in any way affects Her Majesty's Royal Prerogative of Mercy.[53]

Remission is only applicable to those prisoners sentenced to a finite term of imprisonment.[54]

Tasmania

The releasing authority in Tasmania is the State Governor, who may by order, on the recommendation of the Controller of Prisons, grant to any prisoner a licence to be at large during such portion of his term of imprisonment and upon such conditions as the Governor thinks fit.[55]

The Governor may also, on the recommendation of the Controller of Prisons, revoke or alter such licence[56] at any time before the expiration of the

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51 *Offenders Probation and Parole Act*, 1963-1971 (W.A.), s. 34(2)(ba)(ii).

52 This is reiterated by the *Offenders Probation and Parole Act*, 1963-1971 (W.A.), s. 34(B).

53 *Offenders Probation and Parole Act*, 1963-1971 (W.A.), s. 5(3).

54 Regulation 72(1), *Prison Regulations* 1974.

55 *Prisons Act* 1908 (Tas.), s. 6(1).

56 *Prisons Act* 1908 (Tas.), s. 6(3).

sentence.[57] The Governor may change the conditions of the licence as it is set out in Form 1 of the Schedule of the Act.

Under Section 5 of the Prisons Act the Governor may grant at any time and to any prisoner remission of the whole or part of his sentence upon recognisance.[58]

There is no specific mention for remission of life sentence prisoners in the regulations under the Prisons Act.

Commonwealth

Life sentence prisoners under Federal law are treated identically with other prisoners.

Where a person is serving a term of imprisonment for an offence against the law of the Commonwealth, the Governor-General[59] may, acting on the advice of the Attorney-General, if he thinks it proper to do so, grant a licence to be at large.[60]

Such licence is subject to such conditions, if any, as are specified in the licence[61] and may, at any time before the expiration of the sentence[62] have a condition varied, revoked or added[63] or be revoked altogether.[64]

Notice must be given to the licensee before any condition is varied or added[65] and where there is revocation, arrest may be without warrant.[66]

Where the licensee has failed to comply with a condition of the licence, or there are reasonable grounds for suspecting that he has, he may be arrested without warrant[67] and must be taken, as soon as practicable before a magistrate, who, if he is satisfied that there has been failure to comply with a condition, must cancel the licence.[68]

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57 *Prisons Act* 1908 (Tas.), s. 7.

58 Section 49 of the *Prisons Act* 1868 also grants power to the Governor to pardon prisoners, though the operation of this Act in relation to the *Prisons Act* 1908 is unclear.

59 *Crimes Act* 1914-1973 (Cth.), s. 19A(14).

60 *Crimes Act* 1914-1973 (Cth.), s. 19A(2)(a).

61 *Crimes Act* 1914-1973 (Cth.), s. 19A(4).

62 The expiration of sentence is calculated without remission. See Section 19A(1) second (a). For a life sentence prisoner this period may be for the rest of his life.

63 *Crimes Act* 1914-1973 (Cth.), s. 19A(5)(a).

64 *Crimes Act* 1914-1973 (Cth.), s. 19A(5)(b).

65 *Crimes Act* 1914-1973 (Cth.), s. 19A(6).

66 *Crimes Act* 1914-1973 (Cth.), s. 19A(7).

67 *Crimes Act* 1914-1973 (Cth.), s. 19A(7)(b).

68 *Crimes Act* 1914-1973 (Cth.), s. 19A(8).

In such case a right of appeal exists to the Supreme Court of the State or Territory, and that Court may either confirm the cancellation or order that the cancellation cease to have effect.[69] An appeal is by way of re-hearing, but the Court may have regard to any evidence given before the magistrate.[70]

Australian Capital Territory

A court does not have the power to fix a minimum term of imprisonment in respect of a life sentence prisoner.[71]

In the Australian Capital Territory the releasing authority is the Governor-General. Section 16(b) of the Parole and Prisoners Ordinance preserves the application of Section 19A, Crimes Act (Cth.) as applied to the Australian Capital Territory by Section 7, Interpretation Ordinance.[72]

The Ordinance also does not affect the exercise of the Royal Prerogative of Mercy[73] nor the operation of any Act or other law in force in the Territory relating to the release of offenders.[74]

Northern Territory

The Northern Territory legislation is in the same terms as the Australian Capital Territory Ordinance[75], not giving the court power to fix a minimum term in respect of life sentence prisoners.

Section 16(b) of the Parole of Prisoners Ordinance, preserves the application of Section 19A, Crimes Act (Cth.) as applied by Section 4A of the Interpretation Ordinance. Under Section 385A(b), *Criminal Law Consolidation Act and Ordinance* 1876-1974 (N.T.), the Governor-General may remit, with or without conditions, any sentence of imprisonment.

The Australian Attorney-General, the Honourable Kep Enderby, has strongly criticised[76] the present system whereby the Attorney-General himself has the power of release with regard to federal prisoners, Australian Capital Territory and Northern Territory prisoners, aided only by advice from departmental officers or advice he may receive informally from other sources.

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69 *Crimes Act* 1914-1973 (Cth.), s. 19A(12)(a) and (b).

70 *Crimes Act* 1914-1973 (Cth.), s. 19A(13).

71 *Parole of Prisoners Ordinance* 1971 (A.C.T.), s. 4(2)(b).

72 See above for provisions of *Crimes Act* 1914-1973 (Cth.), s. 19A.

73 *Parole of Prisoners Ordinance* 1971 (A.C.T.), s. 16(a).

74 Section 16(c).

75 See *Parole of Prisoners Ordinance* 1974 (N.T.), s. 4(2)(b).

76 See for example *The National Times*, 9-14 June 1975.

Life sentence prisoners under the Attorney-General's control may be held in a number of places. Those from the Northern Territory are held in South Australia, those from the Australian Capital Territory in New South Wales and those sentenced under Federal law may be held in the State where the offence occurred or, if committed overseas, perhaps the State of domicile of the prisoner.

As was seen above, a considerable variation in release practice exists between the States, ranging between approximately 9 and 17 years, and this has created a dilemma in regard to the treatment of Commonwealth prisoners. If a 'federal' release policy emerges for life sentence prisoners, then a disparity is created between Federal and State prisoners, which may or may not favour the federal prisoner, depending on where he is imprisoned.

If, however, a person sentenced against a law of the Commonwealth and held in a State institution is to be treated in the same way as if he were sentenced for an offence against the law of the State in which the trial takes place[77] then a disparity will occur between federal prisoners sentenced for the same offence but detained in different jurisdictions. This dilemma, under present conditions, seems insoluble.

The Attorney-General proposes to establish a Federal Parole Board which will travel on circuit to jurisdictions where prisoners under his jurisdiction are held. It is proposed that prisoners have a right to legal representation before a parole board hearing, which would be chaired by the judge or magistrate who sentenced the prisoner.

The reports do not make it clear whether the proposed Parole Board would have responsibility for the release of life sentence prisoners. While it is beyond the scope of this study to examine in detail the nature of the parole system, some matters emerge from this study which must be commented upon.

It is clear from the foregoing analysis of the law in Australian jurisdictions that governments have been reluctant to relinquish the power of release of persons undergoing life sentences, or most Governor's pleasure detentions, to the Parole Boards which they have established. The Boards remain, in this area, primarily advisory bodies, albeit that their advice may carry considerable weight.

The government of the day therefore has an important role, through the Royal Prerogative of Mercy, both at commencement of the judicial process by the exercise of the power in commutation and at the conclusion, by the power to remit sentence or release on conditions. It is submitted that this situation is unsatisfactory for the reason, outlined in the earlier discussion of the Royal Prerogative, that it vests important powers over the liberty of the individual in a body in which the safeguards are inadequate to protect that liberty. It would seem that there are no adequate reasons why there should be a differentiation between life

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77 Which is the general policy of the Commonwealth Prisoners Act in relation to minimum terms.

sentence prisoners and the other prisoners and why the Parole Boards, where they exist, should not have the functions and powers now carried out by the Executive. It is conceded that there are many inadequacies in the Parole Boards as they now exist, but these could easily be remedied by providing such things as the right of audience and representation at parole granting or revocation hearings, annual reviews of life sentence prisoners and more qualified staff to aid the Boards in their functions. The composition of Parole Boards may also be altered in some cases by ensuring that only persons qualified or experienced in the criminal justice field can sit on the Board.

The present division of duties between the Executive and the Parole Boards is an unsatisfactory arrangement which seems to have developed on an *ad hoc* basis and which has proved to be detrimental to many prisoners who have been lost in the void between the two bodies.

SUMMARY OF CONCLUSIONS AND IMPLICATIONS

1. There is a diverse array of offences for which the life sentence may be imposed, though in practice the life sentence is imposed for only a few. The sentence is mandatory for a very small number of offences and in one State the mandatory status of the sentence is in doubt. The existence of obsolete penalties tends to bring the law into disrepute and it is recommended that the law should be cleared of anachronistic enactments so that penalties accord with current correctional practice.

2. The present distribution of sentencing powers whereby the Executive may, by the exercise of the Royal Prerogative of Mercy, assume direct sentencing powers, is unsatisfactory, for it has meant the retention of important powers over the liberty of the individual by a body which does not have the traditional safeguards associated with the primary sentencing body, the courts. It is recommended that the legislature should be responsible only for setting the parameters of sentencing powers, leaving it to the courts to impose sentence within these limits. The use of the Prerogative of Mercy should be restricted to exceptional cases where a defect in the law itself has led to an unconscionable situation.

3. The life sentence is a misnomer in that most persons so sentenced are released at some time. It is recommended that the form of sentence be altered to bring it in conformity with practice in the manner proposed by the Criminal Law Revision Committee in England, namely, that a person be sentenced 'to imprisonment, and to remain liable to imprisonment for the rest of [his] life'.

4. The life sentence, because it has the advantages of

   (a) flexibility in allowing release at any time;
   (b) the deterrent value of being theoretically the heaviest sentence available;
   (c) giving the authorities, in most jurisdictions, the power to recall at any time;

is the most suitable form of sentence for the most serious offences. However, because of the dangers inherent in the indeterminate sentence, many safeguards must be provided.

5. The mandatory life sentence has limitations in that it unduly constrains the sentencing discretion of the judge, particularly in those cases where the life sentence may not be the appropriate penalty, albeit the legally correct penalty. It is recommended that this problem can be alleviated by either changes in the substantive law or by a change in the dispositions available to the judge.

6. The imposition of a minimum term is not a suitable adjunct to an indeterminate sentence such as the life sentence.

7. The relationship between the life sentence and the long, determinate sentence has been too little explored by the sentencing authorities, resulting in a lack of enunciated principles relating to the reason for the use of the long determinate sentence where the life sentence has been available.

8. The evidence indicates that the use of the disposition of an indeterminate sentence following a verdict of 'not guilty on the ground of insanity' has been influenced by factors extraneous to the legal system. It is expected that with an expansion of knowledge regarding the subsequent fate of those sentenced to life imprisonment and those found not guilty on the ground of insanity, decisions as to the most appropriate disposition will be made on a sounder basis.

9. In Victoria some prisoners sentenced between 1961 and 1975 may be disadvantaged in comparison with those sentenced before and after that period because the length of their expected detention in comparison to those previously served is disproportionately high.

10. There is a considerable disparity in Australia regarding the length of time served by life sentence prisoners, the maximum current average being 17 years 6 months in New South Wales and the minimum being 9 years 8 months in South Australia. However, lengths of detention in the various jurisdictions have tended to fluctuate over the years.

11. In some jurisdictions there are persons who have been detained for extremely long periods, ranging up to 46 years, in most cases where there has been a history of mental illness. It is recommended that prisoners who are chronically mentally ill and who present no danger to the community should be released from prison and transferred to the appropriate social welfare authority.

12. There is some evidence to suggest that some prisoners sentenced to life imprisonment may suffer a diminution of life expectancy, particularly younger prisoners, and it is recommended that further research be carried out to determine the factors involved.

13. The incidence of suicide in prison among life sentence prisoners is higher than among the general population. It is recommended that

(a) there be more medical facilities to monitor the welfare of prisoners;
(b) there be careful observation of potential suicide risks and particularly of those who may be mentally ill but who have not been found not guilty on the ground of insanity.

14. Persons found not guilty on the ground of insanity are released after spending considerably less time in custody than life sentence prisoners.

15. There is a danger that persons who have been found unfit to stand trial may never have the opportunity to confront the charges against them. It is recommended that some procedure be adopted which will allow such persons to have their guilt or innocence determined and then to be dealt with by either the prison authorities or the mental health authorities. The present system where such persons are suspended in a classificatory limbo is unsatisfactory.

16. Female life sentence prisoners and females found not guilty on the ground of insanity are released after a shorter time in custody than their male counterparts.

17. Juvenile offenders, who have been held during the Governor's pleasure, have been released earlier than juveniles held in jurisdictions where juveniles are treated in the same manner as adult life sentence prisoners.

18. The disposition of 'Governor's pleasure' is an antiquated and amorphous concept and should be replaced with a disposition of a more readily understandable nature.

19. The incidence of recidivism among released murderers and life sentence prisoners is relatively low and there would seem little danger to the community in their release. Recidivism is similarly low for those released after being held indeterminately after a finding of not guilty on the ground of insanity.

20. Care must be taken to monitor the effects of long prison sentences on prisoners particularly with regard to the process of institutionalisation as well as mental and physical deterioration.

21. The procedures to review the progress of indeterminately held persons and the release procedures are a most important factor in minimising the dangers of the indeterminate sentence. In most jurisdictions such procedures are presently inadequate.

It is recommended:

(a) That the power to release be removed from the executive arm of government.

(b) That there be automatic, regular reviews, preferably annual, of the progress of indeterminately held persons.

(c) That there be a right of audience and representation in parole granting and revocation hearings.

22. There may be inequalities in length of time served by federal prisoners where those prisoners are held in different States and where release policies in those States differ.

APPENDICES

OFFENCES PUNISHABLE BY DEATH OR LIFE IMPRISONMENT

Section	*Offence*	
NEW SOUTH WALES		
Piracy Punishment Act, 1902		
4	Piracy accompanied by assault with intent to murder etc.	Death
Common Law Offence		
	Treason	Death
LIFE SENTENCE		
Crimes Act, 1900-1974		
12	Compassing etc., deposition of the Sovereign: overawing Parliament	
19	Murder	Mandatory
24	Manslaughter	
26	Conspiring to commit murder	
27	Acts done to the person with intent to murder	
28	Acts done to property with intent to murder	
29	Certain other attempts to murder	
30	Attempts to murder by other means	
32	Impeding endeavours to escape shipwreck	

Section	*Offence*	
New South Wales		
32A	Destruction of aircraft	
32C	Threats to destroy aircraft or other conveyances	(Mandatory where violence is used)
33	Wounding with intent to do bodily harm or resist arrest	
37	Attempts to choke etc., (garrotting)	
38	Using chloroform etc., to commit an offence	
46	Causing bodily injury by gunpowder etc.	
47	Using etc., explosive substance or corrosive fluid etc.	
51	Casting stone, etc., on a railway carriage	
63	Rape	
67	Carnally knowing girl under 10	
96	Robbery with wounding	
98	Robbery with arms etc., and wounding	
110	Breaking, entering and assaulting with intent to murder etc.	
196	Setting fire to dwelling etc., knowing person therein	
197	Setting fire to dwelling etc., person being therein or to a church	
203	Destroying or damaging a house etc., with gunpowder	
221	Setting fire to coal-mine	
225	Destroying sea or river bank or wall	
228	Injury to a public bridge etc.	
230	Certain acts etc., on railway with intent to obstruct etc.	
235	Setting fire to vessels, any person being therein	
236	Setting fire to vessels	
240	Exhibiting false signals etc.	

Section	*Offence*

New South Wales

241	Doing any act with intent to cause loss of vessel etc.
349	Accessory after the fact to murder
344A	Subject to this Act any person who attempts to commit any offence under this Act shall be liable to that penalty

VICTORIA

LIFE SENTENCE

Crimes Act, 1958 as amended

3	Murder Treason

QUEENSLAND

LIFE SENTENCE

Criminal Code

37	Treason	Mandatory
38	Concealment of treason	
39	Treasonable crimes	
41	Inciting to mutiny	
42	Assisting escape of prisoners of war	
47	Unlawful oaths to commit certain crimes	
64	Rioters remaining after proclamation ordering them to disperse	
65	Rioters demolishing buildings etc.	
81	Piracy	

Section	*Offence*	
Queensland		
82	Attempted piracy with personal violence	Mandatory
83	Aiding pirates	
124	Perjury (in order to secure conviction of other person for crime punishable with life imprisonment with hard labour)	
131	Conspiracy to bring false accusation	
141	Forcibly rescuing (certain) offenders	
150	Counterfeiting gold and silver coin (current coin only)	
151	Preparation for coining gold and silver coin (current coin only)	
152	Clipping	
156	Offence after previous convictions for s. 155 or 154 (uttering counterfeit coin)	
164	Stopping mails	
212	Defilement of girls under 12	
213	Householder permitting defilement of young girls on his premises (under 12 years)	
222	Incest by man	
305	Murder	Mandatory
306	Attempt to murder	
307	Accessory after the fact to murder	
310	Manslaughter	
311	Aiding suicide	
313	Killing unborn child	
315	Disabling in order to commit indictable offences	
316	Stupefying in order to commit indictable offences	
317	Acts intended to cause grievous bodily harm or prevent apprehension	

Section	*Offence*
Queensland	
318	Preventing escape from wreck
319	Intentionally endangering safety of persons travelling by railway
319A	Endangering safety of persons travelling by aircraft
348	Rape
398.I	Stealing wills
398.II	Stealing things sent by post
411	Robbery, armed or in company or wounds
412	Attempted robbery accompanied by wounding
417A	Taking control of aircraft (accompanied by actual violence by use or threat or in company or by fraud trick device or other means)
419	Burglary
461	Arson
465	Casting away ships
467	Obstructing and injuring railways
467A	Endangering the safe use of an aircraft
469.I	Destroying or damaging an inhabited house or a vessel or an aircraft with explosives
469.II	Destroying or damaging a sea bank, sea wall, navigation works or bridges
488.I	Forgery of public seals

Section	*Offence*	
SOUTH AUSTRALIA		
Criminal Law Consolidation Act, 1935-1974		
11	Murder	Death
207	Piracy and attempt to murder	Death
LIFE SENTENCE		
Criminal Law Consolidation Act, 1935-1974		
7	Treason felonies	
12	Conspiring or soliciting to commit murder	
13	Manslaughter	
18	Attempts to murder	
20	Impeding a person endeavouring to save himself from shipwreck	
21	Wounding etc., with intent to cause grievous bodily harm	
25	Choking or stupefying to commit crime	
32	Using explosives etc., with intent to do grievous bodily harm	
35	Throwing stones etc., at railway trains	
36	Acts done with intent to endanger persons on railways	
48	Rape	
50	Carnally knowing a girl under 12 years	
81	Attempts to procure abortion	
84	Arson	
88	Setting fire to crops of corn etc.	
91	Setting fire to a coal mine or timbering of any mine	
93	Damaging building with explosives	

Section	*Offence*
South Australia	
95	Injuries to properties by rioters
97	Destroying goods in process of manufacture, machinery etc.
105	Destroying sea bank, wall, dam, wharfs etc.
108	Poisoning water in rivers etc.
109	Injury to bridges etc.
110	Placing wood etc., on railways with intent to obstruct or overthrow any engine etc.
118	Setting fire to ships etc.
122	Exhibiting false signals etc., (ship loss, danger, destruction)
123	Removing or concealing buoys and other sea marks
158	Robbery with violence
159	Letters demanding money with menaces
161	Letter threatening to accuse of a crime with intent to extort
162	Accusing or threatening to accuse with intent to extort
165	Obtaining execution of documents by force
167	Sacrilege
168	Burglary
204	Personation in order to obtain property
205	Personating the owner of stock
206	Piracy
208	Robbery or other act of hostility at sea under colour of a foreign commission
209	Piracy by master or seaman of ship
210	Forcibly boarding a ship and throwing the goods overboard

Section	*Offence*	
South Australia		
211	Trading with pirates	
213	Forges or utters the public seal of the State	
214	Forges or utters deeds, wills, bills of exchange etc.	
215	Forges or utters transfers of stock etc.	
219	Forging bank notes (or utters)	
238	Rescuing murderers	
244	Rioters remaining after proclamation	
Aircraft Offences Act, 1970-1971		
11	Prejudicing safe operation of aircraft with intent to kill persons	
WESTERN AUSTRALIA		
Criminal Code		
37	Treason	Death
78	Piracy and assaults person on board ship with intent to kill - kills, wounds or endangers life	Death
79	Attempted piracy with personal violence	Death
282(a)	Wilful murder	Death
LIFE SENTENCE		
Criminal Code		
38	Concealment of treason	
39	Treasonable crimes	
41	Inciting to mutiny	

Section	*Offence*	
Western Australia		
42	Assisting escape of prisoners of war	
47	Unlawful oaths to commit capital offences	
78	Piracy	
80	Aiding pirates	
125	Perjury - to procure conviction of other person for crime punishable with death or hard labour for life	
134	Conspiracy to bring false accusation where a person is convicted liable to death or hard labour for life	
144	Forcibly rescuing capital offenders	
153	Counterfeiting gold and silver coins (if with respect to current coin)	
154	Preparation for coining gold and silver coin (if with respect to current coin)	
155	Clipping	
159	Offences after previous convictions (uttering counterfeit gold or silver coin)	
185	Defilement of girls under 13	
186	Householder permitting defilement of young girls on his premises if under 13 years	
197	Incest by man	
282(b)	Murder	Mandatory
283	Attempt to murder	
284	Accessory after the fact to murder	
287	Manslaughter	
288	Aiding suicide	
290	Killing unborn child	
292	Disabling in order to commit indictable offence	
293	Stupefying in order to commit indictable offence	

Section	*Offence*
Western Australia	
294	Acts intended to cause grievous bodily harm or prevent arrest
295	Preventing escape from wreck
296	Intentionally endangering safety of persons travelling by railway
296A	Intentionally endangering safety of persons travelling by aircraft
298	Causing explosion likely to endanger life
326	Rape
343	Child stealing
390B	Unauthorised use of an aircraft (uses or threatens violence - armed with weapon or instrument - or is in company)
393	Robbery (armed or in company)
394	Attempted robbery accompanied by wounding
398	Attempts at extortion by threats (where accusation is of serious offence)
401	Burglary
444	Arson
449	Casting away ships
451	Obstructing and injuring railways
451A	Endangering the safe use of an aircraft
453.I & II	Punishment in Special Cases Destroying or damaging an inhabited house, vessel or aircraft with explosives, or sea bank, sea wall, navigation works or bridges
454	Causing explosion likely to do serious injury to property
473(1)	Forgery (public seals)
511	Personation of owner of shares

Section	*Offence*	
Western Australia		
Prisons Act, 1903-1971		
57	Forcibly rescuing capital offenders	
TASMANIA		
LIFE SENTENCE		
Criminal Code Act 1924		
56	Treason	Mandatory
57	Accessories after fact to treason	
158	Murder	Mandatory
NORTHERN TERRITORY		
LIFE SENTENCE		
Criminal Law Consolidation Act and Ordinance 1876-1974		
5	Murder	Mandatory
15	Conspiring or soliciting to commit murder	
16	Manslaughter	
21	Administering poison or wounding with intent to murder	
22	Destroying or damaging a building with gunpowder with intent to murder	
23	Setting fire to or casting away a ship with intent to murder	
24	Attempting to administer poison or shooting or attempting to shoot or attempting to drown, etc., with intent to murder	

Section	*Offence*
Northern Territory	
25	By any other means attempting to commit murder
27	Impeding a person endeavouring to save himself from shipwreck
28	Shooting or attempting to shoot or wounding with intent to do grievous bodily harm
32	Attempting to choke etc., in order to commit any indictable offence
33	Using chloroform etc., to commit any indictable offence
40	Causing gunpowder to explode, or sending to any person an explosive substance or throwing corrosive fluid on a person with intent to do grievous bodily harm
43	Casting stone etc., at a railway carriage with intent to endanger the passengers
44	Placing wood etc., on a railway with intent to endanger the safety of persons travelling thereon
60	Rape
63	Carnally knowing girl under 12 years
71	Buggery
81	Setting fire to a church, chapel, etc.
82	Setting fire to a dwelling house - any person being therein
83	Setting fire to a house, tent, outhouse, etc.
84	Setting fire to any railway station
85	Setting fire to any public building
89	Destroying or damaging a house with gunpowder, any person being therein etc.
91	Rioters demolishing buildings
94	Destroying goods in process of manufacture, certain machinery etc.

Section	*Offences*
Northern Territory	
96	Setting fire to crops of corn etc.
97	Setting fire to stacks
103	Setting fire to a coal mine or timbering of any mine
107	Destroying sea bank, wall etc., dams, wharfs etc.
110	Poisoning water in rivers etc.
111	Injury to a bridge etc.
112	Placing wood etc., on railway with intent to obstruct or overthrow any engine etc.
120	Setting fire to ships etc.
121	Setting fire to ships to prejudice the owners or underwriters
125	Exhibiting false signals etc. (ships, vessels etc.)
126	Removing or concealing buoys and other sea marks
163	Robbery or assault by a person armed, or by two or more, or robbery and wounding
164	Letters demanding money by menace
166	Letters threatening to accuse of a crime with intent to extort
167	Accusing or threatening to accuse with intent to extort
169	Inducing person by violence or threats to execute deeds etc., with intent to defraud
171	Breaking and entering a church or chapel and committing any felony
172	Burglary
225	Personation in order to obtain property
226	Piracy
227	Piracy and attempt to murder
228	Robbery or other act of hostility at sea under colour of a foreign commission

Section	*Offence*
Northern Territory	
229	Piracy by master or seaman of ship
230	Forcibly boarding a ship and throwing the goods overboard
231	Trading with pirates
232	Forging the public seal
233	Forging deeds, bonds, wills, bills of exchange etc.
234	Forging transfer of stock
235	Personating the owner of certain stock and transferring or receiving or endeavouring to transfer or receive the dividends
240	Forging bank notes
265	Counterfeiting gold and silver coin
266	Colouring counterfeit coin or any pieces of metal with intent to make them pass as gold or silver coin; or colouring or altering genuine coin with intent to make it pass for a higher coin
269	Buying or selling etc., counterfeit gold or silver coin for lower value than its denomination
270	Importing counterfeit coin
274	Every second offence of uttering etc., after a previous conviction shall be a felony
285	Making mending or having possession of any coining tools
290	Rescuing a murderer
300	Rioters remaining after proclamation
301	Rioters opposing the making of proclamation

AUSTRALIAN CAPITAL TERRITORY

LIFE SENTENCE

Crimes Act 1900 of the State of New South Wales as amended in its application to the Australian Capital Territory

19	Murder
24	Manslaughter
26	Conspiring to commit murder
27	Acts done to the person with intent to murder
28	Acts done to property with the like intent (murder)
29	Certain other attempts to murder (poison, destructive thing, shoots at, drown, suffocate, strangle)
30	Attempting to murder by other means
32	Impeding endeavours to escape shipwreck
33	Wounding etc., with intent to do bodily harm or resist arrest
37	Attempts to choke etc., (garrotting)
38	Using chloroform etc., to commit an offence
46	Causing bodily injury by gunpowder
47	Using explosive substances or corrosive fluid with intent to burn, maim, disfigure, disable or do grievous bodily harm
50	Placing wood etc., on a railway
51	Casting stone etc., on a railway carriage
63	Rape
67	Carnally knowing girl under 10 years
79	Buggery and bestiality
96	Robbery with wounding (or intent to rob)
98	Robbery with arms and wounding
110	Breaking, entering and assaulting with intent to murder
184	Fraudulent personation

Section	*Offence*

Australian Capital Territory

197	Setting fire to a dwelling etc., a person being therein or to a church
203	Destroying or damaging a house etc., with gunpowder
221	Setting fire to coal-mine
225	Destroying sea or river banks or walls
228	Injury to a public bridge
230	Certain acts etc., on railway with intent to obstruct etc.
236	Setting fire to vessels
240	Exhibiting false signals etc., (vessel or boat)
241	Doing any act with intent to cause loss of vessel etc.
349	Accessories after the fact to murder

Piracy Punishment Act 1902

4	Piracy accompanied by assault with intent to murder etc.

COMMONWEALTH

LIFE SENTENCE

Crimes Act 1914-1973

24(1)	Treason
24(2)	Treason - knowing and failing to inform, or assists, receives or aids escape of offender who is guilty of treason
24AA(3)	Treachery
25(1)	Inciting mutiny
26	Assisting prisoners of war to escape

Section	*Offence*
Commonwealth	
Crimes (Hijacking of Aircraft) Act 1972-1973	
8(2)	Hijacking
Crimes (Aircraft) Act 1963-1973	
13	Destruction of aircraft with intent to kill
15	Prejudicing safe operation of aircraft with intent to kill persons
Geneva Conventions Act 1957-1966	
7	Punishment of grave breaches of conventions

There are a number of offences under various Acts relating to the defence forces for which a sentence of life imprisonment can be imposed. These were set out in a letter from the Secretary of the Department of Defence to the Senate Standing Committee on Constitutional and Legal Affairs dated 9 November 1971 and incorporated in the House of Representatives Hansard of 21 March 1972 at page 898. At the time of writing of the letter the offences which now carry the life sentence carried the death penalty.

1. Section 98 of the *Defence Act* 1903-1973 (Cth.) provides that no member of the Defence Forces may be sentenced to death by any court martial except for mutiny, desertion to the enemy or traitorously delivering up to the enemy any garrison, fortress, post, guard, or ship, vessel, or boat, or aircraft, or traitorous correspondence with the enemy. The section further provides that a sentence of death cannot be carried out until confirmed by the Governor-General.

   The effect of the *Death Penalty Abolition Act* 1973 (Cth.) upon this section is unclear, especially with regard to the present role, if any, of the Governor-General.

2. Section 34 of the Naval Defence Act applies the *Naval Discipline Act* 1957 of the United Kingdom, subject to adaptations, to the Royal Australian Navy. The offences which carry the life sentence are:

Section 2	Misconduct in action by persons in command with intent to aid the enemy
Section 3	Misconduct in action by other officers and men
Section 4	Obstruction of operations
Section 5	Corresponding with, supplying or serving with the enemy
Section 9	Mutiny
Section 10	Failure to suppress mutiny with intent to assist the enemy
Section 42	Civil offences (contrary to the law of England) of treason or murder

3. Sections 54 and 55 of the Defence Act apply to members of the Military Forces at any time serving overseas, and at all times during war, the provisions of the Army Act (United Kingdom) as it was at the date of its repeal in 1956 but subject to amendments affected to it by Australian Military Regulations. Under this legislation the offences carrying life imprisonment are:

Section 4	Traitorously delivering up to the enemy a garrison, fortress, post or guard or traitorous correspondence with the enemy
Section 7	Mutiny or failure to suppress mutiny

4. Section 8 of the Air Force Act applies to the Royal Australian Air Force the *Air Force Act* 1939 of the United Kingdom, as adapted.

   Under Sections 4, 6 and 7 of the latter act numerous offences committed in the face of the enemy, or treacherously or involving mutiny or sedition are made the subject of a life sentence.

IMPRISONMENT AND LIFE EXPECTANCY

In the discussion on Table 20 it was seen that life sentence prisoners who died in custody were generally older than the average life sentence prisoner and it was concluded that as these prisoners were older it could be expected that they would be more likely to die.

However, the question remains whether they should be expected to die at the ages they did, that is, did they die prematurely for any reason? This question is extremely difficult to answer conclusively and the following is only a tentative attempt, based on what may be unfounded assumptions.

In Victoria, until recent changes in the Social Welfare Regulations a 'life' sentence was considered as equal to the expectation of life of a prisoner at the time of conviction calculated on an actuarial basis. What this table was calculated on is not clear, that is at what date, from what population and by whom. Actuarial calculations can vary considerably depending on what population is used and at what date. They do take into account all factors such as illness, accidents, natural disasters and so on to arrive at an estimation of the likely result.

Three such tables of life expectancy were consulted for males.

(a) That used in the Victorian Social Welfare Regulations. This may be of some antiquity and would therefore underestimate the life expectancy in present times with advances in medical science. It must be remembered though that the period sampled in this study goes back a number of decades.

(b) The Mortality Table of the Faculty of Actuaries: Australia '1949-1952 Select'. This is based on those accepted for life assurance.

(c) That presented in the Australian Year Book 1972, based on the 1965-1967 census (including Aborigines) for the Australian male population.

Following is a summary of life expectancies at various ages for those tables.

Age	(a) Years	(b) Years	(c) Years
20	44.74	52.6	49.9
25	40.6	47.9	-
30	36.5	43.1	40.7
35	32.5	38.4	-
40	28.6	33.6	31.4
45	24.8	29.0	-
50	21.2	24.6	22.76
55	17.7	20.6	-
60	14.1(approx.)	16.8	15.27
70	-	10.6	9.5

Thus according to the Social Welfare Department of Victoria a 20 year old could expect to be imprisoned until he was 64 while a 40 year old could still expect to be in prison on his sixty-eighth birthday. A 60 year old was expected to stay until he was 74 years old.

The differences between the three rates are significant, with (c) probably being the best estimate as it theoretically is based on the whole Australian population rather than good life assurance risks.

However, using (a) as a basis (being the most conservative and used for a prison population) a table was drawn up for New South Wales, the only State where there were sufficient numbers to even consider an hypothesis. The number however may be so miniscule as to render any conclusions invalid.

TABLE A NEW SOUTH WALES: ANALYSIS OF TERM OF IMPRISONMENT BEFORE DEATH BY AGE AND EXPECTATION OF LIFE

Age on Conviction A	N B	Average Age C		Average Time Served D		Average Age At Death E		Life Expectancy F		Difference (F) minus (E) G	
		Years	Months	Years	Months	Years	Months	Years	Months	Years	Months
Under 19	-	-		-		-		-		-	
20 - 29	7	25	7	19	0	44	7	65	7	21	0
30 - 39	7	34	1	12	8	48	7	67	2	18	7
40 - 49	4	43	6	8	0	56	6	69	2	12	8
50 - 59	3	52	8	11	7	64	0	72	0	8	0
60 - 69	5	64	2	11	6	75	5	76	0(approx.)	0	7

It can be seen from Table A that in all cases death occurred before it would be expected according to the table, varying from 21 years to half a year. The moot point is what was the cause of such a truncation and whether it could be the actual hazards of prison life or perhaps is a reflection of the section of the population actually imprisoned for this offence.

To properly test these figures it would be necessary to find out the times of death of those who had been released to see whether they died earlier than could be expected.

If however these figures are indicative of the situation it may be argued that such persons suffer a double penalty, the actual sentence served and the reduction in life expectancy.

RELEASE PROVISIONS FOR JUVENILE OFFENDERS

New South Wales

Where a child or young person under the age of 18 years has pleaded guilty to, or been convicted of homicide, rape or an offence punishable by penal servitude for life, the judge must sentence him according to law.[1]

Where, however, the offence is murder, the mandatory penalty of penal servitude for life[2] may be mitigated by the effect of Section 442 of the Crimes Act, which provides that where a life sentence or sentence for a fixed term is imposed, the court has a discretion to pass a sentence of less duration.[3]

In the unlikely event of a person under 18 years (at the time of the commission of the offence) being convicted of treason or piracy with violence, for which the death penalty is still applicable, by Section 87 (1)(b) of the Child Welfare Act, no sentence of death can be pronounced or recorded, but a life sentence may be passed, unless the judge exercises his discretion under Section 442(1) of the Crimes Act.

Victoria

Prior to the abolition of capital punishment in 1975 a sentence of death could not be pronounced on any person for an offence committed by him while under 18 years of age, but instead the court could sentence him to be held in custody during the Governor's pleasure.[4]

The Parole Board was under an obligation to furnish to the Minister once in every year and whenever so required a report and recommenation in

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1 *Child Welfare Act*, 1939-1969 (N.S.W.), s. 87(1).

2 *Crimes Act*, 1900-1974 (N.S.W.), s. 19.

3 This discretion must be exercised in the light of the maximum penalty provided and all the circumstances of the case. *R. v. Nell* (1969) 90 W.N. (Pt.1)(N.S.W.) 91.

4 *Crimes Act*, 1958 as amended (Vic.), s. 473(1).

regard to every person held pursuant to Section 473 of the Crimes Act.[5]

It would seem now with the repeal of Section 473 juveniles convicted of treason or murder must be sentenced in the same way as their adult counterparts and that the annual reporting provisions of Section 188(3)(a) are therefore inapplicable.[6]

Section 473 prisoners are presently released under Section 500 of the Crimes Act, which allows the release on recognisance or parole by the exercise of the Prerogative of Mercy by the Governor.

Queensland

Where a person under the age of 17 years is convicted of an offence for which he would be liable, were he not a child, to imprisonment with hard labour for life, or is convicted of a number of other serious offences[7] the court may, in its discretion, order that such child be detained during Her Majesty's pleasure in such place and on such conditions as the Minister may from time to time direct.[8]

Detention continues at the Minister's discretion notwithstanding that in the meantime such child has attained the age of 18 years, and detention may be within a prison.

A child ordered to be detained under Section 63 is deemed to have been ordered by the court to be committed to the care and control of the Director.[9] Guardianship of the child vests in the Director, but reverts when the order ceases.[10]

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5 *Social Welfare Act*, 1970 (Vic.), s. 188(3)(a).

6 As to the disposition of life sentence prisoners now in Victoria see p.133 ff above. The desirability of periodic reviews is discussed at p.131 ff above.

7 *Viz.*, an offence or attempt re defilement of girls under 12 years, Section 212, *Criminal Code;* grievous bodily harm, Section 317; intentionally endangering the safety of persons on a railway, Section 319 or aircraft, Section 319A; obstructing or injuring railway, Section 467; endangering safe use of aircraft, Section 467 A(1); an attempt or offence to commit malicious injuries where there is aggravation, Section 469; an offence of attempting to: abuse girls under 10 years, Section 214; injure by explosive substance, Section 321; rape, Section 349; robbery, Section 412; arson, Section 462; destroy property by explosive, Section 470.

8 *Children's Services Act*, 1965-1973 (Qld.), s. 63(1).

9 *Children's Services Act*, 1965-1973 (Qld.), s. 63(2).

10 *Children's Services Act*, 1965-1973 (Qld.), s. 64(1).

It is the duty of the Director to a person committed to his care and control 'to utilise his powers and the resources of the Department so as to further the best interests of such child in care'.[11]

Discharge is obtained when the Governor-in-Council orders same.[12] He may, by that order, order that the Director exercise supervision over such person until he reaches the age of 18, or, if he is 17 at the date of discharge, order that the Director or the Chief Probation Officer (as the Governor-in-Council thinks fit) exercise supervision over and in relation to such person, for such period as the Governor-in-Council fixes.[13]

The Director or Chief Probation Officer has power to order the person released, or the parents or guardian or persons in whose custody that person is, to do or refrain from doing anything that is specified in the supervision order or that is in the best interests of the child.[14]

Where there is a breach of the supervision order, or where the Director or Chief Probation Officer is not satisfied that the conditions under which such a person is living are conducive to the welfare of such person[15] the Director may, without warrant or any other authorisation, direct that such person be taken into custody.[16]

A person so returned must be returned to the custody he was detained in immediately prior to his discharge, and he is again detained during Her Majesty's pleasure until the Minister otherwise orders.[17] Sections 63 (2) and 64(1) again apply.[18]

South Australia

A person under the age of 18 years who is convicted of murder is not sentenced to death, but is detained during the Governor's pleasure in such place and under such conditions as the Governor may direct.[19] Such person may be discharged on licence at any time by the Governor acting on the recommendation of the Parole Board.[20]

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11 *Children's Services Act*, 1965-1973 (Qld.), s. 65.

12 *Children's Services Act*, 1965-1973 (Qld.), s. 66(2).

13 *Children's Services Act*, 1965-1973 (Qld.), s. 66(2)(a).

14 *Children's Services Act*, 1965-1973 (Qld.), s. 67(1)(c).

15 *Children's Services Act*, 1965-1973 (Qld.), s. 68(2)(a) and (b).

16 *ibid.*

17 *Children's Services Act*, 1965-1973 (Qld.), s. 68(2)(a)(i).

18 See above.

19 *Juvenile Courts Act*, 1971-1974 (S.A.), s. 55(1).

20 *Juvenile Courts Act*, 1971-1974 (S.A.), s. 55(4).

The licence may be in such form and contain such conditions as the Governor, on the recommendation of the Parole Board, determines[21], and may be varied from time to time by the same authority.[22]

The Governor may revoke a licence for breach of any condition[23] and such person may be apprehended with or without warrant.[24]

Western Australia

Where the Royal mercy is extended by the Governor conditionally to an offender under sentence of death, and where that person is under 18 years of age he may extend it on condition that that person be detained during the Governor's pleasure, in safe custody in such place or places as the Governor may, from time to time direct.[25]

The Parole Board is required to report to the Governor from time to time as he requires, as to the place where the young person should be detained.[26]

The Governor may order the release on parole, for a period not exceeding five years, of a child or young person detained in safe custody under this section, and such a release is under, and subject to, the Offenders Probation and Parole Act as if it were release from prison on parole under that Act, and Sections 42 and 44 of that Act are specifically made applicable.[27]

Under Section 19(6a)(a) of the *Criminal Code* a child or young person under the age of 18 years convicted of an indictable offence punishable with imprisonment may instead of being sentenced to imprisonment, be ordered

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21 *Juvenile Courts Act*, 1971-1974 (S.A.), s. 55(5).

22 *Juvenile Courts Act*, 1971-1974 (S.A.), s. 55(6).

23 *Juvenile Courts Act*, 1971-1974, s. 55(7): note that it is the Governor alone in this case compared with the Governor acting on the recommendation of the Parole Board in the other sub-sections.

24 *Juvenile Courts Act*, 1971-1974 (S.A.), s. 55(8)(a) and (b).

25 *Criminal Code* (W.A.), s. 679. The language of this section is not couched in mandatory language, and it may be read that a young person may be executed, that is, there is no prohibition on capital sentences on such persons.

26 *ibid.*

27 Section 44 relates to the power of the Parole Board to amend, suspend or vary parole orders, and to the automatic cancellation of a parole order by conviction for an act committed during the parole period. Section 42 relates to the power of the Parole Board to re-release a person on parole.

to be detained in strict custody until the Governor's pleasure is known and thereafter in safe custody in such place or places as the Governor may, from time to time direct.[28]

A person so held may be released by order of the Governor under such conditions as the Governor thinks fit, including a condition that he be under the supervision of a parole officer.[29] Release from detention of persons held pursuant to Section 19(6a)(a) of the *Criminal Code* is deemed to be analagous to release of persons detained under Section 653 of the *Criminal Code*[30] who are released under Section 34A of the Offenders Probation and Parole Act.[31]

Tasmania

Prior to the abolition of capital punishment in 1968, a person under the age of 18 years could not have a sentence of death pronounced or recorded against him but was held at Her Majesty's pleasure.

However, by the Act abolishing capital punishment, the *Criminal Code Act* 1968, the section relating specifically to persons under 18 years convicted of murder was repealed and it would seem that persons now convicted of treason or murder will be dealt with in the same way as adult offenders.

Northern Territory

It was not possible to discover any legislative provisions specifically concerning persons under 18 years convicted of indictable offences. It would seem therefore that they are to be treated identically with adults.

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28 Or he may be committed to the Child Welfare Department until he is 18 or until 2 years after the date of conviction (whichever is the longer) and be dealt with under the *Child Welfare Act*, 1947, s. 19 (6a)(b). It would seem unlikely that a court would exercise these powers for very serious indictable offences. See also below p.176 regarding the powers of the Supreme Court in the Australian Capital Territory, footnote 12.

29 *Offenders Probation and Parole Act*, 1963-1971 (W.A.), s. 34AA(1).

30 That is persons found not guilty on the grounds of insanity.

31 *Offenders Probation and Parole Act*, 1963-1971 (W.A.), s. 34AA(2). The analogy with insanity verdict detainees is limited. Such persons held during the Governor's pleasure must have a report and recommendation made by the Parole Board to the Minister once in every year and whenever so requested by the Minister until the Governor makes an order pursuant to Section 48 of the Mental Health Act transferring the patient to an approved hospital. See Sections 34(2)(a) and 34C (1), *Offenders Probation and Parole Act*. There is no requirement for a report and recommendation regarding Governor's pleasure detainees under Section 19(6a)(a), *Criminal Code*. Indeed periodic review procedures seem lacking for this type of detainee in most jurisdictions.

Australian Capital Territory

Where a child or young person (that is under 18) is charged before a Court of Petty Sessions with an offence under Sections 17[32], 19[33], 24[34], 27[35], 28[36], 63[37], 67[38], 110[39] or 240[40] of the Crimes Act (New South Wales) as amended, the court may commit him to take his trial according to law.[41] Where bail is refused, the person is to be kept in a shelter unless he is certified by the court as not being a fit person for same.[42]

Where that person is convicted upon his trial or has pleaded guilty to an indictable offence, the Supreme Court may sentence him according to law, or, it may exercise any of the powers under Section 57 of the Ordinance.[43]

The powers it has are: to release on probation on such conditions and for such period of time as it thinks fit;[44] to commit to the care of a person willing to undertake same;[45] to commit to the care of the Minister to be dealt with as a ward admitted to government control;[46] to commit to an institution either generally or for a fixed term not exceeding three years;[47] and in addition to or in substitution for the last paragraph, require the person to enter into a recognisance, with or without surety or sureties to be of good behaviour for not less than one year and not more than three years.

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32 Treason.

33 Murder.

34 Manslaughter.

35 Act done with intent to murder.

36 Acts done to property with intent to murder.

37 Rape.

38 Carnal knowledge.

39 Breaking and entering and assaulting with intent to murder.

40 Exhibiting false signals to a ship.

41 *Child Welfare Ordinance*, (A.C.T.), s. 65(1).

42 *Child Welfare Ordinance*, (A.C.T.), s. 65(4).

43 *Child Welfare Ordinance* (A.C.T.), s. 66. The effect of this provision is uncertain. It seems unlikely that a court would revive the powers under Section 57 of the Ordinance, for example, to release a juvenile convicted of murder on probation, but a literal reading of this section indicates that this is within the Court's power. It would seem more likely that a juvenile in the Supreme Court would only be sentenced 'according to law', that is a life sentence.

44 *Child Welfare Ordinance*, (A.C.T.), s. 57(1)(9).

45 *Child Welfare Ordinance*, (A.C.T.), s. 57(1)(b).

46 *Child Welfare Ordinance*, (A.C.T.), s. 57(1)(c).

47 *Child Welfare Ordinance*, (A.C.T.), s. 57(1)(d).

Commonwealth

Prior to the abolition of the death penalty in relation to Commonwealth offences in 1973, the law was that 'where a person under the age of 18 years is convicted of an offence against the law of the Commonwealth that is punishable by death, he shall not be sentenced to death but the Court shall impose such other punishment as the Court thinks fit'.[48]

However, Section 5 of the *Death Penalty Abolition Act* 1973 states that where an Act provides that a person is liable to the punishment of death, 'the reference to the punishment of death shall be read, construed and applied as if the penalty of imprisonment for life were substituted for that punishment'.

The question now therefore is whether a person under the age of 18 years convicted of an offence previously punishable by death must receive a life sentence or whether the court still retains a discretion to impose such other punishment as it thinks fit.

The operation of Section 20(c) of the Crimes Act is not clear in this context. It states that 'a child or young person who in a State or Territory is charged with or convicted of an offence against the Commonwealth may be tried or punished or otherwise dealt with as if it were an offence against the State or Territory'.

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48 *Crimes Act* 1914-1973, s. 20(c)(a).

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