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**Sentencing “Gang Rapists”:
The Crimes Amendment
(Aggravated Sexual Assault in
Company) Bill 2001**

by

Rowena Johns, Gareth Griffith and Rachel Simpson

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EXECUTIVE SUMMARY

The immediate background to this paper, which discusses the offence of aggravated sexual assault committed in company, is the controversy over the sentence handed down in the District Court, at Sydney, on 23 August 2001 in the case of *Regina v AEM (jnr) & AEM (snr) & KEM*. In response to that decision, on 4 September the Government introduced the Crimes Amendment (Aggravated Sexual Assault in Company) Bill 2001 into the Legislative Assembly. The main findings of this paper are as follows:

- the Crimes Amendment (Aggravated Sexual Assault in Company) Bill 2001 proposes a new offence of aggravated sexual assault in company carrying a maximum penalty of life imprisonment. A new s 61JA would be inserted into the *Crimes Act 1900* for this purpose, which would operate in addition to the current s 61J (2)(c) of that Act (pages 1-3);
- the word ‘rape’ has not featured in the statutory offences since 1981. Instead, the *Crimes Act 1900* identifies various types of sexual assault (page 4);
- it follows that there is no offence exclusively punishing ‘gang rape’. Committing a sexual assault in company is a species of aggravated sexual assault under s 61J of the *Crimes Act*. Circumstances of aggravation are outlined in s 61J (2) (page 4);
- to understand aggravated sexual assault it is also important to examine the elementary offence of sexual intercourse without consent, at s 61I (page 4);
- the legislative history of sexual offences reflects an increasing tendency to categorise conduct into specific subcategories with matching maximum penalties. This trend dates back to the *Crimes (Sexual Assault) Amendment Act 1981* which abolished the crime of rape, established new graded offences and extended the definition of sexual intercourse (page 8);
- prior to 1981 the crime of rape had carried a maximum penalty of life imprisonment. Statistics showed that: this life penalty was not being used; it could deter victims from proceeding with their complaint; and its magnitude deterred alleged offenders from pleading guilty. The life penalty was replaced by a sliding scale of maximum penalties, ranging from 20 years to 2 years (pages 8-10);
- in 1987 the aggravated circumstance of being ‘in company’ was added to s 61I, with a maximum penalty of penal servitude for between 10 and 14 years depending on the age of the victim and whether the offender was in a position of authority (pages 10-11);
- the present two-tiered offence structure for sexual offences was introduced in 1991. At the same time the offence of aggravated sexual intercourse without consent was created with a maximum penalty of 20 years (page 12);
- the decision in *Regina v AEM (jnr) & AEM (snr) & KEM* was handed down in the District Court of NSW on 23 August 2001. The offenders were three male youths, the victims were two 16 year old girls (page 13);
- the sentences imposed on the offenders resulted in massive media controversy, with the debate focusing around: the functioning of the criminal justice system, including perceived leniency of sentences handed down by the NSW judiciary; judicial discretion and the role of victims’ impact statements; and the relationship between ethnicity and crime (page 18);
- conclusions are hard to draw from the reported cases on aggravated sexual assault in company (s 61J (2)(c), *Crimes Act*). However, they suggest that actual sentences of

imprisonment for more than 10 years are very rare. They are reserved for the worst cases involving multiple offences, of which *R v Colby* is an instance (page 37);

- the Judicial Information Research System (JIRS) statistics confirm that the maximum penalties are rarely imposed in sexual assault and aggravated sexual assault cases (page 42);
- at present there is no guideline judgment on any sexual offence in NSW (page 43);
- a guideline judgment on rape was issued by the English Court of Appeal (Criminal Division) in *R v Billam* (1986) Cr App R 347; (1986) 1 All ER 985. Lord Lane CJ pronounced numerous categories of offences, accompanied by suggested starting points for custodial sentences, including a starting point of 8 years where 2 or more adult offenders act together (page 45);
- often a contentious aspect of this area of law relates to the sentencing of juvenile offenders. In *Regina v AEM (jnr) & AEM (snr) & KEM* two of the offenders were juveniles and the sentencing judge had to determine whether to deal with them as adults 'according to law', or under the more lenient children's regime of the *Children (Criminal Proceedings) Act 1987* (page 47);
- when a court sentences a person under 21 to a term of imprisonment for an indictable offence, the court may direct that the whole or part of the term be served in a juvenile detention centre. However, the relevant Minister has the power to override such a direction, which means that a person serving their sentence in a detention centre can be transferred to an adult prison (pages 51-52);
- the law respecting the sentencing of juveniles is governed by a complex network of provisions in a plethora of statutes. There may be a case for consolidating these provisions in a single Act dealing with the sentencing of juveniles (page 52); and
- on 6 September 2001 it was announced that the DPP is to appeal the sentences handed down in *Regina v AEM (jnr) & AEM (snr) & KEM*. It was also announced that the Crown appeals will be heard in conjunction with the Attorney General's application for a guideline judgment, advice for which has now been finalised by the Crown Advocate. It is reported that the guideline application will apply to the offences of sexual assault and aggravated sexual assault (page 53).

1. INTRODUCTION

The immediate background to this paper, which discusses the offence of aggravated sexual assault committed in company, is the controversy over the sentences handed down in the District Court, at Sydney, on 23 August 2001 in the case of *Regina v AEM (jnr) & AEM (snr) & KEM*. These sentences will be appealed by the NSW Director of Public Prosecutions.¹ Also in response to that decision, on 4 September the Government introduced the Crimes Amendment (Aggravated Sexual Assault in Company) Bill 2001 into the Legislative Assembly. The main feature of the Bill is that it proposes a new offence of aggravated sexual assault in company carrying a maximum penalty of life imprisonment. A new s61JA would be inserted into the *Crimes Act 1900* for this purpose, which would operate in addition to the current s 61J (2)(c) of that Act.

In the Second Reading speech for the Bill the Attorney General commented that it is part of a 'raft of legislative changes aimed at improving our criminal justice system'. The Minister said that the Crown Advocate is at present preparing an application for a sentencing guideline to the Supreme Court in relation to sexual assaults (to be heard in conjunction with the appeal). He said, too, that 'new offences and additional powers for the police are proposed in the upcoming legislative session'.² The Government has foreshadowed, for example, that gang recruitment is to attract a 7 year prison sentence, while passengers in a car who fail to identify themselves to police will carry a one year prison sentence or a fine of \$5,500.³

The focus of this paper is on the legislative and political background to the Crimes Amendment (Aggravated Sexual Assault in Company) Bill 2001. It looks first at the present legal position and the historical background to the relevant provisions in the *Crimes Act*. The decision in *Regina v AEM (jnr) & AEM (snr) & KEM* is then outlined and the main responses to it set out. Next, the relevant case law and available statistical information is considered. A brief discussion of guideline judgments follows, including an summary of the relevant approach taken in England and Wales where a guideline judgment on rape was issued in 1986 by the English Court of Appeal (Criminal Division) in *R v Billam*. The paper ends with a section on sentencing juveniles.

The full text of the Crimes Amendment (Aggravated Sexual Assault in Company) Bill 2001 is reproduced at Appendix A; the judgment in *Regina v AEM (jnr) & AEM (snr) & KEM* is set out at Appendix B.

¹ AAP Online, 'DPP appeals gang rape sentences', 6 September 2001.

² NSWPD (Hansard proof, Legislative Assembly), 4 September 2001, pp 25-26.

³ AAP Online, 'Life sentence laws for gang rapists rushed through parliament' 4 September 2001.

2. THE CRIMES AMENDMENT (AGGRAVATED SEXUAL ASSAULT) BILL 2001

2.1 Main provisions

The Bill would insert a new offence into the *Crimes Act* under proposed s 61JA titled, 'Aggravated sexual assault in company'. In the Second Reading speech for the Bill the Attorney General explained that this new offence 'will encompass the third and most serious gradation of sexual assault in the Crimes Act 1900. The offence of sexual intercourse without consent carries a maximum penalty of 14 years imprisonment. The offence of aggravated sexual intercourse without consent carries a maximum penalty of 20 years imprisonment'. The Minister went on to explain that this third gradation of sexual assault attracting a life sentence was in the 'worst possible category of offence', alongside murder and trafficking in large commercial quantities of drugs. He continued:

To these offences we are adding this category of offence: the aggravated sexual assault of persons committed in company with violence or with such deprivation of liberty as justifying the life sentence being available as a maximum penalty. Group sexual assaults may be one of the most heinous crimes imaginable. There must be a recognition that sexual assaults by more than one person on a victim are cowardly and extreme examples of persons seeking power and gratification. The worst cases of these types of sexual assault are deserving of the maximum sentence able to be imposed by our society.⁴

As the Explanatory Note for the Bill states, the elements of the proposed offence are sexual assault (that is, sexual intercourse with another person without the person's consent and with knowledge of or recklessness as to that lack of consent) committed:

- (a) in the company of another person or persons, and
- (b) in any one or more of the following circumstances:
 - (i.) the alleged offender maliciously inflicts actual bodily harm on the alleged victim or any other person who is present or nearby,
 - (ii.) the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument
 - (iii.) the alleged offender deprives the alleged victim of his or her liberty for a period before or after the commission of the offence.

Proposed s 61JA (2) provides that a person sentenced to life imprisonment for the proposed offence is to serve that sentence for the term of the person's natural life. Proposed s 61JA (3) preserves the operation of s 21 of the *Crimes (Sentencing Procedure) Act 1999* (which authorises the passing of a lesser sentence than imprisonment for life). Proposed s 61JA

⁴ NSWPD (Hansard proof, Legislative Assembly), 4 September 2001, pp 25-26.

(4) preserves the prerogative of mercy in respect of persons sentenced to life imprisonment.

The Bill would also amend s61P of the *Crimes Act* to provide that a person convicted of attempting to commit the offence under proposed s 61JA will be liable to the penalty of life imprisonment. Amendment is also proposed to s 61Q of the *Crimes Act* to provide for the reaching of alternative verdicts: in particular, a jury may reach an alternative verdict of not guilty of an offence under proposed s 61JA, but guilty instead of an offence under s 61I (sexual assault) or s 61J (aggravated sexual assault).

2.2 Comments

Note that this new proposed offence will operate alongside the current s 61J (2)(c) – aggravated sexual assault ‘in the company of another person or persons’. Proposed s 61JA will apply where one or more of the circumstances mentioned above – of violence, threatened violence or the deprivation of liberty - are in place. What is proposed, in effect, is a specific offence of multiple aggravation, by adding to s 61J (2)(c) those circumstances of aggravation currently found under s 61J (2)(a) and (b) (actual bodily harm and threatened actual bodily harm respectively), or an element of forcible abduction (s 89, *Crimes Act*). The presence of any one of these circumstances will suffice to constitute the proposed offence.

The Bill does not define ‘gang’ or redefine ‘in company’ for the specific purpose of the proposed new offence. Instead, as under s 61J (2)(c), for the new offence the phrase ‘in company’ will mean in the company of ‘another person or persons’. An offender must therefore only be in the company of one other person for the proposed section to apply.

Significantly, what is proposed under the Bill is a maximum sentence, the imposition of which is at the discretion of the Court, but in relation to which the Parliament has indicated, in the relevant Second Reading speech, that ‘The worst cases of these types of sexual assault are deserving of the maximum sentence able to be imposed by our society’.

2.3 Supreme Court Practice Note

In his Second Reading speech for the Bill the Minister also made reference to the issuing by the Chief Justice on 28 August 2001 of Supreme Court Practice Note No 122. Its effect is to require indictments after 1 October 2001 relating to the worst cases of offences for which the maximum penalty is life imprisonment to be presented to the Supreme Court. This would apply where either the NSW or Commonwealth DPP has formed the opinion that the imposition of a life sentence may be appropriate in cases of murder, trafficking in large commercial quantities of drugs or offences under proposed s 61JA. This would mean that the worst cases of aggravated sexual assault in company would no longer be heard in the District Court.

3. LEGISLATIVE PROVISIONS AND HISTORY

3.1 Current provisions

The word ‘rape’ is used by the media, the public, and by lawyers in a vernacular sense, but it no longer features in the wording of the statutory offences. Rather, the *Crimes Act* identifies various types of sexual assault. Common law rape was abolished in 1981.

The colloquial terms ‘pack rape’ and ‘gang rape’ refer to sexual assault in the context of a group of offenders. There is no offence that separately or exclusively punishes gang rape. Rather, committing a sexual assault in company is a species of aggravated sexual assault under s 61J.

To understand aggravated sexual assault it is also important to examine the elementary offence of sexual intercourse without consent, at s 61I.

Both s 61I and 61J are strictly indictable offences. In other words, they must be prosecuted on indictment, not summarily.⁵

(i) Sexual intercourse without consent: s 61I

Section 61I creates an offence when a person has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse. The maximum penalty is 14 years imprisonment.

‘Sexual intercourse’ is defined by s 61H. It is a broad concept, including:

- penetration to any extent of
 - the ‘genitalia’ of a female or
 - the anus of any personby:
 - any part of the body of another person, or
 - by any object manipulated by another person.
- the introduction of any part of the penis of a person into the mouth of another person
- cunnilingus.

‘Consent’ is a crucial aspect of the offence. The Crown must prove that the complainant did not consent to the physical act of the accused.

⁵ **Indictable offences** are serious crimes for which the accused possesses an initial right to stand trial. An indictment is the document that sets out the offence or offences alleged to have been committed by the accused and is presented at court by the prosecution. **Summary offences** are less serious crimes and are usually prosecuted in the Local Court before a magistrate. However, numerous indictable offences may be dealt with summarily unless the prosecution and/or the accused elects to the contrary: see Part 2, Division 3, and Schedule 1 of the *Criminal Procedure Act 1986*.

Section 61R provides some guidance on consent, for the purposes of ss 61I and 61J. A person who has sexual intercourse with another person without the consent of the other person and who is reckless as to whether the other person consents to the sexual intercourse is to be taken to know that the other person does not consent: s 61R(1).

Some grounds on which consent is vitiated are outlined by s 61R(2), and do not limit other potential grounds:

- submitting to sexual intercourse as a result of threats or terror;
- mistaken belief about the identity of the other person;
- mistaken belief that the sexual intercourse is for medical or hygienic purposes.

Section 61R(2)(d) clarifies that a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse.

‘Recklessness’ is a concept that necessitates reference to case law. The accused is reckless when he or she has intercourse not caring whether the complainant consents or not: *R v Murray* (1987) 11 NSWLR 12. An awareness by the accused that the complainant might not be consenting or possibly was not consenting is sufficient: *R v Hemsley* (1988) 36 A Crim R 334, *R v Coleman* (1990) 19 NSWLR 467 at 475-476. Conscious advertence to the possibility of non-consent is not necessary. If the accused fails to advert at all to the question of consent, considering it irrelevant, this amounts to either knowledge or recklessness of consent: *R v Tolmie* (1995) 37 NSWLR 660, *R v Kitchener* (1993) 29 NSWLR 696, *R v Henning* (unreported, CCA, 11 May 1990). But the question of recklessness is not determined by an objective standard; rather, the jury in a trial must focus on the mind of the accused: *R v O’Meagher* (1997) 101 A Crim R 196.

(ii) Aggravated sexual assault: s 61J

The offence of aggravated sexual assault appears at s 61J of the *Crimes Act 1900*. Section 61J(1) creates an offence when a person has sexual intercourse with another person without the consent of the other person and in circumstances of aggravation and who knows that the other person does not consent to the sexual intercourse. The maximum penalty is 20 years imprisonment.

Circumstances of aggravation are outlined in s 61J(2) and occur where:

- (a) the alleged offender **maliciously inflicts actual bodily harm** upon the alleged victim or any other person who is present or nearby, at the time of, or immediately before or after, the commission of the offence; or
- (b) the alleged offender **threatens to inflict actual bodily harm** on the alleged victim or any other person who is present or nearby, by means of an **offensive weapon** or instrument, at the time of, or immediately before or after, the commission of the

offence; or

- (c) the alleged offender is in the **company of another person** or persons; or
- (d) the alleged victim is **under the age of 16 years**; or
- (e) the alleged victim is (whether generally or at the time of the commission of the offence) **under the authority** of the alleged offender; or
- (f) the alleged victim has a **serious physical disability**; or
- (g) the alleged victim has a **serious intellectual disability**.

For example, in the case of *Regina v AEM (jnr) & AEM (snr) & KEM* (District Court of NSW, 23 August 2001), some of the offences of sexual assault were aggravated by being committed in the company of another person: s 61J(2)(c).⁶ The victims were 16 years of age, narrowly avoiding the additional aggravating factor of s 61J(2)(d).

Any circumstance of aggravation has to be proved by the prosecution beyond a reasonable doubt. Numerous terms are referred to in s 61J that require amplification:

Actual bodily harm

The phrase is to be given its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the victim. The hurt or injury need not be permanent but must be more than merely transient and trifling: *R v Donovan* [1934] 2 KB 498 at 509, *R v Brown* [1993] 2 WLR 556 at 559.

Actual bodily harm may include psychiatric injury but not states of mind that are not evidence of some identifiable clinical condition: *R v Chan-Fook* [1994] 1 WLR 691 at 696, *R v Lardner* (unreported, CCA, 10 September 1998).

Maliciously

Section 5 of the *Crimes Act* provides that an act is taken to have been done maliciously within the meaning of the Act and for every charge where malice is by law an ingredient, when it is an act:

- done of malice, or
- done without malice but with:
 - indifference to human life or suffering, or
 - with intent to injure, andin any such case without lawful cause or excuse, or

⁶ See later discussion concerning the judge's reference to the aggravating circumstance.

- done recklessly or wantonly.

The interpretation of s 5 was considered by the Court of Criminal Appeal in *R v Coleman* (1990) 19 NSWLR 467 at 472. Hunt J (with whom Finlay and Allen JJ agreed) confirmed that the provision should be read so that:

...an act done recklessly or wantonly amounts without more to an act done maliciously within the statutory definition. On the other hand, an act done with intent to injure some person...falls within that definition only if it were also done without lawful cause or excuse.⁷

Therefore, crimes of malice require either intention or recklessness, both of which entail a foresight of consequences: *R v Stones* (1956) 56 SR(NSW) 25 at 34. Recklessness is the foresight that the particular kind of harm might be done and taking that risk: *R v Cunningham* [1957] 2 QB 396. In other words, there is a realisation by the accused that the kind of harm in fact done might be inflicted: *R v Coleman* at 475, *R v Stokes and Difford* (1990) 51 A Crim R 25 at 40.

An intent to injure does not have to be to the particular extent which was in fact caused: *R v Stokes and Difford* at 40.

Offensive weapon

A weapon is offensive if it is used in an offensive manner at the time of the commission of the offence regardless of its ordinary function: *R v RJS* (1993) 31 NSWLR 649. Any instrument can therefore potentially be offensive, and in a trial it is a question for a jury as to whether under the particular circumstances the weapon or instrument is to be used for the purpose of an offence.

Section 4 of the *Crimes Act* defines ‘offensive weapon or instrument’ as:

- a dangerous weapon, or
- any thing that is made or adapted for offensive purposes, or
- any thing that, in the circumstances, is used, intended for use or threatened to be used for offensive purposes or is capable of causing harm.

In turn, ‘dangerous weapon’ means:

- a firearm, within the meaning of the *Firearms Act 1996*,⁸ or

⁷ At 472. Hunt J questioned the drafting of s 5 and recommended that the legislature ‘remove completely from the criminal statutes the concept of “malice”, which calls for a meticulous analysis and fine and impractical distinctions to be made by the jury’. He pointed to the United Kingdom and Victoria, which had replaced ‘maliciously’ with phrases such as

⁸ Section 4 of the *Firearms Act 1986* states that a firearm means ‘a gun, or other weapon, that is (or at any time was) capable of propelling a projectile by means of an explosive and includes a blank fire firearm, or an air gun, but does not include anything declared by the

- a prohibited weapon, within the meaning of the *Weapons Prohibition Act 1998*,⁹ or
- a speargun.

Person under authority

Section 61H(2) provides that, for the purposes of ss 61H-66F, a person is under the authority of another person 'if the person is in the care, or under the supervision or

Immediately before or after

The issue of whether the circumstance of aggravation occurred immediately before or after the sexual intercourse is a matter of fact, and depends on each individual case: *R v Attard* (unreported, CCA, 20 April 1993).

3.2 Historical transition from 'rape' to current sexual assault offences

The legislative history of sexual offences reflects an increasing tendency to categorise conduct into specific subcategories with matching maximum penalties.

The following analysis traces some major amendments that have a bearing on the offence of aggravated sexual assault in company. Beyond these amendments of direct relevance, it should be noted that numerous amendments to other aspects of sexual offences have been passed in the last two decades but cannot be encompassed here.

(i) Creation of categories of sexual assault

The *Crimes (Sexual Assault) Amendment Act 1981* No 42 was assented to on 15 May 1981 and commenced on 14 July 1981.¹⁰

The Act heralded major changes including:

- the **abolition of the crime of rape**, which had carried a maximum penalty of life imprisonment;
- the establishment of **new graded offences** of sexual assault, with the highest maximum penalty being 20 years;
- an **extended definition** of sexual intercourse (substantially the same as today).¹¹

regulations not to be a firearm.'

⁹ A diverse range of weapons is described in Schedule 1 of the *Weapons Prohibition Act*.

¹⁰ *Government Gazette*, No 91 of 26 June 1981, p 3392.

¹¹ Some other changes which indicate the scale of the reform but are less relevant to the subject matter of this research paper were: a requirement for judges to warn juries that there may well be good reason for delay in complaint on the part of a victim of a sexual assault; nullification of the common law rule that a husband may not be convicted of raping his wife; abolition of the mandatory obligation on judges to warn juries that it is unsafe to

The categories of sexual assault introduced, and their maximum penalties were:

- category 1 [s 61B at that time] - maliciously inflicts grievous bodily harm with intent to have sexual intercourse ⇒ penal servitude for 20 years;
- category 2 [s 61C] - maliciously inflicts actual bodily harm, or threatens to inflict actual bodily harm by means of an offensive weapon or instrument with intent to have sexual intercourse ⇒ penal servitude for 12 years;
- category 3 [s 61D] - sexual intercourse without consent ⇒ penal servitude for 7 years or, if the victim is under 16 years, penal servitude for 10 years;
- category 4 [s 61E]
 - indecent assault¹² ⇒ imprisonment for 4 years or, if the victim is under 16 years, penal servitude for 6 years;
 - act of indecency with or towards a person under 16 years ⇒ imprisonment for 2 years.

Attempts to commit the above offences were liable to the same penalties.

The common law offences of rape and attempted rape were abolished by the new s 63.

In the second reading speech of the *Crimes (Sexual Assault) Amendment Bill*, the Premier, the Hon. Neville Wran MP, explained why the label of 'rape' was to be replaced with

Because of its historical and social associations and connotations, the term rape is highly stigmatizing for the victim.¹³

The Attorney-General, the Hon. Frank Walker MP, outlined the reasoning for introducing categories of offences graded by severity and with different maximum penalties, instead of a single offence carrying a maximum penalty of life:

- Statistics from the Bureau of Crime Statistics and Research showed that the life penalty was not being used. In 1979, 46 individuals were sentenced for rape, and none received

convict the accused upon the uncorroborated evidence of the complainant; prohibition of irrelevant questioning of complainants about their prior sexual experience.

¹² An indecent assault is an assault accompanied by an act of indecency. The term 'indecency' is not defined in s 4 ('Definitions') of the *Crimes Act*, nor in any of the sections in which it appears. However, case law has recognised indecency to mean conduct which right-minded persons would consider to be contrary to community standards of decency: *R v Harkin* (1989) 38 A Crim R 296. In practice, most indecency cases involve touching or exposure with a sexual connotation.

¹³ NSWPD, 18 March 1981, p 4760.

the maximum penalty. No offender was sentenced to longer than 16 years, and 85% were sentenced to 10 years or less.¹⁴ The average sentence between 1972 and 1979 for rape and attempted rape was 7 years and the single, highest sentence was 20 years.¹⁵

- The prospect of a life sentence could be used as moral blackmail to persuade a complainant, particularly one who knew the offender, not to proceed with the complaint.¹⁶
- The magnitude of the maximum penalty deterred alleged offenders from pleading guilty. Statistics showed that guilty pleas in rape cases were much lower than other crimes. In 1979, 38% of defendants pleaded guilty in the higher courts compared with 81% in all criminal cases. Consequently, more victims endured the ordeal of giving evidence in court than may otherwise have been necessary.¹⁷

(ii) Circumstances of aggravation

Another major development occurred under the *Crimes Act* when aggravating circumstances were inserted into some of the existing sexual assault provisions.

The *Crimes (Child Assault) Amendment Act 1985 No 149*¹⁸ added the aggravating feature of being in a **position of authority** over a person below the age of 16 years, to:

- category 3 [s 61D] - sexual intercourse without consent ⇒ maximum penalty 12 years penal servitude;
- category 4 [s 61E]
 - indecent assault ⇒ maximum penalty 6 years penal servitude;
 - act of indecency ⇒ 4 years.

The definition of sexual intercourse at s 61A was amended by the insertion of s 61A(5) to clarify that ‘a person is under the authority of another person if the person is in the care, or under the supervision or authority, of the other person.’

¹⁴ Mr Wran, *ibid*, p 4760.

¹⁵ Mr Walker, *ibid*, p 4769.

¹⁶ *Ibid*, pp 4767-4768.

¹⁷ *Ibid*, pp 4768-4769.

¹⁸ The Act received assent on 28 November 1985 and commenced on 23 March 1986: *Government Gazette*, No 44 of 14 March 1986, p 1160. The Act also inserted ss 66A-66E, creating new offences of sexual intercourse with a child under 10 years of age (maximum penalty 20 years), sexual intercourse with a child aged 10 years to less than 16 years (maximum penalty 8 years, or 10 years where the child was under the authority of the offender), and attempts of those offences.

The *Crimes (Personal and Family Violence) Amendment Act 1987* No 184¹⁹ added the aggravating circumstance of **being in company** to:

- category 2 [s 61C] ⇒ penal servitude for 14 years;
- category 3 [s 61D]
 - sexual intercourse without consent ⇒ penal servitude for 10 years or, if the victim is under 16 years, penal servitude for 12 years;
 - same, committing the offence in company and being in a position of authority over a person aged less than 16 years ⇒ penal servitude for 14 years.
- category 4 [s 61E]
 - indecent assault ⇒ 6 years;
 - indecent assault in company and in authority, on person under 16 years ⇒ 8 years.

The definition of sexual intercourse at s 61A was amended by the insertion of s 61A(6), which provided that ‘a person is in the company of others if the person is in the company of 1 or more other persons.’ The *Crimes (Personal and Family Violence) Amendment Act 1987* also introduced other substantial amendments such as creating new offences²⁰ and raising the maximum penalty for sexual intercourse without consent from 7 to 8 years where the victim was aged 16 years or over. (For offences against victims under 16, the maximum penalty remained 10 years.)

(iii) Consolidation of circumstances of aggravation

In 1991, the *Crimes (Amendment) Act 1989* No 198²¹ repealed ss 61A-61G of the *Crimes Act* and reorganised the sexual assault provisions into three ‘basic’ offences:

- sexual intercourse without consent: s 61I, maximum penalty 14 years;
- indecent assault: s 61L, maximum penalty 5 years;
- act of indecency: s 61N, maximum penalty 2 years;

and an aggravated version of each:

- aggravated sexual intercourse without consent: s 61J, maximum penalty 20 years;

¹⁹ The Act received assent on 4 December 1987 and commenced on 21 February 1988: *Government Gazette*, No 33 of 19 February 1988, p 930.

²⁰ Namely, sexual intercourse procured by intimidation, coercion and other non-violent threats (new s 65A), and sexual intercourse with an intellectually disabled person by a carer or person in authority (new s 66F).

²¹ The Amendment Act was assented to on 21 December 1989 but did not commence until 17 March 1991: *Government Gazette*, No 37 of 1 March 1991, p 1692.

- aggravated indecent assault: s 61M, maximum penalty 7 years (or 10 years where the victim is under 10 years of age);
- aggravated act of indecency: s 61O, maximum penalty 5 years (or 7 years where the victim is under 10 years of age).

The Attorney-General, the Hon. John Dowd MP, stated: ‘In place of the plethora of offences with its confused and somewhat arbitrary sliding scale of penalties will be a realistic two-tiered offence structure.’²²

The ‘basic’ offence of sexual intercourse without consent moved from s 61D to its present location at 61I. The maximum penalty was increased from 8 to 14 years penal servitude.

The offence of **aggravated sexual intercourse without consent** was created, identifying a range of seven aggravating circumstances under s 61J(2)(a)-(g). The maximum penalty for offences against s 61J has remained 20 years since the provision’s inception.

The Attorney-General explained:

The categories encompass the existing aggravating features in the Crimes Act 1900. However, the scheme is being simplified. Under the existing legislation the aggravating factors are grouped. The penalty available depends on how many of the individual aggravating factors are present, the maximum penalty being 14 years. The present scheme is too complex. Under this bill only one aggravating factor needs to be present in order for the higher penalty of 20 years to apply.²³

Similarly, the aggravated species of indecent assault and act of indecency, under s 61M and 61O respectively, feature a consolidated list of aggravating circumstances, although not identical to s 61J(2).

Two additional new offences were also created by the *Crimes (Amendment) Act 1989*: assault with intent to have sexual intercourse (s 61K, maximum penalty 20 years) and sexual assault by forced self-manipulation (s 80A, maximum penalty 14 years, or 20 years if the victim is under 10 years of age).

4. THE CASE OF REGINA v AEM (JNR) & AEM (SNR) & KEM

The controversy that erupted in the media in August 2001 over sentences for ‘gang rape’ focused largely on the sentence handed down in the District Court of NSW, at Sydney, on 23 August 2001 in the case of *Regina v AEM (jnr) & AEM (snr) & KEM*.²⁴

²² NSWPD, 28 November 1989, p 13569.

²³ Ibid, p 13570.

²⁴ A copy of the judgment is set out at Appendix B.

(i) Introduction

The facts of the case, the principles applied, and the reasoning for the sentences imposed, are contained in the judgment or ‘remarks on sentence’ of her Honour, Judge Megan Latham.

The offenders were three male youths, referred to as AEM(snr), AEM (jnr) and KEM. The victims were two 16 year old girls, JH and DB, who were sexually assaulted in the early hours of 5 September 2000.

AEM (snr) was aged 19 years and five months at the time of the offences. He pleaded guilty to two counts of aggravated sexual assault committed in company²⁵ (s 61J(2)(c) *Crimes Act*), presented on an indictment, and requested that an additional charge of the same offence, presented on a Form 1 document,²⁶ taken into account on sentencing.

KEM is the brother of AEM (snr) and was two months short of his 17th birthday at the time of the offences. He pleaded guilty to two counts of aggravated sexual assault committed in company, and four of the same offences on a Form 1.

AEM (jnr) was 17 years and eight months. He pleaded guilty to one count of detaining with intent to hold for advantage (s 90A *Crimes Act*). That offence carries a maximum penalty of 14 years imprisonment when, as in this case, the Crown conceded that no substantial injury was occasioned to the victim during the detention.²⁷

(ii) The offences

It is instructive to examine the facts relied upon by the court, as they differ from some versions reported in the media, most notably from the revelations of the victims themselves.

²⁵ The judgment refers to s 61J, without identifying the exact subsection of s 61J(2)(c). However, Judge Latham states that AEM (snr) and KEM each pleaded guilty to two counts of ‘aggravated sexual assault on indictment, committed whilst in each others company’ (p 1) and does not identify any other circumstance of aggravation.

²⁶ A ‘Form 1’ is a document presented by the prosecution at sentence, displaying an additional charge or charges which an offender wants the court to take into account when dealing with the principal offence. In other words, the offender does not receive a separate or additional sentence for a matter on a Form 1. The principal offence is usually (but not necessarily) more serious in nature than an offence on a Form 1. For example, an offender sentenced on indictment in the District Court for drug supply might have an offence of possession of a small quantity of drug taken into account on a Form 1. Sections 31-35 of the *Crimes (Sentencing Procedure) Act 1999* provide for taking additional offences into account, and a sample Form 1 appears at Schedule 1 of the *Crimes (Sentencing Procedure) Regulation 2000*.

²⁷ The maximum penalty for leading, taking, enticing away, or detaining a person with intent to hold for ransom or any other advantage is 20 years imprisonment or ‘if it is proved to the satisfaction of the judge that the person...was thereafter liberated without having sustained any substantial injury, to imprisonment for fourteen years.’

In recounting the facts, Judge Latham had regard to the statements of facts tendered by the Crown against each offender, and the statements of the victims. However, the pleas of guilty were accepted by the Crown on the basis that the victims voluntarily went with the offenders to the premises where the sexual assaults took place, and that no knife was produced nor were any threats made to the victims before they entered the premises.

At about 1.00am on 5 September 2000, JH and DB were waiting for a taxi outside Beverley Hills railway station, as no trains were running at that time. The occupants of a vehicle, including the three offenders, a fourth male referred to as MM,²⁸ and a fifth unidentified male, offered the girls a lift. They accepted 'reluctantly'. The girls were driven to the Villawood home of AEM (snr) and KEM, by which time the fifth male had departed. It was suggested that the girls stay the night at the Villawood house and travel to their homes in the morning.

AEM (snr), KEM and MM confronted the victim JH in a bedroom, and AEM (snr) produced a knife. MM excluded the other males from the room while he sexually assaulted JH. Then KEM entered the room and committed three sexual acts on JH. She was instructed to take a shower in the bathroom, where AEM (snr) committed two acts of sexual assault on her. KEM entered the bathroom and committed his fourth offence on JH. Then KEM committed two further offences in combination with MM.

The victim DB had been escorted around the house by AEM (jnr). He accompanied her and stood guard while she used the toilet. When she asked to be permitted to leave, he told her 'You kind of can't' and lifted a curtain to reveal a male person standing outside the premises. Later, AEM (snr) informed DB that she had to have sex with one of them 'otherwise you and your friend will never leave'. She was taken to a front bedroom and sexually assaulted by MM. After he left, AEM (snr) held a knife to her throat before committing one sexual offence, his third overall.

The victims were driven by KEM, with AEM (jnr) as a passenger, to a service station. JH was told to buy cigarettes. While she was inside, the car sped off. A short distance away, DB was pushed out of the car and walked back to the service station where she telephoned her father. Later in the day, police executed a search warrant at the Villawood house and arrested the offenders.

(iii) Victim impact statement

Judge Latham received a victim impact statement from DB. It described her terror, shame and the damaging effect of the offences on her self-esteem and family relationships. The judge acknowledged the importance of 'tak[ing] into account the impact of the offenders' behaviour upon her [DB] and upon JH in sentencing the offenders, subject always to the maintenance of objectivity in the sentencing process.'²⁹ Furthermore, Judge Latham noted

²⁸ The offender MM is being dealt with separately. His sentence proceedings have been adjourned until 2 November 2001.

²⁹ At p 6.

that the absence of a victim impact statement from JH did not mean that the offences lacked a similar influence upon her as that experienced by DB.³⁰

However, Judge Latham disregarded those aspects of DB's victim impact statement that went beyond the agreed facts. The judge also stated:

There is no evidence before me of any racial element in the commission of these offences; there is nothing said or done at any stage by any of the offenders which provides the slightest basis for imputing to them some discrimination in terms of the nationality of the victims.³¹

(iv) Sentencing principles

Sentencing juveniles

The juvenile offenders, KEM and AEM (jnr), were dealt with 'according to law', in other words, not as children. This was necessary in the case of KEM, since his sexual offences were 'serious children's indictable offences' pursuant to ss 3 and 17 of the *Children (Criminal Proceedings) Act 1987*.³² By contrast, AEM (jnr) could have been sentenced for his offence of detaining for advantage, under the more lenient regime of Part 3, Division 4 of the *Children (Criminal Proceedings) Act 1987*.³³ Judge Latham determined that AEM (jnr) be sentenced according to law, on the grounds that he was 'very close to adult status' and the offence was a serious one.³⁴

Objective gravity

The sentencing exercise requires the judge to take into account the objective circumstances of the crime and the subjective characteristics of the offenders, the aggravating and the mitigating factors. In terms of objective gravity, Latham DCJ found little to distinguish K and AEM (snr). She remarked that the criminality of KEM's actions in forcing the victim JH to perform sexual acts on him was 'appalling in one so young' and that his attitude to her was 'particularly callous'.³⁵ By comparison, AEM (jnr)'s criminality was of a 'far lesser

³⁰ At p 5. This accords with s 29(3) of the *Crimes (Sentencing Procedure) Act 1999* which provides 'The absence of a victim impact statement does not give rise to an inference that an offence had little or no impact on a victim'.

³¹ At p 6.

³² The definition of 'serious indictable children's offences' under s 3 includes offences against s 61J (other than subsection 2(d)) of the *Crimes Act*. Section 17 states that such an offender shall be dealt with according to law.

³³ See Part 9 of this paper for discussion of the sentencing of juveniles.

³⁴ At p 8.

³⁵ At p 12.

order. He took no part in the sexual assaults; indeed, on one view... he adopted measures which were designed to prevent access by the others to DB for as long as possible.³⁶

The offences did not, in the opinion of Latham DCJ, fall within the 'worst category' of sexual offences - those where the objective features demonstrated an extreme level of culpability or were so heinous that rehabilitation and subjective considerations were rendered redundant. Rather, the objective features of the instant offences placed them 'at the upper end of the scale of severity'.³⁷

Pleas of guilty

A discount of 20% on the sentences that would otherwise have been imposed was allowed for the offenders' pleas of guilty. Judge Latham arrived at this amount because: the pleas were entered at the first available opportunity once the indictments were settled; the utilitarian value of the pleas was high as the case at trial would have relied substantially on DNA evidence of considerable complexity; a trial would have been lengthy, probably occupying over 4 weeks; and the victims would have been significantly traumatised by the experience of giving evidence.³⁸

It should be noted that judges are required to take guilty pleas into account at sentence by s 22 of the *Crimes (Sentencing Procedure) Act 1999*. Furthermore, the Court of Criminal Appeal has issued a guideline judgment on the appropriate range of discounting for guilty pleas: *R v Thomson; R v Houlton* (2000) 49 NSWLR 383 at 418-419.³⁹

Subjective features of the offenders

AEM (jnr) was born in Australia of Lebanese parents and left school at the end of Year 10 after obtaining his School Certificate. In sentencing him for the instant offence, Judge Latham disregarded an outstanding traffic matter for which AEM (jnr) had yet to be sentenced, as he had no other criminal history. The judge found that the prospects for his rehabilitation were 'sound', and therefore rehabilitation warranted greater emphasis than the community's interest in retribution. Judge Latham accepted that AEM (jnr) was 'genuinely contrite' despite indications to the contrary in a juvenile justice report.⁴⁰

³⁶ At p 5.

³⁷ At p 6.

³⁸ At p 9.

³⁹ In *R v Thomson & Houlton*, Spigelman CJ reasoned (at p 418) that the appropriate range for a discount for a plea of guilty was 10-25%, the amount in a particular case being a matter for the discretion of the sentencing judge. However, two circumstances generally affected the appropriate level of discount: the time at which the plea is entered, and the complexity of the evidentiary issues. The difficulty of assembling the relevant evidence affects the length and complexity of a trial and therefore increases the utilitarian value of the plea.

⁴⁰ At p 10.

KEM emigrated from Lebanon in 1993. Judge Latham rejected KEM's assertion that he was not familiar with the laws of Australia and did not realise his behaviour was criminal. KEM left school before the end of Year 10 and had been unemployed for two months prior to the offence. The sudden death of KEM's father had a significant effect on him, as it did on his brother, AEM (snr). The judge stated that KEM's remorse 'such as it is, appears to be prompted by his present predicament rather than any real appreciation of the damage he has inflicted upon his victim.' KEM had no prior criminal convictions. Latham DCJ found 'special circumstances'⁴¹ based on his need for ongoing supervision and the fact that he would be serving his first custodial sentence.

AEM (snr) was born in Australia to parents of Lebanese extraction and left school after obtaining his School Certificate. He had been employed for two years but was unemployed at the time of the offences. The death of his father in 1998 left him 'grief-stricken and unmotivated'. After that event he started abusing cannabis and alcohol, and had consumed cannabis on the evening of the offences. He had since expressed remorse and participated in vocational and self-development courses in custody. AEM (snr) had a criminal history and was on two recognisances (bonds) at the time of the offences, although he had not previously been in prison. Judge Latham found 'special circumstances'⁴² based on the fact that AEM (snr) would require supervision to enable his reintegration into the community after his first custodial sentence.

Sentences

The sentences imposed on the offenders were:

AEM (jnr): a term of 18 months imprisonment, with a non parole period of 12 months. Judge Latham directed the whole of the sentence to be served in a Juvenile Justice Centre. Because of time already spent in custody awaiting sentence, AEM (jnr) was released on parole on 6 September 2001. However the sentence of AEM (jnr), together with those of AEM (snr) and KEM, will be the subject of a Crown appeal.

KEM: a term of imprisonment of five years and seven months, with a non parole period of three years six months. Judge Latham directed the sentence to be served in a Juvenile Justice Centre.

AEM (snr): a term of imprisonment of six years, with a non parole period of four years.

⁴¹ A sentencing judge must make a finding of 'special circumstances' to depart from the usual rule that the non parole period (ie. the period of the sentence that has to be served) must not be less than 75% of the total term of sentence: s 44(2) *Crimes (Sentencing Procedure) Act 1999*. A special circumstance denotes the need or desirability for the offender to have a longer period on parole than the statutory ratio provides. For example, a sentencing judge may consider that an offender needs more time for supervised rehabilitation, or to facilitate readjustment to the community after serving his or her first prison sentence.

⁴² Ibid.

5. VIEWPOINTS IN THE CURRENT DEBATE

Controversy over sentencing is not new. It arises every time a high profile judgment is delivered where the sentence is perceived to be inadequate. The current debate centres around: the functioning of the criminal justice system, including perceived leniency of sentences handed down by the NSW judiciary; judicial discretion and the role of victims’ impact statements; and the relationship between ethnicity and crime.

Presented below is a selection of statements arising from the judgment in *Regina v AEM (jnr) & AEM (snr) & KEM* made by politicians, academics, representatives of the legal profession, representatives of victims of crime and representatives of the Lebanese community in NSW. Some comments made before Judge Latham’s judgment was delivered are also relevant to the current debate. Also included are media comments made in response to the judgment. Statements are presented in chronological order under each heading.

5.1 Sentences are too lenient

Many comments have been made about the level of sentences handed down by Judge Latham in *Regina v AEM (jnr) & AEM (snr) & KEM*. The judgment has sparked debate about the appropriate level of sentences for violent crime, with calls for the introduction of a maximum life sentence for the offence of aggravated sexual assault in company (commonly referred to in media statements as ‘gang rape’).

NSW Police Association – Ian Ball, President: These predators are roaming around like a pack of dingos attacking young girls. ...Every decent-thinking citizen will want to see them locked away for the maximum. ... As far as I am concerned, the longer they are put away the better. ... we have to make the penalty fit the crime and lock them away for as long as we can. A Mitchell, ‘Libs push life terms for gang rapists’, *The Sun Herald*, 12 August 2001

Shadow Minister for Police, Mr Andrew Tink: I have been extremely concerned about the recent evidence of gang rapes. ... It is an appalling crime. I think that it should carry the sentence of life that it once did. ... The Coalition opposed downgrading the sentence 20 years ago and Parliament should now be reconsidering the reinstatement of life penalties for the worst cases of aggravated sexual assault. ... The police are trying hard and doing their best but I think that a tougher sentence of life will back up the police and help them do their job properly. ... I hope the prospect of a life sentence would also acts as a deterrent to individual members of street gangs. A Mitchell, ‘Libs push life terms for gang rapists’, *The Sun Herald*, 12 August 2001.

United Australian Lebanese Assembly – Charlie Moussa: Criminals should be punished as much as we can. ... There is a judicial system in this country that we have to respect. ... Its up to the legislative powers to amend it. ... To deter these people, we

need much tougher sentences. **'Lebanese leaders says sentences too AAP, 23 August 2001.**

Premier Bob Carr: As Premier I am committed to seeing judges get the message. Gang rape is a dreadful crime. The worst offenders should be in jail for life. ... We want to send a clear message from NSW families [to the judiciary] that judges must take a tougher attitude to people convicted of serious crimes. It is clear we need tougher legislation and a guideline judgment that the courts can follow for these terrible crimes. **'Furious Carr rushes new laws to raise maximum penalty', *The Sun Herald*, 26 August 2001**

NSW Opposition Leader Mrs Kerry Chikarovski: That sort of sentence scares me, how on earth will women feel protected to know those men will be out in the street in four years. Cowardly men committed a cowardly crime against unprotected women. The trauma they go through is just unbelievable. **'Government, opposition support life jail for pack rapists', AAP 26 August 2001.**

NSW Opposition Leader Mrs Kerry Chikarovski: People do not believe that people in pack rape deserve sympathy, they deserve to be locked up. **AAP 26 August 2001 14.58 AEST**

Editorial, *The Sun Herald*, 26 August 2001: Premier Carr acknowledges its seriousness by announcing that those convicted of gang rape or sexual assault will face sentences ranging up to life in prison. This is commendable – particularly after the extraordinary courtroom leniency last week – but it is not the only answer. The longer term solution is to get inside the minds of a generation of young Australian Muslim men who seem to have a grossly distorted notion of what our society is about. **'Rape, race and people in denial', Editorial, *The Sun Herald*, 26 August 2001, p. 20.**

Editorial, *The Sunday Telegraph*, 26 August 2001: Mr Carr is to be congratulated for his move to get tough against people convicted of gang rape, following soft sentences last week against several youths. This disgusting crime cannot be tolerated in a civilised society. **'Our community demands justice', Editorial, *The Sunday Telegraph*, 26 August 2001**

NSW Police Association – Ian Ball, President: If the courts don't start to reflect community views and the views of the Parliament then at some point they're going to forfeit their right to judicial independence. ... Some members of the judiciary have decided, for whatever reason, they'll exercise their own social conscience without having to live with the consequences. You don't see too many of them living out where people [experience crime daily]. **M**

Devine, 'Revolving doors at the courthouse', *The Sydney Morning Herald*, 30 August 2001.

Premier Bob Carr: We need judges to be aware of the public's expectations in sentencing, especially in the serious categories of crime such as sexual assault and aggravated sexual assault. We also want a justice system sensitive to the concerns of the victim and the victim's family. **R Wainwright, 'Lenient' sentences lead Carr to issue manual for judges', *The Sydney Morning Herald*, 31 August 2001.**

Others argue that sentences for sexual assault in NSW are not actually unduly lenient, that increasing maximum sentences will not reduce the incidence of violent crime, and that, moreover, increasing penalties might be counter-productive in that less people will in fact be convicted of such offences.

Women's Electoral Lobby – Ms Sarah Maddison: If we sent that 16-year old to jail for 20 years, you could almost guarantee he would come out of jail more angry and damaged than he went in. Brutalised by the jail system, he will have had little rehabilitation to return to society and be more of a danger to women. **'Carr seeks urgent meeting with chief justice', *AAP*, 24 August 2001.**

NSW Law Society – Mr Nick Meagher, President: If someone is facing the same maximum sentence for rape as for murder, then a 'what have I got to lose' mindset can certainly come into play. It might mean that some victims who otherwise could live through their ordeal are murdered. **K Burke, 'Lives 'at risk' under Carr's new *Sydney Morning Herald*, 27 August 2001.**

NSW Law Society – Mr Nick Meagher, President: Worldwide experience, particularly in America and Britain, has shown that punitive sentencing as a deterrent simply doesn't work. Look at the number of people on death row in Texas – the number just keeps increasing. **K Burke, 'Lives 'at risk' under Carr's new rape law', *Sydney Morning Herald*, 27 August 2001.**

Institute of Criminology – Prof Mark Findlay, Acting Director: We think that in fact if we increase a maximum sentence that's going to have an effect on whether people commit the crime or not, and that's quite problematic. ... People only think about the sentence if they believe they're going to get caught. If they think they're going to get away with what they do then it doesn't matter what sentence we impose. ... The whole idea of sentencing here is to make the public feel more comfortable and to express public outrage and that's important, but whether that in fact has an impact on public safety or not, I would doubt. ... I've got no doubt that if parliament says they want higher sentences for gang rape – they'll

get them. My concern is that we shouldn't sit back then and say 'oh well the incidence of rape is going to drop because of what parliament's done' – that may not necessarily happen. Increasing sentences does not deter serious crime. **AAP, 27 August 2001.**

Institute of Criminology – Prof Julie Stubbs, Deputy Director: [T]he supposition that extending sentence length isn't going to necessarily have a large deterrent effect on serious crime, including serious sexual assault, is problematic.

We only need to look at jurisdictions like various parts of the United States where they have very long sentences in many contexts and for serious crime with very little effect. We need to be really cautious about assuming simply that this is the answer.

Something like sexual assault is likely to be, you know a response to the broader cultural issues. We really need to understand much more about that, and not simply assume that longer sentences will solve the problem, otherwise I think we're going to create false expectations in the community and have yet again victims' interests not being understood and met. **'NSW Premier proposes tougher rape The World Today, ABC, 27 August 2001.**

Women's Electoral Lobby – Ms Eva Cox: People are going to be very reluctant to convict a 16 or 17-year old if there is going to be a life sentence, so I think it's going to reduce sentences. **I Gerard, 'Critics hit Carr on 'life' for rape', The Australian, 27 August 2001.**

NSW Bar Association – Mr Tim Game, Criminal Law Committee: I don't think experience has shown there is undue leniency in NSW for sexual offences....We would query the need or appropriateness for life sentences, other than in the most serious criminal conduct and that which involves people for whom there are no redeeming features whatsoever. **E Connolly & S Chriton, 'Sceptical lawyers have minimal faith in maximum plan', The Sydney Morning Herald, 28 August 2001.**

NSW Law Society – Mr Nick Meagher, President: The community is being bombarded by one side of view ... but they also need to know the downside in relation to this proposition and the downside is not pretty...more and more people could well get off. If it's a borderline case jurors could decide to find a person not guilty because they realise that the person could be jailed for life. There's clearly a large body of people that are of the view that people should be incarcerated for life and I could well understand the parents of a victim wanting that in every case. But whether that

is right is another question. **R Wainwright & E Connolly**, ‘Life for gang rapists in Supreme justice’, *The Sydney Morning Herald*, 28 August 2001.

Editorial, The Sydney Morning Herald, 28 August 2001: Seizing on this case, Mr Carr criticises the leniency of judges. But he also implicitly raises a host of other issues concerning the way criminal cases are tried and decided – the limits to evidence when a guilty plea is accepted; the limited use of victim impact statements; and the court’s focus, at the time of sentencing, on the accused’s prospects for rehabilitation rather than retribution. ...

Harsher sentences sound good, but experience shows they do not lead to lower rates of crime in the serious categories. ... Crimes such as the one Mr Carr has focussed on are dreadful. But the issues they raise for the criminal justice system are more complicated than he seems to allow. ‘Carr on crime’, Editorial, *The Sydney Morning Herald*, 28 August 2001, p 14.

5.2 Independence of the judiciary

One strand in the debate emphasises that the judiciary has an obligation to take into account community expectations when sentencing offenders. Some argue, in addition, that the Premier must intervene to ensure that this occurs.

NSW Opposition Leader Mrs Kerry Chikarovski: I think the judiciary have an obligation to reflect community views and community values and community standards and I have not spoken to a single person who believes the three people involved in this crime have got what they deserved and its as simple as that. ‘State opposition calls for harsher sexual crimes penalties’, ABC, 24 August 2001, 10.33am.

Enough is enough victims’ support group – Mr Ken Marslew: Tougher sentences were not the answer because judges would continue to work in isolation, ignoring community expectations, and were therefore unlikely to impose the harsher sentence anyway. Life should mean life, and if judges start to impose life sentences then it might be a deterrent and we might see a reduction in crime. ... The judiciary is so out of step with the rest of the world. **E Connolly & S Chriton**, ‘Sceptical lawyers have minimal faith in maximum’, *The Sydney Morning Herald*, 28 August 2001

NSW Opposition Leader Mrs Kerry Chikarovski: Clearly, Premier Carr has the ability to appeal the sentences handed down to three gang rapists, yet to date he has refused to do so. Mr Carr should immediately order his attorney-general to take action to appeal the

sentence today as the legislation enables him to do so.⁴³ **‘Opposition leader calls for premier to hasten appeal’**, AAP, 4 September 2001.

Others, such as NSW Law Society President Mr Nick Meagher, believe that it is inappropriate for the Premier to become involved in sentencing by judges. Emphasis is also placed on the consideration that an independent judiciary is essential and judicial discretion necessary to take into account all the relevant factors of the case.

NSW Law Society – Mr Nick Meagher, President: You must always leave judges the unfettered right to use their discretion and their knowledge of the community when they sentence...If you appointed someone as an independent person free of the legislative arm, they must be left unfettered and there must be a mechanism to deal with a wrong decision [by] the court of appeal. **G Jacobsen, K Burke & E Connolly, ‘Carr to question top judge as DPP ponders appeal’** *The Sydney Morning Herald*, 25 August 2001.

NSW Law Society – Mr Nick Meagher, President: I don’t think the Premier should involve himself in trying to influence what the discretion is of judges when handing down sentences. There is a process available by the Director of Public Prosecutions to look at appealing the sentences which have been handed down. **I Gerard, ‘Critics hit Carr on ‘life’ for rape’**, *The Australian*, 27 August 2001.

For his part, the Premier, while acknowledging the need for judicial discretion, has stressed that sentencing judges ought to take into consideration community expectations:

We want judges to have the discretion to deal with individual cases. But we want to send a clear message from NSW families that judges must take a tougher attitude to people being convicted of serious crimes.

I am angry at the discrepancy between the maximum 20 year penalty and the actual sentences being handed out.

As Premier I am committed to seeing judges get the message.

Gang rape is a dreadful crime. The worst offenders should be in jail for life. **‘Life penalty for gang rape’**, News Release, Premier of NSW, August 26, 2001.

5.3 Judicial process and the role of victims

Regina v AEM (jnr) & AEM (snr) & KEM has sparked debate over the appropriateness of plea bargaining when it means that some facts are not presented to the court. In this

⁴³ Under section 5D of the *Criminal Appeal Act 1912*.

particular case the victims of the rape have spoken to the media following the judgment claiming that certain key elements of their story were not taken into consideration by Judge Latham:

Victim’s mother: They [the DPP] told us when we went to the plea bargaining that the sentences would still be many years longer than what was handed down by Judge Latham. They were like a salesperson selling the plea bargain to talk the girls out of a trial. My daughter is very strong-headed and the only reason she backed down was because she thought they were going to get a fair few years. ... We were convinced by the people who were handling it [the case] that they were going to get enough years that we didn’t have to worry about her going through the agony of going through the court. N Toi & L Knowles, ‘Pack rapists’ racial taunts’, *The Daily Telegraph*, 24 August 2001.

Victim’s mother: It was wrong for victims to be gagged. We only just wanted to get our point across to the judge. The Government should really look at the legal system totally and that victims should have some voice. Something has to be done. E Connolly, ‘Mother’s plea: give victims a voice’, *The Sydney Morning Herald*, 25 August 2001.

Sue (victim): I did expect the sentencing to give me some sort of closure so I could start getting on with my life. But it’s been the exact opposite. It’s just made things worse because it’s like, now my story has been changed by the legal system. ... The facts were changed and I want to stop that. My story should be told the way it happened.

They could have told us at least that they were going to change it and then let us decide what we wanted to do from there. But they didn’t. Personally, I would rather go through the process of court because at least my story is getting told and they are actually getting sentenced on what they did and not what they didn’t do. 60 Minutes, transcript of interview, 2 September 2001.

The importance of the victims’ concerns was emphasised by the Premier:

My job as Premier is to speak for victims of crime. That’s how I see it ... I believe it is important for me as Premier to raise these issues. I said that I could go nowhere in the community without ordinary people raising with me their concerns over the decisions coming down from judges, as exemplified by this case. R Wainwright & E Connolly, ‘Life for gang rapists in Supreme justice’, *The Sydney Morning Herald*, 28 August 2001.

5.4 Ethnicity and crime

Another part of the debate has focussed on the link between ethnicity and crime. As reflected in the following statements, a common element of this debate is an ongoing concern about ethnic gangs.

NSW Police Commissioner, Mr Peter Ryan: Here the crime is partly Lebanese based, partly from the old Soviet Union, Hong Kong, Vietnam and China, and they all have their own milieus. There are vast amounts of money, principally based on drugs – crime here is horrific. There is a large domestic murder rate. J Morton, 'Ryan's war', *Police Review*, 29 November 1996.

Federal Police Commissioner, Mr Mick Palmer: I think essentially it [increase in use of knives and guns] is related to drug trafficking. It's related to some of the ethnicity of some of the people involved in the trade and the fact that the use of knives and guns is a more familiar part of the criminal side of those cultures than has been the case in Australia. I think that's a reality. Whilst their numbers are small, the damage they can do is quite large. N Mercer, 'Police chief hits out at ethnic gang violence', *The Sydney Morning Herald*, 12 March 2001.

M Devine, *The Sun Herald*, 12 August 2001: Why did it take two years and as many as 70 rapes for us to be made aware of what appears to be a home-grown form of systematic ethnic cleansing by a group of men said to be of "Middle Eastern" extraction? M Devine, 'Rape, hatred and racism', *The Sun-Herald*, 12 August 2001.

NSW Police Commissioner, Mr Peter Ryan: I've never come across something quite like this before. Where a particular, clearly defined cultural group of attackers attack a very clearly defined cultural group of victims. M Chulov, 'Rape menace from the melting pot', *The Australian*, 18 August 2001.

One Nation – Pauline Hanson: A lot of these people are Muslims, they have no respect for the Christian way of life that this country's based on. Now before I actually came on the scene, this was all politically correct. ... You've got to have punishment before rehabilitation, We can learn a lot from a country like Singapore.' [Asked whether she would advocate floggings as they have in Singapore, Ms Hanson answered] Oh too right I would. Yes I would. L Doherty & G Jacobsen, 'Spray at Muslims, call for floggings: Hanson back on radar', *The Sydney Morning Herald*, 23 August 2001.

Some commentators, including academics and members of the Lebanese community, are concerned that the tenor of this controversy leads to harmful ethnic stereotyping, and the racialisation of the law and order debate.

Australian Lebanese Christian Federation – Anwar Harb (President): There is no nationality for crimes. Most are born in Australia, regardless of their forbears. Why call them Lebanese or anything else other than Australian criminals? **D Humphries, ‘Lebanese gangs behind violence: Ryan’, *The Sydney Morning Herald*, 25 February 2000.**

Lebanese Muslim Association, Keysar Trad (vice-president): There is a message out there, if you’re a victim, then the perpetrator of the crime must be of Middle-Eastern appearance. ... I don’t know why someone has done this malicious attack on the community; we’re getting threatening calls on a daily basis. **M Chulov, ‘Rape menace from the melting pot’, *The Australian*, 18 August 2001.**

April Pham, community worker and refugee: The Premier’s comments about the involvement of certain ethnic groups in crime divide the community into us and them, inviting the community there is (and was) no crime perpetrated by white Australians. Such racist portrayals of particular groups mask the incompetence of the State Government in responding to the needs of the disenfranchised in the community, the high level of youth unemployment, the prevalence of drugs, and of course, the systemic racism and harassment of “ethnic communities.” **A Pham, ‘What happened to the country that once welcomed me?’, *The Sydney Morning Herald*, 22 August 2001.**

Dr Peter Wong MLC: He’s [Mr Carr] going down the same path [as Ms Hanson] of targeting the ethnic community as those more likely to commit crime, and more likely not to contribute towards this country. ... not co-operating with government, the police. He has created a wave of mutual hatred which has never been seen before in NSW. He has abdicated his duty as leader and alienated sectors of the community. **R Morris, ‘Premier rejects hatred claims’, *The Daily Telegraph*, 22 August 2001.**

United Australian Lebanese Assembly – Charlie Moussa: The Lebanese community abhorrently and vehemently denounces and condemns the cowardly, dirty and barbarian acts carried (out) by rapists and every other criminal. ... We are privileged to be Australians but want to be treated equally. Mr Carr should foster harmony and work harder not to alienate the Australian public from ethnic communities. **‘Govt focus on ethnic crime creates tensions, forum AAP, 23 August 2001.**

Editorial, The Sydney Morning Herald, 23 August 2001: There should be no taboo in discussing crime occurring in any particular ethnic community. Equally, there must also be great care to avoid stereotyping, which can slip so easily into racial denigration. ... The problem of ethnic crime gangs has not gone away.... But it is disappointing that the experience of the years of confronting such crime honestly while not inflaming hatred and division by careless stereotyping has not prevented the latest ugliness. ... Terrible though they are, these assaults by young Australian men of Lebanese background have been hardly distinguishable from any number of others by packs of other young men over the years. To suggest otherwise is to cross the line from proper, open discussion of social problems to dangerous, racial stereotyping. **'Taboos, stereotypes', Editorial, The Sydney Morning Herald, 23 August 2001.**

Editorial, The Australian, 24 August 2001: Traditional, offensive patterns of male violence towards, and hatred of, women, could be taking an even more disturbing turn, as racist motivations are heaped on top of misogyny, threatening not only relations between the sexes but across ethnic groups. ...

On the other hand, there is no excuse for gratuitous attacks on Australians of Lebanese background, or other ethnic minorities, the majority of whom are of course law-abiding. And pack rape is by no means an ethnic or south-western Sydney-specific problem. Unfortunately, Islamic spiritual leader Sheik Taj el-Din Al Hilaly only succeeded in inflaming tensions when he said the spate of sexual attacks reflected the failure of Australian, and not Lebanese, culture.

The argument is not that Lebanese culture necessarily promotes rape. Or that Islam is inherently misogynistic. Or, indeed, that immigration breeds crime. The issue is the community's right to have a frank public discussion of a disturbing series of crimes and how to punish the perpetrators, and tackle the underlying causes. **'Culture must be aired in rape debate', Editorial, The Australian, 24 August 2001.**

Institute of Criminology – Prof Mark Findlay, Acting Director: I think those who've been advocating the position that there is an inherent connection between certain ethnic groups and crime have created an atmosphere of hysteria now in which there is clearly racial disharmony. ABC AM Saturday August 25, 8.10am – Peter Lloyd reporting.

K de Briton The Sunday Telegraph, 26 August 2001: It serves no one to generate fear about gang rapes in a particular part of Sydney

when rape is happening under our noses, everywhere, every hour of every day. ...

Rape is about power, violence and domination. Victims and assailants are most frequently the same race. Rape happens to women of all ages, although women aged under 25 are most at risk, and victims come from all races, religions and socioeconomic and ethnic groups. **K de Briton, ‘Rape is not an issue of ethnicity’, *The Sunday Telegraph*, 26 August 2001.**

Council for Multicultural Australia – Neville Roach AO, Chair: Gang related crime is an issue that we should all be concerned about. ... However, Australia is a multicultural society (and) thrives on the concept of a fair go. ... Selective labelling is clearly discriminatory and dangerous. **‘Ethnic tagging risks Australia’s “fair go” reputation – AO’, AAP, 27 August 2001.**

6. CASE LAW ON SEXUAL ASSAULT COMMITTED IN COMPANY

6.1 Statistical limitations

A number of difficulties stand in the way of a comprehensive review of the case law relevant to s 61J (2)(c) of the *Crimes Act* (aggravated sexual assault committed in company). One difficulty, from a statistical standpoint, is that the NSW Judicial Commission’s Sentencing database treats s 61J cases in a generic sense, without specifying which ground(s) of aggravation are at issue in particular cases. In other words, cases where the charge relates specifically to sexual assault committed in company are not distinguished from cases where other grounds of aggravation, such as where the alleged victim is under the age of 16 years,⁴⁴ or where the alleged victim is under the authority of the alleged offender⁴⁵ Nor, for that matter, does the statistical database indicate those cases where multiple grounds of aggravation are at issue. This may be said to create difficulties both for commentators and the courts themselves. In relation to the courts, a sentencing judge cannot receive statistical information specifically related to s 61J (2)(c) cases. Instead, reliance must be placed on the sentencing information relevant to s 61J cases generally. In common parlance this means that ‘gang rape’ cases cannot be separated out for particular analysis for the purpose of deciding an appropriate sentence. ‘Gang rape’ is not, statistically, an isolated offence.

In practice, this lack of specificity is overcome by the prosecution bringing the most relevant comparable cases to the attention of the court. In the present case of *Regina v AEM (jnr) & AEM (snr) & KEM* the judgment of Latham J makes reference to three comparable cases, presumably brought to the court’s attention in this way by the prosecution.⁴⁶ In fact, only

⁴⁴ Section 61J (2) (d), *Crimes Act 1900*.

⁴⁵ Section 61J (2) (e), *Crimes Act 1900*.

⁴⁶ Other cases were cited in the judgment, but not for the purpose of helping to determine an appropriate sentence.

two of these appear to be strictly s 61J (2)(c) cases – *R v Rushby* and *R v Bus & AS*. In the third case – *R v Lewis* – the circumstance of aggravation was that the victim suffered actual bodily harm.⁴⁷

6.2 Paucity of reported NSW cases

In any event, the limited number of comparable s 61J (2)(c) cases cited in the judgment may point to a second difficulty involved in an analysis of the case law. This refers to the paucity of reported cases in this field. Aggravated sexual assault cases are dealt with in the first instance in the District Court, where sentences are determined. However, and it is here that the difficulty arises, the District Court does not systematically transcribe sentencing judgments. This only occurs in the most controversial cases, of which *Regina v AEM (jnr) & AEM (snr) & KEM* is an instance, or in relation to those cases which are appealed. Reported sentencing cases are almost exclusively NSW Court of Criminal Appeal cases. As these are relatively few in number, they cannot be looked upon as comprehensive in scope, or in a strict sense as a representative cross-section of s 61J (2)(c) sentencing decisions.

6.3 The value of reported cases

At any rate, the analysis of the reported cases must be treated with caution. Some may fall into the ‘worst case’ category, or close to it; others may be on appeal for technical, evidentiary reasons. They are, for whatever reason, unusual in nature. On the other hand, the few reported cases which are available do belong to what might be called a reasoned sentencing regime. Ideally, they should form part of a broader pattern of sentencing decisions. Viewed in this light, the caution required when generalising from these cases need not be overstated. Unusual they may be, but they are still indicative of the sentencing tariff relevant to aggravated sexual assault committed in company. In other words, the cases cited in *Regina v AEM (jnr) & AEM (snr) & KEM*, together with the handful of other reported cases, present a useful, if restricted, picture of the sentencing decisions handed down for s 61J (2)(c) offences.

6.4 Seven reported section 61J (2)(c) cases

A survey of the relevant NSW databases has produced no more than seven relevant reported cases. This is likely to be a small proportion of the total number of s 61J (2)(c) cases. As explained above, the database cases are restricted to those which were appealed to the NSW Court of Criminal Appeal. The seven cases are presented in chronological order as follows:

R v Bus & AS NSWCCA 3 November 1995 – this is a s 61J (2)(c) case, in which the fact that the offenders were ‘in company’ constituted the circumstances of aggravation upon which the Crown relied to render the offences liable to a higher maximum sentence. At first instance, the 20 year old Steven Bus received a sentence of *6 years (penal servitude for 4 years as a minimum term, plus an additional term of 2 years)*; his co-offender, the 17 year old AS was sentenced to *4 and a half years (penal servitude for a term of 2 and a half years, plus an additional term of 2 years)*. The case involved acts of violence and degradation against a 17 year old woman in a bedroom after a party, acts which including

⁴⁷ Section 61J (2) (a), *Crimes Act 1900*.

vaginal rape, the use of a baton, as well as tying up and threatening the victim.

On behalf of Bus it was argued that the sentence imposed overstated the objective criminality involved in the acts constituting the offences of aggravated sexual assault. The Court of Criminal Appeal did not agree. Even if the offences were ‘nowhere near the worst class of offences of this kind’, as submitted by Bus, the Court still emphasised that ‘offences of this nature are indeed very serious’. Nor did the Court of Criminal Appeal accept the argument that insufficient weight had been given to such subjective features as Bus’s relative youth or low level of intellectual functioning. ‘In my opinion’, Hunt CJ at CL concluded, ‘the sentence imposed upon Bus was within the range applicable to the

On behalf of the 17 year old AS the ground of appeal turned on the contention that the District Court had failed to take into account, or give sufficient weight, to his youth. In a passage quoted in *Regina v AEM (jnr) & AEM (snr) & KEM*, Hunt CJ at CL stated:

the relevance of the principles stated in s 6 [of the *Children (Criminal Proceedings) Act 1987*] to each individual case depends to a very large extent upon the age of the particular offender and the nature of the particular offence committed. An offender almost eighteen years of age cannot expect to be treated according to law substantially differently to an offender just over eighteen years of age. In both cases, the youth of the offender remains very relevant. Rehabilitation plays a more important role and general deterrence a lesser role. But that principle is subject to the qualification that, where a youth conducts himself in the way an adult might conduct himself and commits a crime of considerable gravity, the function of the courts to protect the community requires deterrence and retribution to remain significant elements in sentencing him...Of course, non-consensual sexual intercourse is regarded as an extreme form of violence.

In the event, the Court of Criminal Appeal found that the judge did draw a clear distinction both between the conduct of Bus and AS and between their subjective circumstances. Emphasis had been placed on AS’s youth and on the fact that Bus played the dominant role. The sentence imposed by the judge on AS was 75% of that imposed on Bus: ‘That was a matter within his discretion, and I can see no error in the exercise of that discretion. It could have been greater; likewise, it could have been less’.

R v Crozier NSWCCA 8 March 1996 – John Crozier and his co-accused were jointly tried on a count of kidnapping (s 90A) and of attempting to have sexual intercourse in circumstances of aggravation, the aggravating feature being that the offence was committed in company contrary to s 61J (2)(c) and s 61P. The jury found the co-accused not guilty on both counts, and Crozier not guilty of kidnapping but guilty of attempted sexual assault in circumstances of aggravation. Crozier was sentenced to *2 years and 8 months (penal servitude for a minimum term of 2 years, plus an additional term of 8 months)*. An appeal

was granted pursuant to s 5 (1)(b) of the *Criminal Appeal Act* on the grounds that: the verdicts of the jury were inconsistent; that the verdict of the jury against Crozier is unsafe and unsatisfactory.

The case involved an incident in which the two co-accused gave a young woman a lift late and night, after which the complainant said she was sexually assaulted by both men in the back of the car. In fact, the evidence did not unequivocally establish that sexual intercourse (as defined) had taken place and the Crown relied upon s 61P which makes an attempt punishable in like manner as commission of an offence.

On appeal, it was found that, in circumstances where the co-accused had remained passive during the appellant's commission of the offence, the mere presence of a co-accused was insufficient to establish that an offence had been committed 'in company'. Grove J remarked that aggravation had not been considered a 'significant feature' at first instance and now, where a substituted conviction was to be imposed, it ceased to be a feature at all. The original verdict was held to be unsafe therefore and the conviction and sentence quashed. Crozier was instead convicted of an offence under s 61I (sexual assault simpliciter) and s 61P of the *Crimes Act* and sentenced to a total term of 20 months.

R v Agafili NSWCCA 1 May 1996 – this is an instance of a Crown appeal against sentence on grounds of leniency. The offences at issue were aggravated sexual assault committed in company and the sentence at first instance imposed on Agafili was *5 years (penal servitude for a minimum term of 3 years, plus an additional term of 2 years)*. In the event, the Court of Criminal Appeal agreed that the original sentence was too lenient, but the members of the Court disagreed on the appropriate severity of the alternative sentence. Meagher JA held it should be a minimum of 9 years with an additional term of 3 years. However, Justices McInerney and Hulme held that the sentence should be *8 years (penal servitude for a term of 6 years, plus an additional term of 2 years)*.

The facts of the case were that the victim was a 20 year old woman who, in the early hours of the morning left a nightclub and waited for a cab on Luxford Road, Mount Druitt. She was soon afterwards dragged involuntarily into a car occupied by Agafili and his friends. She was threatened and physically assaulted in the car and then removed from the vehicle at an isolated spot where she was subjected to acts of violence and degradation, including vaginal and anal rape. She eventually escaped, apparently with help from the co-accused.

All members of the Court of Criminal Appeal agreed that the sentencing judge had given excessive weight to certain subjective features, including that Agafili was 35 and had no previous convictions, his supposed contrition and the fact that he was a devoted religious man. Agafili had also pleaded guilty, albeit at a late stage in the proceedings. Against these considerations, the Court of Criminal Appeal marshalled the full horror of the objective circumstances which led Meagher JA to the view that 'one would have thought it difficult to imagine a more serious case'. He went on to describe the case as 'vicious and brutal' and to conclude that the original sentence was 'wholly inadequate'.

McInerney and Hulme JJ agreed with the general thrust of these remarks, with Hulme J

commenting on the victim's ordeal: 'She thus had some six hours of confinement in circumstances which have been outlined. It is completely incomprehensible to me how the objective circumstances of the case can have permitted the sentencing Judge to do what he did'. However, neither McInerney J nor Hulme J agreed with the severity of the sentencing recommended by Meagher JA. For McInerney J consideration of such factors as Agafili's age and, in particular, that this was the first time he had received a prison sentence were significant in this respect, as was the fact that he had pleaded guilty. A more significant consideration was that this was a Crown appeal where, as McInerney J explained, 'the Court, when interfering with such a sentence and imposing a fresh sentence, will normally impose a sentence less than that imposed at first instance, in particular because of the element of double jeopardy'.⁴⁸ To this Hulme J added the observation:

In terms of what this Court should do, I am content to agree with the orders proposed by my brother McInerney J. That sentence, as his Honour indicated, is significantly less than might have been imposed at first instance had the sentencing Judge properly applied the considerations which enter into this case.

Thus, a sentence of 6 years minimum and 2 years additional term was imposed, albeit on the understanding that the more severe sentence proposed by Meagher JA would have been within the sentencing discretion of Johnston DCJ at first instance.

R v Talbot NSWCCA 19 December 1997 – this was again a Crown appeal against the leniency of sentence at first instance – 7 years (*penal servitude for a minimum term of 4 years, plus an additional term of 3 years*). Simpson J in the Court of Criminal Appeal commented that the 'objective features' of the case 'may readily be characterised as within the worst category justifying consideration being given to the imposition of the maximum sentence provided by the statute'. The appeal was allowed and the sentence increased to 10 years (*penal servitude for a minimum term of 7 years, plus an additional term of 3 years*). The relevance of special considerations applying to Crown appeals, as discussed in relation to *R v Agafili*, were noted. Although a number of charges were involved, including a charge of breaking and entering a dwelling house in circumstances of special aggravation, the third charge of aggravated sexual assault was the subject of the principal sentence both at first instance and on appeal.

A number of aggravating circumstances were at issue in *R v Talbot*. The 25 year old Talbot was in the company of three other men when he abducted a girl of 15 from a farmhouse and, in company, subjected her to brutal sexual violation, during the course of which Talbot threatened the victim. In mitigation, the Court discussed such subjective factors as Talbot's relative youth, plus the fact that he came from a deprived background and had lived in an environment of drugs and alcohol. In terms of mitigating factors, it was also noted that he

⁴⁸ Crown appeals are discussed in detail in *Butterworths Criminal Practice and Procedure NSW* [20.245.1-20.245.5] - 'Where the court allows a Crown appeal, it will normally reduce the sentence imposed by it from that which is otherwise appropriate on the basis of double jeopardy, although it need not always do so: *R v Holder* [1983] 3 NSWLR 245'.

had pleaded guilty and had assisted police. Summing up, Simpson J observed:

In every sentencing decision the sentencer has the difficult task of balancing those features personal to the offender, which sometimes are compelling, against the objective circumstances of the crime and, particularly, the expectation that due regard will be paid to the position of the victim. To over emphasise the former at the expense of the latter is to undervalue the victim. This is of particular significance where the offence is one of violence. It requires very little imagination to envisage the effects of this episode on the victim, and in any event there was evidence of her continuing psychological state. Only passing reference was made by the sentencing judge to the impact of the crime upon her, and although I do not for a moment consider that he entirely overlooked it, I am satisfied that it was relegated to an unacceptably minor place in the overall sentencing judgment.

R v Rushby NSWCCA 24 May 1999 – in *Regina v AEM (jnr) & AEM (snr) & KEM* this case was described as being ‘almost in the worst category’ and it was explained that:

The forced vaginal and anal intercourse of a thirteen year old girl by an eighteen year old male and his sixteen year old male companion attracted sentences of eight years and six years respectively, following pleas of guilty. The Court noted the presence of a number of aggravating features not present in the instant case, namely that the victim was under the age of sixteen years, and she was tied up and left in a remote location after anal intercourse. The Court declined to interfere with the sentences.

Rushby was in fact sentenced to *penal servitude for 8 years comprising a minimum term of 5 years and an additional term of 3 years*. His co-offender Stephen Spence was sentenced to *penal servitude for 6 years, comprising a minimum term of 3 years and an additional term of 3 years*. The Court of Criminal Appeal remarked that there were 4 statutory aggravating features of the offence: actual bodily harm was caused; threats were made with a piece of wood; the offence was committed in company; and the victim was under 16. The fact that the victim was tied to a tree and left in a remote place was a further aggravating feature in the opinion of the Court of Criminal Appeal, as was the fact that one of the acts of sexual intercourse was anal intercourse.

On behalf of Rushby, the older of the two co-accused, it was argued that the disparity between the sentences did not give sufficient weight to the consideration that the younger co-offender was the instigator of the offences. It was also submitted that the subjective features significantly favoured Rushby, except for the fact that the co-offender was younger. Barr J (McInerney AJ and Smart AJ agreeing) in the Court of Criminal Appeal found that the age difference between the offenders was in fact ‘large and significant’. Counsel for Rushby had cited the remarks of Hunt CJ at CL in *R v Bus and AS* on the principles of

sentencing which ought to be applied in respect to young offenders, notably as regards the application of the principles of deterrence and retribution where a 'youth conducts himself in the way an adult might conduct himself and commits a crime of considerable gravity'. In response and dismissing this ground of appeal, Barr J commented:

...when offenders as young as the co-offender are being sentenced, although aspects of general deterrence and retribution are still significant, particularly when offences are as serious as this one, the Courts must give more weight to the question of rehabilitation than they do in the case of an older offender.

A further ground of appeal on behalf of Rushby was that the sentence was manifestly excessive by comparison with sentencing statistics. The statistics were said to show 'this offence to be in the top thirty per cent of all offenders for this offence and that in view of the applicant's age, his plea of guilty, his remorse, his admissions and the assistance he gave, such a position in the scale is not justified'. Barr J responded by citing the case of *R v Lewis* and remarking 'The figures do demonstrate that the sentence is high but not, in my opinion, that it is outside the proper range of sentencing discretion of his Honour'. This second ground of appeal was also dismissed.

R v Khouzame & Saliba NSWCCA 2 July 1999⁴⁹ - in this s 61J (2)(c) case an appeal against conviction was allowed by the Court of Criminal Appeal on the technical ground that the charges, as framed against Khouzame and Saliba, were bad for duplicity.⁵⁰ Leave was also granted to appeal against the sentences imposed on both co-accused, which at first instance were as follows – Khouzame was sentenced to 9 years (*penal servitude for a minimum term of 6 years, plus an additional term of 3 years*); Saliba was sentenced to 8 years (*penal servitude for a minimum term of 5 years, plus an additional term of 3 years*).

The complainant was a 16 year old woman. Her evidence was that she had been sexually assaulted in a number of ways by the two co-accused. Consent was the issue, notably whether the complainant had consented to the initial acts of sexual intercourse but not to the later acts which included vaginal penetration with a bottle. On appeal the question of duplicity was whether, if there had been separate charges, there was a rational basis upon which jurors could have discriminated between counts and convicted Khouzame and Saliba on some counts but not others? The Court of Criminal Appeal answered the question in the affirmative, with Kirby J (Ireland and Bell JJ agreeing) concluding that 'The Crown should have been called upon to elect. Having not done so, the conviction is uncertain. It cannot be said that there was no substantial miscarriage of justice'.⁵¹

⁴⁹ (1999) 108 A Crim R 170.

⁵⁰ The ambit of the rule against duplicity is that 'save for statutory warrant and for the exceptional cases of continuing offences or facts so closely related that they amount to the one activity, separate offences should be the subject of separate charges' – *Walsh v Tattersall* (1996) 188 CLR 77 at 92 (Kirby J). In other words, each count in the indictment should charge only one offence.

⁵¹ (1999) 108 A Crim R 170 at 185.

R v Colby NSWCCA 26 August 1999 – Colby, a 49 year old man, was convicted of two counts of aggravated sexual assault (s 61J, *Crimes Act*), eleven counts of sexual intercourse with a person between 10-16 by a person in authority (s 66C (2) *Crimes Act*) and one count of common assault. Although it is not expressly stated in the judgment of the Court of Criminal Appeal, count 14 seems to have involved a s 61J (2)(c) offence, in which Colby and another man, Kennedy, forced the complainant to engage in oral sex with them at a motel room. Colby was sentenced at first instance to *a minimum term of penal servitude for 16 years, plus an additional term of 6 years*. Colby appealed both against conviction, on the grounds that the verdict was unsafe and unsatisfactory due to lack of evidentiary support, and against sentence which, it was argued on his behalf, was manifestly excessive. In the event, the appeal against conviction was dismissed by the Court of Criminal Appeal. On the other hand, the appeal against sentence was upheld and the following sentence was substituted – *a minimum term of 12 years penal servitude, plus an additional term of 4 years*.

It was held that the sentence imposed was manifestly excessive. Mason P (Grove and Dunford JJ agreeing) commented in this respect:

This was undoubtedly a case that called for a condign sentence. There as a gross betrayal of trust involving a young girl who was in a peculiarly vulnerable condition having regard to the earlier abuse she had suffered at the hands of her father. The appellant was in a position of authority. The particular offences were disgusting and degrading and were part of a pattern of domination and abuse for selfish gratification. Two of the offences involved circumstances of aggravation and carried a maximum sentence of 20 years penal servitude. There was no plea of guilty. The impact of the offences will be with the victim for the rest of her life, albeit that the appellant was not the first close adult to have sexually assaulted the complainant.

It is however relevant to note the closed period (13 months) and the fact that a single victim was involved. These are points of distinction from some of the other cases to which the Court was taken.

No two cases are identical. Nevertheless, the sentence imposed in the present case was significantly in excess of other sentences for similar offences which have been approved by this Court. Particular reference should be made to *R v Hill* CCA unreported 7 July 1992; *R v Moore* CCA unreported 12 April 1994 and *H* (1994) 74 A Crim R 41.

His Honour continued:

H involved prolonged sexual abuse (a span of 11 years) principally involving the prisoner's daughter, but also another young girl. The prisoner had no criminal history. The maximum penalty for the most serious offences charged was, at the time, 10 years penal servitude (contrast the present case). Nevertheless *H* had pleaded guilty from the first time that he was confronted by the authorities. A sentence of 16 years and 6 months, involving a minimum term of 11 years and 6 months and an additional term of 5 years was held to be excessive in its totality. After reference to earlier decisions, including *Moore* and *Hill* Gleeson CJ (with whose reasons Mahoney JA and Sully J agreed) said that consideration of the other cases had led him to the conclusion that the total effect of the sentences was excessive to an extent requiring appellate intervention.

In my view the same can be said of the present case.

With particular reference to count 14 (the s 61J (2)(c) offence) Judge Kinchington had imposed a sentence of *a fixed term of 6 years together with an additional term of 6 years*.⁵² For this the Court of Criminal Appeal substituted a sentence of *a fixed term of 6 years*.⁵³ The net effect is that Colby will be eligible for parole from 21 August 2009.

6.5 Aggravated sexual assault cases generally

Further comment can be made about the sentencing of 61J cases generally. For the most serious examples of aggravated sexual assault, where the offender enters the home of the victim or takes her to an isolated location and subjects her to an ordeal of violence and degradation over a period of hours, the Court of Criminal Appeal has suggested that the appropriate sentencing range was a minimum of 6-9 years (*R v Russell*, NSWCCA 21 June 1996). It has also been suggested that for such serious offences sentences of 10-12 years, with a minimum term in the range of 7½-9 years, would not be appealably excessive (*R v Brennan*, NSWCCA 29 May 1995).

The following are a selection of s 61J cases presented here in summary form. Note that the sentences refer specifically to those handed down for the offence of aggravated sexual assault in each of the cases. Additional sentences referring to other charges are not included:

⁵² To be served cumulatively on the sentence imposed in respect of count 1 (commencing 22 August 2007).

⁵³ To be served cumulatively on the sentence imposed in respect of count 7 to commence on 22 August 2001 and to expire on 21 August 2007.

| | Crown Appeal | Prior Prison Sentences | Plea of Guilty | Age of* Offender | Age of Victim | Aggravating Factor | Sentence at 1 st instance | Sentence on Appeal |
|---------------------------|--------------|------------------------|----------------|------------------|--------------------|------------------------|--------------------------------------|---------------------------------|
| R v Lewis CCA, 14.12.93 | No | No | Yes | 20 | Young adult female | Actual bodily harm | 8 years total (6 min ** 2 add) *** | Upheld |
| R v Brennan CCA, 29.5.95 | Yes | No | Yes | Not known | Not known | Actual bodily harm | 6 years total (3 ½ min 2 ½ add) | 7 years total (5 min 2 add) |
| R v Russell CCA, 21.6.96 | Yes | Yes | Yes | 24 | 20 | Actual bodily harm | 6 years total (4 min 2 add) | 8 years total (5 ½ min 2 ½ add) |
| R v Harrison CCA, 20.2.97 | Yes | Yes | Yes | 22-23 | 17 | Threatened bodily harm | 12 years total (9 min 3 add) | 16 years total (12 min 4 add) |

* Age at time of offence(s).

** Min'refers to minimum term.

*** Add'refers to additional term.

6.6 Comments

No two cases are the same, yet legitimate comparisons can, and are, made for sentencing purposes. What the above review of the reported cases suggests is that actual sentences of imprisonment for more than 10 years are very rare and reserved for the worst cases involving multiple offences. *R v Colby* is an instance. Even there, on count 14, the specific offence of aggravated sexual assault attracted a fixed term of 6 years. In fact at least three circumstances of aggravation under s 61J might have applied in relation to that count: it was committed in company; the victim was under 16; and she was under the authority of the offender. Moreover, there was no plea of guilty to attract a discount. In *R v Rushby* at least four aggravating factors were involved in a case described as 'almost in the worst category'. Following pleas of guilty, the 18 year old Rushby was sentenced to penal servitude for 5 years; his 16 year old co-accused to penal servitude for 3 years. Comparable in seriousness was *R v Agafili*, a Crown appeal in which the Court of Criminal Appeal substituted a sentence of 6 years penal servitude for the 3 year minimum term imposed at first instance. Indeed, it was said that the heavier penalty of 9 years penal servitude (proposed by Meagher JA) would have been within the discretion of the sentencing judge at first instance. This would suggest that a more severe approach than is usual for this

offence may be considered legitimate in the most extreme s 61J (2)(c) cases. Likewise, in *R v Brennan* the Court indicated that sentences of 10-12 years, with a minimum term in the range of 7½-9 years, would not be appellably excessive for the most serious s 61J cases.

Regina v AEM (jnr) & AEM (snr) & KEM might be said to suggest the reluctance of the courts to apply this tougher approach. Then again sentences must reflect the particular objective and subjective facts relevant to a particular case. As noted, Latham DCJ was of the opinion that the offences in the instant case did not fall within the 'worst category' of sexual offences; rather, the objective features placed the offences 'at the upper end of the

7. SENTENCING STATISTICS FOR SEXUAL ASSAULT

7.1 Judicial Commission Statistics⁵⁴

Some general comments need to be made about the nature and classification of the data on the 'Statistics' component of the Judicial Information Research System (JIRS).

The statistics show the number and type of sentences imposed for specific offences. The information currently available ends at March 2000, because data has yet to be processed from sentences imposed under the *Crimes (Sentencing Procedure) Act 1999* which commenced on 3 April 2000.

The statistics can be represented in graph or table form. They demonstrate two basic types of information:

- **Penalty types** - percentages of custodial and non-custodial penalties imposed in the number of cases that were sentenced during the period shown;
- **Duration or amount of penalty** - length of prison terms, fine amounts and community service hours.

The statistics initially displayed are for 'All offenders'. For a common offence such as armed robbery or sexual intercourse without consent this will comprise hundreds of cases. If this result is too general to draw meaningful conclusions, the sample of cases can be modified by identifying the features of the type of offender or case sought.

Numerous subcategories are available under the headings 'Offenders' and 'Penalties', including:

⁵⁴ One of the main providers of statistics on the sentencing of offenders in criminal cases is the Judicial Commission of New South Wales. The statistics are available on the Commission's electronic 'on line' research database, known as the Judicial Information Research System. This is not to be confused with the Commission's website at <www.judcom.nsw.gov.au>, although a demonstration is available on the website. The Parliamentary Library has a computer terminal with access to the Judicial Information Research System.

- Offenders
 - Number of counts (one or multiple)
 - Age group of offender
 - Plea (guilty or not guilty)
 - Prior convictions (none, same or different)
 - Status at time of offence (on bail, bond, probation or at liberty)
 - Form 1 matters⁵⁵
- Penalties
 - Imprisonment - full terms, and minimum/fixed terms⁵⁶
 - Fine amounts
 - Community service order hours

For further details on how the JIRS database works see Appendix C.

7.2 Judicial attitude to the statistics

It is standard practice for lawyers to tender sentencing statistics in court. They are referred to at first instance, to give the sentencing judge guidance on the range of sentences for the relevant offence, and also on appeal, to compare the penalty imposed by the sentencing judge with similar cases.

Judicial comment has been made by the Court of Criminal Appeal in numerous cases about the use of sentencing statistics. In *R v Bloomfield* (1998) 44 NSWLR 734 at 739 Spigelman CJ cautioned that statistics may be of limited use because the sentence to be imposed depends on the facts of each case, which can vary greatly. Surveys of decided cases may be more useful, because they allow for comparison of specific circumstances in some detail. However, Spigelman CJ acknowledged that statistics may indicate an appropriate range, as well as general sentencing trends and standards.

7.3 Statistics for aggravated sexual assault

As noted earlier in the paper, statistics on the Judicial Information Research System for aggravated sexual intercourse without consent are not divided according to the subsections of s 61J of the *Crimes Act*. Therefore, it is not possible to identify the type of aggravation in the cases shown, nor to extract cases with only a particular aggravating feature, such as being in company (s 61J(2)(c)).

A selection of statistics are attached to this briefing paper at Appendix C. The analysis below provides some commentary on interpreting those statistics.

⁵⁵ See n 26 for an explanation of a Form 1.

⁵⁶ Under the regime of the now-repealed *Sentencing Act 1989*, the full term referred to the total sentence, including the minimum term (called the non parole period under the *Crimes (Sentencing Procedure) Act 1999*) and the additional term (parole period). Where a judge declined to divide a sentence into a minimum term and an additional term, the sentence was called a fixed term. Therefore, the statistics group the fixed terms with the minimum terms because both represent the period that offenders actually had to serve in custody.

Aggravated sexual assault - all offenders (Appendix C (i))

In the period from April 1993 to March 2000 there were a total of 248 cases of aggravated sexual assault (s 61J) which were sentenced in the higher courts. Of those cases:

- 96% received a sentence of full-time imprisonment;
- 2% received periodic detention;
- 2% received non-custodial penalties.

The sentences of full-time imprisonment numbered 237 cases. In relation to the full terms of imprisonment (ie. the total sentence, comprised of a fixed term, or a minimum term plus an additional term):

- the length of the full terms ranged from 2 years to 20 years;
- 95% of full terms were between 2 years and 12 years;
- 61% of full terms were between 4 years and 8 years;
- 3 cases out of 237 received the maximum penalty of 20 years.

The minimum and fixed terms (ie. the periods that the offenders actually served in custody):

- ranged from 6 months to 16 years;
- were predominantly (89%) between 12 months and 6 years.

Aggravated sexual assault - types of offenders (Appendix C(ii))

The JIRS database analysis of offenders can be used to see whether the sentencing pattern changes according to the characteristics of the offender. For example, the search can be modified by the insertion of a plea of guilty. This is especially relevant given the ongoing debate about plea bargaining between the defence and the prosecution in sexual assault cases. A profile can also be created of a hypothetical participant in a sexual assault in company, who is under 21 years, pleads guilty, and can be further modified by having or not having a criminal record. Results arising from these 2 kinds of modified searches are shown below.

(a) Example - offender who pleads guilty

The total number of s 61J cases in which the offender was sentenced after pleading guilty was 166.

- In 155 (93%) of these cases, the offenders received a sentence of full-time imprisonment;
- full terms ranged from 6 months to 20 years;
- 96% of full terms were between 2 years and 12 years;
- 57% of full terms were between 4 years and 8 years.

In relation to the minimum and fixed terms served by offenders who pleaded guilty:

- minimum/fixed terms ranged from 6 months to 16 years;
- 86% of minimum/fixed terms were between 12 months and 6 years.

(b) Example - young offender who pleads guilty, with or without criminal record

The total number of cases with the profile of an offender under 21 years who pleaded guilty was 23. Of those:

- 21 cases (91%) received a sentence of full-time imprisonment;
- in the two remaining cases, a bond and a community service order were imposed;
- the 21 full terms ranged from 18 months to 14 years;
- none of the offenders received the maximum penalty of 20 years;
- 58% of the full terms ranged from 6 years to 10 years;
- the minimum/fixed terms ranged from 12 months to 9 years;
- 13 of the 21 minimum/fixed terms (63%) were from 3 years to 6 years.

The presence or absence of a criminal record can reduce the sample to a very small number. For example, there were 7 cases of offenders under 21 years who pleaded guilty and had no prior convictions. Only one case is recorded of an offender under 21 years who pleaded guilty and had a prior conviction or convictions for the same type of offence. A search that retrieves a single case is of questionable value for comparative purposes.

Another offender, AEM (snr) in the case of *R v AEM (jnr) & AEM (snr) & KEM*, was under 21 years, pleaded guilty, and had prior convictions of a different type. The statistics reveal 14 cases for this kind of offender, 93% of whom received a prison sentence. The minimum terms are somewhat scattered, but the highest concentration (31%, or 4 out of 13 cases) is at the 4 year mark. This is the same non parole period received by AEM (snr).

However, AEM (snr) was sentenced for two counts of aggravated sexual assault. Adding this variable ('multiple counts'), the size of the sample falls to only two cases. In both those cases, the minimum term imposed was 4 years, still the same as AEM (snr). But his total term was 6 years, whereas the two offenders in the statistics received full terms of 7 and 8 years.

Sexual assault (s 61I) – comparison (Appendix C(iii))

The offence of sexual intercourse without consent (s 61I) carries a maximum penalty of 14 years imprisonment. It is useful to examine whether there is any difference between the sentences imposed for that offence, and the aggravated version under s 61J, which carries a maximum penalty of 20 years.

In the period April 1993 to March 2000, there was a total of 235 cases in which offenders were sentenced in the higher courts for sexual intercourse without consent. Of those cases:

- 201 (86%) received a sentence of full-time imprisonment;

- 20 (9%) received periodic detention;
- 14 (6%) received non-custodial penalties.

Out of the 201 full terms of imprisonment:

- all ranged from 12 months to 10 years;
- the maximum penalty of 14 years was therefore not imposed in any case;
- 86% of the full terms were between 2 years and 7 years.

The minimum/fixed terms:

- ranged from 6 months to 7 years;
- in 79% of cases were between 12 months and 3 years.

7.4 Comments

These statistics reflect, as one might expect, lower sentences for sexual assault than for the aggravated version of the offence. The statistics also confirm that the maximum penalties are rarely used.

8. GUIDELINE JUDGMENTS ON SENTENCING

8.1 Usage in New South Wales:

Guideline judgments are judicial pronouncements of relevant sentencing principles and/or an appropriate range of sentence for a particular class of offence. They may be purely a judicial initiative, or may be supported by statutory recognition. In New South Wales, legislative provisions on guideline judgments focus on procedural issues such as who may apply for guidelines and who may appear in the proceedings, but also give general delineation of scope and jurisdiction.

The English Court of Appeal (Criminal Division) issued guideline judgments from the 1970s without a statutory basis. The first formal guideline in New South Wales was issued by the Court of Criminal Appeal (the criminal appellate court of the Supreme Court) in *R v Jurisic* (1998) 45 NSWLR 209. At that time, there was no legislative recognition of the practice.⁵⁷

Guidelines are intended to be indicative, rather than binding precedents. Indeed, they may not be applicable in some cases.⁵⁸ In *R v Jurisic*, Chief Justice Spigelman anticipated that guideline judgments would help to achieve a balance between judicial discretion in each individual case, and consistency in sentencing.⁵⁹ He regarded guidelines as preferable to a

⁵⁷ At the time of *R v Jurisic*, the only legislative provision for guideline judgments in Australia was in Western Australia, pursuant to s 143 of the *Sentencing Act 1995* (WA), although the Supreme Court of WA had not exercised that capacity: *R v Jurisic* at 217.

⁵⁸ *R v Jurisic* at 220.

⁵⁹ *Ibid.*

grid system because they are more flexible, allow judges to respond to all the circumstances of a case, and serve the objective of rehabilitation as well as denunciation and deterrence.⁶⁰

The *Crimes (Sentencing Procedure) Act 1999* introduced some conditions for the seeking and issuing of guideline judgments. The Court of Criminal Appeal (CCA) may give a guideline judgment on the application of the Attorney-General: s 37. The Attorney-General's application may include submissions with respect to the framing of the proposed guidelines.

Subsections 37(3)-(4) clarify that an application is not to be made in any proceedings before the CCA with respect to a particular offender, and that the CCA may give a guideline judgment in relation to an indictable or summary offence.⁶¹ A guideline judgment may be reviewed, varied or revoked in a subsequent guideline: s 37(6).

The Senior Public Defender and the Director of Public Prosecutions, or their representatives, have the right to appear in guideline judgment proceedings: ss 37 and 38. They may support or oppose the giving of a guideline judgment and may make submissions with respect to the framing of a guideline.

At present, there is no guideline judgment on any sexual offence. The CCA has issued the following guidelines to date:

***R v Jurisic* (1998) 45 NSWLR 209** - dangerous driving occasioning death and dangerous driving occasioning grievous bodily harm, being offences against s 52A of the *Crimes Act*.

***R v Henry and Others* (1999) 46 NSWLR 346** - armed robbery, under s 97(1) of the *Crimes Act*.

***Re Attorney-General's Application [No 1] under s 25 of the Criminal Procedure Act, R v Ponfield; R v Scott; R v Ryan; R v Johnson* (1999) 48 NSWLR 327** (often referred to as *R v Ponfield*) - break, enter and steal, part of s 112(1) of the *Crimes Act*.⁶²

***R v Wong; R v Leung* (1999) 48 NSWLR 340** - Commonwealth offence of importing heroin, being a prohibited import under s 233B of the *Customs Act 1901* (Cth).

***R v Thomson; R v Houlton* (2000) 49 NSWLR 383** - the value of a plea of guilty in determining a sentence, as required to be taken into account by s 22 of the *Crimes (Sentencing Procedure) Act 1999*.

⁶⁰ Ibid at 221.

⁶¹ See n 5.

⁶² The precise wording of s 112(1) is lengthy and refers to breaking and entering a dwelling house and therein committing a serious indictable offence (a 'felony' at the time of the guideline judgment). But in practice, the offence committed in tandem with breaking and entering is usually larceny, hence the colloquial phrase 'break, enter and steal'.

8.2 Guideline judgments on sexual assault in other jurisdictions

(i) *Western Australia*

Section 143 of the *Sentencing Act 1995* (WA) empowers the Full Court of the Supreme Court of the Court of Criminal Appeal (WA CCA) to give a guideline judgment. In 1997 the WA CCA considered and rejected the option of delivering a guideline judgment on sentencing one type of sexual assault raised in *R v GP* (1997) 18 WAR 196.

The offender in *R v GP* was convicted of having a sexual relationship with a child under the age of 16 years, contrary to s 321A of the *Criminal Code* (WA). This offence is committed if, on three or more separate days, the person sexually penetrates or indecently deals with the child. The maximum penalty is 20 years imprisonment. The sentencing judge imposed a suspended sentence of two years, which the Crown appealed, arguing for the sentence to be served immediately rather than suspended.⁶³ The Crown also sought a guideline judgment on the use of suspended sentences for having a sexual relationship with a child under 16 years.⁶⁴

The WA CCA declined to issue a guideline judgment. Malcolm CJ (at 221) stated that the offence under s 321A, like a number of other sexual offence provisions, covered a wide range of conduct and there could be cases where the gravity of the offence may not justify a sentence of imprisonment. Although conceding that such cases may be exceptional, Malcolm CJ concluded that the court did not have sufficient experience of s 321A offences to issue specific guidelines.⁶⁵ Murray J (at 235) observed that guideline judgments should be used sparingly, and considered that the use of suspended sentences for crimes of maintaining a sexual relationship was too confined a subject for a guideline judgment. Steytler J (at 243) concurred with Murray J on the reasons for declining to issue a guideline.⁶⁶

(ii) *United Kingdom*

A guideline judgment on rape was issued in 1986 by the English Court of Appeal (Criminal

⁶³ The actual result of the case was that the Court allowed the appeal, set aside the suspension, and ordered the respondent to be sentenced to two years imprisonment, with eligibility for parole.

⁶⁴ The guidelines proposed by the Director of Public Prosecutions (quoted on p 221 of the judgment) included that a 'sexual relationship offence ought to attract a custodial sentence in all but exceptional cases in view of: (i) the statutory penalty for the offence; (ii) the course of conduct evidenced by at least three separate incidents of sexual abuse'.

⁶⁵ The offence under s 321A was introduced in 1992.

⁶⁶ For a critique of the WA CCA's attitude to guideline judgments, see N Morgan and B Murray, 'What's in a Name? Guideline Judgments in Australia' (1999) 23(2) *Criminal Law Journal* 90 at 101-107.

Division) in *R v Billam* (1986) Cr App R 347; (1986) 1 All ER 985.⁶⁷

The guideline deals with appropriate sentences for rape, aggravated rape, attempted rape, and offences by persons under 21 years and juveniles. The language of the guideline is geared towards males raping females.

Delivering the judgment of the Court, Lord Lane CJ pronounced numerous categories of offences, accompanied by suggested starting points for custodial sentences.

Rape committed by an adult

- **without any aggravating or mitigating features** - five years as a starting point in a contested case;
- where **two or more offenders act together** - starting point of eight years;
- offender who **breaks into** or otherwise gains access to a place where the victim is living - starting point of eight years;
- offender is in a **position of responsibility** towards the victim - starting point of eight years;
- offender **abducts or holds captive** the victim - starting point of eight years;
- offender conducts a '**campaign**' of rape on a number of different women or girls⁶⁸ - 15 years or more may be appropriate;
- offender's behaviour manifests **perverted or psychopathic tendencies** or gross personality disorder and the offender is likely, if at large, to remain a danger to women for an indefinite time - a life sentence would not be inappropriate.

Aggravating factors

The crime of rape is aggravated by the presence of various factors. Where one or more of these aggravating features are present, the sentence should be 'substantially higher' than the figure suggested as the starting point.

⁶⁷ The bench was comprised of Lord Lane CJ, Mann J and Sir Roger Ormrod. The guideline judgment was delivered on 21 February 1986 in the context of a special hearing of 17 appeals that were listed together, involving various types of rape.

⁶⁸ Regarding this type of offender, Lord Lane CJ stated (at 987): 'At the top of the scale comes the defendant who has carried out what might be described as a campaign of rape, committing the crime on a number of different women or girls. He represents a more than ordinary danger and a sentence of 15 years or more may be appropriate.'

- violence is used over and above the force necessary to commit the rape;
- a weapon is used to frighten or wound the victim;
- the rape is repeated;
- the rape has been carefully planned;
- the defendant has previous convictions for rape or other serious offences of a violent or sexual kind;
- the victim is subjected to further sexual indignities or perversions;
- the victim is either very young or very old;
- the effect on the victim, whether physical or mental, is of special seriousness.

Attempted rape

The starting point for attempted rape should normally be less than for the completed offence, especially if it is desisted at a comparatively early stage. However, the presence of aggravating features may cause an offence of attempted rape to be even more serious than some examples of the full offence.

Offenders under 21 years of age

Provisions giving guidance on the sentencing of persons under 21 years appeared in the *Criminal Justice Act 1982*. However, most offences of rape would be ‘so serious that a non-custodial sentence cannot be justified’, for the purposes of s 1(4) of that Act.

Lord Lane CJ stated (at p 988):

In the ordinary case the appropriate sentence would be one of youth custody, following the term suggested as terms of imprisonment for adults, but making some reduction to reflect the youth of the offender. A man of 20 will accordingly not receive much less than a man of 22, but a youth of 17 or 18 may well receive less.

Juvenile offenders

The court will in most cases exercise the power to order detention under s 53(2) of the *Children and Young Persons Act 1933* (UK). In view of the procedural limitations of that power, it is important that a magistrates’ court dealing with a juvenile charged with rape should never accept jurisdiction to deal with the case itself, but should commit the case to the County Court for trial.

Plea of guilty

The Court acknowledged (at p 988) that the extra distress which giving evidence can cause to a rape victim meant that a plea of guilty, perhaps more so than in other cases, should normally result in some reduction from what would otherwise be the appropriate sentence. The amount of the reduction would depend on all the circumstances, including the likelihood of a finding of not guilty had the matter not been contested.

The victim's behaviour

The fact that the victim may be considered to have exposed herself to danger by acting imprudently, for instance by accepting a lift from a stranger, is not a mitigating factor.

The Court confirmed that the victim's previous sexual experience is equally irrelevant. However, if the victim behaved in a manner that was calculated to lead the defendant to believe that she would consent to sexual intercourse, then there should be some mitigation of the sentence.

Good character of the offender

Lord Lane CJ noted (at p 988) that the previous good character of the offender was 'of only

9. SENTENCING JUVENILES

One of the contentious aspects of the recent debate over the sentencing of 'gang rapists' has been the treatment of juvenile offenders. This is a particularly sensitive issue, as gang members or participants in sexual assaults committed in company are often juveniles.

Therefore it is important to briefly summarise some of the key provisions and principles for the sentencing of juveniles, although a detailed analysis is not possible in this paper. In the case of *Regina v AEM (jnr) & AEM (snr) & KEM* (District Court of New South Wales, Sydney, 23 August 2001), two of the offenders were juveniles. Judge Latham had to determine whether to deal with them as adults 'according to law', or under the more lenient

⁶⁹

Another related issue is the power to direct whether a young person serves the remainder of his or her sentence in a juvenile detention centre, or in an adult prison, upon turning 18 years of age.

9.1 Jurisdiction and options for sentencing children

The *Children (Criminal Proceedings) Act 1987* is the main act governing the sentencing of children.

A 'child' is defined as a person under 18 years of age: s 3.

The concept of a 'serious children's indictable offence' is crucial to understanding juvenile sentencing. Section 3 of the Act classifies the following crimes as serious children's indictable offences:

⁶⁹ See Part 4 of this paper.

- homicide;
- an offence punishable by imprisonment for life or for 25 years;
- an offence of aggravated sexual assault under s 61J of the *Crimes Act* (otherwise than in circumstances referred to in subs(2)(d)) or assault with intent to have sexual intercourse under s61K, or an attempt to commit those offences; or
- an indictable offence prescribed by the regulations as a serious children's indictable offence. Clause 4 of the *Children (Criminal Proceedings) Regulation 2000* prescribes the following offences under the *Crimes Act* to be 'serious children's indictable offences':
 - sexual intercourse with a child under 10 years (s 66A);
 - attempt or assault with intent to have sexual intercourse with a child under 10 (s 66B);
 - attempt or assault with intent to have homosexual intercourse with a male under 10 (s 78I);
 - sexual assault by forced self-manipulation (s 80A) but only if the victim was under the age of 10 when the offence occurred.

Children's Court jurisdiction

The Children's Court **does not** have jurisdiction to deal with:

- a serious children's indictable offence;
- traffic offences (as defined in s 3) unless the offender was not old enough to obtain a driver's licence when the offence was committed, or the traffic offence arose out of the same circumstances as another offence that is before the Children's Court.

The Children's Court **does** have jurisdiction to deal with an offender who was under 18 years when the offence was committed and under 21 when charged before the Court in relation to:

- any offence, whether indictable or not, other than a 'serious children's indictable offence';
- committal proceedings in respect of indictable offences and 'serious children's indictable offences' : s 28(1).

District Court and Supreme Court jurisdiction

The District Court or Supreme Court deals with:

- serious children's indictable offences;
- situations where the offender is charged with an indictable offence other than a 'serious children's indictable offence' but is committed by the Children's Court to a higher court for trial or sentence, or the offender elects to be so committed: ss 31(2)-(5).

Whether to treat a juvenile convicted of an indictable offence as an adult

A sentencing judge faced with a child (under 18 at the time of committing an offence and under 21 when charged before the court) who pleads guilty to, or has been convicted of, an indictable offence by a court other than the Children's Court, must determine whether to sentence the child as a child or an adult.

No choice is available if the offence is categorised as a serious children's indictable offence. The child must be dealt with 'according to law', that is, in accordance with adult penalties: s 17. Therefore, a child who commits aggravated sexual assault, in circumstances of being in company, is sentenced under the adult regime because s 61J(2)(c) qualifies as a serious children's indictable offence.

If the offence is an indictable offence other than a 'serious children's indictable offence', the child can be dealt with:

- 'according to law': s18(1)(a); or
- under the penalties available to the Children's Court in Part 3, Division 4 of the *Children (Criminal Proceedings) Act 1987*: s18(1)(b); or
- where the person is under 21, by remitting the matter to the Children's Court: s 20.

When a court decides to deal with an offender under the children's sentencing regime in Part 3, Division 4, the court may exercise the same functions as the Children's Court: s 18(2).

The penalties are less severe under Part 3, Division 4. When an offender is sentenced pursuant to Part 3, Division 4, the court is prohibited from imposing a sentence of imprisonment: s 33(4).

The *Children (Criminal Proceedings) Act 1987* does not provide guidance on the factors that judges are to take into account in deciding whether to sentence 'according to law' a child who is convicted of an offence other than a serious children's indictable offence. However, the exercise of the discretion has been considered in case law. The most authoritative case on this point is *R v WKR* (1993) 32 NSWLR 447. Hunt CJ at CL (with whom Campbell J agreed) stated (at 451) that some of the matters to be taken into account were:

- the nature of the particular offence;
- the age and the maturity of the offender (both at the time of the offence and at sentence); and
- the nature of the penalty which would be appropriate to the circumstances of the case in the light of those matters.

Children's penalties under Part 3, Division 4

The penalties provided for children in Part 3, Division 4 of the *Children (Criminal Proceedings) Act 1987* include:

- dismissal of the charge with or without a caution: s 33(1)(a);
- good behaviour bond not exceeding 2 years: ss 33(1)(b), 33(1A);
- fine of 10 penalty units or as prescribed for the offence, whichever is lesser: s 33(1)(c);
- combination of fine and good behaviour bond: s 33(1)(d);
- community service order: s 33(1)(f), subject to the provisions of the *Children (Community Service Orders) Act 1987*;
- release on probation, not exceeding 2 years: s 33(1)(e);
- control order not exceeding 2 years: ss 33(1)(g) and 33A.⁷⁰

The court shall not impose a control order unless it is satisfied that it would be ‘wholly inappropriate’ to impose one of the other penalties at s 33(1)(a)-(f).

Also available, subject to eligibility requirements, are the alternative remedies of releasing a child on an undertaking pursuant to the *Children (Protection and Parental Responsibility) Act 1997*, and releasing a child in accordance with an outcome plan determined at a youth justice conference under the *Young Offenders Act 1997*.

Penalties according to law

The penalties at law are the same as those for adults under the *Crimes (Sentencing Procedure) Act 1999*, except where otherwise stated.

Briefly, the available penalties are:

- dismissal of charge, or discharge on good behaviour bond not exceeding 2 years: s 10;
- deferral of sentence (Griffiths remand): s 11;
- suspended sentence: s 12;
- fine as prescribed for the offence or, if none specified, a maximum of 1000 penalty units under s 15;

⁷⁰ Where sentences are cumulated, the total is not to exceed 3 years, taking into account any period for which the offender has already been detained under a control order that the offender is still serving. The court cannot order the offender to be detained for more than 2 periods specified in different control orders, being periods that are not to any extent concurrent: s 33A(4). The court may suspend the execution of a control order and release the offender on a good behaviour bond: s 33(1B).

- community service order - the *Children (Community Service Orders) Act 1987* applies to persons under 18 at the time of the offence and under 21 when charged before the court, according to s 4 of that Act;
- periodic detention is only available for persons aged 18 years or over at the time of sentence: s 66(1)(a);
- term of imprisonment, as prescribed for the offence;
- home detention: Part 6.

Plea of guilty

When sentencing children according to the children's penalties in Part 3, Division 4 of the *Children (Criminal Proceedings) Act 1987*, a court must take into account the fact that the child pleaded guilty and the timing of the plea, and may consequently reduce any order made.

Judges who sentence children according to law must take a guilty plea into account pursuant to s 22 of the *Crimes (Sentencing Procedure) Act 1999*.

Principles of rehabilitation, retribution and deterrence

General legislative guidelines for the treatment of young offenders are outlined in s 6 of the *Children (Criminal Proceedings) Act*, and include the desirability of a child continuing their education or employment uninterrupted and residing in their own home. Judge Latham averted to these principles in *Regina v AEM (jnr) & AEM (snr) & KEM*.⁷¹

It is a well established principle of case law that rehabilitation is of greater importance when sentencing young people than adults, and outweighs deterrence and punishment: *R v GDP* (1991) 53 A Crim R 112, *R v XYJ* (unreported, CCA, 15 June 1992), and cases cited therein.

However, an exception to this general principle is made for offences that are prevalent among young offenders. For example, robbery, 'home invasion' offences and dangerous driving occasioning death or grievous bodily harm are frequently committed by young males. The Court of Criminal Appeal has emphasised that deterrent sentences are therefore required for such crimes: *R v Pham* (1991) 55 A Crim R 128 at 135, *R v Slattery* (1996) 90 A Crim R 519 at 523, *R v Lawson, Wu & Thapa* (unreported, CCA, 12 December 1997).

9.2 Custody in a juvenile detention centre or adult correctional centre

When a court sentences a person under 21 years of age to a term of imprisonment for an indictable offence, the court may direct that the whole or part of the term be served in a juvenile detention centre: s 19 of the *Children (Criminal Proceedings) Act 1987*. Judge

⁷¹ At p 6 of 11.

Latham in *Regina v AEM (jnr) & AEM (snr) & KEM* took this course of action in sentencing the offenders K and A (jnr).

In *R v WKR* (1993) 32 NSWLR 447 at Hunt CJ at CL said (at 450):

Whether or not an order should be made pursuant to s 19 that the whole or a part of the term of penal servitude or imprisonment be served in a detention centre clearly enough depends thereupon whether the offender is an appropriate person to be so detained, by reference to the nature of the offence for which he is sentenced and to his likely conduct there: cf, by way of analogy only, s 28E of the Detention Centre Act.

Custody in a detention centre is not required to end when the detainee turns 21 years, as long as the offender was under the age of 21 at sentence: *R v SMP* [1999] NSWCCA 318 at para 15.

A person serving their sentence in a detention centre can be transferred to an adult prison, notwithstanding the direction of the sentencing judge pursuant to s 19 that they serve the whole of their sentence in a detention centre. The power of the relevant Minister to ‘override’ such a direction by a judge is found in the *Children (Detention Centres) Act 1987*. Section 28 states:

28(1) If –

- (a) a classified person is being detained in a detention centre ; and
- (b) the Minister is satisfied that the person –
 - (i) is not profiting from the discipline and instruction in the detention centre; or
 - (ii) **is not, for any other reason, a suitable person for detention in a detention centre,**

the Minister may, by order in writing made with the consent of the Minister administering the Crimes (Administration of Sentences) Act 1999, direct the transfer of the person from the detention centre to a prison, there to be detained according to law. [Emphasis added]

The definition of ‘classified person’ under s 3 of the *Children (Detention Centres) Act 1987*, read with the definition of ‘detention order’, specifically covers a person who is subject to control by virtue of a court’s direction (under s 19 of the *Children (Criminal Proceedings) Act 1987*) that the whole or part of the person’s term of imprisonment be served in a detention centre.

9.3 Comments

The present controversy has raised several issues, including those involved in the sentencing of juveniles. It may be that any guideline judgment on sexual assault offences would have to confront this matter. From the above survey it is clear that this area of law is presently governed by a complex network of provisions in a plethora of statutes. There

may be a case for consolidating these provisions in a single Act dealing with the sentencing of juveniles.

10. CONCLUSIONS

At one level the Crimes Amendment (Aggravated Sexual Assault in Company) Bill 2001 can be viewed as a specific response to a specific issue, namely, the sentencing of offenders for the offence of aggravated sexual assault in company. At another level it can also be viewed as part of the ongoing law and order debate in NSW, a debate which has many points of focus, including the functioning of the criminal justice system and the relationship between ethnicity and crime. These are of course large, complex and inherently controversial issues which, as shown by the review of viewpoints in the contemporary debate, are sure to generate a host of conflicting opinions.

The current controversy over the decision in *Regina v AEM (jnr) & AEM (snr) & KEM* is ample proof that particular sentencing judgments are from time to time at the centre of the law and order debate. Whenever this occurs we hear, voiced in many contexts, the awkward and often frustrating dialogue between community expectations in respect to the sentencing of heinous crimes, on one side, and the rules and technicalities of the criminal justice system, on the other. Invariably there are calls for legislative amendment. On this occasion, the Crimes Amendment (Aggravated Sexual Assault in Company) Bill 2001 is the result.

On 6 September 2001 it was announced that the DPP is to appeal the sentences handed down in *Regina v AEM (jnr) & AEM (snr) & KEM*. It was also announced that the Crown appeals will be heard in conjunction with the Attorney General's application for a guideline judgment, advice for which has now been finalised by the Crown Advocate. It is reported that the guideline application will apply to the offences of sexual assault and aggravated sexual assault.⁷²

⁷² AAP Online, 'DPP appeals gang rape sentences', 6 September 2001.

APPENDIX A (Click here)
**CRIMES AMENDMENT (AGGRAVATED SEXUAL
ASSAULT IN COMPANY) BILL 2001**

APPENDIX B
R V AEM (JNR) & AEM (SNR) & KEM
FULL JUDGMENT 23 AUGUST 2001

DISTRICT COURT OF NEW SOUTH WALES

**THE DISTRICT COURT
OF NEW SOUTH WALES
CRIMINAL JURISDICTION**

JUDGE LATHAM

THURSDAY 23 AUGUST 2001

01/11/0096 - REGINA v AEM (jnr) & AEM (snr) & KEM

SENTENCE

HER HONOUR: The offenders, AEM (snr) and KEM each pleaded guilty on 12 June 2001 to 2 counts of aggravated sexual assault on indictment, committed whilst in each others company in the early hours of 5 September 2000. AEM (snr) asks me to take into account a further aggravated sexual assault on a Form One; KEM asks me to take into account 4 further aggravated sexual assaults on a Form One. The offence of aggravated sexual assault under s 61J of the Crimes Act carries a maximum penalty of 20 years imprisonment.

The offender AEM (jnr) pleaded guilty on the same day to one count of Detaining with Intent to Hold for Sexual Advantage in relation to one of the victims. That charge carries a maximum penalty of 14 years imprisonment, in the circumstances of this matter as conceded by the Crown, that is, where no substantial injury is occasioned to the victim during the detention.

The following summary of the facts is taken from a statement of facts which the Crown tendered against each offender, together with a statement from each of the victims, two 16 year old girls, referred to as J and D respectively. The statements of the victims are qualified by Ex 1 on sentence, in that the pleas of guilty were accepted by the Crown on the basis that no knife was produced, nor were any threats made, to the victims before they entered the premises where the sexual assaults took place, and that the victims voluntarily went with the offenders to those premises.

At about 1am on 5 September 2000, JH and DB, who were waiting for a taxi in King George's Rd at the entrance to the Beverley Hills railway station, reluctantly entered a vehicle containing the offenders, MM and another young male. The occupants of the vehicle had offered the girls a lift home; there were no trains running from Beverley Hills at that time of night and the young men seemed friendly. The vehicle was driven to a residential garage where MM broke into a Ford Falcon. Both vehicles drove away at high speed, ultimately arriving at an address in Villawood, the home of the offenders A snr and KEM. The girls and the offenders (including MM) entered the house; the fifth unidentified male was no longer in their company. Thus far, there was nothing of an overtly hostile nature in the behaviour of the offenders towards the girls. It had been suggested that the girls sleep what was left of the night at the Villawood house and make their way home in the morning.

Initially, the girls and the offenders sat in the lounge room where marijuana was consumed by AEM (snr). AEM (jnr) engaged JH in conversation and allowed her to charge her mobile phone. She informed him that they were both tired; they were taken to a bedroom towards the back of the house where they lay on two single beds which had been pushed together. AEM (snr) lay down next to JH and commenced to hug her from behind, whilst AEM (jnr) stood nearby. JH

told AEM (snr) not to touch her, but he persisted for a short time before leaving the room. The AEM (jnr) remained in the room, lying next to the victims while they attempted to go to sleep. The AEM (snr) re-entered the room, and continued to fondle JH. DB left the room shortly thereafter in the company of the AEM (jnr). He took her to a front bedroom, locking the door from the outside; she could hear him speaking to the other males outside the room. She attempted to open a window but found that it was locked. She was accompanied to the toilet by the AEM (jnr), who "stood guard" outside the bathroom. She returned to the front bedroom where she lay on a bed, AEM (jnr) laying next to her. In response to her request that she be permitted to leave, he replied "You kind of can't", at the same time lifting a curtain from the window to reveal a male person outside the premises. She slept for some period of time, but woke to the sound of an angry conversation between AEM (jnr) and other male voices through the bedroom door. She was told they would have to leave the room. She was taken to the back bedroom, which was empty.

Meanwhile, AEM (snr), KEM and MM confronted JH in the back bedroom. She started to cry and plead for help from KEM. AEM (snr) pulled out a knife. MM locked himself and JH in the bedroom, excluding the others. He had sexual intercourse with JH without her consent before leaving the room, naked.

Almost immediately, KEM entered the room naked and wearing a condom on his erect penis. He forced his penis into her mouth (offence 1 on the Form 1), before pinning her arms above her head and inserting his penis into her vagina (Count 1 on indictment). A further forced act of fellatio followed, after he had removed the condom (Count 2 on indictment).

She was taken to the bathroom and told to have a shower. AEM (snr) entered the shower naked and forced his penis into the mouth of JH (offence on the Form One), before instructing her to lay on a towel on the bathroom floor and inserting his penis into her vagina (Count 2 on indictment). He removed the condom he was wearing before ejaculating onto her stomach. JH returned to the shower and he left the bathroom.

KEM entered the bathroom, got into the shower naked and forced JH to engage in an act of fellatio. He ejaculated into her mouth whilst holding the back of her head (offence 2 on Form One). At this stage, MM entered the bathroom naked; both he and KEM forced JH to engage in a further act of fellatio upon both of them (offence 3 on Form One). JH was then instructed to bend over and effectively straddle the bath; KEM again inserted his penis into the mouth of JH (offence 4 on Form One) while MM penetrated her vagina with his penis from behind.

JH was allowed to dress and return to the lounge room where KEM, AEM (snr) and MM had gathered. She remained there with KEM while AEM (snr) and MM went to the back bedroom. There, AEM (snr) told DB that she would have to "fuck one of us before you go, otherwise you and your friend will never leave". DB chose AEM (jnr) prompting AEM (snr) to say "I will be back in 15 minutes for my turn". AEM (jnr) and DB were left alone in the room; he tried to reassure DB before speaking to the others outside. He returned, telling her that he had informed the others (falsely) that she was menstruating. He then took her to the front bedroom where he locked the door and lay down next to DB, until 4:30am. MM then entered the room; AEM (jnr) left the room, saying to DB "Be strong and say no".

MM then had vaginal sexual intercourse with DB without her consent.

After MM left the room, both AEM (snr) and AEM (jnr) entered. AEM (jnr) was told to go and talk to MM. DB tried to leave the room, however AEM (snr) held the knife to her throat and became agitated at her refusal to have sex with him. He pushed her onto the bed, told her to remove her clothes and lay the knife across her chest while he tried to put a condom on his erect penis with one hand. He forced her legs apart, causing her considerable pain, and inserted his penis into her vagina, having intercourse with her until ejaculation (Count 1 on indictment).

AEM (jnr) entered the bedroom as AEM (snr) left, saying to DB "This is your fault, you could have said no".

The victims were driven by KEM in company with AEM (jnr) to a service station, where JH was told to purchase cigarettes. Whilst she was with the console operator, the car sped off. A short distance away, DB was pushed from the car and walked back to the service station where DB's father was called. Later that day, the police executed a search warrant on the Villawood premises and the offenders were arrested. They all declined to comment on the allegations.

These facts have only to be set out, in order to demonstrate the objective gravity of these offences. Leaving to one side AEM (jnr) who stands in a different position, there is little which distinguishes the objective criminality of the other three offenders; they each indulged in a gross display of sexual misconduct, adopting a pack mentality whereby they exploited the victims' fear, vulnerability and isolation from each other. Their individual behaviour towards the victims was reprehensible in itself, but one can only guess at the victims' humiliation in being passed from one offender to the next, in circumstances which suggest that these young men placed their reputation for sexual conquests above the standards of ordinary human decency.

AEM (jnr)'s criminality is of a far lesser order. He took no part in the sexual assaults; indeed, on one view of the facts referred to above, he adopted measures which were designed to prevent access by the others to DB, for as long as possible. He was aware that AEM (snr) had a knife and was under no misapprehension as to the intentions of the young men towards the two victims. He stands to be sentenced on the basis that he detained DB within the premises against her will, with the intention that she be kept there for the sexual advantage of AEM (snr), KEM and MM.

Before passing to a consideration of the sentencing principles which apply in this case, some recognition of the victims' ordeal and the impact of the offences upon them is appropriate. The courts of this State are not blind to the well-documented, serious long-term psychological effects of sexual assault. In this particular case, the Court has received a Victim Impact Statement from one of the victims, DB (part of Exs A, B, C and D). It describes her terror, her shame, the damage wrought by the offences to her notion of self-worth and to her family relationships. The absence of a Victim Impact Statement from JH does not, of course, mean that the offences did not have a like effect upon her. The Court recognises the importance of allowing DB a voice in these proceedings and is required to take into account the impact of the offenders' behaviour upon her and upon JH in sentencing the offenders, subject always to the maintenance of objectivity in the sentencing process: see *R v RKB NSWCCA* 30 June 1992. To the extent that the statement goes beyond the agreed facts upon which the offenders stand to be sentenced, I disregard those aspects of the statement. There is no evidence before me of any racial element in the commission of these offences; there is nothing said or done at any stage by any of the offenders which provides the slightest basis for imputing to them some discrimination in terms of the nationality of the victims. The circumstances giving rise to the offences have all the

hallmarks of an opportunistic encounter between a number of adolescent males, who had gone for a drive because they were bored (see Juvenile Justice report, part of Ex B), and two adolescent females, who found themselves stranded late at night, without transport home. These circumstances in no way provide any justification or excuse for the commission of the offences; no responsibility or blame lies with the victims and any suggestion to the contrary should be rejected entirely.

The sentences must reflect the objective gravity of the offences and the totality of the criminality represented by them. The starting point, in terms of the objective criminality, is the maximum penalty prescribed by the legislature for each offence. The maximum penalty in respect of any given offence is reserved for those cases falling within the worst category, that is, where the objective features demonstrate an extreme level of culpability or where the offence is so heinous that considerations of rehabilitation and the offender's subjective features are rendered redundant. I do not consider that the sexual offences fall into that category, although it must be said that the objective features justify the Crown's submission that the offences are at the upper end of the scale of severity. In *R v Rushby* [1999] NSWCCA 104, the Court described the offences as almost in the worst category. The forced vaginal and anal intercourse of a thirteen year old girl by an eighteen year old male and his sixteen year old male companion attracted sentences of eight years and six years respectively, following pleas of guilty. The Court noted the presence of a number of aggravating features not present in the instant case, namely that the victim was under the age of sixteen years, and she was tied up and left in a remote location after anal intercourse. The Court declined to interfere with the sentences. The Court also referred to *R v Lewis* NSWCCA 14 December 1993, where a sentence of eight years was upheld after a plea of guilty by the twenty year old applicant. He had vaginally raped a young female university student as she walked through a park on her way home from the railway station.

The offenders KEM and AEM (jnr) are to be sentenced according to the terms of section 6 of the Children (Criminal Proceedings) Act 1987, which states :-

A court, in exercising criminal jurisdiction with respect to children, shall have regard to the following principles:

- (a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,
- (b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,
- (c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,
- (d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,
- (e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind.

In *R v Bus & AS* NSWCCA 3 November 1995, the then Chief Judge at Common Law observed

that:-

“the relevance of the principles stated in s 6 to each individual case depends to a very large extent upon the age of the particular offender and the nature of the particular offence committed. An offender almost eighteen years of age cannot expect to be treated according to law substantially differently to an offender just over eighteen years of age. In both cases, the youth of the offender remains very relevant. Rehabilitation plays a more important role and general deterrence a lesser role. But that principle is subject to the qualification that, where a youth conducts himself in the way an adult might conduct himself and commits a crime of considerable gravity, the function of the courts to protect the community requires deterrence and retribution to remain significant elements in sentencing him ... Of course, non-consensual sexual intercourse is regarded as an

I note in passing that in *Bus & S*, what were described as very serious sexual assaults under s 61J, committed by a twenty year old male and a seventeen year old male in company, attracted sentences of six years and four and a half years respectively.

KEM was two months short of his seventeenth birthday at the time of these offences, while AEM (jnr) was four months short of his eighteenth birthday. KEM must be sentenced according to law, since his offences are defined as “serious children's indictable” offences by the Children (Criminal Proceedings) Act 1987. AEM (jnr) may be dealt with according to law or by way of the less harsh sentencing regime available under Division 4 of Part 3 of the Children (Criminal Proceedings) Act 1987. However, the offence under s 90A of the Crimes Act being a serious one, and the offender being very close to adult status, I have determined that he should be sentenced according to law. His counsel did not contend otherwise.

AEM (snr) was nineteen years and five months of age at the time of the offences. Whilst he stands to be sentenced as an adult, his youth is also a factor which must be taken into account in the sentencing exercise.

It is accepted that the pleas of guilty were entered at the first available opportunity to the indictments as presently framed. Accordingly, the offenders are to receive the benefit of a discount on the sentences otherwise to have been imposed which reflects the utilitarian value of those pleas. The level of that discount is to be determined by reference to the timing of the pleas and to the complexity inherent in the conduct of a trial of these offences. The strength of the Crown case has no bearing on that issue, although it may have a bearing on whether the offenders should receive any additional discount for contrition, over and above the contrition inherent in the pleas of guilty: *R v Carter* [2001] NSWCCA 245; *R v Lo* [2001] NSWCCA 271. In my view, the utilitarian value of the pleas in each case is high. The pleas were forthcoming as soon as the Crown was in a position to settle the indictment and the case at trial would have turned quite substantially on expert DNA evidence of considerable complexity, together with the evidence of the victims who would have been significantly traumatised by that experience. In addition, the trial itself would have been quite lengthy, in all likelihood occupying in excess of four (4) weeks of court time. Accordingly, I have determined to discount the sentences in each case by twenty percent (20%) on this basis.

I turn then to the subjective features of each of the offenders and the sentences to be imposed.

AEM (jnr)

AEM (jnr) is the eldest child born in Australia to Lebanese parents. The family are practicing Muslims and alcohol is banned within the home. His parents have always provided a financially and emotionally secure environment. He attended State primary and secondary schools, leaving at the end of Year 10 after obtaining his School Certificate. He was employed for four (4) months in a shop owned by his cousin, then for a period of three (3) months with a family friend. He was negotiating employment with another family friend when he was arrested for the offence. He has attempted to gain entry to a TAFE course but did not pass the entrance exam. He has expressed a wish to re-sit the School Certificate to improve his prospects. He is a person of average intelligence who appears emotionally and psychologically well-adjusted. He has been using the time in custody to further his education, as demonstrated by Ex 5. The prospects for his rehabilitation are sound, especially since he enjoys the support of a loving family and provided that he actively pursues employment of a more permanent nature.

The Juvenile Justice Report in relation to AEM (jnr) (part of Ex D) is frankly negative with respect to his prospects of rehabilitation and the presence of any real contrition. The author of the report concluded that he appeared "to be taking no responsibility for his offending and abusive conduct" and that he expressed no remorse for his behaviour or for the victims. His counsel informed me that he had instructed his client not to discuss the offence with officers of the Juvenile Justice Department, hence the tone of the report. Be that as it may, I accept that this offender is genuinely contrite and that he indicated as much to the author of the psychological report (Ex 6).

Independently of the contents of that report, this offender's efforts to minimise the harm visited upon the victim DB mitigate the offence to which he has pleaded. Nonetheless, the length of the detention and its purpose are serious objective features of the offence. It does him no credit that he had been charged and was awaiting sentence for offences under the Motor Traffic Act when the instant offence was committed. I disregard that matter for the purposes of this sentencing exercise. There is no other criminal history. In these circumstances, the community interest in his further rehabilitation warrants greater emphasis than the community interest in retribution, albeit general deterrence must receive some recognition in the sentence to be imposed. Absent the plea of guilty and the offender's contrition, a head sentence of two (2) years imprisonment would have been appropriate in the circumstances of this case. Whilst I am prepared to find special circumstances on the basis that it is the offender's first custodial sentence, the alteration of the ratio between the Non Parole Period and the head sentence should only be slight, lest the Non Parole Period not sufficiently reflect the objective gravity of the offence. I propose therefore to sentence AEM (jnr) in the following terms :-

On the charge of Detain with Intent to Hold for Advantage, you are convicted. I sentence you to a term of eighteen (18) months imprisonment, commencing on 7 September 2000 and expiring on 6 March 2002. I fix a Non Parole Period of twelve (12) months to date from 7 September 2000, expiring 6 September 2001. I direct that the whole of the sentence be served in a Juvenile Justice Centre. You are entitled to be released at the expiration of the Non Parole Period.

KEM

KEM emigrated from Lebanon to Australia in 1993. Up until that time he had lived with his paternal grandparents, while his immediate family lived in Australia. He joined his parents and four siblings in Sydney and undertook further primary and secondary education, leaving before

the end of year 10. Since then he has been employed for approximately twelve (12) months, but had been unemployed for about two months prior to the commission of these offences. His father died suddenly, an event which significantly affected this offender and his brother AEM (snr). He has been applying himself to vocational courses whilst in custody.

The Juvenile Justice Report (part of Ex B) notes that he exhibits a tendency to minimise the seriousness of the offences. The most extreme manifestation of this was an assertion that he was not familiar with the laws of Australia and that he was unaware that his behaviour towards the victim JB was criminal. I reject such a suggestion out of hand, and I reject his account to the counsellor that he was ignorant of what the other young men were doing because he was waiting outside the house. It is difficult to reconcile these statements with his expressions of shame and anger, save to say that his remorse, such as it is, appears to be prompted by his present predicament rather than any real appreciation of the damage he has inflicted upon his victim. He impresses as emotionally immature and lacking the insight which is a prerequisite to rehabilitation. However, the Juvenile Justice personnel consider him capable of addressing these issues with the appropriate support and intervention.

The two offences to which he has pleaded are aggravated by a further four (4) identical offences on a Form One. The sentences to be imposed in respect of the two offences on indictment must therefor reflect the totality of this offender's criminality, that is, including the offences on the Form One. On any view of the offences, this offender showed a particularly callous disregard for the victim JB. He forced her to fellate him a number of times, on one occasion ejaculating into her mouth and on another, forcing her to fellate him while she was being penetrated vaginally by another offender. Such criminality is appalling in one so young, especially given that he comes before the Court with no prior convictions at all. The sexual assaults were however committed in the course of one extended episode, so that the sentences for the two offences on indictment should be served concurrently. Absent the pleas of guilty, an effective head sentence of 7 years would be appropriate to the circumstances of these offences, taking into account the offender's youth and subjective circumstances. I have found special circumstances based upon the offenders need for ongoing supervision and the fact that he will be serving his first custodial sentence. Accordingly, I propose to sentence KEM as follows :-

On each of the offences of Aggravated Sexual Assault, you are convicted. I sentence you to a term of imprisonment of five years and seven months (5 yrs 7 months) in respect of each offence, both sentences to commence on 7 September 2000 and to expire on 6 April 2006. I fix a Non Parole Period in respect of each sentence of three years six months (3 yrs 6 months) to date from 7 September 2000 and to expire on 6 March 2004. I direct that the whole of the sentence be served in a Juvenile Justice Centre and that the offender be subject to the supervision of the Juvenile Justice Department during the Parole period. In sentencing the offender on count one in the indictment, I have taken into account the offences on the Form One.

AEM (snr)

AEM (snr) is the eldest child born to parents of Lebanese extraction in Sydney. He enjoyed a conventional, loving and supportive upbringing in a Muslim family. He attended local State primary and secondary schools until leaving after obtaining his School Certificate in 1997. He had attempted to return to school in 1998 to obtain his Higher School Certificate, but gave up, principally because the sudden death of his father left him grief-stricken and unmotivated. His father had in fact died in the offender's arms and the circumstances surrounding the event

continue to affect the offender. In 1998 and 1999 the offender readily found employment . He travelled to Lebanon . He was unemployed at the time of the commission of the offences. He commenced to abuse alcohol and cannabis after the death of his father and had consumed cannabis on the evening of the offences. He is presently engaged to be married . He expressed remorse for his actions to the author of the psychological report (Ex 2) and professed to be a changed person since his incarceration. He has undertaken a number of vocational and self-development courses in custody.

His criminal history commences in 1998 with traffic offences, and includes offences of dishonesty and property offences in 1999. At the time of the commission of these offences, he was subject to two recognisances, one for two years, granted in November 1998 and the other one for one year, granted in December 1999. His avowed rehabilitation should therefore be viewed against a background of continuing disobedience to the law. The offences are further aggravated by an identical offence on a Form One. The instant offences represent a dramatic escalation of criminality on his part, although it is not unknown for youthful offenders to turn the corner following their first taste of an adult gaol. At this stage, his prospects of rehabilitation appear guarded. I find special circumstances based on the fact that he will require supervision to effect his re-integration into the community and because of the imposition of his first custodial sentence. However, as has already been observed, the objective gravity of these offences must find expression in the No Parole Period. Absent the pleas of guilty, I regard an effective head sentence of seven years and six months (7 yrs 6 months) appropriate to the objective and subjective circumstances of the offences. The sentences will be served concurrently for the reasons referred to in the sentencing of KEM.

Accordingly, I propose to sentence AEM (snr) as follows:-

On the two charges of Aggravated Sexual Assault, you are convicted. I sentence you on each count on indictment to a term of imprisonment of six years, both sentences to date from 7 September 2000 and to expire on 6 September 2006. I fix a Non Parole Period in each case of four years to date from 7 September 2000 and to expire on 6 September 2004. You are eligible for release at the expiration of the Non Parole Period. In passing sentence on the second count on indictment, I have taken into account the offence on the Form One.

APPENDIX C
SENTENCING STATISTICS – SEXUAL ASSAULT AND
AGGRAVATED SEXUAL ASSAULT
JUDICIAL COMMISSION OF NEW SOUTH WALES

Interpreting Judicial Commission statistics

Some general comments need to be made about the nature and classification of the data on the 'Statistics' component of the Judicial Information Research System.

The statistics show the number and type of sentences imposed for specific offences. The information currently available ends at March 2000, because data has yet to be processed from sentences imposed under the *Crimes (Sentencing Procedure) Act 1999* which commenced on 3 April 2000.

The data is organised into the following categories:

- Courts
 - Local Courts
 - Higher Courts (meaning District Court and Supreme Court)
 - Children's Court
- Sources of law
 - Acts of Parliament
 - Regulations (where applicable)
 - Common Law

For example, to find statistics on aggravated sexual assault select: 'Higher Courts' (as the offence is strictly indictable) ⇒ 'Acts of Parliament' ⇒ 'Crimes Act' ⇒ s 61J

The statistics can be represented in graph or table form. They demonstrate two basic types of information:

- **Penalty types** - percentages of custodial and non-custodial penalties imposed in the number of cases that were sentenced during the period shown at the top right of the screen;
- **Duration or amount of penalty** - length of prison terms, fine amounts and community service hours.

The statistics initially displayed on the screen will be headed 'All offenders'. For a common offence such as armed robbery or sexual intercourse without consent this will comprise hundreds of cases. If this result is too general to draw meaningful conclusions, the sample of cases can be modified by identifying the features of the type of offender or case sought.

By clicking on the headings 'Offenders' or 'Penalties' at the top of the screen, numerous subcategories will appear under those headings, including:

- Offenders
 - Number of counts (one or multiple)
 - Age group of offender
 - Plea (guilty or not guilty)
 - Prior convictions (none, same or different)
 - Status at time of offence (on bail, bond, probation or at liberty)

- Form 1 matters
- Penalties
 - Imprisonment - full terms, and minimum/fixed terms
 - Fine amounts
 - Community service order hours

For example, to see the sentences imposed on juvenile offenders who pleaded guilty to a single offence, select: 'Less than 21 years', 'Plea Guilty' and 'One Count'.

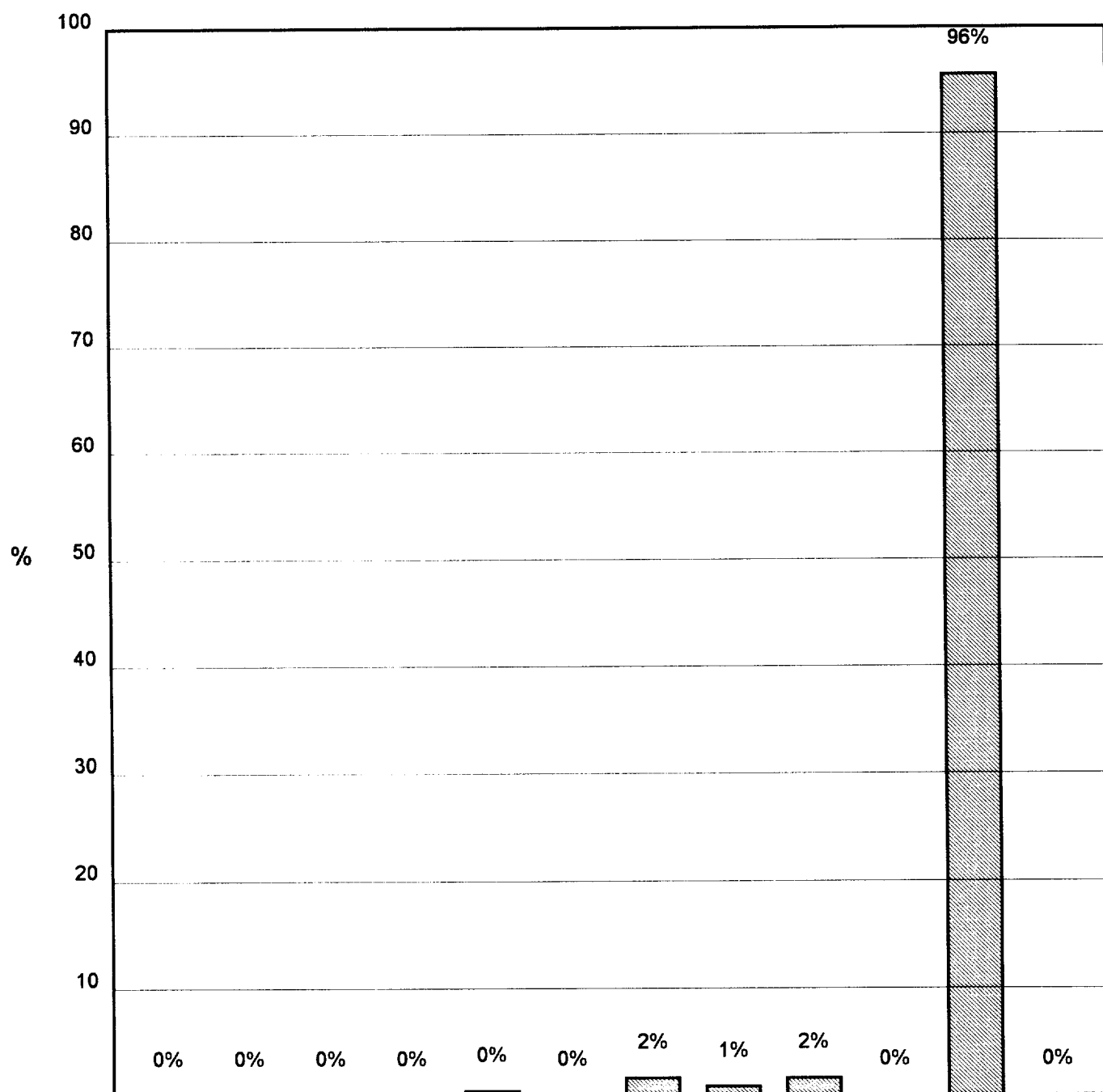
Finally, some commonly raised queries to bear in mind when interpreting the statistics:

- ***What happens to sentences that fall between the categories shown?*** The sentences are rounded upwards. Therefore, a sentence of 9 months imprisonment is included in the category for 12 months.
- ***What about sentences that change on appeal?*** The database is amended when a sentence is increased or reduced on appeal.
- ***Why do the statistics refer to minimum terms instead of non-parole periods?*** At present, the data is exclusively from sentences imposed under the *Sentencing Act 1989* which provided that sentences of imprisonment be expressed as either a 'fixed term' or divided into a 'minimum term' and an 'additional term'. Data from sentences imposed under the *Crimes (Sentencing Procedure) Act 1999*, which commenced in April 2000 and changed the terminology to 'term of imprisonment' and 'non parole period', is not yet represented. The statistics group the fixed terms with the minimum terms because both represent the period that offenders actually had to serve in custody.

APPENDIX C(i)
SECTION 61J – ALL OFFENDERS

Penalty Type

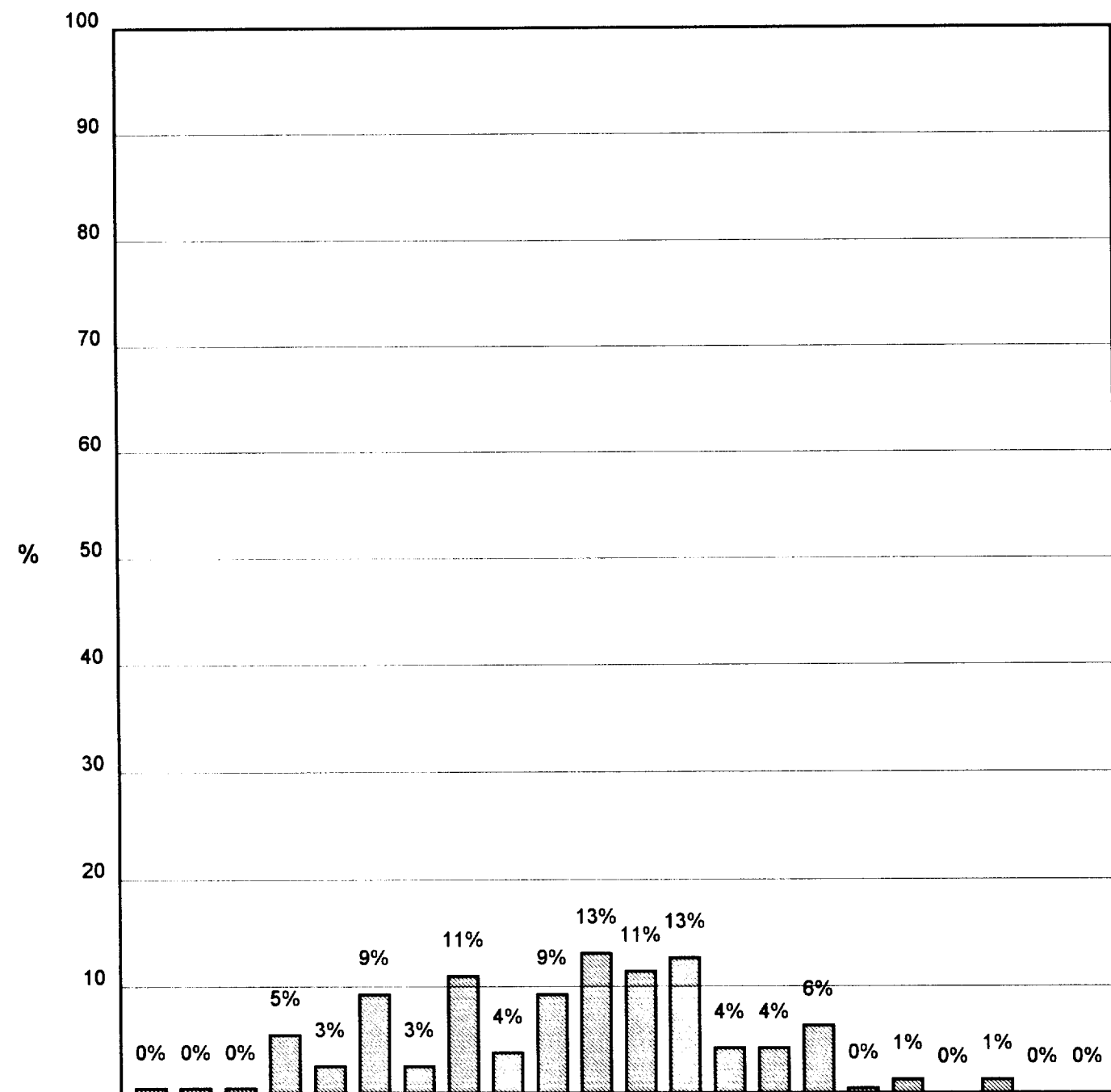
All Offenders



| Total Cases | s556A Disml | Rise of Court | Fine Only | s556A Recog | CL/s558 Recog | s556A +Super | CL/s558 +Super | CSO | Period Detent | Home Detent | Prison | Compound |
|-------------|-------------|---------------|-----------|-------------|---------------|--------------|----------------|-----|---------------|-------------|--------|----------|
| 248 | 0 | 0 | 0 | 0 | 1 | 0 | 4 | 2 | 4 | 0 | 237 | 0 |

Full Terms

All Offenders



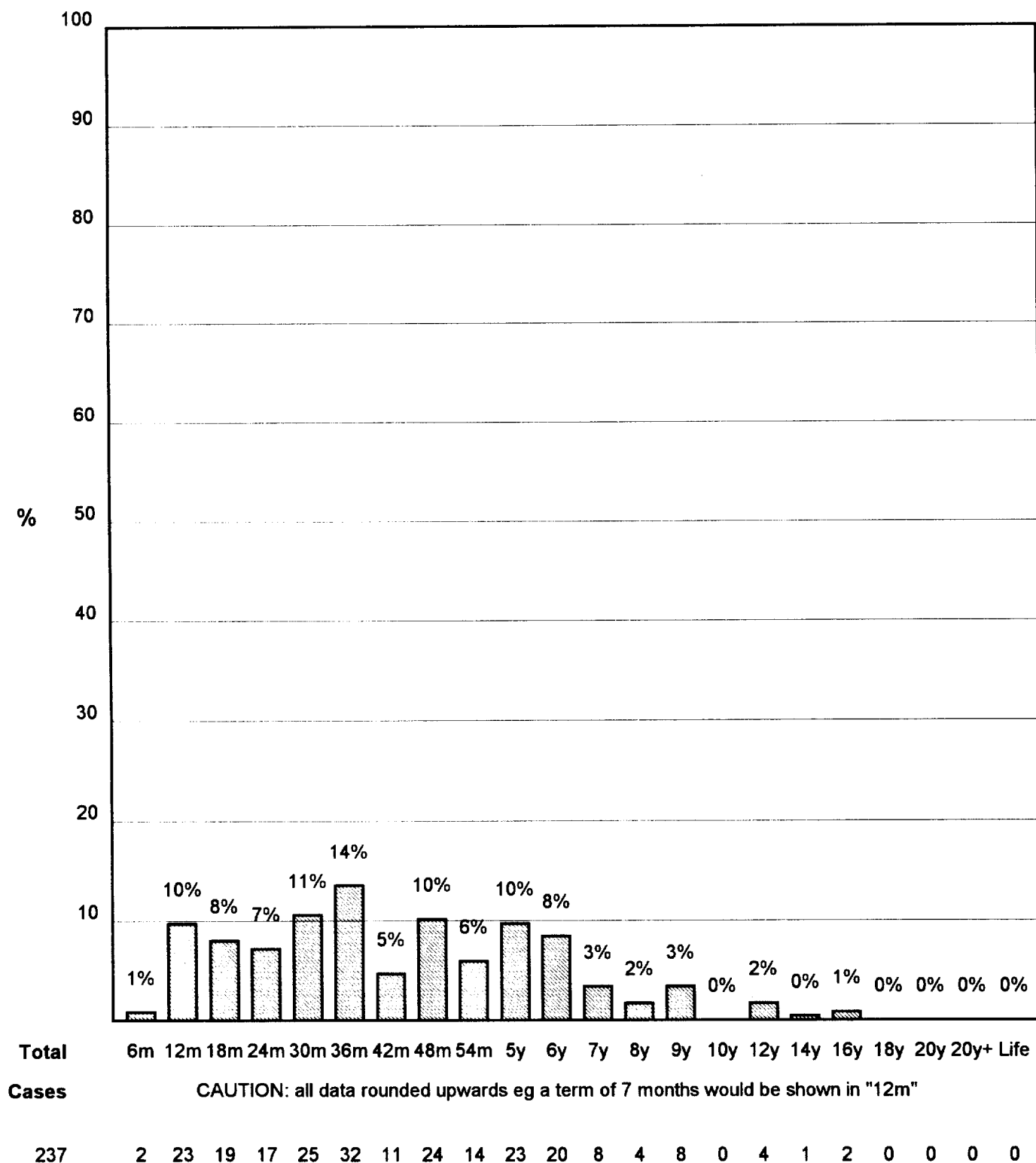
Total Cases

CAUTION: all data rounded upwards eg a term of 7 months would be shown in "12m"

| | | | | | | | | | | | | | | | | | | | | | | |
|-----|---|---|---|----|---|----|---|----|---|----|----|----|----|----|----|----|---|---|---|---|---|---|
| 237 | 1 | 1 | 1 | 13 | 6 | 22 | 6 | 26 | 9 | 22 | 31 | 27 | 30 | 10 | 10 | 15 | 1 | 3 | 0 | 3 | 0 | 0 |
|-----|---|---|---|----|---|----|---|----|---|----|----|----|----|----|----|----|---|---|---|---|---|---|

Minimum/Fixed Terms

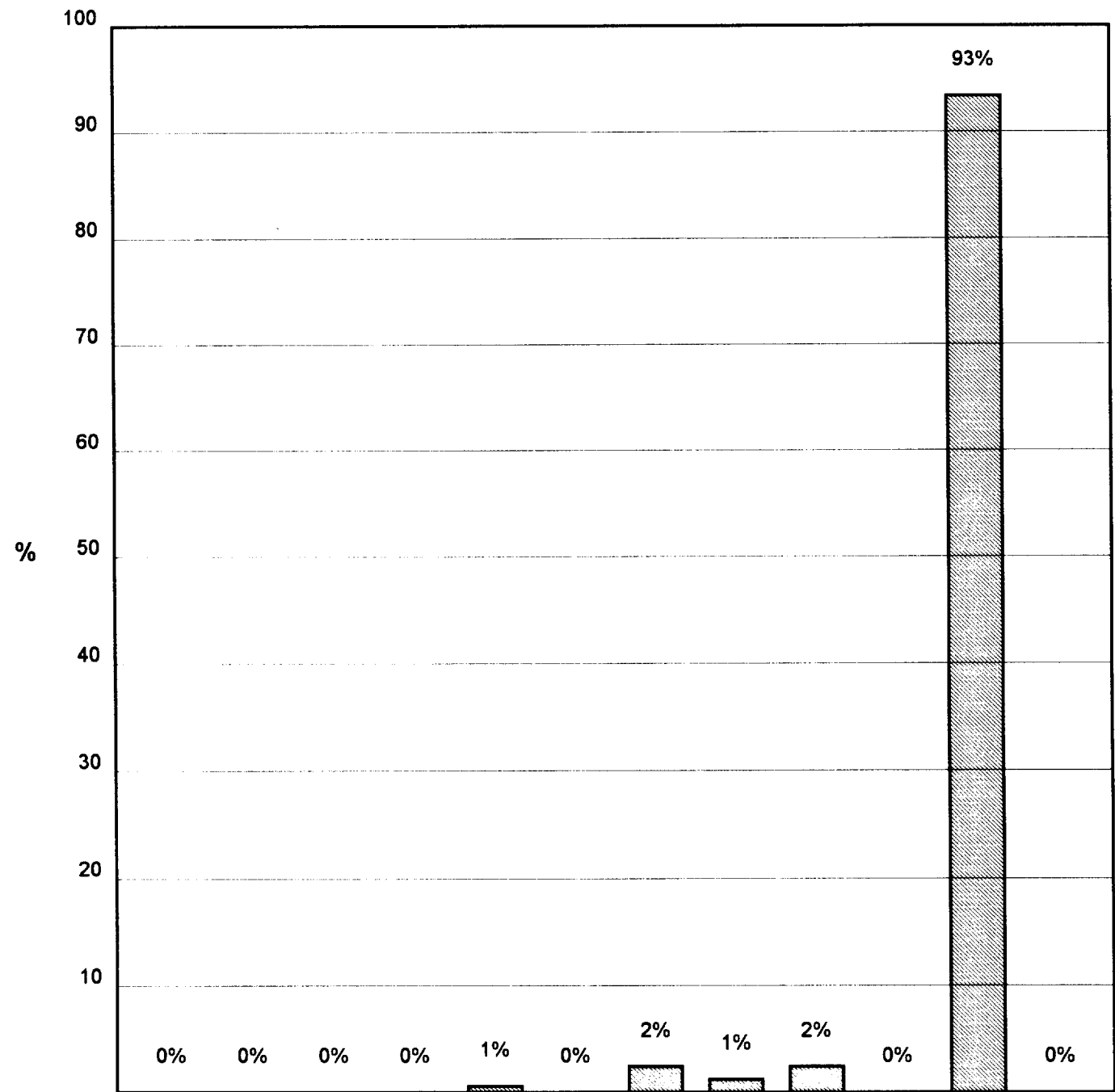
All Offenders



APPENDIX C(ii)
SECTION 61J – TYPES OF OFFENDERS

Penalty Type

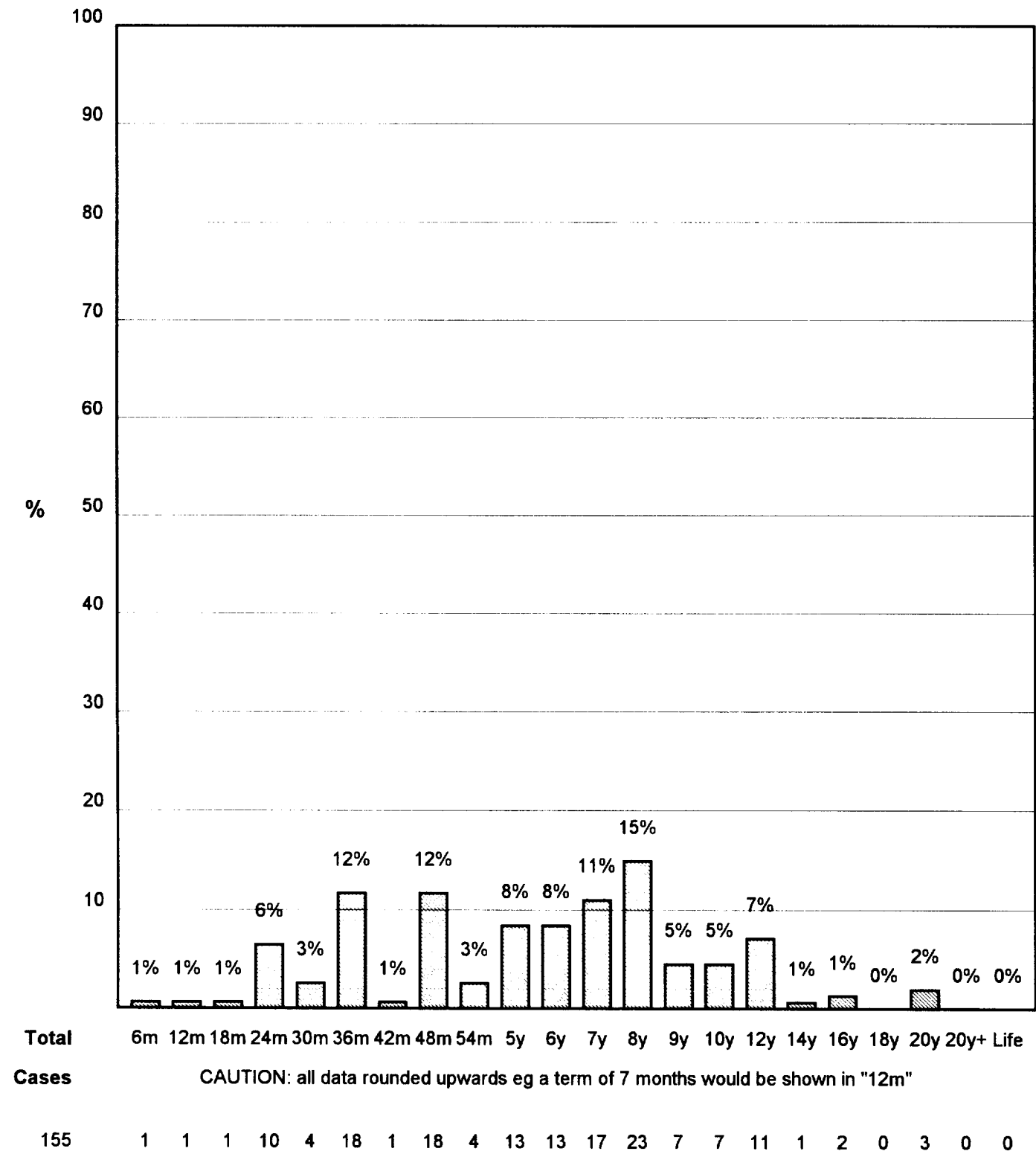
Plea Guilty



| Total Cases | s556A Disml | Rise of Court | Fine Only | s556A Recog | CL/s558 Recog | s556A +Super | CL/s558 +Super | CSO | Period Detent | Home Detent | Prison | Com-pound |
|-------------|-------------|---------------|-----------|-------------|---------------|--------------|----------------|-----|---------------|-------------|--------|-----------|
| 166 | 0 | 0 | 0 | 0 | 1 | 0 | 4 | 2 | 4 | 0 | 155 | 0 |

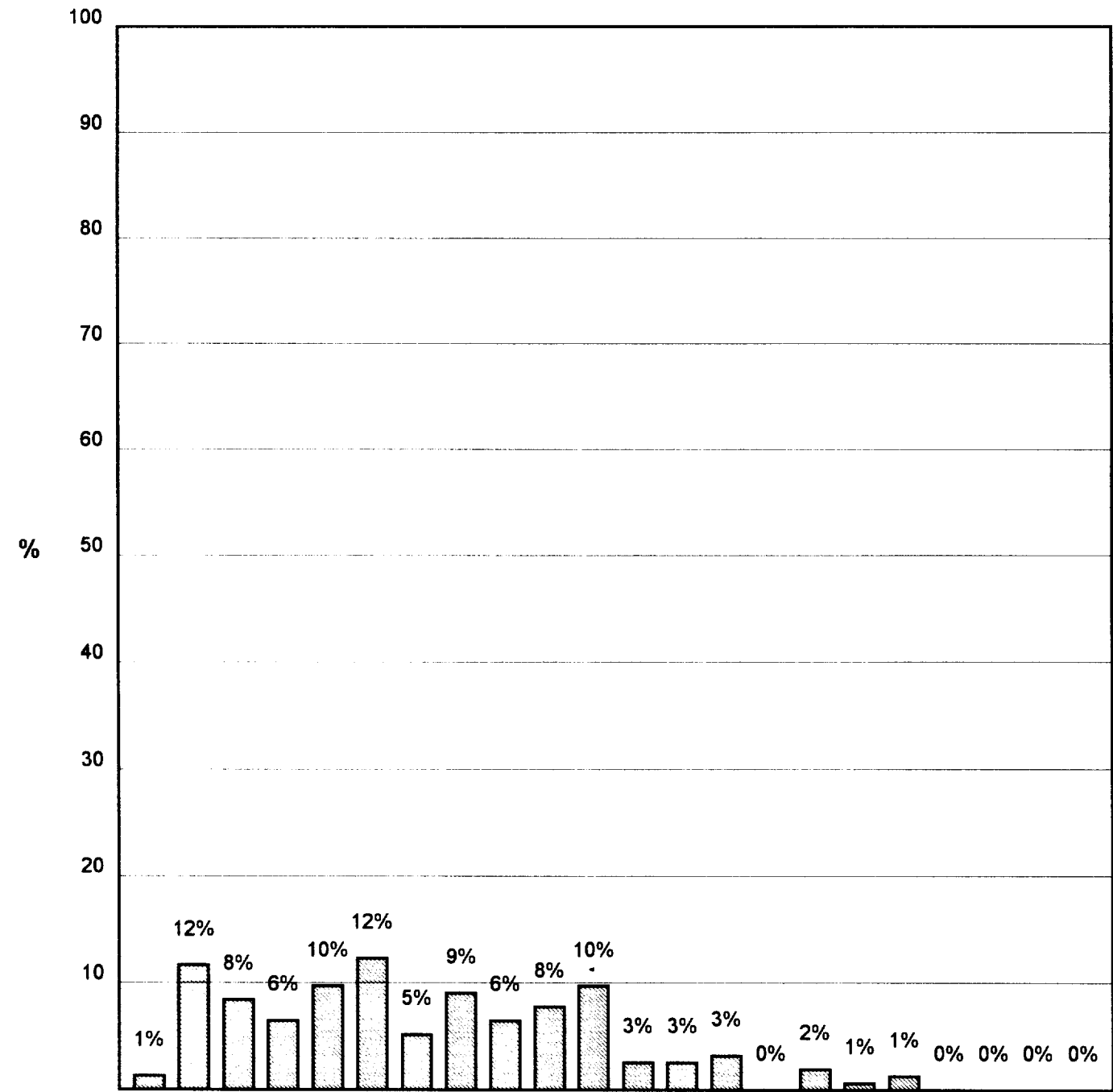
Full Terms

Plea Guilty



Minimum/Fixed Terms

Plea Guilty



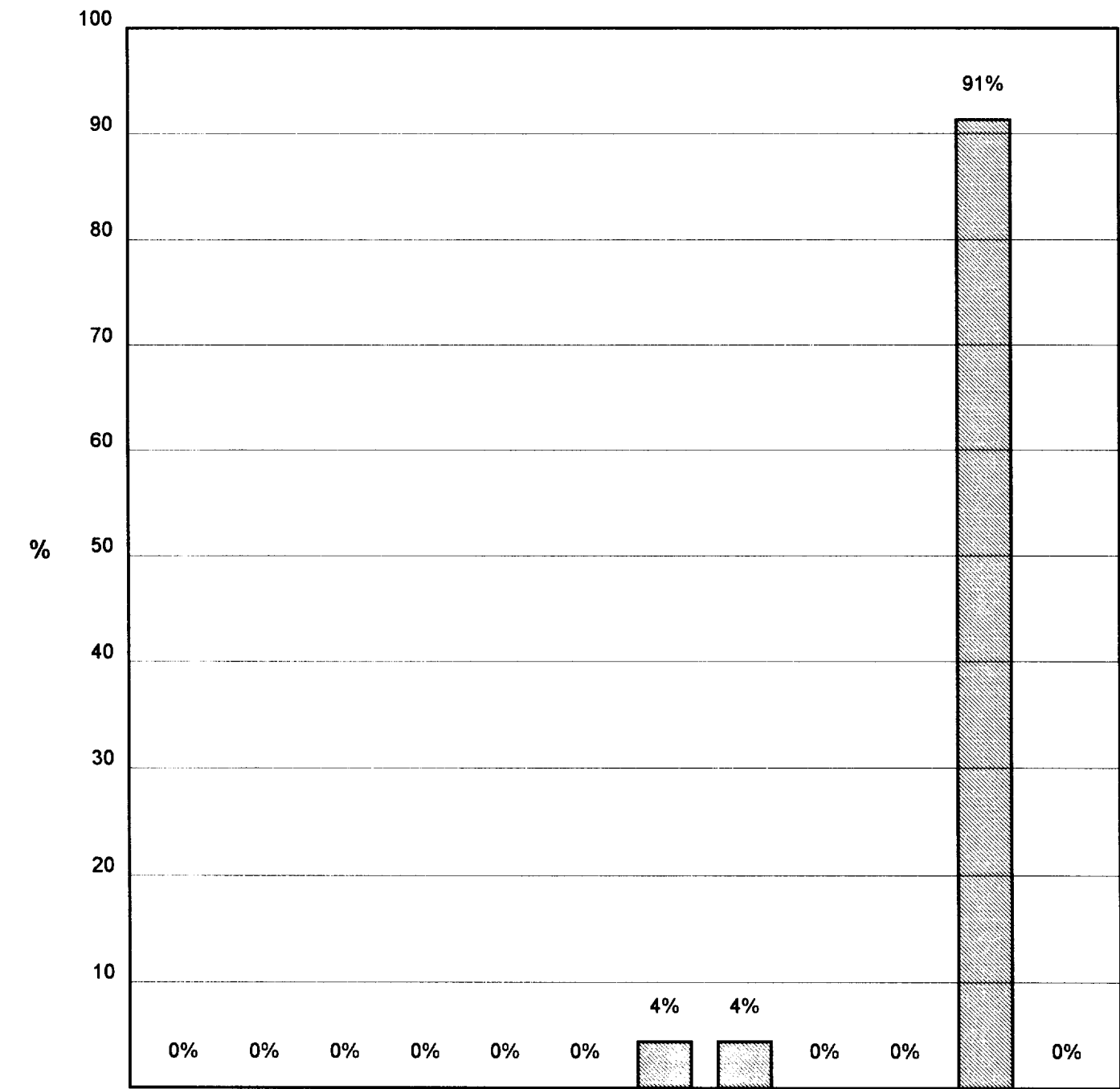
Total Cases

CAUTION: all data rounded upwards eg a term of 7 months would be shown in "12m"

155 2 18 13 10 15 19 8 14 10 12 15 4 4 5 0 3 1 2 0 0 0 0

Penalty Type

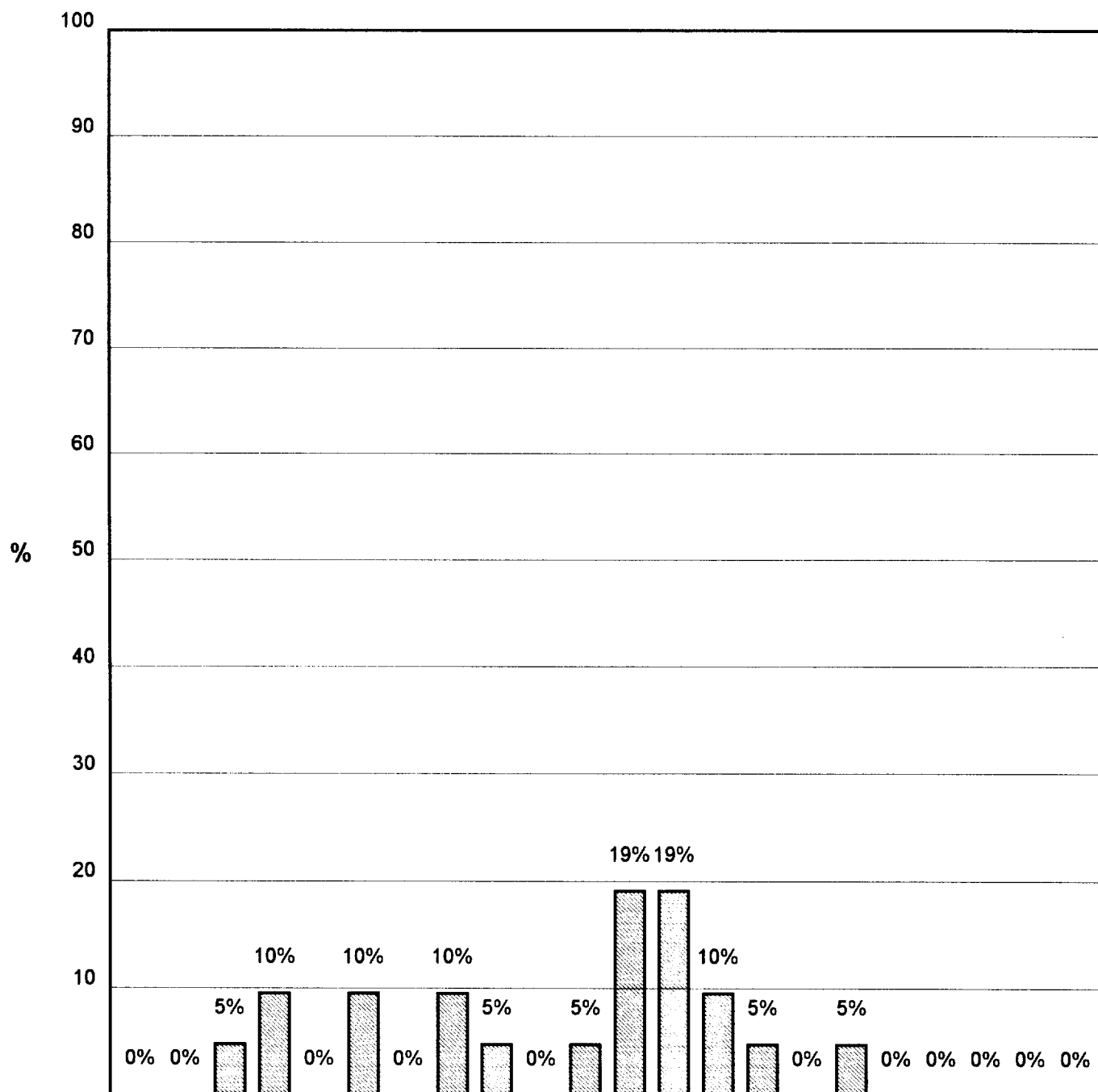
Plea Guilty Less than 21 Years



| Total Cases | s556A Disml | Rise of Court | Fine Only | s556A Recog | CL/s558 Recog | s556A +Super | CL/s558 +Super | CSO | Period Detent | Home Detent | Prison | Com-pound |
|-------------|-------------|---------------|-----------|-------------|---------------|--------------|----------------|-----|---------------|-------------|--------|-----------|
| 23 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 1 | 0 | 0 | 21 | 0 |

Full Terms

Plea Guilty Less than 21 Years

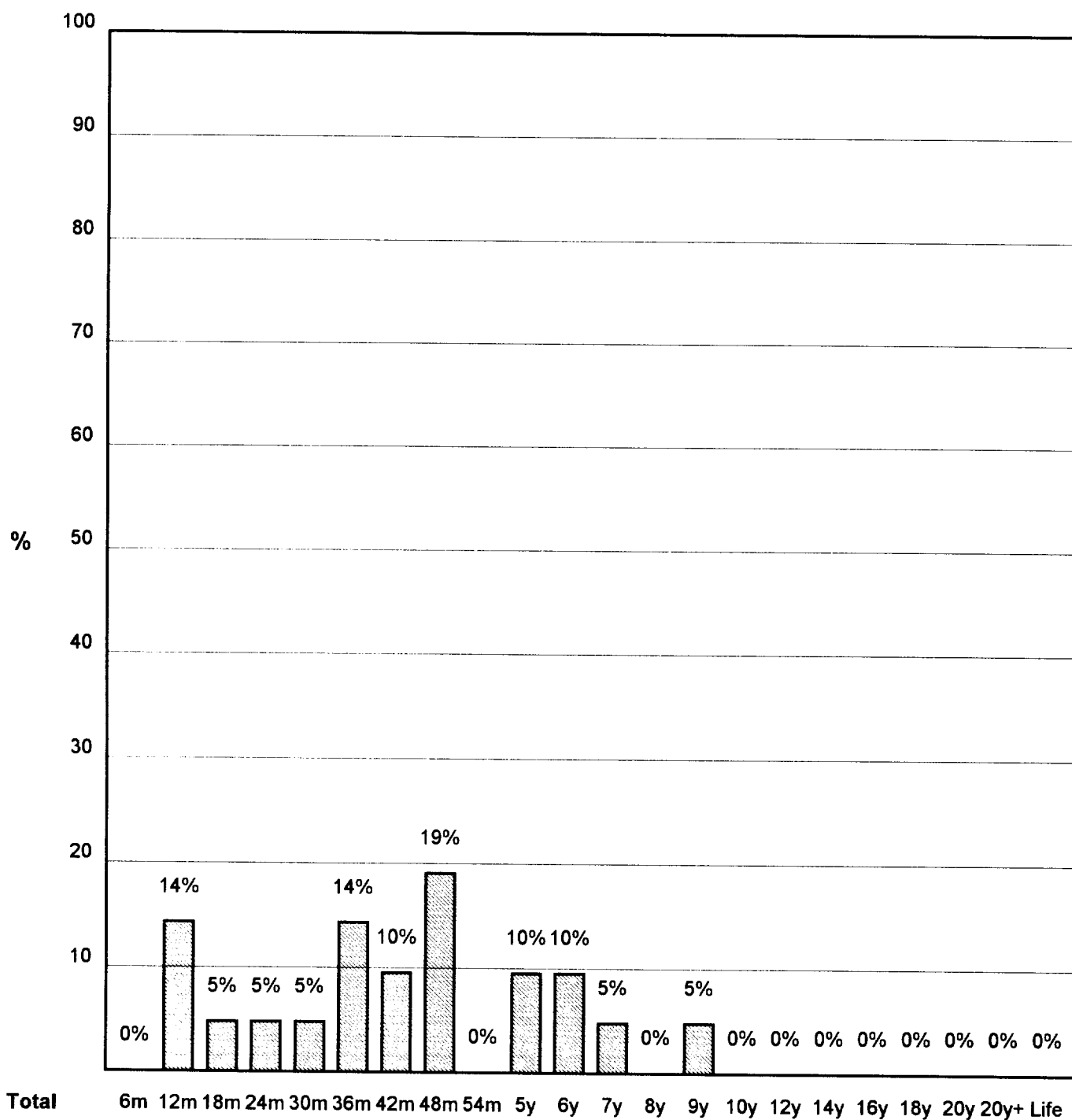


| | | | | | | | | | | | | | | | | | | | | | | |
|-------|----|-----|-----|-----|-----|-----|-----|-----|-----|----|----|----|----|----|-----|-----|-----|-----|-----|-----|------|------|
| Total | 6m | 12m | 18m | 24m | 30m | 36m | 42m | 48m | 54m | 5y | 6y | 7y | 8y | 9y | 10y | 12y | 14y | 16y | 18y | 20y | 20y+ | Life |
| Cases | 0 | 0 | 1 | 2 | 0 | 2 | 0 | 2 | 1 | 0 | 1 | 4 | 4 | 2 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 |
| 21 | 0 | 0 | 1 | 2 | 0 | 2 | 0 | 2 | 1 | 0 | 1 | 4 | 4 | 2 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 |

CAUTION: all data rounded upwards eg a term of 7 months would be shown in "12m"

Minimum/Fixed Terms

Plea Guilty Less than 21 Years



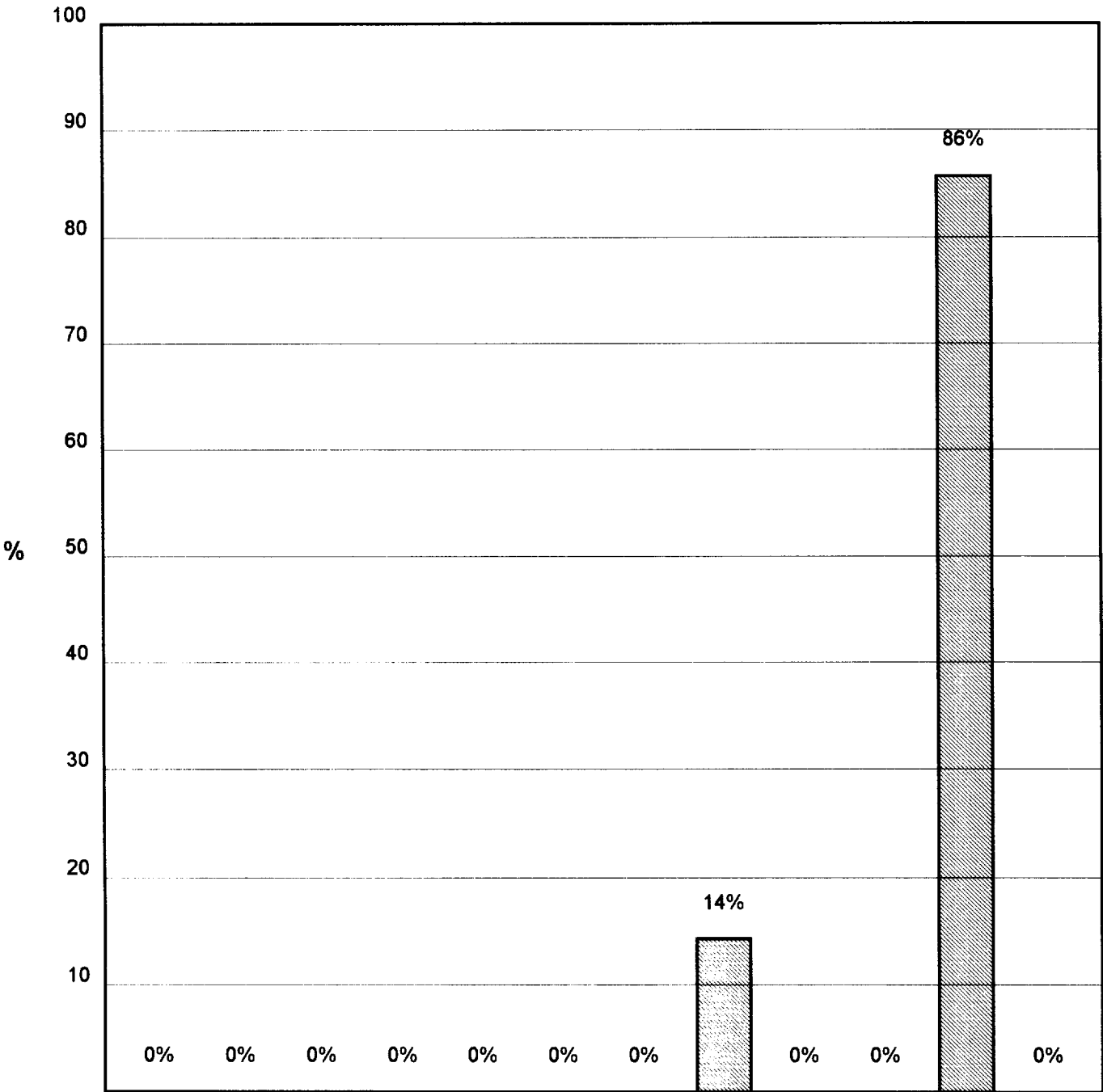
Total 6m 12m 18m 24m 30m 36m 42m 48m 54m 5y 6y 7y 8y 9y 10y 12y 14y 16y 18y 20y 20y+ Life

Cases CAUTION: all data rounded upwards eg a term of 7 months would be shown in "12m"

21 0 3 1 1 1 3 2 4 0 2 2 1 0 1 0 0 0 0 0 0 0

Penalty Type

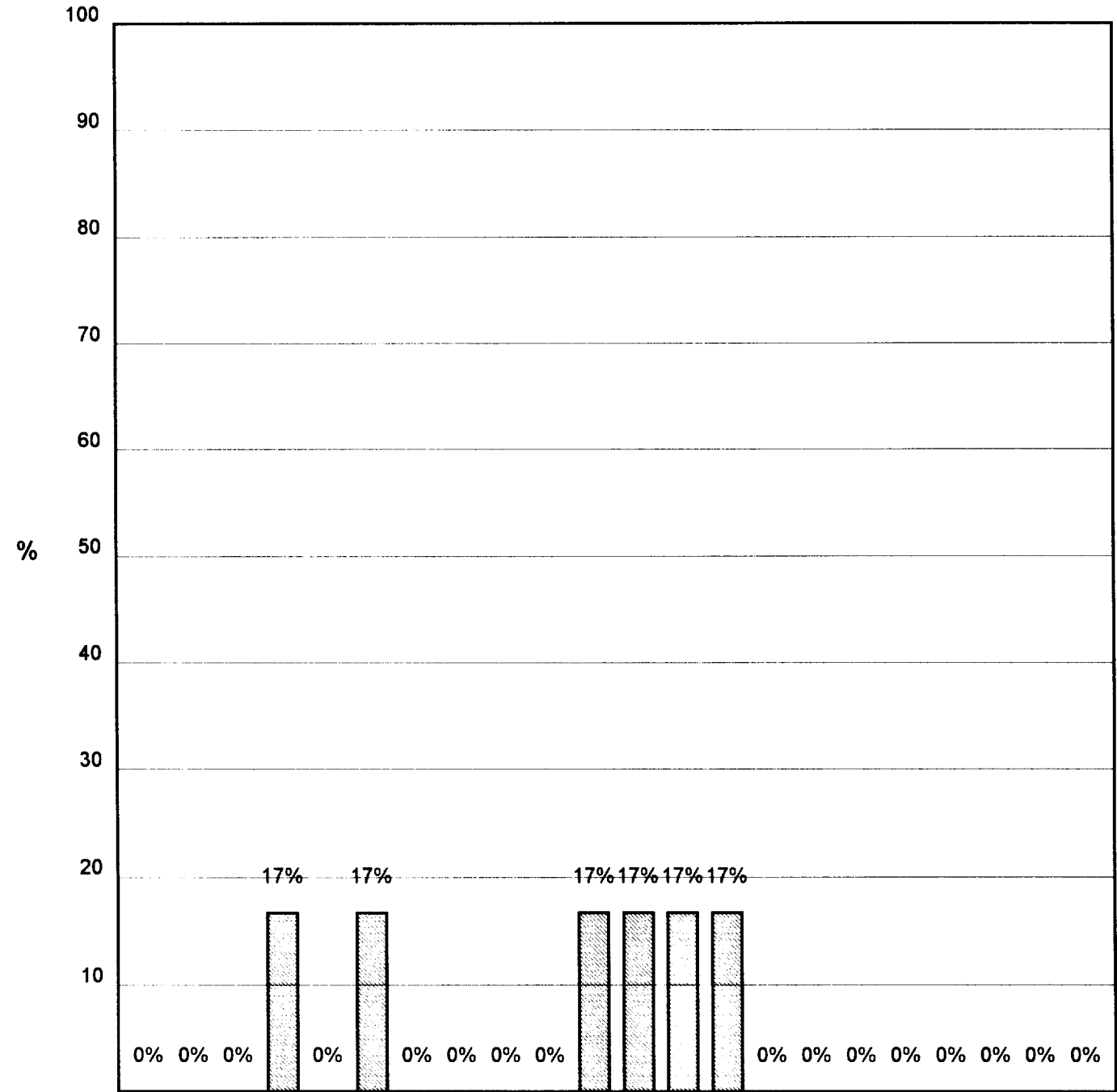
No Priors Plea Guilty Less than 21 Years



| Total Cases | s556A Disml | Rise of Court | Fine Only | s556A Recog | CL/s558 Recog | s556A +Super | CL/s558 +Super | CSO | Period Detent | Home Detent | Prison | Com-pound |
|-------------|-------------|---------------|-----------|-------------|---------------|--------------|----------------|-----|---------------|-------------|--------|-----------|
| 7 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 6 | 0 |

Full Terms

No Priors Plea Guilty Less than 21 Years

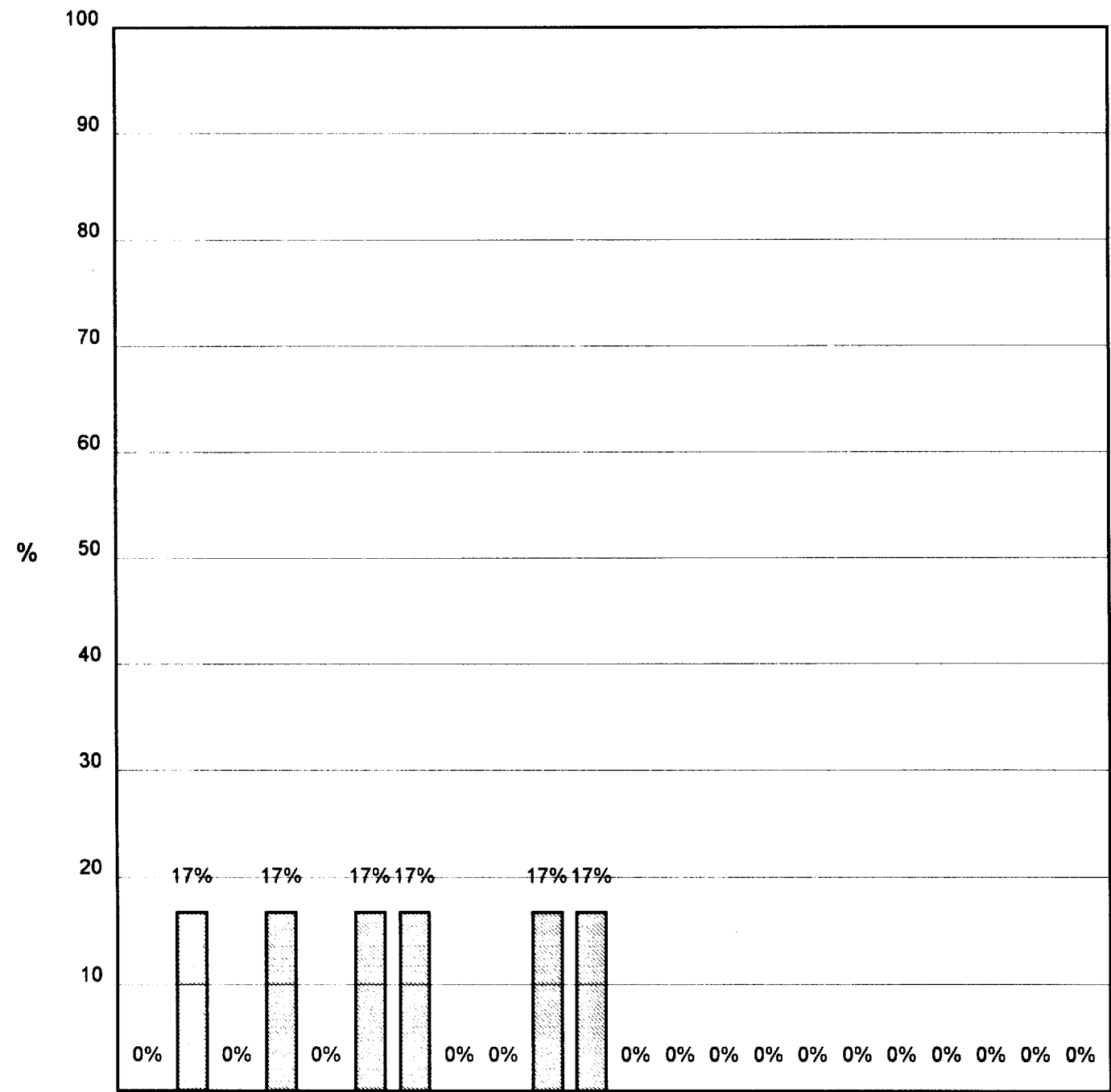


| | | | | | | | | | | | | | | | | | | | | | | |
|-------|----|-----|-----|-----|-----|-----|-----|-----|-----|----|----|----|----|----|-----|-----|-----|-----|-----|-----|------|------|
| Total | 6m | 12m | 18m | 24m | 30m | 36m | 42m | 48m | 54m | 5y | 6y | 7y | 8y | 9y | 10y | 12y | 14y | 16y | 18y | 20y | 20y+ | Life |
| Cases | 0 | 0 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 1 | 1 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 6 | 0 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 1 | 1 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

CAUTION: all data rounded upwards eg a term of 7 months would be shown in "12m"

Minimum/Fixed Terms

No Priors Plea Guilty Less than 21 Years



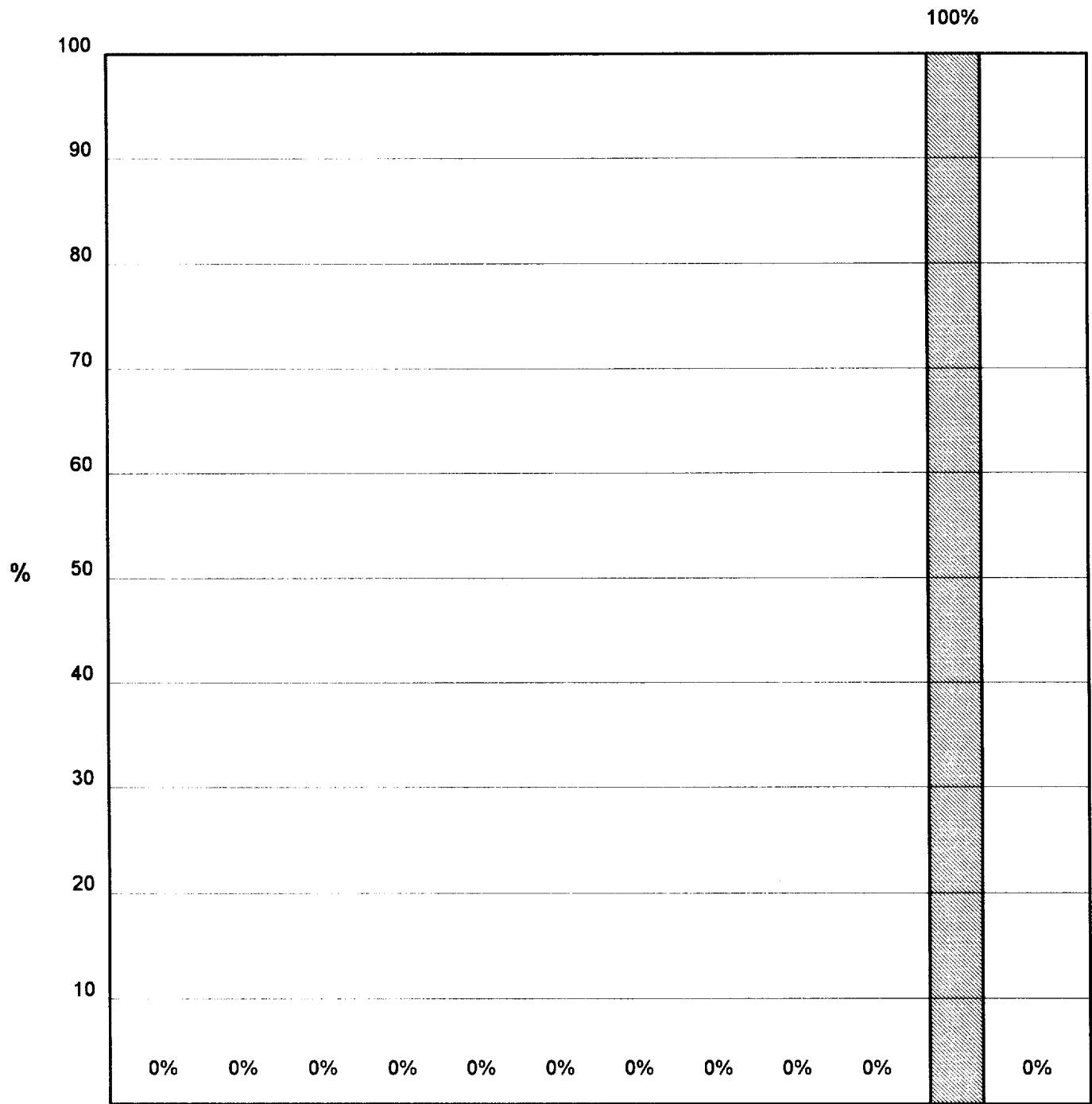
Total Cases 6m 12m 18m 24m 30m 36m 42m 48m 54m 5y 6y 7y 8y 9y 10y 12y 14y 16y 18y 20y 20y+ Life

CAUTION: all data rounded upwards eg a term of 7 months would be shown in "12m"

6 0 1 0 1 0 1 1 0 0 1 1 0 0 0 0 0 0 0 0 0 0

Penalty Type

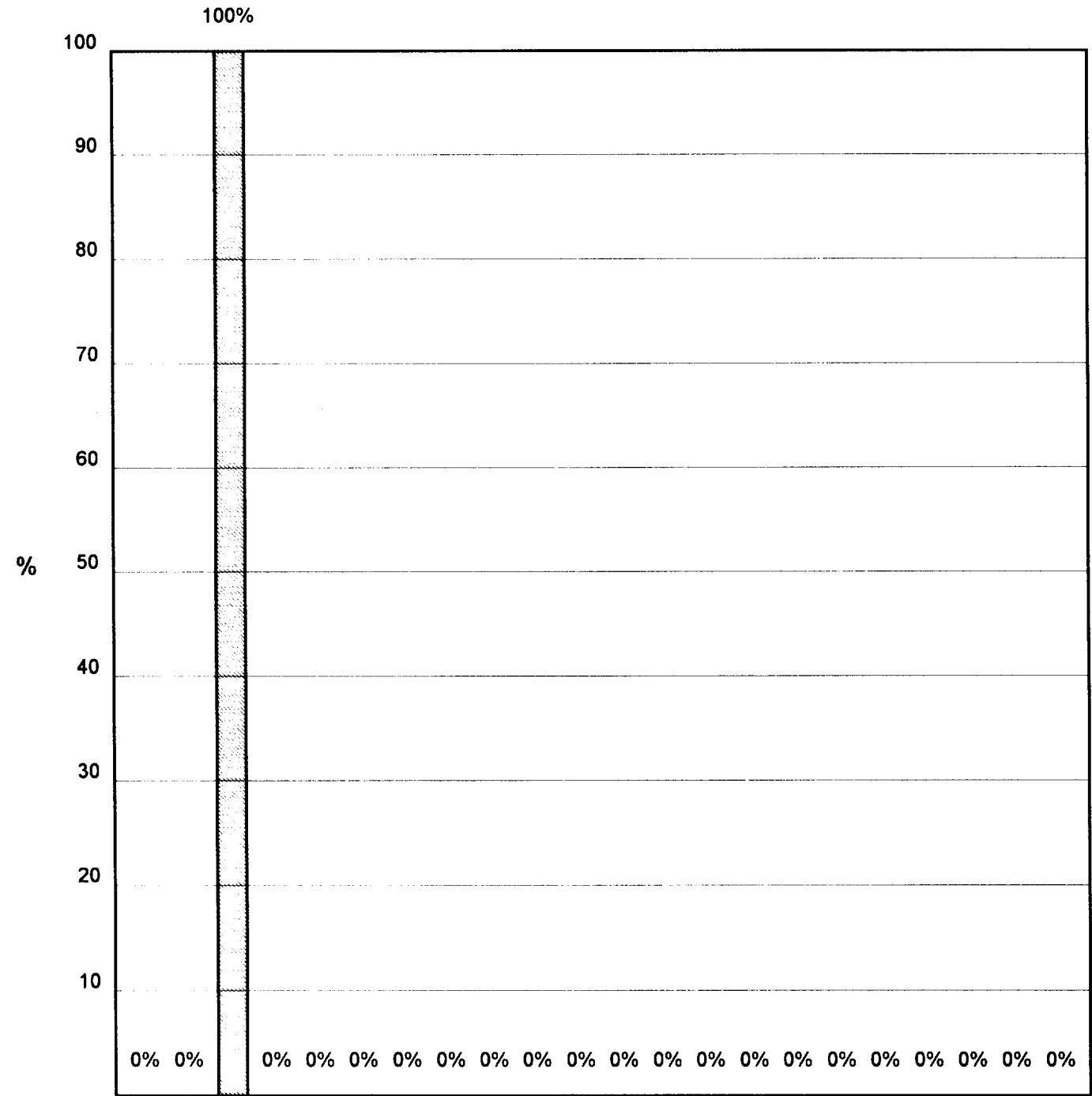
Priors - Same Type Plea Guilty Less than 21 Years



| Total Cases | s556A Disml | Rise of Court | Fine Only | s556A Recog | CL/s558 Recog | s556A +Super | CL/s558 +Super | CSO | Period Detent | Home Detent | Prison | Com-pound |
|-------------|-------------|---------------|-----------|-------------|---------------|--------------|----------------|-----|---------------|-------------|--------|-----------|
| 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 |

Full Terms

Priors - Same Type Plea Guilty Less than 21 Years

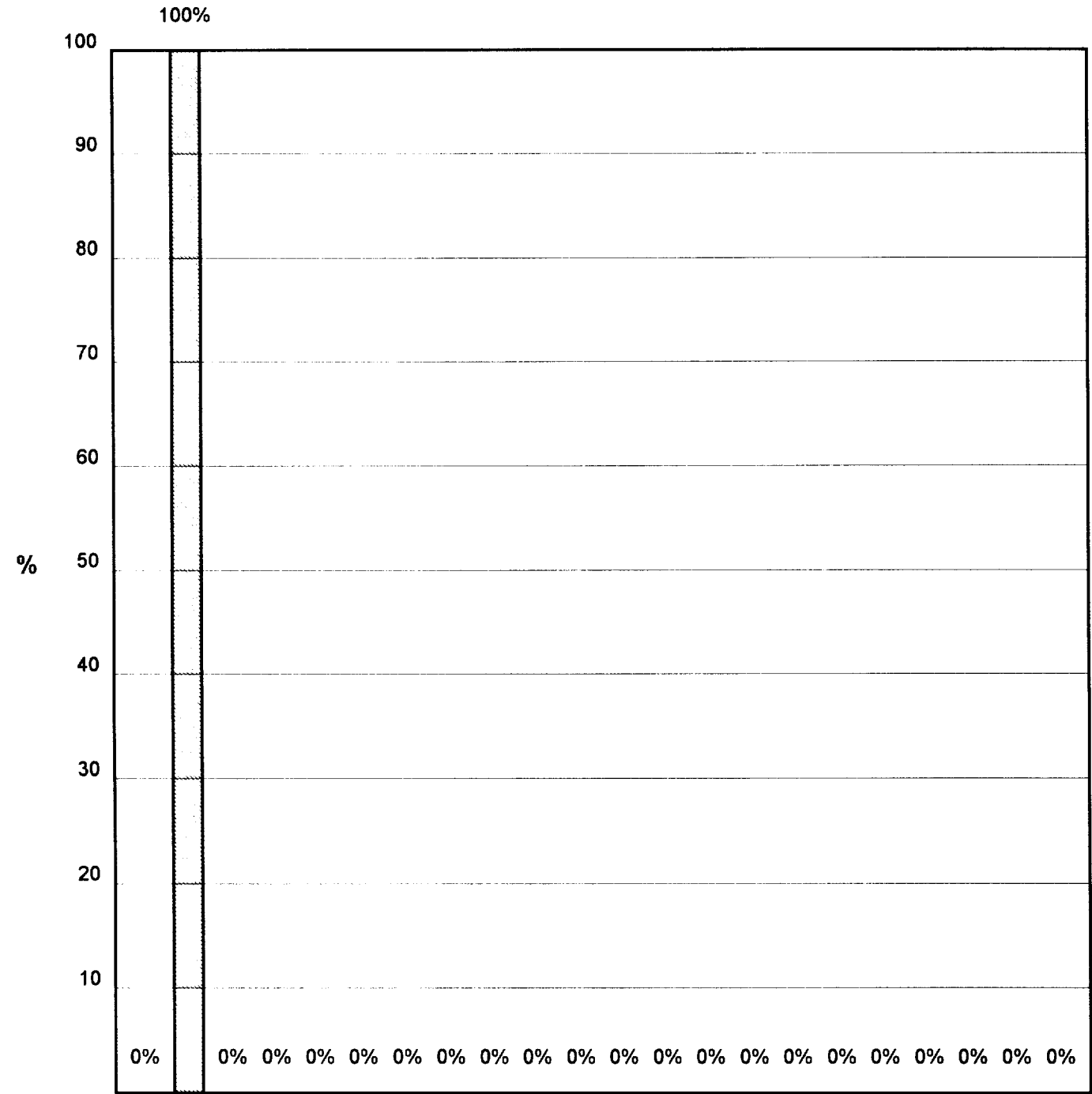


| | | | | | | | | | | | | | | | | | | | | | | |
|-------|----|-----|-----|-----|-----|-----|-----|-----|-----|----|----|----|----|----|-----|-----|-----|-----|-----|-----|------|------|
| Total | 6m | 12m | 18m | 24m | 30m | 36m | 42m | 48m | 54m | 5y | 6y | 7y | 8y | 9y | 10y | 12y | 14y | 16y | 18y | 20y | 20y+ | Life |
| Cases | | | | | | | | | | | | | | | | | | | | | | |
| | 1 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

CAUTION: all data rounded upwards eg a term of 7 months would be shown in "12m"

Minimum/Fixed Terms

Priors - Same Type Plea Guilty Less than 21 Years

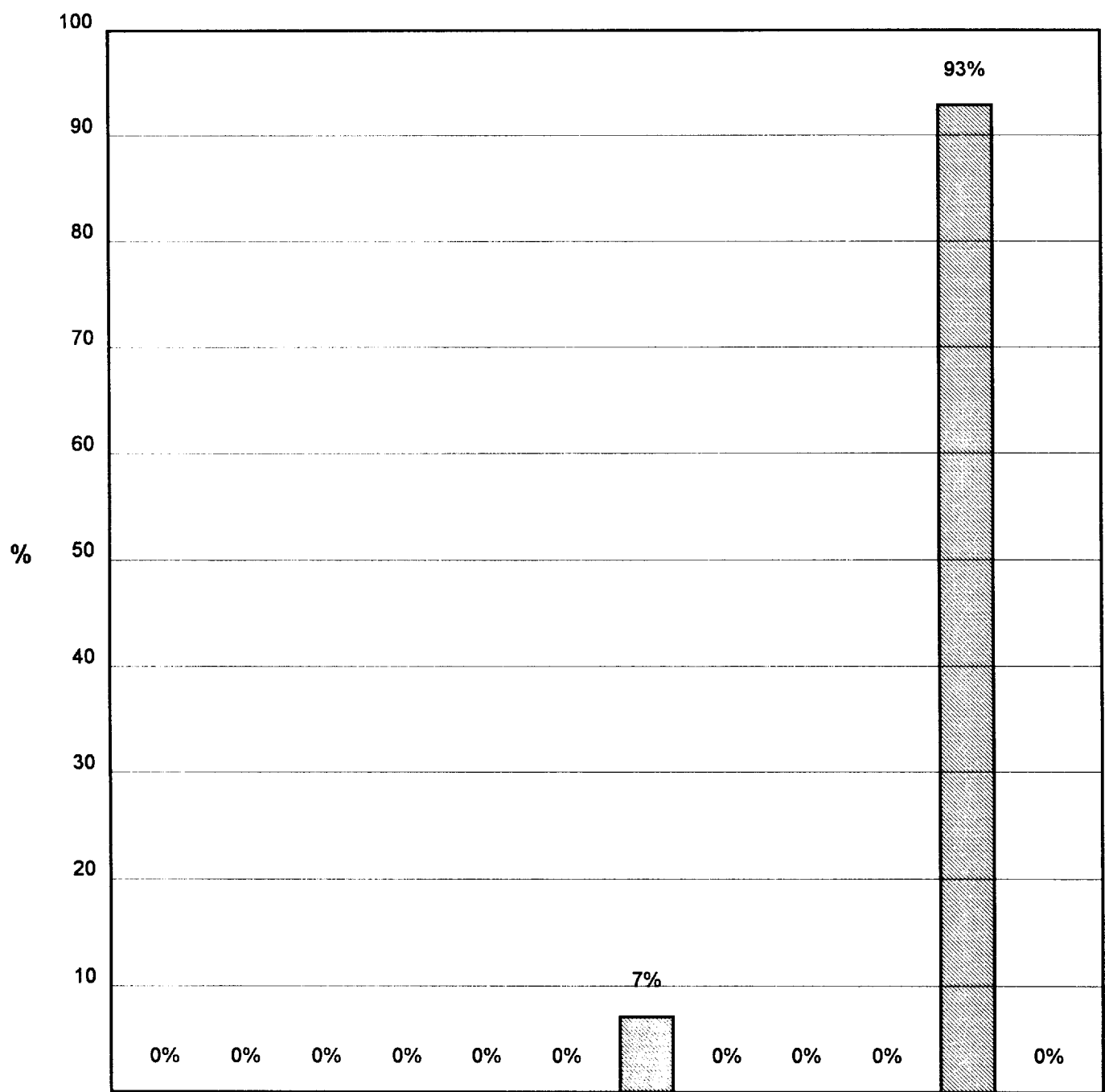


| | | | | | | | | | | | | | | | | | | | | | | |
|-------|----|-----|-----|-----|-----|-----|-----|-----|-----|----|----|----|----|----|-----|-----|-----|-----|-----|-----|------|------|
| Total | 6m | 12m | 18m | 24m | 30m | 36m | 42m | 48m | 54m | 5y | 6y | 7y | 8y | 9y | 10y | 12y | 14y | 16y | 18y | 20y | 20y+ | Life |
| Cases | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

CAUTION: all data rounded upwards eg a term of 7 months would be shown in "12m"

Penalty Type

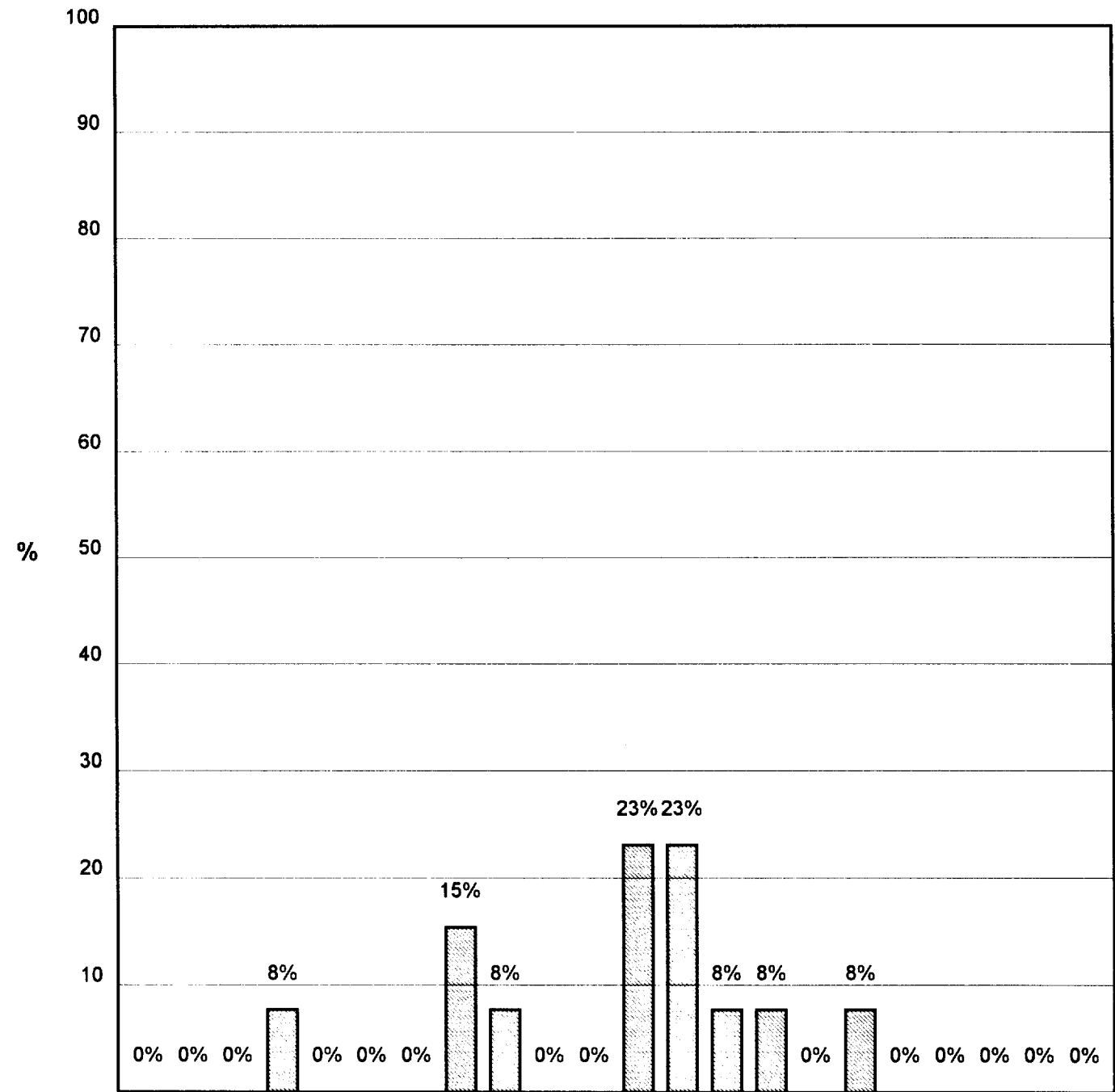
Priors - Different Type Plea Guilty Less than 21 Years



| Total Cases | s556A Disml | Rise of Court | Fine Only | s556A Recog | CL/s558 Recog | s556A +Super | CL/s558 +Super | CSO | Period Detent | Home Detent | Prison | Compound |
|-------------|-------------|---------------|-----------|-------------|---------------|--------------|----------------|-----|---------------|-------------|--------|----------|
| 14 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 13 | 0 |

Full Terms

Priors - Different Type Plea Guilty Less than 21 Years



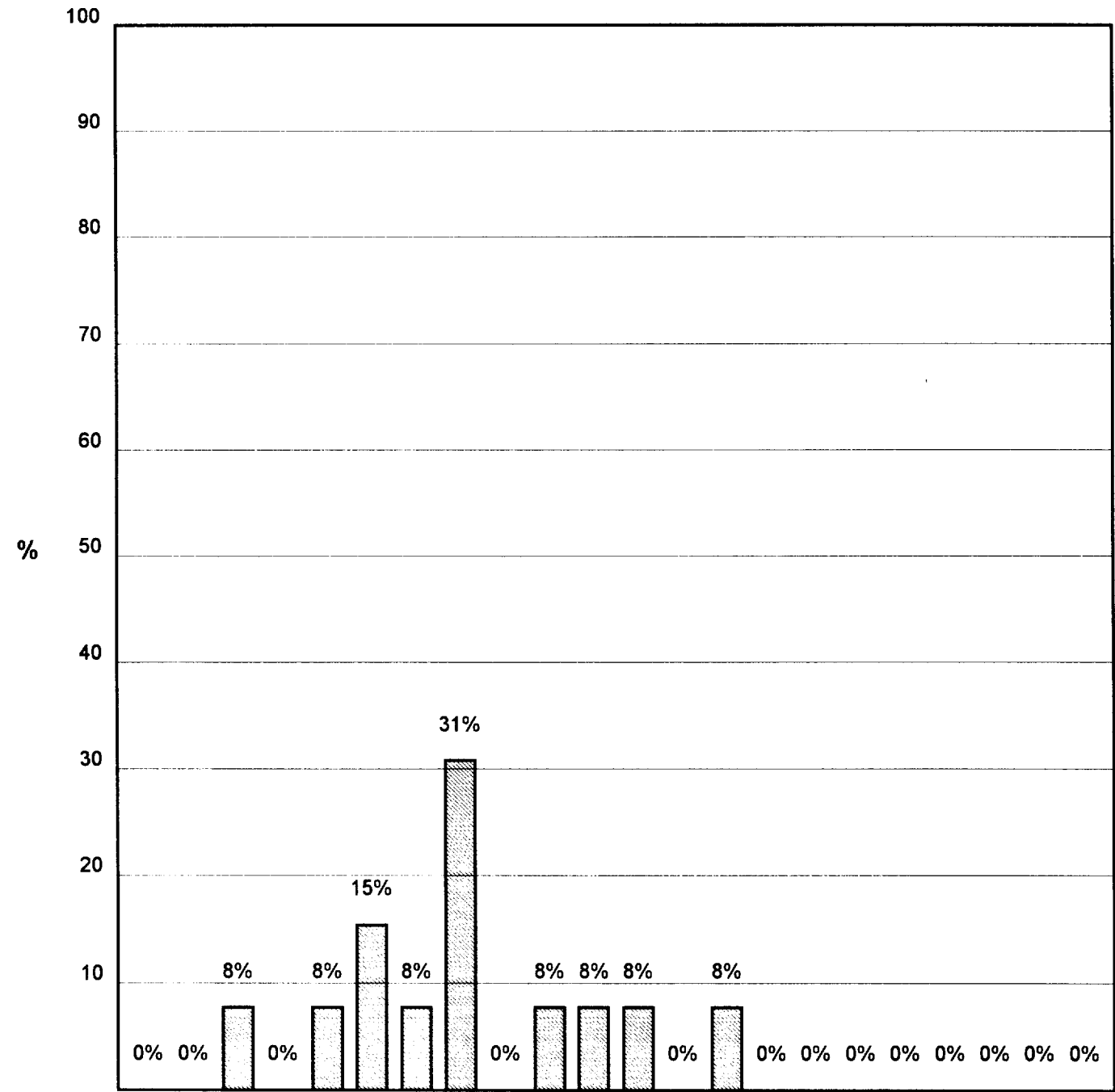
Total Cases 6m 12m 18m 24m 30m 36m 42m 48m 54m 5y 6y 7y 8y 9y 10y 12y 14y 16y 18y 20y 20y+ Life

CAUTION: all data rounded upwards eg a term of 7 months would be shown in "12m"

13 0 0 0 1 0 0 0 2 1 0 0 3 3 1 1 0 1 0 0 0 0 0

Minimum/Fixed Terms

Priors - Different Type Plea Guilty Less than 21 Years



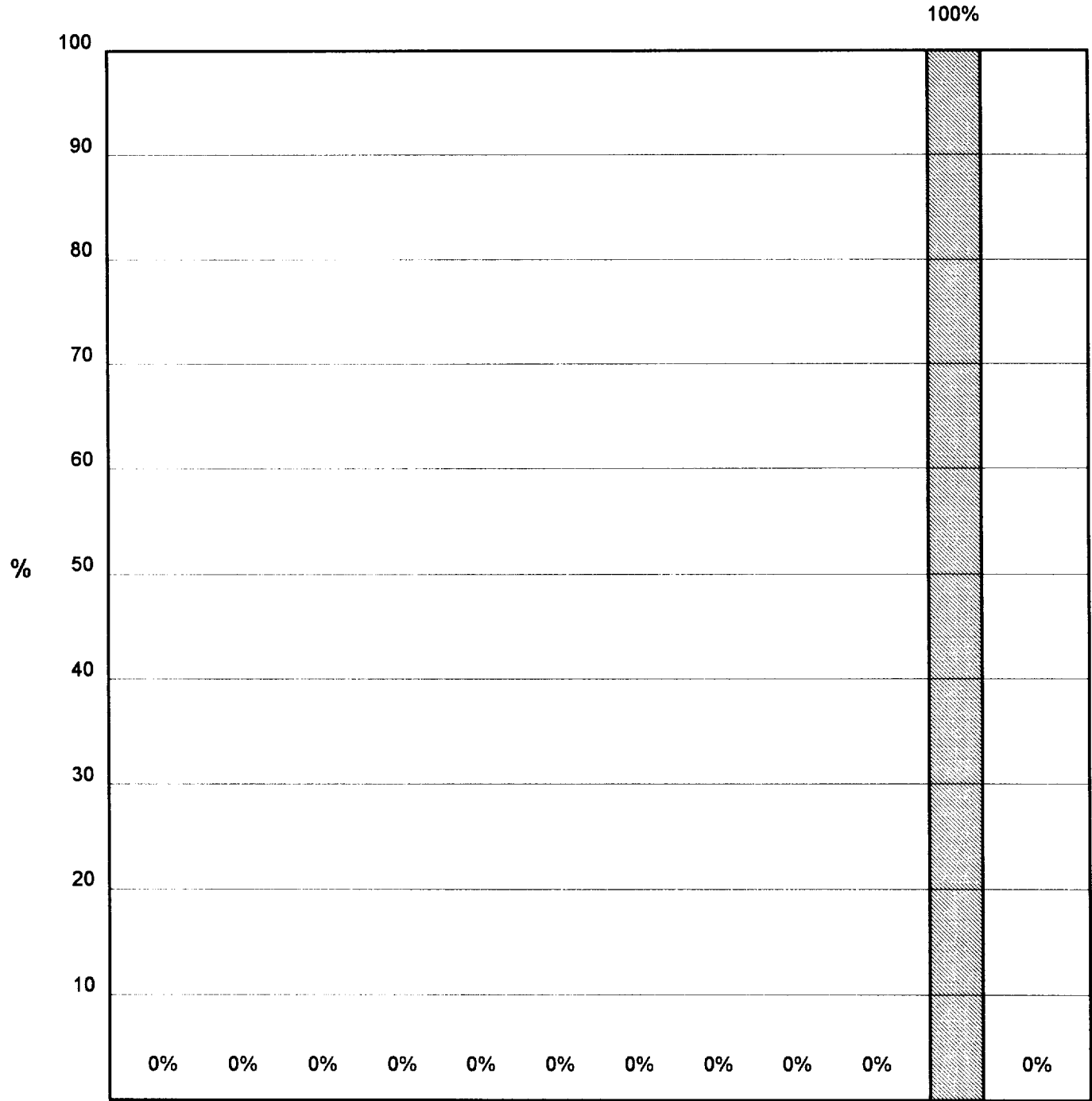
Total Cases 6m 12m 18m 24m 30m 36m 42m 48m 54m 5y 6y 7y 8y 9y 10y 12y 14y 16y 18y 20y 20y+ Life

CAUTION: all data rounded upwards eg a term of 7 months would be shown in "12m"

13 0 0 1 0 1 2 1 4 0 1 1 1 0 1 0 0 0 0 0 0 0

Penalty Type

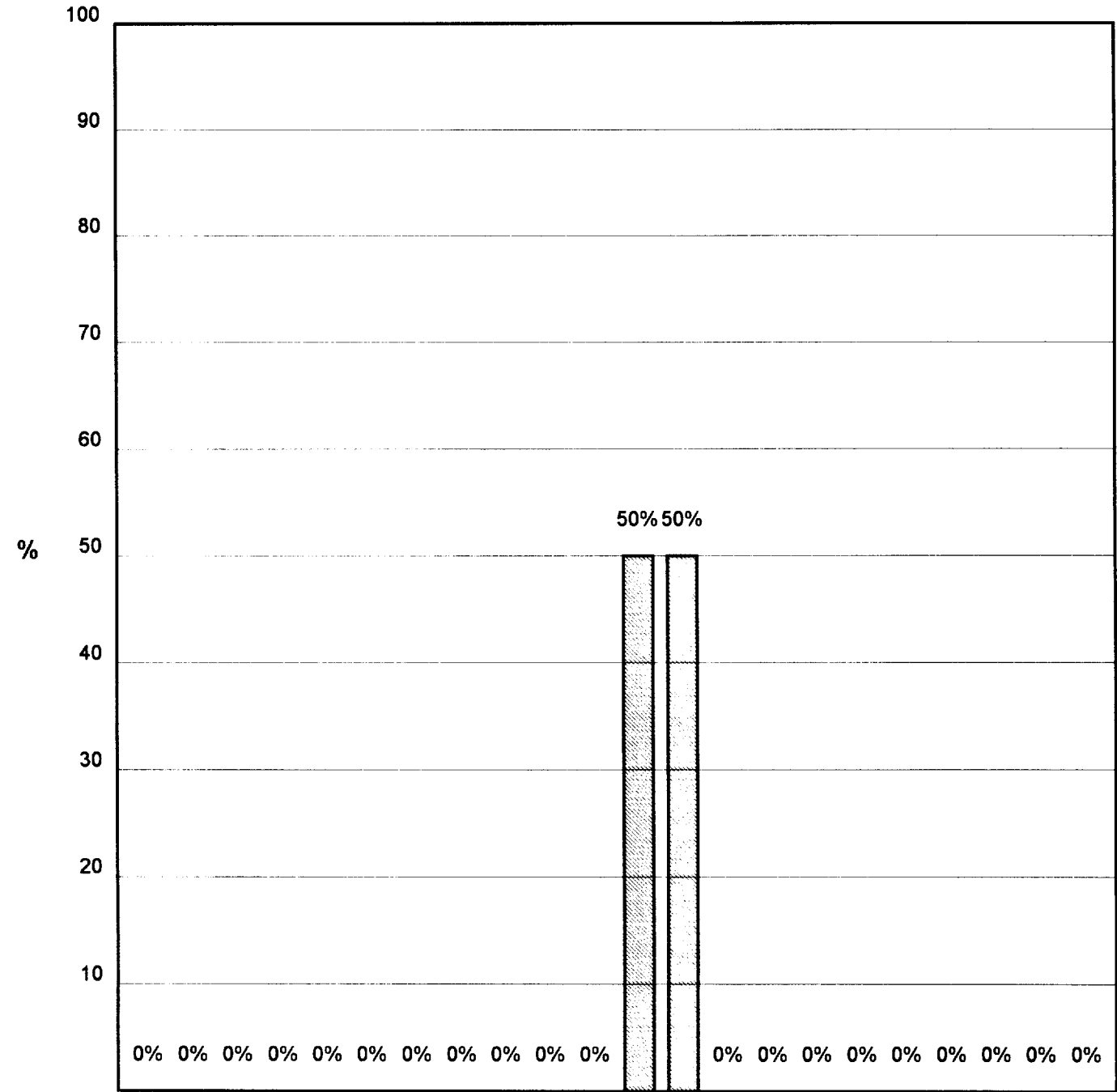
Multiple Counts Priors - Different Type Plea Guilty Less than 21 Years



| Total Cases | s556A Disml | Rise of Court | Fine Only | s556A Recog | CL/s558 Recog | s556A +Super | CL/s558 +Super | CSO | Period Detent | Home Detent | Prison | Com-pound |
|-------------|-------------|---------------|-----------|-------------|---------------|--------------|----------------|-----|---------------|-------------|--------|-----------|
| 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 |

Full Terms

Multiple Counts Priors - Different Type Plea Guilty Less than 21 Years



Total Cases 6m 12m 18m 24m 30m 36m 42m 48m 54m 5y 6y 7y 8y 9y 10y 12y 14y 16y 18y 20y 20y+ Life

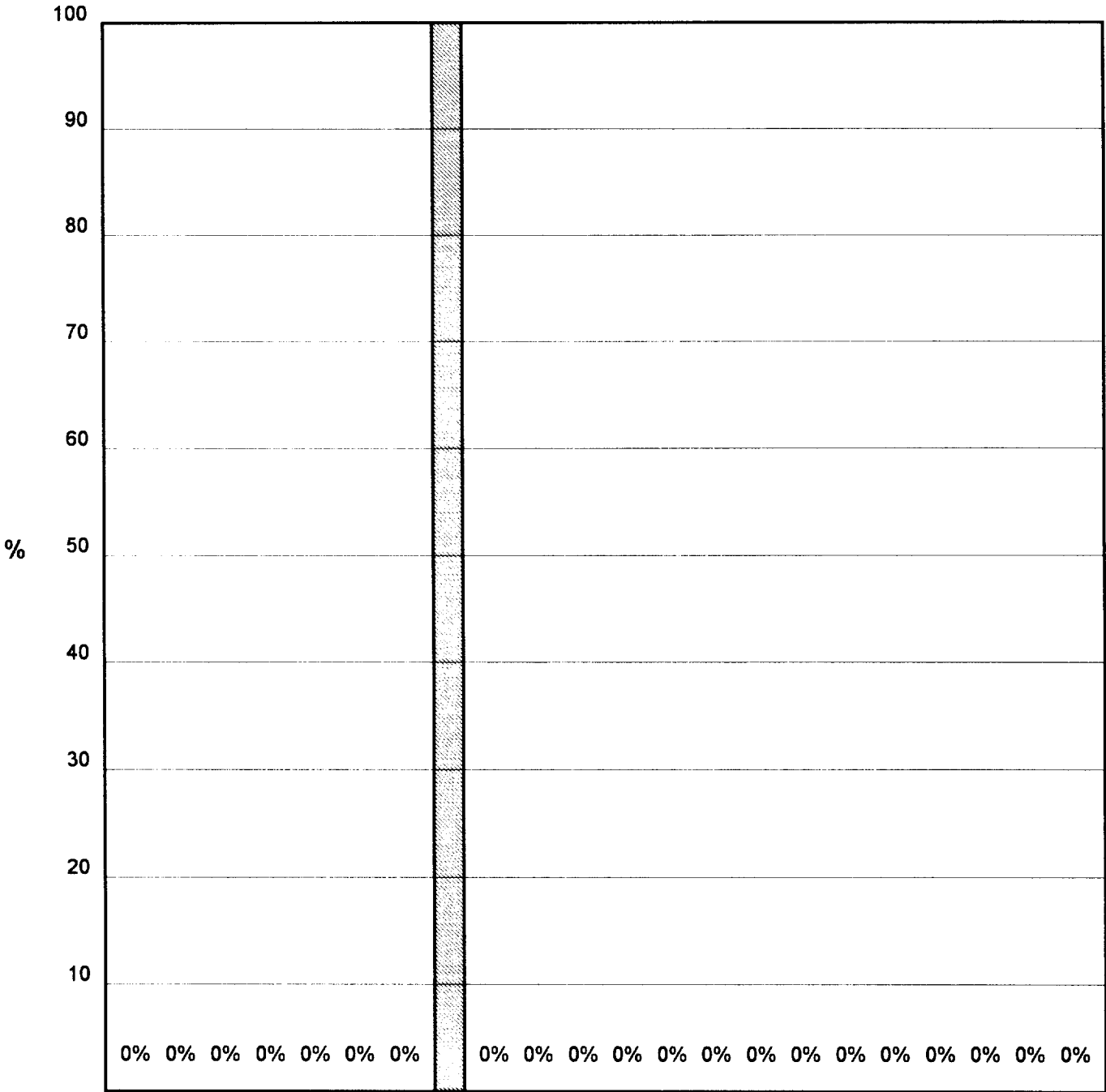
CAUTION: all data rounded upwards eg a term of 7 months would be shown in "12m"

2 0 0 0 0 0 0 0 0 0 0 0 1 1 0 0 0 0 0 0 0 0

Minimum/Fixed Terms

Multiple Counts Priors - Different Type Plea Guilty Less than 21 Years

100%



Total Cases 6m 12m 18m 24m 30m 36m 42m 48m 54m 5y 6y 7y 8y 9y 10y 12y 14y 16y 18y 20y 20y+ Life

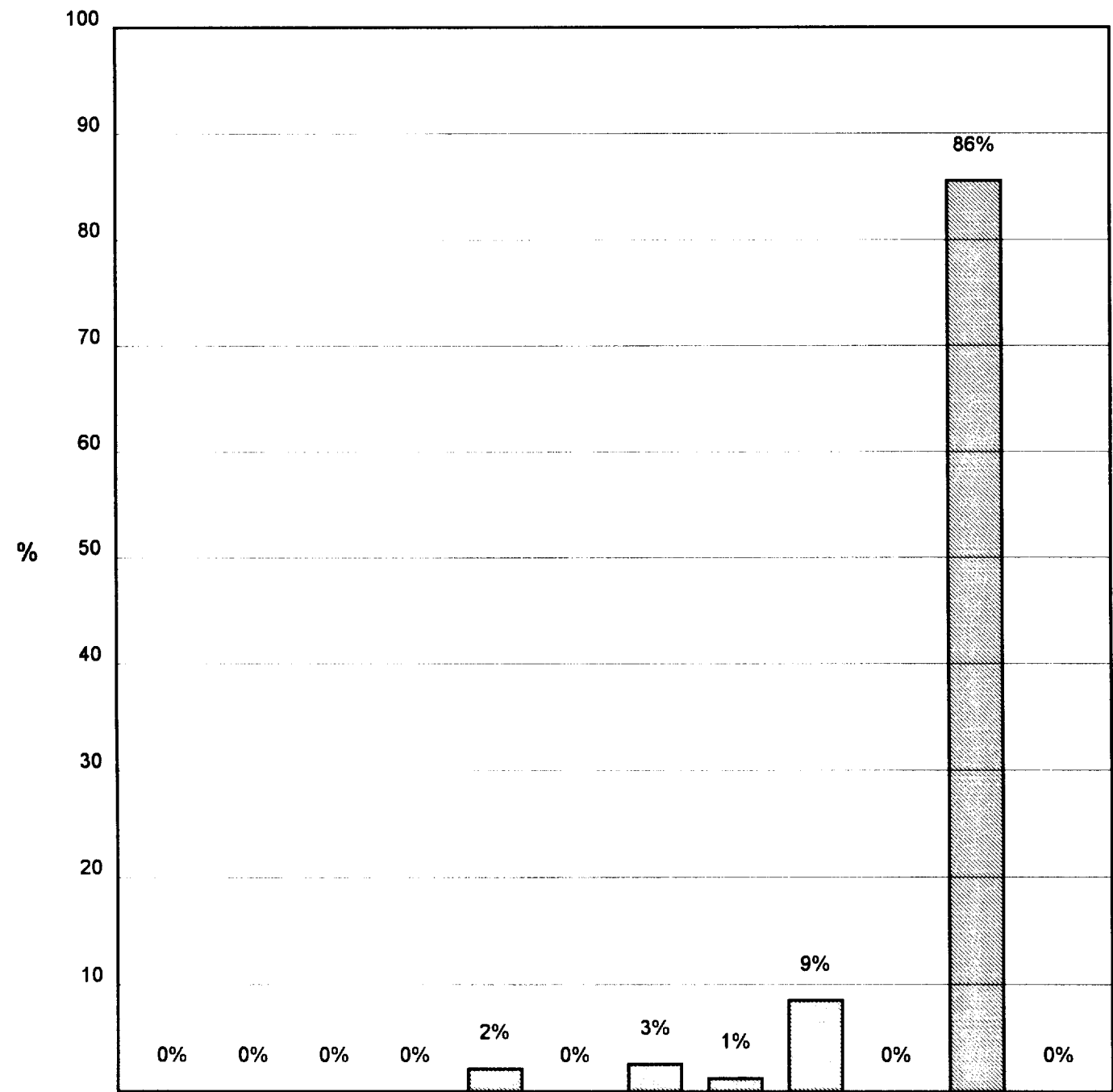
CAUTION: all data rounded upwards eg a term of 7 months would be shown in "12m"

2 0 0 0 0 0 0 0 2 0 0 0 0 0 0 0 0 0 0 0 0 0

APPENDIX C(iii)
SECTION 61I – ALL OFFENDERS

Penalty Type

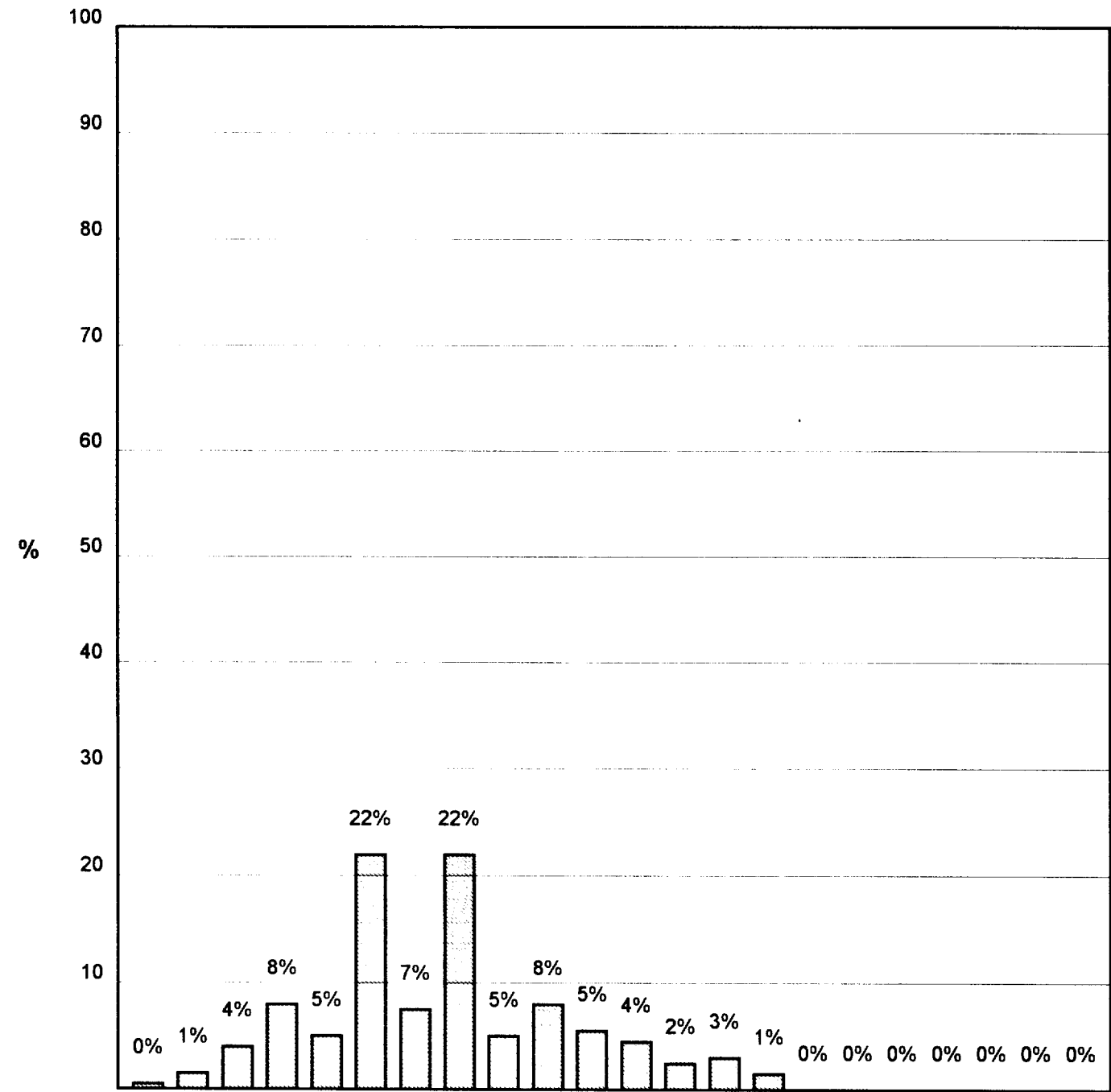
All Offenders



| Total Cases | s556A Disml | Rise of Court | Fine Only | s556A Recog | CL/s558 Recog | s556A +Super | CL/s558 +Super | CSO | Period Detent | Home Detent | Prison | Com-pound |
|-------------|-------------|---------------|-----------|-------------|---------------|--------------|----------------|-----|---------------|-------------|--------|-----------|
| 235 | 0 | 0 | 0 | 0 | 5 | 0 | 6 | 3 | 20 | 0 | 201 | 0 |

Full Terms

All Offenders



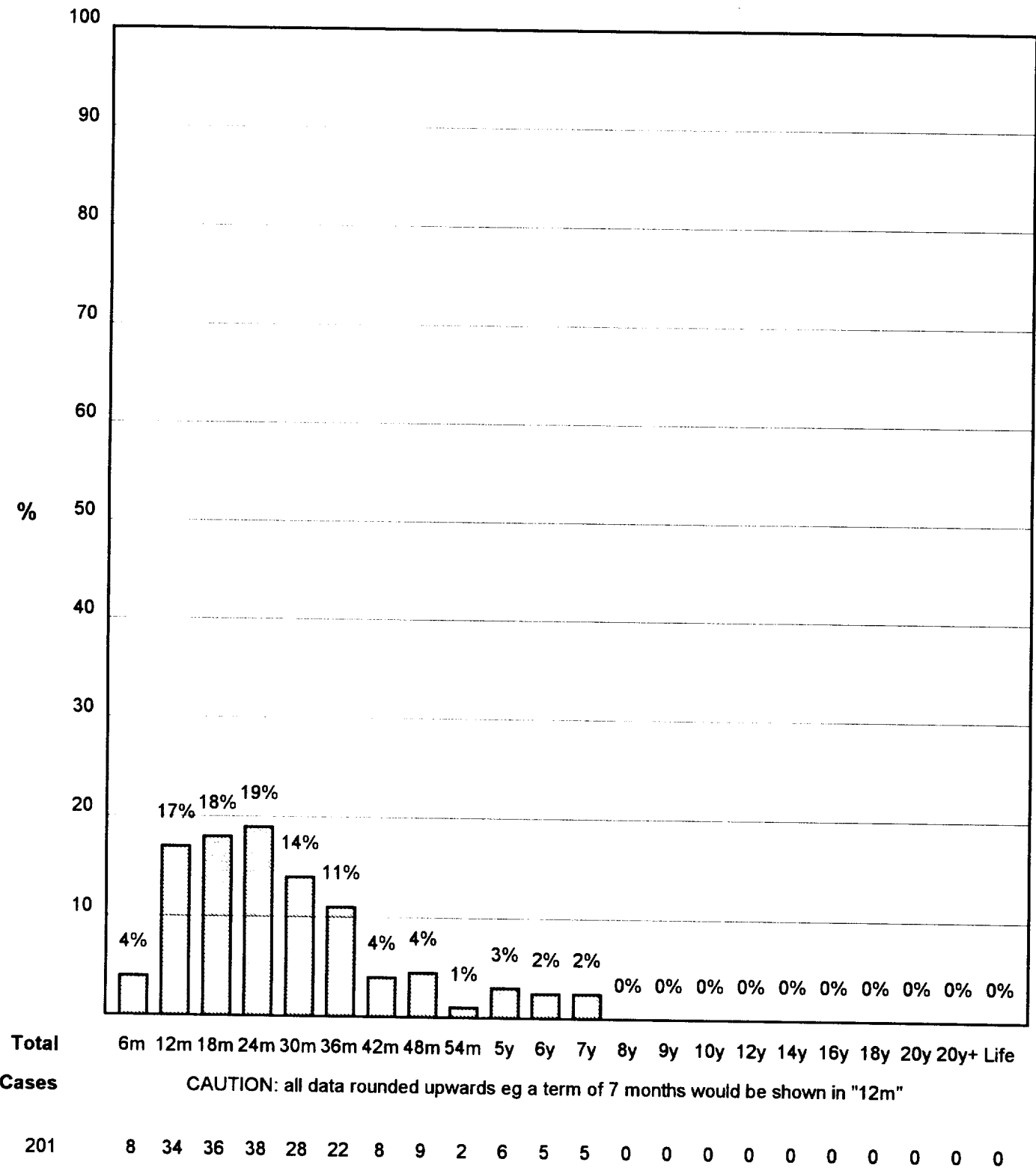
Total Cases

CAUTION: all data rounded upwards eg a term of 7 months would be shown in "12m"

| | | | | | | | | | | | | | | | | | | | | | | |
|-----|---|---|---|----|----|----|----|----|----|----|----|---|---|---|---|---|---|---|---|---|---|---|
| 201 | 1 | 3 | 8 | 16 | 10 | 44 | 15 | 44 | 10 | 16 | 11 | 9 | 5 | 6 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
|-----|---|---|---|----|----|----|----|----|----|----|----|---|---|---|---|---|---|---|---|---|---|---|

Minimum/Fixed Terms

All Offenders



APPENDIX D

**MEDIA RELEASE: THE FACTS ON SEXUAL ASSAULT IN BANKSTOWN AND
ACCOMPANYING STATISTICS, 22 AUGUST 2001**

BUREAU OF CRIME STATISTICS AND RESEARCH

Media Release: The facts on sexual assault in Bankstown

Release Date: Wednesday 22 August 2001

The factual evidence on sexual assault in Bankstown provides no support whatsoever either for the claim that sexual violence in that area is more prevalent than anywhere else in the State or for the claim that the incidence of sexual assault is rising in Bankstown.

As the accompanying graph and analysis shows, the recorded rate of sexual assault in Bankstown has remained stable since 1995, mostly remaining under 10 offences per month.

The only change to this pattern occurred in the month of June 1999, when 70 incidents of sexual assault were recorded by Bankstown police.

These offences were not committed by members of a gang. Police advise me that they were mainly committed by a single individual (Lesley Ketteringham) who has since been charged, convicted and imprisoned for committing a number of wilful and obscene exposure offences.

The [accompanying table](#) shows the recorded rate of sexual assault where more than one offender (i.e. one 'POI') was involved for different areas of New South Wales. As can be seen from the fourth column of the table, the recorded rate of sexual assaults involving multiple offenders is not as high in Bankstown as it is in several other areas of the State.

The recorded rate of this type of sexual assault is nearly twice as high in the Northern Statistical Division and more than twice as high in the North Western Statistical Division. Areas such as the Central West and Far West of NSW also have significantly higher recorded rates of sexual assaults involving multiple offenders than Bankstown.

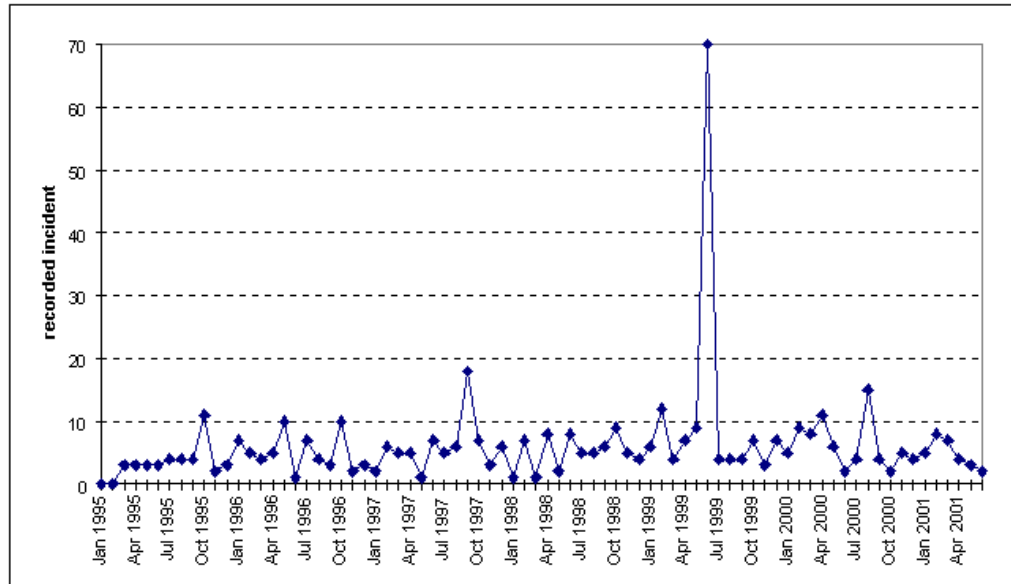
It is, of course, true, that many sexual assaults are not reported to police. There is no reason to believe, however, that victims of sexual violence are any more reluctant to report that violence to police in Bankstown than they are in any other area of the State.

Further enquiries: Dr Don Weatherburn 9231-9190 or 0419-494-408.

NSW Recorded Crime Statistics, January 1995 to June 2001

Sexual assault, Bankstown LGA, NSW

Percentage change for the last 12 months compared with the previous 12 months -10.0% Not Significant
Trend test over last 24 months (Kendall's rank-order correlation coefficient) -0.10
p-value for two-tailed test: 0.51



Source: NSW Bureau of Crime Statistics and Research