

1424/54



Sentencing Drug Offenders

**Analysis of Sentences Imposed in the
Higher Courts of NSW:**

25 September 1989 to 31 December 1991

JUDICIAL COMMISSION OF NEW SOUTH WALES

Monograph Series No 6

SENTENCING DRUG OFFENDERS

Analysis of Sentences Imposed in the Higher Courts of NSW:

25 September 1989 to 31 December 1991

by

Patrizia Poletti and Ivan Potas

Judicial Commission of New South Wales
1992

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Published by the Judicial Commission of New South Wales
Level 5
301 George Street
Sydney 2000
GPO Box 3634
Sydney 2001

ISBN for this volume: 0 7310 0055 2

144154

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Typesetting
Turn-Key Systems Pty Ltd, Crows Nest NSW

Printers
Robert Burton Printers Pty Ltd, Sefton NSW

Acknowledgements

The authors wish to thank the following people who contributed to this report: Stephen Cumines, Michael Cain, Ian MacKinnell, Veronica Roby and staff from the Supreme Court Criminal Registry, Court of Criminal Appeal and the various District Court Criminal Registries in New South Wales.

The views expressed in this paper are purely the views of the authors. Similarly, the Executive Summary represents the views of the Research Director. They do not necessarily represent any official views of the Judicial Commission of New South Wales, nor are they necessarily shared by the members of staff of the Commission.

On the Use of Statistics

While the statistics presented in this report provide a mathematical description of the variables under analysis, caution should be exercised in drawing firm conclusions from them. When considering statistical data of this kind it is important to remember that sentencing involves a balancing of many relevant factors, both pertaining to the offence and to the offender.

Accordingly, the results of our statistical analysis, which at any one time must inevitably draw upon an examination of a limited number of quantifiable variables, may sometimes be explained by factors outside the particular variables under consideration. In particular, it is inappropriate to draw general conclusions from the data where the number of cases under analysis is small.

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EXECUTIVE SUMMARY

One of the most striking features of the sentencing of drug offenders is its complexity. There are so many categories of drug offences, starting with the jurisdictional problem of whether the offence is prosecuted under State or federal law, through to considerations of factors which apply almost uniquely to the sentencing of this offence (such as the scale of the offence, which often bears on the nature of the charge; the statutory penalties that apply to such charges; the type of drug involved; the quantity and or purity of drug; and the role of the offender) that the sentencing of drug offenders presents as one of the most difficult or complex tasks faced by the sentencing judge.

The present analysis therefore, seeks to provide information upon the patterns of drug sentences reflected in the decisions of higher courts of New South Wales between the date of the commencement of the *Sentencing Act* (25 September 1989) and 31 December 1991.

In all, over 1,000 drug sentencing records are analysed. About nine out of ten of these relate to State offences, the balance are Commonwealth offences.

The analysis considers State and Commonwealth sentences separately, because the offences are defined differently and carry different maximum penalties.

Commonwealth Offences

The most prevalent Commonwealth drug offence was importing a prohibited drug (57%). Nearly 75% of cases involved a traffickable quantity of drug, about 25% of cases involved commercial quantities and only one case involved less than a traffickable quantity of drug.

The Commonwealth offenders tended to be in the 31 to 40 years of age bracket (52%). They were mainly male (84%) and had no prior record of offending (84%). About two out of three pleaded guilty. Almost half the offenders either organised or financed their offences, about one in four were couriers and nearly one in five offenders were involved in "receiving" or collecting the imported drugs.

The most common drug implicated in these offences was heroin (62%), followed by cocaine (21%). Almost all (96.5%) of those convicted in the higher courts were sentenced to imprisonment.

In general it was found that the median head sentence and the median minimum term (non-parole period) increased as the seriousness of the offence increased. Analyses of the data are presented by type of drug (heroin, cocaine, amphetamine, cannabis resin and leaf), by type of charge (commercial or traffickable), by drug quantity and by sentence (both head sentence and minimum term). Summary table 4 in the body of the text presents the key statistical findings in relation to Commonwealth offences.

State Offences

The majority of State drug offences were prosecuted under either Section 23(1)(a) (cultivate, or knowingly taking part in cultivating a prohibited plant — 32% of cases) or Section 25 (supply prohibited drug — 63% of cases) of the *Drug Misuse and Trafficking Act 1985*.

An amendment to the Act, which commenced on 21 August 1988, affected the structure of penalties, and *inter alia* introduced a new drug category of "large commercial quantity". Accordingly, the analysis proceeded by examining sentences committed on or after 21 August 1988.

It was found that nearly eight out of ten offenders were aged between 21 and 40 years. About 87% were male, about 85% pleaded guilty, and about 30% were first offenders. About 32% of offenders had prior drug convictions.

Nearly six out of ten State drug offenders were involved in selling prohibited drugs. About seven out of ten of these were dealers, while about one in four were selling drugs to support their drug dependency.

Of those found guilty of supply prohibited drug:

- Over half (58%) were sentenced to a term of imprisonment;
- 11% received periodic detention;
- 12% received a CSO; and
- 11% were placed on probation.

A breakdown of the type of drug involved in this offence was as follows:

- cannabis leaf (one in every three cases)
- heroin (about one in four)
- amphetamines (about one in four)
- cannabis resin (about one in ten)

Nearly nine out of ten individuals involved with heroin were sentenced to imprisonment, whereas just under six out of ten offenders supplying cocaine received a custodial sentence and just under one half of the offenders convicted of supplying amphetamines received a prison sentence.

As expected, the penalties tended to be more severe as the offender moved into a higher offence category (from less than commercial to commercial and to large commercial). The majority of cases fell into the less than commercial drug category.

Periodic detention was rarely used for heroin offences (4.6% of cases) but was quite commonly imposed where the drug type was cocaine (21.1%). For amphetamines, cannabis resin and cannabis leaf periodic detention was imposed in just over one in eight cases. Community Service Orders were often imposed (19.4% of cases) for the supply of cannabis leaf. Bonds, usually with supervision, were employed where the offender was supplying cocaine, amphetamines and cannabis resin in about 15% of the cases. Caution however needs to be exercised in drawing firm conclusions from this statistical data as often the number of cases are small.

With regard to cultivate prohibited plant, the overall use of imprisonment was significantly lower (22.9%), than for supply offences. However as the median number of cannabis plants cultivated increased so too did the median sentence length. Even so, the type of penalty ordered for this offence appeared to be more closely related to

other factors, such as gender, prior criminal record and role of the offender. An analysis of offenders who were prosecuted under the "less than commercial" category of cultivate prohibited plant revealed: that no females (compared with two out of ten males) received a custodial sentence for this offence; that about nine out of ten offenders with no prior convictions received a non-custodial sentence; and that those who were found to have been involved in the offence for financial gain were far more likely to be sentenced to a term of imprisonment (43.9%).

Similarly when the number of plants reached the "commercial" level, those who grew cannabis plants for their own use, or were accomplices rather than principals, tended to receive non-custodial sanctions. However over half of those who were cultivating this quantity of plant for financial reward (53.9%) were sentenced to a term of imprisonment.

Ivan Potas

Research Director

Sydney, September 1992



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Document Identification

Title SENTENCING DRUG OFFENDERS
(Monograph No. 6)

Author(s) POLLETTI, P R
POTTS, I

Corporate Source (if appropriate) JUDICIAL COMMISSION
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Sponsor/Funding Agency (if appropriate) _____

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SENTENCING DRUG OFFENDERS

1.0 INTRODUCTION

The purpose of this study is to determine the patterns in the sentencing of drug offenders who were sentenced between 25 September 1989 and 31 December 1991 – a period of approximately two years and three months.

In particular, it will examine the patterns of sentences having regard to the nature of the drug offence (possession, import/export, trafficking, manufacture, cultivation) and the statutory maximum penalty for the offence; the type of drug; the quantity and purity of the drug; and certain characteristics of the offender such as age, sex, prior convictions, and a number of other variables pertinent to sentencing.¹

In using the information presented in this analysis users should be conscious of the limitations of statistical material, as a guide for sentencing in particular cases. While such statistics do provide a good basis for determining what kinds of sentences have been imposed in the past, they do not provide the full picture of factors (both subjective and objective) which inevitably are weighed in the balance to produce a just sentence. The same criticism may be levelled at the presentation of short statements of facts in cases of apparently similar kind. As Kirby P explained in *Hayes* (1987) 29 A Crim R 452 at p 465:

“It would be a serious mistake to assume that the sentencing of persons for offences, such as those involving the respondent, would be reduced to a simplistic formula derived from little more than the quantity of plants found in the prisoner’s unlawful cultivation. Courts search for consistency. However, that goal would be bought at too high a price if cases were to be reduced to an equation between loss of liberty and the number of Indian hemp plants found. As the cases and the practice of the courts show, the sentencing process is much more complicated. There is a danger in the short presentation of facts, that a busy court, seeking consistency, will seek refuge in levels of punishment imposed in apparently similar cases, attaching undue weight to the only objective features which run through all cases involving cultivation of prohibited plants – namely the variety of the plant and the quantity of the cultivation found. To some extent that cultivation may tend to show a commercial as distinct from a non-commercial character. It may also show the level of the likely increase in the supply of drugs to the illicit market.”

The true value of statistics is obtained when they are considered in conjunction with the principles of sentencing applicable to the case before the court. Statistics may

¹ Furthermore, data for this study were used to check and enhance the quality of data which were available for use in the *Sentencing Information System* (SIS). The SIS is a computerised information system which contains, *inter alia*, statistics on court appearances finalised in the Local courts and in the higher courts of New South Wales. The data presented in this report may be used in conjunction with SIS data in order to provide users with a more comprehensive appreciation of the sentencing patterns applicable to the sentencing of drug offenders in New South Wales.

assist in confirming whether the sentence about to be handed down is within the range commonly imposed for such offences, and if it is not, it may alert the sentencer to review the sentence before it is handed down, or just as importantly, lead to a consideration as to whether there are facts or principles of sentencing which justify a departure from the norm. In short, statistics provide a benchmark or frame of reference against which informed decisions can be made or verified.

2.0 THE DATA

The relevant data needed for this study could not be found in any central record, file or database. Therefore, the file numbers of higher court cases involving a conviction for principal drug matters since the commencement of the *Sentencing Act 1989* were obtained from the Bureau of Crime Statistics and Research (BCSR).

Next, the file numbers were checked against the Case Tracking System (CTS) to see whether any additional drug-related case information could be provided. However, for many drug cases the relevant data could not be found or were found to be inaccurate.

In order to improve the quality of the data, the hard copy of files held at the various District and Supreme Court Criminal Registries were then accessed for each case record. Additional and missing information was obtained and the case records validated by checking the relevant documents within those files.

The data upon which this analysis is based consist of 1061 records. The majority (89.3% or 948) of records relate to State drug offences while approximately one in ten (10.7% or 113) records relate to Commonwealth drug offences. Each record relates to the appearance of an offender found guilty and sentenced in the higher courts during the period from 25 September 1989 to 31 December 1991.²

Thirty-seven (37) hard copy files could not be located at the Criminal Registries and therefore they could not be validated. These records have been excluded from the analysis. A further six cases, whilst drug-related, were not drug offences and seven cases were found to be duplicated. These records have also been excluded.

² Records relate to trial and sentence cases. A record on the SIS comprises sentence information on the principal offence for each offender at a finalised court appearance. The principal offence is defined as the offence attracting the most severe penalty.

PART I

COMMONWEALTH OFFENCES

3.0 CUSTOMS ACT 1901

Offences under Section 233B of the Commonwealth *Customs Act 1901* are grouped in the *Sentencing Information System* (SIS) as Import Prohibited Drug. These offences may be separated into the categories shown in Table 1. More than half of the appearances (56.6%) before the higher courts were for "Importing a Prohibited Drug". Respectively, another 17.7% and 16.8% of offenders were charged with and found guilty of "Possession of a Prohibited Drug" and "Knowingly Concerned in the Importation of a Prohibited Drug".

**Table 1: Drug Offences under Section 233B of the Commonwealth
Customs Act 1901
(25 September 1989 to 31 December 1991)**

DRUG OFFENCE	Number of Cases (n)	%
Import	64	56.6
Conspiracy to Import	9	8.0
Knowingly Concerned in Import	19	16.8
Possess Import	20	17.7
Attempt to Possess Import	1	0.9
TOTAL	113	100.0

Table 2 displays the relevant drug offence levels for offences under section 233B *Customs Act 1901* (Commonwealth). This breakdown in the "Import Prohibited Drug" category is necessary since the Statutory Maximum Penalties vary depending on the amount and purity of drug and whether the drug is of a particular type e.g., cannabis, heroin, etc. Table 2 also shows the Statutory Maximum Penalties associated with each drug offence level. The amounts involved in the illegal importation of drugs were more likely to be traffickable quantities (72.6%). However, just over one-quarter of the offences involved commercial quantities (26.5%).

Table 2: Drug Offence Level and Associated Statutory Maximum Penalties under the Commonwealth Customs Act 1901 (25 September 1989 to 31 December 1991)

DRUG OFFENCE LEVEL	n	%	STATUTORY MAXIMUM PENALTY
Import Prohibited Drug			
- Commercial Qty	30	26.5	Life Imprisonment
- Traffickable with Prior	2	1.8	Life Imprisonment
- Traffickable Qty	66	58.4	\$100,000 and/or 25yrs imp
- Traffickable (Cannabis)	14	12.4	\$ 4,000 and/or 10yrs imp
- Less than Traffickable	1	0.9	\$ 2,000 and/or 2yrs imp
TOTAL	113	100.0	

Table 3: Statutory Ranges (in grams) by Drug Offence Level and Drug Type under the Commonwealth Customs Act 1901

DRUG TYPE	DRUG OFFENCE LEVEL		
	Commercial Quantity (grams)	Traffickable Quantity (grams)	Less than Traffickable Quantity (grams)
Heroin	1500+	2-< 1500	< 2
Cocaine	2000+	2-< 2000	< 2
Amphetamine	N/A	2+	< 2
Cannabis Resin	50000+	20-< 50000	< 20
Cannabis Leaf	100000+	100-<100000	<100

As mentioned earlier, not only is the type of drug important in sentencing offenders but also the drug quantity and, for some drugs, the quality. Table 3 describes the statutory ranges (in grams) applicable to each drug type and offence level. It is important to note that, for drugs such as heroin and cocaine, the amount of drug involved may be based on its **pure value** and is thus calculated as a product of its purity. Therefore, even though the gross amount seized may lie in a particular statutory range, the quality of the drug may place the offence into a lower range.

3.1 Profile of Offenders: Customs Act 1901

Having regard to the large number of complex interactions and the categorical nature of much of the data, it is extremely difficult, if not impossible, to statistically determine the effect that variations in offender characteristics may have had on sentencing in the higher courts. Consequently, observed differences in the makeup of drug offenders sentenced in the higher courts are presented descriptively.

Age:

Over half (52.3%) the offenders sentenced in the higher courts for "Import Prohibited Drug" were aged 31 to 40 years. A further 31.8% were aged 21 to 30 years.

Gender:

The majority of offenders (84.1%) were male.

Plea:

Over two-thirds (70.8%) pleaded guilty.

Prior Criminal Record:

The majority of offenders (83.9%) had no prior record of offending. Note however that the courts have held that the usual leniency that is extended to first offenders does not ordinarily apply to couriers: see *Ferrer-Esis* (1991) 55 A Crim R 231, per Hunt J at p 238.

Bail/Bond or Parole:

Only one offender (0.9%) was on bail or bond at the time of the offence, and another offender (0.9%) was on parole or license at the time of the offence.

Role:

Approximately half the offenders (49.6%) sentenced in the higher courts were directly involved in the importation of a prohibited drug for the purpose of distribution. This means that they either financed and/or organised the various aspects of the importation. One in four offenders (24.8%) were couriers; that is, they were specifically commissioned for reward to carry the drugs into Australia. Often when Federal Police intercept an illegal importation of drugs, they carry out a "controlled delivery" to try to apprehend any other persons involved in supplying drugs. Nearly one in five offenders (18.6%) were involved in "receiving" or collecting the imported drugs for the purpose of self-consumption, or more likely for further distribution.

Addicted:

Approximately one in five (21.0%) offenders were addicted to prohibited drugs.

Legal Representation:

Almost all drug offenders (98.2%) were legally represented in court. 62.7% were represented by "private" firms. Another 35.5% were represented by legal aid.

3.2 Profile of Offences: Customs Act 1901

The observed differences in the makeup of drug offences finalised in the higher courts are also presented descriptively.

Number of Counts of the Principal Offence:

Almost all (94.7%) Commonwealth drug offences finalised in the higher courts had one count of the principal offence.

Other Offences Taken into Account:

Under sections 20 to 23 of the *Criminal Procedure Act 1986 (NSW)*³ an offender may have their sentence for the principal offence determined with outstanding offences, on a 'Form 2' Certificate, taken into consideration. Only 2.7% had outstanding offences listed on a 'Form 2'.

Other Secondary Drug Offences:

Just over one-quarter (26.6%) had been found guilty of other drug offences in addition to the principal offence.

3.3 Sentencing Outcomes: Customs Act 1901

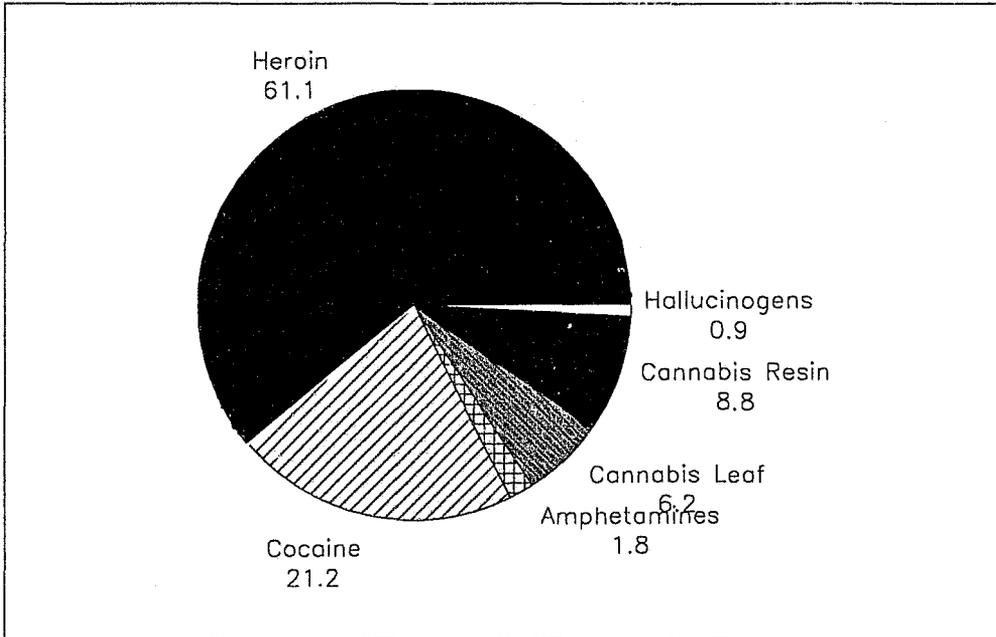
A breakdown of the data shows that the most common drug involved in Importation was Heroin (61.1% or 69), followed by Cocaine (21.2% or 24). Figure 1 graphically shows the type of drug involved in Commonwealth offences. Almost all (96.5% or 109) offenders sentenced in the Higher Courts for Commonwealth drug offences received prison sentences. The other four offenders received non-custodial sentences. These offences involved either "less than traffickable quantities" or "traffickable quantities of cannabis". The following analysis is based on the group of offenders who received a disposition of imprisonment.

Table 4 shows the median gross weight of the drug and the median head and minimum sentence⁴ for each drug offence level and drug type. The median is the number which lies at the midpoint of the distribution and was used in this case to describe the average since it would not be affected by extreme drug quantities or prison terms. The minimum and maximum values are displayed as the range.

³ Under these sections the court, if it thinks fit, can take all or any of the offences in respect of which guilt has been admitted into account when imposing a penalty for another offence: s 21(2). However, the maximum sentence that may be imposed cannot exceed the maximum sentence for the offence for which the offender has been found guilty: s 21(3). A sentence which takes outstanding charges into consideration is, in law, passed for the offence for which the defendant has been found guilty. There is no conviction in respect of the offences taken into account: s 23(b).

⁴ The term "minimum sentence" refers to the non-parole period or determinate sentence and the minimum term or fixed term as the case may be. It is intended to refer to the minimum period of custody that the prisoner must serve having regard only to the court's pronouncement on sentence.

**Figure 1: Type of Drug Involved in Commonwealth Offences
(25 September 1989 -- 31 December 1991)**



As expected, it can be seen from Table 4 that the median head and minimum prison terms increased as the seriousness of the offence increased. However, this was not the case for the offence "Traffickable Quantity with Prior".⁵ There are several reasons why this group received comparatively low prison terms. Only two offenders were in this group; the quantities of heroin involved were at the lower end of the traffickable range; they both pleaded guilty to the offence; and each offender was addicted to heroin so that the main reason for committing the offence was to obtain heroin for their personal use.

⁵ An offender would be placed in this category if it were found that he or she had had a prior conviction for Import Prohibited Drug, regardless of the type of drug.

Table 4: Median Gross Weight of the Drug and Median Head and Minimum Sentence⁶ by Drug Offence Level and Drug Type (25 September 1989 – 31 December 1991)

DRUG OFFENCE LEVEL AND DRUG TYPE	n	DRUG QUANTITY		HEAD SENTENCE		MINIMUM SENTENCE		
		MEDIAN gms/kgs	RANGE ^a gms/kgs	MEDIAN mths	RANGE mths	MEDIAN mths	RANGE mths	
HEROIN								
— Commercial	21	7.1kg	2.3kg- 50.5kg	162	50-336	120	26-240	
— Traf (prior)	2	156.0gm	147.5gm- 164.4gm	40	32- 48	30	24- 36	
— Traffickable	46	0.6kg	16.0gm- 5.6kg	69	8-174	48	6-114	
COCAINE								
— Commercial <i>b</i>	5	3.5kg	2.4kg- 12.0kg	120	61-144	72	46- 96	
— Traffickable <i>c</i>	16	1.3kg	225.0gm- 2.5kg	86	48-180	54	36-120	
AMPHETAMINE								
— Traffickable	2	910.2gm	830.0gm- 990.4gm	46	44- 48	29	28- 30	
CANNABIS RESIN								
— Traffickable	8	10.9kg	85.0gm- 21.0kg	72	3- 84	45	3- 72	
CANNABIS LEAF								
— Commercial	3	3213.0kg	1.2kg-3213.0kg	74	60- 78	47	38- 52	
— Traffickable <i>d</i>	2	2.5kg	1.3kg- 3.7kg	36	24- 48	21	18- 24	

- Notes:** (a) As previously stated, these levels reflect the gross weight of the drug, and therefore, the upper limit in the range may exceed the statutory range limit.
 (b) The weight of the drug was not known in one case
 (c) The weight of the drug was not known in two cases
 (d) The weight of the drug was not known in one case

⁶ Includes non-parole periods and determinate sentences, see supra n⁴.

PART II

STATE OFFENCES

4.0 DRUG MISUSE AND TRAFFICKING ACT 1985

From Table 5 it can be seen that the majority (98.3%) of State drug offences resulting in a sentence in the higher courts since the commencement of the *Sentencing Act 1989* were for offences under the *Drug Misuse and Trafficking Act 1985*. The following analysis is based on this group of offences.

**Table 5: State Drug Offences Finalised in the Higher Courts
(25 September 1989 – 31 December 1991)**

LEGISLATION	SECTION	SECTION NAME	n	%
Drug Misuse & Trafficking Act 1985	10(1)	Possession of a prohibited drug	7	0.7
	23(1)(a)	Cultivate, or knowingly takes part in the cultivation of, a prohibited plant	299	31.5
	23(1)(b)	Supplies, or knowingly takes part in the supply of, a prohibited plant	2	0.2
	23(1)(c)	Has a prohibited plant in his or her possession	4	0.4
	24	Manufacture prohibited drugs	4	0.4
	25	Supply prohibited drug	590	62.2
	26	Conspiracy to supply prohibited drug	26	2.7
			932	98.3
Poisons Act 1966	21(2A)	Supply Drug of Addiction	7	0.7
	21(1)(a)	Supply Indian Hemp	6	0.6
			13	1.3
Common Law		Conspiracy to supply restricted substance	2	0.2
		Incite supply of commercial quantity of a prohibited drug	1	0.1
			3	0.3
TOTAL			948	100.0

With the implementation of the *Drug Misuse and Trafficking (Amendment) Act 1988* various changes were made to the structure of penalties for offences committed on or after the 21 August 1988. These changes involved adding a new category of "large commercial quantity" and altering the amount of prohibited drugs in other categories and the associated maximum statutory penalties.

Table 6 shows the number and proportion of offenders charged under various sections of the *Drug Misuse and Trafficking Act 1985* and sentenced in the higher courts since the commencement of the *Sentencing Act 1989*. Because of the implementation of the *Drug Misuse and Trafficking (Amendment) Act 1988* it also distinguishes between offences committed before (Pre), and on or after (Post), 21 August 1988.

From table 6 it can be seen that overall, more than half (63.3%) the drug offences finalised in the higher courts were "Supply prohibited drug" (s 25). A further 32.1% of offenders were charged with and found guilty of "Cultivate prohibited plant" (s 23(1)(a)). However, when examining the pre and post groups, it is found that there has been a significant proportionate decrease (19.4%) in offences of "supply prohibited drug" since the introduction of the *Drug Misuse and Trafficking (Amendment) Act 1988*. (Pre = 78.4%, Post = 59.0%). There has alternatively, been a significant proportionate increase (19.0%) in offences of "Cultivate prohibited plant". (Pre = 17.3%, Post = 36.3%).

Table 6: State Drug Offences under the *Drug Misuse and Trafficking Act 1985* (25 September 1989 – 31 December 1991)

DRUG OFFENCE	BEFORE 21/8/88		ON OR AFTER 21/8/88		TOTAL	
	n	%	n	%	n	%
Drug Misuse and Trafficking Act 1985						
– s 10(1)	2	1.0	5	0.7	7	0.8
– s 23(1)(a)	36	17.3	263	36.3	299	32.1
– s 23(1)(b)	2	1.0	0	0.0	2	0.2
– s 23(1)(c)	2	1.0	2	0.3	4	0.4
– s 24	0	0.0	4	0.6	4	0.4
– s 25	163	78.4	427	59.0	590	63.3
– s 26	3	1.4	23	3.2	26	2.8
TOTAL	208	22.3	724	77.7	932	100.0

The differences in the makeup of offences before and after the introduction of the *Drug Misuse and Trafficking (Amendment) Act 1988* may be explained by the way the offender pleaded to the offence. In the period before 21 August 1988 one in three (33.6%) offenders pleaded "not guilty" to the principal offence. This compares with only 14.4% in the period on or after 21 August 1988. This difference may have occurred for a number of reasons.

Firstly, because this study examines matters finalised in the higher courts since the commencement of the *Sentencing Act 1989*, fewer cases are present in the "before" group (Pre = 208, Post = 724). Also, these cases are more likely to be offences where the offender pleaded "not guilty" since offences where the offender pleaded "guilty" may have already been finalised before 25 September 1989.

Secondly, offenders sentenced in the higher courts for "cultivate prohibited plant" are more likely to plead "guilty" to the offence than are offenders sentenced for "supply prohibited drug". This does not necessarily mean that these individuals show more remorse, but rather that they were more likely to have been caught "red-handed".

Because of the reasons already mentioned, and the relatively small number of offences present in the period before the commencement of the *Drug Misuse and Trafficking (Amendment) Act 1988*, the following results are based on those drug offenders sentenced in the higher courts who committed their offence on or after 21 August 1988 and were sentenced after the commencement of the *Sentencing Act 1989*.

Thus the following tables relate to offences under the *Drug Misuse and Trafficking Act 1985* committed on or after 21 August 1988. Table 7 displays the Statutory Maximum Penalties for each offence category, whilst Table 8 details the Statutory Ranges applicable to each drug type and offence level.

4.1 Profile of Offenders: *Drug Misuse and Trafficking Act 1985*

As mentioned earlier in Section 3.1, because of the difficulties in statistically determining the effects that variations in the characteristics of drug offenders may have had on sentencing, the observed differences in the makeup of drug offenders sentenced in the higher courts are presented descriptively.

Age:

Almost half (46.8%) the offenders sentenced in the higher courts were aged 21 to 30 years. A further 31.9% were aged 31 to 40 years.

Gender:

The majority of offenders (86.5%) were male.

Plea:

More than eight in every ten (85.6%) drug offenders pleaded guilty to the offence.

Prior Criminal Record:

Approximately three in every ten (30.7%) offenders sentenced in the higher courts had no prior record of offending. Note, however, that it is well established that prior

Table 7: Drug Offence Category and Associated Statutory Maximum Penalties under the Drug Misuse and Trafficking Act 1985 (On or After 21/8/88)

DRUG OFFENCE CATEGORY	STATUTORY MAXIMUM PENALTY
Drug Misuse & Trafficking Act 1985	
– s 10(1)	20 units &/or 2yrs imp
– s 23 s 24 s 25 s 26	
– less than commercial	2000 units &/or 15yrs imp
– less than commercial (Cannabis)	2000 units &/or 10yrs imp
– commercial	3500 units &/or 20yrs imp
– commercial (Cannabis)	3500 units &/or 15yrs imp
– large commercial	5000 units &/or life imp
– large commercial (Cannabis)	5000 units &/or 20yrs imp

Table 8: Statutory Ranges by Drug Offence Level and Drug Type under the Drug Misuse and Trafficking Act 1985 (On or After 21/8/88)

DRUG TYPE	DRUG OFFENCE LEVEL		
	Large Commercial Quantity	Commercial Quantity	Less than Commercial Quantity
Heroin	1kg +	250gm -< 1kg	< 250gm
Cocaine	1kg +	250gm -< 1kg	< 250gm
Amphetamine	1kg +	250gm -< 1kg	< 250gm
Cannabis Resin	10kg +	2.5kg -< 10kg	< 2.5kg
Cannabis Leaf	100kg +	25kg -< 100kg	< 25kg
Cannabis Plant	1000 +	250 -< 1000	< 250
Cannabis Oil	2kg +	500gm -< 2kg	< 500gm
Hallucinogens (LSD)	2gm +	.5gm -< 2gm	< .5gm

good character possesses less significance in crimes involving drugs than it does for other offences: See *Leroy* [1984] 2 NSWLR 441 at 446-447; *Haydon*, unreported, NSW CCA, 11 September 1990, per Lee CJ at p 4. The proportion of offenders with prior convictions for drug offences was 32.3%. Similarly, the proportion of offenders with prior convictions for offences of a different nature was 29.5%.

Bail/Bond or Parole:

One in every ten (10.2%) sentenced drug offenders was on a bail or bond at the time of the offence. A small proportion (0.4%) of individuals was on parole or license at the time of the offence.

Role:

It has long been accepted that the position of the offender in the drug distribution chain or hierarchy is an important consideration in determining the seriousness with which the offence is to be regarded.⁷ In their book *Drug Law in New South Wales*, Zahra and Arden refer to a number of decisions of the NSW Court of Criminal Appeal which, for example, have categorised the role of the offender: as an "intermediary" (*Woods*, unreported, NSW CCA 7 April 1988; *Sha*, unreported, NSW CCA 16 June 1988); as a "go-between" (*Chow*, unreported, NSW CCA 25 February 1988); and as a "low order" offender (*Johnson* NSW CCA 23 June 1988).⁸ Similarly, in a large scale drug conspiracy involving the production and supply of cannabis, a document describing various participants in the enterprise as "manager: cultivation and distribution", "cultivator"; "cultivator (top of the list)"; "owner of land"; and "labourer", was described as helpful by the court (*Morrison*, unreported, NSW CCA 7 June 1990).⁹

Table 9 shows that over half (58.4%) of all sentenced drug offenders were involved in selling prohibited drugs. Of these, almost seven out of every ten (68.8%) were dealers, 24.9% were selling drugs to support their drug dependency, and 6.3% were described as middlemen or go-betweens. The next most common role was cultivate prohibited drugs (36.3%). The purpose for cultivation was known in 209 cases. Of these, four in every ten (40.2%) individuals were found guilty of growing cannabis plants for the purpose of supply, and six in every ten (59.8%) individuals were cultivating cannabis plants for their own use. Another group of individuals (6.8%) could be described as accomplices or accessories in the commission of drug offences.

Addicted:

In the majority of cases (90.1%) it was possible to ascertain whether the offender was addicted to drugs at the time of the offence. Approximately four in every ten (37.0%) drug offenders sentenced in the higher courts were addicted to prohibited drugs. Note however that the courts have held that addiction of the offender is not a mitigating factor: see *Antoun*, unreported, NSW CCA 12 July 1986.

Legal Representation:

Almost all drug offenders (98.1%) were legally represented in court. Nearly three in every four (73.3%) were represented by "private" firms. Another 24.9% were represented by legal aid.

7 For a description of the chain of distribution see generally I. Dobinson and P. Poletti, *Buying and Selling Heroin*, New South Wales Bureau of Crime Statistics and Research, Sydney, 1988 at p 88.

8 P. Zahra and R. Arden, *Drug Law in New South Wales*, The Federation Press, Sydney, 1991 at p 300.

9 *Ibid*

**Table 9: Role of the Offender in the Offence
(25 September 1989 – 31 December 1991)**

ROLE IN THE OFFENCE	n	%
Dealer	271	37.4
Dealer/User (a)	98	13.5
Middleman/Go-between (b)	25	3.5
	394	54.4
Cultivate to supply (c)	84	11.6
Cultivate for own use (d)	125	17.3
Cultivate – unknown	54	7.5
	263	36.3
Manufacture to supply	3	0.4
Possession for own use	11	1.5
Accomplice (e)	49	6.8
Other (f)	4	0.6
TOTAL	724	100.0

- Notes:**
- (a) This group relates to offenders who sold drugs to support their own drug dependency.
 - (b) Individuals were coded as middlemen if they worked for a supplier — selling drugs, delivering drugs, etc., for which they were paid cash and/or drugs. They would also be considered middlemen if they were responsible for introducing buyers to the supplier, as in some undercover police operations. If offenders sold drugs to their own contacts, they were coded as Dealers.
 - (c) This includes 21 cases where the principal offence was supply cannabis, however they were also charged with cultivation or admitted to growing the plants.
 - (d) Also includes one case where the principal offence was supply cannabis however the Judge found no evidence of supply and sentenced the offender accordingly.
 - (e) These offenders were not suppliers nor were they necessarily drug users. However, indirectly, they were involved in dealing drugs or growing cannabis plants — such as packaging deals to be sold; taking messages regarding drug deals; driving dealers and/or drugs to the location where the deal is to take place; minding drugs for the supplier; being a bodyguard or watchguard for the dealer at the scene of the drug deal; providing and maintaining the property or equipment required to manufacture or grow prohibited drugs; and watering plants. Also, a number of individuals were charged with cultivation because they were aware or had knowledge of cannabis plants growing in the home.

- (f) Three offenders were guilty of harvesting plants which they had found and shared them with friends for no financial gain. Another two individuals were charged with supply prohibited drug, however they were actually involved in the importation and distribution of those drugs.

4.2 Profile of Offences: *Drug Misuse and Trafficking Act 1985*

The observed differences in the makeup of drug offences finalised in the higher courts are also presented descriptively.

Number of Counts of the Principal Offence:

The majority (86.5%) of drug offences finalised in the higher courts had one count of the principal offence.

Other Offences Taken into Account:

One in every five (24.7%) sentenced drug offenders had outstanding offences listed on a 'Form 2'.

Other Secondary Drug Offences:

16.6% of drug offenders were also found guilty of drug offences other than, and in addition to, the principal offence.

4.3 Sentencing Outcomes: *Drug Misuse and Trafficking Act 1985*

As mentioned earlier, the most common *Drug Misuse and Trafficking Act 1985* offences before the higher courts were s 25: "supply prohibited drug" and s 23(1)(a): "cultivate prohibited plant". This section relates to the sentencing outcomes for these types of offences.

4.3.1 Supply Prohibited Drug

Table 10 shows the type of disposition ordered in the Supreme and District Courts for offenders found guilty of supply prohibited drug. More than half (58.3%) were sentenced to a term of imprisonment. Periodic Detention (11.0%), Community Service Orders (11.9%) and supervised Recognizances (11.5%) were also frequently used dispositions. Considering the serious nature of drug offences dealt with in the higher courts, it is not surprising to find that the lesser penalties of "offence proven, charge dismissed" and "fine" are not frequently ordered.

**Table 10: Sentencing Outcomes for Drug Offences under s 25 of the
Drug Misuse and Trafficking Act 1985
(25 September 1989 – 31 December 1991)**

DISPOSITION	n	%
Prison	249	58.3
Periodic Detention	47	11.0
Community Service Order	51	11.9
Fine	1	0.2
Recog + Supervision (a)	49	11.5
Recognizance (b)	30	7.0
Proven/Dismissed (c)	0	0.0
TOTAL	427	100.0

- Notes:** (a) Includes s 558 Sentenced deferred with supervision; Common Law Bond with supervision; s 20 (Cth) sentence deferred with supervision; and s 556A Recognizance to Appear, with supervision.
 (b) Includes s 558 Sentenced deferred; Common Law Bond; s 20 (Cth) sentence deferred; and s 556A Recognizance.
 (c) Includes Sentenced to Rising of the Court and s 556A offence proved no conviction – charge dismissed.

The type of drug supplied is most important in sentencing offenders in the higher courts. Table 11 displays the proportion of offenders found guilty for supply prohibited drug by the type of drug. About one in every three (32.6%) individuals was sentenced in the Supreme and District Courts for supplying cannabis leaf. Another one in every four (25.5%) offenders was found guilty of supplying heroin. Other popular drugs supplied were amphetamines (24.8%) and Cannabis resin (10.3%). Having regard to the table of frequencies of Drug Type, it is not proposed to examine the supply of Cannabis Oil, Cannabis Plant, Hallucinogens (LSD) nor Sedatives.

Table 11: Type of Drug Involved in Offences under s 25 of the Drug Misuse and Trafficking Act 1985 (25 September 1989 – 31 December 1991)

DRUG TYPE	n	%
Heroin	109	25.5
Cocaine	19	4.5
Amphetamines	106	24.8
Cannabis Resin	44	10.3
Cannabis Leaf	139	32.6
Cannabis Plant	3	0.7
Cannabis Oil	0	0.0
Hallucinogens (LSD)	6	1.4
Sedatives	1	0.2
TOTAL	427	100.0

Table 12 shows the proportion of drug offenders sentenced in the higher courts for "supply prohibited drug" by the type of drug supplied and the type of penalty ordered. The most common disposition ordered for each of the drug types was imprisonment. However, Judges were more likely to sentence a drug offender to a term of imprisonment if the type of drug supplied was heroin.

Figure 2 (on page 23 below) shows the proportion of offenders sentenced to a term of imprisonment by type of drug supplied. Almost nine in every ten (86.2%) individuals found guilty of supplying heroin were sentenced to a term of imprisonment. Even though cocaine and amphetamines are regarded by legislation to be as serious as heroin, significantly fewer offenders received imprisonment as a sentencing option (57.9% and 47.2% respectively). As for the different types of cannabis supplied, cannabis resin was dealt with more harshly than cannabis leaf. Slightly more than six in every ten (61.4%) individuals found guilty of supplying cannabis resin were sentenced to a term of imprisonment, whereas 44.6% of individuals sentenced for supplying cannabis leaf received a prison term.

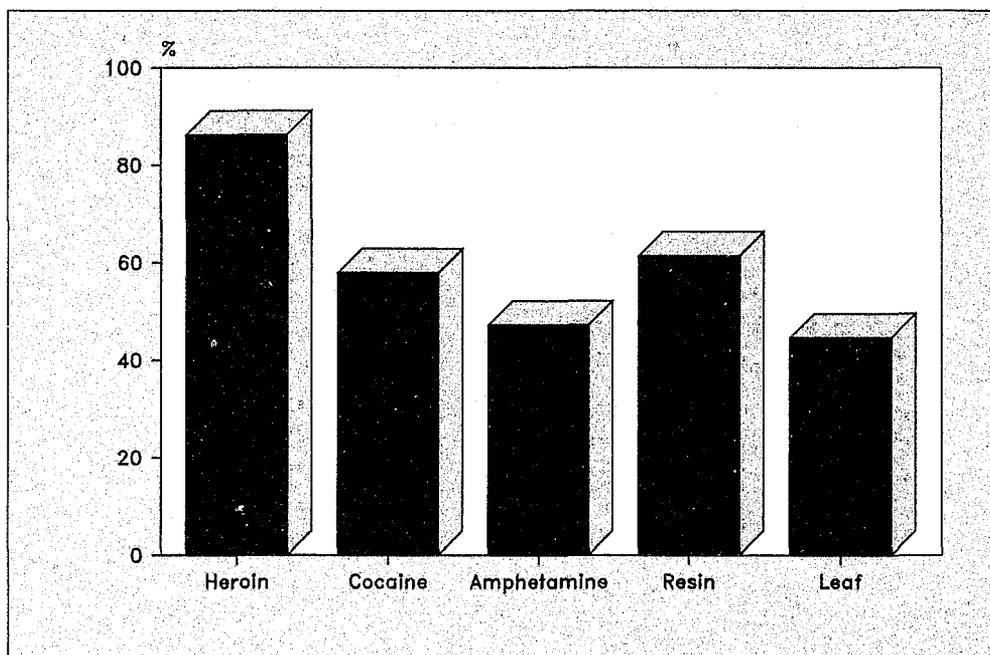
Table 12: Sentencing Outcomes for Offences under s 25 of the Drug Misuse and Trafficking Act 1985 by Drug Type (25 September 1989 – 31 December 1991)

DISPOSITION	DRUG TYPE				
	Heroin n=109	Cocaine n=19	Amphet n=106	Resin n=44	Leaf n=139
Prison	86.2	57.9	47.2	61.4	44.6
Periodic Detention	4.6	21.1	13.2	13.6	13.0
C.S.O.	1.8	0.0	12.3	11.4	19.4
Fine	0.0	0.0	0.0	0.0	0.7
Supervised Recog (a)	6.4	15.8	15.1	6.8	14.4
Recognizance (b)	0.9	5.3	12.3	6.8	7.9
Proven/Dismissed (c)	0.0	0.0	0.0	0.0	0.0
TOTAL	100.0	100.0	100.0	100.0	100.0

- Notes:** (a) Includes s 558 Sentenced deferred with supervision; Common Law Bond with supervision; s 20 (Cth) sentence deferred with supervision; and s 556A Recognizance to Appear, with supervision.
 (b) Includes s 558 Sentenced deferred; Common Law Bond; s 20 (Cth) sentence deferred; and s 556A Recognizance.
 (c) Includes Sentenced to Rising of the Court and s 556A offence proved no conviction – charge dismissed.

Generally, it has been held that periodic detention is not a custodial sentence in the normal sense of the term and it has been held that the special features of drug trafficking usually call for full-time custodial sentences: see *Blanco*, unreported, NSW CCA 22 October 1987; (eg *Leslie* (1991) 55 A Crim R 68, *Eldaghi*, unreported, NSW CCA 11 April 1991). Even so, it can be seen from Table 12 that periodic detention was frequently ordered if the offence committed involved the supply of cocaine. Slightly more than one in five (21.1%) offenders found guilty of supplying cocaine were sentenced to a term in periodic detention. Respectively, if the type of drug supplied was amphetamines, cannabis resin or cannabis leaf 13.2%, 13.6% and 13.0% of individuals sentenced for “supply prohibited drug” received periodic detention.

Figure 2: Proportion of Offenders Sentenced to a Term of Imprisonment by Type of Drug Supplied (25 September 1989 – 31 December 1991)



The Court of Criminal Appeal has held that a Community Service Order is not appropriate for traffickers in narcotics except in special circumstances (see *Thomson*, unreported, NSW CCA, 4 April 1991 per Hunt J at p 8) yet, Community Service Orders were handed down to almost one in every five (19.4%) offenders found guilty of supplying cannabis leaf. This disposition was also used to a lesser extent if the type of drug supplied was amphetamines (12.3%) or cannabis resin (11.4%).

Supervised Recognizances were also frequently ordered for drug offenders sentenced in the higher courts for "supply prohibited drug". If the type of drug supplied was cocaine, amphetamines or cannabis leaf approximately fifteen in every one hundred offenders was handed down a recognizance with supervision (15.8%, 15.1% and 14.4% respectively). If the type of drug supplied was heroin or cannabis resin approximately seven in every one hundred offenders was handed down a recognizance with supervision (6.4% and 6.8% respectively).

Unsupervised Recognizances were less frequently ordered to drug offenders found guilty of "supply prohibited drug". However, if the type of drug supplied was amphetamine, 12.3% of individuals received a recognizance without supervision. The lesser penalties of "fine" and "offence proven, charge dismissed", have been excluded from the following analysis.

As just seen, the type of drug supplied may explain some of the variation in the type of penalty handed down to drug offenders sentenced in the Supreme and District Courts. It may also be that the quantity of the drug supplied may have had an effect on sentencing drug offenders. The following tables look at the types of dispositions ordered for offenders found guilty of "supply prohibited drug" taking into account the amount of drug supplied and the type of drug supplied.

Heroin

Table 13 shows the median gross weight of Heroin and the median sentence length for each disposition and drug offence level. Again, the median was used to describe the average since it would not be affected by extreme drug quantities or sentence lengths. The minimum and maximum values are displayed as the range.

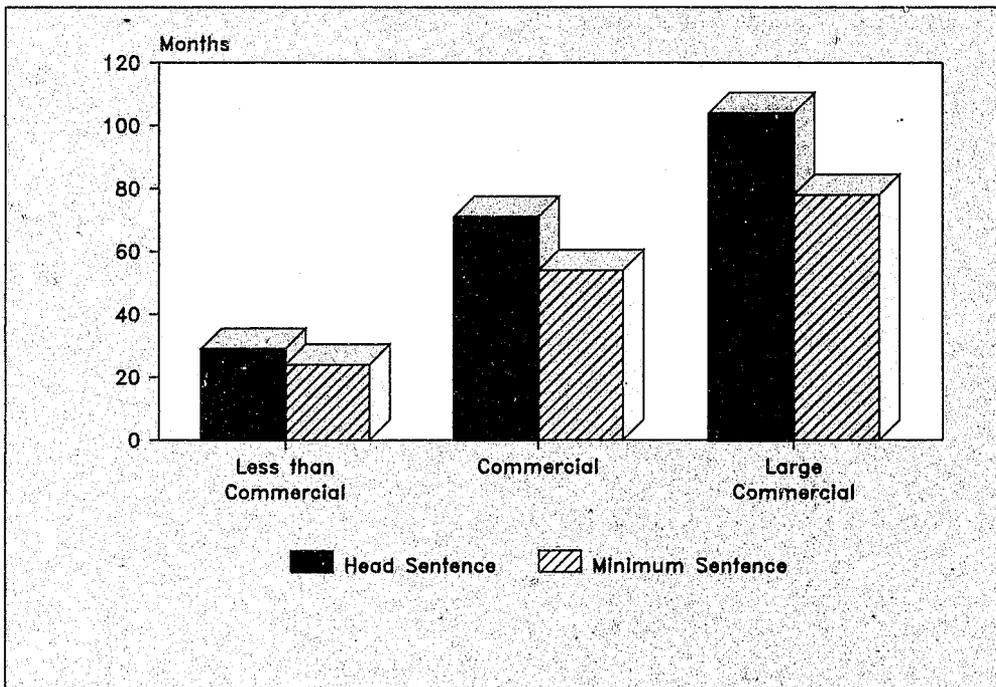
**Table 13: Median Gross Weight of Heroin and Median Sentence Length
by Drug Offence Level and Disposition
(25 September 1989 – 31 December 1991)**

DRUG OFFENCE LEVEL AND DISPOSITION	n (a)	DRUG QUANTITY		SENTENCE LENGTH	
		MEDIAN	RANGE	MEDIAN	RANGE
< COMMERCIAL					
– Prison	78	8.9gm	0.2gm-164.4gm	29mth	2-108mth
<i>Head</i>				24mth	2- 84mth
<i>Min</i>					
– P.D.	4	4.7gm	2.0gm- 6.7gm	18mth	9- 36mth
– C.S.O.	2	10.5gm	1.0gm- 19.9gm	450hrs	400-500hrs
– Recog+Super	6	2.3gm	0.3gm- 5.3gm	36mth	36- 60mth
– Recognizance	1	9.3gm	9.3gm	36mth	36mth
COMMERCIAL					
– Prison	8	371.9gm	280gm- 500gm	71mth	32- 96mth
<i>Head</i>				54mth	24- 72mth
<i>Min</i>					
– P.D.	1	298.5gm	298.5gm	15mth	15mth
LGE COMMERCIAL					
– Prison	3	10.0kg	5.3kg- 44.0kg	104mth	96-111mth
<i>Head</i>				78mth	72- 84mth
<i>Min</i>					

Notes: (a) The weight of the drug was not known in five cases where the penalty was imprisonment. The weight of the drug was not known in one case where the penalty was supervised recognizance.

Figure 3 graphically displays the median head and minimum prison terms for each drug offence level. While it is true that penalties tend to be more severe as a drug offender moves into a higher drug offence level, the same cannot be true of drug offenders within a drug offence level. Even though the majority of individuals found guilty of supplying heroin were sentenced to a term of imprisonment, non-custodial penalties were also ordered when the amount of drug remained relatively the same.

**Figure 3: Median Head and Minimum Prison Terms by Drug Offence Level – Supply Heroin
(25 September 1989 – 31 December 1991)**



Tests of association between custodial and non-custodial sentences were performed on various offender and offence characteristics. It was found that there was a significant relationship between the gender of the offender and the type of sentence.¹⁰ One in every three (33.3%) female drug offenders found guilty of supplying heroin received a non-custodial sentence whereas only one in ten (10.5%) male drug offenders were given a non-custodial sentence. Another variable that may account for some of the variation in the type of sentence handed down was the plea of the offender.¹¹ Every offender (100.0%) who pleaded not guilty but was subsequently convicted of supplying heroin received a custodial sentence whereas 81.4% of offenders who pleaded guilty were given a custodial sentence.

¹⁰ Chi square test, $p < .021$.

¹¹ Chi square test, $p < .033$.

Cocaine

In the past it was thought that Cocaine should be treated less severely than Heroin, but that view has been firmly rejected by the Court of Criminal Appeal. In *Ferrer-Esis* (1991) 55 A Crim R 231, Hunt J at p 236 endorsed the approach taken by Lee CJ at CL in *Chase*, unreported, CCA NSW 19 October 1990, and stated emphatically that it was "a wrong approach to say that lower sentences should be imposed for offences involving Cocaine than for those involving Heroin" (see also *Gibson* (1991) 56 A Crim R 1).

Table 14 shows the median gross weight of Cocaine and the median sentence length for each disposition and drug offence level. Whilst the most common penalty for supplying cocaine was imprisonment other non-custodial penalties were also ordered. Even though the type of disposition handed down was less severe as the amount of the drug decreased, the relatively small number of offenders in this group do not allow for any statistical analysis of the data.

Table 14: Median Gross Weight of Cocaine and Median Sentence Length by Drug Offence Level and Disposition (25 September 1989 – 31 December 1991)

DRUG OFFENCE LEVEL AND DISPOSITION	n (a)	DRUG QUANTITY		SENTENCE LENGTH	
		MEDIAN	RANGE	MEDIAN	RANGE
< COMMERCIAL					
– Prison Head	9	39.2gm	7.1gm- 86.0gm	32mth	12- 63mth
Min				24mth	12- 48mth
– P.D.	4	38.7gm	7.4gm- 96.0gm	12mth	6- 24mth
– Recog+Super	3	6.3gm	2.5gm- 13.6gm	36mth	24- 60mth
– Recognizance	1	4.9gm	4.9gm	36mth	36mth
LGE COMMERCIAL					
– Prison Head	1	1.0kg	1.0kg	36mth	36mth
Min				36mth	36mth

Notes: (a) The weight of the drug was not known in one case where the penalty was imprisonment.

Amphetamines

Table 15 shows the median gross weight of Amphetamines and the median sentence length for each disposition and drug offence level. Figure 4 graphically displays the median head and minimum prison terms for each drug offence level. While it is true that penalties tend to be more severe as a drug offender moves into a higher drug offence level, the same cannot be said of drug offenders within a drug offence level. Even though the most common penalty ordered for individuals found guilty of supplying amphetamines was imprisonment, other non-custodial penalties were also ordered when the amount of drug remained relatively the same.

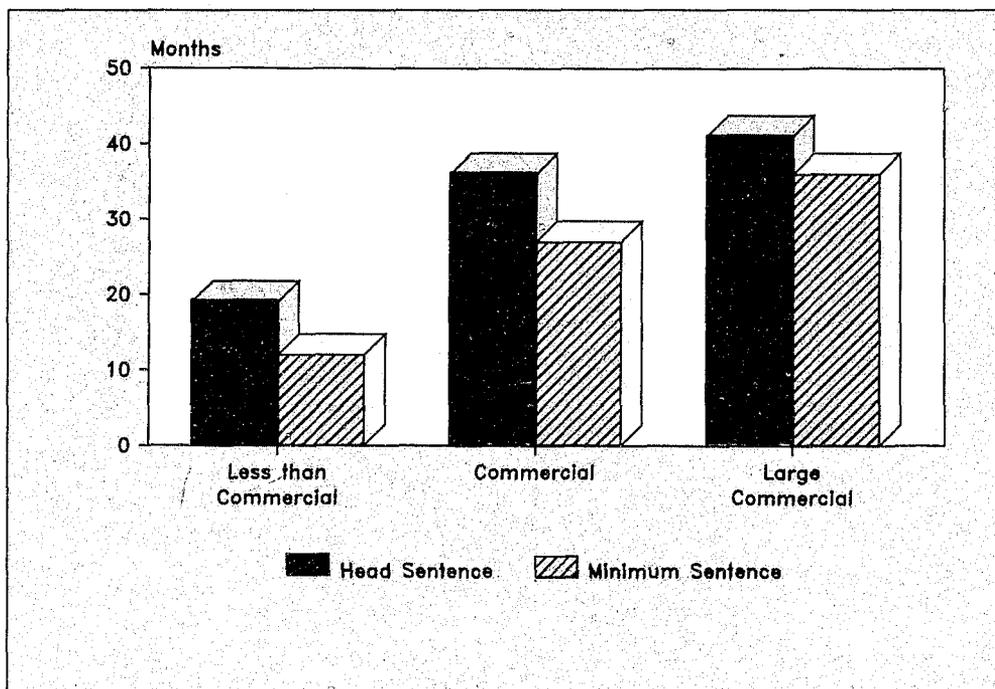
Table 15: Median Gross Weight of Amphetamine and Median Sentence Length by Drug Offence Level and Disposition (25 September 1989 – 31 December 1991)

DRUG OFFENCE LEVEL AND DISPOSITION	n (a)	DRUG QUANTITY		SENTENCE LENGTH	
		MEDIAN	RANGE	MEDIAN	RANGE
< COMMERCIAL					
– Prison <i>Head</i>	42	13.1gm	0.1gm-198.0gm	19mth	1- 69mth
– <i>Min</i>				12mth	1- 36mth
– P.D.	14	11.4gm	4.3gm- 87.4gm	18mth	3- 30mth
– C.S.O.	13	9.3gm	0.5gm-126.5gm	300hrs	100-500hrs
– Recog+Super	15	5.8gm	2.5gm- 94.3gm	36mth	24- 60mth
– Recognizance	12	14.1gm	0.4gm- 94.3gm	36mth	18- 60mth
COMMERCIAL					
– Prison <i>Head</i>	1	877.0gm	877.0gm	36mth	36mth
– <i>Min</i>				27mth	27mth
– Recog+Super	1	292.0gm	292.0gm	12mth	12mth
LGE COMMERCIAL					
– Prison <i>Head</i>	6	3.5kg	2.2kg- 32.2kg	41mth	6- 96mth
– <i>Min</i>				36mth	6- 72mth

Notes: (a) The weight of the drug was not known in one case where the penalty was imprisonment. The weight of the drug was not known in one case where the penalty was a recognizance.

Tests of association between custodial and non-custodial sentences were performed on various offender and offence characteristics. It was found that there was a significant relationship between the age of the offender and the type of sentence.¹² As the age group of the offender increased so did the proportion of individuals given a custodial sentence (Less than 21 = 0.0%, 21 to 30 years = 41.0%, 31 to 40 years = 58.3%, over 40 years = 75.0%).

**Figure 4: Median Head and Minimum Prison Terms
by Drug Offence Level – Supply Amphetamines
(25 September 1989 – 31 December 1991)**



Another variable that may account for some of the variation in the type of sentence handed down was the prior criminal record of the offender.¹³ It was found that 21.6% of offenders who were convicted of supplying amphetamines and had no prior record of offending were sentenced to imprisonment. This compares with 44.4% of drug offenders with prior convictions for offences of a different nature, 63.0% of drug offenders with prior convictions for drug offences, and 100.0% of drug offenders with prior convictions for drug offences which received a sentence of imprisonment.

¹² Chi square test, $p < .026$.

¹³ Chi square test, $p < .001$.

Cannabis Resin

Table 16 shows the median gross weight of Cannabis Resin and the median sentence length for each disposition and drug offence level. Whilst the most common penalty for supplying cannabis resin was imprisonment other non-custodial penalties were also ordered. Generally speaking, the type of disposition handed down was less severe as the amount of the drug decreased. Tests of association between custodial and non-custodial sentences were performed on various offender and offence characteristics. However, no significant relationship was found.

Table 16: Median Gross Weight of Cannabis Resin and Median Sentence Length by Drug Offence Level and Disposition (25 September 1989 – 31 December 1991)

DRUG OFFENCE LEVEL AND DISPOSITION	n (a)	DRUG QUANTITY		SENTENCE LENGTH		
		MEDIAN	RANGE	MEDIAN	RANGE	
< COMMERCIAL						
– Prison Head	25	0.3kg	12.3gm-	2.0kg	20mth	13- 78mth
– Min					15mth	1- 66mth
– P.D.	6	222.9gm	78.0gm-	414.3gm	18mth	3- 24mth
– C.S.O.	5	54.0gm	50.0gm-	274.5gm	450hrs	250-500hrs
– Recog+Super	3	59.2gm	19.5gm-	305.2gm	36mth	36mth
– Recognizance	3	22.2gm	22.0gm-	47.0gm	24mth	24- 36mth
COMMERCIAL						
– Prison Head	1	8.0kg		8.0kg	32mth	32mth
– Min					24mth	24mth

Notes: (a) The weight of the drug was not known in one case where the penalty was imprisonment.

Cannabis Leaf

Table 17 shows the median gross weight of Cannabis Leaf and the median sentence length for each disposition and drug offence level. Even though imprisonment was the most likely penalty to be handed down to offenders convicted of supplying cannabis leaf, non-custodial penalties were given to more than half (55.4%) of these cases.

Table 17: Median Gross Weight of Cannabis Leaf and Median Sentence Length by Drug Offence Level and Disposition (25 September 1989 – 31 December 1991)

DRUG OFFENCE LEVEL AND DISPOSITION	n (a)	DRUG QUANTITY		SENTENCE LENGTH	
		MEDIAN	RANGE	MEDIAN	RANGE
< COMMERCIAL					
– Prison Head	58	1.7kg	3.0gm-21.6kg	20mth	1- 48mth
Min				12mth	1- 36mth
– P.D.	18	1.2kg	2.8gm- 6.2kg	18mth	6- 36mth
– C.S.O.	26	1.8kg	8.8gm-18.1kg	300hrs	100-500hrs
– Recog+Super	19	1.0kg	16.7gm- 4.7kg	36mth	24- 60mth
– Recognizance	10	0.7kg	21.9gm-18.1kg	36mth	18- 48mth
COMMERCIAL					
– Prison Head	1	45.0kg	45.0kg	9mth	9mth
Min				7mth	7mth

Notes: (a) The number of plants was not known in three cases where the penalty was imprisonment. The weight of the drug was not known in one case where the penalty was a community service order. The weight of the drug was not known in one case where the penalty was a supervised recognizance. The weight of the drug was not known in one case where the penalty was a recognizance.

Tests of association between custodial and non-custodial sentences were performed on various offender and offence characteristics. It was found that there was a significant relationship between the gender of the offender and the type of sentence.¹⁴ Slightly more than eight in every ten (81.3%) female drug offenders found guilty of supplying cannabis leaf received a non-custodial sentence whereas approximately one in every two (52.6%) male drug offenders were given a non-custodial sentence. However, since there were only sixteen females (12.1%) found guilty of supplying cannabis leaf, the sex of the offender would only explain a small amount of the variation in the type of sentence handed down.

¹⁴ Chi square test, $p < .038$.

4.3.2 Cultivate Prohibited Plant

In every case, except one, the prohibited plant cultivated was cannabis. The other plant type was opium and has been excluded from the following analysis.

Table 18 shows the type of disposition ordered in the Supreme and District Courts for offenders found guilty of cultivate prohibited plant. Overall, the most frequently used disposition was Community Service Orders (26.5%). Other popular penalties were Recognizances (23.5%), Imprisonment (22.5%) and Supervised Recognizances (18.8%).

Table 18: Sentencing Outcomes for Drug Offences under s 23(1)(a) of the Drug Misuse and Trafficking Act 1985 (25 September 1989 – 31 December 1991)

DISPOSITION	n	%
Prison	60	22.9
Periodic Detention	17	6.5
Community Service Order	72	27.5
Fine	3	1.2
Recog + Supervision (a)	50	19.1
Recognizance (b)	59	22.5
Proven/Dismissed (c)	1	0.4
TOTAL	262	100.0

- Notes:** (a) Includes s 558 Sentenced deferred with supervision; Common Law Bond with supervision; s 20 (Cth) sentence deferred with supervision; and s 556A Recognizance to Appear, with supervision.
 (b) Includes s 558 Sentenced deferred; Common Law Bond; s 20 (Cth) sentence deferred; and s 556A Recognizance.
 (c) Includes Sentenced to Rising of the Court and s 556A offence proved no conviction — charge dismissed.

Table 19: Median Number of Cannabis Plants and Median Sentence Length by Drug Offence Level and Disposition (25 September 1989 – 31 December 1991)

DRUG OFFENCE LEVEL AND DISPOSITION	n (a)	DRUG QUANTITY		SENTENCE LENGTH	
		MEDIAN plants	RANGE plants	MEDIAN	RANGE
< COMMERCIAL					
– Prison <i>Head</i>	34	70	3 – 263	16mth	2- 64mth
– <i>Min</i>				12mth	2- 48mth
– P.D.	11	102	9 – 170	15mth	6- 30mth
– C.S.O.	64	64	4 – 206	275hrs	75-500hrs
– Recog+Super	45	71	9 – 180	36mth	24- 60mth
– Recognizance	52	89	1 – 204	36mth	12- 60mth
COMMERCIAL					
– Prison <i>Head</i>	10	390	286 – 898	21mth	3- 48mth
– <i>Min</i>				17mth	3- 36mth
– P.D.	6	383	265 – 459	18mth	6- 24mth
– C.S.O.	6	317	250 – 437	450hrs	200-500hrs
– Recog+Super	3	298	270 – 363	48mth	36- 48mth
– Recognizance	6	426	259 – 627	30mth	12- 60mth
LGE COMMERCIAL					
– Prison <i>Head</i>	13	2398	1023 -18083	40mth	24- 80mth
– <i>Min</i>				30mth	12- 60mth
– C.S.O.	1	1719	1719	300hrs	300hrs
– Recognizance	1	3496	3496	60mth	60mth

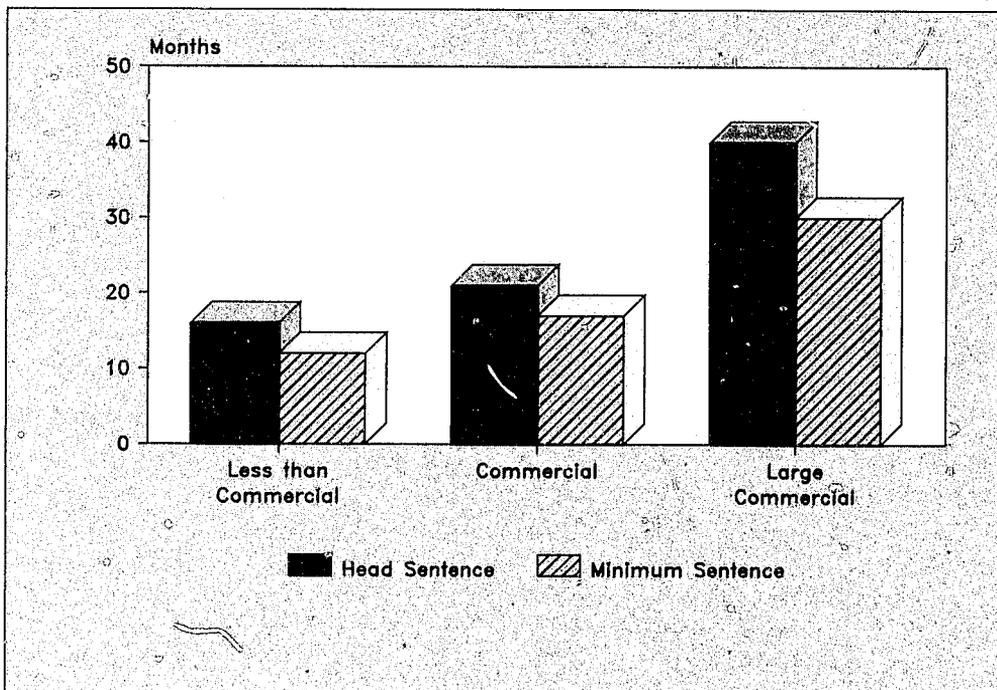
Notes: (a) The weight of the drug was not known in three cases where the penalty was imprisonment. The weight of the drug was not known in one case where the penalty was a community service order. The weight of the drug was not known in two cases where the penalty was a supervised recognizance.

Cannabis Plant

One of the reasons why Judges utilised a range of sentencing options may be associated with the number of cannabis plants cultivated by offenders. Table 19 shows the median number of cannabis plants cultivated and the median sentence length for each disposition and drug offence level. Figure 5 graphically displays the median head and minimum prison terms for each drug offence level. It is quite apparent that the

proportion of individuals sentenced to imprisonment increases as the offender moves into a higher drug offence level (less than commercial = 16.5%, commercial = 32.3%, large commercial = 86.7%). However, the type of penalty ordered within each drug offence level seems to be related to other factors rather than the number of plants cultivated. This suggests that the courts are heeding the warning by Kirby P in *Hayes* (1987) 29 A Crim R 452 at p 465, that there should be no direct equation between the sentence and the number of Indian hemp plants found.

Figure 5: Median Head and Minimum Prison Terms by Drug Offence Level – Cultivate Cannabis Plant (25 September 1989 – 31 December 1991)



Tests of association between custodial and non-custodial sentences were performed on various offender and offence characteristics. Within the "less than commercial" drug offence level, several factors were found to have a significant effect on sentencing in the higher courts:

Gender:

It was found that there was a significant relationship between the sex of the offender and the type of sentence.¹⁵ Every female offender found guilty of cultivating cannabis plants received a non-custodial sentence whereas

¹⁵ Chi square test, $p < .025$.

approximately eight in every ten (81.6%) male offenders were given a non-custodial sentence.

Prior Criminal Record:

Another variable that may account for some of the variation in the type of sentence handed down was the prior criminal record of the offender.¹⁶ It was found that 88.9% of offenders who were convicted of cultivating cannabis plants and had no prior record of offending received a non-custodial sentence. This compares with 83.6% of drug offenders with prior convictions for offences of a different nature, 83.6% of drug offenders with prior convictions for drug offences, and 20.0% of drug offenders with prior convictions for drug offences which received a sentence of imprisonment.

Role:

The purpose for cultivating cannabis plants was also significantly associated with the type of sentence ordered.¹⁷ If the purpose for cultivation was to supply to others for financial gain then offenders were sentenced more severely (43.9% sentenced to imprisonment). The proportion of offenders receiving a custodial sentence dropped to 8.9% if the reason for growing cannabis plants was for their own use. Another group of individuals while charged with and found guilty of cultivation were found to be accomplices or accessories in the offence (see note (e) in Table 9). Every individual in this group was given a non-custodial sentence.

The role of the offender in the cultivation of cannabis plants was also significantly associated with the type of sentence ordered when the number of plants grown reached the "commercial" drug offence level.¹⁸ Every offender who grew cannabis plants for their own use or were accomplices in the cultivation of cannabis plants received a non-custodial sentence. However, just over half (53.9%) of offenders involved in cultivation for the purpose of supply were sentenced to a term of imprisonment.

4.4 Conclusion

Figure 6 provides a composite picture of the median custodial sentences imposed for the various drug types by reference to their particular offence level or category. It shows for example, that for the period under review, the sentences imposed for heroin offences, (with the exception of cocaine in the "less than commercial" category) tower above sentences imposed for other drug types in the same offence category. It also illustrates the general increase in the sentences (with the exception of cannabis leaf) as each drug is considered in descending order of their offence categories.

Once again caution should be exercised in interpreting these data, as the numbers are small in some categories. For example, in the "less than commercial" category the median sentence for cocaine is greater than the median sentence for heroin. When however, the actual number of cases are examined, together with the median weight of drug (see Tables 13 and 14 respectively), a satisfactory explanation for the disparity

16 Chi square test, $p < .001$.

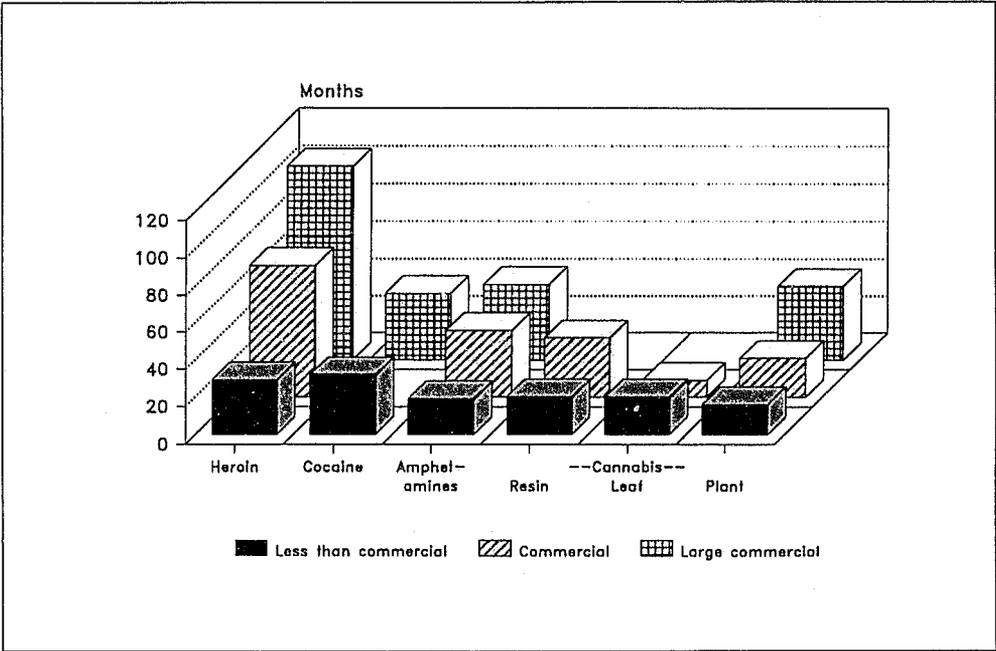
17 Chi square test, $p < .001$.

18 Chi square test, $p < .006$.

is found. Thus there were 78 cases of supply heroin with a median quantity of 8.9 grams of heroin involved in those offences, compared with nine cases of cocaine with a median weight of 39.2 grams per case. In these circumstances, all other things being equal, one would expect that suppliers of cocaine would, on average, be sentenced to longer terms of imprisonment than those supplying heroin.

Similarly, when the disparity between the median sentence for "large commercial" heroin traffickers is compared with the median sentence for "large commercial" cocaine traffickers, it is found that there were only three heroin cases within this category involving a median quantity of 10 kilograms of drug, whereas for cocaine, there was only one case in this category, and it involved one kilogram of the drug. In these circumstances there appears to be a rational explanation for the disparate sentences presented in Figure 6.

Figure 6: Median Head Prison Terms by Type of Drug and Drug Offence Level – Supply and Cultivate (25 September 1989 – 31 December 1991)



A final comment may be made in relation to the counter-intuitive direction in which the median sentence for the "commercial" quantity of cannabis leaf is presented in Figure 6. Again, the median sentence here consists of a sample of one case only whereby the offender's role was that of an "accomplice" and not of a principal in the offence. As such, this case is not a reliable guide against which other offences of this kind should be measured.