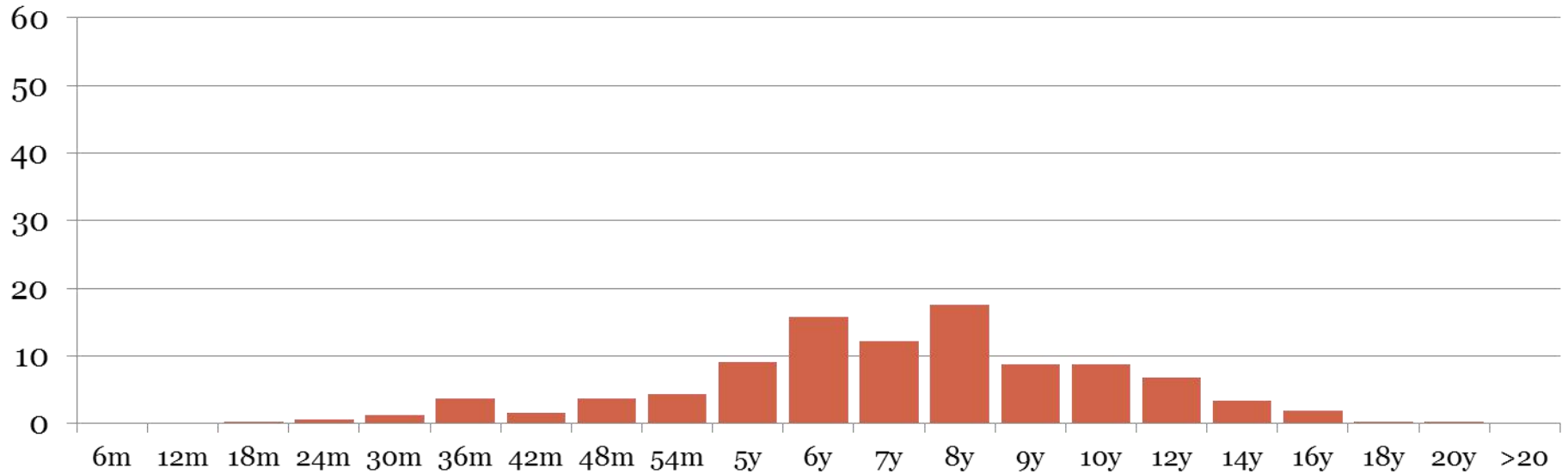
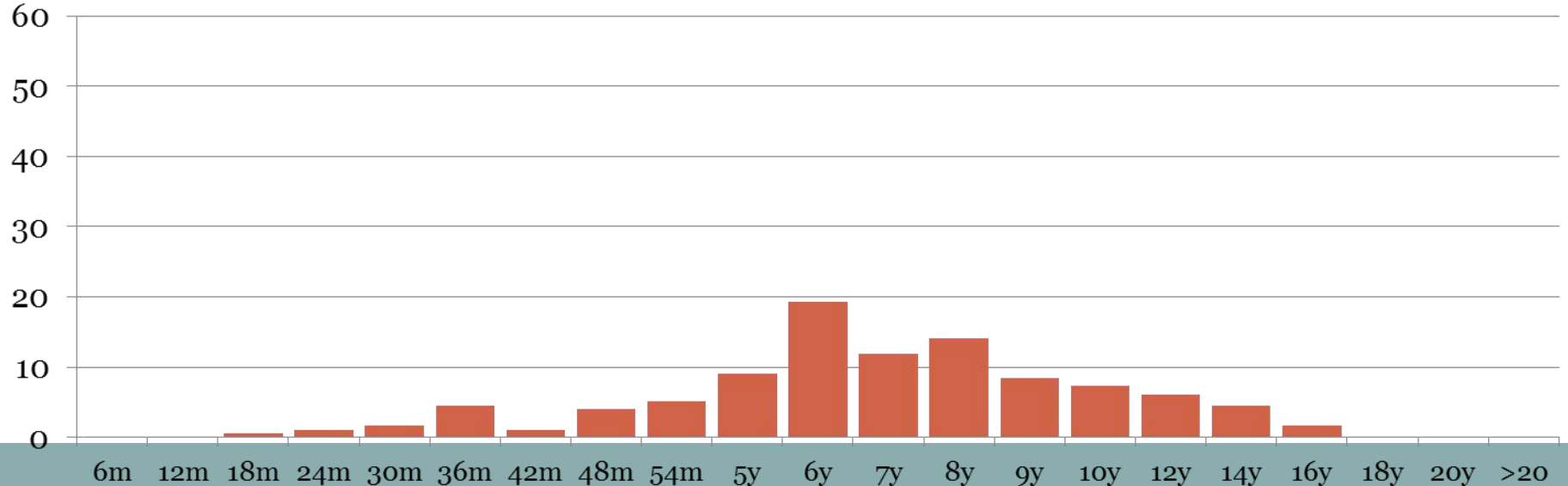


# Term of Sentence- Principal Offences Only s61J(1) Aggravated sexual assault

## All Offenders



## Plea Guilty



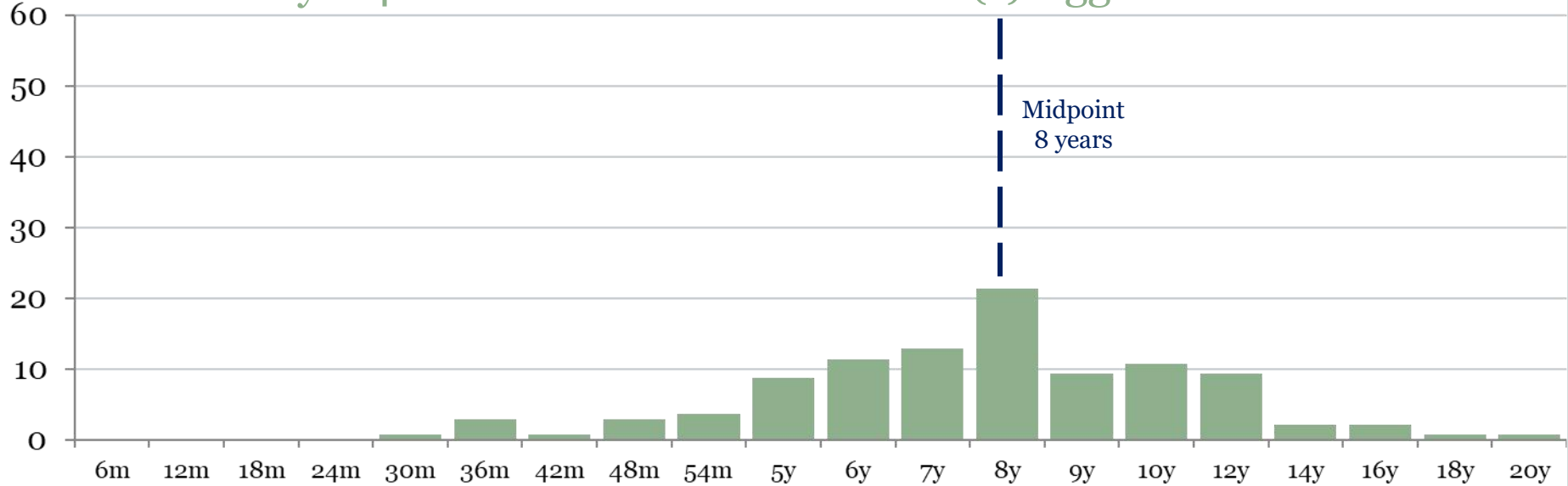
# Spot the Difference

Exploring the practicalities of the discount for pleading guilty

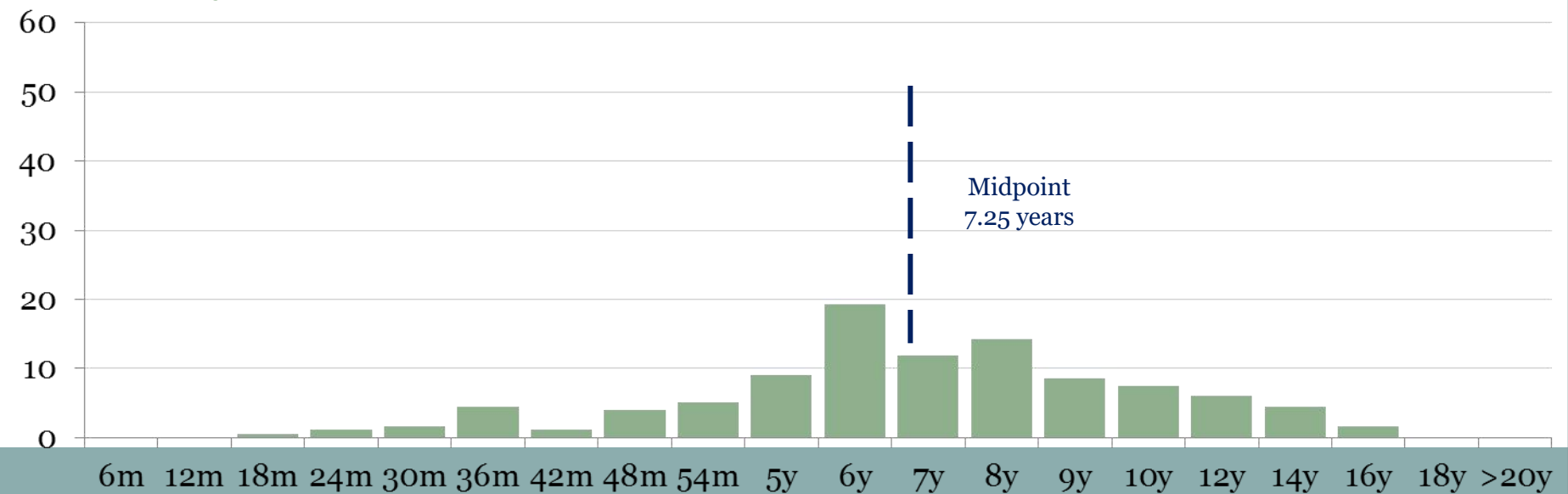


# Term of Sentence- Principal Offences Only s61J(1) Aggravated sexual assault

Plea Not Guilty- 140 cases



Plea Guilty- 176 cases



**s61J (Aggravated sexual intercourse w/o consent)**

**Term of sentence**

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
323	7.57yrs	140	8yrs	176	7.25yrs

7.25 years is 90.625% of 8 years **(just over 9% less for PG)**.

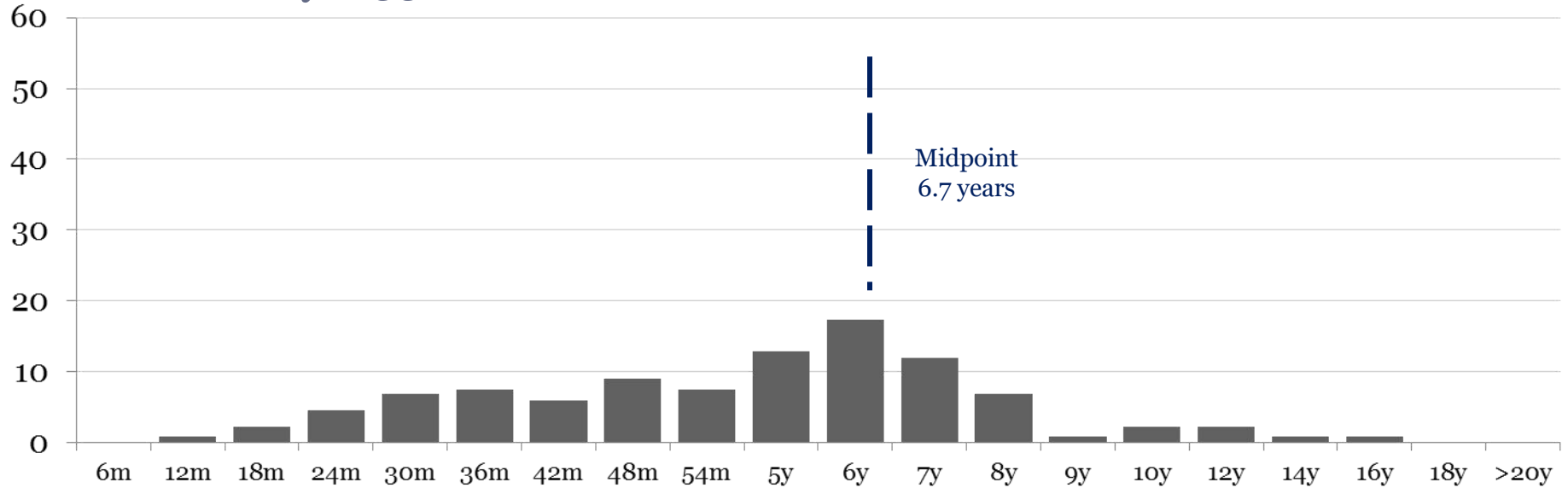
**Non-parole period**

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
298	4.89yrs	133	6.77	161	4.5yrs

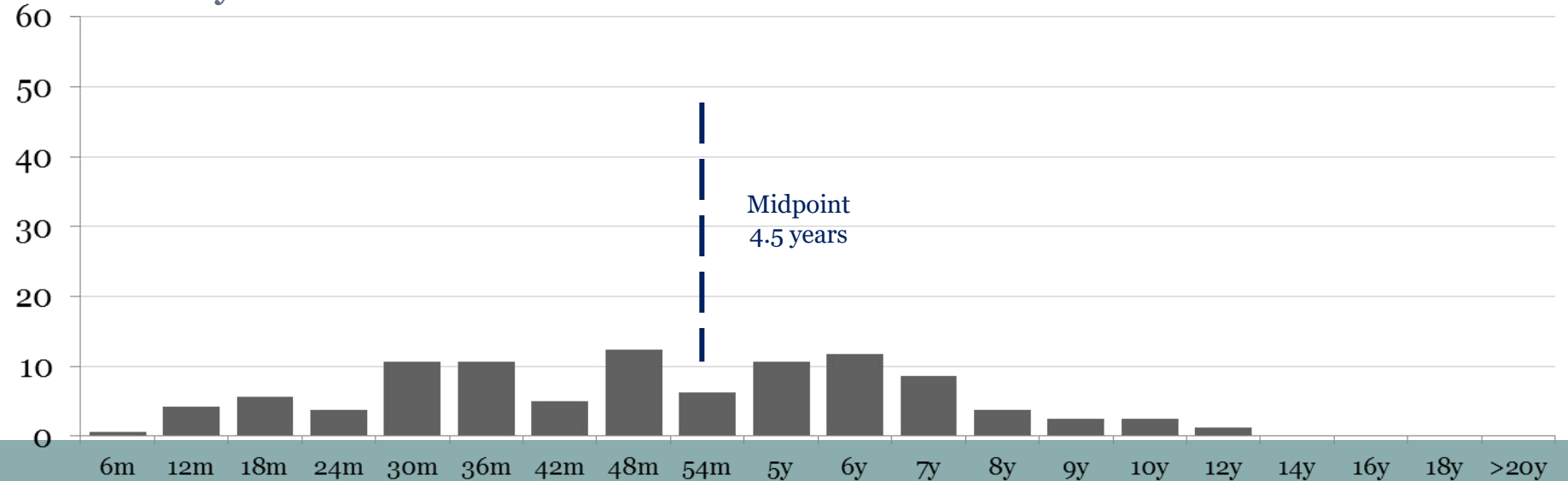
4.5 years is 66.5% of 6.77 years **(23.5% less for PG)**

# Non-parole Period- Principal Offences Only s 61J(1)- Aggravated sexual assault

## Plea Not Guilty- 133 cases

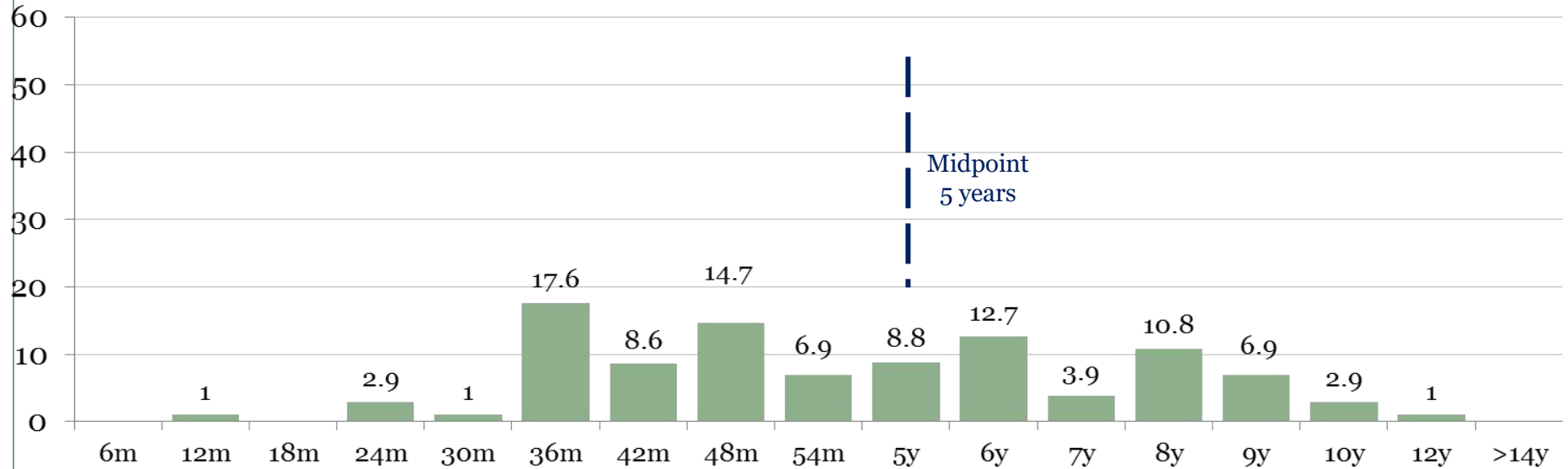


## Plea Guilty- 161 cases

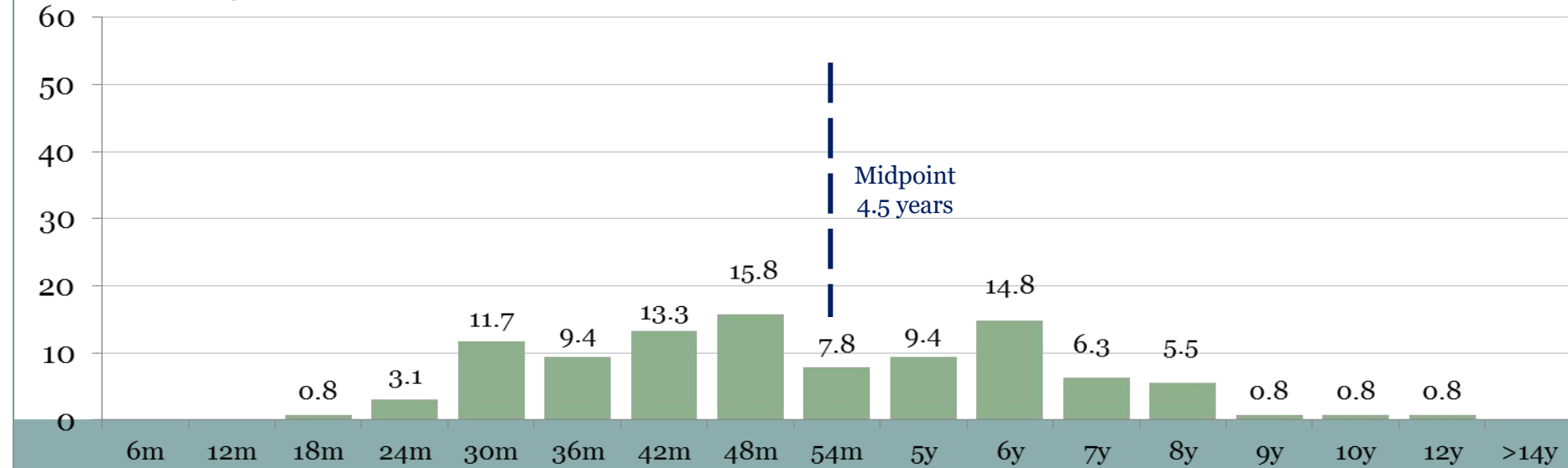


# Term of Sentence- Principal Offences Only s61I Aggravated sexual assault

## Plea Not Guilty- 100 cases

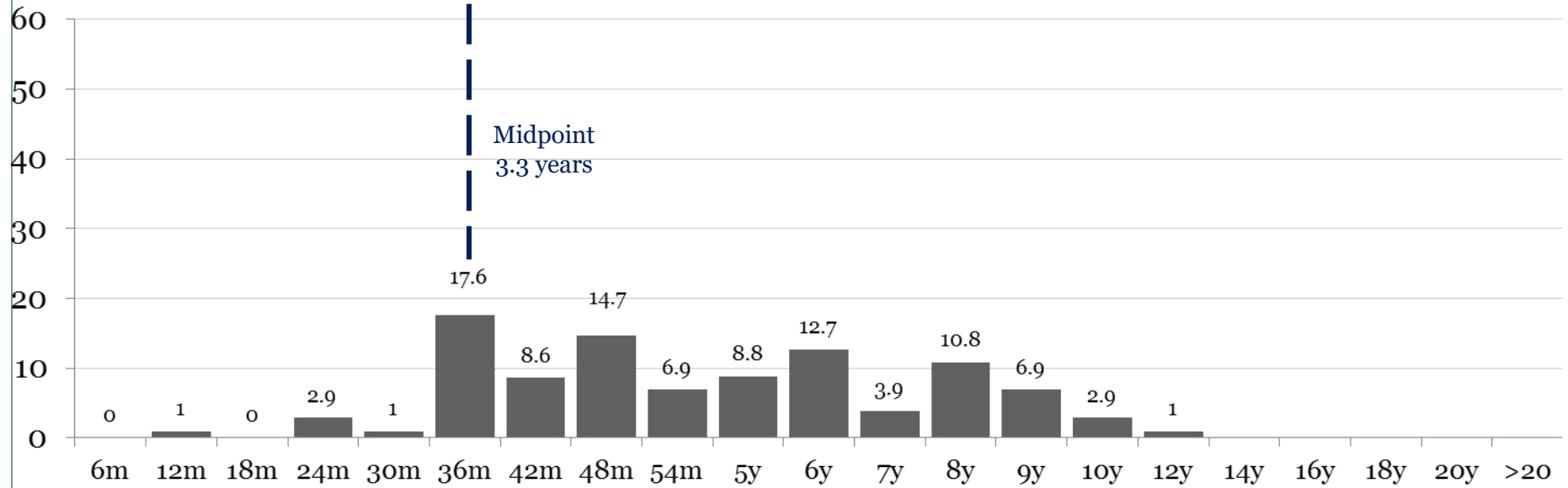


## Plea Guilty- 176 cases

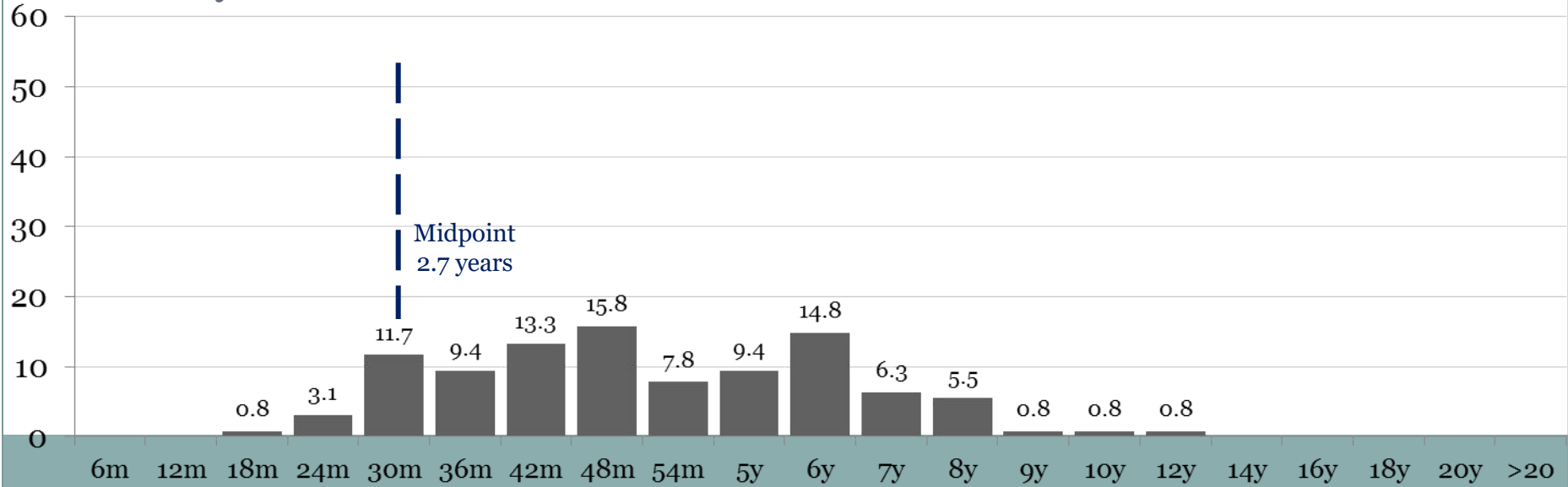


# Non-parole Period- Principal Offences Only s61I- Sexual Intercourse without consent

## Plea Not Guilty- 100 cases



## Plea Guilty- 122 cases



**s61I (Sexual intercourse w/o consent)**

**Term of Sentence**

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
237	4.8yrs	102	5.16yrs	128	4.56yrs

4.56 years is 88.37% of 5.16 years **(just under 12% less for PG).**

**Non-parole period**

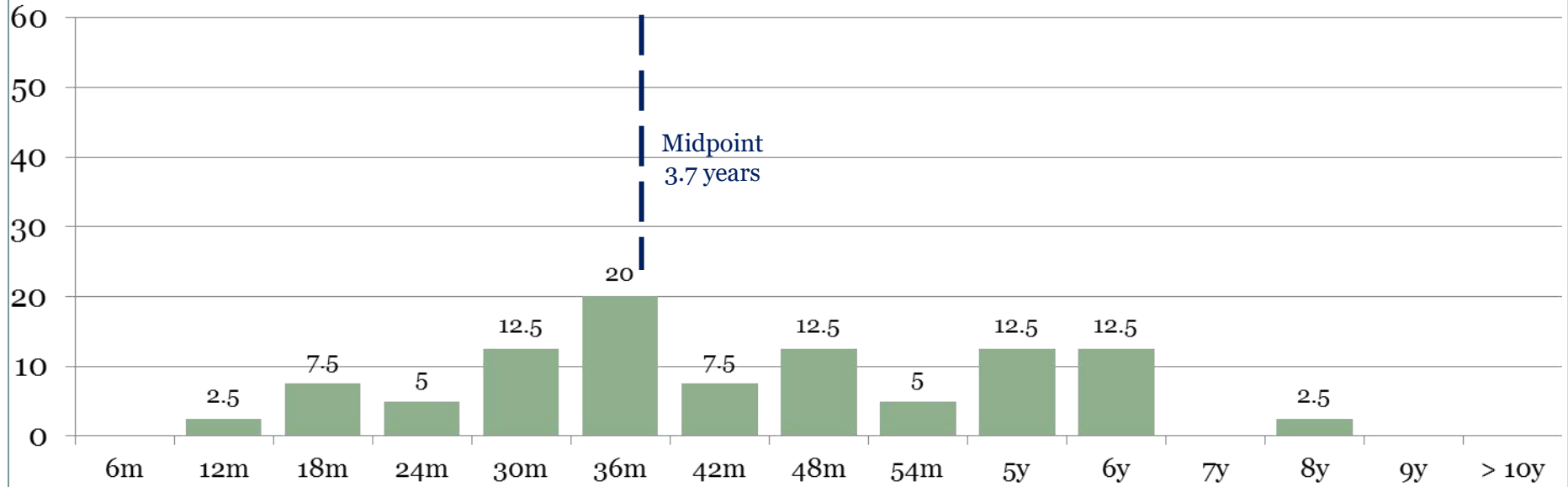
All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
229	2.88yrs	100	3.34	122	2.74

2.74 years is 82% of 3.34 years **(18% less for PG)**

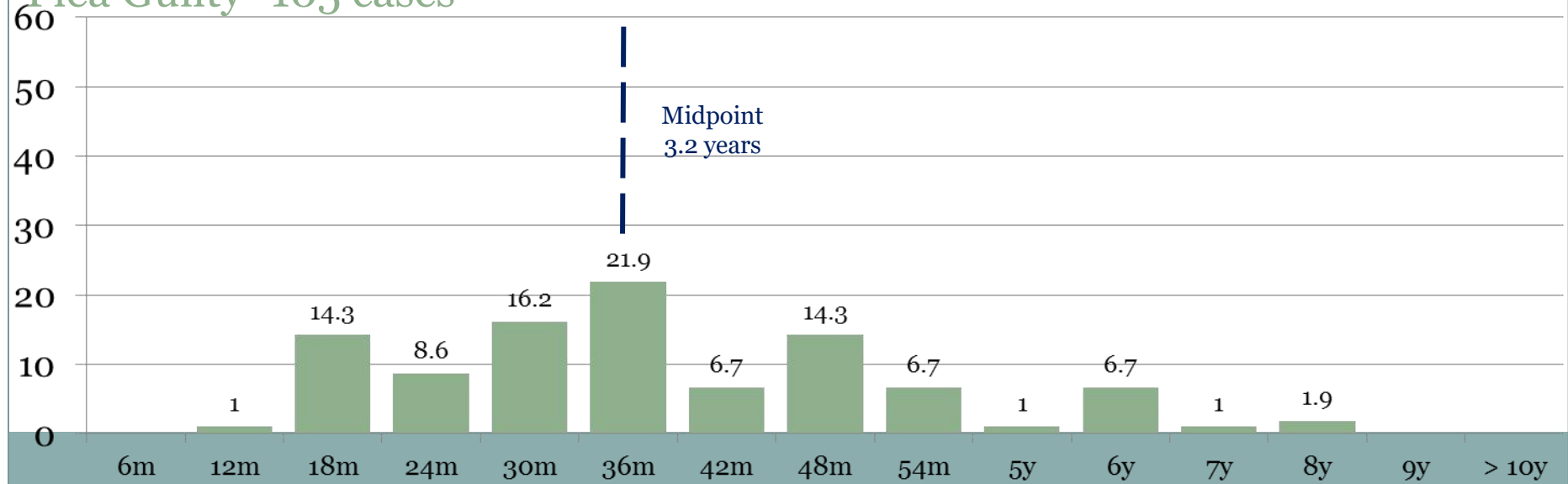


# Term of Sentence- Principal Offences Only s61M(2) Aggravated indecent assault- child <16

## Plea Not Guilty- 40 cases

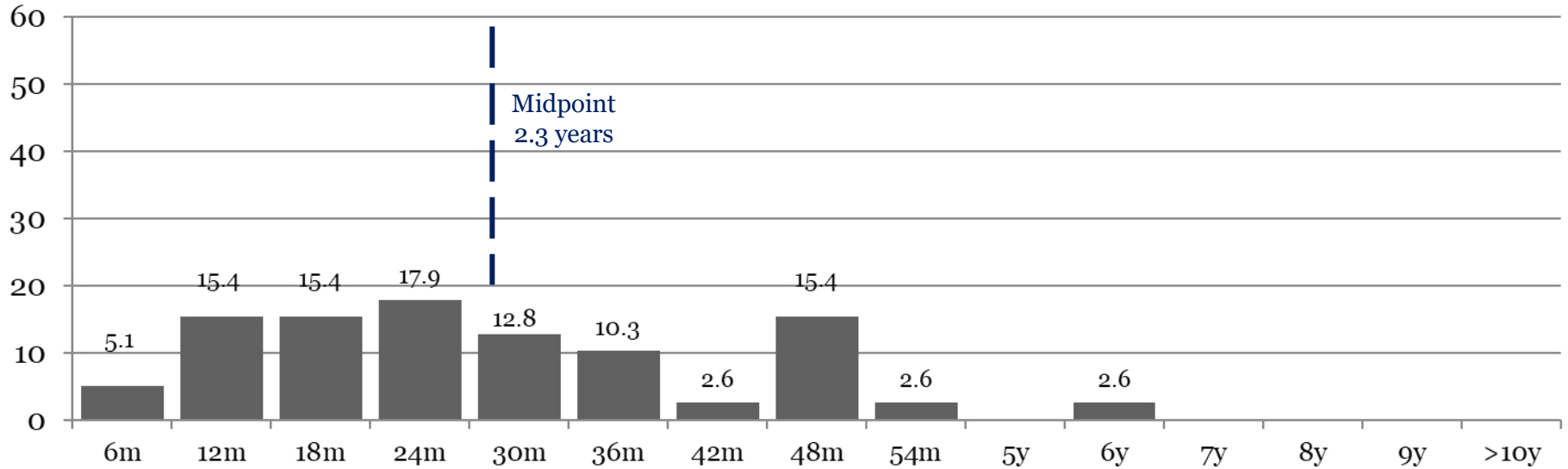


## Plea Guilty- 105 cases

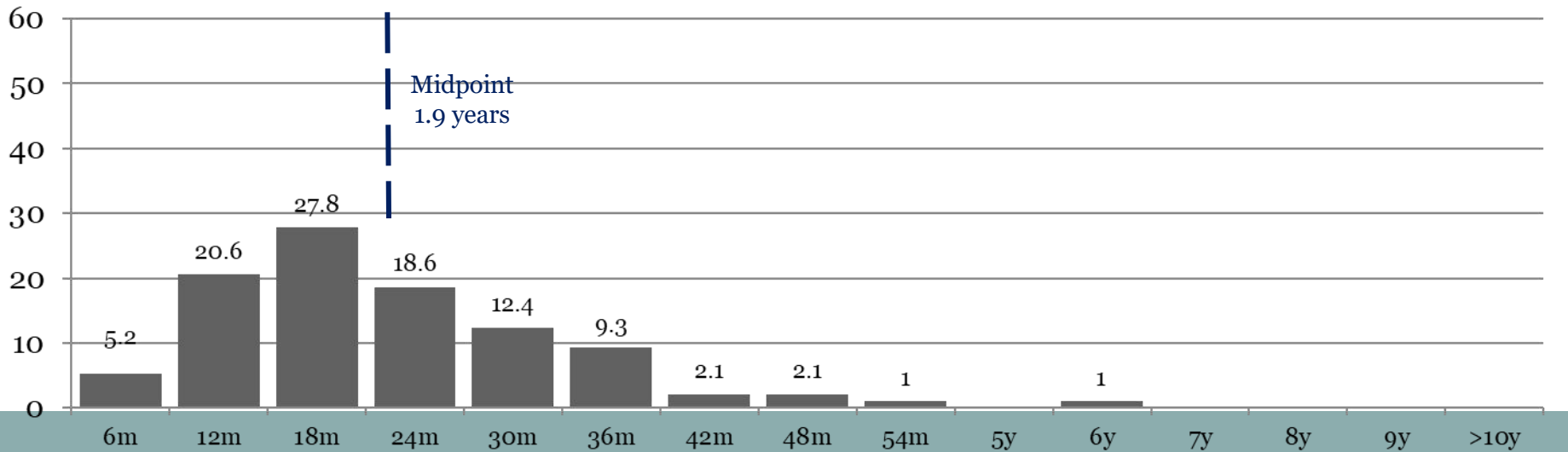


# Non-parole Period- Principal Offences Only s61M(2) Aggravated indecent assault- child <16

## Plea Not Guilty- 39 cases



## Plea Guilty- 97 cases



## s61M(2) (Aggravated indecent assault)

### Term of sentence

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
145	3.3yrs	40	3.7yrs	105	3.23yrs

3.23 years is 87.3% of 3.7 years **(just under 13% less for PG).**

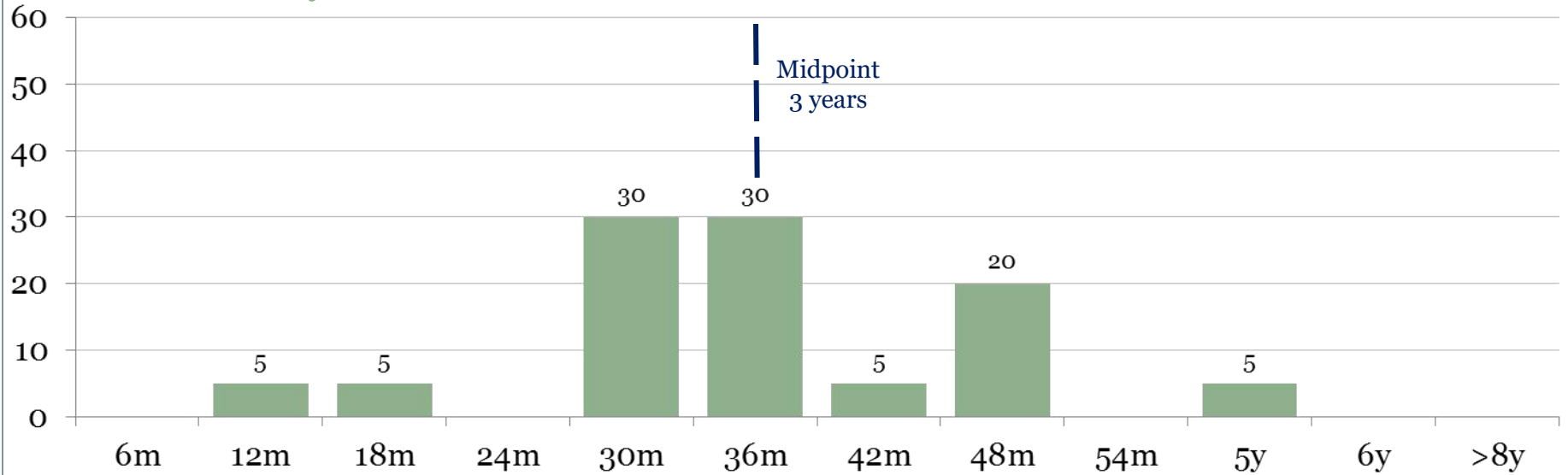
### Non-parole period

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
136	2.01yrs	39	2.37yrs	97	1.87yrs

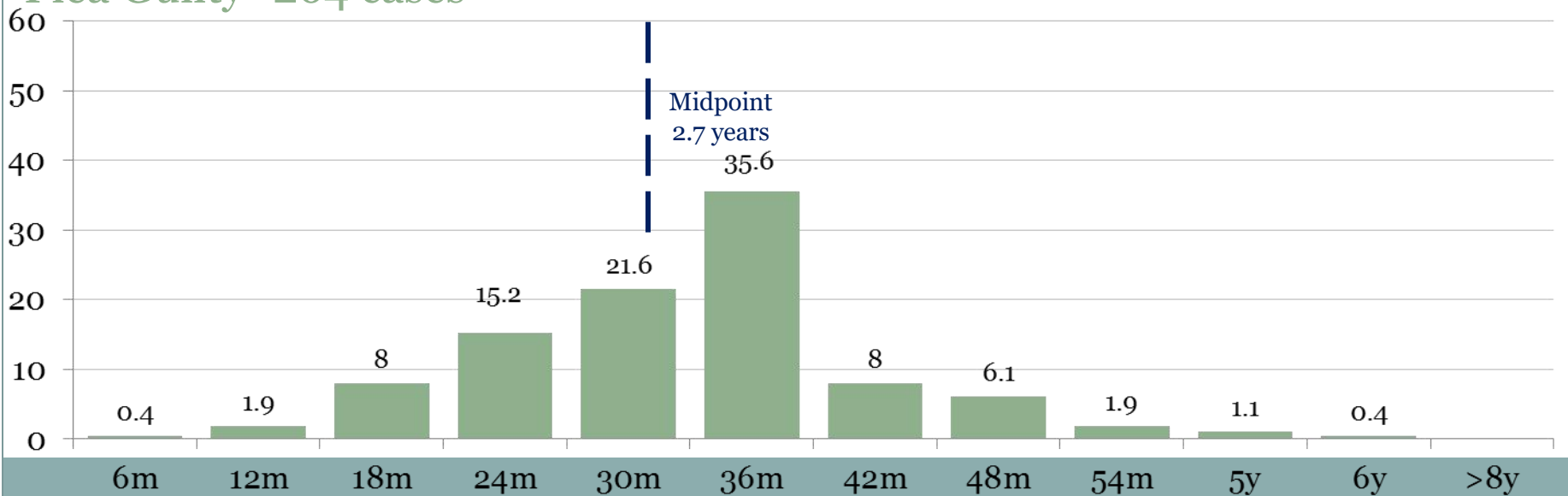
1.87 years is 79% of 2.37 years **(21% less for PG)**

# Term of Sentence- Principal Offences Only s35(4)- recklessly wound

## Plea Not Guilty- 20 cases

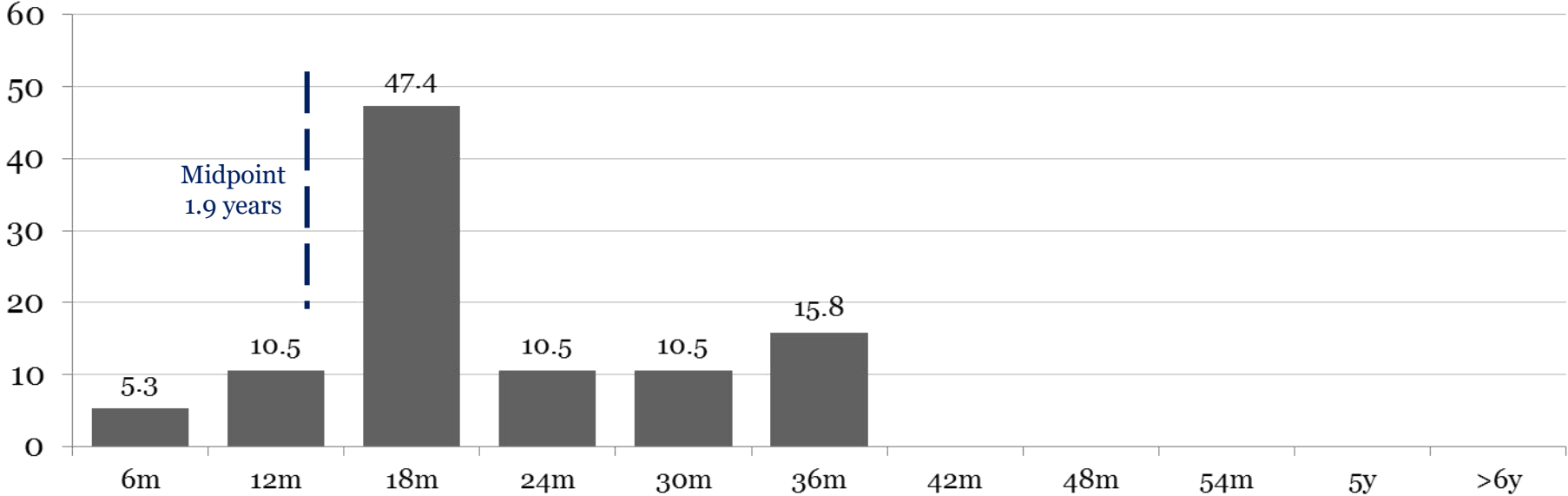


## Plea Guilty- 264 cases

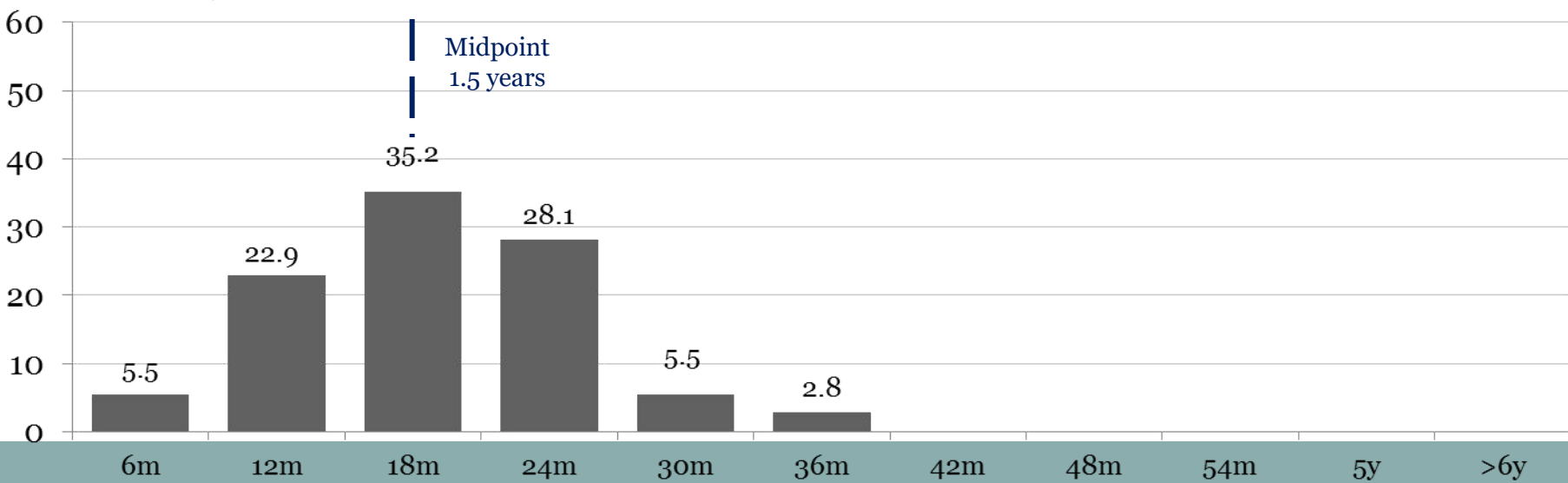


# Non-parole Period- Principle Offences Only s35(4)- recklessly wound

## Plea Not Guilty- 19 cases



## Plea Guilty- 253 cases



### s35(4) (Reckless wounding)

#### Term of sentence

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
288	2.76yrs	20	3yrs	264	2.74yrs

2.74 years is 91.3% of 3 years **(just under 9% less)**.

#### Non-parole period

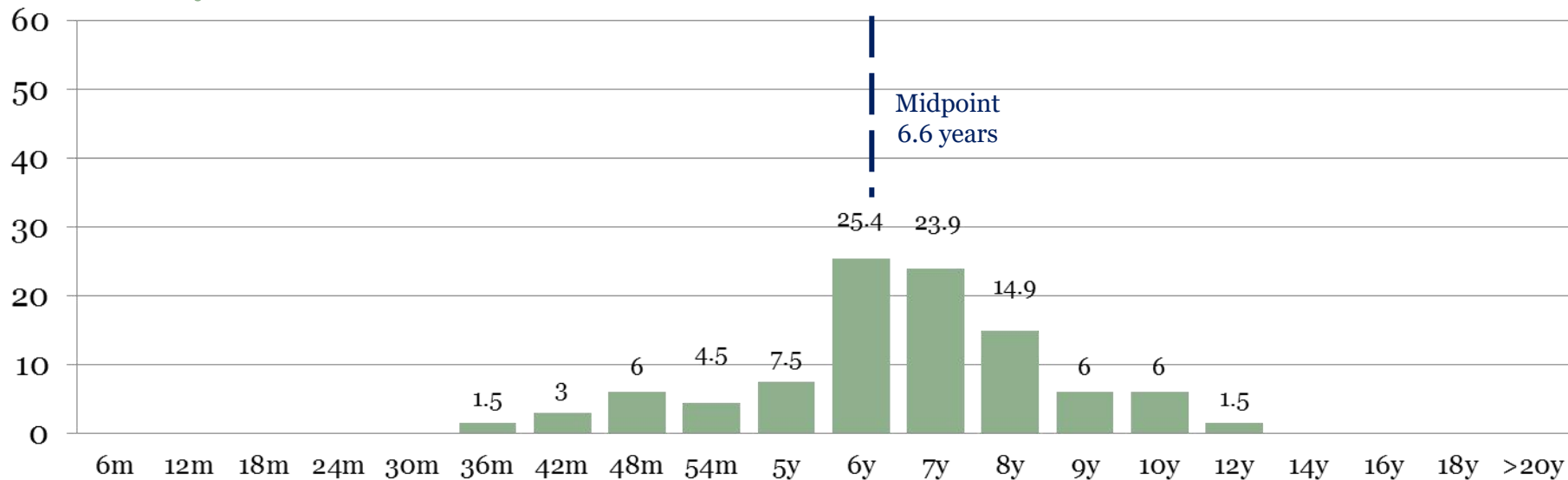
All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
276	1.58yrs	19	1.95yrs	253	1.56yrs

1.56 years is 80% of 1.95 years **(or 20% less)**

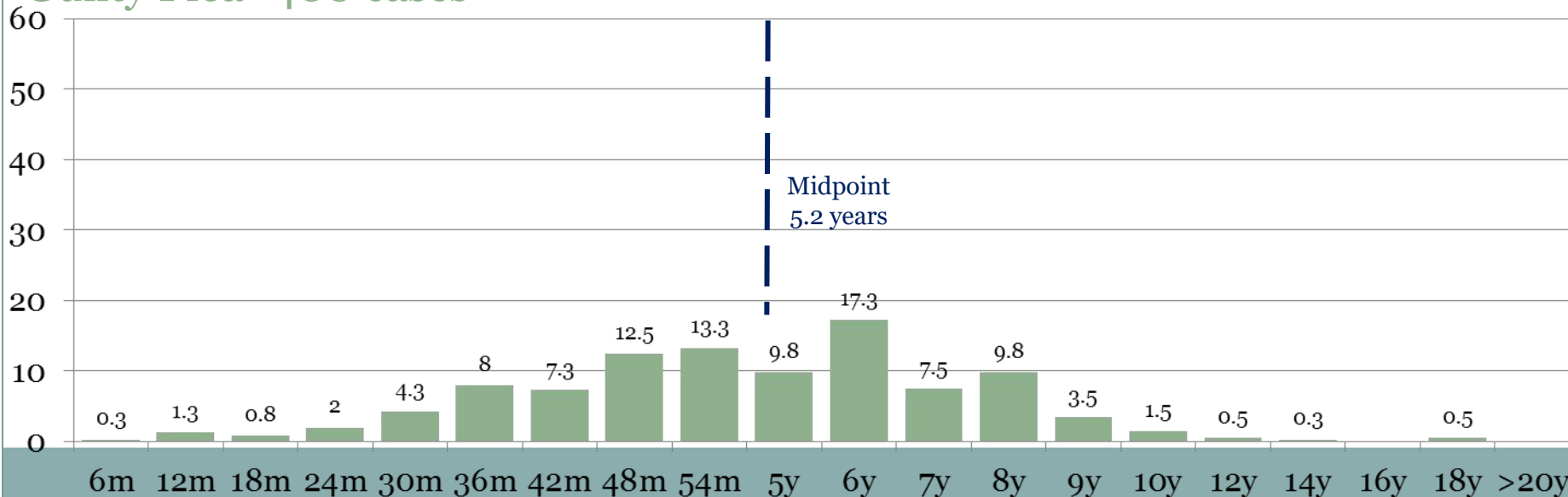
# Term of Sentence- Principal Offences Only

## s97(2) Aggravated robbery etc, armed with dangerous weapon

### Not Guilty Plea- 67 cases



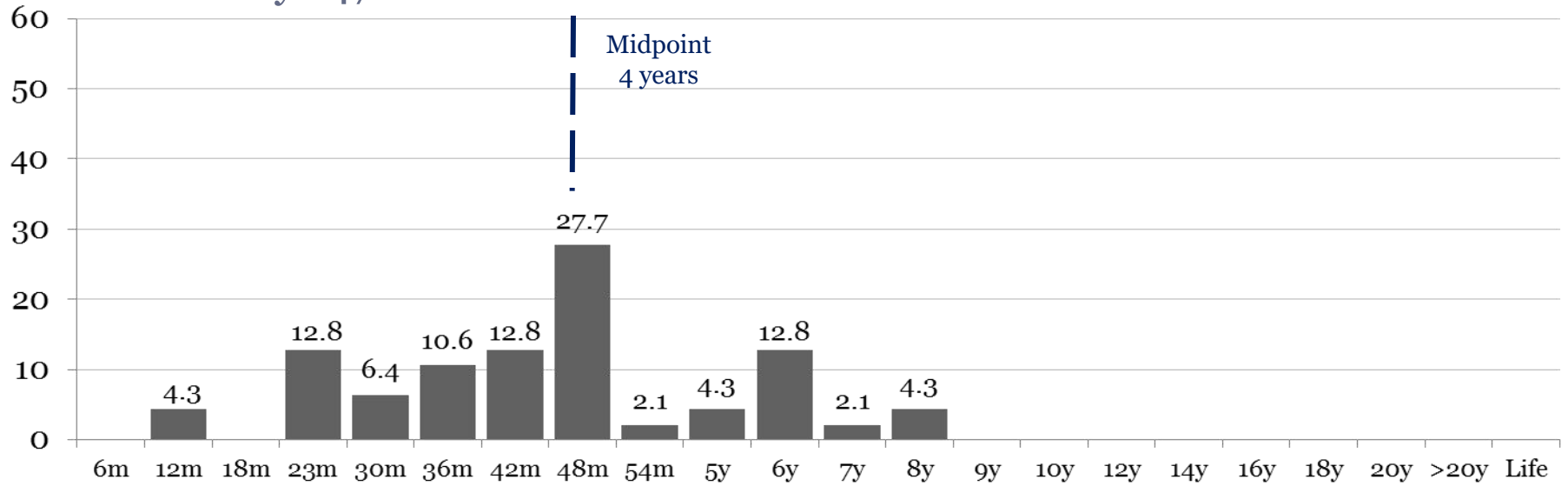
### Guilty Plea- 400 cases



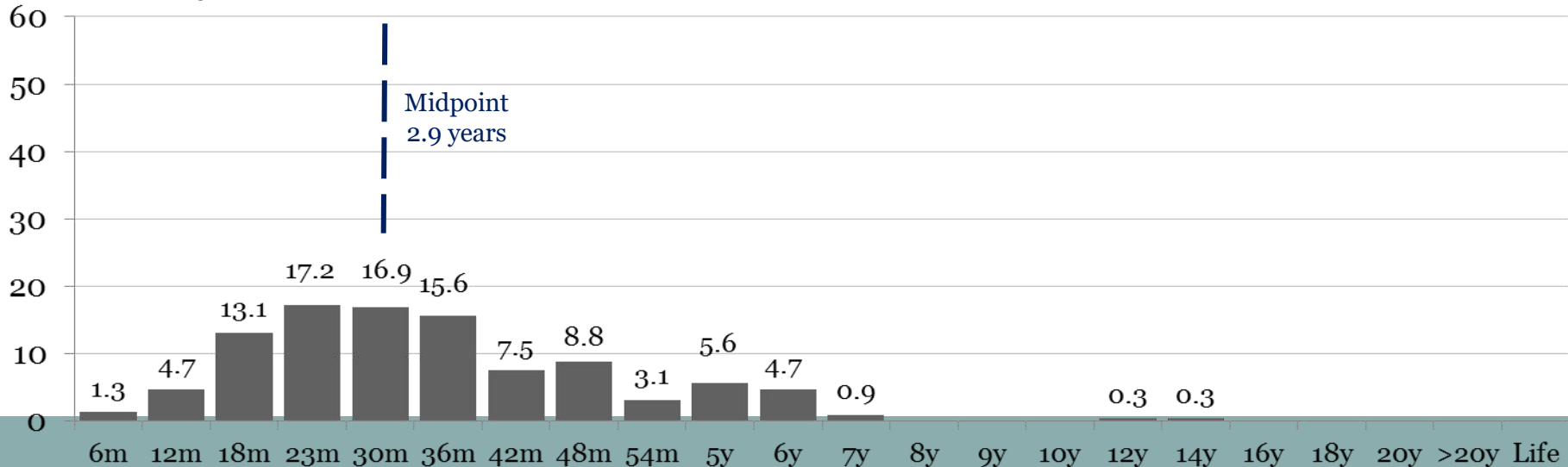
# Non-parole Period- Principal Offences Only

## s97(2) Aggravated robbery etc, armed with dangerous weapon

### Plea Not Guilty- 47 cases



### Plea Guilty- 320 Cases





**s97(2) (Agg Robbery etc, armed with dangerous weapon)**

**Term of sentence**

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
467	5.44yrs	67	6.62yrs	400	5.25yrs

5.25 years is 79.3% of 6.62 years **(just over 21% less)**.

**Non-parole period**

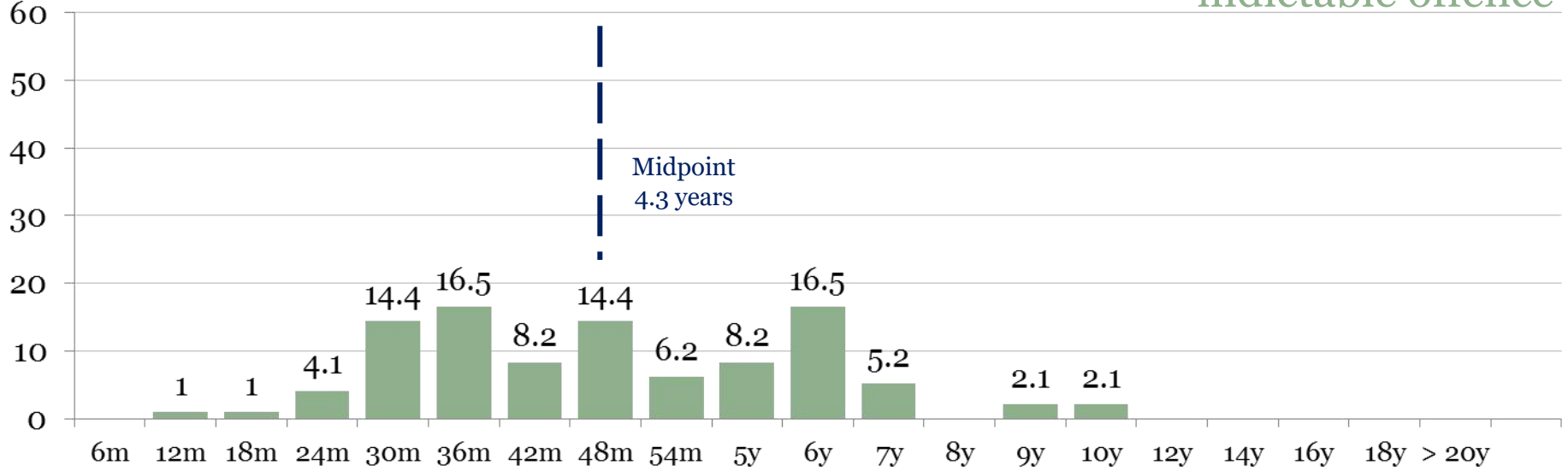
All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
367	3.09yrs	47	4.02yrs	320	2.94yrs

2.94 years is 73% of 4.02 years **(27% less)**.

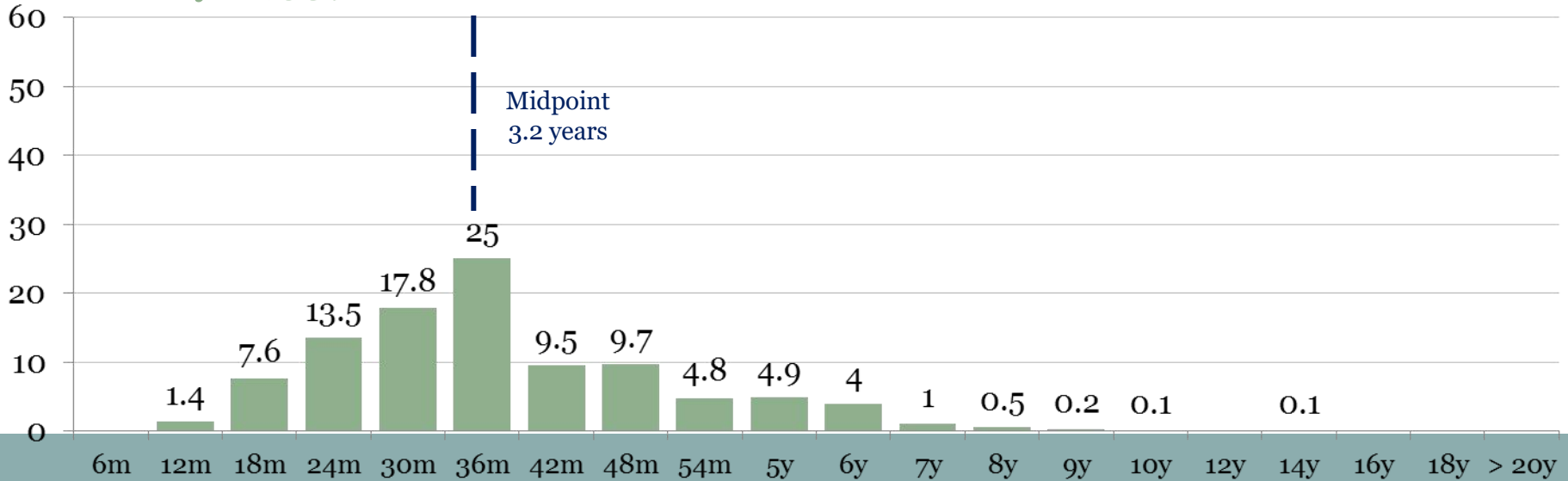
# Term of Sentence- Principal Offences Only

s112(2)- Aggravated break, enter and commit serious indictable offence

Plea Not Guilty- 97 cases



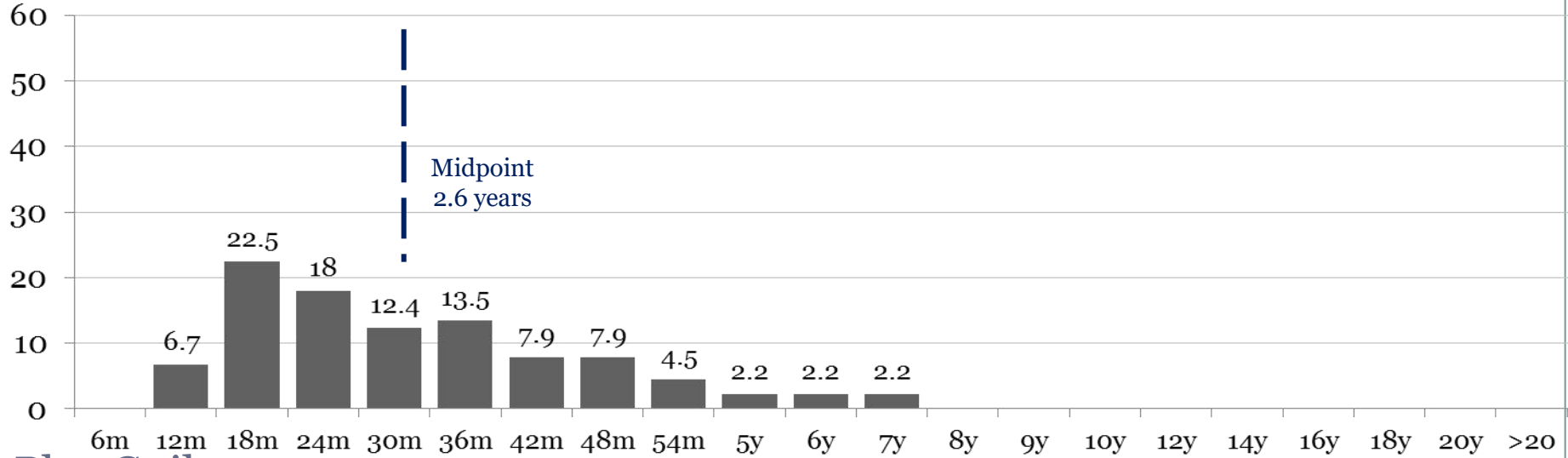
Plea Guilty- 1,539 cases



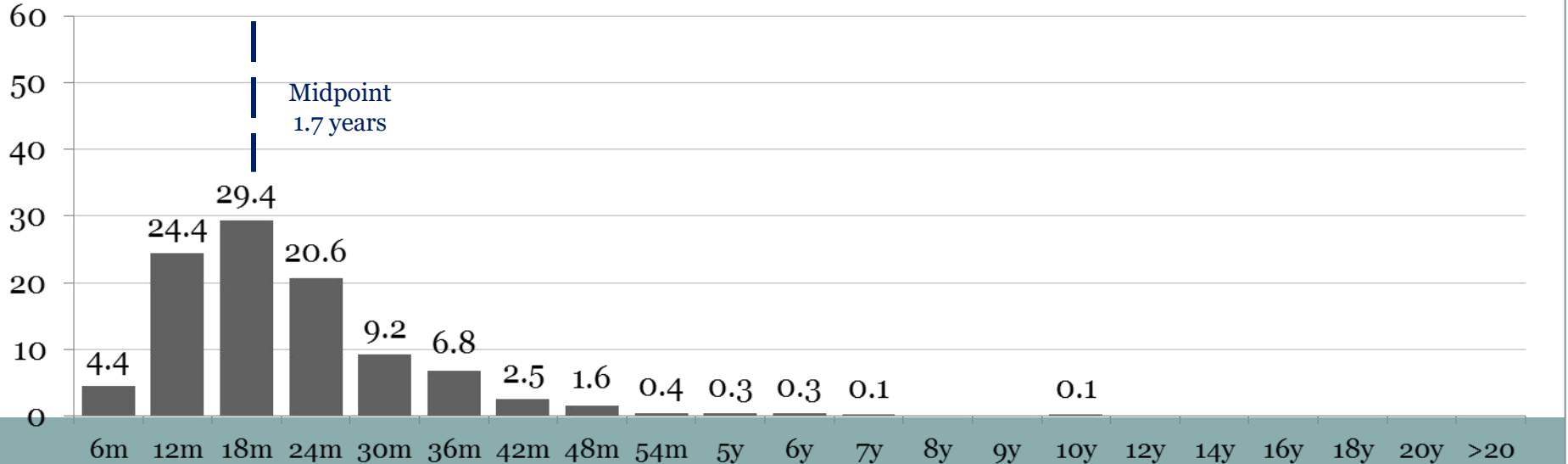
# Non Parole Period- Principal Offences Only

## s112(2)- Aggravated break, enter and commit serious indictable offence

Plea Not Guilty- 97 cases



Plea Guilty- 1,539 cases



**s112(2)** (Aggravated break, enter & commit SI offence)

**Term of sentence**

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
1640		97	4.26yrs	1539	3.15yrs

3.15 years is 73.9% of 4.26 years **(26% less for PG)**.

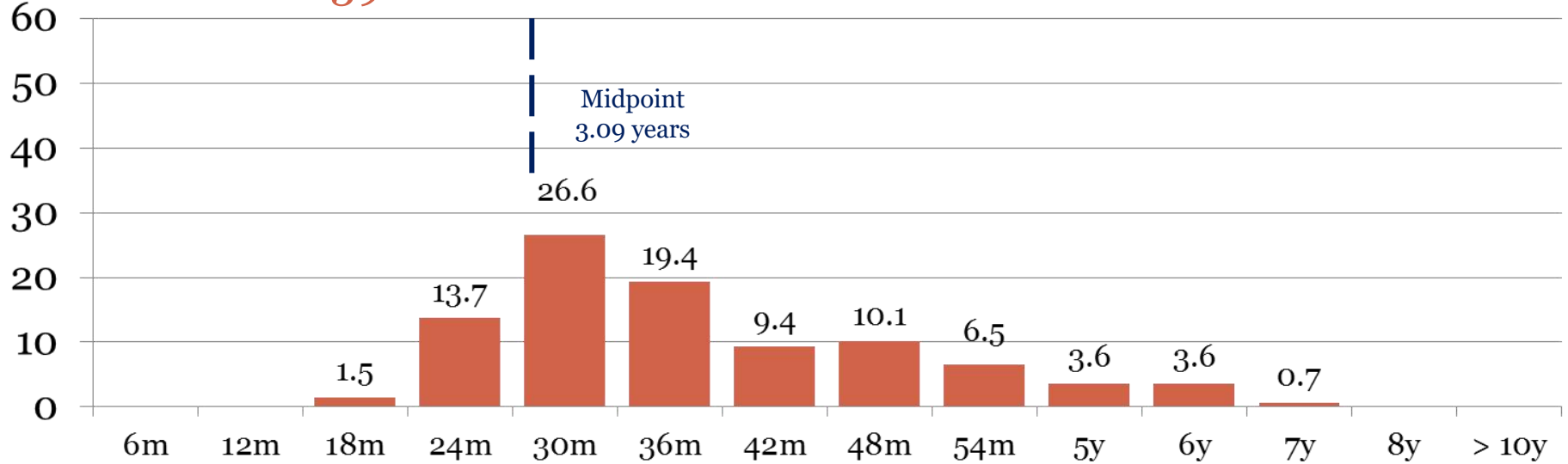
**Non-parole period**

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
1,640	3.22yrs	97	4.35	1,539	3.15yrs

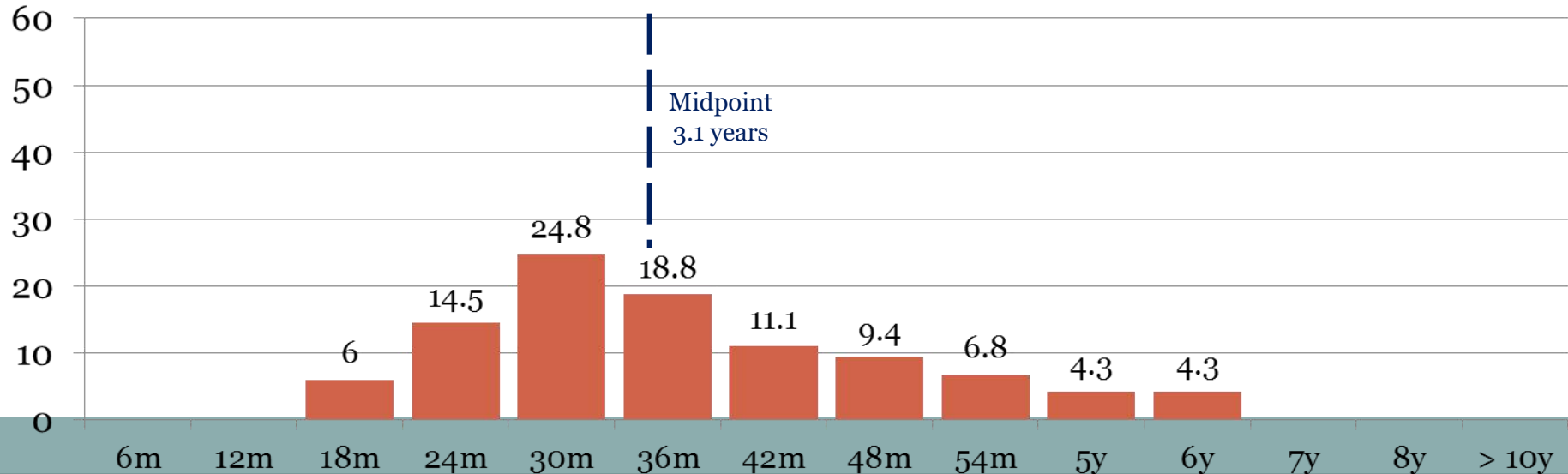
3.15 years is 72.4% of 4.35 years **(just over 27% less for PG)**

# Term of Sentence- Principal Offences Only s52A(1)(c)- dangerous driving occasioning death-manner dangerous

## All Offenders- 139 cases

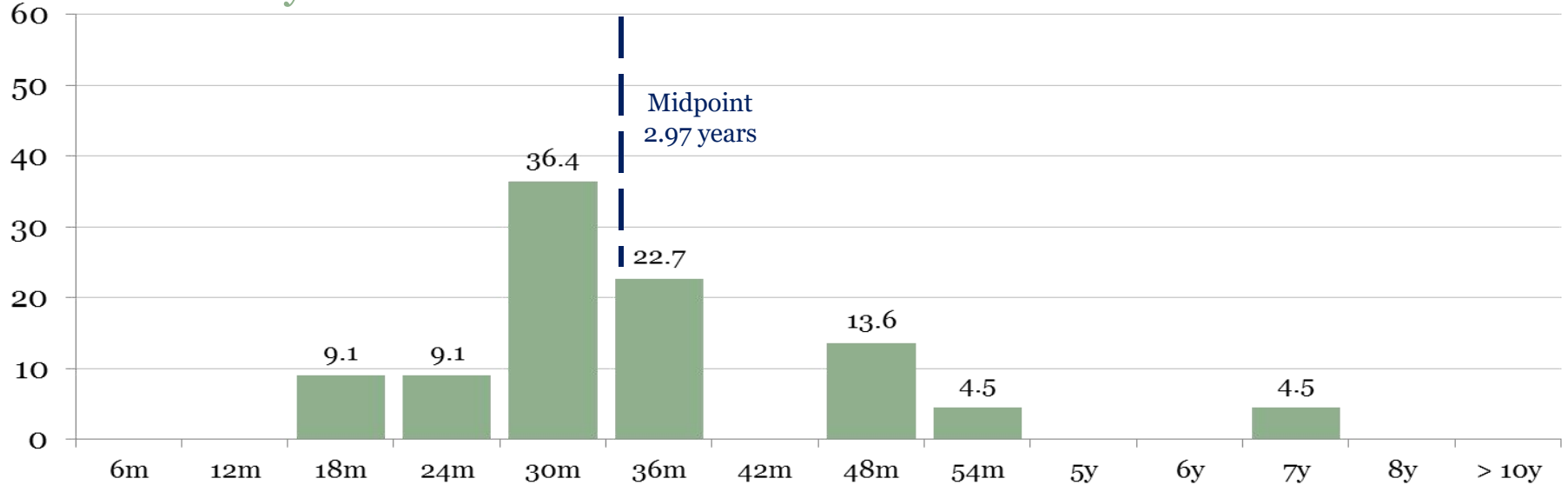


## Plea Guilty- 117 cases

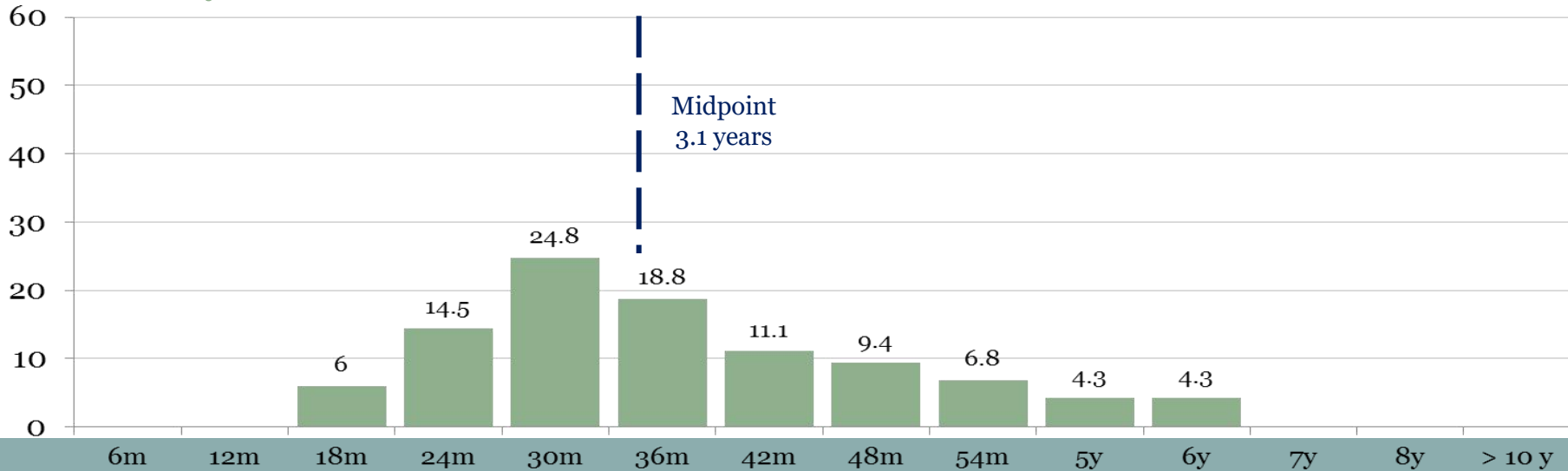


# Term of Sentence- Principal Offences Only s52A(1)(c)- dangerous driving occasioning death-manner dangerous

## Plea Not Guilty- 22 cases



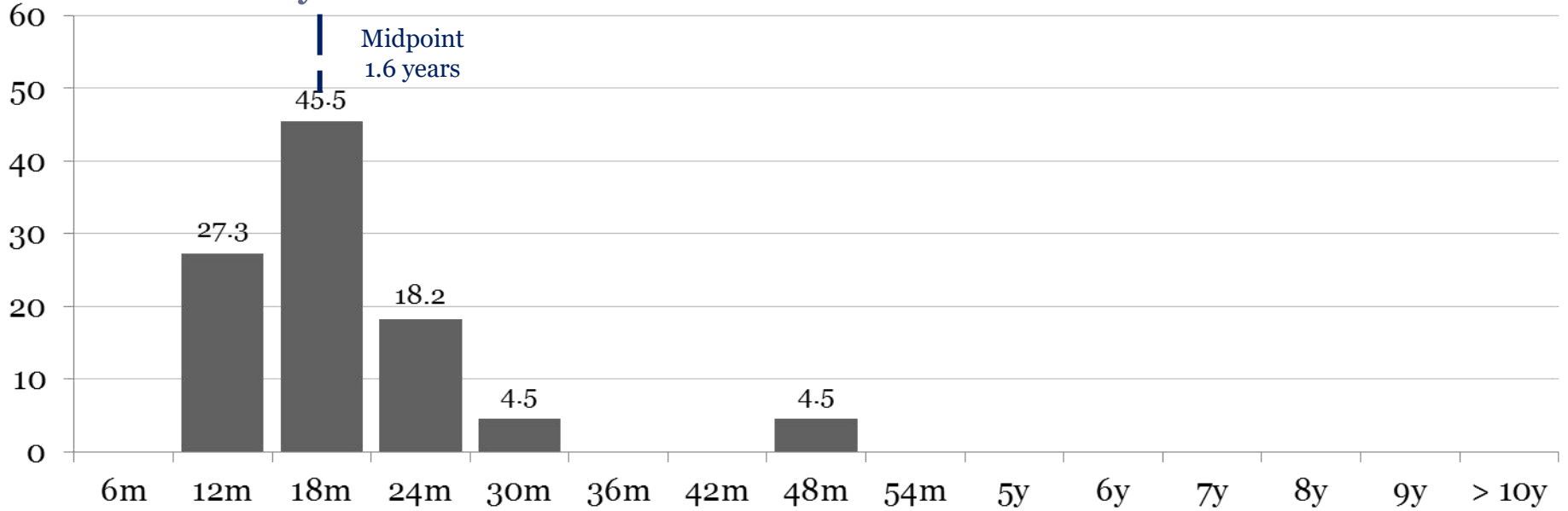
## Plea Guilty- 117 cases



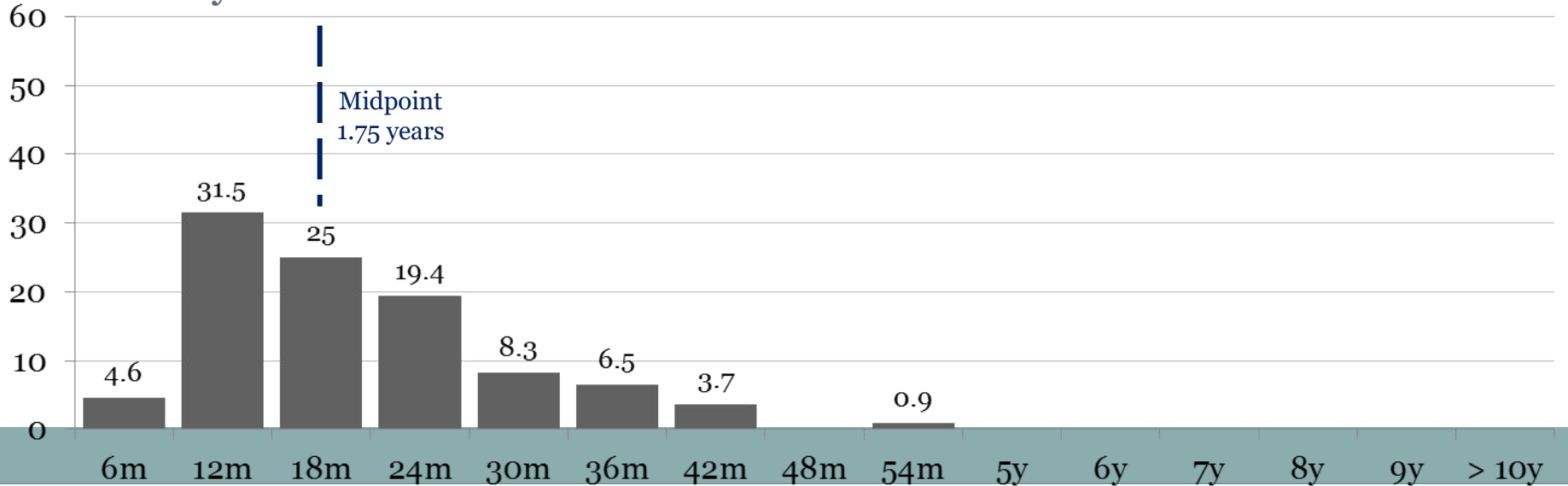
# Non-Parole Period- Principal Offences Only

s 52A(1)(c)- dangerous driving occasioning death- manner dangerous

## Plea Not Guilty- 22 cases



## Plea Guilty- 108 cases



**s52A(1)(c) (Drive manner dangerous causing death)**

**Term of sentence**

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
139	3.09yrs	22	2.977yrs	117	3.1yrs

3.1 years is 104.1% of 2.977 years **(or just over 4% more for PG)**.

**Non-parole period**

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
130	1.66yrs	22	1.63yrs	108	1.75yrs

1.75 years is 107% of 1.63 years **(or just over 7% more for PG)**.



# Spot the Difference



What might this all mean on Monday morning?



The discount remains an important tool in any practitioner's kit



*“The consequences of the general availability of legal aid must, however, be recognised and coped with. It must be recognised that guilty persons can put forward false stories and be defended without cost to themselves. The result is the depletion of funds available for legal aid and congestion and delay in the criminal courts. It is not, generally speaking, for the solicitor assigned or the legal authority to judge the truth of the assisted person’s story, and it is only in the exceptional case that it can be proper to refuse or discontinue assistance because of the strength of the prosecution’s case. If a plea of guilty, as distinct from remorse evidenced by such a plea, cannot be regarded as a factor in mitigation there is no incentive, other than demands for honesty, for an offender to admit his guilt and experience indicates that demands of honesty have but little influence on many of those who appear in the docks of criminal courts”*

Chief Justice King in R v Shannon (1979) 21 SASR 442 at 451

# The EAGP makes you a believer



## 72 Obligations of legal representative of accused

- (1) The accused person's legal representative is to seek to obtain the accused person's instructions concerning the matters to be dealt with in the case conference before participating in the case conference.
- (2) The accused person's legal representative must explain the following matters to the accused person before the case conference certificate is completed—
  - a) the effect of the scheme for the sentencing discount applied under Part 3 of the [Crimes \(Sentencing Procedure\) Act 1999](#) for a plea of guilty to an offence,
  - b) the penalties applicable to the offences certified in the charge certificate and to any other offences the subject of offers made by the accused or the prosecutor in the committal proceedings,
  - c) the effect on the applicable penalty if the accused person were to plead guilty to any offence at different stages of proceedings for the offence.



# Practical Thought 1:



**THE DISCOUNT IS THE BEGINNING – NOT THE END – OF  
THE SIGNIFICANCE OF A PLEA OF GUILTY**

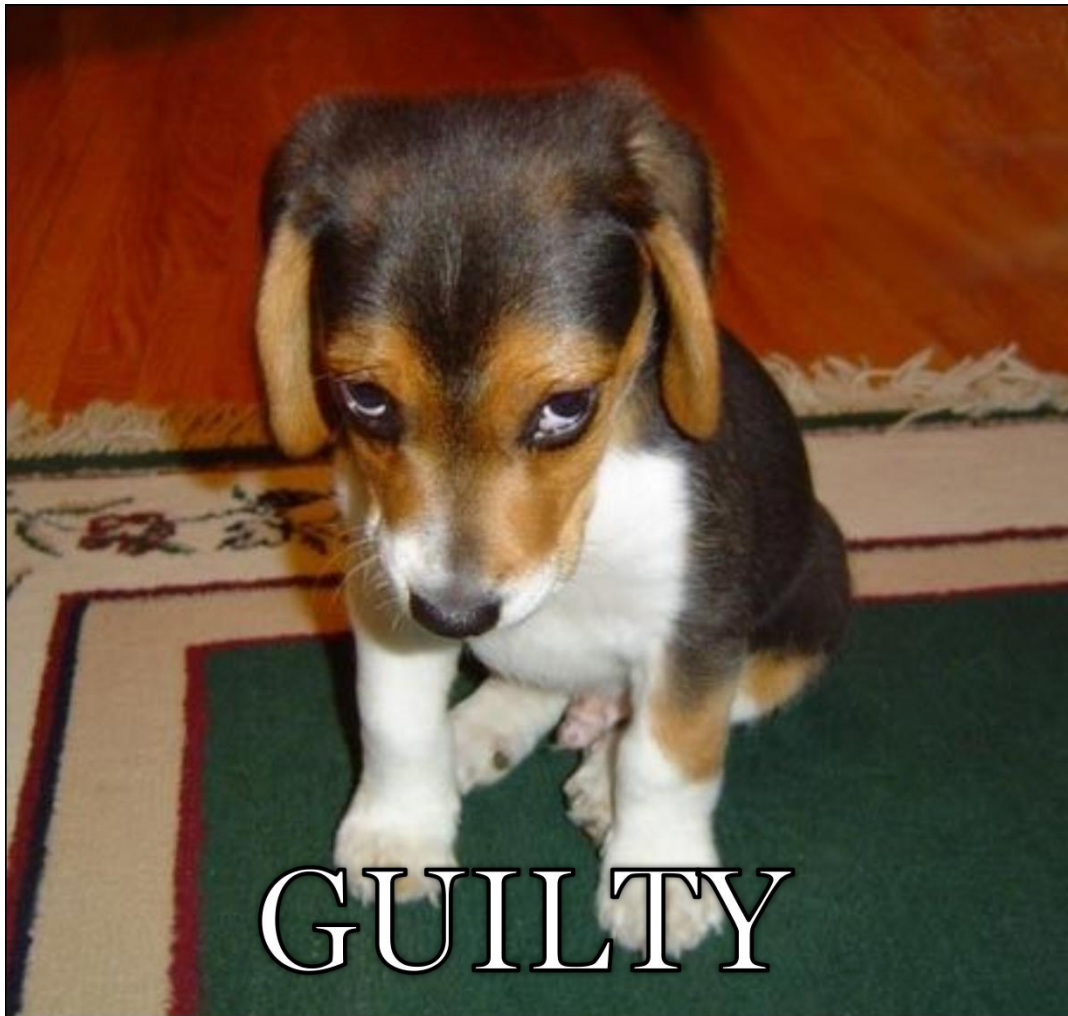


*“...if the offender has nothing to gain by admitting his guilt, he will see no reason for doing so. I am impressed by the strong practical reasons for recognising a willingness to cooperate in the administration of justice by pleading guilty as conduct possessing a degree of merit, quite apart from remorse, which can be taken into account in assessing sentence”*

Chief Justice King in R v Shannon (1979) 21 SASR 442 at 451







GUILTY

## Section 21A

(3) *Mitigating factors* The mitigating factors to be taken into account in determining the appropriate sentence for an offence are as follows—

(i) the remorse shown by the offender for the offence, but only if—

(i) the offender has provided evidence that he or she has accepted responsibility for his or her actions, and

(ii) the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both).

*“a plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on part of the offender...”*

*Siganto v The Queen* (1998) 194 CLR 656 at [33] per Gleeson CJ, Gummow J, Hayne J and Callinan J.

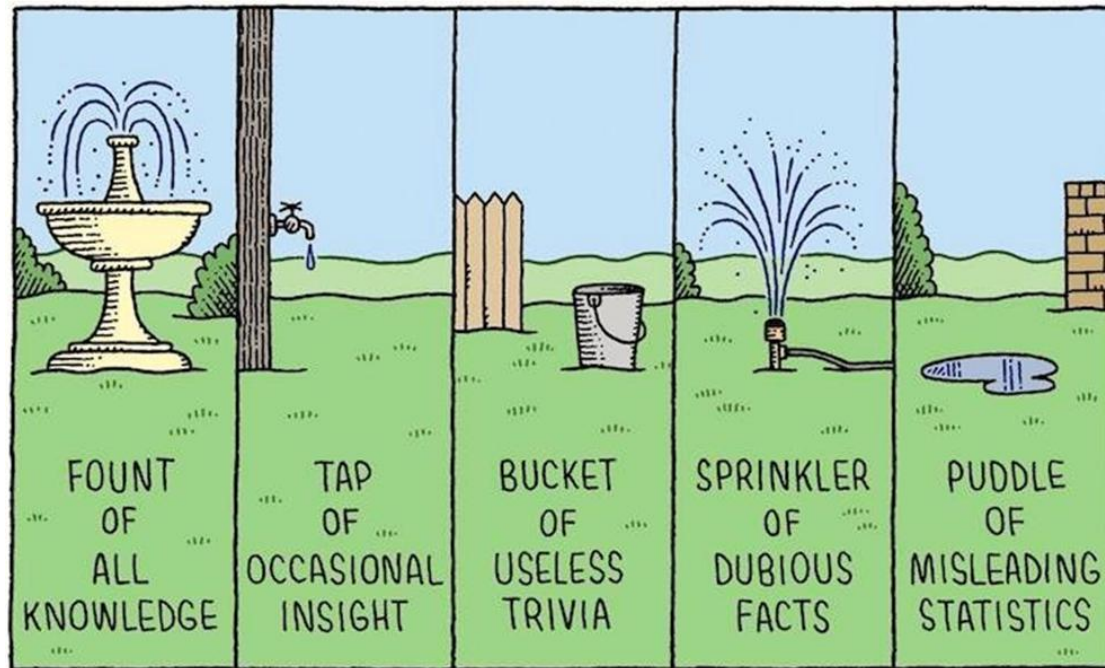
*“The bare fact of a plea is, of itself, a very simple expression of remorse. Much greater weight may be accorded to the conduct and the statements of an accused person over time, which confirm a position of genuine and deeply felt contrition. When such contrition is taken into account by a sentencing judge, then the diminution of sentence is given for contrition, not the plea of guilty. The plea in such a case is, at most, evidence of remorse or contrition and, often, not the best evidence”*

R v Thomson (2000) 49 NSWLR 383 at 412

# Practical Thought 2



## STATISTICS: WHAT ARE THEY GOOD FOR?



Consistency is not demonstrated by, and does not require, numerical equivalence. *Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing judge.* It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were. Presentation in any of these forms suggests, wrongly, that the task of a sentencing judge is to interpolate the result of the instant case on a graph that depicts the available outcomes. But not only is the number of federal offenders sentenced each year very small, the offences for which they are sentenced, the circumstances attending their offending, and their personal circumstances are so varied that it is not possible to make any useful statistical analysis or graphical depiction of the results.

*Reference has already been made to the inutility of the presentation of the sentences imposed on federal offenders by means of numerical tables, bar charts and graphs*

*The Queen v Pham* (2015) 256 CLR 550 at [48]

*In the present case, the statistics, whilst demonstrating that the sentence on Count 1 on the indictment was outside the upper end of the range of sentences provided by the Judicial Commission, do not provide any real assistance in determining whether the sentence was manifestly excessive in the absence of any detail concerning the circumstances of the particular cases in question.*

Per Bathurst CJ in *SS v R* [2016] NSWCCA 197 at [63]



*The reliance on statistics in relation to this offence is unhelpful. The applicant is comparing the notional sentence of 7 years with actual sentences imposed, i.e. sentences after any discount has been applied. Accordingly, no valid comparison is possible. In addition, there are the other limitations associated with statistics set out most recently in Director of Public Prosecutions (Cth) v De La Rosa [2010] NSWCCA 194; 243 FLR 28 at [303] - [305] and Hili v The Queen; Jones v The Queen [2010] HCA 45; 242 CLR 520 at [53] - [54].*

Per Hoeben J in *Holohan v R* [2012] NSWCCA 105 at [51]

On particular limitations for aggregate sentencing:

In my view, in this case, *the use of comparative statistics is not a rewarding process*. Like is not being compared with like. I agree with the remarks of R A Hulme J in his judgment about the basis of the statistics provided and the need for counsel, if they are to assist the Court, to properly understand the statistics, the basis upon which they are compiled and the limits which constrain their use according to authority.

Per Garling J in *Knight v R* [2015] NSWCCA 222 at [89]

I am not satisfied the sentence fell outside of the range of sentences that could have been imposed. Other than their bold assertion that the range requires a more severe sentence, the Crown did not present any material to support the assertion of the range, such as statistics or comparable cases.

While statistics must be used with care, an assertion of that kind ought be accompanied by some comparative material. As earlier stated, given that the gravity of the offending was towards the lower end of objective culpability and given the nature of the subjective circumstances of the offender, the sentence is not outside the range available and is not manifestly inadequate.

*R v NT* [2015] NSWCCA 136 [76] – [77]

It might be said, so far as *Pham* is concerned, that Bell and Gageler JJ were expressing a minority view about the use of sentencing statistics for federal offences, *Barbaro* notwithstanding. However, New South Wales law may be different if one has regard to s 8 *Judicial Officers Act 1986* (NSW). That provision authorises the Judicial Commission to “disseminate information and reports on sentences imposed by courts”. That dissemination is for the purpose “of assisting courts to achieve consistency in imposing sentences”. By dint of s 8(2) the dissemination does not limit “any discretion that a court has in determining a sentence”. In this context, with respect, the judgment of Bell and Gageler JJ provides important guidance in the proper use in sentencing that may be made of statistics “disseminated” by the Judicial Commission under the statutory authority of s 8.

I would wish to emphasise, however, that the pattern which may appear from sentencing statistics can never be decisive. For the reasons explained by Simpson J in *De La Rosa*, sentencing involves the dispensation of individualised justice. The obligation of the sentencing court is to impose the appropriate sentence for the offence and the offender. As has frequently been stated, this involves a consideration of all facts, matters and circumstances relevant to sentencing the particular offender for the particular offence. The use of comparable cases and statistics ultimately must remain a subordinate, even if

## USING STATISTICS IN SENTENCING ADVOCACY

1. Consider your audience
2. Master JIRS
3. Combine statistical analysis with comparative cases
4. Use statistics strategically



# Practical Thought 3



**AGGREGATE SENTENCING AND THE DISCOUNT**

Finally, we do not believe that our approach occasions any injustice to offenders, and, in particular, to offenders who facilitate the administration of justice by entering pleas of guilty. That is because, as we have said, it is almost inevitable that the shortening of indicative sentences (by way of discounts being applied to them) will lead to an aggregate sentence that is itself shortened as a result.....

To express the above proposition in another way, it could be that our difference with Basten JA is a difference of route, not destination. By that we mean, whilst we do not accept that an explicit discount is to be applied to an aggregate head sentence, we do accept that the discounting of indicative sentences can be expected to lead to that outcome, in terms of the actual length of the aggregate sentence.

PG v R [2017] NSWCCA 179 at [92] – [93]