

Are the courts becoming more lenient? Recent trends in convictions and penalties in NSW Higher and Local Courts

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INTRODUCTION

Public concern about whether the courts are becoming too lenient and whether offenders are 'getting off' too often has been a recurring issue in NSW since the early 1980s. Such concern about leniency is typified by some recent media headlines—

'Cakewalk as child molesters back on street'
(*Sunday Telegraph* 22 Sep. 1996, p. 31)

'Judges shorten jail terms'
(*Sunday Telegraph* 8 Sep. 1996, p. 8)

'Courts too soft on child abuse'
(*Daily Telegraph* 10 Sep. 1997, p. 21)

'Millionaire John Singleton drove his Bentley down the Hume Highway at 160km/h. In court yesterday he was not fined, nor did he lose his licence. In fact he wasn't even convicted. IS THIS FAIR'
(*Daily Telegraph* 17 Sep. 1997, p. 1)

'Bring back the death sentence'
(*Sun Herald* 7 June 1998, p. 11)

'When justice is no longer just'
(*Daily Telegraph* 23 June 1998, p. 1)

'This guy crashed his car while he was drunk. He had a reading of .178. He was not fined. He did not lose his licence. Oh, and something else - HE'S A POLICE OFFICER'
(*Daily Telegraph* 24 June 1998, p. 1)

'How am I supposed to ... tell my children their father's life was worth nothing? Two acquitted over killing of shopkeeper'
(*Sydney Morning Herald* 6 Aug. 1998, p. 4)

Part of the reason for the concern about leniency is a lack of public understanding about the sentencing process and how it can produce what seem to be large disparities in the outcomes and penalties for apparently similar crimes. This lack of

understanding can easily be manipulated by the media to create the impression that the courts are very haphazard in the way they deal with offenders.

This bulletin is designed to present some basic facts about convictions and the penalties imposed by the NSW Courts. The bulletin examines a range of offences dealt with by the Local and Higher (District and Supreme) Courts to see just how many people the Courts are convicting, what penalties the Courts are imposing on convicted offenders and whether penalties are getting any more lenient over time. The bulletin also looks at how prior convictions and offence severity affect the type and size of the penalty, as these factors can be taken into account when the court decides on an appropriate penalty.

CONVICTION RATES

In this section conviction rates are examined in the Higher and Local Courts for a range of major offences — *assault, sexual assault, child sexual assault, manslaughter, murder, break and enter, robbery, fraud and deal and traffic in opiates*. For each of the selected major offences, conviction rates are based on the outcomes of all charges relevant to those offences that were finalised in the Higher or Local Courts in NSW in 1996. Note that conviction rates are based on the outcomes of charges rather than the outcomes for accused persons because accused persons may have multiple charges for one or more types of offence, and the outcome of each charge is decided separately.

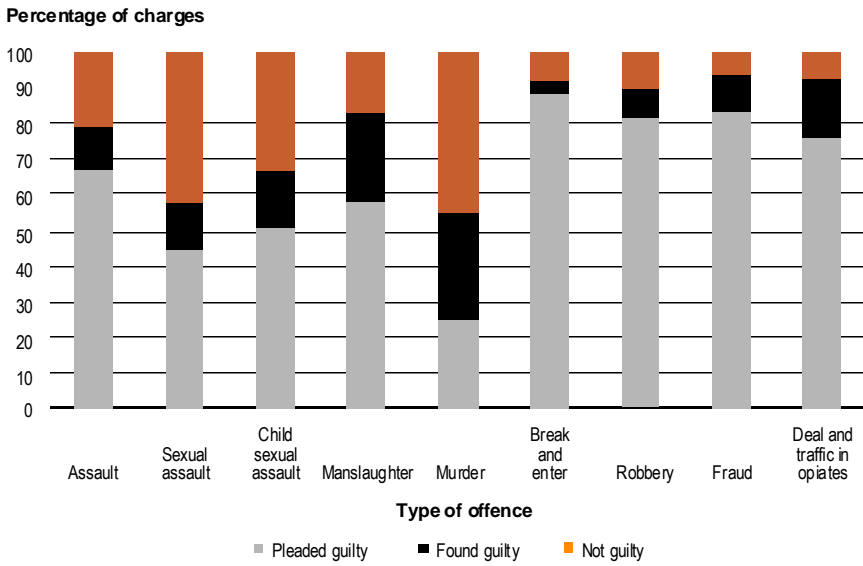
For each selected offence in each Court the following are considered—the proportion of charges to which the accused *pleaded guilty*, the proportion of charges to which the accused did not plead guilty but was *found guilty* by the Court, and the proportion of charges to which the accused did not plead guilty and was *found not guilty* by the Court. Any charges where no genuine decision was made about the guilt or innocence of the accused were excluded to limit the charges to those that were legitimately being processed in the court system, rather than those that were laid inappropriately.¹

Higher Courts

Figure 1 presents, for each of the selected offences, the outcomes of charges dealt with by the Higher Courts in 1996.

Figure 1 shows that, overall, conviction rates were quite high for most of the selected offences dealt with in the Higher Courts. Over three-quarters of the *assault* charges, over 80 per cent of the *manslaughter* charges and 90 per cent or more of the charges involving *break and enter, robbery, fraud or deal and traffic in opiates* resulted in a conviction, either because the accused pleaded guilty or because the accused was found guilty by the Court. Conviction rates were lower for *sexual assault, child sexual assault* and *murder*, although they were still reasonably high. Just over half of the *sexual assault* and *murder* charges, and about two-thirds of the *child sexual assault* charges resulted in a conviction. In the case of *murder*, however, it should

Figure 1: Outcome of charges, NSW Higher Courts, 1996



be noted that many people acquitted of *murder* are found guilty of *manslaughter*.

Another point to note from Figure 1 is that the offences which had the highest conviction rates — *break and enter*, *robbery*, *fraud* and *deal and traffic in opiates* — also had the highest rates of guilty pleas. Guilty pleas comprised over three-quarters of the charges for these offences, and reached as high as 88 per cent for *break and enter* charges. Where the accused did not plead guilty, a conviction resulted slightly more often than an acquittal for *fraud* and *deal and traffic in opiates* charges, while an

acquittal resulted slightly more often than a conviction for *break and enter* and *robbery* charges.

Guilty pleas were also quite common for *assault*, occurring in about two-thirds of the *assault* charges where the accused did not plead guilty, an acquittal was more likely than a conviction.

Guilty pleas were less common for *sexual assault*, *child sexual assault*, *manslaughter* and *murder*. Only 44 per cent of *sexual assault* charges, 50 per cent of *child sexual assault* charges, 58 per cent of *manslaughter* charges and 24

per cent of *murder* charges resulted in a guilty plea. Where the accused did not plead guilty, an acquittal resulted more often than a conviction for *sexual assault*, *child sexual assault* and *murder* charges, but a conviction was more common for *manslaughter* charges.

Local Courts

Figure 2 presents, for each of the selected offences, the outcomes of charges dealt with by the Local Courts in 1996. Note that the Local Courts do not deal with *manslaughter*, *murder* or *robbery* charges.

Figure 2 shows that, overall, conviction rates in the Local Courts were quite high for most of the selected offences, except for *sexual assault* and *child sexual assault*. The conviction rate for *child sexual assault* was particularly low, at 39 per cent. By contrast, almost three-quarters of the *assault* charges and over 80 per cent of *break and enter*, *fraud* and *deal and traffic in opiates* charges resulted in a conviction.

The low conviction rate for *sexual assault* charges may reflect the difficulty involved in proving a case where the central issue revolves around whether the alleged victim consented to sexual activity or not. For *child sexual assault* charges, consent is not an issue, as a child under 16 years is considered by law to be incapable of forming a valid consent. The low conviction rate for this type of offence may, in part, reflect difficulties associated with establishing the reliability of children’s evidence.

Figure 2: Outcome of charges, NSW Local Courts, 1996

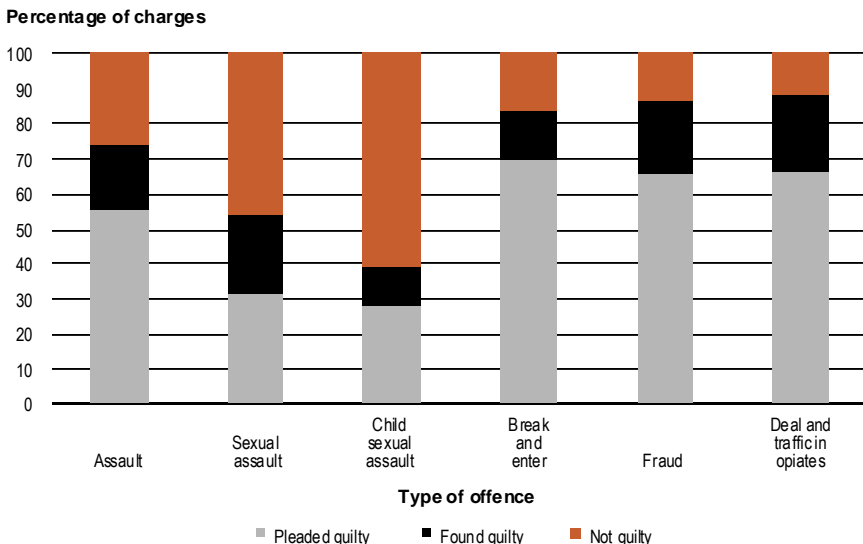


Figure 2 also shows that guilty pleas were most common for the offences that had the highest conviction rates — *break and enter*, *fraud*, *deal and traffic in opiates* and *assault*. The accused pleaded guilty in about two-thirds of the *break and enter*, *fraud* and *deal and traffic in opiates* charges, and in just over half of the *assault* charges. Where the accused did not plead guilty, a conviction was more likely than an acquittal for *fraud* and *deal and traffic in opiates* charges, whereas an acquittal was more likely than a conviction for *break and enter* and *assault* charges.

TRENDS IN THE PENALTIES IMPOSED BY THE COURTS

Trends in the use of imprisonment by the NSW Higher and Local Courts are now examined for persons convicted of each of the selected offences in matters

Table 1: The percentage of convicted offenders imprisoned, NSW Higher Courts, 1990-1997

| | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | |
|-----------------------------|------|------|------|------|------|------|------|------|----------------------|
| <i>Type of offence</i> | % | % | % | % | % | % | % | % | <i>Overall trend</i> |
| Assault | 27 | 33 | 39 | 44 | 43 | 44 | 53 | 49 | Upward |
| Sexual assault | 45 | 50 | 57 | 66 | 62 | 68 | 68 | 66 | Upward |
| Child sexual assault | 45 | 45 | 59 | 62 | 60 | 65 | 69 | 63 | Upward |
| Manslaughter | 71 | 63 | 76 | 87 | 93 | 74 | 79 | 96 | Upward |
| Murder | 67 | 96 | 97 | 100 | 100 | 95 | 100 | 100 | Stable |
| Break and enter | 66 | 63 | 62 | 63 | 61 | 69 | 74 | 67 | Stable |
| Robbery | 66 | 69 | 69 | 71 | 76 | 76 | 77 | 78 | Upward |
| Fraud | 26 | 27 | 21 | 27 | 26 | 30 | 30 | 42 | Upward |
| Deal and traffic in opiates | 65 | 81 | 80 | 75 | 72 | 77 | 79 | 74 | Stable |

Note: the number of offenders convicted for a particular offence in a particular year ranges from 9 to 643.

finalised in the period 1990 to 1997. Note that the data for the Higher Courts for 1997 are only preliminary because final data for 1997 were not available at the time this bulletin was compiled.

For each of the selected offences, the analysis on the use of imprisonment was limited to those persons for whom the selected offence was the most serious offence for which they were convicted.² The reason for considering only the most serious offence was to minimise the influence that other convictions may have had on the penalty for the offence of interest.

The use of imprisonment was measured in two ways — firstly, through the percentage of convicted offenders imprisoned and, secondly, through the average length of prison sentence for those imprisoned. Statistical tests were conducted for each offence to determine whether significant upward or downward trends over the period 1990-1997 were evident in the percentage imprisoned and the average prison sentence length.³

It should be noted that in 1995, toward the end of the eight-year period examined, legislation was amended which affected the way in which the Courts deal with certain offences.⁴ The new legislation allowed some less serious offences, previously dealt with by the Higher Courts, to be dealt with by the Local Courts, at the election of the prosecution, or for some of the affected offences, at the election of either party. This change in the legislation may have had some effect on the severity of the penalties imposed in either Court towards the end of the eight-year period. In particular, if the amended legislation did

create the intended effect, both the Local and Higher Courts would be dealing with more serious matters, overall, than they were prior to the legislation change. As a result the overall severity of penalties imposed by both Courts may have increased after the legislation change. The possible effect of the new legislation should be borne in mind when considering the trends in penalties presented below.

TRENDS IN THE PERCENTAGE OF CONVICTED OFFENDERS IMPRISONED

For a specified offence, the percentage of convicted offenders imprisoned is the percentage of persons convicted for that offence as their most serious offence who were sentenced to imprisonment.

Higher Courts

Table 1 shows, for each of the selected offences, the percentage of convicted offenders sentenced to imprisonment by the Higher Courts between 1990 and 1997. There were statistically significant upward trends in the percentage imprisoned for six of the nine selected offences — *assault, sexual assault, child sexual assault, manslaughter, robbery* and *fraud*. Between 1990 and 1997, the percentage imprisoned had increased from 27 per cent to 49 per cent for *assault* and from 71 per cent to 96 per cent for *manslaughter*. The increase in the percentage imprisoned was quite similar for *sexual assault* and *child sexual assault*, increasing from 45 per cent to over 60 per cent for both offences. These upward trends, with the exception of *child sexual assault*, are illustrated in Figure 3.⁵

Figure 3: Trends in the percentage of convicted offenders imprisoned, NSW Higher Courts, 1990-1997

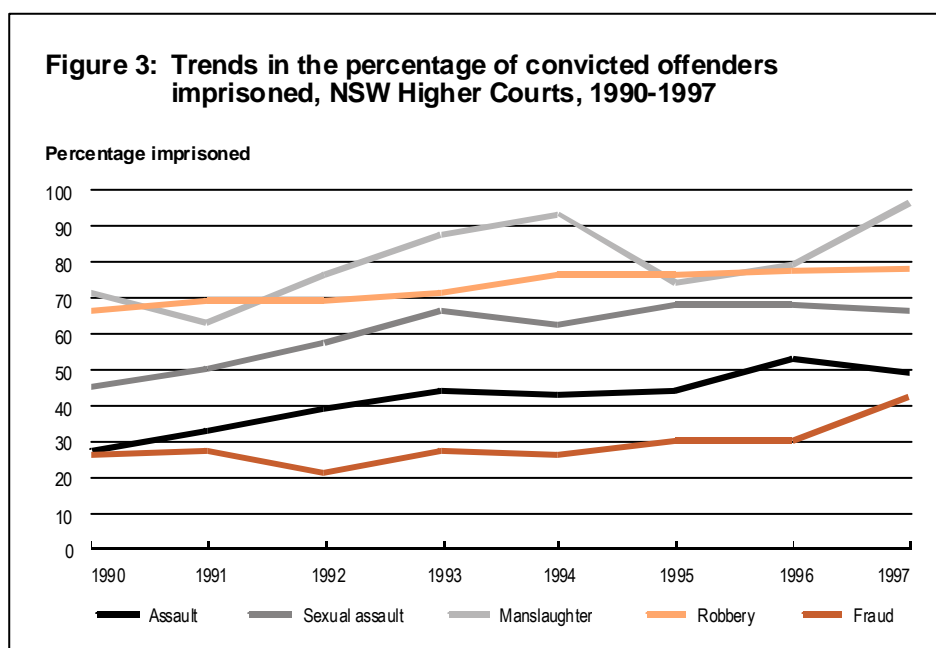


Table 2: The percentage of convicted offenders imprisoned, NSW Local Courts, 1990-1997

| | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | |
|-----------------------------|------|------|------|------|------|------|------|------|----------------------|
| <i>Type of offence</i> | % | % | % | % | % | % | % | % | <i>Overall trend</i> |
| Assault | 7 | 7 | 7 | 7 | 8 | 9 | 8 | 8 | Upward |
| Sexual assault | 8 | 12 | 16 | 19 | 15 | 18 | 18 | 16 | Stable |
| Child sexual assault | 9 | 9 | 10 | 19 | 19 | 21 | 21 | 18 | Upward |
| Break and enter | 32 | 33 | 32 | 34 | 34 | 37 | 40 | 40 | Upward |
| Fraud | 9 | 9 | 8 | 9 | 9 | 10 | 6 | 4 | Stable |
| Deal and traffic in opiates | 25 | 27 | 49 | 46 | 42 | 49 | 46 | 45 | Stable |

Note: the number of offenders convicted for a particular offence in a particular year ranges from 33 to 12,125.

The percentage imprisoned remained stable for the other selected offences of *murder*, *break and enter* and *deal and traffic in opiates*. There was no offence for which a downward trend in the percentage imprisoned was observed.

Local Courts

Table 2 shows, for each of the selected offences, the percentage of convicted offenders sentenced to imprisonment by the Local Courts between 1990 and 1997. There were statistically significant upward trends in the percentage imprisoned for three of the six selected offences — *assault*, *child sexual assault* and *break and enter*. Between 1990 and 1997, a small increase was evident for *assault*, with the percentage imprisoned increasing from 7 per cent to 8 per cent. The percentage imprisoned doubled for *child sexual assault*, increasing from 9 per cent to 18 per cent, and for *break and enter*, the percentage imprisoned increased from 32 per cent to 40 per cent. These upward trends are illustrated in Figure 4. The percentage imprisoned remained stable for the three other selected offences of *sexual assault*, *fraud* and *deal and traffic in opiates*. There was no offence for which a downward trend in the percentage imprisoned was observed.

TRENDS IN THE LENGTH OF PRISON SENTENCES

This section examines the average length of prison sentences imposed for each of the selected offences over the period 1990-1997. As mentioned earlier, this analysis is based on those persons sentenced to imprisonment for the selected offence where the selected offence was the most serious offence for which they were convicted. Average

prison sentences for the Higher Courts are presented first, followed by those for the Local Courts. The prison sentences reported are the minimum or fixed term of imprisonment imposed for the offence.⁶

Higher Courts

Table 3 shows, for each of the selected offences, the length of the average prison sentence imposed by the Higher Courts between 1990 and 1997. Average prison sentence length remained stable over the period 1990-1997 for most of the selected offences — *assault*, *sexual assault*, *child sexual assault*, *manslaughter*, *murder*, *break and enter* and *deal and traffic in opiates*. A statistically significant increase in the average prison sentence length was evident for *fraud*. This increase was only small, however, with the average length of prison sentence increasing from 18 months in 1990 to 21 months in 1997. A statistically significant decrease was

observed in the average prison sentence for *robbery*, which decreased from 38 months in 1990 to 27 months in 1997. This decrease may have occurred because the percentage of convicted *robbery* offenders sent to prison increased. In other words, there may have been an increase in the number of less serious kinds of *robbery* offenders receiving short prison sentences, rather than less severe penalties, such as periodic detention or community service orders. The two significant trends in sentence length, for *fraud* and *robbery*, are illustrated in Figure 5, together with the trend observed for *break and enter* in the Local Courts which is discussed below.

Local Courts

Table 4 shows, for each selected offence, the average length of prison sentence imposed on persons sentenced to imprisonment by the Local Courts

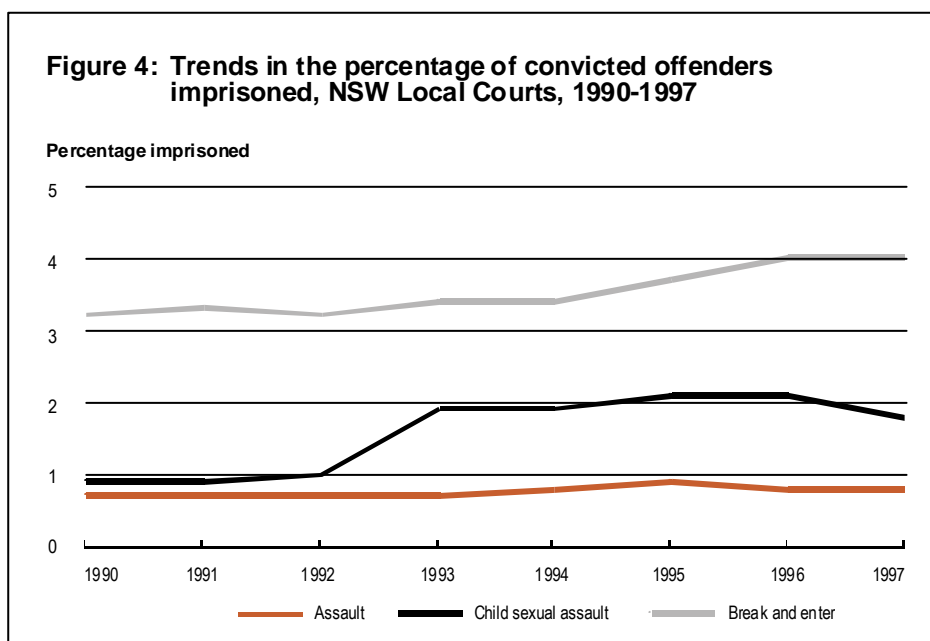


Table 3: Average length of prison sentence imposed, NSW Higher Courts, 1990-1997

| | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | |
|-----------------------------|--------|--------|--------|--------|--------|--------|--------|--------|---------------|
| Type of offence | Months | Months | Months | Months | Months | Months | Months | Months | Overall trend |
| Assault | 19 | 19 | 15 | 22 | 19 | 17 | 21 | 21 | Stable |
| Sexual assault | 31 | 30 | 30 | 32 | 30 | 28 | 33 | 35 | Stable |
| Child sexual assault | 31 | 28 | 33 | 29 | 31 | 24 | 32 | 33 | Stable |
| Manslaughter | 57 | 46 | 54 | 47 | 63 | 49 | 55 | 60 | Stable |
| Murder | 134 | 132 | 146 | 141 | 155 | 144 | 115 | 144 | Stable |
| Break and enter | 21 | 20 | 21 | 20 | 17 | 20 | 20 | 19 | Stable |
| Robbery | 38 | 38 | 32 | 31 | 27 | 26 | 28 | 27 | Downward |
| Fraud | 18 | 17 | 17 | 19 | 19 | 19 | 19 | 21 | Upward |
| Deal and traffic in opiates | 29 | 37 | 29 | 33 | 28 | 25 | 25 | 33 | Stable |

Note: the number of convicted offenders sentenced to imprisonment for a particular offence in a particular year ranges from 6 to 392.

between 1990 and 1997. The average prison sentence length remained stable over the period 1990-1997 for all but one of the selected offences. *Break and enter* was the only offence for which a statistically significant decrease occurred in the average length of prison sentence, from 9 months in 1990 to 8 months in 1997. Once again, the decrease in average sentence length for *break and enter* may reflect the fact that more *break and enter* offenders were being sent to prison. In other words, there may have been an increase in the number of less serious *break and enter* offenders receiving short prison sentences, rather than less severe penalties. The trend in average prison sentence is illustrated in Figure 5, together with the significant trends observed in the Higher Courts.

SUMMARY OF TRENDS

Taken together, these findings from the Higher and Local Courts show that the

penalties imposed are, in general, not getting any lighter. On the contrary, the percentage of convicted offenders who were imprisoned increased for most of the selected offences. Furthermore, the average length of prison sentence imposed on convicted offenders has not decreased for most of the selected offences. The only offences where a downward trend was observed in the average length of prison sentence were *robbery* in the Higher Courts and *break and enter* in the Local Courts. These downward trends may just reflect the fact that more *robbery* and *break and enter* offenders were being sent to prison.

The increasing trends in penalties, which were generally found for the percentage imprisoned, could have been due to the change in the legislation in 1995. However, from the tables it can be seen that, in general, increases were already occurring prior to 1995. Thus, it is unlikely that the trends observed are entirely due to the change in the legislation.

THE EFFECT OF OFFENCE SEVERITY AND PRIOR CONVICTIONS ON PENALTIES

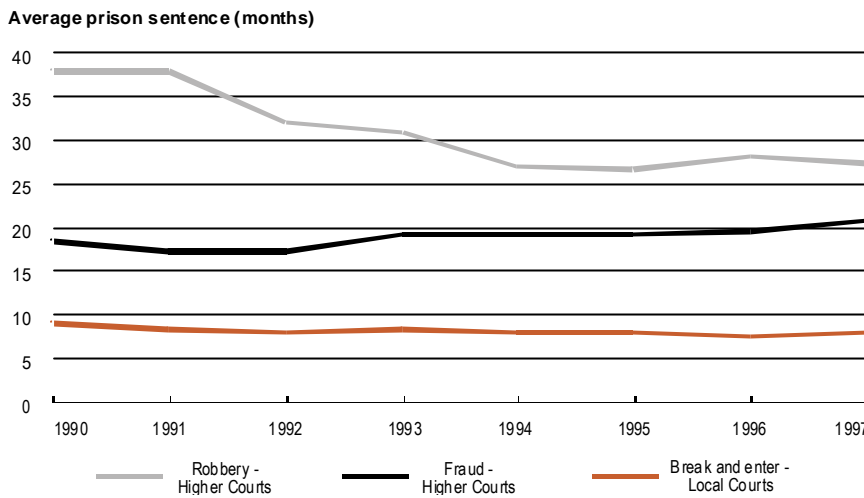
The previous section gave a broad picture of court sentencing patterns but obscured some important patterns in sentencing. In particular, the previous section did not address the sorts of factors that might affect court sentencing patterns. While legislation governs the maximum penalty that can be imposed for each offence, the courts have broad discretion, within this bound, to decide on the severity of the penalty. A number of factors can be taken into account by the courts when deciding on a suitable penalty. Two factors which are likely to have a significant influence on sentencing decisions, and which are readily examinable, are the seriousness of the particular form of the offence and whether the offender has prior criminal convictions.

Table 4: Average length of prison sentence imposed, NSW Local Courts, 1990-1997

| | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | |
|-----------------------------|--------|--------|--------|--------|--------|--------|--------|--------|---------------|
| Type of offence | Months | Months | Months | Months | Months | Months | Months | Months | Overall trend |
| Assault | 5 | 5 | 4 | 5 | 4 | 4 | 4 | 4 | Stable |
| Sexual assault | 9 | 6 | 8 | 7 | 5 | 7 | 6 | 7 | Stable |
| Child sexual assault | 11 | 5 | 16 | 7 | 5 | 7 | 6 | 8 | Stable |
| Break and enter | 9 | 8 | 8 | 8 | 8 | 8 | 7 | 8 | Downward |
| Fraud | 6 | 6 | 5 | 5 | 5 | 6 | 5 | 5 | Stable |
| Deal and traffic in opiates | 7 | 9 | 5 | 5 | 6 | 6 | 5 | 7 | Stable |

Note: the number of convicted offenders sentenced to imprisonment for a particular offence in a particular year ranges from 3 to 979.

Figure 5: Trends in the average prison sentence imposed, NSW Higher and Local Courts, 1990-1997



This section examines the influence of offence severity and prior convictions on both the percentage of convicted offenders imprisoned and the average prison sentence length. As in the previous section, the analysis is based on the penalties imposed on persons convicted of each of the selected offences, where that offence was their most serious offence. The analysis was restricted to Higher Court matters to focus on the more serious offences.⁷ The analysis was also restricted to the offences of *assault*, *sexual assault*, *child sexual assault*, *robbery* and *break, enter and steal* to allow a sufficient volume of matters for meaningful statistical analysis of the influence of offence severity and prior convictions. Note that in this section the offence of *break, enter and steal* is examined, whereas in the previous section the broader offence of *break and enter* was examined. The reason for narrowing the *break and enter* offence was to get a clearer idea of how offence severity influences the penalty.⁸

Each of the broad offences of *assault*, *sexual assault*, *child sexual assault*, *break, enter and steal*, and *robbery* were broken down into sub-categories of varying severity. The breakdown was based on the sections in the *Crimes Act 1900* that specific charges, relating to those offences, are governed by and the maximum penalties attached to these. Charges with higher maximum penalties were assigned to the more serious offence sub-categories for most offences. However, for *sexual assault* and *child sexual assault* offences, similar types of charges were sometimes dealt with under

different sections of the *Crimes Act* and had quite different maximum penalties. In order to achieve relatively meaningful and homogeneous sub-categories, rather than strictly adhering to assigning charges in order of maximum penalties, it was considered appropriate to assign charges of a similar nature to the same sub-category. Further details of the breakdown are provided in the Appendix.

The breakdown of offences is outlined below, in order of increasing severity. Note that the names given to the sub-categories do not necessarily coincide with legislative terms, and are used for the sake of convenience.

Assault

- 'common assault'
- 'assault occasioning actual bodily harm'
- 'inflict grievous bodily harm'
- 'inflict grievous bodily harm with intent to do grievous bodily harm'

Sexual assault

- 'act of indecency / indecent assault'
- 'sexual intercourse without consent'
- 'aggravated sexual assault'

Child sexual assault

- 'act of indecency / indecent assault'
- 'sexual intercourse with a child over 10 years but under 16 years, or homosexual intercourse with a male over 10 years but under 18 years'
- 'sexual intercourse with a child under 10 years, or homosexual intercourse with a male under 10 years'

Break, enter and steal

- 'break, enter and steal'
- 'aggravated break, enter and steal'

Robbery

- 'robbery'
- 'aggravated robbery'
- 'specially aggravated robbery'

Note that in the case of *robbery* and *break, enter and steal* the sub-categories labelled 'robbery' and 'break, enter and steal' refer to the least serious forms of these offences, while the 'aggravated' and 'specially aggravated' sub-categories generally refer to cases where these offences were committed whilst armed, whilst in the company of one or more persons, or with the infliction of grievous bodily harm. Similarly, the 'aggravated' sub-category of *sexual assault* refers to cases where the offence of sexual intercourse without consent was committed with the malicious infliction of, or the threat of, actual bodily harm, or whilst in the company of one or more persons.

The offender's prior convictions were classified into three categories. These were — *no prior convictions*, *prior convictions without imprisonment* (where the offender had at least one prior conviction, but had not previously been sentenced to prison as a result of any prior conviction) and *prior convictions with imprisonment* (where the offender had at least one prior conviction that had resulted in a prison sentence). Note that the prior convictions were not necessarily of the same general type as the current offence.

THE EFFECT OF OFFENCE SEVERITY AND PRIOR CONVICTIONS ON THE PERCENTAGE IMPRISONED

Table 5 shows the percentage imprisoned in 1996 for each of *assault*, *sexual assault*, *child sexual assault*, *break, enter and steal* and *robbery* according to the severity of the particular offence and whether the offender had prior convictions. Taking *assault*, for example, it can be seen from Table 5 that the percentage imprisoned was generally higher for the more serious *assaults*. For persons who had no prior convictions, 86 per cent were imprisoned for the most serious form of *assault* — 'inflict grievous

bodily harm with intent' — nearly eight times higher than the 11 per cent imprisoned for the least serious form of *assault* — 'common assault'. For persons who had prior convictions that did not involve imprisonment, 86 per cent were imprisoned for 'inflict grievous bodily harm with intent', whereas no persons were imprisoned for 'common assault'.

Table 5 also shows that at each severity level of *assault*, the percentage imprisoned tended to be higher for offenders with prior convictions, particularly if the prior convictions had resulted in imprisonment. For offenders convicted of 'assault occasioning actual bodily harm', the percentage imprisoned was 88 per cent for offenders who had previously been imprisoned as a result of prior convictions. This compares with 33 per cent for offenders who had prior

convictions that did not result in imprisonment and 23 per cent for offenders who had no prior convictions.

All offenders convicted of the most serious form of *assault* — 'inflicting grievous bodily harm with intent' — who had been previously imprisoned for prior convictions were sentenced to prison.

From Table 5 it can also be seen that the same general patterns emerged for *sexual assault*, *child sexual assault*, *break, enter and steal* and *robbery*. The percentage imprisoned was generally higher for those convicted of the more serious forms of each offence than for those convicted of the less serious forms. The percentage imprisoned was also higher for the offenders who had prior convictions, particularly if they had been imprisoned as a result of the prior

convictions. These patterns were most clear cut for *robbery*.

The percentage imprisoned was particularly high for the offences of *child sexual assault*, *break, enter and steal* and *robbery*, regardless of the severity of the particular offences, amongst offenders who had previously been imprisoned as a result of prior convictions. The percentage imprisoned for these offences was over 90 per cent at each severity level for persons who had previously been imprisoned.

One final point to note from Table 5 is that, for each offence, all offenders who were convicted of the most serious form of the offence and who had previously been imprisoned as a result of prior convictions were sentenced to imprisonment.

Table 5: Percentage imprisoned for selected offences by offence severity and prior convictions, NSW Higher Courts, 1996

| | No prior convictions | | Prior convictions (without imprisonment) | | Prior convictions (with imprisonment) | |
|--|--------------------------|-----------------------|--|-----------------------|---------------------------------------|-----------------------|
| | No. of persons convicted | Percentage imprisoned | No. of persons convicted | Percentage imprisoned | No. of persons convicted | Percentage imprisoned |
| Assault | | | | | | |
| Common assault | 18 | 11 | 19 | 0 | 16 | 50 |
| Assault occasioning actual bodily harm | 39 | 23 | 39 | 33 | 24 | 88 |
| Inflict grievous bodily harm | 53 | 57 | 35 | 69 | 30 | 86 |
| Inflict grievous bodily harm with intent | 14 | 86 | 7 | 86 | 9 | 100 |
| Sexual assault | | | | | | |
| Act of indecency / indecent assault | 30 | 30 | 15 | 33 | 12 | 75 |
| Sexual intercourse without consent | 15 | 86 | 9 | 89 | 14 | 86 |
| Aggravated sexual assault | 18 | 78 | 14 | 86 | 8 | 100 |
| Child sexual assault | | | | | | |
| Act of indecency / indecent assault | 48 | 50 | 12 | 42 | 1 | 100 |
| Sexual assault child 10-16 yrs | 53 | 83 | 11 | 64 | 11 | 91 |
| Sexual assault child under 10 yrs | 24 | 71 | 7 | 72 | 6 | 100 |
| Break, enter and steal | | | | | | |
| Break, enter and steal | 32 | 53 | 59 | 63 | 123 | 92 |
| Aggravated break, enter and steal | 6 | 67 | 8 | 63 | 3 | 100 |
| Robbery | | | | | | |
| Robbery | 21 | 29 | 27 | 70 | 36 | 94 |
| Aggravated robbery | 104 | 51 | 100 | 81 | 115 | 99 |
| Specially aggravated robbery | 5 | 60 | 18 | 89 | 5 | 100 |

Table 6: Average length of prison sentence for selected offences by offence severity and prior convictions, NSW Higher Courts, 1996

| | No prior convictions | | Prior convictions (without imprisonment) | | Prior convictions (with imprisonment) | |
|--|------------------------------------|----------------------------------|--|----------------------------------|---------------------------------------|----------------------------------|
| | No. of persons sentenced to prison | Average prison sentence (months) | No. of persons sentenced to prison | Average prison sentence (months) | No. of persons sentenced to prison | Average prison sentence (months) |
| Assault | | | | | | |
| Common assault | 2 | 12 | 0 | - | 8 | 6 |
| Assault occasioning actual bodily harm | 9 | 11 | 13 | 12 | 21 | 11 |
| Inflict grievous bodily harm | 30 | 17 | 24 | 18 | 26 | 24 |
| Inflict grievous bodily harm with intent | 12 | 37 | 6 | 45 | 9 | 51 |
| Sexual assault | | | | | | |
| Act of indecency / indecent assault | 9 | 11 | 5 | 12 | 9 | 19 |
| Sexual intercourse without consent | 13 | 29 | 8 | 25 | 12 | 33 |
| Aggravated sexual assault | 14 | 42 | 12 | 49 | 8 | 60 |
| Child sexual assault | | | | | | |
| Act of indecency / indecent assault | 24 | 23 | 5 | 20 | 1 | 22 |
| Sexual assault child 10-16 yrs | 44 | 32 | 7 | 29 | 10 | 43 |
| Sexual assault child under 10 yrs | 17 | 32 | 5 | 45 | 6 | 45 |
| Break, enter and steal | | | | | | |
| Break, enter and steal | 17 | 14 | 37 | 15 | 113 | 20 |
| Aggravated break, enter and steal | 4 | 57 | 5 | 31 | 3 | 67 |
| Robbery | | | | | | |
| Robbery | 6 | 18 | 19 | 16 | 34 | 24 |
| Aggravated robbery | 53 | 23 | 81 | 22 | 114 | 35 |
| Specially aggravated robbery | 3 | 28 | 16 | 24 | 5 | 69 |

THE EFFECT OF OFFENCE SEVERITY AND PRIOR CONVICTIONS ON THE AVERAGE PRISON SENTENCE

Table 6 shows the average length of prison sentence imposed in 1996 for each of *assault*, *sexual assault*, *child sexual assault*, *break, enter and steal* and *robbery* according to the severity of the offence and whether the offender had prior convictions. Taking *assault*, for example, it can be seen that the average prison sentence tended to be longer for the more serious forms of *assault*. For those with no prior convictions the average prison sentence was over three times longer for 'inflict grievous bodily harm with intent' (37 months) than for 'common assault' (12 months). For those

with prior convictions involving imprisonment the average prison sentence was nearly nine times longer for 'inflict grievous bodily harm with intent' (51 months) than for 'common assault' (6 months).

Table 6 also shows that average prison sentences were generally longer for *assault* offenders with prior convictions, and particularly for those who had previously been imprisoned as a result of their prior convictions. For 'inflict grievous bodily harm with intent', the average prison sentence was 51 months for offenders who had been previously imprisoned for prior convictions. This compares with 45 months for offenders who had prior convictions but who had not previously been imprisoned, and 37

months for offenders with no prior convictions.

Similar patterns were evident for the other offences. Average prison sentences were generally longer for the more serious forms of each offence and for offenders who had prior convictions, particularly if they had resulted in imprisonment. These patterns were least clear cut for the offence of *child sexual assault*. However, because the number of persons convicted of *child sexual assault* who had prior convictions was small, the findings relating to the percentage imprisoned and the average prison sentence may not provide a reliable picture.

In this section we have seen that the percentage imprisoned and the average

prison sentence length were generally higher for more serious offences and generally higher at each severity level for offenders with prior convictions, and particularly for offenders who had been previously imprisoned as a result of prior convictions.

SUMMARY AND DISCUSSION

In summary then, conviction rates in the Higher and Local Courts in NSW were generally quite high, in most cases ranging above 70 per cent and in some cases, such as *break and enter*, *robbery*, *fraud* and *deal and traffic in opiates* when dealt with in the Higher Courts, were 90 per cent or more. The only offence where the conviction rate fell below 50 per cent was *child sexual assault* when dealt with in the Local Courts. This low conviction rate may result, in part, from difficulties associated with establishing the reliability of evidence presented in court by children.

The penalties imposed by the NSW Higher and Local Courts have not become any lighter in the period between 1990 and 1997. The percentage imprisoned, in both jurisdictions, has remained stable or increased for each of the selected offences in the period between 1990 and 1997. The average prison sentence length imposed for each of the selected offences has generally remained stable in both jurisdictions in the period between 1990 and 1997. The average prison sentence decreased in only one of the nine selected offences in the Higher Courts — *robbery* — and in only one of the six selected offences in the Local Courts — *break and enter*. In both cases the decrease may have been associated with the increase in the percentage of offenders being sent to prison.

Offence severity and prior convictions were both found to affect the penalties. The percentage imprisoned tended to be higher for the more serious forms of each offence and, at each severity level, tended to be higher for offenders with prior convictions, particularly if the prior convictions had resulted in imprisonment. For offenders who were convicted of the most serious forms of each offence and who had the most serious form of prior criminal record, the outcome was always a prison sentence.

The average length of the prison sentence also tended to be longer for the more serious forms of each offence and, at each severity level, was longer for offenders who had been previously imprisoned for prior convictions. Where this was not the case the estimates of average sentence length tended to be based on small numbers of cases.

Another point worth noting is that the average prison sentences imposed by the Higher Courts were well below the maximum penalties set out in the legislation (the relevant maximum penalties are shown in Table A1 in the Appendix). This was the case for the broad offences (shown in Table 3), as well as for the different severity levels within each broad offence (shown in Table 6). In fact, fewer than one per cent of convicted persons actually received the maximum penalty according to the severity level of their offence. The average prison sentences imposed by the Local Courts for each of the broader offences (shown in Table 4) were also well below the two-year maximum set out for the Local Courts.

Of course, the fact that the averages are well below the maximums is not surprising because each broad offence includes a wide range of charges, as does each severity level. Furthermore, for each type of offence, the maximum penalties are reserved for only extreme instances which should be quite rare.

This bulletin has shown that, despite the largely media-driven perception of court leniency, the NSW Court system is not generally acquitting people, and penalties have, if anything, become heavier since 1990. The courts also deal more harshly with offenders who commit more serious crimes and who have more serious criminal records.

APPENDIX

RESEARCH APPROACH

Details of all charges, convictions and penalties for the Higher and Local Courts were extracted from the NSW Bureau of Crime Statistics and Research databases.

Conviction rates

In the analysis of conviction rates in the Higher Courts, any charges where the outcome was recorded as 'no further proceedings directed crown approval',

'plea accepted in full discharge of indictment', 'charge determined not appropriate', 'dismissed section 428', 'no further proceedings directed', 'accused failed to appear', 'accused deceased' or 'remitted to Local Court' were excluded on the basis that, for such charges, no real decision was made about whether the accused was guilty or not. After excluding these categories, a total of 651 *assault*, 498 *sexual assault*, 551 *child sexual assault*, 24 *manslaughter*, 42 *murder*, 455 *break and enter*, 613 *robbery*, 384 *fraud* and 156 *deal and traffic in opiates* charges were available for the analysis.

In the Local Courts, any charges where the outcome was recorded as 'charge / information dismissed in view of non-appearance of parties', 'charge / information dismissed in view of death of defendant', 'charge / information dismissed - Mental Health', 'charge / information stood out of the list' were excluded on the basis that, for such charges, no real decision was made about whether the accused was guilty or not. A total of 20,558 *assault*, 334 *sexual assault*, 350 *child sexual assault*, 3,272 *break and enter*, 5,698 *fraud* and 333 *deal and traffic in opiates* charges were included in the analysis.

Classification of offence severity

As described earlier, each of the broad offence categories was classified into smaller sub-categories of offence severity, based on the sections in the Crimes Act that specific charges, relating to these offences, were treated under and the maximum penalties attached to these. For each offence category, any specific charges that were not readily classifiable (that is, charges that were governed by Common Law, rather than the Crimes Act, or charges that were rarely dealt with by the Courts) were excluded. Any charge that involved attempting an offence, aiding and abetting an offence, being an accessory before the fact or conspiring to an offence was treated the same as the commission of that offence as this type of charge generally attracts the same maximum penalty as the commission of the offence.

For the offences of *assault*, *break*, *enter and steal*, and *robbery*, similar charges are dealt with under similar sections of the Crimes Act and attract similar maximum penalties. It was therefore straightforward to assign charges with higher maximum penalties to the more serious offence sub-categories.

For the offences of *sexual assault* and *child sexual assault*, classification was not as straightforward, as similar types of charges are sometimes dealt with under different sections of the Crimes Act and attract quite different maximum penalties. In order to achieve relatively meaningful and homogeneous sub-categories, it was considered appropriate to assign charges of a similar nature to the same sub-categories, rather than to strictly adhere to assigning charges according to the size of their maximum penalties. All charges that related to acts of indecency or indecent assaults were included in the least serious sub-categories of *sexual assault* and *child sexual assault* ('act of indecency / indecent assault'), even though they may have had the same, or even higher, maximum penalties than some charges in the higher sub-categories (e.g. 'sexual intercourse without consent') that all involved sexual intercourse. In addition, for *sexual assault* offences, all charges that related to sexual intercourse without consent that were not committed in aggravated circumstances (that is, that were not committed with the malicious infliction of, or the threat of, actual bodily harm, or whilst in the company of one or more persons) were included in the middle sub-category ('sexual intercourse without consent') even though they may have had higher maximum penalties than some charges in the highest sub-category ('aggravated sexual assault') that all involved sexual intercourse without consent committed in aggravated circumstances. On the whole, however, *sexual assault* and *child sexual assault* charges with higher maximum penalties were generally assigned to the more serious sub-categories.

Assault was broken down into — 'common assault', 'assault occasioning actual bodily harm', 'inflict grievous bodily harm' and 'inflict grievous bodily harm with intent to do grievous bodily harm'. Any assaults on police were excluded because the Crimes Act deals with police assaults slightly differently to other assaults.

'Common assault' roughly corresponds to Section 61 of the Crimes Act and includes any assault that does not necessarily involve bodily harm. 'Occasioning actual bodily harm' roughly corresponds with Section 59 of the Crimes Act and involves any infliction of bodily injury. 'Inflict grievous bodily harm' and 'inflict grievous bodily harm with intent to do grievous

bodily harm' roughly correspond with Sections 35 and 33 of the Crimes Act, respectively. These two sub-categories both involve malicious infliction of serious injury. However, the latter involves intent on the part of the offender to do grievous harm, whereas in the former the offender need only act recklessly, knowing that the action can cause harm.

Sexual assault was broken down into — 'act of indecency / indecent assault', 'sexual intercourse without consent' and 'aggravated sexual assault'.

'Acts of indecency / indecent assaults' are drawn from relevant parts of Sections 61E, 61L and 61M of the Crimes Act. An indecent act entails inappropriate exposure of the genitals involving no bodily contact, while an indecent assault involves an indecent act accompanied by an assault. 'Sexual intercourse without consent' is derived from Sections 61D and 61I of the Crimes Act. Sexual intercourse has a broad definition which includes penetration of the vagina or anus by any part of the body of another person or object manipulated by another person, placing the penis into the mouth of another person or the act of cunnilingus. 'Aggravated sexual assault' derives from Sections 61J, 61K and 61C of the Crimes Act. It involves sexual intercourse without consent committed in 'aggravating circumstances' which, in the present study, include the malicious infliction of, or the threat of, actual bodily harm, or the offender being accompanied by at least one other person.

Child sexual assault was broken down into the following sub-categories — 'act of indecency / indecent assault'; 'sexual intercourse with a child over 10 years but under 16 years, or homosexual intercourse with a male over 10 years but under 18 years'; and 'sexual intercourse with a child under 10 years, or homosexual intercourse with a male under 10 years'.

The first sub-category is roughly drawn from relevant parts of Sections 61E, 61M, 61N, 61O, 76 and 78Q of the Crimes Act, the second sub-category from Sections 61D, 66C, 66D, 71, 73, 78K, 78L and 78N and the third sub-category from Sections 66A, 66B, 67 and 78H. Note that these sections overlap with those for adult *sexual assault*. Where a particular charge was covered by one of these sections and that section explicitly specified the age of the victim as under 16 years, the charge

was classified as *child sexual assault*, otherwise charges were treated as *sexual assault*.

Acts of indecency / indecent assaults and sexual intercourse have the same meanings as those just described for adult *sexual assault*. However, with sexual intercourse, consent is no longer an issue as children under the age of 16 years, for heterosexual intercourse, and under 18 years, for male homosexual intercourse, are considered by law to be incapable of forming a valid consent.

Note that sexual intercourse with a child was divided into two sub-categories, based on whether the child was under 10 years or not, as sexual intercourse with children under 10 years is considered by law to be more serious than with children 10 years and over. The sub-category of 'act of indecency / indecent assault' includes all children under 16 years (or 18 years for offences such as acts of gross indecency committed with a male person).

Break, enter and steal was broken down into — 'break, enter and steal', and 'aggravated break, enter and steal'. Any offences that were not strictly break, enter and steal were excluded.

'Break, enter and steal' is drawn from the relevant parts of Sections 112 and 113 of the Crimes Act and involves entering or breaking into a building and stealing. 'Aggravated break, enter and steal' is drawn from the relevant parts of Sections 109 and 112 of the Crimes Act and, in this study, involves the offender being armed or in the company of at least one other person or the offence being committed with infliction of grievous bodily harm.

Robbery was broken down into — 'robbery', 'aggravated robbery' and 'specially aggravated robbery'.

'Robbery' roughly accords with Sections 94 of the Crimes Act and involves theft from a person accompanied by the threat or use of force. 'Aggravated robbery' accords roughly with Sections 95 and 97 of the Crimes Act. In this study 'aggravated robbery' involves robbery committed whilst in the company of at least one other person, whilst armed, with striking or with use of corporal violence. 'Specially aggravated robbery' is drawn from Sections 96 and 98 of the Crimes Act and in this study involves robbery committed with the infliction of grievous bodily harm (the offender may or may not have been armed).

Table A1: Maximum penalties for relevant offence categories and offence sub-categories

| <i>Offence type</i> | <i>Maximum penalty</i> |
|--|------------------------|
| Manslaughter | 25 years |
| Murder | Life |
| Fraud | 10 years |
| Deal and traffic in opiates | Life |
| Assault | |
| Common assault | 2 years |
| Assault occasioning actual bodily harm | 5 years |
| Inflict grievous bodily harm | 7 years |
| Inflict grievous bodily harm with intent | 25 years |
| Sexual assault | |
| Act of indecency / indecent assault | 18 months to 7 years |
| Sexual intercourse without consent | 14 years |
| Aggravated sexual assault | 20 years |
| Child sexual assault | |
| Act of indecency / indecent assault | 2 to 10 years |
| Sexual assault child 10-16 years | 5 to 20 years |
| Sexual assault child under 10 years | 20 years to life |
| Break, enter and steal | |
| Break, enter and steal | 14 years |
| Aggravated break, enter and steal | 20 to 25 years |
| Robbery | |
| Robbery | 14 years |
| Aggravated robbery | 20 years |
| Specially aggravated robbery | 25 years |

MAXIMUM PENALTIES

The maximum penalties set out in legislation for the broad offence categories and the relevant sub-categories of offence severity used in this bulletin are outlined in Table A1. Note that for some sub-categories there is a range of maximum penalties. For the sub-categories of 'act of indecency / indecent assault' within the offences of *sexual assault* and *child sexual assault*, the low end of the range refers to the maximum penalty for acts of indecency, while the high end of the range refers to the maximum penalty for indecent assaults. For the other sub-categories, ranges are specified because different forms of those offences are treated under different sections of the Crimes Act and attract quite different maximum penalties.

NOTES

1 Full details of the exclusions are provided in the Research Approach section in the Appendix.

- 2 The most serious offence is the offence charged which received the most serious penalty. See New South Wales Bureau of Crime Statistics and Research 1998, *New South Wales Criminal Courts Statistics 1997*, NSW Bureau of Crime Statistics and Research, Sydney for a hierarchy of penalty seriousness.
- 3 In each case the Kendall's rank-order correlation test (two-tailed) was used with a significance level of 0.05.
- 4 The legislation was changed by the *Criminal Procedure Amendment (Indictable Offences) Act 1995*. This Act meant that some offences which were previously indictable (that is, only to be dealt with in the Higher Courts) are now able to be dealt with either summarily (that is, in the Local Courts) or on indictment.
- 5 Note that the trend for child sexual assault is not included in the figure as it was relatively similar to that for sexual assault.
- 6 The *Sentencing Act 1989* requires that persons sentenced to prison receive either a fixed term or a minimum and additional term for each offence. Persons receiving a fixed term sentence must serve that term in prison and are not released until the end of that term, while persons receiving a minimum and additional term must serve the full minimum term but may be released on parole for the additional term.
- 7 Note that all matters included in the analysis were finalised in the NSW Higher Courts in 1996.
- 8 The distinction relates to the motivation behind the *break and enter* — *break, enter and steal* refers to breaking and entering into premises and stealing (or having the intent to steal), while *break and enter* is more general, referring to breaking and entering and committing (or having the intent to commit) a felony or misdemeanour.

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