Sentenced Homicides in New South Wales 1994–2001

Jason Keane BA LLB
Research Officer

With statistical analysis by:

Patrizia Poletti BA
Senior Research Officer (Special Projects)
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Executive Summary

Introduction

This study is a continuation of earlier work examining the various categories of culpable homicide, principally murder and manslaughter, and the sentences imposed for these offences. The study includes infanticide cases but excludes death from driving cases, which are not prosecuted as either murder or manslaughter, and murder–suicide cases which, by definition, cannot result in a sentence.

The Judicial Commission published the first study, *Sentenced Homicides in New South Wales 1990–1993*, in 1995. It analysed the sentences imposed on 256 offenders — 129 convicted of murder and 127 convicted of manslaughter. The present study is wider in scope. It analyses all first instance culpable homicide cases decided between 1 January 1994 and 31 December 2001 that resulted in the imposition of a sentence. In that 8-year period there were 421 homicide events involving 477 offenders, 469 victims and 536 convictions.

The primary data for the study were obtained from court files held by the New South Wales Supreme and District Court Registries. This information was supplemented by data held by the Judicial Commission and used as the basis of information contained in the Commission’s Judicial Information Research System.

Aim of the study

The study aims to determine whether there are distinct patterns or types of homicide offences that fall within particular sentencing ranges. While it is recognised that every case is unique and that offences can cover a very broad spectrum of culpability, patterns of similarity enable offences to be grouped or contrasted in a way that may assist the sentencing judge achieve consistency in sentencing.

Key findings

*Number of convictions*

- 216 offenders were convicted of murder as the principal offence (45.3% of offenders)
- 261 offenders were convicted of manslaughter as the principal offence (54.7% of offenders)

*Gender*

- Male homicide offenders outnumbered female homicide offenders by 411 (86.2%) to 66 (13.8%)
- Male victims outnumbered female victims by 315 (67.2%) to 154 (32.8%)
- Females were significantly under-represented in the murder category and over-represented in the manslaughter category — 15 females were convicted of murder
(22.7% of all female homicide offenders) while 51 females were convicted of manslaughter (77.3% of all female homicide offenders)

- Males, on the other hand, were convicted almost evenly of murder and manslaughter — 201 male offenders were convicted of murder (48.9% of all male homicide offenders) compared to 210 male offenders convicted of manslaughter (51.1% of all male homicide offenders)

**Age of offenders**
- The median age of all homicide offenders was 27 years
- Three-quarters of all offenders were 35 years of age or less
- There were 44 juvenile offenders (under 18 years of age), that is, 9.2% of all offenders

**Age of victims**
- The median age of all homicide victims was 31 years, although female victims tended to be slightly younger (median age 30 years) than male victims (median age 32 years)
- There were 69 known child victims (under 18 years of age), that is, 14.7% of all victims

**Aboriginality**
- There were 56 Aboriginal homicide offenders (11.7% of all offenders), an over-representation of approximately 5 to 6 times in relation to the number of Aboriginal persons in the general population
- There were 27 Aboriginal victims (5.8% of the total number of victims), 22 of whom were killed by Aboriginal offenders and 5 by non-Aboriginal offenders. Thus Aboriginal victims were mostly killed by Aboriginal offenders

**Murder sentences**
- All 216 murderers were sentenced to a term of imprisonment. The median term of imprisonment was 18 years and the median non-parole period was 13 years 6 months
- The range of head sentences imposed for murder was 9 years to life imprisonment
- 17 offenders received a sentence of life imprisonment, only one of whom was female

**Manslaughter sentences**
- 30 of the 261 manslaughter offenders did not receive full-time custodial sentences (11.5%)
- 231 manslaughter offenders were sentenced to a term of imprisonment (or penal servitude). The median term of imprisonment was 7 years and the median non-parole period was 4 years 3 months
Sentencing patterns

Gender: Female homicide offenders generally received less severe sentences than their male counterparts — the median head sentence for female murderers was 16 years compared to 18 years for males and the median head sentence for females sentenced for manslaughter was 6 years compared to 7 years for males.

Females also received 15 of the 30 non-custodial sentences imposed for manslaughter. Thus, female manslaughter offenders were more than 4 times more likely than male manslaughter offenders to receive a non-custodial sentence (29.4% compared to 7.1%).

Juvenile offenders: Of the 44 juvenile homicide offenders in this study, 22 were convicted of murder and 22 were convicted of manslaughter.

Juvenile offenders generally received shorter terms of imprisonment and non-parole periods. The median sentence for murder was 16 years head with a non-parole period of 10 years (compared to 18 years head and 14 years non-parole period for adults). The median sentence for manslaughter was 6 years imprisonment with a non-parole period of 3 years (compared to 7 years head and 4 years 6 months non-parole period for adults).

Aboriginal offenders: An examination of the cases involving 56 Aboriginal offenders revealed high levels of unemployment, alcohol abuse and prior violent offending. Aboriginal offenders as a whole received lower non-parole periods, otherwise the sentences imposed were not greatly dissimilar to the general pattern of sentences for murder and manslaughter generally.

The median sentence for murder by Aboriginal offenders was 18 years with a non-parole period of 12 years (compared to 18 years head and 13 years 6 months non-parole period for non-Aboriginal offenders). The median sentence for manslaughter was 7 years head with a non-parole period of 3 years 3 months (compared with 7 years head and 4 years 6 months non-parole period for non-Aboriginal offenders).

Child killing: There were 73 offenders who killed 69 children (those under 18 years of age). Two distinct categories emerged within this group with each having about the same number of victims and offenders. The first of these was infants killed by parents or the mother’s male partner. The second was older children (typically 16 or 17-years-old) getting killed in fights or drunken altercations, such as those commonly encountered in adult patterns of violence.

The murder of children tended to attract higher sentences: the median for murder was 19 years 6 months with a non-parole period of 14 years 6 months (compared with 18 years head and 13 years 6 months non-parole period for murder of adult victims).

In the case of manslaughter, however, the median sentence for child killers was almost exactly the same as for offenders who killed adults: 7 years with a non-parole period of 4 years 4.5 months (compared with 7 years head and 4 years 6 months non-parole period for manslaughter of adult victims). This group contained a lot of mothers of victims, suggesting a degree of sympathy that offset the aggravating fact of killing one’s own baby, while the presence of diminished responsibility and the offence of infanticide also acted to reduce culpability in many of these otherwise very serious offences.
Life sentences: The 17 cases attracting natural life sentences were, by hypothesis, objectively the most serious cases and often involved offenders who were regarded as the most likely to reoffend (that is, the offenders were considered dangerous). These offenders’ claims to leniency were often sparse and appeared to fall into insignificance when compared with the enormity of their crime or crimes.

Other sentencing factors

Guilty plea: Offenders convicted of manslaughter pleaded guilty in two out of three cases (67.8% of the time). Conversely only one in three (32.2%) pleaded not guilty. For manslaughter, a guilty plea increased the likelihood of a non-custodial sentence (15.3% with a guilty plea compared to 4.6% with a not guilty plea). Further, the median custodial terms for manslaughter were 7 years head term with a non-parole period of 4 years with a plea of guilty, compared to 7 years with a non-parole period of 4 years 6 months with a plea of not guilty.

Offenders convicted of murder pleaded guilty less often, with 37.5% of murderers pleading guilty compared with 62.5% pleading not guilty. The median sentence when the offender pleaded guilty to murder was 18 years with a non-parole period of 12 years; for those pleading not guilty the median head sentence was also 18 years but the non-parole period was 14 years.

Form 1 matters: Cases presenting with Form 1 matters (that is, where other offences were taken into account with the homicide offence) showed a slight increase in the median sentences imposed for both murder and manslaughter.

This increase was more noticeable for murderers, where the median sentence was 21 years 4 months with a non-parole period of 15 years. This should be compared with the median sentence for murder when there were no Form 1 matters taken into account: imprisonment for 18 years with a non-parole period of 13 years 6 months.

The increase in the median was only slight when manslaughter offenders presented with Form 1 matters: 7 years 6 months head and a non-parole period of 4 years 6 months with Form 1 matters, compared to 7 years head and a non-parole period of 4 years 3 months without Form 1 matters. No manslaughter offender with Form 1 matters received a non-custodial sentence.

Prior convictions: Of the 477 homicide offenders, 214 had no prior convictions (44.9%). The balance of 263 offenders with priors were divided into those with a record of non-violent offences only (131 or 27.5% of the total number of offenders in the study) and those with a violent offence record (132 or 27.7% of the total number of offenders).

The existence of a prior record involving violence had a marked impact on the outcome of cases. For example, of the 30 offenders who received non-custodial sentences, 25 had no priors, 5 had non-violent priors, while none had violent priors. Further, those with a record of prior violent offences tended to get higher sentences than the norm, as the following median figures revealed:
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murder with no priors — 18 years imprisonment with a non-parole period of 13 years 3 months
murder with non-violent priors — 18 years imprisonment with a non-parole period of 12 years
murder with violent priors — 20 years imprisonment with a non-parole period of 15 years.

Similarly the median sentences for manslaughter were:

manslaughter with no priors — 7 years imprisonment with a non-parole period of 4 years
manslaughter with non-violent priors — 7 years imprisonment with a non-parole period of 4 years 3 months
manslaughter with violent priors — 8 years imprisonment with a non-parole period of 5 years.

Future trends

The present study provides a detailed analysis of the severity of sentences imposed for murder and manslaughter over a period of 8 years ending 31 December 2001. These cases must now be considered in the light of the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002 (NSW). That Act commenced on 1 February 2003 and introduced the concept of the standard minimum non-parole period for certain specified offences. Murder is one such specified offence and it is unique in that it carries two standard non-parole periods: 20 and 25 years imprisonment.

The higher non-parole period applies to cases of murder where the victim is a public figure exercising public or community functions and the offence has arisen because of the victim’s occupation. In all other cases of murder a 20-year standard minimum non-parole period applies.

Of course those standard minimum sentences are subject to adjustment depending on the circumstances of the particular case, but it will nevertheless be interesting to compare future trends in sentencing homicide offenders with those outlined in this study.

Ivan Potas
Director, Research and Sentencing
Judicial Commission of New South Wales
“In the Old Testament, in the second Book of Moses called Exodus, the author laid down the law concerning acts of violence in these terms:

‘And if any mischief follow, then thou shalt give life for life, Eye for eye, tooth for tooth, hand for hand, foot for foot, Burning for burning, wound for wound, stripe for stripe.’ (Ch 21 vv 23-25)

It is, as I say, an understandable desire on the part of the victim or those whom he or she leaves behind to have the law of Moses applied. But we now live in a civilised community. Winston Churchill, during a debate in the (UK) House of Commons in 1910 said this:

‘The mood and tempo of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country.’

Those words admirably express the basic approach which a judge in a civilised country must take.”

To kill another human being is the gravest offence known in the criminal calendar and the offence of murder is punishable by the harshest penalty known to the criminal law. Yet there are rare instances in which killers are sentenced so leniently as to serve no time in custody at all.

Even such a tritely observed paradox illustrates that the responses of society and the criminal justice system to those who kill are as wide and varied as the circumstances in which those killings occur.

So, if those who are convicted of killing another person are sentenced in some instances to the most severe form of punishment available and in others to very light punishments, one may ask what factors, circumstances and conditions operate to cause such disparate outcomes?

The most obvious of these is to be found in the very structure of the criminal law itself which recognises a distinction in culpability — and hence maximum penalties — between two types of killing: murder and manslaughter.

The offence of murder is considered so serious, and the culpability of those who commit the offence considered so great, because of the element of intent. Those who kill with an intention to kill or do serious harm are judged harshly. None of these offenders can expect to avoid custodial sentences.

The law also recognises that sometimes deaths occur where no culpability can be attached to those involved, for example, by accident, through misfortune or in self-defence. Deaths that occur in these circumstances incur no criminal liability and no punishment.

1  R v Petroff (unrep, 12/11/91, Sup Ct NSW, Hunt CJ at CL).
Between these two extremes lies the offence of manslaughter, that is, killings that are culpable and deserving of prosecution and punishment, yet for one reason or another considered less serious than murder. It is into this category that the majority of homicide offences fall and they arrive there by a variety of procedural routes. These offences attract a wide range of punishments, reflecting the myriad circumstances in which they occur, for as Abadee J stated:2

“nowhere is there a greater range of appropriate sentences than there is in the case of manslaughter.”

It is a judicial cliché to describe manslaughter as a protean offence, but this description is apt, for manslaughter seems capable of assuming any form. As such, manslaughter presents what is “probably the most difficult of all the sentencing duties of the court”.3

More interesting is another oft-heard statement of sentencing judges: that the protean nature of the offence reduces sentencing statistics, such as those provided by the Judicial Commission of New South Wales, to a position of very limited value in assisting the sentencing process. For instance, Yeldham J admitted:4

“I find very little assistance from the decisions in other cases. The crime of manslaughter is one which has so many facets and which, in its nature, is so wide and extensive that little, if any, assistance is to be gained from a consideration of what, on other occasions and in other circumstances and on another accused person, was a proper sentence to impose.”

This study aims to go some way to remedying this deficiency. As well as examining homicide sentences in general, it will look more closely at the factual and circumstantial contexts in which offences occur, with the hope of revealing the parts of the whole.

The analysis is twofold: first, is it possible to identify basic situations in which homicides occur and to examine the sentences passed for those groups of offences to see what may be revealed? The chapters on child killings, Aboriginal homicides and juvenile offenders for instance, seek to do this.

Take, for example, the category of child killings, defined by the simple condition of the victim being aged under 18 years. Is it possible to observe patterns in the judicial response to these offences? Is killing one’s own children punished more harshly than killing a partner’s children? Are fathers who kill generally found more or less blameworthy than mothers who kill?

Or, within the category of Aboriginal homicide — again categorised by the single feature that the offender was an Aboriginal person — can we observe differences in sentencing patterns between those who kill Aboriginal victims and those who kill other victims?

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2 R v Gilham (unrep, 7/4/95, Sup Ct NSW, Abadee J).
3 R v LC (unrep, 24/9/99, Sup Ct NSW, Dowd J); see also Street CJ in R v Hill (1981) 3 A Crim R 397 at 402.
4 R v Schelberger (unrep, 2/6/88, CCA NSW, Yeldham J); see also R v LC (unrep, 24/9/99, Sup Ct NSW) where Dowd J said “Very little assistance can be gained from similar cases” when sentencing for manslaughter.
By identifying some simple factual circumstances or conditions by which to categorise homicides, it is possible to produce statistical subsets of cases which may, because of their more specific nature, be of greater assistance to sentencing judges.

The second part of the analysis is, in essence, the corollary of the first. That is, can identified sentencing outcomes be isolated and the offences that generate those sentences be analysed in a way that illuminates the operation of the sentencing discretion?

For example, what types of killings attract the very harshest penalties? What separates a case in which a life sentence is imposed from one in which a very severe but determinate sentence is passed? And which circumstances — be they objective features of the offence or subjective qualities of the offender — may lead to the imposition of a non-custodial sentence?

While recognising that sentencing is “an art rather than a science”,5 this study hopes to illustrate that it is an art informed by well-established and discernible principles,6 and that all sentences — from the lightest to the heaviest — can be explained by reference to the circumstances of any given case.

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5  R v LC (unrep, 24/9/99, Sup Ct NSW, Dowd J).
Definitions and Methodology

Study parameters

This is a study of all homicide offences sentenced by the courts in New South Wales between 1 January 1994 and 31 December 2001. It follows on from the Judicial Commission’s earlier study of homicide, which covered the period 1990–1993.7

The relevant date for determining whether an offence falls within the ambit of this study is the date of sentencing, rather than the date of offence, date of arrest or any other date. The study includes the following offences:

- murder — as defined by ss 18 and 19A of the Crimes Act 1900
- manslaughter — as defined by ss 18 and 24 of the Crimes Act 1900
- infanticide — which is defined by s 22A of the Crimes Act 1900 as a special homicide offence to be sentenced as if it were manslaughter.

This study is not, by any means, an attempt to catalogue or analyse all homicides that occurred in the study period. Rather it concentrates on the legal process of sentencing. Therefore, many killings that may have occurred will not be canvassed in this study, including incidents where:

- no suspect is ever apprehended — James and Carcach, for instance, stated that over 13% of all homicide events in New South Wales between July 1989 and June 1996 were unsolved8
- a suspect is charged and tried but found not guilty
- the alleged offender takes his or her own life (murder–suicide) or otherwise dies before being tried — research has indicated that this accounts for approximately 6% of homicide incidents in Australia9
- offenders are convicted of inchoate offences, such as attempted murder, or secondary offences, such as aiding and abetting or being an accessory before or after the fact
- offenders are convicted of lesser offences, such as dangerous driving causing death or other non-homicide offences against the person
- deaths through industrial accidents.

Numerous other studies that do deal with all occurrences of homicide have been published by bodies such as the Australian Institute of Criminology and the NSW Bureau of Crime Statistics and Research, many of which have been referred to in this study. The present study, however, in keeping with the Judicial Commission’s field of interest, concentrates exclusively on incidents where an offender is eventually convicted and sentenced for the offence of murder, manslaughter or, in two rare instances, infanticide.

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Data collection and analysis

Using files held in the registries of the District and Supreme Courts of New South Wales, sentencing remarks and judgments, information held by the Office of the Director of Public Prosecutions, and information contained in the Judicial Commission’s own Sentencing Information System, data was collected about offenders, victims and the circumstances of the offences committed, as well as legal/procedural information relating to charges and indictments, defences raised and sentences imposed.

Documents that were typically available included:

- police facts and statements
- witness statements (including from the offender)
- victim impact statements
- post mortem examination reports
- New South Wales Police Force Antecedent Report Forms
- psychological and/or psychiatric reports
- pre-sentence reports
- committal transcripts
- Remarks on Sentence/judgments.

Given that one of the principal aims of the study is to provide a view of homicide from the court’s perspective, the Remarks on Sentence were the most valuable resource.

Information was collected and analysed, and separate (but linked) databases were created for offenders, victims, offences and sentences. Therefore, any given variable could be analysed and discussed by reference to the most appropriate base set. For example:

- offender characteristics (such as age, gender, etc) are discussed in terms of the total number of offenders
- victim characteristics are discussed in terms of the total number of victims
- characteristics relating to the offence committed, such as weapons use, are discussed in terms of the total number of offences committed.

This approach allows the present study to accommodate the various homicide incidents that involve multiple victims, multiple offenders or both, as these incidents cause the number of victims to differ from the number of offenders, which in turn differs from the number of offences committed.

It should be noted, however, that where statistics are presented on the effect of various individual factors on sentencing (such as plea, prior convictions or Form 1 matters), these are discussed in isolation and no attempt has been made to control for other factors or to discuss the combined effects of the presence of various factors.

Understanding the statistics

Unique numbers of offenders and victims: All references to numbers of offenders and victims refer to unique individuals. Therefore, if two offenders are involved in the killing of a single victim, that victim is counted only once (although two distinct offences will be counted, one in relation to each offender).
The only exceptions to this are two offenders who committed distinct, unrelated homicide offences for which they were charged, convicted and sentenced in completely separate proceedings within the study period. These offenders were counted twice, once for each set of offences and sentences.

**Principal offence:** The most serious offence for which the offender was committed. Where only one offence was committed this is straightforward. However, where a single offender is convicted of multiple homicide offences a principal offence must be selected. The principal offence would be the one in respect of which the greatest penalty was imposed or, if the same penalty was imposed for more than one offence, the first in time. The offender is then counted only once and only one sentence is used in the calculation of statistics and information.

**Medians and ranges:** Median sentence lengths and ranges only include offenders who received full-time custodial sentences.

All references in this study to sentence lengths, ranges and medians refer to the aggregate sentence imposed on unique offenders for homicide offences. Therefore, for each unique offender, a single sentence exists, whether for a single offence or multiple offences, fixed or not fixed terms, or a concurrent or consecutive/partly consecutive sentence. Only 21 offenders in this study received consecutive or partly consecutive sentences, so this adjustment is relatively minor.

There were two main reasons for calculating the sentencing information in this manner:
- firstly, it reveals how long offenders are actually being imprisoned for, rather than creating an illusion by including shorter fixed terms as unique punishments when in fact that offender is spending a considerably longer period in prison
- secondly, the High Court’s decision in *Pearce v The Queen*\(^{10}\) changed the application of the totality principle. Using aggregate terms throughout the study allows a comparison of like values for offenders sentenced before and after the *Pearce* judgment.

**Definitions and notes on terminology**

**Aboriginal person:** any person able to be identified through available information as either an Aboriginal or Torres Strait Islander person. As the only offender identified in this study as a Torres Strait Islander was also described as Aboriginal, the term Aboriginal person has been adopted throughout.

**Age:** the age of each offender is calculated at the time the offence was committed.

**Child killer or child homicide offender:** a person who commits a child killing.

**Child killing:** a murder, manslaughter or infanticide offence in which the victim is under the age of 18 years.

**Child or juvenile:** any person under the age of 18 years. For juvenile offenders, the age is taken at the time the offence was committed.

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\(^{10}\) (1998) 194 CLR 610.
Diminished responsibility/Substantial impairment by abnormality of mind: the Crimes Act 1900, s 22A, was amended during the present study period. The result was that the partial defence of diminished responsibility was renamed “Substantial impairment by abnormality of mind”, although the substantive nature of the defence was largely unchanged. For consistency and convenience, the term “diminished responsibility” has been used throughout, whether referring to offences that occurred before or after the change to the legislation.

Head sentence: the total period of full-time imprisonment imposed on the offender.

Homicide incident: the actual occurrence of homicide offences. A single homicide incident may involve more than one offender and/or victim, and therefore result in more than one homicide offence. Where there is some temporal, personal or other proximate connection between individual offences, they will be counted as a single incident. For instance, if an offender kills two members of his family at the same time and place, two offences have been committed, but they are considered a single homicide incident.

Homicide offence: the proven offences of murder, manslaughter and infanticide.

Homicide offender: any person convicted of one or more homicide offences.

Homicide victim: any person killed in a homicide incident by one or more homicide offenders.

JIRS: Judicial Information Research System.

Juvenile offender: a person sentenced for the offence of murder or manslaughter who was aged under 18 years at the time the offence was committed.

Manslaughter and infanticide: the proven offence of manslaughter as defined by s 18(1) of the Crimes Act 1900, the punishment for which is set out in s 24. Except where specifically mentioned, a reference to manslaughter also includes the offence of infanticide as defined by s 22A of the Crimes Act 1900. The decision to include infanticide with manslaughter was made because s 22A provides that infanticide is to be dealt with and punished as if it were manslaughter. (There were only two infanticide offences committed in the study period.)

Murder: the proven offence of murder as defined by s 18(1) of the Crimes Act 1900 (NSW), the punishment for which is set out in s 19A.

Non-custodial sentence: all forms of punishment other than full-time imprisonment including bonds, suspended sentences, periodic detention and community service orders.

Non-parole period: the minimum period of full-time imprisonment imposed on the offender.

Sexual partner: any persons who are in, or previously were in, the relationship of spouse, de facto spouse, boyfriend or girlfriend, lover, or any other relationship of an ongoing consensual sexual relationship to each other.

Study period: 1 January 1994 to 31 December 2001. The study includes only those homicide incidents sentenced within that period.
General Information on Incidents, Offenders and Victims

General figures

Within the 8-year study period, there were 421 homicide incidents that resulted in at least one offender being sentenced for either murder, manslaughter or infanticide. These 421 incidents:

- involved 469 individual victims
- involved 477 individual homicide offenders
- resulted in 536 separate convictions and sentences.

As can be clearly seen, the number of offenders is not equal to the number of victims, nor is the number of victims equal to the number of convictions recorded. This is due to the simple fact that, while most homicide incidents involve a single offender and a single victim, many do not. Some incidents involve a single offender who kills more than one victim, some involve multiple offenders killing a single victim, and some involve both multiple offenders and multiple victims: see Table 1.

Table 1: Homicide incidents 1994–2001
Number of offenders and victims involved

<table>
<thead>
<tr>
<th>No of offenders</th>
<th>No of victims</th>
<th>Incidents</th>
<th>No of charges/ convictions resulting</th>
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</tr>
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<td><strong>Total</strong></td>
<td></td>
<td><strong>21</strong></td>
<td><strong>536</strong></td>
</tr>
</tbody>
</table>

† This incident involved two offenders both of whom were involved in killing two victims, while one of the offenders (Rose) killed a further 3 victims singlehandedly. Hence Rose was convicted of 5 counts of murder, and the second offender convicted of only 2 counts: *R v Rose* (unrep, 3/9/98, Sup Ct NSW, Levine J) and *R v Lewis* (unrep, 9/2/00, Sup Ct NSW).
The rate of occurrence of homicides has been steady in Australia and in New South Wales in recent years. This study, when compared to the findings of the Judicial Commission’s earlier homicide study tends to show that, if anything, the number of persons being convicted and sentenced for homicide in the State has declined:

- the first study, covering a 44-month period from January 1990 to August 1993, included 256 offenders and 242 victims
- the present study, which covers an 8-year (96-month) period, includes 477 offenders and 469 victims.

This equates to an annual rate of 69.8 offenders and 66 victims per annum in the earlier study period, and 59.6 offenders and 58.6 victims per annum in the present study period, a reduction of approximately 14.6% in the number of offenders sentenced each year.

The following sections describe the offenders and victims involved in the present study in terms of age, gender and various other observable characteristics. The analysis tends to show that homicide offenders — and to a certain extent victims as well — are young, disadvantaged by lack of education and employment, and often beset by the problems of drug and alcohol abuse.

Putting aside the objective seriousness of the crime, Grove J observed that there is often a hopelessness to the lives of many homicide offenders and, perhaps more interestingly, shows that sometimes the deceased can be a prisoner of the same circumstances: 11

“By the time of the death of [the victim] the prisoner’s life was at a low ebb and his existence had a pointlessness about it. [The victim] had joined him at that level…”

In reducing the following offenders and victims to numbers and statistics, we should never lose sight of the fact that “These simple facts cover a well of tragedy”. 12

**Offender information**

**Gender**

There were 477 people sentenced in New South Wales for homicide offences between 1 January 1994 and 31 December 2001. Of these:

- 411 were male (86.2%)
- 66 were female (13.8%).

This supports the findings of existing research into the phenomenon of homicide which has consistently found an overwhelming majority of male offenders. The proportion of male offenders found in the present study was, however, less than was found in the Judicial Commission’s earlier homicide study, where 91.8% of offenders were male.

---


Among the 411 male offenders, 201 (48.9%) were convicted of murder as their principal offence, while 210 (51.1%) were convicted of manslaughter.

This relatively even distribution between murder and manslaughter for male offenders is significantly different to the pattern among female offenders. Of the 66 female offenders in this study, only 15 (22.7%) were convicted of murder, while 49 were convicted of manslaughter (74.2%) and two were convicted of infanticide (3.0%).

We can say therefore, that although women commit homicide offences far less often than men, when they do kill they are far less likely to be convicted of the offence of murder and significantly more likely to be convicted of manslaughter. A similar finding was made in the Judicial Commission’s first homicide study, where female offenders were “almost always” convicted of manslaughter.13

### Age

The 477 offenders ranged in age from 13–74 years, with a median age of 27 years: see Table 2. This is consistent with most research into homicide, which has tended to show that homicide offenders are quite young. There was little difference between the median age of murderers (27 years) and manslaughter offenders (26 years).

Table 2: All homicides 1994–2001
Age and gender of offenders

<table>
<thead>
<tr>
<th>Age (years)</th>
<th>Males</th>
<th></th>
<th></th>
<th>Females</th>
<th></th>
<th></th>
<th>Overall</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
<td>n</td>
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<tr>
<td>≤20</td>
<td>95</td>
<td>23.1</td>
<td>11</td>
<td>16.7</td>
<td>106</td>
<td>22.2</td>
<td></td>
</tr>
<tr>
<td>21–25</td>
<td>96</td>
<td>23.4</td>
<td>14</td>
<td>21.2</td>
<td>110</td>
<td>23.1</td>
<td></td>
</tr>
<tr>
<td>26–30</td>
<td>75</td>
<td>18.2</td>
<td>12</td>
<td>18.2</td>
<td>87</td>
<td>18.2</td>
<td></td>
</tr>
<tr>
<td>31–35</td>
<td>39</td>
<td>9.5</td>
<td>15</td>
<td>22.7</td>
<td>54</td>
<td>11.3</td>
<td></td>
</tr>
<tr>
<td>36–40</td>
<td>52</td>
<td>12.7</td>
<td>2</td>
<td>3.0</td>
<td>54</td>
<td>11.3</td>
<td></td>
</tr>
<tr>
<td>41–45</td>
<td>20</td>
<td>4.9</td>
<td>2</td>
<td>3.0</td>
<td>22</td>
<td>4.6</td>
<td></td>
</tr>
<tr>
<td>46–50</td>
<td>16</td>
<td>3.9</td>
<td>4</td>
<td>6.1</td>
<td>20</td>
<td>4.2</td>
<td></td>
</tr>
<tr>
<td>51–55</td>
<td>7</td>
<td>1.7</td>
<td>3</td>
<td>4.5</td>
<td>10</td>
<td>2.1</td>
<td></td>
</tr>
<tr>
<td>56–60</td>
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<td>1</td>
<td>1.5</td>
<td>5</td>
<td>1.0</td>
<td></td>
</tr>
<tr>
<td>61–65</td>
<td>4</td>
<td>1.0</td>
<td>1</td>
<td>1.5</td>
<td>5</td>
<td>1.0</td>
<td></td>
</tr>
<tr>
<td>66–70</td>
<td>1</td>
<td>0.2</td>
<td>1</td>
<td>1.5</td>
<td>2</td>
<td>0.4</td>
<td></td>
</tr>
<tr>
<td>&gt;70</td>
<td>2</td>
<td>0.5</td>
<td>–</td>
<td>–</td>
<td>2</td>
<td>0.4</td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>411</td>
<td>100.0</td>
<td>66</td>
<td>100.0</td>
<td>477</td>
<td>100.0</td>
<td></td>
</tr>
<tr>
<td><strong>Median age</strong></td>
<td>26 years</td>
<td>28.5 years</td>
<td>27 years</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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13 Donnelly, Cumines and Wilczynski, op cit n 7, p 11.
The present group of offenders are concentrated between the ages of 16–40 years, with 84.3% of offenders being in that age group. Nearly a quarter of all offenders (106 or 22.2%) were aged 20 years or younger, while 63.5% of all offenders were aged 30 years or less.

Among younger offenders, 44 (9.2%) were aged under 18 years at the time they committed the offence. These juvenile offenders are examined in detail in Chapter 6.

The most frequent offender ages were 22 years (33 offenders), 19 years (26 offenders), and 21 and 17 years (both with 23 offenders).

Table 2 shows that female offenders tend to be slightly older than male offenders, a result contributed to by the high concentration of male offenders in the 25 years and younger age group, and by the 22.7% of female offenders found in the 31–35 years age bracket. This is in keeping with the findings of the Judicial Commission’s earlier homicide study, which found that female offenders were “on average” 4 years older than male offenders.14

Interestingly, although the overall median age for female offenders is higher than for males, the reverse is true for the offence of murder when considered alone. Females convicted of murder had a median age of 25 years, compared to the median age of male murderers which was 27 years.

For manslaughter, however, the median age of male offenders was 25 years compared to 30 years for females. As most female offenders were convicted of manslaughter (77.3%)15 rather than murder (22.7%), this shifts the overall median for females up to 28.5 years, which is older than the overall median age of male offenders.

Marital status

Of the 423 offenders whose marital status was known:16

- 205 (48.5%) were single, which is, if anything, unsurprising considering that the offenders were generally quite young
- 102 were in de facto relationships (24.1%)
- 83 were married (19.6%)
- 33 were either divorced (3.8%), separated (3.8%) or widowed (0.2%).

This compares to the Judicial Commission’s previous homicide study, where 56.5% of offenders were single, 32.9% were either married or in de facto relationships, and 10.5% were either separated or divorced.

Employment status

Employment is a general socioeconomic indicator often analysed in criminological research studies, with most finding high incidences of unemployment among criminal offenders.

14 Ibid, p 12.
15 Including two women convicted of infanticide under s 22A of the Crimes Act 1900.
16 Information on marital status unknown for 54 offenders.
The present study is no exception, with 249 of the 462 offenders whose employment status was known\textsuperscript{17} not being in paid employment (53.9%). The remaining offenders were:

- in paid employment (174 or 37.7%)
- full-time students (22 or 4.8%)
- prison inmates (7 or 1.5%)
- aged pensioners (6 or 1.3%)
- engaged in home duties (4 or 0.9%).

The high proportion of unemployed offenders in the present study is similar to the 51.4% unemployment rate reported among offenders in the Judicial Commission’s previous homicide study, while the previous study’s figure for employed offenders (34.3%) was also similar to the proportion found among the present group of offenders.

**Education**

Education is another general socioeconomic indicator, and one that is closely linked to unemployment. Education information was available for 351 offenders\textsuperscript{18}, most of whom had attained some secondary education. In all:

- 252 offenders (71.8%) had secondary education
- 46 offenders (13.1%) had primary education only
- 25 offenders (7.1%) had trade qualifications
- 24 offenders (6.8%) had tertiary education
- 4 offenders (1.1%) had “poor” or “limited” education.

These figures confirm the findings of earlier homicide research studies, which have tended to show that offenders are not highly educated.

**Prior conviction status**

Whether or not an offender has a history of prior criminal offending is naturally an important consideration in the sentencing process.

Of the 477 offenders in this study:

- 263 were recorded as having prior convictions of some kind (55.1%)
- 214 were not recorded as having prior convictions (44.9%).

In a similar fashion to the Judicial Commission’s earlier homicide study\textsuperscript{19}, those offenders who had recorded prior convictions were separated into two groups:

- those whose convictions are for non-violent offences (131 or 27.5% of all offenders)
- those who have committed violent offences (132 or 27.7% of all offenders).

\textsuperscript{17} Information on employment status unknown for 15 offenders.

\textsuperscript{18} Information on education unknown for 126 offenders.

\textsuperscript{19} Donnelly, Cumines and Wilczynski, op cit n 7, p 15.
The prior conviction status of all offenders is shown in Figure 1 below, clearly demonstrating the very even distribution between those with violent and non-violent prior convictions.

The effect of an offender’s prior record on the sentencing process is discussed in the next chapter.

**Figure 1: Sentenced homicide offenders 1994–2001**  
Prior conviction status of offenders

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**Alcohol and drug information**

Alcohol and other drug use was very prevalent among the 477 offenders in this study. At the time the offence was committed:

- 132 offenders (27.7%) were recorded as being under the influence of alcohol only
- 36 offenders (7.5%) were under the influence of other drugs
- 62 offenders (13%) were under the influence of both drugs and alcohol
- 247 offenders (51.8%) were not affected by either drugs or alcohol.

Cannabis was by far the most common drug involved — others included amphetamines, heroin, cocaine, hallucinogens and legal or prescription drugs (such as sedatives or tranquillisers). There were 15 offenders who were under the influence of more than one type of drug at the time they committed the offence.

As well as recording whether offenders were affected by alcohol or other drugs at the time of the offence, information was also recorded about offenders’ histories of alcohol and drug abuse. According to these figures:

- 142 offenders (29.8%) had histories of alcohol abuse, including alcoholism or alcohol dependency, binge drinking and underaged drinking (including those with histories of both alcohol and drug abuse)

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20 That is, legal/prescription drugs being misused or abused, rather than being used by persons for whom they were prescribed for therapeutic purposes.
161 offenders (33.7%) had histories of drug abuse (including those with histories of both alcohol and drug abuse)

74 offenders (15.5%) had histories of both alcohol and drug abuse

248 offenders (52.0%) did not have histories of either alcohol or drug abuse.

The data gathered in relation to alcohol or drug abuse should be treated with caution, since it does not gauge the extent or seriousness of the abuse. In addition, the information was obtained from sentencing documents and proceedings where subjective factors that favour the offenders (such as a history of drug or alcohol abuse) are only required to be proved on the balance of probabilities.

It must also be remembered that a great deal of information about offender drug and alcohol abuse histories is self-reported. The information is largely obtained from various background reports contained in the court files and, as such, the information disclosed by the offender to the author of that report may be self-serving or unreliable. For instance, it was not unknown for offenders to report that they consumed 40, 50 or even 60 alcoholic drinks daily, or that they spent a certain amount of money each day on drugs such that their total expenditure on drugs would be several hundred thousand dollars a year.

Regardless of whether such reports are accurate or stretch the truth to a degree, where a particular matter is accepted as true by a sentencing judge, thus forming part of the matrix of subjective features of a case, it is recorded as being true for the purposes of this study.

Victim information

In collecting data for the present study, it proved far more difficult to find comprehensive data relating to victim characteristics than it did for offenders. This was because the source documents contained in the court files — statements and interviews, pre-sentence reports, medical and psychological assessments, and most importantly the sentencing judgment itself — naturally focused on the offender’s history and the circumstances of the offence itself.

The victim was, in many cases, incidental to the entire process, as was summed up by Hunt CJ at CL, who said:

“As is often the case in trials involving the death of the victim, very little is known of the victim herself. That is because usually the only relevant fact is the victim’s death…”

In some cases, particularly the more recent ones, a victim impact statement is included in court files, allowing an insight into some relevant details of the victim’s life. While the victim impact statement allows the voices of grieving and aggrieved relatives to be heard, and provides an opportunity for the court to acknowledge and empathise with

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22 R v Dargin (unrep, 22/10/97, Sup Ct NSW), at p 12.
their loss, it remains peripheral to the sentencing process, and indeed the law does not permit such statements to be “weighed in the scales of justice”. More recently victim impact statements have been granted greater prominence by the introduction in 2003 of s 30A to the Crimes (Sentencing Procedure) Act 1999, which created a positive right of relatives of the deceased to read the statement in open court.

However in this study information about particular victim characteristics was not always available, and the following analysis is based on the information that was ascertained.

**Gender**

Male victims (315 or 67.2%) outnumbered female victims (154 or 32.8%) by approximately two to one. This tends to confirm the proposition that homicide is generally a masculine phenomenon, whether analysed in terms of victims or offenders, although the proportion of female victims is more than twice the proportion of female offenders (13.8%).

The present findings are at some variance with the findings of the Judicial Commission’s first homicide study, which reported 56.1% of victims as male and 43.9% as female. Where female victims were involved, they tended to be either child victims (25 or 16.2% of female victims, of whom 14 were killed by their parents or parent’s partners) or adult women killed by their spouses or other male sexual partners (61 or 39.6% of female victims).

**Age**

Table 3 shows the known ages of all homicide victims in this study broken into 5-year age groups. It shows clearly that very young children (aged 5 years and under) are at a high risk of victimisation, a risk that decreases through childhood before peaking again in adolescence and early adulthood.

The victimisation rate remains fairly constant in the four brackets from 16–35 years of age, before beginning a slow decline through the later years.

The peak age bracket, both overall and for male offenders considered alone, is 21–25 years, indicating that males, who form the majority of victims, face their highest risk of victimisation in early adulthood, often losing their lives in altercations with male offenders of a similarly young age.

Among female victims, the peak rates of victimisation were 16–20 years and 21–25 years, each of which recorded 16 victims, followed by 26–30 years and 31–35 years, which both recorded 14 victims. This indicates that there is something of a plateau in the ages of female victims extending from 16–35 years of age.

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23 See generally Hunt CJ at CL in *R v Previtera* (1997) 94 A Crim R 76 at 85 for the general principles limiting the role of victim impact statements in criminal trials.
25 Donnelly, Cumines and Wilczynski, op cit n 7, p 17.
As many female victims (39.6%) are killed by their male partners or spouses, it is unsurprising that many female victims are in these age brackets. The male partners who kill these women would in most instances be of a similar age, and an examination of the table of offenders’ ages shows that a great many male offenders were in those age groups.

In addition, it may be reasonable to assume that if an intimate relationship exists for many years and both parties reach older ages, the risk of lethal violence within that relationship would decrease because of the generally declining rates of male homicide offenders in older age groups, and also because such a relationship is a stable one.

<table>
<thead>
<tr>
<th>Age (years)</th>
<th>Males</th>
<th>%</th>
<th>Females</th>
<th>%</th>
<th>Overall</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>≤5</td>
<td>22</td>
<td>8.9</td>
<td>12</td>
<td>9.6</td>
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<td>6–10</td>
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<td>4</td>
<td>3.2</td>
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<tr>
<td>11–15</td>
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<td>2</td>
<td>1.6</td>
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<td>2.4</td>
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<td>16–20</td>
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<td>16</td>
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<td>31–35</td>
<td>24</td>
<td>9.7</td>
<td>14</td>
<td>11.2</td>
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<td>10.2</td>
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<tr>
<td>36–40</td>
<td>28</td>
<td>11.3</td>
<td>8</td>
<td>6.4</td>
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<td>9.7</td>
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<tr>
<td>41–45</td>
<td>19</td>
<td>7.7</td>
<td>10</td>
<td>8.0</td>
<td>29</td>
<td>7.8</td>
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<tr>
<td>46–50</td>
<td>13</td>
<td>5.2</td>
<td>6</td>
<td>4.8</td>
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</tr>
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<td>61–65</td>
<td>15</td>
<td>6.0</td>
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<td>1.6</td>
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<td>4.6</td>
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<tr>
<td>66–70</td>
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<td>1.6</td>
<td>11</td>
<td>2.9</td>
</tr>
<tr>
<td>&gt;70</td>
<td>7</td>
<td>2.8</td>
<td>7</td>
<td>5.6</td>
<td>14</td>
<td>3.8</td>
</tr>
<tr>
<td>Total</td>
<td>248</td>
<td>100.0</td>
<td>125</td>
<td>100.0</td>
<td>373</td>
<td>100.0</td>
</tr>
</tbody>
</table>
| Median age  | 32 years | 30 years | 31 years

† Age unknown for 67 male and 29 female victims.
Employment and education

The employment status was unknown for a large number of victims (164), so care must be taken in assessing the figures below. Where employment information was available:

- 40% of victims were in paid employment at the time they were killed
- 78 victims (25.6%) were unemployed
- smaller numbers of victims were recorded as being of pre-school age (10.5%), students (9.8%), aged pensioners (8.9%), home duties (3%) and prison inmates (2.3%).

Information on the educational attainments of victims was very scarce, only being found for 135 of the 469 victims in the study, and that figure includes 32 victims who were classified as being of pre-school age. Therefore information about education was only available for 103 victims who were old enough to have attended school. As such, little can be said of the results, other than:

- most had some secondary schooling (70 victims)
- 14 had tertiary education
- 12 had primary schooling only (including those killed while still of primary school age)
- 6 had trade qualifications.

Other information on homicide incidents

Relationship between offender and victim

In order to analyse the relationship that existed between the offender and the victim in any homicide incident, it is necessary to consider the total number of offences committed, rather than the number of victims or the number of offenders.

This is because there are various incidents involving multiple offenders or multiple victims (or sometimes both), and different relationships may exist for each offender and each victim within that “incident”.

The relationship between offender and victim was recorded for each of the 536 homicide offences sentenced between 1 January 1994 and 31 December 2001. These have been sorted into the following 6 categories.

Friend or associate: This category includes all those cases, other than family or intimate relationships, where the offender and victim were known to each other prior to the time immediately preceding the death of the victim. It includes friends, acquaintances, associates, work, school or other colleagues, housemates/flatmates, and so forth. There were 140 offences in this category (26.1%).

Spouses, partners and lovers: This category includes all homicide offences where the offender and victim were, or had previously been, involved in an intimate or sexual relationship. This includes couples who were married, in de facto marriages or otherwise cohabiting, boyfriends and girlfriends, and other lovers.26 There were 88 offences in this group (16.4%).

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26 There were no offences found in this study involving homicide between homosexual partners. If any such offences had been found they would have been included in this group.
Parent of victim: This category includes all offences where the offender was the parent of, or in loco parentis to, the victim. This includes natural (biological) parents, adoptive parents, step-parents and cohabiting partners of a natural parent. There were 41 offences in this group (7.6%).

Child of victim: This category includes those offences where the child, stepchild or adopted child killed his or her parents, step-parent or other person in loco parentis. There were 14 offences in this group (2.6%).

Other family relationship: This category includes all offences where some familial relationship existed between offender and victim, other than the parent/child or marital/spousal relationships described above. This includes, but is not limited to, siblings, grandparents, cousins, aunts and uncles, and relatives by marriage. This category contained 26 offences (4.9%).

Strangers/no relationship: This category includes all cases where there was no discernible relationship between the offender and victim. It is the largest of the 6 categories and contains the remaining 227 offences (42.4%).

The relative proportions of the relationship types are shown in Figure 2.

Methods of killing and weapons usage

Of the 536 homicide offences in the present study, it was possible to identify a method of killing for 526 offences, with 10 being unknown. Each offence has been reduced to a single “method of killing”, so where, for example, a victim may have been bashed and then stabbed, only one cause is recorded based on which appears to have been the more significant or serious cause of injury or death. The selection of a single method or cause of death where there were multiple possible or apparent causes is guided by the documentary evidence available, in particular coroners’ reports and results of postmortem medical examinations.

27 See Chapter 5, Child Victims for further information.
The 526 offences where the method of killing was known have been classified into 6 groups which are discussed below.

**Shot with firearm:** This includes any offence where the victim was killed as a result of injuries arising from gunshot wounds, and includes all types of firearms. This category takes in accidental, unintentional or negligent shootings, and shooting deaths that occurred in the course of the commission of armed robberies or other crimes.

It was intended to report on the ownership and registration status of the weapons involved, particularly in the light of changes to firearms ownership regulations in recent years, but this information proved difficult to obtain and no findings were possible.

This category contained 133 offences (25.3%).

**Stabbed, slashed or pierced:** This includes all offences where the victim was killed as a result of injuries inflicted with a cutting or piercing instrument. The most common weapon in this group was, of course, a knife, but various other weapons were used, including broken bottles, chisels, screwdrivers and, in one case, a bow and arrow.

This category contained 170 offences (32.3%), and was the largest of the 6 categories.

**Battered with an object:** This includes all offences where the victim was battered by an offender armed with some object. The category of objects was unrestricted and included, inter alia, iron bars, lengths of timber or wood, tree branches and sticks, rocks and bricks, and household items such as pots and pans, axe handles, baseball bats and items of furniture.

This category contained 59 offences (11.2%).

**Bashed manually:** This includes all offences where the victim was beaten or kicked to death without the offender using any weapon, but does not include strangulation, which is considered in a separate category below.

This category contained 68 offences (12.9%), a fairly similar proportion to those involving battering with an object.

**Strangled:** This includes offences where the victim died as a result of strangulation, whether by direct manual pressure to the throat and airways or by use of some type of ligature (examples of which included electrical cords, shoelaces, neck ties and belts).

This category contained 44 offences (8.4%).

**Other causes:** This category contains all offences where the method of killing was known, but did not come within any of the above categories. This included vehicle-related deaths, drugging, poisoning, drowning and burning.

This category contained 52 offences (9.9%).

The implications of weapons usage and the various methods of inflicting death upon sentencing outcomes are discussed in greater detail in Chapter 9.
General Sentencing Information

General

Currently, the range of punishments available when sentencing for homicide offences is governed by the following sections of the Crimes Act 1900:

“19A. Punishment for murder

(1) A person who commits the crime of murder is liable to imprisonment for life.

(2) A person sentenced to imprisonment for life for the crime of murder is to serve that sentence for the term of the person’s natural life.

(3) Nothing in this section affects the operation of section 21 (1) of the Crimes (Sentencing Procedure) Act 1999 (which authorises the passing of a lesser sentence than imprisonment for life).

…

(6) Nothing in this section affects the prerogative of mercy.

...

24. Manslaughter—punishment

Whosoever commits the crime of manslaughter shall be liable to imprisonment for 25 years:…”

The current murder provision, s 19A, has replaced the previous s 19, which prescribed a mandatory life sentence.28 Whereas the Judicial Commission’s earlier homicide study contained some cases that were sentenced under the old provision, all murder offenders in the present study were sentenced under the new s 19A, whereby the maximum penalty is imprisonment for the term of the prisoner’s natural life. Currently the maximum penalty is applied only to the “worst category of cases” or cases where the level of culpability is so extreme that the power to impose a life sentence is invoked under s 61 of the Crimes (Sentencing Procedure) Act 1999.

In the present study, 477 offenders were sentenced for homicide offences, that is, either murder or manslaughter.29 The following analysis of the sentences imposed on these offenders reveals, unsurprisingly, that murder sentences are quite constant and concentrated, while manslaughter sentences show a far greater variation.

28 The Crimes (Homicide) Amendment Act 1982, while maintaining the mandatory life sentence for murder, introduced a limited discretion to impose a lesser penalty where the offender’s culpability was “significantly diminished by mitigating circumstances”. Several years later, the Crimes (Life Sentences) Act 1989 introduced the “new” s 19A, which is substantially the same as it reads currently, with the exception of the current reference to the Crimes (Sentencing Procedure) Act 1999, which originally referred to s 442 of the Crimes Act, since repealed.

29 For the purposes of this analysis, the two offenders convicted of the offence of infanticide under s 22A are included as manslaughter offenders.


**Murder**

Between 1 January 1994 and 31 December 2001, 216 unique offenders were sentenced for murder (45.3% of all homicide offenders in the study). These offenders were sentenced for 255 counts of murder, with various offenders being sentenced for more than one count of the offence.

All murder offenders were sentenced to terms of full-time imprisonment, which is to be expected for an offence so grave. Indeed, no murder offender has received anything other than a full-time custodial sentence since the Judicial Commission began monitoring sentences in 1989.

Head sentences imposed on murder offenders in this study ranged from a minimum of 9 years to a maximum life sentence. Life sentences were imposed on 17 offenders.

The longest determinate (non-life) sentence imposed was 45 years on a juvenile offender. Life sentences are not available for juvenile offenders, and this was an offence that may well have attracted a life sentence had the offender been older. The median head sentence for all murder offenders in the study was 18 years.

Non-parole periods imposed on murder offenders ranged from 5 years to life, while the longest determinate non-parole period was 35 years. The median non-parole period was 13 years 6 months.

These figures were consistent with the Judicial Commission’s first homicide study, in which all murderers received prison sentences of at least 9 years duration and a typical sentence for those sentenced under the new s 19A of the *Crimes Act* 1900 was a full term of 18 years with a minimum period of 12 years.

Other research has also shown that in recent years, the sentencing pattern for murder has been quite consistent. Baker reported that murder sentences for the 8-year period of 1990–1997 were “stable”, with the average non-parole period for 6 of the 8 years being in the range of 11 years to 12 years 2 months. Fitzgerald reported murder sentences as stable over the 11-year period of 1990–2000, with the annual average non-parole period ranging from 11 years 2.4 months to 15 years 8 months. Seven of the 11 years recorded average non-parole periods for murder in the range of 11 years 8.8 months to 13 years 2.9 months.

Figures 3 and 4 show the distribution of sentences imposed on the 216 murder offenders.

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30 Donnelly, Cumines and Wilczynski, *op cit* n 7, p 71.
Figure 3: Murder 1994–2001
Distribution of head sentences

Figure 4: Murder 1994–2001
Distribution of non-parole periods
Manslaughter

Between 1 January 1994 and 31 December 2001, 261 unique offenders were sentenced for manslaughter (54.7% of all homicide offenders in the study). These offenders were sentenced for 281 counts of manslaughter, with various offenders being sentenced for more than one count of the offence.

Unlike murder offenders, not all manslaughter offenders were sentenced to terms of full-time imprisonment — 30 offenders (11.5%) received non-full-time custodial sentences, including various bonds, suspended sentences, periodic detention and community service orders.

These 30 offenders, their offences and sentences are analysed in greater detail in Chapter 11. However, for the purposes of the following analysis of full-time custodial sentences, it is important to bear in mind that there are 30 additional offenders located “below” the lightest head sentence group for manslaughter.

For the 231 offenders who were sentenced to imprisonment for manslaughter, head sentences ranged from 18 months to 20 years. The median head sentence was 7 years. Non-parole periods imposed ranged from 8 months to 14 years 6 months, with a median non-parole period of 4 years 3 months.

In comparison, the Judicial Commission’s earlier homicide study found that 109 out of 126 manslaughter offenders received full-time custodial sentences (86.5%), while 13.4% of offenders were sentenced to other forms of punishment. Among those who were imprisoned the median head sentence was 5 years 3 months, while no median figure was quoted for non-parole periods.

A simple comparison of the two studies indicates that manslaughter sentences have become more severe in the intervening period: the occurrence of non-custodial sentencing has decreased slightly (from 13.4% to 11.5%), while the median head term of imprisonment has increased by 21 months (from 5 years 3 months to 7 years).

The most noticeable shifts in the sentences imposed in the two study periods were in the greater than 2–4 year range, which in this study contains 11.3% of offenders, but in the previous study contained 25% of offenders; and the up to 2 years group which in this study contains a mere 0.9% of offenders, but in the previous study contained just over 5% of offenders.

The corollary of this shift away from the lightest category of custodial sentences is an increased proportion of offenders in the middling range of sentences: 29.4% in the greater than 4–6 year range and 26.8% in the greater than 6–8 year range in the present study, compared to approximately 22% in each group in the earlier study.

33 Including two offenders convicted of the offence of infanticide under s 22A of the Crimes Act 1900.
34 Donnelly, Cumines and Wilczynski, op cit n 7, pp 89–90. Note that two offenders sentenced to periodic detention were classified in the custodial sentence group in the earlier study. The figures quoted above remove those two offenders into the non-custodial sentences category to accord with the methods used in the rest of this study, so that reference to custodial sentences only includes full-time custody.
Figures 5 and 6 below show the distribution of head sentences and non-parole periods imposed on the 231 manslaughter offenders who were imprisoned in the current study period. The graphs illustrate that although a wide range of sentences were imposed, there was a heavy concentration of sentences, with 141 of the 231 offenders (61.0%) receiving head sentences within 2 years either side of the median sentence (that is, from 5–9 years).

**Figure 5:** Manslaughter 1994–2001
Distribution of head sentences

**Figure 6:** Manslaughter 1994–2001
Distribution of non-parole periods
These findings overall are quite consistent with other recent analyses of manslaughter sentencing in New South Wales. Both Baker and Fitzgerald report rates of imprisonment for manslaughter that are consistent with the 88.5% imprisonment rate found in the present study, while reported average non-parole periods were generally in the 4–5 year range.

**Sentencing factors**

The following section looks at various factors that one would expect to have some effect on sentences passed in individual cases, and compares median sentences for cases where that factor was present with the median sentences for cases where that factor was not present. The sentencing factors analysed are plea status, prior convictions, multiple offences, additional offences, Form 1 matters and partial defences. These effects are measured in isolation and no attempt has been made to control for other factors that may impact upon sentence outcomes.

**Plea**

Plea is obviously an important factor in sentencing, with offenders who plead guilty generally being entitled to some discount on their sentence. This discount takes account of the offender’s remorse and contrition, while also recognising the utilitarian value of sparing the time and public expense that would be incurred in a contested trial.

A plea of not guilty must not lead to a heavier penalty than is otherwise appropriate. Table 4 shows that for both murder and manslaughter, a guilty plea, while not lessening the median head sentence, does provide a lighter non-parole period. The median non-parole period was 2 years shorter for murder offenders who pleaded guilty and 6 months shorter for manslaughter offenders who pleaded guilty.

**Table 4: Homicide sentences 1994–2001
Effect of plea on sentence**

<table>
<thead>
<tr>
<th></th>
<th>Guilty plea</th>
<th>Not guilty plea</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Head</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Murder</td>
<td>Median</td>
<td>Head</td>
</tr>
<tr>
<td></td>
<td>18 yrs</td>
<td>12 yrs</td>
</tr>
<tr>
<td>Range</td>
<td>9 yrs – life</td>
<td>5 yrs – life</td>
</tr>
<tr>
<td>Manslaughter</td>
<td>Median</td>
<td>Head</td>
</tr>
<tr>
<td></td>
<td>7 yrs</td>
<td>4 yrs</td>
</tr>
<tr>
<td>Range</td>
<td>2.5 – 20 yrs</td>
<td>9 mths – 12.5 yrs</td>
</tr>
</tbody>
</table>

37 Op cit n 32, p 2.
39 Cameron v The Queen (2002) 209 CLR 339 at [65] per Kirby J.
In addition, of the 30 manslaughter offenders who received non-custodial sentences, 27 entered guilty pleas (90.0%), compared to only 3 who pleaded not guilty and received a non-custodial sentence (10%). In other words, 15.3% of manslaughter offenders who pleaded guilty received a non-custodial sentence, compared with 4.6% of offenders who pleaded not guilty.

**Prior convictions**

A history of prior criminal offending is naturally a factor that the courts will consider in sentencing. The application of this principle is outlined in *Veen v The Queen (No 2)*, where it was said:

“... the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences ...The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted.

In the present study, the 477 offenders fell into 3 groups:

- those with no prior convictions (214 offenders)
- those whose convictions are for non-violent offences (131 offenders)
- those who have committed violent offences (132 offenders).

The median sentences and sentencing ranges for offenders in those 3 groups are shown in Table 5. For both murder and manslaughter the median head sentence and non-parole period were longer for offenders with violent prior convictions.

<table>
<thead>
<tr>
<th>Table 5: Homicide sentences 1994–2001</th>
<th>Effect of prior convictions on sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No priors</td>
</tr>
<tr>
<td></td>
<td>Head</td>
</tr>
<tr>
<td>Murder</td>
<td></td>
</tr>
<tr>
<td>Median</td>
<td>18 yrs</td>
</tr>
<tr>
<td>Range</td>
<td>10 yrs – life</td>
</tr>
<tr>
<td>Manslaughter</td>
<td></td>
</tr>
<tr>
<td>Median</td>
<td>7 yrs</td>
</tr>
<tr>
<td>Range</td>
<td>1.5 yrs – 18.5 yrs</td>
</tr>
</tbody>
</table>

In addition, of the 30 manslaughter offenders who received non-custodial sentences, 25 had no prior convictions (83.3%) and 5 had non-violent priors (16.7%), while no manslaughter offender with a conviction for a prior violent offence was afforded such leniency. In other words, 21.2% of manslaughter offenders with no prior convictions received a non-custodial sentence, compared with 7.1% of offenders with non-violent priors and no offender with violent priors.

**Multiple homicide offences**

There were 40 unique offenders (8.4% of all offenders) who were convicted and sentenced for more than one homicide offence. Of those, 22 were convicted of multiple counts of murder, 4 were convicted of both a murder and a manslaughter offence, and 14 were convicted of multiple counts of manslaughter.

A breakdown of the offender numbers by offences is:
- 2 counts of murder — 12 unique offenders
- 3 counts of murder — 7 unique offenders
- 4 counts of murder — 1 unique offender
- 5 counts of murder — 1 unique offender
- 7 counts of murder — 1 unique offender
- 1 murder and 1 manslaughter — 4 unique offenders
- 2 counts of manslaughter — 12 unique offenders
- 3 counts of manslaughter — 2 unique offenders.

It is apparent from Table 6 that those who commit more than one homicide offence generally receive harsher sentences than those who commit a single offence, although this was more pronounced for the offence of murder than for manslaughter. The median head sentence for murder was 12.5 years longer for multiple offenders compared to single offenders and the median non-parole period was 11 years longer. The median head sentence for manslaughter was 3 years longer for multiple offenders compared to single offenders and the median non-parole period was 2 years longer. This accords with the totality principal and the need for a greater degree of retribution and denunciation of the offences, which by their nature involve a higher degree of criminality.

**Table 6: Homicide sentences 1994–2001**

<table>
<thead>
<tr>
<th></th>
<th>Single offence</th>
<th></th>
<th>Multiple offences</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Head</td>
<td>NPP</td>
<td>Head</td>
<td>NPP</td>
</tr>
<tr>
<td>Murder</td>
<td>Median</td>
<td>18 yrs</td>
<td>30.5 yrs</td>
<td>24 yrs</td>
</tr>
<tr>
<td></td>
<td>Range</td>
<td>9 yrs – life</td>
<td>10 yrs – life</td>
<td>6 yrs – life</td>
</tr>
<tr>
<td>Manslaughter</td>
<td>Median</td>
<td>7 yrs</td>
<td>10 yrs</td>
<td>6 yrs</td>
</tr>
<tr>
<td></td>
<td>Range</td>
<td>1.5–20 yrs</td>
<td>4–13 yrs</td>
<td>3–9 yrs</td>
</tr>
</tbody>
</table>
Also of note is that 9 of the 26 multiple murder offenders received sentences of life imprisonment\(^{41}\) and that all 14 multiple manslaughter offenders were imprisoned, compared to 87.9% of single manslaughter offenders.

**Additional (non-homicide) offences**

Of the 477 homicide offenders, 61 were charged and convicted of an additional offence (other than multiple counts of homicide). Of these, 20 were manslaughter offenders and 41 were murder offenders.

Where other convictions were recorded, cumulative sentences were imposed on 21 of the 61 offenders (34.4%), while the remaining 40 offenders (65.6%) received concurrent sentences. Where concurrent sentences are imposed, the totality principle dictates that the overall sentence should reflect the overall criminality involved.

Therefore, it is reasonable to expect that the sentences imposed on those offenders convicted of additional offences will be higher than the sentences imposed on offenders convicted of homicide offences only, and the following figures reveal that this is in fact the case.

Table 7 shows that the presence of additional offences slightly increased both median head sentences and non-parole periods. For murder, the median head sentence was 2 years longer for offenders with additional offences compared to those without additional offences, and the median non-parole period was 18 months longer. For manslaughter, the median head sentence was 2 years 5 months longer for offenders with additional offences compared to those without additional offences, and the median non-parole period was 2 years 3 months longer.

<table>
<thead>
<tr>
<th>Table 7: Homicide sentences 1994–2001</th>
<th>Effect of additional (non-homicide) offences on sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No additional offence</td>
</tr>
<tr>
<td></td>
<td>Head</td>
</tr>
<tr>
<td>Murder</td>
<td></td>
</tr>
<tr>
<td>Median</td>
<td>18 yrs</td>
</tr>
<tr>
<td>Range</td>
<td>9 yrs – life</td>
</tr>
<tr>
<td>Manslaughter</td>
<td></td>
</tr>
<tr>
<td>Median</td>
<td>7 yrs</td>
</tr>
<tr>
<td>Range</td>
<td>1.5–20 yrs</td>
</tr>
</tbody>
</table>

In addition, 12.4% of manslaughter offenders with no additional offences received a non-custodial sentence, while no offender convicted of an additional offence received a non-custodial sentence.

\(^{41}\) Including one offender who received a head sentence of life imprisonment with a non-parole period of 30 years: *R v Hill* [2000] NSWSC 259.
Form 1 matters

When sentencing an offender, the court may take into account other offences to which the offender has admitted guilt provided that the offender wants the court to do so. The admitted offence or offences are listed on a Form 1 document and will be taken into account with the principal offence (but only if the court considers it appropriate to do so).  

Although the sentencing process is still based on the principal offence, appropriate weight has to be given to the Form 1 offences so as to reflect the overall criminality involved. However, it must also be recognised that an offender who adopts the Form 1 procedure is entitled to expect that the additional penalty will be significantly less than would have been imposed had separate charges been prosecuted.

Table 8 shows that the presence of Form 1 matters tended to increase both median head sentences and non-parole periods, although this was more pronounced for the offence of murder than for manslaughter. For murder, the median head sentence was 3 years 4 months longer for offenders with Form 1 matters compared to those without Form 1 matters, and the median non-parole period was 18 months longer.

Table 8: Homicide sentences 1994–2001

<table>
<thead>
<tr>
<th>Effect of Form 1 offences on sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>No Form 1</strong></td>
</tr>
<tr>
<td><strong>Head</strong></td>
</tr>
<tr>
<td>Murder</td>
</tr>
<tr>
<td>Median</td>
</tr>
<tr>
<td>Range</td>
</tr>
<tr>
<td>Manslaughter</td>
</tr>
<tr>
<td>Median</td>
</tr>
<tr>
<td>Range</td>
</tr>
</tbody>
</table>

No manslaughter offender with Form 1 matters received a non-custodial sentence, compared with 12.1% of manslaughter offenders without Form 1 matters who received non-custodial sentences.

Partial defences

The existence of the partial defences of provocation and diminished responsibility acknowledge that there are particular circumstances where the culpability of an offender is reduced to the extent that an offence that would otherwise have been murder is reduced to manslaughter.

43 R v AEM Snr; KEM; MM [2002] NSWCCA 58.
44 Crimes Act 1900, s 23.
45 Crimes Act 1900, s 23A — more recently renamed “Substantial impairment by abnormality of mind”.
46 For a recent full discussion on partial defences, their operation and usefulness in categorising manslaughter offences, see MD Finlay QC, Review of the law of manslaughter in NSW, 2003, NSW Attorney General’s Department, Sydney, pp 38–75.
Where one or both of these partial defences are successfully raised, the outcome will be manslaughter rather than murder and this lesser offence naturally attracts a lesser penalty. But within the group of manslaughter offenders, how are those who are sentenced on the basis of diminished responsibility or provocation treated?

This study found 42 manslaughter offenders (16.1% of all manslaughter offenders in this study) were sentenced on the basis of provocation. This number includes instances where provocation was raised and accepted at trial, as well as instances where the Crown accepted a guilty plea and it was indicated that this acceptance was based on provocation. These offenders committed 43 manslaughter offences (15.3% of all manslaughter offences in this study).

Among those offenders, 41 were imprisoned (97.6%) with only one offender receiving a non-custodial sentence. The median head sentence imposed on those who were imprisoned where provocation was established was 7 years (range: 3–14 years) and the median non-parole period was 4 years 6 months (range: 20 months to 10 years).

There were also 47 offenders sentenced on the basis of diminished responsibility (18.0% of all manslaughter offenders in this study). Again, this number includes instances where the partial defence was raised and accepted at trial, as well as instances where the Crown accepted a guilty plea on this basis. These offenders committed 51 manslaughter offences (18.1% of all manslaughter offences in this study).

Of the 47 offenders, 42 were imprisoned (89.4%) and 5 received some form of non-custodial sentence (10.6%). Among those who were imprisoned the median head sentence imposed was 8 years (range: 3–20 years) and the median non-parole period was 5 years (range: 18 months to 12 years).

These figures compare to the 175 manslaughter offenders who were sentenced without having established either provocation or diminished responsibility — 151 of these offenders were imprisoned (86.3%) and 26 received non-custodial sentences (13.7%). Among those who were imprisoned the median head sentence imposed was 7 years (range: 18 months to 19 years 6 months) and the median non-parole period was 4 years (range: 8 months to 14 years 6 months).

These sentencing figures are shown in Table 9 below.

<table>
<thead>
<tr>
<th></th>
<th>No partial defence</th>
<th>Provocation</th>
<th>Diminished responsibility</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Head</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Median</td>
<td>7 yrs</td>
<td>7 yrs</td>
<td>8 yrs</td>
</tr>
<tr>
<td>Range</td>
<td>18 mths – 19 yrs 6 mths</td>
<td>3–14 yrs</td>
<td>3–20 yrs</td>
</tr>
<tr>
<td></td>
<td>4 yrs</td>
<td>4.5 yrs</td>
<td>5 yrs</td>
</tr>
<tr>
<td></td>
<td></td>
<td>8 mths – 14 yrs 6 mths</td>
<td>18 mths – 12 yrs</td>
</tr>
</tbody>
</table>

Table 9: Homicide sentences 1994–2001
Effect of partial defences on manslaughter sentence

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47 Includes 3 offenders who established both provocation and diminished responsibility.

48 Includes 3 offenders who established both provocation and diminished responsibility.
The figures in Table 9 show that there is little difference in the sentences imposed on those offenders sentenced on the basis of provocation when compared to the larger group of offenders convicted of manslaughter in the absence of any partial defence.

However, the median head and non-parole periods for those offenders who were sentenced on the basis of diminished responsibility were noticeably higher. This is understandable given that a manslaughter conviction reached by way of diminished responsibility recognises that there was present the intention to kill or do serious harm and, but for the element of diminished responsibility, the offence would have been murder. 49

Therefore, we should not expect to see lower sentences among manslaughter offenders convicted on the basis of diminished responsibility. In fact, according to Lee CJ at CL: 50

“it is quite wrong to take the view that merely because there is an element of diminished responsibility, which substantially impairs a person’s judgment, that is an end of the matter and that a light sentence must inevitably follow.”

If anything, the opposite is true: 51

“An examination of sentences imposed in…cases of diminished responsibility shows that quite severe sentences have been passed on persons found to have diminished responsibility.”

These severe sentences are necessary in order to reflect the objective seriousness — notwithstanding the diminished responsibility — of an offence involving “the felonious taking of human life with intent to kill or cause grievous bodily harm”. 52

Hunt CJ at CL also noted that, because of the element of intention, the upper limit for sentencing offenders with diminished responsibility is “a high one”. 53 His Honour added that this was more so for diminished responsibility cases than for provocation cases, a proposition supported by the figures in the present study.

49 R v Maguire (unrep, 30/8/95, CCA NSW).
50 R v Low (1991) 57 A Crim R 8 at 19.
51 R v Blacklidge (unrep, 12/12/91, CCA NSW) per Gleeson CJ at p 5; R v Cooper (unrep, 24/2/98, CCA NSW) per Gleeson CJ.
52 Ibid at p 6.
53 R v Carlson (unrep, 16/10/95, Sup Ct NSW, Hunt CJ at CL), p 9.
Chapter 5

Child victims

Overview

Research has shown that while child mortality rates have declined in advanced nations over the past decades owing to improvements in medical treatment and disease control, homicide victimisation rates have increased. Alder and Polk, for instance, state that across Australia, the United Kingdom, the United States and Canada, children account for between 10% and 20% of homicide victims.

The aim of this chapter is to discuss and analyse homicide incidents and sentencing outcomes involving child victims. There were 61 incidents of child homicide in the study period, involving 69 victims and 73 offenders, who were convicted of 82 offences (27 murders and 55 manslaughters): see Table 10.

Table 10: Child homicide incidents 1994–2001

<table>
<thead>
<tr>
<th>No of offenders</th>
<th>No of victims</th>
<th>Incidents</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1</td>
<td>47</td>
</tr>
<tr>
<td>1</td>
<td>2</td>
<td>5</td>
</tr>
<tr>
<td>1</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>2</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>2</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>3</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>4</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

When considering these numbers, it is important to remember that most authorities consider child homicide to be an under-reported phenomenon, with some researchers suggesting there is a substantial “dark figure” of crimes that for various reasons go undetected, unrecorded and unpunished. This is particularly so in cases where the victim is very young, where it is believed that numerous deaths that may well have been homicides are recorded as accidental or from natural causes. The physical

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54 The age of 18 was chosen for defining a child victim so as to provide as broad a representation of child killings as possible. Various other studies and research in the past have used younger ages, but as will be seen, the younger the age selected for defining a child victim, the more the results will reflect only one particular type of offence, namely homicides within the family: see generally C Alder and K Polk, Child victims of homicide, 2001, Cambridge University Press, Melbourne, pp 14–15.
56 Alder and Polk, op cit n 54.
vulnerability and fragility of infants often means that fatal injuries that are deliberately inflicted may be reported and accepted as accidental, and children who may have been suffocated or smothered, for instance, are often recorded as having died of natural causes, particularly SIDS. \(^58\) One study from the United States estimates that as many as 85% of infant deaths that are recorded as being caused by accidental injury or SIDS (and therefore do not attract the attention of the criminal justice system) may in fact be homicides that go undetected and unpunished. \(^59\)

Similarly, some suspicious deaths of children that are detected by authorities may not result in prosecutions or convictions because the medical evidence vital to establishing the cause of death is inconclusive.

Finally, the figures reported in this study do not represent the total number of known child homicides in NSW between January 1994 and December 2001. The study, by investigating only sentenced homicides, does not include deaths where no criminal prosecution or sentence resulted. Therefore killings where no offender or suspect is found are excluded, as are cases of murder–suicide. Figures from the National Homicide Monitoring Program run by the Australian Institute of Criminology, for example, estimate that between July 1989 and June 1996 there were 144 incidents of murder–suicide in Australia, of which 42.4% occurred in NSW. \(^60\) These figures also state that these incidents claimed the lives of 190 victims (not including the suicide), or an average of 1.32 victims per incident, compared to 1.07 victims per incident of homicide in general. That is to say that murder–suicides were more likely to involve multiple victims. Approximately 20% of the incidents involved the death of the offender’s child, meaning that, according to these figures, approximately 16 children died in murder–suicide incidents in that 7-year period. \(^61\)

**Offender characteristics**

**Gender**

Of the 73 offenders, 56 were male (76.7%) and 17 were female (23.3%). This continues the well-documented pattern of predominantly male offending.

However, the proportion of female offenders among child killers is significantly higher than it is among the remainder of the offender population in this study. In this study, females account for 23.3% of child killers but only represent 12.1% of offenders who killed adult victims.

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\(^{59}\) Lewit and Schuurmann Baker, op cit n 55.


\(^{61}\) By way of comparison, Alder and Polk, op cit n 54, p 29, report that 18 murder–suicides or murder/attempted suicides involving child victims occurred in Victoria between 1985 and 1995; see also generally Strang, 1996, op cit n 58, p 6.
Therefore, of the 66 female offenders in this study, 25.8% (17) had killed a child victim, compared to only 13.6% (56 of 411) of male offenders. Based on this, it appears that when females commit homicide offences, the victim is almost twice as likely to be a child compared to when males commit homicide offences.

This over-representation of females among child homicide offenders (when compared to their participation as offenders in other homicide incidents) confirms the findings of various earlier researchers.\textsuperscript{62}

**Age of offenders**

Child homicide offenders are generally young in age, with the median age of the 73 offenders in this study being just 24 years: see Table 11. This is significantly younger\textsuperscript{63} than the median age of 27 for offenders who killed adult victims.

Of the 73 offenders sentenced only 4 (5.5%) were aged 41 years or older. Of the remainder, 41 (56.2%) were aged 25 and under, while 22 (30.1%) were aged 26–35. These figures were in keeping with those from the Judicial Commission’s earlier homicide study covering the period 1990–1993, in which 80% of offenders were aged 35 or less.\textsuperscript{64} The present study also includes 23 offenders (31.5%) under the age of 21 years, compared with 40% in the previous study.

When comparing the ages of male and female child killers, it is notable that the female offenders are generally older than the male offenders, with a median age of 29 for females and 23 for males. The greatest differences in particular age groups are the under 21 years group, which contains a high proportion of male offenders, and the 31–35 years group, which contains a high proportion of female offenders.

**Table 11: Child homicides 1994–2001**

<table>
<thead>
<tr>
<th>Age (years)</th>
<th>Males</th>
<th></th>
<th>Females</th>
<th></th>
<th>Overall</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
<td>n</td>
</tr>
<tr>
<td>&lt;21</td>
<td>21</td>
<td>37.5</td>
<td>2</td>
<td>11.8</td>
<td>23</td>
</tr>
<tr>
<td>21–25</td>
<td>14</td>
<td>25.0</td>
<td>4</td>
<td>23.5</td>
<td>18</td>
</tr>
<tr>
<td>26–30</td>
<td>9</td>
<td>16.1</td>
<td>4</td>
<td>23.5</td>
<td>13</td>
</tr>
<tr>
<td>31–35</td>
<td>3</td>
<td>5.4</td>
<td>6</td>
<td>35.3</td>
<td>9</td>
</tr>
<tr>
<td>36–40</td>
<td>5</td>
<td>8.9</td>
<td>1</td>
<td>5.9</td>
<td>6</td>
</tr>
<tr>
<td>41–45</td>
<td>2</td>
<td>3.6</td>
<td>–</td>
<td>–</td>
<td>2</td>
</tr>
<tr>
<td>46–50</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>&gt;50</td>
<td>2</td>
<td>3.6</td>
<td>–</td>
<td>–</td>
<td>2</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>56</td>
<td>100.0</td>
<td>17</td>
<td>100.0</td>
<td>73</td>
</tr>
</tbody>
</table>

*Median age 23 years 29 years 24 years*

\textsuperscript{62} Alder and Polk, op cit n 54, p 3.

\textsuperscript{63} Median test: p< 0.036.

\textsuperscript{64} Donnelly, Cumines and Wilczynski, op cit n 7, p 26.
**Education**

Previous studies have indicated that child killers have had little education, and the information in this study tends to confirm that proposition. Of the 53 offenders where information was available:

- 43 (81.1%) had undertaken some secondary studies
- 6 (11.3%) had primary education only
- 2 (3.8%) had trade qualifications
- 2 (3.8%) had commenced or completed a university education.

**Employment**

Of the 70 convicted child killers where employment status was known:

- just over a third (26 or 37.1%) were identified as having paid employment at the time of the offence
- 37 (52.9%) were unemployed
- 5 (7.1%) were school students
- 2 (2.9%) were engaged in home duties.

This rate of employed offenders is lower than was found in the Judicial Commission’s earlier homicide study, where 12 of 25 (48%) offenders were employed, and 12 (48%) were unemployed or engaged in home duties, with one unknown.

Poor education and unemployment have been identified in earlier research as being among “numerous social stresses” that affect typical child killing offenders, and the findings of the present study tend only to confirm that view.

**Marital status**

The current study reveals an increase in the number of offenders living in de facto relationships and a decrease in the number of single offenders when compared to the earlier Judicial Commission homicide study. Of the 69 offenders where marital status was known, 21 were in de facto relationships (30.4%), including three couples where both parties were offenders. By way of comparison, the Judicial Commission’s previous study found that only 8% of offenders were in de facto relationships.

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66 Information unavailable for 20 offenders.
67 Information unavailable for 3 offenders.
68 Donnelly, Cumines and Wilczynski, op cit n 7, p 26.
69 Wilczynski, op cit n 57, p 101.
70 Information unavailable for 4 offenders.
71 Donnelly, Cumines and Wilczynski, op cit n 7, p 26.
The rise in the proportion of offenders in de facto relationships is reflected in a comparative decline in the proportion of single offenders. Only 29 child homicide offenders were identified as single (42%), compared to 56% in the 1990–1993 study.

Fourteen offenders (20.3%) were married, including two couples where both parties were offenders. This is less than the 28% of married offenders revealed in the 1990–1993 study. Two further offenders were divorced but not in any subsequent relationship (2.9%), while 3 were separated (4.3%).

**Prior convictions**

Of the 73 child homicide offenders:
- 39 (53.4%) had no record of any prior conviction
- 23 (31.5%) had convictions for non-violent offences
- 11 (15.1%) had convictions for violent offences.

Of the 56 male offenders:
- 18 (32.1%) had prior convictions for non-violent offences
- 10 (17.9%) had convictions for violent offences, including assaults, assault occasioning actual bodily harm, one robbery with wounding and malicious wounding
- 28 (50%) had no prior convictions.

Of the 17 female offenders:
- 11 (64.7%) had no prior convictions
- 5 (29.4%) had convictions for non-violent offences
- 1 (5.9%) had a conviction for a violent offence.

**Figure 7: Child homicide offenders 1994–2001**

<table>
<thead>
<tr>
<th>Prior convictions</th>
<th>Percentage of offenders</th>
</tr>
</thead>
<tbody>
<tr>
<td>No priors</td>
<td>60%</td>
</tr>
<tr>
<td>Non-violent priors</td>
<td>30%</td>
</tr>
<tr>
<td>Violent priors</td>
<td>10%</td>
</tr>
</tbody>
</table>
Drug and alcohol use

Drugs and alcohol at offence

Relatively few offenders were recorded as being affected by or under the influence of alcohol or drugs at the time they committed child homicide offences. Of 73 offenders:

- 9 were under the influence of alcohol only (12.3%)
- 6 were under the influence of drugs only (8.2%)
- 6 were affected by both drugs and alcohol (8.2%)
- 52 showed no evidence of drug or alcohol consumption (71.2%).

The figure for alcohol consumption at offence is lower than that recorded in the Judicial Commission’s previous homicide study, where 9 out of 25 child homicide offenders (36%) were under the influence of alcohol.

The drugs involved (including instances where more than one drug was used) were:

- prescription drugs, such as serapax, rohypnol and valium (4 instances)
- cannabis (4 instances)
- heroin (3 instances)
- amphetamines (1 instance)
- cocaine (1 instance)
- hallucinogens (1 instance).

Drug and alcohol history

A number of offenders were reported as having histories of drug and/or alcohol abuse. Two were recorded as having a history of alcohol abuse only, 11 had histories of drug abuse only, and 14 had abused both alcohol and drugs in the past.

Of those who had abused drugs, 10 reported cannabis use, two reported heroin use and one amphetamine use. A further 12 were polydrug abusers, including (in various combinations) 10 cannabis users, 5 heroin users, 8 amphetamine users, two abusers of legal/prescription medications, two LSD users and two cocaine users.

The prevalence of drug and alcohol abuse among offenders has been identified in earlier research into child homicide, this being one of the various “social stresses” at play in child homicides.\(^\text{72}\)

Victim characteristics

Age

The age distribution of the 69 child victims in this study shows a clear pattern, with heavy concentrations of victims in the youngest age groups, few victims in the middle years, and high numbers again in the older teenage years.

\(^\text{72}\) Wilczynski, op cit n 57, p 101; Alder and Polk, op cit n 54.
The less than 1-year-old bracket contained 13 victims (18.8%) and the 1 to less than 2-year-old bracket contained 3 victims (4.3%). In total, 34 victims (49.3%) were aged 5 and under. The remaining 35 victims were scattered between the ages of 8 to 14, with a pronounced spike in the late teenage years, particularly the age of 17, which registered 14 victims (20.3%). The ages of 15, 16 and 17 years recorded a total of 22 victims (31.9%), almost mirroring the 25 victims (36.2%) in the 3 youngest age brackets. The median age of all child victims was 6 years.

Table 12 clearly shows that very young children are at some risk of victimisation, and other research studies have also shown high victimisation rates among very young children, particularly those aged less than 1 year. Various factors contribute to the prevalence of infant victims. The first of these, obviously, is the extreme dependency and physical vulnerability of babies and infants and their susceptibility to fatal injury through child abuse, neglect and “shaken baby syndrome”.

It has also been suggested that child killers — in particular young parents — lack adequate social support structures and practical parenting skills, and are therefore “ill-prepared” to cope with the responsibilities of childcare, particularly in the “most demanding” first few years of the child’s life. This was demonstrated quite clearly in the case of R v Hughes and Ashfield, where the young victim’s mother who was “barely coping with the demands which her life made upon her” eventually gave “vent to the frustrations which had accumulated on her over time”. The offender’s violent behaviour in that case was described as:

“an explosion of rage whose intensity and lethal consequences [were] to a great extent explained by the accumulation of indignities inflicted upon [her].”

Finally, it must be remembered that children aged under 5 are of pre-school age. As such they remain at home for the majority of the day and are exposed to the risk of violence, neglect and abuse from their parents and parent’s partners (those in loco parentis) — the very persons who, sadly, are responsible for many of the child killings in this study (see below).

The older victims were generally killed in circumstances more similar to the adult homicide victim population, including violence between sexual partners and drunken altercations or fights, particularly between male victims and offenders of similar ages. Of the 28 victims aged 11 or above, only one (3.6%) was killed by a parent or a parent’s male partner. This is significant when one considers that 35 of the 41 victims aged under 11 (85.4%) were killed by either a parent or a parent’s male partner.

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74 Wilczynski, op cit n 57, p 103.
75 Ibid.
76 (unrep, 16/12/94, Sup Ct NSW).
77 Ibid at p 24.
Table 12: Child homicides 1994–2001
Age and gender of victims

<table>
<thead>
<tr>
<th>Age (years)</th>
<th>Males</th>
<th></th>
<th>Females</th>
<th></th>
<th>Overall</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
</tr>
<tr>
<td>&lt;1</td>
<td>7</td>
<td>15.9</td>
<td>6</td>
<td>24.0</td>
<td>13</td>
<td>18.8</td>
</tr>
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<td>3</td>
<td>6.8</td>
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<td>4.3</td>
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<tr>
<td>2</td>
<td>6</td>
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<td>3</td>
<td>6.8</td>
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<td>4.5</td>
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<td>4.3</td>
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<td>6</td>
<td>3</td>
<td>6.8</td>
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<td>4.0</td>
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<td>5.8</td>
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<tr>
<td>10</td>
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<td>2.9</td>
</tr>
<tr>
<td>11</td>
<td>2</td>
<td>4.5</td>
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<td>–</td>
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<td>2.9</td>
</tr>
<tr>
<td>12</td>
<td>–</td>
<td>–</td>
<td>1</td>
<td>4.0</td>
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<td>1.4</td>
</tr>
<tr>
<td>13</td>
<td>1</td>
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<td>16</td>
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<td>4.5</td>
<td>3</td>
<td>12.0</td>
<td>5</td>
<td>7.2</td>
</tr>
<tr>
<td>17</td>
<td>10</td>
<td>22.7</td>
<td>4</td>
<td>16.0</td>
<td>14</td>
<td>20.3</td>
</tr>
<tr>
<td>Total</td>
<td>44</td>
<td>100.0</td>
<td>25</td>
<td>100.0</td>
<td>69</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Gender

The proportions of male and female child victims in this study were similar to the proportions of male (67.8%) and female (32.3%) adult victims. Male child victims (44 or 63.8%) were more common than female child victims (25 or 36.2%) in the present study. This finding was something of a reversal from the Judicial Commission’s previous study in which 60% of child victims were female. The prevalence of male victims in the current study is, however, more in keeping with earlier Australian

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78 That is those aged 18 years and above.
79 Donnelly, Cumines and Wilczynski, op cit n 7, p 28.
research which has tended to show a greater number of male child victims, or at least a relatively even split between male and female victims.

Given the discrepancy between the current figure and that of the Judicial Commission’s earlier study, one may wish to take a broader view by combining the two tallies. Doing so reveals a total of 94 child victims for the period 1990–2001, of whom 54 (57.45%) were male and 40 (42.55%) were female.

Of 33 child victims killed by offenders other than a parent or partner of a parent, 22 were male and 11 were female. The relevance of this discrepancy becomes more apparent when we analyse the differing contexts of parental and non-parental child homicide offences (see below).

**Drugs and alcohol**

Five child victims were affected by alcohol, and the only victims affected by drugs were two who were forcibly administered prescription drugs by the offender in the course of the killing, and one who was affected by both prescription medication and opiates.

**The context of child killings**

As is the case with homicide in general, child killings often occur within an established relationship between the victim and offender. In the case of children, who are naturally less likely to be involved in intimate partner or sexual relationships, the most common relationships between child victims and their killers is that of parent (22 of 73 or 30.1% of offenders) and lover/spouse/cohabitant of parent (12 of 73 or 16.4% of offenders).


82 R v Carter [2001] NSWSC 1119; R v Cramp (unrep, 16/11/98, NSW DC); R v Whitney (unrep, 13/12/01, NSW DC); R v Hines (unrep, 21/3/97, Sup Ct NSW, Ireland J); R v Bryant (unrep, 10/8/98, Sup Ct NSW).


84 R v Beltrame (unrep, 26/5/94, Sup Ct NSW).

85 Strang, 1995, op cit n 58.

86 Alder and Polk, op cit n 54, p 103.

87 Note that there was one offender who killed two children: one his own child and the other his wife’s child (his stepdaughter). For the purposes of analysing the relationships, this offender is counted as a stepfather only because that offence received the greater head sentence: R v Haynes (unrep, 25/3/94, Sup Ct NSW, Studdert J).
Adding these two figures reveals that almost half of those sentenced for homicide offences against children in the study period were either the parent of the victim or the partner of the victim’s parent (representing 46.6% of offenders and 52.2% of child victims). Similarly high proportions have been revealed in earlier studies.88

Significantly, all 12 of the partners were male, while the distribution of fathers (9) to mothers (13) was more even, consistent with what has been described by Strang as the “gross over-representation of fathers” (including de facto fathers) as offenders.89 This is also consistent with the findings of Alder and Polk who found that stepfathers and male de facto fathers are common perpetrators of fatal violence against children,90 while only biological mothers were present among female offenders, with the “wicked stepmother” being no more than a folk myth.91

The remaining child homicide incidents occurred in different circumstances. These incidents tended to involve older victims killed by friends and acquaintances, or by strangers in various types of altercations. This generally reflects the different set of dangers to which older victims, now less dependent on their parents and engaging in a variety of social and other activities, are exposed. In particular, adolescent homicide victims are often killed by offenders of similar age where one or both parties were affected by alcohol.

It is appropriate then to consider child killings as occurring in two general contexts, which may be described as “parental/quasi-parental killings” and “non-parental killings”,92 each of which contains roughly equal numbers of victims and offenders. Victim and offender information and conviction and sentencing outcomes for offences in these two categories are discussed below, with an additional note on multiple child homicides and partner/child homicides.

**Parental killings of children**

This category includes:

- 31 of the 61 child homicide incidents (50.8%)
- 34 of the 73 offenders (46.6%)
- 37 of the 69 victims (53.6%).

**Victims**

The 37 children killed by their own parents or mother’s partners ranged in age from less than 1 year to 12 years. Twenty-two victims were male (59.5%) and 15 were female (40.5%). These victims tended to be quite young, with the median age being only two years. This is significantly different to the median age of 16 years for child victims who were not killed by their parents or partners of parents.

88 Strang, 1996, op cit n 58, which quotes 70% of child victims as being killed by parents/de facto parents in the period July 1989 to December 1993.
89 Ibid, p 3.
90 Alder and Polk, op cit n 54, p 70.
91 Ibid, p 46.
92 Lewit and Schuurmann Baker, op cit n 55.
This is consistent with an earlier research finding that biological parents are more likely to kill very young children.\textsuperscript{93} Based on these figures it would appear that parents and their partners are unlikely to kill their teenage children.

**Offenders**

The 34 offenders included:

- 9 fathers of victims\textsuperscript{94}
- 13 mothers of victims
- 12 male partners of mothers of victims (boyfriends, de factos and husbands).

**Charges and outcomes**

Of the 34 parents/partners of parents convicted of child homicide offences:

- 10 were convicted of murder (6 fathers, 1 mother and 3 male partners)
- 22 were convicted of manslaughter (3 fathers, 10 mothers and 9 male partners)
- 2 women were convicted of the offence of infanticide: see Figure 8.

Of note is the fact that only one mother of a victim was convicted of murder, whereas 12 mothers of victims were convicted of manslaughter or infanticide. Indeed of the 17 females in total who killed children,\textsuperscript{95} this was one of only two murder outcomes, and it arose from an offence committed in company with a male partner who was also convicted of murder.\textsuperscript{96} The offence in question involved a 6-year-old male victim subjected to an attack of such “hideous brutality” that it was described by the sentencing judge, Badgery-Parker J, as being marginally short of the worst category of cases.

**Figure 8: Conviction outcomes 1994–2001**

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{conviction_outcomes.png}
\caption{Parent or partner/child homicide}
\end{figure}

\textsuperscript{93} Mouzos, op cit n 73.
\textsuperscript{94} See n 88 above.
\textsuperscript{95} Including non-parental killings discussed below.
\textsuperscript{96} \textit{R v Hughes and Ashfield} (unrep, 16/12/94, Sup Ct NSW).
Manslaughter outcomes\textsuperscript{97} were more common for female (mother) offenders (12 out of 13 or 92.3\%) than male (father or mother’s partner) offenders (12 out of 21 or 57.1\%). This was partly due to the deployment of the partial defence of diminished responsibility, which seemed to lend itself more readily to female offenders. No fewer than 7\% of the 10 women convicted of manslaughter were convicted and sentenced on the basis of diminished responsibility, compared to 13 male manslaughter offenders, of whom only one\textsuperscript{99} was convicted and sentenced on this basis.

Earlier research, particularly that of Wilczynski,\textsuperscript{100} has also highlighted that female child killers are far more likely than males to be convicted of manslaughter rather than murder, and to present psychiatric evidence in their defence and rely on “psychiatric pleas” such as diminished responsibility.

The link between female offenders and the defence of diminished responsibility may be reinforced by a slightly circuitous argument, as summed up by Hidden J in the case of \textit{R v Hunt} where his Honour, taking note of a psychiatrist’s report concurred with the following comments:\textsuperscript{101}

“Culturally and traditionally it is thought that the relationship between mother and child is a particularly strong one...for a parent to deliberately inflict injury on a child is strongly supportive of the parent being extremely disturbed.”

In addition, two further women in the present group were convicted of the offence of infanticide under s 22A of the \textit{Crimes Act} 1900. This provision operates in a similar fashion to the principle of diminished responsibility (but only in limited circumstances) to reduce the culpability of the offender for an offence that would otherwise have the characteristics of murder. Both these offenders received non-custodial sentences in the form of s 9/s 558 bonds.\textsuperscript{102}

When dealing with the comparatively rare offence of infanticide, the sentencing task may at times be extremely difficult. For instance, Simpson J, when sentencing for the offence of infanticide, spoke of the loss of the life of a baby as a matter of “utmost gravity”, calling for special attention from the courts:\textsuperscript{103}

“Where the life lost is that of a baby, completely defenceless, and at the hand of her mother, from whom she could ordinarily expect nurture and care, the obligation on the courts to signify its respect for the sanctity of life and to punish those who wrongfully take it is so much greater.”

\textsuperscript{97} Including two infanticide outcomes under s 22A of the \textit{Crimes Act} 1900.


\textsuperscript{100} Wilczynski, op cit n 57, pp 118–199.

\textsuperscript{101} \textit{R v Hunt} (unrep, 2/4/96, Sup Ct NSW, Hidden J), p 2.

\textsuperscript{102} \textit{R v Allen} (unrep, 9/2/94, Sup Ct NSW); \textit{R v Cooper} [2001] NSWSC 769.

\textsuperscript{103} \textit{R v Cooper} [2001] NSWSC 769 at [5] per Simpson J; see also \textit{R v Wilson} (unrep, 19/12/97, Sup Ct NSW, Badgery-Parker J), at p 2 for similar comment in respect of a male offender who killed his infant child.
The difficulty of the sentencing task was illustrated by weighing the above comments against those which followed, dealing with the “particular characteristics and a particular genesis” of the offence of infanticide which justify a “different approach to sentencing”. The different approach was obviously followed in the two infanticide cases in the study, resulting in two non-custodial sentences being imposed.

In addition to the two infanticide offenders, non-custodial sentences were imposed on 5 other parental homicide offenders, all of whom were the mother of their victims. These sentences were passed after the Crown accepted pleas of guilty to manslaughter on the grounds of diminished responsibility.

While there was only a small number of non-custodial sentences passed in this sample, all were imposed on female offenders — all male offenders were sentenced to imprisonment. This supports earlier research showing that male child killers are more likely to be imprisoned than their female counterparts. Gender is, however, merely a starting point when analysing the differences between these offenders and the remaining offenders. Various factors contributed to these four non-custodial outcomes, including guilty pleas, lack of prior convictions, highly persuasive psychiatric evidence, the issues of diminished responsibility and infanticide, and the perceived unlikelihood of future violent offending.

**Non-parental killing of children**

This category is defined to include all sentenced homicide incidents involving child victims where the offender was other than the victim’s parent or parent’s partner. This is approximately the same size as the preceding category, and contains:

- 30 of the 61 child homicide incidents (49.2%)
- 39 of the 73 offenders (53.4%)
- 32 of the 69 victims (46.4%).

**Offenders**

Offenders in this group tended to be quite young, with a median age of 23 years (range: 14–55 years). Twenty-five offenders (64.1%) were aged 25 years or less, including 10 juveniles. Of 39 offenders:

- 10 were aged under 18 years (25.6%)
- 6 were aged 18–20 (15.4%)
- 9 were aged 21–25 (23.1%)
- 4 were aged 26–30 (10.3%)
- 4 were aged 31–35 (10.3%)
- 6 were aged over 35 years (15.4%).

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106 Wilczynskí, op cit n 57, p 119.
The high number of adolescent and late-teenaged offenders present who have killed victims of similar ages accords with what Alder and Polk described as the emergence of “youthful involvement in adult patterns of violence”\(^{107}\) as children approach adulthood, including conflict resolution homicides, sexual jealousy homicides, killings in the course of other crimes and “honour contests”.

Of the 39 offenders, 35 were male and 4 female. This proportion of male offenders (89.7%) was higher than for male parental homicide offenders (61.8%).

**Victims**

Victims in this category were aged between 2 and 17 years, and were, on the whole, older than victims of parental homicide — 25 out of 32 (78.1%) were aged over 12, whereas none of the 37 parental homicide victims were aged above 12. In addition, there were only two victims here aged 5 years or younger, compared to parental homicide victims, of whom 32 out of 37 (86.5%) were aged 5 years or less (6.3%). The median age of child victims killed by non-parents was 16 years, significantly higher than the 2-year median age of victims who were killed by parents or partners of parents.

Male victims (22 out of 32 or 68.8%) again outnumbered female victims (10 out of 32 or 31.3%).

**Circumstances of non-parental killings**

Despite the fears many parents would harbour about “stranger danger” or their children falling victim to a violent offender or sexual predator, such occurrences were extremely rare within this study, the scarcity of such incidents confirmed by earlier research.\(^{108}\) Only two child victims in this study were killed in circumstances of abduction and/or sexual assaults or attempted sexual assault.\(^{109}\) These two offenders were each convicted of murder and sentenced to head prison terms of 26 and 22 years respectively.

The remaining 31 victims met their deaths in a variety of circumstances, many of which reflect that as the victims approached maturity, they were engaging in a variety of adult activities that placed them at risk. For example:

- 6 victims were killed either while at, or shortly after leaving parties (often where drugs and alcohol were consumed)
- 2 female victims were killed by boyfriends
- 1 female working as a prostitute was killed by a client
- 2 victims were killed in the workplace, 1 by a colleague and 1 by armed robbers.

\(^{107}\) Alder and Polk, op cit n 54, p 89.

\(^{108}\) Strang, 1995, op cit n 58, quotes a figure of just 3 victims out of a total of 86 as being killed by a stranger; Nguyen da Houng and Salmelainen, op cit n 81, p iii, state children are 6 times more likely to be killed by a family member than a stranger; see also Wilczynski, op cit n 57, pp 175–176.

\(^{109}\) R v Lett (unrep, 4/3/94, NSW Sup Ct) and R v McIntyre [2001] NSWSC 500. McIntyre did not contain a positive finding as to sexual assault or intent to commit sexual assault on the 14-year-old victim, although it was described as a possible motive in the circumstances and given the nature of the injuries inflicted on the victim.
**Charges and outcomes**

**Murder:** Of the 39 offenders, 12 were convicted of murder (30.8%), this being a very similar proportion of murder outcomes as was found in parental homicides (10 of 34 or 29.4%). These offenders attracted quite similar sentences to parental murderers, with 5 sentenced to head terms of 22 years and longer, 3 sentenced to terms of 16–18 years, and 4 to terms of 13 years 5 months to 15 years. No life sentences were imposed on child killers, the harshest sentence being a 28-year head sentence.

The severity of the 5 highest murder sentences in this group is explicable by the particular circumstances of aggravation in each case, including:

- abduction and intent to commit sexual assault\(^\text{110}\)
- desecration of the victim’s body\(^\text{111}\)
- drunken driving and failure to stop having deliberately hit the victim with a stolen motor vehicle\(^\text{112}\)
- multiple homicide.\(^\text{113}\)

**Manslaughter:** There were 27 offenders sentenced for manslaughter in this category, representing a variety of circumstances of killing and a wide range of sentencing outcomes. Examples of some of the cases include:

- The lengthiest manslaughter sentence was imposed on a 28-year-old man who strangled a 17-year-old prostitute. He was sentenced to a head sentence of 16 years and a non-parole period of 11 years.\(^\text{114}\)
- A 20-year-old male offender who shot his girlfriend, aged 16, after she had broken off their relationship\(^\text{115}\) was sentenced to a head term of 7 years 6 months. While the age of the victim placed this offence within the definition of a child killing, the circumstances were more akin to the many non-child homicides involving the killing of a spouse or sexual partner.
- Two offenders received 8 and 10-year head sentences respectively for their roles in the shooting death of a 17-year-old boy, killed when the offenders attempted an armed robbery of the restaurant where the victim was employed. Two other co-offenders were convicted of murder, and received head sentences of 14 years and 18 years respectively.\(^\text{116}\)
- Quite high sentences were imposed on a pair of offenders who killed an 11-year-old boy, his 8-year-old sister (and their mother) by burning down their house. This offence was motivated by a dispute between the offender and the mother, who was a neighbour of the offenders. The female offender received 3 concurrent

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\(^\text{110}\) R v Lett (unrep, 4/3/94, NSW Sup Ct).
\(^\text{111}\) R v McIntyre [2001] NSWSC 500.
\(^\text{112}\) R v Winner (unrep, 31/3/94, Sup Ct NSW).
\(^\text{113}\) R v De Gruchy (unrep, 17/12/98, Sup Ct NSW, Grove J); R v MHN (No 2) (unrep, 20/11/98, Sup Ct NSW, Kirby J).
\(^\text{114}\) R v Beltrame (unrep, 26/5/94, Sup Ct NSW).
\(^\text{115}\) R v McLaughlin (unrep, 24/2/00, Sup Ct NSW, Badgery-Parker J).
\(^\text{116}\) R v Edwards (unrep, 9/8/96, Sup Ct NSW, Dowd J); and R v Kramer (Andrew Charlton) (unrep, 4/7/96, Sup Ct NSW); R v Kramer (Karl John) (unrep, 29/11/95, Sup Ct NSW); R v Piller (unrep, 6/7/95, Sup Ct NSW).
head sentences of 11 years, while the male offender received 3 concurrent head sentences of 8 years 1 month.\textsuperscript{117}

- One offence involved a 16-year-old male victim, stabbed to death by a 24-year-old man he had been drinking with. Again, while the victim was under 18, the circumstances were more similar to many non-child homicides involving drunken disputes and alcohol-fuelled violence. The offender was sentenced to a head term of 6 years 6 months.\textsuperscript{118}

- Lenient sentences were imposed on a married couple following their relatively minor roles in the death of a 3-year-old boy, killed primarily by his mother who drowned him in an attempted exorcism. Each received a non-custodial sentence in the form of a s 12 bond (2 years), while the mother was found not guilty on the grounds of mental illness. The offenders were entitled to such lenient sentences because of their lesser roles in the offence and by virtue of their previously unblemished character.\textsuperscript{119}

- A non-custodial sentence was imposed on a man responsible for installing faulty electrical wiring in his own home, resulting in the electrocution of a 10-year-old girl. This offender was sentenced to 2 years periodic detention by the District Court.\textsuperscript{120}

### Sentencing child killers

#### General

Of the 73 child killers sentenced in this study, 22 (30.1\%) were sentenced for murder and 51 (69.9\%) for manslaughter.\textsuperscript{121}

The general sentencing statistics for all child killers were as follows:

- head sentences for murder ranged between 12 years 6 months and 28 years, with a median sentence of 19 years 6 months, compared with a median head sentence of 18 years (range: 9 years to life) imposed on non-child killers. Of note is that no child murderer received a life sentence

- non-parole periods for murder ranged between 7 years 6 months and 21 years, with a median of 14 years 6 months, compared with a median of 13 years 6 months (range: 5 years to life) for non-child killers.

- head sentences for manslaughter ranged between 2 years and 16 years, with a median sentence of 7 years, compared with a median head sentence of 7 years (range: 18 months to 22 years) imposed on non-child killers

- non-parole periods for manslaughter ranged between 8 months and 11 years, with a median of 4 years 4.15 months, compared with a median of 4.5 years (range: 9 months to 16 years) imposed on non-child killers

\textsuperscript{117} R v Mackey and Hampton (unrep, 17/10/97, Sup Ct NSW, Dunford J).

\textsuperscript{118} R v Bryant (unrep, 10/8/98, Sup Ct NSW).


\textsuperscript{120} R v Ortiz (unrep, 22/6/95, NSWDC).

\textsuperscript{121} Including the only two infanticide offenders, infanticide being sentenced as pre-manslaughter: Crimes Act, s 22A.
7 non-full-time custodial sentences were imposed for manslaughter, including bonds (3), suspended sentences (3) and periodic detention (1), accounting for 13.7% of manslaughter offenders. In comparison, non-custodial sentences were imposed on 10.8% of non-child killers in this study.

**Figure 9:** Homicide 1994–2001
Comparison of median sentences between child homicide offenders and other offenders

Figure 9 shows that there is little difference in the median sentences passed on child killers and other offenders, either for manslaughter or murder.

What difference exists is more evident for the offence of murder than manslaughter, with the median sentences for child murderers exceeding those of other murderers. The fact that the victim is a child is obviously an aggravating factor, particularly in the offence of murder which is by its nature the most serious of offences.

For the offence of manslaughter, the aggravating effect of the victim being a child seems to be balanced by the numerous subjective factors at play, resulting in similar median sentences for manslaughter offenders who kill children and those who kill adults. In saying this it must also be remembered that 13.7% of child-killing manslaughter offenders received non-custodial sentences, a slightly higher proportion than was found among the remainder of manslaughter offenders (10.8%).

**“Parental” and “non-parental” child homicide sentencing**

Within the category of child killings covered by this chapter, two “distinctly different phenomena” are evident — young children being killed by their parents or those in loco parentis, and adolescents being killed by offenders to whom they are not related. Figure 10 demonstrates this clearly, with the parental victims and the non-parental victims concentrated at opposite ends of the age scale.

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122 Alder and Polk, op cit n 54, p 114.
Given that these two patterns of offending exist, and have been discussed in terms of victim and offender characteristics and offence circumstances, it is fair to ask whether noticeably different sentencing patterns can be discerned between the two groups within the overall group of child killers: see Figure 11.

This comparison reveals that where the offence is murder, the median head sentence imposed on “parental” offenders is 21 years (range: 12 years 6 months to 26 years), and the median non-parole period is 15 years 9 months (range: 7 years 6 months to 19 years 6 months). This compares to non-parental murder offenders, where the median head sentence is 18 years (range: 13 years 5 months to 28 years) and the median non-parole period was 13 years 3 months (range: 8 years 5 months to 21 years).

Similarly, where the offence was manslaughter and a sentence of imprisonment was imposed, the median head sentence for parental offenders was 7 years 6 months (range: 3–15 years), and the median non-parole period was 4 years 6 months (range: 18 months–10 years), while for non-parental offenders the median head sentence was 6 years 9 months (range: 2–16 years) and the median non-parole period was 4 years (range: 8 months–11 years).

The manslaughter group also contains 7 non-custodial sentences (accounting for 13.7% of manslaughter sentences for child killers), 4 of which were imposed on parental offenders and 3 on non-parental offenders.
The judicial attitude towards parents who kill children and the sentencing task involved is demonstrated in the following passage from Badgery-Parker J (which also highlights features such as the youth of parental offenders and victims as discussed earlier in this chapter): 123

“The objective seriousness of the offence is obvious. The child was utterly defenceless; the prisoner was the one person from whom, above all, she ought to have been safe; the assault was savage and sustained. Offences of this kind occur with distressing frequency in our community where, as it seems, all too often a person, usually but not always a young person, finds himself unable to cope with the stress imposed by the baby’s crying out and, out of irritation or frustration, assaults the baby in such a way as to cause injury, often fatal injury. All that the courts can do in respect of matters of that kind is to impose sentences of sufficient severity to bring home to such people in the community the weight of their responsibilities as carers, the strength of their obligation to care for and protect the child, and the gravity of any breach of that obligation arising from their own inability to cope. In sentencing in the present matter, as in every such case, general deterrence must be given full weight.”

Within the group of parental killers, there was no great difference found between the median head sentence for murder imposed on fathers (22 years 6 months; range: 12 years 6 months to 26 years) and the one mother convicted of murder (head sentence 21 years), while the median head sentence for male partners convicted of murder was 17 years (range: 13–21 years). The higher figure for fathers is partly explained by the prevalence of multiple homicide offences against both their children and spouses/partners. These medians are based on small samples and caution must be taken when drawing any conclusions from these figures.

123 R v Wilson (unrep, 19/12/97, Sup Ct NSW, Badgery-Parker J), p 2.
Where the offence was manslaughter and full-time custodial sentences were imposed, there was little difference between the median head sentences imposed upon mothers (6 years 9 months; range: 3–13 years) and fathers (7 years 6 months; range: 4 years to 7 years 9 months), while male partners of mothers of the victims had a slightly higher median head sentence (7 years 6 months; range: 5 years 8 months to 15 years). Again, caution should be exercised because of the small sample sizes.

There were also 4 instances where non-custodial sentences were imposed on mother offenders, whereas no fathers or male partners received similar sentences.

**Multiple child homicides and partner/child homicide**

In the present study there were 9 incidents involving either the death of more than one child, or the deaths of children and adult victims together. In all cases, the multiple deaths were the result of a single incident or episode of criminality, which contributed a great deal to the fact that no multiple child killer received any form of cumulative or consecutive sentence: see Table 13.

One of these instances was the house-burning incident between neighbours (mentioned above) which involved the death of two children and their mother, and resulted in manslaughter convictions for the two offenders.

Eight of these instances involved family relationships, mostly that of parent or partner of parent, although there was one incident in which the offender killed his two siblings and his mother. These 8 incidents involved 6 male offenders and only two female offenders.

The two female offenders were both convicted of manslaughter by reason of diminished responsibility, although the sentences for each were not comparable. The 6 male offenders included 5 convicted of murder, while the only manslaughter outcome was again reached by reason of diminished responsibility.124 The 5 male offenders convicted of multiple counts of murder were sentenced to head terms in excess of 20 years, among the harshest sentences handed down for child killings.

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Table 13: Multiple child killings and partner and child killings 1994–2001

<table>
<thead>
<tr>
<th>Case name</th>
<th>Victims</th>
<th>Convictions</th>
<th>Defences</th>
<th>Sentences</th>
</tr>
</thead>
<tbody>
<tr>
<td>R v Wang</td>
<td>husband &amp; 2-year-old daughter</td>
<td>manslaughter (x 2)</td>
<td>DR</td>
<td>husband: head 6 yrs NPP 4 yrs child: 2 yr fixed term concurrent</td>
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<tr>
<td>R v Cornwell</td>
<td>11-year-old son &amp; 10-year-old daughter</td>
<td>manslaughter (x 2)</td>
<td>DR</td>
<td>each offence: head 13 yrs NPP 8 yrs 6 mths, concurrent</td>
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<tr>
<td>R v Haynes</td>
<td>12-year-old stepdaughter &amp; 5-year-old daughter</td>
<td>manslaughter (x 2)</td>
<td>DR</td>
<td>daughter: head 12 yrs NPP 6 yrs stepdaughter: 6 yrs fixed term, concurrent</td>
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<tr>
<td>R v Mackey and Hampton</td>
<td>neighbours: 11-year-old boy, 8-year-old girl and their mother</td>
<td>manslaughter (x 3)</td>
<td>Mackey: each offence</td>
<td>head 8 yrs 1 mth NPP 6 yrs 1 mth, concurrent Hampton: each offence</td>
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<tr>
<td>R v Cheatham</td>
<td>wife &amp; 3-year-old daughter</td>
<td>murder (x 2)</td>
<td>wife</td>
<td>head 24 yrs NPP 16 yrs daughter: 16 yrs fixed term, concurrent</td>
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<tr>
<td>R v Cikos</td>
<td>wife, 4-year-old son &amp; 2-year-old son</td>
<td>murder (x 3)</td>
<td>each offence</td>
<td>head 21 yrs NPP 15 yrs 6 mths, concurrent</td>
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<tr>
<td>R v Park</td>
<td>wife, 3-year-old son &amp; 2-year-old daughter</td>
<td>murder (x 3)</td>
<td>wife: head 27 yrs, NPP 19 yrs 6 mths each child: 15 yrs fixed, concurrent</td>
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<tr>
<td>R v De Gruchy</td>
<td>mother (41), 13-year-old sister and 15-year-old brother</td>
<td>murder (x 3)</td>
<td>each offence</td>
<td>head 28 yrs NPP 21 yrs, concurrent</td>
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<tr>
<td>R v Velevski</td>
<td>wife &amp; 3 daughters, aged 6 and 3 mths (twins)</td>
<td>murder (x 4)</td>
<td>each offence: head 25 yrs NPP 19 yrs, concurrent</td>
<td></td>
</tr>
</tbody>
</table>

DR: diminished responsibility
Juvenile Offenders

Introduction

Juvenile offenders — in particular young men — are responsible for a large number of the homicide incidents reported in this study. This chapter looks specifically at those offenders, the offences they committed and the manner in which the criminal justice system dealt with them. Particular attention is paid to the way sentencing judges balanced the competing demands of punishment, retribution and deterrence with the broader community interest in the rehabilitation of young offenders and the humanitarian aspects of sentencing persons whom, despite the gravity of their offences, the law still regards as children.

Concepts of juvenile sentencing: Youth, immaturity and culpability

Sentencing young offenders is perhaps the most difficult of all sentencing tasks, and not just because the competing demands of justice — punishment, retribution, deterrence and so on — are so finely balanced.

The very fact of the offender’s youth itself calls into question one of the fundamental constructs of the punishment model of criminal justice — the concept of legal punishment as “moral desert”.

Youth — and its psychological manifestation immaturity — is a vital factor in assessing the moral blameworthiness or culpability of a young offender’s actions.

The conundrum of sentencing young offenders has been usefully illuminated by Zimring, who has attempted to highlight the difference between two fundamental concepts: criminal capacity and criminal competence. According to Zimring, criminal capacity either exists or does not exist by reference to a particular age defined by legislation: either a child is, or is not, old enough to be criminally liable for his or her actions. That defined age may vary with developments in legislation, but by reference to that determined age threshold the question of capacity may be simply answered in the affirmative or negative, with no possibility of any other outcome.

Criminal competence, however, is a more complex matter than mere capacity. It exists at many thresholds, and is determined by a greater array of developmental and psychological issues than pure chronological age. Where the (highly subjective) level of the offender’s competence increases — as may be evidenced by the ability to tell right from wrong or to foresee the potentially harmful consequences of actions — the greater the offender’s culpability and the more “deserving” of punishment he or she will be.

125 FE Zimring, “Penal proportionality for the young offender: Notes on immaturity, capacity and diminished responsibility” in T Grisso and RG Schwartz (eds), Youth on Trial, 2000, University of Chicago Press, Chicago.

Zimring argues that youth and immaturity are analogous to mental illness, in that there is a basic threshold below which there can be no criminal competence by reason of insanity, and above which the degree or extent of the affliction acts to inform the level of culpability, either through formal constructs (such as the doctrine of diminished responsibility) or through the general concept of mitigation. Finally, Zimring argues that the lower the threshold of criminal capacity is fixed at by legislation, the greater the importance of mitigation as a principle will be.

So while it is trite law that youth is a mitigating factor, the term “youth” itself becomes, in the context of the sentencing process, something of a shorthand term for a complex assortment of factors such as intelligence, experience and psychological, educational, social and emotional development. The statement “youth is a mitigating factor” becomes a lay term for a more complex expression along the lines of:127

“developmental status warrants a different assignment of culpability to [young persons’] illegal behaviours than is typically assigned to adults.”

The present study sample, for example, contains homicide offences committed by children in circumstances that call into question the offenders’ capacity to anticipate the fatal consequences of their actions, a key factor in assessing culpability.

One such case involved a young man who brought down an overhead powerline by repeatedly throwing a length of metal pipe at it.128 The offender believed that having severed the line it became “dead” — demonstrating a vital lack of understanding of the physical world around him. How do we assess the culpability of this youth when, the following day, a young man out walking in the park treads on the fallen power line and is killed?

The offence itself was characterised by an absence of physical violence, an absence of malice towards the victim and, most importantly, an absence of contemplation that there could even be a victim. This case illustrates that a young person is capable of committing an act of homicide despite lacking an understanding that his or her actions are even capable of being harmful to another human being.

Sometimes, however, young people commit acts that they well know are obviously dangerous, yet they seem incapable of envisioning just how dangerous those acts really are or how grave the consequences may be. Indeed it may be that they are compelled to commit these acts precisely because they are dangerous. This is illustrated in a case, well publicised at the time, where a group of young people entertained themselves by dropping large stones off a freeway overpass onto the traffic passing below.129

The immature offenders may have been unsure of the likelihood of scoring a “hit” with each stone dropped, and may have been curious as to what effect or damage would be caused to a motor vehicle struck by a falling rock, but seemed totally incapable of understanding that a heavy rock falling at great velocity could pierce straight through the thin sheet metal of a vehicle’s roof and kill the driver — which is, of course, precisely what happened.

127  T Grisso and RG Schwartz (eds), Youth on Trial, 2000, University of Chicago Press, Chicago, p 268.
128  R v Cameron (unrep, 18/3/94, NSWDC) — this offender was actually 19 years old, but the point remains true.
129  R v LC (unrep, 24/9/99, Sup Ct NSW, Dowd J) and R v McGoldrick (Liam) [2000] NSWSC 825.
Principles in sentencing juvenile offenders

It is a well-established principle of sentencing that youth is a mitigating factor. That principle is reflected in legislation such as s 21A(3)(h) of the Crimes (Sentencing Procedure) Act 1999, s 61(6) of the same Act which recognises that offenders under the age of 18 cannot be held so culpable as to warrant the imposition of a life sentence and s 6 of the Children (Criminal Proceedings) Act 1987 which provides that children “because of their state of dependency and immaturity, require guidance and assistance”.

It is also generally recognised that the younger the offender, the greater the mitigating effect of youth will be. 130 Within the present study, that effect was best illustrated in the case of R v JMR,131 where a 13-year-old offender — one of the two youngest found in the study — received a head sentence of 10 years for two counts of manslaughter. In that case it was stated that a sentence in excess of 20 years would have been appropriate had the offender been an adult.

More recently in the case of R v SLD131a a 10-year-old child received a 20 year head sentence for the murder of a 3-year-old child. The sentencing judge indicated that the crime was in the upper range of seriousness and may have warranted a life sentence had the offender been an adult. (This case was sentenced on 30 December 2002 and was therefore outside the present study period.)

The corollary of this principle is also true, in that offenders on the cusp of adulthood should be held more accountable for their actions and receive adequate punishment. As Dowd J stated in R v LC,132 proximity to the age of 18 is a factor that should be taken into account, and where “young offenders conduct themselves like adults and commit serious crimes, they may attract less leniency in sentence than their age might demand”.

The mitigating effect of youth, as has been “repeatedly emphasised”133 by the courts, is based primarily on the notion of rehabilitation, for “the public has no greater interest than that [the offender] become a good citizen”.134

There are, however, some other issues related to youth that act to reduce the culpability of young offenders. For instance, in R v O’Grady135 Hulme J described the 16-year-old offender’s immaturity as tending to make his conduct “less serious on a moral scale” than would be similar conduct by a person of more advanced years. Similarly, Hulme J regarded drug abuse or addiction, which would not ordinarily act in mitigation of an offence, as attracting sympathy where it occurs in an offender so young.

Despite side issues such as these, the primary objective in sentencing young offenders remains rehabilitation, and to this end other common sentencing principles — in particular retribution and general deterrence — play a lesser role in the process.

130  R v Hearne [2001] 124 A Crim R 451 at [27].
131a  [2003] NSW CCA 310.
132  (unrep, 24/9/99, Sup Ct NSW).
133  R v Bui (unrep, 18/12/95, Sup Ct NSW) per Studdert J at p 10.
135  [2000] NSWSC 1255 at [120] per Hulme J.
The primacy of rehabilitation as the goal of sentencing reached a high-water mark some years ago, and was encapsulated by Yeldham J, who said “…considerations of punishment and general deterrence of others may properly be largely discarded…” when sentencing young offenders.136

This position has been pegged back by subsequent decisions137 and it is now generally accepted that while rehabilitation remains more important when sentencing young offenders than adult offenders,138 considerations such as general deterrence “should not be ignored completely”.139

This is particularly the case when sentencing young people for violent offences and in this respect it is worth noting the comments of Lee CJ at CL, who stated:140

“It is true that courts must refrain from sending young persons to prison, unless that course is necessary, but the gravity of the crime and the fact that it is a crime of violence frequently committed by persons even in their teens must be kept steadfastly in mind otherwise the protective aspects of the criminal courts’ functions will cease to operate. In short, deterrence and retribution do not cease to be significant merely because persons in their late teens are the persons committing grave crimes, particularly crimes involving physical violence…”

It has more recently been suggested that when sentencing for murder — the most serious of violent offences — that “some limit on the application of [the] approach favouring young offenders” may have been reached.141 Hulme J supported this proposition by the use of Judicial Commission Judicial Information Research System statistics, which at the time showed no difference between the median head sentences for murderers overall and for murderers under the age of 21,142 and only a 2-year difference in median non-parole periods in favour of young offenders.

An offence committed by a juvenile is capable of being so grave that, contrary to the general principle of rehabilitation, an extremely severe sentence is imposed. This was the case in R v Robinson143 where a head term of 45 years with a non-parole period of 35 years was set. In that case, the sentencing judge was “sceptical” of the offender’s prospects of rehabilitation and said that it could not “confidently be stated that it will ever be safe to release him”.

In that case, the aim of rehabilitation was subordinated to the requirements of punishment and community protection, both of which demanded a lengthy period of incarceration. Still, it is only in such extreme cases that rehabilitation will not be

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136 R v Wilcox (unrep, 15/8/79, Sup Ct NSW).
137 For instance, R v XYJ (unrep, 15/6/92, NSWCCA).
139 R v O’Grady [2000] NSWSC 1255 at [117] per Hulme J; see also R v Bui (unrep, 18/12/95, Sup Ct NSW) per Studdert J at p 10.
141 R v O’Grady [2000] NSWSC 1255 at [121] per Hulme J.
142 With no priors, guilty plea and a single count of murder.
143 [2000] NSWSC 972 at [42]–[43].
the foremost objective of the sentencing process. The task of the court then is to “determine what treatment gives the best chance of realising that object”.144

Ultimately, the rehabilitative principle is founded on the “common human experience that with age comes change”145 and the hope that that change will be for the better. It is accepted that the most reliable and appropriate way of assessing the quality of that change and the progress of the offender’s rehabilitation is to rely on the judgment of the Parole Board,146 a body whose judgment is to be exercised according to the community’s best interests.

To this end, it is not uncommon for the parole period set for juvenile homicide offenders to be quite long in relation to the overall sentence. This allows the Parole Board the greatest opportunity to assess and review an offender’s progress, and to allow for the controlled and supervised re-entry of the offender into the community if considered appropriate, or otherwise to continue the offender’s imprisonment and review at a later date without the term of incarceration extending beyond reasonable bounds. This also promotes the object of rehabilitation, which as already stated, is often given prominence when sentencing young offenders.

This is borne out in the sentences passed on the 44 juvenile offenders discussed in this chapter. Of the 41 imprisoned, only one received a non-parole period equal to or greater than three-quarters of the head sentence imposed.147 The next highest ratio was 72.7% (22 years head, 16 years non-parole period).

Non-parole periods were often set at 50%, 60% or 66.7% (that is, two-thirds) of the head sentence, and, in total, 32 of the 41 juvenile offenders who were imprisoned (78%) received non-parole periods that were less than or equal to two-thirds of the head sentence, and almost half the juveniles imprisoned (20 out of 41 or 48.8%) received non-parole periods of 50% or less of the head sentences. The lowest ratio was 40%, which occurred on two occasions.

**Overview**

Previous studies have consistently revealed that homicide is generally committed by young offenders,148 with the median age for offenders being around 28 or 29 years in most studies. Some studies have even suggested that the age of homicide offenders is decreasing149 as part of a general trend towards youthfulness among violent offenders.

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144 R v Smith [1964] Crim LR 70; R v XYJ (unrep, 15/6/92, NSWCCA); R v O’Grady [2000] NSWSC 1255.
145 R v Robinson [2000] NSWSC 972 at [42].
146 R v Crump (unrep, 30/5/94, CCA NSW, Hunt CJ at CL).
147 A head sentence of 45 years with a non-parole period of 35 years: R v Robinson [2000] NSWSC 972.
149 Mouzos, op cit n 73, p 53.
This is in accordance with the research of James and Carcach, whose study revealed that among male homicide offenders the 3 most populated age groups were 18–20 years, 21–23 years and 24–26 years, with all 3 groups recording similar proportions of offenders.\footnote{James and Carcach, op cit n 8, pp 27–28.}

Similarly, the Judicial Commission’s earlier homicide study recorded 18 as the single most common age of offenders, with 47.5\% of offenders being aged between 15 and 24 years at the time they were arrested.\footnote{Donnelly, Cumines and Wilczynski, op cit n 7, p 12.} This compares to the present study, where 41.7\% of all homicide offenders were aged 24 years or younger.

While youth itself is a general mitigating factor in sentencing, a decision has been made in this study to specifically analyse the phenomenon of homicide committed by offenders under the age of 18 years, as opposed to “youth homicide” or various other descriptions that have been used in some studies which have included offenders aged anywhere up to 24 or 25 years. This decision has been made because 18 years is the traditional and legal watershed between childhood and adulthood. As such, various pieces of legislation affecting the criminal justice process apply only to those under the age of 18 years.

In the 1994–2001 study period, there were 36 sentenced homicide incidents committed by juveniles, involving 44 offenders\footnote{One offender was responsible for two homicide incidents for which he was convicted and sentenced at separate trials. For the purposes of this chapter, he is counted as two offenders despite of course being only one person.} and 39 victims:

- 20 incidents involved 1 juvenile offender and 1 victim
- 3 incidents involved 1 juvenile offender and 2 victims
- 5 incidents involved 2 juvenile offenders and 1 victim
- 1 incident involved 3 juvenile offenders and 1 victim
- 6 incidents involved both a single juvenile offender and 1 or more adult offenders and a single victim
- 1 incident involved 2 juvenile offenders, an adult offender and 1 victim.

The 44 juvenile offenders represent 9.2\% of the total number of homicide offenders in the present study.

Of note is the number of homicide incidents involving more than one offender. In addition to the 6 instances where there were multiple juvenile offenders, there were also 7 homicide incidents involving juvenile offenders acting in company with one or more adult offenders who were also ultimately convicted of a homicide offence. Therefore, 13 out of 36 homicide incidents (36.1\%) that involved a juvenile offender actually involved more than one offender. This supports the finding of Carcach,\footnote{C Carcach, Youth as victims and offenders of homicides, 1997, Trends and Issues in Crime and Criminal Justice No 73, Australian Institute of Criminology, p 2.} who also found that homicides involving multiple offenders were more likely to involve juvenile offenders.
Offender characteristics

Age of offenders

Juvenile offenders ranged in age from 13 to 17 years. Generally, the number of homicides committed by juveniles increased with age, with 17 years (23 offenders or 52.3%) and 16 years (12 offenders or 27.3%) being the most common ages: see Table 14 for offender ages.

This is consistent with the Judicial Commission’s previous homicide study, in which the most common age of offenders overall — not just among juvenile offenders — was 18 years, followed by 17 years.154

Table 14: Homicides by juvenile offenders 1994–2001

<table>
<thead>
<tr>
<th>Age (years)</th>
<th>Males</th>
<th>Females</th>
<th>Overall</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
</tr>
<tr>
<td>13</td>
<td>2</td>
<td>5.1</td>
<td>–</td>
</tr>
<tr>
<td>14</td>
<td>2</td>
<td>5.1</td>
<td>–</td>
</tr>
<tr>
<td>15</td>
<td>4</td>
<td>10.3</td>
<td>1</td>
</tr>
<tr>
<td>16</td>
<td>11</td>
<td>28.2</td>
<td>1</td>
</tr>
<tr>
<td>17</td>
<td>20</td>
<td>51.3</td>
<td>3</td>
</tr>
<tr>
<td>Total</td>
<td>39</td>
<td>100.0</td>
<td>5</td>
</tr>
<tr>
<td>Median age</td>
<td>17 years</td>
<td>17 years</td>
<td>17 years</td>
</tr>
</tbody>
</table>

Gender

Table 14 also shows the overwhelming presence of male offenders among juveniles convicted of homicide offences. Of the 44 offenders, 39 were male (88.6%) while only 5 were female (11.4%). This is very similar to the adult population of homicide offenders in this study, of whom 85.9% were male.

Again, this finding is consistent with earlier research, both for criminal offences in general155 and for homicide, with one study revealing a ratio approaching 10 males to one female among young homicide offenders.156

No female juvenile offender killed a victim of a similar age: all their victims were much older. They included the boyfriend of one offender’s mother, a taxi driver, a youth refuge worker and a 66-year-old man robbed and killed in the street.

154 Donnelly, Cumines and Wilczynski, op cit n 7, p 12
155 See, for instance, C Cuneen and R White, “Masculinity and juvenile justice” (1996) 29(1) Australian and New Zealand Journal of Criminology 68.
156 Carcach, op cit n 153, p 2.
On the other hand, male juvenile offenders were responsible for killing 13 victims aged 18 years or less. Male offenders were also responsible for the deaths of the oldest victims in the group — aged 69, 75 and 88 years — with two of these deaths occurring in the commission of break and enter offences.

**Employment and education**

Given their age, it is not surprising that a large number of offenders were students at the time they committed the offence. Of 43157 juvenile offenders:

- 16 (37.2%) were secondary school students
- 5 (11.6%) were in paid employment
- 22 (51.2%) were unemployed.

Of the 37 juvenile offenders whose education level was known, 31 (83.8%) were recorded as having undertaken secondary education, including the 16 who were occupied as ongoing students at the time of the offence. A further 6 had undertaken primary education only (16.2%).

None of the 27 offenders who were out of school had attempted any higher education or trade qualification. While this is largely explained by the youth of the offenders, the generally poor education and employment standards of the offenders are still typical of the broader population of homicide offenders.

While single factors such as unemployment or lack of education cannot alone explain criminal behaviour, it is nevertheless true that such factors are often present among offenders, as this and other studies indicate.

Polk and White in their highly recommended article have argued that when various single factors combine — for example lack of education and unemployment — the result is a situation of “economic adversity”, which may be a far more meaningful indicator of likely criminal offending than simpler measures such as unemployment or education taken alone. They believe that this “adversity” is more acutely felt by young people “attempting to make the transition from education to work” and leads to “profound” impacts on the social behaviour of those young people.

They illustrate this point by putting the indicators into a social context: the university student from a well-off family may experience “poverty” while studying, but with family support and the expectation that education will lead to a stable career, experiences this “poverty” only as part of a transitory phase. This contrasts

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157 Information unavailable for one offender.
158 Information unavailable for 7 offenders.
161 Ibid at 285.
162 Ibid at 296.
with the true “economic adversity” of an unqualified teenaged school leaver entering a depressed youth job market who, unable to successfully navigate the transition from school to self-sufficiency is at risk of falling into patterns of destructive or anti-social behaviour, including criminal offending.

This theory is, to a degree, supported by the figures revealed in the present study, where most offenders not still attending school had left somewhere in their secondary years, none had attained any further education, trade qualification or apprenticeship, and most remained unemployed.

**Marital status**

As is to be expected among a group of persons all aged less than 18 years, 40 of the 42 offenders whose marital status was known\(^\text{163}\) were single (95.2%), while none were married or divorced. Two offenders — both male — were living in de facto relationships, and one of the young men recorded as single had previously lived in a de facto relationship.

**Prior convictions**

Despite their youth, over half of all juvenile homicide offenders had recorded prior convictions: see Figure 12. In all, 23 offenders (52.3%) had been convicted of a prior offence, with 6 of those offenders (13.6% of all juvenile offenders) — all male — having committed violent offences in the past. This includes one offender who had committed a prior offence of manslaughter.\(^\text{164}\)

**Figure 12: Homicides by juvenile offenders 1994–2001**

Prior conviction status

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\(^{163}\) Information on marital status unknown for two offenders, both male, aged 15 and 17 years, whom we might reasonably assume were single. In that case, 42 out of 44 offenders were single (95.5%).

\(^{164}\) *R v Bui* (unrep, 13/3/97, Sup Ct NSW, Temby J).
Drug and alcohol use

Drug and alcohol use was found to be quite common among these juvenile homicide offenders, with well over one-third of them recorded as affected by alcohol or other drugs at the time they committed the offence.

Among the 44 juvenile offenders:
- 8 were affected by alcohol only at the time of the offence (18.2%)
- 4 were affected by other drugs only (9.1%)
- 5 were affected by both alcohol and other drugs (11.4%)
- 27 were not recorded as having consumed any alcohol or drugs (61.4%).

In addition to those offenders under the influence of drugs or alcohol at the time of the offence:
- 3 offenders had histories of alcohol abuse only
- 6 offenders had histories of drug abuse only
- 8 offenders had histories of both drug and alcohol abuse.

Cannabis was by far the most commonly abused drug, being used by 9 offenders who were either affected by drugs at the time of the offence or had recorded histories of drug use. Other drugs used included heroin (5 instances), amphetamines (4 instances), hallucinogens and prescription sedatives, cocaine and petrol sniffing (each one instance).165

Many of these offenders reported histories of drug or alcohol consumption beginning at very young ages, in some instances as young as 9- or 10-years-old.166 Nowhere are the tragic effects of drug abuse better illustrated than in the case of R v O’Grady,167 where a 16-year-old boy, who had consumed cannabis, amphetamines and LSD, decided for no apparent reason to murder another boy he had met at a party. To that end he took his father’s rifle from home, led the victim into bushland and shot him 9 times.

Victim characteristics

Age

The age of the 39 victims killed by juvenile offenders ranged greatly, from a youngest of only 8 months to an oldest of 88 years. The median age of the victims was 30.5 years.

Almost one-third of victims were aged from 10–20 years, indicating that many of the homicide incidents occurred between victims and offenders of similar ages. Eleven

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165 Figures include those offenders with histories of polydrug usage.

166 In this chapter and in others, a great deal of information about drug and alcohol abuse histories of offenders is self-reporting. The information is largely obtained from various background reports contained in the court files and, as such, the information disclosed by the offender to the author of that report may be self-serving or unreliable. However, where a particular matter is adopted by the sentencing judge as being true in the reasons for sentence, it is recorded as such in this study: see generally Junger-Tas and Marshall, op cit n 21.

Table 15: Homicides by juvenile offenders 1994–2001
Age and gender of victims†

<table>
<thead>
<tr>
<th>Age (years)</th>
<th>Males</th>
<th></th>
<th>Females</th>
<th></th>
<th>Overall</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
</tr>
<tr>
<td>&lt;10</td>
<td>–</td>
<td>–</td>
<td>1</td>
<td>16.7</td>
<td>1</td>
<td>2.9</td>
</tr>
<tr>
<td>10–20</td>
<td>8</td>
<td>28.6</td>
<td>3</td>
<td>50.0</td>
<td>11</td>
<td>32.4</td>
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<tr>
<td>21–30</td>
<td>5</td>
<td>17.9</td>
<td>–</td>
<td>–</td>
<td>5</td>
<td>14.7</td>
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<td>31–40</td>
<td>7</td>
<td>25.0</td>
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<td>–</td>
<td>7</td>
<td>20.6</td>
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<tr>
<td>41–50</td>
<td>1</td>
<td>3.6</td>
<td>1</td>
<td>16.7</td>
<td>2</td>
<td>5.9</td>
</tr>
<tr>
<td>51–60</td>
<td>2</td>
<td>7.1</td>
<td>1</td>
<td>16.7</td>
<td>3</td>
<td>8.8</td>
</tr>
<tr>
<td>61–70</td>
<td>3</td>
<td>10.7</td>
<td>–</td>
<td>–</td>
<td>3</td>
<td>8.8</td>
</tr>
<tr>
<td>&gt;70</td>
<td>2</td>
<td>7.1</td>
<td>–</td>
<td>–</td>
<td>2</td>
<td>5.9</td>
</tr>
<tr>
<td>Total</td>
<td>28</td>
<td>100.0</td>
<td>6</td>
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<td>34</td>
<td>100.0</td>
</tr>
<tr>
<td>Median age</td>
<td>32 years</td>
<td>17.5 years</td>
<td>30.5 years</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

† Age unknown for three males and two females.

victims (32.4%) were in this age group, while 5 more victims were aged between 20 and 30 years (14.7%), and 7 aged between 30 and 40 years (20.6%). Older age groups were even more concentrated in age, all being aged between 15 and 18 years. Of these, 9 were aged 17 or 18 years, reinforcing the notion that homicide is an offence that commonly occurs between victims and offenders with similar characteristics such as age.

There was only one infant victim, aged 8 months, who was killed by his mother’s boyfriend. The next youngest victim was aged 15 years. Therefore, the 11 victims illustrated in the 10–20 year age group in Table 15 are actually more concentrated in age, all being aged between 15 and 18 years. Of these, 9 were aged 17 or 18 years, reinforcing the notion that homicide is an offence that commonly occurs between victims and offenders with similar characteristics such as age.

A different pattern of offending was revealed in instances where the victim was markedly older than the offender. The 8 oldest victims killed by juvenile offenders were aged between 56 and 88 years, and 7 of these were male. These victims were more likely to be attacked and ultimately killed by juvenile offenders in the course of committing other offences. Of these 8 oldest victims, 4 were killed by offenders breaking into their homes and two were killed in street robberies.

Furthermore, two other victims, aged 40 and 46 years, were also killed in the course of another offence, one in a street robbery and the other was a taxi driver stabbed by a passenger. These represented two of the next 4 oldest victims. There was a further incident where a man was bashed, robbed and killed in the street by a pair of juvenile offenders, but the age of the victim was unable to be obtained for this study.168

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168 R v JB (unrep, 20/11/97, Sup Ct NSW, Hunt CJ at CL) and R v RJH (unrep, 25/11/97, Sup Ct NSW, Hunt CJ at CL).
Therefore, we can see that homicides committed by juvenile offenders generally fall into two categories:

- those involving victims of a similar age to the offender characterised by youthful aggression and violence, typically between males
- those where the victim is considerably older than the offender, which usually occur during the commission of another offence, with 8 of the 12 oldest victims meeting their fates in those circumstances.

**Gender**

Only 8 of the 39 victims were female (20.5%) and of these 7 were killed by male offenders. The remaining 31 victims (79.5%) were male and 28 of these were killed by male offenders. This is a slightly different distribution than is seen between the genders of victims killed by adult offenders in this study, of whom 29.3% were female and 70.7% were male.

This higher representation of males as victims of juvenile homicides is partly explicable by the high number of incidents of what Polk describes as “confrontational homicides” between males (that is, killings resulting from aggressive male behaviour often sparked by trivial disagreements) and a number of cases where killings occur in the course of committing other offences, such as robberies and break and enter offences.

Of the 8 female victims only one was killed by a sexual partner, while no male victims were killed by female partners. As this chapter deals with young offenders, it is to be expected that sexual/marital relationships are less prevalent among offenders, leading to a small number of killings in those circumstances. This in turn contributes to a low proportion of female victims, who within the broader homicide victim population are often killed by their partners.

**Charges and outcomes**

**Murder**

Twenty-two of the 44 juvenile offenders (50%) in this study were ultimately convicted and sentenced for murder. Of these, 10 pleaded guilty and 12 not guilty, including 4 who unsuccessfully entered pleas of guilty to the lesser offence of manslaughter.

Offenders who entered pleas of not guilty to murder did not often raise the partial defence of provocation or diminished responsibility. Provocation was raised only once and diminished responsibility 3 times. On all 3 occasions on which diminished responsibility was raised, it was raised where the offender proffered a reduced plea of guilty of manslaughter.

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170 See Carcach, op cit n 153, p 5; Polk, op cit n 169, pp 93–112.

171 Carcach, op cit n 153, p 4.
The murder offences committed by juveniles included:
- 2 offenders who killed in the course of, or associated with, drug transactions
- 2 offenders who attacked and killed taxi drivers
- 9 offenders who killed in the course of robberies or break and enter offences
- 1 offender who killed, in a revenge attack, a homosexual man whom the offender believed had sexually assaulted him on an earlier occasion
- 2 deaths occurring in the commission of robberies sentenced on the basis of felony murder/constructive homicide as provided for by s 18(1)(a) of the Crimes Act 1900.

Only two juvenile offenders convicted of murder had killed more than one victim. One of these offenders received partly cumulative sentences so that the aggregate head term was 21 years and the aggregate non-parole period was 15 years. The second offender received concurrent sentences, with a head sentence of 22 years and a non-parole period of 16 years.

The head sentences imposed on juveniles for murder ranged from a lowest of 10 years to a longest of 45 years. That sentence was more than double the length of the next longest sentence, and was imposed in respect of an offence so grave that the sentencing judge stated that a life sentence may have been appropriate but for the youth of the offender. Life sentences are, of course, not available where the offender was aged under 18 years at the time the offence was committed.

**Manslaughter**

Twenty-two of the 44 juvenile offenders (50%) were ultimately convicted and sentenced for the offence of manslaughter. Of these, only 4 were indicted for manslaughter initially, while the remaining 18 were indicted for murder.

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172  Note also the case of Ankers who was convicted of manslaughter over the robbery death of the victim, while his co-offender was convicted of murder: *R v Ankers and Doyle* (unrep, 10/2/95, Sup Ct NSW, Simpson J).
173  *R v Kane* [2000] NSWSC 1061.
174  *R v Bui* (unrep, 13/3/97, Sup Ct NSW); see also *R v Bui* (unrep, 18/12/95, Sup Ct NSW), an earlier case where the same offender was sentenced for a manslaughter offence to a head term of 10 years and a non-parole period of 6 years 6 months. The subsequent murder sentences were partly cumulative on this.
175  *R v MHN (No 2)* (unrep, 18/11/98 and 20/11/98, Sup Ct NSW, Kirby J) — one murder conviction and one manslaughter conviction (4 years fixed concurrent).
177  *Crimes (Sentencing Procedure) Act* 1999, s 61(6).
178  Tally of 22 does not include an offender who killed two victims and was convicted of one count of murder and one count of manslaughter, with wholly concurrent sentences imposed. That offender is included in the preceding murder section only: *R v MHN (No 2)* (unrep, 18/11/98, Sup Ct NSW, Kirby J).
179  *R v JMR* (unrep, date unknown, Sup Ct NSW); and *R v Eatts; R v Chan* (unrep, 11/12/96, Sup Ct NSW, Sully J); and *R v Luong* [2000] NSWSC 505.
Of the 18 offenders charged with murder who were ultimately convicted of manslaughter, 3 pleaded not guilty and 16 entered pleas of not guilty of murder but guilty of the lesser offence of manslaughter. The reduced plea was accepted by the Crown in full satisfaction of the indictment in 15 of those 16 occasions.

The partial defences of provocation and diminished responsibility were not invoked very often in these cases. Provocation (in circumstances of homosexual advance) was raised and accepted by the jury only once, in the one case where the Crown rejected a reduced plea.180

Diminished responsibility was accepted as the basis of one other reduced plea of guilty of manslaughter181 where the offender was both mentally retarded and suffering from a diagnosed personality disorder. The only other occasion on which diminished responsibility was a factor was in the case of JMR, where the offender’s mental condition was so apparent and obvious that the Crown opted to proceed only on the lesser charge of manslaughter initially.

Criminal negligence was stated as the basis of one conviction and sentence where a reduced plea had been entered.182 On one further occasion where a not guilty plea was entered, a manslaughter conviction was returned by the jury which the sentencing judge believed could have been supported either by criminal negligence or the generic description of unlawful and dangerous act.183

Manslaughter offences committed by juvenile offenders occurred in circumstances so varied that no trend or pattern can be discerned in the way they were sentenced. They range from the near accidental (where a 17-year-old boy was showing off a gun to his friends)184 to the tragic (a 16-year-old boy who helped his uncle commit suicide by rolling him in a drugged state into a river)185 and the pitiful case of a 15-year-old boy with an intellectual impairment who killed his girlfriend’s 8-month-old baby.186

**Sentencing juvenile offenders**

**General**

Of the 44 juvenile offenders sentenced in this study, 22 (50.0%) were sentenced for murder and 22 (50.0%) were sentenced for manslaughter, which is similar to the proportions of adult offenders sentenced for murder (44.8%) and manslaughter (55.2%). If anything, these figures showed that juvenile offenders were slightly more likely to be convicted of murder than their adult counterparts.

180 R v Turner (unrep, 14/7/94, Sup Ct NSW, Grove J).
181 R v Singh (unrep, 29/6/98, Sup Ct NSW).
183 R v Luong [2000] NSWSC 505.
184 Ibid.
186 R v ARM (unrep, 13/4/95, Sup Ct NSW).
The general sentencing statistics for all juvenile offenders were as follows:

- head sentences for murder ranged between 10 years and 45 years, with a median sentence of 16 years, compared with a median head sentence of 18 years (range: 9 years to life) for adult homicide offenders.
- non-parole periods for murder ranged between 6 years and 35 years, with a median of 10 years, compared with a median of 14 years (range: 5 years to life) for adult homicide offenders.
- head sentences for manslaughter ranged between 3 years 9 months and 12 years, with a median sentence of 6 years, compared with a median of 7 years (range: 18 months to 20 years) for adult homicide offenders.
- non-parole periods for manslaughter ranged between 18 months and 8 years, with a median of 3 years, compared with a median of 4.5 years (range: 8 months to 14.5 years) for adult homicide offenders.
- 3 non-full-time custodial sentences were imposed for manslaughter, including two bonds and one sentence of periodic detention, accounting for 13.6% of juvenile manslaughter offenders, compared with 11.3% of adult homicide offenders.

**Figure 13: Homicide 1994–2001**

Comparison of median sentences between juvenile and adult homicide offenders

Figure 13 shows that juvenile offenders are sentenced somewhat more leniently than adult homicide offenders, for both manslaughter and murder. This leniency is particularly evident when the relative lengths of non-parole periods are compared to the head sentences. The difference between the median head sentence for murder between juvenile offenders and adult offenders was 2 years, but the difference between the median non-parole period was 4 years.

Similarly, the median non-parole period for juvenile manslaughter offenders was exactly 50% of the median head sentence, compared to 64.3% for adult manslaughter offenders.
As mentioned at the start of this chapter, the proportionally longer parole period fosters the rehabilitative aim of sentencing and allows the Parole Board a greater opportunity to monitor the offender’s progress and to supervise their reintegration into the community.

Another major factor that no doubt contributes to the lesser punishments imposed upon these young offenders is prior record. Only 15.9% of juvenile offenders were recorded as having a conviction for a previous violent offence (compared to 29.1% of adult offenders), this being a factor that generally operates to increase sentence lengths.
Aboriginal Offenders

Introduction

It is a well-reported phenomenon that Aboriginal Australians are “grossly over-represented” in all aspects of the criminal justice system, from arrest rates to rates of imprisonment.\(^\text{187}\)

Time and again, researchers have highlighted the high rates of Aboriginal involvement in crime both as victims and offenders, and suggested that this is symptomatic of a greater social malaise affecting Aboriginal Australia. The combined effect of lack of educational opportunity and high levels of unemployment contribute to the “social dislocation” of Aboriginal communities, a phenomenon accentuated by high levels of drug and alcohol abuse.

This contributes to unusually high levels of violence within Aboriginal communities and, as is to be expected, high rates of violence will lead to high rates of homicide, homicide itself being “embedded” within the broader patterns of violence within Aboriginal communities.\(^\text{192}\)

The present study only tends to confirm the various phenomena that have been reported previously. High rates of unemployment, poor education, a high incidence of prior violent offending and a high incidence of alcohol and other drug abuse, were all found among the present sample of Aboriginal homicide offenders.

This study does not seek to analyse the underlying social, political, cultural or economic causes of the “well known social and economic problems that frequently attend Aboriginal communities”.\(^\text{193}\) Rather, it observes their existence through indicators such as employment and education and seeks to analyse what, if any, effect is seen in sentencing patterns for Aboriginal homicide offenders.

The law in NSW has, of course, moved to recognise that the disadvantages faced by members of Aboriginal communities ought to be taken into consideration as mitigating the culpability of Aboriginal offenders. In \(R \text{ v Fernando}\), Wood J provided

\(^{187}\) DF Martin, “Aboriginal and non-Aboriginal homicide: Same but different” in H Strang and S Gurull (eds), Homicide: Patterns, prevention and control, 1992, Conference Proceedings No 17, Australian Institute of Criminology, Canberra.


\(^{189}\) Australian Bureau of Statistics, Corrective Services Australia, ABS Cat No 4510.2, Quarterly Reports.

\(^{187}\) Martin, op cit n 187.

\(^{187}\) Fitzgerald and Weatherburn, op cit n 188; P Memmott, R Stacy, C Chambers and C Keys, Violence in Indigenous Communities, 2001, National Crime Prevention Program, Attorney-General’s Department, Canberra.

\(^{187}\) Martin, op cit n 187.


\(^{187}\) (1992) 76 A Crim R 58.
a set of principles to be applied in sentencing Aboriginal offenders. This judgment has been subsequently referred to by sentencing judges as a “classic judgment”, and in the context of this chapter the relevant part of the judgment warrants printing in full:

“(A) The same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offenders’ membership of such a group.

(B) The relevance of the aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender.

(C) It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand within aboriginal communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.

(D) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive Aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.

(E) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within aboriginal communities, and the grave social difficulties faced by those communities where poor self image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.

(F) That in sentencing persons of aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet

195  *R v Priestly* (unrep, 26/6/00, Sup Ct NSW), per Badgery-Parker AJ.
must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.

(G) That in sentencing an Aborigine who has come from a deprived background or is otherwise disadvantaged by reason of social or economic factors or who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality.”

The *Fernando* judgment came at the end of a line of judicial pronouncements in recent decades that recognise a distinct set of sentencing principles ought to be referred to when sentencing Aboriginal offenders. That is not to say, of course, that the *Fernando* principle will apply in every case where an Aboriginal is sentenced or that Aboriginality is a mitigating circumstance per se.\(^{197}\)

Indeed, there has at times been judicial criticism of:\(^{198}\)

> “counsel appearing for Aboriginal offenders who come to be sentenced [who] refer to *Fernando* as though it provided a charter for the unthinking extension of leniency of such cases, without troubling to examine the way in which, if at all, the considerations referred to by Wood J bear upon the instant case.”

There are, therefore, within this study examples of cases involving Aboriginal offenders where an analysis of the offender’s background and circumstances has led the sentencing judge to conclude that the *Fernando* principles ought not to apply.\(^{199}\)

But, given that the law recognises that sentencing Aboriginal offenders is a difficult task, and given that a set of unique principles has been established to guide this task, this chapter seeks to analyse the sentences passed on Aboriginal homicide offenders both generally and in certain specific circumstances to see what, if any, differences can be discerned when compared to sentences passed on non-Aboriginal offenders.

**Overview**

This study includes 51 incidents of homicide where the offender was recorded as being of Aboriginal background.\(^{200}\) These incidents involved:

- 56 Aboriginal offenders
- 54 victims, of whom 22 (40.7%) were identified as Aboriginal.

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198 R v Priestly (unrep, 26/6/00, Sup Ct NSW), per Badgery-Parker AJ at p 13. See also the comments of Wood C J at CL in R v Morgan [2003] NSW CCA 230 at [20]–[21].
199 For example, R v Grant [2001] NSWSC 552 per Hulme J.
200 None were recorded as Torres Strait Islanders, with the exception of Fox, Alvina Joyce (R v Fox [2001] NSWSC 416) who was recorded as being of both Aboriginal and Torres Strait Islander descent.
This represents 11.7% of the total of 477 homicide offenders sentenced in NSW in the study period. This study confirms the findings of numerous others\textsuperscript{201} that Aboriginal people are over-represented as homicide offenders.

In addition, 5 victims identified as Aboriginal were killed by non-Aboriginal offenders,\textsuperscript{202} taking the total of identified Aboriginal victims to 27, or 5.8% of the 469 victims included in this study. It must be remembered that when collecting data for the present study, information concerning victims was less easily come by than information about the offenders, given that source material tended to concentrate on the offender’s sentencing. As such, many variables relating to victim characteristics, including Aboriginality, are likely to be under-reported in this study. It is likely that some Aboriginal victims were recorded as being of unknown race/ethnicity because there was no information in the documents to indicate otherwise.

So while a figure of 5.8% is an over-representation based on the proportion of Aboriginal persons in the general Australian population, the true Aboriginal homicide victimisation figure may be higher than this. Other studies have varied in their findings on Aboriginal victimisation rates, claiming variously that Aboriginal people are 3 times,\textsuperscript{203} 6.5 times\textsuperscript{204} and 9 times\textsuperscript{205} more likely to be the victims of homicide than non-Aboriginal people. (By way of comparison, the 5.8% rate revealed in this study is in the vicinity of “slightly less than three times more likely”.)

\textbf{Offender characteristics}

\textit{Gender of offenders}

Of the 56 Aboriginal offenders, 44 were male (78.6%) and 12 were female (21.4%). This is consistent with general homicide patterns which show that the majority of offenders are male.\textsuperscript{206} It is also in accordance with specific research on Aboriginal homicide which has shown that the proportion of female Aboriginal homicide offenders tends to be higher than the proportion of female homicide offenders in the general homicide offender population.\textsuperscript{207} (The proportion of females among non-Aboriginal offenders in the present study was 12.8%).


\textsuperscript{202} R v Muir (unrep, 31/1/94, Sup Ct NSW, Levine J); R v Ford [2000] NSWSC 713; R v Thomas (unrep, 21/8/98, Sup Ct NSW, James J); R v Duthie [1999] NSWSC 1223; R v PN (unrep, 30/10/98, Sup Ct NSW, Barr J).

\textsuperscript{203} Fitzgerald and Weatherburn, op cit n 188.

\textsuperscript{204} Mouzos, op cit n 73, p 34.

\textsuperscript{205} James and Carcach, op cit n 8, p 31.

\textsuperscript{206} Donnelly, Cumines and Wilczynski, op cit n 7, p 11, records 91.8% of offenders as male.

Males constituted the overwhelming majority of Aboriginal offenders convicted of murder (22 out of 23 or 95.7%), while the sex of offenders convicted of manslaughter was more evenly distributed — 22 out of 33 were male (66.7%) and the remaining 11 offenders were female (33.3%).

**Age of offenders**

As with homicide offenders generally, Aboriginal homicide offenders tended to be quite young. Of the 56 offenders, over half (31 or 55.4%) were aged 25 years or younger, while 75% were aged 30 years or less. The median age of Aboriginal offenders was 24.5 years, slightly younger than the median for non-Aboriginal offenders (27 years).

Relative youth was a feature of both male and female offenders, with 35 of 44 male offenders (79.5%) and 7 of 12 female offenders (58.3%) being aged 30 years or less. Eight offenders (7 male and one female) were aged under 18 years.

Among older Aboriginal offenders, there were only two females aged over 35 years, compared to 8 male offenders.

**Table 16: Homicides by Aboriginal offenders 1994–2001**

<table>
<thead>
<tr>
<th>Age (years)</th>
<th>Males</th>
<th></th>
<th>Females</th>
<th></th>
<th>Overall</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
</tr>
<tr>
<td>&lt;21</td>
<td>11</td>
<td>25.0</td>
<td>1</td>
<td>8.3</td>
<td>12</td>
<td>21.4</td>
</tr>
<tr>
<td>21–25</td>
<td>15</td>
<td>34.1</td>
<td>4</td>
<td>33.3</td>
<td>19</td>
<td>33.9</td>
</tr>
<tr>
<td>26–30</td>
<td>9</td>
<td>20.5</td>
<td>2</td>
<td>16.7</td>
<td>11</td>
<td>19.6</td>
</tr>
<tr>
<td>31–35</td>
<td>1</td>
<td>2.3</td>
<td>3</td>
<td>25.0</td>
<td>4</td>
<td>7.1</td>
</tr>
<tr>
<td>36–40</td>
<td>3</td>
<td>6.8</td>
<td>–</td>
<td>–</td>
<td>3</td>
<td>5.4</td>
</tr>
<tr>
<td>41–45</td>
<td>4</td>
<td>9.1</td>
<td>–</td>
<td>–</td>
<td>4</td>
<td>7.1</td>
</tr>
<tr>
<td>46–50</td>
<td>1</td>
<td>2.3</td>
<td>1</td>
<td>8.3</td>
<td>2</td>
<td>3.6</td>
</tr>
<tr>
<td>51–55</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>&gt;55</td>
<td>–</td>
<td>–</td>
<td>1</td>
<td>8.3</td>
<td>1</td>
<td>1.8</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>44</td>
<td>100.0</td>
<td>12</td>
<td>100.0</td>
<td>56</td>
<td>100.0</td>
</tr>
<tr>
<td><strong>Median age</strong></td>
<td>24 years</td>
<td></td>
<td>27.5 years</td>
<td></td>
<td>24.5 years</td>
<td></td>
</tr>
</tbody>
</table>

**Marital status**

Where the marital status of Aboriginal homicide offenders was known:

- 25 (55.6%) were single
- 17 (37.8%) were in de facto relationships
- 2 (4.4%) were married
- 1 was widowed (2.2%).

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208 Information unavailable for 11 offenders.
The low proportion of married offenders may relate partly to the overall youth of the group and partly to other cultural factors. In comparison, 21.4% of non-Aboriginal offenders in this study were married.

**Education**

Aboriginal homicide offenders tended to be poorly educated, with only one (2.7%) of the 37 offenders whose education status was known having attempted or completed any education beyond secondary school. This offender had left school as an illiterate teenager but had taught himself to read and write and had progressed to university studies in mathematics while serving a prison term for murder in Western Australia.

Of the remaining offenders:
- 24 had undertaken secondary studies (64.9%)
- 11 had primary education only (29.7%), including two who had what was described as “poor” and “limited” education respectively
- 1 (2.7%) had received no formal education at all.

In comparison 76.2% of non-Aboriginal offenders in this study had undertaken secondary studies and 15.3% had undertaken tertiary studies.

The generally poor education standard of Aboriginal offenders was identified by Wood J in *R v Fernando* as contributing to the cycle of unemployment, financial disadvantage and alcohol abuse that affects Aboriginal communities, particularly those in remote or rural areas. These disadvantages, which contribute to the high rates of offending among Aboriginal persons, must be taken into account as subjective facts which go towards assessing the objective criminality of, and appropriate punishment for, an Aboriginal offender.

Lack of education also contributes to lack of employment opportunities, although this is exacerbated by other factors including a depressed rural economy and general lack of employment opportunity in small towns and remote communities. Lack of employment among Aboriginal offenders is discussed below.

**Employment**

The generally poor socioeconomic status of Aboriginal offenders is dramatically highlighted upon an examination of their employment status. Of the 54 Aboriginal offenders in the study whose employment status was known:
- only 4 (7.4%) were recorded as being in paid employment at the time of the offence
- 47 (87.0%) were unemployed
- 2 were prison inmates (3.7%)
- 1 was an aged pensioner (1.9%).

---

209 Information unavailable for 19 offenders.
211 (1992) 76 A Crim R 58 at 62–63 per Wood J.
212 Information unavailable for two offenders.
Lack of employment opportunity in Aboriginal communities, particularly those in remote or rural areas, is another of the Fernando factors listed by Wood J as contributing to, and compounding the effects of, alcohol abuse among Aboriginal offenders. Unemployment and related financial disadvantage may therefore form part of the subjective factual matrix against which the seriousness of an offence committed by an Aboriginal offender may be measured.213

The 7.4% employment and 87% unemployment figures disclosed for Aboriginal offenders in this study — compared to a 41.7% employment and 49.5% unemployment rate among non-Aboriginal offenders in the study — only adds to the weight of evidence pointing to socioeconomic disadvantage as a major contributing factor to Aboriginal over-representation among homicide offenders, and in the criminal justice system generally.

Some researchers have commented that unemployment is one of the main factors causing Aboriginal people to “remain part of an underclass in Australian society”.214 Unemployment feeds the “social dislocation” of Aboriginal communities, contributing to other problems, including high rates of alcohol and other drug abuse, which in turn ensures that Aboriginal people remain over-represented as both offenders and victims of crimes, including homicide.

**Drug and alcohol use**

Significantly high levels of drug and alcohol use and abuse were found among Aboriginal offenders in this study, which supports findings of prior research. At the time of the offence, of the 56 offenders:

- 23 (41.1%) were affected by alcohol only
- 12 (21.4%) were affected by both drugs and alcohol
- 2 (3.6%) were under the influence of drugs (amphetamines and a combination of heroin and cocaine) but not alcohol
- 19 offenders (33.9%) were not affected by alcohol or other drugs.

In addition to those offenders identified as being affected by drugs or alcohol, 3 offenders reported a history of alcohol abuse but were not intoxicated at the time of the offence, 4 reported a history of both drug and alcohol abuse, and 8 reported a history of drug abuse.

The most common drug involved either at the time of offence or historically was cannabis or marijuana (whether solely or in combination with other drugs) with 12 occurrences. Usage of other drugs was far more limited:

- heroin (3 occurrences)
- petrol sniffing (2)
- amphetamines (2)
- prescription drugs (1)
- cocaine (1).

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213 (1992) 76 A Crim R 58 at 62–63 per Wood J.
214 James and Carcach, op cit n 8, p 31.
The high proportion of Aboriginal homicide offenders recorded as being under the influence of alcohol in this study (62.5%) supports findings of previous research, for example Mouzos,\(^{215}\) who found 69.3% of Indigenous homicide offenders were under the influence of alcohol at the time of the offence.

The incidence of alcohol consumption among Aboriginal offenders in the present study is even greater in incidents where both the offender and the victim were Aboriginal. Where this was the case in the present study, 15 out of 22 offenders (68.2%) were recorded as being affected by alcohol. This figure, while high, is lower than was found by James and Carcach,\(^{216}\) who stated the figure at between 75% and 80% of Aboriginal homicide offenders in NSW in the period from 1 July 1989 to 30 June 1996, and Martin,\(^{217}\) who stated that 80% of Aboriginal homicide victims and 86% of Aboriginal homicide offenders were under the influence of alcohol.

**Prior convictions**

An examination of the prior conviction status of Aboriginal offenders reveals high rates of prior offending (see Figure 14). This reinforces the proposition, as outlined in *Fernando*,\(^{218}\) that factors such as lack of education and employment, alcohol abuse and general social disadvantage are bringing Aboriginal people into contact with the criminal justice system at a disproportionately high rate.\(^{219}\)

The high rates of prior conviction found in the present study, particularly for violent offences, is confirmed by earlier research. Fitzgerald and Weatherburn\(^{220}\) reported an over-representation of Aboriginal offenders compared to non-Aboriginal offenders across a range of offences including assault, domestic violence offences, robbery and murder. Martin\(^{221}\) too, in his writing, reported an over-representation of Aboriginals as both offenders and victims of violent crime, and suggested that the high incidence of Aboriginal homicide should be seen as a phenomenon that is “embedded within wider patterns of disproportionately high levels of violence in parts of Aboriginal Australia”.

Within the present study, 44 of the 56 Aboriginal homicide offenders (78.6%) had prior convictions and, more significantly, of that total 27 (or 48.2% of offenders) had convictions for prior violent offences. Furthermore, 26 of those 27 were male, including 5 who had committed prior homicide offences. Other prior violent convictions recorded included assault, assault occasioning actual bodily harm and a number of unspecified offences.

The only female Aboriginal offender with a recorded prior conviction for a violent offence had been convicted of assaulting a police officer.

\(^{215}\) Op cit n 207, p 5.
\(^{216}\) Op cit n 8, p 31.
\(^{217}\) Op cit n 187, p 170.
\(^{218}\) (1992) 76 A Crim R 58.
\(^{219}\) Fitzgerald and Weatherburn, op cit n 188.
\(^{220}\) Ibid.
\(^{221}\) Op cit n 187, p 170.
Among male Aboriginal offenders, 37 of 44 (84.1%) had prior convictions: 11 for non-violent and 26 for violent offences. Among female offenders, 7 of 12 (58.3%) had prior convictions, although as mentioned above, only one of these was for a violent offence.

The rates for prior convictions of Aboriginal offenders both for violent and non-violent offences were far above the rates recorded in this study for non-Aboriginal offenders. Whereas 78.6% of Aboriginal offenders had a prior conviction, the rate among non-Aboriginal offenders was 52%, while violent priors among Aboriginal offenders (48.2%) were twice as frequent as among non-Aboriginal offenders (24.9%).

**Figure 14: Aboriginal homicide offenders 1994–2001**

<table>
<thead>
<tr>
<th>Prior convictions</th>
<th>Percentage of offenders</th>
</tr>
</thead>
<tbody>
<tr>
<td>No priors</td>
<td>15%</td>
</tr>
<tr>
<td>Non-violent priors</td>
<td>29%</td>
</tr>
<tr>
<td>Violent priors</td>
<td>56%</td>
</tr>
</tbody>
</table>

**Victim characteristics**

**Age**

Seven of the 47 victims killed by Aboriginal offenders whose age was known (14.9%) were children: two were aged 17 years, one 11 years, one 8 years, and 3 were aged 2 years.

At the other end of the spectrum, 8 victims (17%) were older than 50 years, the oldest being 78 years of age. Seven of the 8 victims in this age group were male, 7 were unknown to their killer, and all were non-Aboriginals. These older victims tended to be killed in violent criminal episodes, such as street robberies, break and enter offences, and sexual assaults.

The remaining 32 victims where age was known were aged 21–50 years, with quite even distributions in each of the three 10-year age bands:

- 11 were in the 21–30 age group (23.4%)
- 10 were in the 31–40 age group (21.3%)
- 11 were in the 41–50 age group (23.4%).

The median victim age was 35 years.
Aboriginal victims

In 22 homicide incidents committed by Aboriginal offenders the victim was also Aboriginal. Of these 22 victims, 16 were male. The male Aboriginal victims show a more concentrated age grouping, with 9 of the 16 victims aged 27–34 years, while none was under 20 years of age.

The ages of the 6 female Aboriginal victims of homicide committed by Aboriginal offenders were scattered, with one aged 17 years and the remaining 5 aged 30–46 years.

<table>
<thead>
<tr>
<th>Age (years)</th>
<th>Males</th>
<th></th>
<th>Females</th>
<th></th>
<th>Overall</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>≤10</td>
<td>2</td>
<td>5.4%</td>
<td>2</td>
<td>20.0%</td>
<td>4</td>
<td>8.5%</td>
</tr>
<tr>
<td>11–20</td>
<td>2</td>
<td>5.4%</td>
<td>1</td>
<td>10.0%</td>
<td>3</td>
<td>6.4%</td>
</tr>
<tr>
<td>21–30</td>
<td>10</td>
<td>27.0%</td>
<td>1</td>
<td>10.0%</td>
<td>11</td>
<td>23.4%</td>
</tr>
<tr>
<td>31–40</td>
<td>8</td>
<td>21.6%</td>
<td>2</td>
<td>20.0%</td>
<td>10</td>
<td>21.3%</td>
</tr>
<tr>
<td>41–50</td>
<td>8</td>
<td>21.6%</td>
<td>3</td>
<td>30.0%</td>
<td>11</td>
<td>23.4%</td>
</tr>
<tr>
<td>51–60</td>
<td>2</td>
<td>5.4%</td>
<td>–</td>
<td>–</td>
<td>2</td>
<td>4.3%</td>
</tr>
<tr>
<td>61–70</td>
<td>4</td>
<td>10.8%</td>
<td>–</td>
<td>–</td>
<td>4</td>
<td>8.5%</td>
</tr>
<tr>
<td>&gt;70</td>
<td>1</td>
<td>2.7%</td>
<td>1</td>
<td>10.0%</td>
<td>2</td>
<td>4.3%</td>
</tr>
<tr>
<td>Total</td>
<td>37</td>
<td>100.0%</td>
<td>10</td>
<td>100.0%</td>
<td>47</td>
<td>100.0%</td>
</tr>
<tr>
<td>Median age</td>
<td>36 years</td>
<td></td>
<td>33.5 years</td>
<td></td>
<td>35 years</td>
<td></td>
</tr>
</tbody>
</table>

† Age unknown for 7 victims (5 male and 2 female).

Gender

Of the 54 homicide victims killed by Aboriginal offenders, 42 were male (77.8%) and 12 female (22.2%). Of 21 murder victims, 15 were male and 6 female, and of the 33 manslaughter victims, 27 were male and 6 female.

Of note is the fact that 10 of the 12 female victims were killed by male offenders, while the final two female victims were killed by male and female co-offenders in a single incident.

Aboriginal victims

As mentioned, 22 of the 54 victims killed by Aboriginal offenders were also Aboriginal. Of these, 16 were male and 6 were female. Three of the male Aboriginal victims were murdered and 13 were victims of manslaughter, while 3 of the female victims were murdered and 3 were victims of manslaughter.
The 6 female Aboriginal victims (plus a seventh killed by a non-Aboriginal offender) represent 1.5% of the total number of victims in this study and 4.5% of the total number of female victims. This supports a finding that Aboriginal women are over-represented as victims of homicides, although not to the same extent as was found by Fitzgerald and Weatherburn\(^{222}\) who reported that Aboriginal women are 4 times more likely than non-Aboriginal women to be the victims of murder.

Mouzos\(^{223}\) and Martin\(^{224}\) have also both reported that Indigenous homicides — that is, those where both the offender and the victim were Aboriginal — were far more likely than non-Indigenous homicides to involve a female victim. In the present study, however, of the 22 Aboriginal victims killed by Aboriginal offenders, 6 (27.3%) were female, which is actually lower than the 33.1% of female victims involved in the remainder of the homicide incidents in this study.

The 6 deaths of female Aboriginal victims at the hands of Aboriginal offenders have many similarities. All 6 died at the hands of a male offender, and 4 of the 6 offenders were sexual partners of the victims (two husbands, one de facto husband and one boyfriend). The remaining two offenders were the son of the victim and a male friend. Four victims were stabbed to death and two bashed manually, and in 3 of the 6 offences both the victim and the offender were affected by alcohol.

This finding, although based on a small sample, highlights the dangers Aboriginal women face at the hands of their male partners, particularly when one or both parties are affected by alcohol.\(^{225}\)

**The context of Aboriginal homicides**

Homicides by Aboriginal offenders in this study were found to have occurred in a variety of circumstances, including child abuse (two incidents), prison inmate killings (two incidents), one drug-related killing, and killings of family members.

While these types of killings were too infrequent to suggest they formed a special category worthy of special attention and analysis, there were 3 other sets of circumstances which were noticeably more common than others:

- homicides between sexual partners
- homicides committed in the course of other offences
- drunken altercations.

**Killings of sexual partners**

There were 13 occasions between 1994 and 2001 on which an Aboriginal offender was sentenced for killing a sexual partner. This represents just over a quarter (25.5%) of

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\(^{222}\) Op cit n 188.
\(^{223}\) Op cit n 207, p 4.
\(^{224}\) Op cit n 187, p 170.
\(^{225}\) M Brady, “Alcohol use and its effects on Aboriginal women” in J Vernon (ed), *Alcohol and Crime*, 1989, Conference proceedings No 1, Australian Institute of Criminology, Canberra.
the 51 identified homicide incidents involving Aboriginal offenders within this study. Of the 13 incidents:

- 4 involved a male killing a female partner and 9 involved a female killing a male partner — as only 12 Aboriginal women were sentenced for homicide offences between 1994 and 2001, this indicates that killing a sexual partner is overwhelmingly the most likely scenario in which Aboriginal females commit homicide offences (75%), a finding supported by the research of Mouzos, who also found that nearly 75% of female Indigenous homicide offenders had killed their male partners.

- 11 of the victims were identified as Aboriginal.

- Alcohol was a major factor — the offender was recorded as affected by alcohol at the time of the killing on 10 of the 13 occasions while 11 of the victims were under the influence of alcohol, with 3 of those also having consumed cannabis prior to the offence. One of the two victims not recorded as having consumed alcohol was recorded as being affected by amphetamines at the time of death.

- Most (11 out of 13) occurred at residential premises, given their nature, and on 10 of the 13 occasions death was inflicted by stabbing with a household knife, while the other 3 deaths were caused by unarmed beating or kicking.

- Only two of the couples involved were married, 9 were in de facto relationships and two were described as boyfriend and girlfriend.

**Convictions and outcomes**

**Murder:** Of the 13 Aboriginal offenders convicted of homicide offences against sexual partners between 1994 and 2001, 3 were convicted of murder — two male offenders and one female. The head sentences imposed were 9 years for the female offender, and for the male offenders 17 years and 13 years 5 months respectively.

Little can be said about those 3 sentences as a group, each sentence being referrable to very different subjective and objective features. The 17-year sentence was imposed for a brutal and sustained bashing death, whereas the 13-year 5-month sentence was passed on a juvenile offender (aged 17 years).

**Manslaughter:** Ten of the 13 Aboriginal offenders who killed a sexual partner were convicted of manslaughter — two male and 8 female. Only one of the convictions was based on a partial defence, that being a case of a man suffering a delusional disorder where diminished responsibility was accepted by the jury.

A wide range of sentences were imposed on these 10 offenders, from s 9/s 558 bonds to a head sentence of 10 years. As was the case with the murder offenders, it was the male manslaughter offenders who were dealt with more severely. The only two males among these 10 offenders received the two harshest penalties, being sentenced to head terms of 10 years (non-parole period 6 years) and 7 years (non-parole period 4 years) respectively.

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Chapter 7
Aboriginal Offenders

While neither of those sentences could be described as unduly condign, they are greater than the sentences passed on the 8 female offenders within this group. Three of the 8 female Aboriginal offenders had bonds imposed on them, while the longest custodial sentence imposed was a head term of 6 years, and the shortest was 2.5 years. The non-parole periods here were also universally set at 50% or less of the head sentence, with none of the 8 female Aborigines who killed a sexual partner receiving a minimum gaol sentence of more than 3 years. This compares to the two male offenders, whose non-parole periods were set at 60% and 57.1% respectively.

The apparent leniency extended to these offenders is, of course, justified by the array of subjective features operating in the cases. For example, one female Aboriginal offender who was sentenced to a head term of just 2.5 years with a non-parole period of 1 year was 61 years of age, had no criminal history, suffered from a mild intellectual impairment, was in poor health, had been an alcoholic since the age of 20, and was providing ongoing care to her handicapped son. Such sympathetic circumstances naturally lead to an unusually light sentence, and a finding of special circumstances warranting an adjustment in the ratio between the head sentence and the non-parole period.

The other cases were also marked by alcohol abuse, unemployment, lack of education and histories of domestic violence and deprived upbringings, all of which created situations in which principles such as deterrence, community protection and retribution were of reduced importance in the sentencing process.

Killings associated with other offences

Thirteen offenders (23.2% of the Aboriginal offenders in the study) killed their victims in the course of committing other offences — 9 during robberies or break and enter offences and 4 in the course of sexual assaults of female victims. These offences involved 11 victims, with one of the sexual assault incidents and one of the street robberies each involving two offenders killing a single victim.227

Of these 13 offenders, 9 were convicted of murder and 4 of manslaughter. Only one of these offences228 was prosecuted under the felony murder/constructive homicide provisions of the Crimes Act 1900, the remaining 8 murderers being convicted without recourse to those provisions.

Murder: All 9 Aboriginal offenders convicted of murders committed in the course of another offence were male, and their ages ranged from 14 to 29. This reflects the ages of Aboriginal homicide offenders in general: see Table 16. Seven of the 9 offenders had prior convictions recorded, two of whom had committed violent offences.

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227  R v Fernando and Fernando (1997) 95 A Crim R 533; R v JB (unrep, 20/11/97, Sup Ct NSW, Hunt CJ at CL) and R v RJH (unrep, 25/11/97, Sup Ct NSW, Hunt CJ at CL).
228  R v Johnson (unrep, 24/4/96, Sup Ct NSW).
Six of the offenders killed in the course of committing property crimes: two break-and-enters, two street robberies and one attempted car theft.\textsuperscript{229}

Three offenders, again all male, were sentenced for murders involving sexual attacks of female victims. Two offenders received life sentences for their joint abduction, sexual assault and murder of an on-duty night nurse at a country hospital, while the third offender was sentenced to a head term of 19 years for the sexual assault and bashing murder of a 72-year-old woman in her own home.

The median head sentence imposed on these 9 murderers was 18 years, exactly equal to the medians for both all murder offenders and all Aboriginal murder offenders found in this study.

**Manslaughter:** Four Aboriginal offenders who killed during the course of another offence were sentenced for manslaughter. Three of the offenders were male and one female, and their ages ranged from 16 to 49 years.

These included one man who killed a woman in a sexual assault incident, one shooting death in the course of a break-in on commercial premises and two killings in the course of street robberies. One of those street robbery offences involved the only female offender among the 13 discussed in this group.

The harshest sentence among this group of offenders (head sentence 12 years, non-parole period 7.5 years) was imposed — despite a finding of diminished responsibility by way of mental illness — on a 22-year-old male who shot a security guard while robbing commercial premises.\textsuperscript{230}

The lightest of the four sentences was imposed on a 16-year-old girl for her non-principal role in the bashing and robbery of a 66-year-old man. The sentence imposed was 6 years with a non-parole period of 3 years.\textsuperscript{231}

As was the case with the 9 murderers discussed above, the sentences passed on the 4 manslaughter offenders were generally in keeping with those passed on other groups of offenders. In other words, there is nothing to suggest that sentences imposed on Aboriginal offenders in these circumstances are any more or less severe than the general patterns of sentences imposed on other offenders.

**Drunken altercations**

The third common circumstance in which Aboriginal offenders committed homicide offences was the drunken altercation. These are incidents where what starts as a minor altercation, argument or confrontation between people affected by alcohol ends in an

\textsuperscript{229} R v Jarrett (unrep, 13/11/98, Sup Ct NSW, Levine J). This killing was part of an extended episode of criminal conduct in which the offender broke into several cars at night. Two car owners came out of their homes to confront him and both were stabbed, one fatally. A car was then stolen and used in an armed robbery of a nearby petrol station. As a result, 10 offences were taken into account on a Form One when sentencing for the offence of murder. A head sentence of 22 years with a non-parole period of 15 years was imposed.


\textsuperscript{231} R v TJP (unrep, 2/12/98, Sup Ct NSW).
act of lethal violence.\textsuperscript{232} These killings are usually not premeditated, involve quite short episodes of violence and arise when:\textsuperscript{233}

“alcohol lowered [the offender’s] resistance and inflamed him to the extent where he committed an act which probably, had he been sober, he would not have committed.”

Of the 51 homicide incidents committed by Aboriginal offenders sentenced between 1994 and 2001, 12 (23.5\%) have been identified as arising from drunken altercations.\textsuperscript{234} These incidents involved 14 offenders and 12 victims. Two incidents involved two offenders and a single victim, the remaining 10 all involved one victim and a single offender.

The prevalence of offences occurring in these circumstances is attributable not only to the high levels of alcohol abuse existing within Aboriginal communities, but also to the very nature of Aboriginal drinking as a phenomenon. Various researchers have noted that drinking in Aboriginal communities is “not an individual activity but quintessentially a social one,”\textsuperscript{235} characterised by numbers of community members gathering together, often in public spaces such as parks,\textsuperscript{236} for extended sessions of socialising and alcohol consumption. Where large groups of persons affected by alcohol are gathered together, various tensions old and new may arise and the likelihood of violent outbursts — even if brief and unpremeditated — is obvious, particularly in Aboriginal communities where “fighting and swearing are an accepted part” of the dispute resolution process.\textsuperscript{237}

**Characteristics of offenders and victims:** As might be expected, the offences predominantly involve males, both as offenders and victims. Thirteen of the 14 offenders were male, as were 11 of the 12 victims. There was only one incident of a death arising from a drunken altercation where a male offender killed a female victim.

In the case of *Shillingsworth*, Dunford J, in dealing with such an offence noted that it was:\textsuperscript{238}

“one of those very sad cases involving Aboriginal persons living in the far west of New South Wales involving persons with little or no purpose in life with no opportunities, employment or other activities, often illiterate, often with an alcohol problem and with a tendency to resolve disputes and problems between themselves with physical force.”

\textsuperscript{232} The incidents discussed here do not include incidents of homicide between spouses/sexual partners who were affected by alcohol. They are characterised by the nature of that relationship and discussed above, and not included again as drunken altercations.

\textsuperscript{233} *R v Duke* (unrep, 26/7/94, Sup Ct NSW) per McInerney J at p 51.

\textsuperscript{234} In 11 of these incidents, the offender was affected by alcohol, while in the last — *R v Shillingsworth* (unrep, 1/5/98, Sup Ct NSW, Dunford J) — the victim was affected by alcohol and initiated the altercation with the offender.

\textsuperscript{235} Martin, op cit n 187, p 175.

\textsuperscript{236} James and Carcach, op cit n 8, p 30.

\textsuperscript{237} Brady, op cit n 225, p 139.

\textsuperscript{238} *R v Shillingsworth* (unrep, 1/5/98, Sup Ct NSW) per Dunford J at p 6.
The judge’s statement tends to be supported by the facts of the 12 killings identified:

- 7 of the 12 victims were Aboriginal
- 12 of the 14 offenders were unemployed, that is, only two were in paid employment
- only one offence occurred in the greater Sydney region — the remaining 11 offences occurred in country areas including Queanbeyan, South Nowra, Albury, Kempsey, Gilgandra, Wentworth, Dareton, Bourke, Wilcannia, Broken Hill and Moree
- 13 of the 14 offenders were under the influence of alcohol, and 12 had recorded histories of alcoholism or heavy alcohol abuse commencing in their teenage years; 5 of the offenders had suffered alcohol-related brain damage
- 10 of the 14 offenders had prior convictions for violent offences; significantly this included 4 who had been convicted of earlier homicide offences (including two in other States or Territories).

This group of offenders appear to be those for whom the doctrine in *R v Fernando* is most applicable and, in terms of sentenced outcomes, the relevant considerations from that case are more clearly reflected in the sentences passed on the 9 manslaughter offenders than the 5 murderers.

The 9 manslaughter offenders (8 male; one female) all received custodial sentences, with head terms ranging from 4.5 years to 15 years. The median head sentence among these 9 offenders was 7 years, the same as the overall median sentence recorded for all Aboriginal and non-Aboriginal manslaughter offenders in this study. The median non-parole period of 3 years 6 months was also very similar to the overall median non-parole period for Aboriginal manslaughter offenders in this study, which was 3 years 3 months, but one year less than the median non-parole period for non-Aboriginal manslaughter offenders in this study.

The 5 male murder offenders, however, were sentenced in a very conventional and concentrated manner. There were 3 head sentences of 18 years, one of 17 years and one of 14 years 8 months. The median of 18 years is the same as the overall median sentence recorded for all Aboriginal and non-Aboriginal murder offenders in this study. While the head sentences look very similar to those passed in other cases, the non-parole periods set were a little lighter than in many other cases. The longest non-parole period was 13 years 6 months, and the median was 12 years. This median was the same as for all Aboriginal offenders in this study but less than the 13 year 6 month median for non-Aboriginal offenders.

Therefore, in these cases of drunken altercation leading to killings by Aboriginal offenders, the non-parole periods set are somewhat more lenient, which is generally attributable to the subjective factors of the offenders as understood and dealt with in accordance with the principles enunciated in *R v Fernando*.

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239 The exception was the case of *R v Shillingsworth* (unrep, 1/5/98, Sup Ct NSW, Dunford J), where it was the victim who was affected by alcohol and initiated an attack on the offender.

240 (1992) 76 A Crim R 58.
Sentencing Aboriginal offenders overall

Of the 56 Aboriginal offenders sentenced in this study, 23 (41.1%) were sentenced for murder and 33 (58.9%) were sentenced for manslaughter. Based on the figures revealed in this study, Aboriginal homicide offenders are therefore slightly less likely to be convicted of murder than non-Aboriginal offenders, of whom 45.6% were convicted of murder.

The general sentencing statistics for all Aboriginal offenders were as follows:

- Head sentences for murder ranged from 9 years to life, with a median sentence of 18 years, compared with a median head sentence of 18 years (range: 10 years to life) for non-Aboriginal offenders.
- Non-parole periods for murder ranged from 5 years to life, with a median of 12 years, compared with a median of 13.5 years (range: 5 years 7 months to life) for non-Aboriginal offenders.
- Head sentences for manslaughter ranged from 2 years 6 months to 15 years, with a median sentence of 7 years, compared with a median of 7 years (range: 18 months to 22 years) for non-Aboriginal offenders.
- Non-parole periods for manslaughter ranged from 9 months to 10 years, with a median of 3 years 3 months, compared with a median of 4.5 years (range: 8 months to 16 years) for non-Aboriginal offenders.
- 3 non-full-time custodial sentences were imposed for manslaughter, accounting for 9.1% of Aboriginal manslaughter offenders, compared with 11.8% of non-Aboriginal offenders.

A comparison of the median sentences imposed on Aboriginal offenders and non-Aboriginal offenders is shown in Figure 15.

Looking at these figures it is apparent that the median head sentences for Aboriginal offenders for both murder and manslaughter are the same as the medians imposed on non-Aboriginal offenders.

There is a difference, however, when non-parole periods are examined. For the offence of murder, the median non-parole period for Aboriginal offenders was 88.9% of the non-parole period for non-Aboriginal offenders. While this is not a great difference, it is indicative of some degree of leniency. This is consistent with the sentencing statistics for other groups of offenders examined, where murder sentences tend to show little variation when one group is compared to the remainder of the murder population.

For the offence of manslaughter, Aboriginal offenders were just as likely as non-Aboriginal offenders to receive a non-custodial sentence, but when a custodial sentence was imposed, the non-parole period for Aboriginal offenders was only 72.2% of the median non-parole period for non-Aboriginal manslaughter offenders.

This degree of leniency operates despite the very high incidence of prior convictions — particularly for violent offences — found among Aboriginal offenders, which this study has found to be a noticeable aggravating factor reflected in sentencing.
This is consistent with the analysis of sentences in other groups, where variation is often apparent in manslaughter sentences (as opposed to murder sentences which are quite stable), and any degree of leniency to be found is generally expressed in a shorter non-parole period rather than a shorter head sentence.

**Figure 15: Homicide offences 1994–2001**
Comparison of median sentences between Aboriginal and non-Aboriginal offenders

Aboriginal victimisation and sentencing

As with other “categories” of homicide, Aboriginal homicide is often an “intra” group phenomenon, that is, both the offender and the victim share similar characteristics, be it gender, age or, in this case, race.

As mentioned earlier, of the 54 victims killed by Aboriginal offenders, 22 (40.7%) were also identified as being Aboriginal. This number possibly under-represents the true number of Aboriginal victims killed by Aborigines, as it is likely that there were Aboriginal victims recorded as being of unknown race/ethnicity because there was no positive information in the documents to indicate otherwise.

The homicide incidents in this study which featured both Aboriginal offenders and Aboriginal victims were typically drunken altercations between friends and acquaintances and killings between sexual partners, and did not tend to include those killings that occurred in the course of robberies and other offences.

These cases were the ones, generally, to which the sentencing principles of *R v Fernando* seemed most applicable. One of the points raised by Wood J in *Fernando* concerned the fact that violent offences committed by Aborigines often involve Aborigines as
victims. Wood J, while advocating a sensitive approach to assessing the culpability of Aboriginal offenders, also warned that:241

“... the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive Aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.”

That is, if some sort of blanket discount were to be applied to Aboriginal offenders without being properly considered and applied, the effect would be that the victims of those crimes — often Aborigines themselves — would not be then afforded the full degree of judicial protection through deterrence and punishment.

With this in mind, the sentences imposed on Aboriginal offenders have been analysed according to whether the victim was an Aboriginal person, non-Aboriginal person or of unknown race/ethnicity, and compared to sentences where a non-Aboriginal offender has killed an Aboriginal victim. The results for both murder and manslaughter are shown in Figures 16 and 17.

Although each group contains a small number of cases, it is interesting to note that for both murder and manslaughter, those offences involving both Aboriginal offenders and Aboriginal victims had lower median sentences than the other groups.

Among murder offenders, where both the offender and victim were Aboriginal (6 offenders), the median head sentence was 15 years 10 months, and the median non-parole period was 10 years 4 months. This compares to murder offences committed by Aboriginals where the victims were non-Aboriginal (12 offenders) or of unknown racial identity (5 offenders), where the median head sentence was 18 years for both groups, and the median non-parole periods were 13 years 6 months and 12 years respectively. Where non-Aboriginal offenders killed Aboriginal victims (3 offenders), the median head sentence was 18 years and the median non-parole period was 23 years.

Manslaughter offences involving Aboriginal offenders and Aboriginal victims again showed lower median sentences that the other groups. Of the 13 Aboriginal offenders sentenced to full-time custody for manslaughter where the victim was also an Aboriginal, the median sentences imposed were 6 years head sentence and 2 years 6 months non-parole period. In addition, there were 3 Aboriginal manslaughter offenders who killed Aboriginal victims and received non-custodial sentences — these being the only Aboriginal homicide offenders who received non-custodial sentences.

Where the offender was Aboriginal and the race of the victim was unknown (5 offenders), the median sentences were quite similar to those for Aboriginal offender/Aboriginal victim offences, with a median head sentence of 6 years and a median non-parole period of 3 years.

In comparison, where Aboriginal manslaughter offenders killed non-Aboriginal victims (12 offenders) the median head sentence was 7 years 6 months and the median non-parole period was 5 years.

Interestingly, where non-Aboriginal offenders were sentenced for manslaughter offences where the victim was Aboriginal, the sentences were higher — although it is important to remember that there were only two cases in this category. The sentences imposed on those two offenders were 12 years head with an 8-year non-parole period and 8 years head with a 5-year non-parole period.

**Figure 16: Homicide and Aboriginality 1994–2001**
Median sentences by Aboriginality of offender and victim — Murder

![Bar chart showing median sentences by Aboriginality of offender and victim for Murder](chart)

**Figure 17: Homicide and Aboriginality 1994–2001**
Median sentences by Aboriginality of offender and victim — Manslaughter

![Bar chart showing median sentences by Aboriginality of offender and victim for Manslaughter](chart)
Male Homosexual Victimisation

Introduction

It is unclear exactly how many homosexual men are victims of homicide each year in New South Wales. Some figures suggested by other research were 37 victims in a 10-year period and 26 victims in a 7-year period, but despite the best efforts of researchers it has proven difficult to obtain appropriate information in all homicide cases.

While the exact extent of the phenomenon may be unclear, some have suggested that it is more common than previously thought and may be increasing.

In such an environment, it is unsurprising that there has been a “recent activist, official and media focus on the killings of gay men and the outcome of related trials”. Such has been the concern over this issue that the NSW Attorney General commissioned a working party to investigate gay-related homicides and the rise of the so-called “homosexual advance defence”.

This chapter looks at all homicide incidents within the study period where the victim was able to be identified as homosexual, and examines whether there was any link between the victims’ sexuality and his victimisation.

In so doing, it reveals that while the victim’s homosexuality was a relevant factor in most cases, there were also a variety of other circumstances that precipitated or motivated the killing. So while many of the killings may be “related to prejudice or homophobia which may also be linked to notions of gender and masculinity” they cannot simply be uniformly classified as “gay-hate” crimes motivated by the “homophobic dispensing of punishment aimed at the gay lifestyle”.

Overview

Twenty of the 469 victims of homicide in the present study were identified as homosexual (4.3%).


245 G Mason, Violence against lesbians and gay men, 1993, Violence Prevention Today No 2, Australian Institute of Criminology, Canberra.

246 Tomsen and George, op cit n 244 at 57.


248 Mouzos and Thompson, op cit n 242, p 2.

249 Polk, op cit n 169, p 97.
The number of homosexual victims is probably under-reported, as victim information is generally less detailed than offender information, given that most of the source documents focus on the offender’s history and sentencing rather than the victim’s background and history. Similar problems in identifying gay-hate related homicides have also been encountered by other researchers given that the primary witness to the offence is dead.250

Of the 20 victims identified as homosexual, two were killed in circumstances that suggest the offence was not precipitated or motivated by the fact that the victim was homosexual,251 both being killed in the course of robberies. Those two deaths are therefore excluded from the following analysis.

The other 18 deaths may be considered as a group, defined loosely by the fact that the offence was in some way motivated or precipitated by the victim’s homosexuality. Therefore, the following analysis includes:

- 18 male homosexual victims (approximately 3.8% of the total number of victims in this study)
- 18 offenders (3.8% of the total number of offenders in this study).

The 18 deaths occurred in 17 separate incidents, including:

- 15 incidents where there was a single offender and a single victim
- 1 incident where there was 1 offender and 2 victims252
- 1 incident where there were 2 offenders and 1 victim.253

**Victim and offender information**

**Gender**

All offenders and victims identified in this chapter were male. This is consistent with earlier research which has found no lesbian-hate homicide incidents254 and an overwhelming predominance of male offenders.255

**Age of offenders**

The offenders in these incidents were generally younger than offenders in the remainder of the homicide incidents in this study. The median age for the 18 offenders was only 21 years, compared to 27 years among the remaining population of male homicide offenders.

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250 Mouzos and Thompson, op cit n 242; Tomsen and George, op cit n 244 at 60.
251 R v Pricett and Pricett [1999] NSWSC 1076; and R v Bowen (unrep, 15/12/00, Sup Ct NSW, Howie J).
253 R v Kosakowski (unrep, 12/6/97, Sup Ct NSW) and R v Richards (unrep, 30/8/96, Sup Ct NSW, Sully J).
254 Mouzos and Thompson, op cit n 242, p 2.
255 Mason, op cit n 245; Tomsen and George, op cit n 244 at 60; Mouzos and Thompson, op cit n 242, p 2.
The offenders’ ages were highly concentrated, with 15 of the 18 offenders aged from 16–24 years at the time of the offence, including 3 offenders aged under 18. The remaining 3 offenders were aged 26, 29 and 41 years. This supports the findings of Mouzos and Thomson,256 who found a median age of 20 years among offenders, with high concentrations of offenders in younger age groups.

The oldest offender in the present study (41 years of age) was 12 years older than the next oldest offender, and his offence was committed in unusual circumstances in that he killed a homosexual acquaintance he found in bed with his 9-year-old son.257 This is in contrast to the younger offenders whose offences were motivated, precipitated or provoked by actions of the victim towards the offender in person.

Age of victims

In contrast to the offenders, victims of these offences were generally a great deal older than other victims in this study. The victims’ ages ranged from 22–68 years, but were concentrated in the older age groups. For example, there were 3 victims aged in their fifties and 6 aged in their sixties.

The median age of the 18 victims was 50 years, whereas the median age of other male victims in the present study was only 30 years. This supports the research of Mouzos and Thomson,258 who also found that the victims of gay-hate homicides were generally older than other victims, with a median age of 43 years.

Figure 18 below compares the ages of the victims and offenders, clearly illustrating that most offenders were young, and their victims tended to be older.

Figure 18: Homosexual-related homicides 1994–2001
Ages of offenders and victims

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256 Op cit n 242.
258 Op cit n 242, p 3.
Marital status
All 18 offenders were single. Mouzos and Thomson\textsuperscript{259} also found that gay-hate homicide offenders were more likely than other homicide offenders to be unmarried.

Employment
Of the 17 offenders whose employment status was known:\textsuperscript{260}
- 7 were identified as employed (41.2%)
- 9 were unemployed (52.9%)
- one was a student (5.9%).

The even distribution of employed and unemployed offenders is at odds with the research of Mouzos and Thompson,\textsuperscript{261} whose sample group of offenders had an 81.8% unemployment rate, although given the quite small sample groups involved in both studies, little can be read into this finding.

Drug and alcohol consumption
Of the 18 offenders, many were affected by alcohol, other drugs or both at the time they committed the offence:
- 6 were affected by alcohol only
- 2 were affected by drugs
- 3 were affected by both drugs and alcohol.

The drugs included cannabis (1 instance), amphetamines (2 instances) and the prescription medications normison and rohyphnol (1 instance each).

Context of offences
In the 18 deaths where it was apparent that the victim’s homosexuality was in some way a precipitating factor of the offence, there was “a mix of apparent motives”.\textsuperscript{262}

The offences identified here have been classified into 4 main contexts:
- violent responses to homosexual advances
- revenge attacks
- genuine gay-hate crimes
- other circumstances.

\textsuperscript{259} Ibid, p 4.
\textsuperscript{260} Information unavailable for one offender.
\textsuperscript{261} Op cit n 242, p 4.
\textsuperscript{262} Tomsen and George, op cit n 244 at 65.
Violent responses to homosexual advances or activity

Seven of the 18 incidents in this chapter are characterised by the offenders responding violently to sexual advances or sexual activity on the part of the homosexual victim. All of the incidents involved one victim and one offender only.

Even within these 7 cases, the circumstances surrounding the offences varied. Some attacks were provoked by generally-described homosexual advances or minor sexual contact (such as grabbing the offender’s buttocks), while others were preceded by more offensive or indecent behaviour on the part of the victim. For instance, two offenders claimed they were asleep and awoken by the victim performing sexual acts, while a third offender claimed his offence was preceded by the victim attempting to climb into bed with him.

Two other cases in this group share a common characteristic which makes them of particular interest, particularly in terms of the way the partial defence of provocation is sometimes utilised in cases involving homosexual advances or activity. In each of the two cases the offender killed the victim after appearing, at least initially, to consent to sexual activity with the victim.

In R v Graham, the offender and victim met through a telephone chat service for gay men. They arranged to meet in a parkland reserve at night, but when sexual activity commenced the offender, who was not an experienced homosexual, had a change of heart and struggled with the victim, eventually strangling him.

In the case of R v Jarrett, the victim was a friend of the offender and knew him to be homosexual. After a night of drinking at a club, the two men went together to vacant land by railway tracks. A couple of hours later the victim’s bashed and strangled body was found dumped in the nearby river. The offender claimed he was provoked by sexual advances toward him from the victim, but this claim was rejected by the sentencing judge who, while making no definite finding as to whether sexual activity took place between the two men, ruled that a sexual advance could in no way be “unexpected” in circumstances where the offender, after discussing homosexuality with the victim, went with him to a “dark and secluded spot” apparently with the intention of engaging in some form of homosexual act.

In both these cases the offender was convicted of manslaughter, but in neither case was the conviction based on provocation or homosexual advance defence, despite provocation being raised in both cases: see below for a discussion of the application and operation of the partial defence of provocation.

263 R v Polanski [2000] NSWSC 854; R v Turner (unrep, 14/7/96, Sup Ct NSW).
264 R v Hodge [2000] NSWSC 897 where the offender claimed he was awoken by the victim touching and fondling him; R v Bellamy [2000] NSWSC 1217 where the offender claimed he was asleep or unconscious under the influence of drugs and that when he woke the victim was standing over him masturbating while viewing a gay pornographic video.
265 R v Green (unrep, 2/10/98, Sup Ct NSW) –note this case was a retrial following CCA appeal.
266 [2000] NSWSC 1033.
267 (unrep, 20/7/97, Sup Ct NSW).
**Revenge attacks**

There were 5 killings committed by 6 offenders as revenge for alleged or perceived prior acts of sexual assault, indecency or other non-consensual homosexual acts perpetrated by the victims against the offender.

What separates these incidents from the cases discussed above as “Violent responses to homosexual advances or activity” is a lack of immediacy of reaction on the part of the offender. The time elapsed between the alleged sexual attacks committed by the victim and the revenge attack ranged from weeks to months to 9 years.

Despite the apparently premeditated nature of these offences — one offender even went so far as to write his name and the names of his mother and siblings on the 4 bullets he used to shoot his bisexual stepfather in revenge for alleged years of sexual abuse, before travelling by taxi to the victim’s home in order to gun him down — only one of the 6 offenders was ultimately convicted of murder.

Of the 5 offenders convicted of manslaughter in revenge attacks, provocation was only a factor on two occasions, and on each occasion it was raised in conjunction with the partial defence of diminished responsibility.

**Gay-hate offences**

There were two killings characterised by extreme violence motivated by genuine antipathy towards homosexuals.

The first of these was an obvious hate crime, where the offender had terrorised several men in a park that was known to be frequented by homosexual men, eventually shooting one man dead with a compound bow. He later dismembered the body and stored it in his refrigerator for 4 months before disposing of the body. This offender was sentenced to life imprisonment for murder, both for this offence and for a later savage attack in which he killed a taxi driver by stabbing him 37 times.

The second case resulted in a manslaughter conviction, and in many ways is similar to the first group of killings classified as “Violent responses to homosexual advances or activity”, in that the offender claimed he was accosted to some degree by the victim — who was dressed in women’s clothing — and a fight ensued. What removes this case from the earlier category is the ferocity of the attack, which one witness claimed lasted over 40 minutes and, more significantly, that after this initial attack, the offender, having gone home, decided to return to the scene of the crime to inflict a further beating which proved fatal.

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268 One incident involved two offenders and a single victim. Please note that due to statistical error the case R v PRFN [1999] NSWSC 603 which would have been in this category was not included in this study.
269 R v Kane [2000] NSWSC 1061.
270 R v Diamond (unrep, 15/4/94, Sup Ct NSW).
271 R v Johnson (unrep, 13/12/01, Sup Ct NSW).
273 R v Kane [2000] NSWSC 1061.
275 R v Leonard (unrep, 10/11/97, Sup Ct NSW, Badgery-Parker J).
276 R v Dunn (unrep, 12/9/95, Sup Ct NSW).
Other circumstances

There were 4 killings that did not belong to the above categories.

One of these discussed earlier involved a 41-year-old offender who was sharing residential premises with his 9-year old son and a 43-year-old homosexual acquaintance.277 Both the offender and victim had been drinking at a hotel, until the victim returned home. The offender stayed at the hotel for a few more drinks, but became worried about his son being home alone with the victim.

When the offender returned home and found his son and the victim in bed together,278 he attacked the victim, bashing him to death. A manslaughter conviction on the basis of provocation was recorded.

While this was partly a violent response to homosexual actions of the victim, and partly revenge, it is distinguished from both of those categories by the fact that the victim's actions were not directed towards the offender himself.

The final two cases279 involved offenders killing homosexual victims as vengeance or retribution for perceived acts of paedophilia committed by the victims — not against the offenders themselves, but in general. There was no evidence in either case that the victims were involved in any such activities, but nonetheless the offenders took to the notion that the victims ought to be killed for this reason.

These two cases (including one offender who killed two victims in attacks two weeks apart) shared many similarities:

- the offenders were very young males: 19 and 17 years of age
- the victims were much older than their killers: 68, 59 and 36 years of age
- the victims were unknown to their attackers
- all 3 victims were killed in their own homes
- all 3 victims were killed in circumstances of extreme and prolonged violence
- all 3 victims were severely mutilated after death.

These offences were extremely violent and brutal, even by comparison to other homosexual-related killings which are often characterised by extended or frenzied violence.280 The objective gravity of the offences led to the imposition of a life sentence for the offender who killed two victims281 and a head sentence of 45 years with a non-parole period of 35 years for the second offender.282

This was the longest determinate sentence, singularly or by aggregate, imposed on any of the 477 offenders in the entire study group, and the sentencing judge indicated that it was only the offender’s youth (17 years) that prevented the imposition of a life sentence on such an “extremely disturbed and dangerous” individual.

278 There was no finding made that the victim had performed any sexual act or offence against the child.
280 Tomsen and George, op cit n 244 at 65; Mouzos and Thompson, op cit n 242, pp 2–3.
Partial defences and homosexual advance defence

Introduction

In recent years there have been a number of cases in which criminal defendants have claimed they acted either in self-defence or under provocation when committing acts of violence against homosexual men who had made sexual advances towards them. The reliance on the doctrines of self-defence and/or provocation in these circumstances has come to be termed “homosexual advance defence” — essentially a misleading term as no such defence exists at law. This term should be understood as a shorthand way of referring to either self-defence or, more usually, the partial defence of provocation (or both).

The perceived phenomenon of homosexual advance defence has raised a number of issues about the perception of a legal and judicial prejudice against homosexuals, community attitudes towards homosexuality and homophobia, and notions of what is capable of being provocative in the current age. The High Court of Australia was called upon to canvas these issues in Green v The Queen, and that case encapsulates the current judicial opinion on provocation in circumstances of unwanted homosexual advance.

Such was the concern over the issue of homosexual advance defence — even prior to the High Court’s decision in Green — that the NSW Attorney General commissioned a Working Party on Homosexual Advance Defence. Anyone wishing to further explore the “broader issues relating to the treatment of homosexuality and the gay victim by the criminal justice system and the community generally” is directed towards the Working Party’s Final Report.

This chapter will not explore such issues, but will look briefly at how recognised legal defences have been deployed by offenders in the cases identified.

The use of partial defences in the present sample of cases

Six of the 18 offenders included in this chapter were convicted of murder. Of the 6 offenders, it was possible to identify that 3 had unsuccessfully raised the partial defence of provocation.

Two of the cases — Leonard and Valera — attracted life sentences and the nature of the offences meant that any claim of provocation was speculative at best. The third case, Hodge, was more interesting, however, in terms of understanding the operation of the provocation defence in relation to attacks on homosexual victims.

In that case, it was accepted that the offender “did form the intention to at least cause the deceased grievous bodily harm, and that he did so when he lost his self control as

283 R v Dunn (unrep, 12/9/95, Sup Ct NSW); R v Green (unrep, 2/10/98, Sup Ct NSW); see also the table of cases in Homosexual advance defence: Final report of the Working Party, 1998, NSW Attorney General’s Department, Sydney, pp 12–13.
285 Note that this body continues to operate, monitoring homosexual advance defence cases that arise in NSW courts.
a result of provocation by the deceased in the form of an unwanted sexual advance” — that is, the subjective element of the test for provocation was satisfied.

However, the provocation defence ultimately failed and a murder conviction was recorded because the degree of provocation offered by the deceased “was not such as would have caused an ordinary person of the prisoner’s sex, age and maturity, unaffected by alcohol or drugs, to have so lost his self control to that degree” — that is, the objective criteria of the test for provocation was not satisfied.

The jury’s murder verdict in this case is reassuring in that it demonstrates that juries can, when properly directed, understand and assess the various requirements of the defence and properly reject the defence by application of the objective and subjective elements of the test for provocation.

Among the 12 manslaughter offenders in the present group, the provocation defence influenced the outcome of proceedings in many ways.

Two offenders who pleaded not guilty of murder but guilty of manslaughter had their pleas accepted by the Crown on the basis of provocation. The two cases were R v Ladd, which involved the offender who discovered the victim in bed with his 9-year-old son, and R v Diamond, a revenge attack for an alleged sexual assault that occurred 4 months earlier.

In 5 other cases when the partial defence of provocation was put to the jury, it returned a manslaughter verdict on the ground of provocation. Two of these cases were revenge attacks, although one of these was further clouded by the issue of diminished responsibility which was, in the opinion of the sentencing judge, equally capable of supporting the jury’s verdict.

The 3 other cases included two “violent responses to homosexual advances or activity” cases, and the one gay-hate offence that was not murder (which as discussed earlier, contained elements of homosexual advance).

There was only one case among the sample in which provocation was raised but not accepted by the jury. This was the case of R v Graham where the offender arranged to meet the victim with the intention of engaging in homosexual activity, before changing his mind and killing the victim. Despite provocation being rejected in this case, a manslaughter verdict was still returned on the basis of an unlawful and dangerous act.
There were 3 offenders sentenced where provocation was not a live issue, including:
- one guilty plea to the reduced offence of manslaughter which was accepted on other grounds295
- one revenge attack where the jury’s manslaughter verdict was based on other grounds296
- one case where a manslaughter indictment was presented, hence obviating the need for any partial defence to be mounted (although it was likely in the circumstances that such a defence would have been raised had a murder charge been prosecuted).297

Of greatest interest are the 3 revenge attack cases298 where provocation was used as the basis of a manslaughter conviction. Each of these offences involve a considerable lapse of time between the provocative conduct of the deceased and the lethal actions of the offenders. While immediacy of reaction is, of course, no longer a requirement for establishing the partial defence of provocation,299 it is, nonetheless, generally the case that the shorter the time between the provocative actions of the deceased and the lethal response of the offender, the less objectively serious the offence will tend to be viewed.300 The natural corollary of this is that where a great deal of time has elapsed, the offence — while still committed under provocation — may be viewed as more objectively serious.

This issue was to the fore in Anthony, where the 26-year-old offender shot his stepfather as he slept, claiming he was provoked by the fact that the victim had subjected him and his siblings to many years of sexual abuse as a child. The offender planned the killing to such an extent that Newman J in sentencing described it as “more or no less than an assassination”.301 Despite this degree of premeditation, Newman J believed the jury’s manslaughter verdict was capable of being supported by both provocation and diminished responsibility.

Charges and outcomes

The sentences passed on the 18 offenders were varied, particularly for the 6 convicted of murder. Three of the murderers received relatively light head sentences (10.5 years, 13 years and 15 years), while 3 received severe sentences (45 years and two life sentences). The 3 severe sentences were imposed in cases characterised by severe violence and mutilation of the victim’s bodies.

The head sentences for the 12 offenders convicted of manslaughter were more consistent, ranging from 5 years to 11 years. The median head sentence for these 12 offenders was 7 years, which was the same as the overall median sentence for manslaughter found in this study. None of the manslaughter offenders received non-custodial sentences.

Being such a small sample little can be read into the sentences imposed on these 18 offenders.

295 R v Kosakowski (unrep, 12/6/97, Sup Ct NSW).
296 R v Johnson (unrep, 13/12/01, Sup Ct NSW).
298 R v Richards (unrep, 30/8/96, Sup Ct NSW, Sully J); R v Anthony (unrep, 23/4/94, Sup Ct NSW) and R v Diamond (unrep, 15/4/94, Sup Ct NSW).
299 Crimes Act 1900, s 23(2).
Weapons Use and Methods of Killing

Overview

This chapter examines sentencing of homicide offenders with regard to the method of killing employed. Particular attention is paid to the use of firearms, which has become an area of increasing public, political and judicial concern in the years since the Port Arthur massacre in 1996.

As discussed in Chapter 3, of the 536 homicide offences in the present study, it was possible to identify a method of killing in all but 10 instances. The remaining 526 offences were divided into the following 6 groups:

- shot with a firearm
- stabbed, slashed or pierced by the use of a knife or other sharp instrument
- battered with any object
- bashed manually
- strangled
- other causes, including use of vehicles, drugging, poisoning, drowning and burning.

Figure 19 below shows the relative proportions of the methods used, with stabbing and slashing by a sharp instrument (typically a knife) the most common method (32.3%), followed by shooting deaths (25.3%). Battering with an object, manual bashing and strangulation and other methods were all of roughly equal proportions, ranging between 8.4% and 12.9% of all offences committed.

The following section examines the particular characteristics of each group of offences and the offenders who committed them; discusses the principles that apply in regard to weapons use as an aggravating feature; and analyses the sentences imposed on the offenders who killed by way of these different methods.

Figure 19: Homicide offences 1994–2001
Method of killing
Firearms homicides

In the present study, there were 106 unique offenders (22.7%) who killed their victims with a firearm. These offenders committed 133 of the 526 homicide offences where the method of killing was known (25.3%). This figure is generally in keeping with other research, such as that of Carcach and Grabosky,302 who found that between 1989 and 1996 22.3% of all homicide incidents in NSW involved the use of firearms; and Mouzos,303 who found that just under 25% of all homicide victims between 1989 and 1999 were killed with a firearm. It should be borne in mind that both those figures include murder–suicide incidents, which are excluded from the present study as no conviction and sentence results. Carcach and Grabosky,304 for instance, state that the offender takes his or her own life in as many as 20% of all firearms homicides.

Similar research has also tended to show that, while the overall homicide rate is stable, the proportion of firearms-related homicides within that number has declined a little in the past 20 years.305 However, within the declining number of firearms homicides, the number of those involving handguns (as opposed to long-arms such as rifles and shotguns) has increased, particularly since the introduction of the National Agreement on Firearms following the 1996 Port Arthur Massacre.306 This indicates that the new firearms regulations may be having some positive effect in that traditional long-arms are used less often in homicide incidents, as so many of these weapons were surrendered and destroyed in the gun buyback scheme. One report, for instance quotes a figure of 643,726 long-arms being surrendered under the scheme between 1996 and 1997.307

Firearms homicide offenders were predominantly male (103 or 97.2%), with only 3 female offenders (2.8%) committing firearms homicide offences. This is consistent with most research into firearms-related killings, which show equally high proportions of male offenders. The median age of this group of offenders was 28 years, slightly above the overall median age of offenders in this study (27 years).

Of the 106 offenders, 64 were convicted of murder as the principal offence (60.4%) and 42 were convicted of manslaughter (39.6%). This was the highest rate of murder convictions among any of the 6 categories discussed in this chapter. This compares to the overall pattern in the present study where 45.3% of all offenders were convicted of murder and 54.7% of manslaughter. It is apparent then that the use of a firearm may increase the likelihood of a murder conviction being recorded.

304 Op cit n 302, p 5.
305 Mouzos, op cit n 303.
Among the 64 firearms homicide offenders convicted of murder, the median head sentence imposed was 18 years 6 months (range: 10 years to life), which is 6 months longer than the overall median head sentence for murder offenders in this study. There were 8 offenders sentenced to life imprisonment within this group: see Chapter 10, Life sentences and worst category cases.

The median non-parole period for firearms-related murder was 14 years 3 months (range: 6 years to life), which was 9 months longer than the overall median non-parole period. This median was the highest among the 6 categories discussed, the exception being the other methods category, which contains just 5 murder offenders. The median non-parole period for firearms homicide is, for instance, 9 months longer than for stabbing/slashing murders, 15 months longer than murders by battering with an object, and 2 years 3 months longer than for murder by manual bashing.

Among the 42 firearms offenders convicted of manslaughter, 41 (97.6%) were imprisoned, with the only other offender being sentenced to a term of periodic detention. This was the highest rate of imprisonment for manslaughter found among the 6 categories of killing discussed in this chapter.

Among those imprisoned for firearms-related manslaughter, the median head sentence imposed was 7 years 6 months (range: 3 years 5 months to 20 years), which was 6 months longer than the overall median head sentence for manslaughter offenders in this study. The median non-parole period was 5 years (range: 11 months to 12 years), which was 9 months longer than the overall median non-parole period found in this study.

Based on these figures, it appears that firearms use, whether in relation to a murder or manslaughter conviction, may lead to a slightly higher sentence than other types of killing. This result is understandable given the judicial viewpoint that “Guns and other weapons have no place whatsoever in ordinary social intercourse in our society” and that the courts “must…do what (they) can to deter others” from committing firearms offences.308

Stabbing, slashing and piercing

This is the largest of the 6 categories discussed in this chapter, containing 156 offenders (33.4%) who committed 170 of the homicide offences where the method of killing was known (32.3%). This group is largely made up of those who killed with knives, although other cutting or piercing instruments were also used, including screwdrivers and broken bottles.

Unlike firearms offenders, the group of stabbing/slashing offenders contains the highest proportion of female offenders. Overall, 122 of the stabbing/slashing offenders were male (78.2%) and 34 were female (21.8%). Stabbing/slashing was by far the most common method of killing employed by female homicide offenders found in this study, the 34 offenders accounting for 54.0% of all female offenders.

308 R v Forrester (unrep, 14/5/99, Sup Ct NSW), per Hulme J at p 12.
This reflects, to a degree, the circumstances in which women kill. The offences often occurred in the home where knives come readily to hand as weapons, and involved male victims — often partners of the offender — who were presumably physically larger and stronger than the offender, thus necessitating the use of an offensive weapon to inflict death. For example, of the 24 females in the entire study who killed their partners, 20 (83.3%) used knives as a weapon.

Stabbing/slashing homicide offenders were quite evenly divided between those convicted of murder as the principal offence (76 or 48.7%) and those convicted of manslaughter (80 or 51.3%).

Where the principal offence was murder, the median head sentence imposed was 18 years (range: 9 years to life) and the median non-parole period was 13 years 6 months (range: 5 years to life), which were both the same as the overall median sentences for murder offenders in the present study. There were 6 offenders sentenced to life imprisonment within this group, including the only female offender sentenced to life imprisonment: see Chapter 10, Life sentences and worst category cases.

Among the 80 stabbing/slashing offenders convicted of manslaughter, 71 (88.8%) were imprisoned, with 9 offenders (11.2%) receiving some form of non-custodial sentence. Among those who were imprisoned, the median head sentence imposed was 7 years (range: 2 years 6 months to 17 years), which was the same as the overall median head sentence for manslaughter offenders in this study. The median non-parole period was 4 years (range: 9 months to 12 years 6 months), which was 3 months less than the overall median non-parole period found in the study.

Based on these figures, it appears that stabbing/slashing homicide offences are typical in that the proportion of murder to manslaughter offenders, the rate of imprisonment of manslaughter offenders, and the median head and non-parole periods for both murder and manslaughter are all quite close to the overall figures revealed in this study.

Stabbing/slashing offences do, however, encompass a wide variety of situations, from sympathetic cases that bordered on self defence, to cases of extreme brutality and violence, and this is reflected both in the size of the sample and in the wider range of sentences imposed. It should also be noted that — perhaps because the number of firearms homicides appears to have declined in recent years — a great deal of public, political and judicial concern is being focused upon the use of knives in the commission of serious violent offences.

This is reflected in the comments of Simpson J, who stated:

“Criminal courts are very properly taking an increasingly serious view of the use of knives as weapons. In doing so they are doing no more than reflecting the community’s concern at what appears to be an escalation in this kind of crime.”

309  R v Knight [2001] NSWSC 1011.
311  R v Filipo and Soriano (unrep, 13/5/98, Sup Ct NSW), per Simpson J at p 2.
Simpson J went on to note the need for particular deterrence when sentencing for knife-related homicides. At first glance, it may seem that there is no special deterrent element present in the above sentencing statistics, given that they are similar to the overall figures for all offences within this study. It must be remembered, however, that a number of these offences occurred in domestic circumstances and other situations where culpability was assessed as quite low. The main thrust of the deterrent element is felt among those offenders who go armed into the community, thus presenting a greater threat to the general public. This was noted by Hulme J:312

“An increasing tendency of some sections of the community to use knives in the course of criminal activity has recently attracted the attention of the legislature. It is appropriate to remark that those who arm themselves with weapons preparatory to participating in acts of violence raise the stakes greatly. They raise them for the victims who...are likely to suffer serious injury. They raise the stakes for themselves because the penalties which must be imposed in that eventuality must be set in an attempt to discourage others from doing the same. The degree of violence in the community is such that in matters such as these, general deterrence must play a large part.”

### Battered with an object

This category includes all homicides where death was inflicted by the offender battering the victim with any type of object, and contains 57 offenders (12.2%) who committed 59 offences (11.2%). The offenders were predominantly male (52 or 91.2%) rather than female (5 or 8.8%), and the median age of offenders in this group (25 years) was a little younger than the overall median offender age of 27 years.

Battering homicide offenders were more likely to be convicted of murder (32 offenders or 56.1%) than manslaughter (25 or 43.9%). Where the principal offence was murder, the median head sentence imposed was 18 years (range: 10 years to life) and the median non-parole period was 13 years (range: 5 years 7 months to 35 years). Therefore the median head sentence was the same as for all murder offenders in this study, while the median non-parole period was 6 months lighter. There was one offender sentenced to life imprisonment within this group.313

Among the 25 battering homicide offenders convicted of manslaughter, 23 (92.0%) were imprisoned, with two offenders (8%) receiving some form of non-custodial sentence. Among those who were imprisoned, the median head sentence imposed was 8 years (range: 3–18 years), which was 1 year longer than the overall median head sentence for manslaughter offenders in this study. The median non-parole period was 4 years 6 months (range: 12 months to 12 years), which was 3 months longer than the overall median non-parole period found in the study.

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312 *R v Toma* (unrep, 19/6/98, Sup Ct NSW), per Hulme J p 8
313 *R v Richardson* (unrep, 28/2/1994, Sup Ct NSW, Finlay J) — a total sentence of life imprisonment was imposed, but a non-parole period of 20 years was set: see Chapter 10: Life sentences and worst category cases for further details.
Again, battering homicides were sentenced in a way that appears unremarkable when compared to the general sentencing pattern revealed in this study, despite the fact that, by their nature, these offences often involve a high degree of direct and prolonged physical violence that may be absent from, say, a shooting homicide.

**Bashed manually**

This category includes all offences where the victim was bashed or kicked to death without the offender using any weapon or object to inflict injuries. This category is very similar to the battered with an object category in that:
- it contains a similar number of offenders (67 or 14.3% of all homicide offenders) and offences (68 or 12.9% of all homicide offences)
- the offenders are again predominantly male (86.6% male, 13.4% female)
- the offenders were on the whole younger than the overall population of offenders in this study — with a median age of 23 years, this is the youngest of the 6 groups discussed in this chapter.

However, the most important difference between the bashing group and the battered with an object group is in the relative proportions of murder and manslaughter convictions recorded. Among those who committed homicides by manual bashing, only 18 (26.9%) were convicted of murder as the principal offence, while 49 (73.1%) were convicted of manslaughter. This category and the other methods category largely account for the fact that overall, manslaughter offenders outnumber murder offenders — by 261 (54.7%) to 216 (45.3%).

Where the principal offence was murder by way of manual bashing, the median head sentence imposed was 17 years (range: 12–23 years), 1 year less than the overall median sentence for murder offenders in this study. The median non-parole period was 12 years (range: 7 years 6 months to 18 years), which was 18 months less than the overall median non-parole period. This group contained no offenders sentenced to life imprisonment.

Among the 49 bashing homicide offenders convicted of manslaughter, 45 (91.8%) were imprisoned, with 4 offenders (8.2%) receiving some form of non-custodial sentence. Among those who were imprisoned, the median head sentence imposed was 7 years (range: 3–15 years), which was equal to the overall median sentence. The median non-parole period was 4 years (range: 18 months to 10 years 6 months), which was 3 months less than the overall median non-parole period found in the study.

The sentencing statistics for the group of bashing offenders do show some interesting aspects. Firstly, as already mentioned, the offenders were far more likely to be convicted of manslaughter rather than murder. Second, the median sentences were low — for murder both the median head and non-parole periods were the lowest of any of the 6 groups discussed, while for manslaughter the median head and non-parole periods were equal lowest (along with stabbed/slashed) of any of the 6 groups.
Section 21A of the Crimes (Sentencing Procedure) Act 1999 provides that the use of a weapon is an aggravating feature of most crimes, so it may be expected that this group of offences, because they involved no weapons, would receive slightly lighter sentences in comparison to groups of offences where that aggravating feature was present. However, many other factors may also have affected these figures, for instance the age of the offenders, bearing in mind that overall this was the youngest of the 6 groups.

**Strangled**

This category contains 36 offenders (7.7% of all homicide offenders) who committed 44 offences (8.4%), whether by strangling the victim with bare hands or by using some form of ligature. The offenders were overwhelmingly male (91.7% male, 8.3% female) as may be expected where the method of killing involves extended, hand-to-hand infliction of physical force on the victim. This group of offenders was the oldest of any of the 6 groups discussed in this chapter, with a median age of 30 years.

This group of offenders, unlike the manual bashing group, is divided more evenly among those convicted of murder (52.8%) and manslaughter (47.2%). In fact, the slight majority of murder outcomes is more similar to the pattern seen among the firearms or battering with an object group.

Where the principal offence was murder by way of strangulation (19 offenders), the median head sentence imposed was 18 years 8 months (range: 10 years 6 months to life), the greatest median among any of the 5 major groups of murder offenders (the sixth group of other methods has a greater median but contains just 5 murder offenders). The median non-parole period was 14 years (range: 7 years 6 months to life), which was 6 months more than the overall median non-parole period. This group contained one offender sentenced to life imprisonment.

Among the 17 strangulation homicide offenders convicted of manslaughter, 16 (94.1%) were imprisoned and only one offender (5.9%) received a non-custodial sentence. Among those who were imprisoned, the median head sentence imposed was 7 years 6 months (range: 3–16 years), which was 6 months longer than the overall median sentence for manslaughter. The median non-parole period was 4 years 6 months (range: 21 months to 11 years), which was 3 months longer than the overall median non-parole period found in the study.

The sentencing statistics for the group of strangulation offenders is unremarkable, both for murder and manslaughter.

**Other methods of killing**

This category contains all other offences where the method of killing was known, including vehicle-related deaths, drugging, poisoning, drowning and burning. There were 45 offenders in this category (9.6%) who committed 52 homicide offences (9.9%).
Nine of the 45 offenders (20.0%) were female, the second highest proportion of females found in any of the 6 groups (behind stabbing/slashing). Five of the 9 offenders killed their own children by poisoning (2 instances), drowning (2) or other methods (1).

Of the 45 offenders, only 5 were convicted of murder (11.1%), the lowest rate of murder convictions among any of the 6 groups discussed, while 40 offenders (88.9%) were convicted of manslaughter. As mentioned above, it was this group — along with the manual bashing group — that largely accounted for the overall majority of manslaughter to murder convictions found within the entire study.

Where the principal offence was murder by other methods of killing, the median head sentence imposed was 22 years (range: 17–24 years). This was by far the greatest of all the 6 groups, but the median here is deceptive, as the group contains only 5 offenders and the range of sentences imposed reveals nothing out of the ordinary. As such, little if anything can be read into the elevated median among this small group, although of note is the fact that all five offenders pleaded not guilty. Similarly the median non-parole period is also the longest of any of the groups at 17 years (range: 13–18 years). This group contained no offenders sentenced to life imprisonment.

Of the 40 offenders convicted of manslaughter by other methods of killing, 10 (25%) received some form of non-custodial sentence, while 30 (75%) were imprisoned — the lowest imprisonment rate of any of the 6 groups discussed. Among those who were imprisoned, the median head sentence imposed was 7 years (range: 18 months to 19 years 6 months), which was equal to the overall median head sentence for manslaughter. The median non-parole period was 4 years 6 months (range: 8 months to 14 years), which was 3 months longer than the overall median non-parole period found in the study.

The fact that the medians for manslaughter by other methods are so in keeping with the general figures tends, if anything, to strengthen the proposition that the high medians for murder in this group were an anomaly caused by the small sample group.
### Table 18: Homicide offenders 1994–2001

#### Median sentences and sentence ranges by method of killing

<table>
<thead>
<tr>
<th>Method of Killing</th>
<th>Shot with firearm</th>
<th>Stabbed, slashed or pierced</th>
<th>Battered with object</th>
<th>Bashed manually</th>
<th>Strangled</th>
<th>Other method</th>
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<tr>
<td></td>
<td>Head (yr) NPP</td>
<td>Head (yr) NPP</td>
<td>Head (yr) NPP</td>
<td>Head (yr) NPP</td>
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<td>n = 18</td>
<td>n = 19</td>
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<td></td>
</tr>
<tr>
<td>Median</td>
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<td>14 y 3 m</td>
<td>18 y</td>
<td>13 y 6 m</td>
<td>17 y</td>
<td>12 years</td>
</tr>
<tr>
<td>Range</td>
<td>10 y – life</td>
<td>6 y – life</td>
<td>9 y – life</td>
<td>5 y – life</td>
<td>12 – 23 y</td>
<td>7 y 6 m – 18 y</td>
</tr>
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</tr>
<tr>
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<td>n = 23</td>
<td>n = 45</td>
<td>n = 16</td>
<td>n = 30</td>
<td></td>
</tr>
<tr>
<td>Median</td>
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<td>7 y</td>
<td>4 y</td>
<td>7 y</td>
<td>4 y</td>
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<tr>
<td>Range</td>
<td>3 y 5 m – 20 y</td>
<td>11 m – 12 y</td>
<td>2 y 6 m – 17 y</td>
<td>9 m – 12 y 6 m</td>
<td>3 – 18 y</td>
<td>3 – 15 y</td>
</tr>
<tr>
<td></td>
<td>4 y 6 m</td>
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<td>3 – 16 y</td>
</tr>
<tr>
<td></td>
<td>7 y 6 m</td>
<td>4 y 6 m</td>
<td>7 y</td>
<td>4 y 6 m</td>
<td>18 m – 10 y 6 m</td>
<td>8 m – 14 y 6 m</td>
</tr>
</tbody>
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Life Sentences and Worst Category Cases

Introduction

Currently the punishment for murder is governed by two legislative provisions. The first of these is s 19A of the Crimes Act 1900 which sets a maximum penalty of life imprisonment. The second provision is s 61 of the Crimes (Sentencing Procedure) Act 1999 which mandates life sentences in extreme cases. Section 61(1) provides:

“A court is to impose a sentence of imprisonment for life on a person who is convicted of murder if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.”

The sentence of life imprisonment has been described as a “draconian punishment”, and this chapter does not intend to discuss the philosophy or morality of such a punishment, which some critics describe as being worse than the death sentence. It is sufficient for the present purposes to note only that:

“the Parliament of New South Wales in enacting section 19A of the Crimes Act has recently declared that it is consistent with current community standards in this State for a person convicted of murder to be sentenced to serve the remainder of his life in prison.”

Section 19A(2) of the Crimes Act 1900 provides:

“A person sentenced to imprisonment for life for the crime of murder is to serve that sentence for the term of the person’s natural life.”

There was some ambiguity on this point, with the possibility of a life sentence being “served” on parole clouding the issue. There are two examples in the present study where life sentences were imposed with determined non-parole periods. However, it was confirmed in a series of judgments that a life sentence allows no possibility of release on parole, and that a prisoner thus sentenced is to spend the remainder of his or her natural life in prison.

The comments of Allen J in R v Baker illustrate the grave and onerous nature of the life sentence:

314 R v Glasby (unrep, 11/6/98, Sup Ct NSW, Sully J).
315 R v Boyd (unrep, 18/9/95, CCA NSW) per Gleeson CJ.
316 The Crimes (Administration of Sentences) Act 1999, s 132, provides that “An offender who, while serving a sentence, is released on parole in accordance with the terms of a parole order is taken to continue serving the sentence during the period” he is on parole, and that sentence does not expire until the end of the head or additional term: see also R v Harris [2000] NSWSC 469 at [109]-[111] per Wood CJ at CL.
“Section 19A of the Crimes Act 1900 empowers this Court to sentence a person convicted of murder to penal servitude for life. That is what such a sentence, if imposed, means. It means for life. It means that never can there be any hope of release. It means never, no matter how many decades go by, will the prison door be opened and the prisoner be allowed out again. It matters not whether he is sixty, seventy, or survives to eighty. He is there for life. Such a sentence cannot lightly be imposed in any civilised society.”

And indeed at common law the penalty of life imprisonment is not imposed lightly — it is reserved only for what are referred to as the “worst category” of murder cases, where the offence is one so heinous that its objective seriousness renders considerations of the offender’s rehabilitation and subjective circumstances redundant.320 The Crimes (Sentencing Procedure) Act 1999, s 61(1) provides that a life sentence is to be “mandatory” for murder offences if, and only if:

“the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.”

This chapter looks at those cases sentenced between January 1994 and December 2001 where life sentences were imposed and examines the particular features of those cases that brought them within the ambit of the worst category of cases. By way of contrast, it touches upon other cases where lengthy determinate sentences were passed and seeks to highlight the particular features and circumstances of those cases that caused them to fall short of the worst category of cases.

**Offender characteristics**

Between 1 January 1994 and 31 December 2001, the Supreme Court sentenced 17 offenders to life imprisonment for the offence of murder.

**Gender**

Of the 17 offenders, only one was female321 (5.9%) and the remaining 16 (or 94.1%) were male. This is very similar to the proportions of males (93%) and females (7%) found among murder offenders generally in this study. As such, little can be said of this finding that does not apply to female homicide offenders generally, that is, women commit far fewer offences characterised by serious violence than do men.

**Age**

The ages of those sentenced to life imprisonment ranged from 19–56 years (at the time of the offence) and the median age was 36 years. This is a good deal older than the median age of murderers generally in this study, which was 27 years.

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321  *R v Knight* [2001] NSWSC 1011.
This is understandable for several related reasons. The first of these is the *Crimes (Sentencing Procedure) Act* 1999, s 61(6), which specifically precludes any person aged less than 18 years at the time of the offence from being sentenced to life imprisonment. 322

Second, the mitigating factor of youth (and the accompanying increased prospect of rehabilitation) is generally extended to offenders aged up to their mid-twenties at least, and this alone may operate as a subjective factor to save some offenders from a life sentence that may otherwise have been imposed.

Finally, there is the general proposition that the younger the person being sentenced is, the greater the remaining term of his or her natural life is likely to be — therefore a life sentence imposed on a 20-year-old offender is a more onerous punishment than a life sentence passed on a 30- or 40-year-old offender.

That is not to say, however, that young offenders are immune from life sentences. Of the present group of 17 offenders, 6 (35.3%) were aged under 25 years, their crimes so heinous as to render their youth insignificant in the sentencing process. This dilemma was illustrated in the present study by the case of *R v Steele*, 323 where an offender aged 22 years at the time of the offence was sentenced to life imprisonment despite the fact that the offender’s youth “weighed heavily” upon the sentencing judge in his deliberations.

**Prior convictions**

Among the 17 offenders:

- 5 had no prior convictions recorded (29.4%)
- 5 had convictions for non-violent offences (29.4%)
- 7 had prior convictions for violent offences (41.2%), including one for a previous homicide offence. 324

The proportion of offenders sentenced to life imprisonment who had prior convictions for violent offences is much higher than was found among other murderers in this study, of whom only 27.2% had prior convictions for violent offences. Given that prior criminal history is a relevant feature in sentencing, 325 this higher than usual figure may go a little way towards explaining the harsh sentences imposed in some cases.

**Plea**

Of the 17 offenders, 12 entered not guilty pleas (70.6%) and 5 entered pleas of guilty (29.4%). In comparison, among murder offenders who did not receive life sentences, 38.2% pleaded guilty and 61.8% not guilty.

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322 See *R v Robinson* [2000] NSWSC 972 for an example of an offender who would have been sentenced to life imprisonment but for being under the age of 18 years at the time of the offence. The offender was ultimately sentenced to 45 years imprisonment with a non-parole period of 35 years.

323 (unrep, 20/5/94, Sup Ct NSW).

324 *R v Richardson* (unrep, 28/2/94, Sup Ct NSW, Finlay J).

325 *Crimes (Sentencing Procedure) Act* 1999, s 21A(2); see also *Veen v The Queen (No 2)* (1988) 164 CLR 465.
While those who plead not guilty are not to be subject to any additional penalty for doing so, they are not entitled to the same discount or reduction of sentence that is shown to those who enter pleas of guilty.

The slightly higher rate of not guilty pleas among those sentenced to life — like the higher proportion of offenders with prior convictions for violent offences — goes some way to explaining the harsh sentences imposed.

**Use of weapons**

Weapons usage was common among the 17 offenders — 14 (82.4%) used some type of weapon to kill their victims. This figure included 8 offenders who used firearms, 5 who used knives, and one who used a bow and arrow.

The use of firearms by offenders sentenced to life imprisonment is noteworthy. Of the 16 offenders who received a life sentence where the method of killing was known, 8 (50%) used a firearm to kill the victim. This is a much higher proportion than found among murder offenders generally in this study, of whom 29.6% (64 of 216) used firearms.

The use of weapons in the commission of an offence is generally considered an aggravating offence and is listed as such by the *Crimes (Sentencing Procedure) Act* 1999, s 21A(2).

**Employment, education and marital status**

The 17 life sentence prisoners were unremarkable in terms of employment, education level and marital status when compared to the overall population of murder offenders in this study.

**Offence characteristics**

**Extreme violence and brutality**

To warrant a life sentence, an offender must commit a crime of such heinousness that deterrence, retribution and denunciation demand the imposition of the maximum available penalty. In order to fall within this category it must be:

> “possible in the individual case to point to its particular features which are of very great heinousness, and there must be an absence of any facts mitigating the objective seriousness of the crime (as distinct from any subjective features mitigating the penalty to be imposed.”

That is to say an objective assessment of the crime must be made to establish a threshold of “heinousness” — a term “variously described as meaning atrocious, detestable, hateful, odious, greatly reprehensible and extremely wicked”.

This threshold test has been described as a substantial one to satisfy.

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326 Method of killing unknown for one offender.
327 *R v Arthurell* (unrep, 3/10/97, Sup Ct NSW) per Hunt CJ at CL at p 11.
328 Ibid.
329 Ibid.
Similarly, a life sentence is not considered inappropriate in a particular instance merely because it is possible to envisage a worse case, for “ingenuity can always conjure up a case of greater heinousness”. So, while some cases may be more heinous than others, it is fair to say that most, if not all, of the 17 offenders sentenced to life imprisonment in the present study period committed crimes that can fairly be characterised as extremely violent, brutal and callous.

These include cases such as:

- **R v Milat**, the serial killer convicted for the sadistic murders of 7 young victims, whom he apparently hunted and tortured for his own amusement
- **R v Knight**, the only female sentenced to life imprisonment, who skinned, decapitated and butchered her male partner and cooked parts of his body
- **R v Leonard**, whose hatred of homosexuals led him to shoot a man with a bow and arrow before dismembering and dumping the body, and who later killed a taxi driver in a frenzied and unprovoked attack
- **R v Valera**, who in separate incidents brutally bashed and butchered two older men in their own homes and carried out extensive mutilation and dismemberment of their bodies
- **R v Suckling** and **R v Fernando and Fernando**, which involved the abduction, sexual assault and killing of female victims in the most brutal and callous fashion.

These cases are mentioned not in order to shock, but to highlight that those cases that do attract life sentences are truly heinous in their nature, and deserving of full and severe punishment.

### Dangerousness and protection of the community

A factor that weighs heavily in favour of the imposition of a life sentence is dangerousness and the need to protect the community from further acts of violence by the offender. This factor was recognised by the High Court in **Veen v The Queen (No 2)**, and is now listed in the **Crimes (Sentencing Procedure) Act 1999, s 61(1)**, as one to which the court must have regard, and a life sentence is to be imposed if the court is satisfied that the offender represents an ongoing danger.

The notion of dangerousness is closely linked to the nature of the offences committed. The very nature of the offences under consideration inevitably leads to the conclusion that a person capable of committing acts of:337

> “the most senseless, ruthless, irresponsible and gross violence…with a completely callous lack of concern or remorse for what he has done…will inevitably be a danger to the community if he is ever freed.”

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331 (unrep, 27/7/96, Sup Ct NSW, Hunt CJ at CL).
332 [2001] NSWSC 1011.
333 (unrep, 10/11/97, Sup Ct NSW, Badgery-Parker J).
335 (unrep, 2/9/96, Sup Ct NSW).
337 **R v Steele** (unrep, 20/5/94, Sup Ct NSW). See also the comments of Gleeson CJ in **R v Garforth** (unrep, 23/5/94, CCA NSW) to the effect that the nature of the act itself is evidence of an offender’s dangerousness.
The need to protect the community was certainly to the fore in:
- the case of mass murderers such as Milat and Rose \(^{338}\)
- cases where the offences were unprovoked, senseless or even random in their nature, such as Suckling, Leonard, Steele, Kanaan \(^{339}\) and Hill \(^{340}\)
- cases such as Street \(^{341}\) and Knight where the offender had shown an ongoing propensity for violence towards partners in intimate relationships.

One might naturally assume that, where an offender came before the court to be sentenced for murder and had a prior homicide conviction, there would be an assumption that he or she presented an ongoing danger to the community and hence an indeterminate sentence was warranted.

Although this was true for one offender convicted of manslaughter for killing his uncle in 1983, who then killed his lover (in a similar fashion and at the same location) in 1993 \(^{342}\), it was not necessarily the case that a person with a prior homicide conviction received the maximum sentence for subsequent offences.

For instance, in *R v Arthurell* \(^{343}\), a man was sentenced for the bashing murder of his fiancée while he was still serving parole for a manslaughter conviction. The offender received a head sentence of 24 years with a non-parole period of 18 years after Hunt J was not satisfied that the prisoner — who would be a “very old man” by the time his minimum term expired — was a continuing danger to the community.

Similarly, in *R v Bond* \(^{344}\), the offender battered and stabbed his girlfriend to death in circumstances of extreme violence but did not receive a life sentence, despite a previous manslaughter conviction resulting from him bashing a woman to death in a park after she had refused to have sexual intercourse with him. The sentence imposed for the second offence was severe, however, with a head term of 30 years and a non-parole period of 25 years, with lack of premeditation being the main factor that weighed against the imposition of a life sentence.

### Multiple victims

To the layperson, it may seem reasonable to assume that to kill two, three or more people is worthy of greater punishment than to kill a single victim. This, however, is not always the case, nor is it true that mass murderers or multiple homicide offenders dominate the worst category of murder offences.

In the present study, 22 of the 216 offenders (10.2%) who committed murder offences were convicted for more than one murder offence. Of those 22, 9 received sentences of natural life imprisonment. Therefore, 13 offenders who were sentenced for more than one murder \(^{345}\) received sentences other than life imprisonment.

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341  *R v Street* (unrep, 29/6/95, Sup Ct NSW, Dunford J).
342  *R v Richardson* (unrep, 28/2/94, Sup Ct NSW, Finlay J).
343  (unrep, 3/10/97, Sup Ct NSW) per Hunt CJ at CL at p 10.
345  In a single sentencing judgment.
Of the 9 offenders convicted of more than one count of murder who received life sentences, one was convicted of 7 counts of murder and one of 5 counts. The very fact of having killed so many victims would probably lead to the imposition of a life sentence by itself, notwithstanding the shocking circumstances in which those crimes were committed. The remaining 7 offenders sentenced to life imprisonment for more than one murder offence all killed two victims, sometimes in the same incident and sometimes in separate incidents.

So the mere fact of having murdered more than one person does not of itself place the offences within the worst category of cases. It may be, however, that the principle of totality requires the imposition of a life sentence where there have been multiple murders, despite the fact that each murder standing alone may not justify the imposition of penal servitude for life. This was the case in *R v Street*, where the offender received life sentences for two murders committed 3 months apart.

The operation of the totality principle in relation to multiple murderers and life sentences was more recently examined by the Court of Criminal Appeal in *R v Harris*. In that case the offender had strangled to death 3 victims (one of whom was physically disabled and one of whom was intellectually impaired) in their own homes over a period of 4 or 5 weeks. At first instance, three concurrent sentences of 40 years were imposed, with non-parole periods of 25 years.

On appeal, the sentence for the first count was confirmed, but on the second and third counts life sentences were imposed. Addressing the issue of totality, Wood CJ at CL, stated:

"There was an error of law... in the failure to give due recognition to the degree of heinousness involved in the taking of three human lives in the circumstances such as were present in this case. Where [the sanctity of life] is ignored in a callous, brutal, repeated and savage way, and where there are multiple victims who are elderly, sick, or disadvantaged, then, in the absence of exceptional circumstances reducing the offenders' culpability, the maximum penalty must be expected."

**Contract killings and political assassinations**

According to Grove J, a “deliberate killing for payment would prima facie find its place in the worst category of case with the potential for imposition of the maximum penalty”, an opinion that has been endorsed by the courts on various occasions.

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346 *R v Milat* (unrep, 27/7/96, Sup Ct NSW, Hunt CJ at CL).
348 *R v Hill* [2000] NSWSC 259; *R v Heatley* (unrep, 27/2/98, Sup Ct NSW, McInerney J); *R v Lewis* (unrep, 9/6/00, Sup Ct NSW, Ireland J); *R v Kanaan* [2001] NSWSC 959.
349 *R v Leonard* (unrep, 10/11/97, Sup Ct NSW, Badgery-Parker J); *R v Street* (unrep, 29/6/95, Sup Ct NSW, Dunford J); *R v Valera* [2000] NSWSC 1220.
350 (unrep, 29/6/95, Sup Ct NSW, Dunford J).
351 (2000) 50 NSWLR 409 – note special leave to appeal was refused by the High Court.
352 Ibid at [100].
353 *R v Crofts* (unrep, 6/12/96, Sup Ct NSW, Grove J).
So-called “contract killings” are traditionally viewed as particularly serious examples of the offence of murder because of the element of planning and premeditation they involve, and more importantly, because:

“killing for reward is an outright attack on concepts of the sanctity of human life, and of its protection within a framework of public order underpinned by public justice, which are concepts fundamental to what our society regards as acceptably civilised.”

Among the 17 offenders in the present study who were sentenced to life imprisonment, 3 were involved in contract killings. That is not to say that all contract killings are punished by the imposition of a life sentence, for there may be facts mitigating the objective seriousness of the crime or favourable subjective features. In the present study there were examples of paid killings that were dealt with by way of determinate sentence.

In one of those cases — R v Lo — the offence was meticulously planned and carried out with a business-like approach and was objectively within the scope of the worst category of cases, but great weight was placed upon the offender’s assistance to authorities, thus reducing the probable life sentence to one of 32 years imprisonment with a non-parole period of 23 years.

Of note also is the case of Crofts and Baartman, who were co-offenders in a tragically bungled contract killing which saw them arrive at the wrong address and kill a man completely unrelated to the man they were hired to kill. Because of various procedural issues, the two offenders were sentenced separately, with Baartman being sentenced to 20 years imprisonment with a non-parole period of 15 years. When Crofts came to be sentenced at a later date and by a different judge he received the same sentence, largely because Grove J felt he was bound by the principle of parity.

In passing this sentence Grove J opined that, had he been called upon to sentence Baartman as well, then both offenders would have received far harsher sentences, as 20 years imprisonment was not towards the top of the range for murder offences (as was the opinion of Abadee J who sentenced Baartman initially), and was a generally inadequate sentence for a contract killing style murder.

Closely related to contract killings are assassinations motivated by other types of gain. The prime example in the present study was R v Ngo, an aspiring politician who organised the murder of a member of the NSW Parliament in order that he may gain party preselection and assume the deceased’s suddenly vacant seat in Parliament.

355 R v Glasby (unrep, 11/6/98, Sup Ct NSW, Sully J).
356 Ibid; R v Rose (unrep, 3/9/98, Sup Ct NSW); and R v Lewis (unrep, 9/6/00, Sup Ct NSW, Ireland J).
357 R v Crofts (unrep, 6/12/96, Sup Ct NSW, Grove J); R v Baartman (unrep, 18/12/98, Sup Ct NSW, Dunford J); R v Lo [2000] NSWSC 714.
358 Note that Baartman subsequently appealed his conviction and a new trial was ordered: R v Baartman (unrep, 30/6/97, CCA NSW). He was found guilty again, and on 18 December 1998 was once again sentenced to 20 years imprisonment with a non-parole period of 15 years: R v Baartman (unrep, 18/12/98, Sup Ct NSW, Dunford J).
Premeditated and planned in a similar manner to a contract killing, a political assassination such as this:\footnote{360}

“is greatly aggravated because it involved the killing of a member of Parliament for political ends. It therefore constituted an offence not only against the individual victim, but it was also a direct attack on our system of democratic representative government, and struck at the very fabric of our public institutions.”

A somewhat similar case was \textit{R v Offer},\footnote{361} although this case involved an attack that struck at the judicial system rather than the political system. In this case the offender assassinated a witness who was to give evidence against him in judicial proceedings and severely wounded another who survived. These offences were held to be within the worst category of offence and a life sentence was considered, with particular regard paid to the elaborate planning and execution of the offences and the degree of interference with the judicial system. Ultimately a sentence of 34 years was imposed, with a non-parole period of 25 years,\footnote{362} with the offender’s guilty plea being a significant factor in the reduction of the penalty.

Other worst category cases

As the above discussion touches upon, many examples of offences in the present study that were described as falling within the worst category of offence were not punished by the imposition of life sentences.

In those cases, while the objective gravity of the offences was very great, they were obviously not deemed to be ones where the “level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met” through the imposition of a life sentence.\footnote{363}

Looking at these cases where life sentences were considered closely but not imposed provides further illumination as to what factors, both objective and subjective, may combine to warrant the imposition of a life sentence.

Some of the factors that operated to save offenders from life sentences were:

- **Age:** see Robinson\footnote{364} who was too young to be sentenced to life imprisonment and Arthurell\footnote{365} who was in effect too old. Arthurell was aged 48 years at the time of the offence and 51 years when sentenced. It was considered that an 18-year non-parole period would be sufficient punishment and that, if realised, he would not be a threat to society at the age of 70.

- **Guilty plea:** see \textit{R v Offer}\footnote{366} for an example of an offence that was objectively within the worst category of cases, where the offender’s guilty plea was instrumental in
the decision to impose a determinate sentence. See also R v Lo367 for an example of a guilty plea being “insufficient to remove these offences from the worst category of offences”.

- **Assistance to authorities**: see R v Lo368 for an example of an offence that was objectively within the worst category of cases, where the offender’s assistance to authorities was instrumental in the decision to impose a determinate sentence. In that case, the offender performed a contract killing, but gave assistance to authorities leading to the arrest and charging of the two men who had engaged him to carry out the offence.

- **Lack of preméditation**: while extensive planning and premeditation is not an essential ingredient of a worst category case, it is nonetheless generally indicative of a high level of culpability. See R v Cheatham369 and R v Bond370 for examples of cases where a lack of preméditation was influential in the decision not to pass a life sentence.

- **Lack of continuing dangerousness**: protecting the community from dangerous offenders is one of the rationales behind the imposition of life sentences, therefore it stands to reason that offenders who are not likely to present an ongoing danger may receive determinate sentences even when their offences are objectively of the worst type. Examples of this in the present study included R v Short371 and Cheatham. In Short, Sully J stated that he “would not have hesitated to impose the indeterminate life sentence” had there been evidence to show that the offender would be a continuing danger. Similarly, in Cheatham, there existed the strong possibility that the offender would respond to psychiatric treatment and counselling while imprisoned, and would at some stage in the future present no danger should he be released.

- **Prospect of rehabilitation**: while life sentences are not reserved only for those cases where there is no prospect of rehabilitating the offender, favourable prospects will naturally tend towards the imposition of a lighter sentence. Such was the case in R v Hill372 where a life sentence was imposed, but a non-parole period of 30 years was set on account of the offender showing “a strand of decency” in his relationship with his son. This was held to be indicative of some slight prospect of rehabilitation, and thus the offender was offered the prospect of release on parole.373 Similarly Harris,374 despite murdering 3 victims in separate incidents, was given the benefit of a determinate sentence largely because of his prospects of rehabilitation.375

367 (2000) 115 A Crim R 53 at [31]–[33].
368 Ibid.
369 (unrep, 26/11/98, Sup Ct NSW).
373 Subsequent judgments have held that it is impermissible to do this, and that no minimum or non-parole period may be set where a life sentence is imposed. On appeal, Hill’s sentence was reduced to a head sentence of 30 years with a non-parole period of 25 years for one count of murder, and a concurrent 25-year sentence for the second count: [2003] NSWCCA 128.
375 Although this sentence was increased to life imprisonment on appeal, largely on the grounds of totality: R v Harris (2000) 50 NSWLR 409.
Non-Custodial Sentences

Overview

In *Wilson v The Queen*,375a three members of the High Court said “one principal that stands above all others is the sanctity of human life”. This principle was echoed in *R v Cooper*376 where Simpson J commented: “What must never be lost sight of is that, at the heart of this case, is the loss of life of [the victim]. The loss of human life is something to be treated with utmost gravity.”

The obvious objective gravity of homicide offences is reflected in the maximum sentences provided by the *Crimes Act*, and there is a recognised “obligation on the courts to signify its respect for the sanctity of life and to punish those who wrongfully take it”.377

Yet the crime of manslaughter — and to a lesser extent infanticide — is one that varies greatly, and while “a maximum penalty of 25 years is set aside for the worst kind of offence”,378 an incredibly broad judicial discretion remains open when manslaughter offenders are sentenced. So varied are the circumstances of individual manslaughters and individual offenders, and so broad and effective the discretion, that on rare instances non-custodial sentences are imposed.

These instances are characterised by extraordinary subjective circumstances so tragic and sympathetic that the objective seriousness of the loss of life of the victim ceases to be the focus of proceedings. Sentencing principles such as deterrence, retribution and denunciation are subordinated in favour of a more “humanitarian approach”379 to sentencing, which recognises the offenders involved as being remorseful, contrite and unlikely to reoffend.

Non-custodial sentence outcomes in this study — and in general — occur only for the offences of manslaughter and infanticide. No offender convicted of the offence of murder has been sentenced to anything less that a full-time custodial sentence, either in this study sample or since the Judicial Commission began collecting sentencing statistics in 1989.

The Judicial Commission’s JIRS statistics show that between October 1995 and September 2002, higher courts sentenced 215 persons for the offence of manslaughter. Of these, 89% were sentenced to terms of full-time imprisonment. So while the great majority of offenders were imprisoned for varying terms, some 11% or 24 offenders were sentenced to some other form of punishment.380

This trend is confirmed by the present study, where only 11.5% of manslaughter offenders were sentenced to any form of punishment other than full-time imprisonment.

375a (1992) 174 CLR 313.
376 [2001] NSWSC 769 at [5].
377 Ibid.
379 *R v Kennedy* (unrep, 30/6/98, Sup Ct NSW, Greg James J).
380 Judicial Commission of NSW, JIRS database.
Within the study period 1994–2001, non-custodial sentences were imposed in 28 homicide incidents involving 30 offenders and 28 victims:

- 1 incident involved 2 offenders and a single victim
- 1 incident involved 4 offenders and 1 victim (although only 2 of the offenders received non-custodial sentences)
- all other incidents involved just 1 victim and 1 offender
- no incident involving more than 1 victim resulted in the imposition of a non-custodial sentence.

Sentences passed on the 30 offenders included:

- 19 bonds under s 9 of the *Crimes (Sentencing Procedure) Act* 1999, or equivalent bonds as they previously existed under s 558 of the *Crimes Act* 1900
- 4 suspended sentences under s 12 of the *Crimes (Sentencing Procedure) Act* 1999
- 6 sentences of periodic detention
- 1 community service order.

Of note is that 7 of the 30 non-custodial sentences in this study (23.3%) were imposed by the District Court of NSW. During the study period 1994–2001, the District Court only sentenced 29 offenders for manslaughter, compared to 232 in the Supreme Court. Therefore, 24.1% of manslaughter offenders sentenced by the District Court received non-custodial sentences, compared to only 9.9% of manslaughter offenders sentenced by the Supreme Court in the same period. (See Chapter 12 for an analysis of homicide sentencing in the District Court.)

Also of note is the over-representation of female offenders among those who ultimately received non-custodial sentences. Of the 30 offenders so sentenced, 15 were female (50%). This is well above the 19.5% of female manslaughter offenders found in this study overall.

Therefore, 15 of 51 (29.4%) female manslaughter offenders received non-custodial sentences, compared to just 15 of 210 (7.1%) male manslaughter offenders.

**Characterising non-custodial homicides**

Apart from two incidents in which the offender was convicted and sentenced for the offence of infanticide, all offenders discussed in this chapter were convicted of manslaughter. Infanticide is essentially a specially restricted form of manslaughter applying only to mothers who kill their own children aged less than 12 months. It operates in a manner akin to the partial defence of diminished responsibility in reducing what may otherwise have been murder to an offence punished as if it were manslaughter. So, while we must take account of those two slightly different results, it is convenient in this analysis to refer to all the offences as manslaughter.
Manslaughter is, as touched upon in the introduction to this study, an offence that causes some consternation among sentencing officers, having been described as “the most difficult of all the sentencing duties”. Judges have often commented that statistics and previous cases are sometimes of limited value in guiding the sentencing process for manslaughter, mostly due to the endless variation in the objective and subjective features of the offence.

Yet by looking at the results – that is, known occurrences when non-custodial sentences have been imposed for manslaughter offences — and working backwards to look at the circumstances that led to these results, it is possible to discern a degree of consistency in those cases where a non-custodial sentence was imposed.

A basic analysis of the incidents shows that they fall into 4 groups, mainly defined by the relationships between the offender and victim:

- mother/child killings
- killings of sexual partners
- other family killings
- miscellaneous killings.

This analysis is possible because, recognising that “the community is entitled to a full explanation” for such an unusual outcome, sentencing judges take particular care to address subjective matters in detail when providing reasons for imposing non-custodial sentences.

Within these 4 basic categories analysed below, it is possible to observe the interplay of the objective and subjective features that lead a sentencing judge to adopt a “humanitarian approach” to his or her task: see Table 19.

### Mother/child killings

There were 6 instances identified in the present study in which offenders received non-custodial sentences in relation to child killing offences. Four of these 6 cases shared many similarities in both the circumstances of the offences and the offenders:

- all 4 offenders were female
- all 4 offenders were the biological mother of the victim
- all 4 offenders were suffering from a mental condition at the time of the offence
- none of the offenders had a history of violent convictions and only one had a previous conviction
- all victims were very young, being aged 4 months, 7 months, 1 year and 5 years respectively.

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382 *R v LC* (unrep, 24/9/99, Sup Ct NSW, Dowd J).
383 *R v Cooper* [2001] NSWSC 769 at [5].
384 *R v Kennedy* (unrep, 30/6/98, Sup Ct NSW, Greg James J).
385 The other two cases involving child victims and non-custodial sentences occurred in very different circumstances, and are discussed later in the “Killings of other family members” and “Miscellaneous” categories.
Common aspects of the 4 offences are discussed below.

**Mother/child relationship:** The 4 offenders were in each case the biological mother of the victim. This includes the only two offenders convicted of the offence of infanticide, therefore no offender in the study convicted of infanticide received a custodial sentence. The remaining two offenders come from an overall sample of 10 women who committed manslaughter offences against their own children.

While two out of 10 is not an especially large proportion, it can be contrasted with fathers and male partners of mothers (that is, stepfathers or de facto fathers) who commit manslaughter offences, where all 12 offenders received full-time custodial sentences. See Chapter 5, Child victims for a full analysis of child killings by parents.

**Mental illness/disorders of offenders:** All 4 offenders were, at the time they committed the offence, suffering from a mental condition or illness. In all cases this factor played a major role in determining an appropriate sentence.

Two of the offenders$^{386}$ were convicted of the offence of infanticide. This offence, by its very definition,$^{387}$ involves a finding that “at the time of the act or omission the balance of [the offender’s] mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child”. One of the infanticide offenders also had a long history of depression, including suicide attempts, and was of low intelligence.

The two other offenders both entered pleas of guilty to the lesser offence of manslaughter, the Crown indicating that the pleas were accepted in each case on the basis of diminished responsibility/substantial abnormality of mind. One of these offenders was suffering from severe depression, while the other suffered a dissociative disorder and was in a “fugue state”$^{388}$ at the time she committed the offence.

In all 4 cases the offender’s mental condition operated to substantially reduce her culpability.

**Role of prosecuting authorities:** In these 4 offences, the prosecuting authorities adopted a somewhat lenient or sympathetic approach and did not press for murder convictions. One offender was initially charged with infanticide and pleaded guilty, while the other 3, while indicted for murder, had their reduced pleas to manslaughter and infanticide accepted by the Crown.

The Crown’s willingness to accept the pleas and spare the offender being tried is probably indicative of, as much as anything, the likelihood of a manslaughter conviction resulting were the offence to be tried. Certainly the court would take into account the mitigating effect of the guilty plea in its decision to extend leniency to such offenders.$^{389}$

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386 R v Allen (unrep. 9/2/94, Sup Ct NSW) and R v Cooper [2001] NSWSC 769.
387 Crimes Act 1900, s 22A.
388 A dissociative condition characterised by sudden or unexpected travel away from one’s normal home and full or partial adoption of a new identity: see the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition (DSM 4), 1994, American Psychiatric Association.
Beyond this, it is not possible to quantify any further effects the Crown’s acceptance of the pleas may have had on the ultimate sentence passed. It is probably fair to suggest, however, that the Crown’s willingness to accept — without the process of trial, examination and cross-examination of evidence — that the offence is clearly not a murder, may be conducive of a forensic atmosphere in which a non-custodial sentence is passed.

The Crown’s influence was even greater in the case of *R v Cooper,* 390 where the Crown “very fairly and properly conceded, and indeed urged, that a custodial penalty [was] not called for”. That case resulted in the imposition of an s 9 bond for a period of 4 years for the offence of infanticide.

**Other sentencing factors:** Common to all 4 cases was the finding on the part of the sentencing judge that the offender was not a continuing danger to society and/or was not likely to commit another similar offence. This belief was reinforced by the records of the offenders, none of whom had histories of violence and only one of whom had any criminal record at all — and that being for minor property offences.

The offences were not premeditated, but tended to be impulsive acts triggered by a combination of the offender’s mental disturbance and an inability to cope with the various stresses and pressures associated with raising a small child.

**Killings of sexual partners**

There were 8 incidents in which the killing of a sexual partner resulted in the offender receiving a non-custodial sentence. These incidents involved:

- 6 female offenders killing male victims
- 2 male offenders killing female victims

Again, various features of these cases are worthy of comment.

**Nature of the relationship:** While the definition of sexual partner adopted in this study includes a wide variety of relationship types, all 8 cases in this subgroup involve either married couples or those who identify themselves as being in de facto marriages. There were no killings involving same sex relationships in this study (so far as could be discerned from the available information).

**Gender of offenders:** The preponderance of female offenders here is in contrast to the overall pattern among offenders who killed sexual partners. Of the 85 offenders who killed sexual partners, 24 were female (28.2%), whereas among those who received non-custodial sentences, 6 out of 8 offenders were female. Only one of these offenders was convicted on the basis of diminished responsibility, the other 5 being convicted on the basis of causing death by an unlawful and dangerous act.

Only two male offenders who killed female partners received non-custodial sentences, out of a total of 44 male offenders who committed such offences. Both of these offenders were suffering from mental conditions and were convicted on the basis of diminished responsibility.

**History of violence in relationships:** A history of violence within the relationship was recorded in 4 cases. These included 3 cases of male victims having been violent towards their female killers and one case in which a male killer had been subjected to violence at the hands of his wife. The 3 female offenders were all Aboriginal and their partner/victims were also Aboriginal.

**Mental condition and diminished responsibility:** Three of the 8 offenders in this category were convicted and sentenced on the basis of diminished responsibility (or substantial abnormality of mind), including both male offenders. The female offender convicted on this basis was described as being so impaired as to be almost completely insane. In two of those cases pleas of guilty to manslaughter were accepted by the Crown on the basis of diminished responsibility, while in the third a manslaughter indictment was presented by the Crown because of the offender’s diminished responsibility.

**Method and location of killings:** The killings in this category tended to be more violent than the child killings resulting in non-custodial sentences discussed above. Seven of the 8 deaths were caused by stab wounds and the other by blows to the head with a hammer. The use of knives as a weapon reflects the domestic nature of the offences — 7 of 8 occurred in the couples’ home — and the fact that women who kill men (6 of 8 cases) are unlikely to do so by manual means (such as bashing/beating or strangulation), owing to disparities in the size and strength of the parties.

**Role of prosecuting authorities:** In 7 of the 8 cases an indictment for murder was proffered, and in all 7 of those instances a plea of guilty to the lesser offence of manslaughter was accepted by the Crown. The eighth case involved a guilty plea to a manslaughter indictment.

This reinforces the findings in the other categories of non-custodial homicides, in that in no case was a plea to the lesser offence of manslaughter rejected, and in no case was an offender put on trial for murder.

**Prior offences:** None of the 8 offenders had previous convictions for violent offences and in the only case where an offender had prior convictions, they were described as “insignificant” by the sentencing judge.

### Killings of other family members

This category contains offences where a familial relationship existed between the victim and offender other than that of mother/child or spouse/other sexual partner.

There were 5 such incidents, 4 of which involved a single offender and a single victim, while the final offence involved two offenders and a single victim. In this category, male offenders outnumber females by 5 to 1.

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391 R v Lalor (unrep, 21/7/95, Sup Ct NSW).
Offences in this group varied greatly in their nature and circumstances, from the death of a child in an exorcism to the tragic case of *Gilham*,\(^{392}\) where the offender came home to discover his parents had been killed by his brother, leading the offender to then kill his brother under circumstances of considerable distress and provocation.

None of the offences was premeditated and no offender had any prior conviction for any offence whatsoever. While the offences varied in circumstance, they were all highly unusual offences, committed in circumstances of great tragedy by offenders of otherwise good character who were not considered dangerous or likely to reoffend.

Again, no offender was tried for murder. On 3 occasions manslaughter indictments were proffered and guilty pleas entered, and in the other 3 cases the Crown accepted pleas of guilty to the lesser offence of manslaughter. These 3 pleas were accepted on the basis of provocation, unlawful and dangerous act, and criminal negligence respectively.

**Miscellaneous killings**

There were 11 deaths involving 12 offenders that led to the imposition of non-custodial sentences that could not be placed in any of the above groups. The cases vary greatly, including:

- two male juvenile offenders aged 16 and 17 years who (in a case that received a great deal of media coverage at the time) along with two other young men\(^{393}\) killed a truck driver when they threw large rocks from a freeway overpass onto passing traffic below

- an intellectually handicapped woman convicted on the grounds of criminal negligence over the death of the intellectually disabled man with whom she shared accommodation. The offender in this case was not responsible for the injuries inflicted on the victim, her culpability being based on her failure to provide any care or assistance to the victim in his distress

- a 19-year-old male who participated with a co-offender in a break and enter offence at a residential property. The co-offender\(^{394}\) attacked the 67-year-old victim who subsequently died of a heart attack. In this case, the Crown submitted in favour of an order for periodic detention and a 2-year periodic detention order was ultimately imposed. The sentence was passed some 7 years after the offence was committed, and in the intervening period the offender had lived a “worthy” life and had committed no other criminal offences

- one man sentenced in the District Court to two years of periodic detention after a 10-year-old girl was electrocuted in his home by wiring he had negligently installed himself without proper planning permission or appropriate qualification and experience as an electrician

\(^{392}\) *R v Gilham* (unrep, 7/4/95, NSW Sup Ct, Abadee J).

\(^{393}\) These two co-offenders received full-time custodial sentences.

\(^{394}\) Co-offender not included in this study, as he was ultimately convicted of an aiding and abetting offence.
one man sentenced in the District Court to 500 hours of community service after killing a man in a drunken fight in a pub. The offender punched the victim, who died from injuries sustained when he fell and struck his head on the concrete floor.

one man sentenced in the District Court to 3 years of periodic detention for killing a friend by unintentional or accidental shooting.

a male and a female sentenced in the District Court for unrelated but similar offences that involved supplying drugs and drug paraphernalia to the victims who subsequently died of drug overdoses.

one male and two female offenders sentenced in unrelated incidents (two by the District Court and one by the Supreme Court) to bonds for offences where no information was available as to the circumstances of the offence or the identity of the victim.

Some common threads emerge from these cases:

- only 3 offenders had any recorded criminal history and those were for minor, non-violent offences.
- in several cases the offender was not primarily responsible for inflicting the injuries that led to the death of the victim.
- in no case did death result from any serious or prolonged episode of violence against the victim.
- most cases involved guilty pleas, although among the miscellaneous grouping there were 3 offenders who entered pleas of not guilty.

These factors, combined with others present in individual instances (such as youth and intellectual impairment), contributed to the imposition of lenient sentences.
## Table 19: Schedule of non-custodial sentences imposed 1994–2001

<table>
<thead>
<tr>
<th>Case name</th>
<th>Sentence date</th>
<th>Circumstances</th>
<th>Priors</th>
<th>Charge and plea</th>
<th>Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Mother/child killings</strong></td>
<td></td>
<td></td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>
| *R v Allen*  
(unrep, Sup Ct NSW) | 9/2/94        | Mother (29) who killed 4-month-old baby by bashing. Affected by alcohol and Serapax. | Stealing, false pretences      | Indicted for murder. Plea of guilty to infanticide accepted. | s 558 bond: 3 yrs |
| *R v Cooper*  
| *R v Li*       
[2000] NSWSC 1088 | 24/11/00      | Mother (35) killed 5-year-old son by strangulation and drowning. Mental illness — severe depression. | None                        | Indicted for murder. Manslaughter plea accepted on grounds of diminished responsibility. | s 9 bond: 5 yrs |
| *R v Sette*    
[2000] NSWSC 648 | 6/7/00        | Mother (21) killed 1-year-old son by stabbing. Child had been given up for adoption. Mother killed child on an arranged visit to child and adoptive parents. Suffering from “significant mental disturbance” — dissociative disorder and fugue state. | None                        | Indicted for murder. Manslaughter plea accepted on grounds of substantial abnormality of mind. | s 12 suspended 2-yr sentence with good behaviour bond |
| **Sex partner killings** |               |                                                                                |                         |                                                      |          |
| *R v Melrose*  
| *R v Bateman*  
[2000] NSWSC 867 | 30/8/00       | 74-year-old man who killed his wife aged 77 years by beating her about the head with a hammer. Suffering from psychotic depression/major depressive episode. | None                        | Indicted for murder. Manslaughter plea accepted on grounds of substantial abnormality of mind. | s 9 bond: 5 yrs |
| *R v Jans*     
[2000] NSWSC 525 | 14/6/00       | 54-year-old man killed wife (52) by stabbing. History of violence by wife against husband. Diminished responsibility accepted — no details available as to diagnosis of mental condition. | None                        | Indicted for murder. Manslaughter plea accepted on grounds of diminished responsibility. | s 9 bond: 4 yrs |
<table>
<thead>
<tr>
<th>Case name</th>
<th>Sentence date</th>
<th>Circumstances</th>
<th>Priors</th>
<th>Charge and plea</th>
<th>Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>R v Varagnolo (unrep, Sup Ct NSW, McInerney J)</td>
<td>21/3/96</td>
<td>35-year-old part-Aboriginal woman who killed her de facto husband by stabbing. History of violence in relationship.</td>
<td>None</td>
<td>Indicted for murder. Manslaughter plea accepted — unlawful and dangerous act.</td>
<td>s 558 bond: 2 yrs</td>
</tr>
<tr>
<td>R v Kennedy (unrep, Sup Ct NSW, Greg James J)</td>
<td>30/6/98</td>
<td>69-year-old woman who killed her husband (78) by stabbing. Affected by alcohol and prescription medications. Suffering from dementia and frontal lobe syndrome.</td>
<td>None</td>
<td>Indicted for murder. Manslaughter plea accepted — unlawful and dangerous act.</td>
<td>s 558 bond: 3 yrs</td>
</tr>
<tr>
<td>R v Edwards (unrep, Sup Ct NSW)</td>
<td>2/8/96</td>
<td>45-year-old woman killed her de facto husband395 by stabbing. Affected by alcohol.</td>
<td>None</td>
<td>Indicted for murder. Manslaughter plea accepted — unlawful and dangerous act.</td>
<td>3 yrs periodic detention</td>
</tr>
<tr>
<td>R v Lalor (unrep, Sup Ct NSW)</td>
<td>21/7/95</td>
<td>54-year-old woman who killed her husband (55) by stabbing. Suffering from depression and dissociative disorder — described as being close to completely insane.</td>
<td>None</td>
<td>Indicted for manslaughter — charge proffered on grounds of diminished responsibility. Guilty plea.</td>
<td>3 yrs periodic detention</td>
</tr>
</tbody>
</table>

### Other family killings

<table>
<thead>
<tr>
<th>Case name</th>
<th>Sentence date</th>
<th>Circumstances</th>
<th>Priors</th>
<th>Charge and plea</th>
<th>Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>R v ANG [2001] NSWSC 758</td>
<td>4/8/01</td>
<td>16-year-old boy who killed his 31-year-old uncle. The uncle gave the boy alcohol and drugs, and encouraged the boy to assist him in his own suicide by rolling him into a river after he became unconscious due to the effect of drugs consumed.</td>
<td>None</td>
<td>Indicted for murder. Manslaughter plea accepted on the basis of criminal negligence.</td>
<td>s 12 suspended 2-yr sentence with good behaviour bond</td>
</tr>
<tr>
<td>R v Wilson [1999] NSWSC 1235</td>
<td>3/12/99</td>
<td>40-year-old man who killed his 68-year-old father by drowning. The two argued over family matters while on a yacht. The son struck the father in the head with a bottle and threw him overboard. “Excellent” character.</td>
<td>None</td>
<td>Indicted for murder. Manslaughter plea accepted — unlawful and dangerous act.</td>
<td>s 558 bond: 3 yrs</td>
</tr>
</tbody>
</table>

395 Described as a de facto relationship in the sentencing judgment, despite the fact that the male victim was actually married to another woman and split his time between the offender and his wife.
<table>
<thead>
<tr>
<th>Case name</th>
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</tr>
</thead>
<tbody>
<tr>
<td><strong>R v Platts</strong></td>
<td>7/6/96</td>
<td>38-year-old man who killed his 85-year-old father. The father was verbally abusing his wife (the offender’s mother). Punched several times by son and died during the night. Offender affected by alcohol.</td>
<td>None</td>
<td>Indicted for manslaughter. Guilty plea.</td>
<td>s 558 bond: 3 yrs</td>
</tr>
<tr>
<td><strong>R v Gilham</strong></td>
<td>7/4/95</td>
<td>23-year-old man who killed his brother by stabbing. Acting under great stress and provocation, having come home to discover his brother had killed their parents and set fire to the bodies.</td>
<td>None</td>
<td>Indicted for murder. Manslaughter plea accepted on the basis of provocation.</td>
<td>s 558 bond: 5 yrs</td>
</tr>
<tr>
<td><strong>R v Mika and Sagato</strong></td>
<td>11/8/00</td>
<td>Husband (36) and wife (34) involved in the death of 3-year-old boy. The boy’s mother was Sagato’s cousin. They assisted the boy’s mother in performing an exorcism. The boy died from drowning after the mother poured approximately 12 litres of water down his throat. The mother who was primarily responsible for the death was acquitted on the grounds of mental illness.</td>
<td>None</td>
<td>Both indicted for manslaughter and pleaded guilty.</td>
<td>each: s 12 suspended 2-yr sentence, with good behaviour bond</td>
</tr>
<tr>
<td><strong>Miscellaneous killings</strong></td>
<td></td>
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<tr>
<td><strong>R v LC</strong></td>
<td>24/9/99</td>
<td>Male offenders, aged 16 and 17 years, involved in death of a truck driver. The boys, and two other offenders, were throwing rocks off a freeway overpass onto traffic below. One large stone penetrated the cabin of a truck, killing the driver. The two other offenders (both older) received custodial sentences for their leading roles in the offence.</td>
<td>None</td>
<td>Both indicted for murder. Manslaughter pleas accepted — unlawful and dangerous act.</td>
<td>s 558 bond: 3 yrs</td>
</tr>
<tr>
<td><strong>R v McGoldrick (Liam)</strong></td>
<td>18/8/00</td>
<td>None</td>
<td></td>
<td></td>
<td>2 yrs 6 mths periodic detention</td>
</tr>
<tr>
<td><strong>R v Hall</strong></td>
<td>23/7/99</td>
<td>35-year-old intellectually handicapped woman involved in death of 35-year-old intellectually and physically disabled victim. The victim was beaten by another offender and died some time later. The body was then dumped in a river. Hall was not primarily responsible for the death, and the charge was proffered on the basis of criminal negligence (failure to provide aid or assistance). Culpability greatly reduced because of mental condition.</td>
<td>Non-violent</td>
<td>Indicted for manslaughter. Guilty plea.</td>
<td>s 558 bond: 5 yrs</td>
</tr>
<tr>
<td>Case name</td>
<td>Sentence date</td>
<td>Circumstances</td>
<td>Priors</td>
<td>Charge and plea</td>
<td>Sentence</td>
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<tr>
<td>R v Suters (2000) NSWSC 1116</td>
<td>1/12/00</td>
<td>Involved with a co-offender in a break and enter offence. The co-offender struck the victim in the head with a flashlight, and he subsequently died of a heart attack. Offence occurred in 1992, not sentenced until 2000. Had led life of good character apart from this incident. Not primary offender. Crown submitted in favour of periodic detention.</td>
<td>None</td>
<td>Indicted for murder. Manslaughter plea accepted — unlawful and dangerous act.</td>
<td>2 yrs periodic detention</td>
</tr>
<tr>
<td>R v Ortiz (unrep, 22/6/95, NSWDC)</td>
<td>22/6/95</td>
<td>10-year-old girl electrocuted by faulty wiring negligently installed by the offender, without planning approval, in his own home.</td>
<td>None</td>
<td>Indicted for manslaughter. Guilty plea.</td>
<td>2 yrs periodic detention</td>
</tr>
<tr>
<td>R v Thelan (unrep, 9/11/95, NSWDC)</td>
<td>9/11/95</td>
<td>Offender punched the victim in the course of a drunken altercation in a hotel. The victim fell and struck his head on the floor, dying two days later. Only one blow was struck.</td>
<td>None</td>
<td>Indicted for manslaughter. Guilty plea.</td>
<td>500 hours community service</td>
</tr>
<tr>
<td>R v Do (unrep, 10/9/99, NSWDC)</td>
<td>5/11/99</td>
<td>Offender killed a close family friend with a shotgun blast. Circumstances unclear. This was the only death involving firearms that resulted in a non-custodial sentence.</td>
<td>None</td>
<td>Indicted for manslaughter. Not guilty plea.</td>
<td>3 yrs periodic detention, with npp of 18 mths</td>
</tr>
<tr>
<td>R v McClennan (unrep, NSWDC)</td>
<td>23/6/95</td>
<td>Offender was a prostitute. The victim, her client, asked her to purchase some heroin for him. She made the purchase and assisted him in administering the drug. The victim subsequently died of a heroin overdose.</td>
<td>Drug and prostitution offences</td>
<td>Indicted for manslaughter. Guilty plea.</td>
<td>s 558 bond: 3 yrs</td>
</tr>
<tr>
<td>R v Cao (unrep, NSWDC)</td>
<td>22/11/99</td>
<td>Offender was approached by the victim, who asked the offender where he could obtain a syringe. The offender gave the victim one of his syringes. The victim subsequently died from a heroin overdose.</td>
<td>Non-violent</td>
<td>Indicted for manslaughter. Not guilty plea.</td>
<td>s 558 bond: 3 yrs</td>
</tr>
<tr>
<td>R v Klemm (unrep, NSWDC)</td>
<td>26/11/99</td>
<td>Information unavailable.</td>
<td>None</td>
<td>Indicted for manslaughter. Guilty plea.</td>
<td>s 558 bond: 2 yrs</td>
</tr>
<tr>
<td>R v Simmons (unrep, NSWDC)</td>
<td>26/4/96</td>
<td>Information unavailable.</td>
<td>None</td>
<td>Indicted for manslaughter. Guilty plea.</td>
<td>s 558 bond: 3 yrs</td>
</tr>
<tr>
<td>R v Armstrong (unrep, NSWDC)</td>
<td>25/8/95</td>
<td>Information unavailable.</td>
<td>None</td>
<td>Indicted for manslaughter. Not guilty plea.</td>
<td>s 558 bond: 4 yrs</td>
</tr>
</tbody>
</table>
Homicide Sentencing in the District Court

Overview

While the vast majority of homicide cases are heard in the Supreme Court, a small number each year are disposed of in the District Court of New South Wales.

No murder charges may be heard in the District Court because of the limits imposed on its criminal jurisdiction. In the 8-year study period, 29 offenders were convicted and sentenced for manslaughter in the District Court.

These offenders killed 29 victims in 28 homicide incidents, as follows:
- 26 incidents where 1 offender killed 1 victim
- 1 incident where 2 offenders killed a single victim
- 1 incident where a single offender killed 2 victims.

These killings occurred in a wide variety of circumstances and attracted a wide range of sentences.

Offender and victim information

Gender: 25 offenders were male (86.2%) and 4 were female (13.8%). This is the same as the proportions of male and female offenders found in all Supreme Court cases in this study, although the proportions for manslaughter offenders convicted in the Supreme Court were 79.7% male and 20.3% female.

Among victims, 21 (72.4%) were male and 8 female (27.6%).

Age: The 29 offenders were aged from 18 to 55 years at the time they committed the offence, with a median offender age of 26 years, the same as the median age of manslaughter offenders convicted in the Supreme Court. Within this range, just over half of all offenders were aged 21–30 years (15 or 51.7%) and 5 offenders (17.2%) were aged less than 21 years.

Of the 24 victims whose ages were known, the youngest was aged 1 month and the oldest aged 50 years. The median age of the victims whose ages were known was 20 years 6 months. Nine victims were aged less than 18 years.

Charges and pleas: All offenders sentenced in the District Court faced manslaughter charges, with 13 pleading guilty (44.8%) and 16 pleading not guilty (55.2%), including those who entered pleas of guilty to lesser offences that were not accepted.

In comparison, where manslaughter convictions were recorded in the Supreme Court, 29.3% of offenders pleaded not guilty and 70.7% pleaded guilty, including 59.9% of offenders who were indicted for murder and entered reduced pleas of guilty of manslaughter.

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396 Age unknown for 5 victims.
Prior convictions: A high rate of prior offending was evident among the 29 offenders sentenced for manslaughter in the District Court. Ten offenders (34.5%) had prior convictions for non-violent offences while another 10 (all male) had convictions for violent offences (34.5%). No prior convictions were evident for 9 offenders (31%).

The non-violent prior convictions recorded were generally of a less serious nature, including driving, prostitution and drug-related offences. All offenders with violent priors had been convicted of either single or multiple offences of assault or assault occasioning actual bodily harm, including one offender with convictions for assault and armed robbery. There were no prior homicide offenders or more serious violence offences such as malicious wounding or infliction of grievous bodily harm. Only one offender was recorded as having been previously imprisoned.

Given the frequency of prior offending, it appears that an absence of prior criminal convictions is not a determinative factor in the decision to commit manslaughter matters to the District Court, nor is the presence of prior criminal convictions a bar to the imposition of the relatively lenient sentences imposed for manslaughter cases heard in the District Court.

Education and employment: The employment and education data collected for offenders sentenced in the District Court is mostly in keeping with the overall patterns found for all offenders in this study.

Where employment status was known,397 67.9% (19 of 28) of offenders were unemployed, compared to only 32.1% (9 of 28) who were in employment.

Information about education level was available for 23 offenders,398 and of these 17 had secondary schooling (73.9%), 5 had primary education only (21.7%) and one had a trade qualification (4.3%).

Sentencing

The sentences imposed on the 29 offenders sentenced for manslaughter in the District Court between January 1994 and December 2001 were generally less severe than those passed on manslaughter offenders sentenced in the Supreme Court in the same period: see Figure 20.

For example, 7 of the offenders (24.1%) were not sentenced to full-time custody, instead receiving punishments including community service (one case), s 9/s 558 bonds (4 cases), and periodic detention (two cases). This compares to Supreme Court manslaughter and infanticide cases, where only 23 (9.9%) of the 232 offenders sentenced received non-custodial sentences: see Chapter 11 for a full analysis of cases where non-custodial sentences were imposed.

In the 22 remaining instances where periods of full-time imprisonment were ordered, the head sentences ranged from 2–12 years, with a median head sentence of 4 years.

397 Information unavailable for one offender.
398 Information unavailable for 6 offenders.
On one hand, 12 years (a sentence imposed on two of the offenders) is quite a lengthy term for manslaughter, being within the top 13% of all custodial sentences imposed on manslaughter offenders by either the District Court or the Supreme Court in this study. On the other hand, the same figures also disclose that the head sentence of 2 years is in the lowest 0.9% of custodial sentences imposed on manslaughter offenders by either court.

The median head sentence for the 22 offenders sentenced to imprisonment in the District Court in this study was only 4 years, compared to a median of 7 years for manslaughter offenders sentenced in the Supreme Court. Only 3 of the offenders sentenced by the District Court received terms of imprisonment that were in excess of that 7-year figure. Generally, therefore, persons sentenced by the District Court for manslaughter receive lighter sentences than their counterparts sentenced in the Supreme Court.

A similar picture emerges when the non-parole periods are examined. The non-parole periods imposed on the 22 offenders sentenced in the District Court ranged from 8 months to a maximum of 9 years, with the median non-parole period being 2 years 3 months. Again, this is considerably less than the 4.5 year median non-parole period revealed for all manslaughter offenders sentenced in the Supreme Court in this study.

Figure 20: Manslaughter sentences 1994–2001
Comparison of median sentences in the District and Supreme Courts

The context of the offences

As mentioned earlier, the characteristics — such as prior convictions, age, employment and education — of offenders sentenced for similar offences in the District and Supreme Courts do not differ greatly.

The underlying reason for the pattern of lenient sentencing may well have more to do with the objective nature of the offences committed than the subjective features of the offender. Some cases sentenced in the District Court are no different at first glance to
many others dealt with in the Supreme Court — including a shaken baby death,\(^{399}\) an argument that led to a fatal bashing\(^{400}\) and a woman who stabbed her de facto partner while both were affected by alcohol.\(^{401}\)

Some offences, however, while criminally culpable, were more characterised by misfortune than any particular malice toward the victim. This is exemplified by two cases in which the victim died by electrocution. One case involved a group of youths who knocked down a power line by throwing lengths of pipes at it — an act of youthful trouble-making and gross negligence rather than a direct act of violence. Unfortunately, a 15-year-old boy trod on the fallen line in long grass the following day and died.

A second case involved a man who built an extension to his home without building approval and did the electrical wiring himself. Faults in the wiring caused parts of the steel structure of the building to become charged with live current, and a young girl — a friend of his daughter — was electrocuted.

These deaths were deemed to be the result of acts of criminal negligence and the offenders, while at fault, had not intended to cause harm to the victims and were not considered dangerous or likely to commit future acts of dangerousness. As such, light sentences — 2 years imprisonment with a non-parole period of 8 months and 2 years of periodic detention respectively — were considered appropriate.

Fewer offences sentenced in the District Court occurred in more directly dangerous and violent circumstances. Of particular note is the complete absence of deaths inflicted in the course of armed robberies, street robberies, sexual offences, and break and enter offences, which are regular occurrences among homicides sentenced in the Supreme Court. (There were, however, two deaths caused by drivers of stolen cars.)

Among the 29 manslaughter incidents dealt with by the District Court, 4 sets of circumstances occurred on more than one occasion and these subsets are worthy of some brief analysis. These are:

- drug-related deaths
- accidental shootings
- “one punch” assaults
- vehicular manslaughters.

**Drug-related deaths:** Three of the manslaughter incidents sentenced in the District Court arose from drug-related deaths. These involved 4 offenders and 3 victims — one incident involved two offenders and a single victim.

These offences followed a similar basic pattern, with the victims dying of drug overdoses after having been supplied with drugs and/or drug paraphernalia by the offenders. The drug was not supplied on a commercial basis and the offenders were not active drug dealers as such. Rather they were fellow drug users who helped procure the drugs, supplied syringes and, in two of the cases, assisted the victims to administer the drugs to themselves.

\(^{399}\) *R v Burns* (unrep, 20/8/98, NSWDC).
\(^{400}\) *R v Geoff* (unrep, 12/3/99, NSWDC).
\(^{401}\) *R v Mitchell* (unrep, 16/11/98, NSWDC).
In one case, a female victim and the two offenders, who were friends, took morphine intravenously together at the offenders’ home. The offenders had acquired the drug and syringes. The victim died from an overdose of the drug. Both offenders were sentenced to head terms of 4 years’ imprisonment with non-parole periods of 2 years.\textsuperscript{402}

A second case involved a prostitute whose male client asked her to buy heroin for his use. The offender purchased the drug and assisted him in injecting it, with fatal results. The offender was sentenced to a § 558 bond with a 3-year good behaviour period.

The third case, possibly involving the least culpability of all on the part of the offender, occurred when the offender was approached by a drug user he had never met and asked if he knew where a syringe could be acquired. The offender, “obligingly” in the words of the sentencing judge, gave the victim a syringe. The victim was found dead in the front yard of the offender’s residence the following morning. The sentencing judge noted that this was an “unfortunate” circumstance for the offender — if the victim had gone elsewhere before taking his lethal dose, it would have been unlikely that any consequences would have followed for the offender. Not surprisingly, this offender was sentenced leniently: a 3-year good behaviour bond was imposed under s 558 of the \textit{Crimes Act} 1900.

\textbf{Accidental or unintentional shootings:} There were 4 cases involving what are best described as either accidental or unintentional shootings. These were the only cases among the 29 that involved firearms: no offences were heard at District Court level involving deliberate shootings or deaths in the course of armed robberies or similar circumstances. All of these offences were committed by young male offenders.\textsuperscript{403} This is consistent with the overall pattern of firearm-related homicide offending revealed in this study, where 103 of the 106 offenders were male (97.2%) and only 3 were female (2.8%).

The details of how these shootings occurred are often sketchy or entirely absent. In all 4 cases the victims were shot in their own homes by an offender known to them. In some cases the facts, prima facie, seem more serious than were obviously accepted as true. For instance, one offender entered the home of a female acquaintance armed with a rifle and minutes later her 6-year-old son who was sleeping on the lounge room floor was shot dead.\textsuperscript{404} As mentioned, the facts disclosed by the sentencing remarks in relation to these killings were sometimes vague, but given the manslaughter charges prosecuted and the sentences imposed, they were obviously not deemed by the Director of Public Prosecutions (NSW) to warrant being dealt with in the Supreme Court.

\begin{itemize}
  \item \textsuperscript{402} \textit{R v Lamb and Latham} (unrep, 25/10/94, NSWDC).
  \item \textsuperscript{403} Aged 19, 21, 22 and 27 years.
  \item \textsuperscript{404} \textit{R v Paxman} (unrep, 21/6/95, NSWDC): this controversial sentencing result led to the introduction of the \textit{Criminal Legislation (Amendment) Act} 1996. This Act inserted Part 11A into the \textit{Crimes Act} 1900, effectively abolishing the common law as stated in \textit{R v O’Connor} (1980) 146 CLR 64 and enacting the position in \textit{R v Majewski} [1977] AC 443 so that self-induced intoxication may only be considered in relation to specific intent and not voluntariness of act.
\end{itemize}
The sentences imposed on the 4 offenders were:

- a head sentence of 4 years and a non-parole period of 1 year
- a head sentence of 4 years and a non-parole period of 2 years
- 3 years’ periodic detention
- a head sentence of 6 years and a non-parole period of 3.5 years for the offence involving the child victim mentioned in the previous paragraph.

In the 3 cases where full-time custodial sentences were imposed, the sentence lengths had a median head term of 4 years and a median non-parole period of 2 years, almost exactly the median sentence for all manslaughter offences sentenced in the District Court between January 1994 and December 2001.

“One punch” deaths: There were 3 killings that occurred in the context of drunken altercations between males. One of these offences occurred in a hotel, the other began in a hotel and continued in the street outside, while the third occurred on the street during New Year’s Eve festivities. In all 3 instances alcohol was a factor in the behaviour of both the offender and the victim.

While this is not an uncommon homicide scenario, these 3 District Court cases shared an unusual characteristic. The deaths all resulted from minor unarmed assaults — generally just a single punch. Rather than being bashed to death, all 3 of the victims died when they fell or were knocked down and struck their heads on the ground. While there is obvious culpability on the part of the offender in such circumstances, an element of bad luck or misfortune is evident, reducing the objective gravity of such offences despite their tragic consequences. As the sentencing judge noted in the case of R v Bales, the victim who died after his head struck the concrete gutter may just as easily have landed on the grassed footpath and walked away with little or no injury.

Of the 3 offenders, two were sentenced to head terms of 6 years (non-parole period 3 years 6 months) and 3.5 years (non-parole period 2 years) respectively, while the third offender was sentenced to 500 hours of community service. While these sentences are too varied to discern any pattern, it is worth noting that the only District Court case in the study that involved a death inflicted by a prolonged and violent bashing (where the parties also happened to be affected by alcohol) resulted in a head sentence of 12 years (non-parole period 6 years 6 months), the equal longest head sentence imposed in the District Court for a manslaughter offence (but only the second lengthiest non-parole period).

Motor vehicle homicides: There were 6 offenders sentenced in the District Court for manslaughter arising from motor vehicle accidents, one of which involved the

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405 R v Evans (unrep, 20/9/95, NSWDC).
406 R v Hauser (unrep, 8/6/95, NSWDC).
408 (unrep, 4/11/99, NSWDC).
409 R v Sutie (unrep, 30/8/00, NSWDC).
410 R v Bales (unrep, 4/11/99, NSWDC).
411 R v Thelan (unrep, 9/11/95, NSWDC).
412 R v Goff (unrep, 12/3/99, NSWDC).
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deaths of two victims. As was the case with the 4 accidental shooting fatalities, all the offenders were male and mostly young. Four were aged from 19 to 26 years, the other two aged 47 and 55 years. It would seem that recklessness — whether with guns or cars — is largely the province of young men.

Two of the offences involved stolen vehicles pursued by police. One vehicle struck and killed a pedestrian, the other killed a passenger in another vehicle with which it collided. These two offences occurred in very similar circumstances, and both offenders had prior convictions and had been disqualified from holding drivers’ licences. The sentences were not similar, however. The younger offender, aged 19, received a 12-year head term (including a 4-year fixed concurrent term of imprisonment for injuring a second passenger). The older offender, aged 26, who was under the influence of heroin at the time of the offence, did not stop his vehicle after hitting a pedestrian and later attempted to conceal his involvement in the offence, received a 7-year head sentence.

The other 4 cases all involved reckless and dangerous driving, characterised by excessive speed, prolonged dangerous driving, driving under the influence of alcohol (3 of the 4 cases), driving on the wrong side of the road for prolonged periods, and exposing numbers of passengers to great danger. For instance, in one case a 55-year-old man too drunk to drive himself encouraged a similarly intoxicated 16-year-old learner driver to drive his car at excessive speed for several hours with 3 young children riding in the back seat. The girl eventually crashed the car and was herself killed. These 4 offences attracted head sentences of 9 years 4 months, 4 years, 6 years and 3 years 9 months.

Therefore, of the 6 offenders involved in vehicle-related manslaughters in the District Court, the median head sentence imposed was a relatively high 6.5 years and the median non-parole period was 4 years. The sentences passed included two of the 3 longest head terms, and the longest non-parole period imposed for any manslaughter offence dealt with by the District Court in the 1994–2001 study period.

These vehicle or driving-related killings seem to be treated more harshly than other types of killing sentenced before the District Court. There exists, of course, the offence of dangerous driving causing death under s 52A(2) of the Crimes Act 1900. The Court of Criminal Appeal issued a guideline judgement for this offence, nominating 3 years as a “starting point” for sentencing that offence.

413  R v Falzon (unrep, 16/12/98, NSWDC).
414  R v Bullman (unrep, 26/11/99, NSWDC).
415  R v Cramp (unrep, 16/11/98, NSWDC).
416  Ibid.
417  This case involved two fatalities and two concurrent 4-year sentences were imposed: R v Do (unrep, 10/9/99, NSWDC).
418  R v Sharpe (unrep, 27/4/01, NSWDC).
419  R v Whitney (unrep, 13/12/01, NSWDC).
Manslaughter is generally regarded as a far more serious offence than the various categories of dangerous driving causing death, as is reflected in the maximum penalties set for each offence: 25 years imprisonment for manslaughter and 14 years imprisonment for aggravated dangerous driving causing death. All 6 of the offenders mentioned here were sentenced after the Jurisic guideline judgment was handed down (on 12 October 1998), and as such the existence of the 3-year “starting point” makes a ready point of reference for judges sentencing for manslaughter by motor vehicle. As the offence of manslaughter is more serious, it stands to reason that sentences imposed will generally be higher than the 3 years recommended in Jurisic. Other than this it is generally not appropriate to compare sentences imposed for one offence with those imposed for the other, despite their apparently similar nature.

This point was affirmed by the Court of Criminal Appeal in R v Do422 by Beazley JA, with Wood CJ at CL and O’Keefe J agreeing:

“There can be no doubt that this case [of manslaughter] involved a level of seriousness, including the nature of the offences involved, greater than was the case in Jurisic. That is a significant matter in determining the sentence which should have been imposed…”

Beazley JA went on to rule that a manslaughter sentence of 4 years with a non-parole period of 3 years was not necessarily inadequate merely because it was only one year greater than the Jurisic guideline sentence of 3 years.

So generally, a sentence imposed for manslaughter through the use of a motor vehicle will attract a head sentence greater than 3 years, as is evidenced by the 6 sentences passed in the District Court — all of which were imposed after the Jurisic guideline was handed down.

422 [2000] NSWCCA 459 at [17].
Conclusion

The study period of this paper — 1 January 1994 to 31 December 2001 — is “book-ended” by two sentencing legislation reforms.

The “old” s 19 of the Crimes Act 1900, which called for a mandatory life sentence for murder (unless there were mitigating circumstances that reduced the offender’s culpability), had been fully superseded by the start of the present study period. Therefore no offenders in this study were sentenced in accordance with that provision. In comparison, the Judicial Commission’s previous study on homicide sentencing (covering the period from January 1990 to August 1993) included 36 offenders sentenced for murder under the former provision and 93 offenders sentenced under the current s 19A.423

Similarly, the present study period closed before the introduction of the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002, an Act whose effect on sentencing patterns for homicide offences is likely to be significant.

So, while the study period saw the introduction of some changes in sentencing procedures, we can at least say that all of the offenders in this study were sentenced under provisions that were constant in terms of the maximum available penalties.

This allows for an effective overview of homicide sentencing as it operated in the relevant 8-year period.

Murder

Murder is, of course, a very serious crime, and one that carries with it the highest maximum penalty known to the law in New South Wales. All murders involve a high degree of both criminality and culpability, that is, high degrees of both objective and subjective gravity.

The existence of the alternative verdict of guilty of manslaughter in murder trails and the various partial defences generally operate to ensure that it is only the more serious homicide incidents that result in convictions for murder.

As may be expected for a very serious offence whose maximum penalty is so great, the sentencing pattern revealed for the offence of murder is quite steady and consistent, although if anything, the study shows there has been no movement towards greater leniency in sentencing murderers.

The median sentence passed on each of the 216 murder offenders in this study was 18 years, with a non-parole period of 13 years 6 months. While the lightest sentence passed on any offender was 9 years, such sentences were comparatively rare, with only 24 murder offenders (11.1%) receiving head sentences of 13 years or less. At the opposite end of the scale, 17 offenders received natural life sentences (7.9%).

423  The Crimes (Homicide) Amendment Act 1982, while maintaining the mandatory life sentence for murder, introduced a limited discretion to impose a lesser penalty where the offender’s culpability was “significantly diminished by mitigating circumstances”. Several years later, the Crimes (Life Sentences) Act 1989 introduced the “new” s 19A, which is much the same as the current s 19A.
Overall, murder sentences were concentrated around the median, with 116 offenders (53.7%) receiving sentences of 15–21 years, that is, within 3 years either side of the median head sentence. The present study also reveals an increase in the median non-parole period compared to the Judicial Commission’s previous homicide study, where the median non-parole period was 12 years.

By way of comparison, the NSW Bureau of Crime Statistics and Research found that the average non-parole period for murder offenders on a year-by-year basis from 1997–2001 ranged from 12 years 1 month (1997) to 15 years 9 months (2000).424

These comparisons indicate that sentencing patterns for murder are well established and have remained relatively consistent in recent years, with what variation there is occurring gradually rather than as a dramatic increase at any one point in time.

In addition, we have seen that when various groups of offenders (such as juvenile or Aboriginal offenders) or types of offences (such as child killings or killing of sexual partners) are analysed, consistent patterns emerge within those groups. However, the discrepancies between one group and another, or between a particular group and the remainder of the population of murder offenders, are not great.

This study tends to confirm the proposition that murder is a rare offence, but one that, when it does occur, is punished severely.

Of great interest is a comparison of current sentencing practice with the standard minimum periods recommended by the new Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002.

Division 1A of that Act sets a standard non-parole period of 20 years for the offence of murder, or 25 years if the victim is a police officer, emergency service worker or some other public official killed in the line of duty.425

If for present purposes we leave aside the 25-year figure and concentrate on the 20-year non-parole period as the standard sentence for a murder offence “in the middle range of objective seriousness”,426 we can see that within the present study group, less than 1 in 7 murderers (14.4%)427 was sentenced to a non-parole period that was equal to, or exceeded, the standard.

This suggests that the new sentencing legislation presents a significant challenge to sentencing judges. Long-established patterns and norms for sentencing murderers may have to be cast aside in order to accommodate a new system whereby the standard penalty for a middle range offence is equivalent to what is now a very severe sentence.

425 s 54D(2).
426 s 54A(2).
427 Of 216 offenders, 31 received a non-parole period of 20 years or more, including 15 life sentences.
Regardless of what changes do occur to sentencing levels, the sentencing task and the accompanying reasons for sentence will have to be approached with particular care and diligence, so as to address all mitigating and aggravating features as defined by the new Act\textsuperscript{428} in justification of the sentence.

Whether the new legislation does create a major change in murder sentencing patterns remains to be seen, and the \textit{Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act} 2002 calls for the creation of a Sentencing Council to monitor and report on sentencing trends and practices under the new legislation. Homicide sentencing will no doubt attract the attention of this body and other independent researchers in the years ahead.

**Manslaughter**

Manslaughter is not included among the offences for which a "standard non-parole period" has been recommended by the \textit{Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act} 2002.

The absence of manslaughter from that list — despite it being a major crime, and one at least as prevalent as murder — is recognition of the oft-repeated truism that manslaughter is a protean offence, occurring in incredibly diverse circumstances and attracting the broadest possible range of sentences.

This is amply illustrated in the present study, where the 261 manslaughter offenders received sentences ranging from bonds and community service to a head sentence of 20 years. In total, 30 manslaughter offenders (11.5\%) received non-custodial sentences.

The median head sentence imposed (among the 231 who received custodial sentences) was 7 years, a figure that is less than three-tenths of the maximum penalty of 25 years imprisonment provided by the \textit{Crimes Act} 1900.

Almost two-thirds of those sentenced to imprisonment for manslaughter in this study (141 or 61.0\%) received head sentences of 5–9 years, that is, 2 years either side of the median head sentence.

Generally, non-parole periods were also not very severe. The median non-parole period was 4 years 3 months, with over half the offenders receiving non-parole periods within the 3–6 year range (137 offenders or 59.3\% of those imprisoned for manslaughter).

While these figures may at first glance indicate that manslaughter is an offence dealt with relatively leniently by the courts, one must remember that these figures in fact represent an overall \textit{increase} in sentences compared to manslaughter offenders analysed in the Judicial Commission’s earlier homicide study.

That study, covering a period from January 1990 to August 1993, revealed a median head sentence of 5 years 3 months for manslaughter offenders who were imprisoned. The median in this study is therefore 33.3\% higher than in the previous study.

\textsuperscript{428} s 21A.
The NSW Bureau of Crime Statistics and Research has recorded average non-parole periods of between 33.2 months and 42.6 months for manslaughter offences in each of the years from 1997 to 2001. These figures are less than the medians recorded in the present study, however, the comparison is imperfect since the Bureau’s data includes the offence of dangerous driving causing death alongside manslaughter.

The present study reinforces the notion that manslaughter is a very broad category of offence and, although often dealt with sympathetically, it appears that sentences have gradually increased over recent years.
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