

## Summary of findings

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This monograph presents the findings of an exploratory study of robbery in New South Wales (NSW). The study was aimed primarily at investigating the type and quantum of penalties imposed in the higher courts<sup>iii</sup> for robbery offences under s 97 of the *Crimes Act 1900* (NSW) for a three-year period following the promulgation of the guideline judgment in *R v Henry*,<sup>iv</sup> from 12 May 1999 to 11 May 2002.

To appreciate why courts view robbery as one of the most serious offences on the criminal calendar, it was decided to outline the history of the offence of robbery and trace its development at common law and in statute. In addition, the history of the purposes of punishment in respect of robbery revealed that from the earliest times to the present day the focus of the criminal law has been to deter would-be robbers.

Further, to understand the position of s 97 within the hierarchy of robbery offences in NSW and how these offences are dealt with in all jurisdictions, an overview of sentencing patterns for all robbery offences (ss 94–98) covering a six-year period, from 12 May 1999 to 11 May 2005, was undertaken.

For a deeper understanding of the processes involved in sentencing offenders convicted of s 97 offences, information was collected from 352 remarks on sentence. From these remarks, the authors extracted information on the seven characteristics identified by Spigelman CJ in *Henry*, as well as information on the objective and subjective factors frequently taken into account at sentencing, including the circumstances particular to armed robbery.

For the sake of completeness, all sentencing appeal cases before the Court of Criminal Appeal (CCA) in the timeframe of the study, which related to s 97 offences, were examined.

The main findings for each part of the research study are presented below.

### **Part 2 Overview of sentencing patterns for robbery offences under ss 94–98 of the *Crimes Act 1900***

Trends indicate that the number of sentencing cases involving robbery offences fell during the study period in all jurisdictions. The most common robbery offences dealt with by the courts were under ss 97(1) and 94. The higher courts dealt with around half the cases (49.1%) while the Local Court and the Children’s Court dealt with 14.2% and 36.7% respectively. While differences were observed in penalties depending on the section number, in all jurisdictions, sentences fell at the higher end of the penalty hierarchy relevant to the particular jurisdiction.

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iii Reference to higher courts includes both the NSW Supreme Court and District Court.

iv (1999) 46 NSWLR 346 per Spigelman CJ; Wood CJ at CL (with additional comments), Newman J, Hulme J (with additional comments) and Simpson J (with additional comments) agreeing. Delivered on 12 May 1999.

## Higher courts

In the six-year period, there were a total of 3355 sentencing cases in the higher courts where the principal offence<sup>v</sup> was some form of robbery under ss 94–98 of the *Crimes Act* 1900. This figure constitutes around one-fifth (20.4%) of all sentencing cases in the higher courts over the same period.

The number of robbery offences in the higher courts steadily declined over the study period. After peaking in 2000–2001 with 614 cases, the frequency of robbery offences declined each year. In 2004–2005 there were 482 cases, representing a drop of 21.5% since its peak, and a decrease of 14.4% over the study period.

The most common robbery offences were robbery, or assault with intent to rob, being armed or in company pursuant to s 97(1), which accounted for 60.2% of all robbery offences in the higher courts. Within s 97(1), robbery, or assault with intent to rob, being armed with an offensive weapon accounted for 61.3% of offences, while 38.7% related to robbery, or assault with intent to rob, being in company.

Across all robbery offences, the most common penalty imposed was full-time imprisonment. However, the higher the statutory maximum penalty for an offence the more likely an offender was given this type of penalty (92.4% for robbery offences with a maximum penalty of 25 years imprisonment compared with 83.5% for robbery offences with a maximum of 20 years and 69.4% for robbery offences with a maximum of 14 years).

The same was true when the quantum of full-time custodial sentences were examined. Median terms of sentences were significantly longer for robbery offences with higher statutory maximum penalties (5 years 6 months for robbery offences with a maximum of 25 years imprisonment compared with 4 years for robbery offences with a maximum of 20 years and 2 years 6 months for robbery offences with a maximum of 14 years).

In relation to non-parole periods, special circumstances were found in the vast majority of cases where full-time imprisonment was imposed (between 87.2% and 96.4% depending on the type of robbery offence).

Harsher sentences were handed down to offenders convicted of armed robbery under s 97(1) compared with those convicted of robbery in company under the same section. Almost 9 in 10 armed robbers (88.7%) received a full-time custodial sentence compared with just over three-quarters (76.3%) of offenders convicted of robbery in company. Armed robbers were also more likely to get longer terms of imprisonment (median term = 4 years compared with 3 years 6 months for robbery in company).

There was, however, across the six-year period, a significant increase in the number of cases involving consecutive sentences. When sentences were examined for the three-year period following the issuing of the *Henry* guideline, it was found that the proportion of offenders given consecutive, or partly consecutive, sentences increased from 8.6% to 22.2% in the next three-year period. This may partly be explained by a slow uptake of *Pearce v The Queen*<sup>vi</sup> or a misapplication of *Pearce*.

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v The concept of the “principal offence” is explained at n 221.

vi (1998) 194 CLR 610.

### Local Court

The Local Court deals only with the offence of steal from the person<sup>vii</sup> pursuant to s 94 of the *Crimes Act 1900*. In the six-year period there were a total of 1014 cases involving steal from the person as the principal offence. This figure represents only a very small proportion of all sentencing cases in the Local Court. The number of sentencing cases for this offence in the Local Court declined over the six-year period. After peaking in 2001–2002 with 209 cases, the frequency of robbery offences fell each year. In 2004–2005 there were 126 cases representing a drop of 39.7% since its peak, and a decrease of 23.2% over the study period.

Full-time custody was the most common penalty imposed for this offence (40.0%). The median term of sentence imposed was 9 months and the median non-parole period was 6 months.

### Children's Court

Data relating to the Children's Court covers a three-year period from 1 July 2002 to 30 June 2005. While the timeframe is shorter than presented for higher courts and the Local Court, the three-year period is not so far removed from the last three-year period of data (12 May 2002 to 11 May 2005) discussed above.

Over this period, there were a total of 1178 sentencing cases in the Children's Court where the principal offence was robbery pursuant to ss 94, 95 and 97(1) of the *Crimes Act 1900*. This figure accounts for 6.4% of all sentencing cases in the Children's Court. The same pattern of declining numbers was observed in the Children's Court. The frequency of robbery offences fell each year for the available data. In 2002–2003 there were 469 sentencing cases. In 2003–2004 there were 376 cases and in 2004–2005 there were 333 cases representing a drop of 29.0% over the entire period.

The most common robbery offences were robbery, or assault with intent to rob, being armed or in company pursuant to s 97(1), which accounted for 65.8% of all robbery offences in the Children's Court.

Whereas in the higher courts armed robbery was more common than robbery in company, the opposite was found to be true for s 97(1) offences sentenced in the Children's Court. Robbery, or assault with intent to rob, being in company, accounted for 70.8% and robbery, or assault with intent to rob, being armed with an offensive weapon accounted for 29.2% of s 97(1) offences.

In the Children's Court, a youth justice conference was the most common penalty for juveniles found guilty of the least serious robbery offence — steal from the person (19.6% pursuant to the *Children (Criminal Proceedings) Act 1987* and 2.1% pursuant to the *Young Offenders Act 1997*). However, almost as many juveniles received control orders (17.5%) or probation orders (16.1%) which lie at the higher end of the sentencing hierarchy. For juveniles found guilty of more serious robbery offences, the penalties escalated. For example, the rate of control orders for offences under s 95 and armed robbery under s 97(1) was 25.4% and 23.5% respectively. The median term of the control order was 12 months and 15 months respectively.

vii See n 208.

### **Part 3 The research study: an analysis and discussion of remarks on sentence**

The analysis of sentencing patterns in the higher courts presented in Part 2 showed no significant differences in sentencing patterns from one three-year period (12 May 1999 to 11 May 2002) to the next three-year period (12 May 2002 to 11 May 2005). This finding suggests that it is possible to generalise the findings of the main study, which focused only on sentences imposed during the first three-year period (12 May 1999 to 11 May 2002). The findings in this section are based on the analyses of 352 remarks on sentence for cases where the offender was convicted of robbery under s 97 of the *Crimes Act* 1900.

#### **The offences**

The majority of offences (88.6%) related to s 97(1), and within that section, the most common offence was robbery being armed with an offensive weapon or instrument (50.3%), followed by robbery in company (30.7%).

In 61.9% of cases the judge was required to sentence the offender for multiple offences and/or for further offences that were placed on a Form 1.

#### **Plea and assistance to authorities**

The overwhelming majority of offenders (95.2%) pleaded guilty. Most of these offenders (74.3%) entered their plea at the earliest opportunity. The proportion of offenders who pleaded guilty at the earliest opportunity increased significantly after the guideline judgment in *R v Thomson & Houlton*,<sup>viii</sup> from 64.3% before it to 82.0% after it. Where the discount for a guilty plea was quantified by the sentencing judge, the discount ranged from 5% to 40%, with a median of 25%.

Almost 2 in 10 offenders (18.5%) provided assistance to authorities. Where the discount for assistance to authorities was quantified, the discount ranged from 8.3% to 50%, with a median of 25%.

#### **Objective facts of the offence**

The majority of robberies in this study targeted commercial property (68.3%). Individuals were targeted in 31.7% of cases. The most common locations where robberies occurred were retail stores (24.3%) and service stations (17.1%), followed by robberies in the street or public thoroughfares (12.1%), hotel/bottle shops (7.8%), financial institutions (5.8%), residential premises (5.5%) and chemists (4.3%).

The majority (63.1%) of robberies involved multiple offenders. The role of offenders in this study was varied. Most offenders played a primary role as principals or co-principals in the commission of the offence (83.5%). Only 28 robberies (8.0%) could be described as well planned.

Approximately two-thirds of offenders (63.6%) were armed with a weapon. The most common weapon used to commit the armed robberies was a knife or other cutting instrument (57.3%), followed by firearms (21.7%) and syringes (16.0%).

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viii (2000) 49 NSWLR 383.

Almost two-thirds of robberies involved threats of violence (63.3%) as opposed to actual violence (36.7%). Actual violence was more likely to occur in robberies where there were multiple offenders (43.5% compared with 18.5% of lone offenders) or by younger offenders (median age = 21 years compared with 23 years for robberies involving threatened violence).

### Subjective circumstances of the offender

Most offenders (89.8%) were male and were aged from 14 to 58 years with a median of 22 years. Female robbers were in a narrower age group, from 18 to 36 years with a median of 22.5 years.

The vast majority of offenders (83.5%) had a criminal record. Just over a quarter of offenders (27.6%) had priors for a robbery offence under ss 94–98 and over half (56.0%) had priors for offences other than robbery. Less than half of the offenders (44.9%) had previously served a term of imprisonment imposed in an adult court. Around one-fifth of offenders (19.0%) had previously served a term of imprisonment for a robbery offence under ss 94–98.

Most offenders (61.6%) were on unconditional liberty at the time of committing the offence. Fifty-four offenders (15.3%) were on parole; 54 offenders (15.3%) were on a bond, probation, community service order or on a Drug Court program; 3 offenders (0.9%) were serving a term of periodic detention; and 21 offenders (6.0%) were on bail. Another 3 offenders (0.9%) were escapees at the time of committing the offence.

The vast majority of offenders (83.5%) had a *history* of drug and/or alcohol use/abuse. Eight in 10 offenders (79.6%) had a history of drug use/abuse and almost one-third of offenders (32.7%) a history of alcohol use/abuse. Three-quarters of offenders (75.4%) were *addicted* to alcohol and/or drugs at the time of the offence. Seven in 10 offenders (69.5%) had an addiction to drugs and 13.3% were addicted to alcohol. Three in 10 offenders (30.4%) were under the *influence* of drugs (22.4%) or alcohol (12.5%) at the time of committing the offence.

Issues relating to the offender's mental health were raised in a third of cases (33.0%).

### Sentencing

The majority of offenders (85.2%) sentenced for a robbery offence under s 97 received a full-time custodial sentence. These sentences ranged from 12 months to 15 years, with a median term of sentence of 4 years. The median sentence is at the lower limit of the *Henry* range of 4–5 years. Almost all cases attracted a finding of special circumstances (94.0%).

A finding of exceptional circumstances resulted in 14.8% of offenders receiving a non-custodial sentence.

Apart from the need for a lengthy period of supervision in the community after release from prison, the main factors which resulted in a finding of either special or exceptional circumstances were good prospects of rehabilitation, young age and lack of or insignificant criminal record.

### **Most important factors in determining whether to impose a non-custodial penalty**

The results of the categorical regression showed a statistically significant relationship between many factors and the decision not to impose a full-time custodial sentence when all other factors were held constant. These were:

- the offence seriousness
- offence quantity
- *Thomson & Houlton*
- target of robbery
- role
- age
- prior criminal record
- supervision status at the time of the offence
- delay in sentencing
- pre-sentence custody.

Only 45% of the variance was explained by the set of factors in the regression.

Three variables — prior criminal record (37.2%), pre-sentence custody (17.7%) and the offender's role in the commission of the offence (13.2%) — were the most important variables and explained more than two-thirds of the model's effect in relation to the use of non-custodial penalties.

Offenders with no prior criminal record, or offenders who had served discrete periods of pre-sentence custody (or diversion), or offenders who were not considered to be the ringleaders or the organisers of the robbery were more likely than their respective counterparts to receive a non-custodial penalty.

### **Most important factors in determining the length of a full-time custodial sentence**

The results of the categorical regression in relation to the length of the term of imprisonment imposed showed a statistically significant relationship between many factors when all other factors were held constant. These were:

- the offence seriousness
- offence quantity
- plea
- *Thomson & Houlton*
- target of robbery
- degree of planning
- role
- level of violence (injuries sustained)
- age
- prior criminal record
- delay in sentencing.

Only 49% of the variance was explained by the set of factors in the regression.

Three variables — prior criminal record (24.4%), offence quantity (21.7%) and age (12.2%) — were the most important variables and explained almost 60% of the model's effect in relation to the length of imprisonment imposed.

Offenders with no prior criminal record or who had not previously been imprisoned, or offenders with no other offences or Form 1 matters, or juvenile offenders or offenders aged over 50 years were more likely than their respective counterparts to receive a shorter term of imprisonment.

Conversely, offenders who had previously been imprisoned for a robbery offence, or offenders with multiple offences and further charges on a Form 1, or offenders aged 31–50 years were more likely than their respective counterparts to receive a longer term of imprisonment.

### Issues surrounding the application of the *Henry* guideline judgment

While the *Henry* guideline judgment was explicitly referred to by only 70.5% of judges, this does not mean that the other judges did not have *Henry* in mind when undertaking the sentencing exercise.

The seven characteristics identified by Spigelman CJ in *Henry* as representing the common case of armed robbery sufficient to attract a term of full-time custody of between 4 and 5 years were among the significant characteristics identified in the regression analysis.

While few cases (8.0%) matched all the characteristics identified in *Henry*, 63.9% matched most of the characteristics. Of these *Henry*-like<sup>ix</sup> cases, 81.7% received a full-time custodial sentence. Where full-time imprisonment was imposed, 41.7% were in the range of 4–5 years, 44.4% received less than 4 years and 13.9% received more than 5 years.

In addition to the weight that may be given to a particular characteristic of the offence or the offender that may shift the case above or below the starting range of 4–5 years, there were two other intervening events during the course of the study period which may have affected the final sentencing outcomes. First, suspended sentences under s 12 of the *Crimes (Sentencing Procedure) Act* 1999 were reintroduced. Second, the *Thomson & Houlton* guideline effectively reduced the 4–5 year starting range for *Henry*-like cases by 15% to take account of the fact that *Henry* involved a late plea equivalent to 10%, that is, a range between 3 years 5 months and 4 years 3 months.

### Part 4 CCA sentence appeals

In selecting the research sample, all cases which went to the CCA on appeal were excluded. The reason for excluding these cases was the possibility of recording information at first instance that later may be held to be erroneous by the CCA. The following analysis describes sentencing appeals involving s 97 offences before the CCA in the timeframe of the study.

The 177 sentence appeals against the penalty imposed at first instance represent an appeal rate of approximately 14%. The Crown appealed in 3% and the offender appealed in 11% of first instance sentences.

ix The concept of “*Henry*-like” is explained in more detail at n 264.

Consequently, appeals against the severity of sentence imposed at first instance were the most common type of sentence appeal (78.5%). Crown appeals against the inadequacy of sentence accounted for 21.5% of sentence appeals.

Overall, nearly half (49.2%) of sentence appeals before the CCA were successful. A Crown appeal was more likely than a severity appeal to be successful (60.5% and 46.0% respectively).

## **Conclusions**

In conclusion, the *Henry* guideline has provided consistency in sentencing for robbery offences under s 97 of the *Crimes Act* 1900. This consistency was evident in the way in which judges: commonly articulated that deterrence, both general and specific, was the main purpose of sentencing for this offence; assessed the wide variations in the objective and subjective features of the case; and applied the starting range suggested in *Henry* to arrive at an appropriate sentence in the individual case.