



Sentencing Robbery Offenders since the *Henry* Guideline Judgment



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Sentencing Robbery Offenders since the *Henry* Guideline Judgment

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* The date shown is the date of sentence. Details of the reporting of the sentence proceedings in the *Sydney Herald*, the *Australian* or the *Sydney Gazette* are provided in the footnotes of the monograph.

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Offences Relating to the Coin Act 1861, 24 & 25 Vict c 99

Penal Servitude Act 1857, 20 & 21 Vict c 3

Pillory Abolition Act 1837, 1 Vict c 23

Piracy Act 1837, 1 Vict c 88

Punishment for Burglary & Stealing Act 1837, 1 Vict c 86

Punishment of Transportation Act 1837, 1 Vict c 90

Robbery Act 1551, 5 & 6 Edw VI c 9 & 10

Robbery Act 1597, 39 Eliz I c 15

Robbery and Stealing from the Person Act 1837, 1 Vict c 87

Robbery etc Act 1719, 6 Geo I c 23

Robbery etc Act 1752, 5 Geo II c 36

Theft Act 1968

New South Wales Acts

Carrying out of Capital Punishment Within Prison Walls Act 1853, 17 Vict No 40

Children (Criminal Proceedings) Act 1987

Crimes Act 1900

Crimes (Amendment) Act 1966

i Short titles for Acts were used from 1896 (*Short Titles Act 1896*). Prior to 1896, statutes were only identified by the regnal year and chapter number. The year and a short title have been included here to assist readers to identify the subject matter of the earlier Acts.

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Mental Health (Criminal Procedure) Act 1990

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Runaway Convicts Act 1825, 5 Geo IV No 3

Sentencing Act 1989

Transported Offenders and Suspected Robbers Apprehension Act 1834, 5 Will IV No 9

Weapons Prohibition Act 1998

Young Offenders Act 1997

ii This Act was commonly known as the *Bushranging Act*. For example, see G D Woods, *A history of criminal law in New South Wales: the colonial period 1788–1900*, 2002, Federation Press, Sydney, p 444.

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Summary of findings

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 courtsⁱⁱⁱ 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*,^{iv} 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.

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^v 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*^{vi} or a misapplication of *Pearce*.

^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^{vii} 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*,^{viii} 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%).

^{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^{ix} 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.

Introduction

“... robbery is a denial of one of the elementary freedoms on which our society is based. Robbery involves the imposition of the will of the offender by force or the threat of force on the rights and ability of the victim to go about his own affairs in his own way. Some actions on the part of offenders, for example, being in company, being armed, the malicious infliction of actual bodily harm, find express recognition in the statement of the offences.”¹

In 2003 it was reported that the overall cost of all forms of crime in Australia amounted to nearly \$32 billion per year, which is nearly \$1600 per person and 5% of gross domestic product.² While there are a relatively low number of incidents of violent offences when compared with non-violent offences, violent offences account for a large proportion of the costs of crime in Australia. Robbery, a violent offence, cost the Australian public \$600 million per year, with an average cost per robbery of \$3600.³

In the last 20 years there have been a number of studies conducted in New South Wales (NSW) which have focused on robbery. These studies for the most part used data obtained from police reports, crime victim surveys and interviews with convicted robbers. These studies sought to measure the incidence and trends in robbery⁴ and to highlight the various situational aspects of robbery offences⁵ and characteristics of robbery offenders.⁶ Other studies have focused on specific forms of robbery,⁷ and were primarily interested in obtaining information that would assist in reducing the incidence of robbery through preventative strategies or more effective policing and as a result they primarily focused on situational information.⁸

There has been only one previous study which focused specifically on the sentencing of robbery offenders in NSW.⁹ While this was a comprehensive study of sentencing practices

1 *R v Henry* (1999) 46 NSWLR 346 per Hulme J at [322].

2 P Mayhew, “Counting the costs of crime in Australia”, *Trends and Issues in Crime and Criminal Justice*, No 247, 2003, Australian Institute of Criminology, Canberra, at 8.

3 *ibid*, at 3. The robbery costs were based on the number of robberies committed in 2001.

4 For example see: J Allen, “NSW recorded crime statistics 2001: regional analysis of crime trends”, 2002, *Crime and Justice Statistics*, NSW Bureau of Crime Statistics and Research, Sydney; M Chilvers and D Weatherburn, “The impact of heroin dependence on long-term robbery trends”, *Crime and Justice Bulletin*, No 79, 2003, NSW BOCSAR, Sydney; S Moffatt and S Poynton, “Long-term trends in property and violent crime in New South Wales: 1990–2004”, *Crime and Justice Bulletin*, No 90, 2006, NSW BOCSAR, Sydney.

5 For example see M Borzycki, Y Sakurai and J Mouzos, *Armed robbery in Australia: 2003 national armed robbery monitoring program annual report*, Research and Public Policy Series, No 62, 2004, Australian Institute of Criminology, Canberra.

6 For example see: R Jochelson, *Crime and place: an analysis of assaults and robberies in inner Sydney*, 1997, NSW BOCSAR, Sydney; NSW Bureau of Crime Statistics and Research, *Robbery: an analysis of robbery in New South Wales*, Final report, 1987, BOCSAR, Attorney-General’s Department, Sydney.

7 For example see D Challinger (ed), *Armed robbery*, Proceedings of Australian Institute of Criminology seminar No 26, held 22–24 March 1988, 1989, AIC, Canberra.

8 For example see: C Mayhew, *Violence in the workplace – preventing armed robbery: a practical handbook*, 2000, Research and Public Policy Series, No 33, AIC, Canberra; S Nugent et al, *Armed robbery from an offender’s perspective: implications for prevention*, 1989, AIC, Canberra.

9 I Potas, *Sentencing robbers in New South Wales: principles, policy and practice*, 1990, AIC, Canberra.

in relation to robbery offences in NSW, it was undertaken in the late 1980s and utilised in the main only unreported decisions of the Court of Criminal Appeal (CCA) for the ten-year period between 1978 and 1988.¹⁰ This was well before legislative amendments to the *Crimes Act 1900* (NSW) which resulted in increased penalties for the various forms of robbery, and more importantly before the issuing of the guideline judgment for armed robbery in *R v Henry*¹¹ in May 1999, and the guideline judgment relevant to the utilitarian value of a guilty plea in *R v Thomson & Houlton*¹² in August 2000. Both guideline judgments have had important implications for the type and quantum of penalties imposed on robbery offenders in NSW.

The present robbery study is unique. It differs from previous robbery studies in that the data used in this study are drawn from finalised first instance material.¹³ This includes court records and judicial remarks on sentence which contain a summary of the objective and subjective facts proven in court which provided the basis for the resulting sentence handed down by the court.

Aims of the study

This study is exploratory in nature. Its purpose is to determine the extent to which the *Henry* guideline (extracted on next page) is being used by judges in the higher courts¹⁴ of NSW to guide their sentencing decisions in relation to offenders convicted of robbery offences under s 97 of the *Crimes Act 1900*. It is also intended to determine what factors or legal principles appear to have the most influence on the outcome of sentences imposed for s 97 offences. In particular, this study examines the objective and subjective factors, as revealed in the judge's remarks on sentence, in order to determine the rationale for sentencing decisions lying above and below the range indicated in the guideline judgment. It must be acknowledged that some "difficulties arise in relation to any empirical examination of sentencing due to the highly variable and discretionary aspects of the decision-making processes that operate within sentencing."¹⁵ However, a broad judicial discretion at sentencing is essential to ensure that all the wide variations in circumstances of the offence and the offender are taken into account. Sentences must be individualised.¹⁶

Scope of the study

The study does not attempt to compare sentencing trends in the pre- and post-*Henry* periods, as this aspect of sentencing for s 97(1) offences was detailed in a previous Judicial Commission paper.¹⁷

10 Potas' intention was to update the earlier findings in relation to the sentencing of offenders for armed robbery in the period 1974–1976 presented in I Potas, *Sentencing violent offenders in New South Wales*, 1980, Law Book Company, Sydney.

11 (1999) 46 NSWLR 346.

12 (2000) 49 NSWLR 383.

13 For a full explanation of the data see Methodology at 3.1.

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

15 NSW Bureau of Crime Statistics and Research, *Robbery: an analysis of robbery in New South Wales*, Final report, 1987, BOCSAR, Attorney-General's Department, Sydney, p 133.

16 *R v Whyte* (2002) 55 NSWLR 252 per Spigelman CJ at [147].

17 L A Barnes and P Poletti, "Sentencing trends for armed robbery and robbery in company: the impact of the guideline in *R v Henry*", *Sentencing Trends & Issues*, No 26, 2003, Judicial Commission of New South Wales, Sydney.

For a complete picture of the sentencing of robbery offenders in NSW, the study begins in Part 1 with the historical development of the offence of robbery at common law and in statute. There follows an examination of the purposes of punishment and the *Henry* guideline judgment. The prevalence and incidence of robbery in NSW since *Henry* are also discussed.

Part 2 provides an overview of sentencing patterns for all robbery offences in all jurisdictions in NSW over the six-year period since *Henry* was promulgated (12 May 1999 to 11 May 2005).

Part 3 presents and discusses the findings of the in-depth analysis for the three-year period following the issuing of the *Henry* guideline (12 May 1999 to 11 May 2002) which was the main focus of the study.

Part 4 examines all CCA decisions in the same three-year period for matters where s 97 was the principal offence.¹⁸

R v Henry (1999) 46 NSWLR 346 per Spigelman CJ at [162]–[165]

“It appears from the cases that come to this Court, including the present proceedings, that there is a category of case which is sufficiently common for purposes of determining a guideline:

- (i) Young offender with no or little criminal history;
- (ii) Weapon like a knife, capable of killing or inflicting serious injury;
- (iii) Limited degree of planning;
- (iv) Limited, if any, actual violence but a real threat thereof;
- (v) Victim in a vulnerable position such as a shopkeeper or taxi driver;
- (vi) Small amount taken;
- (vii) Plea of guilty, the significance of which is limited by a strong Crown case.

Whilst it is possible to determine a starting point in a case of this kind, that is, a sentence of X years imprisonment, I do not believe that the Court should do so. Rather, I propose the Court should identify a narrow sentencing range within which this Court would expect sentences in such cases to fall. There are two principal reasons why a sentencing range is appropriate for this offence:

- (i) The seven characteristics identified above do not represent the full range of factors relevant to the sentencing exercise.
- (ii) Many of the seven identified characteristics contain within themselves an inherent variability, for example, different kinds of knives or weapons in (ii); extent of ‘limited actual violence’ in (iv); degree of vulnerability in (v); amount in (vi).

In my opinion sentences for an offence of the character identified above should generally fall between four and five years for the full term.”

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

Part 1

Robbery in context

1.1 The development of the offence of robbery at common law and in statute

*"The offence of robbery is the offence of theft committed with violence or putting in bodily fear; as to the words 'putting in bodily fear', if the theft be committed with violence, that alone would be quite sufficient to constitute a good information; the presence of either of these facts is sufficient. In many instances it may be improper to allow the question to be put as to bodily fear, and he had stopped such a question in the present case; when violence has been proved, that is sufficient; where violence is not proved, then something else as threats or the like, to cause bodily fear must."*¹⁹

1.1.1 A definition of robbery at common law

Robbery is a crime of ancient origin, dating back in England to at least the reign of Henry II (1154–1189), a sovereign who was principally responsible for the early development of the common law. While statutory enactments in England have long addressed the punishments for robbery in its varied forms,²⁰ it was not until the *Theft Act* 1968 that robbery was defined in a statute in England.²¹ It remains to this day undefined in the *Crimes Act* 1900 (NSW).

The continuous and progressive process of defining the offence of robbery can be traced through the early English common law and legal writers.²² Robbery is an aggravated form of larceny, with the application of actual violence or putting the victim in fear of violence (constructive violence) being the element that distinguishes robbery from other forms of larceny. The early importance placed on the element of violence is apparent from a 1562 description of robbery at common law where the court stated that "[i]t is not a robbery if the person be not put in fear, as by assault and violence."²³

By the early 18th century the description of robbery had been expanded in relation to property to include not only property taken from the person, but also from the presence of the victim of the robbery. This expansion is evident in the judgment of Lord Hardwicke CJ

19 *R v Douglas* (Supreme Court of NSW, 14 July 1834, Burton J). Source: *Sydney Gazette*, 27 September 1834. Available at: <http://www.law.mq.edu.au/scnsw/Cases1834/html/r_v_douglas_and_others_1834.htm>, accessed 25/5/04. The quote appears on p 23 of the transcript.

20 See for example: *Robbery Act* 1551; *Robbery Act* 1597; *Robbery etc Act* 1719; *Robbery etc Act* 1752; *Robbery and Stealing from the Person Act* 1837; *Larceny and similar Offences Act* 1861. Available at <<http://www.justis.com>>, accessed 24/11/06.

21 Section 8 of the English *Theft Act* 1968 defined robbery and the proscribed penalty as follows:
 "(1) A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force.

(2) A person guilty of robbery, or of an assault with intent to rob, shall on conviction on indictment be liable to imprisonment for life."

22 See the English case of *Smith v Desmond & Hall* [1965] AC 960, an appeal to the House of Lords from a decision of the Court of Criminal Appeal which raised the question of what constituted the offence of robbery at common law. For a comprehensive history of the offence see particularly the judgments of Lord Morris of Borth-y-Gest at 979–984 and Lord Pearce at 993–997.

23 *Anon* (1562) 2 Dyer 224b at 224b, per cur. The Dyer Reports are law reports for cases before the King's Bench Division between 1513–1582. This case was reported in the second volume of Dyer in the Trinity Term (April–June) in the fifth year, 1563, of Queen Elizabeth's reign (1558–1635), at 73 ER 496.

in *R v Francis*²⁴ where the Chief Justice described robbery as “a felonious taking from the person, putting him in fear … and therefore all indictments lay a taking *a personâ*, but then the law construes a taking in a man’s presence to be taking from the person … and when the taking shall be said to commence is matter of evidence to the jury.”²⁵

Towards the end of the 18th century the amalgamation of the earlier developments of the common law relative to robbery were apparent. Sir William Blackstone, the renowned jurist and legal commentator, described robbery at common law in *The commentaries on the laws of England: of public wrongs*, as “the felonious and forcible taking, from the person or in the presence of another, of goods or money to any value, by violence or putting in fear.”²⁶

In 1779 the court in *R v Donnally*²⁷ relied on the definition of robbery used by the prominent legal commentators of the time, William Staundforde, Sir Matthew Hale and Serjeant William Hawkins, who defined robbery as “a felonious and violent taking of any money or goods from the person of another, putting him in fear”. The court observed that it was evident from that description that “to constitute the crime of robbery three ingredients [were] necessary: First, a felonious intent, or *animus furandi*: Secondly, some degree of violence, or putting in fear: and Thirdly, a taking from the person of another.” As to the use of threats in robbery “[the] threat must necessarily and unavoidably impart intimidation. It is equivalent to actual violence.”²⁸

By 1783 the definition of robbery was almost fully developed and incorporated the taking of the property by violence which overbore the will of the victim. At this time robbery was described by the court in *R v Hickman*²⁹ as “the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear.”

A further refinement to the concept of force as it related to robbery became evident in 1825 when the court recognised that robbery could be committed by offenders “in company”, that is, by other than through the menace or force associated with threats and the use of weapons. In *R v Hughes & Wellings*³⁰ Bayley J observed that “to constitute robbery, there must be either force or menaces. If several persons surround another as to take away the power of resistance, this is force.”

In the leading English robbery case of *Smith v Desmond & Hall*³¹ Lord Pearce stated the common law ingredients of the offence of robbery:

24 (1735) 2 Strange 1015.

25 This quote is taken from the version of *R v Francis* (1735) 2 Strange 1015 recorded in T Lee (ed), *Cases argued and adjudged in the court of King's Bench at Westminster*, 1815, 2nd ed, Pheney & Sweet, London, p 113.

26 W Blackstone, *The commentaries on the laws of England: of public wrongs*, Vol IV, 1876, 4th ed, John Murray, Albemarle Street, London, p 251. The commentaries were first published in 1769.

27 (1779) 168 ER 199 at 200, per cur.

28 *ibid*, at 201.

29 (1783) 1 Leach 278.

30 (1825) 1 Lew CC 301 per Bayley J at 301.

31 [1965] AC 960 per Lord Pearce at 997–999, quoted with approval in *R v Bellamy* (unrep, 15/2/93, NSWCCA). See also *R v Delk* (1999) 46 NSWLR 340 per Smart AJ at [11]–[13] citing *R v Stewart* [1929] SASR 500, where the Full Court of South Australia at 502–505 embarked on a historical review of the law of robbery and stealing from the person.

"The essence of the offence is that violence is done or threatened to the person of the custodian who stands between the robber and the property in order to prevent or overcome his resistance and oblige him to part with the property and submit to the thief stealing it. Thus the offence against the person and the theft are combined.

... the offence can only exist where the victim has sufficient care or personal possession of the goods to allow the court to say that constructively the goods were taken 'in his presence.'

...

It is a question of degree for the jury to decide whether the victim of the violence was sufficiently the custodian of the property stolen, whether he had sufficient possession and care of it, to constitute the stealing as being in his presence."

1.1.2 Legislative history of robbery offences in NSW

Colonial period

In the early colonial period of NSW the laws which governed the colony were limited to the English law which was applicable to the conditions of the colony and the government regulations which were in place at that time. As such the English criminal law relating to larceny and robbery was applied in the colony.

Between 1796 and 1810 there were no significant alterations to the English criminal law. This remained the state of affairs in the colony until 1823 when the *New South Wales Act*³² was enacted. The effect of this legislation was that while Imperial statutes enacted before 25 July 1828 were taken to be part of the law of NSW, Imperial statutes enacted after that date could not be assumed to automatically apply in NSW.

The first attempt to consolidate the criminal law in the colony occurred in 1828 when, through the *Criminal Acts Adoption Act*,³³ five Imperial statutes "for the Amendment of the Law and Improvement of the Administration of Justice in Criminal Cases" were adopted into NSW. While three of these statutes³⁴ had some effect on robbery offences committed in colonial NSW, the most important of these was the statute which amended and consolidated the laws of England relative to larceny and other offences connected to it.³⁵ Pursuant to this statute:

- Benefit of clergy was abolished.³⁶

32 *New South Wales Act* 1823, 4 Geo IV c 96.

33 *Criminal Acts Adoption Act* 1828, 9 Geo IV No 1, 26 March 1828. Effective from 1 April 1828.

34 *Benefit of Clergy etc Abolition Act* 1827, 7 & 8 Geo IV c 27, 21 June 1827, "An Act for repealing various Statutes in England relative to the Benefit of Clergy and to Larceny and other Offences Connected therewith and to Malicious Injuries to Property and to Remedies against the Hundred". *Administration of Justice etc Act* 1827, 7 & 8 Geo IV c 28, 21 June 1827, "An Act for further improving the Administration of Justice in Criminal Cases in England". *Larceny Consolidation Act* 1827, 7 & 8 Geo IV c 29, 21 June 1827, "An Act for consolidating and amending the Laws in England relative to Larceny and other Offences Connected therewith". In 1825 due to the inadequacy of the public gaol in Sydney and the state of the colony, a hulk or floating prison (*The Phoenix*) was situated in Sydney Harbour for the reception and safekeeping of prisoners: *Hulks Regulation Act* 1826, 7 Geo IV No 1, 17 February 1826, "An Act for the regulation of the Hulk or Floating Prison in Sydney Harbour". From 1828 all common gaols were considered to all intents and purposes houses of correction as well as public gaols: *Hulks Regulation Act* 1826, 7 Geo IV No 1, 17 February 1826, "An Act for the regulation of the Hulk or Floating Prison in Sydney Harbour".

35 *Larceny Consolidation Act* 1827, 7 & 8 Geo IV c 29.

36 *Benefit of Clergy etc Abolition Act* 1827, 7 & 8 Geo IV c 27.

- The distinction between petty and grand larceny was abolished.³⁷
- Judges were given the power to add “hard labour” and “solitary confinement” to a sentence of imprisonment.³⁸
- For the offences of robbery or stealing from the person, assault with intent to commit robbery and demands accompanied with menaces or force, the punishment on conviction “at the discretion of the court was transportation beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and if a male to be once twice or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment.”³⁹
- To obtain a “chattel money or valuable security by threatening to accuse a party of an infamous crime” (the abominable crime of buggery with man or beast) was also deemed to be robbery and punished accordingly.⁴⁰

In 1838 a further Imperial statute, the *Robbery and Stealing from the Person Act 1837*,⁴¹ was adopted in NSW under the *Criminal Law Statutes Adoption Act 1838*.⁴² This resulted in further amendments to the laws relating to robbery and stealing from the person:

- The death penalty was limited to robbery offences where the offender had “at the time of or immediately before or after such robbery, stabbed cut or wounded any person.”⁴³
- The penalty for robbery or assault with intent to rob involving the use of an offensive weapon or instrument, or for robbery in company or assault with intent to rob with beating, striking or other personal violence was, at the discretion of the court, transportation beyond the seas for the term of the offender’s natural life or for any term not less than 15 years, or imprisonment for any term not exceeding 3 years.⁴⁴
- For the offence of gaining property by threat of accusing a person of unnatural crimes the penalty was, at the discretion of the court, transportation beyond the seas for the term of the offender’s natural life or for any term not less than 15 years, or imprisonment for any term not exceeding 3 years.⁴⁵
- The penalty for simple robbery or stealing from the person was, at the discretion of the court, transportation beyond the seas for 10–15 years or imprisonment for a term not exceeding 3 years.⁴⁶
- Assault with intent to rob carried a penalty of imprisonment for any term not exceeding 3 years, except in the cases where greater punishment under the Act was provided.⁴⁷

37 *Larceny Consolidation Act 1827*, 7 & 8 Geo IV c 29, s 2.

38 *ibid*, s 4.

39 *ibid*, s 6.

40 *ibid*, s 9.

41 1 Vict c 87. Commenced 17 July 1837. Other Imperial statutes adopted at this time were: *Pillory Abolition Act 1837*, 1 Vict c 23; *Offences against the Person Act 1838*, 1 Vict c 85; *Punishment for Burglary & Stealing Act 1837*, 1 Vict c 86; *Piracy Act 1837*, 1 Vict c 88; *Malicious Injuries to Property Act 1861*, 1 Vict c 89; *Punishment of Transportation Act 1837*, 1 Vict c 90; and *Capital Punishment Abolition Act 1* Vict c 91.

42 2 Vict No 10. Commenced 28 August 1838.

43 *ibid*, s 2.

44 *ibid*, s 3.

45 *ibid*, s 4.

46 *ibid*, s 5.

47 *ibid*, s 6.

Robbery was not the exclusive domain of males. Female offenders transported to the colony of NSW were also convicted of committing robbery offences, including bushranging. If a female convict was found guilty of a further offence before the Supreme Court or the Courts of General Quarter Sessions she could be transported from the colony to a penal settlement. In 1839 the transportation of female convicts from the colony to a penal settlement was abolished and replaced with imprisonment with labour for any term not exceeding 5 years.⁴⁸ The court, in an exercise of its discretion, could add a further punishment of solitary confinement in a dark cell on bread and water. The confinement of female offenders in dark cells was abolished in 1841.⁴⁹ In 1857 transportation to Australia was abolished by statute.⁵⁰

Woods⁵¹ records that by the late 1860s there was considerable dissatisfaction with the state of law in NSW, particularly with respect to the criminal law. There was public concern that “the criminal sentences in NSW were inadequate, and that criminals were escaping their punishments.” These concerns led to “a leading article in the *Sydney Morning Herald* [which] attacked lenient and inconsistent sentences imposed by the courts.” This article became the catalyst for a “motion in the New South Wales Legislative Council critical of the courts, the judges and — indirectly — of the government.” As a result in 1870 the government issued Letters Patent of a Law Reform Commission. After many futile attempts to pass the Law Reform Commission’s draft Bill produced in 1871, it was finally passed and enacted in 1883 as the *Criminal Law Amendment Act 1883*.⁵²

The *Criminal Law Amendment Act 1883* was an Act to consolidate and amend various aspects of the criminal law. The Act was based for the most part on six statutes passed by the Imperial Parliament in 1861⁵³ which had never been adopted in NSW. The Act did not define larceny, and hence the offence of robbery, but “left the common law in place, subject to various additions, mostly as to matters of aggravation of the basic offence.”⁵⁴

The *Criminal Law Amendment Act 1883* contained four sections, ss 90–93, dealing with various forms of robbery. The maximum penalties for these offences were dependent on the form of aggravation involved in the offence: an offensive weapon or instrument; being in company with another person; or the type and level of physical harm or violence involved in the robbery — striking or other corporeal violence, wounding, or grievous bodily harm. The simplest form of robbery — assault with intent to rob or stealing from the person (s 90)⁵⁵ — attracted the lowest maximum sentence: penal servitude for 10 years. For robbery with striking (s 91)⁵⁶

48 *Female Transportation Abolition Act 1839*, 3 Vict No 22. Commenced 19 November 1839.

49 *Female Offenders (Solitary Confinement) Act 1841*, 5 Vict No 3. Commenced 29 June 1841.

50 *Penal Servitude Act 1857*, 20 & 21 Vict c 3. Commenced 26 June 1857.

51 G D Woods, *A history of criminal law in New South Wales: the colonial period 1788–1900*, 2002, Federation Press, Sydney, pp 247–248.

52 46 Vict No 17. Commenced 1 July 1883.

53 The six statutes were: *Accessories and Abettors Act 1861*, 24 & 25 Vict c 94; *Larceny and similar Offences Act 1861*, 24 & 25 Vict c 96; *Malicious Injuries to Property Act 1861*, 24 & 25 Vict c 97; *Forgery Act 1861*, 24 & 25 Vict c 98; *Offences Relating to the Coin Act 1861*, 24 & 25 Vict c 99; and *Offences Against the Person Act 1861*, 24 & 25 Vict c 100. See A Stephen and A Oliver, *Criminal law manual*, 1883, Thomas Richards, Government Printer, Sydney, p iv.

54 Woods, op cit n 51, p 255.

55 This section is founded on ss 40 and 42 of the Imperial *Larceny and similar Offences Act 1861*.

56 This section is founded on part of s 43 of the Imperial *Larceny and similar Offences Act 1861*.

and robbery or stopping a mail being armed or in company (s 92),⁵⁷ the maximum penalty increased to penal servitude for 14 years. The most serious offences of robbery with wounding (s 91)⁵⁸ and robbery with arms and wounding (s 93)⁵⁹ both attracted maximum sentences of penal servitude for life.

Minimum terms of penal servitude

Notwithstanding that a section of the *Criminal Law Amendment Act* 1883 made an offender liable to penal servitude for life or any other fixed term, the sentencing judge had the discretion, having regard to any extenuating circumstances in the case, if they existed, to pass a sentence of penal servitude of a lesser duration. As a result the following maximum penalties could be substituted with a reduced sentence:

- life (ss 91 and 93) — a term of not less than 7 years
- 14 years (ss 91 and 92) — a term of not less than 5 years
- 10 years (s 90) — a term of not less than 4 years
- 7 years — a term of not less than 3 years.⁶⁰

Alternative terms of imprisonment

Where the term of servitude was for either 10, 7 or 5 years the judge could instead of servitude pass a sentence of imprisonment with or without hard labour.⁶¹ As a result the sentences could be reduced as follows:

- 10 years (s 90) — imprisonment for a term not less than 3 years
- 7 years — imprisonment for a term not less than 2 years
- 5 years — imprisonment for a term not less than 1 year.⁶²

In conjunction with a term of penal servitude with hard labour and irons, the court could order the offender to serve a period in solitary confinement if convicted of an offence of robbery or assault under ss 90 and 94.⁶³ If an offender was convicted of an offence under s 93 in addition

57 This section, except as to the stopping of a mail, vehicle or train etc with intent to rob, which is new, is founded on s 43 of the *Imperial Larceny and similar Offences Act* 1861 under which the punishment was penal servitude for life.

58 The last part of the section “And if the person so offending thereby wounds any person he shall be liable to penal servitude for life” is new.

59 This section combines portions of ss 2 and 3 of the *Robbery and Stealing from the Person Act* 1837, 1 Vict c 87. Robbery under that Act was a capital crime.

60 *Criminal Law Amendment Act* 1883, 46 Vict No 17, s 8.

61 Under s 399 of the *Criminal Law Amendment Act* 1883 penal servitude meant, in the case of male offenders, hard labour on the roads or other public works of the colony, in or out of irons, and in the case of female offenders, light labour in some gaol, penitentiary or reformatory. Under s 400 sentences of hard labour applied to all sentences of penal servitude, including capitally convicted offenders who were pardoned on condition of penal servitude.

62 *Criminal Law Amendment Act* 1883, 46 Vict No 17, s 8.

63 Section 398 of the *Criminal Law Amendment Act* 1883 provided that the court may direct that the offender be kept in solitary confinement for any portion or portions of the term, not exceeding 1 month at one time, and not exceeding 3 months within any year.

to a term of penal servitude for life or a term of servitude not less than 7 years, the court could order a whipping⁶⁴ or the use of irons, or both.

Post-colonial period

The *Crimes Act 1900*⁶⁵ was an Act to consolidate the existing statutes relating to criminal law. The Act did not introduce any new law in respect of robbery offences; it only consolidated and refined the existing law in this area. Nonetheless, a comparison of robbery offences contained in the *Criminal Law Amendment Act 1883* and the *Crimes Act 1900* reveal a number of changes:

- five sections instead of four dealing with the different forms of robbery
- a renumbering of the robbery sections
- the offences of robbery with striking and robbery with wounding under the old s 91 became separate offences under ss 95 and 96.

Sentences continued to be expressed as a term of “penal servitude”. This terminology was finally abolished and replaced with “imprisonment” in 2000.⁶⁶

While there were a number of amendments to the *Crimes Act 1900* over the years, it was not until 1966 that amendments⁶⁷ to the Act substantially affected the sentencing of robbers. It was at this time that the maximum penalties for selected robbery offences were increased. The maximum penalty for robbery or stealing from the person (s 94) increased from 10 years to 14 years.⁶⁸ Robbery or stealing from the person with striking (s 95) increased from 14 years to 20 years. Robbery etc or stopping a mail being armed or in company (s 97) increased from 14 years to 20 years.⁶⁹

Legislative amendments in late 1989 resulted in sentences for “life” under ss 96 and 98 being replaced with a term of 25 years.⁷⁰

In 1994 the increasing incidence of home invasion burglary and robbery offences, and the general perception that the sections of the *Crimes Act 1900* which covered these offences were ineffective in deterring offenders from committing these offences, resulted in Parliament

64 Pursuant to s 402, where a male person aged 16 years or above was convicted of robbery with arms and wounding under s 93 the court could, in addition to any other punishment prescribed under that section, sentence the offender to be once, twice or thrice privately whipped.

65 The Act was assented to and commenced on 31 October 1900.

66 *Crimes Legislation Amendment (Sentencing) Act 1999*, s 5 and Schedule 3. Commenced 1 January 2000. Under s 580G of the *Crimes Act 1900* “hard labour” and “light labour” were replaced with reference to imprisonment only. Similarly, pursuant to s 580F of the *Crimes Act 1900*, “penal servitude” was abolished and replaced with the term “imprisonment”.

67 *Crimes (Amendment) Act 1966*.

68 Stealing from the person can be dealt with in the Local Court. For cases which discuss the distinction between robbery and stealing from the person see for example: *R v Kerr-Bell* (unrep, 13/2/91, NSWCCA); *R v Crombie* [1999] NSWCCA 297; *R v Delk* (1999) 46 NSWLR 340; *R v Hua* [2002] NSWCCA 384; *R v Young* [2003] NSWCCA 276.

69 The increase in the maximum penalty in the 1966 amendment indicates that the principal element in punishment is the deterrent effect: *R v Donaldson* (1968) 87 WIN (Pt 1) (NSW) 501.

70 *Crimes (Life Sentences) Amendment Act 1989*. Commenced 12 January 1990.

enacting the *Crimes (Home Invasion) Amendment Act 1994*.⁷¹ The Attorney General stated in the Second Reading Speech:⁷²

“As the law presently exists, there are some provisions in some sections of the *Crimes Act* for increased penalties in aggravating circumstances, but these do not reflect the range of aggravating circumstances which have recently been inflicted on innocent victims. The applicable maximum penalties are also perceived as being too low to act as an effective deterrent.

...

In order to maintain consistency with these burglary provisions, the Government has also decided that existing robbery offences, namely sections 95 to 98 of the *Crimes Act 1900*, which are currently two tiered to provide for limited aggravated circumstances, should also be amended to provide for similar aggravating circumstances. The result of all these amendments is that the shortcomings in the current legislation in relation to aggravating circumstances are addressed, and a strong deterrent of up to 25 years imprisonment is provided to those who would commit these appalling crimes.”

The amendments resulted in a number of changes to the sections of the *Crimes Act 1900* dealing with robbery offences. These changes emphasised various circumstances of aggravation and increasingly severe maximum penalties for robbery offences under ss 95–98. The amendments were:

- s 95 — “in circumstances of aggravation” replaced “immediately before … any person”. The meaning of “circumstances of aggravation” was inserted at the end of the section. These were one or more of the following:
 - the alleged offender uses corporal violence on any person
 - the alleged offender maliciously inflicts actual bodily harm on any person
 - the alleged offender deprives any person of his or her liberty.
- s 96 — “or inflicts grievous bodily harm” was inserted after “wounds”.
- s 97 — the provision was divided into two separate offences depending on the category of weapon used in the robbery. The aggravating offence was the use of a dangerous weapon.
 - s 97(1) offensive weapon — maximum penalty 20 years
 - s 97(2) dangerous weapon — maximum penalty 25 years
 - s 97(3) allowed the jury to find an alternative verdict of guilty of an offence under s 97(1) if the jury were not satisfied that the evidence supported an offence under s 97(2).
- s 98 — the words “so armed” were omitted from “in company with another person so armed, robs”.
- s 4 — the definitions of “armed” and “dangerous weapon” were added to s 4(1) of the *Crimes Act 1900*. The definitions of “offensive weapon” and “offensive weapon, or instrument” included a dangerous weapon and also included an imitation or replica of an offensive weapon or an instrument, as the case may require.

71 Commenced 23 December 1994.

72 The Hon J P Hannaford, Attorney General, Second Reading Speech, *Crimes (Home Invasion) Amendment Bill*, *Hansard*, Legislative Council, 16/11/94, p 5091.

In 1999 a further amendment to the *Crimes Act* 1900 relevant to selected robbery offences occurred when the common law relating to the definition of “offensive weapon” was codified under s 4 of the *Crimes Act* 1900. The old definition was omitted and replaced by a new definition:⁷³

- “Offensive weapon or instrument’ means:
- a dangerous weapon, or
 - any thing that is made or adapted for offensive purposes, or
 - any thing that, in the circumstances, is used, intended for use or threatened to be used for offensive purposes, whether or not it is ordinarily used for offensive purposes or is capable of causing harm.”

Standard non-parole periods

In 2003 the NSW Parliament created standard non-parole periods for a select range of serious offences under the *Crimes Act* 1900.⁷⁴ The standard non-parole periods for the selected offences must be taken as having been intended for a case “in the middle of the range of objective seriousness”⁷⁵ where the offender was convicted after trial. However, the standard non-parole periods remain relevant as a reference point in cases where the offender entered a guilty plea.⁷⁶ The correct approach is to consider all relevant objective and subjective features, including those listed in s 21A of the *Crimes (Sentencing Procedure) Act* 1999, and any other “matter of settled sentencing law” in order to arrive at a sentence which takes into account the “guidance” provided by the statutory standard non-parole period.⁷⁷ Where a court determines that there are reasons for departing from the standard non-parole period, it remains relevant in the sentencing exercise as a “reference point, or benchmark, or sounding board, or guidepost, along with the other extrinsic aids such as authorities, statistics, guideline judgments and the specified maximum penalty, as are applicable and relevant.”⁷⁸ The offences which carry a standard non-parole period are listed in the table following s 54D. Only one robbery offence, under s 98, is included in the table.

Consequently, if an offence under s 98 of the *Crimes Act* 1900 was committed on or after 1 February 2003 it is subject to Division 1A of Part 4 (ss 54A–54D) of the *Crimes (Sentencing Procedure) Act* 1999⁷⁹ which provides for a standard non-parole period of 7 years.

At the time of writing, the following s 98 robbery cases in the CCA involved the application of this legislation:

R v P [2004] NSWCCA 218

R v Tobar & JAN (2004) 150 A Crim R 104

73 *Crimes Amendment (Offensive Weapons) Act* 1999. Commenced 1 September 1999.

74 Applies only to sentencing for the standard non-parole period offences committed on or after 1 February 2003, the date of the commencement of the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002.

75 *Crimes (Sentencing Procedure) Act* 1999, s 54A(2).

76 *R v Way* (2004) 60 NSWLR 168 in a judgment of the court at [68].

77 *ibid*, at [154]; see also *R v Davies* [2004] NSWCCA 319 per Kirby J at [29].

78 *R v Way*, *ibid*, at [122].

79 Inserted by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002.

R v LLM [2005] NSWCCA 302
R v Mason [2005] NSWCCA 403
R v Misiepo [2005] NSWCCA 405
R v Nightingale [2005] NSWCCA 147
McArthur v R [2006] NSWCCA 200
R v AS [2006] NSWCCA 309
Sternbeck v R [2006] NSWCCA 132
Swan v R [2006] NSWCCA 47
Truong v R [2006] NSWCCA 71

Maximum penalties

The court in *R v Way*,⁸⁰ on the issue of maximum penalties, quoted the Second Reading Speech of the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill:⁸¹

"The first important point of reference which must be considered in the sentencing exercise is the maximum penalty for an offence. The maximum penalty is said to be reserved for the 'worst type of case falling within the relevant prohibition': *Regina v Tait and Bartley* (1979) 46 Federal Law Reports at page 386, the decision of Justices Brennan, Deane and Gallop at page 398. However, as the High Court observed in *Veen (No. 2)* at page 478, this does not mean that 'a lesser penalty must be imposed if it be possible to envisage a worse case ...'. At the other end of the sentencing spectrum lie cases which might be described as the least serious or trivial."

In *R v Brown*⁸² Gleeson CJ stated:

"It is apparent that within that range of offences there may exist an enormous variety of individual facts and circumstances which will accompany the commission of a particular crime. The 'offensive weapon' might be a sawn-off shotgun or it might be a stick. The wounding might result from a bullet in the chest, or it might consist of something only a little more serious than a scratch. A crime which might fall within the provisions of s 98 might be such that, on any view of the matter, the appropriate penalty would be substantially less than the maximum penalty provided by s 94. Indeed, it was common ground, and evidently accepted by the learned trial judge, that the present was just such a case.

It will commonly occur that a judge finds himself called upon to pass sentence for a lesser offence when the facts, as they appear to the judge, would sustain a conviction for a more serious offence. When that happens, the judge is placed in a difficult position because he is obliged to sentence on a basis that involves an element of artificiality. The common law principle is that circumstances of aggravation cannot be relied upon for purposes of sentencing if those circumstances could have been made the subject of a distinct charge of which the offender has not been convicted or to which he has not pleaded guilty."

80 (2004) 60 NSWLR 168 at [49].

81 The Hon R J Debus, Attorney General, Second Reading Speech, Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill, Hansard, Legislative Assembly, 23/10/02, pp 5816–5817. The reported citation for *Veen's* case is *Veen v The Queen (No 2)* (1988) 164 CLR 465.

82 (1989) 17 NSWLR 472 at 473–474.

Alternative verdicts and Pemble's case

It has always been the law that a jury can return a lesser verdict where an element of the offence cannot be proved to the requisite standard. The standard direction is that if the jury find each of the elements of the lesser offence proved beyond reasonable doubt, but are not satisfied that each element in the more serious offence has been proved beyond reasonable doubt, then the jury may find the accused “not guilty” of the more serious offence, and “guilty” of the less serious offence.

However, a significant development in this area of law occurred as a result of the armed robbery case of *R v King*⁸³ in which the CCA held that where there is, on the evidence, a “viable case” of an available verdict of guilty of a lesser offence than that charged, failure to give an appropriate direction can amount to an error of law. Whether a lesser offence should be the subject of a direction depends on the state of the evidence and how the respective cases are presented. A direction is not required where the principal offence is grave and the alternative offence is trifling and remote from the real point of the case.⁸⁴ The effect of the decision in *King* is to extend the application of *Pemble v The Queen*⁸⁵ beyond murder cases.

In *King* the appellant was charged and convicted of robbery with an offensive weapon (a screwdriver) under s 97(1) of the *Crimes Act* 1900. While the appellant admitted taking the money and cigarettes, he denied threatening the victim and challenged the assertion that he was armed. The appellant said that what happened was no more than an unarmed snatch and grab and he did not deny he was guilty of larceny. His defence counsel urged the jury to find larceny. When the issue of directions for alternative verdicts was raised both the defence counsel and the Crown Prosecutor informed the judge that robbery and larceny were alternative verdicts to the charge of armed robbery. The trial judge ruled that the appellant would have “to have been charged on the indictment” to entitle the jury to bring back a verdict of robbery. The jury was not directed that they could convict of robbery if they were not satisfied beyond reasonable doubt that the appellant was armed with an offensive weapon. Thus the trial judge must leave the lesser verdict to the jury irrespective of whether the defence counsel requests such a direction or not. It is not to the point that the Crown has not opened nor relied upon such an alternative verdict.⁸⁶

Application of the De Simoni principle in robbery cases

As discussed above there are five sections under the *Crimes Act* 1900, ss 94–98, which deal with the various forms of robbery offences, and all but one section, s 94, deal with various aggravated forms of the offence. For this reason the principle stated by Gibbs CJ in the robbery case of *The Queen v De Simoni*⁸⁷ has particular relevance:

83 (2004) 59 NSWLR 515; [2004] NSWCCA 20 per Grove J at [5].

84 *ibid*, per Smart AJ at [110].

85 (1971) 124 CLR 107.

86 *R v King* (2004) 59 NSWLR 515; [2004] NSWCCA 20 per Grove J at [5] and Smart AJ at [55].

87 (1981) 147 CLR 383 per Gibbs CJ at 389.

“ ... the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted ... The combined effect of the two principles, so far as relevant for present purposes, is that a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.”

This principle has its foundation in a common law principle, which has been recognised since the early 18th century, that “circumstances of aggravation not alleged in the indictment could not be relied upon for purposes of sentence if those circumstances could have been made the subject of a distinct charge”.⁸⁸

The *De Simoni* principle has been applied in the following selection of CCA robbery cases:

- *R v Brindley*⁸⁹ — the sentencing judge was entitled to take into account the whole of the circumstances in which the offences occurred, including the fact that the assault was committed within a short period of the robbery with striking, so that neither offence was an isolated incident. However, the judge was not entitled to take into account what was obviously clear in the evidence, that the applicant had planned and was aiding and assisting in the first robbery. Nor was the judge entitled to take into account what was also obviously clear on the evidence, that the assault in the second incident was committed by the applicant with an intention to rob.
- *R v Vu*⁹⁰ — it was an error to take into account as a matter of aggravation the wounding of another victim of the robbery by a co-offender when the applicant had not been charged with that offence. It was a quite discrete crime. It was not a case where there were other acts done which clearly aggravated the offence charged, which themselves constituted crimes.
- *R v Grainger*⁹¹ — the applicant had originally been charged with armed robbery (s 97(1)), but the Crown accepted a plea to the lesser offence of robbery simpliciter (s 94). As a result the judge was not entitled to take into account the fact that the applicant was armed with a knife because that rendered the applicant liable to the more serious penalty of 20 years for robbery armed with an offensive weapon (s 97(1)).
- *R v Darkin*⁹² — the applicant was originally charged with robbery with wounding (s 96); however, the charge was not pressed and he was charged with robbery with violence (s 95). Thus the wounding with a knife in the charge which was not proceeded with could not be taken into account against the applicant.

88 ibid, per Gibbs CJ at 389 citing *Dominus Rex v Turner* (1718) 93 ER 435.

89 (1993) 66 A Crim R 204 per Hunt CJ at CL at 206. Being an accessory after the fact to robbery with striking (s 95); assault (s 59).

90 (unrep, 11/11/93, NSWCCA) per Hunt CJ at CL. Armed robbery with wounding (s 98).

91 (unrep, 3/8/94, NSWCCA) per Hunt CJ at CL. Assault with intent to rob (s 94); robbery (s 94).

92 (unrep, 10/9/97, NSWCCA) per Smart J. Two judge bench (Sully J agreeing). Robbery with corporal violence (s 95).

- *R v Forrest*⁹³ — it is not a breach of the *De Simoni* principle when assessing the gravity of the offence of assault with intent to rob (s 94) to take into account the nature of the injuries suffered by the victim during the course of any assault committed by the applicant in the course of intending to rob the victim.
- *R v Malone*⁹⁴ — it is not a breach of the *De Simoni* principle to consider the fact that an offender was armed as an aggravating factor in relation to the offence of robbery in company (s 97(1)).
- *R v Ryan*⁹⁵ — in sentencing for an offence of robbery while armed with an offensive weapon (s 97(1)), it is clearly relevant for a sentencing judge to take into account the nature of the offensive weapon in assessing the object gravity of the offence:⁹⁶

“... a Judge, in sentencing for an offence under s 97(1) in a case where the offensive weapon with which the offender was armed was a dangerous weapon, can take into account the nature of the weapon – for example, that it was a firearm and not, say, a piece of wood – without transgressing the principle of sentencing in *De Simoni*. In so proceeding, the Judge is determining what was the objective gravity of the offence under s 97(1) which the offender committed.”
- *R v Smith*⁹⁷ — the reference in the judge’s sentencing remarks to the fact that the applicant, who was convicted of demanding money with menaces with intent to steal (s 99(1)), had taken \$200 from the victim was an irrelevant consideration for the offence being sentenced. To take into account as an aggravating circumstance the fact that the money was actually taken breached the *De Simoni* principle since it constituted robbery.
- *R v Hooper*⁹⁸ — the sentencing judge did not breach the *De Simoni* principle by taking into account as a circumstance of aggravation the fact that the victim was wounded during the commission of the armed robbery (s 97(2)). Robbery with wounding under s 98 cannot be regarded as more serious than an offence under s 97(2). Both offences have the same statutory maximum penalty. The elements of ss 97(2) and 98 are not the same. Nor are all the elements of a s 97(2) offence included in s 98. A wounding under s 98 may not necessarily involve a serious injury. It may be any injury involving the breaking of the skin.
- *Rend v R*⁹⁹ — the judge breached the *De Simoni* principle by taking into account as an aggravating factor under s 21A(2)(e) of the *Crimes (Sentencing Procedure) Act 1999* that the offence was committed in company. The applicant had been convicted of robbery simpliciter (s 94), not the aggravated offence of robbery in company under s 97(1) which carries a higher maximum penalty.

93 (unrep, 26/3/97, NSWCCA) per Newman J. Two judge bench (Sully J agreeing). Assault with intent to rob (s 94).

94 [2000] NSWCCA 156 per Dowd J at [17]. Two judge bench (Hulme J agreeing). Robbery in company; robbery armed with an offensive weapon (s 97(1)). Cited with approval in *R v Bavadra* (2000) 115 A Crim R 152 per Wood CJ at CL at [35].

95 [2000] NSWCCA 98 per James J. Two judge bench (Abadee J agreeing). Robbery armed with an offensive weapon (s 97(1)).

96 *ibid*, per James J at [34].

97 (2004) 144 A Crim R 577; [2004] NSWCCA 95 per Howie J at [16]. Demand money with menaces with intent to steal (s 99(1)).

98 [2004] NSWCCA 10 per James J at [34]–[38]. Assault with intent to rob armed with a dangerous weapon (s 97(2)).

99 (2006) 160 A Crim R 178 per James J at [103]. Robbery (s 94).

1.2 The historical role of deterrence and the *Henry* guideline

*"The function of the criminal law and the purposes of punishment cannot be found in any single explanation, for it depends both upon the nature and type of offence and the offender. But all purposes may be reduced under the single heading of the protection of society, the protection of the community from crime."*¹⁰⁰

The ultimate and immutable aim of the criminal law is the protection of society. Sir William Blackstone wrote in 1769, "[p]ublic wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community in its social aggregate capacity."¹⁰¹ When certain crimes are committed not only is injury done to the individual, but the crime "strikes at the very being of society, which cannot possibly subsist, where actions of this sort are suffered to escape with impunity." Blackstone illustrated this point by stating that the offence of robbery:¹⁰²

" ... is an injury to *private* property; but were that all, a civil satisfaction in damages might atone for it: the *public* mischief is the thing, for the prevention of which our laws have made it a 'felony, and, until recently, if accompanied with wounding, a' capital offence. In these gross and atrocious injuries the private wrong is swallowed up in the public: and we seldom hear any mention made of satisfaction to the individual; the satisfaction to the community being so great."

Blackstone saw the ultimate goal of human punishments as "a precaution against future offences of the same kind." He believed that this goal could be achieved in three ways: "by the amendment of the offender himself"; "by deterring others by the dread of his example from offending in the like way"; or "by depriving the party injuring of the power to do future mischief." Whichever method was used "the public gains equal security."¹⁰³

As to the quantum of punishment Blackstone observed:¹⁰⁴

" ... the quantity of punishment can never be absolutely determined by any standing invariable rule; but it must be left to the arbitration of the legislature to inflict such penalties as are warranted by the laws of nature and society, and as such appear to be the best calculated to answer the end of precaution against future offences."

The form and quantum of the punishment handed down by the courts have been influenced by the interaction of a variety of factors. These factors include:

- the historical time in which the offence was committed
- moral sense and sophistication of the society in which the offence was committed
- the statutory regimes and precedent governing the offence

¹⁰⁰ *R v Cuthbert* [1967] 2 NSW 329 per Herron CJ at 330. See also *R v Geddes* (1936) 36 SR (NSW) 554 per Jordan CJ at 555.

¹⁰¹ Blackstone, op cit n 26, pp 4–5.

¹⁰² ibid, p 5.

¹⁰³ ibid, p 9.

¹⁰⁴ ibid, p 9.

- the prevalence of the offence at a given point in time
- particular characteristics of the offence or offender
- the way in which judicial discretion is exercised.

The sentencing of robbery offenders in Australia from early colonial times to the present day demonstrates how these factors have influenced the type and quantum of penalties imposed on convicted robbers. Further, it is possible to see the way in which, through the use of severe penalties, the criminal law has sought not only to punish but deter individuals from committing robbery, thereby protecting society from this form of crime.

1.2.1 The colonial period

From almost the first days of settlement the courts of the colony were called upon to pass sentence on offenders convicted of the (then) capital felony of robbery. The unique nature of early colonial NSW and the difficulties faced by sentencing judges at that time is evident in the 1831 bank robbery case of *R v Farrell, Dingle & Woodward*¹⁰⁵ where Dowling J observed:

“ ... New South Wales has, with few exceptions, been exclusively dedicated by the Crown, to the reception and detention as a place of punishment, and reforming of offenders against the laws of the empire. To all intents and purposes it has been treated and regarded as an extensive gaol, and most, if not all, the laws and regulations for its government have been founded on that footing. In no sense of the word has it been, nor can it have been considered as a free Settlement and Colony of Englishmen. In this respect it has been in the lowest grade in which a society of English subjects could be placed to form a community, and differed from every other Colony under the dominion of the British Crown ...

...

In endeavouring to apply even some of the fundamental principles of the common law of England, the Judges of this Court have constantly found themselves obstructed by local difficulties and peculiarities, arising from the character of the inhabitants and the relations produced in the intercourse of a society so compounded. They have been compelled to lay down principles, and adopt resolutions, which would perhaps startle a lawyer in Westminster Hall, but which they have been driven to resort to in order to meet the exigencies [sic] of society, and adopt the principles of British law as far as they were practicable, consistently with the heterogeneous state of the community. A very anxious and responsible duty has thus been cast upon the Judges of this Court. They could have been well pleased, if it were practicable by legislative authority, to declare beforehand what rules and maxims of the common law of England were and what were not applicable to the territory of New South Wales: but as such a legislative declaration might be productive of the greatest inconvenience the Legislature has been pleased to leave a wide discretion to the Judges, to mould the principles and rules of the common law, to the actual state of society, to which the Jurisdiction of this Court extends.”

¹⁰⁵ (1831) 1 Legge 5 at 16–18. Also recorded in the *Sydney Gazette*, 30 July 1831, available at <<http://www.austlii.edu.au/cgi-bin/disp.pl/au/special/NSWSupC/1831/44.html?query=title%28r+%20near+%20farrell%29>>, accessed 20/7/04.

The first criminal trials and a subsequent hanging in NSW took place only one month after the arrival of the First Fleet.¹⁰⁶ This was a critical time in the colony's history; stores and livestock had been lost on the voyage to Australia, and a loss of some of the remaining livestock in the early days of settlement resulted in a premium being placed on the remaining stores.¹⁰⁷ For the settlement to survive and flourish, the deterrent role of the criminal law was vital.

On 27 February 1788, Governor Arthur Phillip convened the second criminal court to hear charges against four convicts charged with conspiring to rob the government store. All four men were found guilty, three were sentenced to death and the fourth was sentenced to receive 300 lashes. However, only the ringleader, Thomas Barrett, was executed. He was hanged from a tree in front of a parade of all convicts at 5 pm on the same day as the sentence was passed. The Governor granted two of his co-offenders a reprieve and they were banished, while the other co-offender who was sentenced to the lash was pardoned.¹⁰⁸ Nagle notes that the trial of these men "was not only to indicate to others the enormity of their crime but also to demonstrate that punishments would be sufficiently severe to deter others from repeating their offence."¹⁰⁹

On 29 February 1788, at an adjourned meeting of the same court, three convicts were tried for robbery of a tent. The trial resulted in one being acquitted, and two being sentenced to death. The two convicts sentenced to death were pardoned on condition of being exiled. On the same day a further two men were tried for the robbery of flour. While both men were found guilty, with one being sentenced to receive 300 lashes and the other being condemned to death, both men were pardoned, the latter on the condition that he become the public executioner.¹¹⁰

Judgments in colonial courts emphasised that the prevalence and seriousness of robbery and the dire consequences the offence had for the community demanded the severest penalties. In the case of *R v Jeffries & Pearce*¹¹¹ in 1833, presided over by Chief Justice Forbes and a Commission of seven military officers, two men were found guilty of "highway robbery, putting in bodily fear and stealing ... two shirts, four waistcoats, two pair of trowsers, and three shillings". The Chief Justice remarked before sentencing the offenders to the "awful sentence of death":

" ... the Court always visited offences of this nature with the extreme penalty of the law, from the frequency of the offence, the open and unprotected state of the country, and the awful results that frequently ensued from such courses."

¹⁰⁶ Governor Arthur Phillip convened the first sitting of the Court of Criminal Judicature in Australia on 11 February 1788. The first hanging was carried out on 26 February 1788. Commonwealth of Australia, Historical records of Australia, Series 1, *Governor's despatches to and from England*, Vol 1, 1788–1796, 1914, Library Committee of the Commonwealth Parliament, Canberra, p 22 and p 716, n 14. See also: F Watson, *The beginnings of government in Australia*, 1913, W A Gullick, Government Printer, Sydney, pp 13–14; J F Nagle, *Collins, the courts and the colony*, 1996, UNSW Press, Sydney, pp 96–98.

¹⁰⁷ Commonwealth of Australia, ibid, p 22 and p 716, n 14. See also Nagle, ibid, p 96.

¹⁰⁸ Commonwealth of Australia, ibid, p 22 and p 716, n 14. See also: Nagle, ibid, pp 97–98; M Clarke, *Old tales of a young country*, 1972, facsimile ed, Sydney University Press, Sydney, p 5.

¹⁰⁹ Nagle, ibid, p 96.

¹¹⁰ ibid, pp 98–99.

¹¹¹ (Supreme Court of NSW, 8 May 1833, Forbes CJ). Source: *Sydney Herald*, 13 May 1833. Available at <http://www.law.mq.edu.au/scnsw/Cases1833-34/html/r_v_jeffries_and_pearce_1833.htm>, accessed 20/7/04.

The penalties available to the courts during this period included: the death penalty,¹¹² a term of transportation to a penal settlement,¹¹³ assignment for a period of servitude, the lash, and a term of hard labour¹¹⁴ in iron gangs on the roads or public works in any part of the colony. Any attempt to obtain clemency through a plea of guilty was discouraged by the judiciary so as not to “prejudice the Jury, who were bound to make up their minds upon the evidence before them, independent of all extrinsic circumstances.”¹¹⁵ If a plea of guilty was entered the judge had no hesitation in requesting the defendant change their plea to not guilty.¹¹⁶ The fact that a convicted robber was a person of tender years did not guarantee a lenient sentence.¹¹⁷

The forms of punishment available at this time sought not only to punish the offender, but also to deter other like-minded people from committing the same or similar offences, thereby protecting the fledgling community and its limited resources. During the 1820s when bushranging was rife, Governor Darling, who was determined to deter others from becoming bushrangers, carried out the execution of a group of men found guilty of robbery in a staged public display. These offenders were thought to be part of a “desperate gang of marauders who had lately been a pest to the interior … spreading terror and desolation among unoffending settlers”.¹¹⁸ It was not until 1853 that legislation was passed that restricted executions to being carried out within the walls of the prison.¹¹⁹

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- 112 In certain circumstances the death penalty was “recorded”. Death recorded meant a formal sentence of death, without an intention that the sentence would be carried out. Pursuant to the *Judgment of Death [Recorded] Act 1823*, s 1, 4 Geo IV c 48, except in cases of murder where an offender was convicted of a felony punishable by death, the judge had considerable discretion in recording a sentence of death. See for example *R v Walker, Barlow & Jackson* (Supreme Court of NSW, 1 May 1834, Dowling J). Source: *Sydney Herald*, 5 May 1834. Available at <http://www.law.mq.edu.au/scnsw/Cases1834/html/r_v_walker_barlow_and_jackson.htm>, accessed 20/7/04. From 1838 the death penalty was only available when “at [the] time of or immediately before or immediately after such robbery, the offender stabbed cut or wounded any person.” It was still possible to be hanged for robbery in 1865. The offences of simple robbery and stealing from the person (picking pockets, cutting of purses) were, after 1838, to be punishable by transportation beyond the seas for 10–15 years: *Robbery and Stealing from the Person Act* adopted into NSW in 1838 as *Offences Against the Person Act*, 1 Vict c 85. See also Woods, op cit n 51, pp 131–132.
 - 113 When transportation was abolished in 1857, a sentence of penal servitude with hard labour was introduced. However, the duration of the punishment could not exceed the period of time for which the offender would have been transported by law.
 - 114 It was not until 1 January 2000 that cosmetic changes to the legislation regarding the term “hard labour” commenced. Pursuant to s 580G of the *Crimes Act 1900* the terms “hard labour” and “light labour” were replaced with reference only to “imprisonment”. Similarly, pursuant to s 580F of the *Crimes Act 1900*, the term “penal servitude” was abolished and replaced with “imprisonment”.
 - 115 The highway robbery case of *R v Baker* (Supreme Court of NSW, 18 August 1828, Forbes CJ). Source: *Sydney Gazette*, 20 August 1828. Available at <http://www.law.mq.edu.au/scnsw/Cases1827-28/html/r_v_baker_1828.htm>, accessed 20/7/04.
 - 116 *R v Baker*, ibid, at n 2 of the commentary at <http://www.law.mq.edu.au/scnsw/Cases1827-28/html/r_v_baker_1828.htm>, accessed 20/7/04.
 - 117 See for example *R v Tolemy, Jones & Kennedy* (Supreme Court of NSW, 16 May 1833, Forbes CJ). Source: *Sydney Herald*, 20 May 1833. The boys were charged with burglary but convicted of larceny. The *Herald* reported that the “young urchins … could scarcely peep over the bar” of the court. Available at <http://www.law.mq.edu.au/scnsw/Cases1833-34/html/r_v_tolemy_and_others_1833.htm>, accessed 20/7/04.
 - 118 *R v Patient, Morrison, Roberts & Mac'Cullum* (Supreme Court of NSW, 2 March 1826). Source: the *Australian*, 9 March 1826. Available at <http://www.law.mq.edu.au/scnsw/html/r_v_patient_morrison_roberts.htm>, accessed 20/7/04.
 - 119 *Carrying out of Capital Punishment Within Prison Walls Act 1853*, 17 Vict No 40. Commenced 4 October 1853.

The legal historian Currey notes of the English criminal law in relation to colonial NSW:¹²⁰

“... no other part of the British Empire had been so directly and continuously affected by the severity of the English Criminal Law ... It had caused the foundation of the settlement and ensured a steady stream of involuntary immigrants ... and it was rigorously applied.”

However, Currey states, “[e]ven more barbarous were the laws made by the local Legislature and the punishments decreed by the local magistracy.” So notwithstanding that the criminal law sought to protect the colony from crime, in some instances the criminal law, its procedures and application became the primary motivation for convicts to escape and turn to robbery.¹²¹

From as early as 1799 robbery in the form of bushranging was a problem in colonial NSW. This was primarily a result of escaped convicts, “bolters”, taking to the bush. Lacking the skills to live off the land the convicts had to resort to robbery in order to survive. Woods notes, “By 1830 there were serious episodes of banditry by bushrangers. These were partly related to the extensive use and misuse of the lash in convict punishment — the arbitrary and unlawful infliction of punishment by settlers in their capacity as magistrates”.¹²² For example, in *R v Webber*¹²³ the offender was asked “what induced him to lead such a wild life; he replied starvation and tyranny in the first instance caused him to take [to] the bush, and now it was impossible to return to society”.

These early bushrangers could be distinguished from later bushrangers, known as the “Wild Colonial Boys” because the latter were for the most part born in the colony, excellent horsemen, expert with firearms and could easily survive off the land. These robbers were free men who became bushrangers by choice. It could be said that the robberies committed by these later bushrangers were committed out of greed, not need. The discovery of gold in NSW and Victoria in the 1850s provided excellent circumstances for these bushrangers to exploit their skills and delinquency.

While bushranging had been a major problem in colonial NSW from the 1820s, by 1830 the problem had escalated to the point where Governor Darling and his Legislative Council, in an effort to control the problem, enacted the *Robbers and Housebreakers Act* 1830, commonly known as the *Bushranging Act* 1830.¹²⁴ The aim of this legislation was not only to suppress robbery and housebreaking, but also to punish those people who harboured or assisted bushrangers and housebreakers.¹²⁵

120 C H Currey, “The influence of the English law reformers of the early 19th century on the law of New South Wales” (1937) 23(4) *Royal Australian Historical Society Journal and Proceedings* 229 at 236.

121 For example: *Robbers and Housebreakers Act* 1830, 11 Geo IV No 10 (the *Bushranging Act*), commenced 21 April 1830; *Offenders’ Punishment and Transportation Act* 1830, 11 Geo IV No 12, commenced 12 May 1830; *Quarter Sessions Act* 1830, 11 Geo IV No 13, commenced 20 May 1830.

122 Woods, op cit n 51, p 77; see also C H Currey, *Sir Francis Forbes*, 1968, Angus & Robinson Ltd, Sydney, pp 449–452.

123 (Supreme Court of NSW, 14 June 1831, Stephen J). Source: *Sydney Herald*, 20 June 1831. Available at <http://www.law.mq.edu.au/scnsw/Cases1831-32/html/r_v_webber_1831.htm>, accessed 25/5/04.

124 *Robbers and Housebreakers Act* 1830, 11 Geo IV No 10. Commenced 21 April 1830. Sources which refer to this statute as the *Bushranging Act* include Woods, op cit n 51, p 444.

125 *R v Smith & McCormick* (Supreme Court of NSW, 21 June 1830, Forbes CJ). Source: *Sydney Gazette*, 22 June 1830, at n 1 of the commentary available at <<http://www.austlii.edu.au/au/special/nwsc/pre1900/1830/46.html>>, accessed 25/5/04.

"The Act was remarkable for its severity, including the following provisions. It allowed any person to arrest any other on suspicion of being an escaped convict. The onus was on the arrested person to prove that he or she was entitled to be at liberty. Those who were found on the roads while armed could be treated in the same way, with the same reversal of the usual onus of proof. Those convicted of robbery or of plundering dwelling houses with force were to be executed on the next day but two after sentencing."

The Act was due to expire in 1834; however, Woods notes that a "failure to renew the provision 'would occasion very great dissatisfaction among the free people of the Colony to deprive them of the protection which this law affords'."¹²⁶ The legislation was renewed a number of times for varying periods,¹²⁷ the last time in 1848.¹²⁸ The Act remained in force until 1853 when it was allowed to lapse.

Despite the severe penalties being handed down by the courts for those people convicted of bushranging the problem continued to escalate. The *Felons Apprehension Act* 1865¹²⁹ was introduced in response to the concerns expressed by authorities and what Woods describes as "a crisis of public anxiety" regarding bushranging. The Act also gave effect to the earlier recommendations of Chief Justice Stephen for an "outlawry" procedure.¹³⁰ The Chief Justice regarded the criminal law as essential for the maintenance of public order, and severity in punishment as vital for its deterrent effect. He described the archetypal bushranger who was operating at the time the *Felons Apprehension Act* 1865 was enacted as a professional robber who was:¹³¹

" ... here without the pretence of excuse or palliation for his lawlessness; that he has had before him every inducement to honesty; that he is the victim of no single instance of oppression, or temptation to crime from poverty; but that all seem to have plunged into habits of pillage, from an innate love of wickedness; and that the worst of these ruffians, certainly the greater number, have been young men — some not of age.

It is worth while to notice, however, that of the many who within the last four years have taken to this way of life, scarcely one — I believe not one — has finally prospered in his vocation, such as it is, or succeeded in escaping arrest and conviction, except by death ... It would be well if those who are said to have followed and all who are disposed to follow, the example of these unhappy men, would take warning by their fate."

126 Woods, op cit n 51, p 78 citing Currey, op cit n 122, p 418.

127 *Robbers and Housebreakers Renewal Act* 1832, commonly known as the *Bushranging Act Renewal Act* 1832, 2 Will IV No 9, 29 February 1832; *Bushranging Act Renewal Act* 1834, 4 Will IV No 14, 8 April 1834; *Transportation Offenders and Suspected Robbers Apprehension Act* 1834, 5 Will IV No 9, 5 August 1834; *Bushranging Act Renewal Act* 1836, 6 Will IV No 17, 1836; *Bushranging Act Renewal Act* 1838, 1 Vict No 2, 13 April 1838; *Bushranging Act Renewal Act* 1840, 3 Vict No 26, 9 June 1840; *Bushranging Act Renewal Act* 1842, 5 Vict No 23, 26 May 1842; *Bushranging Act Renewal Act* 1844, 8 Vict No 5, 9 April 1844; *Bushranging Act Renewal Act* 1846, 9 Vict No 31, 11 June 1846.

128 *Bushranging Act Renewal Act* 1848, 11 Vict No 45, 15 June 1848.

129 28 Vict No 2.

130 Woods, op cit n 51, p 203.

131 Part of a speech entitled "The state of crime — the Felons Apprehension Act" given by Stephen CJ prior to the sitting of the Goulburn Circuit Court on 24 April 1865. Reproduced in *NSW Supreme Court Reports*, Vol IV, 1866, Appendix, pp 6–7.

The *Felons Apprehension Act* 1865 allowed for the shooting dead on sight of armed robbers who had been declared “outlaws” by authorities. Further, anyone convicted of harbouring a felon could face up to 15 years hard labour.¹³² Following the introduction of this Act a number of high-profile bushrangers, including Ben Hall, Charlie Gilbert, Johnny Dun and Fred Ward (Captain Thunderbolt), were declared outlaws and either shot dead, mortally wounded or sentenced to long terms of imprisonment.¹³³

On 29 May 1867 Chief Justice Stephen passed sentence on two bushrangers, Thomas and John Clarke, who had been convicted of murder.¹³⁴ His Honour stated that the sentences of death he was about to pass were not sentences of retribution, but rather sentences aimed at deterrence:

“ … the taking of your life is believed to be necessary for the peace and good order, for the safety as well as the welfare of the community; because of the example and warning that a capital execution may hold out to others to restrain them from committing similar crimes for which you stand convicted. This is the principle upon which all our punishment — certainly the punishment of death — rests, or it has no justification whatsoever.”

The Chief Justice went on to express the attitude of the court towards bushrangers, their crimes and those who sympathise with them:¹³⁵

“Much as I dread crime, and much as I have had to do with the punishment of criminals, I don’t know anything in the world that could furnish such a long list of horrors as that which I have laid before the Court to-night. And yet these bushrangers, the scum of the earth, the lowest of the low, the most wicked of the wicked, are occasionally held up for our admiration! But better days are coming. It is the old leaven of convictism not yet worked out, but brighter days are coming. You will not live to see them, but others will. Others who may think commencing a course of crime like yours may rely on it that better days are coming, and that there will be no longer that expression of sympathy with crime which sometime since disgraced the country, and sunk it so low in the estimation of the world.”

While the emphasis was on deterrence through the use of the death penalty, there were many occasions when, upon conviction for a further felony committed in the colony, an offender’s sentence of death was commuted to transportation to another colony for life or a lesser term, in the hope that the offender would have the opportunity to reform.¹³⁶ However, such were the conditions in penal colonies of Norfolk Island and Moreton Bay that many capital convicts transported to these penal settlements had cause to wish that

¹³² Woods, op cit n 51, p 204.

¹³³ Report of the trial of Thomas and John Clarke, 28 May 1867, *Sydney Morning Herald*, 29 May 1867.

¹³⁴ At the time of the trial on 28 May 1867, the police had gathered a list of charges for offences committed in the last two years against Thomas Clarke: excluding the murder of five police constables, there were nine robberies of the mails and 36 robberies of individuals. The offences committed by John Clarke, committed in the last year and mostly in company with his brother, excluding murders were 26 robberies. Both men were hanged at Darlinghurst gaol on 25 June 1867. Report of the trial in the *Sydney Morning Herald*, 29 May 1867.

¹³⁵ ibid.

¹³⁶ Transportation of offenders to another colony was authorised by the *Offenders’ Punishment and Transportation Act* 1830, 11 Geo IV No 12. Commenced 12 May 1830. This Act was replaced by the *Offenders’ Punishment and Justices Summary Jurisdiction Act* 1832, 3 Will IV No 3. Commenced 24 August 1832.

the original sentences of death had been carried out. Some offenders banished to Norfolk Island committed further crimes that would guarantee a death sentence, thereby escaping the unendurable conditions present on the island.¹³⁷

1.2.2 The post-colonial period

The courts in the post-colonial period continue to reflect Blackstone's comments, stressing in their judgments the importance of the interrelated elements of the protection of society, severe penalties,¹³⁸ deterrence¹³⁹ and community expectations.¹⁴⁰ In *R v Hall*¹⁴¹ Gleeson CJ stated, “[t]he reason why the criminal law exists is so people can walk along the street without fear of being attacked and robbed.” Society relies on the courts to teach, through the procedures of the criminal law, certain minimum standards of morality and behaviour. The courts act as an agency for the expression of public indignation and condemnation and are a means of producing cohesion within society.¹⁴²

While the more draconian forms of punishment discussed earlier are no longer available on a conviction for robbery, the public's continuing concern with the seriousness of this offence, the violence often associated with it, its effect on victims,¹⁴³ and the community's expectations of severe sentences¹⁴⁴ have resulted in Parliament increasing penalties for robbery offences.¹⁴⁵

In *R v Haining & Barratt*¹⁴⁶ Street CJ observed:

“It is notorious in the community that armed robberies take place, or are attempted, all too frequently, on occasions accompanied by physical violence and, indeed, sometimes by wounding or even killing. And it is, or should be, notorious that the courts will take a heavy-handed approach in the matter of sentencing persons who take part directly or indirectly in crimes such as these. So far from assenting to the claim that the present sentences exceed what should ordinarily be expected in crimes such as these, we are of the view that the prevalence of armed robbery in the community requires a firm stand to be taken by the courts. The legislature in 1966 increased the maximum penalty for this offence to 20 years. Criminals engaging in armed robbery, whether the proceedings be large or small ... can expect to receive long gaol terms at the hands of the courts.”

137 See *R v Douglas* (Supreme Court of NSW, 14 July 1834, Burton J). Source: *Sydney Gazette*, 27 September 1834. Available at <http://www.law.mq.edu.au/scnsw/Cases1834/html/r_v_douglas_and_others_1834.htm>, accessed 24/5/04.

138 This means in the case of armed robbery offences a full-time custodial sentence “except in the most exceptional circumstances”: *R v Readman* (1990) 47 A Crim R 181; *R v Roberts, Lewis & McVean* (1994) 73 A Crim R 306.

139 *R v Readman*, ibid; *R v Thwaites* (unrep, 6/10/93, NSWCCA).

140 See for example: *R v Geddes* (1936) 36 SR (NSW) 554; *R v Haining & Barratt* (unrep, 3/7/75, NSWCCA); *R v Petrinovic* (unrep, 18/9/90, NSWCCA).

141 (unrep, 28/9/95, NSWCCA) following Gleeson CJ's observations in *R v Ranse* (unrep, 8/8/94, NSWCCA).

142 *Director of Public Prosecutions v Coleman* (2001) 120 A Crim R 415 per Tadgell JA at [14].

143 See for example *Cheng Fung Pty Ltd v Heloui* [2005] NSWCA 222. This was a negligence case which involved the duty of care owed by an employer to an employee, in this case a pizza delivery driver, and the psychological impact the robbery had on the employee.

144 *R v Williscroft* (1975) VR 292; *R v Broxham* (unrep, 3/4/86, NSWCCA).

145 In 1966 and 1994 with the *Crimes (Amendment) Act 1966* and the *Crimes (Home Invasion) Amendment Act 1994*.

146 (unrep, 3/7/75, NSWCCA) per Street CJ.

Traditionally, the NSW courts, when pronouncing sentence on those persons who have been convicted of breaking the law, have relied on the penalties prescribed by Parliament which reflect the views of society regarding the offence, and the authority of the common law to provide the justification for the penalty imposed.¹⁴⁷

In *Veen v The Queen (No 2)*¹⁴⁸ the High Court said of the sentencing process:

“... sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.”

In *R v Engert*,¹⁴⁹ Gleeson CJ expanded on this statement:

“Sentencing is essentially a discretionary exercise requiring consideration of the extremely variable facts and circumstances of individual cases and the application to those facts and circumstances to the principles laid down by statute or established by the common law. The principles to be applied in sentencing are in turn developed by reference to the purposes of criminal punishment. Those purposes were set by the High Court in *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 476 as follows:

‘... protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform’.

A moment's consideration will show that the interplay of the considerations relevant to sentencing may be complex and on occasion even intricate. In a given case, facts which point in one direction in relation to one of the considerations to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance. That was the particular problem being examined by the Court in the case of *Veen (No 2)*. Again, in a particular case, a feature which lessens what might otherwise be the importance of general deterrence, might, at the same time increase the importance of deterrence of the offender.”

The mercy of the court

In both the colonial and post-colonial periods there have been instances where deterrence has assumed a secondary role because particular circumstances of the offence or offender have warranted a less severe sentence being imposed with the aim of reforming and rehabilitating the offender.

¹⁴⁷ *R v Radich* [1954] NZLR 86 at 87, cited with approval and applied in: *R v Cooke & Woolmington* (1955) 72 WN (NSW) 132 at 135–136; *R v Herring* (1956) 73 WN (NSW) 203 at 205; *R v Cuthbert* [1967] 2 NSWR 329 at 333; *R v Rushby* [1977] 1 NSWLR 594 at 597.

¹⁴⁸ (1988) 164 CLR 465 per Mason CJ, Brennan, Dawson and Toohey JJ (in a joint judgment) at 476.

¹⁴⁹ (1995) 84 A Crim R 67 per Gleeson CJ at 68.

In the colonial period a death sentence could be commuted to transportation for life. For example, in *R v Walker, Barlow & Jackson*,¹⁵⁰ because of the youth of the offenders and the fact that no violence was used in the robbery, in an exercise of the court's mercy the judge, acting on the humane recommendations of the jury, ordered that sentence of death be recorded against the offenders.¹⁵¹

Similarly, in the post-colonial period rehabilitation may, depending on the facts of the particular matter, take precedence over deterrence, resulting in a less severe penalty than would otherwise be the case. Again this may occur where, for example, it is the case that the offender is young¹⁵² or mentally ill¹⁵³ or has demonstrated significant progress towards rehabilitation.¹⁵⁴

In *R v Osenkowski*¹⁵⁵ King CJ said:

"There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform."

Despite the earlier amendments to the *Crimes Act 1900*,¹⁵⁶ which resulted in increased penalties for robbery offences, by the late 1990s the problem of lenient and inconsistent sentences being handed down by courts in armed robbery matters remained. These sentences were often a direct consequence of judges failing to observe "the fundamental rule that a sentencing judge should not permit the subjective features of a particular prisoner to overshadow the objective seriousness of the case".¹⁵⁷ As a result, in March 1999 the CCA heard a collection of appeals from armed robbery sentences and the Crown submitted that it was appropriate to promulgate a guideline judgment for armed robbery offences under s 97 of the *Crimes Act 1900*.¹⁵⁸ It was hoped that the resulting sentencing guidelines, as a mechanism for structuring but not restricting the discretion of sentencing judges, would remedy the unsatisfactory trends in sentencing for robbery, particularly in relation to the imposition of non-custodial sentences in cases which could not be characterised as "most exceptional".

150 (Supreme Court of NSW, 1 May 1834, Dowling J). Source: *Sydney Herald*, 5 May 1834. Available at <http://www.law.mq.edu.au/scnsw/Cases1834/html/r_v_walker_barlow_and_jackson.htm>, accessed 24/5/04.

151 See n 112 where the concept of "death recorded" is explained.

152 *R v Pham & Ly* (1991) 55 A Crim R 128.

153 *R v Scognamiglio* (1991) 56 A Crim R 81; *R v Letteri* (unrep, 18/3/92, NSWCCA); *R v Engert* (1995) 84 A Crim R 67; *R v Fahda* [1999] NSWCCA 267; *R v Israil* [2002] NSWCCA 255.

154 For example: *R v Murray* (unrep, 11/9/86, NSWCCA); *R v Silver* [1999] NSWCCA 108; *R v Govinden* (1999) 106 A Crim R 314.

155 (1982) 30 SASR 212 at 212–213. See also *R v Kingsbeer* (unrep, 29/7/88, NSWCCA).

156 The *Crimes (Home Invasion) Amendment Act 1994*. This Act introduced s 97(2) into the *Crimes Act 1900* in addition to a number of other offences designed to ensure that increased penalties applied where dangerous weapons were used and where there were circumstances of aggravation and circumstances of special aggravation.

157 *R v Roberts, Lewis & McVean* (1994) 73 A Crim R 306 per Hunt CJ at CL at 311. See also *R v Vu* (unrep, 11/11/93, NSWCCA).

158 Seven appeals were heard in the matters of Henry, Barber, Tran, Silver, Tsoukatos, Kyroglou and Jenkins. Six of the appeals were Crown appeals and one was a severity appeal. All of the appeals involved the offence of armed robbery under s 97(1), except one Crown appeal involving the aggravated offence under s 97(2).

1.2.3 The *R v Henry* guideline judgment

In *R v Henry*¹⁵⁹ the CCA identified a category of armed robbery case under s 97 of the *Crimes Act* 1900 which was sufficiently common for the purposes of determining a guideline. The typical robbery case outlined by Spigelman CJ contained seven characteristics:¹⁶⁰

- (i) Young offender with no or little criminal history;
- (ii) Weapon like a knife, capable of killing or inflicting serious injury;
- (iii) Limited degree of planning;
- (iv) Limited, if any, actual violence but a real threat thereof;
- (v) Victim in a vulnerable position such as a shopkeeper or taxi driver;
- (vi) Small amount taken;
- (vii) Plea of guilty, the significance of which is limited by a strong Crown case."

His Honour emphasised that the court did not propose a starting point for a sentence in a case which contained these characteristics, rather it proposed "a narrow sentencing range" of between 4 and 5 years for the full term within which the court would expect sentences in such cases to fall.¹⁶¹ There were two reasons why a sentencing range was appropriate for this offence:¹⁶²

- (i) The seven characteristics identified above do not represent the full range of factors relevant to the sentencing exercise.
- (ii) Many of the seven identified characteristics contain within themselves an inherent variability, for example, different kinds of knives or weapons in (ii); extent of 'limited actual violence' in (iv); degree of vulnerability in (v); amount in (vi)."

However, the sentencing range of 4–5 years was to be regarded only as a starting point, as aggravating and mitigating factors could justify a sentence falling above or below the range. Other factors such as youth, assistance to authorities, steps taken towards rehabilitation, criminal record and abuse of conditional liberty would also have an effect on the sentence. Spigelman CJ then identified a number of circumstances which are particular to the offence of armed robbery including:¹⁶³

- (i) Nature of the weapon
- (ii) Vulnerability of the victim
- (iii) Position on a scale of impulsiveness/planning
- (iv) Intensity of threat, or actual use, of force
- (v) Number of offenders
- (vi) Amount taken
- (vii) Effect on victim(s)."

¹⁵⁹ (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.

¹⁶⁰ *ibid*, per Spigelman CJ at [162].

¹⁶¹ *ibid*, per Spigelman CJ at [163] and [165]. His Honour then identified cases consistent with the proposed range at [166], cases above the range to varying degrees at [167] and cases below the range being sentences between 2 and 3.5 years at [168].

¹⁶² *ibid*, per Spigelman CJ at [164].

¹⁶³ *ibid*, per Spigelman CJ at [170].

1.2.4 The implications of the armed robbery guideline for other robbery offences and particular offenders

Subsequent decisions of the CCA have held that the *Henry* guideline judgment is not restricted to armed robbery offences under s 97 of the *Crimes Act* 1900. It is also applicable in other circumstances.

Robbery in company

In *R v Murchie*,¹⁶⁴ Simpson J stated:

"The legislature has prescribed the same maximum penalty for robbery in company as it has prescribed for armed robbery. I consider that the guideline promulgated by this Court in relation to armed robbery offences is equally applicable to offences of robbery in company which can be seen as broadly equivalent. I would therefore proceed on the basis that the sentence promulgated in *Henry* in relation to offences of armed robbery provides equally a guideline in relation to offences of robbery in company. Of course, as was stressed in *Henry* and *Jurisic* (1998) 45 NSWLR 209; 101 A Crim R 259, a guideline sentence is precisely that and is not to be applied inflexibly."

Assault with intent to rob

In *R v Stanley*,¹⁶⁵ Sully J observed:

"... Parliament has legislated in a way that makes, plainly and precisely, the offence of assault with intent to rob a 'robbery-type offence'; and an offence liable to the same maximum penalty as is made applicable to each of the other 'robbery-type' offences with which it is specifically linked by section 97.

Secondly, there is, in my opinion, no reason either of principle or of logic why the considerations which are enumerated by the Chief Justice in paragraph 162 of his Honour's judgment in *Henry* should not apply mutatis mutandis to the section 97 offence of assault in company with another and with intent to rob. In such a case the consideration (ii) would not normally be relevant; but the remaining six nominated characteristics would be very much in point. It is, of course, both relevant and important to keep always in mind the Chief Justice's warnings that the nominated characteristics are not definitive in any individual case; and that in every individual case the proper weight must be given to the particular circumstances of that case."

Aid and abet armed robbery

In *R v Goundar*,¹⁶⁶ Wood CJ at CL stated:

"The offence was one for which the guideline judgment in *Henry* (1999) 46 NSWLR 346; 106 A Crim R 149 also had a relevance, subject to some qualification in relation to the strength of the Crown case. All of the features of that case for which the guideline was intended were here present.

¹⁶⁴ (1999) 108 A Crim R 482 per Simpson J at [20] (Smart AJ agreeing). Although *Murchie* was a two judge bench decision it was applied in *R v Poihipi* [2001] NSWCCA 306 per Mason P at [31] and *R v Miski* [2006] NSWCCA 178 per McClellan CJ at CL at [34].

¹⁶⁵ [2003] NSWCCA 233 per Sully J at [13]–[14]. Applied in *R v Lesi* [2005] NSWCCA 63 per Grove J at [29].

¹⁶⁶ (2001) 127 A Crim R 331 per Wood CJ at CL at [37]–[38].

There was no reference by his Honour to this decision and the inference arises, both from that circumstance and from the gulf between the guideline of four to five years imprisonment there proposed, and the sentence here imposed that his Honour erroneously considered it to have no relevance to the case of a[n] aider and abettor.”

Sentencing of children for armed robbery

In *R v SDM*,¹⁶⁷ Wood CJ at CL held that neither *R v Sua*¹⁶⁸ or *R v RLS*¹⁶⁹ should be taken to state any general principle as to the applicability or non-applicability of guideline judgments to juvenile offenders:

“When it is remembered that the guideline sentence promulgated in *R v Henry* is non prescriptive and has inbuilt a high degree of elasticity, the applicant’s argument, it seems to me, evaporates. The youth of an offender is a relevant factor in the sentencing consideration, to be given the appropriate weight, together with all other relevant factors.

To the extent that it may be thought that the court either in *R v Sua* or *R v RLS* intended to exclude the application of guideline sentences (whether in relation to offences of armed robbery, or any of the other offences which have been the subject of guideline judgments) to children, I respectfully consider them to have overstated the position. It is, in any event, to be borne in mind that each was a judgment of a bench of this Court constituted by two judges in accordance with s 6AA of the *Criminal Appeal Act 1912*, s 6AA(2) of which envisages that disputed issues of general principle will not be decided by the court so constituted. In my opinion neither of the benches in question intended to state any general principle as to the applicability or non-applicability of guideline judgments to juvenile offenders and should not be read as having done so.”

Not a principal offender — joint criminal enterprise — common purpose

In *R v Donovan*,¹⁷⁰ Hidden and Greg James JJ observed:

“It would have been appropriate for his Honour to have regard to the *Henry* guideline, although it should be borne in mind that that guideline does not expressly deal with a person who is not the principal offender and whose criminal liability is founded upon the doctrine of joint criminal enterprise or common purpose.”

A starting point for sentences under s 98

In *R v Campbell*,¹⁷¹ Dunford J considered the approach of the sentencing judge to an offence under s 98:

“As his Honour correctly acknowledged, the starting point in a matter such as this is the guideline judgment in *R v Henry* [1999] NSWCCA 111, (1999) 46 NSWLR 346, although his Honour correctly acknowledged that that was a case under s 97(1); namely, robbery

¹⁶⁷ (2001) 51 NSWLR 530 at [42]–[43].

¹⁶⁸ [2000] NSWCCA 94.

¹⁶⁹ [2000] NSWCCA 175.

¹⁷⁰ [2003] NSWCCA 324 per Hidden and Greg James JJ (in a joint judgment) at [26].

¹⁷¹ [2000] NSWCCA 157 per Dunford J at [21].

armed with an offensive weapon or in company and it carries a maximum of twenty years imprisonment, whereas this offence is under s 98 and carries a maximum of twenty-five years imprisonment. It also involves the additional elements of assault or wounding a person and, therefore, generally the range of penalties should be higher than the penalties for offences under s 97(1)."

1.2.5 *Henry* and the purposes of punishment

The debate about deterrence

In the opinion of Spigelman CJ one of the functions of sentencing guidelines is that of deterrence. Sentencing guidelines act as a deterrent by informing the "public at large and potential offenders in particular 'in advance' that offences of a particular kind are likely to lead to a particular level of sentence."¹⁷² The Chief Justice stated that:¹⁷³

" ... the courts must continue to act on the basis that punishment deters and that, within limits of tolerance, increased punishment has a corresponding effect by way of deterrence. This is a structural feature of the common law, in its application to criminal justice. Legislation would be required to change the traditional approach to this matter."

In the later guideline judgment of *R v Wong & Leung*,¹⁷⁴ Spigelman CJ again emphasised "the fact that penalties operate as a deterrent is a structural assumption of the criminal justice system" but that "[d]eterrence only works to the extent to which knowledge is transmitted to potential offenders about actual sentencing practice."¹⁷⁵

While the legislature and courts have long believed general and specific deterrence can be achieved through the use of heavier penalties, this approach has not been without its critics.¹⁷⁶

The NSW Law Reform Commission in its discussion paper on sentencing recognised that the focus on a particular goal or goals of sentencing will vary from time to time, reflecting changes in society and community perceptions.¹⁷⁷ Nevertheless, the Australian Law Reform Commission¹⁷⁸ notes that the justification for deterrent sentences as a method for preventing future crime has been questioned on a number of grounds:

- There is doubt about the extent to which, empirically, punishment actually prevents the commission of future offences.

¹⁷² The Honourable J J Spigelman, Chief Justice of NSW, "Address to the National Conference of District and County Court Judges", 24 June 1999. Available at <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_240699>, accessed 21/7/04.

¹⁷³ *ibid*.

¹⁷⁴ (1999) 48 NSWLR 340.

¹⁷⁵ *ibid*, per Spigelman CJ at [127]–[128].

¹⁷⁶ B Weston, "Keeping one step ahead", in Challinger, *op cit* n 7, p 98; J McGuire, "Deterrence in sentencing: handle with care" (2005) 79 *Australian Law Journal* 448.

¹⁷⁷ NSW Law Reform Commission, *Sentencing*, Discussion paper 33, 1996, NSW Law Reform Commission, Sydney, at 3.23.

¹⁷⁸ Australian Law Reform Commission, *Sentencing*, ALRC Report No 44, 1988, Sydney, at [37].

- Assuming that punishment does deter, it is argued that it is the threat of detection and resulting punishment (in some form), rather than the level of punishment, which deters the offender. If so, then it follows that a positive deterrent response (for example, by setting higher penalties) achieves little or nothing in terms of the incidence of crime.
- Accounting for deterrence, particularly general deterrence, in setting punishment can be seen as unjustly punishing the offender for what others might do, as opposed to what the offender has in fact done (“scapegoating”).
- There is considerable doubt as to the efficacy of the communication of the penalties to the wider audience upon which the general deterrence depends.

The statutory enactment of the purposes of punishment

In NSW it is no longer necessary for the courts to rely on the common law for a statement of the purposes of punishment in guiding their sentencing decisions. In 1996 the NSW Law Reform Commission in its report on sentencing concluded that although the purposes of punishment should be identified in legislation they should not be placed in any hierarchy.¹⁷⁹ In 2002 s 3A was inserted into the *Crimes (Sentencing Procedure) Act 1999*¹⁸⁰ outlining the purposes of sentencing. In addition to the traditional purposes discussed above, this section also included four additional purposes of sentencing:

- s 3A(c) “to protect the community from the offender”
- s 3A(e) “to make the offender accountable for his or her actions”
- s 3A(f) “to denounce the conduct of the offender”
- s 3A(g) “to recognise the harm done to the victim of the crime and the community”.

Initially it was unclear what effect s 3A would have on the common law approach. In the Attorney General’s Application Under s 37 of the *Crimes (Sentencing Procedure) Act 1999* (No 2 of 2002),¹⁸¹ while no submissions were received by the court relating to the impact of s 3A, Spigelman CJ observed:¹⁸²

“It is arguable that some of the ‘purposes of sentencing’ which must now guide sentencing decisions constitute a change of pre-existing sentencing principle.

For example, ‘prior’ case law refers to the role of sentencing to protect the community, but that objective was often said to be achieved by means of rehabilitation, deterrence or retribution. Section 3A(c) now suggests that this should be regarded as a separate ‘purpose’ and one concerned with protection of the community ‘from the offender’.

It may also be arguable that [s 3A(e)] — making the offender ‘accountable’ — introduces a new element into the sentencing task. The same may be true of the reference to ‘harm’ to ‘the community’ in s 3A(g). ”

¹⁷⁹ NSW Law Reform Commission, op cit n 177, p 57.

¹⁸⁰ The *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* amended the *Crimes (Sentencing Procedure) Act 1999*. Commenced 1 February 2003.

¹⁸¹ [2002] NSWCCA 515 per Spigelman CJ; Wood CJ at CL, Grove, Sully and James JJ agreeing.

¹⁸² ibid, per Spigelman CJ at [57]–[59].

Finally, more recently in *R v MMK*¹⁸³ the CCA held that:

“ ... the purposes of punishment have to be promoted within the limits of over-arching fundamental principles of sentencing derived from the common law. After all s 3A is largely a codification and elaboration of the purposes of punishment derived from the common law and which can be found enunciated in judgments of this and other appellate Courts long before the section was introduced: see *R v MA* [2004] NSWCCA 92.”

¹⁸³ [2006] NSWCCA 272 in a judgment of the court at [10].

1.3 Prevalence of robbery offences

*"General deterrence and retribution are elements that must assume greater importance when the crime in question is a serious one, has been committed in a particularly grave form, and its contemporary prevalence is the cause of considerable community disquiet."*¹⁸⁴

From colonial times¹⁸⁵ until the present time¹⁸⁶ the courts in NSW have regarded robbery as a particularly serious offence that threatens both property and persons. The prevalence of such a serious offence and the need to protect the community from its effects have attracted the imposition of severe sentences,¹⁸⁷ with the focus of the punishment for robbery primarily on general deterrence¹⁸⁸ and retribution.

In *R v Broxham*,¹⁸⁹ Carruthers J noted of the offence of robbery:

"The prevalence of the offence in respect of which the applicant was sentenced is a matter of grave social concern ... It is now well-recognised that the victims of such armed robberies or attempted armed robberies may suffer devastating psychological damage consequent upon the trauma necessarily involved with the commission of such offences. In these circumstances sentencing judges would be recreant to the trust which the community places in them, if they were not to impose sentences consistent with the seriousness and prevalence of such offences."

In *R v Henry*,¹⁹⁰ the Crown presented evidence of the prevalence of armed robbery offences in support of the application for the guideline judgment. Spigelman CJ acknowledged that the prevalence of an offence is a relevant consideration when deciding on an appropriate level of sentence¹⁹¹ and had been a reason for establishing guideline judgments in England.¹⁹²

184 *R v Williscroft* [1975] VR 292 at 299.

185 *R v Jeffries & Pearce* (Supreme Court of NSW, 8 May 1833, Forbes CJ). Source: *Sydney Herald*, 13 May 1833. Available at <http://www.law.mq.edu.au/scnsw/Cases1833-34/html/r_v_jeffries_and_pearce_1833.htm>, accessed 20/7/04.

186 See for example: *R v Murray* (unrep, 11/9/86, NSWCCA); *R v Kingsbeer* (unrep, 29/7/88, NSWCCA); *R v Valentini* (1989) 46 A Crim R 23; *R v Moffitt* (1990) 20 NSWLR 114; *R v Readman* (1990) 47 A Crim R 181; *R v Diamond* (unrep, 18/2/93, NSWCCA); *R v Roberts, Lewis & McVean* (1994) 73 A Crim R 306; *R v Henry* (1999) 46 NSWLR 346.

187 See for example: *R v Patient, Morrison, Roberts & Mac'Cullum* (Supreme Court of NSW, 2 March 1826); *R v Jeffries & Pearce* (Supreme Court of NSW, 8 May 1833); *R v Haining & Barratt* (unrep, 3/7/75, NSWCCA); *R v Williscroft* [1975] VR 292; *R v Broxham* (unrep, 3/4/86, NSWCCA); *R v Murray* (unrep, 11/9/86, NSWCCA); *R v Moffitt* (1990) 20 NSWLR 114; *R v Pham & Ly* (1991) 55 A Crim R 128; *R v Tran* [1999] NSWCCA 109; *R v Henry* (1999) 46 NSWLR 346 (and the authorities referred to therein); *R v Sharma* (2002) 54 NSWLR 300.

188 See for example: *R v Cuthbert* [1967] 2 NSWWR 329; *R v Readman* (1990) 47 A Crim R 181; *R v Sharma* (2002) 54 NSWLR 300.

189 (unrep, 3/4/86, NSWCCA), cited with approval in *R v Bavadra* (2000) 115 A Crim R 152. In this matter the offence was "assault with intent to rob whilst armed".

190 (1999) 46 NSWLR 346.

191 *ibid*, per Spigelman CJ at [86] citing a line of Australian authority for the principle.

192 *ibid*, per Spigelman CJ at [86] citing the English cases of *R v Cunningham* [1993] 2 All ER 15 at 17–19 and *R v Brewster* (1998) 1 Cr App R 220 per Lord Bingham at 224.

His Honour explained that prevalence:¹⁹³

“ ... may refer to a situation in which a particular crime occurs with such frequency that it has a salience beyond the persons immediately affected by the crime and, accordingly, impacts on society by changing patterns of behaviour out of a sense of apprehension. None of the material presented by the Crown to this Court suggests that armed robbery is ‘prevalent’ in this sense ...”

Rather what the Crown sought to prove was that the incidence of this particular crime had increased over recent years, so that the objective of general deterrence was entitled to greater weight than it might have hitherto received.”

The Crown’s submission contained statistical data¹⁹⁴ relating to four time periods: 1982–1989, 1991–1993, 1994–1995 and 1995–1997. The data revealed that the only period that suggested “any changes of statistical significance” was the period 1995–1997.¹⁹⁵ In that period the *NSW Recorded crime statistics* showed “there was a significant increase in the number of armed robberies involving a weapon other than a firearm.” For these types of robberies the rate per 100,000 population increased from 30.5 in 1996 to 53.9 in 1997.¹⁹⁶

Spigelman CJ observed that these figures should be treated with caution in light of the other statistical evidence, which did not show any statistically significant changes in the figures for these time periods.¹⁹⁷ Nonetheless, the observed increase was entitled to weight in considering whether it was appropriate to issue a guideline judgment, and if so “what change with respect to past sentencing practice is appropriate.”¹⁹⁸

More recently in *R v House*,¹⁹⁹ a case where the applicant challenged a sentencing judge’s finding about the prevalence of robbery as a factor at sentencing, Wood CJ at CL referred to previous statements of the court²⁰⁰ relating to the prevalence of an offence and in particular to what Spigelman CJ said in *R v Sharma*:²⁰¹

“Armed robberies of the character involved in the present proceedings, committed by young persons, generally with an addiction problem, are so prevalent that the objective of general deterrence is entitled to significant weight in the process of sentencing for this offence, notwithstanding the youth of the typical offender.”

Wood CJ at CL in *R v House*²⁰² found that there was no error in the sentencing judge’s statements about the prevalence of robbery, observing that:

“It may be acknowledged that, where a sentencing judge does approach a sentencing exercise upon the basis that the increasing prevalence of a particular crime calls for an increase in the preceding pattern of sentencing, then counsel should be warned so that they can deal with

193 *R v Henry*, ibid, per Spigelman CJ at [87]–[88].

194 From the NSW Bureau of Crime Statistics and Research, including *NSW Recorded crime statistics*, *NSW Criminal court statistics* and victim surveys.

195 *R v Henry* (1999) 46 NSWLR 346 per Spigelman CJ at [89].

196 ibid, per Spigelman CJ at [90].

197 ibid, per Spigelman CJ at [93].

198 ibid, per Spigelman CJ at [93].

199 [2005] NSWCCA 88 per Wood CJ at CL at [21]–[25].

200 *R v Broxham* (unrep, 3/4/86, NSWCCA) and *R v Stefanovski* (unrep, 9/6/94, NSWCCA).

201 (2002) 54 NSWLR 300 per Spigelman CJ at [74].

202 [2005] NSWCCA 88 per Wood CJ at CL at [23]–[24].

the issue: *R v Downie* (1988) 2 VR 517 at 522–3. Moreover, before coming to any such finding the judge would need to be satisfied, upon the basis of proper and sufficient evidence, that the factual assumption justifying such an increase is correct.

Normally such an exercise is better reserved for this Court by way of a guideline judgement such as *R v Henry* where that kind of analysis was in fact made.”

1.3.1 Incidence and prevalence of robbery in the community since the *Henry* guideline (1999–2005)

The following discussion outlines the way in which criminal incidents reports²⁰³ and recorded crime victimisation reports²⁰⁴ are used to describe the incidence and prevalence of robbery offences over a seven-year period for the calendar years 1999–2005. Both sets of figures use the Australian Standard Offence Classification (ASOC)²⁰⁵ to group offences. Crime victim surveys²⁰⁶ also shed light on the incidence and prevalence of robbery in Australia. The definition of robbery used in the crime victim surveys was “[a]n incident where someone stole (or tried to steal) property from a respondent by physically attacking them or threatening them with force or violence.”²⁰⁷

As previously mentioned, statistical data placed before the CCA during the hearing for the guideline judgment showed that the incidence and prevalence of robbery, and in particular armed robbery involving a weapon other than a firearm, increased significantly in the period 1995–1997. Recorded crime statistics since have shown that the incidence and prevalence of robbery in NSW continued to rise until 2001 before falling dramatically in 2002.²⁰⁸

Recorded crime victimisation reports show that the national prevalence rates for robbery, expressed as a rate per 100,000 population, increased from 119.4 in 1999 and peaked at 137.0 in 2001 before falling dramatically to 106.9 in 2002. Prevalence rates continued to fall in 2003 (99.2) and 2004 (82.2). In 2005 the prevalence of robbery in Australia was steady at 82.6 per 100,000 population.

²⁰³ Crimes recorded by NSW Police and published annually by NSW Bureau of Crime Statistics and Research: *New South Wales Recorded crime statistics 1999–2005, 2000–2006*, NSW BOCSAR, Sydney.

²⁰⁴ Derived from administrative systems maintained by state and territory police and published annually by the Australian Bureau of Statistics: *Recorded crime – victims Australia 2005, 2006*, cat no 4510.0, ABS, Canberra.

²⁰⁵ Australian Bureau of Statistics, *Australian standard offence classification*, 1997, cat no 1234.0, ABS, Canberra.

²⁰⁶ National household survey of crime and safety conducted periodically by Australian Bureau of Statistics: *Crime and safety, Australia 1998, 2002, 2005, 1999, 2003, 2006*, cat no 4509.0, ABS, Canberra. In addition, the Australian Bureau of Statistics conducts a survey of crime and safety in NSW for the intervening years: *Crime and safety, New South Wales 1999, 2000, 2001, 2003, 2004, 1999, 2000, 2001, 2003, 2004*, cat no 4509.1, ABS, Canberra.

²⁰⁷ Australian Bureau of Statistics, *Crime and safety, Australia 2005, 2006*, cat no 4509.0 – Glossary. The term “force” was added to the definition of robbery in 2005. Victim surveys conducted in NSW have a similar definition of robbery.

²⁰⁸ The research undertaken in Part 2 of this monograph includes steal from the person when discussing robbery offences. Robbery offences under the *Crimes Act 1900* are found in Part 4, Division 1, Subdivision 2, including ss 94–98. Steal from the person is found under s 94 of the *Crimes Act 1900*. The *Australian Standard Offence Classification* (ASOC) classifies steal from the person not as robbery but as a theft offence.

When compared with national rates, NSW had the highest recorded rate of robbery victims for the entire period 1999–2005. The NSW prevalence rates were consistently and significantly higher than the national rates for all forms of robbery offences. The rate per 100,000 population for NSW over the seven-year period was 176.7, about 70% higher than that of the nearest ranked state of Western Australia (103.4). Recorded criminal incidents reports for NSW showed similar prevalence rates for robbery. The rate per 100,000 population over the same period was 163.9.

Crime victim surveys employ a different method of measurement. The first measure relates to the percentage of the population victimised and the second measures the percentage of victims reporting the crime to police. According to the national crime victim surveys carried out in 1998, 2002 and 2005, robbery victimisation rates for Australia showed no significant movement between 1998 (0.5% of persons) and 2002 (0.6% of persons). However, by 2005 robbery decreased to 0.4% of persons. Victim surveys conducted in NSW in the intervening years were consistent with the trends evidenced in the recorded crime data. The victimisation prevalence rate peaked in 1999 at 1.2%, then decreased to 1.0% in 2000 before falling to 0.8% in 2003, 0.7% in 2004 and 0.4% in 2005.

Both crime victim surveys and recorded criminal incidents reports have their disadvantages. For example, victim surveys are limited because not all age groups are interviewed, and only personal robberies in which an individual is considered to be the victim are included. Also, the reliability of the results in these forms of surveys may be affected by sampling and non-sampling errors. On the other hand, not all offences are reported to or detected by police. This may be the result of the victim being unwilling to report the robbery. Also, changes in police procedures or recording systems may influence the level of detection and recording of crime.

According to the national crime victim surveys carried out in 1998 and 2002, approximately half of the victims of robbery did not report the incident to police (49.8% and 50.2% respectively). The main reasons given for not reporting the incident were that the victim felt there was nothing the police could do or the incident was too trivial. The national crime victim survey carried out in 2005 found that only 38.5% of victims of robbery reported the incident to police. The reporting rates by robbery victims in NSW fluctuated between 1999 and 2004.²⁰⁹ The highest reporting rate was in 2002 (60%) and the lowest reporting rate was in 2004 (38%).

Over the seven-year period 1999–2005 in NSW, both recorded crime victimisation reports and criminal incident reports show that robbery without a weapon is the most common form of all reported robbery offences (66.1% and 59.3% respectively).²¹⁰ In the same period, police criminal incident reports for NSW show that robbery with a weapon other than a

209 The figure for 2005 was unavailable.

210 While the national victim surveys also show that robbery without a weapon was the most common form of robbery (accounting for 76.0% of all robberies in 1998, 70.0% in 2002 and 69.0% in 2005), similar figures were unavailable for victim surveys conducted in NSW.

firearm accounts for 33.8% of all reported robbery offences, while robbery with a firearm accounts for only 6.9%.²¹¹

Compared with other criminal offences in NSW, all robbery offences account for only a very small proportion of all criminal incidents recorded by police in the seven-year period 1999–2005. In 1999 the proportion of recorded criminal incidents attributable to robbery was 1.5%. In 2001 the proportion was 1.1% and by 2004 robbery offences constituted 0.6% of all reported criminal incidents in NSW.²¹²

1.3.2 Attrition of robbery offences from the NSW criminal justice system (1999–2005)

Not all incidents of robbery reported to or detected by police in NSW result in the offender(s) being sentenced by the courts.

The clear-up rate for all robbery offences is low. From 1999 to 2005 less than 1 in 5 (17.1%) recorded robbery offences were cleared within 180 days of reporting. The clear-up figures were slightly lower for robbery without a weapon (15.6%) and slightly higher for robbery with a firearm (17.9%) and robbery with a weapon other than a firearm (19.6%).²¹³

Simply because police have identified an individual suspected of being involved in a robbery does not guarantee that police will initiate criminal proceedings. In the seven-year period 1999–2005, police did not proceed with over a third (35.9%) of these persons of interest.²¹⁴ The remaining individuals were proceeded against through the criminal courts (62.5%) or diverted from the formal court system (1.7%), for example, to be dealt with by youth conferencing or cautioning under the *Young Offenders Act 1997*.

211 From 2003 BOCSAR changed its recording practices to include demand money with menaces in its robbery figures. The figures reported here, however, were obtained from BOCSAR's online tools for crime trends where robbery figures prior to 2003 also include demand money with menaces: see <<http://bocd.lawlink.nsw.gov.au/bocd/cmd/crimetrends/Init>>, accessed 6/9/06.

The research undertaken in Part 2 of this monograph does not include demand money with menaces offences when discussing robbery offences. Robbery offences under the *Crimes Act 1900* are found in Part 4, Division 1, Subdivision 2, including ss 94–98. Demand money with menaces is found under s 99 in Subdivision 3 and refers to extortion etc by menace or threat. ASOC classifies demand money with menaces as robbery.

212 In December 2000 police included traffic infringement notices in their count of criminal incidents. This had the effect of increasing the total number of recorded criminal incidents in later years. Consequently, the proportion of criminal incidents related to robbery may be understated when compared with the proportions before 2001. Nonetheless, the proportion of criminal incidents comprising robbery was very small. In July 2003, the method of recording traffic infringement notices changed. However, this had little, if any, effect on the total number of incidents recorded each year.

213 Details of clear-up rates for robbery offences can also be found in the *NSW Recorded crime statistics* produced annually by BOCSAR. However, the figures relating to incidents which were recorded as cleared by NSW Police within 180 days of reporting were only published up until 2003. Yearly figures were, therefore, obtained from the Statistical Services branch of BOCSAR.

214 Yearly figures relating to the number of persons of interest identified by NSW Police in connection with robbery incidents and method of proceeding were provided by the Statistical Services branch of BOCSAR.

Methods of measuring and reporting across the three jurisdictions²¹⁵ make it impossible to draw a direct comparison between the number of individuals charged and ultimately sentenced in the criminal courts. However, despite these limitations it is evident that not all alleged robbery offenders are convicted and sentenced. Over the seven-year period 1999–2005, approximately two-thirds (66.9%) of individuals charged with robbery were convicted and sentenced where robbery was the principal offence.²¹⁶

The research undertaken in the following Parts 2 and 3 of the monograph analyse the cases that were successfully prosecuted and sentenced. These cases may not be representative of the robbery incidents recorded by police or of the types of robberies identified in victim surveys.

215 Children's Court, Local Court and higher courts.

216 Derived from figures published in NSW Bureau of Crime Statistics and Research, *New South Wales Criminal courts statistics 1999–2005, 2000–2006*, NSW BOCSAR, Sydney.

Part 2

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

2.1 Methodology

The aim of the research study in Part 3 is to examine robbery offences under s 97 of the *Crimes Act* 1900 sentenced by the higher courts²¹⁷ in NSW during the three-year period following the issuing of the guideline judgment in *Henry*. However, to fully understand the penalties handed down for s 97 offences it is necessary to look first at the sentencing patterns for all robbery offences.

The following analysis provides an overview of the hierarchy of robbery offences under ss 94–98 of the *Crimes Act* 1900 by comparing the sentencing patterns for s 97 robbery offences with the sentencing patterns relating to other robbery offences finalised in the higher courts over a six-year period.²¹⁸ An examination of robbery offences dealt with in the Local Court and the Children’s Court will also be undertaken.

The relevant offences under the *Crimes Act* 1900 to be analysed include:²¹⁹

- s 94 robbery, assault with intent to rob or stealing from the person
- s 95 aggravated robbery, assault with intent to rob or stealing from the person
- s 96 aggravated robbery, assault with intent to rob or stealing from the person with wounding or grievous bodily harm
- s 97(1) robbery or assault with intent to rob being armed with an offensive weapon or instrument or in company
- s 97(2) aggravated robbery or assault with intent to rob being armed with a dangerous weapon
- s 98 robbery or assault with intent to rob being armed or in company with wounding or grievous bodily harm.

The data used in this part of the study was based on information recorded on the Judicial Commission’s Judicial Information Research System (JIRS).²²⁰ The data comprised first instance

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

218 Initially the study was confined to a three-year period. However, because of circumstances beyond the authors’ control, the analysis was delayed. The delay enabled additional data to be obtained for all robbery offences over a six-year period, thereby allowing a comparison of the first three years (the focus of the study) with the following three years to ascertain whether any significant differences in sentencing patterns had emerged. This has resulted in a more comprehensive study of sentencing trends for robbery offences in NSW.

219 The inchoate offences of aid/abet, accessory before the fact, or accessory after the fact (ss 345–351), attempt (s 344A) and conspiracy to rob (common law) were not included in the analysis. It should be noted that such offences account for only a small percentage of all robbery offences.

220 Higher courts and Local Court data were provided by BOCSAR. Children’s Court data were supplied by the Department of Juvenile Justice. On the rare occasion where a Children’s Court penalty was imposed in the higher courts, these have been excluded from the statistics (7 cases during the six-year study period). Further, if a matter involved multiple offenders sentenced at the same time by the same judge, each offender represented a discrete case. For a more detailed explanation of the rationale behind the statistics presented on JIRS, see I Potas, “The use and limitations of sentencing statistics”, *Sentencing Trends & Issues*, No 31, 2004, Judicial Commission of New South Wales, Sydney, available at <http://www.judcom.nsw.gov.au/publications/sentencing_trends.php>.

sentencing outcomes where the principal offence²²¹ was robbery pursuant to ss 94–98 of the *Crimes Act 1900*. Additional changes are made to the higher court data to take into account CCA outcomes.²²²

The analysis of the data in this part of the study is primarily descriptive in nature and focuses on the:

- frequency of robbery offences
- types of penalties imposed
- duration of full-time custodial sentences
- relationship between the statutory maximum penalty and the term of sentence
- relationship between the term of sentence and the non-parole period, and consequently, the number of sentences which attract special circumstances.²²³

221 As the study was only concerned with the principal offence for each offender, if an offender had been convicted of more than one offence, the principal offence was determined to be the offence which received the highest penalty, in terms of the type and duration of sentence. The highest sentencing option is full-time imprisonment. If two or more offences attracted the same penalty and the matter was dealt with in the higher courts, the offence with the highest statutory maximum penalty was selected as the principal offence. If two or more offences had the same statutory maximum penalty, the offence with a Form 1 attached was selected. In the absence of a Form 1 the offence listed first on the indictment was selected. Also, all things being equal, a completed robbery offence was selected ahead of an assault with intent to rob offence.

222 Thus where the outcome of an appeal to the CCA resulted in an acquittal, a new trial or remit back to the lower court for resentencing, then the record was removed from the data. However, if the outcome of an appeal resulted in a new penalty, then the new penalty replaced the first instance penalty.

223 Special circumstances are those circumstances found by the sentencing judge which justify a departure from the statutory ratio between the non-parole period and the term of sentence: s 44 of the *Crimes (Sentencing Procedure) Act 1999*.

2.2 Analysis and findings

Sections 94–98 are found in Part 4, Division 1, Subdivision 2 of the *Crimes Act* 1900 headed “Robbery”. All of these offences are serious indictable offences.²²⁴ The following analysis provides an overview of sentences (type and quantum) imposed for robbery offences in the higher courts, Local Court and Children’s Court of NSW.

2.2.1 Higher courts

Table 1 displays the types of penalties imposed for robbery offences in the higher courts of NSW over a six-year period since the promulgation of the *Henry* guideline judgment on 12 May 1999.²²⁵ In addition, for those offenders receiving a full-time custodial sentence, the table shows the median terms of imprisonment received²²⁶ and the proportion of cases where special circumstances were found (that is, where the ratio between the non-parole period and the full term of the sentence is less than 75%). The table also provides the statutory maximum penalties associated with each of the six robbery offences under the *Crimes Act* 1900. The statutory maximum penalty is an indication of how Parliament views offences and for that reason it can be considered an important measure of the seriousness of the offence. The maximum sentence is reserved for “worst cases”. Sentencing judges must take into account the maximum penalty for the offence when giving their reasons for sentence.

In the six-year period covered by this analysis, there were a total of 3355 cases where the principal offence 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 most common robbery offence was an offence under s 97(1), namely robbery, or assault with intent to rob,²²⁷ being armed or in company, which accounted for 60.2% of all robbery offences in the higher courts.

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).²²⁸

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

²²⁴ Under s 4 of the *Crimes Act* 1900 (Definitions) “Serious indictable offence” means an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more.

²²⁵ This study focuses on sentences handed down since the *Henry* guideline judgment. An earlier study by the Judicial Commission measured the effect of the *Henry* guideline on sentencing practice for robbery offences under s 97(1) of the *Crimes Act* 1900. See Barnes and Poletti, op cit n 17.

²²⁶ The middle 60% range of sentences is also shown in Table 1. Although not discussed in the monograph, the 60% range provides a useful measure of the concentration of sentences on either side of the midpoint. The lower limit of this range was set at the third percentile and the upper limit was set at the eighth percentile.

²²⁷ For analytical purposes, “assault with intent to rob” offences have been included with completed robbery offences.

²²⁸ Chi-square test, p<0.001.

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).²²⁹

Nevertheless, slight differences were observed between robbery offences with the same statutory maximum penalty. For example, of robbery offences with a maximum of 25 years imprisonment, s 98 offences attracted the most severe penalties in terms of type (93.4% were given a full-time custodial sentence) and quantum (median term of sentence was 6 years). Similarly, of robbery offences with a maximum of 20 years imprisonment, s 97(1) offences attracted more severe penalties than s 95 offences.

Consecutive and non-consecutive sentences²³⁰

In *Pearce v The Queen*²³¹ it was held that a judge, sentencing an offender for more than one offence, must fix an appropriate sentence for each offence, before considering whether the sentences should be accumulated. The principle of totality should be reflected in the aggregate sentence handed down. The court later said in *Johnson v The Queen*²³² that the approach in *Pearce* is desirable but not immutable. It has been observed that the imposition of non-parole periods for consecutive sentences tends to be influenced by the aggregate (or total) sentence rather than by the length of the sentence for the principal offence itself.²³³ Thus presentation of data relating to non-parole periods and special circumstances would be confusing and unhelpful.

Table 1 separates cases of full-time custodial sentences into those to be served consecutively (or partly consecutively) and those to be served non-consecutively (or concurrently).²³⁴ Since it is common for robbers to be sentenced for multiple offences that were committed over an extended period, it is not surprising that a substantial number of cases involved consecutive sentences (between 8.1% and 26.5% depending on the type of robbery offence). It is worth noting that cases involving consecutive sentences recorded higher median terms of sentences than cases involving non-consecutive sentences (between 6 months and 2 years higher depending on the type of robbery offence). This finding suggests that where there are multiple offences, committed over several episodes of criminality, the court needs to strike a balance between the principle of totality on one hand, and on the other hand, ensuring that an effective punishment is imposed for each individual offence.²³⁵

229 Kruskal-Wallis test, $p<0.001$; median test, $p<0.001$.

230 In this study, the word “consecutive” should also be understood to include the old terminology of “cumulative” sentences. Refer to ss 55–60 of the *Crimes (Sentencing Procedure) Act 1999*; formerly s 444 of the *Crimes Act 1900*.

231 (1998) 194 CLR 610 per McHugh, Hayne and Callinan JJ (in a joint judgment) at [45].

232 (2004) 205 ALR 346 per Gleeson CJ at [2]; Gummow, Callinan and Heydon JJ at [26]; and Kirby J at [43].

233 From conducting audits and monitoring sentences for JIRS. For example, a sentencing judge may decline to set a non-parole period because the sentence imposed on another offence is to be served consecutively or partly consecutive. Instead fixed terms are imposed under s 45 of the *Crimes (Sentencing Procedure) Act 1999*. The fixed term in such cases would be subsumed in the aggregate sentence. Alternatively, a judge may set a short non-parole period because it is to be served consecutively or partly consecutive on the sentence imposed for another offence.

234 This includes offenders convicted of one offence.

235 See *R v Wheeler* [2000] NSWCCA 34 per Sully J at [34]–[37]. Two judge bench (Carruthers AJ agreeing).

Table 1 Overview of robbery offences under the *Crimes Act* 1900 – sentences in the higher courts of NSW (12 May 1999 to 11 May 2005)

Offence description	s 94 robbery or steal from person	s 95 aggravated robbery or steal from person	s 96 aggravated robbery or steal from person with wounding/gbh	s 97(1) robbery being armed or in company	s 97(2) aggravated robbery being armed with a dangerous weapon	s 98 robbery being armed or in company with wounding/gbh
Statutory maximum penalty	14 yrs	20 yrs	25 yrs	20 yrs	25 yrs	25 yrs
Number of cases	569	320	50	2019	276	121
Penalty type						
% full-time custody	69.4	81.3	90.0	83.9	92.4	93.4
% home detention	0.5	0.3	0.0	0.1	0.0	0.0
% periodic detention	3.5	4.7	0.0	5.4	1.1	1.7
% suspended sentence ^a	13.9	9.4	8.0	7.1	5.1	3.3
% community service order	4.4	1.6	0.0	1.6	0.7	0.8
% bond/recognition	7.7	2.8	2.0	1.8	0.7	0.8
% non-conviction bond/recognition	0.5	0.0	0.0	0.0	0.0	0.0
If full-time custody						
median full term	2 yrs 6 mths	3 yrs 6 mths	5 yrs	4 yrs	5 yrs	6 yrs
middle 60% range	1 yr 10 mths–3 yrs 6 mths	2 yrs 6 mths–5 yrs	4 yrs–9 yrs	3 yrs–5 yrs 3 mths	3 yrs 6 mths–7 yrs 6 mths	4 yrs–8 yrs
Consecutive sentences						
% consecutive sentences	8.1	15.0	13.3	14.3	24.3	26.5
median full term ^b	3 yrs	4 yrs	6 yrs 9 mths	5 yrs	7 yrs	7 yrs
Non-consecutive sentences						
% non-consecutive sentences	91.9	85.0	86.7	85.7	75.7	73.5
median full term	2 yrs 6 mths	3 yrs 4 mths	5 yrs	4 yrs	5 yrs	5 yrs 6 mths
median non-parole period ^c	12 mths	18 mths	3 yrs	2 yrs	2 yrs 6 mths	3 yrs
% special circumstances (ratio <75%^d)						
% ratio of 50% or less	90.9	92.3	87.2	94.0	94.3	96.4
% ratio of 50% (most common ratio)	71.6	58.8	43.6	60.6	45.6	42.2
	25.3	24.4	25.6	26.3	25.4	21.7

^a Suspended sentences became available from 3 April 2000.^b This figure relates to the principal offence only and does not reflect the aggregate sentence for multiple offences.^c This figure is calculated for non-consecutive sentences only as non-parole periods are not recorded for consecutive sentences.^d This figure is calculated for non-consecutive sentences only as aggregate sentences have not been recorded for consecutive sentences.

Special circumstances

When setting terms of imprisonment, s 44 of the *Crimes (Sentencing Procedure) Act 1999*²³⁶ provides that the court must first set a non-parole period for the offence, and then set the balance of the term of the sentence. Unless the sentencing judge finds “special circumstances”, the balance of the term of the sentence must not exceed one-third of the non-parole period of the sentence (or put another way, the non-parole period must not be less than three-quarters of the full term of the sentence).²³⁷

As can be seen from Table 1, 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).²³⁸ The most common ratio between the non-parole period and the full term of sentence was 1:2 or 50%, which occurred in around a quarter of cases (between 21.7% and 26.3% depending on the type of robbery offence). The proportion of cases where the ratio was 50% or less ranged from 42.2% to 71.6% depending on the type of robbery offence. Offenders convicted of the more serious robbery offences (that is, those with a maximum penalty of 25 years imprisonment), however, were less likely than offenders convicted of less serious robbery offences to receive a ratio of 50% or less (44.4% compared with 60.3% for robbery offences with a maximum of 20 years and 71.6% for robbery offences with a maximum of 14 years).

Armed or in company under s 97(1)

Offences under s 97(1) fall into two distinct categories: being armed with an offensive weapon²³⁹ or being in company with another person(s). The *Henry* guideline applies equally to both categories.²⁴⁰ Table 2 presents statistics similar to those provided in Table 1 above, for s 97(1) offences broken down into armed robbery and robbery in company.

Robbery, or assault with intent to rob,²⁴¹ being armed with an offensive weapon accounted for 61.3% of s 97(1) offences. The remaining 38.7% related to robbery, or assault with intent to rob, being in company.

236 Previously s 5(2) of the *Sentencing Act 1989*.

237 Data in Table 1 relate to sentences imposed before and after the repeal of the *Sentencing Act 1989*. Under the *Crimes (Sentencing Procedure) Act 1999* minimum terms were replaced with non-parole periods and the approach of setting a minimum term and then an additional term was changed to setting a total term and then a non-parole period. Following the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*, courts were once again required to first set the “minimum period for which the offender must be kept in detention”: s 44(1). The amending Act did not affect the way in which the length of the non-parole period is to be calculated.

238 It should be noted that in some cases, the ratio between the non-parole period and the full term of sentence came very close to, without exceeding, 75%. It may be that the calculation of ratios in some cases has been affected by sentences that have taken into account pre-sentence custody and/or by rounding up sentences into complete months.

239 Wherever there is a reference to an offensive weapon under s 97(1), it also refers to an instrument.

240 *R v Murchie* (1999) 108 A Crim R 482 per Simpson J at [19] referred to in: *R v Pohipi* [2001] NSWCCA 306 per Mason P at [31]; *R v Lesi* [2005] NSWCCA 63 per Grove J at [28]–[30]; *R v Miski* [2006] NSWCCA 178 per McClellan CJ at CL at [34].

241 In the assault with intent to rob case of *R v Stanley* [2003] NSWCCA 233, Sully J remarked at [14] that there was no reason that the *Henry* guideline should not be applied “mutatis mutandis”. Applied in *R v Lesi* [2005] NSWCCA 63.

Table 2 Overview of robbery offences under s 97(1) of the *Crimes Act* 1900 – sentences in the higher courts of NSW (12 May 1999 to 11 May 2005)

Offence description	s 97(1)	
	armed robbery	robbery in company
Statutory maximum penalty	20 yrs	20 yrs
Number of cases	1238	781
Penalty type		
% full-time custody	88.7	76.3
% home detention ^a	0.0	0.3
% periodic detention	3.7	8.1
% suspended sentence ^b	5.1	10.4
% community service order	1.0	2.7
% bond/recognizance	1.5	2.3
% non-conviction bond/recognizance	0.0	0.0
If full-time custody		
median full term	4 yrs	3 yrs 6 mths
middle 60% range	3 yrs–6 yrs	2 yrs 8 mths–5 yrs
Consecutive sentences		
% consecutive sentences	16.0	11.2
median full term ^c	5 yrs	4 yrs
Non-consecutive sentences		
% non-consecutive sentences	84.0	88.8
median full term	4 yrs	3 yrs 6 mths
median non-parole period ^d	2 yrs	1 yr 6 mths
% special circumstances (ratio<75%)^e	93.5	94.9
% ratio of 50% or less	59.8	62.0
% ratio of 50% (most common ratio)	26.2	26.5

a Home detention is not available for armed robbery: s 76(c) of the *Crimes (Sentencing Procedure) Act* 1999.

b Suspended sentences became available from 3 April 2000.

c This figure relates to the principal offence only and does not reflect the aggregate sentence for multiple offences.

d This figure is calculated for non-consecutive sentences only as non-parole periods are not recorded for consecutive sentences.

e This figure is calculated for non-consecutive sentences only as aggregate sentences have not been recorded for consecutive sentences.

Clearly, harsher sentences were handed down to offenders convicted of armed robbery compared with those convicted of robbery in company. 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.²⁴² 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).²⁴³

In relation to consecutive sentences, a similar pattern to that found for ss 94–98 offences was observed for the two offences under s 97(1). Terms of imprisonment were longer in cases involving consecutive sentences (armed robbery median = 5 years, robbery in company median = 4 years) compared with cases not involving consecutive sentences (armed robbery median = 4 years, robbery in company median = 3 years 6 months).

In relation to special circumstances, there were no statistically significant differences in the ratio between the full-term of sentence and the non-parole period between the two offences under s 97(1).

Trends in the frequency and nature of robbery offences

Overall, 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 has been falling 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.

Figure 1 shows the trends in the frequency of robbery offences by type of robbery. For some robbery offences, the number of sentencing cases has fallen over the study period. For example, offences under s 94 fell by 35.0% from 103 cases in 1999–2000 to 67 cases in 2004–2005. Over the same period, s 97(1) offences fell by 25.9% from 352 to 261 cases and s 96 offences fell by 25.0% from 8 to 6 cases.²⁴⁴ On the other hand, the frequency of some offences has increased. For example, offences under s 95 rose by 63.9% from 36 to 59 cases, s 97(2) offences rose by 39.5% from 43 to 60 cases, and s 98 offences rose by 38.1% from 21 to 29 cases.

When robbery offences were grouped according to statutory maximum penalties, it was found that offences with a maximum penalty of 25 years had increased over the study period by 31.9% from 72 cases in 1999–2000 to 95 cases in 2004–2005. On the other hand, offences with a maximum penalty of 20 years decreased by 17.5% from 388 cases in 1999–2000 to 320 cases in 2004–2005, and s 94 offences, with a maximum penalty of 14 years, also decreased by 35.0%.

Trends in sentencing robbery offenders

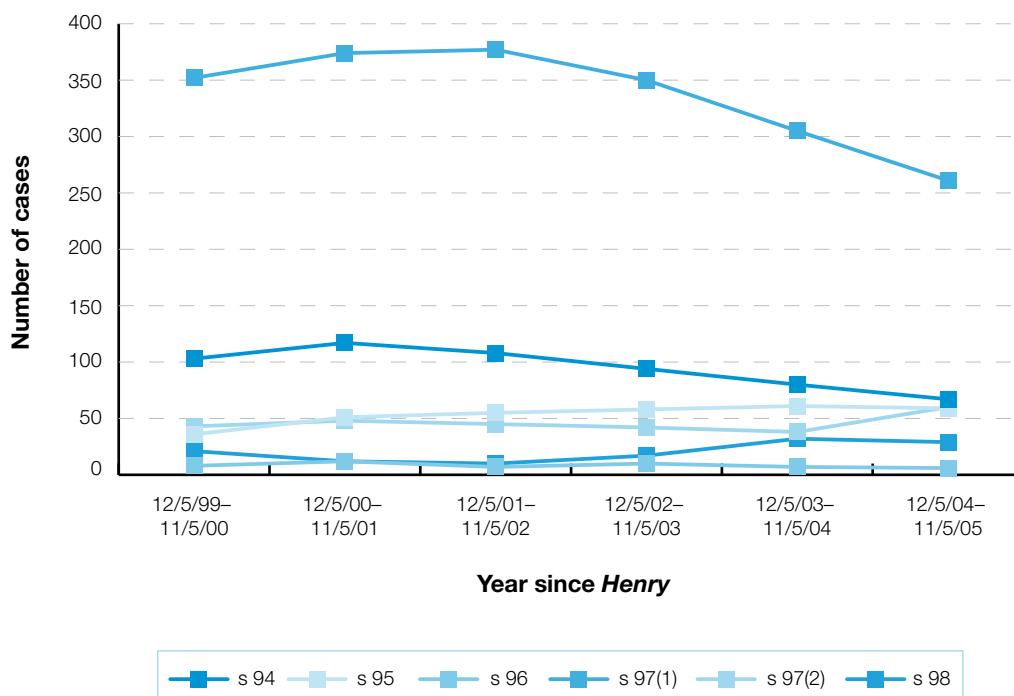
The main aim of the study was to conduct an in-depth analysis of sentencing cases for robbery offences under s 97, following the issuing of the guideline judgment in *Henry*. The

²⁴² Chi-square test, p<0.001.

²⁴³ Kruskal-Wallis test, p<0.001; median test, p<0.001.

²⁴⁴ Because of the small number of s 96 offences, caution should be exercised when reading the figures.

Figure 1 Frequency and nature of robbery offences under the *Crimes Act 1900* sentenced in the higher courts of NSW since *Henry* by year (12 May 1999 to 11 May 2005)



cases included in Part 3 of the monograph were based on a sample of sentencing cases during the first three-year period of data presented here. It is useful, therefore, to compare sentencing patterns for all robbery offences finalised in the first three-year period with sentences imposed in the second three-year period to ascertain whether any significant differences in sentencing patterns had emerged. Table 3 compares the nature of offences and the types of penalties imposed in the two time periods.

As already mentioned, there were generally fewer sentencing cases of robbery in the second three-year period. While fluctuations were evident in the year by year analysis, this was not always clear in the comparison of the two three-year periods. The offences with the largest percentage fall were under s 94 (26.5%) and armed robbery under s 97(1) (23.1%). On the other hand, there was a dramatic increase in the number of offences under s 98 (81.4%) and to a lesser extent offences under s 95 (25.4%).

Some minor differences were observed in the type of penalty imposed across all robbery offences in the two three-year periods. Most noticeably there was an increase in the rate of the use of suspended sentences in the latter period. This is not surprising considering that suspended sentences were only reintroduced as a sentencing option on 3 April 2000,²⁴⁵ almost a year into the first three-year period. If the number of cases in the earlier period is limited to those sentenced on or after that date, then the rate of the use of suspended sentences, and other dispositions, from one period to the next is statistically insignificant.

²⁴⁵ Commencement date of the *Crimes (Sentencing Procedure) Act 1999*, which includes suspended sentences at s 12.

Table 3 Overview of robbery offences under the *Crimes Act 1900* — comparison of sentences in the higher courts of NSW by time period (12 May 1999 to 11 May 2005)

	First 3 years		Second 3 years		Total	
	N	%	N	%	N	%
Section						
94	328	18.4	241	15.3	569	17.0
95	142	8.0	178	11.3	320	9.5
96	27	1.5	23	1.5	50	1.5
97(1)	1103	62.0	916	58.1	2019	60.2
97(2)	136	7.6	140	8.9	276	8.2
98	43	2.4	78	4.9	121	3.6
	1779	100.0	1576	100.0	3355	100.0
Penalty type						
full-time custody	1472	82.7	1290	81.9	2762	82.3
home detention	4	0.2	2	0.1	6	0.2
periodic detention	85	4.8	64	4.1	149	4.4
suspended sentence ^a	109	6.1	166	10.5	275	8.2
community service order	52	2.9	14	0.9	66	2.0
bond/recognition	55	3.1	39	2.5	94	2.8
non-conviction bond/recognition	2	0.1	1	0.1	3	0.1
	1779	100.0	1576	100.0	3355	100.0
If full-time custody						
median full term		4 yrs		4 yrs		4 yrs
middle 60% range		2 yrs 9 mths–6 yrs		2 yrs 9 mths–5 yrs 3 mths		2 yrs 9 mths–5 yrs 6 mths
Consecutive sentences						
% consecutive sentences		8.6		22.2		14.9
median full term ^b		5 yrs		5 yrs		5 yrs
Non-consecutive sentences						
% non-consecutive sentences		91.4		77.8		85.1
median full term		4 yrs		3 yrs 6 mths		3 yrs 9 mths
median non-parole period ^c		2 yrs		1 yr 11.5 mths		2 yrs
% special circumstances (ratio<75%)^d						
% ratio of 50% or less		93.5		93.2		93.4
% ratio of 50% (most common ratio)		61.8		57.5		60.0
	24.7		27.1		25.7	

^a Suspended sentences became available from 3 April 2000. Limiting the cases in the earlier period to those sentenced on or after this date would affect the percentages as follows: full-time custody (81.4%); home detention (0.2%); periodic detention (5.2%); suspended sentence (8.5%); community service order (2.4%); bond (2.2%) and non-conviction bond (0.2%).

^b This figure relates to the principal offence only and does not reflect the aggregate sentence for multiple offences.

^c This figure is calculated for non-consecutive sentences only as non-parole periods are not recorded for consecutive sentences.

^d This figure is calculated for non-consecutive sentences only as aggregate sentences have not been recorded for consecutive sentences.

Also, for offenders receiving a full-time custodial sentence, there were no statistically significant differences in the median terms of imprisonment imposed (4 years in both periods) or in the finding of special circumstances (93.5% in the earlier period and 93.2% in the latter period). There was, however, a significant increase in the number of cases involving consecutive sentences, from 8.6% in the first three-year period to 22.2% in the second three-year period. This may partly be explained by a slow uptake of Pearce or a misapplication of Pearce. For example, a study by the Judicial Commission examining CCA Crown appeal cases between 2001 and 2004 found that in 31.7% of the robbery cases where there was an error in the application of sentencing principle, there were totality errors where the case of Pearce was not properly applied.²⁴⁶

A year-to-year comparison of the proportion of offenders sentenced to full-time custody over the study period found no significant differences. This was also the case when the availability of suspended sentences was controlled for.

Trends in sentencing for s 97 offences

The three offence categories under s 97 that were examined were robbery in company, robbery armed with an offensive weapon and robbery armed with a dangerous weapon. Table 4 displays the sentencing pattern under each category of offence for each period.

Little difference was observed in rates of full-time custody for each category of offence across the two time periods. The proportion of offenders given a full-time custodial sentence changed little from the first three-year period to the second three-year period, even after controlling for the introduction of suspended sentences. There was little, if any, variation in the median term of sentence imposed on these offenders.

What was clearly different between the two time periods, for each category of offence, was the proportion of offenders given consecutive, or partly consecutive, sentences. As explained earlier, the increase in consecutive sentences in the second three-year period was evident across all robbery offences under ss 94–98.

2.2.2 Local Court

The only robbery offence that may be dealt with in the Local Court relates to s 94 of the *Crimes Act* 1900 where the offence is steal any chattel, money, or valuable security from the person of another.²⁴⁷ The maximum penalty that can be imposed for a single offence prosecuted summarily is 2 years imprisonment.²⁴⁸

246 G Brignell and H Donnelly, *Crown appeals against sentence*, Monograph 27, 2005, Judicial Commission of New South Wales, Sydney, p 32.

247 The offence under s 94 of robbery or assault with intent to rob any person may only be dealt with on indictment.

248 Where the value of property, matter or thing exceeds \$5000 the offence is a Table 1 offence. This means it is to be dealt with summarily unless the prosecutor or the accused elect otherwise. (See Schedule 1, Table 1, Part 2, cl 3(b) of the *Criminal Procedure Act* 1986.) The maximum penalty is 2 years imprisonment: s 267(2) of the *Criminal Procedure Act* 1986. Where the value of property, matter or thing does not exceed \$5000 the offence is a Table 2 offence. This requires that it be dealt with summarily unless the prosecutor elects otherwise. (See Schedule 1, Table 2, Part 2, cl 3(b) of the *Criminal Procedure Act* 1986.) The maximum penalty is 12 months imprisonment: s 268(2) of the *Criminal Procedure Act* 1986.

Table 4 Overview of robbery offences under s 97 of the *Crimes Act* 1900 – comparison of sentences in the higher courts of NSW by offence category and time period (12 May 1999 to 11 May 2005)

Penalty type	in company						armed with offensive weapon						armed with dangerous weapon					
	First 3 years			Second 3 years			First 3 years			Second 3 years			First 3 years			Second 3 years		
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
full-time custody	315	78.2	281	74.3	620	88.6	478	88.8	126	92.6	129	92.1						
home detention ^a	1	0.2	1	0.3	0	0.0	0	0.0	0	0.0	0	0.0						
periodic detention	37	9.2	26	6.9	31	4.4	15	2.8	1	0.7	2	1.4						
suspended sentence ^b	26	6.5	55	14.6	25	3.6	38	7.1	8	5.9	6	4.3						
community service order	16	4.0	5	1.3	11	1.6	1	0.2	1	0.7	1	0.7						
bond/recognizance	8	2.0	10	2.6	13	1.9	6	1.1	0	0.0	2	1.4						
non-conviction bond/recognizance	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0						
	403	100.0	378	100.0	700	100.0	538	100.0	136	100.0	140	100.0						
If full-time custody																		
median full term	3 yrs 6 mths		3 yrs 6 mths		4 yrs		4 yrs		5 yrs 3 mths		5 yrs							
middle 60% range	2 yrs 8 mths–5 yrs		2 yrs 8 mths–4 yrs 8 mths		3 yrs–5 yrs 10 mths		3 yrs–6 yrs		4 yrs–7 yrs		3 yrs–7 yrs 6 mths							
Consecutive sentences																		
% consecutive sentences	6.3		16.7		9.4		24.7		15.1									
median full term ^c	3 yrs 6 mths		4 yrs		5 yrs		5 yrs		6 yrs 6 mths									
Non-consecutive sentences																		
% non-consecutive sentences	93.7		83.3		90.6		75.3		84.9		66.7							
median full term	3 yrs 6 mths		3 yrs 2.5 mths		4 yrs		4 yrs		5 yrs		4 yrs 6 mths							
median non-parole period ^d	1 yr 6 mths		1 yrs 6 mths		2 yrs		2 yrs		3 yrs		2 yrs 6 mths							
% special circumstances (ratio<75%)^e																		
% ratio of 50% or less	94.6		95.3		93.6		93.3		95.3									
% ratio of 50% (most common ratio)	65.1		58.1		60.7		58.3		47.7		43.0							
	25.8	26.9	26.9	27.2	24.7	24.7	24.7	24.7	24.3	24.3	26.7	26.7						

a Home detention is not available for armed robbery: s 76(c) of the *Crimes (Sentencing Procedure) Act* 1999.

b Suspended sentences became available from 3 April 2000.

c This figure relates to the principal offence only and does not reflect the aggregate sentence for multiple offences.

d This figure is calculated for non-consecutive sentences only as non-parole periods are not recorded for consecutive sentences.

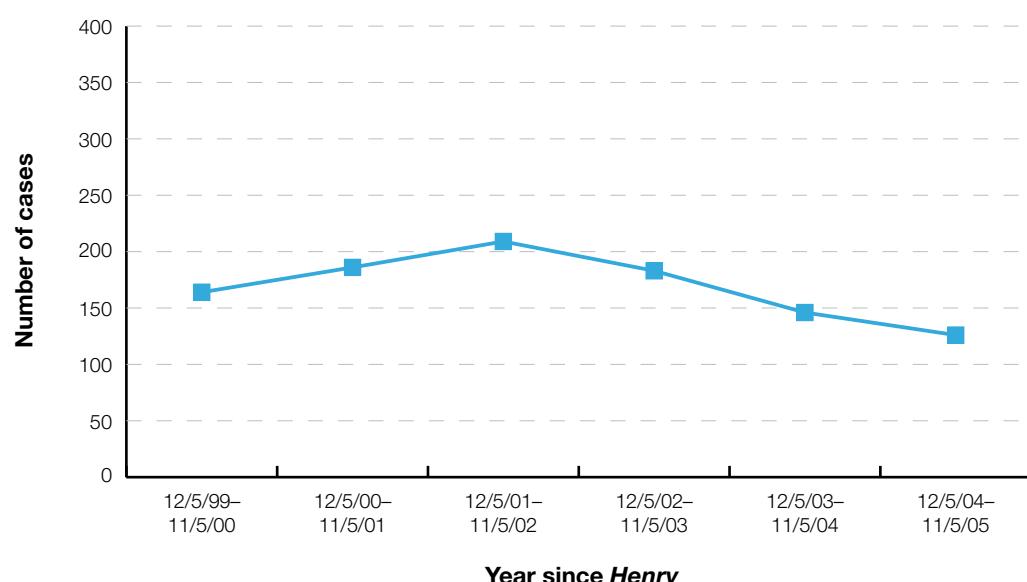
e This figure is calculated for non-consecutive sentences only as aggregate sentences have not been recorded for consecutive sentences.

Over the six-year period mentioned above, there were 1014 cases where the principal offence²⁴⁹ was steal from the person under s 94 of the *Crimes Act 1900*.²⁵⁰ This figure represents only a very small proportion of all sentencing cases in the Local Court. As Table 5 shows, a sentence of full-time imprisonment was the most commonly imposed penalty (40.0%), followed by a good behaviour bond or recognizance (22.3%). The median term of sentence for those sentenced to full-time custody was 9 months and the median non-parole period was 6 months.

Trends in sentencing robbery offenders

Figure 2 shows the trends in the frequency of s 94 robbery cases before the Local Court over the whole six-year period. As was found in the higher courts, the number of sentencing cases in the Local Court has been falling over recent years. After peaking in 2001–2002 with 209 cases, the frequency of robbery offences has been falling 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.

Figure 2 Frequency of robbery offences under s 94 of the *Crimes Act 1900* sentenced in the Local Court of NSW since *Henry* by year (12 May 1999 to 11 May 2005)



249 The method of determining the principal offence in the Local Court differed slightly from the method used in the higher courts (refer to n 221). In the Local Court, if two or more offences attracted the same penalty (type and quantum), the offence recorded first on the court file was selected as the principal offence. That is, no additional steps were undertaken to determine which offence carried the highest statutory maximum penalty or whether any offence had Form 1 matters also taken into account at sentencing.

250 See n 208.

Table 5 Steal from the person under s 94 of the *Crimes Act* 1900 – comparison of sentences in the Local Court of NSW by time period (12 May 1999 to 11 May 2005)

	First 3 years	Second 3 years	Total
Number of cases	559	455	1014
Penalty type			
% full-time custody	38.5	42.0	40.0
% home detention	0.5	0.9	0.7
% periodic detention	3.0	3.3	3.2
% suspended sentence ^a	10.2	14.3	12.0
% community service order	14.0	7.9	11.2
% bond/recognition	22.4	22.2	22.3
% fine	8.2	5.1	6.8
% rise of court	0.0	0.4	0.2
% non-conviction bond/recognition	3.2	4.0	3.6
If full-time custody			
median full term	9 mths	9 mths	9 mths
median non-parole period	6 mths	6 mths	6 mths

^a Suspended sentences became available from 3 April 2000. Limiting the cases in the earlier period to those sentenced on or after this date would affect the percentages as follows: full-time custody (37.6%); home detention (0.7%); periodic detention (3.4%); suspended sentence (13.9%); community service order (12.9%); bond (21.0%); fine (7.1%); rise of court (0.0%) and non-conviction bond (3.4%).

Table 5 also compares sentences for s 94 offences imposed during the first three-year period with sentences imposed in the second three-year period. No statistically significant difference was observed in the use or quantum of full-time custody as a penalty.

2.2.3 Children's Court

The Children's Court has jurisdiction to hear and determine robbery offences under the *Crimes Act* 1900, other than where the offence is a serious children's indictable offence. Under s 3 of the *Children (Criminal Proceedings) Act* 1987, "serious children's indictable offence" includes an offence punishable by imprisonment for life or for 25 years. The statutory maximum penalty for offences pursuant to ss 96, 97(2) and 98 of the *Crimes Act* 1900 is 25 years, and consequently, these offences may not be dealt with in the Children's Court.

A very different sentencing regime exists in the Children's Court. Even though some penalties are similar to those available to adults or to juveniles dealt with according to law,²⁵¹ the sentencing hierarchy is different in a number of ways.²⁵² In addition, the maximum penalties

²⁵¹ Section 17 of the *Children (Criminal Proceedings) Act* 1987.

²⁵² For example, recording a conviction in the Children's Court is not available if the juvenile offender is under 16 years: s 14(1) of the *Children (Criminal Proceedings) Act* 1987. Fines are considered more serious than bonds in the sentencing hierarchy. Periodic detention and home detention are not available in the Children's Court; however, other options under the *Young Offenders Act* 1997 are available.

that can be imposed in the Children’s Court are much lower than those in the higher courts. Section 33 of the *Children (Criminal Proceedings) Act* 1987 sets out the sentencing options available in this jurisdiction. Two other penalties are also available under ss 31 and 40 of the *Young Offenders Act* 1997: cautions by courts and youth justice conferences.

Table 6 displays the types of penalties imposed for robbery offences in the Children’s Court of NSW over a three-year period from 1 July 2002 to 30 June 2005. While the timeframe covers a shorter period 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. In the three-year period from 1 July 2002 to 30 June 2005 there were a total of 1178 sentencing cases in the Children’s Court where the principal offence²⁵³ was robbery pursuant to ss 94, 95 and 97(1). This figure accounts for 6.4% of all sentencing cases in the Children’s Court.

In the Children’s Court, regardless of the type of robbery offence, the most common penalty imposed was probation (between 26.7% and 39.6% depending on the offence section), followed by control orders (between 15.0% and 25.4% depending on the offence section). Both penalties are at the higher end of the sentencing hierarchy in the Children’s Court.

Given that robbery offences under s 94 are less serious than robbery offences under s 95 or s 97(1), it is not surprising that less severe penalties were more likely to be imposed on juveniles found guilty of s 94 offences. As Table 6 shows, fewer offenders received suspended control orders (5.0%), community service orders (11.0%) or probation orders (26.7%) than offenders dealt with under s 95 (16.4%, 18.0% and 33.6% respectively) or s 97(1) (11.5%, 13.2% and 39.6% respectively). On the other hand, a dismissal after attending a youth justice conference was a more likely outcome if the offender had been found guilty of a s 94 offence than an offender who had been found guilty of other robbery offences (12.8% compared with 0.6% for s 97(1) and 0% for s 95). In addition, 5.0% of offenders found guilty of an offence under s 94 were given penalties under the *Young Offenders Act* 1997 (3.6% were cautioned and 1.4% were referred to a youth justice conference).

If given a control order, juvenile offenders found guilty of s 94 offences also received shorter terms of sentence than juveniles found guilty of other robbery offences (median term = 11 months and median non-parole period = 5.5 months compared with 12 months full term with a non-parole period of 8 months for s 95 offences, and 12 months full term with a non-parole period of 6 months for s 97(1) offences).

Offences under s 94 fall into two distinct categories. Approximately half (50.9%) of the offences under this section related to steal from the person and approximately half (49.1%) related to rob, or assault with intent to rob, offences.²⁵⁴ As Table 6 shows, less severe penalties were handed down to juveniles found guilty of steal from the person compared with juveniles found guilty of robbery. Those offenders found guilty of steal from the person were more likely to be dismissed after completing an outcome plan at a youth justice conference (19.6% compared

²⁵³ The method of determining the principal offence in the Children’s Court was the same as that for selecting the principal offence in the Local Court (see n 249), with one additional step. If two or more offences attracted the same penalty (type and quantum), the offence with the lowest ASOC code was selected as the principal offence.

²⁵⁴ For analytical purposes, “assault with intent to rob” offences have been included with completed robbery offences.

Table 6 Overview of robbery offences under the *Crimes Act 1900* — sentences in the Children's Court of NSW (1 July 2002 to 30 June 2005)

Offence description	s 94			s 95	s 97(1)		
	steal from person	robbery	total		armed robbery	robbery in company	total
Number of cases	143	138	281	122	226	549	775
Penalty type							
% control order	17.5	21.0	19.2	25.4	23.5	11.5	15.0
% suspended control order	3.5	6.5	5.0	16.4	19.5	8.2	11.5
% community service order	11.2	10.9	11.0	18.0	9.3	14.8	13.2
% probation order	16.1	37.7	26.7	33.6	36.3	41.0	39.6
% bond and fine	0.7	0.0	0.4	0.0	0.0	0.4	0.3
% dismissed after youth justice conference	19.6	5.8	12.8	0.0	0.4	0.7	0.6
% referred to youth justice conference ^a	2.1	0.7	1.4	0.0	0.4	0.7	0.6
% fine only	8.4	8.0	8.2	3.3	4.9	13.3	10.8
% bond	9.8	8.7	9.3	2.5	5.3	9.5	8.3
% dismissed with caution	0.7	0.0	0.4	0.8	0.0	0.0	0.0
% caution ^b	7.0	0.0	3.6	0.0	0.4	0.0	0.1
% rise of court	3.5	0.7	2.1	0.0	0.0	0.0	0.0
If control order							
median full term	9 mths	12 mths	11 mths	12 mths	15 mths	11 mths	12 mths
median non-parole period	3 mths	6 mths	5.5 mths	8 mths	7 mths	5 mths	6 mths

a Under s 40 of the *Young Offenders Act 1997*.

b Under s 31(1) of the *Young Offenders Act 1997*.

with 5.8% of robbery offenders). They were also more likely to be given penalties under the *Young Offenders Act 1997*: 2.1% were referred to youth justice conferencing and 7.0% were cautioned, whereas only 0.7% of juveniles sentenced for robbery were referred to youth justice conferencing. Conversely, offenders found guilty of steal from the person were less likely than robbery offenders to receive probation orders (16.1% compared with 37.7%), control orders (17.5% compared with 21.0%) and suspended control orders (3.5% compared with 6.5%).

If given a control order, juvenile offenders found guilty of steal from the person also received shorter terms than those found guilty of robbery (median term = 9 months and median non-parole period = 3 months compared with 12 months and 6 months respectively for robbery offenders).

The seriousness of s 95 offences is reflected in the types of penalties handed down. As mentioned earlier, offenders found guilty of s 95 offences are liable to the same statutory maximum penalty as offenders found guilty of s 97(1) offences. It is not inconceivable that

an aggravated robbery offence under s 95²⁵⁵ could be as serious as an offence committed under s 97(1), even where that offence involved the use of an offensive weapon or instrument. Similar penalties were imposed for both kinds of offences. For example, around a quarter of juvenile offenders (25.4% and 23.5% respectively) received control orders. The median term of the control orders was 12 months and 15 months respectively. Around a third of juvenile offenders were given probation orders (33.6% and 36.3% respectively). Other penalties at the higher end of the sentencing hierarchy were also common for juveniles found guilty of these offences (see Table 6).

Armed or in company under s 97(1)

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 dealt with in the Children's Court. Robbery in company accounted for 70.8% of s 97(1) offences. The remaining 29.2% related to robbery being armed with an offensive weapon.

Table 6 also compares penalties imposed for both types of offences under s 97(1). Clearly, more severe penalties were imposed on armed robbers than robbery in company offenders. Twice as many received control orders (23.5% compared with 11.5%) and for longer terms (median term = 15 months and median non-parole period = 7 months compared with 11 months and 5 months respectively for robbery in company offenders).

Robbery in company offenders were more likely than armed robbery offenders to receive most other penalty options, particularly fines (13.7% compared with 4.9%)²⁵⁶ and good behaviour bonds (9.9% compared with 5.3%).²⁵⁷ They were also more likely than armed robbers to be given a community service order (14.8% compared with 9.3%).

Trends in the frequency and nature of robbery offences

Over the last 3 years of the study, 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.

Figure 3 shows the trends in the frequency of robbery offences by type of robbery.

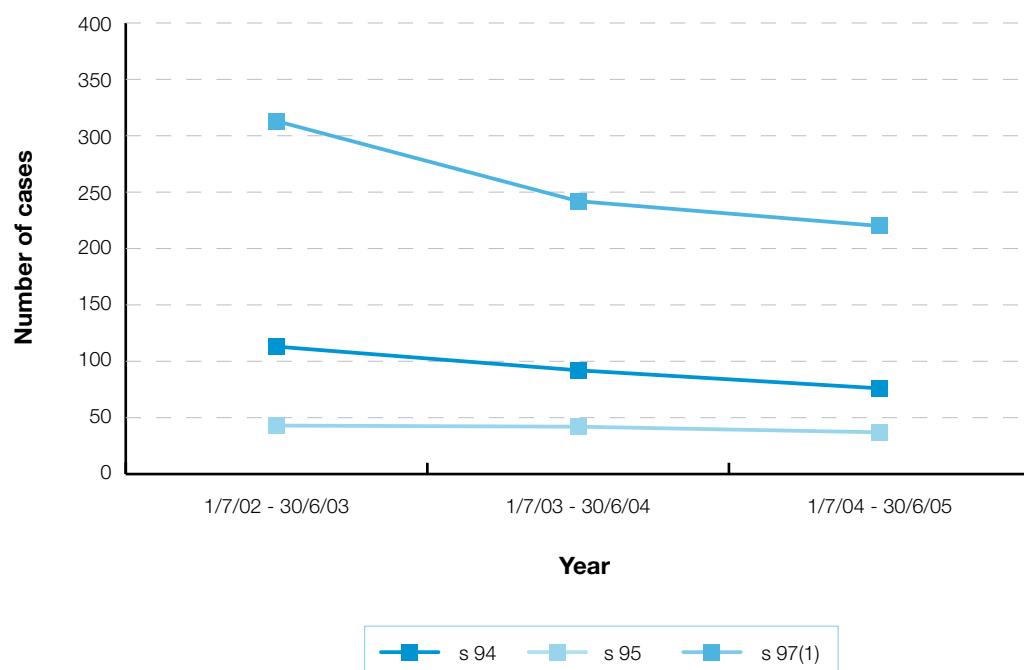
Irrespective of the section of the *Crimes Act* 1900 under which the offence is prosecuted, all types of robbery offences have fallen over the three-year period. Section 94 offences and s 97(1) offences have fallen more rapidly than offences under s 95. Section 94 offences fell by 32.7% from 113 cases in 2002–2003 to 76 cases in 2004–2005. Over the same period, robbery under s 94 fell by 40.4% while s 94 steal from the person fell by 25.0%. Section 97(1) offences fell by 29.7% from 313 cases in 2002–2003 to 220 cases in 2004–2005. Over

255 Circumstances of aggravation include the use of corporal violence, the malicious infliction of actual bodily harm and the deprivation of liberty.

256 This figure includes offenders given a fine only (13.3%) under s 33(1)(c), and a bond and a fine (0.4%) under s 33(1)(d) of the *Children (Criminal Proceedings) Act* 1987.

257 This figure includes offenders given a bond (9.5%) under s 33(1)(b), and a bond and a fine (0.4%) under s 33(1)(d) of the *Children (Criminal Proceedings) Act* 1987.

Figure 3 Frequency and nature of robbery offences under the *Crimes Act 1900* sentenced in the Children's Court of NSW by year (1 July 2002 to 30 June 2005).



the same period, s 97(1) armed robbery fell by 20.7% while s 97(1) robbery in company fell by 33.2%. Section 95 offences fell by 14.0% from 43 cases in 2002–2003 to 37 cases in 2004–2005.

2.2.4 Summary of findings

Trends indicate that the number of cases dealt with in all court jurisdictions has been falling. This is in line with the trends for robbery offences reported elsewhere.²⁵⁸

When the analysis is limited to the data for the last 3 years in all jurisdictions, it was found that the most common robbery offences 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.

Penalties in all jurisdictions fell at the higher end of the sentencing hierarchy. Nevertheless, differences were observed in penalties depending on the section number and statutory maximum penalty.

In the Children's Court, a youth justice conference was the most common penalty for juveniles found guilty of the least serious of the robbery offences — 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. This

258 See Prevalence of robbery offences at 1.3.

may reflect differences in the offenders' respective criminal histories and other objective or subjective factors. For juveniles found guilty of more serious robbery offences, the penalties escalated. For example, the rate of control orders for offences under s 95 — aggravated robbery and s 97(1) — robbery being armed with an offensive weapon — was 25.4% and 23.5% respectively. The median term of the control order was 12 months and 15 months respectively (see Table 6).

The Local Court deals only with the offence of steal from the person pursuant to s 94. In the Local Court, full-time custody was the most common penalty imposed for this offence (40%). The median term of sentence imposed was 9 months and the median non-parole period was 6 months (see Table 5).

For offences finalised in the higher courts, which deal with the whole range of robbery offences under the *Crimes Act* 1900 (ss 94–98), a full-time custodial sentence was the most likely penalty imposed on offenders. The statutory maximum penalty for the offence influenced the likelihood of full-time custody (92% for robbery offences with a maximum penalty of 25 years, compared with 83% of robberies with a maximum of 20 years and 69% where the maximum was 14 years). In addition, the statutory maximum penalty also influenced the length of the term of sentence (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). (See Table 1.)

Two factors that may have influenced the observed sentencing patterns over the six-year study period were the reintroduction of s 12 suspended sentences as an alternative to a full-time custodial sentence of up to 2 years and the judgment of Pearce in relation to the imposition of consecutive sentences.

The analysis did not consider the objective and subjective factors that are taken into account at sentencing. These will be discussed fully in Part 3 of the monograph.

Finally, the analysis showed no significant differences in sentencing patterns from one three-year period to the next three-year period. This suggests that it is possible to generalise the findings in the next part of the study, which focused only on sentences imposed during the first three-year period, to the entire six-year period.

Part 3

The research study: an analysis and
discussion of remarks on sentence

3.1 Methodology

The following analysis provides an in-depth examination of robbery offences under s 97 of the *Crimes Act 1900* — the focus of the study. These offences have been divided into six discrete offence categories as follows:²⁵⁹

- s 97(1) robbery being armed with an offensive weapon or instrument
- s 97(1) robbery being in company
- s 97(1) assault with intent to rob being armed with an offensive weapon or instrument
- s 97(1) assault with intent to rob being in company
- s 97(2) aggravated robbery being armed with a dangerous weapon
- s 97(2) aggravated assault with intent to rob being armed with a dangerous weapon.

The *Henry* guideline judgment provides a framework in which to develop the methodology and research questions used in this part of the study.

The most valuable source of information relating to the circumstances of the offence and the characteristics of the offender(s) and victim(s) was the judges' remarks on sentence. From these, the authors extracted information on the seven characteristics identified 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.

The first instance sentencing data described in Part 2²⁶⁰ was used to select the cases for this part of the study (N=1239). However, any case that went to the CCA during the study period was excluded from the analysis (N=179). The main reason for excluding CCA cases from this part of the study was the possibility of recording information at first instance that may later be held to be erroneous by the CCA.²⁶¹ All CCA cases will be examined separately in Part 4 of the study.

3.1.1 The sample selected

Due to the large number of cases meeting the study parameters and the constraints this large data set would place on the project, it was decided to proceed using only a sample of cases. Approximately one-third of the original cases was randomly selected for analysis (from 1060 to 365). In order to test the validity that the sample group is genuinely representative of the population group, information was compared on a number of relevant factors already known, such as the type of offence and the number of counts of the principal offence; age; gender; plea; whether Form 1 matters were taken into account; prior convictions; liberty status at the time of the offence; and sentencing outcomes. Nevertheless, some sampling error may be present.

259 There were no cases where the principal offence was “stop mail, etc with intent to rob, etc, being armed or in company”.

260 Refer to Methodology at 2.1.

261 This does not mean that the final sample of cases does not contain “appealable” errors. It does mean, however, that neither the Crown nor defence regarded the sentences imposed as manifestly inadequate or manifestly excessive.

The judges' remarks on sentence were obtained for every case in the sample.²⁶² The remarks were then subject to a content analysis and information on the relevant sentencing factors was recorded on a data collection sheet.

Where a case involved multiple counts of the principal offence, the details for the most serious of these were recorded as determined by the judge's remarks. If it was impossible to ascertain which was the most serious offence, then the authors decided by incorporating many factors, including the degree of violence, type of weapon, value of property and number of co-offenders involved in each offence.

The final sample of 365 cases was reduced to 352 after 7 remarks on sentence could not be obtained. The remaining 6 cases were excluded because: the offence details were incorrect (2 cases related to inchoate offences and 1 case was prosecuted under s 94); the penalties imposed were under s 33 of the *Children (Criminal Proceedings) Act 1987* (2 cases); or the matter went to the CCA after the cases had been selected (1 case).

3.1.2 The areas of inquiry

The analysis of the data in this part of the study examines the patterns of sentencing for the six robbery offences under s 97 of the *Crimes Act 1900*. In particular, the analysis focuses on describing the:

- offender characteristics, victim characteristics and the circumstances surrounding the offences
- types of penalties imposed for these offences
- most common exceptional circumstances cited by judges where a penalty other than a term of full-time custody was imposed
- distribution of full-time custodial sentences
- relationship between the term of sentence and the non-parole period, and how often special circumstances were found
- most common special circumstances cited by judges
- pre-sentence custody and/or diversion taken into account at sentencing
- discounts for plea and/or assistance to authorities.

All these factors are guided by legislation and sentencing principles which direct the sentencing process and the penalty outcome. Major cases which provided sentencing principles which were consistently cited by sentencing judges will be described.

In addition, an analysis of sentencing cases before and after the guideline judgment in *R v Thomson & Houlton*²⁶³ relating to discounts for pleading guilty will examine the effect of *Thomson & Houlton* on sentence length for robbery offences under s 97 of the *Crimes Act 1900*.

262 Remarks on sentence were obtained from the Department of Corrective Services (for cases where they were automatically transcribed, as the offender was sentenced to a term of imprisonment for longer than 3 years) and Court Reporting Services (for other cases, some were transcribed and some were on tape).

263 (2000) 49 NSWLR 383. Delivered on 17 August 2000.

Categorical regression

The study also aims to identify the most important factors and principles which influence the sentencing decisions of judges. Using a multivariate categorical regression approach, the study will seek to determine:

- the most important factors influencing the use of penalties other than full-time custody
- the most important factors affecting the duration of full-time custodial sentences.

The *Henry* guideline

In relation to the *Henry* guideline judgment, the following research questions will be addressed:

- How extensively are the guidelines in *Henry* referred to by judges?
- How often did the judge remark that a particular case fell within *Henry*?
- How common is the scenario as described in *Henry*?

Next, the authors examine how many offenders in the cases identified as *Henry*-like cases:²⁶⁴

- received a full-time custodial sentence
- received a term of sentence under 4 years, or in the range of 4–5 years, or greater than 5 years.

264 “*Henry*-like” cases mean those cases which featured six or more of the following factors: young offender; no or little criminal history; weapon like a knife capable of killing or inflicting serious injury; limited degree of planning; limited if any actual violence but a real threat thereof; victim in a vulnerable position; small amount taken; plea of guilty. This will be explored further at 3.9.

3.2 The setting

The 352 remarks on sentence which formed the sample for this study were delivered by 72 judges (including acting judges), with an average of 4.9 remarks on sentence per judge (median = 3.5). While 1 judge was responsible for delivering 20 remarks on sentence (the highest for any judge), a quarter of the judges (25.0%) delivered 1 each. Around half of the judges (47.2%) delivered between 2 and 5 remarks on sentence.

3.2.1 Jurisdiction and location of courts

While the overwhelming majority of cases (99.4%) were finalised in the District Court, 2 cases were finalised in the Supreme Court.

Thirty-one courts from across NSW were represented in the sample. Courts located in Sydney accounted for three-quarters of the cases (266 cases, 75.6%), with the majority of these coming from courts located in Inner Sydney (139 cases, 39.5%), Outer South Western Sydney (44 cases, 12.5%) and Central Western Sydney (43 cases, 12.2%).²⁶⁵

Courts located outside Sydney accounted for the remaining one-quarter of cases (86 cases, 24.4%). Courts located in the Hunter (28 cases, 8.0%) and the Illawarra (17 cases, 4.8%) were responsible for the greatest number of cases outside Sydney.²⁶⁶

3.2.2 Period between offence date and sentence date

On average, sentences were handed down 260 days (approximately 8.5 months) after the date on which the principal offence was committed. The shortest time period was 30 days, and the longest period was 4 years and 34 days. The majority of offenders (71.3%) were sentenced within a year of the offence date. A further 21.9% of offenders were sentenced between 1 and 2 years of the offence date.

3.2.3 The sentencing exercise

It was clear that the vast majority of judges structured their remarks in a similar way thereby demonstrating a consistent approach to the sentencing exercise. Generally, the basic process adopted by the judges was as follows.

First, the judge described the offence(s) charged and whether there were any other matters on a Form 1 to be taken into account. The seriousness of the offence(s) was typically described by judges in terms of the statutory maximum penalties applicable. At this point, it was common for judges to express concern about the incidence and prevalence of the offence and the community's outrage towards such crimes and the need for deterrent sentences.

²⁶⁵ Other courts located within Sydney were Outer Western Sydney (18 cases, 5.1%), Fairfield/Liverpool (16 cases, 4.5%) and Gosford/Wyong (6 cases, 1.7%).

²⁶⁶ Other courts located outside Sydney were Central West (9 cases, 2.6%), Mid North Coast (7 cases, 2.0%), Northern (7 cases, 2.0%), North Western (6 cases, 1.7%), Richmond/Tweed (4 cases, 1.1%), Murrumbidgee (4 cases, 1.1%), South Eastern (2 cases, 0.6%), Murray (1 case, 0.3%) and Far West (1 case, 0.3%).

The judge then discussed the plea(s) entered, the timing of any guilty plea(s), any assistance to authorities and the relevance of those matters in terms of the effect they would have on the sentence.

Next the evidence relating to the offence and the offender was set out including findings of fact. This was done through the examination of various material, including the statement of facts (where applicable), records of interviews, victim statements, criminal and bail histories, pre-sentence reports prepared by the Probation and Parole Service, relevant medical reports, character references and evidence from the offender. At this stage, reference was made to aggravating and mitigating features of the case.

Later in the remarks on sentence the judge often referred to the submissions by the Crown and the defence on the appropriate form of the sentence. Following consideration of all of the above, issues relating to special circumstances such as prospects of rehabilitation and reoffending were addressed. The final step was to pass sentence on the offender and address issues of totality and accumulation where applicable.²⁶⁷

The analysis presented below broadly follows the typical structure of the remarks on sentence.

267 There were some instances when the sentence to be imposed was pronounced at the beginning of proceedings so as not to leave the offender in suspense.

3.3 The offences

In the 352 cases where remarks on sentence were analysed, the principal offence was either s 97(1) or s 97(2). The majority of offences (88.6%) related to s 97(1), and within that section, by far the most common offence was robbery being armed with an offensive weapon²⁶⁸ (50.3% of all cases), followed by robbery in company (30.7% of all cases). Table 7 shows the frequency of cases for each offence under s 97.²⁶⁹

Table 7 Frequency of s 97 offences in the study sample (12 May 1999 to 11 May 2002)

Section	Offence description	N	%
97(1)	robbery being armed with an offensive weapon	177	50.3
97(1)	assault with intent to rob being armed with an offensive weapon	22	6.3
97(1)	robbery being in company	108	30.7
97(1)	assault with intent to rob being in company	5	1.4
97(2)	aggravated robbery being armed with a dangerous weapon	40	11.4
97	All s 97 offences	352	100.0

3.3.1 Secondary offences and Form 1 matters

When a court is dealing with an offender for multiple offences, the sentencing judge must set an appropriate sentence for each offence and then consider the questions of accumulation, concurrence and totality.²⁷⁰ This allows any differences in conduct between offences to be taken into account when setting the penalty for each offence. This is particularly important with respect to claims of disparity between co-offenders.

In addition, s 32 of the *Crimes (Sentencing Procedure) Act 1999*²⁷¹ allows the court to deal with further (unconvicted) charges which the offender wants the court to take into account when sentencing the offender for the principal offence. In essence, in sentencing for the principal offence where a Form 1 is attached, appropriate weight must be given to each offence on the Form 1 to reflect the overall criminality involved. The additional sentence(s) for the Form 1 matter(s) should be significantly less than would have been the case if the charges had been prosecuted independently.²⁷²

268 Throughout this monograph, the term “offensive weapon” includes instrument.

269 There were no cases of aggravated assault with intent to rob whilst armed with a dangerous weapon pursuant to s 97(2). Although there was one such case in the population of offenders sentenced during the study period, that case was not selected in the random sample.

270 *Pearce v The Queen* (1998) 194 CLR 610.

271 Previously s 21 of the *Criminal Procedure Act 1986* which was replaced by the present provision on 3 April 2000.

272 See for example: *R v Morgan* (1993) 70 A Crim R 368 per Hunt CJ at CL at 371–372; *R v Bavadra* (2000) 115 A Crim R 152 per Wood CJ at CL at [30]; *R v Barton* (2001) 121 A Crim R 185 per Carruthers AJ at [35]; *R v Lemene* (2001) 118 A Crim R 131 per Simpson J at [7].

In around 6 out of every 10 cases (61.9%), the judge was required to sentence the offender for multiple offences and/or for further offences that were placed on a Form 1. Of these, almost two-thirds (64.0%) had at least one other robbery offence or Form 1 matter under ss 94–98 dealt with at the same time.

In cases where there were secondary offences to be considered (45.5% of all cases), around three-quarters (74.4%) had other proven robbery offences.

Almost 4 in 10 offenders (38.4% of all cases) had matters on a Form 1 taken into account at sentencing. The number of matters ranged from 1 to 30 matters with a median of 2.5 matters. Of these, 38.7% had at least one robbery matter on the Form 1. The range was 1 to 25 robbery matters with a median of 2 robbery matters. It should be noted that the matters on the Form 1 may or may not be connected factually with the principal offence (or with other offences) before the court.

3.4 Plea and assistance to authorities

3.4.1 Plea

Section 22 of the *Crimes (Sentencing Procedure) Act 1999*²⁷³ provides that a court must take into account the fact and timing of an offender's guilty plea and may impose a lesser penalty than it would have otherwise imposed. The extent to which the penalty is mitigated is dependent upon the circumstances of each case. During the timeframe of the study, the CCA promulgated a guideline judgment, *R v Thomson & Houlton*,²⁷⁴ in relation to a guilty plea. This judgment set out the approach to be taken by judicial officers in assessing the utilitarian discount for a guilty plea. This guideline judgment necessitated an analysis of the effect of the plea pre- and post-*Thomson & Houlton* (see Table 8).

Table 8 Guilty plea in the study sample pre- and post-*Thomson & Houlton* (12 May 1999 to 11 May 2002)

	Pre- <i>Thomson & Houlton</i>	Post- <i>Thomson & Houlton</i>	Overall
	%	%	%
Guilty plea	94.3	95.9	95.2
Timing of guilty plea			
earliest (first opportunity)	64.3	82.0	74.3
early	19.3	10.4	14.2
late	16.4	7.7	11.5
Relevance of guilty plea			
remorse and contrition	54.7	65.4	60.6
utilitarian value	24.0	55.1	41.2
victims are spared	11.3	14.6	13.1
strength of Crown case	40.0	38.9	39.4

Of the 352 offenders in this study, the overwhelming majority (335 or 95.2%) pleaded guilty. There was a slight increase in the proportion of offenders who pleaded guilty in the post-period (95.9% compared with 94.3% in the pre-period). This figure, however, was not found to be statistically significant.

Of those that pleaded guilty,²⁷⁵ around three-quarters (74.3%) entered their plea at the "earliest opportunity".²⁷⁶ Pleas entered at first arraignment (14.2%) were still assessed as "early". The remaining pleas (11.5%) were considered to be "late" pleas, and usually were entered shortly before or on the day of the scheduled trial, and in one case, during the trial.

273 Previously s 439 of the *Crimes Act 1900* which was replaced by the present provision on 3 April 2000.

274 (2000) 49 NSWLR 383. Delivered on 17 August 2000.

275 Based on 323 cases (excludes 12 cases where the timing of the guilty plea was unknown).

276 Most of these were entered before a magistrate at committal proceedings. While some offenders did not enter their plea at committal before a magistrate, they were still considered to have entered their plea at the "first opportunity". This scenario applied, for example, where some offenders offered to plead to a different charge(s) (27 cases) or after a delay in proceedings due to psychiatric assessment or legal advice (5 cases).

One of the aims of the *Thomson & Houlton* guideline judgment was “to ensure that offenders, and those who advise them, will know that in this State a discount for a plea is in fact given on a systematic basis and that the earlier the plea, the greater the benefit.”²⁷⁷ In this study, the proportion of offenders who pleaded guilty at the earliest opportunity increased significantly after the *Thomson & Houlton* guideline (from 64.3% before it to 82.0% after it).²⁷⁸

In *Thomson & Houlton*²⁷⁹ three reasons were advanced to justify the practice of discounting for a guilty plea. First, the plea is a manifestation of remorse or contrition. Second, the plea has a utilitarian value to the efficiency of the criminal justice system.²⁸⁰ Third, in particular cases it avoids the necessity to call witnesses, especially victims, to give evidence. In this study, judges discussed the relevance of the guilty plea in terms of remorse and/or contrition in 60.6% of cases. The utilitarian effect was discussed in 41.2% of cases, and avoiding the necessity to call witnesses, especially victims, was discussed in 13.1% of cases. This does not mean that judges who did not articulate these reasons did not consider them when discounting for guilty pleas.

Following *Thomson & Houlton* the relevance of the guilty plea was more clearly articulated by sentencing judges, particularly in relation to the utilitarian aspect of the plea. After *Thomson & Houlton*, expression of the utilitarian benefit of the plea more than doubled (from 24.0% to 55.1%).²⁸¹ Also significant, but to a lesser extent, was the increase in expression of the relevance of remorse and contrition to the guilty plea (from 54.7% to 65.4%).²⁸²

In *R v Henry*²⁸³ the seventh characteristic common to armed robbery referred to a plea of guilty, the significance of which is limited by a strong Crown case. Following *Thomson & Houlton* it was said that the strength of the Crown case has no bearing on the utilitarian value of the guilty plea. In this study, the strength of the Crown case was mentioned in 39.4% of cases. There was little difference between pre- and post-*Thomson & Houlton*, falling slightly from 40.0% to 38.9%. It was not clear from the remarks on sentence how the judges were using “the strength of the Crown case”.

277 (2000) 49 NSWLR 383 per Spigelman CJ at [112]. His Honour at [90] quoted a similar statement by King CJ in *R v Sutherland* (unrep, 16/11/92, SA CCA): “This is an important public policy consideration, and judges are to be encouraged to foster an awareness amongst people charged with criminal offences, and those who advise them, of the advantage to be gained by a guilty person by acknowledging his guilt at the first reasonable opportunity.”

278 Chi-square test, p<0.001.

279 (2000) 49 NSWLR 383 per Spigelman CJ at [3].

280 During the course of this study, *Cameron v The Queen* (2002) 209 CLR 339 refined the test for taking into account a plea of guilty for its utilitarian value. However, the later case of *R v Sharma* (2002) 54 NSWLR 300 is clear authority for the proposition that in NSW a sentencing court is not required to be satisfied that the offender is motivated by a willingness to facilitate the course of justice before the utilitarian value of the plea may be taken into account in mitigating the penalty. In this study, *Cameron* was followed in 7 cases.

281 Chi-square test, p<0.001.

282 Chi-square test, p<0.045.

283 (1999) 46 NSWLR 346 per Spigelman CJ at [162].

3.4.2 Assistance to authorities

Section 23(1) of the *Crimes (Sentencing Procedure) Act 1999*²⁸⁴ permits a court to impose a lesser penalty having regard to the degree to which an offender has assisted or undertaken to assist law enforcement authorities. Section 23(2) requires the court to consider, among other matters, the effect of the offence on the victim(s), the significance and usefulness of the assistance to the authorities, and whether the offender will experience harsher conditions in custody as a result of the assistance. Section 23(3) provides that a lesser penalty imposed under the section must not be unreasonably disproportionate to the nature and circumstances of the offence.

In the analysis of the remarks on sentence in this area, certain cases were consistently referred to by judges as authorities to explain why a discount was given in a particular case, such as:

- The provision of full and frank information to the authorities is to be encouraged and an appropriate reward should be given regardless of whether such assistance is motivated by genuine remorse or simply self-interest. If the assistance given is motivated by genuine remorse or contrition then greater leniency will be extended to the offender under normal sentencing principles.²⁸⁵
- Where an offender voluntarily discloses guilt in connection with offences that are not likely to have otherwise been detected and established, the offender is entitled to a considerable additional element of leniency at sentencing.²⁸⁶
- A judge who extends leniency on the grounds of assistance to authorities should say that this is being done and why.²⁸⁷

In this study, almost 2 in 10 offenders (65 or 18.5%) provided assistance to authorities as follows:²⁸⁸

- 22 offenders (34.9%) provided information about a co-offender(s) such as their name (or description) and/or whereabouts, which led to charges being laid against the co-offender and often a plea of guilty being entered. The offender may also have provided information about the offence, such as where to recover stolen property or other pertinent information.
- 22 offenders (34.9%) voluntarily gave themselves up to police and confessed in circumstances where the offence was unlikely to have otherwise been detected.
- 19 offenders (30.2%) signed an undertaking/agreement or offered to give evidence (at trial, appeal, retrial) against a co-offender(s) at great risk to themselves or their families.

284 Previously s 442B of the *Crimes Act 1900* which was replaced by the present provision on 3 April 2000.

285 *R v Cartwright* (1989) 17 NSWLR 243 per Hunt and Badgery-Parker JJ (in a joint judgment) at 252.

286 *R v Ellis* (1986) 6 NSWLR 603 per Street CJ at 604.

287 *R v Gallagher* (1991) 23 NSWLR 220 per Gleeson CJ at 230. Also referred to by Spigelman CJ in *R v Thomson & Houlton* (2000) 49 NSWLR 383 at [47].

288 Based on the 63 offenders who provided assistance to authorities (excludes 2 cases where the type of assistance was unknown). Percentages do not total 100% as some offenders provided assistance in several ways.

- 9 offenders (14.3%) volunteered their involvement in other offences where it was unlikely that the offences and the offender's involvement in those offences would have been detected by authorities.
- 3 offenders (4.8%) assisted or agreed to assist police in a controlled operation, for example being fitted with a listening device or infiltrating a criminal group.
- 3 offenders (4.8%) provided information or evidence against offenders for offences unrelated to robbery, for example against a drug supplier, a paedophile and principals in an organised criminal group. In all 3 cases, this information led to a conviction.

3.4.3 Discounting for guilty plea and assistance to authorities

An analysis of the remarks on sentence show that the *Thomson & Houlton* guideline judgment influenced the expression and quantification of the discount for a guilty plea and the discount for assistance to authorities.

Where a sentence was discounted for a guilty plea and assistance to authorities there was some variation in the way in which the judges expressed the discounting. In some cases the judges expressed the discount that applied to each. In other cases, the judge expressed only the discount that applied for the guilty plea, but not for assistance. Conversely, other judges expressed the discount that applied for assistance, but not the guilty plea. Finally, a number of judges gave a combined discount for both the guilty plea and assistance to authorities.²⁸⁹

In cases where the offender entered a plea of guilty, a discount was clearly given in 83.0% of cases. In the other 17.0% of cases no specific reference was made to the discount for the guilty plea. This does not mean that a discount was not given or applied. Reference to the discount available for a plea of guilty increased in the post-*Thomson & Houlton* period (88.6% compared with 76.0% in the pre-*Thomson & Houlton* period).²⁹⁰

In cases where it was determined that a discount was given for a guilty plea, the discount was quantified in 39.2% of cases. However, the guideline judgment had a significant effect on the judicial quantification of the discount, increasing from 4.4% pre-*Thomson & Houlton* to 63.4% post-*Thomson & Houlton*.²⁹¹ Other judges (14.6%) did not quantify the discount in terms of a percentage figure or a figure representing the reduction in the term, but rather used words such as "maximum", "full", "substantial" and "significant" to describe the discount.

For cases post-*Thomson & Houlton* where the discount for a guilty plea was quantified, the discount ranged from 5% to 40%. The median was 25%. This figure is not surprising considering that the majority of offenders who pleaded guilty (82.0%) did so at the earliest opportunity.

289 In *R v Waqa (No 2)* (2005) 156 A Crim R 454 it was held that there is no single method of calculating multiple discounts. Successive discounting and aggregate discounting are both permissible: per Dunford J at [12]. What is essential is that there is a degree of transparency in the process: *R v Thomson & Houlton* (2000) 49 NSWLR 383 per Spigelman CJ at [162]. Transparency is achieved by the judge disclosing both the notional starting point before specifying the discount(s) and the method of calculating the discount, be it successive discounting or multiple discounting.

290 Chi-square test, p<0.002.

291 Chi-square test, p<0.001.

Similarly, the discount for assistance to authorities was quantified in 30.8% of such cases. It appears that the guideline judgment also had an effect on the quantification of the discount for assistance to authorities, increasing from 12.5% pre-*Thomson & Houlton* to 41.6% post-*Thomson & Houlton*.²⁹²

Where the discount for assistance to authorities was quantified, the discount ranged from 8.3% to 50%. The median was 25%, the same median discount given for a guilty plea.

292 Chi-square test, p<0.015.

3.5 Objective facts of the offence

Objective factors relate to the legal elements of the particular offence and other surrounding factors which may impact on the objective seriousness of the offence. As Hunt CJ at CL observed in *R v Roberts, Lewis & McVean*:²⁹³

“A sentence should always be appropriate to the particular crime having regard to the gravity of the offence viewed objectively, for without a proper assessment of that objective gravity the other factors requiring consideration in order to arrive at the proper sentence to be imposed (including the subjective features of the particular case) cannot properly be given their place: *Regina v Dodd* (1991) 57 A Crim R 349 at 354.”

Robbery offences under s 97 of the *Crimes Act* 1900 cover a range of criminality. For example, s 97(1) refers to robbery being either armed or in company. Of course, an offender could be both armed and in company, which is likely to be considered more serious than just being in company. Similarly, a robbery committed by a person who was armed (and alone) may be viewed by some judges as more serious and threatening than a robbery committed by persons who were unarmed (and in company). Even the element of “in company” can embrace a variety of circumstances. For example, a robbery committed by a group of large and threatening individuals would be viewed as worse than being confronted by two relatively unthreatening individuals.

3.5.1 Target of robbery

The majority of robberies in this study targeted commercial property (68.3%). Individuals were targeted in 31.7% of cases. In 8 instances (2.3%), the robbery of the commercial target afforded the opportunity to rob an individual(s) as well.²⁹⁴

3.5.2 Location of robbery

In this study the most common locations where robberies occurred were retail stores²⁹⁵ (24.3%) and service stations (17.1%), followed by robberies in the street or public thoroughfares (12.1%), hotel/bottle shops (7.8%), financial institutions²⁹⁶ (5.8%), residential premises²⁹⁷ (5.5%) and chemists (4.3%). Table 9 shows the various locations where robberies occurred.

3.5.3 Time of robbery

This study used the definition of “night” found in s 4 of the *Crimes Act* 1900, where night is defined as “the period of time commencing at nine of the clock in the evening of each day and concluding at six of the clock in the morning of the next succeeding day.”

293 (1994) 73 A Crim R 306 per Hunt CJ at CL at 308.

294 Based on 350 offenders (excludes 2 cases where the target of the robbery was unknown).

295 This includes, for example, supermarkets, convenience stores and mixed businesses (5.8%), take-away outlets/cafés (3.8%), newsagencies (3.2%), video stores (2.3%), bakeries (1.7%), jewellers (0.6%), other type of shop (4.0%) and type of shop unspecified (2.9%).

296 This includes banks, building societies, credit unions and the rare case of an armoured truck.

297 Includes robberies that took place at the front door, foyer or stairs of a unit block. In this study, 5 judges specifically used the term “home invasion” to describe the robbery at residential premises.

Table 9 Locations of s 97 robberies in the study sample (12 May 1999 to 11 May 2002)

Location	N	%
Commercial premises		
retail stores	84	24.3
service stations	59	17.1
hotel/bottle shops	27	7.8
financial institutions	20	5.8
chemists	15	4.3
post offices	6	1.7
clubs	4	1.2
other commercial premises	10	2.9
Transport/transport premises		
train	12	3.5
taxi-cab	9	2.6
railway station	8	2.3
bus	1	0.3
bus stop	1	0.3
Outdoors		
street/public thoroughfare	42	12.1
carpark	10	2.9
park	8	2.3
ATM	7	2.0
other	2	0.6
Residential premises		
High school	19	5.5
	2	0.6

Of the robbery cases where it was possible to determine the time the offence took place,²⁹⁸ over two-thirds (68.8%) occurred in the day, that is, between 6 am in the morning and 9 pm of the same day.

Robberies of commercial businesses were more likely to take place during the day (73.3%). The exception was robberies of service stations (38.3%). Robberies of newsagencies and bakeries were other commercial premises where proportionately fewer cases occurred during the day (57.1% and 60.0% respectively). This may partly be due to early morning opening hours being counted as night.

Robberies of individuals, however, were disproportionately more likely to occur at night (42.0%), especially if the robbery took place outdoors on the street (47.4%). The exception was robberies on a train (25.0%). This may partly be due to the age of victims, usually young people travelling during the day and not at night.

298 Based on 256 cases (excludes 96 cases where the time of the robbery was not known).

3.5.4 Type of property taken

The most common item stolen during a robbery was cash (84.8%). Other common items taken were handbags and wallets²⁹⁹ (14.6%), cigarettes (13.7%), mobile phones (7.9%) and jewellery (6.6%). Less common items were clothing (3.4%), entertainment equipment (2.7%), drugs³⁰⁰ (1.8%), alcohol (1.5%) and other property³⁰¹ (4.6%).³⁰²

3.5.5 Value of property taken

The dollar value of the property taken was unknown in 136 cases (38.6%).³⁰³ Where the dollar value of the property was known, the median dollar value was \$424 with a range of \$3 to \$188,460. The amount taken was relative to the type of target. For commercial targets the median was \$600 compared with \$140 for individual targets. There were wide variations in the median amount stolen from different types of commercial targets. For example, banks (\$15,520), clubs (\$9500) and post offices (\$2028), not unexpectedly, had higher amounts stolen than smaller commercial targets such as newsagencies (\$1000), bottle shops (\$910), video stores (\$595), service stations (\$350) and convenience stores (\$325).

3.5.6 Offender was alone or in company

Table 10 shows the proportion of cases in this study that involved multiple offenders by the offence charged. Obviously, all in company offences involved multiple offenders. However, almost half (45.6%) of armed robberies also involved multiple offenders.

In this study, irrespective of the offence charged (armed or in company), the majority (63.1%) of robberies involved multiple offenders. The number of co-offenders ranged from 1 to 7, with the most common number of co-offenders being 1 co-offender (58.5%, or 36.2% of all cases) or 2 co-offenders (28.8%, or 17.8% of all cases). The fact that a robbery offence is carried out in company is an aggravating factor.³⁰⁴

Some offenders and co-offenders were not present during the commission of the offence, for example, getaway drivers or lookouts. However, the fact that the offender did not intend that the

299 Excluding cash.

300 Excluding alcohol.

301 Other property includes mobile phone cards, confectionery, motor vehicle parts, computer equipment, firearms, instant lottery tickets and a baseball.

302 Based on 328 cases (excludes 24 cases where the type of property taken was unknown. These missing cases were often associated with “with intent to rob” offences where no property was taken). Percentages do not total 100% as more than one type of property could be taken.

303 The amount was less likely to be known where the target was an individual as opposed to a commercial business. In some cases, the sentencing judge only discussed the property taken in terms of the *Henry* guideline, that is, “small amount taken” or similar words. Some of the missing values were also due to “assault with intent to rob” offences where no property was taken. Sometimes the cash component was known but not the total value of property taken. The cash amount was entered if it accounted for the bulk of the property taken.

304 *R v Li* (unrep, 9/7/97, NSWCCA) per Abadee J. Two judge bench (Studdert J agreeing).

Table 10 Frequency of s 97 offences in the study sample involving multiple offenders (12 May 1999 to 11 May 2002)

Section	Offence description	N	%
97(1)	robbery being armed with an offensive weapon	81	45.8
97(1)	assault with intent to rob being armed with an offensive weapon	2	9.1
97(1)	robbery being in company	108	100.0
97(1)	assault with intent to rob being in company	5	100.0
97(2)	aggravated robbery being armed with a dangerous weapon	26	65.0
97	All s 97 offences	222	63.1

victim should know of their presence does not excuse them from liability. Offenders who act in concert with a co-offender(s) in a common criminal design to rob a victim are still liable.³⁰⁵

3.5.7 Offender was armed or unarmed

Table 11 shows the proportion of offenders armed with a weapon by the offence charged. It is evident that an offender may be charged with armed robbery even when the offender was not in possession of the weapon involved in the offence. In this study, only 86.2% of offenders who were charged with armed robbery were in fact personally armed with a weapon.

Conversely, in 15.9% of robbery in company offences, the judge discussed the use of a weapon involved in the offence as a surrounding circumstance that went to the seriousness of the offence.³⁰⁶

Table 11 Frequency of s 97 offences in the study sample where the offender was armed (12 May 1999 to 11 May 2002)

Section	Offence description	N	%
97(1)	robbery being armed with an offensive weapon	156	88.1
97(1)	assault with intent to rob being armed with an offensive weapon	21	95.5
97(1)	robbery being in company	17	15.7
97(1)	assault with intent to rob being in company	1	20.0
97(2)	aggravated robbery being armed with a dangerous weapon	29	72.5
97	All s 97 offences	224	63.6

³⁰⁵ See: *R v Leoni* [1999] NSWCCA 14 per Adams J at [16]–[17] applying *R v Brougham* (1986) 43 SASR 187 per King CJ at 191; *R v Cooper, Jones & Harris* (1978) 17 SASR 472. See also *R v Button & Griffen* (2002) 54 NSWLR 455 per Kirby J at [115].

³⁰⁶ Often the reason for not charging “armed robbery” is the lack of evidence to support such a charge. See 3.8.1 for a discussion on this topic.

In this study, irrespective of the offence charged (armed or in company), almost two-thirds of offenders (63.6%) were armed with a weapon.

Table 12 summarises which offender(s) were armed regardless of the offence charged or the number of offenders involved in the robbery. Clearly, most robberies under s 97 involve the use of a weapon(s). In 50 cases (14.2%) there was no weapon involved in the robbery. In 190 cases (54.0%) the offender was the only person armed with a weapon. In 78 cases (22.2%), the co-offender was the only person armed with a weapon and in 34 cases (9.7%), at least one co-offender as well as the offender was armed with a weapon.

Table 12 Who was armed in the study sample by type of offence charged and whether they were in company (12 May 1999 to 11 May 2002)

Offence	Who was armed			
	Offender only	Co-offender only	Both	No-one
Armed robbery				
alone	130	n/a	n/a	n/a
in company	52	33	24	n/a
	182	33	24	n/a
Robbery in company	8	45	10	50
All s 97 robbery	190	78	34	50
%	54.0	22.2	9.7	14.2

3.5.8 Type of weapon

The nature of the weapon is of considerable significance in terms of the objective gravity of the offence.³⁰⁷ Armed³⁰⁸ robbery offences under s 97 of the *Crimes Act 1900* refer to the use of two types of weapons or instruments. Section 97(1) refers to the use of an “offensive weapon, or instrument” and s 97(2) refers to the use of a “dangerous weapon”. While the statutory maximum penalty for robbery involving an offensive weapon or instrument is 20 years, offences which involve the use of a dangerous weapon have a maximum penalty of 25 years. Both types of weapon are defined in s 4 of the *Crimes Act 1900*.³⁰⁹

307 *R v Jenkins* [1999] NSWCCA 110 per Spigelman CJ at [5].

308 Section 4 of the *Crimes Act 1900* defines “armed” as follows: “in relation to a weapon, or instrument, or an offensive weapon, or instrument, that is a dangerous weapon, includes bearing or having the immediate physical possession of the weapon, or instrument.”

309 “Dangerous weapon” means:

- (a) a firearm (within the meaning of the *Firearms Act 1996*), or
- (b) a prohibited weapon within the meaning of the *Weapons Prohibition Act 1998*, or
- (c) a spear gun.

...

‘Offensive weapon or instrument’ means:

- (a) a dangerous weapon, or
- (b) any thing that is made or adapted for offensive purposes, or
- (c) any thing that, in the circumstances, is used, intended for use or threatened to be used for offensive purposes, whether or not it is ordinarily used for offensive purposes or is capable of causing harm.”

By far, the most common weapon used to commit the armed robberies in this study³¹⁰ was a knife or other cutting instrument (57.3%).³¹¹ Offenders used a variety of knives, ranging in size from a modest pocket knife to a large carving knife or flick knife. The CCA has rejected the notion that the objective criminality involved in the use of a knife is proportionate to its size.³¹²

Robberies involving the use of firearms can be seen to escalate in seriousness, and hence be more likely to attract a higher penalty depending on the circumstances surrounding the use of the firearm in carrying out the robbery. For example, was the firearm loaded, was the firearm discharged, and if the firearm was discharged, was it deliberately aimed at a victim or important target?³¹³ However, while a loaded³¹⁴ firearm is an aggravating factor,³¹⁵ it is wrong to suggest that an unloaded firearm is a mitigating factor.

In this study, firearms, such as rifles, shotguns, pistols and revolvers, were used in 21.7% of cases involving weapons. Authentic firearms were used in cases involving a rifle or shotgun (9.0% of armed cases). Conversely, where a pistol or revolver was used (12.0% of armed cases), the majority of the firearms were replicas (8.1% of armed cases). In only 8 cases (2.7% of armed cases) the firearm was loaded. In cases where a firearm was used, judges often stated that whether the firearm used in a robbery was a replica, and whether or not it was loaded, did not lessen the fear felt by the victims. The use of a firearm increased the level of fear experienced by victims.

Syringes were used in 16.0% of armed robberies.³¹⁶ Given the number of offenders in this study who had a history of drug use (79.6%), were addicted to drugs at the time of the offence (69.5%), or were affected by drugs at the time of committing the offence (22.4%),³¹⁷ it is not too surprising that some offenders would use such a readily available weapon to commit the robberies. The CCA has held that “those who use syringes filled with blood, or apparently filled with blood, to inflict dread upon their victims of the fear of being inflicted with AIDS, can expect ... punishment which will reflect the terror which that weapon creates”.³¹⁸

310 Based on 300 cases (302 cases where the offender and/or co-offender were armed, less 2 cases where the type of weapon was not known). Percentages do not add to 100% as more than one type of weapon was used in some offences.

311 Knives were used in 50.3% of armed robberies. Other cutting instruments were used in 8.7% of armed robberies and include screwdrivers, machetes, swords, scissors and axes.

312 *R v Doorey* [2000] NSWCCA 456 per Wood CJ at CL at [26]–[27]; *R v Randell & McAlister* [2004] NSWCCA 337 per Wood CJ at CL at [32].

313 *R v Readman* (1990) 47 A Crim R 181 per Maxwell J at 184 citing *R v Dicker* (unrep, 3/7/80, NSWCCA).

314 Section 4 of the *Crimes Act* 1900 defines loaded arms as “any gun, pistol, or other arms, loaded in the barrel or chamber or magazine with gunpowder or other explosive substance, and with ball, shot, slug, or other destructive material, although the attempt to discharge may fail from want of proper priming, or from any other cause; and every gun, pistol, or other arms, unlawfully presented at any person, shall be deemed to be loaded unless the contrary is shown.”

315 *R v Readman* (1990) 47 A Crim R 181; *R v Bavadra* (2000) 115 A Crim R 152.

316 Most of the syringes were filled with blood or red liquid (11.3% of armed cases).

317 See 3.6.10, 3.6.11 and 3.6.12.

318 *R v Hodge* (unrep, 2/11/93, NSWCCA) per Allen J.

A victim has no idea whether the syringe is filled with contaminated blood or coloured water. Victims tend to believe what they are told by the offender.³¹⁹ According to the CCA in *R v Fernando*,³²⁰ a syringe filled with blood is more serious than a knife or the category of weapon in *Henry*.

Other types of weapons used included metal objects, such as iron bars and club locks (7.3%).³²¹ Baseball bats and sticks were used in 2.7% of cases. Bottles and rocks were used in 4 cases (1.3%). In another 4 cases (1.3%) it was implied by the offender that he carried a weapon. These 4 offenders were sentenced for robbery in company.

3.5.9 Role of the offender

The role of offenders in this study was varied. Most offenders played a primary role, being principals or co-principals in the commission of the offence (83.5%). Others played a secondary role, such as acting as a lookout, driving the getaway car, or providing support, for example, by virtue of their physical size, or by the provision of weapons (16.5%).

The doctrine of joint criminal enterprise was raised by judges in 35 cases (9.9%).³²² Under the doctrine of joint criminal enterprise all offenders are held to be equally guilty regardless of the role the offender played in the commission of the offence.³²³ The doctrine “provides a means, often an additional means, of establishing the complicity of a secondary party in the commission of a crime.”³²⁴

In 19 of the 35 cases, the offender was sentenced as a co-principal. In the other 16 cases, the judge raised the doctrine of joint criminal enterprise but still found the offender played a lesser role in the commission of the offence. While all offenders involved in the robbery are considered equally guilty, an assessment by the judge of the objective and subjective factors may result in different sentences for the offenders involved in the same robbery.

319 For example, in one case in the study where the offender used a safety pin as a weapon, the victim believed it to be more serious because the offender stated that he had AIDS.

320 [2002] NSWCCA 28 per Spigelman CJ at [72]. His Honour also quoted the statement of Simpson J in *R v Kyroglou & Tsoukatos* [1999] NSWCCA 106 at [88] that a syringe was “if not more serious than the use of a knife, then at the very least right at the outside limits of seriousness of the kind of weapon the guideline contemplates.” For other statements about the seriousness of threatening a victim with a blood-filled syringe see: *R v Wilson* (2001) 125 A Crim R 450; [2001] NSWCCA 399 and *R v Hodge* (unrep, 2/11/93, NSWCCA).

321 Tyre levers, a hammer, a baton and a club were also used.

322 Various terms were used by judges to describe joint criminal enterprise, for example, common purpose, joint venture or agreement.

323 For discussion of the doctrine of joint criminal enterprise in respect of robbery in company see *R v Leoni* [1999] NSWCCA 14 per Adam J at [16]–[17]. In respect of the doctrine for sentencing purposes see: *R v Hoschke* [2001] NSWCCA 317 per Carruthers AJ at [18]–[19]; *R v Cotter* [2003] NSWCCA 273 per Carruthers AJ at [87]–[88]; *R v Alameddine* [2004] NSWCCA 286 per Wood CJ at CL at [52]; *R v Randell & McAlister* [2004] NSWCCA 337 per Wood CJ at CL at [15].

324 *McAuliffe v The Queen* (1995) 183 CLR 108 at 113 per Brennan CJ, Deane, Dawson, Toohey and Gummow JJ in a joint judgment. The doctrine of common purpose or joint criminal enterprise is outlined at 113–114 of the judgment. See also *Gillard v The Queen* (2003) 219 CLR 1.

3.5.10 Degree of planning

The degree of planning involved in the robberies in this study was not always clear from the remarks on sentence. Judges used a variety of terms when describing the extent of the planning involved in the robbery.³²⁵ While it was relatively easy to discern which cases were “well planned”, a problem arose in trying to categorise cases in which the degree of planning was less than well planned. Therefore, a decision was made to group the degree of planning into two categories: “well planned” and “not well planned”. The latter category comprised cases where the robberies were opportunistic or involved a limited degree of planning, and included cases that were said by the sentencing judge to fit the *Henry* guideline. However, there were still 114 cases (32.4%) where the planning was not discussed at all.

Only 28 cases were well planned (8.0% of all cases or 11.8% of known cases).

3.5.11 Use of disguises

Closely associated with the degree of planning was the use of disguises. Seventy-two remarks on sentence included discussion on the use of disguises (20.5%). This does not necessarily mean that the other offenders did not wear a disguise. Where the use of a disguise was discussed, 41 offenders went to great lengths to disguise their identity by using some form of face covering (for example, balaclava, stocking, face mask, motorcycle helmet) and gloves. Twenty-eight offenders were not as meticulous in their planning, using some form of everyday clothing to conceal their identity, for example, hooded jackets, dark clothing, baseball caps and sunglasses. Three offenders altered their appearance after committing the robbery by cutting their hair, shaving facial hair, removing a fake tattoo and changing clothes immediately after committing the offence.

3.5.12 Violence

The essence of robbery “is that violence is done or threatened to the person of the custodian who stands between the robber and the property in order to prevent or overcome his resistance and oblige him to part with the property and submit to the thief stealing it.”³²⁶ In this study, almost two-thirds of cases involved threats of violence (219 cases or 63.3%) as opposed to cases which involved the use of actual violence (127 cases or 36.7%).³²⁷ Not all actual violence was instigated by the offenders. In 8 cases the violence resulted from victims trying to prevent the robbery or prevent offenders from leaving the scene of the robbery. In 1 case the violence was perpetrated on a participant of the robbery who acted the part of a victim.³²⁸ For analytical purposes, these 9 cases have been regarded as involving threats of violence (65.9%) rather than actual violence (34.1%).

³²⁵ Various terms and phrases were used by judges to describe the degree of planning, or lack thereof, involved in the robberies including amateurish, unsophisticated, ill thought out, unpremeditated, spur of the moment, spontaneous and professional.

³²⁶ *Smith v Desmond & Hall* [1965] AC 960 per Lord Pearce at 997.

³²⁷ Based on 346 cases (excludes 6 cases where the type of violence was unknown).

³²⁸ However, another person was a genuine victim unaware that the violence was staged.

It was not uncommon in this study for offenders to have tried to reassure their victims that they had no intention of harming them. The fact that an offender expresses concern for the victim and assures them they will not be hurt should be given no weight. The reassurances are unlikely to detract from the threat of violence or alleviate the distress caused to the victim.³²⁹

Actual violence was more likely to occur in robberies involving multiple offenders (43.5% compared with 18.5% of lone offenders).³³⁰ Robberies involving actual violence were also more likely to be committed by younger offenders (median age = 21 years compared with 23 years for robberies involving threatened violence).³³¹

In sentencing, judges needed to consider the part played by the offender in cases involving actual violence. Where actual violence was a factor in the robbery, the offender was the only perpetrator of the violence in 54 cases (45.8%), the co-offender was the only perpetrator in 25 cases (21.2%), and in 39 cases (33.1%) both the offender and co-offender(s) perpetrated the violence.

Examples of the most common forms of actual violence involved in the robberies were pushing and pulling or grabbing the victim (55.1%), followed by punching and kicking the victim (28.8%), holding a weapon against the body of the victim (24.6%), striking the victim with the weapon (11.9%), and tying or locking up the victim (9.3%). It was not uncommon for more than one type of violence to be involved in a robbery.³³²

Most robberies in this study (315 cases or 91.0%) did not involve physical injury to the victim(s).³³³ Of the 118 cases which involved actual violence perpetrated by the offender(s), 31 (26.3%) resulted in some form of injury to the victim(s). Most of the injuries were minor³³⁴ (24 cases). However, there were 7 cases involving serious³³⁵ injury.

Most victims did not resist the demands of the robbers (246 cases or 71.3%).³³⁶ In the 99 cases (28.7%) where the victim put up some form of resistance, it was most likely to be physical in nature (79 cases). This involved struggling with the offender(s) or taking some form of evasive action, such as attempting to escape, activating an alarm or calling the police, and intervention by a third party. In 29 cases, the victims offered verbal resistance by screaming or calling out for help. In some cases a combination of physical and verbal resistance was involved. In 3 cases, the victim ignored the demands of the robbers and stood their ground.

329 *R v Speeding* (2001) 121 A Crim R 426 per Giles JA at [23]–[24].

330 Chi-square test, p<0.001.

331 Kruskall-Wallis test, p<0.007; median test, p<0.12.

332 As such, percentages do not total 100%.

333 Based on 346 cases (whether any injury was sustained was unknown in 6 cases).

334 Includes bruises, abrasions and cuts not requiring stitches.

335 Includes broken bones, concussion and injuries requiring medical treatment.

336 Based on 345 cases (whether or not the victim resisted was unknown in 7 cases).

3.5.13 Victims

In *R v Henry*,³³⁷ Spigelman CJ stated that armed robbery is perceived as a life-threatening situation for the majority of victims who may experience significant physiological and psychological problems. In this study, continuing psychological suffering³³⁸ was a factor in 18 cases (5.2%).³³⁹ It is for this reason that armed robbery is regarded as a serious offence. In fact it is a matter of common sense and common knowledge that armed robbery is not merely an offence against property, it is a crime against persons.³⁴⁰

In this study, robberies usually involved a single victim (approximately 80% of cases), except in some cases involving commercial premises, particularly banks, post offices and video stores, where there were more likely to be multiple employees and customers when the robbery took place.

It is a relevant consideration to look at the impact of the robbery on victims. In *R v Henry*,³⁴¹ Spigelman CJ said:

"There is no doubt that impact on victims is an aspect of the seriousness of an individual offence. General patterns of impact of the character referred to in the literature to which the Crown referred, including statistical surveys, confirm the seriousness of the offence.

Plainly the actual impact in each particular case will vary and, appropriately, cause variations in the sentence imposed. This is not a manifestation of inconsistency. Rather, it represents the consistent application of a principle which varies in its import according to the circumstances."

In this study, 209 judges (or 59.4%) made specific mention of the fear and terror that must have been engendered by the offence.

Vulnerability of victims

It is a well established principle that offences involving direct attacks upon the security of persons and their property as they go about their lawful business will be regarded as a serious breach of the peace.³⁴² People who work in occupations which place them in a vulnerable position are in need of special protection and should be protected by deterrent sentences.³⁴³ While a person may be especially vulnerable because of their occupation —

337 (1999) 46 NSWLR 346 per Spigelman CJ at [96].

338 Includes post-traumatic stress disorder, sleeplessness, loss of appetite, mood disturbances, nightmares and flashbacks, and the inability to work or work in the particular job that the victim was employed in at the time of the robbery.

339 Based on 346 cases (excludes 6 cases where details of the violence and impact on victims were not addressed in the remarks on sentence).

340 *R v Henry* (1999) 46 NSWLR 346 per Spigelman CJ at [99]. See also *R v Bavadra* (2000) 115 A Crim R 152 per Wood CJ at CL at [39] citing *R v Broxham* (unrep, 3/4/86, NSWCCA) per Carruthers J; *R v Sootheren* [2001] NSWCCA 425 per Beazley JA at [43]–[46].

341 (1999) 46 NSWLR 346 per Spigelman CJ at [94]–[95].

342 *R v Ranse* (unrep, 8/8/94, NSWCCA).

343 See *R v Thwaites* (unrep, 6/10/93, NSWCCA); *R v Henry* (1999) 46 NSWLR 346; *R v Webster* [1999] NSWCCA 313.

for example, taxi drivers, service station attendants, convenience store assistants and pizza delivery drivers — others may be vulnerable because of a personal attribute such as age, gender or a physical or mental characteristic.

In the 304 cases where the gender of the victim(s) was known, the majority were male (65.8%). Females were victims in 44.1% of cases.³⁴⁴ The large percentage of male victims may be explained by the occupations which employ mainly males, for example, service station attendants, pizza delivery drivers and taxi drivers.

The age of the victim(s) was unknown in 280 cases (or 79.5%). The age of the victim(s) was usually raised only if they were relatively young or relatively old. This demonstrates vulnerability due to a physical characteristic as opposed to a vulnerable occupation. These cases also relate more often to robberies committed on individuals on the street, on trains, in parks, in homes, and so on.³⁴⁵ There was at least one other case where a physical characteristic, a disability, made the victim particularly vulnerable.

As expected with the majority of targets of robberies being commercial premises, most victims (68.2%) were at work when the robbery took place. In 13 cases, customers were also caught up in the robbery of a commercial premise.

344 Percentages do not add to 100% as 30 cases (9.9%) involved a combination of male and female victims.

345 Consequently, any breakdown by age would be misleading as the figures would be biased towards the very young or very old individuals involved in this form of robbery.

3.6 Subjective circumstances of the offender

While the previous section discussed the factors relating to the objective seriousness of the robbery offence, this section looks to the circumstances relevant to the offender. The subjective elements are important as they will affect the sentence either to mitigate or to aggravate the final sentence. In particular, subjective factors will have a bearing on a finding of special circumstances which will allow a variation in the statutory ratio between the term of sentence and non-parole period. In addition, a combination of subjective factors may be sufficient to attract a finding of exceptional circumstances. This in turn may warrant a non-custodial sentence whereas normally a s 97 robbery offence would attract a full-time custodial sentence. Subjective features are important in determining the weight attributed to the purpose of punishment in a particular case. For example, generally rehabilitation is given more weight than deterrence when sentencing young offenders.³⁴⁶

3.6.1 Age

The age of offenders ranged from 14 to 58 years with a median of 22 years. Almost two-thirds of offenders (63.6%) were aged 25 years and under. The most common age group was 18–20 years (36.1%), followed by 21–25 years (24.1%), 26–30 years (20.7%), 31–35 years (9.1%), 36–40 years (3.7%), under 18 years (3.4%), 41–50 years (2.0%), and 51–60 years (0.9%). Therefore, excluding juvenile offenders aged less than 18 years, involvement in robberies under s 97 decreased with age.

The law recognises two distinct groups of young offenders. Young offenders who have reached 18 years of age are dealt with by the adult courts, while those young offenders under 18 years of age are dealt with in the Children's Court.

An exception to the latter group involves cases where the young offender has committed a serious children's indictable offence.³⁴⁷ In these cases the juveniles are committed from the Children's Court to the Supreme or District Court to be dealt with according to law³⁴⁸ under the *Crimes Act 1900* and the principles of the *Crimes (Sentencing Procedure) Act 1999*. Section 97(2) is a serious children's indictable offence.

Another exception is where the offence is not a serious children's indictable offence, but because of factors such as the number of offences, the nature of the offender's involvement in them, the offender's age, prior convictions, and breaches of conditional liberty, it is appropriate that the matter be dealt with according to law. Further, there is a limit on the length of a custodial sentence applicable to the Children's Court (2 years under the *Children (Criminal Proceedings) Act 1987*). Section 97(1) is not a serious children's indictable offence.

In this study 12 offenders (3.4%) were juvenile offenders dealt with according to law. Seven juveniles committed offences under s 97(2), while 5 juveniles committed offences under s 97(1) but some feature(s) of the case required that it be dealt with according to law.

³⁴⁶ *R v Lattouf* (unrep, 12/12/96, NSWCCA).

³⁴⁷ Defined under s 3 of the *Children (Criminal Proceedings) Act 1987*.

³⁴⁸ Section 17 of the *Children (Criminal Proceedings) Act 1987*.

Age and gender

Around 9 in 10 offenders in this study were male (89.8%). The age of males ranged from 14 to 58 years with a median of 22 years. Females fell within a narrower age group from 18 to 36 years. However, the median was similar to the male median at 22.5 years. All 12 juveniles in this study were males.

3.6.2 Ethnicity

The majority of offenders in this study were classified as Anglo³⁴⁹ (54.0%). Aboriginal and Torres Strait Islanders (ATSI) accounted for 17.3% of offenders. The remainder was made up of Pacific Islander (8.8%), Asian (8.5%), Middle Eastern (7.4%) and Other³⁵⁰ ethnic groupings (4.0%).³⁵¹

Ethnicity and age

There was a statistically significant difference observed in the age of offenders across the ethnic groups.³⁵² The median age of Anglo offenders and Other offenders was 24 years and 23 years respectively. The median age of ATSI offenders was 22 years which was the median age for the whole sample. Pacific Islanders and Asians were somewhat younger with a median age of 20 years. The Middle Eastern group had the youngest median age at 19.5 years.

Ethnicity and gender

ATSI females were over-represented when males and females were compared by ethnic group. 19.7% of ATSI offenders were female compared with 10.6% of Anglos, 7.7% of Pacific Islanders and 4.5% of Middle Easterners. Females were not represented in the sample in either the Asian or Other groups.

3.6.3 Level of education

The level of education of offenders was unknown in 202 cases (57.4%). An examination of the cases where the offender's level of education was discussed revealed that 38.7% had not attained Year 10 or an equivalent status. However, for those offenders who had achieved a higher level of education, it was unclear in any given case whether those qualifications were obtained in the community or while serving a control order or a term of imprisonment.

³⁴⁹ In some cases, ethnicity was confirmed or derived from data held by the Department of Juvenile Justice (DJJ). Some offenders were identified as Anglo in the remarks on sentence and DJJ source. However, the ethnicity of most offenders in this group was not discussed by the judge. Offenders were counted in the Anglo group if they were born in Australia, were not ATSI and their name was indicative of Anglo origin.

³⁵⁰ Other includes European (5 cases), South American (3 cases), North American (1 case), African (1 case) and South African (2 cases).

³⁵¹ Ethnicity was unknown in 46 cases. However, none of these were ATSI as ATSI status was known from other data sources (BOCSAR and DJJ). Percentages in the ethnic group have been adjusted to take this into account.

³⁵² Kruskall-Wallis test, p<0.001; median test, p<0.001.

3.6.4 Employment status

According to the remarks on sentence and the data from the Bureau of Crime Statistics and Research, the majority of offenders in this study were unemployed (68.6%). Around one-fifth of offenders (19.4%) were employed. The remaining offenders were students (8.4%) or pensioners (3.6%).³⁵³

3.6.5 Marital status

Given the relatively young median age of the sample, this may in part explain the high rate of offenders who have never been married (62.5%). Almost a quarter of the offenders (23.4%) were married or in a de facto relationship. The remaining offenders (14.2%) were divorced or separated (including from a de facto relationship).³⁵⁴

3.6.6 Dependent children

From the remarks on sentence it was possible to ascertain that 101 offenders (28.7%) had dependent children. However, not all of these offenders had the responsibility for their children's upbringing.

3.6.7 Criminal history at the time of the offence

A sentencing judge may take into account antecedent criminal history in determining the sentence. However, the weight given to the prior criminal history cannot be such as to result in a sentence which is disproportionate to the gravity of the offence. An antecedent criminal history is relevant to show whether the instant offence is an uncharacteristic aberration or whether it demonstrates the offender's continuing disobedience towards the law. If it is the latter then a more severe penalty may be warranted which focuses on retribution, deterrence and the protection of society.³⁵⁵

The vast majority of offenders (83.5%) had a criminal record at the time of committing the principal offence.³⁵⁶ 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.³⁵⁷ These offenders had previously served up to 19 separate terms of imprisonment, with a median of 2 previous terms of imprisonment. Around one-fifth of offenders (19.0%) had previously served a term of imprisonment for a robbery offence under ss 94–98.

³⁵³ Based on 335 cases (excludes 17 cases where the employment status of offenders was unknown).

³⁵⁴ Based on 261 cases (excludes 91 cases where the marital status of offenders was unknown). These figures should be treated with caution as 25.9% of the sample was missing this information.

³⁵⁵ *Veen v The Queen (No 2)* (1988) 164 CLR 465 per Mason CJ, Brennan, Dawson and Toohey JJ (in a joint judgment) at 477.

³⁵⁶ This variable includes cases where the offence(s) was proven, but no conviction was recorded.

³⁵⁷ This variable relates to the number of times the offender has been sentenced to full-time imprisonment in an adult court (defined as a finalised court appearance) and was counted at the time of the commission of the principal offence.

Juvenile offending

While certain rules govern the use of juvenile records in proceedings conducted outside the Children's Court,³⁵⁸ in this study some reference was made to the offender's juvenile record of offending in 143 cases (40.6%). This was not necessarily taken into account as an aggravating factor in sentencing but was sometimes used to describe a lengthy criminal career starting as a juvenile or to discuss whether a period in custody (control order) had previously been served, whether or not for robbery, or to describe a pattern of criminal behaviour, for example, offending relating to drug use, robbery, violent behaviour or petty offending.

3.6.8 Supervision status at the time of the offence

A further important consideration at sentencing is whether or not the offender has breached a form of conditional liberty, such as bail,³⁵⁹ parole³⁶⁰ or good behaviour bond. Any such breach will be considered as an aggravating factor.³⁶¹ The commission of offences while on a supervision order represents a betrayal of an opportunity for rehabilitation and is regarded very seriously.³⁶²

While most offenders (61.6%) were on unconditional liberty at the time of committing the principal offence, all but three³⁶³ of the remaining offenders (37.5%) were on some form of conditional liberty. This is not surprising given the high proportion of offenders in the study with a prior criminal record. Fifty-four offenders (15.3%) were on parole. Another 54 offenders (15.3%) were on a bond, probation, community service order or on a Drug Court program.³⁶⁴ Three offenders (0.9%) were serving a term of periodic detention, and 21 offenders (6.0%) were on bail at the time of committing the principal offence.³⁶⁵

358 Section 15 of the *Children (Criminal Proceedings) Act 1987* states:

“Evidence of prior offences and other matters not admissible in certain criminal proceedings
 (1) The fact that a person has pleaded guilty to an offence in, or has been found guilty of an offence by, a court (being an offence committed when the person was a child) shall not be admitted in evidence (whether as to guilt or the imposition of any penalty) in any criminal proceedings subsequently taken against the person in respect of any other offence if:
 (a) a conviction was not recorded against the person in respect of the first mentioned offence, and
 (b) the person has not, within the period of 2 years prior to the commencement of proceedings for the other offence, been subject to any judgment, sentence or order of a court whereby the person has been punished for any other offence.
 (2) Subsection (1) or (3) does not apply to any criminal proceedings before the Children's Court.
 (3) The fact that a person has been dealt with by a warning, caution or youth justice conference under the *Young Offenders Act 1997* (being in respect of an alleged offence committed when the person was a child) is not to be admitted in evidence (whether as to guilt or the imposition of any penalty) in any criminal proceedings subsequently taken against the person in respect of any other offence.”

359 See for example *R v Richards* [1981] 2 NSWLR 464 per Street CJ at 465.

360 See for example *R v Moffitt* (1990) 20 NSWLR 114 per Badgery-Parker J at 128.

361 *R v Readman* (1990) 47 A Crim R 181 per Maxwell J at 184.

362 *R v Tran* [1999] NSWCCA 109 per Wood CJ at CL at [15].

363 These 3 offenders were escapees from prison (0.9%).

364 Bond (42 cases, 11.9%), probation (4 cases, 1.1%), community service order (7 cases, 2.0%) and Drug Court program (1 case, 0.3%).

365 If an offender was on more than one type of supervision order at the time of committing the principal offence, for example, bail and bond, the more serious status, that is, the bond, was counted.

3.6.9 Addictions generally

It is not uncommon for the facts surrounding the commission of a serious offence to disclose the offender's involvement with drugs (licit and/or illicit), alcohol and perhaps to a lesser extent gambling. These factors may be found in isolation or in combination. Their presence may provide evidence of a one-off or casual incident, or a serious addiction. The facts may reveal that this factor was strongly associated with the motivation to commit the offence, or was responsible for behaviour on the part of the offender that could best be described as "out of character".³⁶⁶

3.6.10 History of drug and alcohol use/abuse

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%) had a history of alcohol use/abuse.³⁶⁷

3.6.11 Drug and alcohol addiction at the time of the offence

While 83.5% of offenders had a history of drug or alcohol use/abuse, at the time of committing the offence, 75.4% of offenders were *addicted* to alcohol and/or drugs. Seven in 10 offenders (69.5%) had an addiction to drugs and 13.3% were addicted to alcohol.³⁶⁸

The type of drug was unspecified in 10.8% of such cases. Where the drug type was known, heroin was by far the most common drug of addiction (84.1%). Other drugs of addiction included amphetamines (11.7%), cannabis (11.7%), cocaine (9.3%), benzodiazepines (5.1%), ecstasy and LSD (each 0.5%).³⁶⁹

3.6.12 Under the influence of drugs/alcohol at the time of the offence

Three in 10 offenders in this study (30.4%) were under the *influence* of drugs (22.4%) or alcohol (12.5%) at the time of committing the offence.³⁷⁰

Where the type of drug was specified, almost half of the offenders (45.7%) were affected by some form of benzodiazepine. These were often taken to ameliorate cravings relating to drug addictions and in some instances were prescribed medication. Other common drugs found to be affecting offenders at the time of the commission of the offence were heroin (32.9%), cocaine (12.9%), amphetamines (12.9%), cannabis (8.6%), ecstasy and methadone

366 See *R v Coleman* (1990) 47 A Crim R 306 where Hunt J at 327 discussed the ways in which intoxication could be relevant at sentencing. Intoxication may be a mitigating factor in sentencing as being relevant to the degree of deliberation with which the offence was committed and as showing that the offender had acted out of character in committing the offence. See also *R v Henry* (1999) 46 NSWLR 346 per Spigelman CJ at [193].

367 There were 101 offenders (28.7%) with a history of both drug and alcohol use/abuse.

368 Based on 345 cases (excludes 7 cases where drug or alcohol addiction was unknown). Twenty-six offenders (7.5%) had an addiction to both drugs and alcohol.

369 Based on 214 cases (excludes 26 cases where the type of drug was unspecified). Percentages do not total 100% because offenders could be addicted to more than one type of drug.

370 Sixteen offenders (4.5%) were under the influence of a combination of drugs and alcohol.

(each 1.4%). Five offenders (7.1%) were under the influence of some prescribed medication unrelated to drug addiction.³⁷¹

In a further 13 cases the judge noted that while the offender was not under the influence of any drug at the time of committing the offence, he or she was suffering from drug withdrawal symptoms or “hanging out” for drugs.

3.6.13 Motivation for committing the offence

Given the high level of drug use and addiction of offenders in the sample, it is not surprising that the motivation for committing the principal offence was drug related in around three-quarters of cases (75.3%). Foremost among the reasons given was the need to obtain funds or drugs to support a drug habit (70.4%). Less common motivating factors were to finance living expenses (10.5%), peer pressure (7.5%), unspecified financial difficulties (5.6%), mental condition (5.2%), to support a gambling addiction (3.7%), simple greed (1.9%) and a mixture of various reasons that were classified under other (3.0%).³⁷²

3.6.14 Mental health history³⁷³

It has long been accepted, based primarily on anecdotal evidence, that people with a mental illness and/or intellectual disability are over-represented in the criminal justice system. However, it is only fairly recently that empirical research has provided concrete evidence of the prevalence of mental illness in prison populations in western countries, including Australia, which has been found to be significantly higher than that of the general population.³⁷⁴

In this study, issues relating to the offender’s mental health were raised in a third of cases (116 or 33.0%). This high incidence of mental disorder or a deficit in intellectual functioning is perhaps not surprising given the high level of drug use and addiction, and the disadvantaged background of many of the offenders in the study, which included poor educational attainment, unemployment, social isolation, homelessness and ill health.

Table 13 shows the incidence of various forms of mental health conditions discussed in the remarks on sentence. The categories used to group these conditions were taken from the American Psychiatric Association’s *Diagnostic and statistical manual of mental disorders* (DSM-IV-TR).³⁷⁵

371 Based on 70 cases (excludes 9 cases where the type of drug was unspecified). Percentages do not total 100% because offenders could be under the influence of more than one type of drug.

372 Based on 267 cases (excludes 85 cases where the motivation was unknown. However, many of these offenders were addicted to or under the influence of drugs and/or alcohol at the time the offence was committed). Percentages do not total 100% as more than one reason for committing the offence was given in some cases. The 8 “other” cases include cry for help syndrome (2), intention was not to rob but remonstrate (2), pay back/exact payment from victim (2), rip off the victim who was after drugs (1) and addicted to offending (1).

373 The offender’s history of mental health can also be considered as an objective fact at sentence.

374 See for example: S Fazel and J Danish, “Serious mental disorder in 23,000 prisoners: a systematic review of 62 surveys” (2002) 359 *Lancet* 545 at 545–550; T Butler and S Allnutt, *Mental illness among New South Wales prisoners*, 2003, NSW Corrections Health Service, Sydney. Available at <http://www.health.nsw.gov.au/areas/corrections/docs/mental_illness_among_nsw_prisoners_2003.pdf>, accessed 20/6/05.

375 American Psychiatric Association, *Diagnostic and statistical manual of mental disorders*, 2000, 4th ed, text revision, American Psychiatric Association, Washington DC.

The most common mental health categories were mood disorders including depressive disorders and bipolar disorders (50.9%), personality disorders such as antisocial or borderline personality (22.4%), attention deficit and disruptive behaviour disorders (16.4%), intellectual disability (13.8%), psychotic disorders (not drug induced) such as schizophrenia, delusional disorders and mood disorders with psychotic features (12.1%), anxiety disorders (not drug induced) such as panic disorder, post-traumatic stress disorder and obsessive/compulsive disorder (11.2%), and substance induced disorders such as psychotic or mood disorders (9.5%). Three offenders (2.6%) were suffering from a mental disorder due to physical trauma and 2 offenders (1.7%) were suffering from a mental disorder due to a medical condition.³⁷⁶

It should be noted that case law suggests that some of the categories listed above do not necessarily attract the common law principles applicable to mental health and sentencing.³⁷⁷ In this study, 25 offenders exclusively suffered a condition with this uncertain status: 10 offenders had a personality disorder; 6 offenders had an attention deficit disorder; 8 offenders had an intellectual disability; and 1 offender had Asperger's syndrome. The proportion of offenders with a mental condition fell to 25.9% if these 25 offenders were excluded.

Table 13 Mental health conditions of offenders in the study sample (12 May 1999 to 11 May 2002)

Mental health condition	N	%
mental disorder due to a physical trauma	3	2.6
mental disorder due to medical condition	2	1.7
substance-induced disorders (not including dependence and abuse)	11	9.5
psychotic disorders (not drug-induced)	14	12.1
mood disorders (not drug-induced)	59	50.9
anxiety disorders (not drug-induced)	13	11.2
dissociative disorders	1	0.9
tic disorders (Tourette's)	1	0.9
personality disorders	26	22.4
intellectual disability	16	13.8
attention deficit and disruptive behaviour disorders	19	16.4
learning disorder	1	0.9
adjustment disorder	1	0.9
persuasive development disorders (Asperger's)	1	0.9

Based on 116 cases. Percentages do not total 100% because some offenders had more than one mental condition.

376 Based on 116 cases. Percentages do not add to 100% as some offenders had more than one mental condition.

377 Grove J noted in *R v Bettini* (unrep, 13/4/93, NSWCCA): "It does not follow that simply because some behaviour which departs from society's norms has a medical label that it amounts to a mental disorder or abnormality which will in every case mitigate sentence." See also: *R v Dunn* [2003] NSWCCA 169 per Barr J at [28]; *R v Lawrence* [2005] NSWCCA 91 per Spigelman CJ at [23]–[24].

3.7 Sentencing

“... there must always be allowed a large discretion to sentencing judges and a place in that discretion for the exercise of leniency where a judge’s sympathies are reasonably excited by the circumstances of the case. But it is also important to bear in mind the instruction of this Court which applies to all judges, that robbery, whether with or without arms, is regarded as a very serious offence indeed.”³⁷⁸

3.7.1 The general rule

There is longstanding authority for the proposition that robbery is to be regarded as an offence of the utmost gravity which, except in the most exceptional circumstances, must carry a full-time custodial sentence.³⁷⁹

3.7.2 Failure to apply the general rule – *Henry* guideline judgment

However, in *R v Henry*³⁸⁰ Spigelman CJ observed that despite the earlier pronouncements of the court in this area the number of cases in which non-custodial³⁸¹ sentences had been imposed indicated that this principle had not been properly implemented by sentencing judges. The sentencing statistics³⁸² for s 97(1) offences tendered by the Crown in *Henry* revealed that non-custodial sentences were not confined to exceptional cases.³⁸³ The fact that 18% or 147 individuals out of a total of 835 had received non-custodial sentences was not consistent with the “exceptional case test”.³⁸⁴ Spigelman CJ stated that these figures taken in conjunction with the other sentencing statistics for s 97(1) offences “strongly suggest both inconsistency in sentencing practice and systematic excessive leniency in the level of sentences. They justify the promulgation of a guideline judgment.”³⁸⁵

Spigelman CJ emphasised that the purpose of the guideline was to ensure that offenders sentenced for robbery offences under s 97 would only receive a non-custodial sentence in “exceptional circumstances”:³⁸⁶

378 *R v Kingsbeer* (unrep, 29/7/88, NSWCCA) per Kirby P citing King CJ in *R v Osenkowski* (1982) 30 SASR 212.

379 *R v Murray* (unrep, 11/9/86, NSWCCA); *R v Kingsbeer* (unrep, 29/7/88, NSWCCA); *R v Valentini* (1989) 46 A Crim R 23; *R v Readman* (1990) 47 A Crim R 181; *R v Diamond* (unrep, 18/2/93, NSWCCA); *R v Hetherington* (unrep, 25/2/93, NSWCCA); *R v Maddocks* (unrep, 25/11/93, NSWCCA); *R v Crotty* (unrep, 28/2/94, NSWCCA). See also: *R v Roberts, Lewis & McVean* (1994) 73 A Crim R 306; *R v Lattouf* (unrep, 12/12/96, NSWCCA); *R v Jones* (unrep, 15/4/94, NSWCCA) referred to in *R v Clark* (1997) 95 A Crim R 585; *R v Tocknell* (unrep, 28/5/98, NSWCCA).

380 (1999) 46 NSWLR 346 per Spigelman CJ at [113].

381 “Non-custodial” refers to penalties other than full-time custody.

382 Judicial Commission sentencing statistics for the period December 1994 to October 1998.

383 The term “most exceptional circumstances” was used by Wood J in *R v Maddocks* (unrep, 25/11/93, NSWCCA) and Hunt CJ at CL in *R v Roberts, Lewis & McVean* (1994) 73 A Crim R 306. However in *Henry*, after quoting what was said in these cases, Spigelman CJ uses the term “exceptional circumstances”. Whether this is an intentional diminution of the term or an oversight, the terminology is now referred to as the “exceptional circumstances test”.

384 *R v Henry* (1999) 46 NSWLR 346 per Spigelman CJ at [109].

385 ibid, per Spigelman CJ at [110].

386 ibid, per Spigelman CJ at [210].

“ … the reasons for the guideline propounded in this judgment do not relate merely to an increase in the size of penalty. The guideline is particularly directed to overcoming the very significant proportion of cases in which non custodial sentences have been imposed. Henceforth, such sentences should be restricted to the exceptional cases to which the authorities have always referred.”

An important aspect of sentencing is the recognition that each case is different and if justice is to be administered fairly it must be “individualised”.³⁸⁷ The failure of a sentencing judge to give any consideration to available sentencing options more lenient than full-time custody, which have been canvassed in a pre-sentence report, will manifest error in an important respect.³⁸⁸

3.7.3 The distribution of penalties

In this study an examination of the types of penalties handed down by the courts for all s 97 offences shows that 300 offenders (85.2%) received a full-time custodial sentence and 52 offenders (14.8%) were sentenced to a range of penalties other than full-time custody. As the severity of the penalty on the sentencing hierarchy decreased so did the number of offenders given that penalty. Periodic detention was imposed on 20 offenders (5.7%), a suspended sentence was imposed on 17 offenders (4.8%), community service orders were imposed on 8 offenders (2.3%) and a bond or recognizance was imposed on 7 offenders (2.0%). In most of the cases where a non-custodial sentence was imposed, the sentencing judge informed the offender that if they breached the order, the only alternative left was a sentence of full-time custody.

It should be noted that suspended sentences were reintroduced as a sentencing option on 3 April 2000,³⁸⁹ almost a year into the study period. If the number of cases is limited to those sentenced on or after that date (247 cases or 70.2%), then the rate of the use of suspended sentences and other dispositions changes slightly. The higher rate of suspended sentences (6.9%) is reflected in higher or lower rates of other penalty types. Full-time imprisonment (83.0%) and community service orders (1.2%) had lower rates of use while periodic detention (6.5%) and bonds³⁹⁰ (2.4%) had higher rates of use. The rate of full-time imprisonment prior to the reintroduction of suspended sentences was 90.5%.

The remainder of the analysis and discussion of penalties is based on the entire timeframe of the study, but readers should be aware of the changes that occurred during the timeframe of the study.

387 *Dinsdale v The Queen* (2000) 202 CLR 321 per Gaudron and Gummow JJ (in a joint judgment) at [68]:

“Each case must be judged on its own facts. The adoption of a blanket rule would itself be an error of sentencing principle. A discretion must be left to permit those with the responsibility of sentencing to take into account the peculiar circumstances of the case, any exceptional circumstances affecting the prisoner, and in some cases the prisoner’s family, or some feature of the matter that reasonably arouses a judicial decision that a measure of mercy is called for in the particular case.”

388 *R v Griggs* (2000) 111 A Crim R 233 per Simpson J at [36].

389 Section 12 of the *Crimes (Sentencing Procedure) Act 1999*.

390 At the same time that suspended sentences were reintroduced, good behaviour bonds replaced the use of recognizances previously found both at common law and under the *Crimes Act 1900*.

The figures discussed so far aggregate the penalties imposed across all five discrete offences under s 97 of the *Crimes Act 1900*. Table 14 shows the distribution of penalties for three categories of offences — robbery being in company under s 97(1), robbery being armed with an offensive weapon under s 97(1) and robbery being armed with a dangerous weapon under s 97(2). Because of the small number of cases in this study, the two offence categories of assault with intent to rob being armed with an offensive weapon and assault with intent to rob being in company have been included with the relevant completed offences under s 97(1). These offences also share the same statutory maximum penalty.

**Table 14 Type of penalty imposed for s 97 offences in the study sample by offence category
(12 May 1999 to 11 May 2002)**

Penalty type	s 97(1) in company		s 97(1) armed with an offensive weapon		s 97(2) armed with a dangerous weapon		all s 97 offences	
	N	%	N	%	N	%	N	%
full-time custody	89	78.8	177	88.9	34	85.0	300	85.2
home detention ^a	0	0.0	0	0.0	0	0.0	0	0.0
periodic detention	12	10.6	7	3.5	1	2.5	20	5.7
suspended sentence ^b	4	3.5	9	4.5	4	10.0	17	4.8
community service order	5	4.4	2	1.0	1	2.5	8	2.3
bond/recognizance	3	2.7	4	2.0	0	0.0	7	2.0
	113	100.0	199	100.0	40	100.0	352	100.0

^a Home detention is not available for armed robbery: s 76(c) of the *Crimes (Sentencing Procedure) Act 1999*.

^b Suspended sentences became available from 3 April 2000.

Full-time custody was the most often imposed penalty for each category of offence charged under s 97. However, this form of custody was more likely to be imposed in robberies involving weapons (88.9% where the offence was robbery with an offensive weapon and 85.0% where the robbery was committed with a dangerous weapon compared with 78.8% where the offence was robbery in company). Penalties disproportionately imposed for robbery in company offences included periodic detention (10.6% compared with 3.5% for s 97(1) armed robbery and 2.5% for s 97(2) armed robbery), community service orders (4.4% compared with 1.0% and 2.5% respectively) and to a lesser extent bonds or recognizances (2.7% compared with 2.0% and 0.0% respectively). However, suspended sentences were more often imposed on s 97(2) offences (10.0% compared with 3.5% of s 97(1) in company and 4.5% of s 97(1) armed robbery).³⁹¹

391 Caution should be exercised when reading these figures because of the small sample size for s 97(2). Factors other than the offence charged may explain the high rate of suspended sentences imposed for this offence. For example, as juveniles charged with an offence under s 97(2) must be dealt with according to law, juvenile offenders are over-represented in s 97(2) offences (17.5% compared with 3.4% overall). Further, 25.0% of juvenile offenders received a suspended sentence compared with 4.8% overall.

3.7.4 Exceptional circumstances

It is most often during an examination of the subjective features³⁹² of the case that certain factors will be disclosed which will result in a finding by the sentencing judge that “most exceptional circumstances” or “exceptional circumstances” exist. These may warrant the imposition of a non-custodial sentence, where a full-time custodial sentence would otherwise have been imposed. It is rare that a single factor will be sufficient to attract this finding. Rather it is most often the case that it will be a constellation of factors, some overlapping, which taken together, result in the finding of “exceptional circumstances”.

An examination of the remarks on sentence of the 52 offenders (14.8%) who were given a non-custodial sentence reveal that in only 23 cases did the sentencing judge use the term “exceptional circumstances” when deciding in an exercise of judicial discretion not to impose a full-time custodial sentence.³⁹³

It is difficult to determine from the remarks on sentence for the 52 cases which single factor made the case exceptional. It was more often the case that the 10 factors in Table 15, expressed in different ways, and in various combinations, were given by the sentencing judges to justify the imposition of a non-custodial sentence.³⁹⁴

Good prospects of rehabilitation and the capacity to reform was the most commonly cited reason, among many reasons, for imposing other than a full-time custodial sentence (88.5%). For example, some of the types of rehabilitation demonstrated by offenders were: undertaking or having completed drug and alcohol rehabilitation programs including while on remand; gaining regular employment; undertaking study; ceasing to associate with undesirable companions; and adhering to stringent bail conditions, especially where there was a delay in sentencing.

The youth of the offender was cited as an exceptional circumstance in just over half of the cases (51.9%). Similarly, factors surrounding the offender’s criminal record or lack thereof were cited in half the cases (50.0%). Examples of these factors were: being a first time offender; having a history of committing only minor offences; not having been previously imprisoned; or the first time in an adult facility.

392 It may be a factor(s) relating to the objective seriousness of the robbery or a combination of both objective and subjective factors which will result in a finding of most exceptional circumstances; see for example *R v Blackman & Walters* [2001] NSWCCA 121.

393 For example, some of the cases which were cited by sentencing judges when finding that most exceptional circumstances existed were: *R v Govinden* (1999) 106 A Crim R 314 (youth, previous good character, prospects of rehabilitation and parity); *R v Lattouf* (unrep, 12/12/96, NSWCCA) (no relevant criminal record, young, family circumstances provided hope for his future in the community); *R v Griggs* (2000) 111 A Crim R 233 (comparative youth, progress in rehabilitation, and recognition of the seriousness of the offence and the harm caused); *R v Farah* (unrep, 11/12/98, NSWCCA) (strong family ties, a supportive family, youth, no prior convictions); *R v Blackman & Walters*, ibid (lesser roles, youth, no priors, achieved a remarkable level of rehabilitation).

394 Based on 52 cases where other than a full-time custodial sentence was imposed. Percentages do not total 100% because many reasons were given to justify the non-custodial sentence. Furthermore, in 3 cases the judge specifically acknowledged that the Crown supported the imposition of a non-custodial sentence.

Table 15 Exceptional circumstances for s 97 offences in the study sample (12 May 1999 to 11 May 2002)

Exceptional circumstance	N	%
good prospects of rehabilitation (capacity to reform)	46	88.5
age/youth of offender	27	51.9
prior criminal record (lack of)	26	50.0
hardship (probable effect of imprisonment)	19	36.5
genuine remorse and contrition (including assistance to authorities)	18	34.6
factors bearing on the offender's culpability	12	23.1
medical/mental condition	11	21.2
pre-sentence custody	9	17.3
issues of parity	5	9.6
other extraordinary subjective features	5	9.6

Based on 52 cases. Percentages do not total 100% because many reasons were given to justify the imposition of a non-custodial sentence.

The hardship associated with a full-time custodial sentence was cited by judges in 36.5% of cases. This factor related primarily to the vulnerability of the offender because of some physical or mental characteristic, or the form of imprisonment, for example, protective custody and the inherent restrictions characteristic of this form of custody. To a lesser extent another relevant issue was the detrimental effect of the offender's imprisonment on third parties.

3.7.5 Terms of full-time imprisonment and findings of special circumstances

As mentioned above in the discussion of the distribution of penalties, 300 offenders (85.2%) received a full-time custodial sentence. These sentences ranged from 12 months to 15 years. The median term of sentence was 4 years. This median is at the lower limit of the *Henry* range of 4–5 years.

Most full-time custodial sentences were non-consecutive (280 cases or 93.3%). The median term of sentence was 4 years and the median non-parole period was 2 years.³⁹⁵ Special circumstances³⁹⁶ were found in 263 such cases (93.9%).

395 It should be noted that there were 2 cases where a limiting term was imposed pursuant to s 23(1) of the *Mental Health (Criminal Procedure) Act 1990*. These cases were classified as fixed terms because the limiting term need only be in the form of a total term. See *R v Mitchell* (1999) 108 A Crim R 85 in a judgment of the court at [21]. The limiting terms in these cases were 44 months and 45 months. This does not affect the median terms of sentence and non-parole periods.

396 As discussed earlier at 2.2.1, special circumstances are those circumstances that allow the sentencing judge to vary the statutory ratio between the term of sentence and the non-parole period.

Consecutive sentences³⁹⁷ were imposed in only 20 cases (6.7%). The median term of sentence in such cases was 4 years 3 months; however, the median aggregate (or total) term of sentence was 5 years 3 months and the median aggregate (or total) non-parole period was 3 years. For consecutive sentences the ratio between the aggregate term of sentence and the aggregate non-parole period was used to determine whether special circumstances were found. Special circumstances were found in 18 such cases (90.0%).

Overall, special circumstances were found in 281 cases (93.7%). For the purposes of this study an additional case³⁹⁸ has been included with the other cases where a finding of special circumstances was made. This brings the total number of cases where a finding of special circumstances was made to 282 or 94.0%.

3.7.6 Reasons for special circumstances

Many reasons were given by the sentencing judges for a finding of special circumstances which justified the departure from the statutory ratio prescribed by s 44 of the *Crimes (Sentencing Procedure) Act 1999*.³⁹⁹ As with the finding of exceptional circumstances, it would be unusual if one circumstance alone was sufficient to result in a finding of special circumstances. Again it was more likely that a number of circumstances combined and in some cases overlapped which made those circumstances special in relation to a particular offender.⁴⁰⁰

As Hunt CJ at CL stated in *R v Lett*:⁴⁰¹

“ ... what constitutes special circumstances is something more than those matters which may be taken into account by way of mitigation of the total sentence. If it were otherwise, there would be no need for the adjective ‘special’... Sometimes the combination of those circumstances *may* be sufficient: *Regina v GDR* (CCA, 8 December 1994, unreported) at 3–4. But what must be shown are circumstances which demonstrate the need or the desirability for the offender to be subjected to an extended period of conditional release subject to supervision on parole.”

Table 16 shows the types of special circumstances expressed by judges in this study.⁴⁰²

397 As discussed earlier at 2.2.1, *Pearce v The Queen* (1998) 194 CLR 610 suggests the approach to be taken by sentencing judges when an offender is being sentenced for more than one offence. That is, the sentencing judge must fix an appropriate sentence for each individual offence before considering whether and how the sentences should be accumulated.

398 In this case the judge set a fixed term of imprisonment for 2 years. His Honour declined to set a non-parole period as the offender was to be deported upon his release. The judge went on to say that while deportation is not a mitigating circumstance, it is a factor relevant to a consideration of fixing a non-parole period and to the finding of special circumstances. If the offender was not to be deported, the judge would have imposed a full term of 3 years with a non-parole period of 2 years and would have found special circumstances. The judge stated the reasons for finding special circumstances, namely, age, first time in custody and the need for supervision to assist overcoming alcohol dependency.

399 Previously s 5(2) of the *Sentencing Act 1989*.

400 See *R v Simpson* (2001) 53 NSWLR 704 per Spigelman CJ at [60] and [88].

401 (unrep, 27/3/95, NSWCCA).

402 Based on 276 cases (excludes 6 cases where special circumstances were found but specific details were unknown). Percentages do not total 100% because many reasons were given to justify the departure from the statutory ratio.

Table 16 Special circumstances for s 97 offences in the study sample (12 May 1999 to 11 May 2002)

Special circumstance	N	%
need for lengthy period of supervision in community after release	206	74.6
good prospects of rehabilitation (capacity to reform)	151	54.7
age of offender	101	36.6
prior criminal record (lack of)	89	32.2
hardship	74	26.8
other extraordinary subjective features	20	7.2
effect of cumulative sentences	18	6.5
demonstrated remorse and contrition (including assistance to authorities)	7	2.5
ward off institutionalisation	7	2.5
issues of parity	1	0.4

Based on 276 cases. Percentages do not total 100% because many reasons were given to justify the departure from the statutory ratio.

The principal reason for giving a longer period on parole than prescribed was the need for a lengthy period of supervision in the community after release, enabling professional supervision, support and assistance (74.6%). For example, some offenders needed specialist psychological counselling and/or treatment for drug and/or alcohol dependency.

Prospects of rehabilitation and the capacity to reform represented a special circumstance in over half of cases (54.7%) where there was a finding of special circumstances. This was usually expressed in terms such as “very real”, “good” or “above average” prospects of rehabilitation or in terms of the offender being “at the crossroads”. Evidence before the sentencing judge to support the offender’s willingness to turn their life around was demonstrated by undertaking some form of drug or alcohol rehabilitation, remaining drug free from the time of offending and gaining employment. Judicial findings in this area often lead to a statement by the judge that the offender was unlikely to reoffend.

The age of the offender was a relevant consideration in special circumstances in over a third of cases (36.6%). In all but one of these cases, the judge referred specifically to the offender’s youth and all that encompassed, for example, immaturity and naivety. In one case the offender’s older age in combination with other factors resulted in a finding of special circumstances.

Lack of criminal history was advanced as a special circumstance in around a third of cases (32.2%). This factor related to the offender’s prior good character, minor criminal history, first time in adult custody or any form of custody, first lengthy period in custody, and lengthy period between their last conviction and the instant offence.

The hardship associated with a full-time custodial sentence was cited by more than a quarter of judges (26.8%). This predominantly related to issues surrounding protective custody and ill health. Cultural isolation and the inability of family to visit regularly were also related to hardship in custody.

Extraordinary subjective features could relate to the offender's social or family background, for example, extremely disadvantaged upbringing, early start to illicit drug use, dislocation and separation from family, and a need to provide for and support their families. These reasons were given in 7.2% of cases.

Another reason for finding special circumstances was the effect of the accumulation of sentences. While only cited in 18 cases or 6.5%, it was nevertheless an important consideration. The accumulation could be on an existing sentence (13 cases) or relate to the structure of the sentence to be imposed for the principal offence in combination with other offences (5 cases).⁴⁰³

3.7.7 Bail status at the time of sentencing

Given robbery under s 97 is one of the most serious offences on the criminal calendar and many offenders in this study had criminal convictions, it is not surprising that three-quarters of offenders (74.4%) were on remand (bail refused) at the time of sentencing. Where bail was granted (25.6%) the offender was subject to reporting conditions in all but one case.

3.7.8 Pre-sentence custody and diversion

Another factor that may affect the type of penalty handed down or the length of a full-time custodial penalty is time served in pre-sentence custody and/or diversion.

Section 24 of the *Crimes (Sentencing Procedure) Act 1999* permits a court to take other matters into account at sentencing.⁴⁰⁴ Section 24(a) permits a court to take into account any pre-sentence custody relating to the offence for which the offender is before the court. Section 24(d) allows a court to take into account anything done by the offender in complying with, and any recommendations arising out of the offender's participation in, an intervention program or plan.

Pre-sentence custody

In cases involving continuous periods of pre-sentence custody, sentences were backdated to the commencement of the pre-sentence custody. However, where there were broken (or discrete) periods of custody prior to sentencing, judges took this fact into account and reduced the term of sentence or imposed a non-custodial sentence.

The problem in measuring terms of sentences where there have been discrete periods of pre-sentence custody is that the time already served is not reflected in the final sentence handed down. In fact the final sentence is understated and the term of sentence is effectively longer. The decision in cases where a penalty other than full-time custody was imposed may have been the result of the judicial officer considering that the time spent on remand was equivalent to a full-time custodial sentence, even though the period on remand was less than the range suggested in *Henry* for a custodial sentence.

403 As shown at 2.2.1, there was a significant increase in the imposition of consecutive sentences in the three-year period following this study's timeframe. As a consequence, there may be an increase of this reason in connection with a finding of special circumstances.

404 Previously found at common law.

In this study, 43 offenders (12.2%) had served discrete periods of pre-sentence custody.⁴⁰⁵ The shortest period was 1 day and the longest period was 350 days. The median period was 60 days. Eight of these offenders spent less than 10 days in pre-sentence custody.

Of these 43 offenders, 25 offenders received a full-time custodial sentence and 18 offenders were given a non-custodial sentence. In some cases, judges believed that the time served in pre-sentence custody, even a short time, was enough to shock some offenders into keeping away from crime in the future. Time served in pre-sentence custody was not sufficient reason alone to impose a non-custodial sentence.

In addition, some judges expressed the view that because pre-sentence custody was served on remand rather than in the sentenced population, the offender's life as a prisoner was more arduous. Many of the institutions where offenders were held on remand had a lesser standard of facilities, no opportunities for work and limited access to programs.

Pre-sentence diversion

Section 11 of the *Crimes (Sentencing Procedure) Act 1999* permits the court to adjourn proceedings and defer sentencing an offender for a number of reasons, including participation in an intervention program.⁴⁰⁶

In this study, 6 offenders (1.7%) had undertaken a rehabilitation or treatment program.⁴⁰⁷ These programs varied in length from 5 months to 18 months. The median was 10 months. Five of these offenders were given a non-custodial sentence.

405 Three of these offenders also participated in a rehabilitation program after being released from custody and prior to sentencing.

406 Replaces what was known as a "Griffiths remand". See *Griffiths v The Queen* (1977) 137 CLR 293.

407 Three of these offenders had first served some period on remand before being bailed to participate in a rehabilitation or treatment program.

3.8 The most important sentencing factors

One of the aims of the study was to identify the most important factors which appear to influence the decisions of judges when sentencing for robbery offences under s 97 of the *Crimes Act 1900*. The following categorical regression analyses were conducted to determine the most important factors affecting the use of penalties other than full-time custody and the length of full-time custodial sentences.

The analysis of the remarks on sentence revealed a large number and wide range of factors that were taken into account by judges when sentencing offenders convicted of robbery offences under s 97. While many of these factors are common considerations taken into account when sentencing for any offence, other factors are specific considerations which are taken into account when sentencing an offender for robbery offences.

3.8.1 Selection of variables and categories

Before undertaking the analyses, a decision was made as to which variables and categories to include in the regression models. Decisions to include or exclude variables and/or to collapse categories or not were dependent on many things including the number of missing cases, the small number of cases in some categories, and the strength of interrelationships between factors which measure essentially the same thing (multicollinearity). These decisions were also guided by legislation, case law and preliminary analysis of the relationships between sentence (type and quantum) and various factors.

What follows is a discussion relating to a number of variables used in the bivariate and multivariate analyses. Both types of statistical analyses are used. Bivariate analysis shows the relationship between individual factors and the final sentence. Multivariate analysis, on the other hand, is used to account for the impact of multiple factors on the final sentence.

Offence seriousness

One of the most important factors in arriving at a final sentence is the seriousness of the offence in terms of the statutory maximum penalty. As discussed in Part 2, this factor was seen to be influential in sentencing robbery offenders dealt with under different statutory maximum provisions. Since the *Henry* guideline judgment did not differentiate between armed robberies prosecuted under s 97(1) or s 97(2), this study contained both kinds of cases. With a statutory maximum penalty of 20 years and 25 years for ss 97(1) and 97(2) respectively, s 97(2) should be regarded as being objectively more serious. Preliminary analysis of the significance of this factor at sentencing showed that longer median terms of imprisonment were imposed on offenders convicted under s 97(2) than under s 97(1) (5 years and 4 years respectively).⁴⁰⁸

408 Kruskall-Wallis test, p<0.001; median test, p<0.001.

Offensive or dangerous weapon

Further investigation, however, found that every offence, except one, under s 97(2) involved the use of a firearm.⁴⁰⁹ Offences involving the use of weapons other than a firearm were in the main dealt with under s 97(1). Where the weapon involved in the offence was a firearm, it could be dealt with under either section (63.9% under s 97(2) and 36.1% under s 97(1)). When offences were differentiated by weapon type it was clear that offenders were given longer median terms of imprisonment if the weapon involved in the offence charged was a firearm, rather than some other type of weapon (5 years compared with 4 years where the weapon was like a knife or syringe and 3 years 9 months where the weapon was something else).⁴¹⁰

It remained to be determined whether offenders charged with robbery being armed with a firearm received the same or different sentences when prosecuted under s 97(1) or s 97(2). There were no statistically significant differences in the imposition of full-time custody (95.5% and 87.2% respectively) or in the median term of imprisonment imposed (5 years for both).

The decision to charge or proceed with a charge under ss 97(1) and 97(2) is an evidentiary issue. To proceed with a charge under s 97(2), robbery involving the use of a dangerous weapon (which under s 4 of the *Crimes Act* 1900 means a firearm⁴¹¹ or prohibited weapon⁴¹²), the Office of the Director of Public Prosecutions (DPP) must have a report which certifies that, in the case of a gun, it is a firearm capable of propelling a projectile by means of an explosive, or in the case of a prohibited weapon, that it is one of the listed prohibited weapons or articles, for example, a flick knife or a replica gun. The decision is based on the circumstances surrounding the case. If the firearm or weapon has not been recovered, or if for some other reason the prosecution case is weak, then rather than risk losing the case altogether the DPP will proceed with a lesser charge under s 97(1) which involves the use of an offensive weapon. Police have a list providing information on which weapons are classified as offensive or dangerous weapons. In addition, the definition of an offensive weapon, which includes a dangerous weapon under s 4 of the *Crimes Act* 1900, is not there specifically for robbery offences. The definition is also there for other offences under the *Crimes Act* which include, as an aggravating factor, the use of an offensive weapon, for example, ss 61J(2)(b) and 114(1)(a). If the definition of offensive weapon did not include a dangerous weapon, then any offender using a firearm or prohibited weapon in the commission of an offence could argue that it was not an offensive weapon under the *Crimes Act*, and the case would be lost.⁴¹³

409 One case involved the use of a small butterfly style knife with the blade exposed. The offender received a term of sentence of 2 years 1 month with a non-parole period of 13 months to be served by way of periodic detention. The offender had also served almost a year (11 months and 20 days) in pre-sentence custody.

410 Kruskall-Wallis test, p<0.005; median test, p<0.005.

411 Under s 4 of the *Firearms Act* 1996 a firearm means: “a gun, or other weapon, that is (or at any time was) capable of propelling a projectile by means of an explosive, and includes a blank fire firearm, or an air gun, but does not include anything declared by the regulations not to be a firearm.”

412 See *Weapons Prohibition Act* 1998, s 4 and Schedule 1.

413 This information was provided by John Favretto, Arraignment Crown, Office of the Director of Public Prosecutions (NSW), on 1 September 2001.

In company

A further consideration with respect to offence seriousness is whether or not a weapon was used in the commission of the offence. Under s 97(1) an offender may be charged with robbery being armed with an offensive weapon, or robbery in company. As discussed earlier at 3.5.7, issues relating to joint criminal enterprise and the lack of evidence to support a charge of armed robbery were important considerations in how the charges proceeded to sentence. As mentioned earlier, where the offence charged was robbery in company, for example, the judge discussed the use of a weapon in 15.9% of such cases.⁴¹⁴

The question then arises as to how these cases should be treated in the analyses. Since it is not a breach of the *De Simoni* principle to consider the fact that an offender was armed as an aggravating factor in relation to the offence of robbery in company,⁴¹⁵ it was decided to report on both types of cases, that is, where the weapon was an element of the offence as charged or where the weapon was present at the commission of the offence, irrespective of the charge.

Judges in this study expressed a view that robbery in company is not as serious as armed robbery. Certainly it was found that the median term of imprisonment imposed on offenders was shorter for robbery in company than for armed robbery (3 years 6 months compared with 5 years if the weapon was a firearm and 4 years if the weapon was other than a firearm).⁴¹⁶ The same figures were found regardless of the method used to count the categories of offence seriousness. For this reason, only the offence as charged will be reported, unless significant differences were found.

Offence quantity

Whether or not the offender has been convicted of other offences in addition to the principal offence is an important consideration when sentencing robbery offenders (see 3.3.1). As shown at 2.2.1, such cases were more likely to involve the imposition of consecutive sentences and offenders were more likely to receive longer terms of imprisonment.

Whether or not the offender had further matters on a Form 1 taken into account at sentence is another important sentencing factor (see 3.3.1).

Preliminary analysis found both factors to be significantly related to prison length and in the case of Form 1 matters significantly related to penalty type as well. Because both factors were highly correlated with each other, it was decided to construct a new variable to measure offence quantity by combining (or nesting) these factors.

414 Where an offender is charged with robbery in company and enters a plea of guilty to that offence, then the plea indicates that all the elements of that offence are proved. This does not mean that there cannot be a dispute about the culpability of the offender. It is for the sentencing judge to determine on the basis of the evidence the ambit of a joint criminal enterprise. In some cases an offender may claim they agreed to rob with another, but did not know a weapon would be produced.

415 *R v Malone* [2000] NSWCCA 156 per Dowd J at [17]. This case was cited with approval in *R v Bavadra* (2000) 115 A Crim R 152 per Wood CJ at CL at [35].

416 Kruskall-Wallis test, p<0.001; median test, p<0.001.

Plea and timing of guilty plea

The type of plea and the timing of the plea are important factors which will impact on the final sentence (see 3.4.1).

In 12 cases the timing of the guilty plea was unknown. Preliminary analysis found that the pattern of sentences imposed in these cases was similar to the pattern of sentences imposed on offenders who entered their plea at the earliest opportunity. Also, since the majority of guilty pleas were entered at the first opportunity, these 12 missing cases have been imputed as pleas entered at the earliest opportunity.

Level of violence (injuries sustained by victim)

The violence or the threat of violence associated with robbery is what sets this offence apart from larceny (see 3.5.12).

Preliminary analysis found little difference in the penalty imposed (type and quantum) and whether actual or threatened violence was used in the offence. However, the degree of injury sustained by the victims appeared to influence the length of the term of imprisonment. For this reason, the degree of injury sustained by the victim was used to measure the level of violence in the multivariate analyses. It should be noted that this factor does not take into account who perpetrated the violence.⁴¹⁷

Target of robbery

This factor is also a construct variable incorporating two variables: whether the robbery targeted commercial property or individuals (see 3.5.1); and the grouped location of robberies (see 3.5.2). Preliminary analysis found both variables to be significantly related to prison length and in the case of the first variable significantly related to penalty type as well. Both variables were highly correlated with each other.

Prior criminal record

Similarly, prior criminal record is a construct variable. Two variables — whether the offender had a prior record and whether the offender had previously been imprisoned — were combined to measure prior criminal record (see 3.6.7). Preliminary analysis found both factors to be significantly related to penalty type and the length of imprisonment and strongly correlated to each other.

Pre-sentence custody

This variable refers to offenders who had served discrete periods of pre-sentence custody. It does not include offenders who had their sentences backdated to commence on the day they entered into custody (see 3.7.8).

⁴¹⁷ A sentencing judge is entitled to have regard to the harm done to the victim by the commission of the offence: *Siganto v The Queen* (1998) 194 CLR 656 per Gleeson CJ, Gummow, Hayne and Callinan JJ (in a joint judgment) at [29].

Bail status at the time of sentence

An earlier study⁴¹⁸ by the Judicial Commission on the factors that contribute to the decision to impose a s 12 suspended sentence⁴¹⁹ rather than full-time custody found that bail status was the best predictor of whether the offender was given a s 12 suspended sentence. That study concluded that similar considerations are taken into account by the court when assessing the offender's prospects of complying with bail and assessing the offender's suitability for a s 12 suspended sentence.

Preliminary analysis of these data found that bail status was the best predictor of the likelihood of an offender receiving a non-custodial sentence. Further, it was found that the factors that predict the granting of bail are very similar to those that predict penalty type. For this reason, this variable has been excluded from the multivariate analyses.

3.8.2 Bivariate analysis

Table 17 sets out the relationship between each factor and the frequency with which full-time custody was imposed. It also shows, for offenders given full-time custody, the relationship between each factor and the length of the term of sentence.

Bivariate analysis indicated that the following offenders were more likely to receive a *non-custodial penalty* than their respective counterpart(s) for each factor shown in bold:

- **Thomson & Houlton:** offenders sentenced in the post-*Thomson & Houlton* period
- **Target and location of robbery:** offenders who targeted individuals other than in residential premises
- **Role of offender:** offenders who were not considered to be the ringleaders or organisers of the robbery
- **Age group:** juveniles or offenders aged 18–20 years or offenders aged over 50 years
- **Indigenous status:** non-Indigenous offenders
- **Ethnicity:** offenders from a Middle Eastern background
- **Employment status:** offenders undertaking some form of study
- **Marital status:** offenders who had never been married or in a de facto relationship
- **Dependent children:** offenders with no dependent children
- **Prior criminal record:** offenders with no prior criminal record
- **Supervision status:** offenders on unconditional liberty at the time of the offence
- **History of drug/alcohol addiction:** offenders with no history of drug and/or alcohol abuse/use
- **Drug/alcohol addiction:** offenders who were not addicted to drugs and/or alcohol at the time of the offence
- **Motivation for committing the offence:** offenders motivated by some other reason than simply to obtain drugs to support a habit
- **Final bail status:** offenders who were granted bail
- **Pre-sentence custody:** offenders who had served discrete periods of pre-sentence custody and/or diversion.

⁴¹⁸ P Poletti and S Vignaendra, "Trends in the use of s 12 suspended sentences", *Sentencing Trends & Issues*, No 34, 2005, Judicial Commission of New South Wales, Sydney.

⁴¹⁹ Under the *Crimes (Sentencing Procedure)* Act 1999.

Table 17 Factors in the study and their relationship to penalty type and term of sentence

Factor	Cases	Full-time custody		Term of sentence			
		N	N	%	median	60% range	
Offence seriousness							
Type of weapon in charge**							
firearm	61	55	90.2	5 yrs	4 yrs–6 yrs	2 yrs–15 yrs	
like a knife	123	104	84.6	4 yrs	3 yrs–5 yrs 4 mths	2 yrs–12 yrs	
syringe	42	40	95.2	4 yrs	3 yrs–5 yrs	18 mths–12 yrs	
other	13	12	92.3	3 yrs 9 mths	3 yrs–4 yrs 6 mths	3 yrs–5 yrs	
no weapon	113	89	78.8	3 yrs 6 mths	2 yrs 6 mths–5 yrs	12 mths–12 yrs	
Type of weapon irrespective of charge**							
firearm	65	59	90.8	5 yrs	4 yrs–6 yrs	2 yrs–15 yrs	
like a knife	162	135	83.3	4 yrs	3 yrs–5 yrs	18 mths–12 yrs	
syringe	45	42	93.3	4 yrs	3 yrs–5 yrs	18 mths–12 yrs	
other	24	20	83.3	3 yrs 6 mths	3 yrs–5 yrs	2 yrs–5 yrs	
no weapon	54	42	77.8	3 yrs 3 mths	2 yrs–5 yrs	12 mths–12 yrs	
Offence quantity							
Offence quantity**							
only charge or matter	134	107	79.9	3 yrs 6 mths	3 yrs–5 yrs	12 mths–12 yrs	
several charges but no matters on Form 1	83	71	85.5	4 yrs	3 yrs–5 yrs	12 mths–8 yrs	
several matters on Form 1 but no other charges	58	51	87.9	4 yrs	3 yrs–5 yrs	18 mths–12 yrs	
several charges and matters on Form 1	77	71	92.2	5 yrs	4 yrs–7 yrs	12 mths–15 yrs	
Plea and assistance to authorities							
Plea and timing of guilty plea**^(KW only)							
guilty – earliest	252	212	84.1	4 yrs	3 yrs–5 yrs	12 mths–15 yrs	
guilty – not earliest	83	75	90.4	4 yrs	3 yrs 4 mths–5 yrs 6 mths	18 mths–12 yrs	
not guilty	17	13	76.5	5 yrs	3 yrs 9 mths–7 yrs	3 yrs–12 yrs	
Thomson & Houlton***							
pre	159	145	91.2	4 yrs	3 yrs–6 yrs	18 mths–12 yrs	
post	193	155	80.3	4 yrs	3 yrs–5 yrs	12 mths–15 yrs	
Assistance to authorities							
yes	65	54	83.1	4 yrs	3 yrs – 6 yrs	18 mths–15 yrs	
no	287	246	85.7	4 yrs	3 yrs – 5 yrs	12 mths–12 yrs	

Factor	Cases	Full-time custody			Term of sentence			
		N	N	%	median	60% range	range	
Objective factors								
Target and location of robbery***								
commercial target – not transport	227	202	89.0	4 yrs	3 yrs–5 yrs 9 mths	12 mths–15 yrs		
commercial target – transport	12	10	83.3	4 yrs	3 yrs–5 yrs	21 mths–9 yrs		
individual target – transport	19	14	73.7	3 yrs 1.5 mths	2 yrs 6 mths–4 yrs	18 mths–5 yrs 3 mths		
individual target – outdoors	64	49	76.6	3 yrs 6 mths	2 yrs 9 mths–4 yrs	12 mths–6 yrs 6 mths		
individual target – residential premises	18	17	94.4	4 yrs	3 yrs 6 mths–5 yrs	3 yrs–6 yrs		
individual target – other	6	4	66.7	3 yrs 2.5 mths	2 yrs 6 mths–7 yrs	2 yrs 6 mths–7 yrs		
Time of robbery								
day	176	153	86.9	4 yrs	3 yrs–5 yrs	12 mths–12 yrs		
night	80	65	81.3	4 yrs	3 yrs–5 yrs	12 mths–9 yrs		
Value of property taken**								
nothing taken (with intent offences)	27	23	85.2	3 yrs 6 mths	2 yrs 6 mths–4 yrs 6 mths	18 mths–5 yrs 6 mths		
<= median (\$424)	108	89	82.4	4 yrs	3 yrs–5 yrs	12 mths–7 yrs 6 mths		
> median (\$424)	108	99	91.7	5 yrs	3 yrs–6 yrs	21 mths–15 yrs		
Number of co-offenders**(KW only)								
alone	130	116	89.2	4 yrs	3 yrs–5 yrs 6 mths	2 yrs–12 yrs		
1 co-offender	124	104	83.9	3 yrs 10.5 mths	3 yrs–5 yrs	12 mths–15 yrs		
> 1 co-offender	88	72	81.8	4 yrs	3 yrs–5 yrs	12 mths–12 yrs		
Role of offender***								
principal or co-principal	293	262	89.4	4 yrs	3 yrs–5 yrs 6 mths	12 mths–15 yrs		
non-principal – not present (lookout, driver)	17	15	88.2	3 yrs	3 yrs–4 yrs 3 mths	21 mths–7 yrs 6 mths		
non-principal – present (not ringleader)	41	23	56.1	3 yrs	2 yrs–5 yrs	18 mths–7 yrs		
Degree of planning**								
not well planned	324	274	84.6	4 yrs	3 yrs–5 yrs	12 mths–15 yrs		
well planned	28	26	92.9	5 yrs	4 yrs–7 yrs	3 yrs–12 yrs		
Violence								
actual	118	98	83.1	4 yrs	3 yrs–5 yrs	12 mths–12 yrs		
threatened	228	198	86.8	4 yrs	3 yrs–5 yrs 3 mths	12 mths–15 yrs		

Table 17 (continued)

Factor	Cases	Full-time custody			Term of sentence		
		N	N	%	median	60% range	range
Injuries sustained by victim							
no	299	256	85.6	4 yrs	3 yrs–5 yrs	12 mths–15 yrs	
yes – minor	25	21	84.0	3 yrs 8 mths	3 yrs–4 yrs	21 mths–7 yrs	
yes – serious	7	6	85.7	4 yrs 6 mths	4 yrs–6 yrs	4 yrs–6 yrs	
yes – only psychological	15	13	86.7	4 yrs	3 yrs–5 yrs 6 mths	21 mths–12 yrs	
Subjective factors							
Gender** (KW only)							
female	36	30	83.3	3 yrs 7 mths	3 yrs–4 yrs 2 mths	18 mths–6 yrs	
male	316	270	85.4	4 yrs	3 yrs–5 yrs 6 mths	12 mths–15 yrs	
Age group***							
< 18 yrs	12	8	66.7	3 yrs 6 mths	2 yrs 6 mths–5 yrs	2 yrs 3 mths–6 yrs	
18–20 yrs	127	95	74.8	4 yrs	3 yrs–4 yrs 6 mths	12 mths–7 yrs 6 mths	
21–25 yrs	85	76	89.4	4 yrs	3 yrs–5 yrs	12 mths–12 yrs	
26–30 yrs	73	68	93.2	4 yrs	3 yrs–5 yrs 6 mths	12 mths–7 yrs 6 mths	
31–40 yrs	45	44	97.8	5 yrs	3 yrs 9 mths–6 yrs	2 yrs–15 yrs	
41–50 yrs	7	7	100.0	5 yrs	3 yrs 6 mths–11 yrs	3 yrs–12 yrs	
> 50 yrs	3	2	66.7	3 yrs 3 mths	2 yrs–4 yrs 6 mths	2 yrs–4 yrs 6 mths	
Ethnic group*							
Anglo	160	137	85.6	4 yrs	3 yrs–5 yrs	12 mths–15 yrs	
ATSI	61	59	96.7	4 yrs	3 yrs–5 yrs	12 mths–11 yrs	
Pacific Islander	26	22	84.6	3 yrs 7 mths	3 yrs–5 yrs	12 mths–12 yrs	
Middle Eastern	22	11	50.0	5 yrs	3 yrs 10 mths–6 yrs	3 yrs–6 yrs	
Asian	25	22	88.0	4 yrs	3 yrs–5 yrs 9 mths	2 yrs–6 yrs 6 mths	
Other	12	11	91.7	4 yrs	3 yrs–5 yrs	21 mths–8 yrs	
Indigenous status*							
yes	61	59	96.7	4 yrs	3 yrs–5 yrs	12 mths–11 yrs	
no	291	241	82.8	4 yrs	3 yrs–5 yrs 4 mths	12 mths–15 yrs	
Employment status***							
employed	65	55	84.6	4 yrs	3 yrs–6 yrs	12 mths–15 yrs	
unemployed, welfare recipient	242	217	89.7	4 yrs	3 yrs–5 yrs	12 mths–12 yrs	
studying	28	13	46.6	3 yrs	2 yrs 3 mths–4 yrs	18 mths–4 yrs	
Marital status*							
never married or de facto	163	130	79.8	4 yrs	3 yrs–5 yrs	18 mths–12 yrs	
married or de facto	61	55	90.2	4 yrs	3 yrs 6 mths–5 yrs 6 mths	21 mths–15 yrs	
separated or divorced or ex de facto	37	35	94.6	4 yrs	3 yrs–5 yrs 4 mths	12 mths–12 yrs	

Factor	Cases	Full-time custody			Term of sentence		
		N	N	%	median	60% range	range
Dependents*							
yes	101	95	94.1		4 yrs	3 yrs–5 yrs 3 mths	12 mths–12 yrs
no/not stated	251	205	81.7		4 yrs	3 yrs–5 yrs	12 mths–15 yrs
Prior criminal record***							
no priors	58	29	50.0	3 yrs 9 mths		3 yrs–5 yrs	12 mths–7 yrs 6 mths
priors – not previously imprisoned	136	114	83.8	3 yrs 6 mths		2 yrs 9 mths–5 yrs	12 mths–7 yrs 6 mths
priors – previously imprisoned not for robbery	91	91	100.0		4 yrs	3 yrs–5 yrs	18 mths–12 yrs
priors – previously imprisoned for robbery	67	66	98.5		5 yrs	4 yrs–6 yrs 6 mths	2 yrs–15 yrs
Supervision status at time of the offence***							
at liberty	217	168	77.4		4 yrs	3 yrs–5 yrs	12 mths–15 yrs
on bail	21	21	100.0		4 yrs	3 yrs–4 yrs 6 mths	12 mths–6 yrs 4 mths
on bond/probation/CSO/ Drug Court program	54	51	94.4	3 yrs 6 mths		3 yrs–5 yrs	12 mths–8 yrs
on parole/PD/escapee	60	60	100.0	4 yrs 6 mths		3 yrs 6 mths–6 yrs	2 yrs–12 yrs
History of drug/alcohol addiction*							
no	58	37	63.8		4 yrs	2 yrs 11 mths–5 yrs 4 mths	12 mths–8 yrs
yes	294	263	89.5		4 yrs	3 yrs–5 yrs	12 mths–15 yrs
Drug/alcohol addiction at time of offence*							
no	85	57	67.1		4 yrs	3 yrs–5 yrs 4 mths	12 mths–8 yrs
yes	260	237	91.2		4 yrs	3 yrs–5 yrs	18 mths–15 yrs
Under influence of drug/alcohol at time of offence							
no	245	205	83.7		4 yrs	3 yrs–5 yrs 6 mths	12 mths–15 yrs
yes	107	95	88.8		4 yrs	3 yrs–5 yrs	12 mths–11 yrs
Motivation for committing offence*							
only to obtain drugs	176	166	94.3		4 yrs	3 yrs–5 yrs 6 mths	18 mths–12 yrs
other reason	96	71	74.0		4 yrs	3 yrs–5 yrs	12 mths–15 yrs
Mental health condition							
no	236	205	86.9		4 yrs	3 yrs–5 yrs	12 mths–15 yrs
yes	116	95	81.9		4 yrs	3 yrs–5 yrs 3 mths	18 mths–12 yrs

Table 17 (continued)

Factor	Cases	Full-time custody			Term of sentence			
		N	N	%	median	60% range	range	
Other factors								
Court location								
Sydney	266	223	83.8	4 yrs	3 yrs–5 yrs 10 mths	12 mths–15 yrs		
outside Sydney	86	77	89.5	4 yrs	3 yrs–5 yrs	18 mths–8 yrs		
Period between offence date and sentence date**								
up to 1 yr	251	220	87.6	4 yrs	3 yrs–5 yrs	12 mths–12 yrs		
between 1 and 2 yrs	77	60	77.9	5 yrs	3 yrs–6 yrs 6 mths	18 mths–15 yrs		
between 2 and 3 yrs	17	13	76.5	4 yrs	3 yrs–11 yrs	2 yrs 6 mths–12 yrs		
more than 3 yrs	7	7	100.0	3 yrs 9 mths	3 yrs 8 mths–5 yrs	3 yrs–6 yrs		
Pre-sentence custody*								
yes	46	25	54.3	3 yrs 8 mths	3 yrs–5 yrs	18 mths–6 yrs 4 mths		
no	306	275	89.9	4 yrs	3 yrs–5 yrs 3 mths	12 mths–15 yrs		
Final bail status***								
bail granted	90	43	47.8	3 yrs 6 mths	2 yrs 6 mths–4 yrs 6 mths	12 mths–11 yrs		
bail refused	262	257	98.1	4 yrs	3 yrs–5 yrs 6 mths	12 mths–15 yrs		
Overall	352	300	85.2	4 yrs	3 yrs–5 yrs	12 mths–15 yrs		

* Using chi-square statistic, factor was found to be significantly associated with rate of imprisonment at 0.05 level.

** Using Kruskal-Wallis and median tests, factor was found to be significantly associated with term of sentence at 0.05 level.

*** Factor was found to be significantly associated with rate of imprisonment (chi-square test) and term of sentence (Kruskal-Wallis test and median test) at 0.05 level.

When the analysis focused on the *length of imprisonment*, the following offenders were more likely to receive *shorter sentences* than their respective counterpart(s) for each factor shown in bold:

- **Offence seriousness:** offenders convicted of robbery in company offences, that is, offences not involving the use of a weapon
- **Offence quantity:** offenders with no other offences or Form 1 matters
- **Plea:** offenders who entered a plea of guilty
- ***Thomson & Houlton:*** offenders sentenced in the post-*Thomson & Houlton* period
- **Target and location:** offenders who targeted individuals other than in residential premises
- **Value of property taken:** offenders who were unsuccessful in their attempt to take property
- **Number of co-offenders:** offenders who were in company with one co-offender
- **Role:** offenders who were not considered to be the ringleaders or organisers of the robbery or offenders who were not present during the robbery
- **Degree of planning:** offenders who were not involved in a well planned robbery
- **Gender:** females
- **Age group:** juveniles, or offenders aged over 50 years
- **Employment status:** offenders undertaking some form of study
- **Prior criminal record:** offenders who had no prior criminal record or had never been imprisoned
- **Supervision status:** offenders who were on a bond, probation order, community service order or Drug Court program at the time of the offence
- **Period between offence date and sentence date:** offenders sentenced more than three years after the commission of the offence
- **Final bail status:** offenders who were granted bail.

The following offenders were more likely to receive *longer sentences* of imprisonment than their respective counterpart(s) for each factor shown in bold:

- **Offence seriousness:** offenders convicted of robbery being armed with a firearm
- **Offence quantity:** offenders with multiple offences and further offences on a Form 1
- **Plea:** offenders who entered a plea of not guilty
- ***Thomson & Houlton:*** offenders who were sentenced in the pre-*Thomson & Houlton* period
- **Target and location:** offenders who targeted commercial property or residential premises
- **Value of property taken:** offenders who stole property with a value greater than the median (\$424)
- **Number of co-offenders:** offenders who acted alone or were in the company of more than one co-offender
- **Role:** offenders who played a principal or co-principal role in carrying out the robbery
- **Degree of planning:** offenders involved in a well planned robbery
- **Gender:** males

- **Age group:** offenders aged 31–50 years
- **Employment status:** offenders not undertaking any form of study
- **Prior criminal record:** offenders who had previously been imprisoned for a robbery offence
- **Supervision status:** offenders who were on parole, on periodic detention or were escapees at the time of committing the offence
- **Period between offence date and sentence date:** offenders sentenced between 1 and 2 years after the commission of the offence
- **Final bail status:** offenders who were refused bail.

While the bivariate analysis is informative and helpful in understanding the association between a factor and the sentence imposed, it cannot account for the interrelationships between the various factors. For example, in the bivariate analysis, offenders with a Middle Eastern background were significantly more likely than other ethnic groups to be given a non-custodial sentence. However, there may have been other reasons for the effect, such as strong interrelationships with other factors including age and prior criminal record.⁴²⁰ Further, data for ethnicity was missing in a large number of cases which may have also affected the results. For these reasons, ethnicity was not included in the multivariate analysis.

Another limitation of bivariate analysis is the inability of this statistical technique to assess the importance or contribution of a factor on the final sentence. Just because a factor is found to be significant at the bivariate level does not necessarily mean it has a significant effect on sentence when other factors are taken into account. For example, the bivariate analysis indicated that females were more likely than males to receive a shorter term of imprisonment. However, this factor was no longer found to be significant in the regression analysis after controlling for other factors.

Because of the limitations of bivariate comparisons a multivariate analysis was undertaken.

3.8.3 Multivariate analysis

In order to determine which factors were the most likely to predict (influence) the sentencing outcomes for robbery offences under s 97 of the *Crimes Act 1900*, categorical regression analyses were carried out.⁴²¹ The analyses sought to measure the impact of selected variables on the type of penalty (full-time custody or not), and if the offender was imprisoned, the length of the term of sentence imposed.

Most of the factors that were found to be statistically significant in the bivariate analysis were retained in the multivariate analyses. Some factors were removed from the analyses if

⁴²⁰ While the Middle Eastern group made up 7.2% of the study sample, they accounted for 26.0% of the offenders aged under 21 years and 14.3% of the offenders with no prior criminal record.

⁴²¹ Regression analysis is a statistical technique that measures the association between a dependent variable (outcome or response) and one or more independent variables (predictors or explanatory factors) while controlling for other independent variables in the regression. SPSS Categories is a regression analysis tool for data sets with mostly categorical (or nominal) variables. The technique is flexible enough to handle data sets which may contain too few observations, too many variables and too many values per variable.

multicollinearity⁴²² (or tolerance) was a concern, for example, employment status and having a history of addiction to drug/alcohol or being addicted at the time of committing the offence. The employment status variable was excluded from the analyses because the category “students” who accounted for most of the difference in sentence were either juveniles or offenders aged 18–20 years who were already represented in the regression models. The drug and/or alcohol addiction variables were excluded because the addicted offenders were more likely than other offenders to have had a criminal record and to have previously been imprisoned, and consequently more likely to have been on conditional liberty when they committed the instant offence. These offenders were also more likely to have played a co-principal role or to have acted alone.

Even when a factor was found to be significant at the bivariate level, it may have been omitted from the multivariate analysis if, for example, there was missing data for a substantial number of cases in the data set. It was more important to retain numbers for the analyses. Factors such as marital status, having dependent children and employment status were all, not surprisingly, significantly related to the age of the offenders. Factors such as the time of the robbery, value and type of property stolen and the number of co-offenders involved were all significantly related to the target of the robbery.

Some other factors that were found to be statistically insignificant at the bivariate level were also retained in the multivariate analysis if there was good reason to leave them in. For example, case law or legislation may suggest that a factor is important in the sentencing process, such as whether the offender provided assistance to authorities. Sometimes, factors were retained so as to enable a comparison of the factor’s effect across both of the analyses relating to penalty type and imprisonment length.

Results of the regression analyses

The Appendix contains the output of the categorical regression analyses. Pratt’s measure of relative importance has been used to interpret the contribution of each factor to the regression.⁴²³ When the importance value for a factor is large compared with other importance values, this indicates the factor is crucial to the regression.

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

When the analyses focused on penalty type, the categorical regression indicated that there was a statistically significant relationship between many of the factors analysed and the decision as to whether or not to impose a full-time custodial sentence when all other factors were held constant (see Table A1). The statistically significant factors were:

- the offence seriousness
- offence quantity

422 See 3.8.1 for an explanation of multicollinearity.

423 This measure defines the importance of the predictors (factors) additively, that is, the importance of a set of predictors is the sum of the individual importance of the predictors. See J J Meulman and W J Heiser, *SPSS Categories 11.0*, 2001, SPSS Inc, Chicago. See also J W Pratt, “Dividing the indivisible: using simple symmetry to partition variance explained”, in T Pukkila and S Puntanen (eds), *Proceedings of the second Tampere conference in statistics*, 1987, University of Tampere, Finland.

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

The patterns followed those reported in the bivariate analysis (see Table 17). The factors found to be statistically insignificant were: plea; assistance to authorities; degree of planning; level of violence; gender; Indigenous status; being under the influence of drugs/alcohol; mental health; and court location.

None of these factors fully accounted for the imposition of a non-custodial penalty. In fact, only 45% of the variance was explained by the set of factors in the regression.⁴²⁴

As Table A2 shows, three variables — prior criminal record, pre-sentence custody, and the offender's role in the commission of the offence — explained more than two-thirds of the model's effect in relation to the use of non-custodial penalties. The offender's prior criminal record was the most important factor, accounting for 37.2% of the variance such that offenders with no prior record were more likely than offenders with a prior record to receive a non-custodial penalty. Pre-sentence custody accounted for 17.7% of the variance such that offenders who had served time in pre-sentence custody (or diversion) were more likely to receive a non-custodial penalty than offenders who had not served discrete periods in custody prior to sentencing. The offender's role accounted for 13.2% of the variance such that offenders who were not considered to be the ringleaders or the organisers of the robbery were more likely to receive a non-custodial penalty than principals or non-principals such as lookouts or drivers.

Another three variables which independently accounted for more than 5% of the variance were, in order of importance: the offender's age (7.8%); liberty status at the time of the offence (6.0%); and whether or not the sentence was imposed before or after the issuing of the *Thomson & Houlton* guideline judgment (5.8%). Juvenile offenders or offenders aged 18–20 years or offenders aged over 50 years, offenders on unconditional liberty at the time of the offence, or offenders sentenced after *Thomson & Houlton*, were more likely than their respective counterparts to receive a non-custodial penalty.

A further four factors — offence seriousness, offence quantity, target of robbery and delay in sentencing — had less of an influence on the decision to impose a non-custodial sentence but were still found to have a significant relationship with the type of penalty when all other factors were held constant.

⁴²⁴ R²=0.453, F=5.764, p<.000 (adjusted R²=0.375).

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

When the focus of the analysis changed to the length of the term of imprisonment imposed, the categorical regression indicated that there was a statistically significant relationship between many of the factors analysed when all other factors were held constant (see Table A3). The factors found to be significantly related to the length of the term of imprisonment 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.

The patterns followed those reported in the bivariate analysis (see Table 17). The factors found to be statistically insignificant were: assistance to authorities; gender; Indigenous status; supervision status at the time of the offence; being under the influence of drugs/alcohol; mental health; court location; and pre-sentence custody.

None of these factors fully accounted for the observed differences in sentence length. In fact, only 49% of the variance was explained by the set of factors in the regression.⁴²⁵

As Table A4 shows, three variables — prior criminal record, offence quantity and age — explained almost 60% of the model's effect in relation to the length of imprisonment imposed. The offender's prior criminal record accounted for 24.4% of the variance such that offenders with no prior record or offenders who had not previously been imprisoned were more likely to receive shorter terms than offenders who had previously been imprisoned. Offenders who had been previously imprisoned for a robbery offence were more likely to receive longer terms. Offence quantity accounted for almost as much of the variance (21.7%) such that offenders with no other offences or Form 1 matters were more likely to receive shorter sentences, while offenders with multiple offences and further offences on a Form 1 received the longest sentences. Age accounted for 12.2% of the variance such that juvenile offenders or offenders aged over 50 years were most likely to receive shorter terms, while offenders aged 31–50 years received the longest terms.

Another five variables which independently accounted for at least 5% of the variance were, in order of importance: the degree of planning (9.0%); the offence seriousness, denoted by weapon use and type (6.9%); delay in sentencing (6.7%); plea (5.3%); and the target of the robbery (5.0%). Offenders who committed offences that were well planned, offenders who were convicted of robbery being armed with a firearm, offenders who were sentenced

425 R²=0.493, F=5.643, p<.000 (adjusted R²=0.405).

between 1 and 2 years after the commission of the offence, or offenders who pleaded not guilty, were more likely than their respective counterparts to receive longer prison sentences. Offenders targeting individuals, other than in residential premises, were more likely to receive shorter sentences than offenders targeting commercial property or residential premises. Offenders convicted of robbery in company were more likely to receive shorter terms of imprisonment than offenders convicted of armed robbery.

A further three factors — role, level of violence and *Thomson & Houlton* — had less of an influence on the term of sentence imposed, but nevertheless were found to have a significant relationship with the length of imprisonment when all other factors were held constant.

3.8.4 Discussion of findings of the multivariate analysis

The main findings of the regression analysis relating to the imposition of a non-custodial penalty reinforce earlier findings⁴²⁶ that the offender's criminal record (or lack thereof) and age (youth) were two of the most commonly cited reasons for imposing non-custodial penalties. Pre-sentence custody (or diversion) was also cited as a reason for exceptional circumstances, but it may be that this variable is acting here as a proxy, for "good prospects of rehabilitation", as this group of offenders may have had the opportunity to demonstrate in a tangible way a willingness to rehabilitate and reform.

Interestingly, many of the factors found to be significant in the regression analysis relating to the length of imprisonment imposed are the same factors referred to in the *Henry* guideline judgment. These factors are:

- prior criminal record
- age
- degree of planning
- offence seriousness (weapon type or in company)
- plea and *Thomson & Houlton*
- target of robbery
- level of violence.

The variable "target" represents the *Henry* variables of "small amount taken" and "victim in a vulnerable position", as it was found in the preliminary analysis that these two factors were closely related to the target of robbery.

An important factor affecting the length of imprisonment unrelated to the *Henry* characteristics was "offence quantity". Not surprisingly, offenders who were convicted of multiple offences and/or had further offences taken into account on a Form 1 received longer terms of imprisonment than offenders with no other offences or Form 1 matters. As mentioned earlier, the imposition of consecutive sentences is also strongly related to prison length. In such cases, the court needs to strike a balance between the principle of totality on the one hand and, on the other hand, ensuring that an effective punishment is imposed for each individual offence.⁴²⁷

426 See the reasons for exceptional circumstances at 3.7.4.

427 *Pearce v The Queen* (1998) 194 CLR 610.

Another factor which should be mentioned is Indigenous status. As mentioned at 3.6.2, there were 61 ATSI offenders in this study, accounting for 17.3% of offenders. Therefore, it was not surprising that the case of *R v Fernando*⁴²⁸ was raised in 29 cases.⁴²⁹ *Fernando* sets out the matters that should be considered when sentencing Aboriginal offenders. This factor was found to be insignificant in both regression models.

Of course, not all factors could be quantified or were available for analysis. For example, even the seven *Henry* characteristics “do not represent the full range of factors relevant to the sentencing exercise” and “contain within themselves an inherent variability”.⁴³⁰

Other caveats on the analysis were having too few cases to measure important variations within some factors, and variables which were not suitable for quantification, such as whether the firearm was loaded or not, degree of mental health, drug use as a mitigating factor and issues of parity. These variables were not part of the analyses and may contribute to some of the unexplained variance in the two models. A short outline of these factors or sentencing principles follows.

Weapons

As discussed at 3.5.8, not only is the type of weapon an important consideration at sentencing, so too is the way in which that weapon was used in the commission of the offence.⁴³¹ In respect of firearms, other examples of important considerations are: how the firearm was carried; whether the firearm was loaded; if it was loaded, whether it was discharged; and whether the discharging firearm was deliberately aimed at a victim or important target.⁴³² While a loaded firearm is an aggravating factor,⁴³³ it is wrong to suggest that an unloaded firearm is a mitigating factor. A shotgun, even if it is not loaded, is prone to cause panic and fear in the minds of victims. A loaded shotgun is “probably the most dangerous weapon available on a personal basis in the community.”⁴³⁴ Further, in comparing a firearm with a knife, two commonly used weapons in armed robberies, the CCA has held that a loaded shotgun is considered to be more dangerous than a knife and much more readily capable of causing death or grievous bodily harm.⁴³⁵

Mental health issues

The mental health variable in the regression analyses only distinguished between those offenders with a mental health condition or intellectual disability which was discussed in the remarks on sentence, and those offenders who the authors assumed did not have either

428 (1992) 76 A Crim R 58. See also *R v Fernando* [2002] NSWCCA 28.

429 In 3 of these cases, *Fernando* was discussed in relation to a Maori, a Papuan and a Somalian offender.

430 *R v Henry* (1999) 46 NSWLR 346 per Spigelman CJ at [164].

431 *R v Readman* (1990) 47 A Crim R 181 per Maxwell J at 184.

432 *ibid*, per Maxwell J at 184 citing *R v Dicker* (unrep, 3/7/80, NSWCCA).

433 *R v Readman*, *ibid*, per Maxwell J at 185; *R v Bavadra* (2000) 115 A Crim R 152 per Wood CJ at CL at [28].

434 *R v Campbell* [2000] NSWCCA 157 per Dunford J at [22].

435 *ibid*.

condition because mental health issues were not raised in these remarks on sentence. The guiding principles for sentencing offenders who have a mental condition or intellectual disability were discussed at 3.6.14.

While information was collected on the offenders' mental health, the complexity of the mental health conditions and the combination of these conditions in many cases precluded any meaningful categorisation of this variable. In this study, 64.9% of offenders with a mental health condition had only one defined mental health condition. The remaining 35.1% had multiple conditions. The mental health conditions fell into different categories and degrees of mental illness or levels of intellectual disability. For these reasons, no further analysis was undertaken.

When sentencing an offender with a mental illness or intellectual disability, the extent to which the condition will affect the final sentence will be dependent on a finding of fact by the judge. In a given case, the offender's condition may raise questions about the way in which the mental condition was causally related to the offence committed; the weight to be given to general deterrence in light of the mental health condition; the impact of the offender's mental condition on their ability to cope with the conditions of imprisonment, including the ability of the correctional service to provide an adequate level of mental health care; and finally, the danger the community faces should the offender with the mental condition be released into the community.⁴³⁶

In relation to the connection between mental illness and drug addiction, in *R v Henry*⁴³⁷ it was stated that drug addiction is not analogous to mental abnormality in respect of which the element of general deterrence may be given less weight:

“... the community will readily understand that the offender who suffers from a mental disorder or abnormality is less in control of his or her cognitive facilities or emotional restraints, and in some instances lacks the ability to make reasoned or ordered judgments. Almost invariably there is a limited appreciation of the wrongfulness of the act, or of its moral culpability, which although falling short of avoiding criminal responsibility does justify special consideration upon sentencing.”

Drug use as a mitigating factor

The courts have acknowledged that drug addiction, particularly to heroin, is a major cause of serious crime. However, they have emphasised that drug addiction of itself cannot be a mitigating factor at sentencing, and that “drug addicts must face the same consequence for being involved in criminal conduct as persons who are not drug addicts”.⁴³⁸

⁴³⁶ *R v Engert* (1995) 84 A Crim R 67 per Gleeson CJ at [71] discussing *R v Scognamiglio* (1991) 56 A Crim R 81 and *R v Letteri* (unrep, 18/3/92, NSWCCA); *R v Lauritsen* (2000) 22 WAR 442.

⁴³⁷ (1999) 46 NSWLR 346 per Wood CJ at CL at [254].

⁴³⁸ *R v Duncan* (unrep, 7/12/78, NSWCCA) per Street CJ.

As Wood CJ at CL stated in *R v Henry*:⁴³⁹

“ … to accept the fact of drug addiction as a mitigating factor generally, would not be justified in principle. Moreover, it would involve an exercise in irresponsibility on the part of the Court, if it were understood as a message that committing the crime of armed robbery to feed a drug habit is less deserving of censure than would otherwise be the case.”

There are a number of general principles outlined in *Henry* which state the law in NSW in relation to the sentencing of offenders with drug addictions:⁴⁴⁰

(a) the need to acquire funds to support a drug habit, even a severe habit, is not an excuse to commit an armed robbery or any similar offence, and of itself is not a matter of mitigation;

(b) however, the fact that an offence is motivated by such a need may be taken into account as a factor relevant to the objective criminality of the offence in so far as it may throw light on matters such as:

(i) the impulsivity of the offence and the extent of any planning for it (cf *R v Bouchard* (1996) 84 A Crim R 499 at 501–502) and *R v Nolan* (Victorian Supreme Court, Court of Appeal, 2 December 1998, unreported);

(ii) the existence or non-existence of any alternative reason that may have operated in aggravation of the offence, for example, that it was motivated to fund some other serious criminal venture or to support a campaign of terrorism;

(iii) the state of mind or capacity of the offender to exercise judgment, for example, if he or she was in the grips of an extreme state of withdrawal of the kind that may have led to a frank disorder of thought processes or to the act being other than a willed act;

(c) it may also be relevant as a subjective circumstance, in so far as the origin or extent of the addiction, and any attempts to overcome it, might:

(i) impact upon the prospects of recidivism/rehabilitation, in which respect it may on occasions prove to be a two-edged sword: eg, *R v Lewis* (Court of Criminal Appeal, 1 July 1992, unreported);

(ii) suggest that the addiction was not a matter of personal choice but was attributable to some other event for which the offender was not primarily responsible, for example, where it arose as the result of the medical prescription of potentially addictive drugs following injury, illness, or surgery (cf *R v Hodge* (Court of Criminal Appeal, 2 November 1993, unreported) and *R v Talbot* [(1992) 34 FCR 100]); or where it occurred at a very young age, or in a person whose mental or intellectual capacity was impaired, so that their ability to exercise appropriate judgment or choice was incomplete;

(iii) justify special consideration in the case of offenders judged to be at the ‘cross roads’: *R v Osenkowski* (1982) 30 SASR 212; 5 A Crim R 394.”

In this study, there were 15 offenders with a history of drug/alcohol addiction who had their sentence mitigated to some extent because of the sentencing principles outlined above. When these offenders were grouped according to either the objective or subjective

439 (1999) 46 NSWLR 346 per Wood CJ at CL at [274].

440 ibid, per Wood CJ at CL at [273].

circumstances of the case, it was found that the majority of offenders fell into one or more of the categories that went to the offender's subjective circumstances (11 offenders). One offender's mitigation related to the objective circumstances of the offence (state of mind affected by drug/alcohol), and 3 offenders had circumstances that could be described as both objective and subjective.

For the sake of completeness, when discussing the relationship between addiction and crime and how this will affect the final sentence, something should be said about other forms of addictions which were found in the study. While the focus above has been on how courts take drug abuse into account when sentencing for robbery offences, this is not to diminish the influence other forms of addictions may have had on an offender's life, or how they will be taken into account at sentencing. However, with respect to alcohol addiction the primary difference is that while drug addicted robbers most often commit robberies to obtain drugs or the money to purchase drugs,⁴⁴¹ this would be an atypical case for an alcoholic.⁴⁴² In addition, in recent times it is rare to find a case where a robber was only affected by alcohol. Most often it is the case that the offender will have a history of alcohol and drug abuse or will be under the influence of drugs and alcohol at the time of committing the robbery.⁴⁴³

Committing robbery to finance a gambling debt or gambling addiction is not unusual.⁴⁴⁴ In this study, at least 10 offenders had a gambling addiction which was the motivation for committing the offence.

Parity issues

The issue of parity may arise at sentencing when a court imposes a sentence on a co-offender at the same time, or in respect of a co-offender who has already been dealt with by another court. Factors which will be determinative of the sentence handed down by the court will be the objective criminality involved in the offence, for example, the offender's role and involvement in planning the offence, and the offender's subjective factors, such as criminal history and age. While all offenders involved in the same robbery are considered equally guilty, these factors may result in different sentences for each offender.

It is very difficult to achieve parity when co-offenders are charged with different offences and have different subjective features.⁴⁴⁵ Difficulties also arise when there are juvenile and adult co-offenders and sentences have been handed down in different regimes.⁴⁴⁶ This may leave the adult with a "justifiable sense of grievance".⁴⁴⁷ While parity issues do not arise between

441 See for example: *R v Murray* (unrep, 11/9/86, NSWCCA); *R v Valentini* (1989) 46 A Crim R 23.

442 In this study, one case involved an offender who was under the influence of alcohol at the time of committing the offence. His motivation for committing the offence was to obtain money to buy more alcohol. The sentencing judge applied *Henry* to mitigate, to some extent, the sentence because of his alcohol addiction.

443 See for example: *R v Hughes* [2000] NSWCCA 366; *R v Young* [1999] NSWCCA 275.

444 See for example *R v Dickson* (unrep, 14/12/67, NSWCCA).

445 *R v Broad* (unrep, 1/12/92, NSWCCA).

446 *R v Blackman* (unrep, 4/8/92, NSWCCA).

447 *Lowe v The Queen* (1984) 154 CLR 606; *Postiglione v The Queen* (1997) 189 CLR 295.

adults and juveniles, this does not mean that the sentences imposed on co-offenders in the Children's Court are irrelevant when sentencing the adult co-offender.⁴⁴⁸ However, the principles of parity should not be applied to support sentences which would otherwise be inappropriate to the circumstances of the offence.

In this study there were 26 cases where the judge discussed the sentences handed down to co-offenders dealt with in the Children's Court (7.4% of all cases or 11.8% of cases involving multiple offenders). Of these, 25 were adults. These 25 offenders were more likely than other offenders to receive non-custodial penalties (44.0% compared with 12.3% of all cases and 13.3% of cases involving multiple offenders), and if imprisoned, received shorter terms of sentence (3 years compared with 4 years and 4 years respectively). However, these offenders were also, for example, more likely to be younger (80.0% were aged 18–20 years compared with 36.2% and 45.4% respectively aged under 21 years), to have a less significant, if any, criminal record (40.0% did not have any prior convictions compared with 14.4% and 15.8% respectively or 76.0% had not previously been imprisoned compared with 53.4% and 57.6% respectively), and to have played a non-principal role in the commission of the offence (48.0% compared with 14.2% and 23.6% respectively). In fact it was sometimes the case that the juvenile co-offender was the principal or the ringleader in the offence. A number of judges also commented that some juvenile co-offenders were dealt with too leniently in the Children's Court.

In the one case where a juvenile was dealt with according to law he received a s 12 suspended sentence with supervision for 18 months. Two of his co-offenders sentenced in the Children's Court received a probation order for 18 months and a good behaviour bond for 2 years respectively.

Judicial discretion

In all of the above analysis there was one very important variable that could not be quantified, and therefore, measured. This factor, judicial discretion, is probably the most important variable in sentencing and is necessary to give justice in the individual case.

⁴⁴⁸ *R v Colgan* [1999] NSWCCA 292; *R v Govinden* (1999) 106 A Crim R 314; *R v Diamond* (unrep, 18/2/93, NSWCCA); *R v Griggs* (2000) 111 A Crim R 233; *R v Cimone* (2001) 121 A Crim R 433.

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

Another aim of the study, discussed under Methodology at 3.1.2, relates to how the judges in their remarks on sentence have interpreted and addressed the application of the *Henry* guideline judgment in robbery cases under s 97 of the *Crimes Act* 1900.

3.9.1 The common case described in *Henry*

In *R v Henry* the court identified a category of armed robbery cases under s 97 of the *Crimes Act* which was sufficiently common for the purposes of determining a guideline. The typical robbery case identified by Spigelman CJ contained the following seven characteristics:⁴⁴⁹

- “(i) Young offender with no or little criminal history;
- (ii) Weapon like a knife, capable of killing or inflicting serious injury;
- (iii) Limited degree of planning;
- (iv) Limited, if any, actual violence but a real threat thereof;
- (v) Victim in a vulnerable position such as a shopkeeper or taxi driver;
- (vi) Small amount taken;
- (vii) Plea of guilty, the significance of which is limited by a strong Crown case.”

These categories may have been deliberately left flexible enough to encompass a wide variation within each characteristic, permitting judicial officers a broad discretion at sentencing to allow for individualised justice.

Before undertaking the analysis the following rules were applied to two of the *Henry* characteristics.

In regard to the seventh characteristic, the authors looked only at whether the plea entered was a guilty plea and ignored the significance of the Crown case owing to the issuing, during the study period, of the *Thomson & Houlton* guideline judgment on the treatment of guilty pleas. In *Thomson & Houlton* it was said the strength of the Crown case has no bearing on the utilitarian value of the guilty plea. Furthermore, the guideline judgment determined that a discount in the range of 10–25% was appropriate for a guilty plea based primarily on the timing of that plea. The court emphasised that in *Henry* the court was concerned with a guilty plea of limited value which should be understood to involve a late plea of guilty.⁴⁵⁰

In relation to the first characteristic (young offender with no or little criminal history), the authors decided to look separately at the two factors in this characteristic. This resulted in eight characteristics for the following analysis.

449 *R v Henry* (1999) 46 NSWLR 346 per Spigelman CJ at [162].

450 *R v Thomson & Houlton* (2000) 49 NSWLR 383 per Spigelman CJ at [161].

3.9.2 Identifying the common case in the study

In this study, 248 judges (70.5%) made some reference to *Henry*. This does not mean that the other judges did not have *Henry* in their minds when undertaking the sentencing exercise. Of the judges who made reference to *Henry*, 150 (60.5%, or 42.6% of all cases) specifically referred to one or more of the characteristics which were said to represent a common case for the purposes of the guideline judgment. The other judges referred to *Henry* only in terms of the offender's drug addiction as the motivation for committing the offence, or simply made reference to the guideline judgment being issued. The amount of information provided in the remarks on sentence varied widely. Some judges went into great detail in relation to all aspects of the case while others provided only the minimum information required. This paucity of information presents difficulties when undertaking content analysis.

When the authors examined the 150 cases which made reference to at least one *Henry* characteristic, in only 42 cases (28.0%, or 11.9% of all cases) did the judge specifically say that he or she considered the particular case was a "*Henry* case". This does not mean that other cases were not necessarily "*Henry* cases"; however, the judges did not identify the cases as such.

Before undertaking an analysis of the 42 "*Henry* cases", the authors examined the cases that Spigelman CJ in *R v Henry*⁴⁵¹ said were consistent with a starting point range of 4–5 years imprisonment. An examination of these cases highlighted the variability within the eight characteristics as well as the other factors that are said to be relevant to sentencing for armed robberies. Given the wide variations, on the face of it, it would appear to be impossible to find a set of characteristics common to all cases. Nevertheless, an analysis was undertaken of cases which the sentencing judges stated were "*Henry* cases" to determine whether a common value could be identified for each of the eight characteristics referred to above.

Because of the subjective nature of interpreting many of these characteristics, and the variability inherent within them, the authors developed a set of rules to enable statistical analyses to be undertaken. The rules were developed using the remarks of judges who described the case as a "*Henry* case" and the responses of other judges who discussed a particular characteristic in depth. In addition, the construction of the rules was also guided by standard statistical methodology relevant to the particular analysis to be undertaken in this section.

Rules governing the selection of "*Henry* cases"

Young offender

While the majority of judges agreed that a young offender was under 24 years, there was some overlap in the range between 24 and 32 years inclusive. A decision was made to use under 25 years as the cut-off age for a young offender based on the Australian Bureau of Statistics' age groupings for a young offender.

451 (1999) 46 NSWLR 346 per Spigelman CJ at [166].

No or little criminal history

If a judge described the significance of the offender's criminal history which allowed for a classification of that history, no problems arose. However, where the description was ambiguous or criminal antecedents were not discussed, then data from the Bureau of Crime Statistics and Research was used to determine whether or not the offender's prior record was significant. For example, if the offender had a previous conviction for a robbery offence which had resulted in a term of full-time custody, this was considered as significant. Alternatively, if the offender had no prior convictions or convictions for minor offences, this was determined to be insignificant.

Weapon like a knife capable of killing or inflicting serious injury

Once again this characteristic allowed for a wide variation in determining what constituted a weapon like a knife. Other weapon types may have been considered by judges to fit *Henry* because such weapons were capable of killing or inflicting serious injury. A decision was made to include knives and other cutting or stabbing instruments — for example, machetes, screwdrivers and scissors — in this category.

Limited degree of planning

The degree of planning involved in some robbery offences was not always clear from the remarks on sentence. As already discussed, while it was relatively easy to discern which cases were "well planned", a problem arose in trying to categorise the degree of planning which was "less than well planned", if the planning was discussed at all. The rule was to accept as "limited" any case which was not "well planned" or was not discussed.

Limited, if any, actual violence but a real threat thereof

The majority of cases only involved threatened violence. Actual violence, where serious injury resulted, was only present in a small number of cases. Actual violence, where only minor injuries were sustained or where no injuries resulted, was counted with threatened violence.

Victim in a vulnerable position, such as a shopkeeper or taxi driver

In addition to shopkeepers and taxi drivers, any other employees of a commercial organisation were considered to be in a vulnerable position. This is not to say that individual victims would not be vulnerable because of their age, intellectual capacity or some physical characteristic. However, for the purposes of this analysis, they were excluded on these personal attributes.

Small amount taken

In more than a third of the cases, the amount taken was unknown. When this was the case, the median amount taken in robberies with similar targets was substituted in both a commercial and individual situation. There was some disagreement between judges as to what constituted a small amount. This was evident from the use of the expression to

describe sums between \$400 and \$2700 inclusive. The amount taken may be relevant to the type of target robbed. Therefore, a decision was made to use the sum of \$1000 or less to represent a small amount taken.

Plea of guilty

As mentioned earlier, there are a number of factors that impacted on this characteristic. First, the majority of the offenders in the study pleaded guilty. Second, the introduction of the *Thomson & Houlton* guideline judgment changed the way in which the plea was taken into consideration at sentencing. For example, the strength of the Crown case was no longer relevant to the plea. The important issue became the timing of the guilty plea and the quantum of discount available for that plea. It was, therefore, decided to include all guilty pleas as fitting this characteristic.

3.9.3 “Henry cases”

Figure 4 provides information on the proportion of cases that fitted each *Henry* characteristic based on the rules outlined above. The first bar of the chart illustrates how common each of the characteristics was in the 42 cases identified by judges as being “*Henry* cases”. The second bar refers to all cases in the study and shows how often each characteristic, independently, is represented.

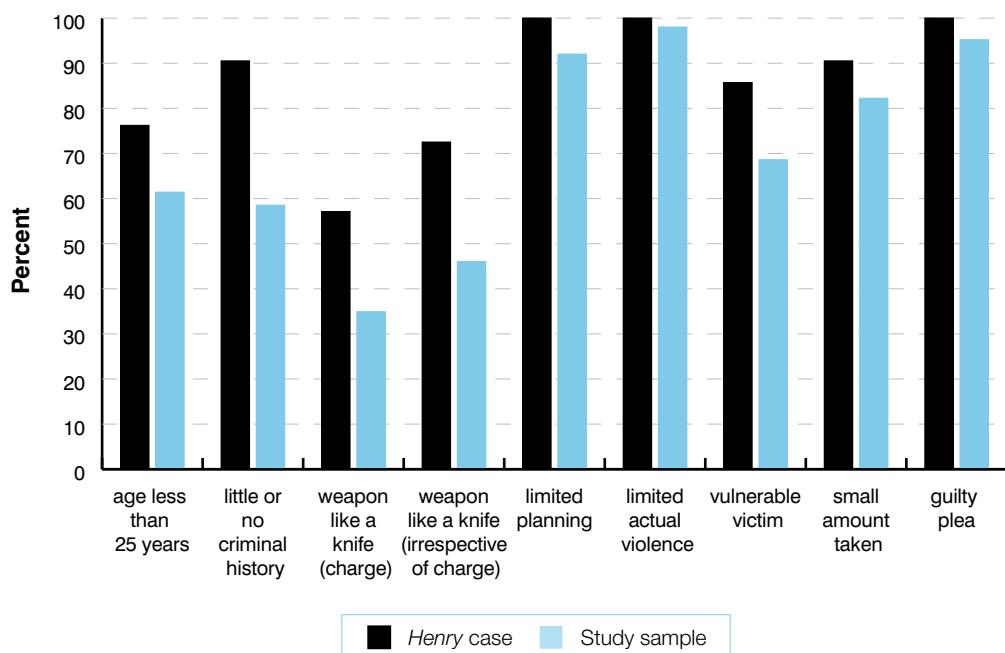
It was expected that cases judicially described as “*Henry* cases” would have a perfect fit (100%) or a near perfect fit across all characteristics. As can be observed from Figure 4 this was not the case. This may in part be explained by the variability and the subjectivity involved in deciding whether or not an offender’s characteristic fitted a specific *Henry* characteristic. This is particularly evident in relation to the characteristics of age and weapon.

Were there cases in our sample that fitted squarely within a common category of a “*Henry* case”? That is, did the case match each of the eight characteristics? The result was that while judges called them “*Henry* cases”, only 15 of the 42 cases were a perfect fit. When the rules discussed above were applied across the whole sample, only 28 of the 352 cases (or 8.0%) matched all the characteristics.

However, when the rules were relaxed to accept as a “*Henry* case” any case where at least seven of the eight characteristics were present, a further 12 (judicially described) and 64 (overall) cases were added. Again, if only six of the eight characteristics were present then the number of “*Henry* cases” rose to 39 and 225 respectively (or 63.9% of cases in the study).

So far, these figures reflect cases where a “weapon like a knife” was an element of the offence charged. If this was changed to include cases where a “weapon like a knife” was used or was present in the robbery offence, irrespective of the charge, then the number of cases that fitted squarely the “*Henry* case” increased to 17 (judicially described) and 36 (overall) cases. Allowing a match on seven characteristics added another 13 and 73 cases respectively, while allowing a match on six characteristics resulted in a total of 39 and 237 “*Henry* cases” respectively (or 67.3% of cases in the study).

Figure 4 Frequency of each of the *Henry* characteristics in the judicially described “*Henry cases*” and in all cases in the study (12 May 1999 to 11 May 2002)



3.9.4 Penalties imposed for “*Henry cases*”

The authors applied a general rule to accept wherever a judge stated that the offender was within a particular characteristic or not. This general rule overrode other rules. Consequently, this meant that all the cases judicially described as “*Henry cases*”, together with cases defined by the authors as “*Henry cases*”, were included in the analysis of the penalties imposed.

Where a weapon was an element of the offence charged ($N = 225$), 81.7% of “*Henry cases*” received a full-time custodial sentence. This compares with 91.9% of cases that were not considered to be “*Henry cases*”. A term of imprisonment in the range of 4–5 years was imposed in 41.7% of cases, 44.4% received less than 4 years and 13.9% received more than 5 years. Of the cases that did not fit the “*Henry case*”, 36.3% fell within 4–5 years, 33.6% fell below 4 years and 30.1% fell above 5 years.

Where a weapon was involved in the offence irrespective of the charge ($N = 237$), 82.3% of “*Henry cases*” received a full-time custodial sentence. This compares with 91.3% of cases which were not considered to be “*Henry cases*”. A term of imprisonment in the range of 4–5 years was imposed in 41.0% of cases, 45.1% received less than 4 years and 13.8% received more than 5 years. Of the cases that did not fit the “*Henry case*”, 37.1% fell within 4–5 years, 31.4% fell below 4 years and 31.4% fell above 5 years.

It should be remembered that the 4–5 year range is only a suggested starting point for a case which is considered to be a “*Henry case*”. Other objective and subjective factors involved in the case may aggravate or mitigate the offence with a result that the sentence may be increased or decreased.

Another factor that the reader should be aware of when considering sentencing patterns is the effect of the *Thomson & Houlton* guideline judgment discussed above. Since most of the offenders in this study pleaded guilty at the earliest opportunity, it was considered worthwhile to examine the range of sentences imposed after *Thomson & Houlton* where the 4–5 year starting range for *Henry*-like cases was effectively reduced by 15% to take account of the fact that *Henry* itself involved a late plea equivalent to 10%, that is, a range between 3 years 5 months and 4 years 3 months.

The analysis was performed, first, where the weapon was an element of the offence and, second, where a weapon was used in the offence irrespective of the charge. It was found that 34.7% and 33.3% of sentences respectively were within the adjusted range, 36.7% and 39.2% respectively were below and 28.6% and 27.5% respectively were above the adjusted range.

Part 4

CCA sentence appeals

4.1 CCA sentence appeals

Between 12 May 1999 and 11 May 2002 there were 179 appeals⁴⁵² before the CCA relating to a robbery offence under s 97 of the *Crimes Act 1900*.⁴⁵³ These were the cases that were excluded from the original population of cases from which the sample for the study was drawn. The main reason for excluding these cases concerned the possibility of recording information at first instance that may later be held to be erroneous when dealt with by the CCA.

Of the 179 appeal cases, 2 were conviction only appeals and have been excluded from the following analysis. A further 9 cases involved appeals against both conviction and sentence. In all 9 cases the appeal against conviction was dismissed. These 9 cases have been included with sentence severity appeals. Another case involved a conviction and Crown appeal. Similarly, the conviction appeal was dismissed and this case was included with Crown appeals against sentence.

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. The lower rate of Crown appeals reflects what was said by Barwick CJ in *Griffiths v The Queen*,⁴⁵⁴ that Crown appeals should be limited to the rare and exceptional case which involves a substantial matter of principle and which can provide guidance to sentencing courts. In addition, Crown appeals against sentence are relatively infrequent because of the element of double jeopardy involved.⁴⁵⁵ Table 18 provides information on the type and outcome of sentence appeals during the three-year study period.

It is apparent from Table 18 that 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). This is not surprising given that the Crown is unlikely to appeal against a sentence unless it has a strong case and is likely to succeed. When viewed by year since the *Henry* guideline was promulgated, both types of appeals showed no significant difference in the success rate of sentence appeals.

452 There was another case that went to appeal during the study timeframe. The Crown appealed against the inadequacy of the sentence and the matter was remitted back to the District Court for resentencing. Consequently, the case was removed from JIRS. In addition, 15 successful conviction appeals were also removed from JIRS during the study period. Nine of these resulted in a new trial being ordered against the offender and 6 resulted in the offender's acquittal. Where a CCA case deals with more than one offender, each offender is treated as a separate case on JIRS and in this study.

453 Where s 97 was the principal offence.

454 (1977) 137 CLR 293 per Barwick CJ at 309–310. Affirmed by the High Court in *Everett & Phillips v The Queen* (1994) 181 CLR 295.

455 See for example: *Griffiths v The Queen*, ibid, per Barwick CJ at 310; *R v Allpass* (1993) 72 A Crim R 561 in a judgment of the court at 562–563; *Dinsdale v The Queen* (2000) 202 CLR 321 per Kirby J at [62].

**Table 18 Outcome of appeals against sentence for s 97 robbery offences since *Henry* by year
(12 May 1999 to 11 May 2002)**

Type of sentence appeal	Year since <i>Henry</i>							
	12/5/99–11/5/00		12/5/00–11/5/01		12/5/01–11/5/02		Overall	
	N	%	N	%	N	%	N	%
Severity of sentence	58		37		44		139	
successful outcome	24	41.4	16	43.2	24	54.5	64	46.0
Crown	13		16		9		38	
successful outcome	9	69.2	8	50.0	6	66.7	23	60.5
Total sentence appeals	71		53		53		177	
successful outcome	33	46.5	24	45.3	30	56.6	87	49.2

4.1.1 Crown appeals against sentences for s 97 robbery offences

The Crown appealed against sentence in 38 cases during the study period. Of these, 9 were against the inadequacy of a non-custodial sentence and 29 were against the inadequacy of a term of full-time custody.

Crown appeals against non-custodial sentences⁴⁵⁶

Successful appeals

The reason for giving a non-custodial sentence on conviction for a robbery offence under s 97 is most often because the sentencing judge found “exceptional circumstances”. Of the 9 appeals against non-custodial sentences, 4 were successful. Exceptional circumstances were discussed in 2 of these cases and the court found that the circumstances surrounding the offender did not qualify as exceptional. Both resulted in a new sentence of full-time custody.⁴⁵⁷ The other 2 successful cases involved appeals against s 558 recognizances. The court found the circumstances of the offender were not sufficient to warrant a finding of exceptional circumstances at first instance. However, for other reasons the court did not impose a full-time custodial sentence. Both offenders were resentenced to terms of periodic detention.⁴⁵⁸

456 Two other appeal cases in the study period received non-custodial sentences at first instance. One was dismissed at appeal and the other received an increase in the term of periodic detention. These cases are not included here because they involved inchoate offences of accessory after the fact to s 97(1) armed robbery (*R v Govinden* (1999) 106 A Crim R 314) and an attempt to commit s 97(1) armed robbery (*R v Khamas* (1999) 108 A Crim R 499).

457 *R v Tran* [1999] NSWCCA 109; *R v Hoschke* [2001] NSWCCA 317.

458 *R v Mastronardi* (2000) 111 A Crim R 306; *R v Griggs* (2000) 111 A Crim R 233.

Unsuccessful appeals

In 5 of the 9 Crown appeals against a non-custodial sentence, the CCA found no error in the type of sentence imposed at first instance. In 3 cases, the court confirmed the finding of exceptional circumstances at first instance.⁴⁵⁹ In 1 case, the court found an error at first instance regarding assistance to the authorities but exercised its residual discretion not to intervene and dismissed the appeal.⁴⁶⁰ In the last case, which was considered a “unique and exceptional departure” from the decision in *Henry*, the court dismissed the appeal.⁴⁶¹

Crown appeals against full-time custodial sentences

Successful appeals

Of the 29 Crown appeals against the inadequacy of the term of a full-time custodial sentence, 19 were successful.⁴⁶² As discussed in Parts 2 and 3 any analysis regarding the length of the term of imprisonment needs to distinguish between cases where the term is to be served consecutively (or partly consecutively) and those where the term is to be served non-consecutively (or concurrently). The latter group also includes cases where the principal offence was the only matter before the court. All successful appeals involved the imposition of non-consecutive sentences at first instance. On appeal, however, 6 cases (33.3%) were resentenced to consecutive terms of imprisonment.

At first instance, the median term of imprisonment for non-consecutive sentences was 3 years 6 months (range = 18 months to 5 years 6 months). On appeal, the median increased by 42.9% to 5 years (range = 2 to 7 years). At first instance, the median non-parole period was 15 months (range = 6 months to 2 years 3 months). After a successful appeal, the median non-parole period increased by 90.0% to 2 years 4.5 months (range = 12 months to 5 years 6 months).

For the 6 cases involving consecutive sentences, the aggregate term of sentence and aggregate non-parole period have been used to calculate the median and range. At first instance, the median aggregate term of imprisonment was 6 years (range = 5 years 3 months to 10 years). On appeal, the median increased by 18.8% to 7 years 1.5 months (range = 7 to 12 years). At first instance the median aggregate non-parole period was 3 years 10 months (range = 2 years 9 months to 6 years). After a successful appeal, the median aggregate non-parole period increased by 27.2% to 4 years 10.5 months (range = 4 to 8 years).

459 *R v Metcalf* [2000] NSWCCA 277; *R v Blackman & Walters* [2001] NSWCCA 121.

460 *R v Calderoni* [2000] NSWCCA 511.

461 *R v Cimone* (2002) 121 A Crim R 433.

462 The following analysis is based on 18 successful Crown appeals. One case, *R v Yucel* [2000] NSWCCA 532, was removed from the analysis as the respondent had served the short non-parole period that was imposed at first instance (head sentence of 4 years with a non-parole period of 3 months and 2 days) and had been at liberty in the community for 6 months during which time he had obtained full-time employment and was living in a stable family environment. As a result of the successful Crown appeal the offender received a head sentence of 3 years with a non-parole period of 18 months to be served by way of periodic detention. The court took into account the time already served.

These results suggest that at first instance the non-parole periods, in particular, were not reflecting the objective seriousness of the offences. However, caution should be exercised when considering these figures as the number of cases was small.

Unsuccessful appeals

None of the 10 unsuccessful Crown appeals involved consecutive sentences. The median term of imprisonment was 3 years (range = 6 months to 6 years) and the median non-parole period was 9.5 months (range = 2 months to 3 years). An examination of these 10 cases revealed that while error was found at first instance in 9 of these cases,⁴⁶³ the court, considering the principles governing Crown appeals, exercised the residual discretion not to alter the sentences. The predominant reasons given by the court were: that it would be inappropriate to return the offender to custody because of the period of time the offender had been at liberty; the offender had made progress towards their rehabilitation; and the offender had strong subjective factors such as mental or physical illness.

4.1.2 Severity appeals against sentences for s 97 robbery offences

Successful appeals

During the course of the study, 139 offenders appealed against the severity of the full-time custodial sentence imposed at first instance. The appeal was successful in 64 cases.⁴⁶⁴ Once again a distinction was made in the analysis between consecutive and non-consecutive cases.

For the 51 successful severity appeals involving non-consecutive sentences, the median term of imprisonment imposed at first instance was 5 years 6 months (range = 3 to 11 years). On appeal, the median was reduced by 9.1% to 5 years (range = 2 to 8 years). At first instance, the median non-parole period was 3 years (range = 12 months to 8 years). After a successful appeal, the median non-parole period decreased by 16.7% to 2 years 6 months (range = 6 months to 6 years).

For the 12 successful severity appeals involving consecutive sentences, the median aggregate term of imprisonment at first instance was 10 years (range = 4 years 6 months to 28 years). On appeal, the median was reduced by 16.3% to 8 years 4.5 months (range = 4 years to 23 years 6 months). At first instance the median aggregate non-parole period was 7 years (range = 2 years 6 months to 19 years). After a successful appeal, the median aggregate non-parole period decreased by 17.9% to 5 years 9 months (range = 2 years 3 months to 14 years).

463 The other case, *R v Forrester* [2000] NSWCCA 66, involved an error in the formulation of the appeal. This case concerned an appeal against the resentence (fixed term 6 months) for a breach of recognizance for robbery in company.

464 The following analysis is based on 63 successful severity appeals. One case, that of the applicant Simpson in *R v Philips & Simpson* [2002] NSWCCA 167, was removed from the analysis as Simpson's appeal was allowed but only to backdate the sentence to take into account a period of pre-sentence custody. (Philips' severity appeal was dismissed.)

Unsuccessful appeals

Sixty-six of the 75 unsuccessful appeals against severity of sentence involved non-consecutive sentences. The median term of imprisonment was 5 years (range = 2 to 12 years) and the median non-parole period was 3 years (range = 12 months to 8 years).

Nine cases involved consecutive sentences. The median aggregate term of imprisonment was 8 years 6 months (range = 6 to 11 years) and the median aggregate non-parole period was 6 years (range = 3 years to 7 years 6 months).

Conclusions

This study was exploratory in nature. Its purpose was to determine the extent to which the guideline judgment in *R v Henry*,⁴⁶⁵ promulgated on 12 May 1999, was being used by judges in the higher courts of NSW to guide them in sentencing offenders convicted of robbery offences under s 97 of the *Crimes Act* 1900.

It was originally planned to look only at the three-year period following the promulgation of the guideline judgment of *Henry*. However, difficulties associated with data collection and resource constraints delayed the study. It was decided, therefore, in addition to the main focus of the study, to provide an overview of sentencing patterns for all robbery offences in all NSW courts for a six-year period (12 May 1999 to 11 May 2005).

It was found that robbery offences in all jurisdictions fell during the six-year period. The most common robbery offences before the courts in the six-year period were offences under ss 97(1) and 94. The penalties imposed in all jurisdictions were at the higher end of the sentencing hierarchy relevant to the particular jurisdiction. As discussed in the history of robbery and its development at common law and in statute, the type and quantum of penalties have been aimed at deterring individuals from committing robbery offences. This was also one of the aims of the *Henry* guideline judgment.

Two intervening events that may have impacted on the sentencing trends observed in the six-year period were the reintroduction of suspended sentences under s 12 of the *Crimes (Sentencing Procedure) Act* 1999⁴⁶⁶ as an alternative to a full-time custodial sentence of up to two years, and the *R v Thomson & Houlton*⁴⁶⁷ guideline judgment which set out the way in which the utilitarian value of a guilty plea should be taken into account at sentencing.

In addition, the correct way for sentencing offenders with multiple offences outlined in *Pearce v The Queen*⁴⁶⁸ had an effect on the imposition of consecutive sentences over the six-year period. It was evident, when comparing the two three-year periods (May 1999 to May 2002 and May 2002 to May 2005), that the imposition of consecutive sentences significantly increased in the second three-year period.

These issues aside, the analysis showed no significant differences in sentencing patterns from one three-year period to the next. These results allowed the findings of the main study in Part 3, in relation to the *Henry* guideline judgment, to be generalised to later periods.

The main focus of the study was to determine which factors and legal principles had the most influence on the outcome of sentences imposed for s 97 offences dealt with in the higher courts between 12 May 1999 and 11 May 2002. In particular, this study examined the objective and subjective factors, as revealed in the 352 remarks on sentence delivered by 72 judges, in order to determine the rationale for sentencing decisions lying above and below the 4–5 year range indicated in the *Henry* guideline judgment.

465 (1999) 46 NSWLR 346.

466 Commenced 3 April 2000.

467 (2000) 49 NSWLR 383. Judgment delivered 17 August 2000.

468 (1998) 194 CLR 610. Judgment delivered 10 September 1998.

The main findings of the study were:

- In the main, judges applied or referred to the *Henry* guideline judgment when sentencing for robbery offences under s 97.
- The majority of offenders (85.2%) received a full-time custodial sentence. Prior to the reintroduction of suspended sentences, 90.5% of offenders received a full-time custodial sentence compared with 83.0% after their reintroduction.
- The most important factors for imposing a non-custodial sentence were the existence and relevance of any prior criminal record, whether the offender had had discrete periods of pre-sentence custody, or had undertaken pre-sentence diversion, and the role of the offender in the commission of the offence.
- The median term of imprisonment imposed on offenders who received a sentence of full-time custody was 4 years, which is at the lower limit of the *Henry* range.
- The seven characteristics identified in *Henry* in relation to the common case were found to be statistically significantly related and important to the length of imprisonment imposed. The most important *Henry* characteristics were prior criminal record and age.
- A factor unrelated to *Henry* which was also found to be important to the length of the full-time custodial sentence was offence quantity, that is, whether the offender was being sentenced for multiple offences and/or matters on a Form 1.

The study also examined 177 sentence appeals before the CCA in the same timeframe as the main study representing an appeal rate of approximately 14%. It was found that the most frequent type of appeal was against the severity of sentence (78.5%) as opposed to appeals by the Crown against the inadequacy of sentence (21.5%). Crown appeals were more likely than severity appeals to be successful (60.5% and 46.0% respectively).

This study illustrates how complex the sentencing process is for judges, having to balance a multiplicity of objective and subjective factors in arriving at an appropriate sentence. It must be reiterated that this was an exploratory study. The complexity of the sentencing process, and the fact that no empirical research of this kind had been undertaken before, meant that certain rules and methods had to be developed to address and answer the research questions in the study. The methodology that was developed may assist future research in the area of sentencing for particular offences where the balance between objective and subjective features of cases has to be measured statistically.

As was stated earlier, “[d]ifficulties arise in relation to any empirical examination of sentencing due to the highly variable and discretionary aspects of the decision-making processes that operate within sentencing.”⁴⁶⁹ However, a broad judicial discretion at sentencing is essential to ensure that the wide variation in circumstances of the offence and the offender are taken into account. Sentences must be individualised.⁴⁷⁰

469 NSW Bureau of Crime Statistics and Research, *Robbery: an analysis of robbery in New South Wales*, Final report, 1987, BOCSAR, Attorney-General's Department, Sydney, p 133.

470 *R v Whyte* (2002) 55 NSWLR 252 per Spigelman CJ at [147].

In *R v Henry*,⁴⁷¹ Spigelman CJ referred to the statement by Mahoney ACJ in *R v Lattouf*⁴⁷² regarding the “multiple objectives served by the sentencing process”:

“General sentencing principles must be established, so that the community may know the sentences which will be imposed and so that sentencing judges will know the kind and the order of sentence which it is appropriate that they impose. But, of course, principles are necessarily framed in general terms. General principles must, of their nature, be adjusted to the individual case if justice is to be achieved. For this reason, it is in my opinion important in the public interest that the sentencing process recognise and maintain a residual discretion in the sentencing judge.

... There is a public interest in the adoption and articulation of sentencing principles which will deter the commission of serious crime and punish those who commit it ... But there are other interests to which the sentencing process must have regard; there are other objectives which the sentencing process must seek to achieve. Paramount amongst these is the achievement of justice in the individual case.”

In conclusion, the authors found that the *Henry* guideline judgment 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.

471 (1999) 46 NSWLR 346 per Spigelman CJ at [8]–[10].

472 (unrep, 12/12/96, NSWCCA). Mahoney JA had previously stated, “If justice is not individual, it is nothing”, in *Kable v Director of Public Prosecutions* (1995) 36 NSWLR 374 at 394.

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Appendix

The Appendix contains the output from the categorical regression analyses.

Table A1 (penalty type) and Table A3 (length of imprisonment) show the standardised regression coefficients from the categorical analyses. These values are divided by their corresponding standard errors, yielding an F test for each variable. However, regression coefficients cannot fully describe the impact of a factor or the relationships between the factors. Alternative statistics must be used in conjunction with the standardised coefficients to fully explore factor effects.⁴⁷³

Table A2 (penalty type) and Table A4 (length of imprisonment) show the correlation, tolerance and importance values for each factor. The tolerance values for each factor were very high, indicating that multicollinearity was not present in either analysis. Furthermore, no factor had a high beta value as well as a low importance value, indicating there were no factors acting as suppressor variables in either analysis. A suppressor variable conceals a relationship between variables.⁴⁷⁴

Pratt's measure of relative importance has been used to interpret the contribution of each factor to the regression. When the importance value for a factor is large compared with other importance values, this indicates the factor is crucial to the regression.⁴⁷⁵

Table A1 Penalty type — standardised regression coefficients (all predictors nominal)

Factor	Standardised Coefficients				
	Beta	Std error	df	F	Sig
offence seriousness (weapon type)	0.084	0.045	4	3.503	0.008
offence quantity	0.081	0.044	3	3.351	0.019
plea	0.048	0.046	2	1.105	0.333
<i>Thomson & Houlton</i>	0.161	0.044	1	13.189	0.000
assistance to authorities	0.007	0.045	1	0.026	0.873
target of robbery	0.103	0.045	5	5.275	0.000
role	0.188	0.046	2	17.004	0.000
degree of planning	0.017	0.045	1	0.148	0.701
level of violence (injuries)	0.050	0.044	3	1.290	0.278
gender	0.017	0.044	1	0.147	0.701
age group	0.151	0.046	6	10.730	0.000
Indigenous status	0.083	0.046	1	3.312	0.070
prior criminal record	0.346	0.049	3	49.617	0.000
supervision status at time of offence	0.135	0.044	3	9.340	0.000
under the influence of drug/alcohol	0.013	0.045	1	0.081	0.776
mental health condition	0.083	0.044	1	3.600	0.059
court location	0.001	0.046	1	0.001	0.980
delay in sentencing	0.110	0.045	3	6.058	0.001
pre-sentence custody	0.239	0.046	1	27.459	0.000

473 See J J Meulman and W J Heiser, *SPSS Categories 11.0*, 2001, SPSS Inc, Chicago, pp 87–88.

474 *ibid*, pp 89–90.

475 *ibid*, p 89.

Table A2 Penalty type – correlations, tolerances and importances

Factor	Correlations			Importance	Tolerance	
	Zero-order	Partial	Part		After transformation	Before transformation
offence seriousness (weapon type)	0.095	0.108	0.080	0.018	0.901	0.804
offence quantity	0.077	0.105	0.078	0.014	0.931	0.862
plea	0.053	0.061	0.045	0.006	0.874	0.790
<i>Thomson & Houlton</i>	0.163	0.206	0.155	0.058	0.934	0.916
assistance to authorities	0.003	0.009	0.007	0.000	0.911	0.862
target of robbery	0.124	0.132	0.098	0.028	0.913	0.842
role	0.319	0.232	0.176	0.132	0.880	0.845
degree of planning	-0.061	0.022	0.016	-0.002	0.892	0.887
level of violence (injuries)	0.010	0.066	0.049	-0.001	0.933	0.935
gender	-0.024	0.022	0.016	-0.001	0.924	0.919
age group	0.234	0.186	0.140	0.078	0.855	0.695
Indigenous status	0.142	0.105	0.078	0.026	0.875	0.867
prior criminal record	0.488	0.377	0.301	0.372	0.758	0.614
supervision status at time of offence	0.202	0.174	0.131	0.060	0.938	0.765
under the influence of drug/alcohol	0.059	0.016	0.012	0.002	0.910	0.886
mental health condition	0.066	0.109	0.081	0.012	0.945	0.921
court location	0.056	0.001	0.001	0.000	0.864	0.837
delay in sentencing	0.088	0.141	0.105	0.022	0.910	0.842
pre-sentence custody	0.335	0.290	0.224	0.177	0.878	0.876

Table A3 Length of imprisonment – standardised regression coefficients (all predictors nominal)

Factor	Standardised Coefficients					
	Beta	Std error	df	F	Sig	
offence seriousness (weapon type)	0.137	0.048	4	8.218	0.000	
offence quantity	0.315	0.049	3	40.624	0.000	
plea	0.140	0.048	2	8.622	0.000	
<i>Thomson & Houlton</i>	0.102	0.048	1	4.585	0.033	
assistance to authorities	0.047	0.048	1	0.960	0.328	
target of robbery	0.106	0.050	5	4.531	0.001	
role	0.087	0.048	2	3.269	0.040	
degree of planning	0.161	0.047	1	11.490	0.001	
level of violence (injuries)	0.086	0.047	3	3.403	0.018	
gender	0.069	0.047	1	2.103	0.148	
age group	0.198	0.049	6	16.478	0.000	
Indigenous status	0.008	0.048	1	0.027	0.869	
prior criminal record	0.304	0.049	3	38.088	0.000	
supervision status at time of offence	0.040	0.047	3	0.737	0.531	
under the influence of drug/alcohol	0.038	0.049	1	0.609	0.436	
mental health condition	0.003	0.047	1	0.005	0.941	
court location	0.025	0.050	1	0.263	0.609	
delay in sentencing	0.133	0.048	3	7.646	0.000	
pre-sentence custody	0.034	0.047	1	0.520	0.472	

Table A4 Length of imprisonment – correlations, tolerances and importances

Factor	Correlations			Importance	Tolerance	
	Zero-order	Partial	Part		After transformation	Before transformation
offence seriousness (weapon type)	0.248	0.178	0.129	0.069	0.886	0.837
offence quantity	0.340	0.374	0.287	0.217	0.833	0.837
plea	0.186	0.183	0.132	0.053	0.887	0.796
<i>Thomson & Houlton</i>	0.130	0.134	0.096	0.027	0.890	0.879
assistance to authorities	0.043	0.062	0.044	0.004	0.881	0.870
target of robbery	0.232	0.133	0.096	0.050	0.824	0.856
role	0.156	0.114	0.081	0.028	0.867	0.879
degree of planning	0.276	0.210	0.153	0.090	0.904	0.886
level of violence (injuries)	-0.008	0.116	0.083	-0.001	0.928	0.915
gender	0.130	0.091	0.065	0.018	0.905	0.904
age group	0.304	0.249	0.183	0.122	0.855	0.717
Indigenous status	0.061	0.010	0.007	0.001	0.890	0.870
prior criminal record	0.395	0.364	0.278	0.244	0.836	0.672
supervision status at time of offence	0.075	0.054	0.039	0.006	0.937	0.799
under the influence of drug/alcohol	-0.067	0.049	0.035	-0.005	0.858	0.877
mental health condition	0.048	0.005	0.003	0.000	0.907	0.907
court location	0.096	0.032	0.023	0.005	0.821	0.830
delay in sentencing	0.249	0.172	0.125	0.067	0.877	0.838
pre-sentence custody	0.068	0.046	0.032	0.005	0.904	0.879

