

Sentencing in **NSW**

A cross-jurisdictional comparison of full-time imprisonment

Georgia Brignell

Senior Research Officer (Legal)

Hugh Donnelly

Director, Research and Sentencing

Published in Sydney by the:
Judicial Commission of NSW
Level 5, 301 George Street,
Sydney NSW 2000

DX 886 Sydney

GPO Box 3634
Sydney NSW 2001
www.judcom.nsw.gov.au

National Library of Australia Cataloguing-in-Publication entry
Creator: Brignell, Georgia, author.
Title: Sentencing in New South Wales: a cross-jurisdictional
comparison of full-time imprisonment/
Georgia Brignell; Hugh Donnelly.

ISBN: 9780731356362 (hardback)

Series: Monograph series (Judicial Commission of New South Wales); 39.

Notes: Includes bibliographical references.

Subjects: Sentences (Criminal procedure) — New South Wales.

Determinate sentences (Criminal procedure) — New South Wales

Imprisonment — New South Wales.

Other Creators/Contributors:

Donnelly, Hugh, 1965– author.

Judicial Commission of New South Wales issuing body.

Dewey Number: 345.940772

© Judicial Commission of NSW 2015

This publication is copyright. Other than for the purposes of, and subject to the conditions prescribed under the *Copyright Act 1968* (Cth), no part of it may in any form or by any means (electronic, mechanical, microcopying, photocopying, recording or otherwise) be reproduced, stored in a retrieval system or transmitted without prior permission. Enquiries should be addressed to the publisher.

The views expressed in this monograph are the views of the individual authors and do not represent any official views of the Judicial Commission of NSW, nor are they necessarily shared by all members of the staff of the Commission. Whilst all reasonable care has been taken in the preparation of this publication, no liability is assumed for any errors or omissions.

Acknowledgements

The authors would like to thank Geoff Fisher, Senior Data Analyst and Zsombor Bathy, Data Analyst at the Sentencing Advisory Council (Vic); Lydia Rutter, Assistant Director, National Centre for Crime and Justice Statistics and Population, Labour and Social Statistics at the Australian Bureau of Statistics; Zeinab Baghizadeh, Research officer (Statistics) and Patrizia Poletti, Principal Research Officer (Statistics) of the Judicial Commission of NSW; and Sarah-Jane Frydman, Ryan Schmidt and Alexandra McPherson, research trainees at the Judicial Commission.

From international agencies, the authors would like to thank Alistair Ramsden, Statistical Analyst, Customer Policy and Research Unit, Statistics New Zealand; Roy Walmsley, Director, World Prison Brief at the International Centre for Prison Studies; Erinn Herberman, Statistician, Bureau of Justice Statistics at the United States Department of Justice; and Sophia Nicole Ir, Infostats, Statistical Information Service, Statistics Canada.

Editors: Antonia Miller and Pauline Buckland
Proofreading: Kate Lumley and Ros Cook
Graphic design and typesetting: Lorraine Beal
Printed by: Emerald Press

Executive summary

It is common for participants in debates about sentencing in NSW (and elsewhere) to assert that sentencing by the courts is either too lenient or too harsh. Severity and leniency are, however, relative concepts. This study examines how sentences of imprisonment imposed in NSW for offences dealt with on indictment compare with interstate jurisdictions. The sentences imposed in jurisdictions such as Queensland and Victoria serve as a yardstick against which sentences in NSW can be judged. The study also compares NSW prison statistics against interstate and international (common law) jurisdictions. The analysis shows that, comparatively speaking, NSW is one of the harshest jurisdictions in Australia.

Sentencing is an area of law largely regulated by State and Territory governments. The respective Parliaments of each jurisdiction define the ingredients of offences and set maximum penalties. Sentencing law is the same across Australian jurisdictions in two important respects: first, in determining a sentence the court must apply the principle of proportionality — the sentence imposed should neither exceed nor be less than the gravity of the crime having regard to the objective circumstances; and secondly, full-time imprisonment is a sanction of last resort — a court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.ⁱ

The study overcomes differences between jurisdictions by carefully aligning offences and further coding sentencing data. The analysis also takes into account custodial options which require an offender to serve part of his or her sentence in a prison, such as partially suspended sentences. The latter sentencing option is available in Queensland and until very recently in Victoria.

The head sentence (that is, the non-parole period and parole period of a term of imprisonment) imposed for the principal offence has been used for the purposes of comparing the length of sentences in each jurisdiction. The sentence for the principal offence does not, however, reflect how long an offender actually spends in prison in cases where more than one offence has been committed. Nevertheless, it is the best measure of sentencing levels for a given offence.

The study focuses on serious cases dealt with on indictment in NSW, Queensland and Victoria. Five categories of offence are examined: sexual assault, child sexual assault, dangerous/culpable driving causing death, robbery, and break and enter/burglary. Statutory maximum penalties, full-time imprisonment rates and median head sentences are reported for these five categories of offence. The study also compares the imprisonment rate per 100,000 in the adult population in NSW with a number of Australian and international jurisdictions.

Key findings

Full-time imprisonment rates

Of the three eastern seaboard states, NSW had the highest rate of full-time imprisonment for all five offence categories examined — sexual assault (92.6%), child sexual assault (89.0%), dangerous/culpable driving causing death (66.8%), robbery (80.2%), and break and enter/burglary (69.0%). However, when partially suspended sentences are included, Queensland had higher rates of imprisonment than NSW for all five categories. Full-time imprisonment rates in Victoria remained below NSW even with the inclusion of partially suspended sentences.

The study also compares imprisonment rates for NSW against those in Victoria and Queensland for particular offences within the five offence categories where it was possible to closely align offences. This permitted a more refined analysis of sentencing levels. New South Wales had a higher rate of imprisonment than Victoria and Queensland for sexual assault of a child under 10 years of age (89.0%, 76.1% and 70.0% respectively) and dangerous/culpable driving causing death (66.8%, 54.8% and 35.7% respectively). For offences where the relevant offence provisions could only be sufficiently aligned with one other jurisdiction, NSW had a higher imprisonment rate than Victoria for armed robbery (89.7% and 67.1% respectively) and aggravated break and enter/burglary (66.4% and 52.3% respectively).

ⁱ It is to be noted that the latter principle was abolished in Queensland by the *Youth Justice and Other Legislation Amendment Act 2014*, which commenced on 28 March 2014.

Median head sentences

The term “median” refers to the sentence that lies in the middle of the range of sentences (the 50th percentile). Overall, NSW had longer median head sentences (for the principal offence) than Victoria for sexual assault, child sexual assault, robbery, and break and enter/burglary offences. Victoria had a longer median head sentence for dangerous/culpable driving causing death offences.

Overall, NSW had longer median head sentences than Queensland for child sexual assault, robbery, and break and enter/burglary offences. Queensland had a longer median head sentence for sexual assault and dangerous/culpable driving causing death.

The median head sentence in NSW for sexual assault offences was 72 months compared with 60 months in Victoria and 84 months in Queensland.

The median head sentence in NSW for sexual assault of a child under 10 was 84 months compared with 48 months in Victoria and 72 months in Queensland.

The median head sentence in NSW for dangerous/culpable driving causing death was 36 months compared with 66 months in Queensland. In Victoria, the median head sentence for culpable driving causing death and dangerous driving causing death was 66 months and 36 months respectively.

For all robbery offences the median head sentence for NSW was 44 months, for Victoria 36 months, and Queensland 36 months. These offences were further delineated for the purposes of analysis. For non-aggravated robbery, the median head sentence for both NSW and Queensland was 30 months compared with 20.5 months in Victoria. Serious robbery offences in NSW and Queensland were examined separately. NSW had a higher median head sentence of 45 months compared with 36 months in Queensland. For the prevalent offence of armed robbery, NSW had a median head sentence of 49 months compared with 36 months in Victoria.

The median head sentence in NSW for break and enter/burglary was 36 months compared with 24 months in both Victoria and Queensland.

Statutory maximum penalties

Statutory maximum penalties for a range of offences were compared across five Australian jurisdictions and two overseas jurisdictions. New South Wales, Victoria and Queensland have very similar maximum penalties for the offences analysed. The maximum penalty for sexual assault of a child under 10 in NSW (natural life without parole for the aggravated offence) is higher than Queensland (life with a possibility of parole) and Victoria (25 years). However, South Australia has the highest maximum penalty (life) for the most aggravated form of dangerous/culpable driving causing death, followed by Victoria (20 years). South Australia has a maximum penalty of life for offences falling within all five offence categories, while Queensland has a maximum penalty of life for offences falling in all but one of the categories (dangerous/culpable driving causing death).

Imprisonment rates per 100,000 population

In 2014, the NSW imprisonment rate per 100,000 adult population (181.7) was slightly lower than the Australian average (185.6). New South Wales had a higher rate than Victoria (134.4), the Australian Capital Territory (130.4), and Tasmania (112.0). However, the rate in NSW was lower than the Northern Territory (829.4), Western Australia (264.6), Queensland (192.9) and South Australia (187.9). Internationally, Australia had a lower imprisonment rate per 100,000 population than New Zealand, England (including Wales) and the United States, but had a higher rate than Canada.

Indigenous offenders

As at 30 June 2014, the age standardised imprisonment rate for Aboriginal and Torres Strait Islander prisoners in Australia was 1,857.2 per 100,000 adult Aboriginal and Torres Strait Islander population. This is just under 13 times higher than non-Indigenous prisoners who had an age standardised imprisonment rate of 144 per 100,000 adult non-Indigenous population. The median age of Aboriginal and Torres Strait Islander prisoners was 31.0 years, which is 4.3 years lower than the median age of non-Indigenous offenders (35.3 years).