

Sentencing Assault Offenders in the Higher Courts in New South Wales

INTRODUCTION

The purpose of this bulletin is to provide a detailed analysis of sentencing practice in relation to one offence which features prominently in the Higher Criminal Courts of NSW. The offence is that of assault.

Two useful indicators of the frequency of assault in the community are the rate of offences reported to the police and the number of cases dealt with before the courts. As Figure 1 shows, the rate of reported assaults has risen sharply in the past few years. There would also appear to have been an increase in the number of assault convictions in the Higher Courts. Although Higher Court statistics were unavailable between 1983, when the Australian Bureau of Statistics ceased to publish statistics, and 1988, the first year of statistics published by the NSW Bureau of Crime Statistics and Research (BCSR), Figure 2 suggests that the number of assault convictions per year has been rising.

Comparisons of sentencing practice in relation to particular offences are provided annually in the BCSR report 'New South Wales Higher Criminal Courts Statistics'. The comparisons in that report, however, make no attempt to examine the effect on sentence of factors such as plea and prior criminal record, factors which are very important to a court in determining what penalties to impose in particular cases.

Generally, when a court sentences an offender, it first looks at the objective facts of the offence and their seriousness. Once these have been assessed the court then considers any factors personal to the offender which may affect the sentence warranted by the offence. The court's assessment of both the objective and

subjective facts is guided by a number of considerations.

SENTENCING AND STATUTE LAW

The first thing governing the court's decision is the 'statute law'. Statutes are sets of rules decided upon by the parliament and set forth as 'Acts'.

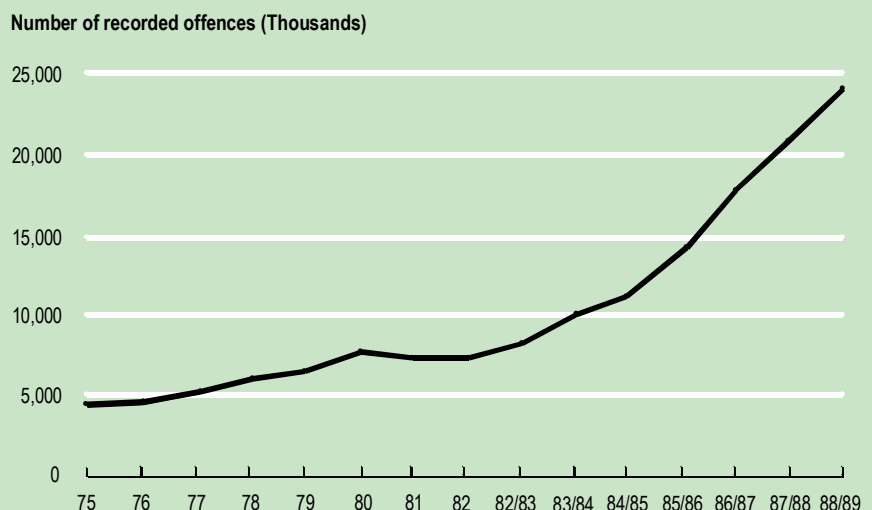
Statute law affects sentencing in two main ways. Firstly, there are statutes governing how sentences may be imposed in general. For example, the *Sentencing Act 1989* states that, for prison sentences over 6 months, the court may impose either a fixed term sentence to be served in prison, or a minimum sentence which must be served in prison plus an

additional term (which is usually no longer than one third of the minimum sentence) during which the offender is released on probation or parole.

The second set of statutes governing sentencing are those which define the type and length of penalties which may be imposed by the courts for particular offences. In NSW the *Crimes Act 1900* defines most criminal offences and specifies maximum penalties for different offences and the types of penalties which are available. Statute law does not, as a rule, tell the courts how to sentence in particular cases. It usually only sets an upper limit on the severity of the penalty.

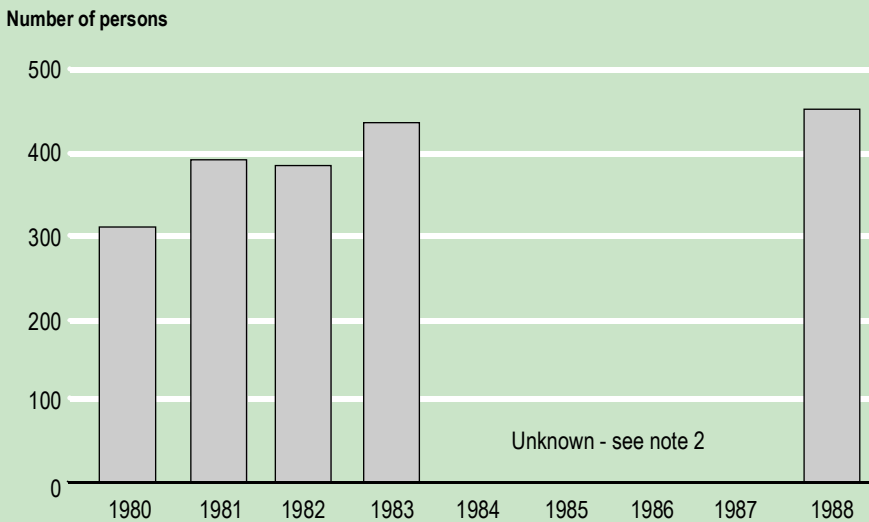
The sentencing options which are available in NSW include prison, periodic detention, Community Service Orders, various types of bonds (so-called 'recognizances') and fines.

Figure 1: Number of assaults reported to police, 1975 – 1988/89



Source: NSW Police Service, 1989, *Crime Statistics 1988/89*, NSW Police Service, Sydney.

Figure 2: Number of convictions for assault in the Higher Courts, 1980 – 83 and 1988¹



Notes: 1. Includes only cases where the assault was the most serious offence for which the offender was convicted.
2. The change in the source of the data means comparisons between 1980-83 and 1988 are only approximate.

Periodic detention is, as the name suggests, a sentence where the offender spends each weekend of the sentence term in custody, but returns to a normal weekday routine in between. Community Service Orders involve the offender in a specified amount (up to 500 hours) of unpaid community work. A recognizance is, generally speaking, a 'good behaviour bond', that is, a period during which the offender, though at large, must be of good behaviour or risk incurring further penalties. Recognizances may be supervised or unsupervised. A fine is an amount of money which the offender must pay to the State as a penalty.

In addition to these, there are certain alternative options which may be applicable when special leniency is called for. For example, when a person has been found guilty of an offence, there may be particular circumstances - the trivial nature of the offence, the good character of the defendant, and so on - which make the recording of a conviction inappropriate. In these circumstances the court is permitted under Section 556A of the Crimes Act to dismiss the charge (i.e. not record a conviction) or to impose a recognizance without recording a conviction.

Another option when leniency is called for is to give a nominal penalty of detention until the 'rising of the court'. This involves

the person being held in custody until the end of court proceedings and then released (effectively an immediate release).

SENTENCING AND THE COMMON LAW

The statutory restrictions on the court's discretion to impose a penalty are not the only restrictions on that discretion. Others come from what is known as 'common law'. The common law on sentencing is that body of rules and principles enunciated by the courts when making sentencing decisions or hearing sentence appeals.

To give an example, suppose a court hearing an appeal against the severity of a sentence decides that leniency is warranted because the offender has no prior criminal record. The court's argument in reaching this conclusion becomes a common law rule which must be followed in future unless subsequently overturned. In practice the main source of revisions to the common law affecting sentencing is the Court of Criminal Appeal.

Through the development of the common law a very large body of rules and principles has evolved, governing those

things which mitigate or exacerbate an offender's blameworthiness.

The result of these principles is that two offenders convicted of the same category of offence may receive quite different sentences according to the circumstances of each case and the common law rules which apply. The common law thus enables the courts to respond to the details of each case in a manner which is consistent across cases.

SENTENCING AND ASSAULT: STATUTE LAW

In NSW assault offences are defined under the Crimes Act. The Act specifies the types of punishable assault offences and the maximum penalties which may be imposed by the courts.

'Assault' covers a range of offences from extremely serious malicious wounding, where the victim is badly injured, to minor altercations resulting in no injury at all. Under Sections 476 and 495 of the Crimes Act, certain of the less serious assault offences may be dealt with in the Local Court. When this happens the maximum penalty which may be imposed on the offender is 2 years imprisonment. In fact, the vast majority of assault cases, being relatively minor, are prosecuted before the Local Court.

More serious assault offences, for example Infliction of Grievous Bodily Harm (s. 35 (b) of the Crimes Act, maximum penalty 7 years in prison), must be dealt with in the Higher Courts.

When cases may be dealt with in either the Local or the Higher Courts, the decision to pass the case to the Higher Courts is made by the Local Court magistrate, with the restriction that, in some circumstances, the defendant can choose to be dealt with in the Higher Courts. The magistrate's decision is based primarily on whether the degree of criminality involved could be adequately dealt with under Local Court jurisdiction.

SENTENCING AND ASSAULT: COMMON LAW

A number of principles derived from common law are relevant to the sentencing

of assault offenders. Some of the factors commonly taken into account, such as the offender's age, the degree of contrition shown, having a hitherto good character or pleading guilty to the charge, are relevant in any sentencing decision regardless of the nature of the offence. Other factors, such as whether the attack was premeditated or was committed under provocation, or the extent of the injuries sustained by the victim, are specially relevant to assaults. Let us look at some of these factors in more detail.

SEVERITY OF THE CHARGE

Both statute and common law affect the relationship between the severity of the charge and the sentence. Firstly, as discussed above, the maximum penalty for an offence is defined by statute. Secondly, common law holds that the gravity of a penalty should be proportional to the severity of the crime committed.¹ It might be expected, therefore, that more serious offences would receive more serious penalties.

INJURIES INFLICTED ON THE VICTIM

To some extent, the severity of the injuries inflicted upon the victim(s) is reflected in the nature of the charge. Over, and above this, however, the impact of the assault upon the victim may be taken into account by the court when passing sentence upon the offender.

PREVIOUS CONVICTIONS

The courts are disposed to be lenient with first offenders. That is, lack of previous convictions is a mitigating factor in sentencing. In *R v. Wakim*,² for example, the trial judge was noted to have said that 'Courts, in general, like to give first offenders another chance'. Thus, it would be likely that, all other things being equal, first offenders would get less severe sentences than those with previous convictions.

AGE OF THE OFFENDER

If an offender is a youth the court may regard this as a ground for leniency in sentencing. Another way that the

offender's age may affect sentencing is that if the offender is old a lengthy prison sentence may be considered unduly severe despite the gravity of the offence in question.

SUPERVISION STATUS AT THE TIME OF THE OFFENCE

If an offender is convicted of an offence which was committed while he or she was 'under supervision', that is, on bail, on parole, or on a bond for another offence, this will be regarded as more serious. In these circumstances the courts may emphasize the aim of punishment as a deterrent, arguing that people who abuse the system by committing further crimes while paying a penalty or while on bail for other offences, must be given stiffer sentences to discourage them. For example, in *R v. Richards*,³ the judge said that, in the interest of protecting the community, 'the only means open to the criminal courts...is to pass severely deterrent sentences upon those who thus abuse their freedom on bail'. In *R v. Cardwell*,⁴ the Court of Criminal Appeal found a sentence to be inadequate because the crime was committed while the person was on a bond for a previous offence.

PLEA

The courts generally consider that if people plead guilty because of genuine remorse or out of a desire to co-operate with the authorities then this should act in their favour.⁵ Courts often cite this as a reason for sentencing more leniently than they would otherwise have done.

METHOD

Having considered the principles of sentencing law in relation to assault offenders, let us now look at how the law is applied in the courts.

The assault cases to be examined here are cases which were dealt with before the Higher Criminal Courts in NSW in 1988. The data were derived from the Justice Information System (JIS), a statistical database maintained by BCSR. In examining cases from the Higher Courts, the discussion is limited to only the most serious of assault offences.

While the Crimes Act details a considerable number of specific assault offences, the majority (68%) of convictions for assault as a principal offence⁶ before the Higher Courts in 1988 fell into four categories. These categories are listed below, according to the relevant sections of the Crimes Act.⁷

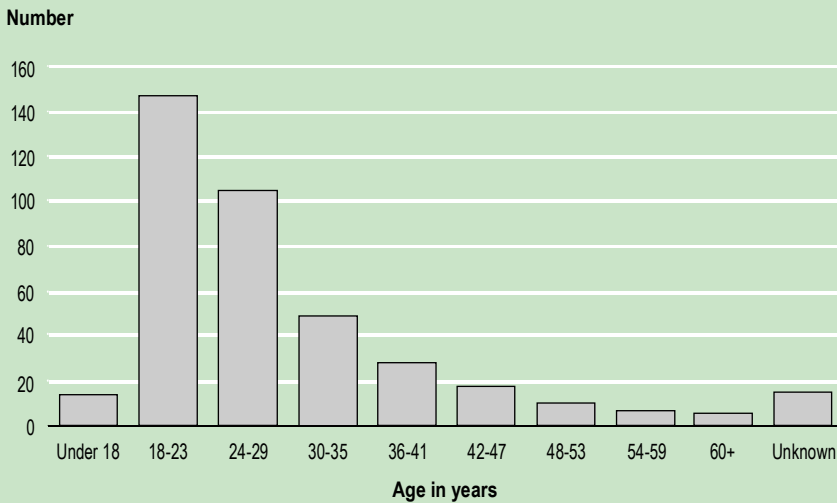
- Section 33: Malicious wounding or infliction of grievous bodily harm with intent to do grievous bodily harm or to resist arrest (hereafter referred to as 'Intent to do GBH'). Maximum penalty - 25 year prison sentence.
- Section 35: Malicious wounding or infliction of grievous bodily harm ('Inflict GBH'). Maximum penalty - 7 year prison sentence.
- Section 59: Assault occasioning actual bodily harm ('Occasioning ABH'). Maximum penalty - 5 year prison sentence.
- Section 61: Common assault prosecuted by indictment ('Common Assault'). Maximum penalty - 2 year prison sentence.

As can be seen from the descriptions of the offences and from the maximum penalties involved, these four categories involve offences of differing degrees of severity. The most serious category - Intent to do GBH - involves the intention on the part of the assailant to do grievous harm or resist arrest as well as maliciously inflicting severe injury. The next category, Inflict GBH, involves maliciously inflicting serious injury, but in this case it is sufficient that the assailant has behaved recklessly, knowing that the action can cause harm. Occasioning ABH involves any infliction of bodily injury, while Common Assault is any assault not necessarily involving bodily harm.

By limiting the discussion to only these four categories it should be possible to analyse any differences in sentencing which may be attributable to the application of sentencing principles rather than differences in the legal status of the offence.

The cases surveyed represent all convictions under the sections of the Crimes Act described above where the assault offence was the most serious offence for which the offender was convicted.

Figure 3: Age of offenders at time of arrest



Over the entire sample of 399, only 32 (8.0%) pleaded not guilty to the assault charge.

The majority of the offenders (226, or 56.6%) were known not to have been under supervision when the offence was committed, but in a further 102 cases (25.6%) the supervision status was unknown.

Data on other aspects of the cases, such as the degree of injury inflicted on the victim, are not contained in the JIS and so were not available for analysis.

The range of sentences imposed was very wide, although the majority of the offenders (71.4%) received non-custodial penalties.

Figure 4 presents the types of sentence imposed on the offenders by the severity of the charge. As can be seen, the most common penalty for Intent to do GBH and Inflict GBH offenders was a prison

RESULTS

There were 399 offenders in the sample of assault convictions examined. The numbers in each offence category were:

- Intent to do GBH - 25;
- Inflict GBH - 65;
- Occasioning ABH - 147;
- Common Assault - 162.

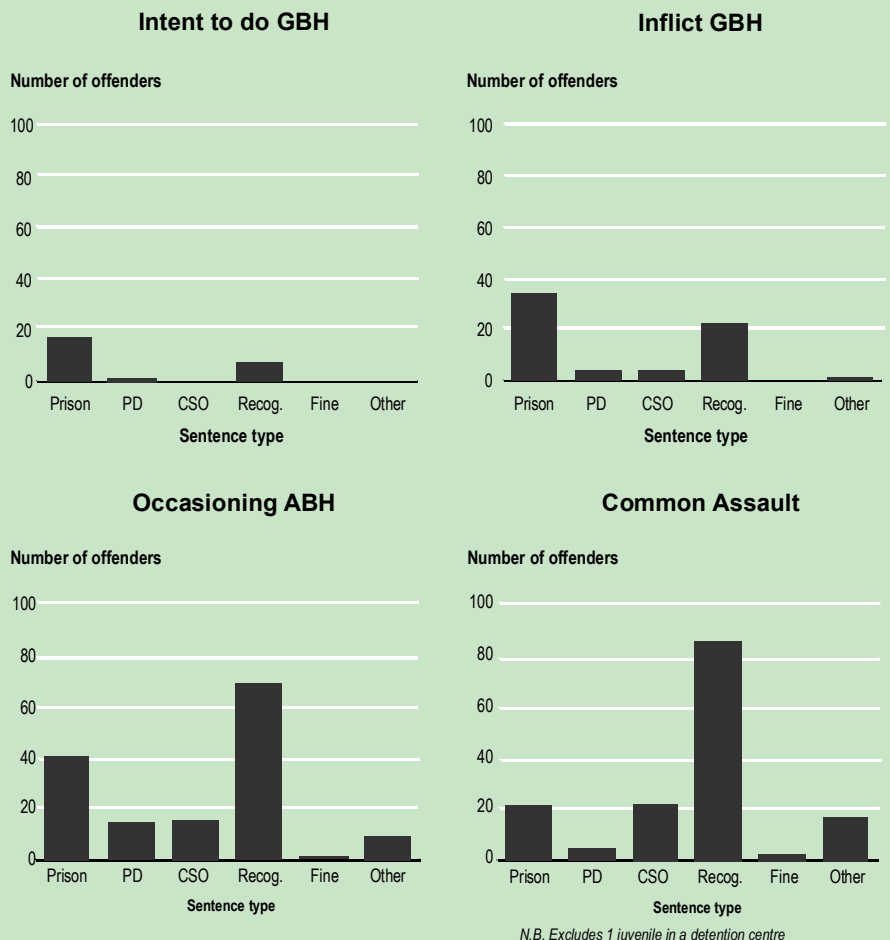
The ages of the offenders are presented in Figure 3. Two hundred and sixty-six or 66.7% of the offenders were under the age of 30 at the time of arrest.⁸ This is much higher than the percentage of the population of NSW aged between 10 (the age of criminal responsibility) and 30 which is around 46%. Fourteen (3.5%) of the offenders were juveniles (i.e. under 18) when arrested. Of these, 4 were sent to prison and 1 to a juvenile detention centre. The longest prison term for a juvenile was between 6 and 7 years (for an Intent to do GBH offence).

Of the total of 399 offenders, the vast majority (95.7%) were male. The corresponding proportion of males in the general population is 49.8%. That is, males and particularly young males are greatly over-represented in the assault offender sample.

One hundred and twenty of the offenders (30.1%) had served previous prison terms and a further 164 (41.1%) had previous convictions which did not involve imprisonment. In other words,

only 28.8% of the offenders did not have any previous convictions.

Figure 4: Type of sentence by severity of offence charged



N.B. Excludes 1 juvenile in a detention centre

Abbreviations: PD – Periodic detention, CSO – Community Service Order, Recog. – Recognizance

sentence. In contrast, the most common penalty for Occasioning ABH and Common Assault offenders was a recognizance. Other penalties such as periodic detention, Community Service Orders and fines were used much less often. The category of ‘other’ referred to in Figure 4 represents penalties such as ‘recognizance without conviction’, ‘rising of the court’ and ‘no conviction recorded’ (see the section, above on ‘Sentencing and Statute Law’).

As can be seen from Figure 4, the proportion of offenders who were imprisoned varied with the severity of the offence charged. Sixty-eight per cent of Intent to do GBH, 52% of Inflict GBH, 27% of Occasioning ABH and 14% of Common Assault offenders⁹ were imprisoned.

Figure 5 presents the distribution of length of prison sentences imposed for each offence category. It is obvious from Figure 5 that there was a considerable range in the length of prison sentences imposed within each offence category.

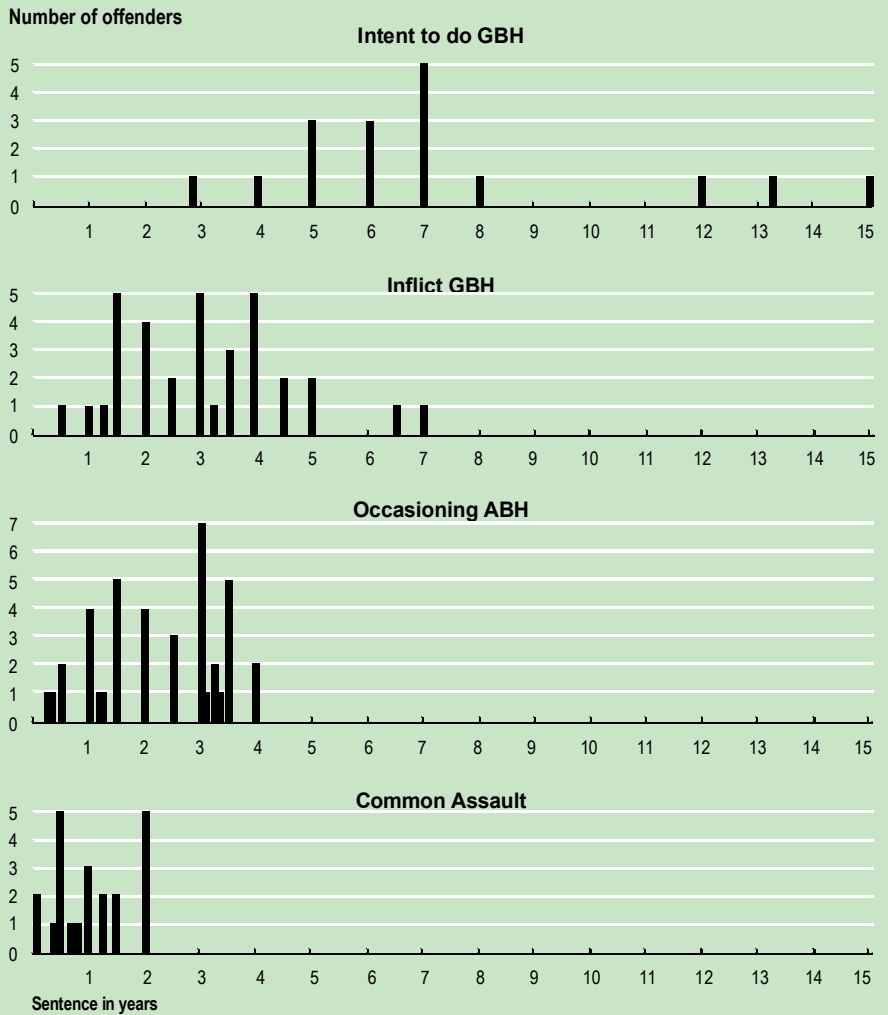
From the figure it can be seen that the maximum penalties varied, as we would expect, according to the maximum penalty allowable for the offence in question (see the section on ‘Assault - Statute Law’, above). None of the Intent to do GBH or Occasioning ABH offenders, however, received the maximum penalty for the offence in question (25 years and 5 years respectively). In addition, Figure 5 shows that the minimum sentence lengths also varied with the severity of the offence.

From Figure 5 we can also see that for Intent to do GBH, Inflict GBH, and Common Assault most of the sentences tended towards the lower end of the range for each offence category. For Occasioning ABH, on the other hand, there were more sentences near the top of the range.

EFFECT OF CASE CHARACTERISTICS ON SENTENCE

We have seen that the severity of the charge appears to have played an important part in the type and length of sentences handed down. Nevertheless, within each category of offence there is still a considerable variability in sentences. The question now is whether

Figure 5: Prison sentences: Length of sentence by severity of offence charged



some other characteristics of the cases, namely those considered important in common law, can be shown to account for this variability.

In order to answer this question the data were investigated using the statistical procedure of loglinear analysis.¹⁰ In the analysis, it was necessary to exclude two groups of cases. The first of these was the group of 25 Intent to do GBH cases, which were omitted because the number was too small to provide a meaningful result when incorporated in the analysis. The second group consisted of cases where either the supervision status at the time of the offence (99 cases) or the plea status (1 case) was not known. The number of cases analysed was thus reduced to 274.

The choice of which factors to analyse was constrained in two ways. Firstly, the

scope was limited by the types of information available from the Higher Courts database. As noted above, the nature of the injury to the victim, for example, is not something which may be determined from the data. Secondly, the nature of the statistical technique to be used imposed limitations of its own.¹¹ Taking these circumstances into account, the four factors analysed were the severity of the charge, the offender’s previous convictions, the offender’s supervision status at the time of the offence, and the plea.

The different categories for the severity of the charge factor were:

- Inflict GBH;
- Occasioning ABH;
- Common Assault.

For previous convictions the categories were:

- no previous convictions;
- one or more previous convictions but no prison sentences;
- one or more previous convictions with at least one prison sentence.

For supervision status at the time of the offence the categories were:

- under supervision;
- not under supervision.

For plea the categories were:

- guilty;
- not guilty.

To simplify matters, sentence type was grouped into only two categories:

- prison sentences;
- other sentences (including periodic detention, Community Service Orders, recognizances and fines).

The analysis established that each of the factors of interest did have an effect on the type of sentence. The nature of these effects can be assessed from an examination of the sample data.

SEVERITY OF THE CHARGE

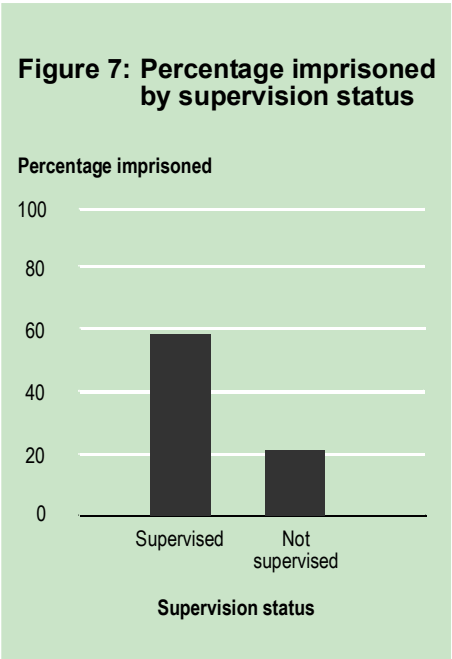
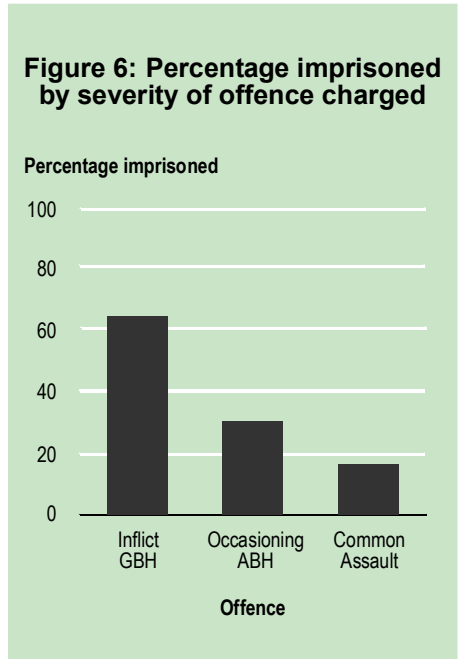
Figure 6 presents the percentage of offenders imprisoned in each offence category. From Figure 6 it is evident that those convicted of Occasioning ABH were twice as likely to be imprisoned as those convicted of Common Assault. Those convicted of Inflict GBH were twice as likely to be imprisoned as those convicted of Occasioning ABH and 4 times as likely to be imprisoned as those convicted of Common Assault.

SUPERVISION STATUS AT THE TIME OF THE OFFENCE

Figure 7 presents the percentages of those in each supervision status category who were imprisoned. As shown in Figure 7, those who were under supervision at the time of the offence were nearly three times more likely to be sentenced to prison than those who were not.

PREVIOUS CONVICTIONS AND PLEA

The analysis established a relationship between previous convictions and plea in

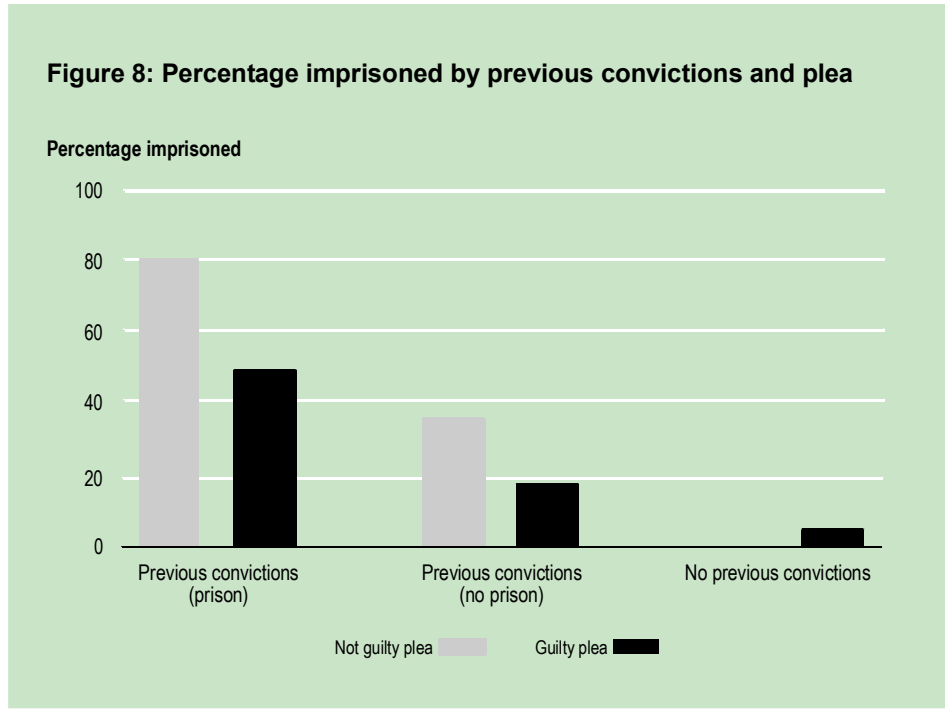


addition to the relationship of each of them to sentence type. This means that the effects of previous convictions and plea upon sentence type cannot be considered separately from each other. Figure 8 presents the percentages of offenders sentenced to imprisonment depending on plea and previous conviction status.

For those who had previous prison sentences, pleading not guilty increased the likelihood of a prison sentence by a factor of 1.6, from 50% to 80%.

For those who had previous convictions but no previous prison sentences, 36% of those who pleaded not guilty were sentenced to prison compared with 18% of those who pleaded guilty. For this group, therefore, pleading not guilty increased the likelihood of a prison sentence by a factor of two.

There were only 23 people with no previous convictions in the sample and only 2 of these pleaded not guilty, too small a group to draw any inferences.



In addition, when comparing the two groups with previous convictions those who had previously served a prison sentence were more than twice as likely to be sent to prison as those whose previous convictions had not resulted in prison, regardless of plea.

CONCLUSIONS

The people convicted of assault in our sample of Higher Court cases from 1988 were predominantly young (two thirds were under the age of 30 when arrested) and overwhelmingly male.

The majority of offenders were convicted of either Common Assault offences (41%) or Occasioning ABH offences (37%). The range of penalties handed down for each offence was very wide. Overall, most of the offenders (71%) were not given prison sentences. Even in the category of Intent to do GBH, 8 of the 25 offenders (32%) received non-prison sentences, while the prison sentences given in this category ranged from 34 months to 15 years. For Occasioning ABH offences the longest prison sentence was 4 years, although the maximum allowed is 5 years. In the categories of Inflict GBH and Common Assault the prison sentences ranged up to the maximum allowed (7 years and 2 years respectively).

According to the common law sentencing principles discussed in the early part of this bulletin, the courts should take a number of factors into account when handing down sentences. In this study we have been able to demonstrate the effects of four of these, namely, the severity of the offence charged, previous convictions, supervision status at the time of the offence and plea.

The analysis has shown that a prison sentence was more likely to be imposed if:

- 1) the offender was convicted of a more serious assault offence such as Inflict GBH;
- 2) had previous convictions;
- 3) was under supervision at the time of the offence (bail, probation etc.); or
- 4) pleaded not guilty to the charge.

These factors do not account for all the variation in sentence within our sample of cases. There are many other factors relevant to the sentencing decision,

however, which are not able to be measured (e.g. the offender's degree of contrition) but which might account for that variation. So far as the factors we have examined are concerned, the data provide clear evidence of an orderly relationship between sentencing principle and sentencing practice.

NOTES

- 1 Herron C.J., quoted in Potas, I., 1980, *Sentencing Violent Offenders in New South Wales*, the Law Book Company and the Australian Institute of Criminology, Sydney.
- 2 Unreported, NSW Court of Criminal Appeal, 2 July 1981.
- 3 NSW Court of Criminal Appeal, 1981, 2 NSWLR 464.
- 4 Unreported, NSW Court of Criminal Appeal, 17 December 1984.
- 5 See, for example, R v. Lawrence 1980, 32 ALR 72.
- 6 'Principal offence' here means that the assault offence was the most serious offence for which the offender was convicted. The most serious offence is defined as the one which was given the highest penalty. Thus, for example, a case where the offender was convicted of a murder and an assault would not be included here if, as is probable, the assault offence attracted a lower penalty than the murder.
- 7 A further 17% of cases involved culpable driving. Legally speaking, causing injury to persons through driving offences, where intent to injure or kill is not an issue, is treated very differently from other assault offences and so driving offences may legitimately be excluded from this discussion of assault.
- 8 Age was unknown in a further 15 (3.8%) of the 399 cases.
- 9 This includes one person in a juvenile detention centre.
- 10 Loglinear analysis is a procedure for examining the interrelationships between a number of factors.
- 11 For example, offender's age cannot be examined. While of interest, this factor had to be excluded because there were too few cases to allow the other factors to be meaningfully compared across different age-groups.

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