

SETTING NON-PAROLE PERIODS IN THE NEW SOUTH WALES LOCAL COURT: COMPARING OUTCOMES FOR INDIGENOUS AND NON-INDIGENOUS OFFENDERS*

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I Introduction

The Royal Commission into Aboriginal Deaths in Custody argued that the sentencing process provides opportunities for reducing the numbers of Indigenous people in custody.¹ Despite this, Indigenous sentencing disparities research has only been undertaken recently in Australia, and thus far, has been dominated by higher court studies of imprisonment decisions.² To date, there have been only three prior investigations of Indigeneity and lower court sentencing.³

Findings from higher court studies of Indigenous/non-Indigenous sentencing are mixed, but overall do not suggest negative discrimination against Indigenous offenders. In other words, there is little evidence to suggest that Indigenous offenders are more likely than non-Indigenous defendants to receive prison sentences when they appear before the higher courts under statistically comparable conditions (such as for similar criminality). Instead, these studies more frequently find equality⁴ (that is, no statistically significant difference in the likelihood of imprisonment) or leniency⁵ (that is, that Indigenous offenders are statistically less likely to be imprisoned). As a result, sentencing researchers have suggested that in Australia's post-Royal Commission environment, judges are sensitive to the unique needs of Indigenous offenders.⁶

In contrast, at the lower court level, research evidence indicates that Indigenous defendants receive harsher treatment. Prior studies consistently show that Indigenous offenders are more likely to be incarcerated than their non-Indigenous counterparts when sentenced under comparable circumstances (such as for similar crimes and with similar criminal histories).⁷ Differing organisational contexts of higher and lower courts and their impact on judicial

assessments of offenders and their cases, might explain these contrasting findings.

In contrast to judges in the Australian higher courts, lower court magistrates are required to make sentencing decisions under tighter time constraints and with less comprehensive and reliable information. Research on sentencing decision-making suggests that these types of conditions may produce a reliance on 'perceptual shorthands' that allow judicial officers to manage the information and uncertainty of the decision-making process.⁸ These short-hands are based on stereotypes and perceptions related to offender characteristics (such as Indigeneity) entering the decision-making process through images or attributions that those who belong to certain groups are more dangerous, criminal or risky than others.⁹

Perceptions of Indigenous peoples as 'deviant' pervade mainstream Australian society with Indigenous communities being seen as 'troublesome', 'untrustworthy', 'dysfunctional', 'disintegrated', 'pathological' and 'given to criminal conduct'.¹⁰ Thus, within the time-pressured lower court environment, these socially broader stereotypical assumptions could be more likely drawn on subconsciously by magistrates to make sentencing determinations. In other words, and in contrast to their judicial colleagues in the higher courts, lower court magistrates operate in circumstances that provide less opportunity for the submission of more detailed information about the broader social disadvantage and marginalised position of Indigenous offenders.¹¹

Given previous findings of harshness in the treatment of Indigenous offenders in the decision to imprison in Australia's lower courts, further work on Indigeneity and the imprisonment sentencing decision is timely, especially as the majority of criminal defendants will have their cases finalised

in the lower courts. This paper examines the relationship between Indigeneity and the setting of non-parole periods by magistrates in the Local Court of New South Wales. To date, there have been no systematic investigations of Indigeneity and non-parole periods within or outside Australia.¹²

In New South Wales, for offenders sentenced to prison terms of over six months, magistrates are required (unless sufficient reason can be given otherwise) to set a non-parole period. The non-parole period is the minimum period for which the offender must remain in full-time incarceration. Generally, non-parole periods should not be higher than two-thirds of the prison term imposed unless the court decides that there are special circumstances justifying a higher proportion. Thus, for prison sentences over six months, magistrates have a degree of discretion in deciding non-parole periods.¹³

In deciding the non-parole period, as noted by the Judicial Commission of New South Wales,¹⁴ consideration must be given to the objectives of punishment, rehabilitation and deterrence. For example, the decision must reflect the seriousness of the offence¹⁵ and may consider the reoffending risk (such as may be indicated by criminal history).¹⁶ The legislation also allows the magistrate to take into account 'special circumstances' as mitigating factors in determining the non-parole period. What constitutes special circumstances is to be determined by the sentencing magistrate.¹⁷ Circumstances that are commonly considered 'special' include youthfulness and hardship to family members.¹⁸ Thus, Indigenous histories of disadvantage may plausibly fall within 'special circumstances'. Although sentencing case law around Indigenous disadvantage has narrowed the application of Indigenous-specific circumstances, it remains a viable consideration for some Indigenous offenders.¹⁹

The current study examines the impact of Indigenous status on the *percentage difference* in length between the total sentenced term and the set non-parole period for prison sentences over six months in the New South Wales Local Court. Why percentage difference between total length and non-parole length rather than the actual length of the non-parole period? We argue that this approach better captures the nature of the non-parole decision: the setting of non-parole is about how *much* of a sentence should be served, not the length.

Therefore, we ask whether Indigenous and non-Indigenous offenders are sentenced to disparate non-parole periods,

after taking into account other key factors, such as current and past criminality, age and gender. As discussed above, defendants' age and criminality (past and present) may impact the setting of non-parole periods. Further, gender may act as a proxy for family hardship. For example, women are more frequently responsible for primary childcare and this could reduce non-parole terms. Compared to men, there may be a higher social cost (that is, familial hardship) attached to the incarceration of women due to gender role differences within family units.²⁰

II Current Study

The current research relies on New South Wales Local Court data provided by the New South Wales Bureau of Research and Crime Statistics from their lower courts database for a six-year period from 2003 to 2008. We focus on the impact of Indigenous status on the percentage difference between length of the total sentenced prison term and the set non-parole period for cases in the lower adult court. Our analyses are restricted to those with imprisonment sentences over six months (see earlier). During this time, a total of 45,029 cases received a sentence of imprisonment, of which 53.31 per cent (n=24,003) were over six months.²¹ Due to missing information and other data errors, the final analysis used 23,228 cases, of which, 35.61 per cent were identified as Indigenous, 8.55 per cent were female, and the mean age was 31.48 years. Over the entire six-year period, on average, non-parole periods were 38.83 per cent lower than the total imposed prison length for prison sentences over six months.

III Does Indigenous Status Directly Impact Non-parole Period Decisions?

To examine the influence of Indigenous status on the non-parole period decision, we examined differences in offender demographics, past and current criminality and court processing factors by Indigenous status for the total study period (2003–2008). (Appendix A provides a full description of the variables.) Our results showed that the profile of Indigenous offenders differed to that of non-Indigenous offenders (see Table 1). There was a higher proportion of Indigenous female offenders than non-Indigenous female offenders. The mean age of Indigenous offenders was younger than the mean for non-Indigenous offenders. On average, Indigenous offenders had more extensive past offending and more serious current offending. Indigenous offenders were also more likely not to have been released on bail. There was

TABLE 1: OFFENDER AND CASE CHARACTERISTICS BY INDIGENOUS STATUS (NEW SOUTH WALES, LOWER ADULT COURTS, 2003–2008, N=23,228)

Offender Social Background Characteristics	Indigenous Offenders	Non-Indigenous Offenders
Percentage female	11.19	7.08
Mean age	29.80 (8.15)	32.42 (9.28)
Prior and Current Criminal Offending		
Mean number of prior appearances	10.95 (6.33)	7.92 (5.87)
Mean seriousness score for principal offence	81.47 (41.48)	73.55 (42.28)
Percentage with multiple conviction counts	79.87	78.71
Court Processing Factors		
Percentage pleading guilty	84.20	83.54
Percentage not released on bail	81.32	72.12
Outcome		
Mean percentage difference in length	40.04 (22.04)	28.16 (21.87)
Number of Cases	8272	14956

Note: All differences were statistically significant at $p < 0.05$, *except* for pleading guilty. Standard deviations are reported in brackets.

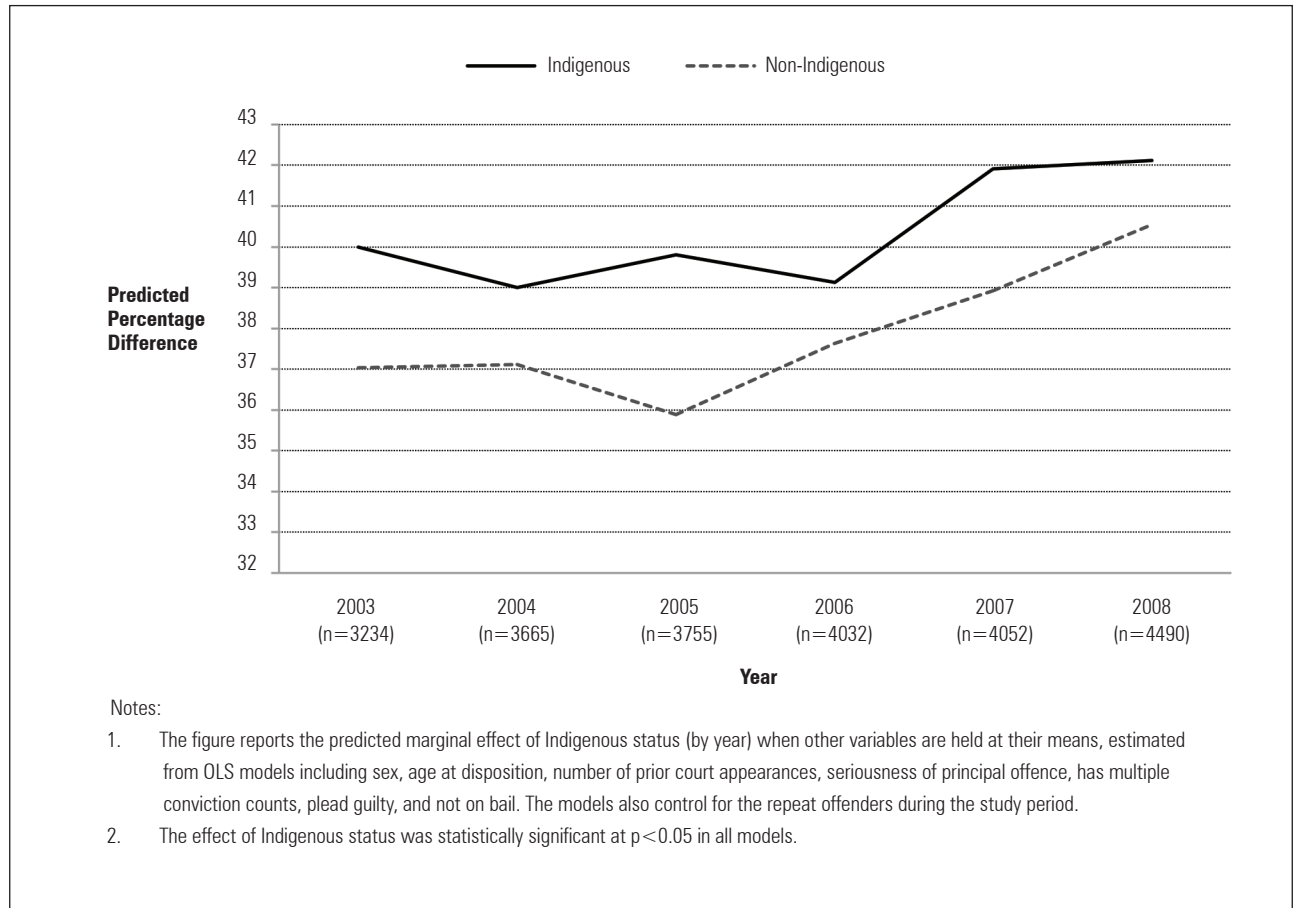
little difference in the proportion of Indigenous offenders and non-Indigenous offenders who plead guilty.

Of particular interest, Indigenous offenders on average had more lenient non-parole periods set, with a mean percentage difference between the full term and the non-parole period of 40.04 (compared with 28.16 for non-Indigenous offenders) (see Table 1). In other words, Indigenous offenders had a smaller proportion of their imposed prison sentence set as a non-parole period. However, this initial difference in non-parole periods by Indigenous status could be due to Indigenous/non-Indigenous differences in other factors (for example, Indigenous offenders were younger and more likely to be female). To adjust for these differing circumstances (described more fully in Appendix A), we conducted a series of ordinary least squares regression analyses²² (by year) to estimate the separate impact (that is, controlling for other sentencing factors) of Indigenous status on the percentage difference in length of imposed imprisonment term and non-parole period.

Figure 1 presents the independent effect of Indigenous status on the percentage difference in length of the imposed prison

length and the set non-parole period, after controlling for social background characteristics, past and current offending and court processing factors. Results show that, all else being equal, between 2003 and 2008, there was a statistically significant difference in the setting of non-parole periods by Indigenous status, with Indigenous offenders having more lenient non-parole periods set (that is, a greater gap between imposed prison term and set non-parole period). After adjusting for other sentencing factors, the average percentage difference (over the study period) between the length of sentenced prison term and non-parole period for an Indigenous offender is 35.72 per cent, compared to an average percentage difference of 33.33 per cent for a non-Indigenous offender. In other words, compared to Indigenous offenders, non-Indigenous offenders are expected to serve more time in prison before being released on parole. For example, for the median imposed prison term of 12 months, this results in a non-parole period of 7.71 months on average for an Indigenous offender and eight months for a non-Indigenous offender. This pattern of results suggests that Indigenous offenders, after accounting for differences in social and offending circumstances, continue to be treated more leniently in the setting of non-parole periods.

FIGURE 1: INDEPENDENT EFFECT OF INDIGENOUS STATUS ON THE PERCENTAGE DIFFERENCE IN LENGTH (NEW SOUTH WALES, LOWER ADULT COURTS, 2003-2008, N=23,228)



IV Summary and Discussion

This study compared the percentage difference between imposed prison sentence and the set non-parole period of Indigenous and non-Indigenous offenders in the New South Wales Local Court. Results suggest that, under similar circumstances, Indigenous offenders receive shorter non-parole periods as a proportion of the imposed prison term, although the average magnitude of the difference is small.

This finding of proportionately shorter non-parole periods (although small), contrasts with prior findings showing harsher outcomes for Indigenous offenders earlier in the process (that is, the decision to imprison) in the New South Wales lower courts.²³ Yet, the current research findings are not overly surprising. In Australia and internationally,

mixed findings about the presence and direction of disparity by Indigeneity, ethnicity and race by the sentencing stage are not unusual.²⁴ However, as is the case with other statistical explorations of sentencing, our ability to fully explain the current research outcome is limited by our methodological approach.²⁵

First, as discussed earlier, when setting the non-parole period, magistrates may consider a range of factors relevant to punishment, rehabilitation and re-offending risk. In the current analyses, key factors crucial to these considerations were included: current crime seriousness, previous offending, offenders' age and gender. There are, however, other offender and case factors that can be considered by magistrates in non-parole period decisions. These include drug abuse; ill health, disability, and mental illness; being

previously incarcerated; genuine remorse and offender self-punishment; and the preservation of parity between co-offenders.²⁶ We were not able to consider these additional factors because this information was not available in the administrative data. At the lower court level, obtaining more detailed information about offenders and their cases is likely only possible through observational court research and/or access to the audio recordings of lower court sentencing hearings.

Second, and more broadly, statistical analyses of sentencing disparities are limited in an explanatory sense. While this approach can establish whether or not Indigenous status matters when it comes to sentencing – current and previous studies suggest that it does – *how* and *why* it comes to matter is more speculative. This issue was highlighted in prior work on higher court sentencing in South Australia by Jeffries and Bond;²⁷ after finding that Indigeneity had a statistical impact on sentencing outcomes (for example, Indigenous offenders were less likely to be sentenced to prison), it was qualitative analyses of judicial sentencing remarks that provided a fuller explanation of the statistical finding of difference.²⁸

Ideally then, future research on the relationship between Indigeneity and sentencing at the lower court level should incorporate a qualitative component in its design. This type of analysis could include observations of lower court sentencing hearings, analyses of sentencing hearing audio recordings, and interviews with magistrates about their Indigenous sentencing philosophies and practices.

Finally, this study focuses on the *judicial* non-parole period decision. To what extent, after adjusting for other factors, Indigeneity independently influences the parole decision itself has yet to be empirically estimated. Further, we do not know what factors impact the actual release of offenders on parole, and whether these differ by Indigenous status. Understanding the parole decision is vital given ongoing concerns around Indigenous over-representation in prison. Future research on the relationship between Indigeneity and the parole decision is therefore important for a more nuanced understanding of the sources of continuing over-representation in the criminal justice system.

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- 1 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).
- 2 Samantha Jeffries and Christine Bond, 'Does Indigeneity Matter?: Sentencing Indigenous Offenders in South Australia's Higher Courts' (2009) 42(1) *Australian and New Zealand Journal of Criminology* 47; Christine Bond and Samantha Jeffries, 'Sentencing Indigenous and Non-Indigenous Women in Western Australia's Higher Courts' (2010) 17(1) *Psychiatry, Psychology and Law* 70; Christine Bond and Samantha Jeffries, 'Indigeneity and the Likelihood of Imprisonment in Queensland's Adult and Children's Courts' (2012) 19(2), *Psychiatry, Psychology and Law* 169; Christine Bond and Samantha Jeffries, 'Indigeneity and the Judicial Decision to Imprison: A Study of Western Australia's Higher Courts' (2011) 51 *British Journal of Criminology* 256; Christine Bond and Samantha Jeffries, 'Harsher Sentences? Indigeneity and Prison Sentence Length in Western Australia's Higher Courts' (2011) 48(3) *Journal of Sociology* 266; Christine Bond, Samantha Jeffries and Don Weatherburn, 'How Much Time? Indigenous Status and the Sentenced Imprisonment Term Decision in New South Wales' (2011) 44 *Australian and New Zealand Journal of Criminology* 272.
- 3 Bond and Jeffries, 'Indigeneity and the Likelihood of Imprisonment in Queensland's Adult and Children's Courts', above n 2; Bond, Jeffries and Weatherburn, above n 2; Samantha Jeffries and Christine Bond, 'Indigenous Disparity in Lower Court Imprisonment Decisions: A Study of Two Australian Jurisdictions, 1998 to 2008' (2011) (unpublished, copy on file with authors).
- 4 Bond and Jeffries, 'Indigeneity and the Likelihood of Imprisonment in Queensland's Adult and Children's Courts', above n 2; Bond and Jeffries, 'Indigeneity and the Judicial Decision to Imprison', above n 2.
- 5 Jeffries and Bond, 'Does Indigeneity Matter?', above n 2; Bond and Jeffries, 'Sentencing Indigenous and Non-Indigenous Women in Western Australia's Higher Courts', above n 2.
- 6 See for example, Jeffries and Bond, 'Does Indigeneity Matter?', above n 2; Bond and Jeffries, 'Sentencing Indigenous and Non-

- Indigenous Women in Western Australia's Higher Courts', above n 2.
- 7 Bond and Jeffries, 'Indigeneity and the Likelihood of Imprisonment in Queensland's Adult and Children's Courts', above n 2; Jeffries and Bond, above n 3.
- 8 Brian Johnson, 'Racial and Ethnic Disparities in Sentencing Departures Across Modes of Conviction' (2003) 41 *Criminology* 449; Darrell Steffensmeier, Jeffery Ulmer and John Kramer, 'The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male' (1998) 36 *Criminology* 763; Brian Johnson, Jeffery Ulmer and John Kramer, 'The Social Context of Guidelines Circumvention: The Case of Federal District Courts' (2008) 46 *Criminology* 737; Darrell Steffensmeier and Stephen Demuth, 'Ethnicity and Sentencing Outcomes in US Federal Courts: Who is Punished More Harshly?' (2000) 65 *American Sociological Review* 705.
- 9 Ibid.
- 10 Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, 200) 1; Jeffries and Bond, 'Does Indigeneity Matter?', above n 2; Samantha Jeffries and Christine Bond, 'Narratives of Mitigation: Sentencing Indigenous Criminal Defendants in South Australia's Higher Courts' (2012) 46 *Journal of Sociology* 219.
- 11 Samantha Jeffries and Christine Bond, 'Does a Therapeutic Court Context Matter?: The Likelihood of Imprisonment for Indigenous and Non-Indigenous Offenders Sentenced in Problem-Solving Courts' (2013) forthcoming *International Journal of Crime, Law and Justice*.
- 12 Of the Australian jurisdictions with minimum standard non-parole period schemes, NSW is one of the few states with the quality of data for multivariate analyses. Fortunately, as of 2008 NSW prisons held the largest proportion of Indigenous prisoners within the total Australian Indigenous population: see Jacqueline Fitzgerald, 'Why Are Indigenous Imprisonment Rates Rising?' (Crime and Justice Statistics Bureau Brief, Issue Paper No 41, NSW Bureau of Crime Statistics and Research, August 2009).
- 13 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46.
- 14 Judicial Commission of New South Wales, *Setting Terms of Imprisonment* (2012) <http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/setting_terms_of_imprisonment.html>.
- 15 *R v MA* (2004) 145 A Crim R 434.
- 16 *Bugmy v The Queen* (1990) 169 CLR 525, 537 (Dawson, Toohey and Gaudron JJ).
- 17 *R v Simpson* (2001) 53 NSWLR 704.
- 18 *Setting Terms of Imprisonment*, above n 14.
- 19 Thalia Anthony, 'Sentencing Indigenous Offenders' (Research Brief No 7, Indigenous Justice Clearinghouse, March 2012).
- 20 Kathy Daly, 'Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing' (1989) 3 *Gender and Society* 9; Samantha Jeffries, 'Does Gender Really Matter? Criminal Court Decision Making in New Zealand' (2002) 17 *New Zealand Sociology* 135; Samantha Jeffries, 'Just or Unjust? Problematising the Gendered Nature of Criminal Justice' (2002) 18 *Women's Studies Journal* 24; Samantha Jeffries and Christine Bond, 'Sex and Sentencing Disparity in South Australia's Higher Courts' (2010) 22 *Current Issues in Criminal Justice* 81.
- 21 Note that NSW local courts can impose a maximum prison term of two years.
- 22 A series of diagnostic tests were conducted on the analyses, especially as the dependent variable had some non-normality in its distribution. After these tests and some sensitivity analyses, we decided to use the OLS regression results. Similar results (direction of effect and pattern of significance) were obtained through other analyses.
- 23 Jeffries and Bond, above n 3.
- 24 Samantha Jeffries and Christine Bond, 'The Impact of Indigenous Status on Adult Sentencing: A Review of the Statistical Research Literature from the United States, Canada and Australia' (2012) 10 *Journal of Ethnicity in Criminal Justice* 223.
- 25 Kathy Daly, *Gender, Crime, and Punishment* (Yale University Press, 1994). See also sources referred to at n 2 above.
- 26 See *Setting Terms of Imprisonment*, above n 14. The fit of our models (with adjusted R² statistics ranging from 1.3 to 2.7) also suggests that these other considerations may be more influential predictors.
- 27 Jeffries and Bond, 'Does Indigeneity Matter?', above n 2.
- 28 Ibid.

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APPENDIX A: DESCRIPTION OF STUDY VARIABLES (NEW SOUTH WALES, LOWER ADULT COURTS, 2003–2008)

Variables	Description	Mean or % for all years*
<i>Dependent variable</i>		
Difference in length	Percentage difference in length of imposed imprisonment term and length of non-parole period.	38.83 (21.95)
<i>Independent variables</i>		
Offender social background characteristics:		
Indigenous status	0=non-Indigenous; 1=Indigenous (Indigenous status is self-identified).	35.61% Indigenous
Sex	0=male; 1=female.	8.55% Female
Age	At disposition (in years).	31.48 (8.98)
Prior and current criminal offending:		
Prior court appearances	Number of prior court appearances (proven and unproven) since 1994.	9.00 (6.21)
Seriousness of principal offence:[†]	Reverse coded National Offence Index (NOI). The NOI ranks all offence classifications contained within the Australian Standard Offence Classification System in order of seriousness from 1 (most serious) to 156 (least serious). We reverse coded the score so that higher scores indicated more serious offences.	76.37 (42.17)
Convicted of multiple counts	0=no; 1=yes.	79.12% with multiple counts
Court processing factors:		
Plea of guilt	0=plead not guilty/no plea; 1=plead guilty	83.77% plead guilty
Not granted bail	0=no; 1=yes. Refers to whether or not an offender had bail refused or was already in custody on another offence.	75.40% refused bail, or already in custody

Source: New South Wales Bureau of Crime Statistics and Research, *Criminal Courts Statistics 2008* (2009)

* Means (and standard deviations in brackets) are reported for continuous variables. Percentages are reported for dichotomous variables.

† Principal offence is the offence with the most serious penalty, determined by penalty type, then quantum (total length if a custodial penalty), and then non-parole period (if a custodial penalty).