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# ABOLISHING PRISON SENTENCES OF 6 MONTHS OR LESS

## A Report of the NSW Sentencing Council

**It is important to "…*assist the judiciary to impose the sentence which is appropriate to punish the offender, while at the same time tackling the reasons for offending.* It is important to "*also ensure that in appropriate cases more use is made of meaningful community sentences, while at the same time reserving custodial sentences for those cases where it is necessary.*" -Lord Woolf, Lord Chief Justice of England and Wales.**[1]

The members of the NSW Sentencing Council are:

Hon Alan R Abadee RFD QC, Chairperson
Hon J P Slattery AO QC, Deputy Chairperson
Prof. Larissa Behrendt, Jumbunna Indigenous House of Learning
Mr Howard W Brown OAM, Victims of Crime Assistance League
Mr N R Cowdery AM QC, Director of Public Prosecutions
Mrs Jennifer Fullford, Community Representative
Ms Martha Jabour, Homicide Victims Support Group
Commander John Laycock APM, NSW Police
Mr Ken Marslew AM, Enough is Enough Anti-Violence Movement
Mr Peter Zahra SC, Senior Public Defender.

The views expressed in this report do not necessarily reflect the private or professional views of individual Sentencing Council members or the views of their individual organisations. A decision of the majority is a decision of the Sentencing Council.[2]

[1] Lord Chief Justice Woolf in discussing the importance of the English Sentencing Guidelines Council, and the importance of guidelines. "Sentencing Council begins its work" (March 2004) 154 *New Law Journal* 368.
[2] See Schedule 1A, clause 12 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

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# 1. Summary of Recommendations

**Abolition of short prison sentences should be considered, but not until:**

- **Primary alternatives to full-time custody are available uniformly throughout NSW;**
- **The impact of abolition of short sentences in Western Australia is evaluated;**
- **Exceptions to abolition are settled;**
- **Abolition is trialled throughout *all* of NSW for Aboriginal women.**

**Uneven distribution of sentencing options throughout the state**

The intention to abolish short prison sentences of 6 months or less pre-supposes that such prison sentences would be replaced by alternatives to full-time custody. The fact that many alternatives to full-time custody are not available uniformly throughout NSW is a matter of great concern. **The Sentencing Council recommends that priority should be given to making primary sentencing options such as periodic detention, home detention, community service and probation supervision available throughout NSW.**

Until such sentencing options are available uniformly throughout the state, there is a real concern that if short prison sentences were abolished, offenders would be inappropriately sentenced to a longer period of imprisonment ("sentence creep").

**Other Jurisdictions**

Whilst recognising that different conditions prevail in WA and NSW, the Sentencing Council recommends that it is desirable to evaluate the impact of abolition of short sentences in WA before further considering abolishing short prison sentences in NSW.

**Possible exceptions to any move to abolish short prison sentences**

At present, there are a large number of possible exceptions to any move to abolish short prison sentences, and no consensus at this time as to what the exceptions should be.

**Piloting abolition of short prison sentences**

The Sentencing Council recommends that abolition of short prison sentences should be piloted for Aboriginal female offenders throughout all of NSW. Such a pilot should be carefully monitored and evaluated.

The Sentencing Council recommends that BOCSAR should be asked to design an appropriate evaluation model for the pilot. Such evaluation could include cost effectiveness of the pilot.

**Alternative sentencing options to imprisonment for 6 months or less**

Section 65A of the *Crimes (Sentencing Procedure) Act 1999* provides that a periodic detention order may not be made for an offender who has previously served imprisonment for more than 6 months by way of full-time detention. The Sentencing Council recommends that this restriction should be removed.

**Relationship between full-time imprisonment, periodic detention, home detention, and suspended sentences**

The Sentencing Council recommends that consideration of abolishing short prison sentences should be restricted to those to be served by way of full-time imprisonment.

There is a "nexus" between full-time imprisonment, and imprisonment that is suspended, or served by way of periodic or home detention. The latter three options cannot be considered until it is decided that no sentence other than imprisonment would be appropriate. If the nexus between full-time imprisonment and suspension, periodic detention and home detention were to be broken, the Sentencing Council considers that there would be a serious risk of "net widening".

The Sentencing Council considers that a possible exception to any abolition of short prison sentences would be for breach of periodic detention, home detention, or suspended sentence.

The Sentencing Council recommends that the power to partially suspend prison sentences should be restored.[3]

The Sentencing Council recommends that short prison sentences should *not* be automatically suspended.

The Sentencing Council recommends that there should be a wider discretion to a Court in addressing a breach of a suspended sentence.

**Section 5 of the *Crimes (Sentencing Procedure) Act 1999***

The Sentencing Council recommends that as an alternative to abolishing short prison sentences, at least in the interim, statutory guidelines further restricting the use of such sentences could be introduced.

**Section 46 and rehabilitation of prisoners serving prison sentences of 6 months or less**

The Sentencing Council recommends that prisoners who serve a short prison sentence should receive supervision on release. The Sentencing Council therefore recommends that section 46 should be repealed or otherwise amended. In addition, "program release" or transitional centres could be used to ensure that offenders sentenced to a short prison sentence receive supervision on release.

**"Custody plus"**

The Sentencing Council recommends that consideration be given to introducing a form of "custody plus" (a short prison sentence followed by intensive supervision) subject to considerations of cost effectiveness and other resource and supervision issues.

**Intellectually disabled offenders**

Section 32 of the *Mental Health (Criminal Procedure) Act 1990* provides a method of diversion for defendants who are suffering from a mental illness (but are not mentally ill

[3] See *Crimes Legislation Amendment Act 2003* (NSW), assented to on 8 July 2003, Schedule 6 commenced on the same day.

persons in terms of the *Mental Health Act*), are developmentally disabled, or suffering from a mental condition for which treatment is available in a hospital. The Sentencing Council recommends that the diversionary provisions of section 32 should be available to *all* persons with a cognitive impairment, not just those who are suffering from a mental illness, are developmentally disabled, or suffering from a mental condition for which treatment is available.[4]

**Juvenile offenders**

The Sentencing Council recommends that control orders of 6 months or less should not be abolished.

[4] For example, section 32 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) could be made available to a defendant with a cognitive impairment that affects reasoning and behaviour, including intellectual disability, acquired brain injury, autism, and a neurological disorder including dementia.

## 2. Introduction

For the purposes of this paper, "prison sentences of 6 months or less" will be referred to as "short prison sentences".

Short prison sentences have recently been considered in two other jurisdictions. In Western Australia, prison sentences of 3 months or less were abolished in 1995, with suspended sentences and Intensive Supervision Orders introduced as alternatives. The effect of this legislative change was not evaluated. Western Australia has since passed and commenced legislation to extend the abolition of short prison sentences to include prison sentences of 6 months or less.[5] The Western Australian Government has agreed to review the legislation 2 years after commencement. It is suggested that NSW should wait until the Western Australian legislation is reviewed before making any similar move.

In England, the overcrowding of prisons has been described as a "*cancer eating at the ability of the prison service to deliver*".[6] Short prison sentences were recently reviewed in that jurisdiction and a system of "custody plus" has been introduced under the *Criminal Justice Act 2003* (UK). This is where offenders sentenced to a short term of imprisonment spend a period of time in custody along with a period of time supervised in the community. The terms of the supervision period are tailored to the needs of the individual offender. Importantly, the question of abolishing short prison sentences was considered in England, but the system of "custody plus" was preferred.

Almost all short prison sentences are imposed by the Local Court, and in 2002, the Local Court imposed 96.9% of all short prison sentences.[7] Most offenders have a criminal history, and almost 70% have previously served a sentence of imprisonment. The Department of Corrective Services ("DCS") has provided data on the characteristics and size of the population serving prison sentences of 6 months or less.[8] In summary, the vast majority are male,[9] almost a quarter are Aboriginal,[10] almost all have a prior record and almost 70% have previously served a period of imprisonment.[11]

The Department further reports that there has been a recent *downward trend* in the number of offenders serving prison sentences of 6 months or less.[12] This is in contrast to the increase in the overall prison population. One may speculate as to the explanation, but the trend may

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[5] Part 5, section 33 *Sentencing Legislation Amendment and Repeal Act 2003 (no 50 of 2003)* amends section 86 of the *Sentencing Act 1995* (WA). The amending legislation was assented to on 9 July 2003, and commenced on 15 May 2004.

[6] Lord Justice Woolf, 'A New Approach to Sentencing' (April 2003) 15(4) *Judicial Officers' Bulletin* 1

[7] BOCSAR has reported that for 2002, 96.9% of short prison sentences were imposed in the Local Court, and 3.1% imposed in the higher courts. 55.8% of those sentenced to imprisonment in the local courts and 1.3% of those sentenced in the higher courts were sentenced to a short term of imprisonment: see Keane, Polletti and Donnelly (2004) '*Sentencing Trends and Issues no. 30: Common Offences and the Use of Imprisonment in the District and Supreme Courts in 2002*' Sydney: Judicial Commission of NSW at 3. See also Keane and Polletti (2003) '*Sentencing Trends and Issues no. 28: Common Offences in the Local Courts 2002*' Sydney: Judicial Commission of NSW at 11. This figure does not include suspended sentences or sentences to be served by way of home detention or periodic detention. Nor does it include sentences of greater than 6 months where the non-parole period is less than 6 months.

[8] Such data is based on a prison census conducted on 30 June 2003.

[9] 91% of such offenders are male, with 9% being female.

[10] 23.2% were Aboriginal.

[11] 4.5% had no prior record. 95.5% had a prior record, and 69.3% had previously served a sentence of imprisonment. See Table 4 in Annexure A of the Discussion Paper.

[12] See Table 2, Annexure A of the Discussion Paper, provided by the Department of Corrective Services.

possibly be attributable to the introduction of section 5(2) of the *Crimes (Sentencing Procedure) Act 1999*.

There are also a significant number of offenders sentenced to short terms, but do not serve the sentence in full-time imprisonment. In 2002-2003, over one third of periodic detention orders were for 6 months or less, over two thirds of home detention orders were for 6 months or less, and just under one third of suspended sentences were for a period of 6 months or less.[13]

The debate around this topic has called for a focus on alternate sentencing options, diversionary pilot programs and whom they target. The Committee, in its Discussion Paper (see below), discussed the competing aims of sentencing and how and why emphasis is on rehabilitation in certain circumstances. It has exposed the tensions between the aims of enlightened diversionary programs on the one hand and "law and order" amendments on the other.

It is conceded that there are many competing and complex issues to be considered in this proposal. There are also some important exceptions that must be considered. There may be important gains for the community in tightening up the circumstances in which short sentences can be used, and by making alternative sentencing options uniformly available throughout NSW.

### 2.1 Terms of Reference and the Course of the Sentencing Council's Reference

The issue of short prison sentences[14] has been a topic of discussion within the Sentencing Council since its formation in March 2003.The Sentencing Council's Chairperson raised the issue with the Attorney General on behalf of the Council, and the Attorney General, on 18 June 2003, formally referred the issue of abolishing prison sentences of 6 months or less to the Sentencing Council for examination. The relevant part of the letter is found at page 4 of the Discussion Paper. The Sentencing Council, with the permission of the Attorney General, formed a committee to assist it in considering this topic.

### 2.2 Discussion Paper prepared by the Committee assisting the Sentencing Council

The Sentencing Council called for preliminary submissions in order to assist in isolating relevant issues, and a Committee was formed. The Committee consisted of representatives of relevant government departments and agencies together with individuals considered to have particular expertise or knowledge valuable to consideration of the issues. The committee was comprised of:

- The Hon. Alan Abadee RFD QC (Chair)
- Professor Chris Cunneen, Director, Institute of Criminology, University of Sydney;
- Ms Robyn Gray, Deputy Solicitor for Public Prosecutions;

[13] 32.7%, 68.9% and 27.7% respectively. NSW Department of Corrective Services, *Submission* (22 September 2003).

[14] The Sentencing Council did not merely confine itself to prison sentences of 6 months or less, but also considered prison sentences of 12 months or less. The majority of the Sentencing Council was of the view that consideration of prison sentences of 6 months or less is consistent with the recommendation made by the Select Committee of the Legislative Council on the *Increase in Prison Population*, and also with the language of section 46 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). The minority view was that the same arguments, which could apply to abolishing prison sentences of 6 months or less, would equally apply to prison sentences of 12 months or less.

- Acting Senior Assistant Commissioner Ken Middlebrook, Community Offender Services, Department of Corrective Services;
- Mr Peter Muir, Director, Operations, Department of Juvenile Justice;
- Superintendent Bruce Newling, Court and Legal Services, NSW Police;
- Mr Ivan Potas, Director, Research and Sentencing, Judicial Commission of NSW;
- Mr Brian Sandland, Acting Director of Criminal Law, Legal Aid Commission of NSW;
- Ms Mary Spiers, Senior Policy Officer, Criminal Law Review Division; and
- Ms Tricia White, Senior Policy Analyst, Ministry for Police.

The Committee considered the preliminary submissions received and provided its assistance to the Sentencing Council in the form of a Discussion Paper.[15] The Discussion Paper was intended to attract comment, and was circulated for further comment to those who made preliminary submissions.

The Sentencing Council gratefully acknowledges the valuable contributions made by the Committee in the form of its Discussion Paper. The Council adopts and incorporates the Committee's Discussion Paper as part of this report. A copy of the Discussion Paper is attached (**Attachment 1**).

### 2.3 The Sentencing Council's Report

The Sentencing Council has now prepared this final Report, taking into account the preliminary submissions, the Discussion Paper prepared by the Committee, and the submissions received on the Discussion Paper. A list of all submissions received in preparation of both the Discussion Paper and this Report are attached at **Annexure A.** The Sentencing Council has not, however, felt bound by any of the above materials in reaching its own independent views.

To avoid repetition, this report briefly outlines the basic findings of the Committee's Discussion Paper, particularly in relation to areas of agreement between the Sentencing Council and the Committee. This Report concentrates on the comments received in response to the Discussion Paper and the Sentencing Council's recommendations.

## 3. Arguments which Support the Abolition of Short Prison Sentences

The Sentencing Council considers that short prison sentences should be examined, and questions whether they are effective. In particular, some Sentencing Council members questioned their rehabilitative effect and indeed whether they may be counter-rehabilitative as they may introduce minor offenders to more hardened serious offenders. Short prison sentences also have negative effects on family, housing and employment. Sentencing Council members questioned whether short prison sentences were a cost-effective way of dealing with offenders, and suggested that alternative means of disposition of offenders should be explored.

Below is a summary of the main arguments, which support the abolition of short prison sentences.

[15] Committee assisting NSW Sentencing Council, *Discussion Paper: Abolishing Prison Sentences of Six Months or Less*, 2004

### 3.1 Value in terms of the sentencing objective of rehabilitation

The Committee's Discussion Paper raises questions regarding the rehabilitative value of short prison sentences. Many of the submissions received by the Sentencing Council view this issue as the main argument for abolishing short prison sentences.

The Aboriginal Justice Advisory Council (AJAC) comments that short prison sentences provide little to no real opportunity for offenders to participate in the varied constructive activities that may help to, not only address the causes of their offending, but also equip them with better employment and educational opportunities upon release.[16] AJAC cites anecdotal evidence that many Aboriginal inmates do not apply for training, educational or treatment based courses when serving short prison sentences, as they are not in prison long enough to complete them. AJAC considers community based sentencing options rather than short prison sentences offer greater flexibility and support to address the root causes of an offender's behaviour.[17]

To add, the University of New South Wales Council for Civil Liberties raised for consideration the conclusions of the NSW Select Committee on the Increase in Prisoner Population.[18] The Select Committee identified several issues that questioned the purpose of short terms of imprisonment when there is no access to any programs or services that address the underlying reasons for the offensive behaviour. Issues included: the limited involvement in in-prison programs due to their lengthy duration; prisoners with short terms never have their cases reviewed as case management plans are reviewed every six months and most short term prisoners are not eligible for Probation and Parole services.[19]

However, it is acknowledged in some submissions that rehabilitation is only one of many purposes of sentencing,[20] and that short prison sentences may be quite effective in meeting some of the other objectives of sentencing. A short sentence of imprisonment may be capable of, for example: ensuring that the offender is adequately punished for the offence,[21] achieving a deterrent effect,[22] and denouncing the conduct of the offender.[23]

### 3.2 Section 46 and post-release supervision

There exists a concern with the current law regarding the lack of supervision on release for prisoners serving short prison sentences. Section 46 of the *Crimes (Sentencing Procedure) Act 1999* precludes offenders who have served a short prison sentence from receiving any support or supervision on release. Issues associated with imprisonment, for example employment and housing, are therefore exacerbated for short-term prisoners. The operation of section 46 is discussed further in section 5.3.

### 3.3 Costs and resources

It is argued that abolishing short prison sentences would ensure the efficient use of resources and reduce prison costs. Removing short-term prisoners from gaols would reduce prison overcrowding and simplify the management of inmates. An important argument for the

[16] Aboriginal Justice Advisory Council, *Submission* (24 September 2003)
[17] Aboriginal Justice Advisory Council, *Submission* (24 September 2003)
[18] University of NSW Council for Civil Liberties, *Submission* (3 November 2003)
[19] Select Committee on the Increase in Prisoner Population, NSW Legislative Council, *Final Report,* (2001) Parliamentary Paper No. 924, 13 November 2001.
[20] Section 3A(d) of the *Crimes (Sentencing Procedure) Act 1999*
[21] Section 3A(a) of the *Crimes (Sentencing Procedure) Act 1999*
[22] Section 3A(b) of the *Crimes (Sentencing Procedure) Act 1999*
[23] Section 3A(f) of the *Crimes (Sentencing Procedure) Act 1999*

abolition of short prison sentences is related to the questionable rehabilitative value and the cost implications of such. In *R v. Keating & McInerney* Lord Chief Justice Woolf outlined the staggering cost of re-offending:[24]

> "*Many of the costs of re-offending by ex-prisoners are not quantifiable, but can be devastating and long-term…The financial cost of re-offending by ex-prisoners, calculated from the overall costs of crime, is staggering and widely felt. In terms of the cost to the criminal justice system of dealing with the consequences of crime, recorded crime alone committed by ex-prisoners comes to at least £11 billion per year…An ex-prisoner's path back to prison is extremely costly for the criminal justice system…. And yet these costs are only a fraction of the overall cost of re-offending.*"

The development of alternative sentencing options to short prison sentences clearly involves criminal justice intervention programs, which have as one of their purposes, the treatment and rehabilitation of offenders or accused persons.[25]

Despite the huge costs of recidivism, the potential savings from abolishing short prison sentences may not be as great as at first appears. The issue of costs and resources is further considered below in section 4 of this Report.

[24] [2002] EWCA Crim 3003 at [4] to [7].
[25] Section 347(2)(a) of the *Criminal Procedure Act 1986*

# 4. Concerns with the Proposed Abolition of Short Prison Sentences

Throughout the course of this reference the Sentencing Council has come across a number of recurring concerns regarding the proposed abolition of short prison sentences. As such, the Sentencing Council recommends that abolition of short prison sentences should be considered but not until certain conditions are met.

## 4.1 Inequitable distribution of sentencing options throughout NSW

The Sentencing Council is of the view that the community would *only* accept abolition of short sentences if it were assured that the relevant alternative programs were already developed and being implemented with rigorous supervision and sanctions for non-compliance.

The proposed abolition of short prison sentences presupposes that such prison sentences would be replaced by alternatives to full-time custody. However, it is a reality that sentencing options other than full-time imprisonment are not available uniformly throughout NSW. In some regions, options are quite limited due to a lack of resources. Periodic detention and home detention are not available in a number of regional areas, and supervision of community service orders is theoretically available in most, but not all areas.[26]

This issue was discussed at length in the Discussion Paper[27] and has been raised in numerous submissions to both the Discussion Paper and this Report. Concerns about uniform sentencing options have proven to be fundamental to this reference and our recommendations.

As noted in the submission of the Office of the Public Defender, if prison sentences of 6 months or less are abolished, there is a fundamental matter of equality before the law, as well as the great concern that in areas where alternatives to full-time imprisonment are limited, there will be a great temptation to impose longer periods of imprisonment instead.[28] That is, "sentence creep" will occur.

The submission of the Legal Aid Commission also highlights how the proposed abolition of short prison sentences may operate to the detriment of those for whom an alternative is not available.[29] The Commission submits that channelling resources into alternatives to prison will effectively reduce the prison population. The NSW Law Society agrees:

> *"If sentencing alternatives were available uniformly throughout New South Wales, the Law Society is of the view that the prison population could be reduced without the need to abolish short sentences with consequent 'bracket creep'* [also known as 'sentence creep']. *The cost saving of a reduced prisoner population by the use of alternatives and from the avoidance of bracket creep could be directed toward provision of enhanced Probation and Parole services and alternatives to full-time imprisonment."*[30]

[26] See Annexure E of the Discussion Paper.
[27] Committee assisting NSW Sentencing Council, *Discussion Paper: Abolishing Prison Sentences of Six Months or Less*, 2004 at 11.
[28] Office of the Public Defender, *Submission* (15 June 2004)
[29] NSW Legal Aid Commission, *Submission* (21 June 2004)
[30] The Law Society of New South Wales, *Submission* (25 June 2004)

The geographic unavailability of sentencing options is an issue, which disproportionately affects Aboriginal people, bearing in mind that a significant number of Aboriginal offenders live in remote parts of NSW.[31]

Throughout the course of the reference the consistent view held by both the Committee and the Sentencing Council is that resources should be directed towards expanding already existing options and programs.

"Inequitable" or diversity of available sentencing options is also a concern on a federal level. The Committee's Discussion Paper looks at the relationship between state and commonwealth offenders. More recently, the Australian Law Reform Commission has announced that it will examine whether federal prisoners are receiving differential treatment depending upon the jurisdiction they happen to be in.[32] Any decision to abolish short prison sentences would need to bear in mind the position of federal offenders serving short sentences in NSW gaols.

### 4.2 Removing the option to impose a short prison sentence may be an unnecessary fetter on judicial discretion

Judicial discretion is an important feature of the NSW criminal justice system. In exercising their sentencing function, courts must make an assessment of a wide range of factors relevant to both the offence and the offender. This challenging and important task presupposes the use of discretion, generally in accordance with certain guidelines.

It has been submitted to the Sentencing Council that a recommendation to abolish short prison sentences would reduce the discretion available to sentencing officers. This proposed fetter on judicial discretion has been opposed by a number of submissions on both philosophical and practical grounds.[33] It may be that once primary alternatives to full-time custody are available throughout NSW, the need to abolish short prison sentences will be by-passed. This would remove the need to settle upon specific exceptions to abolition, would leave the option of a short prison sentence in tact to be used in appropriate cases, and would avoid the concern of "sentence creep".

### 4.3 In accordance with the principle of proportionality there are situations where a short prison sentence is appropriate

This consideration is inextricably linked with 4.2 regarding judicial discretion. A short prison sentence may be appropriate in some circumstances.[34] For example:

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[31] The NSW Department of Health further notes that the Royal Commission into "Deaths in Custody" recognised that the location of incarceration has effects not just on the offender, but also on the offender's family. NSW Department of Health, *Submission*, (received 2 August 2004)

[32] Australian Law Reform Commission, *Media Release*, Monday, 26 July 2004

[33] Indeed, "there is no end to the variety of sentencing problems confronting judicial officers everyday in our court system. The abolition of short prison sentences removes one option that may be appropriate in certain circumstances." NSW Legal Aid Commission, *Submission* (21 June 2004); NSW Young Lawyers Criminal Law Committee, *Submission* (21 June 2004); Criminal Law Review Division, *Submission* (22 June 2004).

[34] There is much authority on the topic of the proportionality of the sentence to the crime in question. Although criminal history is a factor which may be taken into account in showing whether an offence is uncharacteristic or part of a continuing attitude of disobedience, and may also be taken into account in determining the type and length of sentence, it "*cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the offence being sentenced."* See *Veen (No 2)* (1998) 164 CLR 465. See also *McGarry* (2001) 207 CLR 121, 184 ALR 225 and *Chester* (1988) 165 CLR 611. As to the "totality" principle in sentencing and also repeat offenders and antecedents see *Weininger v. R* (2003) 77 ALJR 872, 196 ALR 451.

- A prison sentence of 6 months or less may be proportionate to the offence in question;
- An offender may be found guilty of a relatively minor offence, but a very lengthy criminal history and attitude to rehabilitation may suggest that full-time imprisonment, as the option of last resort, has been reached;
- An offender may have repeatedly refused to comply with alternative non-custodial sentencing options;
- An offender may be refused bail and spend a period of under 6 months in custody. At sentencing, the circumstances of the offence make it appropriate for the penalty imposed to be backdated to the date of arrest;[35]
- An old offence is uncovered for an offender due to be released shortly from custody. The offence warrants a sentence of imprisonment, but should not extend the offender's time in custody.[36]

### 4.4 "Sentence creep"

There is a risk that, if short prison sentences were abolished, certain offenders will be sentenced inappropriately to a longer sentence. This is known as "sentence creep" and was addressed in the Discussion Paper at page 34.

Those with a history of prior imprisonment, or those with a history of failing to comply with non-custodial sentences are more likely to be considered unsuitable for alternatives to imprisonment and are the most vulnerable to "sentence creep".[37] A similar issue arises where an offender is sentenced, for example, to a community service order, but refuses to comply with the conditions, or has repeatedly breached such conditions in the past. If short sentences were to be abolished, there would again be a real danger that such offenders may be inappropriately sentenced to imprisonment for a period longer than 6 months.[38]

The New South Wales Law Reform Commission (NSWLRC) acknowledged this issue of "sentence creep" in *Discussion Paper 33* and ultimately decided against abolishing short prison sentences.[39] The Sentencing Council agrees that "sentence creep" is a real concern and submits that if a pilot abolition were to eventuate, it should be closely monitored.

### 4.5 Net widening

There is a "nexus" between full-time imprisonment, and imprisonment that is suspended, or served by way of periodic or home detention. The latter three options cannot be considered until it is decided that no sentence other than imprisonment would be appropriate.

The Committee's Discussion Paper outlined in detail the nexus and called for commentary on this issue.[40] Questions raised included whether the proposed abolition should be limited to full-time imprisonment, and whether net widening would be associated with severing the nexus.

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[35] NSW Legal Aid Commission, *Submission* (21 June 2004)
[36] NSW Legal Aid Commission, *Submission* (21 June 2004)
[37] Mr Ivan Potas, *Personal Submission* (October 2003).
[38] NSW Legal Aid Commission, *Submission* (21 June 2004)
[39] NSW Law Reform Commission (1996) *Discussion Paper 33: Sentencing* at paragraph 3.33 and 3.34
[40] Committee assisting NSW Sentencing Council, *Discussion Paper: Abolishing Prison Sentences of Six Months or Less*, 2004 at 10.

In response, numerous submissions have stated that any abolition should be limited to full-time imprisonment only.[41] This reflects a general concern that courts should have a range of sentencing options at their disposal. As noted by the NSW Law Society, the danger of "sentence creep" would be magnified if abolition of short sentences extended to those suspended or served by periodic or home detention.[42]

If the nexus discussed above is broken, it is argued that net widening may result. This is because people may be sentenced to home / periodic detention or a suspended sentence when a less severe sentence such as community service would be more appropriate. Several submissions stated that it would be difficult to introduce measures to address this risk of net widening.[43]

In contrast, the Office of the Public Defender feels that if short prison sentences are abolished, the nexus between full-time imprisonment and home detention, periodic detention and suspended sentences should be broken.[44] That is, a decision to order home detention, periodic detention or a suspended sentence should not be preceded by a decision that no penalty other than imprisonment is appropriate. The submission states that net widening is not a serious risk as the Office takes the view that the legislative process of reasoning is not a practical reality.[45]

The Council recommends that consideration of abolishing short prison sentences should be limited to full-time imprisonment.

### 4.6 Possible exceptions to abolishing short prison sentences

The large number of possible exceptions to any abolition of short prison sentences is an argument for retention of short prison sentences (and perhaps an argument for a discretionary power to judges). The Sentencing Council has identified a large number of possible exceptions, and at present, there is no consensus as to what the exceptions should be. In any event, it may be that once primary alternatives to full-time custody are available throughout NSW, the need to abolish short prison sentences will be by-passed, removing the need to settle upon specific exceptions and leaving the option of a short prison sentence in tact to be used in appropriate cases. As noted below, the recent abolition of short prison sentences in Western Australia has limited exceptions.[46]

Possible exceptions identified include:

- "exceptional" circumstances;
- where an offender refuses, or cannot be trusted, eg through demonstrated persistent disobedience, to comply with the terms of a non-custodial order;
- breach of periodic detention, home detention, or suspended sentence;

[41] Criminal Law Review Division, *Submission* (22 June 2004); Office of the Public Defender, *Submission* (15 June 2004); Office of the Director of Public Prosecutions, *Submission* (2 June 2004); The Law Society of New South Wales, *Submission* (25 June 2004).
[42] The Law Society of New South Wales, *Submission* (25 June 2004)
[43] Criminal Law Review Division, *Submission* (22 June 2004); Office of the Director of Public Prosecutions, *Submission* (2 June 2004); The Law Society of New South Wales, *Submission* (25 June 2004)

[45] Office of the Public Defender, *Submission* (12 November 2003); Office of the Public Defender, *Submission* (15 June 2004)
[46] See 4.9 of the Report below. See 86(a), (b) and (c) of the *Sentencing Act 1995* (WA), and section 118 (2) *Young Offenders Act 1994* (WA).

- juvenile offenders;
- offences involving violence;[47]
- short sentences to be served cumulative with a larger head sentence;
- short sentences cumulated so that the final sentence is greater than 6 months;
- short sentences imposed for offences committed whilst already serving a longer sentence, and
- a sentence to "the rising of the Court".

## 4.7 Vulnerable groups of offenders

The following vulnerable groups have only been discussed to the extent that short prison sentences particularly impact upon them.

### 4.7.1 Aboriginal offenders

Aboriginal people are more likely to be sentenced to a short term of imprisonment than non-indigenous offenders and any decision to abolish short prison sentences would therefore have a great impact on the indigenous prison population.[48] The Sentencing Council acknowledges that the same sentencing *principles* should be applied to Aboriginal offenders, but that the Aboriginality of an offender *is nevertheless relevant* to explain or throw light on the particular offence and the circumstances of the offender.[49] Judicial education and cultural awareness programs therefore have an important role to play.

The Committee's Discussion Paper acknowledges the clear evidence to show that alternatives to prison specifically targeted to Aboriginal offenders (such as the Circle Sentencing Pilot) have an extraordinary positive effect on reducing re-offending, and that any general reform to prison sentences of 6 months or less should be clearly articulated with current policies specifically developed for Aboriginal people.The development of alternative sentencing options to short prison sentences clearly involves criminal justice intervention programs.[50]

Aboriginal offenders often present to court with long criminal histories, and this increases the likelihood of the person receiving a custodial sentence.[51] A concern was raised in the Discussion Paper regarding the quality of information that is considered when sentencing, particularly in the Local Court. The Sentencing Council commends the agreement between the Chief Magistrate, the Director of Public Prosecutions and the Director of Police Legal

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[47] The impact on victims of domestic violence has been cited as a particular concern. NSW Department of Health, *Submission* (3 December 2003), NSW Department of Health, *Submission,* (received 2 August 2004).

[48] Aboriginal and Torres Strait Islander Social Justice Commissioner (2002) "*Social Justice Report*" at p148

[49] See *Fernando* (1992) 76 A Crim R 58 at 62. The Sentencing Council acknowledges the approach in Canada of special consideration of alternatives to imprisonment for Aboriginal offenders raised in the submission of the NSW Young Lawyers. See Canadian Criminal Code RSC 1985, section 718.2(e) and *Gladue* [1999] 1 SCR 688 at [64] and [65]. The Sentencing Council prefers the present common law position in Australia: See for example *Neal* (1982) 149 CLR 305 per Brennan J at 326 (as his Honour then was), *Fernando* (1992) 76 A Crim R 58 per Wood J (as his Honour then was). The common law position in NSW acknowledges the relevance of Aboriginality in sentencing, but does not offend the basic principle that the same sentencing principle apply irrespective of the offenders identity or membership of an ethnic or racial group.

[50] Part 4 of the *Criminal Procedure Act 1986* makes provision for 'intervention programs' to be declared in the regulations. Clause 11D of the *Criminal Procedure Regulation 2000* declares the circle sentencing program as an 'intervention program' for the purpose of Part 4 of the Act. Schedule 3 to the Regulation sets out the particulars of the program.

[51] The impact of prior record or criminal history is a factor to properly be taken into account in sentencing an offender, and "*a person who has been convicted of, or admits to, the commission of other offences will, all other things being equal, ordinarily receive a heavier sentence than a person who has previously led a blameless life.*" See for example, Kirby J in *Weininger v. R* [2003] HCA 14, (2003) 196 ALR 451 at [32]. See also at [58].

Services in January 2004 to tender, on sentencing, a watermarked criminal history record, or if unavailable, the Local Court Report.

4.7.1.1 Aboriginal Women

The Social Justice Report 2002[52] suggests that the over-representation of Aboriginal women in correctional facilities, and the shorter sentences that they serve indicates that non-custodial sentencing alternatives are not being utilised for them. The Report further notes that many short sentences are for public order offences and fine default.[53]

The submission from AJAC expressed concern that many of these women serving short prison sentences are unable to access counselling or courses, and that community based sentencing options, in place of short prison sentences, would allow for flexibility in service provision and links to ongoing treatment in order to address underlying issues.

The submission of the Office of the DPP has suggested that if abolition of short prison sentences were seriously contemplated, it would be prudent to pilot such a scheme in a limited area and for a limited period of time:[54]

> *"If a decision is made to abolish short sentences, then a prudent (indeed, cautious) approach is required. I suggest as a starting point a pilot in a regional/rural area targeting Aboriginal female offenders, such pilot to be properly assessed, reviewed and costed."*

The Sentencing Council recommends that abolition of short prison sentences should be piloted for indigenous women throughout all of NSW. Such pilot should be carefully monitored and evaluated. Such a pilot is further considered at 4.11.

4.7.2 Juvenile offenders

When sentencing a young person, detention is a measure of last resort,[55] and is to be for the shortest time possible.[56] Further, punishment and general deterrence are considered subordinate to the rehabilitation of a young person.[57] One of the principles that the court must have regard in sentencing the young person is "*that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind.*"[58] As explored in the discussion paper, this principle questions whether a child could be imprisoned for a period of 6 months or less if an adult could not be given such a sentence for a similar offence due to the abolition of short prison sentences.[59] However, an

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[52] Aboriginal and Torres Strait Islander Social Justice Commissioner (2002) "*Social Justice Report*" Chapter 5

[53] Aboriginal and Torres Strait Islander Social Justice Commissioner (2002) "*Social Justice Report*" at 146, citing Cunneen, C, (2001) "*Conflict, Politics and Crime: Aboriginal Communities and the Police*" Allen & Unwin, Sydney, 2001.

[54] Office of the DPP, *Submission* (11 September 2003)

[55] Section 33 of the *Children (Criminal proceedings) Act 1987*

[56] Article 37(b) of the United Nations Convention on the Rights of the Child, to which Australia is a signatory.

[57] See for example, *GDP* (1991) 53 A Crim R 112. Under the United Nations Convention on the Rights of the Child, to which Australia is a signatory, the objectives to be applied when sentencing a juvenile offender include rehabilitation and reintegration at the forefront: Article 40.1. Section 6 of the *Children (Criminal Proceedings) Act 1987* sets out further principles for the court to have regard.

[58] Section 6(e) of the *Children (Criminal Proceedings) Act 1987*. Indeed, any derogation from this principle could put NSW in breach of the United Nations Convention on the Rights of the Child, ratified by Australia on 16 January 1991. See in particular, Art 37 and 40.

[59] The Department of Juvenile Justice has commented on the Discussion Paper and submitted that if "shorter sentences are to be considered for adults, the same principles should be applied to juveniles." Department of Juvenile Justice, *Submission* (9 June 2004).

argument could be made that young persons are often sentenced to control orders of less than 6 months in circumstances where if an adult had committed a similar offence, a longer sentence would have been imposed.[60] Indeed, the majority of control orders imposed are for less than 6 months.[61]

In Western Australia, the abolition of short prison sentences does not apply to juvenile offenders.[62] Many of the submissions received by the Council are of the view that any abolition should include an exception for juveniles, and the Council so recommends.

The commitment of the Department of Juvenile Justice to diversionary initiatives has reduced the numbers of young people in custody and is an important contribution to the current debate about whether to abolish short prison sentences. It is, however, suggested that the overrepresentation of Aboriginal people is high in juvenile detention centres.[63] A major consideration, already discussed at length, is that the abolition of short prison sentences in general presupposes that such short sentences would be replaced by alternative options. With regard to adult offenders these include periodic and home detention. The Department of Juvenile Justice notes that there is an inequity on this point for juvenile offenders, as such options are not available for them.[64]

4.7.3 Intellectually disabled and mentally ill offenders

It has been asserted that intellectually disabled persons are more likely to be charged for a minor offence, are more likely to "confess" to an offence (which may be influenced by a misunderstanding of the question, or a desire to please the questioner) and are more likely to receive a custodial sentence due to inadequate support in the community.[65] Intellectually disabled offenders are more likely to commit a number of minor repeat offences, which may result in a short prison sentence.[66]

Short prison sentences have particular consequences for intellectually disabled people[67] including becoming increasingly entrenched in a culture of criminality, finding it very hard to readjust when they leave prison, and being vulnerable and mistreated in the mainstream prison environment.

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[60] For example, JIRS statistics published by the Judicial Commission of NSW show that for offences against section 25(1) of the *Drug Misuse and Trafficking Act 1985*, 15% of young persons sentenced in the Children's Court were sentenced to a control order, with the midpoint length of the control order being 4 months. In contrast, persons sentenced in the Local Court were overall more likely to be sentenced to imprisonment, and the midpoint length of the non-parole period tended to be longer. For example, for offences involving heroin, 46% of offenders were sentenced to imprisonment with a midpoint of 8 months non-parole period. In the higher courts, an even higher proportion of offenders were sentenced to imprisonment, and the midpoint of the non-parole period tended to be even longer.

[61] Department of Juvenile Justice, *Submission* (23 September 2003). 54.6% of orders of "control" are for periods of 6 months or less.

[62] University of NSW Council for Civil Liberties, *Submission* (3 November 2003). See *Young Offenders Act 1994* (WA) section 118 (2) which provides: "*Despite section 86 of the Sentencing Act 1995 the court sentencing a young person to a term of detention may impose a term of 3 months or less.*"

[63] See for example, NSW Department of Health, *Submission* (received 2 August 2004). See also (September 2001) "*Aboriginal Overrepresentation Strategic Plan*" Sydney: Department of Juvenile Justice.

[64] Department of Juvenile Justice, *Submission* (9 June 2004)

[65] It is unclear whether intellectually disabled people are over-represented in the population of prisoners serving short sentences. See p 56 of the Discussion Paper, and see also Council for Intellectual Disability, *Submission* (12 June 2004)

[66] NSWLRC (1994) "Report 80 – People with an Intellectual Disability and the Criminal Justice System" Sydney.

[67] Council for Intellectual Disability, *Submission* (8 September 2003).

Many intellectually disabled offenders may not understand, or lack the resources and capacity to comply with non-custodial alternatives to short prison sentences.[68]

In Victoria, the Probation and Parole Service working with disability services operate the system of "justice plans". Compliance with the plan is made a condition of the bond.[69] In this way, alternatives to short prison sentences would become much more accessible to intellectually disabled offenders. The Sentencing Council commends consideration being given to such a system being introduced in NSW subject to cost benefit issues.

Presently in NSW, there exists an option for diversion of persons who are suffering from a mental illness (but are not mentally ill persons in terms of the *Mental Health Act*), are developmentally disabled, or suffering from a mental condition for which treatment is available in a hospital.[70] Section 32 is relevant to intellectually disabled offenders, and is considered in the Committee's Discussion Paper. The recent amendments to section 32 have ensured that magistrates have confidence in using the section, as there is now an effective means of enforcement. The recent amendments did not however consider the issue of ensuring that there are more services available in the community for the care and treatment of intellectually disabled or persons with a mental condition.[71] The recent amendments also did not consider issues relating to the "class of persons" to which section 32 orders are available. To this end, the Sentencing Council recommends that the diversionary provisions of section 32 should be available to *all* persons with a cognitive impairment.

The Criminal Law Review Division advises that a Senior Officers' Group has also negotiated a number of practical undertakings to ensure that orders under section 32 will be used effectively.[72]

It is noted that Part 3 of the *Mental Health (Criminal Procedure) Act 1990* is not inconsistent with, but is indeed complimented by section 21A(3)(j) of the *Crimes (Sentencing Procedure) Act 1999*.[73]

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[68] See NSWLRC (1994) "*Discussion Paper 35 – People with an intellectual disability and the criminal justice system: Courts and Sentencing issues*" At 338. Council for Intellectual Disability, *Submission* (8 September 2003).

[69] The Framework report recommended that a system of justice plans should be developed for NSW. Simpson, Martin and Green (2001) "*The Framework Report: Appropriate community services in NSW for those with intellectual disabilities and those at risk of offending*" Sydney: Intellectual Disability Rights Service and the NSW Council for Intellectual Disability at 68

[70] By section 31(1), such provisions apply *"to criminal proceedings in respect of summary offences or indictable offences triable summarily, being proceedings before a Magistrate, and includes any related proceedings under the Bail Act 1978, but does not apply to committal proceedings."* By section 31(2), "*Sections 32 and 33 apply to the condition of a defendant* ***as at the time when a Magistrate considers whether to apply the relevant section*** *to the defendant.*" (Emphasis added). See also Part 3 of the *Mental Health (Criminal Procedure) Act 1990.*

[71] The lack of support for intellectually disabled people is considered to be an important issue to the NSW Council for Intellectual Disability. The Council submits that where a breach occurs, it is important to consider any reason for the breach, and there must be high-level co-ordination between agencies involved in supervision and providing support services. NSW Council for Intellectual Disability, *Submission* (12 June 2004).

[72] The group was established to address concerns regarding the implementation of the amendments to the *Mental Health (Criminal Procedure) Act 1990.* Advice received from Ms Spiers, Criminal Law Review Division, 20 February 2004. It is understood that the Senior Officers' Group will develop strategies to prevent intellectually disabled persons having contact with the criminal justice system, and to respond to the needs of those within the system. It is further understood that the Senior Officers' Group will report in August 2004.

The defence of "mental illness" is available in the higher courts, but arguably does not apply in the Local Court jurisdiction where section 32 and 33 apply.[74] Bearing in mind the vast majority of short prison sentences are imposed by the Local Court, the defence of mental illness is not of direct relevance. Section 33 of the *Mental Health (Criminal Procedure) Act 1990* applies to "mentally ill persons" and was amended by the *Crimes Legislation Amendment Act 2002.*[75]

Many submissions received by the Sentencing Council suggest that people suffering from a mental illness are often sentenced to a short sentence or remanded in custody due to the lack of care and treatment opportunities in the community.[76] Whilst it has been suggested that many of these people could be appropriately diverted to the community setting, it does appear that the cost implications would be considerable.[77]

### 4.8 Recent changes to the NSW bail laws, and impact of abolition on the remand population

There has been a recent increase[78] in the number of people who are remanded in custody prior to sentencing due to changes to the *Bail Act 1978*.[79] It seems that many of these offenders are released at the time of sentencing, or shortly after. That is, after having served their sentence on remand.[80] The Discussion Paper raises two concerns regarding the relationship between NSW bail laws and this consideration of the abolition of short prison sentences. A fear has been expressed that abolition of short prison sentences may see remands being used, deliberately or otherwise, in a manner amounting to a short sentence.[81] Also, there seems to be a clash of philosophy in the tightening of bail laws on the one hand, and the current consideration of abolishing short prison sentences on the other.[82] Whilst

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[73] Section 21A(3)(j) of the *Crimes (Sentencing Procedure) Act 1999* deals with the separate question of treating the offenders disability as a mitigating factor in some circumstances, whereas section 32 provides for diversion of certain intellectually disabled or mentally ill persons. These sections compliment each other.

[74] The definition of "mental illness" required for the defence of mental illness is not codified in NSW, but is based on the M'Naughten rules. Part 4 of the *Mental Health (Criminal Procedure) Act 1990* applies once the defence of "mental illness" has been raised "*on the trial of a person*." Section 39 enables the Court, on a special verdict of "not guilty by mental illness" to "*detain* [the person] *in such place and in such manner as the Court thinks fit until released by due process of law or may make such other order (including an order releasing the person from custody, either unconditionally or subject to conditions) as the Court considers appropriate.*" Dr Jonathan Carne notes that this in effect, allows for indefinite detention: see (2003) 15 *Judicial Officers' Bulletin* 92. Part 4 of the *Mental Health (Criminal Procedure) Act 1990* assumes that the defence of mental illness would not be raised in the Local Court.

[75] Schedule 9, commenced into operation on 14 February 2004.

[76] NSW Department of Health, *Submission* (3 December 2003); NSW Legal Aid Commission, *Submission* (13 October 2003).

[77] NSW Department of Health, *Submission* (received 2 August 2004)

[78] On 1 February 2004, 2001 offenders were on remand. In contrast, 6 months earlier, prior to the commencement of the *Bail Amendment Act 2003* there were 1782 such persons on remand. This represents an increase of 12.2% over 6 months. More recently, on 13 June 2004, 1914 offenders were on remand, including those in police cells.

[79] See for example, the *Bail Amendment Act 2003* No. 22; *Bail Amendment (Firearms and Property Offences) Act 2003* No. 84 (Commenced 1 July 2004 – Schedule 1 excepted); *Bail Amendment (Terrorism) Act 2004* No.34

[80] Data obtained from BOCSAR on 17 February 2004 shows that 44% of the prison sentences imposed in 2002 were for a period of under 3 months, with 10.5% of the prison sentences imposed in 2002 being for a period less than 1 month.

[81] See Morgan, "*The Abolition of Six Month Sentences, New Hybrid orders and Truth in Sentencing: Western Australia's Latest Sentencing Laws*" (2004) 28(1) *Criminal Law Journal* 8-25.

[82] NSW Legal Aid Commission, *Submission* (13 October 2003).

tightening of bail laws may result in more people being denied bail and perhaps serving a short sentence on remand it may also be that a decision to abolish short prison sentences would mean that it would be difficult to justify refusal of bail in some circumstances, and thus create a tension with the recently changed bail laws.[83] The DCS submits that abolishing short prison sentences would lead to a decrease in the remand population, although it would be most difficult to predict the effect of abolition in any more specific terms.[84]

### 4.9 The need to review the impact of abolition in Western Australia

Western Australia has recently commenced legislation to prohibit prison sentences of 6 months or less with limited exceptions.[85] The Government has agreed to review the abolition in May 2006.[86] The Western Australian provisions are to be seen in the context of a "sentencing ladder" of which there is no counterpart in NSW.[87]

The Sentencing Council submits that New South Wales should await this evaluation before a similar proposal be adopted here. All submissions to this Report agree.

As noted by the Committee in their Discussion Paper, in Western Australia the amendments to statutory penalties required the amendment of some 73 Acts.[88] Crucially, the offences for which maxima increased are the offences that, in practice, have been likely to attract sentences of imprisonment. The Sentencing Council notes that this approach exacerbates our concerns regarding "sentence creep" and net widening, and further confirms the need for NSW to await an evaluation of the WA changes.

### 4.10 Cost issues

An argument for the abolition of short prison sentences, discussed above, is the staggering cost of recidivism to the community. However, the potential savings from abolishing short prison sentences may not be as great as at first appears. As outlined in the Discussion Paper, estimating the cost impacts of the abolition of short prison sentences is a challenging task[89] and investment in sentencing alternatives will precede any savings realised by the abolition of short prison sentences.

BOCSAR has estimated the *direct* cost savings of the abolition of short prison sentences, but many submissions question whether substantial savings would be realised, for reasons of *indirect* costs.[90] Such indirect costs include:[91]

- Some offenders may simply be sentenced to imprisonment for a period greater than 6 months;

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[83] NSW Police and the Ministry for Police, *Joint Submission* (25 September 2003).
[84] Department of Corrective Services, *Submission* (22 September 2003). See also Lind and Eyland (2002) "*Crime and Justice Bulletin number 73: The Impact of Abolishing Short Prison Sentences*" Sydney: BOCSAR
[85] Section 86 of the *Sentencing Act 1995* (WA) amended by the *Sentencing Legislation Amendment and Repeal Act 2003* (no 50 of 2003). Commenced on 15 May 2004. Abolition of short sentences in that state has limited exceptions. See 86(a), (b) and (c) of the *Sentencing Act 1995* (WA), and section 118 (2) *Young Offenders Act 1994* (WA).
[86] That is, 2 years after proclamation. See Response to the Report by the Attorney General, the Hon. Jim McGinty MLA, *Hansard* 5 June 2003.
[87] See section 39 of the *Sentencing Act 1995* (WA).
[88] Part 5 of the *Sentencing Legislation Amendment and Repeal Act 2003*
[89] See Committee assisting NSW Sentencing Council, *Discussion Paper: Abolishing Prison Sentences of Six Months or Less*, 2004 at 63
[90] In particular, see Department of Corrective Services, *Submission* (22 September 2003). See also Minister for Police, *Submission* (13 July 2004).
[91] Mr Ivan Potas, *Personal Submission* (October 2003).

- There will be costs in providing more community based resources;
- Some offenders who are given alternative sentences may subsequently breach them and find themselves serving a prison sentence in any event.[92] The cost of imprisonment is simply deferred, and there is the additional cost of the alternative sentence first imposed;
- Widespread costs in following up breach proceedings; and
- Direct costs associated with any offending behaviour committed in the community whilst the offender would otherwise have been imprisoned.[93]

The Sentencing Council recommends that abolition of short prison sentences should not be considered for cost reasons alone.

### 4.11 Piloting short prison sentences

The Sentencing Council considers that in spite of the real concerns raised by the abolition of short prison sentences, there is real potential for positive impact, and a pilot of abolishing short prison sentences would be worthwhile. The Sentencing Council however reiterates that it is imperative that a full range of sentencing options be available for offenders to which the pilot applies.

Because of the unpredictable consequences of abolishing short prison sentences, the Sentencing Council recommends that the pilot should be carefully monitored and evaluated. Any evaluation should concentrate on the identified areas of concern including cost consequences and "sentence creep". Such pilot should be conducted throughout all of NSW due to possible different effects of abolition in city areas compared to regional areas.[94]

The Sentencing Council considers that Aboriginal women would be an ideal group for such pilot as they are a group which is over-represented in the population of prisoners serving short sentences, and it is suggested that non-custodial sentencing alternatives are not being utilised for Aboriginal women.[95]

The Sentencing Council recommends that abolition of short prison sentences should be piloted for Aboriginal women throughout all of NSW. Such pilot should be carefully monitored an evaluated. The Sentencing Council further recommends that BOCSAR should be asked to design an appropriate evaluation model for the pilot. Such evaluation could include cost effectiveness of the pilot.

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[92] Indeed, the submission of the Office of the DPP notes that it would be unrealistic to expect that offenders who have failed to rehabilitate through non-custodial options in the past, when released on further non-custodial options will comply in all respects and remain crime free. As has been shown by the Drug Court, a significant proportion of offenders, even in the best designed community programs, will re-offend and be returned to custody within a relatively short period.

[93] See also *Keating and McInerney* [2002] EWCA Crim 3003

[94] Another possibility would be to pilot abolition of short prison sentences in an area where a full range of alternatives are available. In areas which already have a full range of sentencing options (and usually a lower rate of short term imprisonment) it could be argued that those who are sentenced to short term imprisonment may fit into one of the possible exceptions to abolition. A second option could be to make a full range of sentencing options available, in a defined geographic area which previously did not have these options, and monitor the effects.

[95] See above at 4.7.1.1

# 5. Alternatives to Abolition

In the interim, the Sentencing Council considers that many of the benefits of abolition of short prison sentences may be capable of being achieved through alternative measures. It may be that once the interim measures are in place, the need to abolish short prison sentences will be by-passed. This would remove the need to settle upon specific exceptions to abolition, would leave the option of a short prison sentence in tact to be used in appropriate cases, and would avoid the concern of "sentence creep".

## 5.1 Increased availability of sentencing alternatives

The inequitable distribution of sentencing options has been discussed above at 4.1.

It is understood that addressing this inequality by provision of sentencing alternatives uniformly throughout NSW would require vastly increased resources. However, such direction of resources should ameliorate many of the present concerns regarding short prison sentences without reducing the court's sentencing options and imposing unnecessary restrictions on discretion. The Sentencing Council, in another of its reports, has made a series of recommendations, which may impact upon the increased availability of prison alternatives across the state.[96]

## 5.2 Legislative constraints on the use of short prison sentences

### 5.2.1 Section 5 of the *Crimes (Sentencing Procedure) Act 1999*

It is a fundamental sentencing principle at common law that imprisonment is the option of last resort, and is to be for a period of time no longer than necessary.[97] Section 5(1) of the *Crimes (Sentencing Procedure) Act 1999* provides that 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.[98]

The NSW Law Reform Commission has previously considered the possibility of recommending legislation to abolish short prison sentences, but ultimately did not recommend such legislation due to the fear of "sentence creep". Instead, section 5 of the *Crimes (Sentencing Procedure) Act 1999* was enacted.[99]

Section 5(2) provides that if a court sentences an offender to imprisonment for 6 months or less, it must make and record reasons for doing so, including its reasons that no penalty other than imprisonment is appropriate, and its reasons for declining to make an order for the offender to participate in an intervention or other program for treatment or rehabilitation.

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[96] NSW Sentencing Council (June 2004) "*How best to promote consistency in sentencing in the Local Court*".

[97] See for example, *R v. Parker* (1992) 28 NSWLR 282; *R v. Bibi* (1980) 2 Crim App R. per Lord Lane CJ; the recent decision of *R v. Keating and McInerney* [2002] EWCA Crim 3003 per Lord Woolf CJ. In Canada, see *R v Gladue* (1999) 1 SCR 688. In some jurisdictions the common law principle has been enacted into legislation. For example, section 718.2 of the *Canadian Criminal Code R. S. C. 1985*. See also section 5 of the *Crimes (Sentencing procedure) Act 1999*.

[98] It must be remembered that the decision whether to impose periodic detention, home detention or a suspended sentence does not arise until this preliminary question has been answered. See *JCE* (2000) 120 A Crim R 18

[99] The NSWLRC acknowledged the Common Law principle espoused in *Parker v DPP* that imprisonment is a sanction of last resort, however, it argued that greater substance could be given to the principle by requiring that courts explain their reasons. See *Parker v DPP* (1992) 28 NSWLR 282. See further *Dinsdale v. R* (2000) 175 CLR 315, considered in *Saldaneri* [2001] NSWCCA 480 at [14]

It has been suggested in the Committee's Discussion Paper that section 5(2) has not achieved its desired objectives, although this may be an area for further research. A proposed amendment to section 5 was included, as an Annexure to the Discussion Paper and feedback received indicated general support for the change.[100] Slight variations / additions were suggested.[101] The Sentencing Council recommends that as an alternative to abolishing short prison sentences, at least in the interim, section 5 should be amended to further restrict the use of short prison sentences. The recommended *broad* wording of such amendment is attached at **Annexure B.** Of course, the wording of any amendment would ultimately be a matter for Parliamentary Counsel. If abolition were to be considered after the conditions in recommendation 1 are met, then section 5 would need to be re-visited.

#### 5.2.2 Section 65A of the *Crimes (Sentencing Procedure) Act 1999*

Section 65A of the *Crimes (Sentencing Procedure) Act 1999* provides that a periodic detention order may not be made for an offender who has previously served imprisonment for more than 6 months by way of full-time detention. The submission of the Office of the DPP was that this restriction should be removed. Following consideration of this question, the Sentencing Council agrees that section 65A places an unnecessary limitation on the sentencing discretion of courts. There may be situations where an offender who has previously been imprisoned full-time could be considered for a sentence of periodic detention. Removing the restriction could potentially impact on the need for, and frequency of, short prison sentences.

### 5.3 Post-release supervision, 'custody plus' and electronic monitoring

The Committee's Discussion Paper raises questions regarding the rehabilitative value of short prison sentences, and raises as a concern the lack of supervision on release for prisoners serving short prison sentences. Many of the submissions received by the Sentencing Council viewed the questionable rehabilitative value as the main argument for abolishing short prison sentences.[102]

A short sentence without post-release supervision may exacerbate family, housing and employment issues, which are often related to offending behaviour. There seems to be a clear link between such issues and being returned to prison. A period of supervision on release could resolve some of these issues.[103] The submission of the Office of the DPP suggests that transitional centres may be used as a way of re-integrating short term offenders.[104]

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[100] The submission of the Office of the DPP did not support the introduction of statutory guidelines restricting the use of short prison sentences.

[101] Office of the Public Defender, *Submission* (15 June 2004); The Law Society of New South Wales, *Submission* (25 June 2004); Criminal Law Review Division, *Submission* (22 June 2004).

[102] It is also acknowledged in some submissions that rehabilitation is only one of many purposes of sentencing, and that short prison sentences may be quite effective in meeting some of the other objectives of sentencing. See section 3A of the *Crimes (Sentencing Procedure) Act 1999* and above at 3.1.

[103] See for example, Dr E. Baldry, Dr D. McDonnell, Mr P. Maplestone and Mr M. Peeters (2003) "Ex prisoners and accommodation: What bearing do different forms of housing have on social reintegration?" Sydney: Australian Housing and Urban Research Institute. This study showed a significant association between returning to prison and not having accommodation support, or for those with support, the support being assessed as unhelpful.

[104] The Select Committee also acknowledges the detrimental effect of the lack of supervision for offenders on being released after serving a short prison sentence, noting that the offender's return to the community can be difficult and increase the risk of re-offending: Legislative Council Select Committee on the increase in prisoner population (2001) "Final Report." Sydney: NSW Parliament, at 6.139-6.140 and 7.27

Section 46 of the *Crimes (Sentencing Procedure) Act 1999* currently precludes prisoners serving short prison sentences from parole supervision on release.[105] The section has obvious implications for the rehabilitation and reintegration of offenders serving short prison sentences.[106] The Sentencing Council recommends that section 46 should be repealed, or otherwise amended to allow for supervision on release. In conjunction, consideration should be given to introducing a "custody plus" scheme[107] in NSW.

Prison overcrowding and the related issue of short prison sentences have been considered by the English Courts for some time.[108] In response, the "custody plus" scheme was enacted in the *Criminal Justice Act 2003* (UK). The English "custody plus"[109] scheme should be seen in the context of legislation which does *not* contain provisions similar to sections 44 and 46 *Crimes (Sentencing Procedure) Act 1999*. In NSW, a "custody plus" type scheme could be achieved by repealing section 46 and enacting a "custody plus" provision confined to prison sentences of 6 months or less. This would not necessarily be in terms of a provision similar to section 44. Alternatively, section 46 could simply be repealed, but without enacting a "custody plus" provision. Section 44 would then apply to prison sentences of any duration, including those of 6 months or less.

The NSW Bar Association, and the Office of the DPP, commends the "custody plus" scheme in their submissions.[110]

The Committee's Discussion Paper suggests that if short prison sentences are retained, prison programs could be designed to address the needs of short term prisoners, and that prison programs could be streamlined and broken into workable modules, which could be completed within the custodial setting and in the community.[111] This would allow programs to be continued if the offender is transferred between prisons, and would enable offenders to "pick up where they left off" when released. The Sentencing Council agrees that these are worthwhile suggestions that should be pursued.

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[105] Section 46 provides: "*A court may not set a non-parole period for a sentence of imprisonment if the term of the sentence is 6 months or less*." If prison sentences of 6 months or less were to be abolished, section 46 would obviously have no relevance.

[106] Some practitioners have suggested that despite section 46, there may be ways of structuring sentences to ensure that an offender receives post-release supervision at the conclusion of a short prison sentence. Prior to abolition, partially suspended sentences may have been used in such a way. Committee assisting NSW Sentencing Council, *Discussion Paper: Abolishing Prison Sentences of Six Months or Less*, 2004 at 39.

[107] See *Criminal Justice Act 2003* (UK). The "custody plus" scheme consists of a period in custody followed by a period of post-release supervision. The ratio between the period in custody (between 28 and 51 weeks) and the period of supervision varies between offenders, and is determined on the basis of the pre-sentence report. Prisoners serving the supervision component of their sentence are liable to recall to prison, with a right of appeal, if the supervision component were breached.

[108] *R v. Keating & McInerney* [2002] EWCA Crim 3003

[109] Larry Sherman has suggested that some early "custody plus" type schemes in America have been ineffective, and the Committee assisting the Council has also questioned the cost effectiveness of introducing similar schemes in NSW. See Sherman, L. et al., (1997) Preventing Crime: *What works, what doesn't and what's promising,* National Institute of Justice: Washington. The Report concentrates on crime prevention and emphasises factors relevant to juvenile crime. See Chapter 9, by MacKenzie, D. L. It is suggested that intensive surveillance per se is not associated with decreased recidivism, although programs which incorporate treatment may lead to decreased recidivism.

[110] NSW Bar Association, *Submission* (11 September 2003). Submission of the Office of the DPP, *Submission* (11 September 2003). As to the viability of a scheme similar to "custody plus" in NSW, the submission of the Office of the DPP contained some practical suggestions which recognise the problem faced in NSW of unavailability of sentencing options in some geographical areas.

[111] "Review of the Community Offender Services in NSW" (2003), Sydney, Office of the Inspector General of Corrective Services at 33.

The Committee considered the possibility of section 46 being amended to apply to sentences of 3 months or less. This would recognise the administrative difficulties in administering short non-parole periods, but would allow persons serving short sentences of longer than 3 months to be released to short programs such as the 12-week MERIT program or the 9 week sober driver program. Such release to programs could be accompanied by electronic monitoring. The Sentencing Council agrees that this could be a worthwhile amendment.

Electronic monitoring is considered in the Committee's Discussion Paper[112] as an alternative to short prison sentences (for example, in conjunction with home detention) or as part of a system of releasing persons serving short prison sentences into programs or to transition centres to allow for reintegration back into the community following a short prison sentence.[113] Electronic monitoring could reduce costs, and improve the effectiveness of corrections by allowing the offender to continue community ties and employment, thereby reducing the need for reintegration back into the community at the end of the sentence. Electronic monitoring may allow for offenders to be released into "back-end" home detention, or to be released to periodic detention, home detention or to a transitional centre. The Sentencing Council acknowledges that the Legislative Council's Standing Committee on Law and Justice is presently conducting an inquiry into "back-end" home detention. The Sentencing Council awaits the Standing Committee's Report with interest.

### 5.4 Automatic Suspension of Prison Sentences of 6 months or less

The proposal put forth in the Discussion Paper that all short prison sentences be automatically suspended was not supported in submissions to the Report. The Sentencing Council agrees with the submissions that such a move would go against the rationale behind their re-introduction in 2000. The NSWLRC stated that instances where a suspended sentence would be the preferred sentencing option are 'conceivably limited in number and scope'.[114]

### 5.5 Reintroducing the power to partially suspend sentences of imprisonment

Related to the suggestion in 5.4 is consideration of re-introducing a power to partially suspend a prison sentence. The option of a partially suspended sentence was abolished in NSW on 8 July 2003.[115] It could be argued that partially suspended sentences allow for a period of supervision on release, which is currently precluded.[116]

In considering automatic suspension or partial suspension of short prison sentences, the reasons for the recent move to abolish partially suspended sentences must be considered, namely that they are difficult to administer and partial suspension of the initial period may cause hardship to the offender.[117] The Sentencing Council is of the opinion that the partial suspension of the latter half of the sentence would not "*cause considerable hardship to the*

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[112] Committee assisting NSW Sentencing Council, *Discussion Paper: Abolishing Prison Sentences of Six Months or Less*, 2004 at 42.

[113] For a discussion of electronic monitoring generally, see Black, M. and Smith, G. "*Trends and Issues in Crime and Justice no. 254: Electronic Monitoring in the Criminal Justice System*" Canberra: Australian Institute of Criminology.

[114] NSWLRC, (1996) *Discussion Paper 33 Sentencing* at 9.62

[115] *Crimes Legislation Amendment Act 2003*, assented to on 8 July 2003, Schedule 6 commenced on the same day.

[116] Section 46 of the *Crimes (Sentencing Procedure) Act 1999*

[117] The Hon. J. Hatzistergos MP, Minister for Justice and Minister assisting the Premier on Citizenship. Second Reading Speech to the *Crimes Legislation Amendment Bill (2003), Hansard* Legislative Council, 25 June 2003.

*offender*", and would bring NSW into line with Federal sentencing law.[118] The Sentencing Council therefore recommends that the power to partially suspended prison sentences should be restored.[119]

### 5.6 Mandatory Pre-Sentence Reports

In its Discussion Paper, the Committee considered but rejected a suggestion to make pre-sentence reports mandatory before imposing a short prison sentence. The Committee thought that any move would be ineffective in ensuring that such sentences are used appropriately,[120] and that many practitioners reported that pre-sentence reports are generally ordered in appropriate circumstances. The Sentencing Council agrees, for the reasons given in the Discussion Paper, that pre-sentence reports should not be mandatory prior to the imposition of a short prison sentence.

[118] By section 20(1)(b) of the *Crimes Act 1914*, an offender may serve an initial part of the sentence, followed by partial suspension. It must also be borne in mind that the judgment in *Gamgee* [2001] NSWCCA 251 contemplated partial suspension of an "*initial portion*" of the sentence or "*at the latter end of the term imposed*". It would seem that partial suspension "*at the latter end*" would not cause disruption or hardship to the offender, although it is unclear whether it would cause difficulties for sentence administration.

[119] See *Crimes Legislation Amendment Act 2003*, assented to on 8 July 2003, Schedule 6 commenced on the same day.

[120] The Committee is of the view that such a move would be ineffective even if a proviso similar to that in the UK legislation were included, namely that a report should be obtained "*unless the court is of the opinion that it is not necessary.*"

**Annexure A** (see page 8)
Preliminary submissions were received from:

| |
|---|
| Aboriginal Corporation Legal Service |
| Aboriginal Justice Advisory Council |
| Mr Christopher Bone, Magistrate |
| Professor Chris Cunneen, Director, Institute of Criminology, University of Sydney |
| Conference of Leaders of Religious Institutes (NSW), Social Justice Committee |
| Department of Corrective Services, NSW |
| Department of Juvenile Justice, NSW |
| Mr Ian Guy, Magistrate |
| Homicide Victims Association Inc |
| Honourable Justice G. R. James, Supreme Court of NSW (oral submission) |
| Law Society of NSW |
| Legal Aid Commission of NSW |
| Ministry for Police |
| NSW Bar Association |
| NSW Council for Intellectual Disability |
| NSW Department of Health |
| NSW Mental Health Review Tribunal |
| NSW Police |
| NSW Public Defenders |
| NSW Young Lawyers Criminal Law Committee |
| Office of the Director of Public Prosecutions |
| Mr Ivan Potas, Director of Research and Sentencing, Judicial Commission of NSW |
| Judge D. Price, Chief Magistrate of the Local Court, NSW. |
| University of NSW Council for Civil Liberties |
| Mr George Zdenkowski, Magistrate |

Submissions on the Committee's Discussion Paper were received from:

| |
|---|
| Criminal Law Review Division of the Attorney General's Department |
| Department of Juvenile Justice, NSW |
| His Honour Judge J L Goldring, District Court Judge |
| Law Society of NSW |
| Legal Aid Commission of NSW |
| Minister for Police, The Hon. John Watkins MP |
| NSW Bar Association |
| NSW Council for Intellectual Disability |
| NSW Department of Health |
| NSW Public Defenders |
| NSW Young Lawyers Criminal Law Committee |
| Office of the Director of Public Prosecutions |
| Judge D. Price, Chief Magistrate of the Local Court, NSW. |
| Mr George Zdenkowski, Magistrate |

**Annexure B** (see page 23)

***Imprisonment as a last resort:***

*(1) In determining an appropriate penalty for the offence, the court is to have regard to the principle that imprisonment is a sanction of last resort.*

*(2) 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.*

*(3) If the court determines that the only appropriate penalty is imprisonment, then it must further consider whether such sentence should be fully or partially suspended, ordered to be served by way of periodic detention, or ordered to be served by way of home detention.*

*(4) In setting a term of imprisonment a court will have regard to the principles and purposes of sentencing and impose the shortest and least restrictive form of imprisonment that is commensurate with the seriousness of the offence and the background of the offender.*

***Sentences of 6 months or less:***

*(5) (i) A court may not impose a sentence of imprisonment of 6 months or less, unless it is satisfied, on the balance of probabilities, that it is appropriate. In assessing whether it is appropriate the Court may take into account:*

*(a) whether the offender was subject to a form of conditional liberty at the time of committing the offence and would be unlikely to comply with the terms of any other or further community based order;*

*(b) whether the offender had been sentenced to a term of imprisonment of 6 months or more in the previous 5 years and at the time of sentencing demonstrates poor prospects for rehabilitation;*

*(c) whether the offender poses a real and imminent and serious threat to the safety or the property of another person and any other sanction would fail to provide an appropriate degree of community protection;*

*(d) whether the offender was held in pre-sentence custody and the term of the sentence is back-dated so as to expire no later than the date of sentencing; or*

*(e) all the circumstances of the case, and the sentencing judicial officer has considered all of the circumstances and is of the opinion that any sanction other than a short term of imprisonment would be inappropriate.*

*(ii) A court may impose a sentence of imprisonment of 6 months or less if it is ordered to run concurrently, consecutively or partly concurrently and partly consecutively with any other sentence of imprisonment such that the aggregate term of imprisonment exceeds 6 months.*

*(iii) A court may order that the person be sentenced to the rising of the court*

*(4) A court that sentences an offender to imprisonment for 6 months or less must indicate to the offender, and make a record of its reasons for doing so, including:*

*(a) its reasons for deciding that no penalty other than imprisonment is appropriate, and*

*(b) its reasons for deciding not to make an order allowing the offender to participate in an intervention program or other program for treatment or rehabilitation (if the offender has not previously participated in such a program in respect of the offence for which the court is sentencing the offender).*

***Sentences greater than 6 months***

*(5) A court must not impose a term of imprisonment greater than 6 months on the ground that it has no power to impose a term of imprisonment of 6 months or less.*

**Attachment 1**

# ISSUE OF ABOLISHING PRISON SENTENCES OF 6 MONTHS OR LESS

**DISCUSSION PAPER**

# Index

## Index to Annexures

## 1. Terms of Reference

On 18 June 2003, the Chairperson of the NSW Sentencing Council ("the Sentencing Council"), the Honourable A. R. Abadee RFD QC, received a letter from the Attorney General of NSW, the Honourable Bob Debus MP, which, amongst other things, requested the Sentencing Council to prepare a Report on the subject of abolishing prison sentences of 6 months or less ("*short prison sentences*"). The relevant part of the letter reads as follows:

> "*Prison Sentences of 6 Months or Less*
>
> *I note from your letter that the NSW Sentencing Council resolved, at its meeting of 21 May 2003, that I give consideration to requesting the Council, pursuant to s 100 J (1)(d) of the Crimes (Sentencing Procedure) Act 1999, to prepare a report on the subject of abolishing prison sentences of 6 months or less.*
>
> *This is an issue which I believe deserves examination. Accordingly, pursuant to Section 100 J (1)(d) of the Crimes (Sentencing Procedure) Act 1999 ("The Act"), I am requesting the NSW Sentencing Council to prepare a report on the subject of abolishing prison sentences of 6 months or less. In preparation of that report the Council may wish to consider issues such as:*
>
> 1. *The impact or consequence of abolition of prison sentences of 6 months or less upon:*
>    - *The prison population;*
>    - *Other sentences;*
>    - *Re-offending issues;*
>    - *Crime reduction;*
>    - *Cost/potential savings to the NSW budget*
>    - *Management of the NSW prison population and correctional centres;*
>    - *Other services including probation and parole services and police;*
>    - *Vulnerable groups in the criminal justice system such as juveniles, the intellectually disabled or mentally ill, or persons of an Aboriginal or Torres Strait Islander background.*
> 2. *The effect that abolishing sentences of 6 months or less would have on existing legislation (including sections 5 and 46 of the Act);*
> 3. *Whether sentences of imprisonment of 6 months or less should be abolished generally or subject to condition/s.*
> 4. *The need for any legislative reform to give effect to any recommended changes.*
> 5. *The development of alternative sentencing options to terms of imprisonment of 6 months or less (including whether there is any role for criminal justice intervention programs).*"

## 2. List of Preliminary Submissions Received

Prior to the drafting of this discussion paper, the Sentencing Council called for preliminary submissions from a focussed number of individuals and organisations, and the following submissions were received:

| |
|---|
| Aboriginal Corporation Legal Service |
| Aboriginal Justice Advisory Council |
| Mr Christopher Bone, Magistrate |
| Professor Chris Cunneen, Director, Institute of Criminology, University of Sydney |
| Conference of Leaders of Religious Institutes (NSW), Social Justice Committee |
| Department of Corrective Services, NSW |
| Department of Juvenile Justice, NSW |
| Mr Ian Guy, Magistrate |
| Homicide Victims Association Inc |
| Honourable Justice G. R. James, Supreme Court of NSW (oral submission) |
| Law Society of NSW |
| Legal Aid Commission of NSW |
| Ministry for Police |
| NSW Bar Association |
| NSW Council for Intellectual Disability |
| NSW Department of Health |
| NSW Mental Health Review Tribunal |
| NSW Police |
| NSW Public Defenders |
| NSW Young Lawyers Criminal Law Committee |
| Office of the Director of Public Prosecutions |
| Mr Ivan Potas, Director of Research and Sentencing, Judicial Commission of NSW |
| Judge D. Price, Chief Magistrate of the Local Court, NSW. |
| University of NSW Council for Civil Liberties |
| Mr George Zdenkowski, Magistrate |

## 3. Summary List of Issues

**Uneven distribution of sentencing options throughout the state**

- Some have expressed a concern that if short sentences were abolished, some courts may react by imposing longer sentences on those who would previously have received a short sentence. This is referred to as "bracket creep". What can be done to allay the concern that if short prison sentences are abolished, some offenders will be inappropriately sentenced to a longer period of imprisonment? (Page 34)

- The intention to abolish prison sentences of 6 months or less pre-supposes that such prison sentences would be replaced by alternatives to full-time custody. The fact that many alternatives to full-time custody are not available uniformly throughout NSW is a matter of great concern. Would the provision of sentencing alternatives uniformly throughout the state achieve a reduction in the prison population, but without the risk of "bracket creep"? (Page 34)



**Other Jurisdictions**

- While recognising that different conditions prevail in WA and NSW, is it desirable to evaluate the impact of abolition of short sentences in WA before considering whether any similar scheme should be introduced in NSW? (Page 18)

**Offences with statutory maximum penalties of less than 6 months, and offences for which prison sentences of 6 months or less are regularly imposed**

- If short prison sentences are abolished, should there be exceptions? Possible exceptions are: offences involving violence, short sentences for offenders who refuse or can't be trusted to comply with the terms of a non-custodial order, short sentences to be served cumulative with a larger head sentence, a sentence to "the rising of the Court", short sentences cumulated so that the final sentence is greater than 6 months and short sentences imposed for offences committed whilst already serving a longer sentence. (Page 25)



**Alternative sentencing options to imprisonment for 6 months or less**

- Section 65A of the *Crimes (Sentencing Procedure) Act 1999* provides that a periodic detention order may not be made for an offender who has previously served imprisonment for more than 6 months by way of full-time detention. Should this restriction be removed? (Page 27)

**Relationship between "full-time" imprisonment, periodic detention, home detention, and suspended sentences**

- Should abolition of short sentences be restricted to those to be served by way of "full-time imprisonment"? (Page 30)

- There is a "nexus" between "full time" imprisonment, and imprisonment that is suspended, or served by way of periodic or home detention in that the latter three options cannot be considered until it is decided that no sentence other than imprisonment would be appropriate. If the nexus between full-time imprisonment and suspension, periodic detention and home detention were to be broken, would there be a serious risk of "net widening"? What could be done to mitigate this risk? (Page 30)

- If short sentences are abolished, what should happen when an offender who has been sentenced to periodic detention, home detention or a suspended sentence breaches the terms of the sentence and there is less than 6 months left of the sentence to be served? If "full-time" short prison sentences are abolished, should there be an exception where a non-custodial sanction is breached? (Page 30)

**Section 5 of the *Crimes (Sentencing Procedure) Act* 1999**



- Falling short of abolishing short prison sentences, should statutory guidelines restricting the use of such sentences be introduced? (Page 38)

- Falling short of abolishing short prison sentences, could short prison sentences be automatically suspended (fully or in part)? (Page 38)

- Should there be a wider discretion to the Court in addressing a breach of a suspended sentence? (Page 38)

**Section 46 and rehabilitation of prisoners serving prison sentences of 6 months or less**



- Section 46 of the *Crimes (Sentencing Procedure) Act 1999* provides that "*A court may not set a non-parole period for a sentence of imprisonment if the term of the sentence is 6 months or less.*" Should section 46 be repealed or otherwise amended? (Page 43)

- As an alternative to abolishing short prison sentences, could "program release" or transitional centres be used in order to ensure that offenders sentenced to a short period of imprisonment spend some time in custody followed by supervision on release? (Page 43)

**Piloting short prison sentences**

- Should abolition of short prison sentences be piloted and evaluated? If so, which areas should be selected for a pilot, and should such a pilot target specific groups of offenders? (Page 53)

**Juvenile offenders**

- Should control orders of 6 months or less be abolished? (Page 55)

**Intellectually disabled offenders**

- Some intellectually disabled offenders do not understand, or lack the resources and capacity to comply with non-custodial alternatives. If short prison sentences are abolished, how should an intellectually disabled offender who appears before the court for breaching a community sentence be dealt with? (Page 58)

- Section 32 of the *Mental Health (Criminal Procedure) Act 1990* provides a method of diversion for defendants who are suffering from a mental illness, are developmentally disabled, or suffering from a mental condition for which treatment is available. Should section 32 be available to all persons with a cognitive impairment?[121] (Page 58)

**Cost issues**

- If abolition of short prison sentences is trialled on a pilot basis, would a further cost analysis by BOCSAR, similar to the cost analysis completed in relation to the Drug Court prove useful? (Page 66)



[121] For example, amend section 32 of the *Mental Health (Criminal Procedure) Act 1990* so that an order may also be made under that section where it appears to the Magistrate that the defendant has a cognitive impairment that affects a person's reasoning and behaviour, including intellectual disability, acquired brain injury, autism, and a neurological disorder including dementia.

## 4. Introduction

The Sentencing Council has called for preliminary submissions in order to assist in isolating relevant issues, and a Committee has been formed.[122] The Committee assisting the Sentencing Council has considered these submissions and has expressed tentative views about aspects of the project These views do not, however, represent the views of all Committee members on all aspects of the project; nor will they necessarily be reflected in the Sentencing Council's final recommendations. They are intended to attract comment and promote discussion. For the purposes of this paper, "prison sentences of 6 months or less" will be referred to as "short prison sentences", and under the present conditions, the majority of the Committee is of the view that it is premature to examine abolition of short prison sentences.

Short prison sentences have recently been considered in two other jurisdictions. In Western Australia, prison sentences of 3 months or less were abolished in 1995, with suspended sentences and Intensive Supervision Orders introduced as alternatives. The effect of this legislative change was not evaluated. Legislation in Western Australia has since been passed, but is yet to commence, which will extend this abolition to prison sentences of 6 months or less. The Government has agreed to review this legislative change 2 years after proclamation. It is suggested that NSW should wait until the Western Australian legislation is reviewed before making a similar move.

In England, the overcrowding of prisons has been described as a "*cancer eating at the ability of the prison service to deliver*".[123] In particular, short prison sentences have been reviewed in that jurisdiction. Under the *Criminal Justice Act 2003* (UK), a system of "custody plus" has been introduced whereby offenders sentenced to a short term of imprisonment spend a period of time in custody along with a period of time supervised in the community. The terms of the supervision period are tailored to the needs of the individual offender. Importantly, the question of abolishing short prison sentences was considered in England, but the system of "custody plus" was preferred.



In NSW, the vast majority of short prison sentences are imposed by the Local Court, and such sentences account for over 55.8% of the sentences of imprisonment imposed by that Court.[124] Most offenders have a criminal history, and almost 70% have previously served a sentence of imprisonment. There has been a recent downward trend in the number of offenders serving short prison sentences, and this is contrasted with the rising prison population generally. Most short prison sentences are imposed for offences where the statutory maximum is far greater than 6 months.

There is a "nexus" between "full time" imprisonment, and imprisonment that is suspended, or served by way of periodic or home detention in that the latter three options cannot be considered until it is decided that no sentence other than imprisonment would be appropriate. If short prison sentences were to be abolished, a question arises as to whether such abolition should be restricted to "full time" sentences, or should also apply to short prison sentences to

[122] For membership of the Committee, see below under "Background"
[123] Lord Justice Woolf, "A New Approach to Sentencing" (2003) 15(4) *Judicial Officers' Bulletin* 1
[124] Keane and Polletti (2003) "*Sentencing Trends and Issues no. 28: Common Offences in the Local Courts 2002*" Sydney: Judicial Commission at p 11. This figure does not include suspended sentences or sentences to be served by way of home detention or periodic detention. Nor does it include sentences of greater than 6 months where the non-parole period is less than 6 months.

be suspended or served by way of home or periodic detention. The majority of the Committee is presently of the view that any issue of abolition should only be considered for "full time" short prison sentences.

A related question is whether the "nexus" between full time imprisonment and suspended, periodic and home detention should be broken. If the nexus is broken, there is a real risk of "net widening": that is, a risk that offenders will be given a suspended sentence, periodic or home detention order where they otherwise would have received a less severe penalty such as a fine or community service order. There is already evidence to suggest that suspended sentences are being used inappropriately in place of less severe penalties. If short prison sentences were abolished, a question also arises as to what should happen where an offender breaches or refuses to comply with a non-custodial order, or in the case of a repeat offender, non-custodial sanctions have been repeatedly breached in the past. The Committee is presently of the view that if short prison sentences are abolished, an exception should be made in such circumstances.



The intention to abolish short prison sentences presupposes that such short sentences would be replaced by alternative sentencing options. The fact that many of these alternatives are not available throughout NSW is a matter of great concern. Rather than suggesting a new sentencing option to replace short prison sentences, the committee is presently of the view that priority should be given to making presently existing sentencing options available throughout NSW. If such options were made available, it could be expected that there would be a further reduction in the number of short prison sentences imposed removing the need to abolish short prison sentences. The majority of the Committee is presently of the view that it would be inequitable to abolish short prison sentences until viable sentencing alternatives are available state-wide.

Section 5(2) of the *Crimes (Sentencing Procedure) Act 1999* provides that a court must give, and record its reasons for deciding that no penalty other than imprisonment is appropriate. Some have expressed an opinion that section 5(2) is ineffectual in limiting the use of short sentences, but on the other hand, statistics show that there has been a reduction in the use of short sentences recently.[125] It is unclear whether this reduction can be attributed to section 5(2). It is suggested that research could be undertaken to analyse such reasons in order to assess their validity. It is further suggested that rather than abolishing short prison sentences, section 5(2) could be further tightened, for example, to restrict short prison sentences to those offenders who cannot be trusted to comply with non-custodial orders, or to provide that short prison sentences are automatically suspended.[126]



The question of what can be achieved in terms of prisoner rehabilitation in 6 months has been discussed. It was noted that many of the other objectives of sentencing may be met by a short prison sentence. Presently, section 46 of the *Crimes (Sentencing Procedure) Act 1999* precludes offenders who have served a short prison sentence from receiving any support or supervision on release. An important question is whether section 46 should be abolished or otherwise amended.

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[125] The Chief Magistrate of the Local Court views section 5(2) as ineffectual. In contrast, table 2 in Annexure A shows the recent reduction in the use of short sentences.

[126] This may require consideration of the way in which a breach is treated, and the possibility of re-introducing suspended sentences. At present, breach of a suspended sentence is dealt with by the Courts, and there is little flexibility as to what the Court may do in consequence of a breach.

It has been suggested that pre-sentence reports could be made mandatory prior to imposing a short prison sentence. However whilst this requirement would cause the Court to consider whether a short prison sentence is appropriate, practitioners within the committee are of the view that pre-sentence reports are presently ordered appropriately, and any move to make them mandatory may place an unnecessary burden on the probation and parole service.

If short prison sentences were abolished, there is a real risk that some offenders would be given a longer sentence to circumvent the abolition ("sentence creep" or "bracket creep"). "Sentence creep" has cost ramifications and raises issues of proportionality of the sentence to the crime committed.

If short prison sentences were to be abolished, a number of problems and issues would arise for specific groups of offenders. The scope of this paper is not broad enough to discuss the effects of prison on vulnerable groups generally. Vulnerable groups have only been discussed to the extent that short prison sentences particularly impact upon them. For example:

- Aboriginal people are over represented in the population of prisoners serving short sentences. Any general reform to short prison sentences should be clearly articulated with current policies developed for Aboriginal people.
- In relation to juvenile offenders, different sentencing principles apply with rehabilitation taking a higher priority. The majority of juvenile control orders in NSW are for a period less than 6 months, and it is argued that any move to abolish short prison sentences should not apply to juveniles.[127]
- If short prison sentences are abolished, the needs of intellectually disabled offenders serving community based sentences must be considered. Intellectually disabled offenders would generally require a higher level of support and supervision to ensure compliance with non-custodial orders. Further, section 32 of the *Mental Health (Criminal Procedure) Act 1990* provides options for diversion, and it is suggested that this section be available to all cognitively impaired persons.
- In relation to mentally ill offenders, the majority of short prison sentences are imposed in the Local Court, and the defence of "mental illness" is not available. However, diversions under sections 32 and 33 of the *Mental Health (Criminal Procedure) Act 1990* are available.



The committee has expressed concern at the apparent conflict between the policy supporting the tightening of bail laws on the one hand, and consideration of abolishing short prison sentences on the other. A concern has been expressed that if short prison sentences were to be abolished, remands may be used, deliberately or otherwise, in a manner amounting to a short prison sentence.

Estimating the cost impact of abolishing short prison sentences is difficult, however the cost estimates provided by the Bureau of Crime Statistics and Research ("BOCSAR") are questioned. Funding for the provision of sentencing alternatives state-wide would precede and absorb any savings achieved by the abolition. It is recommended that if any move is made to abolish short prison sentences, even on a pilot basis, a cost analysis should be undertaken, similar to the recent cost evaluation of the Drug Court. Abolition should not be entertained or considered for budgetary reasons alone.

[127] In Western Australia, juveniles are exempt from the abolition of prison sentences of 3 months or less, which will soon be extended to 6 months or less.

If short prison sentences are abolished, a question of fairness arises with Commonwealth offenders serving prison sentences of 6 months or less in NSW gaols. There are however, few such Commonwealth offenders in NSW gaols.

The important question is what purpose would be served by abolishing short prison sentences, and what consequences may follow. In summary, arguments in support of abolishing short prison sentences are:

- Their questionable rehabilitative value;
- The high cost associated with processing and housing short term prisoners;
- The resources required for prisoners serving short sentences could be used for more serious offenders;
- As they presently stand, prisoners who have served a short prison sentence do not receive supervision/reintegration on release.

It is argued that abolition of short prison sentences would:

- Reduce prison overcrowding;
- Simplify the management of inmates;
- Diminish the harmful effects of prison;
- Encourage the use of sentencing alternatives;
- May reduce social security costs.



On the other hand, there are strong arguments against abolition and there may be undesirable consequences:

- A short prison sentence may be appropriate in some circumstances (such as where a short sentence is proportionate to the crime, and where offender either refuses to comply with alternative sentencing options, or has continually breached non-custodial sentences in the past);
- Section 5(2) may be effective in ensuring that short sentences are appropriately used, or the section could be amended to ensure that short sentences are more appropriately used;
- There is a risk of "sentence creep" if short sentences are abolished (for example, offenders being sentenced to a term greater than 6 months which is disproportionate to the seriousness of the crime, or the full sentence being increased beyond 6 months in order to set a non-parole period of less than 6 months) and a risk of "net widening" if the nexus between full-time imprisonment and suspension, periodic detention and home detention were to be broken.



The debate around this topic has focused attention on alternate sentencing options, where they are available, diversionary pilot programs and who they target. The Committee has discussed the competing aims of sentencing and how and why emphasis is given for instance to rehabilitation in certain circumstances. It has exposed the tensions between the aims of enlightened diversionary programs on the one hand and "law and order" amendments on the other which fit within the government's "tough on crime" policies.

It is conceded that there are many competing and complex issues to be considered in a proposal such as this. There are also some important exceptions that must be considered in conjunction with the abolition of short sentences. There may however be important gains to be made for the community in general by tightening up on the circumstances in which short sentences can be given, in conjunction with giving the court more rather than fewer sentencing options.

## 5. Background

The issue of short prison sentences[128] has been a topic of discussion within the Sentencing Council since its formation in March 2003. Members of the Sentencing Council considered that short prison sentences should be examined, as some Council members questioned whether they are effective. In particular, some Council members questioned their rehabilitative effect and indeed whether they may be counter-rehabilitative as they may introduce minor offenders to more hardened serious offenders. They also have negative effects on family, housing and employment. Members questioned whether short prison sentences were a cost-effective way of dealing with offenders, and suggested that alternative means of disposition of offenders should be explored.

The Sentencing Council's Chairperson raised the issue with the Attorney General on behalf of the Council, and the Attorney General then formally referred the issue of abolishing prison sentences of 6 months or less to the Sentencing Council for examination on 18 June 2003. The Sentencing Council, with the permission of the Attorney General, formed a committee to assist it in considering this topic. The Committee consisted of representatives of relevant government departments and agencies together with individuals considered to have particular expertise or knowledge valuable to consideration of this issue. The committee was comprised of:



- The Hon. Alan Abadee RFD QC (Chair)
- Professor Chris Cunneen, Director, Institute of Criminology, University of Sydney;
- Ms Robyn Gray, Deputy Solicitor for Public Prosecutions;
- Senior Assistant Commissioner Ken Middlebrook, Community Offender Services, Department of Corrective Services;
- Mr Peter Muir, Director, Operations, Department of Juvenile Justice;
- Superintendent Bruce Newling, Court and Legal Services, NSW Police;
- Mr Ivan Potas, Director, Research and Sentencing, Judicial Commission of NSW;
- Mr Brian Sandland, Acting Director of Criminal Law, Legal Aid Commission of NSW;
- Ms Mary Spiers, Senior Policy Officer, Criminal Law Review Division; and
- Ms Tricia White, Senior Policy Analyst, Ministry for Police.



The Committee agreed to provide its assistance to the Sentencing Council on the issue of abolishing prison sentences of 6 months or less in the form of this Discussion Paper.

### 5.1 Previous consideration of short prison sentences in NSW:

The issue of abolishing prison sentences of 6 months or less has previously been considered by the NSW Law Reform Commission ("the NSWLRC").[129] In *Discussion Paper 33*, the NSWLRC considered the need to give greater effect to the principle that imprisonment is a sentencing option of last resort, and considered the possibility of recommending legislation to

[128] The Council did not merely confine itself to prison sentences of 6 months or less, but also considered prison sentences of 12 months or less. The majority of the Council were of the view that consideration of prison sentences of 6 months or less is consistent with the recommendation made by the Select Committee of the Legislative Council on the *Increase in Prison Population*, and also with the language of section 46 of the *Crimes (Sentencing Procedure) Act 1999*. The minority view was that the same arguments which could apply to abolishing prison sentences of 6 months or less would equally apply to prison sentences of 12 months or less.

[129] In 1996 the NSWLRC published *Discussion Paper 33: Sentencing*, and shortly after this, in December 1996 the Commission published its *Report 79: Sentencing*.

abolish short prison sentences.[130] Due to the fear of "sentence creep", that is the fear that sentences would be increased to overcome any statutory minimum length, the NSWLRC did not recommend such legislation. The NSWLRC instead recommended that judges and magistrates should be required to give reasons for imposing a sentence of imprisonment of 6 months or less. In *Report 79*, the NSWLRC recommended that courts should not only provide reasons for such a decision, but also give their reasons for not imposing a non-custodial sentence. The NSWLRC acknowledged the Common Law principle espoused in *Parker v DPP*[131] that imprisonment is a sanction of last resort, however, it argued that greater substance could be given to the principle by requiring that courts explain their reasons, hoping that this might encourage courts to make more appropriate use of short prison sentences.

This recommendation resulted in section 5 of the *Crimes (Sentencing Procedure) Act 1999*.[132] This section requires courts to provide reasons for any decision to impose a sentence of imprisonment of 6 months or less including reasons why a non-custodial sentence is not appropriate, and reasons for not allowing the offender to participate in an intervention or other program. Such reasons must be recorded.



The New South Wales Parliament's Select Committee on the Increase in the Prison Population has also considered the issue of abolishing prison sentences of 6 months or less. Amongst other things, the Report recommended that the option of abolishing prison sentences of 6 months or less be considered, and that alternatives to prison be considered.

The Report also questioned the rehabilitative value of short sentences, as it is difficult to design and implement programs for such a short period of time, and the lack of supervision of such prisoners on release made transition back into the community more difficult.[133]

It is important to note that the Select Committee's Report did *not* recommend the abolition of prison sentences of 6 months or less, but rather recommended that research be undertaken to investigate the impact of abolishing prison sentences of 6 months or less. The Report identifies several issues. For example,



> "*It is…important to address issues such as whether abolishing shorter custodial sentences would only lead to inmates serving longer sentences, particularly if funding was not provided for increased alternative programs. For these reasons the Committee recommends that comprehensive research and public consultation be conducted into the possible impact of such an initiative before any measures are implemented.*"

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[130] DP 33: Sentencing at paragraph 3.33 and 3.34

[131] (1992) 28 NSWLR 282. See further *Dinsdale v. R* (2000) 175 CLR 315, considered in *Saldaneri* [2001] NSWCCA 480 at [14]

[132] The *Act* was assented to on 8 December 1999. The *Act* largely consolidated the provisions of various Acts dealing with the sentencing of offenders. The re-enacted provisions were substantially the same as those they replaced, however, the *Crimes (Sentencing Procedure) Act 1999* reintroduced "suspended sentences" as a sentencing option, required courts that impose sentences of imprisonment of 6 months or less to give reasons for their decisions to impose imprisonment and not some lesser punishment, required courts that impose sentences of imprisonment to determine the total sentence first, and then to determine the minimum (non-parole) term of the sentence, and replaced recognisances with good behaviour bonds.

[133] This is because section 46 of the *Crimes (Sentencing Procedure) Act 1999* provides that a Court must not set a non-parole period for a sentence of imprisonment if the term is less than 6 months.

The Report further recommended that the Government initiate a pilot project to divert a number of offenders who would otherwise be sentenced to imprisonment for 3 months or less, with priority given to women and indigenous offenders.

The Report of the Select Committee notes that many prisoners who are in full-time custody could more appropriately and cost-effectively be dealt with under the alternative sentencing options.

In consequence of the Select Committee's Report, BOCSAR conducted research which estimated the impact of abolishing prison sentences of 6 months or less on the prison population, provided a profile on the prisoners who would be affected and estimated savings to the NSW budget.[134] BOCSAR estimated that if short prison sentences were abolished, the number of new prisoners received per week would be reduced by 40%, and the savings in recurrent costs would be between $33 and $47 million per year.



[134] Lind and Eyland (2002) "*Crime and Justice Bulletin number 73: The Impact of Abolishing Short Prison Sentences.*"

## 6. Consideration of short prison sentences in other jurisdictions

### 6.1 Western Australia

Western Australia legislated to prohibit prison sentences of 3 months or less, with limited exceptions, in 1995.[135] It was thought that short sentences served little useful purpose as they fail as a deterrent, fail to protect the community, and fail to rehabilitate. It was thought that the intensive supervision order and suspended prison sentence would provide a more effective solution.[136]

Following the introduction of this legislation, the opportunity was not taken to study the impact that it had on the prison population of Western Australia. The effect is difficult to determine.[137] The ABS[138] has recently reported that between 2001 and 2002, some five years after the legislation was introduced,[139] there has been a decrease in the general imprisonment rate in Western Australia, and a quite substantial decrease of 20% in the indigenous imprisonment rate. Bearing in mind that this decrease has occurred some 5 years after the introduction of the legislation, and does not seem to be part of a steady trend,[140] it is unclear whether this decrease can be attributed to the abolition.



**Western Australia: Abolition of prison sentences of 6 months or less**

On 15 August 2002, the Western Australian Attorney General introduced a Bill to extend the abolition of prison sentences of 3 months or less to those of 6 months or less.[141] The Standing Committee on Legislation reported on the Bill and noted several concerns in its report, but nevertheless considered it was a worthwhile measure so long as the effects of the change were carefully monitored.[142] In particular, the Committee noted that careful monitoring will enable parliament to determine whether the effect is a general increase in sentences, or to reduce what would otherwise have been sentences of imprisonment of 6 months or less to community.

The Committee noted the absence of an evaluation following the abolition of sentences of 3 months or less in 1995, and expressed concern that sentences would be increased to



[135] Section 86 of the *Sentencing Act 1995* (WA), in the Act as it originally came into force.
[136] In the Second Reading Speech, the Hon. Peter Foss acknowledged that the section implemented recommendations of the Joint Select Committee on Parole.
[137] Morgan notes that there has been no formal evaluation of the impact of abolishing prison sentences of 3 months or less in Western Australia: Morgan, "*The Abolition of Six Month Sentences, New Hybrid orders and Truth in Sentencing: Western Australia's Latest Sentencing Laws*" (2004) 28(1) *Criminal Law Journal* 8-25. The Western Australian Department of Justice also concedes that there has been no evaluation: Letter from Mr Alan Piper, Director General, WA Department of Justice, dated 11 February 2004. The Department does however advise that "*Department of Justice data indicates that following the abolition of prison sentences of 3 months or less, there was no shift from prison sentences of 3 months or less towards longer sentences. There was in fact, a reduction in every category of sentence length in the 1 month to 12 months range.*"
[138] Australian Bureau of Statistics (2002) "Prisoners in Australia" Canberra, ABS.
[139] Section 86 of the *Sentencing Act 1995* (WA) commenced, along with most of the *Act* on 4 November 1996. The *Act* was assented to on 16 January 1996.
[140] See Australian Bureau of Statistics (published 1997 - 2003)"*Prisoners in Australia*" for the years 1996-2002. Canberra, ABS.
[141] *Sentencing Legislation Amendment and Repeal Bill* Part 5. See now *Sentencing Legislation Amendment and Repeal Act 2003* (no 50 of 2003)
[142] *Legislation Committee's Eighteenth Report, Chapter 5: Amendment and Repeal Bill 2002 – Abolition of Sentenced of Six Months or Less*" Perth: Standing Committee on Legislation

circumvent the legislation, and distort or create a gap in the Western Australian "sentencing ladder" of which there is no counterpart in NSW. [143]

A further problem identified by the Committee involved the amendment to statutory penalties consequential to the prohibition of prison sentences of 6 months or less. For many offences, the Bill removes imprisonment as a penalty and increases the monetary penalty. The Report recognises that there is an increased imprisonment rate for Aboriginal people as a result of fine default and acknowledges the potential for this to be exacerbated by the abolition of prison sentences of 6 months or less.

The Committee recommended that the part of the Bill prohibiting prison sentences of 6 months or less be proclaimed separately from the remainder so as to enable the effects on sentencing to be clearly distinguished, and that the part be reviewed two years after proclamation. The Bill was assented to on 9 July 2003[144] with the recommendations incorporated. The earliest time at which the provisions abolishing prison sentences of 6 months or less can come into effect is March 2004. Further, the Government has also agreed to review that part of the legislation 2 years after proclamation.[145]



The amendments to statutory penalties required the amendment of some 73 Western Australian Acts.[146] In the vast majority of cases, the penalty option of imprisonment for 6 months or less was removed leaving a fine as the penalty, but for some offences the maximum penalty of imprisonment was increased. Crucially, the offences with the increased maxima are the offences that, in practice, have been likely to attract sentences of imprisonment. Further, increasing the maxima is not a neutral exercise, but is an indication that Parliament intends the offence to be dealt with more severely, and Court's sentencing practices are expected to reflect such changes.[147] A brief description of the offences with increased penalties of imprisonment is attached at **Annexure D**. It has been suggested that most of the offences which no longer attract imprisonment, are the ones that are un-enforced, irrelevant, and in practice never attract prison sentences. "*Indeed, most of them could simply have been decriminalised without anybody noticing.*"[148] On the other hand, "*enhanced maxima will apply to all the offences that, in practice, have been likely to attract immediate imprisonment.*"



The Committee assisting the Sentencing Council considers that it is important to properly monitor the abolition of short sentences in Western Australia. Whilst the developments in Western Australia are relevant, they are not determinative of what should happen in NSW.

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[143] The sentencing ladder is found in section 39 of the *Sentencing Act* 1995. Section 39(3) requires the court, in imposing sentence, to determine that each of the previous sentencing options or "steps in the ladder" is inappropriate before moving on to the next, and abolition of sentences of 6 months or less will create a large step between a suspended sentence and a period of imprisonment of more than 6 months. These concerns have also been noted by Dr. Morgan, "*The Abolition of Six Month Sentences, New Hybrid orders and Truth in Sentencing: Western Australia's Latest Sentencing Laws*" (2004) 28(1) *Criminal Law Journal* 8-25.

[144] Act no 50 of 2003

[145] See Response to the Report by the Attorney General, the Hon. Jim McGinty MLA, 5 June 2003

[146] Part 5 of the *Sentencing Legislation Amendment and Repeal Act 2003*

[147] Dr. Morgan, "*The Abolition of Six Month Sentences, New Hybrid orders and Truth in Sentencing: Western Australia's Latest Sentencing Laws*" (2004) 28(1) *Criminal Law Journal* 8-25.

[148] Dr. Morgan, "*The Abolition of Six Month Sentences, New Hybrid orders and Truth in Sentencing: Western Australia's Latest Sentencing Laws*" (2004) 28(1) *Criminal Law Journal* 8-25.

This is particularly true considering the Western Australian "sentencing ladder" of which there is no counterpart in NSW. [149]

**Question:** While recognising that different conditions prevail in WA and NSW, is it desirable to evaluate the impact of abolition of short sentences in WA before considering whether any similar scheme should be introduced in NSW?

### 6.2 England

Prison overcrowding and the related issue of short prison sentences have been considered by the English Courts for some time. In 2002, the English Court of Appeal handed down a guideline judgment for domestic burglary.[150] In the course of judgment, the Court held:

> *"We fully accept that there are some cases where the clang of the prison cell door for the first time may have a deterrent effect but the statistics of re-offending suggest that the numbers who will be deterred by their first experience of incarceration are not substantial. If they are not deterred by their first period of incarceration, then it becomes even less likely that a moderately longer sentence (which equally gives no opportunity for tackling re-offending behaviour) will achieve anything."*



This statement is a long way short of a suggestion that short prison sentences should be abolished.

Shortly after the guideline judgment for domestic burglary was handed down, Lord Justice Woolf, extra-judicially highlighted the problem of overcrowding in English prisons, and identified the imposition of short prison sentences as one of the contributing factors:

> "*The Problem of overcrowding in prisons is a cancer eating at the ability of the prison service to deliver. It is exacerbated by a large number of prisoners who should not be there, the most significant group being those who are sentenced to less than 12 months imprisonment. It is now accepted on all sides that prison can do nothing for prisoners who are sentenced to less than 12 months. In many of those cases, the prisoners could have been punished in the community. If prison was what was called for, the most appropriate sentence would be one of no longer than one month, to give the offender the experience of the "clang of the prison door.*" [151]



The *Halliday Report*[152] recognised the problem of an overall increase in the prison population, and in particular, an increase in the number of prisoners serving short sentences. The Report noted that between 1989 and 1999, the greatest increases were found for sentences of 6 months or less, with a 119% increase in people entering prison per year to

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[149] The sentencing ladder is found in section 39 of the *Sentencing Act* 1995. Section 39(3) requires the court, in imposing sentence, to determine that each of the previous sentencing options or "steps in the ladder" is inappropriate before moving on to the next.

[150] *R v. Keating & McInerney* [2002] EWCA Crim 3003

[151] Lord Justice Woolf, "A New Approach to Sentencing", Judicial Officers' Bulletin 15(4) April 2003, p1.

[152] Halliday (2001) "*Making Punishment Work: Report of a Review of the sentencing Framework for England and Wales*" London: The Home Office. The later *Review of the Criminal Courts* by Lord Justice Auld did not extend to a consideration of the principles of sentencing, however, in chapter 11, there is discussion of the *Halliday Report*, specifically directed at practical and administrative issues.

serve a sentence of less than 3 months, and a 98% increase in people entering prison per year to serve a sentence of between 3 and 6 months.[153]

The *Halliday Report* did ***not*** recommend that short prison sentences be abolished,[154] but instead recommended a scheme of "custody plus":

> "*Recommendation 15: Prison sentences of less than 12 months need to be substantially reformed to make them more effective in reducing crime and protecting the public.*
>
> *Recommendation 16: All such sentences should normally consist of a period in prison (maximum 3 months) and a period of compulsory supervision in the community, subject to conditions and requirements whose breach may lead to return to prison.*
>
> *Recommendation 17: The period of supervision should be a minimum of 6 months, and a maximum of whatever would take the sentence as a whole to less than 12 months.*



This scheme of a period in custody followed by a period of post-release supervision was termed "custody plus". Prisoners serving the supervision component of their sentence would be liable to recall to prison, with a right of appeal, if the supervision component were breached. The supervision component would vary between offenders, and would be determined on the basis of the pre-sentence report.[155]

The system of "custody plus" proposed in England envisages intensive supervision during the non-custodial period, and the length of such supervision period would not simply be one third of the total sentence, but individually tailored according to the needs of the offender. In this way, "custody plus" differs from simply being a short sentence with a non-parole period. The "custody plus" scheme was enacted in the *Criminal Justice Act 2003* (UK).[156] The NSW Bar Association, in their submission, commends the "custody plus" scheme.[157]



The major difference between the system of "custody plus" proposed in England and simply introducing a non-parole period for sentences of imprisonment of 6 months or less is that "custody plus" envisages intensive supervision during the non-custodial period, and the length of such supervision period is individually tailored according to the needs of the offender.[158]

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[153] Halliday Report, at page 83: Appendix 2.

[154] Indeed, as noted in *R v. McInerney* [2002] EWCA Crim 3003, the "clang of the prison door" for the first time may have a deterrent effect.

[155] It was envisaged that there would be a small number of offenders who could be identified as having no need for a supervisory period. The Report makes it clear that the likelihood an offender will not comply with the supervision is not a valid reason to excuse them from the supervisory period.

[156] Received assent on 20 November 2003. The "custody plus" scheme consists of a period in custody followed by a period of post-release supervision. The ratio between the period in custody (between 28 and 51 weeks) and the period of supervision varies between offenders, and is determined on the basis of the pre-sentence report. Prisoners serving the supervision component of their sentence are liable to recall to prison, with a right of appeal, if the supervision component were breached.

[157] Submission of the NSW Bar Association, 11 September 2003.

[158] Part 12 Chapter 3 of the *Criminal Justice Act 2003* (ss 181 to 195) introduces the concept of "custody plus" for prison sentences of less than 12 months. By section 181(3)(b), the period of supervision is referred to as the "licence period", and by section 182, must contain one or more of the following requirements: An unpaid work requirement; An activity requirement; A programme requirement; A prohibited activity requirement; A curfew

As to the viability of a scheme similar to "custody plus" in NSW, the submission of the Office of the Director of Public Prosecutions ("the ODPP") contained some practical suggestions which recognise the problem faced in NSW of unavailability of sentencing options in some geographical areas:

> "*Although much greater attention and importance needs to be placed on finding alternative means for sanctioning relatively less serious offenders, it is unrealistic to expect that such alternative means and treatment programs will be available in the short term across NSW. A better approach may be to now commence [a] pilot ... and introduce further alternative sentencing options and increased criminal justice intervention programs across the State, particularly outside the main centres, while retaining the option of imprisonment for 6 months or less. To take away the short term imprisonment option leaves a "yawning chasm" in the sentencing ladder between the last available option (community service orders) and a sentence of more than 6 months.*"[159]



These practical suggestions are most relevant when considering the applicability of any scheme similar to "custody plus" in NSW.

The *Criminal Justice Act 2003* (UK) also introduces a scheme of "custody minus" for suspended sentences.[160] Under this scheme, a sentence of between 28 and 51 weeks may be suspended, and the offender instead undergoes a period of supervision of between 6 months and 2 years. The supervision period contains activities such as unpaid work, behaviour programs and drug treatment. Any breach of the supervision period sees the sentence of imprisonment take effect.[161]



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requirement; An exclusion requirement; A supervision requirement; and in the case where the offender is under 25 years old, an attendance centre requirement. The court is also permitted to make an intermittent custody order of at least 28 weeks, but no more than 51 weeks in respect of any one offence. By this type of order, the offender may be temporarily released on licence before serving the required number of days in prison. The court may also suspend a sentence of less than 12 months and may order that during the supervision period the offender comply with requirements and order that the sentence of imprisonment is not to take effect unless the offender fails to comply with requirements during the supervision period, or during the operational period the offender commits another offence. The requirements which can be imposed on a suspended sentence are the same as for "custody plus" with the additional options: A residence requirement; A mental health treatment requirement; A drug rehabilitation requirement; or An alcohol treatment requirement.

[159] Submission of the Office of the DPP, 11 September 2003.

[160] Sections 189 to 194. This scheme of suspended sentences was termed "custody minus in the recent paper (2002) "Justice For All"

[161] Larry Sherman has suggested that some early "custody plus" type schemes in America have been ineffective, and the Committee assisting the Council has also questioned the cost effectiveness of introducing similar schemes in NSW.

## 7. Characteristics and size of population serving prison sentences of 6 months or less

BOCSAR has reported that for 2002, the Local Court imposed almost all short prison sentences.[162] 55.8% of those sentenced to imprisonment in the local courts and 1.3% of those sentenced in the higher courts were sentenced to a short term of imprisonment.[163] Information from BOCSAR also shows that for the local court, 30% of offenders sentenced to imprisonment were given a length of sentence in the 5-6 month range, and 35% of all offenders sentenced to imprisonment were for a sentence of 3 months or less. It seems that these offenders would spend a large proportion of their sentence on remand.[164]

In the Local Court, the most common offences which resulted in a short prison sentence were: "*non-aggravated assault*", [165] Followed by "*driving while licence cancelled, suspended or disqualified*".[166]

In the higher courts, the most common offences which resulted in a short prison sentence was "*non-aggravated assault*".[167]



Tables produced by BOCSAR showing the number of short prison sentences as principal penalty by principal offence and duration for both the Local Court and higher courts are attached at **Annexure A**.

The Department of Corrective Services ("DCS") has recently provided data on the characteristics and size of the population serving prison sentences of 6 months or less.[168] In summary, the vast majority are male,[169] almost a quarter are Aboriginal,[170]almost all have a prior record and almost 70% have previously served a period of imprisonment.[171]

DCS reports that inmate profiles have demonstrated that most of the total inmate population possess characteristics related to unresolved drug and alcohol issues, social disadvantage, low



[162] 96.9% of short prison sentences were imposed in the Local Court, and 3.1% imposed in the higher courts.
[163] See Keane, Polletti and Donnelly (2004) "*Sentencing Trends and Issues no 30: Common Offences and the Use of Imprisonment in the District and Supreme Courts in 2002*" Sydney: Judicial Commission of NSW at p 3. See also Keane and Polletti (2003) "*Sentencing Trends and Issues no. 28: Common Offences in the Local Courts 2002*" Sydney: Judicial Commission of NSW at p 11. This figure does not include suspended sentences or sentences to be served by way of home detention or periodic detention. Nor does it include sentences of greater than 6 months where the non-parole period is less than 6 months.
[164] See Table 1, in Annexure A, "Statistical Information". Note: "length of sentence" refers to the time actually spent in prison, that is, the non-parole period if the overall sentence is greater than 6 months.
[165] This represents 81.5% of all offenders sentenced to imprisonment in the Local Court for this offence. Bureau of Crime Statistics and Research, Request 03/1526 & 03/1527 to the NSW Sentencing Council
[166] This represents 73.2% of all offenders sentenced to imprisonment in the Local Court for this offence.
[167] This represents 24.3% of all offenders sentenced to imprisonment in the higher courts for this offence. Information obtained from the Department of Corrective Services, and compiled from "*inmates discharged in 2002-2003 after completion of custodial sentence; inmates discharged after serving a sentence of 6 months or less (excluding breach of order)*" shows that for all courts, the most common offences which resulted in a short prison sentence were "other steal" (31.1%), "other assault" (18.1%), driving/traffic (18%), major assault (7.9%) and break, enter and steal (6.9%).
[168] Such data is based on a prison census conducted on 30 June 2003.
[169] 91% of such offenders are male, with 9% being female
[170] 23.2% were Aboriginal
[171] 4.5% had no prior record. 95.5% had a prior record, and 69.3% had previously served a sentence of imprisonment. See Table 4 in Annexure A.

educational achievement, poor employment history, unsatisfactory family/social skills and/or significant health problems including mental illness. [172]

Specifically in relation to the large number of offenders serving short prison sentences, DCS noted that it is these inmates who often experience the greatest transitional problems on discharge from prison. The Department states:[173]

> "*Short sentence inmates, who are the greatest proportion of inmate discharges, often display the highest level of resettlement need. However, they unfortunately receive the least intervention from COS [community offender services] and the Department. Put simply, the length of their sentence prevents them from taking advantage of the range of interventions designed to be delivered to longer serving inmates.*"

The Department further reports that there has been a recent ***downward trend*** in the number of offenders serving prison sentences of 6 months or less.[174] This is in contrast to the increase in the overall prison population. Such trend may be attributable to the introduction of section 5(2) of the *Crimes (Sentencing Procedure) Act 1999*. To date, there has not been a review of the effect of section 5(2) of the *Crimes (Sentencing Procedure) Act 1999* on the size of the prison population serving prison sentences of 6 months or less. The submission of Office of the Public Defender states that:



> "*it should be the case that this has been duly complied with, but there is a concern that it may have become an empty incantation.*"

This matter is further discussed below under the heading "*Section 5 of the Crimes (Sentencing Procedure) Act 1999*"

In addition to information on the size and characteristics of the prison population serving "full time" prison sentences of 6 months or less, DCS gives a brief outline of the number of offenders serving prison sentences of 6 months or less which are suspended, ordered to be served by way of periodic detention or home detention. There are quite a significant number of offenders which fall into this category. In 2002-2003, over one third of periodic detention orders were for 6 months or less, over two thirds of home detention orders were for 6 months or less, and just under one third of suspended sentences were for a period of 6 months or less.[175]



[172] Up to 85%. See (2003) "Review of the Community Offender Services in NSW: Sydney: Office of the Inspector General of Corrective Services. At p 5

[173] (2003) "Review of the Community Offender Services in NSW: Sydney: Office of the Inspector General of Corrective Services. At p 5

[174] See Table 2, Annexure A, provided by the Department of Corrective Services.

[175] 32.7%, 68.9% and 27.7% respectively. Submission of the NSW Department of Corrective Services.

## 8. Offences with statutory maximum penalties of 6 months or less, and offences for which prison sentences of 6 months or less are regularly imposed

For the purposes of this report, consideration of short prison sentences will not be restricted to those offences where there is a statutory maximum penalty of 6 months imprisonment. Such a restriction would be unhelpful considering that the vast majority of short sentences are imposed for offences where the statutory maximum is greater than 6 months.[176] A list of offences in NSW attracting a statutory maximum penalty of 6 months imprisonment or 3 months imprisonment is attached at **Annexure B**. It can be seen from Annexure B that there are in excess of 350 such offences.[177]

If short prison sentences are abolished, legislative review, similar to that undertaken in Western Australia would need to be undertaken in relation to NSW Acts. [178]

The UNSWCCL submits that if short prison sentences are abolished, the best option for offences which currently contain a maximum penalty of imprisonment of 6 months or less would be to remove the imprisonment term and retain the current fine.[179] The UNSWCCL argues that statutory maximum penalties of imprisonment should not be increased. As a matter of statutory interpretation, Judicial Officers will "steer by the maximum". Further, increasing sentences could see more people incarcerated for longer periods. The UNSWCCL argues that fines should not be increased because of the social impact that this could have.

Such review of NSW sentences may see the maximum penalty of imprisonment for some offences increased. This may depend on the perceived seriousness of the offence and frequency with which charges are brought for offence. The submission of the NSW Department of Health notes that the abolition of short sentences, particularly for offences of a violent nature, may convey a message of minimising the severity of the crime to the victim.[180] This is particularly an issue in the area of domestic violence where offenders often receive short sentences.



[176] See for example, table 4 of the Submission of the Department of Corrective Services: "*Most serious offence of the 443 inmates serving sentences of 6 months or less on 30 June 2003*". See also Sentencing Statistics from the JIRS database for the offences in NSW with a statutory maximum of 6 months imprisonment. Research by the NSW Sentencing Council shows that for the offences listed in Annexure A, a very small number of those offences had any sentence imposed in the last 5 years, and an even smaller number had a sentence of imprisonment imposed.

[177] The submission of the University of NSW Council for Civil Liberties ("UNSWCCL") similarly notes that there are over 110 pieces of legislation containing offences with a statutory maximum of 6 months or less. The Committee has chosen not to survey the vast number of persons responsible for the administration of the numerous offence provisions with statutory maximum penalties of 6 months imprisonment as to their views on the matter of abolition of short prison sentences. Apart from issues of practicality there are bound to be different views expressed including the views of those who have vested interests in their retention. The absence of JIRS or other statistics in relation to offence commission or punishment is a neutral matter that may reveal no more than the presence of the provisions operate as deterrent in itself. The Committee believes that change should not be for the sake of "window dressing"

[178] In Western Australia, legislation has been passed, but not yet enacted, that will abolish prison sentences of 6 months or less. See the *Sentencing Legislation Amendment and Repeal Act 2003*

[179] Submission of the UNSW CCL, 3 November 2003

[180] Submission of the NSW Department of Health, 3 December 2003

Similarly, the Social Justice Committee of the Conference of Leaders of Religious Institutes ("*CLRI (NSW)*") opposes the abolition of short prison sentences for violence offences.[181] CLRI (NSW) further expresses concern at the lack of counselling and support services within prisons to help with the rehabilitation of violent offenders.

The submission of the ODPP recognises that if short prison sentences are abolished, not only would a careful review be required for all offences carrying a statutory penalty of 6 months imprisonment or less, but also for offences which currently carry a maximum penalty of 12 months imprisonment. This would be necessary to retain a degree of proportionality between the sentence level for offences presently carrying a maximum of 6 months imprisonment and offences with higher penalties. This is because if the sentences for offences carrying a maximum penalty of 6 months imprisonment were to be varied (whether upwards or changed to a non-custodial penalty) issues of parity would arise between these offences and those which presently carry a maximum penalty of 12 months imprisonment. In the Western Australian context, Dr Morgan notes that the offences with the enhanced maxima are the offences that in practice, have been most likely to attract sentences of imprisonment. Dr Morgan further notes that enhancing the maxima is not a neutral exercise, but is an indication that Parliament intends the offence to be dealt with more severely, and Court's sentencing practices are expected to reflect such changes.[182]



In considering short prison sentences, a question arises concerning a situation where, due to concurrency, accumulation or a previous offence, the overall sentence on the offender is greater than 6 months. As noted in the submission of the Office of the Public Defender, the Western Australian legislation provides an exception in such circumstances.[183]

A question arises as to whether an exception should be made for prison sentences of 6 months or less where the final sentence is greater than 6 months. This situation may arise where short sentences are to be served concurrently with a longer sentence, or where a number of short sentences are accumulated in a way that the final sentence is for a period of greater than 6 months.



A situation also arises where an offender is already serving a longer term of imprisonment and commits a crime warranting a short cumulative sentence. The Office of the Public Defender submits that if short prison sentences were to be abolished, an exception should be made in such circumstances.[184] Abolition of short prison sentences would otherwise leave no practical means of punishment in such cases. The submission of the NSW Young Lawyers Criminal Law Committee notes that such a situation arises quite regularly, and argues that a short fixed sentence is appropriate in such a situation.[185]

Another situation is where a person is serving a sentence of imprisonment when some old warrants are discovered. The NSW Legal Aid Commission ("NSW LAC") submits that if short prison sentences were to be abolished, an exception should be made in these circumstances: "*Given the person's custodial sentence, non-custodial options are neither appropriate nor practical. In such circumstances, a sentence of imprisonment of 6 months or*

[181] Submission of the CLRI (NSW), 3 November 2003
[182] Dr. Morgan (2004) "*The Abolition of Six Month Sentences, New Hybrid orders and Truth in Sentencing: Western Australia's Latest Sentencing Laws*" Criminal Law Journal v.28 no.1 Feb 2004 p8-25
[183] See section 86 of the *Sentencing Act 1995* (WA)
[184] Submission of the Office of the Public Defender, 12 November 2003
[185] Submission of the NSW Young Lawyers Criminal Law Committee, 17 September 2003

*less may not affect or have very little effect on their release date. It would be inappropriate to deny courts and offenders the availability of this practical and effective option.*"[186]

Yet another situation where an exception should be considered is where a person has already been in custody and bail refused. This will be discussed further below.

**Question:** If short prison sentences are abolished, should there be exceptions? Possible exceptions are:

- offences involving violence,
- short sentences for offenders who refuse or can't be trusted to comply with the terms of a non-custodial order,
- short sentences to be served cumulative with a larger head sentence,
- a sentence to "the rising of the Court",
- short sentences cumulated so that the final sentence is greater than 6 months and
- short sentences imposed for offences committed whilst already serving a longer sentence.



[186] Submission of the NSW Legal Aid Commission, 13 October 2003.

## 9. Overview of Sentencing Options in NSW

Both at common law and by statute, imprisonment is a sentencing option of last resort in NSW.[187] The main sentencing options in NSW (other than full-time imprisonment) are briefly outlined below. It must be remembered that many of these sentencing options are not uniformly available throughout the state. In addition to these sentencing options there are a number of diversionary options such as the Drug Court pilot, the Magistrates Early Referral Into Treatment ("MERIT") program, and the Circle Sentencing pilot. Many of these diversionary schemes are only in the pilot stage, are also not available uniformly throughout the state, and there are often doubts as to whether funding will continue.[188] Some of these schemes have proved to be quite successful, and where appropriate consideration should be given to their expansion.

**Home Detention:** A court that has sentenced a person to imprisonment for not more than 18 months may order that the sentence be served by way of home detention, [189] except in the case of some offences.[190]



**Periodic Detention:** A court that has sentenced a person to imprisonment for not more than 3 years may order that the sentence be served by way of periodic detention.[191] The utilisation of periodic detention as a sentencing option over recent years has declined.[192] The submission of the Office of the DPP argues that the restriction that periodic detention not be imposed on an offender who has previously served a period of imprisonment of 6 months by way of full-time custody[193] may prevent periodic detention from being ordered in some appropriate situations. It also discriminates against those previously sentenced to imprisonment simply because a suitable non-custodial option was not available.[194]

**Suspended sentences**: Suspended sentences were re-introduced as a sentencing option in 2000.[195] An important matter of administration is that breach of a suspended sentence is dealt with by the Court rather than by the parole board, and there is presently little flexibility as to what may be done in consequence of a breach.[196] Partially suspended prison sentences were removed as a sentencing option on 8 July 2003 as it was considered that they were difficult to administer.[197]



[187] *Parker v. DPP* (1992) 28 NSWLR 282; s 5(1) *Crimes (Sentencing Procedure) Act 1999*
[188] This is acknowledged in the joint submission of the NSW Police and the Ministry for Police. The submission suggests that this project raises an opportunity for those that have proved successful to be implemented on a more organised basis.
[189] Section 7 *Crimes (Sentencing Procedure) Act 1999*. Home detention generally is provided for by Part 6 of the *Crimes (Sentencing Procedure) Act 1999* and Part 4 of the *Crimes (Administration of Sentences) Act 1999*
[190] Section 76 of the *Crimes (sentencing Procedure) Act 1999*
[191] Section 6, *Crimes (Sentencing Procedure) Act 1999*. Periodic detention generally is outlined in Part 3 of the *Crimes (Administration of Sentences) Act 1999* and Part 5 of the *Crimes (Sentencing Procedure) Act 1999*.
[192] As at 10 August 2003, 769 persons were subject to a periodic detention order, of which 577 were attending.
[193] Section 65A, *Crimes (Sentencing Procedure) Act 1999*
[194] This concern was also raised in the submission of the NSW Young Lawyers Criminal Law Committee, and the submission of the NSW Law Society.
[195] Section 12 of the *Crimes (Sentencing Procedure) Act 1999*.
[196] See ss 98(3) and 99(1) of the *Crimes (Sentencing Procedure) Act 1999*
[197] *Crimes Legislation Amendment Act 2003*, assented to on 8 July 2003, Schedule 6 commenced on the same day.

**Community Service Order:** The maximum number of hours of community service that a court may impose for any one offence is 500 hours,[198] and a community service order cannot be made unless the court is satisfied that the offender is suitable.[199] The court may refer the offender for an assessment.

**Good Behaviour Bond (ss9 and 10):** A "section 9" bond provides that following a conviction, the Court may direct the offender to enter into a good behaviour bond.[200] With a "section 10" bond, the court may, after a finding of guilt, not proceed to a conviction but conditionally discharge the offender by directing that he or she enter into a good behaviour bond. A good behaviour bond is required when a suspended sentence is imposed, and may also be imposed where sentencing is deferred for rehabilitation, participation in an intervention program or other purposes. Breaches are dealt with by the Court.[201]

**Fines:** Division 4 Part 2 of the *Crimes (Sentencing Procedure) Act 1999* details the imposition of fines. The *Fines Act 1996* also applies. The value of one penalty unit is prescribed and at present is $110.[202] Fines may be accumulated, but the court must consider the offender's financial means.[203]



**Non-Association and Place Restriction Orders:** Non-association and/or place restriction orders may only be imposed on sentencing for any offence that carries a maximum penalty of 6 months imprisonment or greater.[204] Orders are made *in addition to* any other sanction imposed, and an order may not be made where the only other penalty imposed is a "section 10 bond" or a deferral of sentencing for rehabilitation and other purposes, as provided by section 11 of the *Crimes (Sentencing Procedure) Act 1999.*

**Rising of the Court:** A sentence "to the rising of the court" entails the court discharging the accused and releasing him/her from the custody of the court, notwithstanding that there was a finding of guilt. Nevertheless, a question arises as to whether, if prison sentences of 6 months or less were to be abolished, an exception should be made for a sentence of imprisonment "to the rising of the court".[205]



**Question:** Should the restriction that an offender may not be sentenced to periodic detention if he or she has previously served a full-time prison sentence of 6 months or less (contained in section 65A) be removed?

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[198] S 8, *Crimes (Sentencing Procedure) Act 1999*. Community Service Orders are provided for generally by Part 7 of the *Crimes (Sentencing Procedure) Act 1999* and Part 5 of the *Crimes (Administration of Sentences) Act 1999*.
[199] S 86, *Crimes (Sentencing Procedure) Act 1999*
[200] Section 9 of the *Crimes (Sentencing Procedure) Act* 1999
[201] Sections 98 and 99, *Crimes (Sentencing Procedure) Act 1999*
[202] by section 17, *Crimes (Sentencing Procedure) Act 1999*
[203] section 6 of the *Fines Act 1996*
[204] Section 17A of the *Crimes (Sentencing Procedure) Act 1999*.
[205] The Department of Corrective Services submits that if prison sentences of 6 months or less were to be abolished, an exception should be made for sentence to the rising of the Court, which is effectively a prison sentence of less than 6 months.

## 10. Relationship between full-time imprisonment, periodic detention, home detention, and suspended sentences

The decision to impose a sentence of periodic detention, home detention or a suspended sentence may not be made until a decision has first been made that the offender should be sentenced to a term of imprisonment, and the Court is satisfied that no other penalty would be appropriate. Once the sentencing Judge has considered what term of imprisonment is appropriate, consideration of the way that the sentence may be served arises.[206] In this way, there is a nexus between a sentence of "full time" imprisonment and a sentence of imprisonment to be suspended, served by way of periodic detention or home detention.[207] If the option of a short prison sentence is qualified or removed, this will have flow on effects for the alternatives and their capacity to be utilised in the case of offenders who would otherwise have been sentenced to a short prison sentence. The appropriateness of alternatives to full-time custody depend on a number of factors, including whether the end sentence reflects the objective seriousness of the offence.[208]



Breaches of alternatives to "full time" imprisonment are dealt with in different ways, with no seemingly consistent principles underlying such differences. Breaches of a home detention order or a periodic detention order are dealt with by the Parole Board.[209] In contrast, breach of a suspended sentence is dealt with by the Court. Where a breach of the good behaviour bond accompanying the suspended sentence occurs, the court must revoke the order, unless it is satisfied that the offender's failure to comply was trivial in nature, or that there are good reasons for excusing the breach.[210] When the court revokes the good behaviour bond accompanying the suspended sentence, the order suspending the sentence ceases to have effect, and the sentence takes effect.[211]

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[206] If the term does not exceed 3 years, the option of periodic detention is available: section 6 of the *Crimes (Sentencing Procedure) Act 1999*. If the term does not exceed 18 months, the option of home detention is available: section 7 of the same *Act*. If the term does not exceed 2 years, the option of a suspended sentence is available: section 12 of the same *Act*. See R v. Zamagias[2002] NSWCCA 17 at [25], and *R v. JCE* (2000) 120 A Crim R 18



[207] As has recently been explainedin *R v. Zamagias*, [2002] NSWCCA 17 per Howie J (with Levine J and Hodgson JA concurring) the preliminary question is whether there are any alternatives to the imposition of a term of imprisonment. Section 5 of the Act prohibits a court from imposing a sentence of imprisonment unless the court is satisfied, having considered all possible alternatives, that no other penalty other than imprisonment is appropriate. The next step is to consider what the term of the sentence of imprisonment should be. Only then can consideration given to whether the sentence of imprisonment could be suspended or served by way of home or periodic detention.

[208] As noted in the submission of the NSW Bar Association. See *R v. Jurisic* (1998) 45 NSWLR 209 at 249.

[209] Where an offender breaches a periodic detention order, it may be revoked by the Parole Board, and the person may be taken into custody to serve the remainder of the sentence of imprisonment. The Parole Board may in some circumstances, make an order directing that the offender serve the remainder of the sentence by way of home detention. See Division 1, Part 7 of the *Crimes (Administration of Sentences) Act 1999*. In the case of Home Detention the Parole Board may conduct an inquiry into breaches of conditions: Ss 166 and 182 of the *Crimes (Administration of Sentence) Act 1999* and the Parole Board may revoke a home detention order if it is satisfied that the offender has failed to comply with their obligations under the order, the offender has failed to appear before the Parole Board when called upon to do so, if the offender has applied for the order to be revoked, or if a person with whom the offender resides during the period of home detention has withdrawn his or her consent to the continued operation of the home detention order. A person whose home detention order has been revoked is taken into custody to serve the remainder of the sentence of imprisonment. See Division 2, Part 7 of the *Crimes (Administration of Sentence) Act 1999*

[210] Section 98(3), *Crimes (Administration of Sentences) Act 1999*

[211] Section 99(1)(c) of the *Crimes (Administration of Sentences) Act 1999*. Part 4 ("sentencing procedures for imprisonment") applies to the sentence except to the extent to which it has already applied in relation to setting

If short sentences were to be abolished, a question arises as to whether this should be restricted to sentences of full-time imprisonment, or should also extend to suspended prison sentences, prison sentences served by way of periodic detention and prison sentences served by way of home detention. A related question arises as to how an offender should be dealt with when appearing before the court for refusing to comply with an alternative to a "full time" prison sentence or some other court order.

The submission of the DCS considers that the nexus should remain and that abolition of short prison sentences should extend to those to be suspended or served by way of periodic or home detention. Otherwise, the diversionary nature of the alternatives to full time imprisonment would be undermined.[212]

The DCS does however argue that if short prison sentences are to be abolished, the Probation and Parole Service should continue to be able to impose full-time prison for the balance of the order, even if less than 6 months, in appropriate circumstances, upon breach of a home detention or periodic detention order. The Department is of the opinion that this is necessary to ensure that offenders incur a real penalty for breaching such orders.



The submission of the Office of the Public Defender suggests that if short sentences are abolished, the nexus between full-time imprisonment and home detention, periodic detention and suspended sentences should be broken.[213] That is, a decision to order home detention, periodic detention or a suspended sentence should not be preceded by a decision that no penalty other than imprisonment is appropriate. The submission reads:

> "*If the same sequential process of reasoning is to be retained, the first step would need to be a consideration whether no penalty other than imprisonment for more than 6 months is required. It would also be necessary, in cases which otherwise would have warranted a short sentence, to permit a Judge or Magistrate to reason directly to a conclusion that there be imprisonment to be served by way of periodic or home detention, or that there be a suspended sentence.*"



On the other hand, it may be argued that breaking the nexus between full-time imprisonment and the alternative forms of imprisonment sentence would result in "net widening", that is, people who should appropriately be dealt with by a less severe community sentence would instead be sentenced to home detention, periodic detention or a suspended sentence. Brignell and Poletti have recently examined whether there has been any net widening in NSW since the re-introduction of suspended sentences, and have found that despite the nexus between a sentence of imprisonment and a suspended sentence of imprisonment, there is some suggestion that net widening has occurred.[214] They state:

> "*Despite the fact that the legislation requires suspended sentences to be strictly imposed as an alternative to full-time custody, the statistics tend to suggest that courts sometimes impose suspended sentences in place of less severe penalties, such as*

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the non-parole period and the balance of the term of the sentence, and subject to the requirements of Part 4 having been complied with, the sentence takes effect.

[212] Submission of the Department of Corrective Services, 22 September 2003.

[213] Submission of the Office of the Public Defender, 12 November 2003.

[214] Brignell G and Poletti P (2003) "*Sentencing Trends & Issues 29: Suspended Sentences in NSW*" Sydney: Judicial Commission of NSW

*community service orders and good behaviour bonds. As such, there is little evidence to date to indicate that suspended sentences have contributed to any real reduction in the prison population. In fact, over the period studied, there was a slight increase in the use of full-time custody in the higher courts and a reduction in community service orders and bonds.* "

The increase in the use of full time imprisonment has occurred despite the introduction of suspended sentences in 2000.[215]

The majority of the Committee is presently of the view that consideration of abolishing short prison sentences should be restricted to "full time" short prison sentences. If such "full time" short prison sentences were to be abolished, it is suggested that such should be replaced with suspended sentences, or home/periodic detention.

**Question:** Should abolition of short sentences be restricted to those to be served by way of "full-time imprisonment"?



**Question:** There is a "nexus" between "full time" imprisonment, and imprisonment that is suspended, or served by way of periodic or home detention in that the latter three options cannot be considered until it is decided that no sentence other than imprisonment would be appropriate. If the nexus between full-time imprisonment and suspension, periodic detention and home detention were to be broken, would there be a serious risk of "net widening"? What could be done to mitigate this risk?

**Question:** If short sentences are abolished, what should happen when an offender who has been sentenced to periodic detention, home detention or a suspended sentence breaches the terms of the sentence and there is less than 6 months left of the sentence to be served? If "full-time" short prison sentences are abolished, should there be an exception where a non-custodial sanction is breached?



[215] Section 12 of the *Crimes (Sentencing Procedure) Act 1999*

## 11. Uneven distribution of Sentencing Options in NSW

The intention to abolish prison sentences of 6 months or less pre-supposes that such prison sentences would be replaced by alternatives to full-time custody. The fact that many alternatives to full-time custody are not available uniformly throughout NSW is a matter of great concern and particularly relevant. The Committee considers the emphasis should be on making existing sentencing options uniformly available throughout NSW rather than introducing new sentencing options.

Sentencing options other than full-time imprisonment are not available uniformly throughout NSW. In some regions, options are quite limited due to a lack of resources. Periodic detention and home detention are not available in a number of regional areas, and supervision of community service orders is theoretically available in most, but not all areas.[216]

BOCSAR has provided data on the percentage of sentences of six months or less issued by each Local Court as a proportion of all penalties imposed by that Court (see Annexure G). On the whole, where alternative sentencing options (such as periodic detention or home detention) are available, there are lower percentages of prison sentences of six months or less being issued. Naturally, consideration needs to be given to other factors that may influence the imposition of a prison sentences such as the nature of the offence or the prior criminal history of offenders. Assessed though on a purely geographical basis, on the whole, where alternative sentencing options *are* available, there is a *lower* percentage of short prison sentences. The Sydney, Hunter, Illawarra, Richmond-Tweed, Central West, Murrumbidgee, South Eastern and Murray Statistical Divisions provide examples of this. The average percentage of short sentences as a proportion of all penalties imposed by the Courts in those divisions are low (around 5%).[217] The reverse is also true – in the areas where sentencing options such as periodic detention or home detention are *not* available, there are *higher* percentages of short prison sentences being issued by the Courts in that area. The Northern, North Western and Far West Statistical Divisions provide an example of this (percentages ranging from an average of 5.9% in the North Western Statistical Division to 8.7% in the Far West region).[218] In these divisions the distances between towns and the closest periodic detention centre are in excess of 500km. The exception to the above is the Mid-North Coast Statistical Division which whilst relatively close to detention facilities in Tomago, Tamworth and Grafton, statistics indicate a relatively high percentage (6.8%) of short prison sentences being imposed.



The approach to be taken on sentencing where a certain option is not available was considered in *R v. Atkins*.[219] In that case, the respondent could not serve her sentence by way of periodic detention due to geographic factors. A pre-sentence report assessed the respondent as suitable for periodic detention or a community service order. The sentencing judge seemed to approach the matter on the basis that because periodic detention and home detention were not available, then it was appropriate to consider a community service order.

[216] See Annexure E.
[217] See Annexure G
[218] See Annexure G
[219] NSW CCA, 3 November 1998. Abadee J held that it was erroneous to consider a community service order in circumstances where home detention was not available due to geographic factors.

The NSW Court of Criminal Appeal held that the approach taken by the sentencing judge was erroneous.[220]

The Council has received a number of submissions and the non-availability of sentencing options throughout NSW is repeatedly raised as a matter of concern.

The submission of a NSW Magistrate with extensive first hand experience in sentencing in rural areas raises a concern regarding the lack of sentencing options in some areas:

> "*In the rural areas in which I have sat for about nineteen years, there is a shortage of the full range of sentencing options. I currently sit at Ballina, Byron Bay, Grafton and Maclean and have previously sat at a number of courts on the northern tablelands and on the north-west slopes and plains. Periodic detention is available for men who live at Grafton (or who can get there) but there is no periodic detention for women and no home detention for men or women. The range of sentencing options in many rural areas is limited (particularly when compared to the range of sentencing options available in metropolitan courts) and any further reduction would, in my opinion, be a retrograde step.*"[221]



The submission of the NSW Chief Magistrate expresses a similar concern regarding the unavailability of sentencing options.[222]

The submission of the NSW Bar Association expresses a specific concern regarding offenders being disqualified from alternatives to full-time prison throughout the state. Such disqualification may be due to the unavailability of options in certain areas.[223] The Bar Association submits that if short prison sentences are abolished, then full time custodial sentences of more than 6 months will be imposed inappropriately. Also, the submission of the NSW LAC expresses concern at the lack of available sentencing options in some areas:



> "*The abolition of sentences of imprisonment of 6 months or less must be accompanied by the availability of other appropriate sentencing options. It thus follows that this proposal* ***could not fairly be introduced*** *unless viable sentencing options were uniformly available across the state*". (Emphasis added).[224]

As noted in the submission of the Office of the Public Defender, if prison sentences of 6 months or less are abolished, there is a fundamental matter of equality before the law, as well as the great concern that in areas where alternatives to full-time imprisonment are limited, there will be a great temptation to impose longer periods of imprisonment instead.[225] That is, "bracket creep" will occur. The Law Society of NSW also raises as a matter of concern the

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[220] The court held that even if periodic detention had been available, it would not have been appropriate in the present case. Ultimately, the court held that despite the sentence being manifestly inadequate, it would not intervene and allow the appeal, amongst other things, because of the fact that Atkins had been sentenced to a community service order, which at the time of the appeal had been wholly served.

[221] Submission of a NSW Magistrate, 13 August 2003

[222] See submission of the NSW Chief Magistrate, 23 February 2004, and address by the Chief Magistrate to the NSW Sentencing Council, 16 July 2003.

[223] Submission of the NSW Bar Association, 11 September, 2003.

[224] Submission of the NSW Legal Aid Commission, 13 October 2003.

[225] Submission of the Office of the Public Defender, 12 November 2003.

inequitable spread of sentencing options and intervention initiatives particularly outside metropolitan areas.[226]

Provision of such alternatives to full-time imprisonment uniformly throughout the state will obviously have funding implications, but the importance of the provision of such alternatives throughout the state is an issue raised in a number of submissions, and is considered a matter of great importance. As stated in the submission of the Office of the Public Defender:

> "*Whatever be the outcome of the proposal to abolish short sentences, it is submitted that the equitable availability of all sentencing options throughout the State is a matter that requires urgent attention. Even if short sentences are not abolished, the greater availability of alternatives should serve, to some extent, to reduce the rate at which such sentences are imposed.*"[227]

It may be that provision of sentencing alternatives uniformly throughout NSW would result in substantially fewer offenders being sentenced to prison sentences of 6 months or less.



The DCS has submitted that it would not be economically feasible to provide, for example, periodic detention facilities across the whole of the state, but as regards to home detention, the Departments notes that subject to funding, this option could be expanded to remaining population centres throughout NSW.[228]

The DCS has provided details of "availability" of various sentencing options including supervision for home detention according to court location (see Annexure E). [229] The Department notes that in fringe areas, it will be extremely difficult if not impossible to provide the level of direct personal supervision which home detention entails.

The Department also notes that the availability of periodic detention is not only influenced by the location of periodic detention centres, but also depends on the ability of an individual offender to travel to the periodic detention centre in question. The Department notes:



> "*Depending on individual circumstances and individual motivation, many offenders living in areas located many kilometres from a periodic detention centre do in fact attend periodic detention."*

On the other hand, an individual offender may not have the means of travelling to a periodic detention centre, despite it being "available" in the area in question. This particularly applies in the Far West area, where there is little public transport, and vast distances to be covered. It is noted that the distance between Bathurst and Broken Hill is slightly less than 1000 kilometres, Tamworth to Walgett is 370 kilometres and a further 200 kilometres from Walgett to Bourke. There is no public transport between these centres.

Questions have been raised regarding the "availability" of certain sentencing options. In relation to periodic detention, the "availability" of periodic detention throughout the state is questioned. The submission of the NSW Chief Magistrate notes that whilst it may be the case that in some instances an offender travels many kilometres to attend periodic detention, the

[226] Submission of the NSW Law Society, 17 September, 2003.
[227] Submission of the Office of the Public Defender, 12 November 2003.
[228] Submission of the Department of Corrective Services, 22 September 2003.
[229] Based on the Australian Standard Geographical Classification (ASGC)

assertion that this happens in "*many cases*" is questioned.[230] Instead, the NSW Chief Magistrate notes that a pre-sentence report will usually simply state that periodic detention is unavailable without referring to the possibility of an offender travelling many kilometres to attend a periodic detention centre. Further, the NSW Chief Magistrate notes that many offenders are obtained are charged with driving offences, and do not have a licence. The availability of public or other suitable transport then becomes an important issue.

It is understood that community service orders may not be widely used in some regional areas, as there is limited community service order work and corresponding supervision available. The DCS advises that community based sentencing options are available throughout the state, but such community service order places are limited in some remote areas. [231] The Department further advises that in recent times there has been an increasing difficulty in retaining suitable work agencies.

A submission of the NSW Chief Magistrate expresses concern regarding a lack of available work for community service orders, and notes that "*a lack of available work is more frequently being reported in pre-sentence reports and is of concern.*"[232] The NSW Chief Magistrate further notes that lack of transport to access community service agencies in remote locations is another limiting factor.



In relation to supervision of good behaviour bonds, the DCS reports "*currently supervision and community service options are available in **most areas**. However, some difficulties are experienced due to limited resources, particularly in remote locations.*" (Emphasis added.)[233]

It is understood that provision of sentencing alternatives uniformly throughout NSW would require vastly increased resources. A pragmatic approach may be to expand certain sentencing alternatives strategically into rural areas. To this end, it is noted that the recommendations 21 and 22 of the Report of the Legislative Council's Select Committee into the Increase in Prisoner Population recommend that the NSW Government should give priority to funding expansion of home detention on a strategic basis into rural areas as an alternative to full-time custody, and that the DCS should initiate a pilot program to expand the use of home detention by indigenous offenders in rural NSW. The Committee is of the view that consideration could be given to resourcing such a program.



**Question:** Some have expressed a concern that if short sentences were abolished, some courts may react by imposing longer sentences on those who would previously have received a short sentence. This is referred to as "bracket creep". What can be done to allay the concern that if short prison sentences are abolished, some offenders will be inappropriately sentenced to a longer period of imprisonment?

**Question:** The intention to abolish prison sentences of 6 months or less pre-supposes that such prison sentences would be replaced by alternatives to full-time custody. The fact that many alternatives to full-time custody are not available uniformly throughout NSW is a matter of great concern. Would the provision of sentencing alternatives uniformly throughout the state achieve a reduction in the prison population, but without the risk of "bracket creep"?

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[230] Submission of the NSW Chief Magistrate, 23 February 2004.
[231] Letter from Commissioner R. Woodham to the Council's Chairperson dated 2 February 2004.
[232] Submission of the NSW Chief Magistrate, 23 February 2004.
[233] Letter from Commissioner R. Woodham to the Council's Chairperson dated 2 February 2004

## 12. Section 5 Crimes (Sentencing Procedure) Act 1999

Section 5(1) of the *Crimes (Sentencing Procedure) Act 1999* provides that 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.[234]

Section 5(2) provides that a court that sentences an offender to imprisonment for 6 months or less must make a record of its reasons for doing so, including reasons why no penalty other than imprisonment is appropriate.[235] Section 5(2) provides:

> *(2) A court that sentences an offender to imprisonment for 6 months or less must indicate to the offender, and make a record of, its reasons for doing so, including:*
> *(a) its reasons for deciding that no penalty other than imprisonment is appropriate, and*
> *(b) its reasons for deciding not to make an order allowing the offender to participate in an intervention program or other program for treatment or rehabilitation (if the offender has not previously participated in such a program in respect of the offence for which the court is sentencing the offender).*



As discussed above, section 5(2) was introduced after the NSWLRC considered abolishing short prison sentences. The NSWLRC instead recommended that courts should provide reasons for any decision to impose a short sentence, hoping that this might encourage courts to use imprisonment more appropriately.[236]

The NSW Chief Magistrate of the Local Court has submitted that section 5(2) is ineffectual in limiting the use of short prison sentences, as the section does no more in real terms than require the sentencing court to provide reasons for imposing a short prison sentence:



> "*A court is required absent statutory obligation as a matter of procedural fairness, to provide reasons for any sentence which it might impose and terms of imprisonment are not to be imposed unless the court has considered all possible alternatives to section 5(1) Crimes (Sentencing Procedure) Act 1999. In reality, section 5(2) does not provide additional obligations on a sentencing court.*"

The NSW Chief Magistrates submissions are most relevant bearing in mind that the vast majority of short prison sentences are imposed in the Local Court.

In contrast, it may be that section 5(2) has been effective in requiring sentencers to turn their minds to the question of whether a short prison sentence is appropriate. As noted above, there has recently been a ***downward trend*** in the number of offenders serving prison sentences of 6 months or less.[237] This is in contrast to the increase in the overall prison population. It is

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[234] It must be remembered that the decision whether to impose periodic detention, home detention or a suspended sentence does not arise until this preliminary question has been answered. See *JCE* (2000) 120 A Crim R 18

[235] These reasons are not considered on appeal to the District Court.

[236] See NSWLRC (1996) "*Discussion Paper 33: Sentencing*" at 3.33 and "*Report 79: Sentencing*" at 8.2 – 8.7. Aside from section 5(2) there is the common law principle that imprisonment is a sanction of last resort. For example, see *Parker v DPP* (1992) 28 NSWLR 282

[237] See Table 2, Annexure A, provided by the Department of Corrective Services.

unclear whether such trend may be attributable to the introduction of section 5(2). It should be the case that the section has been complied with, but there is a concern that it may have become an "empty incantation".[238] To date, there has not been a review of the effect of section 5(2) of the *Crimes (Sentencing Procedure) Act 1999* on the imposition of short prison sentences. It is suggested that such a study be conducted prior to any move to abolish short prison sentences, and such study may involve a review of the reasons given for the imposition of a short prison sentence, which are required to be given and recorded under section 5(2). A review of section 5(2) may find that short prison sentences are being imposed in appropriate situations, or may reveal a specific concern in the way that they are being used, which may allow for section 5 to be tightened and refined without the need to abolish short prison sentences.

The submission of the NSW LAC acknowledges that there are many purposes of sentencing that pull in different directions, but further notes that "*it is undeniable that there are offenders and offences whose circumstances may warrant the imposition of a short sentence.*"[239] Rather than denying the Judiciary the option of a short prison sentence, the NSW LAC suggests that section 5 could be tightened, without removing the option of a prison sentence of 6 months or less altogether.



It has been suggested in one submission that section 5 of the *Crimes (Sentencing Procedure) Act 1999* may be amended to provide statutory guidelines for imposing prison sentences of 6 months or less, giving greater meaning to the principle that imprisonment should be used as a sanction of last resort whilst retaining some amount of judicial discretion and flexibility. [240] Any abolition of short prison sentences would involve substantial amendment to section 5 along with a substantial expansion of community based alternatives to meet the demand for alternative measures. A suggested amendment to section 5 is attached at Annexure F. This suggested amendment is designed to stop some offenders from entering gaol for a period of 6 months or less, whilst allowing prison sentences of 6 months or less for those who cannot be trusted to comply with alternative sentencing options.[241]



**12.1 Automatic Suspension of Prison Sentences of 6 months or less**

Another suggested amendment of section 5 might provide that a sentence of imprisonment for 6 months or less is to be automatically suspended, and that the offender may be returned to prison on breach of the bond accompanying the suspended sentence. This would remove fixed prison sentences of 6 months or less whilst providing a threat of reinstatement if the bond is breached. A suggested amendment is included in Annexure F.

Related to this suggestion is consideration of re-introducing a power to partially suspend a prison sentence. As noted above, the option of a partially suspended sentence was abolished in NSW on 8 July 2003.[242] It could be argued that in relation to short prison sentences, such

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[238] Submission of the Office of the Public Defender, 12 November 2003.
[239] Submission of the NSW Legal Aid Commission, 13 October 2003.
[240] Personal submission of Mr Ivan Potas. Mr Potas' submission does not necessarily represent the views of the Judicial Commission of NSW.
[241] However, it must be remembered that the vast majority of offenders sentenced to short prison sentences are not first time offenders. See above. 95.5% of those serving a short sentence on 30 June 2003 had a prior record, and 69.3% had previously served a sentence of imprisonment.
[242] *Crimes Legislation Amendment Act 2003*, assented to on 8 July 2003, Schedule 6 commenced on the same day.

partially suspended sentences allow for a period of supervision on release, which is currently precluded.[243]

In considering automatic suspension or partial suspension of short prison sentences, the reasons for the recent move to abolish partially suspended sentences must be considered, namely that they are difficult to administer and partial suspension of the initial period may cause hardship to the offender.[244]

It is suggested that partial suspension of the latter half of the sentence would not "*cause considerable hardship to the offender*", and would bring NSW into line with Federal sentencing law.[245]

The submission of the ODPP suggests that an option for consideration is that prison sentences of less than 6 months be automatically suspended, other than in exceptional circumstances:

> "*The conditions could include being of good behaviour for a period exceeding the original sentence. (This would require legislative change and additional resources for Probation and Parole.) During the term of the suspended sentence and at the conclusion of it the court could receive reports as to the offender's progress.*"[246]



Care would have to be taken to ensure that any power of suspension is used appropriately, and not used to increase the length of the sentence. This would perhaps be a matter for judicial education.

The Committee assisting the Council raised concerns regarding automatic suspension of prison sentences of 6 months or less. In considering automatic full or partial suspension of prison sentences of 6 months or less, it is important to remember that at present, breach of a suspended sentence is dealt with by the Court rather than by the Parole Board, and there is little flexibility as to what the Court may do in consequence of a breach of a suspended sentence.[247] Unless the breach is trivial, the sentence takes effect. The Court may however, order that it be served by way of periodic or home detention. Another concern is the need to clarify the criteria as to when it is appropriate to suspend a sentence, and need to clarify the ambiguity regarding whether "street time" for a suspended sentence is to count, or whether an offender who breaches a suspended sentence on the last day could be required to serve the whole sentence in prison.



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[243] Section 46 of the *Crimes (Sentencing Procedure) Act 1999*

[244] The Hon. J. Hatzistergos MP, Minister for Justice and Minister assisting the Premier on Citizenship. Second Reading Speech to the Crimes Legislation Amendment Bill (2003), Legislative Council, 25 June 2003.

[245] By section 20(1)(b) of the *Crimes Act 1914*, an offender may serve an initial part of the sentence, followed by partial suspension. It must also be borne in mind that the judgment in *Gamgee* [2001] NSWCCA 251 contemplated partial suspension of an "*initial portion*" of the sentence or "*at the latter end of the term imposed*". It would seem that partial suspension "*at the latter end*" would not cause disruption or hardship to the offender, although it is unclear whether it would cause difficulties for sentence administration. It may be noted that under section 20(1) of the *Crimes Act 1914*, the court may order that the offender be released on entering into a recognizance for up to 5 years after serving a suspended portion. In contrast, in NSW, the suspended period may not exceed the term of the sentence and any good behaviour bond may not exceed the term of the sentence. A court may only suspend a sentence where the term is less than 2 years: *Crimes (Sentencing Procedure) Act 1999*. The suspended sentence conditions may perhaps inhibit use of this option in the Local Court.

[246] Submission of the ODPP, 11 September 2003.

[247] See ss 98(3) and 99(1) of the *Crimes (Sentencing Procedure) Act 1999*

**Question:** Falling short of abolishing short prison sentences, should statutory guidelines restricting the use of such sentences be introduced?

**Question:** Falling short of abolishing short prison sentences, could short prison sentences be automatically suspended (fully or in part)?

**Question:** Should there be a wider discretion to the Court in addressing a breach of a suspended sentence?

## 13. Section 46 and rehabilitation for prisoners serving sentences of 6 months or less

Section 46 of the *Crimes (Sentencing Procedure) Act 1999* provides that: "*A court may not set a non-parole period for a sentence of imprisonment if the term of the sentence is 6 months or less.*" If prison sentences of 6 months or less were to be abolished, section 46 would obviously have no relevance.[248]

The section has implications for the rehabilitation of offenders serving prison sentences of 6 months or less and precludes post-release supervision. The section would suggest that rehabilitation for such offenders is not regarded by the legislature as being of practical significance. Some practitioners have suggested that despite section 46, there may be ways of structuring sentences to ensure that an offender receives post-release supervision at the conclusion of a short prison sentence. For example, where an offender is being sentenced on a number of charges, a short prison sentence may be imposed in relation to one, and a lengthy good behaviour bond in relation to another. Also, it may be that a sentence of greater than 6 months is imposed with a non-parole period of 6 months in order to ensure that an offender received a period of post release supervision after serving a period of 6 months in custody.[249] Further, prior to their abolition, it is understood that partially suspended sentences were used to provide a short period in custody followed by a period of post-release supervision.



Post release supervision is identified as a most important issue in the submission of the Office of the Public Defender.[250] The Office of the Public Defender submits that a short sentence without post-release supervision may exacerbate family and community issues which are often related to offending behaviour. The submission suggests that transitional centres may be used as a way of re-integrating such offenders.[251] There seems to be a clear link between some community issues and being returned to prison, and a period of supervision on release could resolve some of these community issues.[252]



Some question whether short prison sentences serve any rehabilitative purpose, while others would argue that much can be done to address offending behaviour and underlying issues during a 6 month period in custody. Some type of intervention during this short period is particularly important bearing in mind that under section 46, offenders serving prison sentences of 6 months or less receive no post release supervision.

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[248] As noted in the submission of the NSW CCL, the current prohibition of setting a non-parole period for prison sentences of 6 months or less in section 46 should be repealed if prison sentences of 6 months or less are prohibited.

[249] It must be remembered that inflating a sentence in order that the offender receive a period of supervision on release would breach the principle of proportionality, and should not be encouraged. In contrast, by section 44, where the sentence is greater than 6 months, the balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence, unless the court decides that there are special circumstances for it being more (in which case the court must make a record of its reasons for that decision).

[250] Submission of the Office of the Public Defender, 12 November 2003.

[251] The Select Committee also acknowledges the detrimental effect of the lack of supervision for offenders on being released after serving a short prison sentence, noting that the offender's return to the community can be difficult and increase the risk of re-offending: Legislative Council Select Committee on the increase in prisoner population (2001) "Final Report." Sydney: NSW Parliament, at 6.139-6.140 and 7.27

[252] See Dr E. Baldry, Dr D. McDonnell Mr P. Maplestone and Mr M. Peeters (2003) "Ex prisoners and accommodation: What bearing do different forms of housing have on social reintegration?" Sydney: Australian Housing and Urban Research Institute. This study showed a significant association between returning to prison and not having accommodation support, or for those with support, the support being assessed as unhelpful.

It has been suggested that if short prison sentences are retained, prison programs should be designed to address the needs of short term prisoners. The submission of the Aboriginal Justice Advisory Council (AJAC) notes that many of the prison programs available are designed for offenders serving longer sentences and that anecdotal information from Aboriginal inmates is that they do not apply for training or educational courses when serving short prison sentences, as they often are not in prison long enough to complete the course.[253]

The DCS also recognises that the opportunities for short term prisoners to participate in programs is hindered by the transfer of prisoners between prisons, which often occurs towards the beginning of their sentence. The Department has recently recommended that programs be streamlined and broken into workable modules, which can be completed within the custodial setting and in the community (and perhaps continued if the offender is transferred between prisons). It is suggested that this would enable offenders to "pick up where they left off" when released on parole, or transferred.[254]



A NSW Magistrate submits that significant rehabilitative progress can be made whilst an offender is serving a short prison sentence. In particular, the Magistrate cites the positive effects of the "Second Chance" prison in Brewarrina:

> "*A period of about four to six months does in my view, provide sufficient time for drug and alcohol counselling and anger management courses to progress significantly whilst the defendant is in prison.*
> ...
> *A sentence of prison of six months or less has, to my observation been effective at the second chance prison in Brewarrina.*"[255]

On the other hand, information obtained from BOCSAR shows that a substantial number of offenders serving short prison sentences are actually serving very short prison sentences of less than 3 months' duration. 35% of all sentences of imprisonment imposed in the Local Court in 2002 were for less than 3 months.[256] These offenders would spend most of their sentence on remand. It is questionable whether much could be done in terms of rehabilitation in this short time, and particularly whilst the offender is part of the remand population.



The issue of supervision on release for offenders serving short prison sentences has been considered in England,[257] and the *Criminal Justice Act 2003* (UK) introduces a scheme of "custody plus".[258] The "custody plus" scheme consists of a period in custody followed by a period of intensive post-release supervision. The ratio between the period in custody and the period of supervision is variable, and is determined on the basis of the pre-sentence report. The Bar Association, in their submission, commends the "custody plus" scheme.[259] It is recognised that introduction of any scheme similar to the "custody plus" scheme proposed in

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[253] Submission of AJAC, 24 September 2003.
[254] (2003) "Review of the Community Offender Services in NSW: Sydney: Office of the Inspector General of Corrective Services. At p 33
[255] Submission of a NSW Magistrate, 5 September 2003.
[256] See Table 1 in Annexure A. The data referred to in this table is the time actually spent in prison, that is, the non-parole period where the overall sentence is greater than 6 months.
[257] See Halliday (2001) "*Making Punishment Work: Report of a Review of the sentencing Framework for England and Wales*" London: The Home Office.
[258] *Criminal Justice Act 2003* UK (Ch 44), Part 12, Chapter 3
[259] Submission of the NSW Bar Association, 11 September 2003.

England would entail repeal or substantial amendment of section 46 of the *Crimes (Sentencing Procedure) Act 1999*.

The *Criminal Justice Act 2003* (UK) also introduces a scheme of "custody minus" for suspended sentences.[260] This scheme is also aimed at providing supervision for offenders, but without them initially serving a period in prison. The offender undergoes a period of supervision, and only if the supervision period is breached does the offender spend time in prison.[261]

A number of submissions also noted that abolition of short prison sentences may also have benefits in terms of rehabilitation for prisoners serving longer prison sentences. It is argued that reducing the current overcrowding would allow for better provision of programs to the remaining prisoners.

The submission of the ODPP argues that rehabilitative ineffectiveness of short prison sentences is the main argument for their abolition:



> "*The main rationale for the abolition of such sentences is their failure to achieve this rehabilitative purpose, which has the result that more than 40% of offenders re-offend and return to prison within two years of release (the revolving door of prison effect) and a further 10% are sentenced to a CSO or bond within two years of release. This is costly in human terms (impact on the victim, the offender's family, the offender, the community) and costly in terms of government provision of services. The "investment" of funds in "housing" the offender for the six months sentence can be viewed as an "investment" which may achieve in the short term most of the stated purposes of sentencing but, because it fails to rehabilitate, it is an investment which must continue to be made, and presumably for longer periods, and only ever for immediate short term "gains"; while the harm to the victim, the community and the offender and his/her family continues and increases in a never ending cycle.*"[262]



The ODPP acknowledge that rehabilitation is only one of many purposes of sentencing, and that short prison sentences may be quite effective in meeting some of the other objectives of sentencing. [263] However, there is no evidence to show that short prison sentences are any more or less effective in meeting these other sentencing objectives. Other purposes of sentencing include punishment, specific deterrence, protection of the community from the offender, making the offender accountable for his actions, denunciation and recognition of the harm done to the victim of the crime and the community.[264] As stated in the submission of a NSW Magistrate opposed to the proposed abolition of prison sentences of 6 months or less:

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[260] Sections 189 to 194. This scheme of suspended sentences was termed "custody minus in the recent paper (2002) "Justice For All"

[261] Larry Sherman has suggested that some early "custody plus" type schemes in America have been ineffective, and the Committee assisting the Council has also questioned the cost effectiveness of introducing similar schemes in NSW.

[262] Submission of the Office of the DPP, 11 September 2003.

[263] See submission of the DPP, 11 September 2003 at p 5, and also noted by the Chief Magistrate of the Local Court in an address to the NSW Sentencing Council, 16 July 2003. The Submission of the DPP further cites the NSW Law Reform Commission's "*Report 79: Sentencing*" in noting that these sentencing principles are not hierarchical,

[264] See section 3A of the *Crimes (Sentencing Procedure) Act 1999*, inserted by Act 90 of 2002, and commencing on 1 Feb 2003. See also *AG's Application no 2 of 2002* [2002] NSWCCA 515 at [58] where it was noted that

> "*Another reason which I have heard advanced for the abolition of short custodial sentences is that offenders are in gaol for far too short a period to be rehabilitated. This argument presupposes that people are rehabilitated in gaols. The classic purposes of sentencing are denunciation, deterrence and rehabilitation; there are competing factors and cannot be easily reconciled with each other. A sentence which consists of a good behaviour bond with conditions that the offender undergo counselling is short on denunciation and deterrence but is long on rehabilitation; a sentence of life imprisonment is short on rehabilitation and long on denunciation and deterrence.*"[265]

The submission of the NSW LAC acknowledges that there are many purposes of sentencing, which often pull in different directions. The objective circumstances of the offence and the subjective circumstances of the offender are important factors in deciding which purposes should be given priority in any particular situation:

> "*It is undeniable that there are offences and offenders whose circumstances may warrant the imposition of a short term sentence…The parliament may legislate to require courts to give greater priority to one of the guiding sentencing principles, for example rehabilitation in the case of juveniles. However, it seems inconsistent with the independence of the judiciary to deny it completely the option of the short term prison sentence.*"[266]



**13.1 Electronic monitoring**

Electronic monitoring may be considered as an alternative to short prison sentences (for example, in conjunction with home detention) or as part of a system of releasing persons serving short prison sentences into programs or to transition centres to allow for reintegration back into the community following a short prison sentence.[267]



As an alternative to prison, it is argued that electronic monitoring could reduce costs, and improve the effectiveness of corrections by allowing the offender to continue community ties and employment, thereby reducing the need for reintegration back into the community at the end of the sentence. Electronic monitoring for home detention orders is not explicitly authorised in NSW, but the Court may impose "*such conditions as it considers necessary.*"[268] The submission of the NSW Law Society suggests that electronic monitoring may be used as a sentencing option in its own right rather than simply as an element of the current home detention scheme. The Department of Juvenile Justice in their submission also report that electronic monitoring is being considered as an alternative to custody. In Western Australia, legislation provides for the electronic monitoring of the compliance with the curfew which accompanies an intensive supervision order.[269] As discussed above, intensive supervision orders were introduced in Western Australia to replace short prison sentences. Electronic

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common law sentencing principles may need to be reconsidered in the light of section 3A. The Common Law principles of sentencing were considered in *Veen (no 2)* (1998) 164 CLR 465

[265] Submission of a NSW Magistrate, 13 August 2003.

[266] Submission of the NSW Legal Aid Commission, 13 October 2003.

[267] For a discussion of electronic monitoring generally, see Black, M. and Smith, G. "*Trends and Issues in Crime and Justice no. 254: Electronic Monitoring in the Criminal Justice System*" Canberra: Australian Institute of Criminology.

[268] As recognised in the submission of the NSW Law Society. See section 82 of the *Crimes (Sentencing Procedure) Act 1999*.

[269] See section 75 of the *Sentencing Act 1995* (WA)

monitoring in that state is thought to ensure that ISO's operate credibly and effectively, and can be rigorously enforced.

As a tool to be used upon release from prison, electronic monitoring may allow for offenders serving short prison sentences to be released into programs at the "back end" of their sentence, or to be released to periodic detention, home detention or to a transitional centre. This would allow for a period of reintegration and supervision upon release. Such "back end" electronic monitoring is used in a number of jurisdictions including the United Kingdom, New Zealand, South Australia and Queensland.[270]

The Committee assisting the Council has considered the possibility of section 46 being amended to apply to sentences of 3 months or less. This would recognise the administrative difficulties in administering short non-parole periods, but would allow persons serving short sentences of longer than 3 months to be released to short programs such as the 12 week MERIT program or the 9 week sober driver program. Such release to programs could be accompanied by electronic monitoring.



**Question:** Section 46 of the *Crimes (Sentencing Procedure) Act 1999* provides that "*A court may not set a non-parole period for a sentence of imprisonment if the term of the sentence is 6 months or less.*" Should section 46 be repealed or otherwise amended?

**Question:** As an alternative to abolishing short prison sentences, could "program release" or transitional centres be used in order to ensure that offenders sentenced to a short period of imprisonment spend some time in custody followed by supervision on release?



[270] Black, M. and Smith, G. "*Trends and Issues in Crime and Justice no. 254: Electronic Monitoring in the Criminal Justice System*" Canberra: Australian Institute of Criminology, p3

## 14. Pre-Sentence Reports

In NSW a court may obtain a pre-sentence report to assist in assessing the offender's suitability for certain forms of punishment.[271] Generally speaking, the decision as to whether there should be an adjournment to obtain a pre-sentence report is a matter for the sentencing judge.[272] In addition, a report may be obtained before imposing periodic detention or to determine the suitability of an offender for a community service order. A pre-sentence report must be obtained prior to imposing a home detention order.[273]

The issue of pre-sentence reports and medical reports in the United Kingdom is addressed in the *Criminal Justice Act* (UK). Under the *Criminal Justice Act 2003* (UK), pre-sentence reports and medical reports (if the offender appears to be mentally disordered) must be obtained in many circumstances unless the court is of the opinion that it is not necessary.[274] These provisions must be viewed in the context of England's geography compared to that of NSW, where we often face unique issues relating to size and remoteness.



The relevance of the English provisions relates to a suggestion that it should be mandatory to obtain a pre-sentence report if the court is considering imposing a short prison sentence.[275] Further, it has been suggested that an amendment could be made so that a court must not impose a full-time short prison sentence if the offender has been assessed as suitable for a sentence other than full-time imprisonment. A requirement for a pre-sentence report prior to the imposition of a short prison sentence falls short of abolition and thereby retains flexibility whilst further ensuring that such sentences are used appropriately.

It may be argued that any decision to make pre-sentence reports mandatory prior to the imposition of a short prison sentence may be ineffective. Many practitioners report that if there is a real possibility that the offender will be sentenced to imprisonment, for any length of time, a pre-sentence report is generally ordered as a matter of course.[276]



Any decision to make a pre-sentence report mandatory prior to imposing a short prison sentence may place an unnecessary strain on the Probation and Parole Service of the

[271] See section 88 of the *Crimes (Sentencing Procedure) Act 1999* in relation to community service orders, section 68 in relation to periodic detention, and section 80 in relation to home detention. A pre-sentence report must be obtained prior to an offender being sentenced to home detention.

[272] An adjournment to obtain a pre-sentence report should be granted only where it will lead to a clear and legitimate advantage to the prisoner: *R v. Majors* (1991) 54 A Crim R 334 at 337 per Carruthers J. Further, there is a mandatory obligation on the court to obtain a "background report" in relation to a person who was a child when the offence was committed, and was under 21 when the matter was before the court, prior to ordering a sentence of imprisonment or a term of detention: section 25 of the *Children (Criminal Proceedings) Act 1987*.

[273] By section 88 of the *Crimes (Sentencing Procedure) Act 1999* a report may be obtained before imposing a Community service order; by section 68 a report may be obtained prior to imposing a periodic detention order; and by section 80, a report must be made before imposing a home detention order.

[274] ss 138 to 142 consider various pre-sentence reports. Section 138 provides for the obtaining of pre-sentence reports. Section 139 provides for medical reports.

[275] The Chief Magistrate of the Local Court has suggested to the Council that mandatory pre-sentence reports should be considered.

[276] Although some practitioners report that a small number of offenders do not wish to obtain a pre-sentence report, as in some circumstances it may simply prolong the inevitable. This is particularly true considering the time that it may take to obtain a pre-sentence report in some remote areas.

DCS. The submission of the NSW Law Society notes the present strain on the Probation and Parole Service in providing pre-sentence reports.[277]

The DCS advises that there may be delays associated with obtaining pre-sentence reports, particularly in remote areas. [278] The delay may be associated with an increase in requests for full pre-sentence reports for relatively minor offences in some areas.[279] In response, the Department has introduced a system of short reports in some areas in order to meet demand. Further problems are experienced in some areas due to lack of transport for the offender to attend for assessment purposes.

If the question of whether a pre-sentence report is mandatory is linked to the period of time for which the person is to be sentenced (for example, providing that a pre-sentence report is mandatory before an offender may be sentenced to a short term of imprisonment) then an issue of increasing sentences in order to circumvent the requirement arises.

Also, it may be that if pre-sentence reports are presently ordered in appropriate circumstances, any move to make such reports mandatory in certain circumstances may divert resources from other areas, such as providing sentencing alternatives to imprisonment in regional areas.



Lastly, it may be argued that any requirement to make the content of the pre-sentence report binding upon the court may move the responsibility for the decision whether or not to imprison the offender away from the discretion of the court to the probation and parole officer who prepares the pre-sentence report. This raises the issues of the experience and qualifications of the relevant corrective services officer.

For these reasons, the Committee is presently of the view that any move to make a pre-sentence report mandatory before imposing a short prison sentence would be ineffective in ensuring that such sentences are used appropriately.[280]



[277] The submission reports that for June 2003, the Probation and Parole Service prepared:2,341 bail and other pre-sentence reports;54 post-sentence reports (for home detention); and217 post-release reports (for parole). The submission states: "*Department of Corrective Services Budget Estimates 2003-2004 project that PPS will be required to produce 35,000 pre-sentence reports during 2003-2004, an increase of 4,000 reports in the year. The Budget Estimates also project that caseload intakes will increase in all categories except community service orders. Further strain will be placed on the PPS as a result of the recent commencement of the Crimes Legislation Amendment (Parole) Act 2003.*"

[278] Letter from Commissioner R. Woodham to the Council's Chairperson dated 2 February 2004

[279] The submission of a NSW Magistrate expresses surprise at the assertion that there has been an increase in the number of full pre-sentence reports being requested by Courts for "relatively minor matters", and notes that the Local Court Strategic Plan (2001) recognises the need for shorter forms of sentence reports in certain cases. The strategic plan further outlines the Memorandum of Agreement between the Attorney General's Department and the Department of Corrective Services outlining time standards for the provision of certain types of pre-sentence reports.

[280] The Committee is of the view that such a move would be ineffective even if a proviso to that in the UK legislation were included, namely that a report should be obtained "*unless the court is of the opinion that it is not necessary*".

## 15. Disproportionality and "Sentence Creep"

An offender may be found guilty of a relatively minor offence, but a very lengthy criminal history may suggest that full-time imprisonment, as the option of last resort, has been reached. In such circumstances, bearing in mind the proportionality between the offence for which the offender is before the court and the length of the sentence, it would be inappropriate to sentence the offender to a period of imprisonment longer than 6 months.

In particular, those with a history of prior imprisonment, or those with a history of failing to comply with non-custodial sentences are more likely to be considered unsuitable for alternatives to imprisonment. These offenders are the most likely to be sentenced to a term of imprisonment of greater than 6 months if short sentences were to be abolished.[281]

This raises for consideration what should happen where an offender is being sentenced for a relatively minor offence, such as theft of an item of little value, but where the offender has a substantial number of prior offences which have been dealt with in a variety of ways, none of which have curbed the offending behaviour. It may well be that the option of imprisonment, as a last resort, has been reached, but it would be excessive to impose a sentence of any greater length than 6 months. If short sentences were to be abolished, there would be a real danger that such offenders may be inappropriately sentenced to imprisonment for a period longer than 6 months.

A further question arises where an offender is sentenced, for example, to a community service order, but refuses to comply with the conditions. In such circumstances it may be appropriate to revoke the order and sentence the person to a short term of imprisonment. Another situation is where an offender has repeatedly offended and repeatedly breached non-custodial sanctions in the past. If short sentences were to be abolished, there would again be a real danger that such offenders may be inappropriately sentenced to imprisonment for a period longer than 6 months, which would be out of proportion to the offence committed.



There is much authority on the topic of the proportionality of the sentence to the crime in question. Although criminal history is a factor which may be taken into account in showing whether an offence is uncharacteristic or part of a continuing attitude of disobedience, and may also be taken into account in determining the type and length of sentence, it "*cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the offence being sentenced.*"[282]

There is a real concern that if a decision is made to abolish short prison sentences, courts may simply increase the period of imprisonment to ensure that the offender spends time in

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[281] Personal submission of Mr Ivan Potas. Mr Potas' submission does not necessarily represent the views of the Judicial Commission of NSW.

[282] See *Veen (No 2)* (1998) 164 CLR 465. See also *McGarry* (2001) 207 CLR 121, 184 ALR 225 where the High Court was faced with an appellant with an extensive history of offences involving sexual misconduct. The Court dealt with section 98 of the *Sentencing Act 1995* (WA), which provided that the Court may order indefinite imprisonment in some circumstances. In the course of judgment, the Court cited *Veen* along with *Chester* (1988) 165 CLR 611 and noted that the fundamental principle of proportionality does not permit the increase of a sentence beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender. As to the "totality" principle in sentencing and also repeat offenders and antecedents see *Weininger v. R* (2003) 77 ALJR 872, 196 ALR 451.

custody. The NSWLRC acknowledged this issue of "sentence creep" or "bracket creep" in *Discussion Paper 33*.[283] In considering whether short prison sentences should be abolished in order to give greater effect to the principle that imprisonment is an option of last resort, the Commission suggested that such a move would involve a real risk of the length of the sentence being increased in order to circumvent the abolition. For example, if short prison sentences were to be abolished, there may be an increase in prison sentences of 6 months and one day.

"Sentence creep" would have a flow on effect in that sentences of greater than 6 months require the imposition of a non-parole period and additional term. It may be that an offender who would otherwise have been sentenced to imprisonment for less than 6 months may receive a sentence of say 9 months with a non-parole period of 6 months. Increases in sentence and time spent on parole would obviously mean increased costs. The DCS considers that there is a danger of courts imposing longer sentences, for example, a prison sentence of 8 months with a non-parole period of 6 months.



In relation to the issue of "sentence creep", the DCS, in its submission, suggests that if a decision is made to abolish prison sentences of 6 months or less, "*the Judicial Commission should undertake judicial education to avoid where possible courts increasing the length of prison sentences.*"[284]

**Question:** If full-time short prison sentences were to be abolished, should an exception be made where an offender refuses to comply with the terms of some other non-custodial sentence?



[283] NSW Law Reform Commission (1996) *Discussion Paper 33: Sentencing* at paragraph 3.33 and 3.34
[284] Submission of the Department of Corrective Services, 22 September 2003.

## 16. Problems and issues identified for specific Groups of Offenders in relation to short prison sentences

### 16.1 Aboriginal and Torres Strait Islander persons

Summary

Aboriginal people are more likely to be sentenced to a short term of imprisonment than non-indigenous offenders.[285] Any decision to abolish short prison sentences would therefore have a great impact on the indigenous prison population. There is clear evidence to show that alternatives to prison specifically targeted to Aboriginal offenders (such as the Circle Sentencing pilot, Community Justice Groups, and Aboriginal supervision of community based orders) have a significant and positive effect on reducing re-offending. It follows that any general reform to prison sentences of 6 months or less should be clearly articulated with current policies specifically developed for Aboriginal people.

In relation to the predicted impact that abolition of prison sentences of 6 months or less would have on the overrepresentation of Aboriginal offenders in NSW prisons, the Social Justice Report 2002[286] cites Cunneen and notes:

> "*In NSW it is considered that a similar move [to Western Australia's move to abolish prison sentences of 6 months or less] would have a significant impact on Indigenous imprisonment rates. As Chris Cunneen notes:*
> *'Aboriginal men and women tend to be more concentrated among those serving sentences less than five years than non-Aboriginal people…Although the abolition of six month sentences would only provide for 82 less Aboriginal male prisoners an 12 less Aboriginal women prisoners on a particular day, we could expect that the overall significance would be considerably greater on the number of Aboriginal people entering the prison system. Other research has suggested that if Aboriginal people given sentences of six months or less were given non-custodial sanctions instead, then the number of Aboriginal people sentenced to prison would be reduced by 54% over a twelve month period'.*" (Footnotes omitted.)



Overrepresentation of Indigenous women and sentencing patterns

The Social Justice Report 2002[287] considers "Indigenous Women and Corrections" and specifically considers Australia wide sentencing patterns for indigenous women. The Report notes that indigenous women tend to receive shorter sentences than non-indigenous women.[288]

The Report suggests that the over-representation of women in correctional facilities, and the shorter sentences that they serve indicates that non-custodial sentencing alternatives are not being handed down to indigenous women. The Report further notes that many short sentences are for public order offences and fine default.[289]

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[285] Submission of the Department of Corrective Services, 22 September 2003.
[286] Aboriginal and Torres Strait Islander Social Justice Commissioner (2002) "*Social Justice Report*" at p148
[287] Aboriginal and Torres Strait Islander Social Justice Commissioner (2002) "*Social Justice Report*" Chapter 5
[288] Aboriginal and Torres Strait Islander Social Justice Commissioner (2002) "*Social Justice Report*" at 137
[289] Aboriginal and Torres Strait Islander Social Justice Commissioner (2002) "*Social Justice Report*" at 146, citing Cunneen, C, (2001) "*Conflict, Politics and Crime: Aboriginal Communities and the Police*"

AJAC has recently completed a project examining, amongst other things, the rising imprisonment rates of Aboriginal women in NSW.[290] The submission of AJAC expressed concern that many of these women serving short prison sentences are unable to access counselling or courses, and their short term sentences often preclude them from completing a course:

> "*...The research found a clear and direct link between childhood sexual assault and adult imprisonment, however almost all of those women were unable to access counselling and other services that would assist them in dealing with these issues. Corrective Services do not provide such treatment to inmates on short prison terms, as any effective treatment would take longer to provide than the time served in prison.*"[291]

Lawrie's research found a clear link between childhood sexual assault, later drug use, and adult imprisonment. However, the Aboriginal women in the study consistently reported an inability to access counselling and other services to assist them in dealing with these underlying issues. This point is noted in the submission of AJAC, along with the observation above that "*Corrective services do not provide such treatment to inmates on short prison terms, as any effective treatment would take longer to provide than the time served in prison.*" AJAC observes that community based sentencing options, in place of short prison sentences, would allow for flexibility in service provision and links to ongoing treatment in order to address underlying issues.



The submission of the ODPP has suggested that if abolition of short prison sentences were seriously contemplated, it would be prudent to pilot such a scheme in a limited area and for a limited period of time.[292] In selecting a geographic area, consideration would be given to the sentencing options available in that area. The ODPP argues that similar to the Drug Court pilot (and unlike the situation in Western Australia following abolition of prison sentences of 3 months or less) such a pilot should be evaluated, with an agency such as BOCSAR involved in the pilot to ensure proper evaluation:



> "*We suggest that the pilot should give priority to selecting women, indigenous inmates or those suffering from an intellectual disability or mental illness. A successful pilot for these women would require consultation with the local Aboriginal community (especially the elders) and that appropriately targeted support services be available in the pilot geographical area, including medical and psychiatric treatment, counselling, housing support, education and training and probation and parole supervision.*"

Such a pilot would be in accordance with recommendation 17 of the Report of the NSW Select Committee on the Increase in the Prison Population.[293] The Law Society of NSW, in its submission, does not support abolition but suggests that if it goes ahead, then it should be

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[290] Aboriginal Justice Advisory Council (2003) "*Speak out Speak strong - Aboriginal Women in Custody Research Project.*"
[291] Submission of AJAC, 24 September 2003.
[292] Submission of the Office of the DPP, 11 September, 2003.
[293] Legislative Council Select Committee on the increase in prisoner population (2001) "*Final Report.*" Sydney: NSW Parliament.

progressed as a pilot project, in accordance with the recommendation of the Select Committee's Report.[294]

Policing of Aboriginal Communities and Criminal Histories

Aboriginal offenders often present to court with long criminal histories, and this increases the likelihood of the person receiving a custodial sentence. The impact of prior record or criminal history is a factor to properly be taken into account in sentencing an offender, and "*a person who has been convicted of, or admits to, the commission of other offences will, all other things being equal, will ordinarily receive a heavier sentence than a person who has previously led a blameless life.*"[295]

However, a concern has been raised regarding the quality of information that is considered when sentencing, particularly in the Local Court. It is noted that there is a difference between the "bail report" (which should only be tendered when the question of bail arises) and "criminal history report". A concern of the NSW Chief Magistrate is that in the Local Court, a "bail report" is frequently handed up in place of a "criminal history report" when sentencing.[296] The bail report is often confusing and contains information irrelevant to sentencing (such as withdrawn charges, and multiple listings of a single offence where numerous warrants issued). In contrast, the "criminal history report" often produced for sentencing in the higher courts, contains only the relevant information. Pages of a bail report may be reduced down to a few entries in the criminal history report. It is suggested that a "criminal history report" be considered when sentencing in all courts. In relation to ascertaining which priors are "recent and relevant", this may best be left as a matter of discretion to the sentencing Magistrate.[297]



The NSW Chief Magistrate raised the issue of "criminal history reports" with the Director of Public Prosecutions and the Director of Police Legal Services in January 2004. The NSW Chief Magistrate raised the possibility of requiring the tendering of a watermarked criminal record or court conviction record in sentencing proceedings in the Local Court. The DPP has indicated that such would be beneficial in primary sentencing proceedings and in the conduct of any appeals. The NSW Police have addressed the concern of the NSW Chief Magistrate by agreeing that police prosecutors will tender only a watermarked criminal history record, or if unavailable, the Local Court Report.



A major factor which may contribute to the fact that many Aboriginal defendants appear in Court with lengthy criminal histories is the way in which Aboriginal communities are policed. In particular, the submission of AJAC raised a concern about the policing of public

[294] Submission of the Law Society of NSW, 17 September 2003.

[295] See for example, Kirby J in *Weininger v. R* [2003] HCA 14, (2003) 196 ALR 451 at [32] "*Imposing a sentence heavier than otherwise would have been passed is not to sentence the first person again for offences of which he or she was earlier convicted or to sentence that offender for the offences admitted but not charged. It is to do no more than give effect to the well-established principle (in this case established by statute) that the character and antecedents of the offender are, to the extent that they are relevant and known to the sentencing court, to be taken into account in fixing the sentence to be passed. Taking all aspects, both positive and negative, of an offender's known character and antecedents into account in sentencing for an offence is not to punish the offender again for those earlier matters; it is to take proper account of matters which are relevant to fixing the sentence under consideration."* See also at [58].

[296] Also noted by Mr Roger Dive, Chief Children's Court Magistrate in discussions with the Council's Chairperson, the Hon. A. R. Abadee, RFD QC in 22 March 2004.

[297] Opinion of Mr Roger Dive, Chief Children's Court Magistrate in discussions with the Council's Chairperson, the Hon. A. R. Abadee, RFD QC in 22 March 2004.

order type offences, and noted that on a state-wide basis, Aboriginal people are convicted of these offences at a rate of 15 times the rest of the population, and in one Local Government Area, namely Richmond River, Aboriginal people were convicted of these offences at a rate of 96 times the rest of the population.[298] As noted by the submission of AJAC, BOCSAR has found that the most significant factor influencing the imposition of short sentences of imprisonment on Aboriginal people is their criminal history, and this is influenced to a large degree by the way in which Aboriginal communities are policed.[299]

Cunneen has noted the effect of the discretion of police on Aboriginal women and young people. [300] Cunneen argues that indigenous women are invariably serving short prison sentences, often for fine default and public order offences. The issue of policing and its impact on Aboriginal people sentenced to imprisonment for 6 months or less is noted in the submission of AJAC.[301] AJAC submits that the number of Aboriginal people sentenced to short prison sentences is directly related to the number of Aboriginal people appearing before the court with criminal histories for public order type offences.[302]



Geographic distribution of sentencing options

The geographic unavailability of sentencing options is an issue which disproportionately affects Aboriginal people, bearing in mind that a significant number of Aboriginal offenders live in remote parts of NSW.

It is timely to remember that recommendation 22 of the Report of the Legislative Council's Select Committee into the Increase in Prisoner Population recommends that the DCS initiate a pilot program to expand the use of home detention by indigenous offenders in rural NSW. The committee further recommended that such a pilot should include provision of alternative accommodation (such as at a hostel) and/or other forms of community support to assist offenders in completing a sentence of home detention. The submission of the ODPP recognises an associated problem: many Aboriginal offenders are currently excluded from home detention due to the violent nature of their offences. This violence is often alcohol related. There is a scarcity of intensive programs available in regional areas to combat alcohol abuse.[303]



Using an example of a specific remote Aboriginal community, the submission of the UNSWCCL notes the Ngaanyatjarra response to the Western Australian move to abolish short prison sentences.[304] The community, which is located in central-eastern region of Western Australia has problems with alcohol abuse, petrol sniffing and excessive cannabis usage. The Ngaanyatjarra community view the abolition of short prison sentences in Western

[298] Submission of AJAC, 24 September 2003.
[299] Cunneen, Chris (2001) "Conflict, Politics and Crime: Aboriginal Communities and the Police" Sydney: Allen and Unwin at p 29
[300] Cunneen, Chris (2001) "Conflict, Politics and Crime: Aboriginal Communities and the Police" Sydney: Allen and Unwin at p 166
[301] Submission of AJAC, 24 September 2003.
[302] In contrast, Weatherburn, Fitzgerald and Hua have expressed a view that although discriminatory treatment of Aboriginal persons by the police and courts is an historical fact, present overrepresentation of Aboriginal people in prisons is not caused so much by systemic bias but rather is due to the high rates of Aboriginal involvement in serious crime.
[303] It is noted that the MERIT program in operation in many parts of NSW is an initiative for offenders with illicit drug problems, and does not apply for offenders with alcohol related issues. See Linden, J "Magistrates Early Referral into Treatment Program (MERIT)" (2003) 15 (5) Judicial Officers' Bulletin.
[304] Submission of the UNSWCCL, 2 November, 2003.

Australia as a "mandatory minimum prison term" which fetters magistrates in imposing a proportionate sentence. In response to these concerns, the UNSWCCL recommends that the impact of abolishing prison sentences of 6 months or less be "*very closely monitored.*"

Alternative Sentencing Schemes and Circle Sentencing Pilot and Evaluation

The *NSW Aboriginal Justice Plan – Discussion Paper*[305] considers the Local Court sentencing outcomes for 2000, and notes that Aboriginal people were more likely to be sentenced to imprisonment but were less likely to be sentenced to home detention, periodic detention, a bond or fine.[306] The Discussion Paper estimates that if all Aboriginal people currently serving short prison sentences were given non-custodial options, "*the number of Aboriginal people sentenced to prison would be reduced by 54% over a 12 month period.*"[307]

Several alternative sentencing schemes have been introduced specifically for indigenous offenders, most notably, the Circle Sentencing pilot. Circle Sentencing is particularly relevant as an alternative to a short prison sentence.[308] AJAC, in conjunction with the Judicial Commission of NSW has recently published a review and evaluation of the Circle Sentencing scheme initially piloted in Nowra, and now extended to other areas of the State.[309] The review and evaluation concentrates on the first 12 months of the trial in Nowra. The Judicial Commission outlines 13 of the matters dealt with by the circle. All 13 offenders had prior convictions and three were in breach of bail when committing the offence. Of the 13 matters, 8 were selected for analysis in the Report. The Report of the review and evaluation shows that the pilot has succeeded in a number of ways:



> "*For example, this novel procedure:*
> - *reduces the barriers that currently exist between the courts and Aboriginal people;*
> - *leads to improvements in the level of support for Aboriginal offenders;*
> - *incorporates support for victims, and promotes healing and reconciliation;*
> - *increases the confidence and generally promotes the empowerment of Aboriginal persons in the community;*
> - *introduces more relevant and meaningful sentencing options for Aboriginal offenders, with the help of respected community members; and*
> - *helps break the cycle of recidivism.*"[310]

From a resourcing viewpoint, the one drawback with Circle Sentencing is the amount of time and the number of participants involved, compared to how routinely and quickly such matters

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[305] Cunneen, C (August 2002) "*Aboriginal Justice Plan – Discussion Paper*" Sydney: AJAC

[306] 15% of matters involving and Aboriginal defendant resulted in a prison sentence compared with 5.6% for non-Aboriginal people.

[307] Cunneen, C (August 2002) "*Aboriginal Justice Plan – Discussion Paper*" Sydney: AJAC, Summary, at 6.2

[308] An offence is eligible to be dealt with by the Circle if it can be finalised in the Local Court, carries a term of imprisonment, and a term of imprisonment is a likely outcome according to the Magistrate. It is also noted that the Circle may impose a sentence of imprisonment.

[309] Potas, Smart and Brignall together with Matthews and Thomas (2003) "*Monograph 22: Circle Sentencing in NSW: A Review and Evaluation*" Sydney: Judicial Commission of NSW and the Aboriginal Justice Advisory Council. On 26 August 2003 the first circle sentencing case was heard in Dubbo, NSW.

[310] Potas, Smart and Brignall together with Matthews and Thomas (2003) "*Monograph 22: Circle Sentencing in NSW: A Review and Evaluation*" Sydney: Judicial Commission of NSW and the Aboriginal Justice Advisory Council, at p iv

would be dealt with in the Local Court.[311] It also must be remembered that in expanding the operation of Circle Sentencing, the process will need to be tailored to the community in which it is being used.[312] AJAC is planning a further evaluation of Circle Sentencing, and has created an evaluation framework to be used in such later evaluation. Further, the Attorney General's Department has announced that Circle Sentencing will be extended to Brewarrina, Walgett and Bourke.

The submission of AJAC further details Aboriginal community sentencing options being used in NSW and other Australian states In particular, the submission notes that one of the most outstanding successes of Aboriginal community sentences is in Western Australia. 40 Aboriginal communities in the Kimberley and Eastern Goldfields have contractual arrangements so that communities can supervise adult offenders on community-based orders. This provides an example of how community based sentencing options such as home detention and supervision of community service orders can be made accessible to remote Aboriginal communities.



In NSW, Local Aboriginal Community Justice Groups[313] could become more actively involved in managing community based sentences.[314] Other similar programs include Aboriginal Courts,[315] and Aboriginal Community based and controlled residential corrections.[316]

**Question:** Should abolition of short prison sentences be piloted and evaluated? If so, which areas should be selected for a pilot, and should such a pilot target specific groups of offenders?

### 16.2 Juvenile Offenders



When sentencing a young person, punishment and general deterrence are considered subordinate to the rehabilitation of the offender[317] and section 6 of the *Children (Criminal Proceedings) Act 1987* sets out further principles for the court to have regard. One of the principles that the court must have regard in sentencing a child is "*that the penalty imposed*

[311] The Council has not been provided with costing of circle sentencing, although the Report notes in relation to sentencing through the Local Court, "*while it is difficult to generalise, the vast majority of sentencing hearings are dealt with in a matter of minutes, often in less than half an hour.*"

[312] The NSW Department of Health and AJAC comments on the success of the Circle Sentencing pilot in their respective submissions. AJAC states: "*Utilising community members in such a way has allowed for a greater degree of flexibility in sentencing than previously existed. The initial review of circle sentencing shows that Aboriginal offenders, who are supervised by their own community members, take their sentences more seriously and earnestly than those supervised by government agencies.*"

[313] For information on Aboriginal Justice Groups generally, see "Factsheet – Community Justice Groups" Downloaded from AJAC website on 1 March 2004.

[314] The submission of COALS notes that the NSW Legislative Council Standing Committee on Social Issues has previously recommended supervision of community based orders in local Aboriginal communities See NSW Legislative Council Standing Committee on Social Issues (May 1992) "*Report no 4: Juvenile Justice in NSW*" Sydney: NSW Parliament.

[315] Such as the Port Adelaide Nunga Court. Such courts operate with an Aboriginal Elder sitting on the bench with the Magistrate to provide advice about cultural and community issues. The submission of Professor Chris Cunneedn advises that the Port Adelaide Nunga Court has increase the rate of attendance by Aboriginal people to 80% compared to other courts which is less than 50%.

[316] Such include detoxification and treatment residential centres run by Aboriginal organisations and develop indigenous specific programs.

[317] See for example, GDP (1991) 53 A Crim R 112

*on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind.*"[318] This principle raises questions as to whether a child could be sentenced to a control order or imprisonment for a period of 6 months or less if an adult could not be given such a sentence for a similar offence due to the abolition of short prison sentences.

In NSW, detention is a measure of last resort in the sentencing of young people.[319] Further, Australia is a signatory to the United Nations Convention on the Rights of the Child, which provides that detention is to be used as a last resort for the shortest possible time.[320] Under the convention, the objectives to be applied when sentencing a juvenile offender include rehabilitation and reintegration at the forefront.[321]

The jurisdictional limit of the Children's Court in imposing a control order is 2 years, although accumulation can occur up to a period of 3 years. The Department of Juvenile Justice reports in their submission that such orders are extremely rare.



A major development in the sentencing of juvenile offenders was the introduction of a diversionary scheme under the *Young Offenders Act 1997*. The scheme allows for the warning, cautioning and conferencing of a young person. The objectives of the *Act* are to provide an alternative to the Court process, to establish a scheme that provides an efficient and direct response certain offences by children, and to establish youth justice conferences in a way that enables a community negotiated response, emphasises restitution, and meets the needs of victims and offenders.

The rate of re-offending is considerably lower for the young offenders diverted to the youth justice conferencing scheme than for the young offenders dealt with by the court.[322]

Following the positive impact that youth justice conferencing has had on the rate of re-offending, the NSW Sentencing Council understands that community justice conferencing is to be piloted for young adult offenders between the ages of 18 and 24. It is proposed that the pilot is available for young adults facing *a real risk of incarceration* for the offence committed. In this way, the pilot will provide an alternative to imposition of a short prison sentence. The Attorney General's Department reports that the working group is considering drafting the regulation and that the scheme will be piloted in one metropolitan and one regional area.



In addition to the diversionary scheme of cautions, warnings and conferences under the *Young Offenders Act 1997*, the Department of Juvenile justice, in its submission, outlines other programs, and expresses a commitment to other diversionary initiatives such as the Youth Drug Court, home detention combined with electronic monitoring, the Intensive Court Supervision program proposed for trialing in Bourke and Brewarrina and the funding of two bail accommodation facilities.[323] The Department of Juvenile Justice notes that their

[318] Indeed, any derogation from this principle would put NSW in breach of the United Nations Convention on the Rights of the Child, ratified by Australia on 16 January 1991. See in particular, Art 37 and 40.
[319] Section 33 of the *Children (Criminal proceedings) Act 1987*
[320] Article 37(b)
[321] Article 40.1
[322] See Luke G and Lind B (2002) "Crime and Justice Bulletin 69: *Reducing Juvenile Crime: Conferencing Versus the Court*". Sydney: Bureau of Crime Statistics and Research.
[323] These programs are dependant upon financial and other resources.

experience in reducing the numbers in custody is an important contribution to the current debate about whether to abolish short prison sentences.

Any decision to abolish short prison sentences, if applicable to control orders of 6 months or less, would have an extremely significant impact on young offenders. The majority of control orders imposed are for periods of 6 months or less, bearing in mind the sentencing principles applicable in the sentencing of young and juvenile offenders.[324]

In Western Australia, the abolition of prison sentences of 3 months or less and the yet to be commenced abolition of prison sentences of 6 months or less **does not apply to juvenile offenders**.[325] The UNSWCCL similarly submits that if prison sentences of 6 months or less were to be abolished, an exception should be made for juveniles.

The above are strong arguments against abolishing short control orders. This raises a problem if short prison sentences were to be abolished for adults, bearing in mind that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind.[326]



**Question:** Should control orders of 6 months or less be abolished?

### 16.3 Intellectually Disabled Offenders

The submission of the NSW Council for Intellectual Disability succinctly outlines some of the consequences of short prison sentences for offenders with an intellectual disability:



- "*Becoming increasingly entrenched in a culture of criminality. Offenders with an intellectual disability tend to want to be accepted by their peer group and therefore copy peers' behaviour. Their behaviour is influenced positively by positive role models and negatively by negative role models. Role models in prison are predominantly negative.*
- *Finding it very hard to readjust when they leave prison, and therefore being likely to reoffend. This is a common problem for offenders generally but the more likely for people with intellectual disabilities who inherently have impaired adaptive skills.*
- *Being assaulted and otherwise mistreated in the mainstream prison environment, in which they are very vulnerable.*"[327]

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[324] Submission of the Department of Juvenile Justice, 23 September 2003. 54.6% of orders of "control" are for periods of 6 months or less.

[325] As observed in the submission of the UNSWCCL. See *Young Offenders Act 1994* (WA) s 118 (2) which provides: "*Despite section 86 of the Sentencing Act 1995 the court sentencing a young person to a term of detention may impose a term of 3 months or less.*"

[326] However, an argument could be made that young persons are often sentenced to control orders of less than 6 months in circumstances where if an adult had committed a similar offence, a longer sentence would have been imposed. For example, JIRS statistics published by the Judicial Commission of NSW show that for offences against section 25(1) of the *Drug Misuse and Trafficking Act 1985*, 15% of young persons sentenced in the Children's Court were sentenced to a control order, with the midpoint length of the control order being 4 months. In contrast, persons sentenced in the Local Court were overall more likely to be sentenced to imprisonment, and the midpoint length of the non-parole period tended to be longer. For example, for offences involving heroin, 46% of offenders were sentenced to imprisonment with a midpoint of 8months non-parole period. In the higher courts, an even higher proportion of offenders were sentenced to imprisonment, and the midpoint of the non-parole period tended to be even longer.

[327] Submission of the Council for Intellectual Disability, 8 September 2003.

Intellectually disabled persons are more likely to be charged for a minor offence, are more likely to "confess" to an offence (which may be influenced by a misunderstanding of the question, or a desire to please the questioner) and are more likely to receive a custodial sentence due to inadequate support in the community.[328] Intellectually disabled offenders are more likely to commit a number of minor repeat offences, which may result in a short prison sentence. [329] Further, many of the services currently available in the gaol system are of little assistance to the short-term prisoner.[330]

The NSWLRC recognises that many intellectually disabled offenders may not understand, or lack the resources and capacity to comply with non-custodial alternatives to short prison sentences.[331] The NSW Council for Intellectual Disability makes the same point:

> "*Sentences such as community service orders and home detention tend not to be used with people with intellectual disabilities because the person's intellectual impairment hampers compliance. Appropriate support and supervision could remedy this problem so that these sentencing options were more available.*
>
> *Similarly, bonds would be used much more if support services were more available. Then, the Court would feel more confident about compliance. In Victoria, there is a legislative system of "justice plans" whereby community corrections and government disability services design a plan aimed at addressing the offending behaviour of a person with an intellectual disability. Compliance with this plan then becomes a condition on a bond.*"[332]



Justice plans operate by the Probation and Parole Service working with disability services in order to assess what community services are available.[333] These available services are set



[328] However, it is unclear whether intellectually disabled people are over-represented in the population of prisoners serving short sentences. The submission of the Department of Corrective Services includes an analysis of the 443 inmates serving a prison sentence of 6 months or less, on 30 June 2003. The Department calculated that 8 of those prisoners had an IQ of below 80, and concludes that the impact of abolishing prison sentences of 6 months or less on intellectually disabled offenders would be similar to the impact on non-intellectually disabled offenders. However, Simpson and Rogers (2002) " Hot Topics 39: Intellectual Disability and the Law" at 1 report that in recent times there has been a move away from over-reliance on IQ scores for assessing disability, with a move towards assessing a person's "support needs", however the IQ score is still a commonly used measure used in assessing intellectual disability. The Department of Corrective Services does, however, note that abolition of prison sentences of 6 months or less may result in the imposition of a community sentence on offenders with an intellectual disability who, at present receive prison sentences, and this may require intensive supervision of such offenders, which is expensive.

[329] NSWLRC "Report 80 – People with an Intellectual Disability and the Criminal Justice System" Sydney. Cited at 32: Hayes and Craddock "*Simply Criminal*" and Hayes and McIlwain "*The prevalence in intellectual disability in the NSW prison population: an empirical study.*"

[330] DP 35 at 330

[331] See NSW LRC (1994) "*Discussion Paper 35 – People with an intellectual disability and the criminal justice system: Courts and Sentencing issues*" At 338

[332] Submission of the Council for Intellectual Disability, 8 September 2003.

[333] The system of Victorian "justice plans" as provided for by ss 80-83 of the *Sentencing Act 1991* (Vic) is further detailed in the *framework report*. Simpson, Martin and Green (2001) "*The Framework Report: Appropriate community services in NSW for those with intellectual disabilities and those at risk of offending*" Sydney: Intellectual Disability Rights Service and the NSW Council for Intellectual Disability.

forth in the justice plan, and where appropriate, the court is able to make compliance with the plan a condition of the bond. [334]

In this way, alternatives to short prison sentences would become much more accessible to intellectually disabled offenders. The system of "justice plans" proposed is in some ways similar to the court liaison and assessment services being trialled for mentally disordered offenders.

At present, there exists the State-wide Community Court Liaison Service ("*CCLS*") which operates out of Burwood, Campbelltown, Central, Gosford, Lismore, Liverpool, Parramatta, Penrith, Sutherland, Tamworth and Wyong Local Courts. The program is administered by Corrections Health. In addition, there are 3 other locally run liaison services run by the Hunter Area Health Service, the Mid-North Coast Area Health Service, and the Illawarra Area Health Service.[335] The service has proved to be successful in increasing diversions under section 32.



The *Criminal Justice Act 2003* (UK) details procedural requirements for imposing discretionary custodial sentences, and makes provision for medical reports. In any case where the offender is or appears to be "mentally disordered", the court must obtain and consider a medical report before passing a custodial sentence other than one fixed by law, unless the court considers that it is not necessary to obtain such report.[336] Interestingly, the term "mentally disordered" used in the *Criminal Justice Act* is defined broadly, and includes intellectually disabled offenders. [337]

Section 32 of the *Mental Health (Criminal Procedure) Act 1990* is also relevant to intellectually disabled offenders. In summary, section 32 of the *Mental Health (Criminal procedure) Act 1990*, applies if a Magistrate is satisfied that the defendant is developmentally disabled, is suffering from mental illness or is suffering from a mental condition for which treatment is available within a hospital, and the defendant is *not* mentally ill within the meaning of the *Mental Health Act 1990*, and the Magistrate considers that it would be more appropriate to deal with the defendant in accordance with the provisions of this Part than otherwise in accordance with law.[338] This is restrictive, as there is often a difference between a "developmental disability" and a "cognitive impairment". Examples of persons who may fall within the latter category but not the former are persons with acquired brain injuries, autism, or a neurological disorder such as dementia.[339]



If section 32 applies, then the magistrate may:

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[334] The Framework report recommended that a system of justice plans should be developed for NSW. Simpson, Martin and Green (2001) "*The Framework Report: Appropriate community services in NSW for those with intellectual disabilities and those at risk of offending*" Sydney: Intellectual Disability Rights Service and the NSW Council for Intellectual Disability. At p 68

[335] Andrew Ellison, CCLS (Corrections Health) Telephone Advice, 1 March 2004. The service is expected to expand over the coming year.

[336] Section 157. By 157(3), the Court must consider a broad category of information: any information before it which relates to his mental condition (whether given in a medical report, a pre-sentence report or otherwise), and the likely effect of such a sentence on that condition and on any treatment which may be available for it. It is noted that such may be taken into account in NSW in any event: See *Weininger v. R* [2003] HCA 14, (2003) 196 ALR 451 at [21]

[337] See section 157(5) of the *Criminal Justice Act* and section 1(2) of the *Mental Health Act 1983* (Ch 20)

[338] by section 32(1)

[339] Ms Mary Spiers, Oral submission 20 February 2004

- adjourn the proceedings,
- grant bail,
- make any other order considered appropriate.

Further, the magistrate may dismiss the charge and discharge the defendant:
- into the care of a responsible person, unconditionally or subject to conditions
- on the condition that the defendant attend for assessment of mental condition or treatment or both, or
- unconditionally.

Section 32 was recently amended by the *Crimes Legislation Amendment Act 2002*[340] to ensure that orders under section 32 are enforced so that Magistrates have confidence in using the section. The effect of the amendments is that if a section 32 order is breached within 6 months, the person may be brought back before the Court and the matter dealt with de novo. In making an order under section 32, it must be remembered that the Court cannot make an order unless it is satisfied that the service is in fact available.[341] The recent amendments to section 32 have ensured that magistrates have confidence in using the section as there is now an effective means of enforcement. The recent amendments do not address the issue of ensuring that there are more services available in the community for the care and treatment of intellectually disabled or persons with a mental condition.



The Criminal Law Review Division advises that a Senior Officers' Group has also negotiated a number of practical undertakings to ensure that orders under section 32 will be used effectively. [342]

**Question:** Some intellectually disabled offenders do not understand, or lack the resources and capacity to comply with non-custodial alternatives. If short prison sentences are abolished, how should an intellectually disabled offender who appears before the court for breaching a community sentence be dealt with?



**Question:** Section 32 of the *Mental Health (Criminal Procedure) Act 1990* provides a method of diversion for defendants who are suffering from a mental illness, are developmentally disabled, or suffering from a mental condition for which treatment is available. Should section 32 be available to all persons with a cognitive impairment?[343]

### 16.4 Mentally ill offenders

The Mental Health Review Tribunal notes that persons sentenced to a short prison sentence are unlikely to come before the Tribunal, but nevertheless strongly supports the abolition of

[340] Schedule 9, commencing into operation on 14 February 2004
[341] Ms Spiers has drawn the Committee's attention to *DPP v. Albon* [2000] NSWSC 896 per Sperling J
[342] The group was established to address concerns regarding the implementation of the amendments to the *Mental Health (Criminal Procedure) Act 1990.* Advice received from Ms Spiers, Criminal Law Review Division, 20 February 2004
[343] For example, amend section 32 of the *Mental Health (Criminal Procedure) Act 1990* so that an order may also be made under that section where it appears to the Magistrate that the defendant has a cognitive impairment that affects a person's reasoning and behaviour, including intellectual disability, acquired brain injury, autism, and a neurological disorder including dementia.

such short prison sentences. The Tribunal does, however, express a concern regarding "net-widening".[344]

The defence of "mental illness" is available in the higher courts, but arguably does not apply in the Local Court jurisdiction where section 32 and 33 apply.[345] Bearing in mind the vast majority of short prison sentences are imposed by the Local Court, the defence of mental illness is not of direct relevance.

Presently in NSW, there exists an option for diversion of mentally ill and intellectually disabled offenders from prisons when being dealt with in the Local Court by Part 3 of the *Mental Health (Criminal Procedure) Act 1990*.[346] Section 32 is considered above under the heading "intellectually disabled offenders" and section 33 is considered below.

Section 33 of the *Mental Health (Criminal Procedure) Act 1990* was amended by the *Crimes Legislation Amendment Act 2002*[347] and is relevant where it appears to the Magistrate that the offender is mentally ill in accordance with the *Mental Health Act 1990*. The Magistrate may dispose of the matter by:



- Ordering that the defendant be detained in a hospital for assessment,
- Ordering that if the defendant is found not to be mentally disordered that the person be brought back before a Magistrate /authorised officer,
- Discharging the defendant into the care of a responsible person, or
- Making a community treatment order.

If a defendant is dealt with under this section, 6 months after the date on which the defendant is so dealt with, the charge which gave rise to the proceedings is to be taken to have been dismissed unless, within that period, the defendant is brought before a Magistrate to be further dealt with in relation to that charge. This section allows a Magistrate to make a Community Treatment Order under the *Mental Health Act 1990*, without an inquiry under that *Act* being held.



The NSW Department of Health commented on the provisions of the *Mental Health (Criminal Procedure) Act 1990*, and in particular, the recent amendments to section 33.[348] The submission states:

> "*While there is currently a system in place for the diversion of mentally ill offenders to mental health facilities… people suffering a mental illness are frequently sentenced to short terms of imprisonment or remanded in custody until an alternative means of dealing with them becomes available.*"

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[344] Submission of the Mental Health Review Tribunal, 29 January 2004.

[345] See Part 4, *Mental Health (Criminal Procedure) Act 1990*. The Part applies on the *trial* of a person charged with an offence. See also Part 3, *Mental Health (Criminal Procedure) Act 1990.* The part is titled "Summary proceedings before a Magistrate relating to persons affected by mental disorders."

[346] "*Summary proceedings before a Magistrate relating to persons affected by mental disorders*" By section 31(1), such provisions apply "to criminal proceedings in respect of summary offences or indictable offences triable summarily, being proceedings before a Magistrate, and includes any related proceedings under the *Bail Act 1978*, but does not apply to committal proceedings." By section 31(2), "*Sections 32 and 33 apply to the condition of a defendant* ***as at the time when a Magistrate considers whether to apply the relevant section*** *to the defendant.*" (Emphasis added).

[347] Schedule 9, commenced into operation on 14 February 2004

[348] Submission of the NSW Department of Health, 3 December 2003.

The NSW Department of Health further notes that the recent amendments to section 33 are likely to have an impact on community mental health services bearing in mind the substantial increase in the number of persons requiring management.

The submission of the NSW LAC raises diversion of offenders under the *Mental Health (Criminal Procedure) Act 1990* as an issue. The NSW LAC submits that it is inappropriate to sentence people with a mental illness or an intellectual disability to a short prison sentence because of the lack of care and treatment options in the community.[349] The NSW LAC submits that the result of not providing adequate care and treatment facilities is that even if short sentences are abolished, these people will be more conspicuous in the community, their offending behaviour is likely to continue, and they will eventually end up serving a sentence of imprisonment..[350]

As noted above, in NSW, sections 32 and 33 of the *Mental Health (Criminal Procedure) Act 1990*, provide that a magistrate *may* deal with a relevant offender under the procedures set out within those sections. In contrast, under the *Criminal Justice Act 2003* (UK) the court *must* obtain and consider a medical report before passing a custodial sentence other than one fixed by law, unless the court considers that it is not necessary.



The Department of Health's submission also discussed the impact that abolition of prison sentences of 6 months or less may have on lowering the remand population. This may have a particularly positive impact on people suffering mental illness who are remanded in custody for relatively minor charges whilst awaiting suitable diversion or trial for minor offences.



[349] Submission of the NSW Legal Aid Commission, 13 October 2003.
[350] Submission of the NSW Legal Aid Commission, 13 October 2003.

## 17. Recent changes to the NSW bail laws, and impact of abolition on the remand population

There has been a recent increase in the number of people who are remanded in custody prior to sentencing due to changes to the *Bail Act 1978*.[351] Over the past 6 months, there has been an increase of 12.2% in the remand population.[352] It seems that many of these offenders are released at the time of sentencing, or shortly thereafter, that is, after having served their sentence on remand.[353]

On the subject of the impact of abolishing prison sentences of 6 months or less on the size of the remand population, a fear has been expressed that abolition of prison sentences of 6 months or less may see remands being used, deliberately or otherwise, in a manner amounting to a short sentence.[354]

In relation to the recent changes to the bail laws, there seems to be a conflict between the tightening of bail laws on the one hand, and the current consideration of abolishing short prison sentences on the other. The submission of the NSW LAC states:



> "*There is a clash of philosophy in tightening bail laws while also abolishing the availability of short term prison sentences. If the rationale for the latter is that it serves no rehabilitation purpose and may put the community at greater risk by releasing people better skilled in the art of crime, one can only wonder at the rationale for the former.*"[355]

On the one hand, whilst the tightening of bail laws may result in more people being denied bail and perhaps serving a short sentence on remand and possibly being released on the date on which they are sentenced, it may also be that a decision to abolish short prison sentences would mean that it would be difficult to justify refusal of bail in some circumstances, and thus create a tension with the recently changed bail laws. The joint submission of the NSW Police and the Ministry for Police raises a concern about repeat offenders.[356] The recent amendments to the *Bail Act 1978* mean that many repeat offenders will be refused bail. However, if short prison sentences were to be abolished, convictions for many offences would no longer be likely to result in a term of imprisonment. In these circumstances, it would be difficult to justify the refusal of bail.



The DCS submits that abolishing short prison sentences would lead to a decrease in the remand population, although it would be most difficult to predict the effect of abolition in any more specific terms.[357] The DCS notes that BOCSAR has similarly found that the impact of

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[351] See for example, the *Bail Amendment Act 2003* no 22, *Bail Amendment (Firearms and Property Offences) Act 2003* no 84, (yet to be commenced).

[352] On 1 February 2004, 2001 offenders were on remand. In contrast, 6 months earlier, prior to the commencement of the *Bail Amendment Act 2003* there were 1782 such persons on remand. This represents an increase of 12.2% over 6 months.

[353] Data obtained from BOCSAR on 17 February 2004 shows that 44% of the prison sentences imposed in 2002 were for a period of under 3 months, with 10.5% of the prison sentences imposed in 2002 being for a period less than 1 month.

[354] See Morgan (2004) "*The Abolition of Six Month Sentences, New Hybrid orders and Truth in Sentencing: Western Australia's Latest Sentencing Laws*" Criminal Law Journal v.28 no.1 Feb 2004 p8-25

[355] Submission of the NSW Legal Aid Commission, 13 October 2003.

[356] Joint submission of the NSW Police and the Ministry for Police, 25 September 2003.

[357] Submission of the Department of Corrective Services, 22 September 2003.

abolishing short prison sentences on the size of the remand population is difficult to determine:

> "*If prison sentences of six months or less were abolished it is not known whether any of the persons likely to attract these short sentences would still be remanded in custody or not....If fewer offenders were remanded in custody as a result of abolishing short sentences, there would be additional savings associated with a reduction in the remand population*"[358]

It should be remembered that BOCSAR's paper was published in August 2002, prior to the recent amendments to the *Bail Act 1978*.

On the subject of the impact of abolishing short prison sentences on the size of the remand population, a fear has been expressed that this may see remands being used, deliberately or otherwise, in a manner amounting to a short sentence.[359]



[358] Lind and Eyland (2002) "*Crime and Justice Bulletin number 73: The Impact of Abolishing Short Prison Sentences*" Sydney: The Bureau of Crime Statistics and Research

[359] See Morgan (2004) "*The Abolition of Six Month Sentences, New Hybrid orders and Truth in Sentencing: Western Australia's Latest Sentencing Laws*" Criminal Law Journal v.28 no.1 Feb 2004 p8-25

## 18. Cost Issues

Estimating the cost impacts of the abolition of short prison sentences is a challenging task. Along with the cost of incarceration there are other subtle costs, and cost shifting from one department to another. There are direct costs associated with offenders re offending whilst subject to non-custodial sanctions.[360] Cost estimations are further complicated by the fact that abolition of short prison sentences will, no doubt, require increased spending on sentencing alternatives. Also, such investment in sentencing alternatives will precede any savings realised by the abolition of short prison sentences. As noted in the submission of the ODPP, the benefits of abolishing short prison sentences assumes immediate availability of effective community options.[361] Immediate provision of these community options would involve considerable outlay of funds prior to any savings from prison housing costs being realised. BOCSAR has attempted to estimate the direct cost savings of the abolition of short prison sentences, but their estimates have been disputed, in particular by the DCS.

**Alternatives to prison and cost and recidivism issues**

The NSW DCS has recently reported that the proportion of prisoners returning to correctional facilities within 2 years of being released from full-time custody was 47.3%.[362] In contrast, the corresponding rate of return for offenders managed by community corrections was much lower at 24.5%. Aside from the lower rate of recidivism for offenders managed by community corrections, the DCS also reported a substantial difference in cost.

The Department reports that full-time custody currently costs between $218.71-$172.77 per day, dependent upon security classification, whereas an offender managed by community offender services costs on average $8 per day.[363] The Department further reports that the cost of housing an offender in Periodic Detention roughly equates to the costs of housing an offender in minimum security, namely $172.77 per day.[364] The Department also advises that although home detention is the most expensive form of community order, it is far cheaper than the cost of minimum security.[365]



[360] The vast majority of offenders have criminal histories and quite often have been given non-custodial options in the past.

[361] Submission of the Office of the DPP, 11 September 2003.

[362] (2003) "Review of the Community Offender Services in NSW: Sydney: Office of the Inspector General of Corrective Services.

[363] See Department of Corrective Services "*Annual Report 2002-2003*" Maximum security is costed at $218.71 per day, medium at $169.35 per day, and minimum at 172.77 per day. See also (2003) "Review of the Community Offender Services in NSW: Sydney: Office of the Inspector General of Corrective Services. At p 6

[364] It must be remembered that if and when an offender moves to "stage 2" periodic detention, there is no requirement to stay overnight and costs reduce substantially.

[365] Advice from Director, Corporate Legislation and Parliamentary support, 11 February 2003. The Department does not have costings but does, however estimate that the cost of home detention is approximately $62 per day. See also (2003) "Review of the Community Offender Services in NSW: Sydney: Office of the Inspector General of Corrective Services, at p 6. where cost of periodic detention is approximated at $135.20 per day. The Department of Corrective Services "*Annual Report 2002-2003*" at Appendix 9 gives figures based on Australia-wide classifications show Open and Periodic Detention at $152.62, and secure at $180.42. It must be remembered, however, that while some periodic detainees stay overnight for two nights per week, if and when a periodic detainee achieves stage 2 status, the detainee simply turns up for work for 8 hours per day and does not stay overnight. This obviously has cost implications.

The DCS argues that there may be a community perception that alternatives to full-time imprisonment, and in particular, community based sanctions are a "soft option".[366] The Department argues that this is not the case, and that attention should be paid to this public perception in order to successfully introduce any form of abolition of short prison sentences of 6 months or less. The Department argues that it will be essential for the NSW Government to explain to the public that a community-based sentence is not a soft option. A community-based sentence requires that an offender face the consequences of the offence while full-time imprisonment often enables an offender to avoid many of the consequences and responsibility for an offence. Similarly, the submission of the Coalition of Aboriginal Legal Services ("COALS") argues that there exists a community perception that alternative sentencing options are "soft", which in turn is reflected at a political level with politicians wishing to appear 'tough' on crime.[367]

The submission of the Office of the Public Defender also argues that community based sentences carry a sufficient denunciatory and punitive effect to deal with offending at the "*low end of the criminal scale*".[368] The submission also questions the utility of short sentences for this type of offending. In relation to public acceptance of alternatives to full-time custody, the ODPP argues that development of appropriate programs prior to any abolition of short prison sentences is necessary. The community would only accept abolition of short sentences if it were assured that the relevant alternative programs were already developed and being implemented with rigorous supervision and sanctions for non-compliance.



**Estimated savings in abolishing prison sentences of 6 months or less**

BOCSAR estimated that if short prison sentences were abolished, the savings in recurrent costs could be between $33 and $47 million.[369] BOCSAR notes that this saving relates to the time actually spent in prison, and if short prison sentences were abolished, then there may be fewer offenders remanded in custody, which would result in further savings.



BOCSAR identified two limitations in its analysis: firstly, an assumption was made that if short prison sentences were abolished, then all prisoners presently serving a prison sentence of under 6 months would be given a non-custodial sentence. However, it is possible that if short prison sentences were abolished, some courts may react by imposing a sentence longer than six months on prisoners who would previously have received a prison sentence of less than 6 months ("bracket creep" or "sentence creep"). Secondly, BOCSAR noted that there may be prisoners whose stay in prison is longer than 6 months, but are serving one or more sentences sequentially, one or more of which may be for 6 months or less. As BOCSAR was unable to identify these prisoners, they were not included in the analysis. In light of these limitations, BOCSAR considered the estimated saving of between $33 and $47 million per year as a *conservative assessment*.

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[366] It is acknowledged that some alternative sentencing options are more lenient than a full time prison sentence, but they should not be generally considered as "soft options". For example, periodic detention is not to be regarded in the same way as an equivalent period of full time custody, and that it is a sentencing option with an amount of leniency built in when compared to a full time sentence: see *R v. Duroux* NSW CCA, Unreported, 11 April 991, *R v. Falzon and Pullen* NSW CCA, Unreported, 20 February 1992.

[367] Submission of the Coalition of Aboriginal Legal Services, citing Assoc Prof. Chris Cunneen, "*What price the hard sell on cutting crime*" in SMH, 18 April 2002.

[368] Submission of the Office of the Public Defender, 12 November 2003.

[369] Lind and Eyland (2002) "*Crime and Justice Bulletin number 73: The Impact of Abolishing Short Prison Sentences*"

BOCSAR has recently completed a comprehensive cost analysis in relation to the Drug Court.[370] It has been suggested that the viability of a similar analysis in relation to abolition of short sentences be discussed with BOCSAR, and that a similar analysis be conducted in relation to abolition of short prison sentences.

The DCS submits that it has three main concerns with the above estimated savings. Firstly that the analysis includes those inmates serving a period of 6 months or less as a result of a breach of a parole order, periodic detention order or home detention order;[371] secondly, it excludes inmates held in court cells or transitional centres; and finally it does not take into account the fact that any offender diverted from prison will still receive some kind of punishment and that costs will be incurred in carrying out any alternative sentence.

The DCS has further submitted that significant savings can only be achieved where a whole gaol or wing is closed, rather than reducing the number of inmates over a range of gaols or wings, as the operational costs of these centres still need to be covered.[372] The Department further notes that much of the money, which would be saved, would need to be transferred to the administration of community service orders and supervised good behaviour bonds. In this way, there would be a shifting of costs rather than a saving.[373]



Many other submissions question whether substantial savings would be realised by the abolition of short prison sentences. One such submission summarises 5 reasons as to why abolishing short prison sentences is unlikely to result in substantial savings:[374]

- Some offenders may simply be sentenced to imprisonment for a period greater than 6 months;
- There will be costs in providing more community based resources to absorb several thousand offenders per year who are presently being sentenced to imprisonment for 6 months or less;
- Some such offenders who are given alternative sentences may subsequently breach them and find themselves serving a prison sentence in any event. In such a case, the cost of imprisonment is simply deferred, and there is the additional cost of the alternative sentence first imposed;
- Widespread costs in following up breach proceedings; and
- Direct costs associated with any offending behaviour committed in the community whilst the offender would otherwise have been imprisoned.



The submission of the ODPP questions the savings estimated by BOCSAR if short prison sentences were to be abolished.[375] The submission suggests that BOCSAR's estimate is

[370] See Weatherburn, Lind and Chen (The Bureau of Crime Statistics and Research); Shanahan, Lancaster, Haas and Lourenco (Centre for Health, Economics, Research and Evaluation) (2002) "*New South Wales Drug Court Evaluation: Cost-effectiveness*" Sydney: The Bureau of Crime Statistics and Research.

[371] The Department of Corrective Services submits that if prison sentences of 6 months or less were to be abolished, it is doubtful that the reform would extend to changing the procedure for revoking parole orders, periodic detention orders or home detention orders.

[372] The Department estimates that approximately 85% of the direct daily cost of housing an inmate is, in the short to medium term, a fixed cost. Significant savings in custodial operations could not, therefore, be achieved until a discrete correctional centre were closed and staff redeployed.

[373] The joint submission of NSW Police and the Ministry for Police also questions the savings reported by the Bureau of Crime Statistics and Research on the same bases as the Department of Corrective Services.

[374] Personal submission of Mr Ivan Potas. Mr Potas' submission does not necessarily represent the views of the Judicial Commission of NSW.

directed towards the short term, and that over the long term, savings would not be as great. Assuming that no offender is sentenced to a longer term of imprisonment (which would result in increased costs in itself), it cannot be assumed that all those currently sentenced to short prison sentences could be given community alternatives and that none would return to prison within the term of their non-custodial sentence. This is particularly true considering that most offenders who are sentenced to a short term of imprisonment have criminal histories and quite often have been given non-custodial options in the past:

> "*It is unrealistic to expect that offenders who have failed to rehabilitate through exposure to such options, when released on further non-custodial options will comply in all respects and remain crime free. Experience at the Drug Court pilot at Parramatta shows that, even with the most intensive court and probation/parole supervision and well resourced support programs taking a holistic approach, relapse into drug use and re-offending (sanctioned by serving short periods in custody) are common.*
>
> *Accordingly one can expect that the community options replacing sentences of 6 months or less will not be a "cure all" and that a significant proportion of offenders, even in the best designed community programs, will re-offend and be returned to custody within a relatively short period. The reduction in the overall prison population may not be as great as at first appears.*"



The ODPP uses the experiences of the Drug Court pilot as an example of the costs which can be associated with alternatives to full-time imprisonment. The ODPP refers to BOCSAR's cost effectiveness evaluation which reports that Drug Court costs are in the order of $143 per offender per day. Such expensive, well-designed programs do not guarantee "success" in any event. The ODPP further notes that the significant funding for such programs would be required up front, and it may be some time before savings are realised from the lesser number of offenders serving short periods in prison



The issue of cost is closely related to the assertion that sentencing alternatives to full-time imprisonment should be provided throughout the state. This assertion was made in a number of submissions, and is considered by many as a matter of great importance. Provision of such alternatives to full-time imprisonment uniformly throughout the state will obviously have funding implications.

The submission of the NSW LAC argues that it is important to identify potential savings from abolition and transfer them into alternative programs. Alternatively, there must be a preparedness to put funding into alternate programs *in anticipation* of them eventually leading to savings elsewhere in the justice system.

**Question:** If abolition of short prison sentences is trialled on a pilot basis, would a further cost analysis by BOCSAR, similar to the cost analysis completed in relation to the Drug Court prove useful?

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[375] Submission of the Office of the DPP, 11 September 2003.

## 19. Relationship Between State and Commonwealth Offences

Federal sentencing law is contained in Part 1B of the *Crimes Act 1914* (Cth), and the sentencing options available when sentencing a federal offender include: dismissal or discharge notwithstanding that the offence has been proved,[376] imposition of a bond,[377] imposing a community service order,[378] suspending a sentence of imprisonment,[379] ordering a sentence of imprisonment to be served by way of periodic detention[380] or a sentence of full-time imprisonment.

By section 120 of the *Commonwealth of Australia Constitution Act 1901*, Australian States must make provision for the detention, in state prisons, of persons accused or convicted of offences against the laws of the Commonwealth. These "commonwealth prisoners" are subject to the same prison regime as other prisoners in NSW prisons.

BOCSAR has found that there are only a handful of such commonwealth prisoners,[381] and more recent information from the NSW DCS suggests that on any given day, there would be no more than 5 inmates in NSW who are serving a full-time prison sentence of 6 months or less for an offence against the law of the Commonwealth.[382]



The Director General of the Western Australian Department of Justice notes that although the abolition of prison sentences of 3 months or less in that state does not apply to Federal offenders, there are very few such Federal offenders serving prison sentence of 3 months or less in Western Australian gaols. The Director General further advises that the Commonwealth Attorney General has been kept appraised of the developments in relation to abolishing prison sentences of 6 months or less in that state.[383]

Attached at **Annexure C** is an example list of some Commonwealth offences attracting a statutory maximum penalty of 6 months or less.



[376] Section 19B *Crimes Act 1914*
[377] For example, a "Griffiths remand": see Griffiths v. R (1977) 137 CLR 293, a good behaviour bond by section 20(1)(a) of the *Crimes Act 1914*
[378] See section 20AB of the *Crimes Act 1914*
[379] See section 20(1)(b) of the *Crimes Act 1914*
[380] See section 20AB of the *Crimes Act 1914*
[381] Lind and Eyland (2002) *The impact of abolishing short prison sentences* Crime and Justice Bulleting number 73, NSW Bureau of Crime Statistics and Research.
[382] The Department's Corporate Research, Evaluation and Statistical Unit reported that at 30 June 2003, there were 380 inmates being held on Commonwealth offences. Of these, only 2 had been sentenced to imprisonment for 6 months or less. In addition, at 30 June 2003, there were 117 ACT inmates being held in NSW correctional centres, 4 of which were serving a prison sentence of 6 months or less (Information provided 6 November 2003). The Bureau of Crime Statistics and Research has recently estimated that for the whole year of 2002, 52 offenders were sentenced for an offence against Commonwealth law to a period of imprisonment for 6 months or less. 41 of such sentences were imposed by the Local Court, and 11 sentences imposed by the higher courts. The Bureau of Crime Statistics and Research: Information provided 27 October 2003.
[383] Letter from Mr Alan Piper, Director General, WA Department of Justice, dated 11 February 2004.

**Annexure A**

**Statistical Material.**

**Table 1: prison sentences imposed by the Local Court for 2002.**

Data provided by The NSW Bureau of Crime Statistics and Research

| **Length of sentence (time actually spent in prison[384])** | **Number imposed in 2002** | **Percentage** |
|---|---|---|
| 0-1 months | 747 | 10.5% |
| 1-2 months | 595 | 8.4% |
| 2-3 months | 1144 | 16.1% |
| 3-4 months | 696 | 9.8% |
| 4-5 months | 174 | 2.5% |
| 5-6 months | 1999 | 28.2% |
| Greater than 6 months | 1742 | 24.5% |
| **Total** | **7097** | **100%** |



**TABLE 2: Inmate population**

Data provided by the Department of Corrective Services



| **Date** | **Total inmate population** | **Inmates with sentences of 6 months or less (excluding breach-of-order inmates)** |
|---|---|---|
| 30 June 2000 | 7347 | 596 |
| 30 June 2001 | 7801 | 599 |
| 30 June 2002 | 7876 | 475 |
| 30 June 2003 | 8095 | 443 |

**Table 3: The most serious offence for the Inmates discharged in 2002-03 after completion of custodial sentence of 6 months or less (excluding breach of order)**

Data provided by the Department of Corrective Services

| **Offence group** | **Number** | **Percent** |
|---|---|---|
| Major Assault | 153 | 7.9 |
| Other Assault | 348 | 18.1 |

[384] Where the overall sentence is less than 6 months, a non-parole period is not set, and the whole sentence is served in prison. Where the overall sentence is greater than 6 months, the time actually spent in prison refers to the non-parole period.

| | | |
|---|---|---|
| Serious Sexual Assault | 2 | 0.1 |
| Indecent Assault | 3 | 0.2 |
| Robbery Major Assault | 8 | 0.4 |
| Other Robbery | 4 | 0.2 |
| Fraud | 88 | 4.6 |
| Break Enter and Steal | 133 | 6.9 |
| Other Steal | 599 | 31.1 |
| Driving/Traffic | 346 | 18.0 |
| Offences against Order | 126 | 6.5 |
| Drug Offences | 63 | 3.3 |
| Other Offences | 52 | 2.7 |
| **Total** | **1925** | **100.0** |

**TABLE 4: Known prior adult imprisonment/order (NSW only) by gender, of the 443 inmates serving sentences of 6 months or less on 30 June 2003**



Data provided by the Department of Corrective Services

| Known prior impris/order | Males | % | Females | % | Total | % |
|---|---|---|---|---|---|---|
| Prior full-time sentence | 281 | 69.7 | 26 | 65.0 | 307 | 69.3 |
| Prior fine | 9 | 2.2 | 0 | 0.0 | 9 | 2.0 |
| Prior periodic detention | 61 | 15.1 | 7 | 17.5 | 68 | 15.3 |
| Prior remand | 7 | 1.7 | 1 | 2.5 | 8 | 1.8 |
| Prior non-custodial sentence | 29 | 7.2 | 2 | 5.0 | 31 | 7.0 |
| No prior record | 16 | 4.0 | 4 | 10.0 | 20 | 4.5 |
| **Total** | **403** | **100** | **40** | **100** | **443** | **100** |



**TABLE 5: Known prior adult imprisonment/order (NSW only) by gender of, Aboriginal inmates of the 443 inmates serving sentences of 6 months or less on 30 June 2003**

Data provided by the Department of Corrective Services

| Known prior impris/order | Males | % | Females | % | Total | % |
|---|---|---|---|---|---|---|
| Prior full-time sentence | 72 | 17.9 | 7 | 17.5 | 79 | 17.8 |
| Prior fine | 1 | 0.2 | 0 | 0.0 | 1 | 0.2 |
| Prior periodic detention | 15 | 3.7 | 0 | 0.0 | 15 | 3.4 |

| | | | | | | |
|---|---|---|---|---|---|---|
| Prior remand | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Prior non-custodial sentence | 6 | 1.5 | 2 | 5.0 | 8 | 1.8 |
| No prior record | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| **Total** | **94** | **23.3** | **9** | **22.5** | **103** | **23.3** |

**Table 6**

**NSW Local Criminal Courts 2002**

**Number of prison sentences as principal penalty by principal offence and duration in local court appearances finalised**

Data provided by the NSW Bureau of Crime Statistics and Research



| Type of principal offence | | | Duration of prison sentence (time actually spent in prison) | | | |
|---|---|---|---|---|---|---|
| | | | 6 months or less | | More than 6 months | |
| | | | Number | % | Number | % |
| Homicide and related offences | Manslaughter and driving causing death | Driving causing death | 2 | 100.0 | 0 | 0.0 |
| Acts intended to cause injury | Assault | Aggravated assault | 28 | 50.0 | 28 | 50.0 |
| | | Non-aggravated assault | 888 | 81.5 | 201 | 18.5 |
| | Other acts intended to cause injury | Acts intended to cause injury, nec | 2 | 100.0 | 0 | 0.0 |
| Sexual assault and related offences | Sexual assault | Aggravated sexual assault | 30 | 66.7 | 15 | 33.3 |
| | | Non-aggravated sexual assault | 3 | 75.0 | 1 | 25.0 |
| | Non-assaultive sexual offences | Non-assaultive sexual offences, nec | 2 | 100.0 | 0 | 0.0 |
| Dangerous and negligent acts endangering persons | Dangerous or negligent operation of a vehicle | Driving under the influence of alcohol or drugs | 24 | 75.0 | 8 | 25.0 |
| | | Dangerous or negligent driving | 82 | 67.8 | 39 | 32.2 |
| Robbery, extortion and related offences | Robbery | Aggravated robbery | 2 | 28.6 | 5 | 71.4 |
| | | Non-aggravated robbery | 7 | 41.2 | 10 | 58.8 |
| | Blackmail and extortion | Blackmail and extortion | 1 | 100.0 | 0 | 0.0 |
| Unlawful entry with intent/burglary, break and enter | Unlawful entry with intent/burglary, break and enter | Unlawful entry with intent/burglary, break and enter | 346 | 46.3 | 401 | 53.7 |
| Theft and related offences | Motor vehicle theft and related offences | Theft of motor vehicle | 29 | 59.2 | 20 | 40.8 |
| | | Illegal use of motor vehicle | 212 | 57.8 | 155 | 42.2 |
| | Theft (except motor vehicles) | Theft from a person (excluding by force) | 50 | 66.7 | 25 | 33.3 |
| | | Theft from retail | 273 | 94.5 | 16 | 5.5 |

| | | | | | | |
|---|---|---|---|---|---|---|
| | | premises | | | | |
| | | Theft (except motor vehicles), nec | 386 | 86.0 | 63 | 14.0 |
| | Receiving or handling proceeds of crime | Receiving or handling proceeds of crime | 373 | 91.0 | 37 | 9.0 |
| Deception and related offences | Fraud, forgery or false financial instruments | Cheque or credit card fraud | 1 | 100.0 | 0 | 0.0 |
| | | Make, use or possess equipment to make false/illegal financial instrument | 50 | 82.0 | 11 | 18.0 |
| | | Fraudulent trade practices | 1 | 100.0 | 0 | 0.0 |
| | | Prescription drug fraud | 11 | 91.7 | 1 | 8.3 |
| | | Fraud, nec | 96 | 72.7 | 36 | 27.3 |
| | Counterfeiting currency and related offences | Counterfeiting currency | 0 | 0.0 | 1 | 100.0 |
| | Dishonest conversion | Dishonest conversion | 9 | 75.0 | 3 | 25.0 |
| | Bribery | Bribery involving Government officials | 0 | 0.0 | 1 | 100.0 |
| | | Bribery, nec | 0 | 0.0 | 1 | 100.0 |
| | Other deception offences | Misrepresentation of professional status | 2 | 100.0 | 0 | 0.0 |
| | | Deception offences, nec | 1 | 100.0 | 0 | 0.0 |
| Illicit drug offences | Deal or traffic in illicit drugs | Deal or traffic in illicit drugs, unknown quantity | 82 | 58.2 | 59 | 41.8 |
| | | Deal or traffic in illicit drugs, non-commercial quantity | 22 | 62.9 | 13 | 37.1 |
| | Manufacture or cultivate illicit drugs | Manufacture or cultivate illicit drugs | 7 | 58.3 | 5 | 41.7 |
| | Possess and/or use illicit drugs | Possess illicit drug | 115 | 92.7 | 9 | 7.3 |
| | | Use illicit drug | 4 | 100.0 | 0 | 0.0 |
| | Other illicit drug offences | Illicit drug offences, nec | 13 | 76.5 | 4 | 23.5 |
| Weapons and explosives offences | Prohibited weapons/explosives offences | Sell, possess and/or use prohibited weapons/explosives | 10 | 66.7 | 5 | 33.3 |
| | Regulated weapons/explosives offences | Unlawfully obtain or possess regulated weapons/explosives | 18 | 66.7 | 9 | 33.3 |
| | | Misuse of regulated weapons/explosives | 13 | 59.1 | 9 | 40.9 |
| | | Deal or traffic regulated weapons/explosives offences | 0 | 0.0 | 1 | 100.0 |
| Property damage and environmental pollution | Property damage | Property damage by fire or explosion | 9 | 47.4 | 10 | 52.6 |
| | | Property damage, nec | 144 | 90.6 | 15 | 9.4 |
| Public order offences | Disorderly conduct | Trespass | 3 | 100.0 | 0 | 0.0 |
| | | Offensive language | 1 | 100.0 | 0 | 0.0 |
| | | Offensive behaviour | 58 | 81.7 | 13 | 18.3 |
| | | Criminal intent | 115 | 76.2 | 36 | 23.8 |

| | | | | | | |
|---|---|---|---|---|---|---|
| | | Disorderly conduct, nec | 11 | 78.6 | 3 | 21.4 |
| | Regulated public order offences | Censorship offences | 0 | 0.0 | 2 | 100.0 |
| | | Prostitution offences | 1 | 100.0 | 0 | 0.0 |
| | | Offences against public order sexual standards | 3 | 100.0 | 0 | 0.0 |
| Road traffic and motor vehicle regulatory offences | Driving licence offences | Driving while licence cancelled, suspended or disqualified | 714 | 73.2 | 262 | 26.8 |
| | | Driving without a licence | 20 | 100.0 | 0 | 0.0 |
| | | Driving licence offences, nec | 1 | 100.0 | 0 | 0.0 |
| | Road vehicle registration and roadworthiness offences | Registration offences | 1 | 100.0 | 0 | 0.0 |
| | Regulatory driving offences | Exceeding the prescribed content of alcohol limit | 170 | 81.0 | 40 | 19.0 |
| | | Regulatory driving offences, nec | 14 | 73.7 | 5 | 26.3 |
| Offences against justice procedures, government security and government operations | Breach of Justice order | Escape custody offences | 29 | 82.9 | 6 | 17.1 |
| | | Breach of bail | 29 | 96.7 | 1 | 3.3 |
| | | Breach of domestic violence order | 293 | 85.2 | 51 | 14.8 |
| | | Breach of justice order, nec | 348 | 84.7 | 63 | 15.3 |
| | Other offences against justice procedures | Subvert the course of justice | 0 | 0.0 | 2 | 100.0 |
| | | Resist or hinder police officer or justice official | 68 | 90.7 | 7 | 9.3 |
| | | Prison regulation offences | 18 | 90.0 | 2 | 10.0 |
| | | Offences against justice procedures, nec | 10 | 76.9 | 3 | 23.1 |
| | Offences against government operations | Offences against government operations, nec | 2 | 100.0 | 0 | 0.0 |
| Miscellaneous offences | Harassment and related offences | Harassment and private nuisance | 6 | 75.0 | 2 | 25.0 |
| | | Threatening behaviour | 74 | 74.0 | 26 | 26.0 |
| | Public health and safety offences | Licit drug offences | 8 | 100.0 | 0 | 0.0 |
| | | Public health and safety offences, nec | 3 | 75.0 | 1 | 25.0 |
| | Other miscellaneous offences | Environmental regulation offences | 3 | 100.0 | 0 | 0.0 |
| | | Import/export regulations | 2 | 100.0 | 0 | 0.0 |
| | | Miscellaneous offences, nec | 2 | 100.0 | 0 | 0.0 |
| **Total** | | | 5,355 | 75.5 | 1,742 | 24.5 |

**Table 7**

**NSW Higher Criminal Courts 2002**

**Number of prison sentences as principal penalty by principal offence and duration in trial and sentence cases finalised**

Data provided by the NSW Bureau of Crime Statistics and Research

| Type of principal offence | | | Duration of prison sentence (time actually spent in prison) | | | |
|---|---|---|---|---|---|---|
| | | | 6 months or less | | More than 6 months | |
| | | | Number | % | Number | % |
| Homicide and related offences | Murder | Murder | 0 | 0.0 | 39 | 100.0 |
| | Conspiracies and attempts to murder | Conspiracy to murder | 0 | 0.0 | 3 | 100.0 |
| | | Attempted murder | 0 | 0.0 | 2 | 100.0 |
| | Manslaughter and driving causing death | Manslaughter | 0 | 0.0 | 18 | 100.0 |
| | | Driving causing death | 2 | 5.0 | 38 | 95.0 |
| Acts intended to cause injury | Assault | Aggravated assault | 9 | 6.4 | 132 | 93.6 |
| | | Non-aggravated assault | 26 | 24.3 | 81 | 75.7 |
| | Other acts intended to cause injury | Acts intended to cause injury, nec | 0 | 0.0 | 3 | 100.0 |
| Sexual assault and related offences | Sexual assault | Aggravated sexual assault | 4 | 2.5 | 159 | 97.5 |
| | | Non-aggravated sexual assault | 0 | 0.0 | 4 | 100.0 |
| | Non-assaultive sexual offences | Non-assaultive sexual offences against a child | 0 | 0.0 | 2 | 100.0 |
| Dangerous and negligent acts endangering persons | Dangerous or negligent operation of a vehicle | Driving under the influence of alcohol or drugs | 0 | 0.0 | 16 | 100.0 |
| | | Dangerous or negligent driving | 0 | 0.0 | 15 | 100.0 |
| | Other dangerous or negligent acts endangering persons | Other dangerous or negligent acts endangering persons, nec | 0 | 0.0 | 1 | 100.0 |
| Abduction and related offences | Abduction and kidnapping | Abduction and kidnapping | 1 | 3.7 | 26 | 96.3 |
| | Deprivation of liberty/false imprisonment | Deprivation of liberty, false imprisonment | 0 | 0.0 | 1 | 100.0 |
| Robbery, extortion and related offences | Robbery | Aggravated robbery | 21 | 4.5 | 441 | 95.5 |
| | | Non-aggravated robbery | 12 | 14.6 | 70 | 85.4 |
| Unlawful entry with intent/burglary, break and enter | Unlawful entry with intent/burglary, break and enter | Unlawful entry with intent/burglary, | 19 | 7.2 | 244 | 92.8 |

| | | | | | | |
|---|---|---|---|---|---|---|
| | | break and enter | | | | |
| Theft and related offences | Motor vehicle theft and related offences | Theft of motor vehicle | 1 | 8.3 | 11 | 91.7 |
| | | Illegal use of motor vehicle | 4 | 57.1 | 3 | 42.9 |
| | Theft (except motor vehicles) | Theft from a person (excluding by force) | 2 | 6.9 | 27 | 93.1 |
| | | Theft from retail premises | 1 | 25.0 | 3 | 75.0 |
| | | Theft (except motor vehicles), nec | 5 | 23.8 | 16 | 76.2 |
| | Receiving or handling proceeds of crime | Receiving or handling proceeds of crime | 0 | 0.0 | 9 | 100.0 |
| Deception and related offences | Fraud, forgery or false financial instruments | Make, use or possess equipment to make false/illegal financial instrument | 6 | 27.3 | 16 | 72.7 |
| | | Fraudulent trade practices | 0 | 0.0 | 2 | 100.0 |
| | | Fraud, nec | 4 | 8.3 | 44 | 91.7 |
| | Counterfeiting currency and related offences | Counterfeiting currency | 1 | 100.0 | 0 | 0.0 |
| | Dishonest conversion | Dishonest conversion | 1 | 6.7 | 14 | 93.3 |
| | Bribery | Bribery involving Government officials | 0 | 0.0 | 1 | 100.0 |
| | | Bribery, nec | 0 | 0.0 | 3 | 100.0 |
| Illicit drug offences | Import or export illicit drugs | Import illicit drugs | 1 | 2.4 | 41 | 97.6 |
| | | Export illicit drugs | 0 | 0.0 | 2 | 100.0 |
| | Deal or traffic in illicit drugs | Deal or traffic in illicit drugs, unknown quantity | 20 | 11.3 | 157 | 88.7 |
| | | Deal or traffic in illicit drugs, commercial quantity | 0 | 0.0 | 47 | 100.0 |
| | | Deal or traffic in illicit drugs, non-commercial quantity | 4 | 17.4 | 19 | 82.6 |
| | Manufacture or cultivate illicit drugs | Manufacture or cultivate illicit drugs | 0 | 0.0 | 27 | 100.0 |
| | Possess and/or use illicit drugs | Possess illicit drug | 0 | 0.0 | 22 | 100.0 |
| Weapons and explosives offences | Prohibited weapons/explosives offences | Sell, possess and/or use prohibited weapons/explosives | 1 | 25.0 | 3 | 75.0 |

| | | | | | | |
|---|---|---|---|---|---|---|
| | Regulated weapons/explosives offences | Unlawfully obtain or possess regulated weapons/explosives | 2 | 28.6 | 5 | 71.4 |
| | | Misuse of regulated weapons/explosives | 2 | 25.0 | 6 | 75.0 |
| | | Deal or traffic regulated weapons/explosives offences | 0 | 0.0 | 5 | 100.0 |
| Property damage and environmental pollution | Property damage | Property damage by fire or explosion | 2 | 25.0 | 6 | 75.0 |
| | | Property damage, nec | 2 | 100.0 | 0 | 0.0 |
| Public order offences | Disorderly conduct | Offensive behaviour | 1 | 12.5 | 7 | 87.5 |
| | | Criminal intent | 2 | 22.2 | 7 | 77.8 |
| | Regulated public order offences | Offences against public order sexual standards | 0 | 0.0 | 1 | 100.0 |
| Offences against justice procedures, government security and government operations | Breach of Justice order | Escape custody offences | 4 | 26.7 | 11 | 73.3 |
| | | Breach of domestic violence order | 1 | 100.0 | 0 | 0.0 |
| | Other offences against justice procedures | Subvert the course of justice | 6 | 50.0 | 6 | 50.0 |
| | | Resist or hinder police officer or justice official | 0 | 0.0 | 1 | 100.0 |
| Miscellaneous offences | Harassment and related offences | Threatening behaviour | 1 | 14.3 | 6 | 85.7 |
| | Public health and safety offences | Public health and safety offences, nec | 0 | 0.0 | 1 | 100.0 |
| | Commercial/industry/financial regulations | Commercial/industry/financial regulations | 3 | 50.0 | 3 | 50.0 |
| | Other miscellaneous offences | Import/export regulations | 0 | 0.0 | 8 | 100.0 |
| **Total** | | | 171 | 8.5 | 1,835 | 91.5 |

**Annexure B**

**Offences with statutory Maximum Penalty of 6 months (NSW):**

**Administrative Decisions Tribunal Act 1997**
129. Offence: improper disclosure of information

**Anatomy Act 1977**
8B. Consent by coroner
9. Conditions of taking possession of body
14. Offences (Subsection (3))

**Anti Discrimination Act 1977**
20D. Offence of serious racial vilification
38T. Offence of serious transgender vilification
49ZTA. Offence of serious homosexual vilification
49ZXC. Offence of serious HIV/AIDS vilification



**Biological Control Act 1985**
41. Failure of witness to attend
43. Refusal to be sworn or to answer questions

**Boxing and Wrestling Control Act 1986**
15. Offence to engage in boxing contest
16. Offence to engage in sparring
36. Offence of damaging medical record book etc

**Casino Control Regulation 2001**
104A. Order by Authority for short-term closure of premises (see subs (6))
121. Unauthorised sale of liquor by licensee
122. Sale of liquor without licence



**Charitable Fundraising Act 1991**
13. False statements etc
20. Proceeds of appeal (see subs (7))
30. Offences in relation to inquiries

**Commercial Agents and Private Inquiry Agents Act 1963**
6. Unlicensed persons prohibited from acting as commercial agents or private inquiry agents
8. Unlicensed persons prohibited from acting as subagents
38. Money received by subagents

**Commission for Children and Young People Act 1998**
21. Tendering information, documents and evidence (subs (3))
42. Unauthorised disclosure or dishonest collection of information

**Community Lands Management Act 1989**
94. Summons to appear before Tribunal (see subs (5))
95. Examination of witness on oath
96. Contempt of Tribunal

**Companion Animals Act 1998**
17. Dog must not be encouraged to attack (subs (1)(b))

**Confiscation of Proceeds of Crime Act 1989**
51. Hindering or obstructing Public Trustee

**Conveyancers Licensing Act 2003**
148. Obstruction etc of authorised officers
161. Disclosure of information

**Co-Operatives Act 1992**
181A. Control of the right to vote (cf Vic Act s 185)
379. Offence---failing to comply with requirements of inspector (cf Vic Act s 397) (subs (4))
398. Fraud or misappropriation (cf Vic Act s 416) (subs (2))
400. Accepting commission (cf Vic Act s 418) (subs (1))
401. False statements in loan application etc (cf Vic Act s 419) (subs (1))



**Coroners Act 1980**
45. Offences

**Crimes (Administration of Sentences) Act 1999**
264. Wearing or possession of correctional officer uniform by others
265. Impersonating correctional officer

**Crimes (Domestic Violence) Amendment Act 1993**
(1) Section 545B (*Intimidation or annoyance by violence or otherwise* ): (act inserts into Crimes Act 1900)



**Crimes Act 1900**
353B – Person Apprehended carrying Razor etc:
502 – Possession of Skin etc of Stolen Cattle:
503 – Stealing Dogs:
505 – Stealing Animals etc ordinarily kept in confinement:
507 – Possession of Stolen Animals etc:
513 – Stealing Shrubs:
520 – Stealing Plants etc in gardens:
521A. Stealing of rock, stone etc
522 – Possession of shipwrecked goods:
523 – Offering shipwrecked goods for sale:
527 – Fraudulently appropriating or retaining property:
527A. Obtaining money etc by wilfully false representation
527C. Persons unlawfully in possession of property (subs (b) – if the thing is not a motor vehicle)
545C - Knowingly joining or continuing in etc an unlawful assembly (Subsection 1)
546A. Consorting with convicted persons
546B. Convicted persons found with intent to commit offence
547A. False statement respecting births, deaths or marriages (subsection 1 and (2)
578A. Prohibition of publication identifying victims of certain sexual offences

**Crimes Prevention Act 1916**
3. Printing or publishing writing inciting to crimes
4. Penalty for offences

If any person is guilty of an offence against this Act for which a penalty is not otherwise provided that person shall be liable on summary conviction before a Local Court to imprisonment for any term not exceeding six months.

**Criminal Assets Recovery Act 1990**
18. Protection of Public Trustee

**Criminal Records Act 1991**
13. Unlawful disclosure of information concerning spent convictions (subs (1))
14. Improper obtaining of information concerning spent convictions



**Dairy Industry Act 2000**
15B Funding of private subsidiary corporations (Subs (5))

**Darling Harbour Authority Act 1984**
60. Disclosure of information

**District Court Act 1973**
30. Obstruction of Sheriff, bailiff etc

**Drugs Misuse and Trafficking Act 1985**

**Electricity Supply Act 1995**
43EG. Confidential information (see subs (5))
43EH. Offences
87C. Offences
97HE. Confidential information
97JA. Obstruction of Tribunal or Scheme Administrator
97JB. False or misleading information



**Electricity Supply Amendment Act 2000**
43EG. Confidential information (see subs (5))
43EH. Offences
87C. Offences

**Environmental Planning and Assessment Act 1979**
148. Disclosure and misuse of information

**Exhibited Animals Protection Act 1986**
12. Licence required for animal display establishment
18. Approval of erection of animal display establishment
19. Alteration of licensed animal display establishment
22. Persons to be authorised to exhibit animals
24. Certain animals may be displayed only with permit

**Exotic Diseases of Animals Act 1991**
22. Control orders (see subs (2))
31. Contravention of importation order
34. Enforcement of destruction order
38. Contravention of quarantine order
38A. Undertaking in certain cases (subs (4))
40. Contravention of disinfection order
44. Offences in connection with information
46. Requiring assistance (see subs (4))
50. Obstruction etc

**Fair Trading Act 1987**
23. Obstruction etc of officers

**Farm Debt Mediation Act 1994**
16. Disclosure of information



**Fisheries Management Act 1994**
14. Offences relating to closures (subs (1))
20. Fish and waters protected from commercial fishing
24. Lawful use of nets or traps
25. Possession of illegal fishing gear
197K. Offence provisions (subs (1))
221IJ. Breaching conditions or restrictions

**Food Act 1989**
9. Preparation or sale of adulterated or sub-standard food
10. Sale not complying with purchaser's demand
11. Tender or dispatch of food etc adulterated or falsely described
12. Sale of food wrongly packed
13. Food or food packages to be correctly labelled



17. Requiring of information
49. Failure to comply with Director-General's directions
54. Contravention of order for closure
59. Assault on inspector
72. False warranties
86. Inspectors etc not to disclose information relating to manufacturing processes and trade secrets

**Food Production (Safety) Act 1998**
15B. Funding of private subsidiary corporations (Subs (5))
21. Offences relating to food safety schemes
26. Directions of Safe Food relating to primary produce or seafood (subs (2))
27. Interfering with seized items
48. Failure to comply with directions
52. Contravention of prohibition order

**Forestry Act 1916**
27. Penalty for unlawfully taking timber, products or forest materials
32C. Offences relating to hunting and the use of firearms etc

44. Penalties for offences against officers etc

**Health Administration Act 1982**
22. Disclosure of information
23. Specially privileged information (see subs (3))

**Health Care Complaints Act 1993**
37. Offence: improper disclosure of information

**Heritage Act 1977**
157. Penalties
158. Proceedings for offences (see subs (5))

**Home Building Act 1989**
121. Disclosure of information

**Human Tissue Act 1983**
16. Revocation of consent (subs (3) (4) and (5))
17. Child no longer in agreement with removal and transplantation (subs (2) (3) (4))
25. Consent by coroner (subs (2))
26. Certificates required in certain situations (subs (1))
30. Consent by coroner (subs (2))
32. Certain contracts etc not to be entered into
36. Offences

**Human Tissue and Anatomy Legislation Amendment Act 2003**
Schedule 1(amendment of Anatomy Act 1977), [17] Section 14 (2)-(3B) (see subs (3)(3A)(3B)
Schedule 1(amendment of Anatomy Act 1977), [19] Section 15
Schedule 2-Amendment of Human Tissue Act 1983 **31B Consent by coroner,** 34A Authority not to be given in respect of child in care of the State, [27] Section 36 Offences, [28] Section 36 (2A).

**Independent Commission Against Corruption Act 1988**
81. Complaints about possible corrupt conduct
82. Offences relating to obtaining information
83. Offences relating to obtaining documents etc

**Independent Pricing and Regulatory Tribunal Act 1992**
21. Hearings in investigations (subs (6))
23. Offences
24AC. Offences
24AD. Confidential information
24FF. Confidential information
24GJ. Confidential information (subs (5))
24GK. Offences

**Industrial Relations Act 1996**
180. Contempt of Commission-offence

**Justice Legislation Amendment (non-Association and Place Restriction) Act 2001**
100E Contravention of non-association and place restriction orders

**Lake Illawarra Authority Act 1987**
27. Disclosure of information

**Landlord and Tenant (Amendment) Act 1948**
95. Offences and penalties

**Land Sales Act 1964**
24. Penalty

**Legal Aid Commission Act 1979**
26. Divulging of certain information prohibited (see subs (1))
32. False application



**Legal Profession Act 1987**
171P. Offence: improper disclosure of information

**Liquor Act 1982**
104A. Order by authorised justice for short-term closure of premises (subs (6))
104C. Order by court for closure of premises (see subs (7))
105. Breach of the peace
121. Unauthorised sale of liquor by licensee
122. Sale of liquor without licence (subs (1) and (3))
123. Unlicensed premises (subs (1))

**Loan Fund Companies Act 1976**
15. Certain persons prohibited from managing etc affairs or activities of loan fund company (Subs (9))
67. Offences by officers of loan fund companies (subs (1))



**Local Court (Civil Claims) Act 1970**
79. Obstructing Sheriff or bailiff

**Lotteries and Art Unions Act 1901**
17A. False statements
21H. Offences in relation to inquiries

**Marine (Boating Safety-Alcohol and Drugs) Act 1991**
7. Operating vessel or supervising juvenile with prescribed concentration of alcohol in blood

**Marine Parks Act 1997**
20G. Offence provisions (subs (1))

**Marine Safety Act 1998**
24. Operating vessel or supervising juvenile with prescribed concentration of alcohol in blood (subs (5))

**Matrimonial Causes Act 1899**
90. Attachment

**Medical Practice Act 1992**
190. Confidentiality

**Mental Health Act 1990**
298. Ill-treatment etc of patients

**Mining Act 1992**
175A. Unlawful entry to site of mineral claim

**Moratorium Act 1932**
43. Offences

**Motor Accidents Compensation Act 1999**
180. Power of Supreme Court to deal with insurers unable to meet liabilities (cf s 116 MAA) (subs (9))



**Motor Dealers Act 1974**
55D. Temporary restraint on disposition of property (see subs (7))

**National Parks and Wildlife Act 1974**
45. Provisions respecting animals in parks and sites (see subs (2))
56. Provisions respecting animals in nature reserves (see subs (2))
57. Restrictions as to timber, vegetation, plants etc in nature reserves (see subs (3))
58Q. Provisions respecting animals in karst conservation reserves (see subs (2))
58R. Restrictions as to timber, vegetation, plants etc in karst conservation reserves (see subs (3))
90. Destruction etc of Aboriginal objects or Aboriginal places (see subs (1)
98. Harming protected fauna, other than threatened species, endangered populations or endangered ecological communities (see subs (2))
101. Buying, selling or possessing protected fauna (see subs (1)(a))
110. Use of certain substances for harming fauna (see subs (1) and (2))
117. Restriction on picking or possession of native plant (see subs (1))
118. Restriction on selling of native plant (see subs (1))
156A. Offence of damaging reserved land



**National Parks and Wildlife Amendment Act 2001**
90 Destruction, defacing or damaging of Aboriginal objects and places
98 Harming protected fauna, other than threatened species, populations or ecological communities
117. Restriction on picking or possession of native plant (see subs (1))
118. Restriction on selling of native plant (see subs (1))
156A. Offence of damaging reserved land

**Non-Indigenous Animals Act 1987**
10. Importation of animals
11. Keeping of animals
12. Movement of anima

13. Release or escape of animals

**NSW Crime Commission Act 1985**
10. Commission may require information from certain State agencies (subs (4))
17. Power to obtain documents and things (subs (3))

**Oaths Act 1900**
Section 30 – Untrue Document Purporting to be an Affidavit: (a) upon conviction on indictment---liable to imprisonment for 5 years, or (b) upon conviction by a Local Court constituted by a Magistrate sitting alone---liable to a penalty not exceeding 5 penalty units or imprisonment for a term not exceeding six months.

**Optometrists Act 1930**
28. Obtaining registration by false pretences

**Parliamentary Electorates and Elections Act 1912**
90. How scrutineers to be appointed. See subs (4)
106. Disputed vote (see (3)(b))
111. Ballot-papers not to be removed from polling-booth etc
114A. Application for a postal vote certificate and postal ballot-paper (see subs (2B) and (3)
114AA. Registration of general postal voters (see subs (14)
114J. Penalty for unlawfully marking etc ballot-paper
114P. Application for permission to vote before polling day (see subs (3)(4) and (5))
114Q. Procedure for voting before polling day (see subs (7)
114U. Appointment of scrutineers (see subs (4))
114ZA. Application for a postal vote certificate and postal ballot-paper (see subs (3), (4), (5), (6))
114ZT. Appointment of scrutineers (see subs (4))
115. Voting outside subdivision (see subs (3))
122A. Ballot-papers not to be informal in certain circumstances (see subs (6)(b), (7)(b))
129. Penalty for breaking seal of or opening parcel or packet
129J. Penalty for breaking seal of or opening packet or parcel
135. Violation of secrecy by officers
151A. Printing etc false information (see subs (1)(e))
151E. Name and address of author and printer to be printed on advertisements etc
151F. Distribution of electoral matter on polling-day
176D. Untrue statements in forms (see subs (1))
176F. Forging or uttering electoral papers
177. Offence of stuffing ballot-box

**Poisons and Therapeutic Goods Act 1966**
9. Prohibition on wholesale supply of certain substances for therapeutic use (see subsection (1)(b))
10. Prohibition on supply of certain substances otherwise than by wholesale (see subsection (1) and (3) (b))
11. Restriction on wholesale supply of certain substances (see subs (1)(b))
12. Obtaining substances by false representation (see subs 1)
16. Offences relating to prescribed restricted substances (see subs (1), (2) and (3))
18. Offence to fail to comply with condition of licence or authority (see subs (b))

45C. Regulations (see subs (1B)(5) – regs may create offence with penalty of imprisonment of up to 6 months)

**Police Act 1990**
203. Wearing or possession of police uniforms by others
204. Impersonation of police officers
205. Use of police designations by others
211E. Disclosure of information concerning former Police Board functions
217. Ministerial inquiries (see subs (3))

**Police Department (Transit Police) Act 1989**
35. Uniforms etc (subs (3)

**Police Integrity Commission Act 1996**
25. Power to obtain information (cf ICAC Act ss 21, 82; RC (PS) Act s 6) (subs (4))
26. Power to obtain documents or other things (cf ICAC Act ss 22, 83; RC (PS) Act s 7) (subs (3))



**Police (Special Provisions) Act 1901**
108. Assaulting or resisting special constables Whosoever assaults or resists any special constable whilst in the execution of his office, or promotes, incites, or encourages any other person so to do shall be liable to a penalty not exceeding 2 penalty units or to imprisonment for any term not exceeding six months.

**Prevention of Cruelty to Animals Act 1979**
5. Cruelty to animals
7. Carriage and conveyance of animals (see subs (1), (2), (2A))
8. Animals to be provided with food, drink or shelter
9. Confined animals to be exercised (see subs (1)and (3))
10. Tethering of animals
11. Animals not to be abandoned



12. Certain operations not to be performed on animals
13. Certain animals not to be ridden etc
14. Injuries to animals to be reported
16. Certain electrical devices not to be used upon animals
17. Certain spurs etc or implements designed for fighting not to be kept
18. Animal baiting and fighting prohibited
18A. Bull-fighting prohibited
19. Trap-shooting prohibited
19A. Game parks prohibited
20. Certain animal-catching activities prohibited
21A. Firing prohibited
21B. Tail nicking prohibited
21C. Steeplechasing and hurdle racing prohibited
21D. Confining of bird by ring and chain prohibited
22. Severely injured animals not to be sold
23. Certain traps not to be set

**Prices Regulation Act 1948**
61. Proceedings for offences (see subs (3)(b))

**Prisons Amendment Act 1996**
Section 38 Miscellaneous offences (Inserts into Prisons Act)

**Property (Relationships) Act 1984**
54. Failure to comply with injunction

**Property, Stock and Business Agents Act 2002**
207. Obstruction etc of authorised officers
219. Disclosure of information (see subs (1))

**Public Health Act 1991**
4. Orders and directions during state of emergency (see subs (5))
5. Public health risks generally (see subs (4))
6. Disinfection or destruction of articles (see subs (4))
8. Closure of premises
11. Precautions against spread of certain medical conditions
28. Offence to contravene public health order
34. Unlawful release from detention
35. Restrictions on publication (subs (6))
74. Obstruction or assault of officers and others (subs (2))



**Public Sector Employment and Management Act 2002**
154. Confidential information (1988 Act, s 117) (see subs (5))
155. Offences (1988 Act, s 118)

**Racing Administration Act 1998**
33. Unauthorised race programs

**Registered Clubs Act 1976**
17AAB. Order by authorised justice for short-term closure of premises (see subs (6))
17AAD. Order by Licensing Court for closure of premises (see subs (7))



**Restricted Premises Act 1943**
8. Offence by owner of premises
9. Offence by occupier of premises
11. Obstructing police
15C. Order by Magistrate for temporary closure of premises (see subs (6))

**Road and Rail Transport (Dangerous Goods) Act 1997**
22. Offence to fail to comply with a direction
32. Exemptions (subs (6))

**Road Obstruction (Special Provisions) Act 1979**
5. Removal of a motor vehicle obstructing a public road (see subs (5))

**Road Transport (Vehicle Registration) Act 1997**
21A. Offences relating to identification numbers of engines and other parts of motor vehicles or trailers

**Royal Commission (Police Service) Act 1994**

6. Power to obtain information (ss 21, 82 ICAC Act)
7. Power to obtain documents etc (ss 22, 83 ICAC Act)

**Rural Assistance Act 1989**
56. Disclosure of information

**Rural Fires Act 1997**
64. Occupiers to extinguish fires or notify fire fighting authorities

**Security Industry Act 1997**
7. Offence of carrying on unauthorised security activity

**Stock Diseases Act 1923**
20. Illegal introduction of stock (see subs (2)(c))

**Strata Schemes Management Act 1996**
196. Witness may be summoned before Tribunal (subs (6))
197. Tribunal may administer oath (subs (2))
198. Contempt of Tribunal



**Summary Offences Act 1988**
5. Obscene exposure
10A. Damaging and defacing property by means of spray paint
11A. Violent disorder
20. Public acts of prostitution
27B. Trafficking (subs (1))
27E. Miscellaneous offences (subs (1))

**Sydney Harbour Foreshore Authority Act 1998**
37. Disclosure of information



**Sydney Olympic Park Authority Act 2001**
70. Disclosure of information

**Teacher Housing Authority Act 1975**
35. Disclosure of information

**Telecommunications (Interception) (NSW) Act 1987**
22. Offences relating to inspections under Part 3

**Totalizator Act 1997**
9. Unlawful conduct of totalizator (subs (1)(a) and (2)(a))

**Tow Truck Industry Act 1998**
23. Requirement for tow truck drivers to hold drivers certificates
36. False or misleading statements
58. Contravention of conditions
62. Prohibition on obtaining authority to repair
72. Holding out
75. Impersonation of authorised officer

85. Offences
99. Disclosure of information

**Traffic Amendment (Penalties and Disqualifications) Act 1998 (amends Traffic Act 1909)**
Section 10A (2) (b) (ii)
Section 10A (2) (b) (ii)

**Travel Agents Act 1986**
39. Temporary restraint on disposition of property (subs (5))

**Unlawful Gambling Act 1998**
21. Notice of making of interim declaration (subs (3))
27. Notice of making of final declaration or revocation of interim declaration (subs (2))

**Valuers Act 2003**
34. Obstruction etc of authorised officers
38. Disclosure of information



**Valuers Registration Act 1975**
24. Practice by certain persons prohibited
25. Penalties for false statements etc

**Water Act 1912**
121. Penalty for wilful destruction

**Witness Protection Act 1995**
20. Special provision in case of marriage of participant



**Workers Compensation Act 1987**
155. Compulsory insurance for employers (cf former s 18 (1), (5), (6))
191. Power of Supreme Court to deal with insurers or former insurers unable to meet liabilities etc (Subs (7))

**Offences with statutory Maximum Penalty of 3 months (NSW):**

**Broken Hill Abattoirs, Markets, and Cattle Sale Yards Act 1900**
18. Legal procedure

**Children (Detention Centres) Act 1987**
33. Escaping
37A. Breaching conditions of leave, failure to return etc

**Children (Interstate Transfer of Offenders) Act 1988**
11. Escape from custody of young offender being transferred from New South Wales

**Commercial Agents and Private Inquiry Agents Act 1963**
39C. Harassment (see subs (2))

**Commissioner for Children and Young People Act 1998**
6 Confidentiality (subs (3) and(4))

**Co-Operative Act 1992**
157. Notice of non-beneficial ownership at time of transfer (see subs (3))
158. Notice of non-beneficial ownership not notified at time of transfer (cf Vic Act s 160) (see subs (4))
159. Registration as beneficial owner of shares notified as non-beneficially transferred (see subs (4))
160. Notification of change in nature of shareholding (cf Vic Act s 162)
250. Location of registers (cf Vic Act s 245)

**Crimes Act 1900**
527B. Framing a false invoice
545A. Bogus advertisements
547C. Peeping or prying



**Dangerous Goods Act 1975**
30. Offences relating to licences and permits

**Evidence (Audio and Audio Visual Links) Act 1998**
20. Contempt of recognised courts

**Exotic Diseases of Animals Act 1991**
65. False claims

**Fines Act 1996**
90. Calculation of period of imprisonment under warrant



**Fisheries Management Act 1994**
14. Offences relating to closures (see subs (2))
16. Offences relating to prohibited size fish
17. Bag limits---taking of fish (see subs (2))
18. Bag limits---possession of fish (see subs (2))
19. Protected fish
35. Possessing fish illegally taken
117. Fish receiver to be registered
119. Fish receiver to supply information
124. False records
127E. Charter fishing boat operators to keep records of catch
197K. Offence provisions (see subs (2))
247. Obstructing, impersonating etc fisheries officers
259. False information

**Gene Technology (GM Crop Moratorium) Act 2003**
30. Offences---enforcement

**Health Care Complaints Act 1993**
72. Confidentiality (subs (3) (4) (6) and (7))

**Heritage Act 1977**
158. Proceedings for offences (see subs (4))

**Human Tissue Act 1983**
21R. Obstruction etc of inspectors

**Human Tissue and Anatomy Legislation Amendment Act 2003**
33H Offences

**Independent Commission Against Corruption Act 1988**
70. Confidentiality (see subs (1B), (1C), (3) and (4))

**Inebriates Act 1912**
10. Penalty for interfering with such institutions

**Legislation Review Act 1987**
12. Confidentiality (see subs (3) and (4))



**Marine Parks Act 1997**
20G. Offence provisions (see subs (2))
20H. Removal of wrecked vessels and other property from marine parks

**Mines Inspection Act 1901**
68. Imprisonment for wilful neglect, endangering life or limb

**National Parks and Wildlife Act 1974**
169. Impersonating, assaulting, resisting or obstructing an officer etc

**Ombudsman Act 1974**
31H. Confidentiality (see subs (1B) (1C) (3) and (4))



**Parliamentary Electorates and Elections Act 1912**
181. Penalty for disobedience

**Piracy Punishment Act 1902**
7. Where persons may be sentenced to imprisonment, hard labour or solitary confinement may be ordered (strange one)

**Police Act 1990**
202. Admission to NSW Police as police officer under false pretences

**Police Department (Transit Police) Act 1989**
12. Vacation of position

**Public Finance and Audit Act 1983**
58. Evidence (see Subs (2B), (2C), (4) and (5)

**Shops and Industries Act 1962**
151. Penalty for forging certificates etc and false declaration

**Stamp Duties Act 1920**
33 Offence

**Summary Offences Act 1988**
4. Offensive conduct
8A. Climbing on or jumping from buildings and other structures
10B. Possession of spray paint
16. Prostitution or soliciting in massage parlours etc
18. Advertising premises used for prostitution
18A. Advertising for prostitutes
19. Soliciting clients by prostitutes
19A. Soliciting prostitutes by clients

**Valuation of Land Amendment (Valuer General) Act 2003**
92 Confidentiality (subs (3) (5) and(6))

**Water Act 1912**
22. Power of entry
23. Obstructing persons in the performance of duties

**Annexure C**

**Sample of Offences with Statutory Maximum Penalty of 6 months –(Commonwealth)**

ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) ACT 1976: Section 23E(4) - Secrecy

AIR NAVIGATION ACT 1920: Section 15A, 17

ANTARCTIC TREATY (ENVIRONMENT PROTECTION) ACT 1980: Section 20, 21

APPROVED DEFENCE PROJECTS PROTECTION ACT 1947: Section 3

AUSTRALIAN WINE AND BRANDY CORPORATION ACT 1980: Section 42(4), 44A(5)

BANKING ACT 1959: Section 16B – duty to give information when required



BANKING (FOREIGN EXCHANGE) REGULATIONS 1959: Section 42(1)(a)

BANKRUPTCY ACT 1966: Section 80, 139U, 139ZT, 152, 263A(a), 263C, 264A, 264C, 264D, 264E, 267D, 267F, 267G
(ss264 and 267 are with respect to providing information, failure to give evidence etc)

BOUNTY AND CAPITALISATION GRANTS (TEXTILE YARNS) ACT 1981: Sections 10BA(7), 18(1)

CANBERRA WATER SUPPLY (GOOGONG DAM) ACT 1974: Section 16(3)

COMMONWEALTH ELECTORAL ACT 1918: Section 218, 315A(6), 323, 325, 325A, 327, 329(4), 330, 338, 339, 347(4), 350(1)



COMMONWEALTH INSCRIBED STOCK ACT 1911: Section 51BA

COMMONWEALTH TEACHING SERVICE ACT 1972: Section 34D(10)

COMPLAINTS (AUSTRALIAN FEDERAL POLICE) ACT 1981: Section 7(8), 44, 50(8), 74, 82(1), 83(1), 83(2), 85, 88A

COPYRIGHT ACT 1968: Sections 133A, 203G(2) and (3)

CORPORATIONS ACT 2001 Schedule 3 (Penalties): Subsections 200B(1), 200C(1), 200D, 283AA(1), 283AA(3), 283AB, 283AC(1) – (2)
(Sections 283AA to 283AC are 'requirements for trust deed and trustee')

COTTON RESEARCH ACT 1982: 26(6), 27,

CRIMES ACT 1914: Section 3LA(3), 30AB(2), 30D, 30F, 30FC, 79(4), 89A,

CRIMES (CURRENCY) ACT 1981: Sections 21(1)(a) and(2)(a)

CRIMINAL CODE ACT 1995: Section 136.1 (4) – False or misleading statements in applications to the Cth

CUSTOMS ACT 1901: Section 201A – failure to comply with an order by a Magistrate for a person with computer knowledge to assist access to information etc

DEFENCE ACT 1903: Sections 61CY, 61CZ(1), (3) (5) and (7), 61CZA, 73F, 80A, 82(1), 86, 88, 89, 90, 106, 107, 116ZB, 118. As a sample – ss 86 to 90 are 'offences in relation to service tribunals': failure to appear, misleading evidence etc

DEFENCE FORCE DISCIPLINE ACT 1982: 26(1) and (2), 27(1), 33, 36A(1) and (2), 37(1), 39(3), 40A(1) and (2), 43(3), 44(1), 45(1), 46(1), 53(1) (2) and (4), 56(4), 101QA(1) and (2)

DEFENCE FORCE DISCIPLINE APPEALS ACT 1955: sections 43-47

DEFENCE (SPECIAL UNDERTAKINGS) ACT 1952: Section 29(3)



DESIGNS ACT 1906: 42B, 42C,

EDUCATION SERVICES FOR OVERSEAS STUDENTS ACT 2000: Section 107 – Failing to identify registered provider in written material

ENVIRONMENT AND HERITAGE LEGISLATION AMENDMENT ACT 2000: Section 72 (Section 37(3)(c), (5) and (6) of principal Act)

ENVIRONMENT PROTECTION (ALLIGATOR RIVERS REGION) ACT 1978: Sections 31(2) and (4)

ENVIRONMENT PROTECTION (SEA DUMPING) ACT 1981: Sections 37(3)(c), 37(5) and 37(6)



EPIDEMIOLOGICAL STUDIES (CONFIDENTIALITY) ACT 1981: Sections 4, 6, 10

EXCISE ACT 1901: Section 124(1)

EXPLOSIVES ACT 1961: Section 20

EXPORT CONTROL ACT 1982: Section 13(1)

FEDERAL COURT OF AUSTRALIA ACT 1976: Section 42 is imprisonment for 1 month, 58,

FINANCIAL AGREEMENTS (COMMONWEALTH LIABILITY) ACT 1932: Section 5

FISHERIES MANAGEMENT ACT 1991: Section 155 – Panel may restrict publication of certain matters

FUEL QUALITY STANDARDS ACT 2000: Section 42 – failure to comply with inspector's warrant / requests

HEALTH INSURANCE COMMISSION ACT 1973: Section 8R(1), 23DNJ(3), 130AA(3)

HOME DEPOSIT ASSISTANCE ACT 1982: Sections 58(2), 59(1),

HOMES SAVINGS GRANT ACT 1964: Section 26 – make false or misleading statement; obtain $ by deception etc

IMMIGRATION (GUARDIANSHIP OF CHILDREN) ACT 1946: Section 6A(3), 9

INCOME TAX ASSESSMENT ACT 1936: Section 221ZXL - secrecy

INSURANCE ACT 1973: Section 49, 49A, 82(1), 87,

LOAN (INCOME EQUALIZATION DEPOSITS) ACT 1976: Section 27C(1)

MARRIAGE ACT 1961: Section 95(2), 98(2), 99, 100, 101, 103, 104, 106
(Sections 99-103 are with respect to invalid solemnization of marriage)



MEAT INSPECTION ACT 1983: Section 28(1)

MIGRATION ACT 1958: Section 21, 257, 268BH, 268CL, 370, 371, 372, 432, 433

NATIONAL HEALTH ACT 1953: Section 60B, 61E, 75(5), 82K(5), 82U(1), 82V(5), 82WC(1), 82XO(1) and (2), 82XT(5), 82ZVB, 128(1), 129(1), 135B(3)(b)

NAVIGATION ACT 1912: Section 386B - 386H, 415

OCCUPATIONAL HEALTH AND SAFETY (COMMONWEALTH EMPLOYMENT) ACT 1991: Section 64 – witness not to be prejudiced in employment



PARLIAMENTARY CONTRIBUTORY SUPERANNUATION ACT 1948: Section 21B(7)

PASSENGER MOVEMENT CHARGE COLLECTION ACT 1978: Section 8(4)

PASSPORTS ACT 1938: Section 11(3)(a) – any offence against this Act which is prosecuted in a court of summary jurisdiction

PETROLEUM (SUBMERGED LANDS) ACT 1967: Sections 32(2) and (3), 39(1), 45,

PUBLIC ACCOUNTS AND AUDIT COMMITTEE ACT 1951: Section 21(3)

PUBLIC ORDER (PROTECTION OF PERSONS AND PROPERTY) ACT 1971: Sections 8(3), 10(2), 17(3), 19(2),

QUARANTINE ACT 1908: Section 27A(7), 27B(6), 70CA(2), 74DA(2), 74E

ROYAL COMMISSIONS ACT 1902: Section 3 – failure of witnesses to attend or produce documents; Section 6 – penalty for refusing to give evidence

SHIPPING REGISTRATION ACT 1981: Section 73, 74(4A)

SUPERANNUATION ACT 1976: Section 44(3), 163A(3),

TELECOMMUNICATIONS (INTERCEPTION) ACT 1979: Section 105(4), 106, 107

TELSTRA (DILUTION OF PUBLIC OWNERSHIP) ACT 1996 Schedule 1: paragraph 8BN(1)(a) – must make correct record

TRADE PRACTICES ACT 1974: Section 44ZG(2) and (5), 44ZI, 44ZJ, 44ZK, 151BV(2), 152DC(4), 152DE(1), 152DF(1), 152DG, 152DJ(2),

TRANSPORT SAFETY INVESTIGATION ACT 2003: Section 18 – person must make immediate report of a reportable matter

WAR GRATUITY ACT 1945: Section 29

WORKPLACE RELATIONS ACT 1996: Section 83BS – must not disclose protected information; Section 305 and 305A – Non-compliance with inspector's request;



**General comment:**
The above sections are often dealing with issues such as: providing misleading information, disclosing protected information, failure to comply with an agency/inspector request, refusal to provide information or be sworn as a witness, and alike.

Of course, some provisions are dealing with specific conduct (eg environmental dumping), but the above comment is a general observation.

**Annexure D**
Increases to maximum penalties in Western Australian as a consequence of the *Sentencing Legislation Amendment and Repeal Bill* 2002

**WESTERN AUSTRALIA**
***Sentencing Legislation Amendment and Repeal Bill 2002***

**Part 5 – Amendments about short sentences**

**Section 33 – Sentencing Act 1995**
This section is the fundamental change to the WA scheme. Amendments are made to s86 of the *Sentencing Act* 1995, such that it will now read:

*86. Term of 6 months or less not to be imposed*
*A court must not sentence an offender to a term of 6 months or less unless- (a) the aggregate of the term imposed and any other term or terms imposed by the court is more than 6 months; (b) the offender is already serving or is yet to serve another term; or*
*(c) the term is imposed under section 79 of the Prisons Act 1981.*



Previously, section 86 dealt with terms of 3 months or less.

**The list below is comprised of sections of the amending legislation which demonstrate an increase in penalty. The relevant offences are noted.**

**Section 34 – Aboriginal Affairs Planning Authority Act 1972**
**Offence: Trespass on Aboriginal reserve land**
Original provision provided for a maximum penalty of 6 months imprisonment for a first offender (severity naturally increased for a second offence).



Amendment replaces 6 months with 9 months

**Section 35 - Aboriginal Heritage Act 1972**
**Offence: Excavating / destroying / damaging / altering / removing an Aboriginal site**

The original provision provided for a $500 fine and/or 4-month imprisonment for a first offence.
The amendment increases this to $20 000 and 9 months.

**Section 37- *Bail Act* 1982**
**Offence: Failure to answer a question / providing mis-leading or false information/ hindering the power a corrections officer in the course of exercising their function of ascertaining whether or not a defendant is complying with a home detention order**
Original penalty was $2000 and/or 6 months.

The amendment increase is to $2000 and/or 12 months.

**Section 40- Boxing Control Act 1962**

**Offence: Engaging in a particular class of boxing contest whilst not registered or suspended from that class**

Original Penalty was $1 000 or imprisonment for 6 months or both.

New penalty: $1000 and/or 9 months.

**Section 46- Companies (Co-operative) Act 1943**
**Offence: s280(1)- Liability where proper accounts not kept**
Where a company is wound up, it is shown that proper accounts were not kept by the company throughout the period of 2 years immediately preceding the commencement of the winding-up every director, manager, or accounting officer of the company who was knowingly a party to or connived at the default of the company shall, unless he shows that he acted honestly or that in the circumstances in which the business of the company was carried on the default was excusable, be liable on conviction on indictment to imprisonment for a term not exceeding one year, or on summary conviction to imprisonment for a term not exceeding 6 months.
The amendment increases 6 months to 9 months



**Offence: s425 -Penalty for false statement in prospectus, report, balance sheet, document etc**
The amendment increases summary conviction imprisonment from 6 months to 9 months

**Section 51 – The Criminal Code**
**Offence: s77 Possession of threatening/abusive material for publication, distribution etc to incite racial hatred**

Original summary conviction penalty: Imprisonment for 6 months or a fine of $2 000 (on indictment – 2 years).



Amendment increases the available penalty for a summary conviction to 12 months.

**Offence: s78 Publication, distribution etc., of material to incite racial hatred**
Original summary conviction penalty: Imprisonment for 6 months or a fine of $2 000 (on indictment – 2 years).

Amendment increases the available penalty for a summary conviction to 12 months.

**Section 56 – *Electoral Act* 1907**
**Offence: Unlawfully destroying, taking, opening, or otherwise interfering with ballot boxes or ballot papers**
Original penalty was 'imprisonment not exceeding 6 months'.

Amendment increases the available to 9 months.

**Section 58- Energy Operators (Powers) Act 1979**
**Offence: s67 Circumventing meters: altering meter reading, prevents meter from operating, interferes with service apparatus, obtaining energy which circumvents the meter etc**
Original penalty: in the case of a natural person $2 000 or imprisonment for 6 months, or both such fine and imprisonment.

Amendment increases the available to 9 months.

**Section 62 - *Firearms Act* 1973**
**Offence: s19(1) Licensing offences – sells, disposes of, purchases, or in possession of a firearm without the appropriate licence or permit.**
The original available penalty of 6 months was applicable only if none of the listed special circumstances applied. Examples of such circumstances are: being disqualified, firearm is a handgun, and firearm has been modified. In these instances, the maximum available penalty remains 18 months.
If no special circumstance exists, the maximum available penalty has increased from 6 to 12 months.

**Offence: General offence s23(5) – defacing/altering ID mark, alters firearm design or calibre such that it differs from any licence or permit attached to it, or is in possession of such a firearm**
Original available penalty has increased from 6 to 12 months



**Section 63 – Fish Resources Management Act 1997**
**Offence: s170 -Use of explosives or noxious substances in WA waters if the use can reasonable be expected to result in the taking of any fish**
Amendment has increased maximum available penalty from 6 to 12 months
(Section 170 also has a clause stating that the Court may order offender to pay compensation in addition to any punishment imposed)

**Offence: s172 - Unlawful interference with fishing gear: removal of fish from, or any interference with, net, trap or gear used for aquaculture**
Amendment has increased maximum available penalty from 6 to 12 months



**Offence: s176 - False statements / omissions in applications under this Act**
Amendment has increased maximum available penalty from 6 to 12 months

**Offence: s225(4)- Court may prohibit person from being on fishing boats or certain places etc if they have been convicted under this Act**
If offender breaches such an order, penalty has increased from 6 to 12 months

**Section 70 – Guardianship and Administration Act 1990**
**Offence: s112(3)- Unauthorised access to documents / material lodged with the Guardianship Board**
Current penalty: $2 000 or imprisonment for 6 months
Increase available imprisonment from 6 months to 9 months

**Offence: Schedule 1 Part B Clause 7(3)-Refusing to attend before the Board, failure to provide document/ answer question**
Current penalty: $2 000 or imprisonment for 6 months
New penalty: $5 000 ‘ ‘ ‘ 9 months

**Offence: Schedule 1 Part B Clause 8(3)- Providing a knowingly false or misleading answer / document to the Board**
Current penalty: $2 000 or imprisonment for 6 months

New penalty: $5 000 ‘ ‘ ‘ 9 months

**Offence: Schedule 1 Part B Clause 10 – Creating a disturbance at Board sitting, or any act which may constitute a contempt of court if the Board were a court**
Current penalty: $2 000 or imprisonment for 6 months
New penalty: $5 000 ‘ ‘ ‘ 9 months

**Offence: Schedule 1 Part B Clause 11 – Board hearings shall be open unless the Board orders otherwise. Failure to comply with such an order is an offence**

Current penalty: $2 000 or imprisonment for 6 months
New penalty: $5 000 ‘ ‘ ‘ 9 months

**Section 85 – *Police Act* 1892**
**Offence: s15 – Member of the Force taking bribes to forego their duties**
Current penalty: $500 and/or 6 months
New penalty: $4 000 and/or 12 months



**Offence: s61(1)- Personating a member of the Force, or attempting to bribe a member of the force**
Current penalty: $500 and/or 6 months
New penalty: $4 000 and/or 12 months

**Offence: s20- Disturb, hinder, or resist any member of the Police Force in the execution of his duty**
Current penalty: $500 and/or 6 months
New penalty: $500 and/or 9 months



**Offence: s41(1) and (7)- Resist or wilfully prevent or obstruct any officer or constable of the Police Force whilst the member is stopping, detaining, entering etc a ship or vessel for the purpose of searching etc**
Current penalty: $500 and/or 6 months
New penalty: $4 000 and/or 12 months

**Offence: s58A- Damage to animals, plants in any place maintained as a garden for botanical etc purposes, or for public resort or recreation**
Current penalty: $500 and/or 6 months
New penalty: $4 000 and/or 12 months

**Offence: s64A(1)- Obtaining property, money or valuable by passing a valueless cheque, unless (a) that he had reasonable grounds for believing that that cheque would be paid in full on presentation; and (b) that he had no intent to defraud**
Current penalty: $500 or 6 months for a first offence
New penalty: $4 000 or 12 months

**Offence: s67A- Any person who aids, harbours, maintains, or employs another person who, to his knowledge, has broken or escaped out of any legal custody and is illegally at large, commits an offence**

Current penalty: $500 and/or 6 months
New penalty: $1 000 and/or 9 months

**Offence: s80(1)- destroys or damages any real or personal property of any kind, whether owned by the Crown or any public authority or local government or by any other person, is guilty of an offence.**

Current penalty: $500 and/or 6 months
New penalty: $4 000 and/or 12 months
(Subject to s80A, which provides for graffiti offenders)

**Offence: s90A-False reports to police**
Current penalty: $500 and/or 6 months
New penalty: $4 000 and/or 12 months

**Section 87 – *Prostitution Act* 2000**
**Offence: s15-A person who acts as a prostitute for a client who is a child commits an offence under this section**
Current penalty: Imprisonment for 6 months
New penalty: Imprisonment for 9 months

**Section 90- Restraining Orders Act 1997**
**Offence: s61(1)-A person who is bound by a violence restraining order and who breaches that order commits an offence**
Current penalty:
(a) if the duration of the order is 72 hours or less, $2 000 or imprisonment for 6 months;
New penalty: replace 6 months with 9 months

**Offence: s71(3)-Person restrained by a firearms restraining order, failing to give an answers or gives a false answer**
Current penalty: $2 000 or imprisonment for 6 months
New penalty: $2 000 or imprisonment for 9 months



**Section 92 – *Road Traffic Act* 1974**

Each of the offences listed below have had the maximum available *imprisonment* penalty increased from 6 months to 9 months:

**Offence: s59A - Dangerous driving causing bodily harm (1) A person who causes bodily harm to another person by driving a motor vehicle in a manner (which expression includes speed) that is, having regard to all the circumstances of the case, dangerous to the public or to any person commits an offence**

**Offence: s60 - Reckless driving (1) Every person who wilfully drives a motor vehicle in a manner (which expression includes speed) that is inherently dangerous or that is, having regard to all the circumstances of the case, dangerous to the public or to any person commits an offence**

**Offence: s61-Dangerous driving -(1) Every person who drives a motor vehicle in a manner (which expression includes speed) that is, having regard to all the circumstances of the case, dangerous to the public or to any person commits an offence**
**Offence: s63-Driving under the influence of alcohol, etc. (1) A person who drives or attempts to drive a motor vehicle while under the influence of alcohol, drugs, or alcohol and drugs to such an extent as to be incapable of having proper control of the vehicle commits an offence, and the offender may be arrested without warrant** (the increase from 6 months to 9 months is with respect to a second offence)

**Offence: s67- Failure to comply with requirement as to provision of breath, blood or urine sample for analysis**

**Section 100 – *Travel Agents Act* 1985**
**Offence: s7(3)- Subject to this Act, an individual shall not hold himself out, and a body corporate shall not hold itself out, as carrying on business as a travel agent unless the individual or body corporate, as the case requires, is a licensee**
Current penalty: Penalty: $25 000 or 6 months' imprisonment or both, with a minimum fine of $2 500 in the case of a second or subsequent offence

New penalty: Replace '6 months' with 9 months

**Section 104 – *Young Offenders Act* 1994**
**The original section 118(2) states:**
**"Despite section 86 of the *Sentencing Act 1995* the court sentencing a young person to a term of detention may impose a term of 3 months or less."**

The amendment replaces 3 months with 6 months

**Annexure E**

**Availability of main sentencing options throughout NSW.**

| **Court Location**[385] | **Availability of Home Detention (team locations)** | **Availability**[386] **of Periodic Detention (suburb location of facility)** | **Availability of Drug court** | **Availability of MERIT** |
|---|---|---|---|---|
| Sydney | City<br>Bankstown<br>Parramatta<br>Campbelltown<br>Mt Druitt<br>Penrith<br>Long Jetty<br>(service may not be available in some fringe areas) | Silverwater<br>Parklea<br>Campbelltown<br>Norma Parker (Parramatta, Females only) | Bankstown<br>Blacktown<br>Burwood<br>Campbelltown<br>Fairfield<br>Liverpool<br>Parramatta<br>Penrith<br>Richmond<br>Ryde<br>Windsor | Burwood<br>Camden<br>Campbelltown<br>Gosford<br>Hornsby<br>Katoomba<br>Kogarah<br>Liverpool<br>Manly<br>North Sydney<br>Parramatta<br>Penrith<br>Redfern<br>Sutherland<br>Wyong |
| Hunter | Maitland (extends to Singleton) | Tomago | | Cessnock<br>Maitland<br>Muswellbrook<br>Newcastle<br>Raymond Terrace<br>Toronto |
| Illawarra | Wollongong to Nowra | Wollongong | | Albion Park<br>Kiama<br>Port Kembla<br>Nowra<br>Wollongong |
| Richmond-Tweed | | | | Ballina<br>Byron Bay<br>Casino<br>Kyogle<br>Lismore<br>Mullumbimby<br>Murwillumbah<br>Tweed Heads, |



[385] Based on the Australian Standard Geographical Classification (ASGC)

[386] As noted above, "availability" also depends on the individual's means of accessing the periodic detention centre in question.

| | | | | |
|---|---|---|---|---|
| Mid-North Coast | Projected pilot for 2004-2005 | Grafton | | Grafton<br>Kempsey<br>Maclean<br>Port Macquarie<br>Wauchope |
| Northern | | Tamworth<br>Grafton | | Tamworth |
| North Western | | Tamworth | | Dubbo<br>Wellington |
| Central West | | Bathurst | | Bathurst<br>Blayney<br>Forbes<br>Oberon<br>Orange<br>Parkes |
| South Eastern | | | | Queanbeyan<br>Wagga Wagga |
| Murrumbidgee | | Mannus | | Junee |
| Murray | | Mannus | | |
| Far West | | Broken Hill | | |



*Availability of Periodic Detention and Home Detention* – it is arguable that the availability of periodic detention and home detention should be assessed by how accessible they are to offenders and not simply by whether a periodic detention exists within a particular division. When assessed this way the data for the Local Courts in the Northern and North Western Statistical Divisions highlight the lack of viable alternatives to prison accessible to offenders in the North/North West of NSW. In the Northern and North Western Statistical Divisions the distances between towns and the closest periodic detention centre are in excess of 500km. Also in these divisions the lack of suitable public transport exacerbates the situation.[387]



**Availability of Periodic Detention when assessed in relation to ASGC Statistical Divisions**

**Sydney**

The Sydney Statistical Division encompasses the CBD and surrounding suburbs, extending north to Wyong, southwest to Camden, northwest to Richmond and west to Katoomba. Servicing this division are 4 periodic detention centres: Parklea, Silverwater, Campbelltown and Parramatta (female prisoners only).

**Illawarra**

[387] In the Northern region there is one Countrylink rail service daily stopping at Tamworth, Walcha, Armidale, Tenterfield and Inverell. In the North Western region a similar situation exists with coach services once daily between the towns of Dubbo, Lightning Ridge, Brewarrina, Bourke and Broken Hill. Information obtained from NSW Government Department of Infrastructure, Planning and Natural Resources web-site: http://www.planning.nsw.gov.au/countrytransportresource/ on 12/03/04 and Countrylink web-site: http://www.countrylink.info/timetable/timetable.do?action=load on 12/03/04

The Illawarra Statistical Division spans south to Milton and west to Moss Vale from Wollongong. Servicing this division is a periodic detention centre at Wollongong. The approximate travel distance from Wollongong to Milton is 160km.[388]

**South Eastern**
South Eastern Statistical Division begins at Batemans Bay, extends south to the border with Victoria, west to Yass and northwest to Young. It includes local courts at Goulburn, Quenbeyan and Cooma. Technically there are no periodic detention centres in this division. It could be argued that the centres situated in Wollongong, Bathurst and Mannus may be of service to the courts in this division. Note though the distance between, for example Eden (situated close to the border with Victoria) and the closest periodic detention centre Mannus, the distance between the two being approx 460km.

**Central West**
Central west Statistical Division encompasses Lithgow local court and Cowra, extending west to Hillston, north to Rylstone and northwest to Condobolin. Periodic detention is available in Bathurst. Bathurst essentially has to serve a division where the approximate travelling distance from Lithgow to Hillston (east to west) is 500km.



**North Western**
The North Western Statistical Division spans west to Cobar and Bourke from Mudgee, (a distance of approximately 580km). The division extends north to Lightning Ridge, encompassing the local courts of Coonamble and Walgett. There is no periodic detention facility available in this division. Servicing the northern areas of this division, the Tamworth periodic detention centre may be suitable. Note though the distance between for example Tamworth and Bourke being approximately 580km.The detention centre in Bathurst may also be suitable to service the eastern areas of this division. Areas on the western edge of this division (for example Cobar and Bourke) would need to travel long distances to attend either of the detention centres at Bathurst or Tamworth. Alternatively, the western area of this division may find access to the periodic detention centre at Broken Hill. Note though the approximate distance between Bourke and Broken Hill is 530km.



**Far West**
Far West Statistical Division encompasses the Broken Hill district and Central Darling district. There is a periodic detention centre in Broken Hill servicing these districts. The distance between Wilcannia and Broken Hill is approx 190km.

**Murray**
The Murray Statistical Division is in the southwest corner of NSW encompassing the courts of Wentworth, Deniliquin and Albury. There is no periodic detention centre in this division. The detention centre at Mannus may be suitable for towns between Albury and Deniliquin (approximate distance between Deniliquin and Mannus is 160km). The detention centre in Broken Hill may be suitable for those in Wentworth (approximate distance 200km).

**Murrumbidgee**
The Murrumbidgee Statistical Division covers local courts Hay in the West, Griffith in the centre and Gundagai in the East. There is a periodic detention centre in this division at the

[388] All approximate travel distances referred to in body of text have been obtained via an NRMA distance calculator accessed from: http://www.mynrma.com.au/products/travel/maps/index.shtml#calculator on 12/03/04

town of Mannus 115km southeast of Wagga Wagga.[389] The distance between Hay and this facility is approx 150km.

**Hunter**
The Hunter Statistical Division includes local courts Musswellbrook, Cessnock, Murrurundi, Gloucester and Newcastle. A periodic detention facility is located at Tomago, a short distance north of Newcastle.

**Northern**
The Northern Statistical Division includes courts Tamworth, Narrabri in the west, Moree in the north and Tenterfield in the east. There is a periodic detention centre at Tamworth. The distance between for example Moree and Tamworth is approx 270km. The periodic detention centre at Grafton may be suitable to service courts on the eastern edge of the division such as Tenterfield or Glen Innes.

**Mid-North Coast**
This Statistical Division begins at Taree and heads north through courts at Kempsey, Port Macquarie, Coffs Harbour and Grafton. There is a periodic detention centre at Grafton. Courts in this division could use either the facility at Grafton or Tomago. Kempsey, which is roughly situated in the middle of these two detention centres, is approx 200km from Grafton and 250km from Tomago.

**Richmond-Tweed**
Richmond-Tweed is a small Statistical Division containing courts at Lismore, Tweed Heads and Ballina. The closest detention centre is Grafton with the longest travel distance being from Grafton to Tweed Heads (approx 300km)

**Availability of Home Detention when assessed in relation to ASGC Regions**
**The availability of home detention across NSW when assessed in relation to ASGC Statistical Divisions is sparse. Sydney is the most accommodated with facilities available in Penrith, Mt Druitt, Parramatta, Bankstown and Campbelltown. Outside of Sydney the availability of home detention is practically non-existent. Servicing the Illawarra Statistical Division are facilities located in Wollongong, which extend to Nowra. In the Hunter Statistical Region home detention is available in Maitland extending to Singleton. Outside these divisions home detention is not available.**



[389] Distance obtained from web-site of Department of Corrective Services: http://www.dcs.nsw.gov.au/correctional/mannus.asp on 12/03/04

**Annexure F**

**Two suggested amendments to section 5 of the *Crimes (Sentencing Procedure) Act 1999***

Suggested amendment to s 5 would read something like as follows:

***Imprisonment as a last resort:***

*(6) In determining an appropriate penalty for the offence, the court is to have regard to the principle that imprisonment is a sanction of last resort.*

*(7) 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.*

*(8) If the court determines that the only appropriate penalty is imprisonment, then it must further consider whether such sentence should be fully or partially suspended, ordered to be served by way of periodic detention, or ordered to be served by way of home detention.*

*(9) In setting a term of imprisonment a court will have regard to the principles and purposes of sentencing and impose the shortest and least restrictive form of imprisonment that is commensurate with the seriousness of the offence and the background of the offender.*



***Sentences of 6 months or less:***

*(10) (i) A court may not impose a sentence of imprisonment of 6 months or less, unless it is satisfied, on the balance of probabilities, that the offender:*

*(f) was subject to a form of conditional liberty at the time of committing the offence and would be unlikely to comply with the terms of any other or further community based order;*

*(g) had been sentenced to a term of imprisonment of 6 months or more in the previous 5 years and at the time of sentencing demonstrates poor prospects for rehabilitation;*

*(h) poses a real and imminent threat to the safety or the property of another person and any other sanction would fail to provide an appropriate degree of community protection; or*

*(i) was held in pre-sentence custody and the term of the sentence is back-dated so as to expire no later than the date of sentencing.*

*(ii) A court may impose a sentence of imprisonment of 6 months or less if it is ordered to run concurrently, consecutively or partly concurrently and partly consecutively with any other sentence of imprisonment such that the aggregate term of imprisonment exceeds 6 months.*

*(iii) A court may order that the person be sentenced to the rising of the court*

*(4) A court that sentences an offender to imprisonment for 6 months or less must indicate to the offender, and make a record of its reasons for doing so, including:*

*(c) its reasons for deciding that no penalty other than imprisonment is appropriate, and*

*(d) its reasons for deciding not to make an order allowing the offender to participate in an intervention program or other program for treatment or rehabilitation (if the offender has not previously participated in such a program in respect of the offence for which the court is sentencing the offender).*

***Sentences greater than 6 months***

*(5) A court must not impose a term of imprisonment greater than 6 months on the ground that it has no power to impose a term of imprisonment of 6 months or less.*"

**Suggested amendment 2:**

Section 5 of the *Crimes (Sentencing Procedure) Act* 1999 could be amended (or further amended) so as to reduce the number and/or duration of full time sentences of imprisonment of 6 months or less. A suggested provision could read something like this:



"*A court shall not sentence an offender to imprisonment for 6 months or less unless it intends to order that the sentence be served by way of home detention or periodic detention or that the sentence be either partially or fully suspended.*"

In these circumstances section 12 of the Act would have to be amended to re-introduce partially suspended sentences. Note: this option would place a considerable burden on the probation and parole service.

**Annexure G:**

**Geographic area in which short prison sentences are imposed.**

| Region/Court (grouped by ASGC Statistical Divisions) | No. Of prison sentences 6 months or less | Total No. Of Sentences | Percentage as a proportion of all penalties imposed |
|---|---|---|---|
| **SYDNEY** | | | |
| Katoomba | 31 | 357 | 8.7 |
| Penrith | 303 | 4855 | 6.2 |
| Windsor | 46 | 997 | 4.6 |
| Blacktown | 171 | 2662 | 6.4 |
| Parramatta | 160 | 2893 | 5.5 |
| Ryde | 14 | 850 | 1.6 |
| Balmain | 3 | 676 | 0.4 |
| Burwood | 181 | 3564 | 5.1 |
| Fairfield | 119 | 2605 | 4.6 |
| Newtown | 37 | 1261 | 2.9 |
| Central | 446 | 928 | 48.1 |
| Downing Centre | 109 | 5903 | 1.8 |
| Kogarah | 17 | 535 | 3.2 |
| Redfern | 39 | 509 | 7.7 |
| Sutherland | 157 | 4932 | 3.2 |
| Waverley | 25 | 2552 | 1.0 |
| Bankstown | 116 | 2447 | 4.7 |
| Camden | 10 | 440 | 2.3 |
| Campbelltown | 227 | 2500 | 9.1 |
| Liverpool | 194 | 4727 | 4.1 |
| Manly | 26 | 2467 | 1.1 |
| North Sydney | 3 | 818 | 0.4 |
| **TOTAL** | **2434** | **49478** | |
| **Total proportion of 6 month sentences to all sentences imposed: 4.9** | | | |
| HUNTER | | | |
| Belmont | 43 | 1206 | 3.6 |
| Cessnock | 60 | 619 | 9.7 |
| Dungog | 0 | 70 | 0 |
| Kurri Kurri | 6 | 129 | 4.7 |
| Maitland | 76 | 1039 | 7.3 |
| Muswellbrook | 27 | 344 | 7.8 |
| Newcastle | 205 | 3446 | 5.9 |
| Raymond Terrace | 38 | 761 | 5.0 |
| Scone | 1 | 124 | 0.8 |
| Singleton | 5 | 346 | 1.4 |
| Toronto | 25 | 1315 | 1.9 |
| Forster | 37 | 438 | 8.4 |
| Gloucester | 1 | 47 | 2.1 |
| **TOTAL** | **524** | **9884** | |
| **Total proportion of 6 month sentences to all sentences imposed: 5.3** | | | |
| **ILLAWARRA** | | | |
| Albion Park | 0 | 155 | 0 |
| Bowral | 1 | 20 | 5.0 |

| | | | |
|---|---|---|---|
| Kiama | 0 | 107 | 0 |
| Moss Vale | 21 | 438 | 4.8 |
| Picton | 5 | 228 | 2.2 |
| Port Kembla | 1 | 545 | 0.2 |
| Wollongong | 209 | 2671 | 7.8 |
| Nowra | 57 | 1318 | 4.3 |
| **TOTAL** | **294** | **5482** | |
| **Total proportion of 6 month sentences to all sentences imposed: 5.4** | | | |

| | | | |
|---|---|---|---|
| **RICHMOND-TWEED** | | | |
| Ballina | 15 | 513 | 2.9 |
| Byron Bay | 11 | 807 | 1.4 |
| Casino | 10 | 548 | 1.8 |
| Kyogle | 1 | 178 | 0.6 |
| Lismore | 104 | 1412 | 7.4 |
| Mullumbimby | 0 | 254 | 0 |
| Murwillumbah | 8 | 336 | 2.4 |
| Tweed Heads | 20 | 930 | 2.2 |
| **TOTAL** | **169** | **4978** | |
| **Total proportion of 6 month sentences to all sentences imposed: 3.4** | | | |

| | | | |
|---|---|---|---|
| **MID-NORTH COAST** | | | |
| Bellingen | 0 | 151 | 0 |
| Coffs Harbour | 101 | 1454 | 6.9 |
| Grafton | 41 | 662 | 6.2 |
| Macksville | 10 | 357 | 2.8 |
| Maclean | 7 | 236 | 3.0 |
| Kempsey | 63 | 768 | 8.2 |
| Port Macquarie | 88 | 918 | 9.6 |
| **TOTAL** | **310** | **4546** | |
| **Total proportion of 6 month sentences to all sentences imposed: 6.8** | | | |

| | | | |
|---|---|---|---|
| **NORTHERN** | | | |
| Armidale | 56 | 555 | 10.1 |
| Glen Innes | 12 | 180 | 6.7 |
| Inverell | 33 | 363 | 9.1 |
| Tenterfield | 14 | 126 | 11.1 |
| Walcha | 0 | 38 | 0 |
| Warialda | 0 | 35 | 0 |
| Gunnedah | 13 | 245 | 5.3 |
| Quirindi | 2 | 143 | 1.4 |
| Tamworth | 56 | 1050 | 5.3 |
| Moree | 53 | 478 | 11.1 |
| Narrabri | 21 | 207 | 10.1 |
| **TOTAL** | **260** | **3420** | |
| **Total proportion of 6 month sentences to all sentences imposed: 7.6** | | | |

| | | | |
|---|---|---|---|
| **NORTH WESTERN** | | | |
| Bourke | 16 | 222 | 7.2 |
| Brewarrina | 5 | 74 | 6.8 |
| Cobar | 6 | 111 | 5.4 |
| Lightning Ridge | 0 | 113 | 0 |

| | | | |
|---|---|---|---|
| Nyngan | 1 | 58 | 1.7 |
| Walgett | 16 | 222 | 7.2 |
| Warren | 7 | 105 | 6.7 |
| Coonamble | 9 | 102 | 8.8 |
| Dubbo | 63 | 1041 | 6.1 |
| Gilgandra | 2 | 90 | 2.2 |
| Narromine | 7 | 94 | 7.4 |
| Wellington | 6 | 115 | 5.2 |
| Coonabarabran | 8 | 119 | 6.7 |
| **TOTAL** | **146** | **2466** | |
| **Total proportion of 6 month sentences to all sentences imposed: 5.9** | | | |

| | | | |
|---|---|---|---|
| **CENTRAL WEST** | | | |
| Bathurst | 53 | 689 | 7.7 |
| Dunedoo | 1 | 29 | 3.4 |
| Gulgong | 0 | 81 | 0 |
| Lithgow | 59 | 378 | 15.6 |
| Mudgee | 5 | 306 | 1.6 |
| Oberon | 0 | 63 | 0 |
| Rylstone | 0 | 45 | 0 |
| Condobolin | 5 | 89 | 5.6 |
| Forbes | 7 | 202 | 3.5 |
| Orange | 34 | 816 | 4.2 |
| Parkes | 11 | 217 | 5.1 |
| Peak Hill | 2 | 30 | 6.7 |
| Cowra | 11 | 378 | 2.9 |
| West Wyalong | 3 | 126 | 2.4 |
| Young | 5 | 217 | 2.3 |
| **TOTAL** | **196** | **3666** | |
| **Total proportion of 6 month sentences to all sentences imposed: 5.3** | | | |



| | | | |
|---|---|---|---|
| **SOUTH EASTERN** | | | |
| Batemans Bay | 20 | 413 | 4.8 |
| Bega | 13 | 366 | 3.6 |
| Eden | 4 | 160 | 2.5 |
| Milton | 3 | 292 | 1.0 |
| Moruya | 11 | 198 | 5.6 |
| Narooma | 2 | 107 | 1.9 |
| Bombala | 1 | 32 | 3.1 |
| Cooma | 7 | 273 | 2.6 |
| Crookwell | 0 | 1 | 0 |
| Goulburn | 105 | 1056 | 9.9 |
| Queanbeyan | 38 | 813 | 4.7 |
| Yass | 8 | 277 | 2.9 |
| **TOTAL** | **212** | **3988** | |
| **Total proportion of 6 month sentences to all sentences imposed: 5.3** | | | |

| | | | |
|---|---|---|---|
| **MURRUMBIDGEE** | | | |
| Gundagai | 7 | 114 | 6.1 |
| Junee | 3 | 103 | 2.9 |
| Lockhart | 0 | 10 | 0 |
| Temora | 5 | 104 | 4.8 |

| | | | |
|---|---|---|---|
| Tumbarumba | 4 | 55 | 7.3 |
| Tumut | 4 | 312 | 1.3 |
| Wagga Wagga | 114 | 1332 | 8.6 |
| Balranald | 4 | 73 | 5.5 |
| Griffith | 24 | 648 | 3.7 |
| Hay | 7 | 136 | 5.1 |
| Hillston | 1 | 52 | 1.9 |
| Leeton | 7 | 304 | 2.3 |
| Narrandera | 8 | 195 | 4.1 |
| Cootamundra | 4 | 240 | 1.7 |
| **TOTAL** | **192** | **3678** | |
| **Total proportion of 6 month sentences to all sentences imposed: 5.2** | | | |

| | | | |
|---|---|---|---|
| **MURRAY** | | | |
| Albury | 81 | 1121 | 7.2 |
| Corowa | 2 | 123 | 1.6 |
| Deniliquin | 5 | 373 | 1.3 |
| Finley | 2 | 97 | 2.1 |
| Holbrook | 3 | 109 | 2.8 |
| Moama | 0 | 67 | 0 |
| Moulamein | 0 | 36 | 0 |
| **TOTAL** | **93** | **1926** | |
| **Total proportion of 6 month sentences to all sentences imposed: 4.8** | | | |

| | | | |
|---|---|---|---|
| **FAR WEST** | | | |
| Broken Hill | 66 | 642 | 10.3 |
| Wenthworth | 16 | 205 | 7.8 |
| Wilcannia | 5 | 149 | 3.4 |
| **TOTAL** | **87** | **996** | |
| **Total proportion of 6 month sentences to all sentences imposed: 8.7** | | | |



When comparing the above data it should be considered that there consists many factors that can affect sentences imposed by magistrates, and hence, sentences imposed in different Local Courts. Factors that impact sentencing include the type of offence, the characteristics of offenders and the availability of sentencing options such as periodic detention. The character of cases can differ significantly between courts. Differences can arise due to local offending patterns or structural factors in the administration of justice. For instance, some Local Courts have facilities for housing offenders on remand and as such they are likely to have a greater proportion of offenders likely to receive a prison sentence.