New South Wales
Law Reform Commission

Sentencing Question Paper 5

Full-time imprisonment

June 2012
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Question paper 5: Full-time imprisonment

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Introduction

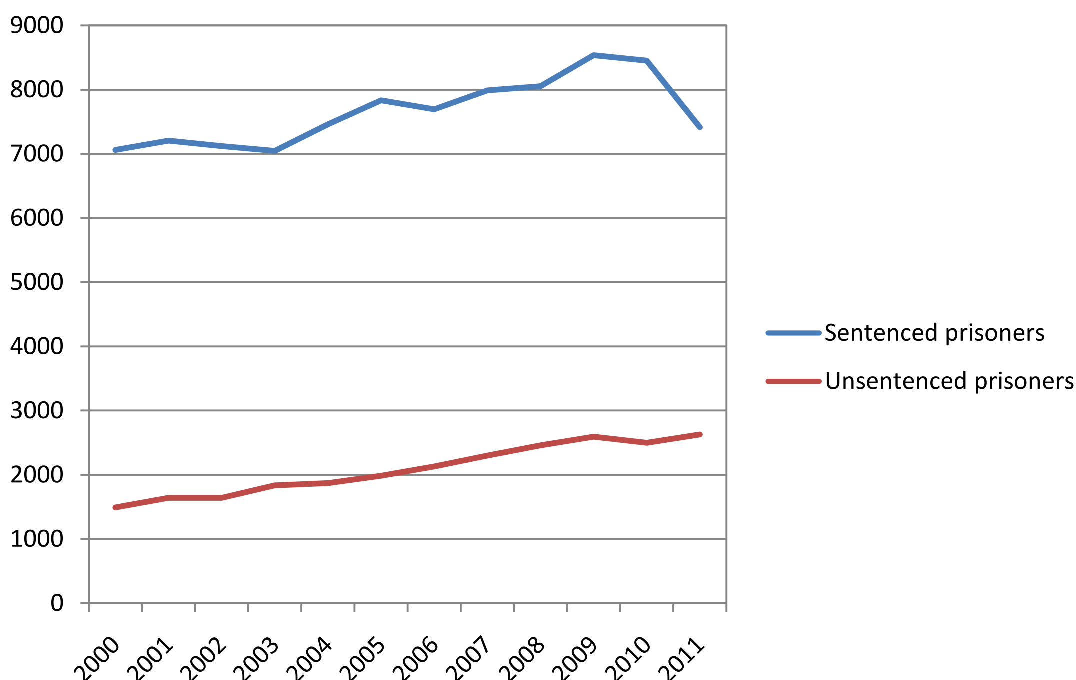
5.1 In this question paper, we discuss a number of issues relating to the structure of full-time imprisonment under the *Crimes (Sentencing Procedure) Act 1999* (NSW) ('the Act'). We use the term "full-time imprisonment" to distinguish this form of imprisonment from other kinds of "custodial" sentences discussed in Question Paper 6, such as home detention and intensive correction orders.

5.2 Earlier in 2012, the Attorney General asked the Law Reform Commission for an interim report on the standard minimum non-parole period ('SNPP') scheme. We

have provided an Interim Report separately on SNPPs[1] and will not discuss them further in this question paper.

5.3 We will give an overview of the provisions relating to full-time imprisonment and then turn to potential areas of reform. In Figure 5.1, we provide data on the number of sentenced prisoners in NSW between 2000 and 2011. In 2000, there were 7057 sentenced prisoners. This rose to a peak in 2009 at 8535 prisoners. In 2010, the number fell marginally to 8448, and then fell more significantly in 2011 to 7411 prisoners.

Figure 5.1: Number of sentenced and unsentenced prisoners in NSW prisons, on prison census dates, 2000 to 2011



Source: Australian Bureau of Statistics, *Prisoners in Australia* (4517.0, 2000-2011).

5.4 It should also be noted that the number of unsentenced prisoners has increased steadily during the period, from 1490 inmates in 2000 to 2629 inmates in 2011.[2] This is of relevance to sentencing because a court must take into account "any time for which the offender has been held in custody in relation to the offence".[3]

Overview of full-time imprisonment provisions

5.5 Section 5(1) of the Act provides that before a court can sentence an offender to imprisonment, the court must first decide that no sentence other than imprisonment

1. NSW Law Reform Commission, *Sentencing: Interim Report on Standard Minimum Non-parole Periods*, Report 134 (2012).
2. Australian Bureau of Statistics, *Prisoners in Australia* (4517.0, 2000-2011).
3. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 24(1).

is appropriate. This reflects the established common law principle that imprisonment is a sentence of "last resort".[4]

5.6 It should be stressed that while s 5 provides a threshold test for identifying when imprisonment is the only appropriate penalty, the actual form of the imprisonment remains open for the court to determine and can take the form of a full-time term, or some lesser form of custodial punishment, such as a suspended sentence, intensive correction order or home detention. We discuss those intermediate custodial sentencing options in Question Paper 6.[5]

5.7 Having determined that some form of imprisonment is the only appropriate penalty, the court must determine the length of the imprisonment without having regard to what form it will ultimately take.[6] In fixing a term of imprisonment, the court is always bound and guided by the maximum penalty stated for the offence,[7] noting that the imposition of the maximum penalty is reserved for the worst examples of offences.[8]

5.8 Once the court has determined that *full-time* imprisonment is required in the circumstances of the case before it, the court can impose:

- a term of full-time imprisonment comprising a non-parole period and a parole period for terms over six months;[9] or
- a fixed term of full-time imprisonment without a parole period.[10]

5.9 If an offender is being sentenced for more than one offence, the court must determine an appropriate sentence for each count and then consider the degree of accumulation or concurrence of the individual sentences when deciding on an appropriate effective term of imprisonment that adequately reflects the totality of the offending.[11]

5.10 Following a recent amendment to the Act, it is possible for the court to impose an aggregate sentence of imprisonment in lieu of accumulating the sentences for the individual offences.[12]

5.11 A court may also "take into account" further offences for which the offender admits guilt when he or she is sentenced for a principal offence.[13] This is commonly referred to as "taking matters into account on a Form 1". For example, if the

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4. *Way v The Queen* (2004) 60 NSWLR 168 [115]. This principle seems to be generally supported in other Australian jurisdictions: see NSW Law Reform Commission, *General Sentencing Principles,* Sentencing Question Paper 2 (2012) [2.2].
5. NSW Law Reform Commission, *Intermediate Custodial Sentencing Options,* Sentencing: Question Paper 6 (2012).
6. *R v Zamagias* [2002] NSWCCA 17 [23]-[32].
7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 49(1)(a) and *R v H* (1980) 3 A Crim R 53.
8. *Ibbs v The Queen* (1987) 163 CLR 447.
9. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44, 46.
10. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 45.
11. *Pearce v The Queen* (1998) 194 CLR 610; *R v XX* [2009] NSWCCA 115 [52]; *R v Cahyadi* (2007) 168 A Crim R 41, 47. See also NSW Law Reform Commission, *General Sentencing Principles*, Sentencing Question Paper 2 (2012) [2.17].
12. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 53A.
13. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 33.

offender has been found guilty or pleaded guilty to an offence of robbery, he or she might ask the court to take into account a range of other admitted offences, usually of lesser seriousness, such as larceny or demanding property with menaces, in order to 'clean the slate' of all outstanding offences for which the offender admits guilt. While individual sentences are not imposed for those further offences, the offences are taken into account with a view to increasing the sentence on the principal offence. That increase in sentence may be significant in some cases, particularly if the matters on the Form 1 are numerous or serious in themselves.[14]

5.12 Both parties must agree to the charges being placed on a Form 1.[15] The court nevertheless can refuse to take a charge into account (and the charge must be dealt with separately) if, for example, in the opinion of the court it is too serious to be dealt with in this way.[16]

5.13 There is a statutory requirement for the prosecution to consult with the victim of an offence and the police officer in charge of the case before placing a charge on a Form 1 or to give reasons to the court why such consultation has not taken place.[17]

Structuring a term of full-time imprisonment in the usual case

5.14 When imposing a sentence of full-time imprisonment and setting a non-parole period, s 44 of the Act requires a court to set a *non-parole period* before setting the *balance of the term* of the sentence.

5.15 The "non-parole period" is "the minimum period for which the offender must be kept in detention in relation to the offence",[18] while the expression "balance of the term" is equivalent to a "parole period".

5.16 Thus, the balance of term follows the non-parole period and is the period of time fixed by the court to act as the parole period for the offender.

5.17 The total or combination of the non-parole period and the balance of term is often referred to in the NSW case law as the "head sentence".

5.18 Under s 50, the offender's release to parole at the expiry of the non-parole period is automatic if the head sentence is three years or less (assuming, of course, that the offender does not have to serve another sentence). However, if the head sentence is longer than three years, the offender's release to parole at the expiry of the non-

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14. The CCA has issued a guideline judgment on the appropriate manner in which courts should take into account matters on a Form 1: *Attorney General's Application under s 37 Crimes (Sentencing Procedure) Act 1999 (No 1 of 2002)* (2002) 56 NSWLR 146, which builds on earlier decisions such as *R v Barton* [2001] NSWCCA 63.
15. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 32.
16. R N Howie and P A Johnson, *Criminal Practice and Procedure NSW* (LexisNexis) [5-s 33.1]; see also Guideline 20 of the NSW Director of Public Prosecutions' *Prosecution Guidelines* in relation the placing of charges on a Form 1.
17. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 35A; see also NSW Office of the Director of Public Prosecutions, *Prosecution Guidelines*, Guideline 20.
18. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(1). This is consistent with the High Court's statement in *Power v The Queen* (1974) 131 CLR 623, 628; and more recently in *Muldrock v The Queen* [2011] HCA 39; 281 ALR 652 [57].

parole period is *not* automatic and will depend on the decision of the Parole Authority.[19] The Parole Authority is also responsible for considering suspected breaches of parole.[20]

5.19 Instead of imposing a non-parole period and balance of term, the court may impose what is commonly referred to as a *fixed term* of imprisonment. That is to say, there is a term of imprisonment fixed by the court which must be served in its entirety by the offender and the fixed term is not broken into a non-parole period followed by a balance of term.[21] Section 45 limits the circumstances in which a court may impose a fixed term:

> … a court may decline to set a non-parole period for the offence or offences if it appears to the court that it is appropriate to do so:
>
> (a) because of the nature of the offence to which the sentence, or of each of the sentences to which an aggregate sentence relates, or the antecedent character of the offender, or
>
> (b) because of any other penalty previously imposed on the offender, or
>
> (c) for any other reason that the court considers sufficient.

5.20 Under s 45(2), the court must record its reasons if it imposes a fixed term, quite apart from its common law duty to give reasons for any sentence it imposes on an offender.[22]

5.21 One reason for imposing a fixed term for an offence may be that the offender is being sentenced for several offences and the sentence for a relatively less serious offence may be entirely subsumed by the non-parole period for a more serious offence. In this example, there would be no utility in stipulating a parole period for the less serious offence because the offender will have to serve the longer non-parole period for the other offence.

5.22 By contrast, under s 46 a court must impose a fixed term if the term of the sentence is six months or less. An offender who is sentenced to full-time imprisonment of six months or less is not entitled to be released on parole before the expiry of the term. Once again, the Act requires reasons to be given for the court's decision:

> 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

19. *Crimes (Administration of Sentences) Act 1999* (NSW) pt 6, 8.
20. *Crimes (Administration of Sentences) Act 1999* (NSW) pt 7.
21. But note that under s 45(1) the court must impose a non-parole period and a balance of term for an offence covered by the standard non-parole period scheme: *Crimes (Administration of Sentences) Act 1999* (NSW) pt 4 div 1A.
22. *R v Thomson* (2000) 49 NSWLR 383 [42]-[44]; *R v Jackson* [2011] NSWCCA 124 [26].

> 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).[23]

5.23 As indicated earlier, if an offender is being sentenced to more than one term of imprisonment, the court must fix an appropriate sentence for each offence and has a discretion to structure the sentences in such a way that they are accumulated or partially accumulated to reflect the totality of the offending.[24] The sentences may start on different dates so that they overlap or may even be served entirely concurrently.

The ratio of the non-parole period and balance of term

5.24 There is a presumption under s 44 that the balance of term set by the court must not exceed one-third of the non-parole period unless "special circumstances" are found by the court (and again the court must record its reasons for making this finding). The section provides:

> 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).[25]

5.25 This is equivalent to saying that the *non-parole period must not be less than three-quarters of the head sentence* unless there are special circumstances. To take a simple example, if the head sentence is four years, the non-parole period must not be less than three years unless the court finds special circumstances.

5.26 A finding of special circumstances is a discretionary finding of fact[26] and what may amount to special circumstances has been the subject of much debate in the case law. Justice Hunt observed in a 1995 decision that:

> what constitutes special circumstances is something more than those matters which may be taken into account by way of mitigation of the total sentence. If it were otherwise, there would be no need for the adjective 'special' … Sometimes the combination of those circumstances may be sufficient. But what must be shown are circumstances which demonstrate the need or desirability for the offender to be subjected to an extended period of conditional release subject to supervision on parole.[27]

5.27 However, today, courts find special circumstances very frequently. The circumstances that may be sufficiently special to amount to special circumstances are not closed and are many and varied. A frequent example is the need for parole

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23. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(2).
24. *Pearce v The Queen* (1998) 194 CLR 610 [45]; NSW Law Reform Commission, *General Sentencing Principles,* Sentencing Question Paper 2 (2012) [2.7], [2.17]-[2.18].
25. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2).
26. R N Howie and P A Johnson, *Criminal Practice and Procedure NSW* (LexisNexis) [5-s 44.15].
27. *R v Lett* (Unreported, NSWCCA, 27 March 1995), omitting citations, quoted in Judicial Commission of NSW, *Sentencing Robbery Offenders since the* Henry *Guideline Judgment*, Monograph 30 (2007) [3.7.6]; see also NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [8.22].

supervision to assist the offender's rehabilitation and reintegration into the community, particularly if the offender has had a problem with drug addiction.

Historical overview

5.28 Section 44 is drafted in almost identical terms to the former s 5(2) of the *Sentencing Act 1989* (NSW), which provided that: "The additional term must not exceed one-third of the minimum term, unless the court decides there are special circumstances".

5.29 Significantly, two years before the introduction of the *Sentencing Act 1989* (NSW), an amendment was made to introduce s 20A into the *Probation and Parole Act 1983* (NSW),[28] so that non-parole periods for a list of nominated "serious offences", including homicide and other serious offences of violence, robbery, sexual assaults and commercial drug trafficking, were not to be less than three-quarters of the head sentence unless there were reasons to justify a departure.

5.30 The Judicial Commission of NSW observed that s 20A was introduced after public criticism of sentencing levels for serious crimes in which non-parole periods were often as short as 50% of the head sentence:

> In light of public criticism of this disparity, particularly in the context of serious crimes of violence, a new section 20A of the *Probation and Parole Act 1983* was introduced by Parliament to require sentencers to impose a non-parole period of at least three-quarters of the head sentence for certain serious crimes, unless it was determined that the circumstances justified a lower proportion (s 21(3)).[29]

5.31 The rationale for the introduction of s 20A was given in the second reading speech:

> The Probation and Parole (Serious Offences) Amendment Bill is concerned with the punishment of serious offenders and the protection of the community. Recent events in New South Wales have heightened our awareness of serious crimes of violence. The sentencing of such offenders has been subject to a deal of public debate. The sentences handed down to such serious offenders and the sentences actually served have been questioned. The punishment of offenders is traditionally justified by a number of principles: deterrence, rehabilitation, denunciation, regard to public attitudes, willful default, retribution of just deserts, and incapacitation. … It is the last two principles with which the Government is concerned in these reforms.[30]

5.32 Notwithstanding the identical, *prima facie* three-quarter ratio under both s 5(2) of the *Sentencing Act 1989* (NSW) and the previous s 20A of the *Probation and Parole Act 1983* (NSW), Justice Badgery-Parker pointed out in *R v Moffitt*[31] that the provisions had quite different legislative histories and this was significant to their interpretation:

> Section 20A was avowedly introduced to "toughen up" sentences in the case of serious crimes only. It was engrafted onto an existing system for that purpose.

28. The amending Act was the *Probation and Parole (Serious Offenders) Amendment Act 1987* (NSW).

29. Judicial Commission of NSW, *"Special Circumstances" under the* Sentencing Act 1989 *(NSW)*, Monograph 7 (1993) 2.

30. NSW, *Parliamentary Debates*, Legislative Assembly, 12 November 1987, 15914 (B Unsworth).

31. *R v Moffitt* (1990) 20 NSWLR 114.

> The object of the *Sentencing Act* [1989] was not to increase sentences – s 3 spells out the object expressly.[32]

5.33 Thus s 5 did not require "special circumstances" to be read restrictively, but should be interpreted in light of the rehabilitative purpose of parole. His Honour contrasted s 5 with the "punitive" approach for the serious sentences covered by s 20A of the *Probation and Parole Act 1983* (NSW).[33]

Proliferation of special circumstances

5.34 Judicial Commission research on sentencing statistics showed that in 1992, two years after the decision in *Moffitt*, the higher courts imposed sentences in which the non-parole period was less than three-quarters of the head sentence – consistent with a finding of "special circumstances" – in about 47% of cases.[34] By 2002, the Judicial Commission found that this figure had risen to about 87%:

> Of all sentences of imprisonment imposed by the District and Supreme Courts in 2002, only 12.9% of sentences included a non-parole period of 75% or more of the full term, including 2.9% of fixed term sentences. It would appear, therefore, that "special circumstances" must have been found in up to 87.1% of cases where imprisonment was ordered.
>
> A further finding is that departure from the statutory norm was not only frequent but also quite pronounced:
>
> - the most common non-parole period / full term ratio was 50%, which occurred in almost a quarter of cases (23.7%)
> - more than half of those imprisoned (52.0%) had a non-parole period / full term ratio of 50% or less
> - over two-thirds of those imprisoned (69.5%) had a non-parole period / full term ratio of 60% or less
> - 84.7% of those imprisoned had a non-parole period / full term ratio of 66.7% or less.[35]

5.35 In 2007, the Judicial Commission of NSW in its research on 276 cases of robbery charged under s 97 of the *Crimes Act 1900* (NSW), found that many circumstances were treated by the courts as being "special".

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32. *R v Moffitt* (1990) 20 NSWLR 114, 136. *Sentencing Act 1989* (NSW) s 3 provided that the objects of the Act were to: "(a) promote truth in sentencing by requiring convicted offenders to serve in prison (without any reduction) the minimum or fixed term of imprisonment set by the court; and (b) to provide that prisoners who have served their minimum terms of imprisonment may be considered for release on parole for the residue of their sentences".
33. *R v Moffitt* (1990) 20 NSWLR 114, 135-136.
34. Judicial Commission of NSW, *"Special Circumstances" under the* Sentencing Act 1989 *(NSW)*, Monograph 7 (1993) 3. This research appears to be on the lengths of sentences, rather than actual findings of special circumstances.
35. Judicial Commission of NSW, *Common Offences and the Use of Imprisonment in the District and Supreme Courts in 2002,* Sentencing Trends and Issues No 30 (2004) (footnotes omitted); also cited in *Fidow v The Queen* [2004] NSWCCA 172 [21] (Spigelman CJ).

Table 5.1: Special circumstances for armed robbery and robbery in company offences in the study sample (12 May 1999 to 11 May 2002)

Special circumstance	Number	%
Need for lengthy period of supervision in community after release	206	74.6
Good prospects of rehabilitation (capacity to reform)	151	54.7
Age of offender	101	36.6
Prior criminal record (lack of)	89	32.2
Hardship	74	26.8
Other extraordinary subjective features	20	7.2
Effect of cumulative sentences	18	6.5
Demonstrated remorse and contrition (including assistance to the authorities)	7	2.5
Ward off institutionalisation	7	2.5
Issues of parity	1	0.4

Source: Judicial Commission of NSW, Sentencing Robbery Offenders since the Henry *Guideline Judgment, Monograph 30 (2007) Table 16, 107.*

5.36 In 2010, the Judicial Commission found that over 87% of cases involving standard non-parole period offences had resulted in non-parole periods less than three-quarters of the head sentence in the period covering 2003 to 2007, rising from 80% for those offence categories in the period 2000 to 2003.[36]

5.37 Obviously, by adjusting the non-parole period as a proportion of the head sentence, there is potential for the non-parole period to become inadequate. Chief Justice Spigelman reviewed the available sentencing statistics in 2004 and cautioned courts against excessive findings of special circumstances.[37] His Honour observed, “There is evidence that findings of special circumstances have become so common that it appears likely that there can be nothing ‘special’ about many cases in which the finding is made”. His Honour queried whether the “provision is perhaps being utilised far more than was anticipated by Parliament”.[38]

5.38 Further, his Honour noted that the presence of a factor capable of constituting special circumstances did not mean that a judge is obliged to vary the statutory ratio, as the circumstances must be sufficiently special to justify a departure from the ratio.[39]

36. Judicial Commission of NSW, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010) 55.
37. *Fidow v The Queen* [2004] NSWCCA 172 [22].
38. *Fidow v The Queen* [2004] NSWCCA 172 [20]-[21].
39. *Fidow v The Queen* [2004] NSWCCA 172 [22].

5.39 The fact that a matter has been taken into account in determining the total sentence does not mean that the circumstance cannot be used in determining whether there are special circumstances. However, when determining whether special circumstances exist, a court must be careful not to double count circumstances to mitigate the total sentence and non-parole period *and* to find special circumstances to reduce the non-parole period further.[40]

Other jurisdictions

5.40 The following table sets out provisions that apply in other jurisdictions in relation to the statutory ratios between non-parole periods and head sentences. However, it does so in broad terms and should be taken as a brief guide only to the ratios which apply in different situations. The degree to which a court may depart from the ratio varies markedly from jurisdiction to jurisdiction.

Table 5.2: Provisions in other jurisdictions in relation to the statutory ratios between non-parole periods and head sentences

Vic	▪ Non-parole period ('NPP') must be at least 6 months less than the head sentence (for head sentences of more than 2 years).[41]
Qld	▪ NPP of 50% of the head sentence where the head sentence exceeds three years and the court does not set a parole eligibility date (or in other specified circumstances, such as imprisonment arising from the breach of a suspended sentence, cancelled parole or imprisonment for a sexual offence where the head sentence is not more than 3 years)[42] or ▪ 80% of the head sentence for serious violence offences (or a minimum of 15 years, whichever is the lesser).[43]
WA	▪ NPP generally 50% of the head sentence if the head sentence is 4 years or less, or ▪ 2 years less than the head sentence if the head sentence is greater than 4 years.[44]
SA	▪ NPP of 80% of the head sentence for serious offences against the person,[45] or for a serious offence where the offender is, or has been, declared to be a serious repeat offender[46] or a recidivist young offender.[47]
Tas	▪ NPP of 50% of the head sentence.[48]
NT	▪ NPP of 70% of the head sentence for the offences of sexual intercourse without consent, certain other sexual and violent offences, and certain offences committed against people under 16 years of age,[49] or

40. R N Howie and P A Johnson, *Criminal Practice and Procedure NSW* (LexisNexis) [5-s 44.15].
41. *Sentencing Act 1991* (Vic) s 11.
42. *Corrective Services Act 2006* (Qld) s 184; Queensland Sentencing Advisory Council, *Final Report: Minimum Standard Non-parole Periods* (2011) xvii, 36.
43. *Penalties and Sentences Act 1992* (Qld) pt 9A; Queensland Sentencing Advisory Council, *Final Report: Minimum Standard Non-parole Periods* (2011) xvii, 36.
44. *Sentencing Act 1995* (WA) s 93 (for aggregate sentences see s 94).
45. *Criminal Law (Sentencing Act) 1988* (SA) s 32(5)(ba).
46. *Criminal Law (Sentencing Act) 1988* (SA) s 20B(4)(b).
47. *Criminal Law (Sentencing Act) 1988* (SA) s 20C(3)(b).
48. *Sentencing Act 1997* (Tas) s 17(3).
49. *Sentencing Act* (NT) s 55, s 55A.

	▪ 50% of the head sentence for other offences where a term of imprisonment of 12 months or longer is imposed.[50]
NZ	▪ In broad terms, NPP generally of 33.3% of the head sentence and generally not in excess of 66.6% of the head sentence if the head sentence is 2 years or more (and further provided the non-parole period will not be in excess of 10 years) but subject to exceptions for serious violent offending, including murder and repeat offending.[51]

5.41 In 2011, the Queensland Sentencing Advisory Council reported that it favoured incorporating a "standard percentage scheme" into the Queensland Serious Violent Offenders Scheme sentencing model.[52] In broad terms, this would mean that such offenders would have to serve a minimum of between 65 and 80% of the total sentence imposed before being eligible to apply for parole, but scope would be permitted in some circumstances to impose a shorter or longer period if it would be unjust to impose the standard percentage period.[53]

5.42 In *R v Hili*, the High Court rejected the submission that the "norm" for a period of mandatory imprisonment under Commonwealth legislation is between 60% and 66% of the total sentence.[54]

Options for reform of special circumstances

5.43 The high frequency of findings of special circumstances may suggest that s 44 may be in need of review.

Repeal

5.44 One approach would be to abolish the section and leave it to the Court of Criminal Appeal ('CCA') to review the appropriateness of non-parole periods imposed by courts as part of its broader appellate role of reviewing other aspects of judicial sentencing discretion.

5.45 In our 1996 report, we recommended the abolition of the special circumstances provision, which appeared then in s 5 of the *Sentencing Act 1989* (NSW), because it represented an "unnecessary and arbitrary restraint" on judicial discretion:

> Section 5(2) acts as a restraint on the judicial discretion to impose a sentence that, in all the circumstances of the case, relates appropriately to the offender and to the crime, by requiring the presence of "special circumstances" before courts can depart from the statutory ratio of minimum to additional terms. This is because the application of the ratio ignores the varied situations which need to be assessed when a sentence is determined, and requires the Court to identify "something about the case that warrants a longer than usual additional term by

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50. *Sentencing Act* (NT) s 54(1).
51. *Parole Act 2002* (NZ) s 84; *Sentencing Act 2002* (NZ) s 86 (but see exceptions in s 86A-I, s 103, and s 104).
52. Queensland Sentencing Advisory Council, *Final Report: Minimum Standard Non-parole Periods* (2011) xvi.
53. Queensland Sentencing Advisory Council, *Final Report: Minimum Standard Non-parole Periods* (2011) xvii, 37.
54. *Hili v The Queen* (2010) 272 ALR 465 [36].

> comparison with the minimum term". This provision has been partly responsible for the increase in the prison population, despite the expressed desire of the Government of the day.
>
> ... The Commission remains of the opinion that, notwithstanding the finding of special circumstances in many cases before the courts, s 5(2) and (3) of the *Sentencing Act 1989* (NSW) constitute an unnecessary and arbitrary restraint on the ability of a court to fix a sentence appropriate to the offence in question, and should be repealed.[55]

5.46 Arguments in favour of repeal include the fact that special circumstances are found in a majority of cases already, tending to suggest that the provision is an ineffective legislative fetter of judicial discretion in any event. Arguments against the repeal of s 44 include the even greater erosion of consistency of sentencing that might be expected if it was repealed, and that the three-quarter ratio can still represent an anchoring point for adequate sentences when the court considers how far it will depart from that ratio in the special circumstances of the case.

Different ratios for different offenders or offences

5.47 As yet, we have not received many submissions that comment on s 44. However the Crime and Justice Reform Committee suggested that:

> [s]ome offenders would be better served by a lesser period in custody and a longer time being supported and supervised in the community; this may be particularly so for vulnerable offenders such as those with cognitive and mental health impairments.[56]

5.48 Thus, an alternative to abolishing s 44 would be for the section to contain different presumptive ratios to apply in different situations. For example:

- a lower presumptive ratio could apply if the Parliament wished to place greater emphasis on the rehabilitation of certain offenders during their parole periods, such as younger offenders, or offenders with cognitive or mental health impairments;
- a higher presumptive ratio could apply if the Parliament wished to place greater emphasis on deterrence, denunciation and retribution for serious offences, such as offences of violence including sexual offences, or offences with high rates of recidivism such as break and enter and motor vehicle theft;[57]
- lowering the ratio for offences carrying a maximum penalty up to a certain amount (for example, two years) to emphasise rehabilitation rather than denunciation and retribution.[58]

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55. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [8.22]-[8.24].
56. Crime and Justice Reform Committee, *Preliminary Submission PSE12*, 3.
57. D Weatherburn and others, *Rates of Participation in Burglary and Motor Vehicle Theft*, Contemporary Issues in Crime and Justice 130 (2009) 1.
58. There would be scope to link this amendment to reform of the purposes of sentencing in s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), discussed in NSW Law Reform Commission, *Purposes of Sentencing,* Sentencing Question Paper 1 (2012).

Different test to be met to depart from the ratio for particular offences

5.49 Another approach would be to change the test to depart from the nominated presumptive ratio if the Parliament wished to place lesser or greater emphasis on the relative length of non-parole period for different offences.

5.50 For example, for particularly serious offences or offences involving a high rate of recidivism, a test of "exceptional circumstances" might have to be met by the offender before the court could depart from the presumptive ratio.[59]

5.51 If a tighter test was adopted under s 44 which applied to sentences of full-time imprisonment across the board, irrespective of their seriousness, non-parole periods for less serious offences may be increased incidentally. Alternatively, if there were different tests for different offences or classes of offenders, the exercise of sentencing discretion may become more complicated and prone to error.

Question 5.1

1. Should the "special circumstances" test under s 44 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) be abolished or amended in any way? If so, how?
2. Should a single presumptive ratio be retained under s 44 or should a different ratio apply for different types of offences or different types of offender; and, if so, what ratio should apply to different offences or different offenders?

Top-down and bottom-up approaches

5.52 If s 44 is to be retained in some form, should it be maintained in its current form in which the non-parole period must be stated first and then the balance of term (the so-called "bottom-up" approach), or should the head sentence should be stated first and then the non-parole period (the so-called "top-down" approach)? Over the years, each of these approaches has been preferred at different times[60] but, currently, the bottom-up approach is required under s 44.[61]

5.53 Strictly, s 44 only applies to the *order of pronouncement* of the non-parole period and parole period. This is because the courts have held consistently that the section

59. "Exceptional circumstances" has been used as a test under the *Bail Act 1978* (NSW) for charges of murder and repeat offenders charged with serious personal violence offences: *Bail Act 1978* (NSW) s 9C, s 9D; *Young v The Queen* [2006] NSWSC 1499 [15]-[24] (Johnson J). There is also an exceptional circumstances test at common law in relation to taking into account the hardship to third parties caused by imprisoning the offender: R N Howie and P A Johnson, *Criminal Practice and Procedure NSW* (LexisNexis) [5-320].

60. *Sentencing Act 1989* (NSW) s 5(1) also required courts to impose a non-parole period first before setting the balance of term, but the top down approach was endorsed in the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44 when it was first enacted.

61. This was thought necessary in order to be consistent with the introduction of the standard non-parole period scheme in 2003 under the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW): see NSW, *Parliamentary Debates (Hansard)*, Legislative Assembly, 23 October 2002, 5813-5819 (R Debus); although it is noted that s 44 applies generally to all offences.

does not apply to the judicial process of determining an appropriate sentence for the offender.[62]

5.54 To some extent, therefore, it could be argued that the debate over reforming the top down or bottom up approach has no practical consequence.

5.55 However, there is a risk that if the section as it is currently drafted is read literally, it may mislead courts into placing undue weight on determining a non-parole period first at the expense of a parole period that is appropriate in the circumstances of the case.[63]

5.56 In 1996, when the *Sentencing Act 1989* (NSW) was in force and mandated the bottom-up approach,[64] we recommended that the approach be abandoned in favour of the top-down approach.[65] We noted that a sentence should embody all the purposes of punishment and also reflect proportionality, as the prisoner is liable to serve the whole of the sentence if parole is not granted.[66] We were of the view that "the mere statement of a minimum term and additional term cannot effectively convey all the purposes of punishment. It is only once a head sentence has been set that the court can determine the minimum term, that is, the period which the offender must, in justice, serve in gaol".[67]

5.57 The Chief Magistrate of the Local Court has also suggested that it would be helpful to return to the top down approach in s 44 of the Act, as it would assist in the transparency and public understanding of sentencing.[68]

5.58 The standard minimum non-parole period provisions for a number of serious offences[69] should also be kept in mind when considering the two options. Those provisions focus on fixing a non-parole period, which appears to be more compatible with a bottom-up approach; however, now there is less potential conceptual difficulty involved in changing to a top down approach in relation to the standard minimum non-parole period provisions because the High Court has held that they are not to be the starting point or to have determinative influence on fixing the sentence.[70]

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62. Judicial Commission of NSW, *Sentencing Bench Book* [7-500], referring to *Musgrove v The Queen* [2007] NSWCCA 21; 167 A Crim R 424 [44] and *Way v The Queen* [2004] NSWCCA 131; 60 NSWLR 168 [111]-[113], citing *R v Moffitt* (1990) 20 NSWLR 114 with approval.
63. See the discussion in *Musgrove v The Queen* [2007] NSWCCA 21; 167 A Crim R 424 [44] (Simpson J). See also *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 [17], in which the High Court unanimously observed: "the fixing of a non-parole period is but one part of the larger task of passing an appropriate sentence upon the particular offender".
64. *Sentencing Act 1989* (NSW) s 5(1) (repealed).
65. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) rec 42.
66. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [8.27], citing *R v Moffitt* (1990) 20 NSWLR 114, 118 (Samuels JA) and 134 (Badgery-Parker J).
67. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [8.27].
68. G Henson, *Preliminary Submission PSE5*, 1-4.
69. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A.
70. *Muldrock v The Queen* [2011] HCA 39; 281 ALR 652.

Question 5.2

1. Should the order of sentencing under s 44 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) return to a 'top down' approach?
2. Could a 'top down' approach work in the context of standard minimum non-parole periods?

Short sentences of imprisonment

5.59 This section of the question paper will examine arguments for and against abolishing short terms of full-time imprisonment.

Current legislation in NSW

5.60 As discussed above, a custodial sentence should be a sentence of last resort and courts are required to consider all possible alternatives before deciding that no penalty other than imprisonment is appropriate.[71] When sentencing an offender to imprisonment for six months or less, a court is required to give reasons for deciding that no penalty other than imprisonment is appropriate and reasons for deciding not to order the offender to participate in an intervention program or other program for treatment or rehabilitation.[72] The requirement to give reasons was introduced into legislation following our 1996 recommendation.[73]

5.61 When a sentence of six months or less is to be imposed, s 46 provides that a court may not set a non-parole period, but may only impose the sentence as a fixed term of imprisonment. The genesis of this provision seems to have been s 4(2) of the *Parole of Prisoners Act 1966* (NSW), which provided that a non-parole period of not less than six months had to be imposed whenever a court imposed a sentence of imprisonment. The then Minister stated that it was not possible for prison authorities to assess a prisoner for parole after a period of imprisonment of less than six months:

> Whatever the sentence, the non-parole period cannot be less than six months. Prison authorities are generally agreed that it is impossible to assess parole potential in a period of imprisonment of less than six months.[74]

5.62 Section 46 of the Act continues the requirement that a fixed term must be set for a sentence of imprisonment of six months or less.

5.63 The section does not appear to rule out a *combination* of a non-parole period of less than six months with a balance of term of several months so long as it results in a head sentence of more than six months. For example, there could be a three month non-parole period with a four-month balance of term, resulting in a seven-month

71. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1).
72. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(2).
73. NSW Law Reform Commission, *Sentencing,* Report 79 (1996) rec 40.
74. NSW, *Parliamentary Debates (Hansard)*, Legislative Assembly, 20 September 1966, 973. See also the now repealed *Probation and Parole Act 1983* (NSW) s 5, s 6 and *Sentencing Act 1989* (NSW) s 7.

sentence. In that case, the offender would be released to parole after three months.[75] In practice, however, it generally seems to be the case that short sentences of six months or less are imposed as fixed terms, without a parole component.

Statistics

5.64 According to an Australian Bureau of Statistics analysis of statistics on prisoners in adult custody in NSW on 30 June 2011, 418 prisoners had received aggregate sentences of imprisonment of less than six months, out of a total of 7292 prisoners serving sentences of full-time custody at that date.[76] The number of prisoners sentenced to terms of imprisonment of less than six months in the course of a year would be expected to be higher than this, as the figures relate only to prisoners serving short sentences at 30 June 2011.

Other jurisdictions

5.65 Western Australian ('WA') legislation introduced a prohibition on sentences of imprisonment of less than six months in 2004.[77] Prior to this time, sentences of imprisonment of less than three months had been precluded by legislation.[78]

5.66 Statutory exceptions to the current WA ban are:

- situations where the aggregate of the term imposed and any other term or terms is more than six months; or
- the offender is already serving or will serve another term; or
- where a prisoner is sentenced for an "aggravated prison offence", committed while in custody, and a court of summary jurisdiction imposes a sentence under s 79 of the *Prisons Act 1981* (WA), which allows the court to sentence a person to imprisonment for a term not exceeding 6 months, to be cumulative upon any existing terms of imprisonment.[79]

5.67 A 2005 Discussion Paper by the Law Reform Commission of WA stated that the abolition of sentences of three months or less did not reduce imprisonment rates and, by 2005, the abolition of sentences of six months or less had not had any positive impact.[80]

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75. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 50.
76. Australian Bureau of Statistics, *Prisoners in Australia*, Publication No 4517.0 (2011) Table 3.9.
77. *Sentencing Legislation Amendment and Repeal Act* 2003 (WA) s 33, amending *Sentencing Act* 1995 (WA) s 86, as referenced in NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less* (2004) 7.
78. Australian Law Reform Commission, *Sentencing of Federal Offenders*, Issues Paper 29 (2005) 29.
79. *Sentencing Act 1995* (WA) s 86.
80. Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Discussion Paper, Project 94 (2005) 96.

5.68 In 2002 the Victorian Sentencing Review considered the abolition of short sentences to be "undesirable because it leaves too large a gap in the sentencing continuum".[81]

5.69 Scotland introduced a presumption against sentences of three months or less for low-level offenders in 2010.[82] A Scottish Government News Release stated that a proposal for an identical presumption against terms of imprisonment of six months or less was not preferred "in order to secure the widest possible Parliamentary backing". It was also noted that the provision could be altered at a later time to expand the presumption beyond three months with the agreement of Parliament.[83]

5.70 The Scottish Justice Secretary distinguished between serious and dangerous offenders, for whom prison was appropriate, and low level offenders, for whom short sentences "do not work", and noted evidence that recidivism rates were lower for offenders sentenced to tough community based sentences than for offenders sentenced to jail terms of six months or less.[84]

5.71 A UK Ministry of Justice consultation paper in 2010 noted that two thirds of custodial sentences passed each year were for six months or less. The consultation paper noted that recidivism rates were higher for offenders sentenced to these short sentences than for other offenders, but the Ministry was not in favour of abolishing short sentences, arguing that courts should be able to impose such sentences, particularly when recidivist offenders have not responded to community sentences or fines. However, the consultation paper noted government efforts in developing more effective community sentences and the government's long term strategy to stop offending earlier and prevent repeat offenders from persistent offending.[85] The Ministry ran consultations and published the Government Response in June 2011 which set out plans that included introducing work requirements for prisoners in full-time custody, making non-custodial sentences tough and demanding, increasing drug and alcohol treatment for offenders, addressing offenders' mental health problems and broadening the range of employment and learning services available to prisoners.[86]

5.72 However, the Institute for Public Policy Research (UK), was in favour of abolishing short sentences and released a report in 2011 exploring the possibility of "justice reinvestment" in England and Wales. The process is described as the redirecting of resources spent on imprisoning offenders into community-based alternatives that address the causes of crime at the "source". The report made a number of recommendations aimed at achieving this reinvestment, one of which was the

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81. Australian Law Reform Commission, *Sentencing of Federal Offenders*, Issues Paper 29 (2005) [1.28], referring to A Freiberg, *Pathways to Justice: Sentencing Review 2002* (2002) 136.
82. *Criminal Justice and Licensing (Scotland) Act 2010* (UK).
83. Scottish Government, 'Community Punishments to Replace Shortest Prison Sentences' (News Release, 23 June 2010).
84. Scottish Government, 'Community Punishments to Replace Shortest Prison Sentences' (News Release, 23 June 2010).
85. UK Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (2010).
86. UK Ministry of Justice, *Breaking the Cycle: Government Response* (2011).

abolition of sentences of imprisonment of less than six months, so that community-based penalties would be imposed instead.[87]

NSW Sentencing Council report on abolishing short sentences

5.73 In 2004, the NSW Sentencing Council published a report on abolishing prison sentences of six months or less. While the report recommended that consideration could be given to the abolition of short prison sentences in the future, it did not recommend that course in the circumstances that then existed because, at the time of the report, many alternatives to full-time custody were not available uniformly throughout NSW. The report detailed concerns that the abolition of short sentences may result in certain offenders being sentenced to longer custodial sentences, rather than alternatives to imprisonment, a process known as 'sentence creep'.[88] It is noted that some alternatives to full-time custody are currently not available uniformly throughout NSW.[89]

5.74 The NSW Sentencing Council report also referred to further difficulties in determining the exceptions to the ban on short sentences, as there were a large number of possible exceptions that could not be agreed upon.[90]

5.75 The report noted that the recent abolition of sentences of six months in WA was unevaluated and a similar abolition in NSW should not be considered until an analysis of the scheme's operation in WA was undertaken.[91] Unfortunately, there appears to have been no comprehensive evaluation of the WA scheme to date.

5.76 The Sentencing Council report also recommended a trial period for abolishing short sentences that would only apply to Aboriginal female offenders across NSW, a recommendation that was not implemented. The Sentencing Council emphasised that sentence creep was a real concern and that any pilot should be closely monitored.[92]

5.77 The then Attorney General interpreted the report as articulating the Sentencing Council's position as "unanimous in its recommendation not to abolish six-month sentences" and announced that the government would "not be proceeding with the proposal",[93] citing concerns such as the possibility of sentence creep.

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87. Institute for Public Policy Research (UK), *Redesigning Justice*, Report (2011) 3-4.
88. NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less* (2004) 4.
89. Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Inquiry into Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations*, Report 30 (2006) 33; Office of the Director of Public Prosecutions, *Preliminary Submission PSE10*, 8; The Shopfront Youth Legal Centre, *Preliminary Submission PSE13*, 9; Law Society of NSW, *Preliminary Submission PSE8;* Crime and Justice Reform Committee, *Preliminary Submission PSE12*, 1; Jumbunna Indigenous House of Learning, *Preliminary Submission PSE15*, 5.
90. NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less* (2004) 4, 15-16.
91. NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less* (2004) 4.
92. NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less* (2004) 13.
93. NSW, *Parliamentary Debates (Hansard)*, Legislative Assembly, 17 November 2004, 13056 (R Debus).

Particular groups of offenders

5.78 The NSW Sentencing Council report also noted that Indigenous people are more likely to receive short term prison sentences than non-Indigenous offenders and the abolition of short prison terms would have a greater impact on Indigenous offenders.[94]

5.79 Corrective Services NSW Women's Advisory Council submitted that women typically spend less than 12 months in custody, with the majority serving sentences of five months or less. The Council referred to statistics demonstrating that a higher percentage of Aboriginal female offenders received short sentences compared with non-Indigenous offenders.[95]

5.80 The Corrective Services NSW Women's Advisory Council submitted that:

> The over-representation of Aboriginal women in correctional facilities, in particular, and the shorter sentences that they serve indicates that non-custodial sentencing alternatives are not being utilised for them.[96]

5.81 If the above inference is correct, then the unavailability of short sentences may lead to sentence creep rather than an emphasis on alternatives to custody.

5.82 Any proposal to abolish sentences of less than six months should consider the possible disproportionate impact on particular groups of offenders.

Arguments in favour of abolishing short sentences

Encouraging the use of non-custodial alternatives for low level offending

5.83 A central argument in favour of abolishing short prison terms is that it may encourage the use of non-custodial and community-based sentences for less serious offences, which is one of the aims of this review that the Attorney General articulated when announcing the Terms of Reference.[97]

Short sentences are ineffectual

5.84 Sentences of full-time imprisonment of less than six months' duration could be criticised as being ineffectual in achieving some of the purposes of punishment.

5.85 Such criticism includes the arguments that short sentences do not allow sufficient time for effective rehabilitative programs,[98] fail to achieve the purpose of

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94. NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less* (2004) 16, citing Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report* (2002) 148.
95. Corrective Services NSW Women's Advisory Council, *Preliminary Submission PSE19*, 8.
96. Women's Advisory Council, Corrective Services NSW, *Preliminary Submission PSE19*, 8.
97. G Smith, "Sentencing Laws to be Reviewed" (Media Release, 23 September 2011) 1.
98. Women's Advisory Council, Corrective Services NSW, *Preliminary Submission PSE19*, 8; NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less* (2004) [3.1] citing NSW Legislative Council, Select Committee on the Increase in Prisoner Population, *Final Report*, Parliamentary Paper No 924 (2001).

deterrence[99] and have minimum incapacitative effects,[100] and thus do not protect the community.

Negative impact of short sentences

5.86 Further arguments in favour of abolishing short sentences include "reduction of imprisonment rates, the disruptive impact on custodial programs when high proportions of inmates have short stays, and reducing the 'revolving door' created by repeated short sentences".[101] Cost saving has also been cited as a reason for abolishing short sentences.[102]

5.87 The Women's Advisory Council of Corrective Services NSW submitted that the impact of short sentences can include loss of housing, employment and other community connections, as well as "disruption to care arrangements for dependents". The Council was in favour of increasing community based sentencing options to replace sentences of less than six months.[103]

Arguments against abolishing short sentences

Sentence creep

5.88 It has been argued that if short sentences are unavailable, sentence creep may occur because of the unavailability in some geographical locations of suitable alternative options to sentences of less than six months, or may result if offenders are considered unsuitable for alternatives to imprisonment.[104] In these cases, a court may be left with no choice but to sentence the offender to a term of imprisonment longer than six months. Sentence creep may cause a steady increase in sentences, particularly for summary offences, and may result in greater rates of imprisonment.

5.89 In 1996, we considered the option of setting a minimum period of imprisonment for a sentence (that is, abolishing short sentences) but noted the concerns about sentence creep. We therefore instead recommended the current requirement that courts provide reasons for any decision to impose a sentence of imprisonment of six

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99. NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less* (2004) [6.1], referring to the reasons for the introduction of the prohibition on short sentences in WA.

100. Tasmanian Law Reform Institute, *Sentencing*, Final Report No 11 (2008) [3.2.7].

101. Australian Law Reform Commission, *Sentencing of Federal Offenders*, Issues Paper 29 (2005), referring to N Morgan, "The Abolition of Six-Month Sentences, New Hybrid Orders and Truth in Sentencing: Western Australia's Latest Sentencing Laws" (2004) 28 *Criminal Law Journal* 8, 14; NSW Legislative Council, Select Committee on the Increase in Prisoner Population, *Final Report* (2001) ch 6.

102. Tasmanian Law Reform Institute, *Sentencing*, Final Report No 11 (2008) 3.2.7, referring to B Lind and S Eyland, 'The impact of abolishing short prison sentences' (2002) 73 *Crimes and Justice Bulletin* 1.

103. Women's Advisory Council, Corrective Services NSW, *Preliminary Submission PSE19*, 9.

104. NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less* (2004) [4.1], [4.4].

months or less, including reasons why a non-custodial sentence is not appropriate.[105]

5.90 As discussed above, the abolition of sentences of less than six months in WA was introduced in 2004. If sentence creep occurred as a consequence of this legislative amendment, it may be expected to be reflected in sentencing data since 2004.

5.91 Although data have been published by the Australian Bureau of Statistics[106] on the percentage of prisoners in 2001-2011 who were in custody in WA on census dates serving aggregate sentences of less than six months and between six and twelve months, the interpretation of the data is not straight-forward. The data show a decrease in aggregate sentences of imprisonment of between six and twelve months in 2005 and 2006, which would not be expected if sentence creep were occurring because of the abolition of sentences of less than six months in 2004. The data also show a general increase in these sentences in 2007-2011, but there is no evidence that this increase is attributable to sentence creep and the Australian Bureau of Statistics noted an overall increase in prisoners in 2008-2011, due in part to the impact of the Truth in Sentencing legislation (implemented on 23 September 2008) which "removed the automatic [one-third] discount for each and every offence that appears in WA Statute books".[107]

Inappropriate fetter on judicial discretion

5.92 Another argument against the removal of short sentences as a sentencing option is that it would fetter judicial discretion too much as the imposition of a short sentence may be appropriate in some circumstances.[108]

5.93 For example, if an offender breached a non-custodial order or a short period of home detention, intensive correction order or suspended sentence, judicial discretion may be inappropriately constrained if there is no option available to impose a short period of full-time imprisonment for the breach.

5.94 The abolition of short sentences as a sentencing option may therefore conflict with one of the Commission's Terms of Reference, which is to consider "the need to ensure that sentencing courts are provided with adequate options and discretions". However, it may assist in achieving other aims of the reference, such as exploring the ways in which alternatives to imprisonment could be used more widely to reduce re-offending.

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105. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(2); NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [3.33]-[3.34]; NSW Law Reform Commission, *Sentencing*, Report 79 (1996) rec 40.

106. Australian Bureau of Statistics, "Prisoners in Australia" for each year, Publication No 4517.0 available at <www.abs.gov.au> data cubes.

107. Australian Bureau of Statistics, "Prisoners in Australia" for each year, Publication No 4517.0 available at <www.abs.gov.au>; Explanatory Notes referring to the *Sentencing Act 1995* (WA) Transitional Provisions.

108. Tasmanian Law Reform Institute, *Sentencing*, Final Report No 11 (2008) [3.2.10]; NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less* (2004) 13, referring to submissions received from NSW Legal Aid, NSW Young Lawyers Criminal Law Committee and Criminal Law Review Division.

Question 5.3

1. Should sentences of six months or less in duration be abolished? Why?
2. Should sentences of three months or less in duration be abolished? Why?
3. How should any such abolition be implemented and should any exceptions be permitted?
4. Should sentences of imprisonment of six months or less continue to be available as fixed terms only or are there reasons for allowing non-parole periods to be set in relation to these sentences?

Aggregate head sentences and non-parole periods

5.95 As a result of the High Court's 1998 decision in *Pearce v The Queen*,[109] when sentencing an offender for multiple offences, a court must fix an appropriate sentence for each offence and then determine the structure of the overall sentence in terms of the degree of concurrence, accumulation, or partial accumulation of the individual sentences, so that the effective sentence appropriately reflects the totality of the offending.

5.96 The insertion of s 53A in the Act in 2011 partially overcame some of the technicalities involved in applying *Pearce*. The section allows a court when imposing imprisonment for multiple offences to fix an aggregate head sentence and aggregate non-parole period for all of the offences (or an aggregate fixed term if the court considers a fixed term to be appropriate). The court must also indicate to the offender, and make a record of, the sentence that would have been imposed for each offence, but does not have to go through the sometimes complex and error-prone process of aggregating them by staggered starting dates.

5.97 The Chief Judge of the District Court has suggested that the requirement to indicate the sentence that would have been imposed for each offence "still makes the sentencing process for multiple offences more complicated than it need be".[110] One way to simplify the process would be to abolish the need to record the individual sentences. That approach could be criticised, however, as it would effectively conceal the individual components of the aggregate sentence, potentially resulting in less transparency and consistency of sentences where an offender commits multiple offences. This was one of the High Court's main criticisms in *Pearce* of the 'global' approach to sentencing for multiple offences.

5.98 The question is whether s 53A provides an appropriate balance between the aim of allowing courts to impose a 'bottom line' for the aggregate sentence in a straight-forward way, against the related aim of the courts providing enough detail about the individual sentences so that error in individual sentences, and the aggregate sentence, can be revealed and corrected on appeal if necessary.

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

110. R O Blanch, *Preliminary Submission PSE3*, 2.

5.99 A preliminary issue might be whether the aggregate sentencing system has been in place for a sufficient period of time in order to come to a firm view about whether the provision is operating satisfactorily or should be changed in any way.

Question 5.4

1. How is the aggregate sentencing model under s 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) working in practice and should it be amended in any way?
2. Should a court be required to state the individual sentences that would have been imposed if an aggregate sentence had not been imposed by the court?

Accumulation of sentences and special circumstances

5.100 If the court does not impose an aggregate sentence under s 53A, it is still required under *Pearce* to consider and state the degree of accumulation of sentences if sentencing the offender for multiple offences. In practice, if the court wishes to accumulate or partially accumulate the sentences for different offences, this is done by the court staggering the starting dates of the sentences.

5.101 However, a side effect of this approach might be that the court overlooks the ultimate relationship between the effective non-parole period for all the offences and the effective head sentence for all the offences. If the court has found special circumstances for the offender under s 44 (see earlier discussion) and imposed individual sentences in which the non-parole period is less than three-quarters of the head sentence, the effect of finding special circumstances might be lost in the accumulation of the sentences if the parole period at the end of the sentence is not long enough. This has given rise to numerous appeals to the CCA.

5.102 The CCA generally has resolved such appeals by considering what the court had intended to be the effective non-parole period. However, on occasions it has been difficult to ascertain the court's intention from the sentencing remarks. The appeal point continues to arise on a relatively frequent basis.[111]

5.103 One possible resolution of this problem would be to amend s 44 so that it included a requirement for the court to state reasons if the effective sentence did not reflect the special circumstances found on the individual sentences.

Question 5.5

1. Should a court be required to state reasons if the effective sentence does not reflect the special circumstances finding on the individual sentences?
2. Are there any other options to deal with these cases?

111. For recent examples, see *Rios v The Queen* [2012] NSWCCA 8 [31]-[39] (in which the ground of appeal was successful) and *O'Neill v The Queen* [2012] NSWCCA 22 [17]-[23] (in which the ground was rejected).

Directing release on parole

5.104 As was indicated earlier, under s 50 a court does not have the power to order the release of the offender to parole at the end of the non-parole period if a head sentence of greater than three years is imposed. In that case, the Parole Authority has the responsibility to consider the offender's release on parole at the expiry of the non-parole period.[112]

5.105 Legal Aid NSW has suggested in its preliminary submission that the three year limit in s 50 should be extended to five years:

> Although sentences have been increasing in general, s 50 of the Act has not changed in response to such increases. This has resulted in persons no longer meeting the criteria for automatic parole for offences which may have met the criteria in the past.[113]

5.106 As a practical matter, it might be queried whether courts are able, or should be required, to predict an offender's suitability for parole years into the future.

5.107 It may be argued that, at the time the sentence is imposed, the court is not in a position to make determinations about the offender's suitability for release to parole, as the offender's progress in gaol and future circumstances cannot be known. Moreover, at the time of sentencing the court is required to take into account the seriousness of the offence as well as the offender's subjective features. It may be that the current requirement for the Parole Authority to assess an offender's suitability for parole for head sentences greater than three years is more appropriate, as the offender's present circumstances can be taken into account.

Question 5.6

What limit should be applied to the automatic release of offenders to parole on expiry of a non-parole period?

Back end home detention

5.108 Back end home detention is a sentence that involves a period of full-time imprisonment followed by a period of home detention. In South Australia, back end home detention has been in place since 2001. The Chief Executive Officer of the Department for Correctional Services has the discretion to release a prisoner to serve a period of home detention after serving at least half of his or her non-parole period or fixed term, with a maximum of one year to be served by way of home detention.[114] Victoria, however, abolished back end home detention in 2011[115] in order to "ensure truth in sentencing and restore the community's confidence that jail means jail".[116] There were also further concerns about the impact of home detention orders on the families of offenders and pressure that partners of offenders may feel

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112. *Crimes (Administration of Sentences) Act 1999* (NSW) pt 6, 8.
113. Legal Aid NSW, *Preliminary Submission PSE18*, 8.
114. *Correctional Services Act 1982* (SA) s 37A.
115. *Sentencing Legislation Amendment (Abolition of Home Detention) Act 2011* (Vic).
116. Victoria, *Parliamentary Debates*, Legislative Assembly, 16 June 2011, Book 9, 2199.

to consent to an order than ultimately confines them to their home along with the offender.[117]

5.109 Back end home detention is thought to help prisoners reintegrate into the community,[118] and provide an incentive for good behaviour while in prison.[119]

5.110 On the other hand, back-end home detention may result in sentence creep – that is, the court may lengthen the sentence of imprisonment because it has taken into account the fact that part of the sentence is not likely to be served in custody.[120]

5.111 It is difficult to identify who should determine the eligibility and suitability of a person for back end home detention. Similarly to assessments for parole suitability, at the time of sentencing, a court may not be able to predict whether a person will be suitable for home detention, particularly if the non-parole period is a long one. On the other hand, allowing the correctional authorities to release a person to home detention during the non-parole period undermines the policy that prisoners should spend their entire non-parole period in full-time custody (often known as 'truth in sentencing').[121]

5.112 In our 1996 report on sentencing, we discussed the possibility of back end home detention but, based on the divergence of opinions in the submissions, concluded that a scheme should not be introduced. It was considered that it was not possible to formulate a satisfactory scheme without compromising the concept of truth in sentencing.[122]

5.113 One alternative that may address these concerns has been proposed by the Standing Committee on Law and Justice. Under this proposal the court would decide at the time of sentencing whether a person is eligible for back end home detention, what portion of the sentence should be served as home detention and review the decision at a later date. When the first portion of the offender's sentence is nearly completed, the matter should be referred back to the court to ensure that the offender is suitable for home detention.[123]

5.114 Another possibility is for the Parole Authority to assess an offender's suitability for back end home detention, similarly to assessments for parole. However, if home detention is served during the non-parole period set by the court, this again raises the issue of truth in sentencing.

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117. Victoria, *Parliamentary Debates*, Legislative Assembly 16 June 2011, Book 9, 2199.
118. NSW Standing Committee on Law and Justice, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) xviii.
119. NSW Standing Committee on Law and Justice, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) 219.
120. NSW Standing Committee on Law and Justice, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) 219-220.
121. For a more detailed discussion of these issues, see NSW Law Reform Commission, *Sentencing*, Report 79 (1996) and NSW Standing Committee on Law and Justice, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006).
122. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [7.31].
123. NSW Standing Committee on Law and Justice, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) rec 44.

5.115 This is particularly so as there are similarities between the conditions of home detention[124] and the conditions of parole, the main difference being the requirement for the offender to remain at home except when authorised. Back-end home detention may in effect result in the premature granting of parole-like conditions to prisoners who should be serving their non-parole periods imposed by the court.

Question 5.7

1. Should back end home detention be introduced in NSW?
2. If so, how should a person's eligibility and suitability for back end home detention be determined and by whom?

Local Court's sentencing powers

5.116 The Chief Magistrate has raised the issue of whether the jurisdictional limit on the maximum sentence length in the Local Court should be increased to five years.[125] Generally speaking, the Local Court has power to sentence an offender to a limit of not more than two years' imprisonment and to accumulate sentences to a total of no more than five years. These general rules are subject to a limited number of exceptions, such as the further accumulation of a sentence for an escape offence, or where the maximum penalties for certain offences dealt with in the Local Court are lower than two years.[126] The broad question is whether the general two-year jurisdictional limit in the Local Court should be increased and, if so, by how much.

5.117 There are arguments for and against the proposal. In broad terms, it is noted that any change to the Local Court's jurisdiction could have significant impacts on sentencing levels and resource implications for corrective services and the criminal justice system.

5.118 Arguments in favour of lifting the jurisdictional limit include recognising the reality that there has been an increasing frequency of indictable matters that have been prosecuted summarily in the Local Court. Serious offences, including offences of violence and child sex offences carrying maximum penalties of up to 10 to 16 years' imprisonment, can be dealt with in the Local Court. On occasions this has resulted "in a challenge to the legitimacy of the sentencing exercise" because the Local Court has insufficient sentencing scope available to it under its jurisdictional limits to impose a sentence that is proportional to the seriousness of the offence.[127]

5.119 On the other hand, concern has been expressed that if the jurisdictional limit is increased, police prosecutors may have to deal with more serious matters in the

124. The conditions of home detention are discussed in detail in NSW Law Reform Commission, *Intermediate Custodial Sentencing Options*, Sentencing Question Paper 6 (2012) [6.20]-[6.30].
125. G Henson, *Preliminary Submission PSE5*, 5.
126. See the detailed discussion in NSW Sentencing Council, *An Examination of Sentencing Powers of the Local Court* (2010) [1.9]-[1.14].
127. G Henson, *Submission on Standard Non-parole Periods SES2*, 1-2. This submission noted a 33% increase in the number of indictable matters finalised in the Local Court from 53,063 in 1996 to 70,708 in 2008 and noted that the increase in indictable matters was unlikely to be in proportion to a decrease in the seriousness of the offences: G Henson, *Preliminary Submission PSE5*, 5; *Submission on Standard Non-parole Periods SES2*, annexure 1, 2-3.

Local Court as these prosecutions may not be taken over by the NSW Office of the Director of Public Prosecutions.[128] Another concern is that sentences imposed by the Local Court may increase if the limit is increased; although an offender would continue to have a right of appeal against sentence to the District Court if he or she believed that the sentence imposed was not proportionate to the seriousness of the offence.

A compromise solution

5.120 In 2010, the NSW Sentencing Council reported on whether the Local Court's sentencing jurisdiction ought to be increased and concluded that it was not persuaded of a need to increase the jurisdictional limit. Instead, by majority, it considered that there was merit in the idea of magistrates having a narrowly circumscribed power to refer matters to the District Court for sentencing if "satisfied that any sentence it could impose would not be commensurate with the seriousness of the offence".[129]

Question 5.8

1. Should the sentencing jurisdictional limits in the Local Court be increased and, if so, by how much?
2. Should a magistrate be able to refer a sentencing matter to the District Court if satisfied that any sentence imposed in the Local Court would not be commensurate with the seriousness of the offence?

128. NSW Police Force, *Submission on Standard Non-parole Periods SES11*, 11-12. The Police Force favours raising the limit to 3 years.

129. NSW Sentencing Council, *An Examination of Sentencing Powers in the Local Court* (2010) [4.25]. The NSW Police Force supports this proposal: NSW Police Force, *Submission on Standard Non-parole Periods SES11*, 11-12. However, the Chief Magistrate is opposed: G Henson, *Submission on Standard Non-parole Periods* SES2, 1-2 and annexure letter; and the Chief Judge of the District Court does not see anything in favour of the proposal: R O Blanch, *Submission on Standard Non-parole Periods SES1*, 3

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