4. Sentencing Options

Contents

Summary

4.1 A number of themes have emerged in preliminary consultations with stakeholders in this Inquiry about the impact of sentencing provisions and practices on the over-representation of Aboriginal and Torres Strait Islander defendants in the criminal justice system including that:

- judicial discretion should be maximised in sentencing matters;
- there may be significant benefits to sentencing courts if the quality of material put before them, as well as sentencing options available to them, are enhanced or increased; and
- some of the following issues affect not only Aboriginal and Torres Strait Islander defendants, but all defendants.

4.2 In this chapter, the ALRC asks a number of questions designed to elicit further information about sentencing provisions and practices including on mandatory sentencing, the impact of short sentences of imprisonment, and flexibility in tailoring sentences. The ALRC also makes a proposal about community-based sentencing options.

Mandatory sentencing

Question 4–1 Noting the incarceration rates of Aboriginal and Torres Strait Islander people:

(a) should Commonwealth, state and territory governments review provisions that impose mandatory or presumptive sentences; and

(b) which provisions should be prioritised for review?

4.3 In Australia, the typical approach to legislating criminal offences is to provide a maximum penalty that may be imposed upon conviction, based on the parliament's assessment of the relative severity of the offence. This approach gives courts a broad discretion to impose a sentence up to, and including, the maximum based on a range of factors. These factors include the impact of the offence on the victim and the circumstances of the offending and the accused. In sentencing an offender, the court must consider whether a particular case meets the threshold for imposing a term of incarceration, taking into account and balancing the purposes and principles of sentencing.

4.4 It is unusual for legislation to set minimum or mandatory penalties for criminal offences. Mandatory sentencing laws require that judicial officers deliver a minimum or fixed penalty (for the purposes of this paper, a term of imprisonment) upon conviction of an offender.[1] The removal of the usual discretion of the court to consider mitigating factors or to utilise alternate sentencing options to deal with an offender are defining features of such provisions. Mandatory sentencing laws may apply to certain offences, or to a particular type of offender—for example, repeat offenders.

4.5 While mandatory sentencing laws are found in most Australian jurisdictions in various forms,[2] the ALRC focuses on the impacts of mandatory sentencing for offences that stakeholders have identified as having a disproportionate impact on Aboriginal and Torres Strait Islander adult offenders.[3]

The impact on Aboriginal and Torres Strait Islander peoples

4.6 During preliminary consultations, stakeholders across the country overwhelmingly supported the repeal of mandatory sentencing provisions. The ALRC has heard that such provisions have a disproportionate impact on Aboriginal and Torres Strait Islander peoples.

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1 For the purposes of this part, the ALRC is not referring to strict liability offences.

2 See, eg, *Migration Act 1958* (Cth) s 236B; *Crimes Act 1900* (NSW) 1900 s 19B(4); *Criminal Law Consolidation Act 1935* (SA) s 11; *Misuse of Drugs Act* (NT) s 37(2); *Sentencing Act* (NT) s 78F; *Domestic and Family Violence Act 2007* (NT) s 121(2); *Crimes Act 1958* (Vic) ss 15A, 15B; *Road Traffic Act 1974 1974* (WA) ss 60, 60B(3); *Criminal Code Act Compilation Act 1913* (WA) ss 297, 318.

3 The ALRC notes that mandatory sentencing also affects young offenders in some jurisdictions: eg, *Criminal Code Act Compilation Act 1913* (WA) s 297(6).

4.7 Western Australia (WA) and the Northern Territory (NT) have high Aboriginal and Torres Strait Islander populations, coupled with historically extensive mandatory sentencing regimes. Both jurisdictions were identified by stakeholders as currently having mandatory or presumptive sentencing provisions that have a significant impact on their Aboriginal and Torres Strait Islander populations. These provisions are discussed below.

Western Australia

4.8 In WA, mandatory penalties apply to convictions for grievous bodily harm offences; and to offenders convicted on multiple burglary counts. These were identified by stakeholders as having a disproportionate impact on Aboriginal and Torres Strait Islander populations.

4.9 In WA, a mandatory minimum term of imprisonment—75% of the maximum—is imposed upon conviction for causing grievous bodily harm when committed in the course of an aggravated home burglary.[4] The maximum penalty for grievous bodily harm is 10 years imprisonment, or 14 years if committed in circumstances of aggravation. This means that an offender would receive, at a minimum, seven and a half years, or 10 and a half years imprisonment.

4.10 Western Australian law also imposes a minimum term of imprisonment for repeat burglary offenders. An adult offender with two prior convictions for burglary must, upon the third conviction, be sentenced to at least two years imprisonment.[5]

4.11 The offence of burglary covers a broad range of conduct and the mandatory minimum sentences may be problematic, given the variance in the nature and gravity of conduct for which individuals are charged with burglary. This has been noted by the Australian Human Rights Commission, in an example of a young offender:

> Although the legislation assumes that every offence of home burglary is equally serious, home burglary covers a wide range of circumstances. In one case, a 12 year old Aboriginal boy from a regional area, with a history of welfare intervention, educational problems and substance abuse, was sentenced to 12 months detention for entering a house in company with others and taking a wallet containing $4.00. His previous burglaries consisted of entering a laundry room in a hotel where nothing was removed and a school canteen where a can of soft drink was taken.[6]

4.12 The ALRC has also heard that, in some instances, Aboriginal offenders are being charged with burglary after entering dwellings looking for food, or having wandered in and out of houses in communities in a way that may not necessarily be regarded as inherently 'criminal' in the context of those communities.

4.13 Notwithstanding these concerns, a 2001 WA Department of Justice review of the mandatory sentencing provisions applicable to home burglary offences concluded

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4 Ibid s 297(5).

5 Ibid s 401(4)(b). For an example involving a young Aboriginal man, see *Western Australia v Ryan* (Unreported, District Court of Western Australia, 24 October 2016).

6 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (2002) 105.

that the amendments 'had little effect on the criminal justice system', and did not make any recommendations regarding their retention or otherwise.[7]

4.14 More recently, amendments to the WA legislation tightened the regime by providing that an offender who commits their first, second and third burglary on a single night would now be captured by the 'three strikes' law, whereas prior to the changes multiple counts could be counted as a single 'strike' in such circumstances. Some stakeholders referred to these amendments as further affecting Aboriginal and Torres Strait Islander offenders. The ALRC has heard that an offender might enter a number of homes in a night while, for example, heavily intoxicated and looking for food. They might have no prior offending history, and there may be no harm or violence involved, but the judicial officer would be required to impose a sentence of two years imprisonment under the 'three strikes' regime.

4.15 Some stakeholders also reported that the mandatory term of six months imprisonment that applies to the offence of assaulting public officers, including police officers, was a common charge laid against Aboriginal and Torres Strait Islander offenders in WA.[8]

4.16 None of the offences noted above allow for the term of imprisonment to be suspended.

4.17 The ALRC acknowledges that the manner in which data is collected and reported makes it difficult to directly attribute disproportionately high rates of incarceration with the use of mandatory sentencing.[9] However, the two most common categories of offence recorded for Aboriginal and Torres Strait Islander offenders in WA are 'acts intended to cause injury' and 'unlawful entry with intent',[10] categories into which the above offences that attract mandatory penalties would fall.

Northern Territory

4.18 The NT has had mandatory sentencing for some decades. In 1997, mandatory penalties applied to a range of property offences and operated on a 'three strikes' basis. Adult offenders faced mandatory minimum terms of imprisonment at each 'strike' (14 days, 90 days, 12 months).[11] In 2001, the laws were repealed following the suicide of a

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7 Rowena Johns, 'Sentencing Law: A Review of Developments 1998–2001' (Briefing Paper No 2/202, Parliamentary Library, Parliament of NSW, 2002) 75, citing Department of Justice (WA), *Review of Section 401 of the Criminal Code* (2001).

8 *Criminal Code Act Compilation Act 1913* (WA) s 318.

9 This is because individual state and territory based offences are grouped into categories to allow for systematic ordering and analysis across jurisdictions. As a result, individual offence provisions, such as those that attract mandatory penalties, are grouped in with other offences that do not attach to mandatory penalties: Australian Bureau of Statistics, *Australian and New Zealand Standard Offence Classification, Cat No 1234.0* (2011).

10 Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) table 15.

11 Declan Roche, 'Mandatory Sentencing' (Trends & Issues in Crime and Criminal Justice No 138, Australian Institute of Criminology, December 1999). Similar provisions also applied to juveniles.

15 year old Aboriginal boy mistakenly mandatorily detained for his second minor property offence (theft of stationery worth $50 from a council building).[12]

4.19 Currently, the NT *Sentencing Act* classifies individual offences into one of five offence levels. The legislation requires a court to impose either a term of 'actual imprisonment' or a 'minimum sentence', depending on the offence level and whether or not the offence is a second or subsequent offence by the offender.[13] This means that there are mandatory terms of imprisonment attached to some offence levels, and mandatory minimums for others.

4.20 The 'lower end' offences that attract mandatory penalties include common assaults, assaults on police, unlawful stalking, robbery, and assault with intent to steal. Where a person has a previous conviction for a 'violent offence',[14] the court must impose a term of actual imprisonment.[15] When an offender with no prior convictions is convicted of unlawfully causing harm to a victim and that victim 'suffers physical harm as a result of the offence', the court must impose a term of actual imprisonment.[16]

4.21 There is an 'exceptional circumstances' provision,[17] which allows a court to deviate from the mandatory minimum term of imprisonment where it is satisfied that the 'circumstances of the case are exceptional', but it must still impose a term of actual imprisonment.[18]

4.22 The following example referred to on ABC's *Lateline* demonstrates how the law applies:

> 'Gloria' is a young Aboriginal mother of four from a remote town on the northern tip of Arnhem Land. Gloria admitted to drunkenly hitting another woman who taunted her about the death of her mother. The harm caused to the victim was described by the prosecutor as being 'a blood nose and soreness to her chest'. Gloria had appeared in court once previously for a minor offence.
>
> In court, the magistrate told defence counsel, '[t]he test is that unless you can establish some exceptional circumstances, then I must sentence this lady to three months imprisonment'. Defence counsel submitted, 'It was a spur of the moment thing, it's not something she needs deterrence from because she's not a habitual offender. She's not finding herself before the court time and time again'.
>
> With no exceptional circumstances offered, the Magistrate sentenced Gloria to three months imprisonment, as mandated. It was suggested that, prior to the introduction of mandatory sentencing laws, Gloria would have likely received a fine for the offence.[19]

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12 Leonie Howe, 'Mandatory Sentencing: A Death Sentence in the Northern Territory?' (2001) 12(3) *Current Issues in Criminal Justice*.
13 *Sentencing Act* (NT) div 6A.
14 Ibid sch 2.
15 Ibid s 78DF.
16 Ibid s 78DE.
17 Ibid s 78DI.
18 Ibid s 78DG.
19 'Mandatory Sentencing "Increases Prison Numbers"', *Lateline*, 28 May 2014 <http://www.abc.net.au/lateline/content/2014/s4014347.htm>.

4.23 A review of the NT's mandatory minimum sentences for violent offences was conducted in 2015.[20] The review concluded that the introduction of the provisions:

> coincided with a reduction in offending and reoffending dropped, but this was thought to be due to another crime reduction initiative;
>
> did not increase the overall percentage of violent offenders sentenced to prison, although it did result in changes to the type of imprisonment option used;
>
> led to an increase in sentence length for repeat violent offenders sentenced in the Court of Summary Jurisdiction, but not for first-time violent offenders or offenders sentenced in the Supreme Court;
>
> was followed by an increase in the consistency of sentence outcome and sentence length for repeat violent offenders, but had relatively little impact on consistency of outcomes for first-time offenders;
>
> resulted in an increase in the length of time and number of court appearances required to finalise defendants who pleaded guilty, and may have contributed to a decrease in the percentage of defendants with a final plea of guilty; and
>
> did not lead to an increase in the number of prisoners held for assault offences (the majority of violent offences).[21]

Whether to retain mandatory sentencing

4.24 Stakeholders consulted by the ALRC to date strongly supported the repeal of mandatory sentencing provisions as they:

- unacceptably constrain the exercise of judicial discretion;
- displace discretion to other parts of the criminal justice system, most notably to police and prosecutors;
- are inconsistent with the rule of law and the separation of powers, by directing the manner in which the judicial power should be exercised;
- contradict the principle of 'imprisonment as a last resort';[22]
- reduce the incentive to plead guilty, resulting in increased workloads for the courts; and
- do not operate to deter offenders, and may in fact increase the likelihood of reoffending, as periods of incarceration diminish employment prospects, positive social links, and other protective factors that help prevent recidivism.

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20 Department of the Attorney-General and Justice (NT), *Review of the Northern Territory Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* (2015) 7.

21 Ibid 2–3.

22 Noting that all Australian jurisdictions (with the exception of Tasmania and the NT) have legislated to enforce the principle: *Crimes Act 1914* (Cth) s 17A; *Crimes (Sentencing) Act 2005* (ACT) s 10; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5; *Penalties and Sentences Act 1992* (Qld) ss 4S, 9(2); *Criminal Law (Sentencing) Act 1988* (SA) s 11; *Sentencing Act 1991* (Vic) ss 4B, 5(4); *Sentencing Act 1995* (WA) ss 6(4), 86.

4.25 Each of these arguments have been well ventilated previously. Representatives from across the legal sector, including those working in defence, prosecution and among the judiciary, have indicated strong opposition to mandatory sentencing on the basis of these arguments, both in Australia and in comparable international jurisdictions.[23]

4.26 Stakeholders suggested that the mandatory sentencing provisions in WA and in the NT disproportionately affect Aboriginal and Torres Strait Islander offenders because:

- they attach to some offences where Aboriginal and Torres Strait Islander peoples find themselves disproportionately charged;
- this group is highly visible and easily identifiable, particularly in smaller communities; and
- the impact of the provisions tends to exacerbate a range of problems already faced by this cohort that tend to lead to recidivism.

4.27 Of the stakeholders consulted by the ALRC to date, none have indicated support for mandatory sentencing provisions. However the ALRC acknowledges that proponents of such laws argue that they:

- promote consistency in sentencing;
- deter individuals from offending;
- denunciate the proscribed conduct;
- ensure appropriate punishment of the offender; and
- protect the community through incapacitation of the offender.[24]

4.28 In 1999, the ALRC stated that 'mandatory detention offends against the principle of proportionality',[25] noting the comments of the High Court in *Chester v R*, that

> it is now firmly established that our common law does not sanction preventive detention. The fundamental principle of proportionality does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender.[26]

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23 See, eg, Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (2014); Law Society of Western Australia, *Briefing Paper Mandatory Sentencing* (2016); Tammy Solonec, '"Tough on Crime": Discrimination by Another Name—The Legacy of Mandatory Sentencing in Western Australia' (2015) 8(18) *Indigenous Law Bulletin*; Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 6; Nicholas Cowdery, 'Mandatory Sentencing' (Speech, Sydney Law School, Sydney, 15 May 2014); Smart Justice, *Mandatory Sentencing* (2013).

24 For a detailed discussion on these points, and the Law Council's response to them, see Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (2014).

25 Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [19.55].

26 *Chester v The Queen* (1988) 165 CLR 611, [20].

4.29 The ALRC also highlighted at that time that 'mandatory detention violates a number of provisions in the International Convention on Civil and Political Rights (ICCPR) including the prohibition on arbitrary detention in Article 9'.[27] In reference to NT and WA provisions affecting juvenile offenders, the ALRC considered 'these violations of international and common law norms so serious'[28] that it recommended federal legislation to override the laws unless the Parliaments of WA and the NT repealed them.[29]

4.30 Mandatory sentences may also be discriminatory and breach art 2 of the ICCPR in their disproportionate impact on Aboriginal and Torres Strait Islander peoples.

4.31 In 2014, the United Nations expressed concern about Australia's mandatory sentencing provisions, noting their disproportionate impact on Aboriginal and Torres Strait Islander peoples. The Committee against Torture recommended that Australia 'review mandatory sentencing laws with a view to abolishing them, giving judges the necessary discretion to determine relevant individual circumstances'.[30]

4.32 The ALRC acknowledges that, as a consequence of how data is categorised, it is difficult to attribute the numbers of Aboriginal and Torres Strait Islander peoples in prison to the impact of mandatory sentencing provisions.

4.33 The ALRC has not yet had the opportunity to review each jurisdiction's offence provisions to identify all those provisions that attract mandatory penalties, noting that some mandatory sentencing provisions are likely to have little impact on Aboriginal and Torres Strait Islander offenders.[31] For this reason, the ALRC has not made a proposal in this area, but reiterates its previous opposition to mandatory sentencing and, in light of the work necessary to identify each relevant law, questions whether governments should review provisions that impose mandatory and/or presumptive sentences, with a view to restoring judicial discretion. The ALRC also invite submissions on which provisions should be prioritised for review, noting the focus of this Inquiry, as well as case study examples demonstrating the application of these provisions.

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27 Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [19.63].

28 Ibid [19.64], rec 242.

29 Ibid.

30 United Nations Committee against Torture, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia* (2014) [12].

31 For example, some people smuggling offences under the *Migration Act 1958* (Cth) s 236B.

Short sentences of imprisonment

Question 4–2 Should short sentences of imprisonment be abolished as a sentencing option? Are there any unintended consequences that could result?

Question 4–3 If short sentences were to be abolished, what should be the threshold (eg, three months; six months)?

Question 4–4 Should there be any pre-conditions for such amendments, for example: that non-custodial alternatives to prison be uniformly available throughout states and territories, including in regional and remote areas?

4.34 The effectiveness of short terms of imprisonment was a key issue for a number of stakeholders consulted by the ALRC.[32] Some stakeholders called for their abolition. There were, however, strong views that retention of all sentencing options is preferable, and that ensuring that judicial officers have maximum discretion and a variety of alternatives available to them is key to achieving individualised justice.

The impact on Aboriginal and Torres Strait Islander peoples

4.35 Aboriginal and Torres Strait Islander offenders are more likely to be sentenced to short terms of imprisonment than their non-Indigenous counterparts.[33]

4.36 Over one-fifth of Aboriginal and Torres Strait Islander prisoners in Australian prisons are serving sentences of less than 12 months. About 10% of the national cohort are serving sentences of under 6 months. This suggests Aboriginal and Torres Strait Islander prisoners are being incarcerated for relatively minor, or repeat low level, offences.

4.37 ABS statistics indicate that Aboriginal and Torres Strait Islander offenders are more likely to receive shorter sentences than non-Indigenous offenders. Nationally, 14% of non-Indigenous offenders were serving terms of imprisonment under 12 months, compared to 22% of Aboriginal and Torres Strait Islander offenders.[34]

4.38 Australian Bureau of Statistics (ABS) data shows the national median aggregate sentence length for Aboriginal and Torres Strait Islander prisoners was 2.0 years, compared to 3.5 years for non-Indigenous prisoners. The longest median aggregate sentence was in South Australia (3.3 years) and the shortest was in the NT (1.2 years).[35]

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32 For the purposes of this Discussion Paper, the phrase 'short terms of imprisonment' should be read to mean terms of 6 months or less, unless otherwise specified.

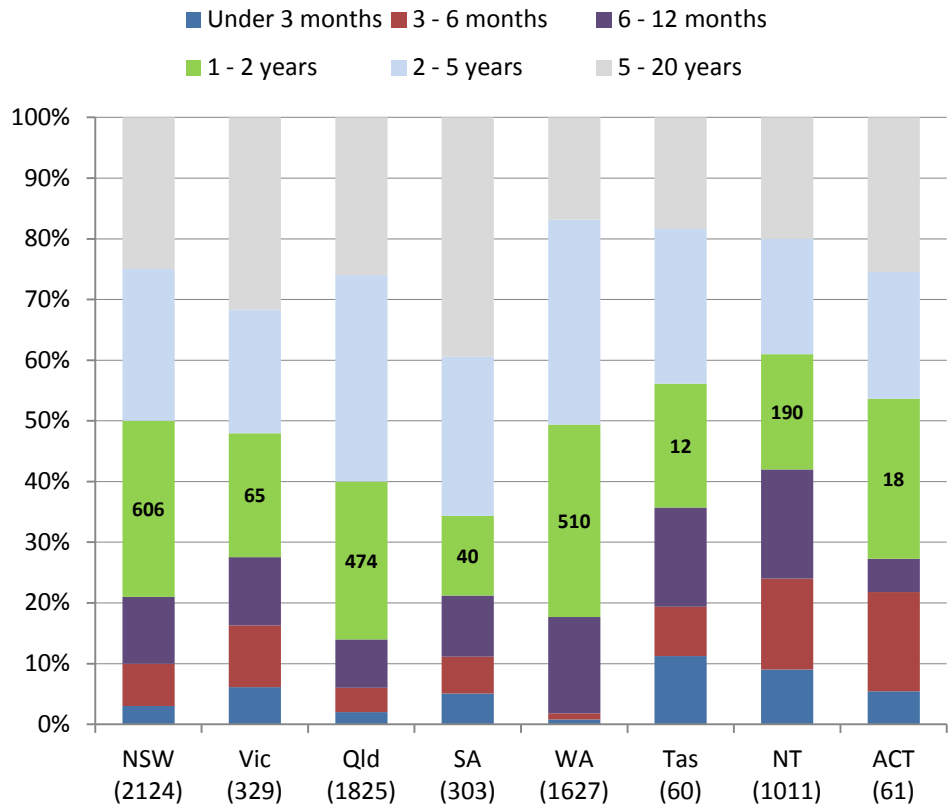
33 Australian Bureau of Statistics, above n 10, table 25.

34 Ibid table 25.

35 Ibid Table 25.

4.39 Chart 1 and Table 1 below indicate sentence lengths imposed on Aboriginal and Torres Strait Islander offenders in each state and territory in 2016, and give a comparative snapshot.

Chart 1**: **Aboriginal and Torres Strait Islander prisoner median aggregate sentence lengths by state/territory (2016)[36]



State/territory and number of Aboriginal and Torres Strait Islander persons serving a sentence of imprisonment

Table 1: Aboriginal and Torres Strait Islander prisoner median aggregate sentence lengths by state/territory (2016)

Jurisdiction (with total No. ATSI prisoners)	**Under 3 months**	**3 - 6 months**	**6 - 12 months**	**1 - 2 years**	**2 - 5 years**	**5 - 20 years**
NSW (2124)	3%	7%	12%	29%	25%	24%
Vic (329)	6%	10%	11%	20%	20%	32%

36 Data source: Ibid table 25.

Qld (1825)	2%	4%	8%	26%	34%	26%
SA (303)	5%	6%	10%	13%	26%	39%
WA (1627)	1%	1%	16%	31%	34%	17%
Tas (60)	12%	8%	17%	20%	25%	18%
NT (1011)	9%	15%	18%	19%	19%	20%
ACT (61)	7%	18%	7%	30%	23%	16%

4.40 Table 2 below concerns Aboriginal and Torres Strait Islander offenders serving short terms of imprisonment. It shows:

- the number of Aboriginal and Torres Strait Islander prisoners serving sentences of under three months, three to six months, and six to 12 months respectively;
- the total number of Aboriginal and Torres Strait Islander prisoners per jurisdiction; and
- how many Aboriginal and Torres Strait Islander prisoners are serving those sentences as a percentage of the total Aboriginal and Torres Strait Islander prison population.

Table 2: Aggregate sentence length by state and territory of sentenced Aboriginal and Torres Strait Islander prisoners (2016)[37]

Sentence length	**ACT**	**NSW**	**NT**	**Qld**	**SA**	**Tas**	**Vic**	**WA**	**Australia**
< 3 months	4	67	90	35	15	7	21	13	**252**
3-6 months	11	149	152	82	17	5	34	17	**464**
6-12 months	4	248	186	142	30	10	37	263	**914**
< 6 months	15	216	242	117	32	12	55	30	**716**
< 1 year	19	464	428	259	62	22	92	293	**1630**
TOTAL**: all** Aboriginal and Torres Strait Islander prisoners	70	2122	1017	1821	295	64	332	1618	**7337**
% < 6 months	21%	10%	24%	6%	11%	19%	17%	2%	**10%**
% < 1 year	27%	22%	42%	14%	21%	34%	28%	18%	**22%**

4.41 Several stakeholders reported that short sentences of imprisonment are particularly damaging to Aboriginal and Torres Strait Islander offenders. Apart from issues relating to availability and access to programs, courses and counselling while

37 Data source: Ibid.

serving short terms of imprisonment, stakeholders spoke about the devastating impacts that incarceration has on the offender's community and family. These impacts included homelessness post-release, loss of employment, children being removed and taken into care, stigmatisation and further marginalisation. Dislocation from family was also identified as a significant concern, with stakeholders noting that offenders were sometimes incarcerated in prisons far from their communities, making it extremely difficult for their families to visit them during their sentences.

4.42 Aboriginal and Torres Strait Islander offenders also have higher recidivism rates than non-Indigenous offenders.[38] This experience of 'cycling' through the system also has significant health impacts:

> [T]he high rates of repeated short-term incarceration experienced by Aboriginal people in Australia have a multitude of negative health effects for Aboriginal communities and the wider society, while achieving little in terms of increased community safety.[39]

4.43 Of particular concern is the effect of short terms of incarceration on female Aboriginal and Torres Strait Islander offenders.[40] Several stakeholders commented that a short period in prison for many women frequently triggered other significant life events that often spiralled the women back into prison. The common scenario was described as a prison term resulting in a woman losing her rental property, and subsequently having her children removed because she no longer had a residence. This then resulted in the woman turning to drugs and/or alcohol, which in turn led to further offending.

Whether to abolish short sentences of imprisonment

4.44 A number of stakeholders have reported that short terms of imprisonment serve no justifiable purpose, particularly when considering the economic and social cost of incarceration. Many referred specifically to the heavy impact on Aboriginal and Torres Strait Islander women (see Chapter 9).

4.45 While there are various arguments supporting the abolition of short sentences, these are principally based on the fundamental assumption that those offenders, who would have otherwise received a short term of imprisonment, would instead receive a community-based penalty, thereby reducing the prison population and attendant social and economic costs. Although the ALRC notes that this assumption may be flawed, given the dire shortfall in the availability and/or resourcing of sentencing alternatives, particularly in regional and remote areas, but also in some metropolitan areas.

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38 See, eg, Boris Beranger, Don Weatherburn and Steve Moffatt, 'Reducing Indigenous Contact with the Court System' (Bureau Brief Issue Paper No 54, NSW Bureau of Crime Statistics and Research, December 2010); Peta MacGillivray and Eileen Baldry, 'Australian Indigenous Women's Offending Patterns' (Brief 19, Indigenous Justice Clearinghouse, June 2015).

39 Anthea S Krieg, 'Aboriginal Incarceration: Health and Social Impacts' (2006) 184(10) *Medical Journal of Australia* 534.

40 NSW Sentencing Council, *Abolishing Prison Sentences of 6 Months or Less* (2004); Human Rights Law Centre and Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-Imprisonment* (2017).

4.46 Some stakeholders argued that incarceration, as the most serious punishment available, ought to be reserved only for those offenders who represent a serious risk to the community, and for whom no other penalty is appropriate. It was argued that jails should not be used for minor or low level offenders, particularly given the cost to the community, and the detrimental impact of incarceration on the individual and their community. Those supporting the abolition of short terms of incarceration were of the view that short sentences of imprisonment:

- expose minor offenders to more serious offenders in prison;
- do not serve to deter offenders;[41]
- have significant negative impacts on the offender's family, employment, housing and income; and
- potentially increase the likelihood of recidivism through stigmatisation and the flow on effects of having served time in prison.

4.47 Stakeholders also reported that prisoners serving short sentences are less likely to be able to access programs or training, and in that regard, the time in prison does little to address offending behaviour or to develop skills that might later promote desistence from offending.[42] Offenders on short sentences are generally released into the community without supervision or supports to assist reintegration into the community on release.[43]

4.48 There were also concerns that short terms of imprisonment are not cost-effective. Stakeholders were firmly of the view that the money spent incarcerating prisoners serving short sentences would be better spent implementing programs and supports in the community which, they argued, would be cheaper and more effective for low level offenders, with prisons being reserved for the most serious offenders. There is some research to support this view. In 2002, the NSW Bureau of Crime Statistics and Research reported that if all offenders in NSW prisons serving six months or less instead received a non-custodial penalty, the prison population would drop by about 10%, resulting in savings (at that time) of between $33m–47m per year.[44]

4.49 Other stakeholders were firmly of the view that short sentences should remain an option. The key reason was the risk of 'sentence creep', that is, the risk that judicial

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41 Judy Trevana and Don Weatherburn, 'Does the First Prison Sentence Reduce the Risk of Further Offending?' (Bureau of Crime Statistics and Research, October 2015).

42 Mark Hughes, 'Prison Governors: Short Sentences Do Not Work', *The Independent* (20 June 2010) cited in Don Weatherburn, above n 23.

43 NSW expressly precludes prisoners serving prison terms of 6 months or less from parole supervision on release. See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46. The NSW Sentencing Council has recommended repeal or amendment of s 46: NSW Sentencing Council, above n 40, 5. Other jurisdictions restrict parole to prisoners sentenced to terms over 12 months: *Crimes (Sentencing) Act 2005* (ACT) s 65; *Sentencing Act 1997* (NT) s 53; *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(a); *Sentencing Act 1991* (Vic) s 11; *Sentencing Act 1995* (WA) s 89(2).

44 Bronwyn Lind and Simon Eyland, 'The Impact of Abolishing Short Prison Sentences' (Contemporary Issues in Crime and Justice No 73, NSW Bureau of Crime Statistics and Research, September 2002) 5.

officers will ultimately sentence offenders for *longer* periods because of a lack of alternate sentencing options, combined with the inability to sentence an offender to a short term of imprisonment. Some referred to the experience in WA, discussed below.

4.50 Stakeholders acknowledged that there may be merit in abolishing short sentences when alternatives to full-time custody are uniformly available, including in remote and regional areas. It was not disputed that such options are not uniformly accessible (see below). Just Reinvest NSW, a coalition of legal, medical, sports, youth, community, and Aboriginal and Torres Strait Islander organisations, have identified reducing the number of people who receive terms of imprisonment under six months as a key policy proposal, to be achieved by encouraging greater use of non-custodial options.[45] Just Reinvest argue that in NSW alone, a 90% reduction in the number of sentences of less than six months would:

- cut the number of prison sentences handed down in NSW courts and the number of people coming through the prison system by almost 40%;
- result in a 5% reduction in the overall prison population; and
- free up approximately $30 million the government currently spends on locking up people for less than 6 months each year–not including potential savings in capital expenditure.[46]

4.51 Two case studies identified in a policy paper by an Aboriginal Legal Services lawyer highlight some of the issues with short sentences and Aboriginal and Torres Strait Islander defendants:

> We recently had a matter where a woman received a two month sentence for stealing $5 worth of chicken from the IGA, another where a man with an intellectual disability was given 3 weeks for breaching an AVO by making contact with his ex-partner. These are clients with drug and alcohol and mental health problems—none of which get addressed in custody in those short stints. Then there is no supervision or support on release. It doesn't make sense.[47]

4.52 Proponents for retaining the option of short sentences were generally of the view that, until such alternatives are in place (community-based sentences), removing a sentencing option will further disadvantage offenders from those areas in particular, many of whom are from Aboriginal or Torres Strait Islander communities, because of sentence creep.

4.53 A related concern was that abolition of short terms of imprisonment would constrain judicial discretion and restrict flexibility in determining an appropriate sentence when dealing with an offender.

4.54 Some stakeholders also suggested that a short term of incarceration may be appropriate in some circumstances. In its 2004 report examining whether sentences of

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45 Just Reinvest NSW, *Policy Paper: Key Proposals #1–Smarter Sentencing and Parole Law Reform* (2017) prop 2. See further ch 13 of this Discussion Paper.

46 Ibid.

47 Ibid.

six months or less should be abolished, the NSW Sentencing Council set out the following as instances where this might be the case:

> 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;
>
> 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.[48]

4.55 The NSW Sentencing Council did not ultimately recommend the abolition of short sentences, largely on the basis that there is a need to ensure that alternatives to custody are uniformly available state-wide, and it suggested waiting on the pending evaluation of the abolition of short sentences in WA before any action was taken. It did, however, acknowledge that 'there is real potential for positive impact',[49] and recommended that 'abolition of short prison sentences should be piloted for Aboriginal women throughout all of NSW'.[50]

The experience in Western Australia

4.56 WA is the only Australian jurisdiction to have abolished short prison sentences. In 1995 it abolished terms of imprisonment of three months or less,[51] because it was considered that short sentences were 'of little utility since they failed as a means of providing deterrence, community protection and addressing offending behaviour'.[52] In 2003, the WA legislature increased the threshold for abolition to six months.[53]

4.57 An article by the Director of the NSW Bureau of Crime Statistics and Research, Dr Don Weatherburn, refers to an unpublished evaluation undertaken by the WA Government in 2003 on the effect of abolition of short sentences: 'The analysis, which purports to show that sentence lengths increased following the reform, makes no adjustment for any changes in the profile of offenders coming before the courts.'[54]

4.58 Dr Weatherburn goes on to note that crime data for the relevant period does not support the 'sentence creep' argument, stating '[d]ata published by the WA crime

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48 NSW Sentencing Council, above n 40, 14.
49 Ibid 22.
50 Ibid.
51 *Sentencing Act 1995* (WA) s 86. There are limited exceptions: ss 86(a)–(c).
52 Chris Cunneen, Neva Collings and Nina Ralph, *Evaluation of the Queensland Aboriginal and Torres Strait Justice Agreement* (2005) 190.
53 *Sentencing Legislation Amendment and Repeal Act 2003* (WA) s 33(3).
54 Don Weatherburn, 'Rack 'em, Pack 'Em and Stack 'Em: Decarceration in an Age of Zero Tolerance' (2016) 28(1) *Current Issues in Criminal Justice*.

research centre, moreover, show no evidence that magistrates in WA began imposing sentences of more than six months after 2003'.[55]

4.59 This contrasts with the views of stakeholders, who reported that the abolition of short sentences resulted in a spike in sentence length, and that magistrates began imposing terms of incarceration greater than six months. Sentence creep was said to have been the practical outcome of abolition in circumstances identified by the NSW Sentencing Council above.

4.60 The ALRC understands that WA is considering amending its provision to revert back to a restriction on the imposition of terms of imprisonment of three months or less.

4.61 In NSW, both the Law Reform Commission and Sentencing Council considered and declined to recommend removing short sentences as an option.[56] In NSW, a judicial officer must give reasons if they are to impose a term of imprisonment for less than six months,[57] and WA has a similar requirement for terms of imprisonment of under 12 months.[58] Other jurisdictions require reasons to be given when sentencing more generally.[59]

4.62 The ALRC invites submissions on the issue and is particularly interested in stakeholder views on any potential consequences flowing from the abolition of short sentences. If short sentences were to be abolished, what should the threshold be (eg, 3 months; 6 months), and why? The ALRC is also interested in whether there are pre-conditions that should be met before such amendments are pursued, and in this regard notes the recommendation of the NSW Sentencing Council in 2004 that 'abolition of short prison sentences should be considered not until … primary alternatives to full-time custody are available uniformly [among other things]'.[60]

Availability of community-based sentencing options

Proposal 4–1 State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to ensure that community-based sentences are more readily available, particularly in regional and remote areas.

4.63 The availability of community-based sentencing options for Aboriginal and Torres Strait Islander offenders can be affected by remoteness and suitability requirements, including the requirement that offenders not have an alcohol or drug dependency and have suitable accommodation. These issues are discussed below.

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55 Ibid. Citations omitted.
56 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) 160–165; NSW Sentencing Council, above n 40.
57 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5.
58 *Sentencing Act 1995* (WA) s 35.
59 See, eg, *Crimes Act 1914* (Cth) s 16F; *Criminal Law (Sentencing) Act 1988* (SA) s 9.
60 NSW Sentencing Council, above n 40, 4.

Remoteness

4.64 The ALRC has been told that a significant number of Aboriginal and Torres Strait Islander prisoners originate from regional and remote areas. For example, almost two-thirds of the Aboriginal and Torres Strait Islander population live outside of metropolitan areas,[61] and up to 80% of the Aboriginal and Torres Strait Islander prisoner population in the NT are from regional or remote communities.[62]

4.65 A range of sentencing options are available to judicial officers when sentencing offenders, including bonds, community service or correction orders, home detention, suspended sentences and intensive correction orders. The ALRC has heard that, in practice, the availability of alternatives to incarceration is limited or non-existent in many locations and, in particular, in areas outside of metropolitan areas. This can lead to the imposition of sentences of imprisonment where community-based sentences would otherwise be appropriate.

4.66 In Chapter 7, the ALRC proposes that state and territory governments should engage with peak Aboriginal and Torres Strait Islander organisations to identify gaps and build the required infrastructure to introduce culturally appropriate community-based sentencing options and support services. That proposal is made with reference to reducing breaches of community-based sentences by Aboriginal and Torres Strait Islander people, but it applies equally to the identification of gaps in rural and remote areas. Accordingly, Proposals 4–1 and 7–1 are closely aligned.

4.67 Chapter 7 also canvasses other options, such as the recommendation of a 2016 independent review of NT Corrective Services to appoint Aboriginal and Torres Strait Islander Probation and Parole Officers to remote communities who are from the community—where the community agrees—to provide local supervision and support to offenders.[63] It is also noted that some stakeholders to this Inquiry have raised the possibility of supervision by community as described in the case of *Djambuy*, where the offenders were sentenced to suspended sentences that were to be supervised by the Aboriginal community, not Community Corrections.[64]

4.68 Almost all stakeholders in this Inquiry to date have supported greater resourcing of alternatives to prison. Stakeholders have told the ALRC that the lack of practical sentencing alternatives to custody—particularly in regional and remote areas—has had a disproportionate impact on Aboriginal and Torres Strait Islander peoples. Other

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61 Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2011, Cat No 3238.0.55.001* (2013).

62 Australian Bureau of Statistics, *Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006, Cat No 4705.0* (2007).

63 Northern Territory Government, *A Safer Northern Territory through Correctional Interventions: Report of the Review of the Northern Territory Department of Correctional Services, 31 July 2016—Statement of Response* (2016) rec 133. See also ch 7 of this Discussion Paper.

64 *R v Yakayaka and Djambuy* (Unreported, Supreme Court of Northern Territory, 17 December 2012); Thalia Anthony and Will Crawford, 'Northern Territory Indigenous Community Sentencing Mechanisms: An Order for Substantive Equality' (2013) 17(2) *Australian Indigenous Law Review*.

inquiries have also noted the lack of appropriate resourcing for community-based options in regional and remote areas.[65]

4.69 The ALRC welcomes submissions on whether alternative sentences, such as community-based options, are required in remote and rural locations. It has, for example, been suggested that expanding the options may result in net-widening, where offenders, who may otherwise be fined, are instead subject to a sentence in the community.[66] The ALRC welcomes information on the best sentencing options for Aboriginal and Torres Strait Islander offenders in remote locations, particularly where the offending conduct would not have otherwise resulted in a sentence of imprisonment.

Suitability requirements for custodial community-based sentences

4.70 Some stakeholders advised the ALRC that the suitability requirements for some types of custodial community-based sentences[67] were particularly restrictive for Aboriginal and Torres Strait Islander offenders.

4.71 For example, in order for the court to impose an Intensive Correction Order (ICO) on an adult in NSW, it must have regard to an assessment report and be satisfied that the offender is a suitable person to serve the sentence, and that it is appropriate in all the circumstances for the sentence to be served by way of an ICO.[68] A person may be found unsuitable due to having a dependency on alcohol or drugs,[69] or due to a lack of stable accommodation.[70] A person living in a remote or regional area may not have access to ICOs.[71] Accordingly, in 2015, only 17% of offenders issued an ICO were Aboriginal and Torres Strait Islander peoples.[72] Aboriginal and Torres Strait Islander peoples make up 24% of the prison population in NSW.[73]

4.72 The ALRC welcomes input on how best to improve access to community-based sentences for Aboriginal and Torres Strait Islander offenders.

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65 See, eg, Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006); Senate Select Committee on Regional and Remote Indigenous Communities, Parliament of Australia, *Final Report* (2010).

66 Don Weatherburn, *Arresting Incarceration—Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) 36.

67 See Ch 7 for an overview on custodial and non-custodial community-based sentences.

68 *Crimes (Sentencing Procedure) Act 1999* (NSW ss 67(1), 70.

69 NSW Justice Sentencing Council, *Intensive Correction Orders: Statutory Review—Report* (2016) [2.17].

70 Ibid fig 2.1.

71 Ibid [2.26].

72 Ibid [2.29].

73 Australian Bureau of Statistics, above n 10.

Flexibility to tailor sentences

Question 4–5 Beyond increasing availability of existing community-based sentencing options, is legislative reform required to allow judicial officers greater flexibility to tailor sentences?

4.73 Jurisdictions vary in how much flexibility judicial officers have in tailoring sentences. For example, Victoria allows for community correction orders to be combined with a term of imprisonment for short sentences[74] while legislation in the ACT and Tasmania provides for sentence combinations that include terms of full-time imprisonment in conjunction with other orders—such as community service orders, good behaviour orders, probation or a fine.[75] Following a review of sentencing law by the NSW Law Reform Commission, the NSW Government has proposed a suite of reforms designed, among other things, to introduce community correction orders intended to be a 'flexible sentence that the court can tailor to reflect the nature of the offender and the offence'.[76] It is unclear whether these will be able to be combined with terms of imprisonment.

4.74 Some jurisdictions have moved towards removing or replacing some sentencing options. Stakeholders noted that suspended sentences have been abolished in Victoria, and NSW has indicated that it will follow suit.[77] Some stakeholders have commented that suspended sentences were particularly beneficial for Aboriginal and Torres Strait Islander female offenders. It was suggested the 'last chance' nature of them, without any other conditions or requirements attached other than not to offend, made them easy to understand and comply with.

4.75 The ALRC has heard that a wide variety of sentencing options, along with more flexibility to allow for greater 'mix and match' combinations, would assist judicial officers when sentencing Aboriginal and Torres Strait Islander offenders. The ALRC welcomes submissions on whether legislative reform is necessary to meet these ends.

74 *Sentencing Act 1991* (Vic) s 44.
75 *Crimes (Sentencing) Act 2005* (ACT) s 29; *Sentencing Act 1997* (Tas) s 8.
76 NSW Government, *Tough and Smart Justice Reforms—Safer Communities FAQs* (2017).
77 Ibid.