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New South Wales
Law Reform Commission

Sentencing
Question Paper 11

Special categories of offenders

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Question paper 11: Special categories of offenders

11.1 This Question Paper considers the issues relating to some groups of offenders which may require special consideration either because they are overrepresented in the criminal justice system or because particular sentences affect members of these groups differently when compared with other offenders.[1]

Indigenous offenders

11.2 According to the 2011 Corrective Services NSW inmate census, 22.9% of inmates (22.3% of male inmates and 30% of female inmates) identified as Aboriginal or Torres Strait Islander.[2] The NSW Bureau of Crime Statistics and Research ('BOCSAR') has reported that, between 2010 and 2011, Indigenous people accounted for 13.6% of Local Court appearances, and 17.6% of higher court appearances.[3] Indigenous children continue to account for 38% of Children's Court appearances (37.5% in 2010 and 38.1% in 2011).[4]

11.3 The Australian Bureau of Statistics reported that just over one quarter (26% or 7,656 prisoners) of prisoners identified as Aboriginal or Torres Strait Islander, representing a rate of 1,868 per 100,000 Aboriginal or Torres Strait Islander population. The equivalent rate for non-Indigenous prisoners was 130 per 100,000 non-Indigenous population.[5] The rate of imprisonment for Aboriginal and Torres Strait Islander prisoners at 30 June 2011 remained the same as the 2010 rate, that is, 14 times higher than the rate for non-Indigenous prisoners.[6]

1. Our previous Question Papers have already considered some issues that are relevant to special categories of offenders. In this paper, we discuss any remaining issues.
2. Corrective Services NSW, *NSW Inmate Census 2011*, [21]-[22].
3. NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics 2011*, Tables [1.3], [1.4], [3.6] and [3.7].
4. NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics 2011*, Tables [2.2] and [2.3].
5. Australian Bureau of Statistics, *Prisoners in Australia* (4517.0, 2011).
6. Australian Bureau of Statistics, *Prisoners in Australia* (4517.0, 2011).

11.4 At the time of Royal Commission into Aboriginal Deaths in Custody ('RCIADIC)' in 1987, RCIADIC, amongst other things, found that:

> …the Aboriginal population is grossly over-represented in custody. Too many Aboriginal people are in custody too often.[7]

The adult Indigenous imprisonment rate in Australia at that time was 15 times the non-Indigenous imprisonment rate (1,465 per 100,000 v 97 per 100,000).[8]

11.5 In its Regional Report in relation to NSW, Victoria and Tasmania, RCIADIC stated that:

> While it is important to divert Aboriginals from custody, to make their custody safer, and to ensure that any deaths are properly investigated, the great challenge to this country is to eliminate the grossly disproportionate rate of incarceration of Aboriginal people.[9]

11.6 BOCSAR, in a 2009 report, attributed the rise in the number of sentenced Indigenous prisoners (by 48% between 2001 and 2008), to an increase in the proportion of Indigenous offenders given a prison sentence and the length of terms imposed, rather than the number of Indigenous adults convicted.[10] It noted that "the substantial increase in the number of Indigenous people in prison is due mainly to changes in the criminal justice system's response to offending rather than changes in offending itself".[11]

Sentencing models targeted at the reduction of recidivism

11.7 In a 2010 report, BOCSAR reported that, the best way to reduce Indigenous overrepresentation in the court system is to reduce the rate of Indigenous recidivism through effective rehabilitation programs.[12] It noted evidence in relation to the effectiveness of rehabilitation in reducing recidivism which indicates that a reduction in recidivism of 10% is feasible, and that:

> The largest average reductions in re-offending were those associated with intensive supervision coupled with treatment (11 studies with an average 16% reduction), vocational education in prison (4 studies with an average 9% reduction) and adult drug courts (57 studies with an average 8% reduction). Investment in drug and alcohol treatment and vocational training would seem particularly worthwhile for Indigenous defendants because drug and alcohol abuse, early school leaving and unemployment have all been shown to be

7. Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1 [1.3].
8. Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1 [9.3.1].
9. Australia, Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry in NSW, Victoria and Tasmania*, Foreword.
10. J Fitzgerald, *Why are Indigenous imprisonment rates rising?* Bureau Brief 41 (NSW Bureau of Crime Statistics and Research, 2009) 6.
11. J Fitzgerald, *Why are Indigenous imprisonment rates rising?* Bureau Brief 41 (NSW Bureau of Crime Statistics and Research, 2009) 6.
12. B Beranger and others, *Reducing Indigenous contact with the Court System*, Bureau Brief 54 (NSW Bureau of Crime Statistics and Research, 2010).

strongly related to the risk of Indigenous arrest (Weatherburn, Snowball & Hunter 2008).[13]

11.8 Preliminary submissions also emphasised the need to find ways to reduce the disproportionate rate of incarceration of Aboriginal people by considering alternative sentencing models and options.

11.9 Jumbunna Indigenous House of Learning submitted that priority should be given to considering whether a separate sentencing regime should be established for Indigenous offenders and that this should take place in consultation with Indigenous communities with a view to "strengthen[ing] the authority of Indigenous communities to determine the relevant considerations in sentencing an Indigenous offender, and the suitable sentence for such an offender".[14]

11.10 The NSW circle sentencing model, and the question of whether there are any ways in which the operation and effectiveness of this model can be improved, has been raised in Question Paper 9.[15] While the Indigenous courts that are currently in operation in various jurisdictions are based on different models (for example, the Koori court in Victoria is based on a Nunga Court model while the NSW court is based on Canadian circle sentencing),[16] the objectives and practices of the courts are broadly similar.[17]

11.11 Some differences do however exist between the various courts. For example, the NSW model encompasses a greater degree of victim participation, and a greater degree of elder participation in the framing of the penalty to be imposed on the offender.[18] In Port Adelaide, the Nunga Court operates as a treatment court, enabling offenders to have access to six-month programs which treat drug use, mental impairment and domestic abuse.[19] In preliminary submissions, the NSW/ACT Aboriginal Legal Service suggested that the Victorian model of Koori Courts "in certain cases has proven to be especially effective through linking offenders with appropriate services (and thus contributing to a reduction in recidivism)".[20] It may therefore be worth considering aspects of the Indigenous court models in other jurisdictions.

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13. B Beranger and others, *Reducing Indigenous Contact with the Court System*, Bureau Brief 54 (NSW Bureau of Crime Statistics and Research, 2010) 3.
14. Jumbunna Indigenous House of Learning, *Preliminary Submission PSE15*, 2.
15. NSW Law Reform Commission, *Alternative Approaches to Criminal Offending,* Sentencing Question Paper 9 (2012) [9.117]-[9.130].
16. E Marchetti and K Daly, *Indigenous Courts and Justice Practices in Australia*, Trends and Issues in Crime and Criminal Justice No 277 (Australian Institute of Criminology, 2004).
17. NSW Law Reform Commission, *Alternative Approaches to Criminal Offending,* Sentencing Question Paper 9 (2012) [9.121]-[9.126].
18. See *Criminal Procedure Regulation 2010* (NSW) pt 6, cl 39; E Marchetti and K Daly, *Indigenous Courts and Justice Practices in Australia*, Trends and Issues in Crime and Criminal Justice No 277 (Australian Institute of Criminology, 2004) 3.
19. South Australia, Attorney-General's Department, *South Australian Government Response to Smart Justice: Building Safer Communities, Increasing Access to the Courts, and Elevating Trust and Confidence in the Justice System* (2012).
20. Aboriginal Legal Service (NSW/ACT), *Preliminary Submission PSE22*, 3.

11.12 While Indigenous courts are one way of dealing with the problem of the high rate of incarceration of Indigenous people, Jumbunna also suggested that further consideration should be given to:[21]

- flexible and/or 'mix and match' sentencing options;
- therapeutic justice models and problem solving approaches to justice;[22]
- restorative justice models, including expansion of the Drug Court;[23]
- justice reinvestment;[24]
- greater availability of non-custodial options and diversion programs in all geographical locations; and
- more culturally appropriate prison settings for Indigenous people that are targeted towards rehabilitation.

These alternative approaches to criminal offending have been considered in further detail in Question Paper 9.

Fernando principles

11.13 Justice Wood identified the relevant common law principles relating to the sentencing of Indigenous offenders in *R v Fernando*[25] (since referred to as 'the Fernando principles'):

> (A) The same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offenders' membership of such a group.
>
> (B) The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender.
>
> (C) It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand within Aboriginal communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.
>
> (D) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the Aboriginal society or their resort to violence when heavily affected

21. Jumbunna Indigenous House of Learning, *Preliminary Submission PSE15*, 2.
22. See NSW Law Reform Commission, *Alternative Approaches to Criminal Offending,* Sentencing Question Paper 9 (2012) [9.156]-[9.205].
23. See NSW Law Reform Commission, *Alternative Approaches to Criminal Offending,* Sentencing Question Paper 9 (2012) [9.91]-[9.97].
24. See NSW Law Reform Commission, *Alternative Approaches to Criminal Offending,* Sentencing Question Paper 9 (2012) [9.14].
25. *R v Fernando* (1992) 76 A Crim R 58, 62-63.

> by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive Aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.
>
> (E) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.
>
> (F) That in sentencing persons of Aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.
>
> (G) That in sentencing an Aborigine who has come from a deprived background or is otherwise disadvantaged by reason of social or economic factors or who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality.
>
> (H) That in every sentencing exercise, while it is important to ensure that the punishment fits the crime and not to lose sight of the objective seriousness of the offence in the midst of what might otherwise be attractive subjective circumstances, full weight must be given to the competing public interest to rehabilitation of the offender and the avoidance of recidivism on his part.

11.14 The NSW Sentencing Council has previously engaged a barrister from the Public Defenders Office to analyse over 100 cases in which the Fernando principles were discussed. In the resulting report, published in 2009, it was found that, in an analysis of 102 (mostly NSW) cases involving an Indigenous offender and decided after *Fernando*, the Fernando principles were considered in 27 of those cases, cited in 24, applied in 29, distinguished in 6, not followed in 10 and not mentioned in 6.[26]

11.15 In noting the Court of Criminal Appeal's uneven application of the Fernando principles,[27] the report noted that:

> this may simply be a reflection of the protean nature of the objective and subjective circumstances of each case and/or the availability (or otherwise) of evidence as to the subjective circumstances of particular Indigenous offenders on sentence. However, some academics have criticised the way in which the NSW Court of Criminal Appeal has considered the *Fernando* principles; for

26. J Manuell, *The Fernando Principles: The Sentencing of Indigenous Offenders in NSW* (NSW Sentencing Council, 2009) 8.
27. J Manuell, *The Fernando Principles: The Sentencing of Indigenous Offenders in NSW* (NSW Sentencing Council, 2009) 10.

> instance, Flynn argues that the Court has, at times, seemed to assess whether an offender is 'aboriginal enough' before determining whether the *Fernando* principles apply.[28]

11.16 The uneven application of the *Fernando* principles seems to be reflective of the approach taken in cases such as *R v Newman,* where the majority of the Court considered that Fernando principles are not necessarily applicable to all Indigenous people who have suffered disadvantage, and in particular that they may not be applicable to Indigenous people who come from an urban setting and have not proven any links with a discrete Aboriginal community.[29] The Court in that case noted that:

> That Fernando is not to be regarded as a decision justifying special leniency, merely because of the Aboriginality of the offender, was recognised in *Hickey* NSW CCA 27 September 1994 where Simpson J noted that the first of the propositions stated by me in that decision "is that sentencing principles are non-discriminatory in that they apply to all accused without differentiating by reason of the offender's membership of a particular racial or ethnic group". This proposition is however varied by the recognition that those factors which constitute the disadvantage, and which may arise by reason of membership of the particular group, may have a role to play in the sentencing determination.
>
> The principles stated should not be elevated so as to create a special class of persons for whom leniency is inevitably to be extended, irrespective of the objective and special circumstances of the case. To do so would itself be discriminatory of others.[30]

11.17 The report commissioned by the Sentencing Council noted criticisms of this approach:

> Flynn observes that the findings in [*Newman*], *Ceissman* and *Morgan* seemed to place undue emphasis on the urban environments in which the offenders lived, and gave little weight to the disadvantages frequently suffered by Indigenous people whether they lived in urban, country or remote Australia. This, Flynn argues, is counter to the 'substantial equality principle' expressed by Brennan J in *Neal v The Queen* when his Honour said that, '… in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group'.[31]

Question 11.1

1. How can the current sentencing regime be improved in order to reduce:
   a. the incarceration rate of Indigenous people; and
   b. the recidivism rate of Indigenous offenders?

28. J Manuell, *The Fernando Principles: The Sentencing of Indigenous Offenders in NSW* (NSW Sentencing Council, 2009) 10.
29. *R v Newman* (2004) 145 A Crim R 361, 60-62.
30. *R v Newman* (2004) 145 A Crim R 361, 62; citing *R v Ceissman* [2001] NSWCCA 73; 119 A Crim R 535, 31-32.
31. J Manuell, *The Fernando Principles: The Sentencing of Indigenous Offenders in NSW* (NSW Sentencing Council, 2009) 10.

2. Are there any forms of sentence other than those currently available that might more appropriately address the circumstances of Indigenous people?
3. Should the Fernando principles be incorporated in legislation and if so, how should this be achieved and what form should they take?

Offenders with cognitive and mental health impairments

11.18 The NSW Law Reform Commission in Consultation Paper 6 (CP 6) has considered sentencing principles and options with respect to people with cognitive and mental health impairments.[32]

Prevalence

11.19 On the basis of available data, the representation of people with cognitive and mental health impairments in the criminal justice system is disproportionately high. However, the paucity of data means the exact scale of over-representation is unknown. The available data is examined in greater detail in our not yet released report on the diversion of people with mental health and cognitive impairments from the criminal justice system.

11.20 In relation to Local Court proceedings, for example, a 2007 study by the Bureau of Crime Statistics and Research surveyed 189 adult defendants appearing for criminal matters in one of two NSW Local Courts and found that 55% of surveyed defendants reported being diagnosed or treated for one or more psychiatric conditions in the previous 12 months.[33]

11.21 In relation to offenders in custody, the most recent NSW Inmate Health Survey (2009) indicates that between 1996 and 2009 the prevalence of mental health problems among inmates has increased.[34] The 2009 survey, which included 996 randomly selected inmates, found a steady increase in the proportion of inmates who have ever been assessed or treated by a doctor or psychiatrist for an "emotional or mental problem" from 39% in 1996 to 43% in 2001 to 49% in 2009.[35]

11.22 A more extensive study in 2003 showed a high level of mental illness among NSW prisoners, including that 74% of the sample of 1,500 inmates experienced at least one psychiatric disorder in the 12 months prior to being interviewed for the study.[36]

32. NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences,* Consultation Paper 6 (2010).
33. C Jones and S Crawford, *The Psychosocial Needs of NSW Court Defendants*, Crime and Justice Bulletin No 108 (NSW Bureau of Crime Statistics and Research, 2007).
34. D Indig and others, *2009 NSW Inmate Health Survey: Key Findings Report* (2010) 135.
35. D Indig and others, *2009 NSW Inmate Health Survey: Key Findings Report* (2010) 17.
36. T Butler and S Allnutt, *Mental Illness Among NSW Prisoners* (2003) 48.

Principles relevant to sentencing

11.23 Justice Sperling summarised the principles relevant to sentencing offenders with mental impairments in *R v Hemsley*:[37]

> First, where mental illness contributes to the commission of the offence in a material way, the offender's moral culpability may be reduced; there may not then be the same call for denunciation and the punishment warranted may accordingly be reduced…
>
> Secondly, mental illness may render the offender an inappropriate vehicle for general deterrence and moderate that consideration…
>
> Thirdly, a custodial sentence may weigh more heavily on a mentally ill person…
>
> A fourth, and countervailing, consideration may arise, namely, the level of danger which the offender presents to the community. That may sound in special deterrence…

11.24 These common law principles are not contained in legislation. While the CSPA refers to an offender's "disability" as a mitigating factor in sentencing, where it results in the offender not being fully aware of the consequences of his or her actions,[38] there is no specific reference in the Act to either cognitive or mental health impairments.

11.25 A number of submissions to CP 6 submitted that the Act should contain a more general statement directing the court's attention to the special considerations that arise when sentencing an offender with a cognitive or mental health impairment.[39] It is worth noting that CP 6 also considered the related question of whether s 21A of the Act should be amended to include cognitive and mental health impairment as a specific factor to be taken into account in sentencing.[40] A number of submissions in response to CP 6 submitted that it should.[41] In Question Paper 3, we also raised the question of whether additional factors (such as cognitive and mental health impairments) should be included in that provision.[42]

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37. *R v Hemsley*, [2004] NSWCCA 228 [33]-[36]; see *R v Engert* (1995) 84 A Crim R 67; *Muldrock v The Queen* (2011) 244 CLR 120 [53]-[54].
38. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(j).
39. NSW Law Society, *Submission MH 13,* 29; Corrective Services NSW, *Submission MH 17,* Issue 6.105; NSW Legal Aid, *Submission MH 18,* 23; Public Interest Advocacy Centre, *Submission MH21,* 2; Public Defenders Office, *Submission MH26,* 11.
40. NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences,* Consultation Paper 6 (2010) [6.104].
41. NSW Bar Association, *Submission MH10,* 48; NSW Law Society, *Submission MH13,* 28; Corrective Services NSW, *Submission MH17,* Issue 6.104; NSW Legal Aid, *Submission MH18,* 23; Brain Injury Association, *Submission MH19,* 23; Public Defenders Office, *Submission MH 26* 46.
42. NSW Law Reform Commission, *Factors to be Taken into Account on Sentence,* Sentencing Question Paper 3 (2012).

Mandatory pre-sentence reports

11.26 In CP 6 we raised the issue of whether it should be a legislative requirement for a court to order a pre-sentence report when considering imposing a sentence of full-time imprisonment on an offender.[43]

11.27 Although a court can request the Probation and Parole Service to prepare a pre-sentence report when it is considering a sentence of full-time imprisonment, there is currently no legislative requirement to do so.

11.28 As outlined in CP 6:

> A pre-sentence report may contain information such as an assessment of the nature and severity of the offender's cognitive or mental state, and the likely impact of incarceration on the offender, the suitability of the offender for various intervention or treatment programs and the availability of those programs within the criminal justice system. This information would be relevant to the type, length and structure of any custodial sentence.

11.29 As was noted in CP 6, the introduction of such a requirement would have significant resource implications and may not be appropriate or necessary in all cases.[44] It is therefore important to determine, if such a requirement is considered necessary, the specific circumstances in which it should apply, as well as the content of any such report.

11.30 In submissions to CP 6, while there was general support for the availability of pre-sentence reports, a number of submissions raised concerns about such reports being mandatory. Concerns raised in that review included that:

- a mandatory requirement may overstress resources;
- some content required to be contained in the reports may be outside the competency of Probation and Parole Officers;[45] and
- such a requirement may lead to defendants who cannot obtain bail spending more time in custody while the report is being prepared compared with defendants who are sentenced after a 'quick plea'. [46]

11.31 Some submissions to CP 6 did however consider that mandatory reports may be justified if the defendant is unrepresented.[47] Otherwise, questions do arise as to the most useful form in which they might assist the sentencing process. For example, supervision suitability reports are being piloted in South Australia with the aim of providing information based on an offender's risks and needs so that a court can

43. NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences,* Consultation Paper 6 (2010).
44. NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences,* Consultation Paper 6 (2010).
45. Corrective Services NSW, *Submission MH17*, 18-19.
46. Public Interest Advocacy Centre, *Submission MH21,* 27.
47. NSW Law Society, *Submission MH13,* 29; Legal Aid NSW, *Submission MH 18,* 24.

better tailor the conditions of a community-based order and identify the time required to comply with those conditions.[48]

Detention in facilities other than prison

11.32 There is no power in NSW to order that a sentence of imprisonment should be served in a facility other than a prison. An inmate in a correctional centre who is found to be mentally ill may be transferred to a mental health facility where the Director General of the Department of Health has made an order to that effect,[49] but there is no provision for a court to sentence an offender to such a facility directly. This contrasts with the position in other jurisdictions, for example, Victoria,[50] the NT,[51] and the Commonwealth,[52] where courts may order that a sentence be served in a specialist facility for people with cognitive and mental health impairments.

11.33 CP 6 raised the issue of whether the Act should be amended to give courts the power to order that offenders with cognitive or mental health impairments be detained in facilities other than prison. While some submissions suggested that it should,[53] some also noted that this is a complex question and one that is dependent on appropriate resources and facilities being made available.[54]

Alternative sentencing options

11.34 Preliminarily submissions emphasised the need for more community-based, rehabilitative and diversionary options for people with cognitive and mental health impairments.[55] We have considered the question of diversion of people with mental health and cognitive impairments and made number of recommendations in our not yet released Report 135.

11.35 The Intellectual Disability Rights Services, for example, submitted that consideration be given to alternatives to prison for people with intellectual disabilities, including: alternatives to imprisonment in line with the principles of restorative justice; and greater accessibility to existing alternatives to prison.[56]

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48. South Australia, Attorney-General's Department, *South Australian Government Response to Smart Justice* (2012) 17.
49. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 55.
50. *Sentencing Act 1991* (Vic) s 82AA.
51. *Sentencing Act*, (NT) s 80.
52. *Crimes Act 1914* (Cth) s 20BS.
53. NSW Law Society, *Submission MH13*, 30; NSW Legal Aid, *Submission MH18*, 24; Public Defenders Office, *Submission MH 26*, 46; NSW Consumer Advisory Group – Mental Health Inc, *Submission MH 11*, 42.
54. NSW Bar Association, *Submission MH10*, 48; NSW Council for Intellectual Disability, *Submission MH12*, 3; Corrective Services NSW, *Submission MH17*, Issue 6.108.
55. Mental Health Coordinating Council, *Preliminary Submission PSE09*, 1-2; Crime and Justice Reform Committee, *Preliminary Submission PSE12*, 1; Shopfront Youth Legal Centre, *Preliminary Submission PSE13*, 10; Intellectual Disability Rights Service, *Preliminary Submission PSE14*, 1-2.
56. Intellectual Disability Rights Service, *Preliminary Submission PSE14*, 3-4.

Question 11.2

1. Should the *Crimes (Sentencing Procedure) Act 1999* (NSW) contain a more general statement directing the court's attention to the special circumstances that arise when sentencing an offender with cognitive or mental health impairments? If yes, what form should these principles take?
2. In what circumstances, if any, should the courts be required to order a pre-sentence report when considering sentencing offenders with cognitive and mental health impairments to prison?
3. Should courts have the power to order that offenders with cognitive and mental health impairments be detained in facilities other than prison? If so, how should such a power be framed?
4. Do existing sentencing options present problems for people with cognitive and mental health impairments? If so, how should this be addressed?
5. Should any new sentencing options be introduced for people with cognitive and mental health impairments? If yes, what types of sentencing options should be introduced?

Women

11.36 In 2011, the NSW Inmate Census recorded that 7% of prisoners were women (692 out of a total of 9,945 prisoners). While the female inmate population has fallen slightly over the last 3 years, CSNSW has previously noted that:[57]

> The female inmate population has increased by 101% between 1994 and 2004, in comparison to a 40% increase in the male prison population. The percentage of female remand inmates has also increased, rising from 15% to 25% from 1993 to 2003, while male remand numbers increased from 12% to 20% during the same period. The increase in the incarceration rate of women is also being experienced internationally. Overall, women offenders represent approximately 7% of the total number of people incarcerated in New South Wales.

11.37 In relation to the characteristics of female inmates, CSNSW further noted that:[58]

> Despite representing only a small proportion of the overall imprisoned population, women experience higher levels of substance abuse and drug related offending than males; higher rates of infection with blood borne viruses; higher rates of mental illness and self harm; and higher reported rates of past childhood and adulthood abuse. Women also face unique needs in the area of motherhood, often being the primary carers for their children. There is a general consensus that the needs of women in the criminal justice system are different from, greater than, and more complex than those of men.

57. Corrective Services NSW, "Women Offenders" <http://www.correctiveservices.nsw.gov.au/offender-management/offender-services-and-programs/women-offenders>.
58. Corrective Services NSW, "Women Offenders" <http://www.correctiveservices.nsw.gov.au/offender-management/offender-services-and-programs/women-offenders>.

11.38 Preliminary submissions noted a growth in the number of women imprisoned, especially Indigenous women, and the consequent need for greater consideration of women's issues and needs within the criminal justice system.[59]

11.39 BOCSAR, in its 1999 study on women in prison, noted that there had been a significant increase in the number of women in prison between 1994 and 1998.[60] It noted that several factors may have been contributing to that increase, both in the local and higher courts, including both harsher penalties handed down by the courts, and a shift in the types of offences being committed by women towards those that are more likely to receive prison sentences (such as robbery).[61]

11.40 In BOCSAR's more recent publication on female offending, it noted that:

> the findings of the present brief suggest that the nature of female offending has changed over the past 10 years. The number and proportion of females and juvenile females offending has increased significantly and there has been an elevation in the severity of the offences they committed. These finding suggest that females and juvenile females are committing more violent offences than they did 10 years ago. Despite these findings, it is important to note that females as well as juvenile females still continue to commit significantly fewer offences than their male counterparts.[62]

11.41 The LRC understands from CSNSW that there have been a number of developments in programs for women in custody in recent years, including rehabilitation programs, programs for women with complex needs, education and training programs and programs for mothers with children. For example, parenting programs are now run in all women's centres, a "Mothers and Children" program is available to minimum-security women who give birth in custody and/or have children up to school age in some locations, and there are options for children up to 12 years of age to stay with their mothers on weekends and during school holidays. There are also programs providing support and guidance for women approaching release.[63]

11.42 An issue raised in preliminary submissions is that, in the context of the changes in patterns of offending by women in recent years, new approaches to sentencing women should be considered which take into account:

- the specific rehabilitation needs of women;
- the changing nature of female offending and the impact that full-time imprisonment has on the roles of women as mothers, and / or carers; and

59. Crime and Justice Report Committee, *Preliminary Submission PSE12*, 1; Women in Prison Advocacy Network, *Preliminary Submission PSE17*, 3.
60. J Fitzgerald, *Women in Prison: The Criminal Court Perspective*, Bureau Brief 4 (NSW Bureau of Crime Statistics and Research,1999).
61. J Fitzgerald, *Women in Prison: The Criminal Court Perspective*, Bureau Brief 4 (NSW Bureau of Crime Statistics and Research,1999) 2-3.
62. J Holmes, *Female Offending: Has there been an Increase?* Bureau Brief 46 (NSW Bureau of Crime Statistics and Research, 2010) 10.
63. Information provided by Corrective Services NSW, 2012.

- the benefits of justice reinvestment.[64]

Question 11.3

1. Are existing sentencing and diversionary options appropriate for female offenders?
2. If not, how can the existing options be adapted to better cater for female offenders?
3. What additional options should be developed?

Corporations

11.43 In NSW in 2010, of the 102,169 offenders sentenced by the Local Court, 1,578 (approximately 1.5%) were corporations.[65] In our 2003 Report on the sentencing of corporate offenders, we considered whether there was a need for additional sentencing options for corporations that commit criminal offences.[66] (We are not here considering the related question of fixing criminal liability for corporate wrongdoing on individual directors or controllers of corporations and then sentencing them.)

11.44 Currently, the range of sentencing options available for corporations being dealt with for breaches of NSW law is limited, with fines being the main penalty imposed. While some statutes provide for sentencing options other than fines, specifically applicable to corporations, these are in areas such as industrial relations and workplace health and safety, for example:

- the *Protection of the Environment Operations Act 1997* (NSW) provides for a range of options in some cases including the suspension or revocation of Environment Protection Licences,[67] and the issuing of Environment Protection Notices;[68] and
- the *Work Health and Safety Act 2011* (NSW) provides for options in some cases including the issuing of notices and adverse publicity orders as well as the provision of injunctions and enforceable undertakings.[69]

11.45 A key recommendation in the 2003 report was that, in addition to or instead of imposing a fine on a corporation, a court should be able to make one or more of the following orders, in order to achieve best the objectives of sentencing:

- Orders for incapacitation, that is, orders aimed either at preventing a corporation from carrying out certain commercial, trading or investment activities or taking advantage of certain rights ("disqualification"), and which may include revoking

64. Women's Advisory Council, Corrective Services NSW, *Preliminary Submission PSE19*, 4; Women in Prison Advocacy Network, *Preliminary Submission PSE17*, 3.
65. NSW, Bureau of Crime Statistics and Research, *New South Wales Criminal Court Statistics 2011* (2012) 36, 44.
66. NSW Law Reform Commission, *Sentencing: Corporate Offenders,* Report 102 *(*2003).
67. *Protection of the Environment Operations Act 1997* (NSW) s 79.
68. *Protection of the Environment Operations Act 1997* (NSW) s 91.
69. *Work Health and Safety Act 2011* (NSW) Pt 10.

or suspending a licence held by the corporation, disqualification from entering into certain contracts or a denial of use of profits for a certain time; or orders aimed at winding up a corporation either directly or indirectly ("dissolution").

- Correction orders: these include "probation orders" and "punitive injunctions". Probation orders aim to alter corporate behaviour, for example by achieving internal discipline or reforming the organisation by means of external monitoring. Punitive injunctions involve a more severe form of intervention in the operation of the corporation, such as requiring that particular activities cease to be undertaken.

- Community service orders: community service orders may direct a corporation to undertake or contribute to work or projects that benefit the community or a part of the community in some way that bears a reasonable relationship to the offence and/or the objectives of the sentence.

- Publicity orders: these include orders designed to inform specific people, groups of people, or the community, of details relating to the offender, the offence and the penalty imposed for the offence.[70]

11.46 In relation to these orders, we also recommended that:

- each order should be capable of being a separate, non-exclusive sanction;

- that the orders should form part of the general sentencing regime but should be expressed to apply only to corporations; and

- the orders should not detract in any way from existing legislative provisions and common law that are applicable to the sentencing of corporations.

11.47 As there has not been a formal government response in relation to these recommendations, a general question remains whether the issues raised require consideration in this review, and more specifically, whether additional sentencing options and discretions are required for the sentencing of corporations.

11.48 Given that many corporations offending in NSW will be breaching Commonwealth laws, and that most of the corporations which offend will be corporations formed under the *Corporations Act 2001* (Cth), some questions may arise as to the interaction of any NSW provisions with the Commonwealth sentencing provisions,[71] and the operation of the inconsistency provisions of the *Constitution* (Cth), for example, in relation to dissolution of a convicted corporation.[72]

Question 11.4

Are additional sentencing options required in order to achieve the purposes of sentencing in relation to corporations? If yes, what should these options be?

70. NSW Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) ch 8-12.
71. In particular, *Crimes Act 1914* (Cth) s 20AB.
72. See, eg, NSW Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003) [8.28].

Any other categories

11.49 In this Question Paper we have considered certain special categories of offenders. However we recognise that there may be further categories of offenders who may warrant special consideration in the course of this review and we would welcome any submissions in relation to such other categories.

Question 11.5

Are there any other categories of offenders that should be considered as part of this review?

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