



**Australian Government**

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**Australian Law Reform Commission**

# Same Crime, Same Time

REPORT

Sentencing of  
Federal Offenders

REPORT 103  
April 2006

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**Australian Government**

**Australian Law Reform Commission**

The Hon Philip Ruddock MP  
Attorney General of Australia  
Suite MF 21  
Parliament House  
Canberra ACT 2600

28 April 2006

Dear Attorney-General,

***Review of Part 1B of the Crimes Act 1914***

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On 12 July 2004, the Commission formally received a reference from you, pursuant to the *Australian Law Reform Commission Act 1996*, to undertake a review of *Part 1B of the Crimes Act 1914*.

Those terms of reference were amended by your letter of 19 December 2005, to extend the reporting date to 28th April 2006, in order to facilitate further community consultation.

On behalf of the Members of the Commission involved in this reference, including Justice Susan Kenny, Justice Susan Kiefel and Justice Mark Weinberg, and in accordance with the *Australian Law Reform Commission Act 1996*, we are pleased to present to you the final report in this reference: *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006).

Yours sincerely

A handwritten signature in dark ink, appearing to read 'David Weisbrot'.

Professor David Weisbrot

A handwritten signature in dark ink, appearing to read 'B. Opeskin'.

Brian Opeskin  
Deputy President

A handwritten signature in dark ink, appearing to read 'Les McCrimmon'.

Associate Professor Les McCrimmon  
Commissioner



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# Terms of Reference

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## TERMS OF REFERENCE

### REVIEW OF PART IB OF THE *CRIMES ACT 1914*

I, PHILIP RUDDOCK, Attorney-General of Australia, HAVING REGARD TO:

- a decade of operation of Part IB of the *Crimes Act 1914*
- concerns raised about the operation of Part IB of the *Crimes Act 1914*
- the relatively small number of federal offenders compared with the number of State and Territory offenders, and
- the Commission's previous reports on sentencing,

REFER to the Australian Law Reform Commission for inquiry and report under the *Australian Law Reform Commission Act 1996*, whether Part IB of the *Crimes Act 1914* is an appropriate, effective and efficient mechanism for the sentencing, imprisonment, administration and release of federal offenders, and what, if any, changes are desirable.

1. In carrying out its review of Part IB of the *Crimes Act 1914*, the Commission will have particular regard to:
  - (a) the changing nature, scope and extent of Commonwealth offences
  - (b) whether parity in sentencing of federal offenders should be maintained between federal offenders serving sentences in different States and Territories, or between offenders within the same State and Territory, regardless of whether they are State, Territory or federal offenders
  - (c) the characteristics of an efficient, effective and appropriate regime for the administration of federal offenders, and whether this could or should vary according to the place of trial or detention
  - (d) whether there are effective sentencing and administrative regimes in Australia or overseas, including alternative sentencing options, that would be appropriate for adoption or adaptation by the Commonwealth, and
  - (e) any related matter.

2. In carrying out its review, the Commission is to consult widely with the key stakeholders, including the relevant Australian Government, State and Territory authorities.
3. The Commission is to report no later than 31 January 2006.\*

Dated: 12th July 2004

Philip Ruddock  
Attorney-General

\* In a letter dated 19 December 2005, the Attorney-General agreed to extend the reporting date for the Inquiry to 28 April 2006.

# List of Participants

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## Australian Law Reform Commission

### Division

The Division of the ALRC constituted under the *Australian Law Reform Commission Act 1996* (Cth) for the purposes of this Inquiry comprised the following:

Professor David Weisbrot (President)  
Mr Brian Opeskin (Deputy President, Commissioner in charge)  
Professor Anne Finlay (until November 2004)  
Associate Professor Les McCrimmon (from January 2005)  
Justice Susan Kenny (part-time Commissioner)  
Justice Susan Kiefel (part-time Commissioner)  
Justice Mark Weinberg (part-time Commissioner)

### Senior Legal Officers

Carolyn Adams  
Gabrielle Carney (until October 2004)  
Isabella Cosenza

### Legal Officers

Althea Gibson (from February 2005)  
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### Research Manager

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### **Advisory Committee Members**

Ms Joanne Blackburn, Commonwealth Attorney-General's Department  
Professor David Brown, Law School, University of New South Wales  
Mr Damian Bugg QC, Commonwealth Director of Public Prosecutions  
Mr Brendan Byrne, General Counsel, Australian Securities and Investments  
Commission  
Mr Paul Coghlan QC, Victorian Director of Public Prosecutions  
Professor Arie Freiberg, Law School, Monash University  
Dr Jeremy Gans, Law School, University of Melbourne  
Mr Luke Grant, New South Wales Department of Corrective Services  
Mr Andrew Haesler SC, New South Wales Public Defenders' Office  
Professor Richard Harding, Inspector of Custodial Services, Western Australia  
The Hon Greg James, Retired Judge  
Dr Toni Makkai, Director, Australian Institute of Criminology  
Professor Kate Warner, Law School, University of Tasmania  
Mr George Zdenkowski, Magistrate, New South Wales Local Court



# Executive Summary

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## *Same Crime, Same Time*

*Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103, 2006), which contains 147 recommendations for reform, is the product of an extensive research and community consultation effort over a period of almost two years. The Terms of Reference asked the Australian Law Reform Commission (ALRC) to examine Part IB of the *Crimes Act 1914* (Cth) and report on whether it provided an efficient, effective and appropriate regime for the sentencing, administration and release of federal offenders, that is, offenders convicted of an offence against Commonwealth law.

The ALRC was asked to have particular regard to issues such as the changing nature and scope of federal criminal law, the relatively small number of federal offenders compared with state and territory offenders, and the question of consistency in the treatment of federal offenders across Australia.

Part IB has been the focus of much criticism since its insertion into the *Crimes Act* in 1989. The legislation has been described as being complex and ambiguous, unclear about the question of consistency between jurisdictions, and lacking any detailed reference to the aims and purposes of sentencing. Specific provisions have been criticised for their complexity, poor drafting, inflexibility, limited scope and impracticality. Part IB has been amended several times since 1989 but there has been no major review since its introduction.

The ALRC recognised the need for broad consultation with the community, as well as with experts and interest groups. To this end, the ALRC released an Issues Paper (IP 29, January 2005) and a Discussion Paper (DP 70, November 2005) to promote debate and comment, and arranged over 80 meetings with interested parties around Australia. The Inquiry received 98 written submissions.

The ALRC also produced a brochure in late 2004, which it sought to distribute to all federal offenders in Australia. The brochure provided general information about the Inquiry and invited federal offenders to register their interest and to make submissions. The brochures were distributed to nearly 2,000 federal offenders and the ALRC received 214 reply-paid forms, the large majority from prisoners. All who responded were sent hard copies of the consultation papers and were invited again to make a submission. The ALRC subsequently received 16 written submissions from federal offenders, which provide unique insights into the way some federal offenders experience the criminal justice system, from the imposition of sentence until release.

One of the problems faced by the ALRC was the lack of available information or statistics on the sentencing of federal offenders. In order to develop sound evidence-based recommendations, the ALRC collaborated with a number of federal agencies, which provided or analysed data on federal offenders. The Australian Institute of Criminology undertook two data analysis tasks for the purposes of this Inquiry. The results of those tasks are set out in Appendices 1 and 2 of this Report. The first task involved analysis of ‘snapshot data’ on the 695 federal prisoners held in custody on 13 December 2004. The second task involved analysis of data collected in the five-year period 2000–2004 by the Commonwealth Director of Public Prosecutions (CDPP). This analysis covered 25,160 ‘cases’, involving 17,105 offenders who were prosecuted on 85,596 charges. Having examined the available evidence, the ALRC considers that there is compelling evidence of inconsistency in the sentencing of federal offenders across Australia.

It is a fundamental principle of the criminal law and the sentencing process that like cases should be treated in a like, or consistent, manner. For this reason, many of the recommendations in this Report are aimed at encouraging and supporting greater consistency in the sentencing of federal offenders and equality among federal offenders across Australia. However, it has been necessary to develop these recommendations in the context of a federal criminal justice system in which:

- federal criminal law picks up and applies significant aspects of state and territory criminal procedure as well as sentencing options available under state and territory law;
- most federal criminal matters are heard in state and territory courts; and
- the states and territories have almost exclusive responsibility for administering the sentences imposed on federal offenders.

Nevertheless, the ALRC is of the view that broad consistency between jurisdictions can be achieved in this context because treating like cases alike does not mean treating them in exactly the same way.

The recommendations contained in this Report are addressed to a wide range of parties and not merely to the Australian Government. For this reason, the Report contains an *Implementation Schedule*, making clear the lines of responsibility for implementation of the various recommendations.

The Inquiry’s key recommendations include:

- The Australian Government should seek to ensure broad equality across Australia in the sentencing, administration and release of federal offenders in different states and territories.

- A new federal sentencing Act should be enacted, which includes a statement of the purposes of sentencing, the fundamental principles that must be applied in sentencing, and the factors that courts must consider in sentencing federal offenders.
- A database on federal sentences should be developed for use by judicial officers and others as a practical tool in promoting consistency in federal sentencing.
- A new sentence indication scheme should be introduced, which—with appropriate safeguards—is designed to encourage guilty defendants to plead guilty by indicating the likely sentencing outcome prior to the plea.
- An Office for the Management of Federal Offenders should be established, within the Attorney-General's Department, with a broad range of responsibilities to monitor, advise and liaise with the states and territories in relation to federal offenders.
- A federal parole authority should be established to make parole-related decisions in relation to federal offenders.

The Terms of Reference limit the ALRC's Inquiry to a consideration of federal offenders. Material on state and territory offenders has been examined for the purposes of comparison, and also in relation to joint offenders, but it has not been the focus of the Inquiry. However, the ALRC has considered the interaction between federal sentencing law and state and territory sentencing law where this impacts on the sentencing and administration of federal offenders.

The Report is divided into eight parts, which are described below.

## Part A: Introduction

This is not the first time the ALRC has conducted an Inquiry focussing on the sentencing of federal offenders. A previous report, *Sentencing* (ALRC 44),<sup>1</sup> was tabled in Parliament in August 1988. Following consideration of that report, the Australian Government introduced the Crimes Legislation Amendment Bill (No 2) 1989 (Cth), inserting Part IB into the *Crimes Act*. The Bill—which was the first major reform of federal sentencing legislation in over 20 years—implemented selected parts of ALRC 44, but in a number of respects diverged from or failed to implement the ALRC's recommendations.

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1 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988).

In a number of earlier reports, including ALRC 44, the ALRC considered whether, in pursuit of equality in the treatment of federal offenders between jurisdictions, it was appropriate and viable to establish a completely separate federal criminal justice system, including federal criminal courts, federal corrective services agencies and a federal prison.<sup>2</sup> This issue has been considered again and the ALRC's views remain essentially unchanged. Given existing state and territory infrastructure, the relatively small number of federal offenders, and the geographic dispersal of offenders across Australia, it is not viable to establish a completely separate federal criminal justice system.<sup>3</sup> This means that the current cooperative system will remain. The overwhelming majority of federal offenders will continue to be sentenced in state and territory courts and the sentences imposed will continue to be administered by state and territory corrective services agencies for the foreseeable future. However, the ALRC recommends that the original jurisdiction of the Federal Court of Australia be expanded to include jurisdiction in relation to nominated federal offences.<sup>4</sup>

In an interim 1980 report, the ALRC recommended that sentencing provisions should be consolidated in a single Commonwealth statute.<sup>5</sup> The ALRC remains of this view and recommends the enactment of a new federal sentencing Act, distinct from the federal provisions dealing with criminal procedure and from those dealing with substantive criminal law. A new sentencing Act will increase the transparency and accessibility of federal sentencing law and emphasise to state and territory judicial officers that a separate sentencing regime applies to federal offenders. In addition, the ALRC recommends that, in drafting the new legislation, the Australian Government should ensure that it includes a clear statement of the objects of the legislation, is well structured and employs language that is both modern and (where practicable) consistent with language used in state and territory legislation.

## **Part B: Determining the Sentence**

Part B examines general issues that arise when sentencing federal offenders and makes a number of recommendations aimed at providing greater guidance to judicial officers exercising the sentencing discretion. More specific issues relating to the mechanics of federal sentencing are dealt with in Part C.

Chapter 4 provides an overview of a number of prominent purposes of sentencing. The ALRC concludes that the only legitimate purposes of sentencing are retribution, deterrence, rehabilitation, incapacitation of the offender, denunciation and restoration.

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2 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980); Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988).

3 See Ch 18 in relation to the establishment of a separate federal criminal court system and Ch 22 in relation to corrective services agencies and facilities.

4 Discussed further below and in detail in Ch 18.

5 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), Rec 9.

These purposes should be set out in federal sentencing legislation to promote consistency, clarity and transparency in the sentencing process.

Chapter 5 deals with the principles of sentencing—that is, the overarching legal rules that are to be applied when sentencing all federal offenders. The principles outlined in this Chapter are well established at common law. Some are already referred to in Part IB of the *Crimes Act*. The ALRC recommends that federal sentencing legislation list five principles of sentencing in order to emphasise their importance to the sentencing process: namely, proportionality, parsimony, totality, consistency and individualised justice.

Chapter 6 considers the factors that must be considered in sentencing a federal offender. Section 16A(2) of the *Crimes Act* sets out a non-exhaustive list of 13 matters that a court must take into account in sentencing a federal offender. Instead, the ALRC recommends that federal sentencing legislation express the primary principle that a court must consider any factor that is relevant to a purpose or principle of sentencing and known to the court. Instead of setting out an ad hoc list of factors, the legislation should include broad categories of factors—for example, factors relating to the offence, factors relating to the conduct of the offender, and factors relating to the impact of the offence—and provide examples of sentencing factors within each category. Both the categories of factors and the factors themselves should be non-exhaustive. Sentencing factors can be distinguished from sentencing purposes and principles, but the factors should promote or facilitate the purposes or principles.

In addition, the ALRC recommends that two factors—pleading guilty and cooperating with the authorities—be dealt with in a separate provision to make it clear that they do not of themselves advance the purposes of sentencing, but rather promote the proper administration of the criminal justice system.

The ALRC does not support designating sentencing factors as aggravating or mitigating. However, the ALRC recommends that federal sentencing legislation specify certain matters that should not aggravate a federal sentence—such as the fact that an offender has pleaded not guilty to an offence—as well as matters that should not mitigate a federal sentence—such as certain confiscation orders.

Chapter 7 examines the sentencing options available to federal offenders, such as fines, discharges and dismissals, and imprisonment. It also discusses the mechanism in the *Crimes Act* that allows certain state and territory sentencing options to be imposed on federal offenders. The ALRC concludes that it is desirable for courts to have access to a broad range of sentencing options in order to tailor a sentence to the individual circumstances of an offender. To this end, it is recommended that the existing sentencing options be retained—with the recognizance release order renamed to reflect its nature as a conditional suspended sentence. The ALRC also recommends that

federal sentencing legislation enable a court to defer sentencing a federal offender for up to 12 months for the purpose of assessing the offender's prospects of rehabilitation or for any other purpose the court thinks fit.

When sentencing a federal offender a court also can make certain ancillary orders, such as orders for restitution or compensation. Chapter 8 examines these orders and concludes that they are an effective way to recognise the interests of victims of crime. However, such orders should not be sentencing options in their own right and should remain ancillary to the sentencing process.

## **Part C: Particular Issues in Sentencing**

Sentencing is a complex and technical process. Part C considers a range of issues relating to the mechanics of sentencing federal offenders.

Chapter 9 considers when a non-parole period should be fixed, the relationship between the head sentence and the non-parole period, and the factors to be considered in setting a non-parole period. The data on federal prisoners analysed by the Australian Institute of Criminology (set out in Appendix 1) reveal significant disparities in the relationship between head sentences and non-parole periods across jurisdictions. In order to strike an appropriate balance between consistency in sentencing and individualised justice, the ALRC recommends that federal sentencing legislation should establish as a reference point that the non-parole period of a federal sentence of imprisonment should be two-thirds of the head sentence. However, a court should retain its discretion to set a different non-parole period whenever it considers it appropriate in all the circumstances. The ALRC does not support an approach that would allow variation from the reference point only in special or exceptional circumstances.

Chapter 10 considers how to determine the commencement date of a federal sentence and how to treat time spent in pre-sentence custody or detention. Currently, Part IB picks up and applies state and territory legislation in relation to the commencement of sentences and the treatment of pre-sentence custody. The ALRC recommends that a federal sentence of imprisonment commence on the day the sentence is imposed, subject to any court order directed to the consecutive service of sentences. Various methods are available in state and territory sentencing legislation for crediting time spent in pre-sentence custody—including backdating and reducing sentences. However, the ALRC is of the view that, in relation to federal offenders, the law should provide one clear method for crediting time spent in pre-sentence custody or detention, namely, by declaring such time as time already served under the term of imprisonment.

Chapter 11 considers discounts and remissions. The ALRC is of the view that, where appropriate, guilty pleas and cooperation with the authorities should be taken into account as mitigating factors in sentencing because they promote the proper administration of the criminal justice system. Federal sentencing legislation should provide additional guidance to judicial officers—through a list of factors to be

considered by the court—in determining whether and to what extent to discount a sentence for a guilty plea or cooperation. The ALRC recommends that the amount of any discount should be left to the court’s discretion. However, in order to encourage cooperation with the authorities and promote guilty offenders to plead guilty, a court should specify the discount given.

Remissions are no longer widely used in Australia as a result of the adoption of the ‘truth in sentencing’ principle. The ALRC is of the view that automatic remissions unrelated to any aspect of a prisoner’s behaviour should not be available to federal offenders.

Chapter 12 considers particular issues that arise when a court sentences an offender for more than one offence, including the setting of consecutive or concurrent sentences, and the imposition of a single aggregate sentence for multiple offences arising out of the same criminal enterprise. While aggregate sentencing is available to federal offenders in respect of multiple summary offences, aggregate sentencing for multiple indictable offences is currently available to federal offenders only in jurisdictions where state and territory schemes invest courts with this power. The ALRC recommends that federal sentencing legislation permit a court to impose an aggregate sentence for multiple indictable offences arising out of the same criminal enterprise or course of conduct. The ALRC also makes recommendations directed to prosecutors and courts to address concerns raised about the use of aggregate sentencing.

## **Part D: Procedural and Evidential Issues in Sentencing**

The sentencing hearing is the stage in the criminal justice process at which an offender is often at risk of losing his or her liberty or having it curtailed in some way. Part D of the Report examines a range of procedural and evidential issues that arise in the context of a sentencing hearing.

The procedural issues discussed in Chapter 13 include: when a federal offender is required to be present for sentencing; the consequences of a federal offender not having legal representation at sentencing; explanation of the sentence imposed; and the provision of sentencing orders to offenders. The ALRC makes a number of recommendations to improve the fairness of sentencing hearings. These recommendations include requiring the presence of an offender where the court intends to impose a sentence that deprives an offender of his or her liberty or where an offender is required to consent to conditions or give an undertaking. The ALRC also recommends that where a federal offender is not legally represented in a sentencing proceeding the court should generally adjourn the proceeding to allow the offender a reasonable opportunity to obtain legal representation. However, the court may proceed to impose a sentence without adjournment in certain defined cases—for example, where the court is of the view that a fair sentencing hearing can be conducted without

the offender being legally represented or where the court does not intend to impose a sentence depriving the offender of his or her liberty.

Chapter 13 also considers a number of evidential issues, including: the process of fact-finding in sentencing; the application of the laws of evidence; and the burden and standard of proof in sentencing. Currently, the laws of evidence have limited application in sentencing proceedings. The ALRC concludes that no change is warranted to the law in this area. The law already provides an important safeguard by enabling a court to apply the laws of evidence where it considers it appropriate in the interests of justice, or where proof of a disputed fact is significant in determining sentence. To impose a requirement that facts relevant to sentencing be proved only by admissible evidence would transform sentencing into an adversarial process, increase cost and delay, and tend to exclude some information that may be useful in fashioning a fair and appropriate sentence.

In Chapter 14, the ALRC expresses its support for the use of victim impact statements and pre-sentence reports in the sentencing of federal offenders. Part IB of the *Crimes Act* does not make provision for this material and so it is necessary to rely on state and territory provisions that are picked up and applied in the sentencing of federal offenders. However, some state and territory legislation is silent on key issues. Having regard to concerns about the use and content of victim impact statements and pre-sentence reports, the ALRC recommends that federal sentencing legislation make provision for the use of such material in the sentencing of federal offenders. The federal provisions are to contain a set of minimum standards. Once the states and territories have laws about the use of this material that conform with the federal minimum standards, the ALRC recommends that the federal laws ‘roll-back’ and that the state and territory laws apply exclusively.

In Chapter 15, the ALRC recommends a sentence indication scheme for federal defendants, which is designed to encourage guilty defendants to plead guilty by indicating the likely sentencing outcome prior to the plea. The indication is to be limited to the choice of sentencing option and a general indication of severity or sentencing range. Potential benefits of such a scheme include the timely resolution of sometimes complex matters; and savings in time and costs as a result of preventing ‘last-minute’ guilty pleas and avoiding unnecessary trials. The ALRC has built into its recommended scheme a number of safeguards that aim to minimise the potential to induce guilty pleas improperly, the potential for excessively lenient sentencing, and the practice of ‘forum-shopping’.

## **Part E: Issues Arising after Sentencing**

Part E discusses the limited circumstances in which a federal sentence may need to be reconsidered after it has been imposed. Chapter 16 deals with reconsideration of federal sentences in the absence of error by the sentencing court. The ALRC rejects a broad power to re-sentence an offender where there has been a change in the offender’s circumstances after sentencing, or where there is new information relating to



exceptional events occurring after sentencing, since this would jeopardise the finality of the sentencing process. The ALRC concludes that reconsideration of sentence on this ground is more appropriately dealt with by an application for the exercise of the executive prerogative to pardon or remit a sentence. This might be done on compassionate grounds or as a reward for exceptional behaviour.

However, the ALRC recommends that there be an express power to re-sentence an offender whose sentence was reduced because he or she promised to cooperate with the authorities, but then failed to do so. Reconsideration by the court that imposed the sentence should replace the current mechanism in Part IB, which empowers an appellate court to hear a prosecution appeal on the basis of inadequacy of sentence. It is not appropriate for appellate courts to reconsider sentences in circumstances where there has been no error by the court below.

Chapter 16 also recommends a power to correct ‘slip errors’ in sentencing as well as a broader power to correct more substantive sentencing errors, although the existence of such a power must not operate to infringe a party’s right to appeal a sentence.

Chapter 17 deals with breaches of sentencing orders. An issue that has caused difficulties in the past is the fact that Part IB does not allow a court to deal with a breach of a sentencing order when an offender has a reasonable cause or excuse for the breach. The ALRC considers it fundamental to the administration of the federal criminal justice system that courts are empowered to deal with *all* breaches of sentencing orders, and recommends that federal sentencing legislation be amended to facilitate this. The ALRC also concludes that the courts’ existing powers to deal with breaches of federal sentencing orders are appropriate, but recommends that courts be given an additional power to vary a sentencing order that has been breached. This will give courts greater flexibility to tailor orders made upon breach to an offender’s individual circumstances.

Chapter 17 also examines federal fine enforcement. Part IB picks up and applies state and territory fine enforcement procedures. The ALRC concludes that there is insufficient information on federal fine enforcement to justify recommendations for legislative change to the existing regime within the context of this Inquiry. However, the ALRC does recommend that: federal offenders should not be imprisoned for failure to pay a fine if a fine recovery mechanism is available and likely to be effective, or if a less severe penalty is available and appropriate; all federal offenders should be given a reasonable opportunity to pay a fine before being imprisoned for fine default; and the maximum term of imprisonment for fine default should be consistent between jurisdictions and should be fixed at 12 months.

## **Part F: Promoting Better Sentencing**

Part F recommends a number of important reforms to promote better sentencing of federal offenders across Australia.

Chapter 18 addresses the issue of judicial specialisation as a means of promoting better sentencing decisions in relation to federal offenders. Most federal criminal offences are prosecuted in state and territory courts in accordance with state and territory criminal procedures. Because of the relatively small number of federal prosecutions in comparison with state and territory prosecutions, state and territory judicial officers have limited opportunity to gain experience in sentencing federal offenders.

In the course of the Inquiry it became clear that this has given rise to problems as federal law becomes increasingly complex and diverges from state and territory law. In some state and territory magistrates' courts special arrangements have been put in place to deal with federal matters—for example, magistrates who specialise in the area. The ALRC is of the view that such specialisation should be promoted in state and territory courts wherever this is practicable. Significantly, the ALRC also recommends that the original jurisdiction of the Federal Court of Australia be expanded to include nominated federal offences where the subject matter of the offence is closely allied to the existing civil jurisdiction of the Court, such as in complex areas of taxation, trade practices and corporations law.

Chapter 19 examines a number of other measures to promote better sentencing. Measures that provide relevant information to judicial officers and others involved in the federal criminal justice system are likely to lead to better sentencing over time. Accordingly, the ALRC makes a number of recommendations, including: the giving of reasons for federal sentencing decisions; the provision of practical assistance to the courts by prosecutors; and the further education and training of judicial officers and others involved in the federal criminal justice system.

A major issue for the Inquiry was promoting consistency in the sentencing of federal offenders across Australia. Chapter 20 considers the available data and concludes there is compelling evidence of inconsistency in the sentencing of federal offenders from one jurisdiction to the other. One of the primary mechanisms for achieving consistency in judicial decision making is appellate review. Chapter 20 examines the appellate structure applicable to federal criminal matters in Australia.

At present, federal criminal appeals go to state and territory courts of appeal or courts of criminal appeal, but no court other than the High Court has the overarching function of developing federal sentencing law for the whole of Australia. In order to promote greater consistency, in Discussion Paper 70 the ALRC proposed that the Federal Court of Australia be given exclusive appellate jurisdiction in federal criminal matters. On the basis of submissions and consultations in response to this proposal, the ALRC believes that it is premature to recommend a major restructuring of appellate jurisdiction in federal criminal matters before allowing time for the other

recommendations in this Report to be implemented and to take effect. A number of these other recommendations—including the introduction of a federal sentencing Act with clearly stated objects and the establishment of a national sentencing database—will help to ensure federal offenders are treated in a more consistent manner by state and territory courts. However, the new federal sentencing Act should include provision for a later review of sentencing in federal criminal matters to determine whether there is significant unjustified disparity in the sentencing of federal offenders across Australia.

Chapter 21 explores other methods for promoting consistency in sentencing, including grid sentencing, mandatory sentencing, a national sentencing database, and guideline judgments. In considering these methods, the principle of consistency needs to be balanced against other sentencing principles, such as the need for individualised justice. The ALRC does not support the use of grid sentencing or mandatory sentencing in Australia. In contrast, sentencing databases promote consistency by providing comparative information to judicial officers rather than restricting the exercise of their sentencing discretion. Consequently, the ALRC recommends that the Australian Government continue to support the development of a federal sentencing database for use by judicial officers and others. Although the ALRC supports the use of guideline judgments in principle, the constitutional uncertainty surrounding guideline judgments at the federal level does not provide a firm foundation for extending their use at this time.

## **Part G: Administration and Release of Federal Offenders**

Part G of the Report considers the administration of federal sentences and the release of federal offenders into the community on parole. The Australian Government relies exclusively on the states and territories to accommodate and supervise offenders serving sentences for federal crimes. The practical arrangements between the Australian Government and the states and territories appear to work reasonably well and to make effective and efficient use of existing resources.

However, the ALRC has formed the view that the arrangements would operate more smoothly and deliver better outcomes if the Australian Government played a more active role in the administration of federal offenders. The ALRC recommends that the Australian Government establish an Office for the Management of Federal Offenders, within the Attorney-General's Department, to engage more actively with the states and territories and directly with federal offenders. The ALRC also recommends active participation by the Australian Government in the Corrective Services Administrators' Conference and the Corrective Services Ministers' Conference.

The Office for the Management of Federal Offenders would have a range of monitoring, liaising and advising responsibilities, including the establishment of a

national case management database with information on all federal offenders. The Australian Government currently lacks ready access to information about the vast majority of federal offenders. This has the potential to impede the development of sound evidence-based criminal law policy and makes it difficult for the Australian Government to determine whether or not federal offenders are treated in a manner that is consistent with national standards and Australia's international obligations.

It appears that the states and territories also would welcome further information and assistance from the Australian Government in administering the sentences imposed on federal offenders. This would help to ensure that mistakes are not made in administering these sentences.

The ALRC also recommends the establishment of a federal parole authority to make parole-related decisions about federal offenders. Federal offenders are unique in Australia in having their parole decisions determined by a ministerial delegate within a government department rather than by an independent authority with broad-based expert and community membership. In the course of the Inquiry there was strong support for the principle that decisions in relation to parole should be made by a body independent of the political arm of government. This was on the basis that, because such decisions affect an individual's liberty, they should be made, and be seen to be made, through an independent, transparent and accountable process and in accordance with high standards of procedural fairness.

The ALRC has proposed two possible models for the federal parole authority. The first model is an independent statutory authority, the Federal Parole Board. Decisions of the Board would be subject to the rules of natural justice and to review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The second model is a Federal Parole Division of the Administrative Appeals Tribunal (AAT). This model would make efficient use of existing infrastructure, procedures and expertise. Decisions of the AAT are subject to judicial review by the Federal Court of Australia.

## **Part H: Special Categories of Federal Offenders**

Finally, Part H examines a number of issues that arise in the sentencing, administration and release of federal offenders who may be considered vulnerable or disadvantaged.

Chapter 27 discusses the sentencing of young federal offenders. Part IB provides that young federal offenders may be tried and punished in accordance with state and territory laws. However, these laws often differ between jurisdictions. In addition, at times it can be difficult to determine how the state and territory juvenile justice systems interact with the federal criminal justice system. The ALRC recommends a four-pronged approach to address these concerns: the introduction of federal minimum standards that will apply to all young federal offenders; the requirement that certain provisions that are applicable to adult federal offenders also apply to young federal offenders; the development of best practice guidelines for juvenile justice; and increased federal oversight of young federal offenders.

Offenders with a mental illness or intellectual disability are notoriously over-represented in prison populations. In Chapter 28, the ALRC recommends that the Australian Government initiate a comprehensive inquiry into *all* issues concerning offenders with a mental illness or intellectual disability in the federal criminal justice system. In addition, it recommends that the Australian Government work with state and territory governments to improve the provision of services to federal offenders with a mental illness. Other recommendations in Chapter 28 are aimed at reforming existing laws relating to these offenders.

Chapter 29 discusses the concerns that arise when sentencing a number of other categories of offenders, namely: women offenders; offenders with family and dependants; Aboriginal or Torres Strait Islander offenders; offenders from linguistically and culturally diverse backgrounds; offenders with a drug addiction; and offenders with problem gambling. The chapter examines the sentencing factors, sentencing options and rehabilitation programs available to offenders who belong to one or more of these categories. The ALRC continues to endorse the recommendations made in its 1986 report, *Recognition of Aboriginal Customary Laws*, and in the 1991 report of the *Royal Commission into Aboriginal Deaths in Custody*, in so far as they relate to the sentencing of Aboriginal or Torres Strait Islander offenders. The ALRC also recommends that federal sentencing legislation facilitate the access of federal offenders to state or territory drug courts in appropriate circumstances.

Corporations can also commit federal offences. In Chapter 30, the ALRC examines some of the difficulties that arise when sentencing corporations for federal offences. One such difficulty is that a corporation cannot be imprisoned. The ALRC recommends that a number of new sentencing options be introduced for corporations that commit federal offences. These include orders disqualifying a corporation from undertaking certain activities; orders requiring a corporation to undertake activities for the benefit of the community; and orders requiring a corporation to publicise its offending conduct. In addition, the ALRC recommends that federal sentencing legislation provide examples of sentencing factors to be considered when sentencing a corporation, and that a court sentencing a corporation for a federal offence be given the power to order that any officer of the corporation attend court at any stage of the sentencing proceedings.



# List of Recommendations

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## Part A Introduction

### 2. A Federal Sentencing Act

- 2-1 The Australian Parliament should enact a separate federal sentencing Act that incorporates those provisions of the *Crimes Act 1914* (Cth) that deal with the sentencing, administration and release of federal offenders. Provisions currently located in Parts I, IA, IB, III and VIIC of the *Crimes Act*, and in other federal legislation, that are relevant to the sentencing, administration and release of federal offenders should be consolidated in the new Act.
- 2-2 Federal sentencing legislation should be redrafted to make its structure clearer and more logical, and the language and numbering simpler and internally consistent. The order of provisions should reflect the chronology of sentencing, administration and release. Principles of general application should precede specific provisions, and provisions relating to each sentencing option should be grouped together.
- 2-3 Federal sentencing terminology should, where practicable, be consistent with terminology commonly used in state and territory sentencing legislation. In particular, the term ‘recognizance release order’ should be replaced with terminology that reflects its nature as a conditional suspended sentence.
- 2-4 Federal sentencing legislation should include an objects clause that states the major objectives of the legislation. The objects should include the following non-exhaustive matters:
- (a) to preserve the authority of the law and promote respect for the law;
  - (b) to promote a just and safe society;
  - (c) to promote public understanding of the laws and procedures for the sentencing, administration and release of federal offenders;
  - (d) to have within the one Act all general provisions dealing with the sentencing, administration and release of federal offenders, and to indicate when state and territory laws apply to the sentencing, administration and release of federal offenders;

- (e) to provide the courts with the purposes and principles of sentencing federal offenders;
- (f) to promote flexibility in the sentencing, administration and release of federal offenders;
- (g) to provide fair and efficient procedures for the sentencing, administration and release of federal offenders;
- (h) to promote greater consistency in the sentencing of federal offenders, regardless of where in Australia they are sentenced;
- (i) to recognise the interests of victims of federal offences; and
- (j) to promote the proper administration of the federal criminal justice system when sentencing federal offenders.

### **3. Equality in the Treatment of Federal Offenders**

3-1 The Australian Government should seek to ensure broad inter-jurisdictional equality and adherence to federal minimum standards in relation to the sentencing, administration and release of federal offenders in different states and territories. In particular:

- (a) The same legislative purposes, principles and factors should apply in sentencing adult federal offenders in every state and territory. Inter-jurisdictional consistency in determining the sentence of federal offenders should be encouraged and supported.
- (b) The Office for the Management of Federal Offenders (OMFO) should work with the states and territories to ensure that each jurisdiction provides adequate facilities to support a minimum range of sentencing options in relation to federal offenders including fines, imprisonment and community based orders. The OMFO should also work with the states and territories to achieve greater inter-jurisdictional consistency in sentencing options available under state and territory law.
- (c) The OMFO should work with the states and territories in relation to the administration of the sentences of federal offenders to: (i) promote the fulfilment of the *Standard Guidelines for Corrections in Australia*; and (ii) ensure compliance with the *Standards for Juvenile Custodial Facilities*.
- (d) The federal parole authority should make decisions in relation to the release of federal offenders on parole to ensure broad inter-jurisdictional equality in decision making. The authority should have



regard to the federal legislative purposes of parole and factors relevant to the grant of parole recommended in this Report.

## **Part B Determining the Sentence**

### **4. Purposes of Sentencing**

- 4–1 Federal sentencing legislation should provide that a court can impose a sentence on a federal offender only for one or more of the following purposes:
- (a) to ensure that the offender is punished justly for the offence;
  - (b) to deter the offender and others from committing the same or similar offences;
  - (c) to promote the rehabilitation of the offender;
  - (d) to protect the community by limiting the capacity of the offender to re-offend;
  - (e) to denounce the conduct of the offender; and
  - (f) to promote the restoration of relations between the community, the offender and the victim.

### **5. Principles of Sentencing**

- 5–1 Federal sentencing legislation should state the fundamental principles that must be applied in sentencing a federal offender in order to achieve any of the stated purposes of sentencing. The principles should be as follows:
- (a) a sentence should be proportionate to the objective seriousness of the offence, which includes the culpability of the offender (proportionality);
  - (b) a sentence should be no more severe than is necessary to achieve the purpose or purposes of the sentence (parsimony);
  - (c) where an offender is being sentenced for more than one offence, or is already serving a sentence and is being sentenced for a further offence, the aggregate of the sentences should be just and appropriate in all the circumstances (totality);

- (d) where possible, a sentence should be similar to sentences imposed on like offenders for like offences (consistency and parity); and
- (e) a sentence should take into consideration all circumstances of the individual case, in so far as they are relevant and known to the court (individualised justice).

## 6. Sentencing Factors

- 6–1 Federal sentencing legislation should state that a court, when sentencing a federal offender, must consider any factor that is relevant to a purpose or principle of sentencing, where that factor is known to the court. The legislation should group these factors into categories and provide examples of sentencing factors under each category. These categories and factors include but are not limited to the following, to the extent that they are applicable:

### *I. Factors relating to the offence*

*Examples:* the nature, seriousness and circumstances of the offence; the maximum penalty for the offence; whether the commission of the offence involved a breach of trust.

### *II. Factors relating to the conduct of the offender in connection with the offence*

*Examples:* the offender's culpability and degree of responsibility for the offence; the offender's degree of premeditation and degree of participation in the offence.

### *III. Factors relating to the conduct of the offender other than the specific conduct constituting the charged offence*

*Examples:* the degree to which the offender has shown contrition for the offence, for example, by taking action to make reparation for any injury, loss or damage resulting from the offence; the offender's antecedent criminal history; the offender's antecedent history in relation to civil penalties; whether the offence forms part of a series of proved or admitted criminal offences of the same or a similar character; where an offender has pleaded guilty to charges and has acknowledged that they are representative of criminality comprising uncharged conduct as well as the charged offences—the course of conduct comprising that criminality; other offences committed by the offender of a similar or lesser seriousness to the principal offence to which the offender has admitted guilt and which are required or permitted to be taken into account.

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*IV. Factors relating to the background and circumstances of the offender*

*Examples:* the offender's character, cultural background, history and circumstances, age, financial circumstances, physical condition, mental illness or condition, intellectual disability; the fact that the offender is receiving treatment or is undertaking a behaviour intervention program to address any physical condition, mental illness or condition, or intellectual disability that may have contributed to the commission of the offence; other factors relevant to special categories of offenders (see Recommendations 28–5; 30–2).

*V. Factors relating to the impact of the offence*

*Examples:* the impact of the offence on any victim; the age of any victim of the offence; the vulnerability of any victim of the offence; the victim's relationship with the offender; any injury, loss or damage resulting from the offence; the impact of the offence on the environment; the impact of the offence on financial markets.

*VI. Factors relating to the impact of a finding of guilt, a conviction or sentence on the offender or the offender's family or dependants*

*Examples:* the likely civil and administrative consequences of a finding of guilt or a conviction; the likely impact of a sentence on the offender, including that imprisonment may have an unusually severe impact on the offender; the likely impact of a sentence on any of the offender's family or dependants.

*VII. Factors relating to the promotion of sentencing purposes in the future*

*Examples:* the prospect of rehabilitating the offender; the prospect of restoring relations between the offender, the community and the victim; the prospect of deterring the offender and others from committing the same or similar offences.

*VIII. Factors relating to any detriment sanctioned by law to which the offender has been or will be subject as a result of the commission of the offence*

*Examples:* any time spent in pre-sentence custody or detention in relation to the offence where a sentence other than a term of imprisonment is imposed; any time spent in a rehabilitation program or other form of quasi-custody where the offender has been subjected to restrictions, unless full credit has been given for pre-sentence custody or detention; (subject to Recommendation 6–6) the nature and extent of any confiscation of property that is to be imposed as a result of the commission of the offence; the

imposition of any civil penalty as a result of conduct that is substantially the same as conduct constituting the offence.

- 6-2 Federal sentencing legislation should provide that the procedures by which another offence may be taken into account in sentencing a federal offender are available only where the conduct that constitutes the other offence is of a similar or lesser seriousness to the principal offence.
- 6-3 The Commonwealth Director of Public Prosecutions should amend its prosecution policy to provide guidance about the circumstances in which it is appropriate for the prosecution to consent to other offences, in respect of which a federal offender has admitted guilt, being taken into account in sentencing. The factors to be considered should include:
- (a) the degree of similarity or any connection between the principal offence and the other offences;
  - (b) the number, seriousness and nature of the other offences;
  - (c) whether the other offences were the subject of investigation or a charge; and
  - (d) whether the offender was legally represented.
- 6-4 Subject to Recommendations 6-5 and 6-6, federal sentencing legislation should not distinguish between sentencing factors that aggravate the sentence and those that mitigate the sentence.
- 6-5 Federal sentencing legislation should provide that the following non-exhaustive matters are not to aggravate the sentence of a federal offender:
- (a) the fact that the offender has not pleaded guilty to the offence;
  - (b) the fact alone that the offender has an antecedent criminal history;
  - (c) the fact that the offender declined to take part in any restorative justice initiative or program; and
  - (d) the fact that the offender has not cooperated with the authorities.
- 6-6 Federal sentencing legislation should provide that any confiscation of property order or other court order that merely neutralises a benefit that has been obtained by the commission of the federal offence for which the offender is being sentenced should not mitigate the sentence.
- 6-7 Federal sentencing legislation should specify factors that the court should not consider in sentencing a federal offender. These factors should include:

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- (a) the possibility that the period of time spent in custody may be affected by executive action of any kind;
  - (b) the offender's election not to give evidence on oath or by affirmation;
  - (c) the legislative intent underpinning a law that has been enacted but has not yet commenced;
  - (d) matters that would establish an offence separate from the offence for which the person has been convicted (other than matters that might constitute an incidental separate offence);
  - (e) matters that would establish a more serious offence than the offence for which the person has been convicted; and
  - (f) a circumstance of aggravation that has not been proved at trial but that renders the person being sentenced liable to a greater maximum penalty.
- 6–8 Federal sentencing legislation should separately specify that when sentencing a federal offender a court must consider the following factors that pertain to the administration of the federal criminal justice system, where relevant and known to the court:
- (a) the fact that the offender has pleaded guilty and the circumstances in which the plea of guilty was made (see Recommendation 11–2); and
  - (b) the degree to which the offender has cooperated or promised to cooperate with law enforcement authorities regarding the prevention, detection and investigation of, or proceedings relating to, the offence or any other offence. (See Recommendation 11–3).
- 7. Sentencing Options**
- 7–1 Federal sentencing legislation should enable a court, when imposing a fine on a federal offender, to order that the fine be paid:
- (a) by a specified future date that the court considers appropriate in all the circumstances; or
  - (b) by instalments over a specified period of time that the court considers appropriate in all the circumstances.
- 7–2 Federal sentencing legislation should enable a federal offender to apply to the court that imposed a fine, whether differently constituted or not, for an

order varying the time or manner of payment of a fine at any time within the period allowed for payment of the fine.

- 7-3 Federal sentencing legislation should repeal s 16C of the *Crimes Act 1914* (Cth). When imposing a fine on a federal offender, the court must have regard to the purposes, principles and factors relevant to sentencing, and to the factors relevant to the administration of the criminal justice system.
- 7-4 Federal sentencing legislation should repeal s 19B(1)(b) of the *Crimes Act*. When dismissing a charge or discharging a federal offender without conviction, the court must have regard to the purposes, principles and factors relevant to sentencing, and to the factors relevant to the administration of the criminal justice system.
- 7-5 Federal sentencing legislation should expressly abolish the power of a court sentencing a federal offender to order that the offender be released on a common law bond.
- 7-6 Federal sentencing legislation should provide that a court may make a deferred sentencing order in relation to a federal offender. In particular, the legislation should:
  - (a) abolish the power of a court at common law to impose a ‘Griffiths bond’ when making orders in relation to a federal offender; and
  - (b) authorise a court to:
    - (i) defer sentencing a federal offender for a period of up to 12 months; and
    - (ii) release the offender in accordance with the applicable bail legislation for the purpose of assessing the offender’s prospects of rehabilitation or for any other purpose the court thinks fit.
- 7-7 Federal sentencing legislation should repeal the provision requiring the court to make a ‘recognizance release order’ for sentences of imprisonment between six months and three years, and should grant the court a discretion to suspend a federal offender’s sentence of imprisonment either wholly or partially, regardless of the length of the sentence.
- 7-8 Sentences of imprisonment of less than six months should continue to be available in the sentencing of federal offenders.
- 7-9 The Office for the Management of Federal Offenders (OMFO) should provide advice to the Australian Government about the appropriateness of using combination sentences in which two or more sentencing options are imposed on a federal offender for a single offence.

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- 7–10 Federal sentencing legislation should grant a court a broad discretion to determine the conditions that may be imposed on a federal offender when it discharges an offender without recording a conviction, releases an offender after recording a conviction, or wholly or partially suspends a sentence of imprisonment. In addition to the mandatory condition that the offender be of good behaviour for a specified period of time, a court should be able to impose any of the following conditions:
- (a) that the offender undertake a rehabilitation program;
  - (b) that the offender undergo specified medical or psychiatric treatment; or
  - (c) that the offender be subject to the supervision of a probation officer and obey all reasonable directions of that officer.
- 7–11 Federal sentencing legislation should prohibit a court from making any of the following conditions when it discharges an offender without recording a conviction, releases an offender after recording a conviction, or wholly or partially suspends a sentence of imprisonment:
- (a) a condition that is an independent sentencing option;
  - (b) a condition that the offender pay a monetary penalty; and
  - (c) a condition that the offender make restitution, pay compensation or comply with any other ancillary order.
- 7–12 Federal sentencing legislation should repeal the provisions that allow a court to require a federal offender to give security by way of recognizance when he or she is discharged without conviction, released after conviction or sentenced to a wholly or partially suspended sentence of imprisonment.
- 7–13 Federal sentencing legislation and regulations should specify exhaustively which state or territory sentencing options may be picked up and applied in sentencing a federal offender.
- 7–14 The OMFO should monitor the effectiveness and suitability of state and territory sentencing options for federal offenders and should provide advice to the Australian Government regarding the state and territory sentencing options that should be made available for federal offenders.
- 7–15 In monitoring state and territory sentencing options in accordance with Recommendation 17–14, the OMFO should:
- (a) review the maximum number of hours of community service and the maximum time within which such service must be completed in each state and territory; and

- (b) advise the Australian Government about appropriate national limits in relation to community based orders and other sentencing options available under state and territory law.
- 7–16 Federal sentencing legislation should state that the following sentencing options are prohibited in relation to federal offenders:
  - (a) capital punishment;
  - (b) corporal punishment;
  - (c) imprisonment with hard labour; and
  - (d) any other form of cruel, inhuman or degrading punishment.
- 7–17 The Australian Government should collaborate with state and territory governments to facilitate access by federal offenders to state or territory restorative justice initiatives in appropriate circumstances. Where a court refers a federal offender to a restorative justice initiative, the outcome of the process must be reported back to the court and the court must finalise the matter after taking into consideration the outcome of the process.

## **8. Ancillary Orders**

- 8–1 Federal sentencing legislation should replace the term ‘reparation’ with the terms ‘restitution’ and ‘compensation’, and define them appropriately.
- 8–2 Federal sentencing legislation should be amended to clarify that a court may order a federal offender to make reparation for any loss suffered by reason of the offence, regardless of whether the loss is economic or non-economic.
- 8–3 Federal sentencing legislation should be amended to clarify that nothing in that legislation affects the right of any person who is aggrieved by conduct punishable as a federal offence to institute civil proceedings in respect of that conduct, but the person shall not be compensated more than once for the same loss.

## **Part C Particular Issues in Sentencing**

### **9. Determining the Non-Parole Period**

- 9–1 Federal sentencing legislation should provide that, in fixing a non-parole period or in declining to fix a non-parole period, the court must have regard to the purposes, principles and factors relevant to sentencing, and to the factors relevant to the administration of the criminal justice system. (See Recommendations 4–1; 5–1; 6–1; 6–8).



- 9–2 Federal sentencing legislation should provide that, when sentencing an offender to a federal sentence of imprisonment that exceeds (or federal sentences of imprisonment that in aggregate exceed) 12 months, a court must set a single non-parole period unless the court:
- (a) has made an order to suspend the sentence or sentences; or
  - (b) is satisfied that it is not appropriate to set a non-parole period and expressly declines to do so.
- 9–3 Federal sentencing legislation should preclude a court from setting a non-parole period if the federal sentence of imprisonment is, or the federal sentences in aggregate are, less than 12 months.
- 9–4 In order to strike an appropriate balance between promoting consistency in sentencing and allowing individualisation of sentencing in particular cases, federal sentencing legislation should establish as a reference point that the non-parole period of a federal sentence of imprisonment should be two-thirds of the head sentence. However, a court should retain its discretion to impose a different non-parole period whenever it is warranted in the circumstances, taking into account the purposes, principles and factors relevant to sentencing, and the factors relevant to the administration of the criminal justice system.

## **10. Commencement and Pre-sentence Custody**

- 10–1 Federal sentencing legislation should provide that, where a court sentences an offender to a term of imprisonment in relation to a federal offence, the sentence commences on the day the sentence is imposed, subject to any court order directed to the consecutive service of sentences.
- 10–2 Federal sentencing legislation should provide that, where a court sentences an offender to a term of imprisonment in relation to a federal offence, the court must give credit for time spent in pre-sentence custody or detention in connection with the offence by declaring the time as time already served under the term of imprisonment.
- 10–3 In calculating the credit to be granted to a federal offender for pre-sentence custody or detention under Recommendation 10–2:
- (a) one day's credit must be given for each full day of pre-sentence custody or detention, subject to the court's discretion to give additional credit in special circumstances;
  - (b) credit must be given whether or not the custody or detention was continuous; and
  - (c) credit must be given irrespective of the fact that the custody or detention may not relate exclusively to the offence for which the

offender is being sentenced, provided that credit is not given more than once for the same period of custody or detention.

## **11. Discounts and Remissions**

- 11-1 Federal sentencing legislation should provide that, where a court discounts the sentence of a federal offender for pleading guilty or for past or promised future cooperation, the court must specify the discount given, whether by way of reducing the quantum of the head sentence or the non-parole period or by imposing a less severe sentencing option. The amount of the discount, if any, should be left to the court's discretion.
- 11-2 Federal sentencing legislation should provide that in determining whether to discount the sentence of a federal offender for pleading guilty, and the extent of any discount, the court must consider the following matters:
- (a) the degree to which the plea of guilty facilitates the administration of the federal criminal justice system; and
  - (b) the objective circumstances in which the plea of guilty was made, including whether the offender pleaded guilty at the first reasonable opportunity to do so, and whether the offender had legal representation.
- 11-3 Federal sentencing legislation should provide that in determining whether to discount the sentence of a federal offender for past or promised cooperation, and the extent of any discount, the court must consider the following matters:
- (a) the significance and usefulness of the offender's assistance to law enforcement authorities;
  - (b) the truthfulness, completeness and reliability of any information or evidence provided by the offender;
  - (c) the nature and extent of the offender's assistance or promised assistance;
  - (d) the timeliness of the assistance or the undertaking to assist;
  - (e) any benefits the offender has gained or may gain because of the assistance or the undertaking to assist; and
  - (f) any detriment suffered by the offender or the offender's family or any danger or risk of detriment to the offender or the offender's family because of the assistance or undertaking to assist.
- 11-4 Federal sentencing legislation should provide that, in sentencing a federal offender who undertakes to cooperate with law enforcement authorities in the future:
- (a) in addition to imposing a reduced head sentence or non-parole period, a court may impose a less severe sentencing option, in which case it

must state what sentencing option it would have imposed but for the undertaking to cooperate; and

- (b) the undertaking must provide details of the promised cooperation and must be in writing or reduced to writing and signed or otherwise acknowledged by the offender.

- 11–5 Federal sentencing legislation should provide that, in sentencing an offender who has cooperated or has undertaken to cooperate with law enforcement authorities, the court has the power, on application of any party to the proceedings or on its own motion: (a) to close the court; and (b) to make orders to protect the safety of any person or to protect information or evidence in relation to the cooperation or the undertaking to cooperate.

## **12. Sentencing for Multiple Offences**

- 12–1 Federal sentencing legislation should expressly empower a court, when sentencing a federal offender for more than one offence, to order the sentences to be served concurrently, consecutively or partly consecutively.
- 12–2 Federal sentencing legislation should provide that, when a court sentences a federal offender for more than one offence, there is a presumption that the sentences are to be served concurrently.
- 12–3 Section 4K of the *Crimes Act 1914* (Cth), which allows charges for a number of federal offences to be joined in the same information, complaint or summons, and permits aggregate sentencing of summary matters in certain circumstances, should be amended as follows:
- (a) the scope of the provision should be extended beyond summary matters to indictable matters; and
  - (b) the provision should be extended to allow the joining of charges against more than one provision of Commonwealth law.
- 12–4 The Commonwealth Director of Public Prosecutions should develop guidelines about when it is appropriate for a prosecutor to seek an aggregate sentence for multiple summary or indictable offences.
- 12–5 The proposed bench book on federal sentencing law should include guidance to judicial officers about when it is appropriate for the court to impose an aggregate sentence for multiple federal offences, and the provision of reasons when it does so, having regard to the need for transparency in the event of an appeal and in the recording of sentencing statistics (see Recommendation 19–5).

## **Part D Procedural and Evidential Issues in Sentencing**

### **13. The Sentencing Hearing**

- 13–1 Federal sentencing legislation should provide that a federal offender must be present during sentencing proceedings—whether in person or by videolink or a similar medium—where the court intends to impose a sentence that: (a) deprives the offender of his or her liberty or places the offender in jeopardy of being deprived of his or her liberty; or (b) requires the offender to consent to conditions or give an undertaking.

Federal sentencing legislation may specify limited exceptions to this rule, such as: (i) where the proceedings involve the correction of slip errors; or (ii) where the proceedings involve the correction of substantive sentencing errors and the offender has been given an opportunity to be present, has consented to the correction being made in his or her absence and the court has given its permission.

- 13–2 Federal sentencing legislation should provide that, where a federal offender is not legally represented in a sentencing proceeding, the court should generally adjourn the proceeding to allow the offender a reasonable opportunity to obtain representation. However, the court may proceed without adjournment and may impose a sentence despite the absence of representation where:

- (a) the offender has refused or failed to exercise the right to legal representation in circumstances where the offender fully understands the right and the consequences of not exercising it; or
- (b) the court does not intend to impose, and does not impose, a sentence that would deprive the offender of his or her liberty or place the offender in jeopardy of being deprived of his or her liberty; or
- (c) the court is of the view that a fair sentencing hearing can be conducted without the offender being legally represented.

- 13–3 Federal sentencing legislation should provide that, when sentencing a federal offender who is present at the sentencing proceedings, the court must itself give to the offender:

- (a) an oral explanation of the sentence at the time of sentencing; and
- (b) a written record of the explanation if the offender requests it or the court is of the opinion that it is desirable in all the circumstances to provide the offender with a written explanation.

When a federal offender is not present at the sentencing proceedings, the court may direct that an appropriate person explain the sentence to the offender. The court should also consider making an order to satisfy itself that

the explanation has been given, such as an order requiring an affidavit of compliance.

- 13–4 Federal sentencing legislation should provide that, in giving an explanation of sentence, the court or the person directed by the court to give the explanation must address the following matters in language likely to be readily understood by the offender, in so far as they are relevant:
- (a) how the sentence will operate in practice, the consequences of the sentencing order, and whether the order may be varied, revoked or appealed;
  - (b) any conditions attached to the sentencing order and the consequences of breach; and
  - (c) where a sentence of imprisonment has been imposed:
    - (i) the date when the sentence starts and ends;
    - (ii) any time declared to have been served as credit for pre-sentence custody or detention;
    - (iii) whether the sentence is to be served concurrently, consecutively, or partially consecutively to any other sentence of imprisonment;
    - (iv) if a non-parole period is set—the non-parole period, when it starts and ends, whether release on parole will be subject to a decision of the federal parole authority, the fact that any release on parole will be subject to conditions, and the fact that the parole order may be amended or revoked;
    - (v) if a partly suspended sentence is imposed—when the suspended part of the sentence starts and ends; and
    - (vi) the earliest date the offender will become entitled to be released from custody or will be eligible to be released on parole.
- 13–5 Federal sentencing legislation should provide that, as soon as practicable after a court makes an order sentencing a federal offender to a term of imprisonment, the court must provide the offender with a copy of the order. The order must set out the relevant matters listed in Recommendation 13–4(c).
- 13–6 Federal sentencing legislation should restate the common law rules in relation to the standard of proof in sentencing. In particular, where a fact is to be proved in sentencing a federal offender:

- (a) a court is not to take into account a fact that is adverse to the interests of the offender unless it is satisfied that the fact has been proved beyond reasonable doubt; and
- (b) a court is not to take into account a fact that is favourable to the interests of the offender unless it is satisfied that the fact has been proved on the balance of probabilities.

13–7 Federal sentencing legislation should provide that in deciding matters in connection with the making of an ancillary order for restitution or compensation, the standard of proof is the balance of probabilities.

#### **14. Victim Impact Statements and Pre-sentence Reports**

14–1 Federal sentencing legislation should make comprehensive provision for the use of victim impact statements in the sentencing of federal offenders, including corporations. Those provisions should, among other things:

- (a) define ‘victim’ to include the primary victim and, where the primary victim has died, the victim’s immediate family members and other defined classes of individuals;
- (b) allow a victim impact statement to be made in relation to summary and indictable offences;
- (c) allow a victim (whether an individual or corporation) to present particulars of any injury, loss or damage suffered as a result of the commission of a federal offence, including particulars of economic loss;
- (d) preclude a victim from expressing an opinion about the sentence that should be imposed on a federal offender;
- (e) allow any facts stated in a victim impact statement to be verified where they are likely to be material to the determination of sentence but not by way of cross examination of the victim unless the court gives leave to do so;
- (f) preclude a court from drawing any inference about the harm suffered by a victim from the fact that a victim impact statement has not been made; and
- (g) provide that a victim impact statement may be given orally or in writing, but where it is in writing: (i) it must be signed or otherwise acknowledged by the victim; and (ii) a copy of the statement must be provided to the prosecution and to the offender or the offender’s legal

representative a reasonable time before the sentencing hearing, on such terms as the court thinks fit.

Where states and territories have laws about the use of victim impact statements that comply with the federal minimum standards set out above, those laws shall be applied in the sentencing of federal offenders to the exclusion of the federal provisions.

14–2 Federal sentencing legislation should make comprehensive provision for the use of pre-sentence reports in the sentencing of federal offenders, including corporations. Those provisions should, among other things:

- (a) authorise a court to request a pre-sentence report prior to the imposition of any sentence, where the court considers it appropriate to do so;
- (b) authorise a court to specify any matter it wishes to have addressed in the pre-sentence report;
- (c) require the pre-sentence report to be prepared by a suitably qualified person within a reasonable time;
- (d) preclude the author of the pre-sentence report from expressing an opinion about the offender's propensity to commit further offences, unless the author is suitably qualified to give such an opinion;
- (e) allow the content of the pre-sentence report to be contested, for example by cross-examination of any person other than the offender; and
- (f) provide that a pre-sentence report may be given orally or in writing, but where it is in writing, a copy of the report should, so far as practicable, be provided to the prosecution and to the offender or the offender's legal representative a reasonable time before the sentencing hearing, on such terms as the court thinks fit.

Where states and territories have laws about the use of pre-sentence reports that comply with the federal minimum standards set out above, those laws shall be applied in the sentencing of federal offenders to the exclusion of the federal provisions.

## **15. A Sentence Indication Scheme**

15–1 Federal sentencing legislation should make provision for a defendant in a federal criminal matter to obtain an indication of sentence prior to final determination of the matter. The procedures governing a sentence indication

should be the subject of nationally consistent Rules of Court or Practice Directions. The essential elements of such a scheme should include the following:

- (a) an indication should be given only at the defendant's request, with judicial discretion to refuse an indication;
- (b) the timing of a sentence indication should be flexible, and Rules of Court or Practice Directions should specify the earliest point at which an indication can be sought;
- (c) the defendant should be entitled to one sentence indication only;
- (d) the court should issue standard advice before any indication is given, to the effect that the indication does not derogate from the defendant's right to require the prosecution to prove its case beyond reasonable doubt;
- (e) the indication should occur in the presence of the defendant and in open court, but if the indicated sentence is not accepted those proceedings must not be reported until the conclusion of the matter;
- (f) the proceedings of the sentence indication hearing must be transcribed or otherwise placed on the court record;
- (g) the indication must be based on the same purposes, principles and factors relevant to sentencing and the same factors relevant to the administration of the criminal justice system that would apply to the passing of sentence;
- (h) the indication should be limited to the choice of sentencing option and a general indication of severity or sentencing range;
- (i) the indication should be given only if there is adequate information before the court, and should not be given if the choice of sentencing option is likely to be materially affected by the contents of a pre-sentence report;
- (j) in giving the indication, the court must take into account but must not specify the quantum of any discount that would be given to the defendant for pleading guilty at that stage of the proceedings;
- (k) the defendant should be given a reasonable opportunity to consult with his or her legal representative before deciding whether to enter a guilty plea on the basis of the indicative sentence;



- (l) where the defendant accepts the indicative sentence, the judicial officer who gave the indication should be the one who passes sentence;
- (m) where the defendant rejects the indicative sentence, the matter should be set for hearing or trial before another judicial officer, who should have no regard to the indicative sentence in passing any subsequent sentence; and
- (n) the sentence indication should not be appealable but the rights of the prosecution and the defence to appeal against sentence, if one is imposed, should be retained.

## **Part E Issues Arising after Sentencing**

### **16. Reconsideration of Sentence**

- 16-1 Federal sentencing legislation should empower a court that imposes a federal sentence, whether differently constituted or not, to reconsider the sentence where:
  - (a) an offender fails to comply with a sentence or the conditions imposed by a sentencing order (see Recommendations 17-1 and 17-2); or
  - (b) the court reduced the sentence because the offender undertook to cooperate with the authorities and the offender failed to comply with that undertaking within a reasonable time, regardless of whether the offender had a reasonable excuse for non-compliance. Such proceedings must be initiated by the Commonwealth Director of Public Prosecutions within a reasonable time after non-compliance and only if the Director is satisfied that the interests of justice will be served by re-sentencing.
- 16-2 Federal sentencing legislation should expressly set out a court's power to correct 'slip' errors that may occur in sentencing a federal offender. The power should be exercisable either by the court on its own motion or on the application of any party to the proceedings or the Attorney-General of Australia. The court must ensure that the parties to the proceedings and the relevant authorities are notified of the correction, but the correction need not be carried out in open court unless the court otherwise directs.
- 16-3 Federal sentencing legislation should expressly empower a court, whether differently constituted or not, to reopen a sentencing hearing to allow it to vary, amend or rescind a sentence where:

- (a) the court has imposed a sentence or a sentence-related order contrary to law;
- (b) the court has failed to impose a sentence or a sentence-related order that is required to be made by law; or
- (c) the sentence included an order that was based on or contained an error of fact.

Any variation, amendment or rescission of sentence under this provision should occur in open court unless the court, in its discretion, closes the court where it considers it necessary to do so. The parties to the proceedings must be given an opportunity to be present and to be heard, subject to Recommendation 13–1. This provision should not affect a party’s right to appeal against sentence, nor a court’s discretion to decline to vary, amend or rescind a sentence where it considers the matter may be dealt with more appropriately on appeal.

## **17. Breach of Sentencing Orders**

- 17–1 Federal sentencing legislation should empower a court to deal with any breach of a sentencing order, regardless of whether the offender has a reasonable cause or excuse for the breach.
- 17–2 Federal sentencing legislation should provide that, in addition to its existing powers, a court dealing with a breach of a sentencing order may vary the order if satisfied of the breach. In particular, the court should be given the power to order that a federal offender who has breached a wholly or partially suspended sentence of imprisonment be imprisoned for a lesser period than that originally imposed.
- 17–3 Federal sentencing legislation should be amended to ensure that any order imposing a monetary penalty for breach of a wholly or partially suspended sentence is enforceable.
- 17–4 The Office for the Management of Federal Offenders, in consultation with the Commonwealth Director of Public Prosecutions and state and territory corrective services authorities, should develop a protocol outlining the procedures to be followed by state and territory correctional authorities and prosecutors when a federal offender breaches a sentencing order.
- 17–5 Federal sentencing legislation should provide that, where a fine has been imposed on a federal offender, the offender must not be imprisoned for failure to pay the fine if a fine recovery mechanism is available and likely to be effective, or if a less severe penalty is available and appropriate in the circumstances.

- 17-6 Federal sentencing legislation should provide that, where a fine has been imposed on a federal offender, the offender must not be imprisoned for failure to pay the fine until such time as he or she has been given a reasonable opportunity to pay.
- 17-7 Federal sentencing legislation should provide that the maximum period of imprisonment to be served by a federal offender for failing to pay a fine is 12 months, to the exclusion of any state or territory laws on that subject that are picked up and applied to federal offenders.

## **Part F Promoting Better Sentencing**

### **18. Judicial Specialisation**

- 18-1 State and territory courts should promote specialisation in the hearing and determination of federal criminal matters by whatever means is most appropriate for those courts, where this is practicable having regard to the nature and volume of their caseloads.
- 18-2 The Australian Parliament should expand the original jurisdiction of the Federal Court of Australia to hear and determine proceedings in relation to nominated federal offences whose subject matter is closely allied to the existing civil jurisdiction of the Federal Court, in areas such as taxation, trade practices and corporations law.

### **19. Other Measures to Promote Better Sentencing**

- 19-1 Federal sentencing legislation should require a court to state its reasons for decision when sentencing a federal offender for an indictable or summary offence. The reasons may be given in writing or read into the records of the court but in either case should be adequate to explain the choice of sentencing option and the severity of the sentence imposed.
- 19-2 The Commonwealth Director of Public Prosecutions (CDPP) should continue its practice of providing courts with detailed information with respect to the sentencing of federal offenders, including statistical and other information about comparable cases.
- 19-3 The National Judicial College of Australia (NJCA), in consultation with courts and other judicial education bodies, should provide regular training to judicial officers in relation to the sentencing of federal offenders.
- 19-4 Australian governments and courts should develop and support opportunities for judicial officers exercising federal criminal jurisdiction to serve on courts in other jurisdictions to promote greater consistency in sentencing of federal offenders.

- 19–5 The NJCA, in consultation with courts and judicial education bodies, should develop a publicly accessible bench book providing general guidance for judicial officers on federal sentencing law. The bench book should indicate how federal sentencing law interacts with relevant state and territory law in each jurisdiction, and should include commentary on special categories of federal offenders.
- 19–6 The CDPP and other Commonwealth prosecuting authorities should develop and enhance their programs to train prosecutors in relation to the federal criminal justice system, including the sentencing of federal offenders and the role of prosecutors in sentencing. This training should indicate how federal sentencing legislation interacts with relevant state or territory law in each jurisdiction.
- 19–7 Providers of continuing legal education and practical legal training in each state and territory should offer education and training to legal practitioners in relation to the federal criminal justice system. These programs should indicate how federal sentencing legislation interacts with relevant state or territory law in each jurisdiction.
- 19–8 State and territory courts should provide training to court services officers in relation to issues relevant to special categories of federal offenders.
- 19–9 University law schools in Australia should place greater emphasis on the federal criminal justice system and federal sentencing law in their undergraduate and postgraduate programs.

## **20. Consistency and the Appellate Process**

- 20–1 The new federal sentencing Act should provide that, three years after it comes into force, a review is to be conducted of sentencing in federal criminal matters, to determine whether there is significant unjustified disparity in the sentencing of federal offenders across Australia. If such disparity exists, the review should consider whether general appellate jurisdiction should be conferred on the Federal Court of Australia in federal criminal matters.
- 20–2 The Australian Parliament should confer exclusive appellate jurisdiction on the Federal Court of Australia in relation to those criminal matters heard at first instance by the Federal Court of Australia under the expanded original jurisdiction conferred in accordance with Recommendation 18–2.

## **21. Other Measures to Promote Consistent Sentencing**

- 21–1 In order to promote consistency in the sentencing of federal offenders, the Australian Government should continue to support the development of a comprehensive national database on the sentences imposed on all federal

offenders. The database should include information on the type and quantum of sentences imposed and the characteristics of the offence and the offender that have been taken into account in imposing the sentence. The data should be made widely available for use by judicial officers, prosecutors, defence lawyers, researchers and members of the public.

- 21–2 In developing a comprehensive database on the sentences imposed on federal offenders, the National Judicial College of Australia should liaise with:
- (a) the Australian Bureau of Statistics and the Australian Institute of Criminology in relation to the categories of information to be recorded in the database;
  - (b) the Commonwealth Director of Public Prosecutions and other prosecuting authorities with a view to collecting comprehensive data in federal criminal matters; and
  - (c) federal, state and territory courts in relation to the collection of complementary data in federal criminal matters.
- 21–3 The Australian Government should review federal criminal offence provisions and seek appropriate amendments to ensure that no mandatory minimum term of imprisonment is prescribed for any federal offence.

## **Part G Administration and Release of Federal Offenders**

### **22. Administration of Federal Offenders**

- 22–1 The Australian Government should take a more active role in monitoring federal offenders in order to:
- (a) enhance policy development in relation to the federal criminal justice system;
  - (b) assist the states and territories to administer sentences imposed on federal offenders more effectively; and
  - (c) ensure that federal offenders are treated in conformity with Australia's international obligations and relevant standard minimum guidelines.
- 22–2 The Australian Government should negotiate with the states and territories to ensure that the relevant Australian Government minister is made a participating member of the Corrective Services Ministers' Conference and that the Australian Government becomes a participating member of the Corrective Services Administrators' Conference.

- 22–3 The Australian Government should establish an Office for the Management of Federal Offenders (OMFO) within the Attorney-General’s Department to monitor and report on all federal offenders, regardless of the sentence imposed. The OMFO should report to the responsible Minister.
- 22–4 The functions and powers of the OMFO should be negotiated with the states and territories, and should include the following:
- (a) maintaining an up-to-date case management database in relation to all federal offenders;
  - (b) providing secretariat or other support to the proposed federal parole authority, depending on the model adopted for establishing the authority;
  - (c) establishing and maintaining a victim notification register;
  - (d) liaising with the states and territories in relation to federal offenders, including special categories of offenders;
  - (e) participating as a full member of the Corrective Services Administrators’ Conference and in the activities of the Australasian Juvenile Justice Administrators and providing support for the relevant federal minister in relation to active participation in the Corrective Services Ministers’ Conference;
  - (f) monitoring progress towards compliance with the *Standard Guidelines for Corrections in Australia* and the *Standards for Juvenile Custodial Facilities* in relation to federal offenders, and liaising with the states and territories in relation to those standards;
  - (g) ensuring the treatment of federal offenders complies with Australia’s international obligations;
  - (h) providing advice to the states and territories in relation to the sentencing, administration and release of federal offenders, in particular in relation to joint offenders;
  - (i) providing advice to federal offenders about the administration of their individual sentences, including information about interstate and international transfer;
  - (j) providing advice to the Australian Government on the interstate and international transfer of federal offenders in individual cases;

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- (k) providing general policy advice to the Australian Government in relation to federal offenders and relevant aspects of the federal criminal justice system;
  - (l) providing advice to the Australian Government about funding, including priorities for special programs for federal offenders;
  - (m) providing advice to the Australian Government about state and territory compliance with federal minimum standards in relation to victim impact statements and pre-sentence reports;
  - (n) providing advice to the Australian Government in relation to state and territory sentencing options and pre-release schemes, including whether they should be picked up and applied in relation to federal offenders; and
  - (o) performing all of the above in relation to young federal offenders and federal offenders with a mental illness or intellectual disability.
- 22–5 The OMFO should develop memoranda of understanding with the states and territories to improve the sharing of information and the coordination and provision of corrective services in relation to federal offenders.
- 22–6 The OMFO should provide advice to the Australian Government on federal–state funding arrangements in relation to federal offenders. The OMFO should have the capacity to fund special programs with respect to federal offenders, as the need arises.
- 22–7 The OMFO should develop key performance indicators to monitor the administration and release of federal offenders. The OMFO should report publicly against these indicators on an annual basis.
- 22–8 The OMFO should expand the existing database for the case management of federal prisoners to include comprehensive information on all federal offenders to inform policy advice in relation to the federal criminal justice system. The database should be developed in consultation with the Australian Institute of Criminology, the Australian Bureau of Statistics, the National Judicial College of Australia and the states and territories, and should include information relevant to the offender, the offence and sentence, sentence administration, and parole and release.
- 22–9 The Australian Bureau of Statistics should disaggregate the data contained in its *Prisoners in Australia*, *Criminal Courts* and *Corrective Services* publications in order to distinguish between federal offenders, state and territory offenders, and joint offenders.

**23. Release on Parole or Licence**

- 23-1 The Australian Government should establish a federal parole authority to make decisions in relation to parole of federal offenders. The federal parole authority should be established as either: (a) an independent statutory authority to be called the Federal Parole Board; or (b) a division of the Administrative Appeals Tribunal to be called the Federal Parole Division. The authority's decisions should be final and not subject to the responsible Minister's approval. The federal parole authority should also make decisions in relation to the conditions to be attached to release on licence.
- 23-2 Federal sentencing legislation should provide that:
- (a) federal offenders have an opportunity to appear before the proposed federal parole authority where the authority is of the opinion that the information currently before it does not justify releasing the person on parole;
  - (b) federal offenders are allowed legal or other representation before the federal parole authority;
  - (c) federal offenders have the benefit of an appropriately qualified interpreter where necessary;
  - (d) the federal parole authority has access to the same information and reports currently considered by state and territory parole authorities and that it has power to require the production of such information;
  - (e) the federal parole authority has power to require persons to appear before it for the purpose of carrying out its functions;
  - (f) registered victims of crime be given the opportunity to provide input into the deliberations of the federal parole authority;
  - (g) the federal parole authority publish reasons for its decisions; and
  - (h) the federal parole authority prepare an annual report on its operations, which must be tabled in the Australian Parliament.
- 23-3 Decisions of the federal parole authority should be subject to the rules of natural justice and to judicial review either under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) or s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) depending on the model adopted. These decisions should not be subject to merits review but where the authority makes a decision to refuse release on parole, the federal offender should have the right to have the decision reconsidered by the authority periodically.



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- 23–4 Federal sentencing legislation should repeal the provisions granting automatic parole to federal offenders.
- 23–5 Federal sentencing legislation should state that the purposes of parole are:
- (a) the reintegration of the offender into the community;
  - (b) the rehabilitation of the offender; and
  - (c) the protection of the community.
- 23–6 Federal sentencing legislation should specify a non-exhaustive list of factors the federal parole authority must consider when determining a parole matter, where the factors are relevant and known to the authority. In particular, the factors should include:
- (a) whether releasing the offender on parole is likely to assist the offender to adjust to lawful community life;
  - (b) the likelihood that the offender will comply with the conditions of the parole order;
  - (c) the offender’s conduct while serving his or her sentence;
  - (d) the risk to the community of releasing the offender on parole;
  - (e) the likely effect on the victim, or victim’s family, of releasing the offender on parole;
  - (f) the length of the parole period, to ensure it is sufficient to achieve the purposes of parole; and
  - (g) any special circumstances of the case, including the likelihood that the offender will be subject to removal or deportation upon release.
- 23–7 Federal sentencing legislation should provide that the fact that an offender is likely to be subject to removal or deportation upon release is one of the factors to be considered by the federal parole authority in deciding whether or not to grant a parole order to a federal offender. [See Recommendation 23–6]
- 23–8 The Office for the Management of Federal Offenders should liaise with the Department of Immigration and Multicultural Affairs to ensure that the Office holds accurate information on the immigration status of non-citizen federal offenders.

- 23–9 Federal sentencing legislation should provide that:
- (a) except in relation to an offender sentenced to life imprisonment, a parole or licence period should commence on the day the offender is released on parole or licence and end on the day the offender's sentence expires; and
  - (b) in relation to an offender sentenced to life imprisonment:
    - (i) a parole period should commence on the day the offender is released on parole and end on a day determined by the federal parole authority; and
    - (ii) a licence period should commence on the day the offender is released on licence and end on a day determined by the relevant Minister.
- 23–10 Federal sentencing legislation should set out the standard conditions imposed on federal offenders released on parole or licence. The federal parole authority should have the discretion to impose any other conditions considered reasonably necessary to achieve the purposes of parole.
- 23–11 Federal sentencing legislation should enable the federal parole authority to impose a supervision period limited only by the length of the parole or licence period.

## **24. Breach of Parole or Licence**

- 24–1 Federal sentencing legislation should provide that, where the federal parole authority is satisfied a federal offender has breached his or her obligations under a parole order or licence, the authority may:
- (a) take no further action;
  - (b) issue a warning to the offender;
  - (c) amend the order or licence by adding, revoking or varying the conditions attached to the order or licence; or
  - (d) revoke the order or licence.
- 24–2 Federal sentencing legislation should provide that the federal parole authority must not revoke a parole order or licence without giving the federal offender an opportunity to provide reasons why the order should not be revoked unless the authority considers it to be impracticable or undesirable to do so. Where the federal offender has not had the opportunity to provide

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- reasons before the order or licence is revoked, the offender should be given that opportunity as soon as practicable after the order or licence is revoked.
- 24–3 Federal sentencing legislation should provide that a parole order or licence is:
- (a) automatically revoked where an offender commits any offence during the parole or licence period and is sentenced to a term of imprisonment that is not completely suspended; and
  - (b) automatically suspended when an offender is removed or deported from Australia during the parole or licence period.
- 24–4 Federal sentencing legislation should provide that ‘clean street time’ is to be deducted from the balance of the period to be served following revocation of parole or licence. ‘Clean street time’ should be calculated from the date of release on parole or licence to:
- (a) in the case of automatic revocation upon conviction—the date the first offence was committed; or
  - (b) in any other case—the date on which it is shown to the federal parole authority’s satisfaction that the offender first failed to comply with his or her obligations under the parole order or licence.
- 24–5 The Office for the Management of Federal Offenders should ensure that, where necessary, a request is made under the *Australian Passports Act 2005* (Cth) or the *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth) to:
- (a) cancel the Australian passport or travel document of a federal offender;
  - (b) prevent an Australian passport or travel document being issued to a federal offender; or
  - (c) surrender a foreign passport or travel document of a federal offender.
- 24–6 The federal parole authority should ensure that, when considering the grant of a parole order or licence, where necessary, a refusal/cancellation request is in place under the *Australian Passports Act 2005* (Cth) or that a surrender request has been made under the *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth).
- 24–7 The federal parole authority should have responsibility for considering requests from federal offenders who have been released on parole or licence for leave to travel overseas.

**25. Other Methods of Release from Custody**

- 25-1 The Office for the Management of Federal Offenders (OMFO) should monitor the effectiveness and suitability of state and territory pre-release schemes for federal offenders and should provide advice to the relevant Minister regarding the state and territory pre-release schemes that should be made available for federal offenders.
- 25-2 The OMFO should provide advice to the relevant Minister in relation to applications for the exercise of the executive prerogative to pardon or remit a sentence imposed on a federal offender.
- 25-3 Federal sentencing legislation should provide that the relevant Minister may refer a matter raised in an application for the exercise of the executive prerogative to a board of inquiry for investigation and report. The report should be provided to the Minister and should inform, but not constrain, the exercise of the executive prerogative by the Governor-General.

**26. Transfer of Federal Offenders**

- 26-1 The Australian Parliament should amend the legislation and arrangements dealing with interstate transfer of prisoners on welfare grounds to ensure that:
- (a) federal offenders may be transferred interstate without delay where welfare grounds are found to exist, except where the transfer would prejudice the proper administration of justice;
  - (b) the decision to transfer a federal offender interstate should be one for the Attorney-General of Australia, or a delegate; and
  - (c) interstate transfer of a federal offender should not require the consent of either the sending or receiving state or territory (except in the case of joint federal-state/territory offenders), but the Attorney-General of Australia or a delegate should be required to consult with relevant authorities in the sending and receiving state or territory before making a transfer decision.
- 26-2 The Australian Government and the governments of the states and territories should work towards expanding the opportunities for the interstate transfer of federal offenders serving community based sentences.
- 26-3 The Australian Government should aim to ensure that prisoners are generally able to serve their sentences in their home country. To this end, the Australian Government should negotiate bilateral agreements for the transfer of prisoners with:

- (a) countries in which significant numbers of Australian nationals are serving custodial sentences; and
- (b) countries that have a significant number of their nationals serving custodial sentences in Australia.

## **Part H Special Categories of Federal Offenders**

### **27. Young Federal Offenders**

27-1 Young federal offenders should continue to be dealt with within the juvenile justice system of the relevant state or territory but federal sentencing legislation should establish minimum standards for the sentencing, administration and release of young federal offenders. These standards should include the following:

- (a) ‘young person’ should be defined as a person who is at least 10 years but not yet 18 years old at the time the offence was committed;
- (b) when determining the sentence of a young federal offender who is being sentenced as a young person, the court is to apply the purposes, principles and factors stated in the juvenile justice legislation of the relevant state or territory, together with the following principles, which should be set out in federal sentencing legislation:
  - (i) the well-being of the young person shall be a guiding consideration; and
  - (ii) detention should be used as a measure of last resort, and only for the shortest appropriate period;
- (c) subject to paragraph (d), where a young person is charged with a federal offence, any judicial proceedings in relation to the offence must be heard and determined in a children’s court and the young person must be sentenced as a young person if found guilty of the offence, in accordance with the relevant state or territory juvenile justice legislation and paragraph (b) above;
- (d) where a young person is charged with a federal offence, and subject to s 80 of the *Australian Constitution*, the matter may be heard and determined in an adult court, in accordance with the laws of the relevant state or territory, in the following cases:
  - (i) where state or territory law allows a young person to elect to have an offence heard by a jury in circumstances that would require committal to an adult court; or

- (ii) where state or territory law requires a young person charged jointly with an adult to be tried in an adult court; or
- (iii) where the young person is charged with a federal offence that is punishable by imprisonment of 14 years or more (a 'serious federal offence').

However, where the matter is heard in an adult court, the young person must be sentenced in accordance with the purposes, principles and factors stated in the juvenile justice legislation of the relevant state or territory and paragraph (b) above;

- (e) where a young federal offender is not legally represented in a sentencing proceeding, the court should generally adjourn to allow the offender a reasonable opportunity to obtain representation. However, the court may proceed without adjournment and may impose a sentence despite the absence of representation where:
  - (i) the young offender has refused or failed to exercise the right to legal representation in circumstances where the offender fully understands the right and the consequences of not exercising it; or
  - (ii) the court is of the view that a fair sentencing hearing can be conducted without the offender being legally represented;
- (f) the publication of a report of proceedings involving a young person who is charged with, found guilty of, or has pleaded guilty to, a federal offence should be prohibited where it identifies or is likely to lead to the identification of the young person;
- (g) where a court, exercising powers conferred by state or territory legislation, refers to a diversionary process any young person who is charged with, found guilty of, or has pleaded guilty to, a federal offence, the outcome of the process must be reported back to the court and the court is to finalise the matter after taking into consideration the outcome of the diversionary process;
- (h) a young federal offender sentenced to detention in a juvenile facility must not be transferred to an adult prison until he or she is at least 18 years of age, unless a court determines either that it is in the best interests of the young person to do so or that there are exceptional circumstances justifying the transfer; and
- (i) where a federal offence is committed by a person who was not yet 18 years old at the time of the commission of the offence but is

18 years or more at the time of sentencing, the court must proceed to sentence the person as a young person in accordance with the relevant state or territory juvenile justice legislation and paragraph (b) above, except that any sentence imposing a term of detention may, in the court's discretion, be served otherwise than in a juvenile detention facility.

27-2 Federal sentencing legislation should require that the following provisions applicable to adult federal offenders be applied to young federal offenders, namely, provisions:

- (a) prohibiting certain sentencing options, including capital punishment, corporal punishment, imprisonment with hard labour, and any other form of cruel, inhuman or degrading punishment (Recommendation 7-16);
- (b) requiring the court to take into account time spent in pre-sentence custody or detention (Recommendations 10-2 and 10-3);
- (c) requiring attendance of the offender during certain sentencing proceedings (Recommendation 13-1);
- (d) requiring the court to give an explanation of the sentence and a copy of the sentencing order to the offender (Recommendations 13-3, 13-4 and 13-5);
- (e) governing the use of victim impact statements and pre-sentence reports (Recommendations 14-1 and 14-2);
- (f) requiring the court to state its reasons for the sentence (Recommendation 19-1);
- (g) dealing with an accused with a mental illness or intellectual disability (Recommendations 28-1, 28-2, and 28-4 to 28-14);
- (h) requiring a suitably qualified interpreter, where necessary, in all proceedings related to sentencing (Recommendation 29-3); and
- (i) facilitating access to drug courts, where they are available for young offenders (Recommendation 29-4).

27-3 Until such time as a federal Office for Children is established, the Australasian Juvenile Justice Administrators, in consultation with relevant government and non-government organisations, should develop national best practice guidelines for juvenile justice, including guidelines relating to the sentencing of young people.

- 27–4 The Office for the Management of Federal Offenders should monitor and report on young federal offenders. The functions of the Office should include:
- (a) maintaining information on young federal offenders as part of an up-to-date case management database in relation to all federal offenders;
  - (b) monitoring progress towards compliance with the *Standards for Juvenile Custodial Facilities* in relation to young federal offenders, and liaising with the states and territories in relation to those Standards;
  - (c) providing policy advice to the Australian Government in relation to young federal offenders and relevant aspects of the federal criminal justice system;
  - (d) participating in the activities of the Australasian Juvenile Justice Administrators; and
  - (e) liaising with the states and territories, including the relevant juvenile justice departments, in relation to young federal offenders.

**28. Federal Offenders with a Mental Illness or Intellectual Disability**

- 28–1 The Australian Government should initiate a comprehensive inquiry into issues concerning people in the federal criminal justice system who have a mental illness, intellectual disability or cognitive impairment.
- 28–2 The Australian Government should work with state and territory governments to improve substantially the provision of services to federal offenders with a mental illness or intellectual disability.
- 28–3 Provisions relating to fitness to be tried, acquittal due to mental illness, and summary disposition of persons suffering from a mental illness or intellectual disability should remain in the *Crimes Act 1914* (Cth). Provisions relating to sentencing alternatives for persons suffering from a mental illness or intellectual disability should be relocated to federal sentencing legislation.
- 28–4 Federal sentencing legislation should define the terms ‘mental illness’ and ‘intellectual disability’. In defining these terms, account should be taken of:
- (a) the different contexts in which the terms are used;
  - (b) the interaction between federal law and state and territory laws dealing with such persons;



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- (c) the possibility that mental illness, intellectual disability and substance abuse may co-exist in one person;
  - (d) the potential difference between criteria used for clinical diagnosis and those appropriate for forensic purposes;
  - (e) the difference between the appropriate definitions in civil and criminal contexts; and
  - (f) the need to ensure that certain conduct or beliefs are not regarded, on their own, as indicative of mental illness or intellectual disability.
- 28–5 Federal sentencing legislation should be amended to provide that the factors to be considered in sentencing a federal offender include:
- (a) ‘mental illness’ and ‘intellectual disability’ in addition to ‘mental condition’; and
  - (b) that the offender is receiving treatment or is undertaking a behaviour intervention program to address any physical condition, mental illness, intellectual disability or mental condition that may have contributed to the commission of the offence.
- 28–6 Federal sentencing legislation should provide that:
- (a) hospital orders are available as a sentencing option when a person with a mental illness is convicted of either a summary federal offence punishable by imprisonment or an indictable federal offence;
  - (b) decisions in relation to the release from detention of persons subject to a hospital order are to be made by the federal parole authority, after considering reports of appropriately qualified professionals; and
  - (c) the reforms identified in Recommendations 9–1 to 9–4 also apply in relation to hospital orders.
- 28–7 Federal sentencing legislation should:
- (a) empower a court to deal with any breach of a psychiatric probation order or program probation order, regardless of whether the offender has a reasonable excuse for the breach; and
  - (b) provide that, in addition to its existing powers, a court dealing with a breach of a psychiatric probation order or program probation order may vary the order if satisfied of the breach.

- 28–8 Federal sentencing legislation should provide that, in jurisdictions where justice plans are available, participation in the services specified in the plan may be attached as a condition of: a community based order; a discharge; a conditional release; a deferred sentence; a program probation order; or a care and rehabilitation order.
- 28–9 The Office for the Management of Federal Offenders should collaborate with state and territory authorities to promote the adoption of justice plans throughout Australia. These plans should specify the services that are recommended for a person with an intellectual disability for the purpose of reducing the likelihood of the person committing further offences.
- 28–10 Federal sentencing legislation should provide that a court may make an order for the care and rehabilitation of a federal offender with an intellectual disability. The provision should be modelled on s 20BS of the *Crimes Act* and provide that the court may, in lieu of imposing a sentence of imprisonment, make an order that the person be detained in secure accommodation for a specified period, but no longer than the period of imprisonment to which the person would otherwise have been sentenced. The order may require compliance with any condition that the court considers appropriate in the circumstances.
- 28–11 Federal sentencing legislation should provide that a court must request a pre-sentence report when:
- (a) an offender has a mental illness or intellectual disability, or such a condition is suspected; and
  - (b) there is a reasonable prospect that the court will impose a sentence that deprives the offender of his or her liberty or places the offender in jeopardy of being deprived of his or her liberty.
- 28–12 Federal sentencing legislation should provide that a court must request that the state or territory department with responsibility for the provision of services to persons with a mental illness or intellectual disability provide the court with a ‘certificate of available services’ if the court is considering imposing an order that a federal offender receive treatment or participate in a rehabilitation program.
- 28–13 State and territory departments of corrective services should ensure that appropriate advice and support is provided to federal offenders with a mental illness or intellectual disability who are required to give consent to participate in a rehabilitation program or give an undertaking to participate in a pre-release scheme.
- 28–14 The Corrective Services Administrators’ Conference, in consultation with relevant government and non-government organisations, should develop and promote compliance with national standards for the assessment, detention,

treatment and care of persons with a mental illness or intellectual disability who come into contact with the criminal justice system. These standards should comply with relevant international instruments.

## **29. Other Special Categories of Offenders**

29–1 The ALRC affirms its commitment to the recommendations made in ALRC 31, *The Recognition of Aboriginal Customary Laws* (1986) in so far as they relate to the sentencing of federal Aboriginal or Torres Strait Islander (ATSI) offenders. In particular, without derogating from international human rights principles applicable to sentencing decisions, the ALRC affirms its commitment to the recommendations that:

- (a) legislation should endorse the practice of considering traditional laws and customs, where relevant, in sentencing an ATSI offender; and
- (b) legislation should provide that, in ascertaining traditional laws and customs or relevant community opinions, a court may give leave to a member of an ATSI offender's or ATSI victim's community to make oral or written submissions.

29–2 The ALRC supports the recommendations made by the *Royal Commission into Aboriginal Deaths in Custody* (1991) in so far as they relate to the sentencing of federal ATSI offenders. In particular, the ALRC supports the following recommendations:

- (a) sentencing and correctional authorities should accept that community service can be performed in many ways, and approval should be given, where appropriate, for ATSI offenders to perform community service work by pursuing personal development courses (Rec 94);
- (b) judicial officers and other participants in the criminal justice system whose duties bring them into contact with ATSI people should be encouraged to participate in appropriate cross-cultural training programs developed after consultation with appropriate ATSI organisations (Recs 96, 97);
- (c) governments should take more positive steps to recruit and train ATSI people as court staff and interpreters in locations where a significant number of ATSI people appear before the courts (Rec 100);
- (d) an appropriate range of properly funded sentencing options should be available, and ATSI communities should participate in the development, planning and implementation of these programs (Recs 109, 111, 112, 113);

- (e) departments and agencies responsible for non-custodial sentencing programs for ATSI offenders should employ and train ATSI people to take particular responsibility for implementing such programs and educating the community about them (Rec 114); and
  - (f) corrective services authorities should ensure that ATSI offenders are not denied opportunities for probation and parole because of the lack of infrastructure or staff to monitor such orders (Rec 119).
- 29–3 Federal sentencing legislation should require a suitably qualified interpreter to be provided to a federal offender in all proceedings related to sentencing unless the court is satisfied that the offender can understand and speak English sufficiently to enable the offender to follow and participate in those proceedings.
- 29–4 The Australian Government should collaborate with state and territory governments to facilitate access by federal offenders to state or territory drug courts in appropriate circumstances. In particular, federal sentencing legislation should:
  - (a) provide that the orders that can be made by a drug court are prescribed ‘additional sentencing alternatives’ for federal offenders; and
  - (b) specify any federal offences or categories of federal offences for which such orders cannot be made.

### **30. Corporations**

- 30–1 Federal sentencing legislation should include the following sentencing options for corporations that have committed a federal offence:
  - (a) orders disqualifying the corporation from undertaking specified commercial activities;
  - (b) orders requiring the corporation to take corrective action within the organisation, such as internal disciplinary action or organisational reform;
  - (c) orders requiring the corporation to undertake activities for the benefit of the community;
  - (d) orders requiring the corporation to publicise its offending conduct; and
  - (e) orders dissolving the corporation.

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- 30-2 Federal sentencing legislation should state that a court, when sentencing a corporation, must consider any factor that is relevant to a purpose or principle of sentencing and known to the court. These factors may include, but are not limited to, any of the following matters to the extent they are applicable:
- (a) the type, size, financial circumstances and internal culture of the corporation;
  - (b) the existence or absence of an effective compliance program designed to prevent and detect criminal conduct;
  - (c) whether the corporation ceased the unlawful conduct voluntarily and promptly upon discovery of the offence;
  - (d) the extent to which the offence or its consequences could be foreseen; and
  - (e) the effect of the sentence on third parties.
- 30-3 Federal sentencing legislation should empower a court, in sentencing a corporation for a federal offence, to require the attendance of any officer of the corporation at any stage of the sentencing proceedings.



# Implementation Schedule

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*This schedule lists the action required of different bodies to implement the recommendations in ALRC 103. The required action is identified in summary form; full details may be found in the List of Recommendations and in the corresponding chapter. The schedule does not list bodies whose role in relation to a recommendation is only to be consulted by another body that has primary responsibility for implementing the recommendation.*

## **Australasian Juvenile Justice Administrators**

- 27–3      Develop national best practice guidelines for juvenile justice, including guidelines relating to the sentencing of young people.

## **Australian Bureau of Statistics**

- 22–9      Disaggregate the data contained in its *Prisoners in Australia*, *Criminal Courts* and *Corrective Services* publications in order to distinguish between federal offenders, state and territory offenders, and joint offenders.

## **Australian Government**

- 2–1      Enact a federal sentencing Act dealing with the sentencing, administration and release of federal offenders.
- 2–2      Ensure that federal sentencing legislation is structurally clear and logical, and that the language and numbering is simple and internally consistent.
- 2–3      Ensure that, where practicable, terminology in federal sentencing legislation is consistent with terminology commonly used in state and territory sentencing legislation.
- 2–4      Include a clause in federal sentencing legislation setting out a non-exhaustive list of the major objectives of the legislation including those matters listed in Rec 2–4.
- 3–1      Seek to ensure broad inter-jurisdictional equality and adherence to federal minimum standards in the sentencing, administration and release of federal offenders in different states and territories.
- 4–1      Include an exhaustive list of the purposes of sentencing in federal sentencing legislation. These purposes are set out in Rec 4–1.
- 5–1      Include a statement of the fundamental principles that must be applied in sentencing a federal offender in federal sentencing legislation. These principles are set out in Rec 5–1.

- 6-1 Provide in federal sentencing legislation that courts must consider any factor that is relevant to a purpose or principle of sentencing when sentencing a federal offender, where that factor is known to the court. The legislation should include categories of factors that may be relevant, and provide examples of sentencing factors under each category. These categories and factors may include, but are not limited to those set out in Rec 6-1.
- 6-2 Provide in federal sentencing legislation that the procedures by which another offence may be taken into account in sentencing a federal offender are available only where the conduct that constitutes the other offence is of a similar or lesser seriousness to the principal offence.
- 6-4 Ensure that, subject to Recs 6-5 and 6-6, federal sentencing legislation does not distinguish between sentencing factors that aggravate the sentence and those that mitigate the sentence.
- 6-5 Provide in federal sentencing legislation that the non-exhaustive list of matters set out in Rec 6-5 are not to aggravate the sentence of a federal offender.
- 6-6 Provide in federal sentencing legislation that any confiscation of property order or other court order that merely neutralises a benefit that has been obtained by the commission of the federal offence for which the offender is being sentenced should not mitigate the sentence.
- 6-7 Specify in federal sentencing legislation those factors that the court should not consider in sentencing a federal offender, including those factors set out in Rec 6-7.
- 6-8 Specify separately in federal sentencing legislation those factors that pertain to the administration of the federal criminal justice system—that is, the fact that the offender has pleaded guilty and the circumstances in which the plea of guilty was made and the degree to which the offender has cooperated or promised to cooperate with law enforcement authorities—and require that courts must consider these factors when sentencing a federal offender, where relevant and known to the court.
- 7-1 Provide in federal sentencing legislation that courts may order fines to be paid by a specified future date or by instalments.
- 7-2 Provide in federal sentencing legislation that federal offenders may apply to the court for an order varying the time or manner of payment of a fine during the period allowed for payment.
- 7-3 Repeal s 16C of the *Crimes Act 1914* (Cth).
- 7-4 Repeal s 19B(1)(b) of the *Crimes Act*.
- 7-5 Abolish the power of courts to order that federal offenders be released on common law bonds.



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- 7-6 Provide in federal sentencing legislation that a court may defer sentencing a federal offender for a period up to 12 months for the purpose of assessing the offender's prospects of rehabilitation or for any other purpose the court thinks fit.
- 7-7 Repeal the provision requiring the court to make a 'recognizance release order' for sentences of imprisonment between six months and three years, and allow the court a discretion to suspend a federal offender's sentence of imprisonment either wholly or partially, regardless of the length of the sentence.
- 7-8 Continue to allow sentences of imprisonment of less than six months to be available in the sentencing of federal offenders.
- 7-10 Provide in federal sentencing legislation that courts have a broad discretion to determine the conditions that may be imposed on a federal offender when it discharges an offender without recording a conviction, releases an offender after recording a conviction, or wholly or partially suspends a sentence of imprisonment.
- 7-11 Provide in federal sentencing legislation that a court is prohibited from imposing certain specified conditions when it discharges an offender without recording a conviction, releases an offender after recording a conviction, or wholly or partially suspends a sentence of imprisonment.
- 7-12 Repeal the provisions that allow a court to require a federal offender to give security by way of recognizance when he or she is discharged without conviction, released after conviction or sentenced to a wholly or partially suspended sentence of imprisonment.
- 7-13 Specify exhaustively in federal sentencing legislation those state and territory sentencing options that may be picked up and applied in sentencing a federal offender.
- 7-16 Prohibit the use of capital and corporal punishment, imprisonment with hard labour and any other form of cruel, inhuman or degrading punishment in federal sentencing legislation.
- 7-17 Facilitate access by federal offenders to state or territory restorative justice initiatives in appropriate circumstances.
- 8-1 Replace the term 'reparation' in federal sentencing legislation with the terms 'restitution' and 'compensation', and define them appropriately.
- 8-2 Clarify in federal sentencing legislation that reparation includes both economic and non-economic loss.
- 8-3 Clarify in federal sentencing legislation that nothing in the legislation affects the right of a person who is aggrieved by conduct punishable as a federal

offence to institute civil proceedings in respect of that conduct, but the person shall not be compensated more than once for the same loss.

- 9-1 Provide in federal sentencing legislation that courts must have regard to the purposes, principles and factors relevant to sentencing, and to the factors relevant to the administration of the criminal justice system, in deciding whether or not to fix a non-parole period.
- 9-2 Provide in federal sentencing legislation that courts must set a non-parole period when imposing a sentence of imprisonment that exceeds 12 months, unless the court decides it is not appropriate or the sentence is wholly suspended.
- 9-3 Preclude courts from setting non-parole periods in relation to federal sentences of imprisonment of less than 12 months.
- 9-4 Include a reference point in federal sentencing legislation indicating that non-parole periods should be two-thirds of head sentences. Courts should retain their discretion to impose a different non-parole period whenever it is warranted in the circumstances, taking into account the purposes, principles and factors relevant to sentencing, and the factors relevant to the administration of the criminal justice system.
- 10-1 Provide in federal sentencing legislation that a term of imprisonment commences on the day the sentence is imposed, subject to any court order directed to the consecutive service of sentences.
- 10-2 Provide in federal sentencing legislation that courts, when sentencing a federal offender to a term of imprisonment, must give credit for time spent in pre-sentence custody or detention in connection with the offence by declaring the time as time already served under the term of imprisonment.
- 10-3 Ensure that: one day's credit is given for each full day of pre-sentence custody or detention, subject to the court's discretion to give additional credit in special circumstances; credit is given whether or not the custody or detention was continuous; and credit is given irrespective of the fact that the custody or detention may not relate exclusively to the offence for which the offender is being sentenced, provided that credit is not given more than once for the same period of custody or detention.
- 11-1 Provide in federal sentencing legislation that, where courts discount sentences for a plea of guilty or for past or promised future cooperation, the courts must specify the discount given.
- 11-2 Provide in federal sentencing legislation that courts must consider certain matters in determining whether to discount the sentence of a federal offender for pleading guilty, and the extent of any discount. Those matters are the degree to which the guilty plea facilitates the administration of the federal

criminal justice system and the objective circumstances in which the guilty plea is made.

- 11-3 Provide in federal sentencing legislation that courts must consider certain matters in determining whether to discount the sentence of a federal offender for past or promised cooperation, and the extent of any discount. Those matters are set out in Rec 11-3.
- 11-4 Provide in federal sentencing legislation that, in sentencing a federal offender who undertakes to cooperate with law enforcement authorities in the future, in addition to imposing a reduced head sentence or non-parole period, a court may impose a less severe sentencing option, but must state what sentencing option it would have imposed but for the undertaking to cooperate. The undertaking must provide details of the promised cooperation and must be in writing or reduced to writing and signed or otherwise acknowledged by the offender.
- 11-5 Provide in federal sentencing legislation that, in sentencing an offender who has cooperated or has undertaken to cooperate with law enforcement authorities, the court has the power to close the court and to make orders to protect the safety of any person or to protect information or evidence in relation to the cooperation or the undertaking to cooperate.
- 11-6 Ensure that federal sentencing legislation expressly picks up and applies state and territory laws that provide for the remission of non-parole periods because of an emergency within the prison or other unforeseen and special circumstances.
- 12-1 Provide in federal sentencing legislation that when sentencing a federal offender for more than one offence a court may order the sentences to be served concurrently, consecutively or partly consecutively.
- 12-2 Provide in federal sentencing legislation that when a court sentences a federal offender for more than one offence, there is a presumption that the sentences are to be served concurrently.
- 12-3 Amend s 4K of the *Crimes Act* to allow aggregate sentencing in summary and indictable matters and to allow the joining of charges against more than one provision of Commonwealth law.
- 13-1 Provide in federal sentencing legislation that a federal offender must be present during sentencing proceedings—whether in person or by videolink or a similar medium—in the circumstances specified in Rec 13-1.
- 13-2 Provide in federal sentencing legislation that where an offender is not legally represented in a sentencing proceeding, the court should generally adjourn the proceeding to allow the offender a reasonable opportunity to obtain representation. However, the court may proceed without adjournment and

may impose a sentence despite the absence of representation in the circumstances set out in Rec 13–2.

- 13–3 Provide in federal sentencing legislation that when sentencing a federal offender who is present at the sentencing proceedings, the court must itself give the offender an oral explanation of sentence; and a written record of the explanation in the circumstances set out in Rec 13–3. When a federal offender is not present at the sentencing proceedings, the court may direct that an appropriate person explain the sentence to the offender.
- 13–4 Provide in federal sentencing legislation that, in giving an explanation of sentence the court, or the person directed by the court to give the explanation, must address specified matters in language likely to be understood by the offender, in so far as they are relevant. Those matters are set out in Rec 13–4.
- 13–5 Provide in federal sentencing legislation that as soon as practicable after a court makes an order sentencing a federal offender to a term of imprisonment, the court must provide the offender with a copy of the order. The order must set out the relevant matters listed in Rec 13–4(c).
- 13–6 Include in federal sentencing legislation the common law rules in relation to the standard of proof in sentencing. The formulation of the rules is set out in Rec 13–6.
- 13–7 Provide in federal sentencing legislation that in deciding matters in connection with the making of an ancillary order for restitution or compensation, the standard of proof is on the balance of probabilities.
- 14–1 Make comprehensive provision in federal sentencing legislation for the use of victim impact statements in the sentencing of federal offenders, but where states and territories have laws about the use of victim impact statements that comply with the federal minimum standards set out in the federal legislation, allow those laws to be applied.
- 14–2 Make comprehensive provision in federal sentencing legislation for the use of pre-sentence reports in the sentencing of federal offenders, but where states and territories have laws about the use of pre-sentence reports that comply with the federal minimum standards set out in the federal legislation, allow those laws to be applied.
- 15–1 Provide in federal sentencing legislation for a defendant to obtain an indication of sentence prior to final determination of the matter. The elements of a federal sentence indication scheme are set out in Rec 15–1.
- 16–1 Provide in federal sentencing legislation that a court, whether differently constituted or not, should be able to reconsider a federal sentence in the circumstances set out in Rec 16–1.

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- 16-2 Provide in federal sentencing legislation for a court to correct ‘slip’ errors that may occur in sentencing a federal offender.
- 16-3 Provide in federal sentencing legislation for a court to reopen a sentencing hearing to allow it to vary, amend or rescind a sentence. The circumstances in which the court should be empowered to reopen a sentencing hearing are set out in Rec 16-2.
- 17-1 Provide in federal sentencing legislation that a court can deal with any breach of a sentencing order, regardless of whether the offender has a reasonable cause or excuse.
- 17-2 Provide in federal sentencing legislation that, in addition to its existing powers, a court dealing with a breach of a sentencing order may vary the order if satisfied of the breach. In particular, the court should be empowered to order that a federal offender who has breached a wholly or partially suspended sentence of imprisonment be imprisoned for a lesser period than originally imposed.
- 17-3 Amend federal sentencing legislation to ensure that any order imposing a monetary penalty for breach of a wholly or partially suspended sentence is enforceable.
- 17-5 Provide in federal sentencing legislation that, where a fine has been imposed on a federal offender, the offender must not be imprisoned for failure to pay the fine if a fine recovery mechanism is available and likely to be effective, or if a less severe penalty is available and appropriate in the circumstances.
- 17-6 Provide in federal sentencing legislation that, where a fine has been imposed on a federal offender, the offender must not be imprisoned for a failure to pay the fine until such time as he or she has been given a reasonable opportunity to pay.
- 17-7 Provide in federal sentencing legislation that the maximum period of imprisonment to be served by a federal offender for failing to pay a fine is 12 months, to the exclusion of any state or territory laws on that subject that are picked up and applied to federal offenders.
- 18-2 Expand the original jurisdiction of the Federal Court of Australia to hear and determine proceedings in relation to nominated federal offences whose subject matter is closely allied to the existing civil jurisdiction of the Court, in areas such as taxation, trade practices and corporations.
- 19-1 Provide in federal sentencing legislation that a court must state its reasons for decision when sentencing a federal offender for an indictable or summary offence.

- 19-4     Develop and support opportunities for judicial officers exercising federal criminal jurisdiction to serve on courts in other jurisdictions to promote greater consistency in sentencing of federal offenders.
- 20-1     Provide in the new federal sentencing Act that, three years after it comes into force, a review is to be conducted of sentencing in federal criminal matters, to determine whether there is significant unjustified disparity in the sentencing of federal offenders across Australia. If such disparity exists, the review is to consider whether general appellate jurisdiction should be conferred on the Federal Court of Australia in federal criminal matters.
- 20-2     Confer exclusive appellate jurisdiction on the Federal Court of Australia in relation to those criminal matters heard at first instance by the Court under the expanded original jurisdiction conferred in accordance with Rec 18-2.
- 21-1     Continue to support the development of a comprehensive national database on the sentences imposed on all federal offenders. What the database should include and to whom the data should be made available are set out in Rec 21-1.
- 21-3     Review federal criminal offence provisions and seek appropriate amendments to ensure that no mandatory minimum term of imprisonment is prescribed for any federal offence.
- 22-1     Take a more active role in monitoring federal offenders in order to achieve the objectives set out in Rec 22-1.
- 22-2     Negotiate with the states and territories to ensure that the relevant Australian Government minister is made a participating member of the Corrective Services Ministers' Conference and that the Australian Government becomes a participating member of the Corrective Services Administrators' Conference.
- 22-3     Establish an Office for the Management of Federal Offenders (OMFO) within the Attorney-General's Department to monitor and report on all federal offenders.
- 22-4     Negotiate the functions and powers of the OMFO with the states and territories, and ensure they include the functions and powers set out in Rec 22-4.
- 23-1     Establish a federal parole authority to make decisions in relation to parole of federal offenders.
- 23-2     Ensure that the procedures of the federal parole authority are consistent with those listed in Rec 23-2.
- 23-3     Ensure that the decisions of the federal parole authority are subject to the rules of natural justice and to judicial review.

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- 23–4 Repeal the provisions granting automatic parole to federal offenders.
- 23–5 Set out the purposes of parole in federal sentencing legislation.
- 23–6 Include a non-exhaustive list of factors in federal sentencing legislation that the federal parole authority must consider when determining a parole matter. Include those factors set out in Rec 23–6.
- 23–7 Provide in federal sentencing legislation that the fact that an offender is likely to be subject to removal or deportation upon release is one of the factors to be considered by the federal parole authority in deciding whether or not to grant parole.
- 23–9 Provide in federal sentencing legislation that parole or licence periods commence on the day the offender is released on parole or licence and end on the day the offender’s sentence expires. In relation to offenders sentenced to life imprisonment: the parole period should commence on the day the offender is released on parole and end on a day determined by the federal parole authority; and the licence period should commence on the day the offender is released on licence and end on a day determined by the relevant Minister.
- 23–10 Set out in federal sentencing legislation the standard conditions always imposed on federal offenders released on parole or licence. The federal parole authority should have the discretion to impose any other conditions considered reasonably necessary to achieve the purposes of parole.
- 23–11 Provide in federal sentencing legislation that the federal parole authority may impose a period of parole or licence supervision limited only by the length of the parole or licence period.
- 24–1 Provide in federal sentencing legislation that, where the federal parole authority is satisfied a federal offender has breached his or her obligations under a parole order or licence, the authority may deal with that breach in the manner specified in Rec 24–1.
- 24–2 Provide in federal sentencing legislation that the federal parole authority must not revoke a parole order or licence without giving the federal offender an opportunity to provide reasons why the order should not be revoked unless the authority considers it to be impracticable or undesirable to do so—in which case the federal offender should be given that opportunity as soon as practicable after the order or licence is revoked.
- 24–3 Provide in federal sentencing legislation that a parole order or licence is automatically revoked when an offender commits any offence during the parole or licence period and is sentenced to a term of imprisonment that is not completely suspended; and is automatically suspended when an offender is removed or deported from Australia during the parole or licence period.

- 24–4 Provide in federal sentencing legislation that ‘clean street time’ is to be deducted from the balance of the period to be served following revocation of parole or licence, and provide for the calculation of ‘clean street time’ as specified in Rec 24–4.
- 25–3 Provide in federal sentencing legislation that the relevant Minister may refer a matter raised in an application for the exercise of the executive prerogative to a board of inquiry for investigation and report.
- 26–1 Amend the legislation and arrangements dealing with the interstate transfer of prisoners on welfare grounds to ensure that federal offenders can be transferred interstate without delay where welfare grounds are found to exist, except where the transfer would prejudice the proper administration of justice.
- 26–2 Work towards expanding the opportunities for the interstate transfer of federal offenders serving community based sentences.
- 26–3 Negotiate bilateral agreements for the transfer of prisoners with (a) countries in which significant numbers of Australian nationals are serving custodial sentences and (b) countries that have a significant number of their nationals serving custodial sentences in Australia.
- 27–1 Establish in federal sentencing legislation a range of minimum standards for the sentencing, administration and release of young federal offenders including those standards set out in Rec 27–1.
- 27–2 Provide in federal sentencing legislation that those provisions applicable to adult federal offenders set out in Rec 27–2, be applied to young federal offenders.
- 28–1 Initiate a comprehensive inquiry into issues concerning people in the federal criminal justice system who have a mental illness, intellectual disability or cognitive impairment.
- 28–2 Work with state and territory governments to improve substantially the provision of services to federal offenders with a mental illness or intellectual disability.
- 28–3 Leave provisions relating to fitness to be tried, acquittal due to mental illness, and summary disposition of persons suffering from a mental illness or intellectual disability in the *Crimes Act*. Move provisions relating to sentencing alternatives for persons suffering from a mental illness or intellectual disability to federal sentencing legislation.
- 28–4 Define the terms ‘mental illness’ and ‘intellectual disability’ in federal sentencing legislation.
- 28–5 Amend federal sentencing legislation to provide that the factors to be considered in sentencing a federal offender include: ‘mental illness’ and



- ‘intellectual disability’ in addition to ‘mental condition’; and that the offender is receiving treatment or is undertaking a behaviour intervention program to address any physical condition, mental illness, intellectual disability or mental condition that may have contributed to the commission of the offence.
- 28–6 Provide in federal sentencing legislation that: hospital orders are available as a sentencing option when a person with a mental illness is convicted of either a summary federal offence punishable by imprisonment or an indictable federal offence; decisions in relation to the release from detention of persons subject to a hospital order are to be made by the federal parole authority, after considering reports of appropriately qualified professionals; and the reforms identified in Recs 9–1 to 9–4 also apply in relation to hospital orders.
- 28–7 Provide in federal sentencing legislation that courts may deal with any breach of a psychiatric probation order or program probation order, regardless of whether the offender has a reasonable excuse for the breach; and that, in addition to its existing powers, a court dealing with a breach of a psychiatric probation order or program probation order may vary the order if satisfied of the breach.
- 28–8 Provide in federal sentencing legislation that in jurisdictions where justice plans are available, participation in the services specified in the plan may be attached as a condition of a community based order, a discharge, a conditional release, a deferred sentence, a program probation order or a care and rehabilitation order.
- 28–10 Insert a provision, modelled on s 20BS of the *Crimes Act*, in federal sentencing legislation providing that a court may make an order for the care and rehabilitation of a federal offender with an intellectual disability.
- 28–11 Provide in federal sentencing legislation that courts must request a pre-sentence report when an offender has a mental illness or intellectual disability and there is a reasonable prospect that the court will impose a sentence that deprives the offender of his or her liberty or places the offender in jeopardy of being deprived of his or her liberty.
- 28–12 Provide in federal sentencing legislation that courts must request that the state or territory department with responsibility for the provision of services to persons with a mental illness or intellectual disability provide the court with a ‘certificate of available services’ if the court is considering imposing an order that a federal offender receive treatment or participate in a rehabilitation program.
- 29–1 Endorse in legislation the practice of considering traditional laws and customs, where relevant, in sentencing Aboriginal or Torres Strait Islander (ATSI) offenders.

- 29–1 Provide in legislation that, in ascertaining traditional laws and customs or relevant community opinions, courts may give leave to a member of an ATSI offender's or ATSI victim's community to make oral or written submissions.
- 29–2 Work with state and territory governments to ensure the implementation of a number of recommendations of the *Royal Commission into Aboriginal Deaths in Custody* (1991) in so far as they relate to the sentencing of federal ATSI offenders.
- 29–3 Provide in federal sentencing legislation that a suitably qualified interpreter is to be provided to a federal offender in all proceedings related to sentencing unless the court is satisfied that the offender can understand and speak English sufficiently to enable the offender to follow and participate in those proceedings.
- 29–4 Collaborate with state and territory governments to facilitate access by federal offenders to state or territory drug courts in appropriate circumstances.
- 29–4 Provide in federal sentencing legislation that the orders that can be made by a drug court are prescribed 'additional sentencing alternatives' for federal offenders; and specify any federal offences or categories of federal offences for which such orders cannot be made.
- 30–1 Include in federal sentencing legislation specified sentencing options for corporations that have committed a federal offence.
- 30–2 Provide in federal sentencing legislation that when sentencing a corporation a court must consider any factor that is relevant to a purpose or principle of sentencing and known to the court. Examples of factors that may be applicable are set out in Rec 30–2.
- 30–3 Provide in federal sentencing legislation that a court has the power, in sentencing a corporation for a federal offence, to require the attendance of any officer of the corporation at any stage of the sentencing proceedings.

### **Commonwealth Director of Public Prosecutions (CDPP)**

- 6–3 Amend its prosecution policy to provide guidance about the circumstances in which it is appropriate for the prosecution to consent to other offences, in respect of which a federal offender has admitted guilt, being taken into account in sentencing. The factors to be considered include those set out in Rec 6–3.
- 12–4 Develop guidelines about when it is appropriate for a prosecutor to seek an aggregate sentence for multiple summary or indictable offences.

- 19–2 Continue its practice of providing courts with detailed information with respect to the sentencing of federal offenders, including statistical and other information about comparable cases.
- 19–6 Develop and enhance its programs to train prosecutors in relation to the federal criminal justice system, including the sentencing of federal offenders and the role of prosecutors in sentencing.

### **Commonwealth prosecuting authorities (other than the CDPP)**

- 19–6 Develop and enhance their programs to train prosecutors in relation to the federal criminal justice system, including the sentencing of federal offenders and the role of prosecutors in sentencing.

### **Correctional authorities**

- 28–13 Ensure that appropriate advice and support is provided to federal offenders with a mental illness or intellectual disability who are required to give consent to participate in a rehabilitation program or give an undertaking to participate in a pre-release scheme.

### **Corrective Services Administrators' Conference**

- 28–14 Develop and promote compliance with national standards for the assessment, detention, treatment and care of persons with a mental illness or intellectual disability who come into contact with the criminal justice system.

### **Courts**

- 15–1 Develop nationally consistent Rules of Court or Practice Directions governing the procedures for a federal sentence indication scheme.
- 19–4 Develop and support opportunities for judicial officers exercising federal criminal jurisdiction to serve on courts in other jurisdictions to promote greater consistency in sentencing of federal offenders.

#### **State and territory courts**

- 18–1 Promote specialisation in the hearing and determination of federal criminal matters by whatever means is most appropriate, wherever this is practicable having regard to the nature and volume of caseloads.
- 19–7 Provide training to court services officers in relation to issues relevant to special categories of federal offenders.

**Federal parole authority**

- 24–6      Ensure that, when considering the grant of a parole order or licence, where necessary, a refusal/cancellation request is in place under the *Australian Passports Act 2005* (Cth) or that a surrender request has been made under the *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth).
- 24–7      Consider requests from federal offenders who have been released on parole or licence for leave to travel overseas.

**National Judicial College of Australia**

- 12–5      Ensure that the proposed bench book on federal sentencing law includes guidance to judicial officers about aggregate sentencing for multiple federal offences.
- 19–3      Provide regular training to judicial officers in relation to the sentencing of federal offenders.
- 19–5      Develop a publicly accessible bench book providing general guidance for judicial officers on federal sentencing law. Material to be included in the bench book is set out in Rec 19–5.
- 21–2      Continue to develop a comprehensive database on the sentences imposed on federal offenders in liaison with the organisations set out in Rec 21–2.

**Office for the Management of Federal Offenders**

- 7–9      Provide advice to the Australian Government about the appropriateness of using combination sentences in which two or more sentencing options are imposed on a federal offender for a single offence.
- 7–14      Monitor the effectiveness and suitability of state and territory sentencing options for federal offenders and provide advice to the Australian Government regarding the state and territory sentencing options that should be made available for federal offenders.
- 7–15      Review the maximum number of hours of community service and the maximum time within which such service must be completed in each state and territory and advise the Australian Government about appropriate national limits in relation to community based orders and other sentencing options available under state and territory law.
- 17–4      Develop a protocol outlining the procedures to be followed by state and territory correctional authorities and prosecutors when a federal offender breaches a sentencing order.
- 22–4      Maintain an up-to date case management database in relation to all federal offenders.

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- 22-4 Provide secretariat or other support to the proposed federal parole authority; depending on the model adopted for establishing the authority.
- 22-4 Establish and maintain a victim notification register.
- 22-4 Liaise with the states and territories in relation to federal offenders.
- 22-4 Participate as a full member of the Corrective Services Administrators' Conference and the Australasian Juvenile Justice Administrators.
- 22-4 Monitor progress towards compliance with the *Standard Guidelines for Corrections in Australia* and the *Standards for Juvenile Custodial Facilities* in relation to federal offenders.
- 22-4 Ensure the treatment of federal offenders complies with Australia's international obligations.
- 22-4 Provide advice to federal offenders, the states and territories and the Australian Government in relation to the matters specified in Rec 22-4.
- 22-5 Develop memoranda of understanding with the states and territories to improve the sharing of information and the coordination and provision of corrective services in relation to federal offenders.
- 22-6 Provide advice to the Australian Government on federal-state funding arrangements in relation to federal offenders.
- 22-7 Develop key performance indicators to monitor the administration and release of federal offenders and report publicly against key performance indicators on an annual basis.
- 22-8 Expand the existing database for the case management of federal prisoners to include comprehensive information on all federal offenders to inform policy advice in relation to the federal criminal justice system.
- 23-8 Liaise with the Department of Immigration and Multicultural Affairs to ensure that the OMFO holds accurate information on the immigration status of non-citizen federal offenders.
- 24-5 Ensure that, where necessary, a request is made under the *Australian Passports Act* or the *Foreign Passports (Law Enforcement and Security) Act* to cancel the Australian passport or travel document of a federal offender; prevent the issue of such documents to a federal offender; or surrender a foreign passport or travel document of a federal offender.
- 25-1 Monitor the effectiveness and suitability of state and territory pre-release schemes for federal offenders and provide advice to the relevant Minister regarding the state and territory pre-release schemes that should be made available for federal offenders.

- 25–2      Provide advice to the relevant Minister in relation to applications for the exercise of the executive prerogative to pardon or remit a sentence imposed on a federal offender.
- 27–4      Monitor and report on young federal offenders including maintaining information on young federal offenders as part of the federal offender case management database; monitoring progress towards compliance with the *Standards for Juvenile Custodial Facilities*; and carrying out the other functions listed in Rec 27–4 in relation to young federal offenders.
- 28–9      Collaborate with state and territory authorities to promote the adoption of justice plans throughout Australia.

### **Providers of continuing legal education and practical legal training**

- 19–7      Offer education and training to legal practitioners in relation to the federal criminal justice system.

### **State and Territory Governments**

- 19–4      Develop and support opportunities for judicial officers exercising federal criminal jurisdiction to serve on courts in other jurisdictions to promote greater consistency in sentencing of federal offenders.
- 26–2      Work towards expanding the opportunities for the interstate transfer of federal offenders serving community based sentences.

### **University law schools**

- 19–8      Place greater emphasis on the federal criminal justice system and federal sentencing law in undergraduate and postgraduate programs.

# 1. Introduction to the Inquiry

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## Background to the Inquiry

1.1 On 12 July 2004, the Attorney-General of Australia asked the Australian Law Reform Commission (ALRC) to conduct a review of Part IB of the *Crimes Act 1914* (Cth) with respect to the sentencing, administration and release of federal offenders.

1.2 This is not the first time the ALRC has been asked to examine the sentencing of federal offenders. The ALRC's previous inquiry commenced in 1978 and resulted in a number of papers and interim reports, culminating in 1988 with the final report, *Sentencing* (ALRC 44).<sup>1</sup> ALRC 44 was tabled in Parliament in August 1988. Following consideration of the report, the Australian Government introduced the Crimes Legislation Amendment Bill (No 2) 1989 (Cth) which, once passed, inserted

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1 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988).

Part IB into the *Crimes Act*. The Bill—which was the first major reform of federal sentencing legislation in over 20 years—was intended to ensure that federal sentencing legislation was fair and effective, and gave the community confidence in the criminal justice system.<sup>2</sup> It implemented selected parts of ALRC 44, but in a number of respects diverged from or failed to implement the ALRC’s recommendations.

1.3 The Second Reading Speech to the Bill noted that it had been the policy of successive Australian Governments to maintain parity in the treatment of federal offenders and state or territory offenders within any one jurisdiction. However, frequent changes to state and territory sentencing legislation (particularly with respect to non-parole periods and remissions) had resulted in greater use of administrative measures to ensure that federal offenders were not disadvantaged because of the jurisdiction in which they were sentenced. The amendments introduced in 1989 were intended to establish a greater degree of certainty in sentencing federal offenders by providing a separate federal scheme for setting non-parole periods and by providing that remissions available to reduce non-parole periods in some states would not apply to federal offenders.

1.4 Part IB of the *Crimes Act* became the focus of a number of criticisms. At a general level it was said that the legislation was unclear about whether it intended to achieve greater equality of treatment between federal offenders serving sentences in different states and territories; was complex and ambiguous; and omitted any detailed reference to the aims and purposes of sentencing. Specific provisions have been variously criticised for their complexity, poor drafting, inflexibility, limited scope, or because they lead to undesirable practical outcomes.<sup>3</sup> In 1991, the Gibbs Committee, which reviewed aspects of federal criminal law, made several recommendations concerning Part IB, including that it be reviewed within three years of its commencement.<sup>4</sup>

1.5 Part IB has been the subject of some amendment since 1989 but there has been no major review since its introduction. An internal review of Part IB was commenced by the Attorney-General’s Department (AGD) in the 1990s. However, in order to ensure a detailed consideration of all of the issues, the Attorney-General decided that the ALRC would be better placed to conduct a comprehensive review.

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2 Commonwealth, *Parliamentary Debates*, House of Representatives, 5 October 1989, 1602 (R Brown—Minister for Land Transport and Shipping Support).

3 See further Ch 2.

4 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991) Attorney-General’s Department, [11.11], [12.59].



## **Scope of the Inquiry**

### **Terms of Reference**

1.6 The Terms of Reference for the Inquiry require the ALRC to examine Part IB and report on whether the legislation is appropriate, effective and efficient and what, if any, changes are desirable. In carrying out its review, the ALRC is required to have particular regard to:

- the changing nature and scope of federal offences;
- whether equality in sentencing federal offenders should be maintained between federal offenders serving sentences in different states and territories, or between offenders within the same state and territory, regardless of whether they are state, territory or federal offenders;
- the relatively small number of federal offenders compared with the number of state and territory offenders; and
- whether there are effective sentencing and administrative regimes in Australia or overseas, including alternative sentencing options, that would be appropriate for adoption or adaptation by the Commonwealth.

1.7 The Terms of Reference limit the ALRC's Inquiry to a consideration of federal offenders. Material on state and territory offenders has been examined for the purposes of comparison, and also in relation to joint offenders, but it has not been the focus of the Inquiry. However, the ALRC has considered the interaction between federal sentencing law and state and territory sentencing law where this impacts on the sentencing and administration of federal offenders.

### **Matters outside the Inquiry**

1.8 The scope of the ALRC's Inquiry is limited both by its formal Terms of Reference and by the practical necessity of demarcating a work program that is coherent and achievable in the time allowed for reporting. At various stages, the ALRC has brushed up against issues that are related to the core subject matter of the Inquiry, and decisions have had to be made about whether to pursue them.

1.9 With these considerations in mind—and recalling that the focus of the Inquiry is the sentencing of federal offenders and the administration of their sentences—the Inquiry has not examined a range of issues that arise prior to sentencing or involve detention or punishment outside the criminal justice system. These issues include:

- reform of substantive federal criminal law;

- the maximum penalties for offences established by Parliament;<sup>5</sup>
- law enforcement and the criminal trial process;
- imposition of civil or administrative penalties or infringement notice schemes;<sup>6</sup>
- the discipline and punishment of defence force personnel;<sup>7</sup> and
- administrative detention for migration or other purposes.<sup>8</sup>

1.10 The exclusion of pre-sentence matters from the Inquiry extends to the issue of fitness to be tried, acquittal and summary disposition on the grounds of mental illness or intellectual disability. Although these matters are currently addressed in Divisions 6–8 of Part IB, the ALRC is of the view that it would not be appropriate to make recommendations about these preliminary issues of criminal procedure and criminal liability in the context of an Inquiry about sentencing. However, the importance of these issues is not in doubt. In Chapter 28 of this Report the ALRC recommends that these issues be addressed as part of an independent inquiry into mental illness and intellectual disability in the federal criminal justice system.

1.11 At the other end of the process, the ALRC has not investigated the conditions within state and territory correctional facilities, except to the extent that conditions have a bearing on the determination of sentence, or where disparity between states and territories in the rules applicable to federal offenders has a bearing on the administration of federal sentences.

## Process of reform

### Advisory Committee

1.12 It is standard operating procedure for the ALRC to establish an expert Advisory Committee to assist with the development of its inquiries. In this Inquiry, the Advisory Committee included prosecutors and criminal defence lawyers, judicial officers from

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5 In February 2006, the Minister for Justice and Customs, Senator the Hon Chris Ellison, announced a review of criminal penalties in Commonwealth legislation to be undertaken by the Attorney-General's Department: C Ellison (Minister for Justice and Customs), 'Review of Criminal Penalties in Commonwealth Legislation' (Press Release, 23 February 2006).

6 These issues were dealt with in detail in Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002).

7 Section 72 of the *Defence Force Discipline Act 1982* (Cth) expressly applies some provisions of Part IB to the proceedings of a service tribunal that imposes a punishment of imprisonment. Any reforms resulting from this Inquiry will therefore have a flow-on effect on the military disciplinary system. However, the impact of any such changes, and any further reforms to the military disciplinary system itself, are the proper subject for a separate inquiry.

8 However, administrative detention in connection with a criminal offence may have a bearing on sentencing in so far as an offender should be given credit for time in detention. This matter, and related issues, are discussed in Chs 6 and 10.

federal and state courts, academics with expertise in the area, and government officers from state and federal agencies with responsibilities for justice and corrections.<sup>9</sup>

1.13 The Advisory Committee met three times in the course of the Inquiry—on 21 September 2004, 2 August 2005, and 2 March 2006—to provide advice and assistance to the ALRC. The Committee was of particular value in helping the Inquiry to identify the key issues and determine priorities, as well as in providing quality assurance in the research and consultation effort. The Advisory Committee also assisted with the development of recommendations as the Inquiry progressed. However, ultimate responsibility for the Report and its recommendations remains with the Commissioners of the ALRC.

### **Community consultation**

1.14 Under the terms of its constituting Act, the ALRC ‘may inform itself in any way it thinks fit’ for the purposes of reviewing or considering anything that is the subject of an inquiry.<sup>10</sup> One of the most important features of ALRC inquiries is the commitment to widespread community consultation.<sup>11</sup> The nature and extent of this engagement are usually determined by the subject matter of the reference.

1.15 The ALRC developed a broad consultation strategy for this Inquiry, which encouraged participation from a wide spectrum of stakeholders. The ALRC held more than 80 consultations involving many hundreds of people and spanning diverse groups: prosecution agencies; criminal defence lawyers; judicial officers; government regulators; legal professional associations; legal aid bodies; prisoners’ rights groups; victims’ rights groups; mental health organisations; data collection agencies; judicial education bodies; corrections authorities; independent corrections inspectorates; parole boards and academics. A full list of consultations is set out in Appendix 4.

1.16 The ALRC’s commitment to widespread community consultation also has a geographic dimension. Although the ALRC is based in Sydney, in recognition of the national character of the Commission, consultations were conducted in every state and territory capital in Australia.

### **Written submissions**

1.17 The Inquiry strongly encouraged interested persons and organisations to make written submissions to help advance the policy-making process. Ninety-eight written submissions were received in the course of the Inquiry. The submissions varied substantially in size and style, ranging from short notes written by individuals providing personal views, to large, well-researched documents prepared by government departments and agencies, professional associations and individual

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9 The members of the Advisory Committee are listed in the front of this Report.

10 *Australian Law Reform Commission Act 1996* (Cth) s 38.

11 B Opeskin, ‘Engaging the Public: Community Participation in the Genetic Information Inquiry’ (2002) 80 *Reform* 53.

researchers. From the outset, the Inquiry was aware that some of the information in submissions might have personal sensitivity and the ALRC left open the possibility of receiving submissions in confidence. Of the 98 submissions received, only five have been designated as confidential, all from past or current prisoners or their families.

### **Timeframe**

1.18 Under the Terms of Reference, the ALRC was originally required to report to the Attorney-General by 31 January 2006, but the reporting date was later formally extended to 28 April 2006.

1.19 The ALRC's usual operating procedure is to produce two community consultation papers—an Issues Paper and a Discussion Paper—prior to producing the final Report. Issues Paper 29 was released in January 2005 and sought to identify the main issues relevant to the Inquiry, provide background information, and encourage informed public participation.

1.20 Discussion Paper 70 differed from the Issues Paper in that it contained a more detailed treatment of the subject matter, as well as specific proposals for reform. Both the Issues Paper and the Discussion Paper were made available free of charge in hard copy from the ALRC, and could also be downloaded free of charge from the ALRC's website.

1.21 In recent reports, the ALRC's approach to law reform has involved a mix of strategies including: legislation and subordinate regulations, official standards and codes of practice, industry and professional guidelines, education and training programs, and so on. Although the final Report is presented to the Attorney-General, some recommendations are directed to other government and non-government agencies. Relevant agencies are identified in the Implementation Schedule.

1.22 Once tabled in Parliament, the final Report becomes a public document.<sup>12</sup> The Report is not self-executing—the Inquiry provides recommendations about the best way to proceed but implementation is a matter for others.<sup>13</sup>

### **Special features of the Inquiry**

1.23 The ALRC's processes in conducting the Inquiry have been described in general terms above. However, there are two features of the current Inquiry that deserve special mention: the ALRC's collaboration with other agencies in relation to the provision and analysis of data, and the participation of federal offenders.

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12 The Attorney-General must table the Report within 15 sitting days of receiving it: *Australian Law Reform Commission Act 1996* (Cth) s 23.

13 However, the ALRC has a strong record of having its advice followed. About 59 per cent of the ALRC's previous reports have been substantially implemented, 27 per cent have been partially implemented, three per cent are under consideration, and 11 per cent have had no implementation to date.

### **Collaboration with other agencies**

1.24 In 1988, ALRC 44 remarked that there was little published information about the number and characteristics of federal offenders and that many studies undertaken in respect of offenders in the states and territories did not distinguish between federal and non-federal offenders.<sup>14</sup> It is an unfortunate but telling fact that little has changed in the intervening years. It is still difficult to locate publicly available data on persons who are prosecuted or sentenced under federal legislation, and this Report again makes a number of recommendations designed to redress this shortfall.

1.25 Nevertheless, the ALRC considers it to be of utmost importance that its recommendations have a sound evidential basis—to the extent that available data allow. To this end, the ALRC collaborated with two federal agencies to provide and analyse data on federal offenders.

1.26 The Australian Institute of Criminology (AIC) analysed snapshot data on the 695 federal prisoners held in custody on 13 December 2004. The information was made available by the AGD in de-identified form from its case management database on the sentences of federal prisoners. That database relates to prisoners, not offenders, and does not record a large number of variables. Yet interesting trends emerged when those data were compared with data on state and territory prisoners published by the Australian Bureau of Statistics. The results of the AIC's analysis are reproduced in Appendix 1 and are incorporated elsewhere in this Report where relevant.

1.27 The second collaboration was with the Commonwealth Director of Public Prosecutions (CDPP). The CDPP collects a significant amount of information about federal offences and federal offenders, which it stores in an in-house electronic database. Prosecutors draw on this sentencing information when making submissions to courts on sentence, but it is otherwise not publicly available.

1.28 In May 2005, the CDPP agreed to provide the ALRC with de-identified information from its database in relation to federal drug and fraud offences prosecuted by the CDPP over the five-year period 2000–2004. The AIC also analysed this much richer dataset and the results are reproduced in Appendix 2 and incorporated elsewhere in this Report where relevant. The analysis covered 25,160 'cases', involving 17,105 offenders who were prosecuted on 85,596 charges.

1.29 In addition, the CDPP responded to numerous requests from the ALRC for specific data in relation to appeals, joint matters, young offenders and mental health, and these data are also referred to in this Report where relevant.

1.30 The ALRC would like to thank James Carter, Anthony Henry, Karen Twigg, Damien Sturgeon and Maggie McEwan for their generosity in sharing and analysing

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14 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [5].

the CDPP's data. The ALRC would also like to record its special thanks to the Director of the AIC, Dr Toni Makkai, and research analysts, Matthew Willis and Jason Payne, for their substantial work in analysing the data.

### **Involvement of federal offenders**

1.31 The other special feature of this Inquiry has been the efforts made to invite comments from federal offenders themselves. The ALRC produced a brochure in late 2004, which it sought to distribute to all federal offenders in Australia. The brochure provided general information about the Inquiry and invited federal offenders to register their interest via a reply-paid form and to make submissions. It was made clear that the ALRC could not provide legal advice or assistance in individual cases.

1.32 The process of distributing the brochure was as revealing about the nature of the federal criminal justice system as any consultation or submission. In the absence of a centralised agency with ready access to federal offenders, the ALRC was required to write to the corrective services agencies in each jurisdiction, seeking their cooperation in distributing the brochure. Since the AGD does not hold information about federal offenders other than prisoners, it was also necessary to ask each state and territory for an estimate of the number of federal offenders serving non-custodial sentences, such as community service orders, in its jurisdiction. In many jurisdictions precise figures were not available, and even estimates required a bit of spadework. In the result, the brochures were distributed by the various agencies to nearly 2,000 federal offenders, but the process took over four months.

1.33 The response to the brochure was encouraging. The ALRC received 214 reply-paid forms, the large majority from prisoners. Many forms identified concerns about lack of information on parole, transfer to another jurisdiction, and even the content of relevant federal legislation. All who responded were sent hard copies of the consultation papers and were invited again to make a submission. The ALRC subsequently received 20 submissions from past or present federal offenders, some of which are confidential. These submissions provide unique insights into the way some federal offenders experience the sentencing process, and they are cited in this Report where relevant.

### **International legal context**

1.34 In drafting this Report the ALRC has also considered a range of international treaties, standards and guidelines dealing with sentencing. While the paragraphs below provide a general overview of these instruments, they are discussed in more detail in other parts of the Report.

1.35 Minimum standards and safeguards in relation to criminal justice systems are contained in the *International Covenant on Civil and Political Rights 1966* (ICCPR)<sup>15</sup> and the *Second Optional Protocol to that Covenant on the abolition of the death penalty*,<sup>16</sup> the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984* (CAT),<sup>17</sup> and the *Convention on the Rights of the Child 1989* (CROC).<sup>18</sup> Australia is a party to all these instruments and any federal, state or territory legislation, policy or practice that is inconsistent with them will place Australia in breach of its international obligations.

1.36 These international instruments include a number of principles relevant to sentencing:

- everyone convicted of a crime should have the right to have his or her conviction and sentence reviewed by a higher tribunal;<sup>19</sup>
- a court must not impose a penalty that is heavier than the one that applied at the time when the criminal offence was committed;<sup>20</sup>
- no one should be subject to arbitrary detention,<sup>21</sup> that is, detention that does not have an adequate legal basis or is otherwise unreasonable, inappropriate or unjust.<sup>22</sup> The detention must also be proportionate;<sup>23</sup> and
- no one should be subjected to torture or to cruel, inhuman or degrading treatment or punishment at the hands of the state.<sup>24</sup>

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15 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976).

16 *Second Optional Protocol to the International Covenant on Civil and Political Rights*, 15 December 1989, [1991] ATS 19, (entered into force generally on 11 July 1991).

17 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, [1989] ATS 21, (entered into force generally on 26 June 1987).

18 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990).

19 ICCPR art 14(5).

20 ICCPR art 15(1).

21 ICCPR art 9(1).

22 *van Alphen v The Netherlands*, Communication No 305/1988, Report of the Human Rights Committee 1990, Volume II, UN Doc A/45/40 (1990), 115.

23 *A v Australia*, Communication No 560/1993, Report of the Human Rights Committee 1999, Volume II, UN Doc A/52/40 (1999) 143.

24 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, [1989] ATS 21, (entered into force generally on 26 June 1987) art 1, 2.

1.37 In relation to juvenile offenders, CROC requires that the arrest, detention or imprisonment of a child should be a measure of last resort and for the shortest appropriate period of time.<sup>25</sup> The Convention also requires that alternatives to detention be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to their circumstances and the offence.<sup>26</sup>

1.38 In addition to these treaties, other international standards and guidelines have been developed, which have broad support among the international community. These include the *United Nations Standard Minimum Rules for the Treatment of Prisoners 1955*,<sup>27</sup> the *United Nations Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment 1988*,<sup>28</sup> the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985* (the Beijing Rules),<sup>29</sup> the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990*,<sup>30</sup> the *United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care 1991*,<sup>31</sup> the *United Nations Standard Minimum Rules for Non-custodial Measures 1990* (the Tokyo Rules),<sup>32</sup> and the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985*.<sup>33</sup> The Preamble to the Tokyo Rules makes clear that the goal of criminal justice systems, and of sentencing in particular, should be the rehabilitation and reintegration of offenders into society.

1.39 Although not necessarily binding on Australia at international law, the standards and guidelines in these instruments do represent internationally accepted minimum standards and the ALRC has used them as important reference points in developing the policies that underpin the recommendations in this Report.

## Developments in federal criminal law and sentencing

1.40 The ALRC also considered the implications of the structure of the federal criminal justice system and the nature of federal criminal law in developing the recommendations in this Report. It has been said that approximately 90 per cent of criminal activity occurring in Australia falls within the responsibilities of the states and

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25 CROC art 37(b).

26 CROC art 40(4).

27 *United Nations Standard Minimum Rules for the Treatment of Prisoners*, UN Doc A/CONF/6/1 (1955).

28 *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Res 43/173, Annex, 43 UN GAOR Supp, UN Doc A/43/49 (1988).

29 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985).

30 *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, UN Doc A/RES/45/113 (1990).

31 *United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, UN Doc A/RES/46/119 (1991).

32 *United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)*, UN Doc A/RES/45/110 (1990).

33 *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc A/Res/40/34 (1985).



territories, while only 10 per cent falls within Commonwealth responsibility.<sup>34</sup> There are now over 500 Commonwealth statutes containing criminal offences,<sup>35</sup> and although there are no readily available statistics, an ALRC survey in 2001 revealed that there were approximately 1,500 federal criminal offence provisions.<sup>36</sup>

1.41 The *Australian Constitution* does not give the Australian Parliament a general power to make criminal laws.<sup>37</sup> However, the Australian Parliament may make criminal laws in relation to the subject matter of other powers granted to it by the *Constitution*. For example, the Parliament's express power to make laws with respect to 'fisheries in Australian waters beyond territorial limits' (s 51(x)) also enables it to create fisheries offences. Similarly, Parliament's express power to make laws with respect to 'trade and commerce with other countries' (s 51(i)) enables it to criminalise the importation of certain substances, such as narcotics. The Parliament also has express power in relation to areas such as taxation, defence, social security and migration.<sup>38</sup>

1.42 The subject matter of federal criminal law is often quite different from state and territory criminal law in that it often has a national or international focus. However, there are areas of overlap where federal and state or territory offences may be committed in the course of a single criminal enterprise.<sup>39</sup>

1.43 The period from the early 1990s to the present has seen an expansion in the type of conduct that is subject to federal criminal penalties. In particular, there has been an increase in regulatory offences; offences relating to transnational crime, cybercrime and national security; and international sex offences. It has been suggested that modern technology (including developments in communications and transportation) and globalisation have made this kind of criminal activity more common, more lucrative, easier to commit, and harder to detect.<sup>40</sup> Part of Australia's response to these developments has been the ratification of a number of international treaties, and the enactment of related legislation including offence provisions.<sup>41</sup> Australia has also recognised the transnational character of particular criminal activities by making such activities an offence when committed outside Australia.<sup>42</sup> The globalisation of financial

34 J Broome, 'Commonwealth/State Boundaries in Crime and Justice' (Paper presented at 3rd National Outlook Symposium on Crime in Australia, Canberra, 22–23 March 1999), 2.

35 See Law Book Co, *Watson & Watson Australian Criminal Law: Federal Offences*, vol 1.

36 See Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [2.11].

37 Although it does give the Parliament specific power to make laws with respect to 'the influx of criminals': *Australian Constitution* s 51(xxviii).

38 See, eg, *Australian Constitution* s 51(ii), (vi), (xxiii), (xxiiiA), (xxvii).

39 Jurisdictional problems arising in relation to joint matters are discussed in Chs 18 and 20.

40 A Graycar, 'New Crimes or New Responses' (Paper presented at 3rd National Outlook Symposium on Crime in Australia, Canberra, 22–23 March 1999), 2.

41 See, eg, *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* (Cth), implementing the *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 20 December 1988, [1993] ATS 4, (entered into force generally on 11 November 1990).

42 See, eg, *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth).

markets has also facilitated economic crime, such as money laundering. New offences under Part 10.2 of the *Criminal Code* (Cth) and the *Proceeds of Crime Act 2003* (Cth) have been enacted to deal with this conduct.

1.44 Conduct related to computer and communications technology has also been the subject of new criminal offences. Several serious computer offences have been introduced under Part 10.7 of the *Criminal Code*, dealing with unauthorised access, modification or impairment of data on a computer. The *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) criminalises local access to pornography on the Internet, and the *Cybercrime Act 2001* (Cth) has created a number of offences relating to computer systems, which are sufficiently broad to embrace both ‘ordinary’ cyber-criminality (such as hacking and the distribution of viruses) and the more serious manifestations of crime that might attract the label of ‘cyber-terrorism’.

1.45 Substantial changes in the criminal law sometimes occur because of particular events.<sup>43</sup> Examples include the terrorist attacks on the World Trade Center and the Pentagon on 11 September 2001, and those in Bali on 12 October 2002. These events have heightened public awareness of matters of national security. Parliament has responded by creating new offences under the *Criminal Code*, including offences relating to terrorist acts, providing or receiving training connected with terrorist acts, possessing things connected with terrorist acts, and collecting or making documents likely to facilitate terrorist acts.<sup>44</sup>

1.46 Parliament has also enacted legislation that creates sex offences. For example, there are now several offences relating to sexual servitude<sup>45</sup> and child sex tourism.<sup>46</sup> In addition, Division 138 of the *Criminal Code* includes offences relating to ‘war crimes’ and ‘crimes against humanity’.

1.47 Traditionally, federal offences have been described as ‘victimless’ in the sense that the injury is often directed not to an identifiable individual but to the Commonwealth as a polity. However, many of these new federal offences—such as terrorism, people smuggling, child sex tourism and sexual slavery—may well affect individuals directly. In this context, a range of emerging issues requires consideration including the role of victims of crime in the sentencing, administration and release of federal offenders.

1.48 It has been suggested that some of these trends will continue into the future. Professor Richard Fox has identified six areas in which movement is likely to occur in Australian criminal law and procedure in the opening decades of the 21st century: the shift from local to national and international sovereignty over criminal law; the search

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43 J Broome, ‘Commonwealth/State Boundaries in Crime and Justice’ (Paper presented at 3rd National Outlook Symposium on Crime in Australia, Canberra, 22–23 March 1999), 4.

44 See *Criminal Code* (Cth) Pt 5.3—Terrorism.

45 See *Ibid* s 270.6.

46 *Crimes Act 1914* (Cth) Pt IIIA.

for more effective sanctions against corporate crime; the greater use of civil remedies; reform of criminal procedure; the possibility of decriminalisation of some types of conduct; and the ongoing re-evaluation of the values and doctrines that underpin the criminal law.<sup>47</sup>

1.49 The ALRC has also been cognisant of the extensive reforms of sentencing law and policy that have taken place in the states and territories over the past 15 years. These changes include:

- shifts in community attitudes about the objectives of criminal law and the value of punishment;
- the increasing media focus on law and order, with its frequent focus on escalating the severity of penalties;
- the impact of victims' groups on sentencing reforms, including greater use of victim impact statements and more options for ordering offenders to make reparation;
- attempts to seek greater consistency in sentencing through mandatory sentencing, grid sentencing and guideline judgments;
- the development of restorative justice initiatives, with their emphasis on repairing the harms and ruptured social bonds caused by crime; and
- the development of specialist courts with a focus on the rehabilitation of offenders, particularly in relation to Indigenous offenders and offenders with a drug addiction.

1.50 Finally, the enactment of the *Criminal Code* (Cth), with its new principles of criminal responsibility, means that federal criminal law is diverging in significant and fundamental ways from state and territory criminal law. The Code is giving rise to new jurisprudence and the need for specialist expertise.<sup>48</sup> In addition, changes at the state and territory level—for example, the introduction of majority jury verdicts in some states<sup>49</sup>—have created further divergence between federal and state criminal law and procedure. The impact of these and other developments can be seen throughout this Report both in the accounts given of state and territory sentencing practices and in the recommendations put forward for reform of federal sentencing law.

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47 R Fox, 'New Crimes or New Responses? Future Directions in Australian Criminal Law' (2002) 28 *Monash University Law Review* 103.

48 Chapter 2 of the Model Criminal Code, which sets out the principles of criminal responsibility, has to date been adopted only at the federal level and in the ACT and the Northern Territory.

49 See, eg, *Juries Act 2000* (Vic) s 46; *Juries Act 1927* (SA) s 57.

## Federal criminal justice system

1.51 Australia has a federal system of government in which legislative powers are distributed between the Australian Parliament and the state and territory legislatures. Under this system, the administration of criminal justice is substantially, but not exclusively, a state and territory responsibility. Each state and territory possesses its own body of criminal law and agencies established to administer that law. At the time of Australia's federation in 1901, these were generally well established in the states and influenced the manner in which the *Australian Constitution* was framed and the way in which the new Commonwealth went about organising its own criminal justice system.

1.52 Over time, the Commonwealth has established a number of federal agencies including the Australian Federal Police (AFP) to investigate federal crime and the CDPP to prosecute federal crime. However federal offenders continue to be dealt with largely in state and territory courts, and the states and territories continue to be responsible for administering the sentences imposed on federal offenders.

## Investigation of federal crime

1.53 Under the *Australian Federal Police Act 1979* (Cth), the AFP is responsible for enforcing federal law, safeguarding Commonwealth interests and protecting Commonwealth property. Current areas of focus include organised crime, transnational crime, money laundering, major fraud, illicit drug trafficking, and e-crime.<sup>50</sup> Investigation and enforcement in these and other areas of federal responsibility require the AFP to work across jurisdictional boundaries and in partnership with state and territory police services.

1.54 Although the AFP is the principal law enforcement arm of the Australian Government, other federal agencies also exercise investigatory powers in regard to particular areas of federal responsibility. These agencies include the Australian Taxation Office (ATO), the Australian Customs Service, the Department of Immigration and Multicultural Affairs, the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC).

## Prosecution of federal offences

1.55 Section 13 of the *Crimes Act* provides that, unless a contrary intention appears in the Act or regulation creating an offence, any person may institute proceedings in relation to federal offences, although the CDPP has the power to take over any proceeding initiated or carried on by another person.<sup>51</sup> State and territory authorities—as well as some federal agencies such as the ACCC, ASIC and the ATO—undertake

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50 Australian Federal Police, *Australian Federal Police Website* <<http://www.afp.gov.au/afp/page/>> at 20 September 2004.

51 *Director of Public Prosecutions Act 1983* (Cth) s 9(5).

some federal prosecutions. This is especially so in relation to high volume matters of minimal complexity where, for example, pleas of guilty are common or prison sentences are rarely imposed.<sup>52</sup> More complex matters are referred to the CDPP. The CDPP is the principal Australian Government agency responsible for conducting prosecutions of federal offences—over 9,000 charges in 2004–05.<sup>53</sup>

1.56 The vast bulk of federal prosecution activity relates to less serious criminal offences and is dealt with summarily (81 per cent). A high proportion of federal offenders plead guilty: in 2004–05, 95 per cent of those convicted of summary offences did so, as did 78 per cent of those convicted of indictable offences.<sup>54</sup>

1.57 In relation to joint offenders who face both federal charges and state or territory charges, arrangements are in place to decide whether the prosecution is handled by the relevant state or territory authority or by the CDPP. This decision is based on factors such as the relative seriousness of the state or territory and federal charges; the degree of inconvenience or prejudice to either the accused or the prosecution if the proceedings are split; the investigative agencies involved; and other matters that go to the balance of convenience.<sup>55</sup>

### **Adjudication of federal offences by state and territory courts**

1.58 The High Court of Australia was established in 1903, and in due course other federal courts were also created, including the Family Court in 1975, the Federal Court in 1976, and the Federal Magistrates Court in 1999. However, only a small number of criminal and quasi-criminal matters are heard in federal courts.<sup>56</sup> This is because the Australian Parliament chose to rely heavily on the state and territory courts to adjudicate proceedings with respect to federal offences in order to avoid the financial and administrative costs associated with establishing a separate system of federal criminal courts.

1.59 The use of state courts was made possible by ss 71 and 77(iii) of the *Australian Constitution*. Section 71 vests the judicial power of the Commonwealth in the High Court, in such other federal courts as the Australian Parliament creates, and in such other courts as it invests with federal jurisdiction. Section 77(iii) provides that the Australian Parliament may make laws investing state courts with federal jurisdiction. Section 39(2) of the *Judiciary Act 1903* (Cth) invests state courts with federal jurisdiction in both civil and criminal matters, subject to certain limitations and exceptions. Specific provision is made under s 68(2) of the *Judiciary Act* for the exercise of federal criminal jurisdiction by state and territory courts. Sections 68(1) and

52 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (1998) <<http://www.cdpp.gov.au/Prosecutions/Policy/Default.aspx>> at 6 October 2004, [3.6].

53 Commonwealth Director of Public Prosecutions, *Annual Report 2004–05* (2005), 37.

54 Based on figures in *Ibid*, 34.

55 Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004.

56 However, these courts do have power to impose sanctions for contempt of court: *Federal Court of Australia Act 1976* (Cth) s 31; *Family Law Act 1975* (Cth) s 35; *Federal Magistrates Act 1999* (Cth) s 17.

79 of the *Judiciary Act* pick up and apply state and territory procedural laws to federal prosecutions in state and territory courts.

1.60 In *R v Loewenthal*, Mason J set out the justification for this approach as follows:

Although the distinction between federal and State jurisdiction has created problems, they were largely foreseen by the authors of the *Judiciary Act*. Pt X of the Act provided a solution to the difficulties arising from a duality of jurisdiction by applying to criminal cases heard by State courts in federal jurisdiction the laws and procedure applicable in the State (s 68). The purpose of the section was, so far as possible, to enable State courts in the exercise of federal jurisdiction to apply federal laws according to a common procedure in one judicial system.<sup>57</sup>

1.61 The application of state and territory procedural laws to the sentencing of federal offenders has the potential to give rise to differences in the way federal offenders are dealt with from one jurisdiction to another. In addition, while federal offence provisions overwhelmingly provide for just two types of sentencing option—fines and imprisonment—many other sentencing options available in the states and territories—such as community service orders, periodic detention and home detention—are picked up by the *Crimes Act* and applied to the sentencing of federal offenders. Thus, the options available for sentencing federal offenders vary across Australia. The High Court has held, however, that the administration of federal criminal law on a state-by-state basis is valid even where this gives rise to significant differences in the procedures applying to the adjudication of federal offences.<sup>58</sup> Finding the balance between reasonable consistency in the sentencing of federal offenders and the need to work within a federalised criminal law system has been one of the key issues for this Inquiry.

### **Imprisonment and punishment of federal offenders**

1.62 The Australian Government historically relied, and continues to rely, on the states and territories to accommodate federal offenders and those accused of crimes against federal law. The number of federal prisoners is relatively small—there were only 672 federal prisoners in custody on 1 March 2006, or less than three per cent of the total Australian prison population. Of these, 86 per cent were male and 14 per cent were female. The majority (57 per cent) were located in New South Wales. The states and territories also administer and supervise federal offenders sentenced to alternative custodial sentences, such as periodic and weekend detention and non-custodial orders such as community service orders. They also enforce the collection of fines imposed for federal offences on behalf of the Australian Government.

1.63 These arrangements have a firm constitutional basis. Section 120 of the *Constitution* requires ‘every State to make provision for the detention in its prisons of

<sup>57</sup> *R v Loewenthal* (1974) 131 CLR 338, 345.

<sup>58</sup> *Williams v The King [No 2]* (1934) 50 CLR 551; *Leeth v Commonwealth* (1991) 174 CLR 455; *Putland v The Queen* (2004) 218 CLR 174.

persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences'. This provision imposes an obligation on the states to receive federal prisoners<sup>59</sup> and to administer some other types of penalties imposed on federal offenders. By and large, the states and territories bear the immediate cost of providing these services, but some account is made for the cost of providing corrective services for federal offenders through the Commonwealth Grants Commission process.<sup>60</sup>

## Organisation of this Report

1.64 The Report is arranged into eight Parts. The principal recommendations in each Part are summarised in the Executive Summary to this Report. For ease of reference, the Parts are as follows:

- Part A—Introduction
- Part B—Determining the Sentence
- Part C—Particular Issues in Sentencing
- Part D—Procedural and Evidential Issues in Sentencing
- Part E—Issues Arising after Sentencing
- Part F—Promoting Better Sentencing
- Part G—Administration and Release of Federal Offenders
- Part H—Special Categories of Federal Offenders.

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<sup>59</sup> *R v Turnbull; Ex parte Taylor* (1968) 123 CLR 28, 37.

<sup>60</sup> See Ch 22 for a discussion of the funding arrangements.





## 2. A Federal Sentencing Act

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### Location of federal sentencing provisions

2.1 Federal sentencing provisions are currently dispersed throughout the *Crimes Act 1914* (Cth). While federal sentencing provisions are located primarily in Part IB of the Act, there are sections relevant to sentencing in Part IA—dealing with penalty units, conversion of penalties, punishment for offences under two or more laws, the sentencing consequences of proceeding summarily on certain indictable offences, and imposing sentences for multiple offences.<sup>1</sup> There are also sections in other parts of the Act that are relevant to the administration and release of federal offenders.<sup>2</sup>

2.2 The *Crimes Act* deals with a wide range of subjects including search warrants, powers of arrest, controlled operations, assumed identities, the investigation of Commonwealth offences, forensic procedures, and the protection of children in proceedings for sexual offences. A portion of the Act also sets out a number of federal criminal offences, including offences against the government, offences against the

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<sup>1</sup> These provisions include *Crimes Act 1914* (Cth) ss 4AA, 4AB, 4B, 4C, 4J, 4K.

<sup>2</sup> For example, s 3B in Part I of the Act provides for arrangements with the states and territories for the performance of functions by state and territory officers and provision of facilities; s 15A in Part IA deals with the enforcement of Commonwealth fines; s 48A in Part III provides that a sentence ceases to run while an escaped prisoner is at large; and Part VIIC provides for pardons, quashed convictions and spent convictions which impact on the release of federal offenders.

administration of justice, offences relating to postal services and telecommunications, unauthorised disclosure of official secrets, child sex tourism and piracy. The structure of the *Crimes Act* does not reflect the chronology of investigation, prosecution, adjudication and sentencing of federal offenders. For example, Part IB, which deals with sentencing, precedes Part IC, which deals with the investigation of federal offences.

2.3 By contrast, the sentencing laws of all states and territories are contained in a separate sentencing Act.<sup>3</sup> There is also precedent in overseas jurisdictions for having a separate sentencing Act.<sup>4</sup> Several states and territories also have laws that deal separately with the administration of sentences.<sup>5</sup>

### Options for reform

2.4 In Discussion Paper 70 (DP 70) the ALRC identified three options for reform in this context.<sup>6</sup> The first is to consolidate the sentencing provisions within the *Crimes Act*, and relocate them within that Act so that the Act better reflects the chronology of investigation, prosecution, adjudication and sentencing of federal offenders. The second option is to enact a separate federal sentencing Act that deals with the sentencing, administration and release of federal offenders. The third option is to enact two new pieces of legislation—a federal sentencing Act and a separate Act dealing with the administration and release of federal offenders.

2.5 The enactment of a separate federal sentencing Act received overwhelming support from a wide range of stakeholders in consultations and submissions.<sup>7</sup> Some called for the ALRC to draft an exposure Bill for public comment.<sup>8</sup> In this regard, the

3 See *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act 1991* (Vic); *Penalties and Sentences Act 1992* (Qld); *Sentencing Act 1995* (WA); *Criminal Law (Sentencing) Act 1988* (SA); *Sentencing Act 1997* (Tas); *Crimes (Sentencing) Act 2005* (ACT); *Sentencing Act 1995* (NT).

4 See *Sentencing Act 2002* (NZ).

5 See, eg, *Crimes (Administration of Sentences) Act 1999* (NSW); *Sentence Administration Act 2003* (WA); *Crimes (Sentence Administration) Act 2005* (ACT).

6 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), [2.4].

7 Law Council of Australia, *Submission SFO 97*, 17 March 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; Attorney-General's Department, *Submission SFO 83*, 15 February 2006; G Urbas, *Submission SFO 82*, 14 February 2006; Office of the Public Advocate Victoria, *Submission SFO 81*, 14 February 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006; Chief Judge P McClellan, *Submission SFO 77*, 10 February 2006; Justice P Johnson, *Submission SFO 73*, 10 February 2006; New South Wales State Parole Authority, *Submission SFO 68*, 17 January 2006; Victim Support Australasia, *Submission SFO 60*, 21 December 2005; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; J Willis, *Submission SFO 20*, 9 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; LD, *Submission SFO 9*, 10 March 2005; Criminal Bar Association of Victoria, *Consultation*, Melbourne, 23 February 2006; Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005; Department of Justice Northern Territory, *Consultation*, Darwin, 27 April 2005; Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005; K Warner, *Consultation*, Hobart, 13 April 2005; Confidential, *Consultation*, Melbourne, 31 March 2005; T Glynn, *Consultation*, Brisbane, 2 March 2005.

8 Justice P Johnson, *Submission SFO 73*, 10 February 2006; Attorney General B Debus, *Submission SFO 65*, 9 January 2006.

ALRC notes that the drafting of legislation falls properly within the province and expertise of the Office of Parliamentary Counsel. Stakeholders expressed the view that in light of the well-documented criticisms about the text and structure of Part IB of the *Crimes Act* it was highly desirable to have stand-alone federal sentencing legislation;<sup>9</sup> that a new federal sentencing Act could have an important part to play in promoting consistency in federal sentencing;<sup>10</sup> that there was a need for a new sentencing regime for federal offenders; and that it would be very difficult to address the problems with Part IB by amending existing provisions.<sup>11</sup>

2.6 The Criminal Bar Association of Victoria submitted that a separate sentencing Act:

would give effect to the reality that sentencing has become a complex process and has created its own jurisprudence. The sentencing of offenders is a highly important process in the criminal justice system. Accordingly the legislation that impacts on this process should give recognition to the importance of that process.<sup>12</sup>

2.7 In its view, the fact that many provisions relating to substantive offences have been moved from the *Crimes Act* to the *Criminal Code 1995* (Cth) creates a logical and timely opportunity for federal sentencing provisions to be moved from the *Crimes Act*. Other reasons given in support of a separate Act were that it would make federal sentencing provisions more accessible,<sup>13</sup> and would hopefully lead to a clearer and more logical set of provisions.<sup>14</sup>

2.8 The Commonwealth Director of Public Prosecutions (CDPP) noted that the effect of proceeds of crime proceedings on sentencing was currently dealt with in s 320 of the *Proceeds of Crime Act 2002* (Cth). It submitted that it was preferable for such a provision to be included in any new federal sentencing Act.<sup>15</sup> This approach was supported by the Attorney-General's Department.<sup>16</sup>

2.9 There was limited support expressed for the enactment of two pieces of federal legislation, dealing separately with sentencing and the administration of federal sentences.<sup>17</sup> One reason given in support of two separate Acts was that it would make

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9 Chief Judge P McClellan, *Submission SFO 77*, 10 February 2006; Justice P Johnson, *Submission SFO 73*, 10 February 2006.

10 Justice P Johnson, *Submission SFO 73*, 10 February 2006.

11 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

12 Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005.

13 Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005.

14 J Willis, *Submission SFO 20*, 9 April 2005.

15 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

16 Attorney-General's Department, *Submission SFO 83*, 15 February 2006.

17 J Willis, *Submission SFO 74*, 10 February 2006; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.

the statutes physically manageable for practitioners.<sup>18</sup> However, Queensland Legal Aid expressed the view that it was desirable to have provisions about sentencing and administration of sentences in one Act, and that the location of such provisions in different Acts in Queensland causes difficulties.<sup>19</sup>

### **ALRC's views**

2.10 In 1980 the ALRC recommended that all general provisions on sentencing and punishment should be consolidated in a single Commonwealth statute.<sup>20</sup> The ALRC remains of this view, having regard to the considerable support in submissions and consultations for the enactment of a new federal sentencing Act, and the fact that this approach is consistent with the approach in all states and territories. Consolidating legislative provisions for the sentencing, administration and release of federal offenders and relocating them to a separate federal sentencing Act would give those provisions a heightened profile, increase the transparency and accessibility of the provisions, and emphasise to state and territory judicial officers that a separate sentencing regime applies to federal offenders.

2.11 The consolidation should include relevant provisions that are dispersed throughout the *Crimes Act*, as well as provisions in other federal legislation, such as s 320 of the *Proceeds of Crime Act 2002* (Cth). The ALRC agrees with the CDPP that a provision regarding the effect of a confiscation order on a federal sentence properly belongs within the ambit of the new federal sentencing Act.

2.12 The ALRC is not convinced of the need for a separate federal Act dealing exclusively with the administration of federal sentences, and notes that there was limited stakeholder support expressed for this approach. The case for separate state and territory legislation dealing with administration of sentences is more compelling than the case for separate federal legislation in this area because states and territories provide a range of corrective services and facilities to federal, state and territory offenders, including accommodating offenders sentenced to imprisonment and supervising offenders sentenced to alternative sentencing options. Many of the issues covered in such state and territory legislation—including correctional centre discipline, segregated and protected custody, and administration of periodic and home detention orders—would not be needed in federal legislation.

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18 J Willis, *Submission SFO 74*, 10 February 2006.

19 Queensland Legal Aid, *Consultation*, Brisbane, 2 March 2005.

20 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), Rec 9.

**Recommendation 2–1** The Australian Parliament should enact a separate federal sentencing Act that incorporates those provisions of the *Crimes Act 1914* (Cth) that deal with the sentencing, administration and release of federal offenders. Provisions currently located in Parts I, IA, IB, III and VIIC of the *Crimes Act*, and in other federal legislation, that are relevant to the sentencing, administration and release of federal offenders should be consolidated in the new Act.

## General criticisms of Part IB

### Drafting complexity

2.13 The Terms of Reference direct the ALRC to have regard to the concerns raised about the operation of Part IB of the *Crimes Act*. Some of the strongest criticisms of Part IB were made in cases decided soon after the legislation entered into force in 1990. The drafting, structure and language of Part IB have been the subject of much judicial criticism. The drafting of Part IB has been described as too complex. The legislation has been criticised for its ambiguity and lack of clarity.<sup>21</sup> Its provisions have been criticised as ‘internally inconsistent’,<sup>22</sup> ‘convoluted’ and ‘confusing’,<sup>23</sup> ‘opaque’ and ‘unnecessarily time consuming’,<sup>24</sup> ‘complicated’ and ‘unnecessarily detailed’,<sup>25</sup> ‘a legislative jungle’ and ‘labyrinthine’.<sup>26</sup>

2.14 In *R v Paull* Hunt J stated:

I intend no disrespect when I suggest that this legislative scheme for sentencing federal offenders, despite the recency of its introduction, is very much in need of urgent reconsideration. ...

This unnecessarily complicated and opaque legislation [has created difficulties]. ... At the present time, the question of sentence will take longer to deal with in the average trial than the question of guilt itself.<sup>27</sup>

2.15 In addition, errors made by judicial officers in sentencing federal offenders have sometimes been directly attributed to the complexity of Part IB.<sup>28</sup>

21 *Director of Public Prosecutions (Cth) v El Karhani* (1990) 21 NSWLR 370.

22 *R v Ng Yun Choi* (Unreported, Supreme Court of New South Wales, Sully J, 4 September 1990), 2–3.

23 *R v Bibaoui* (1997) 2 VR 600, 600.

24 *R v Muanchukingkan* (1990) 52 A Crim R 354, 358.

25 *Edwards v Pregnell* (1994) 74 A Crim R 509, 513.

26 *R v Carroll* [1991] 2 VR 509, 514.

27 *R v Paull* (1990) 100 FLR 311, 318, 321. These comments were endorsed in subsequent cases. See *Selimoski v Picknoll* (Unreported, Supreme Court of Western Australia, Full Court, 6 August 1992), 7; *R v Carroll* [1991] 2 VR 509, 514.

28 See, eg, *R v O'Brien* (1991) 57 A Crim R 80, 84.

### Illogical structure

2.16 In addition to the fact that sections relating to sentencing are dispersed throughout the *Crimes Act*, subjects within Part IB are dealt with in a disjointed manner. The order of provisions in Part IB does not reflect the chronology of sentencing, administration and release of federal offenders. The positioning of Divisions 6 to 8—which deal with issues of mental illness unrelated to sentencing—disrupts the flow of provisions in relation to sentencing generally.

2.17 There is no chronological grouping of provisions that are to be considered by a court at the time of sentencing, nor of those that are relevant after sentencing. For example, in *R v Hutton* the New South Wales Court of Criminal Appeal observed that Division 3 of Part IB, which deals with sentences of imprisonment, contains two sections (ss 16F and 19A) that:

do not have, strictly speaking, anything at all to do with the process of determining a sentence in a particular case. The two sections are, rather, facultative in senses which have to do, not with the pre-determination of a sentence, but with the post-determination of a sentence.<sup>29</sup>

2.18 Some matters of which a court should be aware at the time of sentencing—such as the provision empowering a court to make a reparation order—are belatedly positioned in Division 10, which is headed ‘Miscellaneous’. In addition, the sentencing options of discharging an offender without proceeding to conviction, or conditionally releasing an offender after conviction, appear in Part IB after provisions dealing with the release of an offender on parole or licence. However, the latter issues are clearly post-sentencing issues. Other provisions are housed in Divisions to which they bear no obvious connection. For example, the provisions dealing with alternative sentencing options available under state and territory law and the consequences of breaching such options<sup>30</sup> are oddly placed within Division 5, which is headed ‘Conditional release on parole or licence’.

### Archaic language and inconsistent terminology

2.19 Criticisms have also been made of the language in Part IB. Specifically, use of the terminology ‘hard labour’,<sup>31</sup> ‘recognizance’,<sup>32</sup> ‘recognizance release order’,<sup>33</sup> and ‘estreatment’<sup>34</sup> has been criticised on the basis that they are archaic terms.

2.20 Some terminology in the Act is not used in a consistent manner. One example is the use of the phrase ‘the court’ in the provisions dealing with mental illness and

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29 *R v Hutton* [2004] NSWCCA 60, [22].

30 *Crimes Act 1914* (Cth) ss 20AB, 20AC.

31 *Ibid* s 18.

32 See *Ibid* ss 19B(1)(d), 20(1)(a).

33 See *Ibid* ss 16, 20(1)(b).

34 See *Ibid* s 20A(7).

fitness to be tried. The High Court has noted that some of the references to ‘the court’ relate to the jury, while others relate to the judge.<sup>35</sup>

2.21 There is also inconsistent use of language relating to definitions in the *Crimes Act*. Section 3 of the Act provides that a ‘Commonwealth offence’, ‘except in Part IC means an offence against a law of the Commonwealth’. Section 16 similarly defines a ‘federal offence’ as ‘an offence against the law of the Commonwealth.’ It is odd that different terms are used to describe the same concept.

2.22 Some provisions in Part IB do not make use of defined terms consistently. For example, even though ‘federal offence’ is defined for the purpose of Part IB, s 20C refers to a child or young person charged with or convicted of ‘an offence against a law of the Commonwealth’. The drafting could be simplified if the section referred to ‘a child or young person charged with or convicted of a federal offence’. There are other examples of this.<sup>36</sup>

### Submissions and consultations

2.23 In practice, Part IB has caused considerable difficulties in sentencing federal offenders.<sup>37</sup> Views expressed in submissions and consultations endorsed the criticisms of the drafting, structure and language of Part IB<sup>38</sup> and supported a redrafting of federal sentencing provisions with a clearer and more logical structure, simpler language, and internally consistent terminology.<sup>39</sup> There was support for using plain English in the drafting of federal sentencing provisions<sup>40</sup> and for discarding archaic terminology.<sup>41</sup> The Criminal Bar Association of Victoria submitted that the term ‘non-parole period’ should be replaced with the simpler language of a ‘minimum term’.<sup>42</sup> Defence

35 *Kesavarajah v The Queen* (1994) 181 CLR 230, 242–243.

36 *Crimes Act 1914* (Cth) ss 18, 20A(9).

37 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

38 Chief Judge P McClellan, *Submission SFO 77*, 10 February 2006; Justice P Johnson, *Submission SFO 73*, 10 February 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Chief Magistrate I Gray & Others, *Consultation*, Melbourne, 23 February 2006; Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005; Confidential, *Consultation*, Melbourne, 31 March 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005; Queensland Legal Aid, *Consultation*, Brisbane, 2 March 2005; New South Wales Bar Association, *Consultation*, Sydney, 2 September 2004.

39 Law Council of Australia, *Submission SFO 97*, 17 March 2006; Department of Corrective Services Western Australia, *Submission SFO 88*, 17 February 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006; Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; T Glynn, *Consultation*, Brisbane, 2 March 2005.

40 Attorney-General’s Department, *Submission SFO 52*, 7 July 2005.

41 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.

42 Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005.

practitioners and federal offenders stated that many people, including offenders and their lawyers, did not understand what a recognizance release order was.<sup>43</sup>

2.24 It was submitted that the federal sentencing provisions should show clarity, order and flexibility.<sup>44</sup> The sentencing Acts of other jurisdictions, especially Victoria, were suggested as appropriate models for federal sentencing provisions.<sup>45</sup> The view was also expressed that there was a need to simplify the complex numbering of federal sentencing provisions by labelling sections with integers, rather than with integers followed by one or more letters of the alphabet.<sup>46</sup>

2.25 One problem area identified in submissions and consultations was the unnecessary divergence of language between federal sentencing provisions and state and territory sentencing provisions.<sup>47</sup> The Criminal Bar Association of Victoria submitted that the federal terminology should be consistent, as far as possible, with that used in the states and territories. It submitted, for example, that federal sentencing provisions should adopt the terms ‘suspended sentence’ and ‘concurrent’ and ‘cumulative’ sentences, as used in state sentencing legislation.<sup>48</sup> *Frost v The Queen*<sup>49</sup> demonstrated the difficulty caused by inconsistent terminology in interpreting a state provision in relation to remissions to see if it was picked up and applied under Part IB of the *Crimes Act*. The difficulty arose because Tasmanian sentencing legislation used the term ‘suspended sentence’ while Part IB used the term ‘recognizance release order’.

### ALRC’s views

2.26 Having regard to the strident judicial criticisms of Part IB and the difficulties experienced by legal practitioners and offenders in using and understanding the legislation, the ALRC is of the view that federal sentencing legislation should be redrafted to make its structure clearer and more logical, and the language and numbering simpler and internally consistent.

2.27 Clearly structured legislation enhances accessibility for users of the legislation. As far as possible, legislative provisions that are concerned with similar subject matter should be located in close proximity. Provisions of general application should precede

43 PS, *Submission SFO 21*, 8 April 2005; New South Wales Legal Aid Commission—Criminal Law Division, *Consultation*, Sydney, 22 September 2004.

44 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

45 G Mackenzie, *Submission SFO 80*, 14 February 2006; Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; A Freiberg, *Consultation*, Melbourne, 30 March 2005. The *Sentencing Act 1991* (Vic) was used as a model for some other state sentencing legislation such as *Penalties and Sentences Act 1992* (Qld); *Sentencing Act 1995* (WA); *Sentencing Act 1995* (NT).

46 J Willis, *Submission SFO 20*, 9 April 2005. See also Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.

47 Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.

48 Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005.

49 *Frost v The Queen* (2003) 11 Tas R 460. This case is discussed in more detail in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [9.59].



specific provisions, and all provisions relating to each sentencing option should be grouped together. These principles were utilised in drafting the *Sentencing Act 1991* (Vic).<sup>50</sup> The order of provisions should also reflect the chronology of sentencing, administration and release.

2.28 The ALRC agrees with the views expressed in submissions and consultations that the terms used in federal sentencing legislation should, as far as possible, be consistent with terms commonly used in state and territory sentencing legislation. State and territory judicial officers are generally less familiar with federal sentencing legislation than with the sentencing legislation of their own jurisdiction because they sentence federal offenders less frequently. The use of consistent terms across sentencing legislation would assist judicial officers and practitioners in understanding and applying federal sentencing legislation, and would minimise the potential for confusion or error. However, as the states and territories do not use uniform terms, it is not possible for the terms used in federal sentencing legislation to be consistent with all jurisdictions.

2.29 With this goal in mind, the ALRC recommends that federal sentencing terminology should, as far as possible, be consistent with terminology used in state and territory sentencing legislation. It also specifically recommends that the federal sentencing Act adopt the state and territory sentencing terminology of concurrent and consecutive sentences in relation to sentencing for multiple offences.<sup>51</sup> The term ‘recognizance release order’ should be replaced with terminology that properly reflects the nature of the order, namely, a conditional suspended sentence. Most state and territory sentencing Acts use the term ‘suspended sentence’ rather than the term ‘recognizance release order’.<sup>52</sup> The ALRC notes that if the term ‘non-parole period’ were to be changed to ‘minimum term’, as suggested by one stakeholder, this would not be consistent with the position in most jurisdictions. The term ‘non-parole period’ is commonly used and understood in state and territory sentencing.<sup>53</sup> Further, the phrase ‘minimum term’ has potential to be confused with the concept of a minimum penalty.

50 A Freiberg, ‘Sentencing Reform in Victoria’ in C Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (1995) 51.

51 See Rec 12–1 and accompanying text.

52 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 12(1); *Sentencing Act 1991* (Vic) s 27; *Penalties and Sentences Act 1992* (Qld) s 144; *Sentencing Act 1995* (WA) s 76; *Criminal Law (Sentencing) Act 1988* (SA) s 38; *Sentencing Act 1997* (Tas) s 7; *Crimes (Sentencing) Act 2005* (ACT) s 12; *Sentencing Act 1995* (NT).

53 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 44, 54A; *Sentencing Act 1991* (Vic) ss 11–14; *Criminal Law (Sentencing) Act 1988* (SA) s 32; *Crimes (Sentencing) Act 2005* (ACT) pt 5.2; *Sentencing Act 1995* (NT) ss 53A, 54–57.

2.30 The archaic language of ‘recognizance’ has been replaced in some state sentencing legislation with the term ‘bond’,<sup>54</sup> and the adoption of this terminology was suggested in some submissions and consultations.<sup>55</sup> However, the ALRC does not consider it necessary or desirable to replace the term ‘recognizance’ with the term ‘bond’. This is because the term ‘bond’ can include both an agreement to pay a sum of money in default of fulfilling some condition, as well as an undertaking by an offender to be of good behaviour for a certain period.

2.31 As discussed in Chapter 7, the ALRC has made a recommendation to repeal the provision that allows a court to require a person to give security by way of recognizance when sentenced to a suspended sentence of imprisonment, or when discharged without proceeding to conviction, or when conditionally released after conviction. While the New South Wales sentencing provisions in relation to good behaviour bonds do not require the offender to give security, the use of the term ‘bond’ in federal sentencing legislation may create the false impression that an undertaking to the court is to be supported by security. The ALRC believes that it is sufficient if federal sentencing legislation refers to a court’s power to impose certain conditions when it is conditionally releasing an offender, such as the condition to be of good behaviour, or to request an undertaking from the offender to comply with those conditions.

2.32 In addition, as the ALRC recommends that imprisonment with hard labour be abolished as a sentencing option, there is no need to recommend that the archaic language of ‘hard labour’ be discarded.<sup>56</sup>

**Recommendation 2–2** Federal sentencing legislation should be redrafted to make its structure clearer and more logical, and the language and numbering simpler and internally consistent. The order of provisions should reflect the chronology of sentencing, administration and release. Principles of general application should precede specific provisions, and provisions relating to each sentencing option should be grouped together.

**Recommendation 2–3** Federal sentencing terminology should, where practicable, be consistent with terminology commonly used in state and territory sentencing legislation. In particular, the term ‘recognizance release order’ should be replaced with terminology that reflects its nature as a conditional suspended sentence.

<sup>54</sup> See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 9, 95.

<sup>55</sup> New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005.

<sup>56</sup> See Ch 7.

## General principles or detailed code?

2.33 Part IB contains some provisions that are very lengthy and detailed, but it is also silent on a number of matters, including procedural and evidential issues in relation to the sentencing hearing.

2.34 Legislation that provides a broad framework supported by general principles may have the benefit of allowing greater flexibility in the exercise of judicial discretion in individual matters, thereby increasing the scope for individualised justice. However, the application of general principles could result in wider divergences in the treatment of federal offenders compared with the application of detailed legislation. Detailed provisions can promote consistency in application, but if the provisions are overly prescriptive they can lead to inflexibility.

2.35 Some support was expressed for federal sentencing provisions to set out a broad framework supported by general principles.<sup>57</sup> The importance of maintaining judicial discretion in the sentencing process was emphasised and there was some resistance to prescriptive legislation.<sup>58</sup> However, certain areas of sentencing law involving the mechanics of sentencing, such as determining the commencement date of a sentence, were identified as appropriate subject matter of prescriptive provisions.<sup>59</sup> The CDPP expressed the view that, where possible, examples were better than exhaustive lists, and that over-prescription could lead to ancillary litigation.<sup>60</sup> The view was also expressed that a broad framework without more may give insufficient guidance to judicial officers, and that a measure of detail was necessary and desirable, especially if federal jurisdiction were to be expanded.<sup>61</sup>

## ALRC's views

2.36 Federal sentencing provisions should, at a minimum, provide a broad framework of general principles and this is reflected in specific recommendations in this Report. The ALRC has recommended that the federal sentencing Act set out its objects;<sup>62</sup> the purposes and principles of sentencing;<sup>63</sup> and the types of factors relevant to

57 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.

58 Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005; M Johnson, *Consultation*, Darwin, 27 April 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005. Compare LD, *Submission SFO 9*, 10 March 2005, which supported prescriptive legislation.

59 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

60 Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.

61 A Freiberg, *Submission SFO 12*, 4 April 2005.

62 See Rec 2–4.

63 See Recs 4–1, 5–1.

sentencing.<sup>64</sup> The Act is to set out how the objects, purposes, principles and factors interrelate.

2.37 The federal sentencing Act should also contain enough detail to provide guidance to judicial officers, without being overly prescriptive or inflexible. This approach is consistent with one of the proposed objects of the federal sentencing Act, which is to promote flexibility in the sentencing, administration and release of federal offenders.<sup>65</sup> It is also consistent with one of the principles of sentencing, which is to provide for individualised justice.<sup>66</sup> In some cases the recommendations are designed to introduce greater flexibility into the sentencing process.<sup>67</sup> Where possible, a drafting style that favours the use of examples over exhaustive lists should be used, and this approach has been taken in formulating some recommendations.<sup>68</sup> However, in some limited situations, policy reasons favour the enactment of an exhaustive list.<sup>69</sup> Further, in some areas of sentencing it is appropriate for legislation to be prescriptive because, for example, there may be a need for certainty and consistency of approach.<sup>70</sup>

## An objects clause

2.38 An objects clause is a provision located at the beginning of a piece of legislation that outlines the underlying purposes of the legislation. An objects clause can also be located at the beginning of a part, division, subdivision or section of an Act. Objects clauses have been described as a modern day variant of the preamble<sup>71</sup> and several pieces of Commonwealth legislation include them.<sup>72</sup> Some objects clauses are relatively comprehensive<sup>73</sup> while others are succinct, nominating only one object.<sup>74</sup> The sentencing Acts of Victoria, Queensland, Tasmania, the ACT and New Zealand contain objects clauses.<sup>75</sup> Of these, the Victorian, Tasmanian and Queensland objects clauses are the most comprehensive, setting out between eight and 11 separate objects.

2.39 Objects clauses have several functions. First, they assist in the construction of legislation.<sup>76</sup> A high proportion of matters heard by courts require the court to rule on

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64 See Rec 6–1.

65 See Rec 2–4.

66 See Rec 5–1.

67 See, eg, Rec 17–2 in relation to dealing with a breach of a suspended sentence.

68 See, eg, Rec 6–1 in relation to sentencing factors.

69 See, eg, Rec 4–1 and the discussion of purposes of sentencing in Ch 4.

70 For example, the ALRC has recommended a prescriptive rather than a flexible approach in determining the manner in which pre-sentence custody and detention is to be treated. See Rec 10–2.

71 D Pearce and R Geddes, *Statutory Interpretation in Australia* (5th ed, 2001), 122.

72 See, eg, *Freedom of Information Act 1982* (Cth) s 3; *Sex Discrimination Act 1984* (Cth) s 3; *Radiocommunications Act 1992* (Cth) s 3; *Migration Act 1958* (Cth) s 4.

73 See, eg, *Proceeds of Crime Act 2002* (Cth) s 5; *Aged Care Act 1997* (Cth) s 2–1; *Telecommunications Act 1997* (Cth) s 3.

74 See, eg, *Gene Technology Act 2000* (Cth) s 3; *Civil Aviation Act 1988* (Cth) s 3A; *Trade Practices Act 1974* (Cth) s 2.

75 *Sentencing Act 1991* (Vic) s 1; *Penalties and Sentences Act 1992* (Qld) s 3; *Sentencing Act 1997* (Tas) s 3; *Crimes (Sentencing) Act 2005* (ACT) s 6; *Sentencing Act 2002* (NZ) s 3.

76 See, eg, *Tickner v Bropho* (1993) 114 ALR 409.

the meaning of a legislative provision.<sup>77</sup> This meaning is often ascertained by reference to legislative intention.<sup>78</sup> Section 15AA of the *Acts Interpretation Act 1901* (Cth) provides that:

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

2.40 The interpretation Acts of the states and territories contain similar or identical provisions.<sup>79</sup> An objects clause enables the ‘purpose or object underlying the Act’ to be readily ascertained.

2.41 A second function of objects clauses is that they are useful aids in drafting legislation. The objects of an Act play an important role in drafting because they require those who draft the legislation (or those who instruct the drafters) to consider whether each provision promotes the objects of the Act, thereby leading to a more coherent and considered piece of legislation. Finally, objects clauses have the potential to promote public understanding of the law and enhance public confidence in the legal system.

2.42 In DP 70, the ALRC proposed that an objects clause should be included in the proposed federal sentencing Act, and nominated nine non-exhaustive objects to be included in the clause.<sup>80</sup>

2.43 There was support among stakeholders for the inclusion of an objects clause in the federal sentencing Act,<sup>81</sup> and specific support for the object of recognising the interests of victims of federal offences.<sup>82</sup> The Attorney-General’s Department submitted that the proposed objects set out in DP 70 were ‘unusually comprehensive’ and suggested a more confined object for the Act.<sup>83</sup> One judge submitted that, consistent with the position in state sentencing legislation, the federal Act should be drafted so as to preserve the authority of the law, whatever its source, not just federal criminal law.<sup>84</sup> Another judge submitted that the provision setting out the objects of the

<sup>77</sup> D Pearce and R Geddes, *Statutory Interpretation in Australia* (5th ed, 2001), 1.

<sup>78</sup> *Singh v Commonwealth of Australia* (2004) 209 ALR 355, 362.

<sup>79</sup> *Interpretation Act 1987* (NSW) s 33; *Interpretation of Legislation Act 1984* (Vic) s 35(a); *Acts Interpretation Act 1954* (Qld) s 14A; *Interpretation Act 1984* (WA) s 18; *Acts Interpretation Act 1915* (SA) s 22; *Acts Interpretation Act 1931* (Tas) s 8A; *Interpretation Act 1978* (NT) s 62A.

<sup>80</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 2–4.

<sup>81</sup> Law Council of Australia, *Submission SFO 97*, 17 March 2006; Department of the Attorney General Western Australia, *Submission SFO 96*, 15 March 2006; Department of Corrective Services Western Australia, *Submission SFO 88*, 17 February 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006.

<sup>82</sup> Department of the Attorney General Western Australia, *Submission SFO 96*, 15 March 2006.

<sup>83</sup> Attorney-General’s Department, *Submission SFO 83*, 15 February 2006.

<sup>84</sup> Justice H Fryberg, *Submission SFO 94*, 1 March 2006.

Act could expand upon the desirability of consistency in sentencing and the application of the rule of comity by Courts of Criminal Appeal of the different states and territories.<sup>85</sup>

### **ALRC's views**

2.44 The ALRC believes the federal sentencing Act should include a reasonably comprehensive objects clause. This approach is consistent with the sentencing legislation of a number of comparable jurisdictions.

2.45 As a general principle, the ALRC favours the inclusion of broadly expressed objects, as opposed to specific objects, unless there is a special reason for the inclusion of a specific object. Having reviewed the objects clauses of sentencing legislation in a number of jurisdictions,<sup>86</sup> and having adapted them where necessary to take into account the content and scope of the proposed federal sentencing Act, the ALRC considers that the following objects should be specified in a non-exhaustive list in the federal sentencing Act:

- to preserve the authority of the law and promote respect for the law;
- to promote a just and safe society;
- to promote public understanding of the laws and procedures for the sentencing, administration and release of federal offenders;
- to have within the one Act all general provisions dealing with the sentencing, administration and release of federal offenders, and to indicate when state and territory laws apply to the sentencing, administration and release of federal offenders;
- to provide the courts with the purposes of and principles for sentencing federal offenders;
- to promote flexibility in the sentencing, administration and release of federal offenders;
- to provide fair and efficient procedures for the sentencing, administration and release of federal offenders;

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<sup>85</sup> Justice P Johnson, *Submission SFO 73*, 10 February 2006.

<sup>86</sup> The objects of sentencing legislation vary in nature and detail. Some are expressed quite broadly, such as promoting consistency of approach in sentencing offenders, and providing the sentencing principles to be applied by courts. Other Acts include objects that are comparatively specific: see, eg, *Penalties and Sentences Act 1992* (Qld) s 3(f) (opportunity to obtain fine option order to avoid imprisonment for non-payment of fine); and *Sentencing Act 1991* (Vic) s 1(i) (compensation and restitution for victims).

- to promote greater consistency in the sentencing of federal offenders, regardless of where in Australia they are sentenced; and
- to recognise the interests of victims of federal offences.

2.46 As discussed in Chapter 3, one of the criticisms of Part IB is that it is unclear whether that Part is intended to achieve greater equality of treatment between federal offenders serving sentences in different states and territories. The new federal sentencing Act should therefore be explicit about pursuing the policy of promoting greater consistency in the sentencing of federal offenders.

2.47 In addition to the above objects, one of the objects of the new federal sentencing Act should be to promote the proper administration of the federal criminal justice system when sentencing federal offenders. Sentencing law and practice often takes into account specific factors that are designed to promote the efficacy of the criminal justice system. As discussed elsewhere in this Report, these factors are: (a) the fact that the offender has pleaded guilty; and (b) the fact that the offender has cooperated with law enforcement authorities.<sup>87</sup> Unlike traditional sentencing factors, these factors do not focus on the individual circumstances of the offence, the offender or the victim; and unlike sentencing factors, they do not on their own promote the traditional purposes of sentencing.<sup>88</sup> Rather, allowing courts to take these factors into account when sentencing promotes the goal of facilitating the administration of the criminal justice system.<sup>89</sup> For reasons of transparency, this goal should be explicitly recognised in the objects of the new federal sentencing Act.

**Recommendation 2–4** Federal sentencing legislation should include an objects clause that states the major objectives of the legislation. The objects should include the following non-exhaustive matters:

- (a) to preserve the authority of the law and promote respect for the law;
- (b) to promote a just and safe society;
- (c) to promote public understanding of the laws and procedures for the sentencing, administration and release of federal offenders;

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<sup>87</sup> See Rec 6–8.

<sup>88</sup> The purposes of sentencing are discussed in Ch 4.

<sup>89</sup> This is discussed further in Chs 6, 11.

- (d) to have within the one Act all general provisions dealing with the sentencing, administration and release of federal offenders, and to indicate when state and territory laws apply to the sentencing, administration and release of federal offenders;
- (e) to provide the courts with the purposes and principles of sentencing federal offenders;
- (f) to promote flexibility in the sentencing, administration and release of federal offenders;
- (g) to provide fair and efficient procedures for the sentencing, administration and release of federal offenders;
- (h) to promote greater consistency in the sentencing of federal offenders, regardless of where in Australia they are sentenced;
- (i) to recognise the interests of victims of federal offences; and
- (j) to promote the proper administration of the federal criminal justice system when sentencing federal offenders.



### 3. Equality in the Treatment of Federal Offenders

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#### Introduction

3.1 Federal law applies throughout Australia and offenders sentenced for the same federal offence in similar circumstances might generally expect to receive similar sentences. However, federal offenders are nearly always tried and sentenced in state and territory courts, applying state and territory laws in relation to procedure and, in some jurisdictions, picking up alternative sentencing options available under state and territory law.<sup>1</sup> This creates the potential for federal offenders to receive different sentences for the same offence, depending on the jurisdiction in which they are sentenced.

3.2 Differing arrangements in the states and territories may also give rise to inequality of treatment in the administration of sentences imposed on federal offenders. As noted in the ALRC's 1980 report, *Sentencing of Federal Offenders* (ALRC 15):

The Commonwealth relies on State criminal justice institutions to handle offenders against laws of the Commonwealth. The policy fosters parity in treatment between Federal and State prisoners within the State and Territory jurisdictions. It enjoys practical advantages, especially cost saving. Nevertheless, the arrangement is a source of disparity in the treatment of Federal offenders sentenced to imprisonment because conditions in prisons vary considerably in different parts of Australia.<sup>2</sup>

3.3 The Terms of Reference for the present Inquiry asked the ALRC to examine whether equality in sentencing federal offenders should be maintained between federal offenders serving sentences in different states and territories—inter-jurisdictional

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<sup>1</sup> The sentencing options available in the states and territories are discussed in Ch 7.

<sup>2</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [201].

equality—or between offenders within the same state or territory, regardless of whether they are state, territory or federal offenders—intra-jurisdictional equality.

3.4 A threshold issue is whether there are constitutional constraints in relation to the treatment of federal offenders. In *Leeth v Commonwealth*<sup>3</sup> the High Court considered whether the *Australian Constitution* requires the equal application of federal law to federal offenders throughout Australia. The issue arose in relation to a section of the *Commonwealth Prisoners Act 1967* (Cth), which was repealed by the *Crimes Legislation Amendment Act (No 2) 1989* (Cth) and replaced by Part IB of the *Crimes Act 1914* (Cth). Section 4 of the *Commonwealth Prisoners Act* provided that, where an offender was sentenced to a term of imprisonment for a federal offence and the law of the state or territory in which the offender was sentenced required a minimum non-parole period to be set, the federal offender was to be sentenced in accordance with that law. This meant that federal offenders in different states and territories could receive different non-parole periods in relation to similar offences. Mason, Dawson and McHugh JJ expressed the view that there was no general requirement in the *Constitution* that federal laws must operate in a uniform way throughout Australia. They stated that:

the administration of the criminal law of the Commonwealth is organized upon a State by State basis and there may be significant differences in the procedures applying to the trial of a person charged with an offence against a Commonwealth law according to the State in which he is tried.<sup>4</sup>

3.5 Issues of uniformity and equality of treatment have also been considered in a number of other High Court cases.<sup>5</sup> While the Court has often been divided on the issue, it appears that a majority of the Court will allow some scope for the differential treatment of federal offenders under the laws of the states and territories.

## The policy choice

### Previous consideration by the ALRC

3.6 ALRC 15 considered whether greater efforts should be made to ensure that federal offenders are treated as uniformly as possible throughout Australia for like offences. The Report noted that the existing policy placed emphasis on integrating federal offenders into the local state and territory criminal justice systems, notwithstanding that this inevitably resulted in inequality in their treatment throughout Australia.<sup>6</sup> The ALRC recommended a change to this policy and adopted the principle that federal offenders should be treated uniformly, wherever they are convicted in Australia.<sup>7</sup> The ALRC considered two options for achieving better inter-jurisdictional

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3 *Leeth v Commonwealth* (1991) 174 CLR 455.

4 *Ibid*, 467.

5 See, eg, *Kruger v Commonwealth* (1997) 190 CLR 1; *Cameron v The Queen* (2002) 209 CLR 339; *R v Gee* (2003) 212 CLR 230; *Putland v The Queen* (2004) 218 CLR 174.

6 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), xxiv.

7 *Ibid*, Rec 16.

equality in the treatment of federal offenders: the adoption of a series of federal interventions in the handling of federal criminal matters by state and territory courts and officers; and the establishment of an entirely separate federal criminal justice system.<sup>8</sup>

3.7 The majority of ALRC commissioners recommended the adoption of a series of federal interventions in the handling of federal criminal matters by state and territory courts and officers.<sup>9</sup> In their view, while the existing arrangements had a number of problems that affected the treatment of federal offenders, they had generally ‘withstood the tests of time, convenience and economics’, and suited the geographical distribution of the Australian population. Accordingly, the existing system ‘should not be abandoned before an attempt to make it work more justly has been made’.<sup>10</sup>

3.8 However, one commissioner was of the view that the only effective way to ensure federal offenders were treated uniformly was to establish a completely separate federal criminal justice system with separate policies, prosecution, courts and correctional personnel and facilities to deal with federal offenders. He recommended that such a system should be introduced and the use of state institutions and personnel should be gradually phased out.<sup>11</sup>

In the past, Federal Governments have successively largely waived their responsibilities for the handling of Federal criminal matters. This situation should not continue. The Commonwealth should assume control over the administration of its own criminal laws in a manner which makes it accountable for them to the citizens of Australia.<sup>12</sup>

3.9 In its 1988 report, *Sentencing* (ALRC 44), the ALRC accepted that, in the prison environment, the policy of intra-jurisdictional equality of treatment for federal prisoners was the only practical approach while such prisoners continued to be housed in state and territory prisons.<sup>13</sup> ALRC 44 noted that:

Responses to ALRC 15, especially from corrections administrators, showed particular concern at the proposal that federal prisoners ... be differentiated in some way within a prison from local prisoners. The secure management of a prison demands as few sources of conflict as possible. A clearly identifiable group of prisoners who receive different and preferential treatment would be a constant source of friction and conflict within the prison, causing prison administrators considerable difficulty.<sup>14</sup>

3.10 This recommendation was subject to a number of qualifications intended to ensure that certain minimum standards applied in relation to federal prisoners,

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8 Ibid, Ch 5.

9 Ibid, Rec 18.

10 Ibid, [153].

11 Ibid, Rec 20.

12 Ibid, [157].

13 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 158.

14 Ibid, [234].

including the appointment of a federal prison coordinator to monitor conditions under which federal prisoners were held and to report to the Australian Government.<sup>15</sup>

### Current arrangements under Part IB

3.11 Following these two reports, Part IB of the *Crimes Act* introduced a number of changes intended to create greater uniformity in the sentencing and administration of federal offenders across Australia, including in relation to the fixing of non-parole periods and the application of remissions. In his second reading speech for the Crimes Legislation Amendment Bill (No 2) 1989 (Cth), which introduced Part IB into the *Crimes Act*, the Hon Robert Brown MP, stated that:

Because of the close association of Federal and State/Territory prisoners it has been the policy of successive Commonwealth governments to maintain intrastate parity of treatment for Federal offenders. The current Commonwealth legislation applies State and Territory laws relating to the fixing of non-parole periods to Federal sentences. However, the increasing divergence of, and frequent changes, both administrative and statutory, to State and Territory legislation have resulted in increasing use of administrative measures to ensure that Federal offenders are not disadvantaged.<sup>16</sup>

3.12 Part IB now provides a separate regime for fixing federal non-parole periods, rather than relying on applied state and territory law.<sup>17</sup> Part IB also provides that remissions available under state and territory law that reduce the non-parole period, or pre-release period, do not apply to federal sentences.<sup>18</sup>

3.13 The Explanatory Memorandum to the Crimes Legislation Amendment Bill (No 2) 1989 sets out 13 main purposes of the Bill, including to review and consolidate the legislation relating to the sentencing and release on parole of federal offenders. In *Putland v The Queen*, the High Court commented that a notable exception to this list was ‘any reference to an overriding or general purpose of providing complete uniformity of treatment as between federal offenders’.<sup>19</sup>

3.14 In *DPP v El Karhani*, the New South Wales Court of Criminal Appeal (NSWCCA) stated that the purpose of the new legislation was not clear.<sup>20</sup> It said that Part IB glossed over, and left unresolved, conflicting policy choices. One such choice was whether federal offenders should be treated equally with one another, irrespective of where their offence was committed, or whether

out of recognition that they are housed side by side with State offenders in State prisons (and often also upon sentences following conviction of connected State

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<sup>15</sup> Ibid, Rec 162.

<sup>16</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 5 October 1989, 1602 (R Brown—Minister for Land Transport and Shipping Support).

<sup>17</sup> See Ch 9.

<sup>18</sup> The only exception to this is remissions for industrial action by prison warders, in those jurisdictions where such remissions are available: *Crimes Act 1914* (Cth) s 19AA(4). See Ch 11.

<sup>19</sup> *Putland v The Queen* (2004) 218 CLR 174, [22].

<sup>20</sup> *Director of Public Prosecutions (Cth) v El Karhani* (1990) 21 NSWLR 370, 387.

offences) ... their punishment [should] be assimilated, approximately, with that of State prisoners.<sup>21</sup>

3.15 While the NSWCCA was of the view that the policy choice behind Part IB was not clear, a former Commonwealth Director of Public Prosecutions (Michael Rozenes), who held office shortly after the legislation was introduced, expressed the view that the legislation in some respects had adopted the wrong policy choice:

The only workable policy is that federal offenders should be subject to State sentencing laws in their entirety, save where it is necessary to make special provision by reason of the fact that they are federal offenders—for example, in the procedures for release on parole. The Commonwealth could then direct its energies in the direction of encouraging the States and Territories to adopt uniform sentencing laws.<sup>22</sup>

3.16 He considered that, notwithstanding there was a compelling argument that federal offenders should be treated as equally as possible irrespective of where they are tried, one could not escape the limitations inherent in the Commonwealth's heavy reliance on the criminal justice systems of the states. In addition, it was unrealistic to expect state courts to be familiar with, and apply consistently, a separate body of law when sentencing federal offenders, especially in cases where a court deals with federal offenders infrequently. Mistakes in sentencing would be inevitable.

### Reconsidering the policy choice

3.17 The current federal sentencing regime lies somewhere along a spectrum of policy options between complete inter-jurisdictional equality and complete intra-jurisdictional equality. In addition, different elements of the sentencing process and administration sit at different points along the spectrum. This is partly because, on some topics, Part IB operates as a complete code for sentencing federal offenders, while on other topics state and territory laws are picked up and applied. For example, the procedure applied in sentencing hearings is heavily dependent on state and territory laws in the relevant jurisdiction. Likewise, the availability of alternative sentencing options (such as community service orders, home detention orders and periodic detention orders) varies from jurisdiction to jurisdiction because these options are available to federal offenders only where they are provided under the relevant law in each jurisdiction. On the other hand, the fixing of non-parole periods is almost entirely dependent on the provisions of the *Crimes Act*.

3.18 In submissions and consultations, a distinction became evident between the views of stakeholders on the issue of equality in the sentencing of federal offenders and equality in the administration of those sentences. Support was expressed for the proposition that a different approach to different issues in the sentencing,

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21 Ibid, 375.

22 M Rozenes, 'Sentencing for Commonwealth Offenders' (Paper presented at Law Council of Australia Criminal Law Seminar, Hobart, 7 March 1992).

administration and release of federal offenders was acceptable given the current federal arrangements.<sup>23</sup>

### *Sentencing*

3.19 In relation to the sentencing of federal offenders, the majority of stakeholders expressed the view that equality between federal offenders was important.<sup>24</sup> There was a level of disquiet that sentences imposed on federal offenders convicted of the same offence in the same circumstances might depend on the geographic location of the trial.<sup>25</sup> Courts have certainly asserted that a fundamental principle of sentencing law is that like cases should be treated in a like, or consistent, manner.<sup>26</sup> Both the Australian Securities and Investments Commission and the Australian Taxation Office cited the importance of national consistency in regulating and enforcing national schemes, such as those established under corporations and taxation laws.<sup>27</sup> The Attorney-General's Department noted a push towards greater consistency in the sentencing options available across jurisdictions in the Corrective Services Ministers' Conference.<sup>28</sup>

3.20 A small number of stakeholders were of the view that it was more important to achieve intra-jurisdictional equality in sentencing<sup>29</sup> or that the weight to be given to inter-jurisdictional equality might depend on the facts of particular cases and the offences committed. Where the federal offence was part of a criminal history also involving state or territory offences, intra-jurisdictional equality might become more important.<sup>30</sup> Two stakeholders submitted that it would be better if federal offenders were dealt with under state legislation.<sup>31</sup>

23 Corrections Victoria, *Submission SFO 48*, 2 May 2005; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005.

24 Department of Corrective Services Western Australia, *Submission SFO 88*, 17 February 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006; Australian Taxation Office, *Submission SFO 72*, 10 February 2006; Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Corrections Victoria, *Submission SFO 48*, 2 May 2005; Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Department of Corrective Services Queensland, *Submission SFO 27*, 14 April 2005; JC, *Submission SFO 25*, 13 April 2005; PS, *Submission SFO 21*, 8 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; Justice T Connolly, *Consultation*, Canberra, 13 February 2006; Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005; New South Wales Bar Association, *Consultation*, Sydney, 2 September 2004.

25 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.

26 See, eg, *Lowe v The Queen* (1984) 154 CLR 606, 610–611. Consistency in sentencing federal offenders is discussed further in Chs 20 and 21.

27 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005.

28 Attorney-General's Department, *Consultation*, Canberra, 9th February 2006.

29 Justice H Fryberg, *Submission SFO 94*, 1 March 2006; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005.

30 Chief Justice D Malcolm, *Submission SFO 71*, 10 February 2006.

31 Inspector of Custodial Services Western Australia, *Consultation*, Perth, 19 April 2005; Justice R Atkinson, *Consultation*, Brisbane, 2 March 2005.

3.21 There was some support for the position put by Michael Rozenes, namely, that federal offenders should generally be subject to state sentencing laws but that the states and territories should be encouraged to adopt uniform sentencing laws.<sup>32</sup> The idea of uniform national sentencing laws proved attractive to quite a few stakeholders, although most of these recognised the difficulty of achieving it.<sup>33</sup>

#### *Administration and release*

3.22 While the majority of stakeholders expressed support for inter-jurisdictional equality in relation to the sentencing of federal offenders, there was general acknowledgement that in relation to the administration of sentences imposed on federal offenders—and particularly in relation to the imprisonment of federal offenders—intra-jurisdictional equality became more important. This is because federal offenders are accommodated in state facilities, and the administrative and correctional regimes vary from state to state. Corrections Victoria did, however, express support for developing greater uniformity of approach between jurisdictions in this area and noted that the Australian Government could play an active role in the process.<sup>34</sup>

3.23 The New South Wales Department of Corrective Services was emphatically of the view that intra-jurisdictional equality in the corrective services context was more important than inter-jurisdictional equality. The Department pointed out that federal offenders make up only four per cent of the prisoner population in New South Wales and that it was essential that policies and principles had equal application to all inmates. The Department noted that the *Standard Guidelines for Corrections in Australia*<sup>35</sup> have been adopted by all states and territories and apply to all prisoners, including federal prisoners.<sup>36</sup>

3.24 One stakeholder expressed the view that it was important to pursue both intra-jurisdictional and inter-jurisdictional equality for all offenders—federal, state and territory. This equality should be based on the standards set out in relevant international human rights instruments and international standards, as well as the *Standard Guidelines for Corrections in Australia*.<sup>37</sup>

#### **ALRC's views**

3.25 In a number of previous reports, the ALRC considered whether, in pursuit of inter-jurisdictional equality, it was appropriate and viable to establish a completely

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32 J Willis, *Submission SFO 20*, 9 April 2005.

33 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005; J Willis, *Submission SFO 20*, 9 April 2005; Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005.

34 Corrections Victoria, *Submission SFO 48*, 2 May 2005.

35 Corrective Services Ministers' Conference and Conference of Correctional Administrators, *Standard Guidelines for Corrections in Australia* (2004).

36 Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.

37 Sisters Inside Inc, *Submission SFO 40*, 28 April 2005.

separate federal criminal justice system, including federal criminal courts, federal corrective services agencies and a federal prison.<sup>38</sup> The issue has been considered again in the context of this Inquiry and the ALRC's views remain essentially unchanged. Given existing state and territory infrastructure (including courts and correctives services agencies and facilities), the relatively small number of federal offenders, and the geographic dispersal of offenders across Australia, it is not viable to establish a completely separate federal criminal justice system.<sup>39</sup> This means that the overwhelming majority of federal offenders will continue to be sentenced in state and territory courts and that the sentences imposed will continue to be administered by state and territory corrective services agencies for the foreseeable future. On this basis, it is the ALRC's view that it is not possible to achieve complete inter-jurisdictional equality for federal offenders.

3.26 However, a breach of federal criminal law by a person anywhere in Australia should attract generally similar consequences and this principle is fundamental to a just criminal law system.<sup>40</sup> The ALRC has attempted, in each section of this Report, to balance the need for like cases to be treated alike with the necessity of working within a federal system in which the Australian Government relies heavily on the states and territories to administer federal criminal law. Achieving broad equality within the federal system is possible because treating like cases alike does not mean treating them identically. Broad equality can be achieved while accepting certain differences that arise from Australia's federal system of government.

3.27 In developing the recommendations in this Report, the ALRC has considered the degree of difference that is acceptable at each stage of the sentencing process. One factor that the ALRC has had to consider is the need to promote best practice—for example, in relation to innovative sentencing options available under state and territory law—even though it may mean that federal offenders receive different sentences in the various jurisdictions. The principle of broad equality should not mean that federal offenders are always subject to the lowest common denominator. The Australian Government can and should play a role in promoting best practice across Australia and encouraging compliance with national and international minimum standards. It can achieve this through greater involvement both with federal offenders and with the states and territories.

3.28 Finally, the ALRC accepts that a different balance between inter-jurisdictional equality and intra-jurisdictional equality may be appropriate in relation to different elements of the sentencing process, as long as certain minimum standards are met.

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38 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980); Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988).

39 See Ch 18 in relation to the establishment of a separate federal criminal court system and Ch 22 in relation to corrective services agencies and facilities.

40 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [151].



### **Sentencing**

3.29 The ALRC agrees with the majority of stakeholders that, in relation to the law governing the determination of a federal offender's sentence, a high degree of inter-jurisdictional equality is possible and desirable. Relying on state and territory legislation in this area would introduce an unacceptable level of inconsistency in the sentencing of federal offenders. The High Court has made clear that consistency in punishment is a fundamental element in a rational and fair system of criminal justice.<sup>41</sup>

3.30 In Chapter 2 the ALRC recommends the development of federal sentencing legislation and in the following chapters the ALRC recommends the development of legislative purposes, principles and factors to apply in sentencing federal offenders.<sup>42</sup> Together, these recommendations will establish a legislative framework within which federal offenders are sentenced and will help to ensure a greater degree of inter-jurisdictional equality and consistency. Other recommendations in this Report are also intended to encourage and support inter-jurisdictional equality in the sentencing of federal offenders, including the establishment of a national sentencing database,<sup>43</sup> the development of a federal sentencing benchbook, and further education of those involved in sentencing federal offenders.<sup>44</sup>

3.31 State and territory courts are already required to apply a distinct sentencing regime to the sentencing of federal offenders under Part IB of the *Crimes Act*. If the recommendations in this Report are implemented, the problems with Part IB identified in this Inquiry will be eliminated and the federal sentencing regime will be simpler and clearer and therefore easier for the state and territory courts to work with.

3.32 In relation to sentencing options for federal offenders, broad equality can be achieved even though different sentencing options may be available in different jurisdictions. The ALRC recommends that the Office for the Management of Federal Offenders (OMFO)<sup>45</sup> work with the states and territories to ensure that each jurisdiction provides adequate facilities to support a minimum range of sentencing options in relation to federal offenders including fines, imprisonment and community based orders. The OMFO should also work with the states and territories, in the context of the Corrective Services Ministers' Conference and the Corrective Services Administrators' Conference, to achieve greater inter-jurisdictional consistency in sentencing options available under state and territory law.<sup>46</sup>

3.33 In relation to sentencing options available under state and territory law, the OMFO should be given the task of examining those options and recommending to the

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41 *Lowe v The Queen* (1984) 154 CLR 606, 610–611.

42 See Chs 4, 5 and 6.

43 See Ch 21.

44 See Ch 19.

45 See Ch 22 on the establishment and role of the OMFO.

46 See Ch 7 in relation to sentencing options.

Australian Government whether they should be made available for federal offenders. The OMFO will be required to consider the issue of equality when making recommendations on state and territory sentencing options. Finally, the ALRC recommends that certain sentencing options should be prohibited in relation to all federal offenders, for example, corporal punishment and imprisonment with hard labour.<sup>47</sup>

### ***Administration and release***

3.34 Different issues arise once federal offenders have been sentenced and responsibility for administering those sentences passes to the states and territories. The day-to-day management of federal offenders is a matter for state and territory corrective services agencies. To ensure the minimum of friction between prisoner populations and to facilitate efficiency in administration, the ALRC accepts that federal offenders must be managed in much the same way as state and territory offenders. The ALRC notes, however, that each offender—federal, state or territory—is subject to an individual sentence imposed for one or more particular offences. In this sense, each sentence must be administered on an individual basis, and federal offenders are no different in this regard.

3.35 A number of the recommendations in this Report—for example, the abolition of automatic parole for federal offenders—will bring the administration of federal sentences more into line with state and territory sentences. In addition, the establishment of the OMFO and the increased involvement of that Office with state and territory corrective services agencies are intended to assist the states and territories in administering the sentences imposed on federal offenders on behalf of the Australian Government. This report recommends that the OMFO have a role in promoting the fulfilment of the *Standard Guidelines for Corrections in Australia* and ensuring compliance with the *Standards for Juvenile Custodial Facilities* in relation to young federal offenders. As all states and territories have adopted these standards, this should not result in the creation of a privileged class of federal offenders. The OMFO will have to work with the states and territories to ensure these standards apply in relation to all offenders.

3.36 Finally, the ALRC considers that, while the current parole arrangements should be improved, responsibility for release of federal offenders into the community should remain at the federal level. The ALRC recommends that the Australian Government establish a federal parole authority to make decisions in relation to parole of federal offenders in order to ensure broad inter-jurisdictional equality in decision making.<sup>48</sup>

3.37 The following recommendation seeks to capture the essential attributes of the ALRC's approach to the issue of equality. Each of the matters addressed in the recommendation is explored in detail in later chapters of this Report.

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47 See Ch 7.

48 See Ch 23.

**Recommendation 3–1** The Australian Government should seek to ensure broad inter-jurisdictional equality and adherence to federal minimum standards in relation to the sentencing, administration and release of federal offenders in different states and territories. In particular:

- (a) The same legislative purposes, principles and factors should apply in sentencing adult federal offenders in every state and territory. Inter-jurisdictional consistency in determining the sentence of federal offenders should be encouraged and supported.
- (b) The Office for the Management of Federal Offenders (OMFO) should work with the states and territories to ensure that each jurisdiction provides adequate facilities to support a minimum range of sentencing options in relation to federal offenders including fines, imprisonment and community based orders. The OMFO should also work with the states and territories to achieve greater inter-jurisdictional consistency in sentencing options available under state and territory law.
- (c) The OMFO should work with the states and territories in relation to the administration of the sentences of federal offenders to: (i) promote the fulfilment of the *Standard Guidelines for Corrections in Australia*; and (ii) ensure compliance with the *Standards for Juvenile Custodial Facilities*.
- (d) The federal parole authority should make decisions in relation to the release of federal offenders on parole to ensure broad inter-jurisdictional equality in decision making. The authority should have regard to the federal legislative purposes of parole and factors relevant to the grant of parole recommended in this Report.



## 4. Purposes of Sentencing

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### Purposes of sentencing

4.1 Punishment is an essential component of any criminal justice system. Those suspected of engaging in criminal activity are investigated and prosecuted on the understanding that they will be punished—or will at least face the threat of punishment—if found guilty of an offence. While most people agree there is a need to punish those found guilty of criminal offences, there is an on-going debate about the underlying justification for this punishment. This debate has generated a prodigious amount of academic literature and has been largely dominated by two different theories of punishment.<sup>1</sup>

4.2 The utilitarian theory of punishment states that punishment is justified because its beneficial effects outweigh its detrimental effects.<sup>2</sup> Proponents of this theory consider that punishment has the potential to reduce crime.<sup>3</sup> On the other hand, the retributive theory of punishment states that punishment is an appropriate moral response to the voluntary commission of an offence and should be imposed regardless of its effects.

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1 C Ten, *Crime, Guilt and Punishment* (1987), 3.

2 Ibid, 7.

3 Ibid, 7.

4.3 While sentencing and punishment are not synonymous, many of the accepted purposes of sentencing have been derived from theories of punishment. The commonly cited purposes of sentencing are retribution, deterrence, rehabilitation, incapacitation and denunciation. Retribution—often referred to as ‘punishment’ in legislation and case law—is derived from the retributive theory of punishment. Deterrence, rehabilitation and incapacitation are derived from the utilitarian theory of punishment.<sup>4</sup> Denunciation is often associated with retributivism, although it has also been linked to utilitarianism. Another purpose of sentencing that has gained prominence in recent years is restoration. These purposes will be considered in turn.

### Retribution

4.4 Retribution is based on the belief that those who engage in criminal activity deserve to suffer.<sup>5</sup> One of the oldest versions of retributivism—*lex talionis* or ‘law of retaliation’—is found in the Old Testament’s ‘eye for an eye’ principle. Retributivists disagree about why offenders deserve to be punished. Some argue it is to satisfy a debt owed to society, while others say it is to eliminate the unfair advantage the offender gained over other law abiding citizens by committing the offence.<sup>6</sup>

4.5 Retribution was a popular purpose of sentencing in colonial Australia.<sup>7</sup> However, by the mid-1970s it had been virtually abandoned in favour of utilitarian purposes such as deterrence and rehabilitation.<sup>8</sup> Nevertheless, in the last quarter of the twentieth century, retribution enjoyed a renaissance under the guise of ‘just deserts’.<sup>9</sup> Proponents of just deserts consider that offenders deserve to be punished, but that the punishment should be proportionate to the gravity of the offending conduct.<sup>10</sup> Some commentators have argued that the notion of just deserts has led to an increase in the severity of punishment because it has enabled politicians to introduce more punitive sentencing policies.<sup>11</sup> Others have argued that there is no causal connection between just deserts and increased sentencing severity.<sup>12</sup>

### Deterrence

4.6 It is widely accepted that the mere existence of a criminal justice system that punishes offenders has the effect of deterring would-be criminals.<sup>13</sup> This systemic

4 Ibid, 7–8.

5 M Bagaric, ‘Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?’ (2000) 24 *Criminal Law Journal* 21, 22.

6 N Walker, *Why Punish?* (1991), 73–75.

7 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [38].

8 See, eg, *R v Williscroft* [1975] VR 292, 303–304.

9 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [41].

10 A von Hirsch, *Doing Justice: The Choice of Punishments* (1976) Report of the Committee for the Study of Incarceration, 6.

11 A Von Hirsch and A Ashworth, *Proportionate Sentencing* (2005), 75, 78.

12 Ibid, 80.

13 See, eg, P Robinson and J Darley, ‘Does Criminal Law Deter? A Behavioural Science Investigation’ (2004) 24 *Oxford Journal of Legal Studies* 173, 173; N Demleitner and others, *Sentencing Law and Policy: Cases, Statutes and Guidelines* (2003), 10; P Robinson and J Darley, ‘The Role of Deterrence in

effect is commonly known as ‘absolute deterrence’. Other types of deterrence are concerned with the sentencing stage of the criminal justice process, and describe the deterrent effect of the sentence imposed on the future conduct of other people and of the offender. These types of deterrence are known, respectively, as general deterrence and specific deterrence.

### *General deterrence*

4.7 The notion of general deterrence assumes that offenders are rational beings who will desist from criminal activity if the consequences of their actions are perceived to be sufficiently severe. In *R v Radich*, a New Zealand case that has significantly influenced Australian sentencing jurisprudence,<sup>14</sup> general deterrence was described as follows:

[O]ne of the main purposes of punishment ... is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilised countries, in all ages, that has been the main purpose of punishment, and it still continues so.<sup>15</sup>

4.8 General deterrence is a controversial purpose of sentencing. In its 1988 report on sentencing (ALRC 44), the ALRC objected to general deterrence on the ground that it was unfair to punish one person by reference to a hypothetical crime of another.<sup>16</sup> Another objection to general deterrence is that it is ineffective because crimes are committed by offenders who often do not engage in a rational analysis of their actions prior to offending.<sup>17</sup> Further, some crimes are committed by offenders who cannot be deterred because they believe they will never be caught, are unaware of the punishment for their crime,<sup>18</sup> or do not have the mental capacity to understand they may be punished for their crime.

4.9 Australian courts have demonstrated a ‘peculiar fondness’ for deterrence in sentencing jurisprudence.<sup>19</sup> The omission of general deterrence from the list of sentencing factors in s 16A(2) of the *Crimes Act 1914* (Cth) has caused considerable judicial disquiet. In *Director of Public Prosecutions (Cth) v El Karhani*, the New South

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the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best’ (2003) 91 *Georgetown Law Journal* 949, 951; N Walker, *Why Punish?* (1991), 15.

14 J McGuire, ‘Deterrence in Sentencing: Handle With Care’ (2005) 79 *Australian Law Journal* 448, 448, 449; M Bagaric, ‘Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?’ (2000) 24 *Criminal Law Journal* 21, 32.

15 *R v Radich* [1954] NZLR 86, 87.

16 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [37].

17 See, eg, P Robinson and J Darley, ‘The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best’ (2003) 91 *Georgetown Law Journal* 949; D Anderson, ‘The Deterrence Hypothesis and Picking Pockets at the Pickpocket’s Hanging’ (2002) 4 *American Law and Economics Review* 295.

18 D Anderson, ‘The Deterrence Hypothesis and Picking Pockets at the Pickpocket’s Hanging’ (2002) 4 *American Law and Economics Review* 295, 306.

19 M Bagaric, ‘Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?’ (2000) 24 *Criminal Law Journal* 21, 33.

Wales Court of Criminal Appeal concluded that the absence of general deterrence from s 16A(2) was the result of a legislative oversight, and held that it remained an important consideration when sentencing federal offenders because it was a fundamental sentencing purpose ‘inherited from the ages’.<sup>20</sup> General deterrence has been identified as a significant purpose of sentencing for offences involving fraud or dishonesty,<sup>21</sup> which represent the vast bulk of federal offences.<sup>22</sup> It has also been held to be a significant sentencing purpose for other major categories of federal offences.<sup>23</sup>

### *Specific deterrence*

4.10 Specific deterrence aims to prevent offenders from committing further offences by demonstrating to them the adverse consequences of criminal activity. Specific deterrence may be given more weight when sentencing an offender who has committed offences in the past because it is assumed that the previous sentence was not of sufficient severity to deter him or her from crime.<sup>24</sup> On the other hand, specific deterrence may be less important in circumstances where an offender is considered unlikely to re-offend in the future, such as where he or she demonstrated significant remorse by voluntarily disclosing the criminal behaviour to authorities.<sup>25</sup>

4.11 It has been noted that it is difficult to determine the effectiveness of specific deterrence given the numerous factors that contribute to the likelihood of offending, such as age, socio-economic status, gender, and education.<sup>26</sup> Some studies have shown that harsher penalties have no effect, or inconsistent effects, as a specific deterrent.<sup>27</sup>

### **Rehabilitation**

4.12 The notion of rehabilitation is based on the belief that offenders are driven to engage in criminal behaviour by psychiatric, psychological or social forces beyond their control. Proponents of rehabilitation argue that the criminal tendencies of any offender can be addressed by first identifying and eliminating the underlying causes of

20 *Director of Public Prosecutions (Cth) v El Karhani* (1990) 21 NSWLR 370, 378.

21 See, eg, *Director of Public Prosecutions (Cth) v Milne* [2001] VSCA 93, [12]–[13] (fraud); *R v Cappadona* (2001) 122 A Crim R 52 (tax fraud); *Chugg v Stanford* (2000) 113 A Crim R 127 (social security fraud); *R v Zongas* Matter No 60302/97 (31 October 1997) (‘medifraud’).

22 See Appendix 1.

23 *R v Zainudin* [2005] NTSC 14 (offences under the *Fisheries Management Act 1991* (Cth)); *R v Cassar* [2005] VSCA 164 (offences under the *Customs Act 1901* (Cth)); *R v Cassidy* [2005] NSWSC 410 (offence under the *Corporations Act 2001* (Cth)); *R v Disun* (2003) 27 WAR 146 (offence under the *Migration Act 1958* (Cth)); *R v Wong* (1999) 48 NSWLR 340; *Stevenson v Dix* (1995) 81 A Crim R 167.

24 M Bagaric, ‘Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?’ (2000) 24 *Criminal Law Journal* 21, 32.

25 *Ibid*, 33.

26 R Edney and M Bagaric, ‘Imprisonment for Driving While Disqualified: Disproportionate Punishment or Sound Public Policy?’ (2001) 25 *Criminal Law Journal* 7, 15; M Bagaric and K Amarasekara, ‘The Errors of Retributivism’ (2000) 24 *Melbourne University Law Review* 125, 137.

27 D Weatherburn, J Hua and S Moffatt, *How Much Crime Does Prison Stop? The Incapacitation Effect of Prison on Burglary—Crime and Justice Bulletin No 93*, New South Wales Bureau of Crime Statistics and Research, 1 January 2006, 2.



his or her criminal behaviour.<sup>28</sup> Accordingly, rehabilitation involves altering an offender's personality, attitudes, habits, beliefs, outlooks or skills in order to make him or her a law-abiding member of society.

4.13 Rehabilitation was a prominent purpose of sentencing in the mid-twentieth century, particularly in the United States.<sup>29</sup> However, in the 1960s the results of several evaluations of the effectiveness of rehabilitative programs were published.<sup>30</sup> Their conclusions were disappointing and led to widespread disillusionment with rehabilitation.<sup>31</sup> Currently, it is generally accepted that rehabilitation is sometimes, but not always, possible.<sup>32</sup>

### Incapacitation

4.14 Incapacitation aims to impose some form of restraint on an offender in order to render him or her incapable of re-offending.<sup>33</sup> The most extreme form of incapacitation is capital punishment. However, capital punishment is not available in Australia, nor in the ALRC's view should it be.<sup>34</sup> The most heavily used form of incapacitation is imprisonment, but other sentencing options that involve the curtailment of an offender's freedom—such as disqualification from driving, curfews, or the use of electronic surveillance to track an offender's movements in the community—could also be classified as forms of incapacitation.

4.15 Collective incapacitation is the strategy of attempting to reduce crime by incapacitating more offenders, or incapacitating offenders for longer.<sup>35</sup> Most overseas studies that have examined the effect of collective incapacitation policies demonstrate that they have a very limited effect on crime rates.<sup>36</sup> There are few Australian studies that seek to quantify the effect of incapacitation on crime rates.<sup>37</sup> The results of one such study on the effect of imprisonment on burglary rates concluded that 'prison should neither be dismissed as irrelevant to crime control nor treated as a panacea'.<sup>38</sup>

28 Victorian Sentencing Committee, *Sentencing* (1988), 79.

29 R Duff and D Garland (eds), *A Reader on Punishment* (1994), 12.

30 A von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (2nd ed, 1998), 2.

31 American Law Institute, *Model Penal Code: Sentencing Report* (2003), 28.

32 Ibid, 29–31.

33 M Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2000) 24 *Criminal Law Journal* 21, 24; A von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (2nd ed, 1998), 88.

34 See Ch 7.

35 D Weatherburn, *Law and Order in Australia: Rhetoric and Reality* (2004), 124–125.

36 Ibid, 125.

37 D Weatherburn, J Hua and S Moffatt, *How Much Crime Does Prison Stop? The Incapacitation Effect of Prison on Burglary—Crime and Justice Bulletin No 93*, New South Wales Bureau of Crime Statistics and Research, 1 January 2006, 2.

38 Ibid, 9.

4.16 Selective incapacitation is the strategy of attempting to identify and then incapacitate particular offenders who are likely to re-offend.<sup>39</sup> As such, it is a policy that relies on predictions of future criminality. It has often been argued that predictions of future criminality are inherently unreliable<sup>40</sup> and more often than not result in erroneous predictions that an offender is likely to re-offend.<sup>41</sup> Legislation in a number of Australian states and territories provides for the selective incapacitation of certain offenders.<sup>42</sup> For example, additional punishment may be imposed on offenders in New South Wales who, by virtue of their criminal records, are deemed to be ‘habitual criminals’.<sup>43</sup> It has been argued that selective incapacitation policies invariably result in ‘avoidance techniques’, such as charge bargaining, by which participants in the criminal justice system attempt to avoid the consequences of harsh sentencing laws.<sup>44</sup>

4.17 ALRC 44 concluded that incapacitation was not a legitimate purpose of sentencing because it required punishment to be imposed by reference to the future conduct of an offender and, in doing so, did not link the punishment to the crime.<sup>45</sup>

### Denunciation

4.18 Denunciation is based on the theory that a sentence can be used to communicate to the offender and to the community the message that the law should not be flouted.<sup>46</sup> By imposing a sentence that denounces the conduct of an offender, courts seek to educate both the offender and the public about correct moral values. In addition, a sentence that denounces the conduct of an offender represents a symbolic, collective statement of society’s disapproval of the criminal behaviour.<sup>47</sup> However, there are limits to the manner in which courts can take into account and express the opinion of the public when sentencing. The public opinion to be taken into account is not actual public opinion but ‘informed public opinion’.<sup>48</sup> In *Inkson v The Queen*, Underwood J commented that:

the community delegates to the Court the task of identifying, assessing and weighing the outrage and revulsion that an informed and responsible public would have to criminal conduct.<sup>49</sup>

39 D Weatherburn, *Law and Order in Australia: Rhetoric and Reality* (2004), 125.

40 N Demleitner and others, *Sentencing Law and Policy: Cases, Statutes and Guidelines* (2003), 11; American Law Institute, *Model Penal Code: Sentencing Report* (2003), 32.

41 A von Hirsch, ‘The Problem of False Positives’ in A von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (2nd ed, 1998) 98, 99.

42 See B McSherry, ‘Indefinite and Preventative Detention Legislation: From Caution to an Open Door’ (2005) 29 *Criminal Law Journal* 94.

43 *Habitual Criminals Act 1957* (NSW).

44 N Morgan, ‘Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories’ (1999) 22 *University of New South Wales Law Journal* 267, 277–278.

45 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [37].

46 N Walker, *Why Punish?* (1991), 26. See also *Ryan v The Queen* (2001) 206 CLR 267, [118].

47 N Walker, *Why Punish?* (1991), 31.

48 *Inkson v The Queen* (1996) 6 Tas R 1, 2.

49 *Ibid*, 16.

4.19 In addition, the influence of informed public opinion cannot lead to the imposition of a sentence that is contrary to law.<sup>50</sup>

### Restoration

4.20 Restorative justice has become a ‘global phenomenon’ in criminal justice systems in the past 25 years.<sup>51</sup> It is estimated that between 80 and 100 countries use some form of restorative justice process to address crime.<sup>52</sup> There is no universally accepted definition of restorative justice, but it can be described as an approach to crime that focuses on repairing the harm caused by criminal activity and addressing the underlying causes of criminal behaviour. Accordingly, restoration includes elements of rehabilitation. Restorative initiatives use inclusive decision-making processes that involve bringing the offender, the victim, and sometimes members of the wider community, together to determine collectively the approach to be taken to a crime.<sup>53</sup> Restorative initiatives are based on the rationale that those involved in, and affected by, criminal activity should be given a real opportunity to participate in the process by which the response to the crime is decided.<sup>54</sup>

4.21 Restorative initiatives have the potential to: increase the satisfaction of participants in the criminal justice system; encourage offenders to accept responsibility for their conduct; reduce recidivism by addressing the causes of criminal behaviour; and provide insight into the causes of crime.<sup>55</sup>

4.22 Restorative justice initiatives in Australia are diverse and are employed at different stages of the criminal justice process, including the sentencing stage.<sup>56</sup> They include victim-offender mediation, conferencing and circle sentencing. While many of these initiatives were initially applied to young offenders, they are increasingly being made available to adult offenders.<sup>57</sup> Participants in restorative justice initiatives generally report high levels of satisfaction with the process but studies of the effect of restorative justice initiatives on recidivism rates have produced mixed results.<sup>58</sup>

50 *R v Nemer* (2003) 87 SASR 168, 171.

51 D Van Ness, ‘An Overview of Restorative Justice Around the World’ (Paper presented at Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, 22 April 2005), 13.

52 *Ibid.*, 1.

53 G Davies and K Raymond, ‘Do Current Sentencing Practices Work?’ (2000) 24 *Criminal Law Journal* 236, 245.

54 D Schmid, ‘Restorative Justice: A New Paradigm for Criminal Justice Policy’ (2003) 34 *Victoria University of Wellington Law Review* 91, 96.

55 *Ibid.*, 114–128.

56 K Daly and H Hayes, *Restorative Justice and Conferencing in Australia—Trends and Issues in Crime and Criminal Justice No 186*, Australian Institute of Criminology.

57 See, eg, *Crimes (Restorative Justice) Act 2004* (ACT).

58 D Weatherburn, *Law and Order in Australia: Rhetoric and Reality* (2004), 137–138.

### Other sentencing purposes

4.23 Some overseas and state and territory sentencing Acts refer to other purposes of sentencing. Some of these purposes are concerned with changing an offender's attitudes and perceptions. For example, New South Wales sentencing legislation provides that a purpose of sentencing is to make the offender accountable for his or her actions,<sup>59</sup> while Canadian legislation provides that a purpose of sentencing is to promote a sense of responsibility in offenders and to acknowledge the harm done to victims and the community.<sup>60</sup> Other purposes are concerned with recognising victims of offences.<sup>61</sup> For example, New Zealand legislation provides that a purpose of sentencing is 'to provide for the interests of the victim of the offence'<sup>62</sup> and United Kingdom legislation provides that a purpose of sentencing is 'the making of reparation by offenders to persons affected by their offences'.<sup>63</sup>

### Submissions and consultations

4.24 In Discussion Paper 70 (DP 70) the ALRC expressed the view that the only legitimate purposes of sentencing were retribution, deterrence, rehabilitation, incapacitation, denunciation and restoration.<sup>64</sup> A number of stakeholders agreed with this conclusion.<sup>65</sup> One stakeholder submitted that the purposes articulated by the ALRC were generally consistent with the purposes listed in legislation in other jurisdictions, such as Canada, England and Wales.<sup>66</sup>

4.25 Other stakeholders expressed views about particular purposes of sentencing. Some supported the inclusion of general deterrence in federal sentencing legislation.<sup>67</sup> Others opposed this on the basis that it was unjust to increase a sentence beyond what was appropriate in the circumstances of a particular case to alter the behaviour of others.<sup>68</sup> One stakeholder questioned the need for general deterrence at all given that

59 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(e); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(e); *Sentencing Act 2002* (NZ) s 7(1)(a).

60 *Criminal Code* (RS 1985, c C-46) (Canada) s 718(f). See also *Sentencing Act 2002* (NZ) s 7(1)(b).

61 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(g); *Sentencing Act 2002* (NZ) s 7(1)(b); *Criminal Justice Act 2003* (UK) s 142(1)(e); *Criminal Code* (RS 1985, c C-46) (Canada) s 718(e).

62 *Sentencing Act 2002* (NZ) s 7(1)(c).

63 *Criminal Justice Act 2003* (UK) s 142(1)(e). See also *Criminal Code* (RS 1985, c C-46) (Canada) s 718(e).

64 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005).

65 Law Council of Australia, *Submission SFO 97*, 17 March 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; J Roberts, *Submission SFO 67*, 16 January 2006.

66 J Roberts, *Submission SFO 67*, 16 January 2006.

67 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; LD, *Submission SFO 9*, 10 March 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005.

68 G Mackenzie, *Submission SFO 80*, 14 February 2006; J Willis, *Submission SFO 74*, 10 February 2006; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; BN, *Submission SFO 17*, 8 April

heavier penalties already attached to more serious offences, thereby acting as a deterrent to potential offenders.<sup>69</sup> One federal offender made the following submission about general deterrence:

In my case, the sentencing judge specifically stated that a relatively severe sentence was required to achieve the effect of general deterrence, that is, modifying future behaviour of other practitioners in the tax industry ...

I have great difficulty with the concept of making someone the 'scapegoat' with the objective of modifying the future behaviour of others. The offender should be charged with the offence they committed without reference to the sentence's potential deterrent effect on others. There is little, if any, evidence of the effectiveness of deterrence and it merely becomes some form of social experimentation by a judge in an obtuse attempt at altering the general behaviour of others.<sup>70</sup>

4.26 Some stakeholders submitted that restoration could be an inappropriate and undesirable sentencing purpose in many cases.<sup>71</sup> It was also submitted that denunciation could conflict with other purposes of sentencing, such as rehabilitation and restoration, if the denunciation was directed to the offender rather than the offence.<sup>72</sup>

#### ALRC's views

4.27 The ALRC remains of the view that the legitimate purposes of sentencing are retribution, deterrence, rehabilitation, incapacitation, denunciation and restoration. Restoration aside, these purposes are well established at common law and are regularly applied by courts in all Australian jurisdictions. They are the only purposes that should be considered when sentencing federal offenders.

4.28 While restoration in its current form is a relatively new purpose of sentencing, the current Inquiry provides a timely opportunity to recognise and promote it as a purpose of sentencing. Restoration may not always be an appropriate purpose of sentencing. However, where appropriate, restorative initiatives have demonstrated their potential to complement and enhance the operation of the criminal justice system. They provide an effective way to recognise victims' interests in the sentencing process and to encourage offenders to accept responsibility for their actions.

4.29 Having regard to judicial pronouncements on the importance of general deterrence, the purposes of sentencing articulated in other jurisdictions, and opinions expressed in submissions and consultations, the ALRC agrees that general deterrence is an established and legitimate purpose in sentencing law. However, general deterrence

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2005; WT, *Submission SFO 23*, 11 April 2005; M Bagaric and R Edney, *Consultation*, Melbourne, 1 April 2005.

69 I Potas, *Submission SFO 78*, 13 February 2006.

70 WT, *Submission SFO 23*, 11 April 2005.

71 South Australia Victims of Crime Co-ordinator, *Submission SFO 84*, 15 February 2006; Victim Support Australasia, *Submission SFO 60*, 21 December 2005.

72 M Nolan, *Submission SFO 90*, 21 February 2006.

may be applied too readily when sentencing federal offenders and it is important that judicial officers do not assume general deterrence is always an effective purpose of sentencing.<sup>73</sup> Further, it is desirable that courts do not use the language of deterrence as a means of expression when different, more accurate, terminology may be used to express the views sought to be conveyed.<sup>74</sup> In Chapter 19, the ALRC recommends that judicial officers receive further education and training in the sentencing of federal offenders and that a bench book on federal sentencing law be developed. This will help to ensure that judicial officers understand the purposes of sentencing and pursue those purposes through the imposition of appropriate sentences.

4.30 The purposes of sentencing may sometimes conflict. However, some purposes of sentencing, such as retribution and deterrence, can be pursued simultaneously. When sentencing federal offenders, judicial officers should consider and balance the various purposes of sentencing and decide which purpose or purposes can and should be pursued in any particular matter.

4.31 It must be recognised that each of the purposes of sentencing, pursued unchecked, could lead to the imposition of unjust sentences. For example, grossly disproportionate sentences could be imposed in order to achieve general deterrence; indeterminate sentences could be imposed in order to rehabilitate or incapacitate an offender; and unnecessarily severe punishments could be imposed in the pursuit of retribution. Accordingly, it is imperative that the purposes of sentencing are pursued only within the boundaries established by the principles of sentencing discussed in Chapter 5, including proportionality.

### Specifying the purposes of sentencing

4.32 Many state and territory sentencing Acts now expressly refer to the purposes of sentencing.<sup>75</sup> The Council of Europe has recommended that legislators should declare the rationales for sentencing.<sup>76</sup> Part IB of the *Crimes Act* does not contain a provision outlining the purposes of sentencing. However, specific deterrence is included in the list of sentencing factors in s 16A(2)(j) of the Act. In addition, s 16A(2)(k) refers to the need to ensure that an offender is 'adequately punished for the offence', a statement that could be interpreted as a reference to retribution.

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73 P Robinson and J Darley, 'The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best' (2003) 91 *Georgetown Law Journal* 949, 951.

74 For a discussion of 'deterrence speak', see *Ibid*, 971–974.

75 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1991* (Vic) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 3; *Sentencing Act 1997* (Tas) s 3(e); *Sentencing Act 1995* (NT) s 5.

76 Council of Europe, *Consistency in Sentencing* (1993) Council of Europe Press, Rec no R (92) 17.

4.33 Different views were expressed in submissions and consultations about whether the purposes of sentencing should be specified in federal sentencing legislation. There was considerable support for the view that they should be.<sup>77</sup> The Commonwealth Director of Public Prosecutions (CDPP) submitted that identifying the purposes of sentencing would promote transparency in the sentencing process.<sup>78</sup> Professor Arie Freiberg noted that it is currently standard practice to specify the purposes of sentencing and that doing so provides a useful means of communicating with the public about sentencing.<sup>79</sup>

4.34 However, it was also submitted that there was no need to specify the purposes of sentencing in federal sentencing legislation because they were well established at common law.<sup>80</sup> In addition, it was submitted that listing the purposes of sentencing would provide little guidance to judicial officers because there was no indication of how they should be selected and weighed.<sup>81</sup>

4.35 The CDPP expressed concern that the ALRC's proposal in DP 70 did not expressly require a judicial officer to consider and weigh each of the purposes of sentencing when sentencing a federal offender.<sup>82</sup> Professor Julian Roberts submitted that the expression of the purpose of retribution—namely, 'to ensure that the offender is punished appropriately for the offence'—was ambiguous. He suggested that the word 'appropriately' be replaced with the word 'justly' if it were intended to be a reference to proportionality.<sup>83</sup> Professor Roberts also submitted that it would be preferable to use clearer language to express the purpose of incapacitation rather than expressing it as 'the protection of the community'.

### ALRC's views

4.36 Federal sentencing legislation should contain a provision specifying the purposes of sentencing. Listing the purposes of sentencing will provide greater consistency in the content and structure of sentencing legislation in Australia. It will also encourage consistency of approach in sentencing federal offenders, and will eliminate any confusion about the purposes of sentencing federal offenders, given the disparate provisions regarding the purposes of sentencing in the states and territories.

77 Law Council of Australia, *Submission SFO 97*, 17 March 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; Chief Judge P McClellan, *Submission SFO 77*, 10 February 2006; J Roberts, *Submission SFO 67*, 16 January 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005; M Johnson, *Consultation*, Darwin, 27 April 2005; K Warner, *Consultation*, Hobart, 13 April 2005.

78 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

79 A Freiberg, *Submission SFO 12*, 4 April 2005.

80 I Potas, *Submission SFO 78*, 13 February 2006; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.

81 I Potas, *Submission SFO 78*, 13 February 2006.

82 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006. See also Chief Magistrate Judge D Price & Others, *Consultation*, Sydney, 3 February 2006.

83 J Roberts, *Submission SFO 67*, 16 January 2006.

Specifying the purposes of sentencing in federal legislation will also enhance their visibility and highlight the need for judicial officers to give careful consideration to the appropriate purpose or purposes to be pursued in any given matter.

4.37 Given the fundamental importance of the purposes of sentencing to the sentencing process, the legislative list of purposes should be exhaustive. This will eliminate any argument that other purposes of sentencing can apply to federal offenders and will prevent judicial officers from pursuing illegitimate sentencing purposes when sentencing federal offenders.

4.38 The ALRC does not believe the provision specifying the purposes of sentencing should expressly require judicial officers to consider every purpose when sentencing a federal offender. Federal sentencing legislation already contains a list of factors that courts must consider, where relevant and known, when sentencing a federal offender. Purposes of sentencing are distinct from sentencing factors and represent high-level guidance about the goals that judicial officers should seek to attain. In Chapter 6, the ALRC recommends that a court sentencing a federal offender should consider any factor that is relevant to a purpose or principle of sentencing and known to the court, including factors relating to the promotion of certain sentencing purposes.<sup>84</sup> In this way, judicial officers will be required to consider the prospects of achieving the sentencing purposes when these prospects are relevant and known.

4.39 As noted above, and discussed further in Chapter 5, the principle of proportionality should be applied when sentencing any federal offender, regardless of the sentencing purposes being pursued. Nevertheless, it is prudent to include the word ‘justly’ in the expression of the purpose of retribution to avoid any inference that retribution involves emotive and unreasoned responses to crime, such as vengeance.

## Ranking the purposes of sentencing

4.40 Ranking the purposes of sentencing necessarily involves identifying one primary purpose and then listing the other purposes in the order in which they should be applied. It has been argued that a failure to identify a primary purpose of sentencing, or to specify the relationship between various purposes of sentencing, results in unwarranted sentencing disparity.<sup>85</sup> By not identifying a primary rationale for sentencing, sentencing decisions are made in a ‘cafeteria system’ in which judicial officers are free to pick and choose the sentencing rationale to be applied in the circumstances of the case.<sup>86</sup> It has also been argued that a sentencing system that enables a judicial officer to select freely from various sentencing options is open to abuse. For example, it enables a judicial officer to decide the sentence to be imposed,

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<sup>84</sup> See Ch 6.

<sup>85</sup> Ireland Law Reform Commission, *Consultation Paper on Sentencing* (1996), [2.9]; Council of Europe, *Consistency in Sentencing* (1993) Council of Europe Press, Rec no R (92) 17.

<sup>86</sup> A Ashworth, *Sentencing and Criminal Justice* (2nd ed, 1995), 331, cited in M Bagaric, ‘Sentencing: The Road to Nowhere’ (1999) 21 *Sydney Law Review* 597, 597.



and then work backwards to justify it.<sup>87</sup> Finally, it has been contended that the simultaneous pursuit of conflicting sentencing purposes, such as retribution and rehabilitation, can result in a sentence that achieves no purpose.<sup>88</sup>

4.41 However, strong arguments have also been made against the identification of a primary sentencing purpose, or the ranking of sentencing purposes, by various governments, law reform agencies and judicial officers. In 1982 the Canadian Government declared that:

no social institution as important or complex as the criminal law can afford the luxury of picking just one purpose—intellectually simple and satisfying though that selection might be.<sup>89</sup>

4.42 Similarly, in *Veen v The Queen [No 2]* Mason CJ, Brennan, Dawson and Toohey JJ said that:

sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.<sup>90</sup>

4.43 The Canadian Sentencing Commission, the ALRC, the Victorian Sentencing Committee and the New South Wales Law Reform Commission have all previously noted that there is no simple answer to the question of why we impose sentences on offenders, and have accepted that any sentencing system must invariably contain multiple purposes of punishment.<sup>91</sup>

4.44 Submissions and consultations largely supported the proposition that the purposes of sentencing should not be ranked.<sup>92</sup> The New South Wales Law Society submitted:

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87 P Robinson, 'The ALI's Proposed Distributive Principle of 'Limiting Retributivism': Does it Mean In Practice Anything Other Than Pure Desert?' (2003) 7(1) *Buffalo Criminal Law Review* 4, 4.

88 Ireland Law Reform Commission, *Consultation Paper on Sentencing* (1996), [2.17].

89 Government of Canada, *The Criminal Law in Canadian Society* (1982) cited in J Meyer and P O'Malley, 'Missing the Punitive Turn? Canadian Criminal Justice, "Balance" and Penal Modernism' in J Pratt and others (eds), *The New Punitiveness: Trends, Theories, Perspectives* (2005) 201, 203.

90 *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476–477.

91 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [14.13]; Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988) [35]–[37]; Victorian Sentencing Committee, *Sentencing* (1988), 122; Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987), 144;

92 Law Council of Australia, *Submission SFO 97*, 17 March 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006; J Roberts, *Submission SFO 67*, 16 January 2006; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005; M Johnson, *Consultation*, Darwin, 27 April 2005.

There should not be a ranking of the purposes of sentencing as these differ in individual cases. The ranking of the purposes of sentencing may involve policy choices, which may be tied to political ideology and short-term community trends. Such a ranking would place further fetters on judicial discretion and could undermine individualised justice.<sup>93</sup>

4.45 It was also submitted that it would be difficult to rank the purposes of sentencing.<sup>94</sup> However, there was limited support for ranking the purposes of sentencing.<sup>95</sup> Professor Freiberg submitted that the purposes of sentencing should be ranked only if the primary purpose preserved the proportionality principle.<sup>96</sup>

### ALRC's views

4.46 The ALRC is not persuaded that it is necessary or desirable to identify a primary purpose of sentencing or to rank the various purposes of sentencing. Identifying a primary purpose of sentencing is not necessarily an effective means of promoting consistency in sentencing. Many factors contribute to inconsistency in sentencing and there are many ways in which inconsistency can be addressed.<sup>97</sup> Identifying a primary purpose of sentencing, or ranking the purposes of sentencing, would not necessarily result in more consistent sentencing practices because judicial officers could seek to achieve the same purpose or purposes of sentencing in different ways.

4.47 The purposes of sentencing must ultimately depend on the offender and the offence. For example, it is well established at common law that general deterrence will be of less weight when sentencing an offender with a mental illness or intellectual disability, and that rehabilitation will be of more importance when sentencing a young offender.<sup>98</sup> Nominating one purpose of sentencing, or mandating the order in which the purposes should be considered, is an unnecessary intrusion into judicial discretion, for limited gain, if any.

4.48 Even if it were accepted that there is a need to identify a primary purpose of sentencing, or to rank the various purposes of sentencing, there is no agreement as to the purpose that should be chosen, or the order in which the purposes should be ranked. Various sentencing purposes have dominated the sentencing landscape at different times in the development of the criminal justice system. Notions of restorative justice played an important role in many pre-modern communities; incapacitation (in the form of transportation of convicts) was popular in industrial Britain; retribution and deterrence were popular in colonial Australia; rehabilitation was an important purpose in many countries in the mid-twentieth century; 'just deserts' gained prominence in the 1970s; and the notion of 'just deserts' is currently being challenged by theories of

93 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.

94 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

95 LD, *Submission SFO 9*, 10 March 2005; A Freiberg, *Submission SFO 12*, 4 April 2005.

96 A Freiberg, *Submission SFO 12*, 4 April 2005.

97 See Chs 20, 21.

98 K Warner, *Sentencing in Tasmania* (2nd ed, 2002), 67, 72.

incapacitation and restorative justice. For these reasons, federal sentencing legislation should contain an exhaustive list of the purposes that can be pursued when sentencing a federal offender, but those purposes should not be ranked.

**Recommendation 4–1** Federal sentencing legislation should provide that a court can impose a sentence on a federal offender only for one or more of the following purposes:

- (a) to ensure that the offender is punished justly for the offence;
- (b) to deter the offender and others from committing the same or similar offences;
- (c) to promote the rehabilitation of the offender;
- (d) to protect the community by limiting the capacity of the offender to re-offend;
- (e) to denounce the conduct of the offender; and
- (f) to promote the restoration of relations between the community, the offender and the victim.



## 5. Principles of Sentencing

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### Introduction

5.1 Principles of sentencing are the overarching legal rules that should be applied when sentencing a federal offender. They are to be distinguished from sentencing factors, which identify the specific matters that the court must consider when sentencing an offender, where they are relevant and known.<sup>1</sup> They are also to be distinguished from sentencing purposes, which describe the goals or objectives that a sentence should aim to achieve.<sup>2</sup> The common law principles of sentencing apply when sentencing federal offenders, so far as they are not inconsistent with the provisions of Part IB of the *Crimes Act 1914* (Cth).<sup>3</sup>

5.2 Sentencing legislation in Canada and New Zealand sets out the principles to be applied when sentencing an offender. Some state and territory Acts refer to certain principles of sentencing and not to others.<sup>4</sup> In 1996, the New South Wales Law Reform Commission recommended against listing the common law principles of sentencing in sentencing legislation, arguing that such an approach had the potential, among other things, to cause confusion and stultify the development of the law.<sup>5</sup> The following sections consider the main principles of sentencing, before considering whether such principles should be specified in federal sentencing legislation.

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1 Sentencing factors are discussed in Ch 6.

2 The purposes of sentencing are discussed in Ch 4.

3 *Johnson v The Queen* (2004) 205 ALR 346, 353.

4 See, eg, *Sentencing Act 1995* (WA) s 6(1) (proportionality).

5 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [14.15]–[14.16].

## Proportionality

5.3 The principle of proportionality requires courts to impose sentences that bear a reasonable, or proportionate, relationship to the criminal conduct in question. Accordingly, the principle imposes an obligation on judicial officers to ensure that sentences imposed on offenders are of a severity that reflects the gravity of the crime considered in light of its objective circumstances.<sup>6</sup> The objective circumstances of the offence include the maximum statutory penalty for the offence, the degree of harm caused by the offence, the method by which the crime was committed, and the degree of culpability of the offender.<sup>7</sup>

5.4 It has been argued that proportionality is linked to retributivism.<sup>8</sup> However, proportionality has also been relied upon to support utilitarian goals of punishment, such as deterrence. For example, it has been argued that a system of justice that distributes proportional punishments can encourage offenders to commit crimes of a lesser severity in order to receive a lesser punishment if caught.<sup>9</sup>

5.5 The principle of proportionality is the primary mechanism for ensuring that sentences imposed on offenders are fair. It operates to ‘restrain excessive, arbitrary and capricious punishment’.<sup>10</sup> It is of paramount importance to sentencing law and is a principle that is ‘rooted in respect for the basic human rights of those before the court’.<sup>11</sup> Indeed, grossly disproportionate punishments could violate provisions of international human rights instruments that prohibit the imposition of cruel, inhuman or degrading punishment.<sup>12</sup> The principle of proportionality reflects common sense and intuitive notions of justice, preserves the legitimacy of the sentencing system, and gives practical guidance to judicial officers.<sup>13</sup>

5.6 On a number of occasions the High Court has declared the principle of proportionality to be a fundamental sentencing principle at common law.<sup>14</sup> Proportionality is a limiting principle that operates to prevent the imposition of

6 *Hoare v The Queen* (1989) 167 CLR 348, 354.

7 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.506]–[3.509]; R Fox, ‘The Meaning of Proportionality in Sentencing’ (1994) 19 *Melbourne University Law Review* 489, 498.

8 N Demleitner and others, *Sentencing Law and Policy: Cases, Statutes and Guidelines* (2003), 40.

9 A Von Hirsch and A Ashworth, *Proportionate Sentencing* (2005), 132.

10 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), 492.

11 R Fox, ‘The Meaning of Proportionality in Sentencing’ (1994) 19 *Melbourne University Law Review* 489, 492.

12 D van Zyl Smit and A Ashworth, ‘Disproportionate Sentences as Human Rights Violations’ (2004) 67 *Modern Law Review* 541; *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) art 7; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, [1989] ATS 21, (entered into force generally on 26 June 1987) art 16.

13 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), 4–5.

14 *Veen v The Queen [No 1]* (1979) 143 CLR 458; *Veen v The Queen [No 2]* (1988) 164 CLR 465; *Hoare v The Queen* (1989) 167 CLR 348.

sentences that are manifestly excessive or manifestly lenient, in light of the objective circumstances of the offence.<sup>15</sup> A judicial officer can pursue any of the established purposes of sentencing within the parameters of the proportionate sentence.<sup>16</sup>

5.7 A number of overseas<sup>17</sup> and state and territory Acts contain reference to notions of proportionality in sentencing. In the United States, proportionality has featured in discussions about sentencing reform,<sup>18</sup> and in the United Kingdom it has played a significant role in sentencing jurisprudence.<sup>19</sup> In Australia, s 16A(1) of the *Crimes Act*, which requires a sentence imposed on a federal offender to be of a 'severity appropriate in all the circumstances of the offence' has been interpreted as a reference to the principle of proportionality.<sup>20</sup> In addition, s 16A(2)(k) of the *Crimes Act*, in making reference to 'adequate' punishment, could also be seen as a reflection of the principle of proportionality.<sup>21</sup> Some state sentencing Acts contain provisions that reflect the principle of proportionality,<sup>22</sup> and the Western Australian sentencing Act specifically provides that the sentence imposed on an offender must be commensurate with the seriousness of the offence.<sup>23</sup>

5.8 Canadian legislation specifically identifies proportionality as the fundamental sentencing principle.<sup>24</sup> Other sentencing principles are listed in a separate provision.<sup>25</sup> In Discussion Paper 70 (DP 70), the ALRC indicated that it was interested in hearing any views as to whether a similar approach should be adopted in Australia.<sup>26</sup>

## Parsimony

5.9 The principle of parsimony operates to prevent the imposition of a sentence that is more severe than is necessary to achieve the purpose or purposes of the sentence. In *Webb v O'Sullivan*, Napier CJ described the operation of the principle in the following terms:

- 
- 15 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), 221.
  - 16 R Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19 *Melbourne University Law Review* 489, 495.
  - 17 *Penal Code* (Finland) ch 6, s 1(1); *Penal Code* (Sweden) ch 29, s 1; *Criminal Code (RS 1985, c C-46)* (Canada) s 718.1; *Sentencing Act 2002* (NZ) s 8(h).
  - 18 See, American Law Institute, *Model Penal Code: Sentencing Report* (2003).
  - 19 A Von Hirsch and A Ashworth, *Proportionate Sentencing* (2005), 1.
  - 20 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.503].
  - 21 *Ibid*.
  - 22 *Sentencing Act 1991* (Vic) s 5(1)(a), (2)(c), (2)(d); *Criminal Law (Sentencing) Act 1988* (SA) s 10(k).
  - 23 *Sentencing Act 1995* (WA) s 6(1).
  - 24 *Criminal Code (RS 1985, c C-46)* (Canada) s 718.1.
  - 25 *Ibid* s 718.2.
  - 26 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), [5.22].

Our first concern is the protection of the public, but, subject to that, the court should lean towards mercy. We ought not to award the maximum which the offence will warrant, but rather the minimum which is consistent with a due regard for public interest.<sup>27</sup>

5.10 The principle of parsimony recognises the inherent dignity and worth of offenders by mandating concern for their welfare.<sup>28</sup> It acknowledges that some sentences can have devastating consequences for both the individual offender and the wider community, and it operates to ensure that judicial officers exercise restraint when wielding the formidable power of the state to punish those who violate its laws.

5.11 The Victorian sentencing Act and some overseas sentencing legislation explicitly state the principle of parsimony.<sup>29</sup> The *Crimes Act* currently recognises limited forms of the principle of parsimony. For example, s 17A provides that the court is not to impose a sentence of imprisonment unless it is satisfied that no other sentence is appropriate in all of the circumstances of the offence. In addition, s 17B provides that the court is not to impose a sentence of imprisonment on an offender for certain offences relating to property or money of a total value of \$2,000 or less unless the court is satisfied that there are exceptional circumstances to warrant such a sentence.

## Totality

5.12 The principle of totality is relevant to the sentencing of offenders for multiple offences. It has been described as a 'limitation on excess'.<sup>30</sup> It ensures that an offender who is sentenced for multiple offences receives an appropriate sentence overall and not a 'crushing sentence'.<sup>31</sup> In *Mill v The Queen* the High Court affirmed the following expression of the principle from a well-regarded text:<sup>32</sup>

The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'.<sup>33</sup>

5.13 If the sum of the individual sentences is excessive, the court can make adjustments to the manner in which the sentences are structured in order to reduce the

27 *Webb v O'Sullivan* [1952] SASR 65, 66.

28 A von Hirsch, 'The Project of Sentencing Reform' in M Tonry and R Frase (eds), *Sentencing and Sanctions in Western Countries* (2001) 405, 406.

29 *Sentencing Act 1991* (Vic) s 5(3), (4); *Sentencing Act 2002* (NZ) s 8(g); *Criminal Code* (RS 1985, c C-46) (Canada) s 718.2(d).

30 *R v Patison* (2003) 143 A Crim R 118, 133.

31 D Thomas, *Principles of Sentencing* (2nd ed, 1979), 57-58, cited in *Postiglione v The Queen* (1997) 189 CLR 295, 413; *Johnson v The Queen* (2004) 205 ALR 346, 355.

32 D Thomas, *Principles of Sentencing* (2nd ed, 1979), 56-57.

33 *Mill v The Queen* (1988) 166 CLR 59, 63.



overall head sentence, or, less desirably, reduce each of the individual sentences below that which would otherwise be appropriate.<sup>34</sup>

5.14 The principle of totality also applies when a court sentences an offender who is already serving a sentence.<sup>35</sup> It has also been held to apply to an offender who has completed a sentence in one jurisdiction and is being sentenced in another jurisdiction for an offence that is closely related in time and nature to the initial offence.<sup>36</sup> Further, the principle of totality applies where the court imposes a single, global sentence on an offender for a number of offences.<sup>37</sup> The ALRC considers that the principle of totality should continue to apply in these circumstances.

5.15 The *Crimes Act* currently contains two provisions that give some effect to the principle of totality.<sup>38</sup> Section 16B requires a court sentencing a federal offender to have regard to any other sentence yet to be served by that offender. Section 19AD requires a court sentencing a federal offender who is serving a sentence with a non-parole period to consider what new non-parole period should be fixed after considering the existing non-parole period, the nature and circumstances of the offence or offences concerned, and the offender's antecedents. It has also been contended that s 16A(2)(c), which requires a court sentencing a federal offender to take into account the fact that an offence formed part of a 'course of conduct', is a reference to the principle of totality.<sup>39</sup>

## Consistency

5.16 Consistency in sentencing is fundamental to maintaining a just and equitable criminal justice system.<sup>40</sup> In the context of sentencing, consistency essentially means that like cases should be treated alike.<sup>41</sup> Gleeson CJ described the principle succinctly in *Wong v The Queen*:

All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in a like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.<sup>42</sup>

34 Ibid, 63; *Director of Public Prosecutions v Grabovac* [1998] 1 VR 664, 680; *Johnson v The Queen* (2004) 205 ALR 346, 356.

35 *Director of Public Prosecutions v Farmer* [2005] TASSC 15, [24].

36 *Mill v The Queen* (1988) 166 CLR 59, 64.

37 *Director of Public Prosecutions v Farmer* [2005] TASSC 15, [24]. See also *R v E, AD* (2005) 93 SASR 20, [36]–[38].

38 K Warner, *Sentencing in Tasmania* (2nd ed, 2002), 242.

39 *Weininger v The Queen* (2003) 212 CLR 629, [57]. Section 16A(2)(c) is discussed further in Ch 6.

40 See Chs 20–21 for further discussion of consistency.

41 *Lowe v The Queen* (1984) 154 CLR 606.

42 *Wong v The Queen* (2001) 207 CLR 584, 591.

5.17 Inconsistency in sentencing has the potential to erode public confidence in the criminal justice system.<sup>43</sup> In addition, it has been argued that inconsistent sentencing practices reduce the deterrent effect of the criminal justice system by detracting from the perception that appropriate punishment for criminal behaviour is certain.<sup>44</sup>

5.18 It is generally recognised that given the vast range of factors to be considered when sentencing an offender, it is unlikely, if not impossible, that any two cases will be identical. The literature has drawn a distinction between consistency in approach to sentencing and consistency in sentencing outcome.<sup>45</sup> Consistency of approach requires courts to apply the same purposes and principles of sentencing, and to consider the same types of factors when sentencing. Consistency in outcome is concerned with the type and quantum of the sentences imposed in similar cases. Consistency in approach and consistency in outcome are related to each other because judicial officers are more likely to achieve consistent outcomes if they adopt a similar approach to sentencing. Conversely, substantially different outcomes in similar cases may indicate differences of approach.

5.19 In the ALRC's view, the principle of consistency requires courts both to adopt a similar approach to the task of sentencing and to impose sentences that fall within an appropriate range in light of the objective seriousness of the offence and the subjective circumstances of the offender. Judicial officers are required to have regard to the collective wisdom of other judicial officers when considering whether a proposed sentence is within the appropriate range.<sup>46</sup> Consistency is discussed further in Chapters 20 and 21.

5.20 The principle of parity between co-offenders is essentially a subset of the principle of consistency, although it is often referred to as a sentencing principle in its own right. Parity stipulates that offenders who have jointly engaged in the same type of criminal conduct should ordinarily receive similar sentences. However, courts are able to have regard to any relevant differences in the level of culpability of each offender, and to take into account differences in the subjective circumstances of the offenders. Differences in sentences imposed on co-offenders should not be so marked as to give rise to a justifiable sense of grievance on the part of the offender with the heavier sentence.<sup>47</sup> Parity is best achieved when the same judicial officer determines the sentences of all co-offenders.<sup>48</sup>

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43 *Lowe v The Queen* (1984) 154 CLR 606, 611.

44 *Griffiths v The Queen* (1977) 137 CLR 293, 327.

45 New South Wales Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court* (2005), 12.

46 See, eg, *Ellis v The Queen* (1993) 68 A Crim R 449, 460.

47 *Lowe v The Queen* (1984) 154 CLR 606; *Postiglione v The Queen* (1997) 189 CLR 295.

48 *R v Christianos* (1983) 34 SASR 316.

## Individualised justice

5.21 The principle of individualised justice requires the court to impose a sentence that is just and appropriate in all the circumstances of the particular case. Courts have consistently recognised the importance of this sentencing principle. For example, in *Kable v Director of Public Prosecutions*, Mahoney ACJ stated that ‘if justice is not individual, it is nothing’.<sup>49</sup> Individualised justice can be attained only if a judicial officer possesses a broad sentencing discretion that enables him or her to consider and balance multiple facts and circumstances when sentencing an offender. This broad discretion is required because sentencing is ultimately ‘a synthesis of competing features which attempts to translate the complexity of the human condition and human behaviour to the mathematics of units of punishment usually expressed in time or money’.<sup>50</sup>

## Submissions and consultations

5.22 A substantial number of stakeholders expressed support for the proposal in DP 70 to list the fundamental principles of sentencing in federal sentencing legislation.<sup>51</sup> However, one stakeholder expressed concern that codifying well-known principles in legislation could cause unnecessary confusion.<sup>52</sup> The Attorney-General’s Department submitted that it could be useful to include the proper administration of the criminal justice system as a principle of sentencing, to help explain the inclusion of sentencing factors relating to guilty pleas and cooperation with authorities.<sup>53</sup> Justice Peter Johnson submitted that any statutory statement about consistency should acknowledge that federal offenders might receive different sentencing options in different states and territories.<sup>54</sup>

5.23 Some stakeholders expressed concern about the way in which the ALRC expressed the principle of proportionality in DP 70. It was submitted that the phrase ‘objective seriousness of the offence’ did not make it clear that the culpability or mental state of the offender was also a matter to be considered when applying the principle of proportionality.<sup>55</sup> Some stakeholders expressed support for designating proportionality as the fundamental principle of sentencing.<sup>56</sup>

<sup>49</sup> *Kable v Director of Public Prosecutions* (1995) 36 NSWLR 374, 394.

<sup>50</sup> *Weininger v The Queen* (2003) 212 CLR 629, [24].

<sup>51</sup> Department of Corrective Services Western Australia, *Submission SFO 88*, 17 February 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; Office of the Public Advocate Victoria, *Submission SFO 81*, 14 February 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006; Chief Judge P McClellan, *Submission SFO 77*, 10 February 2006; J Willis, *Submission SFO 74*, 10 February 2006; Australian Taxation Office, *Submission SFO 72*, 10 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; J Roberts, *Submission SFO 67*, 16 January 2006.

<sup>52</sup> Chief Justice D Malcolm, *Submission SFO 71*, 10 February 2006.

<sup>53</sup> Attorney-General’s Department, *Submission SFO 83*, 15 February 2006.

<sup>54</sup> Justice P Johnson, *Submission SFO 73*, 10 February 2006.

<sup>55</sup> J Willis, *Submission SFO 74*, 10 February 2006; J Roberts, *Submission SFO 67*, 16 January 2006.

<sup>56</sup> G Mackenzie, *Submission SFO 80*, 14 February 2006; I Potas, *Submission SFO 78*, 13 February 2006; J Roberts, *Submission SFO 67*, 16 January 2006.

## ALRC's views

5.24 Federal sentencing legislation should specify the fundamental principles of sentencing, namely, proportionality, parsimony, totality, consistency and individualised justice, as set out in Recommendation 5–1 below. This is consistent with the approach adopted in Canada and New Zealand. The *Crimes Act* already contains indirect references to three of the established principles of sentencing, namely, proportionality, parsimony and totality. The inclusion of all five principles in federal sentencing legislation will emphasise their importance to judicial officers and practitioners. The ALRC does not consider that specifying the principles of sentencing will lead to unnecessary confusion, given that the principles are firmly established at common law. The common law will, of course, continue to provide guidance as to the manner in which the principles are to be applied.

5.25 The ALRC does not consider that promoting the proper administration of the criminal justice system is a principle of sentencing. It is not a rule that governs the way in which sentences should be imposed but, rather, an objective that the entire federal sentencing system seeks to achieve. Accordingly, in Chapter 2, the ALRC recommends that an object of federal sentencing legislation should be ‘to promote the proper administration of the federal criminal justice system when sentencing federal offenders’.<sup>57</sup>

5.26 It may not be possible for federal offenders to receive identical sentences for like offences in the federal context. This is because different state and territory sentencing options can be picked up and applied to federal offenders. As discussed in Chapter 7, the ALRC does not consider that limiting the sentencing options available to federal offenders is an appropriate way to deal with this potential inconsistency. Instead, federal sentencing legislation should provide that consistency should be pursued, where possible, when sentencing like offenders for like offences.

5.27 The ALRC agrees that the culpability of the offender, usually determined by reference to the offender’s mental state, is a relevant factor to consider when applying the common law principle of proportionality. The ALRC does not intend to alter this common understanding, and the wording of Recommendation 5–1 now makes this clear.

5.28 The ALRC received limited feedback on the desirability of designating proportionality as the fundamental principle of sentencing, as some stakeholders had suggested. The ALRC is not persuaded that such a change should be adopted. It is more appropriate to give judicial officers flexibility to consider and apply sentencing principles in a manner appropriate to the circumstances of the case, without mandating a hierarchy of principles to be applied in the sentencing process.

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57 See Rec 2–4.

**Recommendation 5–1** Federal sentencing legislation should state the fundamental principles that must be applied in sentencing a federal offender in order to achieve any of the stated purposes of sentencing. The principles should be as follows:

- (a) a sentence should be proportionate to the objective seriousness of the offence, which includes the culpability of the offender (proportionality);
- (b) a sentence should be no more severe than is necessary to achieve the purpose or purposes of the sentence (parsimony);
- (c) where an offender is being sentenced for more than one offence, or is already serving a sentence and is being sentenced for a further offence, the aggregate of the sentences should be just and appropriate in all the circumstances (totality);
- (d) where possible, a sentence should be similar to sentences imposed on like offenders for like offences (consistency and parity); and
- (e) a sentence should take into consideration all circumstances of the individual case, in so far as they are relevant and known to the court (individualised justice).



## 6. Sentencing Factors

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6.1 This chapter considers: factors that are relevant to the determination of a sentence and how they should be treated; factors that are relevant to the administration of the criminal justice system, which should also be considered in sentencing; and factors that should not be considered in sentencing. Many of the recommendations in this chapter are directed towards providing legislative guidance to judicial officers in the exercise of the sentencing discretion.

## Background

6.2 Section 16A(2) of the *Crimes Act 1914* (Cth) sets out a non-exhaustive list of 13 matters that a court must take into account in sentencing an offender, to the extent they are relevant and known to the court. These include factors relevant to the circumstances of the offence, the circumstances of the offender, and the personal circumstances of any victim. The section also lists matters that might properly be regarded as purposes of sentencing, including specific deterrence and punishment,<sup>1</sup> although it excludes any reference to general deterrence.<sup>2</sup>

6.3 Section 16A(2) provides as follows:

In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:

- (a) the nature and circumstances of the offence;
- (b) other offences (if any) that are required or permitted to be taken into account;
- (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character—that course of conduct;
- (d) the personal circumstances of any victim of the offence;
- (e) any injury, loss or damage resulting from the offence;
- (f) the degree to which the person has shown contrition for the offence:
  - (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
  - (ii) in any other manner;
- (g) if the person has pleaded guilty to the charge in respect of the offence—that fact;

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1 *Crimes Act 1914* (Cth) s 16A(2)(j), (k) respectively.

2 General deterrence and other purposes of sentencing are discussed in Ch 4.



- (h) the degree to which the person has cooperated with law enforcement agencies in the investigation of the offence or of other offences;
- (j) the deterrent effect that any sentence or order under consideration may have on the person;
- (k) the need to ensure that the person is adequately punished for the offence;
- (m) the character, antecedents, cultural background, age, means and physical or mental condition of the person;
- (n) the prospect of rehabilitation of the person;
- (p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.

### Should sentencing factors be specified or at large?

6.4 There are different practices in relation to the issue of whether sentencing legislation should set out 'factors' that a court must consider when sentencing an offender for breach of the criminal law. Sentencing legislation in most states and territories specifies sentencing factors.<sup>3</sup> In contrast, the sentencing legislation of Tasmania does not set out any factors to be generally considered in sentencing.<sup>4</sup> Sentencing legislation in Western Australia states that a sentence imposed on an offender must be commensurate with the seriousness of the offence and sets out four factors that must be taken into account in determining seriousness, including 'any aggravating factors' and 'any mitigating factors'.<sup>5</sup>

6.5 In 2005, the Law Reform Commission of Western Australia expressed the view that the sentencing legislation of Western Australia should be amended to include a list of factors that are generally considered relevant to sentencing. It said:

This list should be for the purpose of guidance for the judiciary as well as the defence and prosecution, but it should not constitute an exhaustive list because flexibility is required in sentencing.<sup>6</sup>

6.6 One drawback of listing sentencing factors is the risk that a list will be treated as a codification of the law, especially by less experienced judicial officers who may concentrate on the matters listed and overlook other considerations that may be relevant in a particular case.<sup>7</sup>

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3 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A; *Sentencing Act 1991* (Vic) s 5(2); *Penalties and Sentences Act 1992* (Qld) s 9(2), (4), (6); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1); *Crimes (Sentencing) Act 2005* (ACT) s 33; *Sentencing Act 1995* (NT) s 5(2).

4 It does, however, list three non-exhaustive factors relevant to the recording of a conviction: see *Sentencing Act 1997* (Tas) s 9.

5 *Sentencing Act 1995* (WA) s 6(1), (2).

6 Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Project 94, Discussion Paper (2005), 208.

7 M Rozenes, 'Fundamental Flaws in Sentencing Laws' (1992) 27(4) *Australian Law News* 12, 14–15.

6.7 In response to Issues Paper 29 (IP 29),<sup>8</sup> a range of stakeholders expressed support for federal legislation to specify factors to be considered in sentencing.<sup>9</sup> Professor Arie Freiberg submitted that courts were used to handling and balancing lists of factors.<sup>10</sup> The Commonwealth Director of Public Prosecutions (CDPP) submitted that including a list of factors relevant to sentencing provides useful guidance.<sup>11</sup> Some support was expressed for a checklist of factors.<sup>12</sup> However, the New South Wales Legal Aid Commission submitted that

the specification of particular factors relevant to choices of sentencing options, or quantum of sentence, should not be undertaken, as this imposes fetters on the discretion of the courts and would introduce rigidity in relation to the sentencing exercise.<sup>13</sup>

6.8 In Discussion Paper 70 (DP 70) the ALRC proposed that, when sentencing a federal offender, a court must consider any factor that is relevant and known to the court. The ALRC proposed a non-exhaustive list of sentencing factors that a court would be required to consider to the extent they were applicable.<sup>14</sup> There was general support for this approach.<sup>15</sup> The Law Council of Australia submitted that it

broadly supports the Commission's identification of key factors to be taken into account in sentencing federal offenders ... as well as the flexible approach adopted in describing these particular factors as among those which 'may' be relevant. Of course, where there is evidence before a court that relates to these factors (eg the nature, seriousness and circumstances of the offence), it would be difficult to envisage a circumstance where a court would dismiss the evidence as irrelevant. It may, however, be useful to clarify that the definition of 'relevant evidence' in s 55 of the *Evidence Act 1995* (Cth), according to which evidence is relevant if it is capable of 'rationally' affecting the fact in issue may also apply (subject to s 4(2) of that Act) to sentencing proceedings in federal courts and those exercising federal jurisdiction.<sup>16</sup>

6.9 However, one judge submitted that:

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<sup>8</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005).

<sup>9</sup> Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; JC, *Submission SFO 25*, 13 April 2005; BN, *Submission SFO 17*, 8 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; LD, *Submission SFO 9*, 10 March 2005; M Johnson, *Consultation*, Darwin, 27 April 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005; T Glynn, *Consultation*, Brisbane, 2 March 2005; New South Wales Public Defenders Office, *Consultation*, Sydney, 22 September 2004.

<sup>10</sup> A Freiberg, *Submission SFO 12*, 4 April 2005.

<sup>11</sup> Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

<sup>12</sup> Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005; New South Wales Public Defenders Office, *Consultation*, Sydney, 22 September 2004.

<sup>13</sup> New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.

<sup>14</sup> See Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 6–1.

<sup>15</sup> Law Council of Australia, *Submission SFO 97*, 17 March 2006; Department of Corrective Services Western Australia, *Submission SFO 88*, 17 February 2006; Attorney-General's Department, *Submission SFO 83*, 15 February 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006. Victoria Legal Aid submitted it would support separate federal sentencing laws only if suspended sentences were abolished in Victoria. Its support for proposals referred to in this chapter is to be regarded on that basis.

<sup>16</sup> Law Council of Australia, *Submission SFO 97*, 17 March 2006.

While, generally speaking, principles of sentencing and factors relevant to sentencing are well established, and so it might be thought that there is no objection to specifying those matters in legislation, there is a potential for codification of matters which are well understood at common law to give rise to unanticipated confusion.<sup>17</sup>

6.10 As discussed in DP 70,<sup>18</sup> one option for reform is for federal sentencing legislation to refrain from setting out factors relevant to sentencing, as is the position in Tasmania. This option would be the least prescriptive and would promote maximum flexibility in the exercise of judicial discretion. However, it provides no guidance to judicial officers, nor does it assist in promoting consistency in determining sentences. Another option is for federal sentencing legislation to specify factors that are relevant to sentencing generally, which may or may not be applicable in the circumstances of a particular case. The factors specified could be exhaustive or non-exhaustive. A further option is for federal sentencing legislation to specify separate factors relevant to the imposition of each of the sentencing options available to a court.

#### ***ALRC's views***

6.11 Specifying an extensive but non-exhaustive list of factors is the practice in most states and territories.<sup>19</sup> Specification of factors provides guidance to courts and promotes consistency in sentencing. In the federal context, the need for guidance is greater than within a single jurisdiction because consistency must be sought in relation to sentences imposed by federal, state and territory judicial officers. Legislative specification of sentencing factors also promotes clarity where there is conflicting case law about the relevance of a particular factor or the circumstances in which the factor should be applied.

6.12 Federal sentencing legislation should specify non-exhaustive factors that are relevant to sentencing and that may be applicable in a particular case, depending on the circumstances. If any specified factor is applicable to the case and known to the court, it must be considered, but if the factor has no application to the case it will not need to be considered.

6.13 An exhaustive list of factors would be problematic because it is not possible to specify in advance every factor that might conceivably be relevant to sentencing, given the diversity of facts in individual matters. In addition, 'attempts at exhaustiveness are inherently self-defeating: the longer a list, the more conspicuous its lacunae'.<sup>20</sup> A non-exhaustive specification provides for flexibility in sentencing—which is one of the

17 Chief Justice D Malcolm, *Submission SFO 71*, 10 February 2006.

18 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), [6.8]–[6.11].

19 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A (14 aggravating and 13 mitigating factors); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1) (18 factors); *Crimes (Sentencing) Act 2005* (ACT) (26 factors); *Sentencing Act 1995* (NT) s 5(2) (17 factors).

20 'Friendly Skies Dept: Peanuts, Madam?', *The New Yorker*, 10 April 2006, 27, 30.

objects of the proposed federal sentencing Act—and allows courts to develop jurisprudence in relation to additional sentencing factors.<sup>21</sup>

6.14 The ALRC does not support a separate list of factors relevant to the imposition of each of the sentencing options available to a court. Such an approach would introduce undue complexity into the sentencing process; would result in the duplication of many relevant factors; and would be fraught with difficulty because it may require a court to ignore potentially relevant factors when imposing a particular sentencing option.<sup>22</sup> An additional difficulty with this option arises from the fact that many state and territory sentencing options are picked up and applied in the sentencing of federal offenders. To require separate lists of factors for each of these options—which may change over time—would be impractical.

### Should sentencing factors be mandatory or discretionary?

6.15 When sentencing a federal offender, it is at present mandatory for the court to take into account the factors set out in s 16A(2) of the *Crimes Act*, to the extent they are relevant and known to the court. Sentencing legislation in most states and territories sets out a list of mandatory factors, which the court must either take into account<sup>23</sup> or to which it must have regard.<sup>24</sup> Victoria and the Northern Territory distinguish between mandatory and discretionary factors.<sup>25</sup> As noted above, the sentencing legislation of Western Australia sets out four mandatory factors to be taken into account in determining the seriousness of an offence, including ‘any aggravating factors’ and ‘any mitigating factors’.<sup>26</sup>

6.16 Most state and territory sentencing legislation expressly requires the court to have regard to any relevant circumstances or any relevant matter;<sup>27</sup> and other state and territory legislation requires the court to take into account or consider certain specified factors to the extent they are relevant and known to the court.<sup>28</sup>

6.17 In response to IP 29, the CDPP expressed support for the current approach by which listed factors are to be taken into account by a court where they are relevant and

21 Objects of the proposed federal sentencing Act are discussed in Ch 2.

22 For example, in Ch 7 of this Report, it is recommended that the provision in the *Crimes Act 1914* (Cth) (s 19B(1)(b)) that sets out a limited list of factors to be considered when a court discharges or dismisses a federal offender without conviction should be repealed.

23 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A.

24 *Sentencing Act 1991* (Vic) s 5(2); *Penalties and Sentences Act 1992* (Qld) s 9(2), (4), (6); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1); *Crimes (Sentencing) Act 2005* (ACT) s 33; *Sentencing Act 1995* (NT) s 5(2).

25 *Sentencing Act 1991* (Vic) s 5(2A), (2C); *Sentencing Act 1995* (NT) s 5(4)(a), (b).

26 *Sentencing Act 1995* (WA) s 6(1), (2).

27 *Sentencing Act 1991* (Vic) s 5(2)(g); *Penalties and Sentences Act 1992* (Qld) s 9(2)(q); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(o); *Sentencing Act 1995* (NT) s 5(2)(s).

28 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1); *Crimes (Sentencing) Act 2005* (ACT) s 33.

known to the court.<sup>29</sup> Some submissions favoured factors being discretionary rather than mandatory<sup>30</sup> or expressed opposition to mandatory factors.<sup>31</sup> However, one federal offender supported the idea of having some mandatory factors in order to promote consistency of approach, and having some discretionary factors to allow for ‘fairness on a case-by-case basis’.<sup>32</sup> Other stakeholders stated that they were against legislation identifying factors as either mandatory or discretionary.<sup>33</sup>

6.18 The Attorney-General’s Department (AGD) submitted that

flexibility and the discretion of the court to take account of the fullest range of factors in considering an appropriate sentence should remain a keystone. Sentencing is not a precise science and caution should be exercised in considering any move to prescription which would carry with it the dangers of a check-list approach by the courts.<sup>34</sup>

6.19 In DP 70 the ALRC proposed mandatory consideration by the court of any factor relevant to sentencing and known to the court.<sup>35</sup> This approach received support.<sup>36</sup> DP 70 also noted that there was some ambiguity about what makes a particular factor ‘relevant’ to sentencing, and invited stakeholders’ views as to whether federal sentencing legislation should state that the factor must be relevant to either a purpose or a principle of sentencing.<sup>37</sup> One stakeholder submitted:

I am of the view that the legislation *should* state this, by so doing sentencers will focus their minds on the question of relevance, and this will promote consistent, principled sentencing. It is all too easy for judges to follow their intuition and to consider factors that are not relevant to the purposes of sentencing.<sup>38</sup>

6.20 While not expressing a particular view on the question posed in DP 70, the AGD submitted that there was a need to clarify the link between the principles, purposes and factors of sentencing.<sup>39</sup>

6.21 If sentencing factors are to be specified, they could be designated as either mandatory or discretionary. Another alternative is to set out a short list of ‘core’ factors to which the court *must* have regard, and a list of ‘non-core’ factors to which the court *may* have regard in sentencing. If there were numerous core factors, issues may arise

29 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

30 Ibid; LD, *Submission SFO 9*, 10 March 2005.

31 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.

32 BN, *Submission SFO 17*, 8 April 2005.

33 Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005; Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005.

34 Attorney-General’s Department, *Submission SFO 52*, 7 July 2005.

35 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 6–1.

36 Law Council of Australia, *Submission SFO 97*, 17 March 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

37 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), [6.12]. See, eg *Defence Force Discipline Act 1982* (Cth) s 70(2), which links relevance to sentencing principles.

38 J Roberts, *Submission SFO 67*, 16 January 2006.

39 Attorney-General’s Department, *Submission SFO 83*, 15 February 2006.

on appeal if a judicial officer referred to some of the factors but not others.<sup>40</sup> Of those jurisdictions that set out factors relevant to sentencing, Victoria is the only one that sets out what could potentially be described as nine core factors.<sup>41</sup> However, as one of those factors is described broadly as ‘the presence of any aggravating or mitigating factor or any other relevant circumstance’ the legislation somewhat blurs the issue of what is core and what is non-core. While the Northern Territory legislation distinguishes between mandatory and discretionary factors, it cannot be said that it sets out a short list of core factors because its list of mandatory factors includes 17 separate items.<sup>42</sup>

### *ALRC’s views*

6.22 Part IB of the *Crimes Act* includes a list of *mandatory* sentencing factors. For the past 16 years courts that sentence federal offenders have been accustomed to taking those sentencing factors into account on a mandatory basis. Most states and territories also follow the approach of specifying mandatory sentencing factors. In each case, the specified mandatory factors are non-exhaustive, allowing the court the latitude to take into account any other relevant matter. However, what makes the exercise of the sentencing discretion a finite exercise is that the factors are only mandatory to the extent that they are relevant and known to the court.

6.23 The ALRC recommends the adoption of a mandatory approach in this regard. Federal sentencing legislation should express the primary principle that a court *must* consider any factor that is relevant to a purpose or principle of sentencing, where the factor is known to the court. As discussed further below, federal sentencing legislation should group such factors into broad categories and provide non-exhaustive examples of factors that may fall into each category.

6.24 Some submissions and consultations opposed the specification of mandatory sentencing factors. However, identification of mandatory factors provides guidance to courts and promotes consistency in sentencing. As noted above, in the federal context the need for guidance is greater than within a single jurisdiction because consistency must be sought in relation to sentences imposed by federal, state and territory judicial officers.

6.25 The ALRC does not consider the approach of listing a small number of mandatory core factors and a larger number of discretionary non-core factors to be workable. Delineating core and non-core factors would be difficult and somewhat arbitrary because what is core may depend on the circumstances of the case.

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40 See, however, *R v Wickham* [2004] NSWCCA 193, [29] and *R v Lilley* (2004) 150 A Crim R 591, [41], suggesting it is unnecessary for a judicial officer to refer specifically to every legislative factor.

41 *Sentencing Act 1991* (Vic) s 5(2).

42 *Sentencing Act 1995* (NT) s 5(2)(a)–(s).

## Restructuring sentencing factors

6.26 It is important that the examples of sentencing factors to be specified in federal sentencing legislation are, in fact, sentencing factors. However, some of the matters currently listed in s 16A(2) of the *Crimes Act* are not sentencing factors and should therefore not be included as examples of sentencing factors in the new federal sentencing Act.

## Relocating purposes of sentencing

6.27 The sentencing factors to be specified in a new federal sentencing Act should be distinct from, but consistent with, the stated purposes and principles of sentencing. The factors should be relevant to either a sentencing purpose or a sentencing principle—that is, they should either promote a sentencing purpose or facilitate the application of a sentencing principle. As a result, those items in s 16A(2) of the *Crimes Act* that are purposes of sentencing—namely, specific deterrence and punishment<sup>43</sup>—should be removed from the list because there is to be a separate provision in the new federal sentencing Act dedicated to the purposes of sentencing.<sup>44</sup>

6.28 One of the recommended purposes of sentencing is ‘to promote the rehabilitation of the offender’. On this basis it might be thought that s 16A(2)(n), which refers to the ‘prospect of rehabilitation’, should not be specified as a sentencing factor. However, the ‘prospect of rehabilitation’ can be properly categorised as a factor that is consistent with, and relevant to promoting, the rehabilitative purpose of sentencing.<sup>45</sup> For this reason, this factor should not be removed from the current list.<sup>46</sup>

## Relocating factors relevant to the administration of the criminal justice system

6.29 Section 16A(2)(g) of the *Crimes Act* provides that a factor to be taken into account in sentencing is the fact that a person has pleaded guilty to the charge in respect of the offence. Section 16A(2)(h) provides that a factor to be taken into account in sentencing is the degree to which the person has cooperated with law enforcement agencies in the investigation of the offence or of other offences.

6.30 The factors relating to a guilty plea and cooperation with authorities are taken into account by judicial officers as an incentive to promote the effective administration of the criminal justice system. These factors do not strictly focus, as traditional sentencing factors do, on the individual circumstances of the offence, the offender, or the victim. And unlike sentencing factors, these are not factors that on their own promote, or are consistent with, the traditional purposes of sentencing. In *Markarian v The Queen*, McHugh J stated that:

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43 *Crimes Act 1914* (Cth) s 16A(2)(j), (k).

44 See Ch 4.

45 See Rec 4–1(c).

46 Factors relating to promoting sentencing purposes in the future are discussed separately below.

the quantification of the discount commonly applied for an early plea of guilty or assistance to authorities is offered as an incentive for specific outcomes in the administration of criminal justice and is not related to sentencing purposes. The non-sentencing purpose of the discount for an early guilty plea or assistance is demonstrated by the fact that offenders are ordinarily entitled to additional mitigation for any remorse or contrition demonstrated with the plea or assistance, aside from the discount for willingness to facilitate the course of justice.<sup>47</sup>

6.31 The ALRC has recommended that the main legislative provision specifying relevant sentencing factors does so on the basis that those factors are relevant to either a purpose or principle of sentencing.<sup>48</sup> Factors relating to a guilty plea and cooperation with the authorities do not sit comfortably within this conceptual framework. As discussed below, the ALRC recommends that these factors be removed from the provision specifying relevant sentencing factors, and be dealt with instead in a separate provision that identifies factors relevant to the administration of the federal criminal justice system.

### **Grouping of factors**

6.32 The ALRC's proposal in DP 70 in relation to sentencing factors listed a number of non-exhaustive sentencing factors. The approach of listing factors is consistent with the approach taken in many states and territories. However, following further consideration and input from the Sentencing Advisory Committee, the ALRC considers that an ad hoc list of factors can be unwieldy to work with: the longer the list the greater the likelihood that judicial officers will use it as a check list without considering other factors that might not be listed but might nevertheless be relevant in the circumstances of a particular case. It is preferable for the factors to be set out in a logical and clear manner, such as within groups that share a common theme.

6.33 Accordingly, the ALRC has formed the view that, in order to provide a more principled and usable framework for judicial officers, and to promote clarity of approach, federal sentencing legislation should group factors into broad categories, and provide examples of sentencing factors under each category. Both the categories of factors and the factors themselves should be non-exhaustive. This approach is less likely to lead judicial officers to use the specified factors as a check list without considering other potentially relevant factors. The identification of broad categories of factors, supplemented by examples in each category, emphasises that other non-listed examples may fall within the categories. The categories of factors should include the following:

- I factors relating to the offence;
- II factors relating to the conduct of the offender in connection with the offence;

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<sup>47</sup> *Markarian v The Queen* (2005) 215 ALR 213, [74]. Discounts on sentence are discussed in Ch 11.  
<sup>48</sup> See Rec 6–1.



- III factors relating to the conduct of the offender other than the specific conduct constituting the charged offence;
- IV factors relating to the background and circumstances of the offender;
- V factors relating to the impact of the offence;
- VI factors relating to the impact of conviction or sentence on the offender or the offender's family or dependants;
- VII factors relating to the promotion of sentencing purposes in the future; and
- VIII factors relating to any detriment sanctioned by law to which the offender has been or will be subject as a result of the commission of the offence.

6.34 These categories are not mutually exclusive, and a single sentencing factor might be relevant to more than one category. Examples of factors that fall under each of these categories are discussed separately below under the eight broad groupings.

### Group I: The offence

6.35 Factors relating to the offence are essentially concerned with the nature and seriousness of the offence for which the offender is being sentenced, as distinct from the conduct of the offender in relation to the commission of the offence.

6.36 The maximum penalty for an offence is one of the few ways Parliament can indicate the seriousness of an offence. In *Markarian v The Queen*, the High Court said:

Careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.<sup>49</sup>

6.37 Section 16A(2)(a) of the *Crimes Act* specifies that a relevant sentencing factor is the nature and circumstances of the offence. It has been said that included within the broad ambit of this term are the maximum penalty and whether the commission of the offence involved a breach of trust or the use of a weapon.<sup>50</sup>

6.38 A review of state and territory sentencing legislation reveals examples of further factors in relation to the offence, which could appropriately be adopted in federal

<sup>49</sup> *Markarian v The Queen* (2005) 215 ALR 213, [31].

<sup>50</sup> M Rozenes, 'Fundamental Flaws in Sentencing Laws' (1992) 27(4) *Australian Law News* 12, 15.

sentencing legislation. These factors include the maximum penalty for the offence<sup>51</sup> and the seriousness or the gravity of the offence.<sup>52</sup>

6.39 In DP 70 the ALRC proposed that the seriousness of the offence and the maximum penalty for the offence be included as new sentencing factors.<sup>53</sup> One stakeholder expressed the view that the maximum penalty was simply a statutory limit and not a factor to be considered.<sup>54</sup>

6.40 In the ALRC's views, in addition to the existing factors of the nature and circumstances of the offence, federal sentencing legislation should specify: the seriousness of the offence; the maximum penalty for the offence; and whether the offence involved a breach of trust, as examples of sentencing factors relating to the offence. The seriousness of the offence, for example, is a relevant consideration in applying the proportionality principle, as well as being relevant to the sentencing purposes of denunciation and retribution.<sup>55</sup>

## Group II: Conduct of the offender in connection with the offence

6.41 Factors under this broad category are focused on the particular offender's conduct in connection with the offence, and are essentially concerned with the offender's culpability in relation to the offence.

6.42 Section 16A(2) of the *Crimes Act* does not set out any specific factors relating to the conduct of the offender in connection with the offence. However, a review of state and territory sentencing legislation reveals examples of factors relating to the conduct of the offender in connection with the offence, which could appropriately be adopted in federal sentencing legislation. These factors include the offender's culpability and degree of responsibility for the offence.<sup>56</sup>

6.43 It has been said that s 16A(2)(a) (the 'nature and circumstances of the offence') includes consideration of the degree of premeditation and the degree of participation in

51 *Sentencing Act 1991* (Vic) s 5(2)(a); *Penalties and Sentences Act 1992* (Qld) s 9(2)(b); *Sentencing Act 1995* (NT) s 5(2). See also *Sentencing Act 1995* (WA) s 6(2)(a) (statutory penalty relevant to determining seriousness of offence).

52 *Sentencing Act 1991* (Vic) s 5(2)(c); *Penalties and Sentences Act 1992* (Qld) s 9(2)(c); *Sentencing Act 1995* (WA) s 6(1), (2); *Sentencing Act 1995* (NT) s 5(2)(b). See also *Criminal Justice Act 2003* (UK) s 143; Sentencing Guidelines Council (UK), *Overarching Principles: Seriousness Guideline*, 1 December 2004.

53 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 6–1(a), (b).

54 J Roberts, *Submission SFO 67*, 16 January 2006.

55 Sentencing purposes are discussed in Ch 4.

56 *Sentencing Act 1991* (Vic) s 5(2)(d); *Penalties and Sentences Act 1992* (Qld) s 9(2)(d); *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(h); *Sentencing Act 1995* (NT) s 5(2)(c). See also *Criminal Justice Act 2003* (UK) s 143(1) (offender's culpability relevant to determining seriousness of the offence).

the offence.<sup>57</sup> These factors could also be listed as examples of factors relating to the conduct of the offender in connection with the offence.

6.44 The ALRC considers that federal sentencing legislation should specify the offender's culpability and degree of responsibility for the offence, and the offender's degree of premeditation and degree of participation in the offence, as examples of factors within this group. An offender's culpability for the offence is a relevant consideration in applying the proportionality principle and may also be relevant to a number of sentencing purposes such as denunciation, retribution and rehabilitation.

### **Group III: Conduct of the offender other than the specific conduct constituting the charged offence**

6.45 Some conduct in which an offender engages, whether before or after the commission of the offence for which he or she is being sentenced, may also be relevant to sentencing. Some conduct may be mitigating, while other conduct may result in an increase in the sentence to be imposed. An example of mitigating conduct that occurs after the commission of the offence is an offender's demonstration of contrition. An example of conduct that may have occurred before the commission of the offence is the commission of another offence that the offender has requested be taken into account in sentencing for the principal offence. Examples of factors falling within this category are discussed below.

#### **Contrition**

6.46 There are two approaches to determining the relevance of contrition to sentencing. The first is to regard expressions of remorse as relevant in themselves. The second is to require the demonstration of contrition through some practical act, such as making reparation for any loss resulting from the offence.

6.47 The degree to which the person has shown contrition for the offence is currently listed as a sentencing factor in s 16A(2)(f) of the *Crimes Act*. Sentencing legislation in New South Wales and South Australia also includes the degree to which the offender has shown contrition or remorse as a sentencing factor.<sup>58</sup>

6.48 Professor Mirko Bagaric has argued that contrition is irrelevant to sentencing.<sup>59</sup> However, other stakeholders expressed support for contrition to be treated as a sentencing factor noting in particular its significance to victims and the role it plays in restorative justice.<sup>60</sup> One stakeholder submitted that the mere fact that an offender is

<sup>57</sup> M Rozenes, 'Fundamental Flaws in Sentencing Laws' (1992) 27(4) *Australian Law News* 12, 15.

<sup>58</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(i); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(f).

<sup>59</sup> M Bagaric and K Amarasekara, 'Feeling Sorry?—Tell Someone Who Cares: The Irrelevance of Remorse in Sentencing' (2001) 40(4) *The Howard Journal* 364.

<sup>60</sup> Law Council of Australia, *Submission SFO 97*, 17 March 2006; J Willis, *Submission SFO 74*, 10 February 2006; J Roberts, *Submission SFO 67*, 16 January 2006.

sorry is relevant, and that the factor should not be limited to demonstrations of remorse.<sup>61</sup> However, the Law Council of Australia submitted that the existence of contrition prior to the sentencing hearing—particularly if expressed practically such as through ‘action to make reparation for any injury, loss or damage’—was most significant to sentencing courts, as opposed to mere statements of remorse or contrition in defence counsel’s sentencing submissions.<sup>62</sup>

6.49 In the ALRC’s view, the ‘degree to which the person has shown contrition’ is a relevant sentencing factor. It may be relevant to the prospect of rehabilitation of the offender, which in turn is relevant to the sentencing purpose of promoting the rehabilitation of the offender. It is also relevant to the sentencing purposes that underlie restorative justice, as well as to the purpose of specific deterrence.<sup>63</sup> The ALRC recommends that a broad description of this factor be retained as expressed in s 16A(2)(f) because it is important to emphasise the practical demonstration of contrition as opposed to mere expressions of contrition, which are easy to assert but difficult to establish.

6.50 An offender can demonstrate contrition in many ways, for example by taking action to make reparation for any injury, loss or damage resulting from the offence or by demonstrating a willingness to facilitate the administration of justice by pleading guilty or cooperating with the authorities.<sup>64</sup>

### **Antecedent criminal history**

6.51 It is generally accepted that an offender’s antecedent criminal history is relevant to sentencing, although how the court is entitled to treat such a history is a controversial issue, which is discussed more fully below.

6.52 Section 16A(2) of the *Crimes Act* includes as a relevant factor ‘antecedents’. This broad term encompasses relevant facts and circumstances in the background or history of the offender as well as an offender’s antecedent criminal history.<sup>65</sup>

6.53 The *Crimes Act* does not set out what constitutes antecedent criminal history. Criminal records kept by police services in each jurisdiction generally include court appearances, prior convictions, findings of guilt with no conviction, charges and matters currently under investigation.<sup>66</sup> However, not everything that is included in a criminal record is relevant to sentencing. The CDPP submitted that all prior

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61 J Willis, *Submission SFO 74*, 10 February 2006.

62 Law Council of Australia, *Submission SFO 97*, 17 March 2006.

63 Purposes of sentencing are discussed in Ch 4.

64 Pleading guilty and cooperating with the authorities are discussed separately below. See also Ch 11.

65 *Binder v The Queen* (1989) 42 A Crim R 221; *Cobiac v Liddy* (1969) 119 CLR 257.

66 Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the Basis of Criminal Record—Discussion Paper* (2004), 15.

convictions, including spent convictions, should be available to a court in sentencing.<sup>67</sup> In consultations, the Offenders Aid and Rehabilitation Services South Australia expressed the view that spent convictions and unrelated and juvenile history should not be able to be considered in sentencing.<sup>68</sup>

6.54 In the ALRC's view, there is some utility in reformulating the existing factor of 'antecedents' so that separate reference is made to 'antecedent criminal history' and to the history and circumstances of the offender. 'Antecedent criminal history' is a term often used by the courts.<sup>69</sup> It should be defined to mean a record of all prior convictions, offences in respect of which an offender was found guilty but released without conviction, and other offences admitted in accordance with the usual procedures for taking other offences into account,<sup>70</sup> up to the time of sentence.<sup>71</sup> Charges and matters under current investigation should not be encompassed within 'antecedent criminal history'.

6.55 While there are legitimate reasons for restricting the disclosure of spent convictions in certain areas, such as employment and insurance, a court should be able to consider spent convictions when sentencing federal offenders. Older convictions may carry less weight but nevertheless may be relevant to sentencing. Allowing spent convictions to be considered in sentencing is consistent with the current position<sup>72</sup> and with the recommendation made in ALRC 37.<sup>73</sup>

### **Offender's antecedent history in relation to civil penalties**

6.56 If it is accepted that an offender's antecedent criminal history is relevant to sentencing, the issue arises whether an offender's antecedent history in relation to civil penalties is also relevant. This issue is to be distinguished from the issue of whether a court can have regard to a civil penalty order imposed on an offender as a result of the actual conduct the subject of sentence. This latter issue, which arises in the context of parallel civil and criminal proceedings for an offence, is discussed separately below.

6.57 In response to DP 70, the CDPP submitted that:

We note the ... proposal to separate 'antecedent criminal history' from the 'history and circumstances of the offender'. We are concerned that framing antecedents to refer to 'criminal antecedents' could exclude courts taking into account previous civil penalty breaches in relation to similar conduct. In our view, it is important for courts to be apprised of such breaches on sentencing in relation to later similar conduct.<sup>74</sup>

<sup>67</sup> Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

<sup>68</sup> Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005.

<sup>69</sup> See, eg, *Veen v The Queen [No 2]* (1988) 164 CLR 465, 477.

<sup>70</sup> Taking other offences into account is discussed below.

<sup>71</sup> As opposed to up until the time the offence was committed: see *R v Poulton* [1974] VR 716.

<sup>72</sup> *Crimes Act 1914* (Cth) s 85ZZH(c).

<sup>73</sup> Australian Law Reform Commission, *Spent Convictions*, ALRC 37 (1987), Rec 7.

<sup>74</sup> Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

6.58 The ALRC agrees that the offender's history in relation to civil penalties could be a relevant sentencing factor. For example, when sentencing an offender for an insider trading offence, it may be relevant for the court to know whether the offender has previously had a civil penalty imposed on him or her in relation to a breach of the insider trading provisions, arising from conduct other than the conduct the subject of sentencing. However, in the ALRC's view, while a court may consider such a civil penalty, it should make due allowance for the fact that the standard of proof to establish breach of a civil penalty provision is lower than the standard of proof to establish breach of the criminal law. The court should consider this fact in exercising its discretion to deprive the offender of the benefit of mitigation to which he or she would otherwise be entitled as a result of being a first offender. It may still be appropriate in the circumstances of an individual case to treat an offender as a first 'criminal' offender notwithstanding the existence of a prior civil penalty order.

### Course of conduct

6.59 Where the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character, that course of conduct is specified as a sentencing factor under s 16A(2)(c) of the *Crimes Act*.

6.60 There appears to be some judicial confusion about the meaning of s 16A(2)(c). In *Weininger v The Queen*, Kirby J stated that the section did not allow 'uncharged criminal acts' to be taken into account in sentencing and expressed the view that s 16A(2)(c) was an attempt to express the totality principle.<sup>75</sup> In that case, Callinan J stated that because s 16A(2)(b) allowed 'other offences' to be taken into account and s 16A(2)(c) referred to 'a course of conduct' there was a basis for distinguishing the subsections and

for taking into account under the latter, relevant conduct, albeit that it might involve criminal acts which in turn might not have resulted in charged and established, (by verdict or plea) facts constituting other offences.<sup>76</sup>

6.61 Submissions and consultations expressed confusion about the meaning and operation of this factor. It was said that the section was problematic and appeared to allow the court to take into account uncharged conduct.<sup>77</sup>

6.62 The CDPP submitted that s 16A(2)(c) applies where several offences are charged that themselves comprise a course of conduct, for example a series of drug importations. It submitted that the section also applied where representative charges are used—that is, where a court sentences a federal offender for a limited or representative number of offences on the basis that those offences are part of a wider course of

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75 *Weininger v The Queen* (2003) 212 CLR 629, 647.

76 *Ibid*, 665.

77 J Willis, *Submission SFO 74*, 10 February 2006; Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.

conduct. It said that it is important for the CDPP to retain the ability to use representative charges and for courts to take into account a course of conduct.

For example, the new Commonwealth offences involving use of a carriage service to access child pornography material may involve thousands or even tens of thousands of images and it would not be practical to charge in relation to every single image.<sup>78</sup>

6.63 Representative charges are often used in relation to fraud or sexual assault cases. In *R v D*, Doyle CJ of the South Australian Court of Criminal Appeal said that the term ‘representative charges’ described an approach whereby:

the court sentences an offender in respect of a relatively small number of offences, but does so on the basis that those offences were not isolated offences, but part of a course of conduct involving similar behaviour. On that basis, the scope for extending leniency is reduced. The uncharged offences that are part of the course of conduct cannot be used to increase the potential maximum punishment, which maximum remains the accumulation of the maxima attracted by the charged offences. The only way in which the uncharged offences can be used is to rely upon them to refuse to extend the leniency that might be extended if the offences for which the offender is convicted were isolated offences.<sup>79</sup>

6.64 This approach has also been adopted by the New South Wales Court of Criminal Appeal. For example, in *R v JCW*, a case dealing with sexual abuse, the offender made an admission that the offences with which he was charged were representative of the general nature of his relationship with his daughter. Spigelman CJ said:

I do not, however, conclude that the admission extended to any, let alone each, of the specific allegations contained in [the daughter’s evidence].

An admission of this general character is appropriate to be taken into account for purposes of rejecting any claim to mitigation and attendant reduction of an otherwise appropriate sentence. It is not, however, in my opinion, appropriate to be taken into account as a circumstance of aggravation, if that be permissible at all.<sup>80</sup>

6.65 In the ALRC’s view, s 16A(2)(c) should be redrafted to provide greater clarity and to eliminate confusion about its meaning and scope. There are two distinct sentencing factors the court may consider in relation to a course of conduct. The first is whether the offence forms part of a series of proved or admitted criminal offences of the same or similar character, and this factor is relevant to a consideration of the totality principle. Where a course of conduct is comprised of multiple *proven* offences, in order to apply the totality principle—as well as the ‘single transaction rule’—a court may impose concurrent or partly concurrent sentences or, in certain circumstances, impose an aggregate sentence.<sup>81</sup>

78 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

79 *R v D* (1997) 69 SASR 413, 419. See also *R v Reiner* (1974) 8 SASR 102; *R v B, RWK* (2005) 91 SASR 200, 203.

80 *R v JCW* (2000) 112 A Crim R 466, [67]–[68]. See also *Holyoak v The Queen* (1995) 82 A Crim R 502.

81 This is discussed in Ch 12.

6.66 The second factor concerns the use of representative charges. In this case, the relevant sentencing factor is: where the offender has pleaded guilty to charges and has acknowledged that they are representative of criminality comprising uncharged conduct as well as the charged offences—the course of conduct comprising that criminality.

### Other offences permitted to be taken into account

6.67 Section 16A(2)(b) of the *Crimes Act* requires a court to take into account ‘other offences (if any) that are required or permitted to be taken into account’. An issue that arises is whether the description of this sentencing factor should be amended to clarify the types of offences that might be taken into account. This, in turn, requires a consideration of s 16BA of the *Crimes Act*, which is the substantive provision setting out the procedures for taking other offences into account.

6.68 Where a person has been convicted of a federal offence, s 16BA permits the court, with the consent of the prosecutor, to take into account other federal offences in respect of which an offender has pleaded guilty, where the offender wishes those offences to be taken into account. Where such offences are taken into account in sentencing, the court may not impose a penalty in excess of the maximum penalty prescribed for the offence in respect of which the person has been convicted. However, further proceedings in respect of the admitted offences are barred; admissions of guilt are inadmissible in later proceedings; and the offences taken into account are not regarded as convictions, although reference may be made to the admitted offences in subsequent proceedings as if they were convictions.

6.69 The procedure in s 16BA can be invoked only where a person is *convicted* of a federal offence. It cannot be invoked where, notwithstanding that a charge has been proved, the court discharges the person without conviction or dismisses the charges.<sup>82</sup> This is consistent with the position in some jurisdictions<sup>83</sup> but contrasts with other state and territory provisions, which allow the court to take other offences into account even where the court dismisses the principal charge or conditionally discharges the offender in respect of the principal charge without proceeding to conviction.<sup>84</sup>

6.70 Further, under s 16BA, another offence can be taken into account even where the person has not been charged with that other offence. It suffices if the offence is one that the convicted person ‘is believed to have committed’.<sup>85</sup> This is consistent with the position in some states,<sup>86</sup> but again contrasts with other state and territory provisions

<sup>82</sup> *Dreezer v Duvnjak* (1996) 6 Tas R 294.

<sup>83</sup> See *Sentencing Act 1991* (Vic) s 100(1); *Penalties and Sentences Act 1992* (Qld) s 189(2)(c); *Sentencing Act 1995* (NT) s 107.

<sup>84</sup> See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 33; I Potas, *Sentencing Manual: Law, Principles and Practice in New South Wales* (2001); *Sentencing Act 1997* (Tas) s 89 (finding of guilt sufficient); *Crimes (Sentencing) Act 2005* (ACT) s 55 (prerequisite of conviction or finding of guilt).

<sup>85</sup> *Crimes Act 1914* (Cth) s 16BA(1)(b).

<sup>86</sup> See *Sentencing Act 1997* (Tas) s 89(1)(a). See also *Penalties and Sentences Act 1992* (Qld) s 189(1)(b).



which require the offender to have been charged or presented for trial in respect of the admitted offences.<sup>87</sup>

6.71 Allowing other offences to be taken into account upon sentence has been said to promote the rehabilitation of an offender because he or she is given a ‘clean slate’. It also saves the investigative resources of law enforcement authorities by encouraging admissions of guilt; and it facilitates the resolution of offences in respect of which an offender may never have been inculpated.<sup>88</sup>

6.72 Section 16BA provides no guidance about when it is appropriate for other offences to be taken into account in sentencing,<sup>89</sup> and therefore does not shed light on the type of offences that may fall within the ambit of the sentencing factor in s 16A(2)(b). There is, however, authority for the proposition that:

it is contrary both to logic and to established practice for a sentencing judge to take into consideration offences that are not, viewed broadly, of the same kind and of about the same order of gravity as the offence or offences for which the convictions have been recorded.<sup>90</sup>

6.73 Judicial officers have expressed concern about the difficulty in sentencing for the principal offence when they are asked to take into account a range of unrelated and incomparable offences.<sup>91</sup> Further, it has been said that it is normally inappropriate to take more serious offences into account where the maximum penalty available for the principal offence is insufficient to reflect the total criminality of the offender’s conduct.<sup>92</sup>

6.74 In a guideline judgment on equivalent provisions—ss 31–35 of the *Crimes (Sentencing Procedure) Act 1999* (NSW)—the New South Wales Court of Criminal Appeal noted that:

Nothing in the statutory scheme identifies any criterion for selection of matters to be [taken into account]. Nor is there any statutory indication of any desirable, let alone necessary, relationship between a principal offence and offences [to be taken into account].<sup>93</sup>

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87 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 31, 32; *Sentencing Act 1991* (Vic) s 100(1)(a); *Sentencing Act 1995* (NT) s 107(1)(a).

88 See *Attorney General’s Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, 161–162.

89 Compare *Crimes (Sentencing Procedure) Act 1999* (NSW) s 33(4)(b) (procedure not available in respect of indictable offence punishable by life imprisonment); *Sentencing Act 1991* (Vic) s 100(1); *Sentencing Act 1995* (NT) s 107(1) (procedure not available for offences of treason or murder).

90 *R v White* (1981) 28 SASR 9, 11–12. See also *R v McAllister* (1982) 30 SASR 493, 500.

91 See *Attorney General’s Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, 160.

92 *Ibid.*, 160.

93 *Ibid.*, 159.

6.75 The Court expressed the view that the wide discretion conferred on a court to refuse to accede to the wishes of the prosecution and the offender to take certain offences into account should not be statutorily confined.<sup>94</sup>

6.76 In response to IP 29, there was support for the retention of a procedure that allows an offender to elect to have matters taken into account with the prosecutor's consent. It was submitted that such a process had utilitarian benefits with respect to the efficient use of court time.<sup>95</sup> There was express support for the retention of s 16BA.<sup>96</sup> The majority of submissions and consultations that addressed this issue did not consider there was any need for substantive reform in this area,<sup>97</sup> although it was submitted that the equivalent provision in the sentencing legislation of New South Wales was better drafted.<sup>98</sup>

6.77 In DP 70, the ALRC proposed that the procedures by which another offence may be taken into account in sentencing a federal offender should be available only where the conduct that constitutes the other offence is of a like nature and of similar or lesser seriousness to the principal offence.<sup>99</sup> This proposal received both unqualified<sup>100</sup> and qualified support.<sup>101</sup>

6.78 The CDPP submitted that:

Whilst we agree with Proposal 6–6 that this course should be available only where the conduct that constitutes the offence is of a similar or less serious nature, we do not agree with the proposed limitation that this course should only be open where the conduct is of a like or similar nature. ...

Taking other offences into account assists in 'clearing the books' of outstanding matters and saves time and resources for the prosecution and the defence, as well as the court. In our opinion, it is appropriate for this course to be flexible.

6.79 The CDPP submitted that there were sufficient safeguards in the provision to prevent offences from being taken into account inappropriately.<sup>102</sup>

6.80 In the ALRC's view, federal sentencing legislation should contain general guidance about when it is appropriate to take other offences into account in sentencing. The legislation should be amended to make it clear that the existing sentencing factor which allows a court to take into account other offences committed by the offender is restricted to situations in which those offences are of a similar or lesser seriousness to

94 Ibid, 159–160.

95 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.

96 Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005.

97 Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.

98 New South Wales Public Defenders Office, *Consultation*, Sydney, 22 September 2004.

99 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 6–6.

100 Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

101 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

102 Ibid.

the principal offence. A consequential amendment will need to be made to s 16BA to provide that the *procedures* by which another offence may be taken into account are available only where the conduct that constitutes the other offence is of similar or lesser seriousness to the principal offence.<sup>103</sup> Although the common law provides that another offence may be taken into account if it is of similar seriousness to the principal offence, as a matter of principle there is no objection to offences of lesser seriousness also being taken into account.

6.81 The ALRC no longer considers that legislation should impose a strict requirement that offences to be taken into account should be of a like nature to the principal offence. There may be situations in which it is appropriate to take into account another offence even if it is not of like nature: for example, taking into account incidental offences committed during the commission of the principal offence.

#### ***Prosecution policy of the CDPP***

6.82 An ancillary issue that arises in the context of this discussion is whether the prosecution policy of the CDPP should contain specific guidance in relation to when it is appropriate for the prosecution to consent to other offences being taken into account under s 16BA. Although this discussion is not strictly relevant to the description of the sentencing factor with respect to taking other offences into account, it is convenient to deal with it at this point.

6.83 The prosecution policy of the CDPP refers to other offences being taken into account in its guidelines on charge bargaining and provides some general guidance in this area.<sup>104</sup> However, the policy does not contain specific guidance in relation to when it is appropriate for the prosecution to consent to other offences being taken into account under s 16BA.

6.84 In the guideline judgment on ss 31–35 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), mentioned above, the New South Wales Court of Criminal Appeal said that the prosecution policy of the New South Wales Director of Public Prosecutions should provide guidance about the suitability of offences to be taken into account in sentencing.<sup>105</sup>

6.85 In DP 70 the ALRC proposed that the CDPP should amend its prosecution policy to provide guidance about the circumstances in which it is appropriate to take into account other offences in respect of which a federal offender has admitted guilt,

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103 See Rec 6–2 below.

104 For example, it states that a charge-bargaining proposal is not to be entertained by the prosecution unless the charges provide an adequate basis for an appropriate sentence in all the circumstances of the case. See Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (1998) <<http://www.cdpp.gov.au/Prosecutions/Policy/Default.aspx>> at 6 October 2004, [5.12]–[5.18].

105 *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, 161.

and suggested some factors in this regard.<sup>106</sup> This proposal received support.<sup>107</sup> The CDPP submitted that:

The prosecution policy ... requires care to be taken in choosing a charge or charges which adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and which will provide the court with an appropriate basis for sentence. ... offences should not be taken into account where they warrant a separate penalty to properly reflect the criminality involved and provide an appropriate basis for sentence. This latter factor is relevant to whether or not offences of a different character might be included. We note the ALRC's views that this area is something that might be specifically addressed in the Prosecution Policy of the Commonwealth.<sup>108</sup>

6.86 In the ALRC's view, the prosecution policy of the CDPP should provide more specific guidance about when it is appropriate for the prosecution to consent to other offences being taken into account. The factors to be considered should include the degree of similarity or any connection between the principal offence and the other offences; the nature, number and seriousness of the other offences; whether the offender was legally represented; and whether the other offences were the subject of investigation or charge. The inclusion of the latter factor is of particular importance. As Wells J stated in *R v McAllister*, there are situations in which the authenticity of an admission of guilt needs to be checked because

it is not unknown for a person who has been convicted of one offence to confess to other offences and to ask them to be taken into consideration, simply for the sake of saving some other person from prosecution and punishment.<sup>109</sup>

6.87 It may be that extra precautions need to be taken by the prosecution before it consents to having an offence taken into account where that offence was not the subject of an investigation or charge. For example, it would be relevant for the prosecution to consider whether the offender received legal advice before admitting guilt in those circumstances. The ALRC's recommendation in this area appears later in the chapter.<sup>110</sup>

## Group IV: Background and circumstances of the offender

6.88 Factors relating to the background and circumstances of the offender are essentially concerned with factors about the offender as an individual. Allowing the court to consider these factors facilitates individualised justice, which is one of the key sentencing principles.<sup>111</sup>

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<sup>106</sup> See Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 6–7.

<sup>107</sup> Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

<sup>108</sup> Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

<sup>109</sup> *R v McAllister* (1982) 30 SASR 493, 501.

<sup>110</sup> See Rec 6–3 below.

<sup>111</sup> Principles of sentencing are discussed in Ch 5.

6.89 The personal characteristics of an offender are also relevant to the sentencing principle of proportionality and the sentencing purposes of specific deterrence and rehabilitation. A factor such as the offender's youth may affect the assessment of culpability for the offence in question or highlight the need for sentencing orders that promote rehabilitation.<sup>112</sup> A factor such as old age may need to be considered because each year of a custodial sentence for an aged person represents a substantial proportion of his or her remaining life expectancy.<sup>113</sup> Factors such as old age and ill health may be relevant in determining the choice and duration of a sentencing option because they can render imprisonment particularly onerous for the offender or for the corrective services authorities who have to administer the sentence.<sup>114</sup>

6.90 Courts also consider the previous good character of an offender as a mitigating factor. Good character is usually evidenced by an absence of antecedent criminal history and by testimonials as to the offender's character.<sup>115</sup> However, good character can be an aggravating factor where victims have been led to trust the offender because of his or her good character or reputation.<sup>116</sup>

6.91 An offender's financial circumstances is relevant to the issue of whether the offender has the capacity to pay any fine imposed on him or her. As discussed in Chapter 7, the expression 'financial circumstances' has been interpreted broadly to include an offender's earnings, assets, debts, monetary commitments, cost of living and ability to generate income in the future.<sup>117</sup> Section 16C(1) of the *Crimes Act* requires a court to take into account the financial circumstances of an offender before imposing a fine.

6.92 While it is not permissible to discriminate in the sentencing process on the basis of an offender's race, colour or ethnicity, cultural background may be considered. As stated by Fox and Freiberg:

Courts, in dealing with identifiable racial or ethnic groups, particularly with persons of Aboriginal background, have tried to make allowance for 'ethnic, environmental and cultural matters'. These matters do not necessarily relate to the offender's race, but the person's actual circumstances, such as their background, education, cultural outlook and life experiences.<sup>118</sup>

6.93 Section 16A(2)(m) of the *Crimes Act* requires a court to take into account the character, antecedents, cultural background, age, means and physical or mental condition of the person. Provisions in state and territory sentencing legislation also

112 Courts tend to emphasise rehabilitation rather than deterrence in the case of young offenders: R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.701], [3.708].

113 *R v Hunter* (1984) 36 SASR 101, 103.

114 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.711].

115 K Warner, *Sentencing in Tasmania* (2nd ed, 2002), [3.154].

116 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.720].

117 See, eg, *Nelson v Meredith* (2001) 118 A Crim R 433, [5]; *Chugg v Stanford* (2000) 113 A Crim R 127.

118 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.716].

specify some of these sentencing factors.<sup>119</sup> In 2005, the Law Reform Commission of Western Australia proposed that the sentencing legislation of Western Australia include as a relevant sentencing factor the cultural background of the offender.<sup>120</sup>

6.94 The ALRC recommends the retention of some factors listed in s 16A(2)(m) in their current form. These include factors relating to the personal circumstances of the offender, such as character, cultural background and age. As noted above, both youth and old age are relevant considerations.

6.95 The examples of sentencing factors should also include a number of additional factors that are relevant to special categories of offenders. These factors are discussed in Chapters 28 and 30. For example, the legislation should specify an offender's 'mental illness' or 'intellectual disability' as sentencing factors in their own right.<sup>121</sup> Each of these factors may be relevant, for example, to assessing the culpability of the offender for the offence in question. Another example of relevant history is whether the offender is receiving treatment or is undertaking a behaviour intervention program to address any physical condition, mental illness, intellectual disability or mental condition that may have contributed to the commission of the offence.<sup>122</sup> Where the offender is voluntarily seeking such treatment this factor is also relevant to the Group III factors discussed above relating to the conduct of the offender other than the specific conduct constituting the charged offence.

6.96 Some particular issues arise from the terms in which s 16A(2) of the *Crimes Act* is drafted. Having regard to the desirability of accuracy, clarity and consistency in language, the ALRC recommends that:

- the existing reference to 'means' in s 16A(2)(m) should be replaced with the wider term 'financial circumstances', which is currently used in s 16C of the *Crimes Act*;<sup>123</sup> and
- the legislation should make it clear that a court can have regard to both physical and mental condition, as the current reference to 'physical or mental condition' in s 16A(2)(m) conveys the incorrect impression that a court can have regard to only one of these factors.

119 See, eg, *Criminal Law (Sentencing) Act 1988* (SA) s 10(l); *Crimes (Sentencing) Act 2005* (ACT) s 33(m), (n).

120 See Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Project 94, Discussion Paper (2005), Proposal 29.

121 See Rec 28–5 and accompanying text.

122 See Rec 28–5 and accompanying text.

123 See also *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(n). The consideration of financial circumstances when imposing a fine is discussed in Ch 7.

## Group V: Impact of the offence

6.97 Factors relating to the impact of the offence are relevant, for example, to the sentencing purpose of promoting the restoration of relations between the community, the offender and the victim. Included within this category of factors are: the impact of the offence on identifiable victims; the impact of the offence on the environment or financial markets; and the injury, loss or damage resulting from the offence.

### Impact on victim

6.98 Among the sentencing factors listed in s 16A(2) of the *Crimes Act* are the personal circumstances of any victim of the offence; and any injury, loss or damage resulting from the offence.<sup>124</sup> However, s 16A(2) does not specify the impact of the offence on a victim as a separate sentencing factor.

6.99 ‘Personal circumstances of any victim’ has been interpreted in the context of various sentencing statutes to include the impact of an offence on a victim,<sup>125</sup> the age<sup>126</sup> or vulnerability of a victim,<sup>127</sup> and the conduct of a victim at the time of the offence<sup>128</sup>—the latter on the basis that ‘the sentencing discretion may be tempered by an understanding of the reasons which led to the committing of serious criminal behaviour’.<sup>129</sup> Courts have also taken into account such factors as the age and vulnerability of victims, and their relationship with the offender, without linking these considerations to the statutory factor of ‘personal circumstances of any victim’. The attitude of a victim to sentencing has generally been held to be irrelevant. However, evidence that the victim has forgiven the offender has been recognised for its potential to indicate that the effects of the offence were not long-lasting, or, in the case of an offence occurring in a domestic situation, for its relevance to rehabilitation.<sup>130</sup>

6.100 The sentencing legislation in the ACT includes the effect of an offence on a victim as a relevant sentencing factor.<sup>131</sup> The Victorian sentencing legislation was amended in 2005 to include impact on a victim as a sentencing factor.<sup>132</sup> The Victorian Attorney-General, in his second reading speech, noted that the legislation requires the court to have regard to various matters including the personal circumstances of any

124 *Crimes Act 1914* (Cth) s 16A(2)(d), (e).

125 See, eg, *R v Bendix* [2004] VSC 133, [16] (considering *Sentencing Act 1991* (Vic)); *R v Collins* [1998] QCA 280, [22] (considering *Penalties and Sentences Act 1992* (Qld)) s 9; *Director of Public Prosecutions (Vic) v Hebllos* (2000) 117 A Crim R 49, [43] (considering *Sentencing Act 1991* (Vic)).

126 See, eg, *R v Kalache* [2002] NSWSC 507, [47].

127 See, eg, *Australian Competition and Consumer Commission v Chubb Security Australia Pty Limited* (2004) ATPR 42–041, [94] (considering *Crimes Act 1914* (Cth) s 16A).

128 See, eg, *R v Nguyen* [2002] NSWSC 536, [28] (considering *Crimes (Sentencing Procedure) Act 1999* (NSW)) (relevant that victims were committing a crime when they were assaulted); *R v Howarth* [2000] 1 VR 593, [44]; *Okutgen v The Queen* (1982) 8 A Crim R 262.

129 *R v Aboujaber* (Unreported, Victorian Supreme Court of Appeal, O Tadgell, Kenny JJA, 9 October 1997), 10.

130 See *R v Skura* [2004] VSCA 53, [48] (considering *Sentencing Act 1991* (Vic)).

131 *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(f).

132 *Sentencing Act 1991* (Vic) s 5(2)(daa).

victim of the offence; and any injury, loss or damage resulting directly from the offence. He said:

However, these matters which the legislation requires the court to have regard to may not fully encompass all aspects of the impact of a crime on a victim. For example, impacts such as a victim's eroded sense of safety, inability to form social relationships or inability to hold down a job may not be regarded as falling within the matters to which a court currently must have regard. A court may consider such things as part of the impact on the victim but is not currently required to.

In order to emphasise the relevant impact on a victim, this Bill will introduce an express requirement ... that courts must have regard to impact of the offence on the victim when making sentencing decisions. The purpose of this amendment is not to fetter judicial discretion. Rather, this will reinforce the longstanding position that it has always been relevant for a sentencer to have regard to the impact of an offence on the victim.<sup>133</sup>

6.101 Victims groups expressed support for additional factors relating to victims to be included in the list of federal sentencing factors, and for recognition that individual victims are harmed in some federal offences.<sup>134</sup> Victims Support Service Inc expressed the view that there was little in the current list that would cover the impact of the offence on the victim.<sup>135</sup> The Department of the Attorney General Western Australia also strongly supported the inclusion of the impact of an offence on a victim as a sentencing factor.<sup>136</sup> Other stakeholders expressed the view that the existing factor of the 'personal circumstances of the victim' was unclear and potentially encompassed irrelevant considerations,<sup>137</sup> or that it was wide enough to encompass the impact of an offence on a victim, rendering express reference to impact unnecessary.<sup>138</sup>

6.102 In the ALRC's view, the impact of an offence on any victim is a relevant sentencing factor, and it is a factor of increasing relevance in sentencing federal offenders. New federal offences such as sexual servitude, child sex tourism and terrorism depart from the traditional subject matter of federal offences (such as social security fraud and tax fraud), which has generally been considered to be victimless in the sense that the injury is often not directed to an identifiable individual but to the Commonwealth as a polity. It is particularly desirable that the impact of an offence on any victim be added as an example of a sentencing factor given the recommendation elsewhere in this Report to facilitate the use of victim impact statements in

133 Victoria, *Parliamentary Debates*, Legislative Assembly, 24 March 2005, 432 (R Hulls—Attorney-General).

134 Victim Support Australasia, *Submission SFO 60*, 21 December 2005; Victim Support Service Inc, *Consultation*, Adelaide, 20 April 2005.

135 Victim Support Service Inc, *Consultation*, Adelaide, 20 April 2005.

136 Department of the Attorney General Western Australia, *Submission SFO 96*, 15 March 2006.

137 J Roberts, *Submission SFO 67*, 16 January 2006.

138 J Willis, *Submission SFO 20*, 9 April 2005.



sentencing.<sup>139</sup> It should also be noted that one of the objects of the proposed federal sentencing Act is to recognise the interests of victims.<sup>140</sup>

6.103 In addition, in order to promote greater clarity, the current factor of the ‘personal circumstances of the victim’ should be reworded to refer to specific relevant factors relating to the victim, such as the victim’s age, vulnerability and relationship to the offender. Of course, other relevant attributes of the victim could be considered in assessing the impact of the offence on the victim.

### **Injury, loss or damage**

6.104 Section 16A(2)(e) requires a court to take into account ‘any injury, loss or damage resulting from the offence’. Despite the changing nature of federal offences it remains the case that the damage or injury resulting from certain federal offences (such as corporations law offences and fisheries offences) does not always impact on individual victims, or may have an impact beyond individual victims, such as impact on financial markets or the environment.

6.105 In response to IP 29, the Australian Securities and Investments Commission submitted that the Commission’s matters

can be prosecuted in a wide range of courts and jurisdictions, and not all courts have understood the levels of damage that corporate offences can cause. ... General provisions could refer to factors such as impact of the offences on market integrity, market confidence and consumer confidence in the financial sector.<sup>141</sup>

6.106 In DP 70 the ALRC proposed that the existing factor in s 16A(2) dealing with injury, loss or damage be modified to include effects beyond any immediate victim, such as effects on the environment or the market. The ALRC also proposed that, to assist in resolving the potentially difficult issues relating to causation or the foreseeability of harm, the injury, loss or damage that the court must consider should be limited to harm that results directly from the offence.<sup>142</sup> This is consistent with the approach taken in Victorian sentencing legislation,<sup>143</sup> although the sentencing Acts in the other states and territories do not adopt this limitation.

6.107 However, some stakeholders expressed opposition to confining the operation of the factor to any injury, loss or damage resulting directly from the offence.<sup>144</sup> The CDPP submitted that:

In our view, the existing provision would encompass effects beyond any immediate victim and that limiting this factor to direct loss is not warranted. The reference in

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139 See Ch 14.

140 See Ch 2.

141 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.

142 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 6–1(g).

143 *Sentencing Act 1991* (Vic) s 5(2)(db).

144 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; J Willis, *Submission SFO 74*, 10 February 2006.

Proposal 6–1(g) to ‘directly’, might be understood to be a limitation on what may be taken into account which, as we understand it, is not intended. We think that it is important that the effects on the environment or the market be taken into account in sentencing. We query the need for such effects to be specified.

6.108 In the ALRC’s view, the factor relating to injury, loss or damage should be expressed broadly so as not to restrict unduly a court’s discretion in this regard. The degree of ‘directness’ of the harm might then inform the weight to be given to the factor. Accordingly, the ALRC recommends that the current factor should be retained in its present form. However, the impact of the offence on the environment and on financial markets should be included as examples of additional sentencing factors falling within the group of factors relating to the impact of the offence.

## **Group VI: Impact of a finding of guilt, a conviction or sentence on the offender or others**

6.109 An offender may suffer a number of detriments as a result of a finding of guilt in relation to an offence, even where the court chooses not to record a conviction. These detriments may be exacerbated by the recording of a conviction. Some of these detriments will be immediate while others will be suffered long after the finding of guilt or the recording of the conviction. In addition, the offender and his or her family and dependants may suffer a number of adverse consequences as a result of the sentence imposed on the offender. These factors are discussed separately below.

### **Civil consequences of a finding of guilt or a conviction**

6.110 The civil and administrative consequences of a finding of guilt or of the recording of a conviction in relation to the offence often reach far beyond the immediate sentence imposed by the court. Long after a sentence has been completed an offender may face restrictions in gaining access to employment, housing, or goods and services by reason of his or her criminal history. Other consequences may include cancellation or suspension of trading licences or the possibility of deportation.<sup>145</sup> One federal offender submitted that, due to deregistration from his professional body, there was no potential for him to earn income from his profession in the future.<sup>146</sup>

6.111 ALRC 44 recommended that relevant sentencing factors should include the indirect effects on the offender of conviction, such as loss of, or inability to continue in or obtain suitable employment.<sup>147</sup>

6.112 Courts have treated loss of employment opportunities or career prospects as relevant sentencing factors, which may or may not carry significant weight, depending on the circumstances. In *R v TA Adams* J said:

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145 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.905].

146 WT, *Submission SFO 23*, 11 April 2005.

147 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 94.

Certainly, loss of professional prospects is a real and significant aspect of punishment and should not be ignored. His Honour adverted to the matter but observed that, where the offences involved the abuse of the offender's professional position, the loss of the privilege was a 'collateral penalty' and was not 'significant mitigation' in the sense ... that it should reduce by much the sentence that was otherwise appropriate in the circumstances of this case. ... Since abuse of the applicant's professional position is (unarguably) a serious aggravating factor, I do not see how the fact that this position will be foreclosed to him should be a *significant* mitigating factor. It is a necessary consequence of the requirement that the responsible professional body ensure that the public is protected, and is not imposed as a punishment.<sup>148</sup>

6.113 The ALRC considers that federal sentencing legislation should specify as an additional sentencing factor the likely civil and administrative consequences of a finding of guilt or a conviction in relation to the offence. The consequences may vary according to an offender's socio-economic background. For example, offenders from relatively advantaged backgrounds might face loss of directorship of a corporation, deregistration from a professional body, or cancellation of honours or awards,<sup>149</sup> while other offenders may face loss of opportunity for employment. Judicial officers should be careful not to apply this factor in a manner that privileges offenders from advantaged backgrounds.

### Effect of sentencing option on the offender

6.114 ALRC 44 recommended that relevant sentencing factors should include: whether a particular type of sanction would cause hardship to the offender; and the indirect effects on the offender of a particular sanction.<sup>150</sup> The sentencing legislation of the ACT includes as a sentencing factor whether the imposition of a particular penalty is likely to cause particular hardship to an offender.<sup>151</sup>

6.115 In *R v Sellen*, the New South Wales Court of Criminal Appeal stated that:

If it is shown that imprisonment will cause particular hardship (either because of a pre-existing physical or mental disability of the prisoner or because of the circumstances in which the prisoner must be kept for protection) this is a circumstance to be taken into account in determining the duration of the imprisonment.<sup>152</sup>

6.116 In *York v The Queen*, the High Court held that it was appropriate for a judicial officer to take into account the grave risk that an offender could be killed in prison, and

148 *R v TA* [2003] NSWCCA 191, [32]. See also *R v Stanbouli* (2003) 141 A Crim R 531, 547.

149 For example, after HIH executive Ray Williams received a federal sentence of imprisonment he was stripped of his Order of Australia Award given to him for services to the community. See 'Disgraced HIH Executive Stripped of his Order of Australia', *The Canberra Times*, 16 January 2006, 6.

150 See Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 94.

151 *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(r).

152 *R v Sellen* (1991) 57 A Crim R 313, 318. See also *R v Tsiaras* [1996] 1 VR 398; *R v Smith* (1987) 44 SASR 587, 589; *R v Perez-Vargas* (1986) 8 NSWLR 559, 563.

that the weight to be given to this factor depended on the circumstances of the case, including the likelihood of the occurrence.<sup>153</sup>

6.117 In *R v DS*, the Victorian Court of Appeal noted that serving a term of imprisonment would be particularly difficult for the appellant given her cultural background and her isolation in Australia.<sup>154</sup>

6.118 In response to IP 29, the Law Society of South Australia expressed the view that when sentencing a federal offender a court should be able to take into account sufficiently adverse prison conditions or the fact that someone would be subject to protective custody.<sup>155</sup>

6.119 In DP 70 the ALRC proposed that an additional sentencing factor should be specified in federal sentencing legislation, namely, the probable effect on the offender of a particular sentencing option, including that the offender's circumstances may result in imprisonment having an unusually severe impact on him or her.<sup>156</sup> A federal offender submitted that lack of access by non-citizens to rehabilitation programs should be a sentencing factor.<sup>157</sup> The Law Council of Australia submitted that it may be useful to include characteristics such as the age and health of the offender as contributing to the probable effect on the offender of a particular sentencing option. It noted, for example, that long custodial sentences imposed on aged offenders could constitute de facto sentences of life imprisonment.<sup>158</sup>

6.120 In the ALRC's view, federal sentencing legislation should expressly recognise as a sentencing factor the likely impact of a particular sentence on the offender, including that the offender's circumstances may result in imprisonment having an unusually severe impact on him or her. This factor is broad enough to encompass consideration, for example, of whether the lack of access by non-citizens to rehabilitation programs, or the offender's age, health or need for protective custody, may result in imprisonment having an unusually severe impact on him or her.

### Effect on family or dependants

6.121 The probable effect that any sentencing option or order under consideration would have on any of the offender's family or dependants is a factor currently listed in s 16A(2)(p) of the *Crimes Act*. However, some courts have read this paragraph down to allow consideration of this factor only in exceptional circumstances.<sup>159</sup>

153 *York v The Queen* [2005] HCA 60, [23].

154 *R v DS* (2005) 153 A Crim R 194, [19].

155 Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005.

156 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 6–1(m).

157 Confidential, *Submission SFO 64*, 6 January 2006. See also K Gutierrez, *Submission SFO 58*, 20 December 2005.

158 Law Council of Australia, *Submission SFO 97*, 17 March 2006.

159 See, eg, *R v Ceissman* (2001) 119 A Crim R 535, [36]; *R v Sinclair* (1990) 51 A Crim R 418, 430. Compare *R v Oancea* (1990) 51 A Crim R 141, 155.

6.122 In *R v Edwards* Gleeson CJ cited with approval the following statement by Wells J in *R v Wirth*.<sup>160</sup>

Hardship to spouse, family and friends, is the tragic but inevitable consequence of almost every conviction and penalty recorded in a criminal court. ... It seems to me that courts would often do less than their clear duty ... if they allowed themselves to be much influenced by the hardship that prison sentences which from all other points of view were justified, would be likely to cause to those near and dear to prisoners.

But ... the strength of our law lies in the willingness of judges, when applying a principle, not to carry it past the point where a sense of mercy or of affronted common sense imperatively demands that they should draw back. So ... hardship likely to be caused by a sentence of imprisonment under consideration should be taken into account where the circumstances are highly exceptional, where it would be, in effect, inhumane not to do so. ... For example, if it were demonstrated to the satisfaction of the court that to send a man to prison would, without much doubt, drive his wife to suicide, it would be a steely-hearted judge who did not, however illogically, at least try to meet the situation by suitably framed orders as to penalty.<sup>161</sup>

6.123 In response to IP 29, the New South Wales Public Defenders Office expressed the view that a court should always be able to take into account the probable effect that any sentence or order under consideration would have on an offender's family or dependants.<sup>162</sup> The effect of incarceration on family was emphasised by one federal offender who submitted that his custodial sentence caused severe financial hardship to his family members, resulting in their becoming welfare beneficiaries; and caused psychological damage to his son.<sup>163</sup>

6.124 In DP 70 the ALRC proposed that the existing factor in s 16A(2)(p) should be modified to make it clear that a court should have regard to this factor whether or not the circumstances are exceptional.<sup>164</sup> This approach was opposed by the CDPP and the AGD.<sup>165</sup> The CDPP submitted that the approach was inconsistent with the established position under state and territory law and would present difficulties for matters involving joint federal and state or territory offences. It supported the current approach and emphasised the importance of justice being administered even-handedly.<sup>166</sup> On the other hand, Sisters Inside Inc strongly supported the proposal. It submitted that:

85% of women who are incarcerated are the primary caregivers of their children. It has been our experience working regularly with these children that the incarceration of their mother is a destabilising and emotionally traumatic experience.<sup>167</sup>

<sup>160</sup> See *R v Wirth* (1976) 14 SASR 291, 295–296.

<sup>161</sup> *R v Edwards* (1990) 90 A Crim R 510, 516–517. Particular adverse effects that may be suffered by an offender's family and dependants are discussed in Ch 29.

<sup>162</sup> New South Wales Public Defenders Office, *Consultation*, Sydney, 22 September 2004.

<sup>163</sup> WT, *Submission SFO* 23, 11 April 2005.

<sup>164</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 6–1(p).

<sup>165</sup> Commonwealth Director of Public Prosecutions, *Submission SFO* 86, 17 February 2006; Attorney-General's Department, *Submission SFO* 83, 15 February 2006.

<sup>166</sup> Commonwealth Director of Public Prosecutions, *Submission SFO* 86, 17 February 2006.

<sup>167</sup> Sisters Inside Inc, *Submission SFO* 98, 6 April 2006.

6.125 In other contexts, the common law allows for the impact of the offence or the impact of a sentencing option on the offender to be considered by a court without requiring exceptional circumstances. In these cases, the common law gives the court discretion to attach appropriate weight to the factor, depending on the particular circumstances. In the ALRC's view, it is desirable that the common law adopt a similar approach in dealing with the likely impact of a sentencing option on an offender's family or dependants.

6.126 A court should be able to consider the likely impact of a sentencing option on an offender's family or dependants whether or not the circumstances are exceptional. The impact on dependants could be financial, social or psychological. However, the weight attached to this factor should always be a matter for the court's discretion. For example, it may be that certain effects on family and dependants would not warrant a modification in the sentence or order imposed. On the other hand, other impacts may be sufficiently serious—even if not strictly exceptional—to warrant a modification in the sentence or order when considered in the light of other relevant factors. In the ALRC's view, courts have taken an unnecessarily restrictive approach to this sentencing factor but it is a matter on which the common law can develop. The key aspect is to preserve the court's discretion to allow it to impose an appropriate sentence in all the circumstances of the case.

6.127 An offender's family and dependants may be seen as indirect 'victims'. They may suffer adverse consequences as a result of the sentencing of the offender, through no fault of their own. Just as the ALRC has made recommendations directed to recognising the interests and needs of the victims of crime, it advocates an approach that would encompass consideration of the impact of sentencing on this particular group of persons without the need to establish exceptional circumstances.

## **Group VII: Promotion of sentencing purposes in the future**

6.128 Section 16A(2)(n) of the *Crimes Act* specifies as a relevant sentencing factor 'the prospect of rehabilitation of the person'. This can be categorised as a factor that is consistent with, and relevant to promoting, the rehabilitative purpose of sentencing.<sup>168</sup> This raises the question whether the prospect of promoting other sentencing purposes should be specified in federal sentencing legislation.

6.129 As discussed in Chapter 4, the purposes of sentencing are retribution, deterrence, rehabilitation, incapacitation, denunciation and restoration. Of these purposes, denunciation is achieved simultaneously with the passing of sentence. In the case of retribution and incapacitation, the passing of sentence sets in train the events that will inexorably lead to the achievement of these purposes. These three purposes do not, in any significant sense, require a judicial officer to assess the *future prospects* of achieving those purposes. For example, upon a judicial officer pronouncing a sentence

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168 See Rec 4–1(c).

of imprisonment of 10 years, the offender's conduct is denounced, and punishment of the offender and protection of the community by preventing the offender from re-offending during imprisonment are assured, even though the sentence is yet to be served.

6.130 In contrast, other sentencing purposes are forward looking and require a court to assess the future prospect of achieving that purpose. For example, the sentencing purpose of promoting restoration of relations between the community, the offender and the victim could legitimately involve consideration of the prospect of promoting restoration. If the victim or offender has expressed opposition to engaging in restorative justice processes, a judicial officer should take that into account in assessing whether the prospect of restoration in that particular case is slim.

6.131 It is also proper for a judicial officer to assess the prospect of deterring the offender or others from committing the same or a similar offence. For example, where an offender has been sentenced on a number of occasions for the same type of offence, a judicial officer should consider this in assessing whether the prospect of achieving specific deterrence is slim. The futurity of specific deterrence is highlighted (in the case of imprisonment) by the fact that it relates to the offender's conduct after release. Similarly, if a series of heavy sentences have been imposed in relation to a particular type of federal offence and there is, for example, empirical evidence that since the imposition of those sentences there has been a decline in the incidence of that offence, that should be considered by a judicial officer in assessing the prospect of deterring others from committing that offence.

6.132 In response to DP 70 some stakeholders stated that general deterrence should be included as a sentencing factor.<sup>169</sup> The CDPP submitted that:

The failure to include general deterrence was the subject of considerable judicial criticism of Part IB and it might be anticipated that a similar response will result if this is not included.<sup>170</sup>

6.133 However, as discussed in Chapter 4, the ALRC has concluded that general deterrence is a legitimate sentencing purpose. Given that general deterrence is properly categorised as a purpose of sentencing, rather than as a factor to be considered in sentencing, it should not be specified as a sentencing factor. In this regard, the Law Council of Australia submitted:

The Law Council ... notes the peculiar absence of general deterrence alongside specific deterrence as a factor in s 16A(2) of the *Crimes Act 1914* (Cth). This consideration, however, may well be more appropriately categorised as a purpose of

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169 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; Chief Magistrate Judge D Price & Others, *Consultation*, Sydney, 3 February 2006.

170 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

sentencing than as a factor specifically to be taken into account by a court in imposing a sentence.<sup>171</sup>

6.134 In addition, unlike Part IB, in the model recommended by the ALRC, federal sentencing legislation will not be silent in relation to general deterrence. Moreover, in addition to general deterrence and specific deterrence being identified as sentencing purposes, the prospect of deterring the offender or others from committing the same or a similar offence should be included as a sentencing factor, and this in itself will draw the court's attention to the sentencing purposes aimed at deterrence.

### **Group VIII: Any detriment sanctioned by law to which the offender has been or will be subject**

6.135 An offender may be subject to a number of detriments sanctioned by law as a result of the commission of an offence. Some of these detriments—such as time spent in pre-sentence custody—will be experienced prior to the imposition of sentence, while others may be experienced as a result of the processes of conviction and sentencing. Examples of factors falling within this group are discussed below.

#### **Pre-sentence detention or custody**

6.136 It is generally accepted that a court is to take into account any time spent in pre-sentence custody where a sentence of imprisonment is imposed.<sup>172</sup> However, an issue arises in relation to the treatment of pre-sentence custody or detention where a sentence other than imprisonment is ultimately imposed by the court. This issue has arisen in the sentencing of unlawful non-citizens for fisheries-related offences, although it is also relevant in other contexts, such as pre-sentence detention of the mentally ill.<sup>173</sup>

6.137 The *United Nations Convention on the Law of the Sea* 1982 prohibits imprisonment as a penalty for violations of certain fisheries laws, in the absence of agreements to the contrary by the States concerned.<sup>174</sup> Consequently, certain offences against the *Fisheries Management Act 1991* (Cth) are not punishable by imprisonment but only by the imposition of other sentencing options, including fines. Unlawful non-citizens can be detained by the authorities for the purpose of determining whether or not to charge or prosecute them with certain offences, including fisheries offences. They can either be detained under the *Fisheries Management Act* for a maximum period of 168 hours<sup>175</sup> or they can be detained under the *Migration Act 1958* (Cth).<sup>176</sup> In the latter case there is no limit to the time a person may be held in immigration

171 Law Council of Australia, *Submission SFO 97*, 17 March 2006.

172 See *Crimes Act 1914* (Cth) s 16E, which is discussed in Ch 10. The treatment of pre-sentence detention where a sentence of imprisonment is imposed is also considered in Ch 10.

173 See Ch 28.

174 See *United Nations Convention on the Law of the Sea*, 10 December 1982, ATS 31, (entered into force generally on 16 November 1994) art 73.

175 *Fisheries Management Act 1991* (Cth) s 84(1)(ia).

176 *Migration Act 1958* (Cth) s 250.



detention and there is no requirement to bring a charge against a detainee within any particular time.<sup>177</sup> Judges have recognised a danger that detention under the *Migration Act* may be abused by the tactical use of ‘go-slow’ methods.<sup>178</sup>

6.138 Different judicial opinions have been expressed about whether pre-sentence immigration detention is a relevant factor in sentencing. In *R v Yusup*, Angel J, when imposing a fine for a fisheries offence, refused to take into account the period of time spent by the offender in immigration detention pending disposition of the matter. He stated that it was not a relevant sentencing factor, and referred to the fact that it was not mentioned in s 16A(2) of the *Crimes Act*. He expressed the view that the period of immigration detention was not punishment but was attributable to the offender’s unlawful presence in Australia.<sup>179</sup> However, in *R v Zainudin*, Mildren J concluded that considerations of justice required that pre-sentence detention be taken into account. He distinguished pre-charge immigration detention from the type of immigration detention used to hold illegal immigrants, and stated that from an offender’s perspective, pre-charge immigration detention was, for all practical purposes, the same as being held on remand.<sup>180</sup> In 2005, the Court of Criminal Appeal of the Northern Territory resolved the conflicting approaches by holding that pre-charge immigration detention is a relevant sentencing factor. However, in the circumstances of that case, the Court held that, notwithstanding the offender had been in detention for a lengthy period, it was still appropriate to impose a substantial fine.<sup>181</sup>

6.139 The Northern Territory Legal Aid Commission expressed the view that immigration detention connected with an offence should be taken into account in sentencing. It noted that offenders in immigration detention are prejudiced by the fact that they are not brought promptly before the courts.<sup>182</sup>

6.140 In the ALRC’s view, in imposing a sentence other than imprisonment<sup>183</sup> a court should consider any time spent by the offender in pre-sentence custody or detention in relation to the offence. In the case of immigration detention, the need for fairness is highlighted by the fact that there is no limit to the amount of time that an unlawful non-citizen can be kept in immigration detention in relation to a suspected offence before a charge is laid. In addition, alternative sentencing options imposed on an offender may be substantial. For example, the maximum fines for certain fisheries offences are

177 See *R v Zainudin* [2005] NTSC 14, [26].

178 See *Ibid*; *Yusup v The Queen* [2005] NTCCA 19, [4] (Mildren J), [21] (Riley J).

179 *R v Yusup* (Unreported, NTSC, Angel J, 20 January 2005).

180 See *R v Zainudin* [2005] NTSC 14, [37]–[39], [42].

181 *Yusup v The Queen* [2005] NTCCA 19, [25].

182 Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005.

183 Pre-sentence custody and detention where a sentence of imprisonment is imposed are discussed in Ch 10.

significant,<sup>184</sup> and when imposed on impecunious offenders may result in imprisonment for non-payment of the fine.<sup>185</sup>

### Pre-sentence quasi-custody

6.141 Another issue is the treatment of time spent by an offender in pre-sentence residential rehabilitation programs or other forms of quasi-custody involving significant restrictions on the offender's liberty. While it may not be appropriate to give full credit for the time spent in quasi-custody (in the sense of reducing any sentence of imprisonment by the full number of days spent in quasi-custody), a number of decisions recognise that periods in quasi-custody should be taken into account by a court in sentencing.<sup>186</sup>

6.142 One stakeholder submitted that if offenders are aware that pre-sentence quasi-custody will be taken into account in sentencing, they are more likely to undertake rehabilitation programs.<sup>187</sup> The view was also expressed that in order to promote uniformity, consideration could be given to weighting time spent in pre-sentence quasi-custody—for example, by making one day of pre-sentence quasi-custody equal to half a day of imprisonment.<sup>188</sup>

6.143 The ALRC considers that an additional factor should be added to the examples of sentencing factors in Group VIII, namely, time spent by an offender in a rehabilitation program or other form of quasi-custody where the offender has been subjected to restrictions, except where full credit must be given for pre-sentence custody or detention in accordance with other recommendations in this Report.

6.144 However, given the diversity and evolving nature of rehabilitation programs in the states and territories, and the fact that such programs or other forms of quasi-custody can be tailored to meet the individual needs of an offender, it is not practicable for legislation to impose a uniform weighting that would be appropriate for all types of quasi-custody. The weighting to be given to quasi-custody is best left to judicial discretion.

### Confiscation of property orders

6.145 A federal offender who is being sentenced for an offence may separately be subject to orders for the confiscation of property in relation to that offence. Confiscation orders may relate either to property used in the commission of the offence

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184 See, eg, *Fisheries Management Act 1991* (Cth) s 100A (7,500 or 5,000 penalty units depending on boat's length); ss 101A, 101B (7,500 and 500 penalty units respectively).

185 Enforcement of fines is discussed in Ch 17.

186 See, eg, *R v Eastway* (Unreported, NSWCCA, 19 May 1992); *R v Delaney* (2003) 59 NSWLR 1; *R v Campbell* [1999] NSWCCA 76, [24]; *R v Everingham* (Unreported, New South Wales Court of Criminal Appeal, 4 July 1994).

187 J Roberts, *Submission SFO 67*, 16 January 2006.

188 Ibid.

or to property that is the proceeds of crime. In some states and territories courts are required to have regard to forfeiture of property orders when sentencing an offender.<sup>189</sup>

6.146 As noted in Chapter 2, the ALRC agrees with the CDPP's submission that a provision regarding the effect of a confiscation order on a federal sentence properly belongs within the ambit of the new federal sentencing Act.<sup>190</sup>

6.147 The ALRC considers that the nature and extent of any confiscation of property order that is to be imposed as a result of the commission of the offence should be specified as a new sentencing factor in federal sentencing legislation. However, for the reasons discussed more fully below, this recommendation is subject to the qualification that any confiscation order that merely neutralises a benefit that has been obtained by the commission of a federal offence—that is, a confiscation order directed to the proceeds of crime—should not mitigate the sentence.<sup>191</sup>

### **Imposition of a civil penalty**

6.148 In some federal legislation, criminal liability and liability for a civil penalty attach to the same conduct. For example, s 1317P of the *Corporations Act 2001* (Cth) allows criminal proceedings to be started against a person for conduct that is 'substantially the same as conduct constituting a contravention of a civil penalty provision' regardless of whether a declaration of contravention, a pecuniary penalty order or a compensation order has been made against the person. Section 486C of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) also allows criminal proceedings to be commenced against a person for conduct that is 'substantially the same as conduct constituting a contravention of a civil penalty provision' regardless of whether a pecuniary penalty order has been made against the person.

6.149 Accordingly, at the time that a federal offender is being sentenced for a criminal offence it is possible that the offender has already had a civil penalty imposed on him or her in relation to the conduct that is the subject of sentencing. Fairness requires that in sentencing the offender the court consider the imposition of the civil penalty order. Such consideration is relevant to the sentencing principle of proportionality. As the ALRC stated in a previous report:

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189 *Sentencing Act 1991* (Vic) s 5(2A)(a); *Criminal Law (Sentencing) Act 1988* (SA) s 10(ka); *Sentencing Act 1995* (NT) s 5(4)(b).

190 See Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006. Section 320 of the *Proceeds of Crime Act 2002* (Cth) currently deals with the effect of the confiscation on sentencing.

191 See Rec 6–6 below.

Without adequate safeguards, multiple penalties for the same conduct could result in a variety of punishments imposed upon the regulated that would be both oppressive and unfair.<sup>192</sup>

**Recommendation 6–1** Federal sentencing legislation should state that a court, when sentencing a federal offender, must consider any factor that is relevant to a purpose or principle of sentencing, where that factor is known to the court. The legislation should group these factors into categories and provide examples of sentencing factors under each category. These categories and factors include but are not limited to the following, to the extent that they are applicable:

*I. Factors relating to the offence*

*Examples:* the nature, seriousness and circumstances of the offence; the maximum penalty for the offence; whether the commission of the offence involved a breach of trust.

*II. Factors relating to the conduct of the offender in connection with the offence*

*Examples:* the offender's culpability and degree of responsibility for the offence; the offender's degree of premeditation and degree of participation in the offence.

*III. Factors relating to the conduct of the offender other than the specific conduct constituting the charged offence*

*Examples:* the degree to which the offender has shown contrition for the offence, for example, by taking action to make reparation for any injury, loss or damage resulting from the offence; the offender's antecedent criminal history; the offender's antecedent history in relation to civil penalties; whether the offence forms part of a series of proved or admitted criminal offences of the same or a similar character; where an offender has pleaded guilty to charges and has acknowledged that they are representative of criminality comprising uncharged conduct as well as the charged offences—the course of conduct comprising that criminality; other offences committed by the offender of a similar or lesser seriousness to the principal offence to which the offender has admitted guilt and which are required or permitted to be taken into account.

*IV. Factors relating to the background and circumstances of the offender*

<sup>192</sup> See Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [11.12] and Ch 12 generally on multiple proceedings and multiple penalties.

*Examples:* the offender's character, cultural background, history and circumstances, age, financial circumstances, physical condition, mental illness or condition, intellectual disability; the fact that the offender is receiving treatment or is undertaking a behaviour intervention program to address any physical condition, mental illness or condition, or intellectual disability that may have contributed to the commission of the offence; other factors relevant to special categories of offenders (see Recommendations 28–5; 30–2).

*V. Factors relating to the impact of the offence*

*Examples:* the impact of the offence on any victim; the age of any victim of the offence; the vulnerability of any victim of the offence; the victim's relationship with the offender; any injury, loss or damage resulting from the offence; the impact of the offence on the environment; the impact of the offence on financial markets.

*VI. Factors relating to the impact of a finding of guilt, a conviction or sentence on the offender or the offender's family or dependants*

*Examples:* the likely civil and administrative consequences of a finding of guilt or a conviction; the likely impact of a sentence on the offender, including that imprisonment may have an unusually severe impact on the offender; the likely impact of a sentence on any of the offender's family or dependants.

*VII. Factors relating to the promotion of sentencing purposes in the future*

*Examples:* the prospect of rehabilitating the offender; the prospect of restoring relations between the offender, the community and the victim; the prospect of deterring the offender and others from committing the same or similar offences.

*VIII. Factors relating to any detriment sanctioned by law to which the offender has been or will be subject as a result of the commission of the offence*

*Examples:* any time spent in pre-sentence custody or detention in relation to the offence where a sentence other than a term of imprisonment is imposed; any time spent in a rehabilitation program or other form of quasi-custody where the offender has been subjected to restrictions, unless full credit has been given for pre-sentence custody or detention; (subject to Recommendation 6–6) the nature and extent of any confiscation of property that is to be imposed as a result of the commission of the offence; the imposition of any civil penalty as a result of conduct that is substantially the same as conduct constituting the offence.

**Recommendation 6–2** Federal sentencing legislation should provide that the procedures by which another offence may be taken into account in sentencing a federal offender are available only where the conduct that constitutes the other offence is of a similar or lesser seriousness to the principal offence.

**Recommendation 6–3** The Commonwealth Director of Public Prosecutions should amend its prosecution policy to provide guidance about the circumstances in which it is appropriate for the prosecution to consent to other offences, in respect of which a federal offender has admitted guilt, being taken into account in sentencing. The factors to be considered should include:

- (a) the degree of similarity or any connection between the principal offence and the other offences;
- (b) the number, seriousness and nature of the other offences;
- (c) whether the other offences were the subject of investigation or a charge; and
- (d) whether the offender was legally represented.

## Aggravating and mitigating factors

### Should all factors be categorised as aggravating or mitigating?

6.150 A further issue is whether federal sentencing legislation should identify which sentencing factors increase the penalty to be imposed (an aggravating factor) and which lessen the penalty to be imposed (a mitigating factor).

6.151 The *Crimes Act* does not list aggravating or mitigating factors. New South Wales is the only Australian jurisdiction that sets out a list of aggravating and mitigating factors that the court must take into account.<sup>193</sup> Other state and territory sentencing legislation states that a court must have regard to the presence of any mitigating or aggravating factor concerning the offender<sup>194</sup> or must have regard to any mitigating or aggravating factor in determining the seriousness of an offence,<sup>195</sup> without listing examples of such factors.<sup>196</sup> Some sentencing legislation is silent on the issue of aggravating and mitigating factors.<sup>197</sup> There is precedent in the sentencing provisions of overseas jurisdictions for the listing of aggravating and mitigating factors<sup>198</sup> and some of these provisions expressly allow for the consideration of any aggravating or mitigating factor relating either to the offence or the offender.<sup>199</sup>

6.152 Professors Richard Fox and Arie Freiberg have expressed the view that it is:

artificial, misleading and possibly an error in principle to isolate certain factors and label them as always either aggravating or mitigating the circumstances of the offence and, consequently, its penalty.<sup>200</sup>

6.153 The relationship between mitigating and aggravating factors is complicated by the fact that the opposite of a mitigating factor is not necessarily an aggravating factor, and vice versa.<sup>201</sup> For example, a plea of guilty could be a mitigating factor but it is improper to treat a plea of not guilty as an aggravating factor. Similarly, while youth or old age may be a mitigating factor, the fact that an offender's age does not fall in either extreme is not an aggravating factor.

193 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A.

194 *Sentencing Act 1991* (Vic) s 5(2)(g); *Penalties and Sentences Act 1992* (Qld) s 9(2)(g); *Sentencing Act 1995* (NT) s 5(2)(f).

195 *Sentencing Act 1995* (WA) s 6(2)(c), (d).

196 Although *Ibid* s 8(2) provides that a plea of guilty is mitigating.

197 See *Criminal Law (Sentencing) Act 1988* (SA) s 10(o) which requires the court to take into account 'any other relevant matter'; *Sentencing Act 1997* (Tas); *Crimes (Sentencing) Act 2005* (ACT) s 33.

198 See, eg, *Sentencing Act 2002* (NZ) s 9; *Violent Crime Control and Law Enforcement Act of 1994* (2002) 18 USC s 3592 (US) (mitigating and aggravating factors in determining whether a death sentence is justified); *Criminal Justice Act 2003* (UK) ss 143–146.

199 See *Criminal Code (RS 1985, c C-46)* (Canada) s 718.2, which sets out a non-exhaustive list of five aggravating factors.

200 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.103].

201 *Ibid*, [3.103].

6.154 In response to IP 29, stakeholders expressed opposition to federal sentencing legislation specifying aggravating and mitigating factors. It was said that specifying such factors might mislead and give rise to error,<sup>202</sup> that it was unnecessary and unhelpful,<sup>203</sup> and that, if factors were to be specified, it would have to be done carefully and would be undertaken more appropriately by a Sentencing Council than by legislation.<sup>204</sup>

6.155 In DP 70 the ALRC proposed that the list of factors relevant to sentencing a federal offender should not distinguish between factors that aggravate and those that mitigate the sentence.<sup>205</sup> This proposal received general support from stakeholders.<sup>206</sup> However, while the Law Council of Australia expressed broad support for the proposal's intention, it expressed concern that the interplay between this proposal and the proposals that certain specified matters must not be aggravating or mitigating<sup>207</sup> could cause confusion.<sup>208</sup>

6.156 In its 1988 report on sentencing, the ALRC expressed the view that no distinction should be drawn between aggravating and mitigating factors.<sup>209</sup> The ALRC remains of that view. No problem has been identified during the course of this Inquiry that gives cause to reconsider this aspect of federal sentencing legislation.

6.157 Some of the sentencing factors set out in Recommendation 6–1, such as the maximum penalty for the offence, cannot be categorised as either aggravating or mitigating. Other factors may be either aggravating or mitigating depending on the circumstances. For example, aggravating factors could be that an offender's culpability and degree of responsibility for the offence were high, while mitigating factors could be that an offender's culpability and degree of responsibility for the offence were limited. However, such distinctions seem self-evident and there is little utility in attempting to give them statutory expression.

6.158 It is also self-evident that some sentencing factors are always mitigating. For example, the factor relating to time spent in pre-sentence custody or detention where a sentence other than imprisonment is imposed is obviously mitigating.

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202 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.

203 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; T Glynn, *Consultation*, Brisbane, 2 March 2005.

204 A Freiberg, *Consultation*, Melbourne, 30 March 2005.

205 See Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 6–2, which was subject to Proposals 6–3 and 6–4.

206 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; Attorney-General's Department, *Submission SFO 83*, 15 February 2006; J Willis, *Submission SFO 74*, 10 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

207 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposals 6–3; 6–4.

208 Law Council of Australia, *Submission SFO 97*, 17 March 2006.

209 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 44.



6.159 Finally, some factors relevant to sentencing are such that their existence may serve neither to increase nor to decrease the severity of a sentence, but may guide the court in selecting an appropriate sentencing option or in specifying certain conditions tailored to the needs and circumstances of the offender. Factors that could fall into this category include the cultural background, age, and physical and mental condition of an offender.

**Recommendation 6–4** Subject to Recommendations 6–5 and 6–6, federal sentencing legislation should not distinguish between sentencing factors that aggravate the sentence and those that mitigate the sentence.

### Factors that do not aggravate

6.160 Part IB of the *Crimes Act* does not identify factors that *must* be treated as non-aggravating. There is precedent for the contrary position. Examples of non-aggravating factors identified in legislation are: that a person has pleaded not guilty; that a person has a prior criminal record; and that a previous sentence has not achieved the purpose for which it was imposed.<sup>210</sup>

6.161 However, some legislative provisions confuse the distinction between irrelevant factors and factors that are not aggravating. Section 34 of the *Crimes (Sentencing) Act 2005* (ACT) is headed ‘Sentencing—irrelevant considerations’ but the substance of the provision is directed to identifying factors that preclude a court from increasing the severity of the sentence that it would have otherwise imposed. Among this list of factors are some that should not be considered at all,<sup>211</sup> and others that may be considered but should be regarded as non-aggravating.

6.162 In DP 70 the ALRC proposed a list of four factors that should not aggravate the sentence of a federal offender.<sup>212</sup> This proposal received some support, although the Law Council of Australia urged further consideration in relation to the language of the proposal.<sup>213</sup> On the other hand, the CDPP submitted it was not necessary to instruct the courts about non-aggravating factors.<sup>214</sup> The AGD submitted that it would prefer there not to be a legislative provision specifying non-aggravating factors but that if there were to be such a provision it should be clear that the factors identified were non-exhaustive, and that the failure of an offender to cooperate with the authorities should also be specified as a non-aggravating factor.<sup>215</sup>

210 *Sentencing Act 1995* (WA) s 7(2).

211 See discussion on factors that should not be considered below.

212 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 6–3.

213 Law Council of Australia, *Submission SFO 97*, 17 March 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

214 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

215 Attorney-General’s Department, *Submission SFO 83*, 15 February 2006.

6.163 Specific factors that might be treated as non-aggravating are discussed separately below.

### ***Plea of not guilty***

6.164 At common law a plea of not guilty is not to be treated as aggravating. In *Siganto v The Queen*, the High Court stated:

A person charged with a criminal offence is entitled to plead not guilty, and defend himself or herself, without thereby attracting the risk of the imposition of a penalty more serious than would otherwise have been imposed.<sup>216</sup>

6.165 ALRC 44 recommended that an offender's choice to plead not guilty be specified as an irrelevant factor 'to help ensure that the court does not take into account a not guilty plea to increase the severity of the sentence'.<sup>217</sup> While the ALRC recommended that a plea of not guilty be treated as irrelevant, the reasoning was in fact directed to ensuring that a plea of not guilty be treated as non-aggravating.

6.166 The ALRC is of the view that federal sentencing legislation should specify that the fact that the offender has pleaded not guilty to the offence should not be treated as an aggravating factor. This is consistent with the common law position and with the position in Western Australia and the ACT,<sup>218</sup> and it received support among stakeholders.<sup>219</sup> Further, as the court is entitled to treat an offender's plea of guilty as mitigating, there is merit in expressly stating that a plea of not guilty is not aggravating. This would provide explicit reassurance that federal offenders who exercise their right to plead not guilty will not be penalised for doing so.

### ***Antecedent criminal history***

6.167 Part IB of the *Crimes Act* is silent on the issue of how antecedent criminal history is to be treated. The sentencing legislation of New South Wales, New Zealand and the United Kingdom expressly provide that prior convictions are to be regarded as aggravating,<sup>220</sup> and certain United States sentencing provisions deem certain types of prior convictions to be aggravating in sentencing for specific types of offences.<sup>221</sup> The United Kingdom Sentencing Guidelines Council has issued a guideline that identifies

<sup>216</sup> *Siganto v The Queen* (1998) 194 CLR 656, 663.

<sup>217</sup> Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [180]; Rec 98.

<sup>218</sup> *Sentencing Act 1995* (WA) s 7(2)(a); *Crimes (Sentencing) Act 2005* (ACT) s 34(1)(f).

<sup>219</sup> G Mackenzie, *Submission SFO 80*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

<sup>220</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(d); *Sentencing Act 2002* (NZ) s 9(1)(j); *Criminal Justice Act 2003* (UK) s 143(2) (which provides that if the offender has recent and related prior convictions a court must consider each prior conviction as justifying an increment in sentence severity, based on the incremental enhancement in crime seriousness). See also *Criminal Law (Sentencing) Act 1988* (SA) s 11(1)(a)(iii).

<sup>221</sup> See, eg, *Violent Crime Control and Law Enforcement Act of 1994* (2002) 18 USC s 3592(b)(1) (US) (prior conviction for espionage or treason is an aggravating factor in sentencing for espionage or treason); s 3592(c)(2), (3) (prior conviction for violent felony involving firearm and prior conviction for offence for which a sentence of death or life imprisonment was authorised are aggravating factors in sentencing for homicide).

prior convictions as an aggravating factor.<sup>222</sup> By contrast, the sentencing legislation of Western Australia provides that the fact that an offender has a prior criminal record is not to be regarded as aggravating.<sup>223</sup>

6.168 ALRC 44 expressed the view that the punishment for a current crime should not be increased by reference to an earlier crime, but noted that there are ways in which antecedent criminal history could be relevant to sentencing without contravening that principle.<sup>224</sup>

6.169 The proper treatment of prior convictions or antecedent criminal history in sentencing is open to debate. Professor Julian Roberts has expressed the view that in order to reduce the use of incarceration there should be:

Statutory directions to discourage ‘penal escalation’, namely the imposition of a disproportionate sanction to reflect the fact that the offender has a previous conviction that resulted in imposition of a non-custodial sanction. In addition, courts need to be discouraged from ‘cumulative sentencing’, that is the practice of imposing progressively more severe sanctions to reflect the number and seriousness of the offender’s previous convictions.<sup>225</sup>

6.170 Professor Bagaric has expressed the view that prior convictions should be irrelevant in sentencing because they are the primary cause of disproportionate sentences and perpetuate existing social injustices by leading to harsher penalties for offenders from deprived social backgrounds.<sup>226</sup> He has argued that

imposing harsher punishments on offenders for what they have done in the past not only violates the proscription against punishing people twice for the one offence, but also amounts to the unacceptable notion that people should be punished for their character as opposed to what they have done.<sup>227</sup>

6.171 Professor Kate Warner expressed the view that prior convictions should not be treated as aggravating but that the absence of prior convictions should be a mitigating factor.<sup>228</sup>

6.172 The judgments of the High Court in *Veen [No 2]* expressed differing views about the treatment of prior convictions.<sup>229</sup> The majority considered that prior convictions could be treated as an aggravating factor within the confines of the proportionality principle:

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222 Sentencing Guidelines Council (UK), *Overarching Principles: Seriousness Guideline*, 1 December 2004, 6.

223 *Sentencing Act 1995* (WA) s 7(2).

224 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [172].

225 J Roberts, ‘Reducing the Use of Incarceration: A Review of Strategies’ (2005) 86 *Reform* 15, 18.

226 M Bagaric, *Punishment & Sentencing: A Rational Approach* (2001), 229. See also M Bagaric and R Edney, *Consultation*, Melbourne, 1 April 2005, which raised the deleterious impact of considering prior convictions on the sentencing of Indigenous Australians.

227 M Bagaric, *Punishment & Sentencing: A Rational Approach* (2001), 230.

228 K Warner, *Consultation*, Hobart, 13 April 2005.

229 *Veen v The Queen [No 2]* (1988) 164 CLR 465.

the antecedent criminal history of an offender is a factor which may be taken into account in determining a sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. ... The antecedent criminal history is relevant, however, to show whether the offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind.<sup>230</sup>

6.173 By contrast, the minority expressed the view that prior convictions should only militate against any leniency that might otherwise be afforded to the offender,<sup>231</sup> and should not be considered aggravating or justifying the imposition of a longer sentence than the objective circumstances of the offence would warrant.<sup>232</sup> In *Baumer v The Queen*, the High Court commented that it would be wrong for a judge to increase a sentence beyond what was considered appropriate for that offence by reason of the offender's prior convictions. However, the Court said that the existence of prior convictions might make it difficult for a court to view the circumstances of the offence or the offender with any degree of leniency.<sup>233</sup>

6.174 In DP 70 the ALRC proposed that the mere fact that an offender has an antecedent criminal history should not be an aggravating factor.<sup>234</sup> Stakeholders were divided in opinion about this proposal. Some supported it.<sup>235</sup> Others stated it was not necessary or helpful.<sup>236</sup> The CDPP submitted that:

It is important for all relevant prior convictions to be available for consideration by a sentencing court. An antecedent criminal history may well justify aggravation of a sentence. Prosecutors have discretion as to what prior matters are put forward to the court and the decision may be taken that matters are not relevant to a current sentencing process. Some matters may not be very significant, for example, due to their age, but it may nevertheless be important that they be available to the court.<sup>237</sup>

6.175 Professor Roberts submitted:

After crime seriousness, previous convictions explain more variance than any other factor at sentencing. ... It would prove unacceptable to the community to have a sentencing statute which prohibited a court from aggravating the sentence on the basis

230 Ibid, 477 (Mason CJ, Brennan, Dawson and Toohey JJ).

231 See Ibid, 494 (Deane J); 496 (Gaudron J).

232 See Ibid, 488–489 (Wilson J).

233 *Baumer v The Queen* (1988) 166 CLR 51, 57.

234 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 6–3(b).

235 G Mackenzie, *Submission SFO 80*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

236 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; J Willis, *Submission SFO 74*, 10 February 2006.

237 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

of the offender's previous convictions. The literature on public opinion is quite clear on this issue. ... If an offender's previous convictions are recent and relevant enough, then both community and courts are going to wish to consider them at sentencing. This said, some constraint must be introduced to prevent previous convictions from swamping crime seriousness, and thereby undermining the principle of proportionality.<sup>238</sup>

6.176 The ALRC notes the widely conflicting views expressed in relation to how antecedent criminal history is to be treated in sentencing. The division of judicial opinion in the High Court demonstrates that there is a contentious but developing body of law in this area. With this mind, the ALRC is of the view that legislation in this area should not be overly prescriptive and that the common law should not be hindered from developing over time.

6.177 As a general principle, the fact alone that an offender has an antecedent criminal history should not be treated as an aggravating factor, but the absence of such a history can be treated as a mitigating factor. An antecedent criminal history may, for example, contain trivial or unrelated convictions, or spent convictions, or convictions for offences committed when the offender was a juvenile. Depending on the circumstances, the aggravation of sentence on the basis of such a history might serve no legitimate sentencing purpose.

6.178 However, that is not to say a court should never find aggravating circumstances on the basis of an antecedent criminal history. A court may justifiably increase a sentence on this basis in furtherance of the purposes of sentencing, so long as the sentence remains proportional to the offence.<sup>239</sup>

6.179 A legislative statement that the fact alone that the offender has an antecedent criminal history is not aggravating will prevent judicial officers from automatically treating antecedent criminal history as aggravating without giving due regard to the substance of the antecedent criminal history and how the purposes of sentencing are served in the individual case. It will also encourage judicial officers to consider actively whether the existence and content of such a history justify aggravation of the sentence in light of the purposes of sentencing. This approach may have particular benefits where federal sentencing is conducted in states in which judicial officers are accustomed to treating antecedent criminal history as an aggravating factor.

#### ***Declining to participate in a restorative justice program***

6.180 As discussed in Chapter 4, restoration is a purpose of sentencing that has gained prominence in recent years. The ALRC has recommended that one of the purposes for

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238 J Roberts, *Submission SFO 67*, 16 January 2006.

239 Purposes of sentencing are discussed in Ch 4.

which a court can sentence a federal offender is to ‘promote the restoration of relations between the community, the offender and the victim’.<sup>240</sup>

6.181 In DP 70 the ALRC proposed that federal sentencing legislation should specify that the fact that an offender has declined to take part in a restorative justice initiative or program should not in itself be an aggravating factor.<sup>241</sup> This is consistent with the position in the ACT.<sup>242</sup> This proposal received support from the Restorative Justice Unit of the Department of Justice and Community Safety ACT, which noted the importance of voluntary participation in its programs.<sup>243</sup>

6.182 Because an offender’s consent is integral to effective participation in a restorative justice program or initiative, it would be improper to treat the absence of consent as an aggravating factor. The integrity of the restorative justice process or outcome would be impaired if offenders were, or were perceived to be, coerced into participation. The fact that an offender declined to take part in a restorative justice initiative or program may nevertheless be relevant to sentencing. For example, in imposing an appropriate sentence it may be relevant to know that the offender has declined to take part in such a program so that the court does not impose a sentence or make an order that incorporates a restorative justice element.

#### ***Failure to cooperate with the authorities***

6.183 As noted above, the AGD submitted that any legislative provision setting out non-aggravating factors should include the fact that the offender has not cooperated with the authorities.<sup>244</sup> The ALRC agrees with this approach. It is consistent with the treatment of the fact that an offender has not pleaded guilty. Because the court is entitled to treat an offender’s cooperation with the authorities as mitigating, there is merit in expressly stating that a failure to cooperate with the authorities is not aggravating.

#### ***Course of conduct***

6.184 In DP 70, the ALRC proposed that the fact that the offence for which the offender is being sentenced forms part of a course of conduct consisting of criminal acts of the same or similar character should not be aggravating.<sup>245</sup> This received some support among stakeholders<sup>246</sup> but was opposed or questioned by others.<sup>247</sup>

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240 See Rec 4–1(f).

241 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 6–3(c).

242 *Crimes (Sentencing) Act 2005* (ACT) s 34(1)(g).

243 Restorative Justice Unit Department of Justice & Community Safety ACT, *Consultation*, Canberra, 13 February 2006.

244 Attorney-General’s Department, *Submission SFO 83*, 15 February 2006.

245 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 6–3(d).

246 G Mackenzie, *Submission SFO 80*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

6.185 As discussed above, given the ambiguity surrounding the meaning of s 16A(2)(c) of the *Crimes Act*, which specifies course of conduct in these circumstances to be a sentencing factor, the ALRC has recommended above that the factor be reformulated to refer to two specific situations in which course of conduct is relevant to sentencing.<sup>248</sup> In light of the reformulation it is not necessary to make a recommendation in relation to how the reformulated factors should be treated in sentencing.

**Recommendation 6–5** Federal sentencing legislation should provide that the following non-exhaustive matters are not to aggravate the sentence of a federal offender:

- (a) the fact that the offender has not pleaded guilty to the offence;
- (b) the fact alone that the offender has an antecedent criminal history;
- (c) the fact that the offender declined to take part in any restorative justice initiative or program; and
- (d) the fact that the offender has not cooperated with the authorities.

### Factors that do not mitigate

6.186 Part IB of the *Crimes Act* does not identify factors that must be treated as non-mitigating. There is precedent for the contrary position. Examples of non-mitigating factors identified in sentencing legislation are: forfeiture orders of property derived as result of the commission of an offence;<sup>249</sup> certain automatic forfeiture orders;<sup>250</sup> and voluntary consumption of certain drugs and alcohol.<sup>251</sup> Confiscation orders are discussed below.

### Confiscation orders

6.187 As noted above, a federal offender who is being sentenced for an offence may be subject to confiscation orders in relation to property. The orders may pertain to two quite different situations: (a) where the property that is the subject of the order is itself the proceeds of crime; or (b) where the property that is the subject of the order was used in the commission of the offence.

247 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; J Willis, *Submission SFO 74*, 10 February 2006; Victim Support Australasia, *Submission SFO 60*, 21 December 2005.

248 See Rec 6–1.

249 *Sentencing Act 1995* (WA) s 8(3).

250 *Crimes (Sentencing) Act 2005* (ACT) s 34(2).

251 *Sentencing Act 2002* (NZ) s 9(3).

6.188 In relation to the first situation, the sentencing provisions of Western Australia provide that the fact that property derived from the commission of an offence is forfeited is not a mitigating factor in sentencing for that offence.<sup>252</sup> The sentencing provisions of the ACT also preclude a court from mitigating a sentence because of such forfeiture orders under the *Confiscation of Criminal Assets Act 2003* (ACT).<sup>253</sup>

6.189 The sentencing provisions of other states and territories prevent a court from taking into account a forfeiture order that merely neutralises a benefit that has been obtained through the commission of the offence,<sup>254</sup> or a forfeiture order in respect of property derived or realised as a result of the commission of the offence.<sup>255</sup> However, the sentencing provisions of these states and territories allow the court to have regard to other types of forfeiture orders that have been, or are to be, imposed as a result of the commission of the offence,<sup>256</sup> including certain forfeiture orders of the second type—namely, those in respect of property that was used in the commission of an offence.<sup>257</sup>

6.190 Section 320 of the *Proceeds of Crime Act 2002* (Cth) provides that in passing sentence on a person for an indictable offence the court must not have regard to any forfeiture order that relates to the offence to the extent that the order forfeits proceeds of the offence but that the court must have regard to the forfeiture order to the extent that the order forfeits any other property.

6.191 In *Stocks v The Queen*, Underwood J said:

There might be a case in which the forfeiture order and/or pecuniary penalty order impose financial loss upon the convicted person far in excess of profits made by the commission of the crime. In such a case, it would seem appropriate to take into account the impact of the confiscation orders in the imposition of sentence. Conversely, if the making of confiscation orders does no more than deprive the convicted person of the profits of his or her crime, then the making of the confiscation orders would have no weight in the sentencing process. ...

Deprivation of profits from heinous criminal activity does not go in reduction of an appropriate penalty for the commission of that criminal activity.<sup>258</sup>

6.192 In response to IP 29, there was some support in submissions and consultations for federal sentencing legislation to specify factors that should not mitigate a sentence.<sup>259</sup> In DP 70, the ALRC proposed that federal sentencing legislation should provide that any forfeiture order or other order that merely neutralises a benefit that has

252 *Sentencing Act 1995* (WA) s 8(2).

253 *Crimes (Sentencing) Act 2005* (ACT) s 34(2).

254 *Criminal Law (Sentencing) Act 1988* (SA) s 10(ka).

255 See *Sentencing Act 1991* (Vic) s 5(2A)(b); *Sentencing Act 1995* (NT) s 5(4)(c). See also *Criminal Property Forfeiture Act 2002* (NT) ss 12, 97 (forfeiture of crime-derived property).

256 *Criminal Law (Sentencing) Act 1988* (SA) s 10(ka).

257 *Sentencing Act 1991* (Vic) ss 5(2A)(a), (ab); *Sentencing Act 1995* (NT) s 5(4)(b). See also *Criminal Property Forfeiture Act 2002* (NT) ss 11, 96 (forfeiture of property used in commission of offence).

258 *Stocks v The Queen* (2000) 9 Tas R 210, 219–220. See also *R v Stanbouli* (2003) 141 A Crim R 531, 546.

259 A Freiberg, *Submission SFO 12*, 4 April 2005; A Freiberg, *Consultation*, Melbourne, 30 March 2005.



been obtained by the commission of a federal offence should not mitigate the sentence.<sup>260</sup> This proposal was generally supported by Victoria Legal Aid,<sup>261</sup> received qualified support from the Law Council of Australia,<sup>262</sup> and was opposed by Sisters Inside Inc.<sup>263</sup>

6.193 The ALRC remains of the view that confiscation orders that merely neutralise a benefit obtained by the commission of the offence should be treated differently from confiscation orders relating to property used in the commission of an offence. Confiscation of property derived from the commission of an offence should not be treated as a mitigating factor. However, the court should retain the discretion to treat confiscation of property used in the commission of an offence as a mitigating factor.

6.194 For example, in the case of a fishing offence, an order requiring an offender to forfeit the illegal catch should not be used as a basis for mitigating the sentence because it is a benefit obtained by the criminal conduct itself. On the other hand, an order requiring an offender to forfeit a valuable fishing vessel might be relevant to mitigating any fine imposed. However, there may be situations where it would be inappropriate for the court to mitigate a sentence having regard to a forfeiture of property used in the commission of an offence, such as where that property was unlawfully obtained or was not the property of the offender.

6.195 The distinction in the treatment of different types of confiscation orders is consistent with many state and territory sentencing provisions that address this issue. In relation to confiscation orders of the first type—namely, those that merely neutralise a benefit obtained from the commission of the offence—the ALRC recommends a statutory formulation that requires the court not to treat them as a mitigating factor.

**Recommendation 6–6** Federal sentencing legislation should provide that any confiscation of property order or other court order that merely neutralises a benefit that has been obtained by the commission of the federal offence for which the offender is being sentenced should not mitigate the sentence.

## Factors not to be considered

6.196 Judicial officers have sometimes taken into account factors that have been held on appeal to be irrelevant in sentencing.<sup>264</sup> Part IB of the *Crimes Act* does not specify factors that are not to be considered in the exercise of the sentencing discretion. Some state and territory provisions specify certain factors to which a court must not have

260 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 6–4.

261 Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

262 Law Council of Australia, *Submission SFO 97*, 17 March 2006.

263 Sisters Inside Inc, *Submission SFO 98*, 6 April 2006.

264 See, eg, *Edwards v Pegg* (1994) 74 A Crim R 509.

regard.<sup>265</sup> As discussed above, some legislative provisions blur the distinction between factors that are irrelevant and those that are non-aggravating.<sup>266</sup>

6.197 ALRC 44 recommended that there should be a statutory list of factors that the court should not take into account in sentencing. That list included remission entitlements and early release policies; prevalence of the offence; the offender's demeanour in court; the offender's choice not to give evidence; facts relevant to charges to which the offender has pleaded not guilty and on which the prosecution has led no evidence; any antecedent or subsequent offences committed by the offender or in respect of which charges had been laid against him or her; and allegations concerning possible antecedent or subsequent offences.<sup>267</sup>

6.198 At common law it has been held that a matter should not be taken into account by a court in sentencing if it would establish a separate offence, a more serious offence, or a circumstance of aggravation that renders the person liable to a greater maximum penalty.<sup>268</sup> However, a matter that might technically constitute an incidental separate offence—such as trespass or resisting arrest—is not, for that reason, necessarily excluded from consideration.<sup>269</sup>

6.199 There was some support for federal legislation to set out factors that should not be considered in sentencing.<sup>270</sup> It was submitted that specification of such factors could be useful,<sup>271</sup> but would be difficult to formulate because the sentencing process is not static.<sup>272</sup> The Law Society of South Australia expressed the view that the types of factors recommended in ALRC 44 as factors that should not be taken into account should be expressed in legislation.<sup>273</sup>

6.200 However, there was also some opposition to federal legislation setting out such factors, including on the basis that it would be unnecessarily prescriptive.<sup>274</sup> A view was expressed that it was not useful to set out factors that are not to be considered because if the legislation contained a provision that said the court had to consider 'any other relevant factor' that would clearly signal that the factor had to be relevant before

265 See, eg, *Sentencing Act 1991* (Vic) s 5(2AA)(a) (possibility that time in custody will be affected by executive action).

266 See *Crimes (Sentencing) Act 2005* (ACT) s 34.

267 See Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 98 for full list of factors.

268 See *R v De Simoni* (1981) 147 CLR 383; 389–390; *R v Dales* (1995) 80 A Crim R 50, 87–88. See also *R v JCW* (2000) 112 A Crim R 466, [23].

269 *R v Dales* (1995) 80 A Crim R 50, 87.

270 G Mackenzie, *Submission SFO 80*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; JC, *Submission SFO 25*, 13 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Hobart, 14 April 2005.

271 A Freiberg, *Submission SFO 12*, 4 April 2005.

272 Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.

273 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.

274 Attorney-General's Department, *Submission SFO 83*, 15 February 2006; LD, *Submission SFO 9*, 10 March 2005; M Johnson, *Consultation*, Darwin, 27 April 2005.

it was taken into account in sentencing.<sup>275</sup> The Law Council of Australia did not express a view but noted that any list of factors not to be considered would necessarily be incomplete.<sup>276</sup>

6.201 One of the factors that the ALRC proposed should not be considered in sentencing was the offender's demeanour<sup>277</sup> except to the extent that such demeanour demonstrates contrition or lack of contrition.<sup>278</sup> This approach was supported by the CDPP<sup>279</sup> and opposed by another stakeholder.<sup>280</sup>

6.202 Whether a particular factor should be considered in sentencing can be open to debate. For example, Professor Bagaric expressed the view that prior convictions should not be considered,<sup>281</sup> and the Offenders Aid and Rehabilitation Services South Australia expressed the view that unrelated crime or juvenile history should not be considered.<sup>282</sup>

6.203 In the ALRC's view, there is merit in having federal sentencing legislation set out those factors that clearly should not be considered in sentencing. Of course, a factor can only be considered if it is relevant to a purpose or principle of sentencing. The justification for specifying factors that are not to be considered is that it constitutes an important legislative statement about the relevance to sentencing of a particular matter and does not rely on the exercise of judicial discretion in individual cases, with the attendant possibility of differences in judicial opinion on that question.

6.204 In deciding what factors should be included in such a list, the ALRC has had regard to views expressed in submissions and consultations, the provisions in state and territory legislation, the common law and the list of factors recommended in ALRC 44.

6.205 In the ALRC's view, federal sentencing legislation should state that the following factors should not be considered in sentencing:

- the possibility that the period of time spent in custody may be affected by executive action of any kind;<sup>283</sup>

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275 M Johnson, *Consultation*, Darwin, 27 April 2005.

276 Law Council of Australia, *Submission SFO 97*, 17 March 2006.

277 This was consistent with Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 98. See also *Crimes (Sentencing) Act 2005* (ACT) s 34(1)(e).

278 See *Sentencing Act 1991* (Vic) s 5(2C) (court may have regard to conduct of offender on or in connection with the trial as indication of remorse or lack of remorse); Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 6–8(d).

279 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

280 J Willis, *Submission SFO 74*, 10 February 2006.

281 M Bagaric and R Edney, *Consultation*, Melbourne, 1 April 2005.

282 Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005.

283 See *Sentencing Act 1991* (Vic) s 5(2AA)(a).

- the offender's election not to give evidence on oath or by affirmation;<sup>284</sup>
- the legislative intent underpinning a law that has been enacted but has not yet commenced;<sup>285</sup>
- matters that would establish an offence separate from the offence for which the person has been convicted (other than matters that might constitute an incidental separate offence);
- matters that would establish a more serious offence than the offence for which the person has been convicted; and
- a circumstance of aggravation that has not been proved at trial but that renders the person being sentenced liable to a greater maximum penalty.

6.206 An example of the third factor is that unproclaimed legislation may increase the maximum penalty for a federal offence. The legislature may have decided that, in order to deter persons from committing that offence, an increase in the maximum penalty is desirable. However, as long as that law has not commenced operation, a court should not consider the policy that underpins it when sentencing a federal offender.

6.207 One factor that was treated as irrelevant in ALRC 44 but which the ALRC has decided not to adopt is the prevalence of the offence, since this may be relevant to the sentencing purpose of deterring other offenders from committing the same or similar offences.<sup>286</sup>

6.208 The ALRC no longer considers that federal sentencing legislation should state that a court is not to consider the demeanour of the offender in court, except to the extent that it demonstrates contrition or lack of contrition. Demeanour is an uncertain basis on which to assess contrition. Further, demeanour may be relevant to the proceedings in other ways; for example, the offender's demeanour may be indicative of a mental illness, which should be considered in sentencing.

**Recommendation 6–7** Federal sentencing legislation should specify factors that the court should not consider in sentencing a federal offender. These factors should include:

284 See Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 98; *Crimes (Sentencing) Act 2005* (ACT) s 34(1)(c) which is limited to an offender's choice not to give evidence on oath.

285 See different formulation in Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 98; *Crimes (Sentencing) Act 2005* (ACT) s 34(1)(a). Note that *Crimes Act 1914* (Cth) s 4F deals with the effect on sentencing of increases and decreases in federal maximum penalties.

286 See Ch 4. This approach was supported by one stakeholder: Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006. The recommendation in ALRC 44 was consistent with the ALRC's view at that time that general deterrence should not be relevant in sentencing.

- (a) the possibility that the period of time spent in custody may be affected by executive action of any kind;
- (b) the offender's election not to give evidence on oath or by affirmation;
- (c) the legislative intent underpinning a law that has been enacted but has not yet commenced;
- (d) matters that would establish an offence separate from the offence for which the person has been convicted (other than matters that might constitute an incidental separate offence);
- (e) matters that would establish a more serious offence than the offence for which the person has been convicted; and
- (f) a circumstance of aggravation that has not been proved at trial but that renders the person being sentenced liable to a greater maximum penalty.

### **Factors relevant to the administration of the federal criminal justice system**

6.209 As noted at the beginning of this chapter, s 16A(2)(g) of the *Crimes Act* provides that a factor to be taken into account in sentencing is the fact that a person has pleaded guilty to the charge in respect of the offence. Section 16A(2)(h) provides that a factor to be taken into account in sentencing is the degree to which the person has cooperated with law enforcement agencies in the investigation of the offence or of other offences.

6.210 Some state and territory sentencing legislation includes as a sentencing factor the time when the offender pleaded guilty or indicated an intention to do so.<sup>287</sup> Certain state and territory sentencing provisions adopt a formulation of cooperation with law enforcement agencies that is broader than s 16A(2)(h) and encompasses cooperation at various stages of the criminal justice process, not just the investigative stage,<sup>288</sup> or expressly includes past and promised future cooperation.<sup>289</sup>

6.211 As discussed above, the factors relating to a guilty plea and cooperation with authorities are taken into account by judicial officers as an incentive to promote the

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287 *Sentencing Act 1991* (Vic) s 5(2)(e); *Penalties and Sentences Act 1992* (Qld) s 13(2); *Crimes (Sentencing) Act 2005* (ACT) s 35(2); *Sentencing Act 1995* (NT) s 5(j).

288 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23(1); *Crimes (Sentencing) Act 2005* (ACT) s 36(1).

289 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23(1); *Crimes (Sentencing) Act 2005* (ACT) s 36(1), (2).

effective administration of the criminal justice system. Unlike sentencing factors, these are not factors that on their own promote, or are consistent with, the traditional purposes of sentencing.

6.212 In response to IP 29, the CDPP submitted that, in sentencing a federal offender, a court should be able to consider the offender's cooperation with the authorities because it is appropriate to have regard to an offender's behaviour towards the criminal justice system as a whole.<sup>290</sup> One issue for consideration is how pleading guilty and cooperating with the authorities should be dealt with in federal sentencing legislation given that these factors, on their own, do not advance the traditional purposes of sentencing.

6.213 Another issue is whether the description of each of these factors could be improved having regard to the comparable provisions in state and territory sentencing legislation. In particular, the description of cooperation in s 16A(2)(h) does not specifically refer to future cooperation. An offender's promise to provide future cooperation is separately dealt with in s 21E of the *Crimes Act*. It was noted in consultations that the relationship between s 16A(2)(h) and s 21E is unclear,<sup>291</sup> and there is a need to distinguish clearly between future cooperation as provided for in s 21E and past cooperation as provided for in s 16A(2)(h).<sup>292</sup>

6.214 In DP 70 the ALRC proposed that federal sentencing legislation should separately specify the factors that a court must consider that pertain to the administration of the federal criminal justice system; namely the factors relating to a guilty plea and cooperation with the authorities.<sup>293</sup> This approach was supported by Victoria Legal Aid.<sup>294</sup> However, the AGD while supportive of the proposition that a guilty plea and cooperation with the authorities are relevant sentencing factors, opposed those factors being included in a section separate from other sentencing factors, on the basis that such separation was artificial and may complicate the legislation.<sup>295</sup>

6.215 In the ALRC's views, as a matter of principle, the nature and purpose of factors such as a guilty plea and cooperation with law enforcement authorities necessitate their being identified separately from the factors relevant to sentencing. The former factors should be dealt with in a separate provision to make it clear that they advance the goal of promoting the proper administration of the criminal justice system and must be considered by a court in sentencing a federal offender, where they are relevant and known to the court. While these factors may evidence contrition or a subjective willingness to facilitate the administration of justice—which are factors consistent with

290 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

291 Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.

292 J Champion, *Submission SFO 46*, 29 April 2005.

293 See Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 6–5.

294 Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

295 Attorney-General's Department, *Submission SFO 83*, 15 February 2006.

sentencing purposes—taking into consideration the objective benefit that flows to the federal criminal justice system as a result of such conduct is not relevant to the purposes of sentencing.<sup>296</sup>

6.216 As discussed above, the main legislative provision specifying relevant sentencing factors should do so on the basis that those factors are relevant to either a purpose or principle of sentencing.<sup>297</sup> Factors relating to a guilty plea and cooperation with the authorities do not sit comfortably within that conceptual framework. However, the legislative provision setting out sentencing factors, and the legislative provision setting out factors relevant to the administration of the criminal justice system should be located in close proximity to each other in the new federal sentencing Act.

6.217 Having regard to comparable provisions in state and territory sentencing law, and to the views expressed in consultations, the current formulation of the factor relating to cooperation should be modified to make it clear that it relates to both past and future cooperation. In addition, this factor should be expressed more broadly than is currently the case to encompass the degree of cooperation with law enforcement authorities at various stages of the criminal justice process, including cooperation in the prevention, detection and investigation of, or proceedings relating to, the offence or any other offence.

6.218 While some state and territory sentencing provisions specifically provide that the timing of a guilty plea is a relevant factor, this is not the best approach. The ALRC prefers a formulation that focuses on the broader circumstances in which a guilty plea is made, rather than emphasising only the timing of a plea. Other relevant circumstances may include the degree of prosecution disclosure at the time of the plea, and whether and when legal representation or advice was available to the offender.<sup>298</sup> It may not necessarily be the case that a late plea is due to intransigence or fault on the part of an offender.<sup>299</sup>

**Recommendation 6–8** Federal sentencing legislation should separately specify that when sentencing a federal offender a court must consider the following factors that pertain to the administration of the federal criminal justice system, where relevant and known to the court:

- (a) the fact that the offender has pleaded guilty and the circumstances in which the plea of guilty was made (see Recommendation 11–2); and

<sup>296</sup> This is discussed further in Ch 11.

<sup>297</sup> See Rec 6–1.

<sup>298</sup> See discussion on guilty pleas in Ch 11.

<sup>299</sup> M Johnson, *Consultation*, Darwin, 27 April 2005.

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| <p>(b) the degree to which the offender has cooperated or promised to cooperate with law enforcement authorities regarding the prevention, detection and investigation of, or proceedings relating to, the offence or any other offence. (See Recommendation 11–3).</p> |
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## 7. Sentencing Options

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### Introduction

7.1 This chapter discusses the sentencing options available when sentencing federal offenders, including fines, discharges and dismissals, certain state and territory sentencing options, and imprisonment. Issues relating to sentencing hierarchies and conversion between sentencing options are also considered.

7.2 Sentencing options for federal offenders with a mental illness or intellectual disability are dealt with in Chapter 28. Sentencing options for young federal offenders are dealt with in Chapter 27. Sentencing options for special categories of federal offenders such as corporations are dealt with in Chapters 29 and 30.

## Sentencing options and orders under federal law

### Fines

7.3 A fine is a monetary penalty imposed on an offender who has been convicted of a criminal offence.<sup>1</sup> Legislative provisions creating federal offences often authorise the court to impose a fine for the offence by setting out the maximum fine that can be imposed for the offence.<sup>2</sup> In addition, s 4B(2) and (2A) of the *Crimes Act 1914* (Cth) enable a court to impose a fine on an offender for an offence when the offence provision refers only to imprisonment if the contrary intention does not appear and the court considers it appropriate to do so in all the circumstances of the case. The advantages of fines are that they are flexible, generate revenue for the state, are comparatively cheap to administer, and are suitable for a wide variety of offences.

7.4 Section 16C(1) of the *Crimes Act* requires a court to take into account the financial circumstances of an offender before imposing a fine, although s 16C(2) allows a court to impose a fine when it has been unable to ascertain the offender's financial circumstances. A number of overseas and state and territory sentencing Acts contain similar provisions.<sup>3</sup> The expression 'financial circumstances' has been interpreted broadly to include an offender's earnings, assets, debts, monetary commitments, cost of living and ability to generate income in the future.<sup>4</sup>

7.5 Fines are a frequently used sentencing option in the states and territories.<sup>5</sup> For the purposes of this Inquiry, the Australian Institute of Criminology (AIC) analysed data provided by the Commonwealth Director of Public Prosecutions (CDPP) about offenders prosecuted for federal fraud or drug offences in the five-year period 2000–04. The results of that analysis are set out in Appendix 2. The data reveal that fines were ordered in 4,006 fraud and drug cases across Australia.<sup>6</sup> Fines were issued in 16 per cent of fraud cases and 11 per cent of drug cases. All jurisdictions have

1 The *Crimes Act 1914* (Cth) does not enable a court to impose a fine on a federal offender without recording a conviction: *Commissioner of Taxation v Doudle* [2005] SASC 442, [26].

2 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2004) <www.ag.gov.au> at 17 September 2004, 36. However, reduced maximum penalties apply when an indictable federal offence is dealt with summarily: *Crimes Act 1914* (Cth) s 4J; Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [7.28]–[7.31].

3 *Fines Act 1996* (NSW) s 6; *Sentencing Act 1991* (Vic) s 50; *Penalties and Sentences Act 1992* (Qld) s 48; *Crimes Act 1900* (ACT) s 348; *Crimes (Sentencing) Act 2005* (ACT) s 14; *Sentencing Act 1995* (NT) s 17; *Sentencing Act 2002* (NZ) s 40; *Criminal Justice Act 2003* (UK) s 164.

4 See *Nelson v Meredith* (2001) 118 A Crim R 433, [5]; *Chugg v Stanford* (2000) 113 A Crim R 127, [6].

5 K Warner, *Sentencing in Tasmania* (2nd ed, 2002), [4.101]; R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [4.101].

6 See Appendix 2, Figure A2.52 and accompanying text.

remained relatively stable in their ordering of fines across the five-year period, except New South Wales, where there has been a significant reduction in the use of fines.<sup>7</sup> It is not known how often fines are used for other federal offences. Chapter 20 discusses data relating to the use of fines in the sentencing of federal offenders in different jurisdictions.

7.6 A disadvantage of the fine is its potential to operate unequally on offenders, depending on their financial means. The same fine can represent a severe sentence for an impecunious offender and an inconsequential sentence for a wealthy offender. Enabling a court to consider the financial circumstances of an offender before fixing the amount of a fine is a legislative attempt to address this problem.

7.7 While s 16C(1) of the *Crimes Act* requires a court to take into account an offender's financial circumstances before imposing a fine, it does not provide any guidance as to how this should be done. A number of state and territory sentencing Acts provide more guidance in this area by directing judicial officers to consider any other orders they have made, or propose to make, in relation to confiscation of proceeds of crime, restitution or compensation when considering the offender's financial circumstances.<sup>8</sup>

7.8 In addition, s 16C(1) does not prevent the court from imposing a fine on an offender who lacks the financial means to pay it.<sup>9</sup> This has been held to reflect 'the long-standing common law position'.<sup>10</sup> In contrast, sentencing legislation in South Australia prevents a court from imposing a fine if it is satisfied that the offender would be unable to pay the fine or that payment of the fine would unduly prejudice the welfare of the offender's dependants.<sup>11</sup>

7.9 Another issue is the extent to which the court should be empowered to tailor the order imposing a fine to an offender's circumstances. At present, federal sentencing legislation does not expressly enable judicial officers to order that a fine be paid by instalments or by a particular date,<sup>12</sup> or to vary or cancel an order imposing a fine after it has been made. Some state and territory sentencing Acts allow judicial officers to

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7 See Appendix 2, Figure A2.63 and accompanying text.

8 *Sentencing Act 1991* (Vic) s 50(3); *Penalties and Sentences Act 1992* (Qld) s 48(3); *Sentencing Act 1995* (NT) s 17(3). See also *Sentencing Act 2002* (NZ) s 40(4).

9 *CEO of Customs v Rota Tech Pty Ltd* [1999] SASC 64, [35]–[36].

10 *Ibid*, [35].

11 *Criminal Law (Sentencing) Act 1988* (SA) s 13. See also *Criminal Code (RS 1985, c C-46)* (Canada) s 734(2).

12 However, note that s 15A(1) of the *Crimes Act 1914* (Cth) provides that a law of a state or territory relating to the 'enforcement or recovery of a fine' applies to federal offenders if it is not inconsistent with a law of the Commonwealth (and with certain modifications made by s 15A).

order that fines be paid by instalments or by a particular date,<sup>13</sup> or to vary the order imposing a fine at any time during the period allowed for payment of the fine.<sup>14</sup> Further, in Victoria a court can cancel the order imposing a fine and re-sentence the offender during the period allowed for payment of the fine in certain circumstances.<sup>15</sup> However, as discussed in Chapter 16, the desirability of finality in sentencing generally militates against the review of sentences that have been passed, other than by way of appeal.

### *Options for reform*

7.10 Federal sentencing legislation could be amended to provide the court with further guidance on how to assess an offender's financial circumstances before imposing a fine. The Northern Territory Legal Aid Commission commented that further legislative guidance was needed.<sup>16</sup> In Discussion Paper 70 (DP 70) the ALRC proposed that a court should have the power to order that a fine be paid in instalments or by a particular date, and to vary or cancel an order imposing a fine at any time during the period allowed for the payment of the fine.<sup>17</sup> Some stakeholders expressed support for this proposal.<sup>18</sup>

7.11 A reform that could address the potentially inequitable operation of fines on federal offenders is the 'day fine' or 'unit fine' scheme. This scheme would enable federal offenders to be fined in units representing a number of days' work or a number of days' worth of disposable income. The monetary amount per unit could then be calculated on the basis of the offender's income.<sup>19</sup> ALRC 44 recommended against the adoption of a day fine scheme for federal offenders on the basis that it would be time consuming to administer and could result in breaches of privacy if financial data were obtained by reviewing offenders' taxation records.<sup>20</sup> In 1996 the New South Wales Law Reform Commission concluded that a day fine scheme should not be introduced in New South Wales.<sup>21</sup>

7.12 Some submissions and consultations expressed support for the introduction of a day fine scheme for federal offenders.<sup>22</sup> However, one stakeholder submitted that:

13 *Sentencing Act 1991* (Vic) ss 53, 54; *Penalties and Sentences Act 1992* (Qld) ss 50, 51; *Sentencing Act 1997* (Tas) s 44; *Crimes (Sentencing) Act 2005* (ACT) s 14(5).

14 *Sentencing Act 1991* (Vic) s 61; *Sentencing Act 1997* (Tas) s 46.

15 *Sentencing Act 1991* (Vic) s 61.

16 Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005.

17 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposals 7–1, 7–2.

18 G Mackenzie, *Submission SFO 80*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

19 J Greene, 'The Unit Fine: Monetary Sanctions Apportioned to Income' in A von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (2nd ed, 1998) 268, 268.

20 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [114], Rec 61.

21 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [3.14].

22 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Prison Reform Group WA, *Consultation*, Perth, 18 April 2005.

The day-fine scheme has, in my view, little to recommend it. It would cause significant delays in sentencing, raise problems of proof with respect to an offender's means and could lead to very large fines for wealthy defenders which in some cases could be seen as breaching the need to give primary consideration to the objective seriousness of the offence.<sup>23</sup>

### ***ALRC's views***

7.13 Federal sentencing legislation should require judicial officers to consider a federal offender's financial circumstances when fixing the amount of a fine. This is an established method of reducing the unfairness that can arise when fines are imposed on offenders with different financial circumstances.

7.14 However, the ALRC is of the view that s 16C of the *Crimes Act* is unnecessary and should be repealed. In Chapter 6, the ALRC recommends that federal sentencing legislation should require a court to consider any factor that is relevant to a purpose or principle of sentencing and known to the court, when sentencing a federal offender. Recommendation 6–1 lists categories of sentencing factors and provides examples of sentencing factors under each category, including an offender's financial circumstances. Accordingly, courts sentencing federal offenders will be required to consider an offender's financial circumstances before imposing a fine, when this factor is relevant and known to the court.

7.15 Further, it is unnecessary for federal sentencing legislation to attempt to provide further guidance on how to assess an offender's financial circumstances. The term 'financial circumstances' is broad and encompasses any other order that the court has made, or proposes to make, that will affect an offender's capacity to pay the fine, such as an order that the offender pay compensation to any victim of the crime.

7.16 Federal sentencing legislation should enable judicial officers to order that a fine imposed on a federal offender be paid in instalments or by a particular date. This will provide courts with more scope to tailor the order imposing a fine to the particular circumstances of the offender, thereby minimising the risk of fine default. In addition, legislation should enable an offender to apply for an order varying the time or manner of payment of a fine at any time during the period allowed for the payment of the fine. Again, this would minimise the risk of fine default and prevent an offender from suffering undue hardship in circumstances where an offender's financial circumstances have changed after the imposition of the fine.

7.17 As discussed in Chapter 16, empowering a court to reconsider a sentence after it has been imposed can detract from the finality of the sentencing process. However,

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23 J Willis, *Submission SFO 20*, 9 April 2005.

enabling a court to vary the time or manner in which a fine is to be paid does not undermine the need for finality in litigation because such a variation involves altering only the mechanics of payment as opposed to the amount of the fine.

7.18 The ALRC remains of the view expressed in ALRC 44 that a day fine scheme should not be introduced for federal offenders. Day fine schemes do not operate in any state or territory, and submissions and consultations revealed limited support for such a scheme. A day fine scheme would be time consuming and complex to administer in practice. In addition, the ALRC is not persuaded that a day fine scheme would ensure that fines operated more equitably for all offenders. For example, an offender with little or no income may have substantial assets, a significant future earning capacity, or the capacity to acquire money from other sources.

**Recommendation 7–1** Federal sentencing legislation should enable a court, when imposing a fine on a federal offender, to order that the fine be paid:

- (a) by a specified future date that the court considers appropriate in all the circumstances; or
- (b) by instalments over a specified period of time that the court considers appropriate in all the circumstances.

**Recommendation 7–2** Federal sentencing legislation should enable a federal offender to apply to the court that imposed a fine, whether differently constituted or not, for an order varying the time or manner of payment of a fine at any time within the period allowed for payment of the fine.

**Recommendation 7–3** Federal sentencing legislation should repeal s 16C of the *Crimes Act 1914* (Cth). When imposing a fine on a federal offender, the court must have regard to the purposes, principles and factors relevant to sentencing, and to the factors relevant to the administration of the criminal justice system.

## Dismissals, discharges and releases

7.19 A number of sentencing options are currently available under Part IB of the *Crimes Act*. Section 19B enables the court to dismiss a charge or to discharge an offender without proceeding to conviction upon a finding of guilt.<sup>24</sup> Section 20(1)(a) provides for the conditional release of an offender after conviction, and s 20(1)(b) enables the court, in effect, to wholly or partially suspend a sentence of imprisonment.

<sup>24</sup> However, s 233B of the *Migration Act 1958* (Cth) prevents a court from making a s 19B order in relation to certain migration offences unless it is established on the balance of probabilities that the offender was under 18 years of age at the time of the offence.

Suspended sentences and the conditions that should be attached to the sentencing options available under Part IB are discussed later in this chapter.

7.20 Dismissals, discharges and releases are available in one form or another in all states and territories.<sup>25</sup> It has been held that the power to dismiss a charge or discharge an offender pursuant to s 19B should be exercised with ‘compassion and imagination, as well as with wisdom and prudence’.<sup>26</sup>

7.21 The AIC’s analysis of data provided by the CDPP reveals that some form of discharge or release (sometimes referred to as a ‘bond’) was ordered in 12,126 (48 per cent) of federal drug and fraud cases in the period 2000–04.<sup>27</sup> Of those fraud and drug cases in which some form of bond was ordered, s 19B bonds were ordered in 15 per cent of cases, s 20(1)(a) bonds in 34 per cent of cases, and s 20(1)(b) bonds in 50 per cent of cases.<sup>28</sup> The data show that s 19B bonds were used significantly more often in Victoria than in other jurisdictions, with 26 per cent of Victorian fraud and drug cases resulting in a s 19B bond. In other jurisdictions s 19B bonds were ordered in between one and five per cent of cases.<sup>29</sup>

7.22 It has been held that the application of the discretion to dismiss a charge or discharge an offender pursuant to s 19B consists of two stages.<sup>30</sup> First, the court must have regard to certain factors, namely: the character, antecedents, cultural background, age, health or mental condition of the person; the extent (if any) to which the offence is of a trivial nature; or the extent (if any) to which the offence was committed under extenuating circumstances.<sup>31</sup> These factors were derived from the *Probation of Offenders Act 1907* (UK) and have been discussed in case law.<sup>32</sup> Secondly, the court must be satisfied that in light of the existence of one or more of these factors it is inexpedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation.<sup>33</sup> It has been held that the sentencing factors listed in s 16A(2) of the *Crimes Act* should be taken into account in exercising the second stage of the discretion in s 19B.<sup>34</sup> The court must

25 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 9, 10; *Penalties and Sentences Act 1992* (Qld) ss 19, 30, 31; *Criminal Law (Sentencing) Act 1988* (SA) ss 15, 39.

26 *Uznanski v Searle* (1981) 26 SASR 388, 390.

27 See Appendix 2, [48]. These data relate to cases in which a single penalty outcome was recorded.

28 See Appendix 2, [49].

29 See Appendix 2, Figure A2.21 and accompanying text.

30 See, eg, *Commissioner of Taxation v Baffsky* (2001) 192 ALR 92; *Morrison v Behrooz* [2005] SASC 142.

31 *Crimes Act 1914* (Cth) s 19B(1)(b).

32 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [7.216], [7.218].

33 *Crimes Act 1914* (Cth) s 19B(1).

34 See, eg, *Commissioner of Taxation v Baffsky* (2001) 192 ALR 92; *Morrison v Behrooz* [2005] SASC 142.

also consider the nature and severity of the conditions that may be imposed on, or may apply to, the offender under an order made pursuant to s 19B.<sup>35</sup>

7.23 In contrast to s 19B(1)(b), s 20(1)(a) does not list any specific factors that the court must consider when exercising its discretion to conditionally release an offender after conviction. Instead, the court must consider the general sentencing factors set out in s 16A(2) and the nature and severity of the conditions that may be imposed on, or may apply to, the offender.<sup>36</sup>

7.24 ALRC 44 recommended that dismissals and conditional discharges should continue to be available for federal offenders.<sup>37</sup>

7.25 While the discretion conferred by s 19B is broad, it may be more restrictive than the discretion conferred by equivalent state and territory provisions. For example, New South Wales legislation provides that a court may have regard to ‘any other matter that the court thinks proper to consider’ when dismissing a person without conviction.<sup>38</sup>

7.26 Further, as noted above, when considering whether to make an order pursuant to s 19B, the court is required to have regard to two differing sets of factors; those set out in s 19B(1)(b) and those listed in s 16A(2). Little statutory guidance is given on the way these two sets of factors interrelate. Some of the factors, such as antecedents, character and cultural background, are listed in both s 19B(1)(b) and s 16A(2) of the *Crimes Act*.

7.27 In DP 70 the ALRC proposed that federal sentencing legislation repeal s 19B(1) because it is unnecessary and confusing to have additional lists of sentencing factors for particular sentencing options.<sup>39</sup> Some stakeholders supported this proposal.<sup>40</sup> However, the CDPP submitted that federal sentencing legislation should provide guidance about the circumstances in which it is appropriate to make an order pursuant to s 19B to ensure that offenders are not given the benefit of a non-conviction sentencing option if it is unwarranted.<sup>41</sup> It submitted that federal sentencing legislation should expressly require courts to consider the seriousness of the offence before making a s 19B order because a non-conviction option might be an inappropriate sentencing option for offenders who have committed serious offences. The Welfare Rights Centre Inc (Queensland) submitted that any provision replacing s 19B should be broad and unfettered to enable judicial officers sufficient scope to deal with the intricacies of social security matters.<sup>42</sup>

35 *Crimes Act 1914* (Cth) s 16A(3).

36 *Ibid* s 16A(3).

37 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [139], Recs 81–82.

38 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(3). See also *Sentencing Act 1991* (Vic) s 76.

39 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 7–3.

40 G Mackenzie, *Submission SFO 80*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

41 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

42 Welfare Rights Centre Inc (Queensland), *Submission SFO 29*, 15 April 2005.



**ALRC's views**

7.28 Federal sentencing legislation should continue to enable judicial officers to impose the sentencing options currently available under ss 19B and 20(1)(a) of the *Crimes Act*. These are important sentencing options, which enable judicial officers to impose lenient sentences when appropriate in all the circumstances of a case. In addition, these sentencing options are available in all states and territories, and retaining them in federal sentencing legislation will enhance consistency between federal and state and territory sentencing legislation.

7.29 However, s 19B(1)(b) of the *Crimes Act* should not continue to list factors to be taken into account when considering whether to dismiss charges or discharge offenders without conviction. The existence of this additional list of factors creates unnecessary confusion and complexity in the sentencing of federal offenders for limited, if any, benefit.

7.30 The three factors currently listed in s 19B(1)(b) are redundant because a court will consider them as a matter of course when it has regard to the purposes, principles and factors of sentencing and to the factors relevant to the administration of the criminal justice system (see Chapters 4–6). For example, a court sentencing a federal offender will consider factors relating to the offence, such as the nature, seriousness and circumstances of the offence; and factors relating to the background of the offender, such as the offender's degree of responsibility for the offence, when determining the appropriate sentence to be imposed. Further, the principle of proportionality will ensure that a judicial officer does not make an order discharging without conviction a federal offender who has committed a serious offence.

7.31 The data discussed above show that, to this point in time, the inclusion of the additional list of factors has not prevented inconsistency across jurisdictions in the use of orders to dismiss charges or discharge offenders without conviction. However, the further development of a federal sentencing database will, in time, promote consistency.<sup>43</sup> Case law will also continue to provide guidance to judicial officers about when the use of these orders is appropriate.

**Recommendation 7–4** Federal sentencing legislation should repeal s 19B(1)(b) of the *Crimes Act*. When dismissing a charge or discharging a federal offender without conviction, the court must have regard to the purposes, principles and factors relevant to sentencing, and to the factors relevant to the administration of the criminal justice system.

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43 See Ch 21.

### Common law bonds

7.32 At common law, courts have the power to ‘respite’ judgment by ordering, in lieu of passing sentence, that an offender be released after entering into a recognizance to appear for sentence when called upon and to be of good behaviour.<sup>44</sup> This power, known as the ‘common law binding over’ power,<sup>45</sup> has existed for centuries and is a precursor to the modern system of probation.<sup>46</sup> One type of order made pursuant to this power is known as a common law bond.

7.33 It is uncertain whether courts sentencing federal offenders still possess the power to impose common law bonds given that they have a statutory power in s 20 of the *Crimes Act* to release a federal offender ‘without passing sentence’ upon the offender entering into a recognizance to be of good behaviour.<sup>47</sup> In any event, it has been argued that the common law bond is unnecessary in light of the provisions in the *Crimes Act*.<sup>48</sup>

7.34 In ALRC 15 it was noted that the existence of overlapping common law and statutory powers to release offenders on recognizances caused confusion and uncertainty, which needed to be remedied.<sup>49</sup> It was argued that federal legislation should abolish the court’s common law powers to release federal offenders.<sup>50</sup> Many state and territory sentencing Acts have abolished the court’s power to release an offender on a common law bond.<sup>51</sup> In DP 70 the ALRC proposed that federal sentencing legislation abolish the power of a court sentencing a federal offender to be released on a common law bond.<sup>52</sup> A number of stakeholders expressed support for this proposal.<sup>53</sup>

### ALRC’s views

7.35 The ALRC remains of the view that the existence of parallel common law and statutory powers of release is confusing. It is unclear whether the statutory power to release offenders pursuant to s 20 of the *Crimes Act* wholly supersedes the common law bond. In addition, the common law bond has a complex history that makes the nature and scope of the court’s power to release offenders on such a bond uncertain. Accordingly, federal sentencing legislation should remove the ambiguity surrounding

44 *R v McHutchison* (1990) 3 WAR 261, 268. Recognizances are discussed further below.

45 *Ibid*, 268–269.

46 *Devine v The Queen* (1967) 119 CLR 506, 516.

47 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [375]; *Devine v The Queen* (1967) 119 CLR 506, 511.

48 K Warner, *Sentencing in Tasmania* (2nd ed, 2002), [7.104].

49 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [373].

50 *Ibid*, [375].

51 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 101; *Sentencing Act 1991* (Vic) s 71; *Sentencing Act 1995* (WA) s 12; *Sentencing Act 1997* (Tas) s 101.

52 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 7–4.

53 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

the interaction between common law bonds and statutory powers of release by expressly abolishing the court's power to release an offender on a common law bond.

**Recommendation 7–5** Federal sentencing legislation should expressly abolish the power of a court sentencing a federal offender to order that the offender be released on a common law bond.

### Deferred sentencing orders

7.36 In *Griffiths v The Queen* the High Court held that the common law binding over power enabled a court to defer the sentence of an offender to a particular date upon the offender entering into a recognizance to be of good behaviour.<sup>54</sup> The deferral of the sentence of an offender is often referred to as a 'Griffiths bond' or a 'Griffiths remand'.<sup>55</sup> A Griffiths bond has certain similarities to a common law bond.

7.37 ALRC 44 recommended that courts sentencing federal offenders should have a statutory power to defer the sentence of an offender for up to 12 months, and that breach of any conditions attached to the deferral should not result in a further sentence being imposed on the offender, but should rather result in the court declining to continue the period of deferral.<sup>56</sup> Many state sentencing Acts provide statutory powers to defer the sentencing of offenders.<sup>57</sup> It has been noted that s 68 of the *Judiciary Act 1903* (Cth) picks up and applies state or territory provisions relating to the deferral of sentence to federal offenders.<sup>58</sup>

7.38 It is widely accepted that the primary purpose of an order deferring the sentencing of an offender is to provide an offender with an opportunity to demonstrate his or her prospects of rehabilitation. However, it has been argued that such an order may also be appropriate in other circumstances; for example, to avoid the risk of suicide if an offender remains in custody prior to sentence; to enable an offender to undergo surgery;<sup>59</sup> or to ensure that a mother is not separated from a newborn baby.<sup>60</sup> The New South Wales sentencing Act provides that a sentence can be deferred to

<sup>54</sup> *Griffiths v The Queen* (1977) 137 CLR 293, 305.

<sup>55</sup> *Ibid.*

<sup>56</sup> Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [67], Rec 20.

<sup>57</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11; *Sentencing Act 1991* (Vic) s 83A; *Penalties and Sentences Act 1992* (Qld) s 24; *Sentencing Act 1995* (WA) ss 16, 17; *Sentencing Act 1997* (Tas) s 7(f); *Crimes (Sentencing) Act 2005* (ACT) Ch 8.

<sup>58</sup> See M Pedley, *Federal Sentencing in Victoria* (2005) Commonwealth Director of Public Prosecutions, 2.

<sup>59</sup> *R v Trindall* (2002) 133 A Crim R 119, 130.

<sup>60</sup> *R v Togias* (2001) 127 A Crim R 23.

enable the court to assess the offender's prospects of rehabilitation or 'for any other purpose the court considers appropriate in the circumstances'.<sup>61</sup>

7.39 There has been some judicial debate regarding the circumstances in which it is appropriate to defer the sentencing of an offender. It has been argued that it is not appropriate to order the deferral of a sentence in circumstances where it is inevitable that the offender will be sentenced to a period of full-time imprisonment.<sup>62</sup> However, the New South Wales Court of Criminal Appeal has refused to endorse this argument on a number of occasions,<sup>63</sup> although it has been held that a court should clearly inform an offender if he or she will be ordered to serve a period of full-time imprisonment when sentenced.<sup>64</sup>

7.40 Another question that arises is the period of time for which the sentence should be deferred. Deferring a sentence delays the finalisation of the proceedings. In *R v Palu* the New South Wales Court of Criminal Appeal commented that:

Time and again sentencing courts are asked to have regard to the delay in sentencing an offender as a matter of mitigation because of the adverse effects of delay upon the wellbeing of the offender and the disruption it causes to his or her everyday life. Delay unavoidably results in unfairness: unnecessary delay results in injustice. Steps have been taken throughout the criminal justice process to eliminate unnecessary delay wherever possible. Unless delay in the sentencing of the offender is essential in order to ensure a just result, the court has failed in its duty both to the offender and the community.<sup>65</sup>

7.41 State sentencing legislation varies in the maximum period allowed for the deferral. For example, the maximum period of adjournment is 12 months in New South Wales and 60 months in Tasmania.<sup>66</sup>

7.42 In DP 70 the ALRC proposed that a court should be authorised to defer the sentencing of a federal offender for up to 12 months and to release the offender for the purpose of assessing the offender's prospect of rehabilitation or for any other purpose the court thinks fit.<sup>67</sup> Several stakeholders supported this proposal.<sup>68</sup> However, the CDPP submitted that the proposal would provide courts with a very broad power to defer sentencing for reasons that may be unrelated to the purposes of sentencing and that, if used frequently, it could have a significant impact on the workload of the

61 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11.

62 *R v Tindall* (1994) 74 A Crim R 275, 276–277.

63 See, eg, *R v Trindall* (2002) 133 A Crim R 119; *R v Leahy* [2004] NSWCCA 148; *R v Clark* (1997) 95 A Crim R 585.

64 *R v Trindall* (2002) 133 A Crim R 119, 131.

65 *R v Palu* (2002) 134 A Crim R 174, 182.

66 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11(2); *Sentencing Act 1997* (Tas) s 7(f).

67 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 7–5.

68 G Mackenzie, *Submission SFO 80*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; J Roberts, *Submission SFO 67*, 16 January 2006; New South Wales Legal Aid Commission, *Consultation*, Sydney, 28th February 2006; Chief Magistrate I Gray & Others, *Consultation*, Melbourne, 23 February 2006.

courts.<sup>69</sup> Accordingly, the CDPP submitted that the power to defer a sentence should only be available to enable an offender to undertake activities conducive to his or her rehabilitation, and should only be utilised where there was a real expectation founded on solid grounds that rehabilitation was likely to be achieved as a result of the order.<sup>70</sup> The Attorney-General's Department (AGD) agreed with the CDPP's comments on the use of deferred sentences.<sup>71</sup>

### *ALRC's views*

7.43 Federal sentencing legislation should enable a judicial officer to defer the sentencing of a federal offender for up to 12 months. The power to defer the sentencing of a federal offender is a useful sentencing tool that can facilitate a sentence that is just and appropriate in all of the circumstances of the case. The introduction of a federal statutory power of deferral will ensure that the power to defer the sentencing of federal offenders, and the length of any such deferral, are consistent between jurisdictions because courts will not have to rely on the 'picking up' mechanism in s 68 of the *Judiciary Act*. Limiting any deferral to a period of 12 months strikes an appropriate balance between the need for flexibility to enable a court to achieve individualised justice and the need to avoid excessive delay in the resolution of criminal proceedings.

7.44 The primary purpose of the power to defer sentencing is to provide an offender with an opportunity to demonstrate his or her prospects of rehabilitation. However, there may be other circumstances, such as those discussed above, in which it may be appropriate to defer the sentencing of a federal offender. It may also be appropriate to defer sentencing for reasons unrelated to the purposes of sentencing. For example, deferring the sentence of a federal offender could help to achieve an object of the federal sentencing Act, such as the object of promoting fair procedures for the sentencing of federal offenders.<sup>72</sup> For this reason, the power to defer sentencing should be reasonably broad. Nevertheless, it should be exercised judicially and case law will continue to provide guidance as to when it is appropriate to defer sentencing. The ALRC also considers that the court's common law power to make a Griffiths bond should be abolished to avoid any confusion as to the source of the power to defer the sentencing of a federal offender.<sup>73</sup>

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69 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

70 Ibid.

71 Attorney-General's Department, *Submission SFO 83*, 15 February 2006.

72 See Rec 2–4.

73 See, eg, *Director of Public Prosecutions (SA) v District Court of South Australia* (1995) 65 SASR 357.

**Recommendation 7–6** Federal sentencing legislation should provide that a court may make a deferred sentencing order in relation to a federal offender. In particular, the legislation should:

- (a) abolish the power of a court at common law to impose a ‘Griffiths bond’ when making orders in relation to a federal offender; and
- (b) authorise a court to:
  - (i) defer sentencing a federal offender for a period of up to 12 months; and
  - (ii) release the offender in accordance with the applicable bail legislation for the purpose of assessing the offender’s prospects of rehabilitation or for any other purpose the court thinks fit.

### Recognizance release orders

7.45 A ‘recognizance’ is an undertaking whereby an offender acknowledges liability to pay a specified amount of money to the Crown unless he or she complies with certain conditions.

7.46 A ‘recognizance release order’ is an order made under s 20(1)(b) of the *Crimes Act*.<sup>74</sup> When making a recognizance release order a court sentences a federal offender to a period of imprisonment but orders that the offender be released, either immediately or after having served a specified period of imprisonment, upon the giving of security that he or she will comply with certain conditions.<sup>75</sup> Security may be given with or without sureties, by recognizance or otherwise.<sup>76</sup>

7.47 Currently, a court is required to make a recognizance release order (as opposed to fixing a non-parole period) when it sentences a federal offender to a total period of imprisonment that is greater than six months and less than or equal to three years, unless it considers that it would be inappropriate to do so in light of the nature and circumstances of the offence and the offender’s antecedents.<sup>77</sup> No state or territory has a similar presumption in favour of the making of an order in the nature of a recognizance release order for sentences of a particular duration.

7.48 When a court sentences a federal offender to a total period of imprisonment that is greater than three years it may decide whether to fix a non-parole period or make a

<sup>74</sup> *Crimes Act 1914* (Cth) s 16.

<sup>75</sup> *Ibid* s 20(1)(a), (b). The conditions of a recognizance release order are discussed further below.

<sup>76</sup> *Ibid* s 20(1)(a), (b).

<sup>77</sup> *Ibid* s 19AC(1), (2), (3), (4).

recognizance release order. However, it may do neither if it would be inappropriate in light of the nature and circumstances of the offence and the offender's antecedents.<sup>78</sup>

7.49 In 2003–04, 883 federal offenders were sentenced to imprisonment but released immediately without serving any period of imprisonment.<sup>79</sup> As mentioned above, the AIC's analysis of data provided by the CDPP about offenders prosecuted for federal fraud or drug offences in the five-year period 2000–04 indicates that the most frequently ordered form of bond was a bond under s 20(1)(b) (50 per cent of bond cases).<sup>80</sup> Thirty-four per cent of fraud cases and 81 per cent of drug cases resulted in a prison sentence.<sup>81</sup> Of those fraud cases resulting in a prison sentence, 74 per cent had fully suspended sentences, with a prison term served in 26 per cent.<sup>82</sup> Of those drug cases resulting in a prison sentence, only five per cent had fully suspended sentences, with 95 per cent involving a period of time served in prison.<sup>83</sup>

7.50 A suspended sentence is a sentencing option available in varying forms in all states and territories.<sup>84</sup> When imposing a suspended sentence a court first determines that a sentence of imprisonment is appropriate and orders that the offender be imprisoned for a specified period of time. The court then orders that the offender be released either immediately without serving any period of imprisonment or after serving only a portion of the sentence of imprisonment. The portion of the sentence of imprisonment that is not served is held in suspense when the offender is released into the community. If the offender commits another offence, or breaches any conditions that have been attached to the suspended sentence, he or she may be ordered to serve part or all of the original sentence of imprisonment. A recognizance release order is essentially a *conditional* suspended sentence, and sentences of this kind are available in New South Wales, South Australia, Tasmania, the ACT and the Northern Territory.<sup>85</sup>

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78 Ibid s 19AB(1), (2), (3).

79 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

80 See Appendix 2, [49].

81 See Appendix 2, Figure A2.65 and accompanying text.

82 See Appendix 2, Figure A2.67 and accompanying text.

83 See Appendix 2, Figure A2.70 and accompanying text.

84 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 12; *Sentencing Act 1991* (Vic) s 27; *Penalties and Sentences Act 1992* (Qld) s 144; *Sentencing Act 1995* (WA) s 76; *Criminal Law (Sentencing) Act 1988* (SA) s 38; *Sentencing Act 1997* (Tas) pt 3 div 4; *Crimes Act 1900* (ACT) s 403(1); *Crimes (Sentencing) Act 2005* (ACT) s 12; *Sentencing Act 1995* (NT) s 40.

85 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 12, 95, 95A; *Criminal Law (Sentencing) Act 1988* (SA) ss 38, 42; *Sentencing Act 1997* (Tas) s 24; *Crimes Act 1900* (ACT) s 403(1); *Crimes (Sentencing) Act 2005* (ACT) s 12; *Sentencing Act 1995* (NT) s 40(2).

7.51 The legitimacy of suspended sentences has historically been a matter of controversy. Suspended sentences have not always been available in all jurisdictions. They were abolished in New South Wales in 1974<sup>86</sup> and re-introduced in 2000,<sup>87</sup> and were abolished in Victoria in 1958 and re-introduced in 1986.<sup>88</sup> The Sentencing Advisory Council is currently reviewing the use of suspended sentences in Victoria and has made an interim recommendation that they be abolished and a new form of sentencing order introduced.<sup>89</sup>

7.52 Suspended sentences have been criticised on the basis that they are not sufficiently punitive and hence violate the principle of proportionality; are inappropriate for certain offences; and are illogical given that they are imposed only when the court determines that a sentence of imprisonment is the only appropriate sentence.<sup>90</sup>

7.53 However, it has been argued that suspended sentences are ‘an important arrow from the quiver of sentencing dispositions available to the Court’.<sup>91</sup> Arguments in favour of suspended sentences include that they enable courts to denounce objectively serious criminal conduct and impose sentences with a significant personal deterrent effect, while simultaneously allowing courts to give effect to other relevant sentencing purposes such as rehabilitation of the offender.<sup>92</sup> In 2005, the High Court held that a suspended sentence imposed on an offender convicted of serious drug offences was appropriate in circumstances where the offender had given valuable assistance to authorities and faced a real risk of serious harm in prison. McHugh J held that in wholly suspending the sentence imposed on the offender the primary judge

appropriately balanced the relevant, even if conflicting, considerations of ensuring the sentence protected society from the risk of Mrs York re-offending and inflicting condign punishment on her on the one side and ensuring the sentence protected her from the risk of her fellow inmates committing serious offences against her on the other side.<sup>93</sup>

7.54 A number of stakeholders expressed support for the retention of a sentencing option in the nature of the recognizance release order.<sup>94</sup> The CDPP submitted that a

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86 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [4.20].

87 *Crimes (Sentencing Procedure) Act 1999* (NSW).

88 Sentencing Advisory Council—Victoria, *Suspended Sentences in Victoria: A Preliminary Information Paper* (2005), 2.

89 Sentencing Advisory Council—Victoria, *Suspended Sentences: Interim Report* (2005).

90 See Sentencing Advisory Council—Victoria, *Suspended Sentences Discussion Paper* (2005), [7.1]–[7.41].

91 Submission of the Magistrates’ Court of Victoria to Sentencing Advisory Council—Victoria, *Suspended Sentences: Interim Report* (2005), [2.4].

92 Sentencing Advisory Council—Victoria, *Suspended Sentences Discussion Paper* (2005), [8.18]–[8.29].

93 *York v The Queen* [2005] HCA 60, [32].

94 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; JC, *Submission SFO 25*, 13 April 2005; PS, *Submission SFO 21*, 8 April 2005.



sentencing option that enabled courts to release a federal offender conditionally after serving a period of imprisonment was a useful sentencing tool and that such an option should remain in some form in federal sentencing legislation.<sup>95</sup> It noted that concerns that suspended sentences were insufficiently punitive could be allayed by the use of combination sentences.<sup>96</sup> However, some stakeholders submitted that recognizance release orders should be abolished.<sup>97</sup>

7.55 If an order in the nature of a recognizance release order is to be available, another issue is whether there should be a presumption in favour of making the order in relation to all offences of a particular duration. Some stakeholders agreed with the ALRC's view in DP 70 that there should be no presumption in favour of making a recognizance release order in federal sentencing legislation.<sup>98</sup>

#### ***ALRC's views***

7.56 A recognizance release order should continue to be a sentencing option available to courts sentencing federal offenders. However, as recommended in Chapter 2, the term 'recognizance release order' should be replaced with terminology that reflects its nature as a conditional suspended sentence.<sup>99</sup>

7.57 Judicial officers sentencing federal offenders should have a wide variety of sentencing options at their disposal to enable them to impose the most appropriate sentence in all the circumstances of the case. A recognizance release order has the potential to satisfy a number of the purposes of sentencing, such as denunciation and specific deterrence. It may also represent a proportionate sentence in the circumstances of the case. Recognizance release orders are an established and frequently utilised sentencing option for federal offenders and orders of that nature are currently available in all states and territories.

7.58 However, it is undesirable for federal sentencing legislation to contain a presumption in favour of the imposition of a recognizance release order for a sentence of imprisonment of a certain duration. No state or territory contains a similar presumption. A recognizance release order should be imposed only if it is an appropriate sentence in the circumstances of the case, and that can be determined only after considering the purposes, principles and factors of sentencing and the factors relevant to the administration of the criminal justice system. Accordingly, a court

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95 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

96 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006. Combination sentences are discussed further below.

97 LD, *Submission SFO 9*, 10 March 2005; M Bagaric and R Edney, *Consultation*, Melbourne, 1 April 2005.

98 G Mackenzie, *Submission SFO 80*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

99 See Rec 2–3.

sentencing a federal offender should have the discretion to wholly or partially suspend any period of imprisonment imposed on a federal offender, regardless of the length of the sentence.

**Recommendation 7–7** Federal sentencing legislation should repeal the provision requiring the court to make a ‘recognizance release order’ for sentences of imprisonment between six months and three years, and should grant the court a discretion to suspend a federal offender’s sentence of imprisonment either wholly or partially, regardless of the length of the sentence.

## Imprisonment

7.59 Imprisonment involves forcibly depriving an offender of his or her liberty. It is widely recognised at common law that, of the sentencing options in use in Australia, imprisonment is the most severe and should be imposed only as a last resort.<sup>100</sup> Prison populations in Australia are rising, having doubled nationally since 1978.<sup>101</sup> While imprisonment has the advantage of protecting the community from an offender during the period in which the offender is incarcerated, it is a costly response to crime, particularly given that its effectiveness as a crime control tool has been questioned.<sup>102</sup>

7.60 There was a marked increase in the rate of federal imprisonment between 1998 and September 2001.<sup>103</sup> This increase peaked in 2001 and then rapidly declined.<sup>104</sup> In contrast, state and territory imprisonment rates during this period have increased at a steady rate.<sup>105</sup> On 1 March 2006 there were 672 federal prisoners in Australia.<sup>106</sup>

7.61 The AIC’s analysis of data provided by the CDPP about offenders prosecuted for federal fraud or drug offences in the period 2000–04 reveals that a prison sentence was imposed in 8,980 cases (36 per cent of all cases). Thirty-four per cent of fraud cases and 81 per cent of drug cases resulted in a prison sentence.<sup>107</sup>

7.62 The authority to impose a sentence of imprisonment on a federal offender is usually found in the statute creating the offence. Commonwealth offence provisions generally specify the maximum period of imprisonment that can be imposed for an

100 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [9.205].

101 D Brown, ‘Continuity, Rupture, Or Just More of the ‘Volatile and Contradictory’? Glimpses of New South Wales’ Penal Practice Behind and Through the Discursive’ in J Pratt and others (eds), *The New Punitiveness: Trends, Theories, Perspectives* (2005) 27.

102 D Weatherburn, *Law and Order in Australia: Rhetoric and Reality* (2004), 128.

103 See Appendix 1, Figure A1.4.

104 See Appendix 1, Figure A1.4.

105 See Appendix 1, Figure A1.5.

106 Attorney-General’s Department, *Federal Prisoners in Australia as at 1 March 2006: Statistics* (2006).

107 See Appendix 2, Figure A2.65 and accompanying text.

offence.<sup>108</sup> Drafters of Commonwealth offence provisions are encouraged not to impose a statutory maximum term of imprisonment of less than six months.<sup>109</sup> Federal legislation prescribes mandatory minimum terms of imprisonment for some offences.<sup>110</sup>

7.63 Section 17A of the *Crimes Act* reflects the common law position that imprisonment is a sentencing option of last resort. The section provides that a court is not to impose a sentence of imprisonment unless it is satisfied that no other sentence is appropriate in all the circumstances of the case. In addition, s 17B provides that the court is not to impose a sentence of imprisonment on an offender for certain offences relating to property or money of a total value of \$2,000 or less unless the court is satisfied that there are exceptional circumstances to warrant such a sentence. In one consultation support was expressed for the retention of s 17A.<sup>111</sup>

7.64 The ALRC endorses the view that imprisonment is a sentencing option of last resort. Accordingly, ss 17A and 17B of the *Crimes Act* should remain in federal sentencing legislation. They serve as a salutary reminder of the importance of the principle of parsimony when sentencing federal offenders, particularly when imprisonment is being considered as a sentencing option.

### Short sentences of imprisonment

7.65 The *Crimes Act* contains no prohibition on the imposition of sentences of imprisonment of six months or less (short sentences of imprisonment). It is estimated that only four per cent of federal prisoners serve sentences of imprisonment of less than six months, compared with seven per cent of the total Australian prison population.<sup>112</sup> The AIC's analysis of data provided by the CDPP reveals that head sentences of less than six months were imposed in only two per cent of drug cases.<sup>113</sup> However, head sentences of less than six months were imposed in 36 per cent of fraud cases.<sup>114</sup>

7.66 In the past 10 years there has been considerable debate in Australia and the United Kingdom about the effectiveness of short sentences of imprisonment. In 1995, Western Australia abolished sentences of imprisonment of three months or less, and in

108 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2004) <www.ag.gov.au> at 17 September 2004, 36. However, when an indictable federal offence is dealt with summarily reduced maximum penalties apply: *Crimes Act 1914* (Cth) s 4J.

109 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2004) <www.ag.gov.au> at 17 September 2004, 39.

110 See, eg, *Migration Act 1958* (Cth) s 233C.

111 Aboriginal Justice Advisory Committee and North Australian Aboriginal Legal Aid Service, *Consultation*, Darwin, 28 April 2005.

112 See Appendix 1, Figure A1.19.

113 See Appendix 2, Figure A2.71.

114 See Appendix 2, Figure A2.68.

March 2004 this was extended to sentences of imprisonment of six months or less.<sup>115</sup> The issue was considered in New South Wales, although the New South Wales Sentencing Council recommended that it was undesirable to make any legislative change prohibiting short sentences of imprisonment until there had been an evaluation of the impact of similar changes in Western Australia.<sup>116</sup>

7.67 Several arguments have been made for the abolition of short sentences of imprisonment. Short sentences of imprisonment are said to be costly and to lead to prison overcrowding.<sup>117</sup> They are also said to be ‘counter-rehabilitative’ as they destabilise offenders’ lives; expose minor offenders to more serious offenders; and limit the opportunity for offenders to undertake programs to address the underlying causes of their criminal behaviour while incarcerated.<sup>118</sup> In addition, short sentences of imprisonment do not generally have a non-parole period because short periods of parole are of questionable utility.<sup>119</sup> Accordingly, offenders who have served short sentences of imprisonment do not benefit from the assistance and supervision of parole authorities when attempting to reintegrate into the community.

7.68 However, it has also been argued that short sentences of imprisonment are a necessary part of the sentencing continuum<sup>120</sup> and that in some cases a short sentence of imprisonment will be an appropriate sentence.<sup>121</sup> Many have expressed concern that abolishing short sentences of imprisonment could lead to ‘sentence creep’ or the imposition of longer sentences of imprisonment than would otherwise have been warranted.<sup>122</sup> Sentence creep can occur if judicial officers are reluctant to impose alternative sentences because the offending conduct appears to require a sentence of imprisonment, or if there is an insufficient range of adequately funded alternative sentencing options for offenders. In addition, it is argued that more offenders may be refused bail and placed in remand as a way of ensuring they serve a short sentence of imprisonment.<sup>123</sup>

7.69 Some stakeholders submitted that short sentences of imprisonment should continue to be available to federal offenders.<sup>124</sup> In consultations, Deputy Chief Magistrate Woods expressed the view that the abolition of short sentences of imprisonment in Western Australia had been counterproductive and had led to

115 *Sentencing Act 1995* (WA) s 86.

116 New South Wales Sentencing Council, *Abolishing Prison Sentences of 6 Months or Less* (2004), 4.

117 *Ibid.*, 10–11.

118 *Ibid.*, 9–10.

119 For further discussion of short parole periods, see Ch 9.

120 A Freiberg, *Pathways to Justice: Sentencing Review 2002* (2002) Victorian Government, 136.

121 New South Wales Sentencing Council, *Abolishing Prison Sentences of 6 Months or Less* (2004), 13–14.

122 *Ibid.*, 14.

123 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, 16.

124 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; J Roberts, *Submission SFO 67*, 16 January 2006; Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006.

offenders receiving longer sentences than they would have received in the absence of the legislative prohibition.<sup>125</sup> This has been supported by anecdotal comments from legal practitioners in Western Australia.<sup>126</sup> Other stakeholders supported the abolition of short sentences of imprisonment.<sup>127</sup> Sisters Inside Inc submitted that many women offenders received short sentences of imprisonment. Accordingly, the abolition of short sentences of imprisonment could be a useful strategy to reduce the rate of imprisonment of women if mechanisms were put in place to ensure it did not lead to sentence creep.<sup>128</sup>

### *ALRC's views*

7.70 Short sentences of imprisonment should continue to be available in the sentencing of federal offenders. The ALRC considers that the federal sentencing regime protects against the inappropriate imposition of short sentences. Section 17A of the *Crimes Act* provides that a sentence of imprisonment should not be imposed for a federal offence unless the court is satisfied that no other sentence is appropriate in all the circumstances of the case. As discussed below, federal offenders should continue to have access to state and territory sentencing options. The availability of a wide range of sentencing options for federal offenders will augment the operation of s 17A of the *Crimes Act*.

7.71 In addition, as discussed above, s 17B of the *Crimes Act* prohibits the imposition of sentences of imprisonment for certain minor offences unless the court is satisfied that there are exceptional circumstances to warrant the sentence. Elsewhere in this Report the ALRC has recommended that the sentencing principles of proportionality and parsimony be expressed in federal sentencing legislation.<sup>129</sup> These features of the federal sentencing regime, taken together, should ensure that federal offenders are not sentenced to short sentences of imprisonment unless such sentences are appropriate in all the circumstances of the case.

7.72 In any event, anecdotal evidence from Western Australia indicates that the abolition of short sentences of imprisonment may have perverse consequences, resulting in offenders receiving longer sentences of imprisonment than would otherwise have been warranted.

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125 Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.

126 P Wright, 'Impact of Abolishing Short Sentences of Imprisonment' (Paper presented at No Imprisonment—Mandatory Imprisonment Seminar, Sydney, 24 May 2004), 4.

127 Sisters Inside Inc, *Submission SFO 98*, 6 April 2006; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Prisoners' Legal Service, *Submission SFO 28*, 15 April 2005.

128 Sisters Inside Inc, *Submission SFO 98*, 6 April 2006.

129 See Rec 5–1.

**Recommendation 7–8** Sentences of imprisonment of less than six months should continue to be available in the sentencing of federal offenders.

### Conviction only and non-conviction sentencing options

7.73 A conviction is a judicial act that alters an offender's legal status.<sup>130</sup> At common law, an offender is not convicted when he or she enters a plea of guilty or receives a verdict of guilty unless the plea or verdict is explicitly or implicitly accepted by the court.<sup>131</sup> If an offender is convicted of a criminal offence, he or she will have a criminal record.

7.74 Federal sentencing legislation does not enable a judicial officer to convict a federal offender without making another sentencing order (that is, the court cannot impose a conviction-only sentence); nor can a judicial officer impose a sentence without convicting an offender (that is, the court cannot impose a non-conviction sentence). However, as discussed above, the *Crimes Act* does enable a judicial officer to dismiss the charge or charges against the offender or discharge the offender without proceeding to conviction upon the offender agreeing to enter into a recognizance.<sup>132</sup> In addition, the *Crimes Act* establishes a spent conviction scheme which gives individuals the right not to disclose certain convictions if 10 years have passed since the conviction was recorded.<sup>133</sup>

7.75 Conviction-only sentences and non-conviction sentences are available in a number of states and territories.<sup>134</sup> For example, sentencing legislation in Queensland enables the court to make a non-contact order, a probation order, a community service order or an order imposing a fine without recording a conviction.<sup>135</sup>

7.76 The existence of conviction-only and non-conviction sentencing options at the state and territory level raises the issue of whether conviction should be a sentencing option for a federal offender in its own right. A conviction can have adverse civil or administrative consequences for an offender. For example, a conviction can affect an offender's visa status or limit his or her employment options. In addition, the social stigma attached to convictions can result in an offender suffering from discrimination on the basis of his or her criminal record.<sup>136</sup> Non-conviction sentencing options provide a legislative means of avoiding these adverse consequences of conviction.

130 R Fox and A Freiberg, 'Sentences Without Conviction: From Status to Contract in Sentencing' (1989) 13 *Criminal Law Journal* 297, 300.

131 Ibid, 302; R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [1.505].

132 *Crimes Act 1914* (Cth) s 19B(1).

133 Ibid, pt VIIC.

134 See *Sentencing Act 1991* (Vic) s 7(e), (f), (h); *Criminal Law (Sentencing) Act 1988* (SA) ss 15(1)(b), 16.

135 *Penalties and Sentences Act 1992* (Qld) ss 43A, 90, 100, 44 respectively.

136 Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the Basis of Criminal Record—Discussion Paper* (2004).

7.77 A number of stakeholders expressed support for non-conviction sentencing options.<sup>137</sup> Some noted the adverse social and civil consequences attached to a conviction.<sup>138</sup> Professor Arie Freiberg expressed the opinion that a conviction was a sufficient punishment for some offenders.<sup>139</sup> The CDPP did not support non-conviction sentencing options, noting that they appeared to be an anomaly and submitting that the current power to discharge a federal offender without conviction in certain narrow circumstances remained appropriate.<sup>140</sup>

### ***ALRC's views***

7.78 Federal sentencing legislation should not recognise a conviction as a sentencing option in its own right or enable judicial officers sentencing federal offenders to impose non-conviction sentencing options. A conviction is a formal legal step to be taken prior to the imposition of a sentence. Guidelines developed by the AGD direct those responsible for framing Commonwealth offences to consider the adverse consequences of conviction, including the consequences resulting from the operation of other federal statutes, when deciding whether to attach criminal or civil liability to a particular type of conduct.<sup>141</sup> In addition, the ALRC recommends that the civil or administrative consequences of a conviction should be factors to be considered when sentencing a federal offender,<sup>142</sup> and the Commonwealth spent convictions scheme enables the adverse consequences of conviction to be avoided in certain circumstances. In the result, the ALRC considers that it is not appropriate to use federal sentencing legislation to seek to avoid the operation of other laws and practices that attach civil consequences to conviction.

7.79 The ALRC recognises that federal offenders may encounter discrimination because of their criminal record. Although such discrimination is a matter of concern and may be in need of further examination, the resolution of these issues is beyond the scope of this Inquiry.

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137 J Willis, *Submission SFO 74*, 10 February 2006; Chief Magistrate M Irwin, *Submission SFO 33*, 20 April 2005; J Willis, *Submission SFO 20*, 9 April 2005; Chief Magistrate I Gray & Others, *Consultation*, Melbourne, 23 February 2006; Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005; Prison Reform Group WA, *Consultation*, Perth, 18 April 2005; M Bagaric and R Edney, *Consultation*, Melbourne, 1 April 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005; T Glynn, *Consultation*, Brisbane, 2 March 2005.

138 Chief Magistrate M Irwin, *Submission SFO 33*, 20 April 2005; Prison Reform Group WA, *Consultation*, Perth, 18 April 2005; T Glynn, *Consultation*, Brisbane, 2 March 2005.

139 A Freiberg, *Consultation*, Melbourne, 30 March 2005.

140 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

141 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2004) <www.ag.gov.au> at 17 September 2004, 13.

142 See Ch 6.

### Combination sentences

7.80 A judicial officer sentencing a federal offender cannot impose two sentences for one offence unless this is expressly permitted by federal legislation.<sup>143</sup> Some federal offence provisions enable a court to impose both a fine and a sentence of imprisonment on a federal offender for one offence.<sup>144</sup> In addition, s 4B(2) and (2A) of the *Crimes Act* enable a court in some circumstances to impose both a fine and a sentence of imprisonment on an offender for an offence when the offence provision refers only to imprisonment. Section 20AB(4) of the *Crimes Act* provides that a court may also impose a fine on a federal offender when it sentences a federal offender to a state or territory sentencing option picked up by s 20AB(1).

7.81 Some state and territory sentencing legislation provides judicial officers with more scope to combine sentencing options when sentencing an offender for one offence.<sup>145</sup> For example, sentencing legislation in the ACT provides that if an offence is punishable by imprisonment, a court may impose a ‘combination sentence’ consisting of two or more of a number of sentencing options, including: a sentence of imprisonment, a suspended sentence order, a good behaviour order and a fine order.<sup>146</sup> It also sets out the combinations of sentencing options that can be imposed on an offender convicted of an offence punishable by a fine.<sup>147</sup> The CDPP submitted that combination sentences might be effective in the federal context.<sup>148</sup>

### ALRC’s views

7.82 Allowing numerous sentencing options to be imposed on a federal offender for one offence has the potential to lead to ‘sentence creep’ or the imposition of more severe sentences than would otherwise have been warranted. In addition, it may be difficult to determine the relative severity of combination sentences when seeking to achieve consistency in the sentencing of federal offenders. However, in light of the developments in this area in the states and territories, the ALRC is of the view that the Office for the Management of Federal Offenders (OMFO) should monitor the use of combination sentences in the states and territories and consider the appropriateness of combination sentences for federal offenders. The OMFO should provide advice to the Australian Government about what, if any, combinations of sentences should be available when sentencing federal offenders.

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143 M Pedley, *Federal Sentencing in Victoria* (2005) Commonwealth Director of Public Prosecutions, 31.

144 See, eg, *Migration Act 1958* (Cth) s 232A.

145 See, eg, *Crimes (Sentencing) Act 2005* (ACT) pt 3.6; *Sentencing Act 1997* (Tas) s 8.

146 *Crimes (Sentencing) Act 2005* (ACT) s 29.

147 *Ibid* s 30.

148 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.



**Recommendation 7–9** The Office for the Management of Federal Offenders (OMFO) should provide advice to the Australian Government about the appropriateness of using combination sentences in which two or more sentencing options are imposed on a federal offender for a single offence.

### Other sentencing options

7.83 In Issues Paper 29 the ALRC noted that other sentencing options can be imposed for certain federal offences, such as forfeiture of employer contributions to superannuation where an employee of the Commonwealth or a Commonwealth authority has been convicted of a ‘corruption offence’.<sup>149</sup> The AGD submitted that the superannuation orders made under the *Crimes (Superannuation Benefits) Act 1989* (Cth) were not sentencing options or penalties but instead were a consequence of failure to fulfil a condition of employment.<sup>150</sup>

7.84 The rationale underlying superannuation orders is that publicly-funded superannuation benefits should not be available to employees who discharge their duties in a corrupt manner.<sup>151</sup> The Minister (currently the Attorney-General)<sup>152</sup> can authorise the CDPP to make an application for a superannuation order if satisfied that an employee has been convicted of a corruption offence.<sup>153</sup> As noted by the AGD, the possibility that a superannuation order might be made in the future cannot be taken into account in sentencing.<sup>154</sup> The ALRC agrees that superannuation orders are not sentencing options but are rather orders relating to the forfeiture of benefits upon conviction for certain offences. These orders are not considered further in this Report.

## Particular issues relating to discharges, releases and suspended sentences

### Permitted conditions

7.85 Part IB of the *Crimes Act* sets out the conditions that may be attached to an order discharging a federal offender without conviction, releasing a federal offender after conviction, or releasing a federal offender pursuant to a recognizance release

<sup>149</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [7.88].

<sup>150</sup> Attorney-General’s Department, *Submission SFO 52*, 7 July 2005.

<sup>151</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 17 August 1989, 388 (L. Bowen—Deputy Prime Minister and Attorney-General).

<sup>152</sup> Commonwealth of Australia, *Administrative Arrangements Order*, 16 December 2004 sch, pt 2.

<sup>153</sup> *Crimes (Superannuation Benefits) Act 1989* (Cth) s 16.

<sup>154</sup> *Ibid* s 43.

order. For the purposes of this discussion, these three orders will be referred to collectively as ‘conditional release orders’.

7.86 Before a federal offender is discharged without conviction he or she is required to undertake to comply with the following conditions:

- to be of good behaviour for a period not exceeding three years;
- to make any reparation or pay any costs as ordered by the court; and
- to comply with any other conditions the court thinks fit, including any condition that the offender be subject to the supervision of a probation officer for a period not exceeding two years.<sup>155</sup>

7.87 A federal offender who is released after conviction or pursuant to a recognizance release order is required to undertake to comply with the same conditions, except that the period of good behaviour may extend up to five years. The offender may also be required to undertake to pay a pecuniary penalty not exceeding the maximum fine for the offence, or, if the offence is not punishable by a fine, a pecuniary penalty not exceeding 60 penalty units in a court of summary jurisdiction and 300 penalty units in any other court.<sup>156</sup>

7.88 Like Part IB, some state and territory sentencing legislation gives judicial officers a broad discretion to specify conditions that the court considers appropriate when making a conditional release order.<sup>157</sup> Some state legislation sets out examples of the types of conditions that may be imposed.<sup>158</sup> For example, sentencing legislation in Tasmania sets out a list of special conditions that can be attached to an order releasing an offender on probation, including a condition that an offender attend educational and other programs or submit to medical, psychological or psychiatric assessment and treatment.<sup>159</sup>

7.89 Sentencing legislation in New South Wales allows a court to order that an offender participate in an ‘intervention plan’ as a condition of his or her good behaviour bond.<sup>160</sup> A court may make such an order only if it is satisfied that the offender is eligible and suitable to participate in the program; that the program is available in the area in which the offender resides or intends to reside; and that

<sup>155</sup> *Crimes Act 1914* (Cth) s 19B(d).

<sup>156</sup> *Ibid* s 20(1)(a), (b), (5). A penalty unit is \$110: *Crimes Act 1914* (Cth) s 4AA.

<sup>157</sup> *Sentencing Act 1991* (Vic) ss 72(2), 75(2); *Penalties and Sentences Act 1992* (Qld) s 19(1), (2), (2A); *Crimes Act 1900* (ACT) s 402(1); *Sentencing Act 1995* (NT) ss 11(1), 13(1).

<sup>158</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95A; *Penalties and Sentences Act 1992* (Qld) s 19(2A); *Criminal Law (Sentencing) Act 1988* (SA) s 42; *Sentencing Act 1997* (Tas) s 37(2).

<sup>159</sup> *Sentencing Act 1997* (Tas) s 37(2)(a), (d).

<sup>160</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95A. See also *Crimes (Sentencing) Act 2005* (ACT) ss 96, 97.

participation by the offender would reduce the likelihood of the offender committing further offences.

7.90 One issue is whether federal sentencing legislation should continue to require a federal offender who is the subject of any conditional release order to undertake to be of good behaviour. Sentencing legislation in a number of states requires offenders who have been conditionally released to be of ‘good behaviour’.<sup>161</sup> However, Queensland legislation imposes the lesser requirement that an offender released on probation refrain from committing another offence<sup>162</sup> and Western Australian legislation provides that a court may impose ‘any requirements on the offender it decides are necessary to secure the good behaviour of the offender’.<sup>163</sup>

7.91 The concept of good behaviour has been criticised for being poorly defined.<sup>164</sup> However, it is accepted that it means more than mere compliance with the law<sup>165</sup> and the High Court has held that for behaviour to be a breach of a condition to be of good behaviour it must bear some relationship to the original offence.<sup>166</sup>

7.92 Another issue is whether federal sentencing legislation should provide further guidance on the conditions that may be imposed on a federal offender who is the subject of a conditional release order. It has been held that when exercising an unfettered discretion to attach conditions to a conditional release order a court should ensure the conditions are related to the purposes of sentencing, are defined with reasonable precision, and are not unduly harsh.<sup>167</sup> In addition, courts should not impose conditions that contravene a provision of a statute, or are contrary to public policy or the legislative policy of the federal law.<sup>168</sup> There is some doubt whether a judicial officer can impose a condition requiring an offender subject to a conditional release order to undergo drug treatment because such a condition may be inconsistent with the offender’s release.<sup>169</sup>

7.93 In Issues Paper 29 the ALRC asked whether federal sentencing legislation should set out the conditions that may be imposed on a federal offender who is conditionally discharged and, if so, what those conditions should be.<sup>170</sup> Some

161 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95(b); *Sentencing Act 1991* (Vic) ss 72(2)(b), 75(2)(b); *Criminal Law (Sentencing) Act 1988* (SA) ss 38(1)(a), 39(1)(a).

162 *Penalties and Sentences Act 1992* (Qld) s 93(1)(a). See also *Sentencing Act 1997* (Tas) s 37(1)(a).

163 *Sentencing Act 1995* (WA) s 49(1).

164 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [7.304].

165 *Ibid*, [7.304].

166 *Devine v The Queen* (1967) 119 CLR 506.

167 *R v Bugmy* [2004] NSWCCA 258, [61].

168 *R v Theodossio* (1998) 104 A Crim R 367.

169 *R v Jones* [1984] WAR 175, 180; M Pedley, *Federal Sentencing in Victoria* (2005) Commonwealth Director of Public Prosecutions, 3.

170 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), Question 9–8.

stakeholders submitted that federal sentencing legislation should not set out the conditions that may be attached to federal sentencing orders.<sup>171</sup> Others stated that the conditions should be the same as those that can be attached to state and territory sentencing orders.<sup>172</sup> The CDPP submitted that while it may be of assistance to judicial officers to set out some of the conditions that may be attached to federal sentencing orders, the court should retain a broad discretion to determine the conditions to be imposed in any given case.<sup>173</sup>

7.94 In DP 70 the ALRC expressed the view that federal sentencing legislation should grant courts a broad discretion to determine the conditions to be attached to a federal sentencing order, but that in all cases it should be mandatory to require the offender to be of good behaviour for a specified period of time.<sup>174</sup> There was support for this approach.<sup>175</sup> However, the Department of Corrective Services Queensland noted that a condition that a federal offender participate in a state or territory program should only be attached to a sentencing order after the offender had been assessed as suitable to participate in the program.<sup>176</sup>

#### *ALRC's views*

7.95 Federal sentencing legislation should continue to require a federal offender who is the subject of a conditional release order to be of good behaviour for a specified period of time because this condition will invariably be appropriate when releasing an offender into the community. However, it should not be mandatory to attach any other condition to a conditional release order. Given the wide range of factors to be considered in sentencing, it is unlikely that any other condition will be appropriate or applicable in every case. The principle of individualised justice requires that courts sentencing federal offenders retain a broad discretion to impose conditions that are appropriate in all the circumstances of a case.

7.96 Nevertheless, it would be useful for legislation to set out examples of the types of conditions that may be attached to conditional release orders and the circumstances in which they can be attached. This is consistent with the approach taken in some states and territories, and will provide guidance to judicial officers without unduly fettering their discretion. Useful examples of conditions are that offenders undertake a rehabilitation program, undergo specified medical or psychiatric treatment, or be subject to the supervision of a probation officer.

171 Law Society of South Australia, *Submission SFO 37*, 22 April 2005; JC, *Submission SFO 25*, 13 April 2005; LD, *Submission SFO 9*, 10 March 2005.

172 Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005; Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005.

173 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

174 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 7–8.

175 Sisters Inside Inc, *Submission SFO 98*, 6 April 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006; J Willis, *Submission SFO 74*, 10 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006.

176 Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006.

7.97 Conditions should be attached to conditional release orders only if they are capable of being complied with. Accordingly, the court should not order a federal offender to participate in a rehabilitation program unless it is satisfied that the offender is a suitable person to participate in the program, is eligible to participate, and the program is accessible to the offender. Similarly, the court should not order a federal offender to undergo medical or psychiatric treatment unless the treatment has been recommended by a qualified medical practitioner and is available to the offender.

**Recommendation 7–10** Federal sentencing legislation should grant a court a broad discretion to determine the conditions that may be imposed on a federal offender when it discharges an offender without recording a conviction, releases an offender after recording a conviction, or wholly or partially suspends a sentence of imprisonment. In addition to the mandatory condition that the offender be of good behaviour for a specified period of time, a court should be able to impose any of the following conditions:

- (a) that the offender undertake a rehabilitation program;
- (b) that the offender undergo specified medical or psychiatric treatment; or
- (c) that the offender be subject to the supervision of a probation officer and obey all reasonable directions of that officer.

### Prohibited conditions

7.98 Part IB of the *Crimes Act* does not list any conditions that cannot be imposed on a federal offender when making a conditional release order. In contrast, some state and territory legislation specifies conditions that cannot be imposed on offenders who are conditionally released. For example, in New South Wales a court cannot impose a condition requiring a person to perform community service work, or pay a fine or compensation, when conditionally releasing an offender.<sup>177</sup>

7.99 There has been judicial debate about whether a court can attach to a conditional release order a condition that is an independent sentencing option. For example, in *Adams v Carr*, the Full Court of the Supreme Court of South Australia held that an order requiring an offender to perform community service could be attached to a conditional release order made pursuant to s 20(1) of the *Crimes Act*.<sup>178</sup> However, in *Shambayati v The Queen*, the Queensland Court of Appeal held that a community

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<sup>177</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95(c).

<sup>178</sup> *Adams v Carr* (1987) 81 ALR 151, 160.

service order could not be attached to a conditional release order because a community service order had no meaning or operation outside the context of the *Penalties and Sentences Act 1992* (Qld), which was not applicable to federal offenders released pursuant to s 20(1).<sup>179</sup>

7.100 It has been argued that attaching independent sentencing options as conditions of conditional release orders creates confusion about the appropriate sentence to be imposed. It can also result in the imposition of more severe sentences than would otherwise have been the case.<sup>180</sup> The Sentencing Guidelines Council in the United Kingdom has stated that:

Because of the very clear deterrent threat involved in a suspended sentence, requirements imposed as part of that sentence should generally be less onerous than those imposed as part of a community sentence. A court wishing to impose onerous or intensive requirements on an offender should reconsider its decision to suspend sentence and consider whether a community sentence may be more appropriate.<sup>181</sup>

7.101 Another issue is whether courts sentencing federal offenders should be able to order a federal offender to pay a monetary penalty as a condition of a conditional release order.

7.102 In DP 70 the ALRC proposed that federal sentencing legislation prohibit a court from attaching three types of conditions to sentencing orders made under ss 19B, 20(1)(a) and 20(1)(b) of the *Crimes Act*, namely: (a) a condition that is an independent sentencing option; (b) a condition that the offender pay a monetary penalty; and (c) a condition that the offender make restitution, pay compensation or comply with any other ancillary order.<sup>182</sup> Some stakeholders supported this proposal,<sup>183</sup> while others expressed the view that it unduly fettered the discretion of judicial officers.<sup>184</sup> The CDPP submitted that it would be useful if courts sentencing federal offenders were able to impose a short period of full-time imprisonment and order that the offender be released on the condition that he or she comply with another sentencing option such as community service.<sup>185</sup>

### ***ALRC's views***

7.103 The ALRC remains of the view that judicial officers should not be able to require federal offenders to comply with independent sentencing options, such as community service, as a condition of their release. There is little benefit in enabling independent sentencing options to be imposed as conditions of conditional release

179 *Shambayati v The Queen* (1999) 105 A Crim R 373, 375–376.

180 Sentencing Advisory Council—Victoria, *Suspended Sentences Discussion Paper* (2005), [8.62].

181 Sentencing Guidelines Council (UK), *New Sentences: Criminal Justice Act 2003* (2004), [2.2.14].

182 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 7–9.

183 G Mackenzie, *Submission SFO 80*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

184 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; J Willis, *Submission SFO 74*, 10 February 2006.

185 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

orders when those options are already available to courts sentencing federal offenders. If a court sentencing a federal offender determines that a particular sentencing option is appropriate in light of the purposes, principles and factors of sentencing then it should impose that sentencing option in its own right and not as an adjunct to another sentencing option. It would introduce unnecessary complexity and inhibit transparency in sentencing to enable independent sentencing options to be attached as conditions of conditional release orders.

7.104 In addition, courts should not be able to require federal offenders to pay a monetary penalty as a condition of their release. There is no practical difference between a monetary penalty and a fine. It is undesirable to enable a court to impose a monetary penalty as a condition of a conditional release order when the offence in question is punishable by a fine.

7.105 In Chapter 8, the ALRC expresses the view that federal sentencing legislation should prohibit a court from attaching to a conditional release order a condition that a federal offender comply with an ancillary order.

**Recommendation 7–11** Federal sentencing legislation should prohibit a court from making any of the following conditions when it discharges an offender without recording a conviction, releases an offender after recording a conviction, or wholly or partially suspends a sentence of imprisonment:

- (a) a condition that is an independent sentencing option;
- (b) a condition that the offender pay a monetary penalty; and
- (c) a condition that the offender make restitution, pay compensation or comply with any other ancillary order.

### The use of the recognizance

7.106 As noted above, a recognizance is an undertaking whereby an offender acknowledges that he or she may be required to pay an amount of money to the Crown unless he or she complies with certain conditions. A recognizance may be supported by a surety, that is, another person who also acknowledges liability to pay a specified amount of money to the Crown if the offender does not comply with certain conditions. In New South Wales legislation, the term ‘recognizance’ has been replaced with the term ‘bond’.

7.107 Recognizances can be made in respect of recognizance release orders, orders discharging an offender without conviction, and orders releasing an offender after conviction.<sup>186</sup> Section 20A(7) of the *Crimes Act* provides that where a federal offender fails to comply with a condition of one of these sentencing options supported by a recognizance, the court may order that the recognizance entered into by the offender or the surety be forfeited. There is no statutory or common law limit to the amount of money that a court can fix as the amount of a recognizance.<sup>187</sup>

7.108 The AIC's analysis of the CDDP's data about federal drug and fraud prosecutions in the period 2000–04 shows differences between jurisdictions in the amount of money courts fix as the amount of a recognizance.<sup>188</sup> For example, in South Australia the majority of recognizance orders were for amounts of less than \$500, while in Queensland and Western Australia the majority of recognizance orders were for \$1,500 or more.

7.109 Part IB of the *Crimes Act* does not expressly state when the sum of money fixed in relation to a recognizance must be paid. In contrast, sentencing legislation in Western Australia expressly provides that a court may require an offender or a surety to enter into an undertaking to forfeit a sum of money on breach of a conditional release order, or to deposit a sum of money with the court to be forfeited in event of a breach.<sup>189</sup> One federal offender who received a 'bond' submitted that he did not know whether he was required to lodge money by way of security immediately or only in the event of a breach.<sup>190</sup>

7.110 In consultations, some stakeholders commented that there was uncertainty regarding the manner in which a recognizance should be enforced because there is no federal provision for enforcement.<sup>191</sup> Section 15A of the *Crimes Act* deals only with the enforcement of fines and other specified pecuniary penalties;<sup>192</sup> it does not extend to the enforcement of recognizances. Some commentators have suggested that ss 68(1) and 79 of the *Judiciary Act 1903* (Cth) pick up and apply state and territory provisions regarding the enforcement of recognizances.<sup>193</sup> The provisions relating to the enforcement of recognizances in the states and territories differ.<sup>194</sup> Some provisions enable offenders and sureties to be ordered to serve a term of imprisonment in default of payment of an amount fixed pursuant to a recognizance.<sup>195</sup>

186 *Crimes Act 1914* (Cth) ss 19B(1)(d), 20(1)(a), (b).

187 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [7.303].

188 See Appendix 2, Figure A2.31 and accompanying text.

189 *Sentencing Act 1995* (WA) s 51(1).

190 RC, *Submission SFO 50*, 13 May 2005.

191 Commonwealth Director of Public Prosecutions, *Consultation*, Melbourne, 31 March 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Darwin, 28 April 2005.

192 *Crimes Act 1914* (Cth) s 3(2).

193 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [7.503].

194 See, eg, *Crown Proceedings Act 1958* (Vic); *Penalties and Sentences Act 1992* (Qld) s 33B; *Fines and Penalties (Recovery) Act 2002* (NT) s 109.

195 See *Crown Proceedings Act 1958* (Vic); *Penalties and Sentences Act 1992* (Qld) s 33B.



7.111 In DP 70 the ALRC proposed that federal sentencing legislation repeal the provisions that allow a court to require a federal offender to give security by way of recognizance when making an order pursuant to ss 19B, 20(1)(a) or 20(1)(b) of the *Crimes Act*.<sup>196</sup> There was some support for this proposal.<sup>197</sup> However, the CDPP submitted that these provisions should remain available.<sup>198</sup>

### *ALRC's views*

7.112 The ALRC considers that the provisions allowing a court to require a federal offender to give security in support of his or her undertaking to comply with conditions of a sentencing order, or to require that a recognizance be supported by a surety, should be repealed. Part IB of the *Crimes Act* outlines the action a court may take if a federal offender breaches a sentencing order.<sup>199</sup> For example, if an offender breaches an order for conditional discharge or release, he or she may be re-sentenced for the original offence; if a federal offender breaches a recognizance release order, he or she may be imprisoned for the part of the sentence of imprisonment that has not been served. In consequence, the provisions requiring an offender or surety to forfeit money on breach of a sentencing order have limited utility in promoting compliance with conditions of a sentencing order because the consequences of breaches of these orders are already potentially serious.

**Recommendation 7–12** Federal sentencing legislation should repeal the provisions that allow a court to require a federal offender to give security by way of recognizance when he or she is discharged without conviction, released after conviction or sentenced to a wholly or partially suspended sentence of imprisonment.

## State and territory sentencing options

### Background

7.113 Section 20AB(1) of the *Crimes Act* provides a mechanism for federal offenders to access a number of sentencing options that are available in the states and territories. The provision specifically identifies some of these sentencing options and others are prescribed by regulation. The *Crimes Regulations 1990* (Cth) currently lists a number of sentencing options, such as home detention and intensive correction orders, which

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196 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 7–10.

197 G Mackenzie, *Submission SFO 80*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

198 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

199 Breach of sentencing orders is discussed in Ch 17.

are available to courts sentencing federal offenders.<sup>200</sup> Section 20AB(1) also empowers courts to impose sentencing options that are ‘similar’ to the ones set out in the provision or listed in the regulations.

7.114 Since the introduction of s 20AB(1) in 1982,<sup>201</sup> there has been a proliferation of sentencing options in the states and territories. This has occurred as a result of a growing realisation that full-time imprisonment is not always an appropriate sentencing option, not least because it is costly, can inhibit the rehabilitation of offenders, and does little to prevent crime. According to the CDPP, in 2003–04 approximately 1,000 federal offenders were sentenced to options picked up by s 20AB(1). Of these, 49 were sentenced to periodic detention, 40 to home detention, 67 to intensive supervision orders and intensive correction orders, and 870 to community service orders and community-based orders.<sup>202</sup>

7.115 One of the purposes of the *United Nations Standard Minimum Rules for Non-custodial Measures 1990* (the Tokyo Rules) is to promote the promulgation and use of sentencing options other than imprisonment. Rule 2.3 provides that:

In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions. The number and types of non-custodial measures available should be determined in such a way so that consistent sentencing remains possible.<sup>203</sup>

7.116 At present, some sentencing options are available only in certain jurisdictions. For example, periodic detention is available only in New South Wales and the ACT;<sup>204</sup> home detention is available only in New South Wales, Victoria and the Northern Territory;<sup>205</sup> non-association orders are available only in New South Wales and Queensland;<sup>206</sup> and place restriction orders are available only in New South Wales and Tasmania.<sup>207</sup> Accordingly, when these options are picked up pursuant to s 20AB(1) of the *Crimes Act*, they can only be imposed on federal offenders who are sentenced in the jurisdictions and locations in which the options are available.<sup>208</sup>

200 *Crimes Regulations 1990* (Cth) reg 6.

201 *Crimes Amendment Act 1982* (Cth).

202 Commonwealth Director of Public Prosecutions, *Correspondence*, 16 November 2005.

203 *United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)*, UN Doc A/RES/45/110 (1990) r 2.3.

204 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 6; *Crimes (Administration of Sentences) Act 1999* (NSW) pt 3; *Periodic Detention Act 1995* (ACT).

205 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7; *Sentencing Act 1991* (Vic) pt 3 div 2; *Sentencing Act 1995* (NT) pt 3 div 5.

206 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A; *Penalties and Sentences Act 1992* (Qld) pt 3A.

207 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A; *Sentencing Act 1997* (Tas) s 70.

208 Some state and territory sentencing options are only available to offenders sentenced in particular geographic regions: see, eg, Legislative Council Standing Committee on Law and Justice—Parliament of New South Wales, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations*, Report No 30 (2006).

7.117 In addition, the nature of apparently identical sentencing options can vary from jurisdiction to jurisdiction. For example, while community service orders are available in all states and territories,<sup>209</sup> the criteria a court applies when considering whether it is appropriate to make a community service order vary.<sup>210</sup> Similarly, the core conditions for sentences of home detention vary among the jurisdictions in which it is available.<sup>211</sup>

7.118 Further, the maximum duration of a sentencing option picked up by s 20AB and the maximum amount of time in which the sentence must be completed vary among the jurisdictions. For example, in New South Wales a community service order cannot exceed 500 hours.<sup>212</sup> If the number of hours under the order is less than 300, the community service must ordinarily be completed within 12 months; if the number of hours under the order is greater than 300, the community service must ordinarily be completed within 18 months.<sup>213</sup> In contrast, in Queensland a community service order cannot exceed 240 hours and the community service must ordinarily be completed within 12 months.<sup>214</sup> The AIC's analysis of data provided by the CDPP shows significant differences in the hours of community service that federal fraud offenders were required to perform in different jurisdictions.<sup>215</sup> For example, 58 per cent of community service orders in the ACT in fraud cases were for more than 200 hours, but this was true in only three per cent of community service orders in Tasmania.

7.119 Accordingly, reliance on state and territory sentencing options raises the issue of equality in the treatment of federal offenders.<sup>216</sup> During consultations the ALRC was informed that the Corrective Services Ministers' Conference was concerned about achieving consistency in the sentencing options available in the states and territories.<sup>217</sup> The Law Society of South Australia expressed the view that sentencing options for federal offenders should be as uniform as possible.<sup>218</sup> The Australian Securities and Investments Commission (ASIC) submitted that the application of state and territory legislation regarding sentencing options could lead to significant disparity in the

209 *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 7; *Penalties and Sentences Act 1992* (Qld) pt 5, div 2; *Criminal Law (Sentencing) Act 1988* (SA) pt 6; *Sentencing Act 1997* (Tas) s 7; *Crimes Act 1900* (ACT) pt 19; *Crimes (Sentencing) Act 2005* (ACT) s 13, pt 6.1; *Sentencing Act 1995* (NT) pt 3, div 4. See also *Sentencing Act 1991* (Vic) pt 3, div 3; *Sentencing Act 1995* (WA) pt 9, which provide for community based orders.

210 Compare *Crimes (Sentencing Procedure) Act 1999* (NSW) s 86(1) and *Sentencing Act 1997* (Tas) s 7.

211 See, eg, *Sentencing Act 1991* (Vic) s 18ZZB; *Prisons (Correctional Services) (Home Detention Orders) Regulations 1996* (NT) reg 4.

212 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8(2).

213 *Crimes (Administration of Sentences) Act 1999* (NSW) ss 107, 110.

214 *Penalties and Sentences Act 1992* (Qld) s 103(2).

215 See Appendix 2, Figure A2.48 and accompanying text.

216 This issue is discussed further in Ch 3.

217 Attorney-General's Department, *Consultation*, Canberra, 9th February 2006.

218 Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005.

treatment of federal offenders because not all sentencing options are available in all jurisdictions.<sup>219</sup>

### Options for reform

7.120 One way of ensuring that federal offenders have access to the same sentencing options, and that these options are considered and imposed on the same basis, is to prescribe the options in federal sentencing legislation. This would ensure that the sentencing options for federal offenders are uniform and remain stable over time. However, it would require considerable resources to make the various sentencing options available to federal offenders in every jurisdiction.

7.121 In addition, in relation to some sentencing options, it is unclear whether s 120 of the *Australian Constitution*—which directs states to accommodate federal offenders in their prisons—would allow the Australian Government to dictate what those prisons should be like, for example, by requiring facilities appropriate for periodic detention of federal offenders.

7.122 These problems could be overcome by curtailing the sentencing options available for federal offenders. For example, federal sentencing legislation could provide for only a limited range of sentencing options that would require no additional resources to implement, such as fines, discharges, suspended sentences and imprisonment.

7.123 Submissions and consultations revealed limited support for federal prescription of sentencing options.<sup>220</sup> Professor Freiberg commented that it would be impracticable to attempt to create and administer intermediate federal sentencing options without a completely separate federal criminal justice system.<sup>221</sup> The CDPP noted that while federal prescription of sentencing options would assist in achieving uniformity of treatment of federal offenders, there were practical difficulties with such a scheme, which included the associated costs of administration.<sup>222</sup> In addition, a number of stakeholders expressed the view that judicial officers should have a wide range of sentencing options at their disposal when sentencing federal offenders.<sup>223</sup>

7.124 Alternatively, federal sentencing legislation could continue to enable federal offenders to access state and territory sentencing options. This would give due recognition to the fact that different sentencing options are needed to enable a court to impose a sentence that is appropriate to the particular offender. If federal offenders were to continue to access state and territory sentencing options, s 20AB could be

219 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.

220 LD, *Submission SFO 9*, 10 March 2005; JC, *Submission SFO 25*, 13 April 2005.

221 A Freiberg, *Submission SFO 12*, 4 April 2005.

222 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

223 Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005.

expanded to include all existing sentencing options available in the states and territories. Alternatively, an ambulatory provision could be drafted, which would pick up all state and territory options as they exist from time to time.

7.125 Submissions and consultations showed some support for complete reliance on state and territory sentencing options.<sup>224</sup> Sisters Inside Inc submitted that all non-custodial sentencing options available in the states and territories should be made available to federal offenders.<sup>225</sup> However, the AGD commented that not all sentencing options would be suitable for federal offenders and expressed concern that states and territories could develop sentencing options that were inconsistent with Australia's international obligations.<sup>226</sup>

7.126 Another option would be to retain the current mechanism by which regulations prescribe the state and territory sentencing options available to federal offenders. This would ensure that the Australian Government retained an element of control over the sentencing options for federal offenders. A substantial number of stakeholders expressed support for this option.<sup>227</sup> The CDPP submitted that the range of sentencing options currently available for federal offenders should remain available, and that new state and territory sentencing options should be assessed before being picked up at the federal level.<sup>228</sup> ASIC also expressed the view that the Australian Government should evaluate state and territory sentencing options before making them available for federal offenders, noting that it may be inappropriate for sentencing options to be made available for federal offenders until they are available in a reasonable number of jurisdictions.<sup>229</sup> Associate Professor John Willis submitted that federal sentencing options should be listed in regulations or some other legislative instrument that could be amended readily in order to accommodate the mutability of state and territory sentencing practices.<sup>230</sup>

### ALRC's views

7.127 As discussed in Chapter 3, equality of treatment of federal offenders is an important goal to be pursued in the sentencing of federal offenders wherever

224 Victoria Legal Aid, *Submission SFO 70*, 9 February 2006 (if suspended sentences remain available in Victoria); Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005; Confidential, *Consultation*, Melbourne, 31 March 2005.

225 Sisters Inside Inc, *Submission SFO 98*, 6 April 2006.

226 Attorney-General's Department, *Consultation*, Canberra, 16 March 2005.

227 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; Attorney-General's Department, *Submission SFO 83*, 15 February 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006; J Willis, *Submission SFO 74*, 10 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006.

228 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

229 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.

230 J Willis, *Submission SFO 20*, 9 April 2005.

practicable. However, it is not practicable for the Australian Government to create and administer new sentencing options for federal offenders, or to develop infrastructure to make existing sentencing options available in all jurisdictions, given the relatively small number of federal offenders dispersed throughout Australia.

7.128 Further, it would be a retrograde step and inconsistent with international standards to limit severely the sentencing options available for federal offenders in an attempt to achieve inter-jurisdictional equality. For sentencing practices to be just and fair, and for the sentencing principles of proportionality, parsimony and individualised justice to have an application in reality, it is essential that courts sentencing federal offenders have a wide range of sentencing options at their disposal.

7.129 However, it is not appropriate to rely automatically and without further inquiry on the sentencing options that happen to be available in the states and territories. As discussed in Chapter 22, the Australian Government has an obligation to ensure that practices relating to the sentencing, administration and release of federal offenders are just and efficient. Some state and territory sentencing options may be unsuitable for federal offenders or may be undesirable if they conflict with international obligations.

7.130 Accordingly, the current mechanism by which federal legislation and regulations pick up state and territory sentencing options should be retained. However, there are ways of achieving greater equality in the treatment of federal offenders while utilising this mechanism. To this end, the OMFO should monitor and evaluate the use and effectiveness of state and territory sentencing options.<sup>231</sup> A body such as the OMFO is needed to assess new sentencing options as they are developed and implemented by state and territory governments, and to evaluate established sentencing options that are currently unavailable to federal offenders. When evaluating state and territory sentencing options the OMFO should consider how widely the options are available, as this may be indicative of their effectiveness or community acceptance. The OMFO should then provide advice to the Australian Government regarding the sentencing options that should be made available to federal offenders.

7.131 In addition, the OMFO should be given the task of reviewing the terms of the sentencing options, such as the maximum hours of community service, and advising the Australian Government about appropriate national limits in relation to sentencing options. This would ensure that the sentencing options available for federal offenders are imposed and administered consistently across the jurisdictions.

<p><b>Recommendation 7–13</b> Federal sentencing legislation and regulations should specify exhaustively which state or territory sentencing options may be picked up and applied in sentencing a federal offender.</p>
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231 The OMFO is discussed in Ch 22.

**Recommendation 7–14** The OMFO should monitor the effectiveness and suitability of state and territory sentencing options for federal offenders and should provide advice to the Australian Government regarding the state and territory sentencing options that should be made available for federal offenders.

**Recommendation 7–15** In monitoring state and territory sentencing options in accordance with Recommendation 7–14, the OMFO should:

- (a) review the maximum number of hours of community service and the maximum time within which such service must be completed in each state and territory; and
- (b) advise the Australian Government about appropriate national limits in relation to community based orders and other sentencing options available under state and territory law.

## Prohibited sentencing options

7.132 The state's power to sentence an offender should be limited. The international community has developed a number of binding international instruments dealing with the imposition of punishment by the state, such as the *International Covenant on Civil and Political Rights 1966* (ICCPR)<sup>232</sup> and the *Second Optional Protocol to that Covenant on the abolition of the death penalty*,<sup>233</sup> the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984* (CAT),<sup>234</sup> and the *Convention on the Rights of the Child 1989*.<sup>235</sup> Australia is a party to all these instruments and any federal, state or territory legislation, policy or practice that is inconsistent with them will place Australia in breach of its international obligations.

7.133 There are four types of punishment that are questionable when measured against these international norms. These are:

- capital punishment;

232 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976).

233 *Second Optional Protocol to the International Covenant on Civil and Political Rights*, 15 December 1989, [1991] ATS 19, (entered into force generally on 11 July 1991).

234 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, [1989] ATS 21, (entered into force generally on 26 June 1987).

235 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990).

- corporal punishment;
- imprisonment with hard labour; and
- other cruel, inhuman or degrading punishment.

7.134 Capital punishment is a term used to describe all state sanctioned executions.<sup>236</sup> Capital punishment was abolished for federal offenders in 1973<sup>237</sup> and for all state and territory offenders by 1985.<sup>238</sup> Currently, over half the countries in the world have abolished capital punishment in either law or practice.<sup>239</sup> Capital punishment potentially violates two universally recognised human rights, the right to life and the right not to be subjected to cruel, inhuman or degrading punishment.<sup>240</sup> Australia is a party to the Second Optional Protocol to the ICCPR on the abolition of the death penalty.

7.135 Corporal punishment involves the infliction of pain on an offender's body. While capital punishment is a form of corporal punishment, the term is generally used to refer to less severe forms of physical punishment such as whipping and branding. Corporal punishment potentially violates art 7 of the ICCPR, which prohibits the imposition of 'cruel, inhuman or degrading treatment or punishment'.<sup>241</sup> Some forms of corporal punishment could also constitute torture.<sup>242</sup> Corporal punishment is no longer authorised in any Australian jurisdiction<sup>243</sup> and s 16D(1) of the *Crimes Act* explicitly prohibits the imposition of corporal punishment on any offender found guilty of a federal offence.

7.136 Imprisonment with hard labour is a sentencing option that was introduced in the United Kingdom in 1779.<sup>244</sup> Offenders sentenced to imprisonment with hard labour

236 I Potas and J Walker, *Capital Punishment—Trends and Issues in Crime and Criminal Justice No 3*, Australian Institute of Criminology, 1.

237 *Death Penalty Abolition Act 1973* (Cth) s 4.

238 I Potas and J Walker, *Capital Punishment—Trends and Issues in Crime and Criminal Justice No 3*, Australian Institute of Criminology, 1–2.

239 Amnesty International, *Abolitionist and Retentionist Countries* Amnesty International <[www.web.amnesty.org/pages/deathpenalty-countries-eng](http://www.web.amnesty.org/pages/deathpenalty-countries-eng)> at 20 September 2005.

240 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) arts 6, 7; *Second Optional Protocol to the International Covenant on Civil and Political Rights*, 15 December 1989, [1991] ATS 19, (entered into force generally on 11 July 1991); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, [1989] ATS 21, (entered into force generally on 26 June 1987).

241 *United Nations Human Rights Committee General Comment 20: Article 7*, UN Doc HRI/GEN/1/Rev7 (1992), [5]; *Osbourne v Jamaica, Communication No 759/1997, Report of the Human Rights Committee 2000 (Volume II)*, UN Doc A/55/40 (2000).

242 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, [1989] ATS 21, (entered into force generally on 26 June 1987) art 1.1.

243 The last officially sanctioned whipping is believed to have occurred in 1958: Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [39], [63]–[65].

244 Home Office, *Prisons Over Two Centuries* (2005) Home Office <[www.homeoffice.gov.uk/docs/prishist.html](http://www.homeoffice.gov.uk/docs/prishist.html)> at 20 September 2005.



were required to dredge the river Thames and later to work the crank or treadwheel in prison.<sup>245</sup> Hard labour was abolished in the United Kingdom in 1948.<sup>246</sup> Imprisonment with hard labour is not prohibited under the ICCPR.<sup>247</sup> Although hard labour has been abolished in several Australian states and territories,<sup>248</sup> s 18 of the *Crimes Act* currently provides that a period of imprisonment imposed for any federal offence may be imposed ‘with or without hard labour’, unless the contrary intention appears.

7.137 The right to freedom from cruel, inhuman or degrading treatment or punishment is a fundamental human right from which there can be no derogation, not even in times of public emergency.<sup>249</sup> The words ‘cruel’, ‘inhuman’ and ‘degrading’ are not defined in the ICCPR or CAT but they extend beyond acts causing physical pain to acts causing mental suffering.<sup>250</sup> The right to freedom from cruel, inhuman or degrading punishment is a right that recognises and protects the inherent dignity and integrity of every human being.

7.138 In DP 70 the ALRC proposed that federal sentencing legislation explicitly prohibit the above forms of punishment.<sup>251</sup> A number of stakeholders supported this proposal.<sup>252</sup> However, the AGD submitted that Australia already complies with its international obligations under the ICCPR and CAT. It submitted it was unnecessary for federal sentencing legislation to prohibit capital punishment because it is already prohibited under the *Death Penalty Abolition Act 1973* (Cth). It submitted that corporal punishment is prohibited by a provision of the *Crimes Act* and that this prohibition could be replicated in any new federal sentencing Act; and that torture and cruel, inhuman or degrading treatment is prohibited by a range of provisions in existing Commonwealth and state legislation. It submitted that it was unnecessary to prohibit explicitly hard labour or cruel, inhuman or degrading punishment in federal sentencing legislation in order for Australia to comply with its international legal obligations.

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245 Ibid.

246 *Criminal Justice Act 1948* (UK).

247 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) art 8(3)(b).

248 *Crimes Act 1900* (ACT) s 580G; *Criminal Law (Sentencing) Act 1988* (SA) s 73; *Criminal Law (Amendment) Act 1992* (WA).

249 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) arts 4(1), (2), 7; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, [1989] ATS 21, (entered into force generally on 26 June 1987) art 16.

250 *United Nations Human Rights Committee General Comment 20: Article 7*, UN Doc HRI/GEN/1/Rev7 (1992), [5].

251 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 7–14.

252 Sisters Inside Inc, *Submission SFO 98*, 6 April 2006; Law Council of Australia, *Submission SFO 97*, 17 March 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

### ALRC's views

7.139 The ALRC is of the view that federal sentencing legislation should expressly state that sentences involving capital punishment, corporal punishment, hard labour, or any other form of cruel, inhuman or degrading punishment are prohibited in relation to federal offenders. Capital punishment is an invidious practice that has no place in an enlightened regime for the sentencing of federal offenders. Imprisonment with hard labour and corporal punishment are also anachronistic sentences, reminiscent of an age when punishments were brutal and abhorrent. Further, specifically prohibiting cruel, inhuman or degrading punishments will amount to partial domestic implementation of Australia's international obligations under the ICCPR and CAT. The ALRC considers it logical and desirable to state expressly all of the sentencing options that are unavailable to federal offenders. All provisions relating to federal sentencing should be consolidated into a single Act. In addition, it is important that federal sentencing legislation highlight the need to protect the fundamental human rights of federal offenders.

**Recommendation 7–16** Federal sentencing legislation should state that the following sentencing options are prohibited in relation to federal offenders:

- (a) capital punishment;
- (b) corporal punishment;
- (c) imprisonment with hard labour; and
- (d) any other form of cruel, inhuman or degrading punishment.

### Sentencing hierarchies

7.140 The creation of a sentencing hierarchy requires the sentencing options available to the court to be ranked in order of severity. It has been argued that sentencing hierarchies help to ensure sentences are consistent by providing guidance as to the relative severity of sentencing options.<sup>253</sup> However, it has also been argued that it is impracticable and undesirable to attempt to rank sentences in terms of severity.<sup>254</sup>

253 Council of Europe, *Consistency in Sentencing* (1993) Council of Europe Press, 29; A Freiberg and R Fox, 'Sentencing Structures and Sanction Hierarchies' (1986) 10 *Criminal Law Journal* 216; Victorian Sentencing Committee, *Sentencing* (1988), 363–364.

254 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991) Attorney-General's Department, [16.10]; Criminal Law and Penal Methods Reform Committee of South Australia, *First Report: Sentencing and Corrections* (1973), [3.8].

Sentencing hierarchies have been developed in Victoria and Western Australia.<sup>255</sup> It is not clear whether they have had any impact on consistency in sentencing.<sup>256</sup>

7.141 Part IB of the *Crimes Act* does not set out a hierarchy of sentencing options although it does provide that imprisonment is to be the sanction of last resort.<sup>257</sup> In its 1987 Discussion Paper on sentencing options, the ALRC explored the possibility of a hierarchy of sanctions and potential models for such a hierarchy.<sup>258</sup> However, ALRC 44 did not pursue any proposal in relation to a sanction hierarchy.

7.142 In this Inquiry, differing opinions were expressed about the desirability of creating a federal sentencing hierarchy. Some stakeholders supported the idea.<sup>259</sup> It was argued that a sentencing hierarchy could promote consistency in sentencing.<sup>260</sup> However, Professor Freiberg submitted that sentencing hierarchies did not necessarily enhance consistency, but instead were a valuable way of promoting the principle of parsimony.<sup>261</sup> Other stakeholders were opposed to the idea of a sentencing hierarchy.<sup>262</sup> It was submitted that case law already provides guidance on the relative severity of sentencing options and that the creation of a legislative hierarchy would unduly fetter the sentencing discretion.<sup>263</sup> It was also noted that a federal sentencing hierarchy could conflict with state or territory sentencing provisions.<sup>264</sup>

7.143 Others stakeholders were more ambivalent about the creation of a sentencing hierarchy, commenting that while such a development could be useful it would be difficult to implement in practice because it was hard to compare the severity of sentences.<sup>265</sup> Some suggested this could be overcome by grouping different sentencing options together in the hierarchy rather than attempting to compare and rank the severity of every sentencing option.<sup>266</sup>

255 *Sentencing Act 1991* (Vic) s 5(3)–(7); *Children and Young Persons Act 1989* (Vic) ss 137–138; *Sentencing Act 1995* (WA) s 39. See also *Defence Force Discipline Act 1982* (Cth) ss 68, 68A.

256 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.204].

257 *Crimes Act 1914* (Cth) s 17A.

258 Australian Law Reform Commission, *Sentencing: Penalties*, DP 30 (1987), [138]–[156].

259 JC, *Submission SFO 25*, 13 April 2005; LD, *Submission SFO 9*, 10 March 2005; Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005; Confidential, *Consultation*, Melbourne, 31 March 2005.

260 K Warner, *Consultation*, Hobart, 13 April 2005; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.

261 A Freiberg, *Submission SFO 12*, 4 April 2005.

262 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; J Willis, *Submission SFO 20*, 9 April 2005.

263 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.

264 J Willis, *Submission SFO 20*, 9 April 2005.

265 K Warner, *Consultation*, Hobart, 13 April 2005; Attorney-General's Department, *Consultation*, Canberra, 16 March 2005.

266 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; Attorney-General's Department, *Consultation*, Canberra, 16 March 2005.

7.144 The CDPP submitted that sentencing options could have different effects on different offenders and that a strict legislative hierarchy could limit the court's flexibility to consider the individual circumstances of an offender.<sup>267</sup> However, the CDPP suggested that federal sentencing legislation could be structured to reflect the following broad hierarchy of sentencing options:

- non-conviction bond;
- conviction bond;
- fine;
- community service and like orders;
- suspended sentence;
- imprisonment involving a component of custody including home detention and periodic detention;
- imprisonment involving full-time custody.

#### **ALRC's views**

7.145 Subject to the view that imprisonment should be a sentencing option of last resort, the ALRC does not consider that federal sentencing legislation should include any further hierarchy of sentencing options. The severity of a sentence must always depend on the circumstances of the individual offender. For example, a large fine would be a more severe sentence for an impecunious offender than for a wealthy one; a sentence of home detention would be a more severe sentence for an offender living in meagre circumstances than for an offender with a luxurious home; and a sentence of periodic detention would be a more severe sentence for an offender whose employment was disrupted by the detention than for an offender whose employment was unaffected by the sentence. In addition, the severity of any sentence depends on its quantum. For example, a large fine could be more severe than a short period of community service, and a lengthy period of community service could be more severe than a short period of periodic detention.

7.146 The ALRC is not persuaded that the principle of parsimony is better served by the creation of a sentencing hierarchy. The principle of parsimony prevents a court from imposing a sanction that is more severe than is necessary to achieve the purpose

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<sup>267</sup> Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005. A similar view was expressed by ASIC: Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.

or purposes of the sentence. Whether or not a sentence is more severe than necessary must be determined in light of all the circumstances of the case.

7.147 In any event, a sentencing hierarchy would be impractical and undesirable in the federal context. First, a federal sentencing hierarchy could conflict with state or territory sentencing hierarchies, causing unnecessary confusion about the actual severity of similar sentencing options and unwarranted disparity in federal and state and territory sentencing practices. Secondly, it would be difficult to devise a federal sentencing hierarchy given the diverse range of state and territory sentencing options available to federal offenders—a problem that is not encountered to the same degree within an individual state or territory. This problem would be exacerbated by the variations in the structure of ostensibly identical sentencing options between jurisdictions. Finally, the severity of a sentencing option that is available in two or more jurisdictions may depend on the manner in which the option is administered in the state or territory. For example, periodic detention could be a more severe sentence in a jurisdiction in which offenders are required to travel long distances to attend the detention centre than in a jurisdiction in which periodic detention was readily available in a number of convenient locations.

7.148 For these reasons the ALRC is of the view that courts should retain a broad discretion to impose a sentence that is appropriate in all the circumstances of the case and should not be required to impose sentences in accordance with a legislative sentencing hierarchy.

### Penalty conversions

7.149 Provisions creating federal offences specify the maximum penalty for the offence, which is intended for the worst type of case covered by the offence.<sup>268</sup> Section 4B(2) of the *Crimes Act* sets out a formula that can be applied to determine the maximum pecuniary penalty for an offence where the provision creating the offence refers only to a penalty of imprisonment. In addition, s 4B(3) provides that the maximum pecuniary penalty that can be imposed on a body corporate convicted of an offence is five times the maximum pecuniary penalty that can be imposed on a natural person convicted of the same offence, and s 4B(2A) states that if an offence provides for imprisonment for life, the court may impose a maximum pecuniary penalty of 2,000 penalty units.<sup>269</sup>

7.150 Section 4B was introduced into the *Crimes Act* in 1987.<sup>270</sup> Prior to its introduction, legislative penalties for federal offences of comparable severity were

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268 *Ibbs v The Queen* (1987) 163 CLR 447, 451–452; *Veen v The Queen [No 2]* (1988) 164 CLR 465, 478.

269 A penalty unit is \$110: *Crimes Act 1914* (Cth) s 4AA.

270 *Crimes Legislation Amendment Act 1987* (Cth).

inconsistent.<sup>271</sup> Section 4B provides a mechanism for ensuring that offences of comparable severity—that is, offences attracting the same maximum period of imprisonment—attract the same maximum fine if none is prescribed. It also gives effect to the policy that imprisonment should never be the sole option available to a court sentencing a federal offender.

7.151 Some stakeholders expressed support for the idea of enabling conversion between sentencing options after the imposition of a sentence.<sup>272</sup> However, others were concerned that allowing conversion between sentencing options would in effect allow offenders to choose their sentence, thereby derogating from the court's authority to impose an appropriate sentence in all the circumstance of the case.<sup>273</sup> ASIC expressed the concern that offenders who engaged in corporate crime were often well resourced and would not be appropriately punished if they were able to convert a sentence of imprisonment to a financial penalty.<sup>274</sup>

7.152 Associate Professor Willis emphasised that s 4B of the *Crimes Act* does not provide for conversion of penalties but instead provides a formula to determine the *maximum* fine for an offence if the offence provision only refers to imprisonment.<sup>275</sup>

### ALRC's views

7.153 Section 4B of the *Crimes Act* does not enable the court to convert one particular sentence into another. Instead, it enables the court to determine the maximum fine that can be imposed for certain federal offences. It provides a mechanism for ensuring maximum monetary penalties for federal offences are fixed in a rational, consistent and coherent manner. Submissions and consultations did not identify any difficulty with the operation of s 4B and the ALRC is of the view that this provision should remain in federal sentencing legislation.

7.154 It is unnecessary and impracticable to attempt to devise other formulae to determine other maximum penalties when sentencing federal offenders. Most sentencing options available to federal offenders are already limited in duration. For example, community service orders in New South Wales cannot exceed 500 hours.<sup>276</sup> While the maximum duration of similar sentencing options can differ between jurisdictions, the ALRC has recommended that the OMFO should advise the Australian Government on appropriate national limits for these sentencing options to enhance

271 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [409]–[426].

272 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; JC, *Submission SFO 25*, 13 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; LD, *Submission SFO 9*, 10 March 2005.

273 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; T Glynn, *Consultation*, Brisbane, 2 March 2005.

274 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.

275 J Willis, *Submission SFO 20*, 9 April 2005.

276 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8.

consistency in sentencing federal offenders.<sup>277</sup> While creating further formulae to determine other maximum penalties would perhaps provide a greater degree of consistency in the sentencing of federal offenders, it would also make federal sentencing legislation undesirably complex. The ALRC has recommended other methods for enhancing consistency in sentencing.<sup>278</sup>

7.155 Judicial officers should retain the ultimate responsibility for imposing appropriate sentences after considering the purposes, principles and factors of sentencing and the factors relevant to the administration of the criminal justice system. Accordingly, offenders should not be entitled to convert between sentencing options once a sentence has been imposed.

## Restorative justice

7.156 As discussed in Chapter 4 of this Report, restorative justice can be defined broadly as an approach to crime that focuses on repairing the harm caused by criminal activity and addressing the underlying causes of criminal behaviour. Restorative justice initiatives can be employed at any stage in the criminal justice process, including the sentencing stage. Some examples of restorative justice initiatives are victim-offender mediation and conferencing. While restorative justice initiatives were originally developed for young offenders, they are becoming increasingly available for adult offenders. For example, a restorative justice scheme for adult offenders has recently been established in the ACT.<sup>279</sup>

7.157 As discussed above, s 20AB of the *Crimes Act* provides that certain sentencing options can be picked up and applied to federal offenders. The sentencing options listed in s 20AB are: community service orders, work orders, attendance centre orders, attendance orders, and sentences of periodic and weekend detention. Other sentencing options are prescribed in regulations. Section 20AB also provides that sentencing options of a ‘similar’ nature to the ones listed in s 20AB or prescribed in the regulations can also be picked up and applied to federal offenders. It is unlikely that restorative justice initiatives could be picked up in this way because they are not sufficiently similar to the existing sentencing options, not least because they are interim rather than final in nature.<sup>280</sup>

7.158 Section 68(1) of the *Judiciary Act 1903* (Cth) picks up and applies state and territory procedural laws to federal prosecutions in state and territory courts. However, the distinction between what is ‘procedural’ and what is ‘substantive’ is not always

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277 See Rec 7–15.

278 These are discussed in Chs 20 and 21.

279 *Crimes (Restorative Justice) Act 2004* (ACT).

280 *Director of Public Prosecutions (Cth) v Costanzo* [2005] QSC 79, [25].

clear. It is possible that some restorative justice initiatives could be procedural, but this would need to be determined by the courts on a case-by-case basis. Section 79 of the *Judiciary Act* picks up and applies to a court exercising federal jurisdiction certain state and territory procedural laws, except in so far as they are inconsistent with the *Australian Constitution* or with other federal laws. However, as these laws are picked up with their meaning unchanged, they cannot be given a different meaning in the federal context.<sup>281</sup> Therefore, it is possible that some state or territory laws relating to restorative justice initiatives may not be capable of being picked up and applied to federal offenders. For example, a state or territory law could limit access to a restorative justice initiative to state or territory offenders.<sup>282</sup>

7.159 Some stakeholders expressed support for the utilisation of restorative justice initiatives when sentencing federal offenders.<sup>283</sup> One stakeholder expressed the view that restorative justice initiatives in the ACT could be effective in situations where there was an individual victim of a federal crime.<sup>284</sup> The Law Council of Australia submitted that state and territory legislation governing the use of restorative justice initiatives might need to be amended to enable federal offenders to access the initiatives.<sup>285</sup> Professor Freiberg commented that establishing such initiatives for federal offenders would require additional resources.<sup>286</sup>

### ALRC's views

7.160 Given the relatively small number of federal offenders and the significant resources that would be required to establish and operate restorative justice initiatives, the ALRC considers it preferable to facilitate access by federal offenders to existing state and territory initiatives. In some cases it may be possible to facilitate access by amending federal sentencing legislation. In other cases it may be necessary for state and territory governments to amend their legislation to enable federal offenders to access these initiatives. There may also be practical impediments to enabling federal offenders to access restorative justice initiatives, such as funding arrangements. Accordingly, a collaborative effort by the Australian Government and state and territory governments will be necessary to ensure that federal offenders have access to state and territory restorative justice initiatives. Any matter referred from the court to a restorative justice initiative must be referred back to the court for determination because the *Australian Constitution* precludes a non-judicial body from exercising federal judicial power.

281 See, eg, *Solomons v District Court of New South Wales* (2002) 211 CLR 119.

282 See, eg, *Crimes (Restorative Justice) Act 2004* (ACT) s 12, 19.

283 Law Council of Australia, *Submission SFO 97*, 17 March 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; Prison Reform Group WA, *Consultation*, Perth, 18 April 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005.

284 Restorative Justice Unit Department of Justice & Community Safety ACT, *Consultation*, Canberra, 13 February 2006.

285 Law Council of Australia, *Submission SFO 97*, 17 March 2006.

286 A Freiberg, *Submission SFO 12*, 4 April 2005.



**Recommendation 7–17** The Australian Government should collaborate with state and territory governments to facilitate access by federal offenders to state or territory restorative justice initiatives in appropriate circumstances. Where a court refers a federal offender to a restorative justice initiative, the outcome of the process must be reported back to the court and the court must finalise the matter after taking into consideration the outcome of the process.



## 8. Ancillary Orders

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### Introduction

8.1 This chapter examines the nature and effectiveness of the provisions of Part IB of the *Crimes Act 1914* (Cth) relating to ancillary orders. Ancillary orders are orders made at the time of sentencing that do not have a punitive purpose, such as orders for restitution, compensation, forfeiture or costs.<sup>1</sup>

8.2 Forfeiture orders are made pursuant to federal proceeds of crime legislation and are often made independently of the sentencing process.<sup>2</sup> Accordingly, they are not discussed further in this chapter, although they may be relevant to the sentence imposed on a federal offender.<sup>3</sup>

### Clarification of terminology

8.3 Reparation is a broad term used to describe any attempt to make amends for a wrong or injury. It encompasses both restitution and compensation.<sup>4</sup> Restitution in the criminal context refers to the return to its owner of the exact property taken by an offender. Compensation refers to the provision of monetary or other recompense by the offender to another for any loss, damage or injury suffered as a result of a crime.<sup>5</sup>

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1 K Warner, *Sentencing in Tasmania* (2nd ed, 2002), [5.101].

2 *Proceeds of Crime Act 2002* (Cth).

3 The *Proceeds of Crime Act 2002* (Cth) and forfeiture orders are discussed further in Chs 2 and 6.

4 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [5.102].

5 *Ibid*, [5.102].

8.4 The terminology used in the *Crimes Act* in relation to reparation orders is confusing. Some provisions of the Act refer to reparation only,<sup>6</sup> while others refer to reparation, restitution and compensation simultaneously.<sup>7</sup> The terms reparation, restitution and compensation are not defined in the Act and the relationship between them is uncertain. At times the terms appear to be used interchangeably.

8.5 It has been argued that the word ‘reparation’ in the *Crimes Act* could be broad enough to encompass some forms of restorative labour or community service.<sup>8</sup> The ambiguous language used in certain provisions of the Act could support this argument.

### ***ALRC’s views***

8.6 The ALRC is of the view that federal sentencing legislation should omit all references to reparation and replace them with the words ‘restitution’ and ‘compensation’. Restitution and compensation should be defined appropriately in the legislation. This will eliminate any confusion arising from the inconsistent use of these terms. It will also prevent the use of the ancillary orders power in Part IB to impose orders that are not strictly ancillary, such as orders for community service. However, for convenience the term ‘reparation’ will be used in the remainder of this chapter to refer to both restitution and compensation because this is the terminology currently used in the *Crimes Act*.

**Recommendation 8–1** Federal sentencing legislation should replace the term ‘reparation’ with the terms ‘restitution’ and ‘compensation’, and define them appropriately.

### **Availability of reparation orders in criminal proceedings**

8.7 Section 21B of the *Crimes Act* was introduced in 1926<sup>9</sup> and is the main provision enabling judicial officers to make reparation orders when sentencing federal offenders. Section 21B(1)(c) provides that a judicial officer may order a federal offender to make reparation to the Commonwealth, or to a public authority under the Commonwealth, for any loss suffered or expense incurred by reason of the offence. Section 21B(1)(d) provides that a judicial officer may order a federal offender to make reparation to a person who has suffered loss as a direct result of the offence.

<sup>6</sup> See, eg, *Crimes Act 1914* (Cth) s 16A(2)(f)(i).

<sup>7</sup> Ibid ss 16BA(5), 19B(1)(d)(ii), 20(1)(ii), 20AB(4)(b).

<sup>8</sup> R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [5.209].

<sup>9</sup> *Crimes Act 1926* (Cth).

8.8 Other provisions of Part IB empower judicial officers to make reparation orders in certain circumstances, such as when taking other offences into account on sentence or imposing state or territory sentencing options pursuant to s 20AB.<sup>10</sup>

8.9 In 2003–04 the Commonwealth Director of Public Prosecutions obtained reparation orders to the value of \$34,905,838 and in 2004–05 to the value of \$37,077,453.<sup>11</sup>

8.10 All states and territories have legislation enabling criminal courts to make reparation orders when sentencing offenders.<sup>12</sup> The *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* states that offenders should, where appropriate, make fair restitution to victims, their families or dependants.<sup>13</sup> It also provides that victims of crime should be able to obtain redress through judicial and administrative procedures that are expeditious, fair, inexpensive and accessible.<sup>14</sup> Administrative procedures include statutory schemes such as that provided under the *Social Security Act 1991* (Cth) for repayment of overpaid social security benefits through deductions from future social security payments or arrangements to repay the debt by instalments.

8.11 Some submissions expressed support for the retention of provisions enabling reparation orders to be made.<sup>15</sup> The Australian Securities and Investments Commission submitted that reparation orders help to alleviate the financial loss suffered by victims of financial crime, and emphasise to the offender and the community that financial crimes are harmful and serious.<sup>16</sup> The Australian Taxation Office (ATO) submitted that the Australian Government Investigation Standards required investigating agencies to attempt to recover the proceeds of fraud against the Commonwealth, and that ancillary orders provided a means of establishing a legally enforceable civil debt against an offender without the need for separate civil action.<sup>17</sup>

### ***ALRC's views***

8.12 In 1988 the ALRC's report, *Sentencing*, (ALRC 44) recommended that ancillary orders for restitution and compensation should continue to be available in the sentencing of federal offenders.<sup>18</sup> The ALRC remains of the view that federal

10 *Crimes Act 1914* (Cth) ss 16BA(5), 20AB(4)(b).

11 Commonwealth Director of Public Prosecutions, *Annual Report 2004–05* (2005), 41.

12 *Criminal Procedure Act 1986* (NSW) s 43; *Victims Support and Rehabilitation Act 1996* (NSW) ss 71, 77B; *Sentencing Act 1991* (Vic) pt 4; *Penalties and Sentences Act 1992* (Qld) s 35; *Sentencing Act 1995* (WA) s 111; *Criminal Law (Sentencing) Act 1988* (SA) ss 52, 53; *Sentencing Act 1997* (Tas) ss 65, 68; *Crimes (Sentencing) Act 2005* (ACT) s 18; *Sentencing Act 1995* (NT) s 88.

13 *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc A/Res/40/34 (1985), [8].

14 *Ibid*, [5].

15 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005.

16 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.

17 Australian Taxation Office, *Submission SFO 18*, 8 April 2005.

18 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 85, [141]–[142].

sentencing legislation should continue to enable judicial officers to make reparation orders when sentencing federal offenders. Reparation orders are an established and effective way of recognising the interests and needs of victims of crime. Empowering a court to make reparation orders provides victims of crime (whether individuals or institutions) with a statutory remedy that aims to restore victims to the position they were in prior to the offence, in so far as money can do so. It also promotes the effective use of judicial resources by eliminating the need for separate civil and criminal proceedings in relation to the same conduct.

8.13 As discussed below, the ALRC considers that reparation orders should retain their civil status and should be enforced civilly. Accordingly, empowering judicial officers to make reparation orders when sentencing federal offenders will not undesirably conflate civil and criminal proceedings.

### **Reparation as a sentencing option**

8.14 Many criminal offences also constitute civil wrongs that give rise to civil liability. For example, the crime of assault can also constitute the tort of battery.<sup>19</sup> Although one act may give rise to both criminal and civil liability, the criminal law and the civil law have historically pursued very different objectives. The criminal law is primarily concerned with punishment, while the civil law is primarily concerned with compensation.<sup>20</sup> Statutory provisions enabling a criminal court to order that an offender make reparation have traditionally been viewed as a means of providing a victim with a ‘quick and easy civil remedy’.<sup>21</sup>

8.15 Several provisions of Part IB of the *Crimes Act* suggest that reparation orders are intended to enable victims of crime to achieve quick and easy civil remedies. This is evident from the fact that: reparation orders may be made ‘in addition to the penalty’ imposed on the offender; reparation orders are enforced as civil debts; and federal offenders cannot be imprisoned for failure to comply with a reparation order.<sup>22</sup>

8.16 A number of state and territory jurisdictions characterise reparation orders as civil orders.<sup>23</sup> However, in some jurisdictions reparation orders can be imposed as independent sentencing options.<sup>24</sup> The *United Nations Declaration of Basic Principles*

19 R Balkin and J Davis, *Law of Torts* (3rd ed, 2004), [1.5].

20 K Mann, ‘Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law’ (1992) 101 *Yale Law Journal* 1795, 1796.

21 V Morabito, ‘Compensation Orders Against Offenders: An Australian Perspective’ (2000) 4 *Singapore Journal of International and Comparative Law* 59, 86; Law Reform Committee—Parliament of Victoria, *Restitution for Victims of Crime*, Interim (1993), [2.34]–[2.35].

22 *Crimes Act 1914* (Cth) ss 21B, 19B(2A), 20(2A).

23 See, eg, *Victims Support and Rehabilitation Act 1996* (NSW); *Sentencing Act 1991* (Vic) pt 4; *Sentencing Act 1995* (WA) s 110; *Sentencing Act 1997* (Tas) pt 9.

24 See, eg, *Criminal Law (Sentencing) Act 1988* (SA). See also *Crimes (Sentencing) Act 2005* (ACT) ss 19, 20; *Sentencing Act 2002* (NZ) s 12.

*of Justice for Victims of Crime and Abuse of Power* states that governments should consider making restitution a sentencing option.<sup>25</sup>

8.17 It has been argued that reparation orders may achieve some of the purposes of sentencing such as deterrence, rehabilitation and denunciation.<sup>26</sup> Surveys have revealed that victims of crime and the general public view reparation as an important feature of the sentencing process.<sup>27</sup>

8.18 However, it has been argued that reparation orders are inappropriate sentencing options because they are not punitive and seek only to restore the status quo. It has been argued that the appropriate and proportionate sentence for a particular offence will not always be linked to the harm caused by the offence.<sup>28</sup> Further, making reparation orders available as sentencing options would give victims of crime an advantage over civil litigants by enabling reparation orders to be enforced in the criminal justice system.<sup>29</sup>

8.19 In 1994, the Law Reform Committee of the Parliament of Victoria rejected the idea of establishing reparation orders as sentencing options,<sup>30</sup> and in 1996 the New South Wales Law Reform Commission concluded that reparation orders should retain their ancillary status.<sup>31</sup>

8.20 A number of stakeholders expressed the view that reparation orders were analogous to monetary penalties and effectively served to punish offenders twice for the same conduct.<sup>32</sup> Sisters Inside submitted that:

the sentencing process should provide that judges and magistrates *must* consider the issue of reparation for social security offences and include any reparation as part of the sentence for the offence and that the imposition of reparation orders—in social security and other matters—should only be considered where it would not impact negatively on the resettlement and community reintegration of a person sentenced to imprisonment.<sup>33</sup>

25 *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc A/Res/40/34 (1985), [9].

26 A Freiberg and S Glacken, 'Restitution for Victims of Crime: The Convergence of Civil and Criminal Remedies' (1993) 67(9) *Law Institute Journal* 794, 795–796.

27 Law Reform Committee—Parliament of Victoria, *Restitution for Victims of Crime*, Interim (1993), [1.21]–[1.22].

28 A Freiberg and S Glacken, 'Restitution for Victims of Crime: The Convergence of Civil and Criminal Remedies' (1993) 67(9) *Law Institute Journal* 794, 796.

29 *Ibid*, 796.

30 Law Reform Committee—Parliament of Victoria, *Restitution for Victims of Crime*, Final Report (1994), xviii.

31 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [13.2].

32 Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Welfare Rights Centre Inc (Queensland), *Submission SFO 29*, 15 April 2005; JC, *Submission SFO 25*, 13 April 2005; Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005; Prisoners' Legal Service and others, *Consultation*, Brisbane, 4 March 2005.

33 Sisters Inside Inc, *Submission SFO 40*, 28 April 2005.

***ALRC's views***

8.21 Reparation orders should retain their ancillary status and should not be made independent sentencing options. A reparation order, in seeking to restore a victim of crime to his or her situation prior to the offence, does not have a punitive purpose, even though it may cause hardship to the offender.<sup>34</sup> Further, it is not appropriate that an entirely different enforcement regime should apply for victims of crime seeking reparation through the criminal justice system when compared with an applicant seeking reparation through civil litigation.

**Ancillary orders as conditions of sentencing options**

8.22 The *Crimes Act* currently enables reparation and costs orders to be made as conditions of sentencing orders imposed pursuant to ss 19B and 20(1) of the Act. If an ancillary order has been made a condition of a sentencing order, an offender who fails to comply with the ancillary order will be in breach of his or her sentencing order. Accordingly, the original sentencing order imposed on the offender may be revoked and the offender may be re-sentenced for the original offence.<sup>35</sup> However, as mentioned above, a federal offender cannot be imprisoned for failure to comply with an ancillary order that has been imposed as a condition of a federal sentencing order.<sup>36</sup> The ALRC was informed that there are difficulties in enforcing reparation orders that are conditions of federal sentences because Part IB does not enable these orders to be treated as civil debts in the same way that orders made pursuant to s 21B are treated as civil debts.<sup>37</sup>

8.23 Some state and territory sentencing Acts enable reparation orders to be conditions of sentencing orders,<sup>38</sup> while others prohibit this.<sup>39</sup>

***ALRC's views***

8.24 In Chapter 7, the ALRC recommends that federal sentencing legislation should prohibit a court from making a reparation order a condition of a federal offender's discharge, release or suspended sentence.<sup>40</sup> The *Crimes Act* enables judicial officers to make reparation orders in addition to the sentence imposed. These orders are enforced by way of civil enforcement action such as the seizure and sale of land or property, registration of a charge on land, or garnishee of wages.<sup>41</sup> It is incongruous that reparation orders can be attached as conditions of some sentencing options and

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34 The relevance of the means of the offender is discussed further below.

35 *Crimes Act 1914* (Cth) s 20A. Breach of sentencing orders is discussed in Ch 17.

36 *Ibid* ss 19B(2A), 20(2A).

37 Commonwealth Director of Public Prosecutions, *Correspondence*, 21 April 2005.

38 See, eg, *Penalties and Sentences Act 1992* (Qld) ss 94, 104. See also *Crimes (Sentencing) Act 2005* (ACT) s 13(3)(e) (reparation order condition of good behaviour order).

39 See, eg, *Sentencing Act 1995* (WA) s 110(5).

40 See Ch 7.

41 *Crimes Act 1914* (Cth) s 21B(3).



enforced through the breach procedures in the *Crimes Act* when other reparation orders are ancillary to the sentencing process and are enforced as civil debts.

8.25 The ALRC does not consider it desirable to use the criminal justice system to enforce payment of a reparation order by placing offenders at risk of being re-sentenced for failure to make reparation. To require a federal offender to comply with a reparation order as a condition of his or her sentence is to create an undesirable and confusing amalgam of criminal and civil procedures, which should be avoided.

### Relevance of the means of the offender

8.26 Section 16C of the *Crimes Act* requires a court to take into account a federal offender's financial circumstances before imposing a fine. This provision was introduced to 'reduce the likelihood of default imprisonment for impecunious offenders'.<sup>42</sup> There is no legislative requirement that a court take into account the financial circumstances of a federal offender before making a reparation order. In contrast, some state legislation expressly authorises a court to take into account the financial circumstances of an offender before making an order for compensation.<sup>43</sup>

8.27 There has been some debate about the relevance of an offender's financial circumstances to the making of reparation orders. It has been argued that it is inappropriate to take an offender's financial circumstances into account when providing victims of crime with a civil remedy when the offender's financial circumstances would be irrelevant in civil proceedings.<sup>44</sup>

8.28 In *R v Braham*, the Full Court of the Supreme Court of Victoria noted that the power to make a compensation order was intended to enable criminal courts to provide victims of crimes with a civil remedy, and held that the means of an offender should not be considered when exercising the power to make a compensation order unless there was a 'necessary implication to the contrary'.<sup>45</sup> In *R v Knight* the New South Wales Court of Criminal Appeal upheld a reparation order made pursuant to s 21B despite accepting that it was unlikely that the offender would ever be able to pay the amount specified in the order.<sup>46</sup> Further, in *Gregory v Gregory*, Cummins J held that:

differentially to award compensation because of the offender's means to pay gives the wholly undesirable appearance that victims with similar suffering are valued differentially by the law. Just as there should not be one law for the rich and one for the poor, so there should not be a sliding scale of compensation for victims of crime because the offender is rich or poor.<sup>47</sup>

42 Explanatory Memorandum (Senate), Crimes Legislation Amendment Bill (No 2) 1989 (Cth), 8.

43 See, eg, *Sentencing Act 1991* (Vic) s 86(2).

44 V Morabito, 'Compensation Orders Against Offenders: An Australian Perspective' (2000) 4 *Singapore Journal of International and Comparative Law* 59, 98.

45 *R v Braham* [1977] VR 104, 112.

46 *Knight v R* (1990) 51 A Crim R 323, 326.

47 *Gregory v Gregory* (2000) 112 A Crim R 19, 26.

8.29 However, in *Vlahov v Commissioner of Taxation*, the Full Court of the Supreme Court of Western Australia held that a court could consider the personal circumstances and means of the offender when exercising the discretion conferred by s 21B.<sup>48</sup> Appellate courts in some jurisdictions have applied this judgment.<sup>49</sup> It has been noted that the judicial reluctance to order reparation that an offender cannot pay

seems to be as much to do with the court's reluctance to make futile orders or orders that by objective standards are likely to be counterproductive as it is to do with notions of rehabilitation or subjective concern for the wrongdoer's wellbeing.<sup>50</sup>

8.30 The decision in *Vlahov* has been criticised for relying on United Kingdom authorities when legislation in the United Kingdom expressly requires judicial officers to consider the financial circumstances of an offender when making a compensation order.<sup>51</sup> In *R v Hookham* the High Court left open the question of whether the financial circumstances of the offender should be taken into account in determining the quantum of reparation to be made, holding that the question did not properly arise for determination in the matter before the court.<sup>52</sup>

8.31 The New South Wales Legal Aid Commission and Victoria Legal Aid submitted that a court should take into account the financial circumstances of a federal offender before making a reparation order.<sup>53</sup> Victoria Legal Aid submitted that courts should be given clear guidance regarding their power to reduce or waive reparation orders in circumstances where an offender has limited capacity to pay.<sup>54</sup>

8.32 In its 1994 report, *Restitution for Victims of Crime*, the Law Reform Committee of the Parliament of Victoria concluded that sentencing courts should take the financial circumstances of offenders into account when making reparation orders and should decline to make such orders when offenders would be unable to comply with them.<sup>55</sup> In its 1996 report on sentencing, the New South Wales Law Reform Commission concluded that the New South Wales provision enabling courts to make compensation orders when sentencing offenders was broad enough to enable the court to consider an offender's ability to pay when making such an order.<sup>56</sup>

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48 *Vlahov v Federal Commissioner of Taxation* (1993) 93 ATC 4501, 4507.

49 See, *R v Hookham* (1993) 68 A Crim R 129; *Vadasz v Director of Public Prosecutions (Cth)* [1999] SASC 255; *Davies v Taylor* (1997) 7 Tas R 265.

50 *Gould v Commissioner of Taxation (Cth)* (1998) 100 A Crim R 300, 306.

51 V Morabito, 'Compensation Orders Against Offenders: An Australian Perspective' (2000) 4 *Singapore Journal of International and Comparative Law* 59, 95.

52 *Hookham v The Queen* (1994) 181 CLR 450.

53 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005.

54 Victoria Legal Aid, *Submission SFO 31*, 18 April 2005.

55 Law Reform Committee—Parliament of Victoria, *Restitution for Victims of Crime*, Final Report (1994), [3.20].

56 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [13.14].

**ALRC's views**

8.33 The ALRC is of the view that federal sentencing legislation should preclude a court from considering an offender's financial circumstances when making a reparation order. A tension clearly exists between the desire to recognise the civil rights of victims of crime in the sentencing process, on the one hand, and the desire to avoid the making of futile orders or imposing crushing financial burdens on federal offenders, on the other. However, the ALRC does not believe this tension is best resolved by empowering courts to consider factors relevant to sentencing when making ancillary orders.

8.34 A central purpose of the power to make reparation orders is to ensure that victims of crime receive adequate compensation for the loss they have suffered as a result of an offence. This purpose is not effectively achieved if the financial circumstances of an offender are taken into account so as to reduce the quantum of the compensation to be paid to a victim. It is not desirable that victims of crime are awarded less compensation than civil litigants because of the financial circumstances of the offender.

8.35 As discussed in Chapter 7, the ALRC is of the view that s 16C of the *Crimes Act*—which requires a court to take into account an offender's financial circumstances before imposing a fine—enables a court to consider a reparation order that it has made or proposes to make when imposing a fine on a federal offender. This is the appropriate mechanism by which a court can balance the financial burden placed on a federal offender who is ordered to pay a fine and make reparation.

**Priority issues**

8.36 Part IB of the *Crimes Act* does not require a court sentencing a federal offender to give priority to a reparation order over a fine when an offender is ordered to pay both, but lacks the means to do so. In contrast, some state sentencing legislation expressly provides that, where a court considers it appropriate to make a compensation order and impose a fine, and the offender cannot pay both, the court must give priority to the compensation order.<sup>57</sup> One state provision provides that where a court makes a costs recovery order, a compensation order, and imposes a fine, but the offender has insufficient means to pay them all, the court must give first preference to the compensation order, second preference to the costs recovery order, and third preference to the fine.<sup>58</sup>

8.37 In 1987, the ALRC expressed the view that where the means of an offender are limited, priority should be given to reparation.<sup>59</sup> It has been said that giving priority to

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57 *Sentencing Act 1991* (Vic) s 50(4); *Penalties and Sentences Act 1992* (Qld) ss 14, 48(4); *Criminal Law (Sentencing) Act 1988* (SA) s 14; *Sentencing Act 1997* (Tas) s 43; *Sentencing Act 1995* (NT) s 17(3).

58 *Sentencing Act 1991* (Vic) s 87J(3).

59 Australian Law Reform Commission, *Sentencing: Penalties*, DP 30 (1987), [83].

a reparation order over a fine is an acknowledgment that compensating victims is more important than punishing offenders.<sup>60</sup>

8.38 A number of stakeholders expressed the view that federal sentencing legislation should specify that reparation orders take priority over the payment of fines.<sup>61</sup> The ATO submitted that it was necessary to specify priorities between reparation orders and fines in order to ensure that proceeds of crime were not used to pay fines.<sup>62</sup> However, it has been argued that prioritising reparation orders over fines overrides the general principle that these orders are ancillary to the sentencing process.<sup>63</sup>

### ***ALRC's views***

8.39 The ALRC does not believe that federal sentencing legislation should specify priorities between fines and ancillary orders. As discussed above, ancillary orders are compensatory rather than punitive, and they should not be sentencing options in their own right. As noted above, a court is required to take an offender's financial circumstances, including any ancillary order, into account before imposing a fine. This is the appropriate mechanism to allow the court to balance the financial burden placed on a federal offender who is ordered to pay a fine and make reparation.

8.40 While it is important to attempt to ensure that victims of federal offences are restored to the position they were in prior to the offence, this is not the principal function of the criminal justice system. Criminal proceedings are generally initiated and conducted by the state on behalf of the community to vindicate a public wrong. Accordingly, the ALRC considers that ancillary orders should remain separate from, and ancillary to, the sentencing process and should not take priority over sentencing options. If the impecuniosity of federal offenders is a real obstacle to the just compensation of victims of crime, the appropriate solution may be to establish a federal victims compensation fund. That issue is discussed briefly below but a full consideration of the matter is outside the Terms of Reference for this Inquiry.

## **Reparation for non-economic loss**

8.41 Part IB of the *Crimes Act* allows reparation orders to be made in respect of loss suffered or, in some cases, expense incurred as a result of a federal offence. It does not explicitly provide that a reparation order may be made in respect of non-economic loss such as pain and suffering, loss of amenities or loss of expectation of life. However, some provisions of Part IB implicitly accept that injury, which may give rise to non-economic loss, may result from the commission of a federal offence. Section 16A(e) provides that the court is to take into account any 'injury, loss or damage' resulting

60 K Warner, *Sentencing in Tasmania* (2nd ed, 2002), [4.214].

61 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005; Victim Support Service Inc, *Consultation*, Adelaide, 20 April 2005.

62 Australian Taxation Office, *Submission SFO 18*, 8 April 2005.

63 K Warner, *Sentencing in Tasmania* (2nd ed, 2002), [5.307].

from the offence when sentencing a federal offender, and s 16A(f) provides that the court is to take into account the degree to which a person has shown contrition for an offence by taking action to make reparation for any injury, loss or damage resulting from the offence.

8.42 There are currently a number of federal offences that may result in individual victims suffering non-economic loss—for example slavery, sexual servitude and terrorism offences.<sup>64</sup>

8.43 In most states and territories, courts are empowered to direct offenders to pay compensation to victims for injury suffered as a result of an offence.<sup>65</sup> In addition, all states and territories have established statutory criminal injuries compensation schemes that enable victims of crime to receive compensation from public funds.<sup>66</sup> For example, in New South Wales victims of acts of violence can receive compensation from the Victims Compensation Fund for injury and financial loss attributable to the act of violence.<sup>67</sup>

8.44 There is no federal victim compensation scheme. In ALRC 15, the ALRC considered arguments for and against such a scheme and concluded that it was desirable and should be established.<sup>68</sup>

8.45 Victim Support Services Inc submitted that there should be national coordination of issues relating to compensation for victims of federal offences and that the Australian Government should compensate victims of federal offences where the offender lacks the means to make reparation for his or her offending conduct.<sup>69</sup> Victims Support Australasia expressed the view that there needed to be a coordinated, national approach to victims' issues in Australia.<sup>70</sup>

### ***ALRC's views***

8.46 There is no reason in principle to distinguish between economic and non-economic loss suffered as a result of a federal offence. A number of federal offences can give rise to non-economic loss. The ALRC considers that federal sentencing

<sup>64</sup> *Criminal Code* (Cth) ch 8 div 270, ch 5 pt 5.3 div 101.

<sup>65</sup> See, eg, *Victims Support and Rehabilitation Act 1996* (NSW) pt 4 div 1; *Sentencing Act 1991* (Vic) s 85B; *Criminal Offence Victims Act 1995* (Qld) s 24; *Penalties and Sentences Act 1992* (Qld) s 35(1)(c); *Criminal Law (Sentencing) Act 1988* (SA) s 53; *Sentencing Act 1997* (Tas) s 67; *Sentencing Act 1995* (NT) s 88(a).

<sup>66</sup> *Victims Support and Rehabilitation Act 1996* (NSW); *Victims of Crime Assistance Act 1996* (Vic); *Criminal Offence Victims Act 1995* (Qld); *Criminal Injuries Compensation Act 2003* (WA); *Victims of Crime Act 2001* (SA); *Criminal Injuries Compensation Act 1976* (Tas); *Victims of Crime (Financial Assistance) Act 1983* (ACT); *Crimes (Victims Assistance) Act 1982* (NT).

<sup>67</sup> *Victims Support and Rehabilitation Act 1996* (NSW) s 10, sch 1.

<sup>68</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [462]–[466].

<sup>69</sup> Victim Support Service Inc, *Consultation*, Adelaide, 20 April 2005.

<sup>70</sup> Victim Support Australasia, *Consultation*, Sydney, 4 July 2005.

legislation should be amended to clarify that judicial officers are authorised to order federal offenders to make reparation for any loss suffered by reason of an offence, whether the loss is economic or non-economic. The question whether a federal victim compensation scheme should be established is outside the scope of this Inquiry.

**Recommendation 8–2** Federal sentencing legislation should be amended to clarify that a court may order a federal offender to make reparation for any loss suffered by reason of the offence, regardless of whether the loss is economic or non-economic.

### Preserving civil rights of action

8.47 Section 15F of the *Crimes Act* provides that nothing in the Act affects the right of a person aggrieved by an offence under the Act to institute civil proceedings in any court. Only the civil rights of victims of offences under the *Crimes Act* are expressly preserved, yet many offences that were formerly located in the *Crimes Act* are now located in the *Criminal Code* (Cth). In addition, over 500 Commonwealth statutes contain criminal offences.<sup>71</sup> Accordingly, the ALRC considers that s 15F should be amended to clarify that the civil rights of victims of all federal offences are preserved.

**Recommendation 8–3** Federal sentencing legislation should be amended to clarify that nothing in that legislation affects the right of any person who is aggrieved by conduct punishable as a federal offence to institute civil proceedings in respect of that conduct, but the person shall not be compensated more than once for the same loss.

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71 Law Book Co, *Watson & Watson Australian Criminal Law: Federal Offences*, vol 1.

## 9. Determining the Non-Parole Period

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9.1 This chapter considers particular issues in relation to determining the non-parole period of a sentence of imprisonment, namely, the purpose of the non-parole period; the factors to be considered in fixing the non-parole period; when a non-parole period should be fixed; and the relation between the non-parole period and the head sentence.

### Purpose of the non-parole period and factors to be considered

#### Background

9.2 The non-parole period in relation to a sentence of imprisonment is the period during which an offender must remain in custody and is not to be released on parole.<sup>1</sup> Under Part IB of the *Crimes Act 1914* (Cth) the court is directed to explain to a federal offender the purpose of the non-parole period, although this purpose is not expressed in

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<sup>1</sup> A federal offender may nevertheless be released by the executive prior to the expiration of the non-parole period pursuant to a pre-release scheme or following the exercise of the executive prerogative to pardon or remit a sentence. See Ch 25.

the legislation.<sup>2</sup> Similarly, the sentencing legislation of the states and territories does not set out the purpose or purposes of a non-parole period.

9.3 The non-parole period serves initially to demarcate both the minimum period that must be served in custody and the longest possible term of parole supervision under the sentence.<sup>3</sup>

9.4 In *Deakin v The Queen*, the High Court stated that:

The intention of the legislature in providing for the fixing of minimum terms is to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum term that a judge determines justice requires that he must serve having regard to the circumstances of the offence.<sup>4</sup>

9.5 In *R v Shrestha*, Brennan and McHugh JJ stated:

It is clear that, although a minimum term is a benefit for the offender, it is a benefit which the offender may be allowed only for the purpose of his rehabilitation and it must not be shortened beyond the lower limit of what might be reasonably regarded as condign punishment.<sup>5</sup>

9.6 In *Bugmy v The Queen*, Mason and McHugh JJ stated that a judicial officer does not fix a minimum term solely or primarily in accordance with the offender's prospects of rehabilitation.<sup>6</sup> Thus, other purposes of sentencing—such as retribution, deterrence and incapacitation—are relevant to fixing the non-parole period as well as to fixing the head sentence.<sup>7</sup>

9.7 Part IB does not set out a separate list of factors to which the court must have regard in fixing a non-parole period, but it does set out specific factors to which the court is to have regard in declining to fix a non-parole period. These factors are the nature and circumstances of the offence and the antecedents of the offender.<sup>8</sup> Where a court declines to fix a non-parole period it must state its reasons for doing so and cause them to be entered into the court records.<sup>9</sup>

## Submissions and consultations

9.8 No issues or problems were identified in submissions or consultations in relation to the purposes of the non-parole period. One submission stated that the non-parole

2 *Crimes Act 1914* (Cth) s 16F.

3 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [9.901].

4 *Deakin v The Queen* (1984) 58 ALJR 367, 367; *Power v The Queen* (1974) 131 CLR 623, 629.

5 *R v Shrestha* (1991) 173 CLR 48, 63.

6 *Bugmy v The Queen* (1990) 169 CLR 525, 530–531.

7 See, eg, *Ibid*, 532; *R v Lane* (1995) 80 A Crim R 208; *Attorney-General v Kortum* (Unreported, VSCA, 23 September 1977).

8 *Crimes Act 1914* (Cth) s 19AB(3). See *Wangsaimas v The Queen* (1996) 6 NTLR 14 (court must have regard to both these factors).

9 *Crimes Act 1914* (Cth) s 19AB(4).



period serves many purposes, and that the main one was reinforcing the potential for rehabilitation.<sup>10</sup> Other submissions and consultations nominated the rehabilitation of an offender, or allowing an offender to reintegrate into the community, as the only purposes of a non-parole period.<sup>11</sup> However, no stakeholder addressed the issue of whether the purposes of a non-parole period should be set out in federal legislation.

9.9 In Discussion Paper 70 (DP 70), the ALRC proposed that federal sentencing legislation should provide that, in fixing a non-parole period or in declining to fix a non-parole period, the court must have regard to the purposes, principles and factors relevant to sentencing, and to the factors relevant to the administration of the criminal justice system.<sup>12</sup> This proposal received support.<sup>13</sup> The Law Council of Australia supported the proposal but submitted that a court's decision not to set a non-parole period may require consideration of factors somewhat different from those involved in the quantitative determination of a non-parole period. It also submitted that where a court declines to fix a non-parole period it should be required to put on record its reasons for doing so.<sup>14</sup> In response to Issues Paper 29 (IP 29),<sup>15</sup> the Law Society of South Australia submitted that there was no difference in principle or practice between the factors relevant to the non-parole period and those relevant to the head sentence.<sup>16</sup> One federal offender submitted that lack of access by non-citizen offenders to rehabilitation and re-socialisation options should be a sentencing factor or a factor in setting the non-parole period.<sup>17</sup>

### ALRC's views

9.10 Fixing a non-parole period is just one aspect of sentencing.<sup>18</sup> The purposes, principles and factors relevant to sentencing are also relevant to fixing the non-parole period, or to declining to fix a non-parole period. However, while the factors the court must take into account when fixing the non-parole period are likely to be the same as those applicable to fixing the head sentence, the weight to be attached to these factors and the manner in which they are relevant will differ because of the different questions being considered when fixing a non-parole period.<sup>19</sup>

10 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.

11 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; JC, *Submission SFO 25*, 13 April 2005; New South Wales Public Defenders Office, *Consultation*, Sydney, 22 September 2004.

12 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 9–1.

13 Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006.

14 Law Council of Australia, *Submission SFO 97*, 17 March 2006.

15 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005).

16 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.

17 Confidential, *Submission SFO 64*, 6 January 2006. The relevance of this factor in sentencing is addressed in Ch 6.

18 This is emphasised by the fact that there is no general obligation on a court to give separate reasons for imposing a particular non-parole period. It suffices if adequate reasons are given for the overall sentence: see *R v Dujew* (2004) 146 A Crim R 121.

19 *Bugmy v The Queen* (1990) 169 CLR 525; *R v Suarez-Mejia* (2002) 131 A Crim R 564, [48]; *Norton v The Queen* [2003] WASCA 86, [12].

9.11 The ALRC does not believe there is a need for a separate legislative provision explaining the purposes of a non-parole period, or setting out factors to be considered in determining a non-parole period. Rather, federal sentencing legislation should provide that, in fixing the non-parole period or in declining to fix a non-parole period, the court must have regard to the purposes, principles and factors relevant to sentencing, and to the factors relevant to the administration of the criminal justice system.<sup>20</sup>

9.12 The current provision in Part IB, which requires the court to have regard to the nature and circumstances of the offence and the antecedents of the offender, does not give a clear indication that the court must have regard to other potentially relevant factors in fixing or declining to fix a non-parole period. As noted above, Part IB currently requires the court to put on record its reasons for declining to set a non-parole period. The ALRC supports that approach.

9.13 Although Part IB directs the court to explain to an offender the ‘purpose’ of fixing a non-parole period, ‘purpose’ is the wrong term if it means that a court is expected to explain the justification or philosophy underpinning the non-parole period, as opposed to the practical effect of the non-parole period on the offender’s sentence. This issue is addressed in the recommendation dealing with explanation of sentence in Chapter 13.

**Recommendation 9–1** Federal sentencing legislation should provide that, in fixing a non-parole period or in declining to fix a non-parole period, the court must have regard to the purposes, principles and factors relevant to sentencing, and to the factors relevant to the administration of the criminal justice system. (See Recommendations 4–1; 5–1; 6–1; 6–8).

## When non-parole period should be fixed

### Background

9.14 Part IB of the *Crimes Act* precludes a court from fixing a non-parole period for sentences of three years or less,<sup>21</sup> and provides that a court must fix a single non-parole period (or a recognizance release order) for a federal sentence that exceeds (or federal sentences that in the aggregate exceed) three years.<sup>22</sup> However, as discussed above, even for sentences of more than three years, a court may currently decline to fix a non-parole period having regard to the nature and circumstances of the offence and the antecedents of the offender.<sup>23</sup>

<sup>20</sup> See Chs 4, 5, 6.

<sup>21</sup> *Crimes Act 1914* (Cth) s 19AC.

<sup>22</sup> *Ibid* s 19AB.

<sup>23</sup> *Ibid* s 19AB(3).

9.15 The sentencing provisions of many states and territories require a non-parole period to be fixed in respect of comparatively shorter periods of imprisonment, ranging from sentences in excess of six months,<sup>24</sup> one year,<sup>25</sup> or two years.<sup>26</sup>

### Submissions and consultations

9.16 In DP 70, the ALRC proposed that federal sentencing legislation should provide that, when sentencing a federal offender to a term of imprisonment, a court must set a non-parole period unless it is satisfied that it is not appropriate and expressly declines to do so. However, a court must not set a non-parole period if the term of imprisonment is less than 12 months or the court has made an order to suspend the sentence.<sup>27</sup> This proposal was supported by stakeholders.<sup>28</sup>

### ALRC's views

9.17 Part IB of the *Crimes Act* is out of step with the position in many states and territories in requiring a non-parole period to be fixed only in respect of comparatively long sentences of imprisonment. Section 19AC of the *Crimes Act*, which precludes a court from fixing a non-parole period for sentences of three years or less, should be amended.

9.18 Having regard to the sentences for which a non-parole period must be fixed in the states and territories, the ALRC considers it appropriate for a court to fix a single non-parole period in respect of a federal sentence that exceeds (or federal sentences that in the aggregate exceed) 12 months, unless the court has made an order to suspend the sentence or sentences<sup>29</sup> or it is satisfied that it is not appropriate to set a non-parole period and expressly declines to do so.

9.19 As discussed in Chapter 23, parole serves a number of useful purposes, including the reintegration of the offender into the community and the rehabilitation of the offender. Federal offenders serving sentences of less than three years should be able to enjoy the benefits of parole, provided the sentence is of sufficient duration to make parole feasible. At present, those benefits are available only to federal offenders serving sentences greater than three years. The ALRC's support for extending the circumstances in which a court should fix a non-parole period should also be viewed in

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24 See *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 44–46.

25 *Criminal Law (Sentencing) Act 1988* (SA) s 32; *Crimes (Sentencing) Act 2005* (ACT) s 65; *Sentencing Act 1995* (NT) s 53. See also *Sentencing Act 1995* (WA) s 89(2).

26 *Sentencing Act 1991* (Vic) (mandatory non-parole period for sentences greater than two years; discretionary non-parole period for sentences between one and two years).

27 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 9–2.

28 Law Council of Australia, *Submission SFO 97*, 17 March 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

29 Suspended sentences are discussed in Ch 7. Compare *Crimes (Sentencing Procedure) Act 1999* (NSW) s 12(3) (setting non-parole period for suspended sentence) and *R v Tolley* [2004] NSWCCA 165.

the context of the recommendation to repeal the provision in Part IB requiring the court to make a ‘recognizance release order’ for sentences of three years or less.<sup>30</sup>

9.20 Federal sentencing legislation should also preclude a court from setting a non-parole period where the federal sentence of imprisonment is (or the federal sentences in the aggregate are) less than 12 months. Parole is generally unsuitable in respect of sentences of imprisonment of 12 months or less because there is insufficient time for effective supervision on parole, or to complete rehabilitative programs in prison, which is a factor to be considered in deciding whether to release an offender on parole.<sup>31</sup>

**Recommendation 9–2** Federal sentencing legislation should provide that, when sentencing an offender to a federal sentence of imprisonment that exceeds (or federal sentences of imprisonment that in aggregate exceed) 12 months, a court must set a single non-parole period unless the court:

- (a) has made an order to suspend the sentence or sentences; or
- (b) is satisfied that it is not appropriate to set a non-parole period and expressly declines to do so.

**Recommendation 9–3** Federal sentencing legislation should preclude a court from setting a non-parole period if the federal sentence of imprisonment is, or the federal sentences in aggregate are, less than 12 months.

## Relation between non-parole period and head sentence

### Background

9.21 Amendments made to Part IB by the *Anti-Terrorism Act 2004* (Cth) introduced minimum non-parole periods for persons sentenced for ‘minimum non-parole offences’, namely, treachery, a terrorism offence, treason or espionage.<sup>32</sup> The minimum non-parole period is to be at least three-quarters of the sentence of imprisonment imposed by the court, although the court retains the discretion to impose a longer non-parole period if considered appropriate in the circumstances.<sup>33</sup> Under these provisions, a sentence of life imprisonment is taken to be a sentence of imprisonment for 30 years, so that the minimum non-parole period for a sentence of life imprisonment for a ‘minimum non-parole offence’ is 22½ years.<sup>34</sup>

30 See discussion on recognizance release orders and suspended sentences in Ch 7.

31 See discussion on release on parole in Ch 23. Compare *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46 (court precluded from setting non-parole period for sentences of six months or less).

32 *Crimes Act 1914* (Cth) s 19AG(1).

33 *Ibid* s 19AG(2).

34 *Ibid* s 19AG(3).

9.22 Apart from the ‘minimum non-parole offences’, Part IB provides no guidance in relation to determining the length of a non-parole period for federal offences. This is also the case in a number of the states and territories.<sup>35</sup>

9.23 However, some state and territory sentencing legislation does provide guidance about the *proportion* between the non-parole period and the head sentence, which in this chapter is called the ‘relative non-parole period’. General guidance is sometimes provided by legislative specification of a minimum relative non-parole period—which ranges from half of the head sentence<sup>36</sup> to three-quarters of the head sentence.<sup>37</sup> Specific guidance is sometimes provided for particular offences by legislative specification of minimum relative non-parole periods.<sup>38</sup>

9.24 Some state and territory legislation provides guidance in relation to the *duration* of a non-parole period. For example, some legislation sets out standard non-parole periods for particular offences.<sup>39</sup> Where standard non-parole periods are specified, the court is able, in defined circumstances, to impose a non-parole period that is longer or shorter than the standard.<sup>40</sup> In some cases a court must find ‘exceptional circumstances’ in order to justify a non-parole period that is shorter than the standard.<sup>41</sup>

9.25 The Northern Territory sentencing legislation precludes the fixing of a non-parole period of less than eight months in certain circumstances.<sup>42</sup> Victorian sentencing legislation provides that the non-parole period must be at least six months less than the term of the sentence<sup>43</sup>—which is to allow for a realistic period of supervision if the offender is released on parole<sup>44</sup>—but it is otherwise silent on the relationship between the non-parole period and the head sentence.

9.26 Case law recognises that the non-parole period is generally set at 60 to 66.6 per cent of the head sentence, with the non-parole period increasing to 75 per cent for the worst category of case. In *R v Selim Studdert J* said:

There is no rigid rule as to the proportion that a non-parole period should bear to the head sentence, but more often than not the non-parole period is more than 50 per cent of the head sentence and is ordinarily of the order of 60% to 66⅔% of it.<sup>45</sup>

35 See, eg, *Sentencing Act 1995* (WA); *Criminal Law (Sentencing) Act 1988* (SA); *Crimes (Sentencing) Act 2005* (ACT).

36 *Sentencing Act 1997* (Tas) s 17(3); *Sentencing Act 1995* (NT) s 54.

37 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2).

38 See, eg, *Sentencing Act 1995* (NT) ss 55, 55A (minimum non-parole period of 70 per cent of the head sentence for sexual offences and offences against persons under 16 years).

39 *Sentencing Act 1995* (NT) s 53A (standard non-parole period for murder); *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4, div 1A.

40 In New South Wales this can be done only by reference to the aggravating and mitigating factors set out in *Ibid* s 21A.

41 *Sentencing Act 1995* (NT) s 53A(6)–(8).

42 *Ibid* s 54(2).

43 *Sentencing Act 1991* (Vic) s 11(3).

44 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [9.906].

45 *R v Selim* [1998] NSWSC 165.

9.27 In *Stitt v The Queen* the New South Wales Court of Criminal Appeal stated that:

Generally speaking, in relation to federal offences ... non-parole periods have generally varied between 60 to 75 per cent, with periods of 75 per cent being rare and limited to the more serious cases where the prospects of rehabilitation have not been considered good. ... A similar approach has been taken in other States.<sup>46</sup>

9.28 In *R v Acosta* the New South Wales Court of Criminal Appeal held that a judge should not have set a non-parole period of 75 per cent of the head sentence for a federal offence when the judge did not regard the offender as falling within the worst category of case. The judge was held to have erred in setting the non-parole period at 75 per cent of the head sentence, as required for state sentences by the then New South Wales sentencing legislation in the absence of special circumstances.<sup>47</sup>

### Issues and problems

9.29 Data on federal offenders, maintained by the Attorney-General's Department and analysed by the Australian Institute of Criminology (AIC), reveal that across the entire federal prisoner population 69 per cent of federal offenders receive non-parole periods that are at least 50 per cent of their head sentence; with a noticeable clustering of non-parole periods between 50 and 59 per cent of the head sentence and a further, larger, clustering between 60 and 69 per cent of the head sentence.<sup>48</sup>

9.30 The AIC's analysis shows some variation in the mean (average) ratio of the non-parole period to the head sentence across the jurisdictions, ranging from 51 per cent in the Northern Territory to 72 per cent in Tasmania.<sup>49</sup>

9.31 The AIC's analysis of the relative non-parole period for each jurisdiction shows that non-parole periods for federal offenders are most frequently fixed at 50 per cent of the head sentence in Western Australia, Tasmania and the Northern Territory, while in New South Wales non-parole periods are most frequently fixed at 60 to 69 per cent of the head sentence. Some jurisdictions—namely Queensland, the ACT and the Northern Territory—impose a relatively high percentage of sentences with non-parole periods that are less than half the head sentence. In Queensland, for example, 50 per cent of prisoners had sentences imposed in which the non-parole period was less than 50 per cent of the head sentence.<sup>50</sup>

### Options for reform

9.32 In DP 70 the ALRC identified two main options for reform. Having regard to the desirability of promoting consistency, the first is to establish a benchmark or

46 *Stitt v The Queen* (1998) 102 A Crim R 428, 432. See also *R v Pang* (1998) 105 A Crim R 474, 477; *Bernier v The Queen* (1998) 102 A Crim R 44, 49; *R v Behar* (Unreported, New South Wales Court of Criminal Appeal, 14 October 1998), 13; *R v Nguyen* [1998] 4 VR 394, 412–413.

47 See *R v Acosta* [1999] NSWCCA 334, [9]–[13].

48 See Appendix 1, Figure A1.25 and accompanying text.

49 See Appendix 1, Figure A1.26.

50 See Appendix 1, Figure A1.27 and accompanying text.

reference point for the relative non-parole period of a federal sentence. Judicial officers would be able to fix either a lower or higher non-parole period where it is warranted in all the circumstances, taking into account the purposes, principles and factors relevant to sentencing, and the factors relevant to the administration of the criminal justice system. A judicial officer would not need to find special circumstances in order to make a variation from the benchmark. Unlike a minimum non-parole period, which restricts a judicial officer's ability to fix a lower non-parole period, this approach allows for flexibility in fixing a non-parole period that is appropriate in all the circumstances of the case.

9.33 DP 70 expressed the view that, having regard to the fact that a large number of federal offenders have a sentence imposed in which the non-parole period represents 60 to 69 per cent of the head sentence,<sup>51</sup> an appropriate benchmark for the non-parole period could be fixed at either two-thirds of the head sentence, or perhaps somewhat lower, at 60 per cent.

9.34 An alternative option to establishing a benchmark or reference point is to allow judicial officers unfettered discretion in fixing the length of non-parole periods for federal sentences. This is closer to the current situation, as judicial officers already have complete discretion (within the limits of the common law) in fixing non-parole periods, except for minimum non-parole offences. Such an approach allows a high degree of flexibility but provides no guidance to judicial officers and therefore does not address the marked disparities in relative non-parole periods across jurisdictions.

### Submissions and consultations

9.35 DP 70 proposed that, in order to strike an appropriate balance between promoting consistency in sentencing and allowing individualisation of sentencing in particular cases, federal sentencing legislation should establish a benchmark for the relative non-parole period of a federal sentence at two-thirds of the head sentence.<sup>52</sup> Stakeholders' responses to this proposal were divided. There was some support expressed for this proposal<sup>53</sup> as well as for the general proposition that there should be legislative guidance about the relative non-parole period in order to address disparities in sentencing in this area.<sup>54</sup> One federal offender submitted that the relative non-parole period should be between 50 and 70 per cent of the head sentence.<sup>55</sup> The Commonwealth Director of Public Prosecutions submitted that a court should give reasons for departing from the benchmark.<sup>56</sup>

51 See Appendix 1, Figure A1.25.

52 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 9–3.

53 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006.

54 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; JC, *Submission SFO 25*, 13 April 2005; WT, *Submission SFO 23*, 11 April 2005; LD, *Submission SFO 9*, 10 March 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005.

55 JC, *Submission SFO 25*, 13 April 2005.

56 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

9.36 On the other hand, Victoria Legal Aid expressed concern that the establishment of a benchmark may introduce inflexibility in sentencing and could be seen as prescriptive,<sup>57</sup> while some judicial officers expressed concern that the benchmark would represent an incursion on judicial discretion.<sup>58</sup> The Law Council of Australia submitted that:

The better approach is to allow sentencing courts wide discretion in setting non-parole periods ... While the setting of a 'benchmark' of two-thirds of the head sentence may sound like a reasonable aim, the Law Council is not convinced that this should (or even could) be done in federal sentencing legislations—indeed it is unclear what form of statutory words would give expression to such a benchmark, and how if at all sentencing courts would take such a legislative sentencing guideline into account.<sup>59</sup>

9.37 In response to IP 29, some stakeholders expressed opposition to any form of legislative guidance involving minimum, fixed or maximum non-parole periods.<sup>60</sup> The Law Society of South Australia expressed the view that such guidance was inappropriate<sup>61</sup> and the New South Wales Legal Aid Commission submitted that:

rather than specifying the various circumstances in relation to the setting of non-parole periods courts should retain a general discretion as to the length of any non-parole period and the reasons for determining the ratio in a particular case.<sup>62</sup>

### ALRC's views

9.38 In its 1988 report on sentencing, the ALRC expressed the view that, in the interests of certainty and 'truth in sentencing', a significant proportion of a custodial order should be spent in prison. It recommended that this proportion be specified in legislation, and that in general it should be 70 per cent (and in no case less than 50 per cent) of the head sentence.<sup>63</sup>

9.39 The ALRC remains of the view that judicial officers should maintain a broad discretion in fixing the length of a non-parole period. However, having regard to the data described above, which reveal significant disparities in the percentage of the head sentence formed by the non-parole period, it would be advantageous to provide judicial officers with more guidance.

9.40 The ALRC prefers the less prescriptive approach of establishing a reference point for the non-parole period, which a court can increase or decrease in appropriate

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<sup>57</sup> Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

<sup>58</sup> Chief Magistrate I Gray & Others, *Consultation*, Melbourne, 23 February 2006.

<sup>59</sup> Law Council of Australia, *Submission SFO 97*, 17 March 2006.

<sup>60</sup> Law Society of South Australia, *Submission SFO 37*, 22 April 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; New South Wales Legal Aid Commission—Criminal Law Division, *Consultation*, Sydney, 22 September 2004.

<sup>61</sup> Law Society of South Australia, *Submission SFO 37*, 22 April 2005.

<sup>62</sup> New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.

<sup>63</sup> Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Recs 25–26. These recommendations must be viewed in the context of Recs 33–35 of that report, supporting earned remissions and the application of earned remissions to reduce the non-parole period.



cases, having regard to the purposes, principles and factors relevant to sentencing, and the factors relevant to the administration of the criminal justice system. The ALRC does not support an approach that would allow variation from the reference point only in special or exceptional circumstances. The reference point should be a starting point, which can be varied whenever the circumstances of the case indicate that a different non-parole period would be more appropriate.

9.41 In order to address stakeholder concerns about limiting judicial discretion, the ALRC has amended the proposal in DP 70 to refer explicitly to the fact that a court is to retain its discretion to set any non-parole period it considers appropriate in the circumstances. Further, it has changed the nomenclature from a 'benchmark' non-parole period to a 'reference point' for the non-parole period in the belief that 'reference point' suggests a less prescriptive approach.

9.42 The ALRC does not favour an approach that would require courts to give reasons for departing from the reference point. To require reasons may create the impression that a court should depart from the reference point only in exceptional circumstances. Not requiring reasons for any departure is also consistent with the broader position at common law, whereby no obligation is imposed on a court to give separate reasons for setting a particular non-parole period, as long as adequate reasons are given for the overall sentence.<sup>64</sup>

9.43 This approach strikes a balance between two principles of sentencing, namely, promoting consistency by establishing a reference point, and allowing for individualisation by permitting variation.<sup>65</sup> This recommendation also conforms with one of the objects of the proposed federal sentencing Act, which is to promote flexibility in sentencing.<sup>66</sup> Having regard to these principles and objects, the provisions in Part IB of the *Crimes Act* that set out minimum non-parole periods for certain federal offences should be repealed.

9.44 Having regard to the common law and to the data discussed above, the reference point for the non-parole period should be set at two-thirds of the head sentence.<sup>67</sup>

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<sup>64</sup> *R v Dujew* (2004) 146 A Crim R 121. See also *Norton v The Queen* [2003] WASCA 86, [12].

<sup>65</sup> Principles of sentencing are discussed in Ch 5.

<sup>66</sup> See Ch 2.

<sup>67</sup> Some practitioners noted that two-thirds was generally regarded to be a starting point: Criminal Bar Association of Victoria, *Consultation*, Melbourne, 23 February 2006.

**Recommendation 9–4** In order to strike an appropriate balance between promoting consistency in sentencing and allowing individualisation of sentencing in particular cases, federal sentencing legislation should establish as a reference point that the non-parole period of a federal sentence of imprisonment should be two-thirds of the head sentence. However, a court should retain its discretion to impose a different non-parole period whenever it is warranted in the circumstances, taking into account the purposes, principles and factors relevant to sentencing, and the factors relevant to the administration of the criminal justice system.

## 10. Commencement and Pre-sentence Custody

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10.1 This chapter considers particular issues arising from the mechanics of sentencing, namely, determining the commencement date of a sentence and how to treat any time spent in pre-sentence custody or detention where a federal offender is sentenced to a term of imprisonment.

10.2 The chapter does not deal with the situations where a federal offender has spent time in pre-sentence custody or detention and a sentence other than a term of imprisonment is subsequently imposed, or where a federal offender has spent time in a rehabilitation program or other form of quasi-custody in which the offender is subject to restrictions. These issues are considered in Chapter 6. As discussed in that chapter, in those instances time spent in pre-sentence custody, detention or quasi-custody should be considered by the court as a relevant sentencing factor but the weight to be given to that factor should be a matter for judicial discretion.

### Commencement of sentence

10.3 Part IB of the *Crimes Act 1914* (Cth) does not specify when a federal sentence is to commence. Rather, s 16E of the Act picks up and applies state and territory legislation in relation to the commencement of sentences. The purpose of the section is

‘to avoid the problem of an offender who is sentenced to joint State and federal terms (eg a drug offender) commencing the terms on different dates’.<sup>1</sup>

10.4 Factors that may affect the commencement date of a federal sentence include: (a) in the case of multiple offences, whether the court intends the sentences to be served concurrently or consecutively; and (b) where the offender has spent time in pre-sentence custody, how that time is to be treated.

10.5 Some state and territory sentencing legislation contains a general rule that a sentence is to commence on the day it is imposed, although this rule is expressed to be subject to varying exceptions including: orders allowing for backdating of sentences to take into account pre-sentence custody; orders requiring sentences to be served consecutively; and allowances to be made to accommodate the fact that an offender is not in custody at the time of sentencing.<sup>2</sup>

10.6 Professor Arie Freiberg expressed the view in consultation and in a submission to the Inquiry that the law relating to the commencement of sentences was complex, confusing and in need of reform.<sup>3</sup> The Commonwealth Director of Public Prosecutions submitted that it was appropriate for legislative provisions in relation to the commencement of sentences to be prescriptive.<sup>4</sup>

10.7 There was general support among institutional stakeholders for federal legislation to specify the commencement date of a sentence,<sup>5</sup> and for that date to be the day that the sentence is imposed, subject to any court order directed to the consecutive service of sentences.<sup>6</sup> One federal offender submitted that it would be ideal to have a federal provision in relation to commencement of sentence to ensure consistency of treatment of federal offenders. However, given that the states and territories administer sentences imposed on federal offenders, it was preferable to maintain the status quo in order to preserve consistency of treatment of offenders within each state and territory.<sup>7</sup>

### ALRC’s views

10.8 In Discussion Paper 70 (DP 70), the ALRC proposed that federal sentencing legislation should provide that, where a court sentences an offender to a term of imprisonment in relation to a federal offence, the sentence commences on the day it is

1 Explanatory Memorandum (Senate), Crimes Legislation Amendment Bill (No 2) 1989 (Cth), 8.

2 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 47(1)(a); *Sentencing Act 1991* (Vic) s 17(1); *Penalties and Sentences Act 1992* (Qld) s 154(a); *Sentencing Act 1997* (Tas) s 14; *Crimes (Sentencing) Act 2005* (ACT) s 62; *Sentencing Act 1995* (NT) s 62(1).

3 A Freiberg, *Submission SFO 12*, 4 April 2005; A Freiberg, *Consultation*, Melbourne, 30 March 2005.

4 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

5 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.

6 Law Council of Australia, *Submission SFO 97*, 17 March 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006.

7 JC, *Submission SFO 25*, 13 April 2005.

imposed, subject to any court order directed to the consecutive service of sentences.<sup>8</sup> As noted above, this proposal received support from stakeholders, and the ALRC has not changed the views it expressed in DP 70.

10.9 Determining the commencement date of a sentence is an important part of the mechanics of sentencing. It is an area warranting clarity, simplicity and consistency in the treatment of federal offenders. With this in mind, federal sentencing legislation should specify when a federal sentence of imprisonment is to commence, and that should be the day on which the sentence is imposed, subject to any court order directed to the consecutive service of sentences.

10.10 The general rule that a sentence of imprisonment is to commence on the day it is imposed is consistent with the position in most states and territories. However, one advantage of prescribing a federal commencement date is that federal sentencing legislation can avoid picking up two of the exceptions to this general rule, for which provision is made in some states and territories, on the basis that the exceptions are not appropriate when sentencing federal offenders.

10.11 It is inappropriate to make an exception to the general rule on the basis that an offender is not in custody at the time of sentencing. As recommended in Chapter 13, an offender should be present during sentencing proceedings where a sentence of imprisonment is to be imposed.<sup>9</sup> Additionally, there should be no exception to the general rule to allow for the backdating of a sentence to take pre-sentence custody into account. Backdating may create an artificial commencement date. For the reasons discussed below, the issue of credit for pre-sentence custody in respect of a federal sentence is dealt with more appropriately by declaring such time to be time already served under the sentence.

**Recommendation 10–1** Federal sentencing legislation should provide that, where a court sentences an offender to a term of imprisonment in relation to a federal offence, the sentence commences on the day the sentence is imposed, subject to any court order directed to the consecutive service of sentences.

## Pre-sentence custody

### Background

10.12 A federal offender may spend time in custody in relation to an offence prior to being sentenced for that offence. An example of this is time spent in remand after bail has been refused. Part IB of the *Crimes Act* does not specify how pre-sentence custody

<sup>8</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 10–1.

<sup>9</sup> See Rec 13–1.

is to be taken into account in sentencing. Rather, s 16E of the Act picks up and applies certain state and territory laws dealing with the treatment of pre-sentence custody.

10.13 There are three ways in which time spent by a federal offender in pre-sentence custody can be taken into account, depending on the jurisdiction in which he or she is sentenced. Some jurisdictions allow a court to credit pre-sentence custody in more than one way.<sup>10</sup>

- The first method is to backdate the commencement of a sentence. Backdating is available in some jurisdictions<sup>11</sup> but not in others.<sup>12</sup> Of those jurisdictions that allow backdating, South Australia allows backdating only to the day on which an offender was taken into custody (and not a later date), rendering this method unsuitable for crediting interrupted periods of pre-sentence custody.<sup>13</sup>
- The second method is to count time in custody as time already served under the sentence.<sup>14</sup> For example, if a federal offender is to receive a sentence of 12 months but has already spent 11 months in custody, a court using this method would impose a sentence of 12 months but declare that 11 months of the sentence has already been served.
- The third method is to reduce the term of the sentence.<sup>15</sup> For example, if a federal offender is to receive a sentence of 12 months but has already spent 11 months in custody, a court using the reduction method would impose a sentence of only one month.

10.14 Under some state and territory legislation it is mandatory for the court to take into account any time for which the offender has been held in custody in relation to the offence,<sup>16</sup> while under other legislation it is discretionary.<sup>17</sup> Some sentencing legislation states that pre-sentence custody must be taken into account ‘unless the court otherwise orders’.<sup>18</sup> However, the discretion must be properly exercised.<sup>19</sup> In the

10 *Sentencing Act 1995* (WA) s 87(c), (d); *Criminal Law (Sentencing) Act 1988* (SA) s 30(2)(a), (b).

11 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 47(2)(a); *Sentencing Act 1995* (WA) s 87(d); *Criminal Law (Sentencing) Act 1988* (SA) s 30(2)(b); *Sentencing Act 1997* (Tas) s 16(1); *Crimes (Sentencing) Act 2005* (ACT) s 63; *Sentencing Act 1995* (NT) s 63(5).

12 For example, this method is not available under the *Sentencing Act 1991* (Vic) s 18. See R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [9.804].

13 See *Criminal Law (Sentencing) Act 1988* (SA) s 30(2)(b). Compare, eg, *Sentencing Act 1995* (NT) s 63(5) (sentence may commence on day of arrest or on any other day between that day and the day on which the court passes sentence).

14 *Sentencing Act 1991* (Vic) s 18(1); *Penalties and Sentences Act 1992* (Qld) s 161(1).

15 *Sentencing Act 1995* (WA) s 87(c); *Criminal Law (Sentencing) Act 1988* (SA) s 30(2)(a).

16 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 24(a), 47(3); *Sentencing Act 1997* (Tas) s 16(1)(a); *Crimes (Sentencing) Act 2005* (ACT) s 63(2).

17 *Sentencing Act 1995* (WA) s 87; *Criminal Law (Sentencing) Act 1988* (SA) s 30; *Sentencing Act 1995* (NT) s 63(5).

18 *Sentencing Act 1991* (Vic) s 18(1); *Penalties and Sentences Act 1992* (Qld) s 161(1). See *R v Sidea* (Unreported, Victorian Court of Criminal Appeal, Crockett, Hampel and Coldrey JJ, 21 October 1993).

absence of any reasons why the court exercised its discretion against taking pre-sentence custody into account, error can be inferred.<sup>20</sup>

10.15 Some state and territory sentencing legislation also sets out a number of exceptions to the principle that pre-sentence custody should be taken into account. In most states credit is not given for: periods of custody of less than one day; sentences of imprisonment for less than one day; wholly suspended periods of imprisonment; or the suspended part of a partly suspended sentence of imprisonment.<sup>21</sup>

### **Ambiguous drafting of s 16E**

10.16 One problem with the current federal provision is that the drafting of s 16E of the *Crimes Act* is ambiguous. Section 16E(2) of the Act picks up and applies to the sentencing of federal offenders those state and territory laws that allow for reduction or backdating of sentences,<sup>22</sup> but it does not expressly refer to laws that allow for time spent in pre-sentence custody to be declared as time already served under the sentence. It is unclear whether s 16E(2) intends to pick up such state and territory laws.

10.17 Section 16E(3) of the Act provides that where the law of a state or territory does not have the effect that a sentence or a non-parole period may be reduced by the time that a person has been in custody, or is to commence on the day on which the person was taken into custody, a court in the state or territory must take into account any time spent in custody in relation to the offence. However, the direction in s 16E(3) is also ambiguous. It is not clear whether it requires the court to give full credit for time in custody or whether it simply requires the court to take the pre-sentence custody into account as a relevant consideration in determining the commencement date of the sentence.

### **Federal provision for pre-sentence custody?**

10.18 One argument in favour of having a federal provision for pre-sentence custody is that the picking up of state and territory laws on this subject has the potential to create inconsistencies in the treatment of federal offenders depending on the jurisdiction in which they are sentenced. Federal offenders are potentially in a more advantageous position in jurisdictions in which it is mandatory to take pre-sentence custody into account than in jurisdictions in which the court has a discretion to take it into account or is empowered to 'otherwise order'.

10.19 There was support among institutional stakeholders for federal legislation to make provision for how pre-sentence custody is to be taken into account. The Law

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19 *R v Barry* (Unreported, Victorian Court of Criminal Appeal, Crockett, Southwell and Hampel JJ, 1 October 1992).

20 *Shams v Clarkson* (2002) 130 A Crim R 1, [37], [39].

21 *Sentencing Act 1991* (Vic) s 18(2); *Penalties and Sentences Act 1992* (Qld) s 161(2); *Sentencing Act 1997* (Tas) s 16(2); *Crimes (Sentencing) Act 2005* (ACT) s 63(3).

22 See *Crimes Act 1914* (Cth) s 16E(2)(a), (b).

Society of South Australia submitted it may be helpful for federal legislation to lay down guidelines for how to credit pre-sentence custody, and it should be mandatory for a court to give credit for time spent in pre-sentence custody.<sup>23</sup> The New South Wales Legal Aid Commission submitted that it would be clearer if provisions relating to crediting pre-sentence custody were set out in federal legislation.<sup>24</sup> One judicial officer expressed the view that, irrespective of the method chosen to credit pre-sentence custody, it is important that the method be clearly spelt out in legislation.<sup>25</sup>

### **Manner of crediting pre-sentence custody**

10.20 If there were to be a federal provision covering the field of pre-sentence custody for federal offenders, the issue arises as to what is the most appropriate manner of crediting time spent in pre-sentence custody. As discussed above, the options available are backdating the sentence, reducing the sentence, or declaring time spent in pre-sentence custody as time already served under the sentence.

10.21 Particular problems have been identified in using the reduction method of crediting time spent in pre-sentence custody.<sup>26</sup> In *R v Newman*, Howie J (McColl JA agreeing) said:

If a sentence is decreased by a substantial period already served in custody, it can have the appearance of being inadequate both to public perception and when it appears in the statistical information that is now so often relied upon by sentencing courts. ...

Such a sentence [reduced for pre-sentence custody], particularly where there are few comparable sentences for similar offences, can also skew the statistical information derived from sentences imposed by other courts and give a false indication of the range of sentences that have been imposed for a similar offence or on a similar offender.<sup>27</sup>

10.22 In DP 70 the ALRC proposed that federal sentencing legislation should provide that, where a court sentences an offender to a term of imprisonment in relation to a federal offence, the court must give credit for time spent in pre-sentence custody or detention in connection with the offence by declaring the time as time already served under the term of imprisonment.<sup>28</sup> This proposal was supported by a number of stakeholders,<sup>29</sup> although one expressed a preference for the sentence to be backdated.<sup>30</sup>

23 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.

24 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.

25 Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.

26 Queensland Legal Aid, *Consultation*, Brisbane, 2 March 2005.

27 *R v Newman* (2004) 145 A Crim R 361, [27], [30].

28 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 10–2.

29 Law Council of Australia, *Submission SFO 97*, 17 March 2006; Department of Corrective Services Western Australia, *Submission SFO 88*, 17 February 2006; New South Wales Legal Aid Commission, *Submission SFO 75*, 10 February 2006; Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006.

30 Chief Magistrate Judge D Price & Others, *Consultation*, Sydney, 3 February 2006. See also responses to IP 29: Law Society of South Australia, *Submission SFO 37*, 22 April 2005; M Johnson, *Consultation*, Darwin, 27 April 2005.



The Law Council of Australia submitted that it might be difficult in some cases to determine whether detention or pre-sentence custody is ‘in connection with’ the offence.<sup>31</sup> The Attorney-General’s Department submitted that, whatever option was preferred, the court imposing sentence should clearly detail the head sentence, the non-parole period (where one exists) and the precise date on which the sentence commences and ends, as well as the date on which the offender will first be eligible for parole.<sup>32</sup>

### Interrupted periods of custody

10.23 A further issue is whether credit should be given for interrupted periods of pre-sentence custody and, if so, the best way of doing so.

10.24 The Law Society of South Australia submitted that credit should be given for non-continuous periods of pre-sentence custody:

if an offender went into custody and was then released on bail for a short period before returning to custody, some method by which the time spent in custody can be credited should be allowed for. Even if this results in an artificial starting date, it should do so to be fair to the offender and to take into account any time served.<sup>33</sup>

10.25 In some jurisdictions, where a person charged with a series of offences committed on different occasions has been in custody continuously since arrest, the period of pre-sentence custody must be reckoned from the time the offender was arrested even if the offender is not convicted of the offence for which he or she was first arrested or any other offences in the series.<sup>34</sup> However, the benefit of these provisions does not flow to persons whose period in custody has been interrupted.

10.26 In *R v Newman*, Howie J expressed the view that in cases involving non-continuous periods of pre-sentence custody, a sentence should be backdated rather than reduced in order to give credit for pre-sentence custody. His Honour acknowledged that there might be an element of fiction involved in backdating the commencement of a sentence to a day when an offender may not have actually been in custody. However, he explained that the undesirable consequences flowing from a reduction of sentence (discussed above) rendered backdating the preferable option.<sup>35</sup>

### Custody referable to other offences

10.27 Time spent in pre-sentence custody must relate to the offence for which the sentence is being imposed. However, an offender facing charges for multiple offences

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31 Law Council of Australia, *Submission SFO 97*, 17 March 2006.

32 Attorney-General’s Department, *Submission SFO 83*, 15 February 2006. The ALRC has addressed this issue in Ch 13, Rec 13–4.

33 Law Society of South Australia, *Submission SFO 37*, 22 April 2005. The Law Council of Australia also supported this approach: Law Council of Australia, *Submission SFO 97*, 17 March 2006.

34 See *Sentencing Act 1991* (Vic) s 18(6); *Crimes (Sentencing) Act 2005* (ACT) s 63(4), (5).

35 See *R v Newman* (2004) 145 A Crim R 361, [26]–[32].

may be in custody in relation to more than one offence—that is, the time spent in pre-sentence custody may not be *exclusively* referable to the particular offence or offences for which the offender is being sentenced.

10.28 Queensland Legal Aid expressed a concern in relation to the ambiguous drafting of the Queensland sentencing provision, which requires any time that an offender has been held in custody in relation to proceedings for the offence *and for no other reason* to be declared as time already served.<sup>36</sup> The provision—which is arguably picked up and applied in the sentencing of federal offenders—was said to produce unfair results because it did not apply to an offender who was remanded in custody in relation to a number of offences that were subsequently dealt with in separate proceedings. On a strict interpretation of the provision it could not be said that the offender was in custody in relation to the offence the subject of sentencing and for no other reason.<sup>37</sup>

10.29 Where the time spent in custody is referable to two groups of offences and the offender is sentenced separately for each group, if the first sentence imposed takes account of the entire period of pre-sentence custody, it is not appropriate to take that period into account again when sentencing the defendant for the second group of offences.<sup>38</sup>

### Extension to pre-sentence detention

10.30 Another issue is that s 16E(2) of the *Crimes Act* is expressed to pick up and apply the laws of a state or territory that have the effect of crediting time spent by an offender in *custody*. This does not necessarily encompass time spent by an offender in administrative detention.

10.31 Apart from the sentencing legislation of Victoria and the Northern Territory, which make specific provision for credit to be given for periods of detention under hospital orders,<sup>39</sup> other state and territory sentencing provisions are, on their face, limited to enabling a court to give credit for time spent in custody,<sup>40</sup> which is typically time spent in remand after bail has been refused.<sup>41</sup>

10.32 However, federal offenders may also be subject to administrative detention in relation to federal offences. For example, federal offenders with a mental illness may be subject to pre-sentence detention in a hospital, and unlawful non-citizens can be detained by the authorities under s 250 of the *Migration Act 1958* (Cth) for the purpose

36 *Penalties and Sentences Act 1992* (Qld) s 161(1).

37 Queensland Legal Aid, *Consultation*, Brisbane, 2 March 2005.

38 See *R v Kennedy* (Unreported, New South Wales Court of Criminal Appeal, Hunt CJ, Campbell J and Sully J, 31 August 1993).

39 *Sentencing Act 1991* (Vic) s 18(1); *Sentencing Act 1995* (NT) s 63(3).

40 See *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 24(a), 47(3); *Penalties and Sentences Act 1992* (Qld) s 161; *Sentencing Act 1995* (WA) s 87; *Criminal Law (Sentencing) Act 1988* (SA) s 30; *Sentencing Act 1997* (Tas) s 16; *Crimes (Sentencing) Act 2005* (ACT) s 63.

41 However, see the discussion on the treatment of quasi-custody in Ch 6.

of determining whether or not to prosecute them for certain offences for which they may ultimately be sentenced to imprisonment.<sup>42</sup> There is no limit to the time a person may be held in immigration detention and there is no requirement to bring a charge against a detainee within any particular time. In addition, persons may be detained for a short time period in order to prevent an imminent terrorist act occurring or to preserve evidence relating to a recent terrorist act.<sup>43</sup>

10.33 The Northern Territory Legal Aid Commission expressed the view that immigration detention connected to an offence should be taken into account in sentencing.<sup>44</sup> Judicial views in relation to crediting time spent in pre-sentence immigration detention are discussed in Chapter 6.

### **ALRC's views**

#### ***Credit to be given for pre-sentence custody or detention***

10.34 Federal sentencing legislation should make it clear that, when sentencing a federal offender to a term of imprisonment, it is mandatory for a court to give credit for any time spent by the offender in pre-sentence custody or detention in relation to the offence for which the sentence is being imposed. In the case of pre-sentence immigration detention, the need for fairness is highlighted by the fact that there is no limit to the amount of time an unlawful non-citizen can be kept in detention in relation to a suspected offence before a charge is laid.

#### ***Manner of crediting pre-sentence custody or detention***

10.35 In the interests of promoting clarity, simplicity and consistency of approach, federal sentencing legislation should prescribe only one method by which credit is to be given for pre-sentence custody or detention. The ALRC believes that method should be declaring such time as time already served under the sentence of imprisonment.<sup>45</sup> Of the three methods available for crediting pre-sentence custody, declaring time as time already served is the most principled and transparent, and it lends itself equally to crediting time for continuous and interrupted periods of custody.

10.36 Adopting this method is consistent with having a federal sentence commence on the day it is imposed (see Recommendation 10–1), and it avoids the fiction associated with backdating sentences to take into account interrupted periods of custody, which may result in a commencement date that does not correspond to a time when the offender was actually in custody. Further, this approach does not suffer from the

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42 For example, a non-citizen can be detained in relation to a suspected offence under *Criminal Code* (Cth) s 149.1 (resisting public official in performance of functions—carrying maximum penalty of two years' imprisonment). The crediting of pre-sentence detention where a sentence other than imprisonment is imposed is discussed in Ch 6.

43 See *Anti-Terrorism Act (No 2) 2005* (Cth) sch 4, pt 1, div 105.

44 Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005.

45 The ALRC previously recommended this approach: Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 27.

disadvantages associated with crediting pre-sentence custody by reducing the sentence, namely, creating a public perception of inadequate sentences, and skewing statistics in relation to that category of offence and offender.

10.37 The stated rationale of s 16E was to avoid the problem of an offender who is sentenced to joint state and federal sentences of imprisonment commencing the terms on different dates. However, this issue arises only in respect of joint federal and state or territory sentences that are to be served concurrently: if joint sentences are to be served consecutively they will obviously have different commencement dates. In addition, where joint sentences are to be served concurrently, different commencement dates will arise only where courts take into account pre-sentence custody by backdating a state or territory sentence. Where courts, in respect of a state or territory sentence, credit pre-sentence custody or detention either by reducing the sentence or declaring time spent in pre-sentence custody or detention as time already served under the sentence, the state or territory sentence, like its federal counterpart, will commence on the day it is imposed. As mentioned above, some state and territory sentencing legislation gives the courts a discretion to choose the method by which pre-sentence custody is taken into account.

10.38 The ALRC is not convinced there is any significant problem presented by the fact that its recommendation may result in different commencement dates in respect of some joint federal and state/territory sentences that are to be served concurrently. Nor did any stakeholder indicate how this might pose a problem.

#### ***Calculating credit for pre-sentence custody or detention***

10.39 In DP 70 the ALRC expressed the view that in order to resolve any ambiguity about how pre-sentence custody or detention is to be credited where an offender is sentenced to a term of imprisonment, federal sentencing legislation should make it clear that one day's credit must be given for each full day of pre-sentence custody or detention.<sup>46</sup> This rule should be expressly set out in legislation to distinguish it from the court's approach when sentencing a federal offender to a sentence other than imprisonment. As discussed in Chapter 6, where a court imposes a sentence other than imprisonment it is appropriate for the court to consider any pre-sentence custody or detention, not as a rule, but as a relevant factor in determining the sentence.

10.40 This proposal received support.<sup>47</sup> However, while one stakeholder supported the ALRC's proposal to give credit for pre-sentence custody, he submitted that if detention conditions are appreciably harsher pre-trial this should be recognised by courts at

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46 See Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), [10.36] and Proposal 10-3(a).

47 Law Council of Australia, *Submission SFO 97*, 17 March 2006.

sentencing by departing from the one to one ratio.<sup>48</sup> Another stakeholder noted that remand conditions in Victoria were very restrictive.<sup>49</sup>

10.41 In Canada, two for one credit for time spent in pre-sentence custody is generally considered to be appropriate in recognition of the fact that time served pre-trial is more onerous, particularly as there is an absence of educational, retraining or rehabilitation programs.<sup>50</sup> In some instances, ‘enhanced credit’—which refers to credit at more than the two-to-one ratio—has been given. Normally, enhanced credit approximates a three-to-one ratio, but four-to-one ratios have also been applied.<sup>51</sup> In *R v Kravchov* the trial judge identified the types of factors relevant to enhanced credit. These include: the effect of pre-trial custody on a particular prisoner due to age, infirmity or mental illness; whether a jail is overcrowded and engages in practices such as ‘triple bunking’; the frequency of ‘lockdowns’ and other measures denying the prisoner exercise; and the prevalence of disease or other conditions that endanger the health of the prisoner.<sup>52</sup>

10.42 The ALRC agrees that federal sentencing legislation should be flexible enough to allow additional credit for pre-sentence custody in special circumstances. This is consistent with the common law approach, which allows more credit to be given for pre-sentence protective custody than the actual time spent in pre-sentence custody. For example, in *R v Rose*, the New South Wales Court of Criminal Appeal, having noted that the respondent had spent four months and seven days in pre-sentence protective custody, said:

There was ample evidence, which her Honour was entitled to accept, that the respondent’s time in protective custody had been significantly more onerous than normal prison time. It was accordingly open to her Honour to give that period an equivalence of at least six months or more of ordinary prison time.<sup>53</sup>

10.43 Federal sentencing legislation should also make it clear that credit must be given for pre-sentence custody or detention irrespective of whether the custody or detention was continuous. There is no reason in principle to distinguish between the treatment of continuous and interrupted custody.

10.44 Finally, federal sentencing legislation should make it clear that credit is to be given irrespective of the fact that the pre-sentence custody or detention may not relate exclusively to the offence for which the offender is being sentenced, provided that

<sup>48</sup> J Roberts, *Submission SFO 67*, 16 January 2006.

<sup>49</sup> Criminal Bar Association of Victoria, *Consultation*, Melbourne, 23 February 2006.

<sup>50</sup> See A Manson, ‘Pre-Sentence Custody and the Determination of Sentence (Or How to Make a Mole Hill out of a Mountain)’ (2004) 49 *Criminal Law Quarterly* 292, 311, 314–315.

<sup>51</sup> *Ibid*, 316.

<sup>52</sup> *R v Kravchov* (2002) 4 Criminal Reports (6th) 137.

<sup>53</sup> *R v Rose* [2004] NSWCCA 326, [35]. See also *R v Patison* (2003) 143 A Crim R 118, 136–137 (every year served in strict protection is the equivalent of 18 months or two years in normal conditions of imprisonment); *R v Howard* [2001] NSWCCA 309, [18]; *AB v The Queen* (1999) 198 CLR 111, 152 (every year in protective custody is equivalent to a significantly longer loss of liberty under the ordinary conditions of prison).

credit is not given more than once for the same period of custody or detention.<sup>54</sup> In this regard, the Victorian sentencing legislation may serve as a possible model in so far as it precludes credit from being given for a period of pre-sentence custody that has already been declared as time served in relation to a period of imprisonment for an offence in respect of which an offender has previously been sentenced.<sup>55</sup>

**Recommendation 10–2** Federal sentencing legislation should provide that, where a court sentences an offender to a term of imprisonment in relation to a federal offence, the court must give credit for time spent in pre-sentence custody or detention in connection with the offence by declaring the time as time already served under the term of imprisonment.

**Recommendation 10–3** In calculating the credit to be granted to a federal offender for pre-sentence custody or detention under Recommendation 10–2:

- (a) one day's credit must be given for each full day of pre-sentence custody or detention, subject to the court's discretion to give additional credit in special circumstances;
- (b) credit must be given whether or not the custody or detention was continuous; and
- (c) credit must be given irrespective of the fact that the custody or detention may not relate exclusively to the offence for which the offender is being sentenced, provided that credit is not given more than once for the same period of custody or detention.

### Practical examples

10.45 Set out below are three examples of how the ALRC's recommendations in relation to commencement of sentences and crediting time for pre-sentence custody would work in practice.

#### *Case study A: Federal and state sentences*

10.46 An offender is sentenced on 1 April 2006 in relation to joint state and federal drug offences, having spent four months on remand in relation to both offences. The court imposes a term of imprisonment of two years in relation to the federal offence of importation and a term of imprisonment of one year in relation to the state offence of

<sup>54</sup> The Law Council of Australia supported this approach in principle: Law Council of Australia, *Submission SFO 97*, 17 March 2006.

<sup>55</sup> See *Sentencing Act 1991* (Vic) s 18(2)(d).

supply, to be served concurrently. The court does not find special circumstances that warrant additional credit being given for the time spent on remand.

10.47 The federal sentence will commence on 1 April 2006 (Recommendation 10–1) and four months will be declared as time already served (Recommendation 10–2), so the federal sentence will end on 30 November 2007.

10.48 If we assume the offender is sentenced in New South Wales, and the court chooses to backdate the commencement date of the state sentence, the one-year state sentence will commence on 1 December 2005 and will end on 30 November 2006. If we assume the offender is sentenced in Victoria, and the court credits time for pre-sentence custody for the state offence by declaring time as time already served, the one-year state sentence, like its federal counterpart, will commence on 1 April 2006, and four months will be declared as time already served, so the state sentence will end on 30 November 2006.

***Case study B: Time on remand in relation to two groups of offences***

10.49 An offender is sentenced on 1 April 2006 in relation to six social security fraud offences arising from a single course of conduct, having spent two months on remand in relation to those offences, as well as in relation to taxation offences. Sentencing for the taxation offences is set down for 30 June 2006. On 1 April 2006 the court imposes six terms of imprisonment of 12 months, to be served concurrently in relation to the social security offences.

10.50 In sentencing the offender for those offences the court must give credit for the entire period spent on remand. The court does not find special circumstances that warrant additional credit being given for the time spent on remand. The federal sentences of imprisonment will commence on 1 April 2006 (Recommendation 10–1) and two months will be declared as time served (Recommendation 10–2), so the sentences will end on 31 January 2007. When the offender is sentenced for the taxation offences, the court will not be able to take into account the time spent on remand as the offender has already received credit for that period of time (Recommendation 10–3(c)).

***Case study C: Time on remand not related to the offence***

10.51 An offender is sentenced on 1 April 2006 in relation to a terrorist offence, having spent one year on remand exclusively in relation to that offence. While on remand the offender is investigated for an unrelated corporations law offence. The offender is subsequently charged with the corporations law offence, pleads guilty, and sentencing is set down for 30 July 2006.

10.52 On 1 April 2006 the court imposes a term of imprisonment of seven years in relation to the terrorist offence, and gives credit for the one year spent on remand. The court does not find special circumstances that warrant additional credit being given for the time spent on remand.

10.53 The federal sentence of imprisonment will commence on 1 April 2006 (Recommendation 10–1) and one year will be declared as time served (Recommendation 10–2), so the federal sentence will end on 31 March 2012. When the court sentences the offender for the corporations law offence it will not be entitled to take into account the time spent on remand because the time was not referable to the corporations law offence.



## 11. Discounts and Remissions

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11.1 This chapter considers issues arising in relation to two methods for reducing the sentence of a federal offender. The first method—discounting of a sentence—involves reduction of a sentence by a judicial officer at the time of determining the sentence. Issues that arise in relation to discounting of sentences include: whether a judicial officer should be required to specify any discount given; what factors should be considered in determining discounts for guilty pleas and for cooperation with the authorities; and whether the legislative provision relating to the sentencing of a federal offender who undertakes to cooperate with the authorities needs to be amended.

11.2 The second method—remissions—involves reduction of a sentence after it has been judicially determined. The reduction may be either automatic or earned by an offender through good behaviour. Issues that arise in relation to remissions include whether automatic or earned remissions should be available to federal offenders, and

whether the application of remissions to federal non-parole periods should be extended. The executive prerogative to pardon or remit a sentence is dealt with separately in Chapter 25.

## Specification of discounts

### Background

11.3 There are two ways in which judicial officers assess the factors relevant to determining an offender's sentence. 'Instinctive synthesis' is an approach in which a judicial officer simultaneously takes account of all relevant factors in arriving at a single appropriate sentence.<sup>1</sup> This approach places a premium on judicial discretion, and has been the dominant approach to sentencing in Australia. This may be contrasted with a 'two-stage approach' in which, for example, a judicial officer starts at an 'objective' sentence and then adjusts the sentence up or down to take account of particular circumstances of the case at hand.<sup>2</sup>

11.4 The use of the instinctive synthesis approach to sentencing means that courts specify neither the discount for each mitigating factor nor the premium for each aggravating factor taken into account in determining a federal sentence. Three justices of the High Court have said that:

So long as a sentencing judge must, or may, take account of *all* of the circumstances of the offence and the offender, to single out some of those considerations and attribute specific numerical or proportionate value to some features, distorts the already difficult balancing exercise which the judge must perform.<sup>3</sup>

11.5 But in *Markarian v The Queen*, the High Court softened its criticism of the 'two-stage' approach to sentencing. The majority acknowledged that there might be some circumstances where 'an indulgence in arithmetical process' would better serve the ends of transparency and accessible reasoning.<sup>4</sup>

11.6 It has been suggested that the instinctive synthesis approach to sentencing would not be compromised if certain factors were treated separately, so long as those factors were 'few in number and narrowly confined'.<sup>5</sup> Two factors in respect of which courts in some jurisdictions specify discounts are guilty pleas and cooperation by an offender. As discussed in Chapter 6, the basis upon which courts have regard to guilty pleas and cooperation by the offender is that such factors are not traditional sentencing factors that on their own promote the purposes of sentencing but rather are relevant to the proper administration of the criminal justice system.

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1 *Wong v The Queen* (2001) 207 CLR 584, [75]; *R v Williscroft* [1975] VR 292, 300.

2 *Wong v The Queen* (2001) 207 CLR 584, [76].

3 *Ibid*, [76] (Gaudron, Gummow, Hayne JJ).

4 *Markarian v The Queen* (2005) 215 ALR 213, [39].

5 *R v Thomson*; *R v Houlton* (2000) 49 NSWLR 383, [57].

**Pleading guilty**

11.7 Section 16A(2)(g) of the *Crimes Act 1914* (Cth) lists as a factor to be taken into account in sentencing that the offender has pleaded guilty to the charge in respect of the offence. In contrast to most state and territory sentencing legislation, Part IB of the *Crimes Act* does not state that the weight to be attached to a plea is dependent on the timeliness of the plea.<sup>6</sup> Some state sentencing legislation expressly allows for a discount for a guilty plea<sup>7</sup> and requires a court to give reasons for not reducing a sentence if there has been a guilty plea.<sup>8</sup>

11.8 Where a discount is given for a guilty plea, Part IB does not require the court to specify the discount. The practice in several states—including New South Wales, South Australia and Western Australia—is to encourage judicial officers to quantify discounts for guilty pleas.<sup>9</sup> Specification of discounts for a guilty plea is also a loose practice in the Northern Territory.<sup>10</sup> In *Cameron v The Queen*, the High Court stated that the amount of the discount does not appear to vary greatly in practice.<sup>11</sup> However, unless courts in all jurisdictions specify the discounts they are giving, it is difficult to ascertain the extent of any variation. In Western Australia, for example, the range of discounts for a guilty plea is said to be from 20 to 35 per cent<sup>12</sup> although it is generally accepted that it is an unusual case in which the discount is not at least 25 per cent.<sup>13</sup>

11.9 There is a distinction between a discount given for the utilitarian value of a plea—that is, the value attributed to the fact that the guilty plea saves the state the expense and time of a trial—and discounts given for non-utilitarian reasons such as contrition and willingness to facilitate the course of justice.

11.10 From January 2006, new procedures were introduced into the Local Court of New South Wales in respect of persons who are to be committed to trial in either the District Court or the Supreme Court, where those persons have not entered a plea of guilty.<sup>14</sup> The procedures apply to matters involving indictable offences, including indictable offences that are triable summarily, but do not apply to federal offences. As

6 See *Sentencing Act 1991* (Vic) s 5(2)(e); *Penalties and Sentences Act 1992* (Qld) s 13A(2); *Sentencing Act 1995* (WA) s 8(2); *Crimes (Sentencing) Act 2005* (ACT) s 35(2)(b); *Sentencing Act 1995* (NT) s 5(2)(j). See also *Sentencing Act 2002* (NZ) s 9(2)(b).

7 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(1); *Penalties and Sentences Act 1992* (Qld) s 13.

8 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(2); *Penalties and Sentences Act 1992* (Qld) s 13(4). Under the *Sentencing Act 1995* (WA) s 8(4), when a court reduces a sentence because of a mitigating fact (including a guilty plea) it must state that fact in open court.

9 K Warner, *Sentencing in Tasmania* (2nd ed, 2002), [3.607]. In Tasmania the view has been expressed that a precise discount should not be identified: *Pavlic v R* (1995) 5 Tas R 186, [7], [13].

10 M Johnson, *Consultation*, Darwin, 27 April 2005. See also Law Society of the Northern Territory, *Consultation*, Darwin, 29 April 2005.

11 *Cameron v The Queen* (2002) 209 CLR 339, [95]. See also *R v Thomson*; *R v Houlton* (2000) 49 NSWLR 383, [148]–[149].

12 *Sinagra-Brisca v The Queen* [2004] WASCA 68, [17]; *Ma v The Queen* (2001) 125 A Crim R 349, [101].

13 *Sinagra-Brisca v The Queen* [2004] WASCA 68, [17]; *Radebe v The Queen* (2001) 122 A Crim R 559, [28].

14 See S Beckett, *Case Conferencing* (2006).

part of the reforms, adult defendants who are legally represented are to attend a case conference.

The aim of a Conference is to encourage early appropriate pleas of guilty, the resolution of any other matters relevant to sentence proceedings and to recognise the benefit of such pleas to the community and the accused. Conferences are not compulsory.<sup>15</sup>

11.11 At the conclusion of the conference, the Director of Public Prosecutions (NSW) provides a letter to the defence in which it confirms whether the accused has agreed to plead guilty and whether it will oppose 'the defence submission on sentence that the timing and circumstances of the plea of guilty should attract the maximum allowable discount available for the utilitarian benefit of the plea of guilty'.<sup>16</sup>

11.12 The sentencing legislation of the United Kingdom provides that if a court reduces an offender's sentence because of a guilty plea it is required to state this in open court.<sup>17</sup> A guideline issued by the United Kingdom Sentencing Guidelines Council provides for a sliding scale of discounts for guilty pleas; the level of discount ranging from one-third to one-tenth according to the stage in the proceedings at which the guilty plea was entered.<sup>18</sup>

### *Cooperation by an offender*

11.13 Section 16A(2)(h) of the *Crimes Act* requires a court to take into account the degree to which a federal offender has cooperated with law enforcement agencies in the investigation of the offence or other offences.

11.14 Under Part IB and some state sentencing legislation, it is necessary to specify the reduction given for promised future cooperation.<sup>19</sup> This is often expressed in terms that the court must state the sentence it would have imposed but for the undertaking.<sup>20</sup> A court is not generally required to specify any reduction in sentence given for past cooperation, but the practice of courts in New South Wales is to quantify discounts for both past and promised future cooperation with law enforcement authorities.<sup>21</sup> Similarly, in the ACT, a court is required to specify any reduction it has given in a

15 Chief Magistrate Judge D Price, *Local Court Practice Note No 5 of 2005: Procedures to be adopted for committal hearings in the Local Court for proceedings commenced on or after 1 January 2006*, 5 December 2005.

16 Director of Public Prosecutions (NSW), *Proforma letter from Director of Public Prosecutions (NSW) on outcome of local court conference*.

17 *Criminal Justice Act 2003* (UK) ss 144, 174(2)(d).

18 Sentencing Guidelines Council (UK), *Reduction in Sentence for a Guilty Plea—Guideline*, 1 December 2004. See also Sentencing Advisory Panel (UK), *Advice to the Sentencing Guidelines Council—2: Reduction in Sentence for a Guilty Plea*, 1 June 2004. See also the discussion below.

19 *Crimes Act 1914* (Cth) s 21E; *Penalties and Sentences Act 1992* (Qld) s 13A(7); *Sentencing Act 1995* (WA) s 8(5).

20 *Crimes Act 1914* (Cth) s 21E also requires a court that has reduced a non-parole period to state the non-parole period it would have imposed but for the reduction.

21 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.

sentence on the basis of either past or promised future cooperation.<sup>22</sup> However, it is not the practice in Victoria to specify a discount for past cooperation.<sup>23</sup>

### **Should there be a discount for a guilty plea and on what basis?**

11.15 Discounting for a guilty plea has stirred some academic and judicial controversy. A preliminary issue is whether discounts for guilty pleas should be allowed at all and, if so, on what basis.

11.16 The Law Council of Australia supported the retention of judicial discretion to enable guilty pleas to be considered in determining the appropriate sentencing option and the severity of the sentence.<sup>24</sup> In 2000, the Standing Committee of Attorneys-General recommended that the existing system of discounts for guilty pleas should continue.<sup>25</sup>

11.17 However, Professors Kathy Mack and Sharyn Roach Anleu oppose discounts being given for guilty pleas on the basis that:

it puts an inappropriate burden on the accused's choice to plead guilty, undermines proper sentencing principles, risks inducing a guilty plea from the innocent, undermines judicial neutrality and independence, and does not directly address the problems of time and delay which motivated its introduction by the courts.<sup>26</sup>

11.18 One federal offender also expressed concern that the promise of a substantial discount for a guilty plea could coerce an innocent person to plead guilty to an offence that he or she did not commit. However, he submitted that the way to counter potential abuse was to place a limit on any discount rather than not make it available.<sup>27</sup>

11.19 In *Cameron v The Queen*, the High Court accepted that discounts for a guilty plea could be given for remorse or for willingness to facilitate the course of justice but rejected the view that the discount could be given because it will save the expense of a trial. It said that to allow discounts for utilitarian considerations may have a discriminatory effect on offenders who do not plead guilty:

It is difficult to see that a person who has exercised his or her right to trial is not being discriminated against by reason of his or her exercising that right if, in otherwise comparable circumstances, another's plea of guilty results in a reduction of the sentence that would otherwise have been imposed. However, the same is not true if the plea is seen, subjectively, as the willingness of the offender to facilitate the course of justice.

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22 *Crimes (Sentencing) Act 2005* (ACT) s 37.

23 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

24 Law Council of Australia, *Submission SFO 97*, 17 March 2006.

25 Standing Committee of Attorneys-General, *Deliberative Forum on Criminal Trial Reform* (2000), Rec 51.

26 K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005; K Mack and S Roach Anleu, 'Sentencing Discount for a Guilty Plea: Time for a New Look' (1997) 1 *Flinders Journal of Law Reform* 123, 124.

27 JC, *Submission SFO 25*, 13 April 2005.

Reconciliation of the requirement that a person not be penalised for pleading not guilty with the rule that a plea of guilty may be taken into account in mitigation requires that the rationale for that rule, so far as it depends on factors other than remorse and acceptance of responsibility, be expressed in terms of willingness to facilitate the course of justice and not on the basis that the plea has saved the community the expense of a contested hearing.<sup>28</sup>

11.20 In *Cameron v The Queen*, Kirby J, in dissent, expressed support for a discount to be given on the basis of the utilitarian value of a guilty plea but he noted that this did not detract from the fact that an accused was entitled to plead not guilty and to put the prosecution to proof without being punished more severely for exercising that right.<sup>29</sup> He said:

The main features of the public interest, relevant to the discount for a plea of guilty, are ‘purely utilitarian’. ... it is in the public interest to facilitate pleas of guilty by those who are guilty and to conserve the trial process substantially to cases where there is a real contest about guilt.<sup>30</sup>

11.21 The New South Wales Court of Criminal Appeal’s guideline judgment with respect to the treatment of guilty pleas in relation to state offences expressly encourages quantification of discount for the utilitarian value of a plea. The judgment states that this value should generally be assessed in the range of a 10 to 25 per cent discount on sentence.<sup>31</sup>

11.22 In *R v Sharma*, the New South Wales Court of Criminal Appeal held that a subjective ‘willingness to facilitate the course of justice’—referred to in *Cameron v The Queen*—does not operate to the exclusion of objective considerations in New South Wales. Accordingly, a New South Wales court is entitled to have regard to the utilitarian benefits associated with a guilty plea.<sup>32</sup>

11.23 The Law Society of South Australia saw the ALRC’s inquiry as an opportunity to address proactively the issues raised in *Cameron v The Queen*.<sup>33</sup> Some stakeholders disagreed with the approach of the High Court in *Cameron v The Queen* and supported discounts on the basis of the utilitarian value of a guilty plea.<sup>34</sup> For example, Professor Arie Freiberg suggested courts needed to be pragmatic in this regard.<sup>35</sup>

28 *Cameron v The Queen* (2002) 209 CLR 339, (Gaudron, Gummow, Callinan JJ), [13]–[14]. See also the views expressed by McHugh J, [44]–[47].

29 Ibid, [68].

30 Ibid, [66]–[67]. See also *R v Howard* (2003) 48 ACSR 438, 446–447.

31 *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [158].

32 *R v Sharma* (2002) 54 NSWLR 300.

33 Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005.

34 A Freiberg, *Submission SFO 12*, 4 April 2005; M Bagaric and R Edney, *Consultation*, Melbourne, 1 April 2005; T Glynn, *Consultation*, Brisbane, 2 March 2005.

35 A Freiberg, *Submission SFO 12*, 4 April 2005.

### Should legislation specify the discount or a discounting range?

11.24 Views expressed in submissions and consultations were divided on the issue of whether, if specification of discounts were required, federal legislation should prescribe the discount or the range within which the discount should fall. Some stakeholders supported legislative prescription of discounts on the basis that it would increase transparency in sentencing, limit judicial discretion, and encourage pleas of guilty at the earliest stage in court proceedings.<sup>36</sup>

11.25 Other stakeholders were opposed to the legislative specification of discounts on the basis that it represented an inappropriate fetter on judicial discretion and would hinder application of the instinctive synthesis approach to sentencing.<sup>37</sup> The Law Society of South Australia opposed a legislative sliding scale of discounts for guilty pleas.<sup>38</sup> One legal practitioner indicated that legislative specification of a discount for a guilty plea could make the sentencing process inflexible and may not take into account the fact that an offender is sometimes not at fault when entering a late plea.<sup>39</sup>

11.26 If there were to be legislative prescription of discounts, issues may arise in relation to setting the amounts of such discounts. For example, a low discount could dissuade offenders from pleading guilty.<sup>40</sup>

### Should courts specify discounts and for what factors?

11.27 If a discount on sentence is to be given in certain circumstances, the next issue that arises is whether the court should specify the amount of that discount. There is some judicial support for specification of discounts in respect of factors that are relevant to the proper administration of the criminal justice system. In *Markarian v The Queen*, McHugh J stated that the instinctive synthesis approach to sentencing was not inconsistent with awarding a quantified discount for some factors, provided the discount relates to a purpose distinct from a sentencing purpose:

The distinction between permissible and impermissible quantification of ‘discounts’ on a sentence will usually be found in whether the quantification relates to a sentencing purpose rather than some other purpose. So, the quantification of the discount commonly applied for an early plea of guilty or assistance to authorities is offered as an incentive for specific outcomes in the administration of criminal justice and is not related to sentencing purposes. ... I think the use of discounts should be

36 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; JC, *Submission SFO 25*, 13 April 2005; JK, *Submission SFO 10*, 15 March 2005; M Bagaric and R Edney, *Consultation*, Melbourne, 1 April 2005.

37 Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; M Johnson, *Consultation*, Darwin, 27 April 2005; Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005.

38 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.

39 M Johnson, *Consultation*, Darwin, 27 April 2005.

40 See, eg, M Pelly, ‘Fears late guilty plea penalties could backfire’, *The Sydney Morning Herald*, 7 April 2005, 4.

reserved for only one—maybe two—factors in a particular sentence that serve some goal other than a sentencing goal.<sup>41</sup>

11.28 In *R v Place*, the South Australian Court of Criminal Appeal stated that there were compelling public policy reasons why a court should identify the specific reduction given in respect of a guilty plea:

Experience in this State and in New South Wales has demonstrated that the public policy objectives are not achieved unless the specific reduction is identified. ... After sentence has been imposed an offender is not left in any doubt as to whether benefit was given for a plea of guilty as full knowledge of the extent of the reduction and the reasons for it are given. The community and the appellate court are similarly well informed.<sup>42</sup>

11.29 In *R v Nagy*, McGarvie J (in dissent) acknowledged that specification of discounts makes the task of a judicial officer more difficult but nonetheless expressed support for specification of discounts for cooperation.<sup>43</sup> However, the majority of the Victorian Court of Criminal Appeal in *R v Nagy* opposed the specification of discounts for cooperation on the basis that it involved the adoption of the ‘two-tier’ process of sentencing.<sup>44</sup>

11.30 One advantage of specifying discounts is increased transparency of decision making by judicial officers. In *Cameron v The Queen*, Kirby J expressed the view that if the fact of giving a discount and the specification of that discount are not expressly identified there will be a danger that ‘the lack of transparency, effectively concealed by judicial “instinct”, will render it impossible to know whether proper sentencing principles have been applied’.<sup>45</sup>

11.31 In 2000, the Standing Committee of Attorneys-General recommended that judges identify discounts given for cooperation.<sup>46</sup>

11.32 In response to Issues Paper 29 (IP 29),<sup>47</sup> many stakeholders expressed support for specification of discounts, either for past or promised cooperation or for a plea of guilty.<sup>48</sup> The advantages of specification identified by stakeholders included greater

41 *Markarian v The Queen* (2005) 215 ALR 213, [74].

42 *R v Place* (2002) 81 SASR 395, [81].

43 See *R v Nagy* [1992] 1 VR 637, 650.

44 *Ibid*, 638, 652.

45 *Cameron v The Queen* (2002) 209 CLR 339, [70].

46 See Standing Committee of Attorneys-General, *Deliberative Forum on Criminal Trial Reform* (2000) rec 52.

47 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005).

48 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005; JC, *Submission SFO 25*, 13 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; M Johnson, *Consultation*, Darwin, 27 April 2005; M Bagaric and R Edney, *Consultation*, Melbourne, 1 April 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005; T Glynn, *Consultation*, Brisbane, 2 March 2005; New South Wales Bar Association, *Consultation*, Sydney, 2 September 2004.



consistency and transparency in sentencing, and increasing the incentive for guilty offenders to plead guilty and to cooperate with the authorities.

11.33 Professors Mack and Roach Anleu, who opposed any discount for a guilty plea, expressed the view that if there were to be a discount for a guilty plea a clear statement of the amount of the discount is necessary ‘otherwise the accused is left to wonder whether the benefit which was the inducement for the plea was actually conferred’.<sup>49</sup> One federal offender supported specification of discounts in a number of circumstances including: an early guilty plea; the age and ill health of an offender (including any psychiatric condition); and the fact that an offender would be placed in protective custody.<sup>50</sup>

11.34 The Law Society of South Australia expressed concern that requiring judicial officers to specify particular discounts represented an inappropriate intrusion on the sentencing discretion and risked making the sentencing process inflexible. However, in the case of an offender who had given an undertaking to cooperate with the authorities, the Law Society submitted that a judicial officer would not be remiss in referring to the time range that would have been imposed if the undertaking had not been given.<sup>51</sup>

11.35 In Discussion Paper 70 (DP 70), the ALRC proposed that federal sentencing legislation should provide that, where a court discounts a sentence of a federal offender for pleading guilty or for past or promised future cooperation, the court must specify the discount given, whether by way of reducing the quantum of the sentence or by imposing a less severe sentencing option. The ALRC proposed that the amount of the discount, if any, should be left to the court’s discretion.<sup>52</sup> This proposal received support.<sup>53</sup> The Law Council of Australia submitted that the proposal would make sentencing more transparent. It said:

This proposal should it be adopted and executed by government is likely to minimise court delay and costs and serves public policy interests. This is a legitimate exception to the general principle of intuitive synthesis approach developed at common law. That said ... the remorse aspect of a plea of guilty must still be taken into account.<sup>54</sup>

11.36 The Commonwealth Director of Public Prosecutions (CDPP) submitted that it would be simpler if there were no requirement to specify discounts for past cooperation. It noted that care would need to be taken to ensure that double-discounting does not occur—that is, a court should be careful not to discount a sentence for a guilty plea or cooperation on the basis that it evidences remorse or

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49 K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005.

50 JK, *Submission SFO 10*, 15 March 2005.

51 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.

52 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 11–1.

53 Law Council of Australia, *Submission SFO 97*, 17 March 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006; Australian Taxation Office, *Submission SFO 72*, 10 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

54 Law Council of Australia, *Submission SFO 97*, 17 March 2006.

contrition, and also discount the sentence on the basis of the degree to which the person has shown contrition for the offence.<sup>55</sup>

11.37 Julian Roberts supported the ALRC's proposal to leave the amount of the discount to a court's discretion. However, he submitted that consistency of application warranted that a 'cap' be placed on the amount of any discount in order to discourage guilty pleas from the innocent, and community criticism of the sentencing process.<sup>56</sup>

### **ALRC's views**

#### ***Availability and basis of the discounts***

11.38 As discussed in Chapter 6, the ALRC is of the view that guilty pleas and cooperation with the authorities should be taken into account in sentencing because they promote the proper administration of the criminal justice system. Where appropriate, they are to be treated as mitigating factors. A discount may be given by way of reduction of the head sentence or the non-parole period or by the imposition of a less severe sentencing option.

11.39 The value of awarding a discount for a guilty plea is recognised in contexts other than criminal proceedings, such as disciplinary proceedings before tribunals determining charges against football players.<sup>57</sup> The factors that a court should consider in assessing whether to give a discount for a guilty plea or for cooperation are addressed separately below.

#### ***Legislative specification of discounts***

11.40 The ALRC does not support legislative prescription of the quantum of a discount, whether in the form of a fixed percentage, a range of percentages, or a maximum percentage. Such an approach unduly fetters judicial discretion. Sliding scales of discounts based solely on the timing of a guilty plea are also problematic because they do not recognise the particular circumstances in which a plea is made.

11.41 Further, legislative prescription of discounts may promote the false view that a discount can be given only by way of reducing the quantum of the penalty. As discussed below, there was support among stakeholders for courts to give discounts by imposing less severe sentencing options.

#### ***Judicial specification of discounts***

11.42 In order to encourage guilty offenders to plead guilty and to cooperate with the authorities—thereby promoting the proper administration of the criminal justice

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55 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006. See also Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

56 J Roberts, *Submission SFO 67*, 16 January 2006.

57 C Le Grand, *Discounts Centre of Tribunal Review* (2005) <[www.the-australian.news.com.au](http://www.the-australian.news.com.au)> at 6 October 2005.

system—offenders should be informed of the discount they receive on account of their guilty plea or cooperation. It is already the practice in some states to specify discounts for guilty pleas and future cooperation and, at the federal level, sentencing law currently requires the specification of any discount for promised future cooperation. As noted above, specification of discounts has some judicial and stakeholder support on public policy grounds relating to the administration of the criminal justice system and because it increases transparency in sentencing. To require a court to specify the discount it has given on account of an offender's undertaking to cooperate with the authorities also serves a pragmatic function: it informs a court that re-sentences an offender who fails to comply with the undertaking of the sentence the offender would have received in the absence of such an undertaking. The practice of specifying a discount for past cooperation appears to be less common, although it is the practice in New South Wales and is the approach in the new ACT sentencing legislation.

11.43 However, judicial officers should not be required to specify discounts in relation to mitigating factors such as youth, old age, ill health or the making of reparation. In relation to traditional sentencing factors, transparency can be achieved by a judicial officer addressing, in his or her reasons for decision, the factors that were taken into account in determining the sentence. To require specification of discounts for each mitigating factor would threaten the widely adopted instinctive synthesis approach to sentencing, but to require specification of discounts for the two factors that relate to the administration of the criminal justice system does not present a similar threat.

**Recommendation 11–1** Federal sentencing legislation should provide that, where a court discounts the sentence of a federal offender for pleading guilty or for past or promised future cooperation, the court must specify the discount given, whether by way of reducing the quantum of the head sentence or the non-parole period or by imposing a less severe sentencing option. The amount of the discount, if any, should be left to the court's discretion.

## Factors relevant to discounting a sentence for pleading guilty

11.44 Part IB requires the court, when sentencing a federal offender, to take into account the fact that the offender pleaded guilty but does not refer to any other circumstance in relation to the plea.

11.45 State and territory sentencing legislation provides that a court is to have regard to the timing of a plea.<sup>58</sup> The ACT sentencing legislation identifies a number of factors a court must consider in assessing whether to reduce a sentence of imprisonment

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<sup>58</sup> *Sentencing Act 1991* (Vic) s 5(2)(e); *Penalties and Sentences Act 1992* (Qld) s 13A(2); *Sentencing Act 1995* (WA) s 8(2); *Crimes (Sentencing) Act 2005* (ACT) s 35(2)(b); *Sentencing Act 1995* (NT) s 5(2)(j). See also *Sentencing Act 2002* (NZ) s 9(2)(b).

because of a guilty plea. In addition to the fact and timing of the plea, the legislation refers to whether the guilty plea was related to negotiations between the prosecution and the defence about the charge to which the offender pleaded guilty; the seriousness of the offence; and the effect of the offence on any victims.<sup>59</sup> A court is precluded from making a significant reduction in sentence if the court considers that the prosecution's case is overwhelmingly strong.<sup>60</sup>

11.46 The sentencing legislation of the United Kingdom requires a court to take into account the stage in the proceedings at which the offender indicated his or her intention to plead guilty and the circumstances in which this indication was given. A guideline issued by the United Kingdom Sentencing Guidelines Council provides that:

The critical time for determining the maximum reduction for a guilty plea is the first reasonable opportunity for the defendant to have indicated a willingness to plead guilty. This opportunity will vary with a wide range of factors and the Court will need to make a judgment on the particular facts of the case before it.<sup>61</sup>

11.47 The issue arises whether it is desirable for federal sentencing legislation to set out the factors to which a court must have regard in determining whether to discount a sentence on account of a guilty plea, and the extent of any discount the court might give.

11.48 In response to IP 29, the CDPP submitted that any discount should reflect the stage at which a plea is entered, and that a plea at a late stage should not lead to a significant discount.<sup>62</sup> This supports the view that the timing of a plea should be a relevant factor in assessing any discount to be given. The Law Society of South Australia submitted that, irrespective of when it was entered, a guilty plea should always attract an exercise of the judicial discretion to provide a discount, even if the discount is minor.<sup>63</sup> This supports the view that factors other than the timing of the plea are relevant to the discount.<sup>64</sup>

11.49 In DP 70, the ALRC proposed that:

Federal sentencing legislation should provide that in determining whether to discount the sentence of a federal offender for pleading guilty, and the extent of any discount the court must consider the following matters:

- (a) the degree to which the plea of guilty objectively facilitates the administration of the criminal justice system; and
- (b) the objective circumstances in which the plea of guilty was made, including:

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<sup>59</sup> *Crimes (Sentencing) Act 2005* (ACT) s 35(2).

<sup>60</sup> *Ibid* s 35(4).

<sup>61</sup> Sentencing Guidelines Council (UK), *Reduction in Sentence for a Guilty Plea—Guideline*, 1 December 2004.

<sup>62</sup> Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

<sup>63</sup> Law Society of South Australia, *Submission SFO 37*, 22 April 2005.

<sup>64</sup> See also M Johnson, *Consultation*, Darwin, 27 April 2005.

- (i) whether the offender pleaded guilty at the first reasonable opportunity to do so;
- (ii) whether the offender had legal representation; and
- (iii) whether, as a result of negotiations between the prosecution and the defence, the offender was charged with a less serious offence because of the guilty plea.<sup>65</sup>

11.50 One stakeholder expressed support for the proposal in its entirety.<sup>66</sup> The CDP specifically supported the inclusion of the limb relating to negotiations between the prosecution and the defence, resulting in the offender being charged with a less serious offence on account of the guilty plea.<sup>67</sup> However, Victoria Legal Aid opposed it:

This proposal could lead to the situation where a defendant is charged with a very serious offence that ultimately cannot be made out by the police. However, the defendant may plead guilty to a lesser offence in a situation where the charges to the more serious offence are dropped. The fact that a person was charged with a more serious offence that could not be made out is irrelevant and should not be taken into account in relation to any discount that may be available to the accused. VLA is concerned that this may lead to police charging accused people with more serious offences because of the ultimate impact on discounts.<sup>68</sup>

### ALRC's views

11.51 There is merit in federal sentencing legislation providing additional guidance to judicial officers in determining whether to discount a sentence because of a guilty plea and in assessing the level of any such discount. Providing guidance promotes consistency and clarity of approach, particularly in the context of conflicting judicial opinions about aspects of the discount for a guilty plea.

11.52 Guilty pleas are taken into account in sentencing because it is important to encourage behaviour that promotes the proper administration of the criminal justice system. The subjective willingness of an offender to facilitate the administration of justice is relevant to various purposes of sentencing. However, the ALRC agrees with the view expressed in consultations that, for pragmatic reasons, federal sentences should not be determined solely by reference to the purposes of sentencing.<sup>69</sup> Federal sentences should also advance the object of the new federal sentencing Act, namely, to promote the proper administration of the federal criminal justice system when sentencing federal offenders.<sup>70</sup> Accordingly, in determining whether to give a discount for a guilty plea, and the nature and extent of any discount, a court should have regard to the degree to which the plea of guilty facilitates the administration of the criminal justice system. In making this assessment, courts should have regard to the saving in:

<sup>65</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 11–2.

<sup>66</sup> G Mackenzie, *Submission SFO 80*, 14 February 2006.

<sup>67</sup> Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

<sup>68</sup> Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

<sup>69</sup> Purposes of sentencing are discussed in Ch 4.

<sup>70</sup> Rec 2–4(j).

judicial and court resources; prosecutorial operations; the provision of legal aid to accused persons; witness fees; and the fees paid to jurors.<sup>71</sup> The court should also consider whether the guilty plea spared any victims of the offence from the trauma of giving evidence.

11.53 A court should also have regard to the objective circumstances in which a plea of guilty is made. Under this approach, the timing of a guilty plea is a relevant consideration, but it is not the only factor to be considered. Rather, adapting the formulation of the United Kingdom guideline on discounts—as well as the approach recently favoured by the New Zealand Law Commission<sup>72</sup> and the High Court in *Cameron v The Queen*<sup>73</sup>—a court should have regard to whether an offender pleaded guilty at the first reasonable opportunity to do so. In making that determination, it would be relevant to know the extent of prosecution disclosure in relation to the charges at that time and whether the offender had legal representation.

11.54 The ALRC no longer considers that federal sentencing legislation should require a court to have regard to whether, as a result of negotiations between the prosecution and the defence, the offender was charged with a less serious offence because of the guilty plea, having regard to the concern that this might lead to oppressive conduct by the police.

11.55 Courts will need to be careful not to give a double-discount on sentence—that is, a discount for a guilty plea on the basis that it evidences remorse or contrition, and also a discount on the basis of the degree to which the person has shown contrition for the offence—because the latter is a sentencing factor in its own right.<sup>74</sup> In this regard, the ALRC considers that an offender’s contrition, subjective willingness to facilitate the administration of the criminal justice system, and acknowledgement of responsibility—which all relate to the offender’s attitude—are interrelated and should be considered by a court as sentencing factors. They should not be considered separately as factors relevant to determining whether to give a discount for a guilty plea, and the extent of any such discount. On this approach, the potential for double discounting in relation to subjective factors, such as contrition, does not arise. However, it may be desirable for this issue to be specifically addressed in submissions on sentence.

11.56 The ALRC does not support the inclusion of some of the factors that the ACT sentencing legislation identifies as relevant to the treatment of a guilty plea—namely the seriousness of the offence and the effect of the offence on victims. These are

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71 See *Cameron v The Queen* (2002) 209 CLR 339, [66] (Kirby J).

72 New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), [311].

73 *Cameron v The Queen* (2002) 209 CLR 339, [22].

74 *Crimes Act 1914* (Cth) s 16A(2)(f). See also Rec 6–1.

sentencing factors in their own right. There is no need for a court to consider them separately in determining the head sentence and the amount of any discount given.<sup>75</sup>

**Recommendation 11–2** Federal sentencing legislation should provide that in determining whether to discount the sentence of a federal offender for pleading guilty, and the extent of any discount, the court must consider the following matters:

- (a) the degree to which the plea of guilty facilitates the administration of the federal criminal justice system; and
- (b) the objective circumstances in which the plea of guilty was made, including whether the offender pleaded guilty at the first reasonable opportunity to do so, and whether the offender had legal representation.

### Factors relevant to discounting a sentence for cooperation

11.57 Part IB of the *Crimes Act* does not provide any guidance to a court in assessing whether to give a discount, and the level of any such discount, on account of an offender's undertaking to cooperate with the authorities.

11.58 In contrast, the sentencing legislation of New South Wales and the ACT sets out a number of factors to which the court must have regard in deciding: (a) whether to impose a lesser penalty for an offence on account of an offender's past or promised future cooperation with the authorities; and (b) the nature and the extent of the penalty to be imposed. These factors include: the significance and usefulness of the assistance taking into consideration any evaluation by the authorities of the assistance rendered or undertaken to be rendered; the nature, extent and timeliness of the assistance or promised assistance; any risk of danger or injury or any injury suffered by the offender or the offender's family as a result of the assistance; and the impact of the offence on the victims.<sup>76</sup>

11.59 The question arises as to whether federal sentencing legislation should provide more guidance about whether to discount the sentence of a defendant who undertakes to cooperate with the authorities and the extent of any discount.<sup>77</sup>

11.60 In DP 70, the ALRC proposed that federal sentencing legislation should set out a list of specified factors that a court is to consider in determining whether to discount the sentence of a federal offender for past or promised cooperation, and the extent of

<sup>75</sup> See Ch 6 and Rec 6–1.

<sup>76</sup> See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23; *Crimes (Sentencing) Act 2005* (ACT) s 36.

<sup>77</sup> Commonwealth Director of Public Prosecutions, *Consultation*, Hobart, 14 April 2005.

any discount.<sup>78</sup> This proposal was supported by a number of stakeholders, including the CDPP who said it would assist the court.<sup>79</sup> The Australian Taxation Office submitted:

The requirement to assess the value of the assistance provided or offered before discounting a sentence is supported. Offenders usually have no means of objectively assessing the value of information they provide to an investigatory agency, and a vested interest in inflating its worth. Claims of cooperation by a defendant can therefore be made based on the provision of stale or worthless information.<sup>80</sup>

11.61 The Criminal Bar Association of Victoria expressed the view that the proposal that the court consider ‘any injury suffered by the offender or the offender’s family or any danger or risk of injury to the offender or the offender’s family because of the assistance or undertaking to assist’<sup>81</sup> did not accommodate the fact that offenders may suffer other detriments because of their cooperation with the authorities. For example, offenders may have to sever ties with family and friends; and may suffer economic detriments because they have to give up their livelihood, take on an assumed identity, or move overseas.<sup>82</sup>

11.62 Victim Support Australasia submitted that a court should take into account the effect on a primary victim of any reduction in sentence on account of an offender’s cooperation with law enforcement authorities.<sup>83</sup>

### ALRC’s views

11.63 Federal sentencing legislation should provide additional guidance to judicial officers in determining whether to discount a sentence by reason of past or promised cooperation, and in assessing the level of any such discount.

11.64 Guidance should be provided through a list of factors to be considered by the court. The sentencing legislation of New South Wales and the ACT provide useful models in identifying the types of factors to be included,<sup>84</sup> and many of the factors identified in that legislation are appropriate for adoption in federal sentencing legislation. The ALRC does not, however, support including factors that are sentencing factors in their own right, such as the impact of the offence on the victim.

11.65 The ALRC agrees that the factors to be considered by the court should include any detriment suffered by the offender or the offender’s family because of the assistance or undertaking to assist.

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<sup>78</sup> See Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 11–3 for a full list of factors.

<sup>79</sup> Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006; Australian Taxation Office, *Submission SFO 72*, 10 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

<sup>80</sup> Australian Taxation Office, *Submission SFO 72*, 10 February 2006.

<sup>81</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 11–(3)(f).

<sup>82</sup> Criminal Bar Association of Victoria, *Consultation*, Melbourne, 23 February 2006.

<sup>83</sup> Victim Support Australasia, *Submission SFO 60*, 21 December 2005.

<sup>84</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23; *Crimes (Sentencing) Act 2005* (ACT) s 36.



**Recommendation 11–3** Federal sentencing legislation should provide that in determining whether to discount the sentence of a federal offender for past or promised cooperation, and the extent of any discount, the court must consider the following matters:

- (a) the significance and usefulness of the offender’s assistance to law enforcement authorities;
- (b) the truthfulness, completeness and reliability of any information or evidence provided by the offender;
- (c) the nature and extent of the offender’s assistance or promised assistance;
- (d) the timeliness of the assistance or the undertaking to assist;
- (e) any benefits the offender has gained or may gain because of the assistance or the undertaking to assist; and
- (f) any detriment suffered by the offender or the offender’s family or any danger or risk of detriment to the offender or the offender’s family because of the assistance or undertaking to assist.

### Sentencing offenders who undertake to cooperate

11.66 In sentencing a federal offender, a court may reduce the sentence or the non-parole period imposed because of the offender’s undertaking to provide cooperation with law enforcement agencies. Where a court reduces a sentence or a non-parole period because of such an undertaking, s 21E of the *Crimes Act* requires the court to state that fact and to specify the sentence or the non-parole period that it would have imposed but for the reduction. Section 21E also authorises the CDPP, while the offender is under sentence, to appeal against the inadequacy of the sentence or the non-parole period, where the offender fails without reasonable excuse to cooperate.<sup>85</sup>

11.67 The sentencing legislation of other jurisdictions typically deals with a court’s obligation to specify any reduction in sentence separately from a provision dealing with how an offender’s failure to provide post-sentence cooperation may be redressed.<sup>86</sup>

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85 Dealing with the failure of a federal offender to comply with an undertaking to cooperate with the authorities is discussed in Ch 16.

86 *Penalties and Sentences Act 1992* (Qld) ss 13A, 188; *Sentencing Act 1995* (WA) ss 8(5), 37A; *Crimes (Sentencing) Act 2005* (ACT) ss 36–37, 137.

### Reduction in quantum or type

11.68 Section 21E has been criticised for creating ‘unexpected perplexity’.<sup>87</sup> The section refers only to reduced sentences and reduced non-parole periods, although it has been held to apply where a court makes a recognizance release order notwithstanding that the section does not refer to the reduction of a recognizance release order by virtue of an offender’s undertaking to cooperate.<sup>88</sup>

11.69 Because s 21E refers only to reduced sentences and reduced non-parole periods, it is not clear whether the section allows a court to impose a less severe sentencing option rather than reducing a sentence in quantum, as a way of acknowledging the offender’s undertaking to cooperate. In response to IP 29, officers of the CDPP expressed support for authorising a court to discount a sentence for future cooperation by imposing a less severe sentencing option, and requiring the court to state that it had done so.<sup>89</sup>

11.70 In DP 70, the ALRC proposed that federal sentencing legislation should provide that, in sentencing a federal offender who undertakes to provide future cooperation with law enforcement authorities, in addition to imposing a reduced head sentence or non-parole period, a court may impose a less severe sentencing option. In that case, the court must state what sentencing option it would have imposed but for the undertaking to cooperate.<sup>90</sup> This proposal received support from a number of stakeholders.<sup>91</sup>

### Confidentiality

11.71 Practical difficulties may arise from the requirement to specify the reduction in sentence attributable to an offender’s cooperation where there is a need to protect the offender from retaliation.<sup>92</sup> In response to IP 29, the CDPP submitted that federal legislation should address the confidentiality of material given to courts, without the need to rely on state and territory provisions.<sup>93</sup>

11.72 The sentencing legislation of Queensland, for example, expressly empowers a court, where the safety of any person is in issue or where there is a need to guarantee the confidentiality of information given by an informer: (a) to close proceedings where oral submissions are to be made or evidence is to be led relevant to the reduction of sentence; and (b) to prohibit publication of the proceedings or the personal details of a

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87 *Director of Public Prosecutions (Cth) v Haunga* (2001) 127 A Crim R 358, [6].

88 *Ibid.*

89 Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.

90 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 11–4(a).

91 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

92 See *R v Parsons* (1993) 66 A Crim R 550, 558, 561.

93 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

witness.<sup>94</sup> The CDPP has expressed the view that this section is picked up and applied to the sentencing of federal offenders by s 68 of the *Judiciary Act 1903* (Cth).<sup>95</sup>

11.73 In DP 70, the ALRC proposed that federal sentencing legislation should provide that, in sentencing a federal offender who undertakes to provide future cooperation with law enforcement authorities, the court has the power, on application of any party to the proceedings or on its own motion, to close the court and to make orders to protect confidential information or evidence in relation to the undertaking or to protect the safety of any person.<sup>96</sup> This proposal was also supported.<sup>97</sup> The Criminal Bar Association of Victoria expressed the view that the proposal should be extended to discounts for past cooperation because protection may also be needed in that situation. It said that it was preferable for judicial officers to close the court rather than have the parties hand up documents in sealed envelopes, particularly from the perspective of an appellate court.

### Documenting the undertaking to cooperate

11.74 Another issue identified in consultations was the need for formal evidence and procedures to establish cooperation under s 21E. It was stated that sometimes an offender merely promises cooperation from the bar table, without reinforcement through sealed letters or other formalities.<sup>98</sup> Queensland sentencing legislation expressly requires that a written undertaking be handed up to the court in an unsealed envelope addressed to the sentencing judge or magistrate.<sup>99</sup>

11.75 In DP 70, the ALRC proposed that federal sentencing legislation should provide that, in sentencing a federal offender who undertakes to provide future cooperation with law enforcement authorities, the undertaking must provide details of the promised cooperation and must be in writing or reduced to writing and signed or otherwise acknowledged by the offender.<sup>100</sup> This proposal received support.<sup>101</sup>

### Need for judicial education

11.76 Further problems identified in submissions and consultations were the refusal by some judicial officers to specify the reduction for future cooperation as required by

94 *Penalties and Sentences Act 1992* (Qld) s 13A(5), (7)–(9).

95 Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004.

96 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 11–4(b).

97 G Mackenzie, *Submission SFO 80*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; Criminal Bar Association of Victoria, *Consultation*, Melbourne, 23 February 2006.

98 Commonwealth Director of Public Prosecutions, *Consultation*, Hobart, 14 April 2005.

99 *Penalties and Sentences Act 1992* (Qld) s 13A(3)(a), (4). See also the discussion above on factors relevant to reduction of sentence for cooperation.

100 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 11–4(c).

101 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

s 21E of the *Crimes Act*<sup>102</sup> and the difficulty experienced by some judicial officers in applying the section.

In Victoria the concept of ‘two-tiered sentencing’ does not apply in the normal course of events, and accordingly the structure of s 21E requires a State judge to apply a different approach to the forming of an appropriate sentence.<sup>103</sup>

### **ALRC’s views**

11.77 Amendments should be made to the provision dealing with the sentencing of a federal offender who undertakes to cooperate with law enforcement authorities. Federal sentencing legislation should deal separately with: (a) the court’s obligations at the time of sentencing such an offender; and (b) the post-sentencing issue of how to address an offender’s failure to comply with an undertaking to cooperate (which is considered in Chapter 16). This is consistent with the approach in some states and territories. It is also in step with the ALRC’s recommendation elsewhere in this Report to improve the structure and order of federal sentencing provisions.<sup>104</sup>

11.78 Provisions dealing with the sentencing of a federal offender who undertakes to provide future cooperation with law enforcement authorities should be amended to provide as follows:

- in addition to imposing a reduced head sentence or non-parole period, a court may impose a less severe sentencing option, in which case it must state what sentencing option it would have imposed but for the undertaking to cooperate; and
- an undertaking to cooperate must provide details of the promised cooperation, and must be in writing or reduced to writing and signed or otherwise acknowledged by the offender.

11.79 Requiring a written undertaking setting out details of the promised cooperation will assist a court, when imposing sentence, in assessing whether to reduce the sentence or impose a less severe sentencing option, and the extent of any reduction to be given. It will also assist when reconsidering a sentence following failure to comply with the undertaking, as there will be documentation against which the court can assess the extent of an offender’s failure to comply.

11.80 Federal sentencing legislation should also provide that a court has the power to close the court and to make orders to protect the safety of any person or to protect information or evidence in relation to past cooperation as well as an undertaking to cooperate. While courts have an inherent power to regulate their proceedings for the

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102 Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005.

103 J Champion, *Submission SFO 46*, 29 April 2005.

104 See Rec 2–2.

purpose of administering justice,<sup>105</sup> and many superior courts have an express statutory power to close the court,<sup>106</sup> an express power would be useful for lower courts in the judicial hierarchy.

11.81 There also appears to be a need for judicial education to address judicial reluctance or difficulties in applying the requirement to specify reduction in sentences on the basis of promised cooperation. Recommendations in relation to judicial education are set out in Chapter 19.

**Recommendation 11–4** Federal sentencing legislation should provide that, in sentencing a federal offender who undertakes to cooperate with law enforcement authorities in the future:

- (a) in addition to imposing a reduced head sentence or non-parole period, a court may impose a less severe sentencing option, in which case it must state what sentencing option it would have imposed but for the undertaking to cooperate; and
- (b) the undertaking must provide details of the promised cooperation and must be in writing or reduced to writing and signed or otherwise acknowledged by the offender.

**Recommendation 11–5** Federal sentencing legislation should provide that, in sentencing an offender who has cooperated or has undertaken to cooperate with law enforcement authorities, the court has the power, on application of any party to the proceedings or on its own motion: (a) to close the court; and (b) to make orders to protect the safety of any person or to protect information or evidence in relation to the cooperation or the undertaking to cooperate.

## Remissions

### Background

11.82 Remission is the reduction of a sentence by administrative action after a court has imposed a sentence. Remissions can operate either to reduce the amount of time to be served in prison—for example by reducing the non-parole period—or to reduce the length of a head sentence. Where a court has not set a non-parole period in relation to a term of imprisonment, remissions can also operate to reduce both the time in custody and the head sentence. Remissions are typically characterised as either general remissions, which are usually granted automatically at the commencement of the

<sup>105</sup> *Ex Parte The Queensland Law Society Incorporated* (1984) 1 Qd R 166, 170.

<sup>106</sup> See, eg *Federal Court of Australia Act 1976* (Cth) s 17(4); *Supreme Court Act 1986* (Vic) s 18(1); *Supreme Court Act 1979* (NT) s17.

sentence or at regular intervals during the sentence, or special or earned remissions, which are usually awarded at the discretion of prison authorities on evidence of good behaviour and industry on the part of the offender.<sup>107</sup>

11.83 Section 19AA(1) of the *Crimes Act* applies state and territory remission laws to federal sentences being served in prisons of those states and territories. The provision expressly excludes state and territory laws that allow remissions of non-parole periods or ‘periods of imprisonment equivalent to pre-release periods of imprisonment in respect of recognizance release orders’. However, if special reductions of the non-parole period are available under state law by reason of industrial action taken by prison warders, those remissions are also to be made available to federal prisoners.<sup>108</sup>

11.84 One of the explicit purposes of the legislation introducing Part IB of the *Crimes Act* was to provide that federal offenders would not have their non-parole periods reduced by remissions.<sup>109</sup> The intention of the legislation was to provide ‘certainty in the period that the person is to serve before parole eligibility arises’.<sup>110</sup>

11.85 Remissions are no longer widely used in Australia. The movement towards abolition of remissions arose as a result of the adoption of the ‘truth in sentencing’ principle, which sought to ensure that sentences of imprisonment announced in courts were actually served. In one case, state legislation—now repealed—made provision for automatic remission of one-third of a sentence of imprisonment.<sup>111</sup>

11.86 At the time Part IB was enacted, some states such as New South Wales had abolished remissions, while others had not. For this reason, s 16G was included in Part IB to ensure that federal prisoners were not disadvantaged in being sentenced in one state rather than another.

11.87 Section 16G required a court imposing federal sentences that were to be served in a prison of a state or territory where sentences were not subject to remissions, to take that fact into account in determining the length of the sentence, and adjust the sentence accordingly. The Explanatory Memorandum stated that the sentence to be imposed was to be shorter because the period fixed by the court would not be reduced by remissions.<sup>112</sup> The method by which a court was to make this adjustment was not explained. Courts initially applied the rule that federal sentences should be reduced by one-third of the sentence that would otherwise be appropriate for a sentence imposed in a state where there were no remissions.<sup>113</sup> However, it was later held that it was not

107 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [70]; Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [301]–[302].

108 *Crimes Act 1914* (Cth) s 19AA(4).

109 Explanatory Memorandum (Senate), Crimes Legislation Amendment Bill (No 2) 1989 (Cth), 1.

110 *Ibid.*, 14.

111 The *Sentencing Act 1995* (WA) s 95 used to provide for an automatic remission of one-third of sentences of imprisonment.

112 Explanatory Memorandum (Senate), Crimes Legislation Amendment Bill (No 2) 1989 (Cth), 10.

113 *R v Paull* (1990) 100 FLR 311.

‘invariably or inevitably the case that a one-third allowance would be given’.<sup>114</sup> Section 16G attracted significant judicial criticism.<sup>115</sup>

11.88 Section 16G was repealed in relation to all federal sentences imposed after 16 January 2003. No transitional provisions were enacted.<sup>116</sup> The amendment was said to be a response to the abolition of remissions in most states and territories, and the move towards the abolition of remissions in the remaining jurisdictions.<sup>117</sup> The abolition of remissions in most jurisdictions was said to have resulted in s 16G having the unintended effect of creating disparity between federal and state or territory sentences in the same jurisdiction because federal prisoners served shorter sentences than their state and territory counterparts.<sup>118</sup> This was because courts sentencing state offenders were not required to take into account the abolition of remissions.<sup>119</sup>

11.89 It has been said that federal sentences are likely to increase following the repeal of s 16G,<sup>120</sup> and one case has stated that the repeal of s 16G would lead to an increase in the length of a federal sentence by 50 per cent.<sup>121</sup> However, it has also been said that the correct approach in sentencing a federal offender is to determine the sentence without taking into account the fact that s 16G existed and has now been repealed, and that it would be unfair and crude to increase federal sentences by 50 per cent to accommodate the repeal of s 16G.<sup>122</sup> Some jurisdictions preserve remission entitlements for offenders sentenced prior to the commencement of legislation that repealed such entitlements.<sup>123</sup>

11.90 The sentencing legislation of the Victoria, Tasmania and the Northern Territory, still makes provision for remissions.<sup>124</sup> In the Northern Territory, the Director of Correctional Services is empowered to grant a period of remission of up to 30 days per year in such circumstances as the Director thinks fit.<sup>125</sup> In Tasmania, the Director of Corrective Services is empowered to remit the whole or part of a prisoner’s sentence provided that the remission does not:

114 *Budiman v The Queen* (1998) 102 A Crim R 411, 415.

115 *R v Paull* (1990) 100 FLR 311, 315; *Director of Public Prosecutions (Cth) v El Karhani* (1990) 21 NSWLR 370, 387; *R v Ng Yun Choi* (Unreported, Supreme Court of New South Wales, Sully J, 4 September 1990).

116 *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002* (Cth) sch 3, cl 1.

117 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2002, 9535 (L Anthony—Minister for Children and Youth Affairs).

118 M Pedley, *Federal Sentencing in Victoria* (2004) Commonwealth Director of Public Prosecutions, 4; *R v O'Connor* (2002) 129 A Crim R 505, 507.

119 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [9.1109].

120 See generally A Haesler, *Sentencing Commonwealth Offenders: Some Recent Developments* (2004).

121 *R v Kevenaar* [2004] NSWCCA 210, [46]–[48].

122 *R v Dujou* [2004] NSWCCA 237, [20], [43].

123 See, eg, *Correctional Services Act 1982* (SA) ss 20, 21. See also *Penalties and Sentences Act 1992* (Qld) s 75(1)(a), (2) and *Corrective Services Bill 2006* (Qld) cls 400, 401.

124 *Corrections Act 1986* (Vic) s 58E; *Children and Young Persons (General) Regulations 2001* (Vic) reg 15; *Corrections Act 1997* (Tas) ss 86, 87; *Corrections Regulations 1998* (Tas) regs 23, 24; *Prisons (Correctional Services) Act 1980* (NT) s 93.

125 *Prisons (Correctional Services) Act 1980* (NT) s 93.

- exceed three months;
- exceed one-third of the total period of imprisonment to which a prisoner is sentenced; and
- operate so as to reduce the total period of imprisonment served by a prisoner to less than three months.<sup>126</sup>

11.91 Tasmanian and Victorian corrections legislation makes provision for special remissions. In those jurisdictions, a prisoner's sentence of imprisonment or non-parole period may be remitted by either the Director or Secretary of Corrective Services on account of a prisoner's good behaviour while suffering disruption or deprivation: (a) during an industrial dispute or emergency existing in the prison; or (b) in other circumstances of an unforeseen and special nature.<sup>127</sup>

11.92 Remissions are common in other countries, although the extent of remissions for good behaviour varies. In Canada, a prisoner can earn up to 15 days remission for each month of a sentence of imprisonment.<sup>128</sup> In the United States, a federal prisoner serving a term of imprisonment for more than one year, other than a term of life imprisonment, may receive credit of up to 54 days for each year of imprisonment.<sup>129</sup> In New Zealand, an offender may receive up to 10 per cent remission on the number of hours of community service work imposed by the court.<sup>130</sup>

### Should general remissions apply to federal offenders?

11.93 ALRC 44 recommended that general remissions unrelated to any particular aspect of the prisoner's behaviour should not be available—even if they are capable of being forfeited—because they are inconsistent with the principle of 'truth in sentencing'.<sup>131</sup>

11.94 In the present Inquiry, there was some support in submissions and consultations for automatic or general remissions.<sup>132</sup> One federal offender submitted that there should be a general remission on sentences of between 10 and 20 per cent.<sup>133</sup> Professor Kate Warner expressed the view that automatic remissions that could be lost for prison

126 *Corrections Act 1997* (Tas) s 86; *Corrections Regulations 1998* (Tas) reg 23.

127 *Corrections Act 1986* (Vic) s 58E; *Corrections Act 1997* (Tas) s 87.

128 *Prisons and Reformatories Act (RS 1985, cP-20)* (Canada) s 6.

129 *Sentencing Reform Act of 1984* 18 USC s 3624(b)(1) (US). See also *Sentencing Reform Act of 1984* 18 USC s 3621(2)(B) (US) (Bureau of Prisons may reduce a sentence for a non-violent offence where the offender successfully completes a treatment program).

130 *Sentencing Act 2002* (NZ) s 67.

131 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 32, [86].

132 Law Society of South Australia, *Submission SFO 37*, 22 April 2005; JC, *Submission SFO 25*, 13 April 2005; K Warner, *Consultation*, Hobart, 13 April 2005.

133 JC, *Submission SFO 25*, 13 April 2005.



offences were a useful management tool and did not impact greatly on ‘truth in sentencing’.<sup>134</sup>

11.95 On the other hand, Professor Arie Freiberg noted that most jurisdictions had done away with remissions. He expressed the view that reintroducing remissions was unnecessary and would be contrary to ‘truth in sentencing’.<sup>135</sup> One federal offender also expressed opposition to automatic or general remissions.<sup>136</sup>

11.96 While not expressly supporting the reintroduction of general or automatic remissions, the New South Wales Legal Aid Commission submitted that consideration be given to the fact that:

In New South Wales there has been concern that the repeal of s 16G of the *Crimes Act* ... in relation to federal sentences will have the effect of dramatically increasing prison sentences in New South Wales. ... Given that the majority of Federal prisoners are in New South Wales and that a large proportion of these are for drug importation matters where sentences are generally lengthy, it can be expected that this will have the effect of increasing the overall amount of time that such federal offenders will spend in custody in New South Wales.<sup>137</sup>

### **Should special or earned remissions apply to federal offenders?**

11.97 ALRC 44 recommended that earned remissions should apply to federal offenders because they form part of the rehabilitation process and provide incentive for offenders to be of good behaviour.<sup>138</sup> The report recommended that earned remissions should be restricted to a maximum of 20 per cent of the custodial order, and that to maximise their value as an incentive to the prisoner, the non-parole period should also be reduced by the amount of the remissions earned.<sup>139</sup>

11.98 There was considerable support expressed in submissions and consultations for earned remissions to apply in the sentencing of federal offenders as an incentive for rehabilitation.<sup>140</sup> One federal offender submitted:

I believe that remissions must be reimplemented to assist the rehabilitative process and to encourage good behaviour. It also allows the offender to be released without being imprisoned for longer than absolutely necessary. One must consider the point in time in an offender’s sentence where the sentence stops being rehabilitative and starts

<sup>134</sup> K Warner, *Consultation*, Hobart, 13 April 2005.

<sup>135</sup> A Freiberg, *Submission SFO 12*, 4 April 2005.

<sup>136</sup> BN, *Submission SFO 17*, 8 April 2005.

<sup>137</sup> New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.

<sup>138</sup> Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 33, [86].

<sup>139</sup> *Ibid*, Recs 34–35.

<sup>140</sup> Law Council of Australia, *Submission SFO 97*, 17 March 2006; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Prisoners’ Legal Service, *Submission SFO 28*, 15 April 2005; JC, *Submission SFO 25*, 13 April 2005; BN, *Submission SFO 17*, 8 April 2005; Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005; LD, *Submission SFO 9*, 10 March 2005; Confidential, *Submission SFO 8*, 8 March 2005; Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005.

to become detrimental to a person's psychological well-being. Surely it would be in society's best interest to release a rehabilitated offender from prison rather than an offender who has been profoundly affected by an excessively long sentence.<sup>141</sup>

11.99 On the other hand, Professor Warner expressed the view that earned remissions can be problematic because they are subjective.<sup>142</sup>

11.100 There was some support for earned remissions to apply to the non-parole period or to the time that an offender is in custody.<sup>143</sup> Some stakeholders expressed the view that special or earned remissions should be expressly provided for in federal legislation, especially in light of the fact that their availability under state and territory legislation was limited.<sup>144</sup> However, the Law Council of Australia—while supporting the application of earned remissions to both the head sentence and the non-parole period—submitted that:

The issue of remissions poses particular difficulties in relation to federal offenders as most State and Territory jurisdictions in which federal prisoners serve custodial sentences, no longer have a regime of automatic or earned remissions. It is difficult to see how special rules relating to remissions for federal offenders in State or Territory prisons could be made to work, and any attempt would be likely to exacerbate differences in treatment across jurisdictions.<sup>145</sup>

### Remissions to the non-parole period in special circumstances

11.101 Part IB picks up and applies to a federal sentence state legislation that allows for remissions on non-parole periods where prisoners have been of good behaviour while suffering disruption or deprivation during industrial disputes. However, it does not pick up and apply state legislation that allows for remissions on non-parole periods where an offender is subject to similar conditions arising out of an emergency existing in the prison in which the sentence is being served—for example, a siege—or in other circumstances of an unforeseen and special nature.

11.102 In DP 70, the ALRC proposed that federal sentencing legislation should expressly pick up and apply to federal non-parole periods a law of a state or territory that provides for the remission of a non-parole period because of an emergency within the prison or other unforeseen and special circumstances. The ALRC also proposed that the same principle should apply to remission of pre-release periods in respect of suspended sentences.<sup>146</sup> This proposal received some support, including on the basis

141 Confidential, *Submission SFO 8*, 8 March 2005.

142 K Warner, *Consultation*, Hobart, 13 April 2005.

143 Law Council of Australia, *Submission SFO 97*, 17 March 2006; Prisoners' Legal Service, *Submission SFO 28*, 15 April 2005; Confidential, *Submission SFO 8*, 8 March 2005.

144 BN, *Submission SFO 17*, 8 April 2005; Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005; Confidential, *Submission SFO 8*, 8 March 2005.

145 Law Council of Australia, *Submission SFO 97*, 17 March 2006.

146 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 11–5.

that it would foster just outcomes in specific cases.<sup>147</sup> Victoria Legal Aid submitted that minimum standards should be developed and codified for emergency management days in all states.<sup>148</sup>

### **ALRC's views**

#### ***Application of remissions to federal offenders***

11.103 Automatic or general remissions unrelated to any aspect of a prisoner's behaviour should not be available to federal offenders. Automatic remissions have been abolished in most jurisdictions and the ALRC is not convinced there is any valid policy reason to re-introduce them. As the Western Australian Legislation Committee remarked when considering legislation to abolish automatic remissions, 'there appears to be no reason to impose a sentence that contains a one-third component that will never be served'.<sup>149</sup>

11.104 Stakeholders expressed considerable support for having earned remissions apply to federal offenders; a view the ALRC shared in its 1988 report. However, the ALRC is of the view that re-introducing a system of earned remissions for federal offenders would be fraught with difficulties. It would be impractical to introduce a federal scheme of earned remissions in states and territories that have abolished such schemes, given the relatively small number of federal offenders held within some prisons. For a system of earned remissions to be worthwhile it must be capable of being administered effectively. One of the main reasons an earned remissions scheme was abandoned in Western Australia, for example, was that it was time consuming to administer.<sup>150</sup>

11.105 The other major difficulty is that it would create disparity of treatment of state and federal offenders within the same prison. It could be a source of tension in prisons if federal offenders were entitled to substantial earned remissions, but state or territory offenders were not.

11.106 Discretionary parole is a more appropriate means of promoting positive prison conduct than is earned remissions. Under the scheme recommended in Chapter 23, automatic parole is to be abolished. The abolition of automatic parole will provide an incentive for offenders to be of good behaviour in order to increase their prospects of being released when they first become eligible for parole. Under this scheme, one of

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147 Law Council of Australia, *Submission SFO 97*, 17 March 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006.

148 Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

149 Standing Committee on Legislation—Parliament of Western Australia, *Sentencing Legislation Amendment and Repeal Bill 2002 and the Sentence Administration Bill 2002*, Report 18 (2003), [4.10].

150 Western Australia Ministry of Justice, *Report of the Review of Remission and Parole* (1998), 16.

the factors to be considered by the federal parole authority is ‘the offender’s conduct while serving his or her sentence’.<sup>151</sup>

11.107 In addition, there are other ways to provide incentives for offenders to be of good behaviour while in prison, such as the granting and withdrawal of privileges (for example, access to recreation, hobbies and sporting facilities or equipment; or allowing a television, radio, computer or approved items of personal property in the prisoner’s cell).<sup>152</sup> In this regard, it is noteworthy that in 1998 a formal review of remissions in Western Australia concluded that remissions, or the threat of their removal, were not a necessary motivator of prison conduct and that there were other ways of sanctioning prisoners for unacceptable behaviour.<sup>153</sup>

***Application of remissions to the non-parole period***

11.108 Federal sentencing legislation should expressly pick up and apply to federal non-parole periods a law of a state or territory that provides for the remission of a non-parole period because of an emergency within the prison or other unforeseen and special circumstances. The same principle should apply to remission of pre-release periods in respect of suspended sentences.

11.109 There appears to be no reason in principle to distinguish between remissions for industrial action (which are currently addressed in Part IB) and remissions for other emergencies where an offender has been of good behaviour while being subjected to deprivation or disruption. It is arbitrary to give a federal offender credit only where such deprivation has arisen because of an industrial dispute.

<p><b>Recommendation 11–6</b> Federal sentencing legislation should expressly pick up and apply to federal non-parole periods a law of a state or territory that provides for the remission of a non-parole period because of an emergency within the prison or other unforeseen and special circumstances. The same principle should apply to remission of pre-release periods in respect of suspended sentences.</p>
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151 See Rec 23–6.

152 See, eg, *Director General’s Rules 1981* (WA), rr 3.2.2, 3.1(b), (d).

153 Western Australia Ministry of Justice, *Report of the Review of Remission and Parole* (1998), 17.

## 12. Sentencing for Multiple Offences

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12.1 This chapter considers particular issues that arise when a court is sentencing an offender for more than one offence, namely, the setting of cumulative or concurrent sentences, and the imposition of an aggregate sentence for multiple offences arising out of the same criminal enterprise.

### Cumulative or concurrent sentences

#### Background

12.2 Where a court sentences a federal offender for more than one offence the issue arises whether those sentences should be served concurrently (at the same time), cumulatively (one after the other), or partly cumulatively and partly concurrently.

12.3 The ‘single transaction rule’—also referred to as the ‘continuing episode rule’—assists in determining whether sentences should be served concurrently or cumulatively: when a number of offences arise out of the one transaction or continuing episode, any terms of imprisonment are to be made concurrent.<sup>1</sup> This ‘working rule’ is said to apply when there is ‘one multi-faceted course of criminal conduct’<sup>2</sup> or where the offences are considered to be ‘manifestations of the one criminal enterprise,

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<sup>1</sup> See *R v Faithfull* (2004) 142 A Crim R 554, [28]; *Ruane v The Queen* (1979) 1 A Crim R 284, 286.

<sup>2</sup> *Attorney-General (SA) v Tichy* (1982) 30 SASR 84, 93.

transaction or episode<sup>3</sup> or where a number of offences ‘arise out of substantially the same act, or same circumstances or a closely related series of occurrences’.<sup>4</sup>

12.4 When sentencing an offender for multiple offences a court must also have regard to the rule against double punishment, which provides that:

To the extent to which the two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of elements that are in common.<sup>5</sup>

12.5 The orthodox practice in sentencing an offender for multiple offences is to set an appropriate sentence for each offence and then have regard to questions of cumulation or concurrence, as well as the principle of totality.<sup>6</sup> As discussed in Chapter 5, the principle of totality ensures that an offender who is sentenced for multiple offences receives an appropriate sentence overall and does not receive a ‘crushing sentence’.<sup>7</sup> The setting of concurrent or cumulative sentences is a method by which courts can ensure that multiple sentences comply with the totality principle. However, rather than making sentences wholly or partially concurrent, a court may lower the individual sentences below the otherwise appropriate level to reflect the fact that a number of sentences are being imposed, although this is not the preferred approach.<sup>8</sup>

12.6 When an offender is being sentenced for multiple offences, including federal offences, or at the time of being sentenced for a federal offence is subject to existing sentences, s 19 of the *Crimes Act 1914* (Cth) requires the court to state the commencement date of any federal sentence it imposes. The section allows the court to declare a commencement date for a sentence in a way that makes the sentence cumulative, partly cumulative, or concurrent on an existing sentence or sentence passed at the same sitting in respect of federal, state, or territory offences. The section ensures there is no gap between the end of a non-parole period that an offender is serving in relation to a state or territory offence and the commencement of the sentence for any new federal offence.

12.7 The term ‘cumulative’ is used in the sentencing legislation of most states and territories.<sup>9</sup> However, the term ‘consecutive’ is used instead of ‘cumulative’ in the sentencing legislation of New South Wales and the ACT.<sup>10</sup>

3 *Pearce v The Queen* (1998) 194 CLR 610, 650.

4 *Brown v Lynch* (1982) 15 NTR 9, 11. See also *R v Faithfull* (2004) 142 A Crim R 554, [26].

5 *Pearce v The Queen* (1998) 194 CLR 610, [40].

6 *Johnson v The Queen* (2004) 205 ALR 346, [26]; *Pearce v The Queen* (1998) 194 CLR 610, [45]; *Mill v The Queen* (1988) 166 CLR 59.

7 D Thomas, *Principles of Sentencing* (2nd ed, 1979), 57–58, cited in *Postiglione v The Queen* (1997) 189 CLR 295, 413; *Johnson v The Queen* (2004) 205 ALR 346, 355.

8 *Johnson v The Queen* (2004) 205 ALR 346, [26]; *Mill v The Queen* (1988) 166 CLR 59, 63.

9 See, eg, *Sentencing Act 1991* (Vic) ss 6E, 16; *Penalties and Sentences Act 1992* (Qld) ss 156, 156A; *Sentencing Act 1995* (WA) s 88; *Criminal Law (Sentencing) Act 1988* (SA) s 38; *Sentencing Act 1997* (Tas) s 15; *Sentencing Act 1995* (NT) s 51. See also *Defence Force Discipline Act 1982* (Cth) s 74.

10 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 55; *Crimes (Sentencing) Act 2005* (ACT) pt 5.3.

### Power to pronounce cumulative or concurrent sentences

12.8 One issue identified in consultations and in case law is that judicial officers do not have express power under s 19 of the *Crimes Act* to order that sentences be served cumulatively or concurrently. Courts can only structure sentences so they are in fact cumulative, partly cumulative or concurrent by declaring the commencement date of each sentence in order to bring about that result.<sup>11</sup> Accordingly, on appeal, it has been found that an order made by a judicial officer that a federal sentence be cumulative on sentences imposed for state offences could have no effect, although it was possible to re-sentence the offender and impose a lawfully structured sentence having the same practical effect as that originally imposed.<sup>12</sup>

12.9 In response to Issues Paper 29 (IP 29), members of the Victorian Bar expressed the view that it would be simpler and would save court time if judicial officers were given the express power to order sentences to be served concurrently or cumulatively.<sup>13</sup> In Discussion Paper 70 (DP 70), the ALRC made such a proposal.<sup>14</sup> A number of stakeholders expressed support for this proposal.<sup>15</sup> The Department of Corrective Services of Western Australia submitted it would be necessary to clarify how the proposed federal sentencing legislation would define concurrent and consecutive terms for federal offenders.<sup>16</sup>

### ALRC's views

12.10 The ALRC prefers the plain English term 'consecutive', as used in the sentencing legislation of New South Wales and the ACT, to the term 'cumulative', which is used in the sentencing legislation of other jurisdictions. In DP 70, the ALRC sought stakeholders' views as to whether the term 'concurrent' should be replaced with the term 'simultaneous'.<sup>17</sup> No views were expressed in relation to this point and the ALRC makes no recommendation to change the nomenclature in this regard.

12.11 Federal sentencing legislation should expressly empower a court, when sentencing a federal offender for more than one offence, to order the sentences to be served concurrently, consecutively or partly consecutively. The ALRC considers that

11 *R v O'Brien* (1991) 57 A Crim R 80, 84–88.

12 *R v Daswani* (2005) 53 ACSR 675, [10].

13 Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005.

14 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 12–1.

15 Law Council of Australia, *Submission SFO 97*, 17 March 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006.

16 Department of Corrective Services Western Australia, *Submission SFO 88*, 17 February 2006. See also Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005 ('concurrent' and 'cumulative' should be defined terms in federal legislation.)

17 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), [12.16].

federal sentencing legislation should be drafted in such a way as to minimise the potential for courts to make errors in sentencing. When sentencing a federal offender for multiple offences the potential for error is increased by the fact that state and territory judicial officers in some jurisdictions have an express power to order sentences to be served concurrently or consecutively, although that power is not available to them under federal sentencing law.

12.12 It is unnecessary to define the terms ‘concurrent’ and ‘consecutive’. Neither these terms nor the term ‘cumulative’ are defined in the sentencing legislation of the states and territories. The Explanatory Statement to the Crimes (Sentencing) Bill 2005 ACT provides that ‘concurrent’ has its common meaning of ‘occurring side by side’ or ‘existing together’, and ‘consecutive’ has its common meaning of ‘following one another’.<sup>18</sup> These are the ordinary meanings of these terms and little would be gained by including a statutory definition.

**Recommendation 12–1** Federal sentencing legislation should expressly empower a court, when sentencing a federal offender for more than one offence, to order the sentences to be served concurrently, consecutively or partly consecutively.

### Presumption of concurrency

12.13 Section 19 of the *Crimes Act* provides no guidance as to when it is appropriate to make sentences concurrent or cumulative. There is a common law presumption in favour of concurrency of sentences.<sup>19</sup> When a number of offences arise out of a continuing episode, it is generally accepted that the presumption of concurrency should be given effect.<sup>20</sup> Most state and territory sentencing legislation provides that sentences of imprisonment are to be served concurrently unless the court otherwise orders or the legislation otherwise provides.<sup>21</sup> The *Crimes Act* creates a presumption that sentences of imprisonment imposed on a person in respect of a failure to pay fines for federal offences are to be served concurrently.<sup>22</sup> State and territory legislation also typically sets out the circumstances or the types of sentences in respect of which the presumption of concurrency does not apply. For example, the presumption sometimes does not apply to offences committed in custody or while an offender is on parole or

18 Crimes (Sentencing) Bill Explanatory Statement 2005 (ACT) cl 70.

19 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [9.601].

20 See *Ibid*, [9.612]; *Brown v Lynch* (1982) 15 NTR 9.

21 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 55(1); *Sentencing Act 1991* (Vic) s 16(1); *Penalties and Sentences Act 1992* (Qld) s 155; *Sentencing Act 1995* (WA) s 50; *Sentencing Act 1997* (Tas) s 15; *Crimes (Sentencing) Act 2005* (ACT) s 17(1).

22 See *Crimes Act 1914* (Cth) s 15A(3), (4); *Yusup v The Queen* [2005] NTCCA 19, [25].



unlawfully at large; or (contrary to the federal position) in respect of sentences of imprisonment imposed in default of payment of a fine.<sup>23</sup>

12.14 On appeal, it has sometimes been found that judicial officers have failed to take into account the totality principle when imposing sentences for multiple offences. Thus, they may have imposed cumulative sentences where concurrent sentences were more appropriate, or they may not have made proper allowance for the common factual features of the offences.<sup>24</sup> Conversely, judicial officers have sometimes improperly categorised separate and distinct acts of criminality as part of the one transaction, and imposed concurrent sentences when cumulative or partly cumulative sentences were found to be more appropriate on appeal.<sup>25</sup>

12.15 The New South Wales Law Reform Commission has recommended that there be a general legislative presumption in favour of concurrent sentences.<sup>26</sup> However, the Gibbs Committee stated that it was proper that s 19 of the *Crimes Act* not contain a presumption in favour of sentences being made concurrent or cumulative.<sup>27</sup>

12.16 In response to IP 29, stakeholders expressed support for federal sentencing legislation containing a presumption that multiple sentences should be served concurrently.<sup>28</sup> The Criminal Bar Association of Victoria submitted that:

In federal sentencing there should be a ‘built-in’ assumption of concurrency of sentences when multiple sentences are imposed in respect of the same indictment. As observed in the Issues Paper the enactment of such a provision would give effect to the ‘common law presumption in favour of concurrency of sentences’. However, the Association disagrees with the recommendation of ALRC 44 that sentences should only be required to be served cumulatively in exceptional circumstances. This ought not be a matter of exceptional circumstance. Such an approach would have the effect of imposing an unwarranted limitation on the sentencing discretion of judicial officers. This approach would not assist in giving effect to the current requirement [in

23 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 56, 57; *Sentencing Act 1991* (Vic) s 16; *Penalties and Sentences Act 1992* (Qld) s 156A; *Sentencing Act 1997* (Tas) s 15(2); *Crimes (Sentencing) Act 2005* (ACT) s 71(3).

24 *Johnson v The Queen* (2004) 205 ALR 346, [35], [45]. Failure to consider the totality principle has occurred in cases dealing with joint federal and state offences: *Hooton v Hales* (2002) 12 NTLR 15, [12]; *R v Weiss* [2000] QCA 262.

25 *R v Lappas* (2003) 139 A Crim R 77, [137].

26 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), rec 43.

27 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991) Attorney-General’s Department, [12.29]–[12.31]. The establishment of the Gibbs Committee is discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [6.6].

28 Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; JC, *Submission SFO 25*, 13 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; LD, *Submission SFO 9*, 10 March 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005.

s 16(1) of the *Crimes Act*] that a sentence appropriate in all the circumstances should be passed in respect of each offence for which an offender falls to be sentenced.<sup>29</sup>

12.17 In DP 70, the ALRC proposed that federal sentencing legislation should provide that, when a court sentences a federal offender for more than one offence, there is a presumption that the sentences be served concurrently.<sup>30</sup> This proposal received support from some stakeholders<sup>31</sup> but was opposed by the Commonwealth Director of Public Prosecutions (CDPP).<sup>32</sup> The Law Council of Australia submitted that:

The strongest case for concurrency arises where the several counts on an indictment are merely technically separate but in substance overlapping, while in other cases, such as where the offences are in substance unrelated or of the same nature but relating to different incidents or episodes, the case for concurrence is far weaker. There is already a totality principle in play ... so that excessive cumulation of sentences can be obviated on other grounds. The Law Council prefers a more discretionary approach, recognising the long experience of courts in sentencing multiple offenders.<sup>33</sup>

12.18 The presumption of concurrency aside, submissions and consultations were divided on the issue of whether federal sentencing legislation should provide guidance to courts about when it is appropriate to set concurrent, cumulative or partly cumulative sentences. The majority of stakeholders opposed such an approach.<sup>34</sup> Reasons for stakeholders rejecting this approach included that legislative guidance was unnecessary because the applicable common law principles were well understood and adhered to by the courts,<sup>35</sup> that it would be impossible to provide general guidance given the potentially infinite circumstances which arise for consideration,<sup>36</sup> and that it would be an inappropriate fetter on judicial discretion to set rigid or mandatory guidelines.<sup>37</sup> The CDPP agreed with the view expressed by Wells J in *Attorney-General v Tichy*, and adopted by Gleeson CJ in *Johnson v The Queen*, that:

It is both impracticable and undesirable to attempt to lay down comprehensive principles according to which a judicial officer may determine, in every case, whether sentences should be ordered to be served concurrently or consecutively. According to an inflexible Draconian logic, all sentences should be consecutive, because every offence, as a separate case of criminal liability, would justify the exaction of a

29 Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005 (citations omitted).

30 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 12–2.

31 Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006.

32 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

33 Law Council of Australia, *Submission SFO 97*, 17 March 2006.

34 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Hobart, 14 April 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.

35 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.

36 A Freiberg, *Submission SFO 12*, 4 April 2005.

37 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.

separate penalty. But such a logic could never hold. ... Sometimes, a single act of criminal conduct will comprise two or more technically identified crimes. Sometimes, two or more technically identified crimes will comprise two or more courses of criminal conduct, that reasonably characterized, are really separate invasions of the community's right to peace and order, notwithstanding that they are historically interdependent; the courses of criminal conduct may coincide with the technical offences or they may not. Sometimes, the process of characterization rests upon an analysis of fact and degree leading to two possible answers, each of which, in the hands of the trial judge, could be made to work justice.<sup>38</sup>

12.19 The CDPP submitted that:

it is important for a legislative provision in this area to be flexible to enable a judicial officer to indeed mould a just sentence, by enabling concurrent, consecutive or partly consecutive sentences to be imposed.<sup>39</sup>

12.20 Other stakeholders expressed support for legislative guidance in relation to the setting of concurrent and cumulative sentences on the basis that it could assist a court in sentencing.<sup>40</sup> One legal practitioner expressed the view that federal sentencing legislation should make it clear that totality was an important principle to be adhered to when a court was sentencing for multiple offences.<sup>41</sup>

**ALRC's views**

12.21 Taking into account the divergent views expressed by stakeholders, the ALRC remains of the view that federal sentencing legislation should provide that, when a court sentences a federal offender for more than one offence, there is a presumption that the sentences are to be served concurrently. However, the court should retain the discretion to set consecutive or partly consecutive sentences where it thinks it is appropriate, and it need not find exceptional circumstances in order to do so. The ALRC's approach is consistent with the common law, and with most state and territory sentencing legislation. It is also the approach supported by most stakeholders.

12.22 There should also be legislative recognition of the totality principle because this is a guiding principle in determining whether to set concurrent, consecutive or partly consecutive sentences for multiple offences. The ALRC's views on the totality principle are discussed in Chapter 5.<sup>42</sup>

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38 See *Johnson v The Queen* (2004) 205 ALR 346, [4]; *Attorney-General (SA) v Tichy* (1982) 30 SASR 84, 92–93.

39 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

40 Law Society of South Australia, *Submission SFO 37*, 22 April 2005; JC, *Submission SFO 25*, 13 April 2005.

41 M Johnson, *Consultation*, Darwin, 27 April 2005.

42 See Rec 5–1(c).

12.23 Apart from a legislative presumption of concurrency and legislative recognition of the totality principle, it is unnecessary and undesirable for federal sentencing legislation to provide any further guidance in relation to when it is appropriate to set concurrent or consecutive sentences. No views were expressed by stakeholders in relation to the issue identified by the Attorney-General's Department<sup>43</sup> as to whether legislation should provide that any additional sentence imposed for an escape should be consecutive on the balance of any other sentence remaining to be served.<sup>44</sup> Accordingly, the ALRC makes no recommendation in this regard.

**Recommendation 12–2** Federal sentencing legislation should provide that, when a court sentences a federal offender for more than one offence, there is a presumption that the sentences are to be served concurrently.

## Aggregate sentences

### Background

12.24 In some cases, where a court sentences a federal offender for multiple offences arising out of the same criminal enterprise, it has the option to aggregate the sentences for those offences and impose a single sentence. This is an alternative to the court imposing concurrent sentences for the offences.

12.25 Section 4K(3) of the *Crimes Act* provides that charges for multiple offences against the same provision of a Commonwealth law may be joined in the same information, complaint or summons if they are based on the same facts, or form or are part of a series of offences of the same or similar character.<sup>45</sup> Section 4K(4) provides that the court may then impose one penalty for all such offences but the penalty is not to exceed the sum of the maximum penalties that could be imposed if a separate penalty were imposed in respect of each offence. It has been held that s 4K(4) is confined to summary offences.<sup>46</sup>

12.26 There is no statutory provision in New South Wales, Victoria, Queensland or Western Australia allowing for the imposition of one sentence on a person convicted on indictment of multiple offences.<sup>47</sup> However, the sentencing legislation of South Australia, Tasmania and the Northern Territory allows aggregate sentencing for

<sup>43</sup> Attorney-General's Department, *Submission SFO 52*, 7 July 2005.

<sup>44</sup> See Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), [12.15], [12.21].

<sup>45</sup> Section 4K lies outside Part IB but is directly related to the sentencing of federal offenders. The location of this provision is discussed in Ch 2. The use of representative charges for a course of conduct and taking other offences into account in sentencing are discussed in Ch 6.

<sup>46</sup> *Putland v The Queen* (2004) 218 CLR 174, [9]; *R v Bibaoui* (1997) 2 VR 600.

<sup>47</sup> The *Sentencing Act 1991* (Vic) s 9 authorises the Magistrates' Court to impose an aggregate sentence of imprisonment, including for indictable offences being tried summarily.

indictable offences.<sup>48</sup> Where the state or territory sentencing scheme allows an aggregate sentence to be imposed for indictable offences, this is picked up and applied by s 68(1) of the *Judiciary Act 1903* (Cth) to federal offenders.<sup>49</sup>

### Indictable offences and transparency in sentencing

12.27 In response to IP 29, the majority of stakeholders expressed support for allowing a court to impose one sentence for multiple offences, irrespective of whether the offences are summary or indictable, but recognised that aggregate sentencing would not be appropriate in all circumstances.<sup>50</sup> There was limited opposition to aggregate sentencing.<sup>51</sup>

12.28 Stakeholders submitted that it was anomalous that a court exercising summary jurisdiction had greater powers in this area than a court dealing with matters on indictment;<sup>52</sup> and that there was no relevant difference in principle between offenders who are being sentenced summarily and those who are being sentenced on indictment, as even magistrates could impose heavy sentences.<sup>53</sup> Various legal bodies submitted it could be cumbersome for a judicial officer to have to pronounce numerous separate federal sentences,<sup>54</sup> and it would be useful and appropriate for a court to have available to it the option of aggregating a sentence in respect of a course of conduct reflected in multiple charges contained in the one indictment.<sup>55</sup>

12.29 The CDPP, the Criminal Bar Association of Victoria, and the New South Wales Legal Aid Commission expressed the view that the ability to aggregate sentences would be appropriate for taxation offences or fraud, where offences were often

48 *Criminal Law (Sentencing) Act 1988* (SA) s 18A; *Sentencing Act 1997* (Tas) s 11; *Sentencing Act 1995* (NT) s 52(1).

49 *Putland v The Queen* (2004) 218 CLR 174; *Jackson v The Queen* (1998) 104 A Crim R 196. See also M Pedley, *Federal Sentencing in Victoria* (2005) Commonwealth Director of Public Prosecutions, 23.

50 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Legal Services Commission of South Australia, *Submission SFO 19*, 8 April 2005; Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005.

51 JC, *Submission SFO 25*, 13 April 2005; LD, *Submission SFO 9*, 10 March 2005; M Johnson, *Consultation*, Darwin, 27 April 2005.

52 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.

53 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005.

54 Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005.

55 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Legal Services Commission of South Australia, *Submission SFO 19*, 8 April 2005.

repetitive and occurred over many years.<sup>56</sup> Social security fraud, in particular, lends itself to aggregate sentencing because a new offence is committed each time a person receives a social security payment to which he or she is not entitled. The CDPP submitted that in such circumstances it was unnecessary for the offender to be given multiple sentences.<sup>57</sup>

12.30 Correctional Services Northern Territory submitted that:

The court should have the power to impose one penalty for multiple offences. An offender does not really care what he receives for the individual offences. What matters is how long they must be in custody or under supervision.<sup>58</sup>

12.31 Stakeholders expressed the view that the power to impose an aggregate sentence for multiple indictable or summary offences should be available to the court on a discretionary, rather than mandatory, basis. The CDPP submitted that:

Of course, such a mechanism is enabling rather than prescriptive, in the sense that it would not be mandatory for a Judge to impose a single sentence. A single sentence would only be imposed in circumstances where the offending behaviour was linked in such a way as to make an aggregate sentence the appropriate course of action.<sup>59</sup>

12.32 In DP 70, the ALRC proposed that federal sentencing legislation should invest a court with the power to impose an aggregate sentence in respect of indictable offences as well as summary offences.<sup>60</sup> This proposal received support.<sup>61</sup> However, one stakeholder opposed the proposal on the basis that it was important for offenders and victims—and for the accurate recording of sentencing statistics—to have transparency in sentencing for indictable offences.<sup>62</sup> Other stakeholders also noted the potential for aggregate sentencing for multiple indictable offences to impact adversely on the transparency of sentencing, and the difficulties to which this gives rise on appeal.<sup>63</sup> Where an appellate court sets aside findings of guilt in relation to certain counts that were the subject of an aggregate sentence, an adjustment would have to be made to the aggregate sentence without the appellate court having the benefit of knowing the

56 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; New South Wales Legal Aid Commission—Criminal Law Division, *Consultation*, Sydney, 22 September 2004.

57 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

58 Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005.

59 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005. See also New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005.

60 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 12–3(a).

61 Law Council of Australia, *Submission SFO 97*, 17 March 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

62 D Grace, *Consultation*, Melbourne, 23 February 2006.

63 A Freiberg, *Submission SFO 12*, 4 April 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Hobart, 14 April 2005.

individual sentences that the lower court may have had in mind in respect of those counts.

12.33 In *Putland v The Queen* Kirby J (dissenting) opposed aggregate sentencing for multiple indictable offences:

Only if specific sentences are identified for federal indictable offences ... will the transparency of the sentencing process be fully upheld. ... [T]he submergences of sentences for major crimes in a single undifferentiated aggregate sentence carries a risk of injustice to the offender. In practical terms, it makes the offender's task of challenging the unidentified components of the aggregate sentence much more difficult. It risks depriving the offender of the provision of adequate reasons for the components of the sentence. It undermines the objective of identifying differential sentences for specific federal crimes so that their content might be known and compared throughout the Commonwealth by all concerned. It diminishes the effectiveness of the deterrent value of particularised sentences. It reduces the utility and availability of effective appellate review addressed to consistency throughout Australia in the sentencing of federal offenders for particular offences. ...

Sentences for *summary* offences may be aggregated; but not sentences for the typically more serious *indictable* offences. In the case of indictable offences specificity in sentencing is at a premium. That is so because the punishment (including ... loss of liberty) is typically greater and more onerous. It should therefore be identified and identifiable.<sup>64</sup>

12.34 Kirby J expressed the view that it was a matter for the Australian Parliament to consider explicitly any extension of the aggregate sentencing principle contained in s 4K of the *Crimes Act* to federal indictable offences, if that were its purpose.<sup>65</sup>

### Inconsistent treatment of federal offenders

12.35 The power of a court to impose an aggregate sentence for multiple indictable offences is one that is available in the sentencing of federal offenders in some jurisdictions and not others by virtue of the fact that s 68 of the *Judiciary Act* picks up and applies state and territory schemes that invest courts with such a power. Accordingly there is the potential for inconsistent treatment of federal offenders.

12.36 The Legal Services Commission of South Australia noted that the ability in South Australia to impose aggregate sentences for state offences operates effectively and that it was useful to have a similar power for federal offences. It submitted that federal sentencing legislation should make the procedures for federal offenders the same throughout the states.<sup>66</sup>

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<sup>64</sup> *Putland v The Queen* (2004) 218 CLR 174, [116], [119].

<sup>65</sup> *Ibid*, [118].

<sup>66</sup> Legal Services Commission of South Australia, *Submission SFO 19*, 8 April 2005.

### Offences against different provisions of Commonwealth law

12.37 In response to IP 29, stakeholders expressed support for s 4K of the *Crimes Act* to be amended to allow a court to impose an aggregate sentence for a course of criminal conduct comprised of different but related offences, notwithstanding that those offences were not against the same provision of a Commonwealth law.<sup>67</sup> The CDPP submitted:

From time to time, cases arise where it is clear that although there are different offences which have been made out, it is, in fact, appropriate that the offender be punished once only for the behaviour. For example, in some fraud cases, the offender may have committed several different types of offences (making a false statement, obtaining a benefit not payable), but the circumstances of the offending is such that it could all be said to be part of the same wrongdoing.

In those cases, it is fairer to the offender that one punishment be given. It is not helpful to have multiple sentences to reflect a technical distinction in the law, where it is clear what behaviour is being punished. ...

The CDPP is of the view that it would be helpful if the legislation reflected an option to allow courts to join sentences in this way, in appropriate cases.<sup>68</sup>

12.38 In DP 70, the ALRC proposed that s 4K of the *Crimes Act* be amended to allow the joining of charges against more than one provision of Commonwealth law.<sup>69</sup> This proposal received support.<sup>70</sup>

### Options for reform

12.39 DP 70 identified two ways of achieving consistency of treatment of federal offenders across jurisdictions in relation to aggregate sentencing for multiple indictable offences. One option is for federal sentencing legislation to be amended to extend aggregate sentencing to indictable matters. Express federal legislative provision would obviate the process by which s 68 of the *Judiciary Act* picks up and applies to the sentencing of federal offenders state and territory provisions that allow for aggregate sentencing for multiple indictable offences.

12.40 Another option is for federal sentencing legislation to be amended to provide that aggregate sentencing is not available where a federal offender is to be sentenced for multiple indictable offences. Such a provision would exclude the availability of aggregate sentences for multiple indictable offences in those states and territories in which they are currently available by virtue of s 68 of the *Judiciary Act*.

<sup>67</sup> Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; New South Wales Legal Aid Commission—Criminal Law Division, *Consultation*, Sydney, 22 September 2004.

<sup>68</sup> Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

<sup>69</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 12–3(b).

<sup>70</sup> Law Council of Australia, *Submission SFO 97*, 17 March 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; Chief Magistrate Judge D Price & Others, *Consultation*, Sydney, 3 February 2006.



12.41 A further option for reform—which could be pursued independently of any reform of aggregate sentencing for indictable offences—is to extend the court’s powers to impose an aggregate sentence notwithstanding that the offences relate to more than one provision of Commonwealth law where the offences constitute a course of conduct.

### **ALRC’s views**

#### ***Indictable offences***

12.42 In addition to the option of imposing concurrent sentences for indictable offences arising out of the same criminal enterprise or course of conduct, federal sentencing legislation should invest a court with the power to impose an aggregate sentence in respect of such offences. Section 4K of the *Crimes Act* should be amended so that the scope of the provision extends beyond summary matters to indictable matters.

12.43 The ALRC has come to this view having regard to the majority of views expressed in submissions and consultations; and, in particular, to the fact that certain federal offences such as social security fraud and taxation offences lend themselves to disposition in this manner. Allowing a single aggregate sentence to be imposed in respect of multiple indictable offences also has the advantage of simplifying a court’s task of explaining to a federal offender the sentence imposed.<sup>71</sup> Investing courts with the power to impose aggregate sentences for indictable federal offences will also promote consistency of treatment of federal offenders in all states and territories.

12.44 The ALRC has made separate recommendations to address the concerns expressed by stakeholders in relation to aggregate sentencing,<sup>72</sup> as discussed below.

12.45 In recommending that a court be empowered to impose an aggregate sentence for federal offences, the ALRC envisages that, where an aggregate sentence of imprisonment is to be imposed, the court will be empowered to set a single non-parole period in respect of that sentence. This approach recognises the fact that the non-parole period forms part of the overall sentence. The *Crimes Act* currently allows or requires a court to fix a single non-parole period in respect of a federal sentence that exceeds, or federal sentences that in the aggregate exceed, three years, whether or not the offender is presently serving or subject to a federal sentence.<sup>73</sup> The ALRC agrees with the

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<sup>71</sup> Explanation of sentence is discussed in Ch 13.

<sup>72</sup> See Recs 12–4, 12–5.

<sup>73</sup> *Crimes Act 1914* (Cth) s 19AB. See also *Crimes Act 1914* (Cth) s 19AD(2)(e) (court to consider fixing single new non-parole period where person already subject to a non-parole period); s 19AG (setting of single non-parole period in respect of minimum non-parole offences); *Sentencing Act 1995* (NT) s 53(2) (any non-parole period fixed is to be in respect of the aggregate period of imprisonment the offender is liable to serve under all sentences of imprisonment imposed by court).

approach of setting a single non-parole period for a number of federal sentences and is of the view that it is a logical extension of that approach to empower a court to set a single non-parole period for an aggregate sentence of imprisonment.<sup>74</sup>

***Offences against different provisions of Commonwealth law***

12.46 For the reasons advanced by the CDPP concerning fairness to an offender, s 4K of the *Crimes Act* should also be amended to empower charges against more than one provision of Commonwealth law to be joined where those charges arise out of the same criminal enterprise, thereby facilitating a court's power to impose an aggregate sentence in such circumstances.

**Recommendation 12–3** Section 4K of the *Crimes Act 1914* (Cth), which allows charges for a number of federal offences to be joined in the same information, complaint or summons, and permits aggregate sentencing of summary matters in certain circumstances, should be amended as follows:

- (a) the scope of the provision should be extended beyond summary matters to indictable matters; and
- (b) the provision should be extended to allow the joining of charges against more than one provision of Commonwealth law.

**Guidance to prosecutors**

12.47 The ALRC is mindful of the disadvantages, identified by Kirby J in *Putland v The Queen*, of allowing major indictable offences to be the subject of an aggregate sentence. Stakeholders who supported an expansion of a court's powers to impose aggregate sentences also stressed that aggregate sentencing is not appropriate in all circumstances.

12.48 To address these concerns, DP 70 proposed that the CDPP should develop guidelines about when it is appropriate for a prosecutor to seek an aggregate sentence for multiple summary or indictable offences.<sup>75</sup> This was on the basis that the CDPP has a discretion to join charges in the same information, complaint, summons or indictment, and the exercise of this discretion is a precursor to the exercise of a court's discretion to impose an aggregate sentence. This proposal received support.<sup>76</sup> The CDPP submitted that this was an area where guidance to prosecutors may be

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<sup>74</sup> See Rec 9–2.

<sup>75</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 12–4.

<sup>76</sup> Law Council of Australia, *Submission SFO 97*, 17 March 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

appropriate, given that aggregation may not be appropriate in all matters where multiple charges are involved.<sup>77</sup>

12.49 In DP 70, the ALRC identified the following types of factors that might be considered for inclusion in the guidelines: the seriousness of the offences, including harm caused by the offences; the nature of the offences, including whether they were repetitive in nature; the period of time over which the offences were committed; and whether identifiable individuals were the victims. For example, it may be less appropriate to seek an aggregate sentence for multiple offences if a number of individuals have suffered harm as a result of the offences because victims have an interest in knowing the sentence an offender has received in relation to the conduct that caused them harm.<sup>78</sup> The CDPP agreed with this approach:

For example, where there were individual victims it may be important for a court to articulate what part of the sentence relates to the conduct involving the various individual victims. This course may also not be appropriate where several serious offences have been committed and which the prosecution submits should be the subject of consecutive sentences of imprisonment due to the conduct involved. On the other hand, this option may be appropriate, for example where numerous counts relate to fraudulent activity over some years.<sup>79</sup>

12.50 In light of the support for the proposal, the ALRC's views in relation to prosecutorial guidance remain unchanged.

**Recommendation 12–4** The Commonwealth Director of Public Prosecutions should develop guidelines about when it is appropriate for a prosecutor to seek an aggregate sentence for multiple summary or indictable offences.

### Guidance to judicial officers

12.51 As mentioned above, submissions and consultations noted that aggregate sentencing for multiple indictable offences may detract from the transparency of sentencing, and has the potential to cause difficulties on appeal and in the recording of sentencing statistics. To address these concerns, DP 70 proposed that federal sentencing legislation should require a court that imposes one sentence in relation to more than one federal offence to address, in its reasons for sentence, the weight it has attached to each individual count in a manner that would assist an appellate court in

<sup>77</sup> Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

<sup>78</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), [12.44].

<sup>79</sup> Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

making appropriate orders in the event of a successful appeal.<sup>80</sup> For example, a court could indicate where it had apportioned equal punishment for certain counts, or where the quantum of a sentence was heavily based on the offender's culpability in relation to a particular count.

12.52 The proposal received support from the Law Council of Australia and Victoria Legal Aid<sup>81</sup> but no court or judicial officer expressed a view on this issue. The ALRC now questions whether a legislative requirement to specify the weight attached to individual counts is practicable where an aggregate sentence is imposed. There may be circumstances in which it would be difficult for a court to comply with this requirement without undermining the benefits that are intended to flow from imposing the aggregate sentence in the first place. It is preferable to encourage courts to adopt this practice where they can, rather than imposing a prescriptive requirement in every case. This issue is discussed further below.

12.53 As discussed in Chapter 19, the ALRC has recommended that the National Judicial College of Australia, in consultation with courts and judicial education bodies, should develop a bench book providing general guidance for judicial officers on federal sentencing law.<sup>82</sup> The ALRC is of the view that this bench book should include guidance about when it is appropriate for the court to impose an aggregate sentence for multiple federal offences. Such guidance will complement the guidelines to be developed by the CDPP as to the appropriateness of seeking the imposition of an aggregate sentence. The factors to be included in the bench book might be similar to those included in the prosecutorial guidelines, but there may be others. For example, one consequence that flows from the imposition of an aggregate fine for federal offences is that the person is liable to one period of imprisonment in the event of default in payment. In *R v Yusup* the Court of Criminal Appeal of the Northern Territory considered this to be a relevant consideration in imposing an aggregate fine for two fisheries offences.<sup>83</sup>

12.54 In addition, the bench book should provide guidance to judicial officers in relation to the provision of reasons where an aggregate sentence is imposed, having regard to the need for transparency in the event of an appeal and in the recording of sentencing statistics. For example, the bench book could encourage judicial officers to address, in their reasons for sentence, the weight attached to individual counts in a manner that would assist an appellate court in making appropriate orders in the event of a successful appeal.

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80 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 12–5.

81 Law Council of Australia, *Submission SFO 97*, 17 March 2006; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005.

82 See Rec 19–5.

83 *Yusup v The Queen* [2005] NTCCA 19, [25].

**Recommendation 12–5** The proposed bench book on federal sentencing law should include guidance to judicial officers about when it is appropriate for the court to impose an aggregate sentence for multiple federal offences, and the provision of reasons when it does so, having regard to the need for transparency in the event of an appeal and in the recording of sentencing statistics (see Recommendation 19–5).



## 13. The Sentencing Hearing

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### Introduction

13.1 This chapter considers a number of procedural issues that arise in the context of the sentencing hearing. They include consideration of when a federal offender is required to be present for sentencing; the consequences of a federal offender not

having legal representation at sentencing; the explanation of the sentence imposed; and the provision of sentencing orders to federal offenders.

13.2 This chapter also considers a number of evidential issues in relation to the sentencing hearing, including the process of fact-finding in sentencing, and the burden and standard of proof. Finally, the issue of whether the jury should be given an increased role in sentencing is explored.

13.3 Sections 68(1) and 79 of the *Judiciary Act 1903* (Cth) pick up and apply state and territory procedural laws to federal prosecutions in state and territory courts. It is not always clear whether particular state and territory provisions can be categorised as ‘procedural’ rather than substantive, such that they are picked up and applied in the sentencing of federal offenders. The question of whether ss 68 or 79 pick up and apply particular state and territory provisions is often tested on a case-by-case basis.<sup>1</sup> State and territory provisions relating to victim impact statements and pre-sentence reports have been described as matters of sentencing procedure<sup>2</sup> and these are discussed separately in Chapter 14.

## Presence of offender

13.4 Part IB of the *Crimes Act 1914* (Cth) does not require a federal offender to be present at sentencing. Because a number of provisions in Part IB include a specific requirement that the court explain *or cause to be explained* the purposes and consequences of imposing particular sentencing options, Part IB appears to envisage circumstances in which an offender will not be present at sentencing.

13.5 Article 14(1) of the *International Covenant on Civil and Political Rights 1966* (ICCPR) provides for a fair and public trial, and art 14(3)(d) provides that one of the minimum guarantees to be afforded to a defendant is the right to be tried in his or her presence.<sup>3</sup> Article 6 of the *European Convention on Human Rights 1950* (ECHR) is in similar terms.<sup>4</sup> While the ICCPR does not explicitly state that a defendant’s right to be present at trial extends to sentencing, there is some international authority for the proposition that the right to a fair trial extends to the sentencing process.<sup>5</sup>

13.6 Some state and territory sentencing legislation makes provision for the presence of an offender at sentencing,<sup>6</sup> but the reach of these provisions varies. For example, South Australian legislation only requires the presence of an offender who is to be

1 Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004.

2 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.406], [2.507].

3 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976).

4 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, (ETS) No 5, 213 UNTS 222, (entered into force generally on 3 September 1953).

5 *Cuscani v The United Kingdom* [2002] 32771/96 ECHR 630 (considering ECHR art 6).

6 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25; *Sentencing Act 1991* (Vic) s 18P; *Sentencing Act 1995* (WA) s 14; *Criminal Law (Sentencing) Act 1988* (SA) s 9B; *Sentencing Act 1995* (NT) s 117(1).



sentenced for an indictable offence;<sup>7</sup> New South Wales legislation precludes only the Local Court from imposing certain sentencing options in the absence of an offender;<sup>8</sup> and the relevant Victorian provision applies only where the court imposes an indefinite sentence in respect of a serious offence.<sup>9</sup> In contrast, the reach of the Northern Territory and Western Australian legislation is considerably wider: the requirement for an offender to be present at sentencing is not limited to any category of offence, nor does it vary according to the court in which an offender is sentenced, although it is subject to exceptions.<sup>10</sup>

13.7 There is also international precedent for a legislative provision requiring the presence of a defendant at sentencing. In the United States, as a general rule, an offender is required to be present at sentencing in the federal district courts.<sup>11</sup>

13.8 Jurisdictions that require an offender's presence during sentencing typically set out a number of exceptions to the general rule. These include: where the court imposes a fine;<sup>12</sup> where the court does not impose a sentence;<sup>13</sup> where an order is made on the hearing of an appeal;<sup>14</sup> where the proceeding involves the correction of a sentence;<sup>15</sup> where the defendant is absent with the prosecutor's consent;<sup>16</sup> or where the defendant is being sentenced for an offence punishable by fine or imprisonment for not more than one year, or both, as long as the defendant has given written consent to be absent and the court gives its permission.<sup>17</sup>

13.9 In addition, sentencing legislation in South Australia allows a court to exclude an offender from proceedings if it is satisfied the exclusion is necessary in the interests of safety or for the orderly conduct of the proceedings. If the offender is excluded, the court must make arrangements to enable him or her to see and hear the proceedings by videolink.<sup>18</sup> In the United States, a federal offender may waive his or her right to be present at sentencing by disruptive behaviour.<sup>19</sup>

13.10 Some legislation expressly empowers a court to make any order necessary to ensure an offender is present at sentencing, including issuing a summons to appear or a warrant to have the offender arrested and brought before the court.<sup>20</sup>

7 *Criminal Law (Sentencing) Act 1988* (SA) s 9B.

8 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25.

9 *Sentencing Act 1991* (Vic) s 18P.

10 *Sentencing Act 1995* (WA) s 14; *Sentencing Act 1995* (NT) s 117.

11 *Federal Rules of Criminal Procedure* 18 USC (Appendix) (US) r 43(a)(3).

12 *Sentencing Act 1995* (WA) s 14(2)(b); *Sentencing Act 1995* (NT) s 117(2)(a).

13 *Sentencing Act 1995* (WA) s 14(2)(a).

14 *Sentencing Act 1995* (NT) s 117(2)(b).

15 *Federal Rules of Criminal Procedure* 18 USC (Appendix) (US) r 43(b)(4).

16 *Criminal Law (Sentencing) Act 1988* (SA) s 9B(1).

17 *Federal Rules of Criminal Procedure* 18 USC (Appendix) (US) r 43(b)(2).

18 *Criminal Law (Sentencing) Act 1988* (SA) s 9B(2).

19 *Federal Rules of Criminal Procedure* 18 USC (Appendix) (US) r 43(c)(1)(C).

20 *Sentencing Act 1995* (WA) s 14(5); *Criminal Law (Sentencing) Act 1988* (SA) s 9B(3).

13.11 In Discussion Paper 70 (DP 70) the ALRC proposed that federal sentencing legislation should provide that an offender must be present during sentencing proceedings where the court intends to impose a sentence that: (a) deprives the offender of his or her liberty or places the offender in jeopardy of being deprived of his or her liberty; or (b) requires the offender to consent to conditions or give an undertaking. The ALRC also proposed that federal sentencing may specify limited exceptions to this rule, and suggested three such exceptions.<sup>21</sup>

13.12 There was general support for the proposal, and it was noted that the majority of magistrates would not order the imprisonment of an offender in his or her absence, and would issue a warrant instead.<sup>22</sup> The Law Council of Australia submitted:

The *right* of an offender to be present at sentencing proceedings is an aspect of natural justice that is reflected in most State and Territory procedural laws. The correlate *requirement* imposed on an offender to be present, subject to pragmatic and recognised exceptions, both promotes the participation of the offender in the sentencing process ... and also safeguards some of the community and victim interests in deterrence and denunciation. There are some difficult issues not addressed by the Commission's discussion of these points, such as whether the offender must be present during the reading out of a victim impact statement, but otherwise the Law Council is supportive of the measures in Proposal 13–1.<sup>23</sup>

13.13 The Criminal Bar Association of Victoria expressed the view that the proposal needed to clarify whether presence included presence by videolink.<sup>24</sup> The Commonwealth Director of Public Prosecutions (CDPP) submitted that while it was uncommon for a defendant to decide not to be present at sentencing, the proposal should include as one of the specified exceptions the circumstance where a defendant decides voluntarily not to be present and the court accepts the absence.<sup>25</sup>

### **ALRC's views**

13.14 A sentencing hearing should be conducted fairly and in accordance with the principles of natural justice, particularly having regard to the fact that sentencing is the stage at which an offender is often at risk of losing his or her liberty or having it curtailed in some way. A fundamental aspect of a fair hearing is that the person who will ultimately be affected by its outcome should be able to participate in a meaningful way. The presence of a person at a hearing increases the likelihood of meaningful participation and may also promote those sentencing purposes that aim to deter the offender or denounce his or her conduct. It is also important for an offender to hear what impact his or her offending has had on any victims of the offence because it may promote those sentencing purposes aimed at rehabilitation of the offender and

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21 See Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 13–1.

22 Law Council of Australia, *Submission SFO 97*, 17 March 2006; Chief Magistrate I Gray & Others, *Consultation*, Melbourne, 23 February 2006; Criminal Bar Association of Victoria, *Consultation*, Melbourne, 23 February 2006.

23 Law Council of Australia, *Submission SFO 97*, 17 March 2006.

24 Criminal Bar Association of Victoria, *Consultation*, Melbourne, 23 February 2006.

25 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

restoration of relations between the community, the offender and the victim.<sup>26</sup> Accordingly, an offender should generally be present when a victim impact statement is read out in court.

13.15 Having regard to these considerations, federal sentencing legislation should provide that, subject to defined exceptions, a federal offender must be present during sentencing proceedings where the court intends to impose a sentence that: (a) deprives the offender of his or her liberty or places the offender in jeopardy of being deprived of his or her liberty; or (b) requires the offender to consent to conditions or give an undertaking. In the latter case, the presence of the offender is necessary to ensure that the court is in a position to obtain informed consent and to explain the conditions or undertaking and the consequences of breach.<sup>27</sup>

13.16 Presence could be in person, by videolink or by similar medium. One example of a situation where a court should not require the physical presence of an offender is where this may jeopardise the safety of any person or the orderly conduct of proceedings. In such a case the court should make arrangements, where practicable, to enable the offender to participate by videolink or similar medium.

13.17 Federal offenders should not have to be present for the correction of ‘slip’ errors in sentencing, although they should be given an opportunity to be heard in relation to the correction of more substantive sentencing errors.<sup>28</sup> However, even in the latter case, offenders should not have to be present where they have been given an opportunity to be present at the correction hearing, they have consented to the correction being made in their absence, and the court has given its permission. Requiring the presence of an offender in these circumstances may unnecessarily delay the proceedings.

13.18 As noted above, some state legislation does not require the presence of an offender at sentencing where a fine is to be imposed. For pragmatic reasons, the ALRC agrees that an offender should not be required to be present in these circumstances. Because the imposition of a fine neither deprives an offender of his or her liberty nor requires consent or an undertaking, the ALRC’s recommendation has the practical effect of exempting cases where the court intends to impose a fine alone.

13.19 The exceptions to the general rule requiring an offender’s presence, set out in Recommendation 13–1, are not intended to be exhaustive.

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26 Purposes of sentencing are discussed in Ch 4.

27 Explanation of sentence is discussed below.

28 Correction of sentencing errors is discussed in Ch 16.

**Recommendation 13–1** Federal sentencing legislation should provide that a federal offender must be present during sentencing proceedings—whether in person or by videolink or a similar medium—where the court intends to impose a sentence that: (a) deprives the offender of his or her liberty or places the offender in jeopardy of being deprived of his or her liberty; or (b) requires the offender to consent to conditions or give an undertaking.

Federal sentencing legislation may specify limited exceptions to this rule, such as: (i) where the proceedings involve the correction of slip errors; or (ii) where the proceedings involve the correction of substantive sentencing errors, and the offender has been given an opportunity to be present, has consented to the correction being made in his or her absence and the court has given its permission.

## Legal representation

13.20 Neither Part IB of the *Crimes Act* nor the sentencing legislation of the states and territories make provision for an offender to be legally represented at sentencing. However, the *Magistrates' Court Act 1989* (Vic) provides that if a defendant is charged with an offence punishable by imprisonment and the defendant is unrepresented on his or her first appearance in respect of the charge, the Court must ask the defendant whether he or she has sought legal advice. If satisfied that the defendant has not had a reasonable opportunity to obtain legal advice, the Court must grant an adjournment on the defendant's request.<sup>29</sup>

13.21 The New Zealand *Sentencing Act* provides that, except in defined circumstances, a court may not impose a sentence of imprisonment on an offender who has not been legally represented 'at the stage of the proceedings at which the offender was at risk of conviction'. The prohibition does not apply if the court is satisfied that the offender was made aware of, and understood, his or her rights relating to legal representation and, having had an opportunity to exercise those rights, refused or failed to do so. Refusal or failure is made out where an offender refuses or fails to apply for legal aid, or unsuccessfully applies for it and does not engage legal representation by other means.<sup>30</sup>

13.22 In *Dietrich v The Queen*, the High Court of Australia dealt with the issue of legal representation at trial. That case dealt with a defendant who had applied unsuccessfully for legal aid and exhausted other avenues of obtaining legal assistance. The Court held that a defendant does not have the right to be provided with legal representation at public expense. However, the common law recognises that a

<sup>29</sup> *Magistrates' Court Act 1989* (Vic) s 39.

<sup>30</sup> See *Sentencing Act 2002* (NZ) s 30.

defendant has the right to a fair trial and, depending on the circumstances of the case, the absence of legal representation not due to any fault on the defendant's part may mean a defendant is unable to receive a fair trial.<sup>31</sup> In such cases the courts have a power to stay the criminal proceedings. Mason CJ and McHugh J said that:

The decision whether to grant an adjournment or stay is to be made in the exercise of the trial judge's discretion, by asking whether the trial is likely to be unfair if the accused is forced on unrepresented. For our part, the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional circumstances only. In all other cases of serious crimes, the remedy of an adjournment should be granted in order that representation can be obtained.<sup>32</sup>

13.23 Deane J said:

There are circumstances in which a criminal trial will be relevantly fair notwithstanding that the accused is unrepresented. The most obvious category of case in which that is so is where an accused desires to be unrepresented or persistently neglects or refuses to take advantage of legal representation which is available ... Another category of case in which that is so is where the accused has the financial means to engage legal representation but decides not to incur the expense. ... Finally it is arguable that there are categories of criminal proceedings where inability to obtain legal representation would not have the effect that the trial of an accused person was an unfair one. For example, there is much to be said for the view that proceedings before a magistrate or judge, without a jury, for a non-serious offence ... eg where there is no real threat of deprivation of personal liberty ... would not be rendered inherently unfair by reason of inability to obtain full legal representation.<sup>33</sup>

13.24 In DP 70 the ALRC proposed that where a federal offender is not legally represented in a sentencing proceeding, the court should generally adjourn the proceeding to allow the offender a reasonable opportunity to obtain representation. However, the ALRC proposed that a court may proceed without adjournment and may impose a sentence on a federal offender where: (a) the offender has refused or failed to exercise the right to legal representation in circumstances where the offender fully understands the right and the consequences of not exercising it; or (b) the court does not intend to impose, and does not impose, a sentence that would deprive the offender of his or her liberty or that would place the offender in jeopardy of being so deprived.<sup>34</sup>

13.25 Stakeholders' responses to this proposal were divided. Some stakeholders supported the proposal and noted that it reflected the current position in their jurisdiction or that it was rare for a person to be unrepresented in federal criminal matters.<sup>35</sup> Others opposed the proposal but for different reasons. One stakeholder said

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31 *Dietrich v The Queen* (1992) 177 CLR 292, 311, 357.

32 *Ibid*, 311.

33 *Ibid*, 336.

34 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 13–2.

35 Chief Magistrate I Gray & Others, *Consultation*, Melbourne, 23 February 2006; Criminal Bar Association of Victoria, *Consultation*, Melbourne, 23 February 2006; Justice T Connolly, *Consultation*, Canberra, 13 February 2006.

it did not go far enough to ensure legal representation was provided to defendants.<sup>36</sup> Another said there was no need for a ‘presumption’ that the court should adjourn sentence and that this should be left to the court’s discretion.<sup>37</sup> Still another said the application of the proposal in busy local courts would grind proceedings to a halt.<sup>38</sup>

13.26 The Law Council of Australia submitted:

A grave injustice is likely to occur in the absence of appropriate legal representation. ... The Law Council submits that current research demonstrates the disparity in sentencing outcomes between self represented defendants and defendants with legal representation. Some defendants may make a choice not to have legal representation based on a misconceived belief that they are able to represent [themselves]. ...

Proposal 13–2 [does] not address the situation ... where Legal Aid has been sought but refused, or offered only on the basis of a guilty plea. While the provision and adequate funding of Legal Aid services involve legal policy issues somewhat beyond the scope of the Commission’s inquiry into federal sentencing, the situation described is one that does confront courts dealing with federal offenders and which requires a principled approach.

The Law Council urges the Commission to revise [the proposal] including, to take into account the unavailability of legal representation which does not constitute a refusal or failure of a defendant to ‘exercise the right to legal representation’.<sup>39</sup>

13.27 The Chief Magistrate of the New South Wales Local Court expressed the view that the proposal would require additional funding. He noted that approximately 50 per cent of cases before that Court involved self-represented litigants, many of whom did not qualify for legal aid. He expressed the view that many self-represented litigants are capable of representing themselves and that there is a difference between being self-represented at trial and at a sentence hearing on a guilty plea.<sup>40</sup>

### **ALRC’s views**

13.28 A sentencing hearing should be conducted fairly because of the risk that an offender may be deprived of his or her liberty or have it curtailed in some way. Depending on the circumstances, fairness may dictate that a federal offender not be sentenced in the absence of legal representation.

13.29 The ALRC considers that the principles enunciated by the High Court in *Dietrich v The Queen* in relation to trials are applicable by analogy to sentencing. In *R v Olbrich* Kirby J, in discussing the principles of fact finding in sentencing, stated that:

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36 Law Council of Australia, *Submission SFO 97*, 17 March 2006.

37 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

38 Chief Magistrate Judge D Price & Others, *Consultation*, Sydney, 3 February 2006.

39 Law Council of Australia, *Submission SFO 97*, 17 March 2006.

40 Chief Magistrate Judge D Price & Others, *Consultation*, Sydney, 3 February 2006.

Sentencing proceedings remain part of the criminal trial. They do not cease to be so upon the conviction of the accused, either following a jury's verdict or a plea of guilty.<sup>41</sup>

13.30 The ALRC is particularly attracted to the view expressed by Deane J in *Dietrich* that, where an offender does not face a threat of deprivation of personal liberty, the absence of legal representation is unlikely to render the process inherently unfair.

13.31 Accordingly, the ALRC recommends that where a federal offender is not represented in a sentencing proceeding, the court should generally adjourn the proceeding to allow the offender a reasonable opportunity to obtain legal representation. However, the court may proceed without adjournment and may impose a sentence on a federal offender where: (a) the offender has refused or failed to exercise the right to legal representation in circumstances where the offender fully understands the right and the consequences of not exercising it; or (b) the court does not intend to impose, and does not impose, a sentence that would deprive the offender of his or her liberty or that would place the offender in jeopardy of being so deprived; or (c) the court is of the view that a fair sentencing hearing can be conducted without the offender being legally represented.

13.32 The inclusion of the last proviso focuses on the justification for the rule in *Dietrich*, namely, that an adjournment is necessary only where injustice would otherwise result from the offender's lack of legal representation.

13.33 The practical effect of these principles is that, where a court intends to impose a sentence that deprives the offender of his or her liberty in circumstances where the offender has been unable to obtain legal representation through no fault of his or her own, the court will be required to stay the sentencing proceedings unless it is of the view that a fair sentencing hearing can be conducted without the offender being legally represented. Moreover, it is not essential for a court to adjourn sentencing proceedings where an offender is not legally represented and the court intends to impose a sentence that attaches conditions requiring the offender to consent or to give an undertaking unless the court imposes a suspended sentence. A suspended sentence usually requires an offender to undertake that he or she will comply with certain conditions but, unlike other orders for conditional release, it places the offender in jeopardy of losing his or her liberty.

13.34 Under this scheme it would be possible, for example, for a court to discharge an offender without conviction, make an order of conditional release (other than a suspended sentence) or impose a fine or community service order, notwithstanding that the offender is not legally represented at the sentencing hearing.

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41 *R v Olbrich* (1999) 199 CLR 270, [52].

**Recommendation 13–2** Federal sentencing legislation should provide that, where a federal offender is not legally represented in a sentencing proceeding, the court should generally adjourn the proceeding to allow the offender a reasonable opportunity to obtain representation. However, the court may proceed without adjournment and may impose a sentence despite the absence of representation where:

- (a) the offender has refused or failed to exercise the right to legal representation in circumstances where the offender fully understands the right and the consequences of not exercising it; or
- (b) the court does not intend to impose, and does not impose, a sentence that would deprive the offender of his or her liberty or place the offender in jeopardy of being deprived of his or her liberty; or
- (c) the court is of the view that a fair sentencing hearing can be conducted without the offender being legally represented.

## Explanation of sentence

### Background

13.35 Distinct from the requirement to give reasons for sentencing decisions is the requirement that courts explain to offenders the meaning of the sentencing order imposed upon them.<sup>42</sup> A number of provisions in Part IB of the *Crimes Act* include a requirement that the court explain or cause to be explained to the offender, in language likely to be understood by the person, the purposes and effects of imposing particular sentencing options, including the consequences of failing to comply with a sentence or order.<sup>43</sup> Some state sentencing legislation also imposes a requirement that the court explain sentences,<sup>44</sup> or certain sentences,<sup>45</sup> or sentencing orders that attach conditions to which an offender is required to consent or that require an offender to give an undertaking.<sup>46</sup> Provision is also made in some overseas legislation for courts to explain to offenders the effects of any sentences they impose.<sup>47</sup>

<sup>42</sup> Reasons for decisions are discussed in Ch 19.

<sup>43</sup> *Crimes Act 1914* (Cth) ss 16F(2), 19B(2), 20(2), 20AB(2).

<sup>44</sup> *Children and Young Persons Act 1989* (Vic) s 23; *Sentencing Act 1995* (WA) s 34; *Juvenile Justice Act 1992* (Qld) s 158.

<sup>45</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 48 (explanation of release date where sentence of imprisonment imposed); *Sentencing Act 1991* (Vic) s 27(4) (explanation of suspended sentence); *Crimes (Sentencing) Act 2005* (ACT) s 82 (explanation of sentence of imprisonment).

<sup>46</sup> See *Sentencing Act 1991* (Vic) s 95; *Sentencing Act 1997* (Tas) s 92; *Sentencing Act 1995* (NT) s 102.

<sup>47</sup> See, eg, *Criminal Justice Act 2003* (UK) s 174.



13.36 Where offenders are not present in court, judges may cause an explanation to be given to the offender under s 16F of the *Crimes Act*. For example, in *R v Carroll*, the explanation was delegated to an officer of the Office of Corrections, who was directed to report in writing to the Registrar of Criminal Appeals that the explanation had been given.<sup>48</sup> In *R v Wright*, the Queensland Court of Appeal directed the offender's solicitor to explain the sentence to the offender and file an affidavit deposing to compliance.<sup>49</sup>

### Should an explanation be given and by whom?

13.37 Many stakeholders supported the view that judicial officers should explain the sentences they impose because it is important that offenders understand the terms of their sentences. Requiring a judicial officer to give an explanation of sentence was said to be an essential part of the sentencing hearing.<sup>50</sup> The Law Society of South Australia submitted that:

It is of paramount importance that the sentencing judge should explain to an offender the nature of any penalty/option which has been imposed, otherwise fixing a sentencing option is really meaningless if an offender does not understand what he/she must/must not do.<sup>51</sup>

13.38 Some opposition was expressed to allowing a court to direct a person to explain a sentence.<sup>52</sup> The CDPP submitted that:

as a general rule, it may be appropriate that the legislation reflect the general principle that it is desirable that the Court explains the sentence to the offender, rather than this being delegated to another person.<sup>53</sup>

13.39 However, the CDPP also submitted that:

We anticipate that requiring courts to provide detailed explanations in all cases ... would have an impact on the working of the courts. In our view, there needs to be a measure of flexibility in this area. For example, it may be appropriate for a court to request a legal practitioner to explain the detail of a sentence to a person rather than the court doing this.<sup>54</sup>

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48 *R v Carroll* [1991] 2 VR 509, 517. See also *R v O'Brien* (1991) 57 A Crim R 80, 97; *R v Schofield* (2003) 138 A Crim R 19, [166].

49 *R v Wright* [1995] QCA 279.

50 Law Council of Australia, *Submission SFO 97*, 17 March 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; JC, *Submission SFO 25*, 13 April 2005; LD, *Submission SFO 9*, 10 March 2005.

51 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.

52 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; LD, *Submission SFO 9*, 10 March 2005; Justice R Atkinson, *Consultation*, Brisbane, 2 March 2005.

53 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

54 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

13.40 Some stakeholders said that, as a matter of practice, judicial officers do explain sentences.<sup>55</sup> The practice of Victorian magistrates when discharging federal offenders under s 19B of the *Crimes Act* or making conditional release orders or recognizance release orders under s 20 is to print the relevant forms in court and explain the orders to the defendants. Defendants are then required to sign the forms acknowledging that they have had the orders explained to them.<sup>56</sup> This contrasts with the practice in New South Wales, where the registry staff often gives the explanation.<sup>57</sup>

13.41 Other stakeholders noted that in their experience judicial officers generally direct a person to give the explanation.<sup>58</sup> One judicial officer stated it was often difficult in practice to explain sentences due to time constraints, and expressed the view that a requirement for judicial officers to explain sentences would not be popular in busy courts of petty sessions.<sup>59</sup> The particular difficulties of explaining sentences in local courts with a high caseload were echoed in another consultation.<sup>60</sup>

### Should the explanation be oral or written?

13.42 Another issue is whether explanations of sentence, if they are to be given, should be oral or written, or both. Part IB of the *Crimes Act* does not explicitly require the giving of written explanations of sentence.

13.43 In contrast, the sentencing legislation of the ACT provides that a court must ensure a written record of the matters required to be explained to an offender in relation to a sentence of imprisonment is provided to an offender or his or her lawyer. The legislation states that a copy of the transcript of the oral explanation is an example of a written record of the explanation.<sup>61</sup>

13.44 In DP 70 the ALRC proposed that a court should give an offender: (a) an oral explanation of the sentence at the time of sentencing; and (b) a written record of the explanation within a period specified by law.<sup>62</sup> While this proposal received some support,<sup>63</sup> the majority of stakeholders expressed concern that requiring a written record of all explanations in busy local courts is impractical and would have significant resource implications. They noted that while a record of proceedings may be made in summary courts, transcripts might not be made routinely due to the under-resourcing of

55 Chief Magistrate I Gray & Others, *Consultation*, Melbourne, 23 February 2006; Commonwealth Director of Public Prosecutions, *Consultation*, Hobart, 14 April 2005; M Johnson, *Consultation*, Darwin, 27 April 2005.

56 Chief Magistrate I Gray & Others, *Consultation*, Melbourne, 23 February 2006.

57 Chief Magistrate Judge D Price & Others, *Consultation*, Sydney, 3 February 2006.

58 Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.

59 Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.

60 Law Society of the Northern Territory, *Consultation*, Darwin, 29 April 2005.

61 *Crimes (Sentencing) Act 2005* (ACT) s 83.

62 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 13–3.

63 Law Council of Australia, *Submission SFO 97*, 17 March 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006.

transcription services.<sup>64</sup> For example, proceedings in the Magistrates' Court of Victoria are recorded and parties are entitled to purchase copies of the audiotapes at a cost of \$50 per hearing day.<sup>65</sup>

13.45 The Attorney-General's Department submitted that:

Sentencing should take into consideration the communication needs of the offender. Explanations of sentences must be given in a way that can be understood by the offender, while also serving as a record of the sentencing. For example an oral explanation may not suffice for a deaf offender, and a written explanation may need to be in appropriate format for an offender with a vision impairment/blindness.<sup>66</sup>

### Quality of explanations

13.46 In Issues Paper 29 the ALRC expressed its interest in hearing any concerns about the quality of explanations given to offenders by third parties pursuant to a judicial direction under Part IB.<sup>67</sup> It appears that there are concerns about the quality of explanations of sentence given to offenders, but these concerns are not limited to explanations given by persons directed by the court to do so.

13.47 Some federal offenders submitted they did not receive an adequate explanation of the sentences imposed on them. One submitted that the Commonwealth 'bond' imposed upon him was not explained. He did not know when the bond would take effect and whether he was required to lodge money by way of security immediately or only in the event of breach.<sup>68</sup> Another federal offender stated that the judicial officer who sentenced him delegated to his barrister the task of explaining the recognizance release order imposed on him. He said his barrister gave him incorrect information about the order.<sup>69</sup>

13.48 Other stakeholders stated that many offenders did not understand their sentences.<sup>70</sup> The Department of Justice Western Australia noted that its Sentence Information Unit routinely explained sentences to offenders in the absence of any judicial direction to do so.<sup>71</sup> The North Australian Aboriginal Legal Aid Service said

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64 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; Chief Magistrate I Gray & Others, *Consultation*, Melbourne, 23 February 2006; Chief Magistrate Judge D Price & Others, *Consultation*, Sydney, 3 February 2006.

65 Chief Magistrate A Adams, *Magistrates' Court of Victoria Practice Note No 1 of 1999: Recording of Proceedings*.

66 Attorney-General's Department, *Submission SFO 83*, 15 February 2006.

67 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [9.82].

68 RC, *Submission SFO 50*, 13 May 2005.

69 PS, *Submission SFO 21*, 8 April 2005. See also RH, *Submission SFO 4*, 28 January 2005 (received adequate explanation of some sentences but not others).

70 Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005; Department of Justice Western Australia, *Consultation*, Perth, 18 April 2005.

71 Department of Justice Western Australia, *Consultation*, Perth, 18 April 2005.

some magistrates give very detailed, technical explanations to Indigenous offenders, who do not understand them.<sup>72</sup>

13.49 However, the fact that offenders do not always understand their sentences does not necessarily mean there is a problem with the quality of explanations given. One judicial officer stated that offenders were often under considerable stress at sentencing, so they were not always receptive to a judicial explanation of the sentence, even if simple language was used and the explanation was done carefully.<sup>73</sup> The Northern Territory Legal Aid Commission also expressed the view that offenders were sometimes too anxious at the time of sentencing to understand any explanation given by the court, and that in such circumstances defence lawyers would also provide an explanation.<sup>74</sup>

### **Content of the explanation**

13.50 Part IB sets out some matters that must be covered in explaining certain sentences to offenders. These generally include the purposes and consequences of the sentence or order; whether it can be varied, discharged or revoked; and the consequences of failure to comply. Where a sentence of imprisonment with a non-parole period is imposed, the court is required to explain the purposes and consequences of fixing the non-parole period. This is to include: an explanation of the fact that the sentence will entail a period of imprisonment not less than the non-parole period and, if a parole order is made, a period of service in the community; the fact that any release on parole will be subject to conditions; and the fact that the parole order may be amended or revoked.<sup>75</sup>

13.51 Sentencing legislation in New South Wales and the ACT provides that when sentencing an offender to imprisonment the court must specify:

- the day when the sentence commences; and
- the earliest day on which it appears that the offender will become entitled to be released from custody or eligible to be released on parole, having regard to the non-parole period and other sentences of imprisonment to which the offender is subject.<sup>76</sup>

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72 Aboriginal Justice Advisory Committee and North Australian Aboriginal Legal Aid Service, *Consultation*, Darwin, 28 April 2005.

73 Justice R Atkinson, *Consultation*, Brisbane, 2 March 2005.

74 Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005. See also Legislative Council Standing Committee on Law and Justice—Parliament of New South Wales, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations*, Report No 30 (2006), [5.151]–[5.165].

75 See *Crimes Act 1914* (Cth) s 16F.

76 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 48; *Crimes (Sentencing) Act 2005* (ACT) s 82.

**ALRC's views*****Should explanation be given, by whom and in what form?***

13.52 ALRC 44 recommended that the requirement that an explanation be given should attach to any kind of sentence imposed on federal offenders, and the ALRC remains of this view.<sup>77</sup> Explanations promote understanding and if federal offenders understand their sentences they are more likely to comply with them. Clear explanations are particularly important for federal offenders with a mental illness or intellectual disability<sup>78</sup> and for those who come from culturally and linguistically diverse backgrounds.<sup>79</sup>

13.53 Where a federal offender is present in court, it is incumbent on the court—as the body that exercises the authority of the state—to explain the sentence to the offender. An explanation of the conditions attached to a sentence or the consequences of non-compliance may have more impact on an offender when it emanates from a judicial officer than when it is given by a legal practitioner. Of course, legal practitioners may still have a role in supplementing or clarifying any explanation given by a court. A court should direct an appropriate person to perform the important task of explaining a sentence only where the offender is not present in court. In such circumstances, the court should consider whether it should make any order—such as requiring the filing of an affidavit of compliance—to satisfy itself that the explanation has been given.

13.54 The court should give an oral explanation of the sentence at the time it is imposed. However, courts should be required to provide a written record of the explanation only if the offender requests one or if the court is of the opinion that it is desirable in all the circumstances to provide the offender with a written explanation. A copy of the transcript of the oral explanation should suffice as a written record of the explanation. This approach addresses the concerns about the impracticality of a court of summary jurisdiction providing offenders with a written record of explanation of sentences in all cases.

13.55 Federal offenders should be entitled to receive written explanations of their sentences on their request and at no cost, given that sentences usually impinge on liberties they would otherwise enjoy, or impose obligations they would otherwise not be required to meet. The advent of digital recording, which allows for the retrieval of smaller segments of taped proceedings, will in time reduce the cost of providing this information.

13.56 An advantage of providing a federal offender with a written record of the explanation is that he or she will have it for continuing reference. Given the views expressed in consultations that offenders are often too stressed at sentencing to be

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77 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 93.

78 See Ch 28.

79 See Ch 29.

receptive to an oral explanation, federal offenders may wish to request a written record so they can refer to the explanation later. Even where offenders are unable to read English, provision of the written record may assist them in seeking translation of its contents.

**Recommendation 13–3** Federal sentencing legislation should provide that, when sentencing a federal offender who is present at the sentencing proceedings, the court must itself give to the offender:

- (a) an oral explanation of the sentence at the time of sentencing; and
- (b) a written record of the explanation if the offender requests it or the court is of the opinion that it is desirable in all the circumstances to provide the offender with a written explanation.

When a federal offender is not present at the sentencing proceedings, the court may direct that an appropriate person explain the sentence to the offender. The court should also consider making an order to satisfy itself that the explanation has been given, such as an order requiring an affidavit of compliance.

### *Quality and content of explanation*

13.57 Sentencing orders can sometimes be technical and difficult to understand. That difficulty is compounded where the offender being sentenced is under stress, is young, has a mental illness or intellectual disability, or comes from a culturally or linguistically diverse background. It is important that any explanation of the sentence by the court or by the person directed to give the explanation is given in terms likely to be readily understood by the offender. This is consistent with the present position under Part IB of the *Crimes Act*.<sup>80</sup>

13.58 Part IB currently requires the court to explain the purpose and consequences of certain sentences. The ALRC considers ‘purpose’ to be the wrong term if it means that a court is expected to explain the justification or philosophy underpinning the sentence, as opposed to explaining how the sentence will operate in practice. A federal offender is more likely to be interested in hearing about the practical effect of a sentence than its theoretical justification.

13.59 In DP 70 the ALRC proposed that the matters that should be addressed in an explanation of sentence are:

- how the sentence will operate in practice, the consequences of the sentencing order, and whether the order may be varied or revoked;

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<sup>80</sup> See *Crimes Act 1914* (Cth) ss 16F, 19B(2), 20(2), 20AB(2).

- any conditions attached to the sentencing order and the consequences of breach; and
- a number of specified matters in relation to a sentence of imprisonment.<sup>81</sup>

13.60 The Law Council of Australia supported the proposal and submitted that consideration be given as to whether rights of appeal against sentence, which are set out in various pieces of legislation, should also be the subject of explanation.<sup>82</sup>

13.61 The ALRC has not changed the views it expressed in DP 70, other than to accommodate the Law Council's suggestion mentioned above. In particular, where a court sentences a federal offender to a sentence of imprisonment it is incumbent on the court to address specifically in its explanation a number of matters that affect how the sentence will operate in practice. These matters are set out in Recommendation 13–4 below. Some of these matters—such as explaining the non-parole period—are already the subject of requirements under Part IB.<sup>83</sup> Others—such as informing the offender of the earliest date that he or she will become entitled to be released from custody or be eligible for parole—are not currently required to be addressed in explanations of sentence, but in the ALRC's view they should be.

**Recommendation 13–4** Federal sentencing legislation should provide that, in giving an explanation of sentence, the court or the person directed by the court to give the explanation must address the following matters in language likely to be readily understood by the offender, in so far as they are relevant:

- (a) how the sentence will operate in practice, the consequences of the sentencing order, and whether the order may be varied, revoked or appealed;
- (b) any conditions attached to the sentencing order and the consequences of breach; and
- (c) where a sentence of imprisonment has been imposed:
  - (i) the date when the sentence starts and ends;
  - (ii) any time declared to have been served as credit for pre-sentence custody or detention;

<sup>81</sup> See Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 13–4.

<sup>82</sup> Law Council of Australia, *Submission SFO 97*, 17 March 2006.

<sup>83</sup> See *Crimes Act 1914* (Cth) s 16F.

- (iii) whether the sentence is to be served concurrently, consecutively, or partially consecutively to any other sentence of imprisonment;
- (iv) if a non-parole period is set—the non-parole period, when it starts and ends, whether release on parole will be subject to a decision of the federal parole authority, the fact that any release on parole will be subject to conditions, and the fact that the parole order may be amended or revoked;
- (v) if a partly suspended sentence is imposed—when the suspended part of the sentence starts and ends; and
- (vi) the earliest date the offender will become entitled to be released from custody or will be eligible to be released on parole.

### Provision of sentencing orders

13.62 Part IB of the *Crimes Act* requires the court to cause certain sentencing orders to be reduced to writing and for a copy of those orders to be given to, or served on, federal offenders. The sentencing orders that are subject to these requirements are: conditional release orders where no conviction is recorded; conditional release orders where no sentence is passed; sentences of imprisonment where a recognizance release order is made; and sentencing orders available under state and territory law—such as community service orders and periodic detention orders—that are picked up and applied to federal offenders under s 20AB.<sup>84</sup> State and territory sentencing legislation also makes provision for copies of certain sentencing orders to be provided to offenders.<sup>85</sup>

13.63 There is no requirement under Part IB that a federal offender be provided with a copy of an order sentencing him or her to imprisonment if a recognizance release order is not made. Accordingly, where a federal offender is sentenced to imprisonment and a non-parole period is set or the court declines to fix either a recognizance release order or a non-parole period, there is no requirement that a copy of the order be provided to the offender. In contrast, sentencing legislation in the ACT requires a court that sentences an offender to imprisonment to provide the offender with written notice of such an order—which is to include specified information about the sentence—as well as a copy of the order.<sup>86</sup>

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<sup>84</sup> Ibid ss 19B(4), 20(4), 20AB(5).

<sup>85</sup> See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 93 (community service order); *Penalties and Sentences Act 1992* (Qld) s 136 (community based order); *Crimes (Sentencing) Act 2005* (ACT) ss 14(6) (fine order), 17(5) (non-conviction order), 103 (good behaviour order), 113(2) (reparation order), 121(2) (deferred sentence order); *Sentencing Act 1995* (NT) s 34 (community work order).

<sup>86</sup> See *Crimes (Sentencing) Act 2005* (ACT) s 84.



13.64 In DP 70 the ALRC proposed that, as soon as practicable after a court makes an order sentencing a federal offender to a term of imprisonment, the court must provide the offender with a copy of the order, which is to set out specified matters.<sup>87</sup>

### ALRC's views

13.65 It is anomalous that Part IB requires a court to provide federal offenders with copies of certain sentencing orders—including orders of a non-custodial nature—but does not require a court to provide federal offenders with copies of orders of imprisonment where a recognizance release order is not made.

13.66 Federal sentencing legislation should provide that, as soon as practicable after a court has made an order sentencing a federal offender to a term of imprisonment, the court should provide the offender with a copy of the order. The order should refer, where relevant, to the matters that a court is required to address in its explanation of sentence, which are listed in Recommendation 13–4(c) above.

**Recommendation 13–5** Federal sentencing legislation should provide that, as soon as practicable after a court makes an order sentencing a federal offender to a term of imprisonment, the court must provide the offender with a copy of the order. The order must set out the relevant matters listed in Recommendation 13–4(c).

## Fact-finding in sentencing

### The decision maker

13.67 It is for the trial judge or magistrate to ascertain the facts upon which a sentence is based. In indictable matters—if the facts implied in the jury's verdict are clear—the judge must accept the necessary implications and sentence the offender accordingly.<sup>88</sup>

13.68 Depending on their nature, aggravating circumstances are to be determined by either the jury or the judicial officer. Where an aggravating circumstance comprises an element of the offence charged, it should be alleged in the indictment and it is for the jury to decide whether the prosecution has proved its existence. Where an aggravating circumstance is only a sentencing factor, it is for the judicial officer to determine its existence. Aggravating circumstances that affect the maximum sentence but are not an element of the offence must be alleged in the indictment and determined by a jury. An

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<sup>87</sup> See Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 13–5. This proposal received support: Law Council of Australia, *Submission SFO 97*, 17 March 2006.

<sup>88</sup> R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.312]. See also *R v Webb* [1971] VR 147.

example of this is the quantity of narcotics in relation to illegal importation and possession offences.<sup>89</sup>

### Process of fact-finding

13.69 Where there has been a summary conviction following a hearing or a conviction on indictment following a jury trial, the court will ordinarily be informed about what the offender did from the evidence tendered and adduced at the hearing or the trial. However, many matters relevant to sentencing are not implied by a jury verdict.

13.70 Where an offender pleads guilty (which is in the vast majority of cases), the facts are less well known to the court. A plea of guilty amounts to an admission of all the essential facts necessary to constitute the offence with which the offender is charged. However, it does not amount to an admission of any aggravating circumstances that the prosecution may allege, unless those aggravating matters are an element of the offence; nor does it amount to an admission of the consequences and impact of the offence.<sup>90</sup>

13.71 The prosecution and defence can enlarge upon the facts implied by a guilty plea by engaging in ‘fact-bargaining’. A common mode of such bargaining is to prepare an agreed statement of facts. The *Evidence Act 1995* (Cth) and other uniform Evidence Acts<sup>91</sup> allow certain matters to be formally admitted by the defendant at trial,<sup>92</sup> and these matters will normally constitute part of the agreed statement of facts tendered at sentencing.<sup>93</sup>

13.72 A court is not bound to accept an agreed statement of facts but is entitled to rely on such a statement if it is admitted by consent and the defence accepts that it accurately sets out the facts.<sup>94</sup> A court is entitled to go beyond the agreed statement of facts tendered by the parties and—in the public interest—to seek further details about the conduct for which the offender is to be punished.<sup>95</sup> Where a court proposes to rely on material that extends beyond the agreed statement of facts, it is under a duty to inform the parties and to ascertain whether such material is disputed.<sup>96</sup>

13.73 Judges have an independent duty to satisfy themselves of the factual basis for the sentence they impose, but they do not have an inquisitorial role.<sup>97</sup> Nevertheless, a

89 See *Kingswell v The Queen* (1985) 159 CLR 264; *R v Meaton* (1986) 160 CLR 359.

90 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.315].

91 The uniform Evidence Acts are discussed below.

92 See, eg, *Evidence Act 1995* (Cth) s 184; *Evidence Act 1995* (NSW) s 184.

93 Law Council of Australia, *Submission SFO 97*, 17 March 2006.

94 I Potas, *Sentencing Manual: Law, Principles and Practice in New South Wales* (2001), 251.

95 *Chow v Director of Public Prosecutions (NSW)* (1992) 28 NSWLR 593, 608, 613.

96 *Mielicki v The Queen* (1994) 73 A Crim R 72, 79.

97 *R v Olbrich* (1999) 199 CLR 270, [15]–[17].

judge has a duty to make inquiries where facts relating to the essential elements of the offence are missing.<sup>98</sup>

13.74 An offender often has exclusive knowledge of the existence of mitigating factors that may be relevant to sentencing. These factors are often initially presented in an unsworn form, either by the offender or his or her counsel, and it is common practice for a court to accept statements by the offender's counsel from the bar table. Where facts are disputed, the parties may choose to apply for a direction to apply the laws of evidence in order that the facts may be ascertained.

### Laws of evidence

13.75 The *Evidence Act 1995* (Cth) applies in all federal courts and in courts in the ACT.<sup>99</sup> New South Wales, Tasmania and Norfolk Island have passed mirror legislation, which is substantially the same as the Commonwealth Act but is not identical.<sup>100</sup> The Commonwealth legislation and the mirror legislation are often referred to as the 'uniform Evidence Acts'. In 2004, the Victorian Government announced its intention to implement legislation consistent with the uniform Evidence Acts.<sup>101</sup>

13.76 Section 4(2) of the uniform Evidence Acts provides that the Acts apply to sentencing proceedings only if the court directs that the law of evidence applies either generally or in relation to specified matters.<sup>102</sup> The court must make such a direction if it considers it appropriate in the interests of justice, or if a party to the proceedings applies for such a direction and the court is of the view that proof of that fact is or will be significant in determining sentence.<sup>103</sup>

13.77 In *Weininger v The Queen*, the High Court considered s 16A of the *Crimes Act*, which requires the court to take into account in sentencing a list of specified matters so far as 'they are relevant and known to the court'.<sup>104</sup> The High Court stated that the use of the phrase 'known to the court' as distinct from a phrase such as 'proved in evidence' meant that it was not to be construed as imposing a universal requirement that matters presented in sentencing hearings be formally proved or admitted. The section had been enacted against a background of long established procedures in sentencing hearings in which much of the material placed before a sentencing judge

98 *Coulson v Chick* (Unreported, Supreme Court of Tasmania, Zeeman J, 16 August 1990).

99 Some provisions have a wider reach: *Evidence Act 1995* (Cth) ss 5, 185–187.

100 *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); *Evidence Act 2004* (NI). See also Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), [2.1].

101 State Government of Victoria, *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (2004), 26.

102 However, s 94(2) of the uniform Evidence Acts specifically excludes the application of pt 3.6 of the Acts (tendency and coincidence) to sentencing hearings.

103 See uniform Evidence Acts s 4(3), (4).

104 Section 16A is discussed in Ch 6.

was not proved by admissible evidence.<sup>105</sup> The High Court agreed with the Victorian Court of Appeal in *R v Storey* that it was important to avoid introducing ‘excessive subtlety and refinement’ to the task of sentencing.<sup>106</sup>

## Submissions and consultations

### *Application of the laws of evidence*

13.78 One federal offender supported the laws of evidence applying in federal sentencing hearings.<sup>107</sup> However, both prosecutors and defence lawyers expressed the view that it would not be appropriate to apply the rules of evidence generally to sentencing proceedings because it would introduce unnecessary delay and complexity.<sup>108</sup> It was said that if every fact had to be formally proved the sentencing process would grind to a halt.<sup>109</sup> The CDPP submitted that:

as a general rule, the sentencing process should remain flexible and straightforward. It would be undesirable to introduce a legislative regime which obliged Courts to undertake extensive fact-finding or consideration of extrinsic material in every case.

...

if it is necessary for evidence to be brought to prove a particular matter, appropriate mechanisms should be in place. However, the CDPP is of the opinion that it is important that sentencing remain a relatively simple procedure, with a view to streamlining the criminal justice process. ...

it is appropriate that the Court be entitled to rely on the facts alleged by the prosecutor, except in circumstances where there is a matter in dispute.<sup>110</sup>

13.79 One judicial officer stated that, in her experience, disputed facts in sentencing were rare but when such a dispute arose it was suitably resolved by the application of the laws of evidence.<sup>111</sup> However, the view was also expressed that disputed facts are becoming more common in federal sentencing proceedings and will tend to arise more frequently because of the new fault provisions in the *Criminal Code* (Cth).<sup>112</sup>

13.80 The Law Council of Australia submitted that:

Where factual matters are genuinely in dispute, becoming ‘facts in issue’ in sentencing proceedings, the definition of relevance to a fact in issue embodied in s 55 of the [*Evidence*] Act should be understood to apply to the admission of evidence tendered to prove or disprove the matters.<sup>113</sup>

105 *Weininger v The Queen* (2003) 212 CLR 629, [21].

106 *Ibid*, [24]; *R v Storey* [1998] 1 VR 359, 372.

107 JC, *Submission SFO* 25, 13 April 2005.

108 Commonwealth Director of Public Prosecutions, *Submission SFO* 51, 17 June 2005; New South Wales Public Defenders Office, *Consultation*, Sydney, 22 September 2004.

109 New South Wales Public Defenders Office, *Consultation*, Sydney, 22 September 2004.

110 Commonwealth Director of Public Prosecutions, *Submission SFO* 51, 17 June 2005.

111 Justice R Atkinson, *Consultation*, Brisbane, 2 March 2005. See also T Glynn, *Consultation*, Brisbane, 2 March 2005.

112 Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005.

113 Law Council of Australia, *Submission SFO* 97, 17 March 2006.

***Fact-bargaining***

13.81 Defence practitioners expressed support for the process of fact-bargaining—for example by the use of agreed statements of facts—on the basis that it saved time and minimised the need to call offenders to give evidence.<sup>114</sup> They also stated that the CDPP was amenable to negotiating agreed statements of facts. Support was also expressed for the practice of separately documenting disputed facts.<sup>115</sup> The Law Council of Australia submitted that the current practice of courts in relation to fact-finding in federal sentencing matters is adequate to ensure expeditious hearings.<sup>116</sup>

**ALRC's views*****Application of the laws of evidence***

13.82 The ALRC believes that no change is warranted to the law in this area. No specific concerns were identified in submissions or consultations about the limited circumstances in which the laws of evidence may apply in sentencing. The law already provides an important safeguard for a defendant by enabling a court to apply the laws of evidence where it considers it appropriate in the interests of justice, or where proof of a disputed fact is significant in determining sentence.

13.83 To impose a requirement that facts relevant to sentencing be proved only by admissible evidence would transform sentencing into an adversarial process, increase cost and delay, and tend to exclude some information that may be useful in sentencing, such as material in pre-sentence reports.<sup>117</sup>

***Fact-bargaining***

13.84 The practice of allowing parties to sentencing proceedings to identify and document the facts on which they agree is appropriate and promotes the efficient disposal of those proceedings. In this regard, it is noteworthy that the uniform Evidence Acts regulate the process by which facts are to be agreed.<sup>118</sup>

13.85 Equally, it is appropriate for the parties to identify the facts on which they do not agree, and to decide whether any of those disputed facts are of sufficient significance to warrant the application of the laws of evidence.

13.86 No specific problems were identified in submissions or consultations in relation to the practice of fact-bargaining and the ALRC does not make any recommendation in this regard.

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114 Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005; Queensland Legal Aid, *Consultation*, Brisbane, 2 March 2005.

115 Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005.

116 Law Council of Australia, *Submission SFO 97*, 17 March 2006.

117 See Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [186].

118 See uniform Evidence Acts s 191. See also *Evidence Act 1958* (Vic) s 149AB.

## Burden and standard of proof

### Background

13.87 The persuasive (or legal) burden of proof refers to the duty of a party to persuade the trier of fact of the truth of particular propositions. The evidential burden of proof refers to a party's duty to lead sufficient evidence for the court to call upon the other party to respond.<sup>119</sup>

13.88 The standard of proof refers to the degree of rational certainty or probability that must be met before a court accepts that facts have been proved. Standards of proof include the criminal standard of 'beyond reasonable doubt' and the less onerous civil standard of 'on the balance of probabilities'. The degree of satisfaction that is called for under the civil standard of proof may vary according to the gravity of the fact to be proved.<sup>120</sup>

13.89 Federal legislation sets out the applicable standards of proof to be applied in criminal<sup>121</sup> and civil proceedings,<sup>122</sup> respectively.

13.90 In a criminal trial, the prosecution bears the persuasive burden of proving each *element* of an offence, and the standard of proof is 'beyond reasonable doubt'.<sup>123</sup> However, the prosecution need not prove every *fact* alleged beyond reasonable doubt. There may be situations where an evidential burden falls on the defendant to lead evidence to raise a reasonable doubt about the prosecution's case or to have an issue considered at all.<sup>124</sup>

### Burden of proof in sentencing

13.91 In *R v Storey*, the Victorian Court of Appeal said there was no burden of proof in sentencing.

If there is a dispute about a particular matter (whether because the parties are in dispute or because the judge is not prepared to act on the assertion that has been made) what is important is what use the judge will make of the matter—will it be adverse to the offender or in the offender's favour?—and what degree of satisfaction it is that the judge must have before he or she can use that matter in determining an appropriate sentence. Neither of these questions requires consideration of which party bears the onus of proving the matter. ... It is not for the Crown to prove what is a proper sentence for the offender or to prove the facts that should be taken to account in reaching such a sentence any more than it is for the offender to prove either of

119 D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (3rd ed, 2001), 412–416.

120 See *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362; *Rejcek v McElroy* (1965) 112 CLR 517, 521.

121 See *Evidence Act 1995* (Cth) s 141; *Criminal Code* (Cth) s 13.2.

122 See *Evidence Act 1995* (Cth) s 140(1), (2).

123 *Woolmington v Director of Public Prosecutions (UK)* [1935] AC 462.

124 See, eg, *Criminal Code* (Cth) s 13.3(2) (evidential burden on defendant in relation to certain defences).

those matters; it is for the judge to find the facts which he or she considers affect the exercise of the sentencing discretion and then determine the appropriate sentence.<sup>125</sup>

13.92 That decision was approved by the High Court in *R v Olbrich*,<sup>126</sup> which stated that references to burden of proof in sentencing could mislead. However, it accepted that if the prosecution wished to have the court take a matter into account it was for the prosecution to bring that matter to the attention of the court and, if necessary, call evidence in relation to it. Similarly, if the offender wished to bring a matter to the attention of the court, it was for him or her to do so and, if necessary, call evidence about it. It would not be necessary to call evidence if the parties agreed to the asserted fact or if the court was prepared to act on the assertion.<sup>127</sup>

### Standard of proof in sentencing

13.93 Part IB is silent on the standard of proof in federal sentencing proceedings. In *R v Olbrich*<sup>128</sup> and *Weininger v The Queen*,<sup>129</sup> the High Court approved the formulation of the standard of proof expressed by the Victorian Court of Appeal in *R v Storey*:

the judge may not take facts into account in a way that is adverse to the interests of the accused unless those facts have been established beyond reasonable doubt but if there are circumstances which the judge proposes to take into account in favour of the accused it is enough if those circumstances are proved on the balance of probabilities.<sup>130</sup>

13.94 The practical effect of this rule is that where neither the prosecution nor the defence meet the relevant standard of proof on an issue, the court must ignore that issue altogether in determining sentence. The High Court stated that a judge who is not satisfied of a matter urged in a plea on behalf of an offender is not bound to accept the accuracy of the offender's contention even if the prosecution does not prove the contrary beyond reasonable doubt.<sup>131</sup>

13.95 There is precedent for the standard of proof in sentencing to be given statutory expression. The *Evidence Act 1977* (Qld) provides that a judicial officer may act on an allegation of fact that is not admitted or is challenged if satisfied on the balance of probabilities that the allegation is true—with the degree of satisfaction varying according to the adverse consequences of finding the allegation to be true.<sup>132</sup>

13.96 Queensland and Northern Territory sentencing legislation provides that a court may make a finding that an offender is a serious danger to the community only if it is

125 *R v Storey* [1998] 1 VR 359, 367–368.

126 *R v Olbrich* (1999) 199 CLR 270.

127 *Ibid.*, [25].

128 *Ibid.*, [27].

129 *Weininger v The Queen* (2003) 212 CLR 629, [18], [24].

130 *R v Storey* [1998] 1 VR 359, 371. See also *Langridge v The Queen* (1996) 87 A Crim R 1; *R v Morrison* [1999] 1 Qd R 397.

131 *R v Olbrich* (1999) 199 CLR 270, [24]. See also *R v Storey* [1998] 1 VR 359, [30].

132 *Evidence Act 1977* (Qld) s 132(3), (4).

satisfied to a high degree of probability.<sup>133</sup> Victorian sentencing legislation also has specific provisions in relation to the standard of proof. For example, a court may impose an indefinite sentence on an offender in respect of a serious offence only if it is satisfied, to a high degree of probability, that the offender is a serious danger to the community.<sup>134</sup> Western Australian sentencing legislation provides that in deciding matters in connection with the making of a reparation order, the standard of proof is proof on the balance of probabilities.<sup>135</sup>

13.97 The sentencing legislation of New Zealand sets out the facts that may be accepted by a court in sentencing; and the procedure to be followed where there is a disputed fact. It provides that the prosecution must prove disputed aggravating facts and negate certain disputed mitigating facts raised by the defence beyond reasonable doubt, and that the offender must prove, on the balance of probabilities, any disputed mitigating fact that is not related to the nature of the offence or the offender's part in the offence.<sup>136</sup>

### Submissions and consultations

13.98 There was no suggestion in submissions or consultations that the standard of proof in sentencing established at common law needs to be changed, nor that judicial pronouncements in relation to the burden of proof were problematic.

13.99 However, the issue arose as to whether there should be a legislative statement of the standard of proof that is to apply in sentencing. Views in submissions and consultations in response to Issues Paper 29 were divided on this issue. There was some support for the standard of proof, adopted by the High Court in *R v Olbrich*, to be set out in legislation.<sup>137</sup> One prosecutor expressed the view that a legislative restatement of the common law principles would be helpful because some lower courts adopted the practice of requiring the prosecution to disprove any facts that it disputed.<sup>138</sup> However, the view was also expressed that legislative provisions in this area are unnecessary.<sup>139</sup>

13.100 In DP 70 the ALRC proposed that federal sentencing legislation should restate the common law rules in relation to the standard of proof in sentencing. In particular, in sentencing a federal offender:

133 *Penalties and Sentences Act 1992* (Qld) s 170; *Sentencing Act 1995* (NT) s 71.

134 *Sentencing Act 1991* (Vic) s 18B. See also *Sentencing Act 1991* (Vic) ss 6C, 18Z(c), 18ZL, 18ZP, 18ZM.

135 *Sentencing Act 1995* (WA) s 114.

136 *Sentencing Act 2002* (NZ) s 24.

137 Law Council of Australia, *Submission SFO 97*, 17 March 2006; Law Society of the Northern Territory, *Consultation*, Darwin, 29 April 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Hobart, 14 April 2005. See also Victoria Legal Aid, *Submission SFO 31*, 18 April 2005 (support for legislative expression of evidentiary burdens).

138 Commonwealth Director of Public Prosecutions, *Consultation*, Hobart, 14 April 2005.

139 Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Darwin, 28 April 2005.



- (a) a court is not to take into account a factor that is adverse to the interests of the offender unless it is satisfied that the fact has been proved beyond reasonable doubt; and
- (b) a court may take into account a fact that is favourable to the interests of the offender if it is satisfied that the fact has been proved on the balance of probabilities.<sup>140</sup>

13.101 The Law Council of Australia supported the codification of the common law standard of proof in sentencing and suggested that consideration be given to similarly codifying the burden of proof. It submitted that it should be made clear that paragraph (a) of the proposal is not intended to prevent a court from taking into account facts adverse to the interests of the offender where those facts have been formally admitted at trial or by means of an agreed statement of facts tendered in the sentencing proceeding. It also submitted that paragraph (b) of the proposal should *require* a court to take into account a fact that is favourable to the interests of the offender if it is satisfied that the fact has been proved on the balance of probabilities. In addition, it stated that paragraph (b) should allow for the fact that there may be circumstances where the prosecution should disprove beyond reasonable doubt a matter in relation to which the offender has discharged an evidential burden.<sup>141</sup>

#### ALRC's views

13.102 Federal sentencing legislation should expressly adopt the common law rules in relation to the standard of proof in sentencing. Federal legislation already sets out the applicable standard of proof to be applied in criminal proceedings, notwithstanding that the standard of proof beyond reasonable doubt is well established at common law.<sup>142</sup> It would be consistent for federal legislation to set out the applicable standard of proof in sentencing proceedings. There is precedent for this in other jurisdictions.

13.103 A further advantage of codifying the standard of proof arises from the fact that the *Evidence Act 1977* (Qld) is not consistent with the common law. As noted above, the Queensland provision does not require a fact that is adverse to the interests of the offender to be proved beyond reasonable doubt, and this may cause confusion in sentencing federal offenders in that state. Legislative restatement of the common law principles would promote clarity of approach in this respect.

13.104 The proposal set out in DP 70 has been modified to make it clear that the legislative standard of proof applies only where a fact is to be *proved* in sentencing. As discussed in Chapter 6, a court must consider a factor only where it is relevant and 'known to the court'.<sup>143</sup> As the High Court said in *Weininger*, the phrase 'known to the

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140 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 13–6.

141 Law Council of Australia, *Submission SFO 97*, 17 March 2006.

142 See *Evidence Act 1995* (Cth) s 141; *Criminal Code* (Cth) s 13.2.

143 See Rec 6–1.

court' suggests strongly that there is no requirement for every matter to be formally proved before it can be taken into account in sentencing.<sup>144</sup> For example, facts need not be proved if they are agreed by the parties and the court consents.

13.105 The second limb of the recommendation has also been redrafted to make it clear that, where a fact is to be proved in sentencing a federal offender, the court is not to take into account a fact that is favourable to the interests of the offender unless it is satisfied that the fact has been proved on the balance of probabilities.

13.106 As discussed above, the Victorian Court of Appeal in *R v Storey* has stated that there is no burden of proof in sentencing, and the High Court has essentially adopted this position. The ALRC is not presently convinced of the desirability of codifying the burden of proof in federal sentencing legislation.

13.107 As discussed in Chapter 8, federal sentencing legislation should enable a court, when sentencing a federal offender, to make ancillary orders for restitution or compensation. It is consistent with the civil nature of these orders that the standard of proof is the civil standard, notwithstanding that they are made in the context of criminal proceedings. The Law Reform Committee of the Parliament of Victoria has also expressed the view that it is appropriate that reparation applications be determined in accordance with the civil standard of proof.<sup>145</sup> The ALRC also considers that the civil standard of proof should be applied in deciding matters in connection with the making of a restitution or compensation order.<sup>146</sup>

**Recommendation 13–6** Federal sentencing legislation should restate the common law rules in relation to the standard of proof in sentencing. In particular, where a fact is to be proved in sentencing a federal offender:

- (a) a court is not to take into account a fact that is adverse to the interests of the offender unless it is satisfied that the fact has been proved beyond reasonable doubt; and
- (b) a court is not to take into account a fact that is favourable to the interests of the offender unless it is satisfied that the fact has been proved on the balance of probabilities.

144 *Weininger v The Queen* (2003) 212 CLR 629, [21].

145 Law Reform Committee—Parliament of Victoria, *Restitution for Victims of Crime*, Interim (1993), [4.189].

146 This approach was supported by the Law Council of Australia: Law Council of Australia, *Submission SFO 97*, 17 March 2006.

**Recommendation 13–7** Federal sentencing legislation should provide that in deciding matters in connection with the making of an ancillary order for restitution or compensation, the standard of proof is the balance of probabilities.

## Role of the jury in sentencing

### Background

13.108 Section 80 of the *Australian Constitution* requires that ‘the trial on indictment of any offence against the law of the Commonwealth shall be by jury’. Juries have no role to play in the adjudication of summary offences. Similarly, where there is a plea of guilty, there is no occasion to empanel a jury because there is no function for the jury to perform.<sup>147</sup>

13.109 The role of a jury in a trial on indictment is to decide the facts of a case and to determine whether or not a defendant is guilty of the offence beyond reasonable doubt. The jury has no direct role in the sentencing hearing. However, where the facts implied in a verdict are clear, the sentence passed must not conflict with the jury’s verdict.<sup>148</sup> Further, a jury may make recommendations for leniency or mercy, which are to be treated ‘with respect and careful attention’ but are not binding on the court.<sup>149</sup>

13.110 While a jury trial usually elicits adequate details of the conduct constituting the offence, a guilty verdict may fail to settle the exact circumstances of the defendant’s wrongdoing. For example, a finding of guilt in relation to a strict liability offence does not determine the defendant’s knowledge or intention, which is relevant to sentencing even if not relevant to criminal liability.<sup>150</sup>

13.111 Although a jury’s functions generally cease after determining guilt or innocence, a jury might be invited to determine further facts after it has returned its verdict. A judge can then rely upon these facts in sentencing.<sup>151</sup> In *Isaacs v The Queen* the New South Wales Court of Criminal Appeal said that a trial judge has the power to ask the jury the basis for its verdict. However, it said that the exercise of this power is to be discouraged, save in exceptional circumstances.<sup>152</sup> Occasionally, a jury has been requested to address issues left unresolved by a verdict by being asked to give reasons for its verdict or to make further determinations about facts it has found proved. For example, in drug trafficking cases, a jury may be asked to specify the number of times that it found the offender had supplied drugs.<sup>153</sup> However, the practice of sending a

147 *R v Cheng* (2000) 203 CLR 246, [41]–[42].

148 *R v Ford* (1994) 75 A Crim R 398 (guilty verdict); *R v Webb* [1971] VR 147 (verdict of acquittal).

149 *Whittaker v The King* (1928) 41 CLR 239, 240.

150 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.311].

151 *R v Warner* [1967] 1 WLR 1209.

152 *Isaacs v The Queen* (1997) 90 A Crim R 587.

153 K Warner, *Sentencing in Tasmania* (2nd ed, 2002), [2.320].

jury back to determine collateral sentencing issues is not widely used.<sup>154</sup> Therefore it is largely for the judge alone to determine sentencing facts that are not implied by the verdict itself.

13.112 In the United States, juries have a greater role to play in sentencing. The *United States Code* makes provision for separate sentencing hearings, to be conducted in the presence of the jury that determined the defendant's guilt, to determine whether a federal death sentence is justified.<sup>155</sup> Jury sentencing is used in the determination of death penalty cases in American states that have capital punishment.<sup>156</sup> In addition, in Arkansas, Kentucky, Missouri, Oklahoma, Texas and Virginia juries impose sentences in non-capital cases. Trial judges in Kentucky, Virginia and Arkansas have the power to reduce a jury's sentence but not to raise it unless it fails to comply with mandatory minimum sentencing statutes.<sup>157</sup>

### Issues and problems

13.113 An issue arises as to whether juries should play a greater role in sentencing federal offenders, for example, by determining the sentence to be passed; clarifying the factual basis of a verdict; or otherwise determining the facts upon which a sentence is to be based.

13.114 In 1973, the Criminal Law and Penal Methods Reform Committee of South Australia, chaired by the Hon Justice Mitchell (the Mitchell Committee), concluded that there was no merit in the suggestion that a jury should impose a sentence.

It is unfair to the jury because it places upon them responsibility for the decision of a complex question in an area in which, apart from the occasional individual exception perhaps, they have neither experience nor expertise. The weight of this responsibility is not lessened by the fact that the liberty of an individual is at stake.<sup>158</sup>

13.115 The Mitchell Committee noted that a jury sentence would either have to follow immediately after a verdict without the benefit of a pre-sentence report, or the jury would have to be reconvened at a later time for the purposes of sentencing, and that there were obvious disadvantages with either course of action. It also noted that because sentencing by juries would not arise in summary matters:

jury sentencing would mean ... that in the very area where experience and expertise is at a premium, which is sentencing for more serious offences, the sentencing function is removed to a discontinuous and non-expert body.<sup>159</sup>

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<sup>154</sup> R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.314].

<sup>155</sup> *Federal Death Penalty Act of 1994* 18 USC s 3593 (US). The federal death penalty is rarely invoked.

<sup>156</sup> See A Lanni, 'Jury Sentencing in Non-capital Cases: An Idea Whose Time Has Come (Again)?' (1999) 108 *The Yale Law Journal* 1775.

<sup>157</sup> N King and R Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, Working Paper Number 04-08 (2004) Vanderbilt University Law School, 9.

<sup>158</sup> Criminal Law and Penal Methods Reform Committee of South Australia, *First Report: Sentencing and Corrections* (1973), 25-26.

<sup>159</sup> *Ibid*, 26.

13.116 In January 2005, Chief Justice Spigelman suggested that consideration be given to a system in which judges consult with juries about sentencing, after evidence and submissions on sentence and prior to the determination of sentence. The consultations would take place in camera, and would be protected by secrecy provisions:

A process of consultation can improve both the jury decision-making process and the judicial sentencing process, as well as enhancing public confidence in the administration of the criminal justice system. ...

many of the matters that arise for determination in the sentencing process are such that, in my opinion, judges would welcome assistance from a spectrum of opinion reflecting a diversity of experience. ...

Furthermore, there are occasions when the judge has to make assumptions about the jury's reasoning process. ... it will assist the sentencing exercise for the judge to understand why the verdict was as it was.<sup>160</sup>

13.117 The New South Wales Law Reform Commission is currently conducting an inquiry into 'whether or not a judge in a criminal trial, might, following a finding of guilt, and consistent with the final decision remaining with the judge, consult with the jury on aspects of sentencing'.<sup>161</sup> That inquiry had not been finalised at the time of writing this Report.

13.118 The New South Wales Law Society has expressed opposition to Chief Justice Spigelman's proposal on the basis that:

- sentencing is too complex and specialised a task to be undertaken by jurors and that it would be too costly and time-consuming to educate juries about sentencing law;
- it may lead to greater inconsistencies in sentencing;
- it could compromise a jury's adjudication on guilt;
- the proposed in camera consultations are a denial of natural justice;
- it would represent an intrusion into the secrecy of the jury's deliberations;
- it would increase the already onerous burden placed on jurors in determining guilt;

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160 J Spigelman, *A New Way to Sentence for Serious Crime (Paper Presented at the Opening of Law Term Dinner of the Law Society of New South Wales)* (2005). See also J Spigelman, 'The Power of Twelve: A New Way to Sentence for Serious Crime' (2005) 85 *Reform* 51, 54.

161 *Law Reform Commission New South Wales* <[www.lawlink.nsw.gov.au/lrc](http://www.lawlink.nsw.gov.au/lrc)> at 14 October 2005.

- it would impose extra costs and further delays in the criminal justice system because jurors would need to be recalled for sentencing; and
- there is a risk that in the period between determination of guilt and sentencing, jurors may be affected by external influences.<sup>162</sup>

13.119 The majority of stakeholders expressed opposition to extending the role of the jury in sentencing on the grounds that it is neither desirable nor practical, and would complicate the sentencing process with no determinable benefit.<sup>163</sup> Specific concerns that were identified included: that jurors lack knowledge about sentencing options and comparative sentences; that jury involvement would increase inconsistency in sentencing; and that it would place an extra burden on jurors, requiring them to serve for longer periods of time. One federal offender submitted:

I do not believe there is any role for the jury on the matter of sentencing. Their task is already difficult as finders of fact in complex federal cases and it would merely compound errors to give them a role in sentencing.<sup>164</sup>

13.120 The CDPP submitted that:

the process of sentencing involves a careful consideration of a range of matters which are not limited to fact-finding. They rightly include the offender's personal circumstances and previous history, the circumstances of the offence, the culpability of the offender and comparative sentences. In the view of the CDPP, sentencing is best conducted by judicial officers who have had extensive experience in synthesising all of the relevant facts and circumstances in imposing the appropriate sentence.<sup>165</sup>

13.121 One legal practitioner expressed the view that if the jury were to have any role it could be to make determinations about certain facts. However, he noted that this could present difficulties where the jury made a finding of fact that was inconsistent with its guilty verdict.<sup>166</sup>

13.122 The Law Council of Australia did not express a view in relation to the suggestion that a consultative role be considered for juries in federal sentencing proceedings. However, it noted that juries already have no role in the vast majority of criminal proceedings, as these are uncontested or heard in courts of summary jurisdiction.<sup>167</sup>

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<sup>162</sup> J McIntyre, 'The Role of Juries in Sentencing: The Case Against' (2005) 86 *Reform* 56, 56–57. See also R Johns, *Trial By Jury: Recent Developments—Briefing Paper No 4/05* (2005) NSW Parliamentary Library Research Service, 55–57 for an outline of other responses to Chief Justice Spigelman's proposal.

<sup>163</sup> Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; JC, *Submission SFO 25*, 13 April 2005; WT, *Submission SFO 23*, 11 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; K Warner, *Consultation*, Hobart, 13 April 2005.

<sup>164</sup> WT, *Submission SFO 23*, 11 April 2005.

<sup>165</sup> Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

<sup>166</sup> T Glynn, *Consultation*, Brisbane, 2 March 2005.

<sup>167</sup> Law Council of Australia, *Submission SFO 97*, 17 March 2006.

**ALRC's views**

13.123 It is neither necessary nor desirable to expand the role of the jury in federal sentencing proceedings. This view takes into account the many concerns that have been identified in connection with jury sentencing—the difficulties arising from the fact that a jury would need to be recalled some time after a verdict has been entered; the jurors' lack of expertise in sentencing; the potential for greater inconsistencies in sentencing; increased cost and delay in sentencing; and the fact that in camera consultations between judges and juries are incompatible with principles of transparency and natural justice.

13.124 The ALRC remains of the view that it tentatively expressed in its previous inquiry into sentencing, namely, that even where there is a need to clarify the factual basis of a verdict, the jury's role should not be expanded beyond the determination of guilt.<sup>168</sup> Substantial difficulties may arise if the jury's answer to a judge's question is inaccurate or inconsistent with the verdict reached.

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168 Australian Law Reform Commission, *Sentencing: Procedure*, DP 29 (1987), [62].





## 14. Victim Impact Statements and Pre-sentence Reports

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### Introduction

14.1 A range of information may be relevant to a court in passing sentence. This includes information relevant to sentencing factors<sup>1</sup> and factors affecting the administration of the federal criminal justice system;<sup>2</sup> information about the time an

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1 See Ch 6.

2 See Ch 6.

offender has spent in pre-sentence custody or detention;<sup>3</sup> and comparative sentencing statistics.<sup>4</sup>

14.2 This chapter focuses on two methods of presenting information to the court prior to the imposition of a federal sentence, namely, victim impact statements and pre-sentence reports.

## Victim impact statements

### Background

14.3 As discussed in Chapter 6, one sentencing factor that is of increasing relevance in sentencing federal offenders is the impact of the offence on any victim. While many traditional federal offences are considered victimless—in the sense that the injury is not to an identifiable individual but to the Commonwealth as a polity—many newer offences such as sexual servitude, child sex tourism and terrorism offences may affect individuals directly.

14.4 The Eleventh United Nations Congress on Crime Prevention and Criminal Justice held in Thailand in April 2005 highlighted the need to focus on transnational crimes such as drug and arms trafficking, people smuggling, and terrorism—all areas of federal criminal law. In its concluding Bangkok Declaration, the Congress emphasised the need to give special attention to the victims of such crimes and to strengthen the legal and financial framework for providing support to victims.<sup>5</sup>

14.5 *The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* provides that:

The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: ...

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.<sup>6</sup>

14.6 A victim impact statement is one way of informing a court about the harm, loss or injury suffered by a victim as a result of the offence that is the subject of the sentencing proceedings. Part IB of the *Crimes Act 1914* (Cth) does not make provision for victim impact statements. Professors Richard Fox and Arie Freiberg have expressed

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3 See Ch 10.

4 See Ch 21.

5 Eleventh United Nations Congress on Crime Prevention and Criminal Justice, *Bangkok Declaration: Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice*, UN Doc A/CONF 203/18 (2005).

6 *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc A/Res/40/34 (1985) art 6(b).

the view that because the Commonwealth has not entered this field, state courts exercising federal jurisdiction are subject to the obligations imposed by ss 68(1) and 79 of the *Judiciary Act 1903* (Cth) to apply to federal prosecutions the same state and territory procedural laws that they apply in state or territory prosecutions.<sup>7</sup> In their view, provisions relating to victim impact statements are matters of sentencing procedure and are picked up and applied in the sentencing of federal offenders.<sup>8</sup>

14.7 However, practitioners have noted that it is not always clear whether particular sentencing provisions can be categorised as ‘procedural’. The question of whether s 68 of the *Judiciary Act* picks up and applies particular state and territory provisions to the sentencing of federal offenders often has to be tested on a case-by-case basis.<sup>9</sup>

14.8 All states and territories, except Queensland, have legislative provisions or court rules expressly governing the use of victim impact statements.<sup>10</sup> Queensland legislation provides that the prosecutor should inform the sentencing court of the details of any harm caused to a victim by the crime.<sup>11</sup> There are differences between state and territory laws concerning the availability, content, form and use of victim impact statements, which are addressed below. Other countries also allow victim impact statements to be presented at sentencing.<sup>12</sup> For example, in the United States, federal district courts are required to permit victims of crime to speak or submit information about the sentence.<sup>13</sup>

### Should victim impact statements be available in federal sentencing?

14.9 The literature about victim impact statements points to the benefits to the victim in terms of catharsis, vindication, healing, restoration and being granted a voice in relation to the sentencing hearing.<sup>14</sup> Arguments in favour of the use of victim impact statements include that they may: reduce the perception of the victim’s alienation in the criminal justice process; assist in making sentencing more transparent and more reflective of the community’s response to crime; and promote the rehabilitation of defendants by confronting them with the impact of their offending behaviour.<sup>15</sup>

7 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.507].

8 Ibid, [2.507].

9 Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004.

10 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 26–30A; *Crimes (Sentencing Procedure) Regulation 2005* (NSW) regs 8–11; *Sentencing Act 1991* (Vic) pt 6 div 1A; *Sentencing Act 1995* (WA) pt 3 div 4; *Criminal Law (Sentencing) Act 1988* (SA) s 7A; *Magistrates Court Rules 1992* (SA) r 41.06; *Supreme Court Criminal Rules 1992* (SA) r 19.01–19.08; *Sentencing Act 1997* (Tas) s 81A; *Justice Rules 2003* (Tas) pt 9A; *Crimes (Sentencing) Act 2005* (ACT) pt 4.3; *Sentencing Act 1995* (NT) ss 106A–106B.

11 *Criminal Offence Victims Act 1995* (Qld) s 14. See also, *Penalties and Sentences Act 1992* (Qld) s 15 (court can receive any information it considers appropriate to enable it to impose a proper sentence).

12 See *Victims’ Rights Act 2002* (NZ) ss 17–27; *Criminal Code (RS 1985, c C–46)* (Canada) s 722.

13 *Federal Rules of Criminal Procedure* 18 USC (Appendix) (US) r 32(i)(4)(B).

14 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.501].

15 J Baptie, ‘The Effect of the Provision of Victim Impact Statements in the Local Courts of New South Wales’ (2004) 7 *The Judicial Review* 73, 79–80.

14.10 Problems with victim impact statements include that they can: raise a victim's expectations about sentence, which may not be fulfilled; expose offenders to unfounded allegations by victims;<sup>16</sup> lead sentencers to give disproportionate weight to the impact of a crime on a victim, to the detriment of other relevant considerations;<sup>17</sup> and skew an otherwise objective and dispassionate process by the introduction of emotional and possibly vengeful content.<sup>18</sup>

14.11 In 1988, the Victorian Sentencing Committee noted that if victim impact statements were introduced and were not made compulsory in every case, disparity could arise in the sentencing process: more severe sentences might be imposed in cases where victim impact statements were available than in cases where they were not, even if the culpability of the offender were the same.<sup>19</sup> Victim impact statements may also result in inconsistent sentences where one victim asserts greater psychological harm than another more robust victim.<sup>20</sup>

14.12 A 1994 study into the effect of victim impact statements on sentencing in South Australia noted that:

prosecutors and judges stated that the information provided in VIS [victim impact statements] was highly variable in quality and often was not adequately followed up or updated ... All groups believed that VIS have not led to court delays, additional expenses or mini trials on VIS content. Many of those interviewed actually suggested that VIS save court time. Judges and prosecutors felt that only rarely did VIS contain exaggerations or inappropriate remarks. Defence lawyers stated that they were often suspicious of material relating to the emotional harm suffered by victims; however, they rarely challenged VIS because of the damaging effect a cross-examination of the victim might have on sentencing.

One-third of the judges interviewed stated that VIS were important for sentencing; a third thought that the VIS itself was not very important; and the remaining judges were of the view that the VIS were only important in some cases, in particular, offences against the person and cases in which the defendant pleaded guilty. Most professionals believed that VIS have not increased the severity of sentencing. ... Most judges did not believe that VIS have led to sentencing disparity.<sup>21</sup>

14.13 Most stakeholders expressed support in submissions and consultations for victim impact statements to be used in federal sentencing proceedings where the circumstances of a matter indicated a need to do so, provided the procedures for their

16 A Ashworth, 'Victim Impact Statements and Sentencing' (1993) *The Criminal Law Review* 498, 501, 507.

17 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.502].

18 J Baptie, 'The Effect of the Provision of Victim Impact Statements in the Local Courts of New South Wales' (2004) 7 *The Judicial Review* 73, 80.

19 Victorian Sentencing Committee, *Sentencing* (1988), [13.3.26].

20 J Baptie, 'The Effect of the Provision of Victim Impact Statements in the Local Courts of New South Wales' (2004) 7 *The Judicial Review* 73, 80.

21 E Erez, L Roeger and M O'Connell, *Victim Impact Statements in South Australia, An Evaluation* (1994) Office of Crime Statistics, Attorney-General's Department (SA), cited in J Baptie, 'The Effect of the Provision of Victim Impact Statements in the Local Courts of New South Wales' (2004) 7 *The Judicial Review* 73, 81.

use were properly regulated.<sup>22</sup> Victim Support Services Inc expressed the view that the opportunity for a victim to make a victim impact statement was an important part of the recognition of the victim's rights.<sup>23</sup> However, one judicial officer submitted that such statements are of limited utility and that where they are used, they should be in writing, verified by oath or affirmation, and subject to cross-examination.<sup>24</sup> One federal offender expressed the view that victim impact statements 'are more a political feel good tool rather than a valid constructive mechanism to assist in sentencing'.<sup>25</sup>

14.14 The Australian Securities and Investments Commission (ASIC) submitted that:

[Corporate] crimes often have a large number of victims, some of whom may have suffered a little and others who have suffered a substantial loss. ASIC often prosecutes matters where a vulnerable group is the specific target of offenders, such as retirees, the elderly, those who are socially disadvantaged, or a particular ethnic community. It would be desirable for some mechanism to be in place to allow information to be presented to a court where appropriate, on behalf of such victims. Some ways in which this information could be presented are by way of submissions, a general statement or expert evidence, such as from a psychiatrist or social worker who can attest to the impact of the offence on the affected group.<sup>26</sup>

### Who may make a victim impact statement?

14.15 There is disparity in state and territory legislation about the scope of the term 'victim'. While all jurisdictions that have provisions regulating victim impact statements apply those provisions to a primary victim, some also apply them to family or dependants of a victim where the victim has died as a result of the offence.<sup>27</sup> However, the New South Wales Court of Criminal Appeal has ruled that victim impact statements are irrelevant to the sentencing of an offender in matters involving the death of the primary victim because

the idea that it is more serious or more culpable to kill someone who has or is surrounded by a loving and grieving family than someone who is alone is offensive to our notions of equality before the law.<sup>28</sup>

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- 22 Law Council of Australia, *Submission SFO 97*, 17 March 2006; South Australia Victims of Crime Co-ordinator, *Submission SFO 84*, 15 February 2006; G Urbas, *Submission SFO 82*, 14 February 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006; J Roberts, *Submission SFO 67*, 16 January 2006; Victim Support Australasia, *Submission SFO 60*, 21 December 2005; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; LD, *Submission SFO 9*, 10 March 2005; Victim Support Service Inc, *Consultation*, Adelaide, 20 April 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005.
- 23 Victim Support Service Inc, *Consultation*, Adelaide, 20 April 2005.
- 24 Judge J Goldring, *Submission SFO 54*, 10 December 2005.
- 25 JC, *Submission SFO 25*, 13 April 2005.
- 26 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.
- 27 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26; *Sentencing Act 1997* (Tas) s 81A; *Sentencing Act 1995* (NT) s 106A.
- 28 *R v Dang* [1999] NSWCCA 42, [25].

14.16 New sentencing legislation in the ACT significantly expands the scope of persons who can make a victim impact statement to include parents, carers and close family members of victims, and people in an intimate personal relationship with the victim.<sup>29</sup>

14.17 The Law Society of South Australia submitted that ‘*all* persons directly affected by *any* Commonwealth offence should be able, if they choose, to provide a victim impact statement to the sentencing court’.<sup>30</sup> A number of stakeholders recommended that the definition should include the immediate family members and significant others of the primary victim.<sup>31</sup>

### **In what circumstances should victim impact statements be used?**

14.18 If it is accepted that victim impact statements have a role to play in federal sentencing, the issue arises as to whether they should be available for all federal offences—summary and indictable—and irrespective of the type of injury, loss or damage suffered by the victim.

14.19 There is disparity between state and territory legislation in relation to the types of offences for which a victim impact statement may be made. Some legislation applies only to indictable offences,<sup>32</sup> and other legislation to indictable offences and other nominated offences.<sup>33</sup>

14.20 The provisions regulating victim impact statements in New South Wales apply only to certain offences that result in death, actual physical bodily harm, actual or threatened violence or an act of sexual assault.<sup>34</sup> Primary victims may give particulars in a statement of any ‘personal harm’ they have suffered as a direct result of the offence.<sup>35</sup> ‘Personal harm’ is defined as ‘actual physical bodily harm, mental illness or nervous shock’.<sup>36</sup> The provisions do not cover economic loss, which is often an issue for victims of federal offences. In contrast, ‘harm’ is defined broadly in the provisions regulating victim impact statements in some other jurisdictions, and specifically includes economic loss.<sup>37</sup>

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29 *Crimes (Sentencing) Act 2005* (ACT) s 49.

30 Law Society of South Australia, *Submission SFO 37*, 22 April 2005 (emphasis added).

31 South Australia Victims of Crime Co-ordinator, *Submission SFO 84*, 15 February 2006; Victim Support Australasia, *Submission SFO 60*, 21 December 2005.

32 See, eg, *Criminal Law (Sentencing) Act 1988* (SA) s 7A(1); *Sentencing Act 1997* (Tas) s 81A(1), (2). See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(2). See also *Crimes (Sentencing) Act 2005* (ACT) s 48.

33 *Crimes (Sentencing) Act 2005* (ACT) s 48.

34 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27.

35 *Ibid* s 26.

36 *Ibid* s 26.

37 *Crimes (Sentencing) Act 2005* (ACT) s 47; *Sentencing Act 1995* (NT) s 106A.

14.21 Some provisions that permit economic loss to be the subject of a victim impact statement allow the statement to be made only by a natural person.<sup>38</sup> However, a corporation can suffer economic loss as a result of certain federal offences. In this regard, the sentencing legislation of Victoria expressly allows a victim impact statement to be made by a person on behalf of a victim that is not an individual.<sup>39</sup>

### **Should victims be allowed to express opinions about the sentence?**

14.22 In Australia, a victim's desire for retribution, or a victim's opinion about what is an appropriate sentence for the offender, are generally considered to be illegitimate considerations in sentencing.<sup>40</sup> One state sentencing Act expressly prohibits a victim impact statement from addressing the way in which or the extent to which an offender ought to be sentenced.<sup>41</sup> However, the sentencing legislation of the Northern Territory expressly provides that a victim impact statement may contain a statement as to the victim's wishes in respect of the sentencing order to be made by the court,<sup>42</sup> and the New South Wales legislation does not prevent a court from considering a victim impact statement given by a family victim 'in connection with the determination of punishment for the offence' if it considers it appropriate to do so.<sup>43</sup>

14.23 The Law Society of South Australia submitted that victims should not be permitted to express personal opinions on the appropriate sentence.<sup>44</sup>

### **What provision should be made to protect offenders?**

14.24 In submissions and consultations, the view was expressed that victim impact statements have the potential to be highly prejudicial, vitriolic and unbalanced.<sup>45</sup> Victim impact statements can also expose offenders to unfounded allegations by victims.

14.25 Some state and territory legislation makes provision for the victim to be cross-examined in relation to the contents of a statement,<sup>46</sup> or expressly grants the court the power to rule as inadmissible the whole or any part of a victim impact statement.<sup>47</sup>

38 See *Sentencing Act 1995* (NT) s 106A.

39 *Sentencing Act 1991* (Vic) s 95A(3)(a).

40 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.501]; A Ashworth, 'Victim Impact Statements and Sentencing' (1993) *The Criminal Law Review* 498, 501.

41 *Sentencing Act 1995* (WA) s 25(2).

42 *Sentencing Act 1995* (NT) s 106B(5A).

43 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(4)(b).

44 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.

45 Judge J Goldring, *Submission SFO 54*, 10 December 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005.

46 *Sentencing Act 1991* (Vic) s 95D; *Crimes (Sentencing) Act 2005* (ACT) s 53(3), (4); *Sentencing Act 1995* (NT) s 106B(9). See also *Sentencing Act 1997* (Tas) ss 81A(7), 81(4) (if offender challenges truth of information in statement court may require it to be proved as if it were to be received at trial).

47 *Sentencing Act 1991* (Vic) s 95B(2); *Sentencing Act 1995* (WA) s 26(2). See also *Justice Rules 2003* (Tas) r 54G.

Some legislation also prohibits a victim impact statement from containing anything that is 'offensive, threatening, intimidating or harassing'.<sup>48</sup>

14.26 Some support was expressed in submissions for the maker of the statement to be cross-examined or called to give sworn evidence if required by the offender.<sup>49</sup> However, a number of stakeholders opposed the cross-examination of victims in relation to their statements on the basis that it would disenfranchise them of their personal opinions about the impact of the offence and would add to the traumatic impact of the offence and the proceedings on the victim.<sup>50</sup> One practitioner expressed the view that even where the defence is allowed to cross-examine a victim on a victim impact statement, it would hesitate to do so because it risks making the defendant appear unremorseful.<sup>51</sup> In any event, it was emphasised that whether or not it was possible to cross-examine a victim on the contents of a victim impact statement should be made absolutely clear.<sup>52</sup> Support was also expressed for prior scrutiny by the defence and the court of written victim impact statements for improper or irrelevant content.<sup>53</sup>

### **Can inferences be drawn from the absence of a victim impact statement?**

14.27 Some state and territory legislation provides that no inferences are to be drawn about the harm suffered from the fact that a victim has chosen not to make an impact statement.<sup>54</sup> Queensland Legal Aid noted that sometimes appeal courts draw the inference that because no victim impact statement was tendered the victim did not suffer terrible adverse consequences.<sup>55</sup>

### **What form should victim impact statements take, and should they be served?**

14.28 A victim impact statement must be in writing in New South Wales, South Australia and Tasmania<sup>56</sup> but can be presented orally in Western Australia, the ACT

48 *Crimes (Sentencing Procedure) Regulation 2005* (NSW) reg 10(6); *Crimes (Sentencing) Act 2005* (ACT) s 51(6).

49 Judge J Goldring, *Submission SFO 54*, 10 December 2005; Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005.

50 Chief Magistrate Judge D Price & Others, *Consultation*, Sydney, 3 February 2006; Victim Support Service Inc, *Consultation*, Adelaide, 20 April 2005.

51 Queensland Legal Aid, *Consultation*, Brisbane, 2 March 2005.

52 Chief Magistrate Judge D Price & Others, *Consultation*, Sydney, 3 February 2006.

53 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.

54 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 29(3); *Crimes (Sentencing) Act 2005* (ACT) s 53(1)(b); *Sentencing Act 1995* (NT) s 106B(6).

55 Queensland Legal Aid, *Consultation*, Brisbane, 2 March 2005.

56 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30; *Criminal Law (Sentencing) Act 1988* (SA) s 7A(1), (2); *Sentencing Act 1997* (Tas) s 81A(2), (2A), (3); *Justice Rules 2003* (Tas) r 541. However, the ALRC was informed in consultations that South Australian magistrates allow verbal statements: Victim Support Service Inc, *Consultation*, Adelaide, 20 April 2005.



and the Northern Territory.<sup>57</sup> Where a statement is in written form, some jurisdictions allow the statement to be read aloud in court.<sup>58</sup> In South Australia, a child or young person who is a victim of an offence may present particulars of the impact of an offence by writing, drawing, telling a story or writing a poem.<sup>59</sup>

14.29 Victim impact statements in New South Wales are unsigned and unsworn documents.<sup>60</sup> The New South Wales Law Reform Commission has made various recommendations in relation to the form and presentation of victim impact statements, including that they be signed or otherwise acknowledged as accurate by their authors before the court receives them.<sup>61</sup> In South Australia, the former practice of having police officers prepare victim impact statements that were not signed or acknowledged by the victim was criticised by the Court of Criminal Appeal.<sup>62</sup>

14.30 Some state and territory provisions require victim impact statements to be served on the parties to the proceedings,<sup>63</sup> or the defence,<sup>64</sup> or the prosecution.<sup>65</sup> Where the statement is required to be served on the defence, only the Victorian provision states that this must be done a reasonable time before sentencing is to take place.<sup>66</sup> The New South Wales and Western Australian provisions allow the court to make a victim impact statement available to the parties on such conditions as it thinks fit, including preventing the offender from retaining copies of the statement.<sup>67</sup>

14.31 Stakeholders expressed support for a requirement that victim impact statements be provided to the offender and the court in a timely fashion. Victorian and Queensland practitioners stated that victim impact statements were often served late or provided at the bar table, and this could disadvantage offenders.<sup>68</sup>

57 *Sentencing Act 1995* (WA) s 25(1); *Crimes (Sentencing) Act 2005* (ACT) s 52(1); *Sentencing Act 1995* (NT) s 106B(8). See also *Sentencing Act 1991* (Vic) s 95A(2)(b).

58 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A; *Sentencing Act 1991* (Vic) s 95F; *Criminal Law (Sentencing) Act 1988* (SA) s 7A(3); *Justice Rules 2003* (Tas) r 54D; *Crimes (Sentencing) Act 2005* (ACT) s 52(1)(c).

59 Attorney-General's Department Government of South Australia, *Victim Impact Statement: Information and Form*. See also Victim Support Service Inc, *Consultation*, Adelaide, 20 April 2005.

60 J Baptie, 'The Effect of the Provision of Victim Impact Statements in the Local Courts of New South Wales' (2004) 7 *The Judicial Review* 73, 75.

61 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), Recs 6, 7, 9.

62 *Nicholls v The Queen* (1991) 53 A Crim R 455, 458.

63 See *Justice Rules 2003* (Tas) r 54B(1).

64 *Sentencing Act 1991* (Vic) s 95C; *Crimes (Sentencing) Act 2005* (ACT) s 53(2)(b); *Sentencing Act 1995* (NT) s 106B(8)(a).

65 See *Magistrates Court Rules 1992* (SA) r 41.06(i); *Supreme Court Criminal Rules 1992* (SA) r 19.01.

66 *Sentencing Act 1991* (Vic) s 95C.

67 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(5); *Sentencing Act 1995* (WA) s 26(1).

68 Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; Queensland Legal Aid, *Consultation*, Brisbane, 2 March 2005.

### Options for reform

14.32 One option for reform is for federal law to introduce a comprehensive and self-contained scheme for victim impact statements, which would replace existing state and territory provisions in relation to federal offences.

14.33 Stakeholders expressed support for this option on the basis that it would promote a uniform approach in the federal context, given existing disparities in state and territory provisions;<sup>69</sup> and that it would be useful in relation to offences where the victim was outside the jurisdiction.<sup>70</sup> Victim Support Service Inc expressed the view that it was necessary to have federal provisions in this area, having regard to the benefits that victim impact statements provide to both victims and courts.<sup>71</sup>

14.34 A second option for reform is to make comprehensive federal provision for victim impact statements in federal matters but allow those provisions to roll back once a state or territory enacts laws that conform to specified federal minimum standards. The roll-back mechanism respects state diversity in so far as states may adopt their own procedures and may choose to enact laws that exceed the federal minimum standards. It would thus allow jurisdictional variations in relation to victim impact statements, but in a way that does not impact on the fairness of the federal sentencing process. There are examples of roll-back provisions in various areas of the law.<sup>72</sup> The setting of federal minimum standards received some support in consultations but the Commonwealth Director of Public Prosecutions (CDPP) expressed the view that it should be absolutely clear what law is applicable and that the CDPP would favour state and territory laws being specified or applied by regulation.<sup>73</sup>

14.35 A third option is to retain the current position whereby state and territory provisions in relation to victim impact statements are picked up and applied in federal sentencing. This approach received some support in consultations.<sup>74</sup> A variation of this option would be for federal sentencing legislation to identify expressly which state and territory provisions in relation to victim impact statements are picked up and applied in the sentencing of federal offenders, and which are not. Under this approach, state and territory provisions that are not considered appropriate—such as provisions allowing a victim to express an opinion about the sentence to be imposed—could be expressly excluded from application in federal sentencing.

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69 Attorney-General's Department, *Submission SFO 83*, 15 February 2006; Law Society of South Australia, *Submission SFO 37*, 22 April 2005.

70 K Warner, *Consultation*, Hobart, 13 April 2005.

71 Victim Support Service Inc, *Consultation*, Adelaide, 20 April 2005.

72 See, eg, *Gene Technology Act 2000* (Cth) s 14; *Environmental Protection (Sea Dumping) Act 1981* (Cth) s 9.

73 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

74 Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.

**ALRC's views*****Victim impact statements to be allowed in sentencing federal offenders***

14.36 Victim impact statements should be allowed in the sentencing of federal offenders. They assist the sentencing process by providing judicial officers with details of the impact of offences. They also benefit victims of crime and may promote the rehabilitation of offenders by confronting them with the details of the harm they have caused. The ALRC is also of the view that, where the primary victim has died, the definition of victim should be broad enough to include immediate family members and other defined individuals, such as dependants and those in an intimate personal relationship with the victim.

14.37 Many of the concerns that have been expressed about the use of victim impact statements can be addressed through the adoption of certain safeguards, which are discussed below.

***Victim impact statements to be available, with certain safeguards***

14.38 Victim impact statements should be available in all federal sentencing proceedings, irrespective of whether the offence is summary or indictable, and irrespective of whether the victim is an individual or a corporation. However, the use of victim impact statements should not be mandatory. In some cases, it may be appropriate for the prosecution to use other methods to present particulars of injury, loss or damage, such as where there are many individual victims each suffering only a small amount of harm.<sup>75</sup>

14.39 A victim should be able to present particulars of any injury, loss or damage suffered as a result of the offence, including any economic loss. This is important in the federal context because many federal offences cause economic loss.

14.40 Procedures should allow the facts in victim impact statements to be verified where they are likely to be material to the determination of sentence. Recognising that cross-examination of the victim in order to verify such facts may be problematic in some circumstances—for example, where the offender is not legally represented—the ALRC is of the view that cross-examination in relation to a victim impact statement should be undertaken only with leave of the court.

***Roll-back provisions to be enacted***

14.41 Some jurisdictions already have reasonably sophisticated provisions regulating the use of victim impact statements, and not every discrepancy between jurisdictions has the potential to impact adversely on the fairness of the federal sentencing process. Accordingly, the ALRC favours an approach whereby: (a) federal sentencing

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75 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [14.22].

legislation makes comprehensive provision for the use of victim impact statements in sentencing federal offenders; and (b) where states and territories have laws about the use of victim impact statements that comply with specified federal minimum standards, those laws are to be applied in the sentencing of federal offenders to the exclusion of the federal provisions.

14.42 There is a range of possible mechanisms available to indicate when a state or territory law meets the federal minimum standards such that the federal provisions no longer apply in that jurisdiction. One possibility is to provide that the relevant federal minister issue a proclamation stating that he or she is satisfied that the federal minimum standards have been met in the specified jurisdiction. It would also be possible for regulations to specify those jurisdictions in which the federal minimum standards have been met. The aim should be to make absolutely clear in relation to each jurisdiction whether the state or territory provisions on victim impact statements apply or whether the federal provisions apply in that jurisdiction.

14.43 The adoption of federal roll-back provisions has some advantages over federal provisions that operate to the exclusion of state or territory laws. It recognises that some jurisdictions would have to make only minor changes to existing laws in order to comply with the proposed federal minimum standards. Additionally, once a jurisdiction complies with the federal minimum standards, its own provisions will apply. The state or territory will then have a single set of provisions regulating victim impact statements, which can be used in the sentencing of state or territory offenders and federal offenders. Having a single set of provisions will ultimately reduce the potential for error and will render this aspect of the sentencing process simpler, especially where the provisions are to be used in the sentencing of offenders for joint state or territory and federal offences.

#### ***The content of the federal minimum standards***

14.44 Having regard to the concerns expressed about the content and form of victim impact statements, the way in which their use may adversely impact on an offender, and inferences that may be drawn in their absence, the ALRC considers that federal sentencing legislation should adopt a set of minimum standards.

14.45 The details of those standards are set out in Recommendation 14–1 below. They cover such issues as: the definition of victim, the range of offences for which victim impact statements should be available, the nature of the loss suffered, the relevance of a victim’s opinion about the sentence, verification of facts, inferences to be drawn from the absence of a statement, and the timely provision of statements to the parties.

<p><b>Recommendation 14–1</b> Federal sentencing legislation should make comprehensive provision for the use of victim impact statements in the sentencing of federal offenders, including corporations. Those provisions should, among other things:</p>
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- (a) define 'victim' to include the primary victim and, where the primary victim has died, the victim's immediate family members and other defined classes of individuals;
- (b) allow a victim impact statement to be made in relation to summary and indictable offences;
- (c) allow a victim (whether an individual or corporation) to present particulars of any injury, loss or damage suffered as a result of the commission of a federal offence, including particulars of economic loss;
- (d) preclude a victim from expressing an opinion about the sentence that should be imposed on a federal offender;
- (e) allow any facts stated in a victim impact statement to be verified where they are likely to be material to the determination of sentence but not by way of cross-examination of the victim unless the court gives leave to do so;
- (f) preclude a court from drawing any inference about the harm suffered by a victim from the fact that a victim impact statement has not been made; and
- (g) provide that a victim impact statement may be given orally or in writing, but where it is in writing: (i) it must be signed or otherwise acknowledged by the victim; and (ii) a copy of the statement must be provided to the prosecution and to the offender or the offender's legal representative a reasonable time before the sentencing hearing, on such terms as the court thinks fit.

Where states and territories have laws about the use of victim impact statements that comply with the federal minimum standards set out above, those laws shall be applied in the sentencing of federal offenders to the exclusion of the federal provisions.

## **Pre-sentence reports**

### **Background**

14.46 A pre-sentence report is a document prepared for the court, usually at its request, to provide background information about an offender and to assist the court in

determining the most appropriate manner of dealing with an offender.<sup>76</sup> Pre-sentence reports have a particularly important role in the sentencing of special categories of offenders, such as offenders with a mental illness or intellectual disability, and Aboriginal and Torres Strait Islander offenders,<sup>77</sup> and may also be useful in sentencing corporations.<sup>78</sup> The conclusions of pre-sentence reports do not compel the court to impose a particular sentence.<sup>79</sup>

14.47 Part IB of the *Crimes Act* does not make provision for pre-sentence reports. Provisions relating to pre-sentence reports are considered to be matters of sentencing procedure and are therefore picked up and applied in the sentencing of federal offenders by ss 68 and 79 of the *Judiciary Act*.<sup>80</sup>

14.48 All states and territories other than New South Wales have legislation governing the use of pre-sentence reports.<sup>81</sup> New South Wales makes provision for suitability assessment reports, which are prepared to provide advice to the court on the offender's suitability for community service orders, periodic detention orders and home detention orders.<sup>82</sup> There are differences between the states and territories regarding the authors, content, distribution and use of pre-sentence reports. These are discussed below.

### When should pre-sentence reports be available in federal sentencing?

14.49 Stakeholders expressed support in submissions and consultations for the use of pre-sentence reports in federal sentencing proceedings, if the circumstances of a matter indicated a need for a report.<sup>83</sup> The Welfare Rights Centre submitted that 'the need for pre-sentence reports is manifest', and that it was important for properly researched individual case histories to be provided to a court prior to the sentencing of female offenders, in particular, who committed offences because of poverty or necessity.<sup>84</sup> The Law Society of South Australia submitted that:

76 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.401].

77 See Chs 28, 29.

78 See Ch 30.

79 R Fox, *Victorian Criminal Procedure: State and Federal Law* (11th ed, 2002), [9.2.44].

80 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.406].

81 See *Sentencing Act 1991* (Vic) pt 6 div 2; *Penalties and Sentences Act 1992* (Qld) s 15; *Corrective Services Act 2000* (Qld) s 245; *Sentencing Act 1995* (WA) ss 20–22; *Criminal Law (Sentencing) Act 1988* (SA) s 8; *Sentencing Act 1997* (Tas) ss 81–83, 87; *Crimes (Sentencing) Act 2005* (ACT) pt 4.2; *Sentencing Act 1995* (NT) pt 6 div 2.

82 See *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 66(1), 68–69, 78, 80–81, 86, 88–89; *Crimes (Sentencing Procedure) Regulation 2005* (NSW) reg 15.

83 Victorian Institute of Forensic Mental Health, *Submission SFO 87*, 17 February 2006; Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Welfare Rights Centre Inc (Queensland), *Submission SFO 29*, 15 April 2005; JC, *Submission SFO 25*, 13 April 2005.

84 Welfare Rights Centre Inc (Queensland), *Submission SFO 29*, 15 April 2005.

Pre-sentence reports are a useful option for the court, particularly where a defendant is unrepresented, or where a psychiatric or psychological report on the defendant is not tendered by defence counsel during submissions.<sup>85</sup>

14.50 In its 2003 report on sentencing corporations, the New South Wales Law Reform Commission recommended that a court should also have the power to order the preparation of a pre-sentence report when sentencing a corporation.<sup>86</sup> These reports could address matters such as the effectiveness of compliance programs put in place to prevent and detect criminal activity and the management of the corporation's finances.

14.51 If it is accepted that pre-sentence reports have a role to play in federal sentencing proceedings, issues arise as to whether they should be mandatory or discretionary, and whether they should be made available irrespective of the type of sentence the court is contemplating. In most jurisdictions, courts have a discretion to order a pre-sentence report before passing any sentence on an offender.<sup>87</sup> In certain cases, where a court is considering imposing a specific sentencing option, it is mandatory for the court to order a pre-sentence report.<sup>88</sup> In its 1988 report on sentencing (ALRC 44), the ALRC recommended that pre-sentence reports should not be mandatory but that the court should be able to use them if they would be helpful.<sup>89</sup>

14.52 In New South Wales, the court has a discretion to order a report prior to the imposition of sentence to assess an offender's suitability for periodic detention or a community based order but there is no express legislative power for a court to order a pre-sentence report prior to the imposition of any other sentence. In contrast, the court's power to seek a suitability assessment report in relation to home detention is exercisable only *after* the court imposes a sentence of imprisonment. This sits uncomfortably with Part IB of the *Crimes Act*, which provides that a federal offender may be sentenced to home detention without receiving a sentence of imprisonment.<sup>90</sup>

### Who should prepare them and in what time frame?

14.53 Some state and territory sentencing legislation is silent as to who should prepare a pre-sentence report.<sup>91</sup> In Victoria, pre-sentence reports are prepared by the Secretary to the Department of Justice;<sup>92</sup> in the ACT by an 'assessor' under delegation from the Chief Executive of the Department of Justice and Community Safety;<sup>93</sup> in Queensland

85 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.

86 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), Rec 22.

87 *Sentencing Act 1991* (Vic) s 96(1); *Penalties and Sentences Act 1992* (Qld) s 15; *Sentencing Act 1995* (WA) s 20(1); *Criminal Law (Sentencing) Act 1988* (SA) s 8(1); *Sentencing Act 1997* (Tas) s 82(1); *Crimes (Sentencing) Act 2005* (ACT) s 41(1); *Sentencing Act 1995* (NT) s 105.

88 See, eg, *Sentencing Act 1991* (Vic) s 96(2); *Sentencing Act 1995* (WA) s 20(2a), (3).

89 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 106.

90 See *Crimes Act 1914* (Cth) s 20AB(1A).

91 See, eg, *Criminal Law (Sentencing) Act 1988* (SA); *Sentencing Act 1995* (NT).

92 *Sentencing Act 1991* (Vic) s 96(3).

93 *Crimes (Sentencing) Act 2005* (ACT) s 41(3), (4).

by a corrective services officer,<sup>94</sup> and in Western Australia by one or more ‘appropriately qualified’ persons.<sup>95</sup>

14.54 A number of jurisdictions expressly authorise a court to adjourn proceedings for a pre-sentence report to be prepared,<sup>96</sup> but only some address the time frame in which the report is to be prepared<sup>97</sup> or provided to the court.<sup>98</sup> The South Australian sentencing legislation precludes the court from ordering a pre-sentence report where the information sought by the court cannot be furnished within a reasonable time, but there is no express obligation on the author of the report to furnish the information within a reasonable time.<sup>99</sup>

14.55 The Department of Corrective Services New South Wales submitted that some reports are prepared on the day they are requested by a court, the reports being compiled by a Probation and Parole Officer who is on call at the court for this purpose.<sup>100</sup> The *Standard Guidelines for Corrections in Australia* provide that reports on offenders should be timely.<sup>101</sup>

### What form should they take and what should be included?

14.56 Most jurisdictions expressly allow a pre-sentence report to be given orally or in writing.<sup>102</sup> In New South Wales, specific reports can be delivered verbally by a Court Duty Probation and Parole Officer.<sup>103</sup>

14.57 There are differences in the extent to which state and territory legislation specifies the contents of pre-sentence reports. In addition to providing that a pre-sentence report is to include any matter that the court has directed to be addressed, some legislation sets out a number of common matters that should or may be included in a report. These include: the offender’s age; social history and background; medical and psychiatric history; educational and employment history; financial circumstances; special needs; the extent to which the offender has complied with any sentence; and any courses, treatment or other assistance available to the offender and from which he or she could benefit.<sup>104</sup> In contrast, South Australian legislation restricts the scope of a

94 *Corrective Services Act 2000* (Qld) s 245(1).

95 *Sentencing Act 1995* (WA) s 22(1)(a), (2).

96 *Sentencing Act 1991* (Vic) s 96(1); *Crimes (Sentencing) Act 2005* (ACT) s 41(1)(b); *Sentencing Act 1995* (NT) s 105.

97 *Sentencing Act 1995* (WA) s 22(1)(b) (as soon as practicable and in any event within 21 days).

98 *Sentencing Act 1991* (Vic) s 98(1); *Corrective Services Act 2000* (Qld) s 245(3)(a) (within 28 days); *Sentencing Act 1997* (Tas) s 87(1) (to be filed with court no later than the time directed by the court).

99 *Criminal Law (Sentencing) Act 1988* (SA) s 8(2)(a).

100 Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.

101 Corrective Services Ministers’ Conference and Conference of Correctional Administrators, *Standard Guidelines for Corrections in Australia* (2004): Standard Guidelines for Community Corrections, [1.2].

102 *Sentencing Act 1995* (WA) s 22(3); *Criminal Law (Sentencing) Act 1988* (SA) s 8(3); *Sentencing Act 1997* (Tas) s 82; *Crimes (Sentencing) Act 2005* (ACT) s 44.

103 Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.

104 *Sentencing Act 1991* (Vic) s 97; *Sentencing Act 1997* (Tas) s 83; *Crimes (Sentencing) Act 2005* (ACT) s 42; *Sentencing Act 1995* (NT) s 106.



pre-sentence report to the physical and mental condition of the offender or the personal circumstances and history of the offender.<sup>105</sup> Western Australia provides that a court may give instructions as to the issues to be addressed in a pre-sentence report and that, in the absence of instructions, the report is to address matters relevant to sentencing.<sup>106</sup> Of the jurisdictions that set out the matters that must or may be addressed in a pre-sentence report, only the ACT specifies that one of the matters is the assessor's opinion about the likelihood of the offender committing further offences.<sup>107</sup>

14.58 ALRC 44 recommended that there should be no statutory specification of the contents of a pre-sentence report.<sup>108</sup>

14.59 The *Standard Guidelines for Corrections in Australia* provide that reports on offenders should be concise, objective and factual, and that any expression of opinion should be clearly identified as such.<sup>109</sup> In addition, the guidelines provide that:

Assessment of offenders should draw upon and identify:

- the widest practicable range of information sources regarding offenders and their offences;
- relevant issues in their social and cultural background; and
- knowledge of available correctional services, programmes, and other avenues of information and support. ...

Where there is insufficient information regarding an offender to permit a responsible assessment and recommendation to be made to a court ... advice to this effect should be provided.<sup>110</sup>

### Should their contents be subject to challenge?

14.60 Pre-sentence reports may be self-serving and contain unsubstantiated allegations by the offender.<sup>111</sup> The New South Wales Court of Criminal Appeal has said that a judicial officer should give little weight to any statement in a pre-sentence report concerning the offence if the offender does not give evidence in relation to those matters.<sup>112</sup>

14.61 In *R v Niketic* an offender who did not give evidence at sentencing presented his version of events about his role in the commission of an offence through statements

105 *Criminal Law (Sentencing) Act 1988* (SA) s 8(1).

106 *Sentencing Act 1995* (WA) s 21. See also *Sentencing Act 1997* (Tas) s 82(2).

107 *Crimes (Sentencing) Act 2005* (ACT) s 42(4)(1)(iv).

108 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 106.

109 Corrective Services Ministers' Conference and Conference of Correctional Administrators, *Standard Guidelines for Corrections in Australia* (2004): Standard Guidelines for Community Corrections, [1.2].

110 Ibid: Standard Guidelines for Community Corrections, [1.3], [1.5].

111 *Majors v The Queen* (1991) 54 A Crim R 334, 337. In New South Wales, such allegations are noted as being unsubstantiated: see Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.

112 *R v Qutami* (2001) 127 A Crim R 369, [58]–[59].

made to a consultant forensic psychiatrist, which were included in a pre-sentence report. Wood CJ referred to the

wholly unsatisfactory practice whereby facts of relevance to an assessment of the role of an offender are sought to be proved through histories provided to third parties, which cannot then be tested.<sup>113</sup>

14.62 In light of these concerns, the issue arises whether the contents of pre-sentence reports should be subject to challenge. Some legislation is silent on this point.<sup>114</sup> Other legislation provides a mechanism for the prosecution or the defence to dispute the contents of a pre-sentence report,<sup>115</sup> or expressly provides for the cross-examination of the author of the report.<sup>116</sup> South Australian legislation provides that where a statement of fact or opinion in a pre-sentence report is challenged the court must disregard the fact or opinion unless it is substantiated on oath.<sup>117</sup> Queensland legislation provides that a report purporting to be a pre-sentence report made by a corrective services officer is evidence of the matters contained in it.<sup>118</sup>

14.63 ALRC 44 recommended that both parties should be entitled to challenge the accuracy of any factual statement contained in a pre-sentence report.<sup>119</sup>

### **What provision should be made for their distribution?**

14.64 Most jurisdictions provide for the distribution of a pre-sentence report to the prosecution and the defence, but some jurisdictions are silent on this issue.<sup>120</sup> While some legislation makes it mandatory for either the court or the author of the report to provide a copy to the parties,<sup>121</sup> other legislation gives the court a discretion to make the report available to the parties on such conditions as it thinks fit.<sup>122</sup> In New South Wales, once a report has been delivered to the court, a unit within the Department of Corrective Services provides a copy to the defence and prosecution upon request.<sup>123</sup>

14.65 Of the jurisdictions that provide for distribution of a pre-sentence report, only some address the time within which the report is to be provided to the parties. ACT legislation requires that pre-sentence reports are provided to the parties at least two

113 *R v Niketic* [2002] NSWCCA 425, [4].

114 See, eg, *Sentencing Act 1995* (WA); *Sentencing Act 1995* (NT).

115 *Sentencing Act 1991* (Vic) s 99(a).

116 *Ibid* s 99(b); *Criminal Law (Sentencing) Act 1988* (SA) s 8(5); *Sentencing Act 1997* (Tas) s 88; *Crimes (Sentencing) Act 2005* (ACT) s 46.

117 *Criminal Law (Sentencing) Act 1988* (SA) s 8(6).

118 *Corrective Services Act 2000* (Qld) s 245(8).

119 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 106.

120 See, eg, *Sentencing Act 1995* (NT).

121 *Sentencing Act 1991* (Vic) s 98(2); *Corrective Services Act 2000* (Qld) s 245(4); *Criminal Law (Sentencing) Act 1988* (SA) s 8(4); *Crimes (Sentencing) Act 2005* (ACT) s 45.

122 *Sentencing Act 1995* (WA) s 22(5). See also *Corrective Services Act 2000* (Qld) s 245(6), (7) (court may order that report not be shown to convicted person and that copy of report is to be returned to the court before the end of the proceedings); *Sentencing Act 1997* (Tas) s 87 (unless court otherwise orders, author of report must provide copy of report to parties).

123 Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.

working days before the offender is to be sentenced.<sup>124</sup> Other jurisdictions require pre-sentence reports to be provided a reasonable time before sentencing is to take place,<sup>125</sup> or require the court to ensure the parties have sufficient time before the proceedings to consider and respond to the report.<sup>126</sup>

14.66 ALRC 44 recommended that both parties should be entitled to a copy of a pre-sentence report.<sup>127</sup> In 1996, the New South Wales Law Reform Commission recommended that written reports ordered by the court should generally be made available to the parties at least the day before the sentencing hearing.<sup>128</sup> The Department of Corrective Services New South Wales submitted that if written reports were required to be made available to the parties at least the day before the sentencing hearing then parties requiring access to pre-sentence reports should make arrangements for these to be collected from the court, and that an exception should be made for pre-sentence reports prepared in court or provided verbally.<sup>129</sup> In consultation with the Local Court of New South Wales it was noted that amending the requirements in relation to the provision of pre-sentence reports would be problematic without additional resources.<sup>130</sup>

### Options for reform

14.67 One option for reform is for federal law to make comprehensive provision for pre-sentence reports, which would replace the use of state and territory provisions in relation to federal offences. The Attorney-General's Department supported this approach.<sup>131</sup>

14.68 A second option is to make comprehensive federal provision for pre-sentence reports but allow those federal provisions to roll back once a state or territory enacts laws that conform to specified federal minimum standards. As discussed above, this approach allows for jurisdictional variations that do not derogate from the fairness of the federal sentencing process. The CDPP again expressed the view that it should be absolutely clear what law is applicable and that the CDPP would favour state and territory laws being specified or applied by regulation.<sup>132</sup>

14.69 A third option is to retain the current position whereby state and territory provisions in relation to pre-sentence reports are picked up and applied in federal sentencing. This approach also received some support in consultations.<sup>133</sup>

124 *Crimes (Sentencing) Act 2005* (ACT) s 45.

125 *Sentencing Act 1991* (Vic) s 98(2); *Sentencing Act 1997* (Tas) s 87(3).

126 *Corrective Services Act 2000* (Qld) s 245(5).

127 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 106.

128 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), Rec 2.

129 Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.

130 Chief Magistrate Judge D Price & Others, *Consultation*, Sydney, 3 February 2006.

131 Attorney-General's Department, *Submission SFO 83*, 15 February 2006.

132 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

133 Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.

**ALRC's views*****Pre-sentence reports to be allowed in federal sentencing proceedings***

14.70 Pre-sentence reports should be allowed in federal sentencing proceedings. They benefit the sentencing process by assisting judicial officers in their consideration of relevant sentencing factors, and may assist a court in determining whether a federal offender is suited to a particular sentencing option. Pre-sentence reports may have particular utility in sentencing federal offenders with special needs and may also be useful in sentencing corporations. The ALRC believes that issues raised in relation to the use and attributes of pre-sentence reports can be addressed through the adoption of specific safeguards, which are discussed below.

***Pre-sentence reports to be available prior to imposing any federal sentence***

14.71 A court should be able to request a pre-sentence report prior to the imposition of any federal sentence where the court considers it appropriate to do so. There may be cases where there is no need to order a report, but the availability of reports should not be restricted by legislation to cases in which the court is considering the imposition of particular sentencing options.

14.72 In addition, as discussed in Chapter 28, there are some circumstances in which it should be mandatory for a court to obtain a pre-sentence report when sentencing a federal offender who has a mental illness or intellectual disability.

***Roll-back provisions to be enacted***

14.73 Given the differences in state and territory provisions about pre-sentence reports, and the fact that some legislation is silent on key issues, federal sentencing legislation should make comprehensive provision for the use of pre-sentence reports in the sentencing of federal offenders, including corporations. The ALRC proposes the adoption of a roll-back mechanism—similar to that canvassed above for victim impact statements—rather than the enactment of federal provisions that would operate to the exclusion of state or territory provisions on the subject of pre-sentence reports. The roll-back mechanism may be a proclamation by the relevant federal minister that the federal minimum standards have been met in a specified jurisdiction. It would also be possible for regulations to specify those jurisdictions in which the federal minimum standards have been met.

14.74 As noted above, roll-back provisions offer the advantage of enabling a state or territory to have a single set of provisions regulating pre-sentence reports, which can be used in sentencing state or territory offenders and federal offenders, once the state or territory complies with the minimum federal standards.

***Minimum standards in relation to pre-sentence reports***

14.75 Federal sentencing legislation should authorise a court to specify any matter that it wishes to have addressed in a pre-sentence report. The contents of pre-sentence reports to be used in federal sentencing should not be restricted, as they currently are in

South Australia, to the physical and mental condition or the personal circumstances and history of the offender. State and territory legislation may, however, exceed the minimum standard by specifying certain matters that a pre-sentence report should or may address, in addition to matters directed by the court.

14.76 The ALRC favours the Western Australian approach of requiring the author of a pre-sentence report to be an ‘appropriately qualified’ person, rather than the approach used in other legislation, which focuses on an author’s job title (for example, a corrective services officer). This approach allows for relevant experts to be involved in the preparation of particular pre-sentence reports, for example, in relation to corporations.

14.77 There is value in requiring pre-sentence reports, so far as practicable, to be provided to the prosecution and to the offender or the offender’s legal representative a reasonable time before the sentencing hearing to ensure the parties have sufficient time to consider and respond to the report. However, this may not be possible in every case—particularly in the context of busy magistrates’ courts—and the recommendation reflects these practical limitations.

14.78 The author of a pre-sentence report should be precluded from expressing an opinion about the offender’s propensity to commit further offences, unless the author is suitably qualified to give such an opinion. Other federal minimum standards are listed in Recommendation 14–2.

14.79 As discussed in Chapter 22, the ALRC recommends that the Australian Government establish an Office for the Management of Federal Offenders (OMFO) within the Attorney-General’s Department to monitor and report on all federal offenders (see Recommendation 22–3). One of the functions of the OMFO would be to monitor state and territory compliance with federal minimum standards in relation to pre-sentence reports and victim impact statements. In addition, the OMFO should promote the fulfilment of the *Standard Guidelines for Corrections in Australia*, including in so far as they relate to the preparation of pre-sentence reports.

**Recommendation 14–2** Federal sentencing legislation should make comprehensive provision for the use of pre-sentence reports in the sentencing of federal offenders, including corporations. Those provisions should, among other things:

- (a) authorise a court to request a pre-sentence report prior to the imposition of any sentence, where the court considers it appropriate to do so;
- (b) authorise a court to specify any matter it wishes to have addressed in the pre-sentence report;

- (c) require the pre-sentence report to be prepared by a suitably qualified person within a reasonable time;
- (d) preclude the author of the pre-sentence report from expressing an opinion about the offender's propensity to commit further offences, unless the author is suitably qualified to give such an opinion;
- (e) allow the content of the pre-sentence report to be contested, for example by cross-examination of any person other than the offender; and
- (f) provide that a pre-sentence report may be given orally or in writing, but where it is in writing, a copy of the report should, so far as practicable, be provided to the prosecution and to the offender or the offender's legal representative a reasonable time before the sentencing hearing, on such terms as the court thinks fit.

Where states and territories have laws about the use of pre-sentence reports that comply with the federal minimum standards set out above, those laws shall be applied in the sentencing of federal offenders to the exclusion of the federal provisions.

## 15. A Sentence Indication Scheme

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### Introduction

15.1 A sentence indication scheme entails a judicial officer, prior to the commencement of a trial, advising the defendant of the sentence, or the type or range of sentences, that the defendant is likely to receive if he or she pleads guilty to the offence. One purpose of sentence indication is to ensure that a defendant is in a position to make an informed decision in relation to a plea.<sup>1</sup> There are different models of sentence indication schemes. In some, a dedicated hearing is held to determine a sentence indication; in others, sentence indication forms part of a wider hearing concerned with pre-trial issues.

15.2 The questions addressed in this chapter are whether a sentence indication scheme should be introduced for federal criminal matters and, if so, what its characteristics should be.

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<sup>1</sup> New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), [304]; *R v Goodyear* [2005] EWCA Crim 888, [53].

### Pilot sentence indication scheme in New South Wales

15.3 One example of the dedicated hearing model is the pilot sentence indication scheme that commenced in the New South Wales District Court in 1993. The stated aims of the scheme were to encourage guilty pleas, decrease the number of trials before the District Court, dispose of matters more quickly in the interests of justice, and reduce trial costs and trial preparation time.<sup>2</sup>

15.4 Under the scheme, a District Court judge could give an indication of the sentence the judge might impose if the person were to plead guilty. Sentence indication hearings were held on the application of the defendant and were conducted in open court, subject to express powers to make suppression orders. The hearing in essence proceeded as a provisional guilty plea, following which the indication was given.

15.5 If the defendant accepted the indicative sentence, he or she was arraigned<sup>3</sup> and the formal sentence—reflecting the indicative sentence—was passed. If the defendant rejected the indicative sentence, the matter was set down for trial before another judge who was not told the outcome of the sentence indication hearing, unless the defendant elected to do so. Both the prosecutor and the defendant had the right to appeal against a sentence imposed after acceptance of an indicative sentence.<sup>4</sup>

15.6 The scheme was terminated in January 1996. The New South Wales Bureau of Crime Statistics and Research concluded that the scheme was not achieving its objectives.<sup>5</sup> Further, the evidence suggested that those who pleaded guilty at a sentence indication hearing were treated more leniently than those who pleaded guilty at committal,<sup>6</sup> which was in conflict with principles laid down by the New South Wales Court of Criminal Appeal in *R v Warfield*:

If it was not previously clear, it should now be made very clear that, although those who plead guilty following a sentence indication hearing may expect some discount for that utilitarian benefit, they should not expect as much leniency as those who plead at an earlier stage and who do so as a result of their contrition.<sup>7</sup>

### Other forms of sentence indication

15.7 Other forms of sentence indication exist in Victoria, Tasmania, the Australian Capital Territory (ACT), the United Kingdom and New Zealand. In addition, particular models for sentence indication have been canvassed by the New South Wales Law

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<sup>2</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 November 1992, 9791 (G West).

<sup>3</sup> Arraignment is the process by which a person committed for trial is read the indictment and asked to plead guilty or not guilty.

<sup>4</sup> See J Willis, 'The Sentence Indication Hearing' (1997) 7 *Journal of Judicial Administration* 98, 99–100; A Freiberg and J Willis, 'Sentence Indication' (2003) 27 *Criminal Law Journal* 246, 251.

<sup>5</sup> D Weatherburn, E Matka and B Lind, *Sentence Indication Scheme Evaluation* (1995) New South Wales Bureau of Crime Statistics and Research, iii, 29.

<sup>6</sup> *Ibid.*, iii, 29.

<sup>7</sup> *R v Warfield* (1994) 34 NSWLR 200, 209.



Reform Commission (NSWLRC); the Royal Commission on Criminal Justice, chaired by Viscount Runciman in the United Kingdom (the Runciman Royal Commission); and more recently by the New Zealand Law Commission (NZLC). In addition, in 2005, the England and Wales Court of Appeal in *R v Goodyear*<sup>8</sup> set out some guidelines in relation to the procedures for a sentence indication.

15.8 The sentence indication schemes in Victoria, Tasmania, the ACT and New Zealand form part of a wider hearing concerned with pre-trial issues.<sup>9</sup> Under these schemes, sentence indications are generally limited to an indication of the type of sentence, for example custodial or non-custodial.<sup>10</sup>

### Is a federal sentence indication scheme constitutional?

15.9 The conferral of federal jurisdiction must relate to a ‘matter’ if it is to fall within the ambit of Chapter III of the *Constitution*. In *Re Judiciary and Navigation Acts* the High Court rejected the contention that a ‘matter’ meant no more than a legal proceeding and stated that:

A matter under the judicature provisions of the Constitution must involve some rights or privilege or protection given by law, or the prevention, redress or punishment of some act inhibited by law. ... But we can find nothing in Chapter III of the Constitution to lend colour to the view that Parliament can confer power or jurisdiction upon the High Court to determine abstract questions of law without the right or duty of any person being involved.<sup>11</sup>

15.10 The High Court held that Parliament could not confer jurisdiction on the Court to provide advisory opinions to the executive. There is a strong argument that giving a sentence indication to a particular defendant—based on information and evidence relating to the circumstances of a particular offence and the defendant’s personal circumstances—meets the requirement that there be a ‘matter’. As the indication is not based on hypothetical facts, it cannot be said that the court is determining an abstract question of law.

15.11 There is an additional constitutional question about whether the giving of a sentence indication involves the exercise of federal judicial power. The concept of judicial power is affected by many variables, which make it incapable of exhaustive definition.<sup>12</sup> In *Huddart Parker & Co Pty Ltd v Moorhead* Griffith CJ stated that:

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<sup>8</sup> *R v Goodyear* [2005] EWCA Crim 888.

<sup>9</sup> In Victoria and Tasmania sentence indications can be given during contest mentions; in the ACT they can be given during case management hearings; and in New Zealand they can be given during status hearings, which are modelled on the Victorian contest mention hearings. Contest mentions and case management hearings are aimed at resolving cases and determining and defining contested issues.

<sup>10</sup> A Freiberg and J Willis, ‘Sentence Indication’ (2003) 27 *Criminal Law Journal* 246, 252–254; New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [216]. See also *Criminal Justice Act 2003* (UK) sch 3 cl 6, amending the *Magistrates’ Courts Act 1980* (UK).

<sup>11</sup> *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 266–267.

<sup>12</sup> S Ratnapala, *Australian Constitutional Law: Foundations and Theory* (2002), 120.

the words ‘judicial power’ as used in s 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.<sup>13</sup>

15.12 In *Nicholas v The Queen* Gaudron J stated:

The difficulties involved in defining ‘judicial power’ are well known. In general terms, however, it is that power which is brought to bear in making binding determinations as to rights, liabilities, powers, duties or status put in issue in justiciable controversies, and in making adjustment of rights and interests in accordance with legal standards. It is a power which is exercised in accordance with the judicial process and in that process, many specific and ancillary powers are also exercised.<sup>14</sup>

15.13 While the imposition of sentence is clearly an exercise of judicial power determining rights in relation to liberty, a sentence indication does not itself determine the rights of the parties, and that suggests the function may not be judicial. However, a Chapter III court can exercise non-judicial power where that power is incidental to the exercise of judicial power. In *R v Davison* Dixon CJ and McTiernan J stated:

There are many functions or duties that are not necessarily of a judicial character but may be performed judicially, whether because they are incidental to the exercise of judicial power or because they are proper subjects of its exercise.<sup>15</sup>

15.14 For example, courts can make interlocutory orders—that is, orders and directions made during the course of proceedings that do not have the effect of finally determining the rights of the parties—on the basis that the making of such orders is incidental to the exercise of judicial power.

15.15 In the *Boilermakers’ Case* Williams J stated:

There are many functions of a quasi-judicial administrative character which have achieved recognition as functions suitable for courts to undertake and have become part of the ordinary business of courts because they are proper to the functions of a judge.<sup>16</sup>

15.16 In *R v Murphy* the High Court considered the nature of committal proceedings:

it has been said that the function of a court in deciding whether a person charged should or should not be committed for trial is non-judicial. In *Huddart Parker & Co*

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13 *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357. ‘Binding’ refers to the enforceability of a decision. See *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245.

14 *Nicholas v The Queen* (1998) 193 CLR 173, [70]. See also *Harris v Caladine* (1991) 172 CLR 84, 147 (Gaudron J).

15 *R v Davison* (1954) 90 CLR 353, 369–370. See also unanimous statement of the High Court in *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144, 151.

16 *R v Kirby; Ex Parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 307.

*Pty Ltd v Moorehead* Griffith CJ went further and said that the function did not involve the exercise of judicial power. These statements do not, we think, fully reflect the character of committal proceedings. The hearing of committal proceedings in respect of indictable offences by an inferior court is a function which is sui generis. Traditionally committal proceedings have been regarded as non-judicial on the ground that they do not result in a binding determination of rights. At the same time they have a distinctive judicial character because they are curial proceedings in which the magistrate or justices constituting the court is or are bound to act judicially and because they affect the interests of the person charged. ... Even though they are properly to be regarded as non-judicial in character, committal proceedings themselves traditionally constitute the first step in the curial process, possibly culminating in the presentation of the indictment and trial by jury. They have the closest, if not an essential, connection with an actual exercise of judicial power.<sup>17</sup>

15.17 Kirby J has also expressed the view that ‘the judicial function is not frozen in time. ... So far as is compatible with the judicial function, courts should endeavour to be constructive and useful to parties in dispute.’<sup>18</sup>

15.18 Where a defendant accepts a sentence indication, the indication is clearly a step in the process by which the defendant’s rights are finally determined. Just as committal proceedings may culminate in the presentation of the indictment and trial by jury, a sentence indication may culminate in the actual imposition of sentence. It would seem possible to devise a sentence indication scheme carefully with particular features that render the giving of the indication incidental to the exercise of judicial power, and therefore constitutional. For example, it may be that the close proximity in time between the acceptance of an indication and the passing of sentence may make it more likely that the giving of the indication would be construed as incidental to an exercise of judicial power.

15.19 The giving of a sentence indication—especially an indication that is not specific as to quantum but addresses only the type of sentencing option and general severity—could be seen to be in the nature of the court expressing a tentative view. In *Antoun v The Queen* Kirby J said that it is desirable that a judge express tentative or preliminary views to the parties so that they might address the judge on such matters.<sup>19</sup>

15.20 The England and Wales Court of Appeal has stated that once an indication has been given, it is binding on the judge who has given it, and it also binds any other judge who becomes responsible for the case.<sup>20</sup> Under this type of model, the giving of a binding indication could be seen as an exercise of judicial power. However, if a judicial officer were to give a binding indication of the precise quantum of the sentence to be imposed, there is a risk that this could be considered to be akin to an advance

17 *R v Murphy* (1985) 158 CLR 596, [22]. See also *Ammann v Wegener* (1972) 129 CLR 415, 437; *Re Grinter; Ex parte Hall* (2004) 28 WAR 427, [63].

18 *North Ganalnja Aboriginal Corporation v The State of Queensland* (1996) 185 CLR 595, 666.

19 *Antoun v The Queen* [2006] HCA 2, [31]. See also *Vakautu v Kelly* (1989) 167 CLR 568, [26].

20 *R v Goodyear* [2005] EWCA Crim 888, [61].

ruling on the exercise of a discretion. In *TKWJ v The Queen* Gaudron J stated that a discretion can only be exercised if and when it is invoked.<sup>21</sup>

15.21 On balance, there appears to be a plausible argument that a federal sentence indication scheme could be crafted in a way that would make the giving of an indication incidental to the exercise of federal judicial power, and therefore constitutional. It remains to be considered whether such a scheme is desirable in principle and, if so, what its characteristics should be. These issues are addressed below.

### Is a federal sentence indication scheme desirable?

15.22 Considerable support has been expressed for sentence indication schemes. In 2000, the Standing Committee of Attorneys-General recommended that consideration be given to introducing a system of sentence indication,<sup>22</sup> and in 2002 the United Kingdom Government stated its intention to introduce sentence indications to encourage early guilty pleas.<sup>23</sup> In 2005, the NZLC recommended the adoption of a particular model of sentence indication as a part of pre-trial processes.<sup>24</sup> Academics have also supported it.<sup>25</sup>

15.23 In addition, a number of stakeholders during the course of the ALRC's current Inquiry expressed support for the introduction of an appropriately structured sentence indication scheme.<sup>26</sup> The view was expressed that such a scheme would potentially benefit defendants and victims, as well as the criminal justice system itself, by preventing both 'last-minute' guilty pleas and unnecessary trials, thereby saving court costs and time. The Criminal Bar Association of Victoria submitted that there were particular benefits associated with resolving federal matters given that:

trials prosecuted by the Commonwealth Director of Public Prosecutions are frequently long and complex. Mostly, they are circumstantial cases. Often these cases involve

<sup>21</sup> *TKWJ v The Queen* (2002) 212 CLR 124, 137.

<sup>22</sup> Standing Committee of Attorneys-General, *Deliberative Forum on Criminal Trial Reform* (2000), rec 22.

<sup>23</sup> Lord Chancellor's Department, *Justice for All*, White Paper (2002), 12.

<sup>24</sup> New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), ch 8, rec 50. See also New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [251]–[252].

<sup>25</sup> A Freiberg and J Willis, 'Sentence Indication' (2003) 27 *Criminal Law Journal* 246, 259.

<sup>26</sup> Law Council of Australia, *Submission SFO 97*, 17 March 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; J Willis, *Submission SFO 74*, 10 February 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005; Criminal Bar Association of Victoria, *Consultation*, Melbourne, 23 February 2006; D Grace, *Consultation*, Melbourne, 23 February 2006; Chief Magistrate I Gray & Others, *Consultation*, Melbourne, 23 February 2006; Justice T Connolly, *Consultation*, Canberra, 13 February 2006; Chief Magistrate Judge D Price & Others, *Consultation*, Sydney, 3 February 2006; Justice M Weinberg, *Consultation*, Sydney, 8 June 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005; Chief Justice M Black & Others, *Consultation*, Melbourne, 30 March 2005; T Glynn, *Consultation*, Brisbane, 2 March 2005.

serious drug importations or serious fraud. As a result the cases are expensive at all levels—to the prosecution, the defence, and in court time.<sup>27</sup>

15.24 One prosecutor expressed the view that the threat of imprisonment was of great concern to many defendants but if they knew they were going to receive a sentence other than imprisonment they would be more prepared to plead guilty.<sup>28</sup>

15.25 Other stakeholders reserved their position on a sentence indication scheme. Victoria Legal Aid submitted that it had not formed a view and noted that the issue of sentence indications is currently being considered by the Sentencing Advisory Council of Victoria.<sup>29</sup> The Attorney-General's Department submitted that the Commonwealth is currently monitoring the use of sentence indications in various jurisdictions and would be in a better position to consider them once statistical information had been compiled.<sup>30</sup>

15.26 Objections to sentence indication schemes canvassed in the literature include that they give insufficient regard to the concerns of victims, create significant and unjustified inducements to plead guilty, and cause ethical difficulties for defendants and their lawyers.<sup>31</sup> Some stakeholders during the course of the ALRC's Inquiry expressed opposition to sentence indication schemes<sup>32</sup> or indicated that there would be judicial resistance to such schemes.<sup>33</sup> One judge submitted that:

it is, more often than not, the case that important facts come to light only at the time of or shortly before the trial or, in the case of a guilty plea, the sentencing proceedings, because busy practitioners simply do not have the time to carry out the research and investigations earlier. If an indication of sentence is given in the absence of these facts, it is useless. Moreover, it wastes time, and may also unduly restrict the discretion of the judge.<sup>34</sup>

15.27 The New South Wales Legal Aid Commission submitted that a safer way of ensuring the timely resolution of matters was to adopt the case conferencing scheme recently introduced in the Local Court of New South Wales in respect of persons who are to be committed to trial in either the District Court or the Supreme Court of New South Wales, where those persons have not entered a plea of guilty.<sup>35</sup> The aims of a

27 Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005.

28 Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.

29 Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

30 Attorney-General's Department, *Submission SFO 83*, 15 February 2006.

31 A Freiberg and J Willis, 'Sentence Indication' (2003) 27 *Criminal Law Journal* 246, 248; J Willis, 'The Sentence Indication Hearing' (1997) 7 *Journal of Judicial Administration* 98, 107–109.

32 New South Wales Legal Aid Commission, *Submission SFO 75*, 10 February 2006; Judge J Goldring, *Submission SFO 54*, 10 December 2005; JC, *Submission SFO 25*, 13 April 2005.

33 Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005; M Johnson, *Consultation*, Darwin, 27 April 2005.

34 Judge J Goldring, *Submission SFO 54*, 10 December 2005.

35 New South Wales Legal Aid Commission, *Submission SFO 75*, 10 February 2006.

conference are to encourage appropriate early pleas of guilty and the resolution of matters relevant to sentencing proceedings.<sup>36</sup>

15.28 Although the Commonwealth Director of Public Prosecutions (CDPP) supported the adoption of a federal sentence indication scheme in principle, it noted that the introduction of such a system would need to be carefully handled in order to minimise ‘judge-shopping’ by defendants, and it stated there was a risk that seeking a sentence indication would ‘simply become another step in the criminal justice process that defence lawyers felt obliged to pursue even if there was little likelihood of their client pleading guilty’.<sup>37</sup>

15.29 Professors Arie Freiberg and John Willis have stated that any sentence indication process should not place defendants under a greater pressure to plead guilty than they already face.<sup>38</sup> One federal offender expressed opposition to sentence indication schemes on the basis that they would induce innocent people to plead guilty.<sup>39</sup> However, a legal practitioner expressed the view that the risk of inducing a guilty plea already exists by virtue of the fact that a guilty plea can attract a discount.<sup>40</sup> The NZLC has expressed a similar view:

the giving of a sentence indication cannot in itself be criticised as exerting undue pressure on a defendant. In the absence of a sentence indication, defence counsel would be expected to advise their client of the likely sentence or range of sentences; an indication from a judge is merely providing the same advice in more accurate form, thus enabling the defendant to enter a plea in full knowledge of the consequences.

In fact, the real concern relates not to the sentence indication in itself but rather to the sentencing discount that is integral to it.<sup>41</sup>

## Features of a federal sentence indication scheme

15.30 If there were to be a sentence indication scheme, a number of issues would arise in relation to determining its key features. These matters are considered in the following sections.

### When should indication be sought and given?

15.31 In response to Issues Paper 29 (IP 29), the view was expressed that any sentence indication should be given quite early in criminal proceedings in order to encourage

36 Chief Magistrate Judge D Price, *Local Court Practice Note No 5 of 2005: Procedures to be adopted for committal hearings in the Local Court for proceedings commenced on or after 1 January 2006*, 5 December 2005. Case conferencing is discussed in Ch 11.

37 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

38 A Freiberg and J Willis, ‘Sentence Indication’ (2003) 27 *Criminal Law Journal* 246, 258.

39 JC, *Submission SFO 25*, 13 April 2005.

40 T Glynn, *Consultation*, Brisbane, 2 March 2005.

41 New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), [313]–[314]. Discounts for guilty pleas are discussed in Ch 11.

timely guilty pleas.<sup>42</sup> For example, Professors Kathy Mack and Sharyn Roach Anleu submitted that an indication should be sought well before trial and that a defendant should be allowed to have only one sentence indication.<sup>43</sup>

15.32 There was some support for an indication to be given only at the request of the defendant,<sup>44</sup> although in 2005 the NZLC recommended that there should be judicial discretion to give a sentence indication when requested by either prosecution or defence counsel. The NZLC stated that an indication might be sought by the prosecution in order to make a decision as to appropriate charges to be laid.<sup>45</sup>

15.33 The England and Wales Court of Appeal has stated that an indication should be discretionary:

In whatever circumstances an advance indication of sentence is sought, the judge retains an unfettered discretion to refuse to give one. It may indeed be inappropriate for him to give any indication at all. For example, he may consider that for a variety of reasons the defendant is already under pressure (perhaps from a co-accused) or vulnerable, and that to give the requested indication, even in answer to a request, may create additional pressure. Similarly, he may be troubled that the particular defendant may not fully have appreciated that he should not plead guilty unless he in fact is guilty.<sup>46</sup>

15.34 In Discussion Paper 70 (DP 70), the ALRC proposed that: an indication should be given only at the defendant's request, with judicial discretion to refuse an indication; the indication must be sought well before the hearing or trial; and the defendant should be entitled to one sentence indication only.<sup>47</sup>

15.35 There was support for the proposal that an indication should be given only at a defendant's request.<sup>48</sup> However, stakeholders submitted that it could be impracticable to seek an indication well before the hearing date because, for example, material such as psychological reports and character references was often not organised and compiled until within a few weeks of the hearing date. Moreover, a measure of flexibility was needed to accommodate circumstances such as late briefing of the prosecutor, delays in granting legal aid or change of defence counsel.<sup>49</sup>

15.36 Other stakeholders submitted that time frames needed to be specified, and one judicial officer suggested that timing of an indication should be the subject of practice

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42 K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005; New South Wales Public Defenders Office, *Consultation*, Sydney, 22 September 2004.

43 K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005.

44 Ibid. See also New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [251]; *R v Goodyear* [2005] EWCA Crim 888, [55].

45 New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), [320], rec 50.

46 *R v Goodyear* [2005] EWCA Crim 888, [57].

47 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 15–1.

48 Law Council of Australia, *Submission SFO 97*, 17 March 2006.

49 J Willis, *Submission SFO 74*, 10 February 2006; D Grace, *Consultation*, Melbourne, 23 February 2006.

directions—for example, indicating that the earliest point at which an indication can be sought is after the prosecution brief has been served and the defendant has had an opportunity to consider it.<sup>50</sup>

15.37 One stakeholder did not support the proposal to allow a defendant only one sentence indication:

This is arguably too restrictive. There can be cases where the prosecution case changes significantly after a sentence indication has been rejected (e.g. a witness is found who will assist the prosecution, a co-defender is granted immunity and will testify). In such cases, a second sentence indication might well be appropriate. Judge-shopping is for better or worse an inevitable part of the system; it is not restricted to sentence indications.<sup>51</sup>

### Where should indication take place?

15.38 In most schemes, sentence indications take place in open court. The NZLC has recommended that status hearings—which are the hearings in which sentence indications are given—be held in public and open to the media.<sup>52</sup> Similarly, the England and Wales Court of Appeal has said that the hearing should normally take place in open court, with a full recording of the entire proceedings, and both sides represented, in the defendant's presence.<sup>53</sup>

15.39 Courts have been critical of sentence indications given in private in a judge's chambers. In *R v Marshall*, the Victorian Supreme Court stated that any arrangement in private between judge and counsel in relation to plea and sentence was objectionable, and weakened public confidence in the administration of justice.<sup>54</sup> Some stakeholders expressed the view that sentence indication should not happen behind closed doors<sup>55</sup> and should occur in the presence of the defendant.<sup>56</sup> In response to IP 29, the CDP submitted that:

it would be important to make sure that any discussion would take place in court, and not in Judges' private chambers. The proceedings should be transcribed. This would discourage any possible criticism that the process was not transparent or that 'secret deals' were being struck.<sup>57</sup>

50 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; Chief Magistrate Judge D Price & Others, *Consultation*, Sydney, 3 February 2006.

51 J Willis, *Submission SFO 74*, 10 February 2006.

52 New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), rec 54.

53 *R v Goodyear* [2005] EWCA Crim 888, [75].

54 *R v Marshall* [1981] VR 725, 732.

55 Justice M Weinberg, *Consultation*, Sydney, 8 June 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005. See also Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005.

56 K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005. See also A Freiberg and J Willis, 'Sentence Indication' (2003) 27 *Criminal Law Journal* 246, 258.

57 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.



15.40 The Runciman Royal Commission proposed that a ‘sentence canvass’ would normally take place in the judge’s chambers with both sides represented by counsel. A shorthand writer was also to be present.<sup>58</sup>

15.41 In DP 70, the ALRC proposed that the indication should occur in the presence of the defendant and in open court, subject to express powers of the court to make suppression orders.<sup>59</sup> In this regard, the CDPP submitted that the proposal should be broadened to allow not only for the making of suppression orders but also for the closing of the courts, where necessary.<sup>60</sup> However, the ALRC’s Advisory Committee expressed the view that where an indication was given and was not accepted, the proceedings should not be reported until the conclusion of the matter. If the matter were to proceed to trial, it was important to ensure the jury did not learn of the fact of the rejected indicated sentence.<sup>61</sup>

### What should be indicated?

15.42 One issue that arises is what the subject matter of the indication should be. The options are for a judicial officer to give an indication of:

- the type of sentencing option to be imposed—for example, whether it is custodial or non-custodial;
- the type of sentencing option to be imposed, with a general indication of severity—for example, a ‘short term of imprisonment’, or ‘imprisonment in the range of three to five years’; or
- the type of sentencing option to be imposed and the specific quantum of the sentence—for example, ‘four years’ imprisonment’.

15.43 In 2004, the NZLC proposed that sentence indications should normally be limited to type of sentence rather than quantum.<sup>62</sup> However, the NZLC later recommended that an indication should generally specify the type and quantum of penalty that will be imposed if the defendant were to plead guilty at that time, as well as the likely type and quantum of penalty that would be imposed if the defendant were to be convicted following a defended hearing or trial.<sup>63</sup>

15.44 The model proposed by the Runciman Royal Commission allowed the judge, on the defendant’s request, to indicate the highest sentence that the judge would impose

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58 *Report of the Royal Commission on Criminal Justice* (1993), [7.51].

59 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 15–1(e).

60 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

61 Sentencing Advisory Committee, *Advisory Committee Meeting*, 2 March 2006.

62 New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [251].

63 New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), rec 50.

on the facts as known.<sup>64</sup> The England and Wales Court of Appeal has adopted this approach.<sup>65</sup>

15.45 One legal practitioner expressed the view that a sentence indication scheme should indicate the type and quantum of sentence.<sup>66</sup> Another expressed the view that it would be desirable for a judicial officer to give an indication of the range of sentence based on the available facts.<sup>67</sup> Some stakeholders expressed the view that defendants would want to be given an indication of quantum of sentence.<sup>68</sup>

15.46 Other issues that are relevant to the subject matter of an indication are: (a) whether a judicial officer should indicate the sentence or type of sentencing option that the defendant would be likely to receive if he or she pleaded guilty at that point in time, or whether it should be an indication of the sentence or type of sentencing option that the defendant would be likely to receive upon conviction after trial, or both; and (b) whether any discount to be given because of the guilty plea should be specified at the sentence indication hearing.

15.47 In 1987, the NSWLRC canvassed the idea of sentence indication as an alternative to plea-bargaining, although it made no final recommendations in this regard. The NSWLRC posed the question whether, upon the parties requesting an indication as to the likely nature of the penalty to be imposed *upon conviction after trial*, the court should, in its discretion, be entitled to give such an indication.<sup>69</sup> The suggestion that the sentence indication should be in relation to the likely penalty upon conviction after trial was to counter any notion that the indication itself should act as an inducement to plead guilty.<sup>70</sup>

15.48 In contrast, in 2004 the NZLC proposed that a court giving a sentence indication should not make any reference to the likely penalty if the defendant were to be convicted after a defended hearing or trial.<sup>71</sup> However, as noted above, the NZLC later recommended that a sentence indication should make reference to both the likely

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64 *Report of the Royal Commission on Criminal Justice* (1993), [7.50].

65 *R v Goodyear* [2005] EWCA Crim 888, [54].

66 T Glynn, *Consultation*, Brisbane, 2 March 2005.

67 Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005.

68 Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005. See also Justice M Weinberg, *Consultation*, Sydney, 8 June 2005.

69 New South Wales Law Reform Commission, *Procedure From Charge to Trial: Specific Problems and Proposals*, DP 14 (1987), 496.

70 P Byrne, 'Sentence Indication Hearings in New South Wales' (1995) 19 *Criminal Law Journal* 209, 211. The pilot scheme introduced in New South Wales differed from the scheme tentatively suggested by the NSWLRC in that it provided for an indication of sentence in the event that the defendant pleaded guilty.

71 New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [251].

penalty if the accused were to be convicted after a defended hearing or trial, as well as the penalty that would be imposed if a plea of guilty were to be entered at that time.<sup>72</sup>

15.49 The NZLC stated that, in the interests of transparency, a judicial officer should specify as part of the sentence indication the discount included within the indicative sentence on account of the guilty plea.<sup>73</sup> It recommended that whenever a sentence indication is given it should include the standard advice that an indication is not intended to undermine the defendant's right to require the prosecution to prove its case.<sup>74</sup>

15.50 Professors Mack and Roach Anleu submitted that a sentence indication should be explicitly based on the offender and the offence, with no suggestion of additional leniency as part of the indication process or threat of greater sentence after trial.<sup>75</sup> Some judicial officers supported the view that in giving an indication the court must take into account but must not specify the quantum of any discount that would be given to the defendant for pleading guilty at that stage.<sup>76</sup> On the other hand, the Law Council of Australia submitted that there is merit in a judicial officer specifying at the indication the discount that is likely to accompany a guilty plea.<sup>77</sup>

### Upon what information should an indication be based?

15.51 Another issue identified in submissions was the need to ensure that all relevant facts and circumstances were made known to a judicial officer prior to a sentence indication being given.<sup>78</sup>

15.52 Stakeholders expressed the view that there should be a judicial discretion to refuse to give an indication, including where many factual matters were in dispute.<sup>79</sup> One legal practitioner also expressed the view that where there were few matters in dispute, a judicial officer should have the option of giving alternative indications depending on the ultimate determination of those facts.<sup>80</sup>

72 New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), rec 50. Compare New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [251].

73 New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), [315]–[317].

74 Ibid, rec 50.

75 K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005.

76 See Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 11–5(j); Chief Magistrate I Gray & Others, *Consultation*, Melbourne, 23 February 2006.

77 Law Council of Australia, *Submission SFO 97*, 17 March 2006.

78 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005.

79 K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005; T Glynn, *Consultation*, Brisbane, 2 March 2005. See also New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [251]; New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), rec 50; A Freiberg and J Willis, 'Sentence Indication' (2003) 27 *Criminal Law Journal* 246, 258.

80 T Glynn, *Consultation*, Brisbane, 2 March 2005.

15.53 Stakeholders submitted that the information upon which an indication is based should include a statement of agreed facts, witness statements, parts of the committal record accepted for the purposes of indication, the defendant's antecedent criminal history, oral testimony if required, and information about any co-defendant.<sup>81</sup> These categories of information are consistent with the information utilised in the New South Wales pilot scheme.<sup>82</sup> Some particular categories of information—namely, the defendant's antecedent criminal history and a summary of facts—are also consistent with the information utilised in the sentence indication scheme that operates in New Zealand in the summary jurisdiction,<sup>83</sup> as well as the information proposed to be used in the model advanced by the Runciman Royal Commission.<sup>84</sup>

15.54 Under the latter model, the absence of a pre-sentence report would not normally rule out a sentence indication.<sup>85</sup> The NZLC recommended that an indication may be given subject to information still to be provided by way of a pre-sentence report or victim impact statement. However, it recommended that it should not be given at all or should be confined to a sentence range if the type of sentence is likely to be affected by material in a pre-sentence report or a victim impact statement or if there is otherwise insufficient information to give an indication.<sup>86</sup> It has also recommended that:

Where an indication is given and results in a guilty plea, and subsequent information leads to a different view as to the appropriate sentence, the defendant should always be given the opportunity to withdraw his or her plea.<sup>87</sup>

### Who should give the indication and impose sentence?

15.55 In response to IP 29, one legal practitioner expressed the view that where a person accepted a sentence indication the same judicial officer who gave the indication should pass sentence because he or she would be best placed to ascertain and deal with any discrepancy between the facts presented at the sentence indication hearing and any further facts presented on sentence.<sup>88</sup> This is consistent with the model recommended by the NZLC<sup>89</sup> and with the pilot sentence indication scheme that operated in New South Wales.

81 K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005.

82 J Willis, 'The Sentence Indication Hearing' (1997) 7 *Journal of Judicial Administration* 98, 99–100; A Freiberg and J Willis, 'Sentence Indication' (2003) 27 *Criminal Law Journal* 246, 251. Other information used in the pilot scheme included a draft indictment and submissions on sentence.

83 New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [216].

84 *Report of the Royal Commission on Criminal Justice* (1993), [7.52].

85 *Ibid.*, [7.52].

86 New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), rec 50.

87 *Ibid.*, rec 50.

88 T Glynn, *Consultation*, Brisbane, 2 March 2005.

89 New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), rec 50. See also New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [251].

15.56 However, it was submitted that where a person did not accept a sentence indication the matter should be listed for hearing or trial before another judicial officer because the first judicial officer may have heard information during the sentence indication hearing that would render it difficult for him or her to preside over any subsequent hearing in an unbiased way.<sup>90</sup>

15.57 In response to IP 29, stakeholders also expressed support for the proposition that if a person does not plead guilty after the indication and is later convicted, whether after entering a plea of guilty or after trial, the indicative sentence should not be binding on another judge.<sup>91</sup>

15.58 In DP 70, the ALRC proposed that:

- the defendant should be given a short time in which to decide whether to enter a guilty plea on the basis of the indicative sentence;
- where the defendant accepts the indicative sentence, the judicial officer who gave the indication should be the one who passes sentence; and
- where the defendant rejects the indicative sentence, the matter should be set for hearing or trial before another judicial officer and the indicative sentence should not be binding on that judicial officer.<sup>92</sup>

15.59 In relation to the first proposal, some stakeholders submitted that a time frame needed to be specified.<sup>93</sup> Others said it was important that the defendant be given an opportunity to consult with his or her legal advisers before deciding whether to enter a guilty plea on the basis of the indication, while avoiding any expectation that there was a right to a substantial adjournment.<sup>94</sup>

15.60 In relation to the last proposal, some stakeholders expressed the view that it was preferable for the judicial officer conducting the hearing or trial not to be informed of the indicative sentence.<sup>95</sup> One stakeholder expressed concern that requiring another judicial officer to hear the matter where a sentence indication had been rejected would present difficulties in some regional areas because defendants would need to travel long distances to access another judicial officer.<sup>96</sup> The CDPP also submitted that:

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90 T Glynn, *Consultation*, Brisbane, 2 March 2005. See also Justice M Weinberg, *Consultation*, Sydney, 8 June 2005; A Freiberg and J Willis, 'Sentence Indication' (2003) 27 *Criminal Law Journal* 246, 258.

91 K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005. See also Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.

92 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 15–1.

93 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

94 Chief Magistrate I Gray & Others, *Consultation*, Melbourne, 23 February 2006.

95 Criminal Bar Association of Victoria, *Consultation*, Melbourne, 23 February 2006.

96 Chief Magistrate Judge D Price & Others, *Consultation*, Sydney, 3 February 2006.

Currently, our complex matters may be case managed by a judge who then goes on to hear the matter and we would suggest that consideration might be given to allowing the judge who gave the indication to hear the trial unless the judge disqualified him or herself.<sup>97</sup>

### **Should there be a right of appeal?**

15.61 Another issue that arises is whether there should be a right of appeal against a sentence imposed after acceptance of an indicative sentence. Under the pilot scheme in New South Wales both the prosecution and the defence had the right to appeal in these circumstances. However, the court was more reluctant to interfere with a sentence imposed after an indication hearing on an appeal by the prosecution because upholding the appeal would expose a defendant to greater jeopardy than that normally associated with prosecution appeals.<sup>98</sup>

15.62 In *R v Glass* Hunt J said:

The need, in all but the obvious case where there has been no miscarriage of justice, to permit the respondent to a successful Crown appeal leave to withdraw his plea of guilty ... can only lead to the whole scheme being perceived by the public as some kind of game. ...

[I]n order to make this scheme work for the benefit of all concerned, the Crown prosecutor should in future be under an obligation to go further than his or her traditional role in the ordinary sentencing procedure, and should indicate to the judge a range of sentences which the Crown considers to be appropriate to the circumstances of the particular case being considered, so that both the judge and the applicant for a Sentence Indication can be under no misapprehension that, if the judge decides to impose less than the range so indicated (as the judge is undoubtedly entitled to), there is at least some risk of a Crown appeal.<sup>99</sup>

15.63 The NZLC has said:

there is a concern about the injustice that might result if a defendant pleads guilty on the basis of a sentence indication, and the sentence is then overturned following a Crown appeal on the grounds that it is manifestly inadequate. The injustice arises from the fact the defendant altered his or her position in the expectation of a sentence that is different from the one eventually imposed.

We are ... of the view that this concern can be managed in practice. If a sentence indication is in line with a prosecution submission ... it would likely be in only exceptional circumstances that a court would look favourably on a subsequent Crown appeal. If a Crown appeal is upheld, we agree with the approach of the New South Wales Supreme Court: the defendant should have the right to file an appeal against conviction, have his or her guilty plea vacated, and the case remitted back ... for trial.<sup>100</sup>

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97 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

98 *R v Glass* (1994) 73 A Crim R 299; *R v Warfield* (1994) 34 NSWLR 200.

99 *R v Glass* (1994) 73 A Crim R 299, 305.

100 New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), [339]–[340]. See also K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005.

15.64 In DP 70, the ALRC proposed that the rights of the prosecution and the defence to appeal against sentence should be retained but, where a prosecution appeal against sentence is upheld, the defendant should be given the opportunity to withdraw the guilty plea.<sup>101</sup> There was support for the proposition that rights to appeal against sentence should be maintained.<sup>102</sup> However, the Criminal Bar Association of Victoria expressed the view that allowing a defendant to withdraw a guilty plea after a successful prosecution appeal is problematic given that the guilty plea is an admission of all the elements of the offence. It said that if a defendant knows that the sentence may be appealed, then he or she would take that risk when pleading guilty. It expressed the view that the prosecution should be required to state at a sentence indication whether it would be likely to appeal a particular sentencing option or range so that the defendant is aware of the prosecution's position before deciding whether to enter a plea on the basis of any indicated sentence falling outside the prosecution's submission.<sup>103</sup>

## ALRC's views

### A federal sentence indication scheme

15.65 The ALRC favours the adoption of a sentence indication scheme for federal defendants and thus recommends that federal sentencing legislation make provision for a defendant in a federal criminal matter to obtain an indication of sentence prior to final determination of the matter. While mindful of the abandonment of the pilot sentence indication scheme that operated for a brief period in New South Wales, other sentence indication schemes appear to have operated successfully.<sup>104</sup>

15.66 The potential benefits flowing from a sentence indication scheme include: the timely resolution of sometimes complex matters; minimising the trauma to victims of having to appear in court; saving of time and money as a result of preventing 'last-minute' guilty pleas and avoiding unnecessary trials; and lessening the burden on defendants by reducing the time between charge and disposition.

15.67 There is no reason in principle to limit the availability of a sentence indication scheme to defendants charged with particular categories of federal offences—such as indictable offences. Indeed, where a defendant is charged with a typically less serious summary offence punishable by a term of imprisonment not exceeding 12 months, it is plausible that he or she may receive a non-custodial indicative sentence. In such circumstances, any anxiety on the part of the defendant about facing a term of imprisonment could be alleviated and could encourage an early guilty plea, thereby avoiding an unnecessary hearing.

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101 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 15–1(n).

102 Law Council of Australia, *Submission SFO 97*, 17 March 2006; Criminal Bar Association of Victoria, *Consultation*, Melbourne, 23 February 2006.

103 Criminal Bar Association of Victoria, *Consultation*, Melbourne, 23 February 2006.

104 A Freiberg, *Submission SFO 12*, 4 April 2005; D Grace, *Consultation*, Melbourne, 23 February 2006.

15.68 The sentence indication scheme should be monitored and reviewed following its commencement. In order to facilitate implementation of the scheme and the monitoring of its effectiveness the scheme might be rolled out in stages so that, initially, it might be limited to indictable matters or made available only in some levels of the court hierarchy or in specific geographic locations.

### Features of the sentence indication scheme

#### *Where and when indication to take place*

15.69 Having regard to the desirability for transparency in sentencing and the need to maintain public confidence in the administration of the federal criminal justice system, any sentence indication should occur in the presence of the defendant and in open court. In addition, the sentence indication hearing should be transcribed or otherwise placed on the court record. However, if the indicated sentence is not accepted, those proceedings must not be reported until the conclusion of the matter. This safeguard is necessary to ensure the defendant receives a fair trial or hearing. The England and Court Wales of Appeal has taken a similar approach.<sup>105</sup>

15.70 Whether a sentence indication is to comprise part of a wider hearing concerned with pre-trial issues or whether it should be the subject of a dedicated hearing will depend, to a large degree, on the nature of the offence that is the subject of a charge. It may be that an indication for a simple summary offence could be given as part of a wider hearing dealing with pre-trial issues. However, the ALRC agrees with the view expressed by one prosecutor that a dedicated hearing is warranted where a sentence indication is sought in relation to a serious indictable offence.<sup>106</sup>

15.71 The procedures governing a sentence indication should be the subject of nationally consistent Rules of Court or Practice Directions. The use of Practice Notes to govern the procedures of the scheme was supported in submissions and consultations.<sup>107</sup> There is precedent for the harmonisation of Rules of Court. There are a number of processes to harmonise Rules of Court, both between different courts within a single state or territory,<sup>108</sup> and across jurisdictions in particular subject areas.<sup>109</sup> These processes could be invoked to create national rules in relation to federal sentence indications.

<sup>105</sup> *R v Goodyear* [2005] EWCA Crim 888, [77].

<sup>106</sup> Commonwealth Director of Public Prosecutions, *Consultation*, Melbourne, 31 March 2005.

<sup>107</sup> J Willis, *Submission SFO 74*, 10 February 2006; Criminal Bar Association of Victoria, *Consultation*, Melbourne, 23 February 2006; Chief Magistrate Judge D Price & Others, *Consultation*, Sydney, 3 February 2006.

<sup>108</sup> See, eg, *Civil Procedure Act 2005* (NSW) and *Uniform Civil Procedure Rules 2005* (NSW) which set out one set of rules to govern civil proceedings in the New South Wales Supreme, District and Local Courts, and the Dust Diseases Tribunal.

<sup>109</sup> For example, in 1996 a Committee was established under the auspices of the Council of Chief Judges to harmonise the Corporations Law Rules of Court. See Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, ALRC 92 (2001), [32.10]–[32.11].



15.72 While it would be ideal for sentence indications to be sought well before the hearing or trial in order to identify guilty pleas at an early stage, this may not always be practicable. The timing of a sentence indication needs to be flexible, and Rules of Court or Practice Directions should specify the earliest point at which an indication can be sought.

***Indication to be discretionary***

15.73 The sentence indication scheme must be premised on the basis that it will not always be appropriate or possible for a sentence indication to be given. A judicial officer should retain a discretion to refuse to give an indication. In particular, the indication should be given only if there is adequate information before the court on which to base the indication, and it should not be given if the choice of sentencing option is likely to be materially affected by the contents of a pre-sentence report.<sup>110</sup>

***Subject matter of indication***

15.74 The sentence indication should be limited to the choice of sentencing option and a general indication of severity or sentencing range. An indication of a specific quantum presupposes that all relevant information is before the court at the time of the indication and does not cater for the possibility that a judicial officer may need a measure of flexibility in imposing sentence in order to accommodate any additional information that comes to light at the time of sentencing. Such flexibility is likely to engender confidence in the scheme because defendants are less likely to be aggrieved if their sentences are at the higher end of an indicated range than if their sentences are higher than a specified (but now inappropriate) quantum.

15.75 In order to increase the likelihood that the scheme will prevent last-minute guilty pleas and unnecessary trials, the indication should be given in relation to the sentence that the defendant is likely to receive if he or she pleaded guilty at that point in time, rather than the sentence the defendant is likely to receive if found guilty after a contested hearing. The latter course of action has the practical disadvantage of providing a defendant only with a hypothetical worst-case scenario—which may be inaccurate in any event because the court giving the indication is not in a position to anticipate all the evidence that might be adduced in a contested hearing.

15.76 Because the indication should be limited to the choice of sentencing option and a general indication of severity, it is neither feasible nor necessary for a judicial officer to specify the quantum of any discount given for pleading guilty at that stage of the proceedings. A specification of discount for a guilty plea has meaning only in the context of a defendant knowing the quantum of sentence that he or she would have received in the absence of a plea.

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<sup>110</sup> This approach is consistent with that taken by the England and Wales Court of Appeal. See *R v Goodyear* [2005] EWCA Crim 888, [57].

15.77 Accordingly, in giving the indication the court must take into account, but must not state, the quantum of any discount that would be given to the defendant for pleading guilty at that stage of the proceedings. However, when the court comes to sentence the defendant formally, it should specify any discount that it has given on account of the guilty plea, as recommended elsewhere in this Report.<sup>111</sup>

***Minimising the potential to induce guilty pleas improperly***

15.78 In order to minimise the potential for a sentence indication to induce an innocent defendant to plead guilty, the ALRC recommends the adoption of the following safeguards:

- An indication should be given only at the defendant's request. It is inappropriate for the prosecution to use the sentence indication scheme as a vehicle for charge bargaining since this might coerce a defendant into pleading guilty.
- The court should issue standard advice before any indication is given to the effect that the indication does not derogate from the defendant's right to require the prosecution to prove its case beyond reasonable doubt.

***Minimising the potential for excessively lenient sentences***

15.79 One of the reasons given for the failure of the pilot scheme in New South Wales was that defendants who pleaded guilty at a sentence indication appeared to be treated with greater leniency than defendants who pleaded guilty at committal. In order to safeguard against this, federal sentencing legislation should make it clear that an indication must be based on the same purposes, principles and factors relevant to sentence and the same factors relevant to the administration of the criminal justice system that would apply to sentencing.<sup>112</sup>

15.80 Further, the ALRC's recommendation for the establishment of a federal sentencing database will, over time, promote consistency in indicative sentences by providing judicial officers with up-to-date information on federal sentences.<sup>113</sup>

***Countering 'judge-shopping'***

15.81 In order to address the concern that sentence indication schemes may encourage 'judge-shopping', federal sentencing legislation should make it clear that a defendant is entitled to one sentence indication only in respect of an offence.

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111 Discounts for guilty pleas are discussed in Ch 11.

112 See the discussion in Chs 4–6 on purposes, principles and factors relevant to sentencing, and Ch 11 on the factors relevant to the administration of the criminal justice system.

113 See Ch 21.

15.82 Seeking a sentence indication introduces an extra step into the criminal justice process. There is also therefore a practical advantage in allowing only one sentence indication for each offence.

***When sentencing is to take place and before whom***

15.83 The defendant should be given a reasonable opportunity to consult with his or her legal representative before deciding whether to enter a guilty plea on the basis of the indicative sentence. A defendant may need a short adjournment in which to consider and receive advice about the indicative sentence. However, there should be no expectation that a substantial adjournment will be given because excessive delay would compromise the scheme's goal of promoting the timely disposition of criminal matters.

15.84 This is consistent with the approach taken by the England and Wales Court of Appeal, which has stated that: the defendant be given a reasonable opportunity to consider his or her position; once an indication has been sought and given, it did not anticipate an adjournment for the plea to be taken on another day; and the judge who has given an indication should, where possible, deal with the case immediately.<sup>114</sup>

15.85 In addition, where a defendant accepts an indicative sentence, the judicial officer who gave the indication should be the one who passes sentence. This has the advantage of ensuring integrity in the outcome because if new information comes to light in the short interval between giving the indicative sentence and passing the sentence, the judicial officer who gave the indication will be best placed to assess how that information affects the indicative sentence.

***Action where indicative sentence is rejected***

15.86 Where a defendant rejects the indicative sentence, the matter should be set for hearing or trial before another judicial officer who should have no regard to the indicative sentence in passing any subsequent sentence.

15.87 The ALRC notes the concern that requiring a second judicial officer to hear the matter after an indicated sentence has been rejected may be problematic in some regional areas. However, rather than compromising the principle that seeks to ensure absence of bias, the courts may need to limit the geographical operation of the sentence indication scheme, for example, by confining the scheme to major metropolitan and regional areas.

***Appeals***

15.88 Finally, a sentence indication should not be appellable but where a sentence is imposed following a guilty plea that has been entered after a sentence indication, the rights of the prosecution and the defence to appeal against sentence should be retained.

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114 *R v Goodyear* [2005] EWCA Crim 888, [61].

15.89 However, having regard to the fact that a guilty plea amounts to an admission of all the ingredients of an offence, the ALRC agrees with the view that it would be problematic to allow a defendant to withdraw a guilty plea where a prosecution appeal against sentence is upheld. In pleading guilty, a defendant takes the chance that any sentence imposed may be subject to prosecution appeal. However, allowance should be made for cases where there is a clear miscarriage of justice.

15.90 To minimise the occurrence of miscarriages of justice resulting from successful prosecution appeals against sentence, the proposed Practice Directions or Rules of Court should encourage the prosecution to state at a sentence indication whether it would be likely to appeal a particular sentencing option or range. The defendant will then be aware of the prosecution's likely position before deciding whether to enter a plea on the basis of any indicated sentence falling outside the prosecution's submission.<sup>115</sup>

**Recommendation 15–1** Federal sentencing legislation should make provision for a defendant in a federal criminal matter to obtain an indication of sentence prior to final determination of the matter. The procedures governing a sentence indication should be the subject of nationally consistent Rules of Court or Practice Directions. The essential elements of such a scheme should include the following:

- (a) an indication should be given only at the defendant's request, with judicial discretion to refuse an indication;
- (b) the timing of a sentence indication should be flexible, and Rules of Court or Practice Directions should specify the earliest point at which an indication can be sought;
- (c) the defendant should be entitled to one sentence indication only;
- (d) the court should issue standard advice before any indication is given, to the effect that the indication does not derogate from the defendant's right to require the prosecution to prove its case beyond reasonable doubt;
- (e) the indication should occur in the presence of the defendant and in open court, but if the indicated sentence is not accepted those proceedings must not be reported until the conclusion of the matter;
- (f) the proceedings of the sentence indication hearing must be transcribed or otherwise placed on the court record;

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115 Criminal Bar Association of Victoria, *Consultation*, Melbourne, 23 February 2006.

- (g) the indication must be based on the same purposes, principles and factors relevant to sentencing and the same factors relevant to the administration of the criminal justice system that would apply to the passing of sentence;
- (h) the indication should be limited to the choice of sentencing option and a general indication of severity or sentencing range;
- (i) the indication should be given only if there is adequate information before the court, and should not be given if the choice of sentencing option is likely to be materially affected by the contents of a pre-sentence report;
- (j) in giving the indication, the court must take into account but must not specify the quantum of any discount that would be given to the defendant for pleading guilty at that stage of the proceedings;
- (k) the defendant should be given a reasonable opportunity to consult with his or her legal representative before deciding whether to enter a guilty plea on the basis of the indicative sentence;
- (l) where the defendant accepts the indicative sentence, the judicial officer who gave the indication should be the one who passes sentence;
- (m) where the defendant rejects the indicative sentence, the matter should be set for hearing or trial before another judicial officer, who should have no regard to the indicative sentence in passing any subsequent sentence; and
- (n) the sentence indication should not be appellable but the rights of the prosecution and the defence to appeal against sentence, if one is imposed, should be retained.



## 16. Reconsideration of Sentence

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### Reconsideration of sentence in absence of error

16.1 Reconsideration of sentence may arise either in the absence of any error by the court that imposed the sentence—which is considered in this section—or because of an error made by the court—which is considered in the following section. In either case, a sentence may potentially be reconsidered by the court that imposed the sentence, by an appellate court<sup>1</sup> or by the executive exercising the prerogative power to pardon or remit a sentence.<sup>2</sup>

#### Reconsideration by original court

16.2 As a general rule, a court does not have power to review, rehear, amend or set aside any judgment or order once it has passed into the court record, other than by way of appeal.<sup>3</sup> The rule is based on the principle that it is desirable to have finality of litigation.<sup>4</sup>

16.3 However, sentencing legislation allows courts to re-sentence offenders in certain situations in the absence of any error by the court. One such situation is exemplified by

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1 Appellate review is discussed in Ch 20.

2 The executive prerogative to pardon or remit a sentence is discussed in Ch 25.

3 *Jovanovic v The Queen* (1999) 106 A Crim R 548, [15].

4 *Bailey v Marinoff* (1971) 125 CLR 529, 539. There are exceptions for the correction of errors arising from an accidental slip or omission, and for orders made *ex parte*.

Part IB of the *Crimes Act 1914* (Cth), which allows a court to re-sentence an offender who has breached conditions imposed by a sentencing order or who has failed to comply with a sentence.<sup>5</sup>

16.4 Another situation is illustrated by the sentencing legislation of Queensland and Western Australia, which allow a court to re-sentence an offender where the court had reduced an offender's sentence because of an undertaking by the offender to cooperate with law enforcement authorities and the offender has failed to comply with that undertaking.<sup>6</sup> In contrast, under Part IB of the *Crimes Act*, where a federal offender has had a sentence reduced because of an undertaking to cooperate with the authorities and subsequently fails to comply with that undertaking, the prosecution's avenue of redress is by way of appeal.<sup>7</sup>

16.5 Other circumstances in which a sentence might potentially be reconsidered in the absence of error by a court are: (a) where there is new information relating to events occurring after sentence, such as post-sentence cooperation with the authorities; or (b) where there has been a fundamental change in the circumstances of the offender after sentencing, such as deterioration in health. The *Crimes Act* does not empower courts to reconsider sentences in these circumstances. However, some state and territory legislation provides courts with the power to review community service orders or community based orders on the grounds that it would be in the interests of justice to do so having regard to circumstances that have arisen since the order was made;<sup>8</sup> or on the basis that the offender is not able to comply with the order because his or her circumstances have materially altered since the order was made.<sup>9</sup> Similarly, the sentencing legislation of the Northern Territory allows a court to reconsider a home detention order on the basis of changes in circumstances since sentencing.<sup>10</sup>

16.6 Courts in the United States are empowered to reduce sentences based on evidence of post-sentence cooperation, including where an offender has provided substantial assistance:

- in investigating or prosecuting another person within one year of sentencing; or
- which involved information not known to the offender until one year or more after sentencing; or

5 *Crimes Act 1914* (Cth) ss 20A(5)(a)(i), (c)(ic), (c)(i); 20AC(6)(b). Breach of sentence and conditions imposed by sentence is discussed in Ch 17. See also *Crimes Act 1914* (Cth) s 20AA (power to discharge or vary conditions of recognizance).

6 *Penalties and Sentences Act 1992* (Qld) s 188; *Sentencing Act 1995* (WA) s 37A.

7 *Crimes Act 1914* (Cth) s 21E. See also *Crimes (Sentencing) Act 2005* (ACT) s 137.

8 *Crimes (Administration of Sentences) Act 1999* (NSW) s 115(2)(b).

9 *Sentencing Act 1991* (Vic) s 46; *Penalties and Sentences Act 1992* (Qld) ss 120, 121; *Sentencing Act 1997* (Tas) s 35. See also *Sentencing Act 1995* (NT) s 35.

10 See *Sentencing Act 1995* (NT) 1995 s 47, which authorises a court to quash the original sentence of imprisonment.



- which involved information the usefulness of which could not reasonably have been anticipated by the offender until more than one year after sentencing and where the offender promptly provided that information after its usefulness became reasonably apparent.<sup>11</sup>

### **Reconsideration by appellate court**

16.7 Appellate courts can consider facts that have arisen after sentencing when they re-sentence an offender after allowing a sentencing appeal. However, the power of an appellate court to treat new information relating to events occurring after sentence as a ground of appeal is restricted. At common law, evidence of post-sentence cooperation is not a basis for reduction of sentence on appeal.<sup>12</sup> Generally speaking, the task of an appellate court is to ascertain whether a trial judge made an error on the basis of the material before him or her.<sup>13</sup> An appellate court is not entitled to substitute its own opinion for that of the sentencing judge merely because it would have exercised its discretion differently from the manner in which the sentencing judge exercised his or her discretion,<sup>14</sup> or merely because it considers the sentence inadequate or excessive.<sup>15</sup> It must appear that the sentencing court has made some error in exercising its discretion.<sup>16</sup>

16.8 An appellate court may not receive fresh evidence in relation to events occurring after sentence because the evidence is incapable of demonstrating appellable error by a sentencing judge, unless the evidence sheds new light on material before the judge at the time of sentencing or brings before the court facts that were in existence at the time of the imposition of the sentence but were not known to the sentencing judge.<sup>17</sup>

16.9 However, it is not always easy to draw a distinction between events occurring after sentence that show the true significance of facts in existence at the time of sentence, and events occurring after sentence that do not have that effect.<sup>18</sup> For example, where an offender's health or life expectancy was a relevant factor at the time of sentencing, an appellate court has allowed evidence to be led of the fact that since sentence was passed the offender's health has deteriorated, rendering the effect of imprisonment on the offender harsher than could have been anticipated when sentence was passed.<sup>19</sup>

11 *Federal Rules of Criminal Procedure* 18 USC (Appendix) (US) r 35(b).

12 See, eg, *R v Henry* (1992) 28 NSWLR 348, 353; *R v Willard* (2001) 120 A Crim R 450, 455. Compare *R v Rostom* [1996] 2 VR 97, 101 (evidence of post-sentence cooperation allowed).

13 *R v Dorning* (1981) 27 SASR 481, 488.

14 *Lowndes v The Queen* (1999) 195 CLR 665, 671–672.

15 *R v Suarez-Mejia* (2002) 131 A Crim R 564, [64].

16 *House v The King* (1936) 55 CLR 499, 505; *AB v The Queen* (1999) 198 CLR 111.

17 *R v C* [2004] SASC 244, [13]–[15], [32]; *R v Smith* (1987) 44 SASR 587, 588.

18 *R v C* [2004] SASC 244, [19].

19 See *Ibid*, [20]; *R v Babic* [1998] 2 VR 70; *R v McLachlan* (2004) 8 VR 403.

### Reconsideration by the executive

16.10 The executive prerogative to pardon or remit a sentence is rarely exercised. However, the power is most likely to be exercised where there are compassionate grounds to do so, or as a reward for some form of exceptional behaviour in prison, or for post-sentence cooperation that was not taken into account in sentencing.<sup>20</sup>

### Issues and problems

#### *Reconsideration by courts or executive?*

16.11 Where a sentence falls to be reconsidered because of new information relating to events occurring after sentence or because of a fundamental change in the circumstances of an offender, an issue arises concerning the most appropriate forum in which to undertake that reconsideration. The common law position is that the review of a sentence in the light of subsequent events is the proper province of the executive government and not an appellate court.<sup>21</sup> However, opposing views have been expressed.

16.12 In *R v C*, the majority of the South Australian Court of Criminal Appeal held that the court should not reduce a sentence on the basis of post-sentence cooperation provided by the offender, although they acknowledged that the assistance provided by the offender warranted a reduction in sentence and that if the assistance had been provided before the imposition of sentence, the sentence would have been reduced. The Court stated that it would set an undesirable precedent if the court were to intervene, and that any reduction should be made by the exercise of the executive prerogative of mercy. It said that to allow fresh evidence on appeal in such circumstances would make it difficult to put an end to the sentencing process.<sup>22</sup> Perry J dissented, stating that the exceptional circumstances of the case rendered it appropriate for the court, rather than the executive, to review and reduce the sentence. He said the exceptional circumstances included that the post-sentencing cooperation was considerable, resulted in the offender being subjected to a harsher regime in prison, and seriously jeopardised his safety.<sup>23</sup>

16.13 The Law Society of South Australia expressed the view that the process of obtaining relief through the exercise of the prerogative of mercy is long and arbitrary. It expressed support for empowering courts to reconsider a sentence based on new information or fundamental change of circumstances, such as development of ill health, serious accident in prison, or serious assault in prison. The Law Society gave an example of an offender who had been rendered disabled because of a prison assault. It

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20 Attorney-General's Department, *Correspondence*, 20 October 2004.

21 *R v Munday* [1981] 2 NSWLR 177, 178.

22 *R v C* [2004] SASC 244, [2]–[3], [32]–[36], [144].

23 *Ibid*, [133]–[134].

submitted that a reconsideration of sentence ought to be able to be initiated by the parties, the Commonwealth, or the court of its own motion.<sup>24</sup>

16.14 Some federal offenders, including one who was diagnosed with cancer within months of incarceration, expressed support for a court to be able to reconsider a sentence based on new evidence (including evidence of events occurring after sentence), or a fundamental change in circumstances following sentence.<sup>25</sup>

***Failure to comply with undertaking to cooperate***

16.15 Under s 21E of the *Crimes Act*, the Commonwealth Director of Public Prosecutions (CDPP) may institute an appeal against a sentence that has been reduced on the basis of an undertaking to cooperate only where an offender has failed without reasonable excuse to comply with the undertaking.<sup>26</sup> The CDPP must consider that it is in the interests of the administration of justice to institute an appeal.<sup>27</sup> Accordingly, an offender who promises future cooperation may enjoy the benefits of a reduced sentence notwithstanding that he or she does not comply with that undertaking. This may happen if the offender has a reasonable excuse for the failure to comply, or if the CDPP declines to institute an appeal.

16.16 Another issue arises from the fact that an offender needs to be ‘under sentence’ in order for the CDPP to institute an appeal under s 21E. The section could thus lead to a situation in which an offender who has received a generous reduction for promised cooperation could breach the undertaking with impunity if the reduced sentence has expired. The Law Society of South Australia submitted that this situation was very much a case of ‘shutting the door after the horse has bolted’.<sup>28</sup>

16.17 The CDPP submitted that these deficiencies could be remedied by a new statutory scheme for reconsideration of sentence.

The CDPP is of the view that it would be appropriate to introduce a legislative scheme to replace section 21E which would ensure that the CDPP is able to bring the matter back before the Court in cases where an undertaking of assistance by an offender had not been honoured in whole or in part.

Currently, this mechanism is by way of an appeal. Another option would be to introduce a legislative regime which would enable the CDPP to make an application to bring the offender back before the court in which the offender was sentenced, for

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24 Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005.

25 JC, *Submission SFO 25*, 13 April 2005; WT, *Submission SFO 23*, 11 April 2005; PS, *Submission SFO 21*, 8 April 2005.

26 See also *Penalties and Sentences Act 1992* (Qld) s 188(2)(b) (court may reopen proceedings where offender fails to comply with undertaking without reasonable excuse).

27 *Crimes Act 1914* (Cth) s 21E(2).

28 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.

re-sentencing. In the CDDP's view, the most appropriate forum for reconsideration of the matter is the sentencing court and not an appeal court. This is because the exercise of re-sentencing the offender requires a re-examination of all the facts and circumstances of the case, including the penalty given at the original sentence, the specified discount, the terms of the undertaking given by the offender, the quality of any assistance actually delivered in furtherance of the undertaking, and the reasons for the failure to comply with the undertaking. In our opinion, it is not necessary for this to be carried out on appeal.<sup>29</sup>

### **Options for reform**

16.18 One option for reform is expressly to empower the original sentencing court to reconsider a sentence that has been reduced on the basis of an undertaking to provide cooperation with the authorities where that undertaking has not been fulfilled. Such a reform would replace the current mechanism of appeal in this regard.

16.19 Another option for reform is to broaden the grounds for reconsideration of a federal sentence by empowering a court to reconsider a sentence that involves evidence that would not be caught by the fresh evidence rules in relation to an appeal. Those situations would include:

- where there is new information relating to exceptional events occurring after sentence, such as post-sentence cooperation with the authorities; or
- where there has been a fundamental change in the circumstances of the offender after sentencing, involving facts that do not shed new light on material before the judge at the time of sentencing or which were not in existence at the time of the imposition of the sentence.

16.20 An alternative to the preceding option is to leave reconsideration of sentence in these situations to the executive, in the exercise of its prerogative power to pardon or remit a sentence.

### **ALRC's views**

#### ***Re-sentencing after breach***

16.21 The existing power of a court to reconsider a federal sentence should be preserved where an offender has failed to comply with that sentence or has breached the conditions imposed by a sentencing order.<sup>30</sup> This power should be exercisable by the original court, whether differently constituted or not.

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<sup>29</sup> Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

<sup>30</sup> See Rec 17–1 (expansion of court's powers to deal with breach of sentencing order, regardless of whether the offender has a reasonable cause or excuse for the breach); Rec 17–2 (expansion of court's powers on re-sentencing for breach of suspended sentence).

***Failure to comply with undertaking to cooperate***

16.22 Federal sentencing legislation should empower a court that imposes a federal sentence, whether differently constituted or not, to reconsider a sentence where the court reduced the sentence because the offender undertook to cooperate with the authorities and the offender failed to comply with that undertaking within a reasonable time. Reconsideration by the court that imposed the sentence should replace the current mechanism in Part IB of the *Crimes Act*, which requires the CDPP to appeal against the inadequacy of the sentence. This approach is consistent with the position in Queensland and Western Australia. The ALRC agrees with the reasons advanced by the CDPP that the original sentencing court, rather than an appellate court, is the most appropriate forum in which to reconsider a sentence where an offender has failed to comply with an undertaking to cooperate. In such circumstances, an appellate court would not be dealing, as it customarily does, with an error made by the court below.

16.23 Additionally, where a sentence has been reduced because of an undertaking to cooperate and the offender fails to comply with the undertaking, the CDPP should be able to institute proceedings for reconsideration of the sentence irrespective of whether the offender had a reasonable excuse. The CDPP should be able to institute such proceedings whenever it considers it to be in the interests of justice to do so.<sup>31</sup> There may well be circumstances in which an offender should not retain the full benefit of a reduced sentence, even though he or she had reasonable grounds for failing to cooperate. This approach is consistent with that taken in sentencing legislation in Western Australia and the ACT.<sup>32</sup>

16.24 The CDPP's ability to institute re-sentencing proceedings should not be restricted to circumstances in which an offender is 'under sentence'. Where the CDPP considers that it is in the interests of justice to do so, the CDPP should be able to initiate re-sentencing proceedings against an offender whose reduced sentence has expired where that offender has failed to comply with an undertaking to cooperate. Re-sentencing proceedings should be commenced within a reasonable time after non-compliance.<sup>33</sup>

***New information or fundamental change in circumstances***

16.25 The ALRC does not support a wider judicial power to reconsider a sentence, such as where there is new information relating to exceptional events occurring after sentence, or where there has been a fundamental change in the circumstances of an

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31 This view was supported by the CDPP: See Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

32 See *Sentencing Act 1995* (WA) s 37A; *Crimes (Sentencing) Act 2005* (ACT) s 137.

33 This view was supported by the CDPP: See Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

offender after sentencing. Adopting such an approach significantly detracts from the goal of promoting finality of the sentencing process. Where a sentence is to be reconsidered on these grounds, it is more appropriately dealt with by an application for the exercise of the executive prerogative to pardon or remit a sentence. This might be done on compassionate grounds or as a reward for post-sentence cooperation or other form of exceptional behaviour.

16.26 However, as discussed in Chapter 7, a court should have power to reconsider the time and manner in which a fine is to be paid, taking into account changes to an offender's financial circumstances after sentencing. The existence of such a power does not detract from the finality of the sentencing process because the court may reconsider only the mechanics of payment, not the quantum of the fine.

**Recommendation 16–1** Federal sentencing legislation should empower a court that imposes a federal sentence, whether differently constituted or not, to reconsider the sentence where:

- (a) an offender fails to comply with a sentence or the conditions imposed by a sentencing order (see Recommendations 17–1 and 17–2); or
- (b) the court reduced the sentence because the offender undertook to cooperate with the authorities and the offender failed to comply with that undertaking within a reasonable time, regardless of whether the offender had a reasonable excuse for non-compliance. Such proceedings must be initiated by the Commonwealth Director of Public Prosecutions within a reasonable time after non-compliance and only if the Director is satisfied that the interests of justice will be served by re-sentencing.

## Correction of errors

### Background

16.27 Sentencing is a complex procedure. Complications can arise in the calculation of sentences where a court sentences a federal offender for multiple offences and, in particular, where an offender is sentenced to imprisonment for both federal and state or territory offences.<sup>34</sup> Ascertaining the commencement date of a sentence may involve arithmetic calculations aimed at giving credit for time spent in pre-sentence custody, and at giving effect to a court's decision to impose concurrent, consecutive, or partly consecutive sentences. Other calculations arise in the process of setting non-parole periods and ascertaining the date on which a federal offender will be eligible to be released on parole. In the case of joint offenders, allowance has to be made for the fact

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34 Department of Justice Western Australia, *Submission SFO 35*, 21 April 2005.

that a court is not empowered to fix a single non-parole period in respect of both federal and state or territory sentences of imprisonment.<sup>35</sup> From time to time, judicial officers make technical errors in calculating a sentence, giving rise to a need for a mechanism to redress such errors promptly.

16.28 The common law rule is that, subject to rules of court, a judicial officer may correct a sentence only before it has ‘passed into record’. However, there is no clearly defined point at which that may be said to have happened.<sup>36</sup> Superior courts have an inherent jurisdiction—generally reflected in rules of court<sup>37</sup>—to vary a judgment or order even after it has been passed or entered, so that it states correctly what the court decided and intended.<sup>38</sup>

16.29 The power to correct sentences under Part IB of the *Crimes Act* is limited. The court is given an express power to correct sentencing errors concerning the failure to fix, or properly to fix, a non-parole period, or to make, or properly to make a recognizance release order.<sup>39</sup> An application to correct this type of error can be made by the Attorney-General of Australia, the CDPP or the federal offender, and a court may deal with the application notwithstanding that the court is differently constituted from when the person was sentenced. However, there is no express power in Part IB to correct sentencing orders that are not in conformity with the law; nor is there express power to correct ‘slip’ errors.

16.30 In contrast, some state and territory sentencing legislation gives courts express power to correct errors in sentencing by way of variation, amendment or rescission. For example, courts in some jurisdictions are expressly given the power to reopen sentencing hearings<sup>40</sup> and to make corrections where sentences have been imposed contrary to law;<sup>41</sup> or where the court has failed to impose a sentence that the court legally should have imposed;<sup>42</sup> or where the sentence imposed by the court was based on an error of fact.<sup>43</sup> Provisions that confer on a court the power to correct sentencing

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35 Ibid; *Crimes Act 1914* (Cth) s 19AJ.

36 *Jovanovic v The Queen* (1999) 106 A Crim R 548, [35]. See also *R v Lapa (No 2)* (1995) 80 A Crim R 398, 402.

37 See, eg, *Supreme Court (Criminal Procedure) Rules 1998* (Vic) r 1.14.

38 *Jovanovic v The Queen* (1999) 106 A Crim R 548, [20].

39 *Crimes Act 1914* (Cth) s 19AH.

40 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 43; *Penalties and Sentences Act 1992* (Qld) s 188; *Crimes (Sentencing) Act 2005* (ACT) s 61; *Sentencing Act 1995* (NT) s 112.

41 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 43(1)(a); *Penalties and Sentences Act 1992* (Qld) s 188(1)(a); *Sentencing Act 1995* (WA) s 37(1); *Sentencing Act 1997* (Tas) s 94(2), (3)(a); *Crimes (Sentencing) Act 2005* (ACT) s 61(1)(a); *Sentencing Act 1995* (NT) s 112(1)(a).

42 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 43(1)(b); *Penalties and Sentences Act 1992* (Qld) s 188(1)(b); *Sentencing Act 1997* (Tas) s 94(2), (3)(b); *Crimes (Sentencing) Act 2005* (ACT) s 61(1)(b); *Sentencing Act 1995* (NT) s 112(1)(b).

43 *Penalties and Sentences Act 1992* (Qld) s 188(1)(c); *Sentencing Act 1997* (Tas) s 94(2), (3)(c).

errors of a substantive nature typically state that the parties must be given an opportunity to be heard,<sup>44</sup> and that rights of appeal remain unaffected.<sup>45</sup> Some provisions allow a court the discretion not to reopen a sentencing hearing where it is of the view that the matter would be dealt with more appropriately by a proceeding on appeal.<sup>46</sup>

16.31 Courts in some jurisdictions are also given express powers to correct technical errors; clerical errors; or errors arising from an accidental slip or omission, a material miscalculation of figures or a material mistake in the description of any person, thing or matter.<sup>47</sup> State sentencing laws allow an application to correct a slip error to be made by the court acting on its own initiative<sup>48</sup> or on an application of the parties to the proceedings.<sup>49</sup> In Victoria, a court may correct slip errors without requiring the parties to the proceedings to be given an opportunity to be heard, unless the interests of justice require it in the particular case.<sup>50</sup> In Western Australia a court must ensure that all parties and relevant authorities are notified of the correction of any clerical or slip error.<sup>51</sup>

16.32 The ALRC has been informed that one of the circumstances in which the executive prerogative to remit a sentence may be exercised is where a court has incorrectly applied sentencing laws, with the result that a prisoner's effective sentence differs from that intended by the court.<sup>52</sup>

### Submissions and consultations

16.33 Stakeholders expressed broad support for federal legislation to set out expressly a court's powers to correct errors in the sentencing of federal offenders, including technical, arithmetic and legal errors.<sup>53</sup> One federal offender also supported such a power, but submitted that the power to correct errors should remain with an appellate

44 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 43(2); *Penalties and Sentences Act 1992* (Qld) s 188(3)(a); *Sentencing Act 1995* (WA) s 37(2); *Sentencing Act 1997* (Tas) s 94(4); *Crimes (Sentencing) Act 2005* (ACT) s 61(3); *Sentencing Act 1995* (NT) s 112(2)(a).

45 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 43(4); *Penalties and Sentences Act 1992* (Qld) s 188(6); *Sentencing Act 1995* (WA) s 37(4); *Crimes (Sentencing) Act 2005* (ACT) s 61(6); *Sentencing Act 1995* (NT) s 112(5), (6).

46 See, eg, *Sentencing Act 1995* (NT) s 112(1).

47 *Sentencing Act 1991* (Vic) s 104A(1)(i)–(iv); *Sentencing Act 1995* (WA) s 37(3); *Criminal Law (Sentencing) Act 1988* (SA) s 9A. See also *Federal Rules of Criminal Procedure* 18 USC (Appendix) (US) r 35(a) (correction of 'arithmetical, technical or other clear error').

48 *Sentencing Act 1991* (Vic) s 104A(1); *Sentencing Act 1995* (WA) s 37(3).

49 *Sentencing Act 1991* (Vic) s 104A(1).

50 *Ibid* s 104A(4).

51 *Sentencing Act 1995* (WA) s 37(3).

52 Attorney-General's Department, *Correspondence*, 20 October 2004.

53 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; K Warner, *Consultation*, Hobart, 13 April 2005; New South Wales Legal Aid Commission—Criminal Law Division, *Consultation*, Sydney, 22 September 2004.



court rather than be conferred on the sentencing court.<sup>54</sup> There was limited opposition to such a provision.<sup>55</sup>

16.34 The CDPP submitted that:

Apart from section 19AH of the *Crimes Act 1914* it has been necessary to rely on State/Territory law and/or common law to correct errors that have occurred in sentencing. The inclusion of a general Commonwealth provision to correct errors where sentences are not imposed in conformity with the law or there is an accidental slip or omission would be a very helpful addition for the prosecution to assist the court. Such a provision may, of course, benefit a defendant and, in our view, should be available at the instigation of the court, the prosecution or the defendant.<sup>56</sup>

16.35 The New South Wales Legal Aid Commission supported a provision that enabled the court to reopen a sentencing hearing, such as the provision in the New South Wales sentencing legislation, which was said to allow for flexibility.<sup>57</sup>

16.36 In Discussion Paper 70 (DP 70), the ALRC proposed that federal sentencing legislation should expressly set out a court's power to correct 'slip' errors that may occur in sentencing a federal offender. The power should be exercisable either by the court on its own motion or on the application of any party to the proceedings or the Attorney-General of Australia. The court must ensure that the parties to the proceedings and the relevant authorities are notified of the correction, but the correction need not be carried out in open court unless the court otherwise directs.<sup>58</sup> This proposal received support.<sup>59</sup>

16.37 The ALRC also proposed that federal sentencing legislation should expressly empower a court, whether differently constituted or not, to reopen a sentencing hearing to correct errors of a more substantive nature. The ALRC proposed that any such correction should occur in open court, and that the provision was not to affect a party's right to appeal against sentence, nor a court's discretion to decline to vary, amend or rescind a sentence where it considers the matter may be dealt with more appropriately on appeal.<sup>60</sup> This proposal also received support.<sup>61</sup> However, the Attorney-General's

<sup>54</sup> JC, *Submission SFO 25*, 13 April 2005.

<sup>55</sup> LD, *Submission SFO 9*, 10 March 2005.

<sup>56</sup> Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

<sup>57</sup> New South Wales Legal Aid Commission—Criminal Law Division, *Consultation*, Sydney, 22 September 2004.

<sup>58</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 16–2.

<sup>59</sup> Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; New South Wales Legal Aid Commission, *Submission SFO 75*, 10 February 2006.

<sup>60</sup> See Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 16–3.

<sup>61</sup> Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; New South Wales Legal Aid Commission, *Submission SFO 75*, 10 February 2006.

Department submitted that a court must maintain its discretion to hold hearings in closed court, for example, in order to protect a witness.<sup>62</sup>

### **ALRC's views**

16.38 Having regard to the views expressed in submissions and consultations, and to relevant provisions in state and territory sentencing legislation, the ALRC considers that federal sentencing legislation should expressly set out a court's powers to correct errors in the sentencing of federal offenders. The inclusion in federal legislation of express powers to correct errors may increase the likelihood that errors will be corrected, that they will be corrected expeditiously, and that unnecessary appeals will be avoided. There is a strong public interest in ensuring that correct sentences are imposed on federal offenders.

16.39 The types of errors that should be able to be corrected by a sentencing court should include slip errors. But they should also include errors of a more substantive nature, such as where:

- the court has imposed a sentence or a sentence-related order contrary to law;
- the court has failed to impose a sentence or a sentence-related order that is required to be made by law, including a failure to fix or properly to fix a non-parole period; and
- the sentence included an order that was based on or contained an error of fact.

16.40 Redressing the incorrect application of sentencing laws is a matter properly undertaken by a court rather than by the executive in the exercise of its prerogative to pardon or remit a sentence. A legislative provision that expressly invests a court with the power to correct sentencing errors may have the advantage of encouraging judicial, as opposed to executive, correction.

16.41 A distinction should be made between slip errors and errors of a more substantive nature because the different nature of these errors justifies the adoption of different procedures for correction. In the case of slip errors, a correction need not be carried out in open court, unless a court considers it necessary in the interests of justice. A court should be required to notify the parties to the proceedings and any relevant authorities of the fact that a correction has been made. An offender should not be required to be present for the correction of a slip error.<sup>63</sup> The power to correct slip errors should be able to be initiated by the court on its own motion, or by any party to the proceedings or the Attorney-General of Australia.

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<sup>62</sup> Attorney-General's Department, *Submission SFO 83*, 15 February 2006.

<sup>63</sup> In United States Federal District Courts an offender must be present during sentencing but is not required to be present at a sentence correction hearing. See *Federal Rules of Criminal Procedure* 18 USC (Appendix) (US) r 43(a)(4). See also Rec 13–1.

16.42 The procedures to correct errors of a more substantive nature should be consistent with the principles of open justice and procedural fairness. This is especially important where a party disputes the existence of an error. Accordingly, the procedure for correction of such errors should be carried out in open court unless the court in its discretion closes the court where it considers it necessary to do so. The parties to the proceedings must be given an opportunity to be present and to be heard. However, the court should be able to make the correction in the offender's absence if the offender consents and the court gives its permission.<sup>64</sup> The reopening of a sentencing hearing is one way of ensuring adherence to open justice and procedural fairness.

16.43 The ability to seek correction of a substantive error in sentencing should not infringe a party's right to appeal a sentence; and the court that passed the sentence should retain the discretion to decline to vary, amend or rescind a sentence where it considers the matter may be dealt with more appropriately on appeal.

16.44 It would be preferable for the judicial officer who imposed the original sentence to conduct the re-sentencing hearing, but it should be open to a court to constitute itself differently on re-sentencing, as the need arises. This is consistent with the position in Queensland and the Northern Territory to the extent that a court is empowered to reopen a sentencing hearing regardless of whether the court is constituted differently from the court that originally passed sentence.<sup>65</sup>

**Recommendation 16–2** Federal sentencing legislation should expressly set out a court's power to correct 'slip' errors that may occur in sentencing a federal offender. The power should be exercisable either by the court on its own motion or on the application of any party to the proceedings or the Attorney-General of Australia. The court must ensure that the parties to the proceedings and the relevant authorities are notified of the correction, but the correction need not be carried out in open court unless the court otherwise directs.

**Recommendation 16–3** Federal sentencing legislation should expressly empower a court, whether differently constituted or not, to reopen a sentencing hearing to allow it to vary, amend or rescind a sentence where:

- (a) the court has imposed a sentence or a sentence-related order contrary to law;

<sup>64</sup> See Ch 13 on presence of offender and Rec 13–1.

<sup>65</sup> *Penalties and Sentences Act 1992* (Qld) s 188(1); *Sentencing Act 1995* (NT) s 112(1). Compare *Sentencing Act 1997* (Tas) s 94(4).

- (b) the court has failed to impose a sentence or a sentence-related order that is required to be made by law; or
- (c) the sentence included an order that was based on or contained an error of fact.

Any variation, amendment or rescission of sentence under this provision should occur in open court unless the court, in its discretion, closes the court where it considers it necessary to do so. The parties to the proceedings must be given an opportunity to be present and to be heard, subject to Recommendation 13–1. This provision should not affect a party’s right to appeal against sentence, nor a court’s discretion to decline to vary, amend or rescind a sentence where it considers the matter may be dealt with more appropriately on appeal.

## 17. Breach of Sentencing Orders

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### Introduction

17.1 Federal sentencing orders can be breached in a variety of ways. For example, a federal offender may breach his or her sentence by failing to comply with a condition of release, failing to report to a periodic detention centre, or failing to pay a fine. The *Crimes Act 1914* (Cth) outlines the circumstances in which a court can deal with a breach of a federal sentencing order and the action it can take on such breach.

17.2 The *Crimes Act* does not use the word ‘breach’. However, because this word is often used in practice, it is used in this chapter to describe all situations in which a federal offender does not comply with his or her sentence, regardless of the reason for the non-compliance. Reconsideration of sentence in the absence of breach is dealt with in Chapter 16.

### Power of the court to deal with breach

17.3 Part IB of the *Crimes Act* contains several provisions that enable the court that sentenced a federal offender—whether differently constituted or not—to deal with a breach of a sentencing order. Section 20A deals with breach of an order discharging a federal offender without conviction, releasing a federal offender after conviction, or releasing a federal offender pursuant to a recognizance release order. Section 20AC deals with breach of state and territory sentencing orders picked up by s 20AB and applied in the sentencing of federal offenders.

17.4 Neither s 20A nor s 20AC empowers the court to deal with breaches of sentencing orders where the offender has a reasonable excuse for the breach, such as

illness. The inability to deal with such breaches received some publicity in 2004 in relation to the sentence of periodic detention imposed on Mr Rene Rivkin, who had been found guilty of insider trading.<sup>1</sup>

17.5 It is unknown how many federal offenders breach their sentencing orders. However, it has been reported that as at 23 March 2004, 12 out of 48 federal offenders serving sentences of periodic detention were in breach of their orders.<sup>2</sup> In 2004–05, the Commonwealth Director of Public Prosecutions (CDPP) dealt with nine breaches of sentencing orders pursuant to ss 20A and 20AC of the *Crimes Act*.<sup>3</sup> For the purposes of this Inquiry the Australian Institute of Criminology analysed data provided by the CDPP about offenders prosecuted for federal fraud or drug offences. The results of that analysis are set out at Appendix 2. The data reveal that in the five years from 2000 to 2004 there were 821 cases involving breach action, and that the number of breaches for fraud and drug cases remained roughly constant over time.<sup>4</sup>

17.6 The question that arises is whether courts should be empowered to deal with breaches of sentences imposed pursuant to ss 19B, 20(1) or 20AB(1) where the offender has a reasonable cause or excuse for the breach. A number of stakeholders expressed support for the proposition that courts should be able to deal with all breaches of federal sentencing orders.<sup>5</sup>

#### ***ALRC's views***

17.7 Federal sentencing legislation should be amended to enable the court that sentenced a federal offender, whether differently constituted or not, to deal with all breaches of sentences regardless of whether the offender has a reasonable cause or excuse for the breach. It is fundamental to the legitimacy of the federal criminal justice system that judicial officers are empowered to hear and determine proceedings with respect to breaches of orders imposed by the court. The fact that a federal offender has a reasonable cause or excuse for a breach will no doubt be an important consideration in determining the outcome of breach proceedings. However, it should not bar the court from dealing with the breach and making orders that are appropriate in all of the circumstances of the case. Judicial officers should be given broad and flexible powers to respond to breaches of sentencing orders, given the variety of circumstances that could explain or excuse the breach.

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1 *R v Rivkin* (2003) 198 ALR 400.

2 Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 2004, 28220 (Question No 2852).

3 Commonwealth Director of Public Prosecutions, *Annual Report 2004–05* (2005), 38.

4 See Appendix 2, Figures A2.107, A2.108 and accompanying text.

5 Department of Corrective Services Western Australia, *Submission SFO 88*, 17 February 2006; Department of Corrective Services New South Wales, *Submission SFO 79*, 8 March 2006; Australian Taxation Office, *Submission SFO 72*, 10 February 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

**Recommendation 17–1** Federal sentencing legislation should empower a court to deal with any breach of a sentencing order, regardless of whether the offender has a reasonable cause or excuse for the breach.

## Consequences of breaching a sentencing order

17.8 Part IB of the *Crimes Act* outlines the action a court may take if a federal offender breaches certain sentencing orders without a reasonable excuse. If a federal offender breaches an order for conditional discharge without conviction, the court may revoke the order; convict the offender and re-sentence him or her for the original offence; or take no action.<sup>6</sup> If a federal offender breaches an order for conditional release after conviction made pursuant to s 20(1)(a), or a state or territory sentencing order picked up and applied pursuant to s 20AB, the court may impose a pecuniary penalty not exceeding 10 penalty units; revoke the order and re-sentence the offender for the original offence; or take no action.<sup>7</sup>

17.9 If a federal offender breaches a recognizance release order the court may: impose a monetary penalty not exceeding \$1,000; extend the period of supervision to a period not greater than five years; revoke the order and impose an alternative sentencing option under s 20AB; revoke the order and imprison the person for that part of the sentence that the person had not served at the time of release from custody; or take no action.<sup>8</sup> As discussed in Chapter 2, the ALRC considers that the term ‘recognizance release order’ should be replaced with terminology that reflects its nature as a conditional suspended sentence.<sup>9</sup> Accordingly, the term ‘conditional suspended sentence’ will be used in the remainder of this chapter.

17.10 If a federal offender breaches any of the above sentencing orders, his or her recognizance may be forfeited under s 20A(7). If a court revokes an original sentencing order and re-sentences the offender, the court is required to take into account, in addition to any other matters, the fact that the original order was made, anything done under the order, and any other order made in respect of the original offence or offences.<sup>10</sup>

17.11 In Issues Paper 29 the ALRC asked whether the court’s statutory powers to deal with breaches of federal sentencing orders were appropriate or whether further powers

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6 *Crimes Act 1914* (Cth) s 20A(5)(a).

7 *Ibid* ss 20A(5)(b), 20AC(6).

8 *Ibid* s 20A(5)(c).

9 See Rec 2–3.

10 *Crimes Act 1914* (Cth) ss 20A(6), 20AC(7).

were needed. The ALRC also queried whether there should be any limitations on the court's power to re-sentence an offender upon breach of a sentencing order.<sup>11</sup>

17.12 A number of stakeholders indicated that courts should be entitled to impose custodial sentences on offenders who breached federal sentencing orders.<sup>12</sup> The Australian Taxation Office (ATO) submitted that custodial sentences should be imposed for wilful or deliberate non-compliance with sentencing orders, or where there is no other suitable sentencing option available in dealing with an offender following breach.<sup>13</sup> Correctional Services in the Northern Territory submitted that the consequences of a breach of a federal sentencing order should be the same as the consequences for breach of a state or territory sentencing order.<sup>14</sup>

17.13 Some stakeholders expressed concern about the inflexibility of the consequences of breach of a conditional suspended sentence. The Law Society of South Australia submitted that a federal offender in breach of a conditional suspended sentence should ordinarily be required to serve a period of full-time imprisonment but that the court should have the discretion to impose a lesser term of imprisonment than that initially specified in the order.<sup>15</sup> Similarly, the CDPP submitted that greater flexibility was needed to enable courts dealing with breaches of conditional suspended sentences to impose sentences of imprisonment of a lesser duration than the sentence of imprisonment initially imposed.<sup>16</sup> There has also been judicial criticism of the inflexibility of federal breach procedures for conditional suspended sentences.<sup>17</sup>

17.14 Another issue that arises is the inability to enforce a 'monetary penalty' imposed under s 20A(5)(c)(ia) for breach of a conditional suspended sentence. Section 3 of the *Crimes Act* provides that a reference in the Act to a 'fine' includes reference to a 'pecuniary penalty' (other than particular specified pecuniary penalties). Accordingly, pecuniary penalties imposed on offenders who have breached orders for conditional discharge imposed pursuant to s 20(1) of the Act, or who have breached state or territory sentencing orders imposed pursuant to s 20AB, can be enforced as fines.<sup>18</sup> However, because s 20A(5)(c)(ia) refers to a 'monetary penalty', not a 'pecuniary penalty', such a penalty cannot be enforced as a fine.

11 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [7.95], [7.129]–[7.135].

12 Australian Taxation Office, *Submission SFO 18*, 8 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; LD, *Submission SFO 9*, 10 March 2005.

13 Australian Taxation Office, *Submission SFO 18*, 8 April 2005.

14 Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005.

15 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.

16 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005. See also Commonwealth Director of Public Prosecutions, *Consultation*, Hobart, 14 April 2005.

17 *Kay v Hickey* [2002] TASSC 108, [4]–[5], [12]. See also *Sweeney v Corporate Security Group* [2003] 86 SASR 425; *Ferenczy v Director of Public Prosecutions (Cth)* [2004] SASC 208.

18 Fine enforcement is discussed further below.



**ALRC's views**

17.15 Federal sentencing legislation should continue to specify the consequences of breaches of sentences imposed pursuant to ss 19B, 20(1) or 20AB(1). This will ensure the procedures for dealing with federal offenders who breach these sentencing orders, and the powers that can be exercised by the court when dealing with such breaches, are uniform and do not vary depending on the state or territory in which the federal offender is serving his or her sentence.

17.16 The ALRC considers that courts should retain their current powers to deal with these breaches, but that it is desirable to enable judicial officers to vary the original order where appropriate. This will provide courts with added flexibility to tailor orders to an offender's individual circumstances when dealing with breach. In particular, the ALRC recommends that federal sentencing legislation be amended to allow a court to deal with a breach of a conditional suspended sentence by imposing a lesser period of imprisonment than that originally imposed. It may be appropriate to do so, for example, if the breach occurred close to the completion of the sentence, after a long period of compliance with the order.

17.17 In addition, it is undesirable that a 'monetary penalty' imposed on breach of a conditional suspended sentence is unenforceable, and federal sentencing legislation should rectify this anomaly.

**Recommendation 17–2** Federal sentencing legislation should provide that, in addition to its existing powers, a court dealing with a breach of a sentencing order may vary the order if satisfied of the breach. In particular, the court should be given the power to order that a federal offender who has breached a wholly or partially suspended sentence of imprisonment be imprisoned for a lesser period than that originally imposed.

**Recommendation 17–3** Federal sentencing legislation should be amended to ensure that any order imposing a monetary penalty for breach of a wholly or partially suspended sentence is enforceable.

**Procedure for enforcement action following breach****Background**

17.18 State and territory sentencing options that are picked up and applied to federal offenders are administered by state or territory corrective services agencies. However, a breach of such an order must be dealt with by the court that passed the sentence, whether differently constituted or not.<sup>19</sup> This is because the *Australian Constitution*

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<sup>19</sup> *Crimes Act 1914* (Cth) s 20AC(6).

precludes a non-judicial body from exercising federal judicial power,<sup>20</sup> and the adjudication of a breach of a sentencing order involves the exercise of such power. In contrast, state and territory administrative bodies are often empowered to deal with breaches of sentencing orders made in relation to state or territory offenders.

17.19 Currently, proceedings for breaches of sentences imposed pursuant to ss 19B, 20(1) or 20AB(1) of the *Crimes Act* are initiated when information is laid before a magistrate alleging that a federal offender has, without reasonable cause or excuse, failed to comply with his or her sentence.<sup>21</sup> The magistrate can then issue a summons directing the offender to appear before the court. Alternatively, if information is laid on oath and the magistrate is of the opinion that proceedings against the offender by summons might not be effective, a warrant can be issued for the apprehension of the offender.<sup>22</sup>

### *Issues and problems*

17.20 Many stakeholders involved in administering federal sentences expressed dissatisfaction with existing procedures for dealing with breaches of federal sentencing orders.<sup>23</sup> In submissions and consultations the ALRC was informed that: there was a lack of knowledge about how to deal with federal offenders who had breached sentencing orders;<sup>24</sup> delays were experienced when breaches were referred to the CDPP;<sup>25</sup> and the procedures for dealing with such breaches were cumbersome and resource intensive.<sup>26</sup> In addition, it was submitted that delay in dealing with a breach of a federal sentencing order had the potential to place those involved in supervising federal offenders and the community at risk.<sup>27</sup>

17.21 The New South Wales Department of Corrective Services provided the ALRC with a helpful case study that demonstrated the protracted nature of the procedure for dealing with breach of federal sentencing orders.<sup>28</sup> This case study noted that upon becoming aware of a breach of a sentencing order imposed on one particular federal offender, Community Offender Services (COS) filed a breach report with the New South Wales Parole Board. COS was then advised that the Board lacked the jurisdiction to deal with the matter. However, after contacting the CDPP about the breach, COS was informed that it may be possible for the New South Wales Parole

20 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270.

21 *Crimes Act 1914* (Cth) ss 20A(1), 20AC(2). These provisions do not deal with federal fine default, which is discussed further below.

22 *Ibid* ss 20A(1)(a), (b), 20AC(2)(a), (b).

23 Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005; Correctional Services Northern Territory and Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005; Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005; Department of Corrective Services Queensland, *Consultation*, Brisbane, 3 March 2005.

24 Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.

25 *Ibid*; Correctional Services Northern Territory and Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005.

26 Department of Corrective Services New South Wales, *Submission SFO 79*, 8 March 2006.

27 Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.

28 *Ibid*.

Board to deal with the breach and that this would be investigated further. Approximately one month later, the CDPP informed COS that the New South Wales Parole Board lacked the jurisdiction to deal with the breach. The CDPP then required COS to amend its original breach report to comply with legal requirements, swear the breach report before a magistrate, have the matter listed for hearing, serve the breach notice on the offender, and prepare and file an affidavit of service. Once listed, the matter was adjourned on a number of occasions before it was finalised some six months after the initial breach.

17.22 The CDPP submitted that the constitutional requirement that the judicial power of the Commonwealth be exercised by a court meant that federal breach proceedings were more formal, and as a result were likely to take longer than the administrative procedures for dealing with offenders in breach of state or territory sentences.<sup>29</sup> It rejected assertions that it was responsible for any delay in the initiation or hearing of breach proceedings.

### *Options for reform*

17.23 For the constitutional reasons outlined above, the options for dealing with a breach of a federal sentencing order are limited. While some stakeholders expressed the view that breach procedures for federal offenders should be the same as those for state and territory offenders,<sup>30</sup> this is not constitutionally possible where a state or territory administrative body, such as a parole board, deals with the breaches.

17.24 An option that could circumvent the difficulties associated with having to conduct federal breach proceedings in a court would be to encourage the use of conditional or self-executing orders at the time of sentencing. Self-executing orders are sometimes used to enforce procedural requirements in civil proceedings. They specify the penalty to be automatically imposed on a party if it fails to take a required step to progress the proceedings by a certain date.<sup>31</sup> Self-executing orders are often used when a party has been persistently dilatory or recalcitrant in its approach to the litigation. The orders are a case-management tool designed to enforce compliance with court orders and to reduce the costs associated with litigation. It has been held that self-executing orders should be used sparingly because they circumscribe the discretion of the court;<sup>32</sup> and that they should not be made if there could be a legitimate conflict of opinion about whether the event the subject of the order has occurred.<sup>33</sup>

17.25 Another option would be to attempt to reform the current procedures for dealing with breaches of federal sentencing orders to ensure that breaches are dealt with expeditiously and efficiently. In Discussion Paper 70 the ALRC proposed that the

29 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

30 Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005; Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005.

31 B Cairns, *Australian Civil Procedure* (5th ed, 2002), 429.

32 See, eg, *Trnka v Commonwealth* (1986) 44 SASR 572, 577; *Ford v Gray* (1988) 50 SASR 425.

33 *NBGI v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 233, [11].

Office for the Management of Federal Offenders (OMFO), in consultation with the CDPP and state and territory correctional services authorities, develop a protocol outlining procedures to be followed by correctional authorities and prosecutors in the event of a breach of a federal sentencing order.<sup>34</sup> Some stakeholders supported this proposal.<sup>35</sup> The CDPP submitted that it would be amenable to discussing breach procedures with the OMFO.<sup>36</sup>

### *ALRC's views*

17.26 Self-executing orders are rarely appropriate in the context of criminal proceedings, and courts sentencing federal offenders should not generally make such orders at the time of sentencing.<sup>37</sup> The consequences of a breach of a federal sentencing order can be severe—including the deprivation of liberty—and should not occur automatically. There are many reasons why an offender may breach a sentencing order, some of which may excuse or mitigate the breach. The consequences of a breach of a federal sentencing order should therefore not be predetermined, and judicial officers should deal with breaches only after they have occurred to allow an appropriate response in light of all the circumstances of the case.

17.27 The current procedures for dealing with breaches of sentencing orders should be revised. Submissions and consultations revealed widespread uncertainty about the procedures to be followed upon breach of a federal sentencing order. This confusion could be minimised by the development and widespread dissemination of a protocol outlining the steps to be taken when a federal offender breaches a sentencing order. The OMFO should develop this protocol in consultation with the CDPP and the state and territory corrective services authorities involved in the administration of federal sentencing orders.

**Recommendation 17–4** The Office for the Management of Federal Offenders, in consultation with the Commonwealth Director of Public Prosecutions and state and territory corrective services authorities, should develop a protocol outlining the procedures to be followed by state and territory correctional authorities and prosecutors when a federal offender breaches a sentencing order.

<sup>34</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 17–4.

<sup>35</sup> Department of Corrective Services Western Australia, *Submission SFO 88*, 17 February 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

<sup>36</sup> Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

<sup>37</sup> Such orders are sometimes made to enforce the payment of fines. This issue is discussed further below.

## Fine enforcement

### Responsibility for fine enforcement

#### Background

17.28 Fines do not punish or deter offenders if they are not paid. However, given the high proportion of offenders who are impoverished or otherwise disadvantaged, non-payment of fines is an endemic problem.<sup>38</sup> Each state and territory has its own fine enforcement schemes.<sup>39</sup> Section 15A(1) of the *Crimes Act* picks up and applies state and territory laws relating to the enforcement or recovery of a fine imposed on a federal offender, to the extent that the laws are not inconsistent with federal law, and with certain modifications made by s 15A. Section 15A reflects a policy choice to reduce the cost of federal fine enforcement by using the available state and territory fine enforcement machinery.

17.29 Although s 15A falls outside Part IB of the *Crimes Act*, it is closely linked to other provisions dealing with the imposition of fines. It also raises issues of state and territory involvement in the administration and enforcement of sentences imposed on federal offenders. Accordingly, the ALRC is of the view that it is sufficiently connected with the subject matter of the Inquiry to warrant consideration.

17.30 In some jurisdictions, administrative bodies enforce state fines;<sup>40</sup> in others, state and territory fines are enforced through the courts.<sup>41</sup> For the reasons explained above, it is not possible for state or territory administrative bodies to impose most penalties for fine default on federal offenders. Accordingly, s 15A(1AA) of the *Crimes Act* provides that where a law of a state or territory enables a person or body other than a court to impose certain penalties—such as seizure of property or performance of community service—the penalties can only be imposed on a federal offender by a court of summary jurisdiction.

38 B Chapman and others, *Rejuvenating Financial Penalties: Using the Tax System to Collect Fines* (2003) Centre for Economic Policy Research, 5.

39 See *Fines Act 1996* (NSW) pt 4; *Sentencing Act 1991* (Vic) pt 3 div 4; *State Penalties Enforcement Act 1999* (Qld); *Fines Penalties and Infringement Notices Enforcement Act 1994* (WA); *Criminal Law (Sentencing) Act 1988* (SA) pt 9; *Sentencing Act 1997* (Tas) pt 6; *Magistrates Court Act 1930* (ACT) pt 3.9 div 3.9.2; *Fines and Penalties (Recovery) Act 2001* (NT) pt 5.

40 For example, fines in New South Wales are enforced by the State Debt Recovery Office: *Fines Act 1996* (NSW) ss 113, 114; fines in Queensland are enforced by the State Penalties Enforcement Registry: *State Penalties Enforcement Act 1999* (Qld) s 7; fines in Tasmania are enforced by the Fines Enforcement Unit of the Department of Justice: Tasmania Department of Justice, *Fines Enforcement* Tasmania Department of Justice <[www.justice.tas.gov.au/fines](http://www.justice.tas.gov.au/fines)> at 20 September 2005.

41 Fines in South Australia are enforced by the Fines Payment Unit located within the Magistrates Court of South Australia: *Criminal Law (Sentencing) Act 1988* (SA) pt 9 div 3; fines in Victoria are enforced by the courts: *Sentencing Act 1991* (Vic) s 62; fines in Western Australia are enforced by the Fine Enforcement Registry of the Court of Petty Sessions: *Fines Penalties and Infringement Notices Enforcement Act 1994* (WA) s 6; fines in the Northern Territory are enforced by the Fines Recovery Unit located within the Local Court: *Fines and Penalties (Recovery) Act 2001* (NT) s 27; fines in the ACT are enforced by the court: *Magistrates Court Act 1930* (ACT) div 3.9.2.

17.31 However, s 15A(1ACA) enables an officer of a state or territory court (rather than a judicial officer) to impose a penalty for fine default where the law of the state or territory allows the officer to exercise the court's powers and the court retains effective control and supervision of the exercise of jurisdiction. This means that the delegation of power to the court officer must be effected by, and must be revocable by, the court, and the officer's decisions must be subject to review by the court. In addition, the court must continue to bear responsibility for the exercise of judicial power in relation to the more important aspects of contested matters.<sup>42</sup> The reasons for allowing court officers to enforce federal fines were explained in Parliament as follows:

Firstly, the 'fine enforcement' burden imposed on busy magistrates will be eased. Secondly, many rural and regional areas have a court officer in permanent residence whereas a magistrate may only visit periodically on circuit. In these areas, federal fine enforcement will be easier and more timely if court officers can impose relevant penalties.

Finally, fine enforcement systems in a number of states and territories rely heavily on court officers to impose penalties for fine default. In these states and territories the ability to use court officers in federal cases will allow federal cases to be dealt with more efficiently within the state or territory fine enforcement system.<sup>43</sup>

17.32 There is no available data on how many federal offenders fail to pay their fines. In addition, the extent to which state and territory enforcement processes are used to enforce fines imposed on federal offenders is unknown.

17.33 The Attorney-General's Department (AGD) submitted that the federal fine enforcement regime was problematic because state and territory administrative bodies could not enforce federal fines and it was resource intensive to return to the court to obtain orders to enforce the payment of federal fines.<sup>44</sup> The ATO commented that differences in the resources allocated to fine enforcement in different jurisdictions, and differences in the enforcement options available across the jurisdictions, meant that federal fines were enforced inconsistently.<sup>45</sup>

### ***Options for reform***

17.34 The AGD suggested that federal fines might be enforced more efficiently if the court were to make conditional or self-executing orders outlining the penalty for fine default at the time of sentencing.<sup>46</sup> For example, a court could order a federal offender to pay a fine by a particular date, in default of which the offender would be required to perform a certain amount of community service. This would obviate the need to re-list a matter before the court if the offender failed to pay the fine. The AGD submitted that

42 *Harris v Caladine* (1991) 172 CLR 84, 94–95.

43 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 June 1999, 7865 (P Slipper).

44 Attorney-General's Department, *Submission SFO 52*, 7 July 2005.

45 Australian Taxation Office, *Submission SFO 18*, 8 April 2005.

46 Attorney-General's Department, *Submission SFO 83*, 15 February 2006; Attorney-General's Department, *Submission SFO 52*, 7 July 2005.

the use of conditional orders should not alter the policy that fine defaulters should only be imprisoned as a last resort.<sup>47</sup>

17.35 Some state laws already authorise courts to make conditional or self-executing orders to enforce the payment of fines. For example, in some jurisdictions a court may order a federal offender to pay a fine by a particular date, in default of which the offender is to serve a specified period of imprisonment.<sup>48</sup> Further, in Western Australia a court can in some circumstances order an offender to pay a fine within seven days, in default of which the offender is to report to a community corrections centre to be served with a work and development order.<sup>49</sup> Section 15A picks up these laws and applies them to federal offenders.

17.36 Another option for reform in this area would be the establishment of an entirely different scheme for the collection of federal fines. Some commentators have suggested that this could be achieved by using the tax system to collect fines from offenders by establishing a scheme similar to the existing Higher Education Contribution Scheme (HECS).<sup>50</sup> The ATO submitted that responsibility for the enforcement of federal fines should be vested in a federal agency to ensure consistency in enforcement action.<sup>51</sup> It submitted that it would welcome a review into federal fine enforcement, but noted it had reservations about using the tax system to collect federal fines.<sup>52</sup>

#### *ALRC's views*

17.37 There is a paucity of information regarding federal fines and federal fine enforcement. The ALRC lacks basic data on the number of federal offenders who are fined, the rate of federal fine default, the extent of success of federal fine enforcement action, or the number of matters involving federal fine default that are heard and determined by the courts. Accordingly, the ALRC has been unable to ascertain whether the current procedures for fine enforcement are defective and in need of reform or whether the establishment of a separate federal fine enforcement system is practicable or desirable. However, in view of the criticisms of the current system expressed in some submissions and consultations, the ALRC would support any move towards a thorough review of this area, including the possibility of using the tax system to collect federal fines.

17.38 Section 15A currently picks up state and territory laws that enable orders to be made at the time of sentencing specifying the penalty to be imposed automatically on a federal offender for fine default. For the reasons explained above in relation to breach

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47 Attorney-General's Department, *Submission SFO 52*, 7 July 2005.

48 See, eg, *Penalties and Sentences Act 1992* (Qld) s 182A; *Sentencing Act 1995* (WA) s 59.

49 *Sentencing Act 1995* (WA) s 57A.

50 B Chapman and others, *Rejuvenating Financial Penalties: Using the Tax System to Collect Fines* (2003) Centre for Economic Policy Research.

51 Australian Taxation Office, *Submission SFO 18*, 8 April 2005.

52 Australian Taxation Office, *Submission SFO 72*, 10 February 2006.

of sentencing orders imposed pursuant to ss 19B, 20 and 20AB of the *Crimes Act*, it is generally undesirable for a court to pronounce the consequences of fine default at the time it imposes the fine. Accordingly, the ALRC does not consider it desirable to encourage further use of self-executing orders for federal offenders in jurisdictions in which they are not already used.

### Imprisonment for fine default

17.39 Section 15A(1) picks up and applies state and territory laws regarding imprisonment for fine default. All states and territories have mechanisms that aim to reduce the rate of imprisonment of fine defaulters. They do this by establishing a variety of collection methods to recover fines from offenders, such as garnisheeing wages and seizing property, and by enabling penalties other than imprisonment to be imposed on fine defaulters—such as orders for community service.<sup>53</sup> Where imprisonment is used in response to fine default, the length of any term of imprisonment is generally determined by application of a formula that converts the outstanding fine into a number of days of imprisonment.<sup>54</sup>

17.40 Imprisonment for fine default has been criticised as being ‘unjust and unfair in relation to impecunious offenders, dangerous to vulnerable offenders, expensive, administratively inconvenient and unduly affecting indigenous offenders’.<sup>55</sup> In 1991, the Royal Commission into Aboriginal Deaths in Custody recommended that governments ensure that sentences of imprisonment were not automatically imposed upon default in payment of a fine.<sup>56</sup> The Council of Europe has recommended that, so far as fines are concerned:

custody should be avoided as far as possible in cases of inability to pay, in view of the fact that the original offence was considered insufficiently serious for imprisonment or because such a penalty was inappropriate for other reasons.<sup>57</sup>

17.41 In its 1988 report, *Sentencing of Federal Offenders* (ALRC 44), the ALRC expressed the view that imprisonment for fine default was a harsh and inappropriate response to fine default where the default was not wilful.<sup>58</sup>

53 See, eg, *Sentencing Act 1991* (Vic) s 62; *Sentencing Act 1997* (Tas) s 47; *Magistrates Court Act 1930* (ACT) div 3.9.2; *Fines and Penalties (Recovery) Act 2001* (NT).

54 See, eg, *Magistrates Court Act 1930* (ACT) s 154D(2); *Fines and Penalties (Recovery) Regulations 2001* (NT) reg 15.

55 See B Chapman and others, *Rejuvenating Financial Penalties: Using the Tax System to Collect Fines* (2003) Centre for Economic Policy Research, 7.

56 E Johnston, *National Report of the Royal Commission into Aboriginal Deaths in Custody* (1991), Rec 121.

57 Council of Europe, *Consistency in Sentencing* (1993) Council of Europe Press, Rec no R (92) 17.

58 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [144]. For a discussion of enforcement of civil and administrative penalties, see Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), Ch 31.



17.42 The AGD submitted that imprisonment should be kept as an option of last resort for offenders who default on fines because, without the threat of imprisonment, there is insufficient motivation for offenders to pay their fines.<sup>59</sup>

### ***ALRC's views***

17.43 Imprisonment is generally an inappropriate initial response to fine default. Imprisonment is a costly and severe consequence of fine default, which can have detrimental effects on a federal fine defaulter and his or her family or dependants. Accordingly, imprisonment should not be imposed for fine default if a fine recovery mechanism, such as seizure of property, is likely to be effective, or if a less severe penalty, such as community service, is available and appropriate in the circumstances.

17.44 However, there may be exceptional circumstances in which imprisonment is the only available response to the non-payment of fines and in those circumstances it may be appropriate to impose a term of imprisonment as an initial response to fine default. An example of an exceptional circumstance is when a fine is the only initial sentencing option available to the court, the offender lacks the means to pay the fine, and the risk of the offender being removed from the jurisdiction makes it unlikely that he or she could be penalised for the fine default in any other way.

**Recommendation 17–5** Federal sentencing legislation should provide that, where a fine has been imposed on a federal offender, the offender must not be imprisoned for failure to pay the fine if a fine recovery mechanism is available and likely to be effective, or if a less severe penalty is available and appropriate in the circumstances.

### **Time to pay before imprisonment**

17.45 As noted above, in some jurisdictions judicial officers have the power to order at the time of sentencing that a fine be paid by a particular date, in default of which the offender is to be imprisoned for a specified period. In Western Australia a court that has imposed a fine on an offender can, in some circumstances, order that the offender be imprisoned *until* the fine is paid.<sup>60</sup> However, in other jurisdictions imprisonment cannot be imposed on a fine defaulter until other methods of enforcement have failed.<sup>61</sup>

17.46 An issue that arose in a number of consultations was the enforcement of fines imposed on unlawful non-citizens.<sup>62</sup> In jurisdictions that allow a period of time for the

<sup>59</sup> Attorney-General's Department, *Submission SFO 52*, 7 July 2005.

<sup>60</sup> *Sentencing Act 1995* (WA) s 58.

<sup>61</sup> See, eg, *Fines Act 1996* (NSW), pt 4.

<sup>62</sup> Law Society of the Northern Territory, *Consultation*, Darwin, 29 April 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Darwin, 28 April 2005; Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005.

payment of a fine (such as the Northern Territory), officers of the Department of Immigration and Multicultural Affairs sometimes remove unlawful non-citizens from Australia during the period allowed for payment.<sup>63</sup> Accordingly, their fines cannot be enforced unless the offender is apprehended again on returning to Australia. This problem is exacerbated by the fact that many unlawful non-citizens in the Northern Territory have committed fishing offences, and imprisonment is not a sentencing option for offences under the *Fisheries Management Act 1991* (Cth). Accordingly, a question arises whether federal offenders should be allowed a period of time within which to pay a fine or whether courts sentencing federal offenders should have the power to order that a fine is to be paid immediately, in default of which a penalty may be imposed.

17.47 The ATO submitted that while it was generally supportive of giving offenders a reasonable opportunity to pay a fine, there was a need to consider that non-citizens may decide to voluntarily leave Australia to avoid paying a fine.<sup>64</sup> The CDPP submitted that a default period of imprisonment should be served immediately if a court determines that an offender is unable to pay a fine.<sup>65</sup> The AGD submitted that federal sentencing legislation should prescribe a maximum reasonable time to pay, but noted that an order to pay a fine immediately could be reasonable in certain circumstances.<sup>66</sup>

#### *ALRC's views*

17.48 As a matter of principle, all federal offenders should be given a reasonable opportunity to pay any fine imposed by a court before being imprisoned for fine default. The fact that federal offenders who are also unlawful non-citizens may be removed from Australia by executive action during the period allowed for the payment of the fine does not provide a satisfactory reason to derogate from this principle as a matter of course. Nevertheless, there may be exceptional circumstances in which a court may determine that an order requiring a fine to be paid immediately, or virtually immediately, provides the offender with a reasonable opportunity to pay the fine. Accordingly, the ALRC is of the view that what amounts to a reasonable opportunity to pay a fine should be determined by the court imposing the sentence and should not be expressly prescribed by federal sentencing legislation.

**Recommendation 17–6** Federal sentencing legislation should provide that, where a fine has been imposed on a federal offender, the offender must not be imprisoned for failure to pay the fine until such time as he or she has been given a reasonable opportunity to pay.

63 See *Yusup v The Queen* [2005] NTCCA 19, [2].

64 Australian Taxation Office, *Submission SFO 72*, 10 February 2006.

65 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

66 Attorney-General's Department, *Submission SFO 83*, 15 February 2006.

### Length of imprisonment for fine default

17.49 A number of jurisdictions have a maximum period of imprisonment that can be imposed on an offender who has failed to pay a fine. This maximum period varies. For example, in the Northern Territory it is three months,<sup>67</sup> in Victoria it is two years,<sup>68</sup> and in Western Australia it is the shorter of: (i) the period in days determined by dividing the amount of the fine by \$150; or (ii) the statutory term of imprisonment (if any) provided for the offence.<sup>69</sup>

17.50 The different periods of imprisonment that can be imposed for fine default in the states and territories mean that federal offenders may be treated differently depending on where they are sentenced. In *Djou v Commonwealth Department of Fisheries*, Roberts-Smith J commented that:

there is an obvious unfairness and inconsistency involved where either the range of fines ordinarily imposed or the period of default imprisonment (for similar monetary amounts) vary significantly from one Australian jurisdiction to another.<sup>70</sup>

### ALRC's views

17.51 The disparities in the maximum periods of default imprisonment could result in federal offenders receiving substantially different default penalties in different jurisdictions, notwithstanding that their initial fines were of similar magnitude. Accordingly, it is desirable to seek greater consistency in the maximum periods of imprisonment that can be imposed on federal offenders who fail to pay their fines.

17.52 Federal sentencing legislation should specify a maximum period of imprisonment that can be served by a federal offender for fine default. After surveying the various state and territory maxima, the ALRC has concluded that the period should be 12 months. While there is no science involved in setting a maximum period of imprisonment and alternative maxima could be justified, a ceiling of 12 months will reduce the disparities in the maximum periods of imprisonment for fine default in the states and territories, while still providing a real deterrent to fine default. State and territory maxima that are lower than 12 months should no longer apply to federal offenders because they may be an insufficient response to non-payment of federal fines, which may be substantial.

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67 *Fines and Penalties (Recovery) Act 2001* (NT) s 88; *Sentencing Act 1995* (NT) s 26(3)(c).

68 *Sentencing Act 1991* (Vic) s 63(1).

69 *Sentencing Act 1995* (WA) s 59. As noted above, s 58 of the *Sentencing Act 1995* (WA) allows a court to order in some circumstances that an offender be imprisoned until the fine is paid.

70 *Djou v Commonwealth Department of Fisheries* (2004) 29 WAR 216, 229. See also *Yusup v The Queen* [2005] NTCCA 19, [2].

**Recommendation 17–7** Federal sentencing legislation should provide that the maximum period of imprisonment to be served by a federal offender for failing to pay a fine is 12 months, to the exclusion of any state or territory laws on that subject that are picked up and applied to federal offenders.

## 18. Judicial Specialisation

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### Jurisdictional arrangements in federal criminal matters

18.1 The High Court of Australia was established in 1903, and in due course other federal courts were also created, including the Family Court in 1975, the Federal Court in 1976, and the Federal Magistrates Court in 1999. However, in order to avoid the financial and administrative costs associated with establishing a separate system of federal criminal courts, the Australian Parliament chose to rely heavily on the state and territory courts to adjudicate proceedings with respect to federal offences.

18.2 This was made possible by ss 71 and 77(iii) of the *Australian Constitution*. Section 71 vests the judicial power of the Commonwealth in the High Court, in such other federal courts as the Australian Parliament creates, and in such other courts as it invests with federal jurisdiction. Section 77(iii) provides that the Australian Parliament may make laws investing state courts with federal jurisdiction.

18.3 Section 39(2) of the *Judiciary Act 1903* (Cth) invests state courts with federal jurisdiction in both civil and criminal matters, subject to certain limitations and exceptions. Specific provision is made under s 68(2) of the *Judiciary Act* for the exercise of federal criminal jurisdiction by state and territory courts. Section 68(2) provides:

The several Courts of a State or Territory exercising jurisdiction with respect to:

- (a) the summary conviction; or
- (b) the examination and commitment for trial on indictment; or
- (c) the trial and conviction on indictment;

of offenders or persons charged with offences against the laws of the State or Territory, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, subject to this section and to section 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth.

18.4 It is still the case today that most federal criminal offences are prosecuted in state and territory courts in accordance with state and territory criminal procedures. Only a small number of criminal and quasi-criminal matters are heard in federal courts.<sup>1</sup>

18.5 In some state and territory magistrates' courts there are special arrangements in place to deal with federal matters, for example, magistrates who specialise in the area. In general terms, however, federal offences are heard and determined by state and territory courts in the same way as any other matter—they are listed alongside state or territory matters and are dealt with by the judicial officer who is listed to preside over the court on that day.<sup>2</sup> A number of submissions and consultations noted this could give rise to problems as federal law becomes increasingly complex and diverges from state and territory law.<sup>3</sup>

18.6 This chapter examines the issue of judicial specialisation, both in state and territory courts and in the federal courts, and makes two recommendations designed to ensure that courts at all levels are equipped to deal efficiently and effectively with the sentencing of federal offenders.

## Complexity and divergence in federal criminal matters

18.7 A number of submissions and consultations discussed the increasing complexity of federal criminal law in areas such as cybercrime and other transnational crime, as well as the possibility of an increase in terrorism cases in the future.<sup>4</sup> The Australian Securities and Investments Commission (ASIC) noted the need for specialist experience and expertise in the extremely complex areas of corporate and financial

1 For example, all these courts have power to impose sanctions for contempt of court: *Federal Court of Australia Act 1976* (Cth) s 31; *Family Law Act 1975* (Cth) s 35; *Federal Magistrates Act 1999* (Cth) s 17.

2 National Judicial College of Australia, *Correspondence*, 9 May 2005; National Judicial College of Australia, *Correspondence*, 26 April 2005.

3 J Champion, *Submission SFO 46*, 29 April 2005; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; WT, *Submission SFO 23*, 11 April 2005.

4 G Urbas, *Submission SFO 82*, 14 February 2006; J Champion, *Submission SFO 46*, 29 April 2005; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; WT, *Submission SFO 23*, 11 April 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005; T Glynn, *Consultation*, Brisbane, 2 March 2005.

services law.<sup>5</sup> It was also noted that federal criminal trials can be complex and time-consuming and can be particularly difficult for juries.<sup>6</sup>

18.8 Submissions and consultations also noted that the enactment of the *Criminal Code Act 1995* (Cth), with its new principles of criminal responsibility, means that federal criminal law is diverging in significant and fundamental ways from state and territory criminal law. The Code is giving rise to new jurisprudence and the need for specialist expertise.<sup>7</sup> In addition, changes at the state and territory level, for example, the introduction of majority jury verdicts in some states,<sup>8</sup> have created further divergence between federal and state criminal law and procedure. The issue of divergence is not limited to hearing and trial procedure. Part IB of the *Crimes Act* establishes a sentencing regime specific to federal offenders and, if the recommendations in this Report are implemented, new sentencing legislation will establish a unique framework of objects, purposes, principles and factors particular to federal sentencing.<sup>9</sup>

### Specialisation in state and territory courts

18.9 There are several special arrangements in place across Australia for dealing with federal criminal matters, although these arrangements are limited to summary matters in magistrates courts. In New South Wales, for example, the vast majority of federal matters are dealt with in the Local Court by magistrates who specialise in such matters. In Brisbane, the Magistrates Court deals with federal matters as a specialty jurisdiction. In Tasmania, the Launceston Magistrates Court sets aside one day a month to deal with federal matters.<sup>10</sup>

18.10 Submissions and consultations were divided on whether there should be greater specialisation among state and territory judicial officers in the trial and sentencing of persons charged or convicted of federal offences. In support it was noted that greater specialisation in federal sentencing may enable judicial officers to gain a better understanding of the particular requirements of the federal regime.<sup>11</sup>

18.11 However, other stakeholders noted that the volume of federal criminal matters might dictate the degree of specialisation that is possible within a particular court.

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5 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.

6 Justice M Weinberg, *Consultation*, Sydney, 8 June 2005; Confidential, *Consultation*, Melbourne, 31 March 2005; Chief Justice M Black & Others, *Consultation*, Melbourne, 30 March 2005.

7 J Champion, *Submission SFO 46*, 29 April 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005. Chapter 2 of the Model Criminal Code, which sets out the principles of criminal responsibility, has to date been adopted only at the federal level and in the ACT and the Northern Territory.

8 See, eg, *Juries Act 2000* (Vic) s 46; *Juries Act 1927* (SA) s 57.

9 See, in particular, Chs 2, 4, 5 and 6.

10 National Judicial College of Australia, *Correspondence*, 26 April 2005.

11 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; Welfare Rights Centre Inc (Queensland), *Submission SFO 29*, 15 April 2005; WT, *Submission SFO 23*, 11 April 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005.

Some judicial officers commented that it would be impractical to have greater specialisation in federal matters because there are insufficient resources for judges to specialise either on particular days or in particular types of matters,<sup>12</sup> and that this is a particular issue in Western Australia because of geographical factors.<sup>13</sup> The Commonwealth Director of Public Prosecutions (CDPP) in the Northern Territory did not support magistrates specialising in federal matters and preferred a rotational system.<sup>14</sup>

18.12 Other submissions stated that there is no need for specialisation. One view was that judicial education, rather than specialisation by particular judicial officers, is the way to promote consistency in the sentencing of federal offenders.<sup>15</sup> A second view was that there is no need for specialisation in relation to federal offences because judicial officers are familiar with comparable state offences.<sup>16</sup>

18.13 The magistrates courts in New South Wales, Queensland and Tasmania, discussed above, provide a number of different models of specialisation in federal criminal matters, including specialist judicial officers and dedicated court days. Both models allow a more sustained focus on, and an accretion of experience in, federal matters.

18.14 Another possibility would be for state and territory courts to establish specialist panels of judicial officers to deal with federal criminal matters. Specialist panels of judges have been established in the larger registries of the Federal Court of Australia in areas such as intellectual property, taxation, trade practices, human rights, admiralty and industrial law. Cases within these areas are randomly allocated to a judge on the specialist panel. Judges nominate the panels on which they would like to sit.<sup>17</sup>

### ***ALRC's views***

18.15 The increasing divergence between federal criminal law and state and territory criminal law—in particular, federal sentencing law—does give rise to the need for specialist expertise in relation to the federal regime. Such expertise may be acquired in a number of ways: for example, judicial education is an important strategy for ensuring that all judicial officers who work with federal criminal law have a detailed understanding of it.<sup>18</sup> The ALRC has formed the view that some degree of

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12 Confidential, *Consultation*, Melbourne, 31 March 2005; Justice R Atkinson, *Consultation*, Brisbane, 2 March 2005.

13 Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.

14 Commonwealth Director of Public Prosecutions, *Consultation*, Darwin, 28 April 2005.

15 Law Society of the Northern Territory, *Consultation*, Darwin, 29 April 2005.

16 Queensland Legal Aid, *Consultation*, Brisbane, 2 March 2005.

17 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), [7.23].

18 The need for judicial education is discussed in Ch 19.



specialisation among state and territory judicial officers is also desirable where possible and practicable. However, the nature and volume of federal criminal matters vary significantly between courts. A high degree of specialisation—for example, setting aside whole court days or allowing particular judicial officers to specialise in federal criminal matters—may not be practicable in all state and territory courts.

18.16 To allow maximum flexibility, the ALRC recommends that state and territory courts consider implementing some degree of specialisation in hearing and determining federal criminal matters where this is practicable having regard to the nature and volume of the court's caseload. This may include the setting aside of particular days, or parts of a day, to hear all federal matters together; or the establishment of specialist panels of judicial officers to deal with federal criminal matters.

**Recommendation 18–1** State and territory courts should promote specialisation in the hearing and determination of federal criminal matters by whatever means is most appropriate for those courts, where this is practicable having regard to the nature and volume of their caseloads.

## Original jurisdiction of the federal courts

18.17 Original jurisdiction refers to the power of a court to adjudicate a matter at first instance rather than on appeal from another court. In relation to criminal matters, it generally refers to the hearing of a summary matter or the holding of a trial in an indictable matter and imposing sentence in those cases where the offender pleads guilty or is found guilty. As discussed above, original jurisdiction in federal criminal matters is currently exercised by state and territory courts in nearly all cases.

18.18 While some submissions and consultations supported the existing jurisdictional arrangements, others proposed change to address problems such as the complexity of federal criminal law and sentencing, and the increasing divergence between federal and state criminal law. These proposals ranged from the establishment of an entirely separate federal criminal court system—in which the Federal Magistrates Court (FMC) would hear summary matters at first instance and deal with committal proceedings for indictable offences, and the Federal Court of Australia (FCA) would hear appeals and try indictable offences—to a limited increase in the jurisdiction of the FCA to deal with specific criminal offences.

## Retaining the existing jurisdictional arrangements

18.19 The New South Wales Legal Aid Commission and Victoria Legal Aid both expressed support for the existing arrangements. This was on the basis that state and territory courts have substantial accumulated experience in dealing with federal criminal matters, but federal courts are essentially civil courts and lack the skills and experience to adjudicate criminal cases properly. These organisations were of the view

that it would take federal courts many years to develop expertise in the criminal area due to the relatively small number of federal criminal cases.<sup>19</sup>

18.20 The New South Wales Bar Association also supported leaving jurisdiction with state courts on the basis of their accumulated experience and the fact that there was insufficient workload to justify establishing a separate federal system.<sup>20</sup>

### **Creating a separate federal criminal court system**

18.21 In the 1980 interim report, *Sentencing of Federal Offenders* (ALRC 15), one ALRC commissioner suggested the establishment of a completely separate federal criminal court system.<sup>21</sup> Under this proposed framework, federal magistrates courts would undertake the bulk of federal criminal matters, including committal proceedings for indictable offences; and a single judge of the FCA—or a newly created intermediate level court—would hear appeals from these courts and try indictable offences. A Full Court of the Federal Court would hear appeals from that Court, with the High Court being the final court of appeal.

18.22 However, the majority of commissioners in that report rejected the option of an entirely separate federal criminal court system, recommending instead that the jurisdiction of the FCA be expanded to cover appeals against conviction and sentence in federal criminal matters.<sup>22</sup> This was on the basis that the existing arrangements had withstood the tests of time, convenience and economics and that the added expense of establishing a separate federal criminal court system could not be justified because of

the low numbers of relevant Federal offenders scattered throughout the country, and the need which our criminal justice tradition imposes to deal promptly with criminal matters once initiated.<sup>23</sup>

18.23 Since ALRC 15, the federal judicial system has been significantly expanded with the establishment of the FMC. Jurisdiction has been conferred on the FMC in relation to certain family law matters and a variety of other federal civil matters<sup>24</sup> but not in relation to criminal matters. One option for reform would be to expand the jurisdiction of the FMC to hear federal summary matters at first instance and deal with committal proceedings for federal indictable offences.

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19 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005.

20 New South Wales Bar Association, *Consultation*, Sydney, 2 September 2004.

21 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [155]–[159] (Professor Duncan Chappell).

22 *Ibid.*, Rec 65.

23 *Ibid.*, [153].

24 J Crawford and B Opeskin, *Australian Courts of Law* (4th ed, 2004), 122–123.

18.24 Currently, the FMC is comprised of 31 magistrates. It has a permanent presence in Sydney, Parramatta, Newcastle, Melbourne, Brisbane, Townsville, Adelaide, Launceston, Canberra and Darwin and the Court also conducts circuits to other regional and metropolitan locations.<sup>25</sup> By contrast, in 2004, the Local Court in New South Wales had over 130 magistrates, as well as 26 acting magistrates, working out of 165 locations in that state alone.<sup>26</sup>

18.25 The relatively small number of federal magistrates and their limited geographic distribution were two of the major difficulties identified in submissions and consultations with expanding the original jurisdiction of the FMC to deal effectively with federal criminal matters. A magistrate in Western Australia noted, for example, that the FMC would have difficulty dealing with the geographic area of a state like Western Australia without travelling long distances.<sup>27</sup> Currently, the FMC does not have a permanent presence in Western Australia. Others noted it would take an immense increase in resources to provide equitable access to the Court throughout Australia, including remote communities.<sup>28</sup>

18.26 Submissions and consultations expressed some in-principle support for expanding the jurisdiction of the FMC and the FCA to establish a separate federal criminal court system.<sup>29</sup> Members of the Victorian Bar noted that federal criminal cases are increasing in number and complexity and that the developing jurisprudence around the *Criminal Code* (Cth) requires federal trials and specialist judges.<sup>30</sup>

18.27 However, a number of other stakeholders expressed the view that, in practice, an entirely separate federal criminal court system was not viable for resource reasons.<sup>31</sup> ASIC pointed out that establishing a separate system would require: the appointment of additional magistrates and judges with appropriate commercial and criminal experience; the use of juries; and additional court facilities throughout Australia. ASIC commented that careful consideration would need to be given to the question of whether the benefits of an expanded federal criminal court structure would outweigh the practical difficulties involved.<sup>32</sup>

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25 Federal Magistrates Court of Australia, *Federal Magistrates Court of Australia Website* <<http://www.fmc.gov.au/>> at 6 September 2005.

26 Attorney General's Department (NSW), *NSW Local Courts Website* <<http://www.lawlink.nsw.gov.au/lc.nsf/pages/index>> at 6 September 2005.

27 Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.

28 Department of Immigration and Multicultural and Indigenous Affairs, *Submission SFO 49*, 10 May 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.

29 WT, *Submission SFO 23*, 11 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005; Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005; T Glynn, *Consultation*, Brisbane, 2 March 2005; New South Wales Public Defenders Office, *Consultation*, Sydney, 22 September 2004.

30 Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005.

31 Australian Taxation Office, *Submission SFO 18*, 8 April 2005; J Willis, *Submission SFO 20*, 9 April 2005.

32 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.

18.28 In addition, submissions and consultations noted that the FMC is currently a court of exclusively civil jurisdiction—approximately 80 per cent of its work is in family law—and that there would be a need to recruit a large number of magistrates with criminal law experience if the jurisdiction of the Court were to be expanded.<sup>33</sup> Such expansion would also require the development of court rules and procedures appropriate in the criminal context.

18.29 Concern was also expressed that the objects of the FMC—to operate as informally as possible, to use streamlined procedures, and to make use of appropriate dispute resolution processes<sup>34</sup>—were not appropriate in relation to criminal matters. It was noted that the essential mission of the FMC to provide a ‘cheaper, simpler, and faster method of dealing with less complex civil matters that would otherwise be heard by the Family Court or the Federal Court’<sup>35</sup> might be undermined by an expansion of jurisdiction into the criminal area.

### ***Joint matters and accrued jurisdiction***

18.30 ASIC also noted that there would be a significant restriction on the use of federal courts in ASIC matters because many matters involved offenders charged with both federal and state offences. The *Australian Constitution* imposes limits on the extent to which the jurisdiction of the federal courts can be expanded because federal courts cannot be invested with state jurisdiction.<sup>36</sup> This is likely to give rise to some difficulty for the federal courts in dealing with offenders charged with both federal and state offences—unless the state offences fall within the accrued jurisdiction of the federal court.<sup>37</sup>

18.31 The CDPP provided the ALRC with data on the number of CDPP prosecutions involving both federal and state charges for the five-year period 2000–04. In that period just over 400 joint federal/state matters were prosecuted by the CDPP at first instance.<sup>38</sup> Although it is not possible to say whether all these matters would be heard by the FMC if the original jurisdiction of that Court were expanded, it does indicate that, in a substantial number of cases each year, decisions would have to be made about whether to:

- proceed with the state and federal charges in a state court (assuming that state courts retained concurrent original jurisdiction in federal criminal matters);

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33 A Freiberg, *Submission SFO 12*, 4 April 2005; Chief Justice M Black & Others, *Consultation*, Melbourne, 30 March 2005.

34 *Federal Magistrates Act 1999* (Cth) s 3.

35 J Crawford and B Opeskin, *Australian Courts of Law* (4th ed, 2004), 121.

36 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

37 The same issue does not arise in relation to territory offences.

38 Commonwealth Director of Public Prosecutions, *Correspondence*, 4 May–2 September 2005.

- split the charges and proceed with state and federal charges in different courts; or
- attempt to bring all the charges within the accrued jurisdiction of the FMC.

18.32 The doctrine of accrued jurisdiction was originally developed in relation to the jurisdiction of the High Court but was expanded in the 1980s in a number of cases dealing with the civil jurisdiction of the FCA. The doctrine allows a federal court to deal with questions that would normally fall outside the jurisdiction of the court—for example, a question arising under state law—where it is attached to and not severable from a federal matter, such as where the questions arise out of common transactions and facts. In these circumstances the issues of state law are determined in the exercise of federal jurisdiction.<sup>39</sup>

18.33 While the doctrine was developed in the context of civil matters, it has been cast broadly and there is no reason to suppose that it could not also be applied in relation to criminal jurisdiction vested in a federal court. The doctrine relies on the scope of the term ‘matter’ as used in the *Constitution*, and the term clearly includes criminal matters.<sup>40</sup> A ‘matter’ in the criminal context for the purposes of accrued jurisdiction might, for example, include all offences arising out of the same criminal enterprise. The policy justifications underlying the doctrine apply equally in the criminal context, that is, to avoid multiplicity of proceedings by enabling federal courts to do complete justice between the parties without regard to sterile jurisdictional disputes.

18.34 If the doctrine were to develop in this way, some portion of joint matters could be heard in federal courts, although the limits of the doctrine in this context would need to be developed by the courts over time.

### Expanding the original jurisdiction of the Federal Court of Australia

18.35 Section 19 of the *Federal Court of Australia Act 1976* (Cth) provides that the FCA has such original jurisdiction as is vested in it by laws made by the Australian Parliament. A broad, almost exclusively civil, jurisdiction has been conferred on the FCA by over 150 federal statutes. A more general civil jurisdiction has been conferred on the FCA in matters arising under a law of the Commonwealth by s 39B(1A)(c) of the *Judiciary Act*, but this provision expressly excludes general jurisdiction in relation to criminal matters.

18.36 The FCA has, however, been granted a limited summary jurisdiction in relation to federal criminal matters by various federal statutes.<sup>41</sup> In the intellectual property area, for example, the FCA has concurrent jurisdiction with the state and territory

39 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 562.

40 *R v Murphy* (1985) 158 CLR 596, 617–618.

41 See, eg, *Trade Practices Act 1974* (Cth) s 163; *Copyright Act 1968* (Cth) ss 132(7), 133A(3), 135AT; *Workplace Relations Act 1996* (Cth) s 412(1).

courts to deal with a range of offences under the *Copyright Act 1968* (Cth), although it appears that such proceedings are only rarely brought in the FCA.

18.37 One recent development of interest is the proposal to create new indictable criminal offences for serious cartel behaviour under the *Trade Practices Act 1974* (Cth).<sup>42</sup> Currently, cartel conduct—conduct between competitors designed to limit competition in the markets in which they operate—is prohibited by Part IV of the *Trade Practices Act*, but the FCA is limited to imposing civil penalties. It is possible that the proposed amendment could confer jurisdiction on the FCA to impose criminal sanctions. At present there is no provision in the *Federal Court of Australia Act* for criminal juries, but this would be necessary if the FCA were to be invested with original jurisdiction to try federal indictable offences because s 80 of the *Constitution* requires such trials to be by jury.<sup>43</sup>

18.38 In submissions and consultations support was expressed for this kind of limited expansion of the original jurisdiction of the FCA. This was on the basis that some federal offences would be better dealt with by the FCA because of the Court's existing expertise in relation to complex underlying legislation, such as taxation, corporations and trade practices law.<sup>44</sup> For example, the FCA's existing jurisdiction in relation to breaches of Part IV of the *Trade Practices Act* means that the Court is familiar with the complexities and impact of anti-competitive behaviour in the market and would be well placed to adjudicate any criminal proceedings in this area.

18.39 While some concerns were raised about the limited criminal law experience of FCA judges,<sup>45</sup> Justice Mark Weinberg noted in response that of the 44 judges on the Court, at least a quarter have brought significant criminal law experience to the court from previous positions, for example, as Supreme Court judges.<sup>46</sup> In addition, some judges have ongoing criminal law experience through joint appointments to other courts including the Supreme Courts of the ACT, Norfolk Island and Fiji.

18.40 Concern was also expressed that the predominance of civil matters dealt with by the Court influences the way the Court deals with those criminal matters that do come

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42 P Costello (Treasurer), 'Criminal Penalties for Serious Cartel Behaviour' (Press Release, 2 February 2005).

43 Sections 39–41 of the *Federal Court of Australia Act 1976* (Cth) address jury trials but only in civil suits.

44 Attorney-General's Department, *Submission SFO 83*, 15 February 2006; Chief Justice D Malcolm, *Submission SFO 71*, 10 February 2006; WT, *Submission SFO 23*, 11 April 2005; Chief Justice M Black & Others, *Consultation*, Melbourne, 30 March 2005.

45 Chief Justice J Doyle, *Submission SFO 85*, 16 February 2006; M Johnson, *Consultation*, Darwin, 27 April 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.

46 Justice M Weinberg, *Consultation*, Sydney, 8 June 2005; Chief Justice M Black & Others, *Consultation*, Melbourne, 30 March 2005.

before it, for example, by excessive reliance on affidavit evidence.<sup>47</sup> In consultations with judges and officers of the FCA, it was acknowledged that a review of court rules and procedures would be required in the event of expanded criminal jurisdiction.<sup>48</sup> Such a review would have to consider such issues as the need for committal proceedings, the use of juries in indictable matters, bail, security and the handling of prisoners.<sup>49</sup> Other concerns raised included the cost of establishing such facilities at the federal level and the duplication of facilities at the state and federal levels.<sup>50</sup>

### **ALRC's views**

18.41 In considering the most appropriate jurisdictional arrangements for Australian courts in criminal matters it is difficult, if not impossible, to consider jurisdiction in relation to sentencing in isolation. At first instance, where sentencing follows a hearing or trial, the sentencing process relies heavily on the information put forward at the hearing or trial. It is not practicable to consider the conferral of jurisdiction to sentence in isolation from the conferral of jurisdiction to hear the case. For this reason, the discussion below largely deals with these issues together.

#### ***Creating a separate federal criminal court system***

18.42 It is arguable that the establishment of an entirely separate federal criminal court system would lead to more effective and efficient sentencing of federal offenders. Because of the constitutional constraints on federal courts articulated in *Re Wakim*,<sup>51</sup> such courts would deal exclusively with federal matters, leading to a high level of expertise in such matters. The internal cohesion of the courts could also be used to encourage the exchange of ideas, information and precedents on federal sentencing.

18.43 However, the ALRC has concluded that the establishment of a separate federal criminal court system is not viable given the existing state and territory infrastructure and the very substantial resources that would be required, for example, to expand the jurisdiction of the FMC to deal with federal criminal matters. In order for such court structures to be effective, they would need to be accessible across Australia. The number and geographic dispersal of magistrates in New South Wales give some indication of the resources necessary to achieve this in a country the size of Australia. The ALRC is not persuaded of the need to duplicate the existing infrastructure of state and territory courts at the federal level in this way.

18.44 In addition, other recommendations in this Report will go a long way towards addressing issues of consistency and better decision making in the sentencing of federal offenders in a more cost-effective way than a major expansion of the federal court structure.

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47 Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.

48 Chief Justice M Black & Others, *Consultation*, Melbourne, 30 March 2005.

49 Attorney-General's Department, *Consultation*, Canberra, 16 March 2005.

50 Chief Justice J Doyle, *Submission SFO 85*, 16 February 2006.

51 *Re Wakim*; *Ex parte McNally* (1999) 198 CLR 511.

***Expanding the original jurisdiction of the Federal Court of Australia***

18.45 The state and territory courts deal effectively with a great range of complex matters under federal, state and territory laws. However, in relation to particular offences such as the proposed offence of serious cartel conduct, there is merit in the argument that the FCA is in a stronger position to deal with the matter at first instance. Such matters are not only complex. They are matters in which the FCA has extensive experience given the Court's existing jurisdiction in relation to civil enforcement. The FCA works regularly with the underlying legislation and with the kind of expert evidence necessary in such cases in order to show, for example, the impact of anti-competitive behaviour on the market.

18.46 For similar reasons, the ALRC has formed the view that the original jurisdiction of the FCA should be expanded to hear and determine proceedings in relation to nominated federal offences, where the subject matter of the offences is closely allied to the existing civil jurisdiction of the Court. Criminal jurisdiction would be conferred on the FCA on the basis of the Court's experience in applying complex underlying legislation and in dealing with the relevant facts and evidence in areas such as taxation, corporations and trade practices. A detailed review of offence provisions would be necessary to identify appropriate provisions.

18.47 In Discussion Paper 70 the ALRC proposed that jurisdiction to deal with such offences should be invested concurrently in the FCA and the state and territory courts to ensure that joint federal/state matters involving such offences could be heard together in the state courts where necessary.<sup>52</sup> The conferral of concurrent jurisdiction would mean that, in most cases, the prosecuting authorities would choose whether to proceed in the FCA or in a state or territory court. A number of concerns were raised in relation to this element of the proposal, including the possibility of jurisdictional arguments and forum shopping.<sup>53</sup>

18.48 It is possible that in relation to some federal offences it would be appropriate to confer exclusive jurisdiction on the FCA, for example, in areas in which the Court has particular expertise, there is a strong federal interest, and there are unlikely to be related state or territory offences that would otherwise be prosecuted jointly with the federal offences. This matter should be considered in the context of the detailed review of offence provisions discussed above, taking into consideration the doctrine of accrued jurisdiction and the frequency and need for state offences to be heard and determined alongside particular federal offences. Where there is such a need, it may be more appropriate to confer concurrent jurisdiction on the FCA and state and territory

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52 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 18–2.

53 Chief Justice J Doyle, *Submission SFO 85*, 16 February 2006; Chief Justice D Malcolm, *Submission SFO 71*, 10 February 2006.



courts. A decision on whether the FCA's jurisdiction is to be concurrent or exclusive should be made in relation to individual federal offences.

**Recommendation 18–2** The Australian Parliament should expand the original jurisdiction of the Federal Court of Australia to hear and determine proceedings in relation to nominated federal offences whose subject matter is closely allied to the existing civil jurisdiction of the Federal Court, in areas such as taxation, trade practices and corporations law.



## 19. Other Measures to Promote Better Sentencing

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19.1 Chapter 18 considered judicial specialisation as one means of promoting better sentencing decisions in relation to federal offenders. This chapter considers other measures that may promote better sentencing at the federal level including: the requirement that courts give reasons for their sentencing decisions; prosecutorial assistance to the courts; the establishment of a federal sentencing council; and the education of judicial officers and others involved in the federal criminal justice system.

### Reasons for decision

19.2 In its 1988 report, *Sentencing* (ALRC 44), the ALRC considered the provision of reasons for sentencing decisions as one method of guiding judicial discretion and promoting better decision making. The ALRC expressed the view that better provision of reasons for sentencing decisions would lessen the possibility of those decisions being, or appearing to be, unjustified or arbitrary. It recommended that:

the most appropriate way to promote consistency in sentencing is to encourage judicial officers to frame their decisions in a way that will allow meaningful comparisons to be drawn between them so that the matters that were taken into account, and their significance in the case, can be easily seen and compared.<sup>1</sup>

19.3 Currently, federal sentencing legislation expressly requires the giving of reasons in limited circumstances. Under s 17A(2) of the *Crimes Act 1914* (Cth), where a sentence of imprisonment is imposed for a federal offence, the court is required to explain why no sentence other than imprisonment is appropriate, and to cause those reasons to be entered into the records of the court.

19.4 At common law, the obligation to give reasons is considered a normal incident of the judicial process<sup>2</sup> and 'is of the essence of the administration of justice'.<sup>3</sup> Reasons for decisions are not required in every case,<sup>4</sup> for example, where a decision is 'too plain for argument', or where the reasons for a procedural decision are clear from the context or from the preceding exchanges with the parties or their representatives.<sup>5</sup>

### Should reasons be required in every case?

19.5 There was strong support in submissions and consultations for the giving and recording of reasons in sentencing federal offenders.<sup>6</sup> A number of submissions expressed the view that the giving and recording of reasons would aid consistency and transparency of decision making,<sup>7</sup> as well as enable comparison with sentences in like cases.<sup>8</sup> It has also been argued that if judges were required to give reasons for their sentencing decisions, appeals against sentence would be less likely.<sup>9</sup>

19.6 Some consultations suggested that requiring reasons for sentencing decisions would not affect the current practice of most courts.<sup>10</sup> A number of magistrates

1 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 102.

2 *Pettitt v Dunkley* [1971] 1 NSWLR 376, 387; *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 667.

3 H Gibbs, 'Judgment Writing' (1993) 67 *Australian Law Journal* 494, 494.

4 *Pettitt v Dunkley* [1971] 1 NSWLR 376, 386; *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 666–667.

5 M Kirby, 'On the Writing of Judgments' (1990) 64 *Australian Law Journal* 691, 694.

6 Australian Taxation Office, *Submission SFO 72*, 10 February 2006; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Welfare Rights Centre Inc (Queensland), *Submission SFO 29*, 15 April 2005; JC, *Submission SFO 25*, 13 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005; LD, *Submission SFO 9*, 10 March 2005.

7 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005; LD, *Submission SFO 9*, 10 March 2005.

8 Welfare Rights Centre Inc (Queensland), *Submission SFO 29*, 15 April 2005.

9 F Rinaldi, 'The Role of a Trial Judge's Report in Sentence Appeals' (1980) 4 *Criminal Law Journal* 28, 39.

10 Chief Magistrate I Gray & Others, *Consultation*, Melbourne, 23 February 2006; Justice T Connolly, *Consultation*, Canberra, 13 February 2006; Chief Magistrate Judge D Price & Others, *Consultation*, Sydney, 3 February 2006.

expressed the view that, although the length of the reasons may vary, it is their practice to give reasons for federal sentencing decisions.<sup>11</sup>

19.7 There are arguments against requiring courts to give reasons in every case. For example, such a requirement might result in increased cost and delay, affecting the timely disposition of cases.<sup>12</sup> ALRC 44 noted that requiring courts to give reasons in every case had the potential to create backlogs, particularly in courts of summary jurisdiction with heavy workloads.<sup>13</sup> It has also been argued that it is unnecessary to require courts to give reasons in every case because: most courts give reasons in appropriate cases even in the absence of a requirement to do so; reasons only assist the development of the law in a small number of cases; and the absence of reasons does not amount to a denial of natural justice.<sup>14</sup>

19.8 One judicial officer expressed the view that every offender has a right to know why a particular sentence is imposed.<sup>15</sup> Two submissions stated that reasons should be required in relation to both summary and indictable offences.<sup>16</sup> One submission supported the giving of reasons only in relation to indictable offences,<sup>17</sup> while another stakeholder suggested that the emphasis should be on the giving of reasons for custodial sentences.<sup>18</sup> Some stakeholders also noted that requiring reasons to be given in every case might result in reasons being given perfunctorily.<sup>19</sup> Some submissions expressed the view that there was no real problem in this area, that courts give reasons as a matter of course, and that requiring the giving and recording of reasons in legislation is unnecessary.<sup>20</sup>

### Form and content of reasons

19.9 Sentencing decisions are either given in writing or are given orally and recorded in court transcripts. Because access to court transcripts is often restricted for privacy reasons, it has been argued that, where a sentencing decision establishes a binding legal principle, it should be provided in a written judgment to ensure widespread access to

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- 11 Chief Magistrate I Gray & Others, *Consultation*, Melbourne, 23 February 2006; Chief Magistrate Judge D Price & Others, *Consultation*, Sydney, 3 February 2006.
  - 12 B Beaumont, 'Contemporary Judgment Writing: The Problem Restated' (1999) 73 *Australian Law Journal* 743, 745.
  - 13 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [163].
  - 14 M O'Loughlin, 'Whether Courts Must Give Reasons for Decision' (1999) 73 *Australian Law Journal* 630, 633.
  - 15 Chief Magistrate Judge D Price & Others, *Consultation*, Sydney, 3 February 2006.
  - 16 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; JC, *Submission SFO 25*, 13 April 2005.
  - 17 LD, *Submission SFO 9*, 10 March 2005.
  - 18 J Roberts, *Submission SFO 67*, 16 January 2006.
  - 19 Ibid; Justice T Connolly, *Consultation*, Canberra, 13 February 2006.
  - 20 Chief Justice D Malcolm, *Submission SFO 71*, 10 February 2006; A Freiberg, *Submission SFO 12*, 4 April 2005.

the decision.<sup>21</sup> In consultations, some judicial officers expressed the view that the extra time involved in providing written reasons for sentences would result in inefficiency.<sup>22</sup>

19.10 Little information is available about the content of reasons for courts' sentencing decisions. ALRC 44 expressed doubt about the need for detailed reasons for sentences imposed for minor offences that are dealt with by courts of summary jurisdiction.<sup>23</sup> The ALRC recommended more extensive reasons in relation to the decisions of superior courts.<sup>24</sup> One stakeholder submitted that a legislative provision for a court to state its reasons might be seen as requiring more detailed reasons than those that are currently given.<sup>25</sup>

### ALRC's views

19.11 The giving and recording of reasons for sentencing decisions is likely to lead to better sentencing over time.<sup>26</sup> The giving of reasons requires a more structured and considered approach to sentencing decisions. A statement of reasons provides evidence that the court has considered the correct principles and applied them properly. Transparency of judicial decision making is important for the maintenance of public confidence in the judiciary and the federal criminal justice system. In addition, reasons have the potential to promote consistency by allowing comparison between like cases and serving as precedents for future decisions.

19.12 For these reasons, the ALRC is of the view that federal sentencing legislation should require reasons to be given in every federal sentencing decision, whether the sentence relates to a summary or indictable offence. The requirement should not be limited to situations in which a sentence of imprisonment is imposed.

19.13 However, due regard must be had to the heavy workload of many courts and the need to ensure the timely and efficient disposition of federal criminal matters. It is not necessary for written reasons for sentencing decisions to be given in every case. In many cases—for example, in courts of summary jurisdiction dealing with minor offences—it will be sufficient if the reasons for the courts' sentencing decisions are provided orally and recorded in court transcripts.

19.14 The content of a court's reasons for its sentencing decision will depend on the nature and circumstances of the offence and the sentencing order that is imposed. However, some essential matters should always be addressed in the court's reasons. In particular, the reasons should be adequate to explain the choice of sentencing option and the severity of the sentence imposed. The ALRC is also of the view that the

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21 M Kirby, 'On the Writing of Judgments' (1990) 64 *Australian Law Journal* 691, 693.

22 Chief Magistrate I Gray & Others, *Consultation*, Melbourne, 23 February 2006.

23 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [163].

24 *Ibid.*, [164].

25 Chief Justice D Malcolm, *Submission SFO 71*, 10 February 2006.

26 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), [19.9].

requirement in s 17A(2) of the *Crimes Act*—namely, that the court must explain why no sentence other than imprisonment is appropriate when imposing a sentence of imprisonment—should be retained.

**Recommendation 19–1** Federal sentencing legislation should require a court to state its reasons for decision when sentencing a federal offender for an indictable or summary offence. The reasons may be given in writing or read into the records of the court but in either case should be adequate to explain the choice of sentencing option and the severity of the sentence imposed.

## Role of prosecutors

19.15 Assistance provided to the courts by prosecuting authorities may also contribute to better sentencing decisions. Prosecutors, including the Commonwealth Director of Public Prosecutions (CDPP), have a general duty to assist the court to avoid appealable error.<sup>27</sup> At common law, the positive duty to assist the court is derived from the prosecuting authorities' statutory right to appeal against sentence.<sup>28</sup> The duty has been said to include adequate presentation of the facts; an appropriate reference to any special principles of sentencing that might reasonably be thought relevant to the case in hand; and a fair testing of the defendant's case so far as it appears to require it.<sup>29</sup> A failure by a prosecutor to fulfil this duty can impact on a crown appeal on sentence.<sup>30</sup>

19.16 There is some uncertainty about how precise a prosecutor should be in making submissions on sentence. One view is that while it is proper and desirable for the prosecution to make submissions about sentencing principles, and even about the type of sentence, it is inappropriate and undesirable for the prosecution to go further and make submissions about either the range or the quantum of a sentence.<sup>31</sup> An alternative view is that the prosecution should assist the court by making submissions as to the range of sentences that could be said to be open to the court in the circumstances.<sup>32</sup>

27 *R v Tait* (1979) 24 ALR 473, 477; Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (1998) <<http://www.cdpp.gov.au/Prosecutions/Policy/Default.aspx>> at 6 October 2004; Attorney-General's Department, *Legal Services Directions: Directions on the Commonwealth's Obligation to Act as a Model Litigant* Attorney-General's Department <[www.law.gov.au/olsc](http://www.law.gov.au/olsc)> at 13 October 2004.

28 See, eg, *R v McKeown* [1940] QSR 202, 214.

29 *R v Tait* (1979) 24 ALR 473, 477.

30 See *Ibid*; *R v Jermyn* (1985) 2 NSWLR 194; *R v Howlett* (1997) 97 A Crim R 153.

31 J Willis, 'Some Aspects of the Prosecutor's Role at Sentencing' (1996) 6 *Journal of Judicial Administration* 38, 47.

32 *R v Casey* (1986) 20 A Crim R 191, 196.

19.17 The CDPP has developed administrative guidelines on the role of the CDPP at sentencing. These guidelines make clear that the role of the prosecutor in the sentencing process is: to be fair; to ensure the penalty imposed is appropriate in all the circumstances of the case; not to focus on ensuring the maximum penalty is imposed; and to remain dispassionate. The guidelines note it is a matter for the prosecutor to decide whether to address on penalty and, if so, what matters to cover.<sup>33</sup> The guidelines also indicate matters that may be relevant when a prosecutor is considering whether to address on sentence, or is addressing on sentence when a defendant is unrepresented.<sup>34</sup> The CDPP's guidelines are not currently publicly available.

19.18 In practice, the CDPP provides a great deal of assistance to the court when dealing with Part IB of the *Crimes Act*. This has involved the provision of the relevant sections of the legislation and an explanation of them in the form of written submissions, as well as information on comparable cases derived from the CDPP's internal database.<sup>35</sup>

19.19 A number of submissions and consultations discussed the role of prosecuting authorities in promoting better sentencing of federal offenders. In general, there was strong support for the prosecuting authorities' role in providing assistance to the court.<sup>36</sup> The Australian Taxation Office submitted that prosecuting authorities had a role in providing the court with information relevant to sentencing, including the offender's antecedent criminal history, relevant precedents, and information on the prevalence and impact of the type of offence committed.<sup>37</sup> The CDPP considered that there is a role for the prosecution in addressing the court on penalty and quantum,<sup>38</sup> although there appear to be variations in the practices of regional offices in this regard. Others expressed the view that prosecutors should not make submissions to the court on the quantum of the sentence.<sup>39</sup>

19.20 A further issue for consideration is whether the role of the prosecutor should be formalised, perhaps in the *Prosecution Policy of the Commonwealth*,<sup>40</sup> or in standards

33 There is an exception in the case of major prosecutions.

34 Commonwealth Director of Public Prosecutions, *Correspondence*, 29 October 2004.

35 Commonwealth Director of Public Prosecutions, *Consultation*, Darwin, 28 April 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004; New South Wales Bar Association, *Consultation*, Sydney, 2 September 2004.

36 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; Australian Taxation Office, *Submission SFO 72*, 10 February 2006; J Willis, *Submission SFO 74*, 10 February 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; LD, *Submission SFO 9*, 10 March 2005; Chief Magistrate I Gray & Others, *Consultation*, Melbourne, 23 February 2006; Chief Judge at Common Law P McClellan and Others, *Consultation*, Sydney, 2 February 2006; New South Wales Bar Association, *Consultation*, Sydney, 2 September 2004.

37 Australian Taxation Office, *Submission SFO 18*, 8 April 2005.

38 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

39 A Freiberg, *Submission SFO 12*, 4 April 2005; M Johnson, *Consultation*, Darwin, 27 April 2005.

40 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (1998) <<http://www.cdpp.gov.au/Prosecutions/Policy/Default.aspx>> at 6 October 2004.



such as *Directions on the Commonwealth's Obligation to Act as a Model Litigant*.<sup>41</sup> There was very little comment on this issue in submissions and consultations.

### ALRC's views

19.21 Prosecutors play an important role in assisting the courts in sentencing federal offenders. The CDPP's practice of providing the court with relevant legislative provisions and information on precedents and comparable cases is particularly useful where state and territory judicial officers do not deal with federal criminal matters on a regular basis. This kind of information is likely to help prevent error by providing guidance on whether the proposed sentence is within the usual range imposed in like cases in the past, and in deciding whether any departure from that range is justifiable. The CDPP is in a unique position to provide this information because, unlike the state and territory courts, the CDPP focuses almost entirely on federal criminal matters and keeps detailed records on such matters across all jurisdictions. The CDPP also has an extensive database that is used for various in-house purposes, including providing comparative sentencing information to the courts. The ALRC is of the view that the CDPP should continue its practice of providing detailed information to the court when dealing with federal offences, including statistical and other information about comparable cases.

19.22 In addition, in Chapter 21 the ALRC recommends the development of a national sentencing database to ensure that the sort of information currently available to the CDPP on the sentencing of federal offenders is made more widely available to judicial officers, prosecutors, defence lawyers, researchers and members of the public.

19.23 While the current CDPP practice in relation to assisting the courts on sentencing appears to be satisfactory, in the interests of transparency the CDPP should consider making its administrative guidelines on the role of the prosecutor in sentencing publicly available.<sup>42</sup>

**Recommendation 19-2** The Commonwealth Director of Public Prosecutions (CDPP) should continue its practice of providing courts with detailed information with respect to the sentencing of federal offenders, including statistical and other information about comparable cases.

41 Attorney-General's Department, *Legal Services Directions: Directions on the Commonwealth's Obligation to Act as a Model Litigant* Attorney-General's Department <[www.law.gov.au/olsc](http://www.law.gov.au/olsc)> at 13 October 2004.

42 This was supported in one submission: J Willis, *Submission SFO 74*, 10 February 2006.

## Establishment of a federal sentencing council

### Background

19.24 A third measure that may promote better sentencing decisions is the establishment of a sentencing commission or council to advise on matters related to sentencing. In recent years, governments have established a number of such bodies. The objectives of these bodies usually include the promotion of consistency in sentencing, but their constitutions and functions vary greatly.

19.25 At present, there is no sentencing commission or advisory council at the federal level in Australia; however, both New South Wales and Victoria have established sentencing councils at the state level.<sup>43</sup> Broadly speaking, these councils are constituted by persons with experience in community issues affecting courts, senior academics, members of support or advocacy groups for victims of crime (or persons who have expertise in matters associated with victims of crime), at least one prosecution lawyer and one defence lawyer, and others with experience in the operation of the criminal justice system.<sup>44</sup>

19.26 The functions of the state sentencing councils include advising the government—or stating their views to the courts—on guideline judgments; advising and consulting with the government in relation to offences suitable for standard non-parole periods and their proposed length; conducting research and disseminating information on sentencing matters to the government, the judiciary and other interested persons; and consulting with government departments, other interested persons or bodies and the general public on sentencing matters.<sup>45</sup>

19.27 Although the state sentencing councils have only advisory, research and consultative functions, similar bodies in overseas jurisdictions have rule-making powers and a more direct impact on individual cases. For example, the main function of sentencing councils in the United Kingdom and a number of jurisdictions in the United States is the development and promulgation of sentencing guidelines.<sup>46</sup>

43 A sentencing council was proposed in Queensland but the Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2005 (Qld) failed to pass through the Queensland Parliament: Queensland, *Parliamentary Debates*, Legislative Assembly, 29 September 2005, 3046. The establishment of a sentencing advisory council in Tasmania has been raised in the Tasmania Law Reform Institute's issues paper on sentencing: K Warner, *Sentencing—Issues Paper No 2* (2002) Tasmania Law Reform Institute, 133.

44 *Sentencing Act 1991* (Vic) s 108F. New South Wales has an express requirement that the Sentencing Commission be chaired by a retired judicial officer, and that the Commission include persons with expertise or experience in law enforcement: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100I, sch 1A cl 2.

45 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100J; *Sentencing Act 1991* (Vic) s 108C(1). Not all the stated functions are performed by each sentencing council.

46 See, eg, *Criminal Justice Act 2003* (UK) s 170 (Sentencing Guidelines Council); *Sentencing Reform Act of 1984* 28 USC (US) s 994; (United States Sentencing Commission); *Minnesota Statutes 2004* s 244.09(5), (7), (11) (Minnesota Sentencing Guidelines Commission).

19.28 ALRC 44 recommended the establishment of a sentencing council within the Australian Institute of Criminology (AIC).<sup>47</sup> It was envisaged that the major function of the sentencing council would be to provide judicial officers with comprehensive information in order to promote consistency in the sentencing of federal offenders. In addition, the proposed sentencing council was to: advise the Attorney-General on the need for particular programs relating to punishment and sentencing; monitor sentencing practices; provide information on a systematic basis to the public through its own publications and through the mass media; and provide education programs to judicial officers. The proposed sentencing council was also to review maximum prison terms and to provide advice on new non-custodial sentencing options, and the impact of punishment on young offenders.

### Issues and problems

19.29 A significant number of stakeholders supported the establishment of a federal sentencing council.<sup>48</sup> There was some disagreement about the tasks such a body should perform—ranging from research alone,<sup>49</sup> to research and the provision of advice,<sup>50</sup> to a broader role including oversight of the federal sentencing system, preparation of guidelines and consideration of mitigating and aggravating factors.<sup>51</sup> Although there was some judicial interest in the establishment of such a council, there was also concern that its functions may be seen as interfering with the independence of judicial officers.<sup>52</sup>

19.30 One stakeholder expressed the view that a sentencing council could play an important role in responding to public opinion and helping to correct public misconceptions about sentencing. It was acknowledged that a number of functions that a federal sentencing council could perform can be discharged by existing bodies such as the AIC. However, it was submitted that there is clear benefit in having an organisation dedicated exclusively to monitoring and guiding the sentencing process, and that the impact of a sentencing council on the sentencing process at the federal and state level may be considerable. It was suggested that the recommended national sentencing database is an example of a task that could be assigned to a sentencing council.<sup>53</sup>

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47 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [275], [277], [282].

48 J Roberts, *Submission SFO 67*, 16 January 2006; Attorney General B Debus, *Submission SFO 65*, 9 January 2006; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; WT, *Submission SFO 23*, 11 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005; BN, *Submission SFO 17*, 8 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; LD, *Submission SFO 9*, 10 March 2005.

49 JC, *Submission SFO 25*, 13 April 2005.

50 Sisters Inside Inc, *Submission SFO 40*, 28 April 2005.

51 A Freiberg, *Submission SFO 12*, 4 April 2005; A Freiberg, *Consultation*, Melbourne, 30 March 2005.

52 Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.

53 J Roberts, *Submission SFO 67*, 16 January 2006.

19.31 Commentators have expressed support for sentencing councils on the basis that, being one step removed from political processes, councils can provide more objective information to legislators and courts on how the sentencing process should develop. It is also said that councils can promote the development of sentencing principles,<sup>54</sup> recommend changes to make sentencing more socially defensible and scientifically based,<sup>55</sup> and ensure that the media receives accurate information about sentencing policy and practices.<sup>56</sup> One commentator observed that the broad-based membership of both the New South Wales and the Victorian sentencing councils allows greater community input into the sentencing process. He argued that councils can play a role in gauging as well as creating public opinion, and that this may address public concerns about judges being seen as out of touch with community expectations on sentencing.<sup>57</sup>

19.32 Arguments against sentencing councils are that: they displace parliament in determining an appropriate sentencing framework; their advice to courts on sentencing guidelines and principles is an unacceptable interference with the role of the courts and has the potential to interfere with the exercise of judicial discretion;<sup>58</sup> they may place the courts under moral pressure to assimilate the council's views and to determine sentences according to statistical norms rather than individual circumstances;<sup>59</sup> and they represent unnecessary bureaucracy.<sup>60</sup>

### ALRC's views

19.33 In the ALRC's view, the functions discharged by state sentencing councils in Australia are to be commended. Better sentencing decisions and sound evidence-based policies can be promoted by disseminating sentencing statistics, analysing sentencing trends and conducting broad community consultation.

19.34 However, these functions do not necessarily require the establishment of a new body at the federal level. In general it is undesirable to establish new government agencies unless there is a compelling case to do so, particularly where new functions can be performed effectively by existing agencies. In order to justify the establishment of a federal sentencing council it would be necessary to show that the functions to be performed by the council were necessary at the federal level and were not being, or could not be, performed by other bodies. The ALRC has come to the view that three of the primary functions of sentencing councils—research, advice and rule making—are currently being performed by other bodies, will be performed by other bodies if the

54 M Findlay, S Odgers and S Yeo, *Australian Criminal Justice* (3rd ed, 2005), 282, 283, 285.

55 M Bagaric and R Edney, 'The Sentencing Advisory Commission and the Hope of Smarter Sentencing' (2004) 16 *Current Issues in Criminal Justice* 125, 126.

56 M Findlay, S Odgers and S Yeo, *Australian Criminal Justice* (3rd ed, 2005), 282, 283, 285.

57 A Abadee, 'The Role of Sentencing Advisory Councils' (Paper presented at Sentencing: Principles, Perspectives & Possibilities, Canberra, 12 February 2006), 3, 5.

58 Queensland, *Parliamentary Debates*, Legislative Assembly, 29 September 2005, 3031–3032 (L Lavarch—Minister for Justice and Attorney-General).

59 Queensland, *Parliamentary Debates*, Legislative Assembly, 29 September 2005, 3034 (K Shine).

60 J Silverii, 'Concern Over Government Sentencing Reform' (2003) 77(5) *Law Institute Journal* 20, 20.

recommendations in this Report are implemented, or (in the case of rule making) are not appropriate in the federal criminal justice system.<sup>61</sup>

19.35 In relation to the research function, the ALRC has recommended that the Australian Government continue to support the establishment of a national sentencing database to provide detailed information on the sentencing of federal offenders to judicial officers, prosecutors, defence lawyers and others.<sup>62</sup> In addition, the AIC already conducts research and statistical analysis in order to provide advice to the Australian Government and other key stakeholders (such as law enforcement agencies and community organisations) to support the formulation of evidence-based policy in the field of criminal justice.

19.36 In relation to the advice function, the Office for the Management of Federal Offenders (OMFO),<sup>63</sup> once established, will be responsible for overseeing federal offenders, liaising with the states and territories, and providing advice to the Australian Government in relation to federal offenders and relevant aspects of the federal criminal justice system.<sup>64</sup> The OMFO will not have the independence from government that a sentencing council would have. However, given the number of federal offenders and the fact that most other functions of a sentencing council are being or will be taken up by other bodies if the recommendations in this Report are implemented, the ALRC has concluded that the establishment of a stand alone federal sentencing council is not warranted at this time.

19.37 In relation to the consultative function, the ALRC has made no specific recommendations in this Report on community input into the federal sentencing process. However, there is no impediment to the OMFO or other areas of the Attorney-General's Department engaging in community consultation to inform the policy development process. For example, the terms of reference for the Australian Government's *Review of Criminal Penalties in Commonwealth Legislation* require the Department to seek to understand community expectations about penalising criminal offences.<sup>65</sup> The Minister for Justice and Customs, Senator the Hon Chris Ellison, has said that the Government is keen to hear the views of the community on this matter and will be seeking public comment in response to an issues paper.<sup>66</sup>

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61 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), [19.30].

62 See Rec 21–1.

63 The establishment of the OMFO is recommended in Ch 22: Rec 22–3.

64 Rec 22–4.

65 Attorney-General's Department, *Terms of Reference—Review of Criminal Penalties in Commonwealth Legislation* <<http://www.ag.gov.au/penalties>> at 21 March 2006.

66 C Ellison (Minister for Justice and Customs), 'Review of Criminal Penalties in Commonwealth Legislation' (Press Release, 23 February 2006).

19.38 In relation to the rule-making function, provision of advice on guideline judgments and factors that aggravate and mitigate sentence will not be necessary if the relevant recommendations in this Report are implemented.<sup>67</sup>

## **Education about federal sentencing**

19.39 A further measure that may promote better sentencing in relation to federal offenders is the education of judicial officers and others who are involved in the federal criminal justice system. This section considers judicial education; the development of a bench book on federal sentencing; the education of prosecutors, other legal practitioners and court services officers about federal sentencing; as well as university education about the federal criminal justice system.

### **Judicial officers**

19.40 As discussed in Chapter 18, most federal criminal offences are prosecuted in state and territory courts. While there is some measure of specialisation in some courts dealing with federal criminal matters, this is not possible in many courts because of the relatively small number of federal criminal matters being heard. Generally, federal matters are listed alongside state or territory matters and are dealt with by the judicial officer who is listed to preside over the court on that day.<sup>68</sup> Federal sentencing involves the application of a distinct sentencing regime and this can give rise to problems if the regime is not well understood. Judicial officers currently acquire educational information about sentencing from a number of sources, which are identified below.

19.41 *Courts*: Judicial education committees in some Australian courts help to develop and deliver professional development programs for the judicial officers of those courts. Many courts also hold annual conferences or more regular meetings of judicial officers, which include elements of professional development.

19.42 *National Judicial College of Australia*: The National Judicial College of Australia (NJCA) is an independent body that provides programs and professional development resources to judicial officers in Australia.<sup>69</sup> It was established in response to the ALRC's recommendation in its report on the federal civil justice system, and is jointly funded by contributions from the Commonwealth and some state and territory governments.

19.43 *Judicial Commission of New South Wales*: The Judicial Commission of New South Wales is an independent statutory corporation and part of the judicial arm of the

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<sup>67</sup> See Chs 6 and 21.

<sup>68</sup> However, in some courts federal criminal matters are listed on the same day, and the Local Court of New South Wales has a dedicated Commonwealth list: see Ch 18.

<sup>69</sup> Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), Rec 8.

New South Wales government. One of its principal functions is to organise continuing education and training of judicial officers in New South Wales.

19.44 *Judicial College of Victoria*: The Judicial College of Victoria is an independent statutory authority established to assist the professional development and continuing education of Victorian judicial officers by developing and conducting judicial education programs; producing publications; and providing professional development services, continuing judicial education and training services.

19.45 *The Australian Institute of Judicial Administration*: The Australian Institute of Judicial Administration (AIJA) is a research and educational institute associated with Monash University. The principal objectives of the AIJA include research into judicial administration and the development and conduct of educational programs for judicial officers, court administrators and members of the legal profession.

19.46 *Judicial Conference of Australia*: The Governing Council of the Judicial Conference of Australia consists of judges and magistrates drawn from all jurisdictions and levels of the Australian court system. Although the Conference does not provide formal judicial education programs, it hosts an annual colloquium.

19.47 These judicial education bodies run a variety of programs relevant to sentencing and, on occasion, to federal sentencing. However, at the present time only the NJCA appears to have regular programs targeted specifically at federal sentencing issues, while the Judicial Commission of New South Wales has organised specific programs from time to time.

19.48 In addition to programs offered by these bodies, judicial exchange programs may also be a source of information on federal sentencing. Judicial officers from one jurisdiction have been appointed to courts of another jurisdiction on occasion,<sup>70</sup> including under a judicial exchange program between the Northern Territory and New South Wales.<sup>71</sup>

### ***Submissions and consultations***

19.49 A number of cases indicate that judicial officers occasionally misapply the provisions of Part IB of the *Crimes Act* or fail to apply relevant provisions at all.<sup>72</sup> This

70 For example, a special bench of the New South Wales Court of Appeal was constituted by judges from Western Australia, Queensland and Victoria to hear an appeal in which Heydon J, then a member of that court, was a party: *Heydon v NRMA Ltd* (2000) 51 NSWLR 1.

71 R French, 'Judicial Exchange—Debalkanising the Courts' (2006) 15 *Journal of Judicial Administration* 142, 157–158.

72 See, eg, *R v O'Brien* (1991) 57 A Crim R 80, 84; *R v Salles* [2003] QCA 127; *R v Karipidis* [2003] NSWCCA 168, [28]–[29].

was confirmed in consultations.<sup>73</sup> To the extent that federal law picks up and applies the sentencing laws of the states and territories, there have been a number of cases in which judicial officers have misapplied those laws as well.

19.50 Submissions and consultations also identified a number of problem areas that might be addressed through judicial education. These included the difficulties faced by practitioners in explaining the application of the *Crimes Act* to judicial officers who were used to applying the relevant state or territory sentencing legislation;<sup>74</sup> judicial reluctance to specify a reduction in sentence on the basis of promised cooperation by a federal offender, as required by s 21E of the *Crimes Act*;<sup>75</sup> and failure to use plain language in explaining sentences to offenders, especially in relation to Indigenous offenders.<sup>76</sup>

19.51 In Discussion Paper 70 (DP 70), the ALRC proposed that the NJCA, in consultation with other judicial education bodies, should provide regular training to judicial officers in relation to the sentencing of federal offenders.<sup>77</sup> A number of submissions supported this proposal.<sup>78</sup> Some submissions emphasised the need to provide education and training to people involved in the administration of criminal justice on the special needs and concerns of people with a mental illness or intellectual disability.<sup>79</sup> Others submissions suggested that training programs for judicial officers should include sessions on the rights and needs of victims and the effect of victimisation.<sup>80</sup>

19.52 The NJCA also expressed support for the proposal,<sup>81</sup> but submitted that its ability to implement it would depend on sufficient funding. At present, government funding meets only the operational costs of the NJCA's secretariat, and the presentation of programs is dependent on courts meeting the actual costs of the programs through registration fees. The NJCA commented that because many courts do not receive specific funding for judicial professional development, they have limited ability to fund participation by their judicial officers in the NJCA's programs. The NJCA also submitted that in developing these training programs, consultations should be held with both the judicial education committees of the courts and other judicial education bodies.

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73 Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005.

74 Law Society of the Northern Territory, *Consultation*, Darwin, 29 April 2005.

75 Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005.

76 Aboriginal Justice Advisory Committee and North Australian Aboriginal Legal Aid Service, *Consultation*, Darwin, 28 April 2005.

77 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 19–3.

78 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; JC, *Submission SFO 25*, 13 April 2005; National Judicial College of Australia, *Consultation*, Canberra, 13 February 2006.

79 Department of the Attorney General Western Australia, *Submission SFO 96*, 15 March 2006; New South Wales Guardianship Tribunal, *Submission SFO 69*, 8 February 2006.

80 South Australia Victims of Crime Co-ordinator, *Submission SFO 84*, 15 February 2006; Victim Support Australasia, *Submission SFO 60*, 21 December 2005 (view endorsed by Victim Support Services Inc).

81 National Judicial College of Australia, *Consultation*, Canberra, 13 February 2006.



19.53 Some support was expressed in submissions and consultations for the development of inter-jurisdictional exchange programs for judicial officers as one way to address issues of consistency.<sup>82</sup>

***ALRC's views***

19.54 There is a need for regular training to be provided to judicial officers in relation to the sentencing of federal offenders. This need arises not only from the complexity of Part IB itself but from the complex interaction between Part IB and those parts of state and territory sentencing legislation that are picked up and applied to the sentencing of federal offenders.

19.55 In addition, there is a number of problem areas that might be addressed through judicial education, including judicial reluctance to specify reduction in sentence on the basis of promised cooperation by a federal offender, and failure to use plain language in explaining sentences to offenders. Issues concerning victims and special categories of offenders should also be the subject of judicial education.<sup>83</sup>

19.56 The NJCA is well placed, in consultation with courts and other judicial education bodies, to develop and deliver appropriate training modules for judicial officers on the sentencing of federal offenders. Consultation with courts and other judicial education bodies will ensure a coordinated and consistent approach to these issues across Australia.

19.57 The ALRC is also of the view that Australian governments and courts should develop and support opportunities for judicial officers exercising federal criminal jurisdiction to serve on courts in other jurisdictions. Such inter-jurisdictional exchange programs will raise awareness of developments in federal sentencing across jurisdictions and will help to ensure more consistent decision making in the sentencing of federal offenders.

**Recommendation 19–3** The National Judicial College of Australia (NJCA), in consultation with courts and other judicial education bodies, should provide regular training to judicial officers in relation to the sentencing of federal offenders.

82 Chief Judge P McClellan, *Submission SFO 77*, 10 February 2006; Justice P Johnson, *Submission SFO 73*, 10 February 2006; Chief Judge at Common Law P McClellan and Others, *Consultation*, Sydney, 2 February 2006. Guideline judgments are discussed in Ch 21.

83 See Recs 2–4, 6–1 and 14–1 on victim issues, and Chs 27–29 and Rec 19–5 on issues relevant to special categories of offenders.

**Recommendation 19–4** Australian governments and courts should develop and support opportunities for judicial officers exercising federal criminal jurisdiction to serve on courts in other jurisdictions to promote greater consistency in sentencing of federal offenders.

### Bench books

19.58 A bench book outlines what judicial officers ‘may need to know, understand and do on a day-to-day basis’ in the form of a practice manual.<sup>84</sup> Bench books provide guidance only and are not intended to lay down or develop the law.<sup>85</sup>

19.59 Bench books in some jurisdictions include a section on federal criminal law. For example, in New South Wales, the *Criminal Trial Courts Bench Book* prepared by the Judicial Commission of New South Wales contains a section on the *Criminal Code* (Cth). The *Queensland Supreme and District Courts Bench Book*,<sup>86</sup> the *South Australian Magistrates’ Bench Book*<sup>87</sup> and the *Local Courts of New South Wales Bench Book* contain a section on Commonwealth offences. The *Victorian Sentencing Manual* published by the Judicial College of Victoria also contains some commentary on federal sentencing.<sup>88</sup>

19.60 Some states now have bench books that deal with ethnic, gender and cultural issues. The *Aboriginal Benchbook for Western Australian Courts* (the Aboriginal Benchbook) is a pilot project initiated by the National Indigenous Cultural Awareness Committee of the AIJA.<sup>89</sup> The objectives of the Aboriginal Benchbook are to assist judicial officers in understanding cross-cultural issues that may arise in criminal proceedings involving Aboriginal and Torres Strait Islander (ATSI) people, and to serve as a model or template for adaptation and application in other Australian jurisdictions.<sup>90</sup> The Aboriginal Benchbook is currently specific to Western Australia and contains no commentary on ATSI federal offenders.

84 L Armytage, ‘Developing Bench Books for Tribunals: Some Guidelines’ (Paper presented at Sixth Annual AIJA Tribunals Conference, Sydney, 5–6 June 2003), 2.

85 See, eg, *R v Forbes* [2005] NSWCCA 337, [72]–[76].

86 Queensland Courts, *The Queensland Supreme and District Courts Bench Book* (2004) <[www.courts.qld.gov.au/practice/benchbook.htm](http://www.courts.qld.gov.au/practice/benchbook.htm)> at 1 October 2005.

87 A Newman, *Magistrates’ Bench Book* Courts Administration Authority South Australia <[www.courts.sa.gov.au/lawyers/index2.html](http://www.courts.sa.gov.au/lawyers/index2.html)> at 1 October 2005.

88 Judicial College of Victoria, *Victorian Sentencing Manual* (2005) <[www.judicialcollege.vic.edu.au](http://www.judicialcollege.vic.edu.au)> at 4 November 2005.

89 S Fryer-Smith, *Aboriginal Benchbook for Western Australian Courts (AIJA Model Indigenous Benchbook Project)* (2002) <<http://www.aija.org.au/online/ICABenchbook.htm>> at 7 October 2005, 1:1.

90 Ibid, 1:2, 1:3.

19.61 In Queensland, the *Equal Treatment Benchbook* has adopted parts of the Aboriginal Benchbook and includes commentary on Indigenous culture, language barriers and other issues faced by Indigenous people in the criminal justice system.<sup>91</sup> In addition, it contains sections covering justice and equity, ethnic diversity in Queensland, religion, family diversity, oaths and affirmations, effective communications in court proceedings, disability, self-represented parties, children, gender, sexuality and gender identity.

19.62 In the United Kingdom, the Judicial Studies Board's *Equal Treatment Bench Book* contains sections covering equality before courts and tribunals, minority ethnic communities, belief systems, children, disability, gender inequality and sexual orientation.<sup>92</sup>

19.63 There are currently no bench books on federal criminal law or federal sentencing law. As noted in the preceding section, there have been difficulties with the application of Part IB of the *Crimes Act*, and with the intersection between federal sentencing legislation and state and territory sentencing legislation.

19.64 In addition, there are no bench books at the federal level dealing with special categories of offenders, such as young offenders, ATSI offenders or offenders from culturally and linguistically diverse backgrounds. As discussed in Chapters 27 to 29, some special categories of offenders are strongly represented in the federal offender population. There is also judicial recognition of the need to alert judicial officers to issues relating to Australia's racial and cultural diversity.<sup>93</sup>

19.65 In DP 70, the ALRC proposed that the NJCA, in consultation with other judicial education bodies, develop a bench book providing general guidance for judicial officers on federal sentencing law. The ALRC proposed that the bench book should indicate how federal sentencing law interacts with relevant state and territory law in each jurisdiction, and should include commentary on equal treatment and the sentencing of ATSI people.<sup>94</sup> This proposal was supported by the CDP.<sup>95</sup> Another stakeholder emphasised the need for the bench book to include commentary on

91 Supreme Court of Queensland, *Equal Treatment Benchbook* <<http://www.courts.qld.gov.au/practice/etbb/default.htm>> at 10 October 2005, Chs 7–10, and Ch 9.18.

92 Judicial Studies Board, *Equal Treatment Bench Book* <<http://www.jsboard.co.uk/etac/etbb/>> at 24 October 2005.

93 See Foreword by Chief Justice D Malcolm in S Fryer-Smith, *Aboriginal Benchbook for Western Australian Courts (AIJA Model Indigenous Benchbook Project)* (2002) <<http://www.aija.org.au/online/ICABenchbook.htm>> at 7 October 2005, 1:4–1:5; J Goldring, 'The Reflective Judge: Aims and Content of Judicial Education' (2003) 12 *Journal of Judicial Administration* 216, 222.

94 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 19–4.

95 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

women, people with disabilities and people from culturally and linguistically diverse backgrounds.<sup>96</sup>

19.66 While the NJCA also expressed support for the proposal,<sup>97</sup> it submitted that its ability to develop a bench book on federal sentencing would depend on sufficient funding. The NJCA observed that the experience of courts around Australia is that bench books require significant effort and resources to write and update. It also pointed out this proposal would be implemented in part by the new national sentencing database which would include a 'principles and practice' component giving guidance to judicial officers on federal sentencing issues.<sup>98</sup> In addition, the NJCA expressed the view that it would be useful to develop the bench book in consultation with both the judicial education committees of the courts and other judicial education bodies.<sup>99</sup>

19.67 One submission suggested that the bench book should be publicly available, at least on the Internet, as is the case with the *Victorian Sentencing Manual*.<sup>100</sup>

#### ***ALRC's views***

19.68 A bench book that provided guidance on federal sentencing legislation would increase judicial officers' familiarity with, and understanding of, federal sentencing law, and thus promote better sentencing decisions.<sup>101</sup> The complexity of federal sentencing law and the continued reliance of the federal criminal justice system on state and territory laws make it desirable for the bench book to give guidance on the interaction between federal sentencing legislation and state and territory laws.<sup>102</sup>

19.69 The need to raise awareness of cross-cultural issues among the judiciary has been canvassed in a number of previous reports.<sup>103</sup> Because some special categories of offenders are strongly represented in the federal offender population, the bench book on federal sentencing should include commentaries on issues concerning equal treatment of all persons, including issues of the type addressed in Queensland's *Equal Treatment Benchbook* and the Aboriginal Benchbook.

19.70 The Aboriginal Benchbook is currently confined to issues relevant to ATSI communities in Western Australia but it is an appropriate model for the development of similar bench books in other jurisdictions.<sup>104</sup> Since there are regional differences

96 Sisters Inside Inc, *Submission SFO 98*, 6 April 2006.

97 National Judicial College of Australia, *Consultation*, Canberra, 13 February 2006.

98 National Judicial College of Australia, *Submission SFO 61*, 22 December 2005. See also the discussion on the development of a national sentencing database in Ch 21.

99 National Judicial College of Australia, *Consultation*, Canberra, 13 February 2006.

100 J Willis, *Submission SFO 74*, 10 February 2006.

101 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), [19.50].

102 In Ch 12, the ALRC recommends that the bench book should also include guidance for judicial officers in relation to aggregate sentences for multiple federal offences: Rec 12-5.

103 See, eg, Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC 57 (1992), [2.14]; J Stubbs and others, *Cross Cultural Awareness for the Judiciary* (1996).

104 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), [19.52].

between ATSI communities in terms of language, religion, social organisation and culture,<sup>105</sup> judicial education bodies should be involved in developing such bench books in other jurisdictions. In doing so, consultations with relevant state or territory courts would assist in identifying issues specific to the sentencing of ATSI federal offenders in each jurisdiction.

19.71 In the interests of transparency, the bench book should be made publicly accessible. For example, copies could be made available through public libraries. Alternatively, access to the bench book may be provided online, which would facilitate regular updates of the bench book.

**Recommendation 19–5** The NJCA, in consultation with courts and judicial education bodies, should develop a publicly accessible bench book providing general guidance for judicial officers on federal sentencing law. The bench book should indicate how federal sentencing law interacts with relevant state and territory law in each jurisdiction, and should include commentary on special categories of federal offenders.

### Prosecutors

19.72 The CDPP runs in-house training programs for its prosecutors. In 2004–05, the CDPP also conducted two in-house advocacy courses,<sup>106</sup> which included a component requiring participants to make submissions on sentence.<sup>107</sup> The CDPP plans to conduct courses on both summary prosecutions and sentencing proceedings in 2005–06.<sup>108</sup> The CDPP also conducts in-house legal training to ensure that its lawyers comply with their continuing legal education requirements.<sup>109</sup> Other Commonwealth prosecuting authorities, such as the Australian Taxation Office and the Australian Securities and Investments Commission, also have internal training programs.<sup>110</sup>

19.73 As discussed above, as a matter of practice prosecutors provide substantial assistance to the courts regarding sentencing in federal criminal matters. In DP 70, the ALRC proposed that the CDPP and other Commonwealth prosecuting authorities

<sup>105</sup> Australian Bureau of Statistics, *Year Book Australia: 1994 Special Article—Unity and Diversity: The History and Culture of Aboriginal Australia* (1994) <<http://www.abs.gov.au/Ausstats/abs@.nsf/0/75258e92a5903e75ca2569de0025c188?OpenDocument>> at 17 October 2005.

<sup>106</sup> Commonwealth Director of Public Prosecutions, *Annual Report 2004–05* (2005), 12.

<sup>107</sup> Commonwealth Director of Public Prosecutions, *Consultation*, by telephone, 27 March 2006.

<sup>108</sup> Commonwealth Director of Public Prosecutions, *Annual Report 2004–05* (2005), 13.

<sup>109</sup> *Ibid.*, 72.

<sup>110</sup> Australian Securities and Investments Commission, *Annual Report 2003–04* (2004), 9; Australian Taxation Office, *Annual Report 2004–05* (2005), 75, 264, 266–267.

develop and enhance their programs to train prosecutors in relation to the federal criminal justice system, including the sentencing of federal offenders and the role of prosecutors in sentencing. The ALRC proposed that these training programs should indicate how federal sentencing legislation interacts with relevant state or territory law in each jurisdiction.<sup>111</sup>

19.74 A number of submissions supported this proposal.<sup>112</sup> The CDPP submitted that it is continuing to develop and enhance its training for prosecutors in relation to the federal criminal justice system.<sup>113</sup> Some submissions emphasised the need to enhance education about the special needs and concerns of people with a mental illness or intellectual disability.<sup>114</sup> Other submissions suggested that the proposed training programs should include sessions on the rights and needs of victims and the impact of victimisation.<sup>115</sup>

19.75 The ALRC remains of the view that prosecutorial assistance to the courts could benefit from the CDPP and other Commonwealth prosecuting authorities developing and enhancing their programs to train prosecutors in relation to the federal criminal justice system. These training programs should address how federal sentencing legislation interacts with relevant state or territory law in each jurisdiction. As noted above, issues concerning victims and special categories of offenders are relevant to federal sentencing and training should cover these issues as well.

**Recommendation 19–6** The CDPP and other Commonwealth prosecuting authorities should develop and enhance their programs to train prosecutors in relation to the federal criminal justice system, including the sentencing of federal offenders and the role of prosecutors in sentencing. This training should indicate how federal sentencing legislation interacts with relevant state or territory law in each jurisdiction.

### Legal practitioners

19.76 There are currently a number of organisations providing continuing legal education and practical legal training, including legal professional associations, university law schools, practical legal training institutions, private companies and law firms. Most practical legal education courses include units on criminal law. It is

111 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 19–5.

112 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; J Willis, *Submission SFO 74*, 10 February 2006.

113 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

114 Department of the Attorney General Western Australia, *Submission SFO 96*, 15 March 2006; New South Wales Guardianship Tribunal, *Submission SFO 69*, 8 February 2006.

115 South Australia Victims of Crime Co-ordinator, *Submission SFO 84*, 15 February 2006; Victim Support Australasia, *Submission SFO 60*, 21 December 2005 (the submission was endorsed by Victim Support Services Inc).

difficult to conduct a comprehensive survey of continuing legal education courses due to the large number of organisations offering these services, however, in New South Wales a number of courses have included a component on the federal criminal justice system and federal sentencing law.

19.77 ALRC 44 noted that although the primary focus of sentencing education should be judicial officers, education programs for other groups might also have a beneficial impact on sentencing.<sup>116</sup> These groups include prosecution and defence lawyers; correction, probation and parole officers; and police and media organisations.<sup>117</sup> The ALRC remains of the view that continuing education for all those working in the federal criminal justice system is likely to lead to better sentencing of federal offenders. The ALRC therefore recommends that legal education providers in each state and territory should be encouraged to provide education and training to legal practitioners in this area.<sup>118</sup>

**Recommendation 19–7** Providers of continuing legal education and practical legal training in each state and territory should offer education and training to legal practitioners in relation to the federal criminal justice system. These programs should indicate how federal sentencing legislation interacts with relevant state or territory law in each jurisdiction.

### Court services officers

19.78 Court services officers (also known as court officers) are responsible for liaising with and advising the public on legal procedures and practices relevant to the court.<sup>119</sup> Once a matter reaches the court, court services officers are usually the first point of contact for persons accused of a federal offence. One of their main roles is to assist individual offenders to understand relevant court procedures by providing information, and by recommending appropriate options, resources or services both internal and external to the courts. They also coordinate and manage cases as matters progress through the courts.

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116 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [281].

117 Ibid, [281].

118 This was supported by the CDPP: Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

119 Australia. Department of Education Science and Training, *Job Guide 2005—Court Officer* <<http://jobguide.thegoodguides.com.au/text/jobdetails.cfm?jobid=900>> at 14 October 2005.

19.79 There are a number of courses around Australia that prepare graduates for employment in court administration. A small number of course outlines indicate that such courses include examination of issues concerning ATSI people.<sup>120</sup> Other courses include elective subjects on cross-cultural communication,<sup>121</sup> gender issues,<sup>122</sup> or juvenile justice.<sup>123</sup>

19.80 As discussed in Chapters 27 to 29, certain categories of federal offenders merit special assistance and protection. These include young offenders; offenders with a mental illness or intellectual disability; women offenders; offenders with family and dependants; ATSI offenders; offenders from culturally and linguistically diverse backgrounds; offenders with a drug addiction; and offenders with problem gambling.

19.81 Some categories of offenders may experience particular difficulty in understanding court processes. For example, ATSI offenders and offenders from culturally and linguistically diverse backgrounds may experience difficulties due to inadequate English language skills or cross-cultural communication barriers. The need for interpreters in federal criminal matters is discussed in Chapter 29 but court services officers may also be able to assist by identifying the needs of special categories of offenders and providing these offenders with relevant information and support.

19.82 DP 70 proposed that training be provided to court services officers in relation to issues relevant to special categories of federal offenders, and that such training should be provided by the relevant state or territory court.<sup>124</sup> A number of submissions supported this proposal.<sup>125</sup> While the Mental Health Council of Australia also supported this proposal, it expressed concern that this may not be sufficient to address the misunderstanding of or stigma towards people with a mental illness, particularly as neither judges nor prosecutors will benefit from this training.<sup>126</sup> The ALRC's recommendations that training be provided to judicial officers and Commonwealth

120 See, eg, New South Wales—Associate Degree in Law (Paralegal Studies) and Bachelor of Legal & Justice Studies at the Southern Cross University; Victoria—Bachelor of Arts (Criminal Justice Studies) at the Victoria University; Northern Territory—Associate Degree in Legal Studies at the Charles Darwin University.

121 See, eg, Victoria—Bachelor of Arts (Criminal Justice Studies) at the Victoria University.

122 See, eg, Victoria—Bachelor of Arts (Criminal Justice Studies) at the Victoria University; Northern Territory—Charles Darwin University, *Associate Degree in Legal Studies (ADLS3)* <<http://eagle.ntu.edu.au/NTU/Apps/coursere.nsf/>> at 17 October 2005.

123 Victoria—RMIT University, *Study at RMIT—Legal and Dispute Studies—Bachelor of Social Science* <[http://www.rmit.edu.au/programs/bp204#Program\\_Description](http://www.rmit.edu.au/programs/bp204#Program_Description)> at 17 October 2005.

124 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), [19.62]–[19.63], Proposal 19–7.

125 Department of the Attorney General Western Australia, *Submission SFO 96*, 15 March 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; New South Wales Guardianship Tribunal, *Submission SFO 69*, 8 February 2006; Mental Health Council of Australia, *Submission SFO 59*, 21 December 2005.

126 New South Wales Guardianship Tribunal, *Submission SFO 69*, 8 February 2006.



prosecuting authorities, including a component on issues relevant to special categories of offenders, should help address this concern.<sup>127</sup>

19.83 Some special categories of federal offenders face particular problems in understanding court procedures, and they therefore have a special need for information about court processes and the availability of resources and services. Having regard to the important role court services officers play in providing offenders with information and assistance, training should be provided to court services officers in relation to issues relevant to special categories of federal offenders.

19.84 Since the options, resources and services available to special categories of offenders are often specific to the jurisdiction in which offenders are sentenced—for example, eligibility criteria for drug courts differ between jurisdictions—the ALRC considers that such training should be provided by the relevant state or territory court.

**Recommendation 19–8** State and territory courts should provide training to court services officers in relation to issues relevant to special categories of federal offenders.

### University law courses

19.85 Very few law schools in Australia offer courses on the federal criminal justice system or on sentencing law more generally. All undergraduate law degrees offer criminal law as a core subject in the curriculum; however, the primary emphasis in these courses is on the principles of criminal responsibility in the context of state and territory offences. A number of university law schools offer advanced criminal law and criminology as elective subjects in an undergraduate degree. Many of these place greater emphasis on sentencing than do compulsory core courses. Two law schools offer courses on federal criminal law,<sup>128</sup> and another offers a course in advanced criminal law, which includes consideration of federal criminal law.<sup>129</sup>

19.86 A few universities offer Masters of Laws degrees by coursework that include units relevant to federal criminal law or federal sentencing. Three university law schools offer postgraduate subjects on sentencing, most of which include consideration

<sup>127</sup> Recs 19–3 and 19–6.

<sup>128</sup> Monash University, *LAW5112—Federal Criminal Law 506* <<http://www.monash.edu.au/pubs/handbooks/>> at 23 October 2005; The University of Adelaide, *The Law School—Federal Criminal Law* <<http://www.law.adelaide.edu.au/>> at 23 October 2005.

<sup>129</sup> The University of Newcastle, *Course Information: LAWS5003—Advanced Criminal Law* <<http://www.newcastle.edu.au/>> at 23 October 2005.

of federal legislation and federal sentencing laws.<sup>130</sup> One Masters course also includes a subject on federal criminal law, including federal sentencing law.<sup>131</sup>

19.87 This brief survey of university law school curricula reveals that there is a relative lack of emphasis on the federal criminal justice system and federal sentencing law in university law programs.

19.88 To ensure that future practitioners and judicial officers have a better foundational knowledge about the federal criminal justice system and federal sentencing law, Australian university law schools should be encouraged to place greater emphasis on the federal criminal justice system and federal sentencing law.<sup>132</sup> This increased emphasis should be applied to both undergraduate and postgraduate programs in order to enhance an understanding of issues specific to the federal criminal justice system, and to encourage greater specialisation in this area by future practitioners and judicial officers.

**Recommendation 19–9** University law schools in Australia should place greater emphasis on the federal criminal justice system and federal sentencing law in their undergraduate and postgraduate programs.

130 Monash University, *Postgraduate Units* <<http://www.law.monash.edu.au/>> at 23 October 2005; Queensland University of Technology, *Unit Detail: Contemporary Issues in Sentencing Law—Unit Synopsis* <<http://www.qut.edu.au/>> at 23 October 2005; The University of New South Wales, *UNSW Online Handbook Archive Edition 2005: Sentencing: Law, Policy and Practice—LAWS3001* <<http://www.handbook.unsw.edu.au/2005/index.html>> at 23 October 2005.

131 The University of Adelaide, *The Law School—Federal Criminal Law* <<http://www.law.adelaide.edu.au/>> at 23 October 2005.

132 This was supported by the CDPP: Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

## 20. Consistency and the Appellate Process

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### Introduction

20.1 It is a fundamental principle of the criminal law and the sentencing process that like cases should be treated in a like, or consistent, manner. As Mason J stated in *Lowe v The Queen*:

Just as consistency in punishment—a reflection of the notion of equal justice—is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.<sup>1</sup>

20.2 Therefore, a major issue for this Inquiry—as it was for the ALRC in its 1980 interim report, *Sentencing of Federal Offenders* (ALRC 15)<sup>2</sup>—is consistency in the sentencing of federal offenders. In 1980, the ALRC expressed the view that:

A Commonwealth law is a national law. A breach of this law by a person anywhere in Australia should be attended by generally similar consequences, ranging from decisions to charge and prosecute to the punishment imposed following a conviction ... the uniform treatment of Federal offenders, wherever prosecuted and convicted in Australia, is an integral part of the fairness which should prevail in the imposition of punishment.<sup>3</sup>

20.3 On the information available to the ALRC, there is evidence of inconsistency between jurisdictions in the type and severity of sentences imposed for the same category of federal crime. The evidence, based on analyses undertaken by the

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1 *Lowe v The Queen* (1984) 154 CLR 606, 610–611.

2 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980).

3 *Ibid.*, [151].

Australian Institute of Criminology (AIC), is discussed further below and is set out in detail at Appendix 1 and Appendix 2 of this Report.

20.4 One of the primary mechanisms for achieving consistency in judicial decision making is appellate review. In this chapter the ALRC examines the appellate structure applicable to federal criminal matters in Australia and considers whether any changes are necessary to promote greater consistency in the sentencing of federal offenders.

## **Evidence of inconsistency**

20.5 The issue of consistency in sentencing may arise in a number of contexts, for example:

consistency of the same sentencer in treating like offenders in like cases; or the consistency of different judges within the same jurisdiction in dealing with like situations, or the consistency with which like cases are disposed of in different localities within a jurisdiction or between jurisdictions.<sup>4</sup>

20.6 This chapter is primarily concerned with consistency in sentencing of federal offenders between jurisdictions. However, consistency at other levels, for example within jurisdictions, is also desirable and the recommendations in this and the following chapter are intended to contribute to a more consistent approach to federal sentencing at all levels.

### ***Previous reports***

20.7 Due to the relative lack of Australian research, other inquiries have not been able to furnish conclusive evidence of inconsistency in sentencing.<sup>5</sup> However, on the basis of the evidence available to them, a number of previous inquiries concluded that there was a strong indication that unjustified disparity in sentencing existed. In its 1988 report, *Sentencing*, the Victorian Sentencing Committee examined the research that had been conducted on disparity in sentencing in Victoria and concluded that there were discrepancies in the sentences passed by courts.<sup>6</sup> In 1980, ALRC 15 concluded that there was a strong possibility that the differing rates at which offenders were sentenced to imprisonment throughout Australia reflected differing judicial attitudes towards punishment.<sup>7</sup>

### ***Australian Institute of Criminology analyses***

20.8 The New South Wales Sentencing Council has noted that, in working towards greater consistency, it is consistency of approach rather than consistency of outcome

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4 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [1.220].

5 See, eg, New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [1.11]; Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [156].

6 Victorian Sentencing Committee, *Sentencing* (1988), [4.4.25]–[4.4.26], [4.4.30].

7 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [162]–[166].

that should be the goal.<sup>8</sup> Consistency of approach means ‘ensuring that account is taken of the same factors and that similar weight is given to those factors’.<sup>9</sup> Many of the recommendations in other parts of this Report are intended to promote a more consistent approach to sentencing federal offenders—for example, setting out the purposes, principles and factors to be taken into account in the federal sentencing process.<sup>10</sup>

20.9 The Sentencing Council also noted that significant variations in outcomes in like cases might indicate inconsistency of approach.<sup>11</sup> For this reason the ALRC worked with a number of agencies, including the AIC, to collect and analyse available data on the sentencing outcomes for federal offenders in each Australian jurisdiction. The AIC undertook two tasks for the purposes of the Inquiry. The first involved analysis of snapshot data provided by the Attorney-General’s Department (AGD) regarding 695 federal prisoners held in full-time custody on 13 December 2004, as well as data collected by the Australian Bureau of Statistics (ABS). The results of that analysis are set out at Appendix 1. The second task involved analysis of data from the five-year period 2000–04 provided by the Commonwealth Director of Public Prosecutions (CDPP) about offenders prosecuted for federal fraud or drug offences. This analysis covered 25,160 ‘cases’, involving 17,105 offenders who were prosecuted on 85,596 charges. The results of that analysis are set out at Appendix 2.

### ***Limitations on data***

20.10 The information used in Appendix 1 was collected primarily as a case management tool to assist the AGD in administering the sentences of federal prisoners. For this reason it is limited to those federal offenders sentenced to full-time custody. In addition, the data are categorised by broad types of offence rather than specific offences. It should also be noted that the patterns of offending for some federal offence categories differ across states and territories. For example, there is strong representation of fisheries offenders in Queensland and Western Australia, and of migration offenders in Western Australia and the Northern Territory.<sup>12</sup>

20.11 The information used in Appendix 2 deals with the sentencing outcomes for defendants prosecuted for federal fraud or drug offences across Australia. The information was extracted from the CDPP’s administrative database based on the ‘matter type’ field. A number of factors affected the coverage of the data extracted. Some older cases were not entered into the database using the ‘matter type’ field. In

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8 New South Wales Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court* (2005), 11.

9 Ibid, 11. This view was endorsed by the High Court in *Johnson v The Queen* (2004) 205 ALR 346, [26]. See also *Markarian v The Queen* (2005) 215 ALR 213, [27].

10 See, eg, Chs 4, 5 and 6.

11 New South Wales Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court* (2005), 11.

12 Appendix 1, [58]–[60].

addition, cases can fall into more than one ‘matter type’ classification, but the system allows only one to be recorded. ‘Fraud’ may be interpreted differently depending on who is entering the data, and corporate fraud is classified as ‘corporate’ rather than ‘fraud.’ For these reasons, while details of most fraud and drug cases were provided for analysis, the dataset does not represent the total number of fraud and drug cases prosecuted by the CDPP during the subject period. In addition, the CDPP database does not record details of prosecutions by other agencies such as the Australian Securities and Investments Commission (ASIC) and the Australian Tax Office (ATO).

20.12 Finally, matters can involve more than one offender, offenders can be charged with more than one offence and tracking charges through to sentence outcomes is difficult when dealing with a large number of cases. Quantitative analysis such as that undertaken in Appendix 2 is ultimately broad and will miss the fine detail of individual cases and sentencing outcomes.

20.13 With these limits in mind, the AIC identified a number of interesting trends relevant to the Inquiry.

#### ***Comparison of the use of bonds across jurisdictions***

20.14 The most common sentence imposed in federal fraud and drug cases across Australia is a ‘bond’.<sup>13</sup> Some form of bond was ordered in 12,126 (48 per cent) of the cases in which there was a single sentencing outcome, although bonds were more commonly used in fraud cases than in drug cases.<sup>14</sup> Where a bond was ordered, the most common was a bond imposed under s 20(1)(b) of the *Crimes Act 1914* (Cth) conditionally discharging an offender after conviction and sentence. The second most common was a s 20(1)(a) bond conditionally discharging the offender after conviction but without proceeding to sentence. The third most common was a s 19B bond conditionally discharging the offender without conviction.

20.15 The data show that s 19B bonds were used significantly more often in Victoria than in other jurisdictions, with 26 per cent of Victorian fraud and drug cases resulting in a s 19B bond. In other jurisdictions s 19B bonds were ordered in between one and five per cent of cases.<sup>15</sup> There was wide variation across the jurisdictions in the use of s 20(1)(a) bonds, from 40 per cent of ACT cases to two per cent in Tasmania.<sup>16</sup> There was also variation between the jurisdictions in the percentage of cases that resulted in the order of a s 20(1)(b) bond. In the Northern Territory and South Australia the majority of cases (63 per cent and 61 per cent respectively) resulted in a s 20(1)(b) bond. Percentages dropped across the other jurisdictions, down to 14 per cent in Western Australia and New South Wales.<sup>17</sup> There were also significant differences

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13 See Ch 7 in relation to bonds and other sentencing options.

14 See Appendix 2, Figure A2.20 and accompanying text.

15 See Appendix 2, Figure A2.21 and accompanying text.

16 See Appendix 2, Figure A2.23 and accompanying text.

17 See Appendix 2, Figure A2.25 and accompanying text.

across jurisdictions in the monetary amount of the recognizance imposed with these bonds.<sup>18</sup>

### ***Comparison of the use of community service orders across jurisdictions***

20.16 Community service orders (CSOs)—requiring an offender to undertake some form of unpaid service to benefit the community—were almost never ordered in drug cases. However, across Australia they were ordered in 21 per cent of fraud cases.<sup>19</sup> New South Wales had the highest use of CSOs in fraud cases (32 per cent), closely followed by Tasmania (31 per cent). Together with the ACT, Queensland and Victoria these jurisdictions represented almost all (97 per cent) of the CSOs ordered in Australia. These orders were rarely used in South Australia, the Northern Territory and Western Australia.<sup>20</sup> There were also differences in the number of hours ordered to be served under CSOs across the jurisdictions although it is necessary to take into account that the maximum number of hours allowed for CSOs is different in different jurisdictions. For example, in the ACT 58 per cent of CSOs in fraud cases were for 200 hours or more, while only 10 per cent of CSOs across Australia fell in this category. Yet, this was despite the fact that the ACT had the smallest statutory maximum number of hours for CSOs (208 hours).<sup>21</sup>

### ***Comparison of the use of fines across jurisdictions***

20.17 Fines were ordered in 4,006 (16 per cent) of the fraud and drug cases analysed across Australia. Fines were issued in 16 per cent of fraud cases and 11 per cent of drug cases. The use of fines in fraud cases appears to be much greater in Western Australia (41 per cent of cases) and Victoria (28 per cent) than in other jurisdictions (ranging from 14 per cent in Tasmania to three per cent in the Northern Territory).<sup>22</sup>

### ***Comparison of federal prisoner population and Australian prisoner population***

20.18 The AIC's analysis of the AGD data, set out in Appendix 1, indicates that the federal prisoner population tends to receive longer head sentences when compared with the Australian prisoner population as a whole.<sup>23</sup> The median sentence for federal prisoners (84 months) was more than double the median sentence for prisoners across Australia (38 months).<sup>24</sup> This may indicate that federal crime overall involves more serious criminality than state/territory crime.

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18 See Appendix 2, Figure A2.31 and accompanying text.

19 See Appendix 2, Figure A2.44 and accompanying text.

20 See Appendix 2, Figure A2.45 and accompanying text.

21 See Appendix 2, Figure A2.48 and accompanying text.

22 See Appendix 2, Figure A2.53 and accompanying text.

23 See Appendix 1, Figure A1.21 and accompanying text. 'Head sentence' is the total or maximum sentence a prisoner is serving. This is referred to as the 'aggregate sentence' in Appendix 1 and includes time a person may spend on conditional release from prison.

24 See Appendix 1, Figure A1.21 and accompanying text.

20.19 Federal prisoners are also likely to remain in prison longer than Australian prisoners as a whole.<sup>25</sup> ‘Time expected to serve’ is a measure of how long a prisoner is expected to remain in prison before being released, assuming the prisoner is released on the date he or she first becomes eligible. Generally speaking, it is a measure of the total sentence for those cases where there is a fixed sentence without a non-parole period, and a measure of the non-parole period where one is included in the sentence. The median time expected to serve for federal prisoners is approximately double that of the general Australian prison population.<sup>26</sup>

### ***Comparison of federal prison sentences across jurisdictions***

20.20 Both the AGD data and the CDPD data provide evidence that the frequency and severity of prison sentences for particular categories of federal crime vary across jurisdictions. The analysis of the CDPD data indicates that a prison sentence was imposed in 34 per cent of fraud cases and 81 per cent of drug cases in the five years under review.<sup>27</sup> While Appendix 2 examines fraud and drug cases, the following paragraphs will focus on fraud cases. The number of fraud cases considered in Appendix 2 is higher than the number of drug cases and they are spread more evenly across jurisdictions.<sup>28</sup> Social security-related charges constitute a very high proportion of all fraud cases prosecuted by the Commonwealth.

20.21 Offenders convicted of fraud are more likely to receive a prison term in the Northern Territory and South Australia than in other jurisdictions (76 per cent and 72 per cent of cases, respectively). Prison is used relatively rarely in Western Australia, the ACT, New South Wales and Victoria.<sup>29</sup> Where prison terms were imposed for fraud offences, there was variation in the head sentences imposed. For example, in Tasmania and the Northern Territory a high percentage of offenders were sentenced to less than six months (75 and 72 per cent respectively).<sup>30</sup> In Victoria and South Australia the figures were 54 per cent and 53 per cent respectively. In the ACT, 36 per cent of fraud offenders were sentenced to less than six months and in the other jurisdictions less than 25 per cent. Sentences of less than one year were imposed in 96 per cent of cases in the Northern Territory but only 63 per cent of cases in Western Australia with other jurisdictions falling somewhere in between. Sentences of one year or more were imposed in 38 per cent of cases in Queensland but only 20 per cent of cases in Victoria, 14 per cent of cases in South Australia and five per cent of cases in the Northern Territory.

20.22 In relation to fraud cases in which a term of imprisonment was imposed, in 74 per cent of cases the term of imprisonment was fully suspended.<sup>31</sup> An actual prison

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25 See Appendix 1, Figure A1.29 and accompanying text.

26 See Appendix 1, Figure A1.31 and accompanying text.

27 See Appendix 2, Figure A2.65 and accompanying text.

28 See Appendix 2, Figures A2.4–A2.6 and accompanying text.

29 See Appendix 2, Figure A2.66 and accompanying text.

30 See Appendix 2, Figure A2.68 and accompanying text.

31 See Appendix 2, Figure A2.67 and accompanying text.



term was served in 26 per cent of cases. Where an actual prison term was served, the minimum term served also varied between jurisdictions. A minimum term of less than 12 months was imposed in 80 per cent of cases in the ACT, 30 per cent in Queensland, 16 per cent of cases in Victoria and 14 per cent in South Australia. A minimum term of 12 months or more was imposed in 20 per cent of cases in the ACT, 12 per cent of cases in New South Wales and five per cent or less in other jurisdictions.

20.23 A more detailed analysis of a subcategory of fraud offences—that is, medium level fraud of between \$50,000 and \$500,000—also indicated different sentencing outcomes in different jurisdictions.<sup>32</sup> New South Wales recorded the highest number of offenders sentenced for this kind of offence (37 per cent), followed by Victoria (33 per cent) and Queensland (21 per cent).<sup>33</sup> Regardless of the jurisdiction, these offences were most likely to result in a prison sentence than any other penalty outcome. In New South Wales the average minimum prison sentence imposed was 10 months and the average maximum was 29 months. However, in Victoria the average minimum was three months and the average maximum was 15 months. This difference was statistically significant.

#### ***Submissions and consultations***

20.24 The AIC's analysis was consistent with anecdotal evidence of inconsistency in many submissions and consultations.<sup>34</sup> For example, ASIC submitted there were differences in the sentencing patterns between jurisdictions.<sup>35</sup> The ATO observed there was inconsistency in the sentencing of federal offenders for taxation-related offences both between jurisdictions and within the same jurisdiction. Both ASIC and the ATO cited the importance of consistency in regulating and enforcing national schemes such as those established under corporations and taxation laws. As a federal regulator, ASIC noted that the deterrent effect of ASIC enforcement action could be reduced if there was a perception that particular results were peculiar to certain jurisdictions.<sup>36</sup>

20.25 At the time Discussion Paper 70 (DP 70) was published in November 2005, the ALRC did not have access to the analysis of the CDPP data contained in Appendix 2. In response to DP 70, a number of stakeholders noted the limitations of the AGD data

32 See Appendix 2, Figure A2.75 and accompanying text.

33 See Appendix 2, Figure A2.73 and accompanying text.

34 Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005; Welfare Rights Centre Inc (Queensland), *Submission SFO 29*, 15 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; Law Society of the Northern Territory, *Consultation*, Darwin, 29 April 2005; Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005; A Freiberg, *Consultation*, Melbourne, 30 March 2005; National Judicial College of Australia, *Consultation*, Canberra, 17 March 2005; Prisoners' Legal Service and others, *Consultation*, Brisbane, 4 March 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005; New South Wales Public Defenders Office, *Consultation*, Sydney, 22 September 2004.

35 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.

36 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005.

that formed the basis of Appendix 1 and expressed the view that the data could not be relied on to show there was unacceptable inconsistency in the sentencing of federal offenders across jurisdictions. They suggested that more analysis was necessary.<sup>37</sup> There was some support for further analysis to be conducted following the introduction of the new federal sentencing Act<sup>38</sup> and the establishment of a national sentencing database,<sup>39</sup> both major reforms aimed at better and more consistent sentencing of federal offenders.<sup>40</sup>

### *ALRC's views*

20.26 Accurately documenting inconsistency in the sentencing of federal offenders requires evidence of systematic and substantial variation in sentences for like cases.<sup>41</sup> There are limitations, discussed above and in Appendices 1 and 2, on the data that are currently available. The proposed federal sentencing database, discussed in Chapter 21, should in time address the lack of data. However, on the basis of the information available to the ALRC at this time, including the analysis set out in Appendix 1 and, in particular, the new and more detailed information set out in Appendix 2 covering more than 25,000 fraud and drug cases over a five-year period, there are strong indications of inconsistency between jurisdictions in the type and severity of sentences imposed for the same category of federal crime.

20.27 A significant number of submissions and consultations expressed the view that an expansion of the criminal jurisdiction of the federal courts was likely to lead to greater consistency in the sentencing of federal offenders.<sup>42</sup> However, a number of concerns were raised in response to the proposal in DP 70 that the Federal Court of Australia be invested with exclusive jurisdiction to hear appeals in federal criminal matters. This chapter considers the allocation of appellate jurisdiction in federal criminal matters and, in light of the concerns raised, whether changes to the arrangements are necessary and likely to have a positive impact on consistency in the sentencing of federal offenders.

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37 Chief Judge P McClellan, *Submission SFO 77*, 10 February 2006; Justice P Johnson, *Submission SFO 73*, 10 February 2006; Attorney General B Debus, *Submission SFO 65*, 9 January 2006.

38 See Ch 2.

39 See Ch 21.

40 Chief Judge P McClellan, *Submission SFO 77*, 10 February 2006; Justice P Johnson, *Submission SFO 73*, 10 February 2006.

41 See New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [1.11].

42 Department of Immigration and Multicultural and Indigenous Affairs, *Submission SFO 49*, 10 May 2005; J Champion, *Submission SFO 46*, 29 April 2005; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; WT, *Submission SFO 23*, 11 April 2005; PS, *Submission SFO 21*, 8 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; Chief Justice M Black & Others, *Consultation*, Melbourne, 30 March 2005.

## Appellate jurisdiction

20.28 In *Wong v The Queen*, Gleeson CJ expressed the view that one of the reasons for giving a court jurisdiction to hear appeals against sentence is to secure consistency in sentencing.<sup>43</sup> Appeals in relation to sentence are generally allowed on the basis of an error of fact or law by the sentencing judge, or where the sentence is ‘unreasonable or plainly unjust’, that is, manifestly inadequate or manifestly excessive.<sup>44</sup>

20.29 Sir Ivor Richardson, a past President of the New Zealand Court of Appeal, has stated that that Court has three functions: to correct errors made in the lower courts, to enunciate and harmonise the law, and to ensure consistency of approach to the administration of justice throughout the country.<sup>45</sup>

20.30 The same is true of intermediate appellate courts in Australia. Each state and territory has a court of appeal or court of criminal appeal that performs these functions in relation to their respective jurisdictions. These courts form the apex of the state and territory court hierarchies. They hear appeals in relation to federal criminal matters as well as state and territory criminal matters. In most cases, an appeal lies from these courts, with special leave, to the High Court of Australia.

20.31 While courts of appeal and courts of criminal appeal work to ensure consistency within their jurisdictions, they cannot contribute directly to national consistency because their decisions are not binding in other jurisdictions. However, the principle of comity is intended to encourage a degree of uniformity across jurisdictions. As Street CJ has stated:

where a Commonwealth statute has been construed by the ultimate appellate court within any State or Territory, that construction should, as a matter of ordinary practice, be accepted and applied by the courts of other states or territories so long as it is permitted to stand unchanged either by the court of origin, or the High Court. The risk of differing interpretation amongst the States is thus negated and, in practical terms, a uniform application of Commonwealth laws throughout Australia is assured.<sup>46</sup>

20.32 However, there are limits to the extent to which the principle of comity can ensure consistency between jurisdictions. A court in one jurisdiction may depart from the decision of an intermediate appellate court in another jurisdiction if it is of the view that the decision is plainly wrong.<sup>47</sup> In consultation, a number of stakeholders

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<sup>43</sup> *Wong v The Queen* (2001) 207 CLR 584, 591.

<sup>44</sup> *House v The King* (1936) 55 CLR 499, 505.

<sup>45</sup> I Richardson, ‘The Courts and Access to Justice’ (2000) 31 *Victoria University of Wellington Law Review* 163.

<sup>46</sup> *R v Abbaderis* [1981] 1 NSWLR 530, 542. See also *R v Parsons* [1983] 2 VR 499; *R v Gardiner* (1979) 27 ALR 140.

<sup>47</sup> *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492.

commented that the principle of comity was not always applied in practice.<sup>48</sup> In response, Chief Justice Malcolm of the Western Australian Supreme Court noted that the High Court had a role in ensuring the principle of comity was applied in appropriate cases.<sup>49</sup> Several stakeholders expressed the view that the rule of comity was clear and applied consistently in New South Wales.<sup>50</sup>

### Appellate jurisdiction of the High Court of Australia

20.33 The High Court has very wide jurisdiction, stemming from s 73 of the *Australian Constitution*, to hear appeals in matters of federal, state and territory criminal law. It is at this point in the appellate process that a national perspective is brought to bear in relation to sentencing.

20.34 However, appeals to the High Court may be brought only with special leave<sup>51</sup> and the Court traditionally has been reluctant to grant leave to appeal against sentence. The Court has stated that special leave will be granted only where the case involves some question of law or principle of general importance, or where there has been a gross violation of the principles governing the exercise of the judicial discretion in imposing sentence.<sup>52</sup> The Court has made it quite clear that it is not a court of criminal appeal<sup>53</sup> and it will not grant special leave to appeal simply because, for example, a sentence appears to the Court to be excessive.<sup>54</sup> While conflicting decisions in different state courts may justify a grant of special leave, the High Court is unlikely to grant leave if it considers the decision under challenge to be correct or not attended with sufficient doubt to warrant reconsideration.<sup>55</sup>

20.35 In consultations, Richard Edney noted that in the past the High Court was reluctant to hear sentencing appeals but that since 1990, in particular, the Court has been more involved in developing Australian sentencing principles.<sup>56</sup> While the High Court does have an important role to play in developing sentencing principles for Australian courts, this role has a national focus—supervising federal, state and territory sentencing—rather than a specifically federal focus.

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48 Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005; New South Wales Public Defenders Office, *Consultation*, Sydney, 22 September 2004; Commonwealth Director of Public Prosecutions, *Consultation*, Melbourne, 31 March 2004.

49 Chief Justice D Malcolm, *Submission SFO 71*, 10 February 2006.

50 Justice P Johnson, *Submission SFO 73*, 10 February 2006; Attorney General B Debus, *Submission SFO 65*, 9 January 2006.

51 *Judiciary Act 1903* (Cth) s 35.

52 *Lowe v The Queen* (1984) 154 CLR 606.

53 *Liberato v The Queen* (1985) 159 CLR 507, 509; *Mickelberg v The Queen* (1989) 167 CLR 259, 274; *Griffiths v The Queen* (1989) 167 CLR 372, 396.

54 *Lowe v The Queen* (1984) 154 CLR 606, 608.

55 Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, ALRC 92 (2001), [19.100]–[19.112].

56 M Bagaric and R Edney, *Consultation*, Melbourne, 1 April 2005.

20.36 In the 15 years since the introduction of Part IB into the *Crimes Act*, there have been 12 appeals to the High Court in which the primary matter under consideration was the sentencing of a federal offender,<sup>57</sup> and approximately twice that number of appeals in relation to the sentencing of a state or territory offender. While some decisions of the High Court in state and territory sentencing matters may contribute to the development of general principles relevant to the sentencing of federal offenders, many will be limited in their application to specific legislation of the relevant jurisdiction. The relatively small number of sentencing appeals heard by the High Court and the fact that the Court has made clear that it does not have the same role as a court of criminal appeal mean that the Court is unlikely to play a central role in ensuring national consistency in the sentencing of federal offenders.

### **Appellate jurisdiction of the Federal Court of Australia**

20.37 Section 24(1)(c) of the *Federal Court of Australia Act 1976* (Cth) provides that the Federal Court of Australia (FCA) may hear and determine appeals from state and territory courts exercising federal jurisdiction in such cases as are provided by any other Act, other than appeals from a Full Court of a state or territory Supreme Court. The section could accommodate a situation in which decisions in federal criminal matters were made at first instance in state and territory courts, and appeals from those decisions were brought to the FCA. Section 25 provides that the appellate jurisdiction of the Court shall be exercised by a Full Court—generally three judges—except in a number of specific situations, such as where the appeal is from a court of summary jurisdiction.

20.38 Section 24(1)(b) of the Act provides that the FCA may hear and determine appeals from territorial supreme courts, and the FCA currently exercises that jurisdiction in relation to criminal matters on appeal from the Supreme Court of Norfolk Island. Until 2002, the Court exercised similar jurisdiction in relation to matters on appeal from the Supreme Court of the ACT and, until 1986, from the Supreme Court of the Northern Territory. Section 24(1)(b) now expressly excludes appeals from the ACT and the Northern Territory because those jurisdictions have established their own intermediate appellate courts.

### **Potential workload**

20.39 In DP 70 the ALRC proposed that the FCA be invested with exclusive jurisdiction to hear appeals in federal criminal matters. The channels of appeal to the state and territory courts of appeal and courts of criminal appeal vary significantly and it is difficult to identify precisely which appeals would go to the FCA if that Court

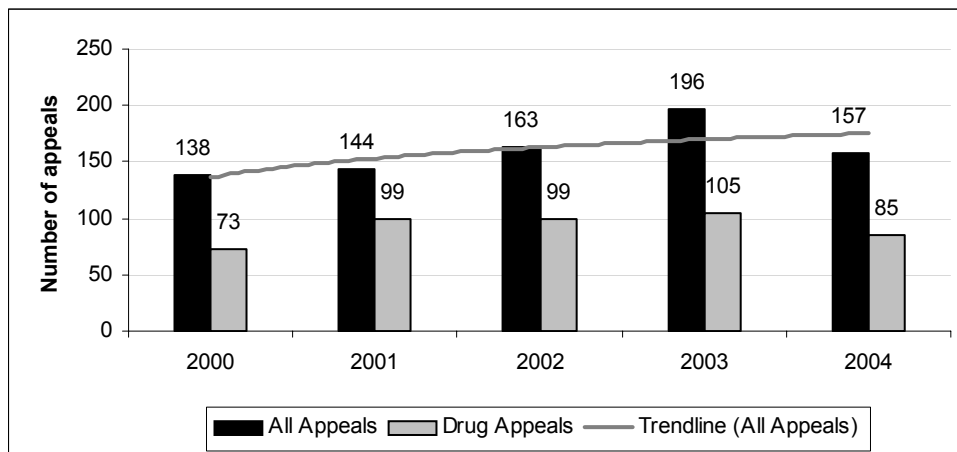
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<sup>57</sup> These cases are: *Johnson v The Queen* (2004) 205 ALR 346; *Putland v The Queen* (2004) 218 CLR 174; *Weininger v The Queen* (2003) 212 CLR 629; *Wong v The Queen* (2001) 207 CLR 584; *R v Olbrich* (1999) 199 CLR 270; *Postiglione v The Queen* (1997) 189 CLR 295; *Vanit v The Queen* [1997] 190 CLR 378; *Savvas v The Queen* (1995) 183 CLR 1; *Kesavarajah v The Queen* (1994) 181 CLR 230; *Hookham v The Queen* (1994) 181 CLR 450; *Leeth v Commonwealth* (1991) 174 CLR 455; *R v Shrestha* (1991) 173 CLR 48.

were invested with general appellate jurisdiction in federal criminal matters. However, in seeking to gain a better understanding of the Court's potential workload, the ALRC examined data provided by the CDPP. In the five-year period 2000–04, there were 798 defence and prosecution appeals to the state and territory courts of appeal and criminal appeal across Australia involving federal offences, that is, on average around 160 cases per year (see Figure 20.1 below). Only a very small number were in relation to summary matters.<sup>58</sup>

20.40 The composition of appeals by offence type and jurisdiction are also noteworthy. In 2004 there were 157 appeals to the state and territory courts of appeal and courts of criminal appeal in federal criminal matters. Of these, 54 per cent related to drugs, 22 per cent to fraud and 10 per cent to corporations matters. New South Wales accounted for the largest proportion of federal criminal appeals in that year (47 per cent), while other jurisdictions representing a significant proportion of such appeals included Victoria (20 per cent), Western Australia (16 per cent) and Queensland (14 per cent).

**Figure 20.1: Federal criminal appeals to state and territory courts of appeal and courts of criminal appeal, 2000–2004**



20.41 These proportions have not been static over time. For example, the combined percentage of fraud and corporations appeals has risen steadily from 21 per cent in

<sup>58</sup> Commonwealth Director of Public Prosecutions, *Correspondence*, 4 May–2 September 2005, appeals data. These figures do not correlate with the figures provided in the CDPP *Annual Reports* because the ALRC requested that withdrawn matters be included in the figures used in this Report to give a more accurate estimation of the workload the FCA might expect if the proposal in DP 70 were implemented. In addition, the figures do not correlate with the appeal figures in Appendix 2 because the information in that Appendix is limited to fraud and drug cases.

2000 to 32 per cent in 2004, while the percentage of drug appeals has fallen from a peak of 69 per cent in 2001 to 54 per cent in 2004.

### ***Submissions and consultations***

20.42 Some support was expressed in submissions and consultations for investing the FCA with broader jurisdiction to hear appeals in federal criminal matters on the basis that it would improve consistency in the administration of federal criminal law.<sup>59</sup> Under such arrangements, judicial officers in state and territory courts exercising federal jurisdiction would be bound by appellate decisions of the FCA according to the doctrine of precedent. The FCA, exercising appellate jurisdiction, could legitimately focus on principles of federal sentencing law, including consistency.

20.43 However, a significant number of stakeholders (particularly judges of state supreme courts) did not support the proposal in DP 70 that the FCA be invested with jurisdiction to hear appeals in federal criminal matters.<sup>60</sup> One submission expressed the view that such major reform of the federal criminal justice system ought to be the subject of a separate and more detailed inquiry.<sup>61</sup>

### ***Expertise in criminal law matters***

20.44 One concern raised in submissions and consultations was whether the FCA was well placed to exercise appellate jurisdiction in federal criminal matters, given its limited experience with such matters at first instance.<sup>62</sup> In consultations, judges and officers of the FCA noted that, if the criminal jurisdiction of the Court were significantly expanded, the Court would probably establish a panel of judges with relevant experience to hear federal criminal matters.<sup>63</sup> The Court has established panels in other areas of the law requiring particular expertise such as intellectual property, corporations, taxation, and admiralty and maritime law.

20.45 As discussed in Chapter 18, a significant proportion of judges of the FCA have experience in the criminal law area through past appointments or current joint appointments to courts exercising criminal jurisdiction. In addition, the FCA exercises

<sup>59</sup> Australian Taxation Office, *Submission SFO 72*, 10 February 2006; Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; WT, *Submission SFO 23*, 11 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; Chief Justice M Black & Others, *Consultation*, Melbourne, 30 March 2005; A Freiberg, *Consultation*, Melbourne, 30 March 2005.

<sup>60</sup> Justice B Debele, *Submission SFO 93*, 23 February 2006; Chief Justice P de Jersey, *Submission SFO 89*, 20 February 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; Chief Justice J Doyle, *Submission SFO 85*, 16 February 2006; Attorney-General's Department, *Submission SFO 83*, 15 February 2006; Chief Judge P McClellan, *Submission SFO 77*, 10 February 2006; New South Wales Legal Aid Commission, *Submission SFO 75*, 10 February 2006; Justice P Johnson, *Submission SFO 73*, 10 February 2006; Chief Justice D Malcolm, *Submission SFO 71*, 10 February 2006; Attorney General B Debus, *Submission SFO 65*, 9 January 2006.

<sup>61</sup> Justice P Johnson, *Submission SFO 73*, 10 February 2006.

<sup>62</sup> New South Wales Legal Aid Commission, *Submission SFO 75*, 10 February 2006; Attorney General B Debus, *Submission SFO 65*, 9 January 2006.

<sup>63</sup> Chief Justice M Black & Others, *Consultation*, Melbourne, 30 March 2005.

original jurisdiction in relation to a limited number of summary criminal matters and appellate jurisdiction in relation to criminal appeals from Norfolk Island. In addition, this Report recommends that the original jurisdiction of the FCA be expanded to deal with nominated federal offences whose subject matter is closely allied to the existing civil jurisdiction of the FCA, such as complex taxation, trade practices and corporations matters. An expansion of this kind would allow the Court to build further expertise in relation to federal criminal matters at first instance, including in relation to indictable matters.

20.46 However, a number of submissions expressed the view that limited original jurisdiction in areas such as taxation, trade practices and corporations would not adequately equip the Court to deal with the majority of appeals, which are in relation to fraud and drug matters.<sup>64</sup> In addition, it was noted that it would be necessary for the FCA to acquire a detailed understanding of relevant procedural law in each state and territory in order to deal with appeals from state and territory courts applying state and territory procedures in federal criminal matters.<sup>65</sup> Other concerns included the fairly low volume of federal appeals, which would make it more difficult for the FCA to gain experience and develop expertise.<sup>66</sup>

#### ***Joint matters and accrued jurisdiction***

20.47 Concern was also expressed about constitutional limitations on the exercise of appellate jurisdiction by the FCA in relation to matters involving both federal and state offences.<sup>67</sup> In his submission, Professor Arie Freiberg expressed the view that the fewer joint matters there were, the stronger the case for federal courts to be given criminal jurisdiction.<sup>68</sup>

20.48 On the basis of data provided by the CDPP, the ALRC estimates that in the five-year period 2000–04 there were 49 appeals to state courts of appeal or courts of criminal appeal across Australia involving both federal and state offences—that is, about 10 cases per year. This figure includes both defence and prosecution appeals.<sup>69</sup> The number of joint matters on appeal is much smaller than the number of joint matters at first instance because not every matter is taken on appeal and, in those cases that are appealed, the appeal is often limited to a state/territory issue or a federal issue. The 10 cases a year mentioned above refer to cases in which both state/territory and federal matters were raised in the same appeal.

64 Justice P Johnson, *Submission SFO 73*, 10 February 2006; Chief Justice D Malcolm, *Submission SFO 71*, 10 February 2006; Attorney General B Debus, *Submission SFO 65*, 9 January 2006.

65 Justice P Johnson, *Submission SFO 73*, 10 February 2006.

66 Chief Justice J Doyle, *Submission SFO 85*, 16 February 2006.

67 Chief Justice P de Jersey, *Submission SFO 89*, 20 February 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; Chief Judge P McClellan, *Submission SFO 77*, 10 February 2006; New South Wales Legal Aid Commission, *Submission SFO 75*, 10 February 2006; Attorney General B Debus, *Submission SFO 65*, 9 January 2006.

68 A Freiberg, *Submission SFO 12*, 4 April 2005.

69 Commonwealth Director of Public Prosecutions, *Correspondence*, 4 May–2 September 2005, joint matters data.



20.49 It is possible that some of these joint matters would fall within the accrued jurisdiction of the FCA. In relation to those that did not fall within the accrued jurisdiction of the Court—for example, where the federal and state charges did not arise out of common transactions and facts—any appeal in relation to the state matter would have to be brought separately in the state court of appeal or court of criminal appeal. This is likely to be less of a problem in the future because, as discussed in Chapter 18, there is a growing trend towards running separate trials in state/territory and federal matters.

### ***Cross-jurisdictional appeals and other issues***

20.50 A number of stakeholders commented that cross-jurisdictional appeals were undesirable and that it was not appropriate for an appeal to lie from a state or territory supreme court to the FCA.<sup>70</sup> Chief Justice Malcolm submitted that where a court conducts the trial and sentencing of an offender, that court should also have responsibility for appellate supervision of the process.<sup>71</sup>

20.51 Other concerns included the potential to establish two separate streams of authority in relation to federal criminal matters<sup>72</sup> and the cost of duplicating facilities for dealing with criminal proceedings at the federal level.<sup>73</sup>

### ***Appellate jurisdiction over offences dealt with by the FCA at first instance***

20.52 The same concerns do not arise in relation to the exercise of appellate jurisdiction by the FCA in relation to matters dealt with by the FCA at first instance. In Chapter 18 the ALRC recommends that the Australian Parliament expand the original jurisdiction of the FCA to hear and determine proceedings in relation to nominated federal offences whose subject matter is closely allied to the existing civil jurisdiction of the Court, in areas such as taxation, trade practices and corporations law.<sup>74</sup>

20.53 There was some support in submissions and consultations for the proposition that where the FCA deals with a federal criminal matter at first instance, that Court should also deal with the matter on appeal.<sup>75</sup>

### **ALRC's views**

20.54 In 1980, the majority of ALRC commissioners recommended that the jurisdiction of the FCA be expanded to cover appeals against conviction and sentence in federal criminal matters.<sup>76</sup> ALRC 15 recommended that appeals to the full court of

70 Chief Justice D Malcolm, *Submission SFO 71*, 10 February 2006; Chief Judge at Common Law P McClellan and Others, *Consultation*, Sydney, 2 February 2006.

71 Chief Justice D Malcolm, *Submission SFO 71*, 10 February 2006.

72 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

73 Chief Justice J Doyle, *Submission SFO 85*, 16 February 2006.

74 Rec 18–2.

75 Chief Justice D Malcolm, *Submission SFO 71*, 10 February 2006; Chief Judge at Common Law P McClellan and Others, *Consultation*, Sydney, 2 February 2006.

76 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), Rec 65.

the state and territory supreme courts or courts of criminal appeal should lie instead to the FCA because this would promote uniformity and consistency in dealing with federal offenders.<sup>77</sup>

20.55 In the context of the current Inquiry, the ALRC has worked with the AIC and other agencies to consider whether, on the basis of the available evidence, there are indications of unacceptable inconsistency between jurisdictions in the type and severity of sentences imposed for the same category of federal crime. Despite the limitations on the available data, there is compelling evidence of disparity in sentencing outcomes between jurisdictions. Because consistency in sentencing is a ‘fundamental element in any rational and fair system of criminal justice’,<sup>78</sup> the ALRC is firmly of the view that this disparity does need to be addressed. The question is ‘how?’.

20.56 The High Court has an important role to play in settling national sentencing principles but, given the special leave requirements and the breadth of the High Court’s workload, it is unlikely that High Court decisions on the sentencing of federal offenders will play a central role in promoting national consistency, except in very broad terms.

20.57 Currently, there is no appellate court, other than the High Court, ensuring consistency in the sentencing of federal offenders nationally. The state and territory courts of appeal and courts of criminal appeal do not have the jurisdiction to perform this role. In this context, the principle of comity is crucial to ensuring that federal offenders are dealt with in a consistent manner across Australia. Many of the recommendations in this Report, including the establishment of a national sentencing database and the establishment of judicial exchange programs, are intended to support judicial comity.<sup>79</sup>

20.58 On the basis of submissions and consultations, the ALRC believes it is premature to recommend a major restructuring of appellate jurisdiction in federal criminal matters before allowing time for the other recommendations in this Report to be implemented and to take effect. The introduction of a federal sentencing Act with clearly stated objects—including the promotion of greater consistency in the sentencing of federal offenders—as well as purposes, principles and factors relevant to sentencing federal offenders will help to ensure that federal offenders are treated in a more consistent manner by state and territory courts.

20.59 However, the new federal sentencing Act should include provision for a later review of sentencing in federal criminal matters to determine whether there is significant unjustified disparity in the sentencing of federal offenders across Australia. That review should take place three years after the legislation comes into force and

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77 Ibid, [435].

78 *Lowe v The Queen* (1984) 154 CLR 606, 610–611.

79 Recs 21–1 and 19–4.

should include an examination of the data collected for the national sentencing database. If significant and unjustified disparity is found to exist, the review should consider again whether general appellate jurisdiction should be conferred on the FCA in federal criminal matters.

20.60 The ALRC also recommends that the Australian Parliament confer exclusive appellate jurisdiction on the FCA in relation to those criminal matters heard at first instance by that Court under the expanded original jurisdiction conferred in accordance with Recommendation 18–2.

**Recommendation 20–1** The new federal sentencing Act should provide that, three years after it comes into force, a review is to be conducted of sentencing in federal criminal matters, to determine whether there is significant unjustified disparity in the sentencing of federal offenders across Australia. If such disparity exists, the review should consider whether general appellate jurisdiction should be conferred on the Federal Court of Australia in federal criminal matters.

**Recommendation 20–2** The Australian Parliament should confer exclusive appellate jurisdiction on the Federal Court of Australia in relation to those criminal matters heard at first instance by the Federal Court of Australia under the expanded original jurisdiction conferred in accordance with Recommendation 18–2.



## 21. Other Measures to Promote Consistent Sentencing

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### Introduction

21.1 The previous chapter examined the available data on the sentencing of federal offenders and concluded that there is compelling evidence of inconsistency between jurisdictions in the sentences imposed for similar categories of federal crime. The chapter went on to examine the arrangements for criminal appeals in Australia on the basis that one of the reasons for allowing appeals against sentence is to promote consistency in the application of the law. However, the ALRC concluded it is premature to recommend a major restructuring of appellate jurisdiction in federal criminal matters before allowing time for other recommendations in this Report to be implemented and to take effect.

21.2 This chapter examines other potential methods for promoting consistency in the sentencing of federal offenders, including guideline judgments, grid sentencing and mandatory sentencing. While the ALRC does not recommend the use of any of these methods, it does recommend that the Australian Government should continue to support the development of a comprehensive national database on the sentences imposed on federal offenders for use by judicial officers, prosecutors, defence lawyers, researchers and others.

21.3 In considering these issues, the ALRC recognises that the principle of consistency needs to be balanced with other principles of sentencing—namely,

proportionality, parsimony, totality and individualised justice. In particular, the need to promote consistency in sentencing must be balanced with the maintenance of judicial discretion to ensure that sentences are individualised and proportionate to both the circumstances of the offence and of an individual offender;<sup>1</sup> in other words, that the ‘punishment fits the crime’.

21.4 Submissions and consultations expressed strong support for the retention of broad judicial discretion in sentencing federal offenders.<sup>2</sup> While some opposed any approach that might curtail discretion,<sup>3</sup> others were of the view that broad guidance in relation to the exercise of that discretion was appropriate.<sup>4</sup>

## National sentencing database

### Background

21.5 Sentencing databases promote consistency by informing the exercise of the court’s sentencing discretion. They assist courts by helping to determine the appropriateness of sentences handed down in individual cases.<sup>5</sup> In particular, databases are intended to assist the court in deciding whether a proposed sentence ‘is in any way inside or outside the normal range of penalties imposed for similar offences in past cases’.<sup>6</sup>

21.6 In its 1988 report, *Sentencing* (ALRC 44), the ALRC expressed support for an information system to provide judicial officers with reliable, accessible and up-to-date information in order to ensure that the penalties imposed on individual offenders were appropriate and that the sentences were consistent. The ALRC expressed the view that meaningful comparisons between sentences can be made only if a relatively standardised description of offences and offenders is collected and made available to judicial officers, the legal profession, and others involved in the criminal justice system.<sup>7</sup>

21.7 Sentencing databases have been established in New South Wales, Victoria, Tasmania and the ACT. The Judicial Commission of New South Wales (JCNSW) has established the Judicial Information Research System (JIRS) in relation to New South Wales cases. JIRS is an online source of primary, secondary and statistical reference

1 See, eg, New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [1.7].

2 Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005; Welfare Rights Centre Inc (Queensland), *Submission SFO 29*, 15 April 2005; Law Society of the Northern Territory, *Consultation*, Darwin, 29 April 2005; T Glynn, *Consultation*, Brisbane, 2 March 2005.

3 Law Society of South Australia, *Submission SFO 37*, 22 April 2005; T Glynn, *Consultation*, Brisbane, 2 March 2005.

4 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; JC, *Submission SFO 25*, 13 April 2005; Law Society of the Northern Territory, *Consultation*, Darwin, 29 April 2005.

5 I Potas, ‘The Use and Limitations of Sentencing Statistics’ (2004) 31 *Sentencing Trends & Issues* 1, 5.

6 Ibid, 6–7.

7 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [267]–[268].

material for judicial officers, the courts, the legal profession and government agencies. JIRS contains some sentencing data for the past 10 years on federal criminal matters dealt with in New South Wales courts where the federal offence is the primary offence.<sup>8</sup> JIRS is available to the Office of the Director of Public Prosecutions New South Wales, the New South Wales Public Defenders Office and the Legal Aid Commission of New South Wales free of charge, and to private legal practitioners by subscription. The database can also be accessed in the libraries of the Supreme Court of New South Wales, the Law Society of New South Wales and the New South Wales Bar Association.<sup>9</sup>

21.8 The Judicial College of Victoria operates a similar sentencing information system, 'Judicial Officers' Information Network' (JOIN), which holds relevant data provided by the courts, with links to legislation, cases and statistics.<sup>10</sup> In Tasmania and the ACT, similar sentencing databases have been developed in relation to sentences handed down by the Supreme Courts in those jurisdictions.<sup>11</sup> In other states and territories, certain sentencing remarks are published on the relevant courts' websites.<sup>12</sup>

21.9 At the federal level, a database on the sentencing of federal offenders is under development. On 8 October 2005, a Memorandum of Understanding relating to the establishment of the National Commonwealth Offenders Sentencing Database was concluded between the National Judicial College of Australia (NJCA), the JCNSW and the Commonwealth Director of Public Prosecutions (CDPP).<sup>13</sup> The database is being developed using data supplied by the CDPP, based on the JIRS model.<sup>14</sup> The project is funded by the Attorney-General and the funding arrangements will cover the costs of the project for five years.<sup>15</sup>

21.10 National Commonwealth Offenders Sentencing Database will provide users with online access to statistical information on the range and frequency of penalties imposed by courts for federal offences. It will enable users to obtain comparative sentencing information by reference to certain agreed criteria. The agreed criteria include the type and quantum of sentence imposed, details of the offence and the offender, and other criteria as agreed in the future by the parties to the Memorandum of Understanding.<sup>16</sup>

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8 Judicial Commission of New South Wales, *Consultation*, by telephone, 17 December 2004.

9 Judicial Commission of New South Wales, *Consultation*, Sydney, 2 February 2006.

10 Judicial College of Victoria, *Annual Report 2004–05* (2005), 9.

11 NiuMedia Pacific, *tasInLaw* <[www.niumedialaw.com/index.htm](http://www.niumedialaw.com/index.htm)> at 7 September 2005; ACT Department of Justice and Community Safety, *Annual Report 2004–05 (vol 1)* (2005), 39.

12 See, eg, Courts Administration Authority South Australia, *South Australian Sentencing Remarks* <[http://www.courts.sa.gov.au/sent\\_remarks/index.html](http://www.courts.sa.gov.au/sent_remarks/index.html)> at 7 October 2005; Supreme Court of the Northern Territory, *Sentencing Remarks* <[http://www.nt.gov.au/ntsc/doc/sentencing\\_remarks/2005/10/index.html](http://www.nt.gov.au/ntsc/doc/sentencing_remarks/2005/10/index.html)> at 7 October 2005.

13 National Judicial College of Australia, *Submission SFO 61*, 22 December 2005.

14 National Judicial College of Australia, *Consultation*, Canberra, 17 March 2005.

15 National Judicial College of Australia, *Consultation*, Canberra, 13 February 2006.

16 Ibid.

21.11 The database will also include links to Commonwealth legislation, selected High Court judgments, the Australasian Legal Information Institute website, the *Commonwealth Criminal Code: A Guide for Practitioners* by the Attorney-General's Department,<sup>17</sup> jury directions relevant to the *Criminal Code*,<sup>18</sup> the relevant section of the *New South Wales Criminal Trial Courts Bench Book* on the sentencing of federal offenders,<sup>19</sup> selected papers by the NJCA, and consultation papers and reports by the ALRC on sentencing.<sup>20</sup>

21.12 The database is expected to be operational in the first half of 2006.<sup>21</sup> Initially the judiciary and the CDPP will have access to the database. The parties to the Memorandum of Understanding have yet to decide on how widely accessible the database will be in the future.<sup>22</sup>

### Issues and problems

21.13 Judicial officers participating in the NJCA's professional development programs have commented adversely on the disparity in the sentencing of federal offenders, and positively on the benefits of computer-based sentencing databases to the administration of justice.<sup>23</sup> Inconsistency may lead to individual injustice but also has the potential to impact adversely on public confidence in the law, especially in relation to federal offences, because of the expectation that there will be parity of sentencing for like cases across Australia.<sup>24</sup> The NJCA has also noted that failure to ensure consistency may result in prosecuting authorities expending unnecessary resources in appealing against inadequate sentences and in loss of revenue where courts impose inappropriately low fines.<sup>25</sup>

21.14 If the national sentencing database were made available to defence lawyers, defendants would have access to more accurate and reliable information about the likely sentencing range for an offence, which may reduce the expenditure of court resources on unnecessarily contested cases or appeals.<sup>26</sup> In consultations, support was

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17 Commonwealth Attorney-General's Department in association with the Australian Institute of Judicial Administration, *The Commonwealth Code: A Guide for Practitioners* (2002).

18 *Criminal Code* (Cth).

19 Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (2005) <[www.judcom.nsw.gov.au/sisdemo/ctbb.htm](http://www.judcom.nsw.gov.au/sisdemo/ctbb.htm)> at 1 October 2005.

20 Judicial Commission of New South Wales, *Consultation*, Sydney, 2 February 2006.

21 National Judicial College of Australia, *Submission SFO 61*, 22 December 2005.

22 National Judicial College of Australia, *Consultation*, Canberra, 13 February 2006.

23 National Judicial College of Australia, *A National Sentencing Database on Commonwealth Offences?* (2005) unpublished manuscript, 1.

24 Crime Victims Support Association Incorporated, *Liberals To Force Publication of Sentencing Facts* <[www.cvsa.asn.au/articles.php?ArticlesShowMe=35](http://www.cvsa.asn.au/articles.php?ArticlesShowMe=35)> at 7 September 2005. See also National Judicial College of Australia, *A National Sentencing Database on Commonwealth Offences?* (2005) unpublished manuscript, 7.

25 National Judicial College of Australia, *A National Sentencing Database on Commonwealth Offences?* (2005) unpublished manuscript, 7.

26 *Ibid.*, 7.



also expressed for making information on the database widely accessible, including providing access to researchers and the general public.<sup>27</sup>

21.15 In submissions and consultations the establishment of a national database on the sentencing of federal offenders received overwhelming support from government and non-government organisations, Commonwealth prosecuting authorities, judicial officers, legal practitioners, federal offenders and academics.<sup>28</sup>

### ALRC's views

21.16 The ALRC strongly supports the development of a comprehensive national sentencing database. Such a database would allow meaningful comparisons between federal sentences across jurisdictions and provide the judiciary with reliable, accessible and up-to-date information that can help to ensure that sentences are appropriate and consistent.<sup>29</sup> The database should include information on the type and quantum of sentence imposed (including head sentence and non-parole period), and relevant characteristics of the offence and the offender that have been taken into account in imposing the sentence.

21.17 As noted above, the NJCA, the JCNSW and the CDPP have taken steps to establish such a database, which is being funded by the Attorney-General. However, the CDPP does not prosecute all federal offences. Because regulators such as the Australian Securities and Investments Commission and the Australian Taxation Office also routinely conduct prosecutions for minor federal offences,<sup>30</sup> the Australian Government should also consult with such organisations in order to obtain comprehensive data on sentences imposed for federal offences.

21.18 In addition to data collected by prosecutors and regulators, the database should utilise any complementary information collected by state and territory courts in federal

27 Sentencing Advisory Committee, *Advisory Committee Meeting*, 2 March 2006; Justice T Connolly, *Consultation*, Canberra, 13 February 2006.

28 Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006; Attorney-General's Department, *Submission SFO 83*, 15 February 2006; G Mackenzie, *Submission SFO 80*, 14 February 2006; Chief Judge P McClellan, *Submission SFO 77*, 10 February 2006; Justice P Johnson, *Submission SFO 73*, 10 February 2006 (this submission was endorsed by 10 other judges of the Supreme Court of New South Wales); Australian Taxation Office, *Submission SFO 72*, 10 February 2006; M Beadle, *Submission SFO 56*, 1 December 2005; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Welfare Rights Centre Inc (Queensland), *Submission SFO 29*, 15 April 2005; JC, *Submission SFO 25*, 13 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005; BN, *Submission SFO 17*, 8 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; LD, *Submission SFO 9*, 10 March 2005; Attorney General's Department of NSW, *Consultation*, Sydney, 27 February 2006; Justice T Connolly, *Consultation*, Canberra, 13 February 2006; Chief Judge at Common Law P McClellan and Others, *Consultation*, Sydney, 2 February 2006; Law Society of the Northern Territory, *Consultation*, Darwin, 29 April 2005; M Johnson, *Consultation*, Darwin, 27 April 2005; Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.

29 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [267]–[268].

30 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [2.22].

criminal matters. In Chapter 18 the ALRC recommends that the original jurisdiction of the Federal Court of Australia be expanded to include nominated federal offences whose subject matter is closely allied to the existing civil jurisdiction of the Court.<sup>31</sup> If this recommendation is implemented, the database should also utilise relevant information collected by the Federal Court.

21.19 In order for the federal sentencing database to incorporate data from different sources, there is a need for data to be collected by source organisations in a consistent manner. The database should therefore be developed in consultation with agencies that have experience in designing and maintaining information databases on crime and criminal justice. In particular, the development of the database should be undertaken in consultation with both the Australian Bureau of Statistics and the Australian Institute of Criminology, given the Bureau's role as Australia's official statistical organisation and the Institute's position as a national crime and criminal justice research agency.

21.20 Technology such as that developed by the JCNSW and the Sentencing Advisory Council in Victoria<sup>32</sup> should be utilised in developing the federal sentencing database. There has been favourable judicial comment on the usefulness of JIRS in judicial decision making.<sup>33</sup> Such databases have provided judges with up-to-date information and have had a real impact on judicial consideration of the appropriate range of sentences to be imposed.<sup>34</sup>

21.21 In Discussion Paper 70 (DP 70), the ALRC proposed that judicial officers, prosecutors and defence lawyers in federal criminal matters should have access to the federal sentencing database. This was to promote consistency in sentencing by judicial officers, reduce uncertainty as to the likely outcome of cases, and provide the basis for improved advice to defendants.<sup>35</sup> In the interests of facilitating research on federal sentencing and promoting better understanding of sentencing by the public, the database should also be made available for use by researchers and members of the public.

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31 Rec 18–2.

32 The Sentencing Advisory Council of Victoria advised that it has a new software system (SuperCROSS) for the collection of sentencing data from the courts. SuperCROSS allows variables to be reclassified in order to reconcile data collected from different sources: Victorian Sentencing Advisory Council, *Consultation*, Melbourne, 23 February 2006.

33 See, eg, *R v Maguire* (Unreported, New South Wales Court of Criminal Appeal, Grove, James and Hulme JJ, 30 August 1995), 9–10. According to the JCNSW, over 300 judgments have mentioned the utility of JIRS: Judicial Commission of New South Wales, *Consultation*, Sydney, 2 February 2006.

34 See, eg, New South Wales Law Reform Commission, *Sentencing*, DP 33 (1996), [6.27]–[6.28].

35 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 21–1.

**Recommendation 21–1** In order to promote consistency in the sentencing of federal offenders, the Australian Government should continue to support the development of a comprehensive national database on the sentences imposed on all federal offenders. The database should include information on the type and quantum of sentences imposed and the characteristics of the offence and the offender that have been taken into account in imposing the sentence. The data should be made widely available for use by judicial officers, prosecutors, defence lawyers, researchers and members of the public.

**Recommendation 21–2** In developing a comprehensive database on the sentences imposed on federal offenders, the National Judicial College of Australia should liaise with:

- (a) the Australian Bureau of Statistics and the Australian Institute of Criminology in relation to the categories of information to be recorded in the database;
- (b) the Commonwealth Director of Public Prosecutions and other prosecuting authorities with a view to collecting comprehensive data in federal criminal matters; and
- (c) federal, state and territory courts in relation to the collection of complementary data in federal criminal matters.

## Guideline judgments

21.22 Guideline judgments are generally judgments delivered by an appellate court in the context of a particular case, but they go beyond the points raised in the particular appeal to suggest a sentencing scale, or appropriate starting point, for the category of crime before the court. They may identify the main aggravating and mitigating factors for the offence, or indicate how particular types of sanction are to be used in relation to that type of offence.

21.23 Alternatively, guideline judgments may indicate relevant sentencing considerations without specifying a range or starting point, or they may deal with issues of general principle such as the effect of guilty pleas on sentencing. Guideline judgments are not binding rules, but they are persuasive for trial courts in subsequent cases and should only be departed from ‘in accordance with a reasoned and justifiable exercise of discretion’.<sup>36</sup>

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36 *R v Romanic (Milorad)* [2000] NSWCCA 524, [16].

21.24 Guideline judgments differ from traditional appellate judgments in a number of ways. They frequently deal with a category of offence or a type of offender, rather than an offence and offender in a particular case.<sup>37</sup> In addition, they provide an opportunity to evaluate current sentencing practice and to suggest new approaches.<sup>38</sup>

21.25 New South Wales, Victoria, Western Australia and South Australia have legislation authorising higher or appellate courts to give a guideline judgment on their own motion.<sup>39</sup> In some states, the Attorney-General or other parties may request that courts deliver guideline judgments without the need for a relevant appeal.<sup>40</sup> Federal legislation does not provide for guideline judgments and, for reasons explained below, it may not be able to do so in some circumstances.

21.26 The advantages of guideline judgments are said to be that they foster consistency while retaining judicial discretion; accommodate special or exceptional cases while serving the aims of rehabilitation, denunciation and deterrence; allow a judge to respond to all the circumstances of a case; result in fewer appeals by the prosecution; and lower pressure on the executive arm of government to respond to media attention.<sup>41</sup> On the other hand, the potential disadvantages of guideline judgments include erosion of judicial discretion, and the possibility of greater use of imprisonment due to a new emphasis on establishing exceptional circumstances to justify departure from a guideline.<sup>42</sup>

21.27 Regardless of the merits of guideline judgments, it is clear that in federal criminal matters a court could not give a guideline judgment in the nature of an advisory opinion. The exercise of federal judicial power must generally involve the binding or authoritative ascertainment or determination of existing rights.<sup>43</sup>

21.28 In *Wong v The Queen*,<sup>44</sup> the High Court appears to have cast doubt on the constitutional validity of guideline judgments at the federal level in some other circumstances. In *Wong*, the High Court overturned a guideline judgment concerning the sentences appropriate for couriers and others with a minor role in the importation of heroin in contravention of the *Customs Act 1901* (Cth). The guideline, issued by the New South Wales Court of Criminal Appeal, consisted of five levels related to the quantity of the drug involved, and a range of penalties was suggested for each level.<sup>45</sup>

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37 *R v Jurisic* (1998) 45 NSWLR 209, 220.

38 N Morgan and B Murray, 'What's in a Name? Guideline Judgments in Australia' (1999) 23 *Criminal Law Journal* 90, 93–94.

39 *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3, div 4; *Sentencing Act 1991* (Vic) pt 2AA; *Sentencing Act 1995* (WA) s 143; *Criminal Law (Sentencing) Act 1988* (SA) pt 2, div 4.

40 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 37; *Criminal Law (Sentencing) Act 1988* (SA) s 29B.

41 R Johns, *Sentencing Law: A Review of Developments in 1998–2001* (2002) NSW Parliament, 25–26.

42 P Byrne, 'Guideline Sentencing: A Defence Perspective' (1999) 11(11) *Judicial Officers' Bulletin* 81, 81.

43 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357.

44 *Wong v The Queen* (2001) 207 CLR 584.

45 *R v Wong* (1999) 48 NSWLR 340, [142].

21.29 On appeal to the High Court, Gaudron, Gummow and Hayne JJ held that because the guidelines elevated the quantity of the narcotic to a position of primacy, they were inconsistent with the sentencing factors listed in s 16A of the *Crimes Act 1914* (Cth).<sup>46</sup> The Court also considered issues arising from Chapter III of the *Australian Constitution*. Their Honours stated that if judicial guidelines had any binding effect on future cases—for example, if departure from the guidelines would attract close scrutiny by an appellate court—they would begin ‘to pass from the judicial to the legislative’.<sup>47</sup>

21.30 In their joint judgment, Gaudron, Gummow and Hayne JJ drew a distinction between the articulation of principles underpinning the determination of a particular sentence, which was central to the exercise of the court’s jurisdiction, and the publication of the expected or intended results of future cases, which was not within the jurisdiction or the powers of the court.<sup>48</sup> Their Honours stated that if the guidelines were not intended to have any binding effect on future cases, their purpose was unclear.<sup>49</sup> Kirby J reserved for future consideration the issue of whether it is possible to formulate sentencing guidelines consistently with the *Constitution*. His Honour noted that much will depend upon the way in which guidelines are expressed and the manner in which they are used.<sup>50</sup>

21.31 Some commentators have suggested that *Wong* casts doubt on the constitutional validity of guideline judgments in general.<sup>51</sup> In consultations, doubt was expressed about whether a scheme that is focused on articulating a set of principles in advance for a particular type of offence, rather than merely indicating the reasons underpinning a particular sentencing decision, would be constitutionally valid.<sup>52</sup>

21.32 Others have argued that the decision in *Wong* is confined to numerical guidelines of the kind considered in that case.<sup>53</sup> It has also been argued that the High Court has expressed clear support for a more minimal approach, involving largely descriptive guidelines that either set out relevant factors to be taken into account in assessing the seriousness of an offence or articulate the type of punishment that should ordinarily be imposed.<sup>54</sup> Some judicial officers also noted that despite the decision in *Wong*, the CDPP has continued to rely upon the substance of the guidelines articulated

46 *Wong v The Queen* (2001) 207 CLR 584, [87].

47 *Ibid*, [80].

48 *Ibid*, [83].

49 *Ibid*, [80].

50 *Ibid*, [144]–[149].

51 See, eg, R Johns, *Sentencing Law: A Review of Developments in 1998–2001* (2002) NSW Parliament, 38.

52 Australian National University Academics, *Consultation*, Canberra, 10 February 2006.

53 See, eg, K Warner, ‘The Role of Guideline Judgments in the Law and Order Debate in Australia’ (2003) 27 *Criminal Law Journal* 8; J Anderson, ‘“Leading Steps Aright”: Judicial Guideline Judgments in New South Wales’ (2004) 16(2) *Current Issues in Criminal Justice* 140; New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 November 2001, 19298 (B Debus—Attorney General).

54 J Anderson, ‘“Leading Steps Aright”: Judicial Guideline Judgments in New South Wales’ (2004) 16(2) *Current Issues in Criminal Justice* 140, 145.

by the New South Wales Court of Criminal Appeal in *Wong* with the object of promoting consistency in the sentencing of drug offenders.<sup>55</sup>

21.33 To the limited extent that the decision in *Wong* does leave scope for guideline judgments in federal criminal matters, it is also necessary to consider what court should deliver such judgments. A number of submissions supported the delivery of guideline judgments by the Federal Court of Australia.<sup>56</sup> However, the criminal jurisdiction of the Federal Court is currently very limited. Although the ALRC recommends in Chapter 20 that the appellate jurisdiction of the Federal Court be expanded to a limited extent,<sup>57</sup> for reasons stated elsewhere in this Report, the ALRC does not recommend that general appellate jurisdiction be conferred on the Federal Court in relation to all federal criminal matters at this time.<sup>58</sup> The Federal Court would therefore not be available for the delivery of guideline judgments in every federal criminal matter.

21.34 Alternatively, state and territory appellate courts could deliver guideline judgments in relation to federal offences (as in *Wong*) if they were accepted and applied by the courts of other states and territories as a matter of judicial comity. This might be appropriate in relation to federal offences that are prevalent in a particular jurisdiction, such as drug importation offences in New South Wales, illegal fishing in Queensland and Western Australia, and people smuggling in Western Australia and the Northern Territory.<sup>59</sup> Where particular federal offences are more prevalent in one jurisdiction, the courts of that jurisdiction have greater experience and expertise in those areas. There was some judicial support for this approach at the state level.<sup>60</sup>

21.35 In consultations, it was suggested that another alternative would be for guideline judgments to be delivered by courts comprised of judicial officers from a range of jurisdictions.<sup>61</sup>

### ALRC's views

21.36 In principle, the ALRC supports the development of guideline judgments as a useful tool for promoting consistency in sentencing—a view shared by many people

55 Justice P Johnson, *Submission SFO 73*, 10 February 2006; Chief Judge at Common Law P McClellan and Others, *Consultation*, Sydney, 2 February 2006. See, eg, *R v Rivadavia* (2004) 149 A Crim R 1, [59]–[61]; *Kardoulis v The Queen* [2005] NSWCCA 456, [82]–[91].

56 JC, *Submission SFO 25*, 13 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005.

57 Rec 20–2.

58 Ch 20.

59 See Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Appendix 1, [58]–[60].

60 Justice P Johnson, *Submission SFO 73*, 10 February 2006; Chief Judge at Common Law P McClellan and Others, *Consultation*, Sydney, 2 February 2006.

61 Chief Judge at Common Law P McClellan and Others, *Consultation*, Sydney, 2 February 2006.

who made submissions to the Inquiry.<sup>62</sup> Moreover, it would seem that not all guidelines are necessarily unconstitutional in the context of federal criminal matters.

21.37 Notwithstanding this, DP 70 did not propose the use of guideline judgments in relation to federal criminal matters. This was on the basis that the High Court's decision in *Wong* has created a climate of uncertainty around guideline judgments, which does not provide a firm foundation for law reform in this area.<sup>63</sup> The decision in *Wong* did not consider whether non-numerical guideline judgments could be constructed in a manner that is constitutionally valid, nor did it define the particular features that would render them valid. Consequently, the validity of each guideline judgment would have to be determined on a case-by-case basis, at least until further decisions of the High Court clarified the issue. In this environment, intermediate appellate courts are unlikely to embrace the opportunity to deliver guideline judgments in federal cases.

21.38 Other issues also arise in relation to guideline judgments in federal sentencing matters. The Federal Court has only limited criminal jurisdiction and would not be able to deliver guideline judgments in all federal criminal matters even if the Court's appellate jurisdiction were expanded as recommended in this Report. If guideline judgments were to be delivered by state and territory appellate courts, the success of the guidelines would hinge on the willingness of judicial officers in other jurisdictions to apply them as a matter of judicial comity. Having guideline judgments delivered by courts comprised of judicial officers from a variety of jurisdictions may help to address this issue but the likelihood of such a scheme—with the need for multiple cross-appointments—being implemented in the short term is remote.

21.39 In addition, it is not constitutionally possible in the federal context for the Attorney-General or another party to request that courts deliver 'guidelines' in the absence of a relevant appeal because the giving of advisory opinions is inconsistent with the exercise of federal judicial power. Any federal scheme would, therefore, be more limited than those currently in place in New South Wales and South Australia. A relevant case would have to arise before it was possible to issue a guideline judgment.

21.40 For these reasons the ALRC does not recommend the use of guideline judgments in relation to federal criminal matters at this time, although the ALRC has made a range of other recommendations in this Report to promote consistency in sentencing of federal offenders.

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62 G Mackenzie, *Submission SFO 80*, 14 February 2006; Justice P Johnson, *Submission SFO 73*, 10 February 2006; Attorney General B Debus, *Submission SFO 65*, 9 January 2006; Australian Taxation Office, *Submission SFO 18*, 8 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; LD, *Submission SFO 9*, 10 March 2005; Chief Judge at Common Law P McClellan and Others, *Consultation*, Sydney, 2 February 2006.

63 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), [21.32], [21.34]–[21.35].

## Grid sentencing

21.41 Grid sentencing is one of many legislative methods for promoting consistency in sentencing. Grid guideline systems establish presumptive sentences or sentencing ranges according to various combinations of offender and offence characteristics. They are normally prescribed in legislation or regulations. Judges are permitted to depart from the guidelines provided reasons are given for doing so, but in practice their discretion is constrained by factors such as the breadth of the sentencing ranges set down and the variety of circumstances under which departures are permitted.

21.42 There are currently no grid sentencing schemes in Australia. The closest that an Australian jurisdiction has come to establishing such a scheme is the sentencing matrix debated in Western Australia in the late 1990s. The matrix was promoted as providing greater accountability, transparency and consistency in the sentencing process.<sup>64</sup> The scheme was to be introduced in three stages.<sup>65</sup> The legislation for the first two stages was enacted in November 2000, but the state's Legislative Council rejected legislation for the third stage by a narrow margin.<sup>66</sup> The matrix was widely criticised and the legislation was eventually repealed.<sup>67</sup> It has been argued that the matrix raised constitutional issues because it interfered with the independence of the courts.<sup>68</sup>

21.43 There are a number of grid sentencing schemes in operation in the United States, which serve as possible models for greater legislative involvement in promoting consistency in sentencing, and as warnings of the disadvantages of such schemes.

21.44 Arguments in favour of grid sentencing schemes include that they enhance consistency in sentencing and allow administrators to predict more accurately the effect of changes to sentencing legislation.<sup>69</sup> There is some evidence that the Federal Sentencing Guidelines in the United States have had modest success in reducing overall disparity in sentencing.<sup>70</sup> However, the success of the Guidelines has been uneven in that some types of cases have shown no improvement in consistency, or improvement in some cities only. Furthermore, there is evidence that regional sentencing disparity has increased under the Guidelines, particularly in drug trafficking, immigration and robbery cases.<sup>71</sup>

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64 N Morgan, 'Accountability, Transparency and Justice: Do We Need a Sentencing Matrix?' (1999) 28 *Western Australian Law Review* 259, 259.

65 *Sentencing Amendment Act 2000* (WA) s 4; N Morgan, 'Going Overboard? Debates and Developments in Mandatory Sentencing, June 2000 to June 2002' (2002) 26 *Criminal Law Journal* 293, 297.

66 N Morgan, 'Going Overboard? Debates and Developments in Mandatory Sentencing, June 2000 to June 2002' (2002) 26 *Criminal Law Journal* 293, 297.

67 *Sentencing Legislation Amendment and Repeal Act 2003* (WA) s 32.

68 N Morgan, 'Accountability, Transparency and Justice: Do We Need a Sentencing Matrix?' (1999) 28 *Western Australian Law Review* 259, 289–290.

69 A Freiberg, *Pathways to Justice: Sentencing Review 2002* (2002) Victorian Government, 202.

70 P Hofer, K Blackwell and R Ruback, 'The Effect of the Federal Sentencing Guidelines on Inter-judge Sentencing Disparity' (1999) 90 *Journal of Criminal Law & Criminology* 239, 241.

71 *Ibid.*, 241, 297, 303.



21.45 Arguments against grid sentencing schemes include that they redistribute discretion so that decisions by police and prosecuting authorities become increasingly important.<sup>72</sup> Shifting discretion from courts to prosecutors is considered undesirable because prosecutors 'generally lack the experience of judges and have many considerations acting upon their decisions other than achieving the goal of uniform sentences'.<sup>73</sup>

21.46 It is also argued that grid sentencing has the potential to erode individualised justice, and results in decisions that are too severe when considered in light of the circumstances of individual offenders.<sup>74</sup> Restrictions placed on judicial discretion by grid sentencing schemes may thus have contributed to an increase in the rate of imprisonment in the United States.<sup>75</sup>

21.47 Other criticisms include that the schemes: rarely deal with non-custodial sentencing options or encourage broader use of such options;<sup>76</sup> indirectly discriminate against certain groups; are overly complex; and focus too much on retribution to the exclusion of other aims of sentencing.<sup>77</sup>

21.48 In submissions and consultations, there was considerable opposition to the introduction of grid sentencing in Australia.<sup>78</sup>

21.49 There may also be constitutional concerns. In the United States one element of sentencing grids has been found to be unconstitutional.<sup>79</sup> In 2004, the United States Supreme Court struck down the practice of increasing a sentence based on aggravating factors that have not been admitted by the defendant or proved to the satisfaction of a jury. This was on the basis that the constitutional rights to due process and trial by jury entitle a defendant to have any fact (other than the fact of a prior conviction) that

72 M Shein and M Doherty, 'The Federal Sentencing Guidelines: A Troubling Historical Perspective' (2004) 51 *Federal Lawyer* 30, 31; P Hofer, K Blackwell and R Ruback, 'The Effect of the Federal Sentencing Guidelines on Inter-judge Sentencing Disparity' (1999) 90 *Journal of Criminal Law & Criminology* 239, 299–302; S Schulhofer and I Nagel, 'Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period' (1997) 91 *Northwestern University Law Review* 1284, 1290.

73 P Hofer, K Blackwell and R Ruback, 'The Effect of the Federal Sentencing Guidelines on Inter-judge Sentencing Disparity' (1999) 90 *Journal of Criminal Law & Criminology* 239, 260.

74 M Shein and M Doherty, 'The Federal Sentencing Guidelines: A Troubling Historical Perspective' (2004) 51 *Federal Lawyer* 30, 34.

75 Ibid, 31.

76 R Frase, 'Sentencing Guidelines in Minnesota, Other States and Federal Courts: A Twenty-Year Retrospective' in N Demleitner and others (eds), *Sentencing Law and Policy: Cases, Statutes and Guidelines* (2003) 132, 135.

77 See N Gertner and H Sarokin, 'Federal Sentencing Guidelines: A View from the Bench' (2002) 29(2) *Human Rights* 6, 23; A Freiberg, *Pathways to Justice: Sentencing Review 2002* (2002) Victorian Government, 202.

78 G Mackenzie, *Submission SFO 80*, 14 February 2006; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.

79 *Blakely v Washington* 124 S Ct 2531 (2004); *United States v Booker* 375 F 3d 508 (7th Cir, 2004).

increases the prescribed statutory maximum penalty for a crime submitted to a jury and proven beyond a reasonable doubt.

21.50 It is a matter of debate whether similar issues might arise under the *Australian Constitution*. Section 80 requires trial by jury for any federal offence that is tried on indictment but there is no direct parallel for the guarantee of due process in Australian law.<sup>80</sup> In *Cheng v The Queen*,<sup>81</sup> the majority of the High Court declined to re-open *Kingswell v The Queen*,<sup>82</sup> which held that where the factual matters required to determine the range of penalties are not elements of the offence, these factual matters can be determined by a judge rather than a jury without contravening s 80.<sup>83</sup>

21.51 It would appear that, provided the facts that determine the range of penalties are not elements of the offence, grid sentencing legislation that requires a judge to determine those facts would be constitutionally valid. However, a constitutional issue may arise where the legislation allows a judge to determine facts that are relevant to sentencing for an indictable offence if those facts constitute elements of the offence.

### ALRC's views

21.52 In DP 70, the ALRC did not favour the establishment of a grid-sentencing scheme in relation to the sentencing of federal offenders on the basis that grid sentencing inappropriately prioritises consistency over individualised justice.<sup>84</sup> By reducing consideration of the circumstances of the individual offender, grid sentencing has the potential to result in injustice.<sup>85</sup> Similar views were expressed in submissions.<sup>86</sup>

21.53 Furthermore, as demonstrated by the United States experience, restricting judicial discretion by grid sentencing may have the consequence of shifting discretion from courts to prosecutors to an inappropriate degree. The ALRC is of the view that this is undesirable because decisions of police and prosecutors are less transparent, accountable and contestable than judicial decisions. The ALRC thus remains of the view that a grid-sentencing scheme should not be established in relation to the sentencing of federal offenders.

### Mandatory sentencing

21.54 Mandatory sentencing is another legislative method for promoting consistency in sentencing. In mandatory sentencing 'the Parliament, by legislation, sets a particular

80 *Dietrich v The Queen* (1992) 177 CLR 292, 307 (Mason CJ and McHugh J), 359 (Toohey J).

81 *Cheng v The Queen* (2000) 203 CLR 248.

82 *Kingswell v The Queen* (1985) 159 CLR 264.

83 *Cheng v The Queen* (2000) 203 CLR 248, [44] (Gleeson CJ, Gummow and Hayne JJ), [283] (Callinan J).

84 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), [21.47]–[21.48].

85 See K Stith and J Cabranes, 'To Fear Judging No More: Recommendations for the Federal Sentencing Guidelines' (2002) 2 *Federal Sentencing Reporter* 187.

86 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005.

sentence, or a minimum as well as a maximum sentence, for a particular offence'.<sup>87</sup> Mandatory sentencing can take various forms, the chief characteristic being that it either removes or severely restricts the exercise of judicial discretion in sentencing. The most common form of mandatory sentencing is mandatory minimum penalties, in which the legislature sets a minimum threshold but leaves the court to impose a harsher sanction where it considers it appropriate.<sup>88</sup>

21.55 Mandatory sentencing schemes at the state and territory level in Australia have included the Western Australian 'three strikes' legislation and the Northern Territory's mandatory minimum imprisonment laws for property offenders. These regimes were controversial and much criticised.<sup>89</sup> Although these regimes are no longer in operation, some state legislation still provides for mandatory penalties.<sup>90</sup> These mandatory sentencing laws apply to state offences and therefore have no application to the sentencing of federal offenders.

21.56 At the federal level, only one Act—the *Migration Act 1958* (Cth)—provides for mandatory minimum head sentences. Under s 233C of the Act, the court is required to impose a head sentence of at least five years imprisonment for the offence of people smuggling—or at least eight years if the conviction is for a repeat offence—unless it can be proven on the balance of probabilities that the offender was under the age of 18 years when the offence was committed. In addition, the court is required to fix a minimum non-parole period of three years—or five years if the conviction is for a repeat offence. Mandatory minimum non-parole periods are discussed in Chapter 9.

21.57 Mandatory minimum sentences do not in themselves raise difficulties under the *Australian Constitution*, but mandatory sentencing schemes may do so in some circumstances. For example, a constitutional challenge might be raised if the scope and severity of the scheme were such that the sentencing discretion effectively passed from the judiciary to the legislative arm of government. This might occur if courts were effectively left without any discretion regarding the sentence to be imposed.<sup>91</sup>

21.58 Arguments in favour of mandatory sentencing include that it: creates greater consistency by avoiding unduly lenient or harsh sentences; increases certainty in sentencing for courts, prosecutors and defendants; provides greater deterrence due to

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87 H Figgis, *Sentencing—Hot Topics Issue 28* (2000) Legal Information Access Centre, 15.

88 M Bagaric, 'What Sort of Mandatory Penalties Should We Have?' (2002) 23 *Adelaide Law Review* 113, 117.

89 G Santow, 'Mandatory Sentencing: A Matter for the High Court?' (2000) 74 *Australian Law Journal* 298; D Johnson and G Zdenkowski, *Mandatory Injustice: Compulsory Imprisonment in the Northern Territory* (2000).

90 See, eg, *Criminal Code* (WA) ss 400, 401 (mandatory penalties for burglary).

91 G Santow, 'Mandatory Sentencing: A Matter for the High Court?' (2000) 74 *Australian Law Journal* 298.

the severity of the sentences; reduces repeat offending by incarcerating offenders; and increases transparency.<sup>92</sup>

21.59 However, mandatory sentencing has been the subject of considerable criticism. It is argued that these schemes: escalate sentence severity; are unable to take account of the particular circumstances of the case; and redistribute discretion so that decisions by the police and prosecuting authorities become increasingly important.<sup>93</sup> Some critics also claim that mandatory sentencing fails to deter criminal behaviour; leads to greater inconsistency;<sup>94</sup> and has a profound discriminatory impact on certain groups.<sup>95</sup> In addition, many commentators have argued that mandatory sentencing schemes contravene a number of accepted sentencing principles and international human rights standards,<sup>96</sup> including: the principle of proportionality; the requirement that the detention of young people should be a last resort and for the shortest appropriate time; and the requirement that sentences should be reviewable by a higher court.<sup>97</sup> A number of United Nations committees have expressed concerns about mandatory sentencing generally, and the schemes in the Northern Territory and Western Australia in particular.<sup>98</sup>

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- 92 See M Bagaric, 'Consistency and Fairness in Sentencing: The Splendour of Fixed Penalties' (2000) 2 *California Criminal Law Review* 1; M Bagaric, 'What Sort of Mandatory Penalties Should We Have?' (2002) 23 *Adelaide Law Review* 113.
- 93 G Zdenkowski, 'Sentencing Trends: Past Present and Prospective' in D Chappell and P Wilson (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond* (2000) 161, 175; N Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where are We Going?' (2000) 24 *Criminal Law Journal* 164, 176–179; N Morgan, 'Why We Should Not Have Mandatory Penalties: Theoretical Structures and Political Realities' (2002) 23 *Adelaide Law Review* 141, 151.
- 94 See D Roche, *Mandatory Sentencing—Trends and Issues in Crime and Criminal Justice No 138*, Australian Institute of Criminology, 4–6.
- 95 N Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where are We Going?' (2000) 24 *Criminal Law Journal* 164, 179; N Morgan, 'Why We Should Not Have Mandatory Penalties: Theoretical Structures and Political Realities' (2002) 23 *Adelaide Law Review* 141, 153.
- 96 See, eg, C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia* (2002), 286–288; Human Rights and Equal Opportunity Commission, *Mandatory Detention Laws in Australia* <www.hreoc.gov.au> at 11 September 2005; United Nations Commissioner for Human Rights and UNICEF, *Setting Out the International Standards on Mandatory Sentencing of Juveniles* <www.dfat.gov.au/media/releases/foreign/2000/fa014\_2000\_att.html> at 15 September 2005.
- 97 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) arts 37(b), 40(2)(b)(v), 40(4); *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) art 14(5); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) rr 5.1, 17.1(b), (c), 19.1.
- 98 United Nations Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc A/55/40 (2000), [498]–[528]; United Nations Committee Against Torture, *Concluding Observations of the Committee against Torture: Australia*, UN Doc A/56/44 (2000), [52]–[53]; United Nations Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268 (2005), [73]–[74]; United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (2005), [20].

21.60 There was strong opposition to mandatory sentencing amongst those who commented on the issue in submissions and consultations.<sup>99</sup> Reasons cited for the opposition included its inflexibility; the fact that in some cases imposition of a mandatory penalty arises not from the circumstances of the instant offence but from an earlier offence for which the offender has already been punished; the increased necessity for jury trials; lack of public confidence in the law due to the perceived injustice of mandatory sentences; escalation of sentencing severity; and discrimination against disadvantaged offenders.

21.61 There has also been consistent opposition to mandatory sentencing by commentators,<sup>100</sup> and by government bodies and committees that have examined the issue.<sup>101</sup>

21.62 Only the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) (now known as the Department of Immigration and Multicultural Affairs) expressed support for s 233C of the *Migration Act*. In its submission, DIMIA stated that s 233C was necessary to make it clear that people smuggling is a serious offence and that offenders would incur substantial custodial sentences. DIMIA submitted that s 233C has operated effectively in deterring people smuggling activities.<sup>102</sup>

### ALRC's views

21.63 Prescribing mandatory terms of imprisonment for a federal offence is generally incompatible with sound practice and principle in this area. Mandatory sentencing has the potential to offend against the principles of proportionality, parsimony and individualised justice.<sup>103</sup> In particular, the ALRC considers that the judiciary should retain its traditional sentencing discretion to enable justice to be done in individual cases.

21.64 While the imposition of substantial penalties may be appropriate in relation to offences like people smuggling, it is important that the legislature not prejudge the appropriate *minimum* penalty in legislation without regard to the facts of individual cases.

99 G Mackenzie, *Submission SFO 80*, 14 February 2006; J Roberts, *Submission SFO 67*, 16 January 2006; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005; J Willis, *Submission SFO 20*, 9 April 2005; Law Society of the Northern Territory, *Consultation*, Darwin, 29 April 2005; Aboriginal Justice Advisory Committee and North Australian Aboriginal Legal Aid Service, *Consultation*, Darwin, 28 April 2005.

100 See, eg, N Morgan, 'Why We Should Not Have Mandatory Penalties: Theoretical Structures and Political Realities' (2002) 23 *Adelaide Law Review* 141; D Sandor, 'The Sorry and Shameful Saga of Mandatory Detention Laws in Australia' (2000) 13(3) *International Children's Rights Monitor* 16.

101 See, eg, Human Rights and Equal Opportunity Commission, *Social Justice Report 2001* (2001), 113–118; Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing for Property Offences) Bill 2000* (2002) <[www.aph.gov.au/senate/committee/legcon\\_ctte/](http://www.aph.gov.au/senate/committee/legcon_ctte/)> at 3 October 2005.

102 Department of Immigration and Multicultural and Indigenous Affairs, *Submission SFO 49*, 10 May 2005.

103 See Ch 5 for a discussion of these sentencing principles.

21.65 The maintenance of individualised justice and broad judicial discretion are essential attributes of our criminal justice system, outweighing the potential deterrent effect that mandatory sentencing might have. The ALRC thus recommends that the Australian Government take steps to ensure that federal criminal offence provisions do not prescribe mandatory minimum terms of imprisonment.

**Recommendation 21–3**     The Australian Government should review federal criminal offence provisions and seek appropriate amendments to ensure that no mandatory minimum term of imprisonment is prescribed for any federal offence.

## 22. Administration of Federal Offenders

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### Introduction

22.1 One of the issues highlighted in the Inquiry's Terms of Reference is whether current arrangements provide an efficient, effective and appropriate regime for the administration of federal offenders. The ALRC has examined the arrangements the Australian Government has in place with the states and territories to accommodate and supervise federal offenders and has formed the view that they work reasonably well in practice and make effective and efficient use of existing resources.

22.2 However, the ALRC believes the existing arrangements do not fully discharge the Australian Government's responsibilities in this area. In particular, the Government does not have enough information about federal offenders, either individually or as a group, to develop effective and appropriate evidence-based policies in the area of federal criminal law or to achieve a suitable level of oversight of individual federal offenders. The ALRC recommends that the Australian Government take a more active role in the administration of federal offenders by: engaging with the states and territories through full participating membership of the Corrective Services Ministers' Conference (CSMC) and the Corrective Services Administrators' Conference (CSAC); developing memoranda of understanding with the states and territories to improve the coordination and provision of corrective services in relation to federal offenders; and ensuring that comprehensive information on all federal offenders flows from the states

and territories to the Australian Government. These recommendations are explained below.

## **Role of the Australian Government**

### **Background**

22.3 As discussed in Chapters 3 and 18, the ALRC has considered on a number of occasions whether it is appropriate to establish a completely separate federal criminal justice system in pursuit of the goal of inter-jurisdictional equality between federal offenders. Such a system would include federal criminal courts, a federal corrective services agency and federal prisons. However, given existing state and territory infrastructure, the relatively small number of federal offenders, and the geographic dispersal of federal offenders across Australia, it has become clear that it is not viable to establish a completely separate federal system.

22.4 The Australian Government relies exclusively on the states and territories to accommodate both federal offenders sentenced to a term of imprisonment and federal prisoners held on remand. In addition, the states and territories administer and supervise federal offenders sentenced to alternative custodial orders, such as periodic and home detention, and non-custodial orders such as community service orders, as well as federal offenders released on parole or licence subject to supervision orders. They also enforce the collection of fines imposed for federal offences on behalf of the Australian Government.<sup>1</sup>

22.5 The Australian Government plays an active role in managing particular administrative aspects of the sentences of some federal offenders, for example, making decisions in relation to parole or release on licence, and the transfer of prisoners interstate and overseas. However, the Australian Government plays only a limited role in the day-to-day administration of federal offenders<sup>2</sup> and does not, as a matter of course, monitor federal offenders or maintain a complete record of all federal offenders.<sup>3</sup>

22.6 The CSMC meets once a year to consider problems relating to prisons and community based corrections. The CSMC comprises all state and territory ministers responsible for corrections, together with the relevant minister from New Zealand. The Australian Government is not a member of the CSMC but the Minister for Justice and Customs is invited to attend. A meeting of the CSAC, comprising the heads of corrective service agencies in each jurisdiction and officers in charge of community

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1 Enforcement of fines is discussed in Ch 17.

2 Attorney-General's Department, *Consultation*, Canberra, 1 October 2004. The Department is not informed of the number of community based orders imposed on federal offenders or, generally, when such orders are breached: Attorney-General's Department, *Correspondence*, 18 October 2004.

3 Australian Institute of Criminology, *Consultation*, Canberra, 1 October 2004; Attorney-General's Department, *Consultation*, Sydney, 31 August 2004.



based corrective services, is also held once a year, usually about a month before the CSMC. The Australian Government, represented by the Attorney-General's Department (AGD), has observer status at these meetings.<sup>4</sup>

### Issues and problems

22.7 In the course of the Inquiry, the ALRC met with corrective services agencies in most states and territories to discuss the existing arrangements.<sup>5</sup> It was generally acknowledged that the arrangements whereby the states and territories administer the sentences imposed on federal offenders are satisfactory. However, reservations were expressed in a number of areas. Although there was general satisfaction with the working arrangements between the states and territories and the Australian Government, a number of jurisdictions expressed the view that communication and liaison could be improved. Concern was also expressed about federal–state funding arrangements, complexity in administering the sentences of joint offenders, and enforcement of sentencing and parole orders.<sup>6</sup>

22.8 The Queensland Department of Corrective Services expressed the view that, although it could provide detailed information on federal offenders in Queensland, it seemed odd that the Australian Government did not have Australia-wide information on federal offenders readily available.<sup>7</sup> The Department noted that better communication between federal and state authorities had the potential to improve service delivery through informed, consistent decision making; to enhance research and assessment capabilities; and to minimise duplication and inconsistency.<sup>8</sup> The Department noted, however, that the states and territories should retain ultimate responsibility for the security and management of prisons.<sup>9</sup>

22.9 The Department of Justice in Western Australia noted that the Department's relationship with the AGD is limited to federal prisoners who are coming up for parole, and that the relationship is a fairly passive one. The Department acknowledged that sometimes mistakes were made in releasing federal offenders on parole and it noted

4 Attorney-General's Department, *Attorney-General's Department Website* <<http://www.ag.gov.au/>> at 27 October 2004.

5 Department of Corrective Services New South Wales, *Consultation*, Sydney, 27 February 2006; Correctional Services Northern Territory and Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005; Department of Justice Western Australia, *Consultation*, Perth, 18 April 2005; Corrections Victoria and Adult Parole Board Victoria, *Consultation*, Melbourne, 31 March 2005; Department of Corrective Services Queensland, *Consultation*, Brisbane, 3 March 2005; ACT Corrective Services, *Consultation*, Canberra, 1 October 2004; Department of Corrective Services New South Wales, *Consultation*, Sydney, 15 September 2004.

6 Corrections Victoria, *Submission SFO 48*, 2 May 2005; Department of Corrective Services Queensland, *Submission SFO 27*, 14 April 2005; Department of Justice Western Australia, *Consultation*, Perth, 18 April 2005; Correctional Services Northern Territory and Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005. Enforcement of sentencing orders is discussed in Ch 17. Enforcement of parole orders is discussed in Ch 24.

7 Department of Corrective Services Queensland, *Consultation*, Brisbane, 3 March 2005.

8 Department of Corrective Services Queensland, *Submission SFO 27*, 14 April 2005.

9 Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006.

delays in dealing with breach of parole by federal offenders. While more active engagement on these issues was possible and there was a willingness to share information with the Australian Government in relation to federal offenders, the Department cautioned that there would be a point at which this could become onerous. The Department also stated that, as corrections has traditionally been an area of state and territory responsibility, there could be sensitivities if the Australian Government were to become more actively involved.<sup>10</sup>

22.10 Corrections Victoria expressed support for the Australian Government taking a more pro-active role:

It would assist the better management of federal prisoners within the Victorian prison system for the Commonwealth to provide a better managed point of reference for the distribution of relevant information and the provision of assistance to State administrators and prison managers.<sup>11</sup>

22.11 Corrections Victoria also noted that it would welcome assistance for federal offenders with special needs.<sup>12</sup>

22.12 Some stakeholders expressed the view that the limited post-sentence involvement of the Australian Government with federal offenders was unacceptable,<sup>13</sup> particularly given the Government's responsibility for making parole decisions.<sup>14</sup> In other submissions and consultations it was noted that the Australian Government has a responsibility to ensure that all federal offenders are treated consistently with international standards and Australia's obligations in international law.<sup>15</sup>

22.13 The CSMC and CSAC are the primary fora for inter-jurisdictional discussion and policy development in the area of corrective services. Currently, the Australian Government is not a formal member of these fora, despite its responsibilities in the area of corrective services for federal offenders. Support was expressed for the proposition that the Australian Government should become a full participating member of the CSMC and the CSAC.<sup>16</sup>

### **ALRC's views**

22.14 It appears from submissions and consultations that the practical arrangements by which states and territories accommodate and supervise federal offenders on behalf of the Australian Government work reasonably well and make effective and efficient use

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10 Department of Justice Western Australia, *Consultation*, Perth, 18 April 2005.

11 Corrections Victoria, *Submission SFO 48*, 2 May 2005.

12 Ibid.

13 Sisters Inside Inc, *Submission SFO 40*, 28 April 2005.

14 Confidential, *Submission SFO 8*, 8 March 2005.

15 Inspector of Custodial Services Western Australia, *Consultation*, Perth, 19 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; Department of Corrections Queensland, *Submission SFO 66*, 16 January 2006.

16 Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006; Department of Corrective Services New South Wales, *Consultation*, Sydney, 27 February 2006.

of existing resources. The ALRC does not recommend any major structural change to these arrangements. However, the arrangements would operate more smoothly and deliver better outcomes if the Australian Government played a more active role in the administration of federal offenders.

22.15 The ALRC strongly endorses the position put in a number of submissions and consultations that the Australian Government has a responsibility to ensure that all federal offenders are treated in a manner that is consistent with international standards and Australia's international obligations. Although the states and territories may fulfil these obligations adequately on behalf of the Australian Government, there are no reporting or monitoring mechanisms in place to ensure that this is so. As a matter of principle, the polity that proscribes conduct through the criminal law should maintain some oversight of the sentences imposed for breaches of those laws.

22.16 At present, the Australian Government engages with the states and territories and maintains records in relation to federal offenders where the AGD is likely to have an administrative role, for example, those offenders who receive a full-time custodial sentence with a specified non-parole period. But the Government does not have ready access to information about the vast majority of federal offenders who are given non-custodial sentences, nor about young federal offenders who are dealt with in the juvenile justice systems of the states and territories in accordance with s 20C of the *Crimes Act 1914* (Cth).

22.17 This lack of information about federal offenders after sentencing has the potential to impede the development of sound evidence-based criminal law policy. For example, how is the Australian Government to know whether the penalties imposed for breach of federal criminal law are appropriate and effective if it has no information about issues such as the sentencing orders imposed on the majority of federal offenders, how often such orders are breached and whether particular offenders re-offend? In the course of the Inquiry, the ALRC itself encountered difficulties in developing sound proposals in a range of areas due to the lack of available data.

22.18 It appears that the states and territories would also welcome further information and assistance from the Australian Government in administering the sentences imposed on federal offenders. This would help to ensure mistakes are not made in administering these sentences.

22.19 The ALRC is therefore of the view that the Australian Government should take a more active role in relation to federal offenders. The particular areas in which it should take further action are identified throughout this Report and many are drawn together below in relation to the role of the proposed Office for the Management of Federal Offenders. The goals of this involvement should be: to enhance policy development in relation to relevant aspects of the federal criminal justice system; to assist the states and territories to administer sentences imposed on federal offenders more effectively; and to ensure federal offenders are treated in conformity with Australia's international obligations and relevant standard minimum guidelines.

22.20 The ALRC also considers that the Australian Government should be actively involved in the peak bodies for inter-jurisdictional discussion and policy development in the area of corrective services by becoming a full participating member of the CSMC and the CSAC. This would also provide opportunities for the Australian Government to liaise with the states and territories in relation to federal offenders, to resolve problems and to influence the direction of corrective services policy at the national level.

**Recommendation 22–1** The Australian Government should take a more active role in monitoring federal offenders in order to:

- (a) enhance policy development in relation to the federal criminal justice system;
- (b) assist the states and territories to administer sentences imposed on federal offenders more effectively; and
- (c) ensure that federal offenders are treated in conformity with Australia's international obligations and relevant standard minimum guidelines.

**Recommendation 22–2** The Australian Government should negotiate with the states and territories to ensure that the relevant Australian Government minister is made a participating member of the Corrective Services Ministers' Conference and that the Australian Government becomes a participating member of the Corrective Services Administrators' Conference.

## **Office for the Management of Federal Offenders**

### **Establishment of the OMFO**

22.21 Currently, the Offender Justice and Management Section (OJMS) of the Criminal Justice Division in the AGD has responsibility for the administration of federal offenders. The Section performs the following roles in relation to federal offenders:

- the grant and revocation of parole and release on licence;
- processing requests from offenders on parole to travel overseas;

- processing applications for the exercise of the executive prerogative (pardons, remission of fines and sentences); and
- interstate and international transfers of prisoners.<sup>17</sup>

22.22 In carrying out these tasks the OJMS liaises with the Department of Immigration and Multicultural Affairs, the Department of Foreign Affairs and Trade, and the states and territories on a routine basis. The Section also has responsibility for monitoring sentencing options and pre-release schemes available under state and territory law and their application to federal offenders.<sup>18</sup>

22.23 Each state and territory has a department responsible for corrective services infrastructure and administration. In Western Australia and Victoria there are also bodies established to oversee the delivery of corrective services within those jurisdictions.

22.24 The Office of the Inspector of Custodial Services in Western Australia was established in 1999 and is the only custodial inspectorate in Australia that possesses statutory autonomy and direct access to the state parliament. The Office provides independent external scrutiny of the standards and operational practices of custodial services in the state. The Office carries out regular inspections of all prisons in the state and conducts thematic reviews of prison services. The Office is required to pass on individual prisoner complaints to the Western Australian Ombudsman.<sup>19</sup>

22.25 The Victorian Corrections Inspectorate was established on 1 July 2003 to monitor the performance of both public and private correctional service providers in the state, conduct specific investigations, and manage the Official Prison Visitors Scheme. The Inspectorate provides advice—independently of Corrections Victoria—on correctional issues and developments to the Secretary of the Victorian Department of Justice.<sup>20</sup> The Victorian Ombudsman handles complaints from individual prisoners.

22.26 In New South Wales, the Office of the Inspector-General of Corrective Services, which was established by the *Crimes (Administration of Sentences) Act 1999* (NSW), was abolished in 2003. The New South Wales Ombudsman now handles complaints relating to the New South Wales Department of Corrective Services.

22.27 Throughout this Report the ALRC has identified areas in which the Australian Government should be more actively engaged in relation to federal offenders. These areas include: the expansion of the existing case management database for federal

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17 Attorney-General's Department, *Submission SFO 52*, 7 July 2005.

18 Attorney-General's Department, *Submission SFO 83*, 15 February 2006.

19 Office of the Inspector of Custodial Services (WA), *Office of the Inspector of Custodial Services Website* <<http://www.custodialinspector.wa.gov.au/>> at 25 November 2004.

20 Victorian Department of Justice, *Annual Report 2003–04* (2003), 52.

offenders;<sup>21</sup> the development of memoranda of understanding with the states and territories in relation to federal offenders;<sup>22</sup> the evaluation of state and territory sentencing options and pre-release schemes for application to federal offenders;<sup>23</sup> young federal offenders and offenders with a mental illness or intellectual disability;<sup>24</sup> and the provision of secretariat or other support to the federal parole authority (depending on the model adopted for establishing the authority).<sup>25</sup> Currently, resources are dedicated to performing some of these tasks at the federal level, but a number of areas are new, or expand on existing tasks, and will require additional resources.

22.28 There was significant support in submissions and consultations for establishing a more substantial unit at the federal level with responsibility for overseeing federal offenders, with some support for the establishment of an independent inspectorate.<sup>26</sup>

22.29 However, the New South Wales Department of Corrective Services expressed the view that this could duplicate existing state functions.<sup>27</sup> Corrections Victoria noted that the role and responsibilities of such a unit would have to be carefully framed to ensure it did not hinder the effective management of federal offenders by state correctional authorities.<sup>28</sup> The Commonwealth Ombudsman expressed support for efforts to provide a more integrated approach to oversight of federal offenders—and complaint handling in particular—but noted it would be important to ensure all parties were clear on arrangements and responsibilities.<sup>29</sup>

### *ALRC's views*

22.30 In a previous report, *Sentencing* (ALRC 44), the ALRC recommended that a federal prison coordinator be appointed to monitor the conditions under which federal prisoners are held and to report to the Australian Government.<sup>30</sup> Given the range of tasks that require further attention from the Australian Government, as identified in this Report, something more than a federal prison coordinator is now needed. The ALRC recommends the establishment of an Office for the Management of Federal Offenders (OMFO).

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21 Discussed below.

22 Discussed below.

23 See Chs 7, 25.

24 See Chs 27, 28.

25 See Ch 23.

26 New South Wales State Parole Authority, *Submission SFO 68*, 17 January 2006; Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; JC, *Submission SFO 25*, 13 April 2005; PS, *Submission SFO 21*, 8 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; Confidential, *Submission SFO 8*, 8 March 2005; Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005; Inspector of Custodial Services Western Australia, *Consultation*, Perth, 19 April 2005; Justice Action, *Consultation*, Sydney, 14 September 2004.

27 Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.

28 Corrections Victoria, *Submission SFO 48*, 2 May 2005.

29 Commonwealth Ombudsman, *Submission SFO 95*, 3 March 2006.

30 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [238].

22.31 In developing a proposed model for the OMFO, the ALRC has carefully considered the concerns expressed by the New South Wales Department of Corrective Services and Corrections Victoria in relation to the role and responsibilities of the Office. The functions identified for the OMFO do not duplicate functions already performed by the states and territories. They reflect the federal interest in federal offenders and the need for the Australian Government to take a more active role in relation to those offenders. Some of the functions are designed to assist and support the states and territories in delivering corrective services to federal offenders more effectively. Some are designed to ensure the Australian Government better fulfils its obligations in relation to individual federal offenders, and to federal offenders as a group. Others are intended to ensure the Australian Government is in a stronger position to develop federal criminal law policy and procedure on the basis of sound evidence.

22.32 The ALRC has considered the need for an independent inspectorate along the lines of the Western Australian model. A number of the proposed functions of the OMFO do involve a level of oversight of the procedures and conditions imposed on federal offenders in state and territory correctional systems. However, given the case management and liaison roles envisaged for the OMFO, the Office should work with state and territory corrective services agencies on the basis of negotiated memoranda of understanding, rather than play the role of inspector, to ensure appropriate and effective delivery of corrective services in relation to federal offenders.

22.33 The ALRC is also of the view that it would be appropriate to locate the OMFO within the AGD as an integral part of the Department but with clear and identifiable functions. This will help to minimise costs through shared corporate services. The functions of the OMFO are discussed further below but would include those functions currently performed by the OJMS. The OMFO should report to the responsible Minister.

**Recommendation 22–3** The Australian Government should establish an Office for the Management of Federal Offenders (OMFO) within the Attorney-General’s Department to monitor and report on all federal offenders, regardless of the sentence imposed. The OMFO should report to the responsible Minister.

### **Functions of the OMFO**

22.34 One of the primary functions recommended in this Report for the OMFO is the expansion and maintenance of the national case management database in relation to federal offenders, discussed below. This database is intended to provide the basis for many of the other functions to be performed by the Office and will allow the Office to track each federal offender from the first appearance in court to the end of his or her sentence.

22.35 Another important role for the OMFO will be increased liaison with states and territories, beginning with the negotiation of a memorandum of understanding (MOU) with each state and territory setting out the roles and responsibilities of each party to the agreement. The detail of the working arrangements should be settled by negotiation to establish good working relationships and minimise the duplication of roles and responsibilities.

22.36 This relationship should be developed further through active membership of the CSMC and the CSAC, discussed above. The OMFO would be responsible for briefing the minister in relation to these meetings. One of the reasons for becoming more involved in these fora, and for increased interaction with state and territory corrective services more generally, is to allow the OMFO to monitor progress towards achieving compliance with national standards, including the *Standard Guidelines for Corrections in Australia* and the *Standards for Juvenile Custodial Facilities*. Importantly, the Australian Government should place itself in a position to report, first hand, that the treatment of federal offenders in Australia complies with Australia's international obligations.

22.37 This active engagement with the states and territories should be two way and include the provision of advice on the sentencing, administration and release of federal offenders. In submissions, a number of states and territories stated that further assistance in this regard would be helpful, particularly in relation to joint offenders.<sup>31</sup> The OMFO should provide training to state and territory corrective services officers and others in relation to issues affecting federal offenders and joint offenders.

22.38 In addition, the ALRC recommends that the OMFO become more actively involved in the provision of information to federal offenders themselves, including information in relation to sentence, parole, transfer and complaint mechanisms. While individual complaints from offenders may continue to be dealt with through existing mechanisms—such as Official Visitors programs, the Commonwealth Ombudsman and state and territory ombudsmen—the OMFO will also have a role in resolving complaints from federal offenders by, for example, working with state and territory corrective services agencies in relation to issues raised by federal offenders.

22.39 Another important role for the OMFO is to provide secretariat or other support to the federal parole authority, depending on the model adopted for establishing the authority.<sup>32</sup> Currently parole and release on licence casework is performed by the OJMS within the AGD, but this workload will increase significantly if the recommendation to abolish automatic parole in Chapter 23 is implemented. There will

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31 Corrections Victoria, *Submission SFO 48*, 2 May 2005; Department of Corrective Services Queensland, *Submission SFO 27*, 14 April 2005; Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005.

32 See Ch 23.



also be additional work related to the establishment, membership and meetings of the federal parole authority.

22.40 One aspect of providing support to the parole authority will be the maintenance and administration of a victim notification register. The OMFO should be required to contact registered victims in a number of circumstances including when the offender is due for parole consideration or release, or when the offender has escaped from custody. In addition, a registered victim should be given the opportunity to make submissions to the federal parole authority.<sup>33</sup>

22.41 The following functions currently undertaken by the OJMS should be transferred to the OMFO, with the federal parole authority involved as appropriate:

- processing requests from offenders on parole to travel overseas;<sup>34</sup>
- processing applications for the exercise of the executive prerogative (pardons, remission of fines and sentences);<sup>35</sup> and
- interstate and international transfers of prisoners.<sup>36</sup>

22.42 In a number of areas, state and territory laws are picked up and applied to the sentencing of federal offenders by provisions of the *Crimes Act 1914* (Cth) and the *Judiciary Act 1903* (Cth). It is necessary to keep these state and territory laws under regular scrutiny to ensure they are picked up when appropriate and, once picked up, remain appropriate to federal offenders. The OMFO should have responsibility for providing advice to the Australian Government on whether state and territory sentencing options and pre-release schemes should be picked up and applied in relation to federal offenders.<sup>37</sup>

22.43 In a number of places in this Report, the ALRC has suggested that federal minimum standards or nationally agreed guidelines should be developed in relation to federal offenders. These areas include victim impact statements and pre-sentence reports,<sup>38</sup> as well as the treatment of young federal offenders,<sup>39</sup> and federal offenders with a mental illness or intellectual disability.<sup>40</sup> If minimum standards or guidelines are put in place, it will be necessary for the OMFO to monitor the implementation of those standards and guidelines (for example, through membership of CSMC and CSAC) and to work with states and territories towards better compliance. The OMFO will also

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33 See Ch 23 for a more detailed discussion of the victim notification register.

34 See Ch 24.

35 See Ch 25.

36 See Ch 26.

37 See Chs 7, 25.

38 See Ch 14.

39 See Ch 27.

40 See Ch 28.

have an increased role in monitoring and managing young federal offenders and offenders with a mental illness or intellectual disability on an individual basis.

22.44 Finally, the OMFO should also be responsible for providing policy advice to the Australian Government in relation to federal offenders and relevant aspects of the federal criminal justice system.

**Recommendation 22–4** The functions and powers of the OMFO should be negotiated with the states and territories, and should include the following:

- (a) maintaining an up-to-date case management database in relation to all federal offenders;
- (b) providing secretariat or other support to the proposed federal parole authority, depending on the model adopted for establishing the authority;
- (c) establishing and maintaining a victim notification register;
- (d) liaising with the states and territories in relation to federal offenders, including special categories of offenders;
- (e) participating as a full member of the Corrective Services Administrators' Conference and in the activities of the Australasian Juvenile Justice Administrators and providing support for the relevant federal minister in relation to active participation in the Corrective Services Ministers' Conference;
- (f) monitoring progress towards compliance with the *Standard Guidelines for Corrections in Australia* and the *Standards for Juvenile Custodial Facilities* in relation to federal offenders, and liaising with the states and territories in relation to those standards;
- (g) ensuring the treatment of federal offenders complies with Australia's international obligations;
- (h) providing advice to the states and territories in relation to the sentencing, administration and release of federal offenders, in particular in relation to joint offenders;
- (i) providing advice to federal offenders about the administration of their individual sentences, including information about interstate and international transfer;
- (j) providing advice to the Australian Government on the interstate and international transfer of federal offenders in individual cases;

- (k) providing general policy advice to the Australian Government in relation to federal offenders and relevant aspects of the federal criminal justice system;
- (l) providing advice to the Australian Government about funding, including priorities for special programs for federal offenders;
- (m) providing advice to the Australian Government about state and territory compliance with federal minimum standards in relation to victim impact statements and pre-sentence reports;
- (n) providing advice to the Australian Government in relation to state and territory sentencing options and pre-release schemes, including whether they should be picked up and applied in relation to federal offenders; and
- (o) performing all of the above in relation to young federal offenders and federal offenders with a mental illness or intellectual disability.

### **Memoranda of understanding with states and territories**

22.45 Section 3B of the *Crimes Act 1914* (Cth) provides that the Governor-General may make arrangements with the governors of the states and the governments or administrators of the territories for state and territory officers to administer sentences imposed on federal offenders and for state and territory correctional facilities and procedures to be made available. Arrangements are in place with each state and territory in relation to the following matters:

- state and territory facilities being made available to carry out state and territory sentencing options that are picked up and applied to federal offenders by the *Crimes Act*;
- state and territory officers exercising powers and performing functions in order to carry out such sentencing options imposed on federal offenders;
- state and territory officers exercising the powers and performing the functions of probation officers under the *Crimes Act*; and

- state and territory facilities being made available and state and territory officers exercising powers and performing functions in relation to persons with a mental illness or intellectual disability accused of a federal offence.<sup>41</sup>

22.46 Section 21F(1)(b) of the *Crimes Act* provides that the Governor-General may make arrangements with the governors of the states and the governments or administrators of the territories for state and territory officers to perform the functions of parole officers under Part IB. There are currently no arrangements in place under this section.

22.47 The ALRC has been advised that it is unnecessary to have legal arrangements in place under s 21F(1)(b) or s 3B for state and territory officers to perform the functions and exercise the powers of parole officers in relation to federal offenders.<sup>42</sup> This is because s 120 of the *Australian Constitution* requires the states to make provision for the punishment of persons convicted of a federal offence, and parole is now clearly established as part of the punishment of a convicted offender. Probation, on the other hand, may be imposed in cases where no conviction is recorded.<sup>43</sup> The s 3B arrangements ensure that the states and territories will provide probation services in these and other circumstances.

22.48 The ALRC has been advised that this is also why the s 3B arrangements are limited to state and territory sentencing options that are picked up and applied to federal offenders, and why they do not make reference to the states and territories providing facilities and exercising functions and powers in relation to full-time custodial orders. Section 120 of the *Constitution* requires the states to provide these services.<sup>44</sup>

22.49 These legal arrangements formalise the relationship between the Australian Government and the states and territories with respect to the provision of corrective services to federal offenders. However, they include no detail about the services to be delivered, such as minimum standards for the treatment of federal offenders, access by the Australian Government to federal offenders, or reporting requirements. In this Report, the ALRC recommends that the Australian Government take a more active role in overseeing federal offenders and in monitoring the delivery of corrective services by states and territories in relation to federal offenders. If these recommendations are implemented, it will be necessary to set out in more detail the expectations and obligations of the parties to these arrangements.

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41 See, eg, *Commonwealth of Australia Gazette—Special (Arrangement under Section 3B of the Crimes Act 1914 of the Commonwealth of Australia between the Commonwealth of Australia and NSW)*, 12 November 1990, No S293.

42 Attorney-General's Department, *Correspondence*, 22 December 2004.

43 *Crimes Act 1914* (Cth) s 19B (discharge of offender without conviction).

44 Attorney-General's Department, *Correspondence*, 22 December 2004.

22.50 One example of where arrangements of this sort have been put in place is the MOUs between Centrelink and state and territory corrective services agencies in relation to the provision of Centrelink services to prisoners. The MOUs are not legally binding but are intended to set out the roles and responsibilities of the parties, including Centrelink's access to prisoners, release of information to Centrelink, and the provision of certain information and services to prisoners.<sup>45</sup>

22.51 Although the AGD was of the view that formal MOUs would be unnecessary,<sup>46</sup> there was support among the states and territories for this kind of arrangement.<sup>47</sup>

### ***ALRC's views***

22.52 Section 120 of the *Constitution* and the Australian Parliament's other constitutional powers provide a firm basis for federal legislation in relation to federal offenders. However, the detail of the arrangements between the Australian Government and the states and territories should be set out in MOUs negotiated with the states and territories. These MOUs should reflect the balance of responsibilities between the Australian Government and the states and territories, recognising that the Australian Government is ultimately responsible for the treatment and welfare of federal offenders and that states and territories are responsible for delivering corrective services to federal offenders.

22.53 Some of the issues that should be addressed in the MOUs include: the regular provision of data on federal offenders by the states and territories to the Australian Government; access by the OMFO to federal offenders; arrangements for dealing with parole of federal offenders including the provision of reports to the federal parole authority; notification about changes to relevant state and territory legislation (for example, legislation dealing with sentencing options and pre-release schemes); minimum standards for the treatment of federal offenders; and reporting requirements.

**Recommendation 22–5** The OMFO should develop memoranda of understanding with the states and territories to improve the sharing of information and the coordination and provision of corrective services in relation to federal offenders.

### **Funding arrangements**

22.54 Under the *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations*, the fiscal arrangements in Australia rely to a significant extent on the redistribution of funds from the Australian Government to the states and territories.

<sup>45</sup> Centrelink, *Correspondence*, 14 March 2005.

<sup>46</sup> Attorney-General's Department, *Submission SFO 83*, 15 February 2006.

<sup>47</sup> Department of Corrective Services New South Wales, *Submission SFO 79*, 8 March 2006; Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006.

This is because the Australian Government raises more revenue than it outlays, and the states and territories outlay more money than they raise. These funds are redistributed in two ways: (a) through untied grants—largely made up of the Goods and Services Tax (GST) revenue payments—which the states and territories can spend as they choose; and (b) through specific purpose payments (SPPs), which must be spent on the purposes for which they are given.<sup>48</sup> In 2005–06, GST revenue payments to the states and territories are expected to total around \$37.3 billion and SPPs around \$19.1 billion.<sup>49</sup>

22.55 The GST revenue payments are distributed to the states and territories on the basis of Commonwealth Grants Commission advice and are the largest single intergovernmental transfer. Grants Commission advice is based on the principle of horizontal fiscal equalisation, which is defined as follows:

State governments should receive funding from the Commonwealth such that, if each made the same effort to raise revenue from its own sources and operated at the same level of efficiency, each would have the capacity to provide services at the same standard.<sup>50</sup>

22.56 The Grants Commission calculates the relative share of GST revenue that each state and territory receives based on a range of factors including the cost of services that impact on state and territory budgets. The GST revenue is not distributed to meet the cost of those services directly. Rather, the cost of services is part of the calculation used to decide, on the basis of relativities, what proportion of GST revenue is paid to each state and territory.

22.57 One of the services taken into consideration in the Grants Commission's calculation is the provision of corrective services. In calculating the relative cost of corrective services in each state and territory a number of special factors are taken into account including, for example, the number of high and low risk prisoners in each jurisdiction, the number of Indigenous Australian prisoners in each jurisdiction, and the number of federal prisoners in each jurisdiction.

22.58 Apart from untied GST revenue payments, funds also flow from the Australian Government to the states and territories by way of SPPs. The Australian Government makes SPPs to the states, territories and local government as a financial contribution to areas of state responsibility in pursuit of its own specified objectives. SPP agreements often include agreed national objectives. The majority of SPPs are subject to conditions such as general policy requirements, requirements that payments be expended for a specific purpose only, and reporting of financial and performance information.

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48 Commonwealth Grants Commission, *Guidelines for Implementing Horizontal Fiscal Equalisation*, Information Paper CGC 2002/1 (2002), 4–5.

49 P Costello (Treasurer), *Federal Financial Relations 2005–06*, 2005–06 Budget Paper No 3 (2005), 2.

50 Commonwealth Grants Commission, *Guidelines for Implementing Horizontal Fiscal Equalisation*, Information Paper CGC 2002/1 (2002), 6.

However, in making these payments, the Australian Government does not seek to take over responsibility for state functions.<sup>51</sup>

22.59 It is also possible for grants to be made to the states and territories from funding provided to Australian Government departments. For example, in 2004–05 the AGD provided funding to the states and territories for the provision of legal aid services in federal matters (\$105.2 million).<sup>52</sup> Funding in relation to such services is provided by way of an SPP or a departmental administered grant in order to allow the Australian Government to exercise some policy control over the way the money is spent; in this case, to allow the Australian Government to set priorities in relation to the federal cases funded by legal aid. In addition, the AGD administers an ‘expensive criminal case’ fund to be used in exceptional circumstances.<sup>53</sup>

### **Issues and problems**

22.60 In consultations with the states and territories some disquiet was expressed about the funding arrangements in relation to federal offenders. The Department of Justice in Western Australia expressed the view that the states and territories should be able to claim the costs associated with federal offenders directly from the Australian Government, and noted that a claim had been made in 2000 when there was a spike in the number of federal offenders in Western Australia. The Department explained that in jurisdictions with smaller populations, such as Western Australia, the impact of a spike in the number of federal offenders on the state budget could be significant.

22.61 In addition, the Department noted that federal offenders often had special needs that were expensive to meet. Many federal offenders, for example, were from overseas and had special dietary and other requirements. In addition, international drug smugglers and terrorists required high levels of security, which were also expensive to provide.<sup>54</sup> Corrections Victoria noted that it would welcome assistance for federal offenders with special needs.<sup>55</sup> The Department of Corrective Services Queensland noted that existing funding arrangements do not take into consideration the cost of supervising and providing services to federal offenders serving their sentences in the community.<sup>56</sup> The Department was also of the view, however, that federal funding should not be contingent on services provided, and should not be by way of SPPs or departmental administered grants.<sup>57</sup>

22.62 In the negotiations leading up to the Grants Commission 2004 review of state revenue sharing relativities, New South Wales argued that federal offenders should be weighted more heavily in the Grants Commission’s calculations because a higher

51 P Costello (Treasurer), *Federal Financial Relations 2005–06*, 2005–06 Budget Paper No 3 (2005), 25.

52 Attorney-General’s Department, *Annual Report 2004–05* (2005), 210.

53 Attorney-General’s Department, *Consultation*, Canberra, 16 March 2005.

54 Department of Justice Western Australia, *Consultation*, Perth, 18 April 2005.

55 Corrections Victoria, *Submission SFO 48*, 2 May 2005.

56 Department of Corrective Services Queensland, *Submission SFO 27*, 14 April 2005.

57 Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006.

proportion of federal offenders were imprisoned for drug offences and this raised health and security problems in prisons, requiring specialist services. The Northern Territory presented evidence that there were additional costs associated with federal offenders for a number of reasons, including the growing number of non-Australian citizen offenders (in particular Indonesians) with specific health and cultural needs. The Grants Commission accepted that the states and territories faced higher costs in relation to federal offenders given their specialist medical and other needs and agreed to assess the cost of federal offenders at six per cent above average costs.<sup>58</sup>

### ***ALRC's views***

22.63 This Report recommends a significant increase in the involvement of the Australian Government with the administration of federal offenders. The ALRC is also of the view that the Australian Government should exert more influence to ensure federal offenders are treated in a way that is consistent with national minimum standards and Australia's international obligations. One powerful mechanism for exercising greater policy control in areas of state service delivery is to fund those services through tied grants—either through SPPs or departmental administered grants.

22.64 As noted above, in the area of legal aid, funding is provided by way of tied grants to state and territory legal aid bodies for the provision of legal aid in relation to federal matters. A different approach has been taken in relation to the provision of corrective services to federal offenders by state and territory corrective services agencies. The ALRC also notes the arguments put to the Grants Commission that federal offenders have special needs that impose a higher cost on state and territory budgets than state and territory offenders. It is possible that funding in the corrective services area could be provided by way of tied grants.

22.65 The provision of funding to the states and territories by way of SPPs or departmental administered grants comes at a cost in terms of administration. A change in the funding arrangements may not be necessary if the Australian Government's policy goals can be promoted through other means, for example, through MOUs with the states and territories as discussed above. For this reason, the ALRC recommends that the OMFO keep these matters under review and provide advice to the Australian Government as the need arises.

22.66 However, the OMFO should be established with the capacity to fund special programs with respect to federal offenders, for example, to assist where there is a spike in the number of federal offenders in a particular jurisdiction. This will promote better working relationships between the Australian Government and the states and territories and will help to ensure that states and territories see the Australian Government as an active partner in the administration of federal offenders.

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58 Commonwealth Grants Commission, *Report on State Revenue Sharing Relativities 2004 Review: Working Papers 1998–99 to 2002–03*, Vol 6 (2004), 102, 109.



**Recommendation 22–6** The OMFO should provide advice to the Australian Government on federal–state funding arrangements in relation to federal offenders. The OMFO should have the capacity to fund special programs with respect to federal offenders, as the need arises.

### Key performance indicators

22.67 Performance measurement can provide governments with indicators of their performance over time; make performance more transparent, allowing assessment of whether program objectives are being met; help clarify government objectives and responsibilities; inform the wider community about government service performance; encourage ongoing performance improvement; and promote analysis of the relationships between agencies and between programs, allowing governments to coordinate policies within and across agencies.<sup>59</sup>

22.68 All Commonwealth agencies are required to publish performance information in key accountability documents such as Portfolio Budget Statements and annual reports.<sup>60</sup> Performance information is published in relation to outcomes and outputs. Outcome performance relates to the specific impact that an agency's outputs have had on the community. Output performance relates to an agency's efficiency in executing its responsibilities.<sup>61</sup> Key performance indicators help illustrate how an organisation has performed in terms of outcomes and outputs.

22.69 The AGD reports against an outcome and output structure in each annual report. This structure includes Outcome 2 'Coordinated federal criminal justice, security and emergency management activity for a safer Australia', and Output 2.1 'Policy advice on, and program administration and regulatory activities associated with, the Commonwealth's domestic and international responsibilities for criminal justice and crime prevention, and meeting Australia's obligations in relation to extradition and mutual assistance'. The Criminal Justice Division of the AGD is responsible for Output 2.1.

22.70 In its 2003–04 *Annual Report*, the AGD reported in very general terms on the functions it undertakes in relation to federal offenders, including the number of decisions on parole and release on licence, interstate transfers, permission to travel overseas and applications for the exercise of the executive prerogative of mercy. More detail was provided in relation to international transfer of prisoners.<sup>62</sup> The 2004–05

<sup>59</sup> Productivity Commission, *Report on Government Services 2006* (2006), [1.3].

<sup>60</sup> Performance management principles have been developed to guide Commonwealth departments and agencies on performance reporting and its uses for external and internal purposes: Department of Finance and Administration, *Performance Management Principles* <[www.finance.gov.au](http://www.finance.gov.au)> at 21 December 2004.

<sup>61</sup> Department of Finance and Administration, *Performance Reporting Under Outcomes and Outputs* <[www.finance.gov.au](http://www.finance.gov.au)> at 21 December 2004.

<sup>62</sup> Attorney-General's Department, *Annual Report 2003–04* (2004), 90.

*Annual Report* included only one sentence in relation to Output 2.1 on the administration of federal offenders serving sentences in Australia, although more detail was included in relation to the international transfer of prisoners.<sup>63</sup>

22.71 More detailed key performance indicators are used by state and territory corrective services agencies,<sup>64</sup> the Productivity Commission,<sup>65</sup> and the Victorian Corrections Inspectorate.<sup>66</sup> Other sources of guidelines and standards that might form the basis of key performance indicators in this area include the *Standards for Juvenile Custodial Facilities*<sup>67</sup> and the *Standard Guidelines for Corrections in Australia*.<sup>68</sup>

### ***ALRC's views***

22.72 The OMFO should develop key performance indicators to monitor the provision of corrective services by the states and territories in relation to federal offenders. The MOUs between the OMFO and the states and territories, discussed above, should address the provision of information by the states and territories against these key performance indicators. This information will allow the OMFO to identify significant differences between jurisdictions and potential problems in the administration of the sentences imposed on federal offenders. The information might also be used to identify areas of special need requiring further funding, as discussed above.

22.73 The OMFO should report against these indicators annually. This will ensure that both the Australian Parliament and the community are provided with information on the treatment and welfare of federal offenders on a regular basis.

**Recommendation 22–7** The OMFO should develop key performance indicators to monitor the administration and release of federal offenders. The OMFO should report publicly against these indicators on an annual basis.

## **Australian Government information on federal offenders**

### **National case management database**

22.74 The AGD maintains a federal prisoner database, which contains information about current federal prisoners including age, sex, the state or territory where the prisoner is housed, and broad categories of offence (drugs, social security, migration and people smuggling, illegal fishing, *Crimes Act 1914*, bankruptcy, financial, and

<sup>63</sup> Attorney-General's Department, *Annual Report 2004–05* (2005), 106.

<sup>64</sup> See, eg, New South Wales Department of Corrective Services, *Annual Report 2003–04* (2004), 14–46.

<sup>65</sup> Productivity Commission, *Report on Government Services 2006* (2006).

<sup>66</sup> Victorian Corrections Inspectorate, *Correspondence*, 1 April 2005.

<sup>67</sup> Australasian Juvenile Justice Administrators, *Standards for Juvenile Custodial Facilities (Revised Edition)* (1999).

<sup>68</sup> Corrective Services Ministers' Conference and Conference of Correctional Administrators, *Standard Guidelines for Corrections in Australia* (2004).

other). The database is a case management tool set up to assist the AGD to administer those elements of the sentences of federal offenders for which the Department has responsibility, for example, release on parole. There are no historical data on individual prisoners because their details are deleted from the system when they have completed their sentences.<sup>69</sup>

22.75 The AGD produces monthly statistics on the federal prisoner population including: the number of federal prisoners at the end of each month and whether they are in full-time custody or on periodic or home detention; the number of new prisoners each month including the offence type, sentence type and the maximum and minimum period of imprisonment; and the number of prisoners released from prison each month organised by offence type. The information in the AGD database, together with Australian Bureau of Statistics (ABS) data, provided the basis for the analysis of federal prisoners by the Australian Institute of Criminology (AIC), set out in Appendix 1.

22.76 The Commonwealth Director of Public Prosecutions (CDPP) also collects data on federal offenders. The CDPP maintains an in-house electronic database known as the 'case reporting and information management system', in which details of prosecutions conducted by the CDPP are recorded. Information stored on the database includes details of charges and the sentences imposed, as well as details relating to parameters such as the amount of drug imported or money defrauded. Prosecutors draw on this sentencing information when making submissions to courts on sentence.<sup>70</sup> The information in the CDPP database provided the basis for the analysis of federal sentencing by the AIC, set out in Appendix 2.

22.77 States and territories hold information on all offenders within their jurisdiction, including federal offenders. In the Northern Territory, for example, the Integrated Justice Information System database contains information on prisoners as well as offenders serving their sentences in the community and juvenile offenders. It is possible to identify federal offenders in these categories from the database.<sup>71</sup> In Queensland, the recently established Integrated Offender Management System can also be used to identify federal offenders serving custodial or community based sentences.<sup>72</sup> Victoria is in the process of moving from the Prisoner Information Management System to the E\*Justice system. Corrections Victoria noted in its submission that while it could easily identify federal prisoners from its database, federal offenders serving alternative sentences under Victorian legislation could be identified only by a manual search.<sup>73</sup>

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69 Australian Institute of Criminology, *Consultation*, Canberra, 1 October 2004.

70 Commonwealth Director of Public Prosecutions, *Correspondence*, 20 December 2004.

71 Correctional Services Northern Territory and Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005.

72 Department of Corrective Services Queensland, *Consultation*, Brisbane, 3 March 2005.

73 Corrections Victoria, *Submission SFO 48*, 2 May 2005.

*Issues and problems*

22.78 In consultations, the AGD noted that it was in the process of upgrading its case management database to allow better collection of information and search capability. The Department explained that it would be possible to collect more detailed information about federal offenders—for example, identifying Aboriginal and Torres Strait Islander offenders—if this was required but that currently this information is not collected in a systematic way.<sup>74</sup> The AGD does have a collection field labelled ‘nationality’, but information in this field is collected on the basis of self-identification and not in every case.

22.79 There was significant support for a more comprehensive database being established at the federal level.<sup>75</sup> The AGD acknowledged that better information at the national level would assist in the development of federal criminal law policy<sup>76</sup> and agreed that it would be worthwhile to consider establishing a more comprehensive database in consultation with the AIC, the National Judicial College of Australia (NJCA) and the ABS.<sup>77</sup>

22.80 The AIC noted that the AGD currently collects basic information in relation to federal prisoners and that, if more detailed information were required, it would be important to make strategic decisions about what other information would assist in policy development and research. For example, information about ethnic origin of federal offenders is likely to be of interest to the Department of Immigration and Multicultural Affairs, as well as to the AIC and the AGD.<sup>78</sup>

22.81 The AIC noted that the current AGD field of ‘nationality’ was not a standard ABS collection field and expressed the view that it would be better to collect information in a way that is consistent with national standards. The AIC noted, however, that the ABS classification of offenders on the basis of ‘most serious offence’ was not entirely satisfactory as it could obscure other criminal patterns and links between offences such as drug importation, illegal fishing and people smuggling.<sup>79</sup>

22.82 The National Centre for Crime and Justice Statistics in the ABS is working on standardising the collection of information in the crime and justice area, for example,

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74 Attorney-General’s Department, *Consultation*, Canberra, 16 March 2005.

75 Corrections Victoria, *Submission SFO 48*, 2 May 2005; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; ACT Corrective Services, *Submission SFO 34*, 20 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005; Attorney-General’s Department, *Consultation*, Canberra, 1 October 2004; Australian Institute of Criminology, *Consultation*, Canberra, 16 March 2005.

76 Attorney-General’s Department, *Consultation*, Canberra, 1 October 2004.

77 Attorney-General’s Department, *Submission SFO 83*, 15 February 2006.

78 Australian Institute of Criminology, *Consultation*, Canberra, 16 March 2005.

79 Ibid.

ensuring that police use Aboriginal and Torres Strait Islander indicators in their records.<sup>80</sup>

### ***ALRC's views***

22.83 Currently, the AGD case management database does not contain information about the majority of federal offenders, including offenders sentenced to community based orders and young federal offenders. It does not provide a comprehensive picture of the federal offender population. Nor does it systematically identify offender characteristics that may be valuable in developing federal criminal law policy, for example, whether offenders are Aboriginal or Torres Strait Islanders.

22.84 The ALRC believes that the Australian Government should become more closely involved in overseeing federal offenders, including federal offenders with a mental illness or intellectual disability and young federal offenders. The current database does not provide enough information to allow this to happen.

22.85 The AGD case management database should therefore be expanded to include all federal offenders regardless of the sentence imposed. The AGD should systematically collect sufficient information about federal offenders to provide a sound basis for federal criminal law policy development. This information will also assist the Australian Government in exercising appropriate oversight of the sentences imposed on federal offenders and the way those sentences are administered.

22.86 The information to be collected should be identified in consultation with other stakeholders and experts in data collection and analysis, such as the AIC, the ABS and the NJCA. As far as possible, information should be collected in ways that are consistent with national standards to facilitate exchange of information and research. Any such exchange will have to be conducted within the framework of the *Privacy Act 1988* (Cth).

22.87 This information will need to be collected from a range of sources, including the states and territories. This flow of information should be one of the issues addressed in the MOUs with states and territories discussed above. It is also an area in which the Australian Government should work closely with states and territories to ensure each jurisdiction can readily provide information about federal offenders.

22.88 In Chapter 21 the ALRC recommends the establishment of a national sentencing database to provide the courts and others with information to help ensure consistency in sentencing federal offenders. While this database is expected to be established separately from the AGD case management database and for different purposes, it would be sensible to ensure that, as far as possible, the databases are compatible and that information collected is not duplicated. For this reason, the ALRC recommends

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80 Australian Bureau of Statistics, *Consultation*, Sydney, 2 March 2005.

that, in developing the offender case management database, the OMFO work with the NJCA and others involved with the sentencing database project.

**Recommendation 22–8** The OMFO should expand the existing database for the case management of federal prisoners to include comprehensive information on all federal offenders to inform policy advice in relation to the federal criminal justice system. The database should be developed in consultation with the Australian Institute of Criminology, the Australian Bureau of Statistics, the National Judicial College of Australia and the states and territories, and should include information relevant to the offender, the offence and sentence, sentence administration, and parole and release.

### Statistical information on federal offenders

22.89 The ABS is Australia's national statistical organisation, established to assist and encourage informed decision making, research and discussion within governments and the community.<sup>81</sup> The National Centre for Crime and Justice Statistics, within the ABS, includes three statistical units that are governed by separate Boards of Management. The National Criminal Courts Statistics Unit and the National Corrective Services Statistics Unit are jointly funded and managed by the ABS, the AGD and the states and territories. These units produce a number of statistical publications in relation to offences and offenders in Australia including *Criminal Courts* and *Prisoners in Australia* (both issued annually) and *Corrective Services* (issued quarterly).<sup>82</sup>

22.90 *Criminal Courts* provides statistics on the administration of criminal justice in the courts across Australia. The publication includes information on the characteristics of defendants, including age and sex, as well as information on offence and sentence imposed.

22.91 *Prisoners in Australia* provides statistics on all prisoners in custody on 30 June each year. The statistics are derived from information collected by the ABS from corrective services agencies in each state and territory. The publication includes information on the characteristics of prisoners, including age, sex and legal status, as well as on the nature of the offence with which the person was charged or convicted. The publication also provides details of the type and length of sentences being served.

22.92 *Corrective Services* provides statistics on adults in corrective services custody or serving community based orders in Australia. The publication includes information on offenders including sex, Indigenous status, type of custody, legal status and sentence

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<sup>81</sup> Australian Bureau of Statistics, *Annual Report 2004–05* (2005), vi.

<sup>82</sup> Australian Bureau of Statistics, *Themes—National Centre for Crime and Justice Statistics* <www.abs.gov.au> at 16 December 2004.

type; the number of sentenced persons received into corrective services custody each month; and the number of federal prisoners.

22.93 In each of the three publications, data are analysed in a number of ways, including by jurisdiction. Most of the information is not disaggregated to identify federal offenders. *Corrective Services* does, however, include a table, based on information obtained from the AGD, identifying the number of federal prisoners in full-time custody.

22.94 The data in these publications are also presented by reference to 'principal offence' or 'most serious offence'. These offences are not identified precisely but by offence category only. The offence categories are based on the Australian Standard Offence Classification and the National Offence Index, which set out descriptions of broad categories of offence, but neither specifically identifies federal offences. Although some sub-categories of offence are limited to federal offences, others include both federal and state offences.

22.95 The ABS *National Information Development Plan for Crime and Justice Statistics*,<sup>83</sup> developed through consultation with the Australian Government, state and territory agencies and non-government organisations, identifies statistical priorities as they relate to crime and justice for the next three years. The plan acknowledges that there are currently gaps, deficiencies and overlaps in information needed by stakeholders.<sup>84</sup>

### ***ALRC's views***

22.96 One significant gap in available data is information on federal offenders. The ALRC recommends that the ABS collection of crime and justice statistics should distinguish between federal offenders and state and territory offenders. Accurate statistical information in relation to federal offenders is essential to the development of federal criminal law policy. The Commonwealth is a separate criminal law jurisdiction and this is not adequately reflected in current ABS crime and justice publications.

22.97 In drawing a distinction between federal and state or territory offenders, it may also be necessary to identify joint offenders, that is, offenders charged or convicted of both federal and state or territory offences.

22.98 In consultations with state and territory corrective services agencies it became apparent that distinguishing federal offenders from state and territory offenders is relatively easy in some jurisdictions and more difficult in others with different data collection procedures and systems. It will be necessary to work with these jurisdictions to ensure information on federal offenders is readily accessible. There are likely to be

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83 Australian Bureau of Statistics, *National Information Development Plan for Crime and Justice Statistics*, 4520.0 (2005).

84 Ibid, 1.

transitional difficulties in collecting disaggregated data from the state and territory courts, but this issue is important and the difficulties should be confronted and addressed.

22.99 The ALRC understands that these issues are already under consideration by the National Criminal Courts Statistics Unit and the National Corrective Services Statistics Unit.<sup>85</sup> The ABS and AGD should make the collection of information about federal offenders a priority in the next review of the *National Information Development Plan for Crime and Justice Statistics*, which is scheduled to be completed before 2008.

**Recommendation 22-9** The Australian Bureau of Statistics should disaggregate the data contained in its *Prisoners in Australia*, *Criminal Courts* and *Corrective Services* publications in order to distinguish between federal offenders, state and territory offenders, and joint offenders.

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85 Attorney-General's Department, *Correspondence*, 29 April 2005.



## 23. Release on Parole or Licence

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### Introduction

23.1 There are several ways in which federal offenders serving custodial sentences may be released into the community before their sentence is completed. A prisoner may be released on parole, on licence, or under a pre-release scheme. While release on parole occurs following the expiry of the non-parole period set by the court, release on licence may occur before the end of the non-parole period, but only in exceptional circumstances. An offender may also be granted temporary leave of absence or, in exceptional circumstances, may be released by the Governor-General exercising the executive prerogative.

23.2 The arrangements at the federal level in relation to release on parole are very different to the arrangements in place in the states and territories. Currently, parole decisions in relation to federal offenders are made by a ministerial delegate within a government department rather than by an independent board with broad-based expertise and community membership. In the course of the Inquiry there was strong support for the principle that decisions in relation to parole should be made by a body

independent of the political arm of government. This was on the basis that, because such decisions affect an individual's liberty, they should be made, and be seen to be made, through an independent, transparent and accountable process and in accordance with high standards of procedural fairness. In this chapter the ALRC recommends, among other things, the establishment of a federal parole authority to make decisions in relation to parole of federal offenders.

## **Federal parole authority to be established**

### **Independence and transparency**

23.3 Part IB of the *Crimes Act 1914* (Cth) provides that where a discretion exists in relation to the release of a federal offender on parole or licence, that discretion is to be exercised by the Attorney-General.<sup>1</sup> The authority to grant or refuse release on parole or licence, and to set conditions in relation to that release, has been delegated to senior officers of the Attorney-General's Department (AGD).<sup>2</sup> Decisions of the delegate are subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The former Attorney-General, the Hon Daryl Williams AM QC, established a federal Parole Panel to assist the delegate in complex or potentially controversial cases. Although the Parole Panel provides advice to the delegate, the Panel does not have any independent powers to make decisions in relation to parole of federal offenders.

23.4 This contrasts with the arrangements in the states and territories where the authority to make decisions in relation to parole for the vast majority of offenders lies with an independent parole board or equivalent body.<sup>3</sup> There are limited exceptions to these arrangements in some jurisdictions, for example, in relation to offenders serving an indefinite or life sentence, where the authority to grant or refuse release on parole lies with the state Governor or the responsible Minister.<sup>4</sup>

23.5 In all jurisdictions, the executive retains a long-standing prerogative, discussed in Chapter 25, to release an offender from custody at any time, including before the end of the non-parole period set by the court.

23.6 The Uhrig *Review of the Corporate Governance of Statutory Authorities and Office Holders* has noted that statutory authorities should only be created where there is a need for efficiency or independence, that is, 'when functions require a level of separation from government to ensure objectivity'.<sup>5</sup> State and territory parole bodies are established as independent statutory authorities and are not subject to direction from the responsible Minister, or the state or territory government. This helps to ensure

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1 *Crimes Act 1914* (Cth) ss 19AL(2), 19AP(1).

2 Delegation of 19 July 2004 made under the *Law Officers Act 1964* (Cth) s 17(2).

3 In some jurisdictions there is a separate body to deal with juvenile offenders, such as the Youth Parole Board established under the *Children and Young Persons Act 1989* (Vic).

4 See, eg, *Sentence Administration Act 2003* (WA) s 18; *Correctional Services Act 1982* (SA) s 67(6).

5 J Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003), 7.

that their decisions are objective and made on the basis of legislative criteria and the facts in each case. It also helps to make clear to the offender and to the community that there has been no political involvement in the process.

23.7 In consultations and submissions there was almost universal support for the principle that decisions in relation to parole should be made by a body independent of the executive.<sup>6</sup> In a number of consultations it was suggested that this was also desirable from the executive's point of view because it allows the executive an appropriate distance from decisions in individual cases.<sup>7</sup> The Sentence Administration Board of the ACT noted that while parole authorities may at times come under pressure from the media and others in relation to their decisions, that pressure would potentially be greater if the decision were made by politicians. The importance of due process and transparency of decision making was also emphasised.<sup>8</sup> Attention was drawn to the 1987 case of Mr Rex Jackson, a former New South Wales Minister for Corrective Services, who was convicted of accepting bribes in relation to release of offenders on licence.<sup>9</sup>

23.8 Depending on the constitution of the parole authority, there is also scope for involving a wider range of expertise, as well as members of the community, in the decision-making process. The benefits of a varied membership received some support in consultations.<sup>10</sup>

23.9 The AGD did not support the establishment of an independent federal parole authority, arguing that the present system was an effective and efficient use of public resources. The Department also expressed the view that the current arrangements provide an adequate level of transparency to prisoners and correctional services agencies and that this transparency is maintained through judicial review and freedom

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6 New South Wales Legal Aid Commission, *Submission SFO 75*, 10 February 2006; New South Wales State Parole Authority, *Submission SFO 68*, 17 January 2006; Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; JC, *Submission SFO 25*, 13 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; Parole Board of South Australia, *Consultation*, Adelaide, 20 April 2005; Parole Board of Tasmania, *Consultation*, Hobart, 14 April 2005; K Warner, *Consultation*, Hobart, 13 April 2005; Corrections Victoria and Adult Parole Board Victoria, *Consultation*, Melbourne, 31 March 2005; Youth Parole Board Victoria, *Consultation*, Melbourne, 30 March 2005; Sentence Administration Board ACT, *Consultation*, Canberra, 17 March 2005; Queensland Community Corrections Board, *Consultation*, Brisbane, 3 March 2005; New South Wales Parole Board, *Consultation*, Sydney, 4 November 2004.

7 Parole Board of Tasmania, *Consultation*, Hobart, 14 April 2005; Youth Parole Board Victoria, *Consultation*, Melbourne, 30 March 2005; Queensland Community Corrections Board, *Consultation*, Brisbane, 3 March 2005.

8 Sentence Administration Board ACT, *Consultation*, Canberra, 17 March 2005.

9 *Jackson v The Queen* (1988) 33 A Crim R 413.

10 Queensland Community Corrections Board, *Consultation*, Brisbane, 3 March 2005; New South Wales Parole Board, *Consultation*, Sydney, 4 November 2004.

of information legislation.<sup>11</sup> A number of stakeholders, including the AGD, expressed concern that establishing new procedures may result in delay in decision making.<sup>12</sup>

### ***ALRC's views***

23.10 The ALRC is of the view that the existing arrangements whereby the Attorney-General or departmental delegate make parole decisions in relation to federal offenders are not appropriate. Because these decisions affect an individual's liberty, they should be made through transparent and accountable processes in accordance with high standards of procedural fairness and independently of the political arm of government. The current arrangements lack adequate transparency and independence.

23.11 While parole decisions are made by the executive rather than the judicial branch of government, these decisions form part of the administration of criminal justice. In that context, transparency requires that justice should be done and be seen to be done. The criminal justice process should be transparent, not only to the offender and the bureaucracy, but to the community at large. Transparency provides safeguards for the offender and the community, and ensures they can see that decisions are made impartially and not arbitrarily.

23.12 Parole decisions should be made within a legislative framework approved by Parliament. However, it is important that such decisions are made on the basis of the facts in individual cases and insulated as far as possible from political considerations of the day.

23.13 The ALRC is also of the view that the establishment of an independent federal parole authority would improve the parole decision-making process in other ways, for example, through the involvement of relevant specialists and community members.

### **Three models for reform**

23.14 The ALRC examined three principal options for reform in this area:

- delegating decision-making authority in relation to federal offenders to existing state and territory parole authorities;
- establishing a federal parole authority as an independent statutory authority; and
- establishing a parole division within the Administrative Appeals Tribunal.

### ***Delegating decision making to state and territory parole authorities***

23.15 There was some support for delegating parole decisions to state and territory parole authorities as this would take advantage of existing administrative structures,

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11 Attorney-General's Department, *Submission SFO 83*, 15 February 2006.

12 Ibid; New South Wales Legal Aid Commission, *Submission SFO 75*, 10 February 2006.

procedures and expertise, including working arrangements with state and territory corrective services agencies.<sup>13</sup> In consultations, all states and territories expressed the view that, given the small number of federal offenders, the state and territory parole authorities would be able to absorb the extra workload with relative ease, although some extra funding might be necessary.<sup>14</sup> In 2003–04, the AGD made decisions in relation to around 150 individual matters in dealing with the administration of the sentences imposed on federal offenders.<sup>15</sup> If automatic parole is abolished, as recommended later in this chapter, the number of decisions is likely to increase by a factor of three to around 450 decisions a year, if the federal prisoner population were to remain at its current level.<sup>16</sup>

23.16 Concern was expressed, however, about state and territory parole authorities having to apply new and different procedures in relation to federal offenders, and about the possibility that there would be inconsistency in decision making across jurisdictions.<sup>17</sup> The AGD was strongly of the view that parole decisions should be made at the federal level for reasons of consistency and political accountability, although it did not support the establishment of an independent federal parole authority.<sup>18</sup>

23.17 Although delegating parole decision-making authority to the states and territories appears to be a convenient solution, it is not the outcome preferred by the ALRC. Having examined the procedures of the state and territory parole authorities, the ALRC is of the view that not all procedures meet appropriate levels of transparency and fairness. In particular, a number of state and territory authorities are not bound by the rules of natural justice and their decisions are not subject to judicial review.<sup>19</sup> In addition, the ALRC agrees with the AGD that responsibility for release of federal offenders into the community prior to the expiration of their sentence should reside at the federal level.

13 Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005; Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005; Inspector of Custodial Services Western Australia, *Consultation*, Perth, 19 April 2005.

14 Correctional Services Northern Territory and Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005; Parole Board of South Australia, *Consultation*, Adelaide, 20 April 2005; Department of Justice Western Australia, *Consultation*, Perth, 18 April 2005; Parole Board of Tasmania, *Consultation*, Hobart, 14 April 2005; Corrections Victoria and Adult Parole Board Victoria, *Consultation*, Melbourne, 31 March 2005; Sentence Administration Board ACT, *Consultation*, Canberra, 17 March 2005; Queensland Community Corrections Board, *Consultation*, Brisbane, 3 March 2005; New South Wales Parole Board, *Consultation*, Sydney, 4 November 2004.

15 Attorney-General's Department, *Annual Report 2003–04* (2004), 90.

16 This estimate is based on the fact that around two-thirds of federal prisoners were eligible for automatic parole or release in December 2004 (see Appendix 1, [73]). If automatic parole is abolished, the federal parole authority will have to make parole-related decisions in relation to these offenders in addition to the decisions currently made by the departmental delegate or relevant Minister.

17 Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Department of Justice Western Australia, *Consultation*, Perth, 18 April 2005.

18 Attorney-General's Department, *Submission SFO 52*, 7 July 2005.

19 *Corrections Act 1986* (Vic) s 69(2); *Sentence Administration Act 2003* (WA) s 115; *Parole of Prisoners Act 1971* (NT) s 3HA.

### ***Establishing an independent federal statutory authority***

23.18 A second alternative is to establish an independent statutory authority to make federal parole decisions. In Discussion Paper 70 (DP 70), the ALRC proposed one possible model for such an authority, namely, the establishment of a Federal Parole Board.<sup>20</sup> If this model is adopted, members of the Board should be appointed for a fixed term. The chair and deputy chair of the Board should be legally qualified and have a sound understanding of the rules of natural justice. The Board should have a broad membership including women, Indigenous members, and members with relevant expertise in the areas of psychology, psychiatry and social work.

23.19 A number of submissions and consultations expressed support for the establishment of a federal statutory parole authority on the basis that it would lead to greater inter-jurisdictional equality and more consistent decision making.<sup>21</sup> However, the AGD expressed the view that the establishment of a stand-alone Federal Parole Board would require a significant increase in resources, which could not easily be justified.<sup>22</sup>

### ***Establishing a federal parole panel within the AAT***

23.20 Following the publication of DP 70, the ALRC examined another possible model for the federal parole authority.<sup>23</sup> The impetus behind this third model was to utilise existing federal decision-making structures, and to see whether these might be adapted to the special context of parole decisions. The ALRC approached the Administrative Appeals Tribunal (AAT) to discuss the possibility of that body taking on the role of making federal parole decisions. In that consultation, the view was expressed that, while any extension of the jurisdiction of the AAT was a matter for the Australian Government, it would be possible for the AAT to take on this new role, given appropriate resourcing, structural changes and security safeguards.<sup>24</sup> Establishing a new Federal Parole Division within the AAT would make efficient use of existing infrastructure, procedures and expertise.

23.21 The primary role of the AAT is the independent merits review of a range of federal administrative decisions. While it would be possible for the AAT to take on this same role in relation to parole decisions made by the AGD, for the reasons discussed below, the ALRC does not support merits review of departmental parole decisions. Instead, the ALRC recommends that, if this model is adopted, a new Federal Parole

20 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 23–1.

21 New South Wales Legal Aid Commission, *Submission SFO 75*, 10 February 2006; New South Wales State Parole Authority, *Submission SFO 68*, 17 January 2006; Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; JC, *Submission SFO 25*, 13 April 2005; Parole Board of Tasmania, *Consultation*, Hobart, 14 April 2005.

22 Attorney-General's Department, *Submission SFO 83*, 15 February 2006.

23 Australian National University Academics, *Consultation*, Canberra, 10 February 2006; Justice G Downes & Others, *Consultation*, Sydney, 1 March 2006.

24 Justice G Downes & Others, *Consultation*, Sydney, 1 March 2006.

Division should be established within the AAT to make original decisions in relation to the parole of federal offenders.

23.22 The role of the AAT is not limited to the merits review of administrative decisions. Members of the AAT exercise other powers under a number of Acts, for example, the issuing of telecommunications interception warrants under the *Telecommunications (Interception) Act 1979* (Cth) and the conduct of compulsory examinations in connection with confiscation proceedings under the *Proceeds of Crime Act 2002* (Cth). Expanding the role of the AAT in the area of primary decision making would not be unprecedented. Administrative tribunals at the state and territory level make a range of original administrative decisions.<sup>25</sup>

23.23 Existing members of the AAT have expertise in areas such as accountancy, actuarial work, administration, aviation, engineering, environment, insurance, law, medicine, military affairs, social welfare, taxation and valuation.<sup>26</sup> Appointments to the AAT may be full-time or part-time. This membership structure could be adapted to suit the requirements of a Federal Parole Division. The ALRC recommends that such a Division should have a broad representative membership, including members with relevant expertise, for example, in the areas of psychology, psychiatry and social work.

### **Role of the Office for the Management of Federal Offenders**

23.24 The Office for the Management of Federal Offenders (OMFO), which is discussed in Chapter 22, would be ideally placed to provide secretariat support to the federal parole authority, given the proposed responsibilities of the OMFO for federal offender case management and liaison with state and territory corrective services agencies. The OMFO should play a central role in providing information and documentation whether the federal parole authority is established as a Federal Parole Board or as a division of the AAT, although the procedural arrangements will differ depending on the model adopted. If the Federal Parole Board model is adopted, the OMFO should not be represented on the Board to ensure independence from the executive in the Board's decision-making processes.

### **Release on licence**

23.25 Release on licence may be granted at any time during an offender's sentence of imprisonment and whether or not a non-parole period has been set. It is expressly limited to exceptional circumstances.<sup>27</sup>

Exceptional circumstances are intended to cover matters that occur, usually post-sentence, that significantly affect an offender's circumstances such as extensive

25 See, eg, the Victorian Civil and Administrative Tribunal's powers in relation to guardianship of adults with a disability: *Guardianship and Administration Act 1986* (Vic).

26 Administrative Appeals Tribunal, *Annual Report 2004–05* (2005), Appendix 1.

27 *Crimes Act 1914* (Cth) s 19AP.

cooperation with law enforcement agencies or development of a serious medical condition which cannot be adequately treated within the prison system.<sup>28</sup>

23.26 Decisions of this kind are more closely related to the exercise of the executive prerogative, given that an offender may be released before the end of the non-parole period set by a court. The ALRC is of the view that such decisions are appropriately made by the responsible Minister.

23.27 However, given the expertise that will accrue in the federal parole authority over time in relation to the conditions imposed on federal offenders released into the community, and the authority's role in dealing with breaches of parole orders and licences (discussed below), the authority should have a role in settling the conditions attached to a licence. Once the Minister has made a decision that a prisoner is to be released on licence, the matter should be referred to the federal parole authority for a decision in relation to the conditions to be attached to the licence.

**Recommendation 23–1** The Australian Government should establish a federal parole authority to make decisions in relation to parole of federal offenders. The federal parole authority should be established as either: (a) an independent statutory authority to be called the Federal Parole Board; or (b) a division of the Administrative Appeals Tribunal to be called the Federal Parole Division. The authority's decisions should be final and not subject to the responsible Minister's approval. The federal parole authority should also make decisions in relation to the conditions to be attached to release on licence.

## Procedures of the federal parole authority

### Appearance before the federal parole authority and related issues

23.28 Currently, the Attorney-General, or his or her delegate in the AGD, makes parole decisions solely on the basis of written reports and information.<sup>29</sup> While the written information and reports available to the Attorney-General or delegate are similar to those available to state and territory parole authorities, there is no opportunity for the offender to appear before the Attorney-General or delegate at any stage.

23.29 The ALRC held consultations with the parole authorities in every jurisdiction except Western Australia. The procedures of the state and territory parole authorities vary widely, but offenders have some opportunity to appear before the authorities in New South Wales, Victoria, Queensland, South Australia, Tasmania and the ACT. In

28 Explanatory Memorandum (House of Representatives), Crimes Legislation Amendment Bill (No 2) 1989 (Cth).

29 Attorney-General's Department, *Consultation*, Sydney, 31 August 2004.



some jurisdictions the parole authority interviews every offender eligible for parole, and in others the parole authority interviews an offender only if it is considering refusing release on parole. The offender has a right to appear and to make submissions in the ACT if the parole authority is considering refusing release on parole,<sup>30</sup> and may appear in the other jurisdictions with leave of the parole authority. New South Wales is the only jurisdiction to hold these hearings in public.

23.30 In New South Wales, South Australia and the ACT, the offender has a right to be legally represented before the parole authority. In addition, in New South Wales and the ACT the offender may be represented by another person with the consent of the parole authority.<sup>31</sup> In Queensland, an offender may be represented by an agent, but that agent must not be a lawyer.<sup>32</sup> In the other jurisdictions there is no legislative provision for representation.

23.31 In New South Wales, release on parole is granted in about half the matters considered at public hearings—which are those matters in which the parole authority is considering refusing release on parole.<sup>33</sup> This suggests that the parole authority receives important additional information from personal representations made by the offender, or his or her representative, at the review hearing.

23.32 There was strong support for this practice among those parole authorities that do allow offenders to appear, as well as other organisations. This was on the basis that the process allows greater procedural fairness and transparency; that it provides a more accessible process for offenders with an intellectual disability or limited literacy or language skills; and that important information that is unlikely to be included in written reports can be obtained through meeting and talking to the offender. In addition, it allows parole authorities to put issues to the offender for response, without providing the offender with copies of sensitive written reports from, for example, psychiatrists or victims.<sup>34</sup>

23.33 Only one parole authority expressed the view that allowing offenders to appear was unnecessary<sup>35</sup> and the AGD expressed the view that an appearance by an offender ought not influence the decision-making process.<sup>36</sup>

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30 *Crimes (Sentence Administration) Act 2005* (ACT) s 127.

31 *Crimes (Administration of Sentences) Act 1999* (NSW) s 190; *Correctional Services Act 1982* (SA) s 77; *Crimes (Sentence Administration) Act 2005* (ACT) s 209.

32 *Corrective Services Act 2000* (Qld) s 137.

33 New South Wales Parole Board, *Annual Report 1 January 2003—31 December 2003*, 3.

34 Parole Board of South Australia, *Consultation*, Adelaide, 20 April 2005; Corrections Victoria and Adult Parole Board Victoria, *Consultation*, Melbourne, 31 March 2005; Sentence Administration Board ACT, *Consultation*, Canberra, 17 March 2005; Queensland Community Corrections Board, *Consultation*, Brisbane, 3 March 2005; New South Wales Parole Board, *Consultation*, Sydney, 4 November 2004.

35 Correctional Services Northern Territory and Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005.

36 Attorney-General's Department, *Submission SFO 83*, 15 February 2006.

23.34 In a number of jurisdictions the geographic dispersal of offenders wishing to appear is a significant issue for parole authorities. In New South Wales offenders appear by video link. In Victoria and Queensland they appear personally or by video link. In South Australia offenders appear personally or by video link and the parole authority also travels to remote regions on occasion. While a number of parole authority members expressed the view that personal appearances were preferable, there was general support for the use of video link where necessary. It was recognised that the use of video link was cost-effective and avoided the security issues arising from the transport of offenders from one location to another. The Queensland Department of Corrective Services expressed support for the use of video conferencing in relation to federal offenders, noting that personal appearances would not be practical given the cost and security issues. There are video conferencing facilities in all Queensland correctional centres.<sup>37</sup> However, the Prisoners' Legal Service cautioned that the use of video link in relation to Aboriginal or Torres Strait Islander offenders, offenders with a first language other than English, or offenders with an intellectual disability, may cause distress or confusion in some circumstances.<sup>38</sup>

23.35 A number of organisations expressed support for allowing legal or other representation before parole authorities.<sup>39</sup> This was on the basis that offenders frequently lack the skills to put their case fully and clearly, and that legal representation may assist offenders to articulate their submissions and to focus the discussion on relevant matters. On the other hand, in Victoria legal representation is not generally allowed because it has the potential to slow the deliberations of the parole authority in an unacceptable way.<sup>40</sup> The Queensland Department of Corrective Services expressed the view that legal representation is not appropriate because board proceedings are intended to be non-adversarial. The Department noted, however, that it is possible in Queensland for a legal representative to make written submissions on behalf of an offender.<sup>41</sup>

### ***ALRC's views***

23.36 Federal sentencing legislation should provide that federal offenders have an opportunity to appear before the federal parole authority where the authority is of the opinion that the information currently before it does not justify releasing the person on parole. The authority should not make a decision in these circumstances until it has given the offender the opportunity to appear and to provide further information and respond to submissions and reports before the authority.

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37 Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006.

38 Prisoners' Legal Service, *Submission SFO 28*, 15 April 2005.

39 Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Prisoners' Legal Service, *Submission SFO 28*, 15 April 2005; Sentence Administration Board ACT, *Consultation*, Canberra, 17 March 2005.

40 Corrections Victoria and Adult Parole Board Victoria, *Consultation*, Melbourne, 31 March 2005.

41 Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006.

23.37 Geographic dispersal is an even greater issue in relation to federal offenders than in relation to state and territory offenders. While an appearance in person before the authority would be ideal, the ALRC is of the view that the use of video link facilities, which are already available in correctional centres in four jurisdictions, will be necessary to address the cost, security and distance issues. The ALRC notes that the AAT has registry facilities throughout Australia and videoconferencing facilities in Adelaide, Brisbane, Canberra, Melbourne, Perth and Sydney, which could be used to allow offenders to appear at parole hearings if the AAT model is adopted.<sup>42</sup>

23.38 In some instances, parole authority members may also consider travelling to the relevant corrective services facility to interview an offender.

23.39 Federal offenders appearing before the federal parole authority should be allowed legal or other representation. This will help to ensure the rules of natural justice are adhered to; the offender has an adequate opportunity to make submissions and respond to matters raised in the hearing; and offenders with a mental health issue, an intellectual disability, or literacy or language issues will be adequately supported during the process.

23.40 Where an offender is unable to speak and understand the English language sufficiently to follow and participate in the proceedings, the provision of an interpreter is vital to ensure the offender understands the parole process and can make submissions if he or she chooses to do so.

### **Powers and procedures of the federal parole authority**

23.41 Parole authorities rely on a range of information when making their decisions and when determining what conditions to attach to parole orders or licences. This information generally includes the offender's antecedent criminal history; the court's sentencing remarks; any appeal court judgment; correctional history and incident reports; correctional program participation reports; an assessment of residential and employment plans following release; any medical, psychiatric or psychological reports; and submissions from the offender.

23.42 In some jurisdictions information from victims is also made available to the parole authority. A victim notification register is maintained in each state and territory, except the Northern Territory. While the arrangements differ from state to state, in general terms victims of crime provide their name and contact details on a voluntary and confidential basis so they can be informed of certain developments in relation to an offender who has perpetrated a crime against them, for example, when the offender is due for parole consideration. In most states and territories, legislation expressly provides for victims to make submissions to the parole authority in relation to the

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42 The use of video conferencing facilities in parole hearings is discussed further below.

release of the offender.<sup>43</sup> In Queensland and the Northern Territory this is done on an administrative basis.<sup>44</sup> The definition of a victim of crime for these purposes differs from state to state. In Victoria and Queensland it is limited to victims of violent crime<sup>45</sup> but the definition is wider in other jurisdictions.<sup>46</sup> In some jurisdictions the definition includes family members and others where, for example, the primary victim dies as a result of the offence.<sup>47</sup> Victim Support Australasia was firmly of the view that similar arrangements should be put in place at the federal level.<sup>48</sup>

23.43 Although information relevant to parole authority decisions is usually provided as a matter of course, most authorities have the power to require people to attend meetings of the authority and to produce information and documents where necessary.<sup>49</sup>

23.44 Only the Tasmanian Parole Board currently publishes its decisions online.<sup>50</sup> The New South Wales State Parole Authority (formerly known as the NSW Parole Board)<sup>51</sup> will provide copies of transcripts of hearings on request.<sup>52</sup> In consultations, one parole authority noted that holding parole hearings in private encouraged less formality and a more honest and comprehensive exchange of information with the offender, including information relating to personal and private matters.<sup>53</sup>

### *ALRC's views*

23.45 The federal parole authority should have access to the same sort of information and reports currently considered by state and territory parole boards. The ALRC

43 *Victims Rights Act 1996* (NSW) s 6; *Corrections Act 1986* (Vic) s 74A; *Victims of Crime Act 1994* (WA) sch 1; *Victims of Crime Act 2001* (SA) s 10; *Corrections Act 1997* (Tas) s 72; *Crimes (Sentence Administration) Act 2005* (ACT) s 123.

44 The Corrective Services Bill 2006 (Qld), currently before the Queensland Parliament, provides for the establishment of an 'eligible persons' register. 'Eligible persons' include victims of violent or sexual offences. 'Eligible persons' will have the opportunity to make submissions to the Queensland parole boards.

45 *Corrections Act 1986* (Vic) s 30A; *Corrective Services Act 2000* (Qld) s 242.

46 *Victims Rights Act 1996* (NSW) s 5: 'a person who suffers harm as a direct result of an act committed ... by another person in the course of a criminal offence'; *Victims of Crime Act 1994* (WA) s 2: 'a person who has suffered injury, loss or damage as the direct result of an offence'; *Victims of Crime Act 2001* (SA) s 4: 'a person who suffers harm as the result of the commission of the offence'; *Corrections Act 1997* (Tas) s 3: 'a person who has suffered injury, loss or damage as a direct consequence of the offence'; *Crimes (Sentence Administration) Act 2005* (ACT) s 214: 'a person ... who suffers harm because of an offence by the offender'.

47 See, eg, *Crimes (Sentence Administration) Act 2005* (ACT) s 214(1)(b).

48 Victim Support Australasia, *Submission SFO 60*, 21 December 2005.

49 *Crimes (Administration of Sentences) Act 1999* (NSW) s 186; *Corrections Act 1986* (Vic) s 71; *Corrective Services Act 2000* (Qld) s 182; *Sentence Administration Act 2003* (WA) s 107; *Correctional Services Act 1982* (SA) s 63; *Corrections Act 1997* (Tas) s 63; *Crimes (Sentence Administration) Act 2005* (ACT) ss 198–199.

50 Parole Board of Tasmania, *Parole Board Decisions* (2005) <<http://www.justice.tas.gov.au/paroleboard/decisions>> at 15 August 2005.

51 *Crimes (Administration of Sentences) Amendment (Parole) Act 2004* (NSW).

52 New South Wales Parole Board, *Consultation*, Sydney, 4 November 2004.

53 Sentence Administration Board ACT, *Consultation*, Canberra, 17 March 2005.

understands that an appropriate range of written information and reports is currently provided to the AGD as a matter of administrative procedure. The federal parole authority should, however, have the power to require the production of information and to require persons to appear before it, where necessary, for the purpose of carrying out its functions.

23.46 Victims should also be given the opportunity to provide input to the federal parole authority where appropriate. As discussed in Chapter 14, many federal offences are considered to be victimless—in the sense that the harm caused by the offence is not to an identifiable individual but to the Commonwealth as a polity. However, newer federal offences such as slavery and sexual servitude, child sex tourism, people smuggling and terrorism may affect individuals directly and have the potential to give rise to victims of crime with a legitimate interest in the administration of the sentence imposed on the offender. In Chapter 22 the ALRC recommends that the OMFO establish and maintain a victim notification register. The register should be used to ensure registered victims are given the opportunity to have input into federal parole authority deliberations. Given the nature of federal criminal offences, the definition of victim for the purposes of the register should not be limited to victims of violent crime.

23.47 Having discussed the parole authority procedures with authorities in five states and two territories, the ALRC is of the view that a valuable exchange of information may be encouraged between the parole authority and the offender where hearings are held in private. However, in some circumstances (such as controversial cases), and for reasons of transparency, it may be of benefit to hold other hearings in public. For this reason the federal parole authority should have the discretion to hold hearings in public or in private. In order to promote transparency and to provide the basis for judicial review, the federal parole authority should be required to publish a statement of reasons for its decisions.

23.48 The federal parole authority should also be required to prepare an annual report on its operations for consideration by the relevant Minister and for tabling in the Australian Parliament. If the authority is established as a division of the AAT, this information should be included in the AAT's annual report.

**Recommendation 23–2** Federal sentencing legislation should provide that:

- (a) federal offenders have an opportunity to appear before the proposed federal parole authority where the authority is of the opinion that the information currently before it does not justify releasing the person on parole;
- (b) federal offenders are allowed legal or other representation before the federal parole authority;

- (c) federal offenders have the benefit of an appropriately qualified interpreter where necessary;
- (d) the federal parole authority has access to the same information and reports currently considered by state and territory parole authorities and that it has power to require the production of such information;
- (e) the federal parole authority has power to require persons to appear before it for the purpose of carrying out its functions;
- (f) registered victims of crime be given the opportunity to provide input into the deliberations of the federal parole authority;
- (g) the federal parole authority publish reasons for its decisions; and
- (h) the federal parole authority prepare an annual report on its operations, which must be tabled in the Australian Parliament.

### Review of decisions of the federal parole authority

23.49 The decisions of parole authorities are decisions of an administrative character, which directly affect the liberty of individuals. For this reason it is essential to ensure that the decision-making process adheres to high standards of procedural fairness and transparency. One of the ways this can be achieved is by allowing decisions to be reviewed by an agency external to the original decision-making body. Such review falls into two broad categories:

- Merits review, where the reviewer steps into the shoes of the original decision maker and remakes the decision on the basis of the merits of the case. Review of this kind is undertaken by the executive.
- Judicial review, where a court examines whether a decision was made lawfully. Judicial review is intended to ensure that decision makers use correct reasoning and follow correct procedures. The court does not, generally, remake the decision on the basis of its view of the merits of the case.<sup>54</sup>

23.50 At the federal level, external review of the merits of decisions about release on parole or licence is not available, but it is possible to seek judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). There have been very few such applications for review.

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<sup>54</sup> Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report 39 (1995), viii.

23.51 In Victoria, Western Australia and the Northern Territory, the parole authorities are not subject to merits review or judicial review.<sup>55</sup> In New South Wales, there is a limited right of review by the Supreme Court where the offender, the state Attorney General or the state Director of Public Prosecutions alleges that the decision was made on the basis of false, misleading or irrelevant information.<sup>56</sup> In other jurisdictions, decisions of the parole authorities are subject to judicial review but not to merits review.

23.52 The New South Wales Law Reform Commission, in its 1996 report on sentencing, was of the view that merits review of the decisions of the New South Wales Parole Board was not appropriate and that ‘the community-dominated Board should remain the forum in which the public interest is determined’.<sup>57</sup> In consultations, one stakeholder noted that merits review was undesirable in the parole context because of the ongoing relationship between offenders and parole authorities involving the monitoring, supervision and disciplining of offenders in breach of their parole orders.<sup>58</sup> The ALRC did not receive any submissions in support of merits review for parole-related decisions.

#### ***ALRC’s views***

23.53 Decisions of the federal parole authority should be subject to the rules of natural justice and to judicial review. Because these decisions directly affect the liberty of individuals it is essential to ensure that decision makers use correct reasoning and follow correct procedures. If the Federal Parole Board model is adopted, decisions of the Board should be subject to the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Decisions of the AAT are subject to judicial review by the Federal Court of Australia under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth).

23.54 However, decisions of the federal parole authority should not be subject to merits review. Establishment of the authority, as proposed above, can be expected to improve the quality of decision making in this area and to bring a new level of transparency and procedural fairness to the federal process.

23.55 In addition, the relationship between a parole authority and an offender is an ongoing one. In those cases where the authority makes a decision not to grant release on parole at a particular time, parole authorities generally revisit their decisions on a periodic basis in order to give the offender the opportunity to meet the criteria for release by, for example, undertaking a rehabilitation program. The ALRC is of the view that where the federal parole authority makes a decision to refuse release on parole, the federal offender should have the right to have the decision reconsidered by the authority periodically.

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55 *Corrections Act 1986* (Vic) s 69(2); *Sentence Administration Act 2003* (WA) s 115; *Parole of Prisoners Act 1971* (NT) s 3HA.

56 *Crimes (Administration of Sentences) Act 1999* (NSW) ss 155, 156.

57 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [11.78].

58 Australian National University Academics, *Consultation*, Canberra, 10 February 2006.

**Recommendation 23–3** Decisions of the federal parole authority should be subject to the rules of natural justice and to judicial review either under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) or s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) depending on the model adopted. These decisions should not be subject to merits review but where the authority makes a decision to refuse release on parole, the federal offender should have the right to have the decision reconsidered by the authority periodically.

## Parole decision

### Automatic parole to be abolished

23.56 Currently, where a federal offender has been sentenced to more than three years and less than 10 years imprisonment, the Attorney-General or delegate must grant parole at the end of the non-parole period.<sup>59</sup> This means, in effect, that parole is automatic for those prisoners sentenced to between three and 10 years imprisonment, unless the prisoner is still serving a state or territory sentence when the federal non-parole period expires.<sup>60</sup> Where the sentencing court imposes a term of imprisonment of more than six months and less than three years, the court is required to make a recognizance release order rather than set a non-parole period.<sup>61</sup> In these circumstances, an offender is automatically released at the end of any pre-release period set by the court.

23.57 The large majority of federal offenders are sentenced to less than 10 years imprisonment and so are eligible for automatic parole or release.<sup>62</sup> Appendix 1 indicates that 33 per cent of federal prisoners who were in custody on 13 December 2004 had received sentences of more than 10 years.<sup>63</sup> On that basis, approximately two-thirds of federal prisoners were eligible for automatic parole or release.

23.58 In New South Wales, parole is automatic where an offender is sentenced to less than three years and in South Australia parole is automatic where an offender is sentenced to less than five years.<sup>64</sup> In other jurisdictions release on parole is always discretionary.

<sup>59</sup> *Crimes Act 1914* (Cth) s 19AL(1).

<sup>60</sup> *Ibid* s 19AM.

<sup>61</sup> *Ibid* s 19AC.

<sup>62</sup> Australian Institute of Criminology, *Consultation*, Canberra, 16 March 2005; Attorney-General's Department, *Consultation*, Canberra, 1 October 2004.

<sup>63</sup> Appendix 1, [73].

<sup>64</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 50; *Correctional Services Act 1982* (SA) s 66. Under proposed amendments to the *Penalties and Sentences Act 1992* (Qld) contained in the Corrective Services Bill 2006 (Qld) offenders who are sentenced to three years or less—who are not serious violent offenders or sex offenders—will be automatically released on parole at a time fixed by the sentencing court.



23.59 In consultations, the AGD indicated that automatic parole was problematic in some circumstances. For example, where the Department receives reports from state or territory corrective services agencies in relation to an offender eligible for automatic parole and the reports do not support release of the offender on parole, there is no discretion to refuse to release the offender. The only response the Attorney-General or delegate can make to such reports is to impose appropriate conditions in the parole order.<sup>65</sup>

23.60 Another problem area identified by the AGD is where offenders commit a further offence while serving a sentence of imprisonment but have not been sentenced at the time they become eligible for release on automatic parole. Again, there is no discretion to refuse release on parole.<sup>66</sup>

23.61 Finally, the AGD noted that, where a federal offender becomes eligible for automatic parole but is also serving a sentence for a state or territory offence, the Attorney-General or delegate must make the order but it does not come into effect until the offender is eligible to be released for the state or territory offence.<sup>67</sup>

23.62 There was some support for automatic parole in submissions and consultations on the basis that it provides certainty of release date for the offender and the offender's family; eliminates political pressure on parole authorities in relation to the length of time served; and ensures timely release of offenders.<sup>68</sup>

23.63 On the other hand, the use of discretionary parole was strongly supported on the basis that it provides an incentive to participate in rehabilitation programs and to address offending behaviour; assists with the management of offenders in custody; and encourages the development of post-release plans.<sup>69</sup> In addition, the fact that most federal offenders are eligible for automatic parole was identified as one cause of friction between federal offenders and state and territory offenders in custody.<sup>70</sup>

23.64 During passage through Parliament of the *Crimes Legislation Amendment Act (No 2) 1989* (Cth)—which introduced Part IB into the *Crimes Act*—the Opposition stated that parole should never be automatic. The Shadow Attorney-General expressed

65 Attorney-General's Department, *Consultation*, Canberra, 16 March 2005.

66 Attorney-General's Department, *Submission SFO 52*, 7 July 2005.

67 *Crimes Act 1914* (Cth) s 19AM.

68 Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; PS, *Submission SFO 21*, 8 April 2005.

69 New South Wales State Parole Authority, *Submission SFO 68*, 17 January 2006; Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005; ACT Corrective Services, *Submission SFO 34*, 20 April 2005; Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; Parole Board of South Australia, *Consultation*, Adelaide, 20 April 2005; Parole Board of Tasmania, *Consultation*, Hobart, 14 April 2005; Sentence Administration Board ACT, *Consultation*, Canberra, 17 March 2005; Queensland Community Corrections Board, *Consultation*, Brisbane, 3 March 2005.

70 Correctional Services Northern Territory and Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005.

the view that discretionary parole was important because the prospect of release on parole operated to keep order in prisons.<sup>71</sup>

### *ALRC's views*

23.65 In 1988, the ALRC recommended that parole should be granted automatically at the end of the non-parole period in relation to all sentences except life sentences.<sup>72</sup> At that time, the application of remissions under state and territory law to both head sentences and non-parole periods was causing confusion and disquiet because of the disparity between the sentences imposed by the court and the sentences actually served. Automatic parole was recommended as one element in a raft of recommendations intended to enhance 'truth in sentencing' and ensure that offenders served their custodial sentences in accordance with the orders imposed by the courts.

23.66 Given the limited use now made of remissions in all jurisdictions, the ALRC has reconsidered the issues and has formed the view that automatic parole should no longer be available in relation to federal offenders. The ALRC is persuaded that the use of discretionary parole supports a range of positive outcomes for offenders and for the community. The Department of Corrective Services in Western Australia noted, however, that abolishing automatic parole will impact on the workload of state and territory corrective services agencies as there will be more federal offenders requiring supervision.<sup>73</sup> This issue should be discussed with those agencies before this recommendation is implemented.

23.67 In Chapter 9, the ALRC recommends that courts be required to set non-parole periods in relation to sentences of imprisonment of 12 months or more.<sup>74</sup> This means that the federal parole authority would be required to exercise its discretion in relation to the release of all offenders serving sentences of 12 months or more. In relation to sentences of imprisonment of less than 12 months the ALRC recommends that courts be precluded from setting a non-parole period.<sup>75</sup> Parole is not suitable in respect of such sentences because the period of supervision is too short to be effective.

**Recommendation 23–4** Federal sentencing legislation should repeal the provisions granting automatic parole to federal offenders.

71 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 October 1989, 2078 (N Brown—Shadow Attorney-General).

72 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Recs 28–29.

73 Department of Corrective Services Western Australia, *Submission SFO 88*, 17 February 2006.

74 Rec 9–2.

75 Rec 9–3.

### Guidance for parole decision makers

23.68 Part IB of the *Crimes Act* does not provide any guidance on decision making in relation to parole. In consultations, the AGD indicated that the Department has internal guidelines in the form of a manual but that the content of the manual was not on the public record.<sup>76</sup>

23.69 In most other jurisdictions the relevant legislation specifies criteria and information that the parole authority must consider in making its decisions.<sup>77</sup> In Victoria and Queensland the parole authorities have published lists of the criteria and information they consider in making their decisions.<sup>78</sup> In Queensland, Ministerial Guidelines provide guidance to the parole authorities.<sup>79</sup> There is some divergence in the criteria between jurisdictions.

23.70 The New South Wales Law Reform Commission has noted that without clear and public criteria for parole decisions

it is difficult for prisoners to know exactly by what criteria their applications will be assessed, and how they have been specifically applied in each case. This hampers attempts to address factors relevant to the decision in their applications and their behaviour in prison.<sup>80</sup>

23.71 There was support for the development and publication of federal criteria in submissions and consultations, although there was some divergence of views about whether or not it would be appropriate to include these criteria in federal sentencing legislation.<sup>81</sup> This support was justified on the basis that such criteria alert offenders to the issues they need to address, assist with procedural fairness and the production of reasons for decisions, and serve to inform the community at large of the roles and responsibilities of parole authorities.<sup>82</sup>

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<sup>76</sup> Attorney-General's Department, *Consultation*, Canberra, 1 October 2004.

<sup>77</sup> *Crimes (Administration of Sentences) Act 1999* (NSW) s 135; *Sentence Administration Act 2003* (WA) s 16; *Correctional Services Act 1982* (SA) s 67(4); *Corrections Act 1997* (Tas) s 72(4); *Crimes (Sentence Administration) Act 2005* (ACT) s 120; *Parole of Prisoners Act 1971* (NT) s 3GB (in relation to a prisoner serving life imprisonment for murder only).

<sup>78</sup> Department of Justice Victoria, *Adult Parole Board of Victoria Website* (2003) <<http://www.justice.vic.gov.au/>> at 10 November 2004; Department of Corrective Services Queensland, *Community Corrections Board Website* (2005) <[http://www.dcs.qld.gov.au/About\\_Us/Community\\_Corrections\\_Board/index.shtml](http://www.dcs.qld.gov.au/About_Us/Community_Corrections_Board/index.shtml)> at 16 August 2005.

<sup>79</sup> Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006.

<sup>80</sup> New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [11.51].

<sup>81</sup> New South Wales State Parole Authority, *Submission SFO 68*, 17 January 2006; Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; JC, *Submission SFO 25*, 13 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; Sentence Administration Board ACT, *Consultation*, Canberra, 17 March 2005.

<sup>82</sup> Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Parole Board of Tasmania, *Consultation*, Hobart, 14 April 2005; Sentence Administration Board ACT, *Consultation*, Canberra, 17 March 2005.

23.72 A number of parole authorities noted that setting the criteria out in the legislation will not assist offenders—who are unlikely to be familiar with the legislative provisions—and that it was essential that parole authorities and corrective services agencies ensured that offenders were informed about these issues.<sup>83</sup> The Parole Board of South Australia makes prison visits and the Parole Board of Tasmania runs a Parole Awareness Program to facilitate this flow of information.<sup>84</sup>

### *ALRC's views*

23.73 It would be desirable for federal sentencing legislation to set out some guidance for the federal parole authority in making parole-related decisions. A number of elements underpin good administrative decision making, that is, decision making that is 'consistent and equitable as between individuals in similar situations'.<sup>85</sup> These include clear guidelines for decision makers, which set out the criteria upon which the decision-making discretion is to be based. Publication of guidelines assists both individuals affected by decisions and the general community to understand the basis upon which decisions are made, and contributes to the transparency of the decision-making process.

23.74 This guidance should be provided in two ways:

- a general framework provision setting out the purposes of parole; and
- a provision setting out a non-exhaustive list of factors the authority must consider, where they are relevant and known to the authority, in making parole-related decisions.

23.75 The ALRC has developed this approach in parallel with the purposes, principles and factors relevant to sentencing as described in Chapters 4, 5 and 6. The list of factors to be taken into consideration by the authority is non-exhaustive and is intended to be distinct from, but consistent with, the purposes of parole. This approach is intended to provide guidance to decision makers while allowing adequate scope for the exercise of discretion in individual cases.

23.76 The list of relevant purposes and factors has been developed based on criteria set out in state and territory legislation, information received in submissions and consultations, and further research. Factor (f) in Recommendation 23–6 addresses the issue that very short parole periods, while drawing on limited state and territory

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83 Correctional Services Northern Territory and Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005; Parole Board of South Australia, *Consultation*, Adelaide, 20 April 2005; Parole Board of Tasmania, *Consultation*, Hobart, 14 April 2005.

84 Parole Board of South Australia, *Consultation*, Adelaide, 20 April 2005; Parole Board of Tasmania, *Consultation*, Hobart, 14 April 2005.

85 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report 39 (1995), x.

corrective services resources, may not achieve the purposes of parole. Factor (g) on immigration removal or deportation is discussed further below.

23.77 The ALRC notes the view expressed in some submissions and consultations that including this sort of information in legislation will not assist federal offenders. The ALRC is of the view, however, that it is appropriate to set out this guidance in legislation to provide a clear framework for decision making and judicial review of decision making. The legislative provisions should also provide the basis of information supplied to offenders by the federal parole authority, the OMFO, and state and territory corrective services agencies.

**Recommendation 23–5** Federal sentencing legislation should state that the purposes of parole are:

- (a) the reintegration of the offender into the community;
- (b) the rehabilitation of the offender; and
- (c) the protection of the community.

**Recommendation 23–6** Federal sentencing legislation should specify a non-exhaustive list of factors the federal parole authority must consider when determining a parole matter, where the factors are relevant and known to the authority. In particular, the factors should include:

- (a) whether releasing the offender on parole is likely to assist the offender to adjust to lawful community life;
- (b) the likelihood that the offender will comply with the conditions of the parole order;
- (c) the offender’s conduct while serving his or her sentence;
- (d) the risk to the community of releasing the offender on parole;
- (e) the likely effect on the victim, or victim’s family, of releasing the offender on parole;
- (f) the length of the parole period, to ensure it is sufficient to achieve the purposes of parole; and
- (g) any special circumstances of the case, including the likelihood that the offender will be subject to removal or deportation upon release.

**Removal or deportation while on parole**

23.78 Section 19AK of the *Crimes Act* provides that a court is not precluded from fixing a non-parole period merely because the offender is, or may be, liable to be deported from Australia. As a matter of practice, offenders who are non-citizens and subject to a removal or deportation order are removed or deported by the Department of Immigration and Multicultural Affairs (DIMA), as it is now known, when they become eligible to be released from custody.<sup>86</sup>

23.79 It has been suggested that this situation is unsatisfactory because the period of release on parole is part of the sentence imposed on the offender and, if the offender is removed or deported at the end of the non-parole period, he or she is not being required to serve his or her entire sentence, including time in the community under supervision.<sup>87</sup>

23.80 The New South Wales State Parole Authority has *Operating Guidelines* that state that, in considering the grant of parole in relation to an offender liable to removal or deportation, the Authority must consider the following factors:

- (a) whether a definite decision has been made by the Department of Immigration;
- (b) whether the offender has adequately addressed the offending behaviour;
- (c) whether the offender would otherwise be released to parole in Australia if not subject to deportation;
- (d) the seriousness of the offence;
- (e) the risk to the community in the country of deportation;
- (f) the post release plans in the country to which the offender is to be deported;
- (g) the duration of the period to be served on parole;
- (h) the fact that supervision of the parole order is highly unlikely to occur;
- (i) whether or not the offender entered the country specifically to commit the crime for which he/she has been sentenced.<sup>88</sup>

23.81 The New South Wales Department of Corrective Services has indicated that this matter is under active consideration by the Corrective Services Administrators' Conference and the Corrective Services Ministers' Conference. In May 2005, the latter Conference endorsed a New South Wales resolution proposing the establishment of a working party to consider the issue. The draft resolution stated that legislation should ensure that

offenders liable to be deported upon release from custody ... may only be granted parole when the public interest in releasing the offender from custody for compassionate or other reasons (without supervision in the community and without

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<sup>86</sup> *R v Shrestha* (1991) 173 CLR 48, [10].

<sup>87</sup> New South Wales Parole Board, *Consultation*, Sydney, 4 November 2004.

<sup>88</sup> New South Wales State Parole Authority, *Operating Guidelines* (2005).

any means of enforcing compliance with parole conditions by enabling revocation of parole for non-compliance) outweighs the public interest in protecting the community by refusing parole until appropriate supervision and enforcement arrangements can be made.<sup>89</sup>

23.82 In its submission, DIMA described its role in relation to non-citizen offenders sentenced to a period of imprisonment as being:

- to identify non-citizens liable to removal or deportation on completion of their sentence and bring this to the attention of the individual and prison authorities;
- to ensure non-citizens in prison have lawful immigration status during their prison sentence; and
- to ensure that in doing this the non-citizen is not prevented from participating in rehabilitative schemes such as work or study release.<sup>90</sup>

23.83 DIMA stated that it would not remove or deport an offender while that person was serving a sentence in custody. However, non-citizen offenders liable to removal or deportation are taken into immigration detention when their period of custody ends. Leave of absence schemes, such as work or study release, do not technically bring the period of custody to an end. However, pre-release schemes such as release to home detention do bring the period of custody to an end and an offender would be transferred to immigration detention at this time. DIMA noted that the purpose of removal is to protect the Australian community.<sup>91</sup>

23.84 It was argued in the High Court case of *Shrestha*<sup>92</sup> that offenders who are liable to deportation on release from custody should never be granted a non-parole period or released on licence. The High Court rejected this blanket approach, but stated that where an offender would almost certainly be deported upon release from custody, this factor should be taken into account by the court in fixing a non-parole period and should also be taken into account by the parole authority in considering whether the offender should actually be released on parole or licence. This was not the only relevant factor, however. The High Court also stated that the parole authority should consider other factors such as the likelihood of rehabilitation and any other mitigating factors such as the offender's cooperation with authorities.<sup>93</sup>

### ***ALRC's views***

23.85 Problems associated with non-citizen federal offenders subject to removal or deportation highlight the importance of international transfer of prisoners schemes that allow non-citizen offenders to serve their sentences in their home countries. This issue

89 Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.

90 Department of Immigration and Multicultural and Indigenous Affairs, *Submission SFO 49*, 10 May 2005.

91 *Ibid.*

92 *R v Shrestha* (1991) 173 CLR 48.

93 *Ibid.*, [15].

is discussed in detail in Chapter 26. In the absence of such arrangements with all relevant countries, the ALRC supports the establishment of a working party to consider this issue further. In the interim, the ALRC is of the view that the approach adopted by the High Court in *Shrestha* is appropriate and that the fact that an offender is likely to be subject to removal or deportation upon release is one of the factors that should be considered by the federal parole authority in deciding whether or not to grant a parole order to a non-citizen federal offender.<sup>94</sup>

23.86 The approach adopted by the New South Wales State Parole Authority in its *Operating Guidelines*, discussed above, is also appropriate and, in particular, the risk to the community in the country to which the offender would be removed or deported should also be considered in making a parole decision.

23.87 To ensure that the federal parole authority has accurate information in relation to non-citizen federal offenders, the ALRC recommends that the OMFO should liaise with DIMA on these issues.

**Recommendation 23–7** Federal sentencing legislation should provide that the fact that an offender is likely to be subject to removal or deportation upon release is one of the factors to be considered by the federal parole authority in deciding whether or not to grant a parole order to a federal offender. [See Recommendation 23–6]

**Recommendation 23–8** The Office for the Management of Federal Offenders should liaise with the Department of Immigration and Multicultural Affairs to ensure that the Office holds accurate information on the immigration status of non-citizen federal offenders.

## Parole order and conditions

### Term of a federal parole order or licence

23.88 Part IB of the *Crimes Act* provides that, except in relation to federal offenders sentenced to life imprisonment, the maximum length of the period to be served on parole or licence is five years.<sup>95</sup> In relation to offenders sentenced to life imprisonment and released on parole or licence, the Attorney-General or delegate decides the length of the parole or licence period. This is normally at least five years and may be longer.<sup>96</sup> Where the balance of an offender's sentence at the end of the non-parole period is more than five years, the parole or licence period may expire before the end of the offender's head sentence.

<sup>94</sup> See Rec 23–6(g) above.

<sup>95</sup> *Crimes Act 1914* (Cth) s 16.

<sup>96</sup> Attorney-General's Department, *Information for Federal Offenders*, (pamphlet).



23.89 Except in Tasmania,<sup>97</sup> state and territory legislation generally provides that the period to be served on parole runs from the date of release on parole until the expiry of the offender's sentence.<sup>98</sup> There is some variation among the states and territories in relation to indeterminate and life sentences.

23.90 In his submission, Professor Arie Freiberg commented that federal law is not satisfactory in this regard, and that a parole order should not expire before the end of the head sentence.<sup>99</sup>

### ***ALRC's views***

23.91 Except in relation to federal offenders sentenced to life imprisonment, a federal parole or licence period should run from the day an offender is released on parole or licence until the expiry of the offender's head sentence. Limiting the length of the parole or licence period to five years means that, in some cases, the last part of a sentence is simply disregarded: it is served neither in custody nor in the community. The recommended approach ensures the sentence is served completely.

23.92 While some conditions attached to the parole order or licence may be varied during this period, for example, in relation to the level of supervision, the standard conditions discussed below—that the offender be of good behaviour and not commit any offence—should apply for the entire parole or licence period.

23.93 In relation to federal offenders sentenced to life imprisonment, the length of a parole period should be decided by the federal parole authority and the length of a licence period should be decided by the relevant Minister.

#### **Recommendation 23–9** Federal sentencing legislation should provide that:

- (a) except in relation to an offender sentenced to life imprisonment, a parole or licence period should commence on the day the offender is released on parole or licence and end on the day the offender's sentence expires; and
- (b) in relation to an offender sentenced to life imprisonment:
  - (i) a parole period should commence on the day the offender is released on parole and end on a day determined by the federal parole authority; and

97 In Tasmania, the Parole Board determines the appropriate length of the parole period: *Corrections Act 1997* (Tas) s 72(3)(a)(i).

98 *Crimes (Administration of Sentences) Act 1999* (NSW) s 132; *Corrections Act 1986* (Vic) s 55(1); *Corrective Services Act 2000* (Qld) s 154; *Sentence Administration Act 2003* (WA) s 20(4); *Correctional Services Act 1982* (SA) s 69; *Rehabilitation of Offenders (Interim) Act 2001* (ACT) s 43; *Parole of Prisoners Act 1971* (NT) s 3(1).

99 A Freiberg, *Submission SFO 12*, 4 April 2005.

- (ii) a licence period should commence on the day the offender is released on licence and end on a day determined by the relevant Minister.

### Parole or licence conditions

23.94 Under Part IB of the *Crimes Act*, certain conditions set out in the legislation attach automatically to release on parole and release on licence. These are that offenders must be of good behaviour and that they must not violate any law during the parole period or the period of release on licence.<sup>100</sup> The Attorney-General or departmental delegate has a wide discretion to attach any other conditions to the release, but the only other condition set out in the *Crimes Act* is that offenders may be subject to supervision and that, if so, offenders must obey all reasonable directions from their supervisor.

23.95 An offender cannot be released on parole unless he or she agrees in writing to the conditions to which the parole order is subject, although this requirement is not imposed in relation to release on licence.<sup>101</sup>

23.96 Legislation in the states and territories generally sets out the standard conditions to be imposed on all offenders released on parole and makes some provision for additional conditions to be imposed. In Tasmania, however, the terms and conditions of the order are left entirely to the Parole Board.<sup>102</sup> The standard parole conditions vary between jurisdictions but include, for example, that the offender must be of good behaviour and not commit any offence; that the offender is subject to a period of supervision; and that the offender must not travel out of the jurisdiction without permission.<sup>103</sup>

23.97 In some jurisdictions the additional conditions are also set out in legislation.<sup>104</sup> They include, for example, requirements about where offenders may reside; requirements to facilitate rehabilitation, such as undertaking approved educational or training courses; and requirements to prevent offenders from contacting victims.

23.98 In consultations, the AGD noted there was a need to clarify the scope of the conditions imposed on federal offenders. The Department explained that it was required to set conditions in parole orders and licences relating to offenders who transferred to Australia under the International Transfer of Prisoners Scheme,

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100 *Crimes Act 1914* (Cth) ss 19AN(1)(a), 19AP(7)(a).

101 *Ibid* s 19AL(5).

102 *Corrections Act 1997* (Tas) s 72(5).

103 See, eg, *Crimes (Administration of Sentences) Regulation 2001* (NSW) reg 215; *Corrective Services Act 2000* (Qld) s 144; *Correctional Services Act 1982* (SA) s 68(1).

104 See *Corrections Regulations 1998* (Vic) sch 4 Form 1; *Sentence Administration Act 2003* (WA) s 30.

discussed in Chapter 26, and in relation to joint offenders. In relation to joint offenders, the Department was unclear whether it was limited to imposing conditions in relation to the federal offence. In addition it was unclear about the scope of conditions it could impose in relation to offenders transferred to Australia from other countries where the offences committed may have been of a different nature to the federal offences with which the Department is usually concerned.<sup>105</sup>

23.99 There was widespread support in submissions and consultations for ensuring that parole authorities retain a wide discretion to impose conditions appropriate to the individual offender.<sup>106</sup> But there was also some support for defining the scope of the conditions to promote clarity, consistency and transparency.<sup>107</sup>

### *ALRC's views*

23.100 Federal sentencing legislation should set out the standard conditions imposed on federal offenders released on parole or licence. These conditions should be that the offender be of good behaviour and that the offender not commit any further offences while on parole or release on licence. The standard conditions should apply for the entire parole or licence period. While federal sentencing legislation should make provision for supervision of the offender by state and territory corrective services officers in some circumstances, this condition should not be included in the standard conditions as it will not be necessary in every case and will not always apply for the entire length of the parole or licence period.

23.101 The federal parole authority should be given a wide discretion to impose any other conditions it considers reasonably necessary to achieve the purposes of parole set out in Recommendation 23–5. Because one of the proposed purposes of parole is the protection of the community, this would allow the authority to impose any conditions reasonably necessary to achieve that purpose, including conditions related to offences committed in other countries by offenders transferred to Australia.

23.102 In relation to joint offenders, the ALRC understands that in some cases both a federal parole order and a state or territory parole order are necessary to authorise the release of the offender. In these circumstances, parole authorities at both federal and state or territory level will need to be involved in approving release on parole and in setting conditions of parole. The OMFO should be responsible for liaising with state

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<sup>105</sup> Attorney-General's Department, *Consultation*, Canberra, 16 March 2005.

<sup>106</sup> Law Society of South Australia, *Submission SFO 37*, 22 April 2005; New South Wales Parole Board, *Submission SFO 22*, 8 April 2005; Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005; M Johnson, *Consultation*, Darwin, 27 April 2005; Parole Board of South Australia, *Consultation*, Adelaide, 20 April 2005; Sentence Administration Board ACT, *Consultation*, Canberra, 17 March 2005.

<sup>107</sup> Law Society of South Australia, *Submission SFO 37*, 22 April 2005; JC, *Submission SFO 25*, 13 April 2005; New South Wales Parole Board, *Submission SFO 22*, 8 April 2005; K Warner, *Consultation*, Hobart, 13 April 2005; Sentence Administration Board ACT, *Consultation*, Canberra, 17 March 2005; Attorney-General's Department, *Consultation*, Canberra, 16 March 2005; Queensland Community Corrections Board, *Consultation*, Brisbane, 3 March 2005.

and territory authorities to ensure that the processes, parole orders and conditions imposed on the offender are properly coordinated.

23.103 The conditions imposed by the federal parole authority should be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) or the *Administrative Appeals Tribunal Act 1975* (Cth), depending on the model adopted for establishing the authority.

**Recommendation 23–10** Federal sentencing legislation should set out the standard conditions imposed on federal offenders released on parole or licence. The federal parole authority should have the discretion to impose any other conditions considered reasonably necessary to achieve the purposes of parole.

### Period of supervision

23.104 One of the conditions regularly imposed on federal offenders is that the offender be subject to supervision during some part of the period on parole or release on licence. Except in relation to federal offenders sentenced to life imprisonment, the maximum length of the supervision period is three years.<sup>108</sup> In relation to offenders sentenced to life imprisonment and released on parole under supervision, there is no limit imposed on the length of the supervision period and the Attorney-General or departmental delegate decides the length of the period.<sup>109</sup>

23.105 In New South Wales the period of supervision is limited to three years and in Western Australia, in relation to sentences greater than four years where a parole term has been set, it is limited to two years.<sup>110</sup> In the other states and territories the period of supervision is limited only by the length of the parole period and in a number of jurisdictions supervision extends for the entire length of the parole period.<sup>111</sup>

23.106 Where a federal offender's parole or licence period is less than three years, or where the offender is serving a life sentence, it is possible to supervise the offender for the entire parole or licence period. However, in other cases the supervision period will end after three years and this may be before the end of the parole or licence period.

23.107 The Law Society of South Australia expressed the view that it would be desirable for the federal parole authority to have greater flexibility in setting the length of the supervision period. This was on the basis that 'recent research has shown that a

<sup>108</sup> *Crimes Act 1914* (Cth) s 16.

<sup>109</sup> *Ibid* s 16.

<sup>110</sup> *Crimes (Administration of Sentences) Regulation 2001* (NSW) reg 216; *Sentence Administration Act 2003* (WA) s 28.

<sup>111</sup> *Corrections Regulations 1998* (Vic) sch 4 Form 1; *Corrective Services Act 2000* (Qld) s 144(2)(a); *Correctional Services Act 1982* (SA) s 68(1); *Corrections Act 1997* (Tas) s 77(2); *Parole of Prisoners Act 1971* (NT) s 5(5).

slower approach to rehabilitation is more effective as it enables an ex-offender to better internalise change for more sustainable outcomes'.<sup>112</sup> The New South Wales Parole Authority, which may impose supervision for a maximum of three years, also supported giving the federal parole authority greater flexibility.<sup>113</sup>

***ALRC's views***

23.108 The federal parole authority should have the discretion to impose an appropriate period of supervision on a federal offender. In many cases the authority may decide not to impose supervision on an offender for the entire length of the parole or licence period. However, it appears unnecessary to limit the maximum period of supervision by legislation, except to provide that the period should not extend past the end of the parole or licence period. As discussed above, a parole or licence period should generally commence on the day of release on parole or licence and end on the day the offender's sentence expires.<sup>114</sup> This should be the maximum period that supervision may be imposed on a federal offender, but the federal parole authority should have the discretion to set a shorter period.

**Recommendation 23–11** Federal sentencing legislation should enable the federal parole authority to impose a supervision period limited only by the length of the parole or licence period.

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112 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.

113 New South Wales Parole Board, *Submission SFO 22*, 8 April 2005.

114 Rec 23–9.



## 24. Breach of Parole or Licence

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24.1 The previous chapter recommended the establishment of a federal parole authority to make parole decisions in relation to federal offenders. This chapter examines, amongst other things, the role of the authority in relation to breach of the conditions attached to a parole order or licence. The reforms recommended in this chapter include that the powers of the federal parole authority to take action in response to a breach should be expressly set out in legislation, and that all federal offenders should receive credit for time spent on parole or licence before the parole or licence conditions were breached.

### Powers of federal parole authority following breach of conditions

24.2 Currently, a federal parole order or licence can be revoked in two ways. It is revoked automatically when a federal offender who is released on parole or licence commits a further state, territory or federal offence and is sentenced to a term of imprisonment of more than three months.<sup>1</sup> The question of automatic revocation is discussed further below. In addition, the Attorney-General has authority to revoke a parole order or licence if a federal offender fails to comply with conditions attached to the parole order or licence, or if there are reasonable grounds for suspecting the offender has failed to comply.<sup>2</sup>

24.3 Once a parole order or licence is revoked, the offender may be arrested and must be brought before a ‘prescribed authority’, usually a state or territory magistrate, as soon as practicable. The magistrate is required to remand the offender in custody for the unserved portion of the original sentence.<sup>3</sup>

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1 *Crimes Act 1914* (Cth) s 19AQ.

2 *Ibid* s 19AU.

3 *Ibid* ss 19AV, 19AW.

24.4 While the Attorney-General has a discretion to revoke a parole order or licence for breach of conditions, the legislation does not specify what other action the Attorney-General may take, for example, where the breach is of a minor nature and would not justify returning the offender to prison.

24.5 The ALRC understands that, in practice, the Attorney-General or departmental delegate may issue a formal warning in relation to breaches that are considered minor, but there is no express provision in federal legislation for this or any other alternative response to a breach of conditions.

24.6 By contrast, most state and territory legislation provides a range of possible responses to a breach of the conditions attached to a parole order. For example, the New South Wales State Parole Authority may revoke the order, impose further conditions on the order, or vary any of the existing conditions.<sup>4</sup> The Sentence Administration Board of the ACT may take no further action, issue a warning, impose additional or varied conditions, or revoke the parole order.<sup>5</sup>

24.7 There was significant support in submissions and consultations for setting out a list of options available to the federal parole authority in relation to a breach of a parole order or licence.<sup>6</sup>

#### ***ALRC's views***

24.8 The power to revoke parole orders and licences currently resides with the Attorney-General or the departmental delegate. In the states and territories, these matters are dealt with by the parole authorities and the ALRC is of the view that, at the federal level, these matters should be dealt with by the federal parole authority.

24.9 The federal parole authority should have the power to deal with breaches of licences, in the same way it deals with breaches of parole orders, even though licences are granted by the responsible Minister. The federal parole authority will have responsibility for setting the conditions attached to a licence, and it should also have responsibility for dealing with breaches of those conditions.

24.10 The ALRC is also of the view that it would be valuable to set out clearly in federal sentencing legislation the full range of the federal parole authority's powers to deal with a breach of a parole or licence condition.

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4 *Crimes (Administration of Sentences) Act 1999* (NSW) s 170.

5 *Crimes (Sentence Administration) Act 2005* (ACT) s 148.

6 New South Wales State Parole Authority, *Submission SFO 68*, 17 January 2006; Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006; Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; JC, *Submission SFO 25*, 13 April 2005; New South Wales Parole Board, *Submission SFO 22*, 8 April 2005; Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005.



**Recommendation 24–1** Federal sentencing legislation should provide that, where the federal parole authority is satisfied a federal offender has breached his or her obligations under a parole order or licence, the authority may:

- (a) take no further action;
- (b) issue a warning to the offender;
- (c) amend the order or licence by adding, revoking or varying the conditions attached to the order or licence; or
- (d) revoke the order or licence.

### Opportunity to be heard before revocation of parole or licence

24.11 Currently, where a federal offender fails to comply with a parole or licence condition, or there are reasonable grounds for suspecting the offender has failed to comply, the Attorney-General or departmental delegate must, where possible and practicable, notify the offender of the alleged breach and the fact that the parole order or licence is to be revoked in 14 days. The offender then has the opportunity to provide written reasons why the parole order or licence should not be revoked.<sup>7</sup>

24.12 In the states and territories, revocation is dealt with by the state and territory parole authorities. In New South Wales, Victoria, Queensland, Western Australia and the Northern Territory the parole authority may revoke the order whether or not the offender has had an opportunity to give reasons why the order should not be revoked.<sup>8</sup> In South Australia, except in relation to designated conditions, the parole authority may revoke a parole order only after it has considered a report from the officer supervising the offender.<sup>9</sup> In the ACT the parole authority may revoke a parole order only after the authority has held an inquiry into the matter and the offender has been invited to make submissions to the inquiry.<sup>10</sup> In Tasmania, the parole authority may revoke a parole order only after it has called on the prisoner to show cause why the power should not be exercised, unless the authority considers it impracticable to do so.<sup>11</sup>

<sup>7</sup> *Crimes Act 1914* (Cth) s 19AU.

<sup>8</sup> *Crimes (Administration of Sentences) Act 1999* (NSW) s 170; *Corrections Act 1986* (Vic) s 74; *Corrective Services Act 2000* (Qld) s 150; *Sentence Administration Act 2003* (WA) s 44; *Parole of Prisoners Act 1971* (NT) s 5.

<sup>9</sup> *Correctional Services Act 1982* (SA) s 74.

<sup>10</sup> *Crimes (Sentence Administration) Act 2005* (ACT) s 147.

<sup>11</sup> *Corrections Act 1997* (Tas) s 79(2).

24.13 In submissions and consultations a number of corrective services agencies stated that the procedures in relation to the breach of a federal parole order or licence were much more cumbersome and time consuming than those for dealing with state and territory offenders. This might jeopardise community safety if offenders who breach their parole orders or licences are not dealt with promptly.<sup>12</sup> The Queensland Department of Corrective Services suggested that state and territory parole authorities should be given the power to suspend a federal parole order or licence for up to 28 days in some circumstances so that a federal offender can be returned to custody promptly, pending a decision of the federal parole authority.<sup>13</sup>

***ALRC's views***

24.14 At the federal level, the existing procedures for dealing with breach of parole or licence conditions—including the need to issue a written notice and wait for 14 days for a written response from the offender—are likely to cause delay. This situation has the potential to undermine the authority of federal parole orders and licences, as well as the state and territory corrective services agencies responsible for administering them. In those states and territories where parole orders can be revoked without giving the offender an opportunity to be heard, the breach process may be more streamlined but it does not conform to high standards of procedural fairness.

24.15 The revocation of a parole order or licence has serious consequences for the offender—namely, he or she will be returned to custody. For this reason, the ALRC believes that these orders should not be revoked without giving the offender an opportunity to be heard, unless it is impracticable or undesirable to do so. It may be impracticable where the offender cannot be found, and it may be undesirable where the offender is placing himself or herself, or the community, at imminent risk of harm.

24.16 Giving a federal offender an opportunity to provide reasons why the order should not be revoked need not cause unnecessary delay. An offender's submissions to the authority need not be in writing: for example, the offender could be given the opportunity to address the authority by telephone, video link or in person. This will facilitate a quicker resolution of the matter.

24.17 The ALRC does not recommend that a power to suspend a federal parole order be conferred on state and territory parole authorities because this may lead to confusion of responsibilities. Under the arrangements recommended in this Report, the federal parole authority will have the capacity to deal with alleged breaches in a timely fashion, and in the absence of the offender where necessary.

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12 Department of Corrective Services Queensland, *Submission SFO 27*, 14 April 2005; Department of Justice Western Australia, *Consultation*, Perth, 18 April 2005.

13 Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006.

24.18 Where the offender has not had the opportunity to provide reasons before the order or licence is revoked, the offender should be given that opportunity as soon as practicable after the order or licence is revoked.

**Recommendation 24–2** Federal sentencing legislation should provide that the federal parole authority must not revoke a parole order or licence without giving the federal offender an opportunity to provide reasons why the order should not be revoked unless the authority considers it to be impracticable or undesirable to do so. Where the federal offender has not had the opportunity to provide reasons before the order or licence is revoked, the offender should be given that opportunity as soon as practicable after the order or licence is revoked.

### Automatic revocation of parole or licence

24.19 Currently, a federal parole order or licence is revoked automatically when a federal offender who is released on parole or licence commits a further state, territory or federal offence and is sentenced to a term of imprisonment of more than three months.<sup>14</sup>

24.20 In New South Wales, Victoria and Western Australia parole is never revoked automatically. In these jurisdictions the matter must go to the parole authority for consideration.<sup>15</sup> In the ACT parole is revoked automatically if the offender is convicted or found guilty of an offence against ACT law punishable by imprisonment, but the matter must go to the parole authority if the offender is convicted or found guilty of an offence against the law of another jurisdiction punishable by imprisonment.<sup>16</sup> In all other Australian jurisdictions parole is automatically revoked where the offender is sentenced to a term of imprisonment of any duration for an offence committed during the period the offender was released on parole.<sup>17</sup>

#### *ALRC's views*

24.21 Parole or licence should be automatically revoked if a federal offender is sentenced to a term of imprisonment that is not wholly suspended for an offence committed during the parole or licence period. Revocation should not depend on the length of the term of imprisonment. If the offender is sentenced to any term of imprisonment and taken into custody, the parole order or licence is no longer of any effect and should be automatically revoked. A later custodial order is necessarily

<sup>14</sup> *Crimes Act 1914* (Cth) s 19AQ.

<sup>15</sup> *Crimes (Administration of Sentences) Act 1999* (NSW) s 179; *Corrections Act 1986* (Vic) s 77; *Sentence Administration Act 2003* (WA) s 44.

<sup>16</sup> *Crimes (Sentence Administration) Act 2005* (ACT) ss 149, 150.

<sup>17</sup> *Corrective Services Act 2000* (Qld) s 151(1); *Correctional Services Act 1982* (SA) s 75; *Corrections Act 1997* (Tas) s 79(3); *Parole of Prisoners Act 1971* (NT) s 5(8).

inconsistent with a parole order or licence that allows an offender to serve part of his or her sentence in the community.

24.22 Where a term of imprisonment is imposed for an offence committed during the parole or licence period but the term of imprisonment is wholly suspended, the matter should be one for consideration by the federal parole authority.

24.23 For similar reasons, the ALRC is also of the view that where an offender is removed or deported from Australia during the parole or licence period, the parole order or licence is no longer of any effect and should be automatically suspended. The order should be automatically revived if the offender returns to Australia during the parole or licence period.

**Recommendation 24–3** Federal sentencing legislation should provide that a parole order or licence is:

- (a) automatically revoked where an offender commits any offence during the parole or licence period and is sentenced to a term of imprisonment that is not completely suspended; and
- (b) automatically suspended when an offender is removed or deported from Australia during the parole or licence period.

## Crediting clean street time

24.24 Where a parole order or licence is revoked, the offender becomes liable to serve that part of the sentence that had not been served at the time the offender was released on parole or licence. The balance of the sentence to be served is, however, subject to the operation of s 19AA(2) of the *Crimes Act 1914* (Cth), which picks up and applies state and territory laws that allow an offender credit for the time between release on parole or licence and the time the parole order or licence is revoked. In those jurisdictions that have such laws, the period of ‘clean street time’, as it is often called, is deducted from the sentence remaining to be served.

24.25 New South Wales, Queensland, Western Australia and South Australia give credit for ‘clean street time’.<sup>18</sup> Victoria and Tasmania give the parole authority a discretion to give credit for ‘clean street time’,<sup>19</sup> although the parole authorities in both

18 *Crimes (Administration of Sentences) Act 1999* (NSW) s 171; *Corrective Services Act 2000* (Qld) s 152(2); *Sentence Administration Act 2003* (WA) s 71; *Correctional Services Act 1982* (SA) s 73.

19 *Corrections Act 1986* (Vic) s 77(7); *Corrections Act 1997* (Tas) s 79(5).

jurisdictions noted that credit was rarely, if ever, given.<sup>20</sup> The ACT and the Northern Territory do not give credit for 'clean street time'.<sup>21</sup>

24.26 There was significant support for giving credit for 'clean street time' in submissions and consultations. This was on the basis that it provides encouragement and motivation to those on parole and recognises the efforts of the offender to comply with the conditions of parole. In addition, it was seen as particularly unfair, where the parole period was a long one and the breach occurred towards the end of the period, if no credit was given for the period of compliance.<sup>22</sup> The Parole Board of South Australia stated that parole was not intended to be punitive but to encourage behavioural change, and that failing to recognise good behaviour did not encourage such behaviour.<sup>23</sup>

24.27 Even those submissions and consultations that did not support giving credit for 'clean street time' were somewhat ambivalent on the issue. It was noted that no credit provided an incentive to comply with conditions of parole for the entire parole period and that an offender could reapply for release on parole following revocation of parole. It was also noted, however, that offenders viewed the lack of credit for 'clean street time' as unfair.<sup>24</sup> The Attorney-General's Department did not support giving offenders credit for 'clean street time'.<sup>25</sup>

24.28 One further issue in relation to 'clean street time' is the way it is calculated in cases of automatic revocation. 'Clean street time' for federal offenders is calculated from the date of release on parole or licence to the date of revocation. Currently, a federal parole order or licence is revoked when the offender is actually sentenced for the offence committed while on parole or licence. By contrast, for New South Wales state offenders 'clean street time' is calculated from the date of release on parole to the date on which it appears to the New South Wales State Parole Authority that the offender failed to comply with the conditions of the parole order, for example, the date of the first offence committed on parole.

24.29 For a state offender in New South Wales, the balance of the sentence to be served is calculated from the date the offender committed the offence while on parole to the end of the original sentence. For a federal offender in New South Wales, the balance of the sentence to be served is calculated from the date a sentence is imposed

20 Corrections Victoria and Adult Parole Board Victoria, *Consultation*, Melbourne, 31 March 2005; Parole Board of Tasmania, *Consultation*, Hobart, 14 April 2005.

21 *Crimes (Sentence Administration) Act 2005* (ACT) s 160; *Parole of Prisoners Act 1971* (NT) s 7.

22 Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; New South Wales Parole Board, *Submission SFO 22*, 8 April 2005; Parole Board of South Australia, *Consultation*, Adelaide, 20 April 2005; Correctional Services Northern Territory and Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005.

23 Parole Board of South Australia, *Consultation*, Adelaide, 20 April 2005.

24 Sentence Administration Board ACT, *Consultation*, Canberra, 17 March 2005; Parole Board of Tasmania, *Consultation*, Hobart, 14 April 2005.

25 Attorney-General's Department, *Submission SFO 83*, 15 February 2006.

for the new offence to the end of the original sentence. It is likely, therefore, that the balance a federal offender will be required to serve in New South Wales will be shorter than the balance a state offender in New South Wales will be required to serve. It is also possible—where sentencing of the federal offender in relation to the new offence is delayed through adjournments and so on—that there will be little or no balance of the original sentence to be served.

24.30 Finally, only those federal offenders serving their sentences in states and territories that recognise ‘clean street time’ are given credit. This creates undesirable inequality between federal offenders in different jurisdictions and can give rise to problems when a federal offender wishes to transfer to another jurisdiction to serve his or her parole or licence period.

#### ***ALRC’s views***

24.31 On balance, for the reasons articulated in submissions and consultations, the ALRC is of the view that credit should be given for ‘clean street time’ following revocation of parole or release on licence. This should be provided for in federal sentencing legislation to ensure that credit is given to all federal offenders released on parole or licence, not only to those in jurisdictions where credit is allowed under state or territory law.

24.32 The calculation of ‘clean street time’ should not be based on the date of sentencing but rather on the date of the first offence committed on parole or licence or, in the case of discretionary revocation, the date the offender first failed to comply with the conditions of parole or licence.

**Recommendation 24–4** Federal sentencing legislation should provide that ‘clean street time’ is to be deducted from the balance of the period to be served following revocation of parole or licence. ‘Clean street time’ should be calculated from the date of release on parole or licence to:

- (a) in the case of automatic revocation upon conviction—the date the first offence was committed; or
- (b) in any other case—the date on which it is shown to the federal parole authority’s satisfaction that the offender first failed to comply with his or her obligations under the parole order or licence.

### **Cancellation of travel documents**

24.33 It is usual for the Attorney-General or departmental delegate to impose conditions related to travel in federal parole orders or licences. These conditions include:

- that the offender will not leave the state or territory in which the offender is on parole or release on licence without the permission of a designated state or territory officer; and
- that the offender will not leave Australia without the written permission of the Attorney-General or the departmental delegate.<sup>26</sup>

24.34 Before a federal offender released on parole or licence can travel out of Australia, he or she must hold a valid passport. One way of regulating international travel by federal offenders is to confiscate the offender's passport and to regulate the issue of any new passport to the offender. One of the problems identified in the course of this Inquiry was that the *Passports Act 1938* (Cth) did not expressly prohibit the issue of a passport to an offender who was still serving a prison sentence.

24.35 That Act was repealed and replaced by the *Australian Passports Act 2005* (Cth). The new Act establishes a regime under which a 'competent authority' may make a request to have an Australian passport or travel document cancelled and to ensure that a new passport is not issued to a person who is prevented from leaving Australia by force of, for example, a parole or licence condition. The Act makes clear that this may also apply to a person who is in prison.<sup>27</sup> A 'competent authority' is one that has responsibility for, or powers, functions or duties in relation to, people who are subject to such conditions. This might include, for example, the Office for the Management of Federal Offenders (OMFO)<sup>28</sup> as well as the federal parole authority.

24.36 In addition, the *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth) provides that a 'competent authority' may request that the responsible Minister order the surrender of a person's foreign passport or travel document in similar circumstances.<sup>29</sup>

24.37 Finally, s 22 of the *Crimes Act* provides that in passing sentence for a serious narcotics offence or other prescribed offence, the court may order that a federal offender remain in Australia, surrender his or her Australian passport and refrain from obtaining or applying for an Australian passport.

24.38 Offenders who are released on parole or licence and leave Australia without permission breach their parole or licence conditions, but they do not thereby commit a criminal offence. Although the offender may be warned at the immigration barrier that departure will be a breach of parole or licence conditions, the offender cannot be detained unless the offender has committed a further criminal offence that would justify arrest. In the past, it appears there were problems where a passport was issued to

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26 Attorney-General's Department, *Commonwealth of Australia Crimes Act 1914—Standard Parole Order* (2004).

27 *Australian Passports Act 2005* (Cth) s 12.

28 The establishment and functions of the OMFO are discussed in Ch 22.

29 *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth) s 13.

an offender in prison, thereby allowing the offender to leave the country on release, in breach of his or her parole or licence conditions.

***ALRC's views***

24.39 The new *Australian Passports Act* and the *Foreign Passports (Law Enforcement and Security) Act* will go some way towards better regulating international travel by federal offenders released on parole or licence. The OMFO should be responsible for ensuring that cancellation/refusal and surrender requests are processed in relation to federal offenders. The federal parole authority should ensure that appropriate arrangements are in place in relation to custody of an offender's travel documents, where necessary, in considering the grant of a parole order or licence.

24.40 Under the new Acts, an officer—including a Customs officer or member of the Australian Federal Police—can demand the surrender of a passport or travel document in certain circumstances. These include where the Minister has ordered the surrender of a foreign passport or travel document and, in relation to a person holding an Australian passport or travel document, where the officer suspects on reasonable grounds that the person owes money to the Commonwealth, for example, where the Commonwealth has incurred expenses on behalf of the person in a foreign country.<sup>30</sup> If the new passport control procedures are not sufficient to prevent federal offenders on parole or licence leaving the country without permission in the future, the Australian Government should consider introducing a provision to allow an officer to demand the surrender of an Australian passport or travel document where the officer believes on reasonable grounds that the person is prohibited from leaving Australia by force of a parole or licence condition. This would enable federal offenders to be stopped at the immigration barrier even if they have managed to obtain a valid passport or other travel document.

24.41 Finally, the federal parole authority should be responsible for considering requests from federal offenders who have been released on parole or licence for leave to travel overseas.

**Recommendation 24–5** The Office for the Management of Federal Offenders should ensure that, where necessary, a request is made under the *Australian Passports Act 2005* (Cth) or the *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth) to:

- (a) cancel the Australian passport or travel document of a federal offender;
- (b) prevent an Australian passport or travel document being issued to a federal offender; or
- (c) surrender a foreign passport or travel document of a federal offender.

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30 *Australian Passports Act 2005* (Cth) s 25.



**Recommendation 24–6** The federal parole authority should ensure that, when considering the grant of a parole order or licence, where necessary, a refusal/cancellation request is in place under the *Australian Passports Act 2005* (Cth) or that a surrender request has been made under the *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth).

**Recommendation 24–7** The federal parole authority should have responsibility for considering requests from federal offenders who have been released on parole or licence for leave to travel overseas.



## 25. Other Methods of Release from Custody

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25.1 There are a number of ways in which federal offenders serving custodial sentences may be released into the community before their sentence is completed—apart from release on parole or licence discussed in Chapters 23 and 24. This chapter examines a number of issues in relation to pre-release schemes, temporary leave of absence, and release by the Governor-General exercising the executive prerogative.

### Pre-release schemes

25.2 Pre-release schemes involve release from custody for a specific purpose prior to the expiry of the offender's non-parole period, for example, to engage in employment or education, or to complete a custodial sentence by way of home detention. Federal legislation does not expressly provide for specific pre-release schemes but instead relies on those available under state and territory law. Section 19AZD(3) of the *Crimes Act 1914* (Cth) provides that a law of a state or territory providing for a pre-release scheme may also apply to a federal offender serving a sentence in the relevant state or territory where the scheme is prescribed in the *Crimes Regulations 1990* (Cth).

25.3 Regulation 5 of the *Crimes Regulations* includes a list of state and territory pre-release schemes for which federal offenders are eligible. The list includes schemes in Victoria, Queensland, Western Australia and South Australia. There are no pre-release schemes listed for New South Wales, Tasmania, the ACT or the Northern Territory. A number of the schemes listed in reg 5 have been repealed or replaced in the relevant jurisdiction.

25.4 The regulations also provide that federal offenders are not eligible to participate in pre-release schemes if they are liable to deportation under the *Migration Act 1958* (Cth) upon release.<sup>1</sup> Limited access to rehabilitation opportunities for foreign federal offenders was highlighted as an issue in a number of submissions.<sup>2</sup> It is one reason that transfer arrangements to allow foreign nationals held in Australian prisons to serve the balance of their sentence in their home country should be facilitated. The international transfer of prisoners scheme is discussed in Chapter 26.

### **ALRC's views**

25.5 The Australian Government should facilitate access to pre-release schemes for federal offenders in appropriate cases. Pre-release schemes are generally aimed at reintegrating offenders into the community and are an important element in rehabilitation. The fact that the *Crimes Regulations* are out of date highlights the importance of the Australian Government addressing the needs of federal offenders in this regard. The Office for the Management of Federal Offenders (OMFO) should be given the task of monitoring the effectiveness and suitability of state and territory pre-release schemes and providing advice to the relevant Minister regarding the state and territory pre-release schemes that should be included in the regulations and made available to federal offenders.

**Recommendation 25–1** The Office for the Management of Federal Offenders (OMFO) should monitor the effectiveness and suitability of state and territory pre-release schemes for federal offenders and should provide advice to the relevant Minister regarding the state and territory pre-release schemes that should be made available for federal offenders.

### **Leave of absence**

25.6 Section 19AZD(1) of the *Crimes Act* provides that where a state or territory law allows state or territory offenders to be granted temporary leave of absence from prison, such leave may also be granted to federal offenders serving a sentence in the state or territory. Although some concern was expressed in one submission in relation to federal offenders being granted leave of absence in one jurisdiction,<sup>3</sup> no systemic issues were identified and the ALRC makes no recommendation in this area.

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1 *Crimes Regulations 1990* (Cth) reg 5(2A).

2 Confidential, *Submission SFO 64*, 6 January 2006; K Gutierrez, *Submission SFO 58*, 20 December 2005.

3 JC, *Submission SFO 25*, 13 April 2005.

## Executive prerogative to pardon or remit the sentence

### Background

25.7 The Governor-General may exercise the executive prerogative, on the advice of the Federal Executive Council, to pardon or remit any sentence imposed on a federal offender. The prerogative is one element of executive power, vested in the Queen and exercisable by the Governor-General under s 61 of the *Australian Constitution*. Section 21D of the *Crimes Act* states that nothing in Part IB is to affect the exercise of the prerogative of mercy.

25.8 The executive prerogative is also available at the state and territory level in respect of state and territory offenders and is vested in the Governor or Administrator. In all the states and territories the relevant minister, Governor or Administrator has a power to refer aspects of applications for the exercise of the executive prerogative to the courts or to bodies of inquiry for advice or resolution.<sup>4</sup> For example, in New South Wales the Governor may direct that an inquiry be conducted into the conviction or sentence; the Minister may refer the whole case to the Court of Criminal Appeal to be dealt with as an appeal; or the Minister may request that the Court give an opinion on any point arising in the case.<sup>5</sup>

25.9 In the ACT, the executive may order an inquiry into a conviction for a territory offence under the *Inquiries Act 1991* (ACT), although this power is not tied to the exercise of the executive prerogative. The board of inquiry must be constituted by a judge of the Supreme Court or a magistrate. The board of inquiry's report is referred to the Supreme Court of the ACT for consideration and the Court may take certain action in response to the report, for example, quashing the conviction or, alternatively, confirming the conviction but recommending the executive exercise the prerogative to pardon or remit the sentence.<sup>6</sup>

25.10 Currently, where the federal Minister wishes to refer a matter raised in an application for the exercise of the executive prerogative to the courts for hearing and determination, the Minister relies on state and territory provisions, as picked up and applied by ss 68 and 79 of the *Judiciary Act 1903* (Cth).

### Issues and problems

25.11 Reliance on the state and territory provisions in this way can give rise to problems where there is a need for detailed advice on the issues raised in an application for the exercise of the prerogative. First, not every jurisdiction has legislation permitting such a matter to be referred to an appellate court to be heard and determined

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4 *Crimes Act 1958* (Vic) s 584; *Criminal Code Act 1899* (Qld) s 672A; *Sentencing Act 1995* (WA) s 140; *Criminal Law Consolidation Act 1935* (SA) s 369; *Criminal Code Act 1924* (Tas) s 419; *Criminal Code Act* (NT) s 431.

5 *Crimes Act 1900* (NSW) s 474C.

6 *Crimes Act 1900* (ACT) ss 422–432.

as an appeal: for example, there is no such provision in the ACT. This creates disparity in the procedures available in respect of federal offenders in different parts of Australia.

25.12 Secondly, where such legislation does exist, there are lingering doubts about the validity of picking up and applying such laws to federal criminal matters under ss 68 or 79 of the *Judiciary Act*.<sup>7</sup> This is because the relevant state or territory laws often give a named state officer (for example, the state Attorney-General) the power to refer the matter to a named state court (for example, the Court of Criminal Appeal). It is unclear whether the *Judiciary Act* enables a different officer (the Attorney-General of Australia) to refer the matter to the state court, at least where there is no on-going proceeding to which the reference relates.

25.13 Thirdly, even where the *Judiciary Act* does operate to pick up and apply the state provisions to federal criminal matters, there are constitutional limits to the functions that a state court can perform. For example, a state court cannot give, consistently with the *Australian Constitution*, an advisory opinion to the federal executive when exercising federal jurisdiction, even though it might give the state executive an advisory opinion in an equivalent state criminal matter.<sup>8</sup>

### Options for reform

25.14 The Attorney-General's Department expressed the view that it is desirable for the relevant federal Minister to be able to refer some matters raised in applications for the exercise of the executive prerogative to a court for determination. The Department noted in its submission that

referral may be considered in cases where it is specifically requested by the petitioner; where the issues involved are of sufficient complexity; where the evidence is so voluminous that it is more appropriate for the matter to be dealt with by a Court; or where there is a reasonable possibility that a miscarriage of justice has occurred or there are sufficient grounds to consider that the conviction might have been unjust.

There are clearly cases where the administration of justice is best served by a matter being referred back to a Court for a hearing and a decision, rather than the executive making a decision on untested or incomplete information. It should not be a matter of chance whether State legislation provides for referral back to a Court, it should be available to all federal offenders.<sup>9</sup>

25.15 Alternatively, it would be possible to establish a procedure at the federal level to allow an inquiry to be established to consider such matters and to report to the

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7 See, eg, in a slightly different context, *Peel v The Queen* (1971) 125 CLR 447; *Williams v The King [No 2]* (1934) 50 CLR 551.

8 Courts exercising federal jurisdiction must do so in a way that is consistent with the constitutional doctrine of the separation of powers. Federal judicial power does not include the ability to provide advisory opinions because judicial power must involve the binding and authoritative ascertainment or determination of existing rights: *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357.

9 Attorney-General's Department, *Submission SFO 52*, 7 July 2005.

executive. This would meet the concerns expressed by the Department, particularly if an inquiry were chaired by a judge or a retired judge and given adequate powers to carry out its functions, for example, to require persons to appear and to require the production of documents and information. Any report of the inquiry would be provided to the executive but would not constrain the exercise of the prerogative.

### **ALRC's views**

25.16 The executive prerogative to pardon or remit a sentence is an important power, which may be exercised in exceptional cases to do justice where legal rights have been exhausted. In some cases it may be desirable for the executive to seek advice, for example, where the issues are complex or contested and the evidence is voluminous. However, the ALRC has formed the view that such matters should not be referred to the courts for consideration as an appeal but referred to an executive inquiry for consideration and report.

25.17 At the federal level, a clear constitutional line is drawn between the exercise of the executive power and the exercise of judicial power by the courts. This distinction is drawn in part to prevent the exercise of judicial power being unduly affected or influenced by the executive. The principle underpins the independence of the judiciary. The executive prerogative is generally exercised once legal rights have been exhausted and is not constrained by legal concerns. It may, for example, be exercised purely on compassionate grounds. For these reasons the distinction between the two processes—one judicial, the other executive—should be maintained. Where the executive desires advice in relation to the exercise of the prerogative, this should be provided in the first instance by the OMFO, and in more complex cases by a board of inquiry established for that purpose.

25.18 Federal sentencing legislation should make clear that such advice does not affect the power of the Governor-General in relation to the exercise of the executive prerogative.

**Recommendation 25–2** The OMFO should provide advice to the relevant Minister in relation to applications for the exercise of the executive prerogative to pardon or remit a sentence imposed on a federal offender.

**Recommendation 25–3** Federal sentencing legislation should provide that the relevant Minister may refer a matter raised in an application for the exercise of the executive prerogative to a board of inquiry for investigation and report. The report should be provided to the Minister and should inform, but not constrain, the exercise of the executive prerogative by the Governor-General.





## 26. Transfer of Federal Offenders

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26.1 The Terms of Reference require the ALRC to examine whether current arrangements provide an efficient, effective and appropriate regime for the administration of federal offenders, and whether this could or should vary according to the place of trial or detention. Concerns were raised in the course of the Inquiry in relation to the transfer of federal offenders between jurisdictions and, in particular, delay in the interstate transfer of federal prisoners on welfare grounds and the absence of international transfer arrangements with many countries. This chapter makes a number of recommendations to address these concerns.

### Location of trial

26.2 Section 80 of the *Australian Constitution* requires that where a federal offence is tried on indictment the trial must be held in the state where the offence was committed. This limitation does not apply to the vast majority of federal matters where, for example, the offender enters a guilty plea or the matter is dealt with summarily. Where an offence is not committed in a state, s 80 provides that the Australian Parliament may prescribe where the trial should be held. The *Judiciary Act 1903* (Cth) provides that in these circumstances the trial may be held in any state or territory.<sup>1</sup> The Act also provides that, where a federal offence is begun in one state or territory and completed in another, the offender may be tried in either state or territory.<sup>2</sup> Other legislation deals with offences committed at sea or on interstate or international flights.<sup>3</sup>

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1 *Judiciary Act 1903* (Cth) s 70A.

2 *Ibid* s 70.

3 See, eg, *Crimes at Sea Act 2000* (Cth) and related state and territory legislation; *Crimes (Aviation) Act 1991* (Cth).

26.3 The *Judiciary Act* also provides that, subject to the limitation on location of trials on indictment in s 80 of the *Constitution*, federal criminal jurisdiction is conferred on state and territory courts notwithstanding any limits as to locality of the jurisdiction of those courts. This makes clear that state and territory courts may deal with federal offences committed in another state or territory in some circumstances.<sup>4</sup>

26.4 The Commonwealth Director of Public Prosecutions (CDPP)—the principal prosecuting authority in relation to federal offences—has offices in all state and territory capital cities, as well as regional offices in Townsville and Cairns. In cases that give rise to a choice of location (for example, where elements of the offence have been committed in more than one jurisdiction) the CDPP makes a decision about the location of trial based on the balance of convenience, considering such issues as the whereabouts of investigators and witnesses, and the jurisdiction in which the offender was apprehended.<sup>5</sup>

26.5 However, where the trial of a federal offence committed within the one state is to be on indictment there is no choice as to venue, even where the balance of convenience or the interests of justice would be better served by holding the trial in another jurisdiction.

26.6 In 1988, the Constitutional Commission recommended a number of changes to s 80 of the *Constitution* and expressed the view that:

Trial by jury for any offence against a law of the Commonwealth should be held in the State or Territory where the offence was committed. However, the court should have power to transfer the trial to another competent jurisdiction on the application of either the accused or the prosecution. Where such an offence was not committed in a State or Territory, or was committed either in two or more of the States and Territories or in a place or places unknown, the trial should be held where Parliament prescribes.<sup>6</sup>

26.7 The Constitution Alteration (Rights and Freedoms) Bill 1988 (Cth), which included amendments to the *Constitution* based on these recommendations, was passed by the Australian Parliament but rejected at a referendum held on 3 September 1988.

26.8 In submissions, the CDPP and the Australian Taxation Office expressed the view that the current arrangements generally operate satisfactorily. The CDPP did not see any need for constitutional change.<sup>7</sup>

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4 *Judiciary Act 1903* (Cth) s 68(5), (5C).

5 Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004.

6 Constitutional Commission, *Final Report of the Constitutional Commission* (1988), [9.705].

7 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005.

**ALRC's views**

26.9 It is possible to envisage situations in which it would be desirable to transfer the trial on indictment of a person accused of a federal offence to another jurisdiction. An example is where the case has attracted such publicity in the jurisdiction in which the offence was committed that the defendant is unlikely to receive a fair trial. However, it appears from submissions and consultations that the constitutional limitations on location of trial have not caused significant problems in practice. For this reason, while supporting the 1988 recommendations of the Constitutional Commission in principle, the ALRC does not recommend any further steps be taken for constitutional change at this time.

**Location of imprisonment and other sentences**

26.10 Federal offenders generally serve their sentences in the state or territory in which they are sentenced. Under a range of cooperative arrangements discussed below, it is possible to transfer offenders, including federal offenders, between jurisdictions in some circumstances. These arrangements include offenders serving full-time custodial sentences, offenders serving alternative sentencing orders 'picked up' from state and territory law, and offenders released on parole or licence.

26.11 In the course of the Inquiry, the ALRC sought the views of stakeholders on whether a more flexible system should be established in relation to federal offenders, such as a cooperative scheme to allow federal offenders to serve their sentence in the most appropriate or convenient location. A number of submissions and consultations expressed support for the existing arrangements.<sup>8</sup> However, prisoner support organisations and others emphasised the fundamental importance of offenders' proximity to family and other support structures, and the need for more flexibility in relation to the location in which offenders serve their sentences. In particular, a number of submissions and consultations identified problems with the interstate and international transfer schemes designed to allow offenders to serve their sentences closer to home.<sup>9</sup> These issues are discussed below and a number of recommendations are made to address the concerns raised.

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8 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005; Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005.

9 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; JC, *Submission SFO 25*, 13 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005.

## Interstate transfer

### Transfer on welfare grounds

#### *Background*

26.12 Complementary federal, state and territory legislation provides for the transfer of offenders serving a term of imprisonment between jurisdictions.<sup>10</sup> The *Transfer of Prisoners Act 1983* (Cth) allows for the transfer of a federal prisoner for the following purposes:

- the prisoner's welfare (s 6);
- to stand trial on outstanding charges in another state or territory (ss 8–9);
- to return to the state or territory in which he or she was initially sentenced (s 14); or
- in the interests of national security (s 16B).

26.13 Submissions and consultations did not identify significant concerns with the provisions dealing with transfer to stand trial, to return to the state of sentencing, or on national security grounds.

26.14 However, significant concern was expressed in relation to transfer on welfare grounds. The *Transfer of Prisoners Act* provides that a prisoner may request a transfer to another state or territory in the interests of his or her welfare. The *Transfer of Prisoners Regulations 1984* (Cth) provide that a prisoner's welfare may relate to: family or near family support in the state or territory to which the prisoner seeks to be transferred; family or other social circumstances that may benefit the welfare of the prisoner; medical reasons; prospects of employment following release from prison; and any other matters that the prisoner wishes to put forward in support of the application.<sup>11</sup>

26.15 In exercising the discretion to grant or refuse an application for transfer on welfare grounds, the Attorney-General of Australia must have regard to all relevant matters, including the interests of the administration of justice and the prisoner's welfare.<sup>12</sup> The Attorney-General must not make a welfare transfer order unless the appropriate minister of the state or territory to which the prisoner would be transferred has consented to the transfer.<sup>13</sup> While the consent of the relevant minister in the

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10 See *Transfer of Prisoners Act 1983* (Cth); *Prisoners (Interstate Transfer) Act 1982* (NSW); *Prisoners (Interstate Transfer) Act 1983* (Vic); *Prisoners (Interstate Transfer) Act 1982* (Qld); *Prisoners (Interstate Transfer) Act 1983* (WA); *Prisoners (Interstate Transfer) Act 1982* (SA); *Prisoners (Interstate Transfer) Act 1982* (Tas); *Prisoners (Interstate Transfer) Act 1993* (ACT); *Prisoners (Interstate Transfer) Act 1983* (NT).

11 *Transfer of Prisoners Regulations 1984* (Cth) reg 4.

12 *Transfer of Prisoners Act 1983* (Cth) s 6(3).

13 *Ibid* s 6(4).

sending state or territory is not legally required, it may be sought in practice. The Attorney-General may revoke a welfare transfer order on his or her own motion, or at the prisoner's request.<sup>14</sup>

### *Issues and problems*

26.16 The major issue identified in submissions and consultations was unreasonable delay in transferring offenders interstate on welfare grounds. The Offenders Aid and Rehabilitation Services of South Australia works with interstate offenders who have family in South Australia to assist them to apply for transfer to South Australia on welfare grounds. However, the organisation indicated that where the offender has been sentenced to less than twelve months imprisonment it was not worthwhile applying for a transfer because the process takes too long.<sup>15</sup> Other consultations noted that the process takes so long that it appears to be structured to discourage applications and that, on some occasions, transfer is not possible at all because the relevant state or territory will not accept the offender.<sup>16</sup>

26.17 Victoria Legal Aid expressed the view that the Attorney-General and the relevant state and territory ministers should be required to accommodate requests for transfer on welfare grounds unless the application is made in bad faith or the transfer would prejudice the administration of justice.<sup>17</sup> The Department of Corrective Services in Queensland cautioned, however, that it is essential to ensure that jurisdictions to which offenders are transferred have appropriate facilities to house the offenders. The Department noted that the smaller jurisdictions do not have the same range of secure facilities available to house high-risk offenders.<sup>18</sup>

26.18 In Discussion Paper 70 the ALRC proposed that decisions in relation to the transfer of federal offenders on welfare grounds should be made by the Australian Government in consultation with the states and territories.<sup>19</sup> The ALRC was of the view that consultation was necessary in order to ensure that prisoner transfers did not prejudice the proper administration of justice. However, such transfers should not require the consent of the relevant states and territories. Very few submissions addressed this issue. The Attorney-General's Department did not support this proposal.<sup>20</sup> The Department of Corrective Services Western Australia noted that any such proposal would need to be developed in consultation with the states and territories and that issues such as which jurisdiction would bear the cost of the transfer would need to be considered.<sup>21</sup>

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14 Ibid s 7.

15 Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005.

16 Prisoners' Legal Service and others, *Consultation*, Brisbane, 4 March 2005.

17 Victoria Legal Aid, *Submission SFO 31*, 18 April 2005.

18 Department of Corrective Services Queensland, *Consultation*, Brisbane, 3 March 2005.

19 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 26–1.

20 Attorney-General's Department, *Submission SFO 83*, 15 February 2006.

21 Department of Corrective Services Western Australia, *Submission SFO 88*, 17 February 2006.

**ALRC's views**

26.19 The stated purpose of transfer on welfare grounds is to 'assist the rehabilitation of prisoners and reduce the hardships caused to the families of prisoners'.<sup>22</sup> However, it appears from submissions and consultations that there are currently significant delays in arranging welfare transfers. The ALRC is of the view that it is in the public interest for federal offenders to be able to serve their sentences close to home whenever possible and that the Australian Government should facilitate such transfers in a timely and efficient manner.

26.20 While consultation with the states and territories in relation to the transfer of a particular federal offender is appropriate and necessary to establish that legitimate welfare grounds exist and that the transfer will not prejudice the proper administration of justice, the transfer should ultimately remain a matter for the Australian Government. Section 120 of the *Constitution* imposes an obligation on the states to make provision for the imprisonment of federal offenders. The Australian Government has ultimate responsibility to safeguard the welfare of federal offenders and should retain ultimate decision-making authority in relation to transfer of federal offenders on welfare grounds. Such transfer should not depend on the consent of the states and territories, although the consent of the states and territories is an appropriate requirement in relation to the interstate transfer of state and territory offenders and joint offenders.

26.21 The Australian Government should review the interstate transfer arrangements to ensure that federal offenders are routinely transferred interstate where welfare grounds are established. Offenders should be transferred without delay to the receiving jurisdiction unless the transfer would prejudice the proper administration of justice because, for example, the receiving jurisdiction does not have appropriate facilities to house the offender.

**Recommendation 26-1** The Australian Parliament should amend the legislation and arrangements dealing with interstate transfer of prisoners on welfare grounds to ensure that:

- (a) federal offenders may be transferred interstate without delay where welfare grounds are found to exist, except where the transfer would prejudice the proper administration of justice;
- (b) the decision to transfer a federal offender interstate should be one for the Attorney-General of Australia, or a delegate; and

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22 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 October 1983, 1898 (L Bowen—Deputy Prime Minister).

- (c) interstate transfer of a federal offender should not require the consent of either the sending or receiving state or territory (except in the case of joint federal-state/territory offenders), but the Attorney-General of Australia or a delegate should be required to consult with relevant authorities in the sending and receiving state or territory before making a transfer decision.

### Transfer on other grounds

26.22 The New South Wales Department of Corrective Services, in its submission, reiterated its support for a further ground of transfer—operational security.<sup>23</sup> In their joint submission to the Senate Committee review of the Anti-terrorism Bill (No 2) 2004 (Cth), the state and territory Corrective Services Ministers recommended that transfer should be available on operational security grounds, in addition to national security grounds. Operational security grounds would include circumstances in which an extremely high-risk offender must be moved interstate to more secure facilities.<sup>24</sup> The Attorney-General's Department advised the Senate Committee that the matter was already on the agenda of the relevant ministerial councils, and scheduled to be dealt with at a later date.<sup>25</sup>

26.23 The ALRC understands that the proposal to allow interstate transfers on operational security grounds is still under consideration by the Corrective Services Ministers Conference. The ALRC does not have sufficient information about the impact of such a development to make a recommendation on this issue in this Inquiry.

### Transfer while on parole

26.24 Complementary state and territory legislation provides for the transfer of state and territory parole orders through a system of interstate transfer, registration and enforcement.<sup>26</sup> This legislative scheme does not, however, apply to federal offenders. Federal parole orders are made by the Attorney-General of Australia, or departmental delegate, under s 19AL of the *Crimes Act 1914* (Cth) and are valid throughout Australia. Where a federal offender on parole wishes to transfer to another jurisdiction, it is usual for the state or territory parole authority to arrange to have the relevant conditions attached to the parole order amended under s 19AN of the *Crimes Act*. An example would be a requirement that the offender report to a specified parole office.

23 Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.

24 Senate Legal and Constitutional Legislation Committee—Parliament of Australia, *Provisions of the Anti-terrorism Bill (No 2) 2004* (2004), 39.

25 Ibid, 38.

26 *Parole Orders (Transfer) Act 1983* (NSW); *Parole Orders (Transfer) Act 1983* (Vic); *Parole Orders (Transfer) Act 1984* (Qld); *Parole Orders (Transfer) Act 1984* (WA); *Parole Orders (Transfer) Act 1983* (SA); *Parole Orders (Transfer) Act 1983* (Tas); *Parole Orders (Transfer) Act 1983* (ACT); *Parole Orders (Transfer) Act 1981* (NT).

26.25 No significant problems were identified with the arrangements for the transfer between Australian states and territories of federal offenders released on parole. In Chapter 23 of this Report the ALRC recommends the establishment of a federal parole authority to make decisions in relation to the parole of federal offenders. If that recommendation is implemented, any necessary changes to parole orders to allow offenders to move interstate would be made by the authority rather than by the Attorney-General or delegate. The ALRC does not recommend any further change to the parole transfer arrangements.

### **Transfer while serving community based sentences**

26.26 As discussed in Chapter 7, a number of alternative sentences—such as periodic detention, home detention and community service orders—are picked up from state and territory law by s 20AB of the *Crimes Act* and reg 6 of the *Crimes Regulations 1990* (Cth) and made available in sentencing federal offenders. The options available vary from jurisdiction to jurisdiction; for example, periodic detention is available only in New South Wales and the ACT.

26.27 New South Wales and the ACT have introduced a pilot scheme for the interstate transfer, registration and enforcement of a number of sentencing orders such as community service orders, recognizances, and periodic detention orders, which are referred to collectively in the relevant legislation as ‘community based sentences’.<sup>27</sup> The scheme commenced on 1 February 2005 and allows for the formal transfer of the supervision and administration of such sentences from one jurisdiction to another, with the consent of the offender. The purpose of the scheme is to allow offenders sentenced in one jurisdiction to serve their sentences in the other jurisdiction in order to take advantage of better family or community support or increased choice of employment or study opportunities.

26.28 Under the pilot scheme, before accepting a transfer, the receiving jurisdiction must be able to administer and supervise the offender’s sentence safely, efficiently and effectively. In making this determination, the receiving jurisdiction must consider the safety of the community and of relevant individuals, including any victims.

26.29 The scheme formalises a process that already occurs informally between all Australian jurisdictions, allowing offenders with certain community based sentences to have their orders supervised and administered in another jurisdiction. The informal arrangements led to difficulties where the offender breached the order while in the receiving jurisdiction: it was necessary to return the offender to the original jurisdiction

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27 *Crimes (Interstate Transfer of Community Based Sentences) Act 2004* (NSW); *Community Based Sentences (Transfer) Act 2003* (ACT). The ACT provisions will be repealed and replaced by similar provisions in the *Crimes (Sentence Administration) Act 2005* (ACT) when the new Act comes into force in mid-2006.



in order to enforce the sentence. The new scheme will allow the receiving jurisdiction to enforce the sentence in the event of breach.<sup>28</sup>

26.30 In submissions and consultations, the New South Wales Department of Corrective Services and ACT Corrective Services indicated that the pilot scheme did provide an appropriate model for a national scheme and that, following an evaluation, the pilot scheme was likely to be implemented nationally.<sup>29</sup> It would be a cooperative legislative scheme similar in some respects to the transfer of prisoners scheme, discussed above.

26.31 The legal issues that arise in relation to the inter-jurisdictional enforcement of community based sentences imposed on federal offenders by state and territory courts exercising federal jurisdiction are not the same as those that arise in relation to the enforcement of sentencing orders imposed on state and territory offenders. However, Part IB of the *Crimes Act* currently requires federal offenders in breach of community based sentencing orders—including orders set out in the *Crimes Act* such as recognizance release orders and sentencing orders picked up from state and territory law—to appear before the court that made the original order.<sup>30</sup> This means that federal offenders who move to another jurisdiction and then breach their community based sentencing orders must be returned to the original jurisdiction for the sentence to be enforced. In addition, many of the same administrative issues will arise in relation to interstate transfer of state and territory offenders and federal offenders serving community based sentences, for example, whether the state or territory to which the offender wishes to be transferred has the facilities to administer and supervise the sentence.

### ***ALRC's views***

26.32 Given the links between an offender's proximity to family and other support structures and successful rehabilitation, it is important to ensure that federal offenders are generally able to serve their sentences, including community based sentences, close to home. The pilot scheme established in New South Wales and the ACT appears to provide an appropriate model for the transfer of offenders serving community based sentences between jurisdictions and the ALRC supports further development of the scheme on a national level. The Australian Government and the governments of the states and territories should ensure that the benefits of any such scheme are extended to federal offenders serving community based sentences.

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28 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 12 December 2002, 4374 (T Quinlan).

29 Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005; ACT Corrective Services, *Submission SFO 34*, 20 April 2005.

30 *Crimes Act 1914* (Cth) ss 20A(1)(a), 20AC(2)(a).

**Recommendation 26–2** The Australian Government and the governments of the states and territories should work towards expanding the opportunities for the interstate transfer of federal offenders serving community based sentences.

## International transfer

26.33 Australia participates in international transfer of prisoners arrangements under the Council of Europe's *Convention on the Transfer of Sentenced Persons*.<sup>31</sup> Under the scheme, Australian citizens and permanent residents who have community ties with an Australian state or territory and who are imprisoned in other countries participating in the scheme may apply to return to Australia to serve the balance of their sentences in an Australian prison. The scheme also permits foreign nationals who are held in Australian prisons to apply to serve the balance of their sentence in a foreign country, provided that country is a participant in the scheme. The Australian Parliament has enacted legislation to give effect to the transfer scheme—the *International Transfer of Prisoners Act 1997* (Cth)—and the states and territories have enacted complementary legislation.

26.34 Upon transfer to Australia, the prisoner's sentence is treated as a federal sentence of imprisonment and the prisoner is treated as a federal prisoner. Any relevant Australian law, practice or procedure concerning the detention of prisoners applies in relation to the prisoner upon his or her transfer to Australia.<sup>32</sup> Arrangements under the Council of Europe Convention are limited to those countries that are a party to the Convention. While the Convention and relevant legislation allow for transfer of prisoners between Australia and 56 other countries, very few of these are in the Asia-Pacific region.<sup>33</sup>

26.35 Australia is also a party to bilateral agreements with Thailand and Hong Kong on the transfer of prisoners.<sup>34</sup>

26.36 The first repatriation of an Australian held in a foreign prison occurred in April 2003 and involved a transfer from Thailand to Western Australia. Under the Council of

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31 *Convention on the Transfer of Sentenced Persons*, 21 March 1983, Council of Europe, CETS 112, (entered into force generally on 1 July 1985).

32 *International Transfer of Prisoners Act 1997* (Cth) s 46.

33 The following parties to the Convention are not member States of the Council of Europe: Australia, Bahamas, Bolivia, Canada, Chile, Costa Rica, Ecuador, Israel, Japan, Mauritius, Panama, Republic of Korea, Tonga, Trinidad and Tobago, United States, Venezuela. Only four lie in the Asia-Pacific region.

34 *Agreement Between the Government of Australia and the Government of the Kingdom of Thailand on the Transfer of Offenders and Co-operation in the Enforcement of Penal Sentences*, 26 July 2001, [2002] ATS 22, (entered into force generally on 26 September 2002); *Agreement Between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China Concerning Transfer of Sentenced Persons*, 25 November 2005; C Ellison (Minister for Justice and Customs), 'Australia and Hong Kong Sign Prisoner Transfer Agreement' (Press Release, 26 November 2005).

Europe Convention, five prisoners have been transferred between Australia and Spain; five prisoners between Australia and the Netherlands; four prisoners between Australia and the United Kingdom; and one prisoner between Australia and Israel. At 30 June 2005, Australia was processing an additional 79 applications for transfer out of Australia and 23 applications for transfer to Australia under both the Council of Europe Convention and Australia's agreement with Thailand.<sup>35</sup>

26.37 In May 2005, the Minister for Foreign Affairs, the Hon Alexander Downer MP, announced that a draft bilateral agreement on the transfer of offenders had been sent to the Indonesian Government for consideration. He noted that there were 14 Australians in custody in Indonesia at that time, and about 155 Australians in custody around the world.<sup>36</sup>

26.38 The international transfer scheme is particularly important in the context of federal offenders. In its statistical overview of federal offenders, the Australian Institute of Criminology notes that a high proportion of federal prisoners are born overseas or are foreign nationals.<sup>37</sup> For example, while approximately 9 per cent of the Australian prisoner population comes from the Asia-Pacific region, 26 per cent of federal offenders come from that region. Conversely, while 74 per cent of the Australian prisoner population was identified as born in Australia or of Australian nationality, this was true of only 43 per cent of federal prisoners. The Institute has noted that this reflects one of the differences between federal and state/territory criminal law, namely, that federal law is more concerned with matters at the national and international levels, such as the cross-border smuggling of drugs or persons.

26.39 A number of submissions noted that many foreign nationals in Australian prisons are not eligible for international transfer and that, even where they are eligible, there are often long delays in arranging transfers.<sup>38</sup> In particular, Northern Territory Correctional Services noted that a significant number of federal offenders being held in Australia are Indonesian nationals and that it would be desirable for them to be able to serve their sentences in their home country.<sup>39</sup> The National Interest Analysis prepared by the Australian Government in relation to the new prisoner transfer agreement with Hong Kong noted that:

Over the past year there has been growing public pressure for Australia to capitalise on its well established ITP [International Transfer of Prisoners] scheme by concluding bilateral ITP agreements with more of its regional neighbours. This pressure has come from a wide range of individuals and groups, including parliamentarians, media

35 *Agreement Between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China Concerning Transfer of Sentenced Persons*, National Interest Analysis [2005] ATNIA 19, 25 November 2005, [14].

36 A Downer (Minister for Foreign Affairs), 'Doorstop Interview—Schapelle Corby' (Press Release, 27 May 2005).

37 See Appendix 1, Figure A1.13 and accompanying text.

38 Confidential, *Submission SFO 11*, 15 March 2005; WR, *Submission SFO 41*, 28 April 2005.

39 Correctional Services Northern Territory and Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005.

commentators, senior academics, human rights organisations, prisoner support groups, friends and families of prisoners, and prisoners themselves. In addition, Australia has also been approached by a number of countries about the possibility of Australian involvement in prisoner transfers.<sup>40</sup>

### ***ALRC's views***

26.40 The international transfer of prisoner arrangements fall squarely within the scope of this Inquiry because all prisoners transferred to Australia become federal prisoners and a significant number of prisoners seeking transfer out of Australia are federal offenders.

26.41 The ALRC believes that it is desirable for offenders to be able to serve their sentences in their home country wherever possible. Given the limited membership of the Council of Europe *Convention on the Transfer of Sentenced Persons*, there is scope for the Australian Government to negotiate bilateral transfer arrangements with other countries, particularly in the Asia-Pacific region, in which significant numbers of Australian nationals are serving custodial sentences and with countries that have a significant number of their nationals serving custodial sentences in Australia.

**Recommendation 26–3** The Australian Government should aim to ensure that prisoners are generally able to serve their sentences in their home country. To this end, the Australian Government should negotiate bilateral agreements for the transfer of prisoners with:

- (a) countries in which significant numbers of Australian nationals are serving custodial sentences; and
- (b) countries that have a significant number of their nationals serving custodial sentences in Australia.

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<sup>40</sup> *Agreement Between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China Concerning Transfer of Sentenced Persons*, National Interest Analysis [2005] ATNIA 19, 25 November 2005.

## 27. Young Federal Offenders

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### Introduction

27.1 Young offenders belong to a category of offenders that merit special consideration. It is an internationally recognised principle that children, by reason of their physical or mental immaturity, are entitled to special care, safeguards and assistance, including appropriate legal protection.<sup>1</sup>

27.2 Three central concerns underpin the ALRC's development of the recommendations in this chapter, namely:

- promoting consistency in the treatment of young federal offenders across states and territories;

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<sup>1</sup> *United Nations Universal Declaration of Human Rights*, GA Res 217A(III), UN Doc A/Res/810 (1948) art 25(2); *United Nations Declaration of the Rights of the Child*, GA Res 44/25, UN GAOR, UN Doc A/Res/44/49 (1989), preamble.

- adhering to internationally accepted principles applicable to the sentencing of young people;<sup>2</sup> and
- ensuring the efficacy of the federal criminal justice system.

27.3 The issue of consistency of treatment arises in relation to young federal offenders because s 20C(1) of the *Crimes Act 1914* (Cth) provides that:

A child or young person who, in a State or Territory, is charged with or convicted of an offence against a law of the Commonwealth may be tried, punished or otherwise dealt with as if the offence were an offence against a law of the State or Territory.

27.4 Section 20C(1) thus enables young federal offenders to be dealt with by the specialist juvenile justice systems established in the states and territories. Although there are similarities in the approaches to juvenile justice across states and territories, there are also areas of significant disparity. Furthermore, there are differences in the extent to which each state or territory adheres to internationally recognised principles in the sentencing of young people.

27.5 In 1991, the Gibbs Committee recommended that s 20C be the subject of a separate inquiry that would examine all relevant state and territory legislation in relation to the trial and punishment of young federal offenders.<sup>3</sup> No separate inquiry has been established in relation to s 20C. In this Report the ALRC makes a number of recommendations relating to the sentencing, administration and release of young federal offenders. However, it is acknowledged that further work needs to be done in relation to pre-trial and trial aspects of the treatment of young federal offenders.

## Data on young people prosecuted for a federal offence

27.6 Very little information is available on young people in the federal criminal justice system. Issues Paper 29 set out statistics available from earlier inquiries on the number of young federal offenders.<sup>4</sup> The Commonwealth Director of Public Prosecutions (CDPP) has since provided the ALRC with an analysis of more recent data on young federal offenders.<sup>5</sup>

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2 This was supported in submissions and consultations: Human Rights and Equal Opportunity Commission, *Submission SFO 62*, 22 December 2005; National Children's and Youth Law Centre, *Consultation*, Sydney, 28 February 2006.

3 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991) Attorney-General's Department, [12.50], [12.59].

4 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [15.3].

5 Commonwealth Director of Public Prosecutions, *Correspondence*, 4 May–2 September 2005, young people and young adults data.

27.7 From January 2000 to June 2005, the CDPP prosecuted 107 ‘cases’<sup>6</sup> involving *young people* aged under 18 years at the time of sentencing. Of these, 73 (68 per cent) involved summary offences, and 34 (32 per cent) involved prosecutions on indictment. In 94 per cent of cases, the young people were sentenced for the offence. The majority of cases were prosecuted in the Northern Territory (36 per cent) and Western Australia (27 per cent).

27.8 The number of custodial sentences imposed on young federal offenders has changed significantly in recent years. In 2000, 10 sentences (46 per cent of the cases in that year) were custodial, and in 2001 27 sentences (61 per cent) were custodial. However, only one custodial sentence was imposed per year in 2002 and 2003, and no custodial sentences were imposed from then until June 2005.

27.9 During the 2000–05 period, a further 657 cases involving *young adults* aged 18 years or over and under 21 years at the time of sentencing were prosecuted, of which 86 per cent were summary proceedings and 14 per cent were prosecutions on indictment. Sentences were imposed in 95 per cent of these cases. Most of these cases were prosecuted in the Northern Territory (27 per cent), Western Australia (20 per cent) and Queensland (16 per cent).

27.10 As with young federal offenders aged under 18 years, there has also been a decline in the imposition of custodial sentences on young adults sentenced for federal offences. In 2000, 40 sentences (35 per cent of the cases in that year) were custodial; in 2002 only 18 sentences (15 per cent) were custodial, and this trend has continued in subsequent years.

27.11 In the CDPP analysis, federal offences were grouped under five broad categories—drugs, fraud, corporations, money laundering, and other offences. The vast majority of cases—84 per cent of young people and 59 per cent of young adults—fell into the last category. A large number of cases in this category involve either illegal fishing or people smuggling offences. In relation to young adults, a significant number of cases (32 per cent) involved fraud.

27.12 No information is available to indicate whether these offenders were dealt with in a children’s court or an adult court, or whether they were dealt with under state or territory juvenile justice legislation or Part IB of the *Crimes Act*.

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6 For the purposes of this analysis, a ‘case’ is one that was dealt with by the CDPP arising from the same series of events that gave rise to an offence (or offences). Limitations of the data mean that it is not possible to identify whether two or more separate ‘cases’ involved the same young person if the cases did not arise from the same series of events. The number of ‘cases’ is currently the best approximation of the number of young people dealt with by the CDPP during the stated period.

27.13 The Australasian Juvenile Justice Administrators and the Australian Institute of Health and Welfare have established the Juvenile Justice National Minimum Data Set (NMDS) based on information collected from state and territory juvenile justice departments. The NMDS provides information on the broad characteristics of juvenile justice clients and the way in which they move through the juvenile justice systems, including information on sentencing outcomes.<sup>7</sup> In February 2006 the first report on the NMDS (covering the period 2000–01 to 2003–04) was released.<sup>8</sup> However, the report does not distinguish between young federal offenders and young state or territory offenders. In the future, data will include broad categories of offence but will not distinguish between state or territory offences and federal offences. In addition, as not all young federal offenders are clients of juvenile justice departments, the data captured by the NMDS are not comprehensive.

27.14 The Australian Bureau of Statistics (ABS) is planning to expand its reporting on court data to include juvenile courts. The ALRC has recommended in Chapter 22 that the ABS data distinguish between federal and state or territory offenders in order to support the development of evidence-based policy in relation to federal offenders, including young federal offenders.<sup>9</sup>

### **Section 20C of the *Crimes Act 1914* (Cth)**

27.15 As stated above, s 20C(1) of the *Crimes Act* provides that a child or young person may be tried and punished in accordance with state or territory laws, thus enabling young federal offenders to be dealt with by the specialist juvenile justice systems established in the states and territories.

27.16 In addition to noting past criticism of the operation of s 20C, Issues Paper 29 identified a number of particular problems relating to s 20C and the sentencing of young federal offenders. These included:

- the absence of a definition of ‘child or young person’ in Part IB of the *Crimes Act*;
- the absence of a clear statement about whether s 20C precludes the use of Part IB in the sentencing of young federal offenders;
- the absence of a statement that the penalty imposed on a young offender should be no greater than that imposed on an adult who commits an offence of the same kind;

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7 Australian Institute of Health and Welfare, *Juvenile Justice: A New National Collection—Bulletin No 19* (2004). See also A Broadbent, *Report on the Development of a Juvenile Justice National Minimum Data Set* (2001) Australian Institute of Health and Welfare.

8 Australian Institute of Health and Welfare, *Juvenile Justice in Australia 2000–01 to 2003–04*, AIHW Cat No JUV 1 (2006).

9 Rec 22–9.



- difficulties accessing diversionary options provided by the states and territories;
- doubts about the power to apply state or territory enforcement provisions if a young federal offender breaches a sentence; and
- disparity between the states and territories in legislative principles, procedures and sentencing options applicable to young federal offenders and in their patterns of sentencing.<sup>10</sup>

27.17 These issues fall into two broad categories—namely, problems caused by reliance on the divergent state and territory juvenile justice systems; and problems caused by the interaction of the state/territory and federal systems, with the result that young federal offenders do not have access to the same sentencing options as young state or territory offenders.

### ***Options for reform***

27.18 There are four ways in which the federal criminal justice system might be reformed to address the concerns identified above:

- establish a separate federal juvenile justice system for young federal offenders;
- adopt a system that is comparable with that in place for adult federal offenders by developing legislation to deal more comprehensively with the sentencing, administration and release of young federal offenders (included as part of the ALRC's recommended federal sentencing Act);
- continue to rely on state and territory systems, but underpin this with federal provisions to ensure minimum standards are met in dealing with young federal offenders; or
- continue to rely on state and territory juvenile justice systems, but work to harmonise those systems through the development of national standards and principles.

### ***ALRC's views***

27.19 Establishing a separate federal juvenile justice system would require not only the development of federal juvenile justice legislation and a federal children's court, but also the establishment of a federal juvenile justice administration to develop and

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<sup>10</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [15.5], [15.8]–[15.18]. The CDPP noted that all these issues arise in practice: Commonwealth Director of Public Prosecutions, *Consultation*, Darwin, 28 April 2005.

supervise programs for young federal offenders, and the establishment of juvenile detention facilities. For reasons explained in Chapter 3 of this Report, the ALRC does not recommend the adoption of a fully federal system for the sentencing, administration and release of federal offenders. With young federal offenders making up only a small proportion of the total number of federal offenders (who are themselves relatively few in number), the establishment of a separate federal juvenile justice system would be impractical.

27.20 Some submissions supported the second option, namely, developing federal legislation to deal more comprehensively with the sentencing, administration and release of young federal offenders.<sup>11</sup> In practice, this option would involve state and territory courts—in many cases children’s courts—continuing to apply state and territory juvenile justice procedures in federal matters, but applying federal legislation in relation to sentencing. However, data provided by the CDPP relating to young people and young adults suggest the annual caseload is low—on average, across Australia there were 20 cases involving young people and 120 cases involving young adults each year between 2000 and 2005.<sup>12</sup> In these circumstances, the effort required to enact and utilise specialised federal sentencing legislation in relation to young federal offenders is likely to outweigh any benefits of establishing separate legislation.

27.21 However, the ALRC is of the view that some change is required to the existing system to promote greater consistency of approach in sentencing young federal offenders. This can be achieved by introducing new provisions in federal sentencing legislation dealing with key aspects of the sentencing, administration and release of young federal offenders, while retaining primary dependence on the existing state and territory juvenile justice systems.

27.22 The ALRC recommends a four-pronged approach, discussed in subsequent sections of this chapter, based on:

- introducing federal minimum standards that will apply to all young federal offenders;
- requiring certain provisions that are applicable to adult federal offenders to apply also to young federal offenders;
- developing best practice guidelines for juvenile justice, to promote consistency across states and territories in relation to the sentencing, administration and release of young offenders; and
- increasing federal oversight of young federal offenders.

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11 JC, *Submission SFO 25*, 13 April 2005; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005.

12 Commonwealth Director of Public Prosecutions, *Correspondence*, 4 May–2 September 2005, young people and young adults data.

## Federal minimum standards for young federal offenders

27.23 Federal minimum standards are a means of ensuring the adequacy of laws and practices with respect to young federal offenders, while maintaining the traditional role of state and territory systems of juvenile justice. This section considers a range of issues that should be addressed in the standards.

### Definition of child or young person

27.24 The term ‘child or young person’ is used in s 20C of the *Crimes Act*, but there is no definition of the term in Part IB of that Act or in the *Acts Interpretation Act 1901* (Cth). There have been various approaches in practice. While the CDPP has preferred to adopt the definitions in the juvenile justice legislation of the relevant state or territory, magistrates have sometimes assumed that ‘child or young person’ refers to any person under the age of 18 years.<sup>13</sup>

27.25 Although there has been greater divergence in the past, since 1 July 2005 all states and territories, with the exception of Queensland, have adopted a common definition of child or young person for the purpose of their juvenile justice legislation—namely, a person who is at least 10 years of age but under the age of 18.<sup>14</sup> In Queensland the relevant definition applies to a person who is at least 10 years of age but under the age of 17.<sup>15</sup>

27.26 The ALRC considers that the lack of definition of ‘child or young person’ in the *Crimes Act* is unsatisfactory. Adopting the definitions of ‘child or young person’ in the relevant state or territory juvenile justice legislation could result in different treatment of young federal offenders depending on the state or territory in which the case is determined. A single definition for the purposes of federal criminal law should be set out in federal legislation rather than left to state and territory legislation.

27.27 The *Crimes Act* defines ‘child’ for the purposes of Part IAD and Part ID of the Act, setting 18 years as the upper limit.<sup>16</sup> This upper age limit is consistent with the

13 Commonwealth Director of Public Prosecutions, *Submission to Children and the Legal Process Inquiry 110*, 2 November 1995.

14 The term used varies between jurisdictions, and includes ‘child’, ‘juvenile’, ‘youth’ and ‘young person’: *Children (Criminal Proceedings) Act 1987* (NSW) ss 3(1), 5; *Children and Young Persons Act 1989* (Vic) s 3(1); *Children, Youth and Families Act 2005* (Vic) s 3(1) (not yet proclaimed); *Young Offenders Act 1994* (WA) s 3; *Criminal Code* (WA) s 29; *Young Offenders Act 1993* (SA) s 4; *Youth Justice Act 1997* (Tas) s 3(1); *Children and Young People Act 1999* (ACT) Dictionary (s 2), ss 8, 66; *Criminal Code 2002* (ACT) s 25; *Juvenile Justice Act 1983* (NT) s 3(1); *Criminal Code* (NT) s 38(1). See also *Youth Justice Act 2005* (NT) s 6 (not yet proclaimed).

15 *Juvenile Justice Act 1992* (Qld) sch 4, s 4; *Criminal Code* (Qld) s 29(1). The *Juvenile Justice Act 1992* (Qld) provides for an increase in the upper age limit by regulation, but no such regulation has been made.

16 For the purposes of Part IAD of the *Crimes Act 1914* (Cth) (the protection of children in proceedings for sexual offences), ‘child’ means a person under the age of 18: s 15YA. For the purposes of Part ID

position in most states and territories and with the United Nations *Convention on the Rights of the Child* 1989 (CROC).<sup>17</sup>

27.28 The ALRC considers that federal sentencing legislation should use the term ‘young person’, defined as a person aged 10 years or over but not yet 18 years at the time the offence was committed. Two stakeholders expressed support for this definition.<sup>18</sup>

27.29 The *Crimes Act* currently states that a child under 10 years of age cannot be criminally responsible for an offence against a law of the Commonwealth.<sup>19</sup> In its submission, the Human Rights and Equal Opportunity Commission (HREOC) expressed the view that the current age of criminal responsibility is too low.<sup>20</sup> Since the age of criminal responsibility is part of substantive federal criminal law, it falls outside the scope of the current Inquiry and therefore the ALRC makes no recommendation on this issue.

### Sentencing principles

27.30 In accordance with s 20C of the *Crimes Act*, most young federal offenders are sentenced under the juvenile justice legislation of the relevant state or territory.<sup>21</sup> The sentencing principles applicable to young offenders differ from those applicable to adult offenders, although in some states they apply in addition to the sentencing principles for adult offenders.<sup>22</sup>

27.31 Juvenile justice legislation in most states and territories (except the Northern Territory) outlines a number of principles to be applied in sentencing a young person.<sup>23</sup> For example, most jurisdictions provide that: a child should be encouraged to accept responsibility for the offending behaviour; a child should be provided with the

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(forensic procedures), ‘child’ means a person who is at least 10 years of age but under the age of 18: s 23WA.

17 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 1.

18 Sisters Inside Inc, *Submission SFO 98*, 6 April 2006; National Children’s and Youth Law Centre, *Consultation*, Sydney, 28 February 2006.

19 *Crimes Act 1914* (Cth) s 4M. The age of criminal responsibility is also set at 10 years in all states and territories: *Children (Criminal Proceedings) Act 1987* (NSW) s 5; *Children and Young Persons Act 1989* (Vic) s 127; *Children, Youth and Families Act 2005* (Vic) s 344; *Criminal Code* (Qld) s 29(1); *Criminal Code* (WA) s 29; *Young Offenders Act 1993* (SA) s 5; *Criminal Code Act 1924* (Tas) s 18(1); *Criminal Code 2002* (ACT) s 25; *Criminal Code* (NT) s 38(1).

20 Human Rights and Equal Opportunity Commission, *Submission SFO 62*, 22 December 2005.

21 Compare H Bonney, ‘Young Offenders: Some Sentencing Considerations’ (1995) 69 *Law Institute Journal* 896, who suggests that Part IB can be applied to young federal offenders.

22 *Juvenile Justice Act 1992* (Qld) s 150(1)(a); *Young Offenders Act 1994* (WA) s 46(1)(a); *Criminal Law (Sentencing) Act 1988* (SA) s 3A(1).

23 *Children (Criminal Proceedings) Act 1987* (NSW) s 6; *Children and Young Persons Act 1989* (Vic) s 139; *Children, Youth and Families Act 2005* (Vic) s 362; *Juvenile Justice Act 1992* (Qld) s 150, sch 1; *Young Offenders Act 1994* (WA) ss 7, 46; *Young Offenders Act 1993* (SA) s 3; *Youth Justice Act 1997* (Tas) s 5; *Children and Young People Act 1999* (ACT) ss 12–14, 68; *Youth Justice Act 2005* (NT) s 4.

opportunity to develop in socially responsible ways; and a child's education, training or employment should not be interrupted where possible.

27.32 International instruments also set out a number of principles that are applicable when sentencing a young person. These include the following:

- the best interests of the child are a primary consideration;
- detention should be the last resort and should be imposed only for the shortest appropriate time;
- a range of sentencing options should be available in order to prevent institutionalisation;
- diversionary measures should be used wherever appropriate and desirable, so that juveniles are not removed from parental supervision unnecessarily;
- proceedings should be conducted in a way that facilitates the child's participation;
- a child should be treated in a manner that takes into account his or her age and the desirability of reintegration into society;
- the child's dignity and physical and mental integrity should be respected;
- delay should be avoided in the proceedings and the sentence;
- the sentence must be proportionate to the circumstances of the child and of the offence;
- the sentence must not be discriminatory or arbitrary in effect; and
- the child must have a right of appeal against the sentence.<sup>24</sup>

27.33 One way to improve consistency in the sentencing of young federal offenders is for federal sentencing legislation to provide a comprehensive list of sentencing

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<sup>24</sup> *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) arts 2, 3(1), 12, 37, 40; *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) rr 5, 11, 14.2, 17.1, 18.1, 18.2, 19, 20; *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, UN Doc A/RES/45/113 (1990) rr 1, 2; *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) art 14.

principles to be applied when sentencing young federal offenders. Alternatively, federal sentencing legislation could supplement the principles applied in the states and territories with an express statement of the *fundamental* principles that should be applied in the sentencing of young federal offenders.

27.34 Two fundamental principles underpin the international standards for dealing with young offenders.<sup>25</sup> Article 3(1) of CROC states that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.<sup>26</sup>

27.35 Article 37(b) of CROC provides that:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.<sup>27</sup>

27.36 These principles are not adequately expressed in all state and territory legislation.<sup>28</sup> Therefore in Discussion Paper 70 (DP 70), the ALRC proposed that these two principles be expressly stated in federal sentencing legislation. HREOC supported this proposal.<sup>29</sup> However, others expressed the view that the ‘best interests’ principle in art 3(1) is more appropriate in the contexts of welfare and family law than in criminal law.<sup>30</sup> Some stakeholders observed that, in the criminal context, the ‘best interests’ principle needs to be balanced against the interests of the community.<sup>31</sup>

### ***ALRC’s views***

27.37 If federal sentencing legislation were to provide a comprehensive list of principles in relation to the sentencing of young federal offenders, state and territory judicial officers would be required to apply a different set of sentencing principles to those applicable to young state or territory offenders. Given the relatively small number of matters involving young federal offenders, and the fact that well-developed

<sup>25</sup> Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), [27.35].

<sup>26</sup> *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 3(1).

<sup>27</sup> *Ibid* art 37(b). See also *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) rr 17.1(b), 19; *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, UN Doc A/RES/45/113 (1990) rr 1, 2; United Nations Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268 (2005), [74(b)].

<sup>28</sup> Only the ACT legislation sets out the ‘best interests’ principle: *Children and Young People Act 1999* (ACT) s 12(1)(a). The principle that detention should be used only as a measure of last resort and for the shortest appropriate period of time is not provided for in New South Wales, Victoria, South Australia or the Northern Territory. However, the principle is reflected in the *Youth Justice Act 2005* (NT) s 4(c).

<sup>29</sup> Human Rights and Equal Opportunity Commission, *Submission SFO 62*, 22 December 2005.

<sup>30</sup> New South Wales Legal Aid Commission, *Submission SFO 75*, 10 February 2006; Magistrate P Power, *Consultation*, Melbourne, 24 February 2006.

<sup>31</sup> National Children’s and Youth Law Centre, *Consultation*, Sydney, 28 February 2006; Magistrate P Power, *Consultation*, Melbourne, 24 February 2006.

juvenile sentencing principles already exist in the states and territories, it is preferable to rely on the existing state and territory laws. However, there is a strong case for ensuring that these laws meet certain minimum standards, which should be set out in federal sentencing legislation.

27.38 Most states and territories (other than the ACT)<sup>32</sup> do not provide for the best interests of the child to be a primary consideration in sentencing a young person. Given its importance as a foundation principle of international juvenile justice, it should be expressly stated in federal sentencing legislation. To address the concern that the term ‘the best interests of the child’ evokes the language of welfare and family law legislation, alternative wordings can be used to convey a similar principle. The ALRC is of the view that the term ‘the well-being of the young person’, which is often referred to in internationally accepted principles in relation to juvenile justice,<sup>33</sup> is appropriate for that purpose.

27.39 However, in the context of juvenile justice, the interests of a child need to be balanced with the interests of the community and any victims. Accordingly, the ALRC is of the view that federal sentencing legislation should make it clear that the well-being of the young person shall be *a* guiding consideration rather than *the* guiding consideration in his or her sentencing.

27.40 In addition, the principle that detention should be used as a measure of last resort and for the shortest appropriate period of time is not adequately covered in all state and territory legislation.<sup>34</sup> The ALRC recommends that this principle should also be expressly stated in federal sentencing legislation.

### **Circumstances in which a young person can be dealt with in an adult court**

27.41 The function of the juvenile justice system is to deal with young people in accordance with principles and procedures that are specifically applicable to young people. This policy is reflected in international instruments, which require children to

32 *Children and Young People Act 1999* (ACT) s 12(1)(a). However, ss 7 and 10 of the *Children and Young People Amendment Act 2006* (ACT) will amend the *Children and Young People Act 1999* (ACT) to provide that although the best interests of the young offender must be *a* consideration when making a decision in relation to a young offender, they do not have to be the *paramount* consideration.

33 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 40(4); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) rr 1.1, 1.3, 5.1, 17.1(d); *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, UN Doc A/RES/45/113 (1990) r 1.

34 This principle is not provided for in New South Wales, Victoria, South Australia or the Northern Territory but it is reflected in the *Youth Justice Act 2005* (NT) s 4(c).

be dealt with taking into account their age,<sup>35</sup> and which encourage the establishment of laws and procedures specifically applicable to children.<sup>36</sup>

27.42 However, not all young people accused or convicted of a federal offence are currently dealt with or sentenced by a children's court in accordance with state or territory juvenile justice legislation. There are three circumstances in which a young person may be dealt with or sentenced as an adult.

27.43 First, all states and territories have provisions allowing a young person to elect to have certain indictable offences<sup>37</sup> that are triable summarily heard by a jury.<sup>38</sup> Since generally there is no provision for jury trials in children's courts,<sup>39</sup> where a young person elects to proceed in this manner, the trial must generally be heard in an adult court. However, a young person's right of election is subject to the requirement in s 80 of the *Australian Constitution* that any trial on indictment of any federal offence must be by jury.

27.44 Secondly, the children's court in some jurisdictions may order that a young person who is charged jointly with an adult be tried in an adult court.<sup>40</sup> In most cases there is an option to try the young person separately, and the CDPP prosecution policy requires prosecutors to take this course wherever possible.<sup>41</sup>

27.45 Thirdly, most states and territories have special provisions for dealing with young people who have been charged with serious offences. In some cases, these charges must be heard by an adult court, and the adult court has the power to sentence the young person as an adult, applying sentencing principles and sentencing options applicable to adults.<sup>42</sup> In other cases, such charges are dealt with by the children's court, which applies a different range of sentencing options.<sup>43</sup>

35 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 40(1); *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) art 14(4).

36 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 40(3).

37 An 'indictable offence' is one punishable by imprisonment for a period exceeding 12 months, unless the contrary intention appears: *Crimes Act 1914* (Cth) s 4G.

38 *Children (Criminal Proceedings) Act 1987* (NSW) s 31(2); *Children and Young Persons Act 1989* (Vic) s 134; *Children, Youth and Families Act 2005* (Vic) s 356(3)(a); *Juvenile Justice Act 1992* (Qld) ss 83, 86, 88, 93; *Children's Court of Western Australia Act 1988* (WA) s 19B(1); *Young Offenders Act 1993* (SA) s 17(3)(b); *Youth Justice Act 1997* (Tas) s 161(2), (3); *Children and Young People Act 1999* (ACT) ss 90, 91; *Juvenile Justice Act 1983* (NT) s 37; *Youth Justice Act 2005* (NT) s 54(2).

39 However, in Queensland a child may be tried for an indictable offence before the Children's Court judge sitting with a jury: *Juvenile Justice Act 1992* (Qld) s 98.

40 See, eg, *Children's Court of Western Australia Act 1988* (WA) s 19C; *Youth Justice Act 1997* (Tas) s 28(1).

41 See Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (1998) <<http://www.cdpp.gov.au/Prosecutions/Policy/Default.aspx>> at 6 October 2004, [2.24], which highlights the need for restraint in laying conspiracy charges.

42 See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) s 28(1)(a) (serious children's indictable offence); *Children and Young Persons Act 1989* (Vic) s 16(1) and *Children, Youth and Families Act 2005*



27.46 Each state and territory has a different list of serious offences that attract adult jurisdiction or special treatment. The list of serious offences may be nominated by type (for example, homicide, arson causing death, or culpable driving causing death),<sup>44</sup> or by the punishment available.<sup>45</sup> In some jurisdictions, a young person may be committed to trial in an adult court for certain indictable offences where the children's court exercises its discretion not to proceed summarily.<sup>46</sup> In South Australia and the ACT, even where the children's court has heard and determined the proceedings, there is provision to send the case to an adult court for determination of sentence.<sup>47</sup>

27.47 Given the potential for differential treatment of young people charged with serious federal offences, an issue arises as to whether federal legislation should provide a definition of 'serious federal offence' to ensure uniformity of treatment. If so, any definition should have regard to the jurisdictional limits of each state and territory children's court. When investing state courts with federal jurisdiction, the Australian Parliament may by express declaration 'extend or limit the jurisdiction of a State court in respect of persons, locality, amount or otherwise, as it may think proper'.<sup>48</sup> However, in the absence of an express declaration, there is a long-standing policy that the jurisdictional limits prescribed by state and territory laws are to be respected.<sup>49</sup>

### ***ALRC's views***

27.48 As a general rule, a young person should be dealt with and sentenced as a young person.<sup>50</sup> However, it may be appropriate for a young person to be dealt with in an adult court in limited circumstances. This is reflected in the three exceptions adopted in state and territory law, namely, a young person's election, joint trials with an adult, and serious offences.

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(Vic) s 516(1) (murder, attempted murder, manslaughter, arson causing death and culpable driving causing death).

43 See, eg, *Children and Young People Act 1999* (ACT) s 92.

44 See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) s 3(1) (definition of 'serious children's indictable offence' includes homicide); *Children and Young Persons Act 1989* (Vic) s 16(1) and *Children, Youth and Families Act 2005* (Vic) s 516(1) (murder, attempted murder, manslaughter, arson causing death and culpable driving causing death); *Young Offenders Act 1993* (SA) s 17(3)(a) (homicide, or an offence consisting of an attempt to commit, or assault with intent to commit homicide).

45 See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) s 3(1) (definition of 'serious children's indictable offence' includes an offence with a maximum sentence of life or 25 years or more imprisonment); *Juvenile Justice Act 1992* (Qld) s 8 ('serious offence' means an offence with a maximum sentence of life or 14 years or more imprisonment).

46 See, eg, *Children and Young Persons Act 1989* (Vic) s 134(3)(b); *Children, Youth and Families Act 2005* (Vic) s 356(3)(b); *Young Offenders Act 1993* (SA) s 17(3).

47 *Young Offenders Act 1993* (SA) s 17(3); *Children and Young People Act 1999* (ACT) s 92.

48 *Peacock v Newtown Marrickville & General Co-operative Building Society (No 4) Ltd* (1943) 67 CLR 25, 39.

49 L Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (3rd ed, 2002), 213.

50 This was supported by HREOC: Human Rights and Equal Opportunity Commission, *Submission SFO 62*, 22 December 2005.

27.49 The ALRC is of the view that federal sentencing legislation should contain a definition of ‘serious federal offence’ to improve consistency of treatment of young federal offenders across states and territories. The definition should be formulated bearing in mind the jurisdiction of the children’s court in each state and territory. In practice, this means that the definition of ‘serious federal offence’ should be set at the lowest level of severity of the equivalently defined terms in state and territory legislation. The preferred definition of ‘serious federal offence’ should thus be any offence punishable by 14 years or more imprisonment. This is compatible with the children’s court jurisdiction in every state and territory, and would ensure that all cases involving non-serious federal offences are heard in a children’s court unless they fall within the other two exceptions. Cases involving serious federal offences could then be heard and determined in either a children’s court or an adult court in accordance with the laws of the relevant state or territory.

27.50 Regardless of whether a matter is heard in an adult court or a children’s court, the court should sentence the offender in accordance with the purposes, principles and factors stated in the relevant juvenile justice legislation, together with the two additional principles applicable to the sentencing of young federal offenders recommended above.<sup>51</sup> International instruments, including CROC, encourage states to establish laws and institutions that are specifically applicable to children.<sup>52</sup> There is no reason in principle why a young person who is tried in an adult court should be denied the benefit of sentencing principles that are applicable to young people. Those principles have sufficient breadth and flexibility to recognise the seriousness of any offence.

### Legal representation

27.51 Currently, there is disparity in state and territory provisions relating to the legal representation of young people in criminal proceedings. In some jurisdictions, the court may or must make provision for the legal representation of a young person in certain circumstances.<sup>53</sup> Some state juvenile justice legislation requires a child to be represented in certain criminal proceedings unless he or she has had a reasonable opportunity to obtain legal representation and did not do so.<sup>54</sup> Other state legislation provides that young people must be informed of their right to obtain legal advice.<sup>55</sup>

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51 This was supported by HREOC: Ibid.

52 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 40(3); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 2.3.

53 *Children and Young People Act 1999* (ACT) s 24; *Juvenile Justice Act 1983* (NT) s 40. Compare *Youth Justice Act 2005* (NT) s 62.

54 *Children and Young Persons Act 1989* (Vic) ss 20, 21(2); *Children, Youth and Families Act 2005* (Vic) ss 524, 525(2); *Juvenile Justice Act 1992* (Qld) s 79.

55 *Young Offenders Act 1997* (NSW) s 7(b); *Young Offenders Act 1994* (WA) s 44(2)(b); *Young Offenders Act 1993* (SA) s 30(2)(b); *Youth Justice Act 1997* (Tas) s 29(1)(a)(ii).

27.52 International human rights principles require that children be guaranteed the right to legal representation at all stages of criminal proceedings, including while under arrest or awaiting trial, in the preparation and presentation of their defence, at the determination of the charge, and when they are deprived of their liberty.<sup>56</sup>

27.53 In the joint inquiry into children in the legal process, the ALRC and HREOC stated that one way of improving children's comprehension of, and participation in, criminal proceedings is to ensure that there is appropriate and early legal representation. It was also stated that legal representation is important in ensuring young offenders receive proper advice about sentencing.<sup>57</sup>

27.54 A lack of legal representation may limit a young person's understanding of, and ability to engage effectively in, the legal process. Research shows that young people who become involved in the juvenile justice system are more likely than non-offending young people to have poor oral language abilities, including the ability to express themselves verbally, and the ability to process and understand what others say.<sup>58</sup> The use of legal language in court is likely to further limit a young person's understanding of legal proceedings.<sup>59</sup>

27.55 In Chapter 13 the ALRC deals with legal representation of adult federal offenders. Where an adult federal offender is not legally represented in a sentencing proceeding, the ALRC recommends that the court should generally adjourn the proceeding to allow the offender a reasonable opportunity to obtain representation. There are three exceptions to that requirement, namely, where: (a) the offender has refused or failed to exercise the right to legal representation in circumstances where the offender fully understands the right and the consequences of not exercising it; (b) the court does not intend to impose, and does not impose, a sentence that would deprive an offender of his or her liberty or place the offender in jeopardy of being deprived of his or her liberty; or (c) the court is of the view that a fair sentencing hearing can be conducted without the offender being legally represented.<sup>60</sup> One option for reform is to extend this recommendation, with its three exceptions, to young federal offenders.

56 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) ¶ 7.1, 15.1; *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, UN Doc A/RES/45/113 (1990) ¶ 18(a); *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) arts 37(d), 40(2)(b)(ii), (iii).

57 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [18.182], [19.87].

58 P Snow and M Powell, 'Interviewing Juvenile Offenders: The Importance of Oral Language Competence' (2004) 16(2) *Current Issues in Criminal Justice* 220.

59 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [18.180], [19.85].

60 Rec 13–2.

27.56 An alternative option is to apply the recommended adult provision concerning legal representation, without the three exceptions, to young federal offenders. Because young people are more vulnerable than adults and are less likely to be able to protect their own interests without legal representation, there is a case for providing a young person charged with a federal offence with stronger procedural safeguards than those applicable to adults. Victoria Legal Aid submitted that legal representation should be mandatory for young offenders because children may not possess the requisite knowledge or maturity to assess whether they require legal representation and are susceptible to inappropriate influences from others as to whether they obtain legal representation.<sup>61</sup>

27.57 A third option is to apply the recommended adult provision concerning legal representation, with some but not all of the three exceptions, to young federal offenders. In DP 70 the ALRC proposed that only the first exception should apply to young federal offenders, namely, young federal offenders should have the opportunity to be legally represented in all sentencing proceedings unless they have refused or failed to exercise that right in circumstances where they fully understand the right and the consequences of not exercising it.<sup>62</sup> This was supported by a number of stakeholders.<sup>63</sup>

#### ***ALRC's views***

27.58 A young federal offender should generally have the opportunity for legal representation in all sentencing proceedings because this is necessary to protect the rights and interests of the young person. It would also aid their understanding of the sentencing process, including the implications of the sentence order, the consequences of non-compliance with the order, and their right of appeal. In addition, it would ensure that young federal offenders have the same entitlement to legal representation regardless of the state or territory in which they are sentenced, and would promote compliance with Australia's international obligations.

27.59 The ALRC is of the view that a young federal offender should have the opportunity to be legally represented whether or not the court intends to impose a sentence that would deprive the offender of his or her liberty. Given that most sentencing options will have a significant impact on the life of a young federal offender, the availability of legal representation should not depend on whether the court intends to impose a sentence that would deprive the offender of his or her liberty.

27.60 However, there is no reason in principle why a court must adjourn the sentencing proceedings where the young person has refused or failed to exercise the right to legal representation in circumstances where he or she fully understands the

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61 Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

62 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 27-1(e).

63 Human Rights and Equal Opportunity Commission, *Submission SFO 62*, 22 December 2005; National Children's and Youth Law Centre, *Consultation*, Sydney, 28 February 2006; Magistrate P Power, *Consultation*, Melbourne, 24 February 2006.

right and the consequences of not exercising it. A court should be able to proceed without adjournment in these circumstances.

27.61 There will be circumstances in which the absence of legal representation for a young person is unlikely to render the sentencing process inherently unfair, for example, where the court dismisses the charge without conviction or imposes a small fine for a minor offence. Therefore the court should also be able to proceed without adjournment where it is of the view that a fair sentencing hearing can be conducted without the young person being legally represented.

### Restrictions on publication

27.62 Each state and territory, with the exception of the Northern Territory, has a general prohibition on reporting proceedings that identify a young person.<sup>64</sup> The extent of the prohibition differs—for example, it may apply only in relation to proceedings in a children’s court, and courts may allow publication in certain circumstances.<sup>65</sup>

27.63 Under CROC, the privacy of every child alleged to have committed a criminal offence must be respected at all stages of the proceedings.<sup>66</sup> This avoids causing harm to the young person ‘by undue publicity or by the process of labelling’.<sup>67</sup> In principle, no information that may lead to the identification of a young offender should be published.<sup>68</sup>

27.64 The public identification of young people as federal offenders is not consistent with the rehabilitative aims of juvenile justice and may not meet Australia’s international obligations. In addition, the different state and territory provisions mean that the identity of young federal offenders may be protected in one state or territory but not in another.

27.65 In DP 70 the ALRC proposed that federal sentencing legislation should prohibit the publication of a report of proceedings involving a young person who is charged

64 Northern Territory legislation gives the court a discretion to order that the proceedings are not to be publicised except by authorised personnel, but it does not protect the identity of a young person if the publication is by the authorised personnel: *Juvenile Justice Act 1983* (NT) s 23. A similar provision is contained in s 50 of the *Youth Justice Act 2005* (NT).

65 *Children (Criminal Proceedings) Act 1987* (NSW) s 11; *Children and Young Persons Act 1989* (Vic) s 26; *Children, Youth and Families Act 2005* (Vic) s 534; *Juvenile Justice Act 1992* (Qld) ss 234, 301; *Children’s Court of Western Australia Act 1988* (WA) ss 35, 36A; *Young Offenders Act 1993* (SA) ss 13, 63C; *Youth Justice Act 1997* (Tas) s 31; *Children and Young People Act 1999* (ACT) s 61A.

66 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 40(2)(b)(vii). See also *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 8.1.

67 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 8.1.

68 *Ibid* r 8.2.

with, found guilty of, or has pleaded guilty to, a federal offence where the details would lead to identification of the young person.<sup>69</sup> A number of stakeholders expressed support for this proposal.<sup>70</sup> However, one stakeholder submitted that the prohibition should be framed in wider terms to also prohibit publication where the details *could* lead to identification of the young person.<sup>71</sup>

27.66 In the interests of protecting the privacy of young people, the ALRC is of the view that the prohibition should be wide enough to cover a report of proceedings that identifies *or is likely to lead to identification of* the young person.

### Severity of punishment

27.67 Some state and territory juvenile justice legislation provides that the penalty imposed on a young offender should be no greater than that imposed on an adult who commits an offence of the same kind.<sup>72</sup>

27.68 Although international instruments do not expressly state that a penalty imposed on a child should be no greater than that which would have been imposed if the offence had been committed by an adult, such a principle is consistent with a number of accepted principles of juvenile justice. These include: (a) a child or young person should be treated in a manner that takes into account his or her age; (b) the disposition of a young offender should always be proportionate to the circumstances of the young person and the offence; (c) restrictions on a young person's liberty shall be imposed only after careful consideration and shall be limited to the shortest appropriate period; and (d) the best interests of the child should be a primary consideration.<sup>73</sup>

27.69 In particular, the commentary to r 17.1 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)* states that whereas considerations of just desert and retribution might have merit in adult cases and possibly in cases of severe offences committed by young people, a strictly punitive approach in relation to the disposition of young offenders is not appropriate. In the case

69 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 27–1(f).

70 Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; Human Rights and Equal Opportunity Commission, *Submission SFO 62*, 22 December 2005; National Children's and Youth Law Centre, *Consultation*, Sydney, 28 February 2006.

71 Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

72 *Children (Criminal Proceedings) Act 1987* (NSW) s 6(e); *Young Offenders Act 1994* (WA) s 7(c); *Youth Justice Act 1997* (Tas) s 5(1)(b); *Children and Young People Act 1999* (ACT) ss 99(1)(c), 123(1)(b).

73 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) arts 3(1), 37(b), 40; *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) rr 5.1, 17.1, 19; *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, UN Doc A/RES/45/113 (1990) rr 1, 2; *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) art 14(4).

of young offenders, 'such considerations should always be outweighed by the interest of safeguarding the well-being and the future of the young person'.<sup>74</sup>

27.70 In DP 70 the ALRC expressed the view that treating young federal offenders more harshly than adult offenders for like offences is not consistent with the rehabilitative aims of juvenile justice.<sup>75</sup> The ALRC proposed that the sentence imposed on a young federal offender should be no more severe than the sentence that would have been imposed if he or she were an adult.<sup>76</sup> There was support for this proposal.<sup>77</sup> However, some stakeholders expressed the view that in some circumstances the rehabilitative focus of the juvenile justice system could result in the imposition of a more severe sentence on a young person than an adult if the sentence was in the best interests of the young person.<sup>78</sup> For example, it might be appropriate to impose a supervisory order on a young person for rehabilitation purposes in circumstances where the offender would have received a fine if he or she were an adult.<sup>79</sup> One stakeholder expressed the view that the emphasis should be on giving the courts sufficient flexibility to deliver the most appropriate outcome for the young person.<sup>80</sup>

27.71 The ALRC acknowledges that in some circumstances the rehabilitative aims of juvenile justice may require a more intrusive sentencing option than would have been imposed if the offender were an adult. To ensure that courts have sufficient flexibility to impose the most appropriate sentence on a young federal offender, the ALRC does not recommend that the sentence imposed on a young federal offender should be no more severe than the sentence that would have been imposed if he or she were an adult.

### Diversiónary options

27.72 International principles provide that young offenders should be dealt with without resorting to formal judicial proceedings whenever appropriate and desirable,<sup>81</sup> and that the police, the prosecution and other agencies should be empowered to exercise discretion in diverting young people from criminal justice processing.<sup>82</sup>

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74 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985), commentary to r 17.1.

75 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), [27.66].

76 *Ibid*, Proposal 27–1(g).

77 Human Rights and Equal Opportunity Commission, *Submission SFO 62*, 22 December 2005.

78 National Children's and Youth Law Centre, *Consultation*, Sydney, 28 February 2006; Magistrate P Power, *Consultation*, Melbourne, 24 February 2006.

79 Magistrate P Power, *Consultation*, Melbourne, 24 February 2006.

80 National Children's and Youth Law Centre, *Consultation*, Sydney, 28 February 2006.

81 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 40(3)(b); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985), r 11.1.

82 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 11.2.

27.73 There are a number of diversionary schemes for young offenders in the states and territories. These schemes usually involve a two-tiered system of diversion—cautioning and conferencing. There are two levels of cautions in Australia—informal cautions (which are called ‘warnings’ in some states and territories)<sup>83</sup> and formal cautions.<sup>84</sup> Formal cautions are available in all states and territories, while informal cautions are available everywhere except the ACT.

27.74 The process of conferencing involves a meeting between a young person (who has admitted to the offence), that person’s family or supporters, the victim, the police, and the conference convenor. The purpose of the meeting is to discuss the offence, its impact, and the outcome (in the form of an undertaking by the offender).<sup>85</sup> There are differences between jurisdictions in the legislative framework, the kinds of offences that may be referred to conferences, the extent of the conferencing process, the range of conference outcomes, and the organisational placement or administration of the conferencing process.<sup>86</sup>

27.75 It has been said that diversion of young offenders from the criminal justice system is ‘the optimal response to the problem of juvenile crime’.<sup>87</sup> The merits of diversion of young offenders include: avoiding the negative effects of the formal juvenile justice process, such as the stigma of a conviction and sentence;<sup>88</sup> avoiding the risk of trapping young people with a previously good record in a pattern of offending behaviour; accommodating the vulnerabilities of young offenders and lessening the punitive nature of the criminal justice system; allowing the identification of family, behavioural and health problems that may have contributed to the offending behaviour; helping to address the causes of the offending behaviour as well as its consequences; and potential saving of law enforcement resources.<sup>89</sup> There is also some evidence that diversion of young people from the criminal justice system may result in reduction in re-offending and greater satisfaction with the outcomes among victims, offenders and their supporters.<sup>90</sup>

83 *Young Offenders Act 1997* (NSW) pt 3; *Children and Young People Act 1999* (ACT) s 81(3)(k); *Police Administration Act* (NT) s 120H. A similar provision is contained in the s 39 of the *Youth Justice Act 2005* (NT).

84 K Polk and others, *Early Intervention: Diversion and Youth Conferencing* (2003) Australian Government, vii.

85 K Daly and H Hayes, *Restorative Justice and Conferencing in Australia—Trends and Issues in Crime and Criminal Justice No 186* (2001), 2.

86 C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia* (2002), 374.

87 M Findlay, S Odgers and S Yeo, *Australian Criminal Justice* (3rd ed, 2005), 321.

88 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 40.3(b). See also *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 11.1 and commentary.

89 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [18.36]–[18.37].

90 See, eg, G Luke and B Lind, *Reducing Juvenile Crime: Conferencing versus Court—Crime and Justice Bulletin No 69* (2002) NSW Bureau of Crime Statistics and Research; L Trimboli, *An Evaluation of the NSW Youth Justice Conferencing Scheme*, New South Wales Bureau of Crime Statistics and Research; L Sherman, H Strang and D Woods, *Recidivism Patterns in the Canberra Reintegrative Shaming*



27.76 It is unclear whether some of the state and territory diversionary options are available to young federal offenders. This issue was raised in the ALRC and HREOC inquiry into children in the legal process (ALRC 84), and again in consultations in this Inquiry.<sup>91</sup> Section 20C of the *Crimes Act* refers to a child or young person being ‘tried, punished or otherwise dealt with’, which might be broad enough to include pre-court diversionary options. On the other hand, s 20C applies only to a child or young person who has been ‘charged with or convicted of a federal offence’, which may be interpreted as excluding a young person who has been accused of, but not yet charged with, a federal offence.

27.77 In addition, in some jurisdictions the court has the power to refer a young person to a diversionary process instead of dealing with the charge in court.<sup>92</sup> This creates difficulties in federal criminal matters because of the constitutional requirement that federal judicial power cannot be exercised by a non-judicial body.<sup>93</sup> This constitutional problem does not arise if the court refers the young person to a diversionary process, but final determination of the matter is left in the hands of the court.

#### **ALRC’s views**

27.78 The ALRC is of the view that state and territory diversionary options should be available to young federal offenders.<sup>94</sup> This is consistent with the internationally accepted principle that diversion of young offenders should be considered wherever appropriate and desirable.<sup>95</sup>

27.79 In order to avoid the constitutional difficulty concerning pre-court diversion, federal sentencing legislation should provide that, where a court refers a young person who is accused of, has pleaded guilty to, or has been convicted of a federal offence to a state or territory diversionary process, the outcome of the process must be reported back to the court and should be taken into consideration in finalising the matter.<sup>96</sup>

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*Experiments (RISE)* (2000), 12; H Strang, *Repair or Revenge: Victims and Restorative Justice* (2002), chs 5–7.

91 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [18.56]–[18.58]; Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005.

92 *Young Offenders Act 1994* (WA) s 28; *Juvenile Justice Act 1992* (Qld) ss 33(b), 161; *Youth Justice Act 1997* (Tas) s 37(1).

93 *Australian Constitution* s 71.

94 This view was supported by HREOC: Human Rights and Equal Opportunity Commission, *Submission SFO 62*, 22 December 2005.

95 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 40(3)(b); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 11.1.

96 This was supported by HREOC: Human Rights and Equal Opportunity Commission, *Submission SFO 62*, 22 December 2005.

### Transfer to adult prison

27.80 State and territory legislation differs on the age at which a person sentenced to detention in a juvenile facility can or must be transferred to an adult prison. Some states allow transfer of a young person to an adult prison from age 16 for behavioural reasons.<sup>97</sup> Queensland also allows the transfer of 17 year olds to adult prisons in particular circumstances, provided the detainee has previously been held in custody in prison or has been sentenced to imprisonment.<sup>98</sup> The Northern Territory requires the transfer of detainees to an adult prison at age 18.<sup>99</sup> There is no specified age for transfer in Tasmania or the ACT. However, in many cases a young person sentenced in the ACT to custodial detention will serve the period of detention in another state and is subject to the rules governing detention in that state.

27.81 Under art 37(c) of CROC, ‘every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so’.<sup>100</sup> Australia has entered a reservation to art 37(c). ALRC 84 observed that Australia’s reservation was based on real difficulties—having regard to Australia’s physical size and population distribution—in ensuring separation of young offenders and adult offenders, while enabling young offenders to maintain contact with their families.<sup>101</sup>

27.82 It has been said that the transfer of a young person serving a sentence of detention to an adult prison at the age of 18 is in accordance with CROC because it ensures the separation of detainees who are now adults from younger detainees who are not.<sup>102</sup> On the other hand, there is an argument that where a person’s conduct in a juvenile detention facility poses a significant risk to the safety and welfare of other detainees or staff of the facility, there should be a mechanism for transfer to an adult prison even if the person is not yet 18 years old.

27.83 ALRC 84 expressed serious concerns about the placement of 16 and 17 year olds in adult prisons. It was said that placing young offenders in an adult prison does

97 *Children (Detention Centres) Act 1987* (NSW) s 28B; *Children and Young Persons Act 1989* (Vic) s 240; *Children, Youth and Families Act 2005* (Vic) s 467; *Young Offenders Act 1994* (WA) s 178; *Young Offenders Act 1993* (SA) s 63(4).

98 *Juvenile Justice Act 1992* (Qld) s 270.

99 *Juvenile Justice Act 1983* (NT) s 53(6). The *Youth Justice Act 2005* (NT) s 164(1) preserves this provision.

100 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 37(c). Article 10 of the *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) has a similar requirement in relation to both accused and convicted young offenders. See also *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) rr 13.4, 26.3; *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, UN Doc A/RES/45/113 (1990) r 29; *United Nations Standard Minimum Rules for the Treatment of Prisoners*, UN Doc A/CONF/6/1 (1955) r 8(d).

101 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [20.102].

102 J Sanders, ‘Human Rights in Juvenile Justice’ (Paper presented at NSW Young Lawyers Continuing Legal Education Seminar, Sydney, 25 October 2004), 5.

little to meet the rehabilitative aims of juvenile justice, especially as contact with adult offenders might further criminalise young offenders. ALRC 84 also pointed out that the risk of criminalisation might be further increased where there were inadequate facilities and programs to deal with young people.<sup>103</sup>

27.84 As noted in ALRC 84, there are no agreed national standards for the observance of natural justice in relation to the decision to transfer young offenders to adult prisons.<sup>104</sup> The joint inquiry recommended that no child under the age of 18 be placed in an adult prison unless a court decides that it is in the best interests of the child to do so, and that state and territory parliaments should amend their laws accordingly.<sup>105</sup> This recommendation has not been implemented.

27.85 In DP 70 the ALRC proposed that, consistently with art 37(c) of CROC, federal legislation should provide that a young federal offender sentenced to detention in a state or territory juvenile facility should not be transferred to an adult prison until the age of 18, except where a court determines that it is in the best interests of the offender to do so.<sup>106</sup> HREOC expressed support for this proposal.<sup>107</sup> However, one stakeholder expressed the view that it would be discriminatory and cause difficulties in the management of juvenile detention facilities if the small number of young federal offenders were treated differently from young state offenders. The view was also expressed that to detain a young federal offender who is unmanageable or dangerous in a juvenile facility could affect the interests and rehabilitation of the other young offenders in the facility.

27.86 In deciding whether a young federal offender should be transferred to an adult prison, the interests of both the young federal offender and the other young people in a particular juvenile facility should be taken into account. The ALRC is of the view that it may be necessary to transfer a young federal offender to an adult prison where it is in the best interests of the offender to do so or where there are other exceptional circumstances. Exceptional circumstances may include, for example, where the young federal offender jeopardises the safety of other young people in the juvenile facility. As an additional safeguard, the decision to transfer should be made by a court. Where a young person is transferred to an adult prison, he or she should be kept separate from adult prisoners in accordance with art 37(c) of CROC.

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103 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [20.111]–[20.112].

104 *Ibid.*, [20.113].

105 *Ibid.*, Rec 273.

106 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 27–1(i).

107 Human Rights and Equal Opportunity Commission, *Submission SFO 62*, 22 December 2005.

### Effect of attaining 18 years of age

27.87 There are significant differences among the states and territories in defining the age and circumstances in which a person, despite having been a ‘child’ at the time of the offence, will be treated as an adult for the purposes of trial or sentencing. In some jurisdictions this age is 18 years;<sup>108</sup> in Victoria it is 19 years;<sup>109</sup> and in New South Wales it is 21 years for an offence that is not a serious children’s indictable offence.<sup>110</sup> Depending on the jurisdiction, reaching the relevant age means the offender is either dealt with in the children’s court but sentenced as an adult,<sup>111</sup> or dealt with and sentenced in an adult court as an adult.<sup>112</sup> The event that triggers this change also varies, but it is usually the age of the person at the time of being charged with an offence,<sup>113</sup> at the time of the first court appearance,<sup>114</sup> or at the time of commencement of proceedings.<sup>115</sup>

27.88 There is no specified age of this kind in South Australia or Tasmania, so that a person who was a child at the time of the offence will be dealt with and sentenced as a child, regardless of his or her age when charged, brought before the court, or sentenced. However, in Tasmania, where a person was a youth at the time of the offence but is aged 19 years or more at the time of commencement of proceedings, any term of detention imposed by the court is to be served as a term of imprisonment in an adult prison.<sup>116</sup>

27.89 To ensure that a young person who has reached the age of 18 years at the time of sentencing is not sentenced to detention in a juvenile detention facility, one option is to provide that a young person who has reached a certain age at the time of sentencing is to be dealt with as an adult. The age that currently applies in most states and territories is 18 years.

108 *Children (Criminal Proceedings) Act 1987* (NSW) s 19(3) (serious children’s indictable offence); *Juvenile Justice Act 1992* (Qld) s 140; *Young Offenders Act 1994* (WA) s 50B; *Children and Young People Act 1999* (ACT) s 69; *Juvenile Justice Act 1983* (NT) ss 3(1) (definition of ‘juvenile’), 19.

109 *Children and Young Persons Act 1989* (Vic) s 3(1) and *Children, Youth and Families Act 2005* (Vic) s 3(1) (definition of ‘child’).

110 *Children (Criminal Proceedings) Act 1987* (NSW) s 28.

111 *Juvenile Justice Act 1992* (Qld) s 140; *Young Offenders Act 1994* (WA) s 50B; *Children and Young People Act 1999* (ACT) s 69.

112 *Children (Criminal Proceedings) Act 1987* (NSW) ss 16–19; *Children and Young Persons Act 1989* (Vic) ss 3 (definition of ‘child’), 16; *Children, Youth and Families Act 2005* (Vic) ss 3(1), 516; *Juvenile Justice Act 1983* (NT) ss 3(1) (definition of ‘juvenile’), 19. Compare *Youth Justice Act 2005* (NT) s 6(2).

113 *Children (Criminal Proceedings) Act 1987* (NSW) ss 16(c), 28(1)(d).

114 *Children and Young People Act 1999* (ACT) s 69.

115 *Children and Young Persons Act 1989* (Vic) s 3(1) (definition of ‘child’); *Children, Youth and Families Act 2005* (Vic) s 3(1) (definition of ‘child’); *Juvenile Justice Act 1992* (Qld) s 140. In Western Australia, a young person who is 18 years or older at the time of sentencing is to be sentenced as an adult: *Young Offenders Act 1994* (WA) s 50B. In the Northern Territory, the event that triggers this change may be the age of the person at the time of being charged or at the time of court appearance: *Juvenile Justice Act 1983* (NT) ss 3(1) (definition of ‘juvenile’), 19; Northern Territory Magistrates Courts, *About the NT Courts & Tribunals* <[www.nt.gov.au/justice/ntmc/about.shtml](http://www.nt.gov.au/justice/ntmc/about.shtml)> at 30 October 2005.

116 *Youth Justice Act 1997* (Tas) s 103.

27.90 A second option is to provide that a young person who has reached the age of 18 at the time of sentencing should be dealt with and sentenced as a young person, but that any sentence of detention is to be served in an adult prison. In DP 70 the ALRC proposed this option.<sup>117</sup> HREOC supported this proposal.<sup>118</sup> However, a number of stakeholders opposed the proposal and favoured the courts retaining a discretion to sentence a young person who has reached the age of 18 years at the time of sentencing to serve the whole or part of the sentence in a juvenile detention facility.<sup>119</sup> It was submitted that this discretion enables a court to take into account the maturity of an individual offender and assess his or her degree of vulnerability in an adult prison.<sup>120</sup>

27.91 One stakeholder expressed the view that it is generally desirable to have young adults serving sentences in facilities other than prisons, provided there is separation of young people who are under 18 years of age and young adults aged 18 years or over within the facility in accordance with CROC.<sup>121</sup> Another stakeholder submitted that contamination of young people by adult offenders within the same facility can be avoided by separating inmates into different units, which is commonly done.<sup>122</sup>

#### ***ALRC's views***

27.92 A person who has committed a crime as a young person should generally be dealt with in accordance with juvenile justice principles and sentenced as a young person. The ALRC does not consider that a person who has committed a federal offence as a young person should be dealt with as an adult merely because they have reached the age of 18 years at the time of being charged or sentenced. As noted above, the age at which young offenders are treated as adults for the purposes of trial or sentencing varies across jurisdictions. Adopting 18 years as the age by which a young federal offender is to be sentenced as an adult would provide consistency, but it would also mean that young federal offenders would be dealt with as adults at a younger age than is currently the case in some jurisdictions.

27.93 However, in order to allow courts to take into account the offender's maturity and vulnerability in an adult prison, the ALRC does not recommend that a young person who has reached the age of 18 years at the time of sentencing must serve any sentence of detention as a sentence of imprisonment in an adult prison. Instead, courts should have a discretion to order that any sentence imposing a term of detention be served otherwise than in a juvenile facility. In addition, any young adults who are

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117 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 27–1(j).

118 Human Rights and Equal Opportunity Commission, *Submission SFO 62*, 22 December 2005.

119 Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; Judge J Goldring, *Submission SFO 54*, 10 December 2005; National Children's and Youth Law Centre, *Consultation*, Sydney, 28 February 2006.

120 Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

121 National Children's and Youth Law Centre, *Consultation*, Sydney, 28 February 2006.

122 Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

sentenced to a term of detention in a juvenile facility should be kept separately from people aged under 18 years within the facility.

**Recommendation 27–1** Young federal offenders should continue to be dealt with within the juvenile justice system of the relevant state or territory but federal sentencing legislation should establish minimum standards for the sentencing, administration and release of young federal offenders. These standards should include the following:

- (a) ‘young person’ should be defined as a person who is at least 10 years but not yet 18 years old at the time the offence was committed;
- (b) when determining the sentence of a young federal offender who is being sentenced as a young person, the court is to apply the purposes, principles and factors stated in the juvenile justice legislation of the relevant state or territory, together with the following principles, which should be set out in federal sentencing legislation:
  - (i) the well-being of the young person shall be a guiding consideration; and
  - (ii) detention should be used as a measure of last resort, and only for the shortest appropriate period;
- (c) subject to paragraph (d), where a young person is charged with a federal offence, any judicial proceedings in relation to the offence must be heard and determined in a children’s court and the young person must be sentenced as a young person if found guilty of the offence, in accordance with the relevant state or territory juvenile justice legislation and paragraph (b) above;
- (d) where a young person is charged with a federal offence, and subject to s 80 of the *Australian Constitution*, the matter may be heard and determined in an adult court, in accordance with the laws of the relevant state or territory, in the following cases:
  - (i) where state or territory law allows a young person to elect to have an offence heard by a jury in circumstances that would require committal to an adult court; or
  - (ii) where state or territory law requires a young person charged jointly with an adult to be tried in an adult court; or

- (iii) where the young person is charged with a federal offence that is punishable by imprisonment of 14 years or more (a 'serious federal offence');

However, where the matter is heard in an adult court, the young person must be sentenced in accordance with the purposes, principles and factors stated in the juvenile justice legislation of the relevant state or territory and paragraph (b) above;

- (e) where a young federal offender is not legally represented in a sentencing proceeding, the court should generally adjourn to allow the offender a reasonable opportunity to obtain representation. However, the court may proceed without adjournment and may impose a sentence despite the absence of representation where:
  - (i) the young offender has refused or failed to exercise the right to legal representation in circumstances where the offender fully understands the right and the consequences of not exercising it; or
  - (ii) the court is of the view that a fair sentencing hearing can be conducted without the offender being legally represented;
- (f) the publication of a report of proceedings involving a young person who is charged with, found guilty of, or has pleaded guilty to, a federal offence should be prohibited where it identifies or is likely to lead to the identification of the young person;
- (g) where a court, exercising powers conferred by state or territory legislation, refers to a diversionary process any young person who is charged with, found guilty of, or has pleaded guilty to, a federal offence, the outcome of the process must be reported back to the court and the court is to finalise the matter after taking into consideration the outcome of the diversionary process;
- (h) a young federal offender sentenced to detention in a juvenile facility must not be transferred to an adult prison until he or she is at least 18 years of age, unless a court determines either that it is in the best interests of the young person to do so or that there are exceptional circumstances justifying the transfer; and

- (i) where a federal offence is committed by a person who was not yet 18 years old at the time of the commission of the offence but is 18 years or more at the time of sentencing, the court must proceed to sentence the person as a young person in accordance with the relevant state or territory juvenile justice legislation and paragraph (b) above, except that any sentence imposing a term of detention may, in the court's discretion, be served otherwise than in a juvenile detention facility.

### **Specified adult provisions to apply to young federal offenders**

27.94 In addition to the introduction of federal minimum standards for young federal offenders, a number of recommendations made elsewhere in this Report in relation to adult offenders should also be applied to young federal offenders. The areas of particular concern include:

- the prohibition of certain sentencing options (Chapter 7);
- giving credit for time spent in pre-sentence custody or detention (Chapter 10);
- the right to be present in certain sentencing proceedings (Chapter 13);
- an offender's understanding of sentencing proceedings and sentencing orders (Chapter 13);
- the use of victim impact statements and pre-sentence reports (Chapter 14);
- provisions dealing with an accused with a mental illness or intellectual disability (Chapter 28); and
- facilitating access by federal offenders to state or territory drug courts (Chapter 29).<sup>123</sup>

27.95 One reason for extending specific recommendations to young federal offenders is that young people should have no lesser protection than adults who are alleged to have committed a federal offence. In practice, some of these protections are not available to the same extent across jurisdictions.

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<sup>123</sup> There was support for extending these provisions applicable to adult federal offenders to young federal offenders: Ibid; National Children's and Youth Law Centre, *Consultation*, Sydney, 28 February 2006. HREOC expressed specific support for extending some of the provisions applicable to adult federal offenders to young federal offenders, namely, Proposal 27-2(a), (b), (f)-(i) in DP 70: Human Rights and Equal Opportunity Commission, *Submission SFO 62*, 22 December 2005.



27.96 One example is the right of a child to be present, to be heard, and to participate in proceedings.<sup>124</sup> Many state and territory provisions are limited to requiring the court to ensure the young person has an understanding of the nature and purpose of the proceedings,<sup>125</sup> with a focus on the allegations being made and the facts that must be proved in a case.<sup>126</sup> Some jurisdictions require the court to explain the orders made by the court.<sup>127</sup> While CROC focuses on participation of young people in proceedings affecting them, only a few jurisdictions specify the need to enable the young person to participate in criminal proceedings generally,<sup>128</sup> and none refers specifically to participation in the sentencing process.

27.97 An example of a protection that is available to a different extent in each state and territory is the ordering of pre-sentence reports for young offenders.<sup>129</sup> Although there are provisions for the preparation and use of pre-sentence reports in all states and territories, the circumstances in which they must be made, their form and content, and the procedure for their consideration, vary across jurisdictions.<sup>130</sup>

27.98 Another reason for extending certain recommendations to young federal offenders is to ensure the uniform treatment of young federal offenders. For example, most states and territories have legislative provisions or court rules governing the use

124 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 12; *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 14.2.

125 *Juvenile Justice Act 1992* (Qld) ss 72, 158; *Children's Court of Western Australia Act 1988* (WA) s 34; *Youth Court Act 1993* (SA) s 8; *Youth Justice Act 1997* (Tas) s 29(1)(a); *Juvenile Justice Act 1983* (NT) s 41; *Youth Justice Act 2005* (NT) s 61.

126 See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) s 12(1); *Juvenile Justice Act 1983* (NT) s 41(2) (only in the absence of legal representation).

127 See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) s 12(3) (only upon request by the child or by some other person on behalf of the child); *Children and Young Persons Act 1989* (Vic) s 23; *Children, Youth and Families Act 2005* (Vic) s 527; *Juvenile Justice Act 1992* (Qld) ss 72(2)(c), 158; *Youth Justice Act 1997* (Tas) s 50; *Youth Justice Act 2005* (NT) s 123.

128 *Children (Criminal Proceedings) Act 1987* (NSW) s 12(4); *Juvenile Justice Act 1992* (Qld) s 72; *Children and Young People Act 1999* (ACT) s 22.

129 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 16.

130 For example, in most states and territories the ordering of a pre-sentence report in relation to a child or young person is mandatory only when the court is considering making certain types of sentencing orders. See *Children (Criminal Proceedings) Act 1987* (NSW) s 25 (imprisonment or control order); *Children and Young Persons Act 1989* (Vic) s 52 (youth residential centre order, youth training order, or where a child appears to be intellectually disabled); *Children, Youth and Families Act 2005* (Vic) s 571 (youth residential centre order, youth justice centre order, or where a child appears to be intellectually disabled); *Juvenile Justice Act 1983* (NT) ss 44(1) (sentence of detention or imprisonment), 53AA(1) (community work order). In other jurisdictions, a pre-sentence report is discretionary: *Young Offenders Act 1993* (SA) s 32; *Criminal Law (Sentencing) Act 1988* (SA) ss 3A, 8; *Children and Young People Act 1999* (ACT) s 73.

of victim impact statements in the case of young offenders.<sup>131</sup> However, there are differences between jurisdictions concerning the availability, content, form and use of these statements.

27.99 A third reason for extending specific recommendations to young federal offenders is that the principles that underlie these recommendations are widely accepted and reflected in international instruments relating both to adults and to young people. In particular, the following propositions reflect internationally accepted principles in sentencing:

- the prohibition against capital punishment and other forms of cruel, inhuman or degrading punishment;<sup>132</sup>
- the right to be present, to be heard, and to participate in proceedings;<sup>133</sup>
- the right to be provided with the reasons for a sentence of detention;<sup>134</sup>
- the requirement that, except for minor offences, authorities are to consider pre-sentence reports prior to sentencing;<sup>135</sup>
- the requirement that various alternatives to institutionalisation should be made available to the greatest extent possible;<sup>136</sup> and

131 *Children (Criminal Proceedings) Act 1987* (NSW) s 33C; *Crimes (Sentencing Procedure) Regulation 2005* (NSW) regs 8–11; *Children and Young Persons Act 1989* (Vic) s 136A; *Children, Youth and Families Act 2005* (Vic) s 359; *Young Offenders Act 1994* (WA) s 46A; *Sentencing Act 1995* (WA) pt 3 div 4; *Criminal Law (Sentencing) Act 1988* (SA) ss 3A, 7A; *Magistrates Court Rules 1992* (SA) r 41.06; *Supreme Court Criminal Rules 1992* (SA) r 19.01–19.08; *Crimes (Sentencing) Act 2005* (ACT) pt 4.3; *Juvenile Justice Act 1983* (NT) s 49A; *Youth Justice Act 2005* (NT) s 61 pt 5 div 3.

132 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, [1989] ATS 21, (entered into force generally on 26 June 1987); *United Nations Universal Declaration of Human Rights*, GA Res 217A(III), UN Doc A/Res/810 (1948) art 5; *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) art 7; *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 17.2 (capital punishment), 17.3 (corporal punishment); *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Res 43/173, Annex, 43 UN GAOR Supp, UN Doc A/43/49 (1988), principle 6.

133 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) art 14; *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 12; *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 14.2.

134 *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Res 43/173, Annex, 43 UN GAOR Supp, UN Doc A/43/49 (1988) principle 11(2).

135 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 16.

136 *United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)*, UN Doc A/RES/45/110 (1990); *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 40(4); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 18.1.

- the right of an offender who is suffering from a mental illness to be treated in a specialised institution and receive all necessary treatment and assistance.<sup>137</sup>

**Recommendation 27–2** Federal sentencing legislation should require that the following provisions applicable to adult federal offenders be applied to young federal offenders, namely, provisions:

- (a) prohibiting certain sentencing options, including capital punishment, corporal punishment, imprisonment with hard labour, and any other form of cruel, inhuman or degrading punishment (Recommendation 7–16);
- (b) requiring the court to take into account time spent in pre-sentence custody or detention (Recommendations 10–2 and 10–3);
- (c) requiring attendance of the offender during certain sentencing proceedings (Recommendation 13–1);
- (d) requiring the court to give an explanation of the sentence and a copy of the sentencing order to the offender (Recommendations 13–3, 13–4 and 13–5);
- (e) governing the use of victim impact statements and pre-sentence reports (Recommendations 14–1 and 14–2);
- (f) requiring the court to state its reasons for the sentence (Recommendation 19–1);
- (g) dealing with an accused with a mental illness or intellectual disability (Recommendations 28–1, 28–2, and 28–4 to 28–14);
- (h) requiring a suitably qualified interpreter, where necessary, in all proceedings related to sentencing (Recommendation 29–3); and
- (i) facilitating access to drug courts, where they are available for young offenders (Recommendation 29–4).

<sup>137</sup> *United Nations Standard Minimum Rules for the Treatment of Prisoners*, UN Doc A/CONF/6/1 (1955) r 82; *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 26; *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, UN Doc A/RES/45/113 (1990) r 53.

## National best practice guidelines for sentencing young offenders

27.100 ALRC 84 recommended that national standards for juvenile justice be developed by the proposed federal Office for Children, in consultation with the relevant state and territory authorities, the legal profession, community groups, peak bodies such as juvenile justice advisory councils, and young people.<sup>138</sup> The national standards were to include: principles for sentencing young offenders; provision for a wide range of sentencing options with clearer and more appropriate hierarchies based on minimum appropriate intervention by the formal justice system; minimum standards on the use of pre-sentence reports; and formal documentation of completion of non-custodial sentencing orders.<sup>139</sup>

27.101 The development of national standards would eliminate much inconsistency across jurisdictions, while allowing for developments based on local needs. However, the proposed Office for Children has not been established and the recommended national standards have not been developed.

27.102 The Australasian Juvenile Justice Administrators (AJJA) is the national body responsible for overseeing the administration of juvenile justice. Its *Standards for Juvenile Custodial Facilities* deal with service standards for juvenile custodial facilities and are based on international obligations.<sup>140</sup> The Standards cover 11 major areas: basic entitlements of juveniles, including an abuse-free environment, and age-appropriate and gender-appropriate services; rights of expression; screening, assessment, orientation and induction; personal and social development, including offenders' programs and counselling services; communication with family and interaction with the community; access to health care, including mental health services and alcohol and drugs services; behaviour management; security and safety; building design and maintenance; human resources; and commitment to quality, supportive leadership and ethical conduct. The Standards are intended to be implemented by way of locally developed internal processes, in preparation for formal accreditation.<sup>141</sup>

27.103 The ALRC considers there is a need for greater consistency in the treatment of young offenders and for better compliance with international norms. One way to facilitate this is by the development of national best practice guidelines for juvenile justice, including guidelines in relation to the sentencing of young people.<sup>142</sup> The ALRC therefore recommends that, until such time as a federal Office for Children is

138 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), Rec 192.

139 Ibid, Recs 239, 240, 244, 246.

140 Australasian Juvenile Justice Administrators, *Standards for Juvenile Custodial Facilities (Revised Edition)* (1999).

141 Ibid, 5.

142 This was supported in two submissions: Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; Human Rights and Equal Opportunity Commission, *Submission SFO 62*, 22 December 2005.

established, the AJJA should develop national best practice guidelines for juvenile justice, including guidelines relating to the sentencing of young people.

27.104 In DP 70 the ALRC proposed that the national best practice guidelines be developed in consultation with the Office for the Management of Federal Offenders.<sup>143</sup> One stakeholder suggested that the consultation could be broadened to involve other bodies such as HREOC.<sup>144</sup> In order to ensure that the guidelines address a wide range of concerns, the ALRC agrees that they should be developed in consultation with relevant government and non-government organisations such as HREOC.

**Recommendation 27–3** Until such time as a federal Office for Children is established, the Australasian Juvenile Justice Administrators, in consultation with relevant government and non-government organisations, should develop national best practice guidelines for juvenile justice, including guidelines relating to the sentencing of young people.

## Monitoring of young federal offenders

27.105 Young federal offenders tend to be an invisible class of federal offenders because they are relatively few in number and the current arrangements rely heavily on the juvenile justice systems of the states and territories. For example, the Attorney-General's Department traditionally has not collected data on young federal offenders.

27.106 Submissions and consultations suggested there is insufficient knowledge about the current practices and issues surrounding sentencing, administration and release of young federal offenders. It is clear that there is a strong need for better data collection in this area; for better data sharing among government agencies; and for better analysis of data collected, with a view to informing practice and policy development.

27.107 In Chapter 22 the ALRC recommends that a new Office for the Management of Federal Offenders be established, with a wide range of monitoring functions in respect of federal offenders. In order to emphasise the importance of this area, the Office should be specifically charged with monitoring and reporting on young federal offenders, including by: maintaining information about these offenders; monitoring progress towards compliance with the *Standards for Juvenile Custodial Facilities*; liaising with states and territories about these Standards; providing policy advice to the Australian Government on these offenders; participating in the activities of the AJJA;

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143 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 27–3.

144 National Children's and Youth Law Centre, *Consultation*, Sydney, 28 February 2006.

and liaising with states and territories in relation to these offenders.<sup>145</sup> Liaison should include contact with the relevant juvenile justice departments in the various jurisdictions.

**Recommendation 27–4** The Office for the Management of Federal Offenders should monitor and report on young federal offenders. The functions of the Office should include:

- (a) maintaining information on young federal offenders as part of an up-to-date case management database in relation to all federal offenders;
- (b) monitoring progress towards compliance with the *Standards for Juvenile Custodial Facilities* in relation to young federal offenders, and liaising with the states and territories in relation to those Standards;
- (c) providing policy advice to the Australian Government in relation to young federal offenders and relevant aspects of the federal criminal justice system;
- (d) participating in the activities of the Australasian Juvenile Justice Administrators; and
- (e) liaising with the states and territories, including the relevant juvenile justice departments, in relation to young federal offenders.

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145 This was supported by a number of stakeholders: Office of the Public Advocate Victoria, *Submission SFO 81*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; Human Rights and Equal Opportunity Commission, *Submission SFO 62*, 22 December 2005.

## 28. Federal Offenders with a Mental Illness or Intellectual Disability

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### Introduction

28.1 Persons with a mental illness or intellectual disability are disproportionately represented within Australian state and territory criminal justice systems.<sup>1</sup> A number of

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<sup>1</sup> See, eg, Senate Select Committee on Mental Health—Parliament of Australia, *A National Approach to Mental Health—From Crisis to Community*, First Report (2006), [13.20]–[13.44]; T Butler and S Allnutt, *Mental Illness Among New South Wales Prisoners* (2003) NSW Corrections Health Service, 2;

factors may contribute to this over-representation, including poverty, homelessness, unemployment, poor social skills and lack of adequate services in the community.<sup>2</sup>

28.2 It is not known how many federal offenders have a mental illness or intellectual disability. Data provided by the Commonwealth Director of Public Prosecutions (CDPP) suggest that during the five years from 1999–2000 to 2003–04, 50 cases were dealt with under Divisions 6 to 9 of Part IB of the *Crimes Act 1914* (Cth).<sup>3</sup> However, these figures do not include federal offenders with a mental illness or intellectual disability who have been sentenced or dealt with under provisions other than Divisions 6 to 9 of Part IB.

### The need for a comprehensive inquiry

28.3 In its 1988 report on sentencing (ALRC 44), the ALRC recommended a number of reforms in relation to the sentencing of federal offenders with a mental illness or intellectual disability. However, the ALRC noted that these recommendations were only a ‘stop-gap measure’ until comprehensive reforms were implemented.<sup>4</sup> ALRC 44 concluded that the interaction of mentally ill and intellectually disabled offenders with the criminal justice system as a whole, not with just one component of it, needed to be considered and a comprehensive scheme developed.<sup>5</sup> The ALRC recommended that it should be given a separate reference covering all issues concerning people with a mental illness or intellectual disability in the criminal justice system.<sup>6</sup>

28.4 In the intervening years, a number of law reform commissions, parliamentary committees and ad hoc review bodies have considered issues related to persons with a mental illness or intellectual disability within the criminal justice system.<sup>7</sup> These

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Department of Justice Victoria, *Victorian Prisoner Health Study* (2003); New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996), Ch 2.

2 See, eg, Senate Select Committee on Mental Health—Parliament of Australia, *A National Approach to Mental Health—From Crisis to Community*, First Report (2006), [13.26]; New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996), Ch 2.

3 Commonwealth Director of Public Prosecutions, *Correspondence*, 4 May–2 September 2005, mental illness and intellectual disability data.

4 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [200].

5 Ibid, [200].

6 Ibid, Rec 114.

7 See, eg, Senate Select Committee on Mental Health—Parliament of Australia, *A National Approach to Mental Health—From Crisis to Community*, First Report (2006); Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993); Mental Health Council of Australia and Brain and Mind Research Institute in association with the Human Rights and Equal Opportunity Commission, *Not for Service: Experiences of Injustice and Despair in Mental Health Care in Australia* (2005); New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996); Victorian Law Reform Commission, *Defences to Homicide—Final Report* (2004); Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care—Final Report* (2003); Legislative Council Select Committee on Mental Health—Parliament of New South Wales, *Mental Health Services in New South Wales* (2002).



inquiries have described the disadvantage experienced by this group. A significant finding of these inquiries is that mentally ill people detained by the criminal justice system are frequently denied the health care and human rights protections to which they are entitled.<sup>8</sup>

28.5 There has never been a full review of issues concerning people with a mental illness or intellectual disability within the federal criminal justice system. Inquiries to date have been limited to discrete issues, or have focused on state and territory criminal justice systems. In particular, the ALRC's recommendation for a comprehensive review has not been implemented.

28.6 Consultations and submissions to the current Inquiry identified a number of important issues that extend beyond Part IB of the *Crimes Act*. These include the criminalisation of persons with a mental illness or intellectual disability; service provision; criminal responsibility and defences; the provision of involuntary treatment; legal professional conduct rules; prison conditions; and access to social security benefits.<sup>9</sup>

28.7 In addition, a number of stakeholders were critical of Divisions 6 to 8 of Part IB. Some commented on the general lack of interaction between these provisions and state and territory legislation. Some suggested that the provisions offend international standards. A number questioned the need for the *Crimes Act* provisions and argued that the relevant state or territory provisions should apply to federal offenders, while others stated that a comprehensive federal scheme should be established.<sup>10</sup> Australian courts have also criticised these provisions.<sup>11</sup> Commentators have noted that:

The Commonwealth legislation is a practical mess when dealing with mentally impaired offenders. Many of the procedures and options open to the Courts are outdated, and do not fit with state legislation or service systems. The legislation and practice is confusing for practitioners and courts and has been subject to criticism by

8 See, eg, Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993), Ch 25.

9 Human Rights and Equal Opportunity Commission, *Submission SFO 62*, 22 December 2005; Office of the Public Advocate Victoria, *Submission SFO 47*, 2 May 2005; Mental Health Coordinating Council, *Submission SFO 44*, 29 April 2005; Victorian Institute of Forensic Mental Health, *Submission SFO 43*, 29 April 2005; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005; Mental Health Council of Australia, *Submission SFO 32*, 18 April 2005; Welfare Rights Centre Inc (Queensland), *Submission SFO 29*, 15 April 2005; Prisoners' Legal Service, *Submission SFO 28*, 15 April 2005; Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005; Legal Services Commission of South Australia, *Submission SFO 19*, 8 April 2005; Correctional Services Northern Territory and Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005.

10 Mental Health Coordinating Council, *Submission SFO 44*, 29 April 2005; Victorian Institute of Forensic Mental Health, *Submission SFO 43*, 29 April 2005; Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005; Mental Health Council of Australia, *Submission SFO 32*, 18 April 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005; Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.

11 See, eg, Transcript of Proceedings, *R v Batori*, (County Court of Victoria, Gullaci J, 17 May 2004); *R v Burns (No 2)* (1999) 169 ALR 149; *R v Goodfellow* (1994) 120 ALR 657; *R v Robinson* [2004] VSC 505.

the few judges across the country who have encountered the provisions. Nothing has been done for many years, despite the concerns being raised on a number of occasions both from within government and outside it.<sup>12</sup>

28.8 Division 6 of Part IB outlines the consequences that flow from a person being found unfit to be tried. Issues raised in relation to these provisions included whether fitness to be tried should be determined by a specialist tribunal or a court; whether a person found unfit to be tried has the capacity to object to detention in a hospital for treatment; whether a person found unfit should be detained in prison; the absence of procedures for determining guilt, leave from custody, and movement between custodial and non-custodial orders; and whether the Attorney-General's Department (AGD) is the appropriate body to review a person's detention.<sup>13</sup>

28.9 Division 7 contains the procedure for acquittal because of mental illness. Stakeholders questioned whether Part IB should provide for the consequences that flow from an acquittal because of 'mental impairment' (as opposed to 'mental illness'), and for the detention in prison of persons acquitted on the grounds of mental illness. They also noted the lack of provision for the circumstances of the offence to be considered by a court when setting a period of detention; and the lack of procedures for determining guilt, leave from custody, and movement between custodial and non-custodial orders.<sup>14</sup>

28.10 Division 8 sets out a summary disposition procedure for persons with a mental illness or intellectual disability. Consultations and submissions noted that it is unclear how the provisions operate when state and territory legislation provides a procedure for determining fitness to be tried in summary matters. Stakeholders noted that orders made under the Division cannot be enforced and that the requirement to comply with conditions for three years is unduly onerous. It was also said that the requirement that a person suffer 'from a mental illness within the meaning of the civil law of the State or Territory' could preclude many people with a mental illness from being dealt with under these provisions.<sup>15</sup>

12 T Dalton and G Mullaly, *Mental Impairment and the Criminal Law*, The Victorian Bar, 13.

13 Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; Human Rights and Equal Opportunity Commission, *Submission SFO 62*, 22 December 2005; Victorian Institute of Forensic Mental Health, *Submission SFO 43*, 29 April 2005; Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005; Corrections Victoria and Adult Parole Board Victoria, *Consultation*, Melbourne, 31 March 2005; See also Criminal Law Committee Law Institute of Victoria, *Submission on Part 1B Division 6 of the Crimes Act 1914 (Cth)—Unfitness to Plead and the Detention of Mentally Ill Offenders* (2004) Law Institute of Victoria.

14 Victorian Institute of Forensic Mental Health, *Submission SFO 43*, 29 April 2005; Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005; Mental Health Council of Australia, *Submission SFO 32*, 18 April 2005; Corrections Victoria and Adult Parole Board Victoria, *Consultation*, Melbourne, 31 March 2005.

15 Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005; Legal Services Commission of South Australia, *Submission SFO 19*, 8 April 2005; Prisoners' Legal Service and others, *Consultation*, Brisbane, 4 March 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.

28.11 In Discussion Paper 70 (DP 70) the ALRC expressed the view that issues concerning the operation of Divisions 6 to 8 of Part IB of the *Crimes Act* fell outside the ALRC's Terms of Reference.<sup>16</sup> However, the ALRC proposed that the Australian Government initiate a comprehensive inquiry into issues concerning people with a mental illness or intellectual disability in the federal criminal justice system.<sup>17</sup> There was widespread support for this proposal.<sup>18</sup> The Office of the Public Advocate Victoria submitted that the terms of reference for any such inquiry should be wide enough to enable consideration of issues concerning people with a cognitive impairment, such as dementia or acquired brain injury, in the federal criminal justice system.<sup>19</sup>

### *ALRC's views*

28.12 The Terms of Reference require the ALRC to inquire into whether Part IB of the *Crimes Act* is an appropriate, effective and efficient mechanism for the sentencing, administration and release of federal offenders. Divisions 6 to 8 of Part IB deal with stages of the federal criminal justice process that precede sentencing, administration and release. Accordingly, they fall outside the Terms of Reference. However, as noted in ALRC 44, the distinction between pre-sentence and post-sentence stages is artificial when considering the appropriate way to deal with persons with a mental illness or intellectual disability. Developing recommendations for reform in relation to these offenders at the sentencing stage alone will lead inevitably to piecemeal change that fails to address adequately the systemic problems faced by this disadvantaged group.<sup>20</sup>

28.13 In light of the scope of the current inquiry, the limited consideration that has been given to persons with a mental illness or intellectual disability in the federal criminal justice system, the findings of other inquiries in relation to these offenders in state and territory criminal justice systems, and the important issues raised in consultations and submissions about stages of the federal criminal justice system that precede sentencing, the ALRC has concluded that a full-scale inquiry is required. The ALRC affirms the recommendation in ALRC 44 that the interaction between people with a mental illness or intellectual disability and the criminal justice system as a whole needs to be considered. This inquiry should enable consideration of the interaction of people with a cognitive impairment with the federal criminal justice system.

16 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), [28.13].

17 Ibid, Proposal 28–1.

18 Department of Corrective Services Western Australia, *Submission SFO 88*, 17 February 2006; Victorian Institute of Forensic Mental Health, *Submission SFO 87*, 17 February 2006; Office of the Public Advocate Victoria, *Submission SFO 81*, 14 February 2006; F Beaupert, *Submission SFO 76*, 13 February 2006; New South Wales Legal Aid Commission, *Submission SFO 75*, 10 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; New South Wales Guardianship Tribunal, *Submission SFO 69*, 8 February 2006; Human Rights and Equal Opportunity Commission, *Submission SFO 62*, 22 December 2005; Mental Health Council of Australia, *Submission SFO 59*, 21 December 2005; Judge J Goldring, *Submission SFO 54*, 10 December 2005.

19 Office of the Public Advocate Victoria, *Submission SFO 81*, 14 February 2006.

20 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [200].

**Recommendation 28–1** The Australian Government should initiate a comprehensive inquiry into issues concerning people in the federal criminal justice system who have a mental illness, intellectual disability or cognitive impairment.

## Adequacy of service provision

28.14 Australia is subject to a number of international obligations that require it to recognise the right of all Australians to the enjoyment of the highest attainable standard of physical and mental health.<sup>21</sup> Although not legally binding, other international instruments set out standards for the provision of services to persons with a mental illness or intellectual disability,<sup>22</sup> including those in prison.<sup>23</sup>

28.15 There are nationally agreed standards for the provision of services in correctional facilities, which apply to offenders with a mental illness or intellectual disability.<sup>24</sup> The *National Mental Health Strategy*<sup>25</sup> and the *Commonwealth Disability Strategy* also set out a number of principles for the provision of services.<sup>26</sup>

28.16 State and territory government agencies are primarily responsible for the provision of services to federal offenders with a mental illness or intellectual disability.<sup>27</sup> These services may include, for example, the provision of treatment to a federal offender with a mental illness who is subject to a hospital order, or the

21 See, eg, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, ATS 5, (entered into force generally on 3 January 1976) art 12; *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 24.

22 See, eg, *United Nations Declaration on the Rights of Mentally Retarded Persons*, UN Doc A/RES2856 (XXVI) (1971); *United Nations Declaration on the Rights of Disabled Persons*, UN Doc A/RES3447 (XXX) (1975); *United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, UN Doc A/RES48/96 (1993).

23 See, eg, *United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, UN Doc A/RES/46/119 (1991) Principle 20; *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Res 43/173, Annex, 43 UN GAOR Supp, UN Doc A/43/49 (1988), Principle 24; *United Nations Standard Minimum Rules for the Treatment of Prisoners*, UN Doc A/CONF/6/1 (1955), rr 22, 24–25.

24 Corrective Services Ministers' Conference and Conference of Correctional Administrators, *Standard Guidelines for Corrections in Australia* (2004); Australasian Juvenile Justice Administrators, *Standards for Juvenile Custodial Facilities (Revised Edition)* (1999).

25 See Australian Health Ministers' Conference, *National Mental Health Plan 2003–2008* (2003); Mental Health Consumer Outcomes Task Force, *Mental Health Statement of Rights and Responsibilities* (2000).

26 Family and Community Services, *Commonwealth Disability Strategy* <[www.facs.gov.au/disability/cds/cds/cds\\_index.htm](http://www.facs.gov.au/disability/cds/cds/cds_index.htm)> at 4 October 2005.

27 See, eg, *Commonwealth of Australia Gazette–Special (Arrangement under Section 3B of the Crimes Act 1914 of the Commonwealth of Australia between the Commonwealth of Australia and NSW)*, 12 November 1990, No S293. The Australian Government has some responsibility for the provision of services to persons with a mental illness or an intellectual disability under the *Disability Services Act 1986* (Cth) and Australian Health Agreements.

provision of secure accommodation to a federal offender with an intellectual disability as part of a program probation order.

28.17 It has been suggested that services are not being provided to offenders with a mental illness or intellectual disability in accordance with Australia's international obligations, international standards and national standards.<sup>28</sup>

28.18 Problems identified in relation to the provision of services to offenders with a mental illness or intellectual disability include: a lack of appropriate and accessible rehabilitation and treatment programs and other services in prison; a lack of appropriate accommodation in the community to facilitate access to rehabilitation and treatment programs; a lack of alternative sentencing options; limited access to parole; limited funding and resourcing of community-based services; a lack of appropriate treatment and rehabilitation programs and other services for persons with dual diagnosis; a lack of available long-term care for persons with a mental illness; the need for appropriately qualified staff to deliver treatment and rehabilitation services to offenders inside and outside the prison system; the availability of appropriate accommodation in prisons for prisoners with ongoing mental health conditions; the development of culturally appropriate assessment tools; and support for organisations that provide legal services to persons with a mental illness or intellectual disability.<sup>29</sup>

28.19 One submission stated that the Australian Government needs to take responsibility for providing funding to the states and territories to enable them to bring their systems to a comparable level and that it should also take responsibility for the provision of services to federal offenders in each state and territory.<sup>30</sup>

28.20 In DP 70 the ALRC proposed that the Australian Government work with state and territory governments to improve service provision to federal offenders with a mental illness or intellectual disability.<sup>31</sup> This proposal received widespread support.<sup>32</sup> One stakeholder submitted that the objective of all Australian governments should be to produce a national strategy to 'improve collaboration between corrections and

28 See Mental Health Council of Australia and Brain and Mind Research Institute in association with the Human Rights and Equal Opportunity Commission, *Not for Service: Experiences of Injustice and Despair in Mental Health Care in Australia* (2005).

29 Mental Health Coordinating Council, *Submission SFO 44*, 29 April 2005; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005; Mental Health Council of Australia, *Submission SFO 32*, 18 April 2005; Prisoners' Legal Service, *Submission SFO 28*, 15 April 2005; Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005; Correctional Services Northern Territory and Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005; Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005; Parole Board of South Australia, *Consultation*, Adelaide, 20 April 2005.

30 Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005.

31 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 28–13.

32 Department of the Attorney General Western Australia, *Submission SFO 96*, 15 March 2006; Victorian Institute of Forensic Mental Health, *Submission SFO 87*, 17 February 2006; Office of the Public Advocate Victoria, *Submission SFO 81*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; New South Wales Guardianship Tribunal, *Submission SFO 69*, 8 February 2006; Human Rights and Equal Opportunity Commission, *Submission SFO 62*, 22 December 2005.

community services systems and the provision of rehabilitation, pre-release and post-release programs'.<sup>33</sup> In February 2006, the Council of Australian Governments discussed mental health reform and requested that an action plan on mental health be developed for consideration by June 2006.<sup>34</sup>

### *ALRC's views*

28.21 The ALRC believes that the Australian Government should play a greater role in the coordination and oversight of service provision to persons with a mental illness or intellectual disability who have come into contact with the federal criminal justice system. This is particularly important to ensure that federal offenders with a mental illness or intellectual disability are treated uniformly across jurisdictions. Improved service provision should be directed to ensuring that federal offenders have equal access to diversionary schemes, sentencing options, prison programs, pre-release schemes and parole.

28.22 The Australian Government will need to work with state and territory governments to ensure that services are provided to federal offenders with a mental illness or intellectual disability in accordance with international obligations, international standards, and national standards. As noted in Chapter 22, the proposed Office for the Management of Federal Offenders (OMFO) should be responsible for monitoring compliance with these standards.<sup>35</sup>

**Recommendation 28–2** The Australian Government should work with state and territory governments to improve substantially the provision of services to federal offenders with a mental illness or intellectual disability.

## **Diversion from the criminal justice system**

28.23 A number of submissions stated that people with a mental illness or intellectual disability should be supported, protected and diverted from the criminal justice system into appropriate services that meet their needs.<sup>36</sup> However, if diversionary schemes are to be effective in practice there must be adequate mechanisms in place to screen offenders at an early stage of the criminal justice process to identify those with a mental illness or intellectual disability.<sup>37</sup>

33 Office of the Public Advocate Victoria, *Submission SFO 81*, 14 February 2006.

34 The actions of the Council of Australian Governments are discussed in: Senate Select Committee on Mental Health—Parliament of Australia, *A National Approach to Mental Health—From Crisis to Community*, First Report (2006), [1.17]–[1.19].

35 Rec 22–4.

36 Mental Health Council of Australia, *Submission SFO 59*, 21 December 2005; Mental Health Coordinating Council, *Submission SFO 44*, 29 April 2005; Mental Health Council of Australia, *Submission SFO 32*, 18 April 2005; Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005.

37 S Hayes, 'Sentencing of People with Mental Disorders' (2005) 86 *Reform* 24, 25.

28.24 The main methods of pre-sentence diversion under Part IB are the fitness to be tried procedures under Division 6, procedures for acquittal because of mental illness under Division 7 and the summary disposition procedures under Division 8, which were discussed briefly above.

28.25 Another method of diversion is a court diversionary scheme, such as the Magistrates Court Diversion Program (MCDP) in South Australia. Under the MCDP a court can adjourn proceedings to allow an offender with a mental illness, intellectual disability, personality disorder, acquired brain injury or neurological disorder to address his or her mental health or disability needs and offending behaviour in the community. The MCDP is open to offenders who have committed a summary offence and certain minor indictable offences. Participants are assigned a Liaison Officer who supports and advises them and service providers, and liaises with them in regard to service provision and the participant's progress. At the final hearing, the magistrate makes a determination taking into account the participant's involvement in the MCDP.<sup>38</sup>

28.26 The MCDP and other state and territory court diversionary schemes have been successful in diverting persons with a mental illness or intellectual disability from the criminal justice system and into appropriate treatment and care. For example, after one year of operation the New South Wales Court Liaison Service screened 800 people, of which 64 percent had a serious mental illness and 50 per cent of these were diverted into community or inpatient mental health services.<sup>39</sup>

28.27 In Chapter 7 the ALRC recommends that federal sentencing legislation should enable a judicial officer to defer the sentencing of a federal offender for up to 12 months. Such a provision would authorise a court to adjourn proceedings to allow an offender to address his or her condition and offending behaviour using a similar process to the MCDP.

28.28 However, court diversionary schemes can be resource intensive. As noted above, the ALRC is of the view that the Australian Government should work with state and territory governments to improve service provision to federal offenders. These services should include screening procedures, court diversionary schemes, programs and accommodation in the community that are appropriate to offenders with a mental illness or intellectual disability. A number of successful diversionary schemes have

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38 Magistrates Court of South Australia, *Magistrates Court Court Diversion Program* <[http://www.courts.sa.gov.au/courts/magistrates/court\\_diversion.html](http://www.courts.sa.gov.au/courts/magistrates/court_diversion.html)> at 3 October 2005. Similar diversionary schemes are available in other states and territories: see A Freiberg, 'Problem-oriented Courts: Innovative Solutions to Intractable Problems?' (Paper presented at AIJA Magistrates' Conference, Melbourne, 20–21 July 2001).

39 Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005. See also A Freiberg, 'Problem-oriented Courts: Innovative Solutions to Intractable Problems?' (Paper presented at AIJA Magistrates' Conference, Melbourne, 20–21 July 2001), 17.

been developed in the United States. These schemes may provide an appropriate model for diversionary schemes in Australia.<sup>40</sup>

## Location of provisions

28.29 One threshold issue is the location of Divisions 6 to 9 of Part IB of the *Crimes Act*. Part IB deals primarily with the sentencing, imprisonment and release of federal offenders. However, Divisions 6 to 8 deal with stages of the criminal justice process that precede sentencing.

28.30 In Chapter 2 the ALRC recommends that federal sentencing legislation be redrafted to make its structure clearer and more logical. In particular, the order of provisions in federal sentencing legislation should reflect the chronology of stages in the criminal justice process.<sup>41</sup> Consistent with that view, provisions relating to stages of the criminal justice process that precede sentencing should remain in the *Crimes Act*. However, provisions relating to the sentencing alternatives for persons suffering from a mental illness or intellectual disability should be relocated to the new federal sentencing legislation. Some stakeholders expressed support for this reform.<sup>42</sup>

**Recommendation 28–3** Provisions relating to fitness to be tried, acquittal due to mental illness, and summary disposition of persons suffering from a mental illness or intellectual disability should remain in the *Crimes Act 1914* (Cth). Provisions relating to sentencing alternatives for persons suffering from a mental illness or intellectual disability should be relocated to federal sentencing legislation.

## Statutory definitions

28.31 Part IB of the *Crimes Act* sets out some specific sentencing options for federal offenders with a mental illness or intellectual disability.<sup>43</sup> A court sentencing a federal offender can make a hospital order or a psychiatric probation order if satisfied, among other things, that the offender is suffering from a ‘mental illness within the meaning of the civil law of that State or Territory’.<sup>44</sup> Further, a court sentencing a federal offender can make a program probation order if satisfied, among other things, that the offender

40 New York State Division of Probation Correctional Alternatives, *Shared Services: Alternatives to Incarceration for Defendants and Offenders with Mental Illness* New York States Division of Probation and Correctional Alternatives <[http://www.dpca.state.ny.us/shared\\_mentally\\_ill.htm](http://www.dpca.state.ny.us/shared_mentally_ill.htm)> at 3 October 2005.

41 See Rec 2–2.

42 Victorian Institute of Forensic Mental Health, *Submission SFO 87*, 17 February 2006; Commonwealth Director of Public Prosecutions, *Submission SFO 86*, 17 February 2006.

43 Sentencing options for federal offenders with a mental illness or intellectual disability are discussed further below.

44 *Crimes Act 1914* (Cth) ss 20BS(1), 20BV(1)(a).



is suffering from an ‘intellectual disability’. The *Crimes Act* does not define the term ‘intellectual disability’.

28.32 One issue is whether federal sentencing legislation should define the terms ‘mental illness’ and ‘intellectual disability’. Some stakeholders noted that the absence of definitions of these terms in the *Crimes Act* caused confusion.<sup>45</sup> In addition, it was noted that relying on state and territory definitions of ‘mental illness’ could result in federal offenders being treated differently across jurisdictions.<sup>46</sup> For example, mental health legislation in South Australia defines ‘mental illness’ as ‘any illness or disorder of the mind’,<sup>47</sup> whereas New South Wales legislation provides a more restrictive definition.<sup>48</sup>

28.33 A number of stakeholders submitted that federal sentencing legislation should continue to distinguish between ‘mental illness’ and ‘intellectual disability’.<sup>49</sup> In the majority of cases, intellectual disability is a permanent condition. Although mental illness can be permanent, many people can recover fully from some forms of mental illness. In other cases mental illness may be episodic.

28.34 A number of matters may need to be considered when defining the terms ‘mental illness’ and ‘intellectual disability’ in federal sentencing legislation. First, the expressions ‘mental illness within the meaning of the civil law of that State or Territory’ and ‘intellectual disability’ are currently used in different contexts in Part IB. For example, whether or not a federal offender has an ‘intellectual disability’ may be relevant when a court is sentencing the offender under Division 9 or considering the offender’s fitness to be tried under Division 6.<sup>50</sup>

28.35 Secondly, federal law and state and territory laws dealing with such persons may interact. For example, a person accused of a federal offence will need to satisfy criteria under state and territory legislation before it can be determined whether the person can or must be admitted for treatment of a mental illness, or whether the person is eligible to receive other services provided by state and territory authorities.<sup>51</sup>

28.36 Thirdly, mental illness, intellectual disability and substance abuse may coexist in one person. A number of submissions noted the prevalence of ‘dual diagnosis’ in

45 Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004.

46 Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.

47 *Mental Health Act 1993* (SA) s 3.

48 *Mental Health Act 1990* (NSW) sch 1.

49 Mental Health Coordinating Council, *Submission SFO 44*, 29 April 2005; Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005; Mental Health Council of Australia, *Submission SFO 32*, 18 April 2005; Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005.

50 *Crimes Act 1914* (Cth) ss 16A(2)(m), 20BB(1)(a).

51 See, eg, *Mental Health Act 1990* (NSW) sch 1; *Intellectually Disabled Persons’ Services Act 1986* (Vic) ss 3, 8.

offender populations. Dual diagnosis refers to a coexisting diagnosis of mental illness and intellectual disability, or mental illness and substance abuse, or intellectual disability and substance abuse.<sup>52</sup>

28.37 Fourthly, submissions suggested that diagnostic criteria and broad definitions of symptoms should not be used when defining ‘mental illness’ or ‘intellectual disability’.<sup>53</sup> The Victorian Law Reform Commission has stated that tools such as the *Diagnostic and Statistical Manual of Mental Disorders* are not designed to be used in the legal context and that such diagnostic tools evolve and change over time.<sup>54</sup>

28.38 Finally, state and territory definitions of mental illness that are currently applied when sentencing federal offenders may provide safeguards against the inappropriate and inaccurate diagnosis of mental illness. For example, legislation in New South Wales provides that a person is not to be considered mentally ill or mentally disordered merely because he or she engages in certain behaviour, expresses certain beliefs or refuses to express certain beliefs.<sup>55</sup> Provisions of this sort are consistent with international principles for the protection of persons with a mental illness or intellectual disability.<sup>56</sup>

28.39 In DP 70 the ALRC proposed that federal sentencing legislation define the terms ‘mental illness’ and ‘intellectual disability’.<sup>57</sup> A number of stakeholders supported this proposal.<sup>58</sup> However, several stakeholders expressed concern that offenders with a cognitive impairment, such as dementia or acquired brain injury, may not fall within the definitions of these terms.<sup>59</sup> Accordingly, they may be unable to access the sentencing options available to offenders with a mental illness or intellectual disability, despite having comparable levels of understanding and cognitive impairment.<sup>60</sup>

28.40 One stakeholder suggested that federal sentencing legislation could use a broader term such as ‘mental disorder’ or ‘impaired functioning’, which would encompass offenders with a mental illness or intellectual disability as well as offenders

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52 Mental Health Coordinating Council, *Submission SFO 44*, 29 April 2005; Mental Health Council of Australia, *Submission SFO 32*, 18 April 2005; Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005.

53 New South Wales Guardianship Tribunal, *Submission SFO 69*, 8 February 2006; Victorian Institute of Forensic Mental Health, *Submission SFO 43*, 29 April 2005; Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005.

54 Victorian Law Reform Commission, *Defences to Homicide—Final Report* (2004), [5.19].

55 *Mental Health Act 1990* (NSW).

56 *United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, UN Doc A/RES/46/119 (1991), Principle 4.

57 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 28–2.

58 Victorian Institute of Forensic Mental Health, *Submission SFO 87*, 17 February 2006; F Beaupert, *Submission SFO 76*, 13 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

59 Department of the Attorney General Western Australia, *Submission SFO 96*, 15 March 2006; Office of the Public Advocate Victoria, *Submission SFO 81*, 14 February 2006; F Beaupert, *Submission SFO 76*, 13 February 2006; New South Wales Guardianship Tribunal, *Submission SFO 69*, 8 February 2006.

60 New South Wales Guardianship Tribunal, *Submission SFO 69*, 8 February 2006.

with other mental conditions.<sup>61</sup> Alternatively, it was suggested that the definition of ‘mental illness’ or ‘intellectual disability’ could be broadened to ensure that it encompassed offenders with a cognitive impairment.<sup>62</sup> Another stakeholder suggested that federal sentencing legislation could also use and define the term ‘cognitive disability’.<sup>63</sup>

### *ALRC’s views*

28.41 Federal sentencing legislation should define the terms ‘mental illness’ and ‘intellectual disability’. The definition of ‘mental illness’ should not rely on the application of state and territory civil law tests. The operation of various provisions of federal sentencing legislation would be clarified, and uniformity of treatment of offenders with these impairments would be more readily achieved, if these terms were clearly defined in federal legislation.

28.42 In defining ‘mental illness’ and ‘intellectual disability’, account should be taken of the different contexts in which the terms are used. For example, the definitions need to take account of the fact that in some circumstances persons with these impairments should be diverted from the criminal justice system, but also that these conditions may be relevant when a court is sentencing an offender with a mental illness or intellectual disability.

28.43 The terms should also be defined taking into account the possibility that mental illness, intellectual disability and substance abuse may co-exist. A number of reviews have noted the prevalence of dual diagnosis in offender populations.<sup>64</sup> Dual diagnosis will be relevant when a court is determining the type of sentence or order to impose on an offender. For example, offenders with a dual diagnosis may require more than one type of treatment or rehabilitation program.

28.44 The ALRC agrees that diagnostic criteria contained in classification systems such as the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-TR) or the *International Classification of Diseases* (ICD-10) should not be used to define these terms. The *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-TR) states that it is not designed to be used in legal contexts.<sup>65</sup> Further, definitions that rely on diagnostic criteria are likely to become out of date as a result of developments in the fields of psychiatry and psychology.

61 F Beaupert, *Submission SFO 76*, 13 February 2006.

62 Ibid.

63 Office of the Public Advocate Victoria, *Submission SFO 81*, 14 February 2006.

64 See Senate Select Committee on Mental Health—Parliament of Australia, *A National Approach to Mental Health—From Crisis to Community*, First Report (2006), ch 14; G Jacobsen, *Prisons Cannot Handle Drug and Mental Health Burden, Report Says* (2004) Sydney Morning Herald <www.smh.com.au> at 16 July 2004. See also M Teesson and L Byrnes, *National Drug Strategy and National Mental Health Strategy: National Comorbidity Project* (2001) National Drug and Alcohol Research Centre.

65 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR* (2000), xxxii.

28.45 Consideration will also need to be given to the difference between the appropriate definitions in civil and criminal contexts. The application of the state and territory civil law test for ‘mental illness’ may unfairly preclude many people with mental illness from the benefit of the special procedures in Part IB. In New South Wales, for example, the criminal law test is less restrictive than the civil law test, allowing a greater number of defendants in criminal matters to be dealt with under the special procedures in the *Mental Health (Criminal Procedure) Act 1990* (NSW).<sup>66</sup> However, the safeguards against misdiagnosis of mental illness in civil law definitions could be useful in the criminal context.

28.46 It is possible that the definitions of ‘mental illness’ and ‘intellectual disability’ in federal sentencing legislation may exclude offenders with some cognitive impairments. However, it is not possible to consider adequately what types of sentencing options may be appropriate for offenders with a cognitive impairment in the context of this Inquiry. Accordingly, the ALRC is of the view that the full-scale inquiry, recommended above, should consider appropriate sentencing options for offenders with a cognitive impairment.

**Recommendation 28–4** Federal sentencing legislation should define the terms ‘mental illness’ and ‘intellectual disability’. In defining these terms, account should be taken of:

- (a) the different contexts in which the terms are used;
- (b) the interaction between federal law and state and territory laws dealing with such persons;
- (c) the possibility that mental illness, intellectual disability and substance abuse may co-exist in one person;
- (d) the potential difference between criteria used for clinical diagnosis and those appropriate for forensic purposes;
- (e) the difference between the appropriate definitions in civil and criminal contexts; and
- (f) the need to ensure that certain conduct or beliefs are not regarded, on their own, as indicative of mental illness or intellectual disability.

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<sup>66</sup> *Mental Health (Criminal Procedure) Act 1990* (NSW) s 32.

## Sentencing factors

28.47 In Chapter 6 the ALRC makes a number of recommendations in relation to the factors a court must consider when sentencing a federal offender. This section discusses whether federal sentencing legislation should list additional factors that a court must consider when determining the sentence to be passed, or the order to be made, in relation to a federal offender with a mental illness or intellectual disability.

28.48 Currently, s 16A(2)(m) of the *Crimes Act* provides that a court must take a federal offender's 'mental condition' into account when sentencing the offender, so far as it is relevant and known to the court. The *Crimes Act* does not define 'mental condition'. Courts have considered a number of conditions under this factor, such as severe depressive episode,<sup>67</sup> low level intellectual functioning<sup>68</sup> and organic brain damage.<sup>69</sup>

28.49 Sentencing legislation in the ACT, South Australia and Queensland also lists 'mental condition' as a sentencing factor but does not define the term.<sup>70</sup> Northern Territory sentencing legislation refers to 'intellectual capacity' and New South Wales legislation provides that the fact that 'the offender was not fully aware of the consequences of his or her actions because of the offender's age or disability' is a mitigating factor in sentencing.<sup>71</sup>

28.50 The Intellectual Disability Rights Service noted that under s 3 of the *Mental Health (Criminal Procedure) Act 1990* (NSW), 'mental condition' is defined specifically to exclude both mental illness and developmental disability (a term that encompasses intellectual disability). It submitted that the definition under the state legislation and the lack of clarity in the *Crimes Act* leads to confusion and potentially to injustice.<sup>72</sup>

28.51 Another issue is whether the sentencing factors a court must consider when sentencing a federal offender should include that the offender is seeking treatment or participating in a program to deal with offending behaviour. A number of submissions emphasised that mental illness can be treated.<sup>73</sup> Stakeholders also noted that programs can be tailored to deal with the slow learning of people with an intellectual disability,

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67 See, eg, *Monahan v McLeod* [2004] QDC 10.

68 See, eg, *R v Thinh Tang* (Unreported, Supreme Court of Victoria (Court of Appeal), Tadgell JA, Batt JA and Vincent AJA, 2 October 1997).

69 See, eg, *R v Scott* [2003] NSWCCA 28.

70 *Crimes Act 1900* (ACT) s 342(1); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1); *Penalties and Sentences Act 1992* (Qld) s 18.

71 *Sentencing Act 1995* (NT) s 5(2); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3).

72 Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005.

73 See, eg, Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005; Mental Health Coordinating Council, *Submission SFO 44*, 29 April 2005.

and can result in a reduction in offending behaviour.<sup>74</sup> The *Crimes Act 1900* (ACT) includes as a sentencing factor, ‘whether the offender is voluntarily seeking treatment for any physical or mental condition that may have contributed to the commission of the offence’.<sup>75</sup>

### *ALRC’s views*

28.52 Federal sentencing legislation should provide that the factors to be considered in sentencing a federal offender should include ‘mental illness’ and ‘intellectual disability’, in addition to ‘mental condition’.<sup>76</sup> This is especially important given the established links between mental illness, intellectual disability and offending behaviour,<sup>77</sup> the increased recognition in case law of the relevance of these conditions in sentencing,<sup>78</sup> and the over-representation of persons with these conditions within Australian criminal justice systems.

28.53 Courts generally accept that an offender’s mental illness or intellectual disability may be considered in sentencing because it may reduce the degree of blameworthiness that would otherwise attach to the offence.<sup>79</sup> These impairments may also affect the weight to be accorded to general deterrence because an offender with a mental illness, intellectual disability or mental condition may not be ‘an appropriate medium for making an example to others’.<sup>80</sup> The ALRC has not heard evidence of courts failing to consider mental illness or intellectual disability under s 16A(2)(m). However, federal sentencing legislation would be clearer if it stated that ‘mental illness’, ‘intellectual disability’ and ‘mental condition’ are all factors to be considered when sentencing a federal offender, when they are relevant to a purpose or principle of sentencing and known to the court.

28.54 Federal sentencing legislation should also provide that one factor that may be relevant when sentencing a federal offender is the fact that the offender is seeking treatment or is undertaking a behaviour intervention program to address any physical condition, mental illness, intellectual disability or mental condition that may have contributed to the commission of the offence. Offenders should be encouraged to address conditions and disabilities that may have contributed to the commission of the

74 Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005; Youth Parole Board Victoria, *Consultation*, Melbourne, 30 March 2005. See also S Hayes, ‘Sentencing of People with Mental Disorders’ (2005) 86 *Reform* 24, 25.

75 *Crimes Act 1900* (ACT) s 342(1)(o).

76 The *United Nations Declaration on the Rights of Disabled Persons* states that disabled people have the right to have their condition taken fully into account in any legal proceedings: *United Nations Declaration on the Rights of Disabled Persons*, UN Doc A/RES3447 (XXX) (1975), Principle 11.

77 S Henderson, *Mental Illness and the Criminal Justice System* (2003) Mental Health Co-ordinating Council.

78 New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996), [8.51].

79 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [202]; R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.724].

80 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.724]. See, eg, *Roadley v The Queen* (1990) 51 A Crim R 336, 343.

offence. If a person is receiving and responding to a program or treatment it may be that the period of time required for rehabilitation is lessened, justifying a shorter sentence or less severe sentencing option. This will be particularly relevant when a court defers a sentence to allow a federal offender to address his or her impairment and offending behaviour.

**Recommendation 28–5** Federal sentencing legislation should be amended to provide that the factors to be considered in sentencing a federal offender include:

- (a) ‘mental illness’ and ‘intellectual disability’ in addition to ‘mental condition’; and
- (b) that the offender is receiving treatment or is undertaking a behaviour intervention program to address any physical condition, mental illness, intellectual disability or mental condition that may have contributed to the commission of the offence.

## Sentencing options

28.55 Division 9 of Part IB sets out some sentencing alternatives for federal offenders with a mental illness or intellectual disability. The Division provides for three options—hospital orders, psychiatric probation orders and program probation orders, each of which is made ‘without passing sentence on the person’.

28.56 The ALRC has considered adopting state and territory sentencing alternatives in relation to federal offenders with a mental illness or intellectual disability.<sup>81</sup> However, it is the ALRC’s view that existing sentencing alternatives under Division 9 should be expanded and improved.

## Hospital orders

28.57 Under s 20BS(1) of the *Crimes Act* a court may make a hospital order in lieu of passing sentence on a federal offender who has been convicted on indictment of a federal offence. The order directs that the person be detained in a hospital for a specified period for the purpose of receiving certain treatment,<sup>82</sup> which is the principal purpose of the order.<sup>83</sup> Data provided by the CDPP suggest that in the five years from 1999–2000 to 2003–04 state and territory courts have not imposed a hospital order.<sup>84</sup>

<sup>81</sup> As suggested by Victorian Institute of Forensic Mental Health, *Submission SFO 43*, 29 April 2005.

<sup>82</sup> *Crimes Act 1914* (Cth) ss 20BS–20BU.

<sup>83</sup> Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [206].

<sup>84</sup> Commonwealth Director of Public Prosecutions, *Correspondence*, 4 May–2 September 2005, Mental illness and intellectual disability data.

28.58 Before making a hospital order the court must be satisfied that: the person is suffering from a mental illness within the meaning of the civil law of that state or territory; the illness contributed to the commission of the offence; appropriate treatment is available in a hospital; and the proposed treatment cannot be provided to the person other than as an inmate of a hospital.

28.59 The order cannot be made unless the person would otherwise have been sentenced to a term of imprisonment and cannot exceed the period of imprisonment that would have been ordered. At any time while the hospital order is in force, the person detained or the CDPP may apply to the court to discharge it and replace it with another sentence that could have been imposed at the time the order was made.

28.60 As part of the order, the court may also set a lesser period of detention during which the person is not eligible to be released from the hospital—much like a non-parole period may be set in relation to period of imprisonment. If a lesser period has been set, the decision to release the person at the end of that period is made by the AGD on the advice of two duly qualified psychiatrists with experience in the diagnosis and treatment of mental illness. The order for release can be conditional and can be revoked.

28.61 One issue for consideration is whether hospital orders should be available only for offenders who have been convicted of an indictable federal offence. Summary federal offences can attract a sentence of imprisonment for a period not exceeding 12 months.<sup>85</sup> In DP 70, the ALRC expressed the view that hospital orders should be made available to federal offenders who have been convicted of summary offences punishable by imprisonment.<sup>86</sup> A number of stakeholders expressed support for this reform.<sup>87</sup> The AGD submitted that consideration should be given to enabling a sentence of imprisonment imposed on a federal offender ‘to be amended, reviewed or commuted to a hospital order where a prisoner is discovered to have a mental illness which was either undetected at the time of sentencing or which has developed during the person’s incarceration’.<sup>88</sup>

28.62 Although the sentencing factors listed in s 16A(2) of the *Crimes Act* must be considered when making a hospital order, Division 9 is silent on what factors a court is to consider when setting a lesser period or when declining to set a lesser period. Further, Division 9 does not provide for a standard lesser period, although ALRC 44 stated that the lesser period of the hospital order should end after completion of 70 per cent of the period ordered.<sup>89</sup>

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85 *Crimes Act 1914* (Cth) s 4H.

86 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 28–5.

87 New South Wales Legal Aid Commission, *Submission SFO 75*, 10 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; New South Wales Guardianship Tribunal, *Submission SFO 69*, 8 February 2006.

88 Attorney-General’s Department, *Submission SFO 83*, 15 February 2006.

89 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [206].



28.63 Another issue is the role of the Attorney-General in deciding whether an offender should be released at the end of the lesser period of the hospital order. In DP 70, the ALRC proposed that these decisions be made by an independent body, such as a federal parole authority.<sup>90</sup> Several stakeholders supported this proposal.<sup>91</sup> One stakeholder submitted that the federal parole authority could include members with experience in intellectual disability and dual diagnosis.<sup>92</sup> Although not supportive of the establishment of a federal parole authority, the AGD submitted that if such a body were established it should include members with particular experience working with offenders with a mental illness or intellectual disability.<sup>93</sup>

#### *ALRC's views*

28.64 Federal sentencing legislation should continue to provide for hospital orders because they are an appropriate alternative to imprisonment for federal offenders with a mental illness. In addition, hospital orders should be made available to federal offenders with a mental illness who have committed summary offences that are punishable by imprisonment. To draw a distinction between summary and indictable offences in this context is artificial.

28.65 ALRC 44 commented that hospital orders should be equated with imprisonment.<sup>94</sup> In Chapter 9 the ALRC makes a number of recommendations in relation to setting non-parole periods. It is the ALRC's view that three of these should apply when a court fixes or declines to fix a lesser period under a hospital order. These are the recommendations in relation to the matters to be considered when fixing or declining to fix a non-parole period; the preclusion of non-parole periods for sentences of less than 12 months; and the reference point by which a non-parole period is two-thirds of the head sentence.

28.66 The ALRC is not persuaded that a sentence of imprisonment should be able to be changed to a hospital order if a federal offender has a mental illness that was not detected at the time of sentencing or which developed after sentencing. As discussed in Chapter 16, enabling courts to reconsider sentences because there has been a fundamental change in the circumstances of the offender significantly detracts from the goal of promoting finality of the sentencing process. Further, before making a hospital order a court must be satisfied that the offender's mental illness contributed to the commission of the offence.<sup>95</sup> For this reason a hospital order would not be an appropriate sentencing disposition for an offender whose mental illness developed *after* his or her sentence was imposed.

90 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 28–5.

91 F Beaupert, *Submission SFO 76*, 13 February 2006; New South Wales Legal Aid Commission, *Submission SFO 75*, 10 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

92 New South Wales Guardianship Tribunal, *Submission SFO 69*, 8 February 2006.

93 Attorney-General's Department, *Submission SFO 83*, 15 February 2006.

94 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [206].

95 *Crimes Act 1914* (Cth) s 20BS(1)(b).

28.67 It is the ALRC's view that the federal parole authority, assisted by the reports of appropriately qualified professionals, is a more appropriate body than the AGD to make decisions in relation to the release of persons after the expiry of the lesser period. Decisions about the detention of a person with a mental illness or intellectual disability should be made by persons with expertise in the area. In Chapter 23 the ALRC recommends that the federal parole authority should include members with relevant expertise, for example, in the areas of psychology, psychiatry and social work.

**Recommendation 28–6** Federal sentencing legislation should provide that:

- (a) hospital orders are available as a sentencing option when a person with a mental illness is convicted of either a summary federal offence punishable by imprisonment or an indictable federal offence;
- (b) decisions in relation to the release from detention of persons subject to a hospital order are to be made by the federal parole authority, after considering reports of appropriately qualified professionals; and
- (c) the reforms identified in Recommendations 9–1 to 9–4 also apply in relation to hospital orders.

### Probation orders

28.68 Section 20BV of the *Crimes Act* provides that where a person is convicted of a federal offence and the court is satisfied that the person has a mental illness within the meaning of the civil law of that state or territory, the court may—without passing sentence—make an order that the person reside at, or attend, a specified hospital or other place for the purpose of receiving psychiatric treatment. This is known as a psychiatric probation order.<sup>96</sup> The court must also order that the person will be subject to supervision by a probation officer for a period not exceeding two years, and will be of good behaviour for such period as the court specifies, not exceeding five years.<sup>97</sup> Data provided by the CDPP indicate that courts have imposed seven psychiatric probation orders in the five years from 1999–2000 to 2003–04.<sup>98</sup>

28.69 Section 20BY provides that the court may—without passing sentence—make an order that a federal offender with an intellectual disability be released on condition that

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<sup>96</sup> Ibid ss 20BV–20BX.

<sup>97</sup> Ibid s 20BV(3).

<sup>98</sup> Commonwealth Director of Public Prosecutions, *Correspondence*, 4 May–2 September 2005, Mental illness and intellectual disability data.

he or she undertake an education program or treatment specified in the order.<sup>99</sup> This is known as a program probation order and is subject to the same additional conditions as psychiatric probation orders.<sup>100</sup> Data provided by the CDPP indicate that in the five years from 1999–2000 to 2003–04 state and territory courts have not imposed a program probation order.<sup>101</sup>

28.70 Sections 20BW and 20BX set out the consequences of a breach of a psychiatric probation order or program probation order. If the person has, without reasonable excuse, failed to comply with the order, the court may: impose a pecuniary penalty not exceeding 10 penalty units; discharge the order and make an order for the conditional release of the offender under s 20; revoke the order and deal with the person as if the order had not been made; or take no further action.

28.71 Consultations and submissions did not address psychiatric probation orders. However, the Intellectual Disability Rights Service noted that program probation orders have the potential to provide for the needs of offenders with an intellectual disability and submitted that program probation orders could be used in conjunction with justice plans, which are discussed further below.<sup>102</sup>

28.72 The provisions dealing with the breach of these orders raise a number of issues. In Chapter 17, the ALRC recommends that courts should be able to deal with all breaches of federal sentencing orders regardless of whether an offender has a reasonable cause or excuse for the breach. Another issue is the lack of flexibility for dealing with a breach. In Chapter 17, the ALRC recommends that a court should have power to vary an order when an offender breaches it, so that the court has the flexibility to tailor any orders to an offender's individual circumstances.

### ***ALRC's views***

28.73 Federal sentencing legislation should continue to provide for psychiatric probation orders and program probation orders. These orders allow offenders to live in the community while addressing the behaviour that may have contributed to the commission of an offence. They also provide an alternative to sending an offender with a mental illness or intellectual disability to prison. Program probation orders are also a suitable option for offenders with a dual diagnosis because they provide for the treatment of an offender as well as participation in education programs.

28.74 Consistent with the recommendations in Chapter 17, federal sentencing legislation should remove the requirement that a court can deal with a breach of a

99 *Crimes Act 1914* (Cth) s 20BY. Similar orders are available under state and territory legislation. See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95A; *Sentencing Act 1991* (Vic) s 38(1); *Penalties and Sentences Act 1992* (Qld) pt 5.

100 *Crimes Act 1914* (Cth) s 20BY(2).

101 Commonwealth Director of Public Prosecutions, *Correspondence*, 4 May–2 September 2005, Mental illness and intellectual disability data.

102 Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005.

psychiatric probation order or a program probation order only if the offender does not have a reasonable excuse for the breach.<sup>103</sup> Further, in addition to the power to discharge or revoke the order or take no further action, federal sentencing legislation should provide that a court has the power to vary a psychiatric probation order or program probation order when it has been breached.<sup>104</sup>

**Recommendation 28–7** Federal sentencing legislation should:

- (a) empower a court to deal with any breach of a psychiatric probation order or program probation order, regardless of whether the offender has a reasonable excuse for the breach; and
- (b) provide that, in addition to its existing powers, a court dealing with a breach of a psychiatric probation order or program probation order may vary the order if satisfied of the breach.

### Justice plans

28.75 There is currently no mechanism under federal sentencing legislation to ensure that federal offenders with an intellectual disability receive the care, rehabilitation and treatment they may require to address their offending behaviour. One option to address this problem is the introduction of justice plans for federal offenders with an intellectual disability.

28.76 A justice plan is a statement specifying services that are recommended for an offender and are designed to reduce the likelihood of the person committing further offences.<sup>105</sup> Justice plans are currently available only in Victoria under Part 3 of the *Sentencing Act 1991* (Vic).<sup>106</sup> Under that Act, a court can impose a special condition that an offender with an intellectual disability participate in the services specified in a justice plan on receiving: (a) a declaration of eligibility to receive disability services under the *Intellectually Disabled Persons' Services Act 1986* (Vic); (b) a justice plan prepared by the Victoria Department of Human Services; and (c) a pre-sentence report.

28.77 Justice plans appear to provide a flexible and effective mechanism for ensuring that persons with an intellectual disability receive the care and treatment they may require to deal with their offending behaviour. Justice plans would provide a link between federal offenders and state and territory agencies responsible for intellectual disability services. In DP 70, the ALRC expressed the view that federal sentencing

103 Rec 17–1.

104 Rec 17–2.

105 *Sentencing Act 1991* (Vic) s 3.

106 Justice plans have been considered in Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care—Final Report* (2003).

legislation should provide that, in jurisdictions where justice plans are available, participation in the services specified in the plan may be attached as a condition of a community based order, a discharge or release, a deferred sentencing order, a program probation order or a care and rehabilitation order. Several stakeholders supported this proposal.<sup>107</sup> However, one stakeholder noted that the lack of availability of justice plans in all jurisdictions might lead to inconsistent sentencing outcomes for federal offenders with intellectual disabilities.<sup>108</sup>

28.78 The ALRC agrees that consistency in sentencing is an important goal to be pursued where possible and practicable. However, as discussed in Chapter 7, it is not desirable to limit the sentencing options available to federal offenders in an attempt to achieve consistency. Accordingly, the ALRC is of the view that the OMFO should collaborate with state and territory authorities to promote the adoption of justice plans throughout Australia. The wider availability of justice plans should promote uniformity in the treatment of federal offenders with an intellectual disability across jurisdictions.

28.79 In addition, in Chapter 7 the ALRC recommends that the OMFO provide advice to the Australian Government regarding the state and territory sentencing options that should be made available to federal offenders. When providing this advice, the OMFO should also provide advice on whether a justice plan could be attached as a condition of a sentencing option.

**Recommendation 28–8** Federal sentencing legislation should provide that, in jurisdictions where justice plans are available, participation in the services specified in the plan may be attached as a condition of: a community based order; a discharge; a conditional release; a deferred sentence; a program probation order; or a care and rehabilitation order.

**Recommendation 28–9** The proposed Office for the Management of Federal Offenders should collaborate with state and territory authorities to promote the adoption of justice plans throughout Australia. These plans should specify the services that are recommended for a person with an intellectual disability for the purpose of reducing the likelihood of the person committing further offences.

### Care and rehabilitation orders

28.80 There may be circumstances where a federal offender with an intellectual disability requires long-term rehabilitation and care in a secure environment. However,

<sup>107</sup> Office of the Public Advocate Victoria, *Submission SFO 81*, 14 February 2006; New South Wales Legal Aid Commission, *Submission SFO 75*, 10 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

<sup>108</sup> New South Wales Guardianship Tribunal, *Submission SFO 69*, 8 February 2006.

there are no appropriate options under federal sentencing legislation—other than imprisonment—for these offenders because hospital orders are generally considered to be inappropriate for persons with an intellectual disability.<sup>109</sup>

28.81 In DP 70 the ALRC proposed that federal sentencing legislation should provide for a care and rehabilitation order for federal offenders with an intellectual disability.<sup>110</sup> The ALRC proposed that this order be modelled on the hospital orders. Several stakeholders supported this proposal.<sup>111</sup> However, one stakeholder submitted that this sentencing option should not be introduced without further consultation and research to ensure, among other things, that appropriate secure accommodation is available to offenders with an intellectual disability.<sup>112</sup> Another stakeholder questioned the need for separate sentencing options for federal offenders with a mental illness and for those with an intellectual disability, noting that these conditions can co-exist and that a single, more flexible care and rehabilitation order could be more appropriate.<sup>113</sup> The AGD submitted that this type of sentencing option could have human rights implications given that it authorised the deprivation of liberty of a person with a disability.<sup>114</sup>

#### *ALRC's views*

28.82 The ALRC is of the view that federal sentencing legislation should provide for a care and rehabilitation order, which should be modelled on the hospital order but designed for offenders with an intellectual disability. There are limited sentencing options available for federal offenders with an intellectual disability. The goal of a care and rehabilitation order is to promote access to rehabilitation programs and other care. Such a sentencing option would not violate the human rights of a federal offender with an intellectual disability because a court should not make a care and rehabilitation order unless it would have otherwise sentenced the person to a term of imprisonment. The order would state that the person be detained in secure accommodation for a period specified in the order, and may require compliance with any condition the court considers appropriate in the circumstances. This may include conditions that the person participate in: (a) rehabilitation and behaviour intervention programs; and (b) the services specified in a justice plan, where available.

109 S Hayes, 'Sentencing of People with Mental Disorders' (2005) 86 *Reform* 24, 26.

110 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 28–9. See also Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care—Final Report* (2003), [7.40]–[7.41], recs 107–110.

111 Department of the Attorney General Western Australia, *Submission SFO 96*, 15 March 2006; Office of the Public Advocate Victoria, *Submission SFO 81*, 14 February 2006; F Beaupert, *Submission SFO 76*, 13 February 2006; New South Wales Legal Aid Commission, *Submission SFO 75*, 10 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

112 New South Wales Guardianship Tribunal, *Submission SFO 69*, 8 February 2006.

113 F Beaupert, *Submission SFO 76*, 13 February 2006.

114 Attorney-General's Department, *Submission SFO 83*, 15 February 2006.

**Recommendation 28–10** Federal sentencing legislation should provide that a court may make an order for the care and rehabilitation of a federal offender with an intellectual disability. The provision should be modelled on s 20BS of the *Crimes Act* and provide that the court may, in lieu of imposing a sentence of imprisonment, make an order that the person be detained in secure accommodation for a specified period, but no longer than the period of imprisonment to which the person would otherwise have been sentenced. The order may require compliance with any condition that the court considers appropriate in the circumstances.

### Assessment and treatment orders

28.83 There is no procedure under Division 9 for assessing an offender to determine whether a hospital order is appropriate. One option for reform is for federal sentencing legislation to provide for assessment orders. Such orders are available under s 90 of the *Sentencing Act 1991* (Vic), which allows for the detention of an offender as an involuntary patient for up to 72 hours to allow an assessment to be made of his or her suitability for a hospital order.<sup>115</sup> On the expiry of the order the offender is returned to court for sentence or other order.

28.84 Additionally, Division 9 does not provide for the court to order that a person be detained for diagnosis, assessment and treatment for a short period of time when there are indications of a number of conditions that require investigation.<sup>116</sup> Diagnosis, assessment and treatment orders are available under the Victorian sentencing legislation.<sup>117</sup> They allow for the detention of an offender as an involuntary patient for up to three months for the purposes of diagnosis, assessment and treatment. These orders are appropriate where the evidence indicates there is a need for a period of in-patient monitoring or supervision of the person.<sup>118</sup> On the expiry of the order the offender is returned to court for sentence or other order.

28.85 In DP 70 the ALRC indicated that it was interested in receiving feedback about whether federal sentencing legislation should provide for assessment orders or diagnosis, assessment and treatment orders.<sup>119</sup> Two stakeholders supported the use of these types of orders when sentencing federal offenders.<sup>120</sup> It was submitted that

115 See also *Sentencing Act 1997* (Tas) s 72; *Sentencing Act 1995* (NT) s 79.

116 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [10.205].

117 *Sentencing Act 1991* (Vic) s 91.

118 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [10.204].

119 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), [28.80].

120 Office of the Public Advocate Victoria, *Submission SFO 81*, 14 February 2006; F Beaupert, *Submission SFO 76*, 13 February 2006.

federal assessment and treatment orders could be modelled on Victorian assessment and treatment orders.<sup>121</sup>

28.86 However, the Victorian Institute of Forensic Mental Health (Forensicare) submitted that assessment orders are rarely made in Victoria because the mental health system has changed radically since their introduction and there is a lack of understanding as to how the orders operate in practice.<sup>122</sup> Further, Forensicare submitted that limited resources mean that if a court were to make some form of assessment order, there might not be the services available to enable compliance with the order. Accordingly, Forensicare submitted that it is more appropriate to enable assessments of an offender's mental health to be made through the use of pre-sentence reports.<sup>123</sup>

28.87 The ALRC is not persuaded that it is appropriate to provide for assessment orders, or diagnosis, assessment and treatment orders in federal sentencing legislation. The ALRC received limited and conflicting feedback about the desirability of introducing these types of orders. Further, these types of orders may raise issues about the involuntary treatment of persons with a mental illness. As discussed further below, involuntary treatment is a complex and controversial issue that would be more appropriately dealt with in a comprehensive inquiry into issues concerning people with a mental illness or intellectual disability in the federal criminal justice system.

### **Guardianship orders**

28.88 The Council of Social Service of New South Wales submitted that consideration should be given to the use of guardianship orders when sentencing federal offenders with an intellectual disability.<sup>124</sup> Guardianship orders are available as a sentencing alternative in the United Kingdom. Under s 37 of the *Mental Health Act 1983* (UK), where a person is convicted before the Crown Court or a Magistrates' Court, the court may place the person under the guardianship of a local social services authority or other approved person.

28.89 ALRC 44 recommended the introduction of guardianship orders. The ALRC commented that where the power to commit a person to the guardianship of another is vested in a board or other tribunal, the form of guardianship order will have to be that the department of corrective services in that jurisdiction take the necessary steps to have the offender placed under guardianship.<sup>125</sup>

28.90 The adoption of guardianship orders as a sentencing option for federal offenders raises a number of issues including: the circumstances in which a guardianship order is

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121 Office of the Public Advocate Victoria, *Submission SFO 81*, 14 February 2006.

122 Victorian Institute of Forensic Mental Health, *Submission SFO 87*, 17 February 2006.

123 Ibid.

124 Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005.

125 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Recs 133–138, [213].



appropriate; the factors a court must consider when imposing such an order; and whether the order should be available without passing sentence on the offender. A significant issue is who would be responsible for the administration of these orders.

28.91 In DP 70 the ALRC expressed the preliminary view that guardianship orders should not be introduced as a sentencing option for federal offenders with an intellectual disability. A number of stakeholders were strongly opposed to the introduction of guardianship orders.<sup>126</sup> It was submitted that existing state and territory guardianship orders are not punitive and are made to empower people with impaired decision-making capacity ‘by appointing a guardian to advocate on their behalf and make decisions which advance their interests’.<sup>127</sup> Further, they are only made as a last resort after consideration has been given to the best interests of the person with impaired decision-making capacity.<sup>128</sup> Accordingly, it was submitted that it would be inimical to existing state and territory guardianship laws to introduce guardianship orders as a sentencing option for federal offenders.<sup>129</sup> One stakeholder commented that guardianship orders made pursuant to s 37 of the *Mental Health Act 1983* (UK) are more akin to hospital orders made under Victorian mental health legislation than to state or territory guardianship orders.<sup>130</sup>

#### **ALRC’s views**

28.92 The ALRC agrees that guardianship orders should not be introduced as a sentencing option for federal offenders with an intellectual disability. Guardianship orders are unnecessary because program probation orders allow federal offenders with an intellectual disability to live in the community and address their offending behaviour under the supervision of a probation officer. In addition, it may be inappropriate in the criminal context to use the types of guardianship orders that are available in each Australian state and territory.<sup>131</sup>

## **Procedural and evidential issues**

### **Pre-sentence reports**

28.93 One method of informing the court about a person’s mental illness or intellectual disability is through the use of pre-sentence reports, which are discussed in Chapter 14.

126 Office of the Public Advocate Victoria, *Submission SFO 81*, 14 February 2006; New South Wales Guardianship Tribunal, *Submission SFO 69*, 8 February 2006; State Administrative Tribunal Western Australia, *Submission SFO 57*, 20 December 2005; Tasmanian Guardianship and Administration Board, *Submission SFO 53*, 15 December 2005.

127 New South Wales Guardianship Tribunal, *Submission SFO 69*, 8 February 2006.

128 Ibid.

129 Tasmanian Guardianship and Administration Board, *Submission SFO 53*, 15 December 2005.

130 New South Wales Guardianship Tribunal, *Submission SFO 69*, 8 February 2006.

131 See, eg, *Guardianship Act 1987* (NSW) s 14; *Guardianship and Administration Act 2000* (Qld) s 12; *Guardianship and Administration Act 1993* (SA) s 25; *Guardianship and Administration Act 1995* (Tas) s 20; *Guardianship and Management of Property Act 1991* (ACT) s 7.

28.94 A number of stakeholders expressed the view that federal sentencing legislation should provide for mandatory pre-sentence reports in relation to offenders with a mental illness or intellectual disability.<sup>132</sup> However, two key issues were raised. The first relates to the need for authors of pre-sentence reports to have sufficient expertise in mental illness or intellectual disability.<sup>133</sup> Without appropriate expertise, pre-sentence reports could disadvantage offenders because their illness or disability could be wrongly identified as indicating a lack of cooperation, with adverse implications for their sentence.<sup>134</sup>

28.95 The second issue relates to resources. Forensicare noted that the preparation of pre-sentence reports is time consuming and resource intensive. It noted that in the financial year 2004–05 it prepared 636 psychological and psychiatric pre-sentence reports for Victorian courts.<sup>135</sup> It submitted that pre-sentence reports should not be produced without the criminal justice system reimbursing or paying for the services of those who have to prepare them.<sup>136</sup>

28.96 One option for reform is for federal sentencing legislation to provide that a pre-sentence report is mandatory when sentencing a federal offender with a mental illness or intellectual disability. ALRC 44 did not recommend mandatory pre-sentence reports. Noting the significant resource issues, the ALRC recommended that where there were reasonable grounds to expect that it would assist in sentencing, courts should avail themselves of pre-sentence reports.<sup>137</sup>

28.97 Alternatively, as proposed in DP 70, federal sentencing legislation could provide that pre-sentence reports are mandatory only in certain circumstances. In its report on *People with Disabilities and the Criminal Justice System*, the New South Wales Law Reform Commission recommended that a mandatory pre-sentence report be limited to circumstances where a person with an intellectual disability is unrepresented and a sentence of imprisonment is a reasonable possibility. This was intended to ensure that a report is prepared in serious cases where the person may not have anyone to raise the

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132 Victorian Institute of Forensic Mental Health, *Submission SFO 87*, 17 February 2006; Attorney-General's Department, *Submission SFO 83*, 15 February 2006; Mental Health Coordinating Council, *Submission SFO 44*, 29 April 2005; Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005; Mental Health Council of Australia, *Submission SFO 32*, 18 April 2005; Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005;

133 Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005.

134 New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996), [8.56].

135 Victorian Institute of Forensic Mental Health, *Submission SFO 87*, 17 February 2006.

136 Ibid; Victorian Institute of Forensic Mental Health, *Submission SFO 43*, 29 April 2005. See also Justice Health, *Consultation*, Sydney, 27 February 2006.

137 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [203].

need for such a report on his or her behalf.<sup>138</sup> Some stakeholders expressed support for this type of reform.<sup>139</sup>

### ***ALRC's views***

28.98 Pre-sentence reports are particularly important when a federal offender has a mental illness or intellectual disability because their impairment may justify diversion from the criminal justice system or imposition of a less severe sentence. Additionally, if a court is aware that a federal offender has a mental illness or intellectual disability, it will be able to tailor a sentence or other order to ensure that the offender receives the treatment, support or care required.

28.99 Mandatory pre-sentence reports in all matters involving a federal offender with a mental illness or intellectual disability is an attractive option. However, the significant resource implications of such a reform has led the ALRC to conclude that such a requirement should be qualified. The ALRC supports the general approach taken by the New South Wales Law Reform Commission because it addresses the need to protect vulnerable and unrepresented offenders whose liberty is at stake, while taking account of resource implications. However, it is not necessary to make special provision for unrepresented offenders with a mental illness or intellectual disability because more general reforms about the adjournment of sentencing proceedings in the absence of legal representation are recommended in Chapter 13.

28.100 Chapter 14 includes a detailed recommendation in relation to pre-sentence reports for federal offenders, including that federal sentencing legislation should require a pre-sentence report to be prepared by 'a suitably qualified person'. It may be that more than one expert may be required to prepare a pre-sentence report in relation to a federal offender with a dual diagnosis.

**Recommendation 28–11** Federal sentencing legislation should provide that a court must request a pre-sentence report when:

- (a) an offender has a mental illness or intellectual disability, or such a condition is suspected; and
- (b) there is a reasonable prospect that the court will impose a sentence that deprives the offender of his or her liberty or places the offender in jeopardy of being deprived of his or her liberty.

138 New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996), [8.57].

139 Office of the Public Advocate Victoria, *Submission SFO 81*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; New South Wales Guardianship Tribunal, *Submission SFO 69*, 8 February 2006.

### Certificate of available services

28.101 Under Division 9 of Part IB, a court can impose an order for the education, treatment or custody in a health facility of a federal offender.<sup>140</sup> A court can also require an offender to receive psychiatric treatment or participate in a rehabilitation program as a condition of a community based order or other order under Part IB of the *Crimes Act*.<sup>141</sup>

28.102 Various provisions in Division 9 state that a court must be satisfied that these services are available before making a hospital order, psychiatric order or program probation order.<sup>142</sup> However, Part IB makes no provision about how a court is to be satisfied that appropriate education programs, treatment or custody in a health facility are available for a federal offender.

28.103 In addition, a court does not have to be satisfied that relevant services are available if the court wants to attach such a condition to a community based order, a conditional release order or other sentencing option under Part IB. Service providers may be put in an invidious position if a court imposes a condition that a federal offender be held at a health facility, receive treatment or attend a behaviour intervention program, and those services are not available.

28.104 One option for reform is for federal sentencing legislation to make provision for a certificate of available services such as that under s 47 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).<sup>143</sup> Section 47 provides that a court must request the Victorian Department of Human Services to provide the court with a certificate of available services if the court is considering imposing orders for the custody of a person or for the provision of treatment or other services. The certificate must state whether facilities or services are available and, if so, give an outline of those facilities or services. If no facilities or services are available, the certificate may state any other options the Secretary considers appropriate for the court to consider in making the proposed order.

28.105 The Victorian legislation provides for a certificate of available services only in relation to services provided to offenders with a mental illness. One variation on this model would be to require a certificate in relation to offenders with a mental illness or intellectual disability. Another variation would be for federal sentencing legislation to provide that the ordering of a certificate is discretionary.

28.106 In DP 70, the ALRC expressed the view that federal sentencing legislation should require a court sentencing a federal offender with a mental illness or intellectual

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140 *Crimes Act 1914* (Cth) ss 20BS (hospital orders), 20BV (psychiatric probation orders), 20BY (program probation orders).

141 For example, as a condition of a conditional release after conviction under *Ibid* s 20. See Ch 7.

142 *Ibid* ss 20BS(1)(c), 20BV(1)(c), 20BY(1)(c).

143 Victorian Institute of Forensic Mental Health, *Submission SFO 43*, 29 April 2005.

disability to request a ‘certificate of available services’ from the relevant state or territory department if the court is considering imposing an order that the offender receive treatment or participate in a rehabilitation program.<sup>144</sup> Several stakeholders supported this proposal.<sup>145</sup> Forensicare submitted that certificates of available services are a vitally important gatekeeping mechanism that ensure that appropriate services are available to offenders and that court orders can be carried out.<sup>146</sup> However, one stakeholder noted that there could be difficulties transposing the Victorian approach to the federal context.<sup>147</sup>

### **ALRC’s views**

28.107 Federal sentencing legislation should provide for a certificate of available services such as that provided for in Victorian legislation. In *R v Batori*, Gullaci J noted that the lack of a mechanism similar to s 47 was a gap in federal sentencing legislation.<sup>148</sup>

28.108 Certificates of available services have the potential to provide a link between the federal criminal justice system and the provision of services by state and territory agencies. As noted by Forensicare, such a gatekeeping mechanism is vitally important to allow service providers to respond appropriately, and to facilitate the carrying out of the court’s orders.<sup>149</sup> The ALRC recommends that it be mandatory for a court to request a certificate of available services if it is considering imposing an order that a federal offender receive treatment or participate in a rehabilitation program.

28.109 Courts should also be assured that appropriate services are available before making an order in relation to a federal offender with an intellectual disability. The ALRC therefore recommends that certificates of available services should apply not only to the provision of psychiatric services, as provided for under s 47 of the Victorian legislation, but also to services such as behaviour intervention and other rehabilitation programs that are appropriate for federal offenders with an intellectual disability.

**Recommendation 28–12** Federal sentencing legislation should provide that a court must request that the state or territory department with responsibility for the provision of services to persons with a mental illness or intellectual disability provide the court with a ‘certificate of available services’ if the court is considering imposing an order that a federal offender receive treatment or participate in a rehabilitation program.

144 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 28–11.

145 Victorian Institute of Forensic Mental Health, *Submission SFO 87*, 17 February 2006; Office of the Public Advocate Victoria, *Submission SFO 81*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006.

146 Victorian Institute of Forensic Mental Health, *Submission SFO 87*, 17 February 2006.

147 New South Wales Guardianship Tribunal, *Submission SFO 69*, 8 February 2006.

148 Transcript of Proceedings, *R v Batori*, (County Court of Victoria, Gullaci J, 17 May 2004), 3.

149 Victorian Institute of Forensic Mental Health, *Submission SFO 43*, 29 April 2005.

## Administration and release

### Programs and pre-release schemes

28.110 State and territory departments of corrective services provide a range of offender rehabilitation programs, including cognitive skills programs, drug and alcohol programs, vocational skills programs and education programs.<sup>150</sup> Federal offenders may undertake these programs in prison, as a condition of a sentencing option, or while on parole.

28.111 The states and territories also offer a variety of pre-release schemes that involve release of an offender from custody for a specific purpose prior to the expiry of the offender's non-parole period, for example, to engage in employment or education. Pre-release schemes are discussed in Chapter 25.

28.112 Issues Paper 29 asked whether any issues arise in relation to the availability of rehabilitation programs and pre-release schemes for mentally ill or intellectually disabled federal offenders during their sentences.<sup>151</sup>

28.113 A number of consultations and submissions reported that there is a lack of appropriate programs for offenders with a mental illness or intellectual disability, both in prisons and in the community.<sup>152</sup> A study of offender rehabilitation programs delivered by each state and territory in 2003 revealed that only one state offers a program specifically designed for offenders with an intellectual disability.<sup>153</sup>

28.114 The requirement that offenders consent to participate in programs or that they give an undertaking to participate in pre-release schemes raises issues for federal offenders with a mental illness or intellectual disability. It is important that offenders with these impairments are fully informed before giving consent or an undertaking because they may have less ability to understand the nature of the program or scheme, and may be more at risk of failing to comply with an undertaking.

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150 K Howells and others, *Correctional Offender Rehabilitation Programs: The National Picture in Australia* (2004) Criminology Research Council <<http://www.aic.gov.au/crc/reports/200203-04.html>> at 5 September 2005, 8.

151 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [14.46].

152 Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Mental Health Council of Australia, *Submission SFO 32*, 18 April 2005; Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005; Correctional Services Northern Territory and Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005; Parole Board of Tasmania, *Consultation*, Hobart, 14 April 2005; Corrections Victoria and Adult Parole Board Victoria, *Consultation*, Melbourne, 31 March 2005; Youth Parole Board Victoria, *Consultation*, Melbourne, 30 March 2005; Queensland Community Corrections Board, *Consultation*, Brisbane, 3 March 2005. See also Gaol as Community Housing: A Forum on Intellectual Disability and Criminal Justice, Sydney, 10 November 2004.

153 K Howells and others, *Correctional Offender Rehabilitation Programs: The National Picture in Australia* (2004) Criminology Research Council <<http://www.aic.gov.au/crc/reports/200203-04.html>> at 5 September 2005, 58, 105. The study did not consider treatment or educational and vocational programs.

28.115 Submissions also noted that offenders with a mental illness or intellectual disability have limited access to programs in prison and pre-release schemes because a large proportion of them are placed on protective orders or are considered by corrective services staff to be too difficult as they require assistance and support to participate in programs.<sup>154</sup>

28.116 Offenders with a mental illness or intellectual disability may experience difficulty participating in rehabilitation programs. For example, a federal offender with an intellectual disability may not be able to participate in a group-work program because of poor verbal skills or a short attention span, and may experience difficulty complying with onerous conditions.<sup>155</sup>

28.117 A lack of access to prison programs can result in federal offenders with a mental illness or intellectual disability serving longer sentences than offenders without these impairments. Offenders are often required to undertake prison programs in order to be considered for parole. Parole boards are hesitant to release an offender unless they are convinced that the person is not a threat to the community.<sup>156</sup> A further issue is the lack of appropriate programs in the community for federal offenders with a mental illness or intellectual disability who are on parole.

#### ***ALRC's views***

28.118 Federal offenders with a mental illness or intellectual disability should have access to rehabilitation programs and pre-release schemes so they may be given the opportunity to address their offending behaviour. Unequal access to rehabilitation programs and pre-release schemes may result in offenders with these impairments being held in custody longer than other offenders. This is discriminatory and may conflict with international standards and national guidelines in relation to offenders with a mental illness or intellectual disability.<sup>157</sup>

28.119 As discussed above, the ALRC recommends that the Australian Government work with state and territory governments to improve substantially service provision to federal offenders with a mental illness or intellectual disability.<sup>158</sup> In addition, in Chapter 22 the ALRC recommends that the OMFO monitor and provide advice to the

154 Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005. See also T Walsh, *Incorrections: Investigating Prison Release Practice and Policy in Queensland and its Impact on Community Safety* (2004), 110.

155 S Hayes, 'A Review of Non-custodial Interventions with Offenders with Intellectual Disabilities' (2005) 17 *Current Issues in Criminal Justice* 69, 74–75.

156 Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Corrections Victoria and Adult Parole Board Victoria, *Consultation*, Melbourne, 31 March 2005; Sentence Administration Board ACT, *Consultation*, Canberra, 17 March 2005; Queensland Community Corrections Board, *Consultation*, Brisbane, 3 March 2005.

157 See, eg, *United Nations Standard Minimum Rules for the Treatment of Prisoners*, UN Doc A/CONF/6/1 (1955), rr 62, 65, 66; Corrective Services Ministers' Conference and Conference of Correctional Administrators, *Standard Guidelines for Corrections in Australia* (2004).

158 Rec 28–2.

Australian Government in relation to state and territory programs and pre-release schemes that are appropriate for federal offenders with a mental illness or intellectual disability.<sup>159</sup> These reforms will help to ensure that federal offenders with a mental illness or intellectual disability have access to appropriately designed rehabilitation programs and pre-release schemes.

28.120 The ALRC notes concerns about the ability of offenders with a mental illness or intellectual disability to consent or give an undertaking to participate in a rehabilitation program or pre-release scheme. The ALRC is of the view that state and territory departments of corrective services should provide appropriate advice and support to federal offenders with a mental illness or intellectual disability to ensure they are fully informed and are able to consent to participate in prison programs or give an undertaking to be able to participate in pre-release schemes. Federal offenders with a mental illness or intellectual disability should fully understand the nature of the programs or schemes in which they are to participate, the effect that the program or scheme will have on the likelihood of parole, and the consequences of a refusal or failure to participate in the program or scheme.

28.121 State and territory corrective services officers (including prison officers, community corrections officer, and probation and parole officers) should also provide ongoing advice and support to federal offenders in order to facilitate compliance with any conditions of a program or scheme.

**Recommendation 28–13** State and territory departments of corrective services should ensure that appropriate advice and support is provided to federal offenders with a mental illness or intellectual disability who are required to give consent to participate in a rehabilitation program or give an undertaking to participate in a pre-release scheme.

## Parole

28.122 As noted above, offenders with a mental illness or intellectual disability often experience difficulties accessing parole. Submissions raised the issue of the capacity of persons with a mental illness or intellectual disability to understand and meet the conditions imposed on them when granted parole. It was said that imposing conditions, without appropriate support and assistance, would be setting the person up for failure.<sup>160</sup> It has been reported that in the period 1990–98, 10.1 per cent of prison

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159 Rec 22–4.

160 Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005; Mental Health Coordinating Council, *Submission SFO 44*, 29 April 2005.



inmates identified with intellectual disabilities in New South Wales were in prison for breach of parole conditions, compared with 5.7 per cent of all inmates.<sup>161</sup>

28.123 The Department of Corrective Services Queensland noted that where a federal offender with a mental illness or intellectual disability contravenes an order for parole or release on licence, the Department must correspond with federal authorities and wait for their response prior to taking action. The Department suggested that community corrections could be authorised to take immediate action to prevent federal offenders posing a risk to themselves or others pending a decision by the relevant federal authority.<sup>162</sup>

28.124 A number of submissions and consultations emphasised that a lack of appropriate accommodation in the community for offenders with a mental illness or intellectual disability impedes access to parole.<sup>163</sup>

### ***ALRC's views***

28.125 In Chapter 23 the ALRC expresses the view that the federal parole authority should include members with relevant expertise in the areas of psychology, psychiatry and social work. This will assist in making parole decisions that are appropriate to federal offenders with a mental illness or intellectual disability.

28.126 The ALRC also recommends a range of amendments to current parole arrangements so that the federal parole authority can deal with breaches of parole more efficiently and effectively, while still ensuring that the offender is given an opportunity to address the authority about the alleged breach.<sup>164</sup>

## **Other issues of concern**

### **Treatment by state and territory authorities**

28.127 Hospital orders and psychiatric probation orders require state and territory mental health authorities to provide treatment to federal offenders with a mental illness. One submission noted that the *Crimes Act* does not authorise a service provider to treat someone involuntarily under state legislation; nor (in the case of a person who

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161 Department of Corrective Services, *Recidivism and Other Statistics on Population of Inmates with Intellectual Disability in NSW Correctional Centres 1.1.1990–31.12.98* (2000) in J Simpson and L Rogers, *Intellectual Disability and Criminal Law—Hot Topics Issue 39* (2002) Legal Information Access Centre. See also S Hayes, *People with Intellectual Disability and their Experience of the Criminal Justice System—Anything But Ordinary*, 10–13 October 2005, 9.

162 Department of Corrective Services Queensland, *Submission SFO 27*, 14 April 2005.

163 Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005; Parole Board of Tasmania, *Consultation*, Hobart, 14 April 2005; Corrections Victoria and Adult Parole Board Victoria, *Consultation*, Melbourne, 31 March 2005; Youth Parole Board Victoria, *Consultation*, Melbourne, 30 March 2005.

164 See Ch 24.

receives a community based order under the *Crimes Act*) to require a person to attend appointments or receive treatment.<sup>165</sup>

28.128 The Australian Government has made a number of arrangements with the states and territories in relation to federal offenders under s 3B of the *Crimes Act*.<sup>166</sup> These arrangements provide that state and territory officers may exercise powers and functions that are appropriate for the carrying out of an order made under Divisions 6 to 9 of Part IB.<sup>167</sup> It is unclear whether these powers and functions would extend to the provision of involuntary treatment. One option for reform would be to amend these arrangements to make it clear that state and territory mental health services officers can provide involuntary treatment to federal offenders in certain circumstances.

28.129 Another option is to encourage states and territories to amend their mental health legislation to ensure that their health authorities are able to provide involuntary treatment to federal offenders who are the subject of orders that require psychiatric treatment. Victorian legislation was recently amended to ensure that federal offenders in Victoria who have been acquitted due to mental illness and detained under s 20BJ of the *Crimes Act* may be treated, as far as possible, in the same way as other forensic patients under the state mental health legislation.<sup>168</sup>

28.130 A further option for reform is for federal sentencing legislation to provide that federal offenders who are subject to orders requiring psychiatric treatment should be dealt with as a 'forensic patient' under relevant state or territory mental health legislation. State and territory mental health legislation makes provision for involuntary and other treatment to offenders who are detained in a hospital, prison or other place, or released from custody subject to conditions. These offenders are usually classified as 'forensic patients'.<sup>169</sup>

28.131 In DP 70 the ALRC indicated it was interested in receiving further information and views on appropriate options for reform of existing procedures for the involuntary treatment of federal offenders. Stakeholders submitted that it is important that any reforms enabling involuntary treatment of federal offenders include sufficient safeguards to ensure the protection of their human rights.<sup>170</sup> It was submitted it would be contrary to accepted national and international standards to enable a federal offender to be treated involuntarily if he or she did not satisfy the civil prerequisites for

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165 Victorian Institute of Forensic Mental Health, *Submission SFO 43*, 29 April 2005.

166 See Ch 22.

167 See, eg, *Commonwealth of Australia Gazette—Special (Arrangement under Section 3B of the Crimes Act 1914 of the Commonwealth of Australia between the Commonwealth of Australia and NSW)*, 12 November 1990, No S293.

168 *Mental Health Legislation (Commonwealth Detainees) Act 2004* (Vic).

169 See, eg, *Mental Health Act 1990* (NSW) sch 1; *Mental Health Act 1986* (Vic) s 3, pt 3; *Mental Health Act 2000* (Qld) ch 7 pt 7.

170 Office of the Public Advocate Victoria, *Submission SFO 81*, 14 February 2006; F Beaupert, *Submission SFO 76*, 13 February 2006.

involuntary treatment.<sup>171</sup> Another stakeholder noted that involuntary treatment is a controversial issue and suggested that any reforms in this area could be thoroughly considered in the recommended inquiry into issues concerning people in the federal criminal justice system who have a mental illness, intellectual disability or cognitive impairment.<sup>172</sup>

### ***ALRC's views***

28.132 It is important that state and territory authorities are authorised to treat federal offenders with a mental illness who are subject to orders requiring psychiatric treatment in appropriate circumstances. Without this authority the rehabilitative function of these orders cannot be fulfilled. However, the provision of involuntary treatment is a difficult and controversial issue. It is also an issue that arises when a federal offender has been found unfit to be tried or has been acquitted due to mental illness—areas that fall outside the Terms of Reference of this Inquiry.

28.133 The ALRC is of the view that it is more appropriate for the issue of involuntary treatment of federal offenders to be given thorough and detailed consideration in the recommended inquiry into issues concerning people in the federal criminal justice system who have a mental illness, intellectual disability or cognitive impairment.

### **Development and implementation of national standards**

28.134 Nationally agreed standards, such as the *Standard Guidelines for Corrections in Australia* and the *Standards for Juvenile Custodial Facilities* set out broad guidelines in relation to the provision of services to offenders with a mental illness or intellectual disability. For example, the *Standard Guidelines for Corrections in Australia* provide that ‘prisoners who are suffering from mental illness or an intellectual disability should be provided with appropriate management and support services’.

28.135 The National Mental Health Working Group (NMHWG) has developed a *National Statement of Principles for Forensic Mental Health* (the Principles). The Principles are underpinned by a number of international instruments, and set out a range of standards, including standards in relation to assessment, safe and secure treatment, comprehensive forensic mental health services, ethics, staff knowledge and skills, and accountability.<sup>173</sup>

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171 F Beaupert, *Submission SFO 76*, 13 February 2006.

172 New South Wales Guardianship Tribunal, *Submission SFO 69*, 8 February 2006.

173 National Mental Health Working Group, *National Statement of Principles for Forensic Mental Health* (2002), 3–4.

28.136 The NMHWG requires the endorsement of the Corrective Services Administrators' Conference (CSAC) to be able to progress the Principles.<sup>174</sup> One submission noted with concern the delay in implementing the Principles.<sup>175</sup> In 2006, the Senate Select Committee on Mental Health recommended that the Australian Health Ministers agree to establish a timeline and implementation plan for the Principles.<sup>176</sup>

28.137 Greater efforts should be made to ensure that federal offenders with a mental illness or intellectual disability are treated as uniformly as possible throughout Australia. Although the states and territories are responsible for the delivery of mental health and intellectual disability services, these services should be delivered within a framework provided by nationally agreed principles.

28.138 The Principles provide a suitable model for such national standards. However, other standards will need to be developed in relation to the provision of services to persons with an intellectual disability in the criminal justice system. These standards should be underpinned by relevant international standards (such as the *United Nations Declaration of the Rights of the Disabled*) and should address issues relevant to the provision of services in custodial and non-custodial environments. A number of stakeholders expressed support for the development of national standards for the assessment, detention, treatment and care of offenders with a mental illness or intellectual disability who come into contact with the criminal justice system.<sup>177</sup>

28.139 In DP 70 the ALRC expressed the view that CSAC was the appropriate body to develop and promote compliance with national standards, but noted that it would need to work with the state and territory authorities with responsibility for the provision of mental health, disability and other relevant services when developing these standards. The AGD submitted that other bodies, such as the Human Rights and Equal Opportunity Commission or the AGD's Office of International Law, could be consulted during the development of the standards.<sup>178</sup> Forensicare submitted that the development of national standards should not be the exclusive purview of correctional administrators in case this led to the development of standards that focus only on achieving correctional goals, such as managing disruptive behaviour. It was submitted

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174 Following CSAC endorsement the NMHWG intended to seek endorsement from the Australian Health Ministers Conference, the Corrective Services Ministers Conference and the Standing Committee of Attorneys General. While awaiting a response from CSAC, NMHWG has established a subcommittee to consider the implementation of the Principles by state and territory mental health services.

175 Mental Health Council of Australia, *Submission SFO 32*, 18 April 2005.

176 Senate Select Committee on Mental Health—Parliament of Australia, *A National Approach to Mental Health—From Crisis to Community*, First Report (2006), Rec 3.

177 Victorian Institute of Forensic Mental Health, *Submission SFO 87*, 17 February 2006; Attorney-General's Department, *Submission SFO 83*, 15 February 2006; Office of the Public Advocate Victoria, *Submission SFO 81*, 14 February 2006; Victoria Legal Aid, *Submission SFO 70*, 9 February 2006; Human Rights and Equal Opportunity Commission, *Submission SFO 62*, 22 December 2005.

178 Attorney-General's Department, *Submission SFO 83*, 15 February 2006.

that forensic health and mental health services, and their relevant administrators, should also be involved in the development of national standards.<sup>179</sup>

28.140 The ALRC agrees that it is appropriate that other organisations, such as human rights bodies and forensic health services, be consulted about the development and implementation of national standards relating to offenders with a mental illness or intellectual disability. The OMFO should monitor the implementation of these standards and work with states and territories to ensure they are complied with.<sup>180</sup>

**Recommendation 28–14** The Corrective Services Administrators' Conference, in consultation with relevant government and non-government organisations, should develop and promote compliance with national standards for the assessment, detention, treatment and care of persons with a mental illness or intellectual disability who come into contact with the criminal justice system. These standards should comply with relevant international instruments.

### Education about mental illness and intellectual disability

28.141 One stakeholder noted the stigma associated with mental illness and intellectual disability in the criminal justice system.<sup>181</sup> Another submitted that it is essential that there be funding of education services to improve the skills of people who work with people with a mental illness or intellectual disability within the criminal justice system.<sup>182</sup> Another submission noted that because training is inadequate in this area, the skills utilised to deal with people with these complex problems are inconsistent, and frequently cause additional problems.<sup>183</sup>

28.142 Chapter 19 includes recommendations directed to the education of judicial officers, prosecuting authorities, legal practitioners, and court services officers in relation to the federal criminal justice system and federal offenders. As discussed in Chapter 19, this training should include a component on issues relevant to persons with a mental illness or intellectual disability. For example, judicial officers should receive training on appropriate and available sentencing options for these offenders; Commonwealth prosecutors and legal practitioners should receive training on how to detect whether a person accused of a federal offence has a mental illness or intellectual disability; and state and territory court services officers should receive training on how to provide appropriate support to federal offenders with these conditions.

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179 Victorian Institute of Forensic Mental Health, *Submission SFO 87*, 17 February 2006.

180 See Ch 22.

181 Mental Health Council of Australia, *Submission SFO 59*, 21 December 2005; Mental Health Council of Australia, *Consultation*, Canberra, 17 March 2005.

182 Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005.

183 Mental Health Coordinating Council, *Submission SFO 44*, 29 April 2005.

28.143 Chapter 19 also includes recommendations in relation to the development of a federal sentencing bench book, which should provide commentary on issues relevant to mental illness and intellectual disability in the context of the federal criminal justice system.

### Young federal offenders

28.144 As discussed in Chapter 27, s 20C(1) of the *Crimes Act* provides that a child or young person who is charged with or convicted of an offence against a law of the Commonwealth may be tried, punished or otherwise dealt with in accordance with state and territory laws. Young federal offenders with a mental illness or intellectual disability are thus often dealt with by state and territory juvenile justice systems and mental health systems, rather than under Part IB.<sup>184</sup>

28.145 Although juvenile justice legislation in each jurisdiction sets out a number of sentencing options that are appropriate for young offenders,<sup>185</sup> it does not provide for sentencing options, or alternatives to sentencing, that are specifically designed for young offenders with a mental illness or intellectual disability.<sup>186</sup>

28.146 A number of recommendations in this chapter are applicable to young federal offenders with a mental illness or intellectual disability. These include improving service provision to federal offenders; developing nationally agreed standards for the detention, treatment and care of persons with a mental illness or intellectual disability; and promoting compliance with national and international standards in relation to persons with a mental illness or intellectual disability who have been accused of a federal offence.<sup>187</sup>

28.147 In addition, in their joint inquiry into children in the legal process, the ALRC and Human Rights and Equal Opportunity Commission recommended that the proposed federal Office for Children develop national standards for juvenile justice, including standards relevant to young offenders with a mental illness.<sup>188</sup> The inquiry recommended that: (a) these standards should provide that courts consider specialist psychiatric reports prior to making sentencing decisions; (b) sentences, where appropriate, should provide for systematic and continuing assessment and treatment for young offenders affected by mental illness or severe emotional or behavioural disturbance; and (c) court, detention centre and other agency staff should receive

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184 *Children (Criminal Proceedings) Act 1987* (NSW); *Children and Young Persons Act 1989* (Vic); *Young Offenders Act 1994* (WA); *Young Offenders Act 1993* (SA); *Youth Justice Act 1997* (Tas); *Children and Young People Act 1999* (ACT); *Juvenile Justice Act 1983* (NT). See also Youth Justice Bill (No 2) 2005 (NT).

185 See Ch 27.

186 However, there is some intersection between juvenile justice and mental health legislation. See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) s 31; *Juvenile Justice Act 1992* (Qld) s 61.

187 Recs 28–2, 28–14.

188 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), Rec 192.

appropriate training in the assessment, treatment and support of young people affected by mental illness or severe emotional or behavioural disturbance.<sup>189</sup>

28.148 In Chapter 27 of this Report, the ALRC recommends that until such time as a federal Office for Children is established, the Australasian Juvenile Justice Administrators should develop national best practice guidelines for juvenile justice, including guidelines relating to the sentencing of young people. These guidelines should be consistent with any national standards for the detention, treatment and care of persons with a mental illness or intellectual disability developed by CSAC.

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189 Ibid, Rec 249.





## 29. Other Special Categories of Offenders

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## Introduction

29.1 This chapter provides a broad overview of some of the issues that arise when sentencing particular categories of federal offenders, namely, women, offenders with family and dependants, Aboriginal or Torres Strait Islander (ATSI) offenders,<sup>1</sup> offenders from linguistically and culturally diverse backgrounds, offenders with a drug addiction and offenders with problem gambling. Although each special category is discussed separately below, many federal offenders belong to more than one category.

29.2 These are not the only categories of federal offenders with special needs that arise in the context of sentencing. During the course of the Inquiry stakeholders expressed concern about sentencing options for elderly offenders<sup>2</sup> and access to rehabilitation programs by non-citizen offenders.<sup>3</sup> It has not been possible to discuss every possible category of offender with special needs in this Inquiry. Nevertheless, stakeholders have highlighted the need for other categories to be considered further.

## A systemic approach to reform

29.3 This Report recommends a range of reforms to the law relating to the sentencing, administration and release of federal offenders. Throughout the Inquiry the ALRC has been cognisant of issues relating to the special categories of offenders discussed in this chapter, and the need to ensure that the federal sentencing regime addresses these issues. Recommendations made elsewhere in this Report seek to promote the equitable treatment of these special categories of offenders.

29.4 *Sentencing factors:* In Chapter 6 the ALRC recommends that a court sentencing a federal offender should consider any factor that is relevant to a purpose or principle of sentencing and known to the court. The ALRC recommends that federal sentencing legislation list examples of factors that may be relevant to sentencing, including factors relating to the background and circumstances of the offender. Courts sentencing federal offenders thus have a discretion to consider issues such as the social and economic disadvantage and rehabilitative needs of female and ATSI offenders and the fact that a federal offender has a drug addiction or a history of problem gambling.<sup>4</sup>

29.5 *Sentencing options:* A number of sentencing options available in the states and territories are not available to courts sentencing federal offenders. Some of these options have been specifically designed for special categories of offenders such as offenders with a drug addiction. In Chapter 7, the ALRC recommends that the Office for the Management of Federal Offenders (OMFO) should monitor and evaluate the

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1 In this Report the acronym 'ATSI' is used to refer to Aboriginal *and* Torres Strait Islander persons, or Aboriginal *or* Torres Strait Islander persons, depending on the context in which it is used.

2 New South Wales Legal Aid Commission, *Submission SFO 75*, 10 February 2006. The Law Council of Australia also noted that the ALRC had not discussed elderly offenders: Law Council of Australia, *Submission SFO 97*, 17 March 2006.

3 Confidential, *Submission SFO 64*, 6 January 2006; K Gutierrez, *Submission SFO 58*, 20 December 2005.

4 See Rec 6–1.

use and effectiveness of state and territory sentencing options and should advise the Australian Government about the options that should be made available to federal offenders.<sup>5</sup> This will enable sentencing options that are particularly appropriate to special categories of federal offenders to be made available as they are introduced and evaluated.

*29.6 Pre-sentence reports:* Pre-sentence reports are a valuable mechanism for providing courts with information about issues such as the personal circumstances of special categories of federal offenders and the likely impact of a sentence on an offender or the offender's family or dependants. In Chapter 14 the ALRC recommends that federal sentencing legislation should authorise a court to request a pre-sentence report prior to sentencing a federal offender and to specify the issues to be addressed in that report.<sup>6</sup>

*29.7 Education:* In Chapter 19 the ALRC recommends that the National Judicial College of Australia provide regular training to judicial officers about the sentencing of federal offenders.<sup>7</sup> This will ensure judicial officers are well informed about the sentencing options available for special categories of offenders and the most appropriate ways of promoting their rehabilitation. The ALRC also recommends that the College develop a bench book on federal sentencing that discusses the equal treatment of federal offenders and, in particular, the sentencing of ATSI offenders.<sup>8</sup> Regular training should also be provided to court services officers regarding issues arising in relation to special categories of federal offenders.<sup>9</sup>

*29.8 Data collection:* In Chapter 22 the ALRC recommends that the OMFO develop a comprehensive national database on all federal offenders. This data should include the information required to enable the Australian Government to develop appropriate policies in relation to special categories of offenders and to oversee the administration of their sentences.<sup>10</sup>

*29.9 Funding for special projects:* In Chapter 22, the ALRC recommends that the OMFO should have the capacity to fund special programs with respect to federal offenders, for example, to meet the needs of special categories of offenders.<sup>11</sup>

*29.10 Compliance with international obligations and national guidelines:* In Chapter 22 the ALRC also recommends that the OMFO monitor progress towards achieving compliance with the *Standard Guidelines for Corrections in Australia*.<sup>12</sup> The

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5 See Rec 7–14.

6 See Rec 14–2.

7 See Rec 19–3.

8 See Rec 19–5.

9 See Rec 19–8.

10 See Rec 22–8.

11 See Rec 22–6.

12 See Rec 22–4.

guidelines set standards in relation to the treatment of and services offered to offenders in correctional facilities and in the community. These standards address many of the issues identified below in relation to special categories of offenders.

29.11 *Pre-release schemes*: In Chapter 25, the ALRC recommends that the OMFO should monitor the suitability of state and territory pre-release schemes and provide advice to the relevant Minister regarding the schemes that should be made available for federal offenders.<sup>13</sup> This mechanism enables pre-release schemes—which may be established to accommodate the needs of special categories of offenders—to be made available to federal offenders.

29.12 The remainder of this chapter examines issues that arise in relation to the sentencing, administration and release of special categories of offenders and makes recommendations relating to some of these issues.

## Women offenders

29.13 During this Inquiry, the Australian Institute of Criminology (AIC) analysed data on federal offenders from two different sources on behalf of the ALRC. First, it analysed data from the Attorney-General's Department (AGD) and the Australian Bureau of Statistics about federal prisoners in full-time custody on 13 December 2004.<sup>14</sup> This analysis revealed that female federal prisoners represent 0.4 per cent of the total prison population in Australia and 12 per cent of the total federal prison population. While male federal prisoners constitute 2.7 per cent of all male prisoners in Australia, female federal prisoners constitute 5.5 per cent of all female prisoners. According to the latest data available to the ALRC, on 1 March 2006 there were 93 female federal prisoners.

29.14 The rate of imprisonment of female federal offenders is lower than the rate of imprisonment for female state and territory offenders<sup>15</sup> and has remained relatively constant since 2001. In contrast, the rate of imprisonment for female state and territory offenders has increased consistently since 1998.<sup>16</sup>

29.15 A significant proportion of female federal prisoners have committed fraud and deception offences against the *Crimes Act 1914* (Cth) and the *Social Security Act 1991* (Cth).<sup>17</sup> The data analysed by the AIC reveal that as at 13 December 2004 no women were imprisoned for committing corporations, fisheries or migration offences.<sup>18</sup>

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13 See Rec 25–1.

14 See Appendix 1, [29].

15 See Appendix 1, Figure A1.7 and accompanying text.

16 See Appendix 1, Figures A1.7, A1.8 and accompanying text.

17 See Appendix 1, Figure A1.9 and accompanying text.

18 Ibid.

29.16 The AIC also analysed data provided by the Commonwealth Director of Public Prosecutions (CDPP) about offenders prosecuted for federal fraud or drug offences in the five years from 2000 to 2004. This analysis again revealed that women were more likely to be involved in fraud offences than in other categories of federal crime. Forty three per cent of the fraud cases analysed involved women offenders, as opposed to 15 per cent of drug cases.<sup>19</sup> The fraud offences committed by women tended to involve larger amounts of money than those committed by men.<sup>20</sup>

### Sentencing factors

29.17 While the sex of an offender should not of itself be a relevant sentencing factor, the history and circumstances of a female federal offender will often be different to those of a male federal offender. Studies have consistently concluded that female offenders are more likely than male offenders to be primary caregivers, to have been unemployed prior to sentencing, to have mental health problems, to have experienced high levels of addiction, and to have suffered domestic violence and sexual abuse in the past.<sup>21</sup> There may also be occasions where the circumstances of a female federal offender are inextricably linked to her sex. For example, the fact that a female offender is pregnant will often be a relevant consideration in sentencing.

29.18 In addition, in some circumstances a sentence may have a more severe impact on a female offender than on a male offender. For example, because women represent a small proportion of the overall prisoner population, states and territories generally have a limited number of correctional facilities for women.<sup>22</sup> The fact that a female offender may be required to serve a sentence of imprisonment in a correctional facility located far from her family and social networks may be a relevant consideration in sentencing.

### Sentencing options

29.19 As noted above, a significant proportion of female federal offenders commit fraud-related offences. Where a female federal offender is motivated to commit a fraud-related offence by need, the sentencing purposes of retribution and general deterrence may be of limited relevance and rehabilitation may be the most relevant sentencing purpose to consider. This may have implications for the quantum of the sentence or the sentencing option chosen.

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19 See Appendix 2, Figure A2.7 and accompanying text.

20 See Appendix 2, Figure A2.12 and accompanying text.

21 See, eg, Australian Bureau of Statistics, *Australian Social Trends 2004*, 4102.0 (2004), 185; New South Wales Legislative Council, *Select Committee on the Increase in Prisoner Population: Issues Relating to Women*, Interim Report (2000), [1.5]; J Salomone, *Towards Best Practice in Women's Corrections: The Western Australian Low Security Prison for Women* (2004) Department of Justice Western Australia <[www.justice.wa.gov.au](http://www.justice.wa.gov.au)> at 18 October 2005, 4; Canadian Human Rights Commission, *Protecting their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women* (2003), 5.

22 Australian Bureau of Statistics, *Australian Social Trends 2004*, 4102.0 (2004), 188.

29.20 The AIC's analysis of data provided by the CDPP about federal fraud and drug prosecutions between 2000 and 2004 revealed that women were more likely than men to be conditionally released pursuant to s 19B of the *Crimes Act* in Victoria, New South Wales, Queensland and Western Australia,<sup>23</sup> and pursuant to s 20(1)(a) in all jurisdictions (although this was only statistically significant in New South Wales and South Australia).<sup>24</sup> Women were less likely than men to be fined.<sup>25</sup>

29.21 Correctional administrators from all jurisdictions have developed and published *Standard Guidelines for Corrections in Australia*.<sup>26</sup> These guidelines set out goals to be achieved by corrective service authorities in all states and territories. The guidelines state that programs and services provided to offenders by community-based correctional agencies should be tailored to suit each offender's needs and that programs related to gender should be developed in consultation with relevant community groups and experts.<sup>27</sup> As mentioned above, in Chapter 22, the ALRC recommends that the OMFO should monitor progress towards achieving these standards.<sup>28</sup>

29.22 A number of submissions and consultations raised issues relating to the management of female offenders in correctional facilities.<sup>29</sup> The Australian prison population is predominantly male. Accordingly, corrective services agencies have traditionally been concerned with the administration of male offenders. A number of Australian and overseas studies have highlighted the need for reform of the design and management of correctional facilities for women.<sup>30</sup> Some of the issues relate to: the security classification of female offenders; the sex of staff in correctional facilities; the availability of ante-natal and post-natal care for pregnant female offenders; search procedures; and the hygiene and health services available to female offenders.

29.23 These issues are clearly important and submissions and consultations made during the course of this Inquiry have highlighted the need for them to be addressed. However, as discussed in Chapter 1, these issues lie outside the ALRC's Terms of Reference and will not be considered further here.

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23 See Appendix 2, Figure A2.22 and accompanying text.

24 See Appendix 2, Figure A2.24 and accompanying text.

25 See Appendix 2, Figure A2.59 and accompanying text.

26 Corrective Services Ministers' Conference and Conference of Correctional Administrators, *Standard Guidelines for Corrections in Australia* (2004).

27 Ibid, [5.2], [5.8].

28 See Rec 22-4.

29 Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Prisoners' Legal Service, *Submission SFO 28*, 15 April 2005; Corrections Inspectorate Victoria, *Consultation*, Melbourne, 1 April 2005; Prisoners' Legal Service and others, *Consultation*, Brisbane, 4 March 2005.

30 Committee on Women's Imprisonment, *Justice for Women: The Need for Reform* (2000); Canadian Human Rights Commission, *Protecting their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women* (2003); J McGinty, *Report on a Visit to Canada, Minnesota and England 11-20 August 2001* (2001) Department of Justice Western Australia <www.justice.wa.gov.au/portal/server.pt> at 19 October 2005.

## Rehabilitation programs

29.24 The number of women in Australia's prison population is relatively small. Accordingly, rehabilitation programs for women in correctional facilities can be limited<sup>31</sup> and at times they are simply modified versions of the rehabilitation programs developed for male prisoners.<sup>32</sup> In its previous report on sentencing, the ALRC noted that there were fewer rehabilitation programs available for women. Currently, Western Australia is the only jurisdiction to have rehabilitation programs specifically designed for women.<sup>33</sup> Victoria and Queensland have adapted existing programs to meet the needs of female offenders.<sup>34</sup>

29.25 Sisters Inside addressed the issue of rehabilitation programs for female federal offenders, submitting that:

Women prisoners do not have adequate recreation or adequate programs, including educational and skill-based programs. The small numbers of women prisoners has been a justification for the failure to focus on the particular requirements of women prisoners. Correctional policies and practices applied to women are an adaptation of those considered appropriate for men—women are a correctional afterthought. It is clear that the programs provided to women prisoners are not comparable in quantity, quality or variety to those provided to male prisoners.<sup>35</sup>

29.26 Rehabilitation programs for female federal offenders should be relevant to women's experiences and needs and should not reinforce gender stereotypes. For example, rehabilitation programs could focus on issues associated with physical and sexual abuse, substance abuse, education, parenting and employment. Anecdotal evidence suggests that rehabilitation programs that have been most successful for women are those that are provided in an intimate and confidential environment; encourage women to establish and develop support networks;<sup>36</sup> and are staffed by women who serve as role models.<sup>37</sup>

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31 A McWhinney, 'Working It Out from the Inside: A Non-traditional Approach to Domestic Violence Support Groups in a Women's Prison' (Paper presented at Is Prison Obsolete?, Melbourne, 20–22 July 2005).

32 J Salomone, *Towards Best Practice in Women's Corrections: The Western Australian Low Security Prison for Women* (2004) Department of Justice Western Australia <[www.justice.wa.gov.au](http://www.justice.wa.gov.au)> at 18 October 2005, 3. See also Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [228].

33 K Howells and others, *Correctional Offender Rehabilitation Programs: The National Picture in Australia* (2004) Criminology Research Council <<http://www.aic.gov.au/crc/reports/200203-04.html>> at 5 September 2005, 66. This survey excluded educational and vocational programs.

34 Ibid, 66.

35 Sisters Inside Inc, *Submission SFO 40*, 28 April 2005.

36 A McWhinney, 'Working It Out from the Inside: A Non-traditional Approach to Domestic Violence Support Groups in a Women's Prison' (Paper presented at Is Prison Obsolete?, Melbourne, 20–22 July 2005).

37 M Morash, T Bynum and B Koons, *Women Offenders: Programming Needs and Promising Approaches* (1998) National Criminal Justice Reference Service <[www.ncjrs.org/pdffiles/171668.pdf](http://www.ncjrs.org/pdffiles/171668.pdf)> at 20 October 2005.

## Offenders with family and dependants

29.27 Several international instruments recognise the importance of the family as a fundamental unit of society.<sup>38</sup> Sentences imposed on federal offenders with family and dependants have the potential to disrupt and damage family relationships.

### Sentencing factors

29.28 Section 16A(2)(p) of the *Crimes Act* currently requires a court sentencing a federal offender to take into account the probable effect of the sentence under consideration on the offender's family or dependants. As noted in Chapter 6, some courts have held that this factor can be considered only in 'exceptional circumstances'.<sup>39</sup>

29.29 Separation of an infant child from a parent can have profoundly damaging physical and psychological effects on the infant. Separation can prevent a mother from breastfeeding an infant. Numerous studies have shown that breastfeeding promotes an infant's sensory and cognitive development and lowers infant morbidity and mortality. In addition, separation can prevent or hinder an infant's attachment to his or her parents. Attachment assists an infant's physical, psychological and social development.<sup>40</sup> The ALRC's 1988 report on sentencing expressed the view that a mother of a young child should be imprisoned only in exceptional circumstances.<sup>41</sup> The *United Nations Declaration of the Rights of the Child 1989* provides that, 'a child of tender years shall not, save in exceptional circumstances, be separated from his mother'.<sup>42</sup>

29.30 Separation of an older child from a parent can also have severe negative physical and psychological effects on the child. Several reports have examined the effects of parental incarceration on children.<sup>43</sup> The effects can vary depending on: whether the child was living with the parent at the time the parent was incarcerated; whether the incarcerated parent was the child's primary caregiver; the length of the sentence of imprisonment imposed on the parent; and the age of the child.<sup>44</sup> The effects

38 See *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) art 23(1); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, ATS 5, (entered into force generally on 3 January 1976) art 10(1).

39 See, eg, *R v Sinclair* (1990) 51 A Crim R 418, 430; *R v Ceissman* (2001) 119 A Crim R 535, [36].

40 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, *Bringing Them Home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) ch 11.

41 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 152.

42 *United Nations Declaration of the Rights of the Child*, GA Res 44/25, UN GAOR, UN Doc A/Res/44/49 (1989), Principle 6.

43 See, eg, Legislative Council Standing Committee on Social Issues—Parliament of New South Wales, *A Report Into Children of Imprisoned Parents*, Report Number 12 (1997); Legislative Assembly Standing Committee on Community Services and Social Equity—Parliament of the Australian Capital Territory, *The Forgotten Victims of Crime: Families of Offenders and their Silent Sentence*, Report 6 (2004).

44 See, eg, R Parke and K Clarke-Stewart, 'Effects of Parental Incarceration on Young Children' (Paper presented at From Prison to Home Conference, Washington D.C, January 30–31 2002).



of a parent's imprisonment on a child tend to be a more extreme version of the effects of any enforced and traumatic parent-child separation<sup>45</sup> and may include:

physical health problems, hostile and aggressive behaviour, use of drugs or alcohol, truancy, running away from home, disciplinary problems, withdrawal, fearfulness, bedwetting, poor school performance, excessive crying, nightmare[s], problems in relationships with others, anxiety and depression and attention problems.<sup>46</sup>

29.31 Separation can also be a traumatic experience for the parent. A study in Western Australia on the impact of imprisonment on women's familial and social circumstances noted that all participants in the study discussed the emotional trauma associated with separation from their children. They commonly expressed concern about the wellbeing of their children and frustration at their inability to help their children when they experienced difficulties.<sup>47</sup>

29.32 In addition to the hardship caused to children, sentences imposed on federal offenders may also adversely affect other adults, such as spouses and any dependent parents of the offender. These adverse effects can include emotional distress and reduced financial circumstances.<sup>48</sup>

### Sentencing options

29.33 The ALRC has previously expressed the view that an offender's childcare responsibilities should not limit the range of sentencing options available to a court, and that facilities for community based sentences should have childcare facilities.<sup>49</sup> Childcare facilities are available for some state and territory offenders serving sentences in the community. For example, the Women's Community Custody Program in Brisbane enables women to perform community service at a centre that enables children under to five to live with their mothers and older children to stay with their mothers on weekends and holidays. However, the ALRC was informed in consultations that many women still experience difficulties accessing sentencing options such as community service because of a lack of childcare facilities.<sup>50</sup> Sisters Inside submitted that it was discriminatory to require women to perform community service or complete rehabilitation or treatment programs without providing them with adequate childcare facilities.<sup>51</sup>

45 G Larman and A Aungles, 'Children of Prisoners and their Outside Carers: The Invisible Population' in P Easta and S McKillop (eds), *Women and the Law: Conference Proceedings* (1993) 265, 265.

46 E Stanley and S Byrne, 'Mothers in Prison: Coping with Separation from Children' (Paper presented at Women in Corrections: Staff and Clients, Australian Institute of Criminology, Adelaide, 31 October 2000), 2.

47 D Goulding, *Severed Connections: An Exploration of the Impact of Imprisonment on Women's Familial and Social Connectedness* (2004), 29.

48 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.904].

49 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [228].

50 Prisoners' Legal Service and others, *Consultation*, Brisbane, 4 March 2005.

51 Sisters Inside Inc, *Submission SFO 98*, 6 April 2006.

### Rehabilitation programs

29.34 There are long-term social and economic benefits associated with encouraging offenders to maintain strong emotional bonds with family and dependants. For example, it has been argued that the strength or weakness of the mother-child bond is a significant indicator of recidivism for women with children.<sup>52</sup>

29.35 Family support can assist an offender to reintegrate into the community after serving a sentence of imprisonment. Accordingly, offenders with family or dependants may benefit from participating in rehabilitation programs that focus on developing the offender's parenting skills or re-establishing severed connections between the offender and his or her dependants. A rehabilitation program that assists prisoners to develop their parenting skills and improve relationships with their children has been implemented in all jurisdictions.<sup>53</sup>

### Contact with family and dependants

29.36 Enabling federal offenders to maintain regular contact with their children assists these offenders to preserve and develop their parenting skills and to continue to develop relationships with their children. It has been argued that allowing an offender to maintain contact with his or her child while incarcerated is not a privilege for the parent but rather a right of the child.<sup>54</sup> Article 9(3) of the *United Nations Convention on the Rights of the Child 1989* provides that:

State parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.<sup>55</sup>

### Accommodating children in correctional facilities

29.37 There are conflicting views about the appropriateness of allowing children to reside with their parents in custodial settings.<sup>56</sup> A number of state and territory correctional facilities enable children to reside with their mothers until they are of a certain age.<sup>57</sup> For example, Brisbane's Women's Correctional Centre has a facility that

52 See J Miller-Warke, 'Prisoners as Women: Questioning the Role and Place of Imprisonment' (Paper presented at Women in Corrections: Staff and Clients, Australian Institute of Criminology, Adelaide, 31 October 2000).

53 Good Beginnings, *Prisoners and their Families* (2005) <[www.goodbeginnings.net.au/prisoners\\_families.htm](http://www.goodbeginnings.net.au/prisoners_families.htm)> at 24 October 2005.

54 Legislative Council Standing Committee on Social Issues—Parliament of New South Wales, *A Report Into Children of Imprisoned Parents*, Report Number 12 (1997), 37.

55 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990).

56 Legislative Assembly Standing Committee on Community Services and Social Equity—Parliament of the Australian Capital Territory, *The Forgotten Victims of Crime: Families of Offenders and their Silent Sentence*, Report 6 (2004), 60.

57 See, eg New South Wales Department of Corrective Services, *Annual Report 2003–04* (2004); *Corrections Act 1986* (Vic) s 31; *Corrective Services Act 2000* (Qld) s 20; Department of Justice Western Australia, *Annual Report 2003–04* (2004); Department for Correctional Services South Australia, *Annual Report 2003–04* (2004), 19; *Corrections Act 1997* (Tas) s 25.

enables eight women to live with their children.<sup>58</sup> The Boronia Pre-Release Centre for Women in Western Australia provides accommodation for 71 women and their children in ‘self-care domestic-style accommodation units’.<sup>59</sup> In addition to residing with their mothers on a full-time basis, a number of correctional facilities enable children to stay with their mothers part-time.<sup>60</sup> Some facilities also facilitate all-day visits so that parents can spend longer periods of time with their children. ACT Corrective Services submitted that the design of the prison being developed in the ACT would enable children to stay with their primary caregiver in prison, either overnight or for weekend visits, or on an ongoing basis up to a certain age.<sup>61</sup>

29.38 In New South Wales, the mother of a young child can apply to the Commissioner of Corrective Services for a local leave permit enabling her to serve her sentence with her child in an appropriate environment, such as her home.<sup>62</sup> However, as discussed in Chapter 25, pre-release schemes available to state and territory offenders are only available to federal offenders when they are prescribed in the *Crimes Regulations 1990* (Cth), and no New South Wales pre-release schemes are so prescribed.

#### **ALRC’s views**

29.39 Federal offenders sentenced to a period of imprisonment should be allowed to maintain contact with their children except where contact is not in the best interests of the child. The ALRC supports the existence of programs that enable children to live with their mothers in safe and supportive environments within correctional facilities. These programs should be extended to all primary caregivers of children.

### **Aboriginal and Torres Strait Islander offenders**

29.40 Indigenous peoples are among the most disadvantaged and socially marginalised groups in the world.<sup>63</sup> In Australia, ATSI offenders are over-represented in all jurisdictions at all stages of the criminal justice process.<sup>64</sup>

29.41 In 1991, the Royal Commission into Aboriginal Deaths in Custody (the Royal Commission) released a report that contained a comprehensive analysis of the

58 Department of Corrective Services Queensland, *Brisbane Women’s Correctional Centre* <www.dcs.qld.gov.au/About\_Us/The\_Department/Custodial\_Corrections/> at 28 October 2005.

59 Department of Justice Western Australia, *Annual Report 2003–04* (2004), 82.

60 See, eg, New South Wales Department of Corrective Services, *Women’s Action Plan 2 2000–03* (2000), 21.

61 ACT Corrective Services, *Submission SFO 34*, 20 April 2005.

62 *Crimes (Administration of Sentences) Act 1999* (NSW) s 26; New South Wales Department of Corrective Services, *Women’s Action Plan 2 2000–03* (2000), 21.

63 *Report of Rodolfo Stavenhagen, Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc E/CN.4/2005/88 (2005).

64 See, eg, D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (4th ed, 2006), [12.63]; Australian Bureau of Statistics, *Australian Social Trends 2005*, 4102.0 (2005); E Johnston, *National Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) vol 3, [22.2.3].

involvement of Aboriginal people in the criminal justice system. The report concluded that Aboriginal deaths in custody were largely due to the gross over-representation of Aboriginal offenders in the criminal justice system. This over-representation was attributable to the systemic socio-economic marginalisation of Aboriginal people caused by post-colonial dispossession, cultural fragmentation and disempowerment.

29.42 The Royal Commission noted that no national statistics were available on the sentencing of Aboriginal offenders that would enable a comparison of sentences imposed across jurisdictions.<sup>65</sup> The AGD does not systematically collect information about federal ATSI offenders.<sup>66</sup> Accordingly, it is unknown how many federal offenders are Aboriginal or Torres Strait Islanders. However, the Northern Australian Aboriginal Legal Aid Service informed the ALRC that only a very small percentage of its work involved federal ATSI offenders and that the federal offences committed by ATSI offenders tended to be offences against the *Social Security Act 1991* (Cth).<sup>67</sup>

### Sentencing factors

29.43 Discrimination on the basis of race is prohibited in the sentencing process.<sup>68</sup> ATSI offenders should not be sentenced more leniently or harshly than non-ATSI offenders simply because of their race. Australian courts have consistently held that Aboriginality is not a mitigating factor in sentencing.<sup>69</sup> To adopt a position that an offender's ATSI background is of itself a mitigating factor assumes that ATSI people are a homogenous group rather than a group with diverse social, cultural and economic backgrounds. In *Neal v The Queen*, Brennan J stated that:

The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But 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.<sup>70</sup>

29.44 Accordingly, when sentencing an ATSI offender a judicial officer may take into account factors associated with his or her background, such as socio-economic disadvantage, separation or removal from family, race relations and health problems.<sup>71</sup> This approach is consistent with art 10(1) of the International Labour Organisation *Convention No 169 Concerning Indigenous and Tribal Persons in Independent Countries 1989* (ILO Convention 169), which states that when 'imposing penalties laid

65 E Johnston, *National Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) vol 3, [22.2.1].

66 Attorney-General's Department, *Consultation*, Canberra, 16 March 2005.

67 Aboriginal Justice Advisory Committee and North Australian Aboriginal Legal Aid Service, *Consultation*, Darwin, 28 April 2005.

68 *Racial Discrimination Act 1975* (Cth) s 9; *Rogers v The Queen* (1989) 44 A Crim R 301, 307.

69 See, eg, *Rogers v The Queen* (1989) 44 A Crim R 301; *R v Daniel* (1997) 94 A Crim R 96; *R v Fernando* (1992) 76 A Crim R 58.

70 *Neal v The Queen* (1982) 149 CLR 305, 326.

71 V Williams, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, Project 94, Background Paper 1, (2003), 62–64.

down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics'.<sup>72</sup> Australia is not a party to this Convention.

29.45 The list of sentencing factors in Part IB of the *Crimes Act* directs courts sentencing federal offenders to take into account matters relating to the offender's personal circumstances, where these are relevant and known to the court. These include the offender's character, antecedents, cultural background, age, means and physical or mental condition.<sup>73</sup> The ALRC recommends that federal sentencing legislation continue to require courts to consider these types of matters when sentencing federal offenders.<sup>74</sup> The personal circumstances and cultural background of an ATSI offender may identify a motive for an offence, explain the commission of the offence, point towards an appropriate penalty, or reveal the action to be taken to promote the rehabilitation of the offender.

29.46 In Chapter 6, the ALRC recommends that federal sentencing legislation should also require a court sentencing a federal offender to consider the impact of a sentence on an offender. This will help to ensure that a court sentencing a federal ATSI offender considers the impact that a term of imprisonment will have on the offender. A term of imprisonment may be particularly onerous for an ATSI offender if it causes the offender to lose an existing connection with his or her land, culture or family.<sup>75</sup> In *R v Fernando* Wood J held that a lengthy term of imprisonment imposed on an ATSI offender might be unduly harsh if served in an environment dominated by non-ATSI offenders and staff with a limited understanding of the offender's culture and society.<sup>76</sup>

### Sentencing options

29.47 The Royal Commission recognised that the great expansion of the number of sentencing options in Australia provided an opportunity to apply the principle that imprisonment is a sanction of last resort and to divert ATSI offenders from correctional facilities.<sup>77</sup> In order to break the cycle of recidivism, the Royal Commission recommended that ATSI offenders should be able to undertake personal development courses as part of community service work.<sup>78</sup> One stakeholder submitted that personal development courses for ATSI offenders should be culturally and regionally appropriate, as well as linked in some way to the offending behaviour.<sup>79</sup>

<sup>72</sup> *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, ILO 169, (entered into force generally on 5 September 1991).

<sup>73</sup> *Crimes Act 1914* (Cth) s 16A(2)(m).

<sup>74</sup> Sentencing factors are discussed in Ch 6.

<sup>75</sup> See, eg, *R v Tjami* [2000] SASC 311, [25]; *R v Juli* (1990) 50 A Crim R 31, 37.

<sup>76</sup> *R v Fernando* (1992) 76 A Crim R 58, 63.

<sup>77</sup> E Johnston, *National Report of the Royal Commission into Aboriginal Deaths in Custody* (1991), vol 3, [22.1.11].

<sup>78</sup> *Ibid*, rec 94; vol 3, 71.

<sup>79</sup> Department of the Attorney General Western Australia, *Submission SFO 96*, 15 March 2006.

29.48 The Royal Commission also recommended that an appropriate range of properly funded sentencing options should be available for ATSI offenders, and that ATSI communities should participate in the development, planning and implementation of these programs.<sup>80</sup>

29.49 As discussed in Chapter 7, s 17A of the *Crimes Act* contains a legislative endorsement of a widely recognised common law principle that imprisonment is a sanction of last resort. This principle is of particular importance when sentencing ATSI offenders. The Royal Commission concluded that the high number of deaths in custody of Aboriginal people was primarily explained by their disproportionate detention rates<sup>81</sup> and recommended that governments legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort.<sup>82</sup> Article 10(2) of ILO Convention 169 provides that, when sentencing Indigenous and tribal peoples, preference should be given to methods of punishment other than confinement to prison. As noted above, Australia is not a party to this Convention. However, in *Police v Abdulla* Perry J held that its provisions reinforced the principle in South Australian sentencing legislation that imprisonment is a sanction of last resort.<sup>83</sup>

29.50 Canadian legislation expressly directs judicial officers to consider the circumstances of Indigenous peoples when applying the principle that imprisonment should be a sanction of last resort.<sup>84</sup> The Law Reform Commission of Western Australia has proposed that sentencing legislation in Western Australia be amended to require a court to have regard to the particular circumstances of Aboriginal people when considering whether a term of imprisonment is an appropriate sentence.<sup>85</sup>

29.51 At the beginning of the ALRC's Inquiry, the Minister for Family and Community Services, Senator the Hon Kay Patterson, wrote to the Attorney-General of Australia regarding the issue of third party management of the income of an offender who had been convicted of an alcohol, drug or gambling related offence. It was suggested that such an option might be of particular benefit to Indigenous communities. Stakeholders expressed the view that such a sentencing option would not be practicable for ATSI offenders in remote communities,<sup>86</sup> and that it would be discriminatory to create such a sentencing option if it were imposed only on ATSI offenders.<sup>87</sup>

80 E Johnston, *National Report of the Royal Commission into Aboriginal Deaths in Custody* (1991), recs 9, 11–13.

81 Ibid, vol 3, 3.

82 Ibid, rec 92.

83 *Police v Abdulla* (1999) 106 A Crim R 466, 472.

84 *Criminal Code (RS 1985, c C-46)* (Canada) s 718.2(e).

85 Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Project 94, Discussion Paper (2005), Proposal 30.

86 Department of Justice Northern Territory, *Consultation*, Darwin, 27 April 2005.

87 Department of the Attorney General Western Australia, *Submission SFO 96*, 15 March 2006; Attorney-General's Department, *Submission SFO 52*, 7 July 2005; Correctional Services Northern Territory and

### Rehabilitation programs

29.52 Some states and territories have designed rehabilitation programs for ATSI offenders.<sup>88</sup> However, in 2004 a report on offender treatment programs in Australia noted that:

Given the over-representation of Indigenous people in the criminal justice system, especially in custodial environments, and the general recognition by informants that mainstream offender rehabilitation programs do not adequately meet the needs of Indigenous offenders, it is surprising that only a handful of programs have been specifically developed for Indigenous offenders.<sup>89</sup>

29.53 During consultations the ALRC was informed that existing rehabilitation programs are not appropriately tailored to meet the needs of ATSI offenders.<sup>90</sup> It was said that effective rehabilitation programs for ATSI offenders should be adequately resourced, incorporate principles of Aboriginal healing, and provide ongoing assistance to participants to enable them to avoid engaging in behaviour that may contribute to further offending.<sup>91</sup>

### Traditional laws and customs

29.54 In 1986, the ALRC released its report into Aboriginal customary laws (ALRC 31).<sup>92</sup> The report made wide ranging recommendations on the recognition of Aboriginal customary laws in relation to, among other things: marriage; children and family property; criminal law and sentencing; local justice mechanisms for Aboriginal communities; and traditional hunting, fishing and gathering rights.

29.55 ALRC 31 contained a detailed analysis of the recognition of Aboriginal customary laws in sentencing.<sup>93</sup> The report did not define the term ‘customary law’ but noted that narrow legislative definitions ‘misrepresent the reality’:

Exactly how Aboriginal customary laws are to be defined will depend on the form of recognition adopted ... But it is clear that definitional questions should not be allowed to obscure the basic issues of remedies and recognition. It will usually be sufficient to identify Aboriginal customary laws in general terms, where these are recognised for particular purposes.<sup>94</sup>

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Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005; Northern Australian Aboriginal Legal Aid Service, *Correspondence*, 6 June 2005.

88 K Howells and others, *Correctional Offender Rehabilitation Programs: The National Picture in Australia* (2004) Criminology Research Council <<http://www.aic.gov.au/crc/reports/200203-04.html>> at 5 September 2005, 69.

89 Ibid, 69.

90 Aboriginal Justice Advisory Committee and North Australian Aboriginal Legal Aid Service, *Consultation*, Darwin, 28 April 2005.

91 Northern Australian Aboriginal Legal Aid Service, *Correspondence*, 6 June 2005.

92 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law*, ALRC 31 (1986).

93 Ibid, Ch 21.

94 Ibid, [101].

29.56 In this Report, the ALRC uses the term ‘traditional laws and customs’ instead of the term ‘customary law’. This is consistent with the terminology used in s 223 of the *Native Title Act 1993* (Cth), which refers to ‘the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders’. It is also the term used by the ALRC in its 2005 report, *Uniform Evidence Laws*.<sup>95</sup> In that report the ALRC, the New South Wales Law Reform Commission and the Victorian Law Reform Commission recommended that this term be defined broadly in the uniform evidence Acts to include ‘the customary laws, traditions, customs, observances, practices, knowledge and beliefs of a group (including a kinship group) of Aboriginal or Torres Strait Islander persons’.<sup>96</sup>

29.57 Since ALRC 31, other law reform bodies have considered issues relating to Aboriginal customary laws and sentencing.<sup>97</sup> Most recently, between 2003 and 2005 the Law Reform Commission of Western Australia published 15 background papers and a comprehensive discussion paper on customary law in Western Australia.<sup>98</sup> The work of other law reform bodies has been relied upon as a valuable source of information for the following discussion.

29.58 The traditional laws and customs of ATSI offenders may vary between ATSI communities. Information about particular traditional laws and customs may be relevant to sentencing to explain the circumstances surrounding the commission of the offence or to indicate the offender’s culpability for the offence. For example, in *R v Shannon* the Supreme Court of South Australia took into account the fact that the offender believed himself to be at risk of harm from ‘kadaitcha’ men at the time he committed the offences for which he was being sentenced.<sup>99</sup> In *R v Goldsmith* the Supreme Court of South Australia took into account the fact that the offender set fire to a house to free the spirit of a dead friend trapped within it.<sup>100</sup>

29.59 Traditional laws and customs have also been taken into account in sentencing ATSI men for violent or sexual state or territory offences against women and children.<sup>101</sup> For example, in *R v GJ* the judge took into account the fact that the offender believed he was entitled to have sexual intercourse with the victim because she was his promised wife and had turned 14 years old.<sup>102</sup> On occasions courts have

95 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC 112, VLRC FR (2005).

96 Ibid, Rec 19–3.

97 Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Project 94, Discussion Paper (2005); Northern Territory Law Reform Committee, *Report of the Committee of Inquiry into Aboriginal Customary Law* (2003); New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report 96 (2000).

98 Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Project 94, Discussion Paper (2005).

99 *R v Shannon* (1991) 57 SASR 14.

100 *R v Goldsmith* (1995) 65 SASR 373.

101 See, eg, *R v GJ* [2005] NTCCA 20; *Hales v Jamilmira* (2003) 13 NTLR 14.

102 Transcript of Proceedings, *R v GJ*, (The Supreme Court of the Northern Territory, Martin CJ, 11 August 2005).



concluded that violent offences committed by ATSI men against ATSI women and children are less serious than similar offences committed in non-ATSI communities.<sup>103</sup> However, a number of sentencing judgments have stressed vigorously that the legal system must ensure that ATSI women and children are protected from violent criminal behaviour.<sup>104</sup> The Human Rights and Equal Opportunity Commission submitted that ATSI cultural practices should not be allowed to prevail over the rights of individuals to be free from violence and discrimination.<sup>105</sup>

29.60 Information about ATSI traditional laws and customs may also be relevant to sentencing if an offender is punished by his or her community for committing an offence, or is to be punished in the future. While traditional punishments may take a wide variety of forms, they can include spearing, beating or banishment.<sup>106</sup> The fact that an offender has suffered, or is to suffer, a traditional punishment for the offence may be a mitigating factor in sentencing.<sup>107</sup> It has been held that courts do not condone, encourage or facilitate traditional punishments by taking them into account in sentencing, but rather recognise them as inevitable.<sup>108</sup>

29.61 Where appropriate, sentences imposed on ATSI offenders can also be structured to accommodate traditional laws and customs. For example, a sentence could be structured to enable an ATSI offender to attend a traditional ceremony.<sup>109</sup>

29.62 ATSI communities are often actively involved in resolving disputes according to traditional laws or customs.<sup>110</sup> The purpose of punishment under traditional laws and customs is generally to restore or heal relationships within ATSI communities.<sup>111</sup> Accordingly, courts have taken community views into account when sentencing ATSI offenders.<sup>112</sup> For example, an ATSI community could indicate that the community believed an offender should be banished for a period of time or required to live in the community under certain conditions.<sup>113</sup> Community views could also inform the court of the impact of the sentence upon the community.<sup>114</sup> However, it has been held that the wishes of an ATSI community cannot be given such weight that they prevail over

103 See, eg, *R v Lane* (Unreported, Northern Territory Supreme Court, 29 May 1980), cited in M Davis and H McGlade, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, Project 94, Background Paper 10 (2005), 404.

104 See, eg, *R v GJ* [2005] NTCCA 20; *Hales v Jamilmira* (2003) 13 NTLR 14; *R v Daniel* (1997) 94 A Crim R 96.

105 Human Rights and Equal Opportunity Commission, *Submission SFO 62*, 22 December 2005.

106 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law*, ALRC 31 (1986), [500].

107 Ibid, [507].

108 See, eg, *R v Minor* (1992) 2 NTLR 183; *Jadurin v The Queen* (1982) 44 ALR 424, 429.

109 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law*, ALRC 31 (1986), [515].

110 Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Project 94, Discussion Paper (2005), 207.

111 Ibid, 207.

112 See, eg, *Munungurr v The Queen* (1994) 4 NTLR 63.

113 See, eg, *R v Miyatatawuy* (1996) 6 NTLR 44.

114 See, eg, *Munungurr v The Queen* (1994) 4 NTLR 63.

the proper sentence to be imposed in all the circumstances of a case.<sup>115</sup> Some state and territory sentencing legislation enables courts sentencing ATSI offenders to have regard to ATSI community opinions.<sup>116</sup> For example, sentencing legislation in Queensland provides that a court must have regard to any relevant submissions made by a representative of a community justice group in the offender's community when sentencing an ATSI offender.<sup>117</sup>

29.63 There is debate about the appropriate way in which to present information about traditional laws and customs or ATSI community opinions to a court sentencing an ATSI offender.<sup>118</sup> Judicial officers sentencing ATSI offenders have been informed about traditional laws and customs and community opinions by way of oral evidence from witnesses, written statements from witnesses, pre-sentence reports and submissions from prosecution or defence counsel.<sup>119</sup> ALRC 31 considered the ways in which information about traditional laws and customs and Aboriginal community opinions could be determined and presented to the court sentencing an Aboriginal offender.<sup>120</sup> The ALRC concluded that:

It should be specifically provided that, where a member of an Aboriginal community has been convicted of an offence, the court may, on application made by some other member of the community or a member of the victim's family or community, give leave to the person to make a submission orally or in writing concerning the sentence to be imposed for the offence. The court should be able to give leave on terms ... It should also be provided ... that the Court may adjourn to enable a pre-sentence report to be obtained from a person with special expertise or experience, in any case where Aboriginal customary laws or traditions are relevant in sentencing.<sup>121</sup>

29.64 Some stakeholders expressed support for the proposal to enable members of ATSI communities to provide information to courts sentencing federal ATSI offenders on traditional laws and customs or community views.<sup>122</sup>

### Community participation in sentencing

29.65 Indigenous courts have been established to enable members of ATSI communities to express views on sentencing and to participate more generally in the sentencing process. The term 'Indigenous courts' is used in this chapter to refer to all courts that formally enable ATSI communities to participate in the sentencing process,

<sup>115</sup> *R v Minor* (1992) 2 NTLR 183.

<sup>116</sup> See, eg, *Sentencing Act 1995* (NT) s 104A; *Penalties and Sentences Act 1992* (Qld) s 2(o).

<sup>117</sup> *Ibid* s 2(o).

<sup>118</sup> See, eg, Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Project 94, Discussion Paper (2005), 221–224.

<sup>119</sup> V Williams, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, Project 94, Background Paper 1, (2003), 6–8.

<sup>120</sup> Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law*, ALRC 31 (1986), [523]–[531].

<sup>121</sup> *Ibid*, [531].

<sup>122</sup> Department of Corrective Services Queensland, *Submission SFO 66*, 16 January 2006; Human Rights and Equal Opportunity Commission, *Submission SFO 62*, 22 December 2005.

including courts that have been specifically established to sentence ATSI offenders<sup>123</sup> and courts that conduct circle-sentencing proceedings.<sup>124</sup> A number of Indigenous courts have been established in Australia.<sup>125</sup> Some have a legislative basis, while others operate informally.<sup>126</sup> The process by which offenders are selected to participate in Indigenous courts differs among the jurisdictions.<sup>127</sup> However, the criteria governing access to Indigenous courts tend to be broad. ATSI community members often have a role in determining whether a particular offender is eligible to access an Indigenous court proceeding.<sup>128</sup>

29.66 Indigenous courts have a number of aims, including reducing existing barriers between courts and ATSI people, empowering ATSI communities, providing relevant and meaningful sentencing processes and options for ATSI offenders, promoting reconciliation between victims and offenders, and reducing recidivism.<sup>129</sup>

29.67 Indigenous courts ‘focus on the processes of communication between a judicial officer, the offender and other relevant people’.<sup>130</sup> A typical proceeding in an Indigenous court involves the judicial officer, the offender, respected members of the offender’s community and any other participants, such as the prosecutor or the victim, discussing the offence and possible sentencing outcomes. The role played in Indigenous courts by elders or other respected members of an ATSI offender’s community varies both between jurisdictions and within jurisdictions.<sup>131</sup> However, members of an ATSI offender’s community could provide the court with background

123 See, eg, the Koori Court in Victoria: *Magistrates’ Court (Koori Court) Act 2002* (Vic); the Murri Court in Queensland: Department of Justice and Attorney-General Queensland, *Murri Court* <[www.justice.qld.gov.au/courts/factsht/C11MurriCourt.htm](http://www.justice.qld.gov.au/courts/factsht/C11MurriCourt.htm)> at 22 October 2005; and the Nunga Court and Aboriginal Courts in South Australia: Courts Administration Authority South Australia, *Magistrates Court Aboriginal Court Days* <[www.courts.sa.gov.au/courts/magistrates/aboriginal\\_court\\_days.html](http://www.courts.sa.gov.au/courts/magistrates/aboriginal_court_days.html)> at 22 October 2005; *Statutes Amendment (Intervention Programs and Sentencing Procedures) Act 2005* (SA).

124 See, eg, circle sentencing in New South Wales: *Criminal Procedure Act 1986* (NSW) pt 9, *Criminal Procedure Amendment (Circle Sentencing Intervention Program) Regulation 2003* (NSW); the Yandeyarra Circle Sentencing Court in Western Australia: M King, ‘Applying Therapeutic Jurisprudence in Regional Areas—the Western Australian Experience’ (2003) 10(2) *E Law: Murdoch University Electronic Journal of Law* <[www.murdoch.edu.au/elaw/issues/v10n2/king102nf.html](http://www.murdoch.edu.au/elaw/issues/v10n2/king102nf.html)>; the Ngambra Circle Sentencing Court in the ACT: Magistrates Court of the Australian Capital Territory, *Final Interim Practice Direction: Ngambra Circle Sentencing Court*, and the Darwin Community Court: Department of Justice Northern Territory, *Consultation*, Darwin, 27 April 2005.

125 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.

126 Compare *Magistrates’ Court (Koori Court) Act 2002* (Vic); Department of Justice and Attorney-General Queensland, *Murri Court* <[www.justice.qld.gov.au/courts/factsht/C11MurriCourt.htm](http://www.justice.qld.gov.au/courts/factsht/C11MurriCourt.htm)> at 22 October 2005.

127 See, eg, *Magistrates’ Court (Koori Court) Act 2002* (Vic) s 4F.

128 See, eg, *Criminal Procedure Amendment (Circle Sentencing Intervention Program) Regulation 2003* (NSW) pt 3.

129 Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Project 94, Discussion Paper (2005), 146–152.

130 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, 5.

131 *Ibid.*, 5.

information about the offender and the offender's culture, or speak directly to the offender about his or her behaviour and how it has affected the community.<sup>132</sup>

29.68 Indigenous courts have other common features.<sup>133</sup> Participation in Indigenous courts is voluntary, and offenders are eligible to participate only if they plead guilty to the offence or offences for which they have been charged. Indigenous courts generally operate informally, meaning that participants are not required to observe traditional court etiquette during proceedings and the use of legal jargon is discouraged. Where proceedings are conducted in a courtroom, the physical layout of the courtroom is often modified.<sup>134</sup>

29.69 While participants in Indigenous courts are actively involved in determining the appropriate sentence to be imposed on an offender, the judicial officer must ultimately approve any sentence under consideration. Participants tend to report high levels of satisfaction with Indigenous court proceedings.<sup>135</sup> A report released in 2006 evaluating the Koori Court in Victoria concluded that the court had been a 'resounding success' in achieving its objectives.<sup>136</sup> The AGD submitted that it was supportive of effective sentencing practices that incorporated aspects of ATSI culture.<sup>137</sup> The ALRC has not been informed that federal ATSI offenders face any difficulties accessing state and territory Indigenous courts.

### ALRC's views

29.70 As noted above, the Royal Commission conducted a comprehensive inquiry into the involvement of Aboriginal people in the criminal justice system in Australia. The recommendations made by the Royal Commission were aimed at reducing the number of Aboriginal people in custody. The ALRC expresses its support for these recommendations in so far as they relate to the sentencing of federal ATSI offenders.

29.71 Further, the ALRC affirms its commitment to the recommendations made in ALRC 31 in so far as they relate to the sentencing of federal ATSI offenders. The ALRC remains of the view that federal sentencing legislation should contain a general legislative endorsement of the practice of considering traditional laws and customs when sentencing, when these laws or customs are relevant and known to the court. Federal sentencing legislation should also enable a court sentencing a federal ATSI offender to consider oral or written submissions from an ATSI community member

132 Ibid, 5.

133 Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Project 94, Discussion Paper (2005), 152–155.

134 Ibid, 153.

135 See, eg, I Potas and others, *Circle Sentencing in New South Wales: A Review and Evaluation* (2003) Judicial Commission of New South Wales, iv; D Dick, 'Circle Sentencing of Aboriginal Offenders: Victims Have a Say' (2004) 7 *Judicial Review* 57, 69; K Auty and others, 'The Koori Court—A Positive Experience' (2005) 79(5) *Law Institute Journal* 40.

136 M Harris, 'A Sentencing Conversation': *Evaluation of the Koori Courts Pilot Program October 2002—October 2004* (2006) Department of Justice (Vic), 8.

137 Attorney-General's Department, *Submission SFO 83*, 15 February 2006.

when ascertaining traditional laws and customs or relevant community opinions. However, when considering traditional laws or customs it is important that courts sentencing federal offenders are cognisant of relevant international human rights principles and do not impose sentences that derogate from these principles.

29.72 While it may be desirable to create a sentencing option designed to assist in the rehabilitation of offenders with a drug addiction or problem gambling—such as third party management of the offender’s income—the ALRC considers it would be discriminatory to make such a sentencing option available to ATSI offenders alone. However, the OMFO should monitor the development of new state and territory sentencing options and provide advice to the Australian Government regarding their suitability for federal offenders.<sup>138</sup>

29.73 A number of other recommendations in this Report are relevant to the sentencing of federal ATSI offenders. In Chapter 14, the ALRC recommends that federal sentencing legislation should enable courts sentencing federal offenders to request that pre-sentence reports be prepared by suitably qualified persons.<sup>139</sup> This would enable an expert with knowledge of ATSI communities to prepare a pre-sentence report for a court sentencing a federal ATSI offender. In Chapter 7, the ALRC recommends that the Australian Government collaborate with state and territory governments to facilitate access by federal offenders to state or territory restorative justice initiatives in appropriate circumstances. This recommendation is broad enough to allow steps to be taken to ensure federal ATSI offenders can access state or territory Indigenous courts if any problems arise in relation to access.

**Recommendation 29–1** The ALRC affirms its commitment to the recommendations made in ALRC 31, *The Recognition of Aboriginal Customary Laws* (1986) in so far as they relate to the sentencing of federal Aboriginal or Torres Strait Islander (ATSI) offenders. In particular, without derogating from international human rights principles applicable to sentencing decisions, the ALRC affirms its commitment to the recommendations that:

- (a) legislation should endorse the practice of considering traditional laws and customs, where relevant, in sentencing an ATSI offender; and
- (b) legislation should provide that, in ascertaining traditional laws and customs or relevant community opinions, a court may give leave to a member of an ATSI offender’s or ATSI victim’s community to make oral or written submissions.

138 See Rec 7–14.

139 See Rec 14–2.

**Recommendation 29–2** The ALRC supports the recommendations made by the *Royal Commission into Aboriginal Deaths in Custody* (1991) in so far as they relate to the sentencing of federal ATSI offenders. In particular, the ALRC supports the following recommendations:

- (a) sentencing and correctional authorities should accept that community service can be performed in many ways, and approval should be given, where appropriate, for ATSI offenders to perform community service work by pursuing personal development courses (Rec 94);
- (b) judicial officers and other participants in the criminal justice system whose duties bring them into contact with ATSI people should be encouraged to participate in appropriate cross-cultural training programs developed after consultation with appropriate ATSI organisations (Recs 96, 97);
- (c) governments should take more positive steps to recruit and train ATSI people as court staff and interpreters in locations where a significant number of ATSI people appear before the courts (Rec 100);
- (d) an appropriate range of properly funded sentencing options should be available, and ATSI communities should participate in the development, planning and implementation of these programs (Recs 109, 111, 112, 113);
- (e) departments and agencies responsible for non-custodial sentencing programs for ATSI offenders should employ and train ATSI people to take particular responsibility for implementing such programs and educating the community about them (Rec 114); and
- (f) corrective services authorities should ensure that ATSI offenders are not denied opportunities for probation and parole because of the lack of infrastructure or staff to monitor such orders (Rec 119).

## **Offenders from linguistically and culturally diverse backgrounds**

29.74 There is a paucity of data on the cultural background of federal offenders or the number of federal offenders with a first language other than English. However, the AIC's statistical overview of federal prisoners shows that 53 per cent of federal

prisoners with a known country of birth or nationality were foreign and seven per cent of federal prisoners were of Indonesian nationality.<sup>140</sup>

29.75 In the negotiations leading up to the Commonwealth Grants Commission's 2004 review of the distribution of revenue from the Goods and Services Tax, a number of states and territories argued that federal prisoners were more expensive to accommodate than state and territory prisoners. New South Wales noted that in 1999–2000, 36.2 per cent of federal prisoners in that state were from a culturally or linguistically diverse background and submitted that it incurred extra costs when providing these prisoners with interpreters, meeting their dietary needs and ensuring they had access to welfare, psychological and educational services.<sup>141</sup> The Northern Territory also noted the additional costs incurred in meeting the health and cultural needs of Indonesian federal offenders.<sup>142</sup>

29.76 Despite the lack of firm data regarding federal offenders in these categories it can reasonably be inferred that a significant proportion of federal offenders are from culturally and linguistically diverse backgrounds.

### Sentencing factors

29.77 In Chapter 6 the ALRC recommends that federal sentencing legislation should require a court to consider a federal offender's circumstances and cultural background when sentencing the offender, so far as these factors are relevant to a purpose or principle of sentencing and known to the court.<sup>143</sup> Accordingly, a court can consider the fact that a federal offender has a first language other than English. This may be relevant when assessing whether an offender will experience isolation in prison due to the fact that he or she cannot speak English.<sup>144</sup> One federal offender with a first language other than English submitted that most offenders in his situation were suffering from depression because they had no visits from friends or family while incarcerated.<sup>145</sup>

### Sentencing options

29.78 Sentencing options for federal offenders with a first language other than English may be more limited than those available to other federal offenders. For example, it has been noted that sentencing options that require offenders to be supervised by community corrections officers may not be available to offenders who are unable to speak English.<sup>146</sup> In addition, sentencing options that incorporate rehabilitation

140 See Appendix 1, Figure A1.13 and accompanying text.

141 Commonwealth Grants Commission, *Report on State Revenue Sharing Relativities 2004 Review: Working Papers 1998–99 to 2002–03*, Vol 6 (2004), 99.

142 Ibid, 102.

143 See Rec 6–1.

144 *R v Ng Yun Choi* (Unreported, Supreme Court of New South Wales, Sully J, 4 September 1990), 6.

145 AL, *Submission SFO 63*, 5 January 2006.

146 J Popovic, 'Migrants and Crime—A Magistrate's Perspective' (Paper presented at The Criminal Justice System in a Multicultural Society, Melbourne, 4–6 May 1993).

programs conducted in English, such as anger management or drug addiction counselling, may not be available to offenders who are unable to speak English.<sup>147</sup>

### Rehabilitation programs

29.79 Federal offenders with a first language other than English may also be unable to access rehabilitation programs conducted in English. This may affect the ability of these federal offenders to be released on parole.<sup>148</sup> The Department of Justice Western Australia submitted that language barriers might prevent federal offenders with a first language other than English from accessing programs in prison.<sup>149</sup> The Queensland Department of Corrective Services noted that culturally and linguistically diverse prisoners had been identified as a special needs group in Queensland and that the *Corrective Services Act 2000* (Qld) required the special needs of offenders to be considered when establishing services and programs for offenders.<sup>150</sup>

### Education for judicial officers, lawyers and corrective services staff

29.80 The provision of education to judicial officers, lawyers and corrective services staff about the linguistic and cultural needs of federal offenders could help to minimise the problems faced by federal offenders from linguistically and culturally diverse backgrounds.

29.81 Education programs could focus on developing the skills of lawyers who work with federal offenders with a first language other than English. These education programs could be modelled on the New South Wales Law Society's *Guide to Best Practice for Lawyers Working with Interpreters and Translators in a Legal Environment*<sup>151</sup> or the *Indigenous Protocols for Lawyers in the Northern Territory*.<sup>152</sup> Alternatively, they could focus on the difficulties associated with interpreting during court proceedings, such as the problems encountered by interpreters attempting to explain complex legal concepts or to explain issues in culturally relevant terms. In addition, they could seek to highlight the actual difficulties experienced by federal offenders with a language other than English. One such program offered to magistrates in Victoria involved magistrates playing the role of either witnesses or litigants in mock proceedings conducted entirely in a language other than English.<sup>153</sup>

29.82 Education programs could also provide judicial officers, lawyers and corrective services staff with information on the different cultural value systems, traditions and beliefs of federal offenders. This could help to ensure that all federal offenders are

147 Ibid.

148 Release on parole is discussed in Ch 23.

149 Department of Justice Western Australia, *Submission SFO 35*, 21 April 2005.

150 Department of Corrective Services Queensland, *Submission SFO 27*, 14 April 2005.

151 The Law Society of New South Wales, *Guide to Best Practice for Lawyers Working with Interpreters and Translators in a Legal Environment* (1996).

152 Northern Territory Law Society, *Indigenous Protocols for Lawyers in the Northern Territory* (2004).

153 J Popovic, 'Migrants and Crime—A Magistrate's Perspective' (Paper presented at The Criminal Justice System in a Multicultural Society, Melbourne, 4–6 May 1993).



treated equitably regardless of their cultural background and that all involved in the federal criminal justice system are responsive and sensitive to cultural diversity among federal offenders.

29.83 In its 1992 report on multiculturalism and the law, the ALRC recommended that the Australian Institute of Judicial Administration provide education and information programs to the judiciary and court personnel designed to increase cross-cultural awareness and training in the use of interpreters.<sup>154</sup> The Institute has since published a number of reports on these issues, including a report on Indigenous issues for courts and a report on cross-cultural awareness for the judiciary.<sup>155</sup> As discussed in Chapter 19, the National Judicial College of Australia is now best placed to provide training to judicial officers on the sentencing of federal offenders, and other recommendations are directed to the educational needs of other relevant persons.

### Provision of interpreters at sentencing hearings

29.84 One issue that arises is whether federal offenders with a first language other than English should be provided with interpreters at sentencing hearings. The *Crimes Act* requires the court to explain a sentence to a federal offender 'in language likely to be readily understood' by the person.<sup>156</sup> However, it does not contain provisions specifically requiring courts to provide federal offenders who are unable to speak or understand English with interpreters during sentencing proceedings. Section 30 of the uniform Evidence Acts deals with the provision of interpreters to witnesses who are unable to understand and speak English competently. However, this provision does not apply in federal sentencing proceedings unless the court directs otherwise.<sup>157</sup>

29.85 The common law establishes that a criminal trial must take place in the presence of the accused.<sup>158</sup> This has been held to extend beyond the mere corporeal presence of the accused to require that the accused understands the evidence and is able to conduct his or her case adequately.<sup>159</sup> In *R v East*, Kirby J commented that the entitlement to an interpreter was not a language right but 'an aspect of the commitment of the judicature to fairness of the trial process'.<sup>160</sup>

29.86 A number of international instruments provide that anyone charged with a criminal offence has the right to the free assistance of an interpreter if he or she does not understand or speak the language used in the court.<sup>161</sup> In *Cuscani v The United*

154 Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC 57 (1992), Rec 3.

155 Australian Institute of Judicial Administration, *AJJA Publications List* <[www.aija.org.au/list.htm](http://www.aija.org.au/list.htm)> at 20 October 2005.

156 *Crimes Act 1914* (Cth) ss 16F, 19B(2), 20(2), 20AB(2).

157 See *Evidence Act 1995* (Cth) s 4(2), and cognate provisions of the states and territories.

158 See *R v East* (1998) 196 CLR 354, [82].

159 See *Ibid*, [82].

160 *Ibid*, [83].

161 See, eg, *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) art 14.3(a), (f); *Convention for the Protection of Human*

*Kingdom*, the European Court of Human Rights held that the right to a fair trial guaranteed by art 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950* had been violated when an offender was not provided with an interpreter at a sentencing hearing.<sup>162</sup>

29.87 The ALRC has been informed that many federal drug offenders whose first language is not English do not understand the judicial process.<sup>163</sup> In consultations, the ALRC was informed that Indonesian offenders in the Northern Territory are always provided with interpreters.<sup>164</sup> However, one federal offender submitted that in his experience interpreters were not always provided to offenders when they were required, and that those provided did not always accurately interpret court proceedings.<sup>165</sup>

### ***ALRC's views***

29.88 The provision of an interpreter to an offender with a first language other than English is vital to ensure the offender is able to understand the sentencing process, provide adequate instructions to his or her legal representative, and give evidence at the sentencing hearing if he or she chooses to do so. The ultimate responsibility for ensuring a federal offender understands and can participate in federal sentencing proceedings rests with the court. Accordingly, the onus should be on the court to decide whether a federal offender's proficiency in English is sufficient to enable him or her to understand and participate in the sentencing proceedings. If not, a suitably qualified interpreter should be provided free of charge.<sup>166</sup>

**Recommendation 29–3** Federal sentencing legislation should require a suitably qualified interpreter to be provided to a federal offender in all proceedings related to sentencing unless the court is satisfied that the offender can understand and speak English sufficiently to enable the offender to follow and participate in those proceedings.

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*Rights and Fundamental Freedoms*, 4 November 1950, (ETS) No 5, 213 UNTS 222, (entered into force generally on 3 September 1953) art 6.3(e).

162 *Cuscani v The United Kingdom* [2002] 32771/96 ECHR 630.

163 Attorney-General's Department, *Consultation*, Sydney, 31 August 2004.

164 M Johnson, *Consultation*, Darwin, 27 April 2005; Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005.

165 JC, *Submission SFO 25*, 13 April 2005.

166 The National Accreditation Authority for Translators and Interpreters Ltd (NAATI) is a national standards body that determines and maintains the standards of translation and interpretation in Australia: *National Accreditation Authority for Translators and Interpreters Ltd* <www.naati.com.au> at 18 October 2005.

## Offenders with a drug addiction

29.89 Several Australian studies have considered the complex relationship between drug use and crime.<sup>167</sup> Federal offenders with a drug addiction (a term which is used in this chapter to include alcohol addiction) can commit drug offences, offend while under the influence of drugs, or offend in order to obtain money to procure drugs. It is not known what proportion of federal offenders are addicted to drugs.

### Sentencing factors

29.90 Drug addiction is often relevant to sentencing. For example, an offender's addiction to drugs may explain why he or she committed an offence, or may be relevant to the prospects of rehabilitation.<sup>168</sup> However, drug addiction of itself is generally not considered to be a mitigating factor in sentencing in Australia. In *R v Henry* the New South Wales Court of Criminal Appeal held that:

The sentencing practices of the courts are part of the anti-drug message, which the community as a whole has indicated that it wishes to give to actual and potential users of illegal drugs. Accepting drug addiction as a mitigating factor for the commission of crimes of violence would significantly attenuate that message. The concept that committing crimes in order to obtain monies to buy an illegal substance is in some way less deserving of punishment than the commission of the same crime for the obtaining of monies for some other, but legal, purpose is perverse.<sup>169</sup>

29.91 Nevertheless, it has been held that drug addiction may be a mitigating circumstance where the addiction did not develop as a result of the voluntary ingestion of drugs, but rather as a result of some other circumstance such as medical treatment.<sup>170</sup>

29.92 In Chapter 6, the ALRC recommends that federal sentencing legislation should state that a court sentencing a federal offender must consider any factor that is relevant to a purpose or principle of sentencing and known to the court. These factors include the history and circumstances of the offender, including the offender's age, financial circumstances, and physical and mental condition.<sup>171</sup> In Chapter 28, the ALRC recommends that one factor the court should consider when sentencing a federal offender is whether the offender is seeking treatment to address any physical or mental condition that may have contributed to the commission of the offence.<sup>172</sup>

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167 See, eg, J Prichard and J Payne, *Alcohol, Drugs and Crime: A Study of Juveniles in Detention—Research and Public Policy Series No 67*, Australian Institute of Criminology; H Johnson, *Drugs and Crime: A Study of Incarcerated Female Offenders—Research and Public Policy Series No 63*, Australian Institute of Criminology; T Makkai and J Payne, *Drugs and Crime: A Study of Incarcerated Male Offenders* (2003) Australian Institute of Criminology.

168 See, eg, *R v McKee* (2003) 138 A Crim R 88.

169 *R v Henry* (1999) 46 NSWLR 346, [206].

170 *Talbot v The Queen* (1992) 59 A Crim R 383, 389.

171 See Rec 6–1.

172 See Rec 28–5.

### Sentencing options

29.93 Some state sentencing options seek primarily to promote the rehabilitation of an offender. For example, in Western Australia a court may sentence an offender to an Intensive Supervision Order and in Queensland and Victoria a court may sentence an offender to an Intensive Correction Order.<sup>173</sup> These options are available to federal offenders<sup>174</sup> and may be appropriate when sentencing federal offenders with a drug addiction.

29.94 Victorian sentencing legislation contains a sentencing option specifically designed for offenders with a drug addiction. If a Victorian court is satisfied that an offender's drug addiction contributed to the commission of an offence and the court is considering sentencing the offender to a period of imprisonment of not more than 12 months, the court may, after receiving a pre-sentence report, make a Combined Custody and Treatment Order. The order involves the imposition of a period of imprisonment of not more than 12 months. An offender must serve at least six months of the sentence and then serve the remainder of the sentence in the community. During the latter period the offender is required to comply with conditions attached to the order.<sup>175</sup> This sentencing option is not available to federal offenders. In New South Wales it is proposed to enable the Drug Court to order an offender to serve his or her sentence of imprisonment in a purpose-built Compulsory Drug Treatment Correctional Centre.<sup>176</sup>

29.95 As discussed in Chapter 7, sentencing options available in states and territories are not automatically picked up and applied to federal offenders. However, the ALRC recommends that the OMFO monitor the development of state and territory sentencing options and advise the Australian Government regarding the options that should be made available to federal offenders.

### Rehabilitation programs

29.96 The *Standard Guidelines for Corrections in Australia* note the need to provide offenders serving sentences in the community or in prison with appropriate programs that address the underlying causes of their criminal behaviour and assist them to develop the skills necessary to lead law-abiding lives.<sup>177</sup>

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173 *Sentencing Act 1995* (WA) pt 10; *Penalties and Sentences Act 1992* (Qld) s 112; *Sentencing Act 1991* (Vic) s 19(1).

174 *Crimes Regulations 1990* (Cth) reg 6.

175 *Sentencing Act 1991* (Vic) s 18Q.

176 *Compulsory Drug Treatment Correctional Centre Act 2004* (NSW).

177 Corrective Services Ministers' Conference and Conference of Correctional Administrators, *Standard Guidelines for Corrections in Australia* (2004), 10, 23.

29.97 Drug rehabilitation programs are available in all states and territories.<sup>178</sup> They vary in intensity from educational programs that aim to motivate offenders to address their drug addiction, to residential programs offering ‘intensive, long term, highly structured, self-help, residential treatment for chronic drug misusers’.<sup>179</sup> The majority of drug rehabilitation programs in Australia are low intensity programs, a fact that has been described as surprising given the high percentage of substance users in the criminal justice system.<sup>180</sup>

### Drug courts

29.98 Drug courts are specialist, problem-oriented courts that aim to break the nexus between drug addiction and crime.<sup>181</sup> Drug courts are based on the philosophy of ‘therapeutic jurisprudence’—that is, the philosophy that the law can affect the psychological and physical well-being of those with whom it has contact.<sup>182</sup> Drug courts have a number of common features. They generally operate informally; focus on identifying the treatment needs of an individual offender; and provide offenders with access to appropriate treatment and rehabilitation services. Judges in drug courts are required to take an active role in supervising the treatment and progress of offenders. The high level of judicial supervision of proceedings in drug courts means that drug court judges are required to abandon their traditional role and adopt the role of ‘confessor, taskmaster, cheerleader and mentor’.<sup>183</sup>

29.99 Drug courts have been established in a number of states and territories.<sup>184</sup> Some are established by legislation while others operate without a legislative basis.<sup>185</sup> Only offenders who plead guilty to the offences for which they have been charged can access drug courts.<sup>186</sup> Otherwise, the composition, powers, jurisdiction and eligibility

178 K Howells and others, *Correctional Offender Rehabilitation Programs: The National Picture in Australia* (2004) Criminology Research Council <<http://www.aic.gov.au/crc/reports/200203-04.html>> at 5 September 2005, 44–45.

179 Ibid, 42.

180 Ibid, 44.

181 C Huddleston, K Freeman-Wilson and D Boone, *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States* (2004) National Drug Court Institute, 1.

182 B Winick and D Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (2003), 7.

183 J Inciardi, D McBride and J Rivers, *Drug Control and the Courts* (1996) cited in T Makkai, *Drugs Courts: Issues and Prospects—Trends and Issues in Crime and Criminal Justice No 95*, Australian Institute of Criminology, 3.

184 *Drug Court Act 1998* (NSW); *Sentencing Act 1991* (Vic); *Drug Rehabilitation (Court Diversion) Act 2000* (Qld) (to be renamed the *Drug Court Act 2000* (Qld)); Department of Justice, *Drug Court* <[www.justice.wa.gov.au](http://www.justice.wa.gov.au)> at 17 October 2005; Courts Administration Authority South Australia, *Magistrates Court Drug Court* <[www.courts.sa.gov.au/courts/drug\\_court/index.html](http://www.courts.sa.gov.au/courts/drug_court/index.html)> at 17 October 2005. See also the Geraldton Alternative Sentencing Regime in Western Australia, which aims to address all the factors that contribute to offending: M King, ‘Geraldton Alternative Sentencing Regime: Applying Therapeutic and Holistic Jurisprudence in the Bush’ (2002) 26 *Criminal Law Journal* 260.

185 Drug courts in Western Australia and South Australia do not have a legislative basis.

186 *Drug Court Act 1998* (NSW) s 5(c); *Sentencing Act 1991* (Vic) s 18Z(1); *Drug Rehabilitation (Court Diversion) Act 2000* (Qld) s 19(c) (to be renamed the *Drug Court Act 2000* (Qld)); Department of Justice, *Drug Court* <[www.justice.wa.gov.au](http://www.justice.wa.gov.au)> at 17 October 2005; Courts Administration Authority South

criteria of the drug courts differ between jurisdictions. For example, only offenders with an addiction to illicit drugs can access most drug courts.<sup>187</sup> However, offenders with an addiction to alcohol can also access the Victorian Drug Court and the Geraldton Alternative Sentencing Regime in Western Australia.<sup>188</sup> The Northern Territory has introduced legislation to establish an alcohol court, although this legislation has not yet commenced.<sup>189</sup> Some drug courts are able to make specific sentencing orders. For example, drug courts in Queensland can make Intensive Drug Rehabilitation Orders (IDRO) and drug courts in Victoria can make Drug Treatment Orders.<sup>190</sup> Evaluations of state and territory drug courts show they can have a positive effect on recidivism rates of offenders.<sup>191</sup>

29.100 One issue that arises is whether federal offenders can access state and territory drug courts. As discussed in Chapter 7, s 68(1) of the *Judiciary Act 1903* (Cth) picks up and applies state and territory procedural laws to federal prosecutions in state and territory courts. Similarly, s 79 of the *Judiciary Act* picks up and applies to a court exercising federal jurisdiction certain state and territory procedural laws, except in so far as they are inconsistent with the *Australian Constitution* or with other federal laws. Whether a law relating to a drug court in a state or territory is capable of being picked up and applied in the federal context needs to be determined on a case-by-case basis.

29.101 In some circumstances it might be difficult to ascertain whether laws relating to state or territory drug courts can be picked up and applied to federal offenders. For example, a law could limit access to state or territory offenders, or require a judicial officer in a drug court to sentence offenders in accordance with the relevant state or territory sentencing legislation (rather than in accordance with Part IB).<sup>192</sup>

29.102 In addition, sentencing orders made by a drug court might not be picked up and applied to federal offenders by s 20AB of the *Crimes Act*.<sup>193</sup> Section 20AB identifies specific state and territory sentencing options that can be made available to federal offenders and provides that other such options can be prescribed by

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Australia, *Magistrates Court Drug Court* <[www.courts.sa.gov.au/courts/drug\\_court/index.html](http://www.courts.sa.gov.au/courts/drug_court/index.html)> at 17 October 2005.

187 See, eg, *Drug Court Act 1998* (NSW) s 5; Courts Administration Authority South Australia, *Magistrates Court Drug Court* <[www.courts.sa.gov.au/courts/drug\\_court/index.html](http://www.courts.sa.gov.au/courts/drug_court/index.html)> at 17 October 2005.

188 *Sentencing Act 1991* (Vic) s 18Z; M King, 'Geraldton Alternative Sentencing Regime: Applying Therapeutic and Holistic Jurisprudence in the Bush' (2002) 26 *Criminal Law Journal* 260.

189 *Alcohol Court Act 2006* (NT).

190 See *Drug Rehabilitation (Court Diversion) Act 2000* (Qld) pt 5 (to be renamed the *Drug Court Act 2000* (Qld)); *Sentencing Act 1991* (Vic) pt 3 div 2 sub div (1C).

191 See, eg, J Payne, *Final Report on the North Queensland Drug Court—Technical and Background Paper No 17*, Australian Institute of Criminology; T Makkai and K Veraar, *Final Report on the South East Queensland Drug Court—Technical and Background Paper No 6*, Australian Institute of Criminology; B Lind and others, *New South Wales Drug Court Evaluation: Cost-Effectiveness* (2002) New South Wales Bureau of Crime Statistics and Research.

192 See Drug Court of New South Wales, *Extracts from 2004 Annual Review* Attorney General's Department (NSW) <[www.lawlink.nsw.gov.au/drugcrt/drugcrt.nsf/pages/drugcrt\\_new](http://www.lawlink.nsw.gov.au/drugcrt/drugcrt.nsf/pages/drugcrt_new)> at 12 April 2006.

193 The state and territory sentencing options available to federal offenders are discussed in Ch 7.

regulation.<sup>194</sup> In *Director of Public Prosecutions (Cth) v Costanzo* it was held that an IDRO made under the *Drug Rehabilitation (Court Diversion) Act 2000* (Qld) was not picked up and applied by s 20AB.<sup>195</sup> The court held that an IDRO was not sufficiently similar to the existing sentencing options available to federal offenders to be a ‘similar sentence or order’ within the meaning of s 20AB(1) of the *Crimes Act*.<sup>196</sup>

29.103 In Discussion Paper 70 the ALRC proposed that federal sentencing legislation should facilitate access by federal offenders to state or territory drug courts in appropriate circumstances.<sup>197</sup> Several stakeholders supported this proposal.<sup>198</sup> Legal Aid Queensland submitted that a number of federal offenders had been referred to Queensland drug courts for offences such as social security offences and that it was desirable to make IDROs available to these offenders.<sup>199</sup> In consultations, the Senior Judge of the Drug Court of New South Wales indicated that the court’s programs would be suitable for federal offenders.<sup>200</sup> One stakeholder submitted that federal offenders should be permitted to access state and territory drug courts only if they complied with existing rules governing the procedure of the courts, such as rules relating to eligibility.<sup>201</sup> It was also submitted that drug courts were resource intensive and that the Australian Government should consider providing the states and territories with funding if federal offenders are to be referred to state and territory drug courts.<sup>202</sup>

#### *ALRC’s views*

29.104 As discussed in Chapter 6, a court sentencing a federal offender should be required to consider any factor that is relevant to a purpose or principle of sentencing and known to the court, including factors relating to an offender’s history and personal circumstances. Accordingly, courts sentencing federal offenders have a discretion to consider an offender’s drug addiction if the court is aware of the addiction.

29.105 Federal offenders should generally be permitted to access state and territory drug courts. These specialist courts focus on the treatment and rehabilitation of offenders with a drug addiction. Providing federal offenders with access to drug courts will assist them to address the underlying causes of their criminal behaviour while simultaneously promoting their health and well-being. In some cases it may be possible to facilitate the access of federal offenders to state or territory drug courts by amending federal sentencing legislation to ensure that the sentencing options available in the drug

194 *Crimes Regulations 1990* (Cth).

195 *Director of Public Prosecutions (Cth) v Costanzo* [2005] QSC 79.

196 *Ibid.*, [23]–[26].

197 Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Proposal 29–4.

198 Department of the Attorney General Western Australia, *Submission SFO 96*, 15 March 2006; Queensland Legal Aid, *Submission SFO 92*, 27 February 2006; Senior Drug Court Judge R Dive, *Consultation*, Sydney, 3rd February 2006.

199 Queensland Legal Aid, *Submission SFO 92*, 27 February 2006.

200 Senior Drug Court Judge R Dive, *Consultation*, Sydney, 3rd February 2006.

201 Department of the Attorney General Western Australia, *Submission SFO 96*, 15 March 2006.

202 Law Council of Australia, *Submission SFO 97*, 17 March 2006; Department of the Attorney General Western Australia, *Submission SFO 96*, 15 March 2006.

courts can be picked up and applied to federal offenders. In other cases it may be necessary for states and territories to amend their drug court legislation to enable federal offenders to access these courts. There may also be practical impediments to enabling federal offenders to access state or territory drug courts, such as the limited geographical reach of some drug court programs and the limited availability of places in these programs due to funding constraints. Accordingly, a collaborative effort by the Australian Government and state and territory governments will be necessary to ensure that federal offenders have access to state and territory drug courts.

29.106 It may not be appropriate for *all* federal offenders with a drug addiction to access state and territory drug courts. For example, these courts generally do not accommodate offenders convicted of offences of a violent or sexual nature. Federal sentencing legislation should specify any particular federal offences or categories of federal offences for which federal offenders should not be able to access state and territory drug courts.

**Recommendation 29–4** The Australian Government should collaborate with state and territory governments to facilitate access by federal offenders to state or territory drug courts in appropriate circumstances. In particular, federal sentencing legislation should:

- (a) provide that the orders that can be made by a drug court are prescribed ‘additional sentencing alternatives’ for federal offenders; and
- (b) specify any federal offences or categories of federal offences for which such orders cannot be made.

## Offenders with problem gambling

29.107 Problem gambling has been defined as ‘the situation when a person’s gambling activity gives rise to harm to the individual player, and/or to his or her family, and may extend to the community’.<sup>203</sup> Pathological gambling is a form of problem gambling that is recognised as an impulse control disorder by the American Psychiatric Association.<sup>204</sup> Recent research points to a causal relationship between problem gambling and financial crime.<sup>205</sup> Offenders with problem gambling may commit federal offences in order to obtain money with which to gamble, or to service gambling-related debts. While it has been estimated that 2.1 per cent of the Australian

203 This definition was cited with approval in Productivity Commission, *Australia’s Gambling Industries*, Report 10 (1990), [6.3].

204 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR* (2000).

205 Y Sakurai and R Smith, *Gambling as a Motivation for the Commission of Financial Crime* (2003) Australian Institute of Criminology.



adult population are problem gamblers,<sup>206</sup> there is no available information about the proportion of federal offenders with problem gambling.

### Sentencing factors

29.108 Problem gambling has often been treated as analogous to drug addiction in sentencing jurisprudence.<sup>207</sup> It is generally considered relevant to the sentencing exercise, but is rarely considered to be a mitigating factor.<sup>208</sup> However, it has been argued that problem gambling should be a mitigating factor because gambling is ‘a legal product, promoted in some cases by the state and certainly licensed by it in a way that illegal drugs are not’.<sup>209</sup> It has been held that even if problem gambling is to be considered a mitigating factor, it is not mitigating to the extent that the proceeds of the offending are used for non-gambling purposes.<sup>210</sup>

### Rehabilitation programs

29.109 Problem gambling has not traditionally been viewed as a significant factor contributing to offending behaviour.<sup>211</sup> Accordingly, there are few rehabilitation programs for problem gamblers in Australia.<sup>212</sup> Yet there is a growing awareness of the relationship between problem gambling and crime, and of the need to develop and implement rehabilitation programs to address problem gambling. In 2003, Relationships Australia (SA) Inc received funding from the South Australian Department of Human Services to develop and conduct a pilot rehabilitation program for prisoners in Mobilong Gaol.<sup>213</sup> The ALRC supports such initiatives. Rehabilitation programs for problem gambling could focus on ensuring offenders understand the nature and dynamics of gambling, appreciate the harm that can result from excessive gambling, and learn skills to deal with problem gambling.<sup>214</sup>

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206 Ibid, 2.

207 See, eg, *R v Foley* [2001] ACTSC 109, [15].

208 See, eg, *R v Petrovic* [1998] VSCA 95, [21]; *R v Chapman* [2001] NSWCCA 457, [13].

209 G Taylor, ‘Is Addiction to Gambling Relevant in Sentencing?’ (2004) 28 *Criminal Law Journal* 141, 142.

210 *Director of Public Prosecutions v Truong* [2004] VSCA 172, [22].

211 Relationships Australia (SA) Inc, *Breaking Even Gambling Program Report* (2004), 15.

212 Ibid, 15.

213 Ibid, 11.

214 Ibid, 7.



## 30. Corporations

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### Introduction

30.1 An artificial legal entity such as a corporation can commit a federal offence, and the *Criminal Code* (Cth) contains provisions relating to corporate criminal responsibility.<sup>1</sup> The term 'corporation' has various meanings depending on the context in which it is used. In this chapter it is used to describe any artificial legal entity that can incur liability for a federal offence. No data are available on how many corporations are sentenced for federal offences.

30.2 The ALRC has considered penalties for corporations in detail on two occasions.<sup>2</sup> In addition, the New South Wales Law Reform Commission (NSWLRC) completed an inquiry into the sentencing of corporations in 2003.<sup>3</sup> The ALRC does not propose to revisit the work of these inquiries in this chapter but will focus on sentencing options,

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1 *Criminal Code* (Cth) ch 2, pt 2.5, div 12.

2 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Ch 28; Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994) Chs 9–10.

3 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003).

sentencing factors and sentencing hearings for corporations that have committed federal offences.

## Sentencing options

30.3 Many of the sentences that can be imposed on natural persons cannot be imposed on corporations—for example, a corporation cannot be sentenced to imprisonment. Fines are the most commonly utilised sentencing option for corporations. Section 4B(3) of the *Crimes Act 1914* (Cth) empowers a court sentencing a corporation to impose a pecuniary penalty that is up to five times greater than the maximum pecuniary penalty that could be imposed on a natural person convicted of the same offence, provided that the contrary intention does not appear in the offence provision. The *Crimes Act* contains no sentencing options specific to corporations.

30.4 One issue that arises is whether additional sentencing options should be available to courts sentencing corporations for federal offences. Fines can be an ineffective sentencing option for corporations because they have a limited ability to achieve the purposes of sentencing.<sup>4</sup> For example, a fine will not deter a corporation if it is viewed as another business expense; nor will it punish a corporation if the burden of the fine is shifted to consumers by an increase in the price of the corporation's goods or services; nor will it promote the rehabilitation of a corporation if it does not attempt to alter the corporation's management structure or internal culture.<sup>5</sup>

30.5 In addition, a variety of sentencing options may be needed for corporations because they vary in size, purpose and financial viability. The Commonwealth Director of Public Prosecutions (CDPP) gave the following examples of types of corporations:

- a proprietary company that is merely the 'alter ego' of its sole director;
- a closely-held company that is wholly owned by its directors, each of whom exercises close management control;
- a company controlled by directors who, as a group, only hold a minority of shares;
- a listed company with a large, diverse shareholding that includes major financial institutions, which is controlled by a core group of executive directors, some of whom have significant shareholdings; and
- a company in liquidation under the control of an administrator.<sup>6</sup>

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4 Purposes of sentencing are discussed in Ch 4.

5 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [6.1]–[6.7].

6 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

30.6 The Australian Securities and Investments Commission (ASIC) submitted that sentencing options for corporations could be similar to civil remedies contained in the *Australian Securities and Investments Commission Act 2001* (Cth).<sup>7</sup> These include probation orders, community service orders and publicity orders.<sup>8</sup> The CDPP submitted that federal sentencing legislation should include a broad range of sentencing options for corporations to enable the court to impose an appropriate sentence after considering all the circumstances of the case.<sup>9</sup> The Australian Taxation Office also supported the development of further sentencing options for corporations.<sup>10</sup>

30.7 Recent reviews have concluded that a variety of sentencing options should be available to courts when sentencing corporations.<sup>11</sup> These options are discussed below.

### Equity fines

30.8 An equity fine involves the transfer of shares from a corporation to a state criminal compensation fund. The compensation fund is then entitled to dispose of the shares and distribute the assets to persons adversely affected by the conduct of the corporation.<sup>12</sup> Equity fines are intended to diminish a corporation's market value.<sup>13</sup>

30.9 It has been argued that equity fines are advantageous because they enable financial burdens to be imposed on corporations that lack the liquid assets to pay fines.<sup>14</sup> However, it has also been argued that equity fines could adversely affect innocent shareholders and would be difficult to administer in practice.<sup>15</sup> The CDPP submitted that it might be difficult to administer equity fines given the volatility in the price of equities.<sup>16</sup> The ALRC has previously recommended against the introduction of equity fines as penalties under the *Trade Practices Act 1974* (Cth) or as civil penalties.<sup>17</sup> The NSWLRC has previously recommended against the introduction of equity fines as sentencing options for corporations.<sup>18</sup>

7 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.

8 *Australian Securities and Investments Commission Act 2001* (Cth) ss 12GLA–12GLB.

9 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

10 Australian Taxation Office, *Submission SFO 72*, 10 February 2006.

11 See New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [6.20]; Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Ch 28.

12 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [28.13].

13 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [7.1].

14 *Ibid*, [7.3].

15 *Ibid*, [7.16]–[7.27].

16 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

17 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Rec 28–1; Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), [10.27].

18 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), Rec 5.

### Turnover fines

30.10 A turnover fine is a fine calculated by reference to the annual turnover of a corporation.<sup>19</sup> It is similar to the ‘day fine’ for a natural person discussed in Chapter 7. Turnover fines would ensure that fines imposed on corporations operated equitably regardless of the financial circumstances of the offending corporation. However, it has been argued that the amount of a turnover fine may represent disproportionate punishment for an offence.<sup>20</sup>

30.11 ASIC submitted that a fine imposed on a corporation could be determined by a sliding scale based on the degree of market capitalisation achieved by the corporation<sup>21</sup> or by other means, such as an assessment of the corporation’s turnover. However, ASIC also noted that that fines calculated according to the financial circumstances of a corporation

might have unintended consequences by adversely impacting on other individuals or companies who were not implicated in the offence. The cost of a fine may be passed on to: shareholders due to reduced share price, creditors by reducing company capital and increasing credit risk; employees if the fine is severe enough to result in cutting of staff; and consumers through increased prices.<sup>22</sup>

30.12 The CDPP submitted that turnover fines could significantly complicate the sentencing process by requiring courts to consider complex accounting issues.<sup>23</sup> The ALRC has previously recommended against the introduction of turnover fines as civil penalties.<sup>24</sup>

### Disqualification orders

30.13 Disqualification orders are designed to restrain the activities of corporations. They may include orders: to cease certain commercial activities for a particular period; to refrain from trading in a specific geographic region; to revoke or suspend licences for particular activities; to disqualify a corporation from particular contracts (for example, government contracts); or to freeze the corporation’s profits.<sup>25</sup> Disqualification orders have the potential to adversely affect consumers, shareholders and employees.<sup>26</sup>

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19 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [26.100].

20 Ibid, [26.106]–[26.114].

21 See the scheme outlined in s 1317DAE of the *Corporations Act 2001* (Cth) to determine the penalty to be specified in an infringement notice for a contravention of s 674(2) of that Act.

22 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.

23 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

24 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [26.118].

25 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [8.2].

26 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

### Orders requiring corrective action

30.14 Corporate probation orders are designed to ensure that a corporation does not engage in contravening conduct of the same, similar or a related kind during the period of the order. Internal discipline orders, organisational reform orders and punitive injunctions are types of corporate probation<sup>27</sup> and are discussed below. Corporate probation orders are primarily intended to promote the rehabilitation of corporations, although they may satisfy other sentencing purposes such as deterrence and retribution.

#### *Internal discipline orders*

30.15 Internal discipline orders require corporations to investigate their offending behaviour, take appropriate internal disciplinary action against those involved in the offence, and provide the court with a satisfactory compliance report.<sup>28</sup> Accordingly, they have been described as a form of ‘mandated self-policing’.<sup>29</sup> The CDPP submitted that care should be taken when imposing such an order to ensure that an offending corporation is not able to shift the blame for an offence onto a junior employee.<sup>30</sup>

30.16 It has been said that internal discipline orders can be an effective sentencing option for corporations because they target the individuals involved in a corporation’s criminal behaviour, can be tailored to suit the particular corporation, and are cheap to administer.<sup>31</sup> However, appropriate steps need to be taken to ensure that individuals are not deprived of the procedural safeguards provided to those suspected or accused of engaging in criminal activity.<sup>32</sup>

#### *Organisational reform orders*

30.17 Organisational reform orders take the form of ‘a court order that requires a corporation’s organisation and methods to be reviewed, under court scrutiny, in order to avoid a repetition of the offence’.<sup>33</sup> Suitably qualified experts, such as corporate lawyers or accountants, could supervise organisational reform orders on the court’s behalf.<sup>34</sup>

#### *Punitive injunctions*

30.18 A punitive injunction requires a corporation to take steps to reform its organisational structure or activities in a manner that incorporates a punitive element.<sup>35</sup> The punitive element might be that the reforms need to be undertaken within a short

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27 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [9.7].

28 Ibid, [9.8].

29 B Fisse, ‘Sentencing Options against Corporations’ (1990) 1 *Criminal Law Forum* 211, 233.

30 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

31 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [9.9]–[9.10].

32 B Fisse, ‘Sentencing Options against Corporations’ (1990) 1 *Criminal Law Forum* 211, 234–235.

33 Australian Law Reform Commission, *Sentencing: Penalties*, DP 30 (1987), [297].

34 Ibid, [297].

35 B Fisse, ‘Sentencing Options against Corporations’ (1990) 1 *Criminal Law Forum* 211, 237.

period of time or that particular members of senior management be actively involved in the reforms. The ALRC has previously recommended against the establishment of punitive injunctions as civil penalties.<sup>36</sup> The NSWLRC recommended that punitive injunctions be introduced as sentencing options for corporations.<sup>37</sup>

### Orders requiring activities for the benefit of the community

30.19 Community service orders require corporations to expend time and effort to undertake activities for the benefit of the community. A community service order can be used to require a corporation to repair the harm caused by an offence. For example, a corporation could be ordered to work on a project to remedy the environmental harm caused by its offence.<sup>38</sup> Alternatively, a community service order could be used to require a corporation to make its facilities available to community groups<sup>39</sup> or to provide training programs to members of the community. It has been argued that a community service order requiring a corporation to make a financial contribution to a community project should bear a reasonable relationship to the offence in question to avoid ‘the perception of arbitrariness or bias on the part of judges in their choice of community projects’.<sup>40</sup>

### Publicity orders

30.20 Publicity orders require corporations to publicise information about their offending conduct to specific groups of people or to the community at large.<sup>41</sup> It has been argued that publicity orders are effective sentencing options because they can damage a corporation’s reputation, adversely affect the morale of a corporation’s employees and diminish a corporation’s profits.<sup>42</sup> Publicity orders may require corporations to disclose their offending conduct, acknowledge their wrongdoing or correct harm caused by their offending conduct.

### Dissolution orders

30.21 Dissolution or deregistration is sometimes referred to as ‘corporate capital punishment’.<sup>43</sup> Dissolution of a corporation is a way of ensuring the corporation cannot repeat its offending conduct. However, it has been described as an extreme sentencing

36 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [28.31]; Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), [10.24].

37 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), Rec 9.

38 R Mulheron, ‘Criminal Enforcement of Environmental Law: Limitations and “Flat Earth Thinking” Sanctions’ (1996) *Queensland Law Society Journal* 427, 440.

39 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

40 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [10.17].

41 Ibid, [11.1].

42 Ibid, [11.2]–[11.13]; B Fisse, ‘Sentencing Options against Corporations’ (1990) 1 *Criminal Law Forum* 211, 240.

43 J Coffee, ‘“No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment’ (1981) 79(3) *Michigan Law Review* 386.



option because of its adverse impact on employees, shareholders and consumers. In addition, dissolution does not necessarily prevent the dissolved corporation from continuing its activities under a different name.<sup>44</sup> It has been said that dissolution should be used only in cases where the offending conduct is egregious or where the offending corporation was operated primarily for a criminal purpose.<sup>45</sup>

30.22 The NSWLRC recommended that courts be given the power to prevent the reincorporation of a corporation in certain circumstances, such as where it intends to carry on the same activities as the dissolved corporation.<sup>46</sup> The ALRC has previously recommended against dissolution as a civil penalty for corporations.<sup>47</sup>

### ALRC's views

30.23 It is desirable to establish a variety of additional sentencing options for corporations to enable the purposes of sentencing to be achieved when sentencing corporations for federal offences. These options should be set out in federal sentencing legislation.

30.24 The ALRC does not consider that equity fines or turnover fines should be introduced as sentencing options for corporations because it is undesirable for the quantum of a financial penalty to be linked formulaically to the financial circumstances of the offender. As discussed in Chapter 5, sentences should be proportionate to the gravity of the offence and should be consistent, in the sense that like cases should be treated alike. Equity fines are inappropriate in the federal criminal context because there is currently no federal criminal compensation fund to which a corporation's shares might be transferred.

30.25 The ALRC considers that the other sentencing options discussed above, namely, disqualification orders, corporate probation orders, community service orders, publicity orders and dissolution orders should be available to courts sentencing corporations for federal offences. The sentencing options available in sentencing a corporation for a federal offence are currently limited to those available in relation to natural persons. Many of these options cannot be imposed on an artificial legal entity. A variety of additional sentencing options is therefore required to enable judicial officers to impose sentences on corporations that are capable of achieving the purposes of sentencing. While the ALRC has previously recommended against the introduction of dissolution orders and punitive injunctions as civil penalties, these sentencing options are appropriate in the criminal justice system with its recognised purposes of retribution and denunciation.

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44 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [8.20].

45 Ibid, [8.21]. See also Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

46 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), Rec 8.

47 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [28.21].

**Recommendation 30–1** Federal sentencing legislation should include the following sentencing options for corporations that have committed a federal offence:

- (a) orders disqualifying the corporation from undertaking specified commercial activities;
- (b) orders requiring the corporation to take corrective action within the organisation, such as internal disciplinary action or organisational reform;
- (c) orders requiring the corporation to undertake activities for the benefit of the community;
- (d) orders requiring the corporation to publicise its offending conduct; and
- (e) orders dissolving the corporation.

## Sentencing factors

30.26 Section 16A(2) of the *Crimes Act* sets out a number of matters that a court must take into account in sentencing an offender, to the extent that they are relevant and known to the court. In Chapter 6, the ALRC recommends that a court sentencing a federal offender should consider any factor that is relevant to a purpose or principle of sentencing and known to the court. The ALRC recommends that federal sentencing legislation list examples of factors that may be relevant to sentencing. Some of these factors, such as any injury, loss or damage resulting from the offence, could be relevant when sentencing a corporation. However, other factors, such as the likely impact of a sentence on an offender's family or dependants, will be irrelevant when sentencing a corporation. The factors relevant to the administration of the criminal justice system, such as whether an offender pleads guilty or provides assistance to the authorities, may also be relevant when sentencing corporations.

30.27 The NSWLRC recommended that, in addition to general sentencing factors, sentencing legislation in New South Wales should set out factors that are relevant when sentencing corporations. These included aggravating factors (foreseeability of the offence or its consequences; involvement in or tolerance of the criminal activity by management; and absence of an effective compliance program) and mitigating factors (financial circumstances of the offender; presence of an effective compliance program; stopping unlawful conduct promptly and voluntarily; and the effect of the penalty on services to the public).<sup>48</sup>

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48 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), Rec 3.

30.28 As noted above, corporations can vary greatly in size, purpose and financial viability. In addition, factors that may reveal a corporation's culpability in the commission of an offence will differ from those that indicate the culpability of a natural person. As noted by the NSWLRC, factors that may indicate the culpability of a corporation include the existence or absence of a compliance program designed to detect criminal activity; the actions of a corporation upon discovery of the offence; and the extent to which the offence or its consequences could have been foreseen. Further, a sentence imposed on a corporation will not affect family or dependants of the corporation (although it may affect related entities), but it may affect third parties such as shareholders and consumers.

30.29 The CDPP submitted that any regime providing for the sentencing of corporations should be flexible enough to enable the court to consider the many different types of corporations.<sup>49</sup> ASIC submitted that courts should take into account the size and nature of a corporation when sentencing it for a federal offence and that sentencing factors for corporations should be contained in general sentencing legislation rather than in legislation creating the offence.<sup>50</sup>

### ALRC's views

30.30 Federal sentencing legislation should state that a court must consider any factor that is relevant and known to the court when sentencing a corporation for a federal offence. The legislation should also set out an indicative list of factors to be considered, which may be applicable according to the circumstances of the case. The weight to be given to any sentencing factor should remain a matter for the court's discretion. The indicative list will provide guidance to judicial officers about the type of factors that may be relevant when sentencing corporations, and will promote consistency in sentencing, without being unduly prescriptive. For the reasons outlined in Chapter 6, the ALRC does not believe that the legislation should specify whether the sentencing factors are aggravating or mitigating.

**Recommendation 30-2** Federal sentencing legislation should state that a court, when sentencing a corporation, must consider any factor that is relevant to a purpose or principle of sentencing and known to the court. These factors may include, but are not limited to, any of the following matters to the extent they are applicable:

- (a) the type, size, financial circumstances and internal culture of the corporation;
- (b) the existence or absence of an effective compliance program designed to prevent and detect criminal conduct;

<sup>49</sup> Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

<sup>50</sup> Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.

- (c) whether the corporation ceased the unlawful conduct voluntarily and promptly upon discovery of the offence;
- (d) the extent to which the offence or its consequences could be foreseen; and
- (e) the effect of the sentence on third parties.

## Sentencing hearings

### Attendance at sentencing hearing

30.31 As discussed in Chapter 13, Part IB of the *Crimes Act* does not require a federal offender to be present at sentencing. The ALRC has recommended that federal sentencing legislation provide that, subject to defined exceptions, the offender must be present during certain sentencing proceedings.<sup>51</sup>

30.32 A particular difficulty arises in relation to the presence of a corporation at a sentencing hearing because a corporation, as an artificial legal entity, cannot physically attend a hearing.

30.33 However, it may be desirable for a number of reasons to have a representative of the corporation attend a sentencing hearing. It may be important to explain the details of a sentencing order to a representative of the corporation. In addition, attendance of a representative of the corporation could help achieve the sentencing purpose of denunciation by allowing judicial officers to express disapproval of the offending conduct directly to the corporation's representative. Attendance could also help achieve the sentencing purpose of deterrence by emphasising the significance of the offence to an officer who may have the ability to influence the corporation's future conduct.<sup>52</sup>

30.34 The NSWLRC recommended that courts in New South Wales be empowered to require the attendance of any officer of a corporation at a sentencing hearing and that courts should be given the discretion to decide which officer should attend.<sup>53</sup> This would enable courts to target officers involved in the offence, or officers with the ability to ensure that the corporation does not repeat the offence.<sup>54</sup>

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51 See Rec 13–1.

52 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [14.26].

53 Ibid, Rec 23.

54 Ibid, [14.35].

### Pre-sentence reports and victim impact statements

30.35 Another issue is whether pre-sentence reports and victim impact statements should be available when sentencing corporations. The NSWLRC recommended the use of pre-sentence reports for corporations.<sup>55</sup> However, it rejected the use of victim impact statements beyond that already provided for by New South Wales legislation on the basis that many offences committed by corporations did not have identifiable victims and that information about the harm caused by the offence could often be provided another way.<sup>56</sup>

30.36 ASIC submitted that offences committed by corporations were often wrongly perceived as ‘victimless’ and that there were a number of situations in which it would be desirable to present information to the court on behalf of victims of offences committed by corporations.<sup>57</sup> ASIC submitted that information provided to assist courts sentencing federal offenders should address issues such as ‘market integrity, market confidence and consumer confidence in the financial sector’.

### ALRC’s views

30.37 Federal sentencing legislation should empower courts sentencing corporations for federal offences to require any officer of the corporation to attend the sentencing hearing. This will enable the court to provide the appropriate officer with an explanation of the sentence, and may help achieve the sentencing purposes of denunciation and deterrence.

30.38 Pre-sentence reports and victim impact statements are discussed in Chapter 14. For the reasons explained in that chapter, the ALRC has recommended that federal sentencing legislation enable pre-sentence reports to be prepared in sentencing matters involving corporations. The ALRC is also of the view that victim impact statements should be available in federal sentencing proceedings, regardless of whether the offender is a natural person or a corporation.

**Recommendation 30–3** Federal sentencing legislation should empower a court, in sentencing a corporation for a federal offence, to require the attendance of any officer of the corporation at any stage of the sentencing proceedings.

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<sup>55</sup> Ibid, [14.7], Rec 22.

<sup>56</sup> Ibid, [14.23].

<sup>57</sup> Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.



## Appendix 1.

### Federal Prisoners: A Statistical Overview

#### Australian Institute of Criminology\*

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Note: This Appendix contains a large number of charts, which for greater clarity can be viewed in colour on the ALRC's website: [www.alrc.gov.au](http://www.alrc.gov.au).

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## Federal law enforcement legislation

1. The Australian Law Reform Commission (ALRC) asked the AIC to examine existing data sources on Australia's prisoner population with a specific focus on the sub-group of federal offenders. The purpose was to assist the ALRC with its inquiry into the sentencing of federal offenders under Part IB of the *Crimes Act 1914* (Cth). There were two possible data sources that allowed for an examination of the nature and extent of federal offending, and in particular those persons whose offences result in a term of imprisonment. These were data published by the Australian Bureau of Statistics (ABS) and an extract of data maintained by the Australian Government Attorney-General's Department (AGD).

2. Federal law enforcement is based in a diverse body of legislation. An extract from the Commonwealth Director of Public Prosecutions (CDPP) Annual Report shows that in 2003–04 the CDPP dealt with 9,368 charges under 68 separate Commonwealth Acts (Commonwealth Director of Public Prosecutions 2004). Figure A1.1 shows charges brought under the major pieces of legislation, defined as those under which 50 or more summary charges or 10 or more indictable charges were brought. A full listing of relevant legislation is reproduced in Part 8 of this paper.

3. Offences under the *Social Security Act 1991* (Cth) accounted for 40 per cent of prosecutions while a further 27 per cent were offences under the *Criminal Code 1995* (Cth). A further 534 related charges (6%) were brought under *the Crimes Act*.

4. In recent years many offences under the *Crimes Act* have been removed from that Act and re-established—not necessarily in the same way—under the *Criminal Code*. The *Crimes Act* now covers a much smaller range of offences against the Commonwealth. In 2003–04 the CDPP dealt with nearly five times as many charges under the *Criminal Code* (n=2,576) than it did under the *Crimes Act* (n=534). In contrast during 2002–03 the CDPP dealt with 595 charges under the *Crimes Act* and 950 charges under the *Criminal Code* (Commonwealth Director of Public Prosecutions 2003). A reduction in *Social Security Act* offences from 4,684 in 2002–03 to 3,778 in 2003–04 may also be largely due to new offences becoming available under the *Criminal Code*.

5. An important feature of federal offending is the very high proportion of offences that are dealt with summarily. Of 9,368 charges dealt with by the CDPP 8,477 (91%) were summary offences and 891 (9%) were indictable. Of the 3,778 charges under the *Social Security Act*, only two were indictable offences. Even offences under the *Criminal Code* were mostly summary offences (94%).

6. For some pieces of legislation, such as the corporations and customs laws, a far greater proportion were dealt with as indictable offences, indicating the higher relative seriousness of the offences—major fraud and drug smuggling in particular—that arise under these laws.



**Figure A1.1: Charges dealt with by the CDPP in 2003–04: Major legislative sources**

<b>Legislation</b>	<b>Summary</b>	<b>Indictable</b>	<b>Total</b>
Social Security Act	3,776	2	3,778
Criminal Code	2,431	145	2,576
Crimes Act	350	184	534
Fisheries Management Act	395	6	401
Customs Act	78	241	319
Non-Commonwealth legislation: Other	157	43	200
Taxation legislation	196	1	197
Financial Transactions Reports Act	161	33	194
Bankruptcy Act	94	35	129
Corporations Law	64	65	129
Excise Act	56	48	104
Migration Act	81	23	104
Great Barrier Reef Marine Park Act and Regs	75	-	75
Civil Aviation Act and Regulations	69	3	72
Non-Commonwealth legislation: Drugs	24	15	39
Torres Strait Fisheries Act	7	10	17
<b>Total (all legislation)</b>	<b>8,477</b>	<b>891</b>	<b>9,368</b>

*Note:* Major legislative sources are those with 50 or more summary charges or 10 or more indictable charges.

*Source:* Commonwealth Director of Public Prosecutions Annual Report 2003–04.

## Data sources

### Attorney-General's Department

7. The AGD is responsible for administering the sentences of federal prisoners. The Department maintains a database of federal prisoner records primarily as a case management tool to assist it in fulfilling its role in relation to administering the sentence and release of federal prisoners. As the database provides the data upon which actions are taken to release federal prisoners from custody, any omission in the data could lead to release action not being taken at the correct time. This could result in an individual being illegally held in custody beyond their authorised date of release. There is a strong incentive for the AGD to maintain the data accurately to avoid such a situation. This also creates a mechanism that ensures the accuracy of the data, as any omission would quickly be highlighted by the individual prisoner or the

jurisdiction in which the prisoner is held. The data maintained by the AGD are therefore considered an accurate record of federal prisoners at any given point in time.

8. Because the database and procedures for its maintenance were established for case management purposes and not with an intention to use the data as a source for statistical analyses, federal prisoner records have not been archived in a form that would allow any time-series analysis. When a person ceases to be a federal prisoner—because he or she is released from custody or completes a federal sentence and begins a sentence for a state/territory offence—that person's details are deleted from the database. The AGD undertakes monthly back-ups of the data and retains these on separate disks. While data on former prisoners are potentially available through the disks, accessing this would be a very labour-intensive process. Part 3 of this paper contains some information about changes in the federal prisoner profile over time, based on data published quarterly by the ABS.

9. This paper uses a snapshot taken on 13 December 2004 and reflects the federal prisoners in custody at that time. Though the numbers in this dataset are small, they represent the total population count for federal prisoners.

### Australian Bureau of Statistics

10. A snapshot of Australian prisoners is also available through the annual census *Prisoners in Australia*, published by the ABS (see, for example, Australian Bureau of Statistics 2004b). This provides data on those persons in prison as at midnight on 30 June each year. As a snapshot, it does not capture information on the flow of people through prisons over time. Time-series data are published in the quarterly reports, *Corrective Services Australia* (see Australian Bureau of Statistics 2004a), which provide average daily numbers of persons in custody on a monthly and quarterly basis. In addition to daily averages, this publication provides some data on persons in custody on the first day of each month.

11. There are differences in the variables captured in the two ABS publications. Data captured in the *Prisoners in Australia* census include:

- numbers of prisoners by sex, age, country of birth, prior imprisonment, level of sentencing court, most serious offence or charge;
- aggregate sentences and time expected to serve;
- sentenced versus unsentenced status;
- above variables by Indigenous status;
- location/institution where held;
- security classification;
- periodic detainees by age, sex and most serious offence; and
- persons in community corrections.

12. Data captured in the quarterly *Corrective Services Australia* include:

- full-time custody—numbers of persons by sex and type of custody (open versus secure);
- imprisonment rates, by sex;

- sentenced receptions;
- Indigenous persons in full-time custody by sex and legal status;
- periodic detention—numbers and rates, by sex;
- federal sentenced prisoners in full-time custody, by sex; and
- persons in community corrections by sex and type of order.

13. Federal prisoners are not reported separately in *Prisoners in Australia*. Until 2001 this publication had reported data separating federal prisoners from state and territory prisoner populations. From 2002 federal prisoners were included as part of the reported overall prison population, together with state and territory prisoners.

14. Due to the differences between state and territory definitions of ‘federal prisoner’, and because the ABS already reported more accurate monthly and quarterly data provided by the AGD, a decision was taken by the working group that advises the ABS on corrective services data to drop federal prisoners as a separate category in the annual census data.

15. The ABS publishes data on federal sentenced prisoners in the quarterly *Corrective Services Australia* series (Australian Bureau of Statistics 2004a). The data published are provided directly to the ABS by AGD. These data are broken down by jurisdiction, but not by other variables such as type of custody. Until September 2004 the data were also broken down by sex, but this breakdown was not provided in the December 2004 or March 2005 reports.

### Use of available data

16. In attempting to draw comparisons between federal and state/territory prisoner populations it was not possible to rely on a single data source. It was necessary to draw on each of the available data sources to provide a profile of the characteristics of federal prisoners.

### *Imprisonment rates*

17. The rates of state/territory and federal imprisonment from January 1998 to September 2004 in Part 3 of this paper were calculated by subtracting the federal prisoner numbers published in *Corrective Services Australia* from the average daily numbers of persons in custody in the same publication to yield a net state/territory prisoner count. The federal prisoner counts and net state/territory counts were both calculated as rates using general adult population figures published by the ABS.

### *Sex distributions*

18. Sex distributions in Part 3 were calculated using data from *Corrective Services Australia* by subtracting federal prisoner counts by sex from numbers of persons in custody by sex to yield a net state/territory prisoner count. Rates of imprisonment for federal female prisoners and state/territory female prisoners were calculated using general adult female population figures published by ABS.

***Offence distributions***

19. Offence categories and distributions in Part 3 were extracted from the federal prisoners data as at 13 December 2004, provided by AGD.

***Prisoners by jurisdiction***

20. The Australian prisoners by jurisdiction data in Part 3 were drawn from *Corrective Services Australia*, which included calculating a net state/territory prisoner count as described in paragraph 17 above.

***Nationality***

21. Country of birth or nationality comparisons in Part 4 are between nationality as recorded in the federal prisoners data provided by AGD and country of birth as published by the ABS in *Prisoners in Australia*.

***Sentences***

22. Sentence comparisons in Part 5 are between sentences recorded in the federal prisoners data provided by AGD and sentence data published in *Prisoners in Australia*. As the ABS does not separately identify federal prisoners in the annual census, the census data include both state/territory and federal prisoners and there is no reliable way of extracting federal prisoner data from the overall prison population data. Calculated mean and median sentences therefore incorporate double counting of federal prisoners in the census data. However given the small number of federal prisoners in the Australian prison population (less than three per cent of the total prison population) and their distribution across the range of sentencing outcomes the effects of this double counting will be relatively minor, but should be taken into account in interpreting the data.

***Population data and statistical significance***

23. The two datasets used in this paper, data held by AGD and data collected by the ABS, are both population datasets. That is, they are data on all prisoners rather than just a sample of prisoners. As such the data are not subject to sampling error and tests of statistical significance should not be used:

significance is essentially a measure of risk in making an inference on the basis of a sample pattern to the population from which the sample was randomly drawn/assigned. If population data are used, however, then significance is not meaningful since there is no inferential risk. In such a case it might be misleading to report p levels. Specifically, some substantial findings might be inappropriately discarded by the reader as being 'non-significant', while trivial findings might be unduly emphasized by the reader on the basis of being 'significant'.<sup>1</sup>

24. While any differences observed in population data are real, that does not mean they are necessarily important. The decision as to whether the differences are important is a policy decision.

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1 Manitoba Centre for Health Policy, University of Manitoba [www.umanitoba.ca/centres/mchp](http://www.umanitoba.ca/centres/mchp) Concept Dictionary, at 18 October 2005, searched under the term 'Population Data and Significance: A Discussion'.

25. However, care must be taken when interpreting observations in this paper due to the very small numbers of federal prisoners, particularly in some jurisdictions, and the effect that individual differences can have on the observations. In a large population it requires a relatively large amount of change to effect distributions. In a very small population, the replacement of a few individuals with others who have different characteristics of interest can alter observed distributions of those characteristics.

### ***Non-parole period as a proportion of total sentence***

26. Part 5 of this paper includes an examination of federal prisoner sentences focusing on the non-parole period as a proportion of the total sentence. This was done using the federal prisoner data from the AGD. In this dataset, sentence data were recorded in a text or string format. This was then converted to a numeric format based on the number of months, which was also used to calculate mean and median aggregate sentences and time expected to serve. To examine non-parole periods, the numeric value for the non-parole period was divided by the numeric value for the head or total sentence. This was then converted into a percentage for presentation purposes.

27. The limitations to this mathematical approach are demonstrated in Figure A1.2. In this example, five sentences were randomly selected from among those sentences where the non-parole period was between 60 and 65 per cent of the head sentence. In the first case, the sentence is a ‘neat’ five and half years, with three and a half years non-parole period, leaving a ‘neat’ two years on parole. The calculated proportion is a less visually ‘neat’ 0.64, which is the same proportion as the differently constituted sentence in case two and the much longer sentence in case five.

***Figure A1.2: Examples of federal prisoner sentences and calculated proportion of non-parole period.***

	Head sentence	Non-parole period	Proportion
1	05 yrs 06 mths 00 dys	03 yrs 06 mths 00 dys	.64
2	07 yrs 00 mths 00 dys	04 yrs 06 mths 00 dys	.64
3	07 yrs 06 mths 00 dys	04 yrs 08 mths 00 dys	.62
4	08 yrs 00 mths 00 dys	05 yrs 00 mths 00 dys	.63
5	22 yrs 00 mths 00 dys	14 yrs 00 mths 00 dys	.64

*Source:* Federal Prisoners 2004 (AIC file)

28. While each of the cases in this example involves a combination of years and months that is easy to understand and manage, the non-parole period does not reduce to a simple mathematical proportion like 60 per cent or two-thirds. While some cases will produce a mathematical outcome of this kind, many do not. The results in this part of the paper are presented in intervals of ten per cent and five per cent and should be interpreted on that basis.

## The federal prisoner population: a profile

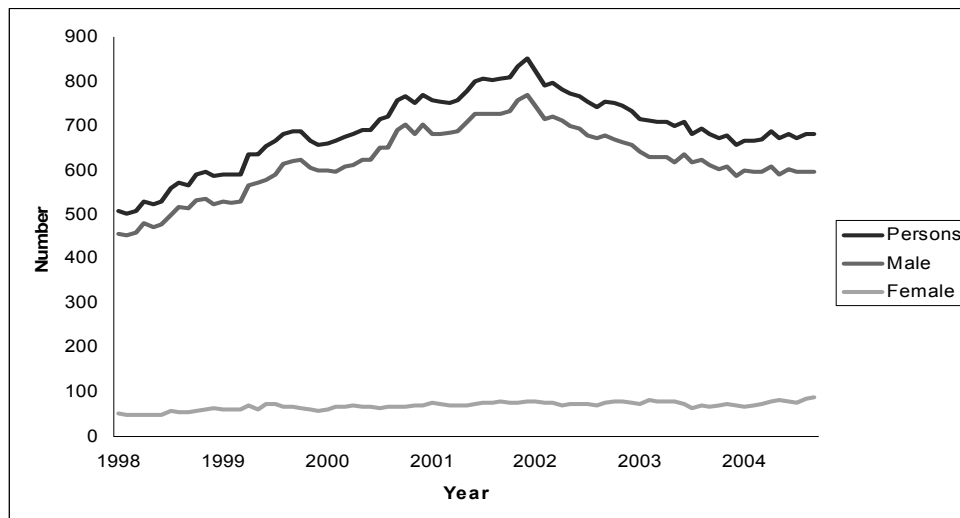
### Numbers and rates

29. Based on data obtained from the AGD, on 13 December 2004 there were 695 federal prisoners in Australia. There were 611 males (88%) and 84 females (12%). In comparison, the ABS report *Corrective Services Australia, December 2004* (Australian Bureau of Statistics 2004a) showed 685 federal prisoners were held on 1 December 2004. This slight discrepancy is likely due to movements in the federal prisoner population during the intervening period, movements that may not have been reflected in the database at the point the snapshot was taken. It does however demonstrate that both datasets are essentially producing the same counts.

### Changes in the federal prisoner population

30. Using 'first day of the month' counts published by the ABS in *Corrective Services Australia*, Figure A1.3 shows changes in the numbers of federal prisoners from January 1998 to September 2004, the last date for which separate male and female numbers were available. There was consistent growth in the number of federal prisoners from January 1998 through to a peak in December 2001. Numbers then began to decline before again showing a slight increase from the earlier part of 2004. Some reasons for the sharp peak in federal prisoner numbers are discussed below in the context of state and territory breakdowns.

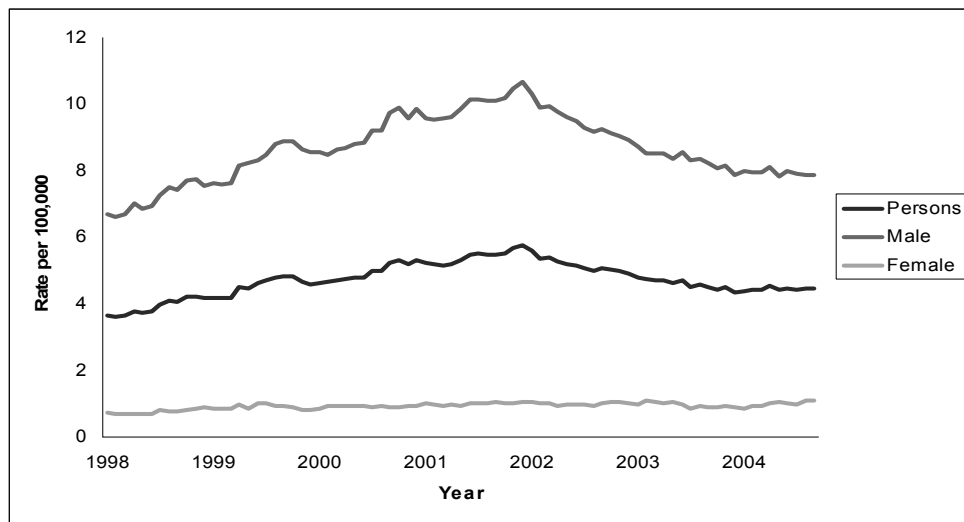
**Figure A1.3: Number of federal prisoners, 1998–2004**



Source: ABS, *Corrective Services Australia* (2004).

31. Figure A1.4 shows changes in the rate of federal imprisonment per 100,000 of the general adult population. This indicates that the rise and subsequent decline in federal prisoner numbers is not due to changes in the overall population.

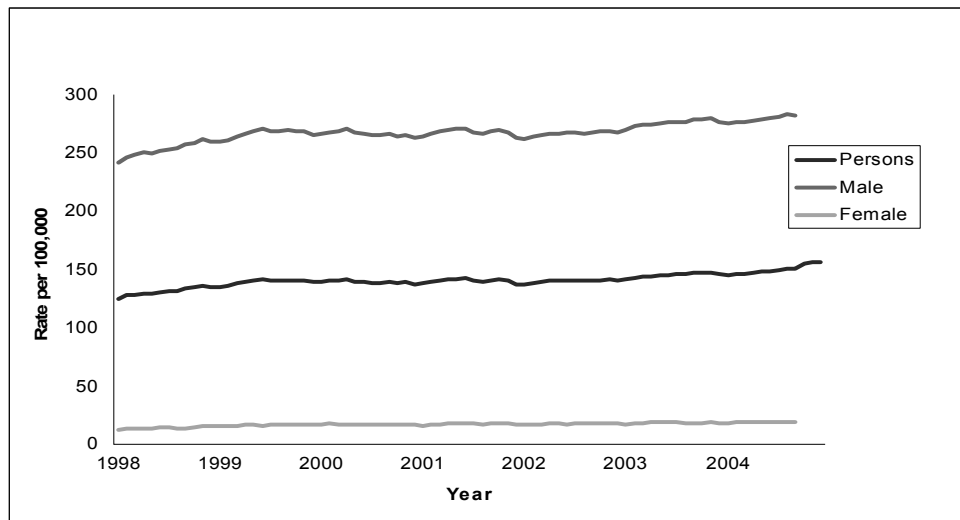
**Figure A1.4: Federal imprisonment rate, 1998–2004**



Source: ABS, Corrective Services Australia (2004).

32. In contrast, the rate of imprisonment of state/territory offenders increased at a steady rate during the January 1998 to September 2004 period (see Figure A1.5). This may be largely due to the much greater numbers of state and territory prisoners, such that changes in policing operations, policy decisions and levels of criminal activity within individual offence types do not have the same potential to affect the overall imprisonment rate.

**Figure A1.5: State/territory imprisonment rate, 1998–2004**



Source: ABS, Corrective Services Australia (2004).

### Distribution by sex

33. Using quarterly ABS data (ABS 2004a), in September 2004 there was an average of 23,553 persons in full-time custody in Australia. Of these, 21,959 persons were in custody for state or territory offences, while there were 682 federal prisoners. Federal prisoners are only a very small proportion of all prisoners in Australia. Viewed across the entire prisoner population, male federal prisoners are 2.5 per cent ( $n=595$ ) of all people in custody and female federal prisoners are 0.4 per cent ( $n=87$ ) of the total prisoner population. Within males, federal prisoners constitute 2.7 per cent of all males in custody. Within females, federal prisoners constitute 5.5 per cent of female prisoners.

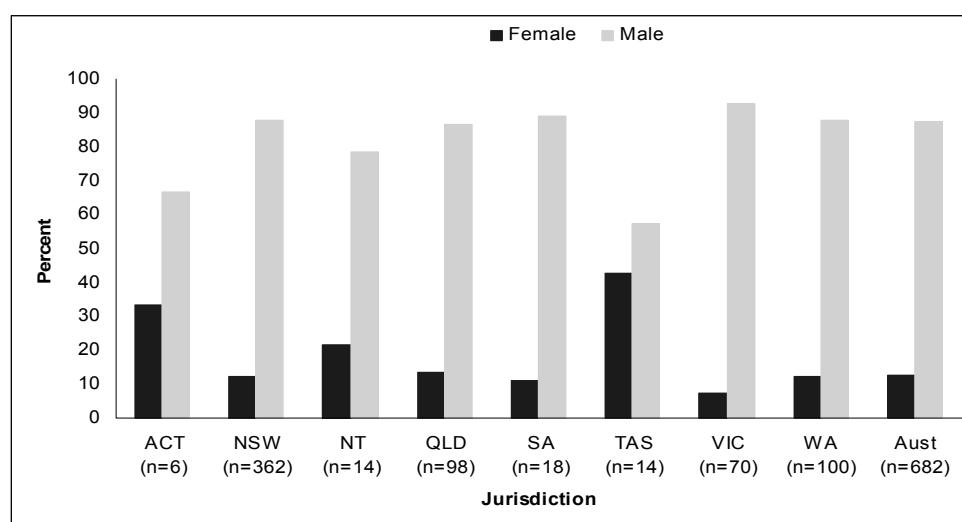
34. Among the federal prisoners there were 87 per cent males and 13 per cent females. As shown in Figure A1.6, this distribution within the federal prisoner population is fairly consistent across most jurisdictions.

35. The relative over-representation of female prisoners in Tasmania and the ACT is an artefact of the small numbers of prisoners held in those jurisdictions: very small differences in raw numbers produce large differences in percentages. For instance, at the beginning of July 2004 there was one female federal prisoner in Tasmania and eight males, so that the sex distribution was 11 per cent female and 89 per cent male, close to the national distribution. The



imprisonment of three females during July 2004 and two during August 2004 changed the distribution to the 43 per cent female and 57 per cent male, shown in Figure A1.6.

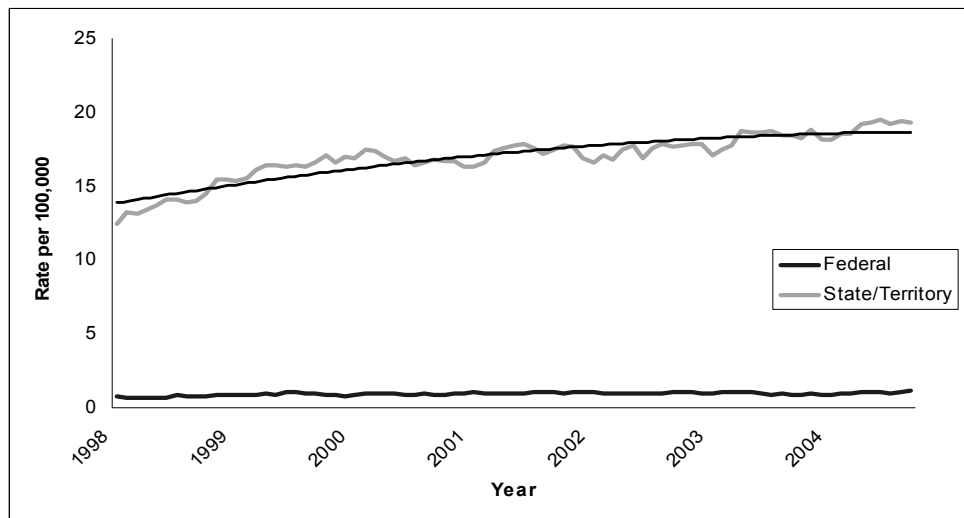
**Figure A1.6: Federal prisoners by sex and jurisdiction**



Source: ABS, Corrective Services Australia (2004).

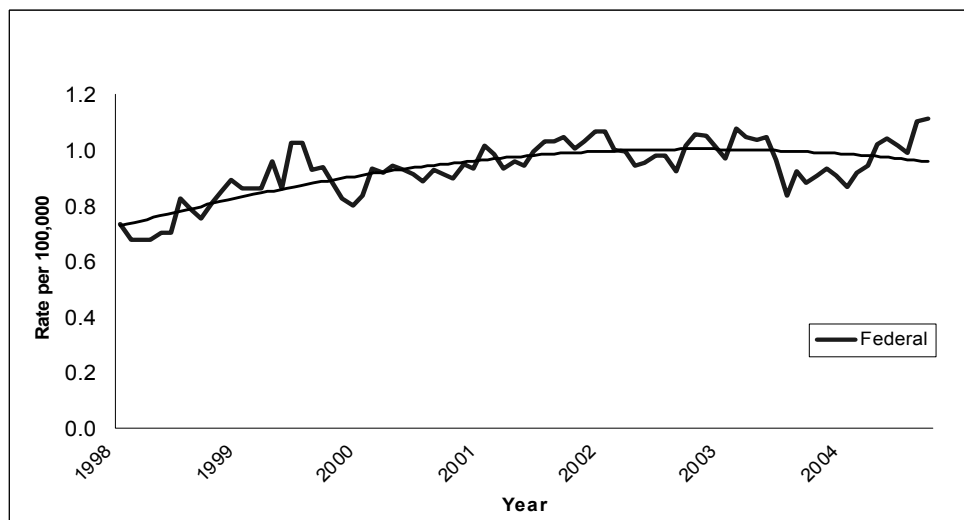
36. The rate of imprisonment of females within the federal prisoner population is lower than the state/territory female imprisonment rate (Figure A1.7). Furthermore, the rate of imprisonment of females within the federal prisoner population has largely plateaued since 2001, while the rate of imprisonment of state/territory female prisoners has consistently increased since 1998, as can be seen by comparing the trend lines in Figures A1.7 and A1.8

**Figure A1.7: Female prisoners per 100,000 adult females in the population, 1998-2004**



Source: ABS, Corrective Services Australia (2004).

**Figure A1.8: Female federal prisoners per 100,000 adult females in the population, 1998-2004**



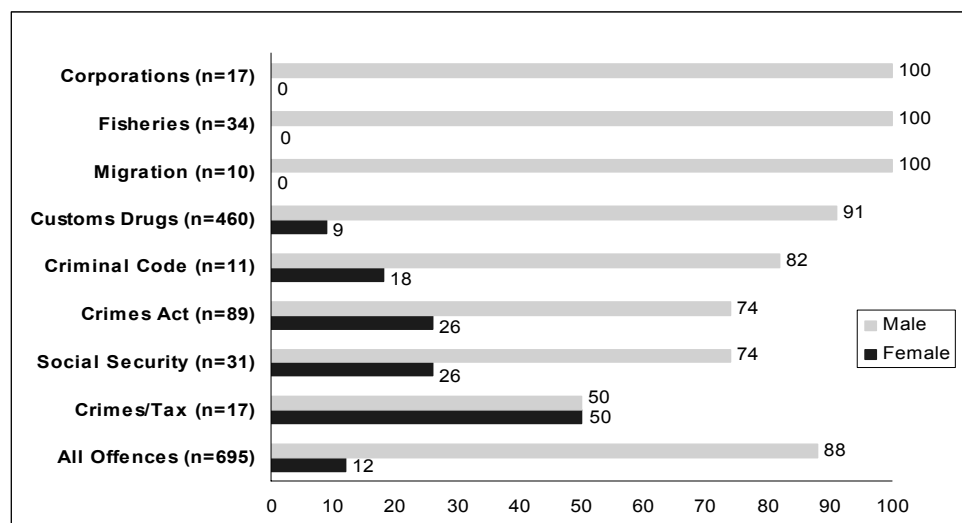
Source: ABS, Corrective Services Australia (2004). The scale of this chart is considerably different from that of the previous chart in order to indicate more clearly trends in the data.

37. The distribution of offence types varies across male and female offenders. Figure A1.9 shows the sex distribution across types of offence for ‘major’ categories, that is, those with 10 or more persons serving sentences for that category of offence.

38. The proportion of females imprisoned for offences against the *Crimes Act* is twice that of the overall female federal prisoner population. Similarly the proportion of females imprisoned for ‘Crimes/Tax’ offences is more than four times the proportion of females in the federal prisoner population. A majority of CDPP prosecutions under the *Crimes Act* in 2003-04 were for fraud and other deception offences, generally involving an attempt to gain some financial advantage. The proportion of female *Social Security Act* offenders is also greater than the proportion of females in the total federal prisoner population.

39. These results suggest a higher representation of females in offences involving welfare-type payments, a phenomenon which has also been observed in state/territory prisoner population (Goldstraw, Smith and Sakurai 2005). Against this interpretation it is worth noting that all of the prisoners offending against corporations, fisheries<sup>2</sup> or migration legislation were male.

**Figure A1.9: Percentage of male and female federal prisoners by major offence classification as at 13/12/2004**



Source: Federal Prisoners 2004 (AIC file).

<sup>2</sup> Under the *Law of the Sea Convention 1982*, foreign nationals cannot be sentenced to imprisonment for illegal fishing activities. Persons convicted of fisheries offences may be given fines but then serve a term of imprisonment if the fine is not paid. The ‘Fisheries’ category in AGD’s federal prisoner database indicates persons serving terms of imprisonment for fine-default related to fisheries offences.

## Distribution by jurisdiction

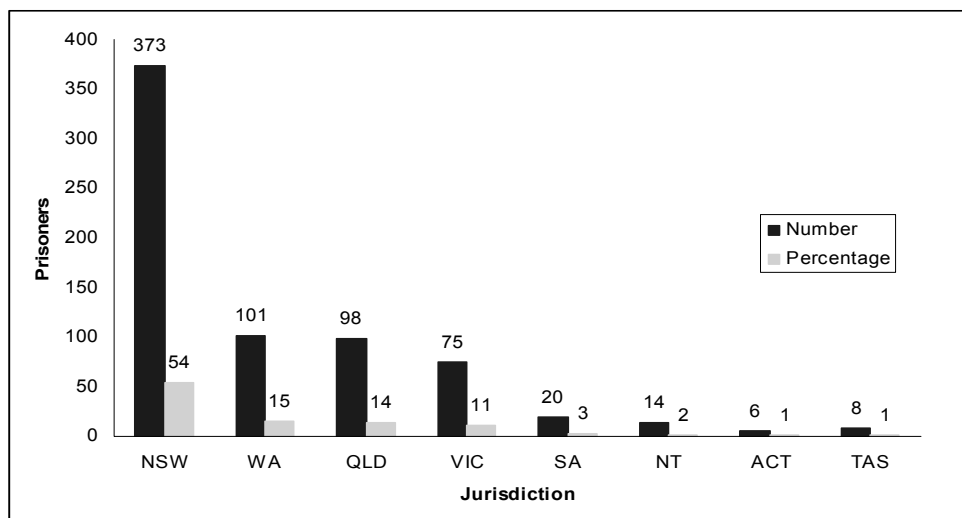
### *Federal prisoners*

40. Federal prisoners are held in the correctional systems of the state or territory in which they committed their offence or offences, and where they were convicted and sentenced. Prisoners may seek transfer to other jurisdictions on welfare grounds or may be transferred for justice reasons, such as where they are wanted for prosecution of more serious offences in another jurisdiction. For this reason, the location in which an offender is held in custody does not necessarily reflect the jurisdiction in which the offence occurred, though in the overwhelming majority of cases it will.

41. The small number of federal prisoners recorded against the ACT represents persons held in NSW, but who were convicted and sentenced in ACT courts. Persons convicted of federal offences in the ACT may be sentenced to periodic detention, which is then served within the Territory, but there are no periodic detainees in this sample.

42. The distribution of federal prisoners across jurisdictions as at 13 December 2004 is shown in Figure A1.10. Not surprisingly, as NSW is the most populous state, the majority of federal prisoners were held there and only small proportions were held in Tasmania, the Northern Territory and the ACT.

**Figure A1.10: Federal prisoners by jurisdiction as at 13/12/2004: numbers and percentages**

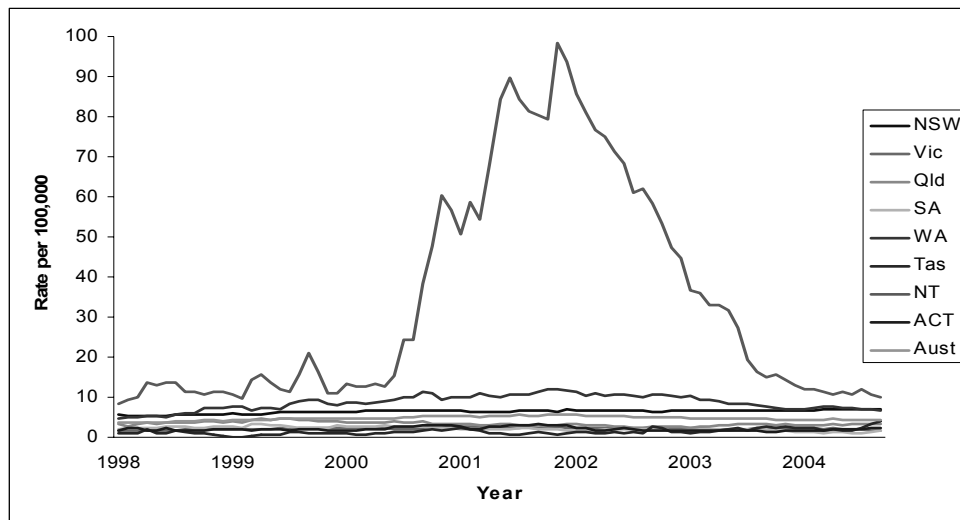


Source: Federal Prisoners 2004 (AIC file). Percentages do not total 100 due to rounding.

43. There have been changes in the number of federal prisoners in each jurisdiction over time. Figure A1.11 provides the rate of federal imprisonment per 100,000 adult population between 1998 and 2004. The rates have remained relatively stable except for the Northern Territory, and to a lesser extent Western Australia. From a rate of 15.45 persons per 100,000 of the general adult population in June 2000, the rate of imprisonment in the Northern Territory

increased to a peak of 98.24 per 100,000 in November 2001. By September 2003 the rate had fallen to 15.04, the lowest rate since May 2000. The rate has remained low since, down to 9.93 per 100,000 in September 2004.

**Figure A1.11: Federal prisoners per 100,000 adult population by jurisdiction, 1998–2004**



Source: ABS, Corrective Services Australia (2004).

44. The increase in federal imprisonment in the Northern Territory was almost solely due to an increase in the commission and detection of ‘people smuggling’ offenders under the *Migration Act 1951* (Cth) (Northern Territory Department of Justice 2004: 8; Warton 2002: 14). This resulted in a relatively large number of people being detected for these offences in Australia’s northern waters. The majority of these offenders were the crew of Indonesian vessels, who typically received sentences of around 12 months imprisonment. Typically, a number of crew members would be convicted at the same time and most offences were detected and dealt with during a relatively short period. The short timeframe involved and the general consistency of the sentences resulted in a relatively large number of people entering the Northern Territory and Western Australia correctional systems within a short period, and leaving those systems again within a short period, 12 to 18 months later.

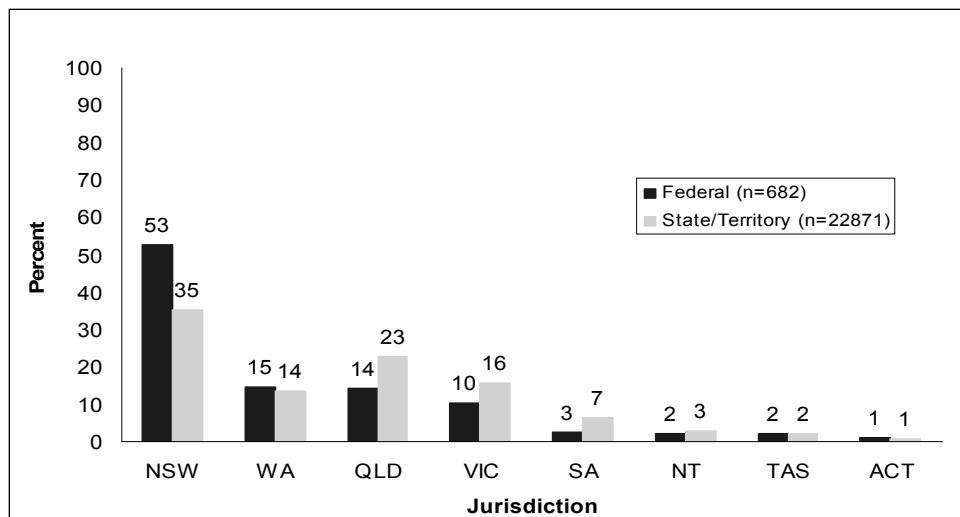
45. Given the small population of federal prisoners, particularly in the smaller jurisdictions, and the narrower range of offences under federal legislation it is easier to identify the impact of specific enforcement activities on the overall federal prisoner profile. Similar impacts would be also be occurring in the state prison population.

### Comparisons with state/territory prisoners

46. Figure A1.12 shows the distribution of Australian prisoners across jurisdictions. In both federal and state/territory prisoner populations the greatest number of prisoners is held in NSW, the largest jurisdiction. Over half of all federal prisoners were in NSW, compared with 35 per cent of state/territory prisoners. Queensland held only 14 per cent of federal prisoners, compared with more than 22 per cent of all state/territory prisoners. Victoria and South Australia also had a relative under-representation of federal prisoners.

47. The high proportion of federal prisoners in NSW is related to the prominence of drug importation offences in the federal prisoner population. As discussed further below, nationally some 67 per cent of drug offenders are held in NSW and 83 per cent of all federal prisoners held in NSW are drug offenders.

**Figure A1.12: Australian prisoners by jurisdiction**



Source: ABS, Corrective Services Australia (2004).

### Distribution by country of birth or nationality

48. The AGD's federal prisoners database and the ABS national prison census provide data on prisoners by their country of birth or nationality. In the federal prisoners data this is recorded as 'nationality' and reflects the prisoner's nationality or country of citizenship as determined by the CDPP, typically from documents obtained from the prisoner or other sources. The country recorded does not necessarily reflect the categories in the Standard Australian Classification of Countries as used by the ABS (see Australian Bureau of Statistics 2004a). In the ABS national prison census, the 'country of birth' is recorded using the Standard Australian Classification and is determined by corrective services agencies based on prisoner interviews. There may be inconsistencies between the AGD and ABS data based on these differences.

49. The data in Figure A1.13 show that for both the federal prisoner population and the overall Australian prisoner population, persons of Australian nationality or birth are the most

highly represented group. Australian persons make up only 43 per cent of the federal prisoner population, compared with 74 per cent of the overall prisoner population. This reflects one of the fundamental differences between Commonwealth and state/territory criminal law, with Commonwealth law more often addressing matters at a national level, such as the international smuggling of drugs or persons.

50. The other notable representation among federal prisoners is persons of Indonesian nationality, who make up seven per cent of the federal prisoner population. On 13 December 2004 68 per cent (n=34) of Indonesian federal prisoners were being held for fisheries-related offences, for an average term of just over seven months. Given the small numbers and relatively short sentences involved, these distributions may be subject to fluctuation over time.

**Figure A1.13: Country of birth or nationality of Australian prisoners**

Country of birth or nationality	Federal		Australia	
	No.	%	No.	%
Australia	302	43	17,954	74
Asia—other	59	8	312	1
Indonesia	50	7	82	0
Africa*	30	4	57	0
Europe—other	30	4	583	2
Hong Kong (SAR of China)	27	4	65	0
United Kingdom and Ireland	27	4	638	3
North America/Canada	24	3	56	0
Latin America	20	3	0	0
Middle East <sup>#</sup>	16	2	180	1
Netherlands	15	2	52	0
China (excludes Hong Kong SAR & Taiwan)	14	2	144	1
New Zealand	14	2	606	3
Vietnam	11	2	668	3
South Pacific	5	1	270	1
Other	1	0	842	3
Unknown	50	7	1,662	7
<b>Total</b>	<b>695</b>	<b>100</b>	<b>24,171</b>	<b>100</b>

Source: Federal Prisoners 2004 (AIC file); ABS, Prisoners in Australia 2004. \*ABS data place African countries except South Africa in 'other'. # ABS data place Middle East countries except Lebanon in 'other'.

## Offences

### Types of offences

51. The available data on federal prisoners do not record discreet offences using the established Australian Standard Offence Classification (ASOC) or the older Australian National Classification of Offences (ANCO) systems. Rather the offences are placed into categories based, in most cases, around the relevant legislation. This produces categories such as ‘Crimes Act’, which covers any offence against the *Crimes Act 1914*.

52. In some cases more specific detail is given about the relevant section of the Act, such as ‘Crimes/50BC’ (child sex tourism—sexual conduct involving child under 16) or ‘Crimes/50DB’ (encouraging an offence against the child sex tourism provisions of the Act).

53. In further cases the category may indicate a broader part of the Act. For example, ‘Crimes/Post’ indicates an offence against one of the several sections of Part VIIA of the Act—‘Offences relating to postal services’.

54. As noted above, federal offending overall is dominated by relatively minor offences involving deception or dishonesty and minor financial gain. When the subset of offenders who become imprisoned is examined, the picture is dominated by serious drug importation offences.

55. Figure A1.14 provides a breakdown of federal prisoners by offence categories as recorded by the AGD. The majority of prisoners (n=460; 66.2%) had committed offences under the *Customs Act 1901* (‘CD’ is an abbreviation of ‘Customs Drugs’), usually involving the importation of narcotics or ‘drug smuggling’.

56. There are only a small number of other offence categories with notable representation. Those include offences under provisions of the *Crimes Act 1914*, *Criminal Code 1995*, *Corporations Act 2001*, *Taxation Administration Act 1953* (in conjunction with *Crimes Act* offences), *Fisheries Management Act 1991*, *Migration Act 1951* and the *Social Security Act 1991*. Together with the *Customs Act 1901*, these eight areas of legislation account for 97 per cent of persons imprisoned for Commonwealth offences.



**Figure A1.14: Federal prisoners by recorded offence category as at 13/12/2004**

Type of Offence	No.	%
Bankruptcy	6	<1
'CD' (Customs Drugs)	460	<b>66</b>
CD/Crimes Act	2	<1
CD/Proceeds of Crime Act	3	<1
Civil Aviation	1	<1
Corporations	17	<b>2</b>
Criminal Code	11	<b>2</b>
Crimes Act	89	<b>13</b>
Crimes Act/Currency	1	<1
Crimes Act s 50BC	1	<1
Crimes Act s 50DB	1	<1
Crimes Act/Postal	1	<1
Crimes Act/Proceeds of Crime Act	2	<1
Crimes Act/Tax	12	<b>2</b>
Customs (not drugs)	1	<1
Environment Act	1	<1
Escape	1	<1
Excise	2	<1
Family Law	1	<1
Fisheries-related	34	<b>5</b>
Financial Transactions Reporting Act	3	<1
Health Insurance Act	2	<1
'I/PROT' Act	1	<1
Migration Act	10	<b>1</b>
Passports	1	<1
Social Security	31	<b>4</b>
<b>Total</b>	<b>695</b>	<b>100</b>

Source: Federal Prisoners 2004 (AIC file).

## Offence distributions in federal prisoner population

57. Figure A1.15 shows the distribution across jurisdictions of major federal prisoner offence types. 'Major offences' for this purpose are those where 10 or more federal prisoners are serving sentences where this is the most serious indicated offence. Offence categories in the database that show multiple offences (such as 'Crimes/Tax' and 'CD/Crimes') have been aggregated into the first indicated offence. Offences under the *Criminal Code* have also been aggregated with *Crimes Act* offences for this purpose.

58. The majority of prisoners serving sentences for drugs offences (n=465, 67%) were in NSW and 83 per cent of all federal prisoners (n=310) held in that State were drugs offenders. Sydney is a major international transport hub and therefore the most likely location for illicit drugs to enter the country. The prominence of illegal drug imports into NSW is also likely to be a result of the significance of Sydney as an illicit drug market and distribution point.

**Figure A1.15: Number of major federal prisoner offence types by jurisdiction as at 13/12/2004**

Type of Offence	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Total
Customs Drugs	2	310	8	26	12	0	52	55	465
Corporations	0	6	0	3	1	2	2	3	17
Crimes Act	4	41	2	28	6	3	18	16	118
Fisheries-related	0	0	0	24	0	0	0	10	34
Migration	0	1	3	0	0	0	0	6	10
Social Security	0	6	1	13	0	3	2	6	31
<b>Total (all offence types)</b>	<b>6</b>	<b>373</b>	<b>14</b>	<b>98</b>	<b>20</b>	<b>8</b>	<b>75</b>	<b>101</b>	<b>695</b>

Source: Federal prisoners 2004 (AIC file).

59. In contrast, all fisheries-related offenders were located in either Queensland (n=24, 71%) or Western Australia (n=10, 29%). Migration offences were also strongly localised, with six in Western Australia (60%) and three in the Northern Territory (30%). As the large majority of fisheries and migration offenders come from Indonesia (n=39 of 44 offenders; 89%) the location of fisheries and migration offences reflects the physical location of fishing areas and sea transportation routes.

60. Fourteen per cent of the federal prisoner population was located in Queensland (n=98), yet 42 per cent of social security offenders were located in Queensland (n=13). Possible reasons for the over-representation of social security prisoners in Queensland cannot be answered using data available for this paper.

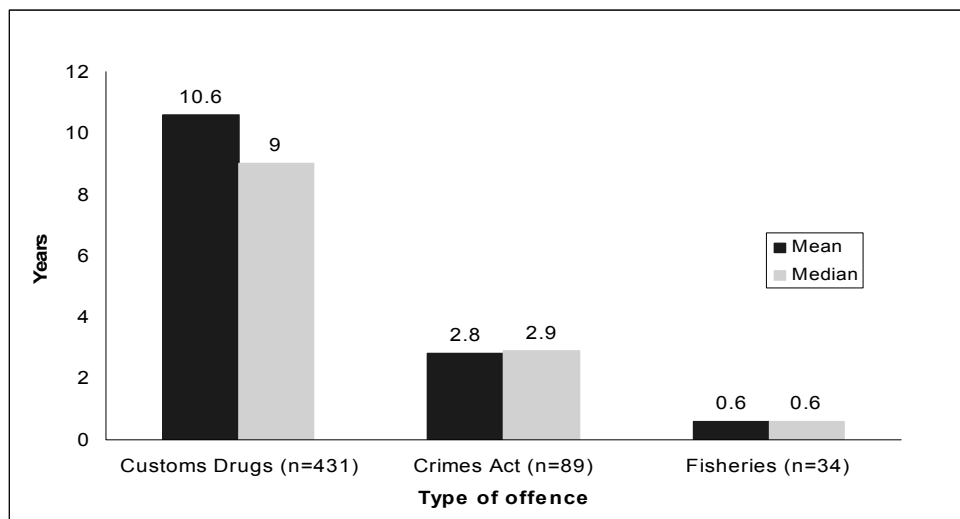
## Drug offences

61. The high proportion of drugs offenders in the federal prisoner population is partly a function of the seriousness of the offences. As examined in more detail below, drug importation offences typically incur a lengthy sentence, so these offenders will remain and accumulate in the system. In contrast, even though there may be more offenders receiving shorter sentences for

other offences, during any given period the number entering imprisonment will tend to be offset by the number released.

62. To illustrate this point, as shown in Figure A1.16, the mean sentence for ‘Customs Drugs’ offences is nearly 10 years 8 months and the median sentence is 9 years. There are also 29 sentences of life imprisonment for ‘Customs Drugs’ not included in these calculations. For the next most frequent offence category, ‘Crimes Act’, the mean sentence is 2 years 10 months with a median of 2 years 11 months and a longest sentence of 8 years. For the third most frequent offence category, ‘Fisheries’, the mean and median terms of imprisonment, resulting from fine-default, are only 7 months with a longest term of 14 months. The federal prisoner population is therefore dominated by drug importation offences in terms of both numbers of prisoners and the seriousness of the offences.

**Figure A1.16: Mean and median sentences for most common offence categories amongst federal prisoners as at 13/12/2004**



Source: Federal Prisoners 2004 (AIC file). Note that 29 life sentences for ‘Customs Drugs’ offences have been excluded for calculation purposes.

### ***Fraud offences***

63. Not surprisingly, federal offending is dominated by fraud offences against the Commonwealth. As noted above, 40 per cent of all offences dealt with by the CDPP in 2003–04 were offences against the *Social Security Act*. Due to the nature of this legislation these offences generally involve an act or omission intended to gain a financial advantage for the offender.

64. Figures A1.17 and A1.18 show charges dealt with by the CDPP under the *Crimes Act* and the *Criminal Code*. These figures list all offences involving deception or dishonesty to gain a financial advantage, together with an aggregated total for other offences under those Acts. A full listing of charges dealt with by the CDPP under those Acts is included in Part 8 of this paper.

65. Together with the *Social Security Act*, offences under the *Crimes Act* and the *Criminal Code* comprised 70 per cent of all matters dealt with by the CDPP. A breakdown of the 3,110 total charges brought under these latter two Acts shows that 2,789 charges (90%) were for offences involving fraud or other acts of dishonesty. The offence of 'obtaining a financial advantage' under s 135.2 of the *Criminal Code* represented 84 per cent of charges under that legislation. The offences of 'imposition' (s 29B) and the more serious offence of 'fraud' (s 29D) accounted for 69 per cent of charges brought under the *Crimes Act*.

66. As noted above, a large proportion of fraud and dishonesty offences are dealt with on a summary basis, particularly those under the *Social Security Act*. Only 0.05 per cent of the 3,778 offences brought under that Act were indictable offences, with a similar percentage of 'obtaining a financial advantage' offences under the *Criminal Code* being dealt with on indictment.

**Figure A1.17: Number of charges dealt with by the CDPP in 2003–04: Crimes Act 1914**

Offence	Summary	Indictable
False pretences (s 29A)	5	–
Imposition (s 29B)	127	16
Fraud (s 29D)	91	137
Forgery (ss 65-69)	6	1
Falsification of books (s 72)	1	–
Other offences under the <i>Crimes Act</i>	120	30
<b>Total</b>	<b>350</b>	<b>184</b>

Source: Commonwealth Director of Public Prosecutions Annual Report 2003–04.

**Figure A1.18: Number of charges dealt with by the CDPP in 2003–04: Criminal Code 1995**

Offence	Summary	Indictable
Obtaining property by deception (s 134.2)	9	7
Obtaining a financial advantage by deception (s 134.2)	26	57
General dishonesty (s 135.2)	54	38
Obtaining financial advantage (s 135.2)	2,155	1
False or misleading statement in applications (s 136.1)	19	3
False or misleading information (s 137.1)	7	1
False or misleading documents (s 137.2)	3	1
Making forged documents (s 144.1)	5	3
Using forged document (s 145.1)	10	2
Falsification of documents (s 145.4)	4	–
Other offences under the <i>Criminal Code</i>	139	32
<b>Total</b>	<b>2,431</b>	<b>145</b>

Source: Commonwealth Director of Public Prosecutions Annual Report 2003–04.

### Comparative offence distributions

67. Differences in the nature of federal and state/territory criminal laws mean there are few grounds for comparison between the types of offences committed by the federal and state/territory prisoner populations. State and territory criminal laws largely concern actions committed against individual persons or against personal property, and are intended to reduce harm at an individual level. Other state and territory laws are concerned with regulation of activities that fall within state and territory responsibilities, such as road traffic laws. In contrast, federal criminal laws are largely framed around protection of federal assets, or are matters for which the Australian Government has constitutional responsibility, such as importation of illicit drugs and migration as well as transnational offences such as those involving sexual servitude, child sex tourism and offences related to terrorist activities.

68. This means that many offences that dominate state and territory prisoner populations are entirely or largely missing from the federal prisoner population. For example, just five types of state offence—homicide, other acts intended to cause injury, sexual assault and related offences, robbery and extortion, and unlawful entry—account for 60 per cent of prisoners in the state and territory prison populations but are not represented in the federal prisoner population. Where offences involving property or violence occur in federal law they are narrowly focused on acts against government property or government officials.

69. Nonetheless, some basis for comparison exists, albeit in a relatively crude form. The *Prisoners in Australia* census provides broad level data on sentenced prisoners by most serious

offence. Offence category information is also available from the AGD's federal prisoners database. These snapshots are separated in time by nearly six months and some discrepancies must be expected because of this. At a very broad level of analysis these discrepancies are unlikely to effect the overall interpretation.

70. As noted earlier, federal offending is characterised by a very high proportion of fraud and other offences involving deception and dishonesty. A very high proportion of federal offences that result in imprisonment involve illicit drugs, and a smaller though clearly observed proportion involves fraud offences.

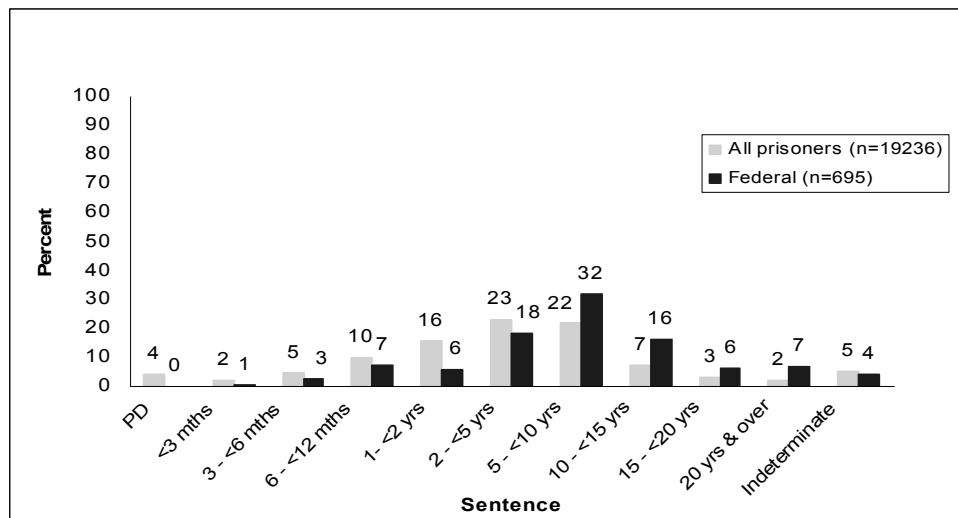
## Sentences

71. The annual *Prisoners in Australia* census provides data on the aggregate sentences of prisoners in the overall prison population. The census also provides data on time expected to service, that is, how long prisoners are expected to remain in prison before being released unconditionally or conditionally. The AGD's federal prisoners database also provides snapshot data on sentences and non-parole periods, creating the ability to compare at a broad level sentencing for federal and state/territory offences.

### Aggregate sentences

72. The aggregate sentence is the total or maximum sentence a prisoner is serving, often referred to as the head sentence. It includes the time a person may spend on conditional release from prison. This sentence may be composed of elements from different offences or multiple counts of an offence. Some of these elements might be served concurrently, others consecutively. The aggregate sentence is the total period of time a person will be under sentence.

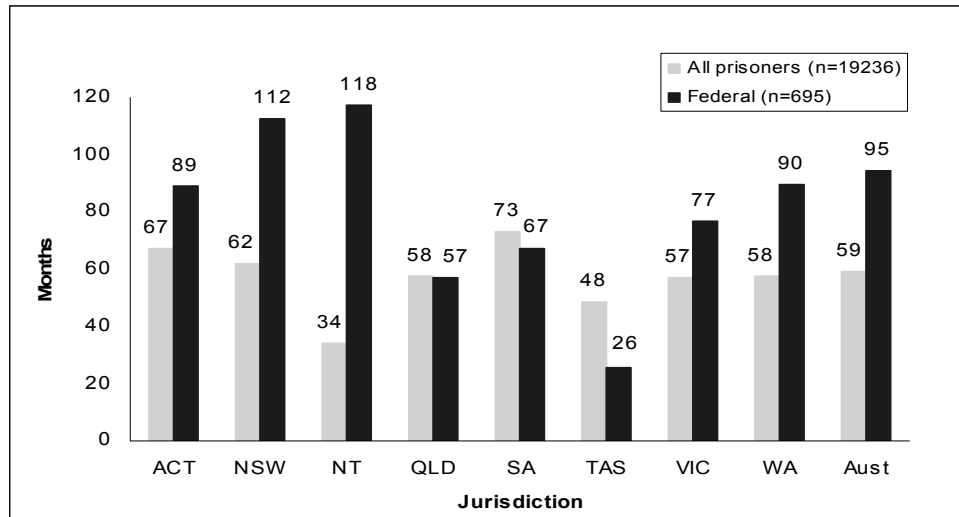
73. The ABS publishes data on aggregate sentences by prisoner numbers as well as by mean and median aggregate sentences. Compared with all Australian prisoners, the federal prisoner population attracts longer sentences. Figure A1.19 shows that 37 per cent of Australian prisoners received aggregate sentences of less than two years and 60 per cent received less than five years. In contrast, only 17 per cent of federal prisoners received less than two years imprisonment and 35 per cent received less than five years. While only 17 per cent of Australian prisoners received more than 10 years, 33 per cent of federal prisoners received these longer terms.

**Figure A1.19: Australian prisoners by length of aggregate sentence**

Source: Federal Prisoners 2004 (AIC file) and ABS, Prisoners in Australia.

74. Mean and median aggregate sentences were calculated for this paper from the federal prisoners' dataset. Mean and median aggregate sentences for both federal prisoners and state/territory prisoners exclude life and other indeterminate sentences (ABS 2004b: 11). This allows further comparison of federal offences with state/territory offences, as provided in Figure A1.20. The mean sentence for prisoners across Australia is 59 months. There is some variation across jurisdictions with mean sentences ranging from 34 months in the Northern Territory to 73 months in South Australia.

75. The mean sentence for federal prisoners was more than 60 per cent longer at 95 months. There is also greater variation, with mean sentences ranging from 26 months in Tasmania to 118 months in NSW. While at one end the Tasmanian figure is subject to the influence of a very small number of cases (n=8), at the other end the NSW figure is elevated by a number of lengthy sentences for drug offences. The mean sentences for Australia and NSW have also been reduced by the exclusion of indeterminate sentences, the majority of which are life sentences for drug offences committed in NSW.

**Figure A1.20: Australian prisoners mean aggregate sentence by jurisdiction**

Source: Federal Prisoners 2004 (AIC file) and ABS, Prisoners in Australia.

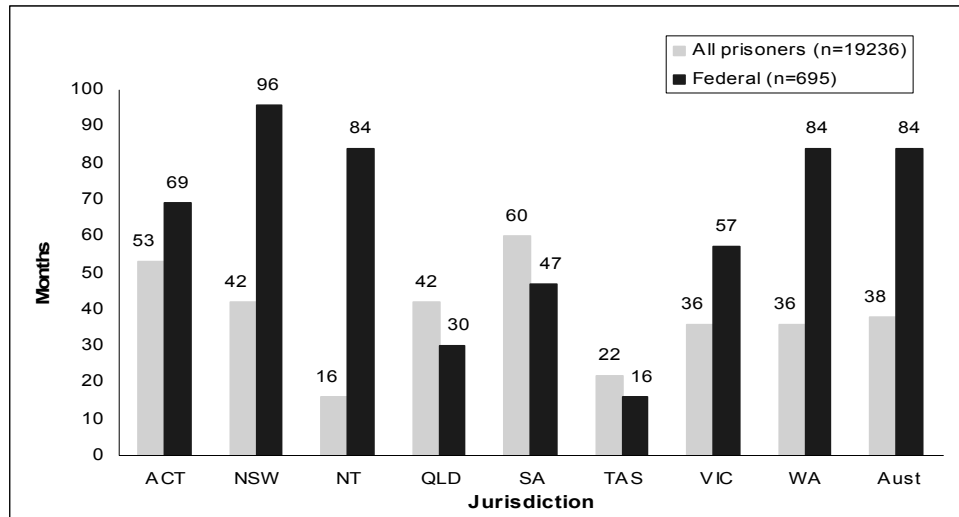
76. Within a prisoner population, mean aggregate sentences may be skewed by a disproportionate number of short or long sentences.<sup>3</sup> As noted above, most Australian prisoners (but not federal prisoners) serve sentences of less than five years. Some prisoners will also receive very long sentences of more than 25 years, which can have a skewing effect on the arithmetic mean.

77. Another way of looking at aggregate sentences is through the median sentence, which may provide a more valid descriptor. Figure A1.21 shows that the median sentence for prisoners in Australia was 38 months. The median sentences ranged from 16 months in the Northern Territory to 60 months in South Australia.

78. The median sentence for federal prisoners is 84 months. As with state/territory prisoners, there is variation in federal median sentences, ranging from 16 months in Tasmania to 96 months in NSW.

3 For instance, the Northern Territory mean sentence in Figure A1.20 is based on 11 cases, of which eight were over five years. Four of these sentences were over 15 years. The Northern Territory federal prisoner population also included three life sentences, which were excluded from the calculation of means.



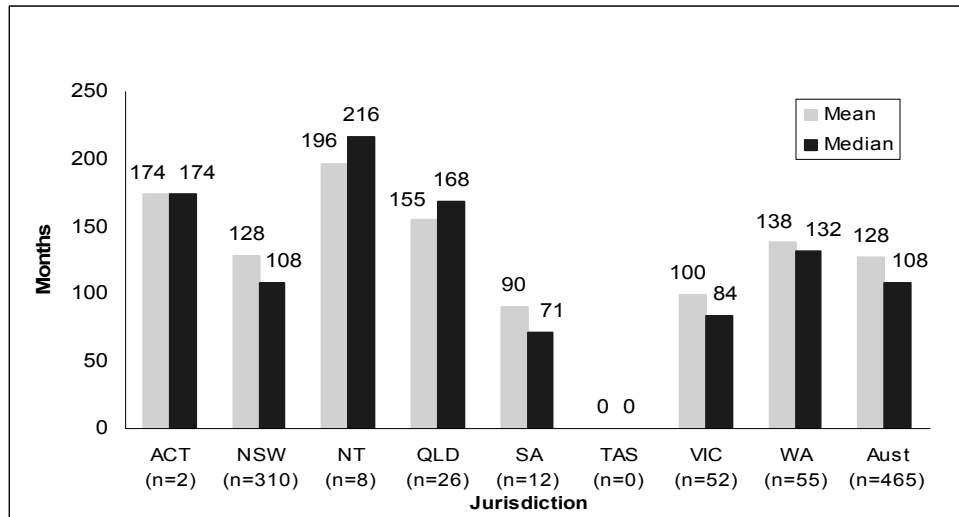
**Figure A1.21: Australian prisoners: median aggregate sentence by jurisdiction**

Source: Federal Prisoners 2004 (AIC file) and ABS, Prisoners in Australia.

79. Breakdowns of the mean and median aggregate sentences given to federal prisoners across major offence categories and by jurisdiction are given below. Some caution must be taken in interpreting these charts because each has different scales, reflecting the much heavier sentences attracting to drugs offences.

80. Figure A1.22 indicates that the highest aggregate sentences for drug offenders were given in the Northern Territory, although the number of cases there is small (n=8). Because a range of factors can affect the sentencing outcome in any particular case, the potential influence of individual cases should be taken into account in interpreting these data. In addition, these mean and median figures do not include indeterminate sentences. In NSW where the majority of federal drug offenders are held (n=310), these figures do not include 29 prisoners serving life sentences for drug offences.

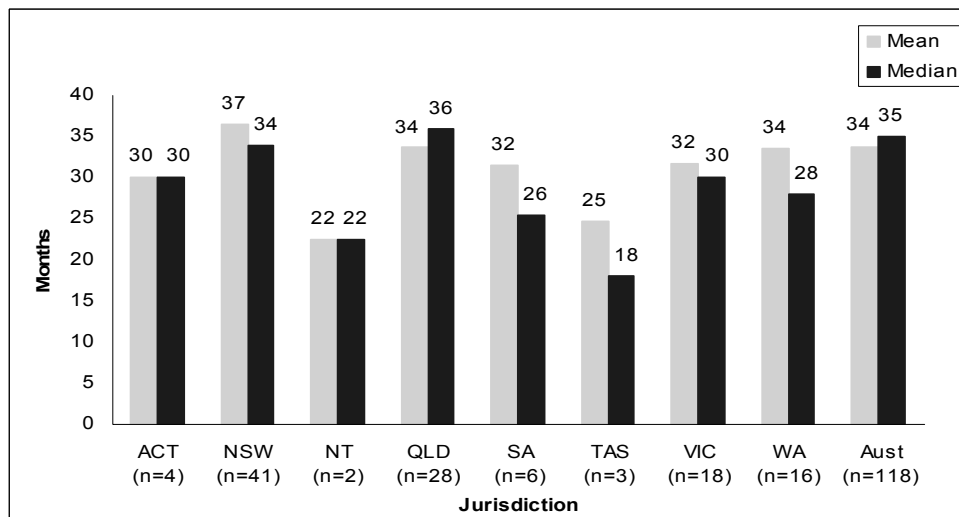
**Figure A1.22: Federal prisoners: mean and median aggregate sentences for drugs offences by jurisdiction**



Source: Federal Prisoners 2004 (AIC file).

81. Figure A1.23 shows mean and median aggregate sentences for *Crimes Act* offences. These show less variation than sentences given for drugs offences, though there is still variation across jurisdictions.

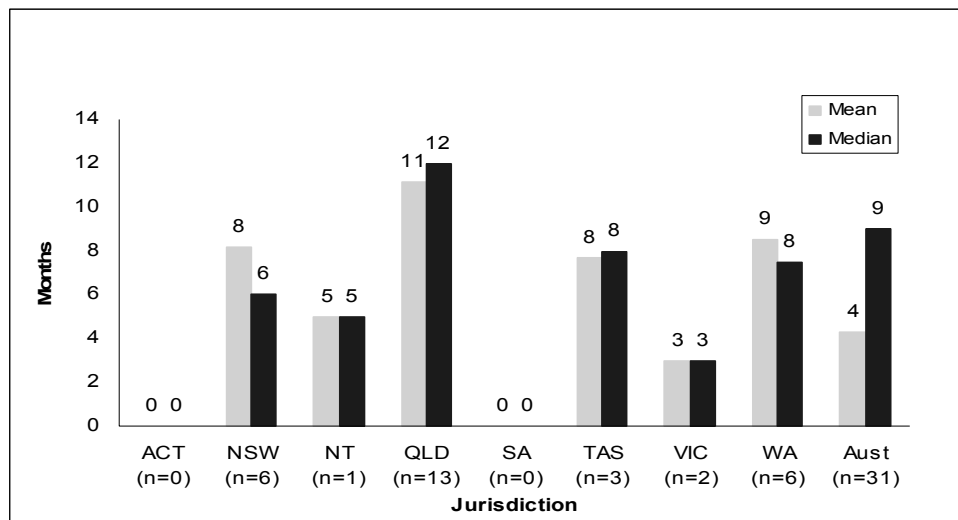
**Figure A1.23: Federal prisoners: mean and median aggregate sentences for Crimes Act offences by jurisdiction**



Source: Federal Prisoners 2004 (AIC file).

82. Distributions of mean and median aggregate sentences for *Social Security Act* offences are shown in Figure A1.24.

**Figure A1.24: Federal prisoners: mean and median aggregate sentences for *Social Security Act* offences by jurisdiction**



Source: Federal Prisoners 2004 (AIC file).

### Non-parole periods

83. The non-parole period is an important indicator of variations in sentencing practice because it not only represents the minimum duration of the sentence but in many cases also constitutes the actual period of time spent in custody. This is true of federal prisoners even more so than state and territory prisoners given that federal prisoners with head sentences of less than 10 years are granted automatic release on parole at the end of their non-parole period.

84. When examining data on non-parole periods, two important measures are the percentage of the total sentence formed by the non-parole period (the 'relative non-parole period') and the time expected to serve. The relative non-parole period can be determined from the AGD's snapshot data on federal prisoners, but the available ABS data do not allow for a comparison of relative non-parole periods between federal and state/territory prisoners. The ABS data do, however, allow comparisons on the basis of time expected to serve.

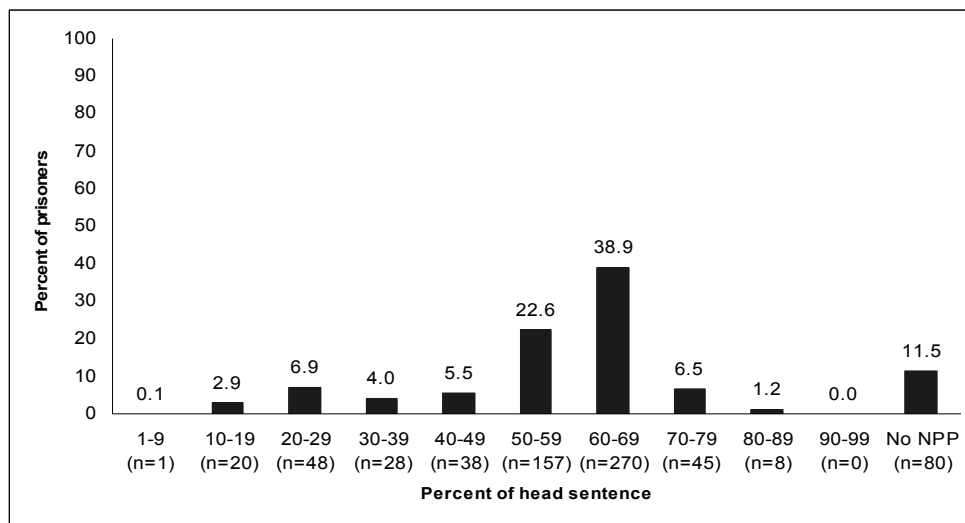
### Relative non-parole periods by jurisdiction

85. One strong indicator of variation in sentencing practices across jurisdictions is the proportion of the total or head sentence that is formed by the non-parole period. To allow this to be examined, the sentences and non-parole periods represented in text form in the AGD's federal prisoners database were converted into a numeric form and a calculation made of the

percentage of the total sentence formed by the non-parole period. The resulting percentages were grouped into intervals of 10 per cent and the relative frequency of each group was calculated.

86. Figure A1.25 shows that across the entire federal prisoner population most offenders (69%) received non-parole periods that were at least half of their head sentence and a further 11.5 per cent received sentences that did not have a non-parole period. There was a noticeable clustering of non-parole periods at 50 per cent of the head sentence and a further, larger clustering between 60 and 69 per cent of the head sentence.

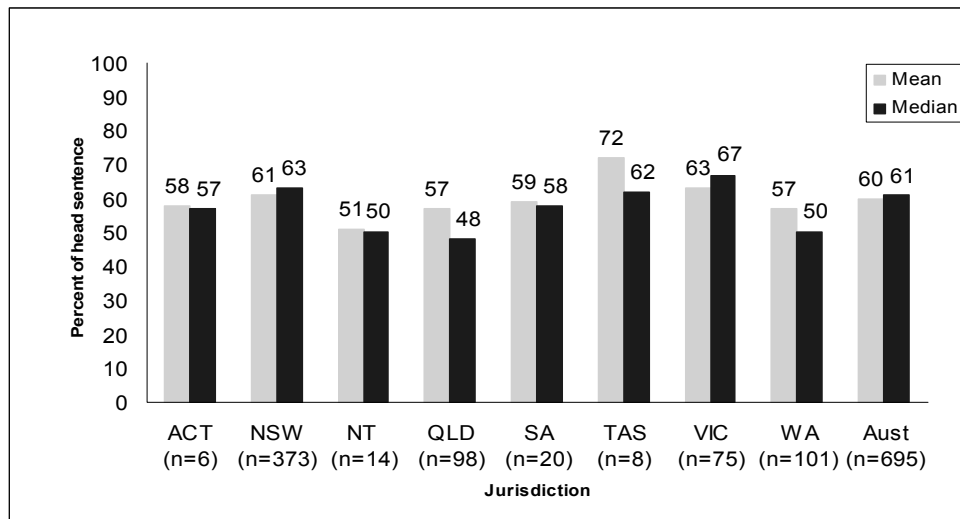
**Figure A1.25: Federal prisoners: non-parole period as percentage of head sentence**



Source: Federal Prisoners 2004 (AIC file).

87. Figure A1.26 shows the mean and median relative non-parole periods across the jurisdictions.

**Figure A1.26: Federal prisoners: mean and median relative non-parole periods by jurisdiction**

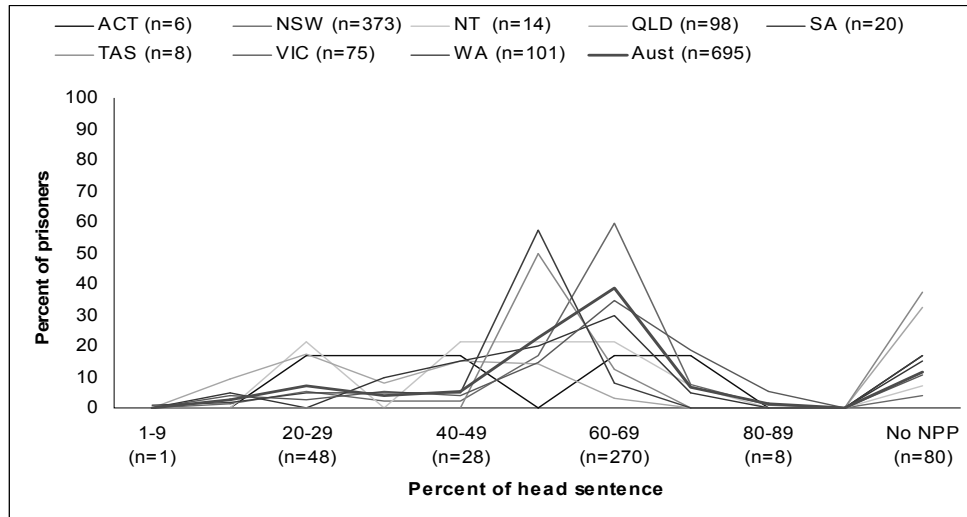


Source: Federal Prisoners 2004 (AIC file).

88. Figure A1.27 breaks down the relative non-parole periods in each jurisdiction into 10 per cent intervals. Non-parole periods were most often set at 50 per cent of the head sentence in the Northern Territory (21.4% of all sentences), Tasmania (37.5%) and Western Australia (45.4%). Interpreting these results must take into account remissions on the head sentence that were still available in Western Australia at the time most of these prisoners were sentenced. In Queensland, South Australia and Victoria approximately 15 per cent of prisoners received non-parole periods at 50 per cent of the head sentence, in line with the average across Australia.

89. Although most federal prisoners received non-parole periods that were at least half of their head sentence, some jurisdictions imposed a relatively high percentage of sentences with non-parole periods below that level. In Queensland, 50 per cent of prisoners received non-parole periods less than half of their total sentence. This type of sentence was also common in the ACT (50%) and the Northern Territory (42%). Explanations for these and other variations in relative non-parole periods between jurisdictions would require further examination at a level not possible with the available data.

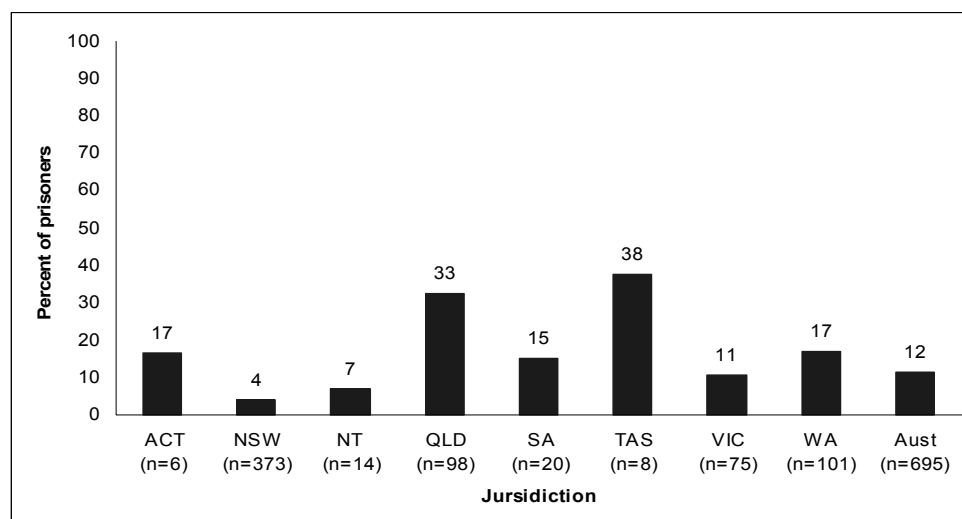
**Figure A1.27: Federal prisoners: non-parole period as percentage of head sentence by jurisdiction**



Source: Federal Prisoners 2004 (AIC file). Only selected percentage ranges depicted. Indicated values are percentages across all ranges.

90. Figure A1.28 shows wide variation between jurisdictions in the proportion of federal sentences within that state or territory with no non-parole period. Because s 19AB of the *Crimes Act* requires a non-parole period to be set when the total sentence exceeds three years, sentences with no non-parole period necessarily relate to shorter sentences. The high percentages of sentences without non-parole periods in Tasmania and Queensland reflect the lower mean and median aggregate sentences in those states. As with other Tasmanian data, it is necessary to take into account the influence of individual variations on the very small numbers of federal prisoners held in Tasmania. In the case of Queensland, the dominance of shorter sentences may be related to the high proportion of social security offenders imprisoned in that state.

**Figure A1.28: Federal prisoners: percentage of sentences with no non-parole period by jurisdiction**



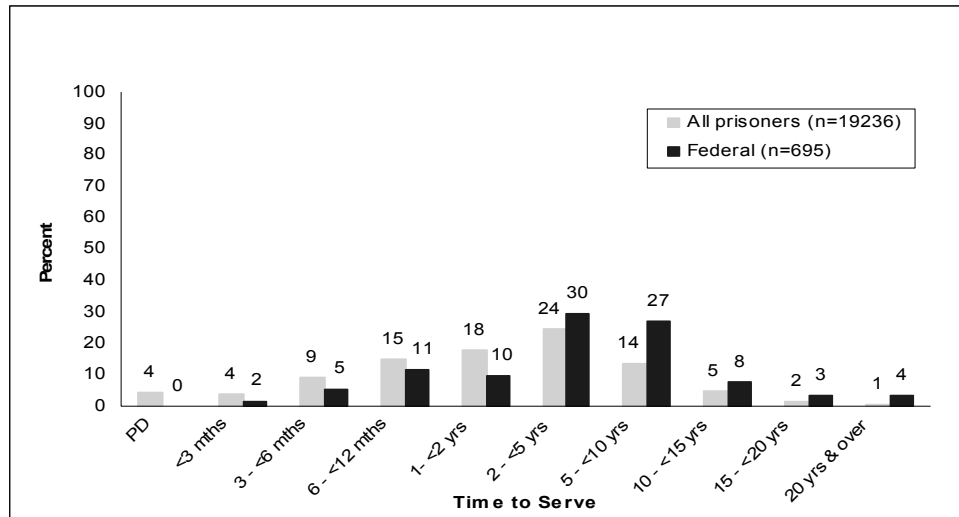
Source: Federal Prisoners 2004 (AIC file).

### ***Time expected to serve***

91. 'Time expected to serve' is a measure of how long a prisoner is expected to remain in prison before being released, assuming the prisoner is released on the date he or she first becomes eligible. Generally speaking, it is a measure of the total sentence for those cases where there is a fixed sentence without a non-parole period, and a measure of the non-parole period where one is included in the sentence.

92. Relative to the 'time expected to serve', the actual time served is influenced in one direction by those cases where a prisoner is not granted parole at the first eligible date and in the other direction by cases where a prisoner is granted early release, typically for compassionate reasons. These influences affect only a small proportion of cases and, by operating in both directions, are likely to negate each other, leaving 'time expected to serve' as a reasonably accurate measure of how long the prisoner population will actually remain in custody.

93. Figure A1.29 shows that, as was the case with aggregate sentences, federal prisoners are likely to remain in prison longer than Australian prisoners overall. Thus, the chart shows that 50 per cent of Australian prisoners expected to serve less than two years and 74 per cent expected to serve less than five years. In contrast, only 28 per cent of federal prisoners expected to serve less than two years and 58 per cent expected to serve less than five years. While only eight per cent of Australian prisoners expected to serve more than 10 years, 15 per cent of federal prisoners expected to serve these longer periods. As non-parole periods are often set as a percentage of the head sentence, this is an expected result.

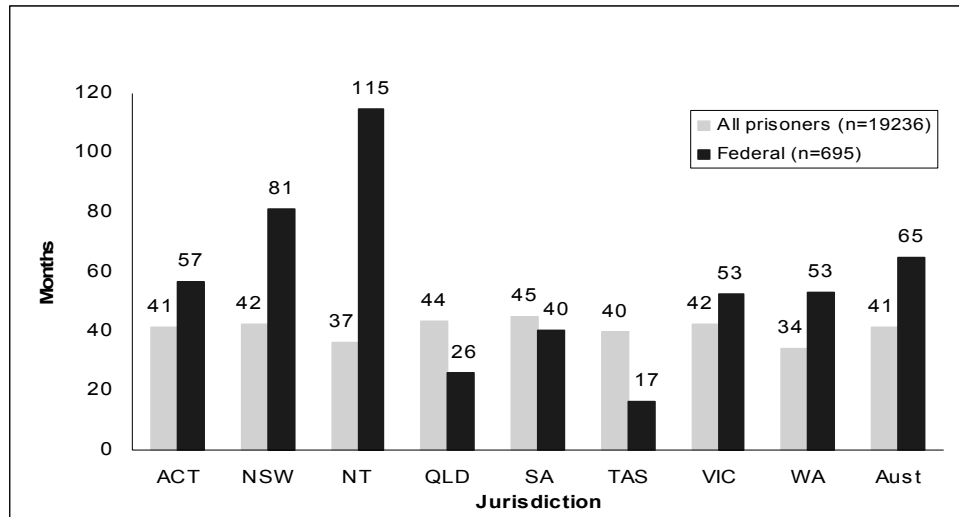
**Figure A1.29: Australian prisoners by length of time expected to serve**

Source: Federal Prisoners 2004 (AIC file) and ABS, Prisoners in Australia.

94. In the overall Australian prison population there is relatively little variation across jurisdictions, with mean time expected to serve ranging from 34 months in Western Australia to 45 months in South Australia (Figure A1.30). In the federal prisoner population there is wider variation, from 17 months in Tasmania to 115 months in the Northern Territory.<sup>4</sup> These figures exclude two cases where the individuals are serving a life sentence with no non-parole period. In cases where there is an indeterminate head sentence with a set non-parole period, that non-parole period has been included in the calculations of mean and median sentences. The mean time expected to serve for all Australian prisoners (41 months) is also lower than that for all federal prisoners (65 months).

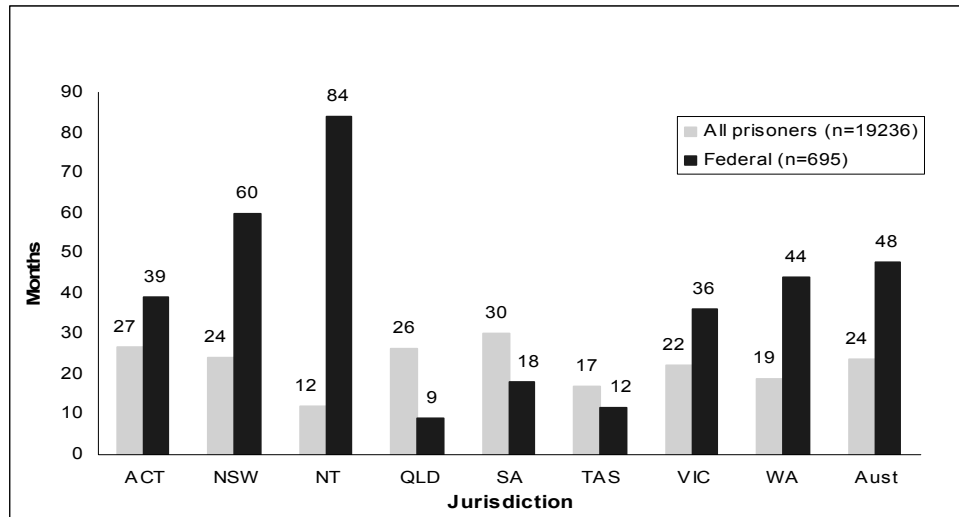
4 The mean time expected to serve in the Northern Territory reflects the small number of cases (n=14) encompassing wide variations, including two cases with a non-parole period less than three months, and three cases with a non-parole period greater than 20 years.



**Figure A1.30: Australian prisoners, mean time expected to serve by jurisdiction**

Source: Federal Prisoners 2004 (AIC file) and ABS, Prisoners in Australia.

95. Data for median time expected to serve (Figure A1.31) show a similar pattern to that for means, with much greater cross-jurisdictional variation for federal sentences. The median time expected to be served by all federal prisoners (48 months) is double that of the general prison population (24 months).

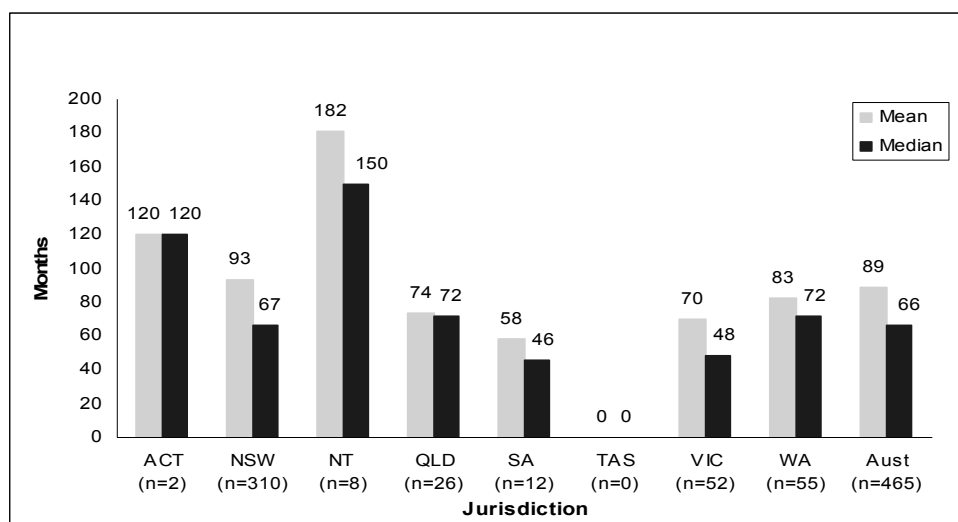
**Figure A1.31: Australian prisoners, median time expected to serve by jurisdiction**

Source: Federal Prisoners 2004 (AIC file) and ABS, Prisoners in Australia.

96. As was done with aggregate sentences, mean and median time expected to serve has also been calculated for major federal offences. As noted in relation to aggregate sentences, care must be taken when interpreting these charts due to the different scales used.

97. Figure A1.32 shows mean and median time expected to serve in different jurisdictions for drugs offences under the *Customs Act*. The pattern is the same seen for aggregate sentences, with very high mean and median sentences in the Northern Territory. Again, this effect is likely to be strongly influenced by the small number of prisoners held in the Northern Territory for these offences, and the exclusion of life sentence prisoners in NSW.

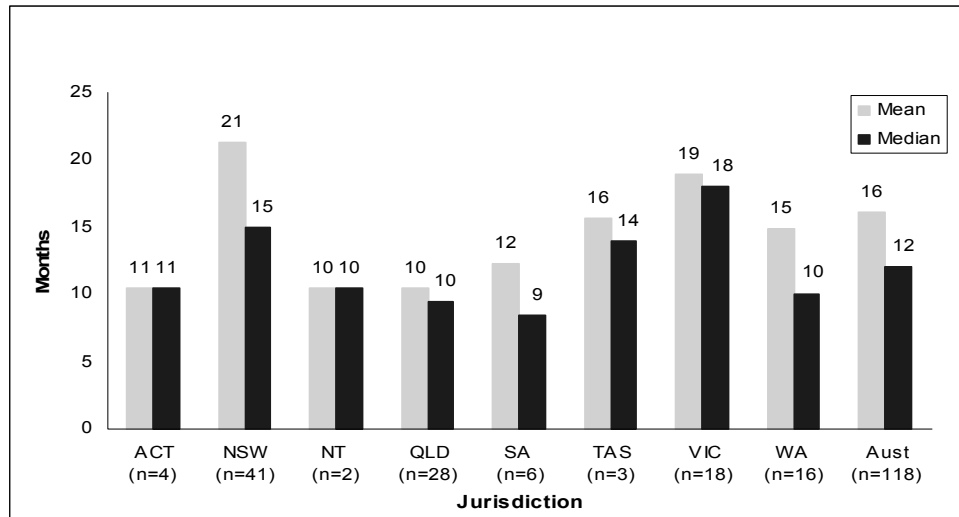
**Figure A1.32: Federal prisoners: mean and median time expected to serve for drugs offences by jurisdiction**



Source: Federal Prisoners 2004 (AIC file).

98. Time expected to serve for *Crimes Act* offences is longer in some jurisdictions, particularly NSW and Victoria, than others (Figure A1.33). As the 'Crimes Act' category covers a range of different offences under the *Crimes Act*, further examination—at a greater level of detail than can be found in the available data—would be needed to determine whether this is the result of differences in sentencing for similar offences, or differences in the particular offences being committed in each jurisdiction.

**Figure A1.33: Federal prisoners: mean and median time expected to serve for Crimes Act offences by jurisdiction**



Source: Federal Prisoners 2004 (AIC file).

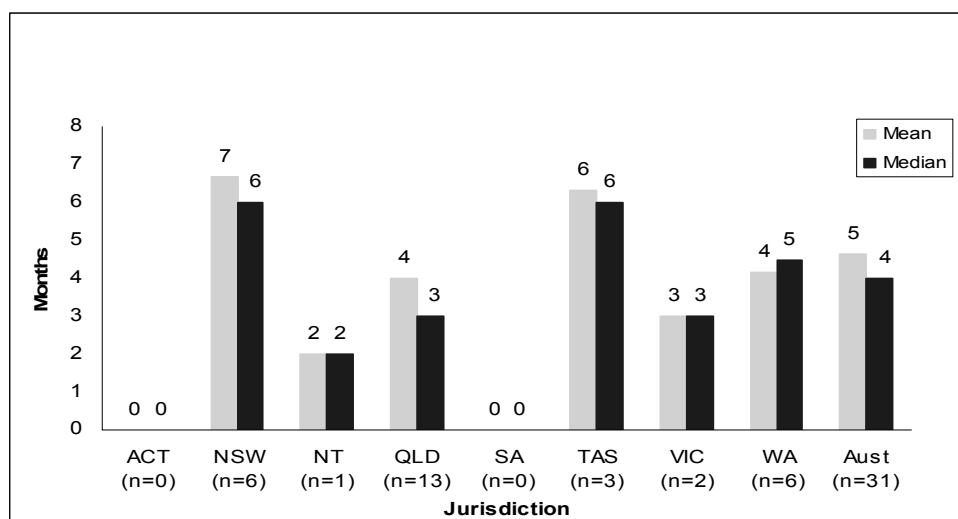
99. Figure A1.24 above showed that mean and median aggregate sentences for *Social Security Act* offences in Queensland are longer than in other jurisdictions. Mean and median time to serve for *Social Security Act* offences, as shown in Figure A1.34, are shorter in Queensland than in many other jurisdictions. This is the result of a relatively small number of cases involving short non-parole periods. Of nine cases in Queensland where the aggregate sentence was 12 months:

- two prisoners were expected to serve two months;
- five prisoners were expected to serve three months;
- one prisoner was expected to serve five months; and
- one prisoner was expected to serve the full 12 months.

100. Of two individuals sentenced to 15 months in Queensland, one was expected to serve three months and the other six months. The two remaining *Social Security Act* offenders had been sentenced to one month and six months, respectively, and were expected to serve their full sentences.

101. The reason for these short non-parole periods is not evident from the data at hand. As shown in Figure A1.15 above, *Social Security Act* offenders are relatively over-represented in Queensland compared with other jurisdictions.

**Figure A1.34: Federal prisoners: mean and median time expected to serve for Social Security Act offences by jurisdiction**



Source: Federal Prisoners 2004 (AIC file).

## Concluding remarks

102. This paper has provided an overview of the nature and extent of federal offending, and changes in the federal prisoner profile over time utilising two sources of data. It has also explored some comparisons between federal prisoners and the general prisoner population.

103. Federal prisoners represent only a very small part of the Australian prisoner population. Information published by the ABS is a valuable source of knowledge about the Australian prison population but is limited in its coverage of federal prisoners. Most of the published data include federal prisoners as part of the overall population and does not allow for information about federal prisoners to be readily identified.

104. While federal prisoners are only a small part of the Australian prisoner population, they also represent the end result of only a very small part of offending against federal law. During 2003–04 the CDPP dealt with over 9,000 criminal charges from the activities of 5,500 defendants.

105. Most federal prosecutions originate with a small number of agencies: most matters dealt with by the CDPP are referred to it by Centrelink for offences under the *Social Security Act*. Centrelink's role in administering financial payments on a very large scale makes it a clear target for people attempting to gain financial advantage through dishonest means. The very large number of matters referred by Centrelink, almost all of which are dealt with summarily, helps to

create an overall picture of federal offending as dominated by small scale acts of dishonest and fraudulent representation.

106. The vast majority of federal offending does not result in imprisonment. An examination of the small federal prisoner population shows that it is dominated by persons serving lengthy sentences, mostly for serious drug offences. The profile is one of a culturally diverse population, which reflects the type of offences for which the Commonwealth has responsibility. Based on an examination of sentences, the federal prisoner population exhibits a higher level of criminality than the general prisoner population across Australia, which again reflects the crimes for which the Commonwealth has responsibility. As a result of a small total population and a fairly narrow range of offences that result in imprisonment, the federal prisoner population is marked by strong localisation of some offences within particular states and territories.

107. There remain firm limits to what can be said about federal offending given the available data. In particular when comparing to aggregated state and territory offending, the crimes for which the Commonwealth has responsibility are the primary reason for differences in both the profile of offenders and their sentencing outcomes at the national level. The available data are restricted to a relatively small number of comparable variables. In relation to federal offending that does not result in imprisonment there has been little information published. Information in the CDPP's annual reports provides some clues to the potential for a far greater understanding of federal offending to be gained in the future.

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## Additional data

The main body of this paper contains a number of tables in which information has been extracted or condensed in the interests of clearer presentation. This part contains the complete information.

**Figure A1.35: Charges dealt with by the CDPP in 2003–04: Relevant legislation**

Legislation	Summary	Indictable	Total
Social Security Act	3776	2	3778
Criminal Code	2431	145	2576
Crimes Act	350	184	534
Fisheries Management Act	395	6	401
Customs Act	78	241	319
Non-Commonwealth legislation: Other	157	43	200
Taxation legislation	196	1	197
Financial Transaction Reports Act	161	33	194
Bankruptcy Act	94	35	129
Corporations Law	64	65	129
Migration Act	81	23	104
Excise Act	56	48	104
Great Barrier Reef Marine Park Act and Regulations	75	—	75
Civil Aviation Act and Regulations	69	3	72
Crimes (Currency) Act	44	9	53
Passports Act	37	8	45
Non-Commonwealth legislation: Drugs	24	15	39
Health Insurance Act	38	—	38
Crimes (Aviation) Act	31	2	33
Torres Strait Fisheries Act	29	2	31
Environment Protection & Biodiversity Conservation Act	25	6	31
Australian Crime Commission Act	27	1	28
Trade Marks Act	27	—	27
Copyright Act	23	—	23
Superannuation Industry (Supervision) Act	18	1	19
Public Order (Protection of Persons and Property) Act	17	—	17
ANTS (Family Assistance) (Administration) Act	16	—	16
Student Assistance Act	16	—	16
Quarantine Act	15	—	15
Air Navigation Act and Regulations	11	—	11
Census and Statistics Act	9	—	9

Primary Industries Levy Collection	9	—	9
Veterans Entitlements Act	9	—	9
Proceeds of Crime Act	6	3	9
National Health Act	8	—	8
Radio Communications Act	4	3	7
Defence Act and Regulations	6	—	6
Insurance (Agents and Brokers) Act	4	2	6
Financial Management and Accountability Act	3	1	4
Marriage Act and Regulations	3	1	4
Agriculture & Veterinary Chemicals Code Act	3	—	3
Commonwealth Electoral Act	3	—	3
Distillation Act	3	—	3
Foreign Acquisitions & Takeovers Act	3	—	3
ANTS (Australian Business Number) Act	2	1	3
Export Control Act	—	2	2
Crimes (Confiscation) Act	2	—	2
Service & Execution of Process Act	2	—	2
Therapeutic Goods Act	2	—	2
Protection of Sea (Prevention of Pollution from Ships) Act		2	2
Aged Care Act	1	—	1
Australian Citizenship Act	1	—	1
Australian Military Regulations	1	—	1
Australian Postal Corporation Act	1	—	1
Banking Act	1	—	1
Crimes (Aircraft) Act	1	—	1
Financial Sector (Collections of Data) Act	1	—	1
Fuel (Penalty and Surcharges) Administration Act	1	—	1
Historic Shipwrecks Act	1	—	1
National Crime Authority Act	1	—	1
Protection Movable Cultural Heritage Act	1	—	1
Protection Orders Act	1	—	1
Tobacco Advertising Prohibition Act	1	—	1
Vagrants Gaming & Other Offences Act	1	—	1
Workplace Relations Act	1	—	1
Australian Securities Commission Act	—	1	1
Navigation Act	—	1	1
Royal Commission Act	—	1	1
Total	8,477	891	9,368

Source: Commonwealth Director of Public Prosecutions Annual Report 2003–04.



**Figure A1.36: Charges dealt with by the CDPP in 2003–04: Crimes Act 1914**

Offence	Summary	Indictable	Total
Fraud (s 29D)	91	137	228
Imposition (s 29B)	127	16	143
Telecommunications offences (ss 85ZB–85ZKB)	38	–	38
Administration of Justice (ss 32–50)	12	6	18
Damage property (s 29)	15	2	17
Stealing or receiving (s 71)	7	7	14
Postal offences (ss 85E–85ZKB)	12	–	12
Trespass on Commonwealth land (s 89)	12	–	12
Accessory after the fact (s 6)	6	5	11
Computer offences (ss 76A–76F)	7	3	10
Bribery (ss 73 & 73A)	5	3	8
Forgery (ss 65–69)	6	1	7
False pretences (s 29A)	5	–	5
Offence against Commonwealth (s 7)	1	3	4
Breach of recognizance (ss 20A, 20AC)	2	–	2
Fail to furnish name (s 3)	2	–	2
Conspiracy (s 86)	–	1	1
Falsification of books (s 72)	1	–	1
Resisting public officers (s 76)	1	–	1
<b>Total</b>	<b>350</b>	<b>184</b>	<b>534</b>

Source: Commonwealth Director of Public Prosecutions Annual Report 2003–04

**Figure A1.37: Charges dealt with by the CDPP in 2003–04: Criminal Code 1995**

Offence	Summary	Indictable	Total
Obtaining financial advantage (s 135.2)	2155	1	2156
General dishonesty (s 135.2)	54	38	92
Obtaining a financial advantage by deception (s 134.2)	26	57	83
Theft (s 131.1)	20	10	30
Obstruction of Commonwealth officials (s 149.1)	21	1	22
False or misleading statement in applications (s 136.1)	19	3	22
Theft of mail receptacles/articles/messages (s 471.1)	14	4	18

Obtaining property by deception (s 134.2)	9	7	16
Using forged document (s 145.1)	10	2	12
Burglary (s 132.4)	10	–	10
False or misleading information (s 137.1)	7	1	8
Making forged documents (s 144.1)	5	3	8
Attempt to commit an offence (s 11.1)	4	4	8
Taking or concealing mail receptacles etc (s 471.3)	7	–	7
Receiving Stolen Mail Receptacles (s 471.2)	6	1	7
Bribery of Commonwealth Official (s 141.1)	2	5	7
Corrupting benefits to C'wealth official (s 142.1)	6	–	6
Threatening to cause harm to C'wealth official (s 147.2)	6	–	6
Causing harm to C'wealth official (s 147.1)	5	1	6
Aggravated Burglary (s 132.5)	5	–	5
Unauthorised access to, or modification of, restricted data (s 478.1)	5		5
Complicity in Committing an Offence (s 11.2)	3	2	5
Abuse of Public Office (s 142.2)	4	–	4
Falsification of documents (s 145.4)	4	–	4
False or misleading documents (s 137.2)	3	1	4
Possession of Property Suspected as POC (s 400.9)	2	2	4
Impersonate C'wealth official (s 148.1)	3	–	3
Damaging or destroying mail receptacles etc (471.6)	3	–	3
Use Postal Service to menace etc (s 471.12)	3	–	3
Conspiracy in Committing an Offence (s 11.5)	2	–	2
Impersonation of Official by Official (s 148.2)	2	–	2
Dealing in Proceeds of Crime >\$1000 (s 400.7)	2	–	2
Dishonest taking or retention of property (s 132.8)	1	1	2
Robbery (s 132.2)	1	–	1
Equipped for Theft (s 132.7)	1	–	1
Unauthorised Modification of Computer Data (s477.2)	1	–	1
Using Postal Service to Make Threat (s 471.11)	–	1	1
<b>Total</b>	<b>2,431</b>	<b>145</b>	<b>2,576</b>

Source: Commonwealth Director of Public Prosecutions Annual Report 2003–04.

**Figure A1.38: Federal prisoners as at 13 December 2004: Offence categories by jurisdiction**

Type of Offence	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Total
CD (Customs Drugs)	2	306	8	26	12	0	52	54	460
Crimes	2	32	2	24	6	3	10	10	89
Fisheries	0	0	0	24	0	0	0	10	34
Soc Sec	0	6	1	13	0	3	2	6	31
Corporations	0	6	0	3	1	2	2	3	17
Crimes/Tax	0	4	0	2	0	0	5	1	12
Criminal Code	1	3	0	2	0	0	2	3	11
Migration Act	0	1	3	0	0	0	0	6	10
Bankruptcy	0	3	0	1	0	0	0	2	6
CD/Proceeds Crime	0	2	0	0	0	0	0	1	3
FTRA	0	2	0	1	0	0	0	0	3
CD/Crimes	0	2	0	0	0	0	0	0	2
Crimes/Proceeds	1	0	0	0	0	0	0	1	2
Excise	0	0	0	1	0	0	1	0	2
Health Ins	0	1	0	1	0	0	0	0	2
Civil Aviation	0	0	0	0	0	0	0	1	1
Crimes Currency	0	1	0	0	0	0	0	0	1
Crimes/50BC	0	1	0	0	0	0	0	0	1
Crimes/50DB	0	0	0	0	0	0	0	1	1
Crimes/Aust Post	0	0	0	0	0	0	1	0	1
Customs	0	1	0	0	0	0	0	0	1
Environ Act	0	1	0	0	0	0	0	0	1
Escape	0	1	0	0	0	0	0	0	1
Family Law	0	0	0	0	1	0	0	0	1
I/Prot Act	0	0	0	0	0	0	0	1	1
Passports	0	0	0	0	0	0	0	1	1
<b>Total</b>	<b>6</b>	<b>373</b>	<b>14</b>	<b>98</b>	<b>20</b>	<b>8</b>	<b>75</b>	<b>101</b>	<b>695</b>

Source: Federal Prisoners 2004 (AIC file).



## Appendix 2.

### An Analysis of Federal Fraud and Drug Cases, 2000–2004

Australian Institute of Criminology\*

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\* This report has been prepared for the Australian Law Reform Commission as part of its inquiry into sentencing under Part IB of the *Crimes Act 1914* (Cth). The report draws on information extracted from the Commonwealth Director of Public Prosecutions administrative dataset. The assistance of the CDPP in extracting the data for this purpose and assisting with its interpretation is gratefully acknowledged.

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## Introduction

1. Although national crime statistics have been collated since the mid 1990s, the reports released by the Australian Bureau of Statistics on police, courts and prisoners do not separately identify federal offenders. To address this gap, an analysis was undertaken of data extracted from the administrative database held by the Commonwealth Attorney-General's Department on all federal prisoners held in Australian prisons. However the proportion of people who are incarcerated is a small proportion of the overall number convicted of federal criminal offences. For example, in 2004 there were 695 federal offenders in prison while the Commonwealth Director of Public Prosecutions (CDPP) reported that in the financial year 2004–05 they prosecuted 5,186 federal cases.

2. To enable a more thorough analysis of federal offenders, this report examines data supplied from the CDPP's administrative records for two broad categories—cases involving fraudulent or dishonest activity and charges involving drugs. The focus of this report is on providing a descriptive overview of sentencing outcomes for these two types of cases. There is a range of individual case factors that influence sentencing outcomes, which cannot be fully captured within an administrative dataset. For example, both the volume and seriousness of prior offending history will have an impact on outcomes. Other factors such as the offender's level of remorse and evidence of attempts at rehabilitation will also play a role. It is beyond the scope of this report to undertake detailed and complex analysis that takes these factors into account.

3. The data used in this report have been extracted from the CDPP's records using the 'matter type' variable in the database. Four factors affect the coverage of the data extracted.

- The 'matter type' field was introduced some years ago so some older cases are not classified using this field.
- Matters may have more than one classification but the system allows only one to be recorded.
- Corporate fraud is classified as matter type 'corporate' not 'fraud'.
- People entering the data may differ in their interpretation of what is 'fraud'.

4. Accordingly, the details of most fraud and drug prosecutions were provided for analysis but the dataset does not represent the total number of fraud and drug cases prosecuted by the Commonwealth during the relevant period.

5. Legal cases are complicated matters. They can involve more than one offender; offenders can be charged with more than one offence; and tracking through actual charges to sentence outcomes is extraordinarily difficult when dealing with a large number of cases (see Makkai, Ratcliffe, Veraar and Collins 2004 for further discussion of these difficulties).

6. There are essentially three ways in which the data can be analysed—on the basis of cases, offenders or charges. Offenders can be involved in more than one case. As a result, the number of individual offenders is typically smaller than the number of cases. In the extracted data file there are 25,160 cases that involve 17,105 individual offenders (10,043 males and 7,062 females) (Figures A2.1 and A2.2).

7. However an individual offender may have multiple charges laid. Sixty-three per cent of females and 67 per cent of males had only one charge laid (Figure A2.1). The remainder of offenders (35 per cent) had two or more charges laid. Five offenders had been prosecuted for 20 or more charges, with four of them being male and one female. Overall the dataset contains 25,160 cases involving 17,105 offenders who were prosecuted for 85,596 charges. The focus of the analysis will determine whether cases, offenders or charges are the relevant unit of analysis.

8. Throughout this report, unless otherwise stated, all data in tables and graphs are sourced from the computer files of the Australian Institute of Criminology (AIC) regarding federal fraud and drug prosecutions, as provided by the CDPP. The data are for the five calendar years spanning 2000 to 2004.

**Figure A2.1: Individual offenders and number of charges**

No. of charges	Female		Male		Total	
	n	%	n	(%)	n	(%)
1	4,464	63	6,726	67	11,190	65
2	1,997	28	2,577	26	4,574	27
3	468	7	499	5	967	6
4	100	1	168	2	268	2
5	5	<1	23	<1	28	<1
6	14	<1	23	<1	37	<1
7	5	<1	4	<1	9	<1
8	4	<1	7	<1	11	<1
9	2	<1	5	<1	7	<1
10	0	0	1	<1	1	<1
11	1	<1	1	<1	2	<1
12	0	0	1	<1	1	<1
15	0	0	2	<1	2	<1
16	0	0	1	<1	1	<1
17	0	0	1	<1	1	<1
19	1	<1	0	0	1	<1
20	0	0	2	<1	2	<1
21	1	<1	0	0	1	<1
23	0	0	1	<1	1	<1
28	0	0	1	<1	1	<1
Total	7,062		10,043		17,105	

## Fraud cases

9. Within this dataset, fraud cases were most commonly prosecuted under two pieces of legislation governing the social security system: the *Social Security Act 1991* (Cth) and the *Social Security (Administration) Act 1999* (Cth). Thirty-seven per cent (n=9,305) of all prosecutions from 2000 to 2004 fell under the *Social Security Act* while 30 per cent of cases fell under the *Social Security (Administration) Act*.

10. Social security-related cases are also included among the 24 per cent of cases arising under the *Crimes Act 1914* (Cth) and the *Criminal Code* (Cth). Social security fraud that involves large sums of money is likely to be prosecuted under crimes legislation rather than under social security legislation.

11. Social security-related charges are therefore typical of the kinds of charges prosecuted by the Commonwealth, constituting as they do a very high proportion of all fraud cases prosecuted by the Commonwealth.

12. Section 1347 of the *Social Security Act* created the offence of ‘payment knowingly obtained where not payable’.<sup>1</sup> Offences under s 1347 accounted for 87 per cent of offences prosecuted between 2000 and 2004 under the *Social Security Act* and 32 per cent (n=8,129) of all offences in the dataset.

13. During the timeframe covered by data used for this report, serious fraud against the Australian Government was likely to be prosecuted under s 29B (imposition against the Commonwealth) or s 29D (fraud against the Commonwealth) of the *Crimes Act*. These were relatively serious charges, carrying a penalty of up to 10 years’ imprisonment. Within the data used for this report there are 2,316 cases prosecuted under the *Crimes Act*—nine per cent of all cases. Prosecutions under s 29D accounted for 42 per cent (n=962) of *Crimes Act* cases.

## Outcomes

14. The AIC was asked to analyse the use of penalties or outcomes between jurisdictions for fraud and drug cases. There are a total of 87 different types of outcomes or penalties. Some of these consist of references to particular types of bond or particular legislative provisions that may have been used in only a few instances (or sometimes in only one instance).

15. In order to make the analysis manageable and to allow for inter-jurisdictional comparisons, it was necessary to clean and categorise the data. Where it was reasonably clear that an entry was another way of referring to one of the commonly entered outcomes, that entry was incorporated into other penalty and outcome categories. Entries that appeared in only a small number of cases or whose meaning was ambiguous were disregarded in the analysis.

16. A number of penalty types were used in a considerable number of cases but were only available in some jurisdictions. For example, periodic detention is available as a sentencing option only in the Australian Capital Territory (ACT) and New South Wales (NSW), where it was used in 17 (5 per cent of cases in the jurisdiction) and 347 (4 per cent) cases respectively. Home detention is available in NSW (n=305; 3 per cent of cases) and the Northern Territory

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1 Section 1347 of the *Social Security Act 1991* (Cth) was repealed in 2000 and effectively replaced by s 215 of the *Social Security (Administration) Act 1999* (Cth).



(n=53; 8 per cent). As this report is essentially concerned with inter-jurisdictional comparisons, use of these penalty types was not examined in this report.

## Overview of charges and offenders

17. The dataset covers 24,045 fraud cases and 1,115 drug cases (Figure A2.2). The substantially higher number of fraud cases is a direct result of the Commonwealth's responsibilities—fraud against the Australian Government can range from quite minor offending to serious criminal behaviour, while the Australian Government's responsibilities for drug offences is usually limited to the most serious end of the spectrum of importation and possession of illicit substances.

18. The data suggest that there has been a steady increase in the number of prosecutions for fraud cases, while the number of drug cases has remained relatively stable over the period examined. The apparent increase in fraud cases may be partly due to increased referrals, but may also be due to the fact that some older matters might not have had a 'matter type' recorded because they were entered into the CDPP's database prior to the introduction of the 'matter type' field. In total there were 3,742 fraud and drug cases in 2000 increasing to 5,739 in 2004.

**Figure A2.2: Fraud and drug cases by year, 2000–2004**

Year	Fraud cases		Drug cases		Total	
	No.	%	No.	%	No.	%
2000	3,485	14	257	23	3,742	15
2001	4,591	19	217	19	4,808	19
2002	5,013	21	216	19	5,229	21
2003	5,439	23	203	18	5,642	22
2004	5,517	23	222	20	5,739	23
Total	24,045	100	1,115	100	25,160	100

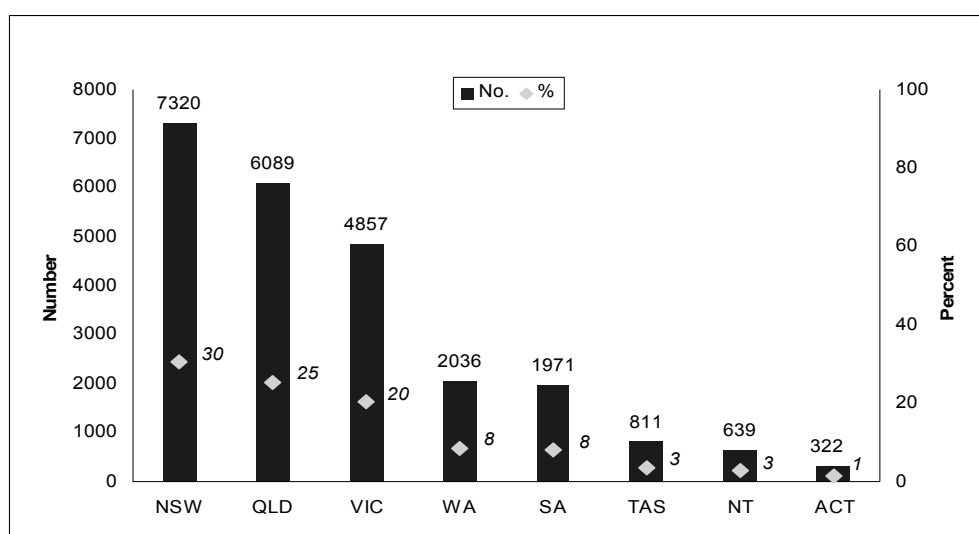
## Cases by jurisdiction

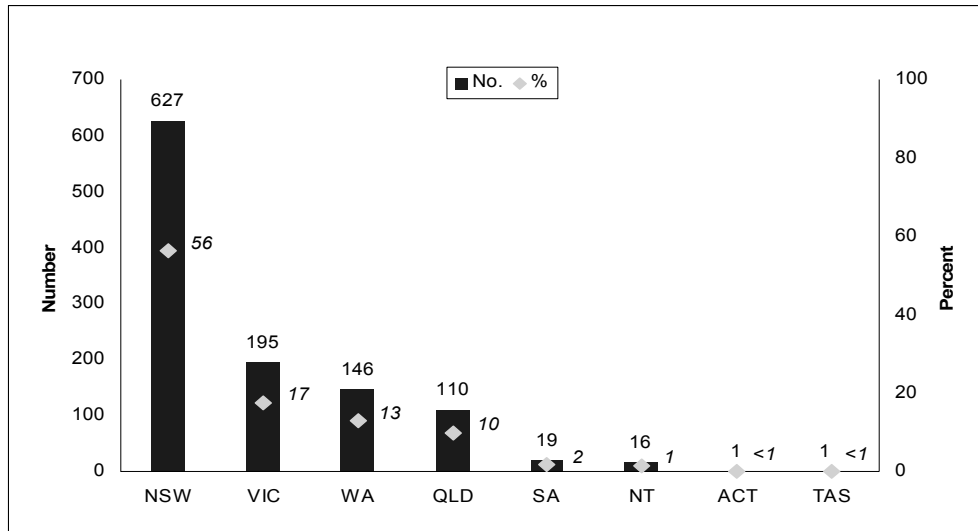
19. The number of cases recorded for each jurisdiction for each of the five calendar years in the dataset is shown in Figure A2.3. In most jurisdictions there is a smaller number of cases for the year 2000 than subsequent years, and this is particularly so for the ACT and the Northern Territory. The dataset records a total of 16 cases for the ACT in 2000, against an average of 77 cases per year in the following four years. For the Northern Territory, there are 10 cases for the year 2000, against an average of 161 cases for the years 2001–2004. As mentioned above, this may be a consequence of the early cases being entered into the database prior to the introduction of the 'matter type' field.

**Figure A2.3: Recorded fraud and drug cases, by jurisdiction and calendar year, 2000–2004**

	2000	2001	2002	2003	2004	Total
ACT	16	70	69	87	81	323
NSW	1,232	1,178	1,768	1,912	1,857	7,947
NT	10	217	226	71	131	655
QLD	822	1,172	1,096	1,555	1,554	6,199
SA	352	534	443	345	316	1,990
TAS	152	183	165	161	151	812
VIC	863	984	1,027	1,042	1,136	5,052
WA	295	470	435	469	513	2,182
Total	3,742	4,808	5,229	5,642	5,739	25,160

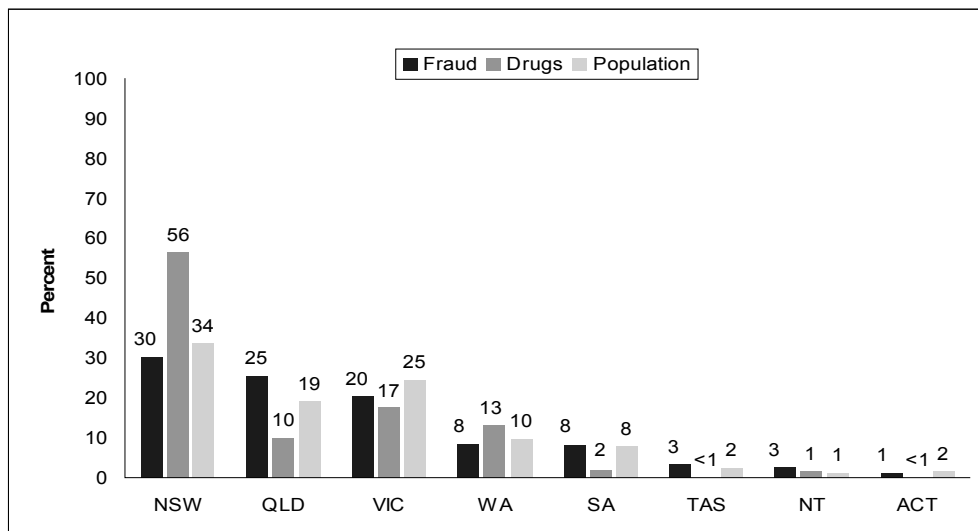
20. Although there are markedly more fraud cases than drug cases, the distributions show that for both case types, more cases are heard in NSW than anywhere else (Figures A2.4 and A2.5). Prosecutions in that state represented 30 per cent of all the fraud cases and 56 per cent of all the drug cases over the five-year period. The ACT hears the fewest number of cases with one per cent (n=322) of fraud cases and 0.09 per cent (n=1) of drug cases.

**Figure A2.4: Fraud cases, by jurisdiction**

*Figure A2.5: Drug cases, by jurisdiction*

21. Jurisdictional variations are shown more clearly in Figure A2.6 with a comparison between the distribution of federal fraud and drug cases across each state and territory and the general population (15 years and over) in each state and territory as recorded in the 2001 national census. While there is some variation, the distribution of prosecutions is similar overall to the general population distribution. For fraud offences, the main difference appears for Victoria and Queensland, with Victoria having a slightly lower percentage of fraud prosecutions, and Queensland having a slightly higher percentage of fraud prosecutions, relative to their population size. A much higher percentage of drug cases are prosecuted in NSW than other jurisdictions. As noted in an earlier paper (Australian Institute of Criminology 2005: 632) this is most likely a result of Sydney's importance within Australia as an international transport hub and distribution point for illicit drugs.

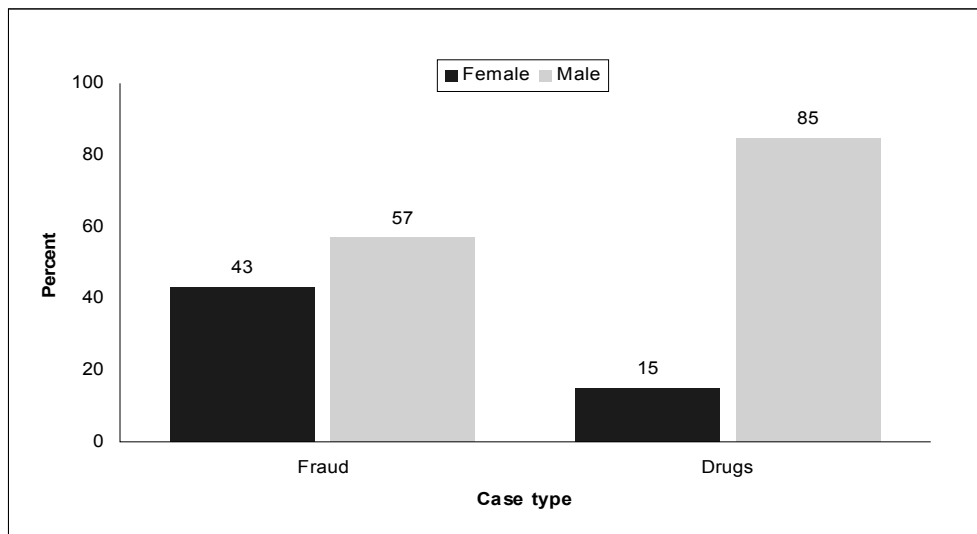
**Figure A2.6: Fraud and drug cases and general population, by jurisdiction**



### Sex distributions

22. Consistent with other research, females are more likely to be involved in fraud cases than in drug cases. Within the 24,045 fraud cases, 10,340 (43 per cent) involved females and 13,665 (57 per cent) involved males (Figure A2.7).<sup>2</sup> Of the 1,115 drug cases, 15 per cent involved females and 85 per cent involved males.

*Figure A2.7: Fraud and drug cases, by sex of offender*



<sup>2</sup> In 40 fraud cases the defendant's sex was not recorded, primarily reflecting prosecutions against corporate defendants.

## Fraud cases

23. The 24,045 fraud cases cover a total of 85,596 charges (Figure A2.8). Approximately half the cases involved a single charge. A further 4,357 involved two charges, and 2,176 involved three charges. Eight cases involved more than 100 charges.

**Figure A2.8: Number of fraud charges per case, by jurisdiction**

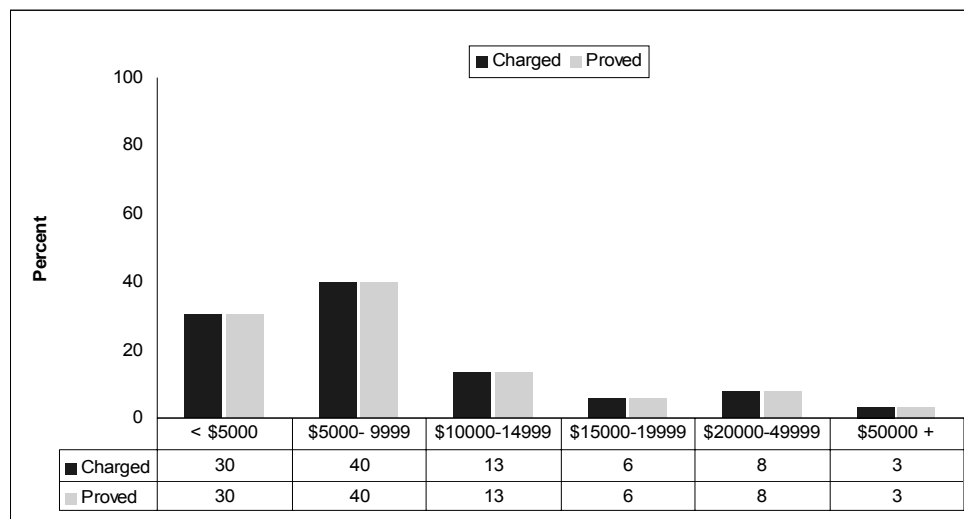
No. of charges	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Cases	Total charges
1	211	3,914	483	2,824	332	87	2,778	1,408	12,037	12,037
2	41	1,544	32	1,213	165	63	991	308	4,357	8,714
3	15	667	23	676	131	49	497	118	2,176	6,528
4	16	355	13	395	108	28	233	60	1,208	4,832
5	4	255	13	246	114	41	124	19	816	4,080
6	3	129	8	180	87	28	76	15	526	3,156
7	2	89	10	126	73	24	39	17	380	2,660
8	0	75	6	86	80	29	26	14	316	2,528
9	1	44	4	60	80	24	16	11	240	2,160
10	2	30	4	42	70	25	14	11	198	1,980
11-20	11	163	21	174	436	227	40	30	1,105	16,090
21-30	1	17	5	39	166	100	10	13	350	8,624
31-40	1	10	1	14	76	52	2	3	159	5,607
41-50	1	6	0	6	14	12	3	5	47	2,129
51-100	2	3	0	4	22	16	4	1	52	3,319
101 +	0	1	0	1	0	5	0	1	8	1,152
Total	322	7,320	639	6,089	1,971	811	4,857	2,036	24,045	85,596

### Amounts

24. Figure A2.9 sets out the total amounts of fraud charged and the amounts proved in each case. Of the 24,045 fraud cases, fraud charged amounts were recorded for 16,070 cases and fraud proved amounts were recorded for 16,067 cases. There was a large degree of variation in the levels of fraud involved, with amounts ranging from \$17.26<sup>3</sup> to \$27,000,000 both for fraud charged and fraud proved. This is reflected in the large difference between the mean and the median, and the large standard deviation for the mean. The mean amount proved was \$33,641.37, with a median amount of \$6,752.58 and a standard deviation of \$562,470.

25. As Figure A2.9 indicates, there was little variation between the fraud amounts charged and the amounts proved. In 132 cases (0.8 per cent) the amount of fraud charged was higher than the amount proved. The reverse occurred in 67 cases (0.5 per cent). Given the minimal overall differences between amounts charged and amounts proved, and some difficulties in determining the nature of the differences where they exist, the fraud amounts in the rest of this section will reflect the amounts proved.

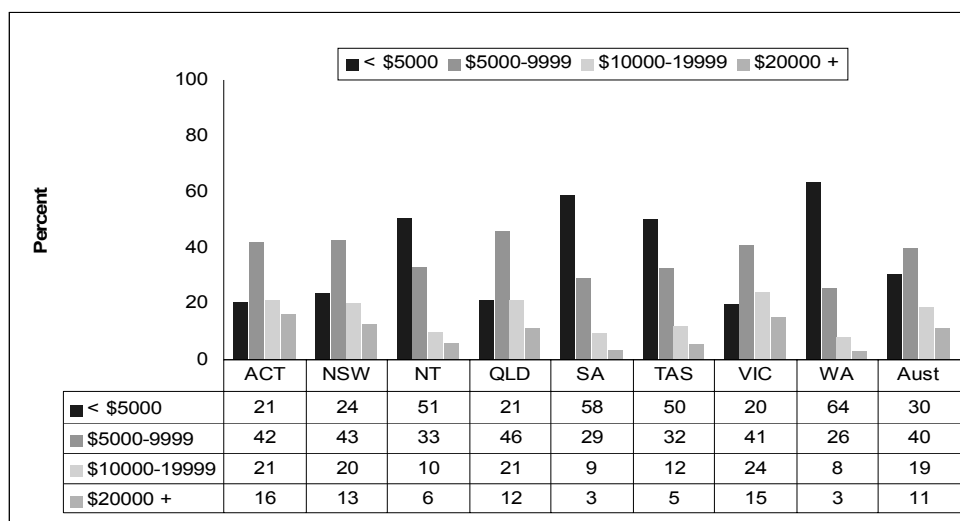
**Figure A2.9: Fraud cases, by amount charged and amount proved**



3 In this case the defendant had prior offences and the offence involved presenting false documents to Centrelink. The essence of the offence was the false documents and the fact that it was not a first offence, not the amount of benefit sought.

26. Figure A2.10 shows the distribution of fraud proved amounts, within categories, across Australia. Smaller value frauds, below \$5,000, were the most common category in the Northern Territory, South Australia, Tasmania and Western Australia. In other jurisdictions the largest category involved amounts of between \$5,000 and less than \$10,000. Victoria had a higher percentage of frauds in the \$10,000 to less than \$20,000 category and, together with the ACT, a relatively high percentage of frauds involving \$20,000 or more.

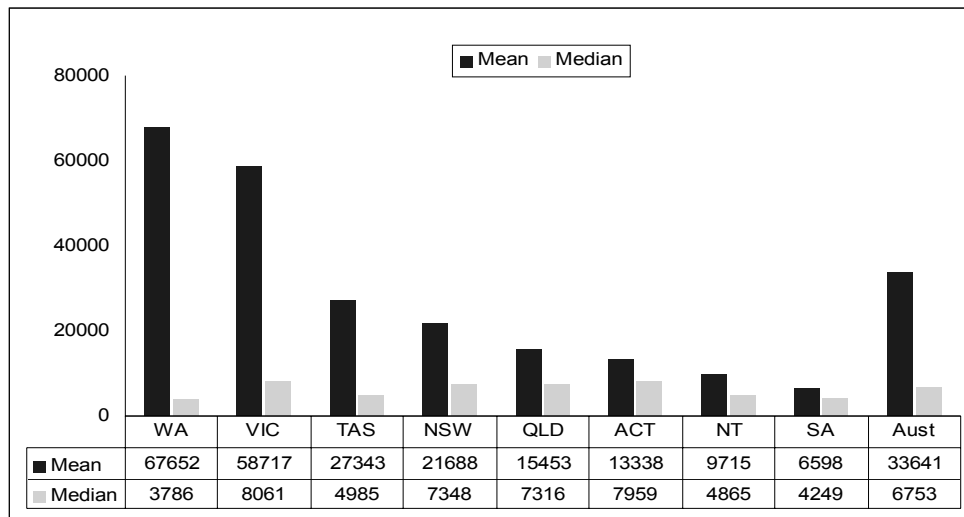
**Figure A2.10: Fraud cases, by fraud proved amounts and jurisdiction**





27. A somewhat different picture emerges from an examination of the mean and median fraud proved amounts across the jurisdictions (Figure A2.11). Despite its large percentage of relatively small frauds, and the smallest median fraud proved amount, Western Australia stands out as having the highest mean fraud proved amount. A closer examination of Western Australian cases shows this is a result of four particularly large prosecutions, each involving \$27 million.<sup>4</sup> Removal of these four cases reduces the mean amount for Western Australia from \$67,652 to \$8,944, the second lowest above South Australia. More than half the cases in Western Australia involved less than \$4,000. In contrast in Victoria, the jurisdiction with the second highest mean amount, just less than 40 per cent of cases involved \$10,000 or more. Only 13 per cent of Victorian cases had fraud amounts below \$4,000.

**Figure A2.11: Mean and median fraud proved amounts, by jurisdiction**

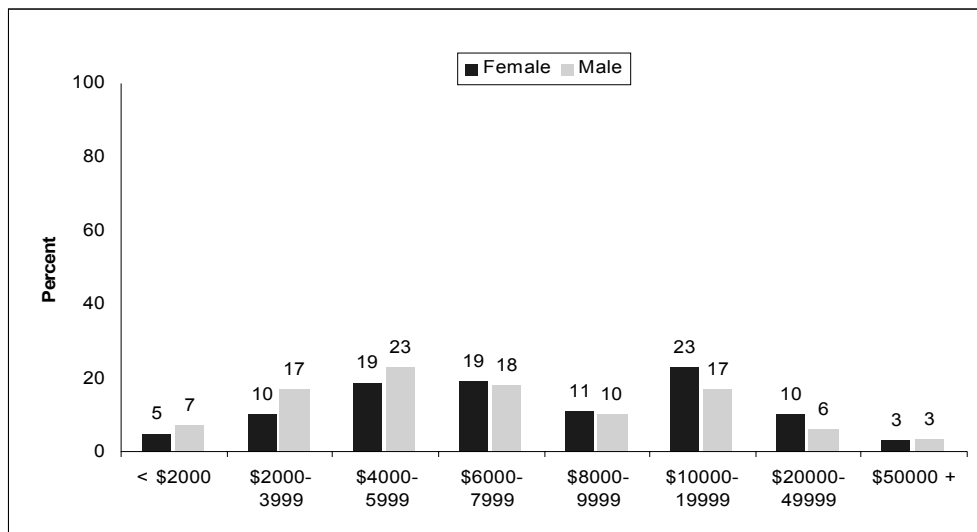


<sup>4</sup> The defendants in these cases were co-offenders in a large tax avoidance scheme.

***Sex differences in fraud amounts***

28. Figure A2.12 shows sex differences in the amounts of fraud proved. Male offenders tended to commit more fraud in the lower amount categories, with 47 per cent of male offenders committing frauds that involved less than \$6,000 compared with 34 per cent of female offenders. Conversely, female offenders committed 36 per cent of frauds involving \$10,000 or more compared with 26 per cent of male offenders.

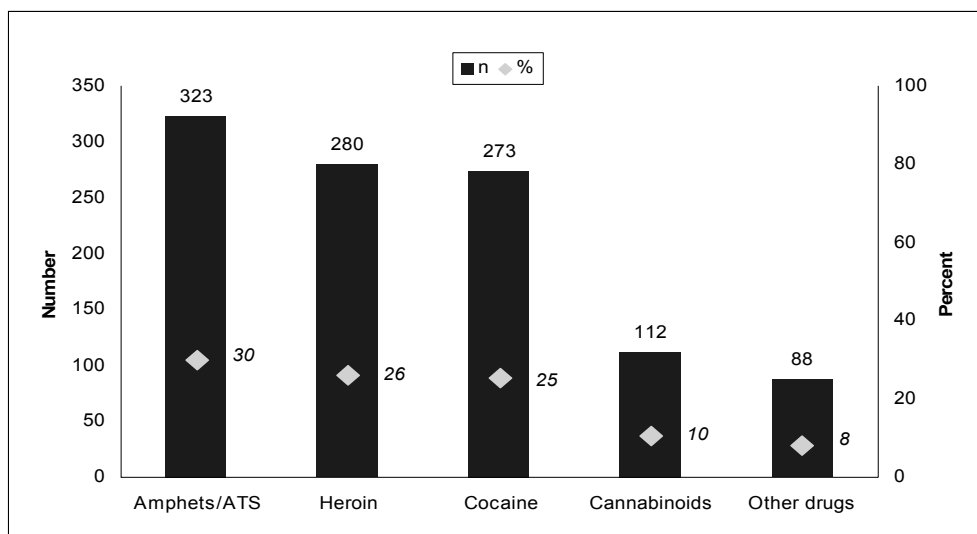
**Figure A2.12: Fraud proved amounts, by sex**



## Drug offences

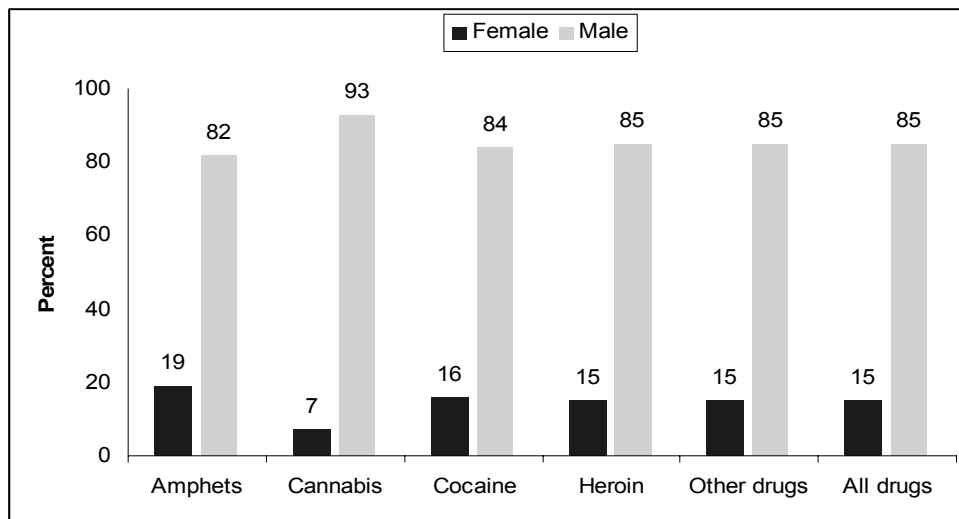
29. There were 1,115 drug cases within the dataset. Ninety-one per cent of cases resulted in one charge and six per cent of cases resulted in two charges. The type of drug was recorded in 1,076 cases, which were grouped into five drug-type categories, as shown in Figure A2.13. The category marked as ‘other drugs’ covers a range of drug types that occur in only very small numbers in the dataset, including LSD and other hallucinogens, other opioids, steroids, precursors and three cases involving multiple drug types. The largest number of cases involved amphetamines and amphetamine-type substances (ATS) (n=323; 30 per cent), followed by heroin (n=280; 26 per cent) and cocaine (n=273; 25 per cent). The smallest number of cases involved cannabinoids (n=112; 10 per cent) and other drugs (n=88; 8 per cent).

**Figure A2.13: Drug prosecution cases, by drug type**



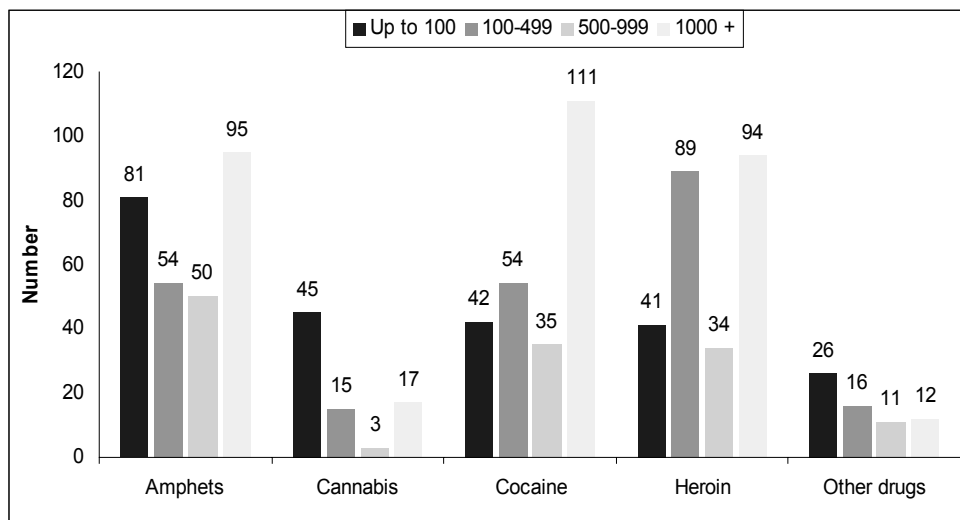
30. Figure A2.14 shows the sex distribution of drug cases for each drug type. Generally the sex distribution for each drug type follows that for drugs overall, with approximately 15 per cent of cases involving females and 85 per cent involving males. While a slightly larger percentage of males than females appeared to be prosecuted for cannabis-related charges, this is not statistically significant.

**Figure A2.14: Sex distribution of drug cases, by drug type**



31. The quantity of drugs involved in each drug case is shown in Figure A2.15. For amphetamines, cocaine and heroin, there are more cases involving quantities in the highest category than in other categories. This is particularly so for cocaine. This may suggest that the international transportation of drugs is most often done with larger quantities of drugs because smugglers need larger quantities to offset the risk and consequences of detection.

**Figure A2.15: Recorded quantities (in grams) in drug cases, by drug type**

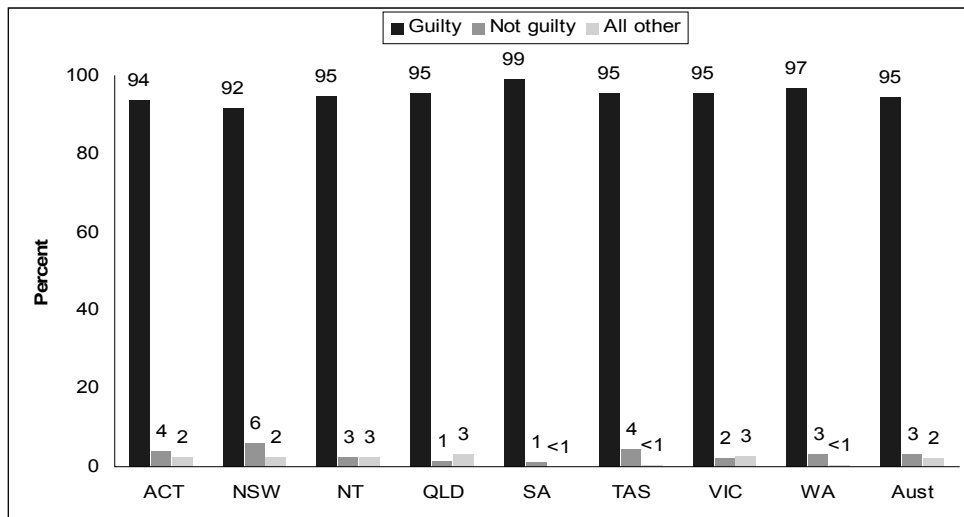


## Pre-sentence processes

32. Pre-sentence processes result in either the defendant pleading guilty or not guilty, or in other plea types. The other plea types shown in the data include 'change plea on arraignment', 'change plea during trial' and 'ex parte'. Where a plea is changed, it is almost invariably from 'not guilty' to 'guilty'.

33. Figure A2.16 shows that almost all the federal fraud and drug cases (95 per cent) resulted in a guilty plea. Three per cent pleaded not guilty and just over two per cent gave other plea types. This was consistently the case for each year, with guilty pleas entered in 93 per cent of cases in 2000, 94 per cent in 2001, and 95 per cent in each of the years from 2002 to 2004. There is a very minor variation across jurisdictions, with NSW recording a slightly lower rate of guilty pleas than other jurisdictions, and South Australia a slightly higher rate.

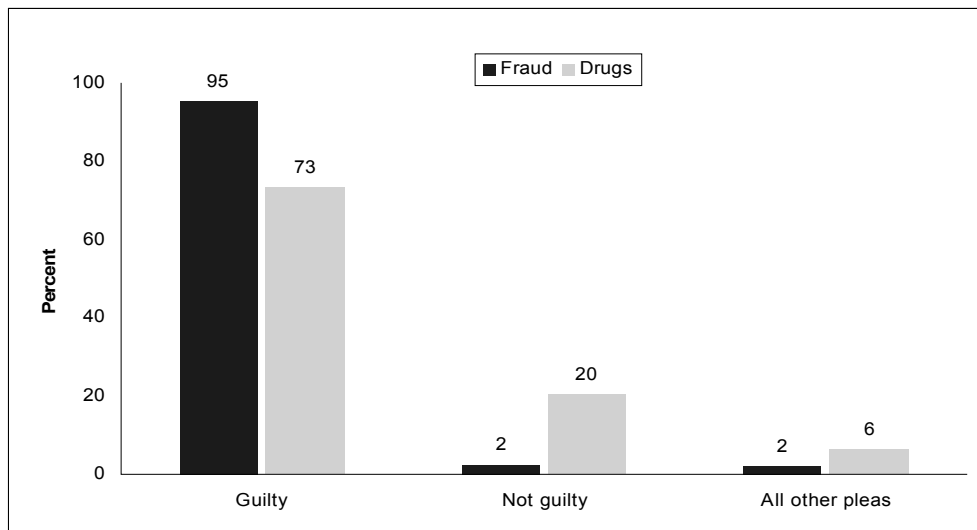
**Figure A2.16: Pleas entered in fraud and drug cases, by jurisdiction**



34. The pleas for different case types are set out in Figure A2.17, showing guilty pleas, not guilty pleas and a total of the other plea types. While guilty pleas were entered in approximately 95 per cent of fraud cases, this was the case in only 73 per cent of drug cases. In 20 per cent of drug cases the defendant or defendants entered a plea of ‘not guilty’. As noted above (Figure A2.6) NSW has a high rate of drug prosecutions relative to other jurisdictions, which explains the relatively lower proportion of guilty pleas in NSW in Figure A2.16.

35. The higher rate of ‘guilty pleas’ for fraud is consistent with the ‘conventional wisdom’ that fraud offenders frequently plead guilty to charges (Smith and Sakurai 2005: 4–5), although the rate of guilty pleas is much higher than the 71–76 per cent reported by Smith and Sakurai. However the Smith and Sakurai analysis focused on serious fraud cases while many federal cases involve minor offending, which is more likely to be associated with guilty pleas. There were no material sex differences in the proportion of fraud defendants who pleaded guilty (96 per cent for females; 94 per cent for males).

**Figure A2.17: Plea entered in fraud and drug cases, by case type**



36. Figure A2.18 shows the relationship between different plea types and the number of charges laid per case in fraud and drug cases. For drug cases, the defendant pleaded guilty in 73 per cent of cases that involved only one charge, as compared to 74 per cent of cases that involved 2–5 charges and 43 per cent of cases that involved 6–20 charges. None of the drug cases had more than 20 charges. For fraud cases, the defendant pleaded guilty in 95 per cent of cases that involved only one charge, as compared to 96 per cent of cases that involved 2–5 charges and 92 per cent of cases that involved 6–20 charges. In general, the data show that in both fraud and drug cases, but especially the latter, the defendant is less likely to plead guilty the larger the number of charges.

37. Charging practices are affected by: the criminal offence provisions used, the available evidence, the different requirements imposed by the various state and territory courts in which prosecutions occur, and legal principles. It is common for the CDPP to ‘roll-up’ certain fraud charges at the charging stage in many states and territories. However, if the defendant pleads not guilty the charges are then ‘unrolled’. This explains why there are more charges when a defendant pleads not guilty. In Centrelink fraud cases—which are a large proportion of the fraud cases referred to the CDPP—multiple charges are based on fortnightly periods. Multiple charges are common in fraud cases because there are often periods of offending interspersed with periods in which there is no offending. In South Australia, the courts do not accept rolling up of certain fraud charges that are commonly charged.

**Figure A2.18: Number of charges per case, by plea status and case type**

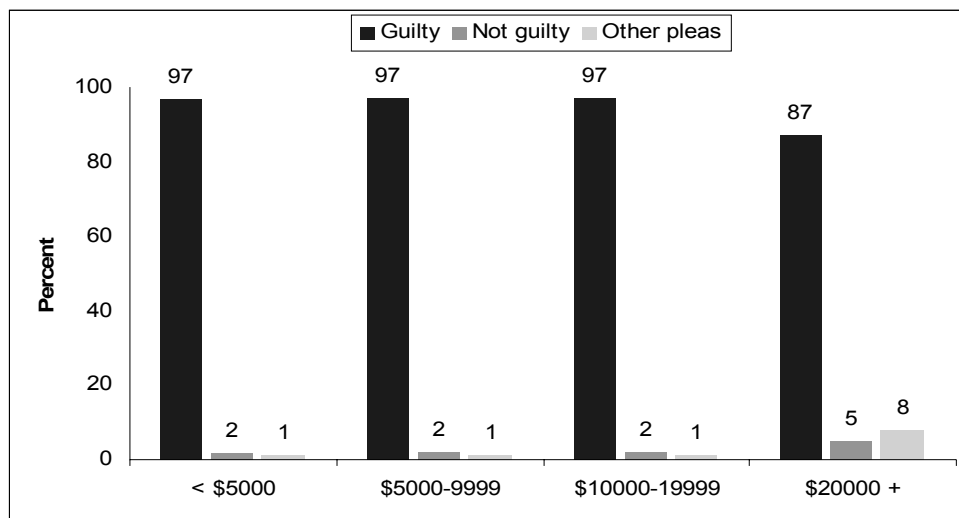
Charges per case	Guilty %		Not guilty %		Other plea %		Number
	Fraud	Drugs	Fraud	Drugs	Fraud	Drugs	
1	95	73	3	20	2	7	11,219
2-5	96	74	2	21	2	5	13,268
6-20	92	43	2	57	6	0	601
>20	100	0	0	0	0	0	72



38. For fraud offences there was variation in the type of plea by the size of the amounts proven (Figure A2.19). This chart shows guilty pleas, not guilty pleas and all other plea types. Cases involving high amounts, which are presumably more complex, were less likely to attract guilty pleas. At this descriptive level, this is consistent with Smith and Sakurai's lower rate of guilty pleas in serious fraud cases.

39. It should be noted though that while the proportion of not guilty pleas increased slightly in the highest fraud amount category, a larger part of the reduction in guilty pleas was accounted for by an increase in pleas changed on arraignment, which is recorded in the 'other pleas' category. This plea type accounted for less than one per cent of pleas in the three lower amount categories, but over seven per cent in the highest category. Defendants in these cases changed their plea from not guilty to guilty plea. This in turn would likely result from offenders seeking a discount on their sentence when reaching the stage of arraignment and confronting the evidence against them.

**Figure A2.19: Plea entered, by amount of fraud charged**



40. In drug cases, there were no significant differences between plea types for the different drug categories.

## Examination of outcomes

41. This section compares sentencing outcomes. Because a key focus of the ALRC's Inquiry is on the extent to which federal defendants are treated consistently throughout Australia, this section focuses on penalty and outcomes by jurisdiction.

42. It is important to acknowledge at the outset that quantitative analyses such as this are ultimately broad and will miss the fine detail of individual cases and sentencing outcomes. Each case contains a unique set of experiences and events, which are taken into account by the court. Any observed differences found in the quantitative analysis need to be balanced against a clear understanding that these differences reflect the individual variation in cases as well as structural constraints and different state and territory legislation that operates within each jurisdiction.

43. There is a range of sentences and penalties that courts can impose on a defendant who pleads guilty or is found guilty. Figure A2.20 shows the major types of outcomes and how often they are used. The data are presented in two ways. The first set simply looks at the number of times a particular outcome is used. It is possible for a defendant to have more than one outcome, so Figure A2.20 also highlights the combination of outcomes that have been applied by the courts; for example, a defendant may be required to pay a fine as well as court and other costs.

**Figure A2.20: Types of penalties and outcomes in fraud and drug cases**

	Fraud		Drugs		Total	
	No.	%	No.	%	No.	%
<b>Outcome</b>						
s 19B bonds	1,807	8	48	4	1,855	7
s 20(1)(a) bonds	4,116	17	22	2	4,138	16
s 20(1)(b) bonds	5,908	25	137	12	6,045	24
Fine	3,878	16	128	11	4,006	16
Community service orders (CSO)	4,327	18	5	<1	4,332	17
Imprisonment/jail	8,077	34	903	81	8,980	36
<b>Other outcomes</b>						
Court costs	9,841	41	90	8	9,931	39
<b>Multiple outcomes applied</b>						
Bond+Fine	94	<1	6	1	100	<1
Bond+Court costs	5,035	21	39	3	5,074	20
Bond+ Fine+Court costs	49	<1	4	<1	53	<1
Bond+CSO	271	1	2	<1	273	1
Bond+CSO+Fine	5	<1	0	0	5	<1
Bond+CSO+Court costs	138	1	0	0	138	1
Bond+Prison	5,751	24	133	12	5,884	23
Fine+Court costs	1,962	8	54	5	2,016	8
Fine+CSO	72	<1	0	0	72	<1
Prison+Fine	53	<1	2	<1	55	<1
Prison+Court costs	2,270	9	2	<1	2,272	9
Prison+CSO	80	<1	1	<1	81	<1

44. The most common outcome is the ordering of a bond, while the least common outcome is a fine. Most offenders receive multiple outcomes. Among those cases in which a bond is ordered, the most common outcome is a s 20(1)(b) bond conditionally discharging an offender after conviction and sentence. The second most common is a s 20(1)(a) bond conditionally discharging the offender after conviction but without proceeding to sentence. The third most common is a s 19B bond conditionally discharging the offender without conviction.

45. There are noticeable differences in the use of combinations of sentencing outcomes between fraud and drug cases. Bonds are more commonly used in fraud cases, and fraud cases are also more likely to result in the ordering of court costs.

46. Most drug cases result in a prison sentence, and prison is a much more common result than it is in fraud cases. As mentioned earlier, this reflects the fact that while federal fraud offences can cover a very wide range from minor to serious offences, federal drug offences are generally concerned with relatively serious offences involving import and export of prohibited substances.

47. Due to the wide range of possible combination of outcomes, this section focuses on individual outcomes and does not generally consider the use of multiple outcomes. The next section focuses on model types of cases based on particular charges. It contains an assessment of the likely outcomes for those model types, including the application of multiple outcomes.

## Bonds

48. Across Australia, some form of bond was ordered for 12,126 (48 per cent) of the single outcome cases. Bonds are usually ordered under one of three sections of the *Crimes Act* and are applied at different stages of the judicial process:

- s 19B bonds are ordered when the court decides to discharge the offender without proceeding to conviction.
- s 20(1)(a) bonds are ordered after conviction but before passing sentence on the offender.
- s 20(1)(b) bonds are ordered after conviction and after sentencing the offender to a period of imprisonment, which may involve serving time or being released forthwith.

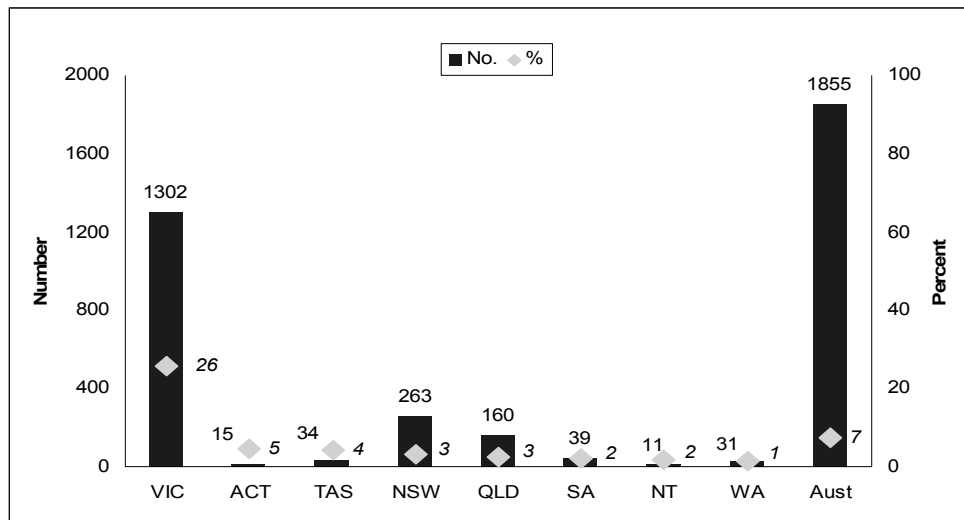
49. Bonds ordered under s 20(1)(b) are the most frequently ordered form of bond (50 per cent of bond cases). Bonds under s 20(1)(a) were ordered in 34 per cent of cases, and bonds were ordered under s 19B in 15 per cent of cases.

50. In addition to these bonds, there were a small number of other bonds (n=103; 1 per cent) identified as falling under legislative provisions or with more descriptive titles such as 'Bond CBO' and 'Bond Prob'. Given the small numbers of each type and their possible overlap with bonds ordered under the *Crimes Act*, further analysis in this section will concentrate on the three most common types of bonds referred to above.

### Section 19B bonds

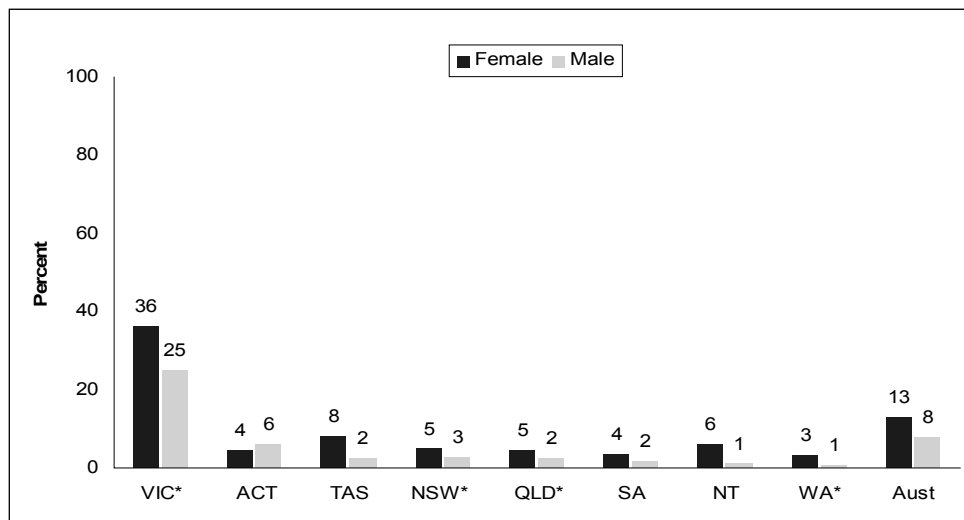
51. Figure A2.21 shows the use of s 19B bonds in each jurisdiction, arranged by use in the highest percentage of cases. There is clearly a greater use of this form of bond in Victoria than in any other jurisdiction, with 26 per cent of Victorian cases resulting in a s 19B bond. In other jurisdictions s 19B bonds are ordered in between one and five per cent of cases.

**Figure A2.21: Cases in which s 19B bonds are ordered, by jurisdiction**



52. There are some differences in the ordering of s 19B bonds between females and males (Figure A2.22). In Victoria there is a statistically significant difference with 36 per cent of female offenders and 25 per cent of male offenders receiving these bonds. Females are also significantly more likely to receive s 19B bonds in NSW, Queensland and Western Australia, although the overall use of s 19B bonds in these states is much lower than in Victoria.

**Figure A2.22: Cases in which s 19B bonds are ordered, by sex and jurisdiction**

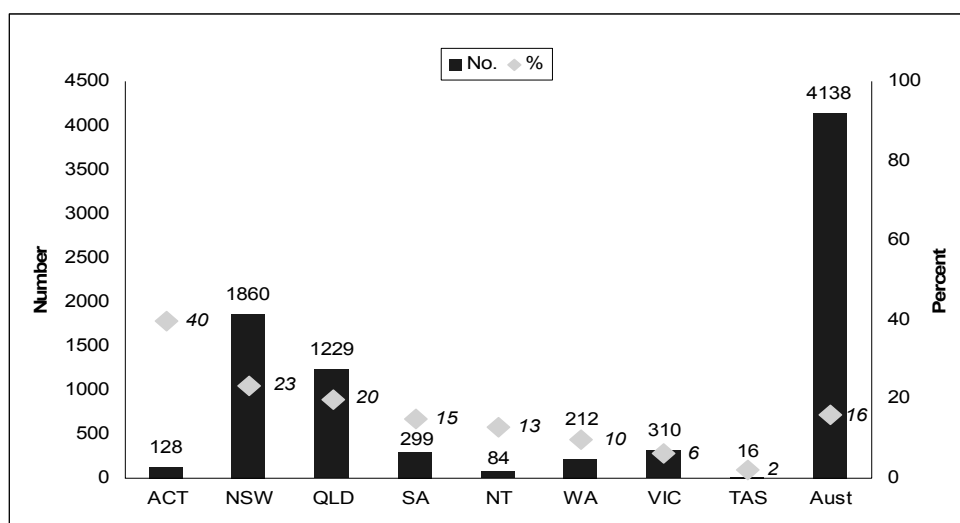


\* Statistically significant at  $p < .01$ .

### Section 20(1)(a) bonds

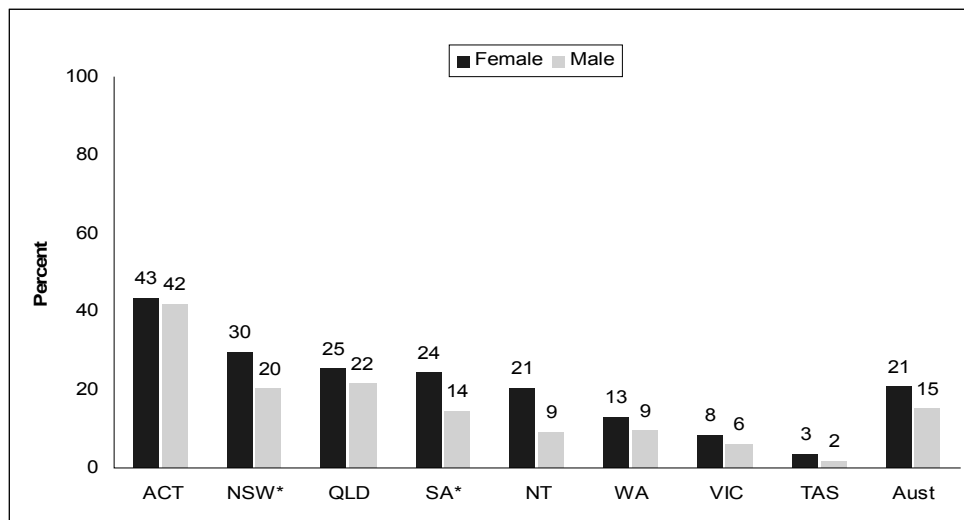
53. Figure A2.23 shows the number and percentage of cases in each jurisdiction that resulted in the order of a bond under s 20(1)(a) of the *Crimes Act*. There was wide variation across the jurisdictions, with the use of these bonds ranging from 40 per cent of ACT cases to two per cent in Tasmania.

**Figure A2.23: Cases in which s 20(1)(a) bonds are ordered, by jurisdiction**



54. In each jurisdiction in Australia, females were more likely to receive s 20(1)(a) bonds than males, though this difference was statistically significant only in NSW and South Australia (Figure A2.24). The observation that females are more likely to receive these bonds echoes the observation that in all jurisdictions except the ACT females are more likely to receive s 19B bonds than males (Figure A2.22).

**Figure A2.24: Cases in which s 20(1)(a) bonds are ordered, by sex and jurisdiction**

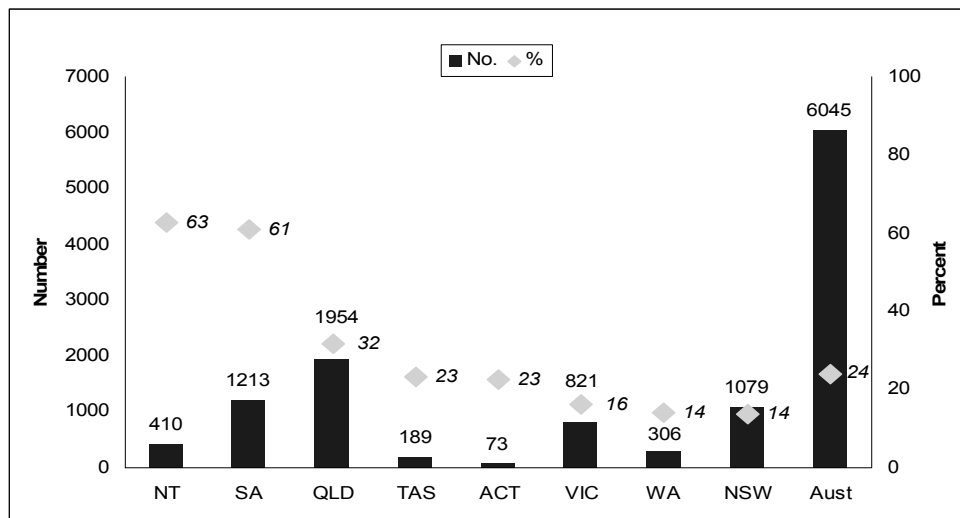


\* Statistically significant at  $p < .01$ .

### ***Section 20(1)(b) bonds***

55. As was observed with the other forms of bond, there was variation between the jurisdictions in the percentage of cases that resulted in the order of a bond under s 20(1)(b) of the *Crimes Act* (Figure A2.25). In the Northern Territory and South Australia the majority of cases (63 per cent and 61 per cent respectively) resulted in a s 20(1)(b) bond. Percentages dropped across the other jurisdictions, down to 14 per cent in both Western Australia and NSW.

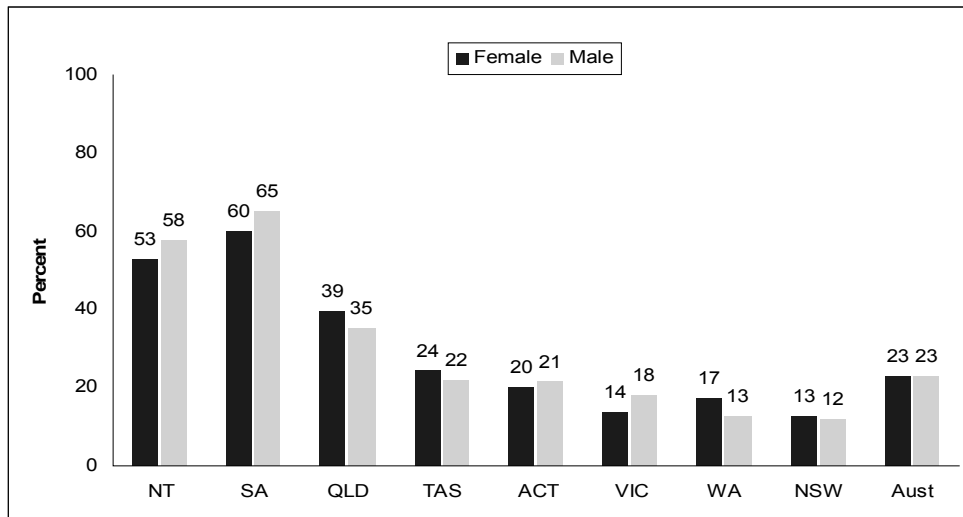
***Figure A2.25: Cases in which s 20(1)(b) bonds are ordered, by jurisdiction***





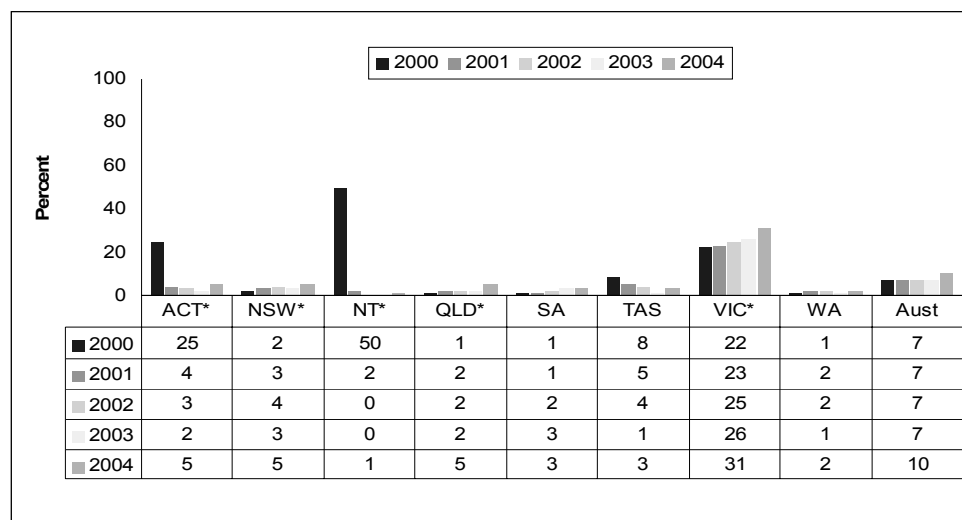
56. Observations on the ordering of s 20(1)(b) bonds by sex did not follow the same pattern observed with other bonds (Figure A2.26). In no jurisdiction was there a statistically significant difference in the use of these bonds between male and female defendants.

**Figure A2.26: Cases in which s 20(1)(b) bonds are ordered, by sex and jurisdiction**



### ***Changes in use of bonds over time: Section 19B***

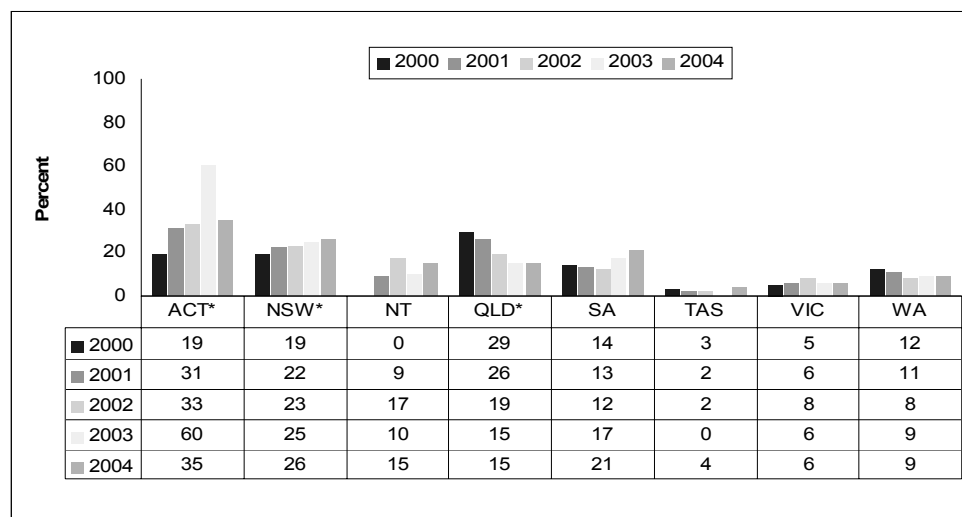
57. Figure A2.27 shows variations in the ordering of bonds under s 19B of the *Crimes Act*. With the exception of some unusually high percentages and small case numbers in both the ACT (25 per cent) and the Northern Territory (50 per cent) in the year 2000, Victoria has consistently made the most use of s 19B bonds. The percentage of Victorian cases resulting in s 19B bonds has been increasing at a statistically significant ( $p < .01$ ) rate during the 2000–2004 period. There were also statistically significant increases in the use of s 19B bonds in NSW and Queensland, although the percentage of cases resulting in such bonds is lower than in some other jurisdictions.

**Figure A2.27: Section 19B bonds by jurisdiction, 2000–2004**

\* Statistically significant at  $p < .01$ .

### **Changes in use of bonds over time: Section 20(1)(a)**

58. The use of bonds under s 20(1)(a) of the *Crimes Act* has been changing in some jurisdictions across the period covered by these data (Figure A2.28). The ACT has an unusually high percentage of s 20(1)(a) bonds ordered in 2003, however there has been a consistent increase across other years. NSW has also shown a consistent increase in the ordering of s 20(1)(a) bonds, while the percentage has been consistently decreasing in Queensland.

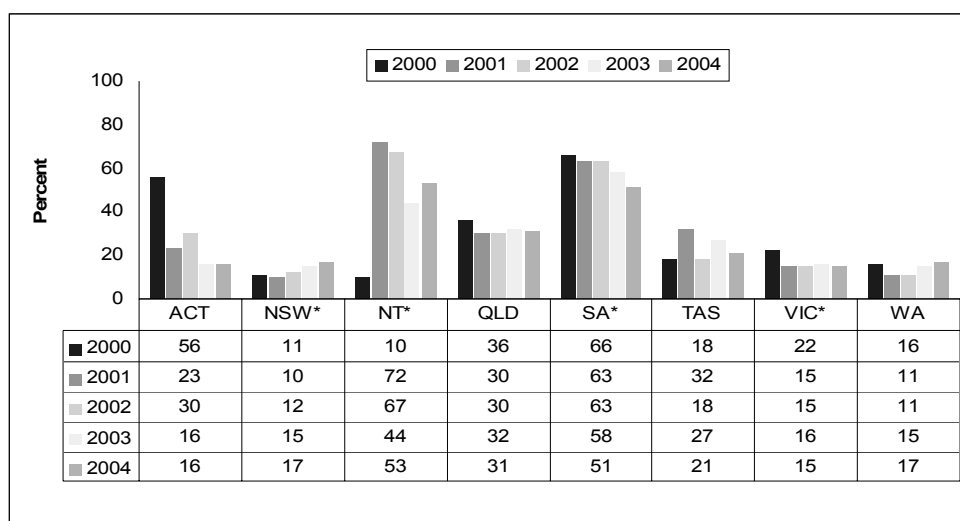
**Figure A2.28: Section 20(1)(a) bonds by jurisdiction, 2000–2004**

\* statistically significant at  $p < .01$ .

### Changes in use of bonds over time: Section 20(1)(b)

59. The use of s 20(1)(b) bonds increased in NSW during 2000–2004 (Figure A2.29). The trend in the Northern Territory is difficult to assess. While use decreased from 2001 to 2003, this was after a sudden rise from very low levels in 2000. The use of s 20(1)(b) bonds increased again in 2004. The data indicate a consistent but relatively small decrease in use in South Australia.

**Figure A2.29: Section 20(1)(b) bonds by jurisdiction, 2000–2004**



\* Statistically significant at  $p < .01$ .

### Recognizance orders

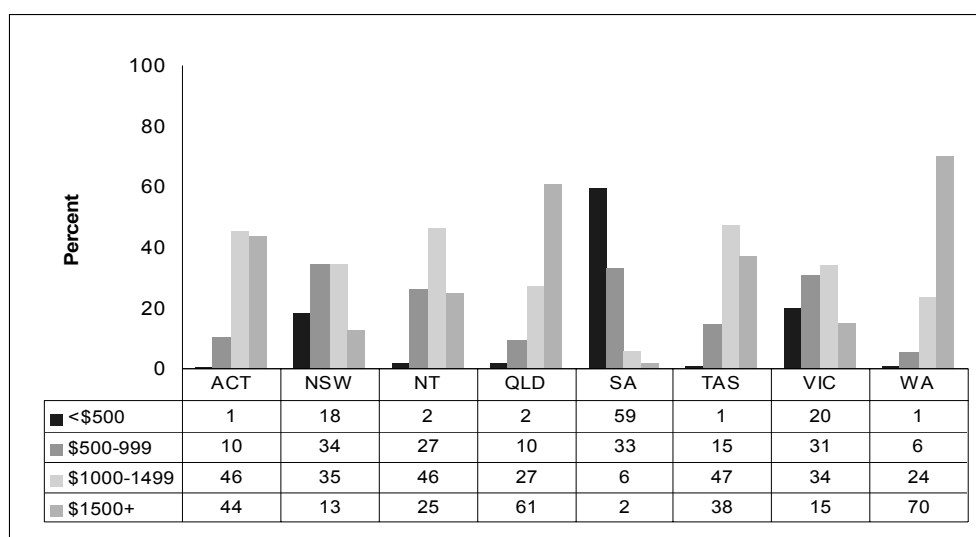
60. As shown in Figure A2.30, half of the bonds under which a recognizance order was made were bonds under s 20(1)(b) of the *Crimes Act*, with 33 per cent being made under s 20(1)(a) of that Act and 16 per cent under s 19B.

**Figure A2.30: Bonds under which recognizance orders are made**

Type of Bond	No.	%
s 19B	1,735	16
s 20(1)(a)	3,610	33
s 20(1)(b)	5,548	50
Other	3	<1
No bond recorded	156	1
<b>TOTAL</b>	<b>11,052</b>	

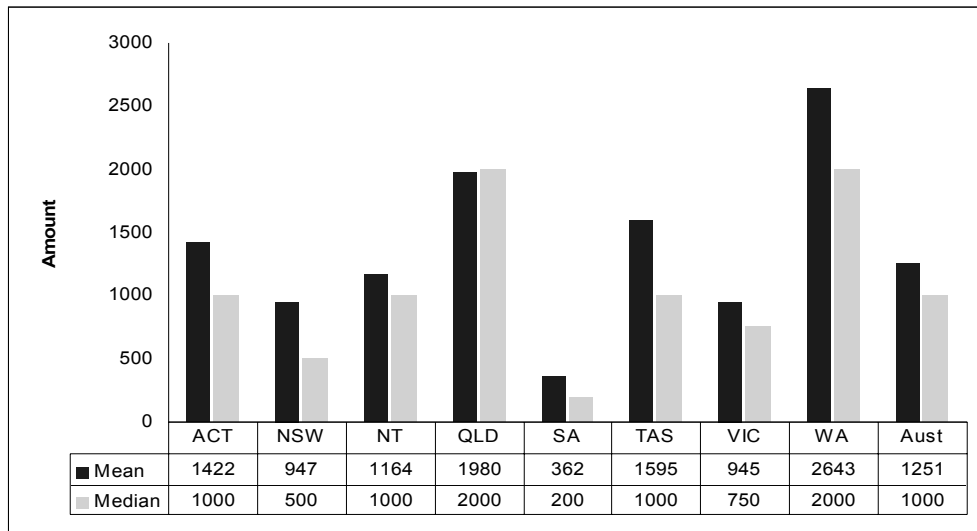
61. Figure A2.31 shows the monetary amounts, in four categories, applied to recognizance orders across each jurisdiction. In South Australia the majority of orders were for amounts of less than \$500, whereas in Queensland and Western Australia the majority of orders were for amounts of \$1,500 or more. The lowest amount applied to a recognizance order across Australia was \$0.01 in NSW and the highest was \$30,000 in Queensland. The next lowest amount of \$10 was ordered in three jurisdictions.

**Figure A2.31: Monetary amounts of recognizance orders, by jurisdiction**



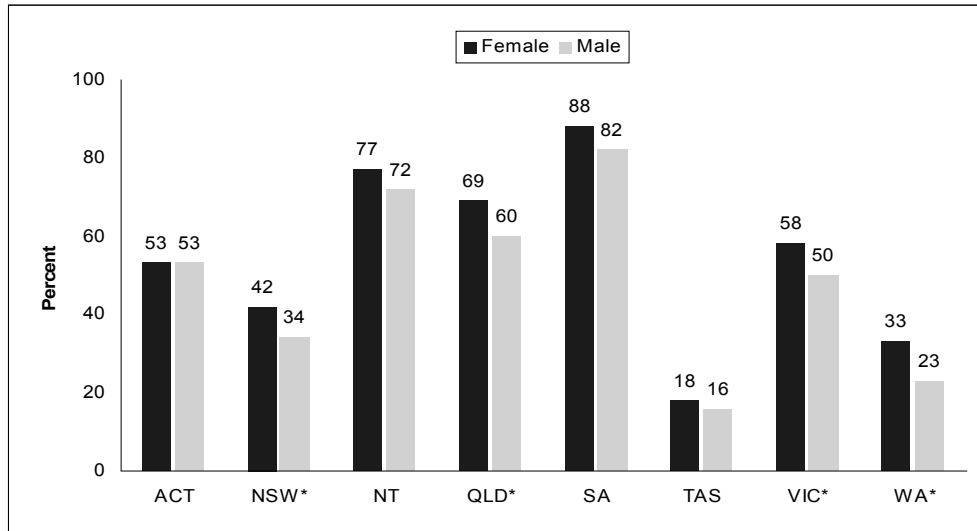
62. The mean and median recognizance order amounts for fraud cases are shown in Figure A2.32. The mean and median in Western Australia were approximately twice that of the national average. South Australia typically ordered recognizance amounts noticeably less than that of the other jurisdictions.

**Figure A2.32: Mean and median recognizance order amounts for fraud cases, by jurisdiction**



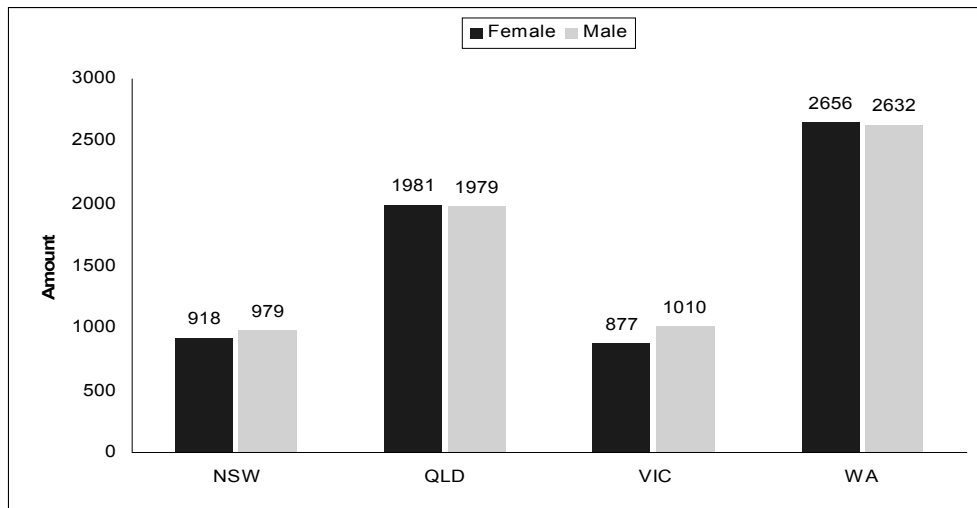
63. Females were more likely to receive recognizance orders than males in fraud cases across each jurisdiction except the ACT, where there was no difference (Figure A2.33). However the differences are only statistically significant for NSW, Queensland, Victoria and Western Australia.

**Figure A2.33: Recognizance orders for fraud cases, by sex and jurisdiction**



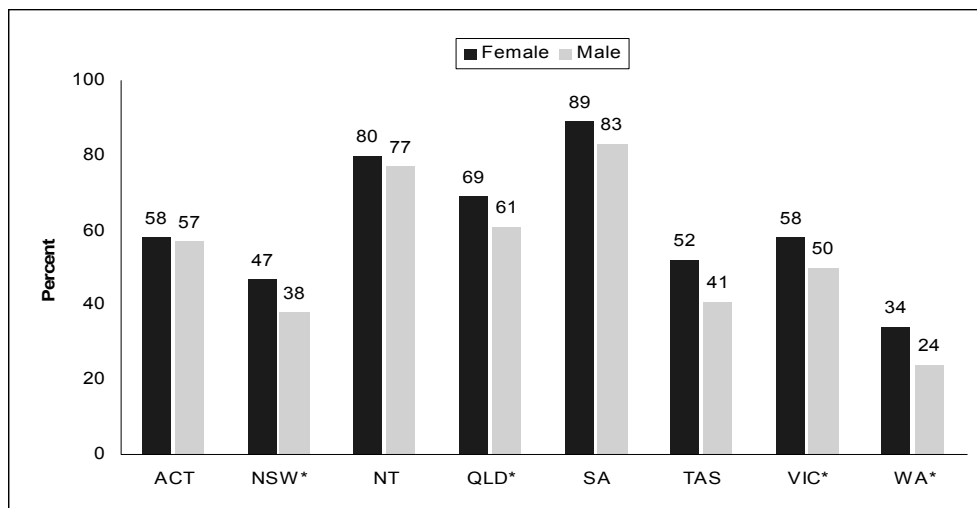
\* Statistically significant at  $p < .01$ .

64. While there was a significant sex difference in the likelihood of recognizance orders being made in four jurisdictions (NSW, Queensland, Victoria and Western Australia), there were no significant differences in the mean amounts attached to the recognizance orders (Figure A2.34).

**Figure A2.34: Mean amounts of recognizance orders for fraud cases, by sex**

### To be of good behaviour

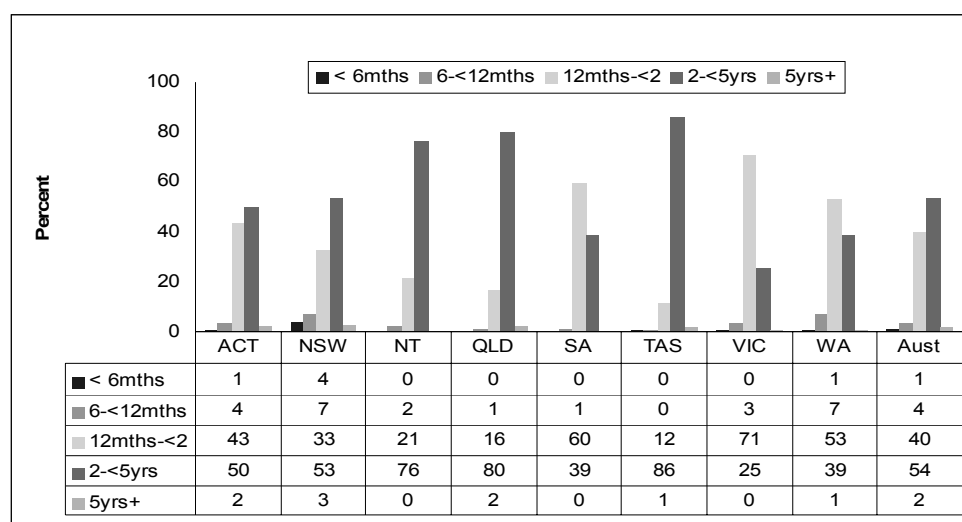
65. Figure A2.35 shows that in all jurisdictions females are more likely than males to receive good behaviour bonds and this difference is statistically significant in the larger jurisdictions.

**Figure A2.35: Good behaviour conditions, by sex and jurisdiction**

\* Statistically significant at  $p < .01$ .

66. An examination of the maximum durations specified in good behaviour conditions is shown in Figure A2.36. Orders in South Australia, Victoria and Western Australia are most likely to be for a maximum of between 12 months and under two years. In the ACT, NSW, the Northern Territory, Queensland and Tasmania the orders are most frequently for a period of between two and five years. Ninety per cent (n=162) of orders in the '5 years and over category' are for a period of exactly five years, which is the maximum period allowed under s 20(1) of the *Crimes Act*.<sup>5</sup>

**Figure A2.36: Duration of 'to be of good behaviour' conditions, by jurisdiction**



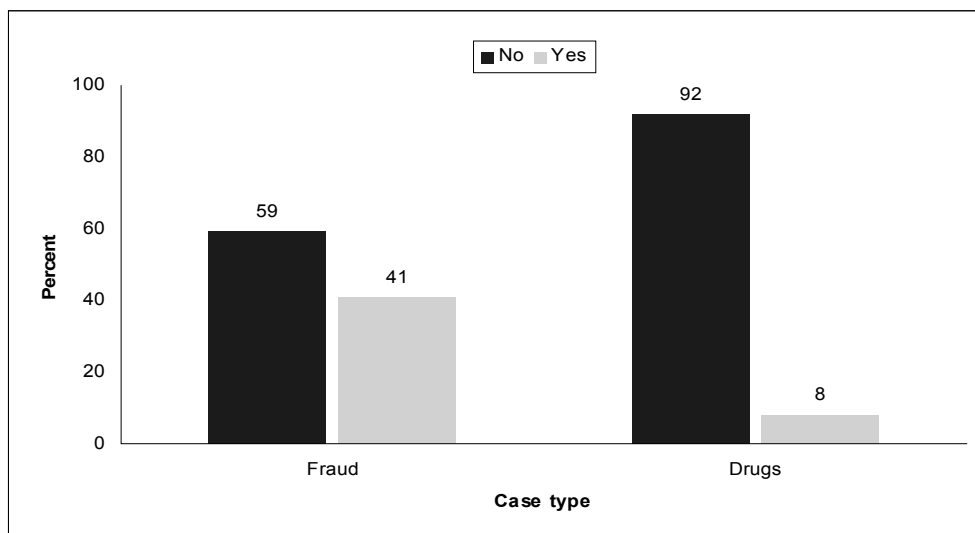
<sup>5</sup> There were a small number of entries greater than five years (n=18).



### Court costs

67. Across Australia, 39 per cent of cases (n=9,931) resulted in the ordering of court costs. As seen in Figure A2.37, court costs were five times more likely to be ordered in fraud cases (41 per cent of all fraud cases) than drug cases (8 per cent).

**Figure A2.37: Cases resulting in the award of court costs, by case type**



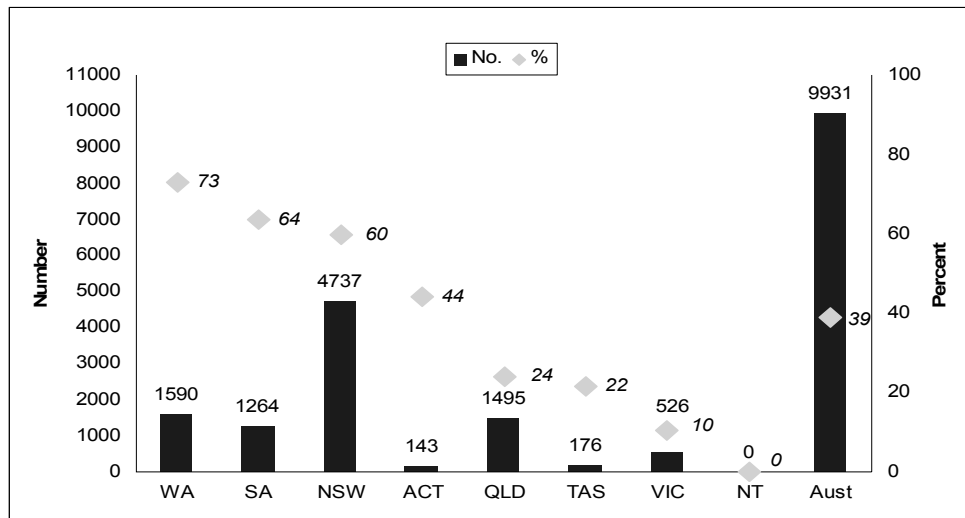
68. Of the 9,931 cases in which court costs were ordered, this was recorded as being a condition of a bond in 51 per cent of cases (Figure A2.38). In 22 per cent of court costs orders this was a bond under s 20(1)(a) of the *Crimes Act*, while in 21 per cent of cases it was under s 20(1)(b) of that Act.

**Figure A2.38: Cases in which court costs are ordered, by disposition**

Type of Bond	No.	%
s 19B	770	8
s 20(1)(a)	2,218	22
s 20(1)(b)	2,076	21
Other	10	<1
No bond	4,857	49
TOTAL	9,931	

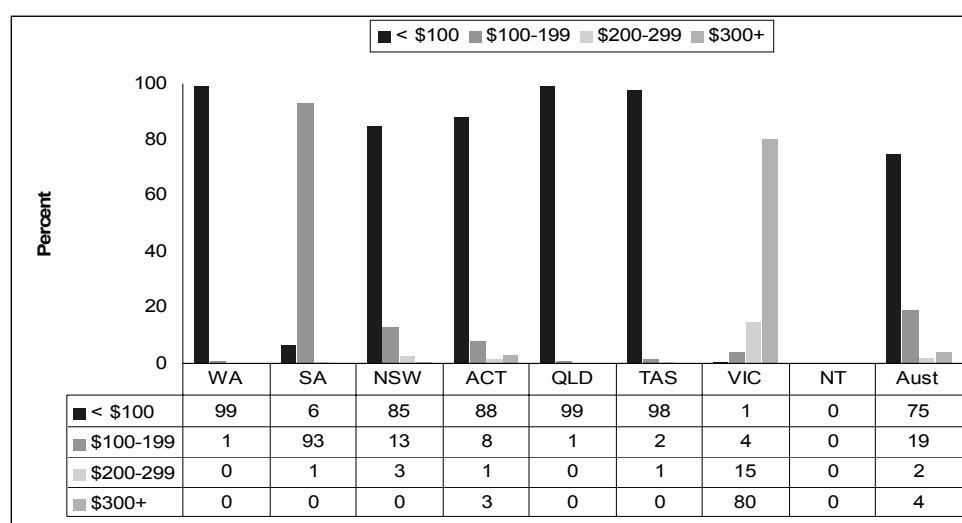
69. Figure A2.39 shows that court costs are ordered in all jurisdictions except the Northern Territory, with the highest proportion awarded in Western Australia (73 per cent of cases). In South Australia and NSW court costs are also ordered in a majority of cases (64 per cent and 60 per cent respectively), and in slightly less than half (44 per cent) of the cases in the ACT. Court costs are ordered in relatively fewer cases in Tasmania (22 per cent) and Victoria (10 per cent).

**Figure A2.39: Cases in which court costs are ordered, by jurisdiction**

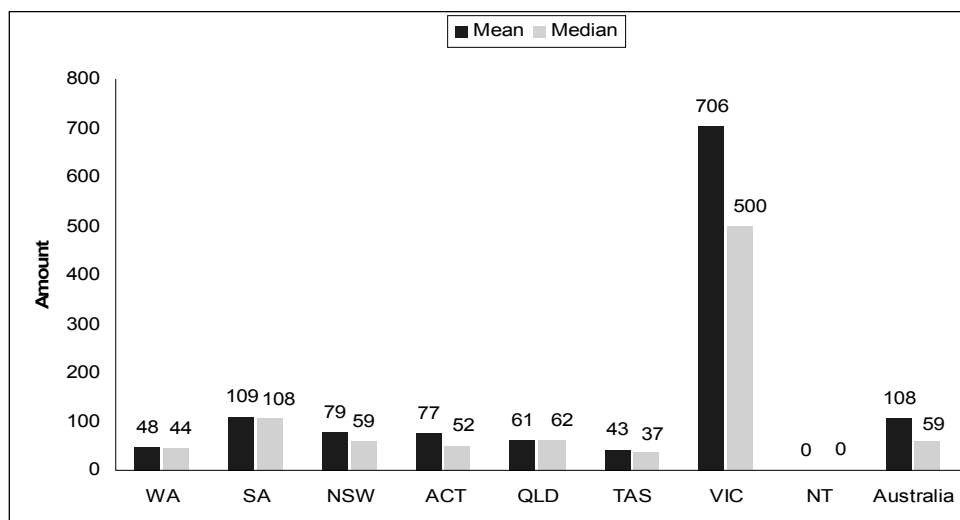


70. Figure A2.40 shows the amounts of court costs ordered in each jurisdiction. In most jurisdictions where court costs were ordered, the majority of orders were for amounts below \$100. The exceptions to this were South Australia, where 93 per cent of orders were for between \$100 and \$199, and Victoria, where 80 per cent of orders were for amounts over \$300 and a further 15 per cent were for between \$200 and \$299.

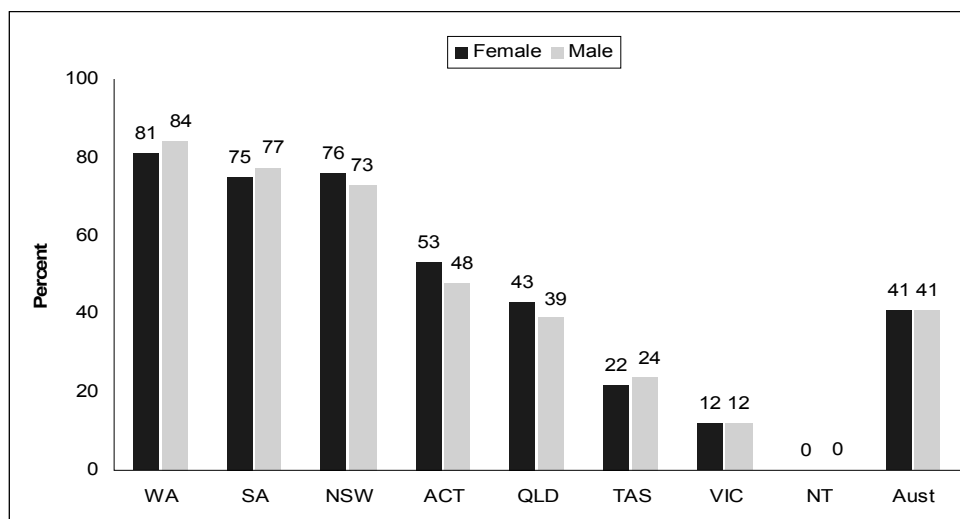
**Figure A2.40: Amounts of court costs orders, by jurisdiction**



71. When mean and median amounts of court costs are examined, Victorian cases have higher payment amounts than other jurisdictions. The Victorian mean amount is nearly seven times higher than the jurisdiction with the next highest amount, South Australia, and the median amount is nearly five times higher (Figure A2.41). The reasons for this are not apparent from the data available for this report, though it was noted earlier that fraud amounts prosecuted in Victoria tend to be higher than in other jurisdictions and this may be a factor.

**Figure A2.41: Mean and median court costs, by jurisdiction**

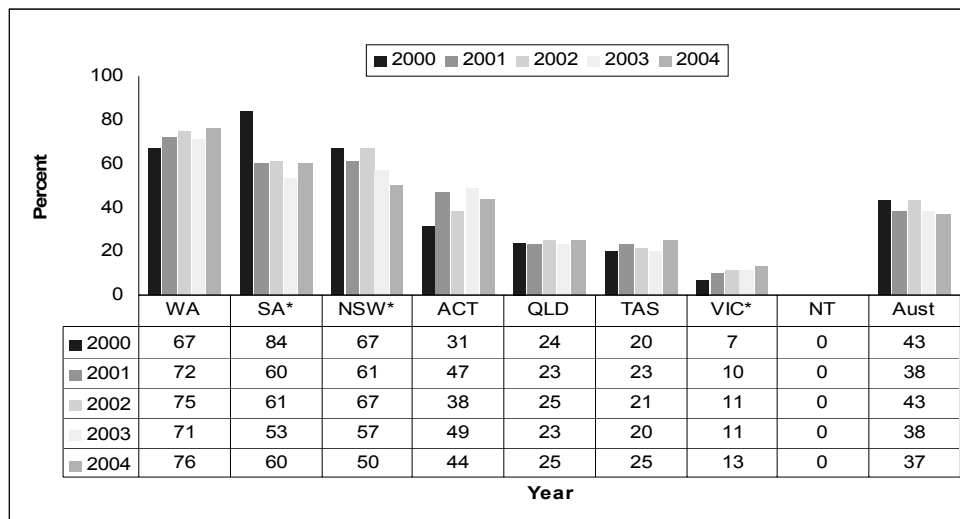
72. Based on an examination of offenders, rather than charges, there are no statistically significant differences between the sexes in the likelihood of court costs being ordered (Figure A2.42).

**Figure A2.42: Court costs orders, by sex and jurisdiction**

### Court costs over time

73. Figure A2.43 indicates there has been some variation in the ordering of court costs over time. There has been a statistically significant decrease in the ordering of court costs in NSW at the same time as there was a significant increase in Victoria. In NSW the percentage of cases in which court costs were ordered declined from 67 per cent in 2000 to 50 per cent in 2004. Over the same period the percentage of cases in which costs were ordered in Victoria increased from seven per cent to 13 per cent. While the decline in South Australia is statistically significant, the result appears to have been influenced by an unusually high percentage of court costs orders in 2000, with less variation in the other years.

Figure A2.43: Court costs orders, by jurisdiction, 2000–2004

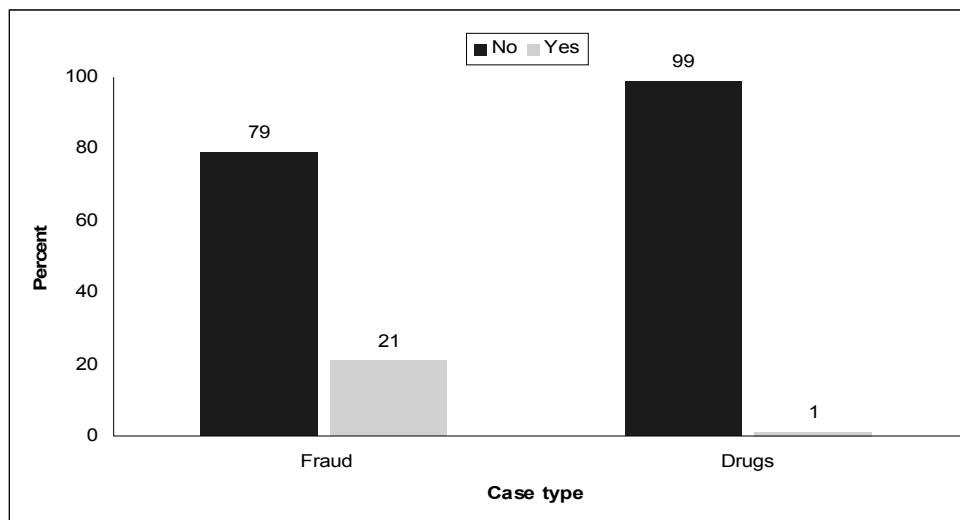


\* Statistically significant at  $p < .01$ .

### Community service orders

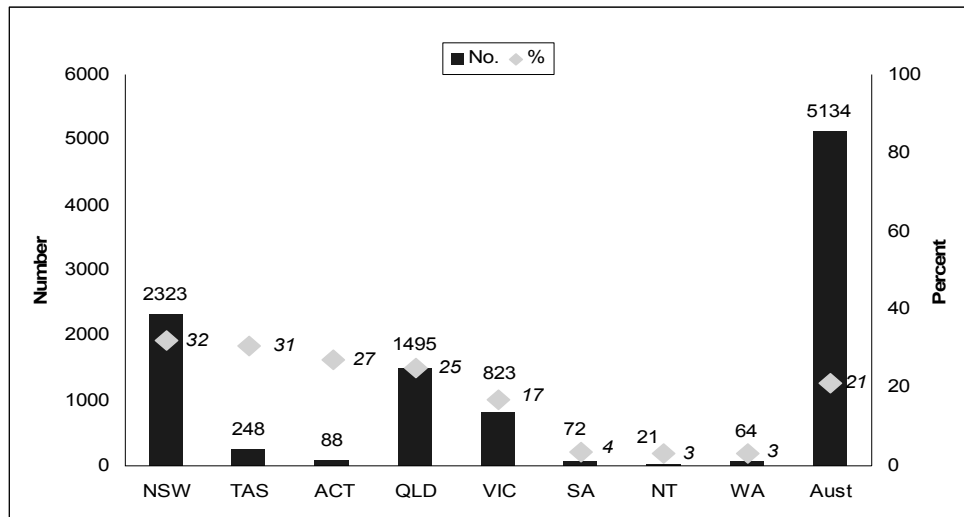
74. Community service orders (CSOs) requiring an offender to undertake some form of unpaid service to benefit the community were ordered in 21 per cent of fraud cases (n=5,134). CSOs were almost never ordered in drug cases, with only eight drug cases in the dataset resulting in a CSO (Figure A2.44). Drug cases have been removed from the analyses that follow.

*Figure A2.44: Cases resulting in a community service order, by case type*



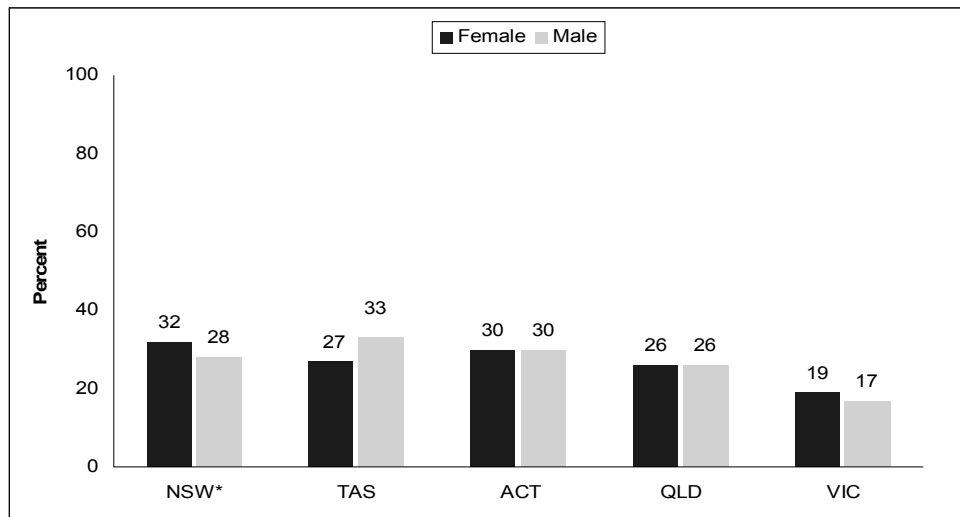
75. NSW had the highest use of CSOs as a proportion of all cases in the jurisdiction (32 per cent), closely followed by Tasmania (31 per cent). Together with the ACT, Queensland and Victoria (where these orders are identified in the data as ‘CBOs’), these jurisdictions provided almost all (97 per cent) the CSOs ordered in Australia (Figure A2.45).

**Figure A2.45: Fraud cases resulting in a community service order, by jurisdiction**



76. As indicated in Figure A2.46 there was a significant difference in the ordering of CSOs by sex in NSW, with females more likely to receive CSOs than males. The apparent differences observed in Tasmania and Victoria are not statistically significant.

**Figure A2.46: Fraud cases resulting in a community service order, by sex and jurisdiction**



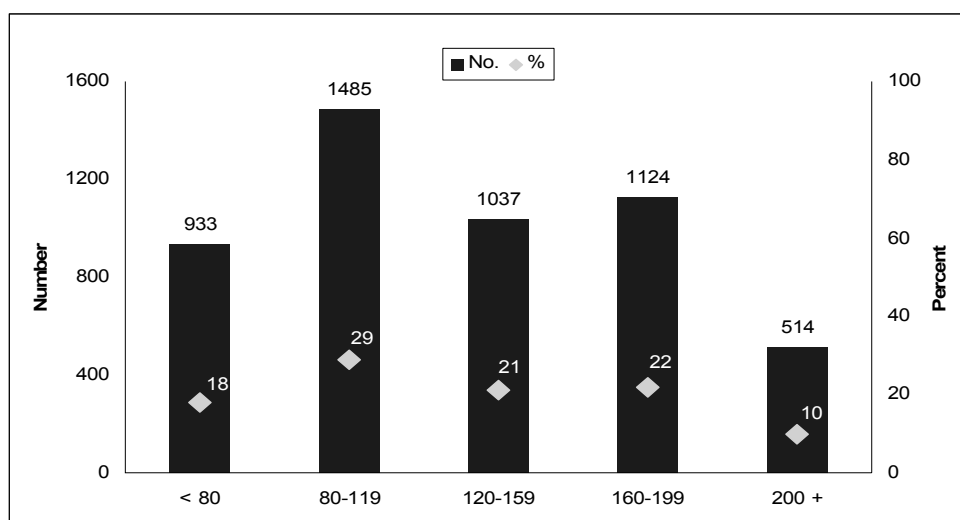
\* Statistically significant ( $p < .01$ ).



77. Most CSOs (50 per cent) were for periods of between 80 and 159 hours (Figure A2.47). The shortest duration was six hours in a Victorian case, the longest 800 hours in NSW. The mean was 142 hours with a median of 125 hours. Interpreting these results needs to take into account that courts can order different maximum numbers of hours for CSOs in different jurisdictions:

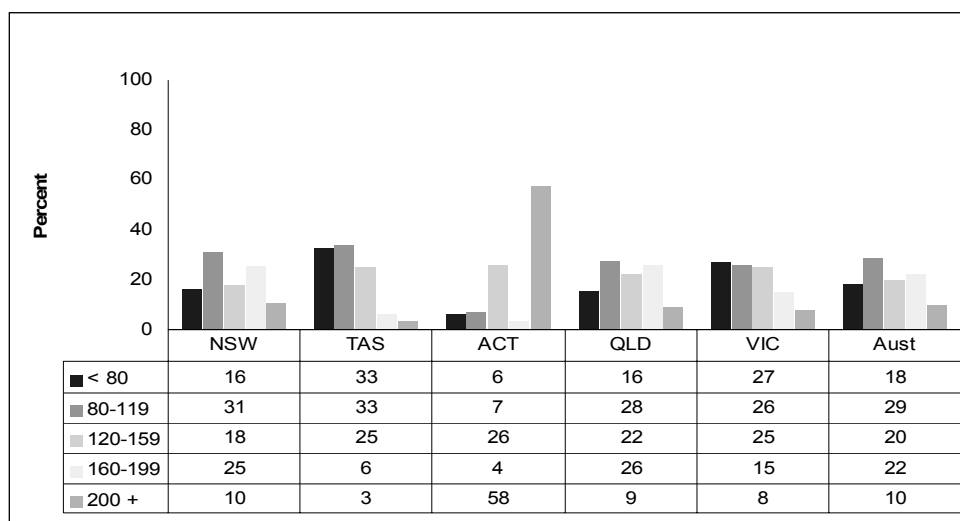
- NSW and Victoria—500 hours
- Northern Territory—480 hours
- South Australia—320 hours
- Queensland, Western Australia and Tasmania—240 hours
- ACT—208 hours

**Figure A2.47: Hours to be served on community service orders in fraud cases**



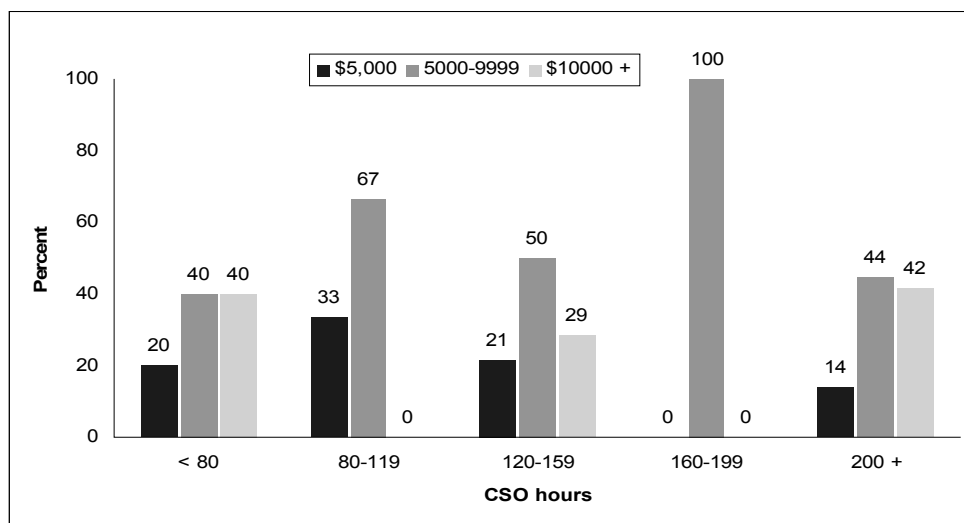
78. Figure A2.48 shows the distribution of hours to be served on CSOs in the five jurisdictions that most commonly order them, as well as for Australia overall. While the number of cases involved is quite small, it is notable that most CSOs ordered in the ACT (58 per cent of 85 CSOs) are for periods between 200 hours and the maximum of 208 hours. Conversely, in Tasmania, 66 per cent of the 239 CSOs are less than 120 hours and only three per cent are for 200 hours or more.

**Figure A2.48: Hours to be served on community service orders in fraud cases, selected jurisdictions**



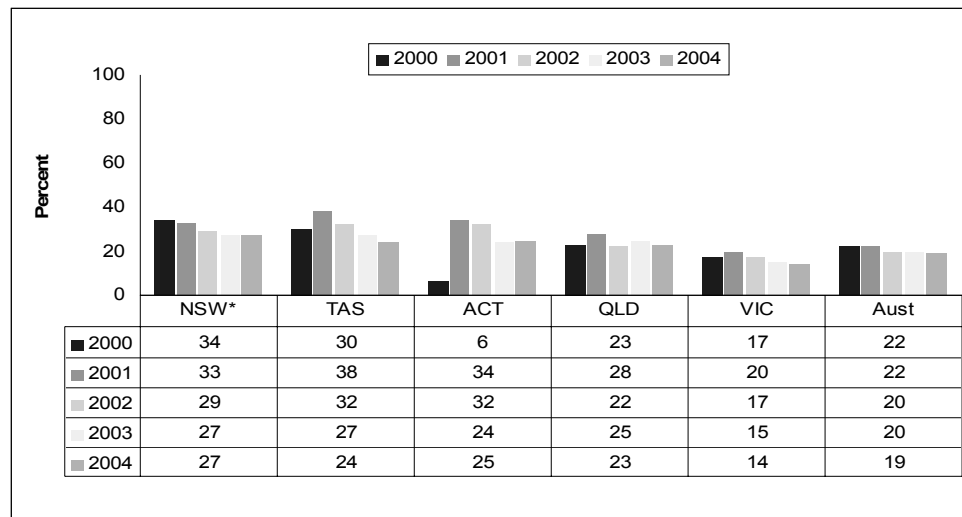
79. A closer examination of the amounts of fraud involved in the ACT cases suggests there is no clear relationship between the amount of fraud proved and the hours to be served under a CSO (Figure A2.49). Forty per cent of cases where a CSO of less than 80 hours was ordered involved middle level fraud amounts, however a further 40 per cent involved high value frauds. Similarly where the CSO was for more than 200 hours, similar proportions involved medium and high-level frauds.

**Figure A2.49: Hours to be served on community service orders in fraud cases in the ACT, by fraud proved amount**



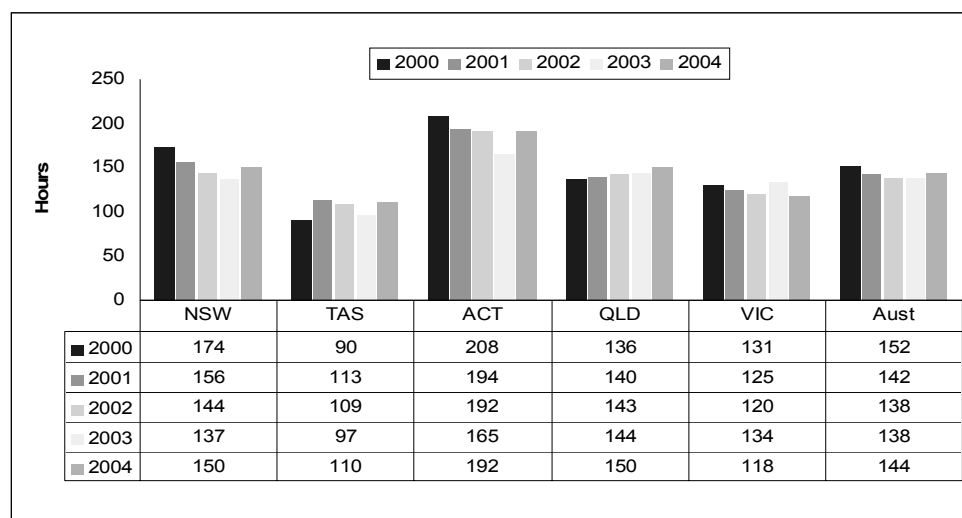
#### ***Community service orders over time***

80. As shown in Figure A2.50, within those jurisdictions that most frequently issue CSOs, there has been some variation between 2000 and 2004 in the percentage of cases in which CSOs are ordered. Across the period there has been a statistically significant decrease in the issuing of CSOs by NSW courts. There were no significant differences in the other jurisdictions.

**Figure A2.50: Community service orders for fraud cases, selected jurisdictions, 2000–2004**

\* Statistically significant  $p < .01$ .

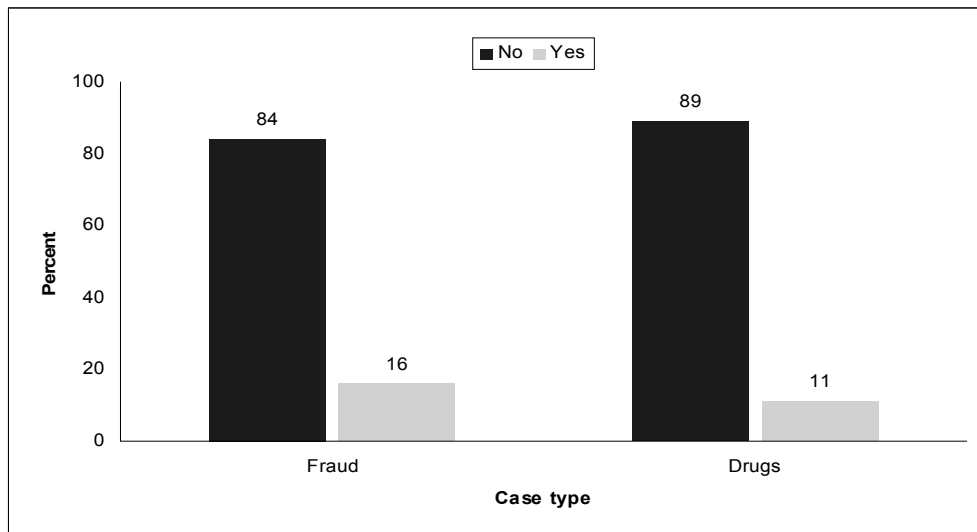
81. Over the five years of data, the ACT has consistently issued CSOs with higher mean hours to be served than the other jurisdictions (Figure A2.51). The mean hours ordered in each jurisdiction has been mostly stable, though there is statistically significant variation in the mean hours in NSW, which reduced between 2000 and 2003. Interpreting these results needs to take into account the maximum CSO hours available in each jurisdiction, as set out above.

**Figure A2.51: Mean community service orders hours for fraud cases, by jurisdiction, 2000–2004**

## Fines

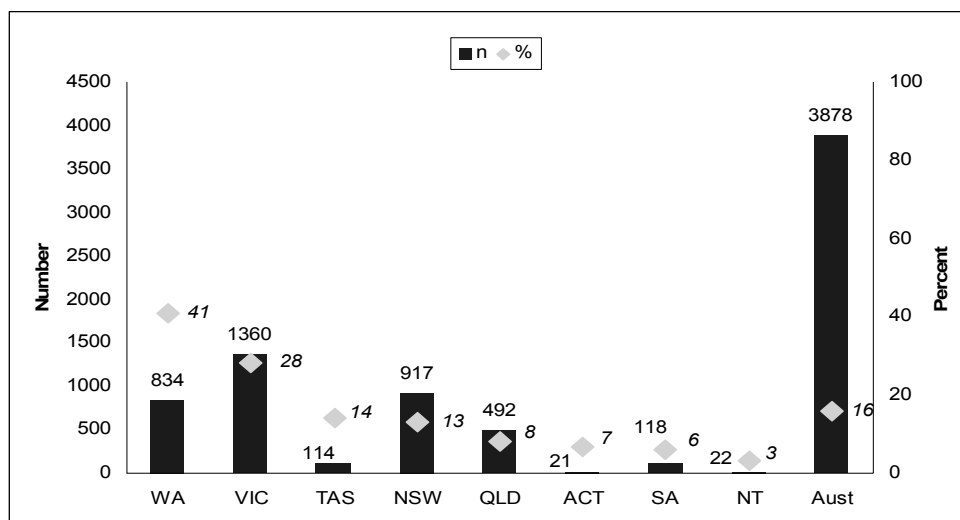
82. Across Australia, fines were ordered in 4,006 cases, being 16 per cent of the 25,160 fraud and drug cases from 2000–2004. As shown in Figure A2.52, fines were issued in 16 per cent of fraud cases (n=3,878) and 11 per cent of drug cases (n=128).

*Figure A2.52: Fines, by case type*

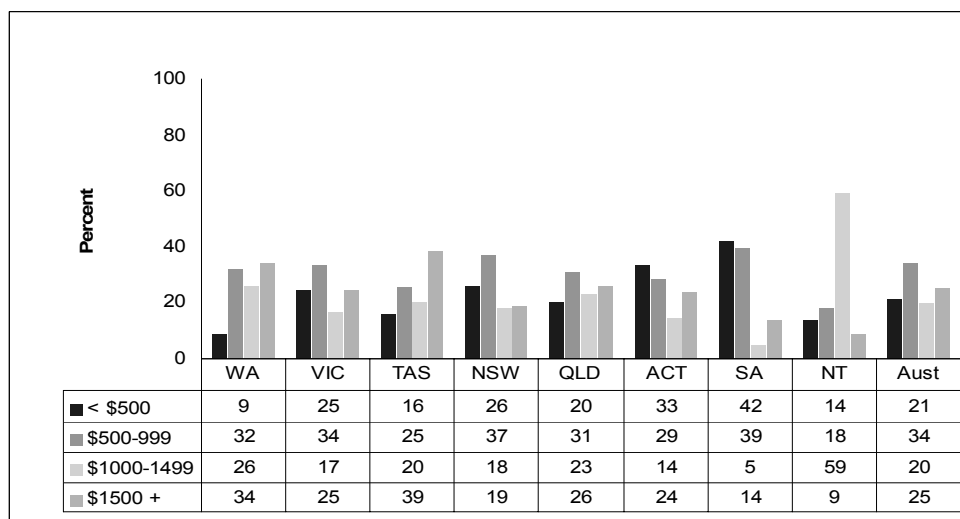


### *Fraud cases*

83. As Figure A2.53 shows, in each jurisdiction the majority of fraud cases do not result in fines, though in Western Australia (41 per cent of cases) and Victoria (28 per cent of cases) the use of fines appears to be much greater than in other jurisdictions (ranging from 14 per cent in Tasmania to 3 per cent in the Northern Territory).

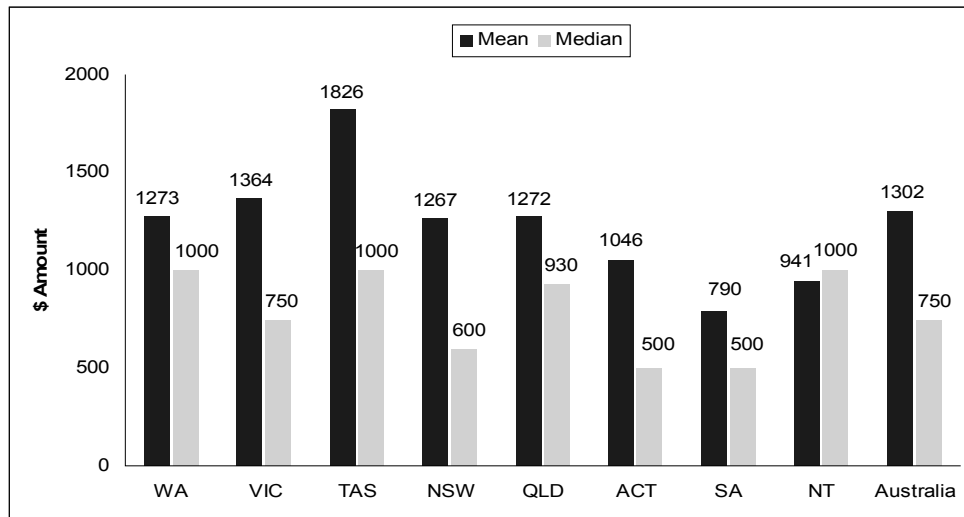
**Figure A2.53: Fines in fraud cases, by jurisdiction**

84. Figure A2.54 shows the amounts of fines awarded, separated into four categories for fraud cases only. Tasmania tends to order a greater percentage of fines in the highest amount category than the other states, while Western Australia issues relatively few fines below \$500.

**Figure A2.54: Amount of fines in fraud cases, by jurisdiction**

85. The mean and median amounts for fines awarded in fraud cases in each jurisdiction are shown in Figure A2.55. There is relatively little variation between each other or against the mean and median amounts for fines across Australia overall, with no statistically significant differences observed.

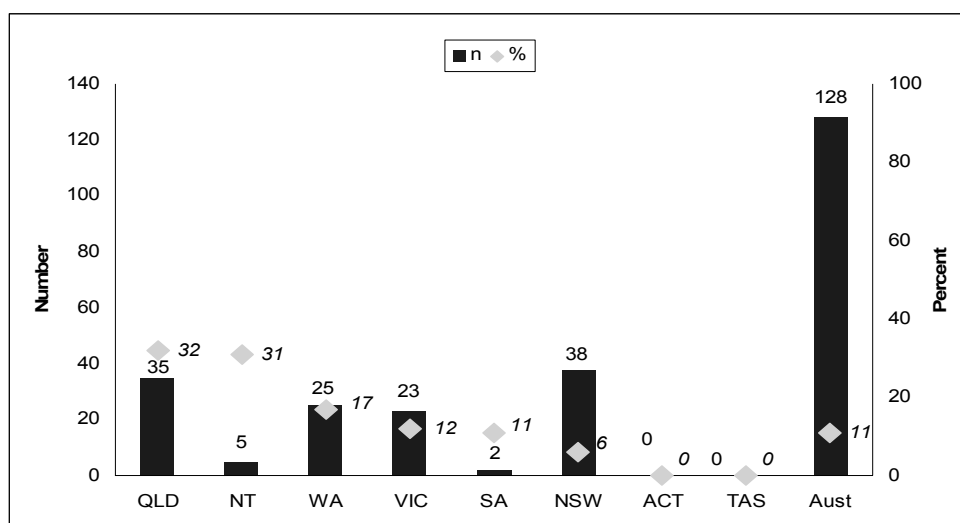
**Figure A2.55: Mean and median fine amounts in fraud cases, by jurisdiction**



### Drug cases

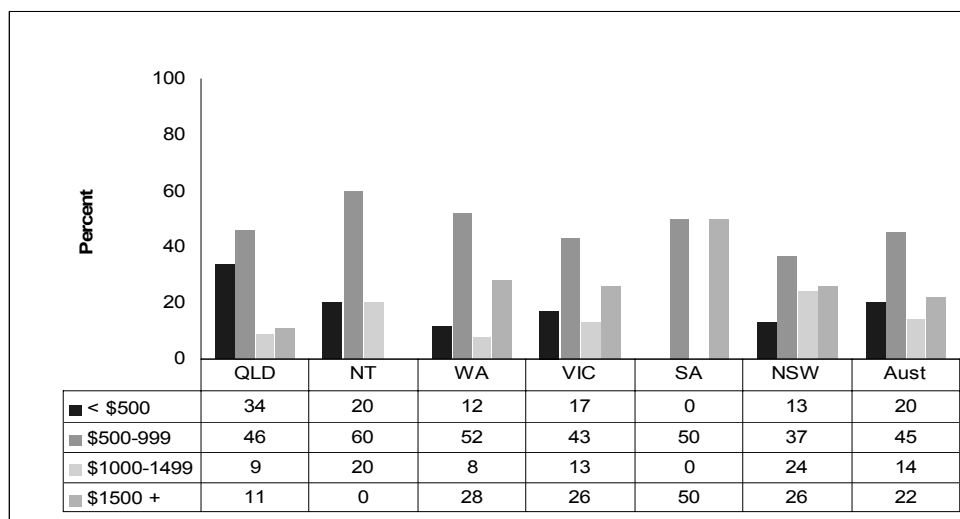
86. The percentages of drug cases in which fines are issued in each jurisdiction are shown in Figure A2.56. Queensland ordered fines in the greatest percentage of drug cases (32 per cent; n=35), followed by the Northern Territory (31 per cent; n=5). The ACT and Tasmania had only one drug case in the dataset.

**Figure A2.56: Fines in drug cases, by jurisdiction**



87. The amounts of fines awarded in drug cases are shown in Figure A2.57. In most jurisdictions, and across Australia overall, the majority of fines are in the \$500 to \$999 category.

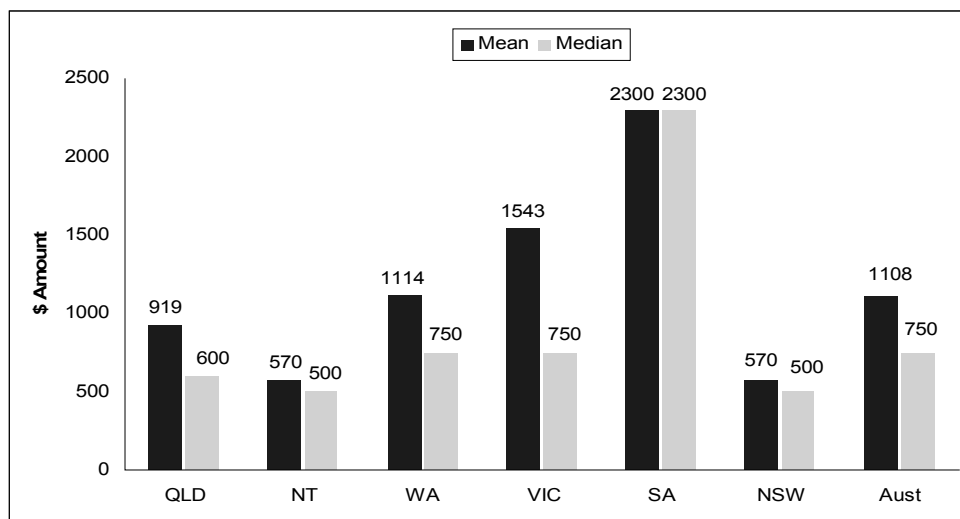
**Figure A2.57: Fine amounts in drug cases, by jurisdiction**





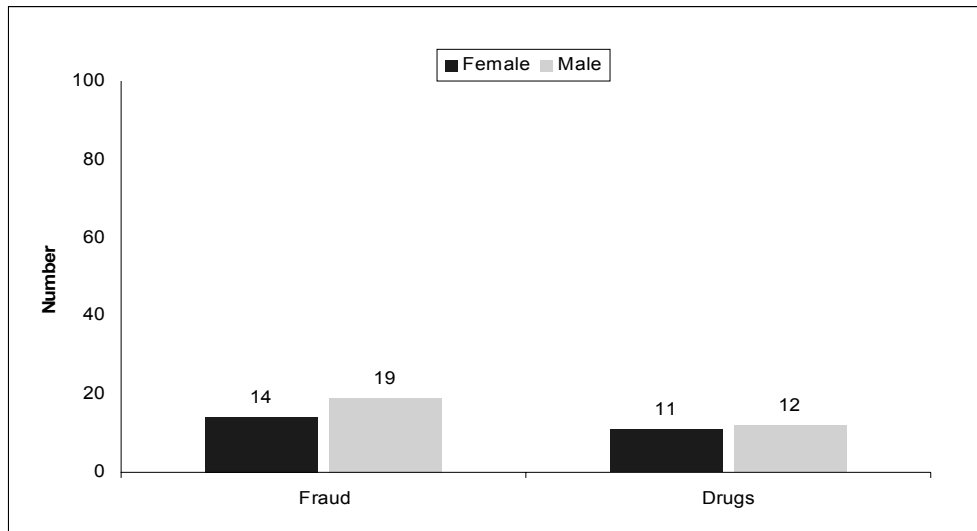
88. The mean and median amounts for fines awarded in drug cases in each jurisdiction are shown in Figure A2.58. While the amounts awarded in South Australia appear higher than other jurisdictions, this is based on only two cases and there are no statistically significant differences between jurisdictions.

**Figure A2.58: Mean and median fine amounts in drug cases, by jurisdiction**



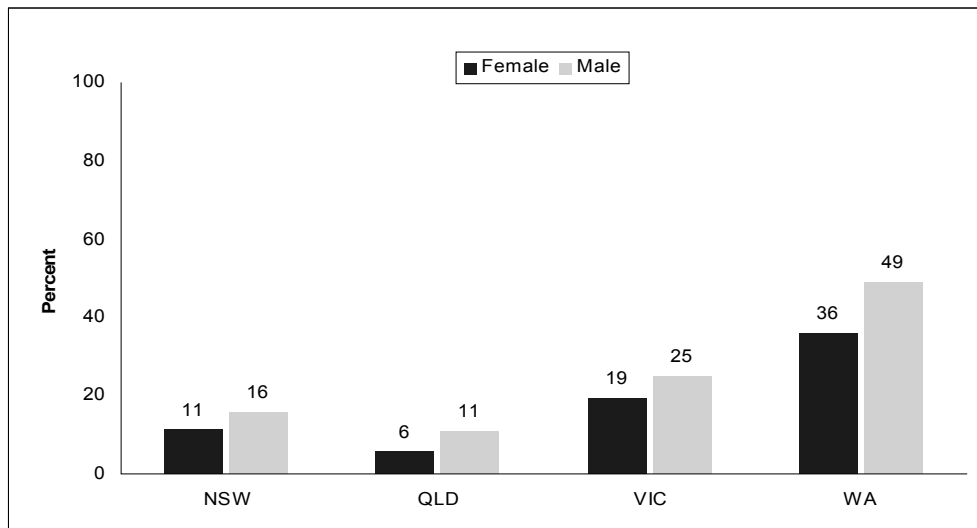
### ***Sex differences***

89. As shown in Figure A2.59, male offenders (19 per cent) are significantly more likely to receive fines in fraud cases than female offenders (14 per cent). There is no significant difference in the sex distribution of fines in drug cases.

**Figure A2.59: Fines by case type and sex**

Statistically significant at  $p < .01$ .

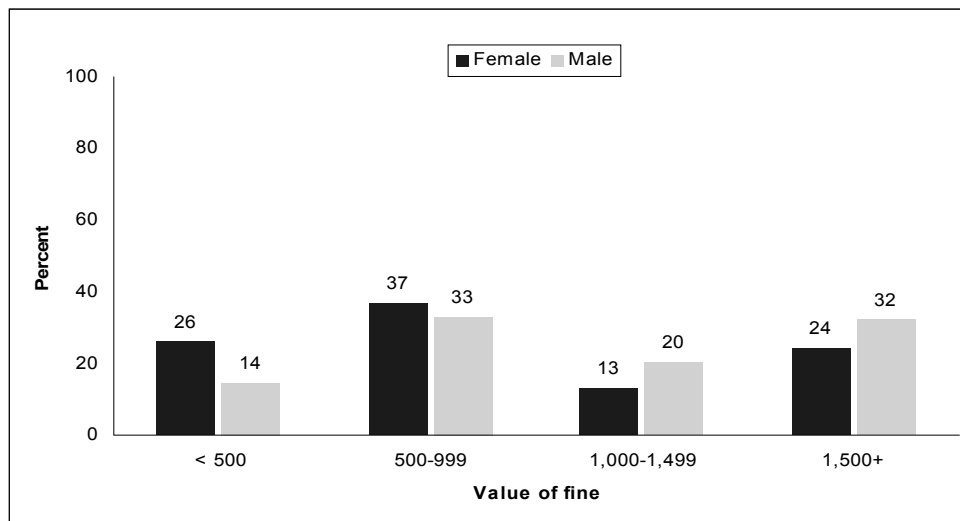
90. Figure A2.60 shows the sex differences in the ordering of fines in fraud cases for selected jurisdictions. Consistent with the Australia-wide figures for fraud cases in Figure A2.59, males are more likely to be ordered to pay fines than females. Statistically significant differences were observed in NSW, Queensland, Victoria and Western Australia.

**Figure A2.60: Fines in fraud cases by sex, selected jurisdictions**

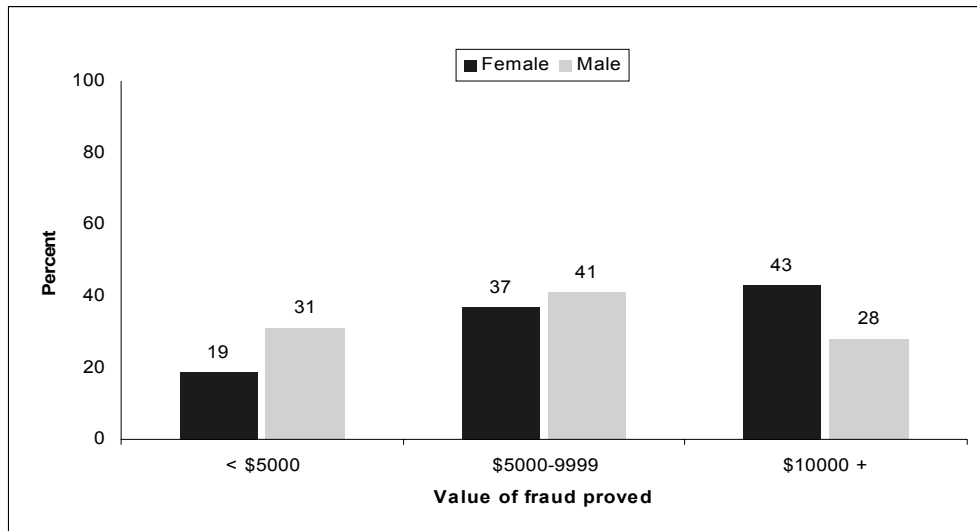
Statistically significant at  $p < .01$ .

91. In Victoria, a statistically significant difference ( $p < .01$ ) was observed in the amounts of fines ordered in fraud cases for female versus male offenders (Figure A2.61). Females (63 per cent) were more likely than males (47 per cent) to receive fines of less than \$1,000. Conversely, males (52 per cent) were more likely than females (37 per cent) to receive fines of \$1,000 or more. Significant differences were not observed in the other jurisdictions.

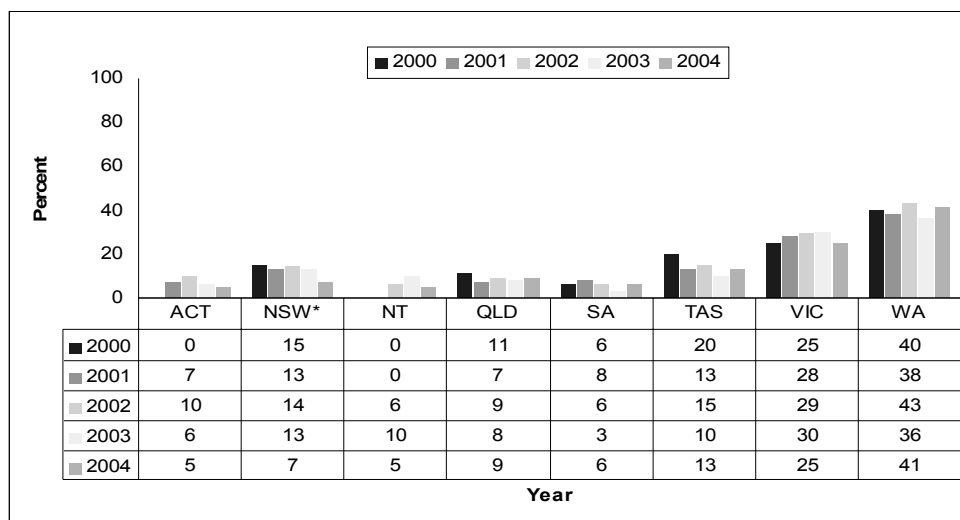
**Figure A2.61: Amounts of fines ordered in Victorian fraud cases, by sex**



92. The greater likelihood of males than females being given higher fines in Victoria exists despite a significantly ( $p < .01$ ) greater percentage of females committing relatively serious fraud charges, based on the fraud amounts proved (Figure A2.62). Nineteen per cent of female offenders committed fraud charges involving less than \$5,000, compared with 31 per cent of males. At the other end of the scale, more females (43 per cent) than males (28 per cent) were convicted of fraud charges involving amounts of \$10,000 or more.

**Figure A2.62: Proved fraud amounts in Victorian fraud cases, by sex****Fines over time**

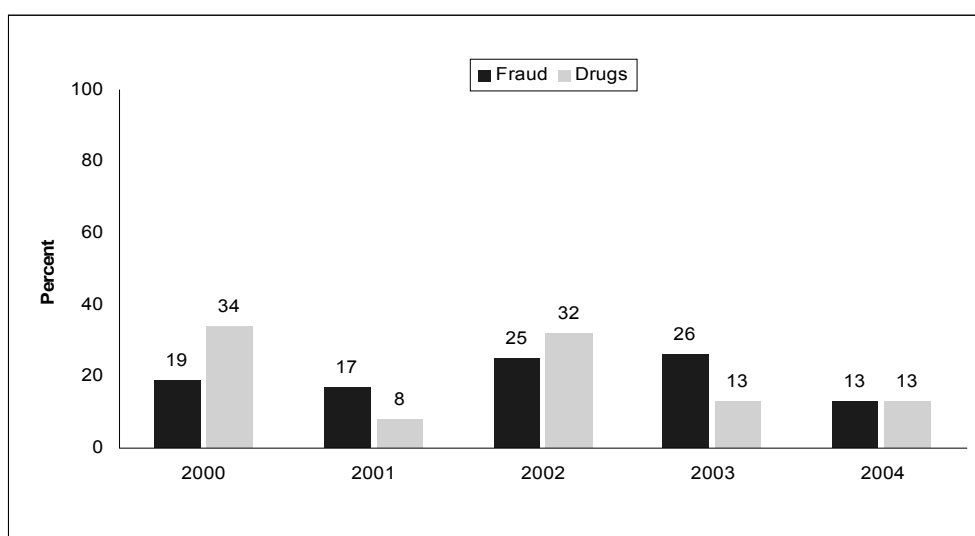
93. The data indicate that all jurisdictions, except NSW, have remained relatively stable in their ordering of fines across the five-year period (Figure A2.63). Western Australia has consistently ordered fines in a higher percentage of cases than other jurisdictions, followed by Victoria. NSW is the only jurisdiction in which there has been a statistically significant reduction in the percentage of cases for which fines are ordered across this period.

**Figure A2.63: Ordering of fines, by jurisdiction, 2000–2004**

Statistically significant at  $p < .01$ .

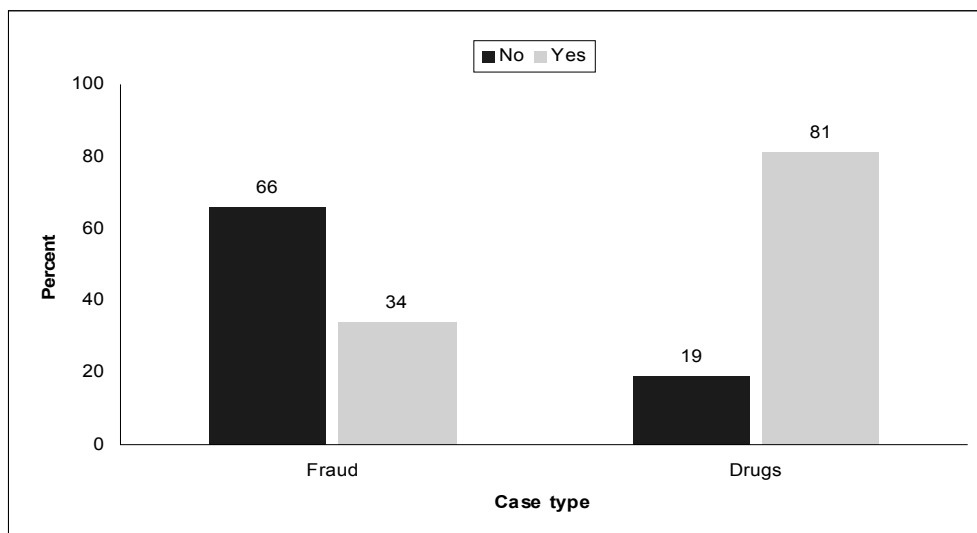
94. There is no consistent trend in the use of fines in NSW across the five-year period, (Figure A2.64). While the variation in percentage of drug cases in which fines are ordered is likely to be the result of differences arising from a relatively small number of individual cases, it is not clear from the available data why there is variation in the fraud cases. Further analysis of the circumstances of the individual cases would be required.

**Figure A2.64: Ordering of fines in NSW, by case type**



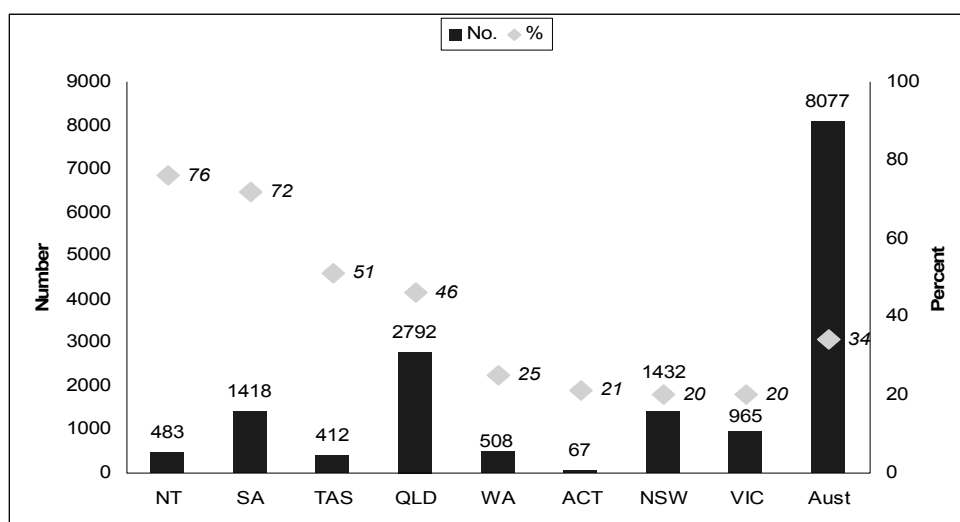
### Prison sentences

95. A total of 8,980 cases (36 per cent of all cases) resulted in the imposition of a prison sentence. Thirty-four per cent of fraud cases and 81 per cent of drug cases resulted in a prison sentence (Figure A2.65). Seventy-four per cent of fraud cases had fully suspended sentences, with a prison term served in 26 per cent. Only five per cent of the drug cases had fully suspended sentences with 95 per cent involving a period of time served in prison. This reflects the level of seriousness of the cases appearing in the courts.

**Figure A2.65: Prison sentences by case type****Fraud cases**

96. As there are likely to be differences in the use of prison sentences between fraud and drug cases, and because the case types are not distributed in the same way across the jurisdictions, outcomes in this section will be presented separately for each case type.

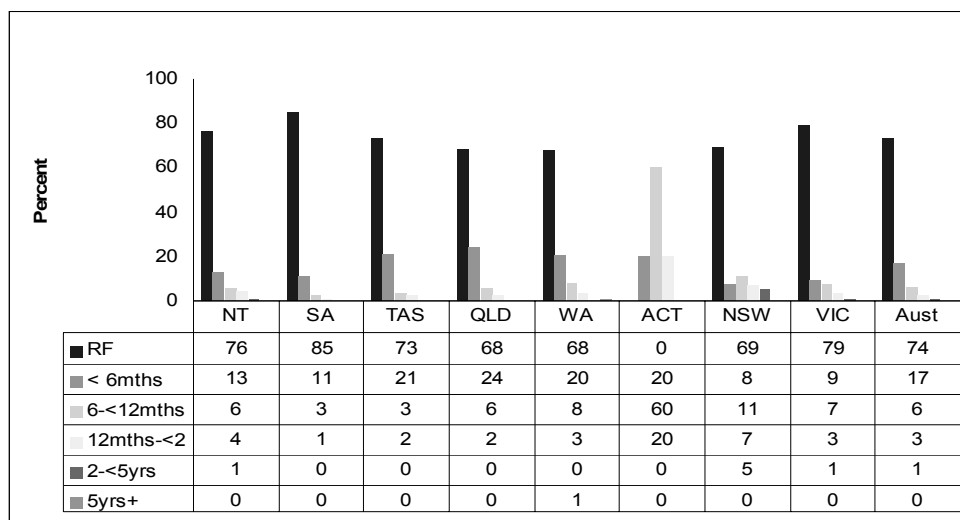
97. Figure A2.66 shows the relative use of prison sentences in fraud cases in each jurisdiction. Prison terms are more likely to be imposed in the Northern Territory and South Australia than in other jurisdictions and prison is used relatively infrequently in Western Australia, the ACT, NSW and Victoria.

**Figure A2.66: Prison sentences in fraud cases, by jurisdiction**

**Minimum prison terms—fraud cases**

98. Figure A2.67 shows minimum prison terms imposed in fraud cases. In all jurisdictions except the ACT, the most common minimum prison term was for the offender to be released forthwith (RF) on a wholly suspended sentence. In these jurisdictions, few offenders were required to serve any time in prison. When they did serve time, this was usually for a period of less than six months. A higher percentage of ACT offenders than those in other jurisdictions were given sentences with a minimum of six months or more.

**Figure A2.67: Minimum prison terms in fraud cases, by jurisdiction**



*Head sentences—fraud cases*

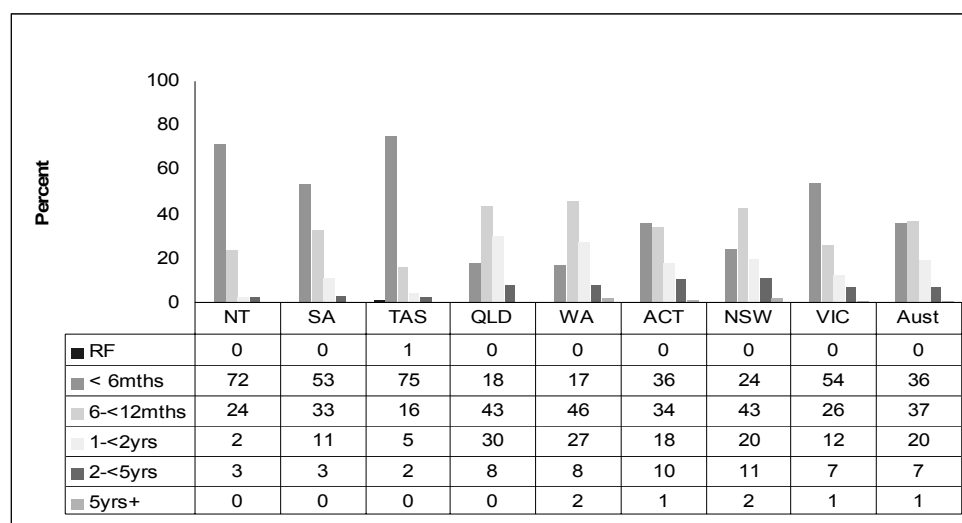
99. Head sentences for fraud cases are shown in Figure A2.68. In the ACT, 70 per cent of offenders were given head sentences of less than 12 months, while 29 per cent of head sentences were 12 months or more. In NSW, 67 per cent of head sentences were for less than 12 months, with 33 per cent greater than this.

100. Head sentences in the Northern Territory showed a tendency for offenders to be given relatively short maximum terms, with 72 per cent receiving less than six months and 96 per cent receiving less than 12 months. Only a small percentage received relatively long sentences in the Northern Territory. In Queensland only 18 per cent of offenders received less than six-month maximum terms and 61 per cent less than 12 months.

101. In South Australia a majority of offenders (53 per cent of cases) received less than six months as a head sentence and a further 33 per cent received less than 12 months. In Tasmanian cases that resulted in a prison sentence, 75 per cent of cases had head sentences of less than six months and only seven per cent of head sentences were for 12 months or more.

102. A majority of Victorian cases (54 per cent) had head sentences of less than six months and 80 per cent were for less than 12 months. In Western Australia, only 17 per cent of cases had head sentences less than six months while 37 per cent were for one year or more.

**Figure A2.68: Head sentences in fraud cases, by jurisdiction**



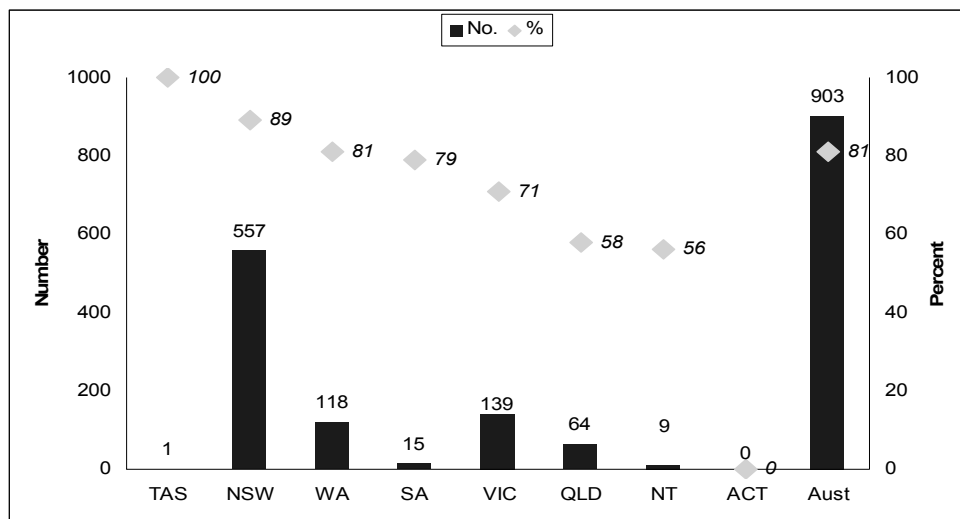


### Drug cases

103. Figure A2.69 shows the imposition of prison sentences in drug cases in each jurisdiction, arranged in order of the jurisdictions ordering prison sentences in the largest percentage of cases. Tasmania is based on only a single case, which resulted in a prison sentence, while the single drug case in the ACT did not.

104. Most drug cases are prosecuted in NSW and this jurisdiction had the greatest number of drug cases resulting in a prison sentence. Excluding the ACT, each jurisdiction imposed prison sentences in a majority of drug cases. Overall, 81 per cent of drug cases resulted in a prison sentence.

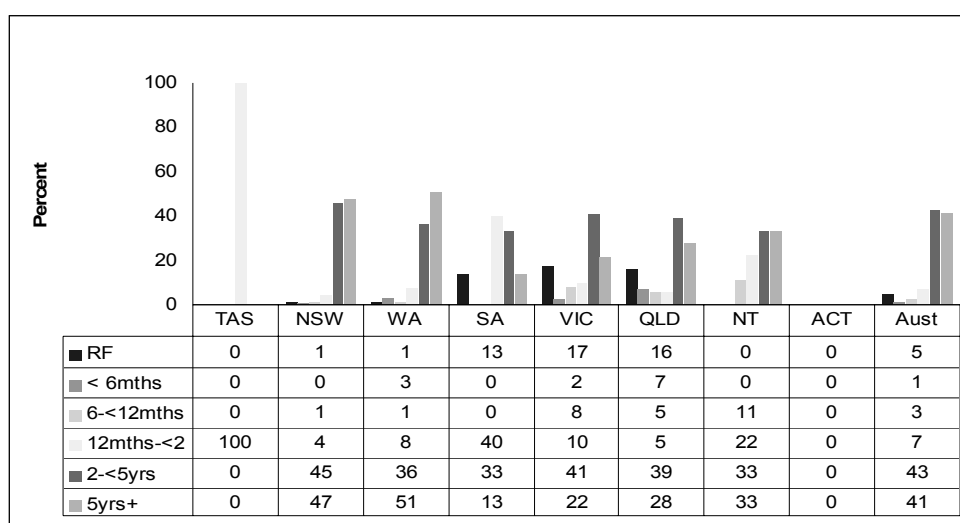
**Figure A2.69: Prison sentences in drug cases, by jurisdiction**



*Minimum prison terms—drug cases*

105. Minimum prison terms in drug cases are shown in Figure A2.70. Compared with fraud cases, these are much less likely to result in a wholly suspended sentence, with most offenders in each jurisdiction being required to serve some time in prison. Leaving aside the ACT and Tasmania, which each had only a single drug case in the dataset, in all jurisdictions except South Australia the majority of cases resulted in prison terms of two years or more. Across Australia overall, some 84 per cent of drug cases resulted in the offender being required to serve at least two years in prison.

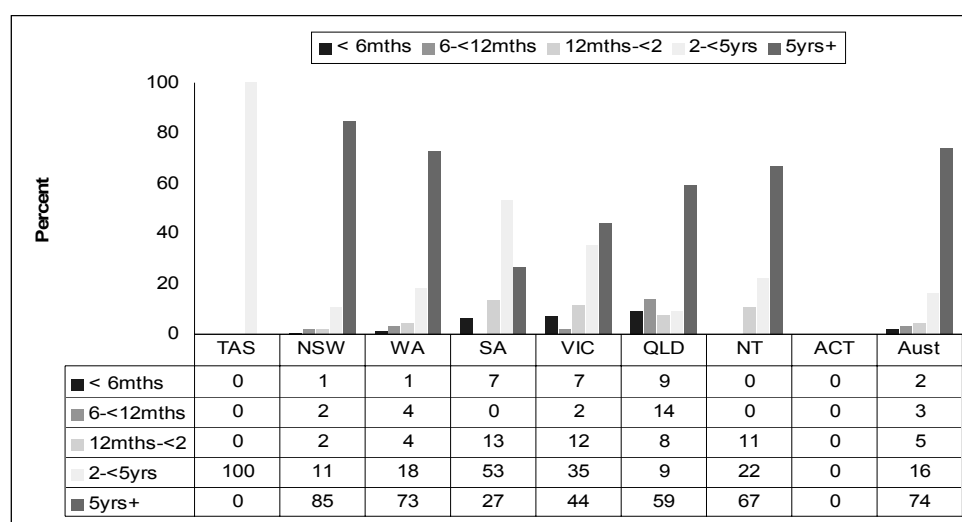
**Figure A2.70: Minimum prison terms in drug cases, by jurisdiction**



**Head sentences—drug cases**

106. Figure A2.71 shows the head sentences that were ordered in drug cases for each jurisdiction. Leaving aside the single cases in the ACT and Tasmania, in each jurisdiction except South Australia the most common result was a head sentence of five years or more. For NSW, the Northern Territory, Queensland and Western Australia the majority of cases resulted in these relatively long sentences. In Victoria this was also the most common result, although a high percentage of cases resulted in two to five year head sentences. In South Australia the majority of cases received head sentences of between two and five years. Queensland had more cases resulting in shorter sentences of less than 12 months than any other jurisdiction.

**Figure A2.71: Head sentences in drug cases, by jurisdiction**

**Conclusion**

107. The data presented in this section have shown that there are a range of sentencing outcomes, which are differentially applied in terms of whether the case relates to fraud or drugs, the seriousness of the offending, and the jurisdictions. This aggregated analysis raises some interesting differences that need further and more detailed analysis, which cannot be undertaken using this data source. The next section focuses on some model types of cases and their sentencing outcomes.

## **Examination of model cases**

108. The preceding section examined the use of specific sentencing outcomes across each jurisdiction. There is in fact a great deal of diversity in sentencing outcomes and this may be the result of diversity in the types of cases. Some cases are for relatively minor frauds, others are for very serious fraud cases, some drug cases involve smaller amounts of drugs than others or the type of drugs involved varies. This section attempts to address this problem in part by examining a number of typical or 'model' cases within each of the broad categories of fraud and drug cases.

109. Six model charges were analysed as part of this review. These were:

- FM1—Medium level fraud of between \$50,000 and \$500,000.
- FM2—Higher level fraud involving amounts over \$500,000.
- DM1—Drug matters involving a commercial quantity of MDMA (ecstasy).
- DM2—Drug matters involving a trafficable quantity of heroin.
- DM3—Drug matters involving a commercial quantity of heroin.
- DM4—Drug matters involving cannabis or cannabis resin.

110. The primary interest of this analysis is the sentencing outcome, namely, the penalty that is likely to be handed down for similar charges within and across jurisdictions. The analysis examines the penalty type handed down by the court for two different categories of sentences:

- sentences resulting from a single charge on the day; and
- sentences resulting from a case with multiple charges on the day.

111. It is easy to conceive that some offenders will face only single charges, while others will face more than one charge. In the former, offenders are sentenced by the court for the model offence charge only, while in the latter the penalty will also take into account the type or severity of other charges being dealt with by the court at the same time. It is only in those situations where a single charge (the model charge) is being considered by the court that we can be reasonably confident that the penalty is directly related to the model charge. Moreover, a comparison of the sentencing outcomes between single and multiple charge episodes can be useful in confirming that multiple charge episodes are more likely to result in more severe sentencing outcomes.

112. Where sentence outcomes occurred on different dates, these are classified as different sentencing episodes and were not counted in the charges.<sup>6</sup> Thus if the offender was sentenced on the same day to five charges this was defined as a single episode but if he or she received

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6 The use of episodes is the most common technique for analysing offending behaviour (see Makkai, Ratcliffe, Veraar and Collins, 2004).

sentences on two separate days this was defined as two separate episodes.<sup>7</sup> Across all the model charges there were 909 sentencing episodes of which 690 involved only one charge (the model charge) and 219 involved multiple charges including the model charge on the day (the model charge plus one or more other charges) (Figure A2.72).

**Figure A2.72: Model fraud and drug sentencing episodes, single and multiple charges**

		Model Characteristics	Single charge (A)	Multiple charges (B)	Total sentencing episodes (A+B)
Fraud models	FM1	Medium level fraud—\$50,000–500,000	269	141 (C)	410
	FM2	High level fraud—over \$500,000	73	15	88
Drugs models	DM1	Commercial quantity of MDMA (ecstasy)	81	20	101
	DM2	Trafficable quantity of heroin	134	21	155
	DM3	Commercial quantity of heroin	49	2	51
	DM4	Cannabis or cannabis resin	84	20	104
(Total)			(690)	(219)	(909)

A Sentencing episodes where a single charge was dealt with.

B Sentencing episodes where multiple charges were dealt with and where at least one charge was a model charge.

C One sentencing episode involved three FM1 charges and one additional charge—all other 140 multiple charge sentencing episodes included just one FM1 charge and one or more additional charges.

113. The advantage of treating the model charges within a ‘daily’ episodic framework is that it allows more accurate comparison of sentencing and penalty outcome if all charges occurring within that sentencing episode are accounted for. The alternative, which is to treat each model charge as a separate unit of analysis, would not have been able to account for sentencing differences arising where the offender was in fact sentenced for multiple charges on the same day. The sentencing outcomes from the latter analysis may have been artificially inflated in cases where the offender was sentenced for more than one charge.

7 Of the 909 episodes 97 (11 per cent) also had sentences that occurred on another day. It is unlikely that these charges would have affected sentencing on the day of the model charge. These additional charges are not analysed in the model cases.

114. Figure A2.72 illustrates the number of sentencing episodes for each model charge, and whether the episode was for a single charge (column A) or for multiple charges (column B). The final column provides the total count of sentencing episodes within each model charge group. In summary:

- FM1—in total there were 410 sentencing episodes involving at least one FM1 charge. In the majority of cases (n=269) the FM1 charge was the only single charge listed within that sentencing episode. The remaining 141 episodes were attributable to cases where one or more other charges were dealt with in addition to the FM1 charge.
- FM2—in total there were 88 sentencing episodes involving at least one FM2 charge. In the majority of cases (n=73) the FM2 charge was the only single charge listed within that sentencing episode. The remaining 15 episodes were attributable to cases where one or more other charges were dealt with in addition to the FM2 charge.
- DM1—in total there were 101 sentencing episodes involving at least one DM1 charge. In the majority of cases (n=81) the DM1 charge was the only single charge listed within that sentencing episode. The remaining 20 episodes were attributable to cases where one or more other charges were dealt with in addition to the DM1 charge.
- DM2—in total there were 155 sentencing episodes involving at least one DM2 charge. In the majority of cases (n=134) the DM2 charge was the only single charge listed within that sentencing episode. The remaining 21 episodes were attributable to cases where one or more other charges were dealt with in addition to the DM2 charge.
- DM3—in total there were 51 sentencing episodes involving at least one DM3 charge. In the majority of cases (n=49) the DM3 charge was the only single charge listed within that sentencing episode. The remaining two episodes were attributable to cases where one or more other charges were dealt with in addition to the DM3 charge.
- DM4—in total there were 104 sentencing episodes involving at least one DM4 charge. In the majority of cases (n=84) the DM4 charge was the only single charge listed within that sentencing episode. The remaining 20 episodes were attributable to cases where one or more other charges were dealt with in addition to the DM4 charge.

115. It is important to note that the number of charges within any sentencing episode is only one of the many factors taken into consideration by the court. Qualitative assessment of prior criminal history or situational and circumstantial information will also influence the court. This analysis does not account for these other factors.

### **Fraud Model Offence No. 1**

116. Fraud Model Offence No. 1 (FM1) covered medium level social security fraud cases. A total of 412 charges were attributable to 410 individual offenders. The remaining two charges were attributable to a single offender who in the same sentencing episode was charged with three FM1 offences.

117. Figure A2.73 illustrates the distribution of these 410 offenders by the number of charges faced at sentence for the FM1 charge. The results illustrate that for around two-thirds of offenders (n=269; 66 per cent) the FM1 charge was the only charge recorded on that episode of sentencing. A further 25 per cent (n=101) were charged for two offences (one offence in addition to the FM1 charge), while the remaining nine per cent were charged with three or more offences.

118. By jurisdiction, NSW recorded the highest number of offenders sentenced for an FM1 charge (37 per cent), followed by Victoria (33 per cent) and Queensland (21 per cent). The Northern Territory recorded the fewest offenders (n=4) with a FM1 charge.

**Figure A2.73: FM1 sentencing episodes, by jurisdiction and number of other charges listed concurrently for sentence**

	1	2	3	4 or more	Total	% by state
<b>ACT</b>	6	1	0	0	7	2
<b>NSW</b>	93	42	10	8	153	37
<b>NT</b>	1	2	0	1	4	1
<b>Qld</b>	39	32	6	10	87	21
<b>SA</b>	5	1	0	0	6	1
<b>Tas</b>	8	2	0	0	10	2
<b>Vic</b>	114	18	2	2	136	33
<b>WA</b>	3	3	1	0	7	2
<b>Total</b>	269	101	19	21	410	100
<b>% by other charge</b>	66	25	5	5	100	

119. As a method for understanding the different types of sentencing outcomes used for FM1 cases, it is necessary in the first instance to examine the outcomes for cases where FM1 was the only charge. As noted in Figure A2.73 there were 269 FM1 sentencing episodes (66 per cent) where the offender was sentenced for one charge only (the FM1 charge). Using these 269 sentencing episodes, Figure A2.74 illustrates the prevalence of various sentencing outcomes by jurisdiction. Given that multiple penalties can be applied to a single sentencing episode, two additional measures—the average number of penalties per sentence and the most frequent penalty combinations—are also provided.

120. Figure A2.74 illustrates that:

- Across all jurisdictions, a prison sentence was the most likely penalty imposed for an FM1 charge (81 per cent of episodes included a prison sentence), followed by a s 20(1)(b) bond (72 per cent) and reparation order (64 per cent).
- The average number of penalties applied across all sentencing episodes was two, and the most frequent combination was prison and a s 20(1)(b) bond.

**Figure A2.74: Sentencing outcomes of FM1 single charge sentencing episodes (n=269)**

		ACT	NSW	NT	Qld	SA	Tas	Vic	WA	% by penalty
1	Prison	6	65	1	37	5	8	94	3	81
2	Bond 19B	0	1	0	0	0	0	2	0	1
3	Bond 20(1)(a)	0	10	0	0	0	0	5	0	6
4	Bond 20(1)(b)	6	61	0	32	5	0	88	3	72
5	Court costs	0	5	0	0	1	0	2	0	3
6	Fine	0	4	0	2	0	0	5	0	4
7	CSO	0	6	0	0	0	0	0	0	2
8	Dismiss	0	0	0	0	0	0	1	0	0
9	Other	0	22	0	0	0	0	5	0	10
10	Reparation	4	63	1	21	2	5	77	1	64
	Total offenders	6	93	1	39	5	8	114	3	—
	Average number of penalties	3	3	2	2	3	2	2	2	2
	Most frequent penalty combinations	1,4,10	1,4,10	1,10	1,4	1,4	1,10	1,4,10	1,4	1,4

121. Although in some jurisdictions, the number of cases was small, analysis reveals some variation in the type of penalty applied to the FM1 charges. For example, all (100 per cent) six FM1 charges in the ACT resulted in a prison penalty, while in NSW this was the case for 65 (70 per cent) of FM1 charges. Also in NSW, 22 sentencing episodes were classified as ‘other’—additional analyses revealed that these were most likely to be periodic or home detention orders. Regardless of jurisdiction it appears that FM1 charges (at least where they occur alone) are most likely to result in a prison sentence, combined with either a s 20(1)(b) bond or reparation order.

122. Figure A2.75 compares the length of prison sentence imposed in each jurisdiction for those cases where FM1 was the only charge. There are two measures provided, the average minimum sentence and average maximum sentence. In some cases a minimum sentence was coded as zero. In both these cases the prison sentence was fully suspended. They remain coded as zero days for the minimum length of the prison sentence.

**Figure A2.75: Prison sentences for FM1 single charge sentencing episodes resulting in prison (n=219)**

	ACT	NSW	NT	Qld	SA	Tas	Vic	WA	Total
<b>Minimum prison sentence</b>									
N	6	65	1	37	5	8	94	3	219
Range	0-6	0-44	—	0-18	0-12	3-24	0-36	0-12	0-44
Mean (months)	3	10	36	7	4	12	3	7	6
<b>Maximum prison sentence</b>									
N	6	65	1	37	5	8	94	3	219
Range	18-36	2-84	54-54	4-54	12-36	9-42	3-54	18-36	2-84
Mean (months)	23	29	54	32	29	21	15	28	23

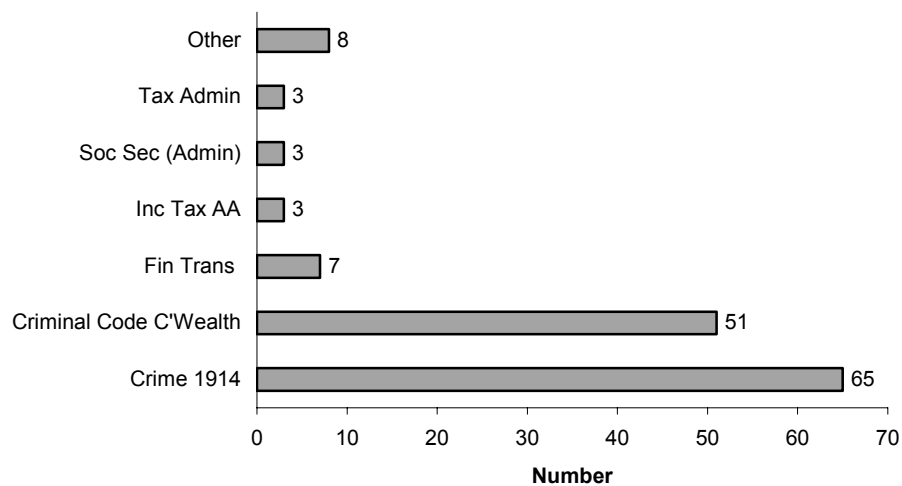


123. The results demonstrate that:

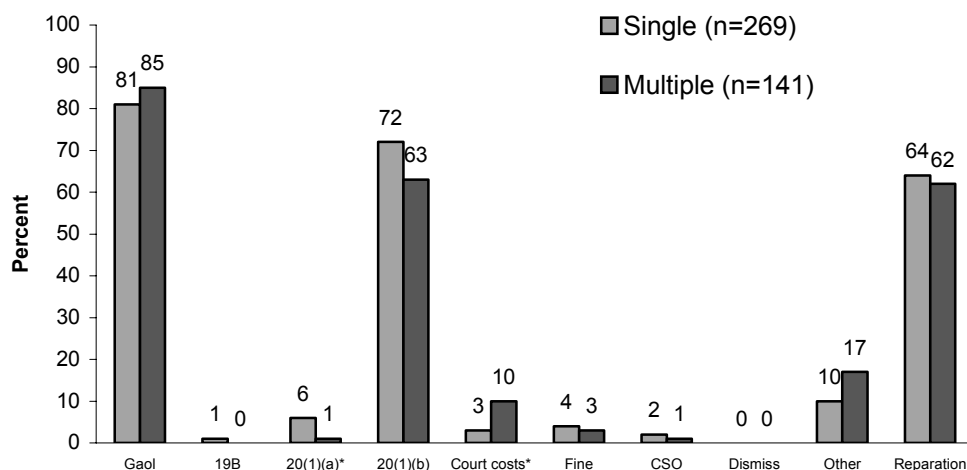
- Across all jurisdictions the minimum prison sentence ranged from zero (fully suspended) to 44 months—the average was six months.
- The maximum prison sentence ranged from two months to 84 months—the average was 23 months.
- Some jurisdictional variation exists. For example, in Victoria, where 94 prison sentences were handed down, the average minimum sentence was three months and the average maximum was 15 months. This is somewhat lower than in NSW where the average minimum was 10 months and the average maximum was 29 months. This difference was statistically significant.

124. It should be noted, however, that these aggregate sentence lengths are influenced by a variety of factors, both situational and personal. For example, an offender's criminal history may have a significant influence on the sentence imposed by the court. It is not possible to account for all the various factors that may have an impact on the likely prison sentence.

125. In addition to the 269 sentencing episodes where FM1 was the only charge, there were 141 episodes where multiple charges were dealt with by the court. To this point, the analysis has excluded these cases because multiple charges are likely to result in higher sentence outcomes. Figure A2.76 shows a frequency distribution for the other charges listed concurrently with the FM1 charge. The *Crimes Act* was the most frequently listed charge (n=65), followed by the *Criminal Code* (Cth) accounting for a further 51 charges.

**Figure A2.76: Other charges for FM1 sentencing episodes with multiple charges (n=140)**

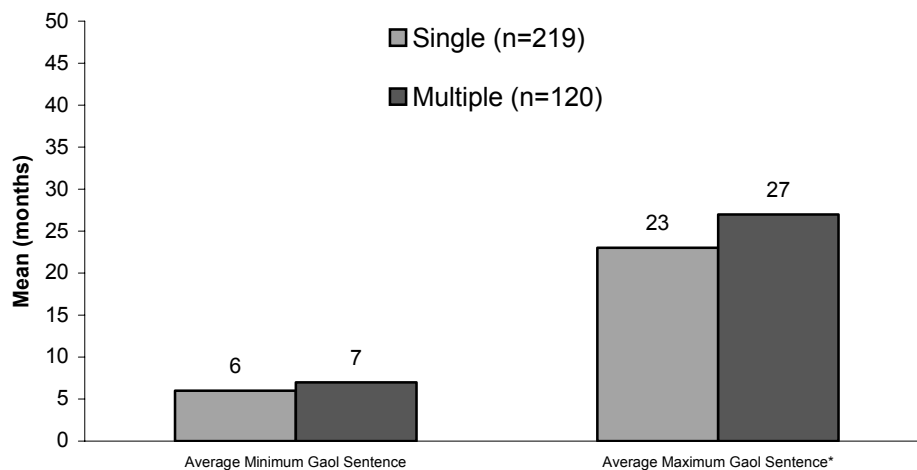
126. Figure A2.77 provides comparative data for the sentencing outcomes according to whether the sentencing episode for the FM1 charge was a single charge or multiple charges. Tests of significance indicate that the observed differences in the use of s 20(1)(a) bonds and court costs is significant. Such bonds are less likely to be an outcome in single charge cases while court costs are more likely to be handed down in multiple charge cases. In both single and multiple charge cases, prison was the most prevalent penalty type, followed by a s 20(1)(b) bond and reparation.

**Figure A2.77: Outcomes of FM1 charge cases, by jurisdiction and number of concurrent charges**

\* Statistically significant difference at  $p < 0.05$ .

127. Figure A2.78 compares the average minimum and maximum prison sentence lengths. In terms of minimum prison sentences, there was only a one-month difference between FM1 sentencing episodes that included a single charge (6 months) or multiple charges (7 months). This difference is greater for the maximum sentence length—a difference of four months, which is statistically significant.

**Figure A2.78: FM1 comparative prison sentences for single and multiple charge episodes**



\* Statistically significant difference at  $p < 0.05$ .

## Fraud Model Offence No. 2

128. Fraud Model Offence No. 2 (FM2) cases cover higher-level fraud involving amounts over \$500,000. Eighty-three per cent of offenders only had one charge, while 18 per cent had two or more charges (including one FM2 charge). By jurisdiction, Victoria had the highest number of offenders sentenced for a FM2 charge (56 per cent) followed by NSW (19 per cent). There were no FM2 charges in the Northern Territory or South Australia and only five in Tasmania and seven in Western Australia.

**Figure A2.79: FM2 sentencing episodes, by jurisdiction and number of other charges listed concurrently for sentence**

	1	2	3	4 or more	Total	% by state
ACT						
NSW	9	2	2	4	17	19
NT						
Qld	6	2	1	1	10	11
SA						
Tas	5	0	0	0	5	6
Vic	47	0	2	0	49	56
WA	6	0	1	0	7	8
Total	73	4	6	5	88	100
% by other charge	83	5	7	6	100	

129. Figure A2.80 shows the sentencing outcomes for the 83 per cent of offenders who had only an FM2 charge. The most likely penalty imposed was a prison sentence (86 per cent of cases) and a s 20(1)(b) bond (77 per cent of cases). A reparation order was also made in 21 per cent of cases. Except for NSW, the average number of penalty outcomes was two—prison and a s 20(1)(b) bond.

**Figure A2.80: Sentencing outcomes of FM2 single charge sentencing episodes, by jurisdiction (n=73)**

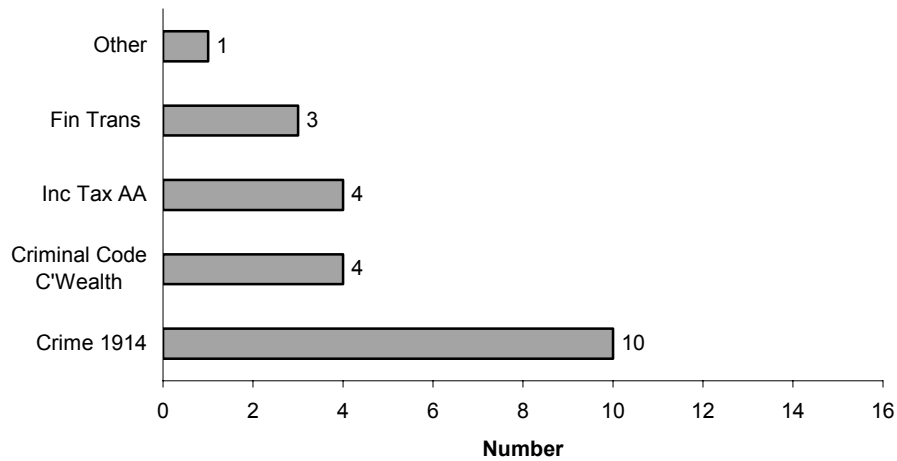
		NSW	Qld	Tas	Vic	WA	% by penalty
1	Prison	6	6	5	40	6	86
2	19B	0	0	0	1	0	1
3	20(1)(a)	0	0	0	5	0	7
4	20(1)(b)	5	4	5	37	5	77
5	Court costs	0	0	0	1	0	1
6	Fine	0	0	0	1	0	1
7	CSO	0	0	0	0	0	0
8	Dismiss	0	0	0	0	0	0
9	Other	1	0	0	1	0	2
10	Reparation	0	0	0	14	1	21
	Total offenders	9	6	5	47	6	73
	Average number of penalties	1	2	2	2	2	2
	Most frequent penalty combinations	1,4	1,4	1,4	1,4	1,4	

130. The average minimum and maximum sentences for FM2 cases are higher than for FM1 cases. As Figure A2.81 shows, across Australia minimum sentences varied between 0 and 56 months while maximum sentences varied from 1 to 152 months. NSW has the highest average minimum sentences followed by Western Australia. The lowest is Tasmania followed by Victoria. Western Australia and NSW also have the highest average maximum sentences while Tasmania and Victoria have the lowest average maximum sentences. In terms of minimum prison sentence, the differences between Victoria and NSW, and between Tasmania and NSW are significant. In terms of maximum prison sentences the differences between Victoria and NSW, and between Victoria and Western Australia are significant.

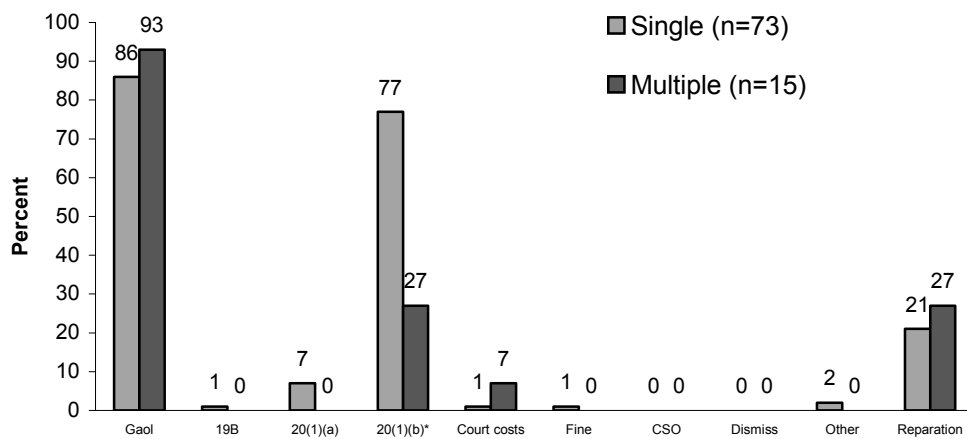
**Figure A2.81: Prison sentences for FM2 single charge sentencing episodes resulting in prison (n=63)**

	NSW	Qld	Tas	Vic	WA	Total
<b>Minimum prison sentence</b>						
N	6	6	5	40	6	63
Range	0-56	6-36	0-7	0-30	10-54	0-56
<b>Mean (months)</b>	<b>27</b>	<b>13</b>	<b>1</b>	<b>8</b>	<b>22</b>	<b>11</b>
<b>Maximum prison sentence</b>						
N	6	6	5	40	6	63
Range	12-152	30-108	4-48	1-60	36-108	1-152
<b>Mean (months)</b>	<b>54</b>	<b>51</b>	<b>21</b>	<b>22</b>	<b>60</b>	<b>31</b>

131. In 17 per cent of cases the offender faced multiple charges. Figure A2.82 indicates that the most frequently listed concurrent charge was under the *Crimes Act 1914*. The next two most common were under the *Criminal Code* (Cth) and the *Income Tax Assessment Act 1997* (Cth).

**Figure A2.82 Other charges for FM2 sentencing episodes with multiple charges (n=14)**

132. Figure A2.83 compares the sentencing outcomes by whether the sentencing episode was for the single FM2 charge or multiple charges. There are some differences. Offenders with multiple charges are more likely to receive a prison sentence and less likely to receive a s 20(1)(b) bond. However only the latter difference is statistically significant.<sup>8</sup>

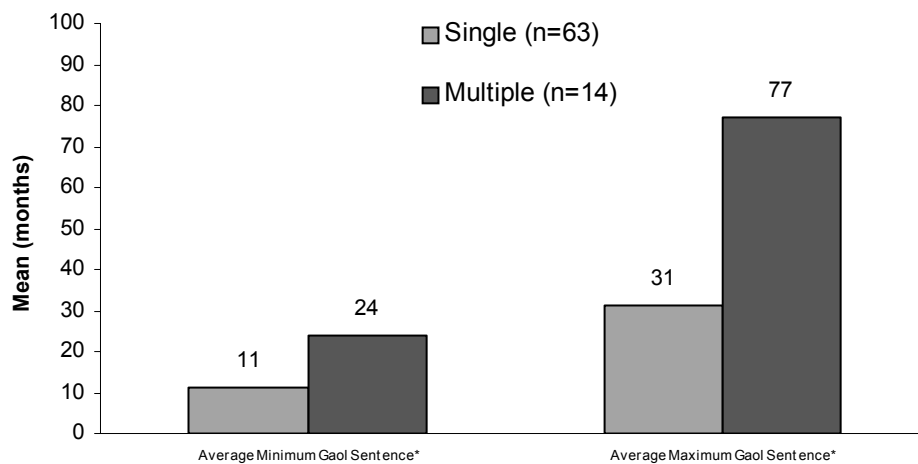
**Figure A2.83: Outcomes of FM2 charge cases, by jurisdiction and number of concurrent charges**

\* Statistically significant difference at  $p < 0.05$ .

8 Sheffe's multiple-comparison tests were used for all comparisons.

133. The difference in sentence outcome is also reflected in the length of sentence (Figure A2.84). The small number of multiple offenders on average receive longer minimum sentences (24 months) and longer maximum sentences (77 months) than those offenders facing a single FM2 charge (11 months and 31 months respectively). These differences are statistically significant.

**Figure A2.84: FM2 comparative prison sentences for single and multiple charge episodes**



\* Statistically significant difference at  $p < 0.05$ .

### Drug Model Offence No. 1

134. Drug Model Offence No. 1 (DM1) covers charges involving trafficable quantities of MDMA. There were 101 cases of which 80 per cent involved a single charge (Figure A2.85). Most cases occurred in NSW (60 per cent) followed by Western Australia (19 per cent) and Victoria (12 per cent). There were no cases in the ACT, the Northern Territory or Tasmania, and only one case in South Australia.

**Figure A2.85: DM1 sentencing episodes, by jurisdiction and number of other charges listed concurrently for sentence**

	1	2	3	Total	% by state
ACT					
NSW	47	11	3	61	60
NT					
Qld	6	2	0	8	8
SA	1	0	0	1	1
Tas					
Vic	10	2	0	12	12
WA	6	2	0	19	19
Total	81	17	3	101	100
%	80	17	3	100	

135. Figure A2.86 shows that all single charge cases received a prison sentence and it was overwhelmingly the only sentence given. This was consistent across jurisdictions.

**Figure A2.86: Sentencing outcomes of DM1 single charge sentencing episodes, by jurisdiction (n=81)**

		NSW	Qld	SA	Vic	WA	% by penalty
1	Prison	47	6	1	10	17	100
2	19B	0	0	0	0	0	0
3	20(1)(a)	0	0	0	0	0	0
4	20(1)(b)	1	0	0	2	0	4
5	Court costs	0	0	0	0	0	0
6	Fine	0	0	0	0	0	0
7	CSO	0	0	0	0	0	0
8	Dismiss	0	0	0	0	0	0
9	Other	1	0	0	0	0	1
10	Reparation	0	0	0	0	0	0
	Total offenders	47	6	1	10	17	81
	Average number of penalties	1	1	1	1	1	—
	Most frequent penalty combinations	1	1	1	1	1	—



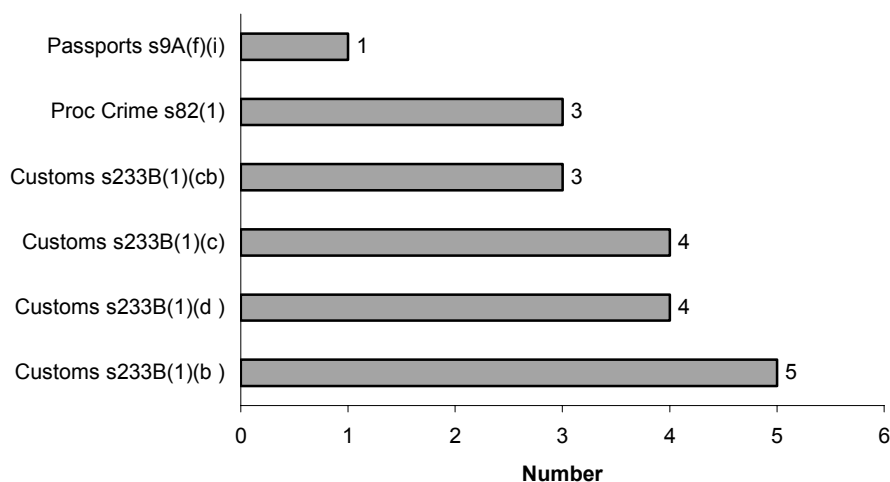
136. There is some variation across jurisdictions in the length of prison terms. Overall, minimum sentences varied between 0 and 252 months with an average of 66 months. Maximum sentences varied between 18 and 1,188 months with an average of 136 months. Victoria and Queensland on average gave the lowest minimum and maximum sentences while South Australia and NSW gave, on average, the highest sentences. Statistical tests revealed no significant differences between the jurisdictions in terms of either the minimum or maximum prison sentences.

**Figure A2.87: Prison sentences for DM1 single charge sentencing episodes resulting in prison (n=63)**

	NSW	Qld	SA	Vic	WA	Total
<b>Minimum prison sentence</b>						
n	47	6	1	10	17	81
Range	0-252	36-84	–	0-108	42-108	0-252
Mean (months)	72	49	96	39	69	66
<b>Maximum prison sentence</b>						
n	47	6	1	10	17	81
Range	42-1188	108-168	–	18-144	84-216	18-1188
Mean (months)	154	124	144	66	132	136

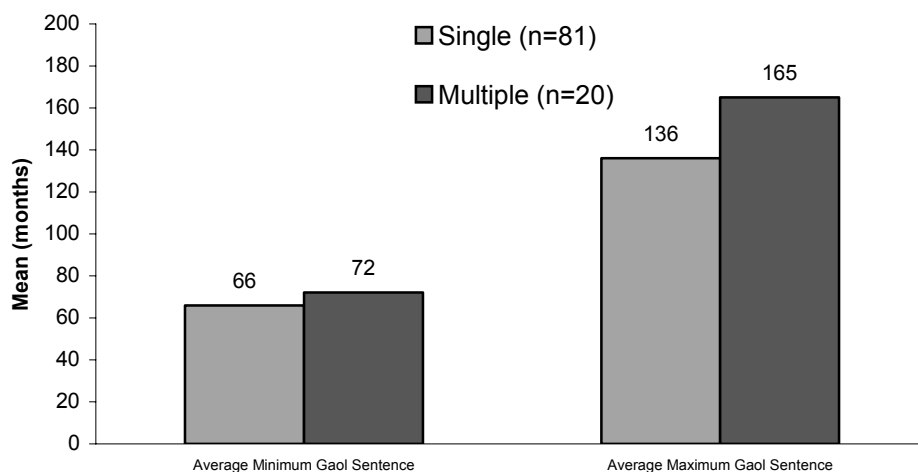
137. For the 20 cases in which the offender had concurrent charges, 16 charges came under various sections of customs legislation, three under proceeds of crime legislation, and one under the passport legislation (Figure A2.88).

**Figure A2.88: Other charges for DM1 sentencing episodes with multiple charges (n=20)**



138. Figure A2.89 shows the average minimum and maximum sentences for DM1 charges when there are single and multiple charge episodes. Although the data show longer sentences for those with multiple charges, the differences are not statistically significant.

**Figure A2.89: DM1 comparative prison sentences for single and multiple charge episodes**



## Drug Model Offence No. 2

139. Drug Model Offence No. 2 (DM2) involves prosecutions for trafficable amounts of heroin (Figure A2.90). There were 155 cases of which 86 per cent involved a single DM2 charge. As with DM1, the majority of cases were heard in NSW (61 per cent) followed by Victoria (19 per cent) and Western Australia (14 per cent). No cases were heard in the ACT, the Northern Territory or Tasmania.

**Figure A2.90: DM2 cases, by jurisdiction and number of other charges listed concurrently for sentence**

	1	2	3	Total	% by state
ACT					
NSW	82	12	1	95	61
NT					
Qld	5	0	0	5	3
SA	5	0	0	5	3
Tas					
Vic	28	2	0	29	19
WA	14	6	1	21	14
Total	134	19	2	155	100
% by other charge	86	12	1	100	

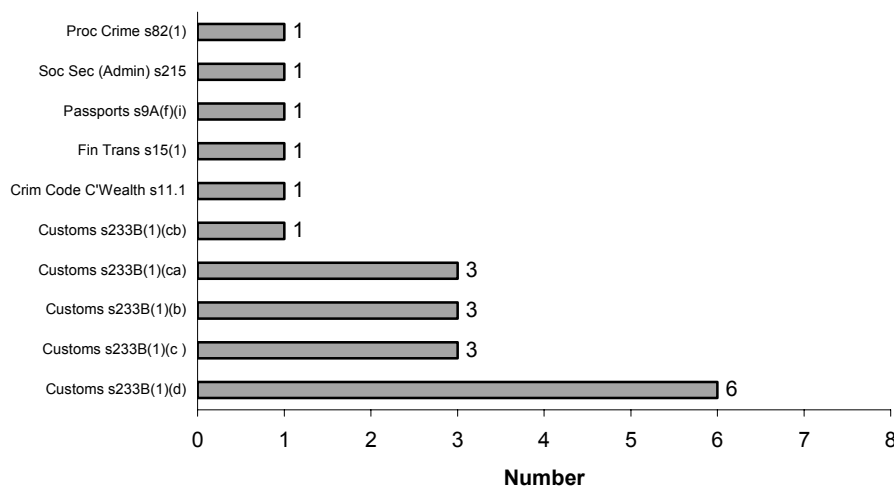
140. In virtually all the single charge cases the offender received a prison sentence (97 per cent) and it was usually the only sentencing outcome. Six per cent also received a bond under s 20(1)(b).

**Figure A2.91: Sentencing outcomes of DM2 single charge sentencing episodes, by jurisdiction (n=134)**

		NSW	Qld	SA	Vic	WA	% by penalty
<b>1</b>	Prison	79	5	5	27	14	97
<b>2</b>	19B	0	0	0	1	0	1
<b>3</b>	20(1)(a)	2	0	0	0	0	1
<b>4</b>	20(1)(b)	2	1	1	4	0	6
<b>5</b>	Court costs	1	0	0	1	0	1
<b>6</b>	Fine	0	0	0	0	0	0
<b>7</b>	CSO	0	0	0	0	0	0
<b>8</b>	Dismiss	0	0	0	0	0	0
<b>9</b>	Other	4	0	0	0	0	3
<b>10</b>	Reparation	0	0	0	0	0	0
	Total offenders	82	5	5	28	14	
	Average number of penalties	1	1	1	1	1	1
	Most frequent penalty combinations	1	1	1	1	1	1

141. Of the 20 offenders with multiple charges, the additional charges were most likely to be for customs offences (Figure A2.92).

**Figure A2.92: Other charges for DM2 sentencing episodes with multiple charges (n=20)**



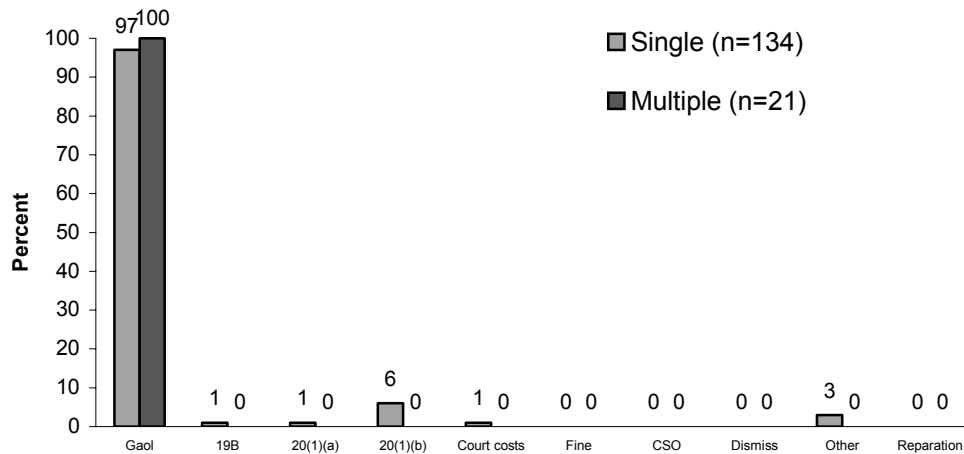
142. Overall, prison sentence outcomes varied from 0 to 138 months for minimum sentences and from 12 to 420 months for maximum sentences (Figure A2.93). The average minimum sentence was 48 months and the average maximum was 87 months. Western Australia was most likely to give both minimum and maximum sentences well above the national average while South Australia was more likely to give sentences well below the national average (although the number of cases there is small). NSW prison sentences were consistent with the national average. Jurisdictional differences between the minimum and maximum prison sentences were statistically significant. In terms of maximum prison sentences, statistically significant differences were evident between South Australia and Western Australia, between Victoria and Western Australia, and between NSW and Western Australia.

**Figure A2.93: Prison sentences for DM2 single charge sentencing episodes resulting in prison (n=63)**

	NSW	Qld	SA	Vic	WA	Total
<b>Minimum prison sentence</b>						
N	79	5	5	27	14	130
Range	0-120	8-72	12-36	0-108	21-138	0-138
<b>Mean (months)</b>	<b>48</b>	<b>42</b>	<b>23</b>	<b>43</b>	<b>70</b>	<b>48</b>
<b>Maximum prison sentence</b>						
N	79	5	5	27	14	130
Range	32-192	36-180	27-60	12-132	42-420	12-420
<b>Mean (months)</b>	<b>81</b>	<b>103</b>	<b>47</b>	<b>65</b>	<b>169</b>	<b>87</b>

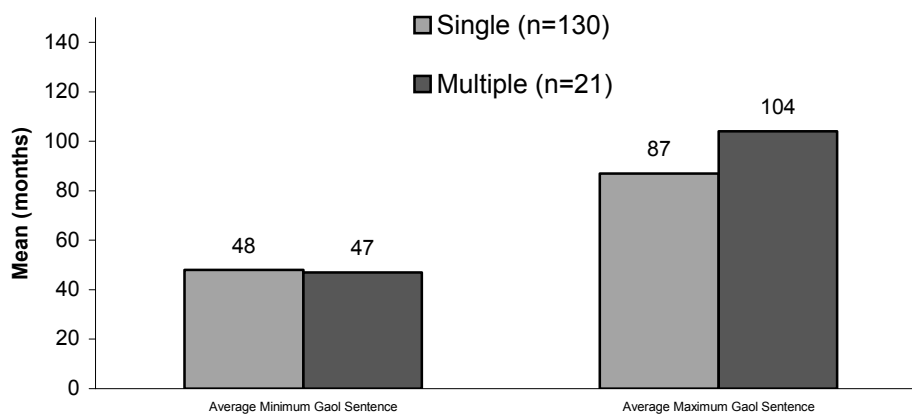
143. The outcomes for DM2 charges do not vary according to whether the episode involves a single or multiple charges (Figure A2.94).

**Figure A2.94: Outcomes of DM2 cases, by jurisdiction and number of concurrent charges**



144. There are no differences between the single and multiple charge episodes for minimum sentences although the latter cases have on average longer maximum sentences. However this difference is not statistically significant.

**Figure A2.95: DM2 comparative prison sentences for single and multiple charge episodes**



### Drug Model Offence No. 3

145. Drug Model Offence No. 3 (DM3) involves prosecutions for commercial quantities of heroin (Figure A2.96). DM3 covers 51 cases which, in the vast majority of cases (96 per cent), involved a single charge. Most of the cases were heard in NSW (73 per cent) followed by Victoria (16 per cent).

**Figure A2.96: DM3 sentencing episodes, by jurisdiction and number of other charges listed concurrently for sentence**

	1	2	Total	% by state
<b>ACT</b>				
<b>NSW</b>	35	2	37	73
<b>NT</b>	1	0	1	2
<b>Qld</b>	5	0	5	10
<b>SA</b>				
<b>Tas</b>				
<b>Vic</b>	8	0	8	16
<b>WA</b>				
<b>Total</b>	49	2	51	100
<b>% by other charge</b>	96	4	100	

146. All the single charge cases resulted in a prison sentence and one case in Victoria also had a partly suspended prison sentence and a s 20(1)(b) bond.

**Figure A2.97: Sentencing outcomes of DM3 single charge sentencing episodes, by jurisdiction (n=49)**

		NSW	NT	Qld	Vic	% by penalty
<b>1</b>	Prison	35	1	5	8	100
<b>2</b>	19B	0	0	0	0	0
<b>3</b>	20(1)(a)	0	0	0	0	0
<b>4</b>	20(1)(b)	0	0	0	1	2
<b>5</b>	Court costs	0	0	0	0	0
<b>6</b>	Fine	0	0	0	0	0
<b>7</b>	CSO	0	0	0	0	0
<b>8</b>	Dismiss	0	0	0	0	0
<b>9</b>	Other	0	0	0	0	0
<b>10</b>	Reparation	0	0	0	0	0
	Total offenders	35	1	5	8	—
	Average number of penalties	1	1	1	1	—
	Most frequent penalty combinations	1	1	1	1	—

147. In terms of the length of sentence, minimum sentences varied between 0 and 360 months, while maximum sentences varied between 24 and 1,188 months. The average minimum sentence was 133 months while the average maximum was 333 months. NSW on average gave the longest minimum and maximum sentences. Tests were performed to determine whether the differences seen in Figure A2.98 were statistically significant—the results indicated no significant differences between the jurisdictions in either the minimum or maximum prison sentences. This is most likely due to small sample sizes.

**Figure A2.98: Prison sentences for DM3 single charge sentencing episodes resulting in prison (n=49)**

	NSW	NT	Qld	Vic	Total
<b>Minimum prison sentence</b>					
n	35	1	5	8	49
Range	0-360	–	66-84	0-240	0-360
Mean (months)	150	132	74	93	133
<b>Maximum prison sentence</b>					
n	35	1	5	8	49
Range	81-1188	–	156-180	24-300	24-1188
Mean (months)	406	216	170	132	333

#### Drug Model Offence No. 4

148. Drug Model Offence No. 4 (DM4) covers all cases in which the drug involved is cannabis or cannabis resin.<sup>9</sup>

**Figure A2.99: DM4 sentencing episodes, by jurisdiction and number of other charges listed concurrently for sentence**

	1	2	3 or more	Total	% by state
<b>ACT</b>					
<b>NSW</b>	26	8	0	34	33
<b>NT</b>	3	1	0	4	4
<b>Qld</b>	31	3	1	35	34
<b>SA</b>	1	0	0	1	1
<b>Tas</b>					
<b>Vic</b>	18	2	1	21	20
<b>WA</b>	5	2	2	9	9
<b>Total</b>	84	16	4	104	100
<b>% by other charge</b>	81	15	4	100	

<sup>9</sup> The number of cannabis resin cases is too small to analyse separately.

149. As shown in Figure A2.99, there were 104 cases of which 81 per cent involved only one charge. Queensland (34 per cent), NSW (33 per cent) and Victoria (20 per cent) accounted for most of the charges. There were no charges in the ACT or Tasmania, and relatively few in the Northern Territory (n=4), South Australia (n=1) and Western Australia (n=9).

150. Unlike MDMA and heroin, cannabis attracts a wide range of sentencing outcomes (Figure A2.100). The most common outcome was a fine (48 per cent) followed by a prison sentence (34 per cent). Just over a quarter of charges also attracted court costs (26 per cent). There are differences across jurisdictions in outcomes. These were:

- NSW had the second largest number of cases and used on average two sentencing outcomes (fines and court costs);
- Queensland had the most cases and used on average only one sentencing outcome (a fine); and
- Victoria had a smaller number of cases and used on average one sentencing outcome, which was most likely to be prison.

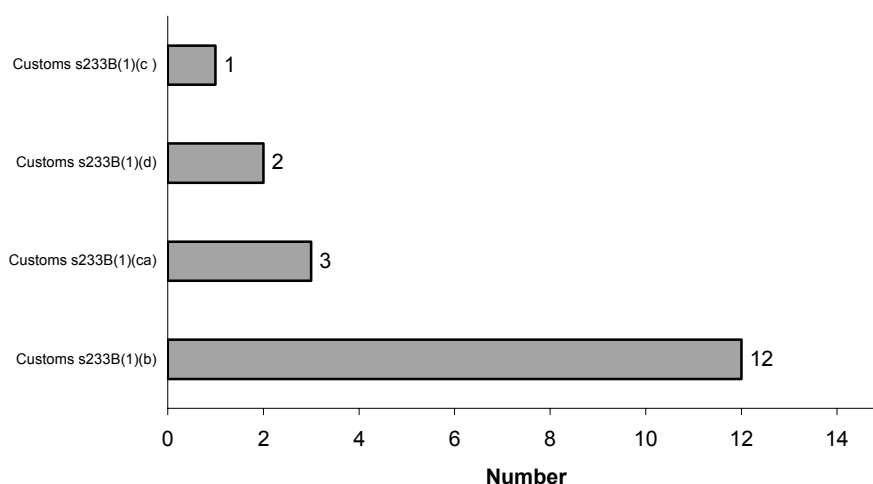
**Figure A2.100: Sentencing outcomes of DM4 single charge sentencing episodes, by jurisdiction (n=84)**

		NSW	NT	Qld	SA	Vic	WA	% by penalty
1	Prison	6	1	12	1	8	1	34
2	19B	0	0	3	0	6	0	11
3	20(1)(a)	5	0	0	0	0	0	6
4	20(1)(b)	2	0	6	1	3	0	14
5	Court costs	14	0	0	0	5	3	26
6	Fine	15	2	15	0	4	4	48
7	CSO	1	0	0	0	0	0	1
8	Dismiss	2	0	0	0	0	0	2
9	Other	7	1	0	0	0	0	10
10	Reparation	0	0	0	0	0	0	0
	Total offenders	26	3	31	1	18	5	84
	Average number of penalties	2	1	1	2	1	2	—
	Most frequent penalty combinations	5,6	6	6	1,4	1	5,6	—



151. There were 19 cases where the offender had multiple charges on the sentencing day. All of these additional charges were under the various provisions in the customs legislation (Figure A2.101).

**Figure A2.101: Other charges for DM4 sentencing episodes with multiple charges (n=19)**



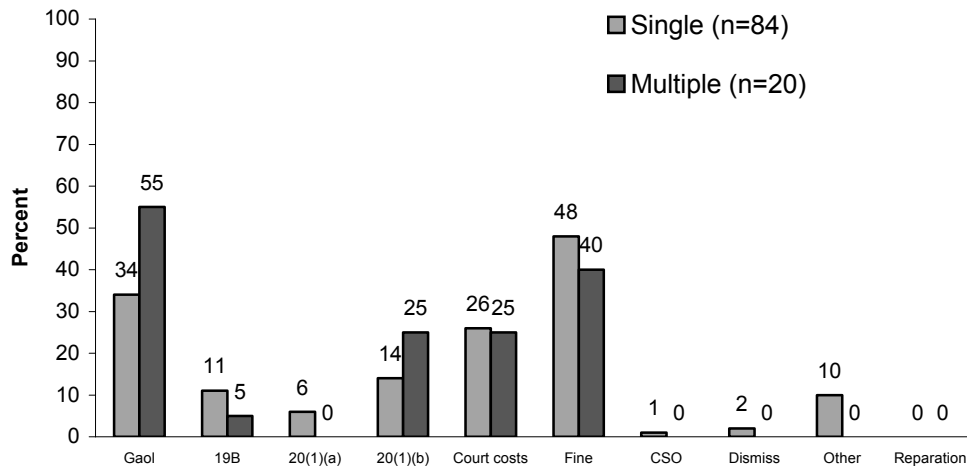
152. As is consistent with the other drug offences, the range of maximum and minimum prison sentences is large. On average, however, the minimum prison sentence is 34 months while the maximum is 62 months (Figure A2.102). Although Victoria sentences a greater proportion of offenders on cannabis charges to prison, on average they are more likely to give prison sentences that are shorter than the national average. In contrast NSW, which gives relatively fewer prison sentences for cannabis offences, on average is more likely to give longer prison sentences than the national average. However, with such small sample sizes the differences between the jurisdictions were not statistically significant.

**Figure A2.102: Prison sentences for DM4 single charge sentencing episodes resulting in prison (n=29)**

	NSW	NT	Qld	SA	Vic	WA	Total
<b>Minimum prison sentence</b>							
n	6	1	12	1	8	1	29
Range	0-96	–	0-54	–	0-72	–	0-204
<b>Mean (months)</b>	<b>43</b>	<b>204</b>	<b>18</b>	<b>18</b>	<b>39</b>	<b>0</b>	<b>34</b>
<b>Maximum prison sentence</b>							
n	6	1	12	1	8	1	29
Range	6-168	–	3-108	–	2-108	–	2-300
<b>Mean (months)</b>	<b>85</b>	<b>300</b>	<b>39</b>	<b>30</b>	<b>61</b>	<b>6</b>	<b>62</b>

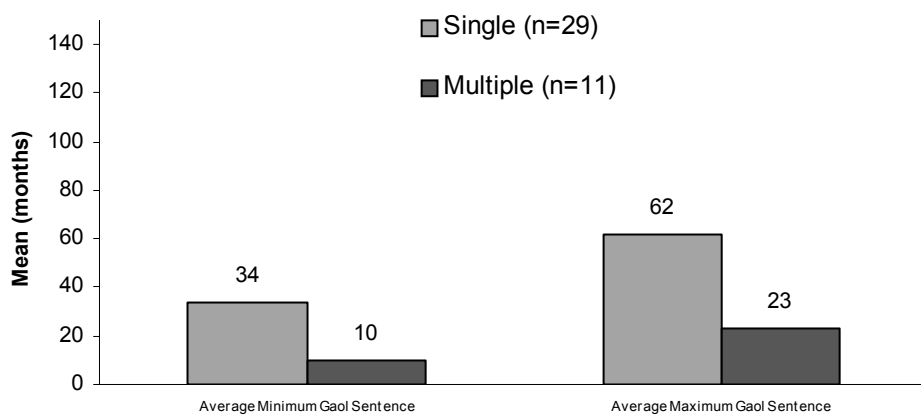
153. Analysis of outcomes shows some differences according to the number of charges—offenders with multiple charges are more likely to receive prison terms and bonds under s 20(1)(b) but less likely to receive a fine. However, statistical tests indicate that the differences are not significant.

**Figure A2.103: Outcomes of DM4 charge cases, by jurisdiction and number of concurrent charges**



154. Unlike in the previous model offence categories, those with one or more other charges accompanying a DM4 charge receive lower prison sentences than those facing a single charge. Figure A2.104 illustrates that the average minimum prison sentence was 34 months for offenders facing a single charge, but only 10 months for offenders facing multiple charges. This disparity is also evident amongst the average maximum prison sentence.

**Figure A2.104: DM4 comparative prison sentences for single and multiple charge episodes**



155. The story concerning prison sentences for DM4 charges is complex. While a greater proportion of offenders facing multiple charges were sentenced to prison, the length of that prison sentence tended to be shorter than for the smaller proportion of offenders facing a single charge who were also sentenced to prison. Unlike the other model drug charges, the DM4 model does not account for the quantity of cannabis involved in the offence. It is likely that the disparity in prison sentencing reflects other situational factors not accounted for in the DM4 model.

## Post-sentence processes

156. There are two principal activities that can occur post sentence. First, the defendant or prosecution may appeal the outcome of the case. Secondly, the defendant may breach the orders that have been imposed on him or her. Both activities are relatively rare.

### Appeals

157. Ninety-nine per cent of all the fraud and drug cases resulted in a guilty verdict while just less than one per cent resulted in a not guilty verdict or dismissal. In those cases in which guilt was established, the overwhelming majority (99 per cent) resulted from the defendant pleading guilty. Of the 24,975 cases in which a guilty verdict was recorded, 640 appeals were lodged. Of these, 565 were defence appeals alone and 73 were prosecution appeals alone. Both defence and prosecution appeals were lodged in two cases.

158. As a proportion of all cases, appeals are lodged in 2.5 per cent of cases but in eight per cent of cases where the plea was not guilty. Appeals were lodged in two per cent of guilty plea cases. Of the 532 appeals in the guilty plea cases, the defence made 481 appeals, while the prosecution made 53 appeals.

159. Defence and prosecution appeals varied by the case type. Eighty-six per cent of the appeals were in fraud cases and 14 per cent were for the drug cases. Defence appeals were less likely in the fraud cases (2 per cent of cases) than drug cases (7 per cent). Prosecution appeals were also less likely in the fraud cases (0.2 per cent) than the drug cases (3 per cent).

160. Figure A2.105 shows the number and percentage of appeals lodged in fraud and drug cases in each jurisdiction. There was some variation between jurisdictions, with more NSW fraud cases resulting in appeals than those in other jurisdictions. The slightly higher increase in appeals does not appear to be associated with case type as NSW had proportionately more appeals for both drug and fraud cases than any of the other jurisdictions. The Northern Territory, Queensland, South Australia and Tasmania had few fraud appeals and no drug appeals. Western Australia also had few fraud appeals but a relatively high rate of appeals in drug cases.

161. There were some differences in the use of appeals by either prosecutors or defence attorneys for different drug types of different drug quantities. Defence appeals were more likely in large quantity amphetamines cases (7 per cent) than in small quantity cases (1 per cent). Appeals were also more likely in large quantity heroin cases (14 per cent) than in smaller quantity cases (7 per cent). There was slightly more likelihood of prosecution appeals in large

volume amphetamines cases (4 per cent) than in small volume cases (2 per cent). The same was true in heroin cases (5 per cent versus 0 per cent), but the numbers of appeals were very small.

**Figure A2.105: Appeals lodged, by jurisdiction**

		ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Total
Fraud cases	%	2	5	<1	<1	<1	<1	2	<1	2
	N	7	346	7	44	9	1	104	7	525
Drug cases	%	0	14	0	0	0	0	5	12	10
	N	0	87	0	0	0	0	10	18	115
Total		7	433	7	44	9	1	114	25	640

162. There appears to be slightly more likelihood of the defence appealing in high value fraud cases (3.3 per cent) than in small value (0.6 per cent) or mid-value cases (1.1 per cent). While there were only seven prosecution appeals lodged in relation to the model fraud cases, these were mostly in the larger value cases (n=6; 1.7 per cent of cases) than in the mid-value (n=1; 0.07 per cent) or small value cases (n=0).

163. To determine if there had been an increasing trend in the use of appeals either as a whole or for one or other of the two case types, the cases were examined over time. The data did not indicate an overall increase in the rate of appeals for either fraud and drug cases. Figure A2.106 shows appeals both as a percentage of all cases, for each case type, and as a percentage of not guilty pleas.

**Figure A2.106: Appeals in fraud and drug cases, 2000–2004**

	% of all cases	% of fraud cases	% of drug cases	% of not guilty pleas
2000	3.5	3.1	8.1	10.3
2001	2.5	2.1	11.5	7.9
2002	2.3	1.9	12.0	7.5
2003	2.4	2.1	10.3	4.8
2004	2.4	2.1	9.9	8.5

## Breaches

164. Between 2000 and 2004, 821 cases involved a breach action (Figure A2.107), which represented three per cent of all cases. There were slightly higher rates of breaches in Queensland and Victoria than in other jurisdictions. The higher rates of breaches were associated with fraud charges; the rate of breaches for drug charges was similar across the jurisdictions.

**Figure A2.107: Breach actions, by jurisdiction**

		ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Total
<b>Fraud cases</b>	%	1.9	2.3	<1	4.5	1.8	<1	5.4	2.9	3.4
	N	6	165	5	275	35	7	263	59	815
<b>Drug cases</b>	%	0	<1	0	3.6	0	0	<1	0	0.5
	N	0	1	0	4	0	0	1	0	6
<b>Total</b>	N	6	166	5	279	35	7	264	59	821

165. There was no observable change in the number of breaches over time (Figure A2.108). This was the case for both fraud and drug cases and did not vary with the jurisdiction.

**Figure A2.108: Breaches over time, 2000–2004**

	% of all cases	% of fraud cases	% of drug cases	% of not guilty pleas
<b>2000</b>	3.3	3.6	0.4	0
<b>2001</b>	2.8	2.9	0.5	0
<b>2002</b>	3.4	3.6	0.5	1.2
<b>2003</b>	3.1	3.1	1.0	0
<b>2004</b>	3.6	3.8	0.5	0.5

166. The likelihood of females or males being breached did not change substantially over time (Figure A2.109). However, during the years 2002–2004, males were significantly more likely to be breached than females.

**Figure A2.109: Breach cases over time, by sex, 2000–2004**

	% of female offenders	% of male offenders	Significant difference?
<b>2000</b>	2.7	3.7	No
<b>2001</b>	2.4	3.1	No
<b>2002</b>	2.4	4.1	Yes
<b>2003</b>	1.9	4.0	Yes
<b>2004</b>	2.8	4.5	Yes

## Conclusions

167. This report has examined fraud and drug cases prosecuted by the CDPP in the five-year period from 2000 to 2004. The examination has focused on differences between jurisdictions in their use of the various sentencing options that are available to them. The analysis has been directed to the question of whether an offender who commits an offence in one jurisdiction is likely to receive the same outcome, or a different outcome, if he or she commits the same offence in another jurisdiction.

168. These issues have been examined from two perspectives. First, the overall use of particular sentencing outcomes was considered. Secondly, the diverse range of charges in the dataset was narrowed down to a smaller number of specific charges so that outcomes for these specific charges could be compared more readily.

169. The analysis of the data suggests there are differences in the outcomes that arise in different jurisdictions. Certain types of outcome are used more in some jurisdictions than others, and the relative severity of the outcome also varies somewhat.

170. The data suggest differences in the use of bonds available under the *Crimes Act*. Bonds under s 19B, which are ordered without a conviction being recorded, are used rarely—except in Victoria, where they are used frequently and where the use appears to be increasing.

171. In other jurisdictions, and especially in the ACT, it is more likely that an offender will receive a bond under s 20(1)(a), which is ordered after conviction but before proceeding to sentence. Use of s 20(1)(a) bonds appears to be increasing in the ACT and in NSW, but decreasing in Queensland. These bonds are rarely used in Tasmania, Victoria and Western Australia.

172. Section 20(1)(b) bonds, ordered after conviction and sentence, are frequently used in the Northern Territory and South Australia, but their use may be declining in both jurisdictions. They are rarely ordered in Victoria or Western Australia but their use, while still uncommon, appears to be increasing in NSW.

173. The use of good behaviour conditions is common in the Northern Territory and South Australia, linked to s 20(1)(b) bonds. These conditions are not generally used in cases in Western Australia or Tasmania, although good behaviour conditions are common in Tasmania, the Northern Territory and South Australia. The use of recognizance orders appears to be increasing in NSW but declining in Queensland.

174. There is a noticeable difference in the imposition of court costs in different jurisdictions and they are much more likely to be ordered in Western Australia, South Australia and NSW, although their use in NSW is decreasing. Court costs are rarely ordered in Victoria and not at all in the Northern Territory.

175. Community service orders are reasonably common in Tasmania, NSW, the ACT and Queensland but their use is decreasing in NSW. The hours required to be performed are higher in the ACT than in other jurisdictions, and are quite low in Tasmania.

176. Monetary fines are mainly used in Western Australia and Victoria and they are generally for higher amounts in Western Australia.

177. The Northern Territory and South Australia imposed prison sentences more frequently than other jurisdictions but they are usually for short maximum periods and most offenders do not serve any prison time. Rather, the time is suspended with good behaviour conditions. Prison sentences are imposed less often in the ACT, NSW and Victoria but are generally for longer periods of time.

178. Generally speaking, cases prosecuted in the ACT are relatively likely to attract bonds ordered without proceeding to sentence, and community service orders. NSW cases attract a fairly diverse range of outcomes, but fines and community service orders are relatively common in smaller-scale fraud cases. In NSW, prison sentences of either average or above average length are likely to be imposed in large-scale fraud or drug cases. Prison sentences are likely to be especially severe in heroin importation cases.

179. Both Northern Territory and South Australian cases tend to result in post-sentence bonds with recognizance and good behaviour conditions. Short, suspended prison sentences are also likely. Offenders in the Northern Territory are unlikely to be ordered to pay costs, though these are more likely in South Australia.

180. Smaller-scale drug cases prosecuted in Queensland are most likely to result in a good behaviour bond, while serious fraud and drug cases are most likely to incur a relatively short prison sentence.

181. In both Victoria and Western Australia offenders are generally more likely to face financial penalties in the form of fines or costs orders. In Western Australia particularly, outcomes are more likely to be financially punitive than in other jurisdictions. Victorian offenders are likely to face fines or 'other costs' but are also relatively likely to receive bonds without convictions being recorded.

## List of references

Makkai, Toni, Jerry Ratcliffe, Keenan Veraar and Lisa Collins, 2004, *ACT Recidivist Offenders*, Research and Public Policy Series No 54, Canberra: AIC.

Smith, Russell, and Sakurai, Yuka, 2003, *Serious Fraud in Australia and New Zealand*, Research and Public Policy Series No 48, Canberra: AIC.

Australian Institute of Criminology, 2005, 'Federal Prisoners: A Statistical Overview' in Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper 70, Sydney: ALRC.

## Additional data

*Figure A2.110: Legislation under which offences were prosecuted*

Legislation	No. of cases
SOC SEC 1991	9,305
SOC SEC (ADMIN)	7,671
CRIM CODE C'WEALTH	3,631
CRIMES 1914	2,316
CUSTOMS	1,128
TAX ADMIN	198
FIN TRANS	154
B'RUPTCY	121
STUD ASSIS	119
HEALTH INS	111
EXCISE	69
INC TAX AA	39
CR(CURREN)	37
PASSPORTS	37
VET ENT	35
ANTS (FAMILY ASSIS)	34
NAT HEALTH	28
SOC SEC 1947	22
PROC CRIME	16
TRADE MARKS	14
MIGRATION	10
STUD & YOUTH	7
TRADE PRAC	6
ANTS (AUST BUS NO)	5
FIN MAN & ACC	5
COPYRIGHT	4
AUS CITIZ	3
COMM ELECT	3
PRIM IND L&CC	3
STAT DEC	3
SUPER (SUPER)	3
AGED CARE	2
AUS POST COR	2
CH SUP(REG&)	2
CORP LAW	2
ED SER OS ST	2
MARR ACT	2
AFP	1
AUS W&B	1



CHILDC REB	1
CHLDC REB	1
CIVIL AV	1
DEFENCE	1
FUEL(PNTY S'CHG)ADM	1
MOTOR VEH STAD ACT	1
SERV EXEC	1
SUPER (SUPERVISION)	1
WILD PROT	1
Total Cases	25,160



## Appendix 3. List of Submissions

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<i>Name</i>	<i>Submission Number</i>	<i>Date</i>
ACT Corrective Services	SFO 34	20 April 2005
AL	SFO 63	5 January 2006
Attorney-General's Department	SFO 52	7 July 2005
	SFO 83	15 February 2006
Australian Securities and Investments Commission	SFO 39	28 April 2005
Australian Taxation Office	SFO 18	8 April 2005
	SFO 72	10 February 2006
M Beadle	SFO 56	1 December 2005
F Beaupert	SFO 76	13 February 2006
BN	SFO 17	8 April 2005
J Champion SC	SFO 46	29 April 2005
Commonwealth Director of Public Prosecutions	SFO 51	17 June 2005
	SFO 86	17 February 2006
Commonwealth Ombudsman	SFO 95	3 March 2006
Confidential	SFO 6	23 February 2005
Confidential	SFO 8	8 March 2005
Confidential	SFO 11	15 March 2005
Confidential	SFO 15	6 April 2005
Confidential	SFO 64	6 January 2006
Correctional Services Northern Territory	SFO 14	5 April 2005
Corrections Victoria	SFO 48	2 May 2005
Council of Social Service of New South Wales	SFO 24	13 April 2005
Criminal Bar Association of Victoria	SFO 45	29 April 2005
Chief Justice P de Jersey, Supreme Court of Queensland	SFO 89	20 February 2006
Justice B DeBelle, Supreme Court of South Australia	SFO 93	23 February 2006

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<i>Name</i>	<i>Submission Number</i>	<i>Date</i>
The Hon B Debus MP, Attorney General of New South Wales	SFO 65	9 January 2006
Department of Corrective Services New South Wales	SFO 42	28 April 2005
	SFO 79	8 March 2006
Department of Corrective Services Queensland	SFO 27	14 April 2005
	SFO 66	16 January 2006
Department of Corrective Services Western Australia	SFO 88	17 February 2006
Department of Family and Community Services	SFO 30	15 April 2005
Department of Immigration and Multicultural and Indigenous Affairs	SFO 49	10 May 2005
Department of Justice Western Australia	SFO 35	21 April 2005
Department of the Attorney General Western Australia	SFO 96	15 March 2006
Chief Justice J Doyle, Supreme Court of South Australia	SFO 85	16 February 2006
A Freiberg	SFO 12	4 April 2005
Justice H Fryberg, Supreme Court of Queensland	SFO 94	1 March 2006
Judge J Goldring, District Court of New South Wales	SFO 54	10 December 2005
K Gutierrez	SFO 58	20 December 2005
Human Rights and Equal Opportunity Commission	SFO 62	22 December 2005
Intellectual Disability Rights Service	SFO 38	21 April 2005
Chief Magistrate M Irwin, Magistrates Court of Queensland	SFO 33	20 April 2005
JC	SFO 25	13 April 2005
JK	SFO 10	15 March 2005
Justice P Johnson, Supreme Court of New South Wales	SFO 73	10 February 2006
J Kulawiec	SFO 91	16 February 2006
Law Council of Australia	SFO 97	17 March 2006

<i>Name</i>	<i>Submission Number</i>	<i>Date</i>
Law Society of South Australia	SFO 37	22 April 2005
Law Society of Tasmania	SFO 26	14 April 2005
LD	SFO 9	10 March 2005
Legal Services Commission of South Australia	SFO 19	8 April 2005
LL	SFO 1	10 August 2004
K Mack and S Roach Anleu	SFO 16	7 April 2005
G Mackenzie	SFO 80	14 February 2006
Chief Justice D Malcolm, Supreme Court of Western Australia	SFO 71	10 February 2006
B Matthews	SFO 2	8 February 2005
	SFO 13	7 April 2005
Chief Judge P McClellan, Supreme Court of New South Wales	SFO 77	10 February 2006
Mental Health Coordinating Council	SFO 44	29 April 2005
Mental Health Council of Australia	SFO 32	18 April 2005
	SFO 59	21 December 2005
V Morabito	SFO 55	19 December 2005
National Judicial College of Australia	SFO 61	22 December 2005
New South Wales Guardianship Tribunal	SFO 69	8 February 2006
New South Wales Legal Aid Commission	SFO 36	22 April 2005
	SFO 75	10 February 2006
New South Wales Parole Board	SFO 22	8 April 2005
New South Wales State Parole Authority	SFO 68	17 January 2006
M Nolan	SFO 90	21 February 2006
Office of the Public Advocate Victoria	SFO 47	2 May 2005
	SFO 81	14 February 2006
I Potas	SFO 78	13 February 2006
Prisoners' Legal Service	SFO 28	15 April 2005
PS	SFO 21	8 April 2005
Queensland Legal Aid	SFO 92	27 February 2006
RA	SFO 7	8 March 2005

<i>Name</i>	<i>Submission Number</i>	<i>Date</i>
RC	SFO 50	13 May 2005
RH	SFO 4	28 January 2005
J Roberts	SFO 67	16 January 2006
Sisters Inside Inc	SFO 40	28 April 2005
	SFO 98	6 April 2006
South Australia Victims of Crime Co-ordinator	SFO 84	15 February 2006
State Administrative Tribunal Western Australia	SFO 57	20 December 2005
Tasmanian Guardianship and Administration Board	SFO 53	15 December 2005
TF	SFO 5	31 January 2005
G Urbas	SFO 82	14 February 2006
Victim Support Australasia	SFO 60	21 December 2005
Victoria Legal Aid	SFO 31	18 April 2005
	SFO 70	9 February 2006
Victorian Institute of Forensic Mental Health (Forensicare)	SFO 43	29 April 2005
	SFO 87	17 February 2006
Welfare Rights Centre Inc (Queensland)	SFO 29	15 April 2005
J Willis	SFO 20	9 April 2005
	SFO 74	10 February 2006
WR	SFO 41	28 April 2005
WT	SFO 23	11 April 2005
WW	SFO 3	23 February 2005

## Appendix 4. List of Consultations

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<i><b>Name</b></i>	<i><b>Location</b></i>
Aboriginal Justice Advisory Committee	Darwin
ACT Corrective Services	Canberra
Adult Parole Board of Victoria	Melbourne
Justice R Atkinson, Supreme Court of Queensland	Brisbane
Attorney-General's Department	Canberra, Sydney
Attorney General's Department of New South Wales	Sydney
Australian Bureau of Statistics	Sydney
Australian Institute of Criminology	Canberra
Australian National University Academics	Canberra
Australian Securities and Investments Commission	Sydney
Australian Treasury	Canberra
M Bagaric and R Edney, School of Law, Deakin University	Melbourne
Chief Justice M Black and Others, Federal Court of Australia	Melbourne
Catholic Prison Ministry	Brisbane
Commonwealth Director of Public Prosecutions	Canberra, Sydney, Melbourne, Hobart, Darwin, Brisbane
Confidential Consultation	Canberra
Confidential Consultation	Melbourne
Confidential Consultation	Melbourne
Confidential Consultation	Sydney
Justice T Connolly, Supreme Court of the Australian Capital Territory	Canberra
Correctional Services Northern Territory	Darwin
Corrections Inspectorate Victoria	Melbourne
Corrections Victoria	Melbourne
Criminal Bar Association of Victoria	Melbourne
Department of Corrective Services New South Wales	Sydney
Department of Corrective Services Queensland	Brisbane

<i><b>Name</b></i>	<i><b>Location</b></i>
Department of Family and Community Services	Canberra
Department of Justice and Community Safety ACT, Restorative Justice Unit	Canberra
Department of Justice Northern Territory	Darwin
Department of Justice Western Australia	Perth
Senior Drug Court Judge R Dive, Drug Court of New South Wales	Sydney
Justice G Downes and Others, Administrative Appeals Tribunal	Sydney
A Freiberg, Law School, Monash University	Melbourne
J Gans, Law School, University of Melbourne	Sydney
T Glynn SC, Queensland Bar Association	Brisbane
D Grace QC	Melbourne
Chief Magistrate I Gray and Others, Magistrates' Court of Victoria	Melbourne
Inspector of Custodial Services Western Australia	Perth
M Johnson, Northern Territory Bar Association	Darwin
Judicial Commission of New South Wales	Sydney
Justice Action	Sydney
Justice Health	Sydney
Law Society of South Australia	Adelaide
Law Society of the Northern Territory	Darwin
Chief Judge at Common Law P McClellan and Others, Supreme Court of New South Wales	Sydney
Members of the Victorian Bar	Melbourne
Mental Health Council of Australia	Canberra
National Children's and Youth Law Centre	Sydney
National Judicial College of Australia	Canberra
New South Wales Bar Association	Sydney
New South Wales Legal Aid Commission—Criminal Law Division	Sydney
New South Wales Parole Board	Sydney
New South Wales Public Defenders Office	Sydney



<i><b>Name</b></i>	<i><b>Location</b></i>
North Australian Aboriginal Legal Aid Service	Darwin
Northern Territory Legal Aid Commission	Darwin
Offenders Aid and Rehabilitation Services South Australia	Adelaide
Parole Board of South Australia	Adelaide
Parole Board of Tasmania	Hobart
Parole Board of the Northern Territory	Darwin
Magistrate P Power, Children's Court of Victoria	Melbourne
Chief Magistrate Judge D Price and Others, Local Courts of New South Wales	Sydney
Prison Reform Group WA	Perth
Prisoners' Legal Service	Brisbane
Queensland Community Corrections Board	Brisbane
Queensland Legal Aid	Brisbane
Sentence Administration Board ACT	Canberra
Sisters Inside Inc	Brisbane
Victim Support Australasia	Sydney
Victim Support Service Inc	Adelaide
Victorian Institute of Forensic Mental Health	Melbourne
Victorian Sentencing Advisory Council	Melbourne
K Warner, Faculty of Law, University of Tasmania	Hobart
Justice M Weinberg, Federal Court of Australia	Sydney
Welfare Rights Centre	Brisbane
Deputy Chief Magistrate E Woods, Magistrates Court of Western Australia	Perth
Youth Parole Board Victoria	Melbourne
Magistrate G Zdenkowski, Local Courts of New South Wales	Sydney



## Appendix 5. List of Abbreviations

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The entities listed below are Australian entities unless otherwise stated.

AAT	Administrative Appeals Tribunal
ABS	Australian Bureau of Statistics
ACT	Australian Capital Territory
AGD	Attorney-General's Department
AIC	Australian Institute of Criminology
AIIA	Australian Institute of Judicial Administration
AJJA	Australasian Juvenile Justice Administrators
ALRC	Australian Law Reform Commission
ALRC 15	Australian Law Reform Commission, <i>Sentencing of Federal Offenders</i> , ALRC 15 (1980)
ALRC 31	Australian Law Reform Commission, <i>The Recognition of Aboriginal Customary Laws</i> , ALRC 31 (1986)
ALRC 44	Australian Law Reform Commission, <i>Sentencing</i> , ALRC 44 (1988)
ALRC 84	Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, <i>Seen and Heard: Priority for Children in the Legal Process</i> , ALRC 84 (1997)
ANCO	Australian National Classification of Offences
ASIC	Australian Securities and Investments Commission
ASOC	Australian Standard Offence Classification
ATO	Australian Taxation Office
ATS	Amphetamine-type substances
ATSI	Aboriginal and Torres Strait Islander
CAT	<i>Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984</i>
CCTO	Combined custody and treatment order
CD	Customs drugs
CDPP	Commonwealth Director of Public Prosecutions
COS	Community Offender Services

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CROC	<i>Convention on the Rights of the Child 1989</i>
CSAC	Corrective Services Administrators' Conference
CSMC	Corrective Services Ministers' Conference
CSOs	Community service orders
DIMA	Department of Immigration and Multicultural Affairs
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
DM1	Drug model drug offence No. 1
DM2	Drug model drug offence No. 2
DM3	Drug model drug offence No. 3
DM4	Drug model drug offence No. 4
DP 70	Australian Law Reform Commission, <i>Sentencing of Federal Offenders</i> , DP 70 (2005)
DSM IV–TR	<i>Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR</i> (2000)
ECHR	<i>European Convention on Human Rights 1950</i>
FCA	Federal Court of Australia
FMC	Federal Magistrates Court of Australia
FM1	Fraud model offence No. 1
FM2	Fraud model offence No. 2
GST	Goods and services tax
HECS	Higher Education Contribution Scheme
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	<i>International Covenant on Civil and Political Rights 1966</i>
IDRO	Intensive drug rehabilitation order
IDRS	Intellectual Disability Rights Service
IP 29	Australian Law Reform Commission, <i>Sentencing of Federal Offenders</i> , IP 29 (2005)
ISO	Intensive supervision order
JCNSW	Judicial Commission of New South Wales
JIRS	Judicial Information Research System
JOIN	Judicial Officers' Information Network
LRCWA	Law Reform Commission of Western Australia

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MCDP	Magistrates Court Diversion Program
MOU	Memorandum of understanding
NCCJS	National Centre for Crime and Justice Statistics
NCOSD	National Commonwealth Offenders Sentencing Database
NCOSS	Council of Social Service of New South Wales
NJCA	National Judicial College of Australia
NMDS	Juvenile Justice National Minimum Data Set
NMHWG	National Mental Health Working Group
NSW	New South Wales
NSWCCA	New South Wales Court of Criminal Appeal
NSWLRC	New South Wales Law Reform Commission
NT	Northern Territory
NZLC	New Zealand Law Commission
OJMS	Offender Justice and Management Section
OMFO	Office for the Management of Federal Offenders
RF	Released forthwith
SCAG	Standing Committee of Attorneys-General
SPPs	Specific purpose payments



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