The Law
Reform
Commission

Report No 44

SENTENCING

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Note: References to the Crimes Act 1900 (NSW:ACT) are references to the Crimes Act 1900 of the State of New South Wales in its application to the Australian Capital Territory.

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Commission Reference: ALRC 44

The Law Reform Commission is established by section 5 of the Law Reform Commission Act 1973 to review, modernise and simplify the law. The first members were appointed in 1975. The offices of the Commission are at 99 Elizabeth Street, Sydney, NSW Australia (Tel (02) 231 1733; VOCADEX (02) 223 1203).

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Terms of reference

SENTENCING

I, PETER DREW DURACK, Attorney-General, HAVING REGARD TO —

(a) the function of the Law Reform Commission, in pursuance of references to the Commission made by the Attorney-General, of reviewing Commonwealth and Territorial laws to which the Law Reform Commission Act 1973 applies;

(b) the costs and other unsatisfactory characteristics of punishment by imprisonment;

(c) the desirability of ensuring that offenders against a law of the Commonwealth are treated as uniformly as possible throughout the Commonwealth in respect of the sentences imposed on them;

(d) the need for a revision of laws of the Commonwealth and the Australian Capital Territory, with particular reference to the questions —

(i) whether principles and guidelines for the imposition of sentences of imprisonment should be formulated; and

(ii) whether existing laws providing alternatives to imprisonment are adequate;

(e) the conclusions of the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders concerning the use of imprisonment, as set out in the report of the United Nations Secretariat in relation to the Congress (E.76.IV.2); and

(f) the matters to be considered at the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders to be held in Australia in 1980, with particular reference to the agenda topic relating to the deinstitutionalisation of corrections,

HEREBY REFER the following matter to the Law Reform Commission, as provided by the Law Reform Commission Act 1973,

FOR REVIEW AND REPORT ON the laws of the Commonwealth and the Australian Capital Territory relating to the imposition of punishment for offences and any related matters.

IN ITS REVIEW AND REPORT the Commission —

(1) shall collaborate with the Australian Institute of Criminology;

(2) shall have particular regard to —

(a) the formulation of principles and guidelines for the imposition of a sentence of imprisonment;

(b) the question whether legislation should be introduced to provide that no person is to be sentenced to imprisonment unless the court is of the opinion that, having regard to all the circumstances of the case, no other sentence is appropriate;

(c) the adequacy of existing laws providing alternatives to sentences of imprisonment;

(d) the need for new laws providing alternatives to sentences of imprisonment, with particular reference to restitution orders, compensation orders, community service orders and similar orders;

(e) the need for greater uniformity in sentencing, with particular reference to laws with respect to the grading of offences and orders and with respect to processes designed to structure discretion in sentencing by means of the establishment of guideline sentences and the use of a sentencing council, institute or commission for this purpose;

(f) the laws that would be required to give effect to the recommendations of the Commission;

(g) the provisions of Section 7 of the Law Reform Commission Act providing that, in the performance of its functions, the Commission shall review laws to which the Act applies, and consider proposals, with a view to ensuring —

(i) that such laws and proposals do not trespass unduly on personal rights and liberties and do not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions; and

(ii) that, as far as practicable, such laws and proposals are consistent with the Articles of the International Covenant on Civil and Political Rights; and

(h) its function in accordance with Section 6(1) of the Act to consider proposals for uniformity between laws of the Territories and laws of the States;

(3) shall —

(a) consider the question whether, in the determination of the punishment for an offence, an emphasis should be placed on —

(i) the state of mind of the offender in the commission of the offence; or

(ii) the personal characteristics of the offender and the need for treatment; and

(b) take into account the interests of the public and the victims of crime.

THE COMMISSION IS REQUIRED to submit by 1 June 1979 an Interim Report on the subject matter of the reference dealing in particular with those aspects of the reference that are relevant to expediting and maximising de-institutionalisation of punishment.

DATED this eleventh day of August 1978

Peter Durack QC
Attorney-General

Participants

The Commission

The Division of the Commission constituted under the Law Reform Commission Act 1973 for the purposes of the Sentencing reference comprised the following members of the Commission:

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Acting Chairman

The Honourable Justice MR Wilcox, LLB (Syd) (1984 to 1985)

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** The recommendations, statements of opinion and conclusions in this report are the responsibility of the members of the Law Reform Commission. They do not necessarily represent the views of consultants or of the organisations with which they are associated.

Summary

Introduction

Sentencing and punishment are matters which arouse public controversy and emotion. There is intense and continuing debate about all aspects of sentencing and punishment policy, not restricted to the public and the media, but extending to writers, correctional adminstrators, judges and others involved in the criminal justice system. Current areas of public concern include inconsistency in sentencing and the difference, often very substantial, between the term of imprisonment imposed by the court and the period which is served in prison by the offender before being paroled. This discrepancy leads many to the view that the present system is merely a charade. Particular attention is also focussed on the use of imprisonment as a sanction and the need to reduce reliance on it, especially in view of its proven cost in human and financial terms.

Sentencing principles

This report is guided by a number of principles:

- Punishments imposed by the criminal justice system for offences must be just, that is, they must be of an appropriate severity, having regard to the circumstances of the offence and the offender.
- Consistently with a just punishment, rehabilitative goals and restitution for victims may also be pursued.
- Inhumane, cruel or vengeful punishments such as capital punishment, corporal punishment, and torture should in no circumstances be permitted.
- Goals such as the incapacitation of the offender or general deterrence should not be objectives of the imposition of punishment.
- Punishment must be consistently applied. This implies not only that offenders should be punished for the crimes they commit but also that similar offenders who commit similar crimes in similar circumstances should be punished in similar ways. It further implies that offenders who commit more serious offences should be punished more severely than those who commit less serious offences.

Major themes of the report

Reducing emphasis on imprisonment

Retention of imprisonment. A major theme of this report concerns the nature of imprisonment and the role it should play in the criminal justice system. Imprisonment is, and will continue to be, an important part of the system of imposing punishment for offences against federal and Australian Capital Territory laws. Justice requires that serious offences be matched by a severe punishment. Since the abolition of the death penalty and of 'cruel and unusual' punishments, imprisonment is the most severe punishment that can be imposed. For some serious offences, it will be the only just punishment. Its abolition as a sanction would leave the criminal justice system without a punishment of the degree of severity appropriate to some crimes.

The need for less imprisonment. Nevertheless, the emphasis that the criminal justice system places on imprisonment is considered to be excessive. Severe punishments can be imposed on offenders without resorting to imprisonment as frequently as the law does at present. This report gives a number of reasons why the emphasis on imprisonment should be reduced.

- The experience of imprisonment is negative and destructive for the offender. In nearly all jurisdictions prisons are overcrowded, leading to stress for prisoners and staff and severe management problems. The lack of useful activities, including work experience, in many prisons leads to boredom and frustration for prisoners.

- The cost of imprisonment is enormous and the returns few. In 1985–86 the Commonwealth paid New South Wales $2,419,000 for the recurrent costs of accommodating about 60 Australian Capital Territory prisoners.

- The severity of prison as a sanction is underscored by reserving it for the most serious cases. The value of imprisonment as a punishment option will be enhanced by its being used more sparingly.

- Reducing the emphasis on imprisonment complements, and is linked with, the principled approach to custodial orders which is recommended in the report.

- It is the policy of all Australian governments, including the federal government.

Techniques for reducing imprisonment. Accordingly, the Commission recommends a number of interlinked techniques for reducing the emphasis on imprisonment and at the same time increasing the range and severity of non-custodial sanctions for serious offences. They include the following:

- Imprisonment should be the punishment of last resort. No federal offence should be stated in legislation to be punishable only by imprisonment
- Prescribed minimum periods of imprisonment should be eliminated. The arbitrariness of mandatory minimum terms of imprisonment tends to undermine consistency in the consideration by sentencers of aspects of offences, or the particular characteristics of the offender. They may also result in unduly harsh sentences being imposed
- Consideration should be given to removing imprisonment as an available sanction for some categories of offences, such as some customs and quarantine offences, and social security and taxation offences where no systematic fraud is involved.
- Maximum periods of custodial orders should be rationalised to promote consistency. In 1980 there were at least 18 different maximum prescribed terms ranging from 14 days to 20 years. Since then, more have been added. Under the Commission's recommendation only eight prescribed terms would be available. These would range from 6 months, then 2, 5, 7, 10, 12 and 15 years. Life imprisonment would be the longest prescribed term.
- A wide range of non-custodial orders of appropriate severity should be available. While community based options such as community service and attendance centre orders are generally regarded as suitable punishment for lesser offences, they may be equally appropriate for serious offences, especially in relation to crimes against property. Their effectiveness should be enhanced by increasing the maximum number of hours available, providing a real alternative to imprisonment. In accordance with the Commission's earlier recommendation, steps should be taken by the Commonwealth to make appropriate arrangements with New South Wales, Queensland and Tasmania to make these sanctions available to courts sentencing federal offenders in those States. The same range of community based orders should be available in the Australian Capital Territory.
- The use of the fine should be increased in appropriate cases. The imposition of a severe fine should be encouraged in cases where the severity of the offence and the means of the offender justify such a penalty. On the other hand, it is undesirable that heavy fines be imposed on poor offenders if alternative non-custodial sanctions are equally appropriate. An informal means inquiry should be encouraged to determine whether a fine or a community based order is the more appropriate penalty in the circumstances.
- Imprisonment should not be an automatic consequence of fine default. Consideration should be given to greater reliance on civil enforcement measures in appropriate cases. By ensuring that enforcement measures

are pursued more vigorously, there is less likelihood that an offender will fail to make payment and be charged with an offence.

- Wilful and substantial default of a non-custodial sentence should be the subject of a new offence. In order to emphasise the serious nature of fines and community based orders as punishment, the wilful refusal to co-operate substantially with these orders should attract serious consequences. A maximum of two years imprisonment is proposed.

Truth in sentencing

Parole and remissions a 'charade'. Another major theme of the report is the need to enhance 'truth in sentencing'. Under the present system, a substantial sentence of imprisonment may be imposed by the court, yet it is generally understood that the offender will be released on parole long before the period is served. Remissions further reduce this period. This had led to public disquiet and the procedure having been judically described as an 'elaborate charade'.

The nature of a custodial order — imprisonment and parole. The report emphasises that while parole has rehabilitative objects an offender on parole is still being punished and is subject to often stringent conditions and requirements. To that end, those sentenced to periods in custody should be referred to as serving a custodial order, and not serving a prison sentence. The custodial order has two stages, the period in custody and the period under supervision while on parole. Parole should not be abolished; its place in the punishment process should be more clearly emphasised.

Automatic release. In order to promote truth in sentencing and to encourage the consistent treatment of offenders sentenced to custodial orders, the Commission recommends an automatic date of release upon parole, specifically after the completion of 70% of the total length of the sentence imposed, subject to certain limitations. These limitations are the allowance for remissions up to a maximum of 20% of the total length of the sentence, and the continuation of the release upon licence scheme for compassionate or other exceptional reasons. These recommendations are dependent on the recommendations to reduce maximum terms and the emphasis on imprisonment.

Remissions. The granting of a maximum of 20% of the length of a sentence as remissions should only be upon the basis that such remissions are earned for good behaviour, diligence or other creditable activity. Automatic remission should be abolished. This recommendation recognises the need to encourage offenders to be of good behaviour while in custody.

Reduction in length of custodial orders. These proposals are designed to reduce public disquiet about apparent leniency in the treatment of those sentenced to custody by eliminating the present elaborate procedure by which periods in custody are determined for Australian Capital Territory and federal offenders. The Commission's overall aim is to reduce the present length of

custodial orders as well as to minimise the number of offenders sentenced to custodial orders. For that reason, in recommending that a maximum of 70% of the length of the sentence be spent in custody, subject to earned remissions to up to 20% of the length of the sentence, the Commission must also recommend that both present statutory lengths of sentences, as well as the sentence lengths used in the normal course of events ('the tariff') be reduced. The result of such a reduction of maxima should be that those sentenced to custodial orders spend, under the proposed new parole system, no more than, but preferably less than, the period in custody likely to be served under present sentencing practices.

Structured discretion

The laws and procedures surrounding the sentencing decision should be structured so as to lead to consistency of treatment of offenders. The present role of the courts in exercising the sentencing discretion should remain but the procedures surrounding the exercise of the sentencing discretion should be such that consistency of treatment between offenders and offences is enhanced. The report makes a number of proposals to promote consistency. They include the following:

- More extensive requirements for the giving of reasons for the decision should be introduced. These will make it clear what factors the courts considered relevant and what weight was given to those factors. They are also needed to explain the process by which the court came to choose a particular type of sanction or the severity of sentence.

- There should be a statutory list of factors regarded as relevant to the exercise of the court's discretion. Under the present law, there is no statement as to what matters should be regarded as relevant, although the report identifies a number of factors which courts currently take into account and notes a variety of 'aggravating' and 'mitigating' factors. The court should not be under an obligation to consider all or any of the matters in the proposed list.

- A 'discount' on the sentence for a plea of guilty is proposed. Since the plea has no bearing on the circumstances of the offence or the offender's characteristics, the proposal may be seen as a significant departure from the just deserts model. Nevertheless, practical considerations, in particular the need to reduce court delays, justify courts being able to take account of the fact that the offender pleaded guilty to the charge. Providing information to the authorities should be treated on the same basis.

- There should be a statutory list of factors to which courts may not have regard. The proposed list relies heavily on the current law, but also includes the defendant's choice to plead not guilty and the prevalence of the offence in the community.

- There should be no requirement that the rules of evidence be applied in the sentencing hearing. However, the court should be able to apply, as appropriate, the rules of evidence to the proof of facts that in the court's view are or will be significant in sentencing.

- The standard of proof required to determine a fact in dispute should depend on the importance of the fact in establishing the offence. There must be an appropriate balance between flexibility and the need, in some circumstances, to prove important and significant facts to a higher standard of proof than less significant facts.

- The quality and reliability of reports about the offender should be improved. Pre-sentence reports need not be mandatory.

- The role of the victim in the sentencing hearing should not be changed to allow either direct participation or separate legal representation. Taking the victim's views into account may lead to unjustified disparities in sentencing. Mandatory victim impact statements are not recommended.

- The prosecution should play a more active role in ensuring an appropriate penalty is imposed on the offender. The published guidelines of the Director of Public Prosecutions on this matter provide a suitable basis for counsel to address on sentence, and should be brought into line with other recommendations in this report.

Other matters

Serving imprisonment

Prison conditions. The conditions under which federal and Australian Capital Territory prisoners serve their sentences is an important issue addressed in the report. At present, federal prisoners are housed in State and Territory prisons and Australian Capital Territory prisoners are housed in New South Wales prisons. As a matter of practical reality, State and Territory prisons and correction services treat such prisoners in much the same way as local offenders. A clearly identifiable group of prisoners receiving preferential or different treatment would be a constant source of friction and conflict within the prison, causing prison administrators considerable difficulty. The report accepts that the continuation of a policy of intra-jurisdictional parity of treatment for federal prisoners is the only practical approach while such prisoners continue to be housed in State and Territory prisons. This view is subject to certain qualifications:

- The federal government must co-operate with prison administrations in all jurisdictions to upgrade prison standards to at least the Minimum Standard Guidelines levels.

- All prisoners, Federal, State, and Territory, should henceforth be covered by Medicare to the same extent as members of the community generally.

- Legislation should require that federal prisoners not be punished by way of dietary restrictions, corporal punishment or solitary confinement.

- A federal prison co-ordinator should be appointed to monitor conditions under which federal prisoners are being held, and report to federal government.

- Minimum Standard Guidelines specifically directed at police lock-ups should be an urgent priority.

For the reasons which apply to federal offenders, Australian Capital Territory prisoners should be subject to the same prison conditions as their New South Wales counterparts.

Civil liberties. At present, federal prisoners and certain other convicted persons may have restrictions placed on their civil liberties, depending on the laws of the relevant State or Territory in which they are convicted. Such persons may lose the right to vote or the right to sue in the courts. The report recommends that these restrictions be removed.

Special categories of offenders

Mentally ill and intellectually disabled offenders. A number of special categories of offenders are examined and recommendations made in relation to four of them. In response to a large number of submissions on mentally ill and intellectually disabled offenders, the report calls for a major review of the position of such offenders within the criminal justice system as a whole. In the meantime, a number of recommendations are made in order to give federal and Australian Capital Territory ofenders access to recent State and Territory innovations in this area. These include:

- Courts sentencing mentally ill offenders should have the power to impose a hospital order committing them to a psychiatric hospital within the relevant jurisdiction. Such orders should only be made where the court would have imposed a custodial sentence had the offender not been mentally ill. Further, to bring these orders into line with the Commission's recommendations on parole, involuntary detention should end after completion of 70% of the period ordered. Provision for remissions is also made. Once involuntary detention has ceased, the only justification for detention should be whatever powers are available under the mental health legislation in the relevant jurisdiction.

- Psychiatric probation orders should be available to all courts sentencing federal or Australian Capital Territory offenders who are mentally ill.

- Guardianship orders should be available for intellectually disabled offenders. The degree of guardianship provided is to be flexible and responsive to the needs of the individual.

- Program probation orders should be available for intellectually disabled offenders to provide training in basic social skills.

Young offenders. In 1987, a research project on sentencing of young offenders was undertaken by the Commission working in co-operation with the then Commonwealth Office of Youth Affairs. This report makes recommendations based largely on the conclusions in that research paper:

- Sentencing of young offenders should proceed on the same 'just punishment' basis as sentencing for adults. Nevertheless, increased and significant emphasis should be given to the possiblities for rehabilitative goals in the sentencing of young offenders.

- Imprisonment should be a sanction of last resort.

- There should be an approved Commonwealth list of non-custodial sentencing options specified by legislation or regulation.

- The Commonwealth should adopt the United Nations Minimum Standards for the Administration of Juvenile Justice (The Beijing Rules) and should provide the development of an equivalent, in the juvenile justice sphere, of the Minimum Standard Guidelines for Australian prisons.

Female offenders. While the gender of an offender should not, in itself, be a matter relevant to sentencing, the problems of particular relevance to female offenders should not be ignored. Only in exceptional circumstances should the mother of a young child be imprisoned. To ensure that offenders and in particular, women, do not miss out on community sentencing options child care facilities should be part of the recommended Australian Capital Territory attendance centre scheme and the existing community service scheme.

Habitual offenders. At present s 17(1) Crimes Act 1914 (Cth) provides that sentencing courts may declare certain offenders to be habitual criminals and may order that they be detained in prison during the pleasure of the Governor-General. Since the punishment is not linked to the commission of a particular offence, it is inconsistent with the principle of just deserts. The provision should be repealed.

Resource implications

The report firmly endorses greater use of non-custodial sentencing options as opposed to custodial orders. Community corrections are vastly less expensive to administer than imprisonment, bestow benefits on the community through

work programs, and reduce the likelihood of recidivism by enhancing the offender's self-esteem. It may be that the overall effect of the Commission's recommendations will be an absolute reduction in the budget to provide correctional services. In any event, resources should presently be directed towards increasing the availability and quality of community corrections. A secure psychiatric facility should be provided in the Australian Capital Territory as soon as possible. So too should facilities for periodic detention. Only after these resources have been provided should an institution or series of institutions to house Australian Capital Territory offenders at all levels of security classification be established. Appropriate programs including educational and vocational programs must be made available for all prisoners, including the mentally ill and intellectually disabled.

Information and education — a sentencing council

Judicial officers need reliable, accessible and up to date information, not only to impose appropriate penalties on individual offenders but also to help ensure that sentences imposed are consistent. Comparisons between sentences can only be made if a relatively standardised description of the offences and offenders concerned is collected and made available to sentencers, and others involved in the criminal justice system. For this purpose, an information system, with both quantitative and qualitative components, is necessary. The report recommends that a sentencing council be established which provides judicial officers with detailed and comprehensive information, advises government on sentencing programs, monitors sentencing practices and provides a public information service. An important function of the sentencing council should be to provide sentencing education programs for judicial officers.

Summary of recommendations

The place of punishment in the criminal justice system

1. The punishment process, including sentencing, is part of the criminal justice system. It is the criminal justice system as a whole, not simply the punishment or sentencing component of that system, that deters crime (paragraph 24).

Just punishments

Just punishments

2. Punishment, to be just, must be linked to a criminal offence (paragraph 27). Further, punishments themselves must be just. Two things follow:

- there must be an appropriate degree of severity in the range of punishments available so that the community can be rationally satisfied that a breach of the criminal law is attended by significant consequences (paragraphs 26, 28)
- the punishment imposed for a particular offence must be just, that is, of a severity appropriate to the offence (paragraph 28).

Unacceptable punishments

3. *Capital punishment.* Capital punishment is unacceptable as a punishment and should never be re-instated.

4. *Corporal punishment.* Corporal punishment should not be re-introduced for either federal or Australian Capital Territory offender.

5. *Torture convention.* The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment should be ratified as soon as practicable (paragraph 31).

Consistent punishments

6. Similar offenders who commit similar offences in similar circumstances should be punished similarly (paragraph 32).

Objectives of punishment

Just punishment

7. Fundamentally, punishment should be just — a real punishment, appropriate but not excessive — and consistently applied (paragraph 35).

Rehabilitation and restitution

8. Rehabilitation of the offender, and restitution of property, where they can be advanced within the context of a just punishment for the crime, should be encouraged (paragraph 36).

Incapacitation and general deterrence

9. Incapacitation of the offender, and general deterrence, should not be invoked as goals or objectives by sentencers (paragraph 37).

Imprisonment as a sanction

Retention of imprisonment, but reducing emphasis

10. Imprisonment is and will continue to be an important part of the system of imposing punishment for offences against federal and Australian Capital Territory laws (paragraph 40). Nevertheless, the emphasis that the criminal justice system presently places on imprisonment should be reduced, and more emphasis should be placed on non-custodial sanctions, particularly community based sanctions (paragraph 41).

Imprisonment the punishment of last resort

11. *Crimes Act s 17A policy affirmed.* The policy of the Crimes Act 1914 (Cth) s 17A is re-affirmed: imprisonment should be the punishment of last resort (paragraph 55).

12. *Amendments to s 17A.* Judicial officers should consider all sanction options on an equal footing in cases where s 17A does not compel a presumption in favour of non-custodial options. Section 17A should be amended to make this clear (paragraph 56). The references in s 17A to offences punishable only by imprisonment should be omitted (paragraph 57).

Mandatory prison term

13. There should be no mandatory prison term prescribed for any federal offence (paragraph 58).

Eliminating prison as a sanction for some offences

14. Consideration should also be given to eliminating imprisonment as a sanction for particular offences. Of federal offences, social security offences and taxation offences, especially where no systematic fraud is involved, and some customs and quarantine offences should be reviewed first for this purpose (paragraph 59).

Rationalising imprisonment

15. *Rationalisation and reduction of maximum prescribed prison terms.* There is a need to rationalise and reduce the large number of different maximum

prescribed prison terms in federal and Australian Capital Territory legislation (paragraphs 60–1). In addition, there is a need to reduce the length of these maximum terms in many cases: some are so high that it cannot be said that they represent a just and appropriate punishment, even for the worst cases of the offence (paragraph 61).

16. *Overall review needed.* There should be an overall review of maximum terms of imprisonment prescribed for federal and Australian Capital Territory offences (paragraph 62).

17. *A limited set of maximum periods of imprisonment.* In that review, the federal Government should adopt, for offences punishable by imprisonment, the following set of different maximum prison terms:

life imprisonment
15 years imprisonment
12 years imprisonment
10 years imprisonment
7 years imprisonment
5 years imprisonment
2 years imprisonment
6 months imprisonment.

The selection of the maximum prison term for a particular offence should be made from that set of maximum terms (paragraph 63).

18. *Allocating maximum periods of imprisonment to particular offences.* In allocating offences to each of these maximum prison terms, a realistic assessment should be made of each offence and of the need for imprisonment in each case. The fact that a wider range of non-custodial options, pitched at a more severe level, is recommended and that imprisonment is the last resort will need to be borne in mind. A deliberate effort should be made to ensure that offences for which the same maximum prison term is prescribed are of the same comparative seriousness. Offences which infringe personal physical security should generally be regarded as more serious than offences which infringe the security of property (paragraph 64).

Cumulative sentences

19. Both the Crimes Act 1900 (NSW:ACT) and the Crimes Act 1914 (Cth) should be amended to provide a clear legislative presumption in favour of concurrent, rather than cumulative, sentencing. Sentences should only be required to be served cumulatively in exceptional circumstances, and the court should have to specify those if it so orders (paragraph 66).

Deferred and suspended sentences

20. Partly suspended or split sentences should no longer be available for sentencing federal and Australian Capital Territory offenders. Suspended sentences and deferred sentences should be rationalised. A conditional adjournment for

sentencing for a specified period, which should in no circumstances be longer than 12 months, should be able to be ordered by sentencing courts in order for the offender to be able to demonstrate remorse, rehabilitation or the like. A breach of conditions should not of itself result in a further sentence being imposed but should result in the court declining to extend further the benefit of the period of deferral to the offender (paragraph 67).

The nature of imprisonment

21. *Imprisonment and parole one sanction.* Imprisonment and parole are not different and independent processes, but dual aspects of the one punishment. That punishment is and should be seen to be subjection to the control of the State for a specified period. For a part of that period, to be fixed by law, the mode of control is detention in prison. For the balance of the period, progressively more relaxed State control is exercised over the offender through the imposition of parole conditions while the offender is in the community. Those conditions are part of the punishment: a part designed to achieve rehabilitative objectives (paragraph 73). Accordingly, parole should not be abolished, but reformed (paragraph 72).

22. *Custodial orders.* Legislation dealing with imprisonment should refer not to 'imprisonment' but to 'custodial orders' — orders based on the offender being in custody, but in due course being released back into the community in a supervised and assisted way (paragraph 73).

Imprisonment reforms to enhance 'truth in sentencing'

Truth in sentencing

23. Sentences of imprisonment imposed by courts should mean what they say (paragraph 73).

Application of reforms

24. All sentences of imprisonment imposed on a federal or an Australian Capital Territory offender should incorporate an appropriate period of supervised release into the community: there should be no discretion to decline to fix a non-parole period. This extends to offenders sentenced to short terms of imprisonment and to life imprisonment (paragraph s 79–80).

Fixing the period to be spent in prison

25. *Period to be spent in prison to be specified in legislation.* The proportion of the custodial order to be served in prison should be specified in legislation: there should no longer be any discretions to fix the length of the non-parole period.

26. *Length of period to be spent in prison.* The proportion of a custodial order to be spent in prison should be significant: the general rule should be

that 70% of the period of a custodial order should be spent in prison. There may be exceptional circumstances in which a residual discretion in the court to reduce the 70% proportion would be appropriate: in no case should it be reduced below one-half of the total period of the custodial order.

27. *Commencement of sentence.* The time of commencement of the custodial order should be the time when sentence is pronounced. But if the offender has already been in custody in relation to the offence, the time spent in custody should be counted as time served under the prison term (paragraph 82).

Discretion to release

28. *Prisoners sentenced to fixed terms.* There should be no discretion not to release a prisoner at the end of the proportion of the period of the custodial order that is to be spent in prison. Release into the community, on parole conditions, should be automatic unless the offender is, for some other reason, not to be released (paragraph 83).

29. *Prisoners sentenced to life imprisonment.* The release of offenders sentenced to life imprisonment should be discretionary. Release should not be permitted before the offender has served 10 years imprisonment unless exceptional circumstances exist (paragraph 84).

30. *Temporary leave, day leave, etc.* Temporary leave of absence from prison, for compassionate or other reasons, should be available to federal prisoners in State and Territory prisons and to Australian Capital Territory prisoners in New South Wales prisons (paragraph 85).

Remissions

31. *Limited remissions.* The impact of remissions on the length of time an offender actually spends in prison should be limited and determinate.

32. *General remissions.* Remissions unrelated to any particular aspect of the prisoner's behaviour should not be available.

33. *Earned remissions.* Earned remissions should remain. But they must be, in substance, earned remissions, not remissions granted subject to being lost for bad behaviour.

34. *Extent of earned remissions.* The amount of earned remission available should be restricted to a maximum rate of 20% of the period of the custodial order, that is, a prisoner should be able to earn a reduction of up to 20% of the length of the period of the custodial order for industry, diligence and good behaviour.

35. *Impact on 'non-parole period'.* To maximise its value as an incentive to the prisoner, the 'non-parole period' should also be reduced by the amount of remissions earned (paragraph 86).

Parole conditions

36. *Parole conditions.* No condition should be mandatory for parole, although the Commission envisages that normally supervision will continue to be imposed.

37. *Clear and certain.* In all cases, parole conditions should be certain, clear and unambiguous.

38. *Variation of conditions.* Because the needs of the offender may vary over time, the parole authority should be able to vary the parole conditions (paragraph 87).

39. *Duration of conditions: the parole period.* The parole period should be the balance of the period of the custodial order, reduced to the extent that remissions have been earned by the prisoner. There should be no requirement that the offender be subject to parole conditions for the whole of the parole period.

40. *Life prisoners.* In the case of parole for a prisoner sentenced to life imprisonment, the parole authority, in granting parole, should be required to specify a date as the day on which the parole period will end (paragraph 88).

Revocation of parole

41. *Sanction for breach of conditions.* The parole authority should be able to revoke parole only on the ground of a breach of a condition of parole.

42. *Australian Capital Territory restrictions.* The present requirement under Australian Capital Territory law that the parolee must be apprehended and brought before the parole authority before it can revoke parole is unnecessarily rigid. Parole should be able to be revoked without this requirement.

43. *'Clean street time'.* 'Clean street time' should be credited to the offender if parole is revoked, that is, the period of the custodial order should be reduced by the time spent on parole before the breach occurred that led to revocation (paragraph 90).

Consequences of commission of new offence

44. *Effect of imprisonment for new offence.* A person who is imprisoned for an offence committed while on parole can no longer been seen as serving any part of the period of the original custodial order in the community. Such imprisonment should have the same effect as revocation, effective from the day the offence was committed.

45. *'Clean street time'.* 'Clean street time' should be credited to the parolee in these circumstances (paragraph 91).

Further parole where revocation

46. *Parole authority to specify period of imprisonment.* On re-imprisonment for revocation of parole, the parole authority should be required to specify the period of imprisonment, which should never exceed the balance of the period of the custodial order, earned remissions and 'clean street time' being taken into account.

47. *Further parole.* Parole release into the community should be available again to the offender (paragraph 92).

Further parole where imprisonment for new offence

48. Where an offender is imprisoned for another offence:

- if the non-parole period for the second offence is longer than the balance of the period of the custodial order for the first offence, earned remissions and 'clean street time' being taken into account — the latter should subsume the former
- if the non-parole period for the second offence is less than that period, then,
  - if release for the second offence takes place under the scheme recommended in this report, release for the second offence should subsume the previous release; the parole authority, in specifying conditions for the second release, should have regard to the conditions imposed in respect of the first release and an appropriate set of conditions should be imposed for the second release
  - if the second offence is a State or Territory offence in respect of which the recommendations in this chapter have not yet been implemented, the offender should continue to be subject to the parole conditions specified in respect of the first release to the extent that they are consistent with whatever conditions are imposed in respect of the second release (paragraph 93).

Implementation: Australian Capital Territory

49. *Implementation.* These reforms should be applied to Australian Capital Territory offenders, in particular, the reforms concerning remissions (paragraph 95).

50. *Parole Board.* The Australian Capital Territory Parole Board should exercise the powers under the recommended scheme (paragraph 95).

51. *Australian Capital Territory Parole Board: procedural requirements.* The procedure recommended in the Commission's second interim report, *The Commonwealth Prisoners Act* (ALRC 43), for parole procedures for federal offenders is generally appropriate. The following recommendations are made in addition to those in that report:

- *Administrative Decisions (Judicial Review) Act.* If there is any doubt whether the Administrative Decisions (Judicial Review) Act 1977 (Cth) applies to the decisions that the Board will be required to make, and discretions it will be required to exercise, under the reforms recommended in this report, it should be amended to put it beyond doubt.

- *Selection or variation of parole conditions.* There should be no requirements, apart from those imposed by or under the Administrative Decisions (Judicial Review) Act 1977 (Cth) or the Freedom of Information Act 1982 (Cth), for reasons to be given for the imposition of particular conditions or, in cases where they are varied, the variations. Nor should there be a requirement, other than the requirements of natural justice imposed by the Administrative Decisions (Judicial Review) Act 1977 (Cth), for the prisoner to be present or represented when these decisions are considered by the Board.

- *Revocation of parole.* It should be mandatory for any decision to revoke parole by the Board to be supported by reasons: the breach relied on should be specified and the reason why revocation is an appropriate response should be specified. The offender should be told of both matters in writing. In the normal course, the Board should notify the offender of its intention to revoke, giving a short period, say seven days, within which representations can be made either personally or by counsel. If the Board if satisfied that it is necessary in the public interest to revoke parole immediately, it should be able to do so. In those cases, once the offender is arrested to be re-imprisoned, he or she should immediately be able to require the Board to reconsider its decision, taking into account whatever representations he or she wishes to make personally or by counsel. On such a reconsideration, the Board should be able to cancel the revocation without further detrimentally affecting the offender's position.

- *Life prisoners.* A decision not to release a prisoner sentenced to life imprisonment on parole on an application made after the 10 year period should be supported by reasons. There is no need for a requirement that reasons for refusal of applications be given before that time or for a rule requiring a hearing in the presence of the prisoner in each case.

In all cases, the Board should have to take into account any representations made by the prisoner, either personally or by counsel, and the reports which it will have available to it.

52. *Information to prisoners.* Australian Capital Territory prisoners should be properly informed about the parole system and their rights in relation to it (paragraph 96).

Implementation: federal parole

53. *ALRC 43 affirmed.* Subject to recommendation 54, the Commission reaffirms the recommendations made in the Commission's second interim report,

The Commonwealth Prisoners Act (ALRC 43). In particular, the Minister should continue to be the parole authority for federal prisoners. The procedural protections for federal prisoners and parolees (chiefly the applicability of the Administrative Decisions (Judicial Review) Act 1977 (Cth)) set out in that report are appropriate (paragraph 97).

54. *Eligibilty for release, and discretionary release.* The imprisonment of federal offenders in all jurisdictions should ultimately be on the basis recommended in this report. The Commonwealth should move to implement the scheme recommended here for all federal offenders (paragraph 98).

Release on licence

55. For federal offenders, the Commission re-affirms the recommendation made in ALRC 43 in respect of release on licence for federal prisoners. The same reforms should be enacted for Australian Capital Territory offenders. This entails

- retention of the present power of the Governor-General to release on licence if it is proper to do so in the circumstances
- limiting the circumstances in which a person can apply to be released on licence to 'exceptional circumstances'
- limitations on release on licence in pursuance of an application unless the Governor-General is satisfied that the exceptional circumstances exist and justify the licence
- the consequences of revocation of licence should be broadly the same as the consequences of revocation of parole, and should be specified in the legislation (paragraph 99).

Inter-related recommendations

56. Recommendations 10–55 are closely linked. They have been designed to address different but related problems in the criminal justice system. It will be essential to implement these recommendations together in order to implement principled reforms. Any other course would be counter-productive (paragraph 100).

Non-custodial sentencing options

Need for diversity

57. Courts sentencing federal or Australian Capital Territory offenders should have a wide range of options available to enable them to choose a sanction that restricts the offender's liberty in appropriate cases and a less punitive one for less serious offenders (paragraph 104).

Removing link with imprisonment

58. The linkage between some types of non-custodial sentencing options and imprisonment need not necessarily continue: each type of sentence should be considered independently in relation to each type of offence to assess what kind of punishment should be available for that offence as a matter of law and policy (paragraph 105).

Fines

59. *Retention of fines.* The fine should be retained as a significant sentencing option, but as a separate, 'free-standing' sanction for which imprisonment is not automatically imposed in default of payment (paragraph 112).

60. *Application for time to pay etc.* The present powers of the courts to allow time to pay and to pay by instalments should continue. An offender who has had a fine imposed should be permitted to apply at any time to the officer of the court to seek further time to make payment, permission to pay by instalments or the variation of an instalment order (paragraph 113).

61. *'Day fine' schemes.* A 'day fine' scheme should not be introduced either for federal or Australian Capital Territory offenders (paragraph 114) (majority recommendation).

62. *Means inquiry.* Courts should be encouraged to continue the practice many already adopt of inquiring informally into an offender's means before imposing a fine.

63. *'Fine option'.* The facility, already present in a number of jurisdictions, for an offender of limited means who has had a fine imposed to apply to an officer of the court for permission to work off the fine by community service should be adapted by encouraging offenders of limited means to make a submission during the means inquiry asking that community service be imposed rather than a fine (paragraph 116).

64. *Matters to be taken into account.* The offender's means should be taken into account in determining whether to impose a fine (paragraph 115) and in determining the amount of the fine (paragraph 117).

65. *Penalty units.* A 'penalty unit' system should be enacted for both federal and Australian Capital Territory offences. The prescription of an exact monetary maximum for each offence should be changed to a certain number of penalty units. The penalty unit should have a specified value. Adjustments to that value should normally be made only on the recommendation of the sentencing council (see recommendations 176–8) (paragraph 119).

Community service orders

66. *Community service orders retained.* Courts should retain the power to impose community service orders on both federal and Australian Capital Territory offenders.

67. *Crimes Act 1914 (Cth) s 20AB.* In those jurisdictions where the Crimes Act 1914 (Cth) s 20AB has not yet been proclaimed, the Commonwealth should pursue the necessary arrangements with State administrations so that federal offenders in those States will have community service orders available to them.

68. *No link to imprisonment.* There should be no link of community service orders to imprisonment: a court in a State or in the Northern Territory sentencing a federal offender to a community service order should not have to find, as a pre-condition to imposing that sentence, that the offender should be imprisoned.

69. *Uniform limits for federal offenders.* The limits of community service orders should be uniform throughout the Commonwealth so far as federal offenders are concerned. The maximum limit for a community service order, both for federal offenders and for Australian Capital Territory offenders, should be set at 500 hours, to be served over a period not exceeding two years (paragraph 125).

Attendance centre orders

70. *Retention of attendance centre orders.* Courts should be able to impose attendance centre orders on both federal and Australian Capital Territory offenders.

71. *Attendance centre for the Australian Capital Territory.* Steps should be taken as a matter of urgency to provide in the Australian Capital Territory the necessary facilities for this option to be available there.

72. *Crimes Act 1914 (Cth) s 20AB.* For federal offenders in jurisdictions not presently covered by the Crimes Act 1914 (Cth) s 20AB, the Commonwealth should pursue the necessary arrangements with State administrations.

73. *No link to imprisonment.* There should be no link to imprisonment: attendance centre orders should be an independent option.

74. *Uniform limits.* The limits of an attendance centre order should be uniform throughout the Commonwealth for federal offenders, and for Australian Capital Territory offenders, at 500 hours, to be served over a period not exceeding two years (paragraph 127).

Periodic detention

75. *Periodic detention.* Periodic detention should be available to both federal and Australian Capital Territory offenders as an independent sanction on the same basis as other community sanctions.

76. *Australian Capital Territory.* Steps should be taken as a matter of urgency to provide in the Australian Capital Territory the necessary facilities for this option to be available there.

77. *Crimes Act 1914 (Cth) s 20AB.* For federal offenders in jurisdictions not presently covered by the Crimes Act 1914 (Cth) s 20AB, the Commonwealth should pursue the necessary arrangements with State administrations as quickly as possible (paragraph 129).

Home detention

78. Home detention should not be an available sentencing option for either federal or Australian Capital Territory offenders (paragraph 131).

Victim-offender programs

79. It is too early to tell whether victim reparation programs, of the kind introduced in New South Wales in 1987, are worthwhile. The sentencing council (see recommendations 176–8) should examine and evaluate them before a decision is made on the question whether they should be available for Australian Capital Territory or federal offenders (paragraph 132).

National strategy for community based sanctions

80. The guidelines relating to minimum standards for community based corrections in Australia and New Zealand approved for circulation and comment by Australian corrections administrators and Ministers in May 1987 should be adopted by the Commonwealth, the States and the Territories (paragraph 133).

Unconditional discharge

81. An absolute discharge is an appropriate sentencing option to have available for minor offenders; it should continue to be available for both federal and Australian Capital Territory offenders (paragraph 134).

Conditional discharge and probation

82. *Retention.* Conditional discharge and probation should continue to be available for both federal and Australian Capital Territory offenders.

83. *Flexibility.* The Crimes Act 1914 (Cth) s 19B and 20 and the equivalent provisions of the Crimes Act 1900 (NSW:ACT) should be amended to remove any suggestion that particular conditions must always be imposed on an offender who is conditionally discharged. The court should have the maximum flexibility in fixing conditions (paragraph 139).

84. *Time limits.* A time limit of two years, with a normal presumption of one year, should be the length of time during which conditions should apply (paragraph 140).

Restitution and compensation

85. Existing powers, under which both federal and Australian Capital Territory offenders may be ordered to make restitution or pay compensation, should continue to be available (paragraph 141).

Combinations involving non-custodial sanctions

86. Imprisonment should not be able to be imposed on federal or Australian Capital Territory offenders in association with any of the non-custodial sanctions. Community service orders, attendance centre orders, periodic detention and fines should generally be applied as separate sentences, but in exceptional circumstances, they may be combined with other sanctions in that group. Any of the ancillary orders may be applied with any type of sentencing option (paragraph 142).

Review and new options

87. Sentencing options available for both federal and Australian Capital Territory offenders should be regularly reviewed by the sentencing council (see recommendations 176–8) to determine whether new options available in the States and Territories should be made available for federal offenders, and that the operation of existing non-custodial sanctions is satisfactory.

Default

88. *Civil enforcement of fines.* Consideration should be given to greater reliance on existing civil enforcement measures for fine default in appropriate cases. It should be a matter for discretion whether to proceed by way of civil enforcement or to impose an alternative sentence in default of payment (paragraph 143).

89. *Breach: re-sentencing.* Where a breach of a community based order occurs or a fine is not paid, the court should have a power to review the terms of the original order and to impose a new order, more appropriate in the circumstances, from the range of orders originally available. In imposing a new order, the court should be required to take into account the offender's behaviour during the operation of the order, particularly the extent of compliance. In the case of fines, methods of enforcing payment should be considered. Imprisonment should no longer be imposed as an automatic sanction for breach of any non-custodial sanction, including fines (paragraph 148).

90. *Wilful and substantial breach.* A wilful and substantial breach of a non-custodial sanction should be a separate and serious offence, punishable by a maximum of two years imprisonment. Factors such as when the breach occurred should be taken into account in determining whether it is substantial. The other non-custodial sentencing options should be available and the rule that imprisonment is the sanction of last resort should apply (paragraphs 149–51) (majority recommendation).

Determining the sentence

Reasons for sentence

91. *Requirement for reasons for sentence.* The present requirements for the giving and recording of reasons for sentences imposed on federal and Australian Capital Territory offenders should be expanded:

- *Where imprisonment ordered.* Legislation should require written reasons for all sentences of imprisonment imposed by any court on federal or Australian Capital Territory offenders
- *Where imprisonment an option.* If imprisonment is an available sentencing option, superior and District or County courts should be required to provide written reasons for any sentence imposed, but courts of summary jurisdiction should only be required to state and record reasons
- *Where imprisonment not an option.* If imprisonment is not an available sentencing option, superior and District or County courts should be required to state and record reasons for sentence, but courts of summary jurisdiction should not be required to provide reasons.

Where an appeal is lodged against any sentence imposed in any court, written reasons should be made available.

92. *Content of statement of reasons for sentence.* Statements of reasons, whether written or recorded in some other way, should specify the court's view of the seriousness of the offence, the matters that were taken into account, the weight given to those matters and the court's view of the appropriateness of the type and severity of the sentence imposed (paragraph 164).

93. *Understanding the effect of sentence.* The requirements of the Crimes Act 1914 (Cth) s 20(2) and s 20AB(2) that, for certain sentencing orders, the court explain or cause to be explained to the offender in language likely to be readily understood by him or her the purpose and effect of the proposed order, the consequences that may follow in the event of failure to comply and the circumstances in which the order may be varied or revoked, should attach to sentences of any kind imposed on federal offenders and to sentences imposed on all Australian Capital Territory offenders (paragraph 165).

Matters relevant and irrelevant to sentence

Facts relevant to sentence

94. *List of facts.* The categories of facts relevant to sentencing should not be closed but should at least include

- the degree of intention, premeditation or planning
- the level of participation in the offence
- whether a weapon was used
- whether the offence was one of a number of offences committed systematically for profit
- the extent and nature of harm to victims
- whether the offender knew that victim was particularly vulnerable person, such as a child or an elderly person
- whether the offender was a law enforcement officer
- whether there was provocation or duress, falling short of a complete defence
- entrapment
- the age of the offender
- the offender's character
- whether the offender was affected by alcohol or another drug, and if so, whether that was intentional
- whether the offender had or has personal difficulties, such as emotional or financial difficulties
- the offender's health
- the offender's cultural background
- whether the offender is remorseful or unrepentant
- whether the offender is intellectually disabled or suffers from a mental illness
- whether the offender is voluntarily seeking treatment for any health (including psychiatric) condition that may have been contributing factor in the commission of the offence
- whether a particular type of sanction would cause hardship to the offender
- the indirect effects on the offender of conviction or a particular sanction, for example
  - loss of, or inability to continue in or obtain, suitable employment
  - loss of pension rights
  - cancellation or suspension of trading or other licences
  - diminution of educational opportunities
  - deportation
- the impact on third parties of a particular sanction, for example, distress, reduced financial circumstances and deprivation of emotional support for the offender's family
- a jury recommendation for mercy
- grievances arising in the course of proceedings, for example, delay in bringing the matter to trial

- prior and relevant history of convictions and dispositions.

No distinction should be drawn, in such a list, between 'aggravating' or 'mitigating' facts.

95. *Enactment of list.* This list of facts should be prescribed in relevant legislation dealing with federal and Australian Capital Territory criminal trials. The legislation should make it clear that the court is not obligated to consider all or any of the matters in the list. It should also state that the list is open ended and that other matters not in the list may be taken into account. The sentencing council (recommendations 176–8) should review the legislated list from time to time (paragraph 170) (majority recommendation).

96. *'Discount' on sentence for a plea of guilty.* A plea of guilty, whether there is evidence of remorse or not, should be listed as a fact that can be taken into account in sentencing. No particular amount should be specified as the amount, or maximum amount, of the 'discount' (paragraph 174) (majority recommendation).

97. *Providing information to the authorities.* A sentencing court should be able to take into account the fact that the offender provided relevant information to the authorities. Care must be taken to ensure that information is not 'recycled', for example, by obtaining a benefit at the pre-trial stage by charge bargaining and then using the same information to obtain a discount at the sentencing hearing. Confidential procedures may be necessary to help protect from retaliation those who provide information (paragraph 175).

Facts irrelevant to sentencing

98. *Matters irrelevant to sentencing.* The following facts should be regarded as irrelevant to sentencing and should therefore not be taken into account:

- remission entitlements and early release (other than parole) policies
- unproclaimed legislation
- prevalence of the offence
- facts arising out of the same incident which may have supported another charge for a more serious or different offence
- any other alleged offences of the defendant which have not been admitted in accordance with the usual procedure for taking offences into consideration
- facts relevant to charges to which the accused has pleaded not guilty and on which the prosecution has led no evidence
- the defendant's demeanour in court
- the defendant's choice not to give evidence
- the fact that the defendant may have committed perjury in the course of proceedings
- any antecedent or subsequent offences either committed by the defendant or charged against him or her

- allegations concerning possible antecedent or subsequent offences
- (majority recommendation) the defendant's choice to plead not guilty (paragraphs 177, 180).

99. *Enactment of list.* This list should also be legislated for (paragraph 177) (majority recommendation).

100. *Parole, remissions and other release policies.* The court, in fixing the length of a sentence, should be able to take account of the fact that the law will prescribe the amount of time to be spent in prison, and the amount to be spent under supervision in the community. If the recommendations implementing automatic release on parole (recommendations 24–9), are not accepted such matters should be irrelevant. Entitlements to earned remissions should not be taken into account. If the Commission's recommendations about general remissions are not accepted, however, the court should be able to have regard to general remission entitlements in fixing sentence (paragraph 179).

101. *Prevalence of the offence.* 'Prevalence' of the offence should be included in the legislated list of matters not to be taken into account in determining sentence (paragraph 181) (majority recommendation).

Preserving discretion

102. The sentencing court must retain a significant amount of discretion. The most appropriate way to promote consistency in sentencing is to encourage sentencers 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 (paragraph 183).

Evidentiary matters

Application of the rules of evidence

103. While there should be no requirement that the rules of evidence be applied in the sentencing hearing, the court should be able, either on application or of its own motion, to apply, as appropriate, the rules of evidence normally applied in that court to the proof of facts that, in the court's view, are or will be significant in sentencing (paragraph 186).

Standard of proof

104. No particular standard of proof should be imposed for facts relevant to sentencing. The standard of proof will need to be related to the significance of the particular fact in the particular case. The standard which should have to be satisfied before making a finding on a more significant fact will be higher than for other, less significant facts. This should be a matter for the court to determine: accordingly, any legislation governing the standard of proof of facts

relevant to sentencing should therefore do no more than require that the court be 'satisfied' of the relevant fact (paragraph 188).

Police antecedents and pre-sentence reports

105. *Police antecedents reports.* Police antecedents reports should confine themselves to relevant matters and be basically factual, setting out, for example, only facts such as date of birth, marital status, current employment status and previous convictions, if any. Matters should not be raised in these reports unless they can be supported appropriately, nor should there be a fact summary made by the police where a trial has been held, or where statements of witnesses or depositions are available if a committal hearing has been held. Where there has been no trial or committal, a fact summary should be prepared by the prosecution. That summary, together with the statement of bare facts to be put before the court, should be handed to the defence so that any matters in dispute may be omitted, or appropriate evidence tending to establish or rebut the matter alleged obtained.

106. *Pre-sentence reports.* The Commission recommends:

- *Reports not mandatory.* Courts should not have to order pre-sentence reports but should use them if they would be helpful. They should not be ordered where the offence is trivial, where the offender is unlikely to re-offend, or merely for ulterior motives such as research.
- *Responsibility for report.* Pre-sentence reports should be prepared by suitably trained staff. Sufficient resources should be allocated to ensure that such staff are available.
- *Content of report.* The court ordering the report should specify any information which it particularly wishes to have, but there should be no statutory or administrative specification of the contents of a report. Reports should not recommend particular sentences.
- *Anonymity of third parties.* Third parties supplying information should be entitled to insist on their anonymity.
- *Consent of the offender.* A pre-sentence report should not be dependent on the consent of the offender but he or she should have the right to appeal against an order for a report if to prepare it will entail unjust delay in sentencing.
- *Access to pre-sentence reports.* The prosecution and the offender should be entitled to a copy of the pre-sentence report. If the report contains material not previously known to the offender which, in the opinion of the court, should not be disclosed to him or her, that part of the report should be furnished only to the legal representative of the offender.
- *Challenge to the report.* Both the prosecution and the offender should be able to cross-examine to challenge the accuracy of any factual statement

in a pre-sentence report. Where cross-examination is impossible because the source of the statement insists on anonymity, the statement should be normally disregarded by the court if its accuracy is disputed by the offender. The prosecution should be under a duty to draw to the attention of the court suspected inaccuracies not mentioned by the offender (paragraph 190).

Procedural matters

Victims

107. Victims should not be able to be parties to the sentencing hearing (paragraph 191).

The prosecution

108. *Active role.* Prosecutors should take a more active role on sentence than they traditionally have done.

109. *DPP's Guidelines.* The Director of Public Prosecution's published guidelines on this matter, generally speaking, provide a suitable basis for counsel prosecuting federal and Australian Capital Territory offenders to address on sentence. They should be be amended to bring them into line with the recommendations in this report. In particular, reference to general deterrence as a relevant matter in sentencing and increases in penalty since the commission of the offence should be removed (paragraph 193).

Implementation

110. Recommendations 91–109 should be implemented by federal legislation both for federal offenders and Australian Capital Territory offenders (paragraph 195).

Aboriginal offenders

Race irrelevant

111. The fact that an offender is Aboriginal should not be a matter relevant to sentence but special factors arising from disadvantages suffered by Aboriginals, or Aboriginal customary practices, should be considered.

Further research required

112. Further research on the impact of the criminal justice system on Aboriginals should be a high priority. The Commonwealth should make funds available for this purpose (paragraph 197).

Corporate offenders

113. The control of corporate behaviour through the criminal system should be referred to the Commission for inquiry and report (paragraph 198).

Mentally ill and intellectually disabled offenders

New reference

114. A reference covering all issues concerning the mentally ill and the intellectually disabled in the criminal justice system should be given to the Commission (paragraph 200).

The sentencing hearing

115. *Matters to be taken into account.* Mental illness and intellectual disability should continue to be taken into account by sentencers (paragraph 202).

116. *Pre-sentence reports.* There should be greater use made of pre-sentence reports, particularly for offenders who may be suffering from an intellectual disability or mental illness (paragraph 203). These reports should be prepared by multi-disciplinary teams and should cover the offender's physical and mental health, cognitive abilities and social and adaptive skills. The family and friends of the offender, and any psychiatrist, psychologist, social worker or welfare worker involved with the offender, should also be consulted (paragraph 203).

Hospital orders

117. *Hospital orders.* Courts should be able to sentence federal and Australian Capital Territory offenders who are mentally ill to a 'hospital order', that is, an order that the offender be detained in hospital for treatment for a specified period (paragraph 205).

118. *Hospital orders to be custody-based.* They should be equated with imprisonment, and should not be made unless, were the offender not mentally ill, the court would have imposed a custodial sentence.

119. *Period of order.* The maximum period of the hospital order should be the period for which imprisonment would have been ordered. Involuntary detention in hospital under a hospital order should end after completion of 70% of the period ordered. Thereafter the only justification for detention is whatever powers are available under the relevant mental health legislation.

120. *Remissions.* If hospitals can devise a suitable earned remission scheme for good behaviour while in hospital, earned remission should be available for up to 20% of the total length of the hospital order. Otherwise, an automatic remission of 20% of the total length of the hospital order should be available (paragraph 206).

121. *Discharge.* An offender whose condition no longer requires detention on an involuntary basis should be discharged. Discharge before the end of the order should be the aim of the treating doctor.

122. *Review.* The offender's case should be reviewed, at a minimum, every three months for the first year of an order and, thereafter, every six months by a forensic psychiatrist experienced in the treatment and diagnosis of mental illness, but if there is a mental health review or patient review tribunal operating in the jurisdiction, it should be responsible for reviews.

123. *Re-sentencing after discharge.* Where an offender is sufficiently recovered no longer to need involuntary hospitalisation, the sentencing court should be required to re-sentence the offender so as to alter the mode under which that sentence is to be served. In deciding what further sentence is appropriate, the matters to which the court should have regard should include the fact that the offender was hospitalised and the course of treatment (paragraph 207).

124. *Parole after discharge.* Where an offender completes that proportion of his or her hospital order required under the Commission's release from custody proposals, (that is, 70% of the total length of hospital order less any deduction for earned remissions up to 20% of the total length of the hospital order) the offender should be assessed by the relevant parole authority, to determine appropriate conditions for the balance of the sentence to be served on parole. The parole authority should consult the treating psychiatrist for this purpose. It should not be possible for parole conditions to require that the offender return to hospital involuntarily (paragraph 208).

125. *Mental illness and its relevance.* The court should have to be satisfied, on the evidence of two psychiatrists specialising in the treatment and diagnosis of mental illness, and preferably with forensic experience, or a mental health review tribunal, if established in the jurisdiction, that

- the offender is mentally ill
- the illness contributed to the offender committing the offence
- appropriate treatment is available
- the proposed treatment cannot, equally effectively, be given on an outpatient basis.

126. *Consultation with treating psychiatrist.* The court should always try to to obtain evidence from a psychiatrist, psychologist or case worker who has been involved with the offender in the recent past as to the most suitable disposition.

127. *Least restrictive order.* The court must be satisfied that a hospital order represents the least restrictive order and care setting which is compatible with the offender's need for treatment and the punishment of the offender.

128. *Control of treatment.* Controls on the administration of treatment and medication, along the lines of those contained in the Mental Health Ordinance 1983 (ACT), should be adopted (paragraph 209).

Psychiatric probation orders

129. *Psychiatric probation orders.* Psychiatric probation orders should be available to all courts sentencing federal or Australian Capital Territory offenders who are mentally ill, that is, courts should be encouraged, where appropriate, to impose as a condition of probation that the offender receive specified treatment.

130. *Consent.* Such a condition should not be imposed unless the offender has consented.

131. *Pre-conditions.* Similar preconditions to those recommended for hospital orders (recommendations 125–8) should apply.

132. *Re-sentencing after breach.* If the offender, after commencing treatment ordered, refuses further treatment, the court should re-sentence the offender, taking into account the course of events under the order to date (paragraph 211).

Guardianship orders

133. *Proposed legislation.* When guardianship legislation is introduced into the Australian Capital Territory, it should be able to be invoked in appropriate cases in the sentencing of intellectually disabled offenders.

134. *Powers to appoint guardians: Australian Capital Territory.* If the power to commit a person to the guardianship of another is to be vested, under the proposed guardianship legislation, in a court, a court should have that power in appropriate cases when sentencing an offender. If, on the other hand, the power to commit a person to the guardianship of another is to be vested in a board or other tribunal, the form of a guardianship order will have to be that the Australian Capital Territory Adult Corrections Service take the necessary steps to have the offender placed under guardianship.

135. *Federal offenders.* For federal offenders, in most cases, the second of these two options will have to be used.

136. *Intellectual disability and its relevance.* The court should have to be satisfied, on the evidence of two psychologists specialising in the treatment and diagnosis of intellectual disability, and preferably with forensic experience, that

- the offender suffers from an intellectual disability
- the disability contributed to the offender committing the offence
- there is a need for such an order.

137. *Guardian available.* There must be a guardianship board or a suitable individual prepared to receive the offender into guardianship.

138. *Consultation with treating psychologist.* The court should always try to to obtain evidence from a psychologist, psychiatrist, or case worker who has been involved with the offender in the recent past as to the most suitable disposition.

Program probation orders

139. *Program probation orders.* Program probation orders, flexible enough to allow any special State schemes for intellectually disabled offenders, such as the Victorian one, to be applied to federal offenders, should be available for intellectually disabled federal or Australian Capital Territory offenders.

140. *Programs.* In the Australian Capital Territory, appropriate programs should be made available, and the court should be able to order that they be used (paragraph 215).

Serving imprisonment

141. *Segregation or integration in prison.* It is not possible to apply a general rule as to whether or not integration or segregation of mentally ill and intellectually disabled offenders is desirable. Each person must be individually assessed.

142. *Australian Capital Territory prison: special unit.* When the Australian Capital Territory prison is established (recommendation 169), it should include a special unit where the mentally ill and intellectually disabled may be accommodated and provided with appropriate programs and treatment, but there should be no presumption that such offenders will be placed in such a unit (paragraph 216).

143. *Programs in prison.* An offender who has not been assessed before being sentenced should be comprehensively assessed in the institutional or other context in which he or she has been placed by the court.

144. *Australian Capital Territory prison: special programs.* When the Australian Capital Territory prison is established (recommendation 169), appropriate programs for mentally ill and intellectually disabled offenders should be developed. Participation in these programs should be on the basis of the offenders' consent and they should be regularly reviewed. Intrusive treatment programs, such as those involving behaviour modification, and experimental programs, should only be offered to offenders after full explanation and discussion of their nature and effect (paragraph 217).

145. *Advocacy in prison.* When the Australian Capital Territory prison is established (recommendation 169), citizens' advocates or volunteer friends should become involved with mentally ill or intellectually disabled offenders in the prison. Alternatively, official visitors schemes, which already exist, could be developed to fill that role within prisons (paragraph 218).

Young offenders

Need for information

146. The sentencing council (recommendations 176–8) should have a particular brief to consider information on the sentencing of juvenile offenders, and should include a representative with expertise in the juvenile justice area or a representative from the specialist children's courts (paragraph 219).

'Welfare' model and 'justice' model

147. The approach of the Commonwealth to juvenile justice issues should continue to concentrate on the 'justice' model, but the age of the offender is a relevant matter which should continue to be taken into account in sentencing (paragraph 223–4).

Juvenile dispositions

148. So far as the dispositions of juvenile offenders are concerned, it is not desirable that juveniles be equated with adults (paragraph 224).

Crimes Act 1914 (Cth) s 20C

149. The approach embodied in the Crimes Act 1914 (Cth) s 20AB should be adopted, in place of s 20C, for juvenile offenders (paragraph 225).

Juvenile prison guidelines

150. The Commonwealth should, through the Standing Committee of Attorneys-General, the Council of Social Welfare Ministers and the Standing Committee of Corrections Ministers, promote the development of an equivalent, in the juvenile justice sphere, of the standard guidelines for Australian prisons, which only apply to adult correctional institutions (paragraph 226).

Female offenders

Gender as a fact relevant to sentencing

151. *Gender irrelevant.* The gender of the offender should not, in itself, be a matter relevant to sentencing; that is, an offender should not be treated differently simply because of his or her sex.

152. *Motherhood.* A factor which should carry considerable weight in the sentencing decision is being the mother of a young child. Only in exceptional circumstances, which constitute a real concern for the safety of others, should such a parent be imprisoned.

Child care

153. *Child-care.* Responsibility for child care should not be allowed to limit the range of sentencing options available for offenders.

154. *Child care and attendance centres.* Child care facilities should be part of the recommended Australian Capital Territory attendance centre scheme and the existing community service scheme (paragraph 228).

Further research

155. The sentencing council (recommendations 176–8) should consider the relationship between gender and sentencing and the question whether discrimination — either positive or negative — is practised in relation to either sex, either in the severity of sanction or in the choice of sentencing option (paragraph 229).

Habitual offenders

156. The Crimes Act (Cth) s 17 should be repealed (paragraph 230).

Prison conditions

Federal responsibility

157. The ultimate responsibility for the conditions under which federal and Australian Capital Territory prisoners are incarcerated is federal (paragraph 232). The present arrangements do not fully discharge the Commonwealth's responsibility in this matter (paragraph 233).

Intra-jurisdictional parity

158. The continuation of a policy of intra-jurisdictional parity of treatment for federal prisoners and Australian Capital Territory prisoners is the only practical approach while such prisoners continue to be housed in State and Territory prisons, subject to the following qualifications (paragraph 234).

Qualifications

159. *Medicare cover.* All prisoners, Federal, State and Territory, should be covered by Medicare to the same extent as members of the community generally for medical costs incurred for treatment provided otherwise than by prison medical officers (paragraph 235).

160. *Harsh punishments on federal prisoners.* Federal prisoners should not be punished by way of dietary restrictions, corporal punishment or being placed in solitary confinement (paragraph 236).

161. *Information.* Basic Commonwealth criminal law materials should be provided to the libraries of all prisons where Commonwealth offenders are imprisoned. Prisoners should be properly informed of their rights and obligations within the prison and in relation to parole. Books and pamphlets setting out these matters should be provided to federal and Australian Capital Territory offenders on their reception into prison (paragraph 237).

162. *A federal prisoner co-ordinator.* A special officer should be appointed by the Commonwealth to monitor conditions under which federal prisoners are being held. It would be appropriate for this officer to be an *ex officio* member of the sentencing council (recommendation 177) (paragraph 238).

163. *Police lock-ups: Minimum Standard Guidelines.* The production and implementation of Minimum Standard Guidelines specifically directed at police lock-ups should be an urgent priority (paragraph 239).

Australian Capital Territory prisoners

164. Australian Capital Territory prisoners should be subject to the same prison conditions as their New South Wales counterparts (paragraph 241).

Disabilities of prisoners and other convicted persons

Voting

165. *Restrictions on the right to vote abolished.* Paragraphs 93(8)(b)–(c) of the Commonwealth Electoral Act 1918 (Cth) should be omitted.

166. *Practical measures.* Practical measures to ensure that voting rights can be exercised (including postal voting, the South Australian system of electoral visitor voting and providing prisoners with information concerning voting rights and voting arrangements and campaign literature for all candidates) should be introduced. Prisoners should be enrolled in

- the subdivision of enrolment prior to sentence, failing this
- the subdivision for which the prisoner was entitled to enrol prior to sentence, failing this
- the subdivision of the prisoner's next of kin, failing this
- the subdivision of birth, failing this
- the subdivision with which the prisoner has or had the closest connection,

but prisoners should have the option, if they so wish, to have the prison address recorded as their electoral address (paragraph 243).

Access to the courts

167. Conviction for a federal or Territory offence (other than an offence under Northern Territory or Norfolk Island law) should not of itself create an incapacity to sue in any court. Conviction for any offence should not create an incapacity to sue in federal courts or courts of a Territory other than the Northern Territory or Norfolk Island (paragraph 244).

A federal prison system

168. There should not be a separate federal prison system at present, but the need for a federal prison system should be kept under review (paragraph 249).

An Australian Capital Territory prison system

Establishment

169. An Australian Capital Territory prison system should be established. That system should give proper emphasis to rehabilitation.

Priority

170. Preference in the allocation of financial and other resources should go to improving and establishing community-based sanctions. Only when all the community-based options recommended in this report are established with adequate staff and resources should funds be expended on establishing a prison system.

Facilities

171. ***Prison.*** The prison system should cater for remand detainees, periodic detention prisoners, prisoners on work release programs, prisoners suitable to be kept in open (low security) facilities and prisoners required to be kept in closed (medium maximum security) facilities. There should be separate quarters for female prisoners, protection facilities and a special care unit for prisoners with particular problems, such as intellectual disability (paragraph 260).

172. ***Secure psychiatric facility.*** A secure psychiatric facility should be provided in the Australian Capital Territory as soon as possible (paragraph 262).

Facilities and services for released Australia Capital Territory prisoners

Half-way house

173. A community based half-way house should be established in the Australian Capital Territory. It should provide accommodation for limited periods to help offenders while they look for permanent accommodation and employment and adjust to their release (paragraph 265).

Parole volunteers

174. A parole volunteer service should be established for Australian Capital Territory offenders. The Commonwealth should encourage State and Territory administrations to establish such services within their own jurisdictions so that federal, as well as State and Territory, offenders can benefit (paragraph 266).

Information and education needs: a sentencing council

A sentencing information system

175. To ensure consistency of approach by sentencers, an information system, with both quantitative and qualitative components, is needed to provide and disseminate comprehensive, up to date and accessible information on

- the offences for which sentences are imposed
- the type and quantum of penalties imposed in respect of particular offences
- the relevant characteristics of the offence and the offender that were taken into account and the weight given to them (paragraph 268).

A sentencing council

176. *Sentencing council.* A sentencing council should be established. Its functions should be:

- *Information.* To provide judicial officers with detailed, comprehensive information to promote consistency in sentencing federal and Australian Capital Territory offenders.
- *Advice to government.* To advise the Attorney-General as to the need for particular programs related to punishment and sentencing and the appropriate ways to introduce and conduct them.
- *Monitoring sentencing practices.* To monitor
  - the use made by sentencers of particular sanctions
  - the ways in which sentencers are taking particular matters into acount in making sentencing decisions
- *A public information service.* To provide information on a systematic basis to the public through its own publications and through the mass media.

The council should meet regularly and monitor research projects and publications which are concerned with sentencing issues (paragraph 275). It should be involved in the overall reviews of federal and Australian Capital Territory maximum imprisonment terms (recommendation 16, paragraph 62), the introduction, for federal and Australian Capital Territory offenders, of new non-custodial sentencing options (recommendation 87, paragraph 143) and analysing the impact of punishment on young offenders (recommendation 146, paragraph 219).

177. *Composition of sentencing council.* The council should be chaired by a judge who is or has been a judge of both the Supreme Court of the Australian Capital Territory and of the Federal Court. It should include judges of the Supreme Court and also of the County Court or District Court in at least one of the States, as well as magistrates from both the States and the Australian Capital Territory. In addition, prosecution and correctional administration interests should be represented as should legal and other relevant academics, members of the legal profession and the general community (paragraph 276).

178. *Institutional framework.* The council should be based within the Australian Institute of Criminology. The Commission does not envisage that a separate research budget would be allocated to the council. The Institute should provide an administrative infrastructure for the council, although there may be a need to have some administrative staff attached specifically to the council. Appropriate arrangements will need to be made between the council and the Institute to ensure that the complementary functions of both bodies are efficiently carried out. There may well need to be some additional allocation of resources to, or re-direction of existing resources within, the Institute to accomodate the additional demands generated by the need for a comprehensive sentencing information base (paragraph 277).

Judicial and other education

179. The sentencing council's functions should include providing, normally in conjunction with bodies such as the Australian Institute of Criminology and the Institute of Judicial Administration, or other education bodies such as Law Schools and Universities, sentencing education programs for judicial officers (paragraph 282).

1. The Reference

The Reference

Terms of reference

1. On 11 August 1978 the then Attorney-General, Senator Peter Durack, referred to the Commission

> the laws of the Commonwealth and the Australian Capital Territory relating to the imposition of punishment for offences and any related matters.

The Reference drew attention to a number of matters, including

- the costs and other unsatisfactory characteristics of imprisonment
- the adequacy of existing alternatives to imprisonment
- the need for greater uniformity in sentencing, especially in respect of federal offenders throughout Australia.

The Commission was particularly directed to consider the emphasis that should be placed on the state of mind and personal characteristics of offenders. Special mention was made in the terms of reference of the interests of the public and the victims of crime.

Focus of report

2. This report only deals with the sentencing and punishment of federal and Australian Capital Territory offenders. Federal offenders are persons found guilty or convicted of offences against federal, as distinct from State and Territory, laws. Australian Capital Territory offenders are persons found guilty or convicted of offences against Australian Capital Territory laws. The focus of the report is the process and consequences of the determination by a court of the legal sanction to be imposed on these offenders. However, the Commission does not, in this report, advance detailed recommendations as to the quantum or severity of the punishment that should be specified as a maximum for, or imposed for, particular federal or Australian Capital Territory offences. The Committee of Review of Commonwealth Criminal Laws, chaired by Sir Harry Gibbs, is presently examining the substantive federal criminal law. Its report will contain recommendations on the quantum and severity of penalties for particular federal offences. Nor does this report make recommendations on other aspects of the criminal justice system that affect the punishment to which an offender is sentenced: the operation of the police and other law enforcement agencies and the prosecution process.[1]

[1] For a discussion of the relationship of sentencing with these matters, see ch 2.

Background

Federal offences and offenders

3. *Structure of the federal criminal justice system.* Although the Commonwealth has the power to create a criminal justice system, in particular, with its own criminal courts, the vast majority of federal offenders are dealt with in State or Territory courts.[2] The Commonwealth's approach has always been to use existing State and Territory courts and procedures for the trial of offences against its laws. Thus, for example, generally speaking, the laws relating to arrest, custody, summary conviction, committal for trial, trial on indictment and hearing of appeals for federal offenders in a State or Territory are the same as apply to State or Territory offenders.[3] There are no federal prisons in Australia: all federal prisoners are held in State or Territory prisons where they are, at present, generally subject to the same laws as their fellow State or Territory prisoners. The Commonwealth relies heavily on existing State criminal justice systems to handle offences under its laws. This has been described as the 'autochthonous expedient' of the Australian federal system.[4] This policy had the advantages of convenience and economy. But once it was adopted, it became necessary, as a matter of practical reality, for State and Territory courts, and State and Territory prisons and corrections services, to treat federal offenders in much the same way as local offenders in the State or Territory. The cornerstone of federal criminal justice has thus been the use of State and Territory criminal justice systems.

4. *Federal offences.* The principal criminal law statute of the Commonwealth is the Crimes Act 1914 (Cth). There are, however, many Commonwealth statutes which create offences.[5] The State criminal calendar covers the full range of 'traditional' criminal activity such as offences against the person, offences against good order, motor vehicle offences and property offences. By contrast, for constitutional reasons, federal offences are either

- offences against the Commonwealth itself or its institutions[6] or
- offences created to enforce or implement a federal law, such as customs, quarantine, taxation and social security offences.

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[2] The Constitution s 77(iii) allows the federal Parliament to invest federal jurisdiction in any State court. The Judiciary Act 1903 (Cth) s 39(2) invests criminal jurisdiction generally in State courts.

[3] Judiciary Act 1903 (Cth) s 68(1).

[4] *R v Kirby; ex parte Boilermakers Society of Australia* (1955–6) 94 CLR 254, 268 (Dixon J). 'Autochthonous' simply means indigenous. An exception is the creation of a federal Director of Public Prosecutions.

[5] In 1980 a search of the Commonwealth statute book disclosed more than 105 Acts creating offences for which a term of imprisonment could be imposed: ALRC 15 para 72.

[6] eg treason, bribery or perversion of the course of federal justice.

The only exception to this arrangement is the Commonwealth Places (Application of Laws) Act 1970 (Cth), which 'federalises' local State and Territory law, including the criminal law, and applies it to Commonwealth places, such as post offices and Commonwealth offices. Thus, for example, a rape committed on Commonwealth property in New South Wales is dealt with under the provisions of New South Wales State sexual offences laws. In broad terms, federal criminal law is a specialised jurisdiction, whereas State and Territory criminal law is more general in character.

5. *Federal offenders.* Most federal offences involve fraud, forgery or the importation of prohibited drugs or other prohibited items or are offences concerned with Commonwealth property or injury to Commonwealth officers. There is little published information about the number and characteristics of federal offenders. This is at least partly explained by the fact that, to a great extent, federal offenders have been subsumed within State and Territory criminal justice systems. Many studies undertaken in respect of offenders in State of Territory jurisdictions do not distinguish between federal and non-federal offenders. The first interim report in this Reference, *Sentencing of Federal Offenders* (ALRC 15) included the results of a pioneering study undertaken by the Commission in collaboration with the Australian Federal Police and the Australian Bureau of Statistics. The study analysed Australian Federal Police files for the 1459 cases prosecuted by federal police and resulting in a conviction from 1 July 1977 to 30 June 1978. The results showed:

- about 90% of these convictions were for fraud, forgery, false pretences and misappropriation
- approximately 75% of convicted offenders were male
- the majority of offenders were over the age of 24
- of the sentences imposed, approximately
  - 19% were terms of imprisonment
  - 32% were fines
  - 18% were bonds
  - 32% were other dispositions.[7]

The accuracy and completeness of this data were questionable on several grounds.[8] When the Commission revived this Reference in 1984, it sought to update the study, but because the available records are not compiled or maintained in a way that adequately differentiates between federal offenders and others, no reliable results could be obtained. However, statistics in respect of federal prisoners have become more readily available since 1984. The number

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[7] ALRC 15 para 78–9.

[8] Including: no information was included on persons who were prosecuted by agencies other than the AFP; the files used had not been compiled with this study in mind and the data in them may have been incomplete.

of these prisoners is increasing. The 1984 national prison census showed that there were 343 federal prisoners,[9] the 1985 census 463[10] and the 1986 census 485.[11] As at October 1987, 505 federal prisoners were reported.[12] Prisoners convicted of drug related offences (possession and use of drugs, trafficking in drugs and manufacture of drugs) predominate. The next most significant category is fraud and misappropriation. These two categories together account for approximately 75% of the most serious offences listed for federal prisoners.[13]

Australian Capital Territory offences and offenders

6. In contrast to the situation at the federal level, the Australian Capital Territory is a complete jurisdiction, with its own criminal law, criminal justice system and criminal courts, broadly similar to State jurisdictions. It does not, however, have its own prison. Australian Capital Territory offenders sentenced to imprisonment serve their terms in the New South Wales prison system under arrangements entered into between the Commonwealth and New South Wales.[14] The basis of Australian Capital Territory criminal law is the Crimes Act 1900 (NSW) as at 1 January 1911, as amended by Australian Capital Territory Ordinances or Commonwealth Acts. The Commonwealth, through the Attorney-General's Department, has begun revising the Crimes Act 1900 (NSW:ACT) with a view, eventually, to producing a complete Australian Capital Territory Crimes Ordinance. The pattern of offending in the Australian Capital Territory generally reveals a lower incidence of serious crime[15] than nationally for all categories of offence except fraud, forgery and false pretences. In 1984–5, for example, the Australian Capital Territory had the second lowest rate of violent crime when compared with all other Australian jurisdictions. Most Australian Capital Territory offenders have committed non-violent property related offences.[16] Finally, the Australian Capital Territory has consistently had a lower rate of imprisonment than anywhere else in Australia.[17]

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[9] 3.5% of the then total Australian prison population: Walker & Biles 1985, Table 13, 13A.

[10] 4.3% of the then total Australian prison population: Walker & Biles 1986, Table 13, 13A.

[11] 4.2% of the then total Australian prison population: Walker & Biles 1987, Table 13, 13A.

[12] AIC No 137.

[13] Walker & Biles 1985, Table 26; Walker & Biles 1986, Table 26; Walker & Biles 1987, Table 26. The 75% total is based on an average derived from assessing each year and then taking an approximate average over the three years.

[14] See Removal of Prisoners (Australian Capital Territory) Act 1968 (Cth).

[15] ie, murder, serious assault, rape, robbery and fraud.

[16] Mukherjee et al 1987, 7, 8–11. This result is obtained from a comparison of the Australian Capital Territory offence rates graph with other jurisdictions' offence rates graphs for the same period. Tasmania had the lowest incidence of violent crime.

[17] eg, in October 1987 the adult imprisonment rate for the ACT was 44.8:100 000. The next lowest rate was for Victoria (72.6:100 000). The national average was 110.6:100 000: AIC No 137.

Other reports and inquiries

Australia

7. ALRC 15 contained an account of previous Australian inquiries and reports into sentencing and penal matters.[18] Since that report was published, the Victorian Government established a Sentencing Committee, chaired by Sir John Starke, formerly of the Victorian Supreme Court. That Committee has released a discussion paper which reviews relevant Victorian sentencing legislation including the Penalties and Sentences Act 1985 (Vic) and the Corrections Act 1986 (Vic).[19] Sentencing law in New South Wales is within the Terms of Reference of the New South Wales Law Reform Commission's Reference on Criminal Procedure. In other jurisdictions, reports have been published dealing with particular aspects of sentencing and punishment.[20]

Overseas

8. Sentencing is also a matter of international concern. Work undertaken under the auspices of the United Nations includes the development of declarations embodying specific principles.[21] The Commission's Terms of Reference specifically refer to the conclusions of the Fifth United Nations Congress on the prevention of crime and the treatment of offenders concerning the use of imprisonment and to those matters considered at the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. Commonwealth countries have held meetings to discuss sentencing issues.[22] Recent overseas reports and inquiries on sentencing include:

- *Canada.* The Canadian Sentencing Commission's Report on Sentencing Reform was published in 1987.[23] Other Canadian studies include those published by the Canadian Correctional Law Review.[24]
- *New Zealand.* In 1982, a major report by the New Zealand Penal Policy Review Committee was published.[25] Among the matters it dealt with were sentencing options and imprisonment.

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[18] ALRC 15 para 33ff.

[19] Victorian Sentencing DP 1987.

[20] eg, Hawkins 1986, NSW Women in Prison Task Force report, Vinson report, Minimum Standard Guidelines 1987, ACT 1987, HRC 5, Tas LRC 41, Carney report, VLRC 1, Law Society WA 1980, Challinger 1983, Houghton 1984, Martin report, Weber 1984.

[21] UN Fifth Congress 1976; Biles 1979.

[22] eg, Commonwealth Correctional Administrators 1985.

[23] Canadian Sentencing Commission report.

[24] Canadian Correctional Law Review WP 1, WP 2.

[25] Casey report.

- *Sweden.* The Swedish Committee on Imprisonment has published significant reports.[26] Sweden has distinctly reduced the emphasis on imprisonment as a sentencing option.

- *United States.* Many major reports have been published in the United States in the last decade. They include the United States Sentencing Commission's review of sentencing guidelines for federal offenders.[27] Other bodies, such as the Minnesota Sentencing Commission use matrices or grids to specify a relatively narrow sentencing range in figures, usually months, of imprisonment for a particular offence.[28]

- *United Kingdom.* In 1985 a report on prison discipline was published.[29]

Outline of report

9. Chapter 2 sets out the approach the Commission has taken to this Reference, and the principles underlying the recommendations for reform. Chapter 3 deals with the circumstances in which imprisonment ought to be imposed as a sanction, and recommends a number of ways by which the fixing of maximum periods of imprisonment prescribed by law, and head sentences, can be rationalised. The next chapter, chapter 4, considers the nature of the order that the court makes when imposing a sentence of imprisonment on an offender. It includes recommendations to reform, in a principled way, the determination of the proportion of the period of the sentence that the offender will actually have to spend in prison. Parole, remission and release policies are dealt with in this chapter. Chapter 5 examines non-custodial options available for Australian Capital Territory and federal offenders and explains why and how these options should be increased in number and severity. Chapter 6 deals with the conduct of hearings leading to the exercise of the sentencing discretion. Chapter 7 examines special categories of offenders, particularly the young and the mentally ill. Chapter 8 deals with the question of prison conditions, and recommends two reforms designed to remove significant disabilities faced by offenders. Chapter 9 discusses questions as to resources arising from the Commission's recommendations, particularly what priority should be given to constructing a prison in the Australian Capital Territory. Finally, chapter 10 discusses the need for improved information and the question, specifically raised in the terms of reference, of a sentencing council, institute or commission. Appendix A contains draft legislation for the reform of parole and release on licence arrangements for Australian Capital Territory prisoners.

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[26] Swedish Committee on Imprisonment 1986.
[27] US Sentencing Commission.
[28] Minnesota Sentencing Guidelines Commission.
[29] Prior report.

History of the Commission's work

Interim report

10. An interim report in this Reference was published in 1980.[30] It reported, among other things, the results of a national survey of judges and magistrates, and of federal prosecutors and offenders, conducted by the Commission. It made a number of recommendations on various aspects of the Reference. Because of time and resources constraints it dealt mostly with federal offenders. Amongst the major proposals in the report were:

- establishment of a national Sentencing Council
- clear guidelines for federal prosecutors
- overhaul of federal legislation dealing with sentencing matters and penalties
- new Australian Capital Territory legislation for the victims of crime
- new rules on prison conditions and grievance machinery for federal prisoners
- new alternatives to imprisonment
- abolition of parole for all federal prisoners or the substantial reform of parole law and procedures as they affect such prisoners.

The Crimes Amendment Act 1982 (Cth) implemented a number of these recommendations. It included:

- a direction that, when a prison term is not mandatory, a person convicted of a federal or Australian Capital Territory offence should not be sentenced to prison unless the court is satisfied that in all the circumstances no other penalty is appropriate
- a provision requiring a court imposing a prison sentence to state its reasons in writing why no other sentence is appropriate
- provisions making available alternatives to imprisonment (such as community service orders or weekend detention) for the punishment of federal offenders where these are available in the State in which they are convicted.[31]

Federal prosecution guidelines have been issued and subsequently revised.[32]

Second phase

11. *Suspension of work.* After the publication of the interim report a decision was made to suspend work on the Reference. There were two reasons for this

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[30] ALRC 15.

[31] The Commonwealth is negotiating separately with States and Territories. To date the legislation has not been proclaimed in all jurisdictions.

[32] Commonwealth Prosecution Guidelines 1982, 1986.

decision. First, it was clear that time was needed for the recommendations and suggestions in the interim report to be considered by the public and by correctional authorities, prosecutors, the legal profession and State and Territory administrations. Secondly, given the demands of other references then before it, the Commission did not have sufficient resources to enable it to produce a final report at that time. Work was suspended until 1984.

12. *Resumption of work.* When work was resumed, the Commission appointed a number of consultants who had expertise in the various aspects of the Reference. Consultations were also undertaken with correctional administrators, prosecutors, defence lawyers, judges, magistrates, prisoners, ex-prisoners, penal reform organisations and academic lawyers. State Attorneys-General assisted by providing contact officers in their respective departments to facilitate communication with State officials. Liaison was begun and maintained with the Victorian Sentencing Committee and the New South Wales Law Reform Commission, which has a reference on Criminal Procedure. Extensive consultation was commenced with relevant Australian Capital Territory authorities and professionals. The Commission, in collaboration with the Australian Institute of Criminology, organised a four day seminar in March 1986 during which a wide range of issues relevant to sentencing were canvassed. The Conference was addressed by experts from the United Kingdom, the United States and speakers from most Australian jurisdictions.[33]

13. *Consultation with the public.* In order to promote public discussion of relevant sentencing issues, members and staff of the Commission took part in many radio, television and newspaper interviews in all States and Territories. In November 1987 extensive public hearings were held in every capital city in Australia. They attracted a large number of oral and written submissions covering all aspects of the Reference.

14. *Publications.* As part of the Commission's consultative process a number of discussion papers were published. In June 1979, before the publication of the first interim report, a discussion paper, *Sentencing: Reform Options* (ALRC DP 10), dealing mainly with Australian Capital Territory reform proposals was published. This paper discussed the question of an Australian Capital Territory prison, non-custodial options, victims' compensation and prisoners' rights. In June 1980 another discussion paper, *Sentencing of Federal Offenders* (ALRC DP 15), was released, summarising the recommendations in the interim report. Three further discussion papers setting out tentative proposals on a range of issues covered by the Reference were also published:

- *Sentencing: Procedure* (ALRC DP 29), published in August 1987. This relates to reform of the sentencing process and discusses the goals of sentencing and the information base of sentencing, including establishing the

[33] See Potas 1987.

factual basis of a sentence. It also discusses possible roles for a sentencing commission.

- *Sentencing: Penalties* (ALRC DP 30), published in September 1987. This discusses sentencing options and a suggested new penalty structure involving a hierarchy of offences and sanctions. It also deals with early release and remissions and special categories of offenders.

- *Sentencing: Prisons* (ALRC DP 31), published in August 1987. This covers the questions of constructing a federal and an Australian Capital Territory prison system. Prison discipline and conditions, together with prisoners' grievance mechanisms and certain civil disabilities of prisoners, are also discussed.

A summary of the proposals contained in these three discussion papers was published in October 1987.

15. *The Commonwealth Prisoners Act 1967.* A further interim report, *The Commonwealth Prisoners Act* (ALRC 43), was written in late 1987 to provide urgent advice on parole and early release from prison for federal prisoners. The report was written at the specific request of the Attorney-General. Its recommendations concern the best way to overcome deficiencies in the Commonwealth Prisoners Act 1967 (Cth) and the Crimes Act 1914 (Cth) s 19A. The report accepts the present policy framework within which Commonwealth law on parole and related matters operates. The recommendations it makes are not put forward by the Commission as long-term solutions to all the problems raised by the operation of a comprehensive parole system for federal offenders. The Commission's final recommendations on these matters appear in chapter 4.

Related work

16. *Child welfare.* In 1980 a major report on child welfare in the Australian Capital Territory, *Child Welfare* (ALRC 18), was published by the Commission. A significant part of this report was devoted to the interaction of children with the criminal justice system in the Australian Capital Territory. The reforms recommended in the report included detailed rules concerning the sentencing options to be available in the case of child offenders. The recommendations were implemented in 1986.[34]

17. *Aboriginal Customary Laws.* In 1986 the Commission published *The Recognition of Aboriginal Customary Laws* (ALRC 31). That report recommended that courts be given a sentencing discretion to take Aboriginal customary laws into account when sentencing an Aboriginal person. The federal Government has yet to make a statement on the implementation of the report's recommendations.

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[34] Children's Services Ordinance 1986 (ACT).

18. *Spent convictions.* In 1987 the Commission published a report, *Spent Convictions* (ALRC 37). That report arose from a suggestion made by the Commission, and agreed to by the then Attorney-General, Senator Gareth Evans, that a separate inquiry be held on the question whether a former offender's criminal record should be legally obliterated and, if so, how long this should happen after the record is created. The report made recommendations designed to minimise the negative consequences that attach to old (spent) convictions and to make it unlawful to discriminate unreasonably against a person on the basis of his or her criminal record. The report is presently being considered by the Standing Committee of Attorneys-General.

19. *Young offenders study.* In early 1987, the then Commonwealth Office of Youth Affairs of the Department of Prime Minister and Cabinet[35] approached the Commission with a view to conducting a research project on sentencing of young offenders. Special funding was made available to employ three consultants, Mr R Fox, Mr A Freiberg and Mr M Hogan, to carry out the research and prepare a report under the auspices of this Reference. The primary purpose of the research project was to provide an account of the plethora of legislative proposals and initiatives around Australia and in particular to consider the Commonwealth's position in that context. The report of that project has been published separately.[36]

Acknowledgements

20. Under its Terms of Reference the Commission was directed to collaborate with the Australian Institute of Criminology. The Commission wishes to record its appreciation of the advice and assistance provided by that institution and its staff. Particular thanks should go to Mr David Biles (Deputy Director), Mr Ivan Potas (Criminologist), Mr John Walker (Criminologist), Dr Paul Wilson (Assistant Director), Mr Dennis Challinger (Assistant Director), Dr Peter Grabosky (Senior Criminologist), Dr S Mukherjee (Principal Criminologist) and Ms Jane Mugford (Principal Programs Officer). The Commission also gratefully acknowledges the assistance of a large number of people who granted interviews, arranged and attended meetings and otherwise assisted in the extended program of consultation. Those people who have made formal submissions, written or oral, to the Commission are listed in Appendix B. The Commission also thanks a number of individuals and organisations who did not make formal submissions but nevertheless greatly assisted the Commission in understanding and assessing a wide range of sentencing issues. These individuals and organisations are separately listed in Appendix B.

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[35] Now the Youth Bureau, Department of Employment, Education and Training.

[36] Freiberg, Fox & Hogan 1988.

2. The Commission's approach

Scope of chapter

21. Sentencing and punishment continue to arouse public controversy and emotion. There is intense and continuing debate about all aspects of sentencing and punishment policy, not restricted to the public and the media, but extending to writers, correctional administrators, judges and others involved in the criminal justice system. At present, particular attention is being paid to the use of imprisonment as a sanction for offenders. Alternatives to imprisonment are being actively sought and introduced.[1] The recommendations in this report are based on a particular view of punishment policy — what it is, what it should be and what it should seek to achieve. This chapter sets out the basis of the Commission's approach.

Punishment and the criminal justice system

Structure of the criminal justice system

22. *The law and its enforcement.* Most aspects of life are governed or affected by law, that is, rules about relationships between people, or between individuals and the community as a whole.[2] Each of these rules can be enforced[3] in, broadly, one of two ways: through the civil justice system[4] or the criminal justice system. Punishment is one of the means the criminal justice system uses to enforce laws. The question whether a particular law is or ought to be enforced by the criminal justice system or the civil justice system is not within the Commission's terms of reference. It is essentially a matter for the legislature creating the law or, in the case of offences at common law, is part of the common law itself. This report is concerned only with enforcement of laws through the criminal justice system. By and large, this is done by the State, not private individuals.[5] The criminal justice system is not designed to redress private wrongs, in the same way as civil proceedings do, but to punish the offender for having broken the law.

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[1] The Commission's terms of reference specifically advert to this.

[2] The law of contract is an example of the first; taxation laws of the second.

[3] 'Rules' that cannot be enforced are simply moral statements.

[4] The means by which obligations such as those created by the law of contract or the law of tort are enforced.

[5] See ALRC 27 para 356–63, 386–92.

23. *Components of the criminal justice system.* The criminal justice system identifies offenders, formally determines that they have committed an offence and imposes punishment on them for having offended.

- *Identifying offenders.* The traditional agency that identifies offenders is the police; at federal level, the Australian Federal Police. In the Australian Capital Territory, the Federal Police are also the community police force. Police are not the only such agency. As crime becomes more sophisticated, more specialised agencies have been created to deal with it. The National Crime Authority, for example

  - investigates organised criminal activities with a view to the prosecution of offenders
  - collects admissible evidence for use in prosecutions of persons engaged in organised criminal activities
  - analyses and disseminates intelligence regarding organised criminal activities.

- *Determining that an offence has been committed.* The process of determining that an offence has been committed is the process of prosecuting and convicting offenders, involving prosecution agencies, such as the Director of Public Prosecutions, and the courts.

- *Punishment.* Sentencing is the process of selecting the type and amount of punishment to impose for a particular breach of the law. It is the function of the courts. The actual administration of the punishment, however, is the responsibility of corrections services, prison administrations and other agencies. Both sentencing and punishment are covered in this report.

The purpose and effectiveness of the criminal justice system

24. *Effectiveness of the system as a whole.* It is inherent in the notion of law that it be observed. This is so independently of the content of particular laws. Observation of the law, in the broadest sense, implies a mechanism for the law's enforcement. Unless there is a means of enforcing the legal rules governing the community, those rules are unlikely to be observed. The purpose of the criminal justice system is to make criminal laws real and meaningful by providing the means to ensure that a breach will attract significant consequences — punishment. There is a fundamental distinction necessary here. As the goal of the criminal justice system is to provide the means of attaching consequences to breach, and thereby ensuring that the law is observed — that order is maintained — it is the criminal justice system as a whole, not its individual components, that should be the focus of inquiry about 'effectiveness' in terms of crime control. The Victorian Sentencing Committee's Discussion Paper summarises the present approach of the law in this way:

> It is presumed by the criminal law that, at least in the case of crimes such as armed robberies, an increase in the general level of sentences will tend to reverse a rising trend in their incidence.[6]

The Commission takes a different view. It is the criminal justice system, taken as a whole, with all its components, which deters crime. While punishment is a significant part of the way the criminal justice system deters, it is inaccurate and imprecise to speak of punishment, or any other component of the criminal justice system, as alone deterring crime. Analyses of the 'effectiveness' of punishment, or particular punishment options, solely in terms of crime control or increased respect for the law are therefore fundamentally misdirected. An increase in sentence severity will not of itself necessarily lead to fewer crimes, because punishment is only one aspect of the criminal justice system. Questions about the effectiveness of the criminal justice system in securing compliance with the law, or about the effectiveness of deterrent measures for this purpose, can only meaningfully be addressed to the whole of the criminal justice system.

25. *The requirement for effectiveness.* The effectiveness of the criminal justice system thus does not depend exclusively on any one of its components. In particular, it does not depend solely, or even principally, on the sentencing or punishment component. What is critical to its effectiveness is the community's perception that the criminal justice system as a whole is operating fairly and justly. It must be possible to say both that justice is being done and that it can be seen to be done. While there is a degree of community tolerance towards imperfections in particular elements of the criminal justice system, if there is a perception that any one of these elements is significantly disturbed, the system as a whole will fail.[7] No matter what the penalty available for a particular offence, if it is understood by the community that offenders will not be prosecuted, observance of that law will be diminshed. Savage punishments alone could not compensate, in today's society, for the absence of an efficient police force. Again, no matter how ruthlessly efficient a police force may be, if the usual punishment for a particular offence is seen as trivial or frivolous, the level of observance of the law creating it may well be low. It is accordingly essential, in proposing reforms to punishment policy and practice, to have regard to the inter-relation between all the elements of the criminal justice system. The recommendations for reform of punishment policy in this report have been structured in such a way that the overall perception of the justice of the criminal justice system should be preserved and enhanced.

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[6] Victorian Sentencing DP, para 2.62, discussing in particular *R v Williscroft & ors* [1975] VR 292.

[7] If the laws that the criminal justice system is to enforce are not seen as just, they will not be able to be enforced effectively, but this is not within the Commission's terms of reference.

What is a just criminal justice system?

26. There are two main criteria by which the community will judge the justice of the criminal justice system. First, the criminal justice system must involve imposing on offenders punishments of sufficient severity that it is possible rationally to say that a breach of the law, when detected, is attended by significant consequences. Secondly, the system must be consistent in the apprehension, identification and punishment of offenders. The need for consistency pervades all elements of the system. One of the most damaging criticisms that can be made of any aspect of the criminal justice system is that it is inconsistent. This is so whether the inconsistency is in sentencing, or in differential police or prosecution practices.

Implications for punishment policy

Punishment to be linked to crime

27. The analysis of the place of sentencing and punishment within the criminal justice system has a number of implications for punishment policy generally. The first concerns the link of punishment with crime. The Commission accepts that it is fundamental to punishment policy that punishment can be imposed only for criminal offences.

> [t]he concept of Desert is the only connecting link between punishment and justice. It is only as deserved or undeserved that a sentence can be just or unjust. I do not here contend that the question 'Is it deserved?' is the only one we can reasonably ask about punishment. We may very properly ask whether it is likely to deter others and to reform the criminal. But neither of these two last questions is a question about justice.[8]

The basic justification, therefore, for the imposition of punishment on a person is that he or she has committed a crime. This is, in part, an expression of the concept of 'just deserts': while it is just to impose punishment for an offence, it is unjust to punish if no offence has been committed.

Justice and the severity of punishment

28. *Severity of punishment.* The second implication of the overriding requirement that the criminal justice system be a fair and just one is that the punishments inflicted for crimes must themselves be just punishments. There must be an appropriate degree of severity in the range of punishments available in order that the criminal justice system as a whole can rationally demonstrate that a breach of the law is attended by real consequences. Further, the punishment imposed for a particular offence must be just — that is, of a severity appropriate to the offence. This is not a justification for punishments of any severity. A criminal justice system which delivered punishments that were

[8] Lewis 1953, 225.

excessively harsh would be as ineffective and unjust as one which delivered punishments that were too lenient. In the latter case, the law is likely to be simply disregarded. In the former, informal means may well be taken to avoid subjecting offenders to the excessively harsh punishments. The level of severity of punishment must strike a balance between these two extremes.

29. *Limits on severity.* Striking that balance necessarily involves selecting a punishment that conforms to the so-called 'principle of parsimony' or 'economy' — the punishment chosen should not exceed that which is necessary in the circumstances. Public disquiet about the level of severity of sentences in general is not of itself an indication that sentences are, objectively, too harsh or too lenient. Neither would disquiet about sentences imposed on particular offenders. A more informed and reflective assessment is needed to determine whether the criminal justice system as a whole is attaching real and meaningful consequences to criminal acts. Some element of judgment is involved, which must take account of evolving community perceptions. There is some evidence that these are less punitive than might be supposed. Certainly, there has been a marked change from the days when the community accepted flogging, public executions, the stocks and the treadmill as appropriate punishments. On the other hand, the present concern with 'truth in sentencing' is a manifestation of a community perception that the punitive element in sentences has become something of a charade. The Commission has taken account of this concern in its recommendations.

30. *International and community values.* A number of universal standards have already been established as minimum standards against which the appropriateness of the severity of particular punishments may be measured. This has chiefly been done through international human rights guarantees, which have a wide international acceptance. Under the Law Reform Commission Act 1973 (Cth) s 7, the Commission must act with a view to ensuring

> . . . that, as far as practicable, [the laws and proposals it reviews] are consistent with the Articles of the International Covenant on Civil and Political Rights.

There are several articles in the International Covenant which are of particular relevance to the severity of punishments that may be imposed. They deal, for example, with the death penalty (article 6), torture (article 7) and the treatment of prisoners (article 10). Australia is now under an international obligation to give effect to the International Covenant on Civil and Political Rights.[9] The implications of the limits it imposes have been taken into account by the Commission in the preparation of this report.

31. *Unacceptable punishments.* The Covenant, and Australian community values, make certain punishments unacceptable. These are capital punishment and corporal punishment.

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[9] It entered into force in relation to Australia on 30 November 1980.

- *Capital punishment.* Capital punishment, so far as federal offenders are concerned, was abolished in 1973 for federal and for Australian Capital Territory offenders.[10] All other Australian jurisdictions have now abolished it. Despite calls from time to time to re-introduce the death penalty, particularly for vicious and violent crime, there is no justification for doing so. The thrust of article 6 of the International Covenant on Civil and Political Rights is the restriction on the use of, and the eventual abolition of, the death penalty. Realistic and meaningful consequences can be attached to the worst crimes — even premeditated murder for financial gain or crimes of sadistic violence — without the State having to resort to the death penalty. It is not merely that the death penalty is irrevocable and that errors are known to have occurred. The death penalty is retributive justice at its rawest. Retribution can move swiftly to vengeance, and then to cruelty, under the cloak of justice. Media indulgence in the detailed processes of capital punishment may be more sophisticated than the public exhibition of hangings at Tyburn, but it evokes very much the same passions. As Bacon's essay, *On Revenge*, puts it:

  > Revenge is a kind of wild justice which, the more man's nature runs to, the more ought law to weed it out.

  Once repealed, the death penalty should never be re-instated.

- *Corporal punishment.* So far as corporal punishment is concerned, the Commission confirms the view expressed in the first interim report, *Sentencing of Federal Offenders* (ALRC 15),[11] that corporal punishment is both degrading and ineffective. It should not be re-introduced for either federal or Australian Capital Territory offenders.

The same applies to the infliction of torture or other cruel, inhumane or degrading treatment as a punishment for an offence. Although the Commission does not suggest that such punishments are presently inflicted on offenders, one of the Commission's discussion papers suggested that the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment be ratified as soon as practicable.[12] The Commission's consultations generally supported this suggestion. Ratification would confirm that element of community values.

Consistency of punishment

32. *Consistency of punishment.* The concept of 'just deserts' not only implies that offenders should be punished for the crimes they commit. It implies that similar offenders who commit similar offences in similar circumstances should be

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[10] Death Penalty Abolition Act 1973 (Cth).
[11] ALRC 15 para 63–5.
[12] ALRC DP 31 para 51, 74.

punished in a similar way. Furthermore, it implies that offenders who commit more serious offences should be punished more severely than those who commit less serious offences. The importance of consistency cannot be understated.

> 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.[13]

33. *Implications for available punishments.* It follows from the need for more serious offenders to be punished more severely that there should be sufficient different kinds of punishments available to sentencers to allow the appropriate distinctions to be made. Chapter 5 sets out the Commission's recommendations on the non-custodial sentencing options presently available to sentencers. A key theme in that chapter is that it is desirable for sentencers to have an appropriately wide range of sentencing options. If, as presently occurs in the Australian Capital Territory, only a few sentencing options are available, the opportunities for sentencers to impose a punishment that fits the crime will be diminished.

34. *Consistency in the application of punishments.* The need to apply punishment options consistently has one further consequence. It implies that laws and procedures surrounding the sentencing decision should be structured so as to lead to consistency of treatment of offenders. The ways in which offenders and the offences they commit are described is the key to determining whether punishments have been imposed consistently. In the Commission's view, it is not possible to impose a rigid structure for this purpose. Individual variations, especially of the circumstances and characteristics of offenders, cannot be exhaustively listed. For this reason, the Commission accepts that the present role of the courts in exercising the sentencing discretion should remain. But the procedures surrounding the exercise of the sentencing discretion should be such that consistency of treatment between offenders and offences is enhanced.[14]

Other objectives

35. *Other objectives.* This report is, therefore, based on the view that punishment should be just — in the sense of being a real punishment, appropriate but not excessive — and consistently applied. Within those principles, however, certain other objectives may be pursued in the circumstances of a particular offence or a particular offender. These objectives are sometimes described as the traditional 'goals of sentencing'.

36. *Rehabilitation and restitution.* Rehabilitation aims at changing the offender's behaviour so as to reduce the likelihood of further occurrence of the offending conduct. Often it involves medical or psychiatric treatment. The

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[13] *Lowe v R* (1984) 58 ALJR 414, 415, (1984) 154 CLR 606 (Mason J).

[14] This matter is dealt with in more detail in ch 6.

focus is on changing the future behaviour of the offender. As a means of promoting one of the overall goals of the criminal justice system — crime control and crime reduction — rehabilitation for individual offenders should be encouraged.[15] Restitution, where this is possible, should also be encouraged. In the final analysis, however, punishments are not imposed on offenders for the purpose of rehabilitation, or for restitution. They are imposed to punish the offender for having broken the law. But, where rehabilitation can be advanced, or restitution ensured, within the context of a just punishment for the crime, this should be encouraged.

37. *Incapacitation and deterrence.* Incapacitation of offenders, and deterrence, are also often cited as objectives that can be pursued through the punishment process. Incapacitation aims to protect other members of society, chiefly by imprisoning offenders who are considered likely to re-offend. It is a preventive sentence, rather than being based on the crime committed. It therefore runs counter to the general principle of justice underlying this report and the criminal justice system, which requires that the punishment imposed be linked to the crime committed by the offender. Nor should general deterrence be invoked as a goal or objective by sentencers. To impose a punishment on one person by reference to a hypothetical crime of another runs completely counter to the overriding principle that a punishment imposed on a person must be linked to the crime that he or she has committed. To single out an offender for increased punishment *pour encourager les autres* also runs counter to the principles of consistency and justice on which this report is based. On the other hand, the Commission acknowledges that the operation of the criminal justice system as a whole can be altered to deter those in the community from committing offences. For example, the Parliament may, for some particularly prevalent offence, choose to increase the maximum penalties which are available to sentencers convicting persons of that offence. The purpose of this increase in penalties is clearly to deter the commission of that offence. Increases in penalties actually imposed, in these cases, are a response by sentencers, not to a perception by those sentencers that this particular offence needs to be deterred, but to the statement of the Parliament that this offence is now to be regarded as more serious than it had been in the past. If deterrence occurs, it is not because of individual sentences, but because the system as a whole treats the offence more seriously.

[15] Imprisonment has proved to be inappropriate to achieve this: see below para 50.

3. Reducing the emphasis on imprisonment

A co-ordinated approach

38. The basic approach of ensuring just punishment and consistency of treatment adopted in this report runs across all aspects of the sentencing and punishment process. Accordingly, the recommendations in this report are to be seen as linked to each other. Thus, the recommendations in chapter 4 that call for imprisonment and parole to be regarded as a single process and to be reformed in a principled way so as to promote 'truth in sentencing' complement and are linked with the recommendations in this chapter for a more principled and rational approach to the selection of maximum prison terms and prison terms actually ordered and for an increased emphasis on non-custodial penalties. The recommendations in this report, taken as a whole, have been designed to ensure that punishments imposed by sentencing courts, as administered by correctional authorities, will support, rather than undermine, public confidence in the criminal justice system.

Scope of chapter

39. This chapter examines the place which imprisonment occupies in the criminal justice system. The present use of imprisonment, the need to retain it as a sanction and its place in the criminal justice system is then explored. A number of recommendations are then made in regard to reducing the emphasis the criminal justice system presently places on imprisonment, in particular, the enactment of the principle that imprisonment is to be the punishment of last resort and an overall rationalisation of maximum prescribed prison terms.

Retention of imprisonment as a sanction

40. Imprisonment is and will continue to be an important part of the system of imposing punishment for offences against federal and Australian Capital Territory laws. Justice will require that the seriousness of some offences be matched by a severe punishment. Since the abolition of the death penalty and of 'cruel and unusual' punishments, imprisonment is the most severe punishment that can be imposed. For some serious offences, it will be the only just punishment. To remove imprisonment as a sanction would leave the criminal justice system without a punishment of the degree of severity appropriate to some crimes.

Reducing the emphasis on imprisonment and emphasising non-custodial sanctions

Need to reduce the emphasis on imprisonment

41. Nevertheless, a full examination of the position has persuaded the Commission that the emphasis which the criminal justice system presently places on imprisonment as a punishment for offences must be reduced. Instead, more emphasis needs to be placed on non-custodial sanctions, particularly the community based sanctions such as the community service order and the attendance centre order. The need to ensure an appropriate level of severity of punishment implies that the range and severity of non-custodial sanctions available to sentencers should be increased. The Commission stresses the importance of this: an increased range and severity of these sanctions is needed to ensure that the degree of severity is sufficient for the community to be rationally satisfied that the criminal justice system is delivering just punishments. Non-custodial sanctions are dealt with in chapter 5.

Reasons for reducing the emphasis on imprisonment

42. In brief, the reasons for reducing the emphasis on imprisonment are:

- the experience of imprisonment is negative and destructive (paragraphs 44 to 46)
- the cost of imprisonment is enormous, and the returns few (paragraphs 47 to 51)
- the severity of imprisonment as a sanction is underscored by reserving it for the most serious cases (paragraph 52)
- it is the policy of all Australian governments, including the federal government (paragraph 53)
- reducing the emphasis on imprisonment complements, and is linked with, the principled approach to custodial orders to be recommended in chapter 4.

Terms of reference

43. The Commission's terms of reference specifically referred to:

> (b) the costs and other unsatisfactory characteristics of punishment by imprisonment;
>
> (d) the need for a revision of the laws of the Commonwealth and the Australian Capital Territory, with particular reference to the questions . . .
>
> (ii) whether existing laws providing alternatives to imprisonment are adequate;

> (f) . . . the de-institutionalisation of corrections,

and directed the Commission to have particular regard to

> (a) the question whether legislation should be introduced to provide that no person is to be sentenced to imprisonment unless the court is of the opinion that, having regard to all the circumstances of the case, no other sentence is appropriate;
> (b) the adequacy of existing laws providing alternatives to sentences of imprisonment;
> (c) the need for new laws providing alternatives to sentences of imprisonment, with particular reference to restitution orders, compensation orders, community service orders and similar orders.

Negative aspects of imprisonment

A harsh environment

44. *A harsh environment.* The essence of punishment by imprisonment was summed up in the first interim report in this reference, *Sentencing of Federal Offenders* (ALRC 15).

> To sentence a person to imprisonment is to order him to be deprived of his liberty by confinement. In our form of society, the deprivation of freedom is one of the severest methods of punishment we can employ.[1]

Whatever the position in theory, the reality is far different. Deprivation of liberty is a severe punishment in itself, but imprisonment imposes additional hardships. While conditions differ between prisons, at its worst, imprisonment can be

> the most individually destructive, psychologically crippling and socially alienating experience that could conceivably exist.[2]

Despite classification procedures designed to send only those prisoners who need to be held in maximum security to maximum security prisons, most prisoners experience at least some time in maximum security.[3] In all jurisdictions except, at present, Tasmania, prisons are overcrowded, leading to increased stress for prisoners and staff and severe management problems. The lack of useful activities, including work experience, in many prisons leads to boredom and frustration for prisoners. It is not surprising that sexual and other assault, violence and intimidation, openly acknowledged by authorities, occur. The difficulties and dangers that face prison staff, trying to carry out their tasks in poor conditions, may tend to lead to staff discontent and industrial disputes,

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[1] ALRC 15 para 160.

[2] Canadian Correctional Law Review WP 1, 31.

[3] Classification is carried out by prison administration but often overcrowding and lack of space results in prisoners spending time in prisons higher than their own classification.

further undermining the quality of prison life. A selective list of recent prison disturbances is as follows:

> *August 1982*: Goulburn Training Centre, New South Wales: A serious disturbance in X Wing, with a number of fires started and serious damage caused to internal areas of the building.
>
> *March 1983*: Yatala Labour Prison, South Australia: 17 prisoners and four prison officers were hurt. 'C' Division was set on fire. During the course of the disturbance, three prison officers were taken hostage.
>
> *November 1983*: A major disturbance at Brisbane Prison, with 129 cells destroyed.
>
> *December 1983*: Prisoner riot at Adelaide Gaol.
>
> *October 1987*: Jika Jika Prison, Melbourne: five prisoners died in a fire set in the course of a prison disturbance protesting against the conditions in the prison.
>
> *December 1987*: Parklea Prison, Sydney: 17 warders and eight prisoners were injured.
>
> *December 1987*: riot in Boggo Road Prison, Brisbane. One prisoner was shot and a prison officer wounded. Two hundred cells were destroyed.
>
> *January 1988*: Fremantle Gaol: five prison officers were held hostage. The maximum security section of the gaol was set on fire.

The fact that these disturbances occur so often is itself compelling evidence of the quality of the prison environment. Nor, in the short term, is the position likely to improve. The Honourable J Akister, then New South Wales Minister for Corrective Services, said to the Commission

> It is accepted that conditions in NSW prisons are not satisfactory. While overcrowding persists and funds available for capital improvements remain extremely limited, it is not anticipated conditions can be improved to any significant extent.[4]

45. *Prisons and drugs.* In other respects, prison environments tend to reflect the more undesirable aspects of modern life. For example, evidence is mounting that drug use and abuse is a significant factor in prison life. Dr J Ward, formerly the Director of the Prison Medical Service at Long Bay Prison, New South Wales, told the Commission in the course of this inquiry that, from his own survey of 200 consecutive receptions to that prison during 1984, 38% were, on reception, heroin users, another 13% were addicted to drugs other than marijuana and 12% were alcoholics.[5] The New South Wales prison methadone

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[4] Hon J Akister, Minister for Corrective Services (NSW), *Submission* 2 December 1987.

[5] Other anecdotal reports from prison authorities in that State suggests that about 70% of prisoners abuse drugs during their stay in prison.

(heroin substitute) program was being used by some 204 prisoners as at March 1988 and the other, limited, drug treatment programs available were operating at capacity. The change that this level of drug use and abuse has wrought on the quality of prison life was described by one inmate on the Australian Broadcasting Corporation's television documentary program *Out of Sight, Out of Mind*, screened in 1987:

> I was out of gaol for six years and when I came back into gaol after, after the six years I found it a totally different situation, the prisoners were totally different. . . . The whole system had changed and I regard this as being related to drugs because the guys who are on drugs now don't seem to have the same moral ethics that we had of years gone by. There's no cameraderie anymore, there's all the guys in gaol now, it's dog eat dog, get what you can, take what you can off people. Years ago we all used to help each other, nobody wanted for anything in the old days . . But now it's open slather in the gaols, the guys seem to have lost any morals at all about where they are and who they are, they don't consider other people at all other than what they can get out of it for themselves, and this is the junkie mentality.

The physical state of prisons

46. The harsh social environment of prison is in too many cases accentuated by the physical fabric of the prison itself. Many Australian prisons were built in the last century. Although repaired and extended from time to time, they remain essentially prisons of the 1800s.[6] Along with some more modern prisons, these old institutions suffer from

- isolation
- poor sanitation
- too much dormitory accommodation
- too much maximum security accommodation and not enough medium and minimum security accommodation
- lack of appropriate accommodation for different classifications of inmates
- inadequate visiting facilities
- inadequate staff facilities
- inadequate facilities for educational, work and recreational activities.

Some of these prisons suffer from conditions which require prisoners to put up with climatic extremes. Very few Australian prisons have appropriate accommodation for the mentally ill.

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[6] A useful account of the history of prison building in NSW is given in A Brunker & K Sawdy, 'New Directions in Correctional Architecture' in Cullen, Dowding & Griffin 1988, 69ff.

Costs and returns

The costs of imprisonment

47. Imprisonment is extremely expensive. The 1984–85 expenditure by State governments on prisons can been seen from Table 1. In 1985–86 the Commonwealth paid New South Wales $2 419 000 for the recurrent costs of accommodating about 60 Australian Capital Territory prisoners. The 1987–88 figure is estimated at $2 490 000. These figures do not take into account the capital costs of prison construction, the scale of which can be seen from Victorian figures in Table 2. Money spent constructing prison spaces and housing prisoners who could be equally appropriately dealt with by the use of community based sanctions and other non-custodial sentences is money taken away from other areas of public expenditure such as health and education. The criminal justice budget is better directed to alternative, community based, punishments than to propping up a means of punishment which is expensive and has many established defects.

Returns: the ability of prison to achieve the traditional 'goals' of punishment

48. *The traditional 'goals' of punishment.* The goals of incapacitation, rehabilitation and deterrence have traditionally been put forward as the primary 'goals' of punishment, including punishment by imprisonment. While they are not the sole or the primary objectives of punishment, they should nevertheless be aimed at where it is possible to achieve them within the context of a just punishment.[7] These 'goals' continue to influence those concerned with the criminal justice system.[8] The accumulated evidence of nearly two centuries, however, shows that prison fails to achieve any of these objectives, on a widespread and consistent basis. In practice, the function of prison today is largely punishment.

49. *Incapacitation.* Imprisoning a person does incapacitate. So long as a person is in prison, he or she cannot commit crimes in the community. But the effect of this incapacitation is limited: with very rare exceptions, offenders are eventually released. And the incapacitation itself is limited: while the offender may not be able to commit crimes in the community, prison crime is a real and continuing problem. Finally, a prison term may well enhance the skills the offender needs to commit crimes in the community. This is particularly so in the case of offenders imprisoned for the first time. The value of prison in incapacitating offenders is, in the Commission's view, outweighed by these considerations.

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[7] See above para 35–7, 36.

[8] eg 'Sentencing the offender called for balancing on the one hand the concept of protecting the community from offenders who commit the crime of armed robbery as a measure of general deterrence and on the other the concept of rehabilitation of the individual offender': *R v Taylor* (1985) 18 A Crim R 14 (O'Bryan J).

Table 1

Expenditure on prisons by State, 1984–85

State or Territory	Average prison population	Prisons budget ($)	Prisons budget as %age of total corrections budget	Average cost per year of imprisonment served ($)
Tas	236	6 318 000	82.0	26 771
NSW	3 747	88 379 922	82.5	23 567
NT	297	9 7001 200	83.5	32 665
Vic	1 878	55 567 000	84.2	29 588
SA	698	27 263 000	85.9	39 059
Qld	1 940	36 706 112	91.2	18 921
WA	1 481	50 205 000	94.3	33 899
Totals	10 277	274 140 234		
Averages			86.5	26 675

Source: Harding 1987 Table 3.

Table 2

Victorian capital costs: prisons

Prison	Number of beds	Total cost ($m)	Cost per bed ($)
remand centre	240	70	291 666
maximum security	250	52	208 000
maximum/minimum security	250	30	120 000
prison farm	26	1	38 461

50. *Rehabilitation for prisoners.* It is generally agreed that rehabilitation programs employed to date have been unsuccessful if the incidence of recidivism is taken as the indicator of success. While Australian recidivism research is somewhat scanty, the work done so far not only indicates high recidivism rates for former prisoners but also suggests that former prisoners are more likely than offenders subjected to non-custodial sanctions to be detected re-offending. This is so even when the number and broad type of previous offences are statistically controlled.[9] That Australian prisons have failed to reform or rehabilitate offenders is hardly surprising, given the lack of educational, vocational, life skills and drug and alcohol rehabilitation programs in many Australian prisons. The lack of drug and alcohol treatment in prisons is particularly marked in view of the increasing number of drug-related crimes for which offenders are sentenced to prison. By contrast, the recidivism rates for non-custodial sentences seem to be far better than those for imprisonment. The impact of community corrections on offenders also seems to be such as to make re-offending less likely. The community service order scheme in the Australian Capital Territory, for example, began in August 1985 and has since dealt with approximately 175 offenders. The Commission understands that about 100 offenders were undergoing community service orders at the beginning of 1988. A co-ordinator of the scheme is reported to have said

> Prison is an inappropriate solution for the vast majority of offenders we see . . . At least the CSO scheme has given our clients a chance to restore some stability to their lives.[10]

51. *General deterrence.* This report has already rejected the notion that general deterrence should be seen as a goal of sentencing. It is unjust to impose a sentence on one person as an example or to deter others from committing crimes.[11] In any event, it is by no means clear that a general increase in imprisonments imposed for a particular offence deters that particular crime, or crime generally. Nor is it clear that imprisonment is a more effective deterrent than other kinds of punishment.[12] One member of the Commission[13] disagrees with the views expressed in this paragraph.

Emphasising the severity of imprisonment

52. The need to retain a sanction of sufficient severity for the most serious crime is the basis for the Commission's acceptance of the continuation of imprisonment as a punishment option.[14] Imprisonment should therefore be a sanction applied only in cases of the most serious crimes. The value of imprisonment

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[9] ALRC DP 25, 73.

[10] *Canberra Times* 16 January 1988, B3.

[11] See above para 37.

[12] eg Christie 1981, 27–33; Blumstein et al 1978.

[13] Mr Greenwell.

[14] See above para 42.

as a punishment option will be enhanced by its being used more sparingly. If imprisonment continues to be used as frequently as it presently is for a broad range of crimes, a community perception will tend to arise that serious cases of serious offences are not being punished appropriately even by the imposition of a custodial order. Pressure will arise for unacceptable punishments to be re-introduced. An overuse of imprisonment will reinforce this pressure.

Attitude of Australian governments

53. All Australian governments, including the federal government, are committed to reducing the emphasis on imprisonment as a sanction. This was underlined when corrections Ministers, meeting in Melbourne in 1987, endorsed a public statement that said, in part

> in each jurisdiction, a review and rationalization of sentencing legislation, policies and practices should promote diversion from imprisonment and should reduce the maximum and average sentence lengths of imprisonment.[15]

ALRC 15 recommended several specific steps to facilitate and encourage the use of non-custodial sentences instead of imprisonment, including

- a legislative direction that imprisonment be the punishment of last resort
- a wider range of non-custodial sentencing options to be available to sentencers sentencing federal offenders.

A number of these recommendations have already been implemented by the federal Government and the Parliament.[16]

Techniques for reducing the emphasis on imprisonment

Introduction

54. Techniques for reducing the emphasis on imprisonment as a sanction for federal and Australian Capital Territory offences include

- legislatively emphasising that imprisonment is to be the sanction of last resort (paragraphs 55–7)
- eliminating prescribed minimum periods of imprisonment (paragraph 58)
- eliminating, where possible, imprisonment as a sanction (paragraph 59)
- rationalising imprisonment terms by reducing the maximum period of imprisonment prescribed for certain offences, and restricting the range of

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[15] National strategy on prison crowding, endorsed by the Meeting of Corrections Ministers, Melbourne, 15 May 1987; the full text of the strategy document is reprinted in ALRC DP 30 App A.

[16] See above para 10.

maximum periods of imprisonment from which the Parliament selects the maximum period of imprisonment to be prescribed for particular offences (paragraphs 60–5)

- legislating for a presumption that prison terms should only be made cumulative in exceptional circumstances (paragraph 66)
- reducing the scope for revocation of parole — considered in chapter 4
- making more use of non-custodial sanctions — considered in chapter 5
- eliminating imprisonment as an automatic consequence of default in a non-custodial sentencing option — considered in chapter 5.

Prison as the last resort

55. *Crimes Act s 17A.* In ALRC 15 the Commission recommended that imprisonment should be the punishment of last resort, that is, a court should not impose imprisonment as a punishment if some other sanction is appropriate.[17] In 1982 the Crimes Act 1914 (Cth) was amended to give effect to this recommendation. There has been considerable support for the general principle that imprisonment be the measure of last resort.[18] It is clearly accepted by governments throughout Australia; for example, the New South Wales Government, in a submission to the Commission, said

> Given the current prison overcrowding and lack of facilities for work as few offenders as possible should be incarcerated. Indeed, as is so often written but unfortunately not always put into effect by sentencers, imprisonment should be a last resort and only after alternatives have failed or the offence is a very serious one, (murder, rape, drugs etc.).[19]

56. *Exclusion of serious offences.* Section 17A does not apply to offences punishable by life imprisonment or for a period of or exceeding 7 years.[20] This limitation was not recommended in ALRC 15. It might be argued that the presumption against imprisonment should extend to all offences, not just those punishable by prison terms of under 7 years, on the basis that imprisonment should be reserved for the most serious cases of the most serious offences. The Commission considers, however, that the existing provisions of s 17A are appropriate. Properly construed, s 17A imposes a presumption against imprisonment for offences attracting a maximum prison term of less than 7 years. For offences attracting a maximum prison term of 7 years or more, no presumption is imposed by s 17A. It does not follow that, in those cases, imprisonment is to be considered first, before non-custodial sanctions are considered. The Commission understands that, in practice, judicial officers may approach the task of

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[17] ALRC 15 para 40, 56, 66–7, 190, 192–3, 377.

[18] eg *Duncan v R* (1983) 47 ALR 746; *R v Morgan* (1983) 9 A Crim R 289; see Penalties and Sentences Act 1985 (Vic) s 11, 13; cf Criminal Justice Act 1985 (NZ) s 5, 7(1)–(2).

[19] Hon J Akister, Minister for Corrective Services (NSW) *Submission* 30 December 1987.

[20] Crimes Act 1914 (Cth) s 17A(4)(a).

sentencing by adopting a presumption, however attenuated, in favour of imprisonment for some offences. Such a presumption is not imposed by the present law and is inconsistent with the principles on which this report is based. Where alternative sanctions are available — that is, in all cases — there should be no presumption in favour of imprisonment. The fact that a lengthy maximum prison term has been prescribed by the Parliament may be an indication of the seriousness of the offence generally, but courts should be able to discriminate between serious cases of such serious offences and less serious cases of such offences. Judicial officers should consider all sanction options on an equal footing in cases where s 17A does not compel a presumption in favour of non-custodial options. Section 17A should be amended to make this clear.

57. *Offences punishable only by imprisonment.* Section 17A does not apply to offences punishable only by imprisonment, an expression which is defined to include offences where

> the court is empowered to pass a sentence of imprisonment for the offence, but is not empowered to impose a fine or other pecuniary penalty on a natural person for the offence or is empowered to impose a fine or other pecuniary penalty on a natural person for the offence only as a condition of an order discharging or releasing the person.[21]

Non-custodial sanctions, such as bonds, conditional discharge and community based sanctions such as community service orders, should always be available sentencing options for any federal or Australian Capital Territory offence. There should be no offence, no matter how serious, for which imprisonment is the only available option.[22] When it comes into operation, the Crimes Act 1914 (Cth) s 4B[23] will allow pecuniary penalties to be imposed in all cases where imprisonment may be imposed. The references in s 17A to offences punishable only by imprisonment will then be unnecessary and should be omitted.

Eliminating prescribed minimum prison terms

58. So far as federal offenders are concerned, mandatory minimum penalties only appear to be prescribed in respect of second or later offences.[24] The arbitrariness of mandatory minimum terms of imprisonment has a number of undesirable consequences. Such penalties tend to undermine consistency in the consideration by sentencers of aspects of offences, or particular characteristics of the offender. They may also tend to result in perverse jury verdicts or encourage technical defences. They may well result in unduly harsh sentences being imposed. There should be no mandatory prison term prescribed for any federal offence. This is already the position under Australian Capital Territory law.

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[21] Crimes Act 1914 (Cth) s 17A(5).

[22] For the availability of non-custodial sanctions see ch 5.

[23] See Crimes Legislation Amendment Act 1987 (Cth) s 11.

[24] eg Customs Act 1901 (Cth) s 242; Excise Act 1901 (Cth) s 131: both provisions are being reviewed in the Commission's current reference on customs and excise legislation.

Eliminating prison as a sanction for some offences

59. Consideration should also be given to eliminating imprisonment as a sanction for particular offences. The Commission suggests that, of federal offences, social security offences and taxation offences, especially where no systematic fraud is involved, and some customs and quarantine offences should be reviewed first for this purpose. These would be cases where non-custodial sanctions, including the fine and community service orders, would be more appropriate than a prison term. Where systematic fraud is involved, fines may well be the appropriate sanction, if set at an appropriately high level.[25] In these cases in particular, an increased emphasis on fines and other non-custodial sanctions will allow a decreasing emphasis on imprisonment.

Rationalising the period of custodial orders

60. *Need to rationalise the prescribed maximum periods of custodial orders.* ALRC 15 reported on a survey of maximum prescribed prison terms in federal and Australian Capital Territory legislation.[26] At least 18 different maximum prescribed terms were discovered, ranging from 14 days to 20 years. Since then, more have been added. Recent legislation prescribes maximum terms of up to 25 years for some offences.[27] The result is that it becomes increasingly doubtful whether this unstructured range of penalty choices is being used consistently. On the other hand, some efforts are being made to standardise and rationalise the process by which legislation assigns maximum prescribed periods of imprisonment to offences. Before being introduced into the Parliament or made by the Governor-General, draft legislation creating federal or Australian Capital Territory offences is, under present arrangements, settled in consultation with the Attorney-General's Department, which advises on the nature and extent of the maximum penalties to be prescribed for the offences. The objective is to ensure uniformity of approach. An informal standard set of penalties is applied by the Department in giving that advice.[28] However, this is only done in the context of new legislation, or the revision of existing legislation where sponsoring agencies seek an increase or change in the penalty level.

61. *Need to reduce maximum periods.* As well as rationalising the choices that are available to the legislature in fixing maximum imprisonment terms, the length of these terms should, in the Commission's view, be carefully considered. Some maximum terms are so high that it cannot be said that they represent a just and appropriate punishment, even for the worst cases of the offence. In the Australian Capital Territory, for example, dishonestly causing electricity to be wasted with intent to cause loss to another is punishable by a maximum

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[25] This matter is further discussed below: para 107–8.

[26] ALRC 15 App E; para 409; see also Gilchrist 1979.

[27] eg Proceeds of Crime Act 1987 (Cth) s 83.

[28] Based on equivalences appearing in legislation such as the proposed Crimes Act 1914 (Cth) s 4B (see Crimes Legislation Amendment Act 1987 (Cth) s 11).

prison term of 5 years.[29] The Crimes Legislation Amendment Act 1987 (Cth) will, when in operation, raise the maximum term for escape from custody under Australian Capital Territory law to the same period.[30] Intentional destruction of another's property (otherwise than by fire or explosive) is punishable by a maximum prison term of 10 years.[31] For most offences, at least those under State law, it appears that penalties actually imposed are at the lower end of existing sentencing ranges. As one recent Victorian study put it:

> A small sampling of the median sentences imposed by the Supreme and County Courts in respect of a number of the major offences tried in 1984 reveals how readily the courts are prepared to disregard the penalty scales in assessing the severity with which they view an offender's criminality.[32]

No comparable information is available for federal offences in any one jursidiction or across Australia, or for Australian Capital Territory offences, but there is no reason to suppose that the trend evident in these figures is not reflected in sentencing patterns for these offences.

62. *Recommendation: an overall review.* What is needed is an overall review of maximum terms of imprisonment prescribed for federal and Australian Capital Territory offences. While the Commission recognises that assigning the maximum penalty to an offence is ultimately a matter for the Parliament, it recommends that the federal Government should adopt, for offences punishable by imprisonment, only a limited number of different maximum prison terms. The selection of the maximum prison term for a particular offence should be made from that set of maximum terms. The advantage of providing a limited set of maximum terms is that attention has to be be clearly focussed on the gravity of particular offences when choosing from a set of more clearly and sharply differentiated maximums.

63. *The proposed set of maximum periods.* The selection of the number of maximum terms, and their value, will be a critical part of this process. The number should not be so large as to be unwieldy, as has happened with some equivalent schemes overseas, but it should provide sufficient differentiation to allow meaningful distinctions to be made. The Commission suggests that a set of eight maximum prison terms would be an appropriate set from which the Parliament should select the maximum prison term to be prescribed for both federal and Australian Capital Territory offences. These terms are

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[29] Crimes Act 1900 (NSW:ACT) s 114.

[30] Crimes Act 1914 (Cth) proposed s 47; see Crimes Legislation Amendment Act 1987 (Cth) s 11.

[31] Crimes Act 1900 (NSW:ACT) s 128(2).

[32] Freiberg & Fox 1986, 224-5. For example, the offence of maliciously inflicting grevious bodily harm had, under Victorian law, a prescribed maximum prison term of 7 years. The median prison term actually imposed was found, in the study, to be 1.75 years (25% of the maximum). On the other hand, culpable driving, which had a prescribed maximum of 7 years, attracted a median term of 3 years (42%) and rape, with a maximum term of 10 years, attracted a median of 5 years (50%).

life imprisonment
15 years imprisonment
12 years imprisonment
10 years imprisonment
7 years imprisonment
5 years imprisonment
2 years imprisonment
6 months imprisonment.

The actual allocation of offences into the groups created by this limited set of maximum imprisonment terms should be done separately for federal and Australian Capital Territory offences; the differences in the character of those offences[33] make it inappropriate to amalgamate the two lists of offences.

64. *Matching maximum terms to offences.* The Commission does not, in this report, advance detailed recommendations allocating particular offences to each of the set of prison terms recommended in paragraph 63. So far as federal offences are concerned, the allocation of maximum prison terms would duplicate work being undertaken by the Review of Commonwealth Criminal Laws. The substantive criminal law of the Australian Capital Territory is being reviewed by the Attorney-General's Department and reforms are gradually being introduced. The allocation of particular offences to each of the recommended maximum periods by the Commission would duplicate, to some extent, that work as well. In either case, the Commission's terms of reference do not extend to a review of the substantive criminal law. The allocation of maximum prison terms to offences, and the question, inextricably linked, whether a particular offence should be punishable by imprisonment, or remain an offence at all, is one of substantive criminal law. In allocating offences to each of these maximum prison terms, a realistic assessment will have to be made of each offence and of the need for imprisonment in each case. The terms have been selected so as to confront Parliament, when considering these offences, with a clear choice. In making that choice, at least the following matters will need to be borne in mind. A wider range of non-custodial options, pitched at a more severe level, are recommended by the Commission in chapter 5. The principle that imprisonment is the last resort has been accepted. A distinction will need to be made between offences which infringe personal physical security and offences which infringe the security of property. Generally speaking, offences of the first kind should be regarded as more serious than offences of the latter kind.[34] The Commission would therefore expect to see the maximum term for property offences reduced to at least the next lowest in the set of maximum terms. For offences against the person or against the State, however, that expectation need not so readily apply. Finally, there should be a deliberate effort made to ensure

[33] See above para 4, 6.

[34] This accords with current community values: Walker, Collins & Wilson 1987; and with recommendations made by expert bodies both in Australia and overseas; eg Minnesota Sentencing Guidelines Commission.

that offences for which the same maximum prison term is prescribed are of the same comparative seriousness. In the long run, a review of this kind would make a significant contribution to the development of coherent and consistent sentencing policy and practice.

65. *Effect on sentences imposed.* The effect of the implementation of these recommendations would be to reduce the maximum prescribed imprisonment terms for a large number of federal and Australian Capital Territory offences in the process of rationalising them and making them more consistent. In terms of sentences actually awarded by the courts, a similar reduction and rationalisation should, over time, be expected. The broad thrust of the recommendations in this chapter is that imprisonment is to be awarded only as the last resort and then, only to the extent needed to impose a just punishment. The adoption by the Parliament and by the federal Government of such a policy, and its implementation in the manner suggested in this chapter, will lead to courts making individual sentencing decisions on a similar basis.

Cumulative sentences

66. Courts sentencing federal or Australian Capital Territory offenders for more than one offence may order that the sentences of imprisonment imposed be served cumulatively, that is, one after the other.[35] The legislative provisions authorising cumulative sentences give no guidance, however, on the circumstances in which courts should exercise this power. Difficulties can arise. For example, if a number of technically separate offences, each arising out of the same incident, attract prison sentences and those sentences are ordered to be served cumulatively, an excessively severe penalty could result when the 'criminality' of the incident, taken as a whole, is considered. The principal of totality, under which some proportionality is required between the offences and the total sentence where cumulative sentences are imposed, is a common law move towards overcoming this kind of difficulty. Both the Crimes Act 1900 (NSW:ACT) and the Crimes Act 1914 (Cth) should be amended to provide a clear legislative presumption in favour of concurrent, rather than cumulative, sentencing. Sentences should only be required to be served cumulatively in exceptional circumstances, and the court should have to specify those if it so orders. In these cases, there should be a legislative recognition of the totality principle. These amendments would emphasise imprisonment as the punishment of last resort.

Deferred and suspended sentences

67. In addition to imprisonment imposed in the traditional way, a court sentencing Australian Capital Territory or federal offenders has a number of other options available.

- *Suspended sentence.* A suspended sentence is a fixed term of imprisonment imposed but not put into immediate effect. The offender is released on

[35] Crimes Act 1900 (NSW:ACT) s 443; Crimes Act 1914 (Cth) s 19.

specified conditions and becomes liable to serve the term of imprisonment if those conditions are breached.[36]

- *Deferred sentence.* This is sometimes known as the 'Griffiths' bond.[37] In this case, the court defers imposing sentence for a limited period to provide an opportunity to the offender to show good behaviour, to repay money which he or she has acquired dishonestly or to perform some other act which would indicate an ability to remain out of trouble. It also gives the court an opportunity to take into account any change in the offender's circumstances during the deferment.

- *Partly suspended or split sentences.* In this case, a court imposes a term of imprisonment but directs that the person be released either forthwith or after having served a specified part of the term of imprisonment.[38] Release is subject to conditions.

The last of these three options should no longer be available for sentencing federal or Australian Capital Territory prisoners. The policy objectives which it seeks to achieve are adequately encompassed by the reforms to the nature of the custodial order, and to the parole system, recommended in chapter 4. It would only be confusing to allow courts to construct an alternative regime for parole. Suspended sentences and deferred sentences should, however, be rationalised. The Commission has already recommended against the suspended or deferred sentence in its report, *Child Welfare* (ALRC 18).[39] However, in the context of this more general review of sentencing policy, the Commission considers that there would be some value in allowing courts to give an offender time to indicate an appropriate ability to remain law-abiding. In a number of cases sentences are already deferred for the preparation of pre-sentence reports or the gathering of other evidence. A conditional adjournment for a specified period, which should in no circumstances be longer than 12 months, should be able to be ordered by sentencing courts in order for the offender to be able to demonstrate remorse, rehabilitation or the like. A breach of conditions should not of itself result in a further sentence being imposed but should result in the court declining to extend further the benefit of the period of deferral to the offender.

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[36] Criminal Code 1899 (Qld) s 656; Offenders Probation Act 1913 (SA) s 4, 9; Criminal Code Act 1924 (Tas) s 386(1)(d), Justices Act 1959 (Tas) s 74C; Criminal Law (Conditional Release of Offenders) Act 1971 (NT) s 5(1)(b); Crimes Act 1900 (ACT:NSW) s 556B(1)(b); Crimes Act 1914 (Cth) s 21; Penalties and Sentences Act 1985 (Vic) s 21.

[37] *Griffiths v R* (1977) 137 CLR 293.

[38] Crimes Act 1914 (Cth) s 20(1)(b); Crimes Act 1900 (ACT:NSW) s 556B(1)(b).

[39] ALRC 18 para 214.

4. Custodial orders

Scope of chapter

68. This chapter concerns the nature of the order that the court makes when sentencing a person to imprisonment, with particular reference to, the determination of the time the offender is to spend in custody. In the process, parole, early release and remission policies are considered and substantial reforms to parole for Australian Captal Territory and federal offenders recommended.

The custodial order

Truth in sentencing

69. *Sentencing: a 'charade'?* The criminal trial is an elaborate process. A conviction is a finding, beyond reasonable doubt, that the offender committed the offence. The court, in the exercise of its discretion, and having considered all relevant material put to it, may impose a specified period of imprisonment (the head sentence) as the appropriate punishment for the offence. But, leaving to one side the question of remissions,[1] this period may bear no relationship to the period that will actually be served. This is because the court, in most jurisdictions, may also fix a minimum term of imprisonment (a non-parole period), after which the offender may be released, at the discretion of a parole authority.[2] In all cases, release will be before the head sentence just fixed has ended. The relationship between the head sentence and the non-parole period varies from jurisdiction to jurisdiction. In some jurisdictions there can be a significant gap between the non-parole period and the head sentence. In others, there is a much closer relationship.[3] Any difference between the two, especially a substantial difference, tends to lead to confusion in the public mind.

> Judging by media and community reaction one of the most influential factors bringing the present parole system into question and perhaps disrepute is the anomaly that exists between the declaration of a head sentence and a non-parole period. . . . When a Court fixes a head sentence it does so for a purpose which, in essence, has to do with the control of crime and the treatment of criminal behaviour. However, the Court then proceeds to pronounce a significantly lower term seemingly for precisely the same purpose. Members of the community (and of the police force) are justifiably puzzled

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[1] See below para 70.

[2] In two States, non-parole periods are fixed by statute: Offenders Probation and Parole Act 1980 (Qld) s 53; Parole Act 1975 (Tas) s 16; and see Offenders Probation and Parole Act 1963 (WA) s 37A (to be added by Acts Amendment (Imprisonment and Parole) Act 1987 (WA)).

[3] See eg Frieberg & Fox 1986 para 9.714 for the position in Victoria.

> and confused over this situation. They cannot understand how a particular offence on the one hand attracts a punishment of X years imprisonment and yet on the other hand attracts X minus Y years imprisonment.[4]

70. *Remissions.* That confusion is accentuated by remission policies. In all jurisdictions, prisoners are entitled to remissions. Remissions have the effect of reducing the amount of time to be served in prison. Their impact may be felt at two points in the prisoner's sentence: the duration of the non-parole period may be reduced, and the duration of the length of the custodial order itself may be reduced. Traditionally, remissions have been characterised in two ways, general remissions and special or earned remission. General remissions are usually granted automatically to prisoners. Special or earned remissions, on the other hand are, in theory, awarded only at the discretion of prison administrators on evidence of good behaviour, industry or diligence. The New South Wales remission scheme, however, does not make such a distinction. Under that scheme, prisoners are entitled to four categories of remission:

- a specified number of days (up to 15 days) per month as is appropriate having regard to the prisoner's general conduct
- two days per month if the prisoner is in an open institution
- such number of days as may be prescribed by the regulations on account of suffering deprivation due to strike or other industrial dispute
- any other further remissions as may be prescribed by the regulations.

Remissions may not be granted unless the Corrective Services Commission is satisfied that 'the prisoner has exhibited good general conduct' during the month.[5] The Western Australian scheme effectively adopts a basic remission of at least one-third of the length of the head sentence, or, if the court so orders, an automatic non-parole period of one third of the head sentence.[6] The impact of remissions, in particular on the non-parole period, has been described as 'profoundly disturbing':

> The mere fact that there can be such a discrepancy between a sentence passed and the period of detention actually served is profoundly disturbing . . . An intelligent observer who was told about the sentence passed and the period of incarceration actually served would be likely to conclude either that the Court had no authority because little notice was taken of the sentence passed or that the Court was engaged in an elaborate charade designed to conceal from the public the real punishment inflicted upon an offender.[7]

71. *The reason for community concern.* The Commission's consultations during the course of this reference disclosed that concern about truth in sentencing, particularly about parole and remissions policies, is common in the community.

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[4] Muir report, 65: this criticism was made in a minority report.

[5] Prisons Act 1952 (NSW) s 64(1)–(2).

[6] Prisons Act 1981 (WA) s 29; but see Offenders Probation and Parole Act 1963 (WA) s 37A, 38–9.

[7] *R v Yates* [1985] VR 41, 43-4.

It was reflected by other commentators; as a submission from Dr Peter Grabosky, of the Australian Institute of Criminology, put it:

> I have in the course of my enquiries . . . become attached to the principle of truth in labelling. I am also aware of the cynicism and anger with which some members of the public regard the gap between a sentence imposed on a convicted offender and the actual time served in custody. Perhaps if judges were to call a spade a spade, the mood and temper of the public would be less vengeful than it is. At the very least, the imposition of the sentence could be accompanied by an authoritative statement about the minimum amount of time a convicted offender would be assured of spending in custody before release.[8]

One of the principal reasons for this concern is that the community sees that the punishment ordered by the court as being appropriate to the offence is not actually served. In many cases, the time actually served in prison bears no relationship to the time ordered by the court to be served. This is because, until the parole authority, and the prison administrators who fix remission entitlements, make their determinations, it is not possible to say how much of the period of imprisonment the court ordered to be served will actually be served. Under present regimes, a court determines that a particular amount of imprisonment is the appropriate sentence to be imposed for a particular offence. Parole and remission authorities, in effect, will later reduce the amount of imprisonment determined by the court to be appropriate by substituting for some part of it a less intrusive form of punishment — release on parole. Even apart from the disquiet caused by the existence of a discrepancy between the sentence as ordered and the sentence as served, the extent of the discrepancy is too wide. Such a system encourages courts and the Executive to abandon or obscure 'truth in sentencing'. The principle on which a system of this kind of operates is hard to discern. The opportunities for corruption it invites are already well known.

Parole abolition?

72. These problems, and others, led the Commission to suggest, in the interim report, *Sentencing of Federal Offenders* (ALRC 15), that parole entitlements be abolished for federal prisoners, leaving them to be released into the community unconditionally at the end of the term of imprisonment actually fixed.[9] That recommendation attracted considerable criticism. A number of submissions to the Commission stressed the beneficial aspect of parole to the offender and to the community as a whole. The Commission now accepts the view that federal and Australian Capital Territory prisoners should be helped to make the transition from the prison environment to the ordinary community. It is in the interests of the community, and in the interests of the offender, that the offender's re-integration into the community be a gradual and assisted one. Parole policies should be an integral part of imprisonment policy. Parole should be reformed, not abolished.

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[8] Grabosky *Submission* 12 November 1987.

[9] ALRC 15 para 344.

Recommendation: the nature of a custodial order

73. The need to enhance public confidence in the criminal justice system, and to avoid the appearance of sentencing degenerating into a 'charade', means that, as far as possible, sentences of imprisonment imposed by courts should mean what they say. At the same time, imprisonment policy must incorporate a supervised transition from prison to the community at the end of the term of imprisonment. The difficulties identified by the Commission have arisen because imprisonment and parole have traditionally been seen as two different things and, perhaps, because the nature of parole as release into the community *subject to conditions* has been lost sight of. The order imposed by the court has been seen as an order of imprisonment, which has been later modified by parole authorities.[10] These problems would be overcome if it were recognised that imprisonment and parole have long since ceased to be different and independent processes, but are dual aspects of the punishment imposed for the offence. That punishment is in truth, and should be seen to be, not simply imprisonment, but subjection to the control of the State for a specified period. For a part of that period, to be fixed by law, the mode of control is detention in prison. For the balance of the period, progressively more relaxed State control is exercised over the offender through the imposition of parole conditions while the offender is in the community. Those conditions are part of the punishment: a part designed to achieve the rehabilitative objectives discussed above.[11] Imprisonment and subjection to parole conditions are one continuous process. To emphasise that point, legislation dealing with imprisonment should refer not to 'imprisonment' but to 'custodial orders' — orders based on the offender being in custody, but in due course being released back into the community in a supervised and assisted way. As one submission to the Commission, suggesting a scheme slightly different in detail to that recommended here, said:

> The advantage of this kind of sentence is that it is simple, easy to understand, and easy to apply. The community would also understand what is meant by a sentence of imprisonment, and that a small part of all sentences would be served in the community.[12]

Reforms to enhance 'truth in sentencing'

Introduction: terminology

74. The balance of this chapter sets out the Commission's recommendations for the reforms that will be needed to overcome the problems just identified. They are reforms to the existing system of parole, release on licence and remission entitlements for federal and Australian Capital Territory offenders. Although the Commission has recommended that supervised release into the community be regarded as an integral part of a custodial order, it continues in this

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[10] Accentuated by prison remissions policies; see above para 70.

[11] See above para 36.

[12] Potas *Submission* 17 November 1987.

chapter to use the traditional terminology of 'parole' and 'release on licence'. These terms are well understood and unnecessary confusion would be caused if an attempt were made to change them here.

Existing parole and early release schemes

75. *Parole: Australian Capital Territory offenders.* Existing parole arrangements for Australian Capital Territory offenders were explained in detail in a discussion paper published by the Commission.[13] Parole is governed by the Parole Ordinance 1976 (ACT). It is available only to offenders sentenced to imprisonment for 12 months or more. For such prisoners, the sentencing court may fix a non-parole period[14] and the power to release on parole is vested in the Parole Board. If, on application by a prisoner, the Board considers release is not justified, reasons in writing are given to the prisoner, who then has an opportunity to make representations. The Board may impose any conditions on parole that it thinks fit. It may revoke parole, and parole is automatically revoked if the offender is sentenced to another term of imprisonment. In the event of revocation, the period during which the prisoner has been released on parole ('clean street time') is not counted as service of the sentence.

76. *Parole: federal offenders.* The position with parole for federal offenders was fully explained in the Commission's second interim report, *The Commonwealth Prisoners Act* (ALRC 43).[15] The Commonwealth Prisoners Act 1967 (Cth) was enacted to extend the benefit of State and Territory parole legislation to all federal prisoners on the same terms as it is available to State or Territory prisoners. Thus, the entitlement of a federal prisoner to parole is, by and large, the same as the entitlement of his or her State or Territory counterpart. The impact of remissions on non-parole periods is also the same. However, the decision to release after the minimum term of imprisonment has ended is vested in the Governor-General acting on the advice of the Attorney-General, as is the power to amend or revoke a parole order. Conditions of parole are set by the Governor-General and the Act provides for the procedures to be followed in the event of breach of a condition of parole. The Act also provides for the order in which a sentence of imprisonment imposed for an offence committed by a person on parole and the balance of the sentence to which the parole relates are to be served. As the Commonwealth does not have a parole service of its own, federal parolees are supervised by State and Territory parole officers pursuant to an agreement under the Act. They are given the same supervision as their State or Territory counterparts.

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[13] ALRC DP 30 para 211ff.

[14] In exceptional circumstances, a release may be ordered earlier than the end of the non-parole period.

[15] ALRC 43 para 11–3.

77. *Release on licence.* In addition to parole, both federal and Australian Capital Territory offenders may be released on licence.[16] In both cases, release on licence may be ordered by the Governor-General. It is usually subject to conditions. The Governor-General may vary or revoke a condition of a licence or revoke the licence itself. In both cases, 'clean street time' does not count towards service of the sentence in the event of revocation. No provision is made explicitly for the consequences of breach of condition or the imposition of another sentence of imprisonment.

78. *Federal offenders: ALRC 43 recommendations.* ALRC 43 recommended wide-ranging reforms of the Commonwealth Prisoners Act 1967 (Cth) and the Crimes Act 1914 (Cth) s 19A. These reforms were designed to ensure that the Commonwealth Prisoners Act 1967 (Cth) adequately reflects present Commonwealth policy, to simplify the administration of the parole and licence schemes for federal offenders and to simplify the legislation. They included incorporating the provisions of the release on licence regime in the Crimes Act 1914 (Cth) s 19A into the Commonwealth Prisoners Act 1967 (Cth). The major recommendations in the report were:

- *Entitlement to parole.* The law governing the entitlement to parole of a federal offender should be the law of the State or Territory in which the offender is convicted subject to this proviso: where the court has a discretion to decline to set a non-parole period for a State or Territory offender, it should not be able to exercise that discretion unfavourably when dealing with a federal offender. Accordingly, a court that sentences a federal offender to imprisonment should have to specify a non-parole period (minimum term of imprisonment). The minimum term should be the same, as nearly as possible, as that which would apply to a State or Territory offender. A federal offender should not be eligible for parole if a similar sentence would not have attracted parole entitlement under State or Territory law.

- *Other provisions which impact upon release date.* The commencement date of the sentence and of the minimum term should be the date of sentence but, if the offender has been in custody for the offence, the time spent in custody should be counted toward service of the sentence. Local State or Territory remissions should continue to apply to federal offenders.

- *Release on parole.* Where a minimum term (non-parole period) has been specified by the court, the offender should be released on parole automatically at the end of the term. Federal offenders sentenced to life imprisonment in respect of whom a minimum term has not been specified should be able to be released on parole by order of the Minister. This should

[16] Crimes Act 1914 (Cth) s 19A; but see ALRC 43 para 62–7; Removal of Prisoners (Territories) Act 1923 (Cth) s 8A.

not occur before the offender has served 10 years imprisonment unless the Minister is satisfied that exceptional circumstances exist.

- *Conditions of parole.* No condition, including supervision, should be mandatory. The power to set conditions for the release on parole of federal offenders should be vested in the Minister.

- *Liability to serve remainder of term.* A parolee should be liable to serve the remainder of the imprisonment to which the parole order relates if and only if

  - the parole is revoked or
  - the parolee is sentenced to a term of imprisonment for an offence committed while on parole.

  A person's parole should be able to be revoked only for breach of a condition of parole. The power to revoke a person's parole should be vested in the Minister alone.

- *Service of remainder of imprisonment.* 'Clean street time' should be credited to offenders who are re-imprisoned. A non-parole period should be specified for the unserved period of imprisonment by the Minister or the court sentencing the offender to the further period of imprisonment.

- *Release on licence.* The circumstances in which a person may apply to be released on licence should be limited to 'exceptional circumstances'. The consequences of revocation of a licence should be the same as the consequences of revocation of parole.

Application of reforms

79. *Reforms apply to all prisoners.* The approach adopted in ALRC 43 was that benefits of parole should be available to as many prisoners as possible. This was reflected in recommendations limiting the circumstances in which courts could refuse to specify a non-parole period for federal offenders, recommendations for automatic release on parole at the end of the non-parole period and the rejection of a suggestion of a discretion to deny parole.[17] The Commission re-affirms that approach. It follows from the approach adopted to custodial sentences in paragraph 73 that, where a court sentences a federal or an Australian Capital Territory offender to imprisonment, the sentence should incorporate an appropriate period of supervised release into the community. Parole release should be an integral part of all custodial sentences.

80. *Short-term prisoners and life prisoners.* The Commission considered whether to exempt prisoners sentenced only to shorter terms of imprisonment

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[17] ALRC 43 para 30, 42–3.

from these recommendations.[18] The Commission has concluded that the benefits to the community and to the offender of these prisoners having a supervised transition back into the community outweigh whatever administrative difficulties may have led to their exclusion. Moreover, there is no reason in principle for excluding these, or any other category of, offenders. Later recommendations in this chapter, for automatic release on parole, mean that the administrative implications of this recommendation will be minimised. In some jurisdictions, offenders sentenced to life imprisonment are not, under present law, entitled to parole. These offenders, when released, are released on licence, or in the exercise of the Royal prerogative. The Commission recommends that prisoners sentenced to life imprisonment should also have available to them the advantages of parole supervision and assistance. Ultimately, even these prisoners will be released into the community. It is better that they be released under the supervision of trained parole officers. Detailed recommendations, setting out how the reforms will apply in the special case of life prisoners, are set out below.[19]

The impact of discretions

81. *Combinations of discretions.* Under present law, in most jurisdictions, the court sentencing an offender to imprisonment will normally fix a non-parole period. At the end of that period, the parole authority determines whether or not to release the offender. Release can, therefore, be delayed beyond the end of the non-parole period. This arrangement is inconsistent with the principles on which the Commission's recommendations are based. It has led to the concern noted earlier.[20] The undesirable consequences of this combination of discretions include:

- there may be a considerable discrepancy between the period of imprisonment ordered by the court in the head sentence and the actual period served before parole
- inconsistencies in regard to sentences actually served are likely to be exaggerated when discretions are distributed in this way
- there is likely to be confusion in the public mind as to the relationship between the head sentence, the non-parole period and the period of imprisonment actually served.

Finally, the function of the court, the agency which determines the appropriate punishment for the offence, is seriously undercut. The court is called upon to pronounce a sentence, but, ultimately, it is another body which determines what period will be served in prison.

82. *Fixing the non-parole period.* The first question is whether, in the light of those difficulties, the non-parole period should continue to be fixed by a

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[18] At present, ACT prisoners who are sentenced to a period of less than 12 months imprisonment are not entitled to be released on parole.

[19] See below para 84.

[20] See above para 71.

court in the exercise of a discretion. The Commission has concluded that, in the interests of certainty and of ensuring that a significant proportion of the period of the custodial order is spent in prison, the proportion of the custodial order to be served in prison should be specified in legislation, and there should no longer be any discretions to fix the length of the non-parole period. Truth in sentencing demands that the proportion of a custodial order to be spent in prison should be significant. There are also benefits in ensuring that the length of time during which the offender is to be subject to parole conditions is not unduly long. The normal condition, supervision, tends to cease to be a useful condition over time — after, at the most, two years, supervision of offenders is seen to be of limited value. Accordingly, the general rule should be that 70% of the period of a custodial order should be spent in prison. This scheme will not only have the advantage of certainty and consistency but it will be readily understood by offenders, the courts and the public alike. Decisions made by courts in fixing the length of custodial orders (head sentences) will be made taking into account the fact that the legislatively prescribed proportion of the period will be served in prison. There may be exceptional circumstances in which a residual discretion in the court to reduce the 70% proportion would be appropriate: accordingly, the court should be able, if it is satisfied that exceptional circumstances exist and that they justify the reduction, to reduce the 70% proportion of the period of the order that the offender must spend in prison. But in no case should it be able to reduce that proportion below one-half of the total period of the custodial order. Finally, while the commencement of the period of the custodial order, and of the non-parole period, should be the time when sentence is pronounced, for the reasons advanced in ALRC 43, if the offender has already been in custody in relation to the offence, the time spent in custody should be counted as time served under the prison term.[21] This will avoid undue harshness.

83. *Prisoners sentenced to fixed terms: discretion to release.* The existence of a discretion in a parole authority to release or not at the end of the proportion of the period of the custodial order that is to be spent in prison also contradicts the principles on which the reforms recommended in this chapter are based. Accordingly, there should be no discretion not to release a prisoner at the end of the proportion of the period of the custodial order that is to be spent in prison. Release into the community, on parole conditions, should be automatic unless the offender is, for some other reason, not to be released, for example, because he or she is on remand in custody awaiting trial for another offence or is serving another sentence of imprisonment. The inclusion of a discretion to release in modern parole regimes was once thought to have a number of advantages, including acting as an incentive to the offender while in prison and allowing a decision as to parole to be made on the basis of the offender's conduct in prison. The Commission considers that these benefits have not been demonstrated in practice. Furthermore, the existence of these discretions has significantly undercut the principle of truth in sentencing. The Commission

[21] See ALRC 43 para 36.

considered whether to recommend a discretion in a parole authority not to release an offender at the end of the prescribed 70% period, or, alternatively, whether there could be a *prima facie* entitlement to automatic release, but with a discretion in a parole authority not to release in a particular case. These are not recommended for three reasons.

- *Benefits of parole.* The result of not releasing a prisoner subject to parole conditions would be that, in due course, he or she would be released without parole supervision. This would be in the interests neither of the offender nor the community.
- *Facts already known.* All the matters relevant to the determination of sentence should already have been taken into account. Generally speaking, offences outstanding at the time of sentence or committed later can be dealt with and, in appropriate cases, further penalties imposed. For misconduct in prison which does not amount to a criminal offence, sufficient disciplinary powers, including loss of remissions,[22] exist.
- *Inconsistent with principle.* To do so would be inconsistent with the principle underlying these reforms, namely, that the court, in the exercise of the sentencing discretion, fixes the period of imprisonment that is appropriate to be imposed for the offence. That period having been served, there is no basis in principle for the offender to be further detained in prison: continued detention, by definition, cannot be justified as punishment for the offence.

84. *Prisoners sentenced to life imprisonment: discretions to fix non-parole period and to release.* The recommendations for automatic release after 70% of the period of the custodial order will not apply to persons sentenced to life imprisonment as it is not possible to have 70% of a life sentence. Within the range of crimes for which life imprisonment may be imposed, there is a wide range of culpability. It is neither possible nor desirable to lay down a formula which will apply equally to all persons sentenced to life imprisonment. In these cases, the decision to release the prisoner into the community subject to parole conditions must be made on a case by case basis. Australian Capital Territory offenders serving life sentences are presently considered for release after 10 years, and annually thereafter.[23] Those prisoners are released on licence, rather than on parole. Other federal life prisoners are also released on licence at the appropriate time. The distinction between release on licence and release on parole is essentially one of form, not of substance. As with prisoners sentenced to fixed terms, the questions are whether the non-parole period should be fixed in the exercise of a discretion and whether release should be granted in the exercise

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[22] See below para 86.

[23] M Kelleher 'Federal and Australian Capital Territory Offfenders: the Future of the Current Law and Practice', in Potas 1987, 417.

of a discretion. As it is not possible to prescribe legislatively a fixed proportion of a life sentence as the non-parole period, the Commission recommends that, after having served 10 years imprisonment, each life prisoner be considered for release on parole. The decision whether to release at that time, or at some later time, will have to be discretionary. A sentencer who imposes life imprisonment on an offender will have done so in the light of this regime and will have determined that it is an appropriate one in the circumstances of the case. Again, there may be a case for a residual discretion in exceptional circumstances arising after the sentence is imposed to consider an offender for release before the end of the 10 year period. Release should not be permitted before the offender has served 10 years imprisonment unless the parole authority is satisfied that exceptional circumstances exist and justify the release.

85. *Release: temporary leave, day leave, etc.* ALRC 43 recommended that temporary leave of absence from prison for compassionate or other reasons such as going to a relative's funeral, working or attending an educational institution, should be available to federal prisoners in State and Territory prisons.[24] The Commission re-affirms this view, and the legislative amendments recommended in ALRC 43 to implement it. Such leave should be available to Australian Capital Territory prisoners; New South Wales legislation authorising such release should be applied for the benefit of Australian Capital Territory offenders in New South Wales prisons.

Remissions

86. The fundamental principle that sentences should mean what they say implies that the impact of remissions on the length of time an offender actually spends in prison should be limited and determinate. General remissions, that is, remissions unrelated to any particular aspect of the prisoner's behaviour, should not be available. They are inconsistent with the principle of 'truth in sentencing'. However, earned remissions are an important way of encouraging prisoners to participate in whatever rehabilitative programs are available within the prison and are essential to encourage order in the prison. They should remain. In the Commission's view, remissions of this kind must be, in substance, earned remissions. It is not enough, as in the present New South Wales scheme, that remissions be granted subject to being lost for bad behaviour. Automatic remissions of any kind — even if capable of being lost — convert the sentence being ordered by the court into a different sentence. The amount of earned remission available should be restricted so as not to conflict with the principle of truth in sentencing. The appropriate maximum rate of earned remissions is 20% of the period of the custodial order, that is, a prisoner should be able to earn a reduction of up to 20% of the length of the period of the custodial order for industry, diligence and good behaviour. To maximise its value as an incentive to the prisoner, the non-parole period should also be reduced by the amount of remissions earned. This is also consistent with the principle un-

[24] ALRC 43 para 39.

derlying these recommendations. The reduction in the number and impact of discretions associated with the sentencing and punishment process, especially those located outside the sentencing court, mean that sentencers imposing sentences of imprisonment will be able to construct custodial orders to ensure that the offender will serve the period of imprisonment ordered. The distinction between head sentence and non-parole period will lose much of its significance.

Parole conditions

87. *Parole conditions.* The essence of parole is that the released prisoner is subject to conditions, including, in most cases, conditions as to supervision and counselling. Unlike the situation for federal prisoners, where supervision is a mandatory condition,[25] there are no mandatory conditions prescribed for Australian Capital Territory prisoners released on parole. The conditions are wholly within the discretion of the parole authority. ALRC 43 recommended that no condition be mandatory for parole.[26] The difficulties that could occur if some specified conditions, especially supervision, are mandatory were explored there. The Commission re-affirms the view it took in that report. No condition should be mandatory. The implication of this recommendation is that it will be possible for offenders not to be subject to parole conditions at all, although the Commission envisages that normally supervision will continue to be imposed. In all cases, parole conditions should be certain, clear and unambiguous. Vague conditions, such as 'The offender will be of good behaviour', provide little guidance to the offender as to what is expected and effectively give the parole authority broad discretions to revoke for breach. The broad discretion is in itself undesirable. Because the needs of the offender may vary over time, the parole authority should be able to vary the conditions.

88. *Duration of conditions: the parole period.* Under present law, the period during which parole conditions may be imposed (the parole period) starts on the day of release from prison and ends on

> the day on which the term of imprisonment to which that person was sentenced expires, or, if the parole order in relation to the person is revoked, on the date of the revocation.[27]

The reformed approach to imprisonment recommended in this report means that the parole period should be seen as an extension of imprisonment and as an integral part of the period of the custodial order. Accordingly, the parole period should be the balance of the period of the custodial order, reduced to the extent that remissions have been earned by the prisoner. Unduly lengthy parole periods will be avoided by the implementation of the earlier recommendations that maximum prescribed prison terms, and therefore periods of

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[25] Commonwealth Prisoners Act 1967 (Cth) s 21(1)(b); but see ALRC 43 para 47–9.

[26] id para 49.

[27] Parole Ordinance 1976 (ACT) s 5(1), definition of parole period; similar provisions apply under the Commonwealth Prisoners Act 1967 (Cth) for federal parolees.

custodial orders,[28] be rationalised and reduced. In any event, there should be no requirement that the offender be subject to parole conditions for the whole of the parole period.[29] The problems identified in ALRC 43 involved in subjecting parolees to lengthy supervision, or other conditions, some of which may seriously affect their lifestyles, will therefore be avoided.[30] In the case of parole for a prisoner sentenced to life imprisonment, the parole authority, in granting parole under the previous recommendations,[31] should be required to specify a date as the day on which the parole period will end.

Revocation of parole

89. *Present law.* The present law on the circumstances in which parole for federal offenders can be revoked was set out in ALRC 43.[32] For Australian Capital Territory parolees, parole can be revoked by the parole authority. It is not necessary that the parolee have committed a breach of a condition.[33] For both federal and Australian Capital Territory parolees, parole is automatically revoked on the offender's being sentenced to imprisonment for an offence committed while on parole.[34] Where parole is revoked, the offender becomes liable to serve the whole of the unserved balance of imprisonment. In neither case is credit given for the period of parole during which the offender complied with parole conditions ('clean street time').

90. *Recommendation: sanction for breach of conditions.* The need for an effective sanction to ensure that released offenders comply with parole conditions requires that the offender should be liable to be returned to prison if he or she breaches a condition of parole. Accordingly, the parole authority should be able to revoke parole on this ground.[35] Breach of a parole condition should be the only ground on in which parole should be liable to be revoked: a power to revoke parole on other grounds runs counter to the understanding of a custodial order explained earlier.[36] However, the present requirement under Australian Capital Territory law that the parolee must be apprehended and brought before the parole authority before it can revoke parole is unnecessarily rigid. Parole should be able to be revoked without this requirement. Finally, it follows from

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[28] See above para 61–5.

[29] See above para 87.

[30] See ALRC 43 para 48. If the Commission's recommendation that the maximum period of a custodial order (other than life imprisonment) be 15 years is adopted (see below para 63), the longest parole period that would ever be available (ignoring remissions) would be 30% of that, ie, 4.5 years.

[31] See above para 84.

[32] ALRC 43 para 51.

[33] Parole Ordinance 1976 (ACT) s 25(7).

[34] Commonwealth Prisoners Act 1967 (Cth) s 5(7); Parole Ordinance 1976 (ACT) s 22(2).

[35] Revocation of parole would be only one option available to the parole authority where a parole condition had been breached. In appropriate cases, the parole authority should also be able to overlook the breach or vary the conditions of parole.

[36] See above para 73.

the principle that the offender is serving the custodial order while on parole that 'clean street time' should be credited to the offender if parole is revoked. To do otherwise provides no incentive for the offender to comply with the parole conditions and could lead to harsh consequences if a breach commmitted very late in the parole period results in re-imprisonment.

91. *Recommendation: consequences of commission of new offence.* At present, parole is deemed to be revoked automatically if the parolee is imprisoned for an offence committed while on parole. Again, no credit is given for 'clean street time'. In these cases, the fact of imprisonment for the new offence means that the offender's release into the community has effectively come to an end.[37] The offender can no longer been seen as serving any part of the period of the original custodial order in the community. Subject to what is said below about further parole, the practical effect of re-imprisonment is therefore the same as if parole had been revoked. The relevant day from which the effect of revocation should apply should be the day the offence was committed. 'Clean street time' should, however, be credited to the parolee for the reasons given in paragraph 90.

92. *Recommendations: further parole where revocation.* When an offender is returned to prison as a consequence of revocation of parole, two questions arise:

- the period of time for which the offender should be re-imprisoned
- whether the offender should be released again on parole.

Under the recommendations concerning the nature of the custodial order in this chapter, an offender who is released into the community on parole conditions has completed that part of the custodial order which the court determined should be served in imprisonment. In the case of revocation of parole, therefore, the offender is being returned to prison as a sanction for the breach that led to revocation, not as part of the continuing punishment for the original offence. The parole authority should therefore be required to specify the period of imprisonment that is appropriate in the circumstances. That period should never exceed the balance of the period of the custodial order, earned remissions and 'clean street time' being taken into account. Consistently with the approach adopted in both this report and in ALRC 43, parole release into the community should be available again to the offender. In effect, the parole authority should, in revoking, specify how much of the balance of the period of the custodial order, earned remissions and 'clean street time' being taken into account, should be served in custody.

93. *Recommendations: further parole where fresh offence.* Where an offender is imprisoned for another offence, similar questions arise. If the non-parole period for the second offence is longer than the balance of the period of the custodial order for the first offence, earned remissions and 'clean street time' being taken into account, no difficulty arises. The latter will simply subsume the former. If, however, the non-parole period for the second offence is less than that

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[37] See ALRC 43 para 53.

period, the important consideration is the regime under which the offender will be released from the imprisonment in respect of the second offence. If release for the second offence takes place under the scheme recommended in this report, release for the second offence should subsume the previous release; the parole authority, in specifying conditions for the second release, should have regard to the conditions imposed in respect of the first release and an appropriate set of conditions will be imposed for the second release. Further consideration of the release conditions in respect of the first offence will, therefore, be superfluous. If, on the other hand, the second offence is a State or Territory offence in respect of which the recommendations in this chapter have not yet been implemented, the offender might be released subject to different conditions or without conditions at all. In these circumstances, the offender should continue to be subject to the parole conditions specified in respect of the first release to the extent that they are consistent with whatever conditions are imposed in respect of the second release.

Implementation: Australian Capital Territory

94. *General.* The reforms recommended in the previous paragraphs should be applied to Australian Capital Territory offenders. Appendix A to this report contains legislation to achieve this. The Commission acknowledges that the substitution of an Australian Capital Territory based remission system for Australian Capital Territory prisoners in New South Wales prisons will introduce an element of disparity between the remissions entitlements of Australian Capital Territory prisoners and their New South Wales co-prisoners. The extent of remissions available to New South Wales prisoners under the New South Wales remission scheme[38] is, however, such as to undermine completely the principle on which the reforms recommended in this chapter are based. The New South Wales remissions scheme should no longer be applied to Australian Capital Territory prisoners. Taken in conjunction with the recommendations as to the general reduction in time served in prison,[39] no problems will arise out of these differing remissions entitlements.

95. *The parole authority.* At present, the parole authority for Australian Capital Territory prisoners is the Australian Capital Territory Parole Board. Its major functions are

- determining whether to release on parole
- determining the conditions of parole
- varying and revoking parole.

The recommendations in this chapter will involve the removal of the major function of the Board — the determination whether or not to grant parole to all but life prisoners. The workload and responsibility of the Board will therefore be considerably reduced, although it will still retain the function of

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[38] See above para 70.

[39] See above para 61–5.

fixing appropriate parole conditions. The Commission considered whether, in the light of this, the Minister should be the parole authority. The Minister is the parole authority in respect of the approximately 500 federal prisoners and about 430 federal parolees and licensees. There are only about 70 Australian Capital Territory prisoners, and at 30 June 1987 there were 15 offender on parole and 38 released on licence.[40] However, the Commission does not recommend that the Parole Board be abolished. A parole board, with community representation, is a useful way of ensuring that community and expert views are brought to bear on parole related decisions. The Australian Capital Territory Parole Board should exercise the powers under the recommended scheme.

96. *Australian Capital Territory Parole Board: procedural requirements.* The procedure recommended in ALRC 43 for reform of parole for federal offenders is generally appropriate. However, the procedures to be observed by the Parole Board in exercising the powers it will have under the reformed scheme need to be considered. The Commission's view is that the Administrative Decisions (Judicial Review) Act 1977 (Cth), the basic Act concerning judicial review of Commonwealth or Australian Capital Territory administrative action,[41] applies to the decisions that the Board will be required to make, and discretions it will be required to exercise, under the reforms recommended in this report.[42] If there is any doubt about this, the Administrative Decisions (Judicial Review) Act 1977 (Cth) should be amended to put it beyond doubt. Within the limits imposed by that Act, the following procedural requirements are appropriate:

- *Selection or variation of parole conditions.* There should be no requirements, apart from those imposed by or under the Administrative Decisions (Judicial Review) Act 1977 (Cth) or the Freedom of Information Act 1982 (Cth), for reasons to be given for the imposition of particular conditions or, in cases where they are varied, the variations. Nor should there be a requirement, other than the requirements of natural justice imposed by the Administrative Decisions (Judicial Review) Act 1977 (Cth), for the prisoner to be present or represented when these decisions are considered by the Board.[43]

- *Revocation of parole.* However, it should be mandatory for any decision to revoke parole by the Board to be supported by reasons: the breach relied on should be specified and the reason why revocation is an appropriate response should also be specified. The offender should be told of both matters in writing. The circumstances in which a revocation decision may need to be made suggest that unnecessarily stringent procedural

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[40] ACT Parole Board 1987, 5.

[41] See also Constitution s 75(v.).

[42] The Act does not apply to the decision whether to release an offender on parole or not: *Riordan v Connor* (1981) 53 FLR 112, but this decision will no longer be one for the Board.

[43] The Commission has been told that in the period 1979 to 1985, only 5 prisoner applicants appeared in person before the Board.

rules should be avoided but adequate protections for the offender are still needed. In the normal course, the Board should notify the offender of its intention to revoke, giving a short period, say seven days, within which representations can be made either personally or by counsel. However, if the Board if satisfied that it is necessary in public interest to revoke parole immediately, it should be able to do so. In those cases, once the offender is arrested to be re-imprisoned, he or she should immediately be able to require the Board to reconsider its decision, taking into account whatever representations he or she wishes to make personally or by counsel. On such a reconsideration, the Board should be able to cancel the revocation without further detrimentally affecting the offender's position.

- *Life prisoners.* A decision not to release a prisoner sentenced to life imprisonment on parole on an application made after the 10 year period referred to above should be supported by reasons. Because release before the end of the 10 year period is only to take place in exceptional circumstances, there is no need for a requirement that reasons for refusal of applications be given before that time. Given the applicability of the Administrative Decisions (Judicial Review) Act 1977 (Cth), there would appear to be no need for a rule requiring a hearing in the presence of the prisoner in each case.

In all cases, the Board should have to take into account any representations made by the prisoner, either personally or by counsel, and the reports which it will have available to it. Finally, Australian Capital Territory prisoners should be properly informed about the parole system and their rights in relation to it. This should be easier to do because of the recommendation that Australian Capital Territory prisoners serve a legislatively prescribed proportion of the period of the custodial order in prison and be automatically released on parole.

Implementation: federal parole

97. *ALRC 43 confirmed.* The reforms of the parole and early release system recommended in this report are a development of, and are consistent with, the recommendations made in ALRC 43. Subject to the matters mentioned in paragraph 98, the Commission re-affirms the recommendations made in that report. In particular, the Minister should continue to be the parole authority for federal prisoners. The Commission considered whether a federal parole board should be created but concluded that there was no necessity for this to be done: acceptance of the Commission's recommendations would further reduce the need for a federal parole board. Practical difficulties, arising from the fact that federal prisoners are housed in prisons throughout Australia, would also be involved in establishing a federal parole board. However, the Commission notes that there may be a need to establish a federal parole board in the future as

the number of federal prisoners increases.[44] In the light of this, the procedural protections for federal prisoners and parolees (chiefly the applicability of the Administrative Decisions (Judicial Review) Act 1977 (Cth)) set out in that report are appropriate.

98. *Eligibilty for release and discretionary release.* The major difference between the recommendations in this report and ALRC 43 arises out of the recommendations in this report that

- a legislatively prescribed portion (70%) of the period of the custodial order be served before release
- all prisoners be automatically released on parole.

The present policy underlying the Commonwealth Prisoners Act 1967 (Cth) is that, in the matters of eligibility for parole and the fixing of a non-parole period, federal offenders should be treated in the same way as their State and Territory counterparts. In the Commission's view, imprisonment of federal offenders in all jurisdictions should ultimately be on the basis recommended in this report. The Commonwealth should move to implement the scheme recommended here for all federal offenders. As was pointed out in ALRC 43, although the present policy is popularly described as a policy of 'intra-jurisdictional parity', significant elements of the policy, for example, those concerning the consequences of breach of parole conditions, do not rely on local State or Territory policy. Acceptance of the recommendations in ALRC 43 would go a considerable way towards making the reforms just recommended more understandable: those recommendations were in fact prepared with this in mind.[45] Two broad options present themselves for the implementation of the present recommendations.

- *Uniform law.* The Commonwealth could, through the Standing Committee of Attorneys-General and the Conference of Corrections Ministers, try to achieve uniformity among the States and Territories. The result would be that the recommendations made above would be applied for the benefit of prisoners, and prison administrations, in all States and Territories. Federal offenders would automatically benefit.

- *Commonwealth action.* The Commonwealth could implement the recommendations for federal prisoners independently of action by the States and Territories.

These courses are not exclusive: the federal Government could, for example, try to achieve uniformity among the States and Territories and at the same time implement these recommendations for federal offenders or it could try

[44] There are approximately 505 federal prisoners, and approximately 400 federal offenders on parole: however, there are only approximately 60 ACT prisoners and about 15 on parole.

[45] ALRC 43 para 4.

to achieve uniformity but if, after an appropriate period, that has not been achieved, implement the recommendations for federal offenders independently.

Release on licence

99. If the recommendations made in this chapter are adopted, the discretionary power to release Australian Capital Territory offenders from prison on licence under the Removal of Prisoners (Territories) Act 1923 (Cth) s 8A will be much reduced in significance. All Australian Capital Territory prisoners, other than those sentenced to life imprisonment, will be covered by the regime recommended. For federal offenders, the recommendations made in ALRC 43 will also reduce the significance of the release on licence provisions contained in the Crimes Act 1914 (Cth) s 19A. The Commission re-affirms the recommendation made in ALRC 43 in respect of release on licence for federal prisoners.[46] The same reforms should be enacted for Australian Capital Territory offenders. This entails

- retention of the present power of the Governor-General to release on licence if it is proper to do so in the circumstances
- limiting the circumstances in which a person can apply to be released on licence to 'exceptional circumstances'
- limitations on release on licence in pursuance of an application unless the Governor-General is satisfied that the exceptional circumstances exist and justify the licence
- specify that the consequences of revocation of licence should be broadly the same as the consequences of revocation of parole.

Inter-related recommendations

100. These recommendations and the recommendations in chapter 3 are closely linked. They have been designed to address different but related problems in the criminal justice system. The Commission emphasises that it will be essential to implement both sets of recommendations together in order to implement principled reforms. Any other course would be counter-productive. Implementation of the recommendations in chapter 3 will lead to an overall reduction in prescribed maximum prison terms. This will be reflected in the length of custodial orders being imposed by the courts in particular cases being reduced. But unless the reforms to remissions and parole policies recommended in this chapter are introduced at the same time, the actual time served in prison — the basic element of the punishment, against which the court and the community measure the justice and the appropriateness of the sentence — could be dramatically reduced. Prison terms would then lack the element of certainty and consistency which is central to public confidence in sentencing and the criminal justice system. If, on the other hand, the parole and remissions

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[46] ALRC 43 para 65–7.

reforms recommended in this chapter are introduced without the recommendations in chapter 3 accompanying them, the length of time offenders actually spend in prison could increase. Overcrowding, already significant, will intensify, with resultant prison disturbances, injuries and possibly prison deaths. The two sets of recommendations are designed to confront policy makers clearly, and in a publicly accountable way, with the consequences of the choices they make. The legislature that fixes maximum prescribed terms of imprisonment for offences, and the courts that sentence offenders to a particular term of imprisonment, should do so in the context of a system that is clearly defined, and in the knowledge that a prison sentence means what it says. In this way public confidence in sentencing and the punishment process can be restored.

5. Non-custodial sentencing options

Introduction

Non-custodial sentencing options

101. This chapter is concerned with non-custodial sentencing options for federal and Australian Capital Territory offenders. The Commission has been asked to consider:

- whether there should be a presumption against imprisonment unless the court considers that no other sentence is appropriate
- the adequacy of existing laws providing alternatives to sentences of imprisonment
- the need for new laws providing alternatives to sentences of imprisonment, with particular reference to restitution orders, compensation orders, community service orders and similar orders.

A number of recommendations aimed at shifting the emphasis away from imprisonment as a sanction are made in chapter 3. These include the proposals that imprisonment should remain the punishment of last resort, that there should be no offences punishable only by imprisonment and that eliminating prison as a sanction for some offences should be considered.

Increased emphasis

102. These recommendations are linked with the Commission's view that non-custodial sanctions be given greater emphasis and that the range and severity of non-custodial sanctions be increased. In accordance with that view, this chapter makes recommendations aimed at ensuring that the widest possible range of non-custodial sentencing options of appropriate severity is available to courts dealing with federal and Australian Capital Territory offenders and that, so far as practicable, they are available for all offences. The Commission's view is that non-custodial sanctions can be no less appropriate than imprisonment as punishment for many offences. While such options are generally viewed as suitable for minor offenders, it is important to stress that they may be equally appropriate for more serious offenders. There is considerable scope to expand their range and use in relation to more serious offences, especially with regard to crimes against property.

Nature of non-custodial options

103. This chapter examines the various non-custodial options with a view to determining their suitability as punishment. The main ones considered are the

fine, community based order and the various forms of conditional discharge. These all differ slightly in their composition and in the punitive element involved in the particular sanction. Fines, for example, are largely punitive, in that they involve the imposition of a monetary penalty which may cause some degree of hardship. Unlike community based sanctions, they have no rehabilitative purpose. Community based sanctions, such as community service and attendance centre orders, also differ from fines in that their punitive element involves a measure of restriction of the offender's freedom by way of intervention and supervision. In contrast, conditional discharges, such as bonds, are aimed at giving the offender a second chance. Both punishment and structured rehabilitation are minor considerations in such options, although some restriction of liberty may be involved where probation is imposed. Because of differences in the nature of the various non-custodial sanctions, it is difficult to characterise one as being inherently more severe than another. Moreover, no sentencing option is appropriate to all offenders. The court must in all cases give serious consideration to the most appropriate sanction, especially where any deprivation of liberty is involved. The need to restrict the liberty of an offender may have to be set against the benefits, in particular, the prospect for rehabilitation, where community based orders are concerned. Such orders may be particularly appropriate for young offenders who can benefit from learning new skills. On the other hand, where the deprivation of an offender's liberty is not justified and the need for rehabilitation minimal, a fine may be a more appropriate sanction.

The Commission's approach

104. *Diversity.* The Commission's approach to non-custodial options is to ensure that courts sentencing federal offenders have a wide range of options available. This will enable them to choose a sanction that restricts the offender's liberty in appropriate cases and a less punitive one for less serious offenders. On the other hand, it is also important that sentencing options that are inhumane or otherwise objectionable should not be available. While the various criticisms and reservations noted in this chapter about particular non-custodial options are significant, they are not of sufficient force, in most cases, to outweigh the need for diversity or to justify the exclusion of those sanctions. An exception to the general proposition that all non-custodial sanctions currently in use in Australia are acceptable is the relatively experimental sanction of home detention.[1] The Commission is also concerned that courts have flexibility in determining the amount of punishment to be imposed. They should be able, in appropriate cases, to impose a nominal fine, or a very short period of community corrections. For this reason, there should be no minimum prescribed sentences in relation to any non-custodial sanctions.

[1] See below para 131.

105. *Removing link with imprisonment.* At present, some sentencing options such as community service orders are available only in respect of offences for which imprisonment may be imposed. It is the Commission's view that this kind of linkage need not necessarily continue. For example, under the Commission's proposals, there are some offences for which prison may no longer be seen as appropriate. However, in most of these cases community based sentences should still be available. In the end result, each type of sentence has to be considered independently in relation to each type of offence to assess what kind of punishment should be available for that offence as a matter of law and policy. Ultimately, within that range a choice is made of the sentence most appropriate to the particular case.

Current position

106. So far as federal offenders are concerned, the Crimes Act 1914 (Cth) s 4B(2), when it comes into operation, will provide that the court may impose a fine for any offence punishable by imprisonment unless there is a contrary intention. Community based sanctions are available for such offenders only in jurisdictions where the Crimes Act 1914 (Cth) s 20AB has been proclaimed and where the particular sanction is available for local State or Territory offenders.[2] In the Australian Capital Territory fines are generally available, but there is not yet a full range of community based sanctions. The Commission's first interim report in this reference, *Sentencing of Federal Offenders* (ALRC 15), noted the unanimous view of Australian Capital Territory judges and magistrates that they did not have an adequate range of non-custodial sentencing options available to them.[3] In 1980 fewer sentencing options were available in the Australian Capital Territory than in other Australian jurisdictions. Since then, the only new sentencing option introduced in the Australian Capital Territory is the community service order, which became available in 1985. The Australian Capital Territory still does not have attendance centres, similar to those operating in Victoria and New South Wales, nor is periodic detention available as a sentencing option. There continues to be a demand for more sentencing options in the Territory. The Chief Magistrate, Mr Cahill, has repeatedly voiced the view that it is important for magistrates and judges in the Australian Capital Territory to have at their disposal the widest possible range of sentencing options.[4] The Vinson report recommended the development of attendance centres where offenders would be able to undertake courses on literacy skills, personal development or drug rehabilitation.[5]

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[2] s 20AB(1) refers to a 'community service order, a work order, a sentence of periodic detention, an attendance centre order, a sentence of weekend detention or an attendance order . . . or [an] order that is prescribed for the purposes of this section'. No new orders have been prescribed.

[3] ALRC 15 para 493.

[4] eg R Cahill, 'Sentencing Options in the Australian Capital Territory' in Potas 1987, 437.

[5] Vinson report 237-8.

Fines

When can fines be imposed?

107. The authority to impose a fine on a federal or Australian Capital Territory offender is generally found in the legislation creating the relevant offence.[6] Maximum fines presently prescribed can be as high as $250 000.[7] In the Australian Capital Territory a fine can be imposed instead of punishment for any offence against the Crimes Act 1900 (NSW:ACT) even if not specifically prescribed, if the court thinks this punishment is sufficient to meet the case.[8]

Important sanction

108. The fine is arguably the most important non-custodial sanction, being by far the most frequently used sentencing option in all Australian jurisdictions. There are numerous benefits in its use, both in relation to the administration of justice and from the viewpoint of the offender. From the former standpoint, the fine can be an effective sanction. It can be suitable, for example, for serious white collar offences where a penalty of thousands of dollars may be appropriate. It can be equally suitable as punishment for minor offenders. Fines are cheaper to administer than custodial sanctions, such as prison, or other non-custodial options, such as community service, attendance centres or periodic detention. Fine payments generate revenue for the State which in turn can apply these funds to victim compensation and counselling schemes, and other components of the criminal justice system.[9] From the offender's point of view, the imposition of a fine generally avoids a prison term being served. This helps to ensure that the risk of graduating to more serious crime is minimised.

Problem areas

109. *Lack of equity.* It is acknowledged that there are certain limits on the effectiveness of fines. If fines are seen mainly as an alternative to imprisonment then inequity can arise in that the wealthy offender can pay without difficulty, whereas the poor offender may be imprisoned. While this problem can be overcome by ensuring that imprisonment is no longer an automatic default punishment for non-payment of fines, there remains the problem that if the amount of the fine is linked solely to the gravity of the offence, then it will have a harsher impact on the poor than on the wealthy. A fine of $100 may be a

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[6] See Acts Interpretation Act 1901 (Cth) s 41; Interpretation Ordinance 1967 (ACT) s 33.

[7] Trade Practices Act 1974 (Cth) s 76; Torres Strait Fisheries Act 1984 (Cth) s 45(2).

[8] Crimes Act 1900 (NSW:ACT) s 431(1).

[9] The revenue generated by fines in the following courts was: NSW Local Courts 1985–6: $21 319 009; 1986–7: $20 660 332; NSW District Court 1987 (Jan–Dec): $1 691 224; (fines and compensation payments); SA (all courts) 1985–6: $7 085 000; 1986–7: $7 661 000; Qld Local Courts 1985–6: $16 015 258; 1986–7: $18 988 430: Qld Supreme and District Courts 1986–7: $134 485.

large amount for an offender of low socioeconomic status[10] yet a trifling sum for a wealthy offender. To be effective as a sentence, the imposition of a fine must take account of the means of the offender. These factors may suggest that the maximum fines should be set at a high figure (to meet the most serious case and the most wealthy offender), while at the same time that the court should have a discretion which relates to the circumstances of the offender. In this context, however, uniformity of sentencing cannot be determined solely by reference to the nature and gravity of the offence. Without clear guidelines as to how an offender's means are to be considered, there can be no certainty that discretion would be exercised in a consistent manner.

110. *Inadequate enforcement.* Another problem about fines is that there is not always adequate enforcement machinery. This may arise from the tendency to see fines as an alternative to imprisonment and because imprisonment is the usual default for non-payment. Whatever the reason, there have been difficulties in enforcing fines, simply because the offender had no assets or regular income. Problems of this sort are, however, less likely to arise where substantial fines are imposed for serious offences on offenders with substantial assets or means. In these cases there is no reason to suppose the civil remedies of sequestration and sale or garnishment could not prove effective in enforcing payment.[11]

111. *Inflation.* In every jurisdiction in Australia, the problem of inflation eroding the value of fines has been dealt with by amending, at more or less regular intervals, each piece of legislation creating an offence. In 1981 Victoria adopted a system of 'penalty units', which rationalised provisions specifying penalty levels. The old monetary maxima have been replaced by a defined number of penalty units. The value of the penalty unit is fixed by legislation and the amount of the fine can be calculated accordingly. The maxima (in penalty units) vary according to the seriousness of the offence. The penalty unit is currently $100 but this can be changed easily by one piece of legislation. Adjustments to penalty levels can be dealt with simultaneously and easily with the relativities between offences retained.[12]

Recommendations

112. *Independent sanction.* Despite the difficulties referred to, the Commission is of the view that the fine should retain its position as a significant sentencing option. It should, however, be a separate, 'free-standing' sanction for which imprisonment is not automatically imposed in default of payment.

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[10] $100 can be compared with the August 1987 figure of $459.90 male average weekly total earnings and $446 estimated male mean weekly earnings.

[11] Methods of enforcement in the event of default are discussed below: para 145.

[12] The Tasmanian Law Reform Commission has recommended that a similar scheme be adopted in that State: Tas LRC 41, 9-10. Similar work is being done in the NT: Department of Law (NT) & Correctional Services (NT), *Submission* 26 February 1988.

This is consistent with the Commission's approach of minimising resort to imprisonment as a penalty and making non-custodial sentencing options more effective.

113. *Application for time to pay etc.* To minimise the burden on offenders, the present powers of the courts to allow time to pay, and to pay by instalments should continue. The Commission also recommends that an offender who has had a fine imposed should be permitted to apply at any time to the officer of the court for an order in relation to these matters. The offender should be entitled to seek further time to make payment, permission to pay by instalments or the variation of an instalment order which has previously been made.

114. *Equity considerations.* The Commission considered ways of making fines more equitable, and therefore overcoming the difficulties noted in paragraph 109. One method considered was the 'day fine'[13] which involves relating the amount of the fine, not only to the gravity of the offence, but also to the income of the offender assessed on a daily basis. Although a Commission discussion paper suggested that a 'day fine' scheme be introduced on a pilot basis in the Australian Capital Territory,[14] where the majority of citizens are wage or salary earners, the practical difficulties involved in the courts having to determine accurately an offender's ability to pay are too great. Not only would the time involved be excessive, especially in magistrates courts, but possibly the only method of obtaining the necessary data with complete accuracy would involve access to the offender's taxation records. This would raise privacy problems.[15] The existence of artificial taxation schemes might lead to white collar offenders being able to conceal their financial position from the courts. Similar considerations apply for federal offenders, and with greater force. A 'day fine' scheme should not be introduced either for federal or Australian Capital Territory offenders.

115. *Recommendation: means inquiry.* To overcome the problem of inequity in regard to fines, the Commission's view is that courts should be encouraged to continue the practice many already adopt of inquiring informally into an offender's means before imposing a fine. In choosing between a fine and an alternative penalty, the financial position of the offender should be a relevant factor. It is undesirable that fines be imposed on poor offenders if alternative sanctions are equally appropriate. At present, in a number of jurisdictions,[16] an offender of limited means who has had a fine imposed may apply to an officer of the court for permission to work off the fine by community service.[17] This is called a 'fine option'. The application must be supported by a statutory declaration stating the offender's means, assets, liabilities, income and recurrent expenditure. This procedure helps to ensure that offenders of limited means

[13] This originated in Sweden, and is fully described in ALRC DP 30 para 25.
[14] ALRC DP 30 para 86.
[15] See ALRC 22 para 407.
[16] Queensland, South Australia and the Northern Territory.
[17] eg Criminal Law (Enforcement of Fines) Act 1987 (SA) (s 5(1).

are not unduly burdened by the imposition of a fine. However, in practical terms, the court's order to pay a fine is effectively converted into a community service order by an officer of the court. The procedure thus raises the possibility that the sentencer's view as to the most appropriate penalty will be effectively undermined.

116. *Recommendation: submission in court.* In the Commission's view, the fine option should be adapted by encouraging offenders of limited means to make a submission during the means inquiry requesting that community service be imposed rather than a fine. Allowing such an application to take place during the sentencing hearing ensures that the offender's financial position is taken into account in the court's initial choice of an appropriate sanction. It also avoids the need for declaring one's means on two separate occasions and ensures that the matter is settled expeditiously.

117. *Recommendation: setting amount.* Where a fine is considered to be the appropriate penalty, the court should also take the offender's means into account in determining the amount of the fine. An informal means inquiry should assist in this objective.[18] The Commission acknowledges that this approach will not always produce credible information because, in the absence of a strict obligation or a detailed attempt to probe for such information, people may conceal or minimise the extent of their financial resources. Some will be genuinely unable to recount accurately details of their income or assets. However, in the light of the other recommendations in this report, in particular the recommendation that the 'financial circumstances of the offender' continue to be a relevant matter in sentencing,[19] offenders whose financial situation makes a fine inappropriate will be able to have that matter taken into account.

118. *Dissent.* Three members of the Commission[20] are of the view that the advantages of introducing a 'day fine' system outweigh the problems referred to in paragraph 114, especially in the Australian Capital Territory. Now that the fine is to stand alone as an independent sanction, that is, not be linked to a term of imprisonment in default of payment, then it is of the utmost importance that an appropriate way be found of 'ordering' fines in accordance with the gravity of the offence and in a way which is equitable, having regard to the means of the offender. This is essential to promote consistency in sentencing and ensure appropriate severity. The 'day fine' has potential for adaptation to meet the purpose. Since circumstances of offenders are so variable, the likely result of making the fine an independent penalty is a great lack of consistency

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[18] There are statutory requirements in some jurisdictions to conduct a means inquiry: Justices Act 1902 (NSW) s 80A: in fixing the amount of any fine or monetary penalty, the court shall consider such information regarding the means of the defendant as is reasonably or practicably available; Penalties and Sentences Act 1985 (Vic) s 65(1): a court, in determining the amount of a monetary penalty must take into consideration, among other things, the financial circumstances of the offender.

[19] See below para 170.

[20] The President, Mr Zdenkowski and Professor Crawford.

and certainty in sentencing. This might discredit the fine as a valid option, especially for those less able to pay. The problem could be overcome by a system of ordering as in 'day-fines'. The Commission's view is, in any event, that a court considering the imposition of a fine should call for information about an offender's income.[21] It would be practicable for the court to make a finding of income on the basis of this material, if satisfied, and impose a 'day fine'. If not satisfied, other sentencing options could be considered. The onus would be upon the offender to produce information as to income.

119. *Inflation.* To take account of the problems posed by inflation, a more efficient method of adjusting fines should be introduced. The 'penalty unit' system is appropriate, and should be enacted for both federal and Australian Capital Territory offences. The prescription of an exact monetary maximum for each offence should be changed to a certain number of penalty units. The penalty unit should have a specified value. Adjustments to that value should normally be made only on the recommendation of the sentencing council recommended in chapter 10.

Community based sanctions

Nature of community based sanctions

120. The expression 'community based sanctions' is a generic term covering a number of modern non-custodial sentencing options which involve a restriction on personal liberty of some kind. Examples include community service orders, work orders, attendance centre orders and home detention. Each of these is discussed later in this chapter. In addition, periodic detention, including weekend detention, is treated here as one of the 'community based sanctions', although it involves an element of custody. There is an increasing emphasis on community based orders, reflecting a general move away from the use of prison to punish offenders. This is consistent with the Commission's overall approach to this reference.

Benefits and problem areas

121. *Benefits of community based sanctions.* Courts, correctional workers, community organisations and even some offenders seem to favour community based sanctions as a penalty,[22] because they are considered to be less costly, more effective and more humane than imprisonment. The average annual cost of community supervision for an offender in New South Wales is about $1 400 compared with approximately $30 000 for a prisoner. A number of other benefits may be identified in support of community based orders. These include

- prospect of achieving rehabilitation by the offender learning new skills
- protection and promotion of the offender's self esteem and sense of worth

[21] See above para 115.

[22] Chan & Zdenkowski 1986, 142.

- provision of a useful service to the community under community service order
- no contact with the prison population.

122. *'Net-widening'.* Nevertheless, some concerns do exist. One is the problem of 'net-widening'. It is thought that community based orders are likely to be imposed on offenders who would previously have received a lesser punishment such as a bond or a small fine. As a result, minor offenders receive harsher punishment than may be considered appropriate for the offence. An example cited to the Commission was of a middle aged woman convicted of a first offence for shoplifting in the Australian Capital Territory. She received a community service order of 160 hours, a penalty that was considered by her counsel to be harsher than the outcome would have been before the introduction of community service orders. The order was also considered difficult to justify, on its own terms, as punishment for the offence.[23] In studies of community based orders undertaken overseas one of the more consistent findings appears to be that such programs are often used in addition to, rather than in place of, imprisonment.[24] In countries where community correction policies have been implemented for almost two decades, imprisonment rates have not decreased, but community based programs continue to expand, taking in more clients and using up more resources. The use of community based orders in place of fines, bonds, or no penalties, where imprisonment was never a threat in the first place, increases the number of people who are subject to a restriction of personal freedom and is hard to accept. The economy objectives of community based orders can only be realised if they are used as real alternatives to imprisonment. If these programs are being used in addition to imprisonment and if the range of offenders being punished is widening, few, if any, savings will be made. The recommendations in chapter 3 to de-emphasise imprisonment and even eliminate it as a sanction in some cases, and the recommendations in this chapter, are aimed at encouraging resort to community based orders as a real alternative to prison.

123. *Link to imprisonment.* Attempts to make community based sanctions genuine alternatives to imprisonment can, however, result in an unintended escalation of penalties. Before its amendment, the law in Victoria treated imprisonment and attendance centre orders as direct alternatives and allowed the courts to use attendance centre orders only by first sentencing the offender to a period of imprisonment. The result was that courts tended to threaten imprisonment so as to make available the supervision offered at an attendance centre when, in reality, probation or a fine might well have been ordered if imprisonment had been the only other possibility. Even where prison was warranted, the

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[23] ACT Law Society (Pilkinton and Crowley) *Transcript*, Canberra, 27 November 1987, 772. However, such net-widening may not occur in all jurisdictions; eg, the Commission has been told that it is not a feature of the community service order program in the Northern Territory.

[24] Chan & Zdenkowski 1986, 137.

announced term could have been longer than the case deserved so that it might be converted into an attendance centre order of meaningful length. Moreover, breach of an attendance centre order exposed the offender to the risk of serving the unexpired portion of this inflated prison term, plus any other period imposed for the breach itself.[25]

Community service orders

124. *Nature, availability and use.* Community service orders are sentencing dispositions under which the court directs the offender to make generalised restitution by performing a set number of hours of community work. This kind of work can include placement with voluntary non-profit agencies such as the Smith Family, meals-on-wheels and the RSPCA. The work involved varies depending upon the employment experience and skills of the offender. For example, it may include driving delivery trucks, bricklaying or building swimming pools. For offenders in full-time employment who must perform community service on weekends when many agencies are closed, helping pensioners by mowing lawns or other maintenance work is often performed. In some jurisdictions[26] a community service order is expressly said to be an alternative to prison: a community service order can only be imposed if the offender would otherwise have gone to prison. In others, a community service order is independent of prison. This sentencing option is now available in all Australian jurisdictions, the Australian Capital Territory being the last to introduce it in 1985. The maximum number of hours for which community work can be ordered varies from jurisdiction to jurisdiction.[27] Under the Crimes Act 1914 (Cth) s 20AB, federal offenders may be ordered to perform community service in the same circumstances as their State and Territory counterparts, although this section has not yet come into operation in New South Wales, Queensland or Tasmania.[28] Community service orders are now widely used. In the first national census of community based corrections in Australia in 1985–6, it was found that 4419 offenders were serving community service orders at the time of the census.[29]

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[25] Fox & Challinger 1985, 8. These problems have been overcome in Victoria by the abolition of the attendance centre order and the introduction of the community based order: Penalties and Sentences Act 1985 (Vic) s 28(1).

[26] eg under Criminal Law (Conditional Release of Offenders) Act 1971 (NT) s 20(1).

[27] eg in NSW 300 hours, in Tasmania 240, in the ACT 208 hours. In Victoria no limit is prescribed.

[28] This has been criticised by the New South Wales Court of Criminal Appeal: 'It is a matter of great regret that the Commonwealth and State have not thus far been able to take steps permitting Commonwealth prisoners to be sentenced to periodic detention or community service. The absence of those valuable sentencing options results in persons suitable for one or other of them being either released without penalty or being sentenced to full time custody.' *R v Blaire* (unreported) NSW Court of Criminal Appeal, 20 November 1987, 17 December 1987 (Street CJ).

[29] Walker & Biles 1986b, Table 35.

125. *Recommendations.*[30] Courts should retain the power to impose community service orders on both federal and Australian Capital Territory offenders, under which offenders will perform a number of hours of community work specified by the court. In those jurisdictions where the Crimes Act 1914 (Cth) s 20AB has not yet been proclaimed,[31] the Commonwealth should pursue the necessary arrangements with State administrations so that federal offenders in those States will have community service orders available to them. The Commission considers that the net-widening effect is best dealt with by judicial education through the proposed sentencing council, rather than by denying the benefits of community service orders to offenders who are not suited to fines because of poverty, but who should not go to gaol or be released without supervision. However, two matters should be mentioned. First, there should be no link of community service orders to imprisonment. In the Australian Capital Territory that is already the case. However, a court in a State or in the Northern Territory sentencing a federal offender to a community service order should not have to find, as a pre-condition to imposing that sentence, that the offender should be imprisoned. In accordance with the Commission's earlier recommendations, each sentencing option should be available for consideration separately on its own merits having regard to the circumstances of the offence and the offender. Community service orders may be appropriate where imprisonment is not. In addition, the Commission has recommended that imprisonment be eliminated as a sentence in some cases and it is inherent in that recommendation that all non-custodial options be available for consideration. The main role of community service orders (and other community based orders) is as a real substitute to prison. Secondly, the limits of community service orders should be uniform throughout the Commonwealth so far as federal offenders are concerned. For example, a federal offender in one jurisdiction should not face a maximum of 500 hours community service while a similar offender can be ordered to serve no more than 200 hours in another jurisdiction. The maximum limit for a community service order should be set at 500 hours, to be served over a period not exceeding two years. This figure, which is higher than any of the existing State or Territory limits, has been selected because of the Commission's view that the severity of non-custodial options must be increased if they are to be used as a real alternative to imprisonment. This limit should also apply to Australian Capital Territory offenders.

Attendance centre orders

126. *Nature, availability and use.* An attendance centre order is one under which a period of imprisonment is imposed, but to be served in the community. Such orders are usually predicated on the assumption that a term of imprisonment is otherwise appropriate, and they provide an alternative method of discharging that sentence. Attendance centre orders usually combine commu-

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[30] For recommendations relating to enforcement for breach of community service orders, see below para 146, 148–51.

[31] ie, NSW, Tas, Qld.

nity work with a requirement for regular attendance at an attendance centre for the purpose of personal development activities. They are not available as a sanction in the Australian Capital Territory. For federal offenders, the position is the same as for community service orders.[32]

127. *Recommendations.*[33] As with community service orders, courts should be able to impose attendance centre orders on both federal and Australian Capital Territory offenders. Steps should be taken as a matter of urgency to provide in the Australian Capital Territory the necessary facilities for this option to be available there.[34] For federal offenders in jurisdictions not presently covered by the Crimes Act 1914 (Cth) s 20AB, the Commonwealth should pursue the necessary arrangements with State administrations. As with community service orders, there should be no link to imprisonment: attendance centre orders should be an independent option. Again, as with community service orders, the limits of an attendance centre order should be uniform throughout the Commonwealth for federal offenders. The appropriate limit, for the reasons given in paragraph 125, is 500 hours, to be served over a period not exceeding two years.

Periodic detention

128. *Nature, availability and use.* Periodic detention is, as noted above,[35] periodic or intermittent imprisonment. It involves imprisoning offenders for limited periods but allowing them to spend the remainder of their time at home, at work or otherwise in the community. One form of periodic detention is weekend detention which permits prisoners to engage in their usual employment or education on week days, while ensuring that they receive a severe punishment.The usual regime for weekend detention is for the offenders to report at the detention centre on the Friday evening, returning home on Sunday evening. They are locked up at night, and during the day work under the supervision of correctional service staff. Periodic detention is available to federal offenders on the same basis as other community based options. New South Wales is the only jurisdiction which has periodic detention, but it is not yet available for federal offenders.[36] It is not available in the Australian Capital Territory.

129. *Recommendations.* The main advantage of periodic detention, for offenders for whom a custodial penalty is appropriate, is that the offender is able to remain in contact with family, friends and employment. The disruption to family and other relationships caused by full-time imprisonment is avoided.

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[32] It is governed by the application of the Crimes Act 1914 (Cth) s 20AB in the particular jurisdiction: see para 106 above.

[33] For recommendations relating to enforcement for breach of attendance centre orders, see para 146, 148-51 below.

[34] See below para 259; Vinson report 237-8.

[35] See para 120 above.

[36] See para 106, 124 above: Crimes Act 1914 (Cth) s 20AB.

> . . . the mere fact of coming into a prison from a free society places a number of stresses on an individual . . . [P]risoners experience change in their relationships with relatives and friends during their incarceration which can be stressful and thus affect their security classification.[37]

Contact with other prisoners, with the associated risk of 'criminogenic effects' is also minimised. On the other hand, weekend detention may require an increase in detention facilities for use only at weekends, which is an uneconomic use of resources, especially when less costly alternatives such as community service orders are available. This problem is reduced if periodic detention is available at any time during the week, as the facilities are then likely to be used more often. Economies can also be achieved by using such facilities for other community based programs as well. Moreover, a flexible scheme of periodic detention accommodates offenders with permanent part-time work, childcare or other responsibilities at weekends. The Commission concludes that periodic detention should be available to both federal and Australian Capital Territory offenders as an independent sanction on the same basis as other community sanctions. Steps should be taken as a matter of urgency to provide in the Australian Capital Territory the necessary facilities for this option to be available there. For federal offenders in jurisdictions not presently covered by the Crimes Act 1914 (Cth) s 20AB, the Commonwealth should pursue the necessary arrangements with State administrations as quickly as possible.

Home detention

130. *Nature and availability of sanction.* Home detention involves imposing a condition on an offender that he or she remain in the home during specified times. There is a strict curfew and intensive supervision by correctional officers. As a separate sentencing option, home detention is presently available in the Northern Territory.[38] The cases involved[39] have been described as 'successful' in terms of there being no reports of criminal activity by offenders while serving home detention.[40] However research carried out by Northern Territory Correctional Services indicates that the expected size of the target group for home detainees will be at least 200 offenders for driving under the influence offences alone, where previous convictions have occurred and where the offenders are long term residents with family support.[41] Although the Crimes Act 1914 (Cth) s 20AB does not provide specifically for home detention orders, the Commission understands that courts sentencing federal offenders in jurisdictions where this sanction is available do at times dispose of offenders in this way. No home

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[37] Department of Law (NT) & Correctional Services (NT) *Submission* 26 February 1988.

[38] Criminal Law (Conditional Release of Offenders) Act 1978 (NT) s 19A.

[39] As at May, 1987 there had been only four cases involving home detention orders (imposed by way of conditions of recognizance), three adults (all convicted of drunk driving) and one juvenile.

[40] This sample is extremely small and is not an adequate basis for proper evaluation.

[41] Oral communication from Mr D Owston, Director of Probation and Parole in the NT Department of Health and Community Service (NT), 3 March 1988.

detention orders have been made for Australian Capital Territory offenders, although interest in having the option available in that jurisdiction is high.[42]

131. *Recommendation.* Home detention as a separate sentencing option is at present experimental. There are a number of serious difficulties associated with it.

- *'Net-widening'.* Even though there are some cases where home detention might be used as a form of custody which is truly alternative to imprisonment (for example, for mothers with young children convicted of serious property or fraud offences), there is a real concern that, if it is introduced, its most common use is likely to be for offenders who do not quite merit a full custodial sentence and for whom other non-custodial options may be more appropriate.
- *Surveillance.* Surveillance on an intensive basis is the key to the effective operation of home detention. If home detention is to be used to any significant extent, electronic surveillance will have to be relied on since supervision by parole or community corrections officers is likely to be too labour-intensive. If surveillance of this intensity is needed, the offender should be in prison. If surveillance of this kind is not needed, the offender should be in a constructive, supervised situation, rather than simply 'quarantined'. Most of the submissions to the Commission which addressed the question of home detention agreed.[43]
- *Limited application.* Another objection is that home detention is available only for offenders who have a 'home' and a telephone. Many would not have such a 'home'. For example, some offenders have no fixed abode, living as best they can in hostels, lodging-houses or caravan sites. The benefits of home detention as a desirable alternative to imprisonment, are unlikely to be available to those offenders who are already the most disadvantaged.

The Commission recommends that home detention should not be an available sentencing option for either federal or Australian Capital Territory offenders.

Victim-offender programs

132. The shift away from imprisonment towards community based alternatives has resulted in greater interest in victim-offender reconciliation programs. Such schemes place greater emphasis on reparation and rehabilitation than on punishment, the underlying notion being that the offender make amends to the victim and the community. In 1987 New South Wales introduced a reparation

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[42] It was tentatively suggested in ALRC DP 30 para 87; there was a Home Detention Public Information Seminar conducted by ACT Corrective Services on 13 February 1988.

[43] eg Green *Submission* 4 November 1987 was strongly opposed to any such electronic 'ball and chain'.

scheme in cases involving theft or property damage by juvenile offenders. Under the scheme, magistrates can ask offenders if they would agree to make some form of reparation to their victims. A court officer contacts a mediation-reparation team who speak to the victim and the offender and try to establish contact between both parties. Reparation may take a variety of forms, ranging from an apology to community service activities for the victim and payments on an instalment basis. The offender then returns to court and the magistrate takes the reparation into account when passing sentence. Similar schemes have been operating in Britain and the United States for some time.[44] It is too early to tell whether this kind of sentencing option is worthwhile. The sentencing council recommended in chapter 10 should examine and evaluate victim-offender programs of the type operating in New South Wales before a decision is made on the question whether they should be available for Australian Capital Territory or federal offenders.

National strategy for community based sanctions

133. The final matter on community based sanctions concerns the development, at a national level, of a co-ordinated approach. A number of guidelines relating to minimum standards for community based corrections in Australia and New Zealand have already been drawn up. They were approved for circulation and comment by Australian correctional administrators and Ministers in May 1987.[45] Among other things, they propose

- *Community service work.* Unpaid community work for offenders should be socially useful and meaningful and should, as far as practicable, enhance the skills of the offender. Community work placements should maximise contact between offenders and members of the public. Offenders should be given full benefit of worker's compensation, equal opportunity and anti-discrimination standards applicable to the community at large.

- *Supervision.* This should normally involve negotiation between the community corrections officer and the offender in developing case plans and goals as well as attendance times and other similar requirements. Account should be taken of the offender's commitments with regard to employment, education, religious beliefs and family. Formal coercive powers may be used where appropriate.

- *Evaluation.* Community based correctional programs should be regularly evaluated. The evaluation should include assessment of the extent to which these programs have a positive effect on the behaviour and life options of offenders and reduce the rates of imprisonment.

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[44] Sydney Morning Herald, 14 January 1987.

[45] Minimum Standard Guidelines, s 3, Draft approved by Meeting of Correction Ministers, 15 May 1987, Melbourne.

Final approval of all these guidelines for adoption by the States and Territories will be considered in May 1988. The Commission recommends that the guidelines be adopted by the Commonwealth, the States and the Territories.

Unconditional discharge

134. An absolute discharge is available to the court where it regards punishment beyond the process of arrest, charge and the hearing as inappropriate. It will follow a finding of guilt but the court usually does not proceed to a conviction.[46] This discharge differs from an order for conditional discharge discussed in the following paragraphs in that the offender is unconditionally released and is absolved of all further liability for the offence. This is clearly an appropriate sentencing option to have available for minor offenders; it should continue to be available for both federal and Australian Capital Territory offenders.

Conditional discharge

Recognizances

135. A number of sentencing options allow courts to return offenders to the community without subjecting them to any direct official supervision. The usual way in which these sentencing options are exercised is to require the offender to enter into a recognizance[47] which imposes certain conditions. Discharge is conditional upon entry into such a recognizance. Failure to comply with conditions laid down can lead to further court action.

Court powers

136. *Where no conviction.* Where the court finds the offender guilty but does not record a conviction it may either discharge the offender absolutely[48] or impose conditions for a specified period. In the case of federal offenders, the conditions prescribed by the Crimes Act 1914 (Cth) are

- to be 'of good behaviour' for up to three years
- to make restitution or reparation, or pay compensation or costs.

Other conditions, including probation, may also be imposed.[49] The conditions can be secured 'by recognizance or otherwise'. In addition, sureties or guarantors may be sought who likewise enter into a bond, for a fixed amount,

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[46] For federal offenders: Crimes Act 1914 (Cth), s 19B(1)(c); for ACT offenders: Crimes Act 1900 (NSW:ACT) s 556A.

[47] A solemn undertaking binding the offender to the performance of an obligation (eg to be of good behaviour) and acknowledgment of indebtedness to pay a sum to the Crown if the undertaking is breached.

[48] See para 134 above.

[49] Crimes Act 1914 (Cth), s 19B(1)(d).

for the performance of the obligation undertaken by the offender. These recognizances can be varied.[50] Similar provisions apply to Australian Capital Territory offenders.[51]

137. *Where conviction.* The court has similar powers where the offender is not only found guilty but a conviction is recorded. For federal offenders, the court may

> by order, release the person, without passing sentence on him, upon his giving security, with or without sureties, by recognizance or otherwise, . . . that he will comply with the following conditions . . .[52]

The conditions are:

- to be of good behaviour for up to five years
- to make restitution or reparation, or pay compensation or costs
- to pay a specified pecuniary penalty.

Other conditions, including probation, may also be imposed. A similar regime applies for Australian Capital Territory offenders.[53]

138. *Probation.* Probation means the obligation to be supervised by, and obey the reasonable directions of, a probation officer, as a condition of discharge into the community. It is a frequently used sanction in all Australian jurisdictions. For federal offenders, as has been indicated, probation conditions are imposed under the Crimes Act 1914 (Cth).[54] Probation is available to Australian Capital Territory offenders.[55] Supervision is undertaken for federal offenders by local State and Territory probation and parole services; for Australian Capital Territory offenders, by the Australian Capital Territory Adult Correction Service.

139. *Recommendation: retention and flexibility.* Conditional discharge and probation are sentences whose acknowledged usefulness should continue to be available for both federal and Australian Capital Territory offenders. The Crimes Act 1914 (Cth) s 19B and 20 and the equivalent provisions of the

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[50] The Crimes Act 1914 (Cth) s 20AA sets out the circumstances in which, and the ways in which, these variations can occur.

[51] Crimes Act 1900 (NSW:ACT) s 556D. A former NSW District Court judge informed the Commission that during his term on the bench he kept a record of all bonds which he imposed. These included both conditional and unconditional discharges. Eight hundred and eighty indictable offences from July 1974 to January 1986 were recorded. Approximately 29% of all cases resulted in breach by the offenders. Further offences constituted 34.1% of these breaches. Failure to pay or arrears of compensation amounted to 34.9%, the single most significant category of breach. In his view, most such offenders lacked the means to pay: G Smith QC, *Transcript*, Sydney, 16 November 1987, 532.

[52] Crimes Act 1914 (Cth) s 20(1)(a).

[53] Crimes Act 1900 (NSW:ACT) s 556B(1)(iii).

[54] s 19B(1)(d)(iii); 20(1)(a)(iv).

[55] Crimes Act 1900 (NSW:ACT) s 556A(1).

Crimes Act 1900 (NSW:ACT) should be amended to remove any suggestion that particular conditions must always be imposed on an offender who is conditionally discharged. The court should have the maximum flexibility in fixing conditions.

140. *Recommendation: time limits.* Further, a limit should be placed on the length of time during which conditions should apply. The present periods (three years and five years) are too long. While the offender is likely to comply with the conditions during the early years of an order, continued adherence is much less likely over a long period of time. There is doubt whether imposing conditions for very long periods serves any useful purpose. The supervision element involved in probation is particularly problematic. Supervision is most beneficial for the offender only during the early years of the order. A further problem is that the resources of State and Territory parole authorities are likely to be strained by orders involving long periods of supervision. In its second interim report, *The Commonwealth Prisoners Act* (ALRC 43), the Commission noted that subjecting parolees to long periods of supervision or other conditions, was unlikely to be helpful.[56] Nevertheless, in the context of parole, no recommendation was made that would limit the flexibility of conditions that might be imposed.[57] That recommendation was re-affirmed in the parole context earlier in this report.[58] In the context of conditional discharge, however, different considerations apply. There should be an emphasis there on the usefulness of supervision and other conditions in helping the offender return to a productive life in the community. Appropriately intensive supervision should be encouraged, but for no longer than is useful. A limit of two years should apply to these kinds of conditions, with a normal presumption of one year. This should ensure that, in the usual case, conditions would be applied for only one year. Nevertheless, it caters for the more serious case where the offender may benefit from being subject to conditions, including probation, over a longer period of time. This was supported by the submissions received in the course of the Commission's consultations.[59]

Ancillary orders

141. In addition to non-custodial sentences, courts have important powers to impose additional sanctions upon conviction. These are called ancillary orders. The following orders are most commonly used.

- *Restitution and compensation.* Leaving aside voluntary restitution to the offender, restitution normally involves a court order for return of stolen property to the owner. Compensation involves a court order for monetary restitution for the injury or loss sustained. Both kinds of orders seek to

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[56] ALRC 43 para 48.

[57] id para 49.

[58] See above para 87.

[59] Department of Law (NT) & Correctional Services (NT) *Submission* 26 February 1988; ACT Law Society Inc *Submission* 26 November 1987.

achieve redress; they personalise the offence by inviting the offender to see his or her conduct in terms of the damage and injury done to the victim. The implicit assumption is that the offender has the capacity to accept responsibility for the offence and that he or she will in many cases be willing to discharge that responsibility by making amends. Both federal and Australian Capital Territory offenders may be ordered to make restitution or pay compensation.[60] These powers are important ways of taking account of the interests of victims of crime. They should continue to be available.

- *Forfeiture.* Forfeiture involves a divestment or confiscation of proprietary interests for the benefit of the Crown. In many senses it is independent of the sentencing process: recent laws, such as the confiscation of criminal profits legislation, are justified not on the basis that they represent a punishment for an offence, but that they serve the overall purposes of the criminal justice system by making it unprofitable to engage in criminal activity.[61] Accordingly, the Commission makes no recommendations on forfeiture in the context of the present report.

- *Disqualification.* This involves either temporary or permanent disqualification from an occupation or activity. The most obvious example is driving a car. The point of these kinds of orders is not primarily to punish the offender, but to advance the objects of the law that required the licence to engage in the activity or occupation concerned. This is usually the object of safeguarding the public from irresponsible, incompetent or unscrupulous persons in that activity or occupation. Again, the Commission makes no recommendations on this area in the context of the present report.

Combinations involving non-custodial sanctions

142. At present a sentencer may combine a number of sanctions for the one offender and create a 'mixed sentence' ostensibly designed to suit that offender. Such sentences may include imprisonment, or they may simply be a mixture of non-custodial options. Whatever form they take, they are likely to lead to an increase in the quantum or severity of punishment imposed on an individual offender and to inconsistencies in the punishment of similar offences. The Commission is concerned to ensure that imprisonment is seen as the most serious of the available sanctions. It is inconsistent with this view to allow imprisonment to be imposed in cases in which a non-custodial option would be sufficient. Under the Commission's earlier recommendations a sentence of imprisonment

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[60] Crimes Act 1914 (Cth) s 21B Crimes Act 1900 (NSW:ACT) s 437(2).

[61] See eg, Crimes Act 1914 (Cth) s 30G; Customs Act 1901 (Cth) s 205(1), 228, 228A, 229, 229A, 230; Proceeds of Crime Act 1987 (Cth): Fox & Freiberg 1985, 210; *Cheatley v R* (1972) 127 CLR 291, 296 (Barwick CJ).

includes a fixed period of parole. It is unnecessary and inconsistent for any other non-custodial option to be imposed, whether of a punitive or rehabilitative nature. Accordingly, the Commission recommends that imprisonment should not be able to be imposed on federal or Australian Capital Territory offenders in association with any of the non-custodial sanctions. Community service orders, attendance centre orders, periodic detention and fines should generally be applied as separate sentences, but in exceptional circumstances, they may be combined with other sanctions in those groups. By classifying periodic detention as a non-custodial option in this way, the court has an opportunity to impose a suitably severe non-custodial sentence including a mixture of punitive and rehabilitative measures in appropriate cases. Any of the ancillary orders may be applied with any type of sentencing option.

Review and new options?

143. The recommendations in this chapter, so far as federal offenders are concerned, are based on the continuation of the present approach embodied in the Crimes Act 1914 (Cth) s 20AB–20AC, although amendments will need to be made to those sections to implement certain of those recommendations. However, the sentencing options available for both federal and Australian Capital Territory offenders should be regularly reviewed for two reasons. First, s 20AB itself contemplates that new sentencing options will be prescribed as coming within its operation. The States and Territories have experimented with new options and they can be expected to go on doing so. It is important that new options be properly evaluated before becoming available to courts sentencing federal offenders: the federal Parliament, and the federal Government, should be able to be satisfied that new options are appropriate before they can be imposed on federal offenders. Secondly, the operation of existing options, especially the community based options, needs to be carefully monitored to ensure that they continue to operate effectively. The sentencing council recommended in chapter 10 should monitor both new developments, to determine whether they should be prescribed under s 20AB, and the operation of existing non-custodial sanctions.

Non-custodial sanctions: default

Existing law

144. *Fine default.* The ultimate sanction for default in payment of fines by both Australian Capital Territory and federal offenders is imprisonment.[62] The position of federal offenders is complicated by the need to make arrangements with State and Territory administrations for the enforcement of fines imposed on federal offenders. In Victoria, South Australia, Western Australia, the Northern Territory, the Australian Capital Territory and Norfolk Island

[62] For ACT offenders see Magistrates Court Ordinance 1930 (ACT) s 150(1).

enforcement of fines against federal offenders may be by any of the measures available under the law of that jurisdiction.[63] In New South Wales, Queensland and Tasmania, on the other hand, enforcement is only available by way of imprisonment in accordance with the legislation in those States.[64] To make prison the only sanction for fine default tends to undermine the advantages of the fine as a sentencing measure. It is also a harsh and and inappropriate enforcement measure in many cases where default is not wilful. In contrast to fine defaulters in other jurisdictions, imprisonment of federal and Australian Capital Territory offenders for fine default is relatively infrequent.[65] In addition to imprisonment, community service orders are available as a sanction for fine default in the Australian Capital Territory and South Australia but in practice these have not been used.[66] However, resource problems can arise. During its consultations with authorities in the Australian Capital Territory, the Commission was told that the severely restricted resources available to administer the community service orders scheme meant that priority was given to the use of community service orders as a primary sentence and that community service had never been used for fine default to date.

145. *Civil enforcement.* Civil methods of recovery are available in the Australian Capital Territory for the enforcement of fines. The Magistrates Court Ordinance 1930 (ACT) s 147(1) for example, allows for execution, garnishment and sequestration. The amount of any penalty may also be levied by distress and sale of the goods and chattels of the person liable to make payment.[67] In regard to federal offenders, the Crimes Act 1914 (Cth) s 18A applies the laws of the relevant State or Territory with respect to the enforcement and recovery of fines.[68] Enquiries reveal, however, that civil methods are rarely used in the Australian Capital Territory. This may indicate a reluctance to pursue offenders who do not have the means to pay. In the Commission's view, a change in this approach would not be desirable. On the other hand, these civil methods are most appropriate for enforcing large fines imposed on certain offenders, such as white collar criminals. Consideration should be given to greater reliance on these civil enforcement measures in appropriate cases. By ensuring that enforcement measures are pursued more vigorously, there is less likelihood that an offender will fail to make payment and be charged with an offence. It is a matter for discretion whether to proceed by way of civil enforcement or to impose an alternative sentence in default of payment.

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[63] Crimes Act 1914 (Cth), s 18A, as amended by the Statute Law (Miscellaneous Provisions) Act (No 2) 1985 (Cth), s 8(1).

[64] The amendments to s 18A have not yet come into operation in relation to those States.

[65] See Challinger 1983; Houghton 1984; Warner 1984; Weber 1984; Brown 1984; Zdenkowski 1985; Dixon report; Daunton-Fear 1972.

[66] Crimes Act 1900 (NSW:ACT) s 556G(3); Criminal Law (Enforcement of Fines) Act 1987 (SA) s 5. Schemes for discharge of fine default by way of community service are now operating in Queensland, South Australia, the ACT, the Northern Territory and Victoria.

[67] eg Magistrates Court Ordinance 1930 (ACT) s 158.

[68] This is not yet operative in all States: see above para 106.

146. *Default in community based orders.* Failure by a federal offender without reasonable excuse to comply with a non-custodial sanction imposed under the Crimes Act 1914 (Cth) s 20AB can lead to

- a pecuniary penalty not exceeding $1000 in addition to the original sentence
- a revocation of the original sentence and substitution of another sentence that was open to the court
- no action.[69]

The pecuniary penalty, and the power to take no action, apply uniformly to federal offenders. However, the power to revoke the original penalty and to substitute a sentence which could originally have been imposed refers the court back to whatever sentencing powers it already has. These will vary depending on whether the Crimes Act 1914 (Cth) s 20AB has been proclaimed for that jurisdiction and the sanctions that are available in that jurisdiction. Breaches of non-custodial sanctions imposed on Australian Capital Territory offenders are covered by the particular legislation authorising the court to impose that sanction. For example, breach of a community service order enables an Australian Capital Territory court to

- extend the period of the order
- increase the number of hours of unpaid work
- order additional work
- revoke the original community service order and make such order as the court could originally have made (taking account of the work performed under the community service order before revocation)
- order payment of a fine not exceeding $1000
- admonish the offender.[70]

There is no specific provision for imprisonment, although this would be available in cases where the court could originally have made such an order.

147. *Breach of condition of discharge.* Failure by offenders to comply with a condition of discharge can lead to serious consequences. For both federal and Australian Capital Territory offenders, a breach of condition without reasonable cause or excuse may lead to the offender being liable to receive any sentence that could have been imposed for the offence if the offender had not been conditionally discharged.[71] In the case of federal offenders, the court is specifically directed to have regard to the fact that the conditional discharge order was made, and anything done under it.[72] The length of time during which

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[69] Crimes Act 1914 (Cth) s 20AC(6). The matters to be taken into account in determining penalty are set out in s 20AC(7).

[70] Crimes Act 1900 (NSW:ACT) s 556K(5)-(7).

[71] Crimes Act 1914 (Cth) s 20A(5); Crimes Act 1900 (NSW:ACT) s 556C(4).

[72] Crimes Act 1914 (Cth) s 20A(6).

the order was complied with is clearly relevant to determining what is the appropriate sentence to impose after a breach. The Crimes Act 1900 (NSW:ACT) should be altered to correspond to the federal law.

Recommendations

148. *Recommendation: re-sentencing on breach.* Where a breach of a community based order occurs or a fine is not paid, it is necessary to distinguish between trivial breaches and wilful and substantial breaches. It will first be necessary to ascertain why the order was breached. It may be, for example, that the order was an inappropriate one which should never have been imposed. The courts should have a power to review the terms of the original order and to impose a new order, more appropriate in the circumstances, from the range of orders originally available. Under the Commission's earlier recommendation all non-custodial options should be made available for most offences. In imposing a new order, the court should be required to take into account the offender's behaviour during the operation of the order.[73] This should include particularly the extent of compliance. In the case of fines, methods of enforcing payment should be considered. Since imprisonment should no longer be imposed as an automatic option to a fine under the Commission's recommendations, non-payment will require a return to court, either for enforcement or for an alternative penalty.

149. *Wilful and substantial breach.* Cases of wilful and substantial breach call for more serious measures. In order to encourage resort to non-custodial orders and to emphasise their gravity as a punishment, it is necessary that wilful breach be regarded as a separate and serious offence, attracting severe sanctions. At present in the Australian Capital Territory failure to comply with a community service order without reasonable excuse is an offence,[74] but the associated sanctions, which do not specify imprisonment, fail to underline the gravity of the offence.[75]

150. *Default serious.* In regard to fines it is inherent in the Commission's approach that fines be paid or enforced where considered appropriate rather than that there be automatic imprisonment for default. Where default is wilful (which implies that the offender had the means to pay) this must be considered seriously. In the case of other non-custodial sanctions one of their objectives is to give offenders an opportunity for rehabilitation. Given this aim, one would not wish to be precipitate in sending a defaulting offender to prison. However, by wilfully refusing to comply with an order, an offender has effectively forfeited an opportunity for rehabilitation. In each case the offender has frustrated deliberately the intended punishment.

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[73] cf Crimes Act 1914 (Cth) s 20A(5)-(6).
[74] Crimes Act 1900 (NSW:ACT) s 556K(1).
[75] Crimes Act 1900 (NSW:ACT) s 556K(5)-(7).

151. *Terms of offence.* The Commission recommends that a default or breach which is both wilful and substantial should be an offence which is punishable by a maximum of two years imprisonment. This penalty should be added to the options now available in cases of failure to comply with community service orders or to pay fines.[76] The court should establish that the refusal was deliberate and that the breach was a substantial one. Factors such as when the breach occurred should be taken into account in determining whether it is substantial. For example, wilful failure to attend a community service program in the latter stages of a 500 hour sentence would normally be regarded as much less serious than a similar refusal in the early stages. It may seem severe to provide a maximum prison term of up to two years for wilful breach in circumstances where the original offence may not have carried imprisonment for this period as a possible sentence. On the other hand, the original offence may have carried a much longer prison term as an option. In any event, wilful default or breach should, in the view of the Commission, be seen as an independent offence. In determining whether the breach is wilful and substantial, the extent to which compliance has been secured with the original order, by whatever means, should be taken into account. The punishment for wilful default is set at a level appropriate for the most serious case of default; it is not expected that the court would consider imprisonment in cases of a less serious nature. Other non-custodial sentencing options should be available and the rule that imprisonment is the sanction of last resort would apply. It is envisaged that the maximum penalty would be imposed only in very serious cases of wilful and substantial default.

152. *Dissent: The President.* One member[77] dissents from this recommendation and considers that the maximum penalty for wilful breach should not exceed the maximum penalty for the original offence or two years imprisonment, whichever is the lesser. If the Commission's recommendations are adopted the charge of wilful default is unlikely to be brought except in cases where the penalty for the original offence is less than two years. In other cases, the court can be asked to impose an alternative sentence which could be more severe without having to prove that the breach was wilful and substantial. While it is valid to create a separate offence of wilful breach, with a penalty that can be imposed in addition to the original (or substituted) penalty, this should not be done in a way which increases the likelihood of a sentence of imprisonment in cases where the original offence carried a sentence of less than two years or even no term of imprisonment.

153. *Dissent: Mr Zdenkowski.* One member of the Commission[78] disagrees with aspects of the recommendation made in paragraph 151, namely that wilful breach of non-custodial sentencing options should be the subject of a new offence, the maximum penalty for which should be two years imprisonment. In

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[76] Crimes Act 1914 (Cth) s 20AC(6); Crimes Act (NSW:ACT) s 556K(5).

[77] The President.

[78] Mr Zdenkowski.

his view, such a recommendation is neither necessary nor desirable. It could have the effect of undermining the general policy to which the Commission is strongly committed, to reduce the use of imprisonment as a sanction. It would be curious to introduce a measure likely to increase the use of imprisonment as a back-up sanction when the general policy is directed towards the reduction of imprisonment as a primary sanction. It is particularly inappropriate where the original offence did not carry the risk of imprisonment as a penalty in the first place, or where, although a penalty of imprisonment was legally available, the sentencing court did not regard imprisonment as appropriate in the circumstances. If the conduct which led to the failure to comply with the original sanction amounted to a fresh criminal offence, an appropriate charge should be brought and penalty imposed. In relation to fine default it now appears to be well established in several jurisdictions that the majority of breaches are not wilful and that imprisonment is not, generally speaking, an appropriate option for enforcement. In the case of wilful default, the trend in Australia in respect of fine default at least, seems to be moving towards the imposition of community service orders. A review of enforcement practices in respect of non-custodial sentencing options other than fine default should be undertaken by the sentencing council so that the level of the problem can be adequately assessed and advice given to government. This course is preferable to the introduction of a new offence with a maximum penalty of two years imprisonment. In this member's view, the currently existing powers should be retained.[79] Such a course would allow, in isolated appropriate cases, the imposition of a penalty exceeding two years imprisonment because the court dealing with breach retains the power to revoke the original sentence and substitute any sentence that was open to the court in respect of the original offence. This has the advantage of granting the court flexibility without introducing a general rule which exposes offenders to imprisonment for minor offences where such a course of action was not originally available.

[79] See, eg, in respect of federal offenders, Crimes Act 1914 (Cth) s 20AB.

6. Determining the sentence

Scope of chapter

154. The sentencing court has a pivotal role in the sentencing process: it 'personalises' the criminal law by imposing particular sanctions on individual offenders. This chapter deals with the role of the sentencing court and, in particular, the way in which judicial officers make sentencing decisions. It examines the need for consistency in approach and decision making by judicial officers conducting sentencing hearings, the requirement to give adequate reasons for sentencing decisions, the facts that are, or should be, relevant to the exercise of the sentencing discretion, whether any evidentiary rules should be applied to the evidence by which those facts are proved, the standard of proof that should be required and a number of aspects of procedure.

Consistency

The need for consistency

155. The need for consistency in all aspects of the criminal justice system has already been noted.[1] It applies particularly to the sentencing hearing, where the type and quantum of punishment are determined for individual offenders. Consistency is a basic requirement of justice. Consistency in sentencing simply means that the court should impose similar punishment for similar offences committed by offenders in similar circumstances. Disparity in sentencing can be justified only if there are acceptable and convincing grounds for differentiating between offences or offenders. This chapter is concerned primarily with the means for ensuring that unjustified disparity between sentences is reduced.

Disparity in sentencing

156. *Extent of disparity.* While overseas studies indicate considerable concern that there are unjustified disparities between sentences,[2] there is little research on the extent to which unjustified disparity between sentences exists in Australia. Most of the research available, while not conclusive, suggests that unjustified disparity does exist. The first interim report in this reference, *Sentencing of Federal Offenders* (ALRC 15), examined the differing rates at which offenders were sentenced to imprisonment throughout Australia.[3] It concluded

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[1] See above para 26, 32–4.

[2] eg Canadian Sentencing Commission report, para 4.1.2–4.2.

[3] ALRC 15 para 162–6.

that, although more research was needed, there was a strong likelihood that the differing rates reflected differing judicial attitudes towards punishment.[4] However, it did not examine disparities within jurisdictions. Some research of this kind has been carried out in Victoria[5] and led the Victorian Sentencing Committee to conclude that it was clear that some improper discrepancies exist in sentences imposed by judges of the Victorian County Court.[6] Similar indications exist for lower courts in Victoria[7] and there is some evidence that New South Wales magistrates may vary in their willingness to impose imprisonment.[8]

157. *Structural disparity.* Whatever the position in fact, the present process by which sentences are determined does not promote consistency in any systematic way. Legislation creating offences will only specify the maximum period of imprisonment, or the maximum fine, that may be imposed for the particular offence. The maximum limits of community based sanctions are usually specified in the legislation creating the sanction, and apply across all offences. Prescribed maximum sentences give little guidance to judicial officers in sentencing offenders.[9] The selection of a level of sentence within the maximum therefore requires an exercise of discretion by the court which is largely unregulated and which permits very extensive freedom to choose the type and quantum of punishment in individual cases:

> . . . every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process.[10]

Present means of achieving consistency

158. *Appellate review.* The most significant constraint on the exercise of judicial discretion is appellate review. In line with the general appellate approach to review of discretionary decisions, however, criminal appeal courts in Australia are generally reluctant to interfere with sentences unless it can be shown that the sentence is manifestly unjust or that the exercise of discretion miscarried because undue weight was given to some factors or irrelevant factors were taken into account. Sentencing principles expounded by appellate courts

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[4] This conclusion has been criticised on the basis that ALRC 15 only demonstrated that there was a lack of relevant federal data: Potas & Walker 1983, 4. A pilot study on the sentencing of federal drug offenders to imprisonment suggested that disparity was not such a serious problem as had been imagined: id, 5.

[5] eg Lovegrove 1984.

[6] Victorian Sentencing DP para 5.6.

[7] ibid; Polk & Tait 1987.

[8] eg 84 NSW magistrates were given the same hypothetical case to consider as part of a sentencing exercise. Twenty five per cent recommended imprisonment, 15% periodic detention, 37% a community service order, 8% a recognisance and 8% a bond with an adjournment for 6 months on conditions: K Anderson, 'Sentencing in Magistrates Courts' in Potas 1987, 205.

[9] See above para 60–1; Freiberg & Fox 1986, 224–5.

[10] *R v Williscroft* [1975] VR 292, 300 (Adam & Crockett JJ).

seem, in most instances, intended to preserve and uphold a very wide measure of individual judicial discretion. For example, the general approach of the High Court has been not to grant special leave to appeal against appellate court judgments on sentences, and to place considerable weight on the discretionary judgment of the trial court and its assessment of the accused. Departures from this policy have been rare. Even when appellate courts entertain sentencing appeals, they are more likely to restrict consideration to the particular case than to seek actively to expound general principles in a way that can be readily applied in future cases.[11]

159. *Informal 'tariffs'.* Aside from appellate review, there are informal ways in which judicial officers try to achieve consistency in sentencing within the broad discretionary framework. Tariffs are informally recognised norms which judicial officers may take into account (mainly unofficially) when imposing penalties. They indicate the range of penalty that ought to be imposed for offences in a particular category, without taking into account factors peculiar to the offender. Given the relatively weak impact of the formal mechanisms for limiting individual judicial discretion, tariffs can assume great significance as a means for judicial officers to compare their sentencing practices with those of their colleagues. Judicial officers apparently favour tariffs as a means of promoting uniformity.[12] There are two arguments against the use of tariffs.

- *Limited information.* 'The tariff' for a particular offence generally gives little indication of the matters taken into account in fixing the range of sentences 'prescribed' by the tariff.
- *Limited accessibility.* The existence of tariffs for particular offences, and their content, will not always be known to courts and legal practitioners. They will rarely be known to lay persons in the community.

160. *Books and conferences.* Other informal ways of securing consistency include published practice books[13] and discussions and conferences amongst judicial officers. The latter only occur from time to time.[14] Judges and courts may also keep sentencing books or sheets which list the sentences awarded for various types of offence, together with summaries of any comments made at the time of sentencing. The disadvantage of all these, however, is their informality and lack of uniformity and comprehensiveness.

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[11] cf the position in the UK where the Court of Criminal Appeal will give 'guideline judgements' on sentencing cases.

[12] See the report of the Judicial Officer Survey in ALRC 15: approximately 58% of judicial officers surveyed favoured or strongly favoured informal tariffs; approximately 25% were opposed or strongly opposed: ALRC 15 Table 37, para 403.

[13] eg Carter 1985.

[14] Approximately 83% of the judicial officers surveyed favoured or strongly favoured informal discussion or consultation among judicial officers as one means of promoting uniformity in sentencing: ALRC 15 Table 37, para 403.

Consistency and reasons for sentence

161. The essential attribute of a system designed to promote consistency in sentencing is the ability to compare one case with another. This can only be done if adequate reasons for sentencing decisions are given and recorded. The giving of reasons is necessary to make it clear what factors the court considered relevant and what weight was given to those factors. Reasons are also needed to explain and, if appropriate, justify the process by which the court came to choose a particular type and severity of sentence. Sentencing decisions cannot be properly understood or assessed by appellate courts, by other judicial officers, by the legal profession, by the parties and by the community generally unless adequate reasons are given and recorded in a way which is readily accessible. Consistency can be promoted by encouraging sentencers to frame their decisions in a way that will allow meaningful comparisons to be drawn between offences, offenders and sentences by reference to matters taken into account and the weight given to them in particular cases. The provision of adequate reasons is also fundamental to achieving justice within the criminal justice system. The imposition of punishment is of such importance to the state and to individual offenders that reasons for particular sentencing decisions must be given as a matter of fairness. The availability of reasons for decisions will lessen the possibility of those decisions being, or appearing to be unjustified or arbitrary.

Reasons for sentence

Present requirements

162. The Crimes Act 1914 (Cth) s 17A requires that, where imprisonment is imposed on a federal or Australian Capital Territory offender, the court must state the reasons for its decision that no other sentence is appropriate and cause those reasons to be entered in the records of the court. This requirement does not apply to offences against the Crimes Act 1914 (Cth) punishable by life imprisonment or for a period of or exceeding 7 years, or federal or Australian Capital Territory offences punishable only by imprisonment.[15] As s 17A is the only provision dealing with the requirements to give or record reasons for sentencing federal and Australian Capital Territory offenders, there is no requirement that reasons should be given or recorded for sentences not imposing imprisonment.

Two issues

163. There are two questions to examine. The first is whether reasons should be required to be given in all cases or only in respect of certain types of sentence. The second question is what method of recording the reasons required to be given is appropriate.

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[15] Crimes Act 1914 (Cth) s 17A(4).

- *Arguments for requiring reasons in all cases.* The giving of reasons is necessary in the interests of consistency and fairness. The provision of detailed reasons is just to the offender and supplies a guide to other courts, enforcement agencies and correctional personnel and to the community.[16] Such a requirement would allow trial and appellate courts to participate actively in developing a more consistent sentencing jurisprudence.

- *Arguments against requiring reasons in all cases.* The main argument against such a proposal is that it would cause serious practical problems in the administration of justice. Courts would face even greater backlogs than they presently do if such a requirement was introduced. This may be particularly so for courts of summary jurisidction, which have a heavy workload. Further, the need for detailed reasons in a case where the offence itself is minor (for example, a conviction for a parking offence) can be doubted. Many minor offences will be dealt with by courts of summary jurisdiction.

Reasons for sentence could be recorded electronically, by typing or shorthand, by written summary on the court file by judicial officers or court officials, or by the provision of written reasons made available to the parties. The latter is the most comprehensive and helpful to the parties but requires the most use of courts' time and resources.

Recommendations

164. *Reasons to be given.* The Commission recommends that more extensive requirements for the giving and recording of reasons should be introduced.

- *Where imprisonment ordered.* Because imprisonment is the sanction of last resort,[17] legislation should require written reasons for all sentences of imprisonment imposed by any court on federal and Australian Capital Territory offenders.

- *Where imprisonment an option.* In this case, a distinction should be drawn between superior and District or County courts and courts of summary jurisdiction.

  - *Superior and District or County courts.* Because imprisonment is the sanction of last resort, superior and District or County courts should be required to provide written reasons for any sentence if imprisonment is an available sentencing option.
  - *Courts of summary jurisdiction.* Because of the special situation of courts of summary jurisdiction, there should be a requirement that those courts only state and record reasons for sentence where imprisonment is an option.

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[16] Mitchell report para 4.7.

[17] See above para 55–6.

- *Where imprisonment not an option.* Again, a distinction should be drawn between superior and District or County courts and courts of summary jurisdiction.
  - *Superior and District or County courts.* These courts should be required to state and record reasons for sentence.
  - *Courts of summary jurisdiction.* These courts should not be required to provide reasons.

The absence of a requirement does not mean that a court of summary jurisdiction should not give reasons for sentence in those cases where the court considers it is appropriate to do so. Finally, where an appeal is lodged against any sentence imposed in any court, written reasons should be made available. This would not unduly burden the courts because appeals represent only a small proportion of cases. Statements of reasons, whether written or recorded in some other way, should specify the court's view of the seriousness of the offence, the matters that were taken into account, the weight given to those matters and the court's view of the appropriateness of the type and severity of the sentence imposed.

165. *Understanding the effect of the sentence.* These recommendations relate to the formal rights of the offender and the desirability of developing a more accountable jurisprudence of sentencing. However, the impact of the penalty on the individual offender must not be neglected. A sentence will lose some of its impact and, in some cases, may cause confusion and hardship unless the effect of the sentence is properly understood by the offender. It is common enough for people with a good grasp of the English language to be confused and disoriented by court proceedings. This possibility is necessarily compounded in the case of offenders who have difficulties understanding ordinary English. The Crimes Act 1914 (Cth) already requires that the court, before making certain orders,[18] explain or cause to be explained to the offender in language likely to be readily understood by him or her

- the purpose and effect of the proposed order
- the consequences that may follow in the event of failure to comply
- the circumstances in which the order may be varied or revoked.

These requirements should attach to sentences of any kind imposed on federal offenders and to sentences imposed on all Australian Capital Territory offenders.

Consistency and relevance

166. Attention must be focussed on what is taken into account in making the sentencing decision — what was relevant to sentencing the particular offender and what weight was given to different factors. Consistency demands

[18] Conditional release of offenders after conviction: s 20(2); certain non-custodial orders: s 20AB(2).

that a broadly similar range of considerations be regarded as relevant for all offenders, and that these considerations be given weight on broadly the same basis. Accordingly, a significant consideration in proposing reforms to sentencing hearings is to determine what matters should and should not be regarded as relevant — what can and cannot be taken into account in making the sentencing decision.

Matters relevant to sentencing

Present law: no statement of what facts are relevant

167. One consequence of the fact that the sentencing discretion is largely unregulated is that the present law does not provide a statement of which facts are relevant to the exercise of that discretion. There is little statute law on the question.[19] There is case law in each State and Territory concerning some

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[19] It includes

- *NSW*: Crimes Act 1900 (NSW) s 424: '. . .the Court may . . . summon witnesses and examine them. . . in respect of any matter in extenuation'; s 556A enables the court to dismiss or conditionally discharge a person because of the 'character, antecedents, age, health or mental condition of the person charged, or . . . the trivial nature of the offence or . . . the extenuating circumstances under which the offence was committed, or . . . any other matter which the court thinks it proper to consider . . .'
- *ACT*: Crimes Act 1900 (NSW: ACT) s 424, 556A (see above), but s 556A is confined to Magistrates Courts
- *Victoria*: Penalties and Sentences Act 1985 (Vic) s 4: a court may take a guilty plea into account; s 10 deals with the disposal of other pending charges when sentence is being imposed; s 65: if a court decides to impose a fine, it must take into account the financial circumstances of the offender; s 90(4) deals with the facts sufficient for a court to make an order for restitution in the case of stolen goods
- *Qld*: Criminal Code 1899 (Qld) s 650: 'The Court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the sentence proper to be passed'; s 657A is equivalent to the Crimes Act 1900 (NSW) s 556A (see above)
- *WA*: Criminal Code 1913 (WA) s 656: the court may 'receive such evidence as it thinks fit in order to inform itself as to the sentence proper to be passed'; s 669 is equivalent to the Crimes Act 1900 (NSW) s 556A (see above)
- *Tasmania*: Criminal Code Act 1924 (Tas) s 386(7): 'the Judge may receive such information . . . as he thinks fit'
- *NT*: Criminal Code Act 1983 (NT) s 392 is equivalent to the Crimes Act 1900 (NSW) s 556A (see above).

aspects of the factual basis of sentencing, but it too provides little guidance on the question, being mainly concerned to expound general rules about the conduct of sentencing hearings.[20] It focusses on resolving conflicts as to facts.

Sentencing practice

168. *Categories of information presently used.* In fact, judicial officers take a wide variety of facts into account in determining sentence. They almost always[21] advert to facts about the offence and facts about the offender, for example prior convictions, allegations of other antecedent or subsequent offences, social, medical and psychiatric history, personality and character. Other matters commonly taken into account include:

- the prevalence and nature of the particular crime involved
- the availability of treatment which may be involved in the choice of sentence
- for sentences such as fines, compensation orders and restitution — the financial means of the offender
- the circumstances of the trial; for example, if a joint trial was held, the role of the co-offender may be relevant
- the fact that the defendant pleaded guilty
- what sentencing options are available
- the effect of the offence upon any victim.

Facts that may be taken into account less commonly, and often not explicitly, are

- community attitudes to a particular offence, and knowledge of local conditions (for example, a high incidence of unemployment)
- matters relevant to the social context of the offence, for example, that the law was selectively applied by police agencies, or that the wisdom and justice of maintaining a particular offence may be doubted since it proscribes behaviour which is no longer regarded as criminal[22]

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[20] Including:

- there is an obligation on both the prosecution and the defence to investigate important matters relevant to a plea
- a plea of guilty is an admission of all facts material to the charge, so no further proof is necessary
- the prosecutor is not subject to direction by the court as to witnesses to be called; he or she must ensure that the accused is not denied a fair trial
- during sentencing following a guilty plea, the prosecutor must present the facts adequately; if there is a jury verdict, the prosecutor must not allow the facts presented to conflict with it; and the prosecutor is expected to provide an antecedents report.

See ALRC DP 29 para 50.

[21] Strict liability offences may be exceptions in some circumstances.

[22] eg consorting offences.

- where the offender is from an Aboriginal community — race relations, and the social and economic conditions, in the community
- the physical conditions in prisons in the jurisdiction, and the treatment, facilities and programs available.

Statistical information which could show the 'tariff' for the offending conduct is generally not officially considered. This list is by no means exhaustive. Under the present law, it could not be. Individual judicial officers may vary considerably in their use of information of these kinds. Some may regard certain kinds of information as always relevant to sentencing, while others may not.

169. *'Aggravating' and 'mitigating' factors.* The way in which courts sometimes approach the question whether to take account of a particular matter is to describe it as an 'aggravating' or a 'mitigating' factor. The following facts are presently, though not universally, regarded as 'aggravating':

- intention, premeditation or planning
- participation as a principal, ringleader or instigator
- use of a weapon
- systematic commission of offences for profit
- unusually extensive harm to the victim
- knowledge that the victim is a member of a particularly vulnerable group (for example, children or the elderly)
- breach of confidence or trust
- offence by law enforcement officer
- prior offences
- the prevalence of the offence.[23]

The following are similarly regarded as 'mitigating':

- lack of intentional planning, or impulsiveness
- minor participation in offence
- provocation
- duress falling short of a complete defence
- entrapment
- youth or old age
- previous good character, where prior offences are irrelevant
- that the offence was out of character
- effect of alcohol and other drugs
- personal crisis, such as emotional stress, ill health or financial difficulties
- cultural background as it relates to the offence

[23] Fox & Freiberg 1985, para 11.301–314.

- remorse or contrition
- offer to make restitution or reparation or actually making restitution or reparation
- voluntarily seeking treatment
- confession and guilty plea (not necessarily as a result of remorse)
- providing information to the authorities
- hardship to the offender, such as physical or psychological injuries or infirmities or additional hardships in prison, from particular sanctions
- hardship to others, such as distress, reduced financial circumstances and deprivation of emotional support
- indirect consequences of conviction, such as loss of or inability to obtain similar employment, loss of pension rights, cancellation or suspension of trading or other licences, diminution of educational opportunities or the possibility of deportation
- a jury recommendation as to mercy
- grievances arising in the course of proceedings, for example, delay in bringing the matter to trial.[24]

Again, these lists are not exhaustive.

Recommendations

170. *List of facts relevant to sentencing.* A rational and consistent system of law requires the existence of a common standard by which to evaluate individual decision making. The facts of individual cases will vary enormously. It is impossible to predict every factor which may be relevant to sentencing, as it is impossible to prescribe, in advance, a comprehensive way of describing all possible circumstances of offences and offenders. Latitude must be allowed in the ways in which the courts can describe offences and offenders for sentencing purposes. Subject to what is said below,[25] the categories of facts relevant to sentencing should not be closed but should at least include

- the degree of intention, premeditation or planning
- the level of participation in the offence
- whether a weapon was used
- whether the offence was one of a number of offences committed systematically for profit
- the extent and nature of harm to victims
- whether the offender knew that the victim was a particularly vulnerable person, such as a child or an elderly person

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[24] id, para 11.401–603; Thomas 1979, 220.

[25] See below, especially para 176–81, but see also below para 197.

- whether the offender was a law enforcement officer
- whether there was provocation or duress, falling short of a complete defence
- entrapment
- the age of the offender
- the offender's character
- whether the offender was affected by alcohol or another drug, and if so, whether that was intentional
- whether the offender had or has personal difficulties, such as emotional or financial difficulties
- the offender's health
- the offender's cultural background
- whether the offender is remorseful or unrepentant
- whether the offender is intellectually disabled or suffers from a mental illness
- whether the offender is voluntarily seeking treatment for any health (including psychiatric) condition that may have been a contributing factor in the commission of the offence
- whether a particular type of sanction would cause hardship to the offender
- the indirect effects on the offender of conviction or a particular sanction, for example
  - loss of, or inability to continue in or obtain, suitable employment
  - loss of pension rights
  - cancellation or suspension of trading or other licences
  - diminution of educational opportunities
  - deportation
- the impact on third parties of a particular sanction, for example, distress, reduced financial circumstances and deprivation of emotional support for the offender's family
- a jury recommendation for mercy
- grievances arising in the course of proceedings, for example, delay in bringing the matter to trial
- prior and relevant history of convictions and dispositions.

This list is not in any order of priority or importance. It does not differentiate on the basis of whether a fact is 'aggravating' or mitigating'. Many of the facts in the list, for example, intoxication by drugs or alcohol, could, depending on

the circumstances, justify harsh or lenient treatment of an offender.[26] This list of facts should be prescribed in relevant legislation dealing with federal and Australian Capital Territory criminal trials. Inclusion of a list of this kind in legislation will promote consistency of approach by sentencers, prosecutors and defence lawyers. The legislation should make it clear that the list is permissive: the court is not obligated to consider all, or any of the matters in the list. It should also state that the list is open ended and that other matters not in the list may be taken into account. The sentencing court should be required by legislation to identify the facts relied upon and give reasons for relying on a particular fact in determining penalty. The sentencing council recommended in chapter 10 should review the legislated list from time to time.

171. *Dissent.* Two members of the Commission[27] do not agree that a list of factors of this kind should be prescribed by legislation. While agreeing that, in particular cases, some or all of the matters mentioned may be relevant, and that a more structured and consistent approach to sentencing is needed, they are of the view that such a statutorily prescribed list may be the least satisfactory way of achieving the desired approach. If its directory character is emphasised, it will provide very little assistance. If, on the other hand, the courts seek to give substance to the list, they would be obliged to have regard to the language of the legislation. This could lead to a very literal approach. The problems this could cause are highlighted in *Premier Automatic Ticket Issuers Ltd v Federal Commissioner of Taxation*, where the High Court considered legislation drafted precisely in the language of a previously decided case.

> The criterion, which the Legislature has now adopted and established, was formulated by the Courts in the absence of any statutory direction . . . So far as it lacks precision or is uncertain in its application, the cause is to be found in the powerlessness of the Courts to do more than state a wide general proposition and to apply it as each case arose. The statement of the proposition was not a definition, but rather an explanation of principle. No doubt, as the language of the statute it must receive a more literal application.[28]

What the High Court had to say in that case is no less pertinent because the subject matter dealt with concerned a different area of law. What is needed here is the development of principle, not an exercise in statutory interpretation. This report recommends that a statement of reasons for sentence should be given. If the proposal is implemented, the development of consistent sentencing principles may be better achieved through the processes of the common law.

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[26] This might justify a less severe punishment if the offender innocently took drugs or alcohol which had an unexpected effect upon his or her behaviour. It might justify a more severe punishment if the offender, knowing his or her undesirable response to alcohol or drugs, nevertheless became intoxicated.

[27] The President and Mr Greenwell.

[28] *Premier Automatic Ticket Issuers Ltd v Federal Commissioner of Taxation* (1933) 50 CLR 268, 298 (Dixon J).

172. *Two controversial matters.* Two matters have been included which may be regarded as controversial.

- *Impact of a particular sanction on third parties.* This matter might be thought to authorise punishment otherwise than by reference to the offender's characteristics or conduct and therefore not be consistent with the principles underlying this report.[29] On the other hand, depending upon the nature of the relationship, a detrimental impact on the offender's family can itself be a form of punishment of the offender. Several submissions to the Commission warned of the potentially destructive results if the impact of punishment on third parties, especially the family of the offender, was ignored.[30]

- *Prior and relevant history of convictions and dispositions.* This has been criticised as a sentencing factor on the basis that, the punishment for an earlier crime having been served, that crime is no longer relevant.[31] The punishment for the current crime should not be increased by reference to an earlier crime. But there are ways in which a prior record can be relevant to sentencing without contravening that principle. If it is appropriate to extend to first offenders some leniency in punishment, it would not be appropriate to treat offenders who have continued to offend with that kind of leniency.[32] Further, the fact that an offender has failed to respond to previous sanctions imposed to achieve rehabilitative goals is relevant to determining whether those sanctions should be imposed again in a further attempt to achieve rehabilitative objectives.

'Discounts' for guilty pleas and providing information

173. *'Discount' on sentence for a plea of guilty.* The Commission further recommends that courts be able to take into account in sentencing two matters that are not, strictly speaking, relevant. They have no bearing on the circumstances of the offence, or the offender's characteristics. However, practical considerations, in particular the need to reduce court delays, justify courts being able to take account of the fact that the offender pleaded guilty to the charge.[33] The Commission has already recommended that a court should be able to have regard to evidence of contrition or remorse in determining sentence. A guilty

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[29] See above para 27.

[30] eg, Council of Social Services (Tas) warned that imprisoning female social security offenders could have very detrimental effects upon their families, particularly their children: *Submission* 3 November 1987.

[31] See ALRC 37 para 15, 19, 22.

[32] However, old offences should be treated with caution: see ALRC 37 para 19–20. Likewise, offences of a kind different from that being considered may not be relevant to sentence.

[33] This means that the offender makes a formal plea of guilty to the charge. It does not extend to confessions or admissions.

plea may indicate contrition or remorse, but it may simply be a recognition of the inevitable. Some pleas may result from tactical considerations, or from charge bargaining. Allowing a 'discount' would have the advantages of

- encouraging shorter trials
- relieving delays and backlogs by lightening the court's workload
- in many cases, saving the expense (often at the cost of legal aid) and inconvenience of a trial
- saving trauma to witnesses, especially victims.

But doing so may

- penalise those who plead not guilty
- undermine the principle that the defendant's plea must be made voluntarily
- weaken the requirement that the Crown prove its case beyond reasonable doubt
- create the risk that innocent persons will plead guilty.

It can also be criticised as introducing administrative convenience as a sentencing principle, and reducing the need to search for other, more desirable, ways of tackling the workload of, and delays and backlogs in, the courts. The Commission agrees that a 'discount' for a guilty plea will have administrative benefits in helping to reduce court delays. At present 'discounts' of this kind are sometimes granted; eliminating them may increase delays. It is often very difficult to determine whether remorse is genuine or not. In the Commission's view, a plea of guilty, whether there is evidence of remorse or not, should be listed as a fact that can be taken into account in sentencing. The Commission's consultations indicate that Victorian legislation allowing a 'discount' for a guilty plea is 'working well'.[34] The wide variety of cases which may arise involving pleas of guilty means that no particular amount should be specified as the amount, or maximum amount, of the 'discount'. The requirement to give reasons for sentence[35] should apply in this case as in all others.

174. *Dissent.* Three members of the Commission[36] do not agree that there should be a 'discount' for a plea of guilty. Their view is that this recommendation is made solely to help reduce court delays. Certainly, there are serious delays in matters coming on for trial and in the hearing of criminal trials. There are strong grounds for the re-appraisal of criminal trial procedures, without jeopardising the concept of a fair trial, to reduce delays. But this recommendation touches on something which is fundamental — the presumption

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[34] Penalties and Sentences Act 1985 (Vic), s 4; the Victorian Criminal Bar Association and the Melbourne office of the federal DPP advised the Commission that this legislation was 'working well' and that no change was necessary.

[35] See above para 164.

[36] The President, Mr Greenwell and Mr Zdenkowski.

of innocence. With that presumption goes the right of an accused to require the Crown to prove its case. 'Discounting' sentences for a plea of guilty amounts to offering accused persons an inducement to forego that right. Not only, in these members' view, should no 'discount' be available, but the presumption of innocence is so important that no regard should be had in sentencing to whether the offender pleaded guilty or not guilty.

175. *Providing information to the authorities.* The Commission recommends that providing information to the authorities should be treated in the same way as the plea of guilty. The Commission, in its consultations, found widespread support for the view that the provision of information to the authorities should be able to be taken into account.[37] Without the incentive of a 'discount' from sentence, offenders may be less likely to provide information which could result in the prosecution of others. An important example is a large drug 'ring', where information from one member can result in the prosecution and closure of the entire 'ring'. Also, in some cases those who do provide information may put themselves in difficult circumstances and face the threat of violence or hostility especially if in prison. Providing information in these cases may need to be 'rewarded' with some tangible benefit. The Commission therefore recommends that the sentencing court should be able to take into account the fact that the offender provided relevant information to the authorities.[38] Care must be taken to ensure that information is not 'recycled', for example, by obtaining a benefit at the pre-trial stage by charge bargaining and then using the same information to obtain a discount at the sentencing hearing. Confidential procedures may be necessary to help protect from retaliation those who provide information.

Matters irrelevant to sentencing

Present law

176. Under present law, a sentencing court may not have regard to

- parole, remissions and release policies of the relevant jurisdiction, although in some jurisdictions courts may take account of remission entitlements in fixing a non-parole period
- unproclaimed legislation
- facts which conflict with a jury verdict, whether or not the judge believes that the jury should have convicted of a more serious offence than charged
- facts arising out of the same incident which may have supported another charge for a more serious or a different offence; for example, matters relating to a more serious offence may include:

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[37] eg the Melbourne office of the federal DPP; Public Defenders (NSW), Victorian Criminal Bar Association.

[38] The Court of Criminal Appeal (NSW) has held that this can be taken into account as an element favouring leniency: *R v Perez-Vargas* (1987) 8 NSWLR 559, 562.

  - aggravating circumstances required by statute to be charged which have not been charged, proved or admitted
  - circumstances of aggravation which by statute constitute elements of the offence

- other alleged offences which have not been admitted in accordance with the usual procedure for taking offences into consideration
- facts or evidence relevant to charges to which the accused has pleaded not guilty and on which the Crown has led no evidence.[39]

Recommendations

177. *Generally.* The Commission recommends that a list of facts not to be regarded as relevant (not to be taken into account) should also be legislated for. These are:

- remission entitlements and early release (other than parole) policies
- unproclaimed legislation
- prevalence of the offence
- facts arising out of the same incident which may have supported another charge for a more serious or different offence
- any other alleged offences of the defendant which have not been admitted in accordance with the usual procedure for taking offences into consideration
- facts relevant to charges to which the accused has pleaded not guilty and on which the prosecution has led no evidence
- the defendant's demeanour in court
- the defendant's choice not to give evidence
- the fact that the defendant may have committed perjury in the course of proceedings
- any antecedent or subsequent offences either committed by the defendant or charged against him or her
- allegations concerning possible antecedent or subsequent offences
- the defendant's choice to plead not guilty.

This list also is not in order of priority. The matters included are generally those which, under the present law, cannot be taken into account in sentencing.

178. *Dissent.* Two members[40] consider it unnecessary to specify in legislation a random list of matters considered irrelevant to sentencing, particularly when most of these matters are already excluded from consideration by authority at

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[39] See ALRC DP 29 para 49, 65–6.

[40] The President and Mr Greenwell.

present. A statutory list of exclusions is usually a response to judicial decisions no longer considered acceptable. In the view of these members, it is more important to ensure that courts give reasons for the matters which they take into account and that the weight they are given is specified.[41]

179. *Parole, remissions and other release policies.* Parole, remissions and other release policies of the relevant jurisdiction call for special comment. Recommendations earlier in this report provide for prisoners to be released into the community subject to parole conditions after a legislatively fixed proportion of the period of a custodial order has elapsed. The court, in fixing that period, should be able to take account of the fact that the law will prescribe the amount of time to be spent in prison, and the amount to be spent under supervision in the community.[42] If those recommendations are not accepted, such matters should be irrelevant. In any event, entitlements to earned remissions should not be taken into account, as the purpose of remissions, under the Commission's recommendations, will simply be as an incentive to good behaviour in prison. If the Commission's recommendations about general remissions[43] are not accepted, however, the court should be able to have regard to unearned remission entitlements in fixing sentence.

180. *Plea of not guilty.* The Commission acknowledges that, if a plea of guilty without remorse can result in a 'discount' in sentence, a defendant who chooses to plead not guilty and is convicted is, in effect, penalised because the opportunity to gain that discount has been forfeited. Such a result is inevitable if a 'discount' is to be allowed. The Commission has concluded that the benefits of the 'discount' outweigh its disadvantages.[44] The Commission, however, has included the defendant's choice to plead not guilty 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 penalty. The 'discount' for a guilty plea may deprive those who plead not guilty of the opportunity of a more lenient sentence. However, those who plead not guilty should not be required to accept a risk that the penalty will be increased because of their choice of plea.

181. *Prevalence of the offence.* The Commission, in its consultations, found divided opinion on the question whether prevalence of the offence should be a relevant or an irrelevant fact in sentencing. There are two ways in which courts can invoke prevalence in connection with sentencing. A court may increase the severity of a penalty for a particular type of offence which the court believes is occurring too frequently with the purpose of deterring others from committing that type of offence, but without taking the view that the offence is inherently more serious than it had previously been seen to be. In this case, the court would be responding to a perceived 'crime wave'. In the Commission's view, to do so would be inconsistent with the principle that individual offenders should,

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[41] See above para 164.

[42] See above para 73.

[43] See above para 86.

[44] The President, Mr Greenwell and Mr Zdenkowski dissent: see above para 174.

as far as possible, be punished only in accordance with the severity of their particular offence and their own culpability. Secondly, there may be a perception that particular offences are more prevalent than they previously were. As more attention is focussed on these offences, the courts may conclude that they should be regarded more seriously than before. Increased penalties will result. The perceived 'crime wave' has caused the courts to reconsider the seriousness of the offence in all cases, not just for the limited purpose of 'stamping out' the perceived crime wave. The principal difficulty with both cases is that the courts are not designed to amass and digest the kind of information needed to base a policy decision of this kind — the detailed statistics necessary to determine whether there has been an increase in the particular offence and the appropriate way all elements of the criminal justice system should respond to it. Responses to the prevalence of offences should come, not from the courts, with their limited capacity to amass and digest the kind of information on which policy decisions of this kind should be based, but from the parliament or the executive, by adjusting appropriately all the elements of the criminal justice system. The arguments against allowing courts to have regard to the perceived 'prevalence' of the offence, together with the principle that individual offenders should be judged only in accordance with the offences which they have committed, mean that 'prevalence' should be included in the legislated list of matters not to be taken into account in determining sentence.

182. *Dissent.* One member of the Commission[45] does not agree that prevalence should be totally disregarded on sentence. The ultimate objective of the criminal justice system is to ensure that the criminal laws are observed. If there is an increasing number of offences of a particular kind, it would be appropriate to look at all aspects of the criminal justice system. It may be that law enforcement in regard to that kind of offence could be improved. It would seem equally justifiable for the courts to look at the level of sentences being imposed. It cannot be doubted that the legislature, when considering the appropriate maximum penalty, would take account of the prevalence or otherwise of the offence. There should not be a recommendation which regards prevalence as totally irrelevant in all circumstances in sentencing. There are objections to a reliance upon prevalence. They are not objections in point of principle but practical considerations. All these practical considerations are important but go to weight not relevance. Nor, given the ultimate objectives of the criminal justice system, is it necessarily unjust to use punishment as an example.

Preserving discretion

183. The Commission has recommended that, subject to the list of matters not to be taken into account, the categories of matters that may be taken into account not be closed. This means that the sentencing court will retain a significant amount of discretion. Consistency will have to be achieved within the

[45] Mr Greenwell.

context of that wide discretion. Attempts to achieve consistency of approach have included prescribing the use of matrices or grids, as in the scheme adopted in Minnesota.[46] Under that scheme, a relatively narrow sentencing range in figures, usually months, for a particular offence is prescribed. Once the fact of the offence and the offender's criminal record are known, the choice of penalty must be made from that range or the court must give reasons for departing from the range. In effect, the fact of the offence and the criminal record are the only significant relevant matters to sentencing under the Minnesota scheme. The Commission does not support the introduction of such a scheme in Australia. It would introduce an undesirable element of rigidity into sentencing. The matters that can properly affect the sentence to be imposed cannot be exhaustively listed — the list must remain open ended. Nor can the weight that should be given to individual factors be prescribed in any meaningful way. The most appropriate way to promote consistency is to encourage sentencers 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.

Evidentiary matters

Introduction

184. The following paragraphs deal with evidentiary questions associated with the sentencing hearing. These questions are:

- what rules, if any, should govern the evidence that should be before the court in determining whether a relevant fact exists?
- what standard of proof is to be required before the court can find that a relevant fact exists?

The evidence by which relevant facts are to be proved: the present law

185. A finding of guilt or a conviction will determine, so far as the sentencing court is concerned, a number of the facts which will be relevant to sentencing the offender. Other facts, however, will remain to be determined by the court. In general, the rules of admissibility are not applied strictly by sentencing courts to evidence adduced to prove those facts. In many instances, that evidence, or the facts it relates to, will not be in dispute. So far as the present law addresses this question, it has focussed on the procedure to be adopted when there is a dispute as to a relevant fact. In that case, the broad rule is that the judicial officer must form a view of the facts and determine any issues in dispute.[47] Failure to identify the facts relied upon in sentencing can lead to a successful

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[46] An Act relating to crimes, etc., (Minnesota) ch 723-SF No 65: the grid is reproduced in ALRC DP 30 App A.

[47] eg *R v Chamberlain* [1983] 2 VR 511, 513.

appeal against sentence.[48] In particular Australian jurisdictions, the following is the position:

- *South Australia.* Judicial officers must only act on sworn depositions or statements, if there are any. A defendant who wishes to dispute a fact deposed to must do so by sworn evidence, but a defendant who does not dispute a fact deposed to but who puts forward an interpretation which may conflict with other interpretations open to the judicial officer has the choice whether to give evidence or simply make submissions by counsel; the prosecution may make submissions accepting or opposing the interpretation put forward. The judicial officer is not bound to act upon the interpretation put forward by either side, whether disputed or not; even where the prosecution and the defence ask for sentence to be imposed upon an agreed basis which differs from the depositions or from inferences which the judicial officer may be disposed to draw from them, it is for the judicial officer to decide whether or not to act upon that agreed basis.[49]
- *New South Wales.* '. . . any dispute as to matters beyond the essential ingredients of the offence admitted by the plea must be resolved by ordinary legal principles, including resolving relevant doubt in favour of the accused'.[50] A conflict of facts critical to sentence '. . . will ordinarily not be possible to resolve . . . without the judge hearing both disputants give evidence, with the result that it would be inappropriate to determine the issue unfavourably to the accused without so doing'.[51]
- *Victoria.* The position is similar to New South Wales.[52] However, the judge need not exclude inadmissible hearsay material and the distinction between sworn and unsworn material is less significant. The procedure used for hand-up briefs also differs.[53]

186. *Imposing the laws of admissibility.* To introduce into the sentencing hearing a requirement that relevant facts be proved by admissible evidence only would transform the sentencing hearing into an adversarial proceeding. Apart from the increased costs and delays that would follow, not all facts may be sufficiently important to sentence to warrant such a requirement. It would tend to exclude some evidence that may be useful to the sentencing court, such as evidence of remorse, or that the offence was out of character. On the other

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[48] eg, in *R v Brown* [1982] Crim LR 53, the English Court of Appeal felt that it was bound to proceed upon the defence version of events where conflict between that version and the prosecution version had not been resolved by the sentencing judge, so that it was not clear which version he had accepted as the basis for the sentence.

[49] *R v Perre* (1986) 41 SASR 105.

[50] *R v O'Neill* [1979] 2 NSWLR 582, 588 (Moffitt ACJ).

[51] id 589.

[52] *R v Halden* (1983) 9 A Crim R 30, 34 (Lush J).

[53] See ALRC DP 29 para 83.

hand, accuracy in establishing relevant facts may be sacrificed if the rules of evidence are abandoned, and there is a danger that a lack of evidentiary rules may lead to decisions being based on inaccurate or unfairly prejudicial material, for example, that 'the defendant is an associate of known criminals'. Although a Commission discussion paper suggested that the rules of evidence should be imposed where facts relevant to sentence are in dispute,[54] the Commission has concluded that the disadvantages of that course outweigh its advantages. The sentencing hearing is in important respects different from the trial. The reasons for requiring strict proof, by admissible evidence, of all relevant facts not admitted by the other party[55] do not apply to the sentencing hearing. This is not to say that the rules of evidence should never be applied. For some facts that, in the context of the particular case, have assumed special significance, justice will require that the court's findings on matters of fact be based on strict proof. It should be for the court to determine whether a particular fact falls within this category: if it does, the court should be empowered to apply appropriately the formal rules of evidence applicable in the jurisdiction. In other words, while there should be no requirement that the rules of evidence be applied in the sentencing hearing, the court should be able, either on application or of its own motion, to apply, as appropriate, the rules of evidence normally applied in that court to the proof of facts that, in the court's view, are or will be significant in sentencing.[56] It should be emphasised that the absence of the formal rules of evidence in those circumstances where the court decides the fact or facts are not sufficiently significant will not mean that the sentencing court will exercise its discretion capriciously or arbitrarily. Decisions as to evidence will still have to be made rationally and fairly.

Standard of proof

187. *Present law.* The various jurisdictions of Australia have developed their own case law on the question of what standard of proof is to be applied in the sentencing hearing. Certainly, the criminal standard does not apply to the proof of all relevant facts. Rather, the present law has tended to focus on the standard to be applied when facts are in dispute. The approach generally adopted is that

> . . . any dispute as to matters beyond the essential ingredients of the offence admitted by the plea must be resolved by ordinary legal principles, including resolving relevant doubt in favour of the accused.[57]

The Victorian Supreme Court has held that a trial judge cannot be required to be satisfied beyond reasonable doubt of every fact relevant to sentence.

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[54] ALRC DP 29 para 79, 87, 89, 90–7.

[55] These are set out in ALRC 38 para 38.

[56] This is consistent with common law developments: *R v Chamberlain* [1983] 2 VR 511.

[57] *R v O'Neill* [1979] 2 NSWLR 582, 588 (Moffitt ACJ).

> [The] degree of persuasion required will vary with the nature and consequence of the fact or facts in question.[58]

If there is a dispute as to a fact crucial to the severity of the offence, the standard of proof may be beyond reasonable doubt. Facts of less significance may require a correspondingly lower level of proof.

188. *Recommendation.* For the same reasons as apply in the case of the rules of admissibility,[59] the Commission does not recommend that a particular standard of proof be imposed for facts relevant to sentencing. The standard of proof will need to be related to the significance of the particular fact in the particular case. The standard which should have to be satisfied before making a finding on a more significant fact will be higher than for other, less significant facts. It should be for the court to determine whether a particular fact falls within this category. The exposition of the Full Court of the Victorian Supreme Court in *R v Chamberlain* is appropriate:

> It follows that when forming his own view of the facts for the purpose of passing sentence a trial judge cannot be required to be satisfied beyond a reasonable doubt of every fact which he considers relevant. To require a judge to be satisfied beyond reasonable doubt of every relevant fact might lead in some cases to quite undue weight being given to self-serving statements offered by an accused during interrogation or evidence. Moreover, a judge may have to sentence an accused where he does not personally agree with the verdict of the jury. On the other hand, to allow the finding of fact which is critical to the determination of the sentence to be imposed upon a basis that admits of the existence of a reasonable doubt about the existence of that fact would plainly be unfair. Between those two extremes a large number of possibilities exist.[60]

This allows a proper balance between flexibility and the need, in some circumstances, to prove important and significant facts to a higher standard of proof. Any legislation governing the standard of proof of facts relevant to sentencing should therefore do no more than require that the court be 'satisfied' of the relevant fact.[61]

Reports

189. *Police antecedents and pre-sentence reports: problem areas.* Sources of information about the offender include police antecedent reports, pre-sentence reports prepared by probation and parole officers, expert evidence (usually medical) and other evidence about the offender's life (for example, from social workers, employers and other community contacts). A problem which frequently arises with police antecedents reports and, occasionally, with pre-sentence reports is the inclusion of evidence as to the lifestyle, habits and tendencies of the offender which may be irrelevant to sentence or of marginal relevance only.

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[58] *R v Chamberlain* [1983] 2 VR 511, 514.

[59] See above para 186.

[60] [1983] 2 VR 511, 514.

[61] See also *Briginshaw v Briginshaw* (1938) 60 CLR 336.

While the offender will usually be aware of the content of a pre-sentence report before the sentencing hearing, statements may be included in a police antecedent report without the offender's prior knowledge of what has been written or is to be said about him or her. Damaging statements can thus be made without an opportunity to object to their admission and without affording the defence the opportunity to prepare a rebutting case. An important problem with this type of information is that it may not be amenable to formal proof since it is often derived from statements made by the offender or other persons. Significant damage may be done by statements made in antecedent or pre-sentence reports which are unsupported or anonymous or which may be only of marginal relevance. For example, it is not easy to disprove a statement by a police officer that the offender may be an associate of known criminals. It is not easy to 'prove' a statement of a probation or parole officer that the offender was uncooperative, anti-social or unsuitable for rehabilitative treatment.

190. *Recommendations.* The Commission makes the following recommendations to improve the quality and reliability of reports about the offender. These recommendations are made in the light of the earlier recommendations concerning the strict application of the laws of evidence, namely, that the question whether evidentiary laws should be applied should be answered having regard to the significance of the fact to the sentencing process.[62] Police antecedents reports should, therefore, confine themselves to relevant matters and be basically factual, setting out, for example, only facts such as date of birth, marital status, current employment status and previous convictions, if any. Matters should not be raised in these reports unless they can be supported appropriately, to avoid the possibility of unfairly prejudicial material — for example, material going only to the character of the offender — being put to the court.[63] Nor should there be a fact summary made by the police where a trial has been held, or where statements of witnesses or depositions are available if a committal hearing has been held. Where there has been no trial or committal, a fact summary should be prepared by the prosecution. That summary, together with the statement of bare facts to be put before the court, should be handed to the defence so that any matters in dispute may be omitted, or appropriate evidence tending to establish or rebut the matter alleged obtained. For pre-sentence reports, the Commission recommends:

- *Reports not mandatory.* The courts should not have to order pre-sentence reports but should use them if they would be helpful. They can be particularly helpful in cases where the offender may be
  - mentally ill or intellectually disabled
  - physically unfit to do work which may be assigned

[62] See above para 186, 188.

[63] Statements such as 'The offender is an associate of known criminals' or 'the offender is previously known to me' may fall into this category.

- is under the age of 21 and has been convicted of a serious offence, is unrepresented and is at risk of a sentence of imprisonment.

Such reports should not be ordered where the offence is trivial, where the offender is unlikely to re-offend, or merely for ulterior motives such as research.

- *Responsibility for report.* Pre-sentence reports should be prepared by suitably trained staff. Sufficient resources should be allocated to ensure that such staff are available.

- *Content of report.* The court ordering the report should specify any information which it particularly wishes to have, but there should be no statutory or administrative specification of the contents of a report. While the report might express expert opinion on the probable effect of particular sentencing options, it should not recommend particular sentences.

- *Anonymity of third parties.* Third parties supplying information should be entitled to insist on their anonymity.

- *Consent of the offender.* A pre-sentence report should not be dependent on the consent of the offender but he or she should have the right to appeal against an order for a report if to prepare it will entail unjust delay in sentencing.

- *Access to pre-sentence reports.* The prosecution and the offender should be entitled to a copy of the pre-sentence report. If the report contains material not previously known to the offender which, in the opinion of the court, should not be disclosed to him or her, that part of the report should be furnished only to the legal representative of the offender.

- *Challenge to the report.* Both the prosecution and the offender should be able to cross-examine to challenge the accuracy of any factual statement in a pre-sentence report. Where cross-examination is impossible because the source of the statement insists on anonymity, the statement should be normally disregarded by the court if its accuracy is disputed by the offender. The prosecution should be under a duty to draw to the attention of the court suspected inaccuracies not mentioned by the offender.[64]

Procedural matters

Victims and sentencing

191. ***The victim: participation in sentencing process.*** At present, courts take into account in sentencing, where appropriate, the extent and nature of the

[64] See Mitchell report ch 3.

harm caused to victims. The report recommends that this continue to be the case.[65] Information about the impact of the offence on its victims is therefore brought to the court's attention by the prosecution or the defence. The victim is a witness, not a party to the proceedings. The question whether victims should, in some or all circumstances, be able to be parties to the proceedings so far as sentencing is concerned was raised in a Commission discussion paper.[66] Little support for this was found in the Commission's consultations. Individual lawyers and groups representing sections of the legal profession overwhelmingly rejected the proposal that victims should be able to be parties to the proceedings. The Australian Victims of Crime Association, while not ruling out the possible desirability of separate representation for victims in sentencing, did not wish to press too strongly that proposal.[67] The Commission concludes that the present situation should continue. All arguments favouring victims taking an independent role in the sentencing hearing[68] are underpinned by an assumption that the attitude of the victim of the offence to the particular punishment ordered — that is, whether the victim is 'satisfied', or 'understands', or whether he or she feels lenient or sympathetic, is relevant and should be brought to the court's attention. In the Commission's view, sentences are imposed in pursuance of the values of the whole community, not to satisfy a particular person. These matters have little if anything to do with the court's function of assessing objectively the circumstances relevant to the offender or the offence: insofar as they relate to the impact of the offence on the victim, they will already have been taken into account.

192. *Victim impact statements.* A recent reform introduced in South Australia requires that a written pre-sentence report on an offender requested by the court must also contain particulars of any injury, loss or damage suffered by any person as a result of the offence if these factors are not already known to the court.[69] The question whether statements of this kind should be required, and perhaps their content expanded, was raised in a Commission discussion paper.[70] The Commission's consultations revealed that there are significant problems in requiring victim impact statements.[71] The Commission does not recommend any change to the existing law in this regard. Reports of this kind may already

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[65] See above para 170.

[66] ALRC DP 29 para 68–74, 101.

[67] The Association's main concern was that victims do feel that they have too little input but that their input could be increased through the prosecution: *Submission* 10 November 1987.

[68] See eg ALRC DP 29 para 68.

[69] Criminal Law Consolidation Act 1935 (SA) s 301.

[70] ALRC DP 29 para 74.

[71] The Australian Victims of Crime Association stated that in some cases, victims may not wish the offender to be fully aware of the harm caused to them: *Submission* 10 November 1987. There may also be cases, eg child abuse, where mandating victim impact statements may in itself constitute another traumatic experience for the victim: Goode *Submission* 10 November 1987. The Public Defenders (NSW) opposed victim impact statements in all cases because they might include information inconsistent with the facts found in the verdict.

be tendered in the sentencing hearing and, under the Commission's recommendations, this position will continue. The prosecution may, if it wishes, submit a victim impact statement or similar document. The Commission does not recommend the introduction of legislation to make such statements mandatory generally or in specific circumstances.

Role of the prosecution

193. The traditional view has been that the prosecutor's task is complete once a conviction has been obtained and, in relation to sentence, is limited to outlining the facts, presenting an antecedents report and ensuring that the court makes no errors of fact or law. The basic duties of the prosecutor are to be fair and to assist the court. Despite divided authorities as to the proper role of the prosecutor on sentence, the increasing weight of judicial opinion appears, however, to favour a more active role.[72] The Commission agrees. The Crown has a right of appeal against sentence in every Australian jurisdiction.[73] It follows that the prosecutor has more than a minimal role to play in ensuring that an appropriate penalty is imposed at the trial. Prosecutors can do this without compromising their duties to be fair and assist the court. The Director of Public Prosecution's published guidelines on this matter, generally speaking, provide a suitable basis for counsel prosecuting federal and Australian Capital Territory offenders to address on sentence. However, they should be be amended to bring them into line with the recommendations in this report. In particular, reference to general deterrence as a relevant matter in sentencing, the prevalence of the offence and increases in penalty since the commission of the offence[74] should be removed.

Appeals

194. The system of appellate review of punishment is an important feature of sentencing. Although a Commission discussion paper suggested some changes to the law concerning venue and grounds of appeal, in the light of the consultations undertaken, the Commission recommends that the law on these matters, and on other issues raised in that paper, such as the power of a court to award costs to either the prosecution or the defence, remain unchanged.[75] However, the time spent by federal or Australian Capital Territory offenders in prison pending appeal should always count towards service of their sentences: to do otherwise is plainly unjust.[76] The role of appellate courts in establishing and developing sentencing principles is a more significant matter. The Commission's

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[72] Fox & Freiberg 1987, 554.

[73] Criminal Appeal Act 1912 (NSW) s 5D; Crimes Act 1958 (Vic) s 567A: Criminal Code 1913 (WA) s 688(2); Criminal Law Consolidation Act 1935 (SA) s 352(2); Criminal Code 1924 (Tas) s 401(2); Criminal Code 1899 (Qld) s 669A; Federal Court of Australia Act 1976 (Cth) s 24–5 (appeal from ACT courts); Criminal Code 1983 (NT) s 407.

[74] DPP Prosecution Address Guidelines, guidelines 2.1(viii), (ix), 2.2(i).

[75] ALRC DP 29 para 118–41.

[76] See also above para 82; ALRC 43 para 36.

recommendations, particularly the recommendations in this chapter for reasons for sentence, will enable appellate courts to take a more active role in providing clearer and firmer sentencing principles than is possible at present.[77] These measures will enable appellate courts to assess the consistency of approach of lower courts in a more structured way.

Implementation

195. The recommendations in this chapter could be implemented at once, by federal legislation, for both federal and Australian Capital Territory offenders. An alternative would be for the Commonwealth to place the recommended reforms before the Standing Committee of Attorneys-General and try to achieve uniformity among the States and Territories. The result would be that the recommendations made above would be applied for the benefit of all offenders, including federal offenders, in all States and Territories. The Commission has concluded, however, that legislation to implement the recommended reforms for federal offenders independently of State and Territory action would not cause difficulty for State and Territory courts imposing sentences on federal offenders. In many ways, what is recommended in this chapter is consistent with, and a development of, the present law. The Commission recommends that the reforms suggested in this chapter be implemented by federal legislation both for federal offenders and Australian Capital Territory offenders.

[77] This may make it easier for appellate courts, for example, to issue 'guideline judgments'.

7. Special categories of offenders

Scope of chapter

Offender groups covered

196. The Commission's terms of reference specifically direct the Commission to

> consider the question whether, in the determination of the punishment for an offence, an emphasis should be placed on . . . the personal characteristics of the offender and the need for treatment.

The Commission identified the following groups for special consideration in the course of its research, and advanced a number of proposals in relation to them in a discussion paper:

- mentally disordered offenders
- female offenders
- young offenders
- habitual offenders
- Aboriginal offenders
- corporate offenders
- defence force offenders.[1]

Subsequently, it was decided that three of these groups, Aboriginal offenders, corporate offenders and defence force offenders should not be dealt with in the final report.

Aboriginal offenders

197. While race itself is not permissible as a ground for discrimination, and therefore should not be taken into account in sentencing, there are a variety of factors which the courts may need to consider when sentencing Aboriginal offenders. Some are specific to Aboriginal people, such as the operation of customary law. Others are general factors, for example, the effect of poverty or unemployment on the offender. The Commission has made detailed recommendations in relation to the specific factors in its earlier report *The Recognition of Aboriginal Customary Laws* (ALRC 31). More general problems, which may also be experienced by other disadvantaged groups in society, can be considered

[1] ALRC DP 30 ch 5.

under the list of matters recommended to be taken into account by the sentencing tribunal.[2] These factors should help to accommodate the disadvantages faced by Aboriginal people. Aboriginal offenders may experience further problems in the criminal justice system. One example, death in custody, is currently the subject of a Royal Commission.[3] Other problems include the disproportionately high rate of imprisonment of Aboriginal offenders and the potential for discrimination by police, and magistrate or jury bias. Most of these matters arise out of the impact of State and Northern Territory criminal justice systems on Aboriginals. Few federal or Australian Capital Territory offenders are Aboriginal. Further research on the impact of the criminal justice system as a whole on Aboriginal people is urgently needed, and the Commonwealth should make funds available for this purpose.

Corporate offenders

198. A consideration of sanctions against corporate offenders cannot be detached from issues which arise in the application of the criminal justice system as a whole to corporations.[4] There are certain aspects of sentencing peculiar to corporations; the most obvious being the inapplicability of certain personal forms of punishment. Also, in the case of regulatory offences there is an interrelation between criminal sanctions and civil remedies. The latter may be more effective, especially where the regulatory agency, as in the case of the Trade Practices Commission, can seek compensation on behalf of the class affected by corporate conduct. Beyond this, however, sanctions can only be considered in the context of the problems of enforcement of regulatory law and the traditional criminal law against corporations. These problems are due to many factors — the often massive documentary nature of the evidence, the need for an assessment of expert evidence, problems arising from the artificial character of corporate personality and questions as to when the corporation will be liable for the conduct of persons employed or engaged by it. It might also be necessary to adopt a different approach towards imprisonment in the case of the principal officers of corporations than that advanced in this report. The Commission recommends that the question of controlling corporate behaviour through the criminal justice system be referred to it for inquiry and report.

Defence force offenders

199. The sentencing of offenders against military law is of special concern to the Commonwealth because of its responsibility for the defence forces. In 1984, the Defence Force Discipline Act 1982 (Cth) was amended to introduce a punishment code for the Australian Defence Forces.[5] It is too early to review these reforms.

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[2] Above, para 170.

[3] The draft Minimum Standard Guidelines for Australian prisons do not apply to police lock-ups, where many of the Aboriginal prisoner deaths have occurred.

[4] These matters were addressed in ALRC DP 30 para 287–307.

[5] Defence Force Discipline Act 1982 (Cth) s 68A.

Mentally ill and intellectually disabled offenders

Mental illness, intellectual disability and the criminal justice system

200. Under current law, mental illness or intellectual disability can be relevant to the disposition of an offender in four different circumstances:

- a person may be found to be unfit to plead, or otherwise be found insane, on arraignment or during trial
- a person may be acquitted on the ground of insanity
- an offender may be convicted of an offence but, owing to his or her illness or disability, be considered primarily to require treatment rather than punishment, or, at any event, to be entitled to have the illness or disability taken into account in determining sentence
- a mentally ill or intellectually disabled offender may be in prison.[6]

Only the last two of these situations are dealt with in this report. Persons in the other categories have not been convicted or found guilty of an offence, and so are outside the Commission's terms of reference. However, these distinctions are to a considerable extent artificial when considering the appropriate way to deal with mentally ill and intellectually disabled offenders. Dealing with only some of the categories tends to lead to piecemeal reform. The interaction of mentally ill and intellectually disabled offenders with the criminal justice system as a whole, not with just one component of it, needs to be considered if the problems these offenders face are to be properly considered and a comprehensive scheme developed.[7] Such a review, for federal and Australian Capital Territory offenders, is a suitable matter to be referred to this Commission. The Commission recommends that a reference covering all issues concerning the mentally ill and the intellectually disabled in the criminal justice system should be given to it. Full-scale reforms for mentally ill or intellectually disabled Australian Capital Territory and federal offenders will undoubtedly take some years to develop and implement. Because the position of these offenders has been ignored for nearly a century, the following recommendations have been made to allow them access to some of the advantages of recent innovations in this area. These recommendations should, however, be seen as only a stop-gap measure, until comprehensive reforms are implemented.

Definition

201. In most situations the criminal justice system does not differentiate between offenders who are mentally ill and those who are intellectually disabled. Generic labels, such as 'mentally disordered', are commonly used to describe the two states. There are, in fact, important differences between the two conditions. Blurring these distinctions can give rise to many misconceptions. For this

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[6] Potas 1982, 20–1.

[7] These problems have been extensively reviewed elsewhere: eg, Butler report; Potas 1982; Hayes & Hayes 1982; Hayes & Hayes 1984; Bean 1986; Bodna 1987; Challinger 1987.

reason, the terminology 'mentally ill' and 'intellectually disabled' is adopted in this chapter. A mentally ill offender is one who suffers from an identifiable or recognisable illness that is often treatable and may be an intermittent rather than a permanent state. Intellectual disability has been defined as a

> significantly sub-average intellectual functioning which manifests itself during the development period and is characterised by inadequacy in adaptive behaviour.[8]

An intellectual disability is a permanent disability which is not treatable as such although

> the social effects of intellectual impairment (ie handicap) and the functional effects (ie disability) can certainly be remediated given appropriate opportunities and support.[9]

Differentiating between the two states can be extremely difficult, particularly as there are often apparent or real overlaps between the two conditions.[10]

The sentencing hearing

202. *Taking mental illness and intellectual disability into account.* Most mentally ill or intellectually disabled offenders are fit to plead and are not considered insane in law. These offenders are, perhaps, the most difficult to deal with. Their illness or disability is not severe enough to absolve them of criminal responsibility, but they may be considered primarily to require, not punishment, but treatment in the case of the mentally ill or training in life skills in the case of the intellectually disabled. The problem is often compounded if the offender has a long history of repeated minor offences. Courts generally accept that the fact that the offender is mentally ill or intellectually disabled, although not legally insane, may be taken into account by the sentencer as lessening the degree of blameworthiness that would otherwise attach to the offence[11] and therefore justify a less severe punishment than would otherwise be the case.[12] This should continue to happen.

203. *Pre-sentence reports.* There should be greater use made of pre-sentence reports, particularly for first offenders, because a court will often fail to recognise the presence of an illness or disability, particularly where the offender pleaded guilty. Increased use of pre-sentencing reports for first offenders would help bring such conditions to light. The Commission has not recommended that pre-sentence reports be mandatory because of the delay and expense that would be involved. Where, however, there are reasonable grounds to expect that it would assist in sentencing, courts should avail themselves of pre-sentence reports.[13] Reasonable grounds are particularly likely to exist where it appears

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[8] American Association on Mental Deficiency, as cited in Hayes & Hayes 1984, 3.

[9] National Association on Intellectual Disability (R Barson, Executive Officer) *Submission* 3 December 1987.

[10] See generally Hayes & Hayes 1984, 6–9.

[11] Potas 1982, 21–2.

[12] See eg *R v Masolatti* (1976) 14 SASR 124, *R v Anderson* [1981] VR 155, 2 A Crim R 379.

[13] See below para 189–90.

that an offender may be suffering from an intellectual disability or mental illness. Any such pre-sentence reports should be prepared by multi-disciplinary teams and should cover the offender's physical and mental health, cognitive abilities and social and adaptive skills. The family and friends of the offender, and any psychiatrist, psychologist, social worker or welfare worker involved with the offender, should be consulted. As was noted at a recent conference on intellectually disabled offenders:

> With respect to sentencing, the groups thought that the best advice the court could be given would come from a 'service person' who knew the convicted intellectually disabled person well. Ideally, that advisor should have knowledge of both options available to the court and services available for the intellectually disabled.[14]

Those preparing pre-sentencing reports on mentally ill or intellectually disabled offenders should bear in mind that all sentencing options are available for these offenders, not just the new options recommended below.

New sentencing options

204. Every jurisdiction in Australia has either recently reformed its laws for the mentally ill and intellectually disabled, is doing so, or proposes to do so in the near future. In some jurisdictions special sentencing options are now available to courts sentencing mentally ill and intellectually disabled offenders. These new options are not, however, available to federal or Australian Capital Territory offenders. In framing the following recommendations the Commission has tried to ensure that federal offenders will not only have existing new options open to them, but also that they will be able to pick up suitable new options that will inevitably emerge from the reforming activity in the various jurisdictions. Similarly, the Commission has sought to ensure that innovations in this area of sentencing are also available to ill and disabled federal and Australian Capital Territory offenders.

Hospital orders

205. *Medical treatment.* The hospital order is an amalgam of sentencing powers and the powers that exist in most jurisdictions to commit involuntarily persons suffering from a mental illness to hospital for treatment. The court orders that the offender be detained in hospital for medical treatment. Such an order is not, as a general rule, suitable for intellectually disabled offenders because intellectual disability is not treatable in the sense in which mental illness may be. A person who is subject to a hospital order will have the same status as an involuntarily committed mental patient within the relevant jurisdiction.[15] There is specific provision for hospital orders in Victoria, England and New

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[14] Challinger 1987, 3.

[15] In some jurisdictions, there is a special 'forensic patient' status created for these people: it involves discharge procedures slightly different from those applying in the case of persons involuntarily committed under civil law: see eg Mental Health Act 1986 (Vic) Pt 4 Div 4.

Zealand.[16] Elsewhere, similar results can be achieved by the use of creative probation orders and prison transfers. In Victoria, hospital orders are made 'instead of passing sentence'. Similar options should be available to federal and Australian Capital Territory offenders who are mentally ill. As with other sanctions for federal offenders, courts will only be able to make hospital orders in jurisdictions that have the necessary link between the criminal justice and the mental health systems.

206. *Hospital orders to be custody-based.* A major purpose of a hospital order is the treatment of the offender. One approach to such orders is that they represent a means of an offender being diverted from the criminal justice system to the mental health system; the Butler Committee adopted this approach, regarding the offender as removed from the penal process. Punishment was not the basis of the disposition.[17] Victoria and New Zealand have adopted a similar approach.[18] While there are some attractions in regarding hospital orders in this way, the Commission is concerned about the possibility of creating what amounts, in practice, to new forms of indeterminate sentences. This is particularly so given the disturbing instances that still occur of mentally ill offenders who become 'lost in the system' for decades. Because it is of the essence of a hospital order that the offender is involuntarily confined in consequence of a conviction, there is a punitive content to hospital orders. They should be equated with imprisonment, and should not be made unless, were the offender not mentally ill, the court would have imposed a custodial sentence. The maximum period of the hospital order (that is, the maximum period for which the offender can be detained), should be the period for which imprisonment would have been ordered. To accord with the recommendation for automatic release of prisoners on parole made earlier in this report,[19] involuntary detention in hospital under a hospital order should end after completion of 70% of the period ordered. If hospitals can devise a suitable earned remission scheme for good behaviour while in hospital, earned remission should be available for up to 20% of the total length of the hospital order. If suitable remission schemes are not in place for the hospital concerned, an automatic remission of 20% of the total length of the hospital order should be available. Thereafter the only justification for detention should be whatever powers are available under the mental health legislation in the relevant jurisdiction.

207. *Discharge.* An offender whose condition no longer requires detention on an involuntary basis should be discharged. Discharge before the end of the order should be the aim of the treating doctor. The offender's case should be reviewed, at a minimum, every three months for the first year of an order and, thereafter, every six months. The review should be carried out by a forensic psychiatrist experienced in the treatment and diagnosis of mental illness, but

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[16] id, s 15; Mental Health Act 1983 (Eng) s 37; Criminal Justice Act 1985 (NZ) s 118.

[17] Butler report para 14.12.

[18] Mental Health Act 1986 (Vic); Criminal Justice Act 1985 (NZ) Pt VIII.

[19] See below para 83.

if there is a mental health review or patient review tribunal operating in the jurisdiction, it should be responsible for these reviews. Where an offender has sufficiently recovered no longer to need involuntary hospitalisation, the sentencing court should be required to re-sentence the offender. In deciding what further sentence is appropriate, the matters to which the court should have regard should include the fact that the offender was hospitalised and the course of treatment. It should be stressed that the purpose of the return to the court is not to increase the severity of the sentence to be imposed on the offender, but to alter the mode under which that sentence is to be served.

208. *Parole after discharge.* Where an offender completes that proportion of his or her hospital order required under the Commission's release from custody proposals (that is, 70% of the total length of hospital order less any deduction for earned remissions up to 20% of the total length of the hospital order), the offender should be assessed by the relevant parole authority,[20] to determine appropriate conditions for the balance of the sentence to be served on parole. The parole authority should consult the treating psychiatrist for this purpose. However, it should not be possible for parole conditions to require that the offender return to hospital involuntarily; this would run counter to the principles underlying the recommendations. But, as pointed out already, civil commitment proceedings should not be precluded.

209. *Further safeguards.* A number of further safeguards should be imposed on the making of hospital orders.

- *Mental illness and its relevance.* The court should have to be satisfied, on the evidence of two psychiatrists specialising in the treatment and diagnosis of mental illness, and preferably with forensic experience, that
  - the offender is mentally ill
  - the illness contributed to the offender committing the offence
  - appropriate treatment is available
  - the proposed treatment cannot, equally effectively, be given on an out-patient basis.[21]
- *Consultation with treating psychiatrist.* The court should always try to to obtain evidence from a psychiatrist, psychologist or case worker who has been involved with the offender in the recent past as to the most suitable disposition.[22]

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[20] ie, the ACT Parole Board, in the case of ACT offenders; in the case of federal offenders, the Minister: see above para 95, 97.

[21] A mental health review tribunal, if established in the jurisdiction, could be used instead of the two psychiatrists.

[22] Para 189–90.

- *Least restrictive order.* The court must be satisfied that a hospital order represents the least restrictive order and care setting which is compatible with the offender's need for treatment and the punishment of the offender.[23]

In addition, controls on the administration of treatment and medication, along the lines of those contained in the Mental Health Ordinance 1983 (ACT), should be adopted.

Psychiatric probation orders

210. *Nature and use.* Psychiatric probation orders are probation orders which include conditions that the offender attend at a specified place and receive treatment. It is a less restrictive form of sentencing disposition than a hospital order. As with hospital orders, psychiatric probation orders are mainly designed for mentally ill, rather than intellectually disabled, offenders. A Commission discussion paper dealt with a similar kind of disposition, called a 'treatment order'.[24] However, imposing treatment conditions through the probation mechanism has advantages over creating a new kind of sentencing option. It will ensure that the 'option' is available to all federal and Australian Capital Territory offenders who are mentally ill. It can ensure that any special programs established by the States or Territories can be used by federal offenders. Finally, linking treatment to a probation order will mean that a probation officer will be attached to the offender, and this may be of assistance to the offender.

211. *Recommendation.* The Commission recommends that psychiatric probation orders should be available to all courts sentencing federal or Australian Capital Territory offenders who are mentally ill, that is, that those courts should be encouraged, where appropriate, to impose as a condition of probation a condition that the offender receive specified treatment. Similar preconditions to those recommended for hospital orders should apply.[25] In particular, all the protections found in the Mental Health Ordinance 1983 (ACT) for people subject to civil treatment orders should be provided. The available evidence suggests that treatment is most successful when undertaken voluntarily, therefore, such a condition should not be imposed unless the offender has consented. If the offender refuses treatment ordered under such a condition, the court should resentence the offender, taking into account the course of events under the order to date.

Guardianship orders

212. *Nature and use.* The two orders discussed above are mainly suitable for mentally ill offenders. Only on rare occasions will they be suitable for intellec-

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[23] Ashworth & Gostin 1984, 212.
[24] ALRC DP 30 para 320.
[25] See above para 209.

tually disabled offenders. There is, however, a clear need for suitable orders for intellectually disabled offenders. This is especially so as the limited available evidence suggests that intellectually disabled people are over-represented in penal populations.[26] One sentencing option which is appropriate is the guardianship order.[27] A guardianship order places the offender under the supervision of a guardianship board (if one exists) or of someone else named in the order. Such orders are available as a sentencing option for intellectually disabled and mentally ill offenders in England.[28] Under traditional guardianship legislation, the appointed guardian has all the powers that a parent has in respect of a child. Such legislation, however, failed to recognise the degrees of intellectual disability that exist and the sometimes intermittent nature of incapacity due to mental illness. It only came into play when there was a need to take over complete management of a person and his or her affairs. Under more modern forms of guardianship order, the degree of guardianship provided is more flexible and responsive to the needs of the individual. There is no assumption that intellectually disabled offenders are incapable of making any decisions about their life.[29]

213. *Recommendation.* Nowhere in Australia are 'guardianship orders' used as a sentencing option although guardianship legislation, or close equivalents, exists in all Australian jurisdictions other than the Australian Capital Territory. Guardianship legislation was recommended by the Review of Welfare Services in the Australian Capital Territory.[30] When guardianship legislation is introduced into the Australian Capital Territory, it should be able to be invoked in appropriate cases in the sentencing of offenders who are subject to intellectual disability. The form of a guardianship order will depend upon the ultimate form of guardianship legislation in the Territory. If the power to commit a person to the guardianship of another is to be vested, under the proposed guardianship legislation, in a court, a court should be able to invoke those powers in appropriate cases when sentencing an offender. If, on the other hand, the power to commit a person to the guardianship of another is to be vested in a board or other tribunal, the form of a guardianship order will have to be that the Australian Capital Territory Adult Corrections Service take the necessary steps to have the offender placed under guardianship. For federal offenders, in most cases, the second of these two options will have to be used. As with other kinds of orders recommended in this chapter, safeguards should apply:

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[26] Hayes & Hayes 1984, 24.

[27] In some instances such orders may also be appropriate for the mentally ill.

[28] Mental Health Act 1983 (Eng) s 37.

[29] The various different forms of guardianship orders have been considered in detail elsewhere: HRC DP 4; Hayes & Hayes 1982, ch 8.

[30] Vinson report, 455.

- *Intellectual disability and its relevance.* The court should have to be satisfied, on the evidence of two psychologists specialising in the treatment and diagnosis of intellectual disability, and preferably with forensic experience, that
  - the offender suffers from an intellectual disability
  - the disability contributed to the offender committing the offence
  - there is a need for such an order.
- *Guardian available.* There must be a guardianship board or a suitable individual prepared to receive the offender into guardianship.
- *Consultation with treating psychologist.* The court should always try to obtain evidence from a psychologist, psychiatrist, or case worker who has been involved with the offender in the recent past as to the most suitable disposition.

Improvements in community resources for the intellectually disabled would greatly enhance the usefulness of guardianship orders.

Program probation orders

214. *Nature and use.* Consultation with those involved with intellectually disabled offenders, and submissions received, indicate that many crimes committed by intellectually disabled offenders, even if done repeatedly, are of a minor nature and that habilitation programs for such offenders have a real likelihood of success. The example often given is of intellectually disabled offenders who shoplift because they do not know how to handle or understand money. The most appropriate and beneficial sanction in these cases is something akin to a psychiatric probation order, requiring that the offender attend a program to be taught how to handle money. Program orders of this type will only be successful, however, if sufficient resources are devoted to creating and running the programs required. While some jurisdictions, notably Victoria and Queensland, have recently increased the resources allocated for the intellectually disabled, in most jurisdictions the programs required are just not available.

215. *Recommendation.* Program probation orders should be available for intellectually disabled offenders. All submissions received by the Commission in relation to intellectually disabled offenders supported the introduction of this option.[31] The definition for such orders should be flexible enough to allow any special State schemes for intellectually disabled offenders, such as the Victorian

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[31] eg The National Association on Intellectual Disability, ACT Branch, *Submission* 27 November 1987; Handicapped Citizens' Association ACT Inc, *Submission*, 20 November 1987; Dr P Gannon, Intellectually Handicapped Citizens' Council of Queensland, *Transcript*, 23 November 1987.

one,[32] to be applied to federal offenders. In the Australian Capital Territory, appropriate programs should be made available, and the court should be able to order that they be used. When the cost of providing appropriate programs is compared with the cost of keeping a person in prison for a year (approximately $30 000), it is clear that it is in the community's interest to ensure that they are provided. Similarly, the provision of such programs should minimise the likelihood of offences being repeated.

Serving imprisonment

216. *Segregation versus integration.* Whether or not mentally ill and intellectually disabled offenders sentenced to imprisonment should be separated from, or integrated with, the rest of the prison population is a difficult and controversial issue. These offenders, especially the intellectually disabled, are particularly vulnerable to the most negative aspects of imprisonment, namely sexual assault, extortion, physical brutality and victimisation.[33] Supporters of separate facilities, or at least of segregation or protection, base their arguments on these realities. Other arguments have, however, been made.

- *Principle of normalisation.* Segregation runs counter to the principle of normalisation by which mentally ill and intellectually disabled people should have available to them patterns and conditions of everyday life which are as close as possible to the norms and patterns of everyday society.
- *Not meeting needs.* The wide diversity of ability and skills means that a special facility is as unlikely as a typical prison to meet their needs.
- *Neglect etc.* The history of segregated non-custodial programs and facilities is one of neglect and lack of funding. There is no reason to suppose that there would be any difference within correctional institutions.
- *Classification.* There are difficult problems as to the process of classification and who is going to perform it. Many offenders will vigorously reject the label of mental illness or intellectual disability. Others will function in the borderline cognitive area, but will suffer from significant social and adaptive deficits. This will mean that they will be effectively handicapped in day to day activity.[34]

Even supporters of integration agree that special units are needed for some types of mentally ill and intellectually disabled offenders, particularly those with severe behaviour problems and those requiring medical supervision. It

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[32] Intellectually Disabled Persons' Services Act 1986 (Vic), s 20. This power allows the court to discharge a convicted intellectually disabled offender on condition that the person receives the services specified in an individual program plan.

[33] Hayes & Hayes 1984, 129.

[34] id, 139–40.

is not possible to apply a general rule as to whether or not integration or segregation is desirable. Each person must be individually assessed. When the Australian Capital Territory prison recommended in chapter 9 is established, it should include a special unit where ill and disabled may be accommodated and provided with appropriate programs and treatment. But there should be no presumption that such offenders will be placed in such a unit.

217. *Programs in prison.* An offender who has not been assessed before being sentenced should be assessed in the institutional or other context in which he or she has been placed by the court. The assessment should be comprehensive and should encompass the offender's physical and mental health, cognitive abilities, and social adaptive skills. When the Australian Capital Territory prison recommended in chapter 9 is established, appropriate programs for mentally ill and intellectually disabled offenders should be developed. Often these will not differ substantially from programs required for the non-disabled. As with prisoners generally, mentally ill and intellectually disabled offenders may require occupational and physical therapy, welfare services, programs addressing education and vocational skills, social and sexual relationships, programs addressing individual living skills, particularly financial management, and drug and alcohol programs. To secure offenders' motivation and co-operation, participation in these programs should be on the basis of the offenders' consent. They should be regularly reviewed. Intrusive treatment programs, such as those involving behaviour modification, and experimental programs should only be offered to offenders after full explanation and discussion of their nature and effect. Offenders who are invited to involve themselves in such programs should have the opportunity for full and free discussion of all relevant matters with a third person and should be permitted to refuse to participate in such programs.[35]

218. *Advocacy in prison.* The intellectually disabled and mentally ill often find it difficult to articulate their problems. Citizens' advocates for the intellectually disabled and mentally ill have thus become increasingly common in the community and in mental health and intellectual disability facilities.[36] Such advocates seek to give voice to the problems of the ill and disabled. In the Australian Capital Territory, the Review of Welfare Services noted strong support for the establishment of an advocacy service for the intellectually disabled.[37] When the Australian Capital Territory prison recommended in chapter 9 is established, citizens' advocates or volunteer friends[38] should become involved with mentally ill or intellectually disabled offenders. Alternatively, official

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[35] S Hayes, 'What corrections should offer the intellectually disabled offender — an idealistic view', in Challinger 1987, 86–7.

[36] see eg Guardianship and Administration Board Act 1986 (Vic) s 15–6.

[37] Vinson report, 447.

[38] See Intellectually Handicapped Citizens Act 1985 (Qld) for an example of a volunteer friend scheme.

visitors schemes, which already exist, could be developed to fill that role within prisons. However, it should not be left to the mentally ill or intellectually disabled offender to initiate contact.

Young offenders

Information about juvenile crime and punishment

219. Not nearly enough is known about the extent and nature of juvenile crime, or about police, court and correctional responses to it, for public policy in relation to the sentencing of young offenders to be developed on a fully informed basis.[39] There are no comprehensive arrangements for the collection and dissemination of statistics or research,[40] although some steps to improve this situation have been taken by such agencies as the Australian Bureau of Statistics.[41] Resource allocation, workload forecasting, performance monitoring and forward planning must benefit from improvements in the scope and accuracy of official statistics. An immediate effort is needed to upgrade significantly and co-ordinate a more comprehensive and integrated approach to juvenile justice data collection and research at national and local levels. The sentencing council recommended in chapter 10 should have a particular brief to consider information on the sentencing of juvenile offenders, and should include a representative with expertise in the juvenile justice area or a representative from amongst the specialist children's courts.

Federal and Australian Capital Territory juvenile offenders

220. Information about federal juvenile offenders is also lacking. Nevertheless the following statistics are available:

- *Numbers.* Nearly 500 young persons were prosecuted by the Director of Public Prosecutions in 1986–87. Some 74 were under 18 years, and 419 between 18 and 21 years.[42]
- *Offences.* The most common offences for which they were prosecuted were under

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[39] The efforts involved in securing the information reported in a research paper prepared for the Commission in this reference were considerable: see Freiberg, Fox & Hogan 1988 para 68–73, especially 72–3; 144–50.

[40] eg the Commission recommended in ALRC 18 that comprehensive and integrated juvenile justice statistics covering police, prosecution, court and correctional data should be published annually. This has not yet been implemented. Such recommendations have been often made eg ALRC 15 para 47; ALRC 18, para 7; Carney report 357.

[41] See Mukherjee 1983. Freiberg, Fox & Hogan 1988 provides hitherto uncollated data and analysis of the use of sanctions but at a general and preliminary level.

[42] Freiberg, Fox & Hogan 1988, Table 3.3.

- Social Security Act 1947 (Cth) s 138(1)[43]
- Crimes Act 1914 (Cth) s 29B,[44] 67(b),[45] 71(1)[46]
- Australian Federal Police Act 1979 (Cth) s 64(1).[47]

When categorised by offence, over two-thirds of charges were for fraud and misappropriation offences (including social security offences). Another 8% involve assault of, or resisting arrest by, Federal Police. Although there is in fact only a small group of federal young offenders at present, their numbers may well increase in parallel with the increasing numbers of adult federal offenders.[48] Almost 1000 final appearances were made before the Children's Court in the Australian Capital Territory during 1986.[49] Most of these were for offences against Australian Capital Territory law.[50]

Child welfare report

221. The Commission's major work on the interaction of the criminal justice system and young offenders appears in its report *Child Welfare* (ALRC 18). That report has now been implemented in the Australian Capital Territory[51] and has had a significant effect on reforms of child welfare law elsewhere in Australia. That report focussed only on reform in the Australian Capital Territory. It did not deal with juvenile federal offenders, nor did it purport to set out a national policy for juvenile offenders.

Research project

222. In early 1987, the then Commonwealth Office of Youth Affairs (in the Department of Prime Minister and Cabinet)[52] approached the Commission with a view to conducting a research project on sentencing of young offenders. Special funding was made available to employ three consultants to carry out the research and prepare a report, in collaboration with the Sentencing Reference. The report of that project was recently released as a research paper.[53] It constituted a project in its own right, separate from this reference. Aspects of

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[43] Claiming full social security benefit while in receipt of board and lodging provided by Commonwealth.
[44] Obtaining money from Commonwealth by false representation.
[45] Forging Commonwealth documents.
[46] Stealing Commonwealth property.
[47] Assaulting, or resisting arrest by, federal police.
[48] Freiberg, Fox & Hogan 1988, para 539.
[49] id App 1: figures supplied by the Australian Bureau of Statistics.
[50] Information supplied by the Director of Public Prosecutions (Cth).
[51] Children's Services Ordinance 1986 (ACT).
[52] Now the Youth Bureau, Commonwealth Department of Employment, Education and Training.
[53] Freiberg, Fox & Hogan 1988.

the project ranged beyond federal and Australian Capital Territory offenders, reflecting the wider interests of the Office of Youth Affairs. Its primary purpose was to provide a coherent account of the many legislative proposals around Australia, and in particular, to consider the Commonwealth's position in relation to these initiatives. The conclusions reached are set out in detail in the paper. The recommendations that follow concerning young offenders are based largely on the conclusions in that research paper.

Juvenile justice models

223. *'Welfare' model and 'justice' model.* The research project identified two basic strands in legislation for juvenile justice in Australia today. They are the 'welfare' model and the 'justice' model. The welfare model emphasises rehabilitation and the needs of offenders. The justice model, on the other hand, concentrates on the offence itself and the appropriate punishment for that offence. It emphasises the matters discussed in chapter 2 as the underlying rationale for punishment of offenders and the procedural and other safeguards necessary for a just punishment system.[54]

224. *Conclusion.* In line with the approach of this report, the Commission endorses the increased concentration on the justice model. This should be the approach of the Commonwealth to juvenile justice issues. But, as mentioned above,[55] the age of the offender is a relevant matter which should continue to be taken into account in sentencing. So far as the dispositions of juvenile offenders are concerned, it is not desirable that juveniles be equated with adults. Children progress through a number of developmental stages and, in these stages, think, feel and act differently from adults. The views, on the one hand, that crime is the product of individual will and, on the other, that it is the result of the interplay of certain social realities, despite the tension between them, have to be accommodated. This applies also to adults, but is of greater force in relation to young people. It is reflected in the more recent statements of principle in juvenile justice legislation.[56] Sentencing of young offenders should proceed on

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[54] No juvenile justice system is exclusively a welfare oriented system or a justice oriented system: each takes its place on a continuum between the two.

[55] See above para 170.

[56] See also UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), commentary to r 17: 'The main difficulty in formulating guidelines for the adjudication of young persons stems from the fact that there are unresolved conflicts of a philosphical nature, such as the following:

(a) Rehabilitation versus just desert;

(b) Assistance versus repression and punishment;

(c) Reaction according to the singular merits of an individual case versus reaction according to the protection of society in general;

(d) General deterrence versus individual incapacitation.'

the same 'just punishment' basis as sentencing of adults. But increased and significant emphasis should be given to the possibilities for rehabilitation in the sentencing of young offenders, within the context of the imposition of a just punishment. Imprisoning young offenders appears to increase the chances of becoming an adult offender.

The Crimes Act s 20C

225. The principal Commonwealth statutory provision dealing with juvenile offenders is in the Crimes Act 1914 (Cth).

> **Offences by children and young persons**
>
> 20C. (1) 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 the law of the State or Territory.

This provision has three areas of uncertainty.

- *Definitions.* There is no definition of the phrase 'child or young person'. Definitions of this expression in State legislation do not govern the federal Act.
- *Relationship of s 20C with other federal laws.* It is not clear whether s 20C excludes the operation of all disposition options under other federal law,[57] and whether it can be used to deal with a young offender more severely than would otherwise be permitted. A juvenile should not be in a worse position than an adult. In particular, the sentencing options picked up by s 20C may not be restricted to those found in children's court or juvenile justice legislation. If local law places age, procedural or other restrictions on access to a particular measure, those limitations would apply to juvenile federal offenders.
- *Disuniformity.* The sentences imposed on federal young offenders will vary widely depending on where in Australia the prosecution is being conducted. Significant disparities amongst federal young offenders thus result, since the juvenile justice systems of the States and Territories differ greatly.[58]

The Commission recommends that the approach underlying s 20C should not continue. Instead, the protections specifically afforded to federal offenders by provisions such as the Crimes Act 1914 (Cth) s 17A[59] should specifically be available for juvenile federal and Australian Capital Territory offenders.[60] So far

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[57] eg Crimes Act 1914 (Cth) s 20AB.

[58] For the differences, see Freiberg, Fox & Hogan 1988, para 66, 527.

[59] See above para 55–6.

[60] cf ALRC 18 App A, Note, para 1–3.

as the permissible dispositions for federal juvenile offenders are concerned, the same approach should be adopted by the Commonwealth as has been adopted in relation to adult offenders. That approach is essentially embodied in the Crimes Act 1914 (Cth) s 20AB. It involves an approved Commonwealth list of sentencing options specified in or under Commonwealth legislation. That approach should be adopted, in place of s 20C, for juvenile offenders.

Commonwealth role in development of juvenile sentencing policy

226. The Commonwealth has a role in juvenile justice matters beyond simply making provision for federal and Australian Capital Territory juvenile offenders. There are significant differences between jurisdictions in juvenile justice policy.[61] The Commonwealth is in a position to influence, and play a leadership role in, the development of co-ordinated juvenile justice policies throughout Australia in several ways. One is from its role in accepting and applying international agreements, covenants and standards, in particular, the United Nations Minimum Standards for the Administration of Juvenile Justice (the Beijing Rules) and the proposed United Nations Convention on the Rights of the Child. The Beijing Rules should be adopted by Australia. Secondly, the Commonwealth is a member of a number of national policy-making and policy-co-ordinating bodies with an interest in the sentencing of young offenders. These are the Standing Committee of Attorneys-General, the Council of Social Welfare Ministers and the Standing Committee of Corrections Ministers. The Commonwealth should, through these organisations, promote the development of an equivalent, in the juvenile justice sphere, of the standard guidelines for Australian prisons, which only apply to adult correctional institutions. The Commission notes that in many respects the more recent State legislation is in accordance with the minimum standards set out in the Beijing Rules. Finally, the adoption of the recommendations concerning the Crimes Act 1914 (Cth) s 20C will have an added impact in promoting consistency of treatment for juvenile offenders.

Female offenders

Current situation

227. Little Australian research has been done on the impact of sentencing on women.[62] Table 3 shows the relative use of community corrections and imprisonment for male and female offenders in all Australian jurisdictions.

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[61] eg the custodial options rate for juvenile offenders in the NT is three times the national average and WA and the NT have signficantly higher rates of imprisonment for juvenile offenders than the national average: Freiberg, Fox & Hogan 1988, para 525.

[62] For a survey of the Australian literature on women, crime and criminal justice up to 1982, see Edwards-Hiller 1982.

Table 3

Community-based corrections and imprisonment rates by sex

Offences	Rate of use of community-based corrections per 100 000 population		Rate of use of imprisonment per 100 000 population		Ratio of rate of use of community-based corrections to rate of use of imprisonment, per 100 000 population	
	M	F	M	F	M	F
Homicide	10.4	0.9	19.6	1.45	0.5	0.6
Assault	53.8	5	12.1	0.38	4.4	13.1
Break/enter	92.2	9	34.2	1.51	2.7	6
Fraud, etc	33.2	18.8	6.8	0.93	4.9	20.2
Other theft	94	34.8	15.5	1.33	6.1	26.2
Drug possession	28.6	10.6	4.4	0.77	6.5	13.7
Drug trafficking	15.6	3.1	12.3	1.07	1.3	2.9

Source: Calculated from Walker & Biles 1986b.

On these figures women receive a non-institutional sentence

- for breaking and entering — twice as often as men
- for assault — three times as often and
- for theft — four times as often.

However, it cannot be assumed that corresponding offences committed by men and women are comparable in character. It is possible that some, even the majority, of offences committed by women are less serious. Differences in the nature of the offences and the previous records of the offenders may in part explain the discrepancies in the imprisonment rates between the sexes. But some of the difference may be gender-based and may be related to a desire by sentencers to keep women, especially mothers, out of prison. It is not possible to determine to what extent such a factor is operating on the information presently available.

Gender as a fact relevant to sentencing

228. The gender of the offender should not, in itself, be a matter relevant to sentencing; that is, an offender should not be treated differently simply because

of his or her sex. This does not mean, however, that problems of particular relevance to female offenders should be ignored. A factor which should carry considerable weight in the sentencing decision is being the mother of a young child. Only in exceptional circumstances, which constitute a real concern for the safety of others, should such a parent be imprisoned. Several submissions to the Commission stressed the harm caused to children by the imprisonment of a parent.[63] The United Nations Declaration of the Rights of a Child provides that:

> A child of tender years shall not, save in exceptional circumstances, be separated from his mother.[64]

Female offenders, particularly female prisoners, experience special problems. Some of their problems are gender specific, such as child-bearing, but most result from the high levels of poverty and unemployment experienced by women offenders and their responsibilities for child-rearing. The recommended statutory list of factors to be taken into account in sentencing should ensure that factors such as poverty, unemployment and child-rearing responsibilities are appropriately taken into account for both male and female offenders.[65] The fact that there are far fewer female than male offenders has also meant that the criminal justice system has developed along paths designed predominantly for male offenders. Fewer programs and facilities are available for female offenders. Community service and attendance centre orders are not feasible sentencing options for offenders with primary child care responsibility unless alternative child minding arrangements are available. Consultations with community service order scheme workers in the Australian Capital Territory indicate that so far child care has not been a major problem, because when problems with child care have arisen, placements are arranged where child care can be provided. Nevertheless, if the scheme continues to expand, and particularly if community service becomes a common alternative to the fine, the lack of organised child care could be a problem. Responsibility for child care should not be allowed to limit the range of sentencing options available for offenders. To ensure that offenders, and in particular, women, do not miss out on community sentencing options for this reason, child care facilities should be part of the recommended Australian Capital Territory attendance centre scheme[66] and the existing community service scheme.

Further research

229. Chapter 10 of this report recommends that a sentencing council be established to co-ordinate, among other things, research and statistical information on sentencing. One area that it should consider is the relationship between

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[63] eg Children of Prisoners Support Group *Submission* 20 November 1987; Fairlea Women's Prison Council (Dame Phyllis Frost OBE, Chairperson) *Submission* 23 November 1987.

[64] See also International Covenant on Civil and Political Rights art 24(1).

[65] See above para 170.

[66] See above 127.

gender and sentencing. More specifically, the sentencing council should address the question whether discrimination — either positive or negative — is being practised in relation to either sex, either in the severity of sanction or in the choice of sentencing option. If discrimination is found to exist, appropriate education programs can be developed as part of the sentencing council's educational role.

Habitual offenders

230. The Crimes Act 1914 (Cth) provides that

> 17. (1) Where a person convicted of an indictable offence against the law of the Commonwealth has been previously convicted on at least 2 occasions of indictable offences against the law of the Commonwealth, or of a State, or of a Territory, the court before which he is convicted may declare that he is a habitual criminal, and may direct . . . that on the expiration of the term of imprisonment then imposed upon him, he be detained in prison during the pleasure of the Governor-General.[67]

The supposed rationale behind this little used habitual offender legislation is not to give additional punishment but to provide protection for the public and an opportunity for the offender to be rehabilitated. However, it is out of keeping with the modern approach to sentencing and amounts to an unfair means of preventive detention. It is inconsistent with the International Covenant of Civil and Political Rights.[68] The punishment imposed can no longer be considered a just punishment, since it is not linked to the commission of a particular crime[69] but is premised on the assumption that it is possible to predict dangerousness and future criminality. Insofar as s 17 is based on the notion that prison is an appropriate setting for rehabilitation, the evidence suggests that this is unwarranted.[70] The Crimes Act 1914 (Cth) s 17 in reality authorises preventive detention in the absence of satisfactory evidence of the likelihood of fresh offences. This is not justifiable as a preventive measure, as a punishment or to promote rehabilitation. It should be repealed.[71]

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[67] No equivalent exists for ACT offenders: see Crimes (Amendment) Ordinance (No 4) 1986 (ACT).

[68] Art 14.1 provides: 'All persons shall be equal before the courts and tribunals'.

[69] See above para 27.

[70] See above para 48–50.

[71] See Mitchell report 89.

8. Serving imprisonment

Scope of chapter

231. This chapter deals with a number of matters affecting the punishment an offender undergoes within prison. It deals chiefly with prison conditions for federal and Australian Capital Territory prisoners and two major civil disabilities attaching to imprisonment and conviction (loss of voting rights and loss of access to the courts).

Federal prisoners

Prison conditions: the issue

232. The conditions under which federal and Australian Capital Territory prisoners serve their sentences is an important aspect in the Commission's inquiry. Laws which govern the management of, and the conditions in, the prisons in which federal and Australian Capital Territory prisoners are incarcerated are clearly laws 'relating to the imposition of punishment for offences'. At the very least, they are 'related matters'. At present, more than 80 State or Territory prisons are available to house federal prisoners.[1] Australian Capital Territory prisoners are housed in New South Wales prisons. The poor conditions which prevail in some Australian prisons underline the importance of ensuring that, for federal and Australian Capital Territory prisoners, the conditions of confinement should be humane. The first interim report in this reference, *Sentencing of Federal Offenders* (ALRC 15), concluded that action was necessary to improve prison conditions throughout Australia.[2] Prison administrations generally make no distinction between federal prisoners, or Australian Capital Territory prisoners, and local prisoners. As has been noted earlier in this report,[3] the Commonwealth relies heavily on existing State criminal justice systems to handle offences under its laws. This course makes it necessary, as a matter of practical reality, for State and Territory prisons and correction services to treat federal offenders in much the same way as local offenders. The Commission accepts, however, that it is a fundamental principle that a polity which convicts and imprisons offenders against its laws should accept the ultimate responsibility for the standards under which those offenders are imprisoned. Accordingly, the ultimate responsibility for the conditions under which federal and Australian Capital Territory prisoners are incarcerated is federal. The question is whether that responsibility is adequately discharged by the current arrangements.

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[1] Ch 9 recommends that no federal prison system be established at this time.

[2] ALRC 15 para 205–22.

[3] See above para 3.

First interim report

233. ALRC 15 concluded that the present arrangements do not discharge the Commonwealth's responsibility in this matter. Under those arrangements, the Commonwealth takes State and Territory prisons as it finds them. That report suggested

> the Commonwealth should ensure that Federal prisoners, even where held in State or Territory prisons, are not subjected to uncivilised or otherwise unacceptable standards of treatment or conditions of detention. . . . such responsibility should not be passed off to other governments but should be recognised and followed by action to the extent of the Commonwealth's constitutional power.[4]

That report also explored a number of constitutional avenues through which the Commonwealth could implement minimum standards for federal prisoners. A key concern in that report was the elimination of disparity of treatment between federal offenders in different jurisdictions.[5] Since that report was published, all States and Territories are moving to adopt and implement Minimum Standard Guidelines based on the United Nations Standard Minimum Rules. Standards in Australian prisons have significantly improved but most prisons still fail to meet at least some of the minimum standards.[6] Budgetary considerations are the main reasons given for non-compliance.

Recommendations

234. *General approach.* Responses to ALRC 15, especially from corrections administrators, showed particular concern at the proposal that federal prisoners (and by extension, Australian Capital Territory 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. The Commission therefore accepts that the continuation of a policy of intra-jurisdictional parity of treatment for federal prisoners and Australian Capital Territory prisoners is the only practical approach while such prisoners continue to be housed in State and Territory prisons. On the question of treatment of prisoners, it agrees with Mr David Biles of the Australian Institute of Criminology, who, in discussing whether to prefer 'intra-jurisdictional injustice' or 'inter-jurisdictional injustice', said:

> I have absolutely no doubt that the form of injustice I would most want to avoid is that which is most apparent, that is, the injustice that would be seen within the same jurisdiction.[7]

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[4] ALRC 15 para 242.

[5] ALRC 15 para 151.

[6] Particular problem areas seem to be separation of categories of prisoners, accommodation, exercise and sport, work and remandees: Loof & Biles 1985, 128, 130.

[7] D Biles, 'A Matter of Comparative Injustice', in Potas 1987, 432.

The Commission's acceptance of the continuation of the present policy of intra-jurisdictional parity of treatment of prisoners is, however, subject to some qualifications. First, the Commonwealth should not be seen as being relieved of its ultimate responsibility for federal prisoners simply by arranging for them to be housed in State or Territory prisons. It has a responsibility to co-operate with prison administrations in all jurisdictions to upgrade prison standards for the benefit of federal prisoners — and thus for all prisoners — to at least the Minimum Standard Guidelines level. Secondly, changes which do not cause management difficulties within prisons should be implemented for the benefit of federal and Australian Capital Territory prisoners where these are otherwise justified. Several recommendations for changes of this kind follow.

235. *Medicare cover.* At present, prisoners are not covered by Medicare. This is unacceptable in principle. Not only is it an unnecessary punishment, it runs contrary to the underlying principle of Medicare, namely, the principle of universal health care coverage. All prisoners, federal, State and Territory, should be covered by Medicare to the same extent as members of the community generally for medical costs incurred for treatment provided otherwise than by prison medical officers.[8] No legislation is needed to implement this recommendation: the Minister, under the Health Insurance Act 1973 (Cth) s 19(2), can achieve the desired result simply by issuing a direction to that effect.

236. *Harsh punishments on federal prisoners.* In a discussion paper, it was proposed that legislation require that federal prisoners should not be punished by way of dietary restrictions, corporal punishment or being placed in solitary confinement.[9] This is in accordance with the policies of most jurisdictions. However, some jurisdictions still retain the capacity to impose solitary confinement as a punishment for serious prison offences. In the Commission's view, the psychological and other detrimental effects of solitary confinement outweigh whatever value it may have as a punishment, even for serious prison offences. The Commission adheres to the suggestion in the discussion paper.

237. *Information.* At the public hearings held in connection with this reference, a Commonwealth prisoner complained that Commonwealth prisoners do not have access to criminal law texts and Acts relevant to Commonwealth criminal law.[10] This situation should be contrasted with the position of State and Territory prisoners who, through prison libraries, will normally have access to materials on the criminal law of the relevant jurisdiction. The Commission recommends that basic Commonwealth criminal law materials be provided to the libraries of all prisons where Commonwealth offenders are imprisoned. In addition, prisoners should be properly informed of their rights and obligations

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[8] 'Special importance was attached to ensuring that offenders and their families were provided access to the health and social welfare benefits which were available to other citizens': UN Fifth Congress 1976, para 282.

[9] ALRC DP 31 para 73; see International Covenant on Civil and Political Rights art 7.

[10] Matheiesen, *Transcript* 618 (23 November 1987).

within the prison, and in relation to parole.[11] Booklets and pamphlets setting out these matters should be provided to federal and Australian Capital Territories prisoners on their reception into prison.

238. *A federal prison co-ordinator.* The Commission recommends that a special officer be appointed by the Commonwealth to monitor conditions under which federal prisoners are being held. The purpose of this appointment would not be to supplement or supplant existing grievance mechanisms or review mechanisms for federal prisoners' complaints, or for prisoners' complaints generally. It would simply be to ensure that the federal government has available to it accurate, comprehensive and up to date information on conditions under which federal prisoners are being housed. It is essential that this kind of information be available to the Commonwealth to enable it to satisfy itself that its prisoners are being housed in acceptable conditions: the fact that federal prisoners are housed in State institutions, under constitutionally sanctioned arrangements, does not relieve the federal government of the ultimate responsibility for these offenders. Any of the Attorney-General's Department, the Australian Institute of Criminology or the Human Rights and Equal Opportunity Commission would be an appropriate agency within which this officer could be located. Because of the role envisaged for the sentencing council recommended in chapter 10, it would be appropriate for this officer to be an *ex officio* member of the sentencing council.

239. *Police lock-ups: Minimum Standard Guidelines.* The Draft Minimum Standard Guidelines for Australian Prisons (as revised in 1987) specifically exclude police lock-ups. Previous drafts of the Guidelines did not make this exclusion and the UN Standard Minimum Rules for Prisons, upon which the Guidelines are based, are taken to cover police lock-ups. The Commission does not suggest that the Guidelines should be simply extended to police lock-ups. However, the production and implementation of Minimum Standard Guidelines specifically directed at police lock-ups should be an urgent priority, especially given the number of Aboriginal deaths in custody which have occurred in police lock-ups.

240. *Minority view: federal funding for State and Territory prisons.* One member[12] also considers that a suggestion in a Commission discussion paper, that the federal government should provide funding to improve conditions in State prisons, should be taken up. It is not taken up in this report. Accepting an intra-jurisdictional approach to uniformity does not relieve the Commonwealth of its responsibility for federal prisoners. In addition, having ratified the International Covenant on Civil and Political Rights, it has certain responsibilities towards all prisoners. If national uniformity of treatment for federal prisoners is an unacceptable option and corrections are to remain an exclusive area of State responsibility, this member considers that an effective way for the

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[11] See above para 98.

[12] Mr Zdenkowski.

federal government to meet its obligations is to assist the States financially in the area of corrections. This could be done in a number of ways. One option which would give the government a significant degree of policy input would be for it to establish, in consultation with the States and Territories, a program of federal grants under section 96 of the Constitution. Section 96 grants could be used for the purpose of upgrading prison conditions, providing additional programs and facilitating compliance with the Minimum Standard Guidelines for Australian prisons. Another option (not inconsistent with the first) would be for existing federal government departments charged with special functions relevant to the administration of prisons (such as health, education, social security and Aboriginal affairs) to fund specific programs. This already occurs to some extent with, for instance, the Department of Aboriginal Affairs financing Aboriginal welfare workers in some jurisdictions. The option of increasing untied general revenue grants is, in this member's view, less effective as there is no way of ensuring that such extra funding would be spent on improving prison conditions.

Australian Capital Territory prisoners

241. Australian Capital Territory prisoners are housed in New South Wales gaols, there being no Australian Capital Territory prison. Recommendations made later in this report include a recommendation that such a prison be established. But it will be some years before this can be done: there are higher priorities for the Australian Capital Territory than the construction of a prison. Accordingly, it can be expected that, for the foreseeable future, Australian Capital Territory prisoners will continue to be housed in New South Wales gaols. For the reasons which apply to federal offenders, Australian Capital Territory prisoners should be subject to the same prison conditions as their New South Wales counterparts.

Disabilities of prisoners and other convicted persons

Voting

242. *Present restrictions.* The punishment associated with imprisonment is the removal from the community and loss of liberty. In Australia, however, imprisonment, and even some non-custodial sentences, lead to the loss of, or restrictions upon, certain civil liberties which are unconnected with the punishment imposed. The removal of most of these civil disabilities which remain after the sentence has been served has been dealt with in an earlier Commission report.[13] Under the Commonwealth Electoral Act 1918 (Cth), federal and Australian Capital Territory offenders who are 'under sentence for treason, treachery or an offence punishable by imprisonment for five years or longer' are

[13] ALRC 37 ch 2.

not qualified to vote.[14] Federal offenders' voting rights in State or Territory elections depend on local State law. The following offenders are disenfranchised under State law:

- *New South Wales*: those in prison and serving sentence of 12 months or more[15]
- *Queensland*: those 'under a sentence of imprisonment'[16]
- *Tasmania*: those in prison under any conviction[17]
- *Victoria*: those under sentence for an offence punishable by imprisonment for five years or more or have been convicted of treason[18]
- *Western Australia*: those attainted of treason or serving an actual sentence of one year or longer. In addition, various categories of persons in custody found to be of unsound mind and other categories of persons serving indeterminate sentences are disenfranchised.[19]

There is no restriction on franchise by reference to status as a prisoner in the Northern Territory or South Australia.[20] The availability of appropriate electoral machinery to ensure that prisoners actually can vote is just as important as the existence of the right itself. It varies greatly between jurisdictions. In some jurisdictions no provision is made for remand and undisqualified prisoners to vote — they are effectively overlooked and their franchise denied them. Other jurisdictions offer postal voting facilities.

243. *Assessment and recommendations.* The denial of the right to vote is an unnecessary restriction upon the civil rights of convicted persons. It is not a just punishment, especially if imposed in addition to other punishments. The bases for its existence are outmoded and anachronistic.[21] All restrictions on the right to vote based on conviction or imprisonment should be removed. The Commonwealth Electoral Act 1918 (Cth) should be amended by omitting paragraphs 93(8)(b)–(c).[22] Practical measures to ensure that voting rights can be exercised should be introduced. Postal voting arrangements would be the most convenient method. The provisions currently in Commonwealth and some State legislation for a register of general postal voters enabling certain

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[14] Commonwealth Electoral Act 1918 (Cth) s 93(8)(b)–(c). In the course of its consultations during this reference the Commission was told by the Australian Electoral Commission that that Commission accepts that these provisions are unworkable and now only considers the length of the actual sentence.

[15] Parliamentary Electorates and Elections Act 1912 (NSW) s 21(b).

[16] Elections Act 1983 (Qld) s 44.

[17] The Constitution Act 1934 (Tas) s 14(2).

[18] The Constitution Act 1975 (Vic) s 48.

[19] Electoral Act 1907 (WA) s 18.

[20] See Electoral Act 1979 (NT) s 27(1); Constitution Act 1934 (SA) s 33.

[21] See Joint Select Committee on Electoral Reform 1986, 14–5, but see 218; Nagle report recommendation 177, 389.

[22] This would also enfranchise all State and Territory offenders in federal elections.

specified persons (including prisoners) to be sent a postal vote application form automatically at the time of each election is an effective method of ensuring that postal votes are made available to prisoners.[23] The presence of a polling booth in the prison increases the likelihood of prisoner voting and removes the possibility of any allegations (however unjustified) of interference by prison authorities with postal votes. Prison authorities, as they already do in some jurisdictions, should issue detailed information to prisoners concerning voting rights and voting arrangements. Campaign literature for all candidates should be available to all prisoners. Some disquiet has been expressed at the idea of the prison being the enrolment address.[24] This may create something of a prison electorate. The Australian Electoral Commission's suggestion, that prisoners be enrolled in

- the subdivision of enrolment prior to sentence, failing this
- the subdivision for which the prisoner was entitled to enrol prior to sentence, failing this
- the subdivision of the prisoner's next of kin, failing this
- the subdivision of birth, failing this
- the subdivision with which the prisoner has or had the closest connection,[25]

appears to be an appropriate approach. However, prisoners should have the option, if they so wish, to have the prison address recorded as their electoral address. If thought desirable, a length of sentence requirement could be attached to this option.[26]

Access to the courts

244. Under the common law, a prisoner serving a life sentence for a capital felony is disabled from suing in the courts until pardoned or the sentence is served.[27] The extent of the common law restriction is unclear. It has been held that the restriction extends to persons in custody under non-capital sentences whose offences are deemed by statute to be felonies.[28] Although the common law restriction has now been removed in New South Wales,[29] it would appear that it still applies in the Australian Capital Territory. The precise position of federal offenders has never been dealt with. It would seem that, at least in respect of access to State courts, federal prisoners are covered by the common

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[23] The SA system of electoral visitor voting at metropolitan prison establishments could also be considered.

[24] Prisoners frequently move from one prison to another and maintaining up to date rolls could be difficult.

[25] Joint Select Committee on Electoral Reform 1986, 15.

[26] This occurs in SA. There, only prisoners incarcerated for two years or more can list the prison as their residence for electoral purposes.

[27] *Dugan v Mirror Newspapers Ltd* (1979) 53 ALJR 166.

[28] *Macari v Mirror Newspapers Ltd*, unreported, NSW Supreme Court (4 March 1980) Cantor J.

[29] Felons (Civil Proceedings) Act 1981 (NSW).

law restriction and its statutory modifications. The standing of federal prisoners in State courts would therefore appear to vary between jurisdictions. In Victoria, for example, there would be no restriction, because all bars to access that related to a person's prisoner status have been removed. South Australia, however, bars actions by all convicted prisoners.[30] The position in respect of access to federal courts has never been decided. The Commonwealth government has an obligation under international law to ensure that all people have equal access to the courts. Current restrictions on access, and any ambiguities as to access, should be removed. Conviction for a federal or Territory offence (other than an offence under Northern Territory or Norfolk Island law)[31] should not of itself create an incapacity to sue in any court. Conviction for any offence should not create an incapacity to sue in federal courts or courts of a Territory other than the Northern Territory or Norfolk Island. A suitable provision to this effect would read as follows:

> **Certain conviction not to create incapacity to sue**
>
> (1) A person shall not, merely because he or she has been found guilty or convicted of an offence against or arising under an enactment[32] or a law of or in force in a Territory other than the Northern Territory or Norfolk Island, be incapable of instituting and maintaining any proceeding in a court.
>
> (2) A person shall not, merely because he or she has been found guilty or convicted of an offence against or arising under an enactment or a law of or in force in a State or Territory, be incapable of instituting and maintaining a proceeding in the High Court, in another federal court or in a court of a Territory other than the Northern Territory or Norfolk Island.
>
> (3) A person shall not, merely because he or she has been found guilty or convicted of an offence against or arising under an enactment or a law of or in force in a State or Territory, be incapable of instituting and maintaining a proceeding in:
>
> (a) a court of the Northern Territory or Norfolk Island; or
>
> (b) a court of a State, in respect of a matter mentioned in section 75 or 76 of the Constitution.
>
> (4) It is immaterial whether the finding or conviction was made before or after the commencement of this section.

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[30] Criminal Law Consolidation Act (SA) s 330.

[31] This exception is included because of the assimilation, for practical purposes, of these Territories with the States: see ALRC 27 para 82.

[32] Which should be defined to include a federal Act, a Territory Ordinance (other than a law of the NT or Norfolk Island) and subordinate legislation made under any of these.

9. Resources

Scope of chapter

245. The Commission's recommendations for custodial and non-custodial sentencing options are based on the assumption that adequate resources will be provided for their operation. This chapter examines the resources that are needed to implement these proposals properly. It discusses whether a federal prison system is needed, whether a prison should be built in the Australian Capital Territory and the need for a secure psychiatric facility. It also recommends the most appropriate allocation of financial resources. Finally, it makes a number of suggestions for the provision of particular facilities and services in the Australian Capital Territory.

A federal prison system

The current situation

246. In November 1987 there were 505 federal prisoners in custody. This figure represented an increase of 31 prisoners since August 1987 and is indicative of the steady increase in the number of federal prisoners in recent years. There are no federal prisons in Australia. All federal prisoners are held in State or Territory prisons. The practice of holding federal prisoners in State prisons is provided for by the Commonwealth Constitution s 120, and the cost of accommodating them is met by the States (although the Commonwealth provides financial assistance through its untied general revenue grants).

Arguments for a federal prison system

247. From time to time it has been suggested that there should be a separate federal prison system either with prisons being constructed in each State and Territory or one federal prison being established for all federal prisoners. Justifications advanced include:

- *Uniformity.* There is no uniformity of treatment for federal prisoners. Prison management, conditions and programs vary considerably between jurisdictions. It is neither feasible nor desirable to impose a completely separate regime for federal prisoners within State or Territory prisons. Even a separate federal conditional release scheme can raise difficulties.

- *Welfare.* Because federal prisoners are sentenced under Commonwealth law, the federal Government has an obligation to provide for their welfare. In addition, the Government has obligations under international law to

ensure that prisoners are treated humanely.[1] Any rehabilitative objective that can be achieved in the context of a prison sentence imposed under Commonwealth law ought not to be undermined by the conditions of imprisonment. It can thus be argued that the current arrangements are not the most appropriate way for the federal government to discharge its responsibilities because they leave the federal Government with no direct control over federal prisoners' experience of imprisonment. The establishment of a separate federal prison system would give the federal Government the direct control needed to ensure that the welfare of federal prisoners is properly catered for.

- *Burden on States.* Federal prisoners contribute to the overcrowding problems experienced in most State prisons. The New South Wales Government, whose prisons accommodate the majority of federal offenders,[2] stated to the Commission that

  > in the absence of the Commonwealth paying for its prisoners the Commonwealth should construct a federal prison.[3]

  This view would appear to be shared by other State governments.[4]

Arguments against a federal prison system

248. There are, however, practical and economic reasons not to proceed with a federal prison system.

- *Uneconomical.* The uneven dispersal of federal prisoners throughout the jurisdictions makes the idea of establishing federal prisons in all or most jurisdictions unrealistic from a financial point of view. For example, in October 1987, there were two federal prisoners in Tasmania and three in the Northern Territory.

- *Impractical to provide suitable programs.* The small number of federal prisoners in some jurisdictions would also make it impractical to supply a full range of programs and services. Federal prisoners in some jurisdictions would, in effect, be sentenced to isolation.

- *Hardship.* To establish a single federal prison, in even the most populous State, would cause extreme hardship and expense to prisoners and their families from other jurisdictions.

- *Increased imprisonment rates.* Some evidence suggests that prisons are 'capacity driven' — that is, the greater the capacity of a prison, the more

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[1] International Covenant on Civil and Political Rights art 10; see above para 30.

[2] In October 1987 there were 255 federal prisoners in NSW prisons.

[3] Hon J Akister, Minister for Corrective Services (NSW) *Submission* 2 December 1987.

[4] It was unanimously agreed by State and Territory corrections administrators at their annual conference in Alice Springs in November 1987.

offenders are sent to it.[5] If this thesis is correct, constructing a separate federal prison system could lead to increased rates of imprisonment for federal prisoners.

Recommendation

249. A separate federal prison system would increase the opportunities for the federal Government properly to meet its responsibilities towards federal prisoners. However, it is unrealistic at this stage to recommend the construction of federal prisons in each jurisdiction, both for financial and practical reasons. A single federal prison would be unacceptable because it would cut many prisoners off from their families and communities, disrupting family and community ties and reducing the prospects for rehabilitation. Since this is not the time for a separate federal prison system the present approach should be continued. Government resources would be better spent in improving community based sentencing options and assisting the States and Territories to improve conditions and provide more programs in existing prisons. However, if the number of federal prisoners continues to increase, this position may change. The need for a federal prison system should be kept under review. In a discussion paper the Commission tentatively suggested that any prison system established in the Australian Capital Territory be expanded so that federal offenders who so chose could be transferred there.[6] No submissions to the Commission supported this proposal. The Commission does not recommend it. It would lead to an unacceptable risk of increasing Australian Capital Territory imprisonment rates. Transfer of prisoners between jurisdictions should be dealt with under the transfer of prisoners legislation without any special federal rights of transfer.

An Australian Capital Territory prison system

The current situation

250. The Australian Capital Territory currently has only a remand centre. It does not have a prison. All sentenced Australian Capital Territory prisoners are transferred to New South Wales to serve their sentence. The initial question in relation to the way Australian Capital Territory offenders serve the imprisonment period of their custodial orders is, therefore, whether the Australian Capital Territory should have its own prison system.

Arguments for an Australian Capital Territory prison

251. *Responsibilities of the Australian Capital Territory.* The Australian Capital Territory now has a greater population than the Northern Territory and a population not significantly less than that of Tasmania. It has been argued that one of the responsibilities of a community of this size is to care for all

[5] Cory & Gettinger 1984, 9; Harding 1987.

[6] ALRC DP 31 para 70.

its people, including those who have been sentenced to a term of imprisonment. As one submission phrased it,

> the Australian Capital Territory must learn that they cannot hide the social problem of crime by pushing it into New South Wales.[7]

Arguably, transporting prisoners outside the jurisdiction for the period of their imprisonment is an abandonment of this responsibility.[8]

252. *Abandonment of control.* Under current arrangements, control of the sentence served by Australian Capital Territory prisoners is abandoned. The premise of this argument is that a community which creates a criminal justice system with powers of imprisonment should have the ability to oversee the sentences, especially the prison sentences, that the system imposes. At present, Australian Capital Territory authorities have virtually no influence over placement, classification, available programs, prison conditions or any other aspect of Australian Capital Territory prisoners' day to day conditions: these powers are all exercised by New South Wales prison authorities. For example, even if Australian Capital Territory sentencers were to classify prisoners, New South Wales prison authorities would not be bound by such decisions, and even if they were prepared to accept them, the decisions would still have to be subject to the availability of accommodation in the prisons at the various classification levels. It has already been noted that the laws concerning the impact of remissions on sentences create a number of difficulties.[9] These are accentuated by Australian Capital Territory prisoners having to serve their terms in New South Wales prisons. The Australian Capital Territory can only have real control over the sentence served by establishing its own prison system.

253. *Personal hardship to offenders and their families.* Prisoners and their families have expressed almost unanimous support for the idea of a prison in the Australian Capital Territory because the present arrangement makes it difficult and costly for prisoners to maintain contact with their families and friends.[10]

254. *Conditions in New South Wales prisons.* Although improvements have been made, conditions in New South Wales prisons have been repeatedly criticised. Like other Australian prison systems, problems include extreme overcrowding and antiquated conditions in many prisons, a lack of facilities and resources for providing work, education and life skills programs in some prisons

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[7] Liberal Party of Australia, as represented at the Fraser Federal Electorate conference of the Australian Capital Territory Liberal Party *Submission*, 30 October 1987.

[8] Law Society of the ACT *Submission*, 5 February 1988.

[9] See above para 70, 86.

[10] See Biles & Cuddihy 1984; cf Children of Prisoners Support Group *Submission* 20 November 1987: 'The interest of Australian Capital Territory prisoners and their families must be weighed against the future potential for increasing number of prisoners — and their families — who may otherwise not have been caught up in the process of imprisonment at all'.

and a serious lack of drug and alcohol treatment programs.[11] The federal Government has a responsibility, both to the community and Australian Capital Territory prisoners, to ensure that offenders are not kept in such conditions. This is argued on the basis that the government should attempt to reduce the negative impact of imprisonment on offenders and thus provide the best long term protection for the community. This is best done by providing prisoners with humane confinement and work, educational and life skills programs which will help them lead a law abiding life upon their release. The conditions and lack of programs in New South Wales prisons are more likely to lead to continuing criminality than rehabilitation.

255. *Work release programs.* Australian Capital Territory prisoners who wish to return to the Australian Capital Territory upon release do not receive the same advantages as their New South Wales counterparts from work and educational release programs. Involvement in the same programs in the Australian Capital Territory would increase their chances of being able to continue with training programs or employment upon the completion of their sentence.

Arguments against an ACT prison system

256. *Keeping imprisonment rates low.* It has been argued that, if an Australian Capital Territory prison system were to be established, it would lead to an increase in the Australian Capital Territory imprisonment rate. Deficiencies of the New South Wales prison system, and the hardships imposed by present transportation arrangements, have arguably deterred sentencers from using imprisonment more often as a sanction. The availability of prison facilities in the Territory might therefore lead to increased imprisonment rates for the Australian Capital Territory. Supporters of the thesis that prisons are 'capacity driven' (that is, that the greater the capacity of the prison system, the greater the rate at which people are sent to it) argue that, where facilities exist, they will be filled. However, the Commission's discussions with Australian Capital Territory magistrates indicate that they try to keep offenders out of prison as much as possible. It is unlikely they would depart from this principle if a prison were established in their jurisdiction.

257. *Entrenching imprisonment as a punishment.* It cannot be demonstrated that prisons have had the effect of rehabilitating offenders. On the contrary, evidence suggests that imprisonment is a central predictor of the likelihood of an offender re-offending and possibly committing more serious crimes. Drug abuse, sexual assault and other forms of violence and intimidation may also occur in an Australian Capital Territory prison system, although contemporary knowledge about prison design and human management should greatly minimise this risk. It is argued that the current lack of an Australian Capital Territory prison system provides an ideal base upon which to build greater dependence on non-custodial community based sanctions. To establish a prison system would entrench the notion of imprisonment as a sanction that is broadly

[11] Hon J Akister, Minister for Corrective Services (NSW) *Submission* 2 December 1987.

applicable, rather than promoting the idea that imprisonment should only be used for the most serious offences. On the other hand, the Commission does not propose that imprisonment should be the sole, or even the chief, form of punishment available in the Australian Capital Territory. Prison would be only one of a number of options ranging from non-custodial sanctions to full time incarceration. The introduction of attendance centre orders and the greater emphasis placed on community service orders should enable the diversion of many offenders away from prison into these community based programs. Furthermore, the introduction of prison programs such as drug rehabilitation programs would be aimed at reducing the risk of the offender committing further crimes.

258. *Costs.* The costs involved in establishing and running a prison system in the Australian Capital Territory would be considerably greater than the cost of accommodating Australian Capital Territory prisoners in New South Wales prisons.[12] Economies of scale can also be achieved by using New South Wales prisons. The New South Wales system is large enough to justify providing the full range of services and programs required by different classifications of prisoners. It is argued that the small number of Australian Capital Territory prisoners could not justify such a range of services. However, a contrary argument is that more flexibility will be available in programs provided only for small groups. In meeting the policy goals set out in the Commission's recommendations, cost should not be the prime consideration to be taken into account. The New South Wales system has often been criticised for its inadequate facilities and resources. The prisons there are overcrowded and antiquated. The alternative of humane containment in the Australian Capital Territory is a policy worth pursuing, even though it is likely to involve greater federal expenditure.

259. *Diversity of prisoners to be catered for.* Prisoners often need to be segregated into groups. Given the small total population of Australian Capital Territory prisoners this process would result in an unworkably small number of prisoners. For example, at any one time there are rarely more than two Australian Capital Territory female prisoners, who will need, for some periods of their term in prison, to be segregated. An Australian Capital Territory prison system would, it is argued, have the effect of causing great isolation for prisoners who need to be separated into small groups.

Recommendations

260. *An Australian Capital Territory prison system.* The Commission's view is that the Commonwealth has a responsibility to ensure that the welfare needs of Australian Capital Territory prisoners are adequately met. It should also do all in its power to assist offenders to lead law abiding lives on release. Furthermore, imprisonment policies, including parole and remissions policies, can be most effectively implemented for Australian Capital Territory offenders within a prison system run by the Australian Capital Territory. The most effective

[12] In 1986–87 the federal Government paid New South Wales $2 419 000 for accommodating Australian Capital Territory prisoners. In 1987–88 this figure is estimated to be $2 490 000.

way to achieve these objectives is to establish an Australian Capital Territory prison system. That system should give proper emphasis to rehabilitation: the opportunities that prison provides for rehabilitation should not be ignored. Punishment should not be the only function of imprisonment.[13] Prison facilities should cater for

- remand detainees[14]
- periodic detention prisoners
- prisoners on work release programs
- prisoners suitable to be kept in open (low security) facilities
- prisoners required to be kept in closed (medium maximum security) facilities.

There should be separate quarters for female prisoners. There will also need to be protection facilities and a special care unit for prisoners with particular problems, such as intellectual disability. This recommendation must be seen as part of the total package of reforms being proposed in this report. In recommending that an Australian Capital Territory prison system be established, the Commission stresses that preference in the allocation of financial and other resources should go to improving and establishing community based sanctions. These options should be the punishment of first choice in all but the most serious cases. It is therefore important that a full range of these programs be available. Only when all the community based options recommended in this report are established with adequate staff and resources should funds be expended on establishing a prison system. The existence of community based programs should ensure that the establishment of an Australian Capital Territory prison does not of itself result in increased imprisonment rates.

261. *Priorities.* In a discussion paper the Commission suggested that construction of an Australian Capital Territory prison system take place in two stages. The first stage would involve low security open facilities and the second a closed maximum security facility.[15] Submissions on the issue of priorities have varied. Some have suggested that construction should commence with the closed, maximum security institution because

- the prisoners it would accommodate serve the longest sentences and are the most in need of attention
- only a closed prison should be built as anyone who can be kept in the open facilities recommended should not be in prison anyway.

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[13] See above para 36, 48.

[14] Alterations to Belconnen Remand Centre recommended in the Vinson report have now all been completed. There is accordingly no longer the same degree of urgency for new remand facilities. The Belconnen Remand Centre remains, however, far from ideal.

[15] ALRC DP 31 para 40.

Others have suggested that the priority should be the establishment of the open low security facilities because

- once operating they may establish that there are not sufficient remaining Australian Capital Territory prisoners to be catered for to justify establishing a closed prison
- it is at the end of a sentence that it is most important for an offender to be near the community to which he or she wishes to return.

All of these arguments have merit and the Commission takes the view that it is a matter for the Australian Capital Territory Administration to decide, taking these and any other relevant factors into account.

262. *Psychiatric facilities in the Australian Capital Territory.* In chapter 8 the Commission recommended the introduction of hospital orders for mentally ill and intellectually disabled offenders. It is futile to provide the courts with the power to impose hospital orders if there are no psychiatric facilities available to accept the offenders on whom they are imposed. Not all hospital order offenders require secure facilities but some do, and secure facilities will need to be available if a hospital order scheme is to be successful. At present there are no suitable secure psychiatric facilities in the Australian Capital Territory. Mentally ill offenders who need secure facilities are sent to New South Wales, usually to the secure psychiatric hospital at Morrisset. The planned closure of this facility will place extra pressure on the Australian Capital Territory to provide its own secure facilities. There have been repeated calls in recent years for the Australian Capital Territory to have its own secure psychiatric facility.[16] Submissions from Australian Capital Territory bodies and others interested in the area have also stressed the need for the establishment of such a facility. But plans to establish such facilities have not been implemented.[17] The Commisson recommends that a secure psychiatric facility be provided in the Australian Capital Territory as soon as possible.

263. *Minority view: qualification.* One member[18] is of the view that, while, on balance, the introduction of an Australian Capital Territory prison system is seen to be desirable on the basis that the Australian Capital Territory should manage the complete destiny of its own offenders on its own terms, the history of imprisonment in Australia and throughout the western world must lead policy makers who are considering the establishment of a new prison system to be extremely cautious. The manifest defects of imprisonment have been well documented and need not be repeated here. In the months prior to writing this report the Australian community has seen an ABC documentary, *Out of Sight, Out of Mind*, highly critical of Australian prisons, observed the death by

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[16] See eg Potas 1982.
[17] Vinson report, 359.
[18] Mr Zdenkowski.

fire of five inmates in the Jika Jika special maximum security unit in Victoria[19] and saw the commencement of the Royal Commission into Aboriginal Deaths in Custody which is examining over 100 such deaths. At the same time, there have been significant riots over prison conditions in Queensland (following the re-opening of the so-called 'Black Hole' at Boggo Road prison) and at Fremantle prison in Western Australia.[20] In these circumstances, and particularly when the Commission is committed to a policy of reducing the overall use of imprisonment, extreme prudence and conservatism are appropriate in seeking to recommend a new prison system. This member considers that government should be provided with guidelines as to the nature of the system which should be established, as indicated below. While this member agrees that, at this stage, it is inappropriate to introduce a separate federal prison system and that federal offenders sentenced to imprisonment should be housed in State or Territory institutions, his view is that, if future circumstances change so that a federal prison system is a viable option for government, the same guidelines set out below as appropriate to an Australian Capital Territory prison system should apply to any such federal prison system. Any Australian Capital Territory (or future federal) prison system should have a satisfactory prison discipline system[21] and a satisfactory grievance procedure.[22] In addition, this member considers that several other matters should be set out in whatever legislation is enacted to establish and govern such systems.

- *Guiding principles.* The Commonwealth government has a responsibility to ensure that federal and Australian Capital Territory prisoners are not kept in unsatisfactory conditions or subject to inhumane treatment. While poor conditions and treatment are by no means universal, their very existence is a 'rebuke to a civilised, confident and relatively prosperous country'.[23] Correctional legislation governing any future federal and Australian Capital Territory prison system should reflect the guiding principles referred to in one of the Commission's discussion papers.[24]

- *Prisoners' rights.* Because of the particularly vulnerable position of prisoners this member considers that proposed correctional legislation for a future Australian Capital Territory or federal prison system should contain a list of prisoners' rights. Such a list would not only help prisoners

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[19] This incident led to its closure. A similar fate was experienced by its New South Wales predecessor, Katingal, after Mr Justice Nagle in his 1978 Royal Commission Report dubbed it an 'electronic zoo'.

[20] An ancient maximum security institution which Western Australian correctional authorities freely admit should have been closed as unsatisfactory some time ago.

[21] As set out in ALRC DP 31 ch 4.

[22] As set out in id, ch 5.

[23] ALRC 15, para 206.

[24] ALRC DP 31 para 57. They were drawn primarily from the 'Statement of Purpose and Principles for Corrections': Canadian Correctional Law Review WP 1, 32-46; and the Guiding Principles preface to the 1984 draft of the Minimum Standard Guidelines for Australian Prisons.

but would also assist prison officials by clearly articulating for them their duties and thus avoiding ambiguities that occur in this area in other jurisdictions. The rights which should be set out in such legislation have been set out in one of the Commission's discussion papers.[25] These rights should be in addition to any other rights that a prisoner has by statute or at common law.

- *Enforcement mechanisms in relation to prisoners' rights.* One defect of the Victorian scheme is the lack of an enforcement mechanism. There is a need for effective enforcement mechanisms to ensure that these rights are complied with. Relevant correctional legislation should provide suitable enforcement mechanisms.[26]

All Australian Capital Territory sentencers should have first hand knowledge of the conditions to which they may sentence offenders. This member considers it desirable that Australian Capital Territory judges and magistrates visit all Australian Capital Territory institutions (once established) upon their appointment and should continue to do so at least once every two years. The sentencing council recommended in chapter 10 could, in this member's view, play an important role by encouraging all sentencers to make such visits. To facilitate such visits, the functions of the sentencing council and the tasks of the Ombudsman and official visitors, this member recommends that the legislation governing Australian Capital Territory prisons include a provision to the effect that:

- a judge of the High Court, any other federal court or the Australian Capital Territory Supreme Court, any Australian Capital Territory magistrate, any member of the proposed sentencing council, any member of the Commonwealth Ombudsman's staff and any official visitor should be able to visit the prison at any time;
- no special notice period need be given of such visits
- the people listed may visit any part of the prison and may communicate, in private, with any inmate or member of staff
- a person who visits a prison under this section may report on the visit to the Minister
- those reports may include recommendations as to actions which may be taken concerning any matters mentioned in the report.

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[25] ALRC DP 31 App B. This would build on the useful lead provided by Corrections Act 1986 (Vic) s 47.

[26] In general terms the suggestions made in ALRC DP 31 para 66 provide useful guidelines. The suggestion concerning class actions may not be appropriate or necessary; this topic is the subject of a separate reference to the Commission. Consultations by the Commission also revealed some disquiet concerning the appropriateness of an unfettered right to pursue claims for damages in respect of the rights nominated.

Facilities and services for released Australian Capital Territory prisoners

Need for facilities and services

264. The purpose of the Commission's recommendations in chapter 4 that Australian Capital Territory offenders sentenced to a custodial order be released into the community subject to parole supervision and conditions[27] is to ensure that all offenders have the benefit of parole supervision and assistance in the process of being re-integrated into the community. The time of greatest difficulty for prisoners is the time immediately after their release from prison. Employment and housing problems are then at their worst. Part of an effective parole system is the provision of assistance in relation to housing, employment and medical care. Two particular ways of providing this assistance are available.

Half-way house

265. Guideline 8 of the Minimum Standard Guidelines for Australian Prisons provides

> The duty of society does not end with a prisoner's release. There should, therefore, be governmental and private agencies capable of providing efficient after-care for released prisoners . . .

The Commission regards the provision of a community based half-way house in the Australian Capital Territory, where offenders can go after their release from prison, as extremely important. It should provide accommodation for limited periods to help offenders while they look for permanent accommodation and employment and adjust to their release. Federal funding is available for half-way houses under the Homeless Persons Assistance Act 1974 (Cth). The establishment of a half-way house will be more important when a separate Territory prison system is established, but it should not be delayed. Australian Capital Territory offenders returning from New South Wales prisons to the Australian Capital Territory would immediately benefit from such a half-way house.

Parole volunteers

266. The Minimum Standard Guidelines for Australian prisons specifically direct attention to the establishment of parole volunteer services.[28] These volunteer sevices are staffed by retired persons, recruited following careful screening procedures and assisting, in the first instance, professional parole officers. Such a service would also materially help returning offenders when released from prison. As a means of providing more community resources, at minimal cost, to help offenders become re-integrated into the community, parole volunteer services are a desirable innovation. Such a service should be established

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[27] See above para 73.

[28] Bevan 1984, guidelines 128–35.

for Australian Capital Territory offenders. Again, although such a service will be more important when a separate Territory prison system is established, it should not be delayed on that account. The Commonwealth should encourage State and Territory administrations to establish such services within their own jurisdictions so that federal, as well as State and Territory, offenders can benefit.

10. Information and education

Scope of chapter

267. This chapter deals with the information and education needs arising from the sentencing process. These needs arise in all aspects of this process but particularly in respect of the sentencing hearing. Judicial officers need reliable, accessible and up to date information, not only to impose appropriate penalties on individual offenders, but also to help ensure that sentences imposed are consistent. This chapter examines the need for a comprehensive information system for sentencing and the present response to this need. It recommends the establishment of a sentencing council to meet it. This was specifically adverted to in the Commission's terms of reference, which called on the Commission to consider '. . . the use of a sentencing council, commission or institute . . .'. Education programs for judicial officers, especially for those who are inexperienced in sentencing, are then considered, and the role of the sentencing council in meeting those needs addressed.

Information needs

The importance of information for consistent sentencing

268. Consistency in sentencing requires that courts should impose similar punishments for similar offences committed by similar offenders. The need for consistency in sentencing has been stressed elsewhere in this report.[1] Meaningful comparisons between sentences for offences can only be made if a relatively standardised description of the offences and the offenders concerned is collected and made available to sentencers, the legal profession, and others involved in the criminal justice system. For this purpose, an information system, with both quantitative and qualitative components, is needed to provide and disseminate comprehensive, up to date and accessible information on

- the offences for which sentences are imposed
- the type and quantum of penalties imposed in respect of particular offences
- the relevant characteristics of the offence and the offender that were taken into account and the weight given to them.

[1] See above para 26, 32–4.

Judicial officers have indicated support for the compilation of detailed statistics on sentences as a means of promoting uniformity in sentencing.[2] It should be stressed that more than raw sentencing statistics is required. Raw statistics are in such an abbreviated form that judicial officers would not generally be able to draw useful inferences from them. Indeed, they might be misleading and could distort sentencing decisions unless accompanied by adequate analysis and interpretation. Judicial officers generally do not have the time nor the expertise to analyse raw data. The desirable course is that statistics about offences and offenders should be gathered, experts should interpret them and reports for the benefit of judicial officers and others involved with the criminal justice system be issued. However, these statistics will not, of themselves, provide information about the process and reasoning by which determinations are made. A qualitative component is thus necessary to identify those factors that have been given weight in determining particular sentences, such as the legal and factual analyses used by the court. The recommendations that reasons for sentence be given[3] should, when implemented, contribute to this process.

The importance of information in the sentencing process generally

269. Information is crucial, not only to ensure consistency in the sentencing hearing, but also to evaluate the sentencing process. Such information is needed, for example

- to evaluate changes to the sentencing process resulting from changes to the law (for example, a new sentencing option) or practice (for example, guidelines as to prosecution policy)
- to gain feedback about the impact of particular sanctions upon particular offenders — this is particularly useful to judicial officers who can thereby better understand the consequences of their imposing sanctions upon particular types of offender
- to receive information about correctional programs and prison conditions — this is vital, both to judicial officers who must select the appropriate punishment, and to government which must make timely and effective decisions as to allocation of resources.

An effective information system can also improve the administration of criminal justice. Effective channels of communication can improve liaison between the various elements of the criminal justice system — the legislature, enforcement agencies, prosecution bodies, courts and corrections services. An effective information network can assist in co-ordinating these elements of the criminal justice system, avoiding contradictory policies and waste of resources. Improved sentencing information can assist defence lawyers to advise their clients and it

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[2] Approximately 74% of those surveyed favoured or strongly favoured detailed statistical data as a means of promoting uniformity in sentencing; approximately 17% were neutral or not sure and approximately 8% were opposed or strongly opposed: ALRC 15 Table 37; para 403.

[3] See above para 164.

can also help offenders and victims to understand how the sentencing process works and affects them. It is not only the elements of the criminal justice system which can benefit. A responsive information system can enhance informed awareness of sentencing matters by presenting accurate, reliable and comprehensive information to the media and through them, to the public. This will ensure that public opinion, which is largely formed through the media, will be more readily able to understand sentencing practices.

Current information resources

270. *Existing agencies.* The Australian Institute of Criminology has a variety of functions related to criminological research,[4] but has a much wider brief than simply sentencing matters. It must serve the criminal justice information needs of all the States and Territories and undertake education activities for those involved in criminological work, crime prevention or correction of criminal behaviour. The Australian Institute of Judicial Administration is a non-statutory body founded in 1982 comprising judges, practitioners and academic lawyers. It is concerned with a wide spectrum of issues affecting the administration of justice. Sentencing issues constitute only one part of its activities.

271. *Other sources.* There are other sources, both formal and informal, which provide information about sentencing. The most significant formal means is appellate review. Informal sources of information, include 'tariffs', discussions and conferences, practice books and court sentencing books or sheets. These are all discussed at paragraphs 158 to 160. Information provided by these means is not collected or disseminated in a systematic and integrated manner. The very informality of these sources means that there are inadequate methods available to ensure that information generated is disseminated generally throughout the courts or the criminal justice system.

272. *Summary: no integrated system.* The present sources of information provide only a fragmented and unco-ordinated response to the information

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[4] Its functions include:

- to conduct criminological research
- to communicate to the Commonwealth and the States the results of research conducted by the Institute
- to conduct such seminars and courses of training or instruction for persons engaged, or to be engaged, in criminological research or in work related to the prevention or correction of criminal behaviour as are approved by the Board
- to give advice in relation to the compilation of statistics relating to crime
- to publish such material resulting from or connected with the performance of its functions as is approved by the Board: Criminology Research Act 1971 (Cth) s 6;

'criminological research' is defined as research into the causes, correction and prevention of criminal behaviour and any related matter: id, s 4.

needs of the criminal justice system and the sentencing process. Existing resources cannot individually or collectively satisfy the quantitative and qualitative requirements of an effective information system.

Recommendations: a sentencing council for information needs

273. *First interim report: a sentencing council.* The first interim report in this reference, *Sentencing of Federal Offenders* (ALRC 15), proposed the establishment of a national sentencing council which would review current sentencing practices and issue broad non-mandatory guidelines indicating the range of penalties that might be applied for specific categories of federal offences and offenders.[5] In the course of its consultations in relations to this present report, the Commission has found wide support for the concept of a sentencing council to co-ordinate the collection, analysis and dissemination of sentencing information.[6] The then Chief Justice of the High Court, Sir Harry Gibbs, also expressed some support.[7] The proposal for a sentencing council was put to the Standing Committee of Attorneys-General but was not adopted. In 1984, the then federal Attorney-General, Senator Gareth Evans QC, suggested a revised model. Despite the extent of support, however, no such council or body has yet been established.

274. *Sentencing council: an advisory role only.* The support was in most cases contingent upon the council not having any prescriptive role or function, but being only an advisory body.[8] The Judicial Commission of New South Wales has only an advisory role in its information services. It has no power to limit any discretion that a court has in determining a sentence.[9] The introduction of a sentencing council with only an advisory role would clearly not limit judicial discretion in sentencing. Nor would it limit Parliament in prescribing maximum penalties and sentencing options.

275. *Recommendation.* The Commission recommends that a sentencing council be established. Its major function should be to provide judicial officers with detailed, comprehensive information to promote consistency in sentencing federal and Australian Capital Territory offenders. It should have a number of other functions:

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[5] ALRC 15 para 442–55.

[6] eg Public Defenders (NSW); the Melbourne Office of the Federal DPP; the Department of Law (NT) *Submission* 26 February 1988; Criminal Lawyers Association of New South Wales, *Submission* 8 October 1987; Law Society of the Australian Capital Territory Inc *Submission* 26 November 1987; Law Society of the New South Wales *Submission* 9 October 1987.

[7] See ALRC DP 29 para 168.

[8] eg Law Society of the Australian Capital Territory Inc supported the proposed body provided that it would be strictly limited to research and advisory functions and would have no power to set guidelines for the exercise of judicial discretion and no function of reviewing sentences: *Submission* 26 November 1987.

[9] Judicial Officers Act 1986 (NSW) s 8.

- *Advice to government.* It should be able to advise the Attorney-General as to the need for particular programs related to punishment and sentencing and the appropriate ways to introduce and conduct them.
- *Monitoring sentencing practices.* As part of the gathering of sentencing information, the council should monitor
  - the use made by sentencers of particular sanctions, especially community-based sanctions, to ensure that unjustified 'net-widening' is not taking place[10]
  - the ways in which sentencers are taking particular matters into account in making sentencing decisions, such as the 'discount' for the plea of guilty recommended in paragraph 173.
- *A public information service.* As well as providing sentencing information to sentencers and the legal profession, the council should also provide information on a systematic basis to the public through its own publications and through the mass media.

The sentencing council should meet regularly and monitor research projects and publications which are concerned with sentencing issues. Elsewhere in this report the Commission has pointed to particular matters where the advice and expertise of a sentencing council would be valuable, for example, in the overall reviews of federal and Australian Capital Territory maximum imprisonment terms,[11] the introduction, for federal and Australian Capital Territory offenders, of new non-custodial sentencing options[12] and the impact of punishment on young offenders.[13]

276. *Composition of sentencing council.* It would be appropriate for the council to be chaired by a judge who is or has been a judge of both the Supreme Court of the Australian Capital Territory and of the Federal Court. It would be desirable to include judges of the Supreme Court and also of the County Court or District Court in at least one of the States, as well as magistrates from both the States and the Australian Capital Territory. In addition, prosecution and correctional administration interests should be represented as should legal and other relevant academics, members of the legal profession and the general community. Conferring the recommended function on a council so constituted would not infringe the proper independence of the judiciary nor supplant the role of the Parliament or prosecution authorities in the criminal justice system.

277. *Institutional framework.* The council should be based within the Australian Institute of Criminology for a number of reasons. The Institute's functions complement those proposed for the council. Establishment and related

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[10] See above para 122.

[11] See above para 62.

[12] See above para 143.

[13] See above para 219.

costs can be minimised, while the expertise, experience and facilities of the Institute can be made available to the council for its work. The location of the Institute, in Canberra, is appropriate for a body which is to deal with both federal and Australian Capital Territory sentencing issues. Because the council will be based within the Institute, the Commission does not envisage that a separate research budget would be allocated to the council. The Institute should provide an administrative infrastructure for the council, although there may be a need to have some administrative staff attached specifically to the council. Appropriate arrangements will need to be made between the council and the Institute to ensure that the complementary functions of both bodies are efficiently carried out. There may well need to be some additional allocation of resources to, or re-direction of existing resources within, the Institute to accommodate the additional demands generated by the need for a comprehensive sentencing information base.

Education

Need for judicial education on sentencing

278. *The need for judicial education.* Sentencing is a complex task. It requires knowledge of sentencing principles, law and procedure and the capacity to select and evaluate relevant facts from a potentially wide range of facts about the offence and the offender. If sentencing is to be consistent, individual judicial officers must also have an understanding of their colleagues' sentencing practices. Most judicial officers learn about the intricacies of sentencing in the course of their daily duties. Especially at Supreme Court level, many judicial officers do not come to criminal work with an extensive background of criminal practice at the Bar. While the recommendations for an improved sentencing information system made earlier in this chapter will help to alleviate these kinds of problems faced by judicial officers, given the significance of sentencing and its potential complexities, the need for judicial education has become increasingly recognised.

279. *Increasing recognition of need for judicial education.* Sentencing education for judicial officers is now well established in England. There, a Judicial Studies Board runs induction and refresher courses for judges each year. Every judge in England must attend on appointment and every five years for a week long course on developments in sentencing and other aspects of criminal justice. The Board publishes a quarterly bulletin summarising leading sentencing decisions and, occasionally, reporting research developments. Recently appointed judges must spend a few weeks 'sitting-in' with an experienced judge engaged on sentencing.[14] Sentencing education is also well established in North America, through, for example, the Federal Judicial Center. Within Australia there have been several developments. The Judicial Commission of New South

[14] See A Ashworth, 'Closing Summary' in Potas 1987, 543; Victorian Sentencing DP para 5.28–5.33.

Wales, established in 1986, has as one of its functions the organisation and supervision of continuing education for judicial officers.[15] The Victorian Sentencing Committee has expressed tentative support for a Victorian Judicial Studies Board broadly modelled on the English Board.[16] Judicial officers have indicated support for formal sentencing conferences and training as a means of promoting uniformity in sentencing.[17] Submissions from judicial officers to the Commission have also expressed support:

> [It is important that sentencers have] maximum contact with a structured method of the study of sentencing and sentences both before appointment and during office.[18]

Current judicial education resources

280. There is currently little structured or formal sentencing education for judicial officers in Australia.[19] The most common occurrence in all Australian jurisdictions at all court levels is as described for Victorian magistrates:

> [Victorian] Magistrates prior to appointment have had no training in the art of sentencing. It is true that some by choice or otherwise have obtained a Diploma of Criminology or have sat some of the subjects as part of a law degree. Apart from that no one faces the study of sentencing. Furthermore no magistrate in Victoria is obliged to attend 'refresher' courses on sentencing. It is true that at times at Magistrates Conferences the problems of sentencing are discussed but there is no more than that.[20]

Conferences and workshops, which may address sentencing issues, occur from time to time on an essentially informal, ad hoc basis. The effectiveness of any sentencing discussions at such conferences and workshops may also be reduced because of constraints imposed by pressures of time and shortage of resources.

Education for others

281. The primary focus of sentencing education must be on judicial officers as they have principal responsibility for sentencing decisions. However, this is not to suggest that education programs for members of other groups who have an impact on sentencing is not desirable. Prosecution and defence lawyers, correction, probation and parole officers and police can also benefit from involvement with sentencing education. In addition, the press and other media

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[15] Judicial Officers Act 1986 (NSW) s 9.

[16] Victorian Sentencing DP para 5.28–5.33.

[17] Approximately 63% of judicial officers surveyed favoured or strongly favoured formal conferences and training as a means of promoting uniformity in sentencing; approximately 16% were neutral or not sure on the issue and approximately 20% were opposed or strongly opposed: ALRC 15 Table 37 para 403.

[18] Clothier *Submission* 12 November 1987; see also Criminal Lawyers Association of New South Wales *Submission* 8 October 1987.

[19] For a report of one sentencing exercise which was part of a continuing legal education program for New South Wales magistrates see K Anderson, 'Sentencing in Magistrate's Courts' in Potas 1987, 191.

[20] Clothier, *Submission* 12 November 1987.

representatives can benefit from a detailed working knowledge of sentencing law and practice: improved reporting of sentencing issues will improve the quality of the public's understanding of sentencing and the criminal justice system as a whole. The extent and nature of such involvement should be matters for the bodies concerned with sentencing education.

Recommendation: the sentencing council

282. The Commission has concluded that judicial education in sentencing is necessary. The importance and complexity of sentencing demand that all reasonable efforts be made to ensure that judicial officers are given the best opportunity to acquire and improve sentencing knowledge and skills. Judicial officers are unlikely to have the time and the readily available resources necessary to carry out self-education. There is a wide variety of material which is relevant to sentencing including case reports, statutes, and information from the areas of penology, criminology and psychology. It is difficult for individual judicial officers to keep fully abreast of relevant developments in these fields. Education programs can enable special time to be allocated to judges to pursue studies while free of immediate duties. Experience may be the 'best teacher' of sentencing duties but this does not negate the benefits of formal courses. For those judicial officers who lack experience, judicial education is extremely important to help avoid mistakes and to minimise difficulties. In addition, the degree of interaction between inexperienced and experienced judges during judicial education programs is in itself a useful way for judicial officers to gain experience.[21] The sentencing council's functions should include providing, normally in conjunction with bodies such as the Australian Institute of Criminology and the Institute of Judicial Administration, or other education bodies such as law schools and universities, education programs for judicial officers. This aspect of the council's functions may require special liaison with State and Territory organisations and judicial officers, since it is mainly State and Territory judicial officers who impose sentences on federal offenders. The council will be able to ensure that the education programs it offers or sponsors will not be inconsistent with the traditional independence of judicial officers.

[21] Victorian Sentencing DP para 5.32.

Appendix A
Draft legislation

- Draft Removal of Prisoners (Australian Capital Territory) Amendment Bill 1988
- Explanatory memorandum to draft Removal of Prisoners (Australian Capital Territory) Amendment Bill 1988
- Draft Parole Amendment Ordinance 1988 (ACT)
- Explanatory memorandum to draft Parole Amendment Ordinance 1988 (ACT)

NOTE: At paragraph 73 the Commission recommends that legislation dealing with imprisonment refer to 'custodial orders'. That suggestion is not taken up in this draft: it should be taken up in the general revision flowing from the overall review recommended at paragraph 62.

A BILL

FOR

An Act to amend the *Removal of Prisoners (Australian Capital Territory) Act 1968* and the *Removal of Prisoners (Territories) Act 1923*

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

PART 1 — PRELIMINARY

Short title

1. This Act may be cited as the *Removal of Prisoners (Australian Capital Territory) Amendment Act 1988*.

Commencement

2. This Act comes into operation on a day fixed by Proclamation.

PART 2 — AMENDMENTS OF THE REMOVAL OF PRISONERS (AUSTRALIAN CAPITAL TERRITORY) ACT 1968

Principal Act

3. The *Removal of Prisoners (Australian Capital Territory) Act 1968* is in this Part referred to as the Principal Act.

Removal to, or detention in, the State

4. Section 5 of the Principal Act is amended:

(a) by omitting from subsection (3) ", including laws relating to the reduction or remission of sentences or non-parole periods," and substituting "including, subject to subsection (4), laws providing for a person to earn, for good behaviour, industry or other like reason, reduction or remission of the period the person is to be detained in prison, however those laws are described,";

(b) by omitting subsections (4) and (5) and substituting the following subsections:

"(4) The maximum period by which the period a person is to be detained in prison may be reduced under laws referred to in subsection (3) is one-fifth of the period of the sentence of imprisonment imposed on the person.

"(5) The provisions of any other law of the State relating to the release from prison of a person before the end of the period of the person's imprisonment, modified as specified in the regulations, apply in relation to person undergoing imprisonment under a law in force in the Territory as they apply to a person sentenced to the like imprisonment under a law in force in the State.".

Application of Removal of Prisoners (Territories) Act

5. Section 7 of the Principal Act is amended by omitting from subsection (2) "sections 8A and 10A" and substituting "section 10A".

6. The Principal Act is amended by inserting after section 8 the following section:

Release on licence

"8A. (1) In this section:

'Governor-General' means the Governor-General acting with the advice of the Attorney-General;

'period of the licence', in relation to a person released on licence, means the period that:

(a) commences on the day on which the person is so released; and

(b) ends on whichever is the earlier of the following:

(i) the day on which, if the person had not been so released, the person would have been discharged from the imprisonment; or

(ii) if the licence is revoked or the person commits an offence for which the person is sentenced to imprisonment — the day of revocation or of the offence;

'person released on licence' means a reference to a person released from prison under subsection (5);

'police officer' means a member or special member of the Australian Federal Police or a member of the police force of a State or Territory;

'prescribed authority' means an authority that is a prescribed authority for the purposes of section 8A of the *Removal of Prisoners (Territories) Act 1923*.

"(2) A person who is serving a sentence of imprisonment may apply to the Minister for a licence to be released under this section.

"(3) The application must:

(a) be in writing;

(b) be signed by the person; and

(c) specify any exceptional circumstances relied on to justify the grant of the licence.

"(4) The Governor-General may, if the Governor-General thinks it proper to do so in the circumstances, grant a licence under this section to a person who has been sentenced to imprisonment.

"(5) A licence shall not be granted on an application from, or made on behalf of, the person unless the Governor-General is satisfied that the exceptional circumstances exist and justify the grant of the licence.

"(6) Unless the person is, for some other reason, not to be released, a licence is sufficient authority for the release of the person from prison.

"(7) A person released on licence must comply with the conditions, if any, specified in the licence and given to the person before the person was released from prison.

"(8) The Governor-General may, by instrument in writing, vary or revoke a condition to which a licence is subject, but the instrument is not effective until a copy of it is given to the person released on licence.

"(9) A person released on licence becomes liable to serve the unserved period of the imprisonment if:

(a) the licence is revoked; or

(b) the person is sentenced to imprisonment for an offence, including an offence against or arising under an Act or a law of a State or Territory, being an offence committed while released on licence.

"(10) The unserved period of the imprisonment is the period of the sentence of imprisonment that the person had not served when the person was so released reduced by:

(a) a period equal to the period of the licence;

(b) a period equal to the period of any remission or reduction earned by the person under subsection 5(3); and

(c) a period equal to any period or periods during which the person is in prison in connection with that licence.

"(11) The Governor-General may, by instrument in writing, revoke a licence.

"(12) The instrument takes effect from the day on which it was made.

"(13) A police officer may, without warrant, arrest a person whose licence has been revoked.

"(14) The police officer shall, as soon as practicable, take the person before a prescribed authority for a hearing under this section.

"(15) The prescribed authority may defer or adjourn the hearing and may:

(a) by warrant from time to time remand the person to a prison until the time appointed for continuing the hearing; or

(b) if the person agrees – order the release of the person upon specified conditions,

but if the person breaches such a condition, a police officer may, without warrant, arrest the person and bring him or her before a prescribed authority who shall then issue a warrant under paragraph (a).

"(16) For the purposes of the hearing, the prescribed authority may:

(a) take evidence on oath or affirmation and, for that purpose, administer an oath or affirmation; and

(b) summon a person to appear before the prescribed authority to give evidence and to produce such documents and articles, if any, as are referred to in the summons.

"(17) A summons shall be served in the same manner as a summons to a witness to appear before a court of summary jurisdiction in the State or Territory in which it is served.

"(18) A person who has been duly served with such a summons shall not, without reasonable excuse, fail or refuse to comply with it.

Penalty:

"(19) A person who appears before a prescribed authority shall not, without reasonable excuse, fail or refuse to be sworn or make an affirmation or fail or refuse to produce documents or articles, or to answer questions, that the person is required by the prescribed authority to produce or answer.

Penalty:

"(20) If the prescribed authority is satisfied that the person's licence has been revoked, the prescribed authority shall issue a warrant directing that the person be detained in prison to undergo imprisonment for the unserved period of the imprisonment.".

Transitional

7. The Principal Act as amended by this Act applies in relation to a prisoner sentenced in the Territory and released on licence under the *Removal of Prisoners (Territories) Act 1923* as if the prisoner had been so released under the Principal Act as so amended.

PART 3 — AMENDMENTS OF THE REMOVAL OF PRISONERS (TERRITORIES) ACT 1923

Principal Act

8. The *Removal of Prisoners (Territories) Act 1923* is in this Part referred to as the Principal Act.

Licences for prisoners to be at large

9. Paragraph 8A(14)(a) of the Principal Act is amended by omitting the words "in the Australian Capital Territory or".

Removal of Prisoners (Australian Capital Territory) Amendment Act 1988 Explanatory memorandum

OUTLINE

1. This Bill amends the Removal of Prisoners (Australian Capital Territory) Act 1968 and the Removal of Prisoners (Territories) Act 1923. It implements the recommendations in a report from the Australian Law Reform Commission titled 'Sentencing' published in 1988 (ALRC 44). The objectives of the Bill are

- to make provision for the release on licence of a person sentenced in the Australian Capital Territory to imprisonment on conditions similar to the conditions of the release on parole of a person sentenced in the Australian Capital Territory to imprisonment
- to remove the provisions relating to the release on licence of Australian Capital Territory prisoners from the Removal of Prisoners (Territories) Act 1923 and include equivalent provisions in the Removal of Prisoners (Australian Capital Territory) Act 1923.

NOTES ON CLAUSES

PART 1 — PRELIMINARY

Clauses 1 and 2 — Short title and Commencement

2. These clauses are formal clauses providing for the citation and the commencement of the Bill. The Bill will come into operation on a day to be fixed by Proclamation.

PART 2 — AMENDMENTS OF THE REMOVAL OF PRISONERS (AUSTRALIAN CAPITAL TERRITORY) ACT 1968

Clause 3 — Principal Act

3. *Clause 3* provides that the Removal of Prisoners (Australian Capital Territory) Act 1968 is the Principal Act referred to in the other clauses in this Part.

Clause 4 — Removal to, or detention in, the State

4. *Clause 4(a)* amends section 5(3) of the Principal Act to apply to persons sentenced in the Australian Capital Territory the benefits of all New South Wales laws allowing prisoners to earn remissions or reductions of head sentences and non-parole periods, however those laws are described, in the same way as applies to New South Wales offenders. It also ensures that the application of those laws to Australian Capital Territory offenders is subject to the operation of proposed section 5(4).

5. *Clause 4(b)* amends section 5 by inserting two new subsections. The first, *proposed section 5(4)*, provides, in effect, that the maximum remission that can be granted is

20% of the head sentence. The second, *proposed section 5(5)*, provides that other New South Wales laws authorising, for example, day release, apply to Australian Capital Territory offenders in the same way as they apply to New South Wales offenders. Provision is made for the modification of the application of these laws, if necessary, by regulation. Such modifications might, for example, include substituting Australian Capital Territory decision makers for New South Wales decision makers.

Clause 5 — Application of Removal of Prisoners (Territories) Act

6. *Clause 5* is a drafting amendment consequential upon the amendments made by this Act to the Removal of Prisoners (Territories) Act 1923.

Clause 6 — Release on licence

7. *Clause 6* provides for the insertion of a new section 8A which sets out the scheme for the release from prison on licence of Australian Capital Territory prisoners.

8. *Proposed section 8A(1)* defines a number of expressions used in the section:

Governor-General is defined to mean the Governor-General acting with the advice of the Attorney-General.

period of licence: this defines the times that mark the beginning and end of the licence period during which a person is on licence. The licence period is to commence on release from prison. Paragraph (b) of the definition provides two alternative finishing dates for the licence period. Normally, the period will end at the end of the head sentence less whatever remissions apply. However, if the licence is revoked or the person is imprisoned for an offence committed while on licence, the licence period ends on revocation or when the offence was committed.

person released on licence: this definition identifies the licensee and is introduced for convenience of drafting.

police officer: this definition is relevant to proposed section 8A(13)ff. It includes Australian Federal Police and State and Territory police.

prescribed authority: this definition enables a prescribed authority for the purposes of the Removal of Prisoners (Territories) Act 1923 to conduct a hearing or issue a warrant in relation to the revocation of a licence.

9. *Proposed section 8A(2)-(3)* allows a person to apply for release on licence. Any application must specify exceptional circumstances relied on to justify the grant of the licence.

10. *Proposed section 8A(4)* authorises the Governor-General, in his or her discretion, to grant a licence.

11. *Proposed section 8A(5)* requires that the Governor-General not issue a licence on an application unless the Governor-General is satisfied that there are exceptional circumstances to justify the licence. This provision is designed to ensure that release on licence is treated as an exception rather than the rule.

12. *Proposed section 8A(6)* provides that a licence is authority for the release from prison of the person to whom the licence relates.

13. *Under proposed section 8A(7)* conditions may be imposed on a person released on licence. Proposed section 8A(8) authorises the Governor-General to vary licence conditions, but variations are not to come into effect until the licensee is notified.

14. *Proposed section 8A(9)* provides that a licensee becomes liable to serve the unserved period of the original sentence on the revocation of the licence or on the licensee being sentenced to imprisonment for a further offence. *Proposed section 8A(10)* defines the unserved period of the original sentence as the balance of the head sentence less remissions and 'clean street time', that is, the period during which the licensee complied with the licence conditions.

15. *Proposed section 8A(11)-(12)* authorises the Governor-General to revoke a licence. Revocation takes effect from the day of revocation.

16. *Proposed section 8A(13)* authorises a police officer to arrest, without warrant, a person whose licence has been revoked. *Proposed section 8A(14)* requires the arrested licensee to be taken before a prescribed authority as soon as practicable for a hearing. The prescribed authority is defined in proposed subsection 8A(1). *Proposed section 8A(15)* authorises the prescribed authority to defer or adjourn the hearing under this section and for that purpose to remand the licensee in custody or to release the licensee conditionally. If the licensee breaches those conditions, the prescribed asuthority must remand the licensee in custody.

17. *Proposed section 8A(16)* authorises the prescribed authority to take evidence on oath or affirmation, administer oaths and affirmations and issue summonses. *Proposed section 8A(17)* provides for the service of summonses. *Proposed section 8A(18)-(19)* create offences of failing to comply with summonses duly served, and failing to be sworn or affirmed, produce documents or articles, or answer questions as required. *Proposed section 8A(20)* requires the prescribed authority to issue a warrant for the imprisonment of the licensee whose licence has been revoked.

Clause 7 — Transitional

18. *Clause 6* provides that the Principal Act, as amended by this Act, applies to persons sentenced in the Australian Capital Territory and released on licence under the Removal of Prisoners (Territories) Act 1923.

PART 3 — AMENDMENTS OF THE REMOVAL OF PRISONERS (TERRITORIES) ACT 1923

Clause 8 — Principal Act

19. *Clause 8* identifies the Removal of Prisoners (Territories) Act 1923 as the Principal Act in this Part.

Clause 9 — Licences for prisoners to be at large

20. *Clause 9* amends the Removal of Prisoners (Territories) Act 1923 to exclude Australian Capital Territory prisoners from the application of s 8A (release on licence).

PAROLE AMENDMENT ORDINANCE 1988

TABLE OF PROVISIONS

Section

AUSTRALIAN CAPITAL TERRITORY

Parole Amendment Ordinance 1988

Short title

1. This Ordinance may be cited as the *Parole Amendment Ordinance 1988*.

Commencement

2. This Ordinance comes into operation on a day fixed by the Minister for the Arts and Territories by notice in the *Gazette*.

Principal Ordinance

3. The *Parole Ordinance 1976* is in this Ordinance referred to as the Principal Ordinance.

Interpretation

4. Section 5 of the Principal Ordinance is amended:

(a) by omitting from subsection (1) the definitions of "non-parole period", "parole order" and "parole period;";

(b) by omitting from the definition of "police officer" in subsection (1) the words "of the Police Force of the Territory" and substituting "or special member of the Australian Federal Police"; and

(c) by omitting subsection (2) and substituting the following subsection:

"(2) A reference in this Ordinance to the period of the balance of the term of imprisonment, in relation to a person released on parole, is a reference to a period equal to so much of the period of the term of imprisonment imposed on the person as the person had not served in prison when so released reduced by a period equal to the period of any remissions earned by the person under subsection 5(3) of the *Removal of Prisoners (Australian Capital Territory) Act 1968*.".

Repeal of Part II

5. Part II of the Principal Ordinance is repealed.

Headings to Part III

6. The Principal Ordinance is amended by omitting the headings to Part III and to Division 1 of Part III and substituting "PART II — PAROLE BOARD OF THE AUSTRALIAN CAPITAL TERRITORY".

7. The Principal Ordinance is amended by inserting after section 16 the following section:

Matters to be taken into account

"16AA. In performing its functions in relation to a person, the matters that the Board must take into account include any representations made by or on behalf of the person.".

Repeal of Divisions 2 and 3 of Part III

8. Divisions 2 and 3 of Part III of the Principal Ordinance are repealed and the following Part is substituted:

"PART III — RELEASE ON PAROLE

Time of commencement of sentence

"17. (1) A sentence of imprisonment imposed on a person shall be taken to have commenced on the day on which it was imposed.

"(2) Where, before the sentence was imposed, the person was in custody in relation to the offence concerned, the person shall be taken to have been detained in prison under the order during any period during which the person was in that custody.

Release on parole

"18. (1) A person detained in prison under a sentence of imprisonment imposed for an offence, other than a sentence of life imprisonment, shall be released from prison on parole after the person has served a period of imprisonment equal to seven-tenths of the period of the term of imprisonment or such shorter proportion of that period as the court, in passing sentence, orders.

"(2) The court shall not make such an order unless the court is satisfied that exceptional circumstances exist, and the shorter proportion must not be less than one-half of the period of the term of imprisonment.

"(3) If more than one such sentence was imposed, then, for the purposes of subsections (1) and (2):

(a) if the sentences are to be served concurrently — the period of the term of imprisonment is the period of the longer or longest of the terms of imprisonment;

(b) if the sentences are to be served cumulatively — the period of the term of imprisonment is the aggregate of the periods of the terms of imprisonment; and

(c) if the sentences are to be served partly cumulatively — the period of the term of imprisonment is to be ascertained accordingly.

"(4) Where a person has been sentenced to life imprisonment, the Board may order in writing that the person be released on parole.

"(5) The Board may not make such an order before the person has served 10 years imprisonment unless the Board is satisfied that exceptional circumstances exist.

"(6) Where the person is, for some other reason, not to be released, the operation of subsection (1), or of an order under subsection (4), in relation to the person is suspended until that reason ceases to exist.

Conditions of parole

"19. (1) A person released on parole must, during the period of the balance of the term of the person's imprisonment, comply with the conditions, if any, specified by the Board by order in writing given to the person before the person is so released.

"(2) In the case of a person released under an order made under section 18(4), the period during which the person must comply with the conditions is the period specified by the Board in the order.

"(3) The Board may, by instrument in writing, vary an order under subsection (1), but the instrument is not effective until a copy of it is given to the person.

Revocation of parole

"20. (1) The Board may, by instrument in writing, revoke a person's parole if the person breaches a condition of the parole.

"(2) The instrument must specify the breach relied on and the reason for revocation.

"(3) The instrument must also specify the period during which the person is to be detained in prison in respect of the breach, which must not exceed the period of the balance of the term of imprisonment.

"(4) Where a person who has been released on parole is sentenced to imprisonment, the parole is not liable to be revoked merely because the person does not, while in prison, comply with conditions of the parole that the person is not able to comply with because the person was detained in prison.

"(5) The Board shall not revoke a person's parole unless the Board has given the person notice in writing of its intention at least 7 days before revoking the parole.

"(6) Subsection (5) does not apply:

(a) if the Board is satisfied that it is in the public interest to revoke the parole without notice; or

(b) if, after making reasonable inquiries, the Board is unable to give the person notice.

"(7) Where a person's parole has been revoked without notice, the person may, before the end of 7 days after being taken into custody, apply to the Board for a review of the revocation.

"(8) The application must be in writing and set out the reason for the application.

"(9) The Board shall then review the revocation and may confirm or cancel it.

Arrest etc, of person where parole revoked

"21. (1) A police officer may, without warrant, arrest a person whose parole has been revoked.

"(2) The police officer shall, as soon as practicable, take the person before a Magistrate for a hearing under this section.

"(3) The Magistrate may defer or adjourn the hearing and may:

(a) by warrant from time to time remand the person to a prison until the time appointed for continuing the hearing; or

(b) if the person agrees — order the release of the person upon specified conditions,

but if the person breaches such a condition, a police officer may, without warrant, arrest the person and bring him or her before a Magistrate who shall then issue a warrant under paragraph (a).

"(4) For the purposes of the hearing, the Magistrate may:

(a) take evidence on oath or affirmation and, for that purpose, administer an oath or affirmation; and

(b) summon a person to appear before the Magistrate to give evidence and to produce such documents and other things, if any, as are referred to in the summons.

"(5) A summons shall be served in the same manner as a summons to a witness to appear before the Magistrates Court.

"(6) A person who has been duly served with such a summons shall not, without reasonable excuse, fail or refuse to comply with it.

Penalty:

"(7) A person who appears before a Magistrate shall not, without reasonable excuse, fail or refuse to be sworn or make an affirmation or fail or refuse to produce documents or other things, or to answer questions, that the person is required by the Magistrate to produce or answer.

Penalty:

"(8) If the Magistrate is satisfied that the person's parole has been revoked, the Magistrate shall issue a warrant directing that the person be detained in prison to undergo imprisonment for period specified in the instrument revoking the parole.".

9. The Principal Ordinance is amended by inserting after section 26 the following section:

Parole orders

"26A. (1) Each of the following is a parole order under this Ordinance:

(a) an order under subsection 18(3);

(b) an instrument signed by the Chairman certifying that a specified person has been released on parole and setting out the details of the parole and the conditions to which the parole is subject.".

Transitional

10. **(1)** The Principal Ordinance as amended by this Ordinance applies in relation to a person who, before the commencement of this Ordinance, had been released from prison on parole as if the person had been so released under that Ordinance as so amended.

(2) Subject to subsection (3), the Principal Ordinance continues to apply in relation to a person who, on the day of commencement of this Ordinance, is being detained in prison.

(3) The Principal Ordinance as amended by this Ordinance applies to such a person on the person's release from prison.

Parole Amendment Ordinance 1988
Explanatory statement

OUTLINE

1. This Ordinance amends the Parole Ordinance 1976 (ACT) to implement recommendations in a report from the Australian Law Reform Commission titled 'Sentencing' published in 1988 (ALRC 44). The objectives of the Ordinance are

- to provide for automatic release from prison on parole of a person sentenced in the Australian Capital Territory to imprisonment after, in normal circumstances, the person has served 70%, less earned remissions, of the term of imprisonment
- to provide for the release from prison on parole, at the discretion of the ACT Parole Board, of a person sentenced in the Australian Capital Territory to life imprisonment after, in normal circumstances, the person has served 10 years imprisonment.

NOTES ON CLAUSES

Sections 1 and 2 — Short title and Commencement

2. These clauses are formal clauses providing for the citation and the commencement of the Bill. The Ordinance will come into operation on a day to be fixed by notice in the *Gazette*.

Section 3 — Principal Ordinance

3. *Clause 3* provides that the Parole Ordinance 1976 is the Principal Ordinance referred to in the Ordinance.

Section 4 — Interpretation

4. *Clause 4* amends existing section 5 (interpretation) by omitting, amending or substituting a number of expressions used in the Ordinance:

5. *Non-parole period* is not required as the period of imprisonment after which a person is to be released from prison is to be fixed by the Ordinance.

6. *Parole order* is not required as the release of a person is to be automatic, except in the case of life prisoners. New section 27AA makes certain orders and instruments parole orders for the purpose of the Ordinance.

7. *Police officer* replaces the existing, out of date, definition in the existing Ordinance.

8. *New section 5(2)* defines the expression *the period of the balance of the term of imprisonment*. The definition is relevant for determining the period during which parole conditions are to be complied with. The period of the balance of the term of imprisonment is the balance of the head sentence less any remissions earned by the person before release. This replaces existing section 24(2).

Section 5 — Repeal of Part II

9. *Section 5* repeals sections 7 and 8. These are replaced by new Part III.

Section 6 — Headings to Part III

10. Section 6 is a drafting amendment.

Section 7 — New section 16AA — Matters to be taken into account

11. *Section 7* provides for a new section 16AA which requires the Board to take into account, in performing any of its functions (that is, in making an order for the release of a prisoner sentenced to life imprisonment (new section 18(3)), specifying conditions of parole or variation of conditions (new section 19), revoking parole (new section 20) and reviewing revocation of parole (new section 20(7)–(9)), the Board must take into account any representations made to the Board.

Section 8 — Repeal of Divisions 2 and 3 of Part III and substitution of new Part

12. *Section 8* repeals Divisions 2 and 3 of Part III and substitutes a new Part III. The sections repealed are existing section 17 (the Secretary to the Board must refer to the Chairman documents connected with a person's parole) and existing section 18 (the Chairman must convene a meeting of the Board to consider releasing a person on parole). These are largely machinery provisions and are unnecessary to be included in legislation. Existing sections 19–25 set out the procedure for release on parole and are to be replaced by a new procedure.

New Part III — Release on parole

New section 17 — Time of commencement of sentence

13. *New section 17(1)* specifies the time when a sentence of imprisonment is to be taken to have commenced. It provides a common point of commencement for the calculation of the date of release on parole. In the case of a person who has previously been in custody for the offence (for example, on remand), *new section 17(2)* requires that time spent in custody be taken into account in calculating the time to be served.

New section 18 — Release on parole

14. *New section 18(1)* provides for the automatic release on parole of a person sentenced to imprisonment for a specified period after the person has served a 70% of that period in prison. Remissions are taken into account under the Removal of Prisoners (Australian Capital Territory) Act 1968: a maximum limit of 20% earned remission applies. This replaces the existing provisions which give the Board a discretion to release. Under the amendments, parole is to be available to all Australian Capital Territory prisoners.

15. New section 18(1) gives power to the court, in passing sentence, to reduce the 70% period. *New section 18(2)* limits this power to cases where the court is satisfied that

exceptional circumstances exist. The court cannot reduce the period below one-half of the head sentence.

16. *New section 18(3)* defines the period of the head sentence where two or more sentences are imposed. Where the sentences are to be served concurrently, the period of which 70% is to be taken is the longer or longest of the head sentences. Where they are to be served cumulatively, the 70% is calculated on the aggregate head sentence. Where the sentences are to be served partly cumulatively, an appropriate adjustment is to be made.

17. *New section 18(4)-(5)* gives the Board a discretion to order the release from prison on parole of a person sentenced to life imprisonment. Release cannot be ordered before the person has served 10 years imprisonment. The Board may make an order for earlier release only if the Board is satisfied that exceptional circumstances exist.

18. *New section 18(6)* confirms that an order of the Board under new section 18(5) is sufficient authority for the release of the person from prison.

New section 19 — Conditions of parole

19. *New section 19(1)* requires that a person released on parole must, during the balance of the period of the head sentence less remissions, comply with the parole conditions specified by the Board and notified to the person before release. Existing section 21 authorises the Board to specify conditions of parole.

20. *New section 19(2)* requires the Board, in releasing a life prisoner, to fix the period during which the parole conditions must be complied with.

21. *New section 19(3)* allows the Board to vary parole conditions. Variations are not effective until a copy of the variation is given to the person.

New section 20 — Revocation of parole

22. *New section 20(1)* authorises the Board to revoke a person's parole, but only for a breach of a parole condition.

23. *New section 20(2)* requires the instrument of revocation to specify both the breach relied on and the reason for revocation. *New section 20(3)* requires the Board also to specify the period of time for which the person is to be re-imprisoned for the breach. That period cannot be longer than the period of the balance of the term of imprisonment (see above, new section 5(2)).

24. *New section 20(4)* provides the parole of a person who has later been sentenced to imprisonment cannot be revoked for breach of condition if, because of the imprisonment, the parolee could not have complied with the condition.

25. *New section 20(5)-(6)* requires the Board to give 7 days notice to a person of its intention to revoke parole unless the Board is satisfied that it is in the public interest that the revocation takes effect immediately or, after making reasonable inquiries, the Board cannot locate the person. The purpose of notice is to allow the person to make representations to the Board.

26. *New section 20(7)-(9)* permits a person whose parole has been revoked without notice to apply to the Board for a review of the revocation. The application must be in writing setting out the reason for the application, and must be made to the Board within 7 days after the person has been taken into custody. The Board must then review the revocation and confirm or cancel it.

New section 21 — Arrest etc, of person where parole revoked

27. *New section 21* replaces existing section 25.

28. *New section 21(1)* authorises a police officer to arrest, without warrant, a person whose parole has been revoked. *New section 21(2)* requires that an arrested parolee be taken before a Magistrate as soon as practicable for a hearing. The purpose of the hearing is to confirm the identity of the arrested person (see new section 21(8)). *New section 21(3)* authorises the Magistrate to defer or adjourn the hearing under this section and for that purpose to remand the parolee in custody or to release the person conditionally. If the person breaches a condition, the Magistrate must remand the parolee in custody.

29. *New section 21(4)* authorises a Magistrate to take evidence on oath or affirmation, administer oaths and affirmations and issue summonses. *New section 21(5)* provides for the service of summonses and *new section 21(6)-(7)* create offences of failing to comply with summonses duly served, failing to be sworn or affirmed, produce documents or articles or answer questions as required.

30. *New section 23(8)* requires the Magistrate to issue a warrant for the imprisonment of a parolee if, after the hearing, the Magistrate is satisfied that the person's parole has been revoked.

Section 9 — New section 27AA — Parole orders

31. *New section 27AA* provides that an order of the Board for the release of a person under section 18(3), and an instrument signed by the Chairman certifying that a person has been released on parole setting out the conditions of the parole, are parole orders for the purposes of the Ordinance. This provision is necessary to ensure that there will be parole orders able to be registered under the scheme for inter-State registration of parole orders.

Section 10 — Transitional

32. Section 10 provides that persons released on parole before the commencement of this Ordinance are taken to have been released on parole under the Parole Ordinance 1976 in its amended form: revocation, etc, will be, for those persons, under the amended Ordinance. Release from prison of persons in prison at the commencement of the Ordinance will, however, be under the Ordinance in its unamended form.

Appendix B
Submissions and assistance

Submissions

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Australian Behaviour Modification Association (South Australian Branch)
Australian Capital Territory Adult Corrections Consultative Committee
Corporate Affairs Commission (ACT)
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Department of Corrective Services (WA)
Department of Defence (Cth)
Department of Health and Community Service (NT)
Department of Law (NT)
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Fairlea Women's Prison Council
Female Inmates HM Prison, Brisbane
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Financial Counsellors Association of Australia
Dr M Finnane, University of Queensland
Professor Brent Fisse, Faculty of Law, University of Sydney
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Dame Phyllis Frost
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AR Green
F Hall
G Hawkins
JD Hickey
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G Jannese
D Keenan
DJ Kelleher
AR Lane
P Lawless
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Law Society of New South Wales
Law Society of the Australian Capital Territory
M Laysem
Liberal Party of Australia (ACT Division)
P Loof, Attorney-General's Department (Cth)
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G Masterman, QC, formerly Ombudsman (NSW)
DG Mathiesen
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GF McCarthy
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National Council of Women of South Australia Inc
New South Wales Society of Labor Lawyers
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MC O'Hanlon
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Peer Institute of Perth
Penal Reform Council of NSW
The Honourable Justice CW Pincus (Federal Court of Australia)
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I Potas, Australian Institute of Criminology
Prisoners' Action Group (NSW)
Prisoner Discussion Group (Male Prisoners Brisbane Prison)
Prisoners' Legal Service Inc
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Queensland Council for Civil Liberties
Redfern Legal Centre
JE Richardson
J Ridgeway
J Rooney
M Ryan
J Sadler
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Small Business Corporation of South Australia
FC Smith
G Smith, QC, former Judge of the District Court (NSW)
G Smith
K Stalder
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Public hearings were held in Hobart (3 November 1987); Melbourne (4 November 1987); Adelaide (10 November 1987); Perth (11 November 1987); Sydney (16 November 1987); Darwin (18 November 1987); Brisbane (23 November 1987) and Canberra (27 November 1987).

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P Ritter
G Scarrott
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R Taylor

Dr RD Tustin
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