The Law Reform Commission

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SENTENCING: REFORM OPTIONS

THIS PAPER IS NOT A COMMISSION REPORT. IT CONTAINS THE COMMISSION'S TENTATIVE PROPOSALS FOR CERTAIN REFORMS IN THE IMPOSITION OF PUNISHMENT IN THE AUSTRALIAN CAPITAL TERRITORY. IT IS INTENDED TO PROMOTE DISCUSSION AND ELICIT COMMENTS WHICH WILL BE CONSIDERED BY THE COMMISSION IN REACHING ITS CONCLUSIONS AND DRAFTING ITS FINAL REPORT. All inquiries and comments should be directed to: The Secretary, Australian Law Reform Commission, 99 Elizabeth Street, SYDNEY (G.P.O. Box 3708, Sydney 2001) (Telephone: (02) 231 1733).

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Commissioner in Charge of the Reference: Professor Duncan Chappell.

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SENTENCING: REFORM OPTIONS

I — INTRODUCTION[1]

1. In this paper reform proposals for the Australian Capital Territory (A.C.T.) are discussed in relation to four important issues affecting the imposition of punishment upon adult offenders. These issues are:

- The need for the provision of correctional institutions
- The need for new non-custodial sentencing options
- The need for a compensation program for victims of crime
- The need to ensure access to the courts for all prisoners.

2. The discussion arises from a Reference on Sentencing and punishment for offences given to the Commission by the Commonwealth Attorney-General in August 1978. The Reference, among other things, calls upon the Commission to review and report on the law of the A.C.T. "relating to the imposition of punishment for offences and any related matters". The Reference also notes the collaboration which is to occur between the Commission and the Australian Institute of Criminology in undertaking this task. Two public seminars have already been conducted on this general subject—one in May of 1975 sponsored by the Minister for the Capital Territory and the A.C.T. Legislative Assembly, and one in December of 1978.

3. The language of the Commission's Reference is in very broad terms. The short time fixed for report and resources available to the Commission have resulted in the fact that this paper is restricted substantially in its scope and content. The Commission has also recently received another Reference from the Attorney-General on the topic of child welfare laws and procedures. Part of the work on this latter reference will consider the need for an institution, and for new non-custodial sentencing options for juvenile offenders in the Capital Territory.[2]

II — PUNISHMENT AND PUBLIC OPINION

Terms of Reference

4. The terms of the Commission's sentencing reference includes a direction that it 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".

This direction, which is couched in somewhat abstruse terms, raises for consideration the immensely difficult and contentious problem of the purpose of punishment. It is a matter which has attracted a profusion of academic, judicial and other writing and debate. It is also a matter which continues to attract substantial public interest and controversy.

1. Textual references have been kept to a minimum throughout this paper. Readers wishing to pursue any issue in greater depth are directed to additional reading sources listed at the conclusion of the paper.
2. A.L.R.C. Discussion Paper No. 9, *Child Welfare: Children in Trouble* raises for public consideration a number of important issues to be reviewed in that Reference.

Changing Attitudes to Punishment Since 1788

5. While it is neither the purpose nor intent of this paper to enter this area of discussion in depth, some mention must be made of the rationale upon which the Commission seeks to build its proposals for reform. It is apparent that certain philosophies of punishment tend to gain ascendancy at a particular period in history. At the time of initial settlement of Australia the predominant philosophies were those of retribution and deterrence. The English common law which was received into Australia with the first settlers and convicts contained a catalogue of drastic penalties, designed to strike terror in the hearts of those contemplating breaking the law and exacting savage retribution upon those who did. Capital punishment, transportation, lengthy terms of imprisonment and whipping were commonplace penalties during this era.

6. In the period since 1788 Australian society, in common with most civilised countries, has experienced profound changes in the philosophy of punishment and in the treatment of offenders. A strong humanitarian influence has resulted in a reduction in the severity of punishments. Capital punishment is now abolished in the law of all Australian jurisdictions except Western Australia. Flogging has fallen into disuse as a sanction and has been abolished in some jurisdictions. Imprisonment is a penalty used more sparingly than in the past, being replaced by fines and a variety of community-based treatment programs like probation. For at least the past fifty years the need to reform those who commit crimes, as well as to punish and deter them, has been in the forefront of penal policies.

7. In recent years it appears that a change has once again occurred in regard to the generally accepted dominant rationale of punishment. Following substantial disillusionment with, and doubt about, the success of rehabilitative programs for offenders of all types, and fuelled by reports of the continuing increase in crime, the public mood and that of many experts and others involved would seem to be moving again towards retribution and deterrence as the main aims of punishment. This development has been most pronounced in the United States. Because it was felt in that country judges were, by and large, "too soft on crime", or because purists believed that the rule of law required the legislature to fix penalties which judges merely applied, greater specificity in punishment is being introduced by legislation. This has had the effect of reducing or limiting the judges' power to vary a sentence, according to the particular details of the offence and features of the offender and even in some cases of fixed penalties removing the judge's discretion altogether.

Increasing Severity of Contemporary Punishments?

8. The outcome of this American trend has yet to be fully documented but it appears that more people are being sent to prison for longer periods and that a general increase in the severity of punishments is occurring. Similar developments may be occurring in Australia. Recent Australian imprisonment rates are displayed in Figure 1.[3]

It will be seen that the number of persons in prison on a per-capita basis reached an all-time low in December 1977. Since that time an increase has occurred in the number of offenders being sent to prison in Australia. Whether this trend will continue remains to be seen. It should be noted that imprisonment rates in

3. Imprisonment rates are the daily average numbers of prisoners for the month per 100,000 of the relevant general population.

most individual Australian jurisdictions have generally decreased during the two most recent decades, as Table 1 illustrates.

FIGURE 1

AUSTRALIA
DAILY AVERAGE NUMBER OF PRISONERS AND IMPRISONMENT RATE,
MAY 1976 TO FEBRUARY 1979

Source: Australian Institute of Criminology. D. Biles.

Public Concern About Crime

9. Public concern about the state of crime in Australia would appear to be substantial. A recent opinion poll (February 1978) revealed that unemployment and crimes of violence were the two issues Australians were most worried about. An earlier poll (June 1977) showed that more than two thirds of the respondents felt that the judges and courts were too lenient in sentencing people convicted of serious crimes. In June 1978, following the report of the Royal Commission into New South Wales Prisons (the Nagle Report), a national poll discovered that a majority of Australians still did not consider conditions in prisons to be too severe.

Table 1

AUSTRALIAN IMPRISONMENT RATES 1959-78

YEAR	N.S.W.*	VIC.	QLD.	S.A.	W.A.	TAS.	N.T.
1959-60	82.1	60.7	62.9	72.3	88.7	65.8	
1960-61	79.3	64.9	59.6	73.0	89.7	61.2	
1961-62	81.6	67.5	60.4	78.8	95.8	68.7	
1962-63	78.9	66.0	59.9	77.9	106.7	68.4	
1963-64	80.7	68.0	56.9	80.1	109.2	65.4	
1964-65	74.6	64.3	55.9	77.2	107.2	64.3	
1965-66	78.3	61.0	61.5	81.9	103.0	64.6	
1966-67	80.5	65.0	64.6	81.0	117.8	78.1	
1967-68	81.8	67.6	62.4	88.2	133.0	85.0	
1968-69	81.1	69.0	61.2	88.8	145.3	86.3	
1969-70	82.1	66.8	63.1	84.5	134.7	91.8	
1970-71	83.0	68.6	68.3	78.2	143.9	97.5	
1971-72	86.9	67.0	71.0	77.8	144.8	94.9	
1972-73	85.5	58.8	79.9	72.7	121.5	93.8	
1973-74	66.6	51.7	76.9	62.9	103.8	86.2	
1974-75	66.7	44.3	72.6	59.8	88.6	84.0	
1975-76	71.8	42.6	67.5	59.3	84.1	75.6	
1976-77	69.5	39.7	74.0	55.2	90.0	64.0	185.0
1977-78	69.9	40.2	71.4	58.3	97.0	58.6	148.5

Source: Australian Institute of Criminology—D. Biles
* Including A.C.T.

10. The Commission is at present seeking further information in regard to public opinion about the imposition of punishment. With the assistance of David Syme & Co. Ltd., publishers of *The Age* newspaper, a number of questions on sentencing and the punishment of offenders have been included in a national opinion poll conducted by *The Age*. The results of this poll will be made available to the Commission later this year.

11. The history of public opinion and attitude surveys in this field over the past two decades reveals a high degree of ambivalence, inconsistency and variability. Moreover, although particularly atrocious crimes, or so-called "crime waves", may arouse momentary punitiveness, in general disinterest and apathy prevail. In terms of the distinctions drawn by public opinion specialists between the "general public", the "attentive public" and the "informed public" the two latter categories represent a small minority of the population. Few are actively interested in or concerned about penal matters; fewer still are familiar with the relevant literature and research studies. In these circumstances responsible law-making calls for more than attention to public opinion polls. Those charged with formulating penal policy must in addition be guided by their own informed judgement and consideration of the facts. In this connection a Committee of the House of Commons in the United Kingdom correctly and recently observed that

> "the organisation and use of the punishments of the criminal justice system must be such as to maintain public confidence".

But the Committee went on to say that

> "when we speak of maintenance of public confidence we are not suggesting that those responsible for policy and administration in the criminal justice system should simply

follow swings in public sentiment—that would be a negation of responsible leadership and a dangerous and undemocratic course to follow. It is up to the leaders of public opinion to inform, educate and persuade the community . . .".[4]

12. In this context one of the principal facts is that although it is assumed by many people that severe punishments deter crime, this view is quite unsupported by such evidence as is available. The history of criminal punishment in the eighteenth and nineteenth centuries is a long record of deterrent and retributive principles in practice. But crime was not diminished; on the contrary it continued to increase. Evaluative studies which have been carried out in this century do not provide any support for the idea that a return to the penological principles and practice of the past would provide more effective protection for the public. As for the use of imprisonment there is a large measure of agreement amongst those who have seriously studied the matter that even when the prison regime is designed to be reformative rather than simply punitive it is more likely to be harmful than beneficial to those imprisoned. In 1973 the United States' National Advisory Commission on Criminal Justice Standards and Goals declared that the failure of prisons to reduce crime was "incontestable". The Commission reported that:

> "Recidivism rates are notoriously high. Institutions do succeed in punishing but they do not deter. . . . They change the committed offender, but the change is more likely to be negative than positive."[5]

In addition, it should be noted that imprisonment is not only the most costly of all penal sanctions but also one which imposes unwarranted suffering and hardship on the families of offenders.

Imprisonment as a Punishment of Last Resort: The Commission's View

13. These considerations have led us to the conclusion that neither retributive, deterrent nor reformative principles of punishment justify the use of imprisonment except as a punishment of the last resort. This is not to deny that for some categories of offence imprisonment is necessary for the protection of society as, for example, in cases where a lesser sentence would depreciate the seriousness of the defendant's crime or where lesser sanctions have been applied in the past and ignored by the offender. Nevertheless, it is the view of the Commission that rational and humane sentencing would be best achieved if it were guided by the principle that the least punitive sanction necessary to achieve social protection should be imposed and that, as far as consistent with social restriction, preference should be given to the use of non-custodial sentencing options.

III — THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE A.C.T.

Commonwealth, State and Territory Criminal Law

14. To appreciate the nature of the process by which punishment is imposed upon offenders it is necessary to describe, in brief, the structure of the criminal justice system and the state of crime in the A.C.T. In Australia at large the administration of criminal justice is primarily a State responsibility. Each of the States, and the Northern Territory, have enacted their own criminal law. Through

4. Fifteenth Report of the Expenditure Committee (U.K.) "*The Reduction of Pressure on the Prison System*" (1977/1978) Vol. 1, xxiv, para. 33.
5. National Advisory Commission on Criminal Justice Standards and Goals (U.S.) *Corrections* (1973), 1.

this law the various Parliaments have made available a range and scale of penalties for the punishment of law breakers. These Parliaments have also established separate bodies for policing the criminal law, and for prosecuting and adjudicating offences against that law. Separate correctional services also exist to deal with convicted offenders.

15. Federal responsibility for the administration of criminal justice is limited to the handling of offences against Commonwealth laws and the laws of the A.C.T. The general body of federal criminal law is administered by the Attorney-General's Department. The principal Commonwealth law relating to crime is the *Crimes Act* 1914. In the A.C.T. the principal legislation relating to criminal matters consists of the *Police Offences Ordinance* 1930, the *Motor Traffic Ordinance* 1936, the *Motor Traffic (Alcohol & Drugs) Ordinance* 1977, the *Gun Licence Ordinance* 1937 and the *New South Wales Crimes Act* 1900, as amended in its application to the Territory by Ordinances. There is no general criminal Ordinance specifically designed for the A.C.T. Three recent attempts to produce such an Ordinance failed because of controversies surrounding certain of the proposed provisions.

The State of Crime

16. An indication of the contemporary state of serious crime in the Australian Capital Territory can be obtained from Figures 2(a) and (b).

Compared with the overall rates of serious crime in Australia, the A.C.T. has a lower incidence of all categories of offence except fraud, forgery and false pretences. However, these rates are not in all cases the lowest among individual jurisdictions throughout the country. For instance, Figure 3 showing the mean rates of homicide for each State and Territory over the decade 1964-73, reveals

Figure 2(a). Serious Crime: Rates per 100,000 of the population for the Australian Capital Territory and Australia as a whole.

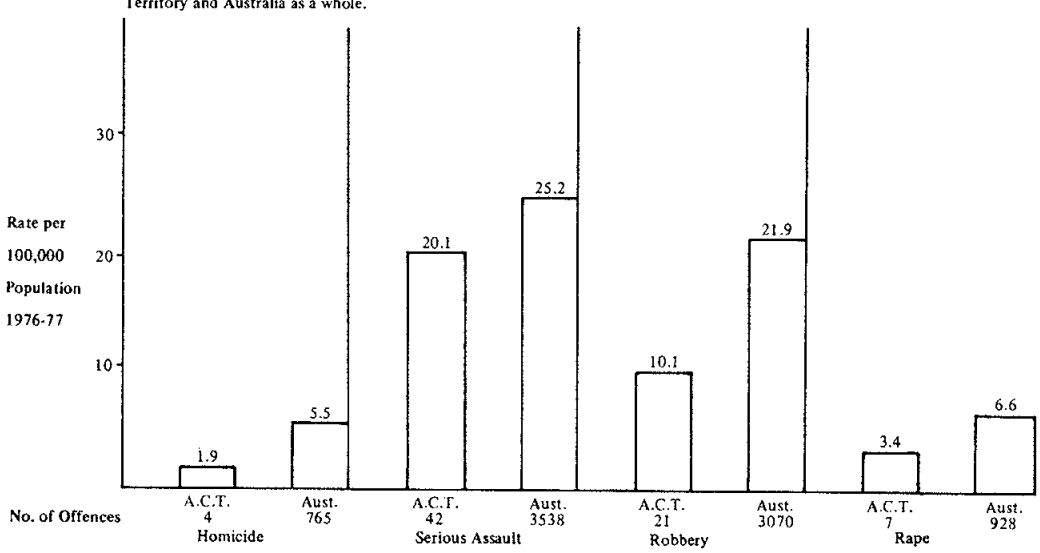
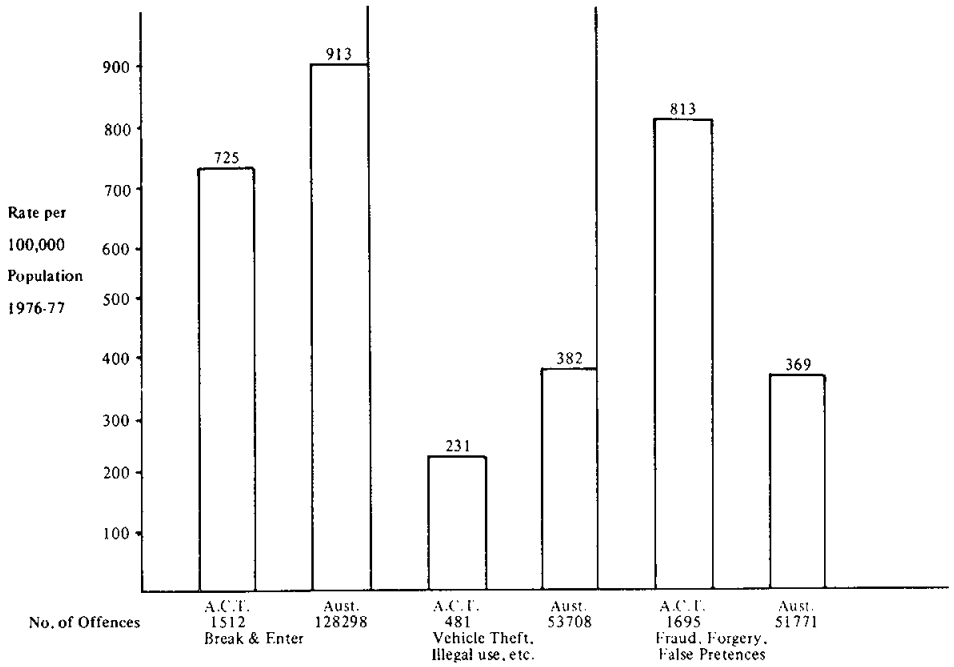


Figure 2(b)



Source: Offences Reported Or Becoming Known, *Year Book Australia*. Australian Bureau Of Statistics

that South Australia and Western Australia both had fewer homicides per head of population than the A.C.T. Figure 4 provides similar comparative information about robbery, Figure 5 about breaking and entering and Figure 6 about fraud, forgery and false pretences.

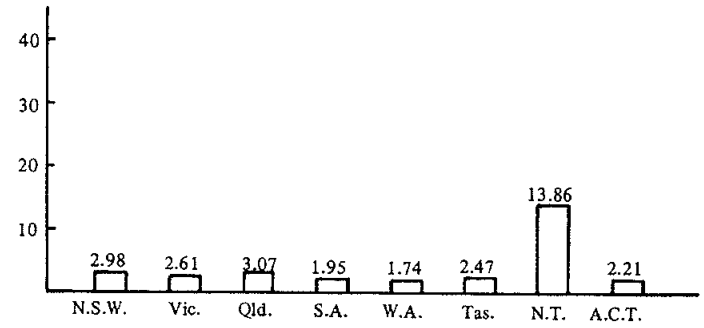
Law Enforcement

17. The day-to-day administration of criminal justice in the A.C.T. is presently conducted by the bodies shown in Figure 7.

The Commonwealth Police Force and the A.C.T. Police Force, which are administered by the Departments of Administrative Services and Australian Capital Territory respectively, are responsible for law enforcement. At present the Commonwealth Police enforce those criminal laws which apply to the Commonwealth as a whole while the A.C.T. Police enforce criminal laws which apply to the A.C.T.[6] However, the two Forces are shortly to be amalgamated to form the Australia Federal Police Force. As part of their responsibility for law enforcement, both forces apprehend and charge persons suspected of committing offences against Commonwealth or A.C.T. criminal laws. The prosecution of such offences is not a police responsibility. The Commonwealth Crown Solicitor's Office within the Department of the Attorney-General carries out the prosecution of most offences against Commonwealth and A.C.T. criminal laws.[7]

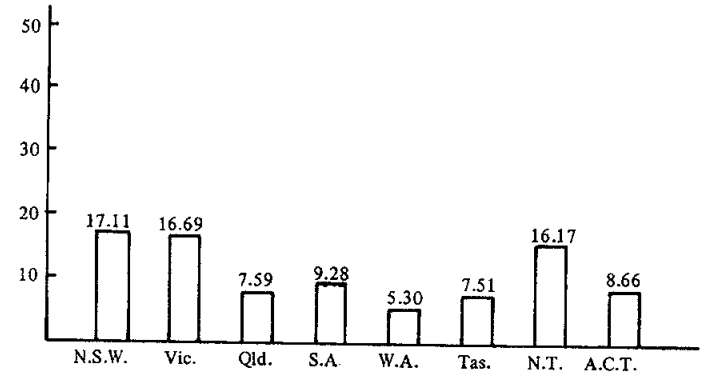
6. There are occasions on which the Commonwealth and A.C.T. Police are called upon to enforce one anothers criminal laws, as are State police forces in relation to Commonwealth matters.
7. On occasions individual Commonwealth Departments conduct the prosecution of offences.

Figure 3 Homicide, mean rates per 100,000 of the population for each State and Territory, 1964-73



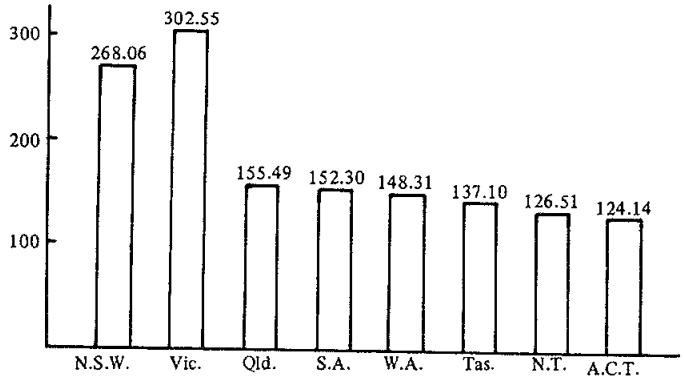
Source: D. Biles *Crime and Justice in Australia*

Figure 4 Robbery, mean rates per 100,000 of the population for each State and Territory, 1964-73



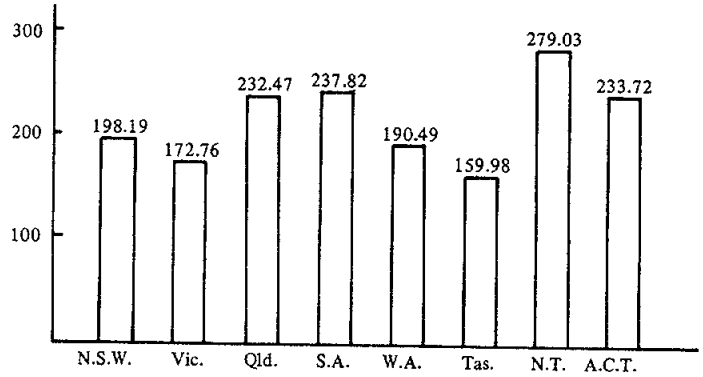
Source: D. Biles *Crime and Justice in Australia.*

Figure 5 Breaking and entering, mean rates per 100,000 of the population for each State and Territory, 1964-73



Source: D. Biles *Crime and Justice in Australia*

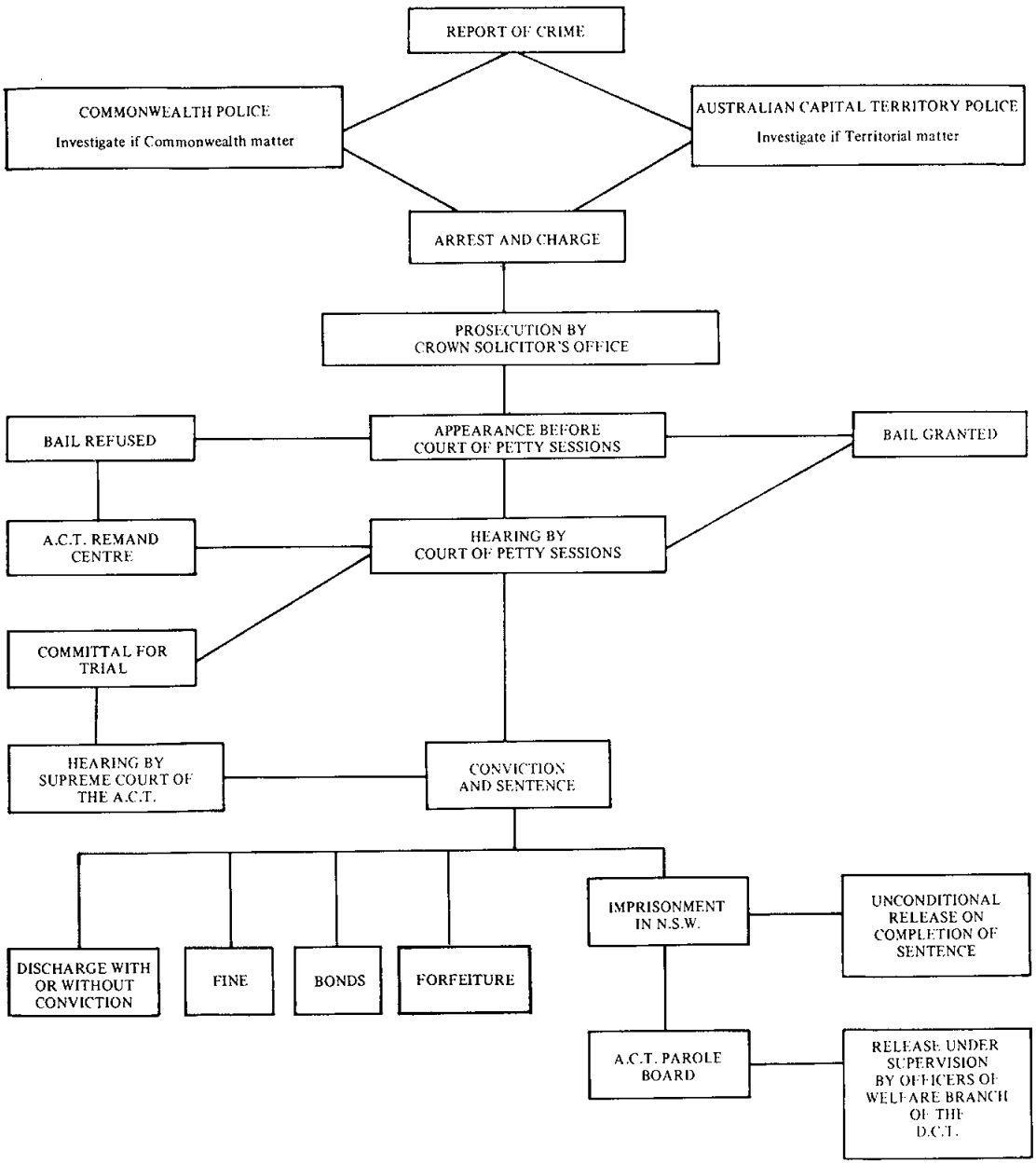
Figure 6 Fraud, forgery, etc., mean rates per 100,000 of the population for each State and Territory, 1964-73



Source: D. Biles *Crime and Justice in Australia.*

FIGURE 7

FLOW OF BUSINESS THROUGH THE AUSTRALIAN CAPITAL TERRITORY CRIMINAL JUSTICE SYSTEM



The Decision to Prosecute

18. The manner in which the police and prosecution conduct their respective duties can have an effect upon the punishment of offenders. It is important to note that the Commission's Reference is not limited to reform of sentencing law but extends to punishment of offenders. Enforcement practices and priorities of prosecutors determine to a significant degree the persons who do or do not enter the criminal justice system in the first place. Equally, these practices and priorities may affect the nature and extent of charges brought against suspected offenders. Many crimes exist in various ascending scales of seriousness attracting ascending penalties. A decision to prosecute at the top of the scale can involve not only greater costs of trial but also greater risks of heavier punishment. Similarly, decisions by the prosecution can determine whether or not a case proceeds, and, if it does, whether it is dealt with summarily or on indictment. Most of the decisions made in this area of criminal justice administration lie outside the field of public scrutiny, representing an area of substantial discretionary power in respect of which those responsible are subject to only limited public accountability. Apart from pointing to this power it is not intended to discuss this issue further in the context of this paper.[8] The Commission is, however, examining the role of the prosecution as part of its broader inquiry under the sentencing reference. With the assistance of the Law Foundation of New South Wales, interviews about procedures are being conducted with a sample of lawyers in the Crown Solicitor's Office involved in prosecuting offences under Commonwealth and A.C.T. laws. A limited examination is also being made of prosecuting policies adopted in major Commonwealth Departments like Taxation, Social Security and Health.

The Courts

19. The actual imposition of punishment upon convicted offenders is conducted in public by the courts. In the A.C.T. the sentencing of offenders convicted under both Commonwealth and A.C.T. laws is carried out by judges or magistrates, the former being members of the Supreme Court of the Territory and the latter members of the Courts of Petty Sessions. As can be seen from Tables 2 and 3 the overwhelming proportion of sentences in the A.C.T. are imposed by magistrates. These Tables also show that the existing sentencing options available to judges and magistrates in the A.C.T. consist of:

- Discharge with or without a conviction being entered
- Fines
- Bonds/probation
- Forfeiture of a right or privilege
- Imprisonment

This list of options is notably shorter than those available in other jurisdictions in Australia as Table 7 below shows.

20. It will be noticed that fines are by far the most frequent penalty imposed by Courts of Petty Sessions, while the Supreme Court more frequently imposes imprisonment as a penalty. This difference can be explained by the types of crime being dealt with by the respective courts, magistrates handling less serious matters such as theft and motoring offences and the Supreme Court graver charges such as murder, robbery and rape.

8. The Commission has referred earlier to the role of the prosecution in Discussion Paper No. 4, *Access to the Courts—I Standing: Public Interest Suits*, 21ff.

Table 2

OFFENCES CHARGED IN THE COURT OF PETTY SESSIONS OF THE AUSTRALIAN CAPITAL TERRITORY, RESULT OF HEARING AND PUNISHMENT, 1976

		RESULT OF HEARING			PUNISHMENT				IMPRISONMENT		
	Cases Charged	Adjourned, Discharged and not Guilty	Committal to Higher Court	Guilty	Fine	Non-App. for Bail Forf.	Bond/ Recog.	Admon. and Discharge	1 Mth. or Less	1-6 Mths.	6 Mths. or more
Against person, *e.g.* assault, sexual	369	73	35	261	162	4	65	7	10	11	2
Against property, *e.g.* larceny	620	63	20	537	244	4	167	76	20	24	10
Against good order/drunk	987	91	—	896	252	480	20	150	—	—	—
Driving and Drinking	13,667	801	4	12,862	12,279	17	143	171	7	27	4
Drug	87	3	—	84	57	2	17	—	1	7	—
False Pretences	431	13	53	365	213	11	56	53	11	15	1
Other	727	86	7	634	517	7	14	8	68	17	3

Source: Australian Bureau of Statistics

Table 3

PERSONS CONVICTED IN THE SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY, PENALTY, AGE AND KNOWN PREVIOUS CONVICTIONS (1976)

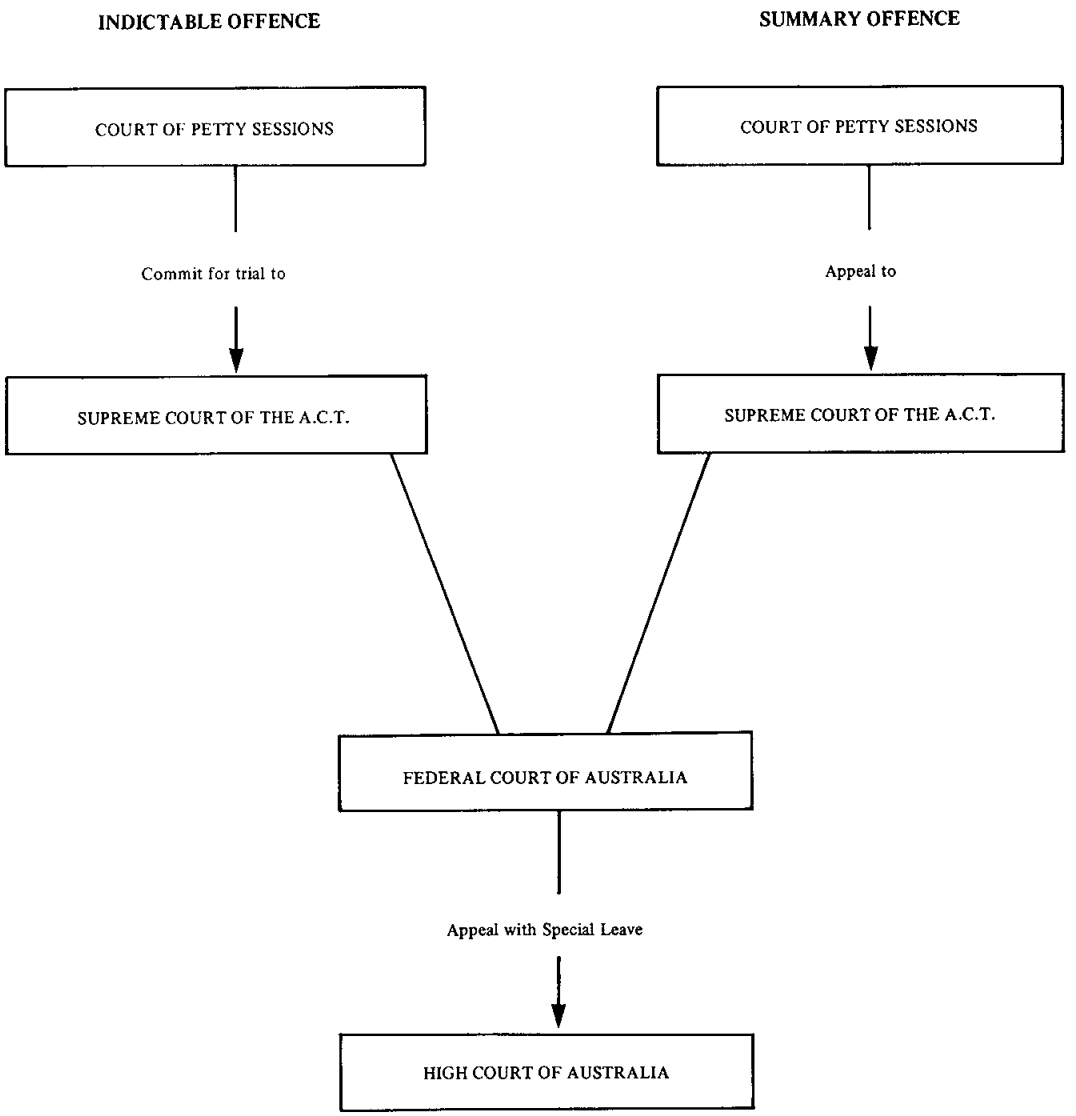
	Persons convicted	Penalty			Age at time of arrest (years)				Known previous convictions		
		Recog-nisance	Fine	Gaol	15-19	20-24	25-29	30 and over	Previously convicted	None	Not available
Homicides, assaults and like offences —											
Manslaughter	1	—	—	1	—	—	1	—	—	—	1
Culpable driving	4	1	—	3	1	—	2	—	1	3	—
Wound	1	—	—	1	—	—	—	—	—	1	—
Assault, beat and ill-treat	1	1	—	—	—	—	—	1	—	—	1
Assault and rob	4	2	—	2	1	—	2	—	—	2	2
Assault	1	1	—	—	—	—	—	1	—	1	—
Sexual and related offences —											
Indecent assault	1	1	—	—	—	—	1	—	—	—	1
Offences against property —											
Break, enter and steal	6	1	—	5	—	4	1	1	—	6	—
Larceny	3	1	—	2	—	1	1	1	1	1	1
Stealing	1	1	—	—	—	—	—	1	—	—	1
Sell goods without good title	1	1	—	—	1	—	—	—	—	—	1
Malicious damage	3	2	—	1	—	3	—	—	—	3	—
Forgery and offences against currency	1	—	—	1	—	—	1	—	—	—	1
Other —											
False testimony	4	4	—	—	1	3	—	—	2	2	—
Knowingly concerned	1	1	—	—	1	—	—	—	—	1	—
Breach of bond	1	1	—	—	—	—	1	—	1	—	—
TOTAL	34	18	—	16	5	11	10	5	5	20	9

Source: Australian Bureau of Statistics

21. Appeals against sentence and conviction at large can be made in the A.C.T. Figure 8 displays the court hierarchy for appeal purposes within the jurisdiction. An appeal lies to the Federal Court in both indictable and summary offences and by special leave from the Federal Court to the High Court of Australia. There is now no appeal from Territory Courts to the Judicial Committee of the Privy Council.[9]

FIGURE 8

COURT HIERARCHY FOR APPEALS IN THE AUSTRALIAN CAPITAL TERRITORY



9. A more detailed description of the system of appeals, and of Federal criminal jurisdiction at large, is contained in Davies "Sentencing the Federal Offender—Jurisdictional Problems". A.L.R.C., Sentencing Research Paper No. 5, 1979.

The Imposition of Punishment

22. Depending on the type of punishment imposed, an offender, following conviction and sentence, may become the responsibility of the Department of the Capital Territory which administers corrective services and programs for the A.C.T. At present the services and programs for adults are quite limited, consisting in the main of probation and parole supervision. The number of persons on probation or parole in the A.C.T. as at November 1, 1978 is shown in Table 4.

Table 4

ADULT PRISONERS, PROBATIONERS AND PAROLEES, AUSTRALIAN STATES AND TERRITORIES, 1 NOVEMBER 1978

	PRISONERS		PROBATIONERS		PAROLEES	
	No.	Rates	No.	Rates	No.	Rates
N.S.W.	3837	76.5	8089	161.2	2255	44.9
VIC.	1569	40.9	2821	73.6	837	21.8
QLD.	1600	74.6	2413	110.9	398	18.3
S.A.	808	62.4	2428	187.6	164	12.7
W.A.	1253	101.8	1758	142.8	496	40.3
TAS.	328	79.0	1815	437.3	59	14.2
N.T.	193	170.8	74	65.5	41	36.3
A.C.T.	41	18.9	182	83.9	15	6.9
AUST.	9629	67.4	19580	137.0	4265	29.8

Source: Australian Institute of Criminology—I. Potas and D. Biles

The Table also shows substantial variations in the rates of imprisonment, probation and parole, per 100,000 of the population, in Australian States and Territories. The imprisonment and parole rates in any jurisdiction tend to be closely related to one another. More will be said below about this relationship when discussing the use of imprisonment in the A.C.T. In the case of probation it will be observed that the A.C.T. is among those jurisdictions with a low rate of use of this form of non-custodial supervision.

23. An offender sentenced to a term of imprisonment by a court in the A.C.T. is sent to a N.S.W. correctional institution, there being no custodial facilities for convicted persons in the Territory. Provision is made for the removal of prisoners from the Territory and their detention in New South Wales (N.S.W.) in the *Removal of Prisoners (Australian Capital Territory) Act* 1968 (Cth.) and Part IX of the *Prisons Act*, 1952 (N.S.W.). The prisoner's transfer to N.S.W. is authorised by a warrant. Under an inter-government agreement, the Commonwealth pays to N.S.W. the cost of imprisoning offenders from the Territory.

24. Federal prisoners from the A.C.T. may be released before completing their full terms of imprisonment. The release procedures are different for prisoners who have offended against laws of the Territory from those for prisoners who have offended against Commonwealth laws applying in the Territory. Parole orders for the former category of prisoner have been made since 1976 by a Parole Board. The Parole Board was established in that year by the *Parole*

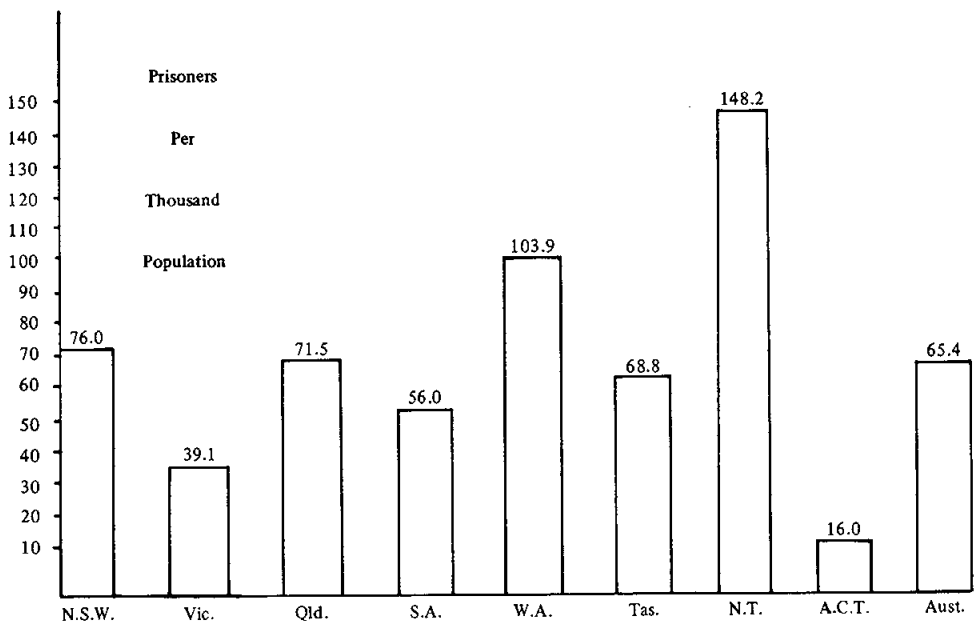
Ordinance (A.C.T.). The Board is chaired by a Supreme Court Judge and has two other members who meet on a regular basis to discuss parole orders. On the other hand, parole orders for those prisoners who have offended against Commonwealth laws are made by the Governor-General on the advice of the Commonwealth Attorney-General's Department. Since the establishment of the Parole Board in the A.C.T., it has been the normal practice of the Department to seek advisory recommendations from the Board on the release of prisoners.

IV — THE NEED FOR THE PROVISION OF CORRECTIONAL INSTITUTIONS IN THE A.C.T.

The Use of Imprisonment

25. The first issue concerns the question whether a need exists warranting the construction of correctional institutions for adult offenders in the A.C.T. As has been pointed out above A.C.T. residents who are sentenced to imprisonment by Territorial courts must at present serve their sentences in N.S.W. The number of such persons is not large. Since 1969 it has averaged between 35 and 40 per day despite substantial general population increases within the Territory. Figure 9 and Table 4 indicate that the rate of imprisonment per 100,000 of the population in the A.C.T. is substantially lower than that of any other Australian jurisdiction. While international comparisons of prison statistics are difficult and

Figure 9 Australian Imprisonment Rates (February 1979)



Source: Australian Institute of Criminology. D. Biles.

hazardous to make, there being no standardised recording or reporting practices for such data, it is also interesting to note that the A.C.T. imprisonment rate is similar to that of the Netherlands which, it is claimed, has one of the lowest imprisonment rates in the world. In 1976 the imprisonment rate in the Netherlands was said to be 18 per 100,000 of the population, one twelfth of the United States rate of 215 per 100,000 which was said to be the highest in the western world.[10]

26. It may be asked why the use of imprisonment is so low in the A.C.T. One explanation offered is that the type of crime, and offender, being considered by sentencers in the A.C.T. call less frequently for the imposition of prison sentences than is the case in other Australian jurisdictions. It has been demonstrated that the A.C.T. has a "unique" general population when contrasted with other parts of the country. As the Commission noted in 1975:

> "Even a cursory glance at the Canberra community reveals that it has unique features. The most recent figures available to the Commission estimate that the population of the Territory at 30 September 1975 was 195,200. Of this number an estimated 192,700 live within the Canberra City district. The population is predominantly an urban one. In addition, the figures disclose that the Territory has by far the highest population density of any of the Australian States and Territories. Furthermore the population is increasing rapidly. For example, between the 1966 and 1971 Census, the population of the Territory increased at an average annual rate of 8.45 per cent. This rate was exceeded only in the Northern Territory. Overall, the statistics show that the typical Canberra resident is fairly young (1972 figures show that 62 per cent of its population is under 30 years compared with 54 per cent for Australia as a whole). He is well educated and receives a higher income than the national average. Average male weekly earnings during the September quarter of 1975 amounted to $199.40. This was $41.70 (26.4 per cent) higher than the Australian average. The Canberra population is also highly mobile. Taking the same five-year period (1966-1971) the statistics reveal that 60 per cent of the Territory's residents moved home within that period. This is well in advance of the national average and demonstrates peculiar features relevant to law enforcement in the area under study."[11]

27. Factors such as rapid urban growth, high-density living and population mobility have in recent decades been strongly associated in many countries with increasing crime rates. Coupled with the comparative youth of the Territory's population, itself a factor often linked with higher rates of crime, it might be anticipated that sentencers would be confronted more rather than less frequently with situations calling for the imprisonment of offenders. Certainly, the rates of serious crime in the Territory, as shown in Figures 2-6 above, indicate that it is far from being the most crime-free community in Australia. Whether these crime rates conceal qualitative differences in the types of offence, and criminals, coming before A.C.T. courts cannot be determined from existing data sources. Even if such differences do occur, they are most unlikely to account for the variations in the use of imprisonment as a penalty found between the A.C.T. and States like South Australia and Tasmania.

28. Rather than looking for an explanation of the A.C.T.'s low imprisonment rate in the nature of the crime and criminals being dealt with, it seems more plausible largely to attribute this rate to the general attitude of the judicial officers who pass sentence on offenders. The data in Figure 9 and Table 4 would appear to demonstrate that as a general rule imprisonment is viewed by sentencers in the A.C.T. as a punishment of last resort. This conclusion is confirmed by per-

10. Doleschal, "Rate and Length of Imprisonment" (1977) 23 *Crime and Delinquency*, 51-56.
11. A.L.R.C.4, *Alcohol, Drugs and Driving* (1976), 63.

sonal interviews conducted by the Commission with most of the judges and magistrates in the Territory.

29. Table 5 shows the length of prison sentences imposed by A.C.T. courts in the period 1975-1978. It will be seen that about two thirds of all such sentences were for a period of less than 6 months and that about 80% were for a period of less than a year. Table 6 supplies further information about the age and sex of those sentenced. As in all Australian jurisdictions it will be seen that the number of women in prison is very small indeed. Most prisoners are young men under the age of 30.

Table 5

LENGTH OF SENTENCES OF IMPRISONMENT IMPOSED BY AUSTRALIAN CAPITAL TERRITORY COURTS 1975-1978

Year	3 months		Over 3 months		Over 6 months		Over 12 months		Total
	No.	%	No.	%	No.	%	No.	%	
1975	23	44.23	11	21.15	7	13.47	11	21.15	52
1976	27	39.13	23	33.33	9	13.05	10	14.49	69
1977	17	22.97	25	33.78	12	16.22	20	27.03	74
1978	29	33.33	29	33.33	12	13.79	17	19.55	87
Total	96	34.04	88	31.20	40	14.19	58	20.57	282

Source: Australian Capital Territory Police

Arguments for Continuing to Send A.C.T. Prisoners to N.S.W.

30. ***Convenience and Economics.*** The principal arguments supporting the continuance of the present situation with regard to sentences of imprisonment in the A.C.T. would seem to be those of convenience and economics. When the Commonwealth Parliament first assumed control over the A.C.T. in 1911, the Territory possessed no criminal justice system of its own. Following a practice already adopted in relation to federal offenders at large it was decided to house Territorial prisoners in State institutions rather than going to the expense of building separate correctional facilities in the A.C.T. N.S.W. became the "host" State and since that time Territorial offenders have been kept in that State's prisons.

31. The cost of maintaining these prisoners in N.S.W. is not negligible. N.S.W. currently charges the federal authorities $31.57 per day for each prisoner in its institutions and for the year 1977-1978, the Commonwealth paid a total of $403,969.72. These charges have risen from $9.91 per day in 1972-1973. This rate of increase reveals no sign of slowing.

32. It seems clear, nevertheless, that the cost to the Commonwealth of the present system is likely to be less than the cost incurred if new correctional institutions were to be built and staffed in the A.C.T. Capital costs of construction would very much depend upon the types of institutions to be built. For example, the Belconnen Remand Centre and Police Station built in 1975 cost $1,429,000. Approximately $800,000 can be attributed to the Remand Centre which has

Table 6

AGE OF PERSON SENTENCED TO IMPRISONMENT BY AUSTRALIAN CAPITAL TERRITORY COURTS 1975-1978

YEAR	18	19	20	21	22	23	24	Over 25 and Under 30	Over 30 and Under 35	Over 35 and Under 40	Over 40 and Under 45	Over 45 and Under 50	Over 50 and Under 55	Over 55 and Under 60	Over 60	TOTAL
1975	3*	6	4	6	5	3	—	12*	5	1	3	3*	1	—	—	52
1976	6	9*	4	4	2	7	4	12	7	4	7*	2	1	—	—	69
1977	7	8*	7*	2	4	5	6	16	9	4	1	2	3	—	—	74
1978	8	8*	9	5*	5**	6	7	16	8	4	4	2	3	1	1	87
TOTAL	24	31	24	17	16	21	17	56	29	13	15	9	8	1	1	282

* Includes 1 female

** Includes 2 females (Total females: 11)

Source: Australian Capital Territory Police

eighteen cells in a maximum security setting. Increases in construction costs since 1975 and the additional facilities required for a prison would mean that a similar sized maximum security institution would cost considerably more in 1979. If all A.C.T. prisoners were to be removed from the N.S.W. system the institutions required to house them in the Territory would have to cater for both male and female prisoners throughout the entire security spectrum. A check made by the Commission of the present security classifications of A.C.T. prisoners in N.S.W. revealed that about 20% were being kept in maximum security prisons. The balance was almost equally divided between medium and minimum security facilities.

33. ***Keeping the Rate of Imprisonment Low.*** Apart from the cost advantages of continuing the present arrangements, another argument advanced against the construction of correctional institutions in the A.C.T. is that the present situation contributes to the fact that the imprisonment rate is kept low. It is claimed by those supporting this view that judges and magistrates are well aware of the deficiencies of the contemporary N.S.W. prison system, and of the hardships imposed by "transporting" A.C.T. residents to N.S.W. to be imprisoned. They therefore seek, wherever possible, to avoid prison sentences except as a necessary last resort. If, on the other hand, new institutions were to be built in the A.C.T. there would, it is claimed, be a risk that this reluctance to impose prison sentences would diminish and more people would be imprisoned. The lack of institutions at present also acts as a psychological deterrent to imprisonment, requiring sentencers to search for viable alternatives. The fear has been expressed that with the removal of this psychological barrier, judges and magistrates might be less diligent in their efforts to find alternatives to imprisonment, filling by default any custodial facilities which might be made available.

Arguments for Keeping A.C.T. Prisoners in the Territory

34. ***Conditions in New South Wales Prisons.*** Those who have recently urged that some type of correctional institution(s) be constructed in the A.C.T. have relied extensively upon the Nagle Report. This report contains a severe condemnation of existing conditions in N.S.W. prisons. The belief that any Territorial offender could benefit from being sent to such a system, no matter what its range of facilities, in preference to a new local institution, is dispelled by a reading of this report. Some quotations:

> *General Conditions* "The Bathurst riot [in February, 1974] illustrated the general and continuing workings of the [New South Wales] Department of Corrective Services: idle inmates; unsuitable and badly trained Superintendents and staff; poor morale; arrogant enforcement of petty restrictions; the unfair application of disciplinary rules . . ." [Report, p. 17]
>
> *On the Public and Prisons* "Generally, the public has scant knowledge of, and pays little regard to, prisons . . . The public's occasional interest in prisons and prisoners is largely morbid, and usually generated by a sensational treatment of the subject in the press; otherwise it is abysmally ignorant of the whole subject. It readily accepts the view that those who have offended against the law should be locked away, out of sight and out of mind." [Report, p. 17]
>
> *Shelter Against the Climate* "Many prisoners in institutions throughout New South Wales are forced to remain for long hours in open prison yards which afford inadequate shelter and, in some cases, no seating. The remand prisoners at Goulburn, where winters are extreme, are frequently held in an open yard all day because there is nowhere else for them to be placed." [Report, p. 279]
>
> *Time Locked in Cells* "In some gaols prisoners have been locked up for more than seventeen hours a day." [Report, p. 270]

Medical Treatment "[T]he examples of medical mismanagement and the failure to provide proper medical treatment for prisoners . . . lead irresistably to the conclusion that the medical services for prisoners in New South Wales are demonstrably inadequate." [Report, p. 281]

35. ***Judicial Concern.*** In the recent judgment of *Veen* v. *R.* the majority of the High Court of Australia took judicial notice of the lack of psychiatric facilities in N.S.W. prisons.[12] Mr. Justice Jacobs, in particular, referred extensively to the Nagle Report in the course of his judgment:

"[I]t is clear that the psychiatric services available in respect of a prisoner such as the present one [Veen] are very limited indeed even if they can be said to exist at all. The trial judge in *R.* v. *Page* was Maxwell J. and that same judge has had occasion to say more recently in *R.* v. *Jessop* (29th March 1978) (unreported) when pronouncing sentence: 'I interpolate to state that according to my information and experience there is no way in which prisoners serving sentences in New South Wales can be afforded appropriate psychiatric treatment.' We were informed during the hearing of this matter, and it was not in any way challenged as a correct statement, that the applicant has not received any psychiatric treatment since his sentence. Yet in the meantime he has once attempted suicide. Any doubts which might otherwise be left about the unavailability of any extensive psychiatric treatment in New South Wales prisons are resolved by the recent report of Nagle J. as Royal Commissioner appointed to enquire into New South Wales prisons. Having stated that medical services in New South Wales prisons are not operating satisfactorily, and having referred to the fact that part-time general practitioners and medical specialists supplement full-time services of Health Commission officers, Nagle J., *Report of Royal Commission into N.S.W. Prisons* (Government Printer, 1978) . . . [a]t pp. 335 *et seq.* says:

'One of the most disturbing aspects emerging from the Commission's inquiries into the medical services of the Department has been the condition and use of the Observation Section at the Malabar Complex. The Section was originally designed for the containment and treatment of prisoners who were psychiatrically disturbed. All parties at the hearings of the Commission unanimously condemned the building and its facilities.

. . .

The cellular conditions in the Observation Section are appalling. Some cells still have toilet tubs for use by occupants.

This practice is both unhygienic and dehumanizing. Some cells have no provision for beds and the occupant, whether sane or insane, is contained in a bare room. On the outside in the attached yard, there is scant cover for prisoners when it rains. Apparently, various attempts and proposals have been made in the past to renovate the Section. Its continual use is an indictment on the prison system, its administration and the people of New South Wales. The situation should not have been allowed to continue and its replacement should be a first priority in any future building program.

The Consultant Psychiatrist to the Prison Medical Service, Dr. W. E. Lucas, described the Section with a note of exasperation:

"One can only describe the Observation Section as Dickensian. Physically, it appears much the same as when I first saw it in 1968. However, it appears utterly durable. Cellular confinement of 16-17 hours per day is totally unacceptable for psychiatric patients. There are no psychiatrically trained staff and the inmates there are now predominantly psychiatrically disturbed. Whilst my knowledge is confined to since 1968 in the period since plans to provide alternatives have consistently foundered." ' "[13]

36. ***Personal Hardship to Offenders.*** Apart from the impact upon them of general conditions in N.S.W. correctional institutions, there is no doubt that those offenders who are sentenced to imprisonment by the A.C.T. courts suffer varying degrees of personal hardship because of their removal from the Territory. The principal receiving prison for male offenders is Goulburn, 120 km from the

12. (1979) 23 A.L.R. 281.
13. *Ibid.*, 297-298.

Territory. Women offenders from the A.C.T. are sent to the Mulawa Training Centre near Sydney, 350 kilometres from the Capital Territory. Males sentenced to life imprisonment are sent initially to Long Bay Gaol in Sydney. Depending on the security classification given them by N.S.W. correctional authorities offenders may subsequently be sent to any one of 27 institutions scattered throughout the State. In recent times A.C.T. offenders have been held at institutions as far away as Cessnock (490 km from Canberra), Milson Island (362 km) and Oberon Afforestation Camp (211 km). There is nothing to prevent the correctional authorities sending them to much more distant places such as Grafton or Glen Innes. In practice, shorter term prisoners from the A.C.T. are likely to remain at either Goulburn or be transferred to minimum security facilities. Women offenders, because of their limited numbers and the small number of institutions available to house them in N.S.W., normally remain at Mulawa.

37. ***Case Studies.*** Members of the Commission's staff interviewed a number of A.C.T. prisoners housed in Goulburn and Long Bay prisons. These interviews revealed the existence of significant problems for the prisoners, their relatives and friends in maintaining regular contact with one another. The interviews also suggested that similar difficulties arose in relation to maintaining contact with lawyers and other professional advisors. Several cases illustrating these various problems are listed below:

Case A: The prisoner, an offender in his twenties, was sentenced to 2 months' imprisonment on drug charges and sent to Goulburn gaol.

"*Q:* Do you have any good friends come and visit you at all? . . .

A: Yes.

Q: Regularly?

A: No, not really. A lot of the times they couldn't get up here . . . Even though . . . it only takes about an hour to get here [by car] and an hour to get back it's still a hassle for them to do it. If it's just a short distance you know then there's no worries about people showing up all the time. It means a lot to the prisoners, you know, not only me, but when you don't get a visitor and when you are expecting a visit and it doesn't come it really rips you, it just builds up extra frustrations in people."

Case B: The prisoner, a man in his fifties and with prior offences, was sentenced to 3 months' imprisonment on stealing charges and sent to Goulburn gaol. He indicated in the course of an interview that he wished to appeal against his conviction: "What I do see is a lack of communication between this place and the A.C.T. . . . [I] was looking to appeal and I felt that should have been done before I'd even left [Canberra]. When I mentioned this on the morning I came here [to Goulburn] I was told it's too late for that—you can't do that now and there's a car waiting and you're going now and I haven't been able to do anything since. . . . 21 days has gone by . . . It's the communication that bothers me. Not being able to get through to either legal aid or any other lawyer. It has to do with my mail. I don't get any replies."

Case C: The prisoner, in his twenties, was returned to prison to serve the balance of a six-year sentence for rape following breaches of his

parole conditions:

"*Q:* Do your family and friends visit you?

A: Yes, every fortnight.

Q: And they have no difficulty getting here—they drive here do they?

A: Yes, from Canberra. It's alright here but when I was up at ——— Mum and Dad used to find it pretty tiring to come up here and see me . . .

Q: When you were up in ——— how often did they come and see you?

A: Once a month . . . They used to come up, leave home on Friday afternoon, get up there Saturday morning to see me and come back Saturday afternoon and again Sunday morning and go back Sunday afternoon.

Q: Would it have been a lot easier for them and others who might visit you if you were imprisoned in the A.C.T.?

A: Oh, a lot easier. Because Dad's got a bad heart and he's not supposed to strain himself too much and Mum—she's had a broken pelvis and she can't sit in one position too long. The long trip used to take a lot out of them."

38. ***Loss of Control Over Offenders.*** The present practice of sending A.C.T. prisoners to N.S.W. amounts, in the Commission's view, to a virtual abandonment on the part of Commonwealth authorities of their responsibility to, and control over, such prisoners. A.C.T. prisoners have indicated to the Commission in correspondence and interviews that they are conscious of this abandonment and feel resentful of it. It is also apparent that the lack of control over these offenders creates a number of problems for Commonwealth authorities. For example, members of the A.C.T. Parole Board expressed concern to the Commission about the difficulties they experience in obtaining from N.S.W. reliable and prompt parole release recommendations. Similar difficulties were reported in obtaining psychiatric and psychological reports about potential parolees, and arranging details of their parole release program. Offenders are also disadvantaged in programs designed to assist in their transition back to the community. While A.C.T. offenders are eligible for work release in N.S.W., this program would have a great deal more effect if it were offered in their home community. The same applies to home visits and study leave.

Support for the Provision of Correctional Institutions in the A.C.T.

39. Having reviewed the arguments on both sides the Commission is of the view that there is a need for the construction of correctional institutions for adult offenders in the A.C.T.[14] This view is one believed to be shared by all the judges and magistrates of the Territory; by the police; and by the welfare authorities. For instance, the Chief Judge of the A.C.T. Supreme Court, Mr. Justice Blackburn, has noted that:

> "The judges of this court . . . all hold the view that it is desirable that persons sentenced to imprisonment by the courts of the Territory should serve their terms of imprison-

14. The situation with regard to children is being considered separately by the Commission in its Reference on Child Welfare.

ment in the Territory. The present practice of imprisonment in New South Wales causes injustice and makes the sentencing process, and the problems facing the Parole Board, more difficult than they should be."[15]

40. The Commission's interviews with imprisoned A.C.T. offenders also confirmed their strong preference for imprisonment in the A.C.T. rather than in N.S.W. No prisoner expressed a desire that the present arrangements be continued. No prisoner interviewed expressed indifference. Although prisoner opinions and desires cannot be a determining factor in this debate, the inconvenience to the families of prisoners and the strain which present arrangements place upon the stability of personal relationships (a factor plainly relevant for rehabilitation) are considerations which the Commission considers relevant to the resolution of the debate.

Previous Recommendations for the Construction of a Correctional Institution

41. The idea that a correctional institution should be established in the A.C.T. is not new. The earliest proposal of this nature ascertained by the Commission was made in 1955 when it was suggested by the Department of the Interior that a gaol to house both A.C.T. and Northern Territory prisoners should be built in the A.C.T. This proposal did not find favour in departmental circles.

42. Discussions at a departmental level about the need for a prison in the A.C.T. took place again in 1965. In 1970 a Joint Submission by the Departments of Interior and the Attorney-General was made to Cabinet on the subject but no action resulted from the submission. In 1974 the then Attorney-General advocated the construction of a prison. However, to date, the only significant development to emerge from these discussions and recommendations has been the construction of the Belconnen Remand Centre in 1975. This Centre is, in the words of the Director of Welfare Services for the A.C.T.:

"a major and enlightened development which has worked out very positively. ... We have managed to walk the tightrope between the requirement of secure custody [for persons awaiting trial] whilst at the same time maximising the individual's rights and dignity in keeping with his status of being an unconvicted person. The rights of detainees to wear their own clothing, to almost unlimited visiting, to the non-censoring of mail and access to phone calls, together with a freedom of movement they are afforded throughout the area and with the key to their unit, have all been major breakthroughs in current Australian custodial practice. It is, I believe, a program that the Territory can be rightly proud of."[16]

43. Against this background, the principal reasons for the lack of action in this area are unclear. The problem of providing an institution which would cater for all categories of prisoner, both male and female, was perhaps seen to be too daunting and costly a problem, given the small number of persons involved. The likelihood of community opposition to the proposal to build a prison may also have played a part in persuading successive governments to "shelve" plans for such an institution. While prisoners were shipped out of the Territory public complaints were few and from sources generally without the ear of government or the interest of media and other outlets. Experience elsewhere may have

15. Letter to Professor Chappell, November 1978. Permission was given by His Honour to have these views expressed to a Seminar held by the Australian Institute of Criminology, December 1978 and to publish them in this paper.
16. Statement at Seminar, Australian Institute of Criminology, December 4, 1978, by Mr. J. Hemer.

suggested that public complaints would multiply into concerted opposition once residents of the A.C.T. became aware of any government's intention to erect a local prison. More recently the concerns about costs and limiting the growth of the public sector may have played a part in governmental inaction.

Commonwealth Responsibilities: The Commission's View

44. It is the Commission's view that the Commonwealth should accept its responsibility to provide humane and just conditions of imprisonment for the few A.C.T. offenders who are sentenced to terms of imprisonment. The conditions of N.S.W. prisons outlined in the Nagle Report, and recent instances of serious judicial disquiet about these conditions expressed in the highest court of the country provide the catalyst for action. This is an area in which the Commonwealth should assume a leadership role, demonstrating to the States and to the Australian community its concern and initiative in dealing with an important and national social problem. The social experimentation which has played a significant part in the overall development of the nation's capital should be applied to the design and construction of adult correctional institutions, as it has already to the Belconnen Remand Centre. As a senior welfare official stated at a sentencing seminar conducted by the Commission in December, 1978:

> "Despite the complexity of the problem in Canberra, we are fortunate to be a community that is contained in a relatively small area. Compared with the States, we are comparatively late in approaching the necessity to accept responsibility for a State-like correctional system. Thus it is possible to choose the best of the services operating elsewhere. It is possible to implement variations on those services. It may be possible to offer the rest of Australia a unique model for reference."[17]

Whilst considerations of cost and staff limitations are relevant, the serious injustices being done to prisoners and their families and the unacceptable conditions to which some of them are sent, as now revealed by recent reports, warrant, in the Commission's view, even at time of financial restraint, action to remedy the present situation. Custodial institutions should be built in the Capital Territory and should receive those persons convicted and sentenced to imprisonment by the courts of the Territory, subject to what appears below. The current practice of sending Territory prisoners to gaols in N.S.W. should be discontinued.

45. The Commission's proposal concerning the need for the construction of correctional institutions for adult offenders in the A.C.T. is one component of a more comprehensive reform package being proposed for the Territory's correctional services. The Commission doubts whether this recommendation may stimulate more rather than less use of imprisonment by judges and magistrates in the Capital Territory. The construction of the new remand centre at Belconnen has not resulted in more accused persons being remanded in custody rather than released on bail. The Belconnen Centre, which has a capacity of 18, has held on a daily average fewer than 10 persons since its opening, and on occasions has had only 4 or 5 occupants. In any case, the countervailing argument must be considered. Are there some persons presently not sentenced to imprisonment who, consistently even with the use of custodial sentences as a last resort, should be so sentenced but are not because of the absence of appropriate facilities? Furthermore, it is not acceptable that a group of prisoners, however small in number, should suffer injustice in order that others should not be imprisoned.

17. *Ibid.*

Planning Objectives

46. Two firm objectives need to be kept in mind during the planning process involved in the design of a new correctional system for the Territory. First, the long-term objective should be to reduce as much as possible the number of persons held in any form of custody in the A.C.T. Ultimately, only those offenders who require imprisonment as punishment and to protect society should be kept in prison. Identification of such offenders admittedly presents difficult practical and moral problems. But as mentioned earlier, at the moment only about 20% of the A.C.T. offenders who are imprisoned are being held in maximum security conditions. This does not necessarily mean that these offenders are dangerous —many of them may simply represent significant escape risks or require protection against their fellow prisoners.

47. Secondly, for the balance of the contemporary A.C.T. offender population who now receive prison sentences, the objective should be to provide the least disruptive and punitive form of custodial sentence appropriate. From the figures discussed earlier in this paper it is apparent that minimum security facilities could probably house the majority of the present A.C.T. prison population, both male and female.[18] In order to provide a desirable range of sentencing options to judges and magistrates, a number of types of facility should be made available. These should include:

- a minimum security farm and forestry camp;
- a work release hostel;
- a periodic detention centre; and
- a maximum security institution.

48. ***A Minimum Security Camp.*** The establishment of a minimum security farm and forestry camp in the A.C.T. would offer constructive labour to those offenders who either lacked present employment opportunities in the community or who were on short-term sentences which precluded participation in vocational or allied programs. Offenders could be sentenced directly to the camp by a judge or magistrate, or be transferred there administratively by correctional administrators from other types of institution. This proposal would require careful discussion with union and other interest groups. At present A.C.T. offenders who are sent to prisons in N.S.W. may, by administrative decision, serve their sentence in a minimum security prison. There is no method by which such offenders can currently be required by judicial order to serve their sentence in such an institution.

49. ***Work Release Hostel.*** A work release hostel would be a minimum security institution from which inmates would be released daily to work for normal wages in the community or to attend a variety of educational and vocational programs. Offenders would be away from the hostel only during working hours and the time taken to travel to and from their place of employment or study. The hostel would serve a dual function. The first would be its use for longer term prisoners, initially kept in conditions of maximum security, who were being re-integrated into the local community prior to the termination of their sentence. Such a use of work release hostels is now quite common in several

18. A conclusion also reached in a study in 1977 by Hopkins, Schick and White "A Prison for the Australian Capital Territory" (1977) 10 *Aust. & N.Z. Journal of Criminology*, 205-215.

Australian jurisdictions. The second function for the hostel would be its use as an institution to which offenders might be sentenced directly by the courts. Through such a sentence:

- courts would be able to avoid the severe disruption which frequently takes place in an offender's employment and personal life following imprisonment;
- The offender would be able to continue to support any dependants, and would also be able to contribute to the costs of running the work release hostel; and
- the possibility of providing restitution to crime victims would be enhanced.

50. ***Periodic Detention Centre.*** A periodic detention centre should be established for the purpose of providing sentencers with the option of sending certain types of offender to prison only for the weekend. Such sentences are now in use in N.S.W., primarily for serious traffic offenders, such as those convicted of reckless or culpable driving offences. In N.S.W. an offender may be ordered to be detained each weekend for a period up to a maximum of 12 months. The usual regime at such centres requires an offender to report on a Friday evening to the institution and to return home on Sunday evening. During the weekend inmates are usually required to work outside the centre, under the direction of correctional staff, on community jobs similar to those proposed later in this paper for use in community service orders. The advantage of periodic detention is that it does not seriously disrupt the normal life of an offender in the community, including his personal life and regular employment, both of which are specially important for his rehabilitation and restoration to society.

51. ***Maximum Security Institutions.*** The provision of secure facilities for the small number of offenders requiring confinement under such conditions would obviously involve greater costs. To maximise the use of staff, and physical resources, it would probably be preferable to locate any maximum security facility in close proximity to the proposed minimum security camp. The initial reception of prisoners could be provided for at this institution, as well as central administrative services for the correctional system.

Costs and Accommodation Needs

52. The provision in the A.C.T. of the three kinds of minimum security facility briefly described need not involve a large investment of funds in capital construction. The work release hostel and periodic detention centre could almost certainly be set up in existing buildings within the Territory. Alternatively, the three minimum security facilities could conveniently be combined in the one modern development. Obviously, there should be substantial community involvement in the planning process adopted for the establishment of these and all other new correctional services proposed for the A.C.T. No community welcomes the establishment of a correctional institution in the vicinity. There are, however, in the Capital Territory, suitable and yet not remote areas where a facility could be appropriately established.

53. The preparation of definitive estimates of the accommodation needs for each of the proposed facilities requires access to data and resources presently beyond the reach of the Commission's own limited research capabilities. However, factors such as estimated crime rates and population increases for the A.C.T. will obviously be central to any planning process. It is significant that official

estimates made in 1970 of future accommodation needs for prisoners in the A.C.T. noted these as 100 in 1975 and 150 in 1980. Measured against present imprisonment rates for the A.C.T., and growth rates in population and serious crime, these projections were excessive.

54. Corrections experts now agree that prisons in general should be kept as small as possible, maximising the opportunities for vocational, educational and related programs. If current sentencing practices persist in the A.C.T. it would appear that on the most gloomy projections no more than 80 local prisoners would need to be accommodated at any one time in the A.C.T. during this century. Most of these offenders could be housed in one of the three minimum security facilities which have been described.

Potential Accommodation for Federal Offenders

55. Because of the small number of A.C.T. prisoners, economies of scale suggest that the proposed new correctional services could be extended to other groups of non-Territorial offenders. Two groups who might be so serviced are federal and regional offenders. At present, persons who are convicted of offences against Commonwealth laws throughout Australia are dealt with by State correctional services, the Federal government possessing no such services of its own. The number of persons sent to imprisonment for federal offences is not large in comparison with State offences. Thus of the average daily Australian prison population of between 9,000 and 10,000 persons about 400 are federal offenders.

56. The Commission, pursuant to its terms of reference, is examining the conditions under which federal offenders are imprisoned by the States. This examination has already revealed that many such offenders are presently housed in facilities which fall far short of the United Nations *Standard Minimum Rules for the Treatment of Prisoners*. The Rules cover such areas as accommodation, medical care, education, discipline and punishment, separation of categories of prisoner, prison visits, institutional personnel and exercise and sport. For example, the Rules call for single cells for prisoners, adequate bedding, clothing and personal hygiene facilities, daily exercise, regular opportunities to make complaints, regular prison visits and regular inspections of prisons. A slightly modified version of the United Nations' Rules has recently been published for proposed application to Australian prisons.[19] The Commission is now considering a number of proposals for changing this situation.[20] Among these is the possibility of providing an option to the court and to the federal offender himself to elect for service of a part or the whole of a custodial sentence in the federal correctional system proposed for the A.C.T. For administrative and allied reasons such an offer could probably only be made to federal prisoners serving longer term sentences. It is also likely that most offenders would prefer to remain in the State where they were convicted, thus ensuring continuing contact with their normal environment. However, if more modern facilities were developed which did meet national and international minimum standards, some prisoners might elect to choose them rather than State facilities which did not. It is unrealistic in current conditions to contemplate for the small numbers involved the creation

19. Bevan (Ed.) *Minimum Standard Guidelines for Australian Prisons* (1978), Australian Institute of Criminology.
20. Richardson, "Minimum Standards for Treatment of Federal Offenders" A.L.R.C., Sentencing Research Paper No. 2, 1979.

of a distinct and separate Federal Penitentiary System. Such a system exists in the United States for the detention of offenders against Federal law in that country.

Potential Accommodation for Regional Offenders

57. Queanbeyan and other N.S.W. residents living in the immediate vicinity of the A.C.T. who are sentenced to imprisonment by either N.S.W. or A.C.T. courts at present serve their prison sentences in N.S.W. correctional institutions. In the same way that the Federal government now has an arrangement with N.S.W. regarding imprisonment of A.C.T. offenders, it might be advantageous in the future for N.S.W. to make arrangements for prisoners from Queanbeyan and surrounding areas to be housed in the proposed new A.C.T. correctional facilities. The possibility of such an arrangement, and that relating to federal offenders, should be kept in mind when planning accommodation needs for prisoners in the A.C.T. at large. Clearly it is relevant to the role which the Commonwealth could properly play in setting an appropriate modern standard for the detention of persons sentenced to lose their liberty.

Special Offender Groups

58. ***The Mentally Ill.*** The provision of separate facilities to house special groups of prisoners tends to present dilemmas for most correctional services. One group which requires particular attention in the A.C.T. are the mentally ill. The state of the psychiatric and allied services presently available to prisoners in the N.S.W. correctional system has already been described. Clearly, the small number of prisoners from the A.C.T. who are in need of such services do not receive them within the existing N.S.W. prison structure. The dilemma which this situation creates for sentencers in the A.C.T. was graphically demonstrated in a recent case. The offender, a man in his thirties, was convicted in the Territory's Supreme Court of a series of indecent assaults on young children. This was not his first conviction for this type of offence and it appeared likely that without a significant period of psychiatric treatment, further examples of the behaviour would occur. Since no such treatment could be anticipated in prison, the court decided upon a suspended sentence for the offender, a condition being that he "voluntarily" underwent an eight-year term of treatment in a psychiatric hospital in N.S.W. Because the hospital was outside the boundaries of the A.C.T., no compulsory order could be made for the offender to be committed there for treatment. The offender, having "voluntarily" presented himself to the hospital, subsequently left after a short period of residence. He was apprehended and brought back before the A.C.T. Court which, reluctantly, sent him to prison.

59. The case, which received substantial media coverage, prompted the following editorial comment in *The Canberra Times*:[21]

> "This situation places once again squarely on the Government the responsibility of providing suitable accommodation for individuals moved by irrational, uncontrollable and potentially aggressive sexual urges, and of protecting the parents and children of the city against probable future depredations by them.
>
> If the Government of Australia can happily commit the sum of $151 million to the building of a new Parliament House over a decade, it can *a fortiori* provide the few thousands of dollars that are necessary to care for under-privileged people who, often as victims of circumstances beyond their personal control, are not fit to mix with the general community and, indeed, constitute a threat to the community. In the con-

21. November 30, 1978.

sidered opinion of at least two judges of the ACT Supreme Court, it would be monstrous to condemn such people, who are not criminally insane in the legal sense, to a lifetime in jail. If we are sincere in our protestations of respect for the human rights of individuals who are incapacitated by grave and apparently incurable intellectual, emotional and social handicaps, we have an obligation to provide a suitable institution to receive them.

Such an institution, in the view of the ACT Supreme Court—and whether or not it is part of another, larger establishment—should provide security, personal guidance, a congenial environment and work with the opportunity of acquiring skills, which all adds up to some chance of happiness and fulfilment."

60. The Commission is of the view that there is a need for an institution in the A.C.T. which can cater for the requirements of offenders who suffer from various forms of mental illness. Such an institution might also be suitable to house persons held at Her Majesty's pleasure, having been found unfit to plead, or who are adjudged to be not guilty of a crime on the grounds of insanity. At present such persons are likely to be held in prison rather than in an institution which can provide treatment and allied services. The Commission does not, however, at this stage go beyond recognising this need to specify the type of facility which might be provided, and the sentencing powers which would be required as an adjunct to establishment of such an institution. Research is at present being conducted for the Commission within the Australian Institute of Criminology on the subject of hospital and treatment orders. Part of this research involves consideration of the issues briefly addressed in this section of the Discussion Paper.

61. ***Women Offenders.*** Because there are so few women offenders it has usually been found necessary to keep them in separate institutions in most correctional systems. These institutions generally lack the range of security conditions, programs and other facilities associated with male institutions. In the Commission's opinion, except for certain special circumstances, such as the provision of private maternity and allied services for women prisoners, female offenders should serve their sentences in separate but integrated correctional facilities. Such integration is already provided for in the daily operation of the Belconnen Remand Centre and seems to work well in practice. It should be noted that the Remand Centre is also staffed on an integrated basis. Well-qualified and motivated correctional staff can handle an integrated service of this type. Such a staff should be recruited for the proposed A.C.T. correctional system.

Evaluating the use of Imprisonment in the A.C.T.

62. The above proposals not only require community debate but also, if implemented by the Commonwealth government, close evaluation. In particular, the fear that the use of imprisonment would increase unacceptably in the A.C.T. as a result of these proposals would need to be addressed by a careful monitoring of the sentencing practices of the Territory courts. This monitoring would require the establishment of a far more sophisticated data-gathering system than exists at present for the compilation of criminal statistics.

63. What is needed is the introduction of a system which would provide a continuous analysis of the handling of persons by criminal justice agencies from the moment they enter the system via police action to the moment they exit. Information concerning transactions such as arrest leading to court action, bail, charging, plea, conviction, acquittal and sentence should be recorded for each person. In this manner a detailed evaluation can be made of the response of

criminal justice agencies to the crime problem. The system would also permit judges and magistrates to be provided with regular information regarding the sentences they impose. This is not done at present and is a constant source of proper complaint by judges throughout Australia.

Statutory Restrictions on the use of Imprisonment

64. The terms of Reference require the Commission to have regard to 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".

No legislation of this type presently exists in the A.C.T. or in other Australian jurisdictions. However, it has been suggested to the Commission that such legislation should be introduced, especially in the light of the proposed development of the custodial sentencing options noted above. The United Kingdom and New Zealand are two jurisdictions which do possess legislation which in terms restricts the use of imprisonment, and formulates some very broad guidelines concerning the imposition of a prison sentence. For instance, s.20 of the *Powers of Criminal Courts Act* (U.K.) 1973 provides:

> "20 (1) The court shall not pass sentence of imprisonment on a person who has attained the age of 21 and has not previously been sentenced to imprisonment unless the court is of opinion that no other method of dealing with him is appropriate; and for the purpose of determining whether any other method of dealing with any such person is appropriate the court shall obtain and consider information about the circumstances, and shall take into account any information before the court which is relevant to his character and his physical and mental condition.
>
> 20(2) Where a magistrate's court sentences to imprisonment any such person as is mentioned in sub-section (1) of this section, the court shall state the reason for its opinion that no other method of dealing with him is appropriate, and cause that reason to be specified in the warrant of commitment and to be entered in the register."

Some judges and magistrates in most jurisdictions of Australia have expressed scepticism about, and even opposition to, such provisions. Typically, they point out that "of course" imprisonment is a last resort and that it does not need a statute for that principle to be observed.

65. Without, at this stage, reaching any firm conclusions on the matter, the Commission is not persuaded that provisions of this type necessarily result in less use of imprisonment as a sanction in those jurisdictions where they have been introduced. Indeed, contemporary evidence from the United Kingdom indicates that in that country imprisonment rates are rising and have reached record levels. The rate of imprisonment in any society tends to reflect the attitudes of that society to the imposition of punishment at large, as expressed through the judicial officers responsible for sentencing individual offenders. It is apparent that in the A.C.T. prevalent judicial attitudes have resulted in imprisonment being used most sparingly as a sanction. The Commission is not convinced that this situation would change for the better, or for the worse, merely because a statute was enacted along broad lines similar to that set out above. Different considerations may apply in respect of a sentencing statute for Commonwealth offences by State judicial officers in different parts of the country. It is clear that the ratio of persons imprisoned per capita of population varies markedly from one jurisdiction in Australia to another (see Tables 1 and 4). However, the Commission is of the view that judges and magistrates in the A.C.T. should have available to them a more extensive range of non-custodial sentencing options than they presently possess. It is to these non-custodial options that we now turn.

V — THE NEED FOR NEW NON-CUSTODIAL SENTENCING OPTIONS

Principles and Approach

66. It would appear to be the unanimous view of A.C.T. judges and magistrates that they do not have an adequate range of non-custodial sentencing options available to them. The existing range of options was listed earlier. As can be seen from Table 7, A.C.T. sentencers have fewer sentencing options generally than their counterparts in other Australian jurisdictions.

Table 7

SENTENCING OPTIONS IN AUSTRALIAN JURISDICTIONS

	A.C.T.	N.S.W.	VIC.	QLD.	S.A.	W.A.	TAS.	N.T.	Cwth.
1. Absolute and conditional discharges	x	x	x	x	x	x	x	x	x
2. Good Behaviour Bond	x	x	x	x	x	x	x	x	x
3. Suspended Sentence	x			x	x	x	x	x	
4. Deferred Sentence		x		x					
5. Probation	x	x	x	x	x	x	x	x	x
6. Fine	x	x	x	x	x	x	x	x	x
7. Prison	x	x	x	x	x	x	x	x	x
8. Periodic Detention (week-end imprisonment)		x	x[1]	x					
9. Attendance centres (offering short-term work and guidance programs, normally during leisure hours)			x						
10. Work/community service orders			x[2]			x	x	x[1]	
11. Work release (imprisonment during non-working hours only with release to enable employment)[3]	x	x	x	x		x			
12. Diversion programs (following court appearance, usually for drug or drink-driving offenders, who are required to undergo a program of training/treatment)	x		x		x	x	x		
13. Halfway House (following imprisonment, usually whilst on parole)			x[4]	x[5]					
14. Hospital orders (requiring the offender to be incarcerated in a treatment environment or hospital rather than a prison)							x		
15. Compensation orders	x	x	x	x	x	x	x	x	x
16. Restitution	x	x	x	x	x	x	x	x	x
17. Criminal Bankruptcy									
18. Capital Punishment						x			
19. Corporal Punishment			x	x		x			

[1] At present there are no facilities.
[2] The Government has recently announced that this option will be introduced.
[3] Available at discretion of Prison Authorities.
[4] Privately operated for drug offenders.
[5] Used for prisoners on work release only.

67. While seeking to extend the range of non-custodial options for A.C.T. sentencers, the Commission is conscious of a number of general caveats which must be issued about such options:

- Existing research evidence has failed to identify any one non-custodial sentencing option which is more effective than another in preventing recidivism by offenders. Thus, if two offenders with similar backgrounds commit similar offences but receive different sentences, such as a fine or probation, current evidence suggests that the chances of them both offending again are about the same.
- The cost of administering various non-custodial sentencing options differs quite substantially. Thus, fines produce revenue while a probation order can be quite expensive to administer as a sentence because it is manpower intensive.
- There is little point providing new non-custodial sentencing options requiring additional administrative staff and allied resources if such resources are not going to be made available. Thus, community service orders will only be a viable sentencing option if suitable work and supervisors can be found for offenders in the community.
- There is a tendency, to be rigorously avoided, to regard each new sentencing option as a panacea for all ills. New options, like community service orders, can become faddish when they are first introduced. Such orders are, however, only suitable for certain situations and certain types of offender.
- The failure of an offender to fulfil what may often be an unreasonable obligation specified under one type of non-custodial sentencing option may result in a much more severe sanction being applied. For example, in many jurisdictions the non-payment of a fine frequently leads to a sentence of imprisonment. Similarly, in some jurisdictions, failure to comply with the conditions of a probation order or the terms of a license or parole may lead to automatic imprisonment.
- The creation of too many non-custodial sentencing options can lead to ambiguity and uncertainty amongst both sentencers and offenders. The aim should be to provide adequate flexibility to sentencers within a framework of options which is clearly defined and understood by all concerned with their imposition and service.

The Commission's Research on Non-Custodial Options

68. The Commission is continuing its research into the various non-custodial sentencing options which are, or should be, available in the A.C.T. At this stage, it is proposed only to outline the general nature of a number of these options, drawing attention where possible to issues which seem to require further public debate. It should be noted that a possible outcome of the research may be the eventual consolidation into a single statute of all A.C.T. sentencing provisions. Such a consolidation would have the merit of making readily available, and intelligible, the system of sanctions in the Territory. In the United Kingdom, the *Powers of Criminal Courts Act* 1973, is an example of an attempt at this type of consolidation.

Fines

69. The fine is by far the most frequently used, non-custodial sentencing option in all Australian jurisdictions, including the A.C.T. As a penalty, the fine is

favoured because of its flexibility, low administrative costs and revenue-producing capabilities. In the A.C.T. more than $1m. per year is raised from fines. A large part of this fund is paid to the Department of the Capital Territory and the balance is paid into Consolidated Revenue.

70. Despite its attractiveness as a penalty, a fine does possess a number of problems which require consideration. These include:

- Disparities in the ratios between fines and periods of imprisonment provided as an alternative to the fine.
- Discrimination in the application of fines.
- Imprisonment for non-payment of fines.

71. ***Disparities.*** The Commission's research has revealed the existence of many disparities in alternative fines provided for periods of imprisonment under Ordinances applying to the A.C.T.[22] The imposition of fines in lieu of imprisonment is dependent on express provisions in each enactment. The *Crimes Act* 1900 (N.S.W.), for example, which is continued in force in the A.C.T. by the *Seat of Government Acceptance Act* 1909, contains relatively few fines as alternatives to imprisonment. Nearly all occur in the penalty range of between 3 months' and 1 year's imprisonment. The range of fines for 3 months' imprisonment is $20 to $40, for 6 months' imprisonment $40 to $100 and for 1 year's imprisonment $40 to $200. The *Police Offences Ordinance* 1930 (A.C.T.) provides a range of fines for 3 months' imprisonment of $20 to $40, for 6 months' imprisonment $40 to $200, and provides only one fine ($50) as an alternative to 1 year's imprisonment. The *Gun Licence Ordinance* 1937 (A.C.T.) provides fines of between $40 and $100 for 3 months' imprisonment and $100 and $500 for 6 months' imprisonment. The *Motor Traffic Ordinance* 1936 (A.C.T.) provides fines of $200 for 6 months' imprisonment and $2000 for 12 months' imprisonment and the *Motor Traffic (Alcohol and Drugs) Ordinance* 1977 (A.C.T.) provides fines of between $200 and $1000 for 6 months' imprisonment and $2000 for 1 year's imprisonment.

72. The alternative ranges of fine provided under the various Ordinances clearly reflect money values current at the time of their enactmnet. However, at present no simple or continuing process exists at the federal level of government to bring these fines up to date. The Attorney-General's Department has assumed the role over recent years of advising other Commonwealth departments responsible for new legislation on the nature and extent of penalties provided for offences created under that legislation to ensure uniformity in approach to offences. To assist in this task the Attorney-General's Department has established a scale of penalties which consists, at the moment, of the following range:

$2000 or 12 months' imprisonment
$1000 or 6 months' imprisonment
$ 500 or 3 months' imprisonment
$ 100 or 1 month imprisonment

73. The rationale for this particular scale remains unclear but it is apparent that only a few of the fines mentioned above in the various ordinances are in accordance with it. A proper rationalisation of this aspect of the penalty struc-

22. Gilchrist, "An Analysis of Penalties Provided in Commonwealth and Australian Capital Territory Legislation" A.L.R.C., Sentencing Research Paper No. 1, 1979.

ture in the A.C.T., and in Commonwealth legislation at large, requires a comprehensive review of the substantive criminal law. Such a review falls outside the ambit of the Commission's sentencing reference. It should be noted, however, that A.C.T. judges and magistrates have brought to attention a number of examples of what they consider to be inadequate powers to fine for particular types of offence. For instance, under s.27 of the *Police Offences Ordinance* 1930 (A.C.T.) the maximum fine available is $20. Under the regulations made pursuant to s.12 of the *Public Health Ordinance* 1928 (A.C.T.), the sale of adulterated food is punishable by a maximum fine of $100 and $10 per day for a continuous offence. Where such inadequate powers exist, a sentencer may be placed in the invidious position of having no alternative but to send a person to prison because the maximum fine provided by law is manifestly inadequate.

Discrimination

74. *Means Inquiry.* At present, no formal legal requirement is placed upon a court to ascertain the relative means of an offender prior to the imposition of a fine although the Commission has been told by sentencers that, in practice, such an inquiry is conducted. As one magistrate stated:

> "We take into account a person with children; we look at capacity to pay. If a fine is imposed and is too large in relation to capacity to pay, the individual will 'give up'. Thus, no useful purpose is served. The fine must be adjusted in terms of the parties' capacity to pay and the deed itself."[23]

75. Despite this statement, other persons have expressed an opinion to the Commission that there is discrimination between offenders in the way fines are fixed in the A.C.T. Such discrimination is said to be particularly apparent in the case of traffic offences, which generate the vast majority of fines. For such offences it is said that a standard fine is calculated, according to a tariff system, for each type of prohibited conduct. Where the resources of a particular offender are well above those of the average citizen there would rarely seem to be an attempt to match the fine with those resources—the wealthy and the poor typically pay the same dollar amount. In the case of companies, the fine provided by law and imposed may often be derisory having regard to corporate resources.

76. The Commission is considering whether a formal system should be established requiring courts to take into account the means of an offender before imposing a financial penalty.[24] At present, no Australian jurisdiction requires such an assessment, although in Tasmania a means inquiry may be conducted following failure to pay fines. In that State, the offender must appear before a court to give evidence of his means and his employer may furnish a statutory declaration as to his wages.

77. The State of Victoria did, for a very short time, require by law that magistrates consider the means of the offender when imposing a monetary penalty. Section 57 of the *Magistrates' Court (Jurisdiction) Act* 1973 (Vic.) contained the following provision:

> "In fixing the amount of a monetary penalty a Magistrates' Court or Justice shall take into consideration among other things the means of the offender so far as they appear or are known to the Court or Justice."

23. This comment was made by Mr. W. Nicholl, S.M. at a Seminar at the Australian Institute of Criminology, December 4, 1978.
24. Scutt, "Alternatives to Imprisonment: The Fine as a Sentencing Measure" A.L.R.C., Sentencing Research Paper No. 3, 1979.

This provision was included in the legislation at the request of the Victorian magistrates. However, immediately following enactment of the *Magistrates' Court (Jurisdiction) Act* 1973 (Vic.), it was referred to the Victorian Statute Law Revision Committee which subsequently recommended repeal of s.57 of the Act in the following terms:

> "The Committee believes that this relatively vague new provision, while stating clearly in the legislation that the means of the offender are to be considered in fixing the penalty, does not specify the extent to which the enquiry could be made into the financial means of the offender and is both unnecessary and undesirable."[25]

Accepting the recommendation of the Statute Law Revision Committee the Victorian Government repealed s.57 by enactment of the *Magistrates' Courts (Amendment) Act* 1975 (Vic.) s.53. The Parliamentary explanations offered for the repeal of the provision provide an insight into the reasons why other Australian jurisdictions have not enacted similar legislation. The Attorney-General of Victoria, speaking during the Second Reading of the *Magistrates' Courts (Amendment) Act* 1975 (Vic.) said:

> "It seems to me that Courts must automatically take this matter into consideration; to provide a machinery for doing so would seem to open up formal consideration of it and this, in my view, could cause longer cases and more delay, and I am endeavouring to clear up delays in the courts."[26]

Speaking on the same issue, a member of the Statute Law Revision Committee stated that the reason for repealing the provision was that it:

> "would become so mandatory that some enquiry should be provided for, probably by way of regulation, to guide the Magistrate or Justice on how he should carry out the enquiry and how deeply he should go into it, realising that in some instances there would be very little tangible evidence of a person's economic and social background".[27]

The outcome of these developments has, presumably, been to restore the *status quo ante* regarding consideration by Magistrates and Justices of the means of an offender to pay a fine. But one commentator on the whole affair has stated:

> "the arguments for repeal [of s.57] are not only unconvincing, they are contradictory ... [If] in many cases there is very little tangible evidence of a defendant's financial state, it is difficult to know just how the sentencing Magistrate or Justice can take it into account ... There is little doubt that s.57 would in many cases have slowed down the processing of cases. But justice, rather than speed, is surely the most important consideration."[28]

78. *Day Fines.* Perhaps the most elaborate system for both determining the means of an offender and relating a fine to the gravity of an offence, has been developed in Sweden. The system is complicated and cannot be described at length. However, in broad terms, a unit fine system is used. Each category of offence under the Swedish Criminal Code is allocated a maximum number of fine units, *i.e.*, a number on a scale of 1 to 120, which reflects the relative gravity of the offence. The value of each unit—the day fine—is assessed according to the means of the offender. In general, the day fine is estimated as one thousandth of the offender's annual gross income (less expenses directly related to his employment). If the offender is married and his wife has no income of her own, a reduction of one fifth is made, and a further reduction is made for each child. There are rules governing the reduction of the amount of the day fine when the income is high (because of progressive taxation) and for its increase when the

25. Statute Law Revision Committee, *Report on the Magistrates' Courts (Jurisdiction) Act* 1973 (Vic.), 1974.
26. Hansard (Vic.), 17 April 1975, 5517.
27. Hansard (Vic.), 3 April 1975, 5742.
28. Willis, "Sentencing and Magistrates' Courts", (1979) 4 *Legal Service Bulletin*, 19.

offender has capital of above a certain value. There are also rules for computing the amount of the day fine in the case of married women with no income of their own and for offenders with large debts. In Sweden, detailed information as to the means of the offender is collected by the police in the course of their normal criminal investigation and is verified by the judge if the offender is present in court. The information collected by the police can also be checked against income tax returns and the register of incomes which are public documents in Sweden.

79. The application in the A.C.T. of similar procedures for ascertaining an offender's income would obviously pose a number of practical and privacy problems. In Australia, for example, income tax returns are not public documents. However, the general principle of relating the amount of a fine directly to the specific resources of an offender is one which has substantial merit. The Commission invites comment on the day fine system and is seeking to ascertain whether, in a modified version, it might be applicable to Australian conditions.

80. *Means Declaration.* An alternative procedure for determining the means of offenders in minor offences punishable by a small fine has been suggested by the South Australian Criminal Law and Penal Methods Reform Committee. In its First Report, the Committee recommended that a form should be served with any summons applying to minor offences on which an offender could make a declaration of his means and commitments. This declaration would then be taken into account by the court in determining the actual fine to impose.

81. *The Commission's View.* At this stage, it is already clear that the present system of relying upon an informal inquiry as to means (if any inquiry is made at all) is not always adequate to ensure justice for both the offender and the state in the setting of financial penalties.[29]

Imprisonment for Non-Payment of Fines

82. *Legislative Provisions.* For those who default in the payment of a fine the likely outcome is a prison sentence. A number of legislative provisions exist in the A.C.T. which prescribe imprisonment in default of the payment of fines. These provisions differ somewhat in their scope and effect. In the Supreme Court, for example, an offender who defaults in the payment of a fine may, in theory if not in practice, be imprisoned indefinitely until the full sum is paid. The Supreme Court, as Table 3 indicates, very rarely imposes fines as a penalty.

83. In magistrate's courts, default in the payment of fines is in the main governed by s.189 (1) of the *Court of Petty Sessions Ordinance* 1930 (A.C.T.). In general terms s.189 (1) provides that the period of imprisonment imposed shall not exceed 12 months, calculated at the rate of $2 per day. Other Territorial Ordinances, however, provide for different maximum prison terms upon default in the payment of fines. Section 189 (1) fails to take account of the very considerable change in money values which has occurred since its passage. The section is clearly in need of revision as are the provisions of the other Ordinances dealing with this issue. As is mentioned below, alternatives other than imprisonment should be used wherever possible for those who default in payment of fines.

29. *Cf.* A.L.R.C. Discussion Paper No. 6, *Debt Recovery and Insolvency* 1978 where in the recovery of civil debts a facility has been suggested to ensure that the total means of the debtor are examined by the court.

84. *Number of Persons Sent to Prison.* Detailed contemporary figures of the number of persons who are imprisoned each year throughout Australia for non-payment of fines are not available. However, in an extensive study of the first 2,000 files indexed in the year 1970 in the Adelaide Magistrate's Court, 1,385 revealed the imposition of single or multiple fines by the Court.[30] Warrants for imprisonment for non-payment of these fines were issued in relation to 472 files, and 129 persons were actually committed to prison. On the basis of these and other figures, it has been estimated by one writer that as many as 15,000 persons are imprisoned each year in Australia for non-payment of fines.[31] In Victoria, according to a recent report,[32] a total of 1,852 offenders whose fines amounted to approximately $420,000 (between 2% and 3% of all fines imposed in 1977-78) were received into prison for non-payment. The total days ordered to be served in default were 52,075 and if all offenders had served the full default period it would have represented an average of 142 prisoners for every day of the year, or about 10% of the normal prison population. In fact, a number of the fines were paid and the actual number of prisoners held was believed to be below this figure.

85. The Commission has been told by N.S.W. correctional authorities that about one third of all prison admissions in that State are for non-payment of fines. A similar figure was provided to the Commission by Western Australian correctional authorities. However, the Commission has also been informed that in the A.C.T., people are very rarely sent to prison for the non-payment of fines. It would seem that the usual practice where a defendant does not pay a fine is to send a letter to that person requesting that they come to court. An inquiry is then made to ascertain whether more time to pay should be allowed. If the letter is ignored or payment arrangements break down, the Clerk of Courts has a discretion to delay issuing a warrant for the arrest and imprisonment of the offender.

86. The Commission has also been informed that persons against whom warrants are issued for unpaid fines requiring no more than 3 days' imprisonment, serve their prison sentence in the lock-up at the A.C.T. Police Force Headquarters in Canberra, rather than being transported to a N.S.W. correctional institution. The A.C.T. Police provided figures to the Commission indicating that 64 persons served out warrants in this manner in the police lock-up in the period from January 1, 1978 until December 1 of the same year. Of these 64 persons, 20 served one day; 28 two days; and 16 three days.

87. *The Commission's View.* Although a benevolent attitude does appear to be adopted towards fine defaulters in the A.C.T., the Commission has formed the tentative view that a more formal system should be established to ensure that persons who fail to pay fines should, so far as possible, not serve sentences of imprisonment. In principle, it would seem that imprisonment is appropriate only where a person is clearly and deliberately contemptuous of a court order to pay a fine. In other circumstances, an alternative method of paying the fine should be adopted. In this context, the Commission is examining Victorian proposals for a work fine option which appear to have merit in principle.[33] Under this

30. Daunton-Fear, "The Fine as a Criminal Sanction" (1971) 4 *Adelaide Law Review,* 306.
31. Rinaldi, *Imprisonment for Non-Payment of Fines,* (1976), Penology Monograph, No. 2 (2nd ed.) Law School, A.N.U., 1.
32. Report of the Sentencing Alternatives Committee (Vic.) *Sentencing Alternatives Involving Community Service* (1979) para. 58 *et. seq.*
33. *Ibid.*

proposal, persons would have to undertake work of equivalent value to the amount of the fine. This value would be based on the adult minimum wage and the person concerned would undertake employment either at attendance centres, which have been established for short-term work in Victoria, or as part of a community service order.

Community Service Orders

88. ***Historical Background.*** As part of its sentencing reference the Commission has been asked to have regard

> "to the need for new laws providing alternatives to sentences of imprisonment, with particular reference to . . . community service orders".

Community service orders, or work orders as they are also termed, are a comparatively new arrival upon the Australian correctional scene. Tasmania was the first State to establish a program for such orders in 1972. Western Australia followed suit in 1977 and more recently each of the remaining States has been considering the establishment of similar schemes.

89. In the A.C.T. there have already been quite extensive discussions regarding the introduction of community service orders. These discussions led to the drafting of a Bill for a *Supervision of Offenders (Community Service Orders) Ordinance* 1977 (A.C.T.), and for an Ordinance designed to supplement the *Crimes Act* 1900 (N.S.W.), with provisions permitting courts to sentence an offender to perform work in the community. Neither piece of legislation has to date reached the statute book. In brief, the scheme envisaged for the A.C.T. would allow sentencers, instead of imposing a prison term upon an offender, to require that person to perform unpaid work for up to a maximum of 208 hours or 26 days of 8 hours. The work in which the offender would be involved would "be of a nature that is useful to the community". Before making an order, the court would have to secure the consent of the offender, and be satisfied that he or she was a suitable person to participate in the program.

90. The idea that offenders against the criminal law should be obliged to work as a part of their punishment is not new. Work has been combined with imprisonment, as in the case of "press gangs" or imprisonment "with hard labour". Women offenders were often, in the past, used as household servants. The work was sometimes productive, involving farming or labouring on capital works. Sometimes it was unproductive and destructive to the individual as, for example, where the work involved breaking rocks. The modern style of work order, under which offenders remain in the community and are obliged to work on certain days for charitable purposes, may be looked upon as either novel or simply a restatement of old-fashioned remedies for crime.

91. ***Benefits and Negative Aspects of Community Service Orders.*** A number of possible benefits have been offered in support of the introduction of community service orders. These benefits include:

- Lower administrative costs than custodial or semi-custodial sentences. These costs are very substantial. One recent estimate suggested that when the costs of maintaining prison facilities, paying prison staff, funding social security benefits to the families of prisoners and nett loss to the community from the loss of employment of the prisoner are added together, they amount to more than $20,000 a year per prisoner
- Preventing substantial disruption to the offender's family and work environment

- Protecting the 'self-esteem' of the offender and providing him or her with an increased sense of worth
- Providing the community with a service that is useful to it
- Preventing contact by the offender with confirmed criminals as may occur in prison.

92. As against these suggested benefits there are a number of possible negative aspects of community service orders which must be taken into account in the making of any recommendations for their possible introduction in the A.C.T. That imprisonment has a deleterious effect upon the offender and the offender's family has been clearly established. If community service orders operate as a real alternative to imprisonment, the advantages to the offender, and the family situation, are obvious. On the other hand, it might be considered that in losing leisure time whilst participating in a community program, the individual will be losing time otherwise spent with his or her family. This will not be as great a disadvantage as imprisonment, but will be a disadvantage where the offender might otherwise have been placed on a bond, placed on probation, discharged, or fined.

93. The evidence of the success of community service orders in reducing the number of persons being sent to prison is inconclusive. Some commentators have contended that the introduction of work orders in Tasmania has had little effect on the number imprisoned, despite a statutory provision that the penalty should be used only as an alternative to a prison sentence. In contrast, another commentator asserted that

> "... introduction of the Work Order scheme has had a pronounced and continuing effect on the imprisonment rate in Tasmania. ... [A]t least one half of those sentenced to Work Orders would have gone to prison had Work Orders not been available."[34]

94. Nevertheless, it does seem that some persons being placed on work orders in Tasmania are persons who would not otherwise have gone to prison. These individuals, who prior to the introduction of work orders would have been under no supervision, are now being subjected to a supervisory punishment. It seems that a similar situation has arisen in the United Kingdom which introduced a work order scheme in 1973. One commentator on the operation of the United Kingdom scheme has stated that

> "... there seems little evidence to suggest that the community service order is reducing the prison population to any significant extent. ... It seems doubtful, then, that the vexed question of how to relieve the alarming pressure on our penal institutions is to be resolved by community service ...".[35]

95. ***Community Service Orders as a General Penalty.*** The problem appears to lie in part in the need to determine why community schemes should be adopted. Is the need to provide a non-custodial measure where a custodial measure would have previously been the only alternative? Or is the community work order another sentencing option which is not to be seen only as an alternative to imprisonment? In the Commission's view the latter approach seems preferable. As such, consideration should be given to the introduction of the community service order as a general penalty in the A.C.T., rather than as a sentence available only as an alternative to imprisonment. However, in introducing the option, care

34. Rook, "Tasmania's Work Order Scheme: A Reply to Varne" (1978) 11 *Aust. and N.Z. Journal of Criminology,* 81, 86.
35. McEwan, "Sentencing—Assessing the Value of Community Service", (1978) *N.L.J.* 772.

should be taken to prevent work orders usurping the position of wholly non-custodial penalties such as the absolute discharge, bond, release on recognizance and fine.

96. ***Type of Work Performed.*** The present position is that the type of work undertaken in community service in Australia is mainly of a manual nature. Under the Tasmanian scheme three types of work are available:

- clearing graveyards and parks;
- gardening and maintenance duties in sheltered workshops, children's homes, geriatric units; and
- assisting individual pensioners about the home with ironing, gardening and the like.

Work projects under English, Canadian and United States schemes are of a similar kind. Disagreement has arisen as to the benefits (or otherwise) of this type of work. It is pointed out that the type of person ordered to perform this work is an atypical offender. Furthermore, as one commentator has stated:

> "Apart from one or two outstanding projects, Work Order recipients have, on the whole, because of a lack of [imagination] concerning projects, participated in little more than 'hard labour' exercises such as cleaning grave yards, council areas and cutting bush tracks."[36]

97. On the other hand, it has been said of Tasmanian work orders that the scheme has proved a "spectacularly successful measure". Offenders have

> "gained great satisfaction from their work, from friendly relationships with the person for whom they worked, and, on occasions, voluntarily continued the work after the order had expired".[37]

In England research has shown that the majority of persons taking part in the community service scheme who were questioned about their penalty found the experience worthwhile and saw it as a more positive measure than imprisonment. Comments and research of this type raise a number of doubts about the purpose of the work performed pursuant to a community service order. The purpose may be to punish the offender by providing work that occupies his or her leisure time, without concern as to whether or not the offender may benefit from the work itself. In contrast the purpose of the scheme may be to "bring out the best" in the offender, by providing a person with a work environment in which he or she may participate in helping the less fortunate, so developing a sense of responsibility and caring for others.

98. It has been said that particular pains are taken in Tasmania to select suitable work for an offender sentenced to community service. However, as the type of work available seems to be limited, it seems questionable whether any effective selection takes place. Furthermore, it has been alleged of the English scheme that a "tariff system" has grown up and is being applied by the courts and that little effort is made to find suitable work for the offender:

> "Offenders who would receive twelve months in prison are given a two hundred and forty hour order; those who would have been sentenced for six months are given a one hundred and twenty hour order and so on."[38]

36. Varne, "Saturday Work: A Real Alternative?" (1976) 9 *Aust. and N.Z. Journal of Criminology*, 95, 105.
37. Seymour, "Restitution and Reparation", unpublished paper delivered at a Seminar organised by the Queensland Branch of the Australian Crime Prevention Council, Brisbane, 17 May 1978, 16.
38. Cromer, "Doing Hours Instead of Time: Community Service as an Alternative to Imprisonment" (1978) 11 *Aust. and N.Z. Journal of Criminology*, 54, 55.

If the basic aim of a work order is to punish, then presumably there can be no quarrel with this approach. But, if the purpose of the sentence is to individualise punishment, the adoption of a "tariff system" appears to be contrary to that aim for it limits the discretion of the sentencer to determine the appropriate amount of work required to meet the rehabilitative needs of each offender.

99. In the Commission's view the main intent of community service orders is the punishment of the offender. Given the very limited range of tasks available to perform as part of such orders little purpose would appear to be served looking for rehabilitative justification for what is in reality a largely retributive measure. Nonetheless, if community service orders are to be introduced as a penalty in the A.C.T. consideration should be given to setting up a scheme under which appropriate and useful work, not necessarily manual, can be found for an offender.

100. ***Trade Unions and Availability of Work.*** In Tasmania, unions were at an early stage involved in discussions about the establishment of a work order scheme. A union nominee is now a member of a committee set up to determine what work should be engaged in by offenders. Similarly, during previous efforts to set up a community service order scheme in the A.C.T., union representatives were consulted. Clearly, any fresh moves to develop such a scheme in the Territory must involve full consultation with union representatives. Union reaction to these moves is likely to be related to the current economic situation. The A.C.T. has, at present, one of the highest rates of unemployment in Australia (currently 7.8% as against a national average of 6.4%). In addition, most of the jobs considered to be suitable for work order programs in other jurisdictions—clearing parks, bushfire boundaries, etc.—are undertaken in the Territory by paid workers.

101. ***The Role of Volunteer Supervisors.*** Community service orders represent one method of involving members of the community in corrections. Many persons playing supervisory roles in schemes currently under-way are not "professionals" but private individuals like pensioners, or employees of hospitals and other institutions. In times of economic constraint it may be a particular advantage to have a corrections program run largely by volunteers. Further, public involvement in the criminal justice system may be beneficial. But problems can arise when volunteers are placed "in charge" of offenders. An important issue concerns the accountability of volunteer supervisors. Although the existing schemes appear to operate with an officer of the administering government department playing the part of a "roving supervisor", on-the-spot supervision is largely undertaken by individuals who have no clear official responsibility. Since supervisors usually have the power to judge the quality of the work performed by offenders and, if necessary, to report lack of effort to the administering government department, there is an obvious need to take substantial care when selecting individuals to serve in such a capacity. If a system of community service orders is to be introduced, standards and guidelines for voluntary supervisors involved with the scheme in the A.C.T. should be drawn up.

102. ***Community Service Orders: A Tentative Recommendation.*** The issues raised in this discussion paper about community service orders are not at this stage intended to be exhaustive or definitive.[39] There is need for a public

39. A more detailed discussion of these issues is contained in Scutt, "Community Work Orders as an Option for Sentencing", A.L.R.C., Sentencing Research Paper No. 4, 1979.

debate concerning a sentencing option which has now had a reasonable amount of operating experience in a number of Australian and overseas jurisdictions. This experience suggests that community service orders, like most other sentencing options, have strengths and weaknesses. On balance, it would appear that a carefully designed and administered community service order scheme would be beneficial in the A.C.T. A scheme should be established, the details of which will be settled following more extensive study and discussion. Community service orders should not be seen as a panacea for the problems of corrections and punishment of offenders.

Other Non-Custodial Sentencing Options

103. The fine and community service order are two of a number of non-custodial sentencing options presently being researched by the Commission. These options include some that are already in operation in the A.C.T., like probation, and some which might be introduced into the Territory, like criminal bankruptcy orders (see Table 7 above). Among the options being considered are:

- *Probation Orders.* A probation order imposes conditions on an offender's liberty. The order is characterised by a requirement that the offender report to a probation officer on a regular basis and behaves well for a specified time. Additional conditions may be stipulated. Failure to comply with the conditions of a probation order usually results in the offender being returned to court for re-sentencing.
- *Suspended Sentences.* Where an offender is to be punished by imprisonment, the court may fix the term and then suspend the operation of the sentence. The suspension is usually subject to similar conditions as appear in probation orders. The effect of this suspension is that the offender remains in the community. Breach of any conditions may result in the original prison sentence being activated.
- *Deferral of Sentences.* Another option is to clothe sentencers with power to defer imposing a sentence on an offender for a prescribed period of time. Postponing the imposition of a sentence may be appropriate for a number of reasons. In many cases, it is to enable the court to be supplied with additional information to assist the choice of an appropriate sentence, or to see if the offender responds to an opportunity to display his sincerity, to make reparation or take some other action indicating his good intentions. It seems that formal statutory recognition of this option adds little to existing powers to remand cases for sentence.
- *Restitution Orders.* An order for restitution may be appropriate where a person is convicted of certain offences, *e.g.*, stealing goods which have not been returned to their owner. In these cases, the court may order the offender to return the goods to the owner. Where the goods have been sold, the offender could be ordered to pay an appropriate sum as compensation to the owner. In addition, a restitution order may be contained with a probation or some other supervisory order.
- *Compensation Orders.* A compensation order is distinct from a victim compensation program funded by the State. A typical order, made by a sentencing court, is that the offender pay a sum of money to the victim to compensate for any personal injuries or damage to property arising from the crime.

- *Forfeiture of Rights, Privileges and Property.* This option envisages that an offender who is convicted may lose the right to engage in a trade or profession, have a business licence revoked or, where a motor vehicle is used in the crime, lose his or her driver's licence. Any property used in the commission of the crime would also be forfeited. Some of these options are already available in State and Commonwealth legislation.
- *Hospital and Treatment Orders.* Hospital orders could be made to ensure that appropriate treatment is received by a person who is mentally unfit to plead, found guilty on the grounds of insanity or is suffering from mental illness. Treatment orders would give the court power to order, either with or without the agreement of the offender, that he attend at a treatment centre or program for alcohol or drug addiction where these conditions contributed to the commission of the offence.
- *Criminal Bankruptcy.* This option is designed to ensure that the offender will be denied the fruits of a crime which causes loss to others. Where that loss remains uncompensated the Court would have the power to make a Criminal Bankruptcy Order and an appropriate official would be able to take out a petition. The normal civil procedures would then apply. The onus would be on those subject to such an order to explain acquisitions of wealth and any transfer to other persons. This option could be a deterrent to those who hope to reap the rewards of their crime when they are released from custody.

Detailed discussion of these various options must await completion of the research.

VI — THE NEED FOR A VICTIM COMPENSATION PROGRAM

Compensation Programs in Australia and Overseas

> "The only reliable way to convince the victims of crime, particularly of violent crime, that more humane treatment of the offender does not imply neglect of the victim is to show greater official concern for their needs and feelings. This has been done only fitfully."[40]

104. In an Australian setting, the fitful quality of official concern for the needs and feelings of crime victims is nowhere better demonstrated than in the Commonwealth and the A.C.T. which are at present the only jurisdictions in the country without a government program designed to provide compensation to the innocent victims of violent crime.[41] Despite discussions extending over a number of years concerning the desirability of introducing such a program, and the drafting of an ordinance on the subject by the Department of the Attorney-General for the A.C.T., a victim compensation scheme has yet to be established in either jurisdiction.

105. Victim compensation programs are not a recent innovation. A pioneering scheme was set up in New Zealand in 1963. In 1964 the United Kingdom fol-

40. *The Times*, 3 February 1976.
41. Victims of violent crimes which are offences against Commonwealth laws must, at present, take their chances under the various State Compensation schemes. They may or may not be covered. The Victorian Crimes Compensation Tribunal has paid compensation to victims of crime against the laws of the Commonwealth because the Victorian statute only specifies that the "crime" occur within the state. By way of contrast in New South Wales the crime involved must be an offence under the *Crimes Act* 1900 (N.S.W.).

lowed New Zealand's lead and since then programs have also been established in each of the Canadian Provinces; in almost a third of the States in the United States; in the Federal Republic of Germany; in the Netherlands; in Sweden and in several other jurisdictions around the world. The first Australian victim compensation program was developed in N.S.W. in 1967. Since then, programs have been introduced in Queensland (1968), South Australia (1969), Western Australia (1970), Victoria (1972), Northern Territory (1975) and Tasmania (1976).

Arguments for Victim Compensation

106. The main arguments, in brief, which have been advanced in support of compensation programs for the victims of violent crime are:

- *State Assumption of Citizen Protection.* It has been suggested the State, having assumed responsibility for the protection of the citizen and at the same time having prohibited him from seeking redress by direct action; having discouraged him from carrying weapons for use in his self-defence; having given priority to criminal over the civil actions for compensation; and in many cases, having incarcerated the offender and thus removed the possibility of his earning money to meet his civil debts; should assume the responsibility for compensating the victim.
- *Sharing the Costs of Crime Control.* Through taxes and allied revenue-raising devices all citizens are compelled to contribtue to, and share in, the cost of crime control measures. When these measures fail, the cost of that failure should also be shared by all citizens. It is said to be unjust and inequitable that the costs of victimisation, which in the case of violent crime can include serious physical injury, ruinous financial harm, and grave social dislocation, should be borne by an unfortunate minority of citizens, usually entirely innocent of any wrongdoing.
- *Aiding Crime Prevention.* The establishment of a victim compensation scheme would, it is claimed, aid crime prevention by making it more likely that citizens would come to the aid of potential victims and the police, since if injured they would be compensated. Such schemes would also ensure prompt reporting of crime, and collaboration by the victim in its investigation and prosecution, since the victim's assistance in those tasks could be a necessary condition of the payment of compensation.
- *Alleviating Suffering.* The injured person has already suffered enough in being the random victim of a violent crime. Society should not leave to him and his family the further burden of financial suffering. However, if he has precipitated the violence and contributed to it, it may be just to reduce or even eliminate compensation.[42]

Arguments Against Victim Compensation

107. The main arguments, in brief, against victim compensation programs are:

- *Cost.* The cost of a scheme to compensate crime victims would be prohibitive. As will be seen, the cost of existing programs varies substantially, depending to a large degree on the limits, if any, set on maximum awards to victims and the level of publicity associated with the scheme.
- *Arbitrary Exclusion of Property Losses.* To restrict compensation, as do all existing programs, to the victims of violent crime and excluding

42. These arguments have been adapted from Morris and Hawkins *A Letter to the President on Crime Control* (1977) 72-73.

property loss as a result of criminal action is to draw an arbitrary distinction. In response to this argument it has been pointed out that the cost of a scheme to compensate the victims of crimes against property would be incalculably large and clearly prohibitive. In addition, the losses suffered by the victims of property crime are more likely to be insured against and are of a different dimension from those experienced by victims of violent crime.

- *Fraudulent Claims.* Provision of a victim compensation program would encourage fraudulent claims, as well as remove a possible deterrent to the commission of violent crime because offenders would feel less concern for the ultimate fate of their victims. Neither of these assertions has been borne out by the operating experience with victim compensation schemes. Fraudulent claims have been virtually non-existent, and there is no evidence to suggest that the incidence of violent crime has increased because of the establishment of compensation programs.
- *Compensation from other Sources.* Victims of crime can already obtain compensation from social security or other public sources. Responding to this argument, it is clear that victims of violent crime may on occasions be able to secure some compensation from public sources, such as social security, or even from private charitable funds. However, this compensation is often likely to be no more than a token amount when measured against the gravity of the losses which may result from the commission of a violent crime.
- *Why Crime Victims?* There is no social principle upon which State compensation for criminal injuries alone can be justified. Further "the idea of selecting yet another group of unfortunates for special treatment is not easily defensible".[43] It is more difficult to provide a social principle upon which to justify the singling out of crime victims to receive official compensation for their injuries rather than the victims of other types of social disaster. The recognition of this difficulty, in part, has led to proposals such as those advanced in 1974 by the *National Committee of Inquiry on Compensation and Rehabilitation in Australia* (the Woodhouse Report), to incorporate compensation for victims of crime into a comprehensive no-fault compensation program for personal injuries of all types. The Australian proposal has not yet been adopted but New Zealand successfully implemented in 1972 a statutory arrangement to provide financial compensation from government revenue for death or personal injury suffered in accidents, including those arising in the course of criminal acts.

Justification for a Victim Compensation Program: The Commission's Views

108. There is an immediate justification and need for an official compensation program in the A.C.T. and in the Commonwealth's sphere. This justification and need is based not only upon the fact that the Commonwealth and A.C.T. are the only Australian jurisdictions without such a program, but also on evidence supplied by the police indicating that local victims of violent crime do suffer injuries which remain uncompensated from existing sources. In most cases where an offender is apprehended for the commission of a violent crime he, or she, proves

43. Atiyah, *Accidents, Compensation and the Law* (1970) 321.

to have no funds with which to recompense the innocent victim. Where, as is quite frequently the case, the offender is not apprehended, the victim is left to cope with the aftermath of the crime without the possibility of receiving compensation from the criminal or from anyone else.

109. The rationale for the proposed establishment of a victim compensation program consists of a combination of practical and humanitarian concerns. In terms of legal concept and overall justice it would be arguable that crime victims should ideally and logically be compensated within the framework of a national accident and rehabilitation program akin to that proposed in the Woodhouse Report. However, as it seems unlikely that such a program will become a reality in the near future, the immediate introduction of a less embracing compensation program is an urgent necessity. There is already in Australia widespread public support for the argument, advanced by the United Kingdom Government when introducing its victim compensation program in 1964, that compensation for crime-related injuries is morally justified as in some measure salving the nation's conscience about its inability to preserve law and order. Reviewing the operation of the United Kingdom victim compensation program in 1978, the Royal Commission on Civil Liability and Compensation for Personal Injury (the Pearson Report) noted that:

> "The scheme has now been in operation for 13 years, and the basis on which it was introduced appears to have been generally accepted by the community. ... We think that criminal injuries form a special category; criminals may not be found or convicted, they often have no funds of their own and there is, obviously, no compulsory insurance. We think that it is right that there should be reasonable provision for the victims of crime, and we accept that these compensation schemes have come to stay."[44]

The Structure of the United Kingdom Victim Compensation Program

110. Before turning to consider in more detail the nature of the victim compensation program that might be implemented in the A.C.T., further mention needs to be made of the structure of the United Kingdom program. This program is now the longest operating victim compensation scheme in the common law world, the New Zealand scheme having been superseded by national compensation. It is also by far the most liberal scheme in terms of the maximum awards which can be made to victims.

111. When the United Kingdom Government first introduced the scheme in 1964, it rejected the concept of the State accepting *legal liability* for victim injuries but accepted that compensation should be paid at public expense on an *ex gratia* basis as an expression of public sympathy to the victims of violent crime. From the outset, the scheme was designed to pay compensation even where the criminal had not been found and prosecuted and also in cases where an individual had been hurt when helping the police to make an arrest. Since the scheme was seen to be of an experimental nature, it was decided that it would be of a non-statutory structure and would be administered by a Compensation Board. The victim was to remain free to sue the offender but would have to repay the Board any compensation received from it out of any damages obtained from the offender.

112. At present the United Kingdom Criminal Injuries Compensation Board comprises a Chairman and thirteen members (all legally qualified) and operates throughout the country. Finance for the program is provided by grant in aid

44. Report (1978) Cmnd. 7954, 332.

from public funds. To qualify for compensation under the scheme, the circumstances of the injury must either have been the subject of criminal proceedings or have been notified to the police, unless the Board waives these requirements. Injuries caused by traffic offences are excluded unless a deliberate attempt is made to run the victim down. Also excluded from the scheme are offences committed against a member of the offender's family living with him at the time of the offence. The Board has also to be satisfied that the victim's "character, way of life and conduct" generally justify an award being made. The nature of compensation for injury or death is based on common law damages but the rate of loss of gross earnings to be taken into account is not permitted to exceed twice the average of gross industrial earnings at the time that the injury was sustained. Compensation is also available for non-pecuniary loss. A minimum loss of £150 has to be established before a person is entitled to any award. Compensation awards are reduced by the value of any social security benefits and analogous government payments to which the victim may be entitled. Compensation will also be reduced by the amount of any damages award in civil proceedings or compensation paid under an order made by a criminal court.

113. The number of awards made in the United Kingdom by the Criminal Injuries Victim Compensation Board, and the total sums paid out in compensation, have been increasing on an annual basis since 1964. In the first full year of its operation, 1965-1966, there were over a thousand awards with payments amounting to about £400,000. In the last year for which figures were available, 1976-77, there were almost 14,000 awards with payments totalling about £9.7m. The average award is about £700 but about two-thirds or more of all awards fall in a level below £400. Only 1.5 per cent of awards are greater than £5,000, and the highest award made in 1976-77 was about £55,000 to a woman who had been blinded by a shotgun.

114. While no appeal lies directly to the courts from orders of the Board, the Queen's Bench Division of the High Court in England and Wales has exercised on a number of occasions its jurisdiction to supervise the discharge of the Board's functions and to review its awards. The Pearson Committee, in its general review of the civil liability and compensation for personal injury in the United Kingdom, recommended the continuation of the Criminal Injuries Compensation Scheme but felt that it should now be put on a statutory basis as it has developed well beyond an experimental program. The Pearson Report also recommended that compensation under the scheme should continue to be based on tort damages. The Pearson Report did not consider that administration of the scheme should be vested in the courts, as some people had suggested, rather than continuing in a separate board. The Royal Commission also felt that the scheme should not be administered through a social security system. In its view the questions to be decided for victim compensation were of a different kind from those dealt with under that system.

115. In addition to the Royal Commission on Civil Liability and Compensation for Personal Injury, a Working Party on Criminal Injuries has also recently reported to the United Kingdom Government. This Working Party Report, which has been accepted in large part by the government, has recommended that the provisions of the Criminal Injuries Compensation Scheme should be extended to victims of violence within the family. Speaking in the House of Commons, the then Home Secretary said that reflecting the considerable public concern over

battered women and children, the government would extend the scheme to these victims of violence within the family, subject to proposed safeguards that applications should normally be considered by the Board in cases of family violence only where

- the offender had been prosecuted for the relevant assault;
- the injuries should be sufficiently serious to justify compensation of at least £500; and
- the Board should be satisfied that the offender would not benefit from the award.[45]

Maximum Awards under Australian Compensation Programs

116. The present victim compensation programs in Australian States and the Northern Territory bear little, if any, resemblance to the United Kingdom scheme which has been described above. Undoubtedly the most striking difference between the United Kingdom and Australian schemes lies in the maximum awards which can be made under the latter programs. Table 8 shows these maxima bear no relationship to common law damages.

Table 8

MAXIMUM AWARDS PAYABLE UNDER AUSTRALIAN VICTIM COMPENSATION PROGRAMS

N.S.W.*	$ 4,000	($600 summary matter)
VIC.	$ 5,000	
TAS.	$10,000	
S.A.	$10,000	
W.A.	$ 7,500	
QLD.	$ 5,000	
N.T.	$ 4,000	

* An amendment to the legislation has passed through both Houses of the N.S.W. Parliament raising the maximum to $10,000 for a felony and $1,000 for a summary matter. The amendment is due to come into effect soon.

As Mr. Justice Isaacs noted in the case of *R.* v. *Tcherchain*[46] with such maximum awards

> "the most that the court can do in considering an application of this nature is to award the applicant something by way of compensation or solatium, not a full compensation, but something by way of consolation for his injury".

Some commentators have suggested that the maxima are so low that they really amount to no more than a political placebo, offered by governments as a sop to crime victims.[47] A recent graphic example of the inadequacies of awards available under Australian schemes occurred in N.S.W. when a man taken hostage during the course of a crime was shot and killed as police moved in to capture the

45. Hansard (U.K.) 19 March 1979, 407-408.
46. (1969) 90 WN (Pt. 1) 85, 90.
47. See, for example, Chappell "Providing for the Victim of Crime: Political Placebos or Progressive Programs" (1972) 4 *Adelaide L.R.* 294; Edelhertz and Geis *Public Compensation to Victims of Crime* (1974) 4.

offender holding him captive. The crime victim left behind a family who became destitute with his death. As a result of representations made directly to the Premier of N.S.W., an *ex gratia* payment of $25,000 was made to assist the family.[48] If the normal rules had applied, the maximum sum available to the family under the State's *ex gratia* victim compensation program would have been $4,000. The N.S.W. Government subsequently announced it was intending to raise the ceiling of compensation awards to $10,000.

Volume of Claims in New South Wales

117. Since it commenced operations on January 1, 1968, almost $1,200,000 has been distributed to crime victims under the provisions of the N.S.W. compensation program. In the last year for which figures are available (1977), more than $300,000 was paid to victims and the maximum payment of $4,000 was made on 33 occasions. Further details of the number of claims made since the inception of the N.S.W. program are shown in Table 9.

Table 9

PAYMENTS MADE UNDER N.S.W. *CRIMINAL INJURIES COMPENSATION ACT* 1967 AND ASSOCIATED *EX GRATIA* SCHEME

YEAR	No. OF CLAIMS	PAYMENT $
1969	5	4,865
1970	40	21,503
1971	27	25,196
1972	39	38,247
1973	75	76,206
1974	132	142,479
1975	168	284,104
1976	143	233,620
1977	151	306,052

Source: Information Bulletin, New South Wales Department of Attorney-General and of Justice

118. Comparable figures are not available from other Australian jurisdictions to show the level of claims made upon the respective schemes since their date of commencement. However, the most recent annual report of the Crimes Compensation Tribunal in Victoria, for the period July 1, 1977 to June 30, 1978 reveals that 987 awards were made totalling almost $1,050,000. The average award in Victoria in that year was approximately $1,000 and the range of awards was:

- $50 to $750 — 63 per cent;
- $750 to $1,500 — 22 per cent;
- $1,500 to $3,000 — 10 per cent; and
- $3,000 to $5,000 (the maximum in Victoria) — 5 per cent.

48. *Sydney Morning Herald*, 20 November, 1978.

Two Basic Models for Australian Programs

119. ***New South Wales.*** Two basic models have been adopted in the design of Australian victim compensation programs — the court-based program in N.S.W. and the tribunal-based program in Victoria. Under the N.S.W. program, which has also been adopted as the prototype in Queensland, South Australia and Western Australia, two separate methods apply to the payment of compensation to crime victims. Under the first of these, which is provided for in the *Criminal Injuries Compensation Act* 1967 (N.S.W.), reliance is placed on provisions which have been in the N.S.W. *Crimes Act* since 1900 authorising the courts, on the conviction of an offender, to make an order for the payment by *the offender* to any aggrieved person of compensation for either personal injury and/or property loss sustained by reason of the commission of the offence. Where the offender was dealt with on indictment, the court could, pursuant to s.437 of the *Crimes Act* 1900 (N.S.W.), make an order for the payment of compensation up to $2,000 (now $4,000). Under s.554(3), a court of summary jurisdiction could make an award up to $300 (now $600). It should be noted that similar provisions apply in the A.C.T. Although the powers to award compensation under these *Crimes Act* provisions have been in existence for many years, the courts have seldom used them, probably because most offenders lack the means to pay compensation, and few applications are made for such orders. Victims are generally simply witnesses, who are unrepresented. Often they do not know of this provision.

120. The *Criminal Injuries Compensation Act* 1967 (N.S.W.) provided that, where a judge or court made a compensation order in respect of injury (specifically defined as bodily harm but including pregnancy, mental shock and nervous shock) under these *Crimes Act* provisions against an offender, the victim (the aggrieved person under the legislation) could apply to "the Under Secretary for payment to him from the Consolidated Revenue Fund of the sum so directed to be paid".[49] The Act also provided that where a charge was dismissed or an alleged offender was acquitted, a judge could nonetheless grant a certificate stating what compensation he would have awarded had the accused been convicted.

121. Although the award of compensation was left in the hands of the judge or court as part of the criminal trial, payment of compensation did not follow automatically upon the making of the judicial order, or certificate in the case of an acquittal or dismissal situation. The Under Secretary, a civil servant, upon receipt of an application was required to provide the Treasurer, a Minister of State, with a statement setting out first the amount of compensation ordered or recommended by the court and, secondly, the amounts which the victim had received or might receive from other sources through the exercise of his legal rights. The Treasurer was then given the discretion to authorise payment of the sum awarded by the court, less any sum otherwise obtained in compensation. The final result of this extremely cumbersome process applied only to awards for compensation for victims injured in offences where an offender was apprehended. The *Criminal Injuries Compensation Act* 1967 (N.S.W.) made no provision for the victim of the attacker who was either unapprehended or untried. This serious gap was recognised and it was announced that, to supplement the provisions of the *Criminal Injuries Compensation Act* 1967 (N.S.W.), the government would, after

49. Section 3, *Criminal Injuries Compensation Act* 1967 (N.S.W.).

an administrative investigation including police reports, make *ex gratia* payments to the victims of crimes injured in circumstances where no one was apprehended or tried.

122. Limited modifications have been made to this procedure in the other States which have used the N.S.W. scheme as the prototype for their own victim compensation programs. However, the basic feature of all these programs is their use of the criminal courts as the assessment body for compensation awards with executive determination of the appropriateness of claims by crime victims not involved in court proceedings. Critics of the N.S.W. model have pointed in particular to the long delays which may occur before a victim can receive any compensation. It is not unusual in serious criminal offences for a case to take up to a year or more to reach trial. Meanwhile, the victim of crime may have urgent and immediate needs for compensation which cannot be met under the N.S.W. model, if there is an apprehended accused.

123. Another serious criticism of the N.S.W. model relates to

> "the use of the ordinary criminal courts to determine compensation for victims (because) it may be seen to introduce an irrelevant consideration into a judicial forum whose primary responsibility is determining whether or not an accused person is guilty of a particular crime. The criminal trial in common law countries is a well-defined procedure, one of the best known characteristics of which is the unique standard of proof imposed on the prosecution. It is not just possible but probable that the standard of proof beyond reasonable doubt may also be employed in the process of determining a claim that a victim's injuries flow from a particular crime where the accused has been acquitted. Conversely, the victim waiting in the wings for compensation may conceivably affect the court in its determination of criminal guilt, though this should be regarded as less likely than the former matter."[50]

124. ***Victoria.*** Influenced by these criticisms, and also by the experience with an alternative model developed in New Zealand prior to its adoption of a National Accident Compensation Program in 1972, Victoria decided upon a different structure for its victim compensation program which was introduced by the *Criminal Injuries Compensation Act* 1972 (Vic.). Under the terms of this Act, a Crimes Compensation Tribunal was established. Applications for compensation are now made to this tribunal which is required to determine claims

> "expeditiously and informally ... having regard to the requirements of justice and without regard to legal forms and solemnities".[51]

The Victorian legislation also permits the tribunal to act without regard to the normal rules relating to evidence or procedure, and to require that information be supplied from police and medical records about a crime and any injuries which may have flowed from it. Awards made by the Victorian tribunal are not subject to governmental or administrative scrutiny and the legislation provides that the award is to be cast as an order which the successful applicant then presents for payment out of Consolidated Revenue. Compensation is not *ex gratia* or discretionary but a matter of legal right in Victoria.

125. Operating experience with the Victorian program suggests that it determines claims with a minimum of delay and formality and that victims are generally satisfied with the awards they receive. In determining the cause of the victim's injuries, a civil standard of proof is applied by the Victorian tribunal

50. Waller, "Compensating the Victims of Crime in Australia and New Zealand", in Chappell and Wilson, *The Australian Criminal Justice System*, (2nd Ed.) 1977, 426, 434.
51. *Criminal Injuries Compensation Act*, 1972, s.1.

which must also, in common with the other State programs, consider any conduct of the victim "which directly or indirectly contributed to his injury or death". A total bar exists under the Victorian legislation for making an order where the injury has been inflicted on the victim by a spouse or a member of the household. This particular provision is more drastic than those in other Australian schemes where the relevant authority or court considering the application for compensation is only required to "take account" of the relationship existing between the offender and the victim. In the most recent report of the Victorian Crimes Compensation Tribunal it was noted that this bar was causing injustice in certain cases:

> "A significant number of cases have emerged when the infliction of the injury has meant the end of the matrimonial relationship, but the severely injured victim (usually the wife) can receive no compensation. Again, children who are the victims of parental violence, including sexual assault, cannot be compensated where the provision applies."[52]

126. The Victorian model has subsequently been used as a prototype for the Tasmanian victim compensation program established by the *Criminal Injuries Compensation Act* 1976 (Tas.). However, a special tribunal has not been created to deal with claims which are instead determined by the Master of the Supreme Court of Tasmania, or his delegate the Registrar.

Proposals for a Victim Compensation Program for the Commonwealth and Australian Capital Territory

127. ***The Basic Model.*** Of the three basic models for victim compensation programs described above—the United Kingdom, N.S.W. and Victorian—the Commission is of the view that the Victorian is the most suitable for adoption by the Commonwealth and A.C.T. because:

- the United Kingdom program, which remains at present on a non-statutory basis, is designed for a small but densely populated country, long accustomed to flexible executive experiments with generous social programs;
- the N.S.W. program gives the appearance of a cumbersome ad hoc arrangement for compensation which cannot, in particular, respond rapidly to meet victim needs; and
- the Victorian program combines substantial advantages of a flexible operating procedure, prompt and informal method of determining claims, and provision of compensation as a legal right.

128. Because of the small workload likely to be experienced by any tribunal reviewing victim claims for compensation in the Commonwealth or A.C.T., the Commission does not believe it would be necessary to create a new body to perform this function. Instead, claims could be made to a tribunal, constituted by a member of the Commonwealth Employees Compensation Tribunal, with a right of appeal to the Administrative Appeals Tribunal. Following the making of an order for compensation, a successful applicant would be entitled to present it to the Department of the Treasury for payment out of Consolidated Revenue.

129. ***The Number of Claims and the Cost of the Program.*** Given the relatively few crimes of violence committed within the A.C.T. (see Figures 2-6 above) (and the Commonwealth's jurisdiction), and the prior experience with schemes in other Australian jurisdictions, the Commission does not believe that

52. Crimes Compensation Tribunal *Report* (1978) 3.

a Commonwealth and A.C.T. victim compensation program would receive a large number of claims. Without more detailed research than has been possible at this stage, it is not possible for the Commission to estimate the number of victims who might be eligible for compensation within both jurisdictions. However, the Commission does believe that claims should actively be encouraged by means of extensive publicity campaigns and by requiring Commonwealth and A.C.T. Police to bring to the notice of all crime victims reporting offences to them, the existence of the compensation program. There have been instances in which the administrators of victim compensation schemes in overseas countries have deliberately kept their programs in a "low profile" in order to keep claims (and hence costs) to a minimum. Such an approach to victim compensation deserves condemnation. A commitment to providing compensation to the innocent victims of violent crime requires effective procedures to be adopted to bring to the attention of potentially eligible persons the availability of compensation. The police, as the main reporting agency for the criminal justice system, are in the best position to provide such notice to victims. For the police, the performance of this notification task would assist in enhancing relations with the public and fostering further co-operation from citizens in crime prevention and control.

130. The overall cost of any scheme is obviously directly related to the number of claims and the size of the compensation awards made. Awards should, ideally, not be limited by artificial ceilings as they are at present in each Australian compensation scheme. The basis for fixing awards should either be that adopted in the United Kingdom, namely, common law damages, or that proposed by the Woodhouse Report.[53]

131. Experience with existing victim compensation programs both in this country and overseas shows that in only a very small proportion of cases do claims involve substantial sums for injuries caused as a result of crime. Even under the generous United Kingdom program, most claims are for relatively small sums. The removal of the artificial ceilings which are at present placed on the Australian schemes would not in the Commission's view be likely to lead to marked escalation in the costs of administration. It is only in the rare case that

53. *Compensation and Rehabilitation in Australia,* Report of the National Committee of Inquiry, 1974, 137-138, where the following broad formula for compensation is suggested:
"(a) There would be prompt, automatic and earnings-related compensation for every person in respect of every significant physical or mental incapacity (arising from criminal injury) . . .
(b) In the event of death, there would be earnings related compensation for survivors . . .
. . .
(d) Cash benefits for total incapacity would equal 85 per cent of past earnings including overtime . . .
. . .
(f) In order to safeguard the interests of Australians at every normal level of income, the upper limit of compensation would be fixed against weekly earnings or $500 (this figure would have to be modified in the light of inflation and other factors since the report was issued in 1974).
(g) The self-employed would be included, as would be the housewife and all children.
(h) There would be no means test.
(i) Benefits once assessed in respect of permanent disabilities would never be reduced but if the need arose they would be increased.
(j) There would be an automatic review at quarterly intervals for benefits to guard against the adverse effects of inflation."

a victim is killed or very severely injured and thus likely to claim for very substantial compensation. But when such injuries do occur, the claim should be met. Payment of $4,000 or $5,000 to a quadraplegic or a person blinded as a result of a criminal act is no more than token charity, and yet this is what occurs under the programs presently available in Australian jurisdictions. It might also be noted that in respect of sporting injuries the government-sponsored schemes to provide compensation are far more generous than those available in criminal victim compensation programs. The maximum sum, for example, payable in N.S.W. under the *Sporting Injuries Insurance Act* 1978 (N.S.W.) is $60,000 which is payable in the case of a quadraplegic. It should be noted, however, that these payments are funded by levies on sporting organisations which are members of the N.S.W. Sports Insurance Scheme and the government contribution has been limited to initial establishment costs.

132. Should the cost of a generous victim compensation program from existing Consolidated Revenue be considered unsuitable in present economic circumstances, part of the substantial sums obtained from fines in the A.C.T. could be devoted to establish a fund to provide compensation for crime victims. Such provision would help to create a sense of equity amongst the members of the public increasingly concerned at the apparent indifference shown to victims of crime. A general increase in the level of fines would be justified if the amount thereby secured could be devoted to providing a fund for adequate compensation to the victims of crime.

133. ***Scope of Coverage.*** Precise details of the proposed victim compensation program for the Commonwealth and the A.C.T. will obviously require further discussion and research. There should not be, for example, as there is at present in Victoria, an automatic exclusion of family members from compensation provisions. Battered women and children represent a significant group of victims who most need compensation and they should be incorporated in any scheme. The program proposed for the Commonwealth and A.C.T. should become a model for all Australian jurisdictions and express in a positive manner the concern which governments should feel for crime victims.

VII — PRISONERS' ACCESS TO THE COURTS

Disabilities upon Conviction: Removing an Historical Anomaly

134. Many social and political disabilities follow the imprisonment and sometimes the mere conviction of a person. A person imprisoned for more than one year loses his right to vote while serving the sentence. Conviction for any crime can disqualify a person from jury service, lead to loss of a licence, bar admission to some professions, result in dismissal from public office, restrict overseas travel or lead to deportation. These are among a number of disabilities which the Commission is presently considering as part of the Sentencing Reference, and which will be the subject of recommendations by the Commission in the future. However, a recent decision of the High Court of Australia calls attention to an important disability, suffered by certain persons convicted and sentenced to imprisonment by the courts of the A.C.T., which requires immediate remedial action. The decision in *Dugan* v. *Mirror Newspapers Ltd.*[54] established, by majority opinion of the High Court, that a prisoner serving a life sentence for a

54. (1978) 53 A.L.J.R. 166.

capital felony was disabled from suing in the courts until he had served his sentence or received a pardon. Dugan had been sentenced to death for the capital felony of wounding with intent to murder. This sentence was subsequently commuted to a sentence of penal servitude for life. Later, Dugan was allowed at large on licence. During this time he committed a further felony for which he was convicted and ordered to serve a concurrent sentence of 14 years with hard labour. Whilst serving these sentences, he commenced proceedings claiming that he had been defamed by the Mirror Newspapers during the period of his sentence. The newspapers pleaded in defence that a prisoner serving a life sentence for a capital felony could not sue for a wrong done to him whilst under that sentence. The judge at first instance (Yeldham J.) upheld this plea.[55] The Court of Appeal confirmed that there was a good defence in law.[56] Finally, the High Court of Australia affirmed the decision of the Court of Appeal of the Supreme Court of N.S.W. Special leave to appeal was refused.[57]

Reforms Elsewhere

135. The legal basis which prevented the prisoner Dugan from having access to the courts is the ancient principle of the common law of England that anyone convicted of treason or a felony and sentenced to death or outlawry was said to be "attainted" or to have suffered "attainder". This consequence had two principal effects. First, he suffered forfeiture of his property and most causes of action which were available to him. Secondly, he suffered "corruption of the blood", *i.e.*, he became incapable of holding or inheriting land, of transmitting title or sustaining a claim in a court of law. As an anomalous exception, it appears that one cause of action could still be sustained, namely, an action for debt. There were possibly other anomalous exceptions. Because of the doctrine of corruption of the blood, no access would be granted to the courts until the prisoner was pardoned or, if the sentence was not one of death, he had served that sentence. The High Court held that these historical disabilities on prisoners were inherited by the infant colony of N.S.W. because they were parts of the law of England which were suitable or reasonably applicable or appropriate to the early conditions of the colony. The reception of these common law rules took place either in 1788 or 1828. The precise date does not matter. In England, attainder, forfeiture and corruption of the blood were abolished by the *Forfeiture Act* 1870.[58] In some States of Australia, whilst the common law principle has been abolished, various statutory limitations upon prisoners' bringing proceedings in the courts or dealing in their property remain.[59] Victoria and South Australia have in recent time taken action but in different directions. In 1966, the South Australian *Criminal Law Consolidation Act* was amended to bar actions by all convicted prisoners (not only those sentenced to death or imprisonment with hard labour for treason or felony) and prevent prisoners dealing in property or making contracts. On the other hand, enactments of this kind were repealed in Victoria in 1973.

55. *Dugan* v. *Mirror Newspapers Ltd.* [1976] 1 N.S.W.L.R. 403.
56. Unreported decision, 9 August 1977.
57. Barwick CJ., Gibbs, Mason, Jacobs and Aickin JJ. were of the view that special leave to appeal should be refused. Stephen J. was of the view that special leave to appeal should be granted and the appeal dismissed. Murphy J. was of the view that special leave should be granted and the appeal allowed.
58. 9 Geo. IV Ch. 83 (Imp.).
59. *Crimes Act* (Vic.), s.543 (1); *Criminal Law Consolidation Act* (S.A.), s.295 (1); *Criminal Code* (W.A.), s.683.

A.C.T. Position

136. By virtue of the *Seat of Government Acceptance Act* 1909 (Cth.) all laws in force in the Territory immediately before the proclaimed day (1 January 1911) "so far as applicable" continue in force until other provision is made. One of the laws which, according to *Dugan's case*, was in force in N.S.W. at the establishment of the A.C.T. was the law limiting the access to the courts of certain prisoners. Subject to the uncertainties as to the "applicability" of that law, it does seem that the position established in *Dugan's case* must be taken to apply in the A.C.T. Certainly, any prisoner convicted of a capital felony in the A.C.T. would be disabled from suing in the courts until he had served his sentence or received a pardon. The death penalty was abolished in the Capital Territory by the *Death Penalty Abolition Act* 1973 (Cth.). According to some of the views expressed in *Dugan's case*, however, the disability preventing access to the courts may extend beyond felons who are sentenced to death and equally disable from suing felons upon whom the lesser penalty of life imprisonment is imposed. The court did not have to resolve this question because Dugan had actually been sentenced to death.

137. The result of the *Dugan case* is unsatisfactory. The extent of the common law disabilities suffered by prisoners in N.S.W., and inherited in the Capital Territory, is unclear. It is desirable, at the very least, that the position should be clarified and that such disabilities should not have to be found in a painstaking search of legal history.

Granting Access to the Courts

138. ***Need for Reform.*** Attention was drawn to the need for reform of the rule in *Dugan's case* by a number of the judges who considered the question. Samuels JA., whilst upholding the defence as good in law, commented that:

> "the state of the law in New South Wales hardly accords with modern notions and merits the attention of the legislature".[60]

Mahoney JA. was equally clear that reform was needed, but was more cautious of the direction that it should take:

> "This is obviously a field which calls for legislation. I do not mean by this that the form which the required legislation should take is obvious. The principles which should govern the right of a person who has been convicted and is in gaol to hold and deal with property and to seek the assistance of the court in his affairs, will no doubt require careful consideration. There will be involved an appropriate adjustment between the entitlement of a person, albeit in gaol, to those rights both as to his person and to property, which are basic to dignity of an individual and the legitimate interests of the State in the effective confinement and, perhaps, punishment of such persons. But, whatever be the form of the legislation, the need for it is, in my opinion, apparent."[61]

139. In the High Court of Australia, Gibbs J. conceded that the rule "seems out of harmony with modern notions".[62] Murphy J. (dissenting) focused attention on the *Universal Declaration of Human Rights*, which provides, amongst other things

> *Article 6.* Everyone has the right to recognition everywhere as a person before the law.
>
> *Article 7.* All are equal before the law and are entitled without any discrimination to equal protection before the law.

60. Unreported decision, 9 August 1977.
61. *Ibid.*
62. *Dugan* v. *Mirror Newspapers Ltd.* (1979) 53 A.L.J.R. 166, 168-169.

Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations.

He also mentioned provisions in the International Covenant on Civil and Political Rights which Australia has signed but not yet ratified.

140. In *Golder* v. *The United Kingdom*[63] the European Court of Human Rights had to consider a provision in the European Convention of 1950 similar to Article 10 of the *Universal Declaration of Human Rights.* The European Court of Human Rights held that an English prison rule which provided that "a prisoner shall not be entitled . . . to communicate with any person in connection with any legal . . . business except with the leave of the Secretary of the State" was a violation of the Convention. The court said:

> "In civil matters, one can scarcely conceive of the rule of law without there being a possibility of having access to the courts . . . The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally recognised, fundamental principles of law: the same is true of the principle of international law which forbids the denial of justice . . ."[64]

141. ***Tasmanian Law Reform.*** In 1978, in advance of the High Court's decision, the Law Reform Commission of Tasmania presented its report upon a reference from the Attorney-General of that State to investigate the civil disabilities of convicted persons. After referring to the decision of Yeldham J. in *Dugan* v. *Mirror Newspapers Ltd.*, the Tasmanian Commission concluded:

> "The Commission regards [the present provisions of the Tasmanian Code] as being, generally speaking archaic and cumbersome. We consider that it is unjust and unnecessarily discriminatory that persons should be deprived of their civil rights whilst imprisoned, unless, of course, such rights are affected by some other branch of the law, such as infancy, mental incapacity or bankruptcy. Obviously, there are practical difficulties in the way of prisoners undertaking certain transactions themselves but there should be nothing to prevent them from exercising their rights in person to the extent that such exercise does not conflict with prison regulations. There should be nothing to prevent a prisoner from appointing an agent or attorney or administrator to look after his property and other interests should he wish to do so."[65]

The Commission proposed the enactment of a *Prisoners' (Removal of Civil Disabilities) Act.* The recommendations of the Commission have not been acted upon to date. Commentators have suggested that the best course to follow is that of Victoria, namely the simple repeal of all laws, whether statutory or in the common law, restricting access by prisoners to the courts.[66]

Removing the Anomaly: The Commission's Views

142. The Commission is of the view that the disability disclosed in *Dugan's case* which applies to the Capital Territory, is anomalous and out of keeping with modern views concerning the rights of prisoners and the disabilities they should suffer whilst in prison. The possible application of the principle in *Dugan's case* beyond prisoners convicted of felony and sentenced to death and the undesirability of having to find such principles in legal history warrant, in the Commission's view, the enactment of legislation clarifying the position. The legislation

63. European Court H.R. 21 February 1975, Series A, No. 18.
64. *Golder* v. *United Kingdom,* cited by Murphy J. in *Dugan* v. *Mirror Newspapers Ltd.* (1979) 53 A.L.J.R. 166, 175.
65. Law Reform Commission (Tas.), Report No. 20, *Civil Disabilities of Convicted Persons,* 1978 5-6.
66. See, *e.g., Report of the Royal Commission into N.S.W. Prisons* (the Nagle Report), 1978; Molomby, "Making Straight the Way of the Law" (1978) 3 *Legal Service Bulletin 241.*

should make it clear that the common law rules of attainder, forfeiture and corruption of the blood are repealed so far as prisoners convicted in the A.C.T. are concerned. Consequential provisions may be needed for the appointment if necessary of an administrator for prisoners' property and the facilitating of legal advice to prisoners' concerning their position at law. Although this is a small issue in the list of matters requiring attention and reform so far as the punishment of offenders is concerned, it is, in the Commission's view, an important one. No matter how serious a person's crimes, the punishment of the loss of his liberty does not warrant, in addition, the loss or suspension of his civil rights as a person. Nor does it warrant denying him access to the courts of the land for the impartial determination of his claim. The punishment of imprisonment is the deprivation of liberty. It is not appropriate to add to that punishment confused and antique notions such as "civil death" which had their origin in a time when the death penalty was the common punishment for convicted felons. The Commission's recommendation is limited, in the present context, to Territory prisoners. In the future, the Commission will be recommending clarification of the law so far as Commonwealth prisoners are concerned, consistent with the above recommendation.

VIII

SUMMARY OF PROPOSALS AND CONCLUSIONS

Punishment and Public Opinion

1. *Certain philosophies of punishment tend to gain ascendancy at a particular period in history. In the convict days the law contained a catalogue of drastic penalties but since then a strong humanitarian influence has resulted in a reduction in the severity of punishments with the emphasis on the need to reform those who commit crimes as well as to punish and deter them.*

   (paras. 5-6)

2. *However, in recent years, following substantial disillusionment with, and doubt about, the success of rehabilitative programs for offenders of all types, and fuelled by reports of the continuing increase in crime, the public mood and that of many experts and others involved would seem to be moving again towards retribution and deterrence as the main aims of punishment.*

   (para. 7)

3. *On a per capita basis the number of persons sent to prison in Australia reached an all-time low in 1977 but the number has begun to rise again since then. Opinion polls indicate that the public believes that judges are too lenient, and that conditions in prison are not too severe. The results of these polls need to be treated with caution. Although it is assumed by many people that severe punishments deter crime, this view is unsupported by the evidence. Prisons are more likely to be harmful than beneficial, they are the most costly of penal sanctions, and they impose unwarranted suffering and hardship on the families of offenders.*

   (paras. 9-12)

4. *These facts have led the Commission to the conclusion that neither retributive, deterrent nor reformative principles of punishment justify the use of imprisonment except as a punishment of the last resort. Humane sentencing would be best achieved if it were guided by the principle that the least*

punitive sanction necessary to achieve social protection should be imposed and preference should be given to the use of non-custodial sentencing options.

(para. 13)

The Need for the Provision of Correctional Institutions in the A.C.T.

5. *The principle arguments in favour of continuing the present practice of sending A.C.T. prisoners to N.S.W. gaols are ones of convenience and cost, and the disincentive created to use imprisonment as a penalty. Against these arguments conditions in N.S.W. gaols have been found by the Nagle Commission to be highly unsatisfactory. Further, the transporting of A.C.T. prisoners to N.S.W. creates substantial hardship for them and their families and presents problems for A.C.T. parole and allied officials.*

(paras. 25-38)

6. *The Commission recommends that the present practice cease and that the Commonwealth accept its responsibility to provide humane and just conditions of imprisonment for adult offenders in the A.C.T. In order to provide a desirable range of sentencing options to judges and magistrates a number of types of facility should be made available including a minimum security farm and forestry camp, a work release hostel, a periodic detention centre and a maximum security institution.*

(paras. 39-53)

7. *The Commission is not convinced that legislation restricting the use of imprisonment will result in any less use of imprisonment as a sanction.*

(paras. 62-64)

The Need for New Non-Custodial Sentencing Options

8. *The range of non-custodial sentencing options is narrower in the A.C.T. than in other Australian jurisdictions. The Commission is reviewing existing non-custodial sentencing options and assessing the need for further options.*

(paras. 66-68)

The Fine

9. *The fine is the most popular non-custodial sentencing option in Australia and in the A.C.T. Problems arise from the absence of a formal legal requirement upon a court to ascertain the relative means of an offender prior to the imposition of a fine. The Commission is considering whether courts should be required to take offenders' means into account before imposing a financial penalty. The present informal inquiry as to means is not always adequate to ensure justice for both the offender and the State. Further a large number of people are imprisoned for non-payment of fines. The Commission believes that a system should be established to ensure that persons who fail to pay fines should, as far as possible, not serve sentences of imprisonment.*

(paras. 69-86)

Community Service Orders

10. *One sentencing option which is presently not available in the A.C.T., and which the Commission tentatively recommends be made available, is a community service order. Its advantages include:*

* *lower administrative costs than other custodial or semi-custodial sentences;*
* *prevention of disruption to offender's family and employment;*
* *protection of the self-esteem of the offender;*
* *prevention of contact with criminal elements in gaols.*

Its disadvantages include:

* *loss of leisure time with family;*
* *possibility that individuals who might otherwise receive non-supervisory sentences will now receive a supervisory form of punishment.*

(paras. 89-93)

11. *Community service orders should be available as a general penalty rather than as a strict alternative to imprisonment. In introducing them, however, the following should be considered:*
    * *they should not usurp the position of wholly non-custodial penalties such as absolute discharges, bonds, release on recognisance and fines;*
    * *appropriate and useful work, not necessarily manual, should be found;*
    * *trade union representatives should be consulted on the type of work undertaken;*
    * *there should be standards and guidelines for volunteer supervisors.*

(paras. 95-102)

12. *The Commission is examining a number of other non-custodial sentencing options. Comments and submissions as to the appropriateness of increasing the range of these options in the A.C.T. are invited.*

(para. 103)

The Need for a Victim Compensation Program

13. *The Commonwealth and the A.C.T. should have a program to compensate the victims of violent crime. It should be modelled broadly on the existing Victorian tribunal-based program rather than on the court-based N.S.W. program. It would not be necessary to create a new administrative body but claims could be made to a tribunal constituted by a member of the Commonwealth Employees Compensation Tribunal with a right of appeal to the Administrative Appeals Tribunal. There should be no artificial limit on awards and the basis for fixing awards should be either common law damages or that proposed by the Woodhouse Report. There should not be any automatic exclusion of family members from compensation as a result of violence inflicted upon them by other family members and police should inform victims of their rights.*

(paras. 104-133)

Prisoners' Access to the Courts

14. *The disability, disclosed in* Dugan's Case, *which prevented a convicted felon suing for a civil wrong, applies to the Capital Territory and is anomalous and out of keeping with modern views concerning the rights of prisoners and disabilities they should suffer whilst in prison. Legislation is required to clarify the rights of prisoners' access to courts. The legislation proposed at this stage is confined to Territory prisoners although the Commission in its Report will recommend that the disabilities affecting Commonwealth offenders also be clarified.*

(paras. 134-142)

PUBLIC HEARING

Members of the public are invited to express their views about sentencing at a public hearing. Details of the hearing are as follows:

PLACE:	Conference Room, 4th Floor, National Library of Australia, Canberra.
DATE:	Friday, 22 June, 1979.
COMMENCING:	10.00 a.m.

The hearing will be conducted informally.
Persons who do not wish to express their views in public may do so in private.

FURTHER READING

1. General Information on the Australian criminal justice system and sentencing:
   Biles, *Crime and Justice in Australia*, 1977.
   Chappell and Wilson, *The Australian Criminal Justice System*, 1st ed., 1972; 2nd ed., 1977.
2. Imprisonment:
   Hawkins, *The Prison, Policy and Practice*, 1976.
   Morris, *The Future of Imprisonment*, 1974.
   Rinaldi, *Australian Prisons*, 1977.
3. Alternatives to Imprisonment:
   Non-Custodial and Semi-Custodial Penalties, Report of the Advisory Council on the Penal System, H.M.S.O., 1970.
   Sentencing and Corrections, First Report of Criminal Law and Penal Methods Reform Committee of South Australia, 1973.
4. Victim Compensation:
   Criminal Injuries Compensation, Law Reform Commission of Western Australia, 1975.

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